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

M.A. Nos.: 627-628/ATVAT/22
In Appeal Nos.: 41-42/ATVAT/19
Date of Order: 20/03/2023

M/s. IKEA Trading (India) Pvt. Ltd.,
Unit No. 421, DLF Tower A
Jasola District Centre
New Delhi-110044. .....Applicant

v.

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

Counsel representing the Applicant : Sh. H. C. Bhatia.
Counsel representing the Revenue : Sh. M. L. Garg.

ORDER

1. This common order is to dispose of afresh, the above captioned two applications u/s 76(4) of Delhi Value Added Tax Act (hereinafter referred to as DVAT Act).

2. Earlier, these applications were disposed of vide order dated 27/01/2020 directing the applicant to deposit 10% of disputed demand and interest along with 5% of the disputed penalty. The dealer challenged the said order by filing ST Appeal No. 1/20.

3. Vide order dated 07/10/2020, passed in ST Appeal No. 1/20, Hon'ble High Court set aside the previous order 27/01/2020 and

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remanded the matter to this Appellate Tribunal for decision of the applications afresh.

4. That is how, the applications have been taken up once again.

5. In this set of two appeals, captioned above, presented on 30/10/2019, dealer-appellant-objector-assessee has challenged order dated 24/06/2019 passed by Learned Objection Hearing Authority (hereinafter referred to as OHA) whereby its objections u/s 74 of DVAT Act, against assessments of tax, interest and penalty, pertaining to the tax period 2008-2009have been disposed of while observing that the findings recorded by the Assessing Authority in the assessment order dated 26/03/2014was self-explanatory, justified and did not require any sort of interference. In this way, learned OHA upheld the default assessments framed by the Assessing Authority u/s 32 & 33 of DVAT Act on account of misutilization of 'H' Forms and its turnover on the said count.

Assessments Initially Framed

6. As already noticed above, initially assessment for the said tax period – 2008-2009 was carried out by Learned Assessing Authority in 2012 raising demand of Rs. 19,70,73,799/- towards tax &interest u/s 9(2) of CST Act and of Rs. 45,96,00,696/- towards penalty, u/s 33 of DVAT Act.

The dealer filed objections against the said assessment.

Vide order dated 13/11/2013, Learned OHA partly allowed the objections and remanded the matter to the Assessing Authority observing that claim of the objector as against turnover on returned goods, was required to be examined after consulting the records. Learned OHA also directed the Assessing Authority to examine evidence and pass speaking orders including on the allegation of misutilization of "H" Form.

Assessment framed on Remand

7. On remand, the Assessing Authority initiated proceedings and framed fresh assessment on 26/03/2014 raising demand of Rs. 12,03,50,412/- towards tax and Rs. 8,88,28,495/- towards interest.

Separate notice of assessment of penalty u/s 33of DVAT Act imposing penalty of Rs. 25,57,46,167/-, u/s 86(12) of DVAT Act.

8. It may be mentioned here that feeling aggrieved by the order dated 13/11/2013 passed by learned OHA remanding the matter to Assessing Authority the dealer filed appeals-Appeals No. 1261-1262/13before Appellate Tribunal. However, said appeals were got dismissed in view of submission of counsel for the

appellant that the same had become infructuous, the reason being that on remand Assessing Authority had framed fresh assessment by then.

Simply because fresh assessment was made on remand, the dealer-assessee had the remedy under section 76 of DVAT Act available to it to challenge the order of remand passed by Learned OHA. In the course of arguments, counsel for the applicant was candidly agreed on the point that the applicant or say, its counsel then representing the applicant, should not have withdrawn the appeals submitting that the same had become infructuous. But, the fact remains that order of remand passed by Learned remained in force, and furthermore, the applicant participated in the proceedings before the Assessing Authority, on remand.

Then, the dealer challenged fresh assessment dated 26/03/2014 (framed on remand) before learned OHA. Said objections were decided on 24/08/2018.

Dealer filed Writ Petition against the order dated 24/08/2018. As per order dated 12/11/2018 in the Writ Petition, Hon'ble High Court remanded the matter to OHA to decide the matter afresh to the extent indicated therein. That is how, impugned order dated 24/06/2019 was passed by learned OHA.

Against said order, appellant has filed present two appeals with the applications u/s 76(4) of DVAT Act.

9. So far as disposal of applications u/s 76(4) of DVAT Act by this Appellate Tribunal, as already mentioned above, Hon'ble High Court vide order dated 07/10/2020, remanded the matter to this Appellate Tribunal for disposal of the stay applications afresh. In the order, Hon'ble High Court observed in the manner as:

> "In view of the aforesaid, the impugned order is set aside. Let the matter be remanded back to the DVAT Appellate Tribunal. The Tribunal shall now decide the application under Section 76(4) of the Act afresh, having regard to the views expressed by us in this order, after affording opportunity to both the parties for hearing. The tribunal will also examine the question of financial hardship of the Appellant. On this aspect, Revenue shall be free to urge and request the Tribunal to consider the financials of the holding company of the Appellant, and cite case laws in support thereof. Needless to say, we have not examined the merits of the case and the observations made in this order shall not be read or construed to be the reflection of our opinion on the merits of the case. Having regard to the fact that the appeal is yet to be heard, we direct the Appellate Tribunal to decide the application as expeditiously as possible. With the aforesaid directions, the appeal is allowed. The pending application is also disposed of accordingly."

10. While setting aside the stay order dated 27.01.2020 passed by this Appellate Tribunal, in para Nos. 37 to 39 of the order dated

07/10/2020 passed in ST Appeal No. 1/2020, Hon'ble High Court, observed as under:

> "37. Now, coming to the impugned order in the present case. We noticed that the Tribunal has declined to go into the merits of the case. The prima facie case of the Appellant has not been evaluated by the Tribunal while exercising its discretion under Section 76(4) of the Act. The Appellant had pleaded strong prima facie case for complete waiver of pre-deposit, on the several grounds including:
>
> (a) Non-establishment by the VATO of the existence of domestic sales;
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> (b) Wrongful allegation of misuse of From H by the Revenue;
>
> (c) Levy of tax on the amounts of debit note, through which price of export sales was reduced, being price of goods which were not returned to India. (The export sales being outside tax net in terms of Section 6(1) of the CST Act. Thus, the entire turnover of the Appellant, regardless of any change in price of export sales, has no taxable consequence);
>
> (d) misconceived demand on the amount of duty drawback received by Appellant from the government as export incentive, which has been passed on by the Appellant to the vendor, with respect to the goods procured from them in the course of export, thus amounting to sale in the course of export, which is exempted from tax levy; and
>
> (e) Misconceived demand on written off assets being misinterpreted as sale of assets.
>
> 38. To our mind, all those aspects enumerated above are pertinent. Unfortunately, the same have not been

taken into consideration. While the Tribunal is correct in observing that these questions would have to be examined when the appeals are taken up finally on for disposal, but at the same time, these aspects would also have to be cursorily examined for arriving at the satisfaction about the prima facie on merits, for deciding the stay application.

39. We would also like to observe that the impugned order also does not record any valid or cogent reason which would indicate application of mind on part of the Tribunal. Since the order does not contain any material grounds for rejection of stay application, it is liable to be quashed on this ground itself. In our view, this kind stereotypical, mechanical order without application of mind to the facts of the case, is not in accordance with the law and the decisions of the courts laying down guidelines for appellate authorities to exercise its discretion under the provisions of the Act."

11. Vide impugned order dated 24/06/2019, learned OHA disposed of the objections filed by the dealer u/s 74 of DVAT Act, while observing that the findings rendered by the Assessing Authority in the assessment order dated 26/03/2014 were self-explanatory, justified and did not require any sort of interference. In this way, learned OHA upheld the default assessments framed by the Assessing Authority *as regards misutilization of 'H' Forms and its turnover on the said count.*

12. It may be mentioned here that during pendency of the appeals, dealer-appellant filed two applications seeking amendment of memorandum of appeals in terms of liberty granted by the

Hon'ble Apex Court vide order dated 16/03/2022 passed in SLP(C) No. 2661/2019. It may be mentioned here that feeling aggrieved by the judgment dated 12/11/2018 passed by Hon'ble High Court, appellant had filed said Special Leave Petition before Hon'ble Apex Court. During the pendency of SLP, department informed the Hon'ble Court that Special Commissioner had passed order dated 24/06/2019 i.e. disposing of the objections (filed against assessment dated 26/03/2014 i.e. framed on remand).

Thereupon, as per order dated 16/03/2022 passed by Hon'ble Apex Court, petitioner-appellant herein was granted liberty to raise all contentions, including the fact of actions being barred by limitation, in the appropriate proceedings and that all the issues in the said proceedings be decided on its own merits and in accordance with law.

None of the two applications seeking amendments was opposed on behalf of the Revenue.

Vide order dated 20-07-2022, both the applications were allowed. Accordingly, amended memorandum of appeals i.e. in Appeal No. 41/19 and 42/19 submitted by the appellant were taken on record.

Even if memorandum of appeals were amended, no prayer was made for amendment in the applications u/s 76(4) of DVAT Act.

13. So far as the factors to be taken into consideration at the time of disposal of applications u/s 76(4) of DVAT Act are concerned, as observed in the order dated 07/10/2020, passed by our own Hon'ble High Court in S.T. Appeal No. 1/2020, if a dealer-applicant has a strong prima-facie case and on a cursory glance it appears that the demand raised completely lacks foundation, this aspect of the matter has to be necessarily considered by the Appellate Tribunal, while deciding such an application u/s 76(4) of DVAT Act, and further that it may be remembered that where an assessee has established a *prima-facie* case it would not *ipso facto* entail sufficient justification for grant of dispensation.

Hon'ble High Court went on to observe that each case will depend on its own facts and the Appellate Authority will have to weigh the factual scenario involved. As regards wide-ranging discretion vested with the Appellant Authority, Hon'ble Court observed that the same necessarily implies that the exercise of this power has to be based on a case-to-case.

Hon'blc Court further observed that the Appellate Tribunal has to be mindful of the consequences that would follow from an order that requires the Assessee to deposit the whole or part of the demand raised by the Department, and that discretion should not be exercised in a mechanical manner and rather, should be exercised after taking into account the totality of the circumstances which include prima-facie case.

It was further opined by the Hon'ble High Court that provision u/s 76(4) of DVAT Act is wide enough to consider various aspects which may contribute to mitigating factors, including the aspect of undue hardship or weak financial condition of an Assessee. In all fiscal statutes, balance of convenience or irreparable loss are manifest in the concept of undue financial hardship.

14. Vide impugned order dated 24/06/2019, learned OHA disposed of the objections filed by the dealer u/s 74 of DVAT Act, while observing that the findings rendered by the Assessing Authority in the assessment order dated 26/03/2014 were self-explanatory, justified and did not require any sort of interference. In this way, learned OHA upheld the default assessments framed by the Assessing Authority *as regards misutilization of 'H' Forms and its turnover on the said count.*

15. Arguments heard. File perused.

Contentions

16. Counsel for the applicant has pointed out that the default assessments of tax, interest, and the assessment of penalty were framed under CST Act, but the OHA, while disposing of the objections, referred to the provisions of section 32 & 33 of DVAT Act.

In this regard, reference has been made to the provisions of CST Act & DVAT Act which are applicable in case of inter-State sales and local sales respectively, to contend that the impugned order dated 24/06/2019 passed by learned OHA under DVAT Act suffers from error of jurisdiction. Anticipating arguments from the opposite side in view of section 80 of DVAT Act, counsel for the applicant has contended that present case is not covered by provisions of section 80 of DVAT Act.

In support of this contention, counsel for the applicant has relied on following decisions:

i. **Nav Bharat Enterprises Ltd. v. Sales Tax Officer,** (1987) 66 STC 252 (Del);
ii. **Moral Alloys Private Ltd. v. Commissioner of Trade & tax**, W.P.(C) 10153/2018, decided by our own Hon'ble High Court on 13/08/2019;
iii. **Arien Sales & Marketing v. Commissioner of Trade & Taxes**, W.Ps.(C) 13336-37/2018 , decided by our own Hon'ble High Court on 01/09/2022.

17. I have gone through the decisions relied on by counsel for the applicant. At this stage, ~~this~~ above decisions do not come to the aid of the applicant.

It is true that in the impugned order it appears as if the assessments were framed by Assessing Authority under DVAT Act, but, prima facie, it appears to be a case of mistake.

18. In the assessment framed on 26/03/2014, on remand under CST Act, Learned Assessing Authority observed in the manner as:

> ".....On the basis of the above, I am of the opinion that sale and purchase turnover which have been reduced by the dealer by revising return cannot be accepted hence books of accounts of the dealer is rejected on the following grounds:
>
> (i) There was no return of goods which is a prime factor in determining turnover of the dealer as per the section 8(A) of the CST Act. Returns were revised merily on the basis of debit notes.
>
> (ii) Dealer has availed H Form of value as per the original return and did not fulful the condition of informing Sales Tax Authority of selling dealer on reimport (return of export goods) as goods were not returned.
>
> (iii) Had there been return of goods, the goods so received would have been sold for some valuable consideration and on the basis of sale of these returned goods department would have earned revenue which in the present case has been denied as goods were not returned. However, on checking calculations of penalty imposed in respect of difference in export sale and purchase turnover in the original assessment order dated 31/08/2012, it is found that there is calculation mistake, the penalty calculated is in the higher side same is now being rectified.
>
> The OHA has disallowed objection in respect of other counts, therefore, the dealer is liable to pay interest on those tax demands till date. Accordingly, interest is calculated till date and demand is revised as per the following details:
>
> Calculation Sheet Particulars Amount (In Rs.) Export as per Original Returns 11964533489 Export as per Balance Sheet 11871172075 Difference in Export Sale 93361414 80% of Rs.93361414 taxed @12.5%(being Carpet, Lamps) 9336141 taxed @ 5% (Handicraft) 933614 Interest on Rs.10269755 7579923

Penalty u/s 86(12) of the Act-till the date of original Assessment Order. 1% of 10269755/- for 175 weeks 17972071 Assets Sale of 9792173 taxed @ 12.5% 1224021 Penalty u/s 86(12) of the Act 2643840 Interest on Rs.1224021 903428 Tax @ 12.5% on duty drawback paid 870853089/- 108856636 Interest on Rs.108856636 80345144 Penalty u/s 86(12) of the Act 235130256 Summary of Demand: Assessment Tax Interest Penalty Total Annual 2008-09 12035041288828495 255746167 464925074 (Detail Order as per Annexure-A)."

Learned Assessing Authority rejected the books of accounts of the dealer due to the following reasons:

(i) "There was no return of goods which is a prime factor in determining turnover of the dealer as per the section 8(A) of the CST Act. Returns were revised merily on the basis of debit notes.

(ii) Dealer has availed H Form of values as per the original return and did not fulful the condition of informing Sales Tax Authority of selling dealer on reimport (return of export goods) as goods were not returned.

(iii) Had there been return of goods, the goods so received would have been sold for some valuable consideration and the basis of sale of these returned goods department would have earned revenue which in the present case has been denied as goods were not returned.

However, on checking calculations of penalty imposed in respect of difference in export sale and purchase turnover in the original assessment order dated 31/08/2012, it is found that there is calculation mistake, the penalty calculated is in the higher side same is now being rectified.

The OHA has disallowed objection in respect of other counts, therefore, the dealer is liable to pay interest on those tax demands till date."

Vide separate notice of assessment of penalty u/s 33 of DVAT Act, Learned Assessing Authority levied penalty of Rs. 25,57,46,167/-, on the ground of violation of the provisions of Section 86(12) of DVAT Act.

Order dated 24/08/2018 is passed by OHA

19. Vide order dated 24/08/2018, learned OHA-Special Commissioner-III disposed of the objections while observing as under:

> "Therefore, keeping in view the above stated facts and circumstances under which tax, Interest and Penalty has been imposed and also keeping in view the grounds of objection and documents filed on behalf of the objector dealer and in particular the ground as well as argument advanced by the objector dealer that the documents has not been examined by the authorities in proper manner, also without reasonable opportunity to make his submissions in support of his claims in the returns and after examining the judgments placed on record, I am of the considered view that the objector dealer deserves an opportunity of being heard in the interest of Justice so that correct facts would be placed on record after thoroughly examining and duly verification of the documents submi9tted by the objector in support of his objections raised, I am inclined to remand back the matter before the assessing authority to decide the cases de novo. The objector dealer is directed to appear before ward VATO with complete records and submissions on 07-09-2018 and VATO is also directed to complete the proceedings within 15 days time from the date of final submission by objector dealer."

20. Challenging order dated 24/08/2018 passed by learned Special Commissioner, Writ Petition (C) No. 10576/2018 was filed by the dealer.

Vide judgment dated 12/11/2018, Hon'ble High Court disposed of the Writ Petition by observing in the manner as:

> "However, on the merits of the impugned order, the court is of the opinion that the Special Commissioner has not applied her mind to the limited scope of the remand which the first OHA order had required.
>
> In these circumstances, the Special Commissioner is directed to decide the issue as expeditiously as possible having regard to the scope of the remand, made by the order of 13.11.2013, by the Special Commissioner while deciding the objection in the first instance against the first assessment order.
>
> Depending upon the final outcome of the proceedings, pursuant to this remand, in case the petitioner is aggrieved by the consequential order – not limited to the issue of Form H (having regard to the facts of the case and intervening events), it is open to it to agitate the same before the Tribunal.
>
> This writ petition is partly allowed in the above terms."

21. Vide order dated 24/06/2019, learned OHA disposed of the objections filed by the dealer u/s 74 of DVAT Act, while observing that the findings rendered by the Assessing Authority in the assessment order dated 26/03/2014 were self-explanatory, justified and did not require any sort of interference. In this way, learned OHA upheld the default assessments framed by the Assessing Authority u/s 32 & 33 of DVAT Act *as regards misutilization of 'H' Forms and its turnover on the said count.*

In this regard, it may be mentioned here that the first default assessment dated 31/08/2012., i.e. of tax and interest was framed by the Assessing Authority u/s 9(2) of CST Act; that the assessment came to be challenged before learned OHA, whereupon learned OHA, vide order dated 13/11/2013 remanded the matter; and that learned OHA dealt with the above said assessments framed under CST Act; that fresh assessment, on remand was framed under CST Act. At the time of final arguments, it would be one of the factors to be considered if any prejudice came to be caused to the dealer because of this mistake on the part of OHA in mentioning that assessments, challenged before her, were framed under DVAT Act, whereas actually same were framed having regard to the provisions of CST Act, and the applicant never apprised the OHA that this mistake had appeared in the order and it was required to be reviewed, so that OHA could rectify the mistake in the impugned order, even if she could rectify the same suo motu as well, after informing the applicant.

Is it a case of review of the previous assessment?

22. As claimed by the applicant, while framing assessment dated 26/03/2014, the Assessing Authority has reviewed the previous assessment dated 31/08/2012 even though there was no order of review u/s 9(2) of CST Act, and interest thereof, and further that

default assessment of tax and interest u/s 9(2) of CST Act read with section 32 of DVAT Act was framed. It has been contended that the original assessment dated 14/09/2012 having been set aside in the objections, it cannot be said that any such assessment dated 14/09/2012 was in existence, for being reviewed.

Further, it has been claimed that when the dealer had already filed appeal against order dated 13/11/2013 passed by learned OHA, learned Assessing Authority could not exercise the power of review as provided in sub-rule (7) of Rule 36(B) of DVAT Rule, 2004.

23. In the default assessment, Assessing Authority mentioned that she was reviewing the assessment order. The contention is that the previous assessment framed in September 2012 already stood set aside; that review of an assessment is permissible only under section 74(B) of DVAT Act, but this is not a case where any such provision was attracted; that when appeal had already been filed before the Appellate Tribunal against the order passed by learned OHA as regards the default assessment initially framed in 2012, and as such there was no ground for review.

24. It is true that in the default assessment dated 26/03/2014, Assessing Authority has used words "reviewing of assessment dated 31/08/2012 suo motu in exercise of powers conferred by virtue of section 74B(5) of DVAT Act", but the fact is that this

assessment came to be framed on remand of the matter by learned OHA, vide order dated 13/11/2013 and prima facie, it cannot be said that Assessing Authority was reviewing the assessment order. This paragraph which appears to have crept in the order by mistake, was required to be struck off by the Assessing Authority before signing the same, but was not struck off.

Is it a case where there is no specification of basis or reasons of satisfaction of Assessing Authority in framing of assessments?

25. Counsel for the applicant has contended that the assessment dated 24/03/2014 is bad in law as the Assessing Authority did not tick mark specifically, out of the 3 reasons mentioned in the assessment, which led to the satisfaction of the Assessing Authority to frame the assessment, and as such the applicant did not know the exact reason/ground of satisfaction of the Assessing Authority.

No doubt, in the beginning of the default assessment dated 26/03/2014, Assessing Authority expressed his satisfaction for framing of default assessment of tax and interest, but he was required to specify the reason(s) out of the three available in this first sentence, by deleting or removing the irrelevant part(s).

However, from the contents and substance of the default assessment, prima facie, it cannot be said that any prejudice was caused to the dealer, due to this reason, particularly when the dealer filed objections before the learned OHA challenging the default assessment raising all grounds available to him.

Is it a case of levy of tax and interest on '0' turnover assessed?

26. Another ground put forth by counsel for the applicant is that in the said assessment dated 24/03/2014, the Assessing Authority depicted turnover of the assessee and the tax assessed/paid as '0' and that it remains unexplained as to how the assessment came to be framed on the basis of the '0' turnover.

27. As regards the submission on behalf of the appellant that in the default assessment "zero" turnover was shown, whereas demand of tax was still raised, learned counsel for the Revenue submitted that it is a case of mistake and in view of provisions of Section 80 of DVAT Act, applicant cannot take any advantage of the said mistake in the default assessment.

28. It is true that at the bottom of default assessment of tax and interest dated 26/03/2014, in the table "zero" appears in three columns i.e. "turnover assets", "tax reported/paid" and "tax assessed", but from the contents and substance available in the default assessment, prima facie, it cannot be said that it was a

case of "zero" turnover assessed, "zero" tax reported/paid" or "zero" tax assessed, and rather, prima facie, appears to be a case of clerical mistake and could be rectified, but was not rectified.

DVAT-40

29. One of the contentions on behalf of the appellant is that the dealer had presented notice in Form DVAT- 40 before OHA, but the OHA did not decide the objections within prescribed period of 15 days from the date of service of said notice, and as such the objections filed by the dealer were deemed to have been allowed.

In this regard, counsel for appellant has placed reliance on decision in **Commissioner of Sales Tax v. Behl Construction**, (2009)21 VST 261 (Del); **M/s Mukesh Agencies v. Commissioner, Trade and Taxes and others**, 2019 (7) TMI 1342;**Combined Traders v. Commissioner of Trade and Taxes**, 2019 (7) TMI 1341; **M/s S. Gurcharan Singh & Sons v. Commissioner, Trade and Taxes &Ors.**, 2019 (8) TMI 1249.

30. In this regard, suffice it to say that when Hon'ble High Court was seized of the matter by way of W.P(C) 10576/18, vide order dated 12/11/2018, Hon'ble High Court was of the opinion that the reasons adduced by the Special Commissioner in the

circumstance of the case were persuasive and reasonable given that at the stage when the OHA received the notice, he did not appear to have been delegated with the powers u/s 68 of DVAT Act.

When the applications u/s 76(4) of DVAT Act are being considered and disposed of, having a cue from the above said opinion expressed by the Hon'ble High Court, in absence of any material to the contrary brought on record by the applicant, it cannot be said that OHA was delegated with the powers and was empowered to dispose of the objections or that there was no need to send the file to the Commissioner. The other point that the Commissioner should have decided the objections himself, without assigning the same to any other Special Commissioner, appears to have not been agitated before the Hon'ble High Court.

On the point of return of goods

31. As regards the claim of the dealer on the point of return of goods and exigibility to tax, as per grounds of appeal, case of the dealer, is as under:

> "XIV. The appellant during the period 2008-09 had effected export sales of Rs. 11,96,45,33,489/- to Ikea Hongkong. After receiving the goods, according to Ikea Hongkong some of the goods were not upto the quality and as per the specifications and same were defective. Accordingly, Ikea Hongkong raised debit notes for Rs.

9,33,61,414/- on the appellant and, in turn, the appellant raised debit notes on its suppliers. Since the books of accounts are finalized after the close of the year, in Balance Sheet export sales were shown as Rs. 11,87,11,72,075/- after deducting the amount of debit notes of Rs. 9,33,61,414/- from the sales of Rs. 11,96,45,33,489/-. The ld. VATO has subjected the amount of debit notes of Rs. 9,33,61,414/- to tax 80% of Rs. 9,33,61,414/- has been subjected to tax @ 12.5% and 20% @5% without appreciating that-

i.) Debit notes are normal commercial documents.

ii.) Sales Tax or VAT is leviable on sale of goods. Debit notes are not goods.

iii.) Whether the ld. VATO took into consideration the figure of sales as Rs. 11,96,45,33,489/- or Rs. 11,87,11,72,075/- the same could not be subjected to tax being exports out of India.

iv.) The foreign buyer had not returned any goods (because it was not commercially viable and because of goods being not of the agreed quality required some remission in agreed price) and had merely raised the debit notes. It is a common trade practice in cases of export that the foreign buyer does not return the goods but seeks reimbursements/remission of price by raising debit notes.

v.) The observation of the ld. VATO that if the goods had been returned, the State would have earned revenue is a hypothetical assumption. If the foreign buyer had returned the goods, appellant was bound to export the goods as per the specification and quality. There can be no levy on assumptions in the absence of a transaction of sale of goods. The ld. VATO could have also said that if the appellant had not exported the goods, the State would have earned revenue on sale of such goods and, therefore, he was taxing the entire export sales."

It is admitted case of the dealer that the foreign buyer had not returned any goods and had merely raised the debit notes. In this situation, dealer-assessee was required to revise returns to explain the difference which had appeared in the balance sheet. In the course of arguments, it has not been submitted on behalf of the applicant that any such step was taken before or during pendency of the proceedings before the Revenue authorities.

Duty Drawback

32. As regards the findings recorded by learned OHA vide order dated 13/11/2013, case of the dealer-appellant is that it had purchased finished goods, which were exported, and further that custom/excise duty was actually paid by the suppliers of goods tothe appellant, but it was agreed between the appellant and its suppliers that the Duty Draw back received from the Government by the appellant shall pass on to its suppliers. As claimed by the appellant, it paid to its suppliers, a sum of Rs. 87,08,53,089/-, same having been received as Duty Draw back.

On behalf of the applicant, it has been submitted that in the given situation, said payment of Rs. 87,08,53,089/- cannot be said to be exigible to tax.

33. In the course of arguments, counsel for the applicant has submitted that the applicant-the exporter-received Duty Draw Back and passed on the same to its supplying dealer-vendor.

34. On point of duty drawback, learned counsel for the Revenue has referred to Annexure 'A' i.e. part of the assessment order initially passed, to contend that the books of accounts of the dealer-applicant were found to have not reflecting true entries; and also that the appellant did not submit any agreement for passing of any incentives by the dealer to the supplier.

35. It is true that the initially framed assessment came to be substituted by fresh assessment consequent upon remand, and as such reasons recorded therein on this point cannot be taken into consideration, at this stage.

In suchlike cases, satisfactory evidence is required to be produced before the Assessing Authority. As per law, Duty Drawback incentive is available to the exporter, for promotion of export.

Here, no agreement was admittedly produced by the dealer-assessee before the Revenue Authorities in support of its claim that it was agreed between the appellant and its suppliers that the Duty Draw back received from the Government by the appellant shall pass on to its suppliers. In absence any such material, prima facie, said claim of the assessee was baseless.

36. Assessing Authority observed in the assessment initially framed on 14/09/2012 that the dealer had supplied dyes and mould under an agreement to the suppliers for stamping of IKEA products with the said machinery and under the agreement said equipments were to be maintained by the suppliers at their own cost. He further observed that since the effective control of such equipment was passed to the suppliers, the cost of said equipment was exigible to tax under the provisions of transfer of right to use.

Dealer has opposed the above said observations recorded by the Assessing Authority.

Case of the dealer-applicant is that tools and dyes were supplied by it to the supplying dealer so that the mark of the applicant could be put on the goods by the said supplying dealer.

No correspondence or copy of any agreement between the parties appears to have been made available to the Revenue Authorities. Even to the Appellate Tribunal, no such record has been made available in support of the claim of the applicant. Therefore, prima facie, at this stage, no reliance can be placed on this claim for rejection of the observations made by the Revenue authorities while framing assessments or upholding the same.

37. As regards invoices bearing Gurgaon address, claim of the dealer is that entries pertaining to said invoices were not found in the books of accounts, but its reason is that Gurgaon office is registered office of the company and no sale-purchase activity took place at the registered office. It has also been submitted in the course of arguments that at times customers mention address of the registered office in the invoices due to inadvertence. Further, it has been submitted that the transactions covered by the said invoices were carried out by its Delhi office. Counsel for the applicant has also submitted that actually there is no difference between head office and the branch office, when both have same entity.

In support of this contention, counsel for the applicant has relied on following 3 decisions:

i. **C. Jairam Pvt. Ltd. v. Commissioner of Sales Tax, New Delhi,** (1983) 52 STC 318 (Del);
ii. **English Electric Co. of India Ltd. v. The Deputy Commercial Tax Officer and Others**, (1976 38 STC 475 (SC);
iii. **Sahney Steel & Press Works Ltd. v. Commercial Tax Officers & Ors.**, (1985) 60 STC 301 (S.C.).

38. In C. Jairam Pvt. Ltd.'s case (supra), our own Hon'ble High Court observed in the manner as:

"that when once the D forms were produced it was not for the sales tax authorities to reject them on some ground, but it was the duty of the sales tax authorities to determine whether the exemption was to be granted on the basis of those forms;

that the branch or the head office or the other branch of the same dealer were not different entities but the same entity.

that, the purchase order in the case had been placed on the company in Bombay. As long as sales were evidence by the 'D' forms the assessee was entitled to the concessional rate of tax. Therefore the D forms were not defective and the word "Bombay" occurring in the forms merely gave the address of the company at Bombay and not the place at which the forms had to used. The applicability of the D forms did not depend on the address given, but depended on the place where the sale was included in the taxable turnover. In other words, the original forms were not defective."

39. Case of the appellant-applicant is that the observation made by the Revenue Authorites that orders were raised by various buyers and the invoices were raised at Gurgaon address, but in making this observation, the authorities have failed to note that the Gurgaon office was only head office and registered office of the appellant and not even registered under Haryana VAT Act.

As further claimed by the appellant-applicant in view of settled law there is no difference between head office and branch office, they having same entity. The contention is that even if the orders were raised on head office, supplies having been made by the branch office, no fault could be found with the transactions. In this regard, reliance has been placed on decision

in English Electric Co. of India Ltd.'s case (supra), where Hon'ble Apex Court observed in the manner as:

> "When the movement of goods from one State to another is an incident of the contract of sale it is a sale in the course of inter-State trade falling under section 3(a) of the Central Sales Tax Act, 1936. It does not matter in which State the property in the goods passes. What is decisive is whether the sale is one which occasions the movement of goods from one State to another. The inter-State movement must be the result of a covenant, express or implied, in the contract of sale or an incident of the contract. It is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement. It is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It will be enough if the movement is in pursuance of and incidental to the contract of sale.
>
> The appellant contended that there was no inter-State sale and that the sale was at Bombay, in as much as the Bombay buyer placed the firm order at Bombay, payment was made at Bombay, railway receipt was in the name of the Bombay branch, the goods were delivered at Bombay and there was no privity of contract between the Madras branch and the Bombay buyer. The Madras High Court held that the sale was an inter-State sale falling under section 3(a) of the Central Act. On appeal to the Supreme Court:
>
> Held, that the appellant was one entity and it carried on business at different branches. Branches are not independent and separate entities. They are different agencies. The contract of sale was between the appellant and the Bombay buyer. When a branch of a company forwards a buyer's order to the principal factory of the company and instructs them to despatch the goods direct to the buyer and the goods are sent to the buyer under those instructions ii would not be a sale between the factory and its branch. The steps taken from the beginning to the end by the Bombay branch in co-

ordination with the Madras factory showed that the Bombay branch was merely acting as the intermediary between the Madras factory and the buyer and that it was the Madras factory which pursuant to the covenant in the contact of sale caused the movement of goods from Madras to Bombay. The inter-State movement of the goods from Madras to Bombay was the result of the contract of sale and the fact that the contract emanated from correspondence which passed between the Bombay branch and the company could not make any difference. The sale was therefore liable to be taxed under section 3(a) of the central Act."

40. Reliance has also been placed on decision in Sahney Steel & Press Works Ltd.'s case (supra), where Hon'ble Apex Court observed in the manner as:

"It was held that even if the customer placed an order with the branch office and the branch office communicated the terms and specifications of the order to registered office and the branch office itself was concerned with despatching, billing and receiving of the sale price, the order placed by the customer was an order placed with the company, and for the purpose of fulfilling that order the manufactured goods commenced their journey from the registered office in the State of Andhra Pradesh to the branch outside the State for delivery of the goods to the customer. Both the registered office and the branch office were offices of the same company: they did not posses separate juridical personalities. The movement of the goods from the registered office at Hyderabad was occasioned by the order placed by the customer and was an incident of the contract, and therefore, from the very beginning from Hyderabad all the way until delivery to the customer it was an inter-State movement. The sale transactions were inter-State sales under section 3(a) of the Act."

In this regard, suffice it to say that in the course of arguments, counsel for applicant has not placed reliance on any document to suggest as to whether the order was placed by the Gurgaon office or Delhi office, and as to at which of the 2 places delivery of goods, purchased vide these invoices, was made. In absence thereof, the decisions cited do not come to the aid of the applicant at this stage when decision is being taken only on applications under section 76(4) of DVAT Act, and applicant is yet to satisfy that the tools, dyes and equipments, purchased during the period, were shown in Capital Assets, there being no specification about it in the Audit report relied on by counsel for the applicant.

Variation in the figure pertaining to Sales

41. As regards difference in sale and purchase figures as per assessment dated 14/09/2012, case of the appellant is that all the transactions were recorded in the books of accounts.

Counsel for the applicant has submitted that as per audit report submitted by Auditor-Batliboi, which is one of the reputed CA firm, proper books of accounts were maintained by the applicant. The contention is that in view of the said observation by the auditor, books of accounts by the applicant could not be

rejected by the Assessing Authority, taking a different view in levying taxes in view of the transactions recorded in the books.

As per Audit report dated 23/07/2009, regarding the applicant, by Chartered Accountants, namely, S. R. Batliboi and company, balance sheet of the applicant as on 31/03/2009 was audited. Profit and Loss Account and cash flow statement for the said year were also audited.

As observed in the report, proper books of accounts, as required by law were found to have been kept by the applicant as their examination during audit revealed that balance sheet, Profit and Loss Account and cash flow statement dealt with vide the audit report, were in agreement with the books of accounts; that the accounts of the applicant revealed the information required by Companies Act and a true and fair view in conformity with the accounting procedure generally accepted in India; that there was no substantial disposal of fixed assets during the year; that as the Auditors were informed certain suppliers of the company had misrepresented and wrongly claimed Rs. 23 million in relation the Duty Draw Back claims, and in this regard applicant made voluntary disclosure to the Customs Authorities and claimed amounts, including penalty and interest, back from the suppliers, and further that in the event of non-payment by the suppliers, the company had recourse through other group companies which are entitled to withhold payments to said suppliers.

42. In this regard, significant to note that in the Audit report dated 23.9.2009, there was no substantial disposal of fixed assets during the year. Furthermore, difference in the figure of loss on sale of fixed assets in the Balance Sheet and Profit & Loss Account audited by the Auditor is, prima facie, apparent.

43. On behalf of the Revenue, reference has been made by learned counsel for the Revenue to the entries made in the balance sheet filed by the dealer, on the point of sale of fixed assets, particularly to column pertaining to deletions as furnished by the dealer in Annexure '2', to contend that there is no merit in the contention raised on behalf of the applicant that no asset was sold by the said dealer and also that the Assessing Authority has not reflected in the default assessment the source of a sum of Rs. 97,92,173/-.

44. While referring to the revised returns, copies available from page 46 to 180 furnished by the appellant, learned counsel for the Revenue has contended that the Assessing Authority rightly observed in the assessment that total value of the goods said to have been returned, did not tally with the figures made available by the dealer. Further, it has been contended that having regard to the date of the invoices, dealer could have shown the value of the goods returned, within a period of six months, but this is a case where the appellant reflected the value of the goods

returned beyond the prescribed period of six months. Further, the contention is that all this goes to show that the dealer has not been maintaining the books properly and no reliance can be placed thereon.

On behalf of the Revenue, it has been submitted that the revised returns are stated to have been furnished due to two reasons, but the dealer did not place on record any document to show as to what was agreed upon between the parties as regards 'scrap'.

Further, it has been contended that no books of accounts of foreign buyers were produced by the dealer, and as such the Assessing Authority was justified in framing the default assessment, the reason being that the debit notes were not adequate evidence on the point of benefit claimed by the appellant.

Counsel for the Revenue has contended that goods, if required to be returned, were to be returned in six months period, from the date of the invoices, but said benefit has been claimed by the applicant during the period which was beyond the prescribed period.

In this regard, on behalf of the applicant, reference has been made to assessment dated 26.3.2014 i.e. the assessment framed on remand wherein the Assessing Authority observed that even

if goods were returned beyond 6 months stipulated period, no adjustment was required to be done in respect of tax.

As noticed above, case of the applicant is that it was actually not a case of actual return of goods, but a case where foreign dealer issued debit notes.

Even otherwise, in view of the above observations in the assessment dated 26.3.2014, framed on remand, at this stage, on this point, prima facie case is in favour of the applicant.

Mis-utilisation of 'H' Forms

45. As regards the observation made on behalf of the Revenue, that it was a case of mis-utilization of 'H' forms, appellant claims that where goods are purchased without payment of tax or at concessional rate of tax for a particular purpose and same are not utilised for the said purpose but are actually utilised for some other purpose, only then it would be a case of mis-utilization.

As further claimed by the dealer, had it not exported the goods purchased by it against 'H' form, it could be said to be a case of mis-utilization of goods, but since the dealer-appellant exported the goods which were purchased against 'H' form, the impugned order deserves to be set aside.

46. In the impugned order dated 24/06/2019, learned OHA made observations as regards non-appearance and non-production of

documents, despite sufficient opportunities granted to the dealer-objector to appear before her with requisite documents. In this regard, observations made in para 3 of the impugned order read as under:

> "In compliance to the said directions of the Hon'ble Court, the undersigned being the Special Commissioner/OHA, has issued the notice dated 27.11.2018 wherein the dealer had been directed to appear before the undersigned on 26.12.2018 along with the requisite documents in order to substantiate the claim made by the dealer. In this regard, it is submitted that neither the dealer nor his authorities representative appear on the said given date and accordingly, the case adjourned till 23.01.2019 and the same has been duly informed to the dealer. Further on 23.01.2019, the dealer instead of appearing before the undersigned has requested to adjourn the matter after the first week of February 2019, and based upon his request, the matter got adjourned till 25.03.2019. Again on 25.03.2019, none appeared from the dealer side and matter got adjourned till 10.04.2019 where the dealer again failed to appear. Thus, it can be inferred that the dealer despite of being granted sufficient and reasonable opportunities, have failed to appear on each and every hearing failing which the undersigned left with no other option but constrained to dispose of the instant objection ex-parte to the best of the judgment on the basis of material available as per record."

In the course of arguments on this application, counsel for the applicant has raised no contention challenging the aforesaid observations made by Learned OHA. When the applicant-objector failed to appear and produce any relevant material on this point, before Learned OHA, at this stage, prima facie no case is made out in favour of the applicant on this point.

Interest

47. Challenging the assessments on the point of interest, counsel for the applicant has contended that had the assessments been framed under CST Act or CST Act read with DVAT Act, it would been have been a different matter, but interest having been granted under the provisions of DVAT Act, the assessments are bad in law. In this regard, Counsel for the applicant has relied on decision in **J.K. Synthetics Ltd. V. Commercial Taxes Officer**, (1994) 94 STC 422.

Present assessment came to be framed after coming into force of DVAT Act. Decision cited on behalf of the applicant pertained to the tax period prior to coming into force of DVAT Act. In the course of arguments, no contention has been advanced on behalf of the applicant that for the purposes of levy of interest, provisions of DVAT Act, 2004 were not attracted to the present matter.

48. As regards penalty, contention on behalf of the applicant is that penalty levied due to violation of section 86(12) of DVAT Act has been upheld by OHA while observing as if the penalty was imposed under section 33 of DVAT Act, and as such imposition of penalty is bad in the eye of law.

As already noticed above, one of the contentions on behalf of the applicant challenging default assessment of tax and interest

was that OHA upheld the assessment as if same was framed under section 32 of DVAT Act, but as has been observed above, prima facie it appears to be a case of mistake in this regard keeping in view the context and substance of the assessment framed.

For the same reasons, the penalty levied for violation of provisions of section 86(12) of DVAT Act i.e. on the ground of deficiency in tax, and provisions of CST Act having been attracted, prima facie, it appears to be a case of mistake in the impugned order of the year 2019 while OHA upheld the same mentioning the provision of section 33 of DVAT Act,

Financial Incapacity

49. Learned counsel for the applicant has submitted that business operations of the applicant company are lying suspended ever since 31/03/2009 and the company has no funds and that keeping in view the financial hardship of the applicant, appeals be entertained waiving the requirement of deposit of amount by way of pre-deposit.

On the point of financial incapacity, learned counsel for the Revenue has submitted that while amending the memorandum of appeal, appellant has not amended the application u/s 76(4) of DVAT Act, so as to put forth this ground.

As regards the submission put forth on behalf of the appellant that certain refunds are due to the dealer from the Revenue, learned counsel for the Revenue has submitted that Revenue has deposited the entire amount of the refunds, with the Hon'ble High Court and only the point of release thereof is involved, and as such on the point of pre deposit for entertaining these appeals, appellant cannot take advantage while claiming that refunds are due to the dealer from the Revenue.

50. It may be mentioned here that in the application u/s 76(4) of DVAT Act filed with the appeal challenging the impugned order as regards levy of tax and interest, applicant has not claimed that ever since 31/03/2009 business operations of the applicant stand suspended and that applicant has no funds. Therein, it has been simply alleged that in case the Appellate Tribunal orders for pre-deposit of penalty, it would cause 'avoidable financial hardship' to the applicant.

No statement of account or copies of accounts books have been placed on record in support of the ground of financial hardship. In absence thereof, prima facie, it cannot be said that applicant has been facing financial hardship or that the orders passed by this Appellate Tribunal calling upon the applicant to deposit any amount by way of pre-deposit would cause financial hardship to the applicant.

51. As a result of the above observations and discussion, I find that this is not a case where appeals deserve to be entertained waiving of the requirement or pre-condition of deposit of disputed demands, and rather, this is a fit case, where the applicant needs to deposit 10% of the disputed demand towards tax and interest only, by way of deposit for the purposes of entertaining these appeals.

Applicant is given 20 days time to deposit the amount by way of pre-condition, submit compliance report with the Registry and also supply one copy thereof to counsel for the Revenue, so that on compliance, appeals are taken up for hearing of final arguments.

52. Copy of the order be supplied to both the parties as per rules. One copy be sent to the concerned authority. Another copy be displayed on the concerned website.

Announced in open Court.
Date: 20/03/2023

Narinder Kumar 20/3/2023

(Narinder Kumar)
Member (Judicial)