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

M.A. Nos. 645-646/23
In Appeal Nos. 466-467/ATVAT/22
&
M.A. Nos. 647-648/23
In Appeal Nos. 468-469/ATVAT/22
Date of Order: 11/05/2023

M/s Metrostroy Era JV,
1107, Indraprakash Building 21,
Barakhamba Road,
New Delhi-110020. .....Applicant

v.

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

Counsel representing the Applicant : Sh. Rohit Gautam.
Counsel representing the Revenue : Sh. P. Tara.

Common Order on 4 Applications u/s 76(4) of DVAT Act

M.A. Nos. 645-646/23 in Appeal Nos. 466-467/ATVAT/22
(Tax Period- Annual 2013-14)

1. The above captioned two appeals came to be presented by the dealer before the Registry on 27/12/2022 challenging order dated 28/10/2022 passed by learned Special Commissioner-III-Objection Hearing Authority (hereinafter referred to as OHA).

2. Vide impugned orders, learned OHA disposed of objections dated 20/11/2017 filed by the dealer-assessee-objector whereby

it had challenged notice of default assessment of tax & interest framed on 15/09/2017 u/s 32 of Delhi Value Added Tax Act (hereinafter referred to as DVAT Act), and separate notice of assessment of penalty framed on 22/09/2017, u/s 33 of DVAT Act.

3. As is available from the impugned order, by way of preliminary issue, learned OHA also dealt with notice in form DVAT 41 and came to the conclusion that it was served upon him (OHA) for the first time on 18/10/2022.

Accordingly, he proceeded to decide the objections on merits.

On merits, learned OHA, upheld both the assessments of tax & interest and that of penalty, for the reasons recorded therein.

4. Assessment dated 15/09/2017, u/s 32 of DVAT Act, which pertains to the period - **Annual 2013-14** came to be framed due to following reasons:-

> "A notice vide ref. No. 10325741 dated 31-05-2017 u/s 59(2) was sent to the dealer to scrutiny of records for the assessment year 2013-14. The dealer has not submitted any documents/reply. Subsequently, a reminder vide ref. No. 50071982/6248 dated 28-06-2017 was issued to produce the records on 06-07-2017. Instead of submitting the records, the dealer applied for time of 15 days vide letter dairy No. 4852/Spl. Zone dated 06-0-2017. The time sought on the ground of GST preparation. Therefore, a letter from the dealer dated 10-07-2017 diary No. 4871/Spl. Zone has also been received and the undersigned asked the bearer to come with records/ required documents on 25-07-2017 but no one

appeared on behalf of the company nor any records/ books of accounts were submitted till date, hence, no option is left but to frame default assessment on the basis of available records on DVAT system. During the year 2013-14, the dealer has executed works contract amounting to Rs.117,01,58,006/- and claimed expenses towards labour, services & other like charges for Rs.31,42,03,136/- which is approximately 26.85% of WCT turnover which can be verified by going through books of accounts/bank records, payment towards labour and services, bills etc. Therefore, despite the opportunities given to the dealer and in the absence of supporting documents of expenses claimed towards labour, services & other like charges, the expenses towards labour & services can be allowed upto 25% of WCT turnover as allowed by the provision of Rule 3 of DVAT Rule, 2005. The claimed excess deduction of labour expenses of Rs. 2,16,63,635/- (1.85% of WCT GTO) is found which is taxed @ 12.5% along with interest."

Penalty came to be imposed vide separate assessment framed on dated 22/09/2017, u/s 33 of DVAT Act, due to violation of provision of Section 86 (10) of DVAT Act, for the reasons given above.

5. Learned OHA disposed of objections filed by the dealer u/s 74 of DVAT Act, vide common order dated 28/10/2022.

6. Feeling dissatisfied with the impugned order, dealer has filed the above captioned appeals.

7. The above captioned two appeals came to be presented by the dealer before the Registry on 27/12/2022 challenging order dated 28/10/2022 passed by learned Special Commissioner-III-Objection Hearing Authority (hereinafter referred to as OHA).

8. Vide impugned order learned OHA disposed of objections dated 19/04/2018 filed by the dealer-assessee-objector, whereby it had challenged notice of default assessment of tax & interest framed u/s 32 of DVAT Act on 20/02/2018, and separate notice of assessment of penalty framed on the same date u/s 33 of DVAT Act.

9. As is available from the impugned order, learned OHA also dealt with a preliminary issue, pertaining to notice in form DVAT 41 and came to the conclusion that it was served upon him for the first time on 18/10/2022. Accordingly, he proceeded to decide the objections on merits.

10. On merits, learned OHA, upheld both the assessments of tax & interest and that of penalty, for the reasons recorded therein.

11. Assessment dated 20/02/2018, u/s 32 of DVAT Act pertaining to the period **Annual 2014-15** came to be framed due to following reasons:-

> "A notice vide ref. No. 10344021 dated 13-09-2017 u/s 59(2) of DVAT Act, 2004 was sent to the company to produce books of accounts for scrutiny for the year 2014-15.

On the given date no one appeared nor was documents produced on behalf of the company. Subsequently, a reminder notice vide ref. No. 50074041/6745 dated 28-09-2017 u/s 59(2) of DVAT Act, 2004 sent to the company. In response to the said reminder notice, Sh. P.N. Mishra, Accountant of the company appeared in the office of the undersigned on 28-09-2017 and requested for some time to produce books of accounts. The case was fixed for 20-10-2017 but on 20-10-2017 Sh. Mishra sought again more time. The case was fixed for 25-10-2017. On 25-10-2017 he again sought time and the case was adjourned for 02-11-2017. On 03-11-2017, the company has simply submitted some documents. A letter vide ref. No. 6883 dated 03-11-2017 was sent to the company with the directions to appear on 10-11-2017 at 11:00 am and produce paper related to exemptions claimed towards labour & services, reconciliation of TDS with turnover etc. and presence of authorized person for the hearing/explanation. Sh. Mishra appeared on the given date and sought more time on a/c of GST finalization/filing. The case was fixed for 17-11-2017. Sh. Pashupati Mishra, Accountant appeared on 17-11-2017, 24-11-2017 & 08-12-2017 and submitted POA, books of accounts like sale & purchases summary, TDS certificates, TDS reconciliation, details of labour & services, payment details to sub-contractor, trading A/c, balance sheet, invoices, bifurcation of exempted sale, consultancy bills etc. time to time. The case was fixed for 14-12-2017 but no one appeared, hence a letter was sent to the company. On 16-01-2018 Sh. V.K. Walia informed that Sh. P.N. Mishra POA holder has left the company without intimation and he requested for some time, accordingly the case was fixed or 22-01-2018. Om 24-01-2018, One Sh. Vinod Bhatia, authorized signatory of the company appeared and submitted that due to death in his family he could not turn up on 22-01-2018 and now submitting the details of petty contractors as asked vide letter No. 7021 dated 27-12-...

The books of accounts/records of the company have been scrutinized and observed that the company is engaged in the business of civil works contract for DMRC. The company have been awarded for design and construction of tunnel by Shield TBM and Lal Quila & Kashmiri Gate for underground works under Delhi MRTS Project Phase – III. As per the submission made by the company, the said work

was executed about 60 feet below the ground level and there are huge heavy rocks on this route from Jama Masgid to Kashmiri Gate passing under the Lal Quila. This work involved the activity of Soil Investigation, Bore Holes,, Design & Drawings, Rocks cutting and its disposal, earth excavations and its disposal, removal of utilities and construction of underground Platforms for Metro Rail. The company executed works contract amounting to Rs. 136,72,22,467/- & claimed exemptions towards labour and services amounting to Rs. 76,66,38,636/- on actual basis and remaining amount of Rs. 60,05,83,831/- is taxable turnover. On scrutiny of the records related to labour & services it is noticed that the dealer has claimed Administrative expenses under the head Guest House expenses for Rs. 10,56,000/- but as per rule 3 of DVAT Rules, 2005, the same is not relatable to the labour, services and other like charges, hence, same is taxed now @ 12.5%.
The penalty u/s 86(10) of DVAT Act, 2004 is also imposed on tax deficiency.

Further, the company executed the said project through involving sub-contractors. As per record, M/s Era Infra Engineering Ltd. executed the works through labour and as per the purchase 2A of Metrostroy Era JV, the goods i.e. Iron & steel taxable @ 5% and other construction material taxable @ 12.5% were also supplied by M/s Era Infra Engineering Ltd. However, as pre record and hearing on 24-01-2018, the authorized person of the dealer stated that no TDS has been deducted by contractee i.e. M/s Metrostroy Era JV from the payment made to (Contractor) M/s Era Infra Engineering Ltd. as it involved only labour contract. The undersigned is of the view that when the work is executed by the same sub-contactor through labour and material (composite) the TDS must be deducted from the payment made by the contractee (M/s Metrostroy Era JV). The dealer has tried to bifurcate the composite supply of work contract by showing purchase of material from M/s Era Infra Engineering Ltd. and labour work from M/s Era Infra Engineering Ltd. separately. Therefore, it is clear that work executed by M/s Era Infra Engineering Ltd. for M/s Metrostroy Era JV falls under the definition of "Works Contract" and liability of deduction of TDS under DVAT Act applies. As per record the payment made to M/s Era

Infra Engineering Ltd. for supply of labour charges was made for Rs. 52,63,80,596/- amd 2% TDS (Rs. 1,05,27,613/-) under Income Tax Act has been deducted but no TDS deduction was made for the composite supply of works contract under DVAT Act. Although, the company is registered in TAN w.e.f. 01-04-2005 vide TAN No. 07853003949 and dealer profile reflects NIL TDS deposit during the year 2014-15. Accordingly, failure to deduct the TDS on the total payment made to Era Infra Engineering Ltd. for Labour of Rs. 52,63,80,596/- and material of Rs. 51,38,37,292/- (Total Rs. 104,02,17,888/-), the dealer is liable to pay a penalty u/s 36A(8) of DVAT Act, 2004 for not deducting the applicable TDS @ 4%, The assessment & penalty order is passed accordingly under DVAT Act."

12. As noticed above, penalties came to be imposed vide separate assessments framed u/s 33 of DVAT Act, due to violation of provision of Section 86 (10) of DVAT Act, for the same reasons.

13. Vide common order dated 28/10/2022, learned OHA disposed of objections filed by the dealer u/s 74 of DVAT Act.

Feeling dissatisfied with the impugned order, dealer has filed the above captioned appeals.

14. On 06/01/2023, when this file was taken up for hearing on application u/s 76(4) of DVAT Act, counsel for the Revenue pointed out that no copy of resolution, if any, passed by the Board of Directors, was filed by the dealer-applicant in proof of authorization for the purpose of filing of the appeal and the accompanying application.

Thereupon, counsel for the applicant submitted that Sh. Hem Singh Bharana having authorized Sh. Pradeep Kumar, the appeal and applications came to be signed and verified by Sh. Pradeep Kumar. However, he sought adjournment to file power of attorney said to have been executed by M/s Metrostroy-Era, Joint Venture, in favour of Sh. Hem Singh Bharana and as such file was adjourned to 13/01/2023.

However, on 13/01/2023, no copy of resolution by board of directors, authorizing Sh. Hem Singh Bharana, or that of power of attorney in favour of said Sh. Hem Singh Bharana came to be filed. Matter was adjourned to 20/01/2023.

On that date, counsel for the appellant presented photocopy of power of attorney dated 29/11/2011, bearing attestation of 30/11/2011. Subsequently, copy of another power of attorney dated 04/08/2020 in favour of Sh. Hem Singh Bharana came to be filed by counsel for the applicant.

15. Arguments heard. File perused.

16. Sub-section (3) of Section 76 of DVAT Act provides that every appeal made under this section shall be in the prescribed format, verified in the prescribed manner and shall be accompanied by such fee as may be prescribed.

Sub-rule (5) of Rule 57(A) of DVAT Rules, 2005 provides that an appeal to the Appellate Tribunal shall be signed by the appellant and shall be presented by him in person or by his

Authorized Representative to the Appellate Tribunal or to an officer authorized by the Appellate Tribunal.

17. The objection raised on behalf of the Revenue to the maintainability of the appeal and accompanying application u/s 76(4) of DVAT Act is that dealer has failed to place on record any document in proof of proper authorization in favour of Sh. Pradeep Kumar, and further that no resolution by the members of the Joint venture has been filed for the purpose of signing and filing of the appeal and the application u/s 76(4) of DVAT Act.

18. On the other hand, learned counsel for the appellant has contended that present appeal came to be signed and filed by Sh. Pradeep Kumar, duly authorized by Sh. Hem Singh Bharana, Power of Attorney holder, on behalf of the appellant firm and that authorization duly executed in favour of Sh. Pradeep Kumar forms part of record.

19. In support of his submissions, counsel for the appellant has placed reliance only on decision in **Mita India Pvt. Ltd. v. Mahendra Jain,** 2023 Live Law (SC) 121.

20. As per copy of Power of Attorney dated 29/11/2011, the joint venture of M/s Metrostroy and Era, constituted and appointed Sh. Hem Singh Bharana (designated as Manager) as Authorized Representative/Attorney to lawfully represent the said joint venture and to execute and perform all or any of the acts, deeds, matters and things in the name and on behalf of the said joint venture.

21. Para 3 of the Power of Attorney, being relevant for the purpose of matter before this Appellate Tribunal, needs to be reproduced for ready reference. It reads as under:

> "To acknowledge in the name of the joint venture this Power of Attorney and to register and record the same in any appropriate office as may be necessary or advisable and to procure to be done any and every act and thing whatsoever which may in any wise be requisite or proper for authenticating and giving full effect to this Power of Attorney according to the local laws and usages. He is further authorized to authorize some other person to appoint pleader/advocate in any matter before any Tribunal/Court/Fora/Authority and to do all the things that may be necessary and to sign all the required documents as and when required."

22. In view of the above contents of Para 3 of the Power of Attorney, the joint venture is recorded to have authorized Sh. Hem Singh Bharana to authorize some other person to appoint Pleader/Advocate in any matter before any Tribunal/Court/Fora/Authority and to do all the things that may be necessary and to sign all the required documents, as and when required.

23. Vide same Power of Attorney, the joint venture agreed to ratify and confirm whatsoever the Attorney-Sh. Hem Singh Bharana shall lawfully do or cause to be done in or about the premises by virtue of the said Power of Attorney, including such confirmation whatever shall be done between the time of revocation of this Power of Attorney by the joint venture.

24. The above said Power of Attorney is purported to have been signed by the Authorized Signatory of M/s Metrostroy and also by the Authorized Signatory of M/s Era Infra Engineering Ltd.

25. As per copy of joint venture agreement between the above said two companies, said agreement had already been entered into and executed on 14/11/2011.

26. With this appeal, a document dated 09/09/2022 titled as "Authorization" came to be filed. It reads as under:

> "I, Hem Singh Bharana S/o Shri Raghubeer Singh Bharana R/o C -56/41, Sector 62, Noida representing M/s. Metrostroy Era do hereby authorise Sh. Pradeep Kumar S/o Sh. Ashok Kumar R/o H. No.18/122, NCT, Faridabad, Haryana to file petition in the Hon'ble Tribunal-VAT in the matter of pending demands , penalties and refund on behalf of M/s. Metrostroy Era JV.
>
> I further authorise Sh. Pardeep Kumar to appoint pleader/advocate in the said matter. He Is also authorised to do all the things that may be necessary and sign all the required documents.
>
> Representative
>
> Authorized Representative."

26. In **Mita India Pvt. Ltd's** case (supra), Hon'ble Apex Court observed in the manner as:

> "The law is settled that though the general power of attorney holder cannot delegate his powers to another person but the same can be delegated when there is a specific clause permitting sub-delegation."

Therein, a careful reading of the general power of attorney would reveal that the appellant-company in its meeting of the board of directors held on 1st May, 2010 has resolved to appoint one of its directors Kavinder Singh Anand as its attorney of the company who was specifically authorised vide paragraph 2 to appoint counsels or special attorney(s).

Hon'ble court observed that the language deployed i.e. to appoint special attorneys was clear enough to indicate that the power of attorney holder had been authorised to appoint special attorneys in addition to the counsel for conducting cases and for doing other relevant and material acts in that connection.

Therein, the power of attorney holder was appointed under the resolution of the board of directors of the appellant company and the draft of the power of attorney was duly approved by the board.

Status of Joint Venture

27. In the course of arguments, counsel for the applicant has submitted that status of joint venture is that of a firm and that under the Partnership Act, no Board of Resolution is required to be passed to authorize for the purpose of signing and filing of an appeal. In support of this contention, reliance has been placed on the decision in **Faqir Chand Gulati v. Uppal Agencies Pvt. Ltd. and Ors.**, (2008) 10 SCC 345.

In **Faqir Chand Gulati's case (supra)**, Hon'ble Apex Court, while dealing with the question as to whether the agreements relied on were truly joint ventures in the legal sense, observed in the manner as:

> "17. This Court had occasion to consider the nature of `joint-venture' in New Horizons Ltd vs. Union of India MANU/SC/0564/1995 : 1995 (1) SCC 478. This Court held :
>
> > "The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. [Black's Law Dictionary; Sixth Edition, p. 839]. According to Words and Phrases, Permanent Edition, a joint venture is an association of two or more persons to carry out a single business enterprise for profit [P.117, Vol. 23]. "
>
> [Emphasis supplied]

The following definition of 'joint venture' occurring in American Jurisprudence [2nd Edition, Vol.46 pages 19, 22 and 23] is relevant:

> "A joint venture is frequently defined as an association of two or more persons formed to carry out a single business enterprise for profit. More specifically, it is in association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit, for which purpose such persons combine their property, money, effects, skill, and knowledge, without creating a partnership, a corporation or other business entity, pursuant to an agreement that there shall be a community of interest among the parties as to the purpose of the undertaking, and that each joint venturer must stand in the relation of principal, as well as agent, as to each of the other coventurers within the general scope of the enterprise.
>
> Joint ventures are, in general, governed by the same rules as partnerships. The relations of the parties to a joint venture and the nature of their association are so similar and closely akin to a partnership that their rights, duties, and liabilities are generally tested by rules which are closely analogous to and substantially the same, if not exactly the same as those which govern partnerships. Since the legal consequences of a joint venture are equivalent to those of a partnership, the courts freely apply partnership law to joint ventures when appropriate. In fact, it has been said that the trend in the law has been to blur the distinctions between a partnership and a joint venture, very little law being found applicable to one that does not apply to the other. Thus, the liability for torts of parties to a joint

venture agreement is governed by the law applicable to partnerships."

"A joint venture is to be distinguished from a relationship of independent contractor, the latter being one who, exercising an independent employment, contracts to do work according to his own methods and without being subject to the control of his employer except as to the result of the work, while a joint venture is a special combination of two or more persons where, in some specific venture, a profit is jointly sought without any actual partnership or corporate designation."

(Emphasis Supplied)

To the same effect is the definition in Corpus Juris Secundum (Vol. 48A pages 314-315):

"Joint venture," a term used interchangeably and synonymous with 'joint adventure', or coventure, has been defined as a special combination of two or more persons wherein some specific venture for profit is jointly sought without any actual partnership or corporate designation, or as an association of two or more persons to carry out a single business enterprise for profit or a special combination of persons undertaking jointly some specific adventure for profit, for which purpose they combine their property, money, effects, skill, and knowledge..... Among the acts or conduct which are indicative of a joint venture, no single one of which is controlling in determining whether a joint venture exists, are: (1) joint ownership and control of property; (2) sharing of expenses, profits and losses, and having and exercising some voice in determining division of net earnings; (3) community of control over,

and active participation in, management and direction of business enterprise; (4) intention of parties, express or implied; and (5) fixing of salaries by joint agreement."

(Emphasis Supplied)

Black's Law Dictionary (7th Edition, page 843) defines `joint venture' thus :

"Joint Venture : A business undertaking by two or more persons engaged in a single defined project. The necessary elements are : (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member's equal voice in controlling the project."

An illustration of joint venture may be of some assistance. An agreement between the owner of a land and a builder, for construction of apartments and sale of those of apartments so as to share the profits in a particular ratio may be a joint venture, if the agreement discloses an intent that both parties shall exercise joint control over the construction/development and be accountable to each other for their respective acts with reference to the project."

28. As noticed above, joint venture is in general governed by same rules by which a partnership firm is governed, even if not exactly the same as those are governed partnerships.

29. In the course of arguments, learned counsel for the Revenue has also not disputed that status of joint venture is that of a firm. As a result, prima facie, at this stage it can be said that no resolution is required to be passed like the one to be passed by the Board of

Directors of a company in its meeting, so as to authorize any person for the purpose of filing of appeal.

30. The contention raised by learned counsel for the Revenue is that each member of the joint venture being a company, was required to pass resolution in the Minutes of Meeting of its respective Board of Directors for the said purpose.

31. On the other hand, counsel for the applicant has submitted that Metrostroy, one of the members of the joint venture being a foreign company, stopped running its business in India long back, and as such no such step could be taken. At the same time, counsel for the applicant submits that when the assessment proceedings were conducted by the Assessing Authority, he never raised any objection on the ground that the joint venture was not being duly represented, and as such at this stage, the point raised by counsel for the Revenue on the non-maintainability of the appeal does not adversely affect the case of the applicant.

32. It is true that from the impugned assessments, it cannot be said that the Assessing Authority, at any point of time observed that the joint venture-dealer was not being duly represented by competent person or duly authorized person. It was during objections that learned OHA observed that all the objections were signed by Sh. Subhash Sharma "by cancelling/cutting the name of one Sh. Praveen Kumar Sharma". In reply to the contention raised by counsel for the Revenue while referring to

the said observation by learned OHA, in the course of arguments, counsel for the applicant has displayed ignorance on this aspect, having not gone through the file pertaining to the objection proceeding, even though learned counsel was expected to have gone through the said record.

33. So, these appeals involve a question as to whether the appeals have been signed by a competent/duly authorized person and as to whether non-raising of any objection by the Assessing Authority and by the OHA on the point of due representation during assessment and objection proceedings, adversely affects or not, the case of the applicant/appellant or the same would lead to the non-maintainability of the appeals.

Said question cannot be effectively decided at this stage, while disposing of these 4 applications, where the question is as to whether the appeals be entertained with pre-condition of deposit towards the disputed demand or as to whether the appeal be entertained while waiving of the said pre-condition u/s 76(4) of DVAT Act.

Pendency of proceedings under IBC against Era Infra Engineering Limited, a partner of the joint venture

34. One of the submissions on behalf of the applicant is that M/s Era Infra Engineering Limited is under moratorium in case no. (IB) - 190 (PB)/2017 titled as Union Bank of India v. M/s Era Infra Engineering Limited.

As per copy of order dt. 24/02/2023 passed in those proceedings reveals that Proceedings in the petition No. IB-190(PB)/2017 titled as Union Bank of India v. M/s Era Infra Engineering Ltd, u/s 7 of IBC, commenced before Hon'ble NCLT in the year 2017.

From the said order, in those proceedings, it transpires the resolution professional was appointed by the Hon'ble NCLT. Furthermore, in those proceedings, an application i.e. IA-1990/2022 came to be filed by EPFO Nagpur u/s 60(5) of IBC read with Rule 11 of NCLT Rules 2016 and thereupon Resolution Professional was directed to ascertain whether the composite claim of EPFO as a whole includes claim of EPFO of Nagpur or not.

It is further available from the said order that Resolution Professional filed an application u/s 60(5) of IBC with respect to the recovery of some dues from M/s Sony Infratech Pvt. Ltd.

How those proceedings do not arise out of a petition filed by M/s Era Infra Engineering Ltd.

35. As noticed above, default assessment of tax and interest came to be framed due to the reason that during the relevant years, the dealer – applicant executed "Works Contract" and claimed expenses towards labour, services and other like charges, which could be verified from the books of account/ bank record, payment towards labour and services etc., and that in absence of supporting document of expenses claimed towards labour, services and other like charges, despite opportunities given to the dealer, such

expenses could be allowed up to 25% of Works Contact turnover, as per Rule 3 of DVAT Rules 2005.

Accordingly, excess deduction of labour expenses was taxed at the rate of 12.5%.

DVAT-41 – Preliminary issue before OHA

36. As noticed above, learned OHA dealt with a preliminary issue raised by the objector on the basis of form DVAT 41 and applicability of provisions of sub-sections (8) and (9) of section 74 of DVAT Act.

37. On behalf of the applicant, it has been submitted that when objections filed by the dealer – objector were not being disposed of, DVAT 41 was sought to be filed before OHA, but the office of the OHA refused to acknowledge the same, and thereupon, DVAT 41 was sent to the Commissioner on 05/08/2022, Department of Trade & Taxes, on his E-mail-ID, with a forwarding letter of the same date.

38. Attention has been drawn to copy of above said forwarding letter dated 05/08/2022 and copy of form DVAT 41, of the same date. Attention has also been drawn to affidavit of the Advocate (counsel representing the appellant – applicant herein), in support of the above said averments on the point of submission of DVAT 41, refusal by the office of OHA to receive the same and dispatch thereof on the Email-Id of the Commissioner.

39. The contention is that OHA was required to dispose of the objection up to 20/08/2022, but, herein the objections having been disposed of on 28/10/2022, the impugned order deserves to be set aside and as the objections filed by the dealer/were deemed to have been allowed.

40. In the grounds of appeal, it stands denied by the dealer-applicant that on 19/10/2022 written submissions were presented by counsel for the dealer via E-mail and that on 20/10/2022 counsel for the dealer presented written submissions while appearing in person. Claim of the appellant is that on these two dates, only an application was presented on behalf of the dealer drawing attention of OHA towards statutory provisions of the Act.

41. On the other hand, on behalf of the Revenue, it has been submitted that as observed by the OHA in the impugned order, the jurisdiction to deal with objections pertaining to Zone – 12 (Special Zone) was transferred to him by the Commissioner vide order dated 08/08/2022 and 09/08/2022 being holiday, he came to know on 10/08/2022 about the said order dated 08/08/2022.

42. Reference has also been made to the following observations made by OHA in the impugned order:

> "As the matter came into my notice for the first time on 10/10/2022, a notice of hearing was issued on 11/10/2022 calling upon the objector for personal hearing on 20/10/2022. Above notice was sent to the registered place of business of the objector. However, the same was returned back undelivered on 13/10/2022 by the Postal Authority. Postal remarks on the body of the envelope are not legible.

Shri Rohit Gautam, Advocate, visited the personal branch on 18/10/2022 to deliver a letter addressed to Commissioner, Trade and Taxes, with a copy endorsed to this office. While his letter was duly received by the Personal Branch, he refused to receive the hearing notice which had been received back undelivered from the postal authorities. In view of the above, said notice was served by the Reader upon Shri Rohit Gautam, Advocate on his email-id (kdlawfirm@gmail.com) as well as through whatsapp (Mobile No. 8860637476, delivered and seen at 12:59 PM on 18.10.2022. In response to our email dated 18.10.2022, Ld. Counsel sent written submissions on 19/10/2022 at 22.02 hrs. On 20.10.2022, Ld. Counsel appeared and filed his written submissions. Ld. Counsel was heard on preliminary issues as well as on merits, as raised by him in his communications dated 18/10/2022 as also his written submissions filed on 20/10/2022."

43. Accordingly, it has been contended on behalf Revenue that impugned order passed on 28/10/2022 can safely be said to have been passed within 15 days, and/ there is no merit in the contention raised on behalf of the applicant that the objections were deemed to have been allowed.

44. From the impugned order, it transpires that learned OHA, while disposing of the preliminary issue, observed in the manner as:

"9.During the hearing on 20.10.2022, Ld. Counsel pressed on the deemed allowance of objections on the basis of notices filed in Form DVAT-41. However, I find it difficult to accept the above contention for the following reasons:-

i) At the very outset, it is relevant to mention that during the entire proceedings, there is no authority letter, POA or Vakalatnama has been made available in favour of Shri Rohit Gautam, Advocate

who is appearing on behalf of the objector. In fact, the file contains Vakalatnama in favour of a Chartered Accountant namely, Sh. Sanjeev Garg;

Notstanding the above,

ii) Ld. Counsel vide his written submissions filed on 10.10.2022 requested to delete the disputed demands on the basis of notices in Form DVAT- 41 which were allegedly attempted to be served upon the then OHA on 05.08.2022 as well as upon Commissioner. It is relevant to mention that on one hand, ld counsel is assuming that objections are deemed to have been allowed in terms of Section 74(9) of the DVAT Act and on the other, he has endorsed a copy of this communication to OHA. Needless to say, assessment or deletion of any demand or passing consequential order are the actions on the part of the concerned Assessing Authority and do not pertain to OHA;

iii) Ld Counsel has also taken an interesting argument that refusal is a deemed acceptance. On this aspect, he has also relied upon Section 27 of the General Clauses Act, 1897 which is reproduced below for ready reference:-

> "27. Meaning of service by post- where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expression "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Perusal of the above provision clearly shows that it is relevant for service by post and is in altogether a different context. It has nothing to do with the argument taken by the Ld. Counsel that refusal is deemed acceptance, that too with regard to service of notice in Form DVAT-41 which has to be governed strictly by the provisions provided under the DVAT Act and Rules made thereunder;

iv) Even otherwise, it is relevant to mention that there is no evidence on record to prove that service of said notices in Form DVAT-41 was refused by the then OHA. It is also evident from the fact that in the month of August, 2022, same objector had filed two notices in form DVAT-41 with the Data Entry Operator posted in the personal branch of the same OHA and consequent to change in jurisdiction vide order no.F.III/7/T/MISC./2020/ESTT./PT. FILE-I/8976-982 dated 08.08.2022, the said matter had also been decided by me vide order dated 16.08.2022. It is therefore, difficult to accept that while notices in form DVAT-41 had been accepted by OHA, which as mentioned above, were disposed of by m vide order dated 16.08.2022, the same OHA had refused to accept notices in form DVAT-41 from the same objector in respect of different objections;

v) Here, it is also relevant to mention that Rule 56(2) of the DVAT Rules specifically provides for service of notice in form DVAT – 41 " in person" and therefore, service of said notice has to be made upon the concerned OHA in person. Further, it is also relevant to mention that in order to facilitate dealers who wish to serve notice in Form DVAT-41 which I am not available in office, vide notice no. SCTT-III/2022/244-46 dated 06.09.2022, I have designated and authorised the Reader to receive such notices. In this regard, notice has also been displayed outside the office for the information of dealer/ld counsels.

vi) Ld counsel has vehemently submitted that now I have become functus officio in the matter as statutory period of 15 days had already expired on 20.08.2022. Interestingly, Ld Counsel's submissions are contrary to each other. He has filed written submissions through mail on 19.10.2022 and also during hearing on 20.10.2022. He has also appeared for hearing on merits on 20.10.2022. He "cannot have his cake and eat it too."

45. In view of the above said observations, learned OHA rejected the contention raised on behalf of the objector that it was a case where the objections were deemed to have been allowed.

46. In the course of arguments, counsel for the applicant has not disputed that jurisdiction to deal with objections u/s 74 of DVAT Act was conferred on learned OHA on 08th of August. When a specific query has been raised by this Appellate Tribunal to counsel for the applicant as to whether learned OHA has correctly recorded in the order that he came to know of DVAT 41 only on 18th of October, counsel for the applicant submits that he did not inspect the file pertaining to the objections proceedings and as such he cannot reply the query. Therefore, prime facie, at this stage it can be said that what learned OHA has recorded in this regard is correct. The contention that the impugned order came to be passed after 15 days period, can be appreciated only at the time of final arguments, if better material is brought on record by the appellant.

On Merits

47. Levy of Tax and Interest by way of default assessment has been challenged on the ground that same has been levied against the provisions of section 5(2) of the DVAT Act read with Rule 3 of DVAT Rules, as the dealer was maintaining separate record

from the initial stage depicting labour and like charges separately.

Counsel for the Revenue has submitted that the Assessing Authority found that the applicant – dealer had claimed expenses towards labour, services, other like charges, which were found to be approximately 26.85% of WCT and that when the dealer was asked to produce books of accounts, proof of payment towards labour and services, bill etc., despite repeated opportunity but to fail to produce any such document. Counsel for Revenue has further submitted that even before this Appellate Tribunal, applicant has failed to produce any such document, and as such, this is a case where the application u/s 76(4) of DVAT Act deserve to be dismissed and the applicant is required to deposit the entire disputed amount towards tax, interest and penalty.

48. In the course of arguments, counsel for the applicant has not refuted the above said contention advanced by counsel for the Revenue. Indisputably, no document i.e. books of accounts, proof of payment towards labour and services, bill etc., has been filed by the applicant so far before this Appellate Tribunal, as were desired by the Assessing Authority for the purpose of framing of assessment and making correct calculation of the said charges. What counsel for the applicant has submitted is that the applicant would file documents when the appeal comes up for final arguments. But the fact remains that in absence of

any such document, prima facie, it cannot be said at this stage that the amount of such charges shown by the applicant in the returns was correct and that the tax levied by the Assessing Authority on this point, is wrong.

Plea of Adjustment of Refund towards Demands

49. One of the contentions raised on behalf of the applicant is that the Assessing Authority has already adjusted amount due to the appellant by way of refund, towards the disputed demands, but not reflected the same in the assessments.

In this regard, counsel for the applicant has placed reliance on photocopy of screenshot-document depicting refund status of the joint venture as regards tax period – 4th Quarter of 2016 and 1st Quarter of 2017: to another screenshot depicting Requisition Account for declaration Form 'C', and contended that the first entry depicts balance by way of demand of Rs. 7,91,17,805/-, for the tax period – 2014-15 and the another balance by way of demand of Rs. 7,39,76,885/- for the tax period – 2015-16.

50. Counsel for the Revenue has submitted that in the other 2 appeals No. 441/22 & 442/22 while arguing on applications u/s 76(4) of DVAT Act filed by the same dealer, and the same set of documents i.e. the screenshots, therein counsel for the applicant had placed reliance on the same set of documents to point out that the amount of refund adjusted, as regards tax period - 4th Quarter of 2016 and 1st Quarter of 2017, and as such the same

amount cannot be taken into consideration for the purpose of present application/appeal which pertains to the year Annual 2013 and Annual 2014.

In the course of arguments, counsel for the applicant has not refuted the aforesaid submission put forth by counsel for the Revenue regarding adjustment of amount against the demands for the above mentioned tax periods i.e. 4th Quarter of 2016 and 1st Quarter of 2017 and also adjustment of refund amount against the penalties as regards tax period – Annual 2014-15 and Annual 2015-16.

In case, a particular amount is stated to have already been adjusted, once again, no reliance can be placed on the same figure of refund amount so adjusted.

In the given facts and circumstances, another question involved in these appeals is if Assessing Authority did not adjust any amount due to the applicant by way of refund, as regards tax period for which impugned assessments have been framed, and the said question can be decided only if better evidence is placed on record on behalf of the applicant.

Penalty

51. Levy of Penalty under section 86(10) has been challenged on the ground that the Assessing Authority nowhere observed that

the returns filed by the applicant were false, misleading or deceptive. In this regard, reliance has been placed on decisions in **M/s Jatinder Mittal Engineers and Contractors v. Commissioner of Trade & Taxes**, MANU/DE/7574/2011 and **M/s Bansal Dye Chem Pvt. v. Commissioner Value Added Tax, Delhi & Anr.**

52. As regards non-providing 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).

Even otherwise, here record reveals that notice u/s 59(2) of DVAT Act was issued by the Assessing Authority to the dealer for scrutiny of records, but despite repeated opportunities given to the dealer failed to produce documents or reply.

The appellant filed objections before learned OHA, and the learned OHA disposed of the objections vide impugned order after providing opportunity to the dealer.

In the given facts and circumstances, at the time of final argument, it would be for the appellant-applicant to show as to how decision in Bansal Dye's case (supra), comes into application.

No other argument has been advanced by counsel for applicant.

53. In view of the above discussion, I find that this is not a fit case to entertain the appeals while totally waiving of the pre-conditions of deposit towards the disputed demands, and while

disposing of these applications, dealer-applicant is directed to deposit 20% of the disputed demands towards tax and interest, within 20 days. Applicant to submit compliance report within 20 days, before the Registry and also apprise counsel for the Revenue, about the same, so that on the next date i.e. 05/06/2023, the appeals are taken up for hearing of arguments. In case of non-compliance with the said order, on the next date matter shall be taken up for further orders having regard to non-compliance.

54. Copy of the common order be supplied to both the parties as per rules. One copy of the order be placed in the connected files. One copy be sent to the concerned authority. Another copy be displayed on the concerned website.

Announced in open Court.
Date : 11/05/2023

Narinder Kumar 11/5/2023

(Narinder Kumar)
Member (J)