DELHI SALES TAX CASES

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HIGHLIGHTS

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Neetika Khanna, Advocate

"The decision makers freedom to change the policy in public interest cannot be fettered by applying the principle of substantive legitimate expectation so long as the government does not act in an arbitrary or in an unreasonable manner, the interference by judicial review on the ground of a legitimate expectation of an individual or a group of individuals being defeated."

– L. Nageswara Rao, J.
[Kerala State Breverages(M&M) Corpn Ltd Vs. P P Suresh. (2019) SCC 710]

Sales Tax Bar Association (Regd.)
Knowledge, Diffusion & Promotion Section
Trade & Taxes Department, 2nd Floor, Bikrikar Bhawan, New Delhi-110002

DELHI
SALES TAX CASES

Containing important decisions of the Supreme Court of India, High Courts, Sales Tax Appellate Tribunal, Other Appellate and Revisional Authorities, Notifications, Circulars, Articles, etc.

Editors-in-Chief
S.K. KHURANA
H.L. MADAN
ASHOK RAI

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the provision for refund under section 38(3) to the requirement of forms under section 38(7)(d) and consequently the timeline within which the refunds had to be processed under section 38(3) remained unchanged – The court held that furnishing of statutory forms under Central Sales Tax Act, 1956 were not mandatory for processing of refunds – The court clarified about the period commencement of interest – During the processing of refund claimed if the petitioners were called upon to furnish particulars relating to any interstate transactions for the purpose of verification of central forms that time would stand excluded – Further clarified that only such time as was consumed by the petitioners beyond the period given in the notice in regard to details of specific transactions would be excluded – The writ petitions allowed.

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Important Information

VALIDITY OF STAMP PAPER

This issue is again one of the areas where misconception is ruling over reality. The misconception is that the validity of the stamp paper is six months beyond which it cannot be used for any transaction. Whereas, the reality is that stamp papers have no validity as such and can be used for any transaction without reference to the date of issuance. This issue may not be news for the legal fraternity but common people are misguided on the matter and every now and then I find people claiming this fact that stamp paper has a validity of six months only. Supreme Court has also dealt with this matter in the case of Thiruvengada Pillai vs. Navaneethammal and Anr. Relevant extract from Supreme Court judgement is reproduced herein below:

> "The Indian Stamp Act, 1899, nowhere prescribes any expiry date for use of a stamp paper. Section 54 merely provides that a person possessing a stamp paper for which he has no immediate use (which is not spoiled or rendered unfit or useless), can seek refund of the value thereof by surrendering such stamp paper to the Collector provided it was purchased within the period of six months next preceding the date on which it was so surrendered. The stipulation of the period of six months prescribed in Section 54 is only for the purpose of seeking refund of the value of the unused stamp paper, and not for use of the stamp paper. Section 54 does not require the person who has purchased a stamp paper, to use it within six months. Therefore, there is no impediment for a stamp paper purchased more than six months prior to the proposed date of execution, being used for a document."

As stamp duty is required to be paid on or before execution of the deed/agreement, there is a provision in law for refund of the stamp duty if the transaction fails for any reason at the last moment. However, it maybe noted that the stamp paper should not have been spoiled or rendered unfit or useless if refund has to betaken. Hence, the period of six months is relevant for refund of stamp duty and not for usage of the stamp paper.

[2016] 54 DSTC 1 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Justice S. Muralidhar And Justice Najmi Waziri]

W.P. (C) 6013/2016 & CM No. 24776/2016
W.P. (C) 6014/2016 & CM No. 24777/2016
W.P. (C) 6015/2016 & CM No. 24778/2016
W.P. (C) 6020/2016 & CM No. 24783/2016
W.P. (C) 6022/2016 & CM No. 24785/2016
W.P. (C) 6023/2016 & CM No. 24786/2016
W.P. (C) 6024/2016 & CM No. 24787/2016
W.P. (C) 5944/2016

Prime Papers & Packers ... Petitioner

Versus

Commissioner of VAT & Anr. ... Respondent

Date Of Order : 28.07.2016

REFUND UNDER DVAT ACT, 2004 – SECTION 38(3) BEING MANDATORY IN NATURE FOR TIME LIMIT – WITHHOLDING OF REFUND – NOTICE UNDER SECTION 59(2) NOT SERVED WITHIN TIME PRESCRIBED IN ACT AND CIRCULAR NO. 6 OF 2005 WAS NOT FOLLOWED – WRIT PETITION FILED SEEKING DIRECTION TO RELEASE REFUNDS WITH INTEREST FOR A.Y. 2010-11 TO 2014-15.

REVENUE HAD ALREADY FRAMED DEFAULT ASSESSMENT FOR THE FOURTH QUARTER OF 2010-11 AND FIRST QUARTER OF 2011-12 CREATED DEMAND AND ELIMINATED REFUND – NO ORDERS WERE UPLOADED TO THE PETITIONER ACCOUNT AND NO NOTICE WAS SERVED – THE REVENUE COULD NOT PROCESS THE REFUNDS FOR A.Y. 2012-13 TO 2014-15 AND SOUGHT EXTENSION – THE COURT NOT GRANTED THE TIME FOR ISSUING THE REFUND CLAIMED - REVENUE TOOK PLEA THAT THE PETITIONER DID NOT UPLOAD THE FORM C ON FORM 9 OF THE CENTRAL SALE TAX (DELHI) RULES, 2005 AND WITHOUT UPLOADING FORMS COMPUTATION OF THE TIME FOR PURPOSE OF SECTION 38 (3) (a) (ii) DID NOT COMMENCE AND REFERRED SECTION 38(7)(d) – PETITIONER ARGUED THAT INTERPRETATION OF SECTION 38(3) READ WITH SECTION 38(7) (d) WAS ERRONEOUS – THE COURT HELD THAT IF PETITIONER COULD HAVE BEEN ASKED TO FURNISH INFORMATION OR PARTICULARS U/S 38(7) AND IF THERE WAS A FAILURE BY THE PETITIONER TO PROVIDE INFORMATION THEN POSSIBLY THE QUESTION OF THE TIME LIMIT UNDER SECTION 38(7) BEING CORRESPONDINGLY POSTPONED MIGHT ARISE – DIRECTIONS WERE ISSUED TO ISSUE REFUND WITH INTEREST.

Facts of the case

The grievance of the Petitioner was that despite the lapse of over two months since the filing of the quarterly returns, the refunds were not

issued in terms of Section 38(3) (a) (ii) of the DVAT Act. The Petitioner also pointed out that Circular No. 6 dated 15th June 2005 issued by the Commissioner, VAT required refund claimed to be processed and refund orders issued in Form DVAT-22 within a period of 15 days from the date of receipt of the return unless it had been picked up for audit or where additional information sought that had not been furnished.

It was further pointed out by the Petitioner that as recently as on 20th July 2016, for the period 1st April 2012 to 31st March 2013, the Department of Trade ad Taxes (DT&T) had issued a notice to the Petitioner under Section 59(2) of the DVAT Act seeking certain documents/books to be produced.

The amounts claimed in the returns filed for various periods as reflected in the following tabular chart:

Case No.	Refund Period	Date of filing return and refund amount
WP(C) 5944/2016	01.01.2014 to 31.03.2014	7th October, 2014 Rs.1,84,728/-
WP(C) 6013/2016	01.01.2015 to 31.03.2015	23rd April, 2015 Rs.2,47,928/-
WP(C) 6014/2016	01.01.2012 to 31.03.2012	28th April, 2012 Rs. 34,406/-
WP(C) 6015/2016	01.04.2011 to 30.06.2011	27th July, 2011 Rs.1,03,714/-
WP(C) 6020/2016	01.07.2012 to 30.09.2012	31st December, 2013 Rs. 92,600/-
WP(C) 6022/2016	01.01.2013 to 31.03.2013	31st December, 2013 Rs.1,50,264/-
WP(C) 6023/2016	01.01.2011 to 31.03.2011	7th May, 2012 Rs.1,60,602/-
WP(C) 6024/2016	01.10.2011 to 31.12.2011	13th February, 2012 Rs.1,23,053/-

With reference to the refund claimed for the first quarter of 2011-12, the Petitioner uploaded the requisite C-form issued under the Central Sales Tax Act 1956 ("CST Act") only on 9th February, 2015.

Without such form being uploaded, the computation of the time limit for the purpose of Section 38 (3) (a) (ii) did not commence. He referred to Section 38(7) (d) of the DVAT Act. In any event since the notice of default assessment had been passed for the aforementioned two periods i.e. for the fourth quarter of AY 2010-11 and first quarter of AY 2011-12, the question of now issuing any refund to the Petitioner for those periods did not arise. It was open to the Petitioner to sought appropriate remedies against those orders in accordance with law.

Held

The Court was constrained to observe that there had been a large number of petitions filed in the Court by dealer awaiting the processing of their refund claims. Despite numerous judgments of this Court and circulars issued by the Commissioner VAT, including Circular No. 6 of 2005 and recently the Order dated 21st July 2016, the problem of delayed refunds persists. The frequent transfers of VATOs and the lack of any orientation and training as regards their statutory responsibilities could not constitute a valid justification for delaying the refunds due to the dealers. The Court would urge the Commissioner VAT to review the issue of grant of refunds on priority basis so that the process was streamlined and his instructions regarding speedy disposal of refunds was strictly followed. He must initiated disciplinary action against those officers of the DT&T who were found disobeying the instructions issued by the Commissioner from time to time in this regard. The Commissioner should undertake a periodic review, at least once in two weeks, as to how many refund applications have been processed and within what time. Responsibility should be fixed on derelict officers and disciplinary proceedings initiated where there was a clear breach of the statutory duties. The collective failure of such officers was imposing a huge interest burden on the exchequer which was clearly avoidable.

The Court therefore issued the following directions as far as the present petitions were concerned: (i) in relation of each of the refund claims for the period above mentioned, the Respondent DT&T will issue to the Petitioner the amount of refund claimed with interest up to the date of payment which shall not be later than two weeks from today; (ii) if there was disobedience of the above directions, it would be open to the Petitioner to seek appropriate remedies in accordance with law.

The petitions were disposed of in the above terms.

Present for Petitioner : Mr. Vasdev Lalwani with Mr. Mohit Gautam and Mr. Rohit Gautam, Advocates

Present for Respondent : Mr. Satyakam, Adv., Addl. Standing Counsel, Govt. of NCT of Delhi with Ms. Jyoti Seth, VATO Ward 68

Order

Dr. S. Muralidhar, J.:

1. These are eight petitions by M/s. Prime Papers & Packers, a dealer registered under the Delhi Value Added Tax Act, 2004 ('DVAT Act') for directions to the Respondent – Commissioner, Value Added Tax (Commissioner, VAT) to refund to the Petitioner the amounts claimed in the returns filed for various periods as reflected in the following tabular chart:

Case No.	Refund Period	Date of filing return and refund amount
WP(C) 5944/2016	01.01.2014 to 31.03.2014	7th October, 2014 Rs.1,84,728/-
WP(C) 6013/2016	01.01.2015 to 31.03.2015	23rd April, 2015 Rs.2,47,928/-
WP(C) 6014/2016	01.01.2012 to 31.03.2012	28th April, 2012 Rs. 34,406/-
WP(C) 6015/2016	01.04.2011 to 30.06.2011	27th July, 2011 Rs.1,03,714/-
WP(C) 6020/2016	01.07.2012 to 30.09.2012	31st December, 2013 Rs. 92,600/-
WP(C) 6022/2016	01.01.2013 to 31.03.2013	31st December, 2013 Rs.1,50,264/-
WP(C) 6023/2016	01.01.2011 to 31.03.2011	7th May, 2012 Rs.1,60,602/-
WP(C) 6024/2016	01.10.2011 to 31.12.2011	13th February, 2012 Rs.1,23,053/-

2. The grievance of the Petitioner is that despite the lapse of over two months since the filing of the quarterly returns, the refunds were not issued in terms of Section 38(3)(a)(ii) of the DVAT Act. The Petitioner also points out that Circular No. 6 dated 15th June 2005 issued by the

Commissioner, VAT requires refund claims to be processed and refund orders issued in Form DVAT-22 within a period of 15 days from the date of receipt of the return unless it has been picked up audit or where additional information sought that has not been furnished.

3. It is further pointed out by the Petitioner that as recently as on 20th July 2016, for the period 1st April 2012 to 31st March 2013, the Department of Trade ad Taxes (DT&T) has issued a notice to the Petitioner under Section 59(2) of the DVAT Act seeking certain documents/books to be produced.

4. Notice. Mr. Satyakam, learned Additional Standing Counsel accepts notice for the Respondents and presents a chart which inter alia shows that in respect of the refunds claimed for the 4th quarter of 2010-11 and the first quarter of 2011-12, notice of default assessment has already been issued by the VATO concerned on 14th October, 2011 creating demands for those periods and effectively determining that no refund is due on those periods. The submission of Mr Satyakam is that the said orders were uploaded on the website in the account of the Petitioner dealer soon after they were passed. Both orders refer to notice dated 10th September, 2011 having been issued to the Petitioner under Section 59(2) of the DVAT Act requiring the Petitioner to produce certain documents. It is submitted that on the failure of the Petitioner to submit those documents, the aforementioned notices of default assessments for the above said periods were issued.

5. With reference to the refund claimed for the first quarter of 2011-12, Mr. Satyakam states that the Petitioner uploaded the requisite C-form issued under the Central Sales Tax Act 1956 ('CST Act') only on 9th February, 2015. Without such form being uploaded, the computation of the time limit for the purpose of Section 38 (3) (a) (ii) did not commence. He referred to Section 38(7)(d) of the DVAT Act. His submission is that in any event since the notice of default assessment has been passed for the aforementioned two periods i.e. for the fourth quarter of AY 2010-11 and first quarter of AY 2011-12, the question of now issuing any refund to the Petitioner for those periods did not arise. It was open to the Petitioner to seek appropriate remedies against those orders in accordance with law.

6. Mr. Vasdev Lalwani, learned counsel for the Petitioner submits in reply that the above interpretation of Section 38(3) read with Section

38 (7)(d) of the DVAT is erroneous. He points out that Section 38 encapsulates a time-bound point scheme for dealing with applications for refund. He points out that where the Commissioner under Section 38 (2) of the DVAT Act determines that any amount is due under the DVAT Act or the CST Act, then he shall first apply the refund towards recovery of such amounts before making any refund either under the DVAT Act or the CST Act. Mr. Lalwani further points out that it is in the context of the tax that is found due that the Commissioner is entitled to issue a notice, in terms of Section 38(4), under Section 58 of the Act, regarding audit, investigation and inquiry or seek additional information under Section 59 of the Act. He could also require the Assessee to furnish security under Section 38(5) of the Act. It is only when such adjustment is contemplated that the question of time limit under Section 38(3)(a) of the Act being subject to Section 38(7) of the Act would arise. He submits that in no instance can the consideration of the application for refund be postponed by the Commissioner beyond what is contemplated under Section 38 of the Act. Mr Lalwani points out that the stage for submitting the requisite forms contemplated under the CST Act would arise subsequently and it would always be open for the DT&T to proceed against the dealer for failure to furnish the requisite forms and to raise a tax demand if so warranted in accordance with the provisions of the DVAT Act. In other words, the powers of the Commissioner or an officer authorized to proceed under Section 59 of the DVAT Act or to create demand for any of the periods for which the refund is granted in accordance with the provisions of the DVAT Act remands unaffected.

7. In the first place a reference is required to be made to Section 38 of the DVAT Act which reads thus:

"38. Refunds

(1) Subject to the other provisions of this section and the rules, the Commissioner shall refund to a person the amount of tax, penalty and interest, if any, paid by such person in excess of the amount due from him.

(2) Before making any refund, the Commissioner shall first apply such excess towards the recovery of any other amount due under this Act, or under the CST Act, 1956 (74 of 1956).

(3) Subject to sub-section (4) and sub-section (5) of this section, any amount remaining after the application referred to in sub-section (2) of this section shall be at the election of the dealer, either –

(a) refunded to the person, –

(i) within one month after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is one month;

(ii) within two months after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is a quarter; or

(b) carried forward to the next tax period as a tax credit in that period. (4) Where the Commissioner has issued a notice to the person under section 58 of this Act advising him that an audit, investigation or inquiry into his business affairs will be undertaken or sought additional information under section 59 of this Act, the amount shall be carried forward to the next tax period as a tax credit in that period.

(5) The Commissioner may, as a condition of the payment of a refund, demand security from the person pursuant to the powers conferred in section 25 of this Act within fifteen days from the date on which the return was furnished or claim for the refund was made.

(6) The Commissioner shall grant refund within fifteen days from the date the dealer furnishes the security to his satisfaction under sub- section (5).

(7) For calculating the period prescribed in clause (a) of sub-section (3), the time taken to –

(a) furnish the security under sub-section (5) to the satisfaction of the Commissioner; or

(b) furnish the additional information sought under section 59; or

(c) furnish returns under section 26 and section 27; or

(d) furnish the declaration or certificate forms as required under Central Sales Tax Act, 1956, shall be excluded.

(8) Notwithstanding anything contained in this section, where–

(a) a registered dealer has sold goods to an unregistered person; and

(b) the price charged for the goods includes an amount of tax payable under this Act;

(c) the dealer is seeking the refund of this amount or to apply this amount under clause (b) of sub-section (3) of this section; no amount shall be refunded to the dealer or may be applied by the dealer under clause (b) of sub-section (3) of this section unless the Commissioner is satisfied that the dealer has refunded the amount to the purchaser.

(9) Where –

(a) a registered dealer has sold goods to another registered dealer; and (b) the price charged for the goods expressly includes an amount of tax payable under this Act, the amount may be refunded to the seller or may be applied by the seller under clause

(b) of sub-section (3) of this section and the Commissioner may reassess the buyer to deny the amount of the corresponding tax credit claimed by such buyer, whether or not the seller refunds the amount to the buyer.

(10) Where a registered dealer sells goods and the price charged for the goods is expressed not to include an

amount of tax payable under this Act the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section without the seller being required to refund an amount to the purchaser.

(11) Notwithstanding anything contained to the contrary in sub-section (3) of this section, no refund shall be allowed to a dealer who has not filed any return due under this Act."

8. There have been numerous judgements rendered by this Court emphasizing the mandatory nature of the time limit set out under Section 38 of the DVAT Act. Instead of burdening this judgement again with the extracts of those decisions, the Court would only like to set out the list of such decisions as under:

(i) *Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax (2010) 31 VST 475 (Del)*

(ii) *Lotus Impex v. Commissioner DT&T (2016) 89 VST 450 (Del);*

(iii) *Dish TV India Ltd. v. GNCTD (2016) 92 VST 83 (Del)*

(iv) *Nucleus Marketing & Communication v. Commissioner of DVAT [decision dated 12th July 2016 in W.P.(C) 7511/2015]*

9. In all of the above judgements, the principles that have been highlighted are:

(1) the mandatory nature of the time limits under Section 38 of the Act for the processing and issuing of refunds have to be scrupulously adhered to by the Department;

(2) where the Department seeks to invoke Section 59 of the DVAT Act to seek more information from the dealer after picking up the return in which the refund has been claimed for scrutiny, those steps are to be taken within the time frame envisaged under Section 38 of the DVAT Act;

(3) even where the Department seeks to invoke Section 39 of the Act, that action again has to be taken within the time frame in Section 38(3) of the DVAT act.

10. The understanding of the Department regarding the calculation of the time limit under Section 38(3) of the Act being subject to Section 38(7), as was advanced before this Court, does not appear to be consistent with the legislative intent behind the enactment of Section 38 of the Act. It is a time-bound composite scheme which requires, in the first place, the DT&T to take immediate action upon receiving a return in which a refund is claimed. What Section 38(2) expects the Respondent to determine upon examining the claim of refund is whether there is any amount due from the dealer either under the DVAT Act or the CST Act. Such amount should already be found to be due. This is not an occasion, therefore, for the Department to start creating new demands either under the DVAT Act or the CST Act. In any event, even if the Department seeks to initiate the process for creating any fresh demand, that process cannot defeat the time period under Section 38(3)(a)(i) or (ii) for processing the refund claim.

11. Circular No. 6 of 2005 dated 15th June 2005 issued by the Commissioner VAT is binding on the DT&T. It curtails the time limit within which notices have to be issued, either for audit under Section 58 of the DVAT Act or for seeking information under Section 59 (2) of the DVAT Act, to just 15 days from the date of filing of the return claiming refund. The recent instructions issued by the Commissioner, VAT on 21st July 2016 regarding speedy disposal of refund claims also emphasises the mandatory nature of the instructions. There is therefore no question of the DT&T, and in particular the VATO concerned, not responding immediately to the refund claim made. Where it is felt that more information should be called for then the notice under Section 59(2) DVAT Act has to necessarily be issued within fifteen days thereafter.

12. In the instant case, the return for the fourth quarter of 2010-11 was filed on 28th April, 2011. Yet, the notice under Section 59 (2) of the DVAT Act was issued only on 10th September 2011, well beyond the 15 day time limit in term of Circular No. 6 of 2005. The return for the first quarter of 2011-12 was filed on 27th July, 2011. The notices under section 59 (2) DVAT Act was issued on 10th September, 2011 again beyond the 15 day time limit. In both instances the notices of default assessments were issued on 14th October, 2011. It is another matter that the Petitioner claims not to have received the above notices under Section 59 (2) DVAT Act and the consequent notices of default

assessments. The files produced by Mr Satyakam contain copies thereof but no proof of the said notices having been uploaded on the website in the Petitioner's account soon after they were issued.

13. In any event, the above notices having been issued beyond the time limits set by the Commissioner VAT for processing of refund claims, there is no valid explanation offered by the DT&T for not processing the refund claims for the said two periods within the time period under Section 38 (3) (a) (ii) of the DVAT Act. As has been explained by this Court in Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax (supra), proceedings initiated by issuing a notice under Section 59(2) of the DVAT would be independent of the requirement of processing and issuing the refund within the time limit under Section 38 of the DVAT Act. It will not constitute an excuse to postpone the issuing of the refund claimed.

14. Consequently, the Court finds no valid explanation for the failure by the DT&T to process and issue to the Petitioner the refunds for the fourth quarter of 2010-11 and first quarter of 2011-12 within the time frame set out under Section 38 of the DVAT Act.

15. On the question of the Petitioner not uploading the requisite Form 9 under the CST Act till 9th February 2015, learned counsel for the Petitioner is right in his contention that Section 38 (7) has to be read with Section 38 (3) of the DVAT Act and not in isolation. Section 38 (3) opens with the words "Subject to sub-section (4) and sub-section (5) of this Section" and proceeds to refer to any amount remaining due "after the application referred to in sub-section (2) of this Section". If Section 38(7) is read in the context of Section 38(3) of the Act, it becomes clear that those time limit will have to be calculated in the context of the Commissioner determining that some other amount is due under the DVAT Act or the CST Act against which the refund claimed requires to be adjusted. In the present case, there was nothing found due from the Petitioner whether under the DVAT Act or the CST Act at the time the Petitioner's return for the said periods claiming refund were picked up for scrutiny. Had the DT&T responded promptly as was envisaged, then the Petitioner could have been asked to furnish the information or particulars as envisaged under section 38 (7). If there was a failure by the Petitioner thereafter to provide the information or documents then possibly the question of the time limit under Section 38 (3) being correspondingly postponed might arise.

16. As regards the other periods for which refunds have been claimed, viz., the third and fourth quarters of 2011-12 and the second and fourth quarters of 2012-13 and the fourth quarters of 2013-14 and 2014-15, it is not disputed even by the Respondent, that the claims were not processed within the time limit set out under Section 38 of the DVAT Act. It appears that in relation to the return filed for the second quarter of 2012-13, a notice under Section 59(2) was issued on 25th July, 2016. Clearly, therefore it is way beyond the two months period envisaged under Section 38(3)(a)(ii) within which refund had to be processed and issued.

17. Mr. Satyakam urged the Court to grant the Respondent sufficient time so that entire exercise pursuant to the notices issued under Section 59 of the DVAT could be completed. The Court is not, in these petitions, concerned with the outcome of the proceedings sought to be initiated by the Respondent by issuing notices under Section 59 of the DVAT Act. The issue that is before the Court is the failure of the DT&T to issue refunds within the time limits envisaged under Section 38 of the DVAT Act. These refunds need not and should not await the outcome of those proceedings under Section 59 of the DVAT Act which in any event have been initiated beyond the stipulated time limits. The refunds are long overdue and interest on the refund amounts are mounting.

18. The Court is constrained to observe that there have been a large number of petitions filed in this Court by dealers awaiting the processing of their refund claims. Despite numerous judgments of this Court and circulars issued by the Commissioner VAT, including Circular No. 6 of 2005 and recently the Order dated 21st July 2016, the problem of delayed refunds persists. The frequent transfers of VATOs and the lack of any orientation and training as regards their statutory responsibilities cannot constitute a valid justification for delaying the refunds due to the dealers. The Court would urge the Commissioner VAT to review the issue of grant of refunds on priority basis so that the process is streamlined and his instructions regarding speedy disposal of refunds is strictly followed. He must initiate disciplinary action against those officers of the DT&T who are found disobeying the instructions issued by the Commissioner from time to time in this regard. The Commissioner should undertake a periodic review, at least once in two weeks, as to how many

refund applications have been processed and within what time. Responsibility should be fixed on derelict officers and disciplinary proceedings initiated where there is a clear breach of the statutory duties. The collective failure of such officers is imposing a huge interest burden on the exchequer which is clearly avoidable.

19. The Court therefore issue the following directions as far as the present petitions are concerned:

(i) in relation of each of the refund claims for the period above mentioned, the Respondent DT&T will issue to the Petitioner the amount of refund claimed with interest up to the date of payment which shall not be later than two weeks from today;

(ii) if there is disobedience of the above directions, it would be open to the Petitioner to seek appropriate remedies in accordance with law.

20. The petitions are disposed of in the above terms.

CM No. 24776/2016 (Exemption) in W.P.(C) 6013/2016

CM No. 24777/2016 (Exemption) in W.P.(C) 6014/2016

CM No. 24778/2016 (Exemption) in W.P.(C) 6015/2016

CM No. 24783/2016 (Exemption) in W.P.(C) 6020/2016

CM No. 24785/2016 (Exemption) in W.P.(C) 6022/2016

CM No. 24786/2016 (Exemption) in W.P.(C) 6023/2016

CM No. 24787/2016 (Exemption) in W.P.(C) 6024/2016

21. Allowed, subject to all just exceptions.

22. A certified copy of this order be delivered forthwith to the Commissioner VAT by a Special Messenger. Order dasti under the signature of the Court Master.

[2016] 54 DSTC 14 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Hon'ble Mr. Justice S. Ravindra Bhat and Hon'ble Mr. Justice Najmi Waziri]

W.P.(C) 9252/2016, CM APPL. 37361/2016

Aesthetic Packaging ..... Petitioner

versus

Commissioner of VAT & Anr. ..... Respondents

Order : 21.11.2016

WRIT PETITION – SEEKING DIRECTION FOR RELEASE OF REFUND AMOUNT WITH INTEREST U/S 38 AND 42 OF DVAT ACT – REVENUE HAD REJECTED REFUND – NOTICE U/S 59 ISSUED BEYOND TIME PROVIDED IN THE ACT WHICH REMAINED UNSERVED – RESPONDENTS WERE DIRECTED TO PROCESS THE REFUND AND PASS APPROPRIATE ORDERS WITHIN A WEEK.

Held

What was more disturbing to the Court, however, was that all seven notices produced and relied upon by the Revenue demand "zero" from the assessee and assessed turnover at "zero". It was not only to the utter dismay of the Court but was entirely un-comprehensible and went completely untenable.

So called orders, copies of which were produced and hereby taken on record, were hereby quashed. The respondents were directed to process the petitioner's application and pass appropriate orders within a week. Any amount deposited by the petitioner, shall be refunded after adjusting tax due together with interest payable in accordance with law within a period of two weeks.

Present for Petitioner : Mr Vasdev Lalwani, Mr Sunil Agarwal, Mr. Rohit Gautam and Mr. Mohit Gautam, Advs.

Present for Respondents : Mr. Satyakam, Addl. Standing Counsel, Govt. of NCT of Delhi with Ms. Poonam, VAT(C).

O R D E R

We have heard the learned counsel for the parties. The petitioner seeks a direction for refund of the amount deposited together with interest. The respondent VAT Department (Commissioner of VAT)

submits that although returns were filed for two quarters for the year 2011, nevertheless notices of default assessment of tax and interest under Section 32 of the Delhi Value Added Tax Act, 2004 (DVAT Act) of all tax and interest premised upon previously issued notices under Section 59 of DVAT Act (on 13.06.2012, 06.08.2012 and 08.08.2012) had remained unserved and as a result, the refund claims could not be acceded to, and in fact, were rejected.

This Court has considered the submissions.

The authority of the ruling in ***Prime Papers & Packers v. Commissioner of VAT & Anr.*** WP(C) 6013/2016 decided on 28.07.2016 clearly states that the notice under Section 59 of the DVAT Act, if at all, has to be issued within the overall time frame indicated by the Act which is two months. Consequently, the notices in question even if they were served upon the assessee, do not conform the Rule that was issued much later in the year 2012. What is more disturbing to this Court, however, is that all seven notices produced and relied upon by the Revenue demand "zero" from the assessee and assessed turnover at "zero". It is not only to the utter dismay of the Court but is entirely un-comprehensible and goes completely untenable.

So called orders, copies of which are produced and hereby taken on record, are hereby quashed. The respondents are directed to process the petitioner's application and pass appropriate orders within a week. Any amount deposited by the petitioner, shall be refunded after adjusting tax due together with interest payable in accordance with law within a period of two weeks.

[2016] 54 DSTC 15 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Justice S. Muralidhar And Justice Najmi Waziri]

W.P. (C) 5478/2016

Shaila Enterprises ... Petitioner

Versus

Commissioner of Value Added Tax ... Respondent

Date of Order: 05.08.2016

REFUND UNDER DVAT ACT, 2004 – REFUND REFUSED DUE TO OUTSTANDING DEMAND – ADJUSTMENT ORDER PASSED MENTIONING REFUND ALLOWED

ZERO ONLY – REFUND CLAIMED ADJUSTED AGAINST OUTSTANDING DEMAND – THEREAFTER NOTICE ISSUED OF DEFAULT ASSESSMENT OF TAX AND INTEREST AND PENALTY – DEMAND CREATED – THE ORDERS WERE CHALLENGED BEFORE OBJECTION HEARING AUTHORITY WHO REMANDED THE MATTER TO VATO CONCERNED – THE VATO DID NOT TAKE ACTION AND CASE BECAME TIME BARRED – WRIT PETITION FILED SEEKING DIRECTION TO ISSUE REFUND – THE COURT FOUND THAT NOTICE U/S 59 (2) WAS ISSUED ON 06.07.2016 REQUIRING THE PETITIONER TO SHOW RECORDS FOR 2007-08 – TIME LIMIT FOR MAKING RE-ASSESSMENT OF THE PERIOD HAD LONG BEEN CLOSED. THE COURT DIRECTED TO REFUND AMOUNT THROUGH RTGS AND IMPOSED COST RS.10,000/- – THE COMMISSIONER WAS DIRECTED TO TAKE ACTION ON VATO WHO PASSED ADJUSTMENT ORDER.

Facts

The Petitioner Shaila Enterprises was a Hindu Undivided Family. Its registered office was at Jhandewalan, New Delhi. The Petitioner was registered as dealer under the Delhi Value Added Tax Act, 2004. The Petitioner was engaged in the business of trading in cement. The Petitioner filed its return for the period of month of January, 2008 on 28th February 2008, claiming refund of Rs. 1,02,08,179. In terms of Section 38(3) (a) (i) of the DVAT Act, with the return being filed on monthly basis, the date on which the refund was due to the Petitioner was 27th March 2008.

It was a major supplier to "Ready Concrete Mix" plants. It was stated that many of these plants were located outside Delhi and therefore the sales of cement took place as inter-state sales. The Petitioner made purchases locally from local registered dealers against tax invoices after paying VAT to its selling dealers. It thereafter made inter-state sales. This results in excess input tax credit which generated a refund for the Petitioner. While no action was taken on the refund claim, on 30th December 2010, "Adjustment Order" was passed by the Value Added Tax Officer. However, the refund (Refund Allowed) of Rs.0 (Rs. Zero Only) granted without any reason. Thereafter notices were issued for default assessment of tax & penalty and the same were challenged before OHA who remanded back the matter to VATO. The VATO did not take action. The case become time barred. The petitioner filed Writ before Delhi High Court.

Held

The refund for the month of January 2008, which the Petitioner had claimed refund along with the return became due to the Petitioner from

the expiry of one month thereafter in terms of Section 38(3)(a) (i) of the DVAT Act. The interest thereon till the date of payment also falls due in terms of Section 42 of the DVAT Act.

The Court found that along with the counter affidavit, the Respondent had now enclosed a notice dated 6th July 2016 issued under Section 59(2) of the DVAT Act, requiring the Petitioner to produce documents and records for the period 1st May 2007 to 31st December 2007. Since the time limit for making any re-assessment of the said period had long been closed, the said notice was obviously contrary to law. The said notice need not be acted upon by the Petitioner and would not be pursued by the DT&T hereafter. The Court accordingly directed the Respondent DT&T to pay to the Petitioner the aforementioned refund amount with the interest thereon up to the date of payment on or before 5th September 2016. The Court made it clear that the amount through RTGS should be deposited in the Petitioner's account on or before that date. Any non-compliance of this direction will entitle the Petitioner to seek appropriate remedy in accordance with law. Due to the careless action of the VATO in the present matter, who issued the 'adjustment order' dated 30th December 2010 unmindful of the law, an interest burden of nearly Rs. 56 lakhs was now placed on the exchequer. A question then arisen as to who should be made responsible for this and whether any action on the disciplinary side was not called for? Consequently, the Commissioner, VAT was directed to seek an explanation from the VATO who issued the above 'adjustment order' and to pass appropriate orders on the disciplinary side as he deemed fit not later than four weeks from today. The writ petition was allowed with costs of Rs. 10,000 which shall be paid by the Respondent to the Sales Tax Bar Association.

Present for Petitioner	:	Mr. Vineet Bhatia, Advocate with Ms. Neha Choudhary, Advocate.
Present for Petitioner	:	Mr. Ramji Srinivasan, Senior Advocate With Mr. Satyakam, ASC with Mr. Rajesh Goel, Addl. Commissioner, DT&T, GNCTD.

Cases Referred

1. *Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax (2010) 31 VST 475 (Del)*

2. *Lotus Impex v. Commissioner DT&T (2016) 89 VST 450 (Del); Dish TV India Ltd. v. GNCTD (2016) 92 VST 83 (Del)*
3. *Nucleus Marketing & Communication v. Commissioner of DVAT*
4. *Prime Papers and Packers v. Commissioner, VAT*
5. *Capri Bathaid Pvt. Ltd. v. Commissioner of Trade & Taxes (2016) 90 VST 143 (Del)*

Order

Dr. S. Muralidhar, J.:

1. The Petitioner Shaila Enterprises is a Hindu Undivided Family, the Karta of which is Mr. Gyan Chand Khattar. Its registered office is at Jhandewalan, New Delhi. The Petitioner is registered as dealer under the Delhi Value Added Tax Act, 2004 ('DVAT Act'). The Petitioner states that it is engaged in the business of trading in cement.

2. The Petitioner filed its return for the period of month of January, 2008 on 28th February 2008, claiming refund of Rs. 1,02,08,179. In terms of Section 38(3) (a) (i) of the DVAT Act, with the return being filed on monthly basis, the date on which the refund was due to the Petitioner was 27th March 2008.

3. In terms of Section 38 (4) of the DVAT Act, it was open to the Commissioner, if he sought to make inquiries while processing the refund, to go in for an audit of the business affairs of the Petitioner under Section 58 of the DVAT Act or seek additional information under Section 59 of the DVAT Act. In the present case, none of these steps were taken by the Respondent/Department of Trade & Taxes ('DT&T'). Consequently, the time limit in terms of Section 38(3) (a) (i) commenced from 27th March 2008. In terms of Section 42(1) DVAT Act, the interest on the refund due also started accruing from that date. According to the Petitioner, as of 31st May 2016 the interest worked out at 6% on the refund due worked out to Rs. 50,12,356.

4. The Petitioner states that it is a major supplier to 'Ready Concrete Mix' plants. It is stated that many of these plants are located outside Delhi and therefore the sales of cement take place as inter-state sales. The Petitoner makes purchases locally from local registered dealers against tax invoices after paying VAT to its selling dealers. IT thereafter

makes inter-state sales. This results in excess input tax credit which generates a refund for the Petitioner.

5. While no action was taken on the refund claim, on 30th December 2010, the following 'Adjustment Order' was passed by the Value Added Tax Officer ('VATO'):

> "This is in response to your application for refund submitted in form DVAT-16 on 28-2-2008 claiming a refund of Rs. 10208179 (Rs. One crores two lacs eight thousand one hundred seventy nine only) and the said application has been examined by the Department. However, the refund (Refund Allowed) of Rs.0 (Rs. Zero Only) cannot be granted to you because of following reasons:
>
> The amount of refund claimed by you has been adjusted completely against the following outstanding demand
>
> The said amount of demand has not been paid by you till date, neither stayed by any authority/court and is recoverable from you."

6. What is noticeable from the above order, which has been enclosed with the counter affidavit filed by Mr. Rajesh Goyal, Additional Commissioner, DT&T, is that it refers to the refusal to grant refund because of the "following reasons" but there are no reasons stated below the said line. It again states that the refund claim "has been adjusted completely against the following outstanding demand" and again there is blank below this line.

7. In short, the above order makes no sense. The most crucial parts of the so called adjustment order are completely missing. As it transpired, on that date i.e. 30th December 2010 there was no outstanding demand that had been determined for the aforementioned period for which the refund was claimed. Yet the VATO signed the order mechanically without application of mind.

8. What happened thereafter is interesting. One week after the so called adjustment order, on 5th, 6th and 7th January 2011, the VATO (Ward 73) Mr. Vijay Kumar Bansal passed notices of default

assessment of tax and interest as well as penalty under Section 32 and section 33 of the DVAT Act and under Section 9 (2) of the Central Sales Tax Act, 1956 for the following periods:

Period 2007-08 month	**DVAT**		**CST**
	Tax+Intt. Rs.	**Penalty Rs.**	**Tax+Intt. Rs.**
May	–	–	78,735
June	5,93,573/-	7,16,180/-	53,142
July	1,15,421/-	1,33,207/-	
Sept.	15,37,808/-	17,53,101/-	
Oct.	3,97,948/-	4,46,772/-	
Nov.	5,89,349/-	6,51,281/-	
Dec.	12,95,435/-	13,99,513/-	
IVth Qtr (2007-08) Rejection of refund amounting to Rs.1,02,08,179/-			

9. Aggrieved by the above notice of default assessment of tax, interest and penalty, the Petitioner filed objections under Section 74 of the DVAT Act before the Special Commissioner i.e., the Objection Hearing Authority ('OHA'). It is stated that the objection was also filed against the aforementioned adjustment order dated 30th December 2010 by which the Petitioner's refund claim was rejected in toto.

10. The OHA on 25th June 2013 passed an order, the relevant portion of which reads as under:

> "3. Sh. Vineet Bhatia, (Adv) presented the case on behalf of the objector. The Department was represented by Sh. Anil Kumar, VATO. The counsel assailed impugned orders on the ground that the Assessing Authority (AA), had not given sufficient opportunity to submit the relevant documents in support of claim of refund and also that it was not confronted with the adverse report of VATI on non functioning of Transporters. It has been stated by the objector that the major supplies of the objector is to "Ready Concrete Mix" Plants at Gurgaon (Haryana) and nearby areas in view of ban of hot mix plants in Delhi. As such majority of sales of 'Cements' is interstate (Central Sale). The counsel averred that he has in possession necessary documents with regarding to the transporters, all the 'C 'forms and other documents which shall prove that interstate

sale took place and the goods where actually transported through the transporters in question. The counsel also assailed the levy of penalties.

4. In view of the above observations and considering the submission of the objector, I feel that in the interest of natural justice another opportunity may be afforded to the objector to present books of account and other relevant records/ documents pertaining to refund claim sale as may be required by AA .The Ld AA shall carryout examination verification of all documents such as tax invoices, retail invoices, statutory forms, mode of payments, G.Rs, R.C of interstate purchasers, copy of assessment orders if any etc., as per the laid down procedures contained in the various circulars on claim of refunds and as per the provisions of DVAT Act.

5. Ld AA shall provide sufficient opportunity to the objector for seeking any clarification/confrontation on any adverse material and a speaking order thereafter shall be passed afresh giving proper reasons for allowing /disallowing the refund as per the law. Imposition of penalty shall be consequential to the default of any tax due.

6. The objector is directed to appear before the AA/NA on 15/07/2013. The matter may thereafter be decided in 30 days time."

11. According to the Petitioner, despite appearing before the Assessing Officer ('AO') on 15th July 2013 pursuant to the above order and submitting all the documents, no order was passed, by the AO. However, according to the Respondent DT&T, the Petitioner never appeared before the AO on 15th July 2013 pursuant to the above order.

12. The Petitioner has filed a rejoinder affidavit asserting that the Petitioner did appear before the AO on 15th July 2013, and submitted the whole set of documents.

13. In the present proceedings under Article 226 of the Constitution of India, the Court does not consider it necessary to go into the disputed question whether in fact the Petitioner appeared before the AO on 15th July 2013. What the Court, however, proposes to do is to examine

the legal position even assuming that the Petitioner did not appear before the AO on 15th July 2013 as asserted by the Respondent. In the event that the Petitioner had not appeared before the AO on 15th July 2013 as directed by the OHA, the AO was nevertheless required in law to proceed to pass an assessment order since the earlier order passed by him, which was challenged before the OHA and in respect of which the OHA passed the above order dated 25th June 2013, did not survive.

14. An attempt was made by Mr. Ramji Srinivasan, learned senior counsel appearing for the Respondent, to urge that the OHA had not actually set aside the order of the AO, which was the subject matter of the objection before the OHA, and that in the event of the Petitioner not appearing before the AA on 15th July 2013 the earlier order passed by the AO creating the demand for the aforementioned period in 2007-08 would somehow revive.

15. The Court is unable to accept the above submission. Para 5 of the order dated 25th June 2013 is categorical that the AO shall provide sufficient opportunity to the Assessee for seeking any clarification/ confrontation on any adverse material and "a speaking order thereafter shall be passed afresh giving proper reasons for allowing/disallowing the refund as per the law.". It was further added "Imposition of penalty shall be consequential to the default of any tax due". There could be, therefore, no manner of doubt that the orders which were the subject matters of the proceedings before the OHA did not survive after the order of the OHA. The AO was required to pass an order afresh. It is for this reason that the Assessee was directed to appear before the AA on 15th July 2013.

16. The last line of the order of the OHA reads: "The matter may be thereafter be decided in 30 days time". The word 'may' was not to give an option to the AO whether or not to pass an order but the option if at all about the time period within which the order was to be passed. It is possible to argue that the AO could have passed the order not within thirty days but soon thereafter in view of the words 'may be'. However, here the AO appears to have forgotten about the proceedings altogether and not take any action whatsoever. If as contended by the Respondent, the Petitioner failed to appear before the AO on 15th July 2013, the AO was not absolved from passing a fresh order in respect

of the refund claimed of the Petitioner. This was his bounden statutory duty.

17. It was pointed out that, in terms of Section 34(2) of the DVAT Act, there is no power with the OHA to remand the matter to the AO. In the event of a remand ordered by the Court or Appellate Tribunal, the fresh decision on remand was required to be taken within one year. It was volunteered by learned counsel for the Petitioner that notwithstanding the above legal position, even if the Petitioner were to assume without admitting that such a power exists with an OHA then in any event the AO was required to pass an order afresh within a maximum period of one year after the date of the order of the OHA. Clearly in the present case no fresh assessment order was passed nor was an order of refund was passed within one year of the date of the order of the OHA.

18. With the notices of default assessment creating the demand by notices dated 5th, 6th and 7th January 2011 for the period 2007-2008 ceasing to exist by virtue of the order dated 25th June 2013 and with no fresh assessment order being passed, there was no legal impediment any longer in granting refund to the Petitioner in respect of the claim made along with its return filed for the month of January 2008. The AO, obviously did not realise the implications of his failure to pass fresh assessment order in terms of the order dated 25th June 2013 of the OHA.

19. This Court has in a series of judgments emphasised the mandatory nature of the time limits under Section 38 of the DVAT Act for processing of the refunds. Reference in this regard may be made to the decision in *Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax (2010) 31 VST 475 (Del), Lotus Impex v. Commissioner DT&T (2016) 89 VST 450 (Del); Dish TV India Ltd. v. GNCTD (2016) 92 VST 83 (Del), Nucleus Marketing & Communication v. Commissioner of DVAT [decision dated 12th July 2016 in W.P.(C) 7511/2015]* and recently in *Prime Papers and Packers v. Commissioner, VAT [decision dated 28th July 2016 in W.P. (C) No. 6013 of 2016]*. It has further been clarified by the Court that any action the DT&T proposes to take in the form of reopening the assessment, the period within which the refund is to be issued will have to be taken into account.

20. For instance, in the present case, in respect of the assessment for the period 2007-2008, even if the DT&T wished to revisit them, the

limitation under Section 34 of the DVAT Act would apply. There are two periods of limitation under Section 34 of the DVAT Act. One is the period of four years from the end of year comprising one or more time period for which a person furnishes his return and the other is in terms of proviso of Section 34(1) of the Act where there is an extended period of six years and where the Commissioner has reason to believe that the tax was not paid "by reason of concealment, omission or failure to disclose fully material particulars". In the present case, in respect of the month of January 2008 the time within which it could have been reopened has long been crossed. The DT&T cannot therefore possibly seek to reopen the assessment for 2007-08.

21. The net result is that the refund for the month of January 2008, which the Petitioner has claimed refund along with the return became due to the Petitioner from the expiry of one month thereafter in terms of Section 38(3)(a) (i) of the DVAT Act. The interest thereon till the date of payment also falls due in terms of Section 42 of the DVAT Act.

22. The Court finds that along with the counter affidavit, the Respondent has now enclosed a notice dated 6th July 2016 issued under Section 59(2) of the DVAT Act, requiring the Petitioner to produce documents and records for the period 1st May 2007 to 31st December 2007. Since the time limit for making any re-assessment of the said period has long been closed, the said notice is obviously contrary to law. The said notice need not be acted upon by the Petitioner and will not be pursued by the DT&T hereafter.

23. The Court, accordingly directs the Respondent DT&T to pay to the Petitioner the aforementioned refund amount with the interest thereon up to the date of payment on or before 5th September 2016. The Court makes it clear that the amount through RTGS should be deposited in the Petitioner's account on or before that date. Any non-compliance of this direction will entitle the Petitioner to seek appropriate remedy in accordance with law.

24. Before parting with the matter, the Court would like to add that this is yet another instance of orders being passed by the officers of the DT&T with total non-application of mind and in ignorance of the legal position. The Court would only like to reiterate that there is an urgent need for an orientation being imparted to the officers of the DT&T in the law and the decisions of the Court explaining the law. In this regard, the court would like to reiterate the observations made by it in *Capri*

Bathaid Pvt. Ltd. v. Commissioner of Trade & Taxes (2016) 90 VST 143 (Del).

> "53. The CVAT should also hold regular orientation and training courses for the VAT Authorities at various levels on the law and procedure governing the collection of VAT. The CVAT can also consult the Delhi State Judicial Academy for that purpose."

25. Due to the careless action of the VATO in the present matter, who issued the 'adjustment order' dated 30th December 2010 unmindful of the law, an interest burden of nearly Rs. 56 lakhs is now placed on the exchequer. A question then arises as to who should be made responsible for this and whether any action on the disciplinary side is not called for? Consequently, the Commissioner, VAT is directed to seek an explanation from the VATO who issued the above 'adjustment order' and to pass appropriate orders on the disciplinary side as he deems fit not later than four weeks from today. A copy of this order be delivered forthwith to the Commissioner, VAT by the Registry through a Special Messenger for compliance with the above direction.

26. The writ petition is allowed and the application is disposed of in the above terms with costs of Rs. 10,000 which, as requested by learned counsel for the Petitioner, shall be paid by the Respondent to the Sales Tax Bar Association not later than 5th September 2016.

[2016] 54 DSTC 25 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Justice S. Muralidhar And Justice Vibhu Bakhru]

W.P. (C) 12304/2015 & CM 32604/2015

Tata Teleservices Limited ... Petitioner

Versus

Central Board Of Direct Taxes & Anr ... Respondents

Date of Order: 11.05.2016

REFUND – PROCESSING OF RETURN UNDER SECTION 143 OF THE INCOME TAX ACT, 1961 – ISSUE OF NOTICE U/S 143(2) –PETITIONER ENGAGED IN THE BUSINESS OF TELECOM SERVICES, CLAIMED REFUND FOR RELEVANT YEARS

ON ACCOUNT OF TDS DEDUCTED AND DEPOSITED WITH THE GOVERNMENT TOWARDS AN ANTICIPATED INCOME TAX LIABILITY OF PETITIONER - DEPUTY COMMISSIONER OF INCOME TAX DENIED REFUND TO PETITIONER FOR REASON THAT CASE WAS PENDING UNDER SCRUTINY AND THAT IN LIGHT OF SECTION 143(1D) AND INSTRUCTIONS OF CBDT, REFUND COULD NOT BE PROCESSED FOR SAID ASSESSMENT YEARS – REAL EFFECT OF THE INSTRUCTION NO. 1 OF 2015, DT. 13TH JAN., 2015 WAS TO CURTAIL THE DISCRETION OF THE AO BY 'PREVENTING' HIM FROM PROCESSING THE RETURN, WHERE NOTICE HAS BEEN ISSUED TO THE PETITIONER UNDER SECTION 143(2) – WHETHER CIRCULARS, ORDERS AND INSTRUCTIONS ISSUED BY CBDT UNDER SECTION 119 ARE BINDING ON DEPARTMENT ONLY TO EXTENT THEY ARE BENEFICIAL TO ASSESSEE – HELD – YES. WHETHER THUS IMPUGNED INSTRUCTION ISSUED BY CBDT COULD NOT HAVE BEEN RELIED UPON BY DEPARTMENT TO DENY REFUNDS TO ASSESSEE'S IN WHOSE CASES NOTICES FOR SCRUTINY ASSESSMENT UNDER SECTION 143(2) HAD BEEN ISSUED– HELD – YES – IMPUGNED INSTRUCTIONS WAS UNSUSTAINABLE IN LAW AND QUASHED.

Facts

The Petitioner was engaged in the business of providing telecom services. Petitioner has over the years accumulated losses in excess of Rs. 31,000 crores. The return of income filed for the A.Y. 2012-13 TO 2015-16, the Petitioner claimed refund.

The corresponding claims for refund for the aforementioned AYs is as under:

Assessment year	Date of filing return	Losses for the year (Rs.)	Refund Amount (Rs.)
2012-13	27.09.2012	4709,13,65,986	124,68,14,550
2013-14	28.11.2013	4603,27,58,892	186,65,37,090
2014-15	25.11.2014	4725,77,13,003	245,58,74,460
2015-16	26.11.2015	3676,14,81,626	176,81,67,453
Total			733,73,93,553

The refund arose mainly on account of tax deducted at source (TDS) by the payers and deposited with the Government towards an anticipated income tax liability of the Petitioner. The Deputy Commissioner of Income tax denied refund to the Petitioner u/s 143(1) of the Act for the three assessment years (2012-13, 2013-14 and 2014-15). The refund were declined for the reason that the case was pending scrutiny and that in the light of Section 143 (1D) of the Income Tax Act, 1961 & the instruction of the CBDT, refund could not be processed for the said A.Y.'s.

Held

The real effect of the instruction was to curtail the discretion of the AO by 'preventing' him from processing the return, where notice had been issued to the Assessee under Section 143(2) of the Act. If the legislative intent was that the return would not be processed at all once a notice was issued under Section 143 (2) of the Act, then the legislature ought to have used express language and not the expression "shall not be necessary". By the device of issuing an instruction in purported exercise of its power under Section 119 of the Act, the CBDT could not proceed to interpret or instruct the income tax department to "prevent" the issue of refund. In the event that a notice was issued to the Assessee under Section 143 (2) of the Act, it will be a matter the discretion of the concerned AO whether he should process the return. The Court was of the view that the impugned Instruction No.1 of 2015 dated 13th January 2015 issued by the CBDT was unsustainable in law and it was hereby quashed. It was directed that the said instruction shall not hereafter be relied upon to deny refunds to the Assessees in whose cases notices might have been issued under Section 143(2) of the Act. The question whether such return should be processed will have to be decided by the AO concerned exercising his discretion in terms of Section 143 (1D) of the Act.

Present for Petitioner	:	Mr. Tarun Gulati, Mr. Sparsh Bhargava, Ms. Rachana Yadav, Mr. Shashi Mathews, Mr. Ankit Sachdeva, Advocates.
Present for Respondent	:	Mr. Ashok K Manchanda, Sr. Standing Counsel

Cases Referred :

1. *UCO Bank v. Commissioner of Income Tax (1999) 237 ITR 889 (SC)*
2. *Keshavji Ravji and Co. v. Commissioner of Income Tax (1990) 183 ITR 1 (SC)*
3. *Commissioner of Central Excise, Bolpur, v. Ratan Melting & Wire Industries (2008) 13 SCC 1*

Order

Dr. S. Muralidhar, J.:

1. The challenge in this writ petition by Tata Teleservices Ltd. is to an Instruction No. 1 of 2015 dated 13th January 2015 issued by the

Central Board of Direct Taxes ('CBDT') (Respondent No.1) and the consequential letter dated 8th September 2015 issued by the Deputy Commissioner of Income Tax ('DCIT') Circle 25(1) ('Respondent No.2') denying refund of the Petitioner under Section 143(1) of the Act for three assessment years (AYs) 2012-13, 2013-14 and 2014-15. The refunds were declined for the reason that the case was pending scrutiny and that in the light of Section 143(ID) of the Income Tax Act, 1961 ('Act') and the Instructions of the CBDT, refund could not be processed for the said AYs.

2. The facts in brief are that the Petitioner is engaged in the business of providing telecom services. It is stated that the Petitioner has over the years accumulated losses in excess of Rs. 31,000 crores. As such in the returns of income filed for the AYs 2012-13 to 2015-16, the Petitioner claimed refund. A tabular depiction of the losses and the corresponding claims for refund for the aforementioned AYs is as under:

Assessment year	Date of filing return	Losses for the year (Rs.)	Refund Amount (Rs.)
2012-13	27.09.2012	4709,13,65,986	124,68,14,550
2013-14	28.11.2013	4603,27,58,892	186,65,37,090
2014-15	25.11.2014	4725,77,13,003	245,58,74,460
2015-16	26.11.2015	3676,14,81,626	176,81,67,453
Total			733,73,93,553

3. It is pointed out that the refunds arose mainly on account of the tax deducted at source ('TDS') by the payers and deposited with the Government towards an anticipated income tax liability of the Petitioner. It is pointed out that the payers continued to deduct TDS despite the fact that the Petitioner has been incurring losses year after year. It is pointed out that the Petitioner is an eligible undertaking under Section 80IA(2A) of the Act and is eligible for 100 percent deduction of its profits for the first five assessment years commencing any time during the block of 15 years from the year of launch of commercial services and 30% of its profit for next consecutive five years. However, on account of the enormous losses incurred by the Petitioner, it had no occasion to claim the Section 80IA deduction. It is further pointed out that the Petitioner is not expected to have any tax liability even if it is assessed at profits in any of the AYs in question.

4. Section 143(1) of the Act states that every return made under Section 139 of the Act or filed in response to a notice under Section 142 (1) of the Act, would be processed in the following manner:

> "143. (1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely:—
>
> (a) the total income or loss shall be computed after making the following adjustments, namely:—
>
> (i) any arithmetical error in the return; or
>
> (ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;
>
> (b) the tax and interest, if any, shall be computed on the basis of the total income computed under clause (a);
>
> (c) the sum payable by, or the amount of refund due to, the assessee shall be determined after adjustment of the tax and interest, if any, computed under clause (b) by any tax deducted at source, any tax collected at source, any advance tax paid, any relief allowable under an agreement under section 90 or section 90A, or any relief allowable under section 91, any rebate allowable under Part A of Chapter VIII, any tax paid on self-assessment and any amount paid otherwise by way of tax or interest;
>
> (d) an intimation shall be prepared or generated and sent to the assessee specifying the sum determined to be payable by, or the amount of refund due to, the assessee under clause (c); and
>
> (e) the amount of refund due to the assessee in pursuance of the determination under clause (c) shall be granted to the assessee: Provided that an intimation shall also be sent to the assessee in a case where the loss declared in the return by the assessee is adjusted but no tax or interest is payable by, or no refund is due to, him:

Provided further that no intimation under this sub-section shall be sent after the expiry of one year from the end of the financial year in which the return is made."

5. Relevant to the present case is Section 143 (1) (e) which states that the amount of refund due to the Assessee, pursuant to the determination of the tax under sub-clause (c) computed "shall be granted to the Assessee".

6. By the Finance Act, 2012, with effect from 1st July 2012, sub-section (1D) was inserted in Section 143 and it reads as under:

"(1D) Notwithstanding anything contained in sub-section (1), the processing of a return shall not be necessary, where a notice has been issued to the assessee under sub-section (2)".

7. The Memorandum to the Finance Bill, 2012 gives the following explanation for insertion of the above provision:

"**Processing of return of income where scrutiny notice issued**

Under the existing provisions every return of income is to be processed under sub-section (1) of Section 143 and refund, if any, due is to be issued to the taxpayer. Some returns of income are also selected for scrutiny which may lead to raising a demand for taxes although refunds may have been issued earlier at the time of processing.

It is therefore proposed to amend the provisions of the income-tax Act to provide that processing of return will not be necessary in a case where notice under sub-section (2) of Section 143 has already been issued for scrutiny of the return. This amendment will take effect from the 1st day of July, 2012."

8. It is evident that Section 143 (1D) in the manner it is worded gives a discretion to the Assessing Officer ('AO') to decide whether the return of income has to be processed where a notice has been issued under Section 143 (2) of the Act. It is significant that sub-section (1D) was inserted in Section 143 subsequent to the insertion of sub-section

(1A) which provides for centralised processing of returns. Under the Scheme framed by the CBDT in 2011 in terms of Section 143(1A), there is a computerized random selection of returns which might be taken up for scrutiny. Thus the discretion regarding picking up a return for scrutiny is no longer left with the AO. Section 143(1D), however, continues the element of discretion in the AO when it states that the processing of return "shall not be necessary". In other words, it does not expressly state that the return shall not be processed where a notice has been issued to the Assessee under Section 143(2) of the Act.

9. However, despite terming the language of Section 143(1D) to be "unambiguous" the CBDT felt that it required clarification. This led to the CBDT issuing the impugned Instruction dated 13th January 2015 under Section 119 of the Act. The said instruction inter alia states that some doubts have been expressed in view of the words "shall not be necessary" used in Section 143(1D) of the Act and that in the light of the explanatory note in the Finance Act, 2012 (which has been referred to hereinbefore) "the legislative intent is to prevent the issue of refund after processing as scrutiny proceedings may result in demand for taxes on finalisation of the assessment subsequently" (emphasis supplied). The circular then proceeds to state as under:

> "4. Considering the unambiguous language of the relevant provision and the intention of law as discussed above, the Central Board of Direct Taxes, in exercise of the powers conferred on it under section 119 of the Act hereby clarifies that the processing of a return cannot be undertaken after notice has been issued under sub-section (2) of section 143 of the Act. It shall, however, be desirable that scrutiny assessments in such cases are completed expeditiously.
>
> 5. This may be brought to the notice of all concerned for strict compliance."

10. The impugned Instruction therefore interprets the language of Section 143(1D) as 'preventing' the issue of refund once notice is issued under Section 143(2) of the Act. It is as a result of the above impugned instruction and with the notices having been issued to the Petitioner under Section 143(2) of the Act by the Respondent No.2 in relation to the returns filed by it for the AYs in question where it had claimed refund, that the Respondent No. 2 declined to issue the refund by the impugned communication dated 8th September 2015.

11. While directing notice to be issued in the present petition on 23rd December 2015, the Court inter alia noted that as far as the AY 2015-16 is concerned no notice under Section 143(2) of the Act had been issued till that date and therefore directed that the returns for the said AYs should be processed "at the earliest". The Court also expected the assessments in relation to the returns for the other AYs, namely 2013-14 to 2014-15, to be expedited.

12. A further detailed order was passed by this Court on 14th March 2016, in which inter alia it was noticed that against the order dated 23rd December 2015, the Revenue had filed Special Leave Petition (Civil) No. 6525 of 2016 in which the following order was passed by the Supreme Court on 9th March 2016:

> "We do not find any ground to interfere with the interim order passed by the High Court. The special leave petition is, accordingly, dismissed.
>
> However, we request the High Court to dispose of the writ petition expeditiously, preferably with a period of three months from the date of production of copy of this order before the High Court.
>
> The time stipulated by the High Court for completing the assessments, as directed by the High Court, for the years for which notices under Section 143 (2) of the Income Tax Act, 1961 (in short 'the Act') have already been issued, is extended by a month from today.
>
> Needless to say that in case the time for issuing notice under Section 143 (2) of the Act has not expired; it will be open for the Revenue to decide whether notice should be issued at all. Pending applications, if any, stand disposed of."

13. Further directions were issued by the Court regarding completion of the assessment for the remaining AYs.

14. Today Mr. Tarun Gulati, learned counsel for the Petitioner, informs the Court that the assessments have been completed for AYs 2012-13, 2013-14 and 2014-15 and the refunds for each of those AYs have also been computed. He points out that there is a slight discrepancy in the actual refund figures but the Petitioner has

filed a rectification application under Section 154 of the Act. To the extent that the Petitioner's returns have now been processed and the assessment orders have been passed for the aforementioned AYs, one of the grievances of the Petitioner in the present writ petition stands redressed.

15. Nevertheless, the Petitioner seeks to pursue with its challenge to the impugned Instruction No.1 of 2015 since it is pointed out that despite the Petitioner incurring substantial losses year after year and representing to the Department to issue a lower withholding certificate under Section 197 of the Act, that request has not been acceded to by the Department. This has compelled the Petitioner to seek refund year after year and those refunds have been unnecessarily delayed. It is submitted that on the strength of the impugned Instruction, notices under Section 143(2) of the Act in respect of the returns filed by the Petitioner were issued as a matter of routine thus, obviating the need for the Department to process its returns. The net result is that the refund would be either denied or delayed and this is hurting the Petitioner since its losses are mounting year after year.

16. Indeed, as already noticed at the time the present petition was filed, a aggregate figure of the refund that the Petitioner was owed for the four AYs i.e. 2012-13 to 2015-16 was to the tune of Rs.733.73 crores. This is a very substantial figure considering the huge losses that the Petitioner has been suffering over the years. Section 119 of the Act, on the strength of which the impugned Instruction has been issued by the CBDT, no doubt enables the CBDT to issue "such orders, instructions and directions" to the income tax authorities "for the proper administration of this Act". However, this power of the CBDT is hedged in by certain limitations. One such limitation is provided in a proviso to Section 119(1) of the Act. The other limitation is under Section 119(2) of the Act where it is mentioned that the direction or instructions issued by the CBDT should not be "prejudicial to assessees".

17. The idea of vesting the CBDT with the above power is to ensure that there is an ease of administration of the Act and that ambiguities in the practice and procedure may get clarified. At the same time it has to be ensured that such instructions or orders do not add to the difficulties of the tax payers. Circulars, orders and instructions issued by the CBDT under Section 119 of the Act, to the extent they are beneficial to the Assessees are binding on the Department. If they are prejudicial to

the tax payer, then they cannot prevail over the statute, which does not envisage such harsher measure.

18. In *UCO Bank v. Commissioner of Income Tax (1999) 237 ITR 889 (SC)*, the Supreme Court interpreted one such circular issued by the CBDT regarding inclusion of the interest accruing on 'sticky' loans, the recovery of which was doubtful, in the Assessee's taxable income. The Supreme Court clarified the legal position as regards the nature of such circular issued in terms of Section 119(1) of the Act as under:

> "In *Keshavji Ravji and Co. v. Commissioner of Income Tax (1990) 183 ITR 1 (SC)*, a Bench of three judges of this Court has also taken the view that circulars beneficial to the assessee which tone down the rigour of the law and are issued in exercise of the statutory powers under Section 119 are binding on the authorities in the administration of the Act. The benefit of such circulars is admissible to the assessee even though the circulars might have departed from the strict tenor of the statutory provision and mitigated the rigour of the law. This Court, however, clarified that the Board cannot pre-empt a judicial interpretation of the scope and ambit of a provision of the Act. Also a circular cannot impose on the tax-payer a burden higher than what the Act itself, on a true interpretation, envisages. The task of interpretation of the laws is the exclusive domain of the courts. However, the Board has the statutory power under Section 119 to tone down the rigour of the law for the benefit of the assessee by issuing circulars to ensure a proper administration of the fiscal statute and such circulars would be binding on the authorities administering the Act."

19. It was reiterated that:

> ".... to mitigate the rigours of the application of a particular provision of the statute in certain situations by applying a beneficial interpretation to the provision in question so as to benefit the assessee and make the application of the fiscal provision, in the present case, in consonance with the concept of income and in particular, notional income as also the treatment of such notional income under accounting practice."

20. The Constitution Bench of the Supreme Court in *Commissioner of Central Excise, Bolpur, v. Ratan Melting & Wire Industries (2008) 13*

SCC 1 was interpreting the circulars/instructions issued by the Central Board of Excise and Customs under the corresponding provision of the Central Excise Act, 1944. The Court observed as under:

> "7. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."

21. It is sought to be explained by Mr. Ashok K. Manchanda, learned Senior Standing counsel for the Revenue, that what has been issued by the CBDT on 13th January 2015 is only an 'instruction' and not a 'circular' and that the impugned instruction was only for the internal guidance of the officers of the Department.

22. The Court finds that it is this very impugned instruction which is being relied upon by the Department to deny refund, where notice has been issued under Section 143(2) of the Act. This is evident from the impugned letter dated 8th September 2015, addressed to the Petitioner. The power of the CBDT to issue such instructions can be traced only to Section 119 of the Act. Therefore, such 'instruction' also has to adhere to the discipline of Section 119 of the Act.

23. The real effect of the instruction is to curtail the discretion of the AO by 'preventing' him from processing the return, where notice has been issued to the Assessee under Section 143(2) of the Act. If the legislative intent was that the return would not be processed at all once a notice is issued under Section 143 (2) of the Act, then the legislature ought to have used express language and not the expression "shall not be necessary". By the device of issuing an instruction in purported exercise of its power under Section 119 of the Act, the CBDT cannot

proceed to interpret or instruct the income tax department to 'prevent' the issue of refund. In the event that a notice is issued to the Assessee under Section 143 (2) of the Act, it will be a matter the discretion of the concerned AO whether he should process the return.

24. Consequently, the Court is of the view that the impugned Instruction No.1 of 2015 dated 13th January 2015 issued by the CBDT is unsustainable in law and it is hereby quashed. It is directed that the said instruction shall not hereafter be relied upon to deny refunds to the Assessees in whose cases notices might have been issued under Section 143(2) of the Act. The question whether such return should be processed will have to be decided by the AO concerned exercising his discretion in terms of Section 143 (1D) of the Act.

25. The petition and the application are disposed of in the above terms.

[2016] 54 DSTC 36 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI
[Justice S. Muralidhar And Justice Vibhu Bakhru]

W.P.(C) 6510/2014 & CM APPL. 3898/2016
W.P.(C) 12151/2015 & CM APPL. 32261/2015
W.P.(C) 12308/2015 & CM APPL. 32610/2015
W.P.(C) 12319/2015 &CM APPL. 32721/2015
W.P.(C) 12320/2015 & CM APPL. 32724/2015
W.P.(C) 12321/2015 & CM APPL. 32727/2015
W.P.(C) 12322/2015 & CM APPL. 32730/2015
W.P.(C) 12323/2015 & CM APPL. 32733/2015
W.P.(C) 12329/2015 & CM APPL. 32746/2015
W.P.(C) 12330/2015 & CM APPL. 32749/2015
W.P.(C) 231/2016 & CM APPL. 986/2016
W.P.(C) 297/2016 & CM APPL. 1220/2016
W.P.(C) 298/2016 & CM APPL. 1223/2016

Dish TV India Limited ... Petitioner

Versus

Government of NCT of Delhi & Ors. ... Respondents

Date of Order: 04.04.2016

REFUND UNDER DVAT ACT – RETURN REVISED TO REDUCE REFUND AMOUNT – NOTICE OF DEFAULT ASSESSMENT OF TAX & INTEREST ISSUED – OHA DIRECTED TO CONSIDER THE FRESH CLAIM – VATO AGAIN REJECTED REFUND – OBJECTION FILED AGAIN – OHA AGAIN REMANDED THE MATTER – SPECIAL AUDIT CONDUCTED AND FINDING OF SPECIAL AUDIT WAS THAT INPUT TAX CREDIT TO BE AVAILED 1/3 OF INPUT TAX CREDIT AND BALANCE 2/3 TO AVAIL IN NEXT TWO YEARS – NOTICE OF DEFAULT ASSESSMENT ISSUED DURING PENDENCY OF OBJECTION PETITION. NO JURISDICTION FOR WITHHOLDING OF REFUND – REVIEW AND RECTIFICATION NOT ALLOWED WHEREIN PENDENCY OF OBJECTION – THE COURT DIRECTED THE RESPONDENT TO DEPOSIT REFUND AND INTEREST IN COURT.

Facts

The Petitioner was engaged in the business of providing Direct-to-Home ('DTH') broadcasting services. The Petitioner provided an enabling device known as antenna system and accessories which included a set top box, LNB cable and the dish antenna. The DTH services were provided by transmission of satellite programmes through the enabling device installed at the premises of the customers. It was stated that the goods stored in various warehouses were transferred on right to use basis to customers through distributors while the ownership thereof vests with the Petitioner. The Petitioner had filed a refund claim for Rs.20,67,03,510 in the value added tax return on 28th April 2010 under the provisions of DVAT Act. On 8th July 2010 the Petitioner was asked by the VATO to produce documents, which the Petitioner complied with by letter dated 17th July 2010. On 4th November 2010 the Petitioner revised its VAT return by marginally reducing the refund claim to Rs.20,59, 55,250. On 26th November 2010, a notice of default assessment of tax and interest under Section 32 of the Act was issued by the VATO creating a demand of Rs. 6,68,627. On 11th January 2011, the Petitioner filed its objections before the Special Commissioner [Objection Hearing Authority ('OHA')] against the afore mentioned notice of default assessment dated 26th November 2010. The OHA by order dated 5th August 2011 set aside the said notice of default assessment and the Assessing Authority ('AA'), i.e., the VATO was directed to consider the fresh claim filed by the Petitioner. By order dated 12th September 2011, the VATO once again rejected the refund claim of the Petitioner. Against this order, objections were filed by the Petitioner on 20th October 2011 before the OHA. On 24th

June 2013, the order dated 12th September 2011 was set aside by the OHA and again the matter was remanded to the VATO. Meanwhile, a special audit was undertaken. The special auditor submitted a report on 12th June 2012, raising an objection that the Petitioner was capitalizing the cost of goods sold to the customers, that therefore such goods were in the nature of capital goods and that the input tax credit ('ITC') thereon should be availed in terms of Section 9(9) of the Act. The audit report concluded that the Petitioner was entitled to only 1/3rd of the input tax credit claimed on capital goods purchased during the period 2009-10 and the balance 2/3rd input tax credit in equal proportions in the immediate successive financial years. Of the total claim of Rs. 20,59,55,250, a part thereof was disallowed. The credit of Rs.18,75,61,739 was allowed in three equal yearly instalments. Accordingly, Rs.6,25,20,580 was held eligible to be claimed for the AY 2009-10. The balance was permitted to be allowed as refund into equal instalments of the same amount during 2010-11 and 2011-12. On 11th July 2012, a notice under Section 59 of the DVAT Act was issued by the VATO to the Petitioner again calling for documentary evidence with respect to the discrepancy pointed out in the special audit report. The Petitioner stated that none of the queries raised by the VATO pertained to its refund claim. Nevertheless, the Petitioner furnished the details as called for by the VATO. The VATO (Vat Audit) issued a further notice on 10th December 2012 to the Petitioner seeking information which was provided by the Petitioner on 27th December 2012. On 28th December 2012, the Petitioner revised its return for the AY 2009-10, claiming refund of Rs. 6,66,05,308 due to the Petitioner for the said AY as required by the special audit report. The balance refund was claimed in two equal instalments in the subsequent AYs. On 9th January 2013, the VATO again issued a notice for personal hearing and the Petitioner was called to furnish further documents. This was also complied with by the Petitioner. After the OHA had by its order dated 24th June 2013 allowed the Petitioner's objections against the order of the VATO dated 12th September 2011 rejecting its refund claim, the VATO on 19th September 2013 again issued a notice of default assessment of tax and interest under Sections 32 of the DVAT Act. In the said notices, the VATO observed that the Petitioner had filed revised returns claiming only 1/3rd of the ITC and remaining 2/3rd in the subsequent financial year. The revised return of the Petitioner was, therefore, accepted to the above extent. Aggrieved by the default assessment notice dated 19th September 2013 as regards other issues, the Petitioner filed

objections before the OHA on 18th November 2013. These objections were stated to be pending. A copy of the said objections filed on 18th November 2013 had been enclosed with the writ petition as Annexure A-27, and an averment to that effect has been made in para 20 of the writ petition. In the short affidavit filed by Special Commissioner, in response to the present petition, it was admitted that the order dated 19th September 2013 of the VATO is "subject matter of objections". It was contended that in view of the aforementioned order, no refund was due to the Petitioner in response to the objections. In the rejoinder it was pointed out by the Petitioner that its revised returns claiming refund had been accepted by the VATO by order dated 19th September 2013 and therefore there was no question of rejection of the refund claim of the Petitioner. Moreover, the three previous orders passed by the VATO rejecting the refund claimed had been set aside by the OHA and those orders had become final.

Held

The Court found no justification for the refund due to the Petitioner being withheld by the DT&T any longer. The repeated attempts at re-opening the assessments for each of the months of AY 2009-10, notwithstanding the Petitioner's claim for refund being accepted as noted above, appeared to be an abuse of the process of law by the Respondents. There was no justification for the VATO to have issued notices of default assessment for AY 2009-10 when the objections against the order dated 19th September 2013 were admittedly pending before the OHA and in view of the clear bar under Rule 36 B (7) of the DVAT Rules read with Section 74-B of the DVAT Act. The Court directed that the sum deposited by the Respondent in the Court along with interest accrued thereon should be released by the Registry to the Petitioner. Further each of the notices of default assessment issued under Section 32 of the DVAT Act for each of the months of AY 2009-10 were hereby quashed. The writ petitions were accordingly allowed with costs of Rs. 20,000, which shall be paid by the Respondents to the Petitioner within a period of four weeks.

Present for Petitioner : Mr. A.R. Madhav Rao, Mr. Rajat Mittal, Advocates

Present for Respondents : Mr. Anuj Aggarwal, Additional Standing Counsel

Cases Referred:

1. Swarn Darshan Impex (P) Ltd. v. Commissioner, Value Added Tax (201 0) 31 VST 475 (Del)

Order

Dr. S. Muralidhar, J.

1. The main prayer in W.P. (C) No. 6510 of 2014 by Dish TV India Ltd. (hereafter the 'Assessee') is for a direction to the Department of Trade and Taxes (DT&T), Government of NCT of Delhi to disburse the amount claimed by the Assessee towards refund for the Assessment Year ('AY') 2009-10, along with the applicable interest.

2. The challenge in the remaining writ petitions by the same Assessee is to notices of default assessment of tax and interest issued by the Value Added Tax Officer (VATO) on 18th November 2015 under Section 32 of the Delhi Value Added Tax Act, 2004 (DVAT Act) for each of the months of the AY 2009-10.

3. The Assessee is engaged in the business of providing Direct-to-Home ('DTH') broadcasting services. The Assessee provides an enabling device known as antenna system and accessories which include a set top box, LNB cable and the dish antenna. The DTH services are provided by transmission of satellite programmes through the enabling device installed at the premises of the customers. It is stated that the goods stored in various warehouses are transferred on right to use basis to customers through distributors while the ownership thereof vests with the Assessee.

4. The Assessee had filed a refund claim for Rs.20,67,03,510 in the value added tax return on 28th April 2010 under the provisions of DVAT Act. On 8th July 2010 the Assessee was asked by the VATO to produce documents, which the Assessee complied with by letter dated 17th July 2010.

5. On 4th November 2010 the Assessee revised its VAT return by marginally reducing the refund claim to Rs.20,59, 55,250. On 26th November 2010, a notice of default assessment of tax and interest under Section 32 of the Act was issued by the VATO creating a demand of Rs. 6,68,627.

6. On 11th January 2011, the Assessee filed its objections before the Special Commissioner [Objection Hearing Authority ('OHA')] against the aforementioned notice of default assessment dated 26th November 2010. The OHA by order dated 5th August 2011 set aside the said notice of default assessment and the Assessing Authority ('AA'), i.e., the VATO was directed to consider the fresh claim filed by the Petitioner.

7. By order dated 12th September 2011, the VATO once again rejected the refund claim of the Assessee. Against this order, objections were filed by the Assessee on 20th October 2011 before the OHA. On 24th June 2013, the order dated 12th September 2011 was set aside by the OHA and again the matter was remanded to the VATO.

8. Meanwhile, a special audit was undertaken. The special auditor submitted a report on 12th June 2012, raising an objection that the Assessee was capitalizing the cost of goods sold to the customers, that therefore such goods were in the nature of capital goods and that the input tax credit ('ITC') thereon should be availed in terms of Section 9(9) of the Act. The audit report concluded that the Assessee was entitled to only 1/3rd of the input tax credit claimed on capital goods purchased during the period 2009-10 and the balance 2/3rd input tax credit in equal proportions in the immediate successive financial years. Of the total claim of Rs. 20,59,55,250, a part thereof was disallowed. The credit of Rs.18,75,61,739 was allowed in three equal yearly instalments. Accordingly, Rs.6,25,20,580 was held eligible to be claimed for the AY 2009-10. The balance was permitted to be allowed as refund into equal instalments of the same amount during 2010-11 and 2011-12.

9. On 11th July 2012, a notice under Section 59 of the DVAT Act was issued by the VATO to the Assessee again calling for documentary evidence with respect to the discrepancy pointed out in the special audit report. The Assessee states that none of the queries raised by the VATO pertained to its refund claim. Nevertheless, the Assessee furnished the details as called for by the VATO.

10. The VATO (Vat Audit) issued a further notice on 10th December 2012 to the Assessee seeking information which was provided by the Assessee on 27th December 2012. On 28th December 2012, the Assessee revised its return for the AY 2009-10, claiming refund of Rs. 6,66,05,308 due to the Assessee for the said AY as required by

the special audit report. The balance refund was claimed in two equal instalments in the subsequent AYs. On 9th January 2013, the VATO again issued a notice for personal hearing and the Assessee was called to furnish further documents. This was also complied with by the Assessee.

11. After the OHA had by its order dated 24th June 2013 allowed the Assessee's objections against the order of the VATO dated 12th September 2011 rejecting its refund claim, the VATO on 19th September 2013 again issued a notice of default assessment of tax and interest under Sections 32 of the DVAT Act. In the said notices, the VATO observed that the Assessee had filed revised returns claiming only 1/3rd of the ITC and remaining 2/3rd in the subsequent financial year. The revised return of the Assessee was, therefore, accepted to the above extent. Aggrieved by the default assessment notice dated 19th September 2013 as regards other issues, the Assessee filed objections before the OHA on 18th November 2013. These objections are stated to be pending.

12. A copy of the said objections filed on 18th November 2013 have been enclosed with the writ petition as Annexure A-27, and an averment to that effect has been made in para 20 of the writ petition. In the short affidavit filed by Special Commissioner, in response to the present petition, it is admitted that the order dated 19th September 2013 of the VATO is "subject matter of objections". It is contended that in view of the aforementioned order, no refund is due to the Assessee in response to the objections.

13. In the rejoinder it is pointed out by the Assessee that its revised returns claiming refund have been accepted by the VATO by order dated 19th September 2013 and therefore there was no question of rejection of the refund claim of the Assessee. Moreover, the three previous orders passed by the VATO rejecting the refund claimed have been set aside by the OHA and those orders have become final.

14. In the above circumstances, it is urged by the Assessee that it is obligatory on the part of the Respondent to follow the mandate of Section 38 of the DVAT Act and issue the refund due to the Assessee. Reliance is placed in ***Swarn Darshan Impex (P) Ltd. v. Commissioner, Value Added Tax (201 0) 31 VST 475 (Del)***. It is clarified that the Assessee is not aggrieved by the assessment order dated 19th September 2013 to

the extent it accepts the revised returns, thereby accepting the refund claim of the Assessee.

15. In the above background, when the present writ petition was listed for hearing on 24th November 2014, the Court required Respondent No. 2 to deposit a sum of Rs. 4,97,35,047 being the difference between the refund in the sum of Rs. 6,66,05,308 (the ITC claimed by the Petitioner) and Rs.1,68,60,261(the amount of tax and penalty computed in the impugned default assessment notice) for AY 2009-10. It was directed that on the deposit being made the amount will be placed in the fixed deposit which would be kept renewed. Pursuant to the above order, the Respondent had deposited a cheque in the sum of Rs.4,97,35,047. The said amount has been kept in a fixed deposit with automatic renewal.

16. Mr. Sudhir Nandrajog, learned Senior counsel appearing for Respondent No. 2, drew the attention of the Court to Rule 36-B (7) of the Delhi Value Added Tax Rules, 2005 (DVAT Rules) which states that there cannot be any review or reassessment in terms of Section 74B of the DVAT Act, when an objection under Section 74 or an appeal under Section 76 against the original assessment or reassessment order is pending. He pointed out that inasmuch as the Assessee has asserted that its objections filed on 18th November 2013 were still pending consideration, the Respondents required some more time to verify from its record whether such objections were in fact pending. He fairly stated that if indeed those objections are pending then in terms of Section 74B of the DVAT Act read with Rule 36-B (7) of the DVAT Rules, no notice of default assessment could have been issued. He however sought some more time to verify if the objections were indeed pending.

17. The Court is not inclined to grant further time to the Respondents for the above purpose. Rule 36B (7) of the DVAT Rules read with Section 74B of the DVAT Act makes the position explicit that if there is any objection under Section 74 or appeal under Section 76 pending against the order of the assessment or re-assessment, then such order of assessment or reassessment cannot be sought to be reviewed. The short affidavit of the Special Commissioner acknowledges that the Assessee's objections against the order dated 19th September 2013 are indeed pending consideration before the OHA.

18. The undisputed fact is that during the pendency of the aforementioned objections, the VATO has again invoked the powers

under Sections 32 of the DVAT Act and issued notices of default assessment on 18th November 2015 against the Assessee seeking to 'rectify' and in effect review the assessments for each of the months of AY 2009-10. The said default assessment notices are the subject matter of challenge in the writ petitions other than W.P. (C) 6510 of 2014. While Writ Petition (C) No. 12151 of 2015 challenges the notice of default assessment for the month of April 2009, the other eleven petitions deal with the notices for each of the remaining months of AY 2009-10.

19. In the above facts and circumstances, the Court finds no justification for the refund due to the Assessee being withheld by the DT&T any longer. The repeated attempts at re-opening the assessments for each of the months of AY 2009-10, notwithstanding the Assessee's claim for refund being accepted as noted above, appears to be an abuse of the process of law by the Respondents.

20. There is no justification for the VATO to have issued notices of default assessment for AY 2009-10 when the objections against the order dated 19th September 2013 are admittedly pending before the OHA and in view of the clear bar under Rule 36 B (7) of the DVAT Rules read with Section 74-B of the DVAT Act.

21. For the above reasons, the Court directs that the sum deposited by the Respondent in this Court along with interest accrued thereon should be released by the Registry to the Petitioner Assessee forthwith through an authorized representative.

22. Further each the notices of default assessment issued under Section 32 of the DVAT Act for each of the months of AY 2009-10 are hereby quashed.

23. The writ petitions are accordingly allowed with costs of Rs. 20,000, which shall be paid by the Respondents to the Petitioner Assessee within a period of four weeks.

[2016] 54 DSTC 45 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Justice S.Muralidhar And Justice Najmi Waziri]

W.P .(C) 2528/2013
W.P. (C) 3119/2013 & CM No. 5916/2013

Communication World ... Petitioner

Versus

Commissioner, Trade And Taxes And Anr ... Respondents

Date of Order: 27.07.2016

REFUND UNDER DVAT ACT, 2004 – NO NOTICE ISSUED U/S 59(2) & 58 TO PETITIONER WITHIN TIME PRESCRIBED – NOTICE ISSUED U/S 59(2) BELATED AND PASSED DEFAULT ASSESSMENT OF TAX & INTEREST AND PENALTY ORDERS – OHA ALLOWED OBJECTION PETITION & ALLOWED THE REFUND– THE OHA ALSO CLARIFIED THAT SUBSIDY GIVEN BY TTL WAS NOT TOWARDS THE SALE OF HANDSETS BUT THE SERVICE CHARGES TO BE RECEIVED FROM CUSTOMERS-NO ORDER PASSED BY VAT O CONCERNED UP TO 3 YEARS FROM THE REMAND ORDER – WRIT PETITION FILED TO SEEK DIRECTION TO MAKE GOOD THE REFUND DUE – ANOTHER DEFAULT ASSESSMENT WAS PASSED TO IMPOSE TAX, INTEREST AND PENALTY ON ACCOUNT OF SELLING OF HANDSET BELOW THE PURCHASE PRICE. OHA DELETED PENALTY ORDER BUT UPHELD TAX & INTEREST ORDER– THE PETITIONER FILED WRIT PETITION AND ARGUED ITC COULD BE CLAIMED ONLY TO THE EXTENT OF THE OUTPUT TAX AND THE SUBSEQUENT DISCOUNT OR SUBSIDY OFFERED TO THE PURCHASING DEALER WOULD NOT AFFECT THE ITC CLAIMED. NOTICE ISSUED U/S 74A(2) AS TO REVISE THE ORDER OF OHA – THE PETITIONER FURTHER ARGUED BEFORE THE COURT THAT THE NOTICE ISSUED ONLY TO DELAY GRANT OF REFUND- THE COURT STAYED THE OPERATION OF NOTICE AS THERE WAS NO SPECIFIC GROUND GIVEN FOR ISSUANCE THE NOTICE – THE DIRECTION WAS ISSUED TO DEPOSIT THE REFUND AMOUNT WITH INTEREST – THE ORDER OF OHA SETTING ASIDE THE NOTICES OF ASSESSMENTS OF TAX, INTEREST & PENALTY WAS UPHELD– NOTICE ISSUED U/S 74A(2) OF THE DVAT ACT SEEKING TO REVISE ORDER OF OHA WAS SET ASIDE.

Facts

The Petitioner, Communication World, a dealer registered under the Delhi Value Added Tax Act, 2004 (DVAT Act) had filed these two writ petitions against the Commissioner, Trade & Taxes. In W.P. (C) No. 2528 of 2013, the Petitioner inter alia had prayed for a direction to the Respondent to refund a sum of Rs. 81,81,066 due to the Petitioner

along with interest for the period of May 2007 and July 2007. In W. P. (C) No. 3119 of 2013, the prayer was to quash the notice dated 4th April 2013 issued to the Petitioner by the Respondent under Section 74A (2) of the DVAT Act proposing to revised an order dated 9th October 2009 passed by the Objection Hearing Authority (OHA)/Additional Commissioner setting aside the notices of default assessment of tax, interest and penalty under Sections 32 and 33 of the DVAT Act. The Petitioner stated that it was engaged in the business of telephony and undertakes purchase and sale of CDMA handsets as a distributor of M/s. Drive India. It also provides CDMA connection as a service provider of Tata Teleservices Limited (TTL). The Petitioner filed monthly returns for May 2007 and July 2007 in which it claimed refund of excess tax credit. The refund claim for May 2007 was Rs. 70,87,097 and for July 2007 it was Rs. 11,02,969. It was stated that in terms of Section 38 of the DVAT Act, the refund was required to be issued within one month from the date of filing of the monthly returns. Accordingly, the last date of refund for the aforementioned periods was 27th July 2007 and 28th September 2007 respectively. The Petitioner stated that no notice of audit under Section 58 of the DVAT Act was issued nor any additional information under Section 59 sought as envisaged under Section 38 (4) of the DVAT Act. Further, no security as a condition for issuance of refund was demanded within 15 days from the date of filing of monthly returns as contemplated under Section 38 (5) of the DVAT Act. On 27th July 2008 the Petitioner filed a reminder for grant of refund. It was pointed out that in terms of Circular No. 6 dated 15th June 2005 issued by the Commissioner, Trade & Taxes, the VATO of the concerned Ward was supposed to scrutinize the correctness of the amount of the cash refund claimed and pass the refund order in DVAT -22 within a period of 15 days from the date of receipt of the return in the Front Office without fail unless the return of the dealer had been picked up for seeking additional information or audit. In that event, an intimation would be given by the Audit Wing of the Department/designated VAT authority/ VATO concerned within 10 days from the receipt of the return in the Front Office. Meanwhile, the Petitioner also became entitled to interest in terms of Section 42 (1) of the DVAT Act. The Petitioner stated that a notice under Section 59 (2) of the DVAT Act from VATO, Ward-96 was received and thereafter notices of default assessments of tax, interest and penalty under Sections 32 and 33 of the DVAT Act respectively were issued for the months of May 2007, July 2007 and March 2008. These were challenged by filing objections before the OHA under Section 74

of the DVAT Act. The said objections were allowed by the OHA by an order 9th October 2009. Inter alia it was argued before the OHA by the Respondent that the Petitioner was being granted subsidy by TTL in order to attract the customers from whom they could generate revenue from call charges etc. The subsidy was given soon after the purchase to enable to sellers to sell the handsets at prices well below the market price. The subsidy therefore ought to be included in the sale price. The OHA negatived the above contention by pointing out that the Petitioner was liable to pay tax at the rates specified in Section 4 of the DVAT Act on sales effected by it. The Petitioner was also entitled to claim input tax credit (ITC) on turnover of purchases as provided in Section 9 of the DVAT Act. The ITC to which a purchasing dealer was entitled would be equal to the output tax liability of his selling dealer and it could not be different from the output tax liability of the selling dealer on that transaction. M/s. Drive India was the selling dealer from whom the Petitioner had made the purchases. Consequent upon the grant of subsidy by TTL to the Petitioner the output tax liability of the seller had not reduced. The subsidy given by TTL was not towards the sale of handsets but the service charges to be received from the customers. As far as the Respondent was concerned, it was entitled to levy and collect value added tax (VAT) at the price at which the end customer buys the handsets. The OHA held, by referring to the decision in ***Neyveli Lignite Corporation Limited v. Commercial Tax Officer, Cuddalore [2001] 124 STC 586a (SC); Rashtriya Chemicals and Fertilisers Limited v. State of U.P. (1996) 101 STC 487 (All); Natraj Organics Limited v. Assistant Commissioner (Assessment) Sales Tax, Muzzaffarnagar (1995) 96 STC 261 (All); Bongaigaon Refindery and Petrochemicals Limited v. Commissioner of Taxes, Assam (2003) 131 STC 37 (Gau); TISCO General Office Recreation Club v. State of Bihar (2002) 126 STC 547 (SC),*** *and* ***Andhra Agencies v. State of A.P. (2008) 14 SCC 540*** *that subsidy could not form part of the sale consideration. The OHA concluded that "the default assessments were made to defeat the claim of refund of the Objector." The OHA was also surprised "at the action of the VATO who, in order to inflate the demands, added the amount of refund to the figure of demand instead of reducing it." It was also pointed out that the concept of fair market value under Section 2 (l) of the DVAT Act also stood satisfied as the value at which goods were sold was that at which they would be sold between unrelated parties in the open market in Delhi. Till more than three years after the above order, nothing was done by the*

Respondent to challenge to the above order of the OHA. This had led to the Petitioner filing W.P. (C) No. 2528 of 2013 for a direction to the Respondent to made good the refund due to it for the above periods. Notice was issued in the petition on 22nd April 2013. Meanwhile, notices of default assessments of tax, interest and penalty were passed on 26th December 2008 for the periods 2006-07 and 2007-08 raising a total demand of Rs. 2,25,20,281 towards tax and interest and penalty of Rs. 1,02,09,037. The objections filed by the Petitioner against the said notices of default assessments of tax, interest and penalty were disposed of by an order dated 16th December 2009 by another OHA, i.e., the Joint Commissioner, Zone-V. This OHA held that the levy of tax was appropriate. He held that the selling of handsets below the purchase price would eventually result in the loss to the dealer and thus in order to compensate, TTL was paying subsidy to the dealer. Although the purchase price of the dealer was reduced, he could still claim the entire ITC on the basis of tax invoices issued prior to the release of the subsidy. As a result the Department lost revenue. Despite there being no value addition, it had to allow ITC on the higher purchase price. Therefore, it was concluded that "the levy of tax was appropriate and the default assessment orders were upheld regarding levy of tax was appropriate". The OHA further held that merely because a claim made by the dealer was not allowed, the return filed could not be branded as false, misleading or deceptive. Therefore, the notice of assessment of penalty was set aside. Aggrieved by the above order dated 16th December 2009 of the OHA the Petitioner filed a review application which was stated to be pending.

Held

The Petitioner was right in his contention that the notice issued to the Petitioner under Section 74A (1) of the DVAT Act was unsustainable in law. Section 74A (1) reads as under:

"**Section 74 A-**

(1) After any order including an order under this section or any decision in objection is passed under this Act, rules or notifications made thereunder, by any officer or person subordinate to him, the Commissioner may, of his own motion or upon information received by him, call for the record of such order and examine

whether -

(a) any turnover of sales has not been brought to tax or has been brought to tax at lower rate, or has been incorrectly classified, or any claim is incorrectly granted or that the liability to tax is understated, or

(b) in any case, the order is erroneous, in so far as it is prejudicial to the interest of revenue, and after examination, the Commissioner may pass an order to the best of his judgment, where necessary."

It was obvious that the notice dated 4th April 2013 issued under Section 74A (1) of the DVAT Act reproduced the mere words of the above provision without indicating the specific ground on which the Respondent proposed to revise the order dated 9th October 2009. As explained in ***Commissioner of C. Ex, Bangalore v. Brindavan Beverages (P) Limited***, *unless the grounds in the show cause notice (SCN) were specified it was not possible for the Assessee to answer such SCN. In other words, "if the allegations in the show cause notice were not specific and were on the contrary vague, lack details and/or unintelligible that was sufficient to hold that the notice was not given proper opportunity to meet the allegations indicated in the show cause notice." Likewise in* ***Amrit Foods v. Commissioner of Central Excise, U.P.****the Supreme Court held that the Assessee had to be put on notice as to the exact nature of contravention for which the Assessee was liable under the provisions of Rule 173Q of the Central Excise Rules, 1944. Otherwise the notice would be bad in law. The same legal position had been reiterated in* ***Rawani Dal & Flour Mills v. Commissioner of Sales Tax, Orissa*** *and* ***Om Shri Jigar Association v. Union of India***. *For the above reasons, the impugned notice dated 4th April 2013 under Section 74A(2) of the DVAT Act was held to be bad in law and was accordingly quashed.*

The writ petitions were allowed and the pending applications were disposed of with the following directions:

(i) The order dated 9th October 2009 passed by the OHA setting aside the notices of default assessments of tax, interest and penalty for the periods May 2007, July 2007 and August 2008

was upheld. The Petitioner was entitled to the refund claimed for the said periods along with interest.

(ii) Accordingly the sum of Rs. 1,24,01,725 which had been deposited in the Court will be handed over together with interest accrued thereon.

(iii) The notice dated 4th April 2013 issued to the Petitioner under Section 74A(2) of the DVAT Act seeking to revised the order dated 9th October 2009 of the OHA was hereby set aside.

Present for Petitioner : Mr. Ruchir Bhatia, Advocate.

Present for Respondent : Mr. Sanjoy Ghose, Additional Standing Counsel

Cases Referred:

1. *Neyveli Lignite Corporation Limited v. Commercial Tax Officer, Cuddalore [2001] 124 STC 586a (SC);*
2. *Rashtriya Chemicals and Fertilisers Limited v. State of U.P. (1996) 101 STC 487 (All);*
3. *Natraj Organics Limited v. Assistant Commissioner (Assessment) Sales Tax, Muzzaffarnagar (1995) 96 STC 261 (All);*
4. *Bongaigaon Refindery and Petrochemicals Limited v. Commissioner of Taxes, Assam (2003) 131 STC 37 (Gau);*
5. *TISCO General Office Recreation Club v. State of Bihar (2002) 126 STC 547 (SC),*
6. *Andhra Agencies v. State of A.P. (2008) 14 SCC 540*
7. *Challenger Computers Limited v. Commissioner of Trade & Taxes, Delhi (2015) VST 469 (Del)*
8. *Commissioner of Central Excise, Bangalore v. Brindavan Beverages (P) Limited 2007 (213) ELT 487 (SC);*
9. *Amrit Foods v. Commissioner of Central Excise 2005 (190) ELT 433 (SC);*
10. *Rawani Dal & Flour Mills v. Commissioner of Sales Tax, Orissa (1992) 86 STC 409 (Orissa)*
11. *Om Shri Jigar Association v. Union of India (1994) 209 ITR 608 (Guj).*
12. *Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax (2010) 31 VST 475 (Del)*
13. *Lotus Impex v. The Commissioner, Department of Trade & Taxes*

Order

Dr. S. Muralidhar, J.:

1. The Petitioner, Communication World, a dealer registered under the Delhi Value Added Tax Act, 2004 ('DVAT Act') has filed these two writ petitions against the Commissioner, Trade & Taxes. In W.P. (C) No. 2528 of 2013, the Petitioner *inter alia* has prayed for a direction to the Respondent to refund a sum of Rs. 81,81,066 due to the Petitioner along with interest for the period May 2007 and July 2007. In W. P. (C) No. 3119 of 2013, the prayer is to quash the notice dated 4th April 2013 issued to the Petitioner by the Respondent under Section 74A (2) of the DVAT Act proposing to revise an order dated 9th October 2009 passed by the Objection Hearing Authority ('OHA')/Additional Commissioner setting aside the notices of default assessment of tax, interest and penalty under Sections 32 and 33 of the DVAT Act.

2. The Petitioner states that it is engaged in the business of telephony and undertakes purchase and sale of CDMA handsets as a distributor of M/s. Drive India. It also provides CDMA connection as a service provider of Tata Teleservices Limited ('TTL'). The Petitioner filed monthly returns for May 2007 and July 2007 in which it claimed refund of excess tax credit. The refund claim for May 2007 was Rs. 70,87,097 and for July 2007 it was Rs. 11,02,969. It is stated that in terms of Section 38 of the DVAT Act, the refund was required to be issued within one month from the date of filing of the monthly returns. Accordingly, the last date of refund for the aforementioned periods was 27th July 2007 and 28th September 2007 respectively.

3. The Petitioner states that no notice of audit under Section 58 of the DVAT Act was issued nor any additional information under Section 59 sought as envisaged under Section 38 (4) of the DVAT Act. Further, no security as a condition for issuance of refund was demanded within 15 days from the date of filing of monthly returns as contemplated under Section 38 (5) of the DVAT Act.

4. On 27th July 2008 the Petitioner filed a reminder for grant of refund. It is pointed out that in terms of Circular No. 6 dated 15th June 2005 issued by the Commissioner, Trade & Taxes, the VATO of the concerned Ward is supposed to scrutinize the correctness of the

amount of the cash refund claimed and pass the refund order in DVAT -22 within a period of 15 days from the date of receipt of the return in the Front Office without fail unless the return of the dealer has been picked up for seeking additional information or audit. In that event, an intimation would be given by the Audit Wing of the Department/ designated VAT authority/VATO concerned within 10 days from the receipt of the return in the Front Office. Meanwhile, the Petitioner also became entitled to interest in terms of Section 42 (1) of the DVAT Act.

5. The Petitioner states that a notice under Section 59 (2) of the DVAT Act from VATO, Ward-96 was received and thereafter notices of default assessments of tax, interest and penalty under Sections 32 and 33 of the DVAT Act respectively were issued for the months of May 2007, July 2007 and March 2008. These were challenged by filing objections before the OHA under Section 74 of the DVAT Act. The said objections were allowed by the OHA by an order 9th October 2009.

6. *Inter alia* it was argued before the OHA by the Respondent that the Petitioner was being granted subsidy by TTL in order to attract the customers from whom they could generate revenue from call charges etc. The subsidy was given soon after the purchase to enable to sellers to sell the handsets at prices well below the market price. The subsidy therefore ought to be included in the sale price. The OHA negatived the above contention by pointing out that the Petitioner was liable to pay tax at the rates specified in Section 4 of the DVAT Act on sales effected by it. The

Petitioner was also entitled to claim input tax credit ('ITC') on turnover of purchases as provided in Section 9 of the DVAT Act. The ITC to which a purchasing dealer was entitled would be equal to the output tax liability of his selling dealer and it could not be different from the output tax liability of the selling dealer on that transaction. M/s. Drive India was the selling dealer from whom the Petitioner had made the purchases. Consequent upon the grant of subsidy by TTL to the Petitioner the output tax liability of the seller had not reduced. The subsidy given by TTL was not towards the sale of handsets but the service charges to be received from the customers. As far as the Respondent was concerned, it was entitled to levy and collect value added tax ('VAT') at the price at which the end customer buys the handsets.

7. The OHA held, by referring to the decision in ***Neyveli Lignite Corporation Limited v. Commercial Tax Officer, Cuddalore [2001] 124 STC 586a (SC); Rashtriya Chemicals and Fertilisers Limited v. State of U.P. (1996) 101 STC 487 (All); Natraj Organics Limited v. Assistant Commissioner (Assessment) Sales Tax, Muzzaffarnagar (1995) 96 STC 261 (All); Bongaigaon Refindery and Petrochemicals Limited v. Commissioner of Taxes, Assam (2003) 131 STC 37 (Gau); TISCO General Office Recreation Club v. State of Bihar (2002) 126 STC 547 (SC),*** and ***Andhra Agencies v. State of A.P. (2008) 14 SCC 540*** that subsidy cannot form part of the sale consideration. The OHA concluded that "the default assessments were made to defeat the claim of refund of the Objector." The OHA was also surprised "at the action of the VATO who, in order to inflate the demands, added the amount of refund to the figure of demand instead of reducing it." It is also pointed out that the concept of fair market value under Section 2 (l) of the DVAT Act also stood satisfied as the value at which goods were sold was that at which they would be sold between unrelated parties in the open market in Delhi.

8. Till more than three years after the above order, nothing was done by the Respondent to challenge to the above order of the OHA. This has led to the Petitioner filing W.P. (C) No. 2528 of 2013 for a direction to the Respondent to make good the refund due to it for the above periods. Notice was issued in the petition on 22nd April 2013.

9. Meanwhile, notices of default assessments of tax, interest and penalty were passed on 26th December 2008 for the periods 2006-07 and 2007-08 raising a total demand of Rs. 2,25,20,281 towards tax and interest and penalty of Rs. 1,02,09,037. The objections filed by the Petitioner against the said notices of default assessments of tax, interest and penalty were disposed of by an order dated 16th December 2009 by another OHA, i.e., the Joint Commissioner, Zone-V. This OHA held that the levy of tax was appropriate. He held that the selling of handsets below the purchase price would eventually result in the loss to the dealer and thus in order to compensate, TTL was paying subsidy to the dealer. Although the purchase price of the dealer was reduced, he could still claim the entire ITC on the basis of tax invoices issued prior to the release of the subsidy. As a result the Department lost revenue. Despite there being no value addition, it had to allow ITC on the higher purchase price. Therefore, it was concluded that "the levy

of tax is appropriate and the default assessment orders are upheld regarding levy of tax is appropriate". The OHA further held that merely because a claim made by the dealer was not allowed, the return filed cannot be branded as false, misleading or deceptive. Therefore, the notice of assessment of penalty was set aside.

10. Aggrieved by the above order dated 16th December 2009 of the OHA the Petitioner filed a review application which is stated to be pending.

11. On 4th April 2013 the following notice was issued by the Respondent to the Petitioner under Section 74A (2) of the DVAT Act:

> "Whereas it appears that in the order No. 981 dated 9th October 2009 passed under Section 74 of Delhi Value Added Tax, 2004 read with Section 32 and 33 of the said Act by Objection Hearing Authority/Additional Commissioner-II for the assessment period May 2007, July 2007 and March 2008 in your case,
>
> (i) a certain turnover of sales which has not been brought to tax or has been brought to tax at lower rate or has been incorrectly classified, or any claim is incorrectly granted or that the liability to tax is understated, or
>
> (ii) the order is erroneous, in so far as it is prejudicial to the interest of revenue;
>
> And whereas it has been decided to revise the above stated order under Section 74A of the Delhi Value Added Tax, 2004. Therefore, in view of the above, you are hereby directed to appear, before the undersigned at the above mentioned address on 17th April 2013 at 11 am in person or through authorized representative along with books of accounts, copy of contract with Tata Teleservices Limited (TTSL) and all relevant documents, failing which an order in this regard shall be passed on merits as per law."

12. The Petitioner then filed Writ Petition (Civil) No. 3119 of 2013 challenging the said notice on the ground that it had been arbitrarily issued by the Respondent only to delay the grant of refund

to the Petitioner. In the said writ petition, on 14th May 2013 while notice was directed to be issued, the Court also granted a stay of the operation of the said notice. Thereafter, on 23rd July 2013 a direction was issued to the Respondent to deposit the entire amount of refund along with interest payable under the provisions of the DVAT Act within a period of two weeks from that date. The said order was ultimately complied with by the Respondent on 30th March 2016 by depositing a demand draft in the sum of Rs. 1,24,01,725 (inclusive of interest up to date).

13. This Court has heard the submissions of Mr. Ruchir Bhatia, learned counsel for the Petitioner and Mr. Sanjoy Ghose, learned Additional Standing counsel for the Department.

14. Mr. Bhatia submitted that the order dated 9th October 2009 of the OHA had comprehensively negatived the case of the Respondent and there was no ground for the Respondent to seek to revise the said order. Referring to the decision of this Court in ***Challenger Computers Limited v. Commissioner of Trade & Taxes, Delhi (2015) VST 469 (Del)*** he submitted that ITC could be claimed only to the extent of the output tax and the subsequent discount or subsidy offered to the purchasing dealer would not affect the ITC claimed. He submitted that notice issued under Section 74 A (2) of the DVAT Act was bad in law as it was a mere reproduction of the provision without specifying the ground on which the order dated 9th October 2009 of the OHA was sought to be revised. He placed reliance on the decisions in ***Commissioner of Central Excise, Bangalore v. Brindavan Beverages (P) Limited 2007 (213) ELT 487 (SC); Amrit Foods v. Commissioner of Central Excise 2005 (190) ELT*** 433 ***(SC); Rawani Dal & Flour Mills v. Commissioner of Sales Tax, Orissa (1992) 86 STC 409 (Orissa)*** and ***Om Shri Jigar Association v. Union of India (1994) 209 ITR 608 (Guj).*** He also referred to the decision of this Court in ***Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax (2010) 31 VST 475 (Del)*** and the decision dated 19th February 2016 in Writ Petition (Civil) No. 134 of 2014 (***Lotus Impex v. The Commissioner, Department of Trade & Taxes***).

15. Countering the above submissions, Mr. Sanjoy Ghose, learned Additional standing counsel for the Department, submitted that the Court should issue a time-bound direction for disposal of both the review petition filed by the Petitioner as well the revision petition proposed by

the Department so that the conflicting views of the OHAs could be reconciled. On merits he urged that the widest possible meaning had to be given to the expression 'sale' in Section 2(1)(zc) of the DVAT Act. Mr. Ghose submitted that the word 'sale' would include anything that would go to enhance the value of the product sold. In this case, according to Mr. Ghose, the subsidy granted by TTL to the Petitioner was to compensate for the reduced price at which the handsets were to be sold and therefore constituted the 'other valuable consideration' which formed part of the sale price. Mr. Ghose referred to a letter issued by another dealer M/s. Shyam Telecom Limited confirming that they were collecting VAT on the subsidy as well.

16. At the outset, the Court notes that the review petition filed by the Petitioner to challenge the order of the OHA dated 16th December 2009 is not under challenge in these petitions. The Court is therefore not called upon to examine that order. Further, the Court is required to examine whether there is any justification in the Respondent seeking to revise the order dated 9th October 2009 of the OHA. Therefore it would be no answer to direct the disposal of the revision petition without first deciding that question.

17. The expression 'sale' in Section 20(1)(zc) of the DVAT Act has been widely defined to mean "any transaction of property in goods by one person to another for cash or for deferred payment or for other valuable consideration (not including a grant or subvention payment made by one government agency or department, whether of the Central Government or of any State Government, to another) and includes - ..." The words in the brackets points to the fact that a „grant or subvention payment' made by one government department to another is not intended to be included in the sale price. It is not considered part of the 'other valuable consideration' for which there could be a transfer of property in goods from one person to another.

18. The short question that arises in the present cases is whether the subsidy granted to the Petitioner by TTL in respect of the handsets sold by it could be termed as 'other valuable consideration' and therefore, could be included in the sale price?

19. In ***Neyveli Lignite Corporation Limited v. Commercial Tax Officer, Cuddalore*** (*supra*) the issue was whether the retention

price received by the Appellant, a manufacturer of fertilizers, from the Government of India, could form part of the sale price and be included in the turnover for the purpose of the Tamil Nadu General Sales Tax Act, 1959. The Supreme Court answered the question in the negative. It held that the payment made by the government to a manufacturer "could not be regarded as a discharge of any liability or obligation by the Government towards the purchase of the fertiliser." The two payments received by the manufacturer, viz., the subsidy and the price fixed under the Control Order were independent of each other. The subsidy under the Government Scheme did not form part of the bargain between the manufacturer and the purchaser of the fertilizer. The amount given by the Government under the administrative scheme of furnishing subsidy was not part of the sale price or consideration for the sale of fertilizers by the Appellant (manufacturer) and did not form part of the 'turnover' for the purposes of the Tamil Nadu General Sales Tax Act, 1959."

20. In ***Rashtriya Chemicals and Fertilizers Limited v. State of U.P.*** (*supra*), the Allahabad High Court reiterated that the subsidy given by the Government of India to the manufacturer of fertilizers is not covered within the definition of turnover under Section 2 (i) of the U.P. Sales Tax Act, 1948. In the context of the amount received by an oil refinery from the pool account, being the difference between the ex-refinery price of petroleum products and retention price fixed by the Oil Co-ordination Committee set up by the Ministry of Petroleum, the Gauhati High Court in ***Bongaigaon Refinery and Petrochemicals Limited v. Commissioner of Taxes, Assam*** (*supra*) held it to be in the nature of a subsidy and not part of the sale price for purposes of taxation under the Assam General Sales Tax Act, 1993.

21. In ***Tisco General Office Recreation Club v. State of Bihar*** (*supra*), a dealer ran a canteen for the benefit of officers and employees of the TISCO. It sold the food items in the canteen at prices fixed by the Managing Committee. The prices were below the cost price. To make good the loss, as a staff welfare measure, TISCO gave lumpsum subsidies to the dealer. The subsidies were not relatable to any particular item of food. It was held by the Supreme Court in that case that "the lump sum subsidies made *ex gratia* could not be regarded as valuable consideration in respect of the sale or supply of goods and were not part of the sale price and consequently did not form part of the gross turnover of the Appellant for the purposes of sales tax under the Bihar Finance Act, 1981."

22. In ***Andhra Agencies v. State of A.P.*** (*supra*), the Supreme Court held that

> "the basic issue can be better appreciated by way of an illustration. Hypothetically, taking the sale price to be Rs. 100, the tax to be paid by the selling dealers has to be on 100. He may collect 90, after giving discount. If the sale price of the intermediate seller is Rs. 110 his liability to pay tax shall be on Rs. 10, i.e., Rs. 110-100. The Department's stand is that it should be 20, i.e, 110-90. This stand will not be correct if the first settler has paid tax on 110."

23. In the present case M/s. Drive India was the selling dealer from whom the Petitioner, as the purchasing dealer, has made the purchase of the handset. The grant of subsidy by TTL to the Petitioner did not go to reduce the output tax liability of the seller. The subsidy was for the purpose of generating revenue from call charges etc paid by the consumer. It was not towards the sale of handsets. It, therefore, did not affect the sale price of the handsets. In the light of the law explained in the above decisions, the Court holds that the subsidy offered by TTL to the Petitioner cannot be included in the sale price for the purposes of VAT.

24. The order dated 9th October 2009 of the OHA sustaining the objections filed by the Petitioner against the notices of default assessments of tax and penalty for May 2007, July 2007 and August 2008 is upheld as laying down the correct legal position.

25. Learned counsel for the Petitioner is right is his contention that the notice issued to the Petitioner under Section 74A (1) of the DVAT Act is unsustainable in law. Section 74A (1) reads as under:

> "**Section 74 A-**
>
> (1) After any order including an order under this section or any decision in objection is passed under this Act, rules or notifications made thereunder, by any officer or person subordinate to him, the Commissioner may, of his own motion or upon information received by him, call for the record of such order and examine

whether -

(a) any turnover of sales has not been brought to tax or has been brought to tax at lower rate, or has been incorrectly classified, or any claim is incorrectly granted or that the liability to tax is understated, or

(b) in any case, the order is erroneous, in so far as it is prejudicial to the interest of revenue, and after examination, the Commissioner may pass an order to the best of his judgment, where necessary."

26. It is obvious that the notice dated 4th April 2013 issued under Section 74A (1) of the DVAT Act reproduces the mere words of the above provision without indicating the specific ground on which the Respondent proposes to revise the order dated 9th October 2009. As explained in ***Commissioner of C. Ex, Bangalore v. Brindavan Beverages (P) Limited*** *(supra)*, unless the grounds in the show cause notice (SCN) are specified it is not possible for the Assessee to answer such SCN. In other words, "if the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/ or unintelligible that is sufficient to hold that the notice was not given proper opportunity to meet the allegations indicated in the show cause notice."

27. Likewise in ***Amrit Foods v. Commissioner of Central Excise, U.P.*** *(supra)* the Supreme Court held that the Assessee had to be put on notice as to the exact nature of contravention for which the Assessee was liable under the provisions of Rule 173Q of the Central Excise Rules, 1944. Otherwise the notice would be bad in law. The same legal position has been reiterated in ***Rawani Dal & Flour Mills v. Commissioner of Sales Tax, Orissa*** (*supra*) and ***Om Shri Jigar Association v. Union of India*** (*supra*).

28. For the above reasons, the impugned notice dated 4th April 2013 under Section 74A(2) of the DVAT Act is held to be bad in law and is accordingly quashed.

29. The writ petitions are allowed and the pending application are disposed of with the following directions:

(i) The order dated 9th October 2009 passed by the OHA setting aside the notices of default assessments of tax, interest and penalty for the periods May 2007, July 2007 and August 2008 is upheld. The Petitioner is entitled to the refund claimed for the said periods along with interest.

(ii) Accordingly the sum of Rs. 1,24,01,725 which has been deposited in the Court will be handed over by the Registry to the authorized representative of the Petitioner together with interest accrued thereon, within one week from today.

(iii) The notice dated 4th April 2013 issued to the Petitioner under Section 74A(2) of the DVAT Act seeking to revise the order dated 9th October 2009 of the OHA is hereby set aside.

30. There shall be no orders as to costs.

[2016] 54 DSTC 60 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Justice S.Muralidhar And Justice Najmi Waziri]

W.P.(C) 7511/2015
W.P.(C) 8104/2015
W.P.(C) 8393/2015

Nucleus Marketing & Communication ... Petitioner

Versus

Commissioner of Delhi Value Added Tax, Department Of Trade & Taxes ... Respondent

And

Nucleus Impex Pvt. Ltd. ... Petitioner

Versus

Commissioner of Delhi Value Added Tax, Department Of Trade & Taxes ... Respondent

Date of Order: 12.07.2016

REFUND UNDER DVAT ACT, 2004 – NOTICE UNDER SECTION 59(2) – NON COMPLIANCE OF CIRCULAR NO. 6 – DELAY IN PROCESSING OF REFUND –

WRIT PETITION – ALTERNATIVE REMEDY – FAILURE TO MAKE REFUND DUE TO SURVEY UNDERTAKEN – WHETHER JUSTIFIED. HELD-NO.

PETITIONER FILED WRIT PETITION TO GRANT REFUND WITH INTEREST – REVENUE DID NOT ISSUE NOTICE U/S 59 (2) WITHIN TIME PRESCRIBED NOR FOLLOWED THE CIRCULAR NO.6 ISSUED BY COMMISSIONER OF VAT WHICH WAS BINDING ON REVENUE – REVENUE ARGUED THAT THE PETITIONER HAVE AN ALTERNATIVE REMEDY IN THE ACT TO FILE AN OBJECTION – THE COURT REJECTED THE PRELIMINARY OBJECTION OF THE REVENUE ON THE GROUND OF FURTHER DELAY IN GETTING REFUND – THE REVENUE FURTHER TOOK PLEA THAT FAILURE TO MAKE REFUND DUE TO SURVEY CONDUCTED AT PREMISES OF PETITIONER AND DOCUMENTS WERE ASKED TO PROCESSING REFUND – THE PLEA WAS NOT ACCEPTED – OBJECTION HEARING AUTHORITY ACCEPTED THE OBJECTION AGAINST THE ORDER OF DEFAULT ASSESSMENT OF TAX & INTEREST AND PENALTY – THE COURT DIRECTED TO ISSUE REFUND TOGETHER WITH INTEREST.

Facts

Nucleus Impex Pvt. Ltd. (NIPL) was the Petitioner in W.P.(C) Nos. 8104 & 8393/2015 and Nucleus Marketing & Communication (NMC) in W.P.(C) 7511/2015. They were dealers duly registered under the Delhi Value Added Tax Act, 2004 (DVAT Act) and Central Sales Tax Act, 1956 (CST). The essential grievance of the Petitioners was against the failure by the Respondent, Commissioner, Delhi Value Added Tax (DVAT) to grant refund together with interest due to the Petitioners in accordance with Section 38 of the DVAT Act. In the case of NMC the refund together with interest was due for the months of November 2012 for the year 2012-13 and in the case of NIPL it was due for the 3rd and 4th quarter for 2012-13 as well as 1st, 2nd, 3rd and 4th quarters of 2013-14. The case of the Petitioners was that they had been filing returns as and when due under the DVAT Act. For the month of November 2012, the return was filed on 27th December 2012 claiming refund of Rs. 20,46,725. It was submitted that in respect of the said claim, the due date for issuance of refund in terms of Section 38 of the DVAT was 27th February 2013. As regards the quarterly returns for the 3rd and 4th quarter relating to 2012-13, returns were filed on 31st October 2013 (revised) and 26th April 2013 (original) respectively. The respective due dates for issuance of the refund as claimed in these returns were 31st December 2013 and 26th June 2013 respectively. As regards the returns for 2013-14 the

revised returns for the 1st and 2nd quarter were filed on 16th July 2014 claiming refund and for the 3rd and 4th quarter on 28th March 2015 (all revised returns) claiming refund. While the due date for issuance of refund for the 1st and 2nd quarter for 2013-14 was 16th September 2014, the refund for 3rd and 4th quarter for 2013-14 was due on 28th May 2015. It was submitted that during the period in question, the dealers had less output tax payable and more input tax credit (ITC) and such refund was due as indicated in the return. Further, a reference was made to Circular No. 6 issued by the Commissioner, VAT on 15th June 2015 in terms of which the Petitioners had the right to received the refund within 15 days from the date of filing of the return where the return was not picked up for audit. It was stated that the said Circular issued under Section 67 (2) of the DVAT Act was binding on the VATO and yet no refund had been made till date. It was asserted that neither was the refund issued to the Petitioner within 15 days nor was the case picked up for audit nor any security under Section 38 (5) of the DVAT Act demanded. No notice was issued under Section 59 (2) of the DVAT Act within 10 days from the date of filing return.

Held

The Court was of the view that the failure by the Respondent to process the refund claimed by the Petitioners for all the tax periods appeared to be wholly unjustified. It was no longer open to the Respondent to raise an objection to the grant of refund claimed together with interest. In view of the matter, a direction was issued to the Respondent to process the claim refund made by the Petitioners for the aforementioned periods as set out in the three writ petitions and issue appropriate orders granting refund together with interest in terms of Section 38 of the DVAT Act within a period of eight weeks from today and in any event not later than September 10, 2016. If there was any failure by the Respondent to comply with the directions, the Petitioners shall seek appropriate relief in accordance with law.

Present for Petitiioner	:	Mr. A.K. Babbar with Mr. Surinder Kumar, Mr. Bhagat Tripathi, Ms. Amita Babbar, Advocates.
Present for Respondent	:	Mr. Naushad Ahmed Khan, ASC (Civil) with Ms. Astha Nigam, Advocate.

Cases Referred:

1. *Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax (2010) 31 VST 475 (Del)*
2. *Dish TV India Limited v. Government of NCT of Delhi (2016) 92 VST 83 (Del)*
3. *Commissioner of Sales Tax v. Behl Construction (2009) 21 VST 261 (Del)*

Order

Dr. S. Muralidhar, J.*:*

1. Nucleus Impex Pvt. Ltd ('NIPL') is the Petitioner in W.P.(C) Nos. 8104 & 8393/2015 and Nucleus Marketing & Communication ('NMC') in W.P.(C) 7511/2015. They are dealers duly registered under the Delhi Value Added Tax Act, 2004 ('DVAT Act') and Central Sales Tax Act, 1956 ('CST').

2. The essential grievance of the Petitioners is against the failure by the Respondent, Commissioner, Delhi Value Added Tax ('DVAT') to grant refund together with interest due to the Petitioners in accordance with Section 38 of the DVAT Act. In the case of NMC the refund together with interest was due for the months of November 2012 for the year 2012-13 and in the case of NIPL it was due for the 3rd and 4th quarter for 2012-13 as well as 1st, 2nd, 3rd and 4th quarters of 2013-14.

3. The case of the Petitioners is that they have been filing returns as and when due under the DVAT Act. For the month of November 2012, the return was filed on 27th December 2012 claiming refund of Rs. 20,46,725. It is submitted that in respect of the said claim, the due date for issuance of refund in terms of Section 38 of the DVAT is 27th February 2013. As regards the quarterly returns for the 3rd and 4th quarter relating to 2012-13, returns were filed on 31st October 2013 (revised) and 26th April 2013 (original) respectively. The respective due dates for issuance of the refund as claimed in these returns were 31st December 2013 and 26th June 2013 respectively.

4. As regards the returns for 2013-14 the revised returns for the 1st and 2nd quarter were filed on 16th July 2014 claiming refund and for the 3rd and 4th quarter on 28th March 2015 (all revised returns) claiming refund. While the due date for issuance of refund for the 1st and 2nd

quarter for 2013-14 was 16th September 2014, the refund for 3rd and 4th quarter for 2013-14 was due on 28th May 2015.

5. It is submitted that during the period in question, the dealers had less output tax payable and more input tax credit ('ITC') and such refund was due as indicated in the return. Further, a reference is made to Circular No.

6 issued by the Commissioner, VAT on 15th June 2015 in terms of which the Petitioners have the right to receive the refund within 15 days from the date of filing of the return where the return is not picked up for audit. It is stated that the said Circular issued under Section 67 (2) of the DVAT Act is binding on the VATO and yet no refund has been made till date. It is asserted that neither was the refund issued to the Petitioner within 15 days nor was the case picked up for audit nor any security under Section 38 (5) of the DVAT Act demanded. No notice was issued under Section 59 (2) of the DVAT Act within 10 days from the date of filing return.

6. The main plank of the submission of Mr. A.K. Babbar, learned counsel appearing for the Petitioner, is based on the decision of this Court in ***Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax (2010) 31 VST 475 (Del)*** which was subsequently followed by this Court in ***Dish TV India Limited v. Government of NCT of Delhi (2016) 92 VST 83 (Del)***

7. Pursuant to the notices issued in these petitions, counter-affidavits have been filed in W.P.(C) Nos. 8104 and 8393/2015 by the Respondent. In the first place, it is urged that an alternative remedy is available to the Petitioners under the DVAT Act since any return filed by the dealer is deemed to be a notice of assessment under Section 31 (1) (b) of the DVAT Act and if the Commissioner had failed to issue any assessment or order to that effect then the person aggrieved by such failure can file an objection before the Objection Hearing Authority ('OHA') under Section 74 (2) of the DVAT Act. If the dealer is still aggrieved by the decision of the OHA, an appeal can be preferred before the Appellate Tribunal (AT) under Section 76 (1) of the DVAT Act.

8. As regards the preliminary objection raised by the Respondent, the Court finds that the matter pertains to the delay in processing and

issuing the refund due to the Petitioners. For the reasons discussed hereinafter it would be seen that even in the matter of processing of the refund claim, the Respondent has not adhered to the time limits set out in Section 38 of the DVAT Act and in Circular No. 6 issued by the Commissioner, VAT under Section 67 (2) of the DVAT Act. Relegating the Petitioner, in the circumstances, to the alternative remedy of going before the OHA would only further delay the refund and therefore, is not considered to be efficacious. The preliminary objection is, accordingly, rejected.

9. It is submitted by the Respondent that a survey was undertaken by the Enforcement Branch in the business premises of the Petitioners on 17th October 2014 wherein not only some variation in cash and stock was found but also it was admitted by the dealer that it was engaged in making purchases "from suspicious dealers' thereby claiming false ITC and false refunds. It is stated that the Petitioner voluntarily surrendered the ITC claimed in respect of the transaction with M/s. Eagle Trade Mart.

10. As regards the failure to make refund, it is stated that in view of the survey undertaken it became necessary to ask the Petitioner to place the documents on record for the satisfaction of the Assessing Authority, before assessing/processing of refund. Since the Petitioner had not filed any requisite documents, the Respondent was constrained not to issue the refund.

11. Interestingly the counter affidavit of the Respondent is silent on the failure by the Respondent to process the refund application within the time stipulated under Section 38 of the DVAT Act. It is also silent on the failure to comply with the Circular No. 6 issued by the Commissioner, VAT which is binding on the VATO.

12. It is pointed out by Mr. Babbar, learned counsel for the Petitioners that the counter-affidavit filed on 16th December 2015 adverting to the survey undertaken in the business premises of the Petitioners fails to mention that even prior to the filing of the counter-affidavit, the OHA on 30th November 2015 allowed the objections filed on 12th May 2015 by NIPL to the 3rd quarter of 2014-15. A copy of the order in Form DVAT 40 dated 30th

November 2015 passed by the OHA has been placed on record. It adverts to the notice issued under Section 59 (2) of the DVAT Act to

NIPL by the AVATO following the survey conducted, seeking information and record for not one but two assessment years. Later while framing assessment for 3rd quarter of 2014-15 the AVATO covered assessment for more than one AY (2013-14 and 2014-15). This resulted in default assessment orders dated 31st March 2015 being issued by the AVATO for the 3rd quarter of 2014-15 under Sections 32 and 33 of the DVAT Act to which the objections were filed before the OHA. The OHA has referred to the fact that the survey team had in the course of the survey collected two cheques of Rs. 13,30,790 from the Petitioner towards tax and Rs. 2,66,158 towards penalty without framing any assessment under the DVAT Act. The OHA has in respect of the above actions concluded as under:

> "As such, there appears to be tax collection prior to the framing of assessment in the orders. There is documentary evidence on record that proves collection of advance tax and penalty is unlawful, and same was paid in protest under coercion and duress. The facts of the case clearly indicate that no assessment was framed prior to the collection/deposit of tax and penalty sums above mentioned, hence not within the framework of law. Objector is eligible to seek refund of above stated advance tax and penalty paid as per the established provisions of law after satisfying the Ward Officer showing proof of payment of the same."

13. It is surprising that the Respondent has, while filing the counter-affidavit on 16th December 2015, concealed the above fact of OHA having found the survey undertaken to be illegal. The Court further notices that the OHA has, in the same order, adversely commented on the fact that although the notices of default assessments of tax, interest and penalty had been issued by the AVATO for the relevant tax period of 3rd quarter of 2014, yet disallowance of ITC on the purchases made from M/s. Eagle Trade Mart pertained to the earlier year 2013-14. It has been pointed out that the case of disallowance of the ITC ought to have been taken into consideration in a separate assessment order and not to be clubbed in the assessments for the aforesaid 3rd quarter of 2014. The OHA has also observed that the Petitioner had submitted evidence regarding the functionality of the alleged cancelled dealer, M/s. Eagle Trade Mart, through ward records and replies obtained under the RTI. Consequently, the OHA had concluded that the claim

of the surveying Enforcement Officers that M/s. Eagle Trade Mart was a cancelled dealer, "appears to be totally wrong, deceptive, incorrect and false, which is why, the Advance Tax Collection/Deposit of Rs. 13,30,790 (tax) and Rs. 2,66,158 (penalty) is most unlawful, obnoxious and contrary to the facts and circumstances of the case. Therefore, on this count too, the impugned assessment orders being null and void do not survive."

14. The OHA has held the Petitioner to be eligible for the refund of tax and penalty paid for the tax period under which no assessment has been framed till then. It is also to be noted that the above order of the OHA has attained finality. Consequently, the main ground urged in the counter-affidavit for not processing the refund application appears to be entirely without basis, both factually and legally. In any event the fact remains that the survey undertaken was not a justification for the Respondent to not process the refund applications under Section 38 of the DVAT Act.

15. Section 38 of the DVAT Act reads as under:

"**38. Refunds**- (1) Subject to the other provisions of this section and the rules, the Commissioner shall refund to a person the ·amount of tax, penalty and interest, if any, paid by such person in excess of the amount due from him.

(2) Before making any refund, the Commissioner shall first apply such excess towards the recovery of any other amount due under this Act, Or under the Central Sales Act, 1956 (74 of 1956).

(3) Subject to sub-section (4) and sub-section (5) of this section, any amount remaining after the application referred to in sub-section (2) of this section shall be at the election of the dealer, either-

(a) refunded to the person, -

(i) within one month after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is one month;

(ii) within two months after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is a quarter; or

(b) carried forward to the next tax period as a tax credit in that period.

(4) Where the Commissioner has issued a notice to the person under Section 58 of this Act advising him that an audit, investigation or inquiry into his business affairs will be undertaken or sought additional information under Section 59 of this Act, the amount shall be carried forward to the next period as a tax credit in that period.

(5) The Commissioner may, as a condition of the payment of a refund, demand security from the person pursuant to the powers conferred in section 25 of this Act within fifteen days from the date on which the return was furnished or claim for the refund was made.

(6) The Commissioner shall grant refund within fifteen days from the date the dealer furnishes the security to his satisfaction under sub-section (5).

(7) For calculating the period prescribed in clause (a) of subsection (3), the time taken to-

(a) furnish the security under sub-section (5) to the satisfaction of the Commissioner; or

(b) furnish the additional information sought u:nder section 59; or

(c) furnish returns under section 26 and section 27, shall be excluded.

(8) Notwithstanding anything contained in this section, where-

(a) a registered dealer has sold goods to an unregistered person; and

(b) the price charged for the goods includes an . amount of tax payable under this Act;

(c) the dealer is seeking the refund of this amount or to apply this amount under clause (b) of sub-section (3) of this

section; no amount shall be refunded to the dealer or may be applied by the dealer under clause (b) of subsection (3) of this Section unless the Commissioner is satisfied that the dealer has refunded the amount to the purchaser.

(9) Where-

(a) a registered dealer has sold goods to another registered dealer; and

(b) The price charged for the goods expressly· includes an amount of tax payable under this Act, the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section and the Commissioner may reassess the buyer to deny the amount of the corresponding tax credit claimed by such buyer, whether or not the seller refunds the amount to the buyer.

(10) Where a registered dealer sells goods and the price charged for the goods is expressed not to include an amount of tax payable under this Act the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section without the seller being required to refund an amount to the purchaser.

(11) Notwithstanding anything contained to the contrary in subsection (3) of this section, no refund shall be allowed to a dealer who has not filed any return due under this Act."

16. It is seen that in the first place there are strict time limits laid down under Section 38 (3) read with Section 38 (7) of the DVAT Act. For taking any action under Section 38 (8) or 38 (9) or 38 (11) the dealer would have a notice in the first place by the Commissioner. Such notice would have to be only issued in such a manner that the time limit prescribed under Section 38 (3) of the DVAT is not exceeded. Where notice is already issued under Section 58, or additional information sought under Section 59 of the Act, it is only in the circumstances under Section 38 (4) of the DVAT Act, the refund amount sought shall be carried forward to the next tax period as a tax credit in that period. In other words there are several options available to the Commissioner,

VAT or his delegates in response to the application for refund. All these options have to be exercised in such a manner that the time limit under Section 38 (3) is adhered to. Obviously, the proceeding under Section 38 cannot result in reopening of concluded assessment. The statutory rejection for that course of action is entirely different. In other words, having missed the bus on the question of the reopening of a concluded assessment for whatever reason, the Commissioner cannot indirectly at the time of processing the application for refund seek to reopen a concluded assessment.

17. As rightly pointed out by learned counsel for the Petitioner, the law explained by this Court in ***Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax*** (*supra*) appears to squarely apply in the facts and circumstances of the present case. In the said decision, the Court analyzed Section 38 (3) as under:

> "5. A plain reading of Section 38, which deals with refunds, makes it clear that by virtue of sub-section (3) thereof, in the case where a person is assessed quarterly, the refund is to be made to the dealer within two months after the date on which the return is furnished or the claim for the refund is made. Of course, it is the dealer's option to elect as to whether the refund is to be made in cash or the said amount is to be carried forward to the next tax period as a tax credit in that period. In the present case, the petitioner has elected for the grant of refunds in cash and has not elected for carrying forward the refund amount to the next tax period. The provisions of Section 38(3) uses the expression "shall" and, therefore, it is clear that the refund has to be made within two months from the date of the return."

18. The Court in ***Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax*** (*supra*) next considered whether Section 38 of the DVAT Act was directory or mandatory. While distinguishing the decision in ***Commissioner of Sales Tax v. Behl Construction (2009) 21 VST 261 (Del),*** the Court observed as under:

> "10. Such a situation does not arise in the present case inasmuch as the provisions of Section 38 do not contemplate a situation

where the Commissioner does not grant a refund within the stipulated period. The decision in ***Behl Construction (supra)*** was in the context· of the provisions of Section 7 4 and those circumstances do not arise in the present case. As pointed out above, what this court has to determine is: what is the legislative intent behind the provisions of Section 38? It is this intent which shall determine whether the stipulations as to time are merely directory or they are mandatory as suggested by the use of the word "shall". On going through all the sub-sections of Section 38 of the said Act, the legislative intent that is clearly discernible is that refunds must be granted to a person entitled within the specific time period stipulated in sub-section (3) thereof. This intention is further fortified by a look at the provisions of sub-section (7) of Section 38 which stipulates that for calculating the period prescribed in clause (a) of sub-section (3), the time taken to furnish the security under sub-section (5) to the satisfaction of the Commissioner or to furnish the additional information sought under Section 59 or to furnish returns under Sections 26 and 27, "shall be excluded". This provision as to exclusion of time taken in doing the aforesaid acts, is in itself an indication that the legislature was dead serious about the stipulation as to time for making refunds under Section 38 (3) of the said Act. For, if the legislative intent were not so, what was the need or necessity for providing for exclusion of time? Thus, not only do the provisions of Section 38 employ the word "shall", which is usual in mandatory provisions, the legislative intendment discernible from the said provisions also points towards the mandatory nature of the said provisions. Clearly, subject to the exclusion of time provided under sub-section (7) or Section 3 8, in a case falling under Section 38(3)(a)(ii), the refund has to be made within two months from the date of the return."

19. The Court in ***Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax*** (*supra*) also rejected the argument that the issuance of notice to the dealer under Section 59 of the DVAT Act could delay the grant of refund. The Court observed as under:

"13. In any event, even if we assume that the said notice was issued by the respondents and that it had been received by the petitioner, it would not change the position in law. Sub-

section (4) of Section 3 8 has to be read with the provisions of sub-section (3) of Section 38. By virtue of the latter provision, the refund had to be paid to the petitioner within two months from the date of the return furnished by him. No such notice under Section 59 requiring additional information had been issued during that period. Consequently, the subsequent purported issuance of notice under Section 59 cannot be taken as a ground for not paying the refund to the petitioner. In this connection, the provisions of sub-section (7) of Section 38 also needs to be examined. The said provision stipulates that for calculating the period prescribed in Section 38(3)(a), the time taken to, *inter alia,* furnish additional information sought under Section 59 shall be excluded. It is obvious that exclusion can only be when the period of limitation itself has not run out. The consequence of this discussion is that the notice under Section 59 in connection with refund has to be issued within the period of two months stipulated in Section 38(3)(a)(ii). As a result, the submission of the learned counsel for the respondents that because of issuance of notice under Section 59 of the said Act, albeit beyond the prescribed time, the refund was not payable, is not tenable."

20. The Court is of the view that in view of the law explained in the above decision, the failure by the Respondent to process the refund claimed by the Petitioners for all the above tax periods appear to be wholly unjustified. It is no longer open to the Respondent to raise an objection to the grant of refund claimed together with interest.

21. In view of the matter, a direction is issued to the Respondent to process the claim refund made by the Petitioners for the aforementioned periods as set out in the three writ petitions and issue appropriate orders granting refund together with interest in terms of Section 38 of the DVAT Act within a period of eight weeks from today and in any event not later than September 10, 2016. If there is any failure by the Respondent to comply with the directions, the Petitioners shall seek appropriate relief in accordance with law.

22. The petitions are allowed in the above terms with no orders as to costs.

23. Order be given *dasti.*

[2016] 54 DSTC 73 – (Bangalore)

HIGH COURT OF KARNATAKA

[Mrs. B.V.Nagarathna, Justice]

W.P.(C) 53191-97 OF 2013(T-RES)

Primacy Industries Ltd. ... Petitioner

Versus

Assistant Commissioner of Commercial Taxes ... Respondent

Date of Order: 06.12.2013

REFUND UNDER KARNATAKA VALUE ADDED TAX ACT, 2003 – EXCESS INPUT TAX CREDIT – WITHHOLDING OF REFUND – FOR CONDUCTING AUDIT OF ASSESSMENTWHICHREFUNDPERTAINED–WRITPETITIONFILED–WHETHER JUSTIFIED. HELD-NO.

Facts

The petitioner who was stated to be engaged in the business of manufacture of designer wax candles as a 100% export oriented unit had assailed the endorsement dated 06. 11.2013 issued by the respondent. It was the case of the petitioner that during the course of business for the assessment period 2012-13, petitioner had effected exports to an extent of nearly 95% of the goods manufactured by it and that it was not liable to pay any value added tax under the provisions of the Karnataka Value Added Tax Act, 2003. That under Section 10 of that Act, provision was made for output tax, input tax and net tax payable by the registered dealer. Rules 127 and 128 of the Karnataka Value Added Tax Rules, 2005 made under that Act provide for adjustment and refunds respectively with regard to the excess tax paid. It was the case of the petitioner that for the period 2012-13 excess tax to an extent of Rs.1,29,111,119/-was paid and the same had been quantified by the respondent department. Therefore, a claim was made for refund of excess tax paid by the petitioner. In response to the claim, endorsement dated 06.11.2013 had been issued. Being aggrieved by the endorsement, Writ Petition had been filed.

Held

On perusal of the endorsement dated 06.11.2013, it was noted that the reason for refusing to refund the excess input tax was that the assessment for the year 2012-13 would have to be audited. It was only after the audit of the said accounts that the excess tax paid could

be refunded. The reason given for the refusal of refund of the excess tax paid by the assessee was not in consonance with the Rules. The quantum of tax to be refunded was also an admitted fact as well as the eligibility of the petitioner to received refund. In that view of the matter, the impugned endorsement was contrary to Rule 126 of the Rules and therefore, it was quashed. Liberty was also reserved to the petitioner to claim interest on the delayed refund of the excess input tax.

Present for Petitiioner : Smt. Vani H., Adv

Present for Respondent : Sri.S.V.Giri Kumar, AGA

THESE WRIT PETITIONS ARE FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE ENDORSEMENT DATED 6.11.2013 ISSUED BY R-1 VIDE ANN-J AND ETC.

THESE PETITIONS COMING ON FOR PRELIMINARY HEARING, THIS DAY, THE COURT MADE THE FOLLOWING:

Order

The petitioner who is stated to be engaged in the business of manufacture of designer wax candles as a 100% export oriented unit has assailed the endorsement dated 06.11.2013 issued by the 1st respondent.

2. Briefly stated, it is the case of the petitioner that during the course of business for the assessment period 2012-13, petitioner has effected exports to an extent of nearly 95% of the goods manufactured by it and that it was not liable to pay any value added tax under the provisions of the Karnataka Value Added Tax Act, 2003 (the Act, for short). That under Section 10 of that Act, provision is made for out put tax, input tax and net tax payable by the registered dealer. Rules 127 and 128 of the Karnataka Value Added Tax Rules 2005 (Rules, for short) made under that Act provide for adjustment and refunds respectively with regard to the excess tax paid. It is the case of the petitioner that for the period 2012-13 excess tax to an extent of Rs.1,29,11,119/- was paid and the same had been quantified by the respondent-department. Therefore, a claim was made for refund of excess tax paid by the petitioner. In response to the claim, Annexure-J endorsement dated

06.11.2013 which is impugned in this Writ Petition has been issued. Being aggrieved by the endorsement, Writ Petition has been filed.

3. I have heard the learned Counsel for petitioner and learned AGA for the respondents and perused the material on record.

4. In the instant case, petitioner being a 100% export oriented unit would not be liable for payment of tax under the Act insofar as goods exported by it. The tax is liable to be paid insofar as local sales are concerned. It is contended on behalf of the petitioner that the eligibility of the petitioner for refund of the excess input tax paid by it as well as the quantum have been admitted by the respondent, the reason given for the impugned endorsement that the amount cannot be refunded at this stage is contrary to what is stated in Rule 128 of Rules.

5. Learned AGA supporting the endorsement with reference to the statement of objections has stated that unless and until the petitioner gives all the details with regard to the claim for refund of the excess input tax, the same cannot be refunded.

6. On perusal of the endorsement dated 06.11.2013, it is noted that the reason for refusing to refund the excess input tax is that the assessment for the year 2012-13 would have to be audited. It is only after the audit of the said accounts that the excess tax paid could be refunded. The reason given for the refusal of refund of the excess tax paid by the assessee in my view, is not in consonance with the Rules. The quantum of tax to be refunded is also an admitted fact as well as the eligibility of the petitioner to receive refund.

In that view of the matter, the impugned endorsement is contrary to Rule 126 of the Rules and therefore, it is quashed.

At this stage, learned AGA states that within a period of three weeks from the date of receipt of certified copy of this order, the excess input tax paid by the petitioner would be refunded. Counsel for petitioner states that the representation would be made to the concerned authority along with the copy of this order for seeking actual refund of the amount.

Liberty is also reserved to the petitioner to claim interest on the delayed refund of the excess input tax.

Writ Petitions are disposed of in the aforesaid terms.

[2016] 54 DSTC 76 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI
[M.S. Wadhwa, Member (J) and Diwan Chand, Member (A)]

Appeal Nos.1637-1660/ATVAT/12-13
Assessment Period :2007-08
(Default Assessment of Tax, Interest & Penalty)

DKKNS
F-47, Preet Vihar, Delhi-110092 ... Appellant

Verses

Commissioner of Trade & Taxes, Delhi. ... Respondent

Date of Order : 14.10.2016

DVAT ACT, 2004 – REVERSAL OF INPUT TAX CREDIT – SECTION 40(A) – AGREEMENT BETWEEN BUYER AND SELLER TO DEFEAT INTENTION AND APPLICATION OF THE ACT – DENIAL OF INPUT TAX CREDIT BY APPLYING SECTION 40A FOR THE REASON THAT PURCHASES AND SALES ARE CIRCULAR ENTRIES WITH THE INTENTION TO CREATE ARTIFICIAL TURNOVER WHICH RESULTED INTO ARTIFICIAL INPUT TAX CREDIT – NO EVIDENCE FOR MOVEMENT OF GOODS PURCHASED TO PROVE GENUINENESS OF THE TRANSACTION PLACED ON RECORD BY THE APPELLANT – NO ENQUIRY MADE BY AA TO COME TO DEFINITE CONCLUSION THAT PARTIES JOINED HANDS TO CREATE ARTIFICIAL ITC – WHETHER MARGINAL PROFIT BY THE APPELLANT AND DEALING WITH ONLY TWO PARTIES CAN BE A GROUND FOR REJECTION OF ITC – ORDER PASSED BY AA NOT WITH REASONS – NO MISMATCH RECORD BY AA – ORDER SET ASIDE AND CASE REMANDED TO AA TO FRAME FRESH ASSESSMENT.

Facts

The dealer purchased the goods from M/s. Media Satellite and Telecom Limited (MSTL) and sold the goods to Media Video Limited (MVL), which both companies are Public Limited Companies. According to appellant, he had tax invoices in his possession and has also paid for the purchases through banking channel and also received the payment of its sales through banking channel. Even then VATO disallowed all the input tax credits by invoking the provision of section 40A of the DVAT Act stating that the transaction involves low margin and seems to be very artificial because the buying and selling dealers, both are in the same premises. Further pointed out that invoking the provisions of section 40A, which says that any agreement to defeat the

intention and application of the Act is to be void and this is a typical case where three parties have joined hands to create artificial input tax credit. According to appellant, as such, there is no agreement amongst the parties and the VATO has not made any declaration for the avoidance of agreement/arrangements. The demands raised in question are arbitrary, illegal and against the provisions of the DVAT Act.

Held

Appellant filed tax invoices of purchases from 01.04.2007 to 31.03.2008. Perusal of these tax invoices showed the despatch column and destination column had been left blank in each of the tax invoices filed by the appellant which proved beyond doubt that there was no movement of goods from seller's (MSTL) premises B-186/1, Okhla Industrial Area, Phase-II, New Delhi to purchaser's appellant M/s DKKMS premises B-27/7, East Krishna Nagar, Delhi. It proved that it was simply a billing activity and there was no genuine sell and purchase between the parties. In this regard no GRs have been filed by the appellant to prove loading and freight charges from seller's premises to appellant's premises and back from appellant's premises to purchaser's premises. In this way appellant failed to prove movement of goods from sellers premises. No other document to prove the movement of goods had been filed by the appellant on record. On appreciation of evidence and considering all material on record, it appeared that no error had been committed by lower authorities while passing the impugned order.

VATO was supposed to give reasons for refusal to grant ITC, whether it came under the parameter of section 9 of the DVAT Act or not. VATO was supposed to examine and verify whether tax paid by the appellant on purchases made from Media Satellite & Telecom Limited was deposited or adjusted against output tax liability by the seller Media Satellite & Telecom Limited. In the same way after examining these facts he was also supposed to verify whether appellant paid differential tax on the goods sold to Media Video Limited.

Appellant also challenged the impugned order dated 05.02.2013 passed by OHA on the ground that there were ex parte orders and ex parte non-speaking orders. In this regard appellant's submitted that

service was made on the appellant's old address while he orally told his new address to OHA, which was noted by OHA on the file cover. After passing of impugned order creating huge demand he sent notices at the new address which proved beyond doubt that he was aware about his new address, even then notice of hearing was sent at the old address. In this regard, appellant filed affidavit to the effect that no notice was received by the dealer. Revenue side had not filed affidavit in rebuttal. In this regard he also referred to the case of B.L. Srivstava Vs. M.M.L. Shridha AIR 1975 MP 21. In this case Hon'ble Madya Pradesh High Court held that the "certificate of posting may give rise to the presumption that the letters were posted but no presumption can be drawn that they were received by the order party".

VATO while passing the impugned order had not mentioned which of the condition of section 32 was applicable in the present case. VATO was also supposed to record finding why purchases have not been held as genuine by the appellant when in the same circumstances sale has been held to be genuine in other financial years and when no mismatch has been recorded by VATO.

It was clear from the impugned order that no satisfaction had been recorded by the OHA on the file that not only notices were posted but also served on the appellant. Secondly, no new fact or reasoning had been recorded by the OHA while passing the impugned order. He simply affirmed the orders passed by VATO. As appellant had filed objections against VATO's order, so even while passing ex-parte order, he was supposed to pass speaking order in the light of the objections filed by the appellant.

The impugned orders dated 05.02.2013 passed by OHA were hereby set aside and case remanded back to the concerned VATO (Audit) who will frame fresh assessment in the light of above discussion after giving an opportunity of hearing to the appellant. Appeal accordingly allowed.

Cases Referred:

1. *Karanavati Ispat Pvt. Ltd., Vs. Stage of Gujrat (2014) 73 VST 489*
2. *Shreeji Impex Vs. Stage of Gurjat (2014) 76 VST 451*
3. *Hemraj Udyog Vs. Commissioner, Trade Tax, UP (1997) 105 STC*
4. *B.L. Srivstava Vs. M.M.L. Shridha AIR 1975 MP 21*

Present for the Appellant : Shri R.K.Bhalla, Advocate

Present for the Respondent : Shri Pradeep Tara, Advocate

Order

1. These 24 appeals by the assesse appellant have been filed against the impugned order dated 05.02.2013 passed by Ld. Special Commissioner-III, hereinafter called Objection Hearing Authority (in short, OHA), who vide this order rejected the objections and upheld the orders of default assessment of tax and interest u/s 32 and penalty u/s 33 read with section 86 (10) of the Delhi Value Added Tax Act (in short DVAT Act) for the year 2007-08 passed by Ld. VATO, who vide order dated 01.07.2011/13.07.2011, created the following demands:-

S.No.	A.Y. (2007-08)	Tax & Interest	Penalty
1	April	3555724/-	2228050/-
2	May	9462405/-	5975394/-
3	June	2359434/-	1501645/-
4	July	3320544/-	2130050/-
5	August	9388863/-	6070744/-
6	September	2304446/-	1502005/-
7	October	4018408/-	2640358/-
8	November	8316486/-	5509106/-
9	December	2243522/-	1498418/-
10	January	6861383/-	4620673/-
11	February	5193890/-	3527014/-
12	March	2187436/-	1497963/-

2. As common question of law and facts are involved in all these appeals, hence these appeals are being disposed off by following common order –

3. The brief facts of the present appeals are that the dealer is engaged in the business of electronic/electrical goods having TIN No.07880268290 and is registered dealer of Ward-81.

4. The audit of the business affairs of the dealer was conducted during which dealer had produced books of account, purchase and sale vouchers alongwith relevant records during the course of audit. Nothing adverse was pointed out by the auditor.

5. The dealer purchased the goods from M/s. Media Satellite and Telecom Limited (MSTL) and sold the goods to Media Video Limited (MVL), which both companies are Public Limited Companies. According to appellant, he had tax invoices in his possession and has also paid for the purchases through banking channel and also received the payment of its sales through banking channel. Even then Ld. VATO disallowed all the input tax credits by invoking the provision of section 40A of the DVAT Act stating that the transaction involves low margin and seems to be very artificial because the buying and selling dealers, both are in the same premises. Further pointed out that invoking the provisions of section 40A, which says that any agreement to defeat the intention and application of the Act is to be void and this is a typical case where three parties have joined hands to create artificial input tax credit. According to appellant, as such, there is no agreement amongst the parties and the Ld. VATO has not made any declaration for the avoidance of agreement/arrangements. The demands raised in question are arbitrary, illegal and against the provisions of the DVAT Act.

6. Against the assessment order of tax, interest and penalty by the assessing authority, the appellant filed objections before the Ld. OHA who dismissed the objections by passing the ex-parte order without providing reasonable opportunity of hearing to the appellant. Hence, the appellant has filed the present appeals against the impugned order dated 05.02.2013 passed by Ld. OHA on following, among other grounds:

(i) On the facts and circumstances of the case and in the DVAT Act, no proper/legal service of notice has been affected before passing ex-parte order.

(ii) On the facts and circumstances of the case, no proper, reasonable and sufficient opportunity has been given to the dealer before passing the ex-parte order.

(iii) On the facts and circumstances of the case and in the DVAT Act, the ex-parte order passed by Ld. OHA is bad under the law as it is a non-speaking order.

(iv) On the facts and circumstances of the case, Ld. VATO held that these are artificial sales/entries, then it should not be treated as sale as per law and no tax liability should be imposed.

On the basis of above facts and grounds, it has been prayed that impugned order dated 05.02.2013 passed by Ld. OHA be set aside and present appeals be allowed.

7. Appellant was directed to deposit 30% of the amount in dispute of tax and interest and 15% of the amount in dispute of penalty by this Tribunal u/s 76 (4) of the DVAT Act vide order dated 21.02.2014. Appellant challenged these orders before Hon'ble Delhi High Court. Hon'ble Delhi High Court allowing the appeal waived the requirement of pre-deposit and directed the Tribunal to hear the appeal on merit vide order dated 15.05.2015. So appeals were heard on merit.

8. Heard to appellant's Ld. Counsel Shri R.K. Bhalla and Shri Pradeep Tara on behalf of Revenue and perused the filed on the basis of which these appeals are being disposed off as follows.

9. Ld. VATO vide order dated 01.07.2011/13.07.2011 disallowed tax credit claimed by the appellant during the period of April 2007-08 to March 2008-09 and imposed tax, interest and penalty in this period. It would be appropriate to reproduce the orders passed by Ld. VATO, which are annexure to assessment order, which are as follows:-

"During the audit, it has come to notice that the dealer is a regular buyer of goods from M/s. Media Satellite & Telecom Limited (MSTL) and sold to M/s. Media Video Limited (MVL) at a fraction of margin on the same day whereas M/s. MSTL and M/s. MVL are located in the same premises i.e. B-86/1, Okhla Industrial Area, Phase-II, New Delhi. The stock register clearly shows the modus operendi of the transactions. The whole modus operndi seems to be very artificial that M/s. DKKNS is buying and selling goods from two dealers located in same premises and booking a very small margin. The total sale during the year 2007-08 of M/s. DKKNS is Rs.31,09,27,684/- and made gross profit of Rs.10,96,520/- and paid a tax of Rs.1,64,540/-. Against a turnover of Rs.31 core, the tax is only 1.64 lacs which is extremely meagre. How is it possible

that two dealers located in the same premises are buying and selling from each other from a third party when both the parties belong to same media group obviously it is fabricated transaction on paper only.

This appears to be a case of circular entries and made purely with an intention of creating artificial turnover and it result into artificial input also. The total input availed by the dealer during the year 2007-08 is Rs.3,87,01,420/-. Since it is a circular entry that means the same set of dealers are involved in buying and selling. The other two dealers i.e. MSTL and MVL are also indulging into same kind of modus operandi and must be availing artificial input of same kind. Invoking the provision of section 40A which says that any agreement to defeat the intention and application of the Act is to be void and this is a typical case where three parties have joined hands to create artificial input tax credit.

Keeping in view of the above details, input tax credit claimed by the dealer is disallowed alongwith interest".

10. It is clear from the bare perusal of the above orders that input tax credit claimed by the appellant during the year 2007-08 on purchases made by him has been denied by the Ld. VATO on the ground that there is violation of section 40A by these parties. So he imposed tax, interest and penalty while disallowing the input tax credit on the disputed transactions.

11. So it would be appropriate to reproduce section 40A of the DVAT Act before proceeding further, which is as follows:

40A – Agreement to defeat the intention and application of this Act to be Void

(1) If the Commissioner is satisfied that an arrangement has been entered into between two or more persons or dealers to defeat the application or purposes of this Act or any provision of this Act, then, the Commissioner may, by order, declare the arrangement to be null and void as regard the application and purposes of this Act and may, by the said order, provide for

the increase or decrease in the amount of tax payable by any person or dealer who is affected by the arrangement, whether or not such dealer or person is a party to the arrangement, in such manner as the Commissioner considers appropriate so as to counteract any tax advantage obtained by that dealer from or under the arrangement.

(2) For the purposes of this section –

(a) "arrangement" includes any contract, agreement, plan or understanding, whether enforceable in law or not, and all steps and transactions by which the arrangement is sought to be carried into effect;

(b) "tax advantage" includes, -

(i) any reduction in the liability of any dealer to pay tax,

(ii) any increase in the entitlement of any dealer to claim input tax credit or refund,

(iii) any reduction in the sale price or purchase price receivable or payable by any dealer".

12. Opening his arguments appellant's Ld. Counsel Shri R.K. Bhalla submitted that Ld. VATO (Audit) has disallowed ITC on the basis of assumptions and presumptions. He rejected the claim of ITC on the ground that goods sold at a fraction of margin on the same day and the whole modus operendi seems to be very artificial and sales are higher and margin of profit is extremely meagre, hence it appears to be a case of circular entry.

13. Appellant's Ld. Counsel further submitted that Ld. VATO (Audit) passed the order and disallowed the ITC without any legal basis and against the provisions of section 9(1) of the DVAT Act. Appellant has produced the original tax invoices which tally with the sales shown by the seller to whom VAT tax has been paid by the appellant and the seller has shown the true VAT receipt from the appellant in its VAT return filed and all the VAT returns filed by the seller have been accepted and the seller's output tax liability has also been accepted. When the appellant has paid the tax, which has been duly accounted

for by the seller, the same has to be given credit to the appellant. The department cannot charge the tax twice. If credit is not given, it amounts to double taxation of the same tax, which is illegal. Ld. OHA also rejected the objections filed by the appellant upholding the orders passed by Ld. VATO ex parte which is contrary to law, hence it be set aside and present appeals be allowed.

14. While Ld. Counsel for the Revenue vehemently defended the orders passed by lower authorities and submitted that they are as per law. In the peculiar circumstances of the present case, ITC has been rightly denied to the appellant. Appellant is showing sale and purchase from two different parties who are located in the same premises i.e. B-86/1, Okhla Industrial Area, Phase-II, New Delhi. Basing his arguments on the orders passed by Ld. VATO, he further submitted that both the parties belong to same media group. These are fabricated transactions on paper only. The artificial turnover has been credited to claim ITC by the appellant. Ld. Counsel for the Revenue further submitted that how is it possible that two dealers located in the same premises are buying and selling from each other through third party i.e. appellant M/s. DKKNS.

15. Continuing with his arguments, Revenue's Ld. Counsel further submitted that on perusal of books of accounts, stock register, sale and purchase bills, it is crystal clear that these are nothing but circular entries which are made with the intention to create artificial turnover which resulted into artificial input. Learned lower authorities rightly denied ITC to the appellant applying the provisions of section 40A of the DVAT Act. He further submitted that powers u/s 40A have been delegated by Ld. Commissioner u/s 68 of the DVAT Act to authorities appointed u/s 68 of the DVAT Act including VATO vide order dated 20.12.2015.

16. He further submitted that appellant's objections were rejected by the Ld. OHA as he upheld the findings of Ld. VATO to the extent that this is a case of circular entries and are made purely with the intention of creating artificial turnover. He has also held that in this case three parties have joined hands to create artificial input tax credit and therefore ITC claimed by the dealer is disallowed alongwith interest. Revenue's Ld. Counsel further submitted that appellant has filed copies of sale and purchase bill, copy of stock register, copy of

bank account/Ledger account, balance sheet and Profit & Loss account etc. That the case of Revenue is further fortified after going through the above documents and from them it is crystal clear that Ld. VATO was right in holding that this is a case of paper transactions only or a case of circular transaction where actual sale and purchase has not taken place. Therefore, in view of various provisions contained under the DVAT Act, the ITC claim of M/s. DKKNS was correctly rejected and demands created on account of tax, interest and penalty.

17. Ld. Counsel for the Revenue further submitted that it is clear from sale and purchase bills filed by the dealer that almost all the purchases have been shown from M/s. Media Satellite & Telecom Limited (MSTL) which is situated at B-86/1, Okhla Industrial Area, Phase-II, New Delhi and almost all the sales have been shown to M/s. Media Video Limited (MVL) and MSTL which are also situated at the same address whereas appellant is situated at B-27/7, 1st Floor, East Krishna Nagar, Delhi, which is around 20 kms away from Okhla Industrial Area, Phase-II, New Delhi.

18. Ld. Counsel for the Revenue further submitted that it is clear from sale and purchase bills that any purchase shown to have been made in the bills is also shown to have been sold on back to back basis i.e. with no change in quantity whatsoever. In each and every purchase shown followed by each and every sale shown it is also noticed that transactions are entered on the same very day. If it is a case of genuine sale or purchase, then despite various opportunities afforded to dealer, he could not prove any movement of goods from Okhla Industrial Area to East Krishna Nagar on any given day and back from East Krishna Nagar to Okhla Industria Area. It clearly proves beyond doubt that this is not a genuine case of sale and purchase but it is a case of circular transactions and hence ITC has been correctly rejected with interest and penalty.

19. Ld. Counsel for the Revenue further submitted that on perusal of balance sheet of 2007-08 filed along with Paper Book by the appellant, it can be noticed that while showing a total sale and purchase exceeding Rs.3 crore, he has shown fixed assets worth Rs.94/- only, which is quite disproportionate by the size of business shown by him. Moreover, in the balance sheet it is also noticed that there is a current liability exceeding Rs.7 crore and there are sundry debtors exceeding Rs.5 crores, which is again disproportionate to the fixed assessed worth Rs.94/- shown by him. Moreover, on careful

perusal of bank account submitted by him, it is once again noticed that whatever payment received is by him from MVL or Media Industries Limited, almost same amount is transferred to MSTL simultaneously on the same day or next day which raises doubt whether these are genuine sale and purchase or these are sham transactions to create artificial turnover and artificial ITC.

20. Ld. Counsel for the Revenue continuing with his arguments further submitted that while going through the stock register filed by the appellant, it is clear that appellant is holding Nil stock on any given day as all purchases shown are simultaneously shown to have been sold on same very day without any proof of movement of goods, hence these are clearly paper transactions between three parties. The said fact is also evident from the audited trading and Profit & Loss Account filed by appellant which shows Nil opening stock and Nil closing stock.

21. Ld. Counsel for the Revenue further submitted that appellant has filed two certificates one dated 11.04.2016 one each from MVL and MSTL. The opening line of certificate given by MSTL reads "*We hereby certify and confirm that we have sold and delivered the goods to M/s. DKKNS, B-27/7, East Krishna Nagar, Delhi*". According to Revenue's counsel through these certificates the appellant is trying to establish that the actual delivery of goods has taken place whereas the fact is that appellant could never prove the movement of goods from Okhla Industrial Area to East Krishna Nagar and back from East Krishna Nagar to Okhla Industrial Area on the same day, whereas on perusal of bills it can easily be noticed that one single bill exceeded Rs.10 lakh, Rs.20 lakh and in some cases Rs.30 lakh also which is quite a big consignment to be moved from one place to another.

22. In view of the findings of lower authorities and keeping in view the facts and circumstances submitted during the arguments by the Revenue's Ld. Counsel, he prayed that the orders passed by authorities below are as per law as dealer has made an attempt to defraud the Government exchequer by way of artificial ITC, hence present appeals be dismissed. He heavily relied on the decisions passed by Hon'ble Gujrat High Court in following two cases:

(i) Karanavati Ispat Pvt. Ltd., Vs. Stage of Gujrat (2014) 73 VST 489

(ii) Shreeji Impex Vs. Stage of Gurjat (2014) 76 VST 451

23. Under Evidence Act, a fact may be proved by direct evidence as well as by circumstantial evidence. In case of circumstantial evidence all circumstances must lead to only one conclusion. This is also a basic principle of law of evidence that a person may lie but circumstances not. Facts of these appeals are also peculiar in themselves. While deciding these appeals we have also to keep in mind that the things that happened in this case - do they happen in the normal course of business also? As is clear from the facts of the present appeals that appellant was denied benefit of ITC by the Ld. VATO vide orders dated 01.07.2011/13.07.2011 during the assessment year 2007-08, which orders were upheld by Ld. OHA applying the provisions of section 40A of the DVAT Act. According to appellant he deals in the business of electronic/electrical goods. In all the present appeals facts are same. Appellant made purchases of goods from MSTL and sold the goods to MVL. As observed by Ld. VATO in his order that these companies are located in same premises i.e. B-86/1, Okhla Industrial Area while appellant's company is situated at Krishna Nagar, which is around 20 kms away from Okhla Industrial Area, Phase-II, New Delhi. As it is clear from the facts of the appeals that appellant used to purchase goods from MSTL and used to sell them to MVL on the same day. In this way, during the assessment year 2007-08, total sale of the appellant was to the tune of Rs.31,09,27,684/- and out of which he made gross profit of Rs.10,96520/- and paid taxes to the tune of Rs.1,64,500/- and in this year appellant availed input tax credit to the tune of Rs.3,87,01,420/- during 2007-08. Now the question arises whether these were genuine purchases and sales by the appellant, only then he can be given benefit of ITC claimed by him. Ld. VATO, while rejecting the ITC claimed by the appellant, held that these transactions are not genuine as same day goods have been purchased and sold at a fraction of margin. By invoking section 40A of the DVAT Act he denied the ITC to the appellant. The specific question was asked by the bench to the appellant that when selling dealer MSTL and purchasing dealer MVL are situated in the same premises, why they are selling and purchasing goods by the intervention of appellant M/s. DKKNS. Appellant's Ld. Counsel, in respect of this query, has not given satisfactory reply and submitted that it is choice of the businessman from whom to purchase and to whom to sell the goods. Appellant has filed tax invoices and he has also submitted that on purchases from MSTL payment was made through bank channel and in the same way payments were received from MVL purchaser through bank channel.

24. To prove that it is a genuine transaction, it is necessary that appellant should prove movement of goods from seller MSTL's address of B-86/1, Okhla Industrial Area, New Delhi to appellant's premises situated at B-27/1, 1st Floor, East Krishna Nagar, Delhi, which is around 20 kms away from seller's premises. As purchase and sale transactions were made same very day, so appellant was also required to prove again movement of goods from Krishna Nagar to Okhla Industrial Area in which he miserably failed. Burden to prove this fact, as per section 78 of the Act, lies on the appellant. Section 78 of DVAT Act provides that burden of proving any matter in issue in proceedings u/s 74 of this Act, or before the Appellate Tribunal which relates to the liability to pay tax or any other amount under this Act shall lie on the person alleged to be liable to pay the amount.

25. The ratio of the cases of Karnavati Ispat Pvt. Ltd. (supra) and Shreeji Impex (supra) applies to the facts of the present case. In both these cases also VATO denied ITC on the ground that appellant failed to prove genuine sales and purchases and movement of goods. In Shreeji Impex case. First Appellate Authority as well as Appellate Tribunal upheld the orders passed by Ld. VATO. Appellant filed appeal before Hon'ble Gujrat High Court. Hon'ble Court, upholding the orders passed by lower authorities held as follows.

> "Heard to learned advocates for the respective parties at length and perused the order passed by the learned Assessing Officer, order passed by the learned first appellate authority and the impugned judgment and order passed by the learned Tribunal. At the outset, it is required to be noted that the appellant claimed the input tax credit of Rs.1,69,872 on the purchase of goods worth Rs.42,46,800 from M/s. Leela Trading Company and other three vendors. The appellant relied upon the invoices/ bills and their books of profit and loss. However, it is required to be noted that not a single document and/or material was placed on record to show the actual movement of the goods from the vendors to the appellant. In support of the above claim that they actually purchased the goods worth Rs.42,46,800 from M/s. Leela Trading Company and other three venders, the appellant miserably failed to prove the actual transaction by leading the cogent evidence and miserably failed to prove that purchase on which input tax credit was claimed, were genuine and/or on which the tax was paid……"

26. Similarly in the case of Karnavati Ispat Pvt Ltd (supra) Assessing Officer denied ITC claimed by the appellant on the goods purchased from its vendor M/s. Bhawanai Ispat on the ground that the seller dealers from whom appellant purchased the goods were found indulged only in billing activities and no genuine transaction of sale and purchase were carried out. This order was challenged before the Appellate Tribunal which also affirmed the orders passed by Assessing Authority, so appellant filed appeal before the Hon'ble Gujrat High Court. Hon'ble Gujrat High Court in the above case on the arguments submitted by the appellant's Ld. Counsel that Ld. Tribunal as well as Assessing Authorities have materially erred in not holding the sale transactions to be not genuine and treating the same as billing activities only and on the argument that lower authorities have not considered the documentary evidence on record which form part of the Paper Book such as invoices, weigh bridge receipt, stock register and copy of account which would prove and establish that the said transaction are genuine, Hon'ble Court after going through the Paper Book held as follows:-

> "The paper book is running into 400 pages, however relevant pages regarding the physical movement of goods are on pages 77,79 and 81 and pages 83 to 265 are stock register, which is internal evidence, Pages 283-349 are bank statement and pages 365 to 373 are bank certificate. However, from the aforesaid documents, payments made to M/s. Shree Bhavani Ispat are not proved. From the invoices issued by M/s. Shree Bhavani Ispat –pages 77 and 79 are concerned, the loading and freight column in the said invoices are Nil. The loading and freight charges and for the purpose of transportation of goods. Page 81 is the weigh bridge receipt. However, in the said receipt there is neither the name of the consignor nor the name of the consignee. Under the circumstances, credibility of the weigh bridge receipt is in doubt. Ld. Advocate appearing on behalf of the appellant is not in a position to satisfy the court even from the documents on record, i.e., from the paper book with respect to the actual movement of goods. Thus, as such the learned advocate appearing on behalf of the appellant/s has failed to satisfy the court with respect to the genuineness of the sale transactions and/or purchases made by them from M/s. Shree Bhavani Ispat and M/s. Madhav Steel Corporation

by leading evidence and/or on the basis of the documents on record that as such there was movement of goods. Under the circumstance, as such the appellant/s have failed to prove the physical movement of the goods alleged to have been purchased by them".

27. We had also occasion to peruse the papers filed in the paper book by the appellant. Appellant has filed tax invoices of purchases from 01.04.2007 to 31.03.2008. Perusal of these tax invoices shows the despatch column and destination column have been left blank in each of the tax invoices filed by the appellant which proves beyond doubt that there was no movement of goods from seller's (MSTL) premises B-186/1, Okhla Industrial Area, Phase-II, New Delhi to purchaser's appellant M/s DKKMS premises B-27/7, East Krishna Nagar, Delhi. So it proves that it is simply a billing activity as held by Hon'ble Gujarat High Court in the above two cases and there was no genuine sell and purchase between the parties. In this regard no GRs have been filed by the appellant to prove loading and freight charges from seller's premises to appellant's premises and back from appellant's premises to purchaser's premises. In this way appellant has failed to prove movement of goods from sellers premises. No other document to prove the movement of goods have been filed by the appellant on record. In this regard appellant's Ld. Counsel failed to give satisfactory reply that when address of seller and purchaser are exactly same, why they are selling and purchasing goods from appellant. Same quantity of goods were purchased by the appellant on a particular day and same quantity of goods was sold to the purchaser. In the same way amount paid by purchaser Media Video Limited was transferred on the same day to seller Media Satellite & Telecom Limited. In this regard Ld. Counsel for the Revenue drew attention to page 79 of Paper Book which is the Ledger Account. Accordint to it on 23.04.2007 an amount of Rs.49,99,500/- was credited in the appellant's account by transfer from Media India Limited and on the same day this very much amount was transferred to the account of Media Satellite & Telecom Limited. The same thing happened on 04.05.2007, 20.06.2007, 30.06.2007, 20.07.2007, 31.07.2007 when amount of Rs.19,96,500/-, 25,00,000/-, 62,94,377/-, 25,00,000/- on respective dates was transferred by Media Video Limited into appellant's account and appellant transferred this amount into account of Media Satellite & Telecom Limited. On appreciation of evidence and considering all material on record, it

appears that no error has been committed by lower authorities while passing the impugned order.

28. At the same time we should not ignore the fact that taking the benefit of section 40A of the DVAT Act, Ld. VATO has denied the ITC to the appellant but he has not verified and examined the other dealers i.e. Media Satellite & Telecom Limited and Media Video Limited when appellant has filed DVAT-30 and DVAT-31. No enquiry has been made by the Ld. VATO against these dealers. Without recording satisfaction that how these parties are related the impugned tax credit has been denied to the appellant applying provisions of section 40A of the DVAT Act. Ld. VATO was supposed to enquire how the parties are related in fabricated transactions. He was also supposed to enquire the conduct of all the parties and then to come to the definite conclusion that these parties have joined hands to create artificial input tax credit. The conclusion reached by the Ld. VATO is not based on reasoning. No document or other evidence to prove the fact that parties are making circular entries in their account books with the intention of creating artificial turnover, have been mentioned in the assessment order. Ld. VATO has observed that both companies belong to the same group but how they belong to same group has not been mentioned in the assessment order whether these companies have common director or one company is holding more than 51% share in another company has not been clarified. Appellant is getting marginal profit or he is dealing with only two parties cannot be a ground for rejection of ITC claimed by the appellant. In this regard appellant's Ld. Counsel referred to the case of Hemraj Udyog Vs. Commissioner, Trade Tax, UP (1997) 105 STC 418 in which Hon'ble Allahabad High Court observed as follows:

> "*It is settled law that it is not the business of the taxing officers to guide the businessman about the manner in which the later should conduct his business. A businessman is not expected to earn more so as to able to pay high income tax nor can the Sales Tax Officer force a trader to sell his goods at a particular price. It is for the dealer to choose at what price he sells the goods and how much of goods he will sell and how much he will consume for himself or donate. If the assessing officer feels that a particular trader is behaving in a manner which is different from the other traders in the line, the only course open to him is to raise an eye of suspicion and make an investigation.*

But if he does not investigate or if after investigation he does not find anything adverse to the assesse he cannot reject the dealer's faults simply on suspicion or conjecture."

29. Ld. VATO was supposed to give reasons for refusal to grant ITC, whether it comes under the parameter of section 9 of the DVAT Act or not. Ld. VATO was supposed to examine and verify whether tax paid by the appellant on purchases made from Media Satellite & Telecom Limited was deposited or adjusted against output tax liability by the seller Media Satellite & Telecom Limited. In the same way after examining these facts he was also supposed to verify whether appellant has paid differential tax on the goods sold to Media Video Limited.

30. Appellant has also challenged the impugned order dated 05.02.2013 passed by Ld. OHA on the ground that they are ex parte order and ex parte non-speaking order. In this regard appellant's Ld. Counsel submitted that service was made on the appellant's old address while he orally told his new address to Ld. OHA, which was noted by Ld. OHA on the file cover. After passing of impugned order creating huge demand he sent notices at the new address which proves beyond doubt that he was aware about his new address, even then notice of hearing was sent at the old address. In this regard, appellant filed affidavit to the effect that no notice was received by the dealer. Revenue side has not filed affidavit in rebuttal. In this regard he also referred to the case of B.L. Srivstava Vs. M.M.L. Shridha AIR 1975 MP 21. In this case Hon'ble Madya Pradesh High Court held that the "certificate of posting may give rise to the presumption that the letters were posted but no presumption can be drawn that they were received by the order party".

31. Ld. VATO while passing the impugned order has not mentioned which of the condition of section 32 is applicable in the present case. Ld. VATO was also supposed to record finding why purchases have not been held as genuine by the appellant when in the same circumstances sale has been held to be genuine in other financial years and when no mismatch has been recorded by Ld. VATO.

32. It is clear from the impugned order that no satisfaction has been recorded by the Ld. OHA on the file that not only notices were posted

but also served on the appellant. Secondly, no new fact or reasoning has been recorded by the Ld. OHA while passing the impugned order. He simply affirmed the orders passed by Ld. VATO. As appellant has filed objections against Ld. VATO's order, so even while passing ex-parte order, he was supposed to pass speaking order in the light of the objections filed by the appellant.

33. In the light of above discussion, the impugned orders dated 05.02.2013 passed by Ld. OHA are hereby set aside and case is remanded back to the concerned VATO (Audit) who will frame fresh assessment in the light of above discussion after giving an opportunity of hearing to the appellant. Appeal is accordingly allowed. Appellant is directed to appear before the concerned VATO on 24.10.2015 who shall dispose off these appeals as soon as possible.

34. Order pronounced in the open court.

35. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

36. File be consigned to record room.

[2016] 93 DSTC 93 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI

[M.S. Wadhwa, Member (J) and Diwan Chand, Member (A)]

Appeal Nos.1505-1506/ATVAT/12-13

Star Paper Mills Limited,
2nd Floor, Express Building,
9/10, BSZ Marg, New Delhi. ... Appellant

Versus

Commissioner of Trade & Taxes, Delhi. ... Respondent

Date of Order : 14.10.2016

DVAT ACT, 2004 – ENTRY NO. 66 OF THE FIRST SCHEDULE – WHETHER WASTAGE OF PAPER DURING CONVERSION OF REELS INTO SHEETS AND A4 SIZE PAPER IS WASTE PAPER (RADDI) AND EXEMPT AS COVERED IN ENTRY NO. 66 OF SCHEDULE I OR A BY- PRODUCT TAXABLE @ 4%. HELD - EXEMPT

DVAT ACT, 2004- SECTION 9(1) – WHETHER DENIAL OF ITC ON PACKING MATERIAL SENT BY DEALER AND USED BY JOB WORKER IN THE PACKING OF A4 SIZE PAPER AND TO SUPPLY BACK TO DEALER WAS JUSTIFIED. HELD – NO AS SALE OF PAPER IS LIABLE TO TAX.

WHETHER TAX, INTEREST AND PENALTY WAS LEVIABLE ON INSURANCE EXPENSES INCURRED BY THE DEALER ON FIRE, BURGLARY AND THEFT POLICIES OF GODOWN AND OFFICE PREMISES - HELD NO.

WORK CONTRACT – WHETHER CONVERSION OF REELS INTO A4 SIZE PAPER WAS A WORK CONTRACT OR A PURE JOB WORK AS DID NOT INVOLVE ANY MATERIAL AND WHETHER DEALER WAS REQUIRED TO DEDUCT TDS. HELD – NO DEDUCTION OF TDS REQUIRED.

Facts

Appellant dealer had a manufacturing unit at Saharanpur (U.P.) and received papers in reels as stock transfer to Delhi Branch for further sales to the customers. During the assessment year, the appellant dealer awarded the job order to M/s. Everest Paper, New Delhi and M/s. Toshniwal Sons Pvt. Ltd., Delhi for conversion of paper reels into sheet as per the required size and packing of sheets into reams and pasting of label on the bundles. During the course of conversion of reels into sheet the trimming/loss wastage arises. The normal process wastage upto specified percentage was allowed to job worker. That the assessing authority without going into the facts of the case and the nature of process levied tax, interest and penalty on the paper waste which aroused in the course of conversion of reel papers into sheets.

Further assessing authority disallowed the input tax credit availed by the appellant on the packing material purchased within the State of Delhi. The packing material is used by the appellant for wrapping the sheets for ultimate sales to the customers and the cost is included in the paper price charged by the appellant. No separate packing cost was charged on the sale invoices.

The assessing authority further levied tax and interest on insurance expenses worth Rs.3,88,925/- @ 4% without any basis and facts. The appellant had not charged insurance in any of the sale bills.

The assessing authority further added the amount of Rs.58,436/- as TDS without any basis and facts. The appellant had awarded the

job work of converting paper reels into sheets, which was purely a labour job and did not involve any material. It was neither a work contract.

Held

– After carefully considering the arguments advanced by both the sides, considered view of the Tribunal was that paper trimming produced after conversion of reels into reams and A4 size paper could not be termed by any stretch of imagination as by-product. When an item went under any process and a new item was created, that may be termed as by-product but in the present facts and circumstances, no new product had been produced in the process of converting paper reels into reams. In our view, these paper trimming were covered under the category of "Paper Waste" given in Entry 66 of First Schedule of DVAT Act and so it was wrongly taxed by VATO. Tax, interest and penalty imposed on the sale of "*Raddi*" and upheld by OHA hereby set aside.

– The Tribunal found that packing material had been used by the appellant in packing the paper which was liable to be taxed under the Act. So appellant was entitled to tax credit in respect of tax paid on the packing material. VATO wrongly reversed the ITC claimed by the appellant on purchase of packing material which was included in the sale price of the paper and which was clear from the break-up of A4 size copier paper sale price given at page No.14 and break-up of sale price of sheets given at page-17 of written submissions. The appellant had shown packing material charges in consolidated balance sheet under the head "Finishing Charges". It was wrong to hold that packing material was not included in the sale price. ITC claimed by the appellant was wrongly reversed by the VATO and tax, interest and penalty was wrongly imposed on this amount.

– It was clear from the arguments advanced by the Revenue that he also admitted that insurance amount paid by the appellant had been wrongly taxed by the VATO. It was not included in the sale price, so it was wrongly taxed by VATO. The Revenue had failed to bring to notice of Tribunal any provision of law under which insurance charges, which have not been included in the sale price, may be taxed. The orders passed in this regard were also contrary to law hence were hereby set aside.

– Bare perusal of above provision 2(zo) OF DVAT Act, 2004 clearly showed that conversion of paper reels into paper reams was not covered under the above definition. It is purely a labour job work. Nothing had been sold by the appellant to the job workers. Paper reels which were given for conversion were returned by the job workers to the appellant. So TDS was wrongly imposed by the VATO and which was affirmed by the OHA. Appellant's Counsel also referred to the case of Freedom Info System Vs. BSNL (2009) 22 VST 440 (P&H) in which it was held that TDS can be deducted on work contract but not on labour work. Since the contract between the parties involved no sale of goods, the respondent was not entitled to make any deduction out of the payments to be made to the petitioner. Appeal allowed.

Cases Referred:

1. Freedom Info System Vs. BSNL (2009) 22 VST 440 (P&H)

Present for Appellant : Shri R.N. Sharma , Advocate
Shri S. Duggal, Advocate

Present for Respondent : Shri Pradeep Tara, Advocate

Order

1. These appeals have been filed challenging the impugned order dated 12.11.2012 passed by Ld. Additional Commissioner, hereinafter called Objection Hearing Authority (in short, OHA), who vide this order upheld the assessment of tax, interest and penalty u/s 32 and 33 of the Delhi Value Added Tax Act (in short DVAT Act) respectively passed by Ld. VATO.

2. As common question of law and facts are involved in these appeals, hence these appeals are being disposed off by following common order.

3. Brief fact giving rise to present appeals are that the appellant dealer is registered with Trade & Taxes Department of Government of NCT of Delhi vide TIN No.07560102499 and is engaged in the business of purchase and sale of papers in the State of Delhi. That the notice of default assessment of tax, interest and penalty of the appellant for the year 2007-2008 u/s 32 and 33 of the DVAT was issued by Ld. VATO (KDU), Ward-203 vide order dated 02.02.2012 and created a demand

of tax, interest and penalty despite the fact that waster paper *(Raddi)* is an exempted item as per Entry No.66 of Schedule-I.

4. That appellant dealer has a manufacturing unit at Saharanpur (U.P.) and receive papers in reels as stock transfer to Delhi Branch for further sales to the customers. During the assessment year, the appellant dealer awarded the job order to M/s. Everest Paper, New Delhi and M/s. Toshniwal Sons Pvt. Ltd., Delhi for conversion of paper reels into sheet as per the required size and packing of sheets into reams and pasting of label on the bundles. During the course of conversion of reels into sheet the trimming/loss wastage arises. The normal process wastage upto specified percentage was allowed to job worker. That the assessing authority without going into the facts of the case and the nature of process levied tax, interest and penalty on the paper waste which aroused in the course of conversion of reel papers into sheets.

5. That further assessing authority disallowed the input tax credit availed by the appellant on the packing material purchased within the State of Delhi. The packing material is used by the appellant for wrapping the sheets for ultimate sales to the customers and the cost is included in the paper price charged by the appellant. No separate packing cost was charged on the sale invoices.

6. That the assessing authority further levied tax and interest on insurance expenses worth Rs.3,88,925/- @ 4% without any basis and facts. The appellant has not charged insurance in any of the sale bills.

7. That the assessing authority further added the amount of Rs.58,436/- as TDS without any basis and facts. The appellant has awarded the job work of converting paper reels into sheets, which is purely a labour job and does not involve any material. It is neither a work contract.

8. Against the assessment order dated 02.02.2012 of Ld. VATO imposing tax, interest and penalty, appellant filed objections which were also rejected vide impugned order dated 12.11.2012 by Ld. OHA. Still aggrieved, appellant has filed present appeals on following, among other grounds:

(i) That the impugned order passed by the authorities below are totally wrong, capricious, perverse and against the provisions of law.

(ii) That the learned authorities below erred in law and facts of the case on the following –

(a) Taxed the paper waste *(Raddi) ,* which is an exempted item as per Entry No.66 of Schedule.

(b) Wrongly and injudiciously subjected to tax the packing charges which are inclusive of sales price and as such not charged separately on sale invoices.

(c) Wrongly and injudiciously subjected to tax the insurance charges without any basis.

(d) Wrongly added the TDS on presumption, which is not applicable.

(iii) That the appellate authority erred in law and on facts of the case by sustaining the penalty imposed u/s 86 (12) by assessing authority.

On the basis of above facts and grounds it has been prayed that impugned order dated 12.11.2012 passed by Ld. OHA by set aside and present appeals be allowed.

9. Heard to appellant's Ld. Counsel Shri R.N. Sharma and Shri Pradeep Tara on behalf of Revenue. Both the parties have also filed written arguments in support of their case.

10. Appellant's Ld. Counsel during the course of hearing of arguments reiterated the facts as mentioned in the memorandum of appeal and submitted that VATO has wrongly imposed tax, interest and penalty and it has also been wrongly affirmed by Ld. OHA. The orders passed by lower authorities are against the provisions of law and need to be aside and present appeals be allowed.

11. While Ld. Counsel for the Revenue during the course of arguments submitted that the impugned orders passed by lower

authorities are as per law and hence they be sustained and present appeals be dismissed.

12. The impugned order passed by lower authorities have been assailed on various grounds. The first ground on which the impugned order has been assailed is that on waste paper *(Raddi)*, Ld. VATO has wrongly imposed tax, interest and penalty. In this regard, it would be appropriate to reproduce Ld. VATO's impugned order, which are as follows:

> "*The dealer has given job contract to M/s. Everest Paper and M/s. Toshniwal Sons Pvt. Ltd. for conversion of paper reels into reams. As the terms of contract between the dealer and contractor it has been agreed upon by the dealer that trimming losses/wastage occurred during the conversion of reel into A4 size shall be allowed @ 3.50% maximum in respect of M/s. Toshniwal Sons Pvt. Ltd. and 0.5% in respect of M/s. Everest Paper and the wastage may be retained by the contractor thus generated. The dealer has informed that M/s. Everest Paper has cut reel into reams 10969878.3 kg. and M/s. Toshniwal Sons Pvt. Ltd. 864299 kg. Therefore, 0.5% wastage is allowed in case of Everest Paper and that comes out to be 54849.39 kg and 3.50% of wastage in case of M/s. Toshniwal Sons Pvt. Ltd., i.e. 30250.46 kg. thus making a total wastage of 85099.85 kg, which is retained by the dealer in lieu of conversion of reels into reams. The fair market value of Raddi is Rs.8/- per kg. The contractor has sold the wastage of 85099.85 kg @ Rs.8/- per kg i.e. of Rs.6,80,798/-, which is the costing of the dealer in conversion of reel into reams and forms the part of GTO of the dealer. Moreover, the dealer would have paid VAT @ 4% for an amount of Rs.6,80,798/- with interest and penalty u/s 86 (12) of DVAT Act."*

13. It is clear from the above facts that appellant M/s. Star Paper Mills is a paper mill at Saharanpur, U.P. and is manufacturing various kinds of papers which are transported to Delhi for sale purposes. Before this, the paper is converted into sheets and A4 size paper, which is supplied by the Mill in the form of reels and which is converted into reams and A4 size papers. In the present case this job work of conversion into reams and A4 size papers was granted to M/s. Everest Paper Mill and Toshniwal Sons Pvt. Ltd. During this conversion of

paper reels into A4 size paper, trimming/waste paper is produced, which has been taxed by the Ld. VATO. In this regard, appellant's Ld. Counsel argued that it cannot be taxed because it is an exempted item, as provided in Entry 66 of Schedule-I, Entry 66 of Schedule-I provides paper waste which is exempted from Value Added Tax. Now the question arises whether this remaining trimming or cutting which is produced after conversion of reels into sheets is covered under the Head "Paper Head". In this regard, Ld. Counsel for the Revenue submitted that waster paper is altogether different commodity than the usable paper left after reels are converted into reams. He further submitted that the waste paper can be described as the paper pieces found in streets and found in small quantities as industrial paper/other paper waste. According to Revenue's Ld. Counsel the paper remained in huge quantity as in this case cannot be regarded as waste paper as it has significant market value as by-product generated during the process of conversion of paper reels. According to Ld. Counsel for the Revenue "waste" is such a thing which has no significant market value. But if any goods have significant market value, then the same cannot be regarded as waster for the purpose of Entry 66 of 1st Schedule. So the tax, interest and penalty on this count was rightly imposed by Ld. VATO and which was upheld by Ld. OHA. In reply, appellant's Ld. Counsel submitted that Ld. Counsel for the Revenue has twisted the facts in such a manner to substitute his coined words to substitute the words in statute. The word "trimming/waster paper (Raddi) mentioned by assessing authority in the impugned order has been intentionally termed as paper retained by the dealer and by product of his own as a devise to negate the exemption available under Entry No.66 of 1st Schedule of the Act.

14. After carefully considering the arguments advanced by both the sides, we are of the considered view that paper trimming produced after conversion of reels into reams and A4 size paper cannot be termed by any stretch of imagination as by-product. When an item goes under any process and a new item is created, that may be termed as by-product but in the present facts and circumstances, no new product has been produced in the process of converting paper reels into reams. In our view, these paper trimming are covered under the category of "Paper Waste" given in Entry 66 of 1st Schedule of DVAT Act and so it was wrongly taxed by Ld. VATO. So tax, interest and penalty imposed on the sale of "*Raddi*" and upheld by Ld. OHA is hereby set aside.

15. The second ground on which the impugned order passed by Ld. OHA has been assailed is that the Ld. VATO wrongly denied ITC which was claimed on the purchase of packing material. In this regard also it would be appropriate to reproduce the relevant part of VATO's order, which are as under:

> "The dealer has purchased the packing material of Rs.19,61,580/-. The packing material has been used in wrapping the reams of papers. The reams of paper are sold to the dealers. As per the sale invoices produced before the undersigned, no VAT has been accounted for on the packing charges. The packing charges form a part of sale price and the same has not been accounted for in the sale invoice for the payment of VAT. Hence, the purchase amount of Rs.19,61,580/- on which the ITC of 4% which has been claimed by the dealer i.e. Rs.78,463/- is revered with interest and penalty u/s 86 (12) of DVAT Act".

16. In this regard, Ld. Counsel for the appellant submitted that appellant is legally entitled to ITC. The claim of ITC has been reversed on the ground that the cost of packing material has not been included in the sale price of finished goods. Ld. Govt. Counsel has further gone to the balance sheet which is irrelevant on the issue under consideration. According to appellant's Ld. Counsel, the definition of 'Sale Price' as given in DVAT Act would clarify the whole issue which has been given in section 2(1)(zd), which is as follows:

> "Sale price" means the amount paid or payable as valuable consideration for any sale, including the amount of tax,
>
> (i) ……...
>
> (ii) …….
>
> (iii) …….
>
> (iv) Any sum charged for anything done by the dealer in respect of goods at the time of, or before, the delivery thereof."

17. Appellant's Ld. Counsel has drawn attention to the word "sale price" as given sub-clause (iv) of section 2 (1)(zd) and submitted that "sale price" includes any sum charged for anything done by the dealer in respect of goods at the time of, or before, the delivery thereof.

Packing material purchased by the appellant are supplied to the job contractor free of cost who after converting reels into sheets and A4 size paper copier use them in the packing of finished goods. Because packing material is a part of sale price, so ITC was wrongly denied to the appellant.

18. According to appellant, final sale price of the paper includes the cost of packing material which is used for packing of the paper. The Ld. VATO has wrongly reversed the ITC on the ground that packing charges are not included in sale price. It would also be relevant to refer section 9 of the DVAT Act under which tax credit is claimed.

19. Section 9 (1) of the DVAT Act provide that subject to sub-section (2) of this section and such conditions, restrictions and limitations as may be prescribed, a dealer who is registered or is required to be registered under this Act shall be entitled to a tax credit in respect of the turnover of purchases occurring during the tax period in the course of his activities as a dealer and the goods are to be used by him directly or indirectly for the purpose of making sales which are liable to tax under section 3 of this Act and sales which are not liable to tax under this Act.

20. If we apply the above provisions to the facts of the present case, we find that packing material has been used by the appellant in packing the paper which are liable to be taxed under the Act. So he is entitled to tax credit in respect of tax paid on the packing material. So in our view Ld. VATO wrongly reversed the ITC claimed by the appellant on purchase of packing material which is included in the sale price of the paper and which is clear from the break-up of A4 size copier paper sale price given at page No.14 and break-up of sale price of sheets given at page-17 of written submissions. The appellant has shown packing material charges in consolidated balance sheet under the head “Finishing Charges”. So it is wrong to hold that packing material, is not included in the sale price. So in our view amount of ITC claimed by the appellant was wrongly reversed by the VATO and tax, interest and penalty was wrongly imposed on this amount. Ld. OHA, while passing the impugned order has not given any reasoning to justify the reversal of ITC. In this regard impugned orders are totally silent. Only reasoning with regard to waste paper taxed by Ld. VATO has been given. Regarding other issues, no discussion or reasoning has been given by the Ld. OHA while upholding the orders passed by Ld. VATO.

21. The third point on which orders passed by lower authorities have been assailed is that Ld. VATO has wrongly taxed the amount of insurance @ 4% with interest and penalty u/s 86 (12) of DVAT Act. According to Ld. VATO as per details provided by the dealer Rs.3,88,925/- during the year 2007-08 has been incurred by the dealer on insurance which is part of sale price. Hence the amount of Rs.3,88,925/- is taxed @ 4% with interest and penalty u/s 86 (12) of the DVAT Act. In this regard appellant's Ld. Counsel submitted that amount paid on insurance has been wrongly taxed by Ld. VATO because appellant has never charged such amount in any sale transactions but the premium paid to the insurance company against policies for fire, burglary, theft of godown and office premises and fixed assets.

22. In this regard Ld. Counsel for Revenue submitted that Ld. VATO imposed tax on insurance charges incurred by the dealer alongwith interest and penalty. Revenue's Ld. Counsel further submitted that said issue may be decided according to established principles of law.

23. It is clear from the arguments advanced by the Ld. Counsel for Revenue that he also admitted that insurance amount paid by the appellant has been wrongly taxed by the Ld. VATO. In our view as it is not included in the sale price, so it was wrongly taxed by Ld. VATO. Ld. Counsel for the Revenue has failed to bring to our notice any provision of law under which insurance charges, which have not been included in the sale price, may be taxed. So orders passed in this regard are also contrary to law hence are hereby set aside.

24. The impugned order passed by Ld. OHA dated 12.11.2012 has further been assailed on the ground that he affirmed the orders passed by Ld. VATO with regard to deduction of TDS on the amount of Rs.79,88,064/-. Ld. VATO deducted Rs.58,436/- as TDS on this amount. According to appellant's Ld. Counsel, the appellant had awarded the job work of converting paper reels into sheets which is purely labour job and does not involve any material. He further submitted that it is not a works contract.

25. While Ld. Counsel for the Revenue in this regard submitted in his written arguments that the appellant has got converted paper reels into reams from different dealers on which it is admitted fact that he has deducted TDS on amount of Rs.79,88,064/- on account of

Income Tax treating such dealers as contractor but has failed to deduct tax on the account of VAT TDS liability. The dealer has stated that this is pure labour work, hence not liable to deduct VAT TDS on this amount. According to Ld. Counsel for the Revenue, if we go through the definition of "work contract", as contained in section 2 (zo), then we will find that said activity will squarely fall under the definition of work contract, hence the dealer will become liable for VAT TDS on above said payment.

26. It would be appropriate to reproduce the definition of work contract as given in section 2 (zo), which is as follows:

Section 2 (zo) Work Contract –

> "work contract" includes any agreement for carrying out for cash or for deferred payment or for valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, repair or commissioning of any moveable or immovable property".

27. Bare perusal of above provision clearly show that conversion of paper reels into paper reams is not covered under the above definition. It is purely a labour job work. Nothing has been sold by the appellant to the job workers. Paper reels which were given for conversion were returned by the job workers to the appellant. So TDS was wrongly imposed by the Ld. VATO and which was affirmed by the Ld. OHA. Appellant's Ld. Counsel also referred to the case of Freedom Info System Vs. BSNL (2009) 22 VST 440 (P&H) in which it was held that TDS can be deducted on work contract but not on labour work. Since the contract between the parties involved no sale of goods, the respondent was not entitled to make any deduction out of the payments to be made to the petitioner under section 27 of the Act.

28. On the basis of above discussion, the impugned order dated 12.11.2012 passed by the Ld. OHA is hereby set aside and present appeals are allowed.

29. Order pronounced in the open court.

30. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

31. File be consigned to record room.

[2016] 54 DSTC 105 – (Delhi)

BEFORE THE APPELLATE TRIBUNAL, VALUE ADDED TAX, DELHI
[Diwan Chand: Memebr (A) And M. S. Wadhwa: Member (J)]

Appeal No.1282-1317/ATVAT/11-12
Assessment Period: 2008-09
Default assessment of tax, Interest & Penalty

M/s General Motors India Pvt Ltd,
Plot No.2, Khasra No. 867, Om Nagar,
Mith Pur, Badar Pur,
New Delhi-110044 ... Appellant

Versus

Commissioner of Trade & taxes, Delhi ... Respondent

Date of Order: 28.10.2016

SALE CANCELLATION U/S 8 OF DVAT ACT, 2004 – NO TIME PERIOD PRESCRIBED UNDER THE ACT – DEFAULT ASSESSMENT PASSED WITHOUT AFFORDING OPPORTUNITY AND CONSIDERING CANCELLED SALE AS GOODS RETURNED – OHA MISINTERPRETED THE LAW HOLDING THAT SALE REJECTION COULD TAKE PLACE IN A DAY, TWO DAYS, THREE DAYS OR MAXIMUM WITHIN A MONTH – APPELLANT ARGUED BEFORE TRIBUNAL THAT SALE WAS A BILATERAL TRANSACTION LEADING TO TRANSFER OF PROPERTY FROM ONE PERSON TO ANOTHER – FURTHER ARGUED THAT GOODS ALWAYS REMAINED IN THE OWNERSHIP AND CONTROL OF THE APPELLANT – TIME LIMIT OF RETURN OF GOODS U/S 8(1)(d) HAS NO APPLICATION IN THE CASE OF REJECTION OF GOODS – THE ORDERS WERE SET ASIDE AND APPEALS ALLOWED.

Facts

Appellant, M/s General Motors India Private Limited was a registered dealer in Ward-95 under the provisions of the Delhi VAT Act, 2004 and under Central sales Tax Act, 1956 vide TIN No. 07080251658. The Dealer was engaged inter-alia in the business of re-sale of Spare Parts of Light Motor Vehicles (LMV), Lubricants, Batteries, etc across India including Delhi. The Dealer pays tax (VAT and CST) monthly in accordance with the provisions of DVAT Act and also filed returns monthly. The dealer had SAP system for its accounting which was one of the ERP software package for centralised recording of data of an organisation. The dealer does its accounting in SAP by using different document type (code) and document number for different transactions.

The dealer had separate series for its sale invoices and separate series for sale reversal invoices. Sale reversal invoices were generated in those cases where the sales order was cancelled by the purchaser.

VATO vide default assessment orders created the following demands by disallowing the deductions claimed on account of cancellation of sales:-

Tax Period	CST	Interest	Penalty	VAT	Interest	Penalty
April 2008	30,762	10,366	30,762	-	-	-
June 2008	13,273	4,146	13,273	86,250	26,938	86,250
July 2008	51,116	15,336	51,116	-	-	-
August 2008	4,868	1,400	10,000	2,025	583	10,000
September 2008	15,220	4,191	15,220	7,875	2,168	10,000
October 2008	43,490	11,438	43,490	-	-	-
November 2008	2,578	646	10,000	16,856	4,018	16,856
December 2008	9,491	2,262	10,000	-	2,262	10,000
January 2009	6,268	1,417	10,000	111,804	25,271	111,804
February 2009	5862	1,253	10,000	9,129	1,951	10,000
March 2009	6,227	1,254	10,000	7.760	1,563	10,000
Total	189,155	53,709	2,13,861	2,41,699	62,492	2,54,910

Aggrieved with the default assessment the appellant filed objections before the Additional Commissioner/OHA and the OHA vide impugned orders dated 18.10.2011 rejected the objections and upheld the default assessment orders. Aggrieved with the impugned orders passed by the OHA the appellant had came in appeal.

Held

A conjoint reading of the provisions of the DVAT Act revealed that tax was payable on each sale as per section 3 of the Act and while determining the net tax payable under section 11 of the Act , the input tax credit admissible under section 9 of the Act was to be deducted from the output tax liability. Adjustment to tax credit was required to be made

in the event of contingencies arising under section 8 and 10 which stipulates inter-alia that when a sale had been cancelled and where a dealer had accounted for an incorrect amount of tax as contemplated in sub-section (1) of section 8 , the dealer shall make an adjustment in calculating the tax payable by the dealer in the return for the tax period during which it had became apparent that the tax was incorrect and further provided that in case the tax accounted for exceeds the tax payable in relation to the sale, the amount of that deficiency shall be subtracted from the tax payable by the dealer in the tax period in which the adjustment was made , and shall not be attributable to any other tax period. It was not the case of the Revenue that the appellant had not been maintaining accounts regularly and systematically. A reading of the above two sections showed that ITC could be claimed during the tax period in which the purchases occurred. While the adjustment could be made, there was no time limit in which the said adjustment was done be done and after which the same could not be made. While in case of return of goods, time limit of six month had been prescribed, there was no time limit laid down in case of cancellation of sales. Appellant's contention had also been that in the present case, no sale ever took place. Sale was a bilateral transaction leading to transfer of property from one person to another. In the present case, sale never took place. The goods always remained in the ownership and control of the appellant. Reliance was placed on the decisions of Metal Alloys Vs CTO (1977) 39 STC 404 (Cal) and Havell's India Ltd vs Commissioner VAT 2010 (31) VST 20 Delhi. Hon'ble Calcutta High Court in the case of Metal Alloy v CTO 1977 39 STC 404 (Cal) held that when the goods were not as per the agreed description and hence rejected, there is no sale on which sales tax could have been charged. Following para extracted from the said judgement explain the legal position:

> " ….."Sale" is a transfer of property in goods for monetary consideration. The words "by one person to another" occurring in the definition clause clearly indicate that in order to constitute or bring about a "sale" there must be two different parties so as to effect a transfer of property in goods from one, "the seller", to the other, "the buyer". There cannot be a sale or supply of goods by the seller to himself. "Turnover" would mean the aggregate of the sale prices received and receivable by the dealer in respect of sale of any goods in the course of inter-State trade or commerce and "sale price", which has been defined in

section 2(h) of the said Central Act, means the amount payable to a dealer as consideration of the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade. In many State Laws as in West Bengal, the definition of "turnover" includes either sale price received or sale price receivable. But under the definition of the said Central Act, the conjunction is "and" and not "or", between the words "sale prices received" and "sale prices receivable". The two expressions "sale prices received" and "sale prices receivable" have in their background, reference to the two well-known systems of keeping accounts, namely, the "cash system" and "mercantile system". In order to determine "turnover" under the said Central Act, the conjunction "and" between the expressions sale prices "received" and "receivable" in the definition portion, it seems, intends only the mercantile system of keeping accounts as the basis for such determination. For the parties keeping a cash system of accounts, determination of turnover would still be inclusive of unrealised sales. Section 8A as aforementioned has been inserted, with retrospective effect, by section 5 of the Central Sales Tax (Amendment) Act, 1969 (Act 28 of 1969). The deductions so long provided in rule 11 (2) of the Central Sales Tax (Registration and Turnover) Rules, 1957, as amended from time to time, regarding the tax element and the goods returned to a dealer have been incorporated in this section. The sale price under section 8A(1) (b) of the Central Act of all goods returned by the purchasing dealer has to be deducted from the category of sale price, since such sales, on return of the goods, are ineffectual but clause (b) of section 8A(1) prescribed a time-limit for returning the goods. The time-limit is:

(i) for goods returned before 14th May, 1966, the goods must have been returned within a period of 3 months from the date of delivery of the goods,

(ii) for goods returned on or after 14th May, 1966, the goods must have been returned within a period of 6 months from the date of the delivery of the goods.

The deduction under section 8A (I)(b) is allowable only on production of satisfactory evidence by the selling dealer of the

return of such goods and the refund (in “cash”, “cheque” or by adjustment) of the purchase price.

The onus of such proof was on the selling dealer. The return of goods and rejection of the same admittedly stand on different footing. Section 8A(I)(b) had application when the goods were returned by the purchaser. Return of goods was a bilateral transaction brought about by the consent of the seller and the purchaser, which consent may have been effected either prior to the delivery of the goods or subsequent to such delivery. Rejection of the goods on the other hand was an unilateral transaction governed by the provisions of the Contract Act or the Sale of Goods Act, open only to the purchaser. The time-limit of section 8A(I)(b) thus had no application in case of rejection of goods because the very act of rejection gave a go-by to the transactions which were in furtherance of a supposed sale.”

Appellant had submitted a paper book containing copies of the invoices, stock register and the sale cancellation invoices. The sample trail of original invoices, cancelled invoices, stock statement showing that the cancelled sales had been taken back in the stock, party ledger showing cancelled sales and sale of the goods returned again on payment of VAT. Further appellant had also enclosed certificates issued by the appellant’s dealers, showing that the impugned sales were cancelled prior to removal of goods from the premises of the appellant. On the goods returned tax had been duly paid when these returned goods were sold. Impugned orders were set aside and the appeals allowed.

Present for Petitioner : Shri Puneet Aggarwal, Advocate

Presnet for Respondent : Shri S.B. Jain, Advocate

Order

1. This order shall dispose of the above noted appeals filed by the appellant M/s General Motors India Pvt Ltd challenging the impugned orders dated 18.10.2011 passed by Additional Commissioner Special Zone, hereinafter called the Objection Hearing Authority (in short the OHA) vide which he upheld the orders of default assessment of tax and interest passed u/s 32 and default assessment of penalty passed

u/s 33 r/w section 86(10) of the DVAT Act, 2004 passed on 16.12.2010/ 27.12.2010 by VATO Audit.

2. Appellant, M/s General Motors India Private Limited is a registered dealer in Ward-95 under the provisions of the Delhi VAT Act, 2004 and under Central sales Tax Act, 1956 vide TIN No. 07080251658. The Dealer is engaged inter-alia in the business of re-sale of Spare Parts of Light Motor Vehicles (LMV), Lubricants, Batteries, etc across India including Delhi. The Dealer pays tax (VAT and CST) monthly in accordance with the provisions of DVAT Act and also files returns monthly. The dealer has SAP system for its accounting which is one of the ERP software package for centralised recording of data of an organisation. The dealer does its accounting in SAP by using different document type (code) and document number for different transactions. The dealer has separate series for its sale invoices and separate series for sale reversal invoices. Sale reversal invoices are generated in those cases where the sales order is cancelled by the purchaser.

3. Ld VATO vide default assessment orders created the following demands by disallowing the deductions claimed on account of cancellation of sales:-

Tax Period	CST	Interest	Penalty	VAT	Interest	Penalty
April 2008	30,762	10,366	30,762	-	-	-
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Total	189,155	53,709	2,13,861	2,41,699	62,492	2,54,910

4. Aggrieved with the default assessment the appellant filed objections before the Additional Commissioner/OHA and the Ld OHA vide impugned orders dated 18.10.2011 rejected the objections and upheld the default assessment orders. Aggrieved with the impugned orders passed by the OHA the appellant has come in appeal before us and assailed the impugned orders on the following grounds:-

1. That the notice of default assessment of tax and interest issued by the Learned VATO under Section 32 of the DVAT Act did not disclose any reasons as to why the assessment was so framed by the Learned VATO except contending that against the claim for return of goods, the dealer has not furnished copy of GR/LR/RR.

2. That from the perusal of the aforesaid Section, the scheme of the Act is abundantly clear that the assessment under the Act is complete as soon as the return has been filed by the Appellant. It is only under the specific conditions prescribed in Section 32 of the DVAT that the assessment already made can be reopened. In Section 32, the most essential condition to be complied with is the recording of reasons, in writing, by the assessing authority for making such default assessment. Such a provision of law is a mandatory provision which cannot be overlooked. Such condition saves the Appellant from the arbitrary assessments and further mandates the Learned Authority to pass the order after due application of mind and not on his personal whims and fancies.

3. That it is a cardinal principle of justice that no order can be passed without reasoning and if any order is passed in defiance of this principle, it is bad in law. Reference made to decisions of Steel Authority of India Limited (2008) 16 VST 181 SC; Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India and Anr**.** AIR 1976 SC 1785, Mc Dermott International Inc. v. Burn Standard Co. Ltd. and Ors. (2006) SL T 345, Gurdial Singh Fijji v. State of Punjab- [(1979) 2 SCC 368) and Shukla & Brothers AIT-2010-136-SC.

4. That even the department of trade and taxes has itself given clear guidelines on this aspect vide circular no. 1 of 2007-08, relevant part of which reads as follows:

> "7. The default assessment and penalty orders should be passed judiciously stating why the default assessment and penalty orders are being issued and the reasons for accepting/not accepting the version of the dealer and the – reasons/basis for assuming the turnovers in the default assessments and penalty orders."

5. That the Learned Additional Commissioner has referred to a few transactions of sales rejection and has held that since the rejections have been made after almost six months, which is not prudent and which no business would have done, therefore the claim of sales rejection as made by the dealer cannot be considered. This ground/contention was never raised by the assessing authority. Had it been known to the Appellant earlier, the Appellant would have clarified the same by giving proper representation to the Learned VATO as also the Objection Hearing Authority. Moreover, no notice of any such ground was ever served upon the Appellant, giving the Appellant an opportunity to counter the said ground.

6. That the Objection Hearing Authority cannot travel beyond the questions raised before him, and for this reference is made to decisions of Commissioner of Customs Vs Toyo Engineers India Ltd (2006) (201) ELT 513 SC; CCE Vs Ballarpur Industries Ltd (2003) 215 ELT 489 SC and CCE Vs Champdani Industries Ltd (2009) 241 ELT 481 SC.

7. That the Appellant has raised several vital issues for the consideration of the Learned Objection Hearing Authority, on which no finding has been given. Instead the Learned Objection Hearing Authority travelled beyond the assessment orders and also beyond the pleadings of the Appellant and passed order based upon a ground which was never taken and which was never an issue. Since it was never made known to the Appellant, the appellant never got an opportunity to defend itself.

8. That the Learned Objection Hearing Authority has failed to consider following submissions of the Appellant:

(a) That the appellant was never confronted with the proposal that it has to submit GR/LR/RR in support of its claim for sales reversals (cancellations).

(b) That since there is no sale at all, there is no question of denying the tax reversal.

(c) That in absence of any inter state movement, no CST can be charged.

(d) That the issue does not relate to sales return but sales cancellation.

(e) That even otherwise, there is no warrant for imposition of penalty.

9. That the Additional Commissioner passed the impugned order arbitrarily and without appreciating the law. Section 8 of the DVAT Act is categorical and provides that sales rejections are to be adjusted in the period when the same is accounted for in the books. On this point, there is no dispute and the Ld. Objection Hearing Authority has accepted the proposition.

10. That it has been held by the OHA that in normal circumstances a sale may be cancelled in a day, two days, three days or in a month. It is submitted that above said finding are perverse and without any basis. Section 8 does not prescribe any time limit for making adjustment on account of sales rejection. That even section 8 recognizes that there may be so much variation in circumstances warranting rejection of sale that no strict time limit has been prescribed.

11. That the sales cancellation in the present case took place on account of various reasons. Sale cancellation may take place on account of cancellation of the sale order before delivery. In such case, the commercial team negotiates with the buyer. If ultimately, the buyer insists on cancellation, then sale is cancelled. Similarly, there may be circumstances where some materials do not make a truck load and therefore could not be dispatched when asked for by the customer.

Later the customer cancels the order. Sometimes the bills are issued and sale booked in the accounts but the goods could not be dispatched because the customer has not been able to provide way bills. In such case, eventually sales may be cancelled and this may take some time.

12. That the sales are not cancelled as a matter of routine. Total sales net of cancellations is Rs.15.12 Crore (approx) during the year 2008-09, whereas the cancellations are too insignificant in comparison. Proper internal authorizations need to be taken prior to cancellation of sale. Sale cancellation is not treated as routine activity and therefore there is an escalation matrix which authorizes punching of sale cancellation and only then the cancellations are accounted for.

13. That even assuming that there is any tax liability, interest shall be calculated only from the date of assessment and not before.

14. That the Ld. OHA has acted arbitrarily as he has confirmed demand on a ground completely different from that raised by the VATO and the appellant never got an opportunity to present his case. The order is therefore liable to be set aside on this ground itself being in gross violation of principle of Natural Justice. Reference is made to the decision of CCE vs Ballarpur Industries Ltd 200 (215) ELT 489 SC.

15. That there is no time period prescribed for sales cancellation under DVAT Act is completely ignored by the authority and in fact legislature could not tax if there is no sale and therefore legislature consciously did not prescribe such time period. Thus imputing the time period of one month when there is none is in complete violation of Article 265 of the Constitution of India and has placed reliance on the decision in the case of M/s United News of India vs Union of India 2004 (168) ELT 422 Delhi High Court.

5. We have heard Sh. Puneet Aggarwal, Adv., Ld Counsel for the Appellant and Sh. SB Jain, Adv., Ld Counsel for the Revenue and gone through the record of the case.

6. Ld Counsel for the Appellant reiterating the grounds of appeal submitted that the appellant receives the Indents/ orders from its distributors for supply of spare parts of LMV, Lubricants, Batteries etc. when the order is received, the order is processed after various internal documentations. As part of such documentation the dealer generates the sales bills in the name of respective parties. Pursuant to such sale bills, goods are dispatched by the stores. However, there are occasions where prior to the dispatch of goods but post preparation of the sale bill, the buyers would cancel orders for purchase. In some cases, bills are generated under a mistake which needs to be cancelled. Such cancellations are duly evidenced in the system by issuance of a sales reversal invoice. It is pertinent to note that sales reversals may be recorded in the books depending upon the facts of each case. In some cases, sale cancellations take place and are recorded in the books of accounts in month of sale itself. In other cases, there is some time gap and the sales cancellations are recorded in months subsequent to the month of sale. It all depends upon the peculiar facts necessitating cancellation. However, in each case, the appellant pays tax on sales recorded in that month even if the goods have not been dispatched/ delivered. This is so because, as per the accounting policy of the dealer sales are booked at the time of issuing the invoice and as per section 12 of the DVAT Act, turnover of a dealer shall be the amount recorded in the accounts regularly and systematically prepared. Similarly, when cancellation of sale is recorded in the books, the same is given effect to in accordance with the provisions of section 8 of the DVAT Act i.e. when the cancellation is recorded in the books of accounts of the dealer.

7. Coming to the issue of Audit conducted by the department submission made is that audit was conducted by the department under Delhi Value Added Tax Act (DVAT) for the year 2008-09. Here it is pertinent to note that the Appellant had already reflected the sales rejection in form 31. The appellant had also submitted reversal bills to the assessing authority on 28.10.2010 in course of assessment proceedings. In their audit report, it was mentioned by the audit team that the company have claimed reduction on account of goods returned however no supporting documents like LR/RR/GR have been produced. Thereafter without affording any opportunity to the dealer regarding explanation of the above said issue, the VATO (Audit) issued the notices of assessment of tax and interest under section 32 and notices of assessment of penalty under section 33 of the DVAT

Act; and also under the CST Act. In the said orders, it was stated that against the claim for return of goods, the dealer has not furnished copy of GR/LR/RR While, the fact as stated above, was that it was a case of sale cancellation and not sale returns and that since the goods were never dispatched by the dealer, there was no question of furnishing copy of GR/LR/RR. It is submitted that the orders of assessment were passed arbitrarily without even enquiring into the facts of the case and without affording any opportunity to the appellant to represent their case, without application of mind and considering cancellation of sales as sales return. Further penalty orders were passed without even stating as to how the circumstances warranting imposition of penalty have arisen. The goods were never dispatched therefore there was no question of having GR/LR/RR for inward movement of the goods.

8. Appellant has further submitted that he explained its position before the OHA, the methodology of sale, that there is no question of having a GR/RR/LR for goods return because the goods were never even dispatched by the dealer in the first place. It was also submitted that the lower authorities having not afforded any opportunity of being heard, have passed the assessment orders in gross violation of principles of natural justice. However, the OHA totally misinterpreted the law and held that sale rejections could take place maximum within a month from date or issue of invoice and that since some of the rejections have taken a period of around six months from date of invoice, and that no prudent businessman would wait for cancelling the sales for such a long period, therefore the appellant could not take the benefit of the provisions of section 8 and accordingly rejected the objections.

9. Ld Counsel for the Revenue has submitted that the appellant failed to submit necessary documentary evidence in support of his contentions and hence there is no illegality or infirmity in the default assessment orders and the impugned orders passed by the OHA.

10. It is apposite to refer to provisions of section 8 and 9 of the DVAT Act, relevant portion of which are extracted below:-

> Section 9(1) - "Subject to sub-section (2) of this section and such conditions, restrictions and limitations as may be prescribed, a dealer who is registered or is required to be registered

under this Act shall be entitled to a tax credit in respect of the turnover of purchases occurring during the tax period [where the purchase arises] in the course of his activities as a dealer and the goods are to be used by him directly or indirectly for the purpose of making –

(a) sales which are liable to tax under section 3 of this Act; or

(b) sales which are not liable to tax under section 7 of this Act.

Section 8 Adjustments to tax

(1) Subject to such conditions as may be prescribed, this section shall apply where, in relation to the sale of goods by any dealer –

(a) that sale has been cancelled;

(b) the nature of that sale has been fundamentally varied or altered;

(c) the previously agreed consideration for that sale has been altered by agreement with the recipient, whether due to the offer of a discount or for any other reason;

(d) the goods or part of the goods sold have been returned to the dealer within six months of the date of sale; or

(e) the whole or part of the price owed by the buyer for the purchase of the goods has been written-off by the dealer as a bad debt;

and the dealer has –

(i) provided a tax invoice in relation to that sale and the amount shown therein as tax charged on that sale is not the tax properly chargeable on that sale; or

(ii) furnished a return in relation to a tax period in respect of which tax on that sale is attributable, and has accounted for an amount of tax on that sale that is not the amount properly chargeable on that sale.

(2) Where a dealer has accounted for an incorrect amount of tax as contemplated in subsection (1), that dealer shall make an adjustment in calculating the tax payable by that dealer in the return for the tax period during which it has become apparent that the tax is incorrect, and if –

(a) the tax payable in relation to that sale exceeds the tax actually accounted for by the dealer, the amount of that excess shall be deemed to arise in the tax period in which the adjustment is made, and shall not be attributable to any prior tax period; or

(b) the tax actually accounted for exceeds the tax payable in relation to the sale, the amount of that deficiency shall be subtracted from the tax payable by the dealer in the tax period in which the adjustment is made, and shall not be attributable to any prior tax period.

11. A conjoint reading of the provisions of the DVAT Act reveals that tax is payable on each sale as per section 3 of the Act and while determining the net tax payable under section 11 of the Act , the input tax credit admissible under section 9 of the Act is to be deducted from the output tax liability. Adjustment to tax credit is required to be made in the event of contingencies arising under section 8 and 10 which stipulates inter-alia that when a sale has been cancelled and where a dealer has accounted for an incorrect amount of tax as contemplated in sub-section (1) of section 8 , the dealer shall make an adjustment in calculating the tax payable by the dealer in the return for the tax period during which it has become apparent that the tax is incorrect and further provides that in case the tax accounted for exceeds the tax payable in relation to the sale, the amount of that deficiency shall be subtracted from the tax payable by the dealer in the tax period in which the adjustment is made , and shall not be attributable to any other tax period.

12. It is not the case of the Revenue that the appellant has not been maintaining accounts regularly and systematically. A reading of the above two sections shows that ITC can be claimed during the tax period in which the purchases occur. While the adjustment can be made, there is no time limit in which the said adjustment is do be done

and after which the same cannot be made. While in case of return of goods, time limit of six month has been prescribed, there is no time limit laid down in case of cancellation of sales.

13. Appellant's contention has also been that in the present case, no sale ever took place. Sale is a bilateral transaction leading to transfer of property from one person to another. In the present case, sale never took place. The goods always remained in the ownership and control of the appellant. Reliance is placed on the decisions of Metal Alloys Vs CTO (1977) 39 STC 404 (Cal) and Havell's India Ltd vs Commissioner VAT 2010 (31) VST 20 Delhi.

14. Hon'ble Calcutta High Court in the case of Metal Alloy v CTO 1977 39 STC 404 (Cal) held that when the goods were not as per the agreed description and hence rejected, there is no sale on which sales tax could have been charged. Following para extracted from the said judgement explain the legal position:

> " ….."Sale" is a transfer of property in goods for monetary consideration. The words "by one person to another" occurring in the definition clause clearly indicate that in order to constitute or bring about a "sale" there must be two different parties so as to effect a transfer of property in goods from one, "the seller", to the other, "the buyer". There cannot be a sale or supply of goods by the seller to himself. "Turnover" would mean the aggregate of the sale prices received and receivable by the dealer in respect of sale of any goods in the course of inter-State trade or commerce and "sale price", which has been defined in section 2(h) of the said Central Act, means the amount payable to a dealer as consideration of the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade. In many State Laws as in West Bengal, the definition of "turnover" includes either sale price received or sale price receivable. But under the definition of the said Central Act, the conjunction is "and" and not "or", between the words "sale prices received" and "sale prices receivable". The two expressions "sale prices received" and "sale prices receivable" have in their background, reference to the two well-known systems of keeping accounts, namely, the "cash system" and "mercantile system". In order to determine "turnover"

under the said Central Act, the conjunction "and" between the expressions sale prices "received" and "receivable" in the definition portion, it seems, intends only the mercantile system of keeping accounts as the basis for such determination. For the parties keeping a cash system of accounts, determination of turnover would still be inclusive of unrealised sales. Section 8A as aforementioned has been inserted, with retrospective effect, by section 5 of the Central Sales Tax (Amendment) Act, 1969 (Act 28 of 1969). The deductions so long provided in rule 11 (2) of the Central Sales Tax (Registration and Turnover) Rules, 1957, as amended from time to time, regarding the tax element and the goods returned to a dealer have been incorporated in this section. The sale price under section 8A(1) (b) of the Central Act of all goods returned by the purchasing dealer has to be deducted from the category of sale price, since such sales, on return of the goods, are ineffectual but clause (b) of section 8A(1) prescribed a time-limit for returning the goods. The time-limit is:

(i) for goods returned before 14th May, 1966, the goods must have been returned within a period of 3 months from the date of delivery of the goods,

(ii) for goods returned on or after 14th May, 1966, the goods must have been returned within a period of 6 months from the date of the delivery of the goods.

The deduction under section 8A(I)(b) is allowable only on production of satisfactory evidence by the selling dealer of the return of such goods and the refund (in "cash", "cheque" or by adjustment) of the purchase price.

The onus of such proof is on the selling dealer. The return of goods and rejection of the same admittedly stand on different footing. Section 8A(I)(b) has application when the goods are returned by the purchaser. Return of goods is a bilateral transaction brought about by the consent of the seller and the purchaser, which consent may have been. effected either prior to the delivery of the goods or subsequent to such delivery. Rejection of the goods on the other hand is an unilateral transaction governed by the provisions of the Contract Act or

the Sale of Goods Act, open only to the purchaser. The time-limit of section 8A(I)(b) thus has no application in case of rejection of goods because the very act of rejection gave a go-by to the transactions which were in furtherance of a supposed sale."

15. Appellant has submitted a paper book containing copies of the invoices, stock register and the sale cancellation invoices. The sample trail of original invoices, cancelled invoices, stock statement showing that the cancelled sales have been taken back in the stock, party ledger showing cancelled sales and sale of the goods returned again on payment of VAT. Further appellant has also enclosed certificates issued by the appellant's dealers, showing that the impugned sales were cancelled prior to removal of goods from the premises of the appellant. On the goods returned tax has been duly paid when these returned goods were sold.

16. In view of the foregoing the impugned orders are set aside and the appeals are allowed. Matter is remanded back to the VATO to reframe the assessment in accordance with law after giving an opportunity of hearing to the appellant who should appear before th VATO on 17.12.2016.

17 Order pronounced in the open court.

18. Copies of this order shall be served on both the parties and the proof of service be brought on record by the Registry.

[2016] 54 DSTC 123 – (Delhi)

IN THE SUPREME COURT OF INDIA
Civil Appellate Jurisdiction
[Justice Amitava Roy And Justice Dipak Misra]

Civil Appeal Nos.10955-10971 OF 2016
(Arising Out Of S.L.P.(C) Nos.28309-28325/2013)

Southern Motors ... Appellant

Versus

State of Karnataka & Others ... Respondent

with

Civil Appeal Nos. 10972-10978 of 2016
(Arising out of SLP (C) Nos. 27752-27758 of 2014)

Date of Order: 18.01.2017

SPECIAL LEAVE PETITION – TRADE DISCOUNT – POST SALE DISCOUNT THROUGH CREDIT NOTES – DEFINITION OF TURNOVER U/S 2(34) OF KARNATAKA VALUE ADDED TAX ACT, 2003 – RULE 3(2)(C) OF KARNATAKA VALUE ADDED TAX RULES, 2005 – WHETHER RECOGNIZING ONLY DISCOUNTS MENTIONED IN THE TAX INVOICES AS ELIGIBLE FOR DEDUCTION FROM TOTAL TURNOVER – HELD NO. – THE DISCOUNT IN THE TAX INVOICE OR BILL OF SALE TO QUALIFY IT FOR DEDUCTION HAS TO BE CONSTRUED IN RELATION TO THE TRANSACTION RESULTING IN THE FINAL SALE/PURCHASE PRICE AND NOT LIMITED TO THE ORIGINAL SALE SANS THE TRADE DISCOUNT – HOWEVER, THE TRANSACTIONS ALLOWING DISCOUNT HAVE TO BE PROVED ON THE BASIS OF CONTEMPORANEOUS RECORDS AND THE FINAL SALE PRICE AFTER DEDUCTING THE TRADE DISCOUNT MUST MANDATORILY BE REFLECTED IN THE ACCOUNTS AS STIPULATED UNDER RULE 3(2)(C) OF THE RULES.

Facts of the Case

The appellant was a dealer in the motor vehicles and registered under the Act. Its version was that during the years in question i.e. 2007-2008 and 2008-2009, it raised tax invoices on the purchasers as per the policy of manufacturers of vehicles to maintain uniformity in the price thereof. After the sales were completed, credit notes were issued to the customers granting discounts, in order to meet the competition in the market and for allied reasons. Consequentially, it received/retained only the net amount, that was the amount shown in the invoice less the sum of discount disclosed in the credit note. Accordingly, the net amount, so received was reflected in his books of account and returns were filed under Income Tax Act, 1961.

The Assistant Commissioner of Commercial Taxes, (Audit-1.6), VAT Division No.1-1, Gandhi Nagar, Bangalore i.e. the respondent No.3, as the Assessing Authority by his reassessment orders dated 21.06.2010 allowed deductions claimed by the appellant towards discount accorded by the credit notes from the total turnover to quantify the taxable turnover. Subsequent thereto, in the face of the decision of the High Court in State of Karnataka vs. M/s Kitchen Appliances India Ltd., 2011 (71) Karnataka Law Journal 234, recognizing only discounts mentioned in the tax invoices as eligible for deduction from the total turnover in terms of Rule 3(2)(c) of the Rules, the Assessing Authority passed the rectification orders dated 21.05.2012 under Section 41(1) of the Act, disallowing the deduction of post sale discounts earlier awarded by the corresponding credit notes. The appellant having unsuccessfully challenged these rectification orders before the High Court, in both the tiers, had invoked this Court's jurisdiction under Article 136 of the Constitution of India for redress. The above facts pertain to the Civil Appeal Nos. 10955-10971 of 2016.

The Civil Appeal 10971-10978 of 2016, with Samsung India Electronics Ltd. as the appellant, also presented the same debate. The appellant, the assessee was as well a registered dealer under the Act and engaged in the business of electronic goods and I.T. products. Though the assessment for the tax period April, 2006 to October, 2006 was concluded by the Deputy Commissioner of Commercial Taxes (Audit-4) LDU, Bangalore on 29.01.2007, the Assessing Authority disallowed the claim of deduction towards discounts on the ground that the same were not revealed at the time of issuance of tax invoices, though credit notes were issued at the end of the month concerned. The appeals filed by the appellant- assessee before the Commissioner of Commercial Taxes (Appeals), DVO–I & III, Bangalore though came to be dismissed, it succeeded before the jurisdictional Tribunal, where after the Revenue took the challenge to the High Court. By the decision impugned herein, the High Court relying on its earlier decision in M/s Southern Motors vs. State of Karnataka and Ors. rendered in Writ Appeal Nos. 5769-5785 of 2012 reiterated its view that once the sale invoice was issued and the sale price was collected along with the tax, the aggregate of such sales constituted the total turnover and the tax was payable on the taxable turnover. It took note of the deductions permissible under Rule 3(2) of the Rules to determine the taxable turnover and held that though the amounts allowed as discount did constitute permissible deduction to compute the eventual taxable turnover, such discount was to be necessarily reflected in the sale invoice to qualify for such deduction. It thus concluded that by issuing a credit note after receiving the amounts even before the filing of the returns, it could not be construed that the discounts were not includible in the turnover. The claim of deduction of the discount extended through credit notes after the completion of the sale but

not divulged in the tax invoice was negated. As the above rendition was founded on the verdict under scrutiny in the previous batch of appeals where M/s Southern Motors figures as the appellant, and the issue sought adjudication was common, all these appeals with the afore noted marginal factual variations had been analogously heard.

Held

It would, in any case be incomprehensible that the legislature, while occasioning the amendment to the first proviso to Rule 3(2)(c) of the Rules, was either ignorant or unaware of the prevalent practice of offering trade discount in the contemporary commercial dispensations. This was more so, as trade discount continued to be an accepted item of deduction. In such a premise, the intention of the legislature could not have been to deny the benefit of deduction of trade discount by obdurately insisting on the reflection of such trade discount in the text invoice or the bill of sale at the point of the sale as the only device to guard against possible avoidance of tax under the cloak thereof. Axiomatically, therefore the interpretation to be extended to the proviso involved had to be essentially in accord with the legislative intention to sustain realistically the benefit of trade discount as envisaged. Any exposition to probabilise exaction of the levy in excess of the due, being impermissible could not be thus a conceivable entailment of any law on imperative impost. To insist on the quantification of trade discount for deduction at the time of sale itself, by incorporating the same in the tax invoice/bill of sale, would be to demand the impossible for all practical purposes and thus would be ill-logical, irrational and absurd. To reiterate, trade discount though an admitted phenomenon in commerce, the computation thereof may depend on various factors singular to the parties as well as by way of uniform norms in business not necessarily enforceable or implementable at the time of the original sale. To deny the benefit of deduction only on the ground of omission to reflect the trade discount though actually granted in future, in the tax invoice/bill of sale at the time of the original transaction would be to ignore the contemporaneous actuality and be unrealistic, unfair, unjust and deprivatory. This may herald as well the possible unauthorised taxation even in the face of cotaneous accounts kept in ordinary course of business, attesting the grant of such trade discount and adjustment thereof against the price. While, devious manipulations in trade discount to avoid tax in a given fact situation was not an impossibility, such avoidance could be effectively prevented by insisting on the proof of such discount, if granted. The interpretation to the contrary, as sought to be assigned by the Revenue to the first proviso to Rule 3 (2) (c) of the Rules, when tested on the measure of the judicial postulations adumbrated hereinabove, thus did not commend for acceptance.

On an overall review of the scheme of the Act and the Rules and the underlying objectives in particular of Sections 29 and 30 of the Act and Rule 3 of the Rules, the Court was of the considered opinion that the requirement of reference of the discount in the tax invoice or bill of sale to qualify it for deduction had to be construed in relation to the transaction resulting in the final sale/purchase price and not limited to the original sale sans the trade discount. However, the transactions allowing discount have to be proved on the basis of contemporaneous records and the final sale price after deducting the trade discount must mandatorily be reflected in the accounts as stipulated under Rule 3(2)(c) of the Rules. The sale/ purchase price had to be adjudged on a combined consideration of the tax invoice or bill of sale as the case may be along with the accounts reflecting the trade discount and the actual price paid. The first proviso has thus to be so read down, as above, to be in consonance with the true intendment of the legislature and to achieve as well the avowed objective of correct determination of the taxable turnover. The contrary interpretation accorded by the High Court being in defiance of logic and the established axioms of interpretation of statutes was thus unacceptable and was negated. The appeals were thus allowed in the above terms.

Present for Appellant	:	Dhruv Mehta & Tarun Gulati, Advocate
Present for Respondent	:	K.N. Bhatt, Advocate

Cases Referred to:

1. *Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes), Ernakulam vs. M/s. Advani Oorlikon (P) Ltd.(1980) 1 SCC 360,*
2. *IFB Industries Ltd. vs. State of Kerala (2012) 4 SCC 618,*
3. *Commissioner of Central Excise, Madras vs. M/s. Addison & Co. Ltd. (2016) 10 SCC 56,*
4. *Union of India and others vs. Bombay Tyres International (P) Ltd. (2005) 3 SCC 787.*

JUDGMENT

Amitava Roy, J.

The instant adjudicative pursuit is to disinter the statutory intendment lodged in Rule 3(2)(c) in particular of the Karnataka Value Added Tax Rules, 2005 (for short, hereinafter to be referred to as “the Rules”) so as to facilitate the determination of taxable turnover as defined in Section 2(34) of the Karnataka Value Added Tax Act, 2003 (for short, hereinafter to be referred to as “the Act”) in interface with Section 30 of the Act and Rule 31 of the Rules.

2. We have heard Mr. Dhruv Mehta, learned senior counsel for the appellant in Civil Appeal Nos. 10955-10971 of 2016, Mr. Tarun Gulati, learned counsel for the appellant in Civil Appeal Nos. 10972-10978 of 2016 and Mr. K.N. Bhat, learned senior counsel for the respondent-State.

3. The foundational facts, albeit not in dispute present the required preface. The appellant is a dealer in the motor vehicles and registered under the Act. Its version is that during the years in question i.e. 2007-2008 and 2008-2009, it raised tax invoices on the purchasers as per the policy of manufacturers of vehicles to maintain uniformity in the price thereof. After the sales were completed, credit notes were issued to the customers granting discounts, in order to meet the competition in the market and for allied reasons. Consequentially, it received/retained only the net amount, that is the amount shown in the invoice less the sum of discount disclosed in the credit note. Accordingly, the net amount, so received was reflected in his books of account and returns were filed under Income Tax Act, 1961 et al.

4. The Assistant Commissioner of Commercial Taxes, (Audit-1.6), VAT Division No.1-1, Gandhi Nagar, Bangalore i.e. the respondent No.3, as the Assessing Authority by his reassessment orders dated 21.06.2010 allowed deductions claimed by the appellant towards discount accorded by the credit notes from the total turnover to quantify the taxable turnover. Subsequent thereto, in the face of the decision of the High Court in *State of Karnataka vs. M/s Kitchen Appliances India Ltd., 2011 (71) Karnataka Law Journal 234*, recognizing only discounts mentioned in the tax invoices as eligible for deduction from the total turnover in terms of Rule 3(2)(c) of the Rules, the Assessing Authority passed the rectification orders dated 21.05.2012 under Section 41(1) of the Act, disallowing the deduction of post sale discounts earlier awarded by the corresponding credit notes. The appellant having unsuccessfully challenged these rectification orders before the High Court, in both the tiers, has invoked this Court's jurisdiction under Article 136 of the Constitution of India for redress. The above facts pertain to the Civil Appeal Nos. 10955-10971 of 2016.

5. The Civil Appeal 10971-10978 of 2016, with Samsung India Electronics Ltd. as the appellant, also present the same debate. The appellant, the assessee is as well a registered dealer under the Act and engaged in the business of electronic goods and I.T. products. Though the assessment for the tax period April, 2006 to October, 2006 was concluded by the Deputy Commissioner of Commercial Taxes (Audit-4) LDU, Bangalore on 29.01.2007, the Assessing Authority disallowed the claim of deduction towards discounts on the ground that the same were not revealed at the time

of issuance of tax invoices, though credit notes were issued at the end of the month concerned. The appeals filed by the appellant- assessee before the Commissioner of Commercial Taxes (Appeals), DVO–I & III, Bangalore though came to be dismissed, it succeeded before the jurisdictional Tribunal, whereafter the Revenue took the challenge to the High Court. By the decision impugned herein, the High Court relying on its earlier decision in *M/s Southern Motors vs. State of Karnataka and Ors.* rendered in Writ Appeal Nos. 5769-5785 of 2012 reiterated its view that once the sale invoice was issued and the sale price was collected along with the tax, the aggregate of such sales constituted the total turnover and the tax was payable on the taxable turnover. It took note of the deductions permissible under Rule 3(2) of the Rules to determine the taxable turnover and held that though the amounts allowed as discount did constitute permissible deduction to compute the eventual taxable turnover, such discount was to be necessarily reflected in the sale invoice to qualify for such deduction. It thus concluded that by issuing a credit note after receiving the amounts even before the filing of the returns, it could not be construed that the discounts were not includible in the turnover. The claim of deduction of the discount extended through credit notes after the completion of the sale but not divulged in the tax invoice was negated. As the above rendition was founded on the verdict under scrutiny in the previous batch of appeals where M/s Southern Motors figures as the appellant, and the issue seeking adjudication is common, all these appeals with the aforenoted marginal factual variations have been analogously heard. 6. As the dissension stems from contrasting interpretations of the underlying purport of Rule 3(2)(c) of the Rules in the context of the scheme of the Act as a whole and Section 30 thereof and Rule 31 of the Rules in particular, further reference to the factual details would be inessential.

7. The emphatic insistence on behalf of the appellant is that the combined reading of Section 30 and Rule 31 demonstrates in clear terms that the assesses are entitled to claim deduction of the discount allowed to their customers by credit notes, from the total turnover to quantify their taxable turnover. The learned counsel have urged that as some discounts, especially those linked to targets to be achieved in a particular period are not comprehendable at the time of sale, these logically cannot be reflected in the tax invoices. They have maintained that such discounts actualize through credit notes at the end of the prescribed period for which the target is fixed and are thus governed by Section 30 of the Act and Rule 31 of the Rules. They have asserted that in no view of the matter, Rule 3(2)(c) can be conceded a primacy to curtail or abrogate Section 30 or Rule 31 of the Rules, lest the latter provisions are rendered otiose. Such an explication would also be extinctive of the concept of the well ingrained concept of turnover/trade discount which is indefensible.

8. Referring to the definition of "total turnover" and "taxable turnover" as defined in Sections 2(36) and 2(34) of the Act, it has been urged that as the discount allowed by the credit notes is not payable to the assessee by the customers and does not form a part of the sale consideration, it is not exigible under the Act. According to the learned counsel, it is no longer res integra that trade discount is not a constituent of the sale price and therefore not taxable. It has been insistently pleaded that a post sale discount through credit notes is revenue neutral in terms of Section 30(3) of the Act, as a consequence whereof the selling and the purchasing dealers accordingly remodel their returns and pay tax as due. In endorsement of the above contentions, the following decisions have been relied upon:

1. Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes), Ernakulam vs. M/s. Advani Oorlikon (P) Ltd.(1980) 1 SCC 360,

2. IFB Industries Ltd. vs. State of Kerala (2012) 4 SCC 618,

3. Commissioner of Central Excise, Madras vs. M/s. Addison & Co. Ltd. (2016) 10 SCC 56,

4. Union of India and others vs. Bombay Tyres International (P) Ltd. (2005) 3 SCC 787.

9. In refutation, the the learned counsel for the respondents, has argued that a discount to qualify for deduction to compute the total and eventual taxable turnover, as contemplated in Rule 3(2)(c) of the Rules has to be essentially reflected in the tax invoice or the bill of sale issued in respect of the sales. According to them, Section 30 and Rule 31 deal with a situation where after a tax invoice is issued, it transpires that the tax charged has either exceeded or has fallen short of the tax payable for which a credit/debit note, as the case may be, would be issued. As these two provisions do not regulate the computation of a taxable turnover, there is no correlation thereof with Rule 3(2)(c) of the Rules which has been assigned an independent role to determine the tax liability. In absence of any specific provision in the parent statute granting tax exemption based on deduction founded on post sale trade discount, Section 30 and Rule 31 are of no avail to the assesses, he urged. It is maintained that in any view of the matter, a taxing statute has to be construed strictly and any exemption is permissible only if the legislation permits the same. Reliance in buttressal of the above has been placed on the decisions of this Court in *A.V. Fernandez vs. The State of Kerala 1957 SCR 837, IFB Industries Ltd. vs. State of Kerala (2012) 4 SCC 618* and *Jayam & Co. vs. Assistant Commissioner and Another (2016) 8 SCALE 70*.

10. As the gravamen of the discord has its roots in the interplay of Sections 29 and 30 of the Act with Rule 3(2)(c) in particular, apposite it would be to refer to the same as well as the accompanying provisions as are construed indispensable.

11. The Act is a legislation, as its preamble suggests to provide for further levy of tax on the purchase or sale of goods in the State of Karnataka. It defines amongst others "dealer" "tax invoice" "taxable turnover" "total turnover" and "turnover" as contained in Sections 2(12), 2(32), 2(34), 2(35), 2(36). For immediate reference the relevant excerpts of these expressions are set out hereunder:

> "2(12) 'Dealer' means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration, and includes-.....
>
> 2(32) 'Tax invoice' means a document specified under Section 29 listing goods sold with price, quantity and other information as prescribed;
>
> 2(34) 'Taxable turnover' means the turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed, but shall not include the turnover of purchase or sale in the course of interstate trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India and the value of goods transferred or dispatched outside the State otherwise than by way of sale.
>
> 2(35) 'Total turnover' means the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax, including the turnover of purchase or sale in the course of interstate trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India and the value of goods transferred or despatched outside the State otherwise than by way of sale.
>
> 2(36) 'Turnover' means the aggregate amount for which goods are sold or distributed or delivered or otherwise disposed of in any of the ways referred to in clause (29) by a dealer, either directly or through another, on his own account or on account of others, whether for

cash or for deferred payment or other valuable consideration, and includes the aggregate amount for which goods are purchased from a person not registered under the Act and the value of goods transferred or despatched outside the State otherwise than by way of sale, and subject to such conditions and restrictions as may be prescribed the amount for which goods are sold shall include any sums charged for anything done by the dealer in respect of the goods sold at the time of or before the delivery thereof.

Explanation.- The value of the goods transferred or despatched outside the State otherwise than by way of sale, shall be the amount for which the goods are ordinarily sold by the dealer or the prevailing market price of such goods where the dealer does not ordinarily sell the goods."

12. Section 3 is the charging provision and the modes of fixation of rate and measure of tax exigible under the statute are enumerated in Section 4. Having regard to the exigency of the adjudication, appropriate it would be to extract Sections 29 and 30 of the Act as hereunder:

"29. Tax invoices and bills of sale

(1) A registered dealer effecting a sale of taxable goods or exempt goods along with any taxable goods, in excess of the prescribed value, shall issue at the time of the sale, a tax invoice marked as original for the sale, containing the particulars prescribed, and shall retain a copy thereof.

(2) A tax invoice marked as original shall not be issued to any registered dealer in circumstances other than those specified in sub-section (1), and in a case of loss of the original, a duplicate may be issued where such registered dealer so requests.

(3) A registered dealer,-

(a) selling non-taxable goods; or

(b) opting to pay tax by way of composition under section 15 and selling any goods; or

(c) permitted to pay tax under section 16 and selling any goods, in excess of the prescribed value, shall issue a bill of sale containing such particulars as may be prescribed.

(4) Notwithstanding anything contained in sub-section (1) or (3) or sub-section (1) of Section 7, a registered dealer executing civil works contracts shall issue a tax invoice or bill of sale at such time and containing such particulars as may be prescribed

30. Credit and Debit Notes

(1) Where a tax invoice has been issued for any sale of goods and within six months from the date of such sale the amount shown as tax charged in that tax invoice is found to exceed the tax payable in respect of the sale effected, or is not payable on account of goods sold being returned within the prescribed period, the registered dealer effecting the sale shall issue forthwith to the purchaser a credit note containing particulars as prescribed.

(2) Where a tax invoice has been issued for sale of any goods and the tax payable in respect of the sale exceeds the amount shown as tax charged in such tax invoice, the registered dealer making the sale, shall issue to the purchaser a debit note containing particulars as prescribed.

(3) Any registered dealer who receives or issues, credit notes or debit notes shall declare them in his return to be furnished for the tax period in which the credit note is received or debit note is issued and claim reduction in tax or pay tax due thereon.

(4) Any document issued by the registered dealer as required under any other law containing particulars of credit note or debit note as prescribed shall be deemed to be a credit or debit note for the purpose of this Section"

13. Under Section 29, it is incumbent on a registered dealer effecting a sale of taxable goods or goods exempted from tax along with any taxable goods in excess of the prescribed value, to issue at the time of sale, a tax invoice marked as original for the sale and containing the particulars prescribed. Thereunder a registered dealer in the eventualities mentioned therein has to issue a bill of sale containing such particulars as may be prescribed. Section 30 mandates that where such a tax invoice has been issued for any sale of goods and withing six months from the date of such sale, the amount shown as tax charged in that tax invoice is found to exceed the tax payable in respect of the sale effected, or is not payable on account of goods sold being returned within the prescribed period, the registered dealer effecting the sale, would issue forthwith to the purchaser,

a credit note containing the particulars as prescribed. The Section further stipulates that when a tax invoice has been issued for sale of any goods and the tax payable in respect of the sale exceeds the amount shown as tax charged in such tax invoice, the registered dealer making the sale would issue to the purchaser, a debit note containing the particulars as prescribed. It is further ordained that any registered dealer who receives or issues credit notes or debit notes would declare them in his return to be furnished for the tax period in which the credit note is received or debit note is issued and claim reduction in tax or pay tax due thereon. Noticeably, the period of six months for the issuance of the credit note on the eventuality of excess tax being paid is not a factor for the contingency requiring issuance of a debit note.

14. Be that as it may, Rule 3 of the Rules framed under Section 88 of the Act, is lodged under Part II dwelling on "Turnover, Registration and Payment Of Security". This provision in particular deals with the determination of total and taxable turnover and predicates that the taxable turnover would be determined by allowing the deductions from the total turnover as listed in sub-rule (2) thereof. Rule 3(2)(c) of the Rules, indispensable for the present adjudication is quoted hereunder for ready reference:

> "3(2)(c): All amounts allowed as discount: PROVIDED that such discount is allowed in accordance with the regular practice of the dealer or is in accordance with the terms of any contract or agreement entered into in a particular case and the tax invoice or bill of sale issued in respect of the sales relating to such discount shows the amount allowed as discount.
>
> PROVIDED FURTHER that the accounts show that the purchaser has paid only the sum originally charged less discount."

15. A plain reading of this quote would reveal that all amounts allowed as discount would qualify for deduction from the total turnover to ascertain the taxable turnover and thus the extent of exigibility under this statute. The first proviso which occupies the center stage of the debate prescribes that a discount to be eligible for deduction has to be one which is allowed in accordance with the regular practice of the dealer or is in accordance with the terms of any contract or agreement entered into in a particular case and the tax invoice or bill of sale issued in respect of the sales relating to such discount shows the amount allowed as discount. The second proviso enjoins further, that the accounts should show that the purchaser had paid only the sum originally charged less the discount. Whereas the Revenue insists in view of the first proviso in particular, that a discount to

be entitled for deduction to quantify the taxable turnover should essentially be mentioned in the tax invoice or bill of sale issued in respect of the sales and further the purchaser has to reflect in his accounts that he had paid only the sum originally charged less the discount, the appellants contend that having regard to the uniform canons regulating the trade practice, a trade discount though in comprehension at the time of original sale is not always precisely quantifiable at that point of time and is contingent on variable factors to be computed only on the happening of a future event(s). In any case, however as the discount eventually sanctioned is tangible and actual, the literal interpretation sought to be given to the contents of first proviso to Rule 3(2)(c) is expressly illogical and if accepted would lead to absurd results rendering this provision redundant and unworkable.

16. Before embarking on analysis of the competing assertions, expedient it would be to advert to the citations addressed at the Bar.

17. In *A.V. Fernandis (supra)*, a Constitution Bench of this Court while dwelling on the interpretation of the relevant provisions of the United State of Travancore and Cochin General Sales Tax Act, 1125 and the Travancore Cochin General Sales Tax Rules, 1950 framed thereunder ruled that in elucidating a fiscal statute, it is not the spirit thereof but the letter of law that has to be looked into and that if a particular tax cannot be brought within the letter of the law, the subject could not be made liable for the same. That the emphasis has to be to the strict letter of law and not merely on the spirit of the statute or the substance of law was highlighted. In this context, the observations of Lord Russel of Killowen in Inland Revenue Commissioner vs. Duke of Westminister (1936) AC 1 24 was extracted :

> "I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case"

18. The following passage as well from *Partington vs. Attorney General (1869) 4 HL 100, 122* was quoted with approval.

> "As I understand the principle of all fiscal legislation it is this: if the person sought to be taxed, comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to

recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.".

19. In the textual facts, in essence, the claim of the appellant-assessee to avoid deduction of an amount arising out of sales effected beyond the State concerned was negated as the same were not taxable in terms of Section 26 of the Travancore-Cochin General Sales Tax Amendment Act, 1951 in clear terms. Drawing a distinction between the provisions contained in a statute with regard to the exemptions, refund or rebate on one hand and non liability of tax or non imposition of tax on the other, it was enunciated that in the former, the sales or purchases would have to be included in the gross turnover of the dealer because those were prima facie liable to tax and the dealer was only entitled to deductions from the gross turnover so as to arrive at the net turnover on which the tax could be imposed. In the latter case, the sales or the purchases were exempted from taxation altogether. It was thus ruled that as the sales beyond the State, were not liable to tax, those were liable to be excluded from the calculation of the gross turnover as well as the net turnover on which the sales tax could be levied or imposed. The attempt on the part of the appellant-assessee to include the turnover of the sales beyond the State in the gross turnover and thereafter to seek a deduction thereof was thus disapproved.

20. The distinction between "trade discount" and "cash discount" was elaborated upon by this Court in *M/s. Advani Oorlikon (P) Ltd. (supra)*, in re, the question whether for the purpose of computing the turnover assessed to sales tax therein, under the Central Sales Tax Act 1956, the sale price of goods was to be determined by including the amount paid by way of trade discount. The facts as unfolded evinced that the assessee was a private limited company, carrying on business as sole selling agent for certain brand of welding electrodes and for the goods supplied to the retailers, it charged them the catalogue price less the trade discount. The concerned Revenue Authority, for the assessment year in question, refused to allow the deduction and sans thereof, computed the taxable turnover, being of the view that the trade discount was not excludable from the catalogue price. It was contended on behalf of the Revenue that in view of the definition of "sale price" in Section 2(h) of the Central Sales Tax Act which permitted the deduction of sums alleged as cash discount only, the deduction by way of trade discount was not contemplated or permissible.

21. This Court referred to the definition of "sale price" in Section 2(h) of the Act and noted that it was defined to be the amount payable to a dealer as a consideration for the sale of any goods, less any sum allowed as

cash discount, according to the practice normally prevailing in the trade. While observing that cash discount conceptually was distinctly different from a trade discount which was a deduction from the catalogue price of goods allowable by whole-sellers to retailers engaged in the trade, it was exposited that under the Central Sales Tax Act, the sale price which enters into the computation of the turnover is the consideration for which the goods are sold by the assessee. It was held that in a case where trade discount was allowed on the catalogue price, the sale price would be the amount determined after deducting the trade discount. It was ruled that it was immaterial that the definition of "sale price" under Section 2(h) of the Act did not expressly provide for the deduction of trade discount from the sale price. It also held a view that having regard to the nature of a trade discount, there is only one sale price between the dealer and the retailer and that is the price payable by the retailer calculated as the difference between the catalogue price and the trade discount. Significantly it was propounded that, in such a situation, there was only one contract between the parties that is the contract that the goods would be sold by the dealer to the retailer at the aforesaid sale price and that there was no question of two successive agreements between the parties, one providing for the sale of the goods at the catalogue price and the other providing for an allowance by way of trade discount. While recognizing that the sale price remained the stipulated price in the contract between the parties, this Court concluded that the sale price which enters into the computation of the assessee's turnover for the purpose of assessment under the Sales Tax Act would be determined after deducting the trade discount from the catalogue price.

22. The decision in *Jayam and Company (supra)* cited by the Revenue was to underline the postulation that whenever concession is given by a statute, notification etc., the conditions thereof are to be strictly complied with in order to avail the same. Section 19(20) of the Tamil Nadu Value Added Tax Act, 2006, which in clear terms, denied the benefit of Input Tax Credit, where any registered dealer sold goods at a price lesser than the price at which the same had been purchased, was adverted to consolidate this proposition. Noticeably, this provision of the statute involved, which fell for scrutiny, did by unequivocal mandate deny the availment of the income tax credit, in case the registered dealer/assessee had sold goods at a price lesser than the price at which the same had been purchased by him.

23. In *IFB Industries Ltd. (supra)*, this Court was seized with the query as to how far deductions were allowable under Rule 9 (a) of the Kerala General Sales Tax Rules, 1963 for trade discounts. The jurisdictional High Court returned the finding that unless the discount was shown in the invoice evidencing the sale, it would not qualify for such deduction

and further any discount that was given by means of credit note issued subsequent to the sale, in reality was an incentive and not a trade discount eligible for exemption under Rule 9 (a) of the Rules. The appellant was a manufacturer of home appliances having a scheme of trade discount for its dealers under which the latter on achieving a pre set sale target would earn certain discount on the price for which they had purchased the articles from it. As the discount was subject to achieving the sale target, the dealer would naturally be qualified for it in the later part of the Financial years/assessment period i.e. long after the sales had taken place. It was noted that for the sales taking place between the appellant and its dealer after the sale target was achieved, the dealer would get the articles on the discounted price but for the sales that had taken place before the sale target was achieved, the manufacturer would issue credit notes in favour of the dealer. Under the statute involved, in the computation of the turnover as defined, amongst others, any cash or other discount on the price allowed in respect of any sale and any amount refunded in respect of articles returned by the customers, was deductible. Rule 9 (a) provided that in determining the taxable turnover, all amounts allowed as discount, provided such discount was accorded in accordance with the regular practice would stand deducted, if the accounts show that the purchaser had paid only the sum originally charged less the discount. Rule 9(a) therefore did stipulate, as the conditions precedent for deduction of any amount allowed as discount, two prescriptions i.e. the discount had been given in accordance with the regular practice in trade and that the accounts maintained by the purchaser would disclose that it had paid only the sum originally charged less the discount. This Court thus expounded that in absence of any prescript of reference of such discount availed in the sale invoices, the negation of the benefit of deduction of the trade discount in the quantification of the taxable turnover was erroneous. It was held, that there was nothing in Rule 9 (a) to read it in a restrictive manner to mean that the discount in order to eligible for exemption thereunder must be reflected in the invoice itself. While dilating on the notion of “trade discount” to be a deduction from the catalogue price of goods allowed by wholesalers to the retailers engaged in the trade to enable the latter to sell the goods at the catalogue price and yet make a reasonable margin of profit after taking into account his business expense, the following observations of this Court in *Union of India and others vs. Bombay Tyres International (P) Ltd. (2005) 3 SCC 787*, describing “trade discount” and countenancing its deductibility from the sale price were alluded to:

> “(1) **Trade discounts** – Discounts allowed in the trade (by whatever name such discount is described) should be allowed to be deducted from the sale price having regard to the nature of

the goods, if established under agreements or under terms of sale or by established practice, the allowance and the nature of the discount being known at or prior to the removal of the goods. Such trade discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price."

(emphasis supplied)

24. This rendering presumably had been cited on behalf of the respondents in order to underscore that the appellant's claim therein for the deduction of the trade discount had been approved as both the prerequisites stipulated by Rule 9(a) had been complied with. This is to reinforce the plea that the appellant in the case in hand thus by analogy of reasonings can avail the benefit of deduction of trade discount only if the same is reflected in the tax invoice as statutorily prescribed by Rule 3(2)(c) of the Rules.

25. This Court in *M/s Addison and Co. Ltd. (supra)* was chiefly seized with the issue of refund of excise duty under Section 11B of the Central Excise Act, 1944. The respondent, a manufacturer of cutting tools, filed a refund claim which, on being eventually allowed after persuading through the different tiers, culminated in a reference before the High Court of Madras which was also answered in favour of the respondent/assessee. It was held by the High Court that the refund towards deduction of turnover discount could not be denied on the ground that there was no evidence to show who was the ultimate consumer of the product and as to whether the ultimate consumer had borne the burden of duty. The word "buyer" used in Section 12B of the Act, as construed by the High Court did not refer to the ultimate consumer and was confined only to the person who bought the goods from the manufacturer. This Court accepted the postulation in *Union of India and others vs. Bombay Tyre International Ltd. and others (1984) 1 SCC 467* and *Bombay Tyres International (P) Ltd. (supra)* to the extent that discounts allowed in the trade should be permitted to be deducted from the sale price having regard to the nature of the goods, if it established under agreements or in terms of sale or by established practice and that such trade discounts ought not to be disallowed only because those were not payable at the time of each invoice or deducted from the invoice price, but declined the relief of refund to the respondent on the consideration that the burden of duty had meanwhile been passed on to the ultimate buyer. It was explicated that the word "buyer" appearing in Clause (e) to the proviso of Section 11B(2) of the Central Excise Act could not be restricted to the first buyer from the manufacturer. The prevalence of trade discounts was

recognized so much so that deductions on the basis thereof were also approved so as to determine the eventual tax liability.

26. The parties noticeably are not in issue over the prevalence of trade discount contemplated in regular practice and that wherever warranted, the dealing parties in accord therewith do enter into a contract or agreement to apply the same for reduction of the sale/purchase price. Understandably, the taxable turnover is the summation of the actual sale/purchase price exigible to tax under the Act and the Rules. Depending on the eventualities as comprehended in Section 30, credit and debit notes are issued, as a consequence whereof, the tax liability is reduced or enhanced correspondingly and the same is determined on the basis of the declarations made by the assessees in their returns. That there is an inseverable co-relation between the taxable turn over and the tax payable need not be over emphasized. Noticeably, Section 30 dilates on the contingencies witnessing reduction or enhancement of tax liability subsequent to the sale/purchase of goods. The tax liability, to reiterate would be contingent on the sale/purchase price in the eventual sale/purchase price, to be essentially reflected in the return of the assessee. Section 30 axiomatically thus deals only with the incidence of tax and not the spectrum of situations or eventualities bearing on the tax liability. Rule 3(2), in particular lists the array of deductions conditioned on variety of situations as scheduled therein to ascertain the taxable turnover. Allowance of discount is one of the several other permissible deductions contingent on the melange of determinants referred to therein. These deductions, however contribute to the reduction of the total turnover to quantify the taxable turnover and thus the tax liability. It is too trite to state that neither an assessee is liable to pay tax in excess of what is due in law nor is the revenue authorized to exact the same. Any interpretation of Rule 3(2)(c) though an integrant of a fiscal statute has to be in accord, in our estimate unite this fundamental mandatory postulation.

27. It is a matter of common experience that in the present contemporary competitive market, trade discounts not only are dependent on variable factors but also might be strategically not disclosable at the time of the original sale/purchase so as to be coevally reflected in the tax invoice or the bill of sale as the case may be. The actual quantification of the trade discount, depending on the nature of the trade and the related stipulations in any contract with regard thereto, may be deferred till the happening of a contemplated event, so much so that the benefit thereof is extended at a point of time subsequent to that of the original sale/purchase. That by itself, subject to proof of such regular trade practice and the contract/agreement entered into between the parties, would not render the trade

discount otherwise legal and acceptable, either non est or fictitious for evading tax liability. In the above factual premise, the interpretation as sought to be provided by the Revenue would evidently reduce Section 3(2)(c) to a dead letter, ineffective and unworkable and would defeat the objective of permitting deductions from the total turnover on account of trade discount.

28. A trade discount conceptually is a pre sale concurrence, the quantification whereof depends on many many factors in commerce regulating the scale of sale/purchase depending, amongst others on goodwill, quality, marketable skills, discounts, etc. contributing to the ultimate performance to qualify for such discounts. Such trade discounts, to reiterate, have already been recognized by this Court with the emphatic rider that the same ought not to be disallowed only as they are not payable at the time of each invoice or deducted from the invoice price. In our comprehension, Sections 29, 30 and Rule 3 are the constituents of a same scheme to determine the taxable turnover and thus the extent of exigibility. Whereas Sections 29 and 30, to repeat, deal with the issuance of tax invoice and bill of sale to start with and thereafter credit and debit notes to be in accord with the tax actually payable, Rule 3 in a way espouses the exercise of ascertaining the taxable turnover by enumerating the permissible deductions from the total turnover. We are thus of the considered view that there is no repugnance or conflict amongst these three provisions so much so that Rule 3(2)(c) stands out in isolation and is incompatible with either the scheme of the Act or Sections 29 and 30 to be precise. The interplay of these three provisions is directed to ensure correct computation of the taxable turnover for an accurate computation of the tax liability. These provisions therefore for all practical purposes complement each other and are by no means militative in orientation or impact. Perceptionally, if taxable turnover is to be comprised of sale/purchase price, it is beyond one's comprehension as to why the trade discount should be disallowed, subject to the proof thereof, only because it was effectuated subsequent to the original sale but evidenced by contemporaneous documents and reflected in the relevant accounts.

29. This Court in K.P. Varghese vs. Income Tax Officer, Ernakulam and Anr. AIR 1981 SC 1922, while interpreting Section 52 of the Income Tax Act 1961 favoured an interpretation in departure from a strict literal reading thereof. For ready reference, Section 52, as interpreted, is extracted hereinbelow.

> "Section 52 (1) Where the person who acquires a capital asset from an assessee is directly or indirectly connected with the

assessee and the Income-tax Officer has reason to believe that the transfer was effected with the object of avoidance or reduction of the liability of the assessee under Section 45, the full value of the consideration for the transfer shall, with the previous approval of the Inspecting Assistant Commissioner, be taken to be the fair market value of the capital asset on the date of the transfer.

(2) without prejudice to the provisions of Sub-section (1), if in the opinion of the Income-tax Officer the fair market value of a capital asset transferred by an assessee as on the date of the transfer exceeds the full value of the consideration declared by the assessee in respect of the transfer of such capital assets by an amount of not less than fifteen per cent of the value declared, the full value of the consideration for such capital asset shall, with the previous approval of the Inspecting Assistant Commissioner, be taken to be its fair market value on the date of its transfer."

It was proclaimed thus:

"5. Now on these provisions the question arises what is the true interpretation of Section 52, Sub-section (2). The argument of the Revenue was and this argument found favour with the majority Judges of the Full Bench that on a plain natural construction of the language of Section 52, Sub-section (2), the only condition for attracting the applicability of that provision is that the fair market value of the capital asset transferred by the assessee as on the date of the transfer exceeds the full value of the consideration declared by the assessee in respect of the transfer by an amount of not less than 15% of the value so declared. Once the Income-tax Officer is satisfied that this condition exists, he can proceed to invoke the provision in Section 52 Sub-section (2) and take the fair market value of the capital asset transferred by the assessee as on the date of the transfer as representing the full value of the consideration for the transfer of the capital asset and compute the capital gains on that basis. No more is necessary to be proved, contended the Revenue. To introduce any further condition such as understatement of consideration in respect of the transfer would be to read into the statutory provision something which is not there: indeed it would amount to rewriting the section. This argument was based on a strictly literal reading of Section 52 Sub-section (2) but we do not think such a construction can be accepted. It ignores several vital considerations which must always be borne in mind when we are interpreting a statutory provision. The task

of interpretation of a statutory enactment is not a mechanical task. It is more than a mere reading of mathematical formulae because few words possess the precision of mathematical symbols. It is an attempt to discover the intent of the legislature from the language used by it and it must always be remembered that language is at best an imperfect instrument for the expression of human thought and as pointed out by Lord Denning, it would be idle to expect every statutory provision to be "drafted with divine prescience and perfect clarity." We can do no better than repeat the famous words of Judge Learned Hand when he said:

> "….it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning"

We must not adopt a strictly literal interpretation of Section 52 Sub-section (2) but we must construe its language having regard to the object and purpose which the legislature had in view in enacting that provision and in the context of the setting in which it occurs. We cannot ignore the context and the collocation of the provisions in which Section 52 Sub-section (2) appears, because, as pointed out by Judge Learned Hand in most felicitous language:-

> "….the meaning of a sentence may be more than that of the separate words as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create"

Keeping these observations in mind we may now approach the construction of Section 52 Sub-section (2).

6. The primary objection against the literal construction of Section 52 Sub-section (2) is that it leads to manifestly unreasonable and absurd consequences. It is true that the consequences of a suggested construction cannot alter the meaning of a statutory provision but they can certainly help to fix its meaning. It is a well

recognised rule of construction that a statutory provision must be so construed, if possible that absurdity and mischief may be avoided. There are many situations where the construction suggested on behalf of the Revenue would lead to a wholly unreasonable result which could never have been intended by the legislature. Take, for example, a case where A agrees to sell his property to B for a certain price and before the sale is completed pursuant to the agreement and it is quite well-known that sometimes the competition of the sale may take place even a couple of years after the date of the agreement-the market price shoots up with the result that the market price prevailing on the date of the sale exceeds the agreed price at which the property is sold by more than 15% of such agreed price. This is not at all an uncommon case in an economy of rising prices and in fact we would find in a large number of cases where the sale is completed more than a year or two after the date of the agreement that the market price prevailing on the date of the sale is very much more than the price at which the property is sold under the agreement. Can it be contended with any degree of fairness and justice that in such cases, where there is clearly no understatement of consideration in respect of the transfer and the transaction is perfectly honest and bonafide and, in fact, in fulfillment of a contractual obligation, the assessee who has sold the property should be liable to pay tax on capital gains which have not accrued or arisen to him. It would indeed be most harsh and inequitable to tax the assessee on income which has neither arisen to him nor is received by him, merely because he has carried out the contractual obligation under-taken by him. It is difficult to conceive of any rational reason why the legislature should have thought it fit to impose liability to tax on an assessee who is bound by law to carry out his contractual obligation to sell the property at the agreed price and honestly carries out such contractual obligation. It would indeed be strange if obedience to the law should attract the levy of tax on income which has neither arisen to the assessee nor has been received by him. If we may take another illustration, let us consider a case where A sells his property to B with a stipulation that after some-time which may be a couple of years or more, he shall resell the property to A for the same price could it be contended in such a case that when B transfers the property to A for the same price at which he originally purchased it, he should be liable to pay tax on the basis as if he has received the market value of the property as on the date of resale, if, in the meanwhile, the market price has shot up and exceeds the agreed price by more than 15%. Many other similar

situations can be contemplated where it would be absurd and unreasonable to apply Section 52 Sub-section (2) according to its strict literal construction. We must therefore eschew literalness in the interpretation of Section 52 Sub-section (2) and try to arrive at an interpretation which avoids this absurdity and mischief and makes the provision rational and sensible, unless of course, our hands are tied and we cannot find any escape from the tyranny of the literal interpretation. It is now a well settled rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even 'do some violence' to it, so as to achieve the obvious intention of the legislature and produce a rational construction, Vide: Luke v. Inland Revenue Commissioner [1963] AC 557. The Court may also in such a case read into the statutory provision a condition which, though not expressed, is implicit as constituting the basic assumption underlying the statutory provision. We think that, having regard to this well recognised rule of interpretation, a fair and reasonable construction of Section 52 Sub-section (2) would be to read into it a condition that it would apply only where the consideration for the transfer is under-stated or in other words, the assessee has actually received a larger consideration for the transfer than what is declared in the instrument of transfer and it would have no application in case of a bonafide transaction where the full value of the consideration for the transfer is correctly declared by the assessee. There are several important considerations which incline us to accept this construction of Section 52 Sub-section (2)."

30. In *Commissioner of Income Tax, Bangalore Vs. J.H. Gotla Yadagiri AIR 1985 SC 1698* this Court propounded that though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than injustice, then such construction should be preferred to the literal construction.

31. In a recent rendition in *State of Jharkhand and others vs. Tata Steel Ltd. and Ors. (2016) 11 SCC 147*, this Court while exploring the underlying intent of a notification pertaining to the period of repayment by the respondents-assessee, which had earlier availed the benefit of deferment of payment of tax under the Jharkhand Value Added Tax Act, 2005 did exhaustively dwell on the golden rule of interpretation based on literal and plain meaning of the words/expressions used in a statute and with approval placed reliance on an earlier decision of this Court in Hansraj Gordhandas

vs. H.H. Dave, Assistant Collector of Central Excise & Customs, Surat and others (1969) 2 SCR 252, in which it was propounded thus:

> "It was contended on behalf of the respondent that the object of granting exemption was to encourage the formation of cooperative societies which not only produced cotton fabrics but which also consisted of members, not only owning but having actually operated not more than four power-looms during the three years immediately preceding their having joined the society. The policy was that instead of each such member operating his looms on his own, he should combine with others by forming a society which, through the cooperative effort should produce cloth. The intention was that the goods produced for which exemption could be claimed must be goods produced on its own behalf by the society. We are unable to accept the contention put forward on behalf of the respondents as correct. On a true construction of the language of the notifications, dated July 31, 1959 and April 30, 1960 it is clear that all that is required for claiming exemption is that the cotton fabrics must be produced on power-looms owned by the cooperative society. There is no further requirement under the two notifications that the cotton fabrics must be produced by the Co-operative Society on the power-looms "for itself". It is well established that in a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notification. If the tax-payer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the notification or by necessary implication therefrom, the matter is different, but that is not the case here."
>
> [Underlining is ours]

32. In the same vein, the following passage from *M/s Doypack Systems Pvt. Ltd. vs. Union of India and Ors. (1988) 2 SCC 299* was adverted to:

> "58. The words in the statute must, prima facie, be given their ordinary meanings. Where the grammatical construction is clear and manifest and without doubt, that construction ought to prevail unless there are some strong and obvious reasons to the contrary. Nothing has been shown to warrant that literal construction should not be given effect to. See Chandavarkar S.R. Rao v. Ashalata (1986) 4 SCC 447 approving 44 Halsbury's Laws of England, 4th

Edn., para 856 at page 552, Nokes v. Doncaster Amalgamated Collieries Limited 1940 AC 1014. It must be emphasised that interpretation must be in consonance with the Directive Principles of State Policy in Article 39 (b) and (c) of the Constitution.

59. It has to be reiterated that the object of interpretation of a statute is to discover the intention of the Parliament as expressed in the Act. The dominant purpose in construing a statute is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. That intention, and therefore the meaning of the statute, is primarily to be sought in the words used in the statute itself, which must, if they are plain and unambiguous, be applied as they stand. …"

33. The following excerpts from *Tata Steel Ltd. (supra),* being of formidable significance are also extracted as hereunder.

24. In this regard, reference to *Mahadeo Prasad Bais (Dead) vs. Income- Tax Officer 'A' Ward, Gorakhpur and another (1991)* 4 SCC 560 would be absolutely seemly. In the said case, it has been held that an interpretation which will result in an anomaly or absurdity should be avoided and where literal construction creates an anomaly, absurdity and discrimination, statute should be liberally construed even slightly straining the language so as to avoid the meaningless anomaly. Emphasis has been laid on the principle that if an interpretation leads to absurdity, it is the duty of the court to avoid the same.

25. In *Oxford University Press v. Commissioner of Income Tax (2001) 3 SCC 359, Mohapatra, J.* has opined that interpretation should serve the intent and purpose of the statutory provision. In that context, the learned Judge has referred to the authority in *State of T.N. v. Kodaikanal Motor Union (P) Ltd. (1986) 3 SCC 91* wherein this Court after referring to *K.P. Varghese v. ITO[(1981) 4 SCC 173 and Luke v. IRC (1964) 54 ITR 692* has observed:-

"The courts must always seek to find out the intention of the legislature. Though the courts must find out the intention of the statute from the language used, but language more often than not is an imperfect instrument of expression of human thought. As Lord Denning said it would be idle to expect every statutory provision to be drafted with divine prescience and perfect clarity. As Judge Learned Hand said, we must not make a fortress out of dictionary but

> remember that statutes must have some purpose or object, whose imaginative discovery is judicial craftsmanship. We need not always cling to literalness and should seek to endeavour to avoid an unjust or absurd result. We should not make a mockery of legislation. To make sense out of an unhappily worded provision, where the purpose is apparent to the judicial eye 'some' violence to language is permissible."

26. Sabharwal, J. (as His Lordship then was) has observed thus:-

> "… It is well-recognised rule of construction that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. It was held that construction suggested on behalf of the Revenue would lead to a wholly unreasonable result which could never have been intended by the legislature. It was said that the literalness in the interpretation of Section 52(2) must be eschewed and the court should try to arrive at an interpretation which avoids the absurdity and the mischief and makes the provision rational, sensible, unless of course, the hands of the court are tied and it cannot find any escape from the tyranny of literal interpretation. It is said that it is now well-settled rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even "do some violence" to it, so as to achieve the obvious intention of the legislature and produce a rational construction. In such a case the court may read into the statutory provision a condition which, though not expressed, is implicit in construing the basic assumption underlying the statutory provision. …"

34. As would be overwhelmingly pellucid from hereinabove, though words in a statute must, to start with, be extended their ordinary meanings, but if the literal construction thereof results in anomaly or absurdity, the courts must seek to find out the underlying intention of the legislature and in the said pursuit, can within permissible limits strain the language so as to avoid such unintended mischief.

35. In *Seaford Court Estates Ltd. vs. Asker [1949] 2 All ER 155* hallowed by time, outlining the duty of the Court to iron out the creases, it was enunciated, that whenever a statute comes up for consideration, it must

be remembered that it is not within human powers to foresee the manifold sets of facts which may arise and even if it were, it is not possible to provide for them in terms free from all ambiguity, the caveat being that the English language is not an instrument of mathematical precision. It was held that in an eventuality where a Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that or have been guilty of some or other ambiguity, he ought to set to work on the constructive task of finding the intention of the Parliament and that he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy and then he must supplement the written word so as to give "force and life" to the intention of the legislature.

36. It would, in any case be incomprehensible that the legislature, while occasioning the amendment to the first proviso to Rule 3(2)(c) of the Rules, was either ignorant or unaware of the prevalent practice of offering trade discount in the contemporary commercial dispensations. This is more so, as trade discount continued to be an accepted item of deduction. In such a premise, the intention of the legislature could not have been to deny the benefit of deduction of trade discount by obdurately insisting on the reflection of such trade discount in the text invoice or the bill of sale at the point of the sale as the only device to guard against possible avoidance of tax under the cloak thereof. Axiomatically, therefor the interpretation to be extended to the proviso involved has to be essentially in accord with the legislative intention to sustain realistically the benefit of trade discount as envisaged. Any exposition to probabilise exaction of the levy in excess of the due, being impermissible cannot be thus a conceivable entailment of any law on imperative impost. To insist on the quantification of trade discount for deduction at the time of sale itself, by incorporating the same in the tax invoice/bill of sale, would be to demand the impossible for all practical purposes and thus would be ill-logical, irrational and absurd. To reiterate, trade discount though an admitted phenomenon in commerce, the computation thereof may depend on various factors singular to the parties as well as by way of uniform norms in business not necessarily enforceable or implementable at the time of the original sale. To deny the benefit of deduction only on the ground of omission to reflect the trade discount though actually granted in future, in the tax invoice/bill of sale at the time of the original transaction would be to ignore the contemporaneous actuality and be unrealistic, unfair, unjust and deprivatory. This may herald as well the possible unauthorised taxation even in the face of cotaneous accounts kept in ordinary course of business, attesting the grant of such trade discount and adjustment thereof against the price. While, devious

manipulations in trade discount to avoid tax in a given fact situation is not an impossibility, such avoidance can be effectively prevented by insisting on the proof of such discount, if granted. The interpretation to the contrary, as sought to be assigned by the Revenue to the first proviso to Rule 3 (2) (c) of the Rules, when tested on the measure of the judicial postulations adumbrated hereinabove, thus does not commend for acceptance.

37. On an overall review of the scheme of the Act and the Rules and the underlying objectives in particular of Sections 29 and 30 of the Act and Rule 3 of the Rules, we are of the considered opinion that the requirement of reference of the discount in the tax invoice or bill of sale to qualify it for deduction has to be construed in relation to the transaction resulting in the final sale/purchase price and not limited to the original sale sans the trade discount. However, the transactions allowing discount have to be proved on the basis of contemporaneous records and the final sale price after deducting the trade discount must mandatorily be reflected in the accounts as stipulated under Rule 3(2)(c) of the Rules. The sale/purchase price has to be adjudged on a combined consideration of the tax invoice or bill of sale as the case may be along with the accounts reflecting the trade discount and the actual price paid. The first proviso has thus to be so read down, as above, to be in consonance with the true intendment of the legislature and to achieve as well the avowed objective of correct determination of the taxable turnover. The contrary interpretation accorded by the High Court being in defiance of logic and the established axioms of interpretation of statutes is thus unacceptable and is negated. The appeals are thus allowed in the above terms. No costs.

[2016] 54 DSTC 149 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Hon'ble Mr. Justice S. Ravindra Bhat Hon'ble Mr. Justice Najmi Waziri]

W.P.(C) 10701/2016
Reserved on: 17.12.2016 (1 to 87)
19.12.2017 (88 to 95)
11.01.2017 (96 to 102)
17.01.2017 (103 to 110)
Pronounced on: 19.01.2017

Vizien Organics & Anr. ... Petitioners

Versus

Commissioner Of Trade & Taxes & Anr. ... Respondents

Date of Order: 19.01.2017

REFUND UNDER DELHI VALUE ADDED TAX ACT, 2004 – REQUIREMENT OF CENTRAL FORMS FOR PROCESSING OF REFUND – RULE 4 OF CENTRAL SALES TAX (DELHI) RULES, 2005 – PAYMENT OF INTEREST.

WHETHER TIME LAID DOWN UNDER SECTION 38(7) TO BE EXCLUDED FOR THE PURPOSE OF CALCULATING THE TIME LAID DOWN UNDER SECTION 38(3) – HELD – NO.

WHETHER RULE 4 OF CENTRAL SALES TAX (DELHI) RULES, 2005 IS RELEVANT FOR THE PURPOSE OF GRANT OF REFUND ARISING DUE TO MAKING CENTRAL SALES - HELD - YES.

WHETHER CARVING OUT DIFFERENT SITUATIONS FOR THE PURPOSE OF CALCULATION OF INTEREST ON REFUND DUE UNDER DVAT ACT IS JUSTIFIED - HELD - YES.

REVENUE ARGUED BEFORE THE COURT THAT THE RATIO IN SWARAN DARSHAN IMPEX WAS NOT APPLICABLE DUE TO AMENDMENT TAKEN PLACE IN 2012 AND PRIME PAPERS & PACKERS CASE DID NOT CONSIDER THE IMPACT OF THE SAID AMENDMENT AND OTHER RELEVANT PROVISIONS OF CENTRAL ACT AND RULES – PETITIONERS ARGUED THAT REVENUE CONTENTIONS WITH REGARD TO THE TIME FRAMED UNDER SECTION 38(3) BEING SUSPENDED AS IT WAS WHEREVER PETITIONERS DID NOT FURNISH FORMS WAS MISPLACED. PETITIONERS FURTHER ARGUED THAT THE LEGISLATURE IN ITS WISDOM DID NOT SUBORDINATE THE PROVISION FOR REFUND UNDER SECTION 38(3) TO THE REQUIREMENT OF FORMS UNDER SECTION 38(7)(D) AND CONSEQUENTLY THE TIMELINE WITHIN WHICH THE REFUNDS HAD TO BE PROCESSED UNDER SECTION 38(3) REMAINED UNCHANGED – THE COURT HELD THAT FURNISHING OF STATUTORY FORMS UNDER CENTRAL SALES TAX ACT, 1956 WERE NOT MANDATORY FOR PROCESSING OF REFUNDS – THE COURT CLARIFIED ABOUT THE PERIOD COMMENCEMENT OF INTEREST – DURING THE PROCESSING OF REFUND CLAIMED IF THE PETITIONERS WERE CALLED UPON TO FURNISH PARTICULARS RELATING TO ANY INTERSTATE TRANSACTIONS FOR THE PURPOSE OF VERIFICATION OF CENTRAL FORMS THAT TIME WOULD STAND EXCLUDED – FURTHER CLARIFIED THAT ONLY SUCH TIME AS WAS CONSUMED BY THE PETITIONERS BEYOND THE PERIOD GIVEN IN THE NOTICE IN REGARD TO DETAILS OF SPECIFIC TRANSACTIONS WOULD BE EXCLUDED - THE WRIT PETITIONS ALLOWED.

Facts of the Case

The present batch of writ petitions sought reliefs that had a familiar ring about them: Delhi Value Added Tax (DVAT) excess amount refunds. All the petitioners sought directions that their refund claims, pending for long periods, should be processed and monies disbursed in a time-bound manner; the revenue's contentions, in all these cases, was that the obligation to processed refund claims and to pay interest would arise,

only after all the necessary details - including Central Sales Tax (CST) documents were furnished; it also argued that after introduction of Section 38 (7) (d) - to the DVAT Act, in 2012, the assessee/dealers' refund claims could not be said to be completed in case any amounts were due and owing under the CST regime. Two earlier decisions of this court, i.e. Swarn Darshan Impex (P) Ltd v Commissioner, Value Added Tax (2010) 31 VST 475 (Del) and Prime Papers & Packers vs Commissioner of VAT & Anr. (2016) 94 VST 347(Delhi) had elaborately considered the relevant provisions and given rulings about the obligatory nature of the time limit within which refund claims had to be processed. The respondent/revenue, i.e. the DVAT department, however, urged that the ratio in Swarn Darshan Impex was not applicable any longer, due to the amendment in 2012 and that Prime Papers & Packers did not properly considered the impact of the said amendment and other relevant provisions of the CST and Rules. Therefore, these petitions were heard on the issue of refunds by DVAT authorities and their obligations, in the specific context of the requirement to furnish documents relating to CST provisions.

Held

It was thus evident from the above factual discussion, especially with respect to various notifications and circulars issued by the DVAT Department that even though the amendment to Section 38(7) was made in June 2012, within three weeks, a statutory notification followed by circulars was issued advising all dealers to furnish requisite details online and to not file the original copies of the declarations. The language of Section 38(7)(d) nowhere specified that actual physical or hard copy of the original certificates were required. Moreover, the necessary form, i.e. Form-9 elicits exhaustive details in respect of CST and concessional duties with regard to receipt and pendency of declarations in Form E1, E2, F, H etc. Each of these related to specific quarters for all the previous four years and was to be furnished by the dealers. Such being the case, the Revenue's contention that the mandate of Sections 11(2) of the DVAT Act and Rule 12 of the CST Rules, overriding all other concerns and suspending as it were, the obligation to frame the assessments and process refunds within the time-frame prescribed under Section 38(3) was misplaced and rejected as unacceptable. There was nothing in the language of these provisions compelling the petitioners to provide original certificates in the physical format. Once both the parties agreed that the DVAT mechanism through the provisions of the Act and the Rules would prevail and apply for assessments in regard to both DVAT and CST liabilities and obligations, there was no warrant for the submission that the regime in CST had to be read in a manner different from the one understood in DVAT. Khemka and

India Carbon were authorities for the proposition that although the principles of taxation and the rate of tax were dictated by the Central enactment, the mechanism for adjudication, assessment, recovery, refund etc. and all other related acts were to be found in the local law. So seen, the understanding of the Revenue, which had issued a statutory notification under Section 70 stating that online certificates alone and none others would be entertained effective from 12.07.2012, i.e. after introduction of Section 38(7)(d) and further details that Form 9 itself comprehends four years details- the time for the submission of which was extended repeatedly, undermined and negated the Revenue's arguments.

During the course of hearing, it emerged that with the introduction of online registration regime, in fact papers and documents were not entertained at all and that only in the event of doubts and queries, the concerned assessing authority - VATO / AVATO issued notice to the dealer calling for the necessary specific documents, and verified and returns them. In other words, the revenue did not even provide any longer for the storage and archiving of original documents submitted by the dealers. Another important aspect which could not be lost sight of was that whilst the central statutory forms were intended to enable the dealer concerned to claim concessional duty or exemption, as the case may be, and its verification was an important element, at the same time, the mechanisms evolved by the State (which prevail even for CST assessments etc.) should be pragmatic and simple. What the authorities argued today was contrary to their consistent understanding after the introduction of Section 38(7)(d). With the amendment of Rule 4 of the Central Sales Tax (Delhi) Rules with effect from 05.03.2014 and the introduction of the reconciliation form, which in fact included four years details, the entire argument of the revenue as to the necessity and obligation for furnishing original certificates as a principal condition for processing refund claims, failed.

It was authority for the proposition that whilst circulars were not per se binding and could not override express provisions of law, nevertheless, if they were not inconsistent with law, they bind the statutory authorities. In the present instance, there was no conflict of the kind which the Revenue projects, between the circulars which it issued and pursuant to which dealers furnished online particulars, on the one hand, and Section 38(7) of the DVAT Act or other provisions of the CST Act.

In view of the above discussion, it was held that in all these cases, the ratio in Prime Papers & Packers was good law and did not call for a review. Furthermore, the declaration in Swarn Darshan Impex and Prime Papers & Packers would mean that for the period beyond what was stipulated under

Section 38(3), the Revenue would be under an obligation to pay interest till the point of time the refund claimed was adjudicated and allowed. If, for any reason, during the processing of the refund claim (but after the two month period), the assessee was called upon to furnish particulars relating to any inter-state transactions for the purposes of verification of any of the central forms, that time would stand excluded. It was however, clarified that only such time as was consumed by the dealer beyond the period given in the notice (say 15 days or so) in regard to details of specific transactions would be excluded. In other words, a general notice calling for documents relating to transactions would not do, having regard to the fact that the CST forms were also verifiable online. It was only where the Show Cause Notice specified a particular transaction or transactions in relation to specific quarters and provided the time limits within which the dealer had to furnish details and where such dealer exceeds the time limit would the actual time (taken by the dealer in excess of the time provided) be excluded from the calculation. Thus, if a dealer was issued a notice to provide C-forms for the first quarter of 2012-13 and given 15 days for the purpose, and he did provide those details, which could be verified within 15 days, the time would not be excluded. If on the other hand, the dealer taken additional 15 days, only those 15 days would be excluded for the purpose of calculation of interest.

The Court visualized the following situations in this regard:

(a) If the period of two months is to expire on 31.03.2017, in a given case, and the officer sought explanation on 15.03.2017, which was answered on 15.04.2017, the time after 31.03.2017 would not qualify for interest.

(b) If the period expired on 31.03.2017 and the query or verification was sought through notice on 01.05.2017, which was replied within 15 days (before 14.05.2017), the entire interest after 31.03.2017 was payable. If the query was answered on 30.06.2017, the time taken, i.e. between 01.05.2017 to 30.06.2017 shall be excluded for payment of interest. At the same time, if documents were offered for scrutiny but were in fact not examined, the interest would be payable from the date the documents were offered, not when they were examined. To eliminate abuse on both sides, whenever information was sought it must be specific and related to particular periods, and particular documents; the assessee should, in turn, provide an index of all documents supplied, with particulars and date of submission. The DVAT Department should facilitate the uploading of scanned documents/forms by the dealers, in addition to physical verification.

(c) Once verification of documents was completed, and it was found that they were in order, while calculating interest on refund, the exclusion (of payment of interest) would be only for the period and the amounts relatable to such forms. In other words, interest for other amounts could not be withheld.

Accordingly, a direction was issued to the respondents to process all the pending refund claims of the petitioners in respect of the documents by calling specific details within reasonable time and dispose of the refund claims within four weeks from today. The respondents/DVAT shall ensure that the dealers shall also be entitled to applicable interest in accordance with law up to the date of payment in terms of the above directions. All the writ petitions were allowed in the above terms.

Cases Referred to:

- *Prime Papers & Packers vs Commissioner of VAT & Anr. (2016) 94 VST 347(Delhi)*
- *Swarn Darshan Impex (P) Ltd v Commissioner, Value Added Tax (2010) 31 VST 475 (Del)*
- *Behl Construction [2009] 21 VST 261 (Delhi) : [2009] 162 ECR 110 (Delhi)*

Present for Petitioner : Sh. Ruchir Bhatia, Advocate, in Item Nos.1, 3, 4, 5, 19, 21, 31, 32, 33, 35, 46, 48, 49, 53, 54, 56, 65, 68, 69, 71, 75, 76, 85, 98, 99,103, 104, 105, 110

Sh. Virag Tiwari, Sh. K.J. Bhat and Sh. Nitin Gulati, Advocates, in Item Nos.6, 13, 96.

Sh. Gajanand Kirodiwal and Sh. Saarthak Bansal, Advocates, in Item No.14

Sh. Nitin Gulati, Advocate, in Item Nos.18, 20, 47, 58, 59, 67, 79

Sh. Vasdev Lalwani, Sh. S.C. Jain and Sh. Rohit Gautam, Advocates, in Item No.22,27, 28, 77, 78, 80, 81, 83

Sh. Raj. K. Batra, Sh. Rajesh Jain and Sh. Kapil Chaudhary, Advocates, in Item No.29, 34, 39, 41, 45, 52, 57, 61, 62, 64, 70

Sh. Vineet Bhatia, Sh. Chanderkant and Sh. Saket Grover, Advocates,

in Item No.55, 66, 72, 73, 74 & 92.

Sh. S.K. Khurana, Advocate, in Item No.63

Sh. Biswajeet, Advocate, in Item No.82.

Sh. Vardaan Dhawan, Advocate, in Item No.84

Sh. S.K. Khurana, Advocate, in Item Nos.86, 87.

Present for Respondent: Sh. Gautam Narayan, ASC with
Sh. R.K. Iyer, in Item Nos.1-2, 6, 9, 16, 19, 20, 21, 22, 24, 25, 26, 32, 33, 34, 35, 39, 44, 45, 46, 49, 53, 54, 56, 58, 59, 65, 66, 67, 68, 71

Sh. Satyakam, ASC, GNCTD, in Item Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, , 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22-38, 40-43, 47-48, 50-52, 57, 60-64, 69-70, 72-73, 75-76, 79, 84-85, 87, 96, 98, 99, 101 & 102.

Sh. Anuj Aggarwal, ASC with
Ms. Deboshree Mukherjee, Advocates,
in Item No.3-5, 13-14, 31, 55, 74, 77-78, 80-83, 86, 91 & 93.

Sh. A.K. Babbar, Sh. Surinder Kumar,
Sh. Atul Babbar, Ms. Ruchi Babbar,
Ms. Amita Babbar, Sh. Bharat Tripathi,
Sh. Sushil Gaba, Sh. Bharat Tripathi and
Sh. Promod Kumar Jain, Advocates, in Item Nos. 2, 7-9, 10, 11, 12, 13, 15, 16, 17, 23, 24-26, 30, 36-38, 40, 42-44, 50-51, 60, 97.

Sh. Peeyosh Kalra, ASC with
Sh. Shiva Sharma, Advocate, for VAT Dept.
in Item Nos. 88, 89, 94 & 95, 97, 100.

Sh. Peeyosh Kalra, ASC with
Ms. Sona Babbar, Advocate, in Item No.105, 110

Sh. Gautam Narayan, ASC with
Sh. R.A. Iyer, Advocate, in Item Nos.90 and 92.

Sh. Sumit Kumar Batra, Advocate,
in Item No.100, 101

Sh. Bharat Kumar Tripathi, Advocate,
in Item No.102

Sh. Siddhartha Shankar Ray, Advocate,
in Item No.103.

Sh. Nitin Gulati, Advocate,
in Item No.106.

Sh. Shadan Farasat and Sh. Ahmed Said,
Advocates, in Item No.106.

Sh. S.K. Khurana, Advocate, in Item No.107

Sh. Siddharth Dutta, Advocate,
in Item Nos. 107 and 108.

Sh. A.K. Babbar, Sh. Surendra Kumar,
Sh. Atul Babbar, Sh. Bharat Tripathi and
Ms. Amita Babbar, Advocates, in Item No.108.

Sh. Varun Nishchal, Advocate, in Item No.109.

Mr. Justice S. Ravindra Bhat

1. The present batch of writ petitions seek reliefs that have a familiar ring about them: Delhi Value Added Tax (DVAT) excess amount refunds. All the petitioners seek directions that their refund claims, pending for long periods, should be processed and monies disbursed in a time-bound manner; the revenue's contentions, in all these cases, is that the obligation to process refund claims and to pay interest would arise, only after all the necessary details - including Central Sales Tax (CST) documents are furnished; it also argues that after introduction of Section 38 (7) (d) - to the DVAT Act, in 2012, the assessee/dealers' refund claims cannot be said to be complete in case any amounts are due and owing under the CST regime. Two earlier decisions of this court, i.e. *Swarn Darshan Impex (P) Ltd v Commissioner, Value Added Tax (2010) 31* VST 475 (Del) and *Prime Papers & Packers vs Commissioner of VAT & Anr. (2016) 94* VST 347(Delhi) had elaborately considered the relevant provisions and given rulings about the obligatory nature of the time limit within which refund claims had to be processed. The respondent/revenue, i.e. the DVAT department, however, urges that the ratio in Swarn Darshan Impex (supra) is not applicable any longer, due to the amendment in 2012 and that *Prime Papers & Packers (supra)* did not properly consider the impact of the said amendment and other relevant provisions of the CST and Rules. Therefore, these petitions were heard on the issue of refunds by DVAT authorities and their obligations, in the specific context of the requirement to furnish documents relating to CST provisions.

2. For clarity and understanding, it would be appropriate to notice the relevant provision, which deals with refunds. It is Section 38 of the DVAT Act; it reads as follows:

"38. Refunds

(1) Subject to the other provisions of this section and the rules, the Commissioner shall refund to a person the amount of tax, penalty and interest, if any, paid by such person in excess of the amount due from him.

(2) Before making any refund, the Commissioner shall first apply such excess towards the recovery of any other amount due under this Act, or under the CST Act, 1956 (74 of 1956).

(3) Subject to sub-section (4) and sub-section (5) of this section, any amount remaining after the application referred to in sub-section (2) of this section shall be at the election of the dealer, either -

(a) refunded to the person, -

(i) within one month after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is one month;

(ii) within two months after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is a quarter; or

(b) carried forward to the next tax period as a tax credit in that period.

(4) Where the Commissioner has issued a notice to the person under section 58 of this Act advising him that an audit, investigation or inquiry into his business affairs will be undertaken or sought additional information under section 59 of this Act, the amount shall be carried forward to the next tax period as a tax credit in that period.

(5) The Commissioner may, as a condition of the payment of a refund, demand security from the person pursuant to the powers conferred in section 25 of this Act within fifteen days from the date on which the return was furnished or claim for the refund was made.

(6) The Commissioner shall grant refund within fifteen days from the date the dealer furnishes the security to his satisfaction under Sub-section (5).

(7) For calculating the period prescribed in clause (a) of sub-section (3), the time taken to -

(a) furnish the security under sub-section (5) to the satisfaction of the Commissioner; or````

(b) furnish the additional information sought under section 59; or

(c) furnish returns under section 26 and section 27; or

(d) furnish the declaration or certificate forms as required under Central Sales Tax Act, 1956, shall be excluded.

(8) Notwithstanding anything contained in this section, where -

(a) a registered dealer has sold goods to an unregistered person; and

(b) the price charged for the goods includes an amount of tax payable under this Act;

(c) the dealer is seeking the refund of this amount or to apply this amount under clause (b) of sub-section (3) of this section; no amount shall be refunded to the dealer or may be applied by the dealer under clause (b) of sub-section (3) of this section unless the Commissioner is satisfied that the dealer has refunded the amount to the purchaser.

(9) Where -

(a) a registered dealer has sold goods to another registered dealer; and (b) the price charged for the goods expressly includes an amount of tax payable under this Act, the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section and the Commissioner may reassess the buyer to deny the amount of the corresponding tax credit claimed by such buyer, whether or not the seller refunds the amount to the buyer.

(10) Where a registered dealer sells goods and the price charged for the goods is expressed not to include an amount of tax

payable under this Act the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section without the seller being required to refund an amount to the purchaser. (11) Notwithstanding anything contained to the contrary in Sub-section (3) of this section, no refund shall be allowed to a dealer who has not filed any return due under this Act."

Section 59, which finds reference in Section 38 (7), reads as follows:

"(1) All records, books of accounts, registers and other documents, maintained by a dealer, transporter or operator of a warehouse shall, at all reasonable times, be open to inspection by the Commissioner.

(2) The Commissioner may, for the proper administration of this Act and subject to such conditions as may be prescribed, require –

(a) any dealer; or

(b) any other person, including a banking company, post office, a person who transports goods or holds goods in custody for delivery to, or on behalf of any dealer, who maintains or has in his possession any books of accounts, registers or documents relating to the business of a dealer, and, in the case of a person which is an organisation, any officer thereof; to – (i) produce before him such records, books of account, registers and other documents; (ii) answer such questions; and (iii) prepare and furnish such additional information; relating to his activities or to the activities of any other person as the Commissioner may deem necessary. (3) The Commissioner may require a person referred to in sub-section (2) above, to–

(a) prepare and provide any documents; and

(b) verify the answer to any question; in the manner specified by him.

(4) The Commissioner may retain, remove, take copies or extracts, or cause copies or extracts to be made of the said records, books of account, registers and documents without fee by the person in whose custody the records, books of account, registers and documents are held."

3. The first decision, which grappled with the issue whether the timelines prescribed for refund- under Section 38 (3) were imperative, was Swarn Darshan Impex (supra). The Division Bench's discussion in that judgment is as follows:

> "7. A plain reading of Section 38, which deals with refunds, makes it clear that by virtue of Sub-section (3) thereof, in the case where a person is assessed quarterly, the refund is to be made to the dealer within two months after the date on which the return is furnished or the claim for the refund is made. Of course, it is the dealer's option to elect as to whether the refund is to be made in cash or the said amount is to be carried forward to the next tax period as a tax credit in that period. In the present case, the petitioner has elected for the grant of refunds in cash and has not elected for carrying forward the refund amount to the next tax period. The provisions of Section 38 (3) uses the expression "shall" and, therefore, it is clear that the refund has to be made within two months from the date of the return.
>
> 8. At this point, it would be appropriate to deal with the submission made by Mr. Taneja that the period prescribed in Section 38 (3) as also the period prescribed in Section 38 (5) of the said Act were merely directory and not mandatory….."

The court thereafter discussed the revenue's contention that Section 38 (3) was not mandatory, in the context of its reliance on Section 74 and decisions relating to that provision and held as follows:

> "13. Such a situation does not arise in the present case inasmuch as the provisions of Section 38 do not contemplate a situation where the Commissioner does not grant a refund within the stipulated period. The decision in Behl Construction [2009] 21 VST 261 (Delhi) : [2009] 162 ECR 110 (Delhi) was in the context of the provisions of Section 74 and those circumstances do not arise in the present case. As pointed out above, what this Court has to determine is: what is the legislative intent behind the provisions of Section 38? It is this intent which shall determine whether the stipulations as to time are merely directory or they are mandatory as suggested by the use of the word "shall". On going through all the Sub-sections of Section 38 of the said Act, the legislative intent that is clearly discernible is that refunds must be granted to a person entitled within the specific time period stipulated in Sub-section (3) thereof. This intention is further fortified by a look at the provisions of Sub-section (7) of Section 38 which stipulates that for calculating the

period prescribed in Clause (a) of Sub-section (3), the time taken to furnish the security under Sub-section (5) to the satisfaction of the Commissioner or to furnish the additional information sought under Section 59 or to furnish returns under Sections 26 and 27, "shall be excluded". This provision as to exclusion of time taken in doing the aforesaid acts, is in itself an indication that the Legislature was dead serious about the stipulation as to time for making refunds under Section 38 (3) of the said Act. For, if the legislative intent were not so, what was the need or necessity for providing for exclusion of time? Thus, not only do the provisions of Section 38 employ the word "shall", which is usual in mandatory provisions, the legislative intendment discernible from the said provisions also points towards the mandatory nature of the said provisions. Clearly, subject to the exclusion of time provided under Sub-section (7) of Section 38, in a case falling under Section 38 (3) (a) (ii), the refund has to be made within two months from the date of the return."

4. Another judgment of another Division Bench of this Court in Prime Papers & Packers (supra) revisited the same issue. The discussion and operative portion of the said judgment is as follows:

"10. The understanding of the Department regarding the calculation of the time limit under Section 38(3) of the Act being subject to Section 38(7), as was advanced before this Court, does not appear to be consistent with the legislative intent behind the enactment of Section 38 of the Act. It is a time-bound composite scheme which requires, in the first place, the DT&T to take immediate action upon receiving a return in which a refund is claimed. What Section 38(2) expects the Respondent to determine upon examining the claim of refund is whether there is any amount due from the dealer either under the DVAT Act or the CST Act. Such amount should already be found to be due. This is not an occasion, therefore, for the Department to start creating new demands either under the DVAT Act or the CST Act. In any event, even if the Department seeks to initiate the process for creating any fresh demand, that process cannot defeat the time period under Section 38(3)(a)(i) or (ii) for processing the refund claim.

11. Circular No. 6 of 2005 dated 15th June 2005 issued by the Commissioner VAT is binding on the DT&T. It curtails the time limit within which notices have to be issued, either for audit under Section 58 of the DVAT Act or for seeking information under Section 59 (2) of the DVAT Act, to just 15 days from the date of

filing of the return claiming refund. The recent instructions issued by the Commissioner, VAT on 21st July 2016 regarding speedy disposal of refund claims also emphasises the mandatory nature of the instructions. There is therefore no question of the DT&T, and in particular the VATO concerned, not responding immediately to the refund claim made. Where it is felt that more information should be called for then the notice under Section 59(2) DVAT Act has to necessarily be issued within fifteen days thereafter.

12. In the instant case, the return for the fourth quarter of 2010-11 was filed on 28th April, 2011. Yet, the notice under Section 59 (2) of the DVAT Act was issued only on 10th September 2011, well beyond the 15 day time limit in term of Circular No. 6 of 2005. The return for the first quarter of 2011-12 was filed on 27th July, 2011. The notices under section 59 (2) DVAT Act was issued on 10th September, 2011 again beyond the 15 day time limit. In both instances the notices of default assessments were issued on 14th October, 2011. It is another matter that the Petitioner claims not to have received the above notices under Section 59 (2) DVAT Act and the consequent notices of default assessments. The files produced by Mr. Satyakam contain copies thereof but no proof of the said notices having been uploaded on the website in the Petitioner's account soon after they were issued.

13. In any event, the above notices having been issued beyond the time limits set by the Commissioner VAT for processing of refund claims, there is no valid explanation offered by the DT&T for not processing the refund claims for the said two periods within the time period under Section 38 (3) (a) (ii) of the DVAT Act. As has been explained by this Court in Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax (supra), proceedings initiated by issuing a notice under Section 59(2) of the DVAT would be independent of the requirement of processing and issuing the refund within the time limit under Section 38 of the DVAT Act. It will not be constitute an excuse to postpone the issuing of the refund claimed.

14. Consequently, the Court finds no valid explanation for the failure by the DT&T to process and issue to the Petitioner the refunds for the fourth quarter of 2010-11 and first quarter of 2011-12 within the time frame set out under Section 38 of the DVAT Act.

15. On the question of the Petitioner not uploading the requisite Form 9 under the CST Act till 9th February 2015, learned counsel

for the Petitioner is right in his contention that Section 38 (7) has to be read with Section 38 (3) of the DVAT Act and not in isolation. Section 38 (3) opens with the words "Subject to sub-section (4) and sub-section (5) of this Section" and proceeds to refer to any amount remaining due "after the application referred to in sub-section (2) of this Section". If Section 38(7) is read in the context of Section 38(3) of the Act, it becomes clear that those time limit will have to be calculated in the context of the Commissioner determining that some other amount is due under the DVAT Act or the CST Act against which the refund claimed requires to be adjusted. In the present case, there was nothing found due from the Petitioner whether under the DVAT Act or the CST Act at the time the Petitioner's return for the said periods claiming refund were picked up for scrutiny. Had the DT&T responded promptly as was envisaged, then the Petitioner could have been asked to furnish the information or particulars as envisaged under section 38 (7). If there was a failure by the Petitioner thereafter to provide the information or documents then possibly the question of the time limit under Section 38 (3) being correspondingly postponed might arise.

16. As regards the other periods for which refunds have been claimed, viz., the third and fourth quarters of 2011-12 and the second and fourth quarters of 2012-13 and the fourth quarters of 2013-14 and 2014-15, it is not disputed even by the Respondent, that the claims were not processed within the time limit set out under Section 38 of the DVAT Act. It appears that in relation to the return filed for the second quarter of 2012-13, a notice under Section 59(2) was issued on 25th July, 2016. Clearly, therefore it is way beyond the two months period envisaged under Section 38(3)(a)(ii) within which refund had to be processed and issued.

17. Mr. Satyakam urged the Court to grant the Respondent sufficient time so that entire exercise pursuant to the notices issued under Section 59 of the DVAT could be completed. The Court is not, in these petitions, concerned with the outcome of the proceedings sought to be initiated by the Respondent by issuing notices under Section 59 of the DVAT Act. The issue that is before the Court is the failure of the DT&T to issue refunds within the time limits envisaged under Section 38 of the DVAT Act. These refunds need not and should not await the outcome of those proceedings under Section 59 of the DVAT Act which in any event have been initiated beyond the stipulated time limits. The refunds are long overdue and interest on the refund amounts are mounting.

18. The Court is constrained to observe that there have been a large number of petitions filed in this Court by dealers awaiting the processing of their refund claims. Despite numerous judgments of this Court and circulars issued by the Commissioner VAT, including Circular No. 6 of 2005 and recently the Order dated 21st July 2016, the problem of delayed refunds persists. The frequent transfers of VATOs and the lack of any orientation and training as regards their statutory responsibilities cannot constitute a valid justification for delaying the refunds due to the dealers. The Court would urge the Commissioner VAT to review the issue of grant of refunds on priority basis so that the process is streamlined and his instructions regarding speedy disposal of refunds is strictly followed. He must initiate disciplinary action against those officers of the DT&T who are found disobeying the instructions issued by the Commissioner from time to time in this regard. The Commissioner should undertake a periodic review, at least once in two weeks, as to how many refund applications have been processed and within what time. Responsibility should be fixed on derelict officers and disciplinary proceedings initiated where there is a clear breach of the statutory duties. The collective failure of such officers is imposing a huge interest burden on the exchequer which is clearly avoidable."

Petitioners' contentions

5. The petitioners argue that the DVAT authorities' contentions with regard to the time-frame under Section 38(3) being suspended as it were wherever dealers do not furnish statutory documents, such as C-Forms, F-Forms and H-Forms under the Central Sales Tax Rules, is misplaced. They urge that the DVAT Act was enacted pursuant to Entry 54 of the List 2 to the Seventh Schedule to the Constitution of India whereas CST was enacted in furtherance to the power traceable to Entry 92A of the Union List (List 1) of the Seventh Schedule of the Constitution of India. Both operate in separate fields and are independent of each other. It was contended that applicability of the local or State mechanisms in the adjudication and enforcement of Central Sales Tax liabilities does not in any manner detract from the independent nature of these enactments and their distinct levies. The Central Sales Tax brings to tax inter-State transactions; the State/local Acts such as the VAT prevail only in respect of intra-State sales. Learned counsel rely upon the judgment of this Court reported as Navbharat Enterprises v. Sales Tax Officer 1987 (66) STC 252 (Del) and R.H. Enterprises v. Commissioner Sales Tax 1992 (85) STC 251. It is urged that while adjudicating refund applications under the DVAT Act, recourse to provisions of Central Sales Tax Act and demands made

thereunder are not only inapt, but unwarranted. It is further highlighted that under the Central Sales Tax regime, if some forms are not received by the date of assessment, a very high rate of 15% is charged. Learned counsel emphasized that if the interpretation by the DVAT authorities is accepted, no refund can be issued till receipt of the CST forms and no interest would also be payable by the revenue till such forms are furnished and 15% of such Central Sales Tax would be charged against forms not received, which is completely untenable.

6. It was submitted that inter-State sales are defined under Section 3 of the Central Sales Tax Act whereas sales outside the State are defined in Section 4. Section 5 deals with sales in the course of import of goods and export of goods outside the territory of India. Central Sales Tax Act envisions levy of tax in the course of inter-State trade and commerce under Section 6 whereas Section 8 fixes the rate. Section 8(1) provides for concessional rate of tax subject to the condition that declarations in the prescribed format under Section 8(4) are made. In this context, Sections 13(3) and (4) of the Central Sales Tax Act empower the State Government to frame rules. One such power is under Section 13(4)(e)- framing of rule prescribing authorities from whom and the conditions subject to which and the fee subject to payment of which any form or certificate under first proviso to Section 6(2)(a) or a declaration under Section 6(A)(1) or Section 8(4) may be obtained. Learned counsel submitted that pursuant to this power, Rule 4 of the Central Sales Tax (Delhi) Rules, 2005 prescribe the manner of furnishing the forms which is as follows:

> "in addition to returns required under Rule 3, every dealer shall also furnish to the Commissioner a reconciliation return for a year in form-9 relating to the receipt of declarations/certificates (statutory forms) within a period of 6 months from the end of the year to which it relates. The return shall be filed electronically."

7. It is argued by learned counsel that in view of the above Rule which was brought into force from 05.03.2014, furnishing of declarations in Forms-C, F, J, I etc. is dispensed with and these forms are to be furnished in original if the Commissioner directs the dealer to furnish them during the seven years from the end of the year to which they relate. Learned counsel especially relied upon the proviso to the Rule. Learned counsel also emphasized that under Rule 4(1) instead of a declaration, only a reconciliation return within six months from the end of the concerned year is required. This period for furnishing reconciliation return can be extended by the Commissioner under proviso to Rule 4(3) of the Central Sales Tax (Delhi) Rules, 2005. Learned counsel highlighted that the Commissioner

had been extending the time for furnishing reconciliation return from time to time and rely upon the various extensions granted on 28.11.2014, 09.01.2015, 05.02.2015, 31.03.2015, 31.10.2015, 15.12.2015, 15.01.2016 and 29.02.2016 which continued till 30.09.2016. This meant that the period for furnishing the forms for the year 2012 till date was available to all dealers.

8. Learned counsel next rely upon various circulars issued by the Commissioner DVAT (Circular Nos.6 of 2014-15; 8, 12, 37 and 38 of 2015-16). Each of these emphasize that firstly the concerned VAT officers were under an obligation to adhere to the timelines and that filing of hard copy of the CST forms is no longer essential and thirdly that statutory central forms could be verified from TINXSYS mode for authentication of the claims. It was thus emphasized that the legislature in its wisdom did not subordinate the provision for refund under Section 38 (3) to the requirement of forms under Sections 38(7) (c) and (d) and consequently the timeline within which the refunds had to be processed under Section 38(3) remained unchanged. The petitioners argue that the Revenue's contentions about the timelines being subject to fulfillment of conditions under section 38(7) is misconceived and would result in anomalous consequences. Section 38(3) requires refunds to be made within one month from the date of furnishing of return if tax period is one month and within two months if the tax return is quarterly. As reconciliation returns are to be filed within six months from the end of the year, Section 38(3) would in effect be rendered otiose. It is stated that as a matter of fact, the assessing authorities never picked-up the refund applications within the prescribed time they were allowed and as and when the VAT authorities felt it appropriate, the processing began. In these circumstances, the entire period till which they chose to pick-up the applications - ranging between 6 months to 4-5 years, could not be attributed to the petitioners or dealers. Had such dealers been intimated at the appropriate time, i.e. within the limitation period prescribed under Section 38(3) about any deficiency and they had defaulted, or had consumed some time to file relevant details, only such time could be excluded for the purposes of calculating the interest. Wherever the processing took place after the lapse of the period prescribed under Section 38(3), the question of denying any interest for any period did not arise.

9. Learned counsel relied upon the judgment of the SC in Commissioner Sales Tax v. Indira Industries 122 STC 100 (SC) for the proposition that an interpretation adopted by the taxing authority on the law is binding on it and that it cannot be heard to advance arguments which is contrary to its own understanding. It was stated that such being the case, the consistent trend of circulars issued by the DVAT authorities belie and undermine its

contentions in these proceedings, i.e. that the timelines prescribed under Section 38(3) would not apply where statutory forms and declarations under the Central Sales Tax Act are not furnished by the dealers concerned.

Contentions on behalf of the DVAT authorities

10. Learned counsel for the revenue submit that by virtue of Sections 3 and 7 of the DVAT Act, certain provisions of the CST Act would not apply to determine whether or not a particular taxable sale takes place. These are relevant for the purpose of granting exemptions or deductions from the sales tax by a dealer. Section 11 of the DVAT Act also provides for calculation of net VAT liability for every dealer. Section 11(2) enacts that if the net tax of the dealer calculated under the DVAT Act is negative, then he is to adjust the amount in the same tax period against the tax payable under the CST Act, if any, and be entitled to either carry forward balance or claim refund. The Commissioner is obliged to deal with the refund thereafter in the manner prescribed under Section 38 of the DVAT Act. Learned counsel states that majority of refund claims arising are on account of the CST transactions either at a concessional rate of 2% under Section 3 or at NIL rate under Sections 4, 5 or 6A of the CST Act. In respect of these, various documents such as Forms-C, E1, E2, F, H and I have been prescribed in connection with different kinds of transactions. Form-C relates to inter-State sales for which accounting provisions are Section 8(4) of the CST Act and Rule 12(1) of the Central Sales Tax (Registration and Turnover) Rules. Form-C as well as Forms E-1 and E-2 relate to Section 3 and Section 6(2) read with Rule 12(4). Whereas Form-F relates to the rates and claims under Section 6A read with Rule 12(5) of the Central Sales Tax Rules, Forms-H and I relate to export sales under Section 5(4) read with Rule 12(10) and for sales units under SEZ under relevant sections, i.e. Sections 8(6), 8(8) read with Rule 12(11) respectively. These sales are not taxable under DVAT.

11. Learned counsel argues that the State DVAT authorities are empowered to implement and enforce the provisions of the Central Sales Tax Act; by virtue of Section 11(2) of the DVAT Act. any refund claim has to be dealt with in the manner specified by the State law, which in the present case is Section 38 of the DVAT Act. Placing particular reliance on Section 38(7)(d), learned counsel underlines that this provision has the effect of excluding the time taken in furnishing declarations or certificates or forms mandated under the Central Sales Tax Act, 1956. It is stated that Sections 38(7)(c) and (d) were introduced by way of an amendment to the DVAT Act, 2012. The Statement of Objects and Reasons, in this context, contemplated linkage of the time period under Section 38 for processing refunds with the

filing of statutory forms under the CST Rules. It was, therefore, argued that by virtue of Rule 4 of the Central Sales Tax (Delhi) Rules, every dealer necessarily should furnish reconciliation returns for any year in Form-9 relating to receipt of applications/certificate within six months from the end of the year to which they relate. This document, Form-9 contains details on account of the total Central Sales made under various provisions of the CST Act and total number of statutory forms received against those and value of pending statutory forms against total central sales made. Nevertheless, this form is not in substitution of the original declaration forms, i.e. C, E1, F, H etc, which have to be necessarily provided - in original to the concerned authority. Highlighting this as an important imperative, learned counsel states that the original forms contained the seal and stamp of the issuing authority and it would authenticate the veracity of transactions claims under the Central Sales Tax Act by the dealer. Unless such forms are furnished physically, it is not possible to verify the credentials and authenticity of the refund claims.

12. It is submitted that from a conjoint reading of Section 3(3), Section 7, Section 11(2) and Section 38(3) read with Section 38(7) of DVAT Act, 2004 along with Section 3, Section 4, Section 5, Section 6A and Section 8 of the Central Sales Tax Act, 1956 read with CST (Registration and Turnover) Rules, 1957 and in particular Rule 12, what emerges is that the time limit prescribed under Section 38(3)(a) is subject to the exclusion of time taken by the dealer in furnishing the declaration or certificate forms as required under Central Sales Tax Act, 1956 (which the dealer is obligated under Central Sales Tax Act, 1956 and Central Sales Tax Rules, 1957) by virtue of Section 38(7)(d). Elaborating on this, it is argued that Section 8 (4) of the CST Act provides that the rate of tax (concessional rate of 2%) in Section 8 (1) of the Act is applicable only upon furnishing of the said Declaration(s)/certificate(s) in statutory forms to the prescribed authority within a specified period. In other words, no concession in the rate of the tax shall be applicable to the dealer/s who fail to furnish such prescribed form obtained from prescribed authority. The tenor of other provisions: Section 6 (2), Section 6 (4), Section 6A (1), Section 8 (4) of the CST Act inter alia mandate furnishing of the said declaration(s)/ certificate(s) in the statutory Forms to the prescribed authority within a specified period. Section 5 (4) of the CST Act, also makes the provision under Section 5 (3) conditional inasmuch as the dealer selling the goods is required to furnish to the prescribed authority in the prescribed manner a declaration duly filled and signed by the exporter to whom the goods are sold in a prescribed form obtained from the prescribed authority.

13. Rule 12(1), 12(4) and 12(5) of CST (Registration and Turnover) Rules, 1957 prescribe Form C, D, E-I, E-II and Form F under sub-section

(4) of Section 8, sub-section (2) of Section 6 and sub-section (1) of Section 6A respectively of the CST Act, 1956. The said forms, thus, explicitly provide, among other things, in the very format itself, that the original form of declaration(s)/certificate(s) are to be furnished to the prescribed authority, duplicate is to be retained by the selling dealer, counterfoil to be retained by the purchasing dealer. Rule 12(7) CST (Registration and Turnover) Rules, 1957 reads as follows, *'the declaration in Form-C or Form-F or the certificate in Form E-I or Form E-II shall be furnished to the prescribed authority within 3 months after the end of the period to which the declaration or the certificate relates."* It is submitted that Rule 12(7) of CST (Registration and Turnover) Rules, 1957 inter alia mandates furnishing of the said declaration(s)/certificate(s) in statutory Forms to the prescribed authority within a specified period.

14. Learned counsel relied upon the judgment of this Court in Anand Traders v. Commissioner of Sales Tax 2014 202 ECR 273; Khemka & Co. (Agencies) Pvt. Ltd. v. State of Maharashtra 1975 (35) STC 571 (SC) and India Carbon Ltd. v. State of Assam 1997 106 STC 460 (SC) to say that the State mechanisms are to prevail in respect of levy and collection of Central Sales Tax dues. Thus, when it came to refunds under both Central Sales Tax Act and DVAT, the provisions of Section 38(7)(d) have to prevail. Learned counsel submitted that the so-called understanding of the Department, in the circulars, to the extent it is contrary to law cannot create any enforceable right.

Analysis and findings:

15. The detailed submissions of the parties notwithstanding, the controversy requiring determination in these cases is a narrow one, which is, does Section 38(7)(d) - introduced on 18.06.2012 prevail over, and carve out an exception in respect of the binding period prescribed by Section 38(3) for processing refunds in completed VAT assessments. The interpretation in Swarn Darshan Impex (supra) is not denied. But the Revenue's submission is that the judgment was rendered before introduction of Section 38(7)(d) and that the later judgment in Prime Papers & Packers (supra) did not consider the interface between Sections 8(1) and 8(4) of the CST Act with the obligation to furnish declarations under Rule 12 of the Central Sales Tax Rules, and the refund provisions of Sections 11(2) and 38(3) of the DVAT Act.

16. To recapitulate - both Swarn Darshan Impex (supra) and Prime Papers & Packers (supra) authoritatively ruled that the 1-2 months' period provided for examining and granting refunds is absolute and that the

transgression of these time limits means that the Revenue has to bear interest liability as long as the refund claims are not fully settled. At the outset, this court notices that the Prime Papers & Packers (supra) did consider Section 38(4) and Section 59(3).

Now Section 38(7)(c) and (d) were introduced by the DVAT (Amendment) Act, 2012 with effect from 18.06.2012. An isolated reading of that provision does support the Revenue's contention that the dealer is under an obligation to furnish "the declaration or certificate forms" required by the CST Act. Undoubtedly - again seen in an isolated manner, this obligation is an effectuation of Sections 8 and 11(2) (CST Act) and Rule 12 that prescribe preconditions for grant of concessional or NIL CST levies. The question is - are Sections 38(7)(c) and (d) "game changers" which disrupt or suspend the time-frame under Section 38(3)? This court's considered view is in the negative, and that there is no change, in the time-periods.

17. Firstly, Section 38(7)(c) and (d) nowhere state that the original paper declarations in CST Forms C, E1, E2, F, H, I etc. are to be furnished. Concededly, the DVAT asseessing authority has to examine the claims under the local law as well as CST claims (and refunds). Again, the mechanism for assessments, adjudication, etc. has to be in terms of the local law. In the present instance, the local law is the DVAT Act and Rules framed thereunder. Pursuant to these provisions, dealers provide returns through forms. The amendment to the CST (Delhi) Rules, w.e.f. 05.03.2014, altered Rule 4 and a new Form 9 (Reconciliation Form) had to be furnished by dealers. This form is both comprehensive - and, at the same time, cumbersome. It requires dealers to provide exhaustive details of their turn-overs; including CST turnovers and the types of central forms (C, E-1, E-2, H, I & J). The forms require four years' details (2010-11, 2011-12, 2012-13 and 2013-14) that dealers were to furnish.

18. The Commissioner of DVAT, by various circulars (13 of 2014-15 dated 29.09.2014; 30 of 2014-15 dated 31.03.2015; 21 of 2014-15 dated 08.11.2015 and 26 of 2014-15 dated 16.02.2016) extended the period for furnishing returns in Form-9. Even more importantly, by Circular No.10 of 2012-13 dated 13.07.2012, all registered dealers who had made stock transfer or central sales on concessional rates of tax during 2009-10 and 2010-11 were asked to file requisite information online, to avoid inconvenience, "adverse assessment and penalty at a later date." This is evident from a notification issued under Sections 70(2) and (3) of the DVAT Act. The said statutory notification is in the following terms:

"No.F.7(450)/Policy/VAT/2012/336-347 Dated: 12-7-2012

NOTIFICATION

Whereas, I, Rajendra Kumar, Commissioner, Value Added Tax, Government of National Capital Territory of Delhi, consider it necessary that quarter wise details relating to Central Declaration Forms received against the stock transfer or central sales made on concessional rates, Central Declaration Forms missing and tax deposited on account of missing forms are submitted online by the dealers.

Now, therefore, in exercise of the powers conferred on me by sub-section (1) read with subsection (2) and sub-section (3) of section 70 of Delhi Value Added Tax Act, 2004,I direct that the details relating to Central Declaration Forms received against the stock transfer or central sales made on concessional rates, Central Declaration Forms missing and tax deposited on account of missing forms shall be submitted by the dealers quarter wise, online using his login id and password, for all quarters beginning 01.04.2011 onwards. For this purpose, Form CD-1 annexed with this Notification shall be used. The detailed method of access and use of Form CD-1 is available at the web site of the Department. The last date for filing of information online in Form CD-1 for every quarter shall be the same as the last date for submission of reconciliation return in form DVAT-51 for the quarter.

It may be noted that financial year 2011-12 onwards, credit for central declaration forms shall be allowed only on the basis of the information received online; and the physical central declaration forms physically received shall be considered only as collateral evidence. In cases where no information is furnished online, it will be presumed that no Central Declaration Forms have been submitted for the entire stock transfer or central sale made on concessional rate of tax and such cases will be assessed accordingly.

This notification shall come into force with immediate effect."

19. Section 70 of the DVAT Act reads as follows:

"70 Power of Commissioner to make notifications

(1) The Commissioner may notify and publish any forms which may be necessary for the reporting of information to the Value Added Tax authorities.

(2) Where the Commissioner has notified a form for a particular purpose, all persons using the form, in such manner as may be notified by him].

(3) Where in his opinion it is necessary or convenient to do so, the Commissioner may issue notifications for carrying out the purposes of this Act:"

Thus, it is clear that the above notification, in the wake of amendment to Section 38 (on 18.06.2012) had to be read together with it.

Circular No.10 dated 13.07.2012 issued in this regard, also clarified the department's understanding and is in the following terms:

"CIRCULAR NO. 10 OF 2012-13

Subject: Online submission of information regarding Central Declaration forms

The Department of Trade and Taxes has introduced the facility for online filing of information regarding Central Declaration Forms submitted, Central Declaration Forms missing and tax deposited on account of missing forms. This application can be accessed through the link titled "Central Forms" on dealer login rage on the website of the Department www.dvat.gov.in.

All registered dealers, who have made stock transfer or central sales on concessional rate of tax during 2009-10 and 2010-11, have been requested to file the requisite information online so as to avoid inconvenience, adverse assessment and penalty at a later date, vide Circular No.5 of 2012-13 issued on 29/06/2012.

Representatives of various Trade Associations and Market Associations have approached the Department and requested that the last date for online filing of this information should be extended by ten days so that maximum number of dealers may benefit from this initiative of the Department.

Keeping this in view, the last date for online filing of information regarding Central Declaration Forms for the years 2009-10 and 2010-11 is extended up to 31/07/2012."

Similar circulars and notifications were issued - on 06.11.2013 and 12.12.2013.The Circular No.31 of 2013-14 in fact stated as follows:

"CIRCULAR NO. 31 OF 2013-14

Sub: Filing of information in block R.10 of CST return Form 1.

Block R.10 of CST return Form 1 pertains to filing of the information for receipt and pendency of central statutory forms/declarations in lieu of concessional sale/stock transfer for the preceding 4 years. The block has been inserted in the return through recent amendment in Central Sales Tax (Delhi) Rules, 2005. Second quarter return of the year 2013-14 was the first return to be filed after the amendment.

2. On the request of Sales Tax Bar Association and dealers, the filing of the said block was de-linked from the return and a facility was created to file the information on pending statutory forms separately. The date of filing of the said block as well as return was also extended upto 31st December, 2013.

3. Many dealers have availed of the facility and filed the above said information online. But, some dealers have still not been able to compile and file the information till date, although their returns have been otherwise submitted. Now, the third quarter return also becomes due from 1st January 2014, wherein the same information is to be filed upto date.

4. In view of the above, as a facility to the dealers who could not file the information in block R.10 of CST return Form 1, they are allowed to file the same as part of the third quarter return of the year 2013-14.

5. Further, in exercise of the powers conferred on me by Rule 49A of Delhi Value Added Tax Rules, 2005, I, Prashant Goyal, Commissioner, Value Added Tax hereby extend the date of filing of third quarter return of 2013-14 to 31st January, 2014."

20. It is thus evident from the above factual discussion, especially with respect to various notifications and circulars issued by the DVAT Department that even though the amendment to Section 38(7) was made in June 2012, within three weeks, a statutory notification followed by

circulars was issued advising all dealers to furnish requisite details online and to not file the original copies of the declarations. The language of Section 38(7)(d) nowhere specifies that actual physical or hard copy of the original certificate is required. Moreover, the necessary form, i.e. Form-9 elicits exhaustive details in respect of CST and concessional duties with regard to receipt and pendency of declarations in Form E1, E2, F, H etc. Each of these relate to specific quarters for all the previous four years and are to be furnished by the dealers. Such being the case, the Revenue's contention that the mandate of Sections 11(2) of the DVAT Act and Rule 12 of the CST Rules, overriding all other concerns and suspending as it were, the obligation to frame the assessments and process refunds within the timeframe prescribed under Section 38(3) is misplaced and rejected as unacceptable. There is nothing in the language of these provisions compelling the dealers to provide original certificates in the physical format. Once both the parties agree that the DVAT mechanism through the provisions of the Act and the Rules would prevail and apply for assessments in regard to both DVAT and CST liabilities and obligations, there is no warrant for the submission that the regime in CST has to be read in a manner different from the one understood in DVAT. *Khemka (supra)* and *India Carbon (supra)* are authorities for the proposition that although the principles of taxation and the rate of tax are dictated by the Central enactment, the mechanism for adjudication, assessment, recovery, refund etc. and all other related acts are to be found in the local law. So seen, the understanding of the Revenue, which has issued a statutory notification under Section 70 stating that online certificates alone and none others would be entertained effective from 12.07.2012, i.e. after introduction of Section 38(7)(d) and further details that Form 9 itself comprehends four years' details- the time for the submission of which was extended repeatedly, undermines and negates the Revenue's arguments.

21. During the course of hearing, it emerged that with the introduction of online registration regime, in fact papers and documents are not entertained at all and that only in the event of doubts and queries, the concerned assessing authority -VATO/AVATO issues notice to the dealer calling for the necessary specific documents, and verifies and returns them. In other words, the revenue does not even provide any longer for the storage and archiving of original documents submitted by the dealers. Another important aspect which cannot be lost sight of is that whilst the central statutory forms are intended to enable the dealer concerned to claim concessional duty or exemption, as the case may be, and its verification is an important element, at the same time, the mechanisms evolved

by the State (which prevail even for CST assessments etc.) should be pragmatic and simple. What the authorities argue today is contrary to their consistent understanding after the introduction of Section 38(7)(d). With the amendment of Rule 4 of the Central Sales Tax (Delhi) Rules with effect from 05.03.2014 and the introduction of the reconciliation form, which in fact includes four years' details, the entire argument of the revenue as to the necessity and obligation for furnishing original certificates as a principal condition for processing refund claims, fails.

22. *Indira Industries (supra)* is authority for the proposition that whilst circulars are not per se binding and cannot override express provisions of law, nevertheless, if they are not inconsistent with law, they bind the statutory authorities. In the present instance, there is no conflict of the kind which the Revenue projects, between the circulars which it issued and pursuant to which dealers furnished online particulars, on the one hand, and Section 38(7) of the DVAT Act or other provisions of the CST Act.

23. In view of the above discussion, it is held that in all these cases, the ratio in *Prime Papers & Packers (supra)* is good law and does not call for a review. Furthermore, the declaration in *Swarn Darshan Impex (supra)* and *Prime Papers & Packers (supra)* would mean that for the period beyond what is stipulated under Section 38(3), the Revenue would be under an obligation to pay interest till the point of time the refund claim is adjudicated and allowed. If, for any reason, during the processing of the refund claim (but after the two month period), the assessee is called upon to furnish particulars relating to any inter-state transactions for the purposes of verification of any of the central forms, that time would stand excluded. It is however, clarified that only such time as is consumed by the dealer beyond the period given in the notice (say 15 days or so) in regard to details of specific transactions would be excluded. In other words, a general notice calling for documents relating to transactions would not do, having regard to the fact that the CST forms are also verifiable online. It is only where the Show Cause Notice specifies a particular transaction or transactions in relation to specific quarters and provides the time limits within which the dealer has to furnish details and where such dealer exceeds the time limit would the actual time (taken by the dealer in excess of the time provided) be excluded from the calculation. Thus, if a dealer is issued a notice to provide C-forms for the first quarter of 2012-13 and given 15 days for the purpose, and he does provide those details, which can be verified within 15 days, the time will not be excluded. If on the other hand, the dealer takes additional 15 days, only those 15 days would be excluded for the purpose of calculation of interest.

24. The Court visualizes the following situations in this regard:

(a) If the period of two months is to expire on 31.03.2017, in a given case, and the officer seeks explanation on 15.03.2017, which is answered on 15.04.2017, the time after 31.03.2017 would not qualify for interest.

(b) If the period expires on 31.03.2017 and the query or verification is sought through notice on 01.05.2017, which is replied within 15 days (before 14.05.2017), the entire interest after 31.03.2017 is payable. If the query is answered on 30.06.2017, the time taken, i.e. between 01.05.2017 to 30.06.2017 shall be excluded for payment of interest. At the same time, if documents are offered for scrutiny but are in fact not examined, the interest would be payable from the date the documents are offered, not when they are examined. To eliminate abuse on both sides, whenever information is sought it must be specific and relate to particular periods, and particular documents; the assessee should, in turn, provide an index of all documents supplied, with particulars and date of submission. The DVAT Department should facilitate the uploading of scanned documents/forms by the dealers, in addition to physical verification.

(c) Once verification of documents is completed, and it is found that they are in order, while calculating interest on refund, the exclusion (of payment of interest) would be only for the period and the amounts relatable to such forms. In other words, interest for other amounts cannot be withheld.

25. Accordingly, a direction is issued to the respondents to process all the pending refund claims of the petitioners in respect of the documents by calling specific details within reasonable time and dispose of the refund claims within four weeks from today. The respondents/DVAT shall ensure that the dealers shall also be entitled to applicable interest in accordance with law up to the date of payment in terms of the above directions. All the writ petitions are allowed in the above terms.

Editorial Note : The respondents have filed SLP (C) No. 3496/2017 in Supreme Court against the order dated 19.01.2017 in W.P.(C) 10701/2016 passed by the High Court of Delhi at New Delhi. Hon'ble Supreme Court issued notice and granted stay of the operation of the impugned judgment.

[2016] 54 DSTC 177 – (Madras)

IN THE HIGH COURT OF JUDICATURE AT MADRAS
[Hon'ble Justice T. S. Sivagnanam]

W.P.(C) 305 to 308 of 2016
And W.M.P. Nos. 194 to 201 of 2016

The Computer Consultants ... Petitioner

Versus

Assistant Commissioner (CT) Hosur (South)
Assessment Circle Hosur & Anr. ... Respondents

Date of Order: 02.06.2016

TAMIL NADU VALUE ADDED TAX ACT, 2006 – REVERSAL OF INPUT TAX CREDIT ON THE GROUND OF DATA AVAILABLE ON WEBSITE OF DEPARTMENT – PLEA TOOK BEFORE ASSESSING AUTHORITY THAT INPUT TAX CREDIT CLAIMED AS PER PURCHASE BILLS AND TO VERIFY THE ANNEXURE II OF THE SELLING DEALER – THE PETITIONER PAID TAXES TO SELLING DEALER – EXPLANATION WAS NOT ACCEPTED AND CREATED DEMAND – WRIT PETITION FILED – WHETHER CORRECT – HELD – NO.

Facts of the Case

The petitioner was a registered dealer, under the erstwhile provisions of Tamil Nadu General Sales Tax Act, 1959 (TNGST Act), and at present, under the provisions of Tamil Nadu Value Added Tax, 2006. The challenge in these Writ Petitions was to the proceedings of the Assessing Officer, dated 28.09.2015, in and by which, the Input Tax Credit (ITC) availed by the petitioner, had been reversed, on the ground that, it was in excess of what the petitioner was entitled to availed.

The petitioner was served with a notice, dated 12.08.2015, stated that, on cross verification of the monthly returns for all the four years, viz., 2010-11, 2011-12, 2012-13 and 2013-14 from the Department's website, it was found that the petitioner had reported higher purchases and availed ITC in excess. For the above reasons, the returns filed by the petitioner for the relevant years, were rejected as incorrect, and the ITC, which was availed by the petitioner, was proposed to be reversed. Apart from that, the petitioner was granted 15 days for submission of their objection. On receipt of the show cause notice for all the four years, the petitioner appeared in person before the Assessing Officer, and explained that they had claimed ITC on the basis of purchased bills, and requested the Officer to verify the

Annexure II of the sellers and to dropped proceedings. The respondent, however, did not accept the explanation given by the petitioner, and passed the impugned orders.

Held

In the case of Sri Vinayaka Agencies, the petitioner was dealer in lubricants, purchasing lubricants from a registered dealer. On inspection, it was found that the vendor / dealer had not filed monthly returns nor paid tax to the Department. Though the petitioner had paid tax to the selling dealer, revision notice was issued proposing that the ITC should be reversed on the failure of the selling dealer in paying the tax. Allowing the said writ petition, it was held that at the time of filing the self-assessment return under Section 22 (2), the petitioner-dealer had followed Rule 10 (2) of the Tamil Nadu Value Added Tax Rules, 2007, and therefore, could not be said to have wrongly availed of input tax credit wrongly. Section 19 (1) stated that input-tax credit could be claimed by a registered dealer, if he established that the tax due on such purchase had been paid by him in the manner prescribed and that was accepted at the time when the self-assessment was made. The pre-revision notices and the orders clearly stated that the petitioner-dealer had paid the tax to the selling dealer. If that be the case, it was held that the petitioner's case therein squarely fell under the proviso to Section 19 (1) of the Act. Further, it was another matter that the selling dealer had not paid the collected tax. The liability had to be fastened on the selling dealer and not on the petitioner dealer which had shown proof of payment of tax on purchase made. The orders were thus set-aside.

The above referred decision, squarely would apply to the facts of the present cases, and consequently, it had to be held that the impugned orders were not tenable. Accordingly, the Writ Petitions were allowed, impugned orders were quashed.

Present for Petitioner	:	Mr. V. Sundareeswaran
Present for Respondent	:	Mr. S. Kanmani Annamalai Additional Government Pleader

Cases Referred to

- *Shanti Kiran India Pvt. Ltd., Vs. Commissioner Trade and Tax Dept., (2013) 57 VST 405,*
- *Althaf Shoes (P) Ltd., v. Assistant Commissioner (CT), Chennai, [(2012) 50 VST 179 (Mad)]*

- *Infiniti Wholesale Limited Vs. Assistant Commissioner (CT) Koyambedu [(2015) 82 VST 457 Madras].*

Prayer in W.P.No.305 of 2016

Writ Petition filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for records of the first respondent in TIN : 33653362045/2010-11, dated 28.09.2015, and consequential proceedings in TIN : 33653362045/2010-11, dated nil, signed on 28.09.2015, and to quash the same as ultravires under the provisions of Tamil Nadu Value Added Tax, 2006.

Prayer in W.P.No.306 of 2016

Writ Petition filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for records of the first respondent in TIN : 33653362045/2011-12, dated 28.09.2015, and consequential proceedings in TIN : 33653362045/2011-12, dated nil, signed on 28.09.2015, and to quash the same as ultravires under the provisions of Tamil Nadu Value Added Tax, 2006.

Prayer in W.P.No.307 of 2016

Writ Petition filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for records of the first respondent in TIN : 33653362045/2012-13, dated 28.09.2015, and consequential proceedings in TIN : 33653362045/2012-13, dated nil, signed on 28.09.2015, and to quash the same as ultravires under the provisions of Tamil Nadu Value Added Tax, 2006. ‘

Prayer in W.P.No.308 of 2016

Writ Petition filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for records of the first respondent in TIN : 33653362045/2013-14, dated 28.09.2015, and consequential proceedings in TIN : 33653362045/2013-14, dated nil, signed on 28.09.2015, and to quash the same as ultravires under the provisions of Tamil Nadu Value Added Tax, 2006.

COMMON ORDER

Since the issue involved in these Writ Petition and the parties are one and the same, these Writ Petitions have been taken up together and disposed of by this common order.

2. Heard Mr.V.Sundareeswaran, the learned counsel appearing for the petitioner and Mr.S.Kanmani Annamalai, the learned Additional Government Pleader for respondents.

3. The petitioner is a registered dealer, under the erstwhile provisions of Tamil Nadu General Sales Tax Act, 1959 (TNGST Act), and at present, under the provisions of Tamil Nadu Value Added Tax, 2006. The challenge in these Writ Petitions is to the proceedings of the Assessing Officer, dated 28.09.2015, in and by which, the Input Tax Credit (ITC) availed by the petitioner, has been reversed, on the ground that, it is in excess of what the petitioner is entitled to avail.

4. The petitioner was served with a notice, dated 12.08.2015, stating that, on cross verification of the monthly returns for all the four years, viz., 2010-11, 2011-12, 2012-13 and 2013-14 from the Department's website, it is found that the petitioner had reported higher purchases and availed ITC in excess. For the above reasons, the returns filed by the petitioner for the relevant years, were rejected as incorrect, and the ITC, which was availed by the petitioner, was proposed to be reversed. Apart from that, the petitioner was granted 15 days for submission of their objection. On receipt of the show cause notice for all the four years, the petitioner appeared in person before the Assessing Officer, and explained that they have claimed ITC on the basis of purchased bills, and requested the Officer to verify the Annexure II of the sellers and to drop proceedings. The respondent, however, did not accept the explanation given by the petitioner, and passed the impugned orders.

5. Learned counsel appearing for the petitioner would submit that the ITC could not have been reversed based on website reports, and this has been held to be illegal, in several decisions. To buttress the said contention, reliance was placed on the decision of the Hon'ble Division Bench of Delhi High Court in the case of *(Shanti Kiran India Pvt. Ltd., Vs. Commissioner Trade and Tax Dept.) (2013) 57 VST 405*, and decisions of this Court in i) *(Althaf Shoes (P) Ltd., v. Assistant Commissioner (CT), Chennai, [(2012) 50 VST 179 (Mad)]* and ii) *(Infiniti Wholesale Limited Vs. Assistant Commissioner (CT) Koyambedu) [(2015) 82 VST 457* Madras].

6. Heard the learned Additional Government Pleader for respondents on the above submissions.

7. The ratio deducible from the decisions referred to above are that, ITC shall not be disallowed for the reasons that the seller had not been assessed, since the selling dealer has not filed returns. In fact, the decision

of the Delhi High Court was after amendment of the Act, yet, it was held that ITC shall not be disallowed for the earlier period, i.e., prior to the amendment. In the case of Infiniti Wholesale Ltd.,, referred above, this Court took into consideration the decision in the case of Althaf Shoes, referred above, and other decisions and held as follows:-

> 22. In the case of Althaf Shoes (Pvt) Ltd., cited supra, the petitioner was a dealer and exporter of finished leather and other products, who claimed refund of ITC under Section 18 (2) of the VAT Act in respect of the exports made. Though the refund was granted, subsequently notice was issued seeking to withdraw the relief on the ground that its dealer had not reported the sales turnover and remitted tax and an order was passed, withdrawing the relief granted and levying penalty. While considering the said case, it was held that the circular issued by the Commissioner clearly states that so long as the vendor is found to be a registered dealer on the files of the Revenue, the claim of the assessee for refund could not be rejected nor delayed. Revenue in the said case did not deny, as a matter of fact, that the assessees vendors are all registered dealers on the files of the Revenue and the assessee had also given the TIN number of these vendors. When such particulars are available, it is for the Revenue to take necessary action against the vendors, who had not remitted tax collected by them to the State. Without taking recourse to that, the Revenue could not deny the claim of the assessee. Going by Rule10(2) of TN Vat Rules read along with section 19(1) of the TN Vat Act, it is clear that so long as the purchasing dealer has complied with the requirements as given under Rule 10(2), the claim of the purchasing dealer cannot, by any length of reasoning, be denied by the Revenue. The mere fact that the Revenue had not made an assessment on the assessees vendor, per se, cannot stand in the way of the assessing officer considering the claim of the assessee under section 19 of the Tamil Nadu Value Added Tax Act. A reading of the circular issued by Commissioner along with the provisions of the Act makes it clear that there is nothing repugnant in the said circular issued by the Commissioner as a head of the Department as regards the provisions of the Act on input-tax credit claim. Holding so, allowed the writ petition.
>
> 23. In the case of Sri Vinayaka Agencies, cited supra, the petitioner was dealer in lubricants, purchasing lubricants from a registered dealer. On inspection, it was found that the vendor / dealer had not filed monthly returns nor paid tax to the Department. Though

the petitioner had paid tax to the selling dealer, revision notice was issued proposing that the ITC should be reversed on the failure of the selling dealer in paying the tax. Allowing the said writ petition, it was held that at the time of filing the self-assessment return under Section 22 (2), the petitioner-dealer had followed Rule 10 (2) of the Tamil Nadu Value Added Tax Rules, 2007, and therefore, could not be said to have wrongly availed of input tax credit wrongly. Section 19 (1) states that input-tax credit can be claimed by a registered dealer, if he establishes that the tax due on such purchase has been paid by him in the manner prescribed and that was accepted at the time when the self-assessment was made. The pre-revision notices and the orders clearly stated that the petitioner-dealer had paid the tax to the selling dealer. If that be the case, it was held that the petitioner's case therein squarely fell under the proviso to Section 19 (1) of the Act. Further, it was another matter that the selling dealer had not paid the collected tax. The liability had to be fastened on the selling dealer and not on the petitioner dealer which had shown proof of payment of tax on purchases made. The orders were thus set-aside.

8. The above referred decision, squarely would apply to the facts of the present cases, and consequently, it has to be held that the impugned orders are not tenable. Accordingly, the Writ Petitions are allowed, impugned orders are quashed. No costs. Consequently, connected Miscellaneous Petitions are closed.

[2016] 54 DSTC 182 – (Ahmedabad)

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Justice M.R. Shah And Justice S.H. Vora]

TAXAP – 368/2014 & Civil App. 243/2014
TAXAP – 1305/2014, 1322/2014 & Civil App. 685/2014
TAXAP – 1318/2014 & Spl. Civil App. 11936/2014

State of Gujarat ... Appellant

Versus

Gujarat Ambuja Export Limited ... Opponent

Date of Order: 20.03.2015

PENALTY UNDER SECTION 34(7) OF GUJARAT VALUE ADDED TAX ACT – ADJUSTMENT OF DEMAND AGAINST INPUT TAX CREDIT – TRIBUNAL HELD

THAT THE APPELLANT HAD SUFFICIENT INPUT TAX CREDIT AND THOSE TAX CREDITS COULD HAVE BEEN ADJUSTED AGAINST ADDITIONAL ASSESSED TAX LIABILITY – INTEREST AND PENALTY DELETED – THE REVENUE FILED THE APPEALS AGAINST TRIBUNAL ORDER BEFORE GUJARAT HIGH COURT – THE COURT DISMISSED THE APPEALS OF REVENUE AND SUSTAINED THE ORDERS OF TRIBUNAL.

Facts

As common question of law and facts arose in this group of Tax Appeals as well as Special Civil Application and the only issue involved was the decision of the Gujarat Value Added Tax Tribunal, Ahmedabad in deleting the liability of penalty and interest by permitting such adjustment of carried forward input tax credit, all these appeals as well as special civil application were disposed of by this common order. The State of Gujarat had challenged the respective judgments & orders passed by the Tribunal in the appeals as well as in revision application, as the case may be, deleting the interest and penalty imposed by permitting such adjustment of carried forward input tax credit which was as such lying in the credit of the respective dealers.

Held

When the Tribunal found on facts that in view of availability of input tax credit as against the assessed additional tax, there was no intention on part of the assessee to avoid payment of taxes, no question of law arises. Tax appeal was dismissed. Civil Application also dismissed." Same situation arised in the present matters inasmuch as the demand was confirmed and the adjustment was confirmed under interest and penalty imposed were deleted. It was not in dispute that the respective assessees had surplus balance of input credit, which had been adjusted against the demand of tax upon reassessment. Under these circumstances, the element of avoidance of tax could be said as lacking. Consequently, the deletion of interest and penalty by the Tribunal could not be said as Order unjustifiable and/or it could not be said that the Tribunal had committed any error in deleting the interest and penalty. Under the circumstances, when the issue is already covered by the above referred decisions against the Revenue, following the same, all these tax appeals as well as special civil application deserved to be dismissed and were, according, dismissed. In view of disposal of tax appeals, OJ Civil Application Nos.243/2014 and 685/2014 in respective Tax Appeal Nos.368/2014 and 1322/2014 stand dismissed.

Present for Appellant : Mr Chintan Dave,
Asstt. Government Pleader

Present for Opponent : Ms Gargi Vyas, Advocate

ORDER

As common question of law and facts arise in this group of Tax Appeals as well as Special Civil Application and the only issue involved is the decision of the learned Gujarat Value Added Tax Tribunal, Ahmedabad (hereinafter referred to as "Tribunal") in deleting the liability of penalty and interest by permitting such adjustment of carried forward input tax credit, all these appeals as well as special civil application are disposed of by this common order.

O/TAXAP/368/2014 ORDER [2.0] It is not in dispute that in all these appeals as well as the special civil application, the State of Gujarat has challenged the respective judgment and orders passed by the learned Tribunal in the appeals as well as in revision application, as the case may be, deleting the interest and penalty imposed by permitting such adjustment of carried forward input tax credit which was as such lying in the credit of the respective dealers.

[3.0] Today, when all these appeals as well as special civil application are taken up for final hearing, Shri Chintan Dave, learned AG Phas fairly conceded that the issue involved in the present tax appeals as well as the special civil application is squarely covered against the State Government / Revenue in view of the decision of the Division Bench of this Court dated 25.11.2014 passed in Tax Appeal No.1284/2011 as well as subsequent decision of the Division Bench of this Court in the case of State of Gujarat vs. Dashmesh Hydraulic Machinery rendered in Tax Appeal No. 28/2015.

[4.0] We may record that this Court in the above referred Tax Appeal No.1284 of 2014 vide its decision dated 25.11.2014 had observed thus:− "1. State is in appeal against the judgment of the Gujarat Value Added Tax Tribunal ('the Tribunal' for short) proposing following questions for our consideration:

> "(1) Whether Tribunal erred in deleting levy of interest and penalty merely because assessee had excess input credit adjustable against tax demand?
>
> (2) Any other substantial question of law as may be deemed fit by the Hon'ble High Court may kindly be framed."

2.From the record, it emerges that the Revenue contests the deletion of interest and penalty by the Tribunal in case of the respondent-assessee. The Tribunal in the impugned judgment also held as under:

O/TAXAP/368/2014 ORDER "The appellant has paid the amount of tax fully therefore, we are not disturbing the amount of carried forward ITC. The appellant is entitled to claim said ITC for next tax period. As stated above, the appellant is not liable to pay interest on tax demand as the ITC was first required to adjust against the current year liability as per the provision of rule 18 of the Rule. The appellant had sufficient balance of ITC to adjust against the additional taxliability, which aroused due to disallowance of ITC. We therefore, remove entire interest and penalty. We pass following order."

3. From the observation of the Tribunal, it appears that though the asaessing officer had raised additional tax demand of Rs.76,010/and imposed interest and penalty on such basis, the Tribunal was of the opinion that the assessee had sufficient Input Tax Credit and those tax credits could have been adjusted against the assessee's additional assessed tax liability. That being the position, the Tribunal correctly held that the interest could not be charged. Further, we notice Section 34(7) of the Gujarat Value Added Tax Act, which pertains to the power of the Commissioner to impose penalty, begins with the expression "if a Commissioner is satisfied that the dealer, in order to evade or avoid payment of tax....." Under the circumstances, the basic intention of attempting to evade or avoid payment of taxes would be necessary for imposing penalty.

4. When the Tribunal found on facts that in view of availability of input tax credit as against the assessed additional tax, there was no intention on part of the assessee to avoid payment of taxes, no question of law arises. Tax appeal is dismissed. Civil Application also dismissed."

Same situation arises in the present matters inasmuch as the demand is confirmed and the adjustment is confirmed under interest and penalty imposed are deleted.

[5.0] It is not in dispute that the respective assessees had surplus balance of input credit, which have been adjusted against the demand of tax upon reassessment.

Under these circumstances, the element of avoidance of tax could be said as lacking. Consequently, the deletion of interest and penalty by

the learned Tribunal could not be said as O/TAXAP/368/2014 ORDER unjustifiable and/or it cannot be said that the learned Tribunal has committed any error in deleting the interest and penalty. Under the circumstances, when the issue is already covered by the above referred decisions against the Revenue, following the same, all these tax appeals as well as special civil application deserves to be dismissed and are, according, dismissed. No costs.

In view of disposal of tax appeals, OJ Civil Application Nos.243/2014 and 685/2014 in respective Tax Appeal Nos.368/2014 and 1322/2014 stand dismissed.

[2016] 54 DSTC 186 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Justice S. Ravindra Bhat And Justice Deepa Sharma]

W.P.(C) 297/2013

Community Welfare Banquet Association Delhi ... Petitioner

Versus

Govt. of NCT of Delhi & Ors. ... Respondents

Date of Order: 06.10.2016

WRIT PETITION CHALLENGING THE VIRES OF RULE 3(2)(b)(II) OF DELHI TAX ON LUXURY RULES, 1996 – DEFINITION OF LUXURY UNDER SECTION 2(1) OF DELHI TAX ON LUXURY ACT, 1996 – INCORPORATING EXCLUSIONARY PRINCIPLE U/S 3(5) AND EMBODIES AN IMPORTANT AND SALIENT PRINCIPAL FOR EXCLUDES ALL THOSE ITEMS FOR LUXURY WHICH WERE ALSO SUBJECTED TO DVAT LEVY – RULE 3(2)(b)(II) IS ULTRAVIRES AND QUASHED.

Facts

The petitioner in this proceeding under Article 226 of the Constitution challenged the vires of Rule 3 (2) (b) (ii) of the Delhi Tax on Luxury Rules, 1996. The petitioner was an association of Banquet Hall Owners. According to its pleadings a large majority of its members were registered dealers under the Delhi VAT Act, 2004. The existing VAT regime in Delhi required dealers who report return of an annual turnover of more than Rs.20 lakhs, to complied with its provisions and file quarterly returns purporting the details of the transaction for the particular periods. The grievance in these proceedings was that the Delhi Tax on Luxury Act, 1996 (the Luxury Act), which according to the petitioners clearly bars levy and recovery of luxury

tax "in respect of turnover of receipts for supply of food, drinks and goods such as cosmetics, medicines, nutritional supplements etc. on the sale of which the proprietor is liable to pay tax under the Delhi Value Added Tax Act, 2004" was sought to be undermined if not entirely diluted by the introduction of the impugned rule, which in effect required all Banquet Hall Owners (again expansively defined) to include the entire value of the turnover regardless of whether the substantial part or whole of them were subjected to VAT levy. It was urged that given the primacy of the provision under the parent statute i.e. the Luxury Act, the extraction of luxury tax by the Rule mandated inclusion of the VAT turnover, was ultra vires to rule making power and parent amendment.

Held

It was evident that the levy of luxury tax was upon all those incidents which were defined as luxury under Section 2 (i). The provisions of the Act lay out the manner of recovery which was through an obligation on the part of the proprietor or firms which provided luxury to register itself and collect luxury tax charges, from its customers in respect of the luxury service provided by it. At the same time Section 3 (5) incorporated an important exclusionary principle. Given that the legislature was conscious of an element of overlap in the broad nature of the levy and also the circumstance that the overlap could be in respect of two different heads of taxation which were within the exclusive domain of the State legislature, as a matter of policy in this present instance the provision – Section 3(5) embodied an important and salient principle i.e. excludes all those items for luxury which were also subjected to DVAT levy.

The argument of the revenue was that Rule 3 (2) (b) (ii) only supplements and did not in any manner undermined the principle contained in Section (3) (5) of the Act. This court was unpersuaded by the submission. One of the submissions made by the revenue was that the component of luxury included the hiring of the property in the present instance i.e. banquet halls. In order to support its argument that the impugned rule could not be held to be ultra vires, reliance was placed upon the judgment of Kerala High Court in M Far Hotels Ltd.'s. The Court was of the opinion that that ruling was inapplicable because a plain reading of Rule 3C of the Kerala Rules brought out the circumstance that there was no separate provision for luxury to the extent dealt with hiring out of premises. In the present case, there was however, a separate provision by way of Rule 3 (2) (b) (i). The petitioners did not dispute that. Furthermore and more crucially the Kerala judgment of M Far Hotels Ltd.'s or the discussion by the High Court nowhere revealed

that a provision akin or similar to Section 3 (5) existed.

As far as the argument with respect to "aspect theory" was concerned, the court was again unimpressed. The aspect theory was usually in the context of conflict between two legislatures – classically Federal & State or Provincial Legislatures. It had never been resorted to in case of legislation by the State under two heads. It was of course quite likely that one activity may itself lead to two taxing incidents. But what was confronted here was the setting up of a subordinate legislation against a parent enactment. It was here that the general principle that rules could only supplement but never supplant the provisions of the Act was squarely applied. Whilst the general submissions of the revenue with respect to autonomy as regards the mechanism and the policy connected with it for the recovery were undoubtedly correct, in this instance its submission that such mechanism in nowhere confronted with a provision of the main Act was insubstantial.

During the course of the hearing, the revenue had suggested that there was a radical difference between the threshold required for luxury tax levy on the one hand and the DVAT levy on the other. This argument too had to fail. There was no doubt that in the present case, the thresholds were fulfilled. Furthermore, what was important was not the collection but the subjecting of the incidents of taxation. As long as the activity answers description provided by the legislature – in the present instance of luxury, it would be subjected to tax. Equally, as long as there was a sale or transfer of goods or right to use the goods or other services which were purportedly a subject of VAT, that the dealer was subjected to actual levy and collection at a higher threshold was a matter of detail. The levy exists per se by legal definition. It was this aspect which was crucial rather than the existence of higher or lower threshold as was urged by the revenue.

For the above reasons, the Court holds that the impugned rule i.e. Rule 3 (2) (b) (ii) was ultra vires. It was hereby set aside/quashed. The writ petition was allowed.

Present for Petitioner	:	Mr. Ruchir Bhatia, Advocate
Present for Respondent	:	Mr. Pankaj Sinha and Ms. Richa Singh, Advocates for R-1 and R-2.
		Mr. Satyakam, ASC, GNCTD with Mr.Ashok Kumar, AVATO, Ward 59 for R-3.
		Mr. Sanjeev Narula, Sr. Standing Counsel with Mr. Abhishek Ghai, Adv. for R-4.

Cases Referred to:

- *Godfrey Phillips India Ltd.& Anr. v. State of U.P. & Ors. [2005] 139 STC 537 (SC)*
- *M Far Hotels Ltd. v. State of Kerala*
- *Kunj Behari Lal Butail and Ors.v. State of H.P. and Ors., AIR 2000 SC 1069*
- *Federation of Hotels & Restaurant Association of India v. Union of India (1989) 3 SCC 634*

Judgment

Mr. Justice S. Ravindra Bhat (Open Court)

1. The petitioner in this proceeding under Article 226 of the Constitution challenges the vires of Rule 3 (2) (b) (ii) of the Delhi Tax on Luxury Rules, 1996. The petitioner is an association of Banquet Hall Owners. According to its pleadings a large majority of its members are registered dealers under the Delhi VAT Act, 2004. The existing VAT regime in Delhi requires dealers who report return of an annual turnover of more than Rs.20 lakhs, to comply with its provisions and file quarterly returns purporting the details of the transaction for the particular periods. The grievance in these proceedings is that the Delhi Tax on Luxury Act, 1996 (the Luxury Act), which according to the petitioners clearly bars levy and recovery of luxury tax "in respect of turnover of receipts for supply of food, drinks and goods such as cosmetics, medicines, nutritional supplements etc. on the sale of which the proprietor is liable to pay tax under the Delhi Value Added Tax Act, 2004" is sought to be undermined if not entirely diluted by the introduction of the impugned rule, which in effect requires all Banquet Hall Owners (again expansively defined) to include the entire value of the turnover regardless of whether the substantial part or whole of them are subjected to VAT levy. It is urged that given the primacy of the provision under the parent statute i.e. the Luxury Act, the extraction of luxury tax by the Rule mandated inclusion of the VAT turnover, is ultravires to rule making power and parent amendment. The petitioners rely upon the constitution bench judgment of the Supreme Court in Godfrey Phillips India Ltd.& Anr. v. State of U.P. & Ors. [2005] 139 STC 537 (SC), where entry 62 of the State List was interpreted inter alia in the following manner:

> "Given the language of Entry 62 and the legislative history we hold that Entry 62 of List II does not permit the levy of tax on goods or articles, in our judgment, the word "luxuries" in the Entry refers to activities of indulgence, enjoyment or pleasure in as much as none

of the impugned statutes seek to tax any activity and admittedly seek to tax goods described as luxury goods, they must be and are declared to be legislatively incompetent."

2. The revenue counters the argument of the petitioner and submits that given the broad and expanded definition of term 'luxury' which includes provision for accommodation of space provided in the banquet hall that also includes air cooling, air conditioning and other furniture etc., the rule cannot be characterised as ultravires. It is further submitted that though VAT amounts are excluded by virtue of Section 3 (5), its language states that tax amount would not be levied to the extent "turnover of receipts for supply of food, drinks and goods"; however, the remaining turnover of receipts is liable to luxury tax. It is submitted that in effect Rule 3 (2) (b) (i) and (ii) constitute dimensions of the mechanism for recovery of luxury tax and cannot be per se characterised as ultravires.

3. The revenue elaborates that the impugned rule only clarifies the peculiar situation where a consolidated bill is charged by banquet halls. It only provides a method for bifurcation of the bill by treating 60% of the turnover of receipts as a luxury component. The revenue relies upon a decision of the Kerala High Court in *M Far Hotels Ltd. v. State of Kerala,* decided on 20.12.2013 in WP(C).30399/2009, which held that where the appellant is not collecting separate rental charges, a similar rule by fiction of law took care of the situation to enable the collection of a certain percentage of the total amount charged. The revenue further relies upon the judgment of the Supreme Court in *Kunj Behari Lal Butail and Ors.v. State of H.P. and Ors., AIR 2000 SC 1069* to say that as long as the power to legislate exists, the adoption of a particular mode or method for recovery of the tax cannot be characterised as illegal. It is also submitted that the judgment in Federation of Hotels & Restaurant Association of India v. Union of India (1989) 3 SCC 634 and other judgments have upheld "the aspect theory to interpretation of legislative fields". So viewed, the luxury element or aspect, could correctly be included in the turnover and was done legally under the impugned rule.

4. The Luxury Act defines the taxing event i.e. luxury as follows:

"(i) "luxury" means use of goods, services, property; facilities etc. for enjoyment or comfort or pleasure or consumption by any customer extraordinary to the necessity of life, that is to say:-

(i) accommodation or space provided in a banquet hall which includes air cooling, air conditioning, chairs, tables, linen,

utensils and vessels, shamiyana, tent, pavilion, electricity, water, fuel interior or exterior decoration, music, orchestra, live telecast and the like;

(ii) services provided in a gymnasium or health club, which includes services of trainer or personal trainer, steam, sauna and the like;

(iii) accommodation and other services provided in a hotel, the rate or charges for which, including the charges for air cooling, air conditioning, radio, music, extra beds, television and the like, is seven hundred fifty rupees per room per day or more whether such charges are received collectively or separately per room per day.

(iv) facilities or services provided in a spa which includes beauty treatment, manicure, pedicure, facial, laser treatment, massage shower, hydrotherapy, steam both, saunas or cuisine, medispa and the like;";

5. 'Receipt' is defined under Section 2 (m) as the amount of monetary consideration received or receivable by a proprietor or by his agent for any luxury provided in the establishment.

6. 'Turnover of receipts' is defined under Section 2 (r) as follows:

"turnover of receipts" means the aggregate of amount of valuable consideration received or receivable by a proprietor in respect of any luxury"

7. Section 3 is the charging provision; it requires registration of every proprietor who facilitates or provides luxury (as defined by the Luxury Act) in the establishment under his control to the levy of luxury tax in the turnover of receipts calculated according to its provisions. Section 3 (2) defines the quantum i.e. "the rate not exceeding 15%". Section 3 (3) by dealing fiction includes the service charges which a proprietor may not include in a given case. Section 3 (4) relates to luxury provided in a hotel; and Section 3 (5) – relevant for the purpose of this litigation provides as under:

"The tax shall not be levied and payable in respect of turnover of receipts for supply of food, drinks and goods such as cosmetics, medicines, nutritional supplements etc. on the sale of which the proprietor is liable to pay tax under the Delhi Value Added Tax Act, 2005."

Sections 3 & 4 obliged the proprietor and firm as a case – given the nature of activity in the ownership thereof, subjects proprietor and firm to the levy of Luxury Tax.

8. Rule 3 of the Luxuries Act reads as follow:

3. Incidence of levy of tax and maintenance of accounts

(1) The proprietor shall be liable for collection and payment of tax for luxury as defined under clause (i) of Section 2 of the Act, provided at the establishment to a customer either directly or indirectly through any person or agency.

(2) The tax shall be levied and collected by a proprietor—

(a) in respect of luxury provided in the establishment (other than banquet hall) on the tariff rate,

(b) in respect of luxury provided in a banquet hall in the manner prescribed below—

(i) where the hiring charges have been collected separately, there shall be levied a tax on such turnover of receipts in respect of hiring charges;

(ii) where charges have been collected on consolidated basis for all the luxury including food component or in any other manner then there shall be levied a tax, on sixty percent of such turnover of receipts by treating it as luxury provided in a banquet hall.

(3) Every proprietor shall maintain—

(a) information of residential accommodation and tariff thereof in respect of hotel in Form 1;

(b) information of luxury provided in gymnasium/health club or spa and tariff thereof in Form 1A exclusively and separately;

(c) daily account of occupancy of residential accommodation in hotel and collection of tax therefor in Form 2;

(d) daily account of luxury provided in banquet hall of gymnasium/health club or spa and collection of tax therefor, inform 2A exclusively and separately; and

(e) monthly abstract of collection and remittance of tax, in Form 3.

(4) The proprietor shall maintain a separate bound register for each of the 'Forms' and shall get each of the pages of

such registers serially numbered, sealed and certified by the Commissioner or any officer duly authorized by him in this behalf:

PROVIDED that, in case, a proprietor is maintaining the aforesaid 'Forms' in a computerised manner, then such proprietor shall take a printout of such Form on monthly basis and get each of the pages having auto generated serial number, sealed and certified by the Commissioner or any officer duly authorized by him in this behalf"

9. It is evident that the levy of luxury tax is upon all those incidents which are defined as luxury under Section 2 (i). The provisions of the Act lay out the manner of recovery which is through an obligation on the part of the proprietor or firms which provides luxury to register itself and collect luxury tax charges, from its customers in respect of the luxury service provided by it. At the same time Section 3 (5) incorporates an important exclusionary principle. Given that the legislature was conscious of an element of overlap in the broad nature of the levy and also the circumstance that the overlap can be in respect of two different heads of taxation which are within the exclusive domain of the State legislature, as a matter of policy in this present instance the provision – Section 3(5) embodies an important and salient principle i.e. excludes all those items for luxury which were also subjected to DVAT levy.

10. The argument of the revenue is that Rule 3 (2) (b) (ii) only supplements and does not in any manner undermine the principle contained in Section (3) (5) of the Act. This court is unpersuaded by the submission. One of the submissions made by the revenue is that the component of luxury includes the hiring of the property in the present instance i.e. banquet halls. In order to support its argument that the impugned rule cannot be held to be ultravires, reliance is placed upon the judgment of Kerala High Court in *M Far Hotels Ltd.'s (supra)*. This court is of the opinion that that ruling is inapplicable because a plain reading of Rule 3C of the Kerala Rules brings out the circumstance that there was no separate provision for luxury to the extent dealt with hiring out of premises. In the present case, there is however, a separate provision by way of Rule 3 (2) (b) (i). The petitioners do not dispute that. Furthermore and more crucially the Kerala judgment of M Far Hotels Ltd.'s (supra) or the discussion by the High Court nowhere reveals that a provision akin or similar to Section 3 (5) existed.

11. As far as the argument with respect to "aspect theory" is concerned, the court is again unimpressed. The aspect theory is usually in the context of conflict between two legislatures – classically Federal & State or Provincial

Legislatures. It has never been resorted to in case of legislation by the State under two heads. It is of course quite likely that one activity may itself lead to two taxing incidents. But what is confronted here is the setting up of a subordinate legislation against a parent enactment. It is here that the general principle that rules can only supplement but never supplant the provisions of the Act is squarely applied. Whilst the general submissions of the revenue with respect to autonomy as regards the mechanism and the policy connected with it for the recovery are undoubtedly correct, in this instance its submission that such mechanism in nowhere confronted with a provision of the main Act is insubstantial.

12. During the course of the hearing, the revenue had suggested that there is a radical difference between the threshold required for luxury tax levy on the one hand and the DVAT levy on the other. This argument too has to fail. There is no doubt that in the present case, the thresholds are fulfilled. Furthermore, what is important is not the collection but the subjecting of the incidents of taxation. As long as the activity answers description provided by the legislature – in the present instance of luxury, it would be subjected to tax. Equally, as long as there is a sale or transfer of goods or right to use the goods or other services which are purportedly a subject of VAT, that the dealer is subjected to actual levy and collection at a higher threshold is a matter of detail. The levy exists per se by legal definition. It is this aspect which is crucial rather than the existence of higher or lower threshold as is urged by the revenue.

13. For the above reasons, this court holds that the impugned rule i.e. Rule 3 (2) (b) (ii) is ultravires. It is hereby set aside/quashed. The writ petition is allowed in the above terms.

[2016] 54 DSTC 194 – (Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

[Justice Badar Durrez Ahmed And Justice Sanjeev Sachdeva]

WP(C) 7843/2014

VPSSR Facilities ... Petitioner

Versus

Commissioner Of Value Added & Anr. ... Respondents

Date of Order: 15.02.2017

WORKS CONTRACT-TRANSFER OF PROPERTY IN THE GOODS IN EXECUTION OF WORKS CONTRACT – REVENUE PASSED THE ORDER HOLDING THAT THE

CHEMICALS/SOLVENTS USED IN THE PROCESS OF CLEANING AMOUNTED TO SALE OF GOODS AND THE MOMENT THE CHEMICALS WERE POURED ON THE PROPERTY OF THE CONTRACTEE EVEN THOUGH USED FOR THE PURPOSE OF CLEANING, AMOUNTED TO DELIVERY OF THE SAME AND THE SAME WAS EXIGIBLE TO TAX – WRIT PETITION FILED – THE COURT HELD THAT THE SOAPS, DETERGENT, CHEMICALS AND SOLVENT USED PURELY FOR THE PURPOSES OF CLEANING AND WHICH WERE COMPLETELY CONSUMED, IN THE PROCESS OF THE EXECUTION OF WORKS CONTRACT AND COULD NOT BY ANY STRETCH OF IMAGINATION BE SAID TO GOODS IN WHICH PROPERTY COULD PASS TO THE CONTRACTEE.

Facts

The petitioner was engaged in the business of providing services of maintenance, cleaning, washing, housekeeping, waste management, etc.

In the present case the contract inter alia required the petitioner to perform the task of Mechanized scrubbing of shed floor to keep it free from muck / grime arising due to dropping of oil / grease / effluents and industrial waste by using biodegradable floor chemicals / solvent. Mechanized scrubbing by floor scrubbing / scarifying machine, removal of industrial waste along with muck, unwanted / useless and dumping the same at the nominated place within the shed complex. Cleaning of floor of main shed, SMM store, Lab & Administrative block to keep it free from dropping of oil / grease / grime / effluent including removal of cobwebs from covered area. Cleaning of DEMU Care Centre, DEMU Block and Diesel Training Centre SSB to keep it free from dropping of oil / grease / grime / effluent including removal of cobwebs from covered area. Cleaning of rooms, veranda, etc. of Lab, Administrative block and offices of Sr. Subordinate Super-visors with wiping by wet and dry moppers. Cleaning of rooms, veranda, etc. of DEMU Block and Diesel Training Centre SSB with wiping by wet and dry moppers. To keep floor, side walls of inspection pits free from muck / grime / arises due to dropping of oil / grease / effluents and industrial waste by using high-pressure cold / hot jet cleaner. Removal of unwanted industrial waste and dumping the same at the nominated place within the shed complex. To keep floor, side walls of DEMU Care Centre pits free from muck / grime / arose due to dropping of oil / grease / effluents and industrial waste by using high-pressure cold / hot jet cleaner. Cleaning of toilets by high-pressure water jet cleaner, removal of silt and muck from urinals. Loco Washing / cleaning of Pit wheel lathe machine complex to keep it free from dropping of oil / grease / grime / effluent / Waste metal chips including removal of cobwebs from covered area.

The petitioner was awarded a contract by the Northern Railways in relation to the management, cleaning, washing, housekeeping, waste

management, etc. at Diesel Shed Shakurbasti and at Training School Shakurbasti.

It was contended by the petitioner that the contract was for cleaning of sites of Northern Railways (Contractee) and was a pure service contract and no transfer of property from the Petitioner (Contractor) to Northern Railways (Contractee) was involved. It was contended that the activities undertaken by the petitioner did not constituted a sale within the meaning of Delhi Value Added Tax, 2004.

An application was filed before the Commissioner of DVAT under Section 36(A) (2) of the DVAT Act seeking certificate to the effect that the Railways should not deduct tax at source.

The petitioner, Contractor impugned the order dated 30.06.2014 passed by the Commissioner Valued Added Tax holding that the chemicals/Solvents used in the process of cleaning, amounted to sale of goods and the moment the chemicals were poured on the property of the Contractee, even though used for the purposes of cleaning, amounted to delivery of the same and thus the same was exigible to Tax. The Petitioner filed Writ Petition before Delhi High Court.

Held

The soaps, detergent, chemicals and solvent used purely for the purposes of cleaning and which were completely consumed, in the process of the execution of the above referred tasks, could not by any stretch of imagination be said to goods in which property could pass to the Contractee. Similarly, water was also used in the above-referred process of cleaning and execution of the contract. Could it be said, that even property in water, that was used and consumed in the said process of cleaning and execution of the contract, was also transferred to the Contractee and the value of the water consumed should be exigible to tax.

The mere fact that soaps, detergent, chemicals and solvents were deposited in the store of the Contractee would not make any difference to the exigibility, as was sought to be contended by the Revenue/respondents, because, admittedly, by mere deposit in the store, the property in them was not stated to pass. It was contended by the Revenue/Respondent, that the property passed when they were actually used. The Petitioners and the Railways had contended that the said soaps/detergent/chemical/solvent were deposited with the Railways and issued from their store to ensure that adequate quantity was used by the petitioner for the execution of the awarded work.

The Court held that, the property in the consumable chemicals used in the process of cleaning did not transfer to the Contractee/Railways and accordingly the said goods were not exigible to tax. Since the said goods were not exigible to tax, the Contractee/Railways were not liable to deduct Tax at Source and the Commissioner VAT was liable to grant a certificate for NIL deduction of Tax Deducted at Source.

The impugned order dated 30.06.2014 was set aside. The Commissioner VAT was directed to issue the certificate of NIL deduction of tax at source.

For the Petitioner	:	Mr Vineet Bhatia, Adv. with Ms Neha Choudhary.
For the Respondents	:	Mr Satyakam with Mr Nikhil Bhardwaj, Advs. for R-1.
		Mr Anshuman Sinha with Mr Imran Alam, Adv. for R-2.
		Mr Jagjit Singh, Adv. for Railways.

Cases Referred to:

- *'Enviro Chemicals Vs. State of Kerala 39 VST 434 (Ker)*
- *Microtrol Sterilization Services Pvt. Ltd. v. State of Kerala ((2009) 26 VST 213 (Ker)).*
- *Xerox Modicorp Ltd. v. State of Karnataka, (2005) 7 SCC 380*

JUDGMENT

Sanjeev Sachdeva, J

WP(C) 7843/2014 & CM No. 18415/2014

1. The petitioner (Contractor) impugns the order dated 30.06.2014 passed by the Commissioner Valued Added Tax holding that the chemicals/ Solvents used in the process of cleaning, amounted to sale of goods and the moment the chemicals were poured on the property of the Contractee, even though used for the purposes of cleaning, amounted to delivery of the same and thus the same was exigible to Tax.

2. The questions that arise for consideration in the present writ petition are whether the consumable chemicals/solvents used in the process of cleaning amounts to transfer of property in the goods between the contractor and the Contractee and is thus exigible to tax. The second question raised

by the petitioner, i.e. whether the Commissioner was liable to grant a certificate for NIL deduction of Tax Deducted at Source, is dependent on the answer to the above question.

3. The petitioner is engaged in the business of providing services of maintenance, cleaning, washing, housekeeping, waste management, etc.

4. The petitioner was awarded a contract by the Northern Railways (hereinafter referred to as the Contractee) in relation to the management, cleaning, washing, housekeeping, waste management, etc. at Diesel Shed Shakurbasti and at Training School Shakurbasti.

5. It is contended by the petitioner that the contract was for cleaning of sites of Northern Railways (Contractee) and was a pure service contract and no transfer of property from the Petitioner (Contractor) to Northern Railways (Contractee) was involved. It is contended that the activities undertaken by the petitioner did not constitute a sale within the meaning of Delhi Value Added Tax, 2004 (hereinafter referred to as the DVAT Act).

6. It is contended that being a service contract the petitioner is paying service tax @ 12.36% on the entire consideration received by it from the Contractee. There is no separate payment made for the use of consumables. It is contended that as the payment made by the Contractee to the petitioner was not because of transfer of property in goods, no tax was required to be deducted at source under Section 36(A) of the DVAT Act. It is contended that the Contractee (Railways) to be on safe side insisted on deduction of tax at source.

7. It is contended that for the purposes of providing the service of cleaning, the petitioner was required to use soap/detergent/chemical of a very minimal quantity and a very nominal value. The soap/detergent/ chemical was used for removing the muck/grime and the same got completely 'consumed' in the process and were not transferred to the Railways. It is contended that the contract involved pure labour and service and was a mere works contract.

8. An application was filed before the Commissioner of DVAT under Section 36(A) (2) of the DVAT Act seeking certificate to the effect that the Railways should not deduct tax at source.

9. By the impugned order dated 30.06.2014, the Commissioner (DVAT) relying on the judgment of the Kerala High Court in *'Enviro Chemicals Vs. State of Kerala 39 VST 434 (Ker)* held that the moment the applicant pours the chemical on to the property of the Contractee, he will cease to be the

owner and at that point of time the awarder must be deemed to have taken delivery of the same.

10. In *Enviro Chemicals* (Supra) the court held that upon chemical being poured into the effluent, it loses its identity and that, it is consumed will not detract from the fact that there is delivery of the same to the awarder (Contractee), accordingly, the exigibility to tax is beyond any doubt.

11. Northern Railways arrayed as Respondent No. 2 filed its counter affidavit contending that there is no transfer of property involved from the petitioner to the Railways and these materials are not supplied directly to the Railways and Railways does not release any payment against the said materials.

12. The counter affidavit lists out the material/accessories and its quantity required per month. It is also contended that all consumable items are to be deposited in the sheds store (with the Railways) per month and these materials are to be issued after recommendations of the competent authority or nominated supervisor. The counter affidavit further contends that the arrangement of handing over the material to Railways is an operational procedure to ensure that the requisite quantity of consumables is used by the contractor. It is specifically averred that transfer of property is not involved in this contract.

13. Per contra, Special Commissioner, Department of Trade & Taxes filed the counter affidavit on behalf of Department of Trade & Taxes and defended the impugned order contending that the contract between the parties i.e. the petitioner and the Railways is a works contract of a composite nature. The property in goods i.e. chemical is transferred by the petitioner to the Railways. The petitioner is required to calculate chemical/ solvent per month and the same has to be delivered by the petitioner to the Railways. The contract stipulates that cost of chemicals and machines is included in activities mentioned in the schedule of unit rates.

14. It is contended that it is not just a service contract but a composite contract including transfer of property in goods involved in execution of the work contract. It is contended that the chemicals have been used extensively in the process of preparing, improving and cleaning of Railways property. The chemicals/solvents used are goods involved in execution of the works contract and the moment the petitioner poured chemicals on the property of the Railways he ceased to be the owner and at that point of time, the Railways is deemed to have taken delivery of the same. Thus, it is contended that the scope of work to be performed is such that there is transfer of property from the petitioner to the Railways, in the chemicals/ solvents involved, in the execution of the works contract.

15. To settle the controversy, let us examine the relevant provision of the DVAT Act.

16. Section 2(1) (zc) of the DVAT Act defines 'sale' as under:

" 'sale' with its grammatical variations and cognate expression means any transfer of property in goods by one person to another for cash or for deferred payment or for other valuable consideration (not including a grant or subvention payment made by one government agency or department, whether of the Central Government or of any State Government, to another) and includes-

(i) ********

(ii) ********

(v) transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(vi) ********"

17. In terms of Section 2(1) (zc) of the DVAT Act, when goods are used in execution of a works contract and there is transfer of property in such goods, then there is a deemed sale of the goods irrespective of the fact that the goods are in the same form or their form has changed.

18. The core issue is whether there is any transfer of property in the chemicals etc. that are used by the petitioner in the execution of the awarded work.

19. The Petitioner has been awarded the contract for execution of the work of Housekeeping, maintenance, cleaning, waste management and Locomotives cleaning & washing. The scope of work awarded to the petitioner is as under:-

No.	Description of Activity
1.	Mechanized scrubbing of shed floor to keep it free from muck / grim arises due to dropping of oil / grease / effluents and industrial waste by using biodegradable floor chemicals / solvent. Mechanized scrubbing by floor scrubbing / scarifying machine, removal of industrial waste along with muck, unwanted / useless and dumping the same at the nominated place within the shed complex.
2.	Mechanized scrubbing of oil godown floor Diesel main store to keep it free from muck / grim arises due to dropping of oil / grease / effluents and industrial waste by using biodegradable floor chemicals / solvent and floor scrubbing / scarifying machine, removal of industrial waste along with muck, unwanted / useless and dumping the same at the nominated place within the shed complex.

3.	Cleaning of floor of main shed, SMM store, Lab & Administrative block to keep it free from dropping of oil / grease / grime / effluent including removal of cobwebs from covered area.
4.	Cleaning of DEMU Care Centre, DEMU Block and Diesel Training Centre SSB to keep it free from dropping of oil / grease / grime / effluent including removal of cobwebs from covered area
5.	Cleaning of rooms, veranda, etc. of Lab, Administrative block and offices of Sr. Subordinate Super-visors with wiping by wet and dry moppers.
6.	Cleaning of rooms, veranda, etc. of DEMU Block and Diesel Training Centre SSB with wiping by wet and dry moppers.
7.	To keep floor, side walls of inspection pits free from muck / grime / arises due to dropping of oil / grease / effluents and industrial waste by using high-pressure cold / hot jet cleaner. Removal of unwanted industrial waste and dumping the same at the nominated place within the shed complex.
8.	To keep floor, side walls of DEMU Care Centre pits free from muck / grime / arises due to dropping of oil / grease / effluents and industrial waste by using high-pressure cold / hot jet cleaner. Removal of unwanted industrial waste and dumping the same at the nominated place within the shed complex.
9.	De-silting and cleaning of man holes less than two mts. deep.
10.	De-silting and cleaning of man holes more than two mts. deep.
11.	De-silting and cleaning of connected underground drains / Sewerage / well through truck mounted suction sum high pressure jet sewer cleaning machine.
12.	De-silting and cleaning of open drain
13.	Cleaning of toilets by high-pressure water jet cleaner, removal of silt and muck from urinals.
14.	Cutting of grass and shrubs in the shed premises
15.	Loco Washing / cleaning
16.	Cleaning of Pit wheel lathe machine complex to keep it free from dropping of oil / grease / grime / effluent / Waste metal chips including removal of cobwebs from covered area.
17.	Disposal of industrial waste from Diesel shed Shakurbasti to dumping ground (municipal area) with labour for loading / unloading and transportation.

20. For the execution of the above work of maintenance, cleaning washing of locomotives etc. the petitioner is required to use Chemicals/ solvents.

21. Clause 38 of the Special Conditions of Contract reads as under:

> "38. Chemical / Solvents and machines Chemical / Solvents used should be Eco-friendly, bio degradable pH value 7-8. Chemical/ solvent can be tested by Railway from the independent lab at the contractor's cost. Chemical/solvents used should be of reputed brand. Contractor after having gone through the scope of work will calculate the requirement of chemical/solvent required per month/ year. Chemical will be supplied by the contractor and shall be kept in the custody of Railway. These chemicals will be issued to the contractor on daily basis as per requirement submitted by the contractor and empty bottle s/cans are required to submit back to issuing authority after completion of daily work. Railway will not pay any amount separately to contractor for purchase of chemical or machine. Cost of chemicals and machines should be inclusive in activities mentioned in the schedule of unit rates."

22. Referring to the above clause 38, the Respondent/Revenue has held that the property in the chemicals/solvents used by the petitioner in the execution of the work has transferred to the Contractee.

23. In the impugned order, reliance has been placed on the judgment in the case of *M/s Enviro Chemicals* (Supra) of the Kerala High Court, wherein the majority relied upon the decision of the Supreme Court in *Xerox Modicorp Ltd. v. State of Karnataka, (2005) 7 SCC 380* to hold that in the facts of the case, the property in the goods used for the execution of the contract passed to the Contractee and thus amounted to sale and was exigible to tax.

24. The activity taken by the petitioner in relation to maintenance, cleaning, washing, housekeeping, waste management etc. is under a works contract. No doubt certain chemicals and solvents are used by the petitioner in the execution of the said contract but property in the said chemicals and solvents does not pass on to the Contractee. The use of chemicals and solvents is integral to the very execution of the works contract. The chemicals and solvents are not required by the Contractee for any purpose other than that for execution of the contract i.e. of cleaning, washing, housekeeping etc. The chemicals and solvents are of no independent use to the Contractee.

25. There is a distinction between consumables required for running an equipment and consumables required for servicing or maintaining an equipment. Take the example of a motor car. For running a motor car, petrol and Mobil oil are required and for servicing the car chemicals and solvents

are required. Both are consumables but one is required for running the car and the other is required for servicing the car. Petrol and Mobil Oil which is required for running the car is not composite with the purpose of running of the car and the owner can also independently purchase the same for filling in the car. On the other hand chemicals and solvent required for servicing the car are integral and composite with the service of the car.

26. With regard to petrol and Mobil oil, the moment they are poured in the motor car the property in them passes on to the owner of the motor car. Since property in them passes, the transaction of sale takes place. In contradiction, when a motor car is sent to a garage for the purposes of servicing, the garage owner uses chemicals and solvent for the purpose of cleaning and servicing the car. He may also change Mobil oil and add petrol. In so far as Mobil oil and petrol are concerned, there is no dispute that the moment they are poured in the car, the property in them passes. Even where some spare parts like bulbs etc. are changed, the moment they are affixed in the car, the property in them passes. However, the same cannot be said for the chemicals and solvent used by the garage owner for the pure purpose of servicing and cleaning the car. The chemicals and solvent that are used for the purpose of servicing and cleaning are consumables in the process of the service of the car. They are completely consumed in the process of servicing. They are not separately identifiable and accordingly, the property in them does not pass on to the owner of the car.

27. Similarly, in the present case, the chemicals and solvent that are used for the purpose of cleaning, washing etc. and are integral part of the works contract. They are goods, which are integral for the very execution of the service contract and are consumables, that are completely consumed in the contract, and no property in them passes to the Contractee.

28. It is this distinction that the Respondent/Commission VAT erred in not noticing in facts of the Judgments in *Enviro Chemicals* (Supra) and *Xerox Modicorp Ltd* (Supra).

29. In *Enviro Chemicals* (Supra), the dispute was with regard to the chemical product “Envirofloc” which was used as a chemical for effluent treatment. The Petitioner, therein, was using the chemical “Envirofloc” for the treatment of effluent. The case of the Petitioner was that since the chemical is completely used up in the process of effluent treatment, no transfer of property takes place.

30. The Majority in *Enviro Chemicals* (Supra) held as under:

> “13. After having considered the entire case law cited before us and on a conspectus of the provisions, we would think that the learned

Special Government Pleader is right in his contention based on the decision of the Apex Court in Xerox Modicorp Ltd's case (supra). It is no doubt true that the contract as such is not placed before us, if it is one which is reduced to writing. But we will proceed on the basis that the process involved is substantially the same as has been indicated by the assessee and which we have extracted. It is undoubtedly true that even after the 46th amendment, sales tax cannot be levied merely because there is a works contract. There must be transfer of property in the form of goods or otherwise than in the form of goods. What is taxable is the transfer of property in goods (See the definition of sale in the Act in this regard). It does not matter whether the transfer of property takes place in the form of goods or in any other form. It is undoubtedly also true that in view of the decision of the Apex Court in M/s. Gannon Dunkerley And Co. And Others v. State of Rajasthan And Others (1993 (1) SCC 364) that the cost of consumables involved in works contract cannot be taxed.

14. That the chemical in question is goods, is beyond doubt. It cannot be disputed that the assessee was the owner of the goods in question, namely the chemical. It is obviously the intention of the parties that the assessee must use the chemical in the effluent treatment process. It is equally indisputable that the assessee has actually used it. No doubt, in the Judgment of the Apex Court in Xerox Modicorp Ltd. v. State of Karnataka ((2005) 142 STC 209), the Apex Court found that the toners and developers are liquids put into the Xerox machine and they perform essentially the same function as ink in the printers and the Court also relied on the provision in the contract that the assessees in the said case would charge for the unaccounted stock at prevailing prices. By using the chemical, the petitioner/assessee rendered the effluent compliant with the standards. It could probably be said that in the case of the toner and developers as the function is that of ink in printers, it shows up in the final product of the xerox machines. But, the decision of the Apex Court is not based on there being any requirement that the items which are used should exist in any form in the resultant product which is the principle laid down by this Court in Teaktex Processing Complex Limited v. State of Kerala ((2004) 136 STC 435) and also in Microtrol Sterilization Services Pvt. Ltd. v. State of Kerala ((2009) 26 VST 213 (Ker)).

15. We would think that the principle "quicquid plantatur solo, solo cedit" is a principle which is apposite in the context of a building and

engineering contract. We get the following Account of the principle "quicquid plantatur solo, solo cedit":

> "The well-known principle is that the property in all materials and fittings, once incorporated in or affixed to a building, will pass to the free-holder quicquid plantatur solo, solo cedit. As soon as materials of any description are used in a building or other erection, they cease to be the contractor's property and become that of the free holder. The employer under a building contract may not necessarily be the free-holder, but may be a lessee or licensee, or even have no interest in the land at all, as in the case of a sub-contract. However, once the builder has affixed materials, the property in them passes from him, and at least as against him, they become the absolute property of his employer, whatever the latter's tenure of or title to the lands. The builder has no right to detach them from the soil or building, even though the building owner may himself be entitled to sever them as against some other person - for example, tenant's fixtures. Nor can the builder reclaim them if the building owner or anyone else has subsequently severed from the soil.
>
> Materials worked by one, into the property of another, becomes part of that property. This is equally true whether it be fixed or moveable property. Bricks built into a wall becomes part of the house, thread stitched into a cost which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship. Until, however, the materials are actually built into the work, in the absence of some stipulation intended to pass the property in them, when delivered on the site, they remain the property of the contractor, notwithstanding that they might have been approved by the employer or his agent or brought into the site unless the agreement between the parties evinces a clear intention to the contrary."
>
> We would think that the said principle as such may not advance the case of the Revenue in a case where the works contract involves the effluent treatment process wherein chemical is poured into the effluent.

16. When the assessee has used it, will it remain the owner of the chemical any longer? Will not the property in the goods pass to the

awarder? We would think that the moment the assessee pours the chemicals into the effluent, he will cease to be the owner and at that point of time the awarder must be deemed to have taken delivery of the same. In our view the fact that upon it being poured into the effluent, it loses its identity and that it is consumed will not detract from the fact that there is delivery of the same to the awarder. The assessee does not have a case that the effluent belongs to the assessee. We do not think that it can be their case that the effluent does not belong to the awarder. Let us pose a question, if a complaint by a third party is raised about the treated effluent, can the awarder absolve itself of the ownership of the same? We would think, it may not be possible. Therefore we would be justified in holding that the effluent and the treated effluent both belonged to the awarder. It is, therefore, into the property of the awarder, namely the effluent that the assessee supplies the chemical. The Apex Court in its decision in Gannon Dunkerley & Co. & Others v. State of Rajasthan & Others ((1993) 1 SCC 364) had, inter alia, held that cost of consumables, such as, water, electricity, fuel etc. used in the execution of the works contract, the property in which is not transferred in the course of execution of a works contract, is to be deducted. In Section 5C also, the words "not involving any transfer of property in goods" have been incorporated. Just like the toner and developer having been put into xerox machine becoming the property of the customer in the case before the Apex Court in Xerox Modicorp Ltd case and the sale taking place before the goods are consumed, in the same way, the property in the chemical passed to the awarder the moment they are put into the effluent by the assessee and its subsequent consumption is the consumption after sale and it does not detract from the factum of sale and consequently the exigibility to tax becomes unquestionable."

(Underlining supplied)

31. In *Xerox Modicorp Ltd. v. State of Karnataka, (2005) 7 SCC 380* the Supreme Court held as under:

"7. Even though at first blush the submissions of Mr Ganesh may appear attractive, on a proper consideration, we think that Mr Iyer was right when he submitted that the agreements are not just service contracts but also maintenance contracts. Mr Iyer is right that the machines belong to the customer after they are sold

to them. If after the sale some part was to be replaced or some component supplied there would be sale as understood in law. Under the agreements, apart from the service element, for which no tax is sought to be levied, there is the element of supplying parts and components like toners/developers, etc. Mr Iyer is right in submitting that merely because price is not being separately charged for this, does not detract from the position that the supply is for a price. Such supply has all the elements of sale as understood in law. There is transfer of title in movables for a price. The mere fact that it is not known in the beginning whether or not a part will have to be replaced is irrelevant. If there were no such agreements, it would not be known whether or not a part would be required to be replaced. It could not be denied that, even in the absence of any such agreements, if a part was required to be replaced and was replaced there would be a sale of that part. The same position remains even under the agreements. As and when a part is required to be and is replaced a sale takes place at that instance. To leave no room for doubt it must be mentioned that the tax is on sale. So if there is no replacement of a part then there is no sale of a part. So far as toners and developers are concerned it is known from the beginning that they will require regular replenishment. Under SSMA the customer buys them. Under FSMA they are replenished by the appellants.

***** ***** *****

16. We have considered the rival submissions. As set out hereinabove the word consumable in Explanation I to Rule 6(4) refers to such items which get consumed before the property in the goods can pass. We are informed that toners and developers are liquids which are put in the Xerox machine. They perform, to put it simply, the same function as ink in printers. Under the Sale of Goods Act if specified goods in a deliverable state are delivered the property in the goods passes. It could not be disputed that the toner and developer will be delivered in bottles/containers. In FSMA supplies are left with the customer. Thus clause 9 of the section dealing with the customer's obligation provides as follows:

> "The Customer shall be accountable to MX for xerographic supplies stock left in trust with the customer who shall ensure that such stock is used only in the equipment under this agreement. MX reserves the right to charge

> the customer for any stocks which are unaccounted for, to MX's satisfaction, at the then prevailing MX prices."
>
> Thus for the extra stock there is a provision which provides that it is left in trust. However once the toner and developer are put into the machine they are no longer in trust. This is because the property in the toner and developer passed the moment they are put into the Xerox machine. Now they belonged to the customer. At this stage they are tangible movables in which property can pass. This is clear from the provision that the appellants will charge for unaccounted stock at prevailing prices. That they are goods in which property can pass is also clear from the fact that in SSMA the customer has to buy the toner and developer. If as now claimed they are consumables in which property cannot be transferred how are the appellants charging for toners and developers. In our view, Mr Iyer is right. The sale i.e. transfer of property takes place before the goods are consumed. The transfer takes place in respect of tangible goods. Just like petrol is consumed after sale or ink is consumed after sale in this case also the toners and developers get consumed after sale. The property passes the moment they are put in the machine. At that stage they are not consumed but are tangible goods in which property can pass."
>
> (Underlining supplied)

32. In both *Enviro Chemicals (Supra)* and *Xerox Modicorp Ltd (Supra)*, the courts were not dealing with the goods which were integral to the service contract and which were completely consumed during the execution of the service contract. The goods were consumed for the purposes of the final output i.e. chemical treatment of effluent water *(Enviro Chemicals)* and spare parts and Toners and Developers (*Xerox Modicorp Ltd.*). The Courts were not concerned with goods (soaps/detergent/chemical/solvent) as in the present case which are consumed in the process of cleaning.

33. In the present case the contract inter alia requires the petitioner to perform the task of Mechanized scrubbing of shed floor to keep it free from muck / grime arising due to dropping of oil / grease / effluents and industrial waste by using biodegradable floor chemicals / solvent. Mechanized scrubbing by floor scrubbing / scarifying machine, removal of industrial waste along with muck, unwanted / useless and dumping the same at the nominated place within the shed complex. Cleaning of floor of main shed, SMM store, Lab & Administrative block to keep it free from dropping of oil /

grease / grime / effluent including removal of cobwebs from covered area. Cleaning of DEMU Care Centre, DEMU Block and Diesel Training Centre SSB to keep it free from dropping of oil / grease / grime / effluent including removal of cobwebs from covered area. Cleaning of rooms, veranda, etc. of Lab, Administrative block and offices of Sr. Subordinate Super-visors with wiping by wet and dry moppers. Cleaning of rooms, veranda, etc. of DEMU Block and Diesel Training Centre SSB with wiping by wet and dry moppers. To keep floor, side walls of inspection pits free from muck / grime / arises due to dropping of oil / grease / effluents and industrial waste by using high-pressure cold / hot jet cleaner. Removal of unwanted industrial waste and dumping the same at the nominated place within the shed complex. To keep floor, side walls of DEMU Care Centre pits free from muck / grime / arises due to dropping of oil / grease / effluents and industrial waste by using high-pressure cold / hot jet cleaner. Cleaning of toilets by high-pressure water jet cleaner, removal of silt and muck from urinals. Loco Washing / cleaning of Pit wheel lathe machine complex to keep it free from dropping of oil / grease / grime / effluent / Waste metal chips including removal of cobwebs from covered area.

34. The soaps, detergent, chemicals and solvent used purely for the purposes of cleaning and which are completely consumed, in the process of the execution of the above referred tasks, cannot by any stretch of imagination be said to goods in which property could pass to the Contractee. Similarly, water is also used in the above-referred process of cleaning and execution of the contract. Can it be said, that even property in water, that is used and consumed in the said process of cleaning and execution of the contract, is also transferred to the Contractee and the value of the water consumed should be exigible to tax.

35. The mere fact that soaps, detergent, chemicals and solvents are deposited in the store of the Contractee would not make any difference to the exigibility, as is sought to be contended by the Revenue/respondents, because, admittedly, by mere deposit in the store, the property in them is not stated to pass. It is contended by the Revenue/Respondent, that the property passes when they are actually used. The Petitioners and the Railways have contended that the said soaps/detergent/chemical/solvent are deposited with the Railways and issued from their store to ensure that adequate quantity is used by the petitioner for the execution of the awarded work.

36. In view of the above, we hold that, the property in the consumable chemicals used in the process of cleaning does not transfer to the

Contractee/Railways and accordingly the said goods are not exigible to tax. Since the said goods are not exigible to tax, the Contractee/Railways is not liable to deduct Tax at Source and the Commissioner VAT is liable to grant a certificate for NIL deduction of Tax Deducted at Source.

37. Accordingly, the impugned order dated 30.06.2014 is set aside. The Commissioner VAT is directed to issue the certificate of NIL deduction of tax at source.

38. The Writ Petition is disposed of in the above terms. No costs.

[2016] 54 DSTC 211 – (Delhi)

Before Bansh Raj Additional Commissioner
Objection Hearing Authority (Zone VII)

Reference Number: 23786

Nucleus Impex Private Limited

Date of Order: 30-11-2015

NOTICE OF DEFAULT ASSESSMENT OF TAX & INTEREST U/S 32 OF DVAT ACT, 2004 AND NOTICE OF ASSESSMENT OF PENALTY U/S 33 READ WITH 86 (10) OF DVAT ACT, 2004.

SURVEY OF THE BUSINESS PREMISES OF OBJECTOR – VARIATION FOUND IN STOCK AND CASH IN 3RD QUARTER OF 2014-15 – COLLECTION OF TAX, INTEREST AND PENALTY BEING INPUT TAX CLAIMED AGAINST PURCHASE THE GOODS FROM CANCELLED DEALER PERTAINING TO A.Y. 2013-14 – SURVEY TEAM GOT STATEMENT OF OBJECTOR FOR SURRENDERING THE TAX, INTEREST AND PENALTY U/S 9(2)(G) OF DVAT ACT, 2004 AND ALSO AGAINST THE VARIATION IN STOCK AND CASH PRIOR TO PASSING THE ORDERS AGAINST THE OBJECTOR.

WHETHER ORDER OF DEFAULT ASSESSMENT OF TAX, INTEREST AND PENALTY PASSED BY AVATO (ENFORCEMENT) WAS CORRECT WHEREAS POWER DID NOT DELEGATE FOR ASSESSMENT TO ENFORCEMENT TEAM –HELD – NO.

WHETHER COMBINED ORDER PASSED FOR A.Y. 2013-14 & 2014-15 IS LEGAL– HELD – NO.

WHETHER WITHOUT PROVIDING SUFFICIENT OPPORTUNITY OF BEING HEARD TO PROCEED FOR EX-PARTE ASSESSMENTS – HELD –NO.

WHETHER SURVEY TEAM CAN COLLECT TAX, INTEREST AND PENALTY IN THE ABSENCE OF ANY ASSESSMENT FRAMED – HELD – NO

Facts of the Case

Survey of business premises of the objector dealer was carried out by the officers of the Enf.-1 Branch on 17.10.2014 when difference in cash as well as stock was detected as of total Rs.9,54,110/-on which the tax @12.5% came to be of Rs.1,19,264/-.Simultaneously, it was also found by the surveying officers that the objector had made purchases amounting to Rs.1,06,46,315/- from M/s Eagle Trade Mart, a non-functioning cancelled dealer in the year 2013-14 and claimed input tax credit of Rs.13,30,789/- on the same. The Survey team, after informing the objector on 17-10-2014

about the cancelled status of Eagle Trade Mart; collected two cheques for Rs.13,30,789/- each towards tax and penalty, as is evident from the dealer's statement given to the Enf. Team, a copy of which was placed on record. The said cheques of above amount were collected by the team without framing any assessment as enshrined u/s 32 & u/s 33 of DVAT Act, 2004. Accordingly, invoking the provision of section 9(2)(g) of the DVAT Act, 2004, the AVATO of the Enf.-1 Branch not only taxed the stock and cash variations of Rs.9,54,110/-@12.5% with interest and penalty but also disallowed the input tax credit of Rs.13,30,789/- with interest & penalty under section 86(10) of the Act in the same order. Further, since the objector had deposited the amounts of Rs.13,30,790/- and Rs.2,66,158/- within 3 working days of survey and submitted two challans for these amounts, also gave benefit of reduction in penalty amount by 80% under section 87(6) of the Act. However, still feeling not satisfied, the objector had filled the above objections under sections 74(1) of the DVAT Act. On the objection petitions filed with stay application u/s 74(1) 3rd proviso; of DVAT Act, 2004 stay had been granted vide order no.739-740/ACTT/obj./ End-I&II/2015-16/34-35 dated 31-08-2015 subject to deposit of a sum equal to 5% of the amounts of Tax and Interest and 5% of penalty amount as a pre-condition, on which due compliance of stay order had been done by objector and 2 challans for Rs.14501/- & Rs. 6369/- dated 01-09-2015 placed on record.

Held

O.H.A heard the arguments for the objector and gone through the impugned default assessment orders dated 31.03.2015 issued by the AVATO of the Enf.-1 Branch for the 3rd quarter of 2014 under sections 32 & 33 of the DVAT Act together with the objections filed by the objector against them under section 74(1) of the Act. Simultaneously, copies of documents submitted by the Counsel in support of his case had also been closely perused and the judgments of the Hon. Higher Courts and the Appellate Tribunal (VAT), Delhi noticed with regard. On going through them all, it transpired that as evidenced from record and the impugned assessment orders, the objector had not only deposited on A.A call a sum of Rs.13,30,790/- towards tax and Rs.2,66,158/- towards penalty on 20.10.2014 i.e. within the prescribed period of three working days from the date of survey on 17.10.2014 and furnished copies of challans for these amounts before the AVATO of the Enf.-1 but also, while framing orders, the said assessing authority too besides adjusting the amount of Rs.13,30,790/- towards purported tax deficiency, necessary relief of 80% in the penalty amount under section 87(6) of the DVAT Act had also been given in the same order. As such, there appeared to be tax collection

prior to the framing of assessment in the orders. There was documentary evidence on record that proved collection of advance tax & penalty was unlawful, and same was paid in protest under coercion & duress. The facts of the case clearly indicated that no assessment was framed prior to the collection/deposit of tax and penalty sums above mentioned, hence not within the framework of law. Objector was eligible to seek Refund of above stated Adv. Tax & penalty paid as per the established provisions of law after satisfying the ward officer showing proof of payment of the same.

However, on the question of denial of proper opportunity of being heard to the objector and also to submit his case before the said authority, the objector appeared to have a case. Moreover, as further evidence from the impugned orders, although, in pursuance of cash and stock variations of Rs.9,54,110/- detected by the Enf.-1 officers on the day of survey on 17.10.2014,the notices of default assessments of tax, interest and penalty in respect thereof had been issued by the AVATO for the relevant tax period of 3rd quarter of 2014, yet, disallowance of input tax credit of Rs.13,30,789/- too on the purchase amounting to Rs.1,06,46,315/- alleged to have been made by the objector from M/s Eagle Trade Mart, a non functioning cancelled dealer, in the earlier year 2013-14, had been made and 20% penalty thereon in the assessments for the said tax period of 3rd quarter of 2014 itself, whereas in the eyes of law that every assessment year was an independent and separate year, the case of disallowance of the aforesaid claim of input tax credit had been taken into consideration in a separate assessment order and not to be clubbed in the assessments for the aforesaid 3rd quarter of 2014 as had been done by the AVATO of the Enf.-1 Branch in the present case. Since the objectors had submitted evidence vis-à-vis functionality of the alleged cancelled dealer M/s Eagle Trade Marts in RTI dated 28-07-2015 & 06-08-2015 replies placed on record which revealed the status of Eagle Trade Marts business was functional and regular returns were filled by it upto 31-12-2014. Tax period, in the year 2015 (beginning) & his Registration was cancelled only after the date of survey, question of disallowing ITC in 2013-14, therefore did not arise at all, as dealer was functional in the earlier year 2013-14. The surveying Enf-I officers claimed and passing on the said information to objector on survey date (17-10-2014) that M/s Eagle Trade Mart was a cancelled dealer, appeared to be totally wrong, deceptive, incorrect & false, which was why, the Advance Tax collection/deposit of Rs.1330790/- (tax) & Rs.266158/-(penalty) was most un-lawful, obnoxious & contrary to facts & circumstances of the case.

Therefore, on this count too, the impugned assessment orders being null & void did not survive. Accordingly, in the facts and circumstances

of the case and the law settled by the Hon. Higher Courts on this score, the O.H.A. was of the considered view that ends of justice would stand sufficiently met and served if the objector was given an opportunity of submitting relevant documents for claiming Refund of Tax, penalty before the assessing authority of the Ward. Simultaneously, credit/adjustment of Rs.2,66,158/- deposited by the objector towards penalty on 20.10.2014 shall also be given to the objector after verification thereof from the ward scroll. Also credit of Rs.1330790/- deposited by the objector towards tax for quarter ending 31-3-2014 on 20/10/2014, not accounted for in any return, be also given as per law. The objector, in view of the facts & records available, was eligible for refund of additional Tax and penalty paid for tax period under which no assessment had been framed by the assessing authority of ward-90 until now.

Form DVAT 40
See Rule 52

Reference Number: 23786 Date:30-11-2015

Decision of the Commissioner in respect of an objection
Before the Objection Hearing Authority

Objection Number	Date of filing of Objection
107391	12-05-2015
107393	12-05-2015

To,

Name of person/dealer making the objection: NUCLEUS INPEX PRIVATE LIMITED

Registration Number/TIN / Unregistered Dealer Identification No.:07070420880

Address: C86A (RIGHT SIDE PORTION), FIRST FLOOR, KALKAJI-110019

Objection Number	Period to which objection relates	Amount in dispute	Pay by date	Payable amount
107391	Third Quarter-(2014-2015)	127350.00	30-11-2015	0.00
107393	Third Quarter-(2014-2015)	290010.00	30-11-2015	0.00

Name of authorized representative of
Person making the objection : Sh. Sunil Minocha, (TA)

ORDER

Objection No. ACTT/Obj,/Z-VII /2015/739-740 ; Name &Address of Objector dealer M/s Nucleus Impex private Ltd, E-3, IInd Floor, Kalkaji, New Delhi-110019, TIN No. 0707420880,Nature of Objection Enforcement Survey; Name of Authorized Representative of Person making the objection, Sh. Sunil Minocha, TA.

M/s Nucleus Impex Private Ltd., a registered dealer of Ward-90 has filed these two objections under section 74(1) of the DVAT Act, 2004. One is against notice of default assessment of tax and interest issued by the AVATO of Enf.-1 Branch on 31.03.2015 for the tax period of 3rd quarter of 2014 under section 32 of the Act, 2004 while the other is against notice of assessment of penalty issued by the said assessing authority on the same date for the same tax period under section 33 read with section 86(10) of the said act. The demands in dispute are as above. Further, since issues involved in these objections are similar and inter-related, they both are decided and disposed of by this single order.

Facts of the case, in brief, are that survey of business place of the objector dealer was carried out by the officers of the Enf.-1 Branch on 17.10.2014 when difference in cash as well as stock was detected as of total Rs.9,54,110/-on which the tax @12.5% came to be of Rs.1,19,264/-. Simultaneously, it was also found by the surveying officers that the objector had made purchases amounting to Rs.1,06,46,315/- from M/s Eagle Trade Mart, a non-functioning cancelled dealer in the year 2013-14 and claimed input tax credit of Rs.13,30,789/- on the same. The Survey team, after informing the objector on 17-10-2014 about the cancelled status of Eagle Trade Mart; collected objector two cheques for Rs.13,30,789/- each towards tax and penalty, as is evident from the dealers statement given to the Enf. Team, a copy of which is placed on record. The said cheques of above amount was collected by the team without framing any assessment as enshrined u/s 32 & u/s 33 of DVAT Act,2004. Accordingly, invoking the provision of section 9(2)(g) of the DVAT Act, 2004, the AVATO of the Enf.-1 Branch not only taxed the stock and cash variations of Rs.9,54,110/- @12.5% with interest and penalty but also disallowed the input tax credit of Rs.13,30,789/- with interest &penalty under section 86(10) of the Action the same order. Further, since the objector had deposited the amounts of Rs.13,30,790/- and Rs.2,66,158/- within 3 working days of survey and submitted two challans for these amounts, also gave benefit of reduction in

penalty amount by 80% under section 87(6) of the Act. However, still feeling not satisfied, the objector has filled the above objections under sections 74(1) of the DVAT Act. On the objection petitions filed with stay application u/s 74(1) 3rd proviso; of DVAT Act 2004 stay has been granted vide order no.739-740/ACTT/obj./End-I&II/2015-16/34-35 dated 31-08-2015 subject to deposit of a sum equal to 5% of the amounts of Tax and Interest and 5% of penalty amount as a pre-condition, on which due compliance of stay order has been done by objector and 2 challans for Rs.14501/- & Rs. 6369/- dated 01-09-2015 placed on record.

Grounds taken by the objector in this case, broadly are

1. That the impugned notices of default assessments of tax and interest in form DVAT-24 and of penalty in form DVAT- 24A issued by the AVATO of Enf.– 1 Branch on 31.03.2015 are contrary to law and facts of the case because the said assessing authority of Enf. –1 Branch is not the assessing authority of Ward – 90 in which the objector firm stands registered, hence the AVATO (End-I) has no jurisdiction to assess the objector dealer. The dealer has been forcibly asked to deposit Tax (Rs. 1330790/-) & Penalty (Rs. 266158) within three working days from the date of survey, (as per challans on record) over & above the mount of ITC (i.e, Tax paid on purchases made during 2013-14 from a registered dealer namely M/s Eagle Trade Mart & supported by documentary evidence placed on record, claimed in the said tax period/year. Hence the Tax of Rs. 13,30,790/- paid twice by objector and penalty Rs. 2,66,158/- (20% of the said tax amount), be Refunded back to objector with interest, in accordance with the established provisions of law and rules prescribed, in view of the counsels application dated 26-02-2015 filed in the Enf-1 Branch on 26-02-2015 on the subject of illegitimate collection of Tax & Penalty in the absence of any assessment framed by Ass. Officer, and requesting the Enf. Officer to REFUND, the Tax amount & penalty with interest u/s 42(1) of DVAT Act, 2004.

2. That the AVATO has grossly erred in passing the ex-parte assessments orders without knowing as to what is the exact nature of default and is also not sure of the alleged irregularity. If any, on the part of the objector, Citing multiple reasons & not pin-pointing any one specific reason makes the default assessments unlawful, arbitrary & one which is laden with ambiguity. Hence, these orders are non-Est or nonexistent in the eyes of law.

3. That prior to exercising his powers to enter and search any business premises and resorting to conduct to a lawful survey and search, the AVATO (Enf.-1) has grievously erred in not taking into consideration

the prime issue of fulfillment of preconditions contained u/s 60(2) of the Act because in the case of M/s Shri Pukhraj Parasmal & Co. reported in 45 STC 488, it has been held by the Hon. Kerala High Court that it is incumbent upon the surveying officer to record in writing the reasons and suspicion of attempt to evade tax, in writing "Several other Judgments on similar point have been cited. However, on the issue of recording reasons, a couple of Supreme court decisions delivered in the years 1976 (SIEMENS) & 1996 (Bharat heavy Elect.) have also been cited.

4. That notices of default assessments are illegal, uncalled for and not in consonance with the provisions of law hence void abinito as the same are beyond jurisdiction because the AVATO has grossly erred by flouting the rudimentary provisions of law as stipulated in the DVAT Act. As per the law, after conducting survey, the findings of survey should have been forwarded to the assessing authority of Ward -90 in whose jurisdiction, the objector falls. Hence, the assessment orders could have been issued only by the Ward officer who alone has the inherent Jurisdiction over the objector to frame assessment u/s 32 and or u/s 33 of DVAT Act 2004 and not by the AVATO of the Enf.–1 Branch. This contention is supported by several Court Judgments cited by the counsel of the objector.

5. That the AVATO has also illegally enhanced the turnover of the objector by Rs, 9,54,110/- in a hypothetical manner and taxed the same @ 12.50% with interest and penalty which is against the law and without paying any heed to the documentary evidence produced before him, on several occasions from time to time, as is evident from record. The AVATO, having failed to pin-point or detect any discrepancy/short coming in the records and documents produced & filed before him, has erred grievously by refraining to apply his judicious mind & has blindly infringed upon established provisions of law by turning a blind eye to the material placed on record.

6. That the objector has maintained the books of accounts for the years 2013-14 and 2014-15 satisfactorily and no discrepancy nor any shortcoming was pointed out by the AA in them. Also, that as held by the Hon. High Court of Delhi in M/s Kirloskar Electric Co. Ltd. (1991) (83 STC 485), no tax could be collected except by authority of law. Other citations also quoted with Annexures of Judgment. Besides, the provisions contained u/s 3 of DVAT Act, 2004, which is the charging section, too have been violated with impunity and little respect of law. Sub-section (2) of section 3 clearly provides that every dealer shall be liable to pay tax at the rates specified in section 4 of this Act on every Sale of Goods effected by him (a) & (b) specified in section 4 therefore, merely alleging that dealer

is purportedly holding excess stock of goods than shown in his books is not sufficient. The incidence of tax begins only and only when the dealer makes a sale & this condition is paramount and most significant.

7. That the Enf.Team had coercively collected an amount of Rs. 13,30,790/- towards tax and Rs. 2,66,158/- towards penalty on the date of survey and later deposited on 20.10.2014 even when no assessment was ever done prior to collection and deposit of the said amounts. This contention is supported by several judgments of higher judicial authorities/ Courts prominent among them are two High Court judgments, & Objectors case falls within four corners of the said Judgments. In support of this contention three prominent judgments of Naresh Kumar & Co. (Annex– 6); Bhavesh Trading Co. (Annex-7) of written submissions dated 28-09-2015; and K.M. Puttaswamy V. C.T.O (Annex – 4) of index of documents, on pages 12-14, are cited.

8. That the impugned order imposing the penalty under section 33 is not only illegal, arbitrary and uncalled for but also, is in gross violation of the principles of natural justice because the same too has been passed exparte without affording any opportunity of being heard in a most arbitrary, unwarranted and injudicious manner. Thus, having being denied reasonable opportunity of being heard, the orders are against the rule of Audi Partem.

9. Notice issued u/s 59(2) seeking information & records for not one but two asst. years, and later on while framing assessment for 3rd Qtr of 2014-15.AVATO covered assessment for more than one Ass. Year (2013-14) and (2014-15). Each year is a distinct and separate year, and single Notice or order cannot cover or involve assessment for more than one Asst. Year. Several Judgments are quoted & copies annexed. The proceedings initiated by AVATO(Enf-I) in pursuance to notice issued u/s 59(2) of DVAT Act, 2004 for Ass. Year 2013-14 & 2014-15, have not been recorded at all in the impugned Assessment orders that suffer heavily from legal infirmity & the principles of natural justice, too have been defied. Documentary evidences required in the case were submitted before the AA, but not considered at all in impugned Orders. Therefore, both Asst. orders are laden with huge anomalies & worthy of being declared NULL & void & quashed.

Therefore, referring to a number of judgments of the Hon. Higher Courts, the objector has requested for setting aside and annulling the impugned assessment orders together with the demands raised therein against the objector.

An opportunity of being heard was given to the objector in pursuance of which Shri Sunil Minocha, the Tax Practitioner has appeared before me and reiterating the grounds taken in the objections, he has strongly argued

that not only the impugned orders are against the cannons of justice and law but also, because of their having being issued by the AVATO of Enf.-1 and not by the jurisdictional assessing authority of Ward-90 in which the objector is registered, the same are unsustainable in law. Therefore having filed detailed written submissions and copies of numerous judgments of the Hon. higher Courts, the Counsel has requested for acceptance of the objections and quashing of aside the impugned assessment orders together with the demands raised therein against the objector. He has vehemently also contended and prayed for seeking Refunds of the Tax &penalty unlawfully collected by the deptt. officials & paid by dealer under coercion and duress.

I have heard the arguments made by the Counsel for the objector before the undersigned as above and gone through the impugned default assessment orders dated 31.03.2015 issued by the AVATO of the Enf.-1 Branch for the 3rd quarter of 2014 under sections 32 & 33 of the DVAT Act together with the objections filed by the objector against them under section 74(1) of the Act. Simultaneously, copies of documents submitted by the Counsel in support of his case have also been closely perused and the judgments of the Hon. Higher Courts and the Appellate Tribunal (VAT), Delhi noticed with regard. On going through them all, it transpires that as evidenced from record and the impugned assessment orders, the objector has not only deposited on A.A call a sum of Rs.13,30,790/- towards tax and Rs.2,66,158/- towards penalty on 20.10.2014 i.e. within the prescribed period of three working days from the date of survey on 17.10.2014 and furnished copies of challans for these amounts before the AVATO of the Enf.-1 but also, while framing orders, the said assessing authority too besides adjusting the amount of Rs.13,30,790/- towards purported tax deficiency, necessary relief of 80% in the penalty amount under section 87(6) of the DVAT Act has also been given in the same order. As such, there appears to be tax collection prior to the framing of assessment in the orders. There is documentary evidence on record that proves collection of advance tax & penalty is unlawful, and same was paid in protest under coercion &duress. The facts of the case clearly indicate that no assessment was framed prior to the collection/ deposit of tax and penalty sums above mentioned, hence not within the framework of law. Objector is eligible to seek Refund of above stated Adv. Tax & penalty paid as per the established provisions of law after satisfying the ward officer showing proof of payment of the same.

However, on the question of denied of proper opportunity of being heard to the objector and also to submit his case before the said authority, the objector appears to have a case. Moreover, as further evidenced from the impugned orders, although, in pursuance of cash and stock variations

of Rs.9,54,110/- detected by the Enf.-1 officers on the day of survey on 17.10.2014,the notices of default assessments of tax, interest and penalty in respect thereof have been issued by the AVATO for the relevant tax period of 3rd quarter of 2014, yet, disallowance of input tax credit of Rs.13,30,789/- too on the purchases amounting to Rs.1,06,46,315/- alleged to have been made by the objector from M/s Eagle Trade Mart, a non functioning cancelled dealer, in the earlier year 2013-14, has been made and 20% penalty thereon in the assessments for the said tax period of 3rd quarter of 2014 itself, whereas in the eyes of law that every assessment year is an independent and separate year, the case of disallowance of the aforesaid claim of input tax credit ought have been taken into consideration in a separate assessment order and not to be clubbed in the assessments for the aforesaid 3rd quarter of 2014 as has been done by the AVATO of the Enf.-1 Branch in the present case. Since the objectors counsel has submitted evidence vis-à-vis functionality of the alleged cancelled dealer M/s Eagle Trade Mart in RTI dated 28-07-2015 & 06-08-2015 replies placed on record which reveal the status of Eagle Trade Marts business was functional and regular returns were filled by it upto 31-12-2014. Tax period, in the year 2015 (beginning)& his Registration was cancelled only after the date of survey, question of disallowing ITC in 2013-14, therefore does not arise at all, as dealer was functional in the earlier year 2013-14 (Ward records & RTI replies prove this point). The surveying Enf-I officers claim and passing on the said information to objector on survey date (17-10-2014) that M/s Eagle Trade Mart was a cancelled dealer, appears to be totally wrong, deceptive, incorrect & false, which is why, the Advance Tax collection/deposit of Rs.1330790/-(tax) & Rs.266158/-(penalty) is most un-lawful, obnoxious & contrary to facts & circumstances of the case.

Therefore, on this count too, the impugned assessment orders being null & void do not survive. Accordingly, in the facts and circumstances of the case and the law settled by the Hon. Higher Courts on this score, the undersigned is of the considered view that ends of justice would stand sufficiently met and served if the objector is given an opportunity of submitting relevant documents for claiming Refund of Tax, penalty before the assessing authority of the Ward. Simultaneously, credit/adjustment of Rs.2,66,158/- deposited by the objector towards penalty on 20.10.2014 shall also be given to the objector after verification thereof from the ward scroll. Also credit of Rs.1330790/- deposited by the dealer towards tax for quarter ending 31-3-2014 on 20/10/2014, not accounted for in any return, be also given as per law. The objector, in view of the facts & records available, is eligible for refund of additional Tax and penalty paid for tax period under which no assessment has been framed by the assessing authority of ward-90 until now.

Ordered accordingly.

A TRUE ADVOCATE

By H.L. TANEJA, M.A., LL.B. (Advocate)

Introduction

The All India Federation of Tax Practitioners, true to its function to keep its members upto date in law, in its journal for the month of June, 2016, published an article titled "Conventions For The Noble Profession of Law" wherein, para 1 reads as under :-

> "*Advocate's profession is service oriented, not trade or commerce or industry and is noble. Maintaining dignity and decorum is essentially based on mutual respect in between members of the Bar and Bench. Dignity, decorum and self-respect of the bar should be maintained as they are counterparts of the Administration of Justice, a divine act. Dispensation of Justice is not an individual act of judiciary, but a joint act of the Bar and Bench. The central function of the legal profession is to help promotion of administration of justice. Any misdemeanour or misdeed or misbehaviour can become an act of delinquency. It is desirable to observe written and oral conventions built over long years and followed since time immemorial.*"

Supplement To The Introduction Cited Above[1]

"As a matter of fact the Bar is the mother of the Bench. The popular version about the relationship of the Bar and the Bench is regarded as both being the "wheels of the chariot of justice". Unless, both function in harmony, the cause of justice cannot be advanced. The Bar and the Bench both cannot afford to talk in terms of "I and you". Both will have to talk in terms of "we". Then and only then we can say that we can think of providing justice for the teaming millions of the nation. It should be our constant endeavor to see that our relationship is strengthened day in and day out."

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1 2010 (1) SCC Journal 6 (bottom)

What is Law Profession ?

A highly relevant and beautiful extract from the autobiography of Chief Justice M.C.Chagla named "Roses in December" reads as under:-

> "Law is a great discipline for the mind. It teaches you how to think clearly, precisely and accurately. Every word has its definite meaning, and must find its proper place in its own context. Verbosity and diffuseness are foreign to a well-trained legal mind. Such a mind is essentially logical, and has the courage to face the results of its own mental process, and not to hide them under a cloud of rhetoric and declamation. There are many people who confess that they cannot understand how advocates defend bad causes. There is also a brief that an advocate's function consists for the most part in showing white as black and black as white. The only answer that one can give to this popular misconception is the famous answer that Johnson gave to Boswell, when he was asked what he thought of an advocate supporting a cause which he knew to be bad. Johnson's answer was that the advocate did not know it to be good or bad till the Judge determined it for him and for others. Therefore, the duty of the advocate is to do his best for his client. He is after all the client's mouthpiece, and he must put before the court all aspects of the case which are favorable to his client. But, he must do so fairly, without misleading the court, and without concealing from it anything that it is his duty to divulge. But, he is not concerned with the final result. That rests with the judge, and it is ultimately for the judge to decide which side is right, and how justice should prevail."[2]

Advice to the Young Advocates By Chief Justice M.C.Chagla

"No one can assure success at the Bar to any young man who is entering the advocate's profession. Success must ultimately depend upon the man himself. There is no other profession which demands such patience and perserverance because, as Lord Hewart once said, life at the Bar is never a bed of roses. It is either all bed and no roses, or all roses and no bed. The most difficult time in an advocate's life is when it is all bed and no roses. It is when he is passing through such

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2 2010 (1) SCC (Journal page 7)

a situation that he must maintain a stout heart; it is then that he must work and slave in a spirit of single mindedness. It is also the time to learn all that there is to learn about the art of advocacy.

The duty of an advocate is not to convert the Judge to his point of view, his duty is to see that the judge has understood and appreciated his side of the case and his arguments. By the same token, it is not the duty of the Judge to convert the lawyer, because the lawyer is paid not to be converted."[3]

Source of Inspiration for the Author to Write this Article

(i) In its judgment in the 'State of Punjab vs. Brijeshwar Singh Chahal'[4], the Supreme Court, speaking through Dr.T.S.Thakur, CJI, observed as under :-

> "*40. For a fair, quick and satisfactory adjudication of a cause, the assistance which the court gets from the Bar is extremely important. It is at times said that the quality of judgment or justice administered by the courts is directly proportionate to the quality of assistance that the courts get from the counsel appearing in the case. Our system of administration of justice is so modelled that the ability of the lawyers appearing in the cause to present the case of their clients assumes considerable importance. Poor assistance at the Bar by counsel who are either not sufficiently equipped in scholarship, experience or commitment is bound to adversely affect the task of administration of justice by the court."*

(ii) Supreme Court judgment in the case of Motilal Padampat Sugar Mills Co. Ltd. vs. the State of Uttar Pradesh and others[5], wherein it is held as under :-

> "*There is no presumption in the country that every person knows the law: it would be contrary to common sense and reason if it were so. Scrutton, L.J., also once said: "It is impossible to*

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3 2010 (1) SCC (Journal page 8)

4 (2016) 6 SCC 1 (para 40)

5 (1979) 44 STC 42 – 53

know all the statutory law, and not very possible to know all the common law." But it was Lord Atkin who, as in so many other spheres, put the point in its proper context when he said in Evans v. Bartlam : "….. the fact is that there is not and never has been a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application."

Necessity on the Part of the Advocate to remain Upto Date in Law of the Subject Dealt in by Him

The above apart, there are other factors which necessitate that an advocate should be up-to date in law. These are as under :-

(i) Supreme Court judgment in State of Orissa vs. Nalinikanta Muduli[6] wherein it is held, inter-alia:-

"B. Advocates – Generally – Members of the Bar, held, are officers of the court – They have a bounden duty to assist the court and not mislead it – Citing an overruled decision before a court without disclosing the fact that it has been overruled, held, is a matter of serious concern"

(ii) Supreme Court judgment in the case of Palitana Sugar Mills (P) Ltd. and Another vs. State of Gujrat and Others[7] wherein, para 62 of the judgment reads under :-

"62. It is well settled that the judgments of this Court are binding on all the authorities under Article 142 of the Constitution and it is not open to any authority to ignore a binding judgment of this Court on the ground that the full facts had not been placed before this Court and / or the judgment of this Court in the earlier proceedings had only collaterally or incidentally decided the issues raised in the show-cause notices. Such an attempt to belittle the judgments and the order of this Court, to say the leaset, is plainly perverse and amounts to gross contempt of this Court. We are pained to say that the then Deputy Collector

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6 2004 (7) SCC 19

7 2004 (12) SCC 645

has scant respect for the orders passed by the Apex Court."

(iii) Andhra Pradesh High Court judgment in the case of State of Andhra Pradesh vs. CTO, Kurnool and Another[8], the relevant para reads as under :-

> "The authorities and the Tribunals functioning within the jurisdiction of High Court, and in respect of whom the High Court has the power of superintendence under article 227 of the Constitution, are bound to follow the decisions of the High Court, unless, on appeal, the operation of the judgment has been suspended."

(iv) Supreme Court judgment in Bharat Sanchar Nigam Ltd. vs. Union of India[9] held, inter-alia, the contents of concepts do not remain static. Courts must move with the times.

(v) Supreme Court judgment in Supreme Court Advocates – on-Record Association and another vs. Union of India[10], wherein it is held:-

> "The inevitable truth is that law is not static and immutable but ever increasingly dynamic and grows with the ongoing passage of time."

All the above judgments emphasize that a true advocate should be upto date in law, so that, he does not violate any of the above guidelines. It is very aptly said that for an advocate that day is not lost when he does not get any brief, but, that day is lost when he does not get fresh knowledge of law.

In sum, a true advocate should invariably daily devote proper time towards study of the case law contained in the relevant journals on his subject.

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8. (1988) 68 STC 177

9 (2006) 145 STC 91 (para 44) = (2006) 282 ITR 273

10 AIR 1994 SC 268 – 303 para 16 (bottom)

Obligation of the Advocate Functioning as a Government Counsel

In Mohinder Singh Gill v. Chief Election Commissioner[11], it is held:-

> "when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to the court on account of a challenge, gets validated by additional grounds later brought out".

Necessity of giving reasons while arguing a case

(i) In the judgment reported in Jawahar Lal Singh vs. Naresh Singh[12], the apex court referred to the judgment of Lord Denning M.R. in Breen vs. Amalgamated Engineering Union (1971) 1 All ER 1148 (CA) wherein the court observed :

> "The giving of reason is one of the fundamentals of good administration". In Shri Swamiji of Shri Admar Mutt v. Commissioner, Hindu Religious and Charitable Endowments Departments, AIR 1980 SC 1, the apex court also quoted with approval the legal maxim cessante ratione legis cessat ipsa lex, which means reason is the soul of law and when reason of any particular law ceases, so does the law. In State of West Bengal v. Atul Krishna Shaw, AIR 1990 SC 2205, the apex court reiterated that giving of reason is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review. Reasoned decision is not only for the purpose of showing that the citizen is receiving justice, but also a valid discipline for the Tribunal itself. Therefore, statement of reasons is one of the essentials of justice. Judicial discipline to abide by declaration of law by this court, cannot be forsaken."

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11 AIR 1978 SC 851 -858

12 1987 (2) SCC 222

(ii) In Maneka Gandhi v. Union of India,[13]the Supreme Court has held that the courts insist upon disclosure of reasons on three grounds (a) the party aggrieved has the opportunity to demonstrate before the appellate or revisional court that the reasons which persuaded the authority to reject his case were erroneous; (b) the obligation to record reasons operates as deterrent against possible arbitrary action by executive authority invested with judicial power; and (c) it gives satisfaction to the party against whom the order is made.

A Few Principles of Precedent

(i) On the subject of precedents Lord Halsbury L. C. said in Quinn v. Leathem[14]:-

> "Before discussing Allen v. Flood [1898] AC 1 ; (1895-99) All ER Rep 52 (HL) and what was decided therein, there are two observations of a general character which I wish to make ; and one is to repeat what I have very often said before – that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

(ii) In Bhavnagar University v. Palitana Sugar Mills P. Ltd.[15] held,

> "…… It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.

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13 AIR 1978 SC 597

14 (2015) 372 ITR 1 - 30

15 2003 (2) SCC 111

Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed.

(iii) Karnataka High Court judgment in the case of Ranganatha Associates and Others vs. Union of India and Others[16], held, Interpretation of Supreme Court of similar provision in different enactment binding on High Court. In the same vein is a judgment of Gujrat High Court in Commissioner Wealth Tax vs. Abdul Saeed Abdul Hamid[17] wherein it is held *'when no provision in Act – Similar provision in another taxing statute can be taken into consideration'.*

(iv) Director of Income Tax (International Taxation) vs. Ravva Oil (Sigapore) Pvt.Ltd.[18] held as under :-

> "*Interpretation of a provision in a taxing statute rendered years back should not be easily departed from. It may be that another view of the law is possible but law is not a mere mental exercise. The courts, while reconsidering the decisions rendered long time back particularly under taxing statutes, cannot ignore the harm that is likely to happen by unsettling law that had been once settled."*

(v) Supreme Court judgment in the case of Empire Industries vs. Union of India and Others[19] held : - *Interim order is not a precedent.*

(vi) Supreme Court judgment in Padamsundara Rao (Decd.) and Others vs. State of Tamilnadu and Others[20], reads as under :-

> "The court cannot read anything into a statutory provision which is plain and unambiguous. A statute is the edict of the legislature. The language employed in a statute is the determinative of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the Legislature itself.

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16 (2003) 261 ITR 646

17 (2006) 281 ITR 132

18 (2008) 300 ITR 53

19 (1989) 64 STC 42 – 69

20 (2002) 255 ITR 147

> The court only interprets the law and cannot legislate. If a provision of law is misused and subjected to the abuse of the process of law, it is for the Legislature to amend, modify or repeal it, if deemed necessary. Legislative casus omissus cannot be supplied by judicial intpretative process."

(vii) Delhi High Court – Full Bench in the case of Lachman Dass Bhatia Hingwala (P.) Ltd. v. A.C. of Income-Tax[21] Held, Ratio decidendi – To be read in Context.

(viii) The following words of Lord Denning in the matter of applying precedents have become locus classicus :-

> "*Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblence to another case is not at all decisive..*
>
> *Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches….."*[22]

A Few Principles of Interpretation

The Punjab and Haryana High Court has held in the case of Leader Engineering Works v. CIT, Amritsar II[23] that taxation laws are technical.

(i) Supreme Court judgment in Union of India and Another v. Arulmozhi Iniarasu and Others[24]

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21 (2011) 330 ITR 243 – 244

22 (2015) 372 ITR 1 – 32

23 (1980) 124 ITR 44

24 2011 (7) SCC 397

Held, "court should not place reliance on decisions without discussing as to how fact situation of case before it fits in with fact situation of decision on which reliance is placed – Observations of the courts are neither to be read as Euclid's theorems nor as provisions of statute and that too taken out of their context – They must be read in context in which they appear to have been stated – Disposal of cases by blindly placing reliance on a decision is not proper because one additional or different fact may make a word of difference between conclusions in two cases."

(ii) Supreme Court judgment in the case of Pratibha Processors and Others v. Union of India and Others[25]

"13. In fiscal statute, the import of the words – "tax", "interest", "penalty" etc. are well known. They are different concepts. Tax is the amount payable as a result of the charging provision. It is a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. Penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. Interest is compensatory in character and is imposed on assessee who has withheld payment of any tax as and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty – which is penal in character."

(iii) Supreme Court judgment in the case of Commissioner of Income-Tax, Central, Calcutta v. National Taj Traders[26]

> "The principle that a fiscal statute should be construed strictly is applicable only to taxing provisions such as charging provision or a provision imposing penalty and not to those parts of the statute which contain machinery provisions."

(iv) Supreme Court judgment in the case of Radhasoami Satsang v. CIT[27] reported as under :-

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25 AIR 1997 SC 138 – 143 (para 13)

26 (1980) 121 ITR 535 – 536

27 (1992) 193 ITR 321 – 322

"Strictly speaking, res judicata does not apply to income-tax proceedings. Though, each assessment year being a unit, what is decided in one year might not apply in the following year; where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

(v) Madras High Court judgment in the case of Peirce Laslie and Co. v. CIT[28]

> "It is now an accepted principle in the matter of construction of an Indian Statute that as far as possible, there must be uniformity of construction and if the provisions of law which fall for consideration before the court have already been construed by another High Court or High Courts, unless there are compelling reasons to depart from that view, normally that construction should be accepted."

[1975] 99 ITR 264 (Guj.); [1979] 116 ITR 240 (All) and [1982] 135 ITR 19 (Ker.) [FB] followed.

(vi) Supreme Court judgment in the case of UOI v. Deoki Nandan Aggarwal[29]

> "The court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the Lagislature the court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The court, of course, adopts a construction which will carry out the obvious intention of the Legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities…"

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28 (1995) 216 ITR 176 – 178

29 AIR 1992 SC 96

(vii) Supreme Court judgment in the case of Keshavji Ravji and Co. v. CIT[30]

> "As long as there is no ambiguity in the statutory language, resort to any interpretative process to unfold the legislative intent becomes impermissible. The support intention of the Legislature cannot then be appealed to whittle down the statutory language which is otherwise unambiguous. If the intendment is not in the words, it is nowhere else. The need for interpretation arises when the words used in the statute are, on their own terms, ambivalent and do not manifest the intention of the legislature."

(viii) Supreme Court judgment in the case of CIT, W.Bengal I v. Vegetable Products Ltd.[31]

> "If the court finds that the language of a taxing provision is ambiguous or capable of more meanings than one, then the court has to adopt that interpretation which favours the assessee, mote particularly so where the provision relates to the imposition of a penalty."

(ix) Supreme Court judgment in the case of Bajaj Tempo Ltd. v. CIT[32]

> Held, "A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally; and since a provision for promoting economic growth has to be interpreted liberally, the restriction on it too has to be construed so as to advance the objective of the provision and not to frustrate it."

(x) Supreme Court judgment in the case of CST, U.P., Lucknow v. Anoop Wines[33]

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30 (1990) 183 ITR 1 – 2

31 (1973) 88 ITR 192

32 (1992) 196 ITR 188

33 (1988) 71 STC 262 - 263

"The principle enunciated in **L. Hazari Mal Kuthiala v. Income-Tax Officer [1960] 41 ITR 12 (SC)***, that if a particular action is valid under one section it cannot be rendered invalid because reference was made to another section, has no application where in a penal action no notice was given to the delinquent of the offending party of the other provision under which the penalty is sought to be justified or resort to such other provision was not brought to his knowledge."*

Conclusion

Taking inspiration from the judgment of the Hon'ble Supreme Court in the case of State of Punjab v. Brijeshwar Singh Chahal, referred to above, it can be said that a person will be 'A True Advocate' if and only if he is up to date in law and, the case in which he appears, the judgment delivered reveals his contribution.

Taxability of Trademark – Service or Sale?

By Advocate Amit Sharma & Tripti Pandey

Abstract

The taxation on right to use trademark has been under quieted a chaos in India. The case of taxing Tata Sons for the use of their brand name was in the limelight wherein the court refused to implead the Centre as a party on the grounds that such transactions cannot be subjected to both sales tax by the state governments and service tax by the central government. Further in Subway Systems India Private Ltd[1] *, in this landmark decision, the Bombay High Court has laid down the principles for making a distinction between a 'permissive use' and 'transfer of right to use', The former cannot be subject to VAT as there is no element of sale or deemed sale, however In Maharashtra, in many cases, even though service tax has been paid, state tax authorities raise VAT demands on the grounds that 'franchises' have included within the classification of 'goods' for tax purposes under the Maharashtra VAT Act since 2005.*

The Precedents and judgment varying from state to state has created a state of chaos and confusion. The Apex court needs to step out and clear the stance on just grey areas of taxation law. This paper discusses case laws and throws light on the current situation of taxation regime of right to use of trademark.

Introduction

There are plethora of precedent swinging the sword both side as to how to tax right to use trademark. This paper throws light law on sales tax and service tax since its inception has evolved strongly in their respective areas. While the States depends on the revenue generated from the levy of VAT on goods, the centre banks on the revenue generated from the provision of taxable services. The Constitution Entry 54 empowers state where as Entry 97 empowers 97 gives power to center to levy tax. The independent source of revenue for centre and state is sanctioned by the constitution to sustain the federal governance.

The judgment of Supreme Court in the case of *Imagic Creative (P) Ltd. v. Commissioner of Commercial Taxes and others*[2] it was held that levy of

1 WP No. 497 of 2015

2 2008-TIOL-04-SC-VAT

VAT and service tax are mutually exclusive emphasizing on intention of legislature/

While it is a settled law that a given transaction is not leviable to be taxed simultaneously under the State VAT act and the Finance Act, 1994, however, because of the nature of few unexceptional transactions the fundamental question of nature of levy becomes a challenge. 'Transfer of right to use trademark' is one such transaction which finds a levy both under the state VAT laws as well as under the Finance Act, 1994.

Sales TAX/VAT

In order to attract a levy of VAT, the subject property has to fall within the definition of 'goods' under the State VAT laws. The definition of 'Goods' under different State VAT laws has been broadly adopted from section 2(7) of the Sale of Goods Act, 1930 .

Trademark is an intellectual property right. Trademarks are assignable and transmissible, with or without the goodwill of any business concerned. Trademarks are intangibles and have been broadly categorized as 'goods' by the High Court Bombay in the case of *Commissioner of Sales Tax vs Duke and Sons Pvt Ltd*[3] which was subsequently, followed by the Kerala High Court in the case of *Jojo Frozen Foods (P) Ltd. vs State of Kerala*[4]. The Bombay High Court observed in Duke's case (*Supra*) that "*For transferring the right to use the trade mark, it is not necessary to hand over the trade mark to the transferee or give control or possession of trade mark to him. It can be done merely by authorising the transferee to use the same in the manner required by the law as has been done in the present case. The right to use the trade mark can be transferred simultaneously to any number of persons. . …In the instant case, there is no dispute about the fact that trade mark is specifically included in the Schedule of goods to the 1985 Act in entry No. 7. The amount received by the assessee on the transfer of the right to use the same is, therefore, liable to be taxed under the said Act.*

Further the question of intangibles can be treated as 'goods' for the purpose of VAT levy has been settled with the decision of the Supreme Court in *Tata Consultancy Services vs State of A.P*[5] wherein, it was held that intangibility is not something which should determine whether a property is 'goods' for the purpose of sales tax. The test is whether the property is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored etc.

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3 1999 112 STC 371 (BOM)

4 (2009) 24 VST 327

5 2004-TIOL-87-SC-CT-LB

The transfer of the right to use goods is distinct from the transfer of goods and is yet another economic activity intended to be exigible to State tax. Article 366(29A)(d) states that -"*a tax on sale or purchase of goods includes -(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration* ";

The levy of VAT is normally on the transfer of title of goods which is nothing but sale of goods, however, 'transfer of right to use goods' is a deemed sale which is also leviable to VAT under article 366(29A) of the constitution of India .

High Court of Andhra Pradesh has clearly distinguished features between ordinary sales and deemed sales in *G S Lamba & Sons vs. State of AP*[6]. The court observed that Article 366(29-A)(d) of the Constitution implies tax not on the delivery of the goods for use, but implies tax on the transfer of the right to use goods. The transfer of the right to use goods contemplated in sub-clause (d) of clause (29-A) cannot be equated with that category of bailment where goods are left with the bailee to be used by him for hire. In the case of Article 366 (29-A)(d) the goods are not required to be left with the transferee. All that is required is that there is a transfer of the right to use goods. In such a case taxable event occurs regardless of when or whether the goods are delivered for use. What is required is that the goods should be in existence so that they may be used. The levy of tax under Article 366(29-A) (d) is not on the use of goods, it is on the transfer of the right to use goods which accrues only on account of the transfer of the right.

it can be ascertained that "Assignment" of trade mark is taken to be a sale or transfer of the trade mark by the owner or proprietor thereof to a third party *inter vivos* . Although via assignment, the original owner of trade mark divests of his right, title or interest therein but not the transfer of right to use the same. Further License to use trademark is not accompanied by transfer of any right or title in the trade mark.

Therefore, we can conclude that transfer of right to use trademark is distinct from assignment of trademark, however, both are exigible to VAT.

Service Tax

As per section 66B of the Finance Act, 1994 value of all the services provided or agreed to be provided in the taxable territory other than those services specified in the negative list is chargeable to service tax. The term 'service' is defined in section 65B(44) of the Finance Act, 1994 .

6 2012-TIOL-49-HC-AP-CT

Intellectual property right has not been defined under the current Finance Act, 1994, however, prior to coming in force of ‘negative list of services' Intellectual property right was defined under section 65 (55a). Therefore, it is implied that intellectual property right for the purpose of provision of service includes ‘Trademark'.

It is to be noted that, the definition of ‘service' under section 65B(44) specifically excludes transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause 29A of Article 366 of the Constitution. However, on a careful scrutiny of Article 366(29A) (d) of the Constitution and section 66E of the Finance Act, 1994, it can be observed that, **a transfer of right to use trademarks for a specified period is a ‘deemed sale' under Article 366(29A) and is also a declared service under section 66E of the Finance Act, 1994.**

The Finance Act, 1994 is specifically to cover only a temporary transfer of right in an intellectual property. A permanent transfer of such right to use would clearly render such transaction as ‘sale', which is not the intention of the Finance Act, 1994. While, Article 366(29A)(d) is generic in nature which includes, a transfer of right to use any goods for a specified/non specified period, whereas section 66E is very specific and service tax levy is on a temporary transfer of right to use intellectual property right.

Intellectual property right includes trademarks which have also been held as ‘goods' by the courts. The existence of such an uncertainty in the law makes it very difficult to ascertain as to what is the proper tax levy in a transfer of right to use trademark.

In this regard, in the case of M/ s.Smokin Joe's Pizza Pvt. Ltd[7] wherein the trademark was used by other parties on a franchise basis vide a franchise agreement which also included provision of services to the franchisee like, helping in layout of the premises, selection of raw materials and etc. the appellant was of the opinion that this is a licensing transaction and not a lease transaction. In appeal, the Tribunal placed reliance on the judgment of Supreme Court in case of Gujarat Bottling Co. Ltd. & Others[8] and held that the transaction of franchise of trade mark is not lease transaction but amounts to licensing transaction. Therefore, no tax is payable on such transaction under Sales Tax Law.

The Apex Court in the case of *BSNL v. Union of India*[9]*laid down* and the following attributes are required in transaction to be exigble VAT:-

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7 A.25 of 2004 dt.25.11.2008

8 AIR 1995 SC 2372)

9 2006-TIOL-15-SC-CT-LB

(*a*) *there must be goods available for delivery.*

(b) there must be a consensus ad idem as to the identity of the goods;

(c) the transferee should have a legal right to use the goods--consequently all legal consequences of such use including any permissions or licenses required thereof should be available to the transferee;

(d) for the period during which the transferee has such legal right, it has to be to the exclusion to the transferor--this is the necessary concomitant of the plain language of the statute viz. a "transfer of the right to use" and not merely a license to use the goods;

(e) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same right to others.

These attributes relate to 'transfer of right to use goods' but is useful in letter and spirit if the goods in question are tangible in nature. However due to lack of clear position with respect to intangible goods, it's used as precedent, it is not a good law for intangible asset because of two following reasons,:-

1) "*for the period during which the transferee has such legal right, it has to be to the exclusion to the transferor"* , It is clear that once a transferor has transferred to a transferee the right to use tangible goods for a certain period, the transferor is automatically abstained and excluded from the use of the goods. This is certainly not the case for intangible goods as the owner retains the right to use such goods by default.

2) "*having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same right to others".* Once a transferor has transferred the right to use tangible goods for a certain period, the transferor is actually handicapped from transferring the same right to others. This is because of the very nature of tangible goods However, with respect to intangible its not applicable.

Even the single bench of *Kerala High Court in Malabar Gold Pvt. Ltd vs. Commercial Tax Officer*[10]*,* it was held that the judgment of Supreme court in BSNL vs UOI[11] was held to be not applicable in transactions relating to transfer of right to use trademark. However, the division bench of the Kerala High Court in the same case[12] analyzed and held that transfer

10 2012-TIOL-1032-HC-KERALA-VAT

11 Supra 10

12 2013-TIOL-512-HC- Kerala-ST

of right to use trademark will not attract provisions of the KVAT act and service tax is payable on the same.

In Vitan Departmental Store and Industries Ltd[13] Madras High court brought to fore different perspectives of taxation of intangibles under indirect tax laws. The Kerala High Court in Malabar Gold[14] held grant of franchisee rights as 'service' whereas the Madras High Court held it as 'deemed sale' – transfer of right to use trademarks. In both the cases, the assessee had entered into franchise agreement for providing business know-how, processes, etc for operating businesses under the trade name/trade mark, owned and licensed by the franchisor. The key difference is that the Kerala High Court applied in the Malabar Gold case, based on the analysis of several High Court and Supreme Court judgments including the case of BSNL[15].The Court held that the franchisor retained the right to the trade mark, had effective control and possession of the intellectual property; the franchisor can during the period of agreement with the franchisee transfer the use to other persons; the franchisee has no rights to deal with the trade marks ,it cannot sub-let, sub-lease, sell, transfer and so on and, therefore, the transaction cannot constitute "transfer of right to use goods" and does not attract liability State VAT.

Further, tribunal in a recent case of *Eicher Good Earth Ltd vs Commissioner of Service Tax, New Delhi*[16] it was observed in the light of erstwhile section 65(55b) of the Finance Act, 1994 wherein "*intellectual property service "means, - (a) transferring, temporarily; or (b) permitting the use or enjoyment of, any intellectual property right and will exigble under the act*

Conclusion

The issue as to whether transfer of right to use trademark is exclusively under VAT levy or under service tax levy is unsettled as yet. However, from the trend of the decisions of the various courts it is evident that levy is slowly and steadily shifting from VAT to service tax..A clear Judgment from the Apex court is needed to clear the position of law, and remove all ambiguousness related to the taxability of trademark.

13 TS-195-HC-2013(MAD)-VAT

14 Supra 11

15 ibid

16 2012-TIOL-579-CESTAT-DEL

Migration of taxpayers into GST

By Gaurav Gupta

At the inception, the first tax to be levied in India in Indirect tax regime was Customs Duty, then Excise Duty, followed by Sales Tax and then followed by a line of multiple taxes which resulted in formation of one of the most complicated indirect structure in the world. This multiplicity is marked with division of levy of taxes between Union and States. The Constitution of India closely follows the pattern of division of tax powers between the Centre and the States established by the Government of India Act, 1935. We have discussed the division of Power under Consittution later in the chapter. The parent body of major indirect taxes in India, the Central Board of Revenue, was constituted in 1934. The different types of indirect taxes in India include Excise duty, Customs Duty, Service Tax, Value Added Taxes by respective states, Octroi duty, toiletries and Medical Preperation Duty, Entry tax etc.

Solution to the problem of multiple taxes:

Answer to above has been provided under First Discussion Paper on GST whereby it has been said that there was a burden of “tax on tax” inthe pre-existing Central excise duty of the Government of India and sales tax system of the State Governments. The introduction of Central VAT (CENVAT) has removed the cascading burden of “tax on tax” to a good extent by providing a mechanism of “set off” for tax paid on inputs and services upto the stage of production, and has been an improvement over the pre-existing Central excise duty. Similarly, the introduction of VAT in the States has removed the cascading effect by giving set-off for tax paid on inputs as well as tax paid on previous purchases and has again been an improvement over the previous sales tax regime. Thus GST is not simply VAT plus service tax, but a major improvement over the previous system of VAT and disjointed services tax – a justified step forward.

The introduction of GST in India marks a paradigm shift from the current regime of Service Tax, Excise, VAT and various other taxes and cesses towards an integrated law. This would require all assesses under the current law to migrate to GST. This would entail various aspects such as registration, unutilized balance of CENVAT credit/ input tax credit, pending cases and litigations, demands pertaining to existing law being finalized after introduction of GST and various other things.

Thus, the change to GST regime a major one, however, not only the future regime, but its transition shall also be a challenge both for industry

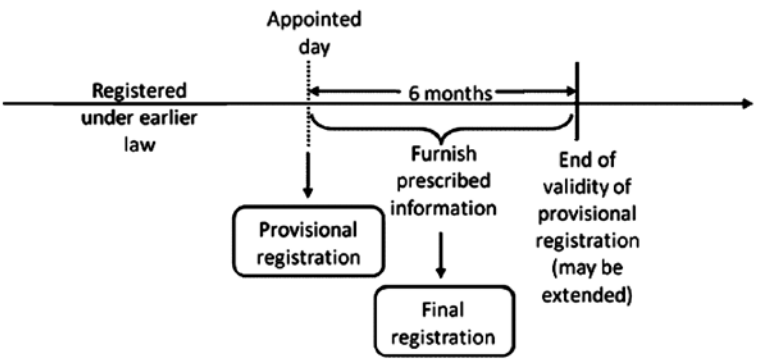
as well as professional. Migration of existing ta payers is one of the most challenging and important tasks in GST migration.

Registration is fundamental to the administration of any tax. The taxpayer enrolls himself by following the prescribed procedure, and thereafter a unique identification code is granted to such taxpayer, which is to be used in all correspondence. For the introduction of Goods & Services Tax or GST, it has been proposed that the registration of all existing assesses under Excise, Service Tax, VAT and certain other laws be migrated to the new system. The additional documents required will be obtained during the process of migration.

To enable this, the GST Common Portal www.gst.gov.in has been made live on the 8th of November, 2016 where existing taxpayers can enroll themselves for smooth transition to GST. The enrolment has been taken up in a staggered manner, and an enrolment plan has been made available on the portal itself.

Though the above exercise is not backed by law, yet, to understand the entire process one may undertake the entire registration process as part of this exercise. The total time period which has provided in the law is six months for the transition, though there are provisions for its extension also. The time frames as available are as under:

Having said that, let us take a detailed look at the process of migration that has been laid down in this behalf.



Step 1: Applying for provisional registration

Under the Model GST Law, it has been provided that provisional registration will be granted to all existing assessees on the appointed day.

The respective tax authorities will grant a provisional ID and password to all the existing assessees as per the schedule provided in the enrollment

plan. Such-ID and password will be used for enrolment on the GST Common Portal.

In the process of enrollment, certain additional documents such as proof of constitution of business, photograph of promoters / partners / Karta of HUF, proof of appointment of Authorized Signatory, photograph of Authorized Signatory and bank statement will be required to be uploaded.

After filling up the application, it will have to be digitally signed. DSC has been made mandatory for companies, foreign companies, Limited Liability Partnerships (LLPs) and Foreign Limited Liability Partnerships (FLLPs). Others have the option of electronically signing the application using Aadhar Number.

After the application is submitted, an Application Reference Number or ARN will be generated, which can be used for future correspondence.

It has been assumed that all existing Central Excise taxpayers are already registered under State VAT Department. Therefore, it covers both Central Excise and State VAT registration. For assessees under Service Tax, the enrollment has been scheduled from the 1st of January, 2017.

It may be noted that there will be **no deemed enrollment under GST**. All the taxpayers are expected to visit the GST Common Portal and enroll themselves.

Step 2: Grant of Provisional Registration

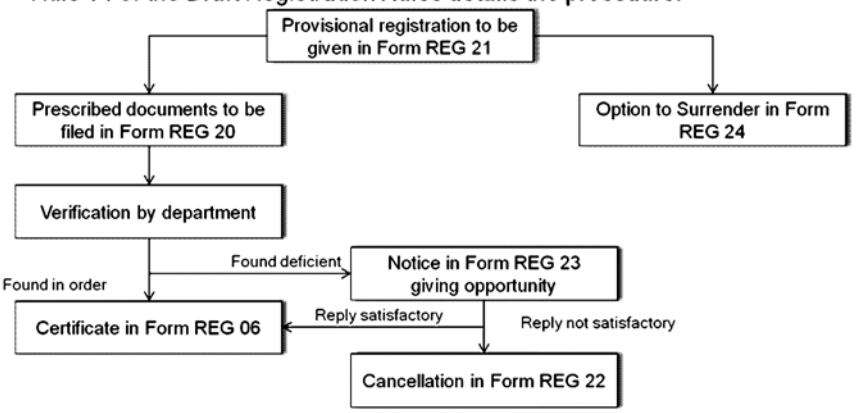
The Provisional Registration Certificate will then be made available for viewing and download on the GST Common Portal on the appointed day in FORM GST REG – 21. This Certificate will incorporate the Goods and Services Tax Identification Number (GSTIN) therein.

Step 3: Grant of Final Registration

The documents will be verified by authorized Center/State officials of the concerned Jurisdiction(s). Thereafter, if the information and the particulars furnished are found to be correct and complete, final Registration Certificate will be issued within six months after the appointed date in FORM GST REG – 06.

The above process can be summarised in the following manner:

- Rule 14 of the Draft Registration Rules details the procedure.



Conclusion

There are certain points which are important to be noted by all assesses:

- If a person supplies in two different names or units, single registration shall be granted per state unless separate business divisions.
- No separate registration required for reverse charge liability
- Separate registration for all firms operating out of single premises
- Amendment of all details is possible except PAN possible
- Registration is to be obtained state wise. The concept of centralised registration in case of Service Tax and premises wise registration in case of excise shall no longer be required or available. However,
- Effective Date of registration shall be from the date of levy in case it is applied in time allowed, else from the date of grant of registration.
- Provision for revocation of cancellation has been provided and the same is to be applied in Form GST REG 17
- Provision for physical verification has been kept live and report of such visit has to be provided by the officer in Rule 17
- Requirement to display registration certificate in place of business is made mandatory
- Pre deposit of tax has been called for in case of non resident taxable persons

Though the transition of registration seems to be most easy process of all, yet, it may turnout to be a nightmare for all assesses who fail to get transition or whose registration certificate is cancelled in this process and in order for a smooth running of business, a seamless transition is must for the assessee.


Whether seamless credits available under Model GST Law

By CA Virender Chauhan and CA Sonam Chauhan

The indirect taxation of the country in on the cusp of a paradigm change. GST, a comprehensive consumption tax regime, is proposed to be introduced with the prime objective of integration of multiple indirect tax levies, India impose as on today and removal of their cascading effect.

Imposition of 'GST' as a destination based tax on value addition is likely to consolidate India into a single market. This would then lead to development of an efficient and harmonized consumption tax system in the country. Having said so, in order to achieve this task of fiscal consolidation, it is imperative that the proposed regime ensures seamless flow of credits across the supply chain i.e. establishment of a continuous chain of set-off from the originating manufacturer's point and/or services provider's point up to the final retailers level. If GST regime is a machine to propel momentum of India's growth, then devising a seamless credit mechanism is certainly its fuel.

With the above perspective in mind, discussed below are the provisions of the Input Tax Credit (**'ITC'**) under the Draft Model GST Law (**'MGL'**) and Model IGST Law released as on 26 November 2016, its advantages, and key issues emanating from such provisions.

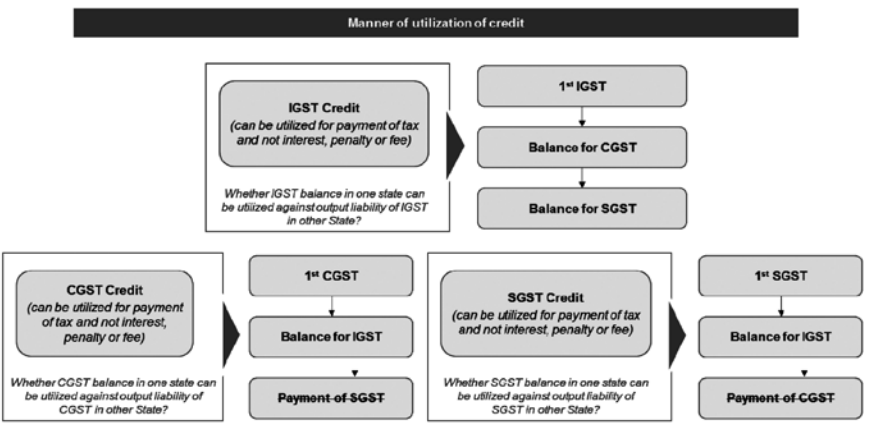
I. Model of seamless credits

Under the extant indirect tax regime, non-fungibility of ITC often results into tax cascading. Manufacturers are not eligible for input Central Sales Tax (**'CST'**) credit. Service providers are not eligible for input Value Added Tax (**'VAT'**) credit and credit on Special Additional Duty (**'SAD'**) paid on imports. Traders are not eligible for credit of input excise duty and service tax, input CST credit and credit of Countervailing Duty (**'CVD'**) paid on imports. All these restrictive tax credits results into higher pricing of goods and services with burden being shifted on the final consumer.

The basic architecture of GST is such that it would generate a continuous chain of set-offs with no breaks, hence, complete elimination of tax cascading effect. Input Integrated GST (**'IGST'**) would be creditable against output IGST, Central GST (**'CGST'**) and State GST (**'SGST'**)

liability respectively. Input CGST would be creditable against output CGST and IGST liability. Input SGST would be creditable against output SGST and IGST liability.

The term 'Input Tax' has been defined [Section 2(55) of MGL] to mean the IGST/ CGST or IGST/ SGST charged on any supply of goods and/ or services to a registered taxable person which are used or intended to be used in course or furtherance of business and includes tax payable on



reverse charge basis under the MGL.

II. Provisions governing eligibility of ITC[Section 16 of MGL]

(i) General Entitlement

Section 16 of MGL provides that every registered taxable person-

– shall be entitled to take ITC charged on any supply of goods and services to him;

– which are used/ intended to be used in the course or furtherance of his business;

– and the said amount shall be credited to the electronic credit ledger of such person, subject to fulfillment of prescribed conditions and within the time specified [Section 44 of MGL].

Certain persons not eligible to take ITC are non-registered taxable person, supplier under composition scheme or those exclusively engaged

in making exempt or non-taxable supplies, agriculturist and government or any local authority making specified supplies.

(ii) Specific provision – Telecommunications and petroleum sector

As an exception to the general rule, it has been specifically provided [proviso to section 16(1) of MGL] that ITC in respect of pipelines and telecommunication tower fixed to earth by foundation or structural support including foundation and structural support thereto shall not exceed:

(a) 1/3 of total ITC in the financial year (**'FY'**) in which the said goods are received;

(b) 2/3 of total ITC, including the credit availed in the first FY, in FY immediately succeeding the year referred to in clause (a) in which the said goods are received; and

(c) balance of the amount of ITC in any subsequent FY.

It may be relevant to note that unlike existing CENVAT credit regime, entire ITC on capital goods shall be available in first year itself, except specific exemption quoted above.

(iii) Entitlement of ITC – Satisfaction of cumulative conditions

Further, Section 16(2) beginning with a non-obstante clause over-riding the general entitlement of ITC but subject to the provisions of governing claim of ITC on provisional basis [Section 36 of MGL], provides that no registered taxable person shall be entitled to ITC in respect of any supply of goods and/or services to him unless:

(a) He **is in possession of a tax invoice or debit note issued by a supplier registered under the said Act**, or such other taxpaying document(s) as may be prescribed;

(b) He has **received the goods and/or services**;

(c) **Tax** charged in respect of such supply has **been actually paid to** the account of the appropriate Government, either in cash or through utilization of ITC admissible in respect of the said supply; and

(d) He has **furnished the return** under section 34.

A combined reading of the above provisions indicates that once an eligible ITC is availed by the registered taxable person on self-assessment basis in the return, the same would stand credited to his electronic credit ledger maintained at the common GST portal.

(iv) Entitlement of ITC – Other miscellaneous provisions

- *Goods received in lots:*In case the goods against an invoice are received in lots or instalments, the registered taxable person shall be entitled to take ITC upon receipt of the last lot or installment.
- *Failure to pay value of supply of services:* Where a recipient fails to pay to the supplier of services, the amount towards the value of supply of services along with tax payable thereon within a period of three months from the date of issue of invoice by the supplier, an amount equal to the ITC availed by the recipient shall be added to his output tax liability, along with interest thereon, in the manner as may be prescribed.
- *Goods received by third person:* Further, an explanation to Section 16 of MGL creates a deeming fiction where the goods are delivered by the supplier to a recipient or any other person on the direction of such taxable person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise, that such goods have been received by such taxable person. This provision is of significance in case of Bill to- Ship to model.
- *No ITC if depreciation charged on tax component:* In case the registered taxable person has claimed depreciation on the tax component of the cost of capital goods under the provisions of the Income Tax Act, 1961, the ITC shall not be allowed on the said tax component.

(v) Time limit for claim of ITC

A taxable person shall not be entitled to take ITC in respect of any invoice or debit note for supply of goods or services after:

– furnishing of the return [Section 34] for the month of September following the end of FY to which such invoice or invoice relating to such debit note pertains; or

– furnishing of the relevant annual return,

whichever is earlier.

Key issues:

- That the definition of "Capital goods" as contained in S.2(19)-MGL contains words and letters "value" and "capitalized". These two words may create interpretational issues and may require further clarification.

- In S.16(1) the concept of ITC availed/ utilized is missing. It is in contradiction with the language used in S. 66 & 67. Else, this sub-section may come in conflict with S.16(4). The proviso to S.16(1) allows a taxpayer credit in 3 years whereas S.16(4) puts an embargo to claim ITC up to a prescribed time. Whether it may create conflict?

- Whether, in case the recipient of service makes payment to the provider of service after 3 months, the ITC reversed on account of non-payment within the prescribed limit of 3 months, will be re-reversed.

- On perusal of the above cumulative conditions and applicable provisions of MGL, it may be noted that one of the conditions prescribed would require confirmation of payment of GST liability as well as filing of valid return by the supplier of input goods/ services. Hence, claim of ITC being an indefeasible right of an assesse [Apex Court judgement of Dai Ichi Karkaria Ltd (112 ELT 353] will stand overruled] no more holds true. This may pose a very big practical challenge and may impair ability to avail legitimate ITCs.

- The condition contained in S.16(2) restricting ITC in the hands of the recipient unless tax is paid by the supplier may go against the jurisprudence as contained in [CCE v. Kay Kay Industries (2013) 42 GST 50 (SC)].

III. Apportionment of ITC and blocked credits [Section 17 of MGL]

(i) ITC restricted to supplies for business purposes

ITC may be claimed by a registered taxable person only when the goods and/or services are used for the purposes of business. ITC attributable to purposes other than business shall not be allowable. The manner of attribution of such ITC may be prescribed by the Central or State Government, by way of a notification issued in this behalf.

(ii) ITC restricted to taxable supplies

Further, it has been provided that where the goods and/or services are used by the registered taxable person partly for effecting taxable supplies including zero-rated supplies under the said Act or under the IGST Act, 2016 and partly for effecting exempt supplies [to include tax paid on reverse charge basis] under the said Acts, the amount of ITC shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.

The manner of attribution of such ITC may be prescribed by the Central or State Government, by way of a notification issued in this behalf.

(iii) ITC –Banking Sector

A specific provision relating to banking sector provides that a banking company or a financial institution including a non-banking financial company, engaged in supplying services by way of accepting deposits, extending loans or advances shall have the option to either comply with the provisions of section 17(2) of MGL, or avail of, every month, an amount equal to 50% of the eligible ITC on inputs, capital goods and input services in that month. Such option once exercised shall not be withdrawn during the remaining part of the FY.

(iv) Non-creditable items for the purposes of ITC

The section 17(4) of MGL beginning with a non-obstante clause provides specific exclusions from eligibility of ITC, as listed below:

(a) Motor vehicles and other conveyances, except when they are used:

  (i) For making following taxable supplies, namely-

    (A) Further supply of such vehicles or conveyances, or

    (B) Transportation of passengers, or

    (C) Imparting training on driving, flying, navigating such vehicles or conveyances,

  (ii) For transportation of goods.

(b) Supply of goods and services, namely:

(i) Food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery *except where such inward supply of goods or services of a particular category is used by a registered taxable person for making an outward supply of the same category of goods or services*,

(ii) Membership of a club, health and fitness centre

(iii) Rent-a-cab, life insurance, health insurance *except where the Government notifies the services which are obligatory for an employer to provide to its employees under any law for the time being force*, and

(iv) Travel benefits extended to employees on vacation such as leave or home travel concession.

(c) Works contract services when supplied for construction of immovable property, other than plant and machinery, except where it is an input service for further supply of works contract service,

(d) Goods or services received by a taxable person for construction of an immovable property on his own account, other than plant and machinery, even when used in course or furtherance of business,

(e) Goods and/or services on which tax has been paid under composition scheme [Section 9],

(f) Goods and/or services used for personal consumption,

(g) Goods lost, stolen, destroyed, written off or disposed of by way of gift **or free samples**, and

(h) Any tax paid in terms of following:

(i) Tax not paid or short paid or erroneously refunded or ITC wrongly availed or utilized by reasons of fraud or any willful misstatement or suppression of facts [Section 67]

(ii) Detention or release of goods and conveyance in transit [Section 89]; or

(iii) Confiscation of goods or conveyance and levy of penalty [Section 90].

Key issues:

- Whether services like car insurance, repairs and maintenance of cars etc. availed for motor vehicles, eligible for ITC?
- Whether ITC available in case of use of own vehicles for transportation of goods for mining companies, food companies etc.?
- Whether ITC is allowed when vehicles used for transportation of items other than goods viz. money, securities, petroleum products, alcohol etc.
- Whether ITC is allowed on use of dumpers and tippers by works contractors?
- may be suggested that credit may be allowed for renting a cab in the course of business.
- It may be suggested that such vehicles/ conveyances may be included in the definition of "Plant and machinery".
- Whether assesse would be entitled to ITC of following-
  - Pick and drop facility for employees
  - Food provided to employees
  - Medical or healthcare kit for employees
  - Group insurance for employees
  - Security expenses of staff quarter
  - Insurance of staff quarter
- Whether ITC would be allowed once the confiscated goods [S17(4)(h)] are released on payment of tax and then sold after charging output tax?
- The inclusion of RCM turnover in exempt supply may entail double taxation [Expn. to S.17(2)]

IV. Availability of credit in special circumstances [Section 18]

(i) ITC - New Registrants

A person who has applied for registration under the relevant Act within 30 days from the date on which he becomes liable to registration and has been granted such registration shall, subject to such conditions as may be

prescribed, be entitled to take ITC in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the day immediately preceding the date from which he becomes liable to pay tax under the provisions of relevant Act. Under the extant indirect tax regime, ITC of pre-registration period was also available. The time limit of 30 days has been clearly introduced to encourage tax compliance.

(ii) ITC - Voluntary registration

A person who takes voluntary registration shall, subject to such conditions as may be prescribed, be entitled to take ITC in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the day immediately preceding the date of grant of registration.

(iii) ITC -Conversion of composition taxpayer into regular taxpayer

Where any registered taxable person ceases to pay tax under the composition scheme [Section 9], he shall, subject to such conditions as may be prescribed, be entitled to take ITC in respect of inputs held in stock, and inputs contained in semi-finished or finished goods held in stock and on capital goods on the day immediately preceding the date from which he becomes liable to pay tax under the relevant Act [Section 8]. Further, ITC on capital goods shall be reduced by such percentage points as may be prescribed in this behalf.

(iv) ITC -Conversion of exempt supply into taxable supply

Where an exempt supply of goods or services by a registered taxable person becomes a taxable supply, such person shall, subject to such conditions as may be prescribed, be entitled to take ITC in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock relatable to such exempt supply and on capital goods exclusively used for such exempt supply on the day immediately preceding the date from which such supply becomes taxable. The credit on capital goods shall be reduced by such percentage points as may be prescribed in this behalf.

(v) Claim of ITC on invoices up to one year

A taxable person shall not be entitled to take ITC under section 18 of MGL, in respect of any supply of goods and/or services to him after the expiry of one year from the date of issue of tax invoice relating to such supply.

(vi) Transfer of ITC in case of change in constitution of business

Where there is a change in the constitution of a registered taxable person on account of sale, merger, demerger, amalgamation, lease or transfer of the business with the specific provision for transfer of liabilities, the said registered taxable person shall be allowed to transfer ITC that remains unutilized in its books of accounts to such sold, merged, demerged, amalgamated, leased or transferred business in the manner prescribed.

(vii) Regular taxpayer switching to composition taxpayer

Where any registered taxable person who has availed of ITC switches over as a taxable person for paying tax under composition scheme[Section 9] or, where the goods and/or services supplied by him become exempt absolutely [Section 11], he shall pay an amount, by way of debit in the electronic credit or cash ledger, equivalent to the ITC in respect of inputs held in stock and inputs contained in semi-finished to finished goods held in stock and on capital goods, reduced by such percentage points as may be prescribed, on the day immediately preceding the date of such switch over or, as the case may be, the date of such exemption. Further, after payment of such amount, the balance of ITC, if any, lying in his electronic credit ledger shall lapse.

(viii) Availability of ITC in special circumstances – Other miscellaneous provisions

- *Manner of computation of ITC*: Amount of ITC under above provisions shall be calculated in such manner as may be prescribed under the Rules.
- *Payment on sale of capital goods:* In case of supply of capital goods or plant and machinery, on which ITC has been taken, the registered taxable person shall pay an amount equal to the ITC taken on the said capital goods or plant and machinery reduced by the percentage points as may be specified in this behalf or the tax on the transaction value of such capital goods or plant and machinery, whichever is higher.
- *Tax on supply of scrap of capital goods:* Where refractory bricks, moulds and dies, jigs and fixtures are supplied as scrap, the taxable person may pay tax on the transaction value of such goods.

V. Recovery of ITC and Interest thereon [Section 19]

Where ITC has been taken wrongly, the same shall be recovered from the registered taxable person in accordance with the provisions of the said Act.

Key issues:

- Law does not provide seam-less credit of input service/capital goods. [S.18(1) and S.18(2)]
- In case a tax payer applies for registration late reasons beyond his control, legitimate claim of ITC may be denied to him. [S.18(1)]
- Law does not provide rationale for lapse of balance ITC lying in electronic credit ledger in case a regular taxpayer switches to composition scheme. Further, what will happen in a situation when such person deals in both exempt and taxable supplies? [S.18(7)]
- Whether ITC would be allowed [S.18(1)] in case a person applies for registration beyond the prescribed period of 30 days due to interpretational issues or for reasons beyond his control.
- The lawmakers may give reasons for withholding credit of input service and capital goods for new registrants [S.18(1) and 18(2)].
- The lawmakers may give reasons for withholding credit of input service in case the compositional taxpayer switches over to a regular taxpayer and also this sub-sections in conflict with S.172 as much as when it allows credit of tax on capital goods.[S.18(3)].
- The lawmakers may align the language of S.18(6) with S.127 and S.129.
- Whether renting of capital goods would be considered as supply and would entail reversal of ITC. [S.18(10)]

VI. Taking ITC in respect of inputs sent for job work [Section 20]

(i) Principal entitled for ITC in respect of inputs/ capital goods sent for job-work

The “principal” [referred to in section 55 of MGL] shall, subject to such conditions and restrictions as may be prescribed, be allowed ITC on inputs/ capital goods sent to a job-worker for job-work.

Even in case if the inputs/ capital goods are directly sent to a job worker for job-work without their being first brought to his place of business, the

"principal" shall be entitled to take credit of ITC on inputs/ capital goods, as the case may be.

(ii) Deemed supply of inputs/ capital goods to job-worker after prescribed period

Where the inputs [or capital goods] sent for job-work are not received back by the "principal" after completion of job-work or otherwise or are not supplied from the place of business of the job-worker in accordance with relevant provisions [Section 55(1)(b)]**within a period of one year [three years in case capital goods]**of their being sent out, it shall be deemed that such inputs [or capital goods] had been supplied by the principal to the job-worker on the day when the said inputs [or capital goods] were sent out.

Further, where the inputs [capital goods] are sent directly to a job worker, the period of one year [or three years in case of capital goods] shall be counted from the date of receipt of inputs [or capital goods] by the job worker. However, these provisions relating to deemed supply shall not be apply to moulds and dies, jigs and fixtures, or tools sent out to a job worker for job work.

VII. Manner of distribution of credit by Input Service Distributor ('ISD') [Section 21]

(i) Where distributor and recipient located in different States

S.21(1) Inter-State Transfer	
Head Office (ISD) can transfer	***Branch Office (Tax Payer)***
CGST	***CGST, IGST***
IGST	***IGST,CGST***
SGST	***SGST,IGST***

(ii) Where distributor and recipient located in same State

S.21(2) Intra-State Transfer	
Head Office (ISD) can transfer	***Branch Office (Tax Payer)***
CGST	***CGST***
IGST	***CGST, SGST***
SGST	***SGST***

(iii) Conditions for distribution of credit

The ISD may distribute ITC subject to the following conditions, namely:

(a) ITC can be distributed against a prescribed document issued to each of the recipients of the credit so distributed, and such document shall contain details as may be prescribed;

(b) Amount of ITC distributed shall not exceed the amount of credit available for distribution;

(c) ITC paid on input services attributable to a recipient of credit shall be distributed only to that recipient;

(d) ITC paid on input services attributable to more than one recipient of credit shall be distributed only amongst such recipient(s) to whom the input service is attributable and such distribution shall be pro rata on the basis of the turnover in a State of such recipient, during the relevant period, to the aggregate of the turnover of all such recipients to whom such input service is attributable and which are operational in the current year, during the said relevant period;

(e) ITC of tax paid on input services attributable to all recipients of credit shall be distributed amongst such recipients and such distribution shall be pro rata on the basis of the turnover in a State of such recipient, during the relevant period, to the aggregate of the turnover of all recipients and which are operational in the current year, during the said relevant period.

The terms ‘relevant period’, ‘recipient of credit’ and ‘turnover’ have been specifically defined under the MGL [under Explanation to Section 21].

VIII. ***Manner of recovery of credit distributed in excess[Section 22]***

Where the ISD distributes the credit in contravention of the above provisions contained in [Section 21] resulting in excess distribution of credit to one or more recipients of credit, the excess credit so distributed shall be recovered from such recipients(s) along with interest in the manner prescribed under the MGL [provisions of section 66 or 67, as the case may be, shall apply mutatis mutandis for effecting such recovery].

IX. ***Refund of unutilized/ accumulated ITC***

The refund of unutilized ITC will be allowed only in case (i) exports; and (ii) in case of inverted duty structure i.e. credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on outputs. Such refund has to be claimed within two years from the relevant date.

[Disclaimer: The views expressed in this article are personal based on her interpretation of the law.]

GST – Whether Would Be A Reality In 2017

By Vineet Bhatia, Advocate

The idea of introduction of GST was mooted for the first time in 2006 when the then Finance Minister P. Chidambaram in his budget speech on 28 February 2006, announced the target date for implementation of GST to be 1 April 2010 and formed another empowered committee of State Finance Ministers to design the road map. However, it has been more than a decade since then but due to various reasons GST has not seen the light of the day. A question which still hovers everyone mind is whether GST would be a reality in 2017. My view is that GST would now definitely be introduced in 2017 and there is a specific reason behind this statement.

As we all are aware that introduction of GST required a Constitutional amendment as the Constitution provides for delineation of power to tax between the Centre and States. While at present the Centre is empowered to tax services and the States have the power to tax sale of goods. However, the concept of GST envisaged a tax on supply of goods and/or services, both by the Centre as well as the State. In its present form the Constitution does not vest express powers in the Central or State Government to levy a tax on the 'supply of goods and services. Therefore, it was essential to have Constitutional Amendments for empowering the Centre to levy tax on sale of goods and for empowering the States to levy tax on services.

The Constitution (One Hundred and First Amendment) Act, 2016 of Parliament received the assent of the President on the 8th September, 2016. The GST Constitutional (122nd Amendment) Bill' 2014 became the GST Constitutional (101st Amendment) Act' 2016 when the president assented the provisions of bill. It contains the provisions which are necessary for the implementation of Goods and Service Tax. The present amendments would subsume a number of indirect taxes presently being levied by Central and State Governments i.e. Central Excise duty, additional excise duty, Service Tax, and additional duty of customs, State VAT, entertainment tax, taxes on lotteries, betting and gambling, Octroi, entry tax and luxury tax into GST. Other taxes which will be subsumed with GST are thus making it a single indirect tax in India thereby doing away the cascading of taxes and providing a common national market for Goods and Services. The aim to bring about these amendments in the Constitution is to confer simultaneous power on Parliament and State legislatures to make laws for levying GST simultaneously on supply of Goods and Services.

The Constitutional amendment Act contains 20 amendments. Central Government vide ***Notification S.O. 2915(E).- [F. No. 31011/09/2015-SO (ST)] dated September 10, 2016***, has appointed 12-09- 2016 as the date on which the provisions of Section 12 of the Constitution (101st Amendment) Act, 2016 shall come into force and thereafter Central Government vide ***Notification S.O. 2986(E).- [F. No. 31011/07/2014-SO (ST)] dated September 16, 2016***, has appointed 16th day of September, 2016 as the date on which the provisions of Sections 1 to 20 (except Section 12 which was notified on September 12, 2016) of the Constitution (101st Amendment) Act, 2016 ("the Constitutional Amendment Act") shall come into force.

On September 12, 2016, being notified as the appointed date for Section 12 of the Constitutional Amendment Act, after article 279 a new article 279A was inserted wherein it is stated that a GST Council shall be constituted within **60 days** from September 12, 2016 and vide Notification dated 15.09.201, the President of India Constituted the GST Council.

Thus, all the amendments of Constitution (One Hundred and First Amendment) Act, 2016 are now active and the same in brief are as under:-

Section 1 of the Constitution (One Hundred and First Amendment) Act, 2016 provides for short title and commencement of the Constitution (Amendment) Act. As per Sub Section (2), these amendments are to be applicable from the date to be notified by the Central Government.

Vide **Section 2** of the Constitution (One Hundred and First Amendment) Act, 2016, a new article 246A has inserted regarding special provision with respect to goods and services tax

- This section makes enabling provisions for the Union and States with respect to the GST legislation. It further specifies that Parliament has exclusive power to make laws with respect to GST on interstate transactions.
- Thus, as per these provisions, the CGST and SGST Act shall be made by Central Government and State Governments respectively, while the IGST Act shall be made by Central Government only.

Vide **Section 3** of the Constitution (One Hundred and First Amendment) Act, Central Government has made an amendment of Article 248

- words, figures and letter "Subject to article 246A, Parliament" shall be substituted

- Thus this section seeks to make consequential amendments in article 248 of the Constitution in view of the amendment in section 2 of the Bill.

Vide **Section 4** Central Government has made an amendment of Article 249

- In clause (1), after the words "with respect to", the words, figures and letter "goods and services tax provided under article 246A or" shall be inserted.

- This amendment enables Parliament to make laws in national interest, if so required as per the procedure laid therein.

Vide **Section 5** Central Government has made an amendment of Article 250

- in clause (1), after the words "with respect to", the words, figures and letter "goods and services tax provided under article 246A or" shall be inserted.

- This amendment enables Parliament to make laws in national interest, if so required as per the procedure laid therein.

Vide **Section 6** Central Government has made an amendment of Article 268

- In clause (1), the words "and such duties of excise on medicinal and toilet preparations" shall be omitted

Vide **Section 7** Central Government has made an amendment of Article 268A

- This section seeks to omit article 268A of the Constitution. The said article empowers the Government of India to levy taxes on services. As tax on services has been brought under GST, such a provision would no longer be required.

Vide **Section 8** Central Government has made an amendment of Article 269

- Article 269 provides for the taxes levied and collected by the Union but assigned to the States.

- clause (1), after the words "consignment of goods", the words, figures and letter "except as provided in article 269A" shall be inserted.

Vide **Section 9** of the Constitution (One Hundred and First Amendment) Act, 2016 a new article 269A has inserted regarding levy and collection of goods and services tax in course of inter-state trade or commerce

- New article 269A provides for goods and services tax on supplies in the course of inter-State trade or commerce which shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

- Further Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce

Vide **Section 10** Central Government has made an amendment of Article 270

- In clause (1), for the words, figures and letter "articles 268, 268A and 269", the words, figures and letter "articles 268, 269 and 269A" shall be substituted;

- *After clause (1), the following clauses shall be inserted, namely:—*

  (1A) The tax collected by the Union under clause (1) of article 246A shall also be distributed between the Union and the States in the manner provided in clause (2).

  (1B) The tax levied and collected by the Union under clause (2) of article 246A and article 269A, which has been used for payment of the tax levied by the Union under clause (1) of article 246A, and the amount apportioned to the Union under clause (1) of article 269A, shall also be distributed between the Union and the States in the manner provided in clause (2).''

- This amendment provides that goods and services tax levied and collected by the Government of India, shall also be distributed.

Vide **Section 11** Central Government has made an amendment of Article 271

- In article 271 of the Constitution, after the words ‘‘in those articles’’, the words, figures and letter ‘‘except the goods and services tax under article 246A,’’ shall be inserted
- This amendment put restrictions on the powers of Parliament to levy surcharge for on the GST.

Vide **Section 12** of the Constitution (One Hundred and First Amendment) Act, 2016 a new article 279A has inserted regarding goods and services tax council

- The present section has inserted the provisions for GST Council.
- The Goods and Services Tax Council shall consist of the following members, namely:-

  a) The Union Finance Minister..... Chairperson;

  b) The Union Minister of State in charge of Revenue or Finance..... Member;

  c) The Minister in charge of Finance or Taxation or any other Minister nominated by each State Government..... Members.

- Further the Goods and Services Tax Council shall make recommendations to the Union and the States on-

  a) The taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;

  b) The goods and services that may be subjected to, or exempted from the goods and services tax;

  c) Model Goods and Services Tax Laws, principles of levy, apportionment of Integrated Goods and Services Tax and the principles that govern the place of supply;

  d) The threshold limit of turnover below which goods and services may be exempted from goods and services tax;

e) The rates including floor rates with bands of goods and services tax;

f) Any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;

g) Special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and

h) Any other matter relating to the goods and services tax, as the Council may decide.

Vide **Section 13** Central Government has made an amendment of Article 286

- In article 286 of the Constitution,—
- *in clause (1),—*

  (A) *for the words "the sale or purchase of goods where such sale or* purchase takes place", the words "the supply of goods or of services or both, where such supply takes place" shall be substituted;

  (B) *in sub-clause (b), for the word "goods", at both the places where it* occurs, the words "goods or services or both" shall be substituted;

- *in clause (2), for the words "sale or purchase of goods takes place", the* words "supply of goods or of services or both" shall be substituted;
- *clause (3) shall be omitted.*

Vide **Section 14** Central Government has made an amendment of Article 366

- The present section specifies the definition of 'Goods and Services Tax', 'Services' and 'State'.

- As per the definitions, only alcoholic liquor for human consumption has been excluded from the ambit of GST Constitutionally. All other forms of alcohol like alcohol for industrial use and medicinal and toilet preparation containing alcohol which falls in the taxing domain of the Central Government have been included in GST.

- Thus Sales Tax/VAT could be continued to be levied on alcoholic liquor for human consumption as per the existing practice. In case it has been made taxable by some States, there is no objection to that. Excise Duty, which is presently levied by the States may not also be affected.

Vide **Section 15** Central Government has made an amendment of Article 368

- In article 368 of the Constitution, in clause (2), in the proviso, in clause (*a), for the* words and figures “article 162 or article 241”, the words, figures and letter “article 162, article 241 or article 279A” shall be substituted.

Vide **Section 16** Central Government has made an amendment of sixth schedule

- This section seeks to amend the sub-paragraph (3) of paragraph 8 of the Sixth Schedule to the Constitution with a view to empower the District Council for an autonomous district to have the power to levy and collect taxes on entertainment and amusements within such district.

Vide **Section 17** Central Government has made an amendment of seventh schedule

- This section seeks to make the consequential amendments in Union List and State List Entries

In Union List

(i) for entry 84, the following entry shall be substituted, namely:—

Duties of excise on the following goods manufactured or produced in India, namely:—

(a) petroleum crude;

(b) *high speed diesel;*

(c) motor spirit (commonly known as petrol);

(d) natural gas;

(e) aviation turbine fuel; and

(f) tobacco and tobacco products.";

(ii) entries 92 and 92C shall be omitted;

In List II—State List

(i) entry 52 shall be omitted;

(ii) for entry 54, the following entry shall be substituted, namely:—

Taxes on the sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption, but not including sale in the course of inter-State trade or commerce or sale in the course of international trade or commerce of such goods.";

(iii) entry 55 shall be omitted;

- **Analysis of tax on Petroleum Products:** As far as petroleum products are concerned, it was decided that the basket of petroleum products, i.e. crude, motor spirit (including ATF), HSD and Natural Gas would be kept outside GST as is the prevailing practice in India. Sales Tax could continue to be levied by the States on these products with prevailing floor rate. Similarly, Centre could also continue its levies.

- **Tax on Tobacco products:** Tobacco products would be subjected to GST with ITC. Centre may be allowed to levy excise duty on tobacco products over and above GST with ITC.

Vide **Section 18** Central Government has provided provisions for compensation to states for loss of revenue on account of introduction of goods and services tax.

- The present section provides for the Mandatory Compensation to States for 5 years for loss of revenue on account of introduction of goods and services tax.

- The present Constitutional amendment Act has deleted the provisions for the applicability of 1% CST.

Vide **Section 19** Central Government seeks to provide for transitional provisions

- This section prescribes a time-frame of 1 year within which the subsuming of different indirect taxes into GST would take place and enable the competent Legislature to amend or repeal their existing laws to find out the way for imposition of SGST in the States.

Vide **Section 20** Central Government has provides power to president to remove difficulties

- This section provides the power to president to remove difficulties within a period of 3 years.

Thus it can be seen that vide Section 17 of the 101st Constitutional Amendment Act, 2016 entries in various Schedules of the Constitution of India have been amended w.e.f. 16.09.2016. The entries in its present form give a very limited powers to Central Government to levy Excise duty only on specified products and similarly Entry No 54 of List II of the Constitution of India, as amended, empower the State Governments to levy VAT/Sales Tax on very limited products. A question then arose as to how Excise duty / VAT is being imposed by the respective Central/ State Governments post 16.09.2016. The power to levy Excise duty/ VAT has been saved by Section 19 of the 101st Constitutional Amendment Act, 2016. The said Section reads as under:-

> 19. Notwithstanding anything in this Act, any provision of any law relating to tax on goods or services or on both in force in any State immediately before the commencement of this Act, which is inconsistent with the provisions of the Constitution as amended by this Act shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until expiration of one year from such commencement, whichever is earlier.

Thus ,but for Section 19, Excise duty/ VAT could not have been levied post 16.09.2016. Now an analysis of Section 19 clearly saves the existing laws relating to tax on goods or services maximum for a period of 1 year. Thus after one year of commencement of Constitutional amendment i.e. after 15.09.2017 the existing laws relating to tax on goods or services would automatically be no longer in force and if the new GST law is not in place by such date then there would be a very precarious situation vis-à-vis levy of taxes on goods and services. In such a scenario i.e. if GST Act is not promulgated before 15.09.2017 then after 15.09.2017 the Central/ State Governments would neither be levying GST and would also have very limited powers to levy taxes as per existing laws relating to tax on goods or services. In my view no Government can even think of affording such a situation even for one day. Thus after having notified the provisions of the 101st Constitutional Amendment Act, 2016 the Government is left with no other option but to bring and implement GST on or before 15.09.2017. A similar view was echoed recently by the Hon'ble Finance

Minister. Thus whatever be the hurdles, all have to be removed and the deadline of September 2017 cannot be surpassed. Whether the provisions of Section 20 of the101st Constitutional Amendment Act, 2016 can be invoked to extend this deadline is in itself a big debatable legal issue. I do not think that the Government would leave such a major source of its revenue to such a legal chance. Thus unless and until something drastic happens it can be safely concluded that GST is bound to be introduced before September 2016.

So lets all hope and sing COME SEPTEMBER and gear up ourselves for the upcoming GST.

Circular regarding Speedy Disposal of all refund claims

F.3(378)/Policy/VAT/2016/761-775 03-10-2016

Circular No. 15 of 2016-17

Sub: Speedy disposal of all refund claims.

In terms of section 38 of the DVAT Act 2004 and rules made thereunder, all refund cases pertaining to the wards/zones are required to be disposed off by the concerned Ward Incharge/Zonal Incharge within the stipulated period of two months. In the wake of ever increasing pendency of Refund cases, directions of the Hon'ble High Court and with a view to provide impetus to the disposal of Refund cases so as to put them on fast track, it has been decided at the departmental level to dispose off all pending refunds in a time bound manner as detailed below.

(A) Refunds upto Rs.50000	Within 02 months.
(B) Refunds of amounts between Rs. 50,000 To Rs. One Lakh	Within 04 months
(C) AII Refund cases upto Rs. Five Lakh	Within 06 months
(D) All other pending Refund cases	Within 12 months

All the Ward /Zonal lncharges are hereby directed to submit a weekly report from now on to the CVAT containing inter-alia details of refund cases cleared by them. Any dereliction of the above directions shall be viewed seriously.

R.K. Mishra
Spl. Commissioner (Policy)

Circular regarding Circular No. 15 of 2016-17 stands withdrawn

F.3(378)/Policy/VAT/2016/777-791 04-10-2016

Circular No. 16 of 2016-17

Sub: Speedy disposal of all refund claims.

Circular no 15 of 2016-17 dated 03/10/2016 stands withdrawn and shall be considered void ab initio.

R.K. Mishra
Spl. Commissioner (Policy)

Circular regarding Filing of online return for first quarter of 2016-17 extension of period thereof

F.3(420)/Policy/VAT/2011/PF/839-44 28-10-2016

Circular No. 17 of 2016-17

Sub: Filing of online return for second quarter of 2016·17- extension of period thereof.

In exercise of the powers conferred under Rule 49A of the Delhi Value Added Tax Rules, 2005, I. H. Rajesh Prasad, Commissioner, Value Added Tax, do hereby extend the last date of filing of online/hard copy of second quarter return for the year 2016-17, in Form DVAT-16, DVAT-17 and DVAT-48 along with required annexure/enclosures to 14/11/2016.

However, the tax due shall continue to be paid in the usual manner as per the provisions of section 3(4) of the Delhi Value Added Tax Act. 2004. The dealers filing the returns through digital signature need not file hard copy of the return/Form DVAT-56.

H. Rajesh Prasad
Commissioner, VAT

Circular regarding Filing of online return for first quarter of 2016-17 extension of period thereof

F.3(420)/Policy/VAT/2011/PF/893-98 16-11-2016

Circular No. 18 of 2016-17

Sub: Filing of online return for second quarter of 2016-17 - extension of period thereof.

In partial modification to this department's Circular NO.17 of 2016-17 on the subject cited above and in exercise of the powers conferred under Rule 49A of the Delhi Value Added Tax Rules, 2005. I.H. Rajesh Prasad, Commissioner. Value Added Tax, do hereby extend the last date of filing of online/hard copy of second quarter return for the year 2016-17, in Form DVAT-16, DVAT-17 and DVAT-48 along with required annexure/enclosures to 21/11/2016.

However. the tax due shall continue to be paid in the usual manner as per the provisions of section 3(4) of the Delhi Value Added Tax Act, 2004. The dealers filing the returns through digital signature need not file hard copy of the return/Form DVAT-56.

H. Rajesh Prasad
Commissioner, VAT

Circular regarding Filing of online return for first quarter of 2016-17 extension of period thereof

F.3(420)/Policy/VAT/2011/PF/932-37 21-11-2016

Circular No. 19 of 2016-17

Sub: Filing of online return for second quarter of 2016-17 - extension of period thereof.

In partial modification to this department's Circular No.18 of 2016-1 7 on the subject cited above and in exercise of the powers conferred under Rule 49A of the Delhi Value Added Tax Rules. 2005. I H. Rajesh Prasad. Commissioner. Value Added Tax. do hereby extend the last date of filing of online/hard copy of second quarter return for the year 2016-17. in Form DVAT-16. DVAT-17 and DVAT-48 along with required annexure/enclosures to 28/11/2016.

However. the tax due shall continue to be paid in the usual manner as per the provisions of section 3(4) of the Delhi Value Added Tax Act. 2004. The dealers filing the returns through digital signature need not file hard copy of the return/Form DVAT-56.

H. Rajesh Prasad
Commissioner, VAT

Circular regarding Communication of Provisional ID and Password to VAT registered dealers for migration to GST from 16-12-2016 to 31-12-2016

No.JCTT/Policy/2016/751-769 14-12-2016

Circular dated 14-12-2016

To

All dealers of Delhi.

Subject : Communication of the Provisional Identification Number and Password to dealers registered with VAT department for migration to GST from 16th December, 2016 to 31st December, 2016.

As you are aware that Goods and Services Tax is to be implemented from 1st April. 2017 and we understand that as a Taxpayer you would like to continue your business operations under GST regime.

Goods and Services Tax Network (GSTN) has been assigned the task of collection of data of existing taxpayers under indirect taxes for their

smooth transition from VAT to GST regime. GSTN will seek the details under the provisions of Proposed Model Goods and Services Tax Act (GST Act).

GST Act shall come into force as on the date to be notified by the Central/State Government and the provisional registration number issued shall be effective only from the date to be notified.

Therefore, as per the Provisions of Proposed Model Goods and Services Tax Act, your Provisional ID and Password has been provided on your dealer's login which shall be used in updating your current information on the Goods and Services Tax Portal on the link at https:/ /www,gst.gov.in from 16th December, 2016 to 31st December, 2016.

A Taxpayer should complete the below mentioned steps for pre-registration:

Step 1: Taxpayer has to enter the username and password as provided in the Table by the State VAT Authority .

Step 2: Enter Mobile Number and Email ID of the Authorized Signatory of the business entity. All future correspondence from the GST Portal will be sent on this registered Mobile Number and Email ID.

Step 3: Different One Time Passwords will be sent on Mobile and Email details entered. Enter the OTP sent on Mobile and Email as provided.

Step 4: Enter information and upload scanned images as mentioned in pre-Registration Form.

Please read the User Guide and FAQ at https://www.gst.gov.in/help/faq before proceedings ahead. Please also see the video tutorial at http://tutorial.gst.gov.in/video also for learning for GST registration for existing dealers.

In case of any queries Taxpayer can contact on the Helpdesk Number 155055. Since all filled information along with Annexure are subject to verification in the GST regime, therefore, in case of misleading/wrong/incorrect information with / without evidence shall attract provisions of cancellation as per the Provisions of Proposed Goods and Services Tax Act, 2016.

After successful submission, a welcome message will come to the registered Mobile Number and Email ID from the system after verification / validation of the information submitted.

Do not share the User ID and Password. In case if it is misplaced or destroyed, do contact your jurisdictional authority with request letter which will be issued later on.

It is requested to complete the entire process of pre-Registration within next 4 weeks from the date of receipt of Provisional ID and Password.

We thank you for your cooperation in collecting all necessary details.

Ajay Kumar
Joint Commissioner (Policy/GSTN)

Circular regarding Grant of Registration under DVAT and CST

F.3(521)/Policy/VAT/2015/1046-51 13-01-2017

Circular No. 20 of 2016-17

Subject:- Grant of Registration under DVAT and CST

In partial modification of this department's Circular No 06 of 2016-17 Dt 17-05-2016 and in keeping with the reforms being undertaken, under 'Ease of Doing Business' in Department of Trade and Taxes, GNCTD, it has been decided to further ease the procedure for grant of registration under DVAT & CST Act, as under:-

1. The applicant dealer, applying through DVAT MSewa, would be granted registration preferably within 01 day, for which no VATI verification would be required .

2. The provision of providing Bank Account details, at the time of applying for registration under DVAT& CST Act , as envisaged in Form DVAT 04, Part (Column No 16) shall be optional, on the part of the applicant dealer. However, the dealer shall provide Bank Account details of the business, on or before the filing of first Return, in rio the registered entity.

3. The digitally signed Registration Certificate (downloadable at the dealer's end) will be granted within one day, to the prospective applicant dealer, applying through MSewa, replacing the old provision of granting 'Provisional' Certificate.

4. The rest of the contents of the Circular 6/2016 shall remain the same.

This issues with the prior concurrence of the Commissioner, VAT.

Anand Kumar Tiwari
Additional Commissioner (Policy)

Circular regarding Filing of online return for 3rd quarter of 2016-17 extension of period thereof

F.3(420)/Policy/VAT/2011/PF/1101-1106 27-01-2017

Circular No. 21 of 2016-17

Sub: Filing of online return for 3rd quarter of 2016-17 - extension of period thereof.

In exercise of the powers conferred under Rule 49A of the Delhi Value Added Tax Rules, 2005, I, H. Rajesh Prasad, Commissioner, Value Added Tax, do hereby extend the last date of filing of online/hard copy of third quarter return for the year 2016-17, in Form DVAT-16 ,DVAT-17 and DVAT-48 along with required annexure/enclosures to **13/02/2017**.

However, the tax due shall continue to be paid in the usual manner as per the provisions of section 3(4) of the Delhi Value Added Tax Act, 2004. The dealers filing the returns through digital signature need not be required to file hard copy of the return/Form DVAT-56.

H. Rajesh Prasad
Commissioner, VAT