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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ST.APPL. 85/2014

ANSAL PROPERTIES&INFRASTRUCTURE LTD Petitioner

Through: Mr Puneet Agarwal and Mr Deepak
Anand, Advocates.

versus

COMMISSIONER OF TRADE & TAXES, DELHI Respondent

Through: Mr Peeyoosh Kalra, Advocate with Mr
Ankit Khurana, Advocate.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

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17.11.2015

S. Muralidhar, J:

1. This Appeal by the Assessee under Section 81 of the Delhi Value Added Tax Act, 2004 is directed against the order dated 21st August, 2014 passed by the Appellate Tribunal, Value Added Tax, Delhi ('Tribunal') in Appeal No. 88/ATVAT/09-10 for the Assessment year ('AY') 2004-05.

2. The Assessee is engaged in the real estate promotion and development and was registered as a dealer under the Delhi Sales Tax Act, 1975 ('the DSTA'). The Assessing Authority (AA) Ward No.96 passed an assessment order dated 31st March, 2006 for the Assessment Period 2004-05, *inter alia*, observing as under:

“In response to ST-13 for 24.02.2006 Sh. M.S. Bisht, A/R with POA appears before me on 24.02.2006 and produced books of

accounts, ledger, sale/purchase vouchers, bank books. The same have been checked. The dealer has filed summary, trading A/c with audited balance sheet (balance sheet is consolidated), list of tax paid purchases, which have been test checked Dealer filed list of tax paid purchases for Rs.6743217/- exemption of tax paid sales allowed on test check. No central sale. All other sales are taxable sales under local Act. There is no sale of asset during the assessment year. Assessment is as follows:

GTO	18918250	Tax assessed	737914
ISS	0	Tax dep.	737627
RD Sale	0	Tax due	287
Tax paid sale	12275290	Interest	49
Tax free sale	0	Penalty	0
Job Work	0	Stay amt.	0
Taxable @ 4%	0	Demand	336
Taxable @8%	1481033		
Taxable@12%	6161927		

Hence, the dealer is liable to pay Rs.336/- for which demand notice is enclosed. ”

3. The AA computed the deficient tax as Rs.336/- and this was paid by the Assessee.

4.Subsequently the AA issued a notice to the Assessee under Section 24 of the DSTA, seeking to reopen the assessment, inter alia, stating:

“Whereas I have reasons to believe that the turnover of your business for the year 2004-2005 has been assessed at a rate lower than the rate at which it was assessable/deduction has been wrongly under vide assessment order dated 31.03.2006 made under section 23 of the Delhi Sales Tax Act, 1975”.

5. Following the above notice, the re-assessment order was passed on 31st May, 2007 where it was observed that “the above said dealer has received 400 lakh during 2004-2005 as Know-How fees. This turnover has escaped for assessment while assessing the dealer for the AY 2004-05.” The said sum of Rs.400 lakhs was sought to be assessed to sales tax at 8% along with interest.

6. The challenge to the above order of re-assessment failed before the Additional Commissioner who upheld it by order dated 24th March, 2009. It was further upheld by the Tribunal by the impugned order dated 21st August, 2014.

7. While admitting this Appeal on 12th February, 2015, the Court framed the following questions of law:

“(a) Were the reassessment proceedings justified in law;

(b) Could the reassessment – premised upon statement of turnover – be completed on the ground that turnover had been assessed at a lower rate than what ought to have been originally done;

(c) Could be Appellate Tribunal – VAT (ATVAT), in the circumstances of the case, have confirmed the demand as one relating to transfer of right to use the goods, which was not the case of the Revenue and if so, the correct rate of tax;

(d) Was interest leviable on the date determined by the ATVAT or any other time?”

8. The reassessment was sought to be reviewed under Section 24 of the DSTA. Section 24 (1) requires the Commissioner to record the 'reasons to believe' that the whole or any part of the turnover of a dealer in respect of any period "has escaped assessment to tax or has been under-assessed or has been assessed at a rate lower than the rate at which it is assessable....."

9. A question was posed by the Court to the learned counsel for the Respondent whether in the present case the law as explained by this Court in several decisions including the recent decision in *Shruti Fasteners Ltd. v. Commissioner of Value Added Tax* (decision dated 15th October, 2015 in Sales Tax Appeal No. 7/2010) has been complied with in the instant case. In the said decision this Court, after surveying the earlier cases that clarified the legal position held that the requirement of the AA having to record 'reasons to believe' preceding the issuance of the show cause notice to an Assessee under Section 24 (1) DSTA was mandatory. It is not enough for the AA to merely reproduce the wording of the provision and state in the notice to an Assessee that there is "reason to believe" that the whole or any part of the turnover has escaped assessment. In other words the exercise of reopening of an assessment is not a casual one. The noting has to reveal that as part of the process of reopening the assessment, the AA applied his mind to the relevant materials prior to arriving at the conclusion, even *prima facie*, that there are 'reasons to believe' that the whole or any part of the turnover has escaped assessment.

10. In response to the above query, Mr Peeyoosh Kalra, learned counsel for the Respondent fairly stated that there was no recording by the AA in the

file, prior to the issuance of notice of reassessment, that there were "reasons to believe" that the whole or part of the turnover has escaped assessment for the assessment period in question. Therefore, the mandatory requirement of Section 24 (1) of the DSTA has not been fulfilled in the present case.

11. While this conclusion is by itself sufficient to invalidate the re-assessment proceedings, the Court finds that what the AA has done, pursuant to the exercise of the power under Section 24(1) of the DSTA is to bring to tax the know how fees which was already disclosed by the Assessee in the balance sheet produced during the assessment proceedings. Schedule 13 of the balance sheet produced by the Assessee clearly discloses the know-how fees in the sum of Rs.400 lakhs. The extracted passage of the order clearly indicates that the Assessing Officer had perused the balance sheet and thereafter framed the assessment. Consequently, what in fact the AA did was to review his earlier order based on a change of opinion that the said sum of Rs.400 lakhs ought to have been brought to tax. This course of action was legally impermissible and was beyond the scope of the powers of the AA under Section 24 (1) of the DSTA. If indeed the assessment order of the AA was prejudicial to the interests of the revenue then it was open to the Commissioner to seek to invoke the revisional powers under Section 46 of the DSTA. That course was, however, not opted in the present case.

12. For the above reasons, the Court finds that the proceedings initiated under Section 24 (1) of the DSTA by the AA was without jurisdiction and unsustainable in law. Question (a) is answered in the negative, in favour of the Assessee and against the Department. Consequently, questions (b) and

(c) are answered likewise. The question of levy of interest therefore does not arise and question (d) is answered accordingly.

13. The impugned order dated 21st August, 2014 of the Tribunal and the corresponding orders of the Additional Commissioner and the AA are hereby set aside.

14. The appeal is allowed but in the circumstances, with no order as to costs. The refund of the tax if any deposited by the Assessee will be made to it in accordance with law without unnecessary delay.

S. MURALIDHAR, J

VIBHU BAKHRU, J

NOVEMBER 17, 2015

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