

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

15

+

ST. APPL. No. 63/2014

H.G. INTERNATIONAL

...Petitioner

Through: Mr. H.L. Taneja with Mr Sumit Kumar
Batra, Advocate

versus

THE COMMISSIONER OF TRADE AND TAXES, DELHI ...Respondent

Through: Mr. Gautam Narayan, ASC with Mr. R.A Iyer,
Advocate for with Ms. Trisha Singh, LA

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE PRATHIBA M. SINGH

ORDER

16.08.2017

%

Dr. S. Muralidhar, J.:

1. The matter is taken up for hearing today as 14th August 2017 was declared a holiday on account of *Janmashtami*.
2. The only question of law framed by the order dated 4th August 2016 is “whether the VATO (Audit) can pass an assessment order in terms of the Delhi Value Added Tax Act, 2004?”
3. The present appeal by the Assessee under Section 81 of the Delhi Value Added Tax Act, 2004 (‘DVAT Act’) is directed against an order dated 1st August 2014 passed by the Appellate Tribunal, Value Added Tax (‘AT’) dismissing the Appellant’s appeal against two separate orders, dated 9th September 2011 and 29th March 2013, passed by the Special Commissioner-

I/Objection Hearing Authority ('OHA') which upheld the default assessment of tax and interest under Section 32 of the DVAT Act for the 2nd, 3rd and 4th quarters of 2008-09 and penalty under Section 33 read with Section 86(13) of the DVAT Act for 2008-09.

4. The Appellant is engaged in the business of trading in auto parts, tyres and the lubricant oil. The Appellant's claim of input tax credit was rejected for the aforementioned 2nd, 3rd and 4th quarters for 2008-09 resulting in creation of demand and imposition of penalty. After the OHA upheld the orders of default assessment and interest and penalty issued by the Value Added Tax Officer ('VATO'), who also happened to be the VATO (Audit), the Appellant approached the AT which, by the impugned order, has dismissed the appeal of the Appellant.

5. It is significant that, at no stage of proceedings before the VATO, the OHA, or the AT, did the Appellant raise the issue regarding the jurisdiction of the VATO (Audit) to pass the default assessment order.

6. However, this Court has permitted the Appellant to raise this question since it does go to the root of the matter. The thrust of the arguments of the Appellant as articulated by its counsel Mr H.L. Taneja, is that the person who conducts the audit cannot himself make the assessment. In support of this contention reliance is first place on the decisions in ***Indian and Eastern Newspaper Society v Commissioner of Income-Tax [1979] 119 ITR 996 (SC)***; ***Carlton Overseas Pvt. Ltd. v. Income Tax Officer [2009] 318 ITR 295 (Del)***; ***ATS Infrastructure Ltd. v. CIT [2009] 318 ITR 299 (Del)*** and ***Duncan Services Ltd. v. Income Tax Officer [1992] 198 ITR 264 (Del)***.

7. It was pointed out to Mr. Taneja that all the above decisions were under the Income Tax Act, 1961 and not in the context of the DVAT Act. Mr. Taneja, however, insisted that the said provisions are comparable. According to him what has been explained in the context of the powers of an officer entrusted with the powers of audit under the Income Tax Act would *ipso facto* also apply to the provisions in the DVAT Act that deal with audit.

8. The Court is unable to agree with the above submission. As far as DVAT Act is concerned, there are specific provisions that deal with audit. Section 58 of the DVAT Act reads as under:

“58. Audit

(1) The Commissioner may serve on any person in the prescribed manner a notice informing him that an audit of his business affairs shall be performed and where applicable, that an assessment already concluded under this Act may be reopened.

Explanation.- A notice may be served notwithstanding the fact that the person may already have been assessed under sections 31, 32 or 33 of this Act.

(2) A notice served under sub-section (1) of this section may require the person on whom it is served, to appear on a date and place specified therein, which may be at his business premises or at a place specified in the notice, to either attend and produce or cause to be produced the books of accounts and all evidence on which the dealer relies in support of his returns (including tax invoices, if any), or to produce such evidence as is specified in the notice.

(3) The person on whom a notice is served under sub-section (1) shall provide all co-operation and reasonable assistance to the Commissioner as may be required to conduct the proceedings under

this section at his business premises.

(4) The Commissioner shall, after considering the return, the evidence furnished with the returns, if any, the evidence acquired in the course of the audit, if any, or any information otherwise available to him, either –

- (a) confirm the assessment under review; or
- (b) serve a notice of the assessment or re-assessment of the amount of tax, interest and penalty if any pursuant to sections 32 and 33 of this Act.

(5) Any assessment pursuant to an audit of the person's business affairs shall be without prejudice to prosecution for any offence under this Act.”

9. The above provision has also to be understood in the context of Section 66 (1) and Section 68 of the DVAT Act, which read as under:

“66 (1) For carrying out the purposes of this Act, the Government shall appoint a person to be the Commissioner of Value Added Tax.”

68. Delegation of Commissioner's powers

(1) Subject to such restrictions and conditions as may be prescribed, the Commissioner may delegate any of his powers under this Act to any Value Added Tax authorities.

(2) Where the Commissioner delegates his powers under Chapter X, the delegate shall carry and produce on demand evidence in the prescribed form of the delegation of these powers when exercising the powers.

(3) Where the Commissioner has delegated a power to a Value Added Tax Authority, the Commissioner may supervise, review and rectify any decision made or action taken by that Authority. Explanation.- The exercise of this power of supervision, review or rectification will not lead to the issue of an assessment or re-assessment after the expiry of the time referred to in section 34 of this Act.

10. It is seen that Chapter X of the DVAT Act deals with the audit, investigation and enforcement. Under Section 58 (1) of the DVAT Act, the Commissioner may serve on any person a notice informing that an audit shall be performed and an assessment already abated with the reopening. In terms of Section 58 (3), the person on whom the notice is served is expected to provide all cooperation and reasonable assistance as may be required to conduct the audit proceedings. Section 58 (4) states that the Commissioner shall, after considering the return, the evidence furnished with the returns, if any, the evidence acquired in the course of audit, if any, or any information otherwise available to him, either confirm the assessment under review or serve a notice of the assessment or re-assessment of the amount of tax, interest and penalty pursuant to Sections 32 and 33 of the DVAT Act. Therefore, Section 58 (4) itself contemplates the auditor carrying out an assessment or re-assessment as the case may be, in terms of Sections 32 and 33 of the DVAT Act.

11. The powers under Section 58 can be delegated by the Commissioner to named officers in terms of Section 66 (1) read with Section 68 of the DVAT Act. At that relevant time when the audit of the Appellant took place, there was an order dated 31st October 2005 issued by the Commissioner, VAT under Section 68 of the DVAT Act read with Rule 48 of the Delhi Value Added Tax Rules, 2005 ('DVAT Rules') delegating his powers under various provisions of the DVAT Act to an officer of a particular designation. Relevant to the present case is the entry at Sl. No. 15 of the said order, which reads as under:

Sl. No.	Section	Powers delegated	Officer to whom delegated
15.	58	All powers to audit the business affairs of the 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.	All Officers appointed under sub section (2) of section 66 of the Delhi Value Added Tax Act, 2004 not below the rank of Value Added Tax Officer.

12. At the time when the impugned orders of default assessment of tax, interest, and penalty were passed by the VATO (Audit) in the present case, the above order was in force. It is a validly issued order and is not a subject matter of challenge in the present proceedings. The above order delegates to the VATO all the powers of an auditor under Section 58 of the DVAT Act for (a) confirming the assessment under review or (b) serving a notice of assessment or re-assessment.

13. Consequently, in the present case, the impugned orders of default assessment of tax, interest and penalty issued by the VATO (Audit) were validly issued and were within his powers and jurisdiction in terms of Section 58 (1) read with Section 58 (4), and Section 66 read with Section 68 of the DVAT Act.

14. Mr. Taneja referred to the decision in *Commissioner of Wealth-Tax v. Abdulsaeed Abdulhamid Patel [2006] 281 ITR 132 (Guj)* where it was held that where there was no specific provision in a tax statute, a similar

provision in another tax statute can be invoked. The said decision was in the context of the Wealth Tax Act, 1957 and is of no assistance to the Appellant since in the DVAT Act, as already noticed hereinbefore, there are specific provisions concerning audit and delegation of powers by the Commissioner, VAT to the VATO for conducting the audit and making assessment thereunder.

15. Mr. Taneja then referred to the decisions in *Tata Sponge Iron Ltd. v Commissioner of Sales Tax, Orissa* [2012] 49 VST 33 (Ori) and *ABB India Limited v. State of Odisha* [2015] 77 VST 124 (Ori) wherein it was held that the officer who prepares the audit report cannot himself pass an assessment order based on such audit report. The said decisions are distinguishable in their application to the present case since the corresponding provision under the Orissa Value Added Tax, 2004 ('OVAT Act') is Section 41 (4) which does not envisage the same officer who conducts the audit also making the consequent assessment. The said provision reads as under:

"41 (4) After completion of tax audit of any dealer under sub-section (3), the officer authorised to conduct such audit shall, within seven days from the date of completion of the audit, submit the audit report, to be called "Audit Visit Report", to the assessing authority in the prescribed form along with the statements recorded and documents obtained evidencing suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit and evasion of tax, if any, relevant for the purpose of investigation, assessment or such other purposes."

16. Thus, under the OVAT Act the officer undertaking the audit has to forward the report to the assessing officer who then, in terms of Section 42

of the OVAT Act, makes an 'audit assessment'. The position under Section 58 of the DVAT Act is very different.

17. Likewise the decisions in *Sha. M. Hastimal and Co. v. Deputy Commissioner of Commercial Taxes (1989) 72 STC 308* which was under the Karnataka Sales Tax Act, 1957, *Eureka Forbes Ltd. v. State of Bihar [2000] 119 STC 460 (Pat)* which was under the Bihar Finance Act, 1981, *Ansal Papers v. State of U.P. [2009] 20 VST 727 (All)* which was under the U.P. Trade and Tax Act, 1948 are distinguishable as they were in the context of the specific provisions of those enactments which bear no comparison to Section 58 of the DVAT Act.

18. For the aforementioned reasons, the question framed by this Court by order dated 4th August, 2016 is answered in the affirmative, i.e. in favour of the Department and against the Assessee. The order dated 1st August 2014 of the AT is affirmed. The appeal is dismissed, but in the circumstances, with no orders as to costs.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 16, 2017

rd