

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

Review Application No.: 07/ATVAT/2022  
In Appeal Nos.: 1017-1020/ATVAT/2011  
& 193-212/ATVAT/13  
**Date of Order: 11/05/2023**

M/s Dish TV India (P) Ltd.,  
B-10, Lawrence Road,  
Industrial Area,  
New Delhi-110035.

.....Applicant

v

Commissioner of Trade & Taxes, Delhi

..... Respondent

Counsel representing the Applicant : Sh. Vivek Sarin.  
Counsel representing the Revenue : Sh. P. Tara.

**ORDER**

1. Present application u/s 76(13) of Delhi Value Added Tax Act (hereinafter referred to as DVAT Act) read with Regulation 24 of DVAT (Appellate Tribunal) Regulations 2005 (hereinafter referred to as Regulations) has been filed by the dealer-appellant in Appeal Nos. 1017-1020/2011 & 193-212/13 which were disposed of by this Appellate Tribunal on 02/06/2022 on merits.

In the application, the prayer is for setting aside the judgment

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dated 02/06/2022 to a limited extent as regards directions of remand for further assessment by the Commissioner of Trade & Taxes, Delhi.

2. Applicant has alleged that error or mistake apparent on the face of record has crept in issuing directions by way of remand and as such there are sufficient reasons for review of the said directions.
3. Regulation 24 of Delhi VAT Appellate Tribunal Regulation 2005 pertains to Review of an order. It reads as under :

“(1) Subject to the provisions contained in sub-section (2) of section 76 of the Act and the rules made thereunder, any person considering himself aggrieved by an order of the Tribunal and who, from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the order made against him, may apply for a review of the order within sixty days from the date of service of the order:

Provided that the Tribunal may at any time, review the order passed by it suo motu also for reasons to be recorded by it in writing.

(1) Where it appears to the Tribunal that there is no sufficient ground for review, it shall reject the application.

(2) Where the Tribunal is of opinion that the application for review should be granted, it shall grant the same:

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Provided that-

(a) no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the order, a review of which is applied for; and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the order was made, without strict proof of such allegation.”

4. Arguments heard. File perused.
5. Vide common judgment dated 02/06/2022, while disposing of the above referred to two sets of appeals, this Appellate Tribunal observed in the operative part as under:

“As a result, all these appeals are disposed of and the impugned assessments and the impugned orders as regards levy of tax, interest and penalty, based on the ground of suppression of sale and keeping in view the provision of section 40A of DVAT Act are set-aside.

However, in the given facts and circumstances and to save any loss to the exchequer by way of tax advantage on account of non-refund of input tax credit, due to sale of the set of product at a price lower than the actual purchase price, Assessing Authority shall be at liberty to proceed in accordance with law within the stipulated period from the date of communication of present decision, no doubt, after providing reasonable opportunity of being heard, to the dealer.”





6. The above said observation was by this Appellate Tribunal in para 25 of operative part of the judgment made keeping in view the submission made on behalf of the Revenue while referring to the provisions of Section 9 and Section 10(2) of DVAT Act. Said contention raised by learned Counsel for the Revenue stands recorded in Para No. 22 of the judgment reads as under:

“On the other hand, learned counsel for the Revenue has contended that this is a matter of unjust enrichment of the dealer as it indulged in suppression of sale, claimed crores by way of tax credit and caused loss to the exchequer on account of non-refund of the amount of tax credit so claimed. In this regard, learned counsel has referred to the provisions of Sections 9(1), (4), (6) and 10(2) of DVAT Act.”

7. At the same time, in Para No. 23 of the judgment, this Appellate Tribunal observed in the manner as:

“As regards applicability of provisions of section 9 and 10(2) of DVAT Act, we cannot adjudicate as regards the point of concession of input tax credit already availed of by the dealer-appellant, the reason being that neither the Assessing Authority nor the Learned OHA took up this point for discussion and appropriate action under the law, for the reasons best known to them.

It was for the department to consider the impact of sale of the goods by the dealer in the manner indicated above i.e. at a price lower than the cost price, especially when the dealer had claimed input tax credit. Department was required to look into as to whether the dealer had complied



with or violated any of the provisions of section 9(2) of DVAT Act, by way of non refund of the amount, after having claimed the concession of input tax credit. But, no such step appears to have been taken.

However, in the given facts and circumstances and to save any loss to the exchequer by way of tax advantage on account of non-refund of input tax credit, due to sale of the set of product at a price lower than the actual purchase price, Assessing Authority shall be at liberty to initiate proceedings in this regard, in accordance with law and within the period prescribed calculating the same from the date of communication of present decision."

8. It may be mentioned here that feeling aggrieved by the above said observations made in Para 25 of the judgment and reproduced herein before in Para <sup>5</sup> ~~A~~ of this order, dealer-applicant filed VAT Appeal No. 34/2022 before the Hon'ble High Court.

Hon'ble High Court dismissed the appeal as having been withdrawn, when counsel for the appellant wished to withdraw the same and to move Review application before this Appellate Tribunal.

9. At this stage, it is pertinent to be mentioned that in VAT Appeal No. 34/2022, counsel for the appellant submitted before the Hon'ble High Court that the remand, if made, had to adhere to the conditions set forth in section 76(8) of DVAT Act, 2004. As regards this submission, Hon'ble High Court





observed in Para 13 of the order that this Tribunal will entertain the Review application and rule as to whether the necessary ingredients of remand, as provided u/s 76(8) of the Act were fulfilled in the case.

10. Sub-section (8) of section 76 of DVAT Act reads as under:

“The Appellate Tribunal shall not set aside an assessment and remit the matter to the Commissioner for a further assessment, unless it has first-

- (a) Advised the aggrieved person of the proposed order;
- (b) Offered the person the opportunity to adduce such further evidence before it as might assist the Appellate Tribunal to reach a final determination.”

11. ~~In case M~~ Had this Appellate Tribunal deemed it a fit case for remand and for further assessment, provisions of section 76(8) of DVAT Act were certainly required to be complied with, by advising the appellant of the proposed order and also offering it an opportunity to adduce such further evidence before the Appellate Tribunal which might assist the Appellate Tribunal to give a final determination.

But, as is available from the operative part of the judgment, reproduced above, it cannot be said that while disposing of the appeals, this Appellate Tribunal remanded the matter for framing of further assessment.

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Here, this Appellate Tribunal as noticed above took into consideration a significant aspect that dealer-appellant had availed of benefit of Input Tax Credit; that purchase price of the set of products was about Rs. 2,056/-, but, by way of various transactions the dealer sold the same at a price much below the cost price, and further that said significant aspect skipped consideration of the department, which<sup>it</sup> was required to look into as regards the validity of the claim of the dealer for Input Tax Credit, having regard to the provisions of section 9 and 10 of DVAT Act.

12. When this Appellate Tribunal observed that Assessing Authority shall be at liberty to proceed, it cannot be said that this Appellate Tribunal issued any directions to the Assessing Authority for framing of further assessment. So, it was not a case of remand.

When this Appellate Tribunal observed that Assessing Authority shall be at liberty to proceed in accordance with law, said observation was made having regard to the fact that powers u/s 74A (2) (c) of DVAT Act were available with the Commissioner, for the purpose of Revision, but the said power can be used on perusal of report or information gathered from an order passed by the Sub-ordinate officer or by the Objection

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Hearing Authority or by Appellate Authority/Tribunal.

Clause (c) of sub-section(2) of section 74 A reads as under:

“Notwithstanding anything contained to the contrary in section 34, where in respect of any order or part of the said order passed by the subordinate officer, an order has been passed by any authority hearing the objection or any appellate authority including the Tribunal or such order is pending for decision in objection or in appeal, or an objection or an appeal is filed, then, whether or not the issues involved in the examination have been decided or raised in the objection or the appeal, the Commissioner may, within five years of the end of the year in which the said order passed by the subordinate officer has been served on the dealer, make a report to the said objection hearing authority or the appellate authority including the Tribunal regarding his examination or the report or the information received by him and the said appellate authority including the Tribunal shall thereupon, after giving the dealer a reasonable opportunity of being heard, pass an order to the best of its judgment, where necessary.”

Here, in the course of arguments, learned counsel for the appellant has himself referred to provisions of section 74A (2) (c) of DVAT Act, and submitted that it empowers the Commissioner to make a report to the Appellate Authority including the Tribunal regarding any report or information received by him, whereupon the Tribunal is required to pass an order to the best of its judgment where necessary, and further submitted that in view of this power u/s 74A (2) (c), Commissioner could exercise the said power. However, the





contention is that the Commissioner could exercise such power within a period of 5 years of the end of the year in which the order passed by the sub-ordinate officer was served on the dealer.

As regard this contention, regarding exercise of power within the above said stipulated period, suffice it to say that when Commissioner has not made any report to this Appellate Tribunal for examination, no observation can be made as regard this contention.

13. As already noticed above, the sole purpose for making above said observation in Para 25 of the judgment was to pin point that it department had skipped consideration on the aforesaid aspect i.e. that the dealer-appellant had availed of benefit of Input Tax Credit and that by way of various transactions the dealer sold the set of products at a price much below the cost price, and so that Assessing Authority could take appropriate steps and thereupon power u/s 74A (2) (c) could be resorted to, if so desired, by the Commissioner.
14. One of the submissions put forth by learned counsel for the applicant is that this Appellate Tribunal could not go beyond the subject matter of the appeal filed by the appellant, while



giving liberty to the Assessing Officer to proceed on the aforesaid aspects. In support of this submission, reliance has been placed on following decisions:

1. Ganga Ram Laxmi Narain v. Commissioner of Sales Tax, (1980) taxmann.com 570 (Allahabad);
  2. Advanced Systek (P.) Ltd. v. State of Gujarat (2014) 44 taxmann.com 473 (Gujarat); and
  3. Shehroj Akhtar v. Commissioner of Sales Tax (1991) 1991 taxmann.com 1170 (Allahabad).
15. On the other hand, learned counsel for the Revenue has referred to the provisions of clause (c) of sub-section (7) of section 76 of DVAT Act and submitted that in view of said provision, when the aforesaid liberty was granted to the Assessing Authority, Appellate Tribunal was justified to pass such an order for final resolution of the matter.
16. Counsel for the applicant has submitted that had he been apprised of that Assessing Authority was going to be given liberty to initiate proceedings on the aforesaid aspect, even though in accordance with law, he would have put forth his submissions before this Appellate Tribunal to exercise powers u/s 76(7) of DVAT Act.

It is true that clause (c) of sub-section (7) of section 76 of DVAT Act empowers the Appellate Tribunal to pass such





other order for determination of the issue, but here is a case where this Appellate Tribunal did not adjudicate on the aforesaid aspect- as regards the applicability under the provisions of section 9 & 10 (2) of DVAT Act- clearly observing that neither the Assessing Authority nor OHA had taken up this point for discussion and appropriate action under the law, for the reasons best known to them.

17. An inconsistent argument has been advanced on behalf of the applicant that the Assessing Authority and the OHA had well considered the point of ITC.

Once, it has been contended on behalf of the applicant that this Appellate Tribunal could not travel beyond the subject matter of the appeal, does the above said contention raised on behalf of the applicant <sup>amount to</sup> not/inconsistent plea? The second mentioned contention is inconsistent with the first contention that this Appellate Tribunal exceeded the subject matter of the appeal.

18. So far as powers of the Appellate Tribunal under sub section (7) of Section 76 of DVAT Act are concerned, no doubt, final resolution of the matter can be made, but Appellate Tribunal decided the issues which were the subject matter of the appeals. Therefore, decisions cited by counsel for applicant do

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not come to the aid of the applicant.

19. As already noticed above, this is not a case of remand of the matter by this Appellate Tribunal on the aforesaid aspect or issuance of any direction to the Assessing Authority that it must initiate proceedings or make further assessment, even beyond the provisions of law or beyond the period prescribed.
20. As finds mentioned in para 25 of the judgment passed by this Appellate Tribunal, specific contention on the ground of unjust enrichment of the dealer was made by counsel for the Revenue and that too in presence of the counsel for the appellant.

Since this point was not taken up by the Department or by learned OHA, this Appellate Tribunal did not adjudicate the same, and even could not adjudicate, as the same required material for which no opportunity could be offered to the applicant in the appeals, reason being that the contention was raised on behalf of the Revenue before this Appellate Tribunal for the first time.

21. Learned counsel for the Revenue has also pointed out that some of the paragraphs of the review application have not been happily worded. He has specified said paragraphs in






presence of counsel for the applicant.

In this regard, suffice it to say that for the purpose of review of an order, applicant is to allege in the application that its case is covered by such and such ground available under regulation 24 of DVAT Regulations, 2005, and not that such and such wrong finding has been recorded, as in case of a wrong finding, it would be a matter of appeal, and not a matter of review.

22. No other contention has been raised or ~~perused~~<sup>perused</sup> by counsel for the applicant in the course of arguments.
23. In view of the above said discussion, no case is made out for review of the judgment dated 02/06/2022, on the aforesaid aspects. The review application is disposed of accordingly.
24. File be consigned to the record room. 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 : 11/05/2023

  
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