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

M. A. No. 153-154/23
In Appeals Nos. 73-74/ATVAT/23
M. A. No. 155-170/23
In Appeals Nos. 75-90/ATVAT/23
Date of Order: 19/06/2023

M/s HDFC Bank Ltd.
RPM Legal Plot No.31,
Najafgarh Industrial Area,
Tower "A", 1st Floor,
Shivaji Marg, Moti Nagar
New Delhi- 110015

.....Applicant

v.

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

Counsel representing the Appellant : Sh. Atul Gupta.
Counsel representing the Respondent : Sh. P. Tara

Order

1. The above captioned appeals are accompanied by two applications u/s 76 (4) of Delhi Value Added Tax Act (hereinafter referred to as DVAT Act) i.e. one in respect of each

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M. A. No. 153-154/23
In Appeals Nos. 73-74/ATVAT/23
M. A. No. 155-170/23
In Appeals Nos. 75-90/ATVAT/23

appeal. Same came to be presented on 02/06/2023. Appellant-applicant has challenged impugned order dated 05/04/2023 passed by learned Joint Commissioner-Objection Hearing Authority (hereinafter referred to as OHA).

2. Dealer-assessee-objector-applicant is in the business of sale of gold and bullion in Delhi. It stands registered under DVAT Act and also Central Sales Tax Act (hereinafter referred to as CST Act).

3. Vide impugned order, learned OHA has dismissed all the 18 objections filed by the appellant-applicant and thereby upheld the 18 notices of default assessments of tax, interest and penalty, issued u/s 32 and 33 of DVAT Act. Default assessments came to be framed by learned Assessing Authority (ward-206) on 29/12/2016, 30/12/2016, 11/01/2017 & 12/01/2017.

4. Matters pertain to years 2006-07 and 2008-09.

5. As per table available in para 2 of the impugned order, following demands were raised by way of assessments:

S.NO.	DATE OF IMPUGNED ASSESSMENT ORDER	TAX PERIOD	IMPUGNED NOTICE REF NO.	DISPUTED AMOUNT OF TAX & INTEREST U/S 32 OF DVAT ACT(In Rs.)	DISPUTED AMOUNT OF PENALTY U/S 33 OF DVAT ACT (In Rs.)
1.	29.12.2016	April,2006	150082122451	53,94,975	-
2.	29.12.2016	April,2006	250012974269	---	1,16,270
3.	30.12.2016	May,2006	150082122550	64,03,148	----
4	30.12.2016	May,2006	250012974295	----	1,70,766
5	30.12.2016	Jul,2006	150082122584	74,34,853	------
6	30.12.2016	Jul,2006	250012974302	----	21,444
7	30.12.2016	Aug,2006	150082122594	59,20,381	----
8	30.12.2016	Aug,2006	250012974305	-----	5,03,578

9	30.12.2016	Sep.,2006	150082122604	76,47,279	------
10	30.12.2016	Sep.,2006	250012974311	------	1,01,794
11	30.12.2016	Oct.,2006	150082122612	52,64,045	------
12	30.12.2016	Oct.,2006	250012974316	------	2,92,490
13	30.12.2016	Feb.,2007	150082122650	44,56,766	------
14	30.12.2016	Feb.,2007	250012974331	------	10,512
15	30.12.2016	Mar.,2007	150082122655	79,92,661	------
16	30.12.2016	Mar.,2007	250012974333		1,62,358
17	12.01.2017	Annual 2008-09	150082127613	17,94,78,357	------
18.	11.01.2017	Annual 2008-09	250012974813	------	9,58,22,295

6. Initially when assessments pertaining to the tax period 2006-07 were framed by the Assessing Authority, dealer filed objections against those assessments.

While disposing of objections learned OHA vide order dated 2/09/2011 upheld the assessments framed for the tax period 2006-07 on both the issues i.e. sale of repossessed vehicles and non-deduction of TDS.

7. As regards assessments pertaining to the tax period 2008-09, initially framed and challenged before learned OHA, vide order dated 11/07/2013, learned OHA upheld those assessments on the point of levy of tax concerning TDS, but, at the same time directed the Assessing Authority to examine books of accounts and other documents to arrive at correct amount of tax to be collected on account of TDS deduction.

8. The dealer then filed appeals before this Appellate Tribunal.

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9. Vide common order dated 27/05/216, appeals were disposed of upholding the demands as regards transactions of sale of repossessed vehicles, but remitting the matter to the Assessing Authority on the issue of non deduction of TDS, with directions in the manner indicated therein i.e. the dealer was to present books of account and other relevant documents before the Assessing Authority so that correct amount of TDS, which was required to be deducted by the dealer was ascertain.

That is how, Assessing Authority framed assessments dated 29/12/2016, 30/12/2016, 11/01/2017 & 12/01/2017.

Against the aforesaid 4 assessments, dealer filed objections. On the basis of applications dated 31/03/2021 and 14/09/2021, the dealer-objector sought withdrawal of those objections. Learned OHA permitted withdrawal of those objections, vide order dated 22/12/2021.

However, the objector filed Writ Petition No. 14725/22 before the Hon'ble High Court. Said writ petition was also withdrawn with the liberty to have recourse to appropriate remedy. Ultimately, the dealer filed objections once again, on 18/11/2022.

10. Ultimately, on 29/03/2023, DVAT 41 came to be filed by the dealer in respect of objections. That is how, hearing took place

on the objections on 31/03/2023 and the objections were disposed of vide impugned order dated 05/04/2023.

11. Vide impugned order, learned OHA has held that the objector failed to furnish relevant documents, showing deposit of amount of tax by the contractor, and accordingly, he did not find any merit in the contention raised on behalf of the objector that due tax of TDS was paid by the contractor.

Learned OHA has also held that the objections filed by the dealer were not maintainable, the reason being that the objections earlier filed by the dealer were withdrawn on 22/12/2021 without seeking any liberty to file objections again.Learned OHA also taken into consideration that the applications for rectifications filed by the dealer u/s 74 (b) were not decided in its favour.

12. Hence, these appeals accompanied by applications under section 76(4) of DVAT Act.

13. Arguments heard on the applications. File perused.

14. Sub-section (4) of section 76 of the Act provides that no appeal against an assessment shall be entertained by the Appellate Tribunal, unless the appeal is accompanied by satisfactory proof of the payment of the amount in dispute, and any other amount assessed as due from the person.

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As per first proviso to sub-section (4) of section 76, the Appellate Tribunal may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order without payment of some or all of the amount in dispute, on the appellant furnishing in the prescribed manner security for such amount, as it may direct.

On the point of admission of appeal with or without pre-deposit, in **Ravi Gupta Vs. Commissioner Sales Tax,** 2009(237) E.L.T.3 (S.C.), it was held as under:-

> "It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no legs to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this court has indicated the principles that does not give a license to the forum/ authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, interim relief can be given."

15. On the applications u/s 76(4) of DVAT Act, counsel for the applicant has submitted that the disputed demands of tax and interest include the demand as regards sale of re-possessed

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vehicles, but said demand as regards sale of re-possessed vehicles was not the subject matter of remand proceedings.

As regards this contention, counsel for the respondent has submitted that the demands as regards sale of re-possessed vehicle have already been upheld upto the Hon'ble High Court.

16. A perusal of the assessments would reveal that learned Assessing Authority has not decided said point afresh. Therefore, it cannot be said that sale of re-possessed vehicles was taken to be scope of remand proceedings. However, the demands of tax and interest on this point were no longer required to be mentioned in the assessments.

17. On the point of non-deduction of TDS by the dealer on the payments made by it to the contractors, as regards demands raised by the Assessing Authority and upheld in the objections, counsel for the applicant has submitted that certificates/declarations issued by the contractors that they had deposited the requisite tax, were submitted to the department, but same were not taken into consideration.

Further, it has been submitted that a certificate issued by the CA of the dealer to the effect that turnover of works contract pertaining to Delhi branches of the dealer, was to tune of Rs. 4,45,70,568/- only, was also produced, but Assessing Authority did not take into consideration said certificate.

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18. On the other hand, counsel for the respondent has submitted thatafter the remand of the matter by the Appellate Tribunal, the dealer did not produce any relevant document before the Assessing Authority, in the proceedings, by way of remand and as such, it can be said that dealer has no such record.

Counsel for the respondent has also submitted that on the one hand there is report by statutory Auditor, but the dealer has relied on certificate issued by Chartered Accountant, which is not of much significance as against the report by the statutory Auditor.

As regards the documents said to have been submitted by the dealer to the effect that the contractors, to whom the dealer made payments, counsel for the Respondent is prima facie correct in arguing that payment if any made by the contractor towards tax due, cannot be said to be on behalf of the dealer-applicant. Prima facie, counsel for the Respondent is also correct in making submission that it was the dealer-applicant who was to discharge its duty in deducting TDS on the said amount, but, the applicant has not disputed that it did not deduct TDS on the works contractfor its deposit with the department, at the time of making payments to the contractors,.

Assessing Authority categorically observed in the assessments about failure of the dealer to produce requisite documents in proof of the fact of deduction of tax on payments made to the

contractors as regards works contract. Learned OHA also recorded findings to the same effect.

19. As regards the findings recorded by learned OHA as to the non-maintainability of the objections, counsel for the applicant is prima facie correct in submitting that the objections filed by the dealer after withdrawal of the writ petition, were maintainable, even though no liberty was sought at the time the objections earlier filed were withdrawn, because the Hon'ble High Court while allowing withdrawal of the writ petition permitted filing of the objections, though within the prescribed period.

20. Counsel for the applicant has contended that the objections filed on 18/11/2022 were decided by learned OHA on 05/04/2023, but same were required to be disposed of within the period prescribed by the Hon'ble High Court, and as such, this is a case where objections are deemed to have been allowed.

On this point, when a specific query has been put by this Appellate Tribunal to counsel for the applicant that if it was so, then why did the counsel representing the objector, advance arguments before the OHA on 31/03/2023 on the expiry of the period prescribed by the Hon'ble High Court. Counsel for the applicant has not been able to reply said query. When the counsel representing the objector argued the matter before OHA even after expiry of the period prescribed the Hon'ble High Court for the disposal, prima facie, it does not lie in the mouth

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of the dealer to say that the objections disposed of beyond the prescribed period shall be deemed to have been allowed.

21. In Appeals No. 73-74/23 (pertaining to the period 2008-09) it has been argued by counsel for the applicant that at the most liability of the dealer for demand on account of non-deduction of TDS comes to Rs. 41,16,090/- i.e. 2% of 5% of Rs. 4,11,60,90,000/- (consisting of Rs. 108,67,68,000/- towards expenses and Rs. 302,93,22,000/- i.e. towards advertisement, publicity, repair and maintenance). Counsel for applicant has further submitted that the aforesaid amount of Rs. 302,93,22,000/- includes a sum of Rs. 4,45,70,568/- paid towards works contract, which finds mention in the assessment order.

Counsel for the applicant has further submitted that the liability, if any, of the dealer should have been assessed on the value of works contract only to the tune of Rs. 4,45,70,568/-, the reason being that dealer was to explain and furnish details as to how much payment pertained to the works contract in Delhi. On this point, counsel for the applicant has relied on the assessments and the consolidated balance sheet of all the branches.

22. On the other hand, counsel for the Respondent is prima facie correct in submitting that consolidated balance sheet is prepared on the basis of balance sheets of each branch of the dealer, but the dealer did not furnish information before the Revenue

Authorities in reply to the query or documents to satisfy as to how much amount was spent by the dealer in Delhi towards the above said payments i.e. repair and maintenance and advertisement and publicity in Delhi, and as such, the Assessing Authority was left with no option, but to arrive at the conclusion that out of the above said amount of Rs. 302,93,22,000/- atleast 5% must have been spent in this regard. In absence of any convincing material from the side of the applicant so far, at this stage, it cannot be said that the above said figure of Rs.302,93,22,000/- included payment of Rs. 4,45,70,568/-, as regards the tax period 2008-09.

23. One of the contentions raised by counsel for the applicant is that the Assessing Authority had no jurisdiction to frame assessments of tax & interest in case of non-deduction of TDS on payments made by the dealer to the contractor. In this regard, reference has been made to notification reproduced in the impugned order, provisions of section 36A (8) of DVAT Act, and to the decision in **Yongnam Engineering & Construction (Private) Ltd. v. Commissioner, Delhi Value Added Tax &Ors.,** W.P. (C)No. 6340/2013.

24. On the other hand, counsel for the respondent has submitted that the notification issued by the Commissioner also empowered the officers, specified in column (4) thereof to levy tax in such a case and further that the notification being of the year 2016, was applicable to the present assessments framed in the year 2017.

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Counsel has also referred to the provisions of section 30, 32 and 33 of DVAT Act.

25. The obligation to pay tax arises by virtue of section 36A (8) of DVAT Act. It is true that in the notification referred to above, Commissioner empowered the officers appointed under sub-section (2) of section 66 of DVAT Act, not below the rank of AVATO, to levy penalty, but, it appears that the notification has not been happily worded, the reason being that the relevant text as regards duty of such a dealer to pay tax deductible, somehow, has not appeared therein.

Sub-section (8) of Section 36A specifically provides about the liability of such a person, failing to make deduction of TDS, to pay penalty in addition tax deductible but not deducted. For ready reference, section 36A (8) is reproduced as under:

> "If any person as is referred to in this section fails to make the deduction or, after deducting fails to deposit the amount so deducted as required in this section, the Commissioner may, by order in writing, direct that such person shall pay, by way of penalty, a sum not exceeding twice the amount deductible under this section **besides tax deductible** but not so deducted and, if deducted, not so deposited into the appropriate Government treasury."

In the notification, there is specific mention about the person referred to in sub-section (8) or any person who fails to comply

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with requirements under sub-section (1) of section 36A of DVAT Act.

It is not believable that the Commissioner, while issuing the above notification intended to delegate powers to the officers only in part i.e. to levy penalty, and not to delegate, or to retain with himself the powers, to assess tax deductible, on account of failure of the dealer to make deductions of TDS, as against the provisions of sub-section (8) of section 36A.

Every person responsible for making any payment to any contractor for discharge of any liability on account of valuable consideration payable for the transfer of property in goods (whether as goods or in some other form) in pursuance of a works contract is duty bound to make deductions of TDS at the prescribed rate. Deduction of tax at source is with reference to the liability to pay VAT.

Here, the dealer does not dispute liability to deduct VAT at the given rate and that no deduction of tax at source was made by it.

In Yongnam Engineering & Construction (Private) Ltd's case (supra), the contention raised on behalf of the petitioner was that the order passed under section 36A(8) of DVAT Act was

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without jurisdiction as it is only the Commissioner who could pass such an order and not the VATO.

Hon'ble High Court observed that the power of the Commissioner could be delegated by the Commissioner in terms of section 68 of DVAT Act, in so far as section 36A is concerned, but, admittedly, it had not been done. Accordingly, the impugned dated 07/08/2013 was quashed.

It remains to be explained at the time of final arguments as to why the notification be not read and interpreted in consonance with the provisions of sub-section (8) of section 36A of DVAT Act so as to include factum of delegation of power by the Commissioner to the officers specified in column (4) of the said notification to levy tax as well.

But, in the given situation, in view of the notification read in consonance with the provision of sub-section (8) of section 36A of DVAT Act, prime facie it cannot be said that the Commissioner did not delegate powers to the said officers to levy tax deductible but not so deducted by the dealer.

26. As regards levy of interest, sub-section (9) of section 36A makes such a dealer liable to pay simple interest at the annual rate to which notified by the Government on such amount which was deductible u/s 36A but not so deducted, from the date on which such amount was deductible to the date on which such amount is actually deposited into the treasury.

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27. Another ground put forth by counsel for the applicant is that the amount already deposited by the assessee by way of pre-deposit, was required to be adjusted while raising the demand of tax and interest.

On the other hand, counsel for the Respondent is correct, prima facie, in submitting that the amount already deposited by way of pre-deposit as per order of the Appellate Tribunal at the time of entertaining the appeals earlier filed, cannot be adjusted, the reason being that the previous appeals stand disposed of as regards the demand on the point of sale of re-possessed vehicles by the dealer.

In the course of arguments, when a specific query was raised if the amount of pre-deposit at the time the appeals earlier filed were entertained can be bifurcated, counsel for the applicant submitted that for the reasons not disclosed by the dealer, the earlier order u/s 76(4) of DVAT Act has not been made available to him by the dealer.

Counsel for the appellant admits that the appeals filed by the dealer on the point of challenge to demands because of sale of repossessed vehicles, filed before the Hon'ble High Court stand dismissed. It is a different matter that the appellant has challenged judgment passed by the Hon'ble High Court, before the Hon'ble Apex Court.

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In this situation, counsel for the Respondent has rightly submitted that the amount already deposited by way of pre-deposit and as a condition for entertaining those appeals, cannot be adjusted so far as present appeals are concerned.

28. As regards appeals pertaining to the tax period 2008-09, counsel for the Respondent has submitted that in view of the admission by the dealer-applicant about liability of Rs. 41,16,090/- i.e. 2% of 5% of Rs. 4,11,60,90,000/-, due to non-deposit of the admitted demand, in view of provisions of section 76(4) of DVAT Act, these appeals pertaining to the tax period 2008-09, deserve to be dismissed in limine.

29. No other argument has been advanced by learned counsel for the parties.

30. It is true that section 76(4) of DVAT Act provides that no appeal shall be entertained by the Appellate Tribunal unless it is satisfied that such amount as the appellant admits to be due from him has been paid.

In the given facts and circumstances, I find that when application u/s 76(4) of DVAT Act has been argued at length, and in view of the above discussion, the dealer – applicant, which is a bank, is directed to deposit ~~the~~ 75% of the amount of demands towards tax which was deductible, but not deducted by the dealer – bank, with 75% of the demands by way of

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interest on such amount, and 75% of the amount of demands of penalties imposed, pertaining to the tax period 2006-07 and 2008-09, as regards non-deduction of TDS on the payments made by the dealer to the contractors.

Said amounts by way of pre-deposit shall be by way condition u/s 76(4) of DVAT Act, and for the purpose of entertaining all these appeals. The amount to be deposited within 20 days.

Dealer – applicant to comply with the order within the above said period and apprised Registry and counsel for the respondent, so that on compliance, the appeals are taken up on the next date i.e. 11/07/2023 for final arguments, and in case of non-compliance, for further orders due to the non-compliance.

31. Copy of this common order be placed in each connected file for record. Its copy be also 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 : 19/06/2023

Narinder Kumar 19/6/2023

(Narinder Kumar)
Member (J)