

BEFORE DELHI VALUE ADDED TAX, APPELLATE TRIBUNAL DELHI
Sh. Narinder Kumar, Member (Judicial)

Stay Application Nos. : 600-601/22
In Appeal Nos. 441-442/22
Date of Order : 10/11/2022

M/s Metrostroy-Era JV
1107, Indraprakash Building 21,
Barakhamba Road,
New Delhi-110020.

.....Applicant

v.

Commissioner of Trade & Taxes, Delhi.

.....Respondent

Counsel representing the Applicant : Sh. Rohit Gautam.
Counsel representing the Revenue : Sh. P. Tara.

Order on Stay Applications u/s 76(4) of DVAT Act

1. This common order is to dispose of two applications u/s 76(4) of DVAT Act with prayer for entertaining Appeal Nos. 441-442/22, without calling upon the dealer to deposit any amount by way of pre-deposit.
2. Dealer-appellant is feeling aggrieved by common order dated 16/08/2022 passed by Learned OHA-Special Commissioner-III while disposing of objections pertaining to the tax period Annual 2014-15 & Annual 2015-16.
3. Separate objections were filed by the assessee-objector challenging levy of penalty of Rs. 8,32,17,430/- u/s 36A(8) of DVAT Act, pertaining to Annual 2014-15 and levy of penalty of

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Rs.9,61,09,262/- u/s 36A(8) of DVAT Act, so far as tax period 2015-16 is concerned.

4. The penalty was imposed due to non-deduction of TDS by the dealer-objector.
5. The objections filed by the dealer stand dismissed vide impugned order passed by Learned OHA while observing that the same were imposed after examination of facts and relevant records, and required no interference.

Learned OHA also dealt with a preliminary issue as regards furnishing of Form DVAT-41. Learned OHA has observed that file of objections of notice in the form of DVAT-41 came to his knowledge only on 10/08/2022 and taking into consideration the fact that the said notice had admittedly come to the knowledge of the OHA, who was earlier seized of the matter, on 02/08/2022.

6. Case of the dealer-appellant-applicant is that DVAT-41 was furnished by the dealer-appellant on 04/07/2022 and as such objections were required to be decided by 19/07/2022, as per provisions of Section 74(8) of DVAT Act, but the same came to be disposed of on 16/08/2022 i.e. beyond the expiry of 15 days period as described u/s 74(8) of DVAT Act. Reliance has been placed by the Counsel for the applicant on the decision by our

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own Hon'ble High Court in **Combined Traders v. Commissioner of Trade & Taxes**, W.P. (C) No. 1397/2019, decided on 24/07/2009.

7. In Combined Traders' case, the respondent had not controverted the case of the petitioner that it had made best efforts to personally serve DVAT-41 of the OHA, but could not succeed, and further as per copy of Form DVAT-41 served on the Commissioner, there was an acknowledgement stamp affixed by Central Resource Unit, DT&T.

Here is a case where Form DVAT-41 is stated to have been delivered to an official of the office of Special Commissioner, Department of Trade & Taxes on 04/07/2022. In the impugned order, Learned OHA has relied upon e-mail dated 08/08/2022 from Sh. Anand Kumar Tiwari, then Special Commissioner (earlier holding the charge of OHA) for Zone II (Special Zone). The e-mail was addressed to the Commissioner, Trade & Taxes with a copy endorsed to the Special Commissioner (Vigilance) – OHA, who passed the impugned order.

8. From the operative part of the e-mail, Learned OHA gathered the following information / facts:

- a) "The role of Sh. Naveen Kumar, DEO appears to be highly suspicious in this matter. He appears to have knowingly made wrong entry of DVAT-41 at objection number 24-25/SCTT/OHA/VAT/Z-XII/W-107/2022, dated 04-07-2022 and may also have a role in the register gone missing. Although his services have been terminated by the Department along with some other contractual employees (DEOs) but his role in this



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matter needs to be investigated either for gross negligence of for action taken knowingly with malafide intent. I request Commissioner Excise to order and enquiry in this matter through an appropriate agency.

- b) The 2 notices in Form DVAT-41 came to my notice on the 2nd of August 2022 and I had intended to proceed on merits of the case and dispose of the matter before 17th of August (15 days from 2nd August).
- c) However on 6th of August there were media reports of the Hon LG having suspended 11 officers of the Excise Department which includes my name as well. As a result of which I am not in a position to attend office and conduct my day to day duties. The situation that has developed over the weekend is totally unforeseen and beyond my control.
- d) I therefore request you to kindly allocate this DVAT 41 application to some other objection hearing authority in the department so that the application can be decided on merits.
- e) A copy of this note is also being emailed to SC (Vigilance) Department of Trade & Taxes, for necessary action with regard to Sh. Naveen Kumar, DEO posted in Pr. Br of Special Commissioner-IV."

9. It is available from the impugned order that copy of the said e-mail was sent by the Special Commissioner (Vigilance), who also happened to be OHA, to the Assistant Commissioner (Vigilance) for initiating necessary action in the matter. At the same time, learned OHA called the files from the office of the OHA earlier dealing with the matter.

10. In view of the facts which were brought to the notice of Learned OHA by way of e-mail dated 08/08/2022, because of the highly suspicious role said to have been played by Sh. Naveen Kumar, DEO by knowingly making wrong entry regarding DVAT-41,

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particularly when the relevant register went missing, prima facie learned OHA appears to be justified in disposing of the objections within 15 days from 02/08/2022 i.e. the date the fact of filing of DVAT-41 came to the notice of the learned OHA, earlier dealing with the matter.

11. On merits, it is case of the dealer-assessee-applicant that as provided u/s 36 A of DVAT Act, penalty can be imposed where a contractor makes payment to any dealer for discharge of any liability on account of valuable consideration payable for the transfer of property in goods in pursuance of a works contract, but this is a case where neither the appellant-assessee nor M/s Era Infra Engineering Ltd. is the contractor.

Further, as per case of the appellant-applicant, actually the dealer-applicant and M/s Era Infra Engineering Ltd. are members/partners of a Joint Venture, as per a contract.

12. In support of the argument that the appellant-applicant had no responsibility to deduct TDS as per section 36A of DVAT Act, on the amount so distributed by two Joint Ventures members/partners, reliance has been placed on **Faqir Chand Gulati v. Uppal Agencies Pvt. Ltd. & Anr**, Civil Appeal No. 3302 of 2005 and **The Income Tax Officer, Ward-3(1) v. Shraddha & Prasad Joint Venture**, ITA No. 2665/PUN/2017.



13. Learned OHA, while dealing with the levy of penalty due to violation of provisions of Section 36A(8) of DVAT Act, referred to the provisions of sub-section (1) & 1A of DVAT Act and observed that no supporting document was filed by the objector in support of its claim. Learned OHA also took into consideration that as per Annexure 2A submitted by the objector, supplies of material like iron and steel taxable @ 5% and other construction material taxable @ 12.5% were made by M/s Era Infra Engineering Ltd. to the dealer-objector, and the objector had also shown in its return for the tax period – 1st Qtr. 2014-15 such work contract purchases. Learned OHA also took into consideration that the objector has deducted TDS on account of payments made to M/s Era Infra Engineering Ltd., for the purpose of Income Tax Act before Learned OHA.

As finds mentioned in the impugned order, the objector did not say anything regarding deduction of TDS as regards supply of material made by M/s Era Infra Engineering Ltd. No document to substantiate claim as regards labour, service and other service like charges was submitted before learned OHA, as stands recorded in the impugned order. It may be mentioned here that herein appellant has submitted only one page of DVAT-38 pertaining to tax period – Annual 2015-16. No statement of facts or objections has been made available in these appeal files.



14. This claim regarding joint venture has been put forth by the dealer-appellant before this Appellate Tribunal for the first time.

In the course of arguments, learned Counsel for the appellant has clearly submitted that it was never submitted before the Revenue Authorities i.e. learned Assessing Authority and learned OHA that it was a case of joint venture between the dealer-appellant and M/s Era Infra Engineering Ltd. From the impugned order, it cannot be made out if the dealer-appellant submitted any document pertaining to joint venture, to learned OHA.

Even though it is the case of the appellant that payments received from DMRC were distributed as per the ration/percentage of the share on the basis of work done, no document appears to have been filed in this appeal. So, at the time of final argument, dealer-assessee shall have to explain non-filing of documents as observed by learned OHA.

15. Learned Counsel for the appellant has referred to statements placed on record depicting adjustment of refund due to the appellant for the purposes of meeting the demands in dispute, and submitted that the appeals be entertained waiving pre-deposit requirement.

As is available from record, in the 1st Qtr. of 2017, refund amount of Rs. 42,81,625/- has been adjusted; in the 4th Qtr. of 2016, refund of Rs. 3,18,02,066/- has been adjusted; refund of



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Rs. 40,99,625/- has been adjusted as against penalty of Rs. 8,32,17,430/- (levied in the tax period – Annual 2014-15) and Rs. 2,21,32,377/- has been adjusted as against penalty of Rs. 9,61,09,262/- (levied in the tax period – Annual 2015-16).

Having regard to the amount shown to have been adjusted towards the impugned demand of penalties, it is deemed to be a fit case to entertain the appeals, without calling upon the dealer-appellant to deposit any amount by way of pre-deposit. It is ordered accordingly.

16. Be put on 25/11/2022 for final arguments.
17. Copy of the order be supplied to both the parties as per rules. One copy be sent to the concerned authority. Another copy be displayed on the concerned website.

Announced in open Court.

Date: 10/11/2022



Narinder Kumar
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(Narinder Kumar)
Member (Judicial)