Review Application No. : 01/ATVAT/22
In Appeal No : 228A/ATVAT/18
Date of Order : 11/11/2022

M/s Evogreen Trading Pvt. Ltd.
1/5, W.H.S. Kirti Nagar,
New Delhi-110015. .....Applicant

V

Commissioner of Trade & Taxes, Delhi ..... Respondent

Counsel representing the Applicant : Sh. V. Lalwani.
Counsel representing the Revenue : Sh. C. M. Sharma.

ORDER

1. This order is to dispose of application u/s 76(13) of Delhi Value Added Tax Act (hereinafter referred to as DVAT Act) read with Regulation 24 of DVAT (Appellate Tribunal) Regulations 2005, with prayer for review of judgment dated 11/08/2022 passed by this Appellate Tribunal.
2. Vide judgment dated 11/08/2022, this Appellate Tribunal disposed of Appeal No. 228A/18.The operative part reads as under:

11/11/22

"As a result, the appeal is disposed of and with the adjudication of the legal grounds/objections raised on behalf of the appellant, the matter is remanded to learned OHA for decision of the remaining objections on merits i.e. as to whether the dealer failed to declare status of Central Statutory Forms received by it against any concessional sale as declared in the latest return furnished for the year 2010-11, and if so, its effect on the framing of assessment dated 30/03/2015.

Of course, learned OHA to provide reasonable opportunity to the dealer of being heard on the aforesaid points."

3. Appeal No. 228A/18 was filed challenging order dated 30/11/2018 passed by learned Special Commissioner-III-learned OHA, as the dealer felt aggrieved by default assessment of tax and interest framed on 30/03/2015 under Central Sales Tax Act, 1956 (CST Act).

4. The matter pertains to tax period - Annual 2010-11.

5. The assessment was framed due to the reason that dealer-assessee had made concessional sales but nowhere declared the status of the Central statutory forms received against such concessional sales either in Column R-10 of the return for 3rd Qtr. of 2013-14 or in CST Form No. 9 for the financial year 2010-11.

   As such, the Assessing Authority treated the said sales on full rate of tax payable under CST Act.

6. Learned OHA disposed of the objections filed u/s 74 of DVAT Act by observing as under:

"I have also perused the written submissions filed as well as the judicial pronouncements relied upon by the counsel. On perusing them all it comes up that the ground taken by the counsel that the assessment order passed is barred by limitation doesn't stand because the period for which the assessment has been issued is 2010-11 and the impugned order has been issued on 30-03-2015 which is well within the limitation period of four years prescribed in section 34(1) of the DVAT Act, 2004. Likewise, the ground taken by the objector that instead of issuing the assessment quarter wise the same has been issued on annual basis, also doesn't succeed because as per provision of sec 32(1)(d) of the DVAT Act, 2004, assessment of the objector could well be made on annual basis. However, in so far as the argument of the objector that before issuing the impugned order he was not only not given any opportunity of being heard and to present his case but also, the order issued is unsigned as well as system generated is concerned, the objector appears to have a case."

"....."

7. The appeal was disposed of by this Appellate Tribunal vide judgment dated 11/08/2022. Operative part of the judgment reads as under:

".....I find that this is a case where Learned OHA should not have passed order of remand for decision afresh by

the Assessing Authority, and rather proceeded to decide the objections on merits to find out if the assessment was valid or not. Accordingly, the order as regards remand of the matter to learned Assessing Authority deserves to be set-aside. I order accordingly."

8. After the disposal of the appeal, dealer has filed this review application.

9. Revenue has filed reply to the Review Application contesting the same.

10. Arguments heard. File perused.

11. Regulation 24 of Delhi VAT Appellate Tribunal Regulation 2005 pertains to Review of an order. It reads as under :

"(1) Subject to the provisions contained in sub-section (2) of section 76 of the Act and the rules made thereunder, any person considering himself aggrieved by an order of the Tribunal and who, from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the order made against him, may apply for a review of the order within sixty days from the date of service of the order:

Provided that the Tribunal may at any time, review the order passed by it suo motu also for reasons to be recorded by it in writing.

(1) Where it appears to the Tribunal that there is no sufficient ground for review, it shall reject the application.

(2) Where the Tribunal is of opinion that the application for review should be granted, it shall grant the same:

Provided that-

(a) no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the order, a review of which is applied for; and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the order was made, without strict proof of such allegation."

12. Counsel for the applicant has opened his argument by submitting that the judgment passed by this Appellate Tribunal suffers from error it is not clear as to from where it has been observed in Para No. 2 of the said judgment that learned OHA had remanded the matter to Assessing Authority (Ward-53).

In this regard, suffice it to say that this fact has been taken from the impugned order passed by learned OHA.

13. Another point put forth on behalf of the applicant is that in Para No. 11 of the judgment passed by this Appellate Tribunal, no reason has been given for not applying the law decided in case **State of M.P. and others v. Shyama Charan Shukla**, 79 STC 439.

In this regard, suffice it to say that this Appellate Tribunal clearly observed in Para No. 11 of the judgment that the decided case of the year 1990 pertained to the assessment made under C.P. and Berar Sales tax Act, 1947, whereas the present matter pertained to the provisions of CST Act, 1956 read with DVAT Act, 2004. When it was further observed that this decided case was distinguishable on facts, the distinct facts were narrated and discussed in the subsequent part of the judgment.

Consequently, decision in **Sunil Goyal &Anr. v. Additional District Judge, Court No. 8, Jaipur City**, S. B. Civil Writ Petition No. 14226/2009, decided on 22/03/2011 by Hon'ble Rajasthan High Court, now cited by Counsel for the applicantfor the purpose of review of the judgment does not come to the help of the applicant.

14. On behalf of the applicant, it has been contended that the judgment passed by this Appellate Tribunal suffers from error as while dealing with his arguments advanced on merits, particularly on the point of limitation in framing of the assessment, this Appellate Tribunal has not neither applied nor distinguished the decision in **Samsung India Electronics Private Limited v. Government of NCT of Delhi & Ors.**, W.P.(C) 2685/2014, by our own Hon'ble High Court on 07/04/2016, cited during arguments in the appeal,in favour of the appellant.

In this regard, it may be mentioned that on the point of limitation / period for framing of assessment, in Para No. 12 of the judgment this Appellate Tribunal dealt with the contention raised on behalf of the appellant and held that facts of present case were distinguishable from the facts of the decided case. Then facts of the case of the appellant were specifically discussed in the subsequent paragraphs of the judgment.

It is well settled that no application for review lies when an applicant comes up with the plea that the decision delivered by this Appellate Tribunal is based on wrong findings. In case of such plea, the appropriate remedy would be appeal, as rightly submitted by learned Counsel for the Revenue.

15. Another ground argued on behalf of the applicant seeking review of the judgment is that the point raised on behalf of the appellant in the course of arguments in the appeal on merits that this is a case of system generated assessment, was required to be considered and decided by this Appellate Tribunal, butthisAppellate Tribunal fell in error by not deciding the same.Further, it has been submitted that onus to prove service of notice of default assessment was on the Revenue. In this regard, Counsel for the applicant has placed reliance on **Gupta Bros India v. Commissioner of Trade and Taxes**, VAT Appeal No. 22/2022, decided on 17/08/2022 by our

own Hon'ble High Court and **Commissioner of Income Tax-III v. Silver Streak Trading Pvt. Ltd.,** (2008) 216 CTR Del 260.

On the other hand, on behalf of the Revenue the contention is that in the appeal the onus to prove that notice of default assessment was not served upon the appellant, but the appellant failed to discharge this onus. It has also been submitted on behalf of the Revenue that no certified copy of the assessment was filed by the applicant with the appeal to support its plea that it was a system generated assessment. Further it has been contended on behalf of Revenue that this point has been thoroughly discussed by this Appellate Tribunal and that the two decisions now cited on behalf of the applicant for the first time while seeking review do not come to the aid of the applicant.

Indisputably, in the appeal, no certified copy of notice of default assessment was submitted by the appellant with the appeal or at the time of arguments.

It may be mentioned here that legal aspect of this point, raised during arguments on appeal, has already been decided by observing in the manner as:

> ".....14. On the other hand, Learned Counsel for the Revenue has drawn attention to Objection No. 1 of the objections submitted by the dealer before Learned OHA wherein the dealer-objector pleaded to have obtained certified copy of impugned order on 28/04/2015 as default assessment was never served upon the dealer-objector, and it

came to know about the default assessment only on visit to the office of Department of Trade & Taxes in connection with pending refund.

The contention raised by Learned Counsel for the Revenue is that in this appeal dealer-appellant has not filed certified copy said to have been obtained by the dealer and rather he has placed on file with the memorandum of appeal some other copy of assessment dated 30/03/2015, but there is no explanation from the appellant as to where from he has collected this copy dated 30/03/2015 filed with the appeal.

Therefore, Learned Counsel for the Revenue has urged that the contention raised by Learned Counsel for the appellant that the impugned order is a system generated and unsigned order, is without any basis.

At Page No. 9 of the memorandum of appeal, the dealer has filed photocopy of notice of default assessment of tax and interest framed under CST Act on 30/03/2015. Even if it is a copy of system generated default assessment, with particulars filled therein and reasons given in the middle, it was for the dealer to explain as to from where it collected this document i.e. copy of the default assessment. Dealer has nowhere explained in the memorandum of appeal as to from where this copy of the default assessment has been collected/obtained by him. It is not case of the dealer that it received the said copy from the department. In the objections filed before Learned OHA, the dealer alleged that no such default assessment was served on the dealer-objector. If it was so, it was for the dealer to explain about the source of supply of this document. Even in the course of arguments, Counsel for the appellant has not replied the contention raised by Counsel for the Revenue to apprise of the source from where the said document was collected for being placed on record.

Undisputably, the dealer-appellant has not placed on record certified copy said to have been obtained on 28/04/2015. Accordingly, the contention put forth by Counsel for the appellant challenging impugned assessment on the ground that the same is a system

generated and unsigned order, is without any basis and the same is liable to be rejected....."

As regards decision in Gupta Bros India's case (supra), therein it was found that information as regards mode of service of order was not available in Ward-98 and learned ASC, representing the respondent, submitted that he had instructions as to no objection if the matter was remanded to the Tribunal. Therefore, said decision is distinguishable.

In view of the detailed discussion of the contentions raised on behalf of the parties in the appeal, this Court does not find merit in the contention raised on behalf of the applicant that the judgment passed by this Appellate Tribunal suffers from any error while dealing with the argument on the point of system generated assessment.

16. On behalf of the applicant, the argument is that this Appellate Tribunal was bound to decide the appeal on merits.

As noticed above, this Appellate Tribunal dealt with only the legal issues raised on behalf of the appellant in the appeal and then passed order of remand. The order of remand came to be passed keeping in view that learned OHA had not decided the objections on merits to find out if the objection was or was not valid. While remanding the matter, following observations were made by this Appellate Tribunal:

"Even if such a submission was made during arguments on objections, I find that this is a case where Learned OHA should not have passed order of remand for decision afresh by the Assessing Authority, and rather proceeded to decide the objections on merits to find out if the assessment was valid or not. Accordingly, the order as regards remand of the matter to learned Assessing Authority deserves to be set-aside. I order accordingly."

17. It may be mentioned here that the Appellate Tribunal remanded the matter to learned OHA for decision of "remaining objections on merits" i.e. as to whether the dealer failed to declare status of Central Statutory Forms received by it against any concessional sale as declared in the latest return furnished for the year 2010-11, and if so, its effect on the framing of assessment dated 30/03/2015. When the objection pertained to the framing of the assessment and declaration forms, the question involved was question of fact and law. Said question was yet to be decided by Learned OHA. Since the question was not decided by Learned OHA, in absence of any reasons or finding by learned OHA, this Appellate Tribunal had no option but to remand the matter to learned OHA for adjudication of the remaining objections, raised by the dealer but not decided.

Counsel for the applicant has not been able to satisfy as to how this Appellate Tribunal could itself decide a point i.e. the objection that

was yet to be decided by the Learned OHA but which the Learned OHA did not decide at all.

The contention of Counsel for applicant that the Appellate Tribunal should have set aside the impugned order passed by Learned OHA and the impugned assessment keeping in view the outcome only on the two legal issues advanced by him during arguments on appeal, is unacceptable being against the procedure established by law. An appeal would lie against a decision dealing with all the points involved in the matter, and not where the OHA fails to decide certain points pertaining to merits so as to see the validity of the assessment framed.

It may be mentioned here that as already noticed above, learned OHA was yet to deal with the point concerning Central Statutory Forms, and on behalf of the appellant it was not submitted in the appeal or in the course of arguments on appeal that the appellant had received any statutory forms or that same to be produced before this Appellate Tribunal. Therefore, the point of Central Statutory Form could not be considered by this Appellate Tribunal without affording opportunity to the appellant – objector to raise the same before Learned OHA.

Decisions titled as **Auto pins (India) & Anr. vs. Sales Tax Officer,**(1986)61 STC 287; **M/s MIL India Ltd. vs. Commissioner of Central Excise,** India, (2007) 3 SCC 533 cited

on behalf of the appellant at the time of arguments on appeal were taken into consideration by this Appellate Tribunal, while dealing with the legal objections raised and thereby setting aside the direction of demand by learned OHA to the Assessing Authority and OHA was directed to proceed with the objections for decision of the remaining objections on merits.

So, there is no error in the judgment of this Appellate Tribunal even on this point.

18. In the course of arguments, in the appeal on merits one of the contentions raised on behalf of the appellant was that the default assessment as framed on 30/03/2015, by Assessing Authority, was barred by limitation in view of period of four years prescribed u/s 34 of DVAT Act.

19. The Appellate Tribunal, after hearing arguments from both the sides decided the point of limitation by observing in the manner as:

> "17. This matter pertains to the year 2010-2011. Default assessment was framed on 30/03/2015. As per provisions of Section 34 of DVAT Act as in force with effect from 01/04/2005 to 31/03/2013 i.e. before the amendment dated 30/03/2013, no assessment or reassessment u/s 32 of DVAT Act shall be framed by the Commissioner after the expiry of four years from the date on which the person furnished a return u/s 26 or sub-section (1) of Section 28 of the Act. As per proviso, where the Commissioner has reason to believe that tax was not paid by reason of concealment, omission or failure to disclosure fully

material particulars on the part of the person, the said period shall stand extended to six years.

Same objection was raised by the objector before Learned OHA and he was of the opinion that in view of provisions of Section 34(1) of DVAT Act, the default assessment framed on 30/03/2015 was well within the prescribed period of four years.

18. Section 34 of DVAT Act w.e.f. 01/04/2013 reads as under –

> "(1) No assessment or re-assessment under section 32 of this Act shall be made by the Commissioner after the expiry of four years from –
>
> (a) the end of the year comprising of one or more tax periods for which the person furnished a return under section 26 or 28 of this Act; or
>
> (b) the date on which the Commissioner made an assessment of tax for the tax period. Whichever is the earlier:
>
> Provided that where the commissioner has reason to believe that tax was not paid by reason of concealment, omission or failure to disclose fully material particulars on the part of the person, the said period shall stand extended to six years.
>
> (2) Notwithstanding sub-section (1) of this section, the Commissioner may make an assessment of tax within one year after the date of any decision of the Appellate Tribunal or court where the assessment is required to be made in consequence of, or to give effect to, the decision of the Appellate Tribunal or court which requires the re-assessment of the person."

19. Before amendment vide notification No. F.14(4)/LA-2013/ cons2law/11, dated 28/3/2013, read with section No. 3(17) Fin. (Rev.-1)/2012-13/dsvi/263; dated 30/3/2013, - enforced w.e.f. 1/4/2013, section 34 read as under –

"(1) No assessment or re-assessment under section 32 of this Act shall be made by the Commissioner after the expiry of four years from –

(a) the date on which the person furnished a return under section 26 or sub-section (1) of section 28 of this Act; or

(b) the date on which the Commissioner made an assessment of tax for the tax period. Whichever is the earlier:

Provided that where the commissioner has reason to believe that tax was not paid by reason of concealment, omission or failure to disclose fully material particulars on the part of the person, the said period shall stand extended to six years.

(2). Notwithstanding sub-section (1) of this section, the Commissioner may make an assessment of tax within one year after the date of any decision of the Appellate Tribunal or court where the assessment is required to be made in consequence of, or to give effect to, the decision of the Appellate Tribunal or court which requires the re-assessment of the person."

20. Since amendment in section 34 of DVAT Act came into force w.e.f. 01/04/2013, period of four years could not be calculated by Learned OHA from the end of the year comprising of one or more tax period.

On this point, I have carefully gone through the decisions cited by learned counsel for the appellant. Significant to mention here that present case has peculiar facts and circumstances distinguishable from the facts of the decisions cited by learned counsel for the appellant on the point of limitation.

21. As noticed above, assessment came to be framed as the dealer failed to declare the status of Central Statutory Forms received by it against such concessional sales. As observed by the Assessing Authority in the assessment order, material particulars as regards the status of Central Statutory Forms received by it against concessional sales were to be disclosed in

Column R-10 for the 3rd Quarter return for the year 2013-14 or in Reconciliation Return in CST Form 9 for the financial year 2010-11.

22. It is true that in the copy of default assessment made available by the dealer with the appeals, details of the concessional sales do not find mention. It has not provided any such detail to this Appellate Tribunal.
Dealer-objector has not furnished certified copy of default assessment of tax and interest for the reasons best known to it. In absence thereof, it cannot be said as to what were the contents of the default assessment actually issued or as per the certified copy thereof collected by the dealer.

23. In the given circumstances, it was for Learned OHA firstly to find out as to in respect of which Central Sales Transactions, it was a case of non-declaration of status of Central Statutory Forms, so that learned OHA could determine if it was a case covered by Section 34(1)- as unamended- or a case covered by the proviso to Section 34(1) i.e. a case of non-payment of tax by reason of concealment, omission or failure to disclose fully material particulars by the dealer.

24. At this stage, it is pertinent to mention that earlier Reconciliation Return DVAT 51used to be furnished in addition to the returns required under Rule 3 of CST (Delhi) Rules, 2005, within a period of 3 months after the end of each quarter. However, in respect of the period from 1st April 2005 to 30th September, 2005, every dealer was furnish to the commissioner by 31st December, 2006, a Reconciliation Return in Form DVAT-51 for the whole period.

Rule 4 of CST (Delhi) Rules, 2005, earlier read as under:

> "4 Annual Reconciliation Statement- In addition to the returns required under rule 4, every dealer shall also furnish an annual reconciliation statement within a period of nine months from the end of the year, in Form DVAT-51 of the Delhi Value Added Tax Rules, 2005"

In this regard, subsequently Circular no. 5 of 2014-15 dated 04/08/2014 came to be issued by the department. As per the extracts of Circular no. 5 of 2014-15 dated 04/08/2014 available in para 7.3.19.1, at page B-315, in Delhi VAT Ready Recknoner by Versatile's, 2016 Edi.- Vol.I, all eligible dealer were required to furnish relevant information for the year 2013-14 latest by 30/09/2014 (or the extended date). In the Form 9, dealer could also furnish the details of pendency of forms for preceding three years, viz. 2010-11, 2011-12, 2012-13, if no assessment had been framed for the relevant year.

Accordingly, Assessing Authorities were not allowed to frame any central assessment related to Central declaration forms and where no refund was involved, as the same were to be generated by the Systems & Operation Branch on the basis of the information furnished by the dealer in Form 9. However, Assessing Authorities were allowed to frame the central assessment order of the dealer, only in such cases where it was required for processing the refund claims.

As per the above circular dated 04/08/2014, even for the financial year 2010-11, the dealers was afforded an opportunity to declare the status of Central Statutory forms in Reconciliation Return in CST Form 9 However, as observed by learned Assessing Authority, the dealer-assessee-appellant failed to declare the status of Central Statutory forms in Reconciliation Return in CST Form 9 for the financial year 2010-11. Here, neither in the appeal nor in the objections before OHA it was pleaded that details of

requisite statutory forms was provided by the dealer in the return or that copies of said forms were also furnished to the department. Even in this appeal, no such detail has been provided about furnishing of Central Statutory Forms.

As per the above circular, the dealer got an opportunity to declare the status of Central Statutory forms received by it against concessional sales in the financial year 2010-11, even while filling in Column R-10 for the 3rd quarter Return for the year 2013-14. However, as observed by learned Assessing Authority, the dealer-assessee-appellant failed to declare the status of Central Statutory forms even in R-10 of the 3rd quarter Return for the year 2013-14.

In view of the provisions of the above said circular and the opportunities afforded to the dealer, the dealer cannot eat the cake and have it too. In other words, when the department afforded him opportunity to declare the status of Central Statutory Forms in respect of concessional sales during the financial year 2010-11 by way of Reconciliation Return in CST Form 9 and then by furnishing the same in column R-10 for the 3rd quarter return for the year 2013-14, it having failed to avail of this opportunity, now it does not lie in its mouth to say that the assessment framed by the Assessing Authority on 30/03/2015 is barred by limitation. Rather in the given facts and circumstances and in view of the circular dated 04/08/2014, the assessment framed on 30/03/2015 is well within limitation. In view of said circular, the concerned Authority was justified in not framing assessment earlier, so that suchlike dealer who was yet to declare such details in the return and the requisite Reconciliation Form, could avail of the opportunity.

For the same reasons, I do not find any merit in the contention of learned counsel for the appellant that since the dealer was liable

to pay tax and furnish return quarterly, the assessment dated 30/03/2015 pertaining to tax period Annual 2010-11, deserves to be set-aside.

In view of the peculiar facts and circumstances of this case to which provisions of circular date 04/08/2014 are applicable, with respect I may observe that said decisions cited by learned counsel for the appellant do not come to the aid of the appellant."

Surprisingly, in the course of arguments on review, Counsel for the applicant has submitted that he nowhere finds reference to any circular No. 5 of 2014-15 dated 04/08/2014 said to have been issued by the department and as mentioned by this Appellate Tribunal in Para No. 24 of the judgment.

In this regard, suffice it to say that as finds mentioned in the portion of the judgment reproduced above, even the source of the said circular finds specific mention.

In the given facts and circumstances, and discussion reproduced above, case titled as **K. R. Anand v. Commissioner of Central Goods and Services Tax**, W.P.(C) 2047/2021, decided on 16/02/2021 by our own Hon'ble High Court, relied on by Counsel for the applicant for the first time while arguing this Review Application, as rightly submitted on behalf of the Revenue, does not come to the aid of the applicant.

20. No other argument has been advanced by learned Counsel for the parties on the application seeking review.

21. In view of the above discussion, finding no merit in this application seeking review of the judgment passed by this Appellant Tribunal, same is hereby dismissed with costs of Rs. 20,000/-.

22. File be consigned to the record room. 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 : 11/11/2022

Narinder Kumar 11/11/2022

(Narinder Kumar)
Member (J)