BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI
DIWAN CHAND: MEMBER (A) AND M. S. WADHWA: MEMBER (J)

Error rectified via Separate order of Appeal No. 26/ATVAT/15 given date.
Narinder Kumar
7/11/2022

Appeal No. 420-426/ATVAT/14-15
Assessment Period 2013-14
Penalty

M/s AARKA Y PRINTES
WZ/584C, NARAINA VILLAGE,
Delhi-110028 ..... Appellant

VERSUS

Commissioner of Trade & Taxes ..... Respondent

Present for the appellant : Sh. RK Aggarwal, Adv.,
Present for the Revenue : Sh. SB Jain, Adv.,

ORDER

1. This order shall dispose of the above noted appeals filed by the appellant challenging the impugned orders dated 10.02.2015.

2. Appellant dealer is engaged in the business of paper and paper board except packing material and is registered with Ward-103 of the Department of Trade and Taxes vide Tin No. 07130390389. The registration certificate of the appellant was cancelled vide order in DVAT 11 on 30-04-2014 on the ground that Returns due during the Financial Year 2013-2014 or even earlier were not filed.

3. Appellant's case is that he came to know of cancellation of registration when the appellant received a message from purchasing dealers that the appellant registration has been cancelled by the department. The appellant was shocked to know this fact, because the appellant had handed over all the data in connection with his returns to his accountant within time. The appellant immediately contacted to his accountant to know about the status of his returns but there was no response from the accountant. The appellant found that the returns for assessment year 2013-14 had not been actually filed by the accountant.

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4. As per appellant he immediately submitted all the pending returns for assessment year 2013-2014 on 26.12.2014 and moved an application for restoration of registration certificate. The Ld VATO, W-103 imposed penalties u/s 86(9) of DVAT Act and under section 9(2) of the Central Sales Tax Act for non filing of returns of all quarters of assessment year 2013-2014 and issued default notices of penalty u/s 33 vide orders dated 02.09.2014 as per under-mentioned details :-

Reference No.	Period of Default Assessment	U/s	Penalty
250012199121	First Quarter-2013	33	10000/-
250012199124	Second Quarter-2013	33	50000/-
250012199127	Third Quarter-2013	33	50000/-
250012199129	Fourth Quarter-2013	33	50000/-
250012199122	First Quarter-2013	9(2)	10000/-
250012199125	Second Quarter-2013	9(2)	50000/-
250012199128	Third Quarter-2013	9(2)	50000/-
250012199131	Fourth Quarter-2013	9(2)	50000/-
	TOTAL		3,20,000/-

5. The registration certificate was restored only after making payment of penalties by appellant on 18.11.2014.

6. The Appellant filed objections before the Objection Hearing Authority against each default assessment of penalty u/s 33 created by the Ld. VATO for the tax period 2013-14.

7. The appellant during the course of hearing produced various evidences before the OHA regarding mistake of the accountant and even submitted affidavit of the appellant. The Objection Hearing Authority having failed to appreciate the legal Position and facts of the case that penalties imposed by the Ld VATO, W-103 were not as per law and the appellant could not be penalized for the mistake of accountant, rejected the objections of the appellant, filed against the order of VATO, vide orders dated 10.02.2015.

8. Appellant has come in appeal before the Tribunal and assailed the impugned orders on the following grounds:-

1.Because the objection hearing authority has erred in law and on facts that penalty procedure is not automatic and it

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is quasi criminal in nature and without giving any opportunity to the dealer imposition of penalty is highly illegal unjust, arbitrary and un-reasonable and bad in law.

2.Because the objection hearing authority has failed to appreciate that the Assessing authority has passed an ex-parte order and ex-parte order is no order in the eyes of law and after that confirming the order of the default assessment of penalty by the assessing authority is bad in law.

3.Because the objection hearing authority has not given any reason for dismissing the objections of the appellant.

4. Because Ld. VATO has no authority to impose penalty u/s 86(9) of DVAT Act as no order of default assessment u/s 32 of DVAT Act has been passed before passing the order of penalty u/s 33 of DVAT Act.

5.Because at any rate penalty for late filing of return under Central Sales Tax Act could have not been imposed because Ld. VATO has no authority to impose penalty u/s 9(2) of CST Act for late filing of returns.

6.Because Ld VATO could have imposed penalty u/s 86(9) of DVAT Act only if a dealer fails to furnish any return under chapter V of DVAT Act. The central return has been prescribed in FORM I by virtue of Rule 3 of Central Sales Tax (Delhi) Rules, 2005.

7. Because non filing of return in Form 1 under Central Sales Tax is an offence u/s section 11 of Central Sales Tax (Delhi) Rules, 2005 and punishable with fine which may extend to five hundred rupees and when the offence is continuing offence, with a daily fine which may extend to fifty rupees for every day during which the offence continues.

9. We have heard Sh RK Aggarwal, Adv., Ld Counsel for the appellant and Sh SB Jain, Adv., Ld Counsel for the Revenue.

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10. Counsel for the appellant reiterating the grounds of appeal submitted that there was no assessment of tax and hence imposition of penalty was not called for. In his support he cited the decision of this Tribunal in case of M/s Garg Electronics (2013) 51 DSTC 518. His submission is that a dealer is liable to furnish return only when the dealer is liable to pay tax and in the present case, appellant being not liable to pay any tax under the DVAT Act , penalty under section 86(9) is not sustainable. His further submission is that the central returns are prescribed under rule 3 and Rule 11 of the CST Act (Delhi) Rule 2005 and referring to section 9(2), 13(3) and 13(4) of the CST Act, has submitted that a breach of rule 3 is punishable under rule 11 and hence penalty cannot be imposed for late filing of the returns under CST Act. He has also relied upon the decision in the case of Ms Anand Traders (2013) 51 DSTC 206(Delhi) and M/s Shubham Marketing (2013) 51 DSTC 451 (Delhi) to argue that the DVAT and CST Act are independent and local law will be applicable only to the extent mentioned in section 9(2) and that the Commissioner has no jurisdiction to impose fine under DVAT Act and CST Act. His further submission is that he has not been provided with sufficient opportunity and has relied upon the decisions of Canara Bank Vs VK Awasthy AIR 2005 Supreme Court 2090; Kraipak Vs Union of India 1970 SC 150; Maneka Gandhi vs Union of India AIR 1978 SC 597; Swadeshi Cotton Mills Vs union of India AIR 1981 SC 818; CB Gautam vs Union of India (1993) 199 ITR 530 SC.

11. Further submitted that there is no tax deficiency on the part of the appellant and the appellant deposited the tax due and payable under Central sales Tax with interest. Therefore the penalty imposed in all quarters without any tax deficiency is very high and the penalty is liable to be reduced to a reasonable level.

12. Counsel for the revenue submitted that there was no force in the submissions made by the Appellant. He cited in his support the decision of the Hon'ble High Court of Delhi in the case of AK Woolen case submitting that the Hon'ble High Court referring to the decision of this Tribunal in Garg Electronics had observed that the observations made by the Tribunal were not correct. Further submitted that the assessment of tax under section 32 of the DVAT Act and assessment of penalty under section 33 of the Act were independent of each other. There are four circumstances when default assessment is framed. These

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circumstances are stated in Clauses (a) to (d) of sub section (1) of section 32. The penalty proceedings which arise u/s 33 nowhere refer to the provisions/ conditions of default assessment stated in section 32 of the Act. Penalty is to be levied if the primary condition stated in section 33 is satisfied: 'the Commissioner has reason to believe that a liability to pay a penalty under this act has arisen, the Commissioner after recording the reasons in writing, shall make and serve on the person a notice of assessment of the penalty'.

13. It is further submitted by the Revenue that different types of penalty are visualised in section 86. Some of the penalties are default oriented namely non-registration, non-filing/ late filing of return, not maintaining /not preparing records or books or not responding to notice etc wherein the amount of penalty prescribed is fixed. These penalties are in no way connected with the actual tax payable or not payable by the dealer. In above instances the dealer if commits the default becomes liable to pay the amount of penalty prescribed under section 86.

14. Further submission made is that the cases under appeal relate to late filing of returns which are not related to tax deficiency and the amount of penalty has been fixed under section 86(9). Therefore, a registered dealer whether required to pay tax or not is under an obligation to file return as per section 26 read together with Rules made thereunder.

15. Counsel for the Revenue also invited our attention to the provisions of Section 9(2) A of the Central Sales Tax Act, 1956 and provisions of rule 13(3) of the CST Rules, section 11(1) of the CST Act regarding determination of the turnover and submitted that if all the provisions are read together the conclusion that emerges is that every dealer is liable to file return for the tax period in form and manner prescribed

16. It is further submitted by revenue that there is no exemption to any registered dealer for not filing return. Filing of return is not dependent upon whether the dealer has to pay tax or to get refund. Rather as held by Hon'ble Supreme Court *'lis starts from filing return'*. It is the return which when filed leads to assessment, determination of admissible tax credit, tax demand or refund, tax collection, penalty, prosecution and any /all proceedings under DVAT/CST Act. Therefore,

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return is an obligation of all registered dealers whether their turnover is taxable or exempt, whether such dealer has to pay any tax or take back any refund or not.

17. It is further submitted by revenue that the provisions of the DVAT Act, 2004 do not provide for issuing any notice before levy of penalty. Therefore there is no question of breach of natural justice due to non-issuance of notice before imposition of penalty. Reliance has been placed on the decision of the Hon'ble High Court of Delhi in the case of Sales Tax Bar Association Case Vs Govt of NCT of Delhi & Ors WP(C) No. 4236/2012.

18. For appreciating the rival contentions it is necessary to look into the relevant provisions of law at this stage. Section 31, 32 & 33 of the Act are extracted hereunder:-

30 Assessment of tax, interest or penalty

No claim may be made by the Commissioner for the payment by a person of an amount of tax, interest or penalty or other amount in the nature of tax, interest or penalty due under this Act except by the making of an assessment for the amount.

31 Self assessment

(1) Where a return is furnished by a person as required under section 26 or section 27 of this Act which contains the prescribed information and complies with the requirements of this Act and the rules -

(a) the Commissioner is taken to have made, on the day on which the return is furnished, an assessment of the tax payable of the amount specified in the return;

(b) the return is deemed to be a notice of the assessment and to be under the hand of the Commissioner; and

(c) the notice referred to in clause (b) is deemed to have been served on the person on the day on which the Commissioner is deemed to have made the assessment.

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(2) No assessment shall arise under sub-section (1) of this section, if the Commissioner has already made an assessment of tax in respect of the same tax period under another section of this Act.

32 Default assessment of tax payable

(1) If any person -

(a) has not furnished returns required under this Act by the prescribed date; or

(b) has furnished incomplete or incorrect returns; or

(c) has furnished a return which does not comply with the requirements of this Act; or

(d) for any other reason the Commissioner is not satisfied with the return furnished by a person;

the Commissioner may for reasons to be recorded in writing assess or re-assess to the best of his judgment the amount of net tax due for a tax period or more than one tax period by a single order so long as all such tax periods are comprised in one year.

(1A) If, upon the information which has come into his possession, the Commissioner is satisfied that any person who has been liable to pay tax under this Act in respect of any period or periods, has failed to get himself registered, the Commissioner may for reasons to be recorded in writing, assess to the best of his judgment the amount of net tax due for such tax period or tax periods and all subsequent tax periods.

(2) Where the Commissioner has made an assessment under this section, the Commissioner shall forthwith serve on that person a notice of assessment of the amount of any additional tax due for that tax period.

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(3) Where the Commissioner has made an assessment under this section and further tax is assessed as owed, the amount of

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further tax assessed is due and payable on the same date as the date on which the net tax for the tax period was due.

Explanation.- A person may, if he disagrees with the notice of assessment, file an objection under section 74 of this Act.

33 Assessment of penalty

(1) Where the Commissioner has reason to believe that a liability to pay a penalty under this Act has arisen, the Commissioner, after recording the reason in writing, shall make and serve on the person a notice of assessment of the penalty that is due under this Act.

(2) The amount of any penalty assessed under this section is due and payable on the date on which the notice of assessment is served by the Commissioner.

(3) Any assessment made under this section shall be without prejudice to prosecution for any offence under this Act.

Explanation.- A person may, if he disagrees with the notice of assessment, file an objection under section 74 of this Act.

19. As is seen the self assessment stands completed the moment a dealer submits his return. The tax due stands assessed that is admitted due by the dealer as per return filed by him. Commissioner under section 32 of the Act can assess or re-assess the dealer for reasons to be recorded in writing only on the following grounds as envisaged in section 32:-

(i) dealer has not furnished the return required under this Act by the prescribed date

(ii) dealer has furnished incomplete or incorrect return

(iii) Dealer has furnished a return which does not comply with the requirements of this Act or

(iv) for any other reason the Commissioner is not satisfied with the return furnished by a person.

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20. Initiation of an assessment of penalty is dependent on the reasonable belief of the Commissioner that a liability to pay a penalty under this Act has arisen, then the Commissioner after recording the reasons in writing shall make and serve on the person a notice of assessment of the penalty that is due under the Act. Liability to pay penalty arises on account of different situations visualised in various provisions of section 86 of the Act which lays down the circumstances giving rise to imposition of penalties and also prescribes the quantum thereof.

21. Scheme of the DVAT Act is that a dealer registered under the Act is required to file returns in terms of section 26 of the Act in the prescribed form. On filing of the return he stands assessed to tax with tax liability admitted by him in the returns. The said return can be subjected to assessment or re-assessment under section 32 of the Act in the circumstances envisaged therein. Section 26 of the Act provides that "Every registered dealer who is liable to pay tax under this Act shall furnish to the Commissioner such returns for each tax period and by such dates as may be prescribed and in the prescribed form and manner. If there is no assessment under section 32 within the period of limitation laid down by the law, the dealer's assessment under section 31 becomes final. Assessment of tax may be even nil in case there is no admitted tax in the period. Demand in terms of the return so filed could be any amount starting from zero in which case it would be a case of nil demand. There is no provision in the Act which gives exemption to the dealer from mandatory filing of the return if according to him no tax is payable. Whether any tax is payable or not can only be known to the authorities only and only when the return is filed, there being no other mechanism to arrive at that conclusion. Non-filing of the return has been made punishable under section 86(9) of the Act. Non-fling of the returns is also a ground for cancellation of the registration of the defaulter. Even the cancellation of RC of a return defaulter does not absolve him from the tax assessment procedure for which he remains liable even after the cancellation of his RC till the relevant period of limitation expires. Non-filing of return also empowers the Commissioner to carry out a best judgement assessment in terms of section 32(2) of the DVAT Act.

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22. Now the question arises as to who and when has the liability to pay tax. For this we need to advert to section 3 of the Act, relevant

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provisions of which are as under:

3 Imposition of tax

(1) Subject to other provisions of this Act, every dealer who is –

(a) registered under this Act; or

(b) required to be registered under this Act;

shall be liable to pay tax calculated in accordance with this Act, at the time and in the manner provided in this Act.

(2) Every dealer shall be liable to pay tax at the rates specified in section 4 of this Act on every sale of goods effected by him -

(a) while he is a registered dealer under this Act; or

(b) on and from the day on which he was required to be registered under this Act.

(3) The amount of tax payable under this Act by a dealer, is the dealer's net tax for the tax period calculated under section 11 of this Act.

(4) the net tax of a dealer shall be paid within twenty one days of the conclusion of the dealer's tax period:

PROVIDED that the Commissioner may, by an order, prescribe that irrespective of the tax period of a dealer or class of dealers, the net tax of a dealer or a class of dealers shall be paid within 21days of the conclusion of a period shorter than the tax period that may be specified in the order.

Explanation.- The obligation to pay the tax arises by virtue of this provision and is not dependent on furnishing a return, nor on the issue of a notice of assessment to the dealer.

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(5) Tax shall be paid in the manner specified in section 36 of this Act.

(6) Every dealer who has become liable to pay tax under this Act on the sale of goods shall continue to be so liable unless his taxable turnover during the preceding twelve months (and such

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further period as may be prescribed) has remained below the taxable quantum and on the expiry of the twelve months or such further period his liability to pay tax shall cease:

PROVIDED that any dealer whose liability to pay tax under this Act ceases for any other reason may apply earlier for the cancellation of his registration, and on such cancellation, his liability to pay tax shall cease:

PROVIDED FURTHER that a dealer shall remain liable to pay tax until the date on which his registration is cancelled.

(7) Every dealer whose liability to pay tax under this Act has ceased or whose registration has been cancelled, shall, if his turnover calculated from the commencement of any year, including the year in which the registration has been cancelled, again exceeds the taxable quantum on any day within such year be liable to pay such tax on and from the date on which his turnover again exceeds the taxable quantum, on all sales effected by him on and after that day.

(8) Where it is found that any person registered as a dealer ought not to have been so registered, then notwithstanding anything contained in this Act, such person shall be liable to pay tax for the period during which he was registered.

(9) If any person who transports goods or holds goods in custody for delivery to or on behalf of any person, on being required by the Commissioner so to do, fails -

(a) to furnish any information in his possession in respect of the goods; or (b) fails to permit inspection thereof;

then without prejudice to any other action which may be taken against such person, a presumption may be raised that the goods in respect of which he has failed to furnish information or permit inspection, are owned by him and are held by him for sale in Delhi and the provisions of this Act shall apply accordingly.

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(10) If any person who, whether as principal, agent or in any other capacity organizes any exhibition-cum-sale in Delhi and fails -

(a) to furnish any information in respect of the goods brought or

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kept in stock or sold by any participant before or during or after the exhibition-cum-sale; or

(b) to ensure that all the participants in the exhibition-cum-sale have obtained registration under this Act and paid due tax; or

(c) to permit inspection of the business premises or goods or account and records of the participants; or

(d) to permit inspection of the accounts and records of the organizer in respect of the exhibition-cum-sale;

then, without prejudice to any other action which may be taken against such participant, a presumption may be raised that the goods of the participant who fails to obtain registration under this Act or the goods in respect of which the participant has failed to furnish information or failed to permit inspection, are owned by the organizer and are held by him for sale in Delhi and the provisions of this Act shall apply accordingly.

23. It is evident that every registered dealer is liable to pay tax under this Act. As per section 3(6) the liability to pay tax remains till the expiry of period of twelve months for the period when his taxable quantum falls below the taxable quantum. If the appellant files an application for cancellation of his RC, even then notwithstanding the cancelation of his RC the liability to pay tax subsists. Even if someone is registered erroneously, and the RC is cancelled, his liability under the Act in respect of tax period he was registered remains there.

24. The conjoint reading of all the provisions stated in pre-para leaves no doubt that liability to pay tax and the actual payment of tax are two different and distinguished aspects. While one has liability to pay tax still one may not be required to pay any tax in a particular tax period in the event of there being no sale or output tax being balanced by the input or there being excess input giving rise to the refund. Whatever may be the event, the liability of the dealer so long as remains in terms of provisions of section 3 of the Act, he is under obligation to file return and the non-filing of the same attracts penalty under section 86(9) of the Act.

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25. The contention that no penalty can be imposed as no default

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assessment of tax has been carried out, has no force when we look at the provisions of section 33 and those of section 86 and 88 of the Act. There is merit in the arguments of the Revenue that proceedings under section 33 are quite distinct from the proceedings under section 32 of the Act and proceedings under section 33 of the Act are in no way dependent upon the proceedings under section 32 of the Act for the following reasons:-

(i) The circumstances in which the default assessment of tax can be carried out by the Commissioner under section 32 of the Act are not referred to in section 33 of the Act. The only condition is that the Commissioner has to have a reason to believe that the liability to pay penalty exist. The section 33 nowhere prescribes that such reason are to be based on the facts taken into account in framing the default assessment.

(ii) Provisions of section 88(1) make it more than explicit that the penalty can be assessed notwithstanding the fact that the dealer does not owe any tax under the Act

26. Coming to the decision of Garg Electroncis cited by the appellant it is distinguishable on the facts and circumstances of the Case. In case of Garg Electronics the dealer had not filed any return for the Assessment years 2007-08, 2008-09, 2009-10, 2010-11 as he had not conducted any business and had no turnover and there being no finding to the contrary by the revenue the appellant was found not to be liable to tax under the provisions of the DVAT Act and on these specific facts and circumstances of the case, it was held that there being no default assessment of tax, penalty could not have been levied. In the case before us the appellant has been conducting his business and has local and inter-state sales as well as is evident from the copies of the return original and revised and sale summary filed by the appellant:-

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	Ist Qtr	2nd Qtr	3rd Qtr	4th Qtr	Total
Gross sales	34,72,150	9,32,840	6,86,945	4,51,000	55,42,935
Central sales	28,22,550	5,76,740	4,28,485	1,04,000	39,31,775
Local sales	6,49,600	3,56,100	2,58,460	3,47,000	16,11,160
Local Purchase	29,23,210	8,92,160	4,00,625	5,90,329	48,06,324

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CST	8,823	11,189	7,199	6,370	33,581
DVAT	0	0	0	0	0

It is only on account of excess input tax credit that he has not paid any net tax at the time of filing the return and on these facts has claimed that he has no liability to pay tax which in our view is unsustainable.

27. In view of the foregoing we are of the considered view that the imposition of penalties cannot be faulted with on the ground that no default assessment of tax has been carried out. Such a proposition is neither warranted from the clear and unambiguous provisions of the Act nor any authority of the higher court has been brought to our notice to state that for imposition of a penalty the imposition of tax before it is a must.

28. Next ground on which the assessment of penalty under the Central Act has been assailed is that no penalty can be imposed in respect of return default under the CST Act, as under u/s 86(9) of DVAT Act penalty can be imposed only if a dealer fails to furnish any return under chapter V of DVAT Act. The central return has been prescribed in FORM I by virtue of Rule 3 of Central Sales Tax (Delhi) Rules, 2005 and non-filing of the return in Form 1 under Central Sales Tax is an offence u/s section 11 of Central Sales Tax (Delhi) Rules, 2005 punishable with fine which may extend to five hundred rupees and when the offence is continuing offence, with a daily fine which may extend to fifty rupees for every day during which the offence continues. In support of his contention that VATO is not competent to impose fine and that the DVAT Act and CST Act operate in different field, appellant has relied upon the decision of Hon'ble Delhi High Court in the case of Anand Traders 51 DSTC 206 and Shubham Marketing 51 DSTC 451.

29. Rule 3 and 11 of the Central Sales Tax (Delhi) Rules 2005 and Rule 11 of the Central Sales Tax Rules 1957 and Section 9 of the Central sales Tax Act, 1957 which are relevant for disposal of the issue raised are as under:-

Rule 3 & 11 of the Central Sales Tax (Delhi) Rules 2005

Rule 11.

"Every dealer liable to pay tax under the Act shall furnish a return in Form-I in respect of each tax period for which the turnover is required to be furnished, determined under rule 11 of the Central Rules, to the Commissioner, in the manner and by the time prescribed in respect of returns for the purposes of the Delhi Value Added Tax Act, 2004 (Delhi Act 3 of 2005) and the rules made thereunder.

Rule 11 Offences

A breach of these rules including any provisions of the Delhi Value Added Tax Act, 2004 (Delhi Act 3 of 2005) and the Rues made thereunder, which have been made applicable by Rule 10, shall be punishable with fine which may extend to five hundred rupees and when the offence is a continuing offence, with a daily fine which may extend to fifty rupees for every day during which the offence continues.

Rule 11 of the Central Sales Tax Rules 1957

Rule 11 Determination of turnover.—(1) The period of turnover in relation to any dealer liable to pay tax under this Act shall be the same as the period in respect of which he is liable to submit returns under the general sales tax law of the appropriate State:

Provided that in relation to a dealer who is not liable to submit returns under the general sales tax law of the appropriate State, the period of turnover shall be a quarter ending on the 30th June, 30th September, 31st December and 31st March, as the case may be, in a financial year.

30. Sub-Section 2, 2A, 2B and 3 of Section 9 of the CST Act,1956 relevant for the purpose are extracted below:-

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"(2) Subject to the other provisions of this Act and the rules made there under, the authorities for the time being empowered to assess, reassess, collect and enforce payment of any tax under the General Sales Tax law of the appropriate State, shall on behalf of the

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Government of India, assess, reassess, collect and enforce payment of tax, including any interest or penalty, payable by a dealer under this Act as if the tax or interest or penalty payable by such a dealer under this Act is a tax or Interest or penalty payable under the General Sales Tax law of the State and for this purpose they may exercise all or any of the powers they have under the General Sales Tax law of the State; and the provisions of such law, including provisions relating to returns, provisional assessment, advance payment of tax, registration of the transferee of any business, imposition of the tax liability of a person carrying on business on the transferee of, or successor to, such business, transfer of liability of any firm or Hindu undivided family to pay tax in the event of the dissolution of such firm or partition of such family, recovery of tax from third parties, appeals, reviews, revisions, references, refunds. rebates, penalties charging or payment or interest, compounding of offences and treatment of documents furnished by a dealer as confidential, shall apply accordingly.

Provided that if any State or part thereof there is no general sales tax law in force, the Central Government may, by rules made in this behalf make necessary provisions for all or any of the matters specified in this subsection.

(2A) All the provisions relating to offences, interest and penalties including provisions relating to penalties in lieu of prosecution for an offence or in additions to the penalties or punishment for an offence but excluding the provisions relating to matters provided for in sections 10 and 10A of General sales Tax law of each state shall, with necessary modifications, apply in relation to the assessment, reassessment, collection and the enforcement of payment of any tax required to be collected under this Act in such State or in relation to any process connected with such assessment, reassessment, collection or enforcement of payment as if the tax under this Act were a tax under such sales tax law.

(2B) If the tax payable by any dealer under this Act is not paid in time, the dealer shall be liable to pay interest for delayed payment of such tax and all the provisions relating to due date for payment of tax, rate of interest for delayed payment of tax and assessment and collection of interest for delayed payment of tax, of the General Sales Tax law of each State, shall apply in relation to due date for payment of tax, rate of interest for delayed payment of tax, and assessment

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and collection of interest for delayed payment of tax under this Act in such States as if the tax and the interest payable under this Act were a tax and an interest under such sales tax law.

(3) The proceeds in any financial year of any tax, including any interest or penalty, levied and collected under this Act in any State (other than a Union Territory) on behalf of the Government of India shall be assigned to that State and shall be retained by it; and the proceeds attributable to Union Territories shall form part of the Consolidated Fund of India.

31. While dealing with the issue of imposition of the Penalty under the Central Sales Tax Act, following observations of the Hon'ble Supreme Court in the case of Om Prakash Sheo Prakash and Others v. Union of India and Another [1983] 053 STC 0289 are also relevant :

"It is seen from sub-section (2) of section 9 quoted above that the authorities empowered to assess, reassess, collect and enforce payment of any tax under the general sales tax law of the appropriate State are authorised to assess, reassess and enforce payment of tax including any penalty payable by a dealer under the Act. The authorities under the general sales tax law of the State have thus been made the agents of the Union Government in discharging the duties of assessment, etc., referred to in section 9(2) of the Act, and empowered to exercise all or any of the powers they have under the general sales tax law of the State for the aforesaid purposes. Section 9(2) further provides that the provisions of the general sales tax law of the State concerned including provisions relating to returns, provisional assessment, advance payment of tax, registration of the transferee of any business, imposition of the tax liability of a person carrying on business on the transferee of, or successor to, such business, transfer of liability of any firm or Hindu undivided family to pay tax in the event of dissolution of any firm or partition of such family, recovery of tax from third parties, appeals, reviews, revisions, references, refunds, penalties, compounding of offences and treatment of documents furnished by a dealer as confidential shall apply accordingly to the proceedings under the Act. The proviso to sub-section (2)

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of section 9 of the Act provides that if in any State or part thereof there is no general sales tax law in force, the Central Government may by rules made in this behalf make necessary provision for all or any of the matters specified in that sub-section. Sub-section (3) of section 9 of the Act virtually carries out the intention of article 269 of the Constitution by providing that the proceedings in any financial year of any tax, including any penalty levied and collected under the Act in any State (other than a Union Territory) on behalf of the Government of India shall be retained by it. It may be mentioned here that there was no express provision in the Act itself authorising the levy of any penalty for delay or default in payment of the tax due under the Act or for other breaches of the general sales tax laws of the States in so far as they were adopted by section 9(2) of the Act as part of the machinery under the Act. But it was understood by all the sales tax authorities in the States who were authorised to exercise power under section 9(2) that penalty could also be collected by them in accordance with the provisions of the general sales tax (law) of the appropriate State in order to enforce the provisions of the Act including collection of tax thereunder. In Khemka & Co. v. State of Maharashtra [1975] 35 STC 571 (SC); [1975] 3 SCR 753 which was a case heard by a Bench of five learned Judges of this Court, an assessee under the Act who was a resident of the State of Maharashtra contended that the levy of penalty under section 16(4) of the Bombay Sales Tax Act for delay or default in payment of tax due under the Act was not warranted by the provisions of section 9(2) of the Act. There were three opinions expressed in that case. A.N. Ray, C.J., with whom Khanna J., agreed, held that a penalty not being merely a sanction or an adjunct to or consequential to an assessment and not being just a machinery to enforce payment of a tax but in reality was a statutory liability, in the absence of any express provision for levy of penalty for delay or default in payment of the tax under the Act, it was not open to the authorities under the State law to levy and recover penalty for delay or default in payment of tax under the Act. Mathew, J., with whom Chandrachud, J. (as he then was), agreed, took a contrary

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view holding that if for enforcing payment of tax due under the general sales tax law of the appropriate State the authorities thereunder had power to impose penalty, they had the same power of imposing penalty for enforcing payment of tax payable under the Act in accordance with the general sales tax law of the State. While the existence of specific provision for levy of penalty under section 10 read with section 10A of the Act was relied on by A.N. Ray, C.J., in support of his view, the said provisions were explained by Mathew, J., by observing that the penalties provided for in section 10 read with section 10A of the Act were not for the purpose of or in connection with assessment, reassessment, collection and enforcement of payment of tax payable by a dealer under the Act. Beg, J. (as he then was), by his separate judgment concurred with the view of A.N. Ray, C.J. The result was that the penalty levied against the appellant was held to be unsustainable in accordance with the opinion of the majority. Consequently section 9 came to be amended by the amending Act which was published in the Gazette of India on September 9, 1976, introducing sub-section (2A) in it. We are not concerned with the other amendments made by the amending Act in this case. Sub-section (2A) of section 9 which was introduced by the amending Act reads:

> (2A) All the provisions relating to offences and penalties (including provisions relating to penalties in lieu of prosecution for an offence or in addition to the penalties or punishment for an offence but excluding the provisions relating to matters provided for in sections 10 and lOA) of the general sales tax law of each State shall, with necessary modifications, apply in relation to the assessment, reassessment, collection and the enforcement of payment of any tax required to be collected under this Act in such State or in relation to any process connected with such assessment, reassessment, collection or enforcement of payment as if the tax under this Act were a tax under such sales tax law."

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Sub-section (I) of section 9 of the amending Act contains a validating provision. Section 9 of the amending Act declared that the provisions of section 9 of the Act would have effect and should be deemed always to have had effect in relation to the period commencing from January 5, 1957, and ending with the date immediately preceding the date of commencement of the amending Act as if section 9 of the Act also provided-

(a) that all the provisions relating to penalties (including provisions relating to penalties in lieu of prosecution for an offence or in addition to the penalties or punishment on conviction for an offence but excluding the provisions relating to matters provided for in sections 10 and 10A of the principal Act and the provisions relating to offences of the general sales tax law of each State shall, with necessary modifications, apply in relation to-

(i) the assessment, reassessment, collection and enforcement of payment of any tax required to be collected under the principal Act in such State and

(ii) any process connected with such assessment, reassessment, collection or enforcement of payment; and

(b) that for the purpose of the application of the provisions of such law, the tax under the principal Act shall be deemed to be tax under such law.

Sub-section (2) of section 9 of the amending Act validated all actions taken in connection with the levy of penalties."

32. In the said case dealing with the contention "that the introduction of sub-section (2A) in section 9 of the Act does not have the effect of making the provisions relating to penalties leviable under the general sales tax laws of the States applicable to the proceedings under the Act;" Hon'ble Apex Court observed as under:-

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"The first contention urged on behalf of the petitioners is that the lacuna in the Act which was pointed out by this Court in Khemka's case [1975] 35 STC 571 (SC); [1975] 3 SCR 753, namely, that there was no specific provision levying penalties in the Act as it stood before its amendment in 1976 remains unfilled up even now and hence no penalties can be recovered by utilising the provisions of the general sales tax laws of the respective States. This argument is based upon the language of sub-section (2A) of section 9 of the Act which is extracted above. It is contended that the words "All the provisions relating to offences and penalties of the general sales tax law of each State shall, with necessary modifications, apply in relation to the assessment, reassessment, collection and the enforcement of payment of any tax required to be collected under this Act. " are insufficient to make the provisions relating to penalties in the State laws applicable to the assessees under the Act as the word "penalties" is not found along with the words "assessment, reassessment, collection and the enforcement of payment of any tax". The argument is misconceived. The principal object of the Act is not the levying of penalties.

Its object is assessment, reassessment, collection and the enforcement of payment of Central sales tax. The assessees incur the liability to pay penalties on account of certain acts or omissions committed by them at the various stages specified above, namely, assessment, reassessment, collection and the enforcement of payment of tax. The inclusion of the word "penalties" along with these four stages would have, therefore, been redundant apart from being inappropriate. Sub-section (2A) of section 9 of the Act expressly makes all the provisions relating to offences and penalties which are committed or incurred, as the case may be, under the general sales tax laws of the respective States, to persons who commit corresponding acts and omissions at the above-mentioned stages under the Act. To illustrate, if a person is liable to pay any penalty for not filing a return required to be filed by him under the general sales tax law of

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a State, a person who is similarly required to file a return under the Act incurs the penalty for not filing a return and the measure of penalty is the same as under the State law. If a person is liable to pay penalty at a particular rate in addition to the tax for not paying any part of the tax due under a State law within the specified time, a person liable to pay tax under the Act becomes liable to pay the penalty at the same rate if he commits default in paying the tax due under the Act.

We do not, therefore, find any lacuna in the language of sub-section (2A) of section 9 of the Act which makes the provisions relating to penalties under the general sales tax laws of the respective States inapplicable even now to the proceedings under the Act. While sub-section (2A) of section 9 of the Act makes the provisions relating to both offences and penalties in the general sales tax laws of the States applicable to the proceedings under the Act prospectively, section 9 of the amending Act makes all the provisions relating to penalties only in the general sales tax laws of the States applicable to the proceedings under the Act retrospectively by adopting the same language appearing in sub-section (2A) of section 9 of the Act. This pattern of legislation had to be adopted perhaps because Parliament wished rightly not to give retrospective effect to the provisions relating to offences also which are referred to in sub-section (2A) of section 9. Having thus given retrospective effect to sub-section (2A) of section 9 with effect from January 5, 1957, in so far as penalties were concerned by enacting sub-section (1) of section 9 of the amending Act, Parliament removed the deficiency pointed out in Khemka's case [1975] 35 STC 571 (SC); [1975] 3 SCR 753 in the Act. In view of the retrospective amendment, the basis of the judgment in Khemka's case [1975] 35 STC 571 (SC); [1975] 3 SCR 753 was also removed. Consequently the judgment delivered in that case could not stand in the way of realisation of penalties in accordance with the validating provisions of section 9(2) of the amending Act. We are of the view that sub-section (2A) of section 9 of the Act and

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section 9 of the amending Act are adequate enough to assess and realise penalties with effect from January 5, 1957, as contemplated therein. We, therefore, hold that there is no substance in this contention of the petitioners."

33. Decisions cited of Anand Traders 51 DSTC 206 and Shubham Marketing 51 DSTC 451 are not applicable and are distinguishable. In Anand Traders, the issue was whether exemption from production of Central Statutory Forms can be granted under rule 7(3) of the Delhi Sales tax Rules 1975. In Shubham Marketing the issue was of the imposition of fine for violation of provisions of section 70 of the Delhi Value Added Tax Act,2005 which is quite distinct from the imposition of penalty which is distinct from the fine.

34. Next ground on which the imposition of penalty has been assailed is that before imposing penalty no notice has been issued and no opportunity of hearing was provided and thus violated principles of natural justice. In this regard Revenue has submitted that provisions of the DVAT Act, 2004 do not provide for issuing any notice before levy of penalty. Therefore there is no question of not issuing notice before imposing penalty and/or breach of natural justice. For this the respondent placed reliance on the decision of the High Court of Delhi in the case of Sales tax Bar Association Vs Govt of NCT of Delhi & Ors WP(C) No.4236/2012 decided on 7th December 2012.

35. On the question of issue of notice and affording of opportunity to the dealer before imposition of penalty, Hon'ble Delhi Court in its decision in Bansal Dye Chem Pvt. Ltd. vs Commissioner, Value Added Tax observed as follows:

"The very nature of proceedings under section 33 of the DVAT Act read with Rule 36 (2) of the DVAT Rules underscore the need for the VATO to observe the principles of natural justice while making the penalty order. This entails serving on the assessee a separate notice to show cause why penalty should not be Imposed and affording the assessee an opportunity of being heard prior to passing the penalty order. The imposition of penalty is not a mechanical or automatic exercise but requires application of mind by the assessing authority to the facts and circumstances of the case..."

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36. In Indian Tourism Development Corporation Vs. Sales Tax Officer and

Indian Railway Catering and Tourism Corporation Limited Vs. Govt. of NCT of Delhi, the Hon'ble Delhi High Court also held that the appellant should have been given an opportunity of hearing before the penalty order could have been passed.

37. On the point of notice before imposing of penalty, appellant's Ld. Counsel also referred to the Hon'ble Orissa High Court judgment in which Hon'ble High Court held as follows:

> "the question is whether penalty could have been levied without grant of opportunity; it was urged by the Ld. Counsel for the revenue that the provision nowhere stipulates for any notice. We do not find any substance in the plea. Even if it is accepted that there is no specific requirement, principles of natural justice mandate it. "

38. In view of the law laid down in the aforesaid decisions , we are of the considered view that the Appellant is bound to succeed on the ground that penalty order passed by the Ld. VATO without service of prior notice and without affording an opportunity of hearing to the appellant on the question of penalty, is unsustainable in law.

39. In view of the foregoing discussions, The matter is remanded back to the concerned VATO for a fresh decision in accordance with law regarding penalty after giving fresh opportunity of hearing to the appellant. Appellant is directed to appear before the concerned VATO on 20.12.2016 who shall dispose off the case as soon as possible, preferably within a period of two months from the date of appearance by the appellant.

40. Orders pronounced in the Open Court

41. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

(DIWAN CHAND)
MEMBER (Administrative)

(M. S. WADHWA)
MEMBER (Judicial)

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Copy to:-

(1) VATO (Ward-103)

(2) Second Case File

(3) Govt. Counsel

(4) Secretary (Sales Bar Association)

(5) PS to Member (J) for uploading the judgement on the portal of DVAT/GST, Delhi–through EDP branch

(6) Dealer

(7) Guard File

(8) AC(L&J)

REGISTRAR

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