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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ST.APPL. 29/2015

BANSAL DYE CHEM PVT LTD

..... Petitioner

Through: Mr A. K. Babbar and Mr Surinder
Kumar, Advocates.

versus

**COMMISSIONER VALUE ADDED TAX,
DELHI & ANR.**

..... Respondents

Through: Mr Gautam Narayan, Additional
Standing Counsel (Civil) and GNCTD appearing
for Respondent nos.1 & 2.

CORAM:

HON'BLE DR. JUSTICE S.MURALIDHAR

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

24.09.2015

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Dr. S. Muralidhar, J.

1. This appeal by the Assessee, Bansal Dye Chemical Private Ltd., under Section 81 of the Delhi Value Added Tax Act, 2004 ('DVAT Act') is directed against the impugned order dated 28th April 2015 passed by the Value Added Tax Appellate Tribunal ('AT') in Appeal No.

1248/ATVAT/13-14 for the assessment period 1st November 2012 to 30th November 2012.

2. The question of law that arises for consideration is whether the AT was by the impugned order dated 28th April, 2015 justified in affirming the order dated 26th February 2013 passed by the Value Added Tax Officer (VATO) imposing penalty on the Appellant Assessee under Section 86(10) of the DVAT Act without issuing notice to the Assessee?

3. The Objection Hearing Authority (OHA) by an order dated 21st January 2014 dismissed the appeal of the Assessee against the order dated 26th April 2013 of the VATO on the ground that the Assessee had already paid the penalty. The AT has by the impugned order confirmed the penalty.

4. The brief facts, as articulated by Mr. A.K. Babbar, learned counsel for the Appellant, are that the Assessee's premises were surveyed on 16th November 2012. Variation in cash and stock was found. The VATO enhanced the gross profit and levied tax, interest and penalty. Admittedly, prior to levying penalty under Section 86 (1) no separate notice was issued to the Assessee. The Assessee paid the tax, interest and penalty. While the Assessee did not challenge the levy of tax and interest, he questioned the

penalty order, *inter alia*, on the ground that no opportunity of hearing was afforded on the question of penalty before the order was passed.

5. Mr Gautam Narayan, learned Standing Counsel for the Respondents, submitted that the Assessee has not challenged the finding of the VATO as far as the levy of tax and interest was concerned, the Assessee accepted that it had filed a return with incorrect particulars. Therefore, there cannot be any mitigating circumstances as far as Section 86(10) is concerned.

6. The fact remains that no notice was issued to the Assessee by the VATO on the aspect of penalty. The mere fact that the Assessee had paid the penalty under protest would not preclude it from questioning the levy of penalty on the ground that the basic procedural requirement was not fulfilled by the VATO.

7. Assessment of penalty is an exercise separate from the main assessment for determining the tax and interest payable. This is evident from a perusal of Sections 31 and 32 (which talk of the self assessment and default assessment) and Section 33 of the DVAT Act which deals with the penalty assessment and which reads as under:

“33. Assessment of penalty.- (1) Where the Commissioner has reason

to believe that a liability to pay a penalty under this Act has arisen, the Commissioner, after recording the reason in writing, shall make and serve on the person a notice of assessment of the penalty that is due under this Act.

(2) The amount of any penalty assessed under this section is due and payable on the date on which the notice of assessment is served by the Commissioner.

(3) Any assessment made under this section shall be without prejudice to prosecution for any offence under this Act.

Explanation.- A person may, if he disagrees with the notice of assessment, file an objection under Section 74 of this Act”.

8. In addition Rule 36 (2) of the Delhi Value Added Tax Rules, 2005 (DVAT Rules) states “ Where the Commissioner makes an assessment of penalty under Section 33, he shall record the order in Form DVAT-24A and such notice of assessment of penalty shall be served on the dealer in the manner prescribed in Rule 62.”

9. The very nature of the proceedings under Section 33 of the DVAT Act read with Rule 36 (2) of the DVAT Rules underscore the need for the VATO to observe the principles of natural justice while making the penalty order. This entails serving on the Assessee a separate notice to show cause why penalty should not be imposed and affording the Assessee an opportunity of being heard prior to passing the penalty order. The imposition

of penalty is not a mechanical or automatic exercise but requires application of mind by the assessing authority to the facts and circumstances of the case. The fact that an Assessee is found liable to pay enhanced taxes and interest does not *ipso facto* determine whether the Assessee is also liable to pay a penalty.

10. In ***Indian Tourism Development Corporation v. Sales Tax Officer*** (decision dated 24th September 2010 in W.P. (C) Nos. 17431 of 2006), this Court *inter alia* dealt with an identical issue as under:

“In the present petition, the petitioner has also challenged the imposition of penalty on the independent ground that it had not been given an opportunity of hearing. Mr. Randhir Chawla, learned counsel for the petitioner has placed reliance upon the order of this Court dated 19th July, 2010 passed in W.P.(C) 10527/2009.

Having heard the learned counsel for the parties, we are of the opinion that petitioner ought to have been given an opportunity of hearing prior to levy of penalty.

Consequently, we set aside the penalty order and remit the matter to the Value Added Tax Officer to pass appropriate orders in accordance with law after giving an opportunity of hearing to the petitioner.”

11. Likewise in ***Indian Railway Catering and Tourism Corporation Ltd.***

Govt. of NCT of Delhi 48 DSTC J-316 (decision dated 19th July 2010 in WP(C) Nos. 10527/2009) this Court ordered: “We feel that the petitioner ought to have been given an opportunity, of hearing before the penalty orders could have been passed.”

12. In the present case it is seen that on the basis of the survey, a notice was issued to the Assessee under Section 59 of the DVAT Act as regards the assessment to tax. The Assessee did not participate in the assessment proceedings and an ex parte ‘Notice of Default Assessment of Tax and Interest’ was issued on 24th February 2013 by the VATO under Section 32 of the DVAT Act read with Rule 36 (1) of the DVAT Rules in Form 24. On the same day the VATO passed the penalty order, without any service of prior notice on the Assessee. The VATO sent to the assessee the penalty order as a “Notice of Assessment of Penalty” under Rule 36 (2) of the DVAT Rules in Form 24A. The Assessee was simply called upon to deposit the penalty amount already determined by the VATO.

13. Inasmuch as the penalty order dated 24th February 2013 under Section 86 (10) of the DVAT Act was passed by the VATO without service of prior notice of penalty on the Assessee and without affording the Assessee an

opportunity of being heard on the question of penalty, the said order is held unsustainable in law and is hereby set aside. The consequential order dated 21st January 2014 of the OHA and the impugned order dated 28th April, 2015 of the AT are also set aside.

14. The Court remands the matter concerning penalty to the VATO for a fresh decision in accordance with law.

15. The appeal is allowed in the above terms but with no order as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

SEPTEMBER 24, 2015/MK