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

Appeals No. 121/ATVAT/2023,
122/ATVAT/2023,
128/ATVAT/2023,
& 129/ATVAT/2023.
Date of Judgment: 09/02/2024.

M/s Larsen and Tourbo Ltd.
61, IFCI Tower, Nehru Place,
New Delhi - 110019 .....Appellant

v.

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

Counsel representing the Appellant : Sh. Atul Gupta.
Counsel representing the Respondent : Sh. C.M. Sharma.

Judgment

1. This common judgment is to dispose of above captioned four appeals filed by the dealer – assessee - appellant.
2. Appeals have been filed challenging order dated 05/07/2023 passed by learned Objection Hearing Authority (hereinafter referred to as OHA) whereby demands of tax and interest under Central Sales Tax Act (hereinafter referred to as CST Act) have

been upheld to the extent the assessee failed to submit statutory forms i.e., 'C' forms, C+E1 forms and E1 forms, in respect of the period- Annual 2012, Annual 2013, 2nd quarter 2016-17 and 3rd quarter of the year 2016-17.

3. Assessing Authority of the concerned Ward-108 (Special Zone) framed assessments of tax and interest under CST Act raising demands of additional tax due and interest, due to the reason that the assessee had failed to submit requisite statutory forms.

4. Said assessments were challenged by the dealer-assessee before learned OHA by way of objections under section 74 of DVAT Act.

5. Before learned OHA some statutory forms were produced. While disposing of the objections, learned OHA granted certain exemptions to the assessee taking into consideration the statutory forms furnished before him, but, as regards remaining statutory forms- which were not produced- even during hearing on objections, the OHA upheld the assessments.

6. One of the arguments advanced by counsel for the appellant is that the transactions in respect of which statutory forms, were not produced before the Authorities below, have been subjected to higher rate of VAT than the one prescribed under the Act.

Counsel for the appellant has referred to the ground raised in this regard in these four appeals for the first time and also to entry

against serial No. 177 of schedule Third of DVAT Act, and contended that because such transactions attract VAT @ 5%, but the authorities below have levied tax on the subject commodities @ 12.5%, the matter needs to be remanded to the Assessing Authority on this point.

7. It is significant to note here that no statutory form has been produced by the dealer-appellant while filing the appeals or during pendency of the appeals. However, on application filed on behalf of the dealer-appellant during pendency of these appeals, while common order of even date, copies of certain documents – Annexure-1, earlier not produced before the authorities below, have been allowed to be produced on record, keeping in view that their production is necessary to levy correct rate of tax to the transactions, in respect of which the dealer has failed to produce statutory forms, and that too while imposing costs for their late production and their non-production before the authorities below.

8. Counsel for the respondent has no objection to the remand of the matter to the Assessing Authority only on the point of levy of ~~to levy correct~~ rate of tax to as regards the transactions, in respect of which the dealer has failed to produce statutory forms, in case the same has not been earlier levied as per law.

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9. In the given facts and circumstances, having regard to the permission granted to the dealer-appellant for production of Annexure-1, i.e., copies of documents, the matter deserves to be remanded and with a direction to the Assessing Authority to levy of rate of tax to the transactions, in respect of which the dealer has failed to produce statutory forms, in accordance with law.

10. The only other contention raised by counsel for the appellant pertains to levy of interest. The contention is that on the basis of excess tax paid, dealer-assessee was entitled to refund of Rs. 71,03,07,669/- for the years 2013-14, 2016-17 and 2017-18, no demand of interest should have been raised.

11. In this regard, reference has been made to the copies of the documents pertaining to refund status downloaded from the portal of Department of Trade & Taxes, Govt. of NCT of Delhi, to point out that for the tax period- 4th quarter, 2013, return filed by the dealer was approved on 20/03/2015 and the status of the refund claimed to the tune of Rs. 41,43,24,878/- was shown as "pending"; for the tax period-4th quarter 2016, return filed by the dealer was approved on 31/03/2018 and the status of the refund claimed to the tune of Rs. 28,48,17,694/- was shown as "pending"; and that for the tax period-1st quarter 2017, return filed by the dealer was approved on 31/03/2019 and the status of the refund claimed to the

tune of Rs. 1,11,65,097/- was shown as "notice issued" vide order No. 29502.

12. It has been contended on behalf of the appellant that as per section 38 of DVAT Act, before making any refund, the Commissioner is empowered to first apply excess of the amount paid by the dealer towards tax, penalty and interest, towards the recovery of any other amount due under this Act, or under the CST Act, but, in these matters the Commissioner did not adjust the above said amounts claimed by the dealer-assessee towards the liabilities for the above said tax periods.

Accordingly, it has been urged that the dealer-assessee was not liable to pay any interest from the dates of approval of the returns, mentioned above.

13. Relevant portion of Section 38 of DVAT Act needs to be extracted for ready reference. Same reads as under:

> "**38. Refunds.**
>
> 1. Subject to the other provisions of this section and the rules, the Commissioner shall refund to a person the amount of tax, penalty and interest, if any, paid by such person in excess of the amount due from him.
>
> 2. Before making any refund, the Commissioner shall first apply such excess towards the recovery of any other amount due under this Act, or under the CST Act, 1956, (74 of 1956).
>
> 3. Subject to sub-section (4) and sub-section (5) of this section, any amount remaining after the application referred to in sub-

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section (2) of this section shall be at the election of the dealer, either.-

(a) refunded to the person-

(i) within one month after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is one month;

(ii) within two months after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is a quarter; or

(b) carried forward to the next tax period as a tax credit in that period."

While referring to the above said provision, counsel for respondent has rightly submitted that the Commissioner can take step under sub-section (1) of section 38 of DVAT Act only after claim of refund of the dealer has been allowed, and in case any refund is directed to be made.

Counsel for the respondent has rightly submitted that in these matters status as regards claim of refund of the dealer, as per Refund Status sheets submitted by the dealer, has been shown as "pending" and "notice issued", but the dealer has not filed any order allowing said claim of refund, and as such, there was no question of adjustment of any such excess towards recovery of the amount under the 4 assessments framed by the Assessing Authority.

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Counsel for respondent has submitted that sub-section (3) of section 38 of DVAT Act comes into application to give opportunity to the dealer to elect either refund of the excess amount or for carrying forward the same to the next period.

As rightly submitted by counsel for the respondent, under sub-section (3) of section 38 of DVAT Act, dealer can either elect to claim the excess ITC as "Refund" in column no. R 9.2 or "Carry Forward" the amount in the column no. R 9.3 of the prescribed return Form DVAT-16, but, appellant has not placed on record any material to suggest that the dealer-assessee ever so elected to exercise the option that the excess amount, after adjustment towards the present demands of tax and interest, be carried forward to the next period.

14. No doubt, as per sub-section (3) of section 38, in case the tax period for the dealer claiming refund is a quarter, the excess amount by way of refund is to be paid to the dealer within two months after the date on which the return was furnished or claim for the refund was made and that the rate of interest allowed on the amount of the refund is lesser than the rate of interest levied by the Department and charged from the assessee on the amount of tax due.

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Even though, in the returns, dealer is said to have claimed refund, said claim has not been adjudicated or decided. As regards difference in the rate of interest, section 42 of DVAT Act specifically provides for grant of simple interest to a dealer/person entitled to a refund under DVAT Act, in addition to the refund, from the period specified in the sub-section (1) thereof.

Sub-section (1) of section 42 reads as under:

> **"42. Interest**
>
> 1. A person entitled to a refund under this Act, shall be entitled to receive, in addition to the refund, simple interest at the annual rate notified by the Government from time to time, computed on a daily basis from the later of-
>
> (a) the date that the refund was due to be paid to the person; or
>
> (b) the date that the overpaid amount was paid by the person, until the date on which the refund is given.
>
> Provided that the interest shall be calculated on the amount of refund de after deducting therefrom any tax, interest, penalty or any other dues under this Act, or under the Central Sales Tax Act, 1956 (74 of 1956):
>
> Provided further that if the amount of such refund is enhanced or reduced, as the case may be, such interest shall be enhanced or reduced accordingly.
>
> Explanation: If the delay in granting the refund is attributable to the said person, whether wholly or in part, the period of the delay attributable to him shall be excluded from the period for which the interest is payable."

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15. It cannot be disputed that no order for adjusting refund against subsequent tax dues can be passed by the department, without issuance of notice for such an adjustment order.

As provided under Rule 34(5) of DVAT Rules, when the Commissioner is satisfied that a refund is admissible, he is required to determine the amount of the refund due and record an order in Form DVAT-22 sanctioning the refund and recording the calculation used in determining the amount of refund ordered including adjustment of any other amount due, as provided in sub-section (2) of Section 38 of DVAT Act.

Here, even though, in the returns, dealer is said to have claimed refund, admittedly said claims have not been adjudicated or decided.

Rate of interest, even though, different for different situations, is to be applied as provided under the law. There is no merit in the contention raised by counsel for the appellant that rate of ~~grant of~~ interest ~~to the dealer~~, in case of non-payment of refund to the dealer within the stipulated period ~~is~~ being lesser than the rate of interest charged by the department on the demands of tax raised while framing assessments, is discriminatory.

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In view of the above discussion, I do not find any merit in the second contention raised by counsel for the appellant that on the basis of excess tax paid, dealer-assessee was entitled to refund, and as such, no demand of interest should have been raised in any of these four appeals.

16. Neither any other argument has been advanced nor any other point or law has been pressed into service by counsel for the appellant or counsel for the respondent.

17. In view of the above findings, all these four appeals are disposed of and matter is remanded to the Assessing Authority with a direction to the Assessing Authority to allow the dealer-appellant to place on record copies of the documents- Annexure-1, to consider levy of rate of tax to the transactions, in respect of which the dealer has failed to produce statutory forms, in accordance with law.

18. It is made clear that the Assessing Authority shall provide to the dealer-assessee opportunity of being heard, but, in the given facts and circumstances when no other statutory form has been produced before this Appellate Tribunal, the Assessing Authority shall not allow production of any statutory form.

19. Dealer is directed to appear before learned Assessing Authority on 26/02/2024.

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19. Files be consigned to the record room. Copy of judgment be placed in each appeal file. 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 : 09/02/2024.

Narinder Kumar 9/2/2024

(Narinder Kumar)

Member (J)

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