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

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Date of Decision: 13.03.2023

+ **VAT APPEAL 33/2022**

LAKRA OIL CO

..... Appellant

Through: Mr. Rakesh Kumar, Mr.
Subhash Chandra Garg and Mr.
Hari Om Garg, Advs.

Versus

COMMISSIONER OF TRADE &
TAXES & ANOTHER

..... Respondents

Through: Mr. Rajeev Aggarwal, ASC
with Ms. Divyanshi Bansal &
Ms. Shilpa Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The appellant has filed the present appeal impugning an order dated 08.08.2022, passed by the Delhi Value Added Tax Appellate Tribunal (hereafter '**the impugned order**') in appeal no.79/ATVAT/06 captioned ***M/s Lakra Oil Trading Co v. Commissioner of Trade and Taxes***, whereby the said appeal preferred by the appellant was partly rejected.

2. The appellant has projected the following questions:

- “a) Whether the impugned order passed by Hon’ble DVAT Appellate Tribunal is perverted to facts of the case inspite of having enough material regarding the alleged clerical error in reported sale in return. As per record turnover was Rs. 13,82,000/- but inadmissible the same turnover was reflected as Rs. 1,38,82,000 and therefore the Tribunal erred in law is not accepting the explanation.
- b) Whether the Hon’ble DVAT Appellate Tribunal is erred on law to upheld and sustain the penalty u/s 86(10) of DVAT Act as the penalty is imposed in contravention to provision of Section 86(10) of DVAT Act and law laid down by this Hon’ble Court in case of in case of Bansal Dye Chem ST.APPL. 29/2015 dated 24-09- 2015 and other cases.”

3. The brief facts of the case are that the appellant is an authorised dealer of Bharat Petroleum Corporation Limited, a public sector undertaking, *inter alia*, engaged in marketing of petroleum products. The appellant is engaged in re-sale of petroleum products and lubricants. The appellant was a registered dealer with the Department of Trade and Taxes at the material time.

4. A notice for default assessment dated 02.09.2005 was issued by the Value Added Tax Officer (hereafter ‘**the VATO**’) calling upon the petitioner to pay an amount of ₹36,24,167/- (Rupees Thirty Six Lakhs Twenty Four Thousand and One Hundred Sixty Seven Only), which included tax for the period of 01.05.2005 to 31.05.2005 amounting to ₹35,35,773/- and an interest of ₹88,394/-. The said demand was raised for, essentially, five allegations/reasons. First, that the appellant had not paid tax amounting to ₹42,604/- on sales of superfine kerosene oil

(hereafter '**SKO**') amounting to ₹10,65,103/-. The appellant had claimed that the said sales are tax free, however, the same were chargeable to tax at the rate of 4%.

5. Second, that the appellant had reflected sales of ₹1,38,82,000/- chargeable to tax at the rate of 12.5%, however, it had calculated the tax of ₹1,72,750/- instead of ₹17,35,250/-. Thus, the tax paid was deficient by ₹15,62,500/-.

6. Third, that the invoices produced were not signed by the authorised representatives and therefore, the same contravened with the provision of Section 50(f) of the Delhi Value Added Tax Act, 2004 (hereafter '**the DVAT Act**'), which invited penalty under Section 86(17) of the DVAT Act. Accordingly, the assessing authority (VATO) imposed a liability of ₹1,00,000/- on the said ground.

7. Fourth, the VATO found that the sales amounting to ₹1,45,74,396/-, which was claimed as inter-state sales, are not supported with the evidence to show the movement of goods to a place outside Delhi. Out of the said amount, the sales of ₹13,07,600/- were in respect of MTO, which was chargeable to tax at the rate of 20% resulting in a tax liability of ₹2,61,520/- and the balance amount of ₹1,32,66,796/- in respect of LDO was chargeable to value added tax at the rate of 12.5% resulting in tax liability of ₹16,58,349/-. Thus, the aggregate tax liability in respect of the sales turn over of ₹1,45,74,396/-, which was considered as a local sale, was computed at ₹19,19,869/-.

8. Fifth, that the VATO found that the sales of ₹2,70,000/- were shown against an invoice dated 30.05.2005 against C-Forms and Central Sales Tax was charged at the rate of 4%. However, the said invoice indicated that the sales were not inter-state sales. This resulted in further liability of ₹10,800/-

9. The VATO also imposed a penalty equivalent to the tax deficiency of ₹35,35,773/-.

10. The appellant filed his objection against the order of default assessment dated 02.09.2005 before the Objection Hearing Authority (hereafter '**the OHA**').

11. It is the appellant's case that a liability of ₹15,62,500/- had been incorrectly raised by considering the sales turnover as ₹1,38,82,000/-. According to the appellant, there was an apparent error in reflecting the sales turnover as ₹1,38,82,000/- as the actual turnover for the relevant period amounted to ₹13,82,000/-. The appellant claims that it had also produced material to establish the same.

12. The OHA rejected the challenge and by an order dated 19.06.2006, upheld the default assessment framed by the VATO, including the levy of penalty.

13. The appellant filed an appeal before the Appellate Tribunal, Value Added Tax (Appeal No.79/AVAT/06-07) for the assessment years 2005-06. However, the said appeal was rejected by an order dated 10.06.2014.

14. Aggrieved by the order dated 10.06.2014 passed by the Appellate Tribunal, the appellant preferred an appeal before this Court (being ST.APPL. 9/2016). The said appeal was allowed by this Court by an order dated 24.05.2016 and the matter was remanded to the Appellate Tribunal to consider afresh in light of the observations made in the said order dated 24.05.2016.

15. The Appellate Tribunal passed the impugned order pursuant to the order dated 24.05.2016 passed by this Court in ST. APPL. 9/2016 remanding the matter for consideration afresh.

16. Insofar as the appellant's contention that sales of SKO were exempted from tax is concerned, the same was rejected and the Appellate Tribunal upheld the assessment order assessing the turnover of SKO amounting to ₹10,65,103/- as chargeable to tax at the rate of 4% quantified at ₹42,604/-. The Appellate Tribunal also found no merit in the appellant's contention that it was under a *bona fide* belief that SKO was not taxable and therefore, levy of penalty was not justified. The Appellate Tribunal concurred with the OHA's view that since the value added tax was paid at the rate of 4% on purchase of SKO in the preceding month of April, 2005, the appellant was fully aware that it was taxable at the said rate. Accordingly, the Appellate Tribunal upheld the levy of penalty equivalent to the amount of tax being ₹42,604/-.

17. The learned counsel appearing for the appellant does not dispute the aforesaid finding.

18. Insofar as the tax deficiency on ₹1,38,82,000/- is concerned, the Appellate Tribunal observed that the appellant had reflected the said amount in his returns and therefore, had incorrectly reflected the output tax. The Appellate Tribunal did not accept that the OHA could have ascertained the correct turnover from the books of accounts that were produced. The Appellate Tribunal also observed that the assessee had not filed the revised returns. Before the Appellate Tribunal, the appellant had filed a copy of the revised returns as well as the certificate issued by the chartered accountant reflecting the correct turnover, however, the Appellate Tribunal did not consider the same on the ground that the same were filed belatedly.

19. The Appellate Tribunal accepted the appellant's contention that it was not afforded any opportunity to clarify the doubts that had crept in the mind of OHA regarding genuineness of transportation of goods for the reason that the Value Added Tax Inspectors (hereafter 'VATI') were unable to verify the transportation of goods by some transporters. The Appellate Tribunal was of the view that it would be in the interest of justice to afford the appellant an opportunity to substantiate its claims regarding inter-state sales. Accordingly, the Appellate Tribunal remanded the matter to the OHA for consideration and decide afresh. Similarly, the Appellate Tribunal also remanded the matter to OHA to consider the movement of goods in respect of invoice dated 20.05.2005.

20. The question regarding levy of penalty under Section 86(10) of the DVAT Act with regard to inter-state sales was also remanded for consideration afresh by the OHA.

21. Mr. Aggarwal, learned counsel appearing for the respondent, has clarified that except for the levy of interest of ₹42,604/- on sales of SKO aggregating to ₹10,65,103/- and the levy of interest and penalty thereon, the question of any further levy under Section 86(10) of the DVAT Act has been remanded to the OHA for consideration afresh. He submitted that since the appellant does dispute the levy of tax or penalty of interest in regard to the sales turnover of SKO, the second question, as projected by the appellant, does not arise.

22. The learned counsel appearing for the appellant concurs with the submission that the second question, whether the Appellate Tribunal had erred in sustaining the penalty under Section 86(10) of the DVAT Act does not arise. He states that there is some ambiguity in the impugned order regarding the penalty. Since it is now clarified that the penalty only to the extent of ₹42,604/- has been sustained, the second question may be ignored.

23. In view of the above, the only question to be examined is whether the Arbitral Tribunal had erred in not accepting that there was a clerical error in reporting the sales as ₹1,38,82,000/- instead of ₹13,82,000/-.

24. In this regard, it is relevant to note that there is no dispute that the tax computed in the said returns was commensurate with the

turnover of ₹13,82,000/-. The appellant claims that the same was correctly computed. Thus, *prima facie*, the contention that a typographical error had crept in the sales figure as reported is not insubstantial.

25. More importantly, it is not disputed that the appellant had produced his books, which were subjected to audit. The same would have clearly revealed the sales turnover as recorded in the books of accounts.

26. The appellant had also filed a revised return which was produced before the Appellate Tribunal. In addition, the appellant had also filed a chartered accountant's certificate confirming that the turnover as reflected in the books of account for the relevant period is ₹13,82,000/-.

27. In view of the above, this Court is unable to concur with the decision of the Arbitral Tribunal to disregard the revised returns or the chartered accountant certificate, which are undeniably relevant for deciding the question whether a typographical error had crept in the returns.

28. In view of the above, we consider it apposite to direct the OHA to determine the correct turnover of the appellant for the period in question after examining all relevant records as may be produced by the appellant and after affording the appellant an opportunity to be heard in this regard.

29. The impugned order, to the extent that it outrightly rejects the appellant's contention that its turnover was erroneously reported at ₹1,38,82,000/- instead of ₹13,82,000/-, is set aside. This issue is remanded to the OHA to consider afresh as indicated above.

30. The appeal is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

MARCH 13, 2023

Ch

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