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

Appeal Nos.: 641-644/13 &
Appeal No.: 648/13
Date of Judgment: 06/12/2022.

M/s HDFC Bank Ltd.,
1st Floor, Kailash Building,
26, Kasturba Gandhi Marg,
New Delhi.

.....Appellant

v.

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

Counsel representing the Appellant : Sh. Atul Gupta with
Ms. Neha Choudhary.

Counsel representing the Revenue : Sh. P. Tara.

JUDGMENT

Appeal No. 641-644/13 (pertaining to tax period 2005-06 December, January, February and March)

1. The above captioned four appeals filed by the dealer-appellant, pertaining "only to penalty" were earlier disposed of by this Appellate Tribunal vide common judgment dated 09/12/2021. Penalties u/s 86(10) and 86(15) of DVAT Act were upheld, whereas penalty u/s 86(12) of DVAT Act was set aside.

2. As per record, notices of assessment of penalty u/s 33 of DVAT Act were issued by learned Assessing Authority, pertaining to

APPELLATE TRIBUNAL VAT DELHI

Narinder Kumar 6/12/2022

tax period- months of December, January, February and March, of the assessment year 2005-06, for the reasons recorded in Annexure 'P' lying annexed to the notice of assessment.

Feeling aggrieved by the levy of penalties, the dealer filed objections u/s 74 of DVAT Act.

Vide order dated 11/07/2013, Learned OHA-Special Commissioner upheld the levy of penalties for the above said tax periods.

3. Dealer-appellant felt aggrieved by the judgment dated 09/12/2021 and filed VAT Appeals Nos. 15/22 and 16/22.

4. Vide order dated 31/05/2022, delivered in VAT Appeals Nos. 15/22 and 16/22, Hon'ble High Court has remanded the matter to this Appellate Tribunal, for a de-novo hearing and observing that this Appellate Tribunal will mind the directions/objections contained in the earlier remand order. That is how, on remand, two appeals bearing No. 643-644/13, stand restored.

5. Earlier the matter was remanded by Hon'ble High Court vide order dated 26/09/2016 passed in VAT Appeals Nos. 26-27/16.

Appeal No. 648/13, (pertaining to tax period 2008-09)

6. The above captioned appeal filed by the dealer-appellant, pertaining to penalty was earlier disposed of by this Appellate Tribunal, with other connected appeals, vide common judgment dated 09/12/2021.

7. It may be mentioned here that initially penalties were imposed for violation of provision of section 86(10), 86(12) and 86 (~~15~~) of DVAT Act.

Vide common order dated 11/07/2013, learned OHA rejected the objections and upheld the penalties. Dealer filed appeals before this Appellate Tribunal. ~~Accordingly, dealer objector filed~~ including this appeal No. 648/13.

Vide judgment dated 09/12/2021 passed by this Appellate Tribunal, penalty imposed u/s 86(12) was set aside, whereas the other penalties were upheld.

8. Dealer filed VAT Appeals Nos. 15/22 and 16/22.Vide order dated 31/05/2022, Hon'ble High Court has remanded the matter to this Appellate Tribunal, for a de-novo hearing, while observing that this Appellate Tribunal will mind the directions/objections contained in the earlier remand order.

9. That is how, this Appeal No. 648/13 also stands restored.

10. Arguments heard. File perused.

Discussion

11. As already noticed above, earlier the matter was remanded by Hon'ble High Court vide order dated 26/09/2016 passed in VAT Appeals Nos. 26-27/16.

12. Learned counsel for the appellant has argued Appeal Nos. 641 to 644/13 only as regards penalties imposed u/s 86(10) and 86 (15) of DVAT Act.

As regards Appeal No. 648/13, learned Counsel for the appellant has advanced arguments challenging penalties imposed u/s 86(10) and 86(14) of DVAT Act.

13. It may be mentioned here that learned counsel for the appellant put forth his submissions in the appeals not only on the limited question of extent of penalty to be levied, but also even challenging the levy of penalty itself, even though learned counsel for the Revenue, in view of what stands recorded in the previous remand order passed by the Hon'ble High Court, repeatedly objected to the raising of arguments on the levy of penalty.

In this regard, Learned counsel for the Revenue also specifically referred to para 7 of the judgment passed by this Appellate Tribunal on 09/12/2021 to point out that said paragraph reveals that Shri Shammi Kapoor, learned counsel, then representing the appellant put forth his arguments before this Appellate Tribunal challenging only "the extent of penalty and urged for modification of penalty", ~~, and as such~~.

14. At this stage, for ready reference, it is necessary to reproduce paragraphs (2) and (3) of the previous remand order dated 26/09/2016 passed by the Hon'ble High Court, in VAT Appeals Nos. 26-27/16. Same read as under:

> "2. The Appellant/ assessee urges that having regard to the circumstances, the fact that the leviability itself was

debatable as is evident from the judgment in **Citi Bank (supra),** and in the absence of clarity, imposition of 200% penalty was not justified and is disproportionate. This court is of the view that imposition of 200% penalty is facially disproportionate. It needs to be recollected that whether sale of repossessed cars in light of Section 8 of Banking Regulation Act is subject to VAT levy was a question of law framed by this court and answered in **Citi Bank (supra).**

3. In these circumstances, it could not be said that the point was not debatable; undoubtedly it was. The levy of 200% penalty, therefore, is not sustainable; this court, at the same time, opines that it would not be appropriate to act as an adjudicating authority as to the proportionateness of the penalty to be imposed having regard to the fact that the issue was debatable. The matter is accordingly remitted to the Tribunal on the limited question of extent of penalty to be properly levied under these circumstances."

15. As can be gathered from the above two paragraphs, Hon'ble High Court was of the view that imposition of 200% penalty was facially disproportionate; that the levy of 200% penalty was not sustainable (when the question of levy of VAT on sale of repossessed cars- a question of law- was framed and answered by the Hon'ble High Court in **Citi Bank vs. Commissioner of Sales Tax**, decided in March 2016 (reported in 2016 (1) AD (DEL) 581).

Having so observed, Hon'ble High Court deemed it appropriate to remit the matter to the Appellate Tribunal for the first time, on the following limited question :-

6/12/22

APPELLATE TRIBUNAL VAT DELHI

"extent of penalty to be properly levied under the given circumstances"

In view of the above and clear observations made by the Hon'ble High Court in the previous remand order, coupled with the second remand order, subject matter or scope of these appeals, on remand, is the limited question of extent of penalty to be properly levied.

As regards the submission made on behalf of the appellant before this Appellate Tribunal, while arguing the appeals challenging the penalty, it may be mentioned that Shri Shammi Kapoor, learned counsel then representing the appellant before this Appellate Tribunal, submitted as under:

> "Ld. Counsel for the appellant has submitted that the impugned order passed by the Ld.OHA is disproportionate in the given circumstances, and as such the impugned order deserves to be modified."

Therefore, learned counsel for the Revenue has rightly submitted that Shri Shammi Kapoor, Advocate, earlier representing the appellant here argued only for modification of the impugned order on the ground that in the given circumstances the same was disproportionate.

16. In the given situation, this Appellate Tribunal proceeds to decide the appeals only on the scope of the orders of remand - which clearly limit the scope to the extent of penalty.

Herein, while framing notice of assessment of penalty, learned Assessing Authority furnished reasons as explained in separate

sheet i.e. Annexure 'P'. He specifically mentioned in the assessment that reasons being in the Annexure as software did not permit the Assessing Authority inclusion of lengthy note of reasons.

Relevant extracts from Annexure 'P' are reproduced for ready reference as under:

"1. The dealer bank was also engaged in financing the vehicles and other moveable assets and a large number of financed vehicles/assets were re-possessed from the defaulters and later on disposed off in the market and VAT was not paid on such sales.

The consolidated annual reports were submitted by the dealer for the year 2005-06 and 2006-07 for its all branches situated in whole of the India and information, about the tax paid or due on the above context was not verifiable from these documents and returns filed by the dealer.

The dealer also did not furnish the information about

(1) Trading account for the period 2005-06 & 2006-07 for Delhi Branch only;

(2) Details of fixed assets as per prescribed proforma of the Income Tax for Delhi Branch only and

(3) No. of vehicles re-claimed/re-possessed from defaulters and sold for the year 2005-06 and 2006-07 by Delhi Branch which made the issue more complex to know the exact status of payment of VAT on; the sale of vehicles & other moveable assets disposed off after repossessing the same form defaulters.

2. The dealer had submitted consolidated annual report for whole of the country. Since no exclusive audited balance sheet of Delhi branch was furnished to department to arrive at correct figures of purchases, sales, other incomes, sale of

assets, scraps etc, for Delhi, it also made the issue complex to assess the exact tax liability of the dealer.

3. In the annual report submitted by the dealer, it was reflected that "the Bank imports bullion including precious metal bars on a consignment basis for selling to its wholesale and retail customers. The wholesale consignment imports are on a back to back basis and are priced to the customer based on the price quoted by the supplier. The Bank earns a fee on the wholesale bullion transactions. The fee was classified under commission income. The bank consolidates the sales and prices the bullion with the supplier. The gain or sale is classified under commission income". The bank also borrows and lends gold which is cheated as borrowing or as lending respectively with the interest paid/received classified as interest expense/income. Further, the bank had not declared any income from sales of Gold in the schedules to the accounts declared in the Annual Report. It had shown the income from commission/exchange & brokerage under schedule-14 (meant for other income). It required proper examination of all the transactions made on above accounts to know as to whether the tax has properly been charged/paid by the bank for the transactions covered under income from commission/exchange & brokerage under schedule-14 (meant for other income) as per the definition of sale?

4. Section 48 of DVAT Act, 2004 read with rule 42 of the DVAT rules, 2005 stipulates maintenance of certain records like a monthly account. Purchase records, showing details of purchases. Sales records, Record of inter-state sales; details of input tax calculations, Stock records etc, by the dealer at its principal place of business. The dealer bank has number of branches in Delhi, involved in the trading of gold and also in financing the vehicles and other moveable assets. It required examination as to how the DVAT 30 & 31 and other books of accounts required under DVAT Act & Rules are being maintained by the dealer?

5. The dealer had made heavy transactions of outward stock transfer and not submitted the complete F forms. It required examination as to whether the huge amount of stock transfer has been taken place to the genuine branches or the sale has been made to the out stationed gold dealers as consignment sale.

6. Discrepancies on point of deduction of TDS on work contract were also noticed on examination of the bills of the work got executed by the bank on contract basis, (for setting up its various branches/ATMs in Delhi from time to time). Since the dealer has number of branches/ATMs operating in Delhi, it also required examination in details as on which date the dealer has set up its various branches/ATM since the introduction of VAT and has got the work executed on contract basis and has, therefore, not deducted the TDS required under the provision of the VAT Act & Rules.

Since it was observed that the tax was not paid/less tax was not paid by reason of concealment/omission/failure to disclose fully material particulars on the part of the dealer, the period of assessment of the dealer was also extended upto six years from the date on which the dealer has furnished a return under section 26 or sub-section (1) of section 28 of this Act. M/s PK Singhal & Co. Chartered Accountant (auditor appointed by the Commissioner to conduct the special audit) after conducting the audit of business affairs of the dealer reported following major negative observations in r/o the dealer:

1. The Auditee has admitted in his books of accounts that has not paid any VAT on the sales of old re-possessed vehicles and fixed assets made during the year 2005-06 for Rs. 18,91,77,931/- and Rs. 22,80,693/- resp. This amount is admitted liability where the auditee is liable to pay the tax with interest u/s 42 of DVAT Act as also penalty u/s 86 read with sec 33.

APPELLATE TRIBUNAL VAT DELHI

2. The Auditee has got work done for his business affairs but he has not deducted TDS as per section 36 of DVAT Act on an admitted paid amount on execution of total contract work of Rs. 8,06,87,702/-. This amount is admitted liability where the auditee is liable to pay the deductible tax with interest u/s 42 of DVAT Act as also penalty under different sub sections 36A of DVAT Act.

This clearly demonstrates that the books of accounts of the dealer are not reliable and the dealer was intentionally filing false & deceptive returns which has made the dealer liable to pay the tax with interest u/s 42 of DVAT Act as also penalty u/s 86 read with section 33."

The comments from the dealer bank were also sought on the report furnished by the auditors appointed by the Commissioner and the dealer has stated that:-

1. The bank has been issued a license by the Reserve Bank of India under sec 22 of the banking regulation Act, 1949 to carry out its activities of banking. On going through the object clauses of the bank as given in its Memorandum of Association, the bank is into the business of borrowing and lending money and such related activities. This borrowing and lending of money is carried out for various [purposes including inter alia car loan, house loan etc. The bank is not into the business of sale and purchase of cars for any consideration whatsoever and hence, it cannot be said to be a dealer. The Auditor without proper application of mind has concluded that the bank is dealer in sale and purchase of cars and hence liable to pay tax on repossessed vehicles. The bank position is only acting as a facilitator for borrower to recover its loan amount. But he failed to prove. How he is a facilitator. In fact he is selling the

APPELLATE TRIBUNAL VAT DELHI

vehicles after taking possession. It would be, therefore, in appropriate to say that the bank is the dealer of cars and hence liable to pay VAT. Further, Sec 8 of the RBI Act, a banking company is categorically barred from directly or indirectly dealing in buying and selling of goods. Thus, it would be absolutely inappropriate to say that the bank is the seller or dealer engaged in sale and purchase of cars. Further, it is pertinent to mention herein that the bank never had the ownership of the cars. The bank does not have the right to use or manage the car as it only facilitates the customer by extending a loan so that the customer can purchase a car of his choice. At no point of time, the bank is having ownership of cars. The bank does not have the right to use or manage the car as it only facilitates the customer by extending a loan so that the customer can purchase a car of his choice. At no point in time, the ownership of the car is in name of the bank. The Auditor has misconstrued the activities carried out by the bank in so far as treating the bank as dealer dealing in sale and purchase of cars and hence, wrongly computed tax under the provisions of the DVAT Act. There are many recent judicial pronouncements in favour of the bank which clearly state that bank is not a dealer engaged in sale or purchase of cars.

2. The bank had given works contract amounting to Rs. 8,06,87,702/- during the year 2005-06. The bank has admitted that he has neither deducted TDS nor deposited in the treasury. A list of contractors along with value of the contract has been furnished along with declarations of various contractors for WCT contract value to the tune of Rs. 8,06,87,702/-.

While furnishing the above comments on the report, the dealer bank had raised objections over the conduct of auditors, and therefore, clarifications from the auditors were also sought on the dealer comments/contentions to have a fair idea of the process adopted for audit and the auditors had clarified that the audit has been conducted after giving sufficient time and opportunities to the dealer to produce the records and other documents etc. in support of his contention and every documents/judgment cited by the dealer has been considered and taken on record though the dealer has not furnished complete required records/document. Further the dealer has failed to prove how he is a facilitator.

After examining each and every issue in detail and applying the provisions of the DVAT Act, I am of the considered view that the returns filed by the dealer are incomplete, false and incorrect which attract penalty u/s 86 (10) of DVAT Act. The dealer has not paid due tax by reasons of concealment and has also failed to disclose fully material particulars of sales by not including the turnover of repossessed vehicle/ fixed assets in the returns filed in Form DVAT – 16. Further due to the reasons stated above, there is a tax deficiency which attract penalty u/s 86 (12) of DVAT Act. Moreover the dealer has prepared records and accounts in a manner that is false misleading or deceptive, so it attract penalty u/s 86 (15) of DVAT Act, 2004. Besides, the dealer has not deducted and deposited TDS, disclosed bullions sale very late and above all offered no plausible comments/ explanation on the auditors findings as to why default assessment be not carried out u/s 32 for furnishing deceptive, incorrect and false returns, moreover the dealer has miserable failed to prove how he is a facilitator.

In view of my findings above, the dealer has separately been assessed; u/s 32 for non-payment of tax @ 12.5% on turnover of sales amounting to Rs. 2,30,02,959/- pertaining to repossessed vehicles & fixed assets during the month of Dec. 2005, which is an admitted liability, payable with

penalty u/s 86(10), (12) & (15) of DVAT Act 2004, as the dealer has not come forward to deposit the deficient tax with interest. Since the tax deficiency has now been detected & assessed, the dealer is liable to pay the penalty on deficiency of tax, as per the provisions of sec 86 (10), (12) & (15) of DVAT Act 2004."

So the Assessing Authority framed assessment of penalty u/s 86(10) and 86(15) of DVAT Act in view of the above reasons.

17. As regards **Appeal No. 648/13**, learned Assessing Authority framed assessment for the tax period 2008-09, imposing penalty of Rs. 9,23,75,219/- u/s 86(10), 86(12) and 86(14) of DVAT Act read with section 33 of DVAT Act.

This assessment came to be framed as per reasons available in Annexure "A" is lying annexed to the detailed order of assessment.

For ready reference, extract(s) of the reasons are reproduced:

"Due to the reasons and arguments stated above, the dealer has not paid the tax by reason of concealment and failed to disclose fully material particulars hence as per section 34 of DVAT Act, the assessment of the year is extended for the six years. The dealer has not paid due tax by reason of concealment. Therefore, the tax deficiency has been detected and assessed so the dealer is liable to pay tax. The dealer is liable to pay taxed as per rates stated above on the value of goods as on 01/04/2008. The dealer is also liable to pay interest on the tax under section 42 of DVAT Act. However the benefit of tax deposited by the dealer for the sale of fixed assets is allowed.

After examining each and every issue in details as discussed above and applying the provisions of DVAT Act as detailed above, I am of the considered view that the returns filed by the dealer are

incomplete, false and deceptive which attracts penalty under section 86(10) of DVAT Act. The dealer has not paid due tax by reason of concealment and has also failed to disclose fully material particulars of sale by not selling the goods at fair market value in the returns filed in Form DVAT 16. Further due to the reason stated above a tax deficiency has arisen which attracts penalty under section 86(12) of DVAT Act. Moreover the dealer has prepared records and accounts in a manner that is false and deceptive, so it attracts penalty under section 86(15) of DVAT Act, 2004. Further the dealer has failed to furnish books of account as stated above, answers to the questions therefore penalty under section 86(14) is also imposed upon the dealer.

In view of my findings above, the dealer has separately been assessed u/s 32 of DVAT Act, for non-payment of tax @ 4% and 12,5% on turnover of sales amounting to Rs. 96,01,248/- and to Rs. 1,38,67,836/- respectively during the year, which is an admitted tax liability, payable with interest under section 42 of DVAT Act and is assessed under section 33 of DVAT Act, 2004 for imposing penalty u/s 86(10),(12) &(15) of DVAT Act 2004, as the dealer has not come forward to deposit the deficient tax. Since the tax deficiency has now been detected & assessed, the dealer is liable to pay the penalty as per the provisions of sec 86(10), (12) & (15) of DVAT Act 2004 respectively."

"Facts of the case:-

During the year the dealer has stated that it has recovered Rs. 14,07,96,686/- (1513 vehicle) towards recovery of outstanding loans by facilitating the sale of vehicles. Where as he knew very well that he has sold the vehicle after taking possession.

To make an enquiry to know whether the dealer is actually facilitator or not, who paid the loan amount and other ancillary charges, who purchase the vehicles whether the dealer has taken the possession of the vehicle or not, the dealer was asked information with documentary proof on 16 points since commencement of assessment proceedings and on 19/12/2011. Sh. Shammi Kapoor, who is representing the bank having a Power of

Attorney stated clearly that the information asked by the Assessing Authority with regard to repossessed vehicles cannot be given. But he reiterated that the bank is facilitator, but how, he stated that if customer fail to make payment even after the notices serve then through authorized dealer who are into the business of sale/purchase of Car is informed through word of mouth and anyone of them would show his intention in buying that Car and the ownership is transferred to the new buyer and the bank is at no point of time is the owner of the Car and that is how the bank is acting as a facilitator. This explanation too points out that the bank has some where taken possession of the Car/vehicle. To arrive at a justified conclusion it was necessary to enquire the matter for which documents as stated in table A were asked from the dealer on 09/11/2011."

"Although the assessee has deliberately not provided to furnished these information to avoid further enquiry but the statement before me on 25/11/2011 also prove that the bank was in possession of the vehicle. The statement is reproduced as under:-

> "What a loan is advance against a Car, the customer has to pay his EMI and if he default in making in payment of EMI three times initially a notice issued by the Bank for making of its EMI. If such customer failed to make payment even after the sale/purchase of Car or individual in any who is informed through word of mouth would show his intents in buying that Car. That bank at no point of time is the ownership. On specific request of the individual or the dealer who is into the business of buying Car after giving Cheque or Cash in favour of the owner of the Car transfer the Car in (newly purchaser) his name. The cheque issued in favour of the first owner of the Car/Vehicle is deposited into the loan account of first owner. Any balance if payable in excess to the loan account is transferred to the first owner from the loan account in which the amount has been initially deposited. However, it is in the case of loss it is return as per law. So the bank is acting as a facilitator. The property in question does not get transferred to the Bank."

APPELLATE TRIBUNAL VAT DELHI

But the dealer was not ready to provide me the information/documents as asked in Table A and on this date he reluctantly agreed to provide the information and he requested for 25 days which I agree for the sake of natural justice. But on 19/12/2011 the dealer clearly refused to provide this information stating, "the information asked in Table 'A' cannot be given."

"Due to the reasons and arguments stated above, the dealer has not paid the tax by reason of concealment and failed to disclosed fully material particulars hence, as per section 34 of DVAT Act, the assessment for the year is extended to six years.

Thus it proves beyond doubt that the intention of the dealer is to evade the VAT and is not acting as a facilitator but is selling the repossessed vehicles. Moreover, he is also not showing the sale of re-possessed vehicles in his books of amount as well as in returns and has prepared records and accounts in a manner i.e. false, misleading or deceptive. The dealer has not paid due to tax by reason of concealment and has failed to disclosed fully material particulars of sale by not including the turnover of sale of repossessed vehicles in his returns. The dealer has not paid the due tax. Since the tax evasion has been detected and the dealer has not come forward to deposit the tax, therefore, he is liable to pay tax @ 12.5% on Rs. 14,07,96,686/- along with interest for 980 days.

After examining each and every issue in detail as discussed above and applying the provisions of DVAT Act as detailed above, I am of the considered view that the returns filled by the dealer are incomplete, false and deceptive which attracts penalty under section 86(10) of DVAT Act. The dealer has not paid due tax by reason of concealment and has also failed to disclose fully material particulars of sale by not including the turnover of repossessed vehicles in the returns filled in Form DVAT

16. Further due to the reason stated above a tax deficiency has arisen which attracts penalty under section 86(12) of DVAT Act. Moreover the dealer has prepared records and accounts in a manner that is false and deceptive, so it attracts penalty under section 86(15) of DVAT Act, 2004. Further the dealer has failed to furnish

books of account as stated above, answers to the questions therefore penalty under section 86(14) is also imposed upon the dealer.

In view of my findings above, the dealer has separately been assessed u/s 32 of DVAT Act, for non-payment of tax @12.5% on turnover of sales amounting to Rs. 14,07,96,686/- which is an admitted tax liability, payable with interest under section 42 of DVAT Act and is assessed under section 33 of DVAT Act, 2004 as the dealer has not come forward to deposit the deficient tax. Since the tax of deficiency has now been detected & assessed the dealer is liable to pay the penalty on deficiency of tax as per the provisions of sec 86(10), (12) & (15) of DVAT Act 2004."

"Due to the reasons and arguments stated above, the dealer has not paid the tax by reason of concealment and failed to disclosed fully material particulars hence, as per section 34 of DVAT Act, the assessment for the year is extended to six years.

After examining each and every issue in detail and applying the provisions of the DVAT Act and CST Act and its rules framed there under, I am of the considered view that the returns filed by the dealer are incomplete, false and incorrect which attract penalty U/S 86 (10) of DVAT Act. The dealer has not paid due tax by reasons of concealment and has also failed to disclose fully material particulars of sales which has been shown as stock transfer and has measurably failed to satisfy the conditions of section 6(A) of CST Act. Due to the reasons stated above a tax deficiency has arisen which attract penalty U/S 86 (12) of DVAT Act. Moreover the dealer has prepared records and accounts in a manner that is false misleading or deceptive, hence is liable to pay penalty under section 86(15) of DVAT Act, 2004. The dealer is liable to pay interest.

In view of my findings above, the dealer has separately been assessed under section 32 read with section 9(2) of CST Act, for non-payment of tax @ 1% on, turnover of sales amounting to Rs. 188,16,45,463/- during the year 2008-09, which is an admitted liability amounting to

APPELLATE TRIBUNAL VAT DELHI

Rs. 188,16,45,463/-, payable with interest and penalty u/s 86(10), (12) & (15) of DVAT Act 2004 read with CST Act and its rules, as the dealer has not come forward to deposit the deficient tax. Since the tax deficiency has now been detected & assessed, the dealer is liable to pay the penalty as per the provisions of section 86(10), (12) & (15) of DVAT Act 2004, respectively.

The dealer has failed to provide so many information and documents to the undersigned inspite of giving him sufficient opportunity and time. Hence, penalty of Rs. 50,000/- under section 86(14) of DVAT Act has been imposed upon the dealer."

18. In the first remand order, Hon'ble High Court clearly observed that the question of levy of tax on the sale of re-possessed vehicles was debateable and came to be decided by our own Hon'ble High Court in **Citi Bank v. Commissioner of Sales Tax,** (2016) 88 VST 246 (Del).

In this regard, on behalf of the appellant, reliance has been placed on the following decisions:

- **CTO, Anti-Evasion vs. ICICI Bank Ltd.**, S.B. Sales Tax Revision Petition No. 156/2017 dated 28.07.2017;
- **HDFC Bank Ltd. vs. State of Kerala**, 2018 (7) TMI 145 (Ker.);
- **Cholamandalam Investment & Finance Co. Ltd. vs. State of Tamil Nadu,** 2019 (9) TMI 1597 – Madras High Court;
- **Shree Krishna Electricals vs. State of Tamil Nadu,** (2009) 23 VST 249 (SC).

19. Learned counsel for the Revenue has contended that even though Citi Bank's case came to be decided by our own Hon'ble High Court in year 2015, said decision is based on the decision

of the year 2007 in **Federal Bank Ltd. & Others vs. State of Kerala & Others**, (2007) 6 VST 736, which had already laid down law.

20. In HDFC Bank Ltd.'s case (supra), the question that arose before the Hon'ble High Court of Judicature for Rajasthan Bench at Jaipur was as to whether learned Rajasthan Tax Board was correct in law in upholding the penalty levied in spite of the fact that all the transactions were recorded in the books of accounts and there was a bona fide question on the taxability.

In Para No. 7.24 of the decision, Hon'ble High Court observed that it was a case where VAT provisions were introduced from 01/04/2006 and admittedly, the assessment years were from 2006-2007 onwards, and the VAT provisions having been introduced, there may have been a reasonable cause in the minds of the assessees, and that penalty at least was not imposable, as different consideration was required to be looked into in so far as penalty is concerned.

While referring to the provisions of Section 61 of Rajasthan VAT Act, Hon'ble High Court observed that penalty is discretionary in nature and not necessary to be imposed. Hon'ble High Court was further of the view that penalty was not sustainable, and accordingly, same was directed to be deleted.

21. That was not a case where the argument was that the penalty imposed was disproportionate.

APPELLATE TRIBUNAL VAT DELHI

Here, in view of the clear observations recorded by Hon'ble High Court in the previous remand order and also that the matter was remanded to this Appellate Tribunal on limited scope, the question arises as to what quantum or extent of penalty shall be the proportionate penalty.

22. In view of the above provisions, learned Counsel for the Revenue has rightly contended that levy of penalty under Rajasthan VAT Act was discretionary and not mandatory. He has also rightly contended that levy of penalty as provided under Section 86(10) & (15) of DVAT Act is mandatory and not discretionary and that the provisions of Rajasthan VAT Act are not in paramateria with the provisions of DVAT Act.

23. In CTO, Anti-Evasion's case (supra), it was found that all the three authorities, following the judgment of Hon'ble Apex Court in the case of Federal Bank Ltd.'s case (supra), upheld that the transaction, to which the matter pertained, was exigible to tax under Rajasthan VAT Act. However, as regards penalty, while Assessing Authority imposed the same and the Dy. Commissioner (A) upheld the same, the Tax Board held that there was no case of imposition of penalty u/s 61 of the Act, and accordingly, deleted the penalty.

Therein, on behalf of the petitioner, it was contended that the assessee having knowledge of the decision by the Hon'ble Supreme Court, Federal Bank Ltd.'s case (supra) was unjustified in not paying required tax, Hon'ble High Court observed that it

was a matter of interpretation whether tax (VAT) was leviable or not.

24. That was not a case where the argument was that the penalty imposed was disproportionate.

Here, in view of the clear observations recorded by Hon'ble High Court in the previous remand order and also that the matter was remanded to this Appellate Tribunal on limited scope, the question arises as to what quantum or extent of penalty shall be the proportionate penalty.

25. In **Jatinder Mittal Engineers and Contractors v. Commissioner of Trade & Taxes**, STA No. 2/2011 and 3/2011, decided on 12/05/2011 by our own Hon'ble High Court, while dealing with the question of levy of penalty u/s 86(10) observed as under:

> "12. As noted from the facts above, the assessee had filed the return in accordance with Section 5(2) of the Act as it is engaged in the business of construction activities on contract basis. As per this provision, it was permissible for the assessee to disclose the net turn-over after excluding the charges towards labour, services and other like charges subject to such conditions as may be prescribed. It is because of this reason that the assessee had shown a turn-over of Rs. 15,36,120/- after deducted labour/services charges as well as other like charges. Though there is an omission in not showing the gross turn-over, the fact remains that when default assessment notice was issued to the assessee, he explained the expenses incurred on the aforesaid accounts.

APPELLATE TRIBUNAL VAT DELHI

13. It is also noted above that the assessee had maintained the centralized books of accounts, particularly, Profit and Loss Account, which the assessee is supposed to do as per the normal accounting practice. The assessee had allocated proportionate expenses to Delhi Sales incurred on account of labour/services. It is a different thing that such an approach on the part of the assessee was not accepted by the OHA or the Tribunal. It can safely be inferred that the aforesaid approach of the assessee was bonafide. It cannot be said that the return filed by the assessee was false, misleading and deceptive in material particular. The claim was bonafide may be the assessee was not able to prove the same, even otherwise, we find that it was an arguable case. For this reason, we are of the opinion that provision to sub-Section 10 of Section 86 could not be invoked in a matter like this. This condition stipulated therein is not satisfied and we, thus, decide the question of law no.1 in favour of the assessee and delete the penalty imposed under Section 86(10) of the Act."

26. That was not a case where the argument was that the penalty imposed was disproportionate.

Here, in view of the clear observations recorded by Hon'ble High Court in the previous remand order and also that the matter was remanded to this Appellate Tribunal on limited scope, the question arises as to what quantum or extent of penalty shall be the proportionate penalty.

27. In **Cement Marketing Company of India Ltd. vs. Assistant Commissioner of Sales Tax**, (1980) 1 SCC 71,while dealing with the question of penalty imposed u/s 2(o) and 43 of Madras General Sales Tax Act, 1958, for not showing freight charge as

part of turnover, Hon'ble Apex Court rejected that the view canvassed on behalf of the Revenue by observing that even if an assessee raises a bona fide contention that a particular item is not liable to be included in the taxable turnover, he would have to show it as forming part of the taxable turnover in his return and pay tax upon it on the pain of being held liable for penalty in case his contention is ultimately found by the Court to be not acceptable.

Hon'ble Court went on to observe that legislature could never have intended such an interpretation on this point. Therein, it was observed that Section 43 of MP General Sales Tax Act, 1958 providing for imposition of penalty is penal in character and unless the filing of an inaccurate return is accompanied by a guilty mind, the section cannot be invoked for imposing penalty.

28. Learned Counsel for the Revenue has rightly contended that decision in Cement Marketing Company's case (supra) does not apply or help the dealer-appellant as the same pertain to the provisions of Sales Tax Act, whereas present case is covered by the DVAT Act.

Furthermore, that was not a case where the argument was that the penalty imposed was disproportionate.

Here, in view of the clear observations recorded by Hon'ble High Court in the previous remand order and also that the matter

was remanded to this Appellate Tribunal on limited scope, the question arises as to what quantum or extent of penalty shall be the proportionate penalty.

29. In **Hindustan Steel Ltd. v. State of Orissa**, AIR 1970 Supreme Court 253, Hon'ble Supreme Court observed as under:

> "The liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Actor where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

Therein, Hon'ble Apex Court observed that those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out.

30. In **Shree Krishna Electrical v. State of Tamil Nadu and others**, (2009) 11 SCC 687, Hon'ble Supreme Court while

dealing with the levy of penalty for the assessment year 1992-93 and 1993-94 observed that the items which were not included in the turnover were found incorporated in the account books of the appellant; that where certain items which were not included in the turnover were disclosed in the dealer's own account books and the Assessing Authorities included said items in the dealer's turnover disallowing the exemption, and as such penalty could not be imposed. Accordingly, the penalty levied therein was set aside.

31. That was not a case where the argument was that the penalty imposed was disproportionate.

Here, in view of the clear observations recorded by Hon'ble High Court in the previous remand order and also that the matter was remanded to this Appellate Tribunal on limited scope, the question arises as to what quantum or extent of penalty shall be the proportionate penalty.

32. On behalf of the appellant, reference has been made to decision in **Pratibha Processors vs. Union of India**, 1996 (88) ELT 12 (SC), wherein Hon'ble Supreme Court observed that penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute, and that in the absence of deliberate violation of statutory provisions or contumacious act, penalty is not imposable upon the appellant.

33. In **State of MP v. Bharat Heavy Electricals**, 1998 (99) E.L.T. 33 (SC), it was observed that depending upon the facts of each case, the Assessing Authority has to decide as to what would be the reasonable amount of penalty to be imposed.

That case pertained to the application of provisions of section 7(5) of the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976. Herein, the appellant paid service tax which is at a lesser rate i.e. 10.3%, on the remaining valuable consideration of the transaction. The two bills relied on by the appellant to claim exemption on the point of service tax are of subsequent date(s), Page 47 of 49 Appeal No. 951-952/ATVAT/2013 and can safely be said to have been collected from Season Catering Pvt. Ltd., to claim said exemption by covering the remaining 50% of the valuable consideration under taxable service. Long Form Agreement has not been produced before us, despite specific mention by counsel for the Revenue in this regard. In this situation, it was observed that mala fide intention to evade payment of requisite percentage of tax could safely be attributed to the appellant; that it could not be said that the appellant had any reasonable cause, so as to set aside the penalty imposed.

34. The above said cases were not cases where the argument was that the penalty imposed was disproportionate.

APPELLATE TRIBUNAL VAT DELHI

Here, in view of the clear observations recorded by Hon'ble High Court in the previous remand order and also that the matter was remanded to this Appellate Tribunal on limited scope, the question arises as to what quantum or extent of penalty shall be the proportionate penalty.

35. In **M/s Cholamandalam Investment & Finance Co. Ltd. v. The State of Tamil Nadu**, Chennai, 2019 (9) TMI 1597, penalty levied was deleted by the Revenue Authority but State filed cross objections before the Appellate Tribunal, challenging order deleting the penalty. The Tribunal affirmed the finding of First Appellate Authority, the Tribunal noted that the Assessing officer had not recorded any specific finding of mens-rea and wilfulness on the part of the assessee in respect of the escaped turnover and accordingly held that imposition of penalty was not justified.

Hon'ble High Court decided the substantial question of law and upheld the order passed by the Tribunal.

As noticed above, learned counsel for the Revenue has submitted that in view of the judgment passed by Hon'ble Apex Court Federal Bank's case, it was known to one and all as to what was the decision given by the Hon'ble Apex Court on the said point, in March 2007, and as such the dealer could have proceeded in accordance with law.

However, as noticed above, specific observations have been recorded by our own Hon'ble High Court in previous remand order that the question of law was debateable and came to be decided in Citi Bank's case (supra). In view of said specific observations, ~~and as such~~ Revenue cannot be allowed to argue here that the point was not debatable.

36. On behalf of the appellant, reference has been made to provisions of Section 86 of DVAT Act to submit that as per its second proviso penalty imposed under this Section can be remitted, and that the penalties imposed by the Revenue Authorities may be remitted.

37. As per second proviso to Section 86 of DVAT Act, in force during the relevant period, the penalty imposed under this section can be remitted where a person is able to prove existence of a reasonable cause for the act or omission giving rise to penalty during objection proceedings under section 74 of this Act.

38. ~~Furthermore~~, the dealer-appellant being a bank, having assistance of Directors, Statutory Auditors and Chartered Accountants, should have highlighted in the return the relevant amount of sales of repossessed vehicles, but the same was not shown. Learned counsel for the Revenue has rightly contended that the dealer bank should have shown the requisite figure of the item in the relevant column(s), as per its own case, as exempted goods, but it did not do so, and due to said omission

the returns were misleading. Accordingly, learned Assessing Authority has rightly held that the dealer violated the provisions of Section 86(10) of DVAT Act.

39. Section 48 of DVAT Act provides for maintaining of records and accounts. Rule 42(1)(c) provides that the dealer shall maintain at his principal place of business, the following record:

> "Sales records showing separately sales made at different tax rates, zero-rated taxable sales and tax-free sales in Form DVAT-31.
>
> Copies of tax invoices related to taxable sales and invoices related to exempt sales shall be retained date wise and in numerical order."

40. Learned counsel for the Revenue has rightly contended that in view of the provisions of Section 48 of DVAT Act read with Rule 42(1)(c) of DVAT Rules, dealer-appellant was required to maintain the above mentioned true sales records and accounts. For the reasons recorded by the Assessing Authority in this regard, this is a case where the dealer – assessee prepared records and accounts in a manner which was misleading. In this way, learned Assessing Authority rightly held that the dealer violated the provisions of Section 86(15) of DVAT Act.

41. As noticed above, Hon'ble High Court has already observed that the question of law as to the levy of VAT on the aforesaid item was debatable. Keeping in view these observations and that the question was debatable, as regards Appeal Nos. 641-643/13, I deem it a fit case to reduce the quantum of penalty imposed u/s

86(10) of DVAT Act in respect of tax period December 2005, January 2006, February 2006 and March 2006 and also to reduce the quantum of penalty imposed u/s 86(15) only in respect of 3 tax periods i.e. January 2006, February 2006 and March 2006. On reduction, the penalties levied under these provisions shall read as under:

Period	Section	Amount	As Reduced
December, 2005	86(10)	28,75,371/-	25,00,000/-
	86(15)	10,00,000/-	10,00,000/-
January, 2006	86(10)	42,69,578/-	35,00,000/-
	86(15)	42,69,578/-	10,00,000/-
February, 2006	86(10)	17,47,087/-	15,00,000/-
	86(15)	17,47,087/-	10,00,000/-
March, 2006	86(10)	46,90,717/-	40,00,000/-
	86(15)	46,90,717/-	10,00,000/-

Appeal No. 648/13

42. As noticed above, Hon'ble High Court has already observed that the question of law as to the levy of VAT on the aforesaid item was debatable. Keeping in view these observations and that the question was debatable, I deem it a fit case to reduce the quantum of penalty imposed u/s 86(10) of DVAT Act from Rs. 3,82,11,389/- to 3,50,00,000/-. It is ordered accordingly.

43. Section 86(14) of DVAT Act provides that any person who fails to comply with the requirement under sub-section (2) or sub-

section (3) of section 59 of this Act shall be liable to pay, by way of penalty, a sum of fifty thousand rupees.

Learned Assessing Authority levied penalty Rs. 50,000/- u/s 86(14) of DVAT Act while observing the dealer has failed to provide so many information and documents to the undersigned inspite of giving him sufficient opportunity and time.

Learned Assessing Authority specifically recorded in Annexure-'A' that in response to notice dated 21/04/2011 and despite opportunities, provided during sufficient time of more than 200 days, dealer failed to furnish quantity wise, item wise and rate wise detail of sales and purchases in table 'A' and in respect of other queries raised by him.

For the detailed reasons recorded by learned Assessing Authority, when the dealer failed to furnish books of accounts and specific information to the learned Assessing Authority, no fault can be found with the penalty of Rs. 50,000/- imposed u/s 86(14) of DVAT Act.

Result

44. In view of the above discussion and findings, **Appeal No. 641-644/13** are partly allowed with modification only in the quantum of penalty levied u/s 86(10) of DVAT Act in respect of all the 4 tax periods and u/s 86(15) of DVAT Act in respect of only 3 tax periods, as under:

6.1.22

APPELLATE TRIBUNAL VAT DELHI

Period	Section	Amount	As Reduced
December, 2005	86(10)	28,75,371/-	25,00,000/-
	86(15)	10,00,000/-	10,00,000/-
January, 2006	86(10)	42,69,578/-	35,00,000/-
	86(15)	42,69,578/-	10,00,000/-
February, 2006	86(10)	17,47,087/-	15,00,000/-
	86(15)	17,47,087/-	10,00,000/-
March, 2006	86(10)	46,90,717/-	40,00,000/-
	86(15)	46,90,717/-	10,00,000/-

45. In view of the above discussion and findings, **Appeal No. 648/13** is partly allowed with modification only in the quantum of penalty levied u/s 86(10) of DVAT Act by reducing the same from Rs. 3,82,11,389/- to 3,50,00,000/-, and upholding the penalty of Rs. 50,000/- imposed u/s 86(14) of DVAT Act.

46. File be consigned to the record room. One copy of judgment be placed in the record of **Appeal No. 648/13.** Copy of the judgment 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 : 06/12/2022.

Narinder Kumar 6/12/2022

(Narinder Kumar)
Member (Judicial)

APPELLATE TRIBUNAL VAT DELHI