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

Appeals Nos. 807-830/ATVAT/10
Date of Judgment: 04/05/2023.

M/s A. K. G. Industries,
B-67, Okhla Indl. Area, Phase-I
New Delhi-110020.

.....Appellant

v.

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

Counsel representing the Appellant : Sh. A. K. Babbar.
Counsel representing the Revenue : Sh. N. K. Gulati.

JUDGMENT

1. On 06/12/2010, 24 Appeals No. 807-830/10, came to be presented, challenging 12 default assessments of tax and interest pertaining to the tax period April 2007 to March 2008 in addition to 12 assessments of penalty pertaining to the same tax period.

2. Default assessments of tax and interest were framed by learned Assessing Authority.

3. The demands by way of tax, interest and penalty as shown in the impugned order passed by learned OHA and also in para no. 2 of the memorandum of appeals, read as under:

Narinder Kumar 4/5/2023

Sr. No.	Period of Objection	U/s	Disputed Demand			
			Tax	Interest	Penalty	Total
1.	April, 2007	U/s 32 of DVAT	62,586	23,148	-----	85,734
2.	April, 2007	U/s 33 of DVAT	--	------	62,586	62,586
3.	May, 2007	U/s 32 of DVAT	62,586	22,377	--	84,963
4.	May, 2007	U/s 33 of DVAT	--	----	62,586	62,586
5.	June, 2007	U/s 32 of DVAT	62,586	16,461	--	79,047
6.	June, 2007	U/s 33 of DVAT	--	----	62,586	62,586
7.	July,2007	U/s 32 of DVAT	62,586	20,833	--	83,419
8.	July,2007	U/s 33 of DVAT	--	------	62,586	62,586
9.	Aug.,2007	U/s 32 of DVAT	62,586	20,062	--	72,648(82648)
10	Aug.,2007	U/s 33 of DVAT	--	----	62,586	62,586
11	Sept.,2007	U/s 32 of DVAT	62,586	19,290	--	81,876
12	Sept.,2007	U/s 33 of DVAT	--	----	62,586	62,586
13	Oct.,2007	U/s 32 of DVAT	62,586	18,519	--	81,105
14	Oct.,2007	U/s 33 of DVAT	--	------	62,586	62,586
15	Nov.,2007	U/s 32 of DVAT	62,586	17,747	--	80,333
16	Nov.,2007	U/s 33 of DVAT	--	-----	62,586	62,586
17	Dec.,2007	U/s 32 of DVAT	62,586	16,975	--	79,586(79561)
18	Dec.,2007	U/s 33 of DVAT	--	-----	62,586	86,957 (62,586)
19	Jan.,2008	U/s 32 of DVAT	62,586	16,204	--	78,790
20	Jan.,2008	U/s 33 of DVAT	--	----	62,586	62,586
21	Feb.,2008	U/s 32 of DVAT	62,586	15,432	--	78,018
22	Feb.,2008	U/s 33 of DVAT	--	-----	62,586	62,586
23	March,2008	U/s 32 of DVAT	62,586	14,661	--	77,247
24	March,2008	U/s 33 of DVAT	--	------	62,586	62,586

4. As per case of the dealer-assessee-objector-appellant, it is engaged in the business of manufacturing of PVC pipes and allied products. For the said products, it has been purchasing raw material mainly from RIL/IPCL from Delhi. Other purchases by way inter-state are stated to have been made against statutory forms or by making payment of tax.

5. An audit is stated to have been conducted in respect of business affairs of the appellant-assessee by VATO (Audit).

6. Assessing Authority framed default assessment of tax and interest and separate assessments of penalty on 17/04/2010 and 27/04/2010, on the following grounds:

> "That company received credit note @4% on account of trade discount/quantity discount from IPCL & Reliance Industries Ltd. during the year 2007-08 on which ITC has not been reversed by the Petitioner Dealer.
>
> The company has claimed ITC on local purchases of raw material consumed in the finished goods, which are sold centrally against C form, or against full CST, or against H form or locally within Delhi. Some of the goods are also sent outward as stock transfer to its branches situated at Noida. As per the impugned Order the ratios of locally purchased material and central purchases are in the ratio of 70:30. The ratio of sale of the finished goods with regard to stock transferred goods is 4:1 Ld VATO had held that from the record maintained by company, it is not clear whether the finished goods prepared from centrally purchased material or locally purchased material have been stock transferred. Moreover, the raw material used in the manufacturing process of finished goods as was seen at the manufacturing unit is used both types of material purchased locally and centrally. The Ld. VATO held that the company has not reversed the ITC in proportionate to the material used in the

manufacturing of finished goods transferred to its Noida Branch against "F" Form. Therefore, the audit team was of the opinion that 20% of the finished goods was transferred against F Form in which material purchased locally constitute 70% which comes to 14% of the total ITC claimed by the dealer. VATO was of opinion that as per section 10(3) of the DVAT Act, the company should have reversed the ITC in proportionate i.e. 75% of the ITC claimed on the purchases of goods used in the manufacturing of those goods which were stock transfers.

The company has purchased the packing material during 2007-08 to the tune of Rs.14,02,1692/- taxable @4% and 12.5%. As per details submitted by the company before the assessing authority, the purchases of 4% Rs.13,97,3692 with ITC Rs.5,58,923/- and another purchase Rs.48,600/- is having ITC credit @ 12.5% with input tax credit Rs.6,075. Out of the total sale 14% of the sale is outward stock transfer against "F" Form and the packing material has also been used in the same proportionate. The ratio of stock transfer against "F" form with regard to the other sale in 14% and as such the dealer is liable to reverse the ITC in the same proportion. The Assessing Officer created by imposing tax, interest & penalty as stated in above paragraph."

7. Feeling aggrieved by the above said assessments, dealer filed objections u/s 76(4) of DVAT Act. Learned OHA rejected the objections by observing in the manner as:

"6. It is fact that the company has received credit note of Rs. 8,41,439/- taxable @ 4% on account of trade discount/ quantity discount from M/s IPCL & Reliance Industries Ltd. during the year 20074-08 on which ITC has not been reversed amounting to Rs. 32,363/-. Therefore, the dealer is liable to reverse the ITC amounting to Rs. 32,363/- alongwith interest and penalty. During argument the dealer has claimed that the credit notes pertain to central purchase against which no ITC has been claimed. Therefore, the VATO Audit has wrongly decided to reverse the ITC amounting to Rs. 32,363/-. I am not convinced with the argument. Even if the credit notes pertain to central

purchase, there is no record to suggest which of the raw material i.e. local purchase or central purchase was used for the goods, which were transferred on 'F' form or goods sold centrally.

7. The company has claimed ITC amounting to Rs. 62,79,683/- on local purchases of raw material consumed in the finished goods. The finished goods so manufactured are sold centrally against C form, full CST, H Form and locally. Some of the goods are also outward stock transferred to its branch situated at Noida. The Audit has noticed that the company has not reversed the ITC in proportionate to the material used in the manufacturing of finished goods transferred to its Noida Branch against 'F' forms. It is also noticed that as per section 10 (3) of the DVAT Act the company should have reversed the ITC in proportionate i.e. 75% of the ITC claimed on the purchase of goods used in the manufacturing of those goods, which were stock transfers.

8. The dealer has submitted that VATO, VAT Audit is wrong in applying estimates and presumption in calculating the additional tax demand when no assumption and presumption or estimates can be applied in the default assessment of tax and interest. However, the argument of dealer cannot be accepted because the dealer was required to keep a record of utilization of raw material for goods transported to branch office or in respect of goods sold locally or centrally. In the absence of such information VATO has rightly passed order on estimated basis.

9. As regards the tax on packing material, the dealer fails to submit any argument. The order of VATO is based upon books of accounts and actual amount of packing material. The dealer was liable to reverse the input tax credit availed on packing material, which was used for stock transfer against "F" form. VATO, VAT Audit, has rightly passed the order. The fact of the case does not warrant any interference and should be dismissed. The objections of the dealer are hereby rejected."

8. Hence, these 24 appeals. Arguments heard. File perused.

9. It may be mentioned here that Registry put up 21 files before Appellate Tribunal on 20/01/223 with its report dated

4/5/23

13/09/2023. As reported by the Registry, out of the 24 files only 21 files i.e. No. 810-830/10 were found lying in Almirah No. 6. Registry further reported that on checking cause list of 29/12/15, available in the computer, the appeals were pending for arguments on merits. As further reported by the Registry, three appeals No. 807, 808 and 809/10 were not available in the bundle. Since the appeals files were not put up before the Appellate Tribunal, by the staff for about 8 years matter was been reported to the Commissioner, Department of Trade & Taxes for disciplinary enquiry.

10. Court notices were issued to the counsel for the parties. Thereupon, documents pertaining to deposit of pre-deposit amount, in compliance with order dated 07/01/2014 passed u/s 76(4) of DVAT Act, came to be presented.

11. With the assistance of learned counsel for the parties, on the basis of copies made available by them from their respective brief, record has been reconstructed in respect of Appeals No. 807, 808 and 809/10.

That is how, the appeals came to be listed for final arguments.

Input Tax Credit (ITC)- Non-reversal thereof.

12. Case of the dealer – appellant is that M/s RIL/ IPCL, who granted trade discount to the tune of Rs. 8,41,439/- to the dealer

– appellant, had not claimed back amount of VAT paid to the Department of Trade & Taxes, Delhi; that the said dealer - M/s RIL/ IPCL had not reduced their output tax liability on sales, on the basis of the above-said discount granted to the appellant.

Reference has been made in the pleadings to provisions of section 9 of DVAT Act, which entitle a dealer to claim input credit on turnover of purchases which is inclusive of input tax.

13. It has also been submitted in memorandum of appeal that learned Assessing Authority did not rightly appreciate the claim of the dealer that material transferred by way of stock transfer, was made from material purchased against "C" forms and no purchase on the basis of ITC was ever used.

Claim of the dealer is that it was not required to reverse input tax credit in case of turnover of purchases, the reason being that no material purchased from it was a stock transfer to other states i.e. outside Delhi.

14. It may be mentioned here that when the appeals were pending for remaining arguments, on 01/05/2023, on behalf of the appellant an application came to be filed seeking leave of the court to raise an additional ground as to the jurisdiction of concerned VATO (Audit) to frame assessment.

It was submitted by counsel for the appellant that said additional ground being legal ground be allowed to be raised even though earlier not raised before the Assessing Authority or before learned OHA. Learned counsel clearly submitted that this ground was not being sought to be raised on facts, but only by referring to law/ legal provision.

The application was allowed vide order dated 02/05/2023 and the above said additional ground was allowed to be raised.

15. The contention raised by learned counsel for the dealer – appellant by way of additional ground is that the impugned assessments framed by VATO (Audit) deserve to be set aside as VATO (Audit) had no jurisdiction to frame the said assessments.

In support of this contention reliance has been placed on decision in **M/s Capri Bathaid Pvt. Ltd. & others** in W.P(C) No. 8913/2014 decided by our own Hon'ble High Court on 02/03/2016, and circular dated 11/04/2016 issued by Commissioner (VAT), Government of N.C.T Delhi, on the basis of said decision.

16. Indisputably the above assessments came to be framed by learned VATO (Audit) on 17/04/2010 and 27/04/2010.

As per averments put forth in the memorandum of appeal, an audit of the business affairs of the dealer – assessee was conducted by VATO (Audit) and the impugned demands

towards tax, interest and penalty were raised by the VATO (Audit).

17. The circular referred to above is of April 2016 issued in compliance with the decision in M/s Capri Bathaid Pvt. Ltd's case (supra), by our own Hon'ble High Court on 02/03/2016.

Present assessments came to be framed on 17/04/2010 i.e. much prior to the decision in Capri Bathaid Pvt. Ltd's case. Therein, the petitioner - Capri Bathaid challenged levy of tax as regards 1st Quarter of 2014, vide default assessments framed u/s 32 and 33 of DVAT Act.

Following common issues, which arose for consideration in the four petitions, were taken up together:-

> "(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, as 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?"

Therein, order in Form DVAT-50 issued by the Special Commissioner on October 15, 2014 did not permit the Enforcement Officer to carry out any assessment and therefore, orders of default assessment of tax, interest and penalty passed

by the AVATO Enf-I under sections 32 and 33 of the DVAT Act were held to be without the authority of law.

18. On 31/10/2005, an order was issued by the Commissioner, VAT, u/s 68 of DVAT Act read with Rule 48 of Delhi Value Added Tax rules.

Said order dated 31/10/2005 was issued by Commissioner, Department of Trade & Taxes, delegating his powers specified in column No. (2) & (3) to the officers specified in column (4) of the table appended below and directing that the said officers will exercise the powers within their respective jurisdiction, w.e.f. 1/4/2005 i.e. the date when DVAT Act, 2004 came into force.

19. Said order dated 31/10/2005 has 4 columns. S. No. 15 of the said order reads as under:

S. No.	Section of the Act	Description of powers	Designation of the officer to whom power delegated
15	58	All powers to audit the business affairs of dealer/any person for (a) confirming the assessment under the review or (b) serve a notice of the assessment or re-assessment of the amount of tax, interest and penalty.	All Officers appointed under sub section (2) of section 66 of the Delhi Value Added Tax Act, 2004 not below the rank of Assistant Value Added Tax Officer.

20. In view of the above entry at S. No. 15 of the said order, it can safely be said that as regards exercise of powers u/s 58 of DVAT Act, i.e. to audit the business affairs of dealer/any person for (a) confirming the assessment under the review or (b) serve a notice of the assessment or re-assessment of the amount of tax, interest and penalty, same were delegated by the Commissioner to all the officers appointed under sub-section (2) of section 66 of DVAT Act, not below the rank of Assistant Value Added Tax Officer.

21. In **H.G. International v. The Commissioner of Trade and Taxes, Delhi**, ST.APPL. No. 63/2014 decided on 16/8/2017 by our own Hon'ble High Court, said order dated 31.10.2005 was held to have been validly issued.

22. Learned counsel for the appellant has submitted that as regards judgment in H.G. International's case, the Hon'ble Apex Court, vide order dated 28/01/2020, in Civil Appeal(s) No. 7762-7763/2019 has remitted to the Hon'ble High Court, the question of jurisdiction of Audit Officer to frame assessment order.

23. It is true that vide order dated 28/01/2020, Hon'ble Apex Court has remitted the aforesaid issue to our own Hon'ble High Court, but indisputably the decision in H.G. International's case by the Hon'ble High Court is still in operation.

In Capri Bathaid Pvt. Ltd's case (supra), there was reference to order dated 12/11/2013 issued by the Commissioner u/s 68(2) of

DVAT Act to various DVAT officers exercising powers under different sections, but herein at the relevant time, circular dated 31/10/2005 issued by the Commissioner, VAT, u/s 68 of DVAT Act was in force, and as such the decision in Capri Bathaid Pvt. Ltd's case does not came to the aid of the dealer – applicant in these matters.

24. Section 78 of DVAT Act pertains to Burden of Proof. It provides that the burden of proving any matter in proceedings u/s 74 of DVAT Act or before the Appellate Tribunal, which relates to the liability to pay tax or any other amount under this Act, shall lie on the person alleged to be liable to pay the amount.

Here, dealer – appellant has not brought on record any material to suggest that Sh. Dharmvir Sharma VATO (Audit) was never vested with the powers to frame assessments u/s 68 of DVAT Act.

25. As noticed above, as per case of the dealer itself, an audit was conducted at the business premises and it was thereafter that assessments were framed by VATO (Audit).

26. At this stage, it is pertinent to mention that Chapter -X of DVAT Act pertains to audit, investigation and enforcement.

27. Section 58 of DVAT Act, available under Chapter –X, reads as under:

"(1) The Commissioner may serve on any person in the prescribed manner a notice informing him that an audit of his business affairs shall be performed and where applicable, that an assessment already concluded under this Act may be reopened.

Explanation.- A notice may be served notwithstanding the fact that the person may already have been assessed under sections 31, 32 or 33 of this Act.

(2) A notice served under sub-section (1) of this section may require the person on whom it is served, to appear on a date and place specified therein, which may be at his business premises or at a place specified in the notice, to either attend and produce or cause to be produced the books of accounts and all evidence on which the dealer relies in support of his returns (including tax invoices, if any), or to produce such evidence as is specified in the notice.

(3) The person on whom a notice is served under sub-section (1) shall provide all co-operation and reasonable assistance to the Commissioner as may be required to conduct the proceedings under this section at his business premises.

(4) The Commissioner shall, after considering the return, the evidence furnished with the returns, if any, the evidence acquired in the course of the audit, if any, or any information otherwise available to him, either –

(a) *confirm the assessment under review; or*

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

5) Any assessment pursuant to an audit of the person's business affairs shall be without prejudice to prosecution for any offence under this Act."

28. In view of above provisions of section 58, it transpires that the Commissioner is empowered to serve a notice of assessment or re-assessment of the amount of tax, interest and penalty, if any, pursuant to section 32 and 33 of DVAT Act, after considering

the return, the evidence furnished with the returns, if any, the evidence acquired in the course of the audit, if any, or any information otherwise available to him. Therefore, it can safely be said that in case of audit, Commissioner is empowered to serve a notice of assessment u/s 32 and 33 of DVAT Act.

Having regard to the said provisions coupled with the circular dated 31/10/2005, vide which the Commissioner delegated his powers to the officers specified in column (4) of the table appended thereto and in view of the above discussion, there is no merit in the contention raised by learned counsel for the appellant, by way of additional ground that VATO (Audit) had no jurisdiction to frame assessment.

Was the dealer liable to reverse ITC on having received credit notes?

29. Case of the dealer – appellant is that it received credit notes on account of trade discount / quantity discount from M/s IPCL & Reliance Industries Ltd., but the Assessing Authority observed that the dealer was liable to reverse the ITC, in view of the said credit notes, and that the company did not reverse the ITC.

30. The contention raised by learned counsel for the appellant is that in view of the decision in **Challenger Computers Ltd v. Commissioner of Trade & Taxes,** Delhi, ST. Appeal. No. 76/2014 decided by our own Hon'ble High Court on 21/08/2015, dealer was not required to reverse ITC, because of

receipt of credit notes, the reason being that the Principal Company, which granted trade discount, had not claimed back the amount of VAT deposited by it with the Department of Trade & Taxes or reduced their output tax liability on the sales on such discount given to the dealer – appellant.

Prior to amendment on 15.07.2015, section 10(1) of DVAT Act read as under:

> "(1) Where any purchaser has been issued with a credit note or debit note in terms of Section 51 of this Act or if he returns or rejects goods purchased, as a consequence of which the tax credit claimed by him in any tax period in respect of which the purchase of goods relates, becomes short or excess, he shall compensate such short or excess by adjusting the amount of tax credit allowed to him in respect of the tax period in which the credit note or debit note has been issued or goods are returned."

31. In Challenger Computers Ltd's case, while dealing with same contention, Hon'ble High Court observed in the manner as:

> "In all these cases, the Appellants have been able to produce certificates from the selling dealers who have clarified that they are not claiming any output tax credit or seeking any refund. In other words, the entire amount of VAT collected by the selling dealer from the buying dealer is remitted to the Department. Therefore, there is no question of the selling dealer resorting to the procedure under Section 51(a) of the DVAT Act to raise a credit note in accordance with Rule 45 of the DVAT Rules, or to notify that on account of an arrangement with the buying dealer the selling price has been altered. Consequently, there is no corresponding obligation on either of them to resort to the procedure under Section 8 (1) of the DVAT Act. There is also, therefore, no obligation on the buying dealer to resort to the procedure under Section 10(1) of the Act. This, of course, is the

scenario prior to the introduction of Section 10 (5) to the Act which, as will be discussed hereafter, is only prospective and not as, contended by the learned ASG, merely clarificatory."

32. It may be mentioned here that the dealer-appellant has not submitted any certificate or document or affidavit to the effect that the selling dealer had not claimed any output tax credit or refund.

33. The fact remains that no evidence has been led in support of the fact that the Principle company had not reduced their output tax liability on sales or claimed back the VAT amount deposited with the department.

In the impugned order passed by learned OHA, the grounds/objections raised by the dealer in the objections u/s 76(4) of DVAT Act were specifically mentioned in para 3. It does not find mention in para 3 of the impugned order that the dealer-objector had produced any document issued by the above said company to the effect that said company had not reduced their output tax liability on sales. Sh. G. R. Bansal, FCA represented the objector before learned OHA. There is nothing in the impugned order to suggest that any reference was made by Sh. G. R. Bansal before learned OHA, to any document to the effect that the aforesaid company had not reduced its output tax liability.

In absence of any certificate from Principal Company, which issued credit notes in favour of the dealer-appellant, that the said Principal company had not reduced its output tax liability,

decision in Challenger Computer's case (where certificate from the company which had issued credit notes were submitted), does not come to the aid of the dealer-appellant.

Claim of the dealer as regards ITC on local purchases of raw material in manufacturing finished goods and on purchase of packing material.

34. The company has claimed ITC amounting to Rs. 62,79,583/- on local purchases of raw material consumed in the finished goods. The finished goods so manufactured are stated to have been sold centrally against "C" Form, full CST, "H" Form, and locally. Some of the goods were claimed as outward stock, transferred to its branch situated at Noida.

Learned Assessing Authority while framing assessments observed in the Annexure to the Assessment in the manner as:

> "The ratio of locally purchased material and central purchases are in the ratio of 70:30. The ratio of sale of the finished goods with regard to stock transferred goods is 4:1. From the record maintained by the company it is not clear whether the finished goods prepared from centrally purchased material or locally purchased material have been stock transferred. Moreover, the raw material used in the manufacturing process of finished goods as was seen at the manufacturing unit is used both types of material purchased locally and centrally. The company has not reversed the ITC in proportionate to the material used in the manufacturing of finished goods transferred to its Noida Branch against 'F' form. Therefore, the audit team is of the opinion that 20% of the finished goods was transferred against 'F' form in which material purchased locally constitute 70% which comes to

14% of the total ITC claimed by the dealer i.e. 6279583 *14% = 879142/-. As per section 10(3) of the DVAT Act the company should have reversed the ITC in proportionate i.e., 75% of the ITC claimed on the purchases of goods used in the manufacturing of those goods which were stock transfers. The 75% of Rs. 879142/- comes to Rs. 659356/- which the company liable to reverse. This amount is divided in equally in all the tax periods which comes to Rs. 54946/- alongwith interest and penalty u/s 86(10) of DVAT Act, 2004 is also imposed.

As regards packing material, Learned Assessing Authority observing in the impugned assessments as under :

> The company has purchased the packing material during 2007-08 to the tune of Rs. 1,40,21,692/- taxable @ 4% and 12.5%. As per details submitted by the company the purchase of 4% Rs. 13973692/- with input tax credit Rs. 558923/- and Rs. 48600/- is that of holo image taxable @ 12.5% with input tax credit Rs. 6075/-. Out of the total sale 14% of the sale is outward stock transfer against 'F' form and the packing material has also been used in the same proportionate. The ratio of stock transfer against 'F' form with regard to the other sale is 14% and the dealer is liable to reverse the ITC in the same proportion. The 14% so calculated come to Rs. 78253/- and Rs. 850/- of which 75% of the ITC is to be reversed which comes to Rs. 58690/- and Rs. 638/- respectively (Rs. 59328/-) which is to be divided in all tax periods equally which comes to Rs. 4944/- alongwith interest and penalty u/s 86(10) of DVAT Act, 2004 is also imposed."

35. Learned counsel for the dealer-appellant admits in the course of arguments liability of the appellant for reversal of ITC in the given facts. The only contention is that the department should have calculated actual figure and not drawn any ratio, as noticed

above, particularly when all the books of accounts were made available by the dealer to the department. Therefore, learned counsel has urged that the impugned assessments and the impugned order deserve to be set aside.

Section 10(3) of DVAT Act reads as under:

> "(3) Where –
>
> (a) goods were purchased by a dealer;
> (b) the dealer claimed a tax credit in respect of the goods, and did not reduce the tax credit by the prescribed percentage; and 1
> (c) the goods are exported from Delhi, -
>
> (i) by way of a sale made as per the provisions of sub-section (1) of section 8 of the Central Sales tax Act, 1956; or
>
> (ii) other than by way of a sale, to a branch of the registered dealer or to a consignment agent;] the dealer shall reduce the amount of tax credit originally claimed by the prescribed proportion."

36. Rule 42 of DVAT Rules, 2005, available under Chapter IX pertains to Accounts, Records and Audit.

Clause (f) of sub-rule (1) of Rule 42 provides that stock records showing stock receipts and deliveries and manufacturing records, shall be maintained by a dealer at its principal place of business.

Learned counsel for Revenue has submitted that there is nothing on record to suggest that any such register/record which finds mention in clause (f) of sub-rule (1) of Rule 42 was ever made available by the dealer-assessee to the Assessing Authority or to

the learned OHA. Even before this Appellate Tribunal, no such record has been made available for perusal, in support of the contention raised on behalf of the appellant. In absence thereof, it cannot be said that the procedure followed by the Assessing Authority in framing assessment as regards reversal of ITC of stock transfer and reversal of ITC on packing material used in goods transferred against 'F' form, was in any manner wrong or illegal.

Assessment of penalty

37. While challenging assessments of penalty levied u/s 86(10) of DVAT Act, and the impugned order passed by learned OHA upholding the said assessments, reliance has been placed by counsel for the appellant on decision in **Bansal Dye Chem v. Commissioner of VAT**, ST. Appeal No. 29 of 2015, decided by our own Hon'ble High Court on 24/09/2015.

38. As regards non-service of any notice before framing assessments of penalty, reference may be made to decision in **Sales Tax Bar Association (Regd.) Vs. GNCTD,** WP (C) No. 4236/2012, decided by our own Hon'ble High Court on 07/12/2012.

In Sales Tax Bar Association's case (supra), our own Hon'ble High Court clearly observed that the scheme of DVAT Act itself is first allowing a unilateral assessment by the assessee, thereafter a unilateral assessment by the Assessing Officer and

thereafter providing for a bilateral assessment after opportunity of hearing. As further held, with such a statutory scheme, it cannot be said that the post decisional hearing will be farcical or a sham. Moreover such hearing is in exercise of quasi judicial power and is subject to an appeal to the Tribunal.

In Bansal Dye's case (supra), it was seen that on the basis of survey, a notice was issued to the Assessee under section 59 of the Act as regards the assessment of tax, but the Assessee did not participate in the assessment proceedings and accordingly, notice of default assessment of Tax and interest was issued by the Assessing Officer. On the same day, the Assessing Officer passed the order of penalty, without service of prior notice on the Assessee.

Undisputedly, the decision in Sales Tax Bar Association's case on the relevant point of opportunity of being heard, before assessment of penalty, was not referred to by learned counsel for the petitioner or the respondent in Bansal Dye's case (supra). Sh. A.K. Babbar, learned counsel representing the appellant herein, was also representing the petitioner in Bansal Dye Chem Pvt. Ltd's case (supra).

Even otherwise, here the appellant filed objections before learned OHA, and the learned OHA disposed of the objections after providing to the dealer – appellant opportunity of being heard. In this way, this is a case where impugned order came to

be passed by Learned OHA, after affording reasonable opportunity of being heard, in terms of decision in Sales Tax Bar Association's case.

In the given situation, in view of decision in Sales Tax Bar Association Case, decision in Bansal Dye's case (supra), does not come to the aid of the appellant.

39. Another contention raised by learned counsel for the appellant is that section 86(10) consists of two clauses i.e., (a) & (b), but the Assessing Authority nowhere specified as to on account of violation of which of the said clauses he was framing assessments of penalty or levying penalty, and as such the assessments of penalty deserve to be set aside.

40. Section 86(10) of DVAT Act reads as under:

> "Any person who-
>
> (a) furnishes a return under this Act which is false, misleading or deceptive in a material particular; or
>
> (b) omits from a return furnished under this Act any matter or thing without which the return is false, misleading or deceptive in a material particular;
>
> shall be liable to pay, by way of penalty, a sum of ten thousand rupees or the amount of the tax deficiency, whichever is the greater."

41. As noticed above sub-section (10) of section 86 contains two clauses. While imposing penalty, Assessing Authority is required to specify as to due to which reason or violation penalty was being levied.

Herein, Assessing Authority nowhere specified as to due to which reason/violation i.e., out of clause (a) & (b), the penalty was being levied.

42. When the matter came up before learned OHA, he nowhere discussed the ground raised on behalf of the dealer-objector challenging levy of penalty. Actually, learned OHA did not touch the point of levy of penalty at all, to find out its legality or illegality.

As a result, the assessments of penalty and the impugned order deserve to be set aside.

Result

43. In view of the above discussion and findings, the appeals challenging levy of tax and interest are hereby dismissed whereas appeals challenging levy of penalties are hereby allowed.

44. 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 : 04/05/2023.

4/5/23

(Narinder Kumar)
Member (J)