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

Review Application No. : 06/ATVAT/22
In Appeal No. : 353-358/ATVAT/13
Date of Order: 07/02/2023

M/s. PRL Projects and Infrastructure Ltd.,
34/1 Vikas Apartments, East
Punjabi Bagh, New Delhi-110026.

.....Applicant

v.

Commissioner of Trade & Taxes, Delhi

.....Respondent

Counsel representing the Applicant : Sh. S. K. Verma.
Counsel representing the Revenue : Sh. C. M. Sharma.

ORDER

1. This order is to dispose of Review Application no. 06/22 filed with prayer for review of judgment dated 29/07/2022 passed by this Appellate Tribunal while disposing of Appeals Nos. 353-358/13.

2. Vide Appeals No. 353-358/13, dealer-appellant-applicant challenged the order dated 06/08/2012 passed by Additional Commissioner- Objection Hearing Authority (OHA) as the objections filed by the dealer-objector were thereby rejected.

3. The matter pertains to levy of tax, interest and penalty relating to tax period 2008-09.

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4. On 08/03/2010, learned Assessing Authority had raised certain demands towards tax, interest and penalty, by framing assessments u/s 32 and 33 of DVAT Act.

5. Feeling aggrieved, the dealer filed objections u/s 74 of DVAT Act. Whereas objections number 3360, 3362, 3364 pertained to 1st quarter, 3rd quarter and 4th quarter respectively, challenging levy of tax and interest, objections no. 3361, 3363 and 3365 pertained to imposition of penalty for the aforesaid three quarters.

6. Vide judgment dated 29/07/2022, the appeals challenging impugned order passed by learned OHA upholding levy of penalties, were allowed and thereby the impugned assessments framed by Assessing Authority and the impugned order upholding the penalties passed by learned OHA, were set aside. The appeals challenging levy of tax and interest and the impugned order passed by learned OHA were dismissed, while upholding their levy.

7. While opening arguments on the review application, counsel for applicant has submitted that during arguments on the appeal, he might have not been able to properly address or put forth some of his contentions before this Appellate Tribunal.

8. On the other hand, while opening arguments, counsel for the Revenue has pointed out that prayer clause of the review application contain sentences, which do not pertain to this matter and rather pertain to some other case.

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Thereupon, counsel for the applicant has candidly admitted that this prayer clause contains text pertaining to some other matter which has inadvertently crept in this paragraph.

Be that as it may, I proceed to deal with the contentions raised in this review application.

9. As regards scope of a review application, counsel for the applicant has submitted that law does not permit rehearing of the entire matter at the time of review of an order, but in the next breath submitted that power of the Court is not restricted to a particular ground on which the review is granted.

Counsel for the appellant also submitted that as per settled legal proposition a new plea cannot be taken in respect of any factual controversy whatsoever, but a new ground raising a pure legal issue, for which no enquiry/proof is required, can be permitted to be raised by the Court at any stage of the proceedings.

Counsel for the applicant has also submitted that justice is a virtue that transcends all barriers and that rules of procedure or technicalities of law cannot stand in its way, as procedure is the handmaid of justice.

Counsel for the applicant has further submitted that a party is not entitled to seek review of a judgment merely for the purpose of a rehearing and a fresh decision in the case. It has been submitted that there is a the said decision was by the Hon'ble Apex Court

and wherein it was observed that normally a judgment pronounced by the Apex Court is final and departure from said principle would be justified only when circumstances of a substantial and compelling character make it necessary to do so. In this regard, counsel for the applicant has simply mentioned about decision in Northern India Caterers (India) v. Lt. Governor of Delhi (1979). It may be mentioned that Counsel for the applicant has not furnished full citation or complete text of the decision.

10. In the course of arguments, counsel for the appellant has himself submitted that a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. However, he has submitted that an interpretation of statue of law at variance with the clear and simple language thereof, would be an error apparent on the face of the record warranting review.

11. Counsel for the applicant has submitted that even though Revenue has filed reply to the review application, signed by counsel for the Revenue, same cannot be considered for want of verification and signing thereof by the party.

On the other hand, counsel for Revenue has submitted that he being counsel for the Revenue has signed the reply. At the same time, he has submitted that the arguments advanced by him on

the review application may be considered even if the reply has not signed or verified by any officer of the Revenue.

12. For the purpose of review of an order / judgment passed by this Appellate Tribunal, as regards the expression "error apparent from the record or its proceedings", appearing in Regulation 24 of Delhi VAT Appellate Tribunal Regulation 2005, the said Regulation needs to be reproduced for ready reference.

Regulation 24 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:
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> 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.
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> (1) Where it appears to the Tribunal that there is no sufficient ground for review, it shall reject the application.
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> (2) Where the Tribunal is of opinion that the application for review should be granted, it shall grant the same:
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> 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."

In view of the above provision pertaining to review of order, any person feeling aggrieved by the order of the Appellate Tribunal is to satisfy that the review is being sought on the ground of error apparent on record or because of discovery of new and important matter or evidence and that the said matter or evidence was not within his knowledge or could not be produced at the time the order was passed by the Appellate Tribunal.

13. The first argument advanced by counsel for applicant is that as per its claim, an application by way of Form WC-01 was submitted, but this Appellate Tribunal, while adjudicating the matter did not take into consideration that as per WC-01 composite scheme of 3% was opted by the dealer and same entitled the dealer to procure the goods from outside the State. Further, it has been submitted that the Appellate Tribunal took into consideration what was mentioned in the return furnished by the dealer i.e that the dealer had specified composition rate of tax as 2.5%. Accordingly, counsel has urged that the Appellate

Tribunal fell in error in not considering what was recorded in Form WC-01.

On the other hand, counsel for Revenue has submitted that the applicant company had opted for first composition scheme i.e the scheme of 2.5% and not that of 3%, and that this point was dealt by this Appellate Tribunal in detail and, therefore, this is not a ground for review of the judgment.

At this stage, I deem it just to reproduce discussion by this Appellate Tribunal on the issue "**as to which of the two composition schemes was opted by the dealer**" and the discussion on the said issue while dealing with the respective contentions raised by counsel for the parties in the appeals. Same read as under:

> "10. Learned Counsel for the appellant has contended that late deposit of tax by the dealer to avail of benefits of a composition scheme cannot be a ground for denial of its benefit to the dealer. In the course of arguments, Counsel for the appellant submitted that the dealer had opted for composition scheme at 3%, but deposited VAT @ 2.5% only, on his gross turnover.
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> Counsel for the appellant further submits that it is admitted case of the dealer that it deposited the balance 0.5% tax on 11/03/2010 i.e. after the framing of assessment dated 08/03/2010, in respect of tax period 2008-2009.
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> Learned Counsel for the appellant has contended that late deposit of tax by the dealer to avail of benefits of a composition scheme cannot be a ground for denial of its benefit to the dealer, who deposited the deficient amount of

0.5% soon after this deficiency was pointed out by the audit team during audit on 30/12/2009.

11. On the other hand, Learned Counsel for the Revenue has pointed out that the dealer company had opted for First composition scheme, and deposited the deficient amount of VAT i.e. 0.5% only after the framing of the assessment and not prior thereto, and since the dealer made purchases from outside Delhi, it violated the provisions of the first scheme, and as such the Assessing Authority rightly framed assessment in terms of the provisions of composition scheme as notified on 17/03/2006.

12. As per notification dated 17/03/2006, two composite schemes were notified.

First Scheme

Under the first scheme, 2.5% of the entire turnover was to be paid, if the dealer opted to pay tax under this scheme and also wanted to make all the purchases and the sales during the period, for which composition was opted, within Delhi only.

Second Scheme

Under the second scheme, 3% of the entire turnover was to be paid on account of works contract executed in Delhi, if the dealer was engaged in procuring goods from any place outside Delhi.

13. Admittedly, in its profile details annexed to DVAT 06, for the assessment year 2009-10, dealer specified that it was in the business of works contract. As per column 4 of DVAT 17 for the period from 01/04/2008 to 30/06/2008, the dealer specified the composition rate of tax as 2.5%. Therein, it did not specify that the relevant composition scheme was of 3%.

In the same column of DVAT 17 for the period from 01/07/2008 to 30/09/2008 the dealer specified the same composition rate of tax i.e. 2.5% and not 3%; in the same column of DVAT 17 for the period from 01/01/2009 to 31/03/2009 the dealer specified the same composition rate of tax i.e. 2.5% and not 3%.

There is thing on record to suggest that the dealer opted for the second scheme. Simply by depositing 0.5% and that too after the framing of the assessment, the dealer did not become entitled to claim that he had opted for the second composition scheme i.e. of 3%. Undisputedly, the said 0.5% was not deposited by the dealer under any orders by the department. Dealer deposited this amount of its own.

There is nothing to suggest that the department could permit the dealer or ever permitted it to convert from first scheme to the second scheme.

Even if the dealer was in the business of works contract and was to engage in procuring goods, including Bitumen from any place outside Delhi, it should have opted for the second composition scheme of 3% and not the first one of 2.5%.

Here, the dealer opted for the first composition scheme of 2.5%, and as such undertook to abide by the terms and conditions of the said scheme i.e. it shall make all purchases and sales within Delhi during the period of the composition scheme.

Admittedly, the dealer made interstate purchases during the concerned tax period 2008-09. By making interstate purchases the dealer violated the terms and conditions of the composition scheme. Consequently, as per general conditions No. 3 of the notification it incurred the liability to pay tax under Section 3 of DVAT Act along with interest due for the delay, if any and all the provisions of DVAT Act came into application *mutatis mutandi* as if the dealer had

never opted for the composition scheme. Further, as per the consequence of such violation, the amount deposited by the dealer as composition amount shall stand forfeited.

In view of the terms and conditions of the notification and the dealer having opted for first scheme and then having violated the same, deposit of 0.5% by the dealer of its own, was of no avail to the dealer so as to claim benefit under the second scheme in place of the first scheme which he had opted for.

14. The contention raised on behalf of the appellant that the terms and conditions of the notification can never be against the provisions of the Act is also of no aid to the dealer, in view of the documents submitted by the dealer regarding option of the first scheme and the interstate purchases made by it."

14. Having gone through the above said reasons already given by this Appellate Tribunal while dealing with this contention, I do not find that the judgment passed by this Appellate Tribunal suffers from any error apparent on face of record. Therefore, the contention raised by Counsel for the applicant for review on this ground is hereby rejected.

15. Another contention raised by counsel for the applicant is that is a case where no assessment was ever framed u/s 32 of DVAT Act and that the Revenue relied upon only an Audit report. Further, the contention is that the assessment was required to be framed, but the same having not been framed, the impugned order deserved to be set aside. Therefore, counsel for the applicant has urged that the Appellate Tribunal fell in error in

upholding the impugned order passed by Additional Commissioner on 06/08/2012.

This contention has also been opposed by counsel for the Revenue by submitting that the ~~said~~ very contention was discussed by this Appellate Tribunal in the judgment in the detail and as such no ground for review is made out.

16. At this stage for ready reference, the contention raised by counsel for the parties during arguments on the appeals, with discussion on the aforesaid point by this Appellate Tribunal need to be reproduced. Same read as under:

> "20. Learned Counsel for the appellant has also referred to decision in **Samsung India Electronics vs. Government of NCT of Delhi & Ors.**, decided on 07/04/2016 by our own Hon'ble High Court and submitted that as per said decision, a self assessment would also be another form of assessment i.e. the one deemed to be an assessment made by the Commissioner on the date on which return is furnished.
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> Reference has also been made to Para 35 of the said decision wherein reliance was placed on decision in **H.M. Industries vs. Commissioner of Value Added Tax**, ST. Appl. 32/2013, decided by our own Hon'ble High Court on 26/09/2014 which was to the effect that unless the conditions of Section 32(1) of the DVAT Act are satisfied, default assessment cannot be made and if made will be liable to be struck down.
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> Here, as noticed above, General Condition No. 3 was made part of the scheme of the notification and as a result, all the provisions of DVAT Act including liability to pay tax with interest due for the delay, were to apply as if the dealer had never opted for Composition Scheme. Therefore, there is no

merit in the contention raised on behalf of the appellant that no assessment could be made after the self assessment, by way of return filed by the dealer, had been treated as an assessment framed by the Commissioner.

At this stage, reference may be made to Chapter X which pertains to audit, investigation and enforcement. As per sub-section (4) of Section 58 of DVAT Act, the Commissioner shall, after considering the return, the evidence furnished with the returns, if any, the evidence acquired in the course of the audit, if any, or any information otherwise available to him, either –

(a) confirm the assessment under review; or

(b) serve a notice of the assessment or re-assessment of the amount of tax, interest and penalty if any pursuant to Sections 32 and 33 of this Act.

This is a case where assessment came to be made after an audit was conducted on 31/12/2009 at the business premises of the dealer. So, this case is covered by the provisions of Section 58 and even on this ground there is no merit in the contention raised by Learned Counsel for the appellant."

17. In view of the above reasons already given by this Appellate Tribunal while dealing with the contention raised, I do not find that the judgment passed by this Appellate Tribunal requires review, and the contention raised by Counsel for the applicant for seeking review on this ground is without any merit.

18. Another contention raised by learned counsel for the applicant on the review application is that even if it be assumed for the sake of arguments that general condition No. 3 was applicable to

the facts of this case and all the provisions of DVAT Act pertaining to liability to pay tax were to apply as if the dealer had not opted for the composition scheme, no notice was issued before passing of the order dated 08/03/2010 and that for want of notice, the said order dated 08/03/2010 deserved to be set aside, but this Appellate Tribunal fell in error in not having appreciated his contention on this point.

Counsel for applicant has also submitted that where a notice is invalid for any reason, the proceedings initiated in pursuance of such notice would also be illegal and invalid, and further that in this case no notice has been issued before framing of assessment, the entire proceedings would stand vitiated.

Counsel for the applicant has further submitted that a decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statue have not been followed or if the 'rules of natural justice' have not been adhered to.

19. This point raised by counsel for the applicant in this review application has already been considered and decided while disposing of the appeals. At this stage relevant text from the judgment passed by this Appellate Tribunal, on the issue **"whether any notice was required to be issued to the dealer before framing of assessment"** needs to be reproduced for ready reference. Same reads as under:

"21. Counsel for the appellant has contended that before passing the impugned assessment, the department should have issued notice to the dealer so that it could explain the things, and since no notice was issued, the assessment deserved to be set aside.

Learned counsel for Revenue has rightly pointed out that here audit was conducted on 31/12/2009 and on its basis assessment was framed.

Dealer admits conducting of audit on 31/12/2009 in presence of Sh. Anand Garg, its Director. In this situation, where was the question of issuance of any notice by the department to the dealer when the terms and conditions of the notification were clear and unambiguous, and it is admitted case of the dealer that interstate purchases were made by it during the concerned tax period, which it could not make after having opted for the first scheme as per version of the department.

22. Learned Counsel for the appellant has pointed out that on the top of the impugned assessment words "Audit Report" find mention and argued that in view thereof this document cannot be termed to be an assessment order.

On the other hand, learned counsel for the Revenue has submitted that the document is an assessment framed under Section DVAT 32 of the Act, and that simply because words "Audit Report" have been typed on top left side of this document, it cannot be said that this is an audit report. Learned counsel has also referred to provisions of Section 80(1) of DVAT Act while submitting that contents of the assessment order are in substance and effect in conformity with or according to the intent and purposes of this Act and as such this clerical mistake in the nomenclature of the document does not adversely affect case of the Revenue.

From the contents of the document and its effect which are in conformity with or according to the intent and purposes of

this Act, by no stretch of imagination it can be said that this document is an audit report. This case is therefore covered by the provisions of Section 80(1) of DVAT Act .

23. Counsel for the appellant has pointed out that the assessment order is an unsigned order, which was supplied by the department to the dealer.

The copy of the impugned assessment has been filed by the dealer. No certified copy thereof has been filed. There is nothing on record to suggest that this is the very copy of the impugned assessment supplied by the department to the assessee. At no point of time soon on receipt of copy of assessment, any objection appears to have been raised or protest lodged by the dealer with the department as to the deficiency, if any, in the copy of the assessment, on the ground that unsigned assessment had been supplied to it. Therefore, this submission of Counsel for the appellant is rejected, as same is not based on record.

24. One of the arguments advanced by counsel for the appellant is that the assessment appears to have been framed by two officers and not by one VATO or AVATO and as such the same deserves to be set-aside.

No such objection was raised by the dealer – objector before learned OHA in the course of objections u/s 74 of DVAT Act. There is nothing on record to suggest that the two officers had not been assigned / delegated powers by the Commissioner for framing of assessment(s). Therefore, there is no merit in this argument advanced on behalf of the appellant."

20. Another argument advanced by counsel for the applicant on the review application is that even if it be assumed for the sake of argument that general condition No. 3 was applicable to the facts of this case and all the provisions of DVAT Act pertaining

to liability to pay tax were to apply as if the dealer had not opted for the composition scheme, dealer was entitled to deductions towards labour and service charges, but this Appellate Tribunal did not discuss this point argued by him at the time of final arguments in the appeal.

21. This argument by counsel for the applicant is against record. Under the heading "**grant of ITC and allowing of deductions towards labour and service charges**", this Appellate Tribunal specifically dealt with the contention raised and adjudicated the issue in the manner as:

> "25. Learned Counsel for the appellant has submitted that this is a case where no ITC has been granted to the dealer as regards the tax already deposited and that no deductions were made on account of labour and services. It has also been submitted that Learned Assessing Authority should have provided an opportunity of being heard to the dealer before any decision on the point of ITC, grant of deductions on account of labour and service charges and on the point of exemptions as regards interstate sales, so that the dealer could put forth its claim/case and same could be decided as per law.....
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> As regards ITC & deductions on account of labour and services charges, the Assessing Authority had the material made available by the assessee in the form of returns and other DVAT forms like DVAT-30 and also the report submitted by the audit team, which was considered by the Assessing Authority before framing of assessments. No application for review or rectification of any mistake in calculation was filed by the dealer before the Assessing Authority.

Learned counsel for the Revenue has rightly pointed out while reading the contents of the impugned assessment that ITC has been granted to the dealer and at the same time, deductions on account of labour & services have also been allowed in respect of all the four quarters. Therefore, the argument advanced by counsel for the appellant in this regard is against record."

22. In view of the aforesaid reasons already given by this Appellate Tribunal while dealing with this contention, I do not find that the judgment passed by this Appellate Tribunal suffers from any error apparent on face of record.

23. As regards decision by our own Hon'ble High Court in Sales Tax Bar Association (Regd.) v. GNCTD, WP (C) No. 4236/2012 cited by this Appellate Tribunal in its judgment, surprisingly, in the application, the applicant has expressed its grievance that this judgment was not brought to the notice of the counsel representing the appellant. At this stage, reference may be made to the reasons already given while dealing with the said contention raised by counsel for the applicant on the point of notice, at the time he argued the appeals. The relevant portion of the judgment is reproduced hereunder:

"Further it has been submitted that no opportunity of being hard was granted to the dealer before making assessment. The contention is that the assessment is nullity for the reason that the principle of natural justice of audi alteram partem has not been observed. In support of this contention, learned counsel has referred to decision in **Ponkumm Traders case**, 1972 83 ITR 508 Ker.

26. At this stage, reference may be made to decision in **Sales Tax Bar Association (Regd.) Vs. GNCTD,** WP (C) No. 4236/2012. Therein, our own Hon'ble High Court has observed in the manner as :

> "The juristic policy enacted with clarity in the DVAT Act is of unilateral assessment first at the hands of the assessee and if the Assessing Officer is not satisfied therewith, then at the hands of the Assessing Officer. The Assessing Officer, of course while doing his unilateral assessment has the benefit of the assessment done by the assessee as well as any other material which may be available, and has to make the assessment to the best of his judgment. Only if the assessee remains dissatisfied with such unilateral assessment done by the Assessing Officer does the stage of „bilateral assessment" in the form of objections under Section 74 comes into play and which undoubtedly provides for an opportunity of hearing as is being demanded by the petitioners.
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> 16. The expression "to the best of his judgment" was in State of Kerala Vs. C. Velukutty (1966) 60 ITR 239(SC) held as requiring the assessing authority to not act dishonestly or vindictively or capriciously, because he must exercise judgment in the matter. It is thus not as if VATO, while exercising powers under Sections 32 or 33 is rudderless. He is required to exercise judgment in the matter and assess what he honestly believes to be a fair estimate of the proper figure of assessment, taking into consideration local knowledge and repute and his own knowledge of previous returns and assessments and all other matters which he thinks will assist him in arriving at a fair and proper estimate. Guess work though held implicit in best judgment, is required to be honest guess work. The limits of the power are implicit in the expression

"best of his judgment". It was held that a judgment is a faculty to decide matters with wisdom truly and legally on settled and invariable principles of justice. The same principles were reiterated in State of Kerala Vs. K.T. Shaduli Yusuff (1977) 2 SCC 777.

17. What falls for consideration is, whether inspite of Section 74 providing for such an opportunity of hearing, can any fault be found with Sections 32 and 33 in not providing such an opportunity.

18. Though the counsels for the petitioners have argued that the remedy of objections is not available owing to Section 79 of the Act but in the face of the express provision in the explanations to Sections 32 and 33 that a person disagreeing with the notices of assessment thereunder may file an objection under Section 74 of the Act, the said contention is clearly erroneous and is not accepted.

19. The Supreme Court in Liberty Oil Mills Vs. Union of India (1984) 3 SCC 465 gave illustrations of situations where post-decisional hearing subserves principles of natural justice. It was held that the rule of audi alteram partem only requires that a man shall not be subject to final judgment or to punishment without an opportunity of being heard. With reference to orders of suspension without hearing, it was observed that though it may involve hardship but hearing post-suspension suffices. Even in Ajit Kumar Nag Vs. General Manager (PJ), Indian Oil Corporation Ltd., Haldia (2005) 7 SCC 764 it was held that the principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in a straitjacket - they must yield to and change with exigencies of situations - they must be confined within their limits and cannot be allowed to run wild - while interpreting

legal provisions, a court of law cannot be unmindful of the hard realities of life; the approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than precedential.

20. Prof. de Smith, the renowned author of "Judicial Review" (3rd Edition), was in Swadeshi Cotton Mills v. Union of India (1981) 1 SCC 664 quoted (with approval) as opining that statutory provision for an administrative appeal or even full judicial review on merits are sufficient to negative the existence of any implied duty to hear before the original decision is made; that the said approach is acceptable where the original decision does not cause serious detriment to the person affected. In the same judgment, it was enunciated that where a statute does not, in terms, exclude the rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre- decisional stage.

21. Though Sections 32(3) and 33(2) make the additional tax if any due and penalty assessed thereunder payable immediately on such unilateral assessment but Section 35(1) though uses the words "may not proceed to enforce payment of the amount assessed", clearly provides that the recoveries of the said amounts are not to be made until two months after the date of service of the notice of assessment. The second proviso to Section 74(1) requires an assessee preferring the objections to only pay the admitted amount of tax and liability to be paid and not the tax and/or penalty qua which objections have been preferred. Further, as aforesaid a time of two months

has been given for preferring the objections. Section 35(2) again provides that where objections have been preferred, the demand under Sections 32 and 33 may not be enforced until the objection is resolved. A conjoint reading of the said provisions clearly shows that enforcement of the demand under Sections 32 and 33 if made the subject matter of objection, is dependent upon the outcome of the objections and till the objections are decided, the disputed demand under Sections 32 and 33 is not to be enforced. Though undoubtedly the third proviso to Section 74(1) has now given a power to the Objection Hearing Authority to direct the disputed tax or penalty or any part thereof also to be deposited but the very fact that the second proviso as well as Section 35(2) have also been retained along therewith on the statute book is indicative of the invocation of the third proviso being only if the circumstances so demand and not in the usual course. Moreover the order if any under the third proviso to Section 74 (1) is to be after giving an opportunity of hearing to the dealer. The contention of the petitioners that the third proviso to Section 74(1) is being invoked as a matter of routine is not only without any specific pleading and particulars but even otherwise does not constitute a ground for us to interfere with the scheme once the legislative policy is plain and clear. Moreover a law has to be adjudged for its constitutionality by the generality of cases it covers, not by the freaks and exceptions it martyrs (Krishna Iyer,J in R.S. Joshi, Sales Tax Officer, Gujarat Vs. Ajit Mills Ltd. (1977) 4 SCC 98).

22. In Haryana Financial Corporation Vs. Kailash Chandra Ahuja (2008) 9 SCC 31, the test of prejudice was applied and it was held that if there is no prejudice, an action cannot be set aside merely on the

ground that no hearing was afforded before taking a decision by the authority.

23. To our mind the scheme aforesaid of the Act does not cause any prejudice whatsoever to the assessee. Inspite of our repeated calling, the counsels for the petitioners failed to substantiate the prejudice if any which the assessees suffer in having the opportunity if any required of hearing, at the stage of objections and not at the stage of assessment under Sections 32 & 33. Though the argument, of the assessee if not complies with demands under Sections 32 and 33 acquiring the status of a defaulter was raised in response thereto, but the counsels were unable to support it with any provision of law. On the contrary a reading of Section 74(1) and Section 35 clearly shows that the liability for payment of the disputed demand under a best judgment assessment under Sections 32 & 33 arises only on the conclusion of objections and which as aforesaid is after the decision on objections and not prior thereto. That being the position, the question of the assessee, during the pendency of objections having the status of a defaulter and thereby suffering any disability does not arise.

24. Even if the hearing, at the stage of objections, is to be treated as a post decisional hearing, we fail to see any effect on the efficacy thereof. Though post decisional hearing was, as aforesaid, held to be not sufficient or effective, being held with a closed mind, after a decision has already been taken but those observations came to be made in the context of a post decisional hearing in the exercise of administrative powers. Here, the scheme of the statute itself is first allowing a unilateral assessment by the assessee, thereafter a unilateral assessment by the Assessing Officer and thereafter providing for a bilateral

assessment after opportunity of hearing. With such a statutory scheme, it cannot be said that the post decisional hearing will be farcical or a sham. Moreover such hearing is in exercise of quasi judicial power and is subject to an appeal to the Tribunal. Further, it is the contention of the counsels for the petitioners themselves, that the Assessing Authority and the Objection Hearing Authority are different. It thus cannot be said that the same officer would shy away from admitting mistakes and thereby reducing the hearing to a farce.

25. In Union of India Vs. Col. J.N. Sinha (1970) 2 SCC 458, the Supreme Court held that if a statutory provision either specifically or by necessary implication excludes the application of any or all the principles of natural justice, then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice and that rules of natural justice can operate only in areas not covered by any law validly made and they do not supplant the law but supplement it. To the same effect is Madan Lal Agarwala Vs. The State of West Bengal (1975) 3 SCC 198.

26. The House of Lords also in Pearlberg Vs. Varty (Inspector of Taxes) [1972] 1 W.L.R. 534 held that before the Courts exercise unusual power of supplementing the procedure laid down in legislation, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation. It was further held that one should not start by assuming that what Parliament has done in the lengthy process of legislation is unfair and that one should rather assume that what has been done

is fair, until the contrary is shown. It was yet further held that where the person affected can be heard at a later stage and can then put forward all the objections he could have preferred if he had been heard on the making of the assessment, it by no means follows that he suffers an injustice in not being heard on the making of the order. Fairness was held to be not requiring plurality of hearings and it was observed that if there were too much elaboration of procedural safeguards, nothing would be done simply, quickly and cheaply.

27. Recently in Smt. Rasila S. Mehta Vs. Custodian, Nariman Bhavan, Mumbai (2011) 6 SCC 220 also the Supreme Court held that the fact that a statute does not provide for a pre-decisional hearing is not contrary to the rules of natural justice because the decision does not ipso facto takes away any right and the post-decisional hearing satisfies the principles of natural justice.

28. We are however unable to concur with the contention of the senior counsel for the respondents that the assessment at the stage of Sections 32 and 33 is provisional or an inchoate and/or an incomplete assessment subject to completion at the stage of Section 74. We had during the hearing enquired from the senior counsel for the respondents that how can the tax be said to be due or recoverable if the assessment under Sections 32 and 33 was incomplete or provisional. It was enquired whether a demand could be raised without the assessment being complete. No satisfactory reply was possible; on the contrary we find that Section 30 prohibits any claim for payment by a person of any amount of tax, interest or penalty except by making an assessment for the amount. If the argument of the respondents of the

assessment under Sections 32 and 33 being provisional or incomplete were to be accepted, then the demand of the assessment and penalty thereunder would be in contravention of Section 30. We therefore do not accept the said contention and hold the assessment of tax and penalty under Sections 32 and 33 to be complete. Merely because an assessment is subject to objections or appeal does not make it any less complete.

29. We are of the opinion that the legislature has, by the scheme aforesaid merely fixed the date on which the tax falls due. If the assessment of the tax were to await hearings, the date of assessment and hence the date on which the tax can be said to fall due may be unduly deferred. The purpose of introducing the regime of self-assessment appears to be to fix the responsibility of assessing the tax on the assessee and even if in subsequent hearings the self-assessment by the assessee turns out to be wrong and erroneous leading to further tax being found due from the assessee, the same would relate back to the date on which the assessee ought to have done the self-assessment and paid tax correctly."

In view of the above proposition of law discussed by our own Hon'ble High Court, in view of the settled law, there is no merit in the contention raised by learned counsel for the appellant that the Assessing authority should have issued notice to the dealer before making assessment."

Keeping in view the long standing of counsel for the applicant at the Bar, it cannot be said that said decision was not within the knowledge of learned counsel, but I remember that even then attention of counsel of the applicant was drawn to the said

decision at the time he argued the appeals. Contention raised by counsel by the applicant that this Appellate Tribunal relied on decision in Sales Tax Bar Association case without giving him any opportunity to rebut the same, is without any merit.

24. Another averment put forth by the appellant is that the interpretation of this Appellant Tribunal on point of the composition scheme is legally not tenable, the reason being that a notification cannot be contrary to the statutory provision.

25. On the scope of review of an order, it is well settled that there is difference between a mere erroneous decision and a decision which may be characterized as vitiated by "error apparent". In case of appeal, an erroneous decision is reheard and corrected, if so required. Review lies only in case of patent error. Power of review is not to be taken to be appellate power available to Appellate Court to correct all errors committed by the subordinate authority.

An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of record. So, where an error has to be established by lengthy and complicated arguments, it would not be covered by the scope of review.

26. It may be mentioned here that in the written submissions filed on completion of his arguments on this review application, counsel for applicant has mentioned the following decisions, but not provided full text thereof, despite wait. Still the text, which is stated to have been extracted from the said decisions has been taken into consideration while dealing with the contentions raised by counsel for the applicant:

Inderjit v. Sahu, AIR 1964 All. 359;

Tata Tech Ltd. v. Commissioner of Central Excise, 2008;

Uma Nath Pandey v. State of U.P., (2009)

CCE v. ITC Ltd., (1995);

State of Kerala & Ors. v. A.P Mammikutty, AIR 2015 SC 3009;

Jindal Stainless (Hisar) Limited v. Saourabh Jinal & Ors, 2021;

Northern India Caterers (India) v. Lt. Governor of Delhi, (1979);

Commissioner of Sales Tax v. Pine Chemicals Ltd., (1995) 1 SCC 58;

S. Nagaraj v. State of Karnataka, 1993 Supp (4) SCC 595;

Bharat Kala Bhandar (P) Ltd. v. Municipal Committee, AIR 1966 SC 249;

Vasant Kumar Radhakisan Vora v. Board of Trustees of the Port of Bombay, (1991) 1 SCC 761;

M/s Sanghvi Reconditioners Pvt. Ltd. v. Union of India & Ors., AIR 2010 SC 1089;

Greater Mohali Area Development Authority and Ors. v. Manju Jain and Ors., AIR 2010 SC 3817;

State of Madras v. K.M. Rajagopalan, AIR 1955 SC 817;

Ariane Orgachem Private Ltd. v. Wyeth Employees Union, 2015 (145) FLR 985;

Kolkata Municipal Corporation v. Union of India, 2018 (158) FLR 535;

M/s Ideal Traders Cream Parlour Pvt. Ltd. v. The Additional Commissioner of Commercial Taxes', STA Nos.6 & 28/2011;

Assistant Commissioner of Commerical Taxes [Audit], Karkala, Udupi District and others v. Abidheep Interlock Pavers Pvt. Ltd., (2016) 94 VST 186 [Karn];

Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755;

S. Nagaraj v. State of Karnataka, 1993 Supp. (4) SCC 595;

Sri Nallana Sambasiva Rao, Krishna District v. State of Andhra Pradesh & Others, (2015) 61 APSTJ 255 (HC – Telangana & A.P.);

Sri Uma Maheshwara Rice and Flour Mill, Vetapalem & others v. Commercial Tax Officer, Peddapuram & others, (2012) 54 APSTJ 51;

ITC Limited, Sarapaka, Khammam District v. The Assistant Commissioner of Commercial Taxes, LTU, Warangal [W.P. No. 12272 of 2009, dt. 17.09.2009];

Justice P.D. Dinakaran v. Hon'ble Judges Inquiry Committee, AIR 2011 SC 3711.

27. On the point of interest, counsel for applicant has submitted that decision in J.K. Synthetic's case cited in the course of arguments has not been properly appreciated and as such the judgment requires review.

On the other hand, counsel for the Revenue has submitted that the contention raised on the point of interest were dealt by this Appellate Tribunal.

28. While dealing with challenge to the levy of interest, this Appellate Tribunal observed in the manner as:

> **"Challenge to the levy of interest**
>
> 28. Contention raised by learned counsel for the dealer-appellant is that in this case Assessing Authority levied interest, but in the given facts and circumstances, even if it is assumed for the sake of argument that the Assessing Authority had the jurisdiction to frame assessment, no interest could be levied. In support of his contention, counsel has referred to the provisions of Section 42(2) of DVAT Act.
>
> Section 42(2) of DVAT Act provides for levy of simple interest in case a person in default in making the payment of any tax, penalty or other amount due under this Act and that too from the date of such default.
>
> As already noticed above, as per General Condition No. 3 of the notification dated 17/03/2006, all the provisions of DVAT Act including liability to pay tax with interest due for the delay, were to apply as if the dealer had never opted for Composition Scheme. In view of this General Condition, the parties have agreed even as regard liability towards interest for the delay in payment of the tax due.

So far as the date of the default and accrual of interest is concerned, when the assessee violated the above said condition, it is deemed as if the dealer had never opted for the composition scheme. Consequently all the provisions of DVAT Act including liability of payment of tax alongwith the interest come into application *mutatis mutandi*. In this way, the liability of the dealer to pay interest arose from the date of filing of the return.

Therefore, it cannot be said that interest from the date of default or for the delay in deposit of the tax due could not be levied by the Assessing Authority."

For the aforesaid reasons already given by this Appellate Tribunal, keeping in view the provisions of Section 42(2) of DVAT Act, which were referred to by counsel for the appellant at the time of arguments on appeal, no ground for review of the judgment is made out.

29. In view of the above discussion and the reasons, this review application deserves to be dismissed. Same is hereby dismissed. File of review application and record of Appeals No. 353-358/ATVAT/13 be consigned to the record room.

30. Copy of the order be sent 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 : 07/02/2023

Narinder Kumar 7/2/2023

Narinder Kumar
Member (Judicial)