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

Appeal Nos.: 922-923/ATVAT/13
Date of Judgment: 10/02/2023.

M/s Parma and Parma India Pvt. Ltd.
1701, Bhagirath Palace, Chandni Chowk,
New Delhi-110006.
.....Appellant

v.

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

Counsel representing the Appellant : Ms. Purvi Sinha.
Counsel representing the Revenue : Sh. C.M. Sharma.

JUDGMENT

1. The above captioned two appeals came to be presented on 18/12/2013 challenging order dated 12/10/2013 passed by learned Additional Commissioner (Zone-III-V) (hereinafter referred to as learned OHA).

   Vide impugned order, learned OHA did not find any merit in the objections filed by the dealer-objector u/s 74 of Delhi Value Added Tax Act (hereinafter referred to as DVAT Act).

2. The objections were filed before learned OHA challenging default assessment of tax and interest framed by learned Assessing Authority-VATO of Ward-207 (Special Zone) u/s 32

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of DVAT Act and separate assessment of penalty framed u/s 33 of DVAT Act.

3. The dealer was registered under DVAT Act while engaged in trading of electronic and electric items.

4. The default assessment of tax and interest came to be framed on the basis of survey conducted on 26/04/2012 by Enforcement-I Branch at the business premises of the dealer. On survey, it transpired that there was variation in stock to the tune of Rs. 1,03,98,451/- (short).Variation in cash to the tune of Rs. 2,77,982/- (short) was also found. It was also a case of seizure value of Rs. 3 lakh (appx.).

5. On 05/09/2022, before framing of the impugned assessment, notice u/s 59 (2) of DVAT Act was issued to the Department to the dealer calling upon the dealer to appear.On the given date, Sh. Bharat Pandey, Director and Sh. M. L. Gupta, Sales Tax Petitioner represented the dealer before the Assessing Authority.

Regarding stock variation, as per the impugned default assessment, before the Assessing Authorityit was stated on behalf of the dealer that the stock variation was due to the difference in rates recorded in the inventory by the survey team, but, as observed by the Assessing Authority, in support of said submission, no documentary evidence was submitted by the dealer. Accordingly, learned Assessing Authority did not accept this contention. The entire stock variation was taxed.

As regards cash variation, the dealer submitted before the learned Assessing Authority that Sh. Ashok Pandey, one of the Directors in the firm, had taken an amount of Rs. 75,000/- for his hospitalization, and gone to the Hospital around 3.30 PM on the day of survey, as he had a Rental Transplant in the previous year.

Learned Assessing Authority observed that neither any documentary proof was provided by the dealer in support of the aforesaid submission, nor said fact was stated by the representative in his statement at the time of survey. This claim / submission was accordingly declined and the entire amount of cash variation of Rs. 2,77,982/- was taxed.

Regarding seizure of documents of the value of Rs. 3 Lacs, the plea put forth by the dealer was accepted by learned Assessing Authority.

6. Learned Assessing Authority framed assessment of tax and interest in the manner as:-

> Since the dealer is engaged in trading of Electronic and Electric items taxed @12.5% & 5% VAT, hence GTO is calculated after adding difference in stock of Rs. 1,03,98,451/- and cash variation of Rs. 2,77,982/-, and taxed accordingly; as it appears that the dealer is engaged in unvouched sale/purchase. Further, Penalty u/s 86(15) of DVAT Act 2004, is imposed upon the dealer for preparing records and accounts in an manner which is false, misleading or deceptive.
>
> The dealer is hereby directed to pay tax of an amount of Rs. 12,69,097/- and furnish details of such payment in Form

DVAT 27A along with proof of payment to the undersigned on or before 11/03/2013 for the following tax period:

Tax period	Amount		
	Tax	Interest	Total
April 2012-13	11,34,371/-	1,34,726/-	12,69,097/-

7. Vide separate assessment framed u/s 33 of DVAT Act dated 09/02/2013, dealer-assessee was directed to pay penalty of Rs. 11,34,371/-, due to violation of provisions of section 86(15) of DVAT Act.

8. Feeling aggrieved by the above two assessments, dealer filed objections.

9. While dealing with the objections, learned OHA observed in the manner as:

> "First of all, in so far as the allegation made by the objector that search and seizure of his business premises was not carried out as per section 60 of the DVAT Act, 2004 nor the procedure laid down in section 100 of the Code of Criminal Procedure, 1973 was followed because the survey team who had conducted the same, was neither carrying with them any search warrants not had they called for two independent witnesses to the search and seizure operation, is concerned, it may be recollected and recalled that the DVAT Act, 2004 is an independent and self-contained Code and provisions of Criminal Procedure Code, 1973 or those of any other Code or an Enactment are applicable/ attracted only when it is so specifically mentioned and to the extents provided for in the DVAT Act, 2004 itself."

> "A conjoint reading of the entire above goes to clearly say and suggest that upon having an information in his possession or otherwise a reasonable ground to believe that any person or a

dealer is attempting to avoid/evade tax or is concealing his liability to pay in any manner and for administration of the Act i.e. the DVAT Act, 2004, the Commissioner may do all acts specified in clauses (a) to (f) of sub-section (2) of section 60 of the Act and that provision of sub-section (6) of this section 60 saves the above all actions done by the Commissioner in this behalf and makes the provisions of Code of Criminal Procedure, 1973 (2 of 1974) applicable only when any search and seizure is made intensively and in addition to what has been provided in clauses (a) to (f) above. To put in other words, the applicability of the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) to the DVAT Act 2004 is very limited and that too only to the extent as provided for in sub-section (6) of section 60 of this Act and not further to any extent. Therefore, as the actions of the survey team fell well within the arena of sub-section (2) of section 60 of the DVAT Act and were clearly save by sub-section (6) thereof, the arguments of the Counsels for the objector that search and seizure made by the survey team not made in accordance with section 100 of Criminal Procedure Code, 1973 (2 of 1974) is bad in law, holds no ground and liable to be out-rightly rejected. Even otherwise, the argument of the Counsels made by them on this score holds no water because the impugned orders of default assessments of tax, interest and penalty passed by the authority below under sections 32 and 33 of the DVAT Act clearly and unambiguously suggest that the survey team had visited and carried out the inspection/survey of the business premises of the objector and not the search etc. thereof. Also, the judgments of higher Courts cited and relied upon in this context and being based on different sets of facts and circumstances and on different provisions of law, are not applicable to the present case.

Further, as regards explanation of the objector that variation/shortage of Rs. 1,03,98,451/- in the stock was due to the reason that stock taking of goods by the survey team was taken in a very callous manner and stock of almost Rs. 1,78,18,493/- of 2500 types of products was counted by them just in two hours which was humanly impossible and by not counting the stock as per stock sheet of the objector and leaving the stock of goods lying in various rooms uncounted, the team had done the whole process in an arbitrary unreliable and unreasonable manner, the argument of the objector made by him at this stage is not acceptable. This is because of the simple reasons that stock inventory was prepared by the survey team in the presence of the objector and the latter had duly signed it by making a statement before the said team and

neither any stock was counted twice nor any left un-counted and in case, the stock taking, as alleged by the objector, was not taken properly and/or the stock inventory of goods prepared by the survey team was not correct, the objector was required to make an objection thereto before the survey team itself and not to sign the same as true and correct which as per the documents available on record, the objector never did. Moreover, it is also noted from the order passed by the VATO of the Special Cell u/s 32 of the DVAT Act, 2004 that in the explanation given by the objector about variation of Rs. 1,03,98,451/- in the stock, he had attributed the same to the rates recorded by the survey team in the inventory and no supporting documents in respect thereof were submitted before the said authority while in the explanation given by the objector before the undersigned now, he has taken different stands/grounds mentioned hereinbefore. Therefore, the objector has no case and the same on this score, is liable to be rejected.

For the differences/shortages of Rs. 2,77,982/- found in the cash, the objector has adverted to explain the same saying that Mr. Ashok Pandey, one of the Directors of the objector company, who was going through a difficult state of health and was not present at the time of survey, had left for the Hospital with an amount of Rs. 2,75,000/- (wrongly mentioned as Rs. 75,000/- in the impugned orders) for the purpose and hence, the alleged shortfall was on this account but again, this argument too of the objector is of little avail to him because, if an amount of Rs. 2,75,000/- was taken by Shri Ashok Pandey, a Director of the objector company along with him to the Hospital on that day, what had prevented the objector from being this very fact too to the notice of the surveying officers and that in case, the objector himself had choosen not to disclose/mention about it before the said team, it is objector alone and none else who is to be blamed and suffer for the omission.

Further, the judgments of higher Courts in the cases of M/s Kothari Filament reported in 2009 (223) ELT 289 (SC) and M/s Vehalana Steels and Alloys Private Ltd. reported in 2008 UPTC 1133 (High Court) cited and relied upon by the objector in support of his case also do not help him much because the law laid down by the Hon. Higher Courts in these judgments that no documents/material can be relied upon by an authority for passing an order without disclosing the same to the affected party and that principles of natural justice are to be strictly adhered to, has already been completely followed by the authority below in passing the orders under sections 32 and 33 of the DVAT Act. This is well evident

from the said orders dated 09/13/2013 according to which in response to notice No. 165/RKB/SC/DT&T/2012/1867-77 issued by the VATO of the Special Cell to the objector under section 59(2) in this behalf, S/shri Bharat Pandey, the Director and Sh. M.L. Gupta, the STP had appeared before the said assessing authority and on being asked for by the latter to explain the seizure and variations in stock and the cash detected at the time of survey, the formers had explained the differences/shortages in them but the same were not accepted because no documentary evidence in support thereof was submitted before the said authority. However, as further transpired from these orders, on finding the explanation given on behalf of the objector before the said authority with respect to seized documents involving transactions worth Rs. 3 Lacs (appx.) satisfactory, the latter had accepted the same dropped the case against the objector on that point.

Therefore, in the facts and circumstances of the case and the detailed narrations made above, the objections of the objector are found to be without any merit and substance and hence, the same are rejected and the orders of default assessments of tax, interest and penalty issued by the authority below under sections 32 and 33 of the Act are upheld and confirmed. However, the objector will be entitled, after proper verification thereof from the Ward Scroll, to the credit/adjustment of Rs. 2,53,820/- and Rs. 1,13,440/- respectively deposited by him vide single challan dated 10.07.2013 in compliance of the order passed by the undersigned in pursuance of the provision of Third Proviso to section 74(1) of the DVAT Act, 2004.

Accordingly, the objections stand disposed of in the above terms."

10. Hence, these appeals.

11. Arguments heard. File perused.

12. Learned counsel for the appellant has referred to the first sentence of the default assessment and submitted that the Assessing Authority did not specify therein as to on what basis /

ground, he was recording his satisfaction, and as such the impugned assessment deserves to be set aside.

The first sentence of the default assessment reads as under:

> "Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004 for the following reasons....."

It is true that in the first sentence three reasons find mention to show non-compliance by the dealer with the requirements of DVAT Act. Assessing Authority was required to tick mark the particular ground / reason out of the three. But non-removal of the irrelevant ground/reason does not adversely affect the case of the Revenue when reasons find mention in the default assessment. Having regard to the provisions of Section 80 of DVAT Act, this omission on the part of the Assessing Authority does not make the default assessment invalid in the eye of law.

13. Admittedly, survey was conducted by the team of Enforcement-I branch of Department of Trade & Taxes at the business premises of the appellant-assessee on 26/04/2012 in presence of Sh. Bharat Pandey, one of the directors of the dealer. It is also admitted that dealer was engaged in trading of Electronic and Electrical items at the relevant time.

On conducting of survey, the survey team prepared report to the effect that it was a case of variation in stock and variation in

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cash. Survey report was also to the effect that it was a case of seizure of documents valuing approximately Rs. 3 Lacs.

14. Admittedly, before framing of default assessment of Tax and Interest, learned Assessing Authority issued notice dated 05/09/2012 u/s 59(2) of DVAT Act to the dealer calling upon the dealer to appear on the given date and time. It is also admitted case of the dealer-assessee that during hearing, the above named director- Bharat Pandey accompanied by Sh. M.L. Gupta, Sales Tax, Practitioner appeared before learned Assessing Authority.

Stock Variation

15. As regards stock variation of Rs. 1,03,98,451/-(~~sought~~ short), it was pleaded on behalf of the dealer-assessee before learned Assessing Authority that the stock variation was due to the difference in rates recorded in the inventory by the survey team. As regards cash variation of Rs. 2,77,982/-, it was pleaded that (as ~~as tends~~ stands recorded in the assessment order), ~~that~~ Sh. Ashok Pandey, one of the directors of the firm, had taken a sum of Rs. 75,000/- for his hospitalisation on that date i.e., 26/04/2012, at about 03:30 PM.

16. On behalf of the appellant-assessee, it has been contended that the survey team was not carrying any authority to conduct survey and that there is nothing to suggest that the

Commissioner had any reasonable ground to believe that the assessee was involved in attempting to avoid or evade tax or was concealing its tax liability in any manner.

Learned counsel for the appellant has ~~contended~~ submitted that the survey team did not comply with the provisions of section 100 CrPC. The contention is that due to violation of these provisions of section 100 CrPC, the survey was entirely illegal and consequently no assessment could be framed on the basis of any such survey. Counsel for appellant has contended that learned OHA has wrongly interpreted the provisions of section 60 and 100 CrPC.

In support of her contentions, counsel for the appellant has relied upon provision of section 60 of DVAT Act and 100 of CrPC and also the following decisions:

1. **Smt. Prem Lata vs. State of Himachal Pradesh**, 1987 CriL J 1539;
2. **State of Assam on The Complaint of the Asstt. Collector of Customs and Central Excise vs. Gopi Kishan Taperia**, (1985) 1 GLR 193;
3. **SVIL Mines Limited v. State of MP and Ors**, 2014 (7) TMI 576;
4. **Shree Ashtvinayak Gems and Stone v. Commissioner of Trade and Taxes, Delhi and Ors**, MANU/DE/0556/2016;
5. **Verma Roadways v. Government of NCT Delhi & Ors.**, 2016 SCC Online Del 4335;
6. **Capri Bathaid Private Limited v. Commissioner of Trade and Taxes**, 2016 SCC Online Del 1332;
7. **Harikisandas v. State of Mysore**, 1971 SCC Online Kar 342;

8. **S.Y. Modagekar v. Commr of CT**, (1978) 41 STC 278.

17. As per notice of default assessment of tax and interest u/s 32 of DVAT Act, survey was conducted in presence of Sh. Bharat Pandey, one of the directors of the assessee and statement of said director was recorded by the survey team. Counsel for the appellant has submitted that the survey team recorded statement of the director of the assessee under duress.

In the course of arguments on these appeals, counsel for the appellant was repeatedly asked about the said statement of the director made before the survey team, but no such statement has been produced or provided by her.

As provided u/s 78 of DVAT Act, the burden of proving any matter in issue in proceedings before the Appellate Tribunal which relates to the liability to pay tax or any other amount under the Act, lies on the person alleged to be liable to pay the amount. Had the statement of Sh. Bharat Pandey, been recorded by the survey team under duress, firstly, the said director should have put forth his protest in this regard before the survey team and signed the statement under protest. As already noticed above, said statement has not been made available by the dealer to this Appellate Tribunal in support of this claim/plea. Therefore, the contention raised is without any basis.

Furthermore, after the survey, the first letter sent by said director to the Commissioner, Department of Trade & Taxes, is of

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08/05/2012. As rightly pointed out by counsel for the Revenue and not disputed by counsel for the appellant, in copy of this letter filed by the appellant, the date of survey has been recorded as 26th March, whereas actually it was conducted on 26th of April 2012.

In this letter, the director nowhere alleged any duress on the part of the survey team or any of its members, in recording of his statement at the business premises. Therefore, even on this ground, contention raised on behalf of the appellant that statement of the director was recorded under duress, is without any basis.

18. Counsel for the appellant has referred to photocopy of affidavit dated 14/09/2013 by the above named director, said to have been submitted to learned OHA during objections filed u/s 74 of DVAT Act, and pointed out that therein the director clearly mentioned that his statement was drawn up by the survey team and got forcibly signed from him.

As already noticed above, survey was conducted on 26/04/2012. The affidavit is dated 14/09/2013 i.e. testified about one and a half year after the survey. There is no explanation as to why no such affidavit was submitted by the director or by the dealer to the Commissioner soon after the survey. Therefore, no reliance can be placed on this affidavit which can safely be termed to be outcome of an afterthought, consultations and deliberations.

Section 60 of DVAT Act

19. Chapter X of DVAT Act pertains to Audit, Investigation and Enforcement. Rule 65 of DVAT Rules, 2005 provides that where the Commissioner wishes to appoint an officer or person to exercise any of the powers in Chapter X of the Act, the grant of authority to exercise the powers shall be in Form DVAT-50 and shall be issued by the person empowered by the Commissioner in this regard. Sub-rule (3) of Rule 65 provides that every officer or other person authorised shall carry with him the authorization in Form DVAT-50, when purporting to exercise any of the powers conferred under Chapter X of the Act, and produce the same if requested by the owner or occupier of any premises where the said officer proposes to exercise said powers. This rule has been framed on the basis of provision of section 68 (2) of DVAT Act.

20. In the course of arguments, specific query has been put to counsel for the appellant as to whether Sh. Bharat Pandey, director of the dealer-assessee had requested the members of the survey team to produce the authorisation in Form DVAT-50, at the time its business premises was going to be subjected to survey.

Counsel for the appellant has not been able to point out any material on record to suggest that any such request was made by

the representative of the assessee to the survey team and that even then Form DVAT-50 was not produced/shown to him.

It may be mentioned here that no such submission was put forth by the said director at the time he participated in the assessment proceedings after the notice u/s 54 (2) of DVAT Act or by Sh. M. L. Gupta, Sales Tax Petitioner, accompanying him in the said proceedings.

The first letter ever sent by the dealer-assessee to the Commissioner, Department of Trade & Taxes is dated 08/05/2012. Had it been a case of violation of provisions of section 68 (2) of DVAT Act or Rule 65 of DVAT rules, the dealer-assessee must have referred to the same in the said letter. However, in this letter, no such ground/objection was put forth.

As a result, it is held that this ground put forth by counsel for the appellant is without any basis and it cannot be said to be a case of violation of the above said provisions.

21. As regards provisions of section 60(6) of DVAT Act, as already noticed above, the same applies in case of entry into business premises and seizure of records and goods.

22. Section 60 of the DVAT Act, 2004 reads as under:

> **"60 Power to enter premises and seize records and goods**
>
> (1) All goods kept at any business premises by a dealer, transporter or operator of a warehouse shall at all reasonable times be open to inspection by the Commissioner.

(2) Where the Commissioner, upon information in his possession or otherwise has reasonable grounds to believe that any person or dealer is attempting to avoid or evade tax or is concealing his tax liability in any manner and for the purposes of administration of this Act, it is necessary so to do, the Commissioner may-

(a) enter and search any business premises or any other place or building;

(b) break open the lock of any door, box, locker, safe, almirah or otherreceptacle for exercising the powers conferred by clause (a) where the keys thereof are not readily available;

(c) seize and remove any records, books of account, registers, other documents or goods;

(d) place marks of identification on any records, books of account, registers and other documents or make or cause to be made extracts or copies thereof without charge;

(e) make a note or any inventory of any such money or goods found as a result of such search or place marks of identification on such goods; and

(f) seal the premises including the office, shop, godown, box, locker, safe, almirah or other receptacle.

(3) Where it is not feasible to remove any records, books of account, registers,other documents or goods, the Commissioner may serve on the owner and any personwho is in immediate possession or control thereof, an order that he shall not removeor part with or otherwise deal with them except with the previous permission of theCommissioner.

(4) Where any premises have been sealed under clause (f) of sub-section (2), ofthis section or an order made under sub-section (3) of this section, the Commissionermay, on an application made by the owner or the person in occupation or in charge ofsuch shop, godown, box, locker, safe, almirah

or other receptacle, permit the de-sealingor release thereof, as the case may be, on such terms and conditions includingfurnishing of security for such sum in such form and manners as may be [prescribed].

(5) The Commissioner may requisition the services of any police officer or anypublic servant, or of both, to assist him for all or any of the purposes specified in sub-section(2) of this section.

(6) Save as otherwise provided in this section, every search or seizure madeunder this section shall as far as possible be carried out in accordance with theprovisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to searchesor seizures made under that Code.

Explanation.- The powers under this section may also be exercised inrespect of a dealer or a third party for the purposes of undertaking an audit or toassist in recovery."

As regards the contention that Commissioner is required to record reasonable ground for the purpose of section 60 of DVAT Act, in the course of arguments, when specific query has been put to learned counsel for the appellant if at any point of time dealer ever sought any information from the Revenue or from the office of Commissioner, Department of Trade & Taxes, about passing of any order u/s 60 of DVAT Act or recording of reasons for authorising the survey team to visit the premises of the dealer, counsel for the appellant has candidly admitted that no such information was ever sought by the dealer from the Revenue Department or from the office of Commissioner, Department of Trade & Taxes. In absence

thereof, it cannot be said that this is a case where no reasons were recorded by the Commissioner authorising the survey team to visit the business premises of the dealer for survey.

Allegation of non-supply of copy of report by the survey team to the dealer.

23. One of the submissions put forth by the counsel for the appellant is that assessment has been framed on the basis of survey report, but no copy of the said survey report was supplied to the dealer-assessee, and on this ground, the assessment deserves to be set aside. In support of this contention, learned counsel has placed reliance on following decisions :

1. **Vehalana Steel & Alloys Pvt. Ltd. v. State of U.P.,**2008 UPTC 1133;
2. **Kothari Filaments v. Commissioner of Customs, Kolkata,** 2009 (233) ELT 289 (SC);
3. **Dhakeswari Cotton Mills Ltd. v. Commissioner of Income Tax, West Bengal,** 1955 (1) SCR 941; and
4. **Sahi Ram v. Avtar Singh & others,** 1999 (4) SCC 511.

On the other hand, learned counsel for the Revenue has contended that the submission that no copy of survey report was provided to the dealer, is without any basis. Learned counsel has referred to the first letter dated 08/05/2012 sent by the dealer to the Commissioner, Department of Trade & Taxes, after the survey dated -26.04.2012 and pointed out that therein no protest was lodged by the dealer with the Commissioner that no copy of survey was supplied by the survey team.

Learned Counsel for the Revenue has referred to decision dated 06/04/2015 by this Appellate Tribunal, Appeal Nos. 1466-1467/ATVAT/12, **M/s Julka Sons v. Commissioner of Trade & taxes, Delhi** and submitted that in similar facts and circumstances, the said appeal filed by the dealer herein came to be dismissed as the dealer could not produced documentary evidence in respect of plea of stock variation due to rate difference and also could not explain cash variation of the amount of Rs. 5,00,000/- said to have been taken away for treatment of the partner.

24. In the notice of default assessment, Assessing Authority observed that as regards stock variation, the dealer stated before him that stock variation was due to the difference in the rates in the inventory by the survey team, but the dealer did not produce before him any documentary evidence in this regard. Accordingly, the Assessing Authority rejected this plea put forth by the dealer.

Learned counsel for the Revenue has rightly submitted that had copy of the survey report not been provided to the dealer, it would not have put forth the said plea that the survey team had recorded rates of the items in the inventory different from the actual rates. Even otherwise, as already noticed above, in the first mentioned letter dated 08/05/2012, the dealer nowhere alleged that no copy of survey report was supplied to it.

As already noticed above, at no point of time, copy of survey report was demanded by the dealer from the Revenue Department alleging that no copy thereof was supplied by survey team.

In view of the above discussion, there is no merit in the contention raised by counsel for the appellant.

25. In **Shree Ashtvinayak Gems & Stone Pvt. Ltd. v. Commissioner of Trade and Taxes, Delhi and Ors.**, (2016) 89 VST 33 (Delhi), cited by learned Counsel for the appellant, challenge by the petitioner was to the invocation of powers u/s 60 of DVAT Act by the Commissioner, Department of Trade & Taxes, in sealing of the business premises of the petitioner on the ground that when the premises were inspected, the accounts and other documents were not produced by the petitioner.

Hon'ble High Court directed for de-sealing of the business premises in view of the fact that the decision to invoke powers u/s 60(2)(f) of the Act was taken in undue haste virtually in continuation of invocation of the power u/s 59 of the Act to search the premises for information and documents, and no sufficient opportunity was afforded to the petitioner to explain non-production of the documents and information sought.

26. Present appeals do not pertain to invocation of powers by the Commissioner for the purpose of sealing of the business premises. Here, the survey/inspection was conducted in

presence of one of the directors of the dealer. Dealer has not brought on record any material to suggest that the survey/inspection was conducted without any authority, what to say of any undue haste. Therefore, said decision is distinguishable on facts and does not come to the aid of the dealer.

27. In **Capri Bathaid Pvt. Ltd. v. Commissioner of Trade and Taxes**, 2016 SCC OnLine Del 1332, reference was made to the provisions of Section 60(6) of DVAT Act and also to the provisions of Section 165(3) CrPC. Therein, following issues had arisen for consideration:

> i. "Whether the AVATO Enf-I who undertook the survey, search and seizure operation and later passed the default assessment orders of tax, interest and penalty, was duly empowered to do so in terms of the DVAT Act?
> ii. Whether the AVATO Enf-I could have proceeded to reverse the ITC claimed during an earlier period and could such reversal take place in the order of default assessment for a different period?"

28. Section 165 CrPC comes into application where the Investigating Officer or Officer Incharge of a police station has reasonable grounds for believing that anything necessary for the purpose of any investigation into any offence may be found in any place and the said thing cannot be otherwise obtained without undue delay, and in such a situation said officer may

search such a thing in any place, after recording in writing the grounds of his belief.

29. It may be mentioned here that at no point of time that the dealer took any step to correct information from the Commissioner, Department of Trade & Taxes about recording of reasons for authorizing survey team to visit the business premises and conduct survey/inspection. In absence of any such material on record, it cannot be said that the Commissioner did not record any reasons for the purpose of authorizing survey team for survey/inspection. Therefore, decision in Capri Bathaid Pvt. Ltd.'s case (supra) does not come to the help of the appellant.

30. Decision in **Verma Roadways v. Govt. (NCT of Delhi)**, (2016) 95 VST 434, cited by learned Counsel for the appellant, also pertained to sealing of the business premises of the dealer by the VATO when it was found by his team that the premises were lying locked, and the same were not de-sealed even on application filed by the dealer alleging that the petitioner was only a transporter and not a dealer and that VAT stood paid on the goods and the same pertained to bona fide dealers registered under the Act. Therein, reliance was placed on above said two decisions. For the aforesaid reasons, decision in Verma Roadways' case (supra) also does not come to the aid of the dealer.

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31. In **Dhakeswari Cotton Mills Ltd. v. Commissioner of Income Tax, West Bengal**, 1955 (1) SCR 941, cited by learned counsel for the appellant, Hon'ble Apex Court observed that in making the assessment under sub-section (3) of Section 23 of Income Tax Act, the Income Tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all and further that there must be something more than mere suspicion to support the assessment. Therein, it was found that the Tribunal had not disclosed to the assessee as to what information had been supplied to it by the departmental representative; that no opportunity was granted to the company to rebut the material furnished to it; that the Tribunal declined to take all the material which the assessee wanted to produce in support of his case, and as a result, the assessee had not had a fair hearing.

Herein after the survey, the Assessing Authority issued notice u/s 59(2) of DVAT Act to the dealer so as to provide him an opportunity of being heard. Thereupon, its director accompanied by Sales Tax Practitioner participated in the proceedings and put forth the claim of the dealer. Assessing Authority specifically recorded in the assessment order that dealer did not submit any documentary evidence as regards its claim regarding difference in rates. Even as regards cash variation, learned Assessing Authority rejected the claim of the dealer while recording reasons.

32. It may be mentioned here that learned Assessing Authority, after applying his mind accepted the claim of the dealer as regards documents seized, which were of the value of Rs. 3,00,000/- approximately. Ultimately, the Assessing Authority levied tax. Therefore, it cannot be said that the assessment framed as regards tax and interest is based only on the survey report.

33. In **Sahi Ram v. Avtar Singh and Others**, 1999 (4) SCC 511, cited by learned counsel for the appellant, Hon'ble Apex Court was of the view that once learned Single Judge had come to the conclusion that certain documents relating to inspection report were not supplied or that the facts relied upon by the State Government and the Central Government in their orders were not put to the respondent seeking his explanation, the Hon'ble Judge should have remitted the matter back instead of straightway setting aside the termination of lease and restoring it back. Hon'ble Court was also of the view that a fresh show-cause notice was required to be issued by the revisional authorities to the respondent giving the facts which were set out in the order of cancellation of lease.

Herein, as already observed above, dealer-appellant has failed to bring on record any material to suggest that copy of survey report was never supplied to it.

34. As regards the plea put forth by the dealer before learned Assessing Authority that stock variation was noticed due to

difference in rates recorded in the inventory which was prepared by the survey team, it was for the dealer to produce evidence before the Assessing Authority.

Learned counsel for the appellant has submitted that dealer had written letter dated 28/05/2012 to learned VATO whereby copies of documents mentioned therein were produced in reply to notice dated 25/05/2012, issued u/s 59 of DVAT Act.

But, in the course of arguments, counsel for the appellant has not made any specific reference to the contents of any of these 7 documents which find mentioned in the said reply dated 28/05/2012 so as to substantiate the plea or to point out that it is a case of difference in the rates recorded in the inventory prepared by the survey team.

35. Counsel for the appellant has submitted that another notice dated 05/09/2012 issued by the Assessing Authority to the dealer calling upon it to produce 13 documents specified therein. However, in the course of arguments, counsel for the ~~applicant~~ appellant has not referred to the contents of any of these 12 documents said to have been submitted to learned VATO vide its reply dated 19/09/2012.

36. It may be mentioned here that dealer has placed on record copy of the stock inventory that was prepared by the survey team at the spot on 26/04/2012. It is significant to note that the stock inventory prepared at the spot, during survey proceedings, bears

signatures, with date, of Sh. Bharat Pandey, Director of the assessee. It also bears rubber stamp of the dealer. On perusal of this stock inventory, it does not transpire that Sh. Bharat Pandey recorded any protest on this stock inventory to the effect that it was wrong in respect of such and such particulars/items/rates.

In the first letter dated 08/05/2012 sent by the dealer after the survey to the Commissioner, the grievance lodged by the dealer was that the inspection was conducted from 5.00 PM to 11.00 PM and they were asked to physically count 2500 products in a short spam of 2/3 yards which was humanly impossible, and further that dealer would have appreciated systematic counting of the stock with the assistance of its staff; that there was also shortage of staff with the dealer that on that date; that on 27th of March (actually April), the dealer met the concerned official to submit list of rest of the stock, which was not counted on 26th i.e. on the day of survey. Dealer has placed before this Appellate Tribunal photocopy of inventory said to contain items/stock not recorded/counted by the Enforcement Team. Counsel for the appellant has submitted that this document was made available to learned OHA during objections, but learned OHA did not consider the same while disposing of the objections.

37. However, as per impugned order, learned OHA specifically mentioned therein that numerous documents like copies of stock inventory of goods prepared by the officers of Enforcement Branch at the time of survey, some of the purchase invoices and

many others were produced before him and that he had gone through the same.

38. Learned OHA also recorded in the impugned order that the plea put forth by the dealer on the point of variation/shortage in stock was not acceptable due to the reason that stock inventory was prepared by the survey team in presence of the said Director and said Director duly signed it by making statement before the Enforcement Team to the effect that neither any stock was counted twice nor any was left uncounted. As rightly observed by learned OHA, in case the counting of the stock was not properly done, as alleged by the dealer-objector or if the stock inventory prepared by the survey team was incorrect, the objector was required to raise objection thereto before the survey team itself and also not to sign the same, but the dealer-objector did not do so, which adversely affects its claim.

39. Learned OHA also took into consideration that as already observed by the Assessing Authority, dealer had not produced any supporting document in support of the plea that the rates recorded in the inventory were written by the survey team. While so observing, learned OHA rightly observed that the dealer-objector had taken different stands/ grounds i.e. the one put forth while participating in the assessment proceedings and the contrary one taken in the proceedings on objections.

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40. In one of the paper books, dealer has submitted copy of certificate dated 14/09/2013 issued by Chartered Accountants after verification of its books and accounts and other related documents. Counsel for the appellants submit that this certificate was also submitted before learned OHA.

Said certificate is purported to have been prepared by Chartered Accountants for PDM & Company. However, this certificate does not bear signatures of any of the Chartered Accountants or that of CA, Sh. Prabhat Jain, its partners.

Furthermore, in the impugned order, there is no mention that any such certificate issued by said Chartered Accountant was made available to learned OHA. Even the copy of the Annexure to this certificate i.e. physical verification and valuation of the inventories as on 24/04/2013 does not bear signatures of any of the Chartered Accountants. This Annexure does not pertain to physical verification as on 26/04/2012 i.e. the day of survey.

41. As regards ~~application~~ applicability of Section 100 of the Code of Criminal Procedure, 1973, same reads as under:

> **"100. Persons in charge of closed place to allow search**
>
> (1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of, such place, shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in the manner provided by sub- section (2) of section 47.

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency.

(4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

(5) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(6) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search. and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person.

(7) When any person is searched under sub- section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person.

(8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an

offence under section 187 of the Indian Penal Code (45 of 1860)."

42. From the title/headnote of section 100 of CrPC, it appears that its sub-section (1) applies in case of search where any place liable to search or inspection under chapter VII of CrPC is closed, and duty has been cast on the person residing in such place or in charge of such place, to allow the concerned officer, on demand, free ingress thereto.

Sub-section (4) of section 100 CrPC comes into application where the officer or other person intends to make search under chapter VII i.e. u/s 93 (when search warrant may be issued) and section 94 (where such a place is to be subjected to search which is suspected to contain stolen property, forged documents etc.). In other words, requirement to call upon two or more independent and responsible inhabitants of the locality in which the place to be searched is situated or of any other locality, if no such habitant of the said locality is available or willing to be a witness to the search, would be in a case where applicability of section 93 and 94 CrPC is called for.

Sub-section (6) of section 60 of DVAT Act provides that as far as possible "every search or seizure made under this section i.e. section 60 be carried out in accordance with the provisions of the CrPC relating to searches or seizures." This goes to show that section 60(6) of DVAT Act is not a mandatory provision for

conducting search or seizure in accordance with the provisions of CrPC relating to searches and seizures made under the said code.

It may also be mentioned that section 60 of DVAT Act pertains to inspection, seizure and removal of records, books of accounts, registers other documents or goods from any "business premises".

43. In Harikisandas Gulabdas & Sons' case (supra), a raid was conducted at the business premises of the petitioner therein by the Commercial Tax Officer from Intelligence branch and at that time some books of accounts and other documents of the petitioner were taken into possession. Statement of one of the partners of the petitioner firm was also recorded as regards voluntarily handing over of the said documents for the purpose of a verification and return. About 3 months thereafter, a show cause notice was issued by the second respondent to the petitioner proposing to treat the entire turnover of Rs. 55,837.28 by way of sales and a sum of Rs. 5,374.40 by way of purchases, as regards the year 1969-70 due to clear suppression of turnover.

The petitioner filed writ petition before the Hon'ble High Court. Second respondent placed reliance on section 28 of Mysore Sales Tax Act, 1957 to justify the proceedings, while pleading that when the Commercial Tax Officer had visited the premises

of the petitioner for inspection he had no intention to search and seize the documents.

As per sub-section (1) of section 28 of Mysore Sales Tax Act, the dealer is required to produce his accounts etc., and furnish any information relating to his business. Sub-section (2) provides that all accounts and registers etc., maintained by dealers shall be open to inspection. This shops, godowns etc., shall also be open for inspection. It also states that the authorised inspecting officers shall have power to enter and search any office, shop, godown, vessel, receptacle, vehicle or any other place of business or any building where such officer has reason to believe that the dealer keeps any accounts etc., of his business.

Hon'ble High Court proceeded to consider the question as to what extent the second respondent was able to satisfy the court that the2nd respondent did not search the business premises of the petitioners and seize the accounts and other documents, and that actually the same were handed over to him voluntarily by the partner of the firm when he visited the premises for inspection and verification of accounts.

Hon'ble High Court observed that except the statement-annexure A dated 27/12/1969, there was nothing else to support the case. The said statement was not written by the signatory. It

was found to have been written by the second respondent or at his dictation.

Therein, the signatory stated in his affidavit that he had objected to the illegal search and seizure made by the second respondent but he was coerced and made to sign the said statement.

Herein, as already noticed above, in the first letter dated 08/05/2012 sent by the director of the appellant no allegation of use of duress in recording of the statement was raised.

In that case, second respondent was an officer of the Intelligence Branch of the department specially empowered to perform function under the Act, but he had never called upon the petitioner to produce before him the accounts and other documents or to furnish any information relating to sales or purchases of his business. That is how, it was observed that if his intention was to inspect and verify the accounts of the petitioner, he would have called for the required accounts and other registers and further that he did not even inform the petitioner that he would be visiting its premises and rather he gave surprise visit with staff, searched and seized some accounts and other documents. In this situation, it was further observed that if his intention was only to verify the accounts, it was unnecessary for him to go to the premises. Accordingly, Hon'ble High Court held that the officer illegally seized the

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accounts and other documents, but made it appear that they were voluntarily given to him.

Therein, the petitioner was stated to have written letters dated 14/04/1970 and 02/07/1970 alleging that second respondent had illegally searched and seized the books of accounts and other documents, and demanded return thereof, but these letters were not replied .

Accordingly Hon'ble High Court held that what second respondent did on 27/12/1969, was wholly illegal and unauthorised. Consequently, all the documents so seized were directed to be returned to the petitioner and further proceedings taken against petitioner were quashed.

Furthermore, proviso of section 28 of Mysore Sales Tax Act, 1957, (referred to in Harikisandas Gulabdas & Sons and Another's case (supra)), pertains to residential accommodation which is sought to be entered into and searched by the officer on the basis of search warrant issued by a Magistrate. Case in hand is not the one where search was to be conducted on the basis of search was issued by any Magistrate. Therefore/the decision in Gulabdas & Sons and Another's case (supra) ~~which are~~ different from the provisions of section 60 of DVAT Act, do~~es~~ not apply.

In S.Y. Modagekar & Sons' case (supra) question of illegality of search and seizure of certain account books by Commercial Tax Officer (Intelligence) was involved. The petitioner, by way of writ petition raised said question on the ground that the respondent, having no assessment proceedings pending relating to the petitioner firm before him, the respondent was not competent to make search and retain the books for such a long period. The contention raised on behalf of the petitioner was that the act done by the respondent was actually search and seizure, but the said respondent had not followed mandatory the safeguards prescribed in proviso to sub-section (2) of Section 28 of Karnataka Sales Tax Act.

Therein, on the other hand, on behalf of the respondent, the contention was that it was only a case of inspection. In the alternative, it was submitted that clause (i) of sub-section (2) of section 28 of the said Act conferred power of inspection and clause (ii) of sub-section (2) conferred power of search for purposes of power of inspection and further that the safeguard in the proviso was in respect of all searches. Further, it was contended that word "inspection" includes search, as the power of search is conferred for the purposes of inspection.

In this regard, reliance was placed on decision in Board of Revenue, Madras v. R. S. Jhaver (full particulars of the decision not found mention in the judgment being referred to).

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In R. S. Jhaver's case (supra), Hon'ble Apex Court while considering analogous provisions of Madras General Sales Tax Act held that there was no power of search whatsoever in sub-section (2) because the sub-section in terms did not provide for search.

On the other hand, on behalf of the petitioner reliance was placed on decision in Harikisandas case (supra). Government pleader representing the respondent relied on decision in G. M. Agdi and Brothers v. The Commercial Tax Officer Enforcement N. A. Belgaum, wherein it was observed by the Hon'ble High Court of Karnataka that all searches are inspection but all inspections are not searches.

In S. Y. Modagekar & Sons' case, Hon'ble High Court observed that it was unnecessary to examine as to whether there can be inspection and seizure of account books without search. Hon'ble High Court accepted the difference between "inspection" and "search" as pointed out on behalf of the respondent and supported by the observations in the above said judgment titled as G. M. Agdi and Brothers' case. However, in the given facts and circumstances, it was held to be a case of search and not a case of inspection.

Hon'ble High Court further observed that when no assessment proceedings qua the petitioner firm were pending before the Commercial Tax Officer, who went to the business premises

accompanied by few other officers and seized some of the account books led to the inevitable conclusion that the impugned action was a clear case of search and seizure and the "camouflage" of inspection was sought to be given by the respondent, with the object of escaping the consequence of law as the procedural safeguards guaranteed by the proviso to sub-section (2) of section 28 of the Act had not been followed.

It is significant to note that in that case there was absence of contradiction of the serious allegations made by the petitioner as there was no proper statement of objections supported by affidavit of the Commercial Tax Officer or those of other officers present at the relevant time. Accordingly, the impugned action was held to be that of search and seizure.

In the said decision, provisions of section 28 (A) (3) of Kerala Sales Tax Act have nowhere been reproduced and as such it cannot be said if the same are in pari materia with the provisions of section 60 of DVAT Act. Accordingly, decision in S. Y. Modagekar & Sons' case also does not come to the aid of the appellant.

44. In Yeduru Sreenivasulu Reddy's case (supra), application of the provisions of Section 55 of Andhra Pradesh (AP) Excise Act, 1968 and Section 100(4) of Cr.P.C. was involved. Decisions in Smt. Prem Latta's case (supra), Prem Chand's case (supra) and State of

Assam's case (supra) were also on the point of applicability of provisions of Section 100 CrPC.

In view of the above discussion and reasons, said decisions also do not come to the aid of the appellant.

Cash Variation

45. Counsel for the appellant has submitted that on the day of survey, Sh. Ashok Pandey, one of the directors of the dealer had taken away a sum of Rs. 2,75,000/- to hospital as he apprehended that he needed the same in connection with his admission in hospital on account of difficult state of health, even after having undergone Renal Transplantation in the year 2011.

Further, it has been submitted that in the assessment order, due to clerical mistake, said amount stated to have been taken away by the said director, has been mentioned as Rs. 75,000/-.

Learned counsel has submitted that since the shortage in the cash stood explained, the Revenue authorities should have accepted the claim of the dealer in this regard. Further, it has been contented that even in case of variation in cash, Revenue department is not entitled to levy tax. In this regard, reliance has been placed on decision in **M/s Girdhari Lal Nannelal v. The Sales Tax Commissioner, M.P**, (1976) 3 SCC 701.

On the other hand, learned counsel for the Revenue has contended that the dealer failed to explain the cash variation, for want of any documentary or cogent and convincing evidence, and as such Assessing Authority was justified in rejecting the plea put forth by the dealer, and learned OHA has rightly upheld the assessment framed.

46. While framing assessment, learned Assessing Authority rejected the plea of the dealer as he was of the opinion that the same was not acceptable. Learned OHA also rejected this plea of the dealer while observing that in case such an amount was taken by the director of the dealer to hospital nothing prevented him from bringing this fact to the notice of the surveying officers, but this fact was not disclosed.

47. Dealer has not brought on record any material to suggest that Sh. Bharat Pandey, the director of the dealer, who was present at the time of survey, brought it to the notice of the survey team that a sum of Rs. 2,75,000/- had been taken away on that very day by the other director apprehending his admission in hospital. Had it been so, Sh. Bharat Pandey would have disclosed this fact to the surveying team without any delay. However, there is nothing on record to suggest Sh. Bharat Pandey came forward with any such version before the surveying team, which falsifies the plea put forth in this regard.

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After the survey, the first letter which the dealer wrote to the Commissioner, Department of Trade & Taxes, is dated 08/05/2012 i.e. said to have been written about 15 days after the survey. No such information was provided to the Commissioner, Department of Trade & Taxes, soon after the survey to lodge grievance against the surveying team in this regard. Even otherwise, in this letter dated 08/05/2012, it does not find mention that Sh. Bharat Pandey, brought this fact to the notice of the surveying team during the survey and that they had omitted to reduce the same in writting in his statement. As already noticed above, dealer has not placed on record copy of the said statement, for the reasons best known to it.

Furthermore, dealer did not submit any medical evidence before the Assessing Authority or before learned OHA suggesting that Sh. Ashok Pandey visited any hospital on the day of survey, with any complaint and that he was attended to by such and such doctor and he tendered such and such medical advice thereupon.

There is nothing on record to suggest that any entry was recorded in the cash register by the cashier or accountant of the dealer to the effect that Sh. Ashok Pandey had collected Rs. 2,75,000/- from him regarding apprehending his admission in hospital. It is not case of the dealer that Sh. Ashok Pandey was not informed about the survey and that he returned to the business premises and displayed Rs. 2,75,000/- so as to rebut the allegation of cash variation.

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48. In M/s Girdhari Lal Nannelal's case (supra), for the year 1950-51, the STO had found a cash credit entry of Rs. 10,000/- standing in the name of wife of K.D, partner of the appellant firm. The explanation given by K.D was that he had gifted said amount to his wife in 1951 in order to obtain her consent to his second marriage. The Assessing Authority treated the said sum of Rs. 10,000/- as income of the appellant out of the concealed sales.

That was not a case of taking away of money by one of the directors on the ground of necessity in connection with his admission in hospital. That case was based on cash credit entry. Therein, Hon'ble Apex Court observed that the fact that the appellant firm or K.D. and his wife failed to adduce satisfactory or reasonable explanation with regard to the source of said amount did not have the effect of discharge of onus and proving both the ingredients.

Therein, further it was observed that no presumption arose that the said amount represented the income of the firm or not that of the partner or his wife.

Here, in these appeals, dealer has not come up with the plea that no shortage of cash variation to the tune of Rs. 2,77,982 /- was detected by the survey team. In view of provisions of Section 78 of DVAT Act burden of proving ~~this fact~~ the plea taken was on the dealer. Here, dealer has failed to furnish any material to suggest that

said amount was taken away by one of the directors on account of any such need. Therefore, decision in M/s Girdhari Lal Nannelal (supra) does not come to the aid of the dealer.

Incorrect computation of tax

49. Counsel for the appellant has contended that since the Assessing Authority computed tax considering 75% of the allegedly suppressed turn over as taxable @ 12.5% and 25% @5%, without specifications and basis, same can safely be said to be arbitrary and unsustainable.

50. As per assessment order and the worksheet annexed thereto since the dealer was engaged in trading of Electronic and Electric items exigible to VAT @12.5% & 5%, GTO was calculated after adding difference in stock of Rs. 1,03,98,451/- and cash variation of Rs. 2,77,982/-. In this regard, Assessing Authority took into consideration the turnover assessed by the dealer in the return. Nothing has been brought to the notice of this Court as to how the computation of tax is incorrect. Therefore, there is no merit in the contention raised by the counsel for the appellant.

51. No other argument has been advanced by learned counsel for the parties on the point of levy of tax and interest.

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Penalty

52. While challenging imposition of penalty u/s 86(5) of DVAT Act, learned counsel for the appellant has contended that under the said provision of penalty is leviable where a person required to prepare records and accounts under DVAT Act, prepares the same in a manner which is false, misleading or deceptive, but in this case Assessing Authority has not recorded specific reasons/allegation for imposition of the said penalty, and as such the same deserves to be set aside.

Further, it has been submitted that penalty should be levied where there is a case of deception and intentional act on the part of the assessee, but this is not a case of false, misleading or deceptive accounts and as such assessment of penalty deserves to be set aside.

In support of her contention, learned counsel has placed reliance on the following decisions:

1. **Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai and Another,** (2007) 6 SCC 329;
2. **T. Ashok Pai v. Commissioner of Income Tax, Bangalore**, (2007) 7 SCC 162;
3. **Commissioner of Income Tax, Ahmedabad v. Reliance Petroproducts Pvt. Ltd.,** (2010) 11 SCC 762;
4. **Commissioner of Sales Tax, UP, v. Sanjiv Fabrics,** (2010) 9 SCC 630;
5. **Jatinder Mittal Engineers and Contractors v. Commissioner of Trade & Taxes;** (2011) 46 VST 498;
6. **Orix Auto Infrastructure Services Ltd. v. Commissioner, DVAT** (2015) 78 VST 490 (Delhi);

7. **Hindustan Steel Ltd. v. State of Orissa,** 1978 (2) E. L.T. (J 159) (SC);
8. **Oudh Sugar Mills Ltd. v. Union of India,** 1978 (2) E. L.T. (J 172) (SC);
9. **Continental Foundation JT. Venture v. Commissioner of C. Ex., Chandigarh-I,** 2007 (216) E. L.T. 177 (SC);
10. **Amrit Foods v. Commissioner of Central Excise, U.P.,** 2005 (190)) E. L.T. 433 (SC);
11. **Collector of Central Excise v. H. M. M. Ltd.,** 1995 (76) E. L.T. 497 (SC); and
12. **Cosmic Dye Chemical v. Collector of Central Excise,** Bombay, 1995 (75) E. L.T. 721 (SC).

53. I have gone through the decisions cited by learned counsel for the appellant to appreciate the contention raised. As per impugned assessment of penalty, same has been imposed while observing in the manner as:

> "Whether I am satisfied that the dealer has liability to pay penalty under section 86 of Delhi Value Added Tax Act, 2004 for the following reasons:
>
> As per DVAT-24
>
> Now, therefore the dealer is hereby directed to pay penalty of an amount of Rs. 11,34,371/- (eleven lacs thirty four thousand three hundred seventy one only) and furnish details of such payment in Form DVAT-27A along with proof of payment to the undersigned on or before 11-03-2013. Worksheet is enclosed for reference."

As is available from the above portion of the notice of assessment of penalty framed u/s 33 of DVAT Act, for reasons Assessing Authority referred to DVAT 24 i.e. default assessment of tax and interest framed u/s 32 of DVAT Act.

Assessing Authority was actually required to record specific reasons in this very notice of assessment of penalty, the reason being that the two assessments are to be framed separately while applying mind to the facts and circumstances describing and reasons for imposition thereof before imposing penalty.

Since Assessing Authority has not given specific reasons for imposition of penalty and simply referred to the reasons which find mentioned in default assessment of tax and interest, the impugned notice of assessment of penalty cannot be said to be valid in the eye of law.

As per impugned order passed by learned OHA, while rejecting the objection, he upheld both the assessments. Learned OHA appears to have not at all discussed legality/illegality of the assessment of penalty, before upholding the same.

In this situation, the impugned order passed by learned OHA upholding the said penalty deserves to be set aside. It is ordered accordingly.

54. No other argument has been advanced by learned counsel for the parties on the point of levy of penalty.

Result

55. In view of the above discussion, there is no merit in the Appeal No. 922/ATVAT/13, which pertains to levy of tax and interest,

and as such the same is hereby dismissed. The other Appeal No. 923/ATVAT/13, which pertains to imposition of penalty, is allowed for the reasons given above.

56. File be consigned to the record room. 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 : 10/02/2023

Narinder Kumar 10/2/2023

(Narinder Kumar)
Member (J)