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

M.A. No.:385-387/23
In Appeal Nos. 310-312/ATVAT/2008.
Date of Order: 27/12/2023

M/s Tek Chand & Sons. .....Applicant

V.

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

Counsel representing the Applicant :Sh. A.K. Babbar & Sh. Surendra Kumar.
Counsel representing the Respondent :Sh. C.M. Sharma.

ORDER

1. On 07/08/2008, above mentioned set of three appeals No. 310-312/ATVAT/2008 came to be filed by the dealer, challenging common order dated 04/06/2008 passed by Sh. B.L. Sharma, Joint Commissioner–V, Department of Trade & Taxes, Objection Hearing Authority (hereinafter referred to as OHA). Appeals are accompanied by applications u/s 76(4) of DVAT Act.
2. Matters pertain to period from 01/04/2005 to 30/04/2006.
3. Vide default assessment of tax and interest framed u/s 32 of DVAT Act, on 15/11/2006, learned Assessing Authority –

27/12/23

VATO (VAT – Audit) framed assessment while observing in the manner as:

"Whereas, I am satisfied that the dealer has furnished return that does not comply with the requirements of Delhi Value Added Tax Act 2004 for the tax period 14.05 to 31.3.06/or any other reasons given below.

Tax Period 1.4.05 to 30.6.05

1. During the Ist Qtr. Of 2005-06 the dealer has claimed tax credit for Rs.1339308/- on transitional stock, same is disallowed as dealer could not produce the annexure and other details of purchases of tax borne items. So above claim could not be verified.

2. The dealer has shown less purchases for Rs. 1801/-, so after adding G.P. @16% these purchases are treated as local sale and taxed @12.5% with interest (Tax=261+ Intt. 58 = 319/-) 3. Input Tax Credit for Rs.2407/- has been claimed on following retail invoices which is disallowed.

Bill No.	Date	Amount
54.	20.4.05	360/-
38.	28.5.05	260/-
14335.	7.06.05	1787/-

Tax Period 1.7.05 to 30.9.05

1. During the IInd Qtr. Of 2005-06, excess purchases has been shown for Rs. 13426/-, so excess ITC claimed on these purchases for Rs 1678/- is disallowed.

2. Input tax credit for Rs.421/- has been claimed on following retall invoices which is disallowed.

Bill No.	Date	Amount
56353.	27.7.05	38/-
044.	23.8.05	20/-
773.	8.9.05	350/-
884.	15.9.05	13/-

Tax Period 1.10.05 to 31.12.05

1. The dealer has shown less purchases for Rs. 124503/- which is treated as local sale and taxed @12.5% with interest after adding GP rate @16% (Tax 18053+ Intt. 2225=20278/-).
2. Input tax credit for Rs.1260/- has been claimed on following retail invoices which is disallowed.

Bill No.	Date	Amount
208.	10.10.05	20/-
1038.	27.10.05	1062/-
1122.	5.11.05	24/-
60.	31.12.05	153.87/-

Tax Period 1.1.06 to 31.3.06

1. Input tax credit for Rs 634/- on following retail invoices claimed which is disallowed.

Bill No.	Date	Amount
2890.	5.1.06	21/-
2895.	5.1.06	240/-
2825.	1.2.06	10/-
1611.	10.2.06	40/-
1618.	21.2.06	252/-
1647.	1.3.06	71/-

Therefore, the dealer is hereby directed to pay tax of an amount of Rs. 1366305/-."

Two separate assessments of penalties were also framed.

4. Feeling dissatisfied with the above assessment, dealer-objector filed objections No. 205, 206, 207 before the OHA. Vide common order dated 04/06/2008, learned OHA rejected the objections while observing in the manner as:

> "The objector's contention with regard to the claim amounting to Rs. 61027/- on account of transitional stock on the pretext that instead of mentioning the amount of tax borne on tax paid stock of Rs. 1339308/-, he mentioned the value of stock in DVAT-15 for the tax period 1" quarter of 05-06 does not hold any merit for the reason that the objector in DVAT-15. in Column No.4 meant for Tax Credit Claimed had shown the total value of tax credit claimed as Rs. 1339308.75 instead of Rs. 61027/-.
>
> Not only so the dealer had recorded figure of Rs. 1339308.75 in Schedule 1 -Column S2.2 and also in Column No R5.4 in DVAT-16 claiming tax credit.
>
> In fact the amount of Rs. 61027/- has neither been shown in DVAT-18 nor in DVAT-16. Had the audit of the objector not been carried out, the objector would have succeeded in getting away with the tax credit/refund illegally.
>
> Further, the objector's claim could have been acceptable had he filed the objection voluntarily, prior to audit, But in the present case it is the DVAT Audit Team which had detected that the dealer had claimed an amount of Rs. 1339308/- as tax credit which was far in excess of actual entitlement. Had the audit team not detected the said unlawful claim the objector would have availed of the said unlawful benefit/tax credit.

Hence, under the given circumstance, the benefit at the tax credit on transitional stock cannot be granted.

The objector's claim with regard to other discrepancies/violation of provisions of DVAT law pointed out by the audit team are also not sustainable in the eyes of the provisions of the Act and the Rules.

I have gone through the objections filed in DVAT 38 forms, notices of default assessment of tax and interest and the notices of default assessment of penalty, the documents furnished in support of the said objections, the relevant provisions of DVAT Act and Rules framed thereunder whereupon, I find no merit in the objections filed by M/s. Tek Chand & Sons. Hence the same are rejected."

5. Vide order dated 17/10/2008, this Appellate Tribunal observed that the objections filed by the dealer-objector before learned OHA were deemed to have been allowed, same having been decided beyond a period of eight months from the date of their filing. In this regard, reliance was placed on decision in M/s Bhel Constructions' case.

6. Revenue filed review petition with an application seeking condonation of delay. Ultimately, on 17/11/14, the review application was disposed of, same having been withdrawn, in view of the orders passed by the Hon'ble High Court on

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25/07/2014. That is how, the matters were adjourned from time to time.

7. It may be mentioned here that neither on 15/07/2016 nor subsequent thereto files were put up by the staff. Registry came across these files while searching other files, and put up these files on 22/11/2023, for the first time after 31/05/2016.

8. Last order available in the main file is of 31/05/2016 vide which these appeals were adjourned to 15/07/2016. Sh. C.M. Sharma, counsel for the Department submitted before the Registry that the matters had not been finalised. Thereupon, notices were issued to the dealer – appellant, its counsel and counsel for the Department.

   Fact remains that neither the parties nor their counsel ever pointed out to the Registry that these files of the year 2008 remained to be disposed of and that the same may be taken up.

9. That is how, these matters have been taken up for disposal of application u/s 76(4) of DVAT Act.

10. One of the contentions raised by counsel for the applicant is being raised for the first time i.e., without raising the same before the OHA or even in the memorandum of appeals. The contention is that the impugned assessments have been framed by the VATO (VAT Audit), but the said VATO had no jurisdiction to frame said assessment, and as such the appeals

deserve to be entertained without compliance with any condition by way of pre-deposit. Counsel for the applicant has submitted that decision by our own Hon'ble High Court in **H.G. International v. Commissioner of Trade and Taxes, Delhi,** ST. Appeal No. 63/2014, on this very issue has been remitted by Hon'ble Supreme Court, and as such, said decision is of no help to the Revenue. Counsel for applicant has also referred to Circular No. F.No.7(6)/L&J/Circular/2016/373 dated 11.04.2016 issued by the Commissioner (VAT), whereby guidelines were issued to the VAT Authorities that after audit etc., reports shall be prepared and the reports shall be mandatorily forwarded to the concerned Ward/Branch officer having jurisdiction over the dealer for assessment of tax and penalty, in accordance with the laid down procedure. Counsel for the applicant has submitted that since the matter has been remitted by the Hon'ble Supreme Court to the Hon'ble High Court, in view of decision in **M/s SREI Equipment Finance Ltd. v. Commissioner of Value Added Tax & Anr.,** VAT Appeal 2/2017 & CM Nos. 1867-68/2017, it cannot be said that VATO (Audit) had any jurisdiction to frame assessments.

11. On the other hand, counsel for the Revenue has contended that VATO (Audit) had the jurisdiction to frame the assessments as well,

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because
this is a case where audit was carried out and deficiencies were observed.

12. It may be mentioned here that in the course of arguments, counsel for applicant has not submitted copy of decision in HG International's case (supra), by our own Hon'ble High Court.

13. These appeals pertain to Tax Period 2005-06 and from 01/04/2006 to 30/06/2006. The Circular relied on by counsel for the applicant is of 11/04/2016 and prima facie not applicable to these matters. During the relevant period, Circular No. F.2(7)/DVAT/L&J/2005-06/1028-1035 dated 31/10/2005 was in force. As per said circular, as regards provisions of section 58 of DVAT Act, all powers to audit the business affairs of dealer/ any person for (a) confirming the assessment under the review or (b) serve a notice of the assessment or re-assessment of the amount of tax, interest and penalty, were to be exercised by all the Officers appointed under sub-section (2) of section 66 of Delhi Value Added Tax Act, 2004.

Impugned assessments were framed by VATO (Audit). In **H.G. International v. The Commissioner of Trade and Taxes, Delhi**, ST.APPL. No. 63/2014 decided on 16/8/2017 by our own Hon'ble High Court, circular dated 31.10.2005 was held to have been validly issued. In view of the provisions of section 58 of DVAT Act and the above circular, prima facie, at this stage, it

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cannot be said that VATO (Audit) had no jurisdiction to frame assessments. Consequently, at this stage, decision in M/s SREI Equipment Finance Ltd.'s case (supra) does not come to the aid of the applicant.

14. As noticed above, while framing assessment for the tax period from 01/04/2005 to 30/06/2005, the Assessing Authority observed that during this tax period, the dealer had claimed tax credit on transitional stock, but not produced annexures and other details regarding purchases of tax-borne-items, as a result whereof said claim could not be verified. The Assessing Authority, accordingly, disallowed the said claim for tax credit.

Assessing Authority observed that the dealer had shown less purchase of Rs. 1,801/-. Accordingly, the Assessing Authority treated said purchases as local sale and levied tax.

On the basis of 3 retail invoices, the dealer was found to have claimed ITC for Rs. 2,407/-, but the Assessing Authority disallowed this claim.

15. As noticed above, while framing assessment for the tax period from 01/07/2005 to 30/09/2005, the Assessing Authority observed that during said quarter, the dealer had shown excess purchases worth Rs. 13,426/- and claimed excess ITC. The Assessing Authority, accordingly, disallowed excess ITC claimed to the tune of Rs. 1,678/-.

Learned Assessing Authority disallowed ITC for Rs. 421/-, claimed on the basis of the retail invoices specified in the assessment.

16. As noticed above, while framing assessment for the tax period from 01/10/2005 to 31/12/2005, the Assessing Authority observed that the dealer had shown less purchases to the tune of Rs. 1,24,503/-. Accordingly, he treated the same as local sale and levied tax.

The Assessing Authority disallowed ITC for Rs. 1,260/- claimed by the dealer on the basis of 4 retail invoices.

17. As noticed above, while framing assessment for the tax period from 01/01/2006 to 31/03/2006, the Assessing Authority disallowed ITC claim of the dealer to the tune of Rs. 634/- claimed on the basis of 6 retail invoices specified therein.

18. On the point of ITC as claimed in the return, counsel for the applicant has submitted that as on 31/03/2005, opening stock of the firm was to the tune of Rs. 33,68,290/-, out of which, creditable input stocks for transitional purposes was of the value of Rs. 13,39,308/-.

As claimed in the appeal, balance stock was not purchased at first point basis, and as such, was not creditable as per Section

14 of DVAT Act and consequently, balance stock worth Rs. 15,83,175/- was reflected in DVAT Form 18A.

Counsel for the applicant has submitted that this being the first return under VAT Act, after transition from Sales Tax Act to DVAT Act, due to mistake the applicant reflected a sum of Rs. 13,39,308/- as the input tax credit for the opening stock as on 01/04/2005. As further submitted, when calculated on the total stocks reported, a tax of Rs. 61,027/- should have been reflected. Counsel has further submitted that this mistake was rectified by the applicant on 28/07/2006 in the subsequent return i.e., of the first quarter of 2006-07, and too without any notice from the department, and as such no assessment of tax and interest should have been framed.

19. On the other hand, counsel for the Revenue has submitted that from the version put forth by the applicant and from the submission made by counsel for the applicant, it can safely be said that in the return the applicant claimed ITC depicting false facts, and is stated to have shown fresh claim of lesser ITC amount in the return for the year 2006-07, and as such, this is a case where the department correctly observed that the assessee furnished a return which was false, and ~~as such~~ consequently the assessment of tax and interest has been correctly upheld by the OHA.

20. In para No. 6 of the application, applicant has reflected figures of input tax, CST tax, and output tax payable in the manner as:

> 6. Quarter wise tax figures as reported in DVAT 30 and 31 and as accepted, other than the opening stock credit, were as follows:

Quarter	Input Tax	CST Tax	Output Tax Payable
First	2226	1050	(-) 1176
Second	8942	36956	28014
Third	24053	86869	62816
Fourth	52221	53725	1504

21. In this regard, in para No. 9 of the application, applicant has reflected figure of the amount of ITC carried forward and of the output tax payable.

22. As per case of the applicant, it was bona fide mistake, which led it to claim opening ITC as Rs. 13,39,308/-, and further that the above tax payable was adjusted from this amount, whereas the balance was carried forward.

23. As per case of the applicant in the memorandum of appeal, it was in the third week of July, the above said mistakes were brought to the notice of the management and that is how the

applicant deposited the deficient tax, with interest, on 30th July, 2007.

24. Counsel for the Revenue has rightly pointed out that for the present, applicant has not placed on record any material to show as to why steps were not taken by the applicant immediately to put forth correct figure of ITC claim. In the given circumstances, it would be for the applicant to satisfy the court that it was a case of bona fide mistake on its part; that correct figure was shown by it in the return of the first quarter 2006-07 and that no step could be taken by the applicant prior thereto.

25. As regards, imposition of penalties, counsel for the applicant has submitted that section 86(10) of DVAT Act has two clauses and that the Assessing Authority has not specified in the assessment as to due to violation of which clause the penalties were levied.

26. A perusal of assessments of penalty would reveal that the assessing authority specified that the penalty was being imposed due to the difference in the amount of the purchases and the amount of ITC claimed. Therefore, prima facie, it cannot be said that the Assessing Authority did not specify in the assessment as to ~~due~~ for ~~to~~ violation of which clause the penalties u/s 86(10) were being imposed.

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One of the penalties levied for the tax period i.e., 01/04/2005 to 30/06/2005 is u/s 86(11) of DVAT Act. As per sub-section (11), where dealer claims a greater tax credit u/s 14 of DVAT Act than is allowed, such dealer shall be liable to pay, by way of penalty, an amount equal to the amount of tax credit so claimed or ten thousand rupees, whichever is the greater. It would be for the applicant to satisfy that provisions of sub-section (11) of section 86 are not attracted. The contention raised by counsel for the applicant that under sub-section (10) of section 86 penalty equal to the amount of tax deficiency could not be levied, this case being not a case of deficiency, is without any merit, at this stage, in view of the provisions of sub-section (11) of section 86 of DVAT Act.

27. While arguing the applications u/s 76(4) of DVAT Act, counsel for the applicant has not put forth any other argument challenging any other issue to which the assessments and the impugned order pertain.

28. Having regard to all the facts and circumstances, dealer-applicant is directed to deposit 15% of the disputed demands challenged in all the three appeals, within 15 days, for the purpose of, and by way of pre-condition, for entertaining of these three appeals.

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Dealer to submit compliance report with the Registry and also apprise Counsel for the Revenue, so that on the next date i.e. 16/01/2024, appeals may be taken up for final arguments subject to compliance.

29. 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 : 27/12/2023

Narinder Kumar 27/12/2023

(Narinder Kumar)
Member (J)