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IN THE HIGH COURT OF DELHI AT NEW DELHI

STA No. 2/2011 & 3/2011

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Decided On: May 12, 2011

M/s Jatinder Mittal Engineers and Contractors . . . Appellant

Through : Mr. Rajesh Mahna with Mr.
Ramanand Roy, Advs.

VERSUS

Commissioner of Trade & Taxes, Delhi . . . Respondent

Through: Mr. H.C. Bhatia, Adv.

CORAM :-

**THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE M.L. MEHTA**

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (ORAL)

(STA No. 2/2011 & C.M No. 9435-9436/2011)

1. This appeal pertains to the tax period 2nd quarter for the assessment year 2005-2006. For that quarter, the appellant/assessee had filed its VAT return dated 10.11.2005. As per this return, he had shown the turn-over in the sum of ₹15,36,120/-. Notice under Section 59(3) dated 14.12.2005 under Delhi VAT Act was issued to the appellant/assessee. The assessee filed the reply thereto. Thereafter,

notice of default dated 18.7.2006 under Section 32 of the Delhi VAT Act was issued creating a demand of tax of ₹4,52,126 and interest thereupon in the sum of ₹67,819/-.

2. We may note in this case that, as per the tax authorities, the assessee had deducted the tax at source in the sum of ₹61,30,514/- and therefore, the work done/turn-over was of the aforesaid amount and not ₹15,36,120/- which led to issuance of default assessment notice. The assessee explained before the VAT Officer that the assessee was in the business of construction activities on contract basis and, therefore, as per the provisions of Section 5(2) of the Act, he had right to disclose the turn-over after excluding the charges towards labour, services and other like charges. His explanation was that the charges towards labour, services as well as consumables incurred by the assessee were deleted from the aforesaid amount of ₹61,30,514/- thereby arriving at a turn-over of ₹15,36,120/- and, therefore, no default was committed. The figures furnished by the assessee in this behalf are as under:

The turn-over disclosed in the return is ₹15,36,120/-, which was arrived at as under:

(1) Work Done	₹61,30,514
(2) Less Labour/Services	₹28,61,766/-
(3) Less Consumables	<u>₹17,32,629/-</u>

₹15,36,119/-

3. The Value Added Tax Officer, however, confirmed the aforesaid demand and interest and also imposed penalty of ₹6,87,232/- vide order dated 18.7.2006. Thereafter, the appellant filed the objections before the Objection Hearing Authority (OHA) on 10.10.2006, which was also rejected by the OHA vide order dated 22.6.2007. Against the order of the OHA, the appellant preferred an appeal before the Appellate Tribunal Value Added Tax, which has also been dismissed by the Tribunal vide order dated 23.3.2011. Challenging that order, the present appeal is preferred under Section 81 of the Delhi Value Added Tax Act, 2004.
4. The aforesaid factors narrated would show that the claim of the appellant/assessee was that it had incurred the labour/services expenses to the extent of ₹28,61,766/- and expenses on account of consumables in the sum of ₹17,32,629/-. Insofar as consumable is concerned, that was surrendered by the appellant even before the OHA. The question, therefore, which was gone into by the OHA was as to whether the assessee had, in fact, incurred the aforesaid expenses on account of labour/services and whether the assessee had been able to prove the said expenses. The assessee had shown justification for the aforesaid labour/services expenses by submitting a note before the OHA (which appears at pages 71 to 74 of the paper

book). In para 9 thereof, the labour/services as per Rule 3(2) are mentioned. It shows that the appellant had debited the Profit and Loss Account with expenses on account of wages, salaries and works expenses, equipment hiring charges, depreciation etc. and this Profit and Loss Account is the centralized account which relates to all India operation of the appellant. The total expenditure on account of wages, salaries and works etc. is ₹118311570/-. From this expenditure to Delhi Sales for 2nd quarter is allocated in proportion arriving at a figure of ₹23,58,549.55/-. In a similar manner, some of the other expenditure incurred on account of machinery finance charges, staff welfare, motor car running & mtc. expenses and motor car finance charges are proportionally assigned to Delhi Sales and in this manner, figure of ₹28,61,765/- is arrived at. This would show that no specific details in respect of the Delhi Operations/Delhi Sales were furnished but the expenses were allocated to Delhi Sales in proportion. That apart, the OHA has come to a specific finding that the appellant/assessee could not prove the exact expenditure incurred in respect of Delhi Sales in spite of various opportunities given to the appellant. For this reason, the Proviso to Section 5 was applied by the OHA r/w Rule 3 of the Rules thereby granting 25% of the total value of the contract of civil work as the expenses incurred,

while rejecting the claim for deduction of ₹28,61,765/- on account of labour/services under Rule 3(2) of the Rules.

5. The Tribunal again went into these issues minutely and also took into consideration the order of the OHA and summed up the position in the following manner;

“15. It is significant to note that the appellant has not alleged in this appeal that the Ld. Ward VATO did not correctly submit his report dated 05.6.2007 to the Ld. OHA. Thus, it is clear that the appellant had merely filed some figures before the Ward VATO which clearly shows that the appellant did not avail the opportunity of establishing its claim for deduction of Rs.28,61,765/- on account of labour, services and works expenses under rule 3(2) on the basis of the books of accounts. When appellant was claiming deduction of Rs.28,61,765/- on account of labour, services and works expenses under rule 3(2) from the GTO then it was for the appellant to establish such a claim on the basis of the books of accounts and on the basis of actual expenses so as to be out of the sweep of the proviso to rule 3(2). Even otherwise it was within the specific knowledge of the appellant as to what were the actual expenses on account of labour, services and works expenses for execution of work pertaining to this contract and the claim of the appellant can not be allowed merely on the basis of presumption to be drawn from the audited accounts as alleged in the grounds of appeal. Moreover, as per proviso to Rule 3(2) presumption arises in favour of the revenue if the appellant does not corroborate the claim in respect of the labour, services and works expenses stated to have been incurred for the works executed, on the basis of the books of accounts. Thus on the basis of this presumption appellant can claim only 25% of the total value of the contract of civil work establishing facts corroborated by the books of accounts supporting the claim of the appellant for deduction of the amount claimed as expenses incurred towards labour, services and works expenses. Thus when appellant could not substantiate its claim of deduction of the labour, services and works expenses on the basis of the books of accounts then the appellant can claim deduction only as per the table to the proviso to Rule 3(2).

16. It is to be noted that the bank statement filed by the appellant during hearing before the Ld. OHA only showed withdrawal of cash from the bank. It was for the appellant to establish that the cash so withdrawn from the bank was spent towards labour, services and works expenses for which it had claimed deduction of Rs.28,61,765/- under Rule 3(2) and that the proviso to Rule 3(2) of the Rules was not applicable. It is not the case of the appellant that it did establish that all the cash withdrawals were spent towards labour, services and works expenses for executing this very work contract to qualify for deduction under rule 3(2)".

6. The aforesaid findings are findings of facts arrived at by the OHA as well as the Tribunal holding that the appellant/assessee has not been able to substantiate its claim towards labour, services and works expenses on the basis of books of accounts which was a reason for applying the percentage prescribed in the table to Proviso to Rule 3(2) of the 25% of the total value of the contract of civil work. These are pure findings of facts. We do not find any perversity herein.
7. There is no merit in the appeal and the same is accordingly dismissed alongwith pending applications.

STA No. 3/2011 & C.M. No. 9437-9437/2011

8. Admit.

The following substantial questions of law arise for consideration;

- (1) Whether the Tribunal VAT is correct in observing that the appellant has become liable for action of penalty under Section 86 (10)(b) of DVAT Act 2004 automatically if the claim of deductions under rule 3(2) of DVAT Rule are denied for which the appellant has recorded the claim in the books of accounts.

(2) Whether the penalty become automatic under Section 86 (12) of the DVAT Act, 2004 where there is no tax deficiency at the time of filing of return with its proper claims as per Rule 3(2) of the DVAT Rules without showing any deliberate action on the part of the appellant.

9. With the consent of the parties, the matter is heard finally at this stage.

10. This appeal is preferred against the penalty of ₹6,87,232/- imposed by the Value Added Tax Officer, which is confirmed by the Tribunal in appeal. The penalty was imposed under two provisions of Delhi VAT Act, namely, Section 86(10) and Section 86(12) thereof. Insofar as, penalty under Section 86(10) is concerned, it is to the tune of ₹4,52,126/- and the penalty imposed under Section 86(12) is to the tune of ₹2,35,106/-. Section 86(10) of the Act reads as under:

“86(10) Any person who,-

- (a) Furnishes a return furnished under this Act any matter or thing without which the return is false, misleading or deceptive in a material particular;
- (b) Omits from a return furnished under this Act any matter or thing without which the return is false, misleading or deceptive in a material particular;

Shall be liable to pay, by way of penalty a sum of ten thousand rupees or the amount of the tax deficiency, whichever is the greater”.

11. It is clear from the above that such a penalty can be imposed only when it is established that return furnished by the assessee is

false, misleading or deceptive in a material particular or the assessee omits from a return furnished under this Act any matter or thing without which the return is false, misleading or deceptive in a material particular

12. As noted from the facts above, the assessee had filed the return in accordance with Section 5(2) of the Act as it is engaged in the business of construction activities on contract basis. As per this provision, it was permissible for the assessee to disclose the net turn-over after excluding the charges towards labour, services and other like charges subject to such conditions as may be prescribed. It is because of this reason that the assessee had shown a turn-over of ₹15,36,120/- after deducted labour/services charges as well as other like charges. Though there is an omission in not showing the gross turn-over, the fact remains that when default assessment notice was issued to the assessee, he explained the expenses incurred on the aforesaid accounts.

13. It is also noted above that the assessee had maintained the centralized books of accounts, particularly, Profit and Loss Account, which the assessee is supposed to do as per the normal accounting practice. The assessee had allocated proportionate expenses to Delhi Sales incurred on account of labour/services. It is a different

thing that such an approach on the part of the assessee was not accepted by the OHA or the Tribunal. It can safely be inferred that the aforesaid approach of the assessee was *bonafide*. It cannot be said that the return filed by the assessee was false, misleading and deceptive in material particular. The claim was *bonafide* may be the assessee was not able to prove the same, even otherwise, we find that it was an arguable case. For this reason, we are of the opinion that provision to sub-Section 10 of Section 86 could not be invoked in a matter like this. This condition stipulated therein is not satisfied and we, thus, decide the question of law no.1 in favour of the assessee and delete the penalty imposed under Section 86(10) of the Act.

14. Insofar as the penalty imposed under Section 86(12) of the Act is concerned, it is rightly argued by learned counsel for the respondent that the same is compensatory in nature as it recompenses the Department for the tax deficiency. Section 86(12) reads as under:

“86(12) Where a tax deficiency arises in relation to a person, the person shall be liable to pay, by way of penalty, a sum equal to one per cent of the tax deficiency per week or a sum equal to rupees one hundred per week., whichever is higher, for the period of default”.

15. Tax deficiency is defined in sub Section 1 of Section 86 in the following manner;

“86(1) Penalties – In this section “tax deficiency” means the difference between the tax properly payable by the person in accordance with the provisions of this Act and the amount of tax paid by the person in respect of a tax period”.

16. Since there was a tax deficiency and the penalty is imposed strictly in accordance with the criteria laid down in sub-Section 12, learned counsel appearing for the appellant has argued that the appellant had paid the tax as per the return and therefore, there was no “tax deficiency”. This is clearly a misconceived argument.

17. As noted above, tax deficiency is the difference between the tax which is found payable in accordance with the provisions of the Act and the amount of tax which was paid by the assessee in respect of a tax period. Admittedly, in this case, the tax paid at the time of filing of return was less than the tax which is found properly payable as per the provisions of the Act. The moment these conditions are satisfied, tax deficiency would arise as per the definition thereof contained in sub Section 1 of Section 86.

18. While ascertaining whether there is a tax deficiency or not, the question of *bonafide* on the part of the assessee is completely alien and irrelevant. Once the tax deficiency is found, sub Section

12 thereof comes into play, as per which, the penalty is leviable on the said amount of tax deficiency. Question of law no. 2 is thus decided in favour of the Revenue and against the assessee thereby maintaining the penalty under Section 86(12) of the Act.

19. The appeal stands dismissed in the aforesaid circumstances alongwith pending applications.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

May 12, 2011.
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