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

DECIDED ON: 10.09.2012

+ **W.P.(C) 2921/2006**

M/S DELHI PETROL DEALERS ASSOC Petitioner

versus

THE COMMISSIONER NEW DELHI & ORS Respondent

W.P.(C) 4669-70/2006

BPCL PETROL DEALERS ASSOCIATION Petitioner

versus

COMMISSIONER DELHI VALUE ADDED Respondent

.....Petitioner

Through: Sh. Rakesh Tikku, Sr. Advocate with Sh.
Aman Walesha, Advocate.

Sh. Randhir Chawla and Ms. Renu Sahgal,
Advocates.

.....Respondent

Through: Sh. Vineet Bhatia, Advocate.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

% 1. The writ petitioners claim directions for quashing of Circular No. 47/2005-06 dated 23.01.2006. The writ petitioners in the first writ petition, i.e. W.P. (C) 2921/2006 claim to be an association of petroleum dealers in Delhi. Similarly, the second petitioner - BPCL Petrol Dealers Association, another Association, is an individual petrol dealer – and a partnership firm; it is represented by one of its partners.

2. Briefly the facts urged in both the proceedings are that the petitioners are petroleum dealers, who receive petroleum and other such supplies, and are engaged in

retail dealership of such products sale. In terms of the Delhi Value Added Tax Act, 2004 (DVAT), Value Added Tax (VAT) is levied at the applicable rate on the entire sale on the turn-over in question at the point of sale. Apparently the product undergoes evaporation loss of around 0.6% for petroleum products. However, the tax at the point of purchase is paid on the value of entire goods as if the whole quantity of petrol is actually received. At the time of sale, when credit is claimed, the dealer adds the cost of purchase, - the commission (by the petroleum company or corporation, as the case may be) and administrative costs. It is argued that even the evaporation loss component is added as credit claim. In these circumstances, the impugned circular was issued in January 2006. It reads as follows:

“CIRCULAR NO. 47 OF 2005-06

It has been brought to the notice of the Commissioner that some Petrol Pump dealers in Delhi are claiming input tax credit on their purchases in respect of the total purchased quantities. As regards sales, the dealer are showing sales of quantity lower than that purchased the difference being on account of loss due to evaporation etc.

In this connection, attention is drawn to sub-rule (3) of rule 7 of Delhi Value Added Tax Rules, 2005, reproduced as under:-

“Where any goods or goods manufactured out of such goods are lost or destroyed, the dealer shall not be eligible to claim tax credit on such goods and the credit taken in any earlier tax period shall be reversed in the tax period in which goods are claimed to have been lost or destroyed.”

The revenue implications, calculated on the basis of a standard evaporation of 0.5% allowed by the companies as reported, are approximately to the tune of 35% of net tax payable by a petrol pump, which the department is supposed to have been losing by this prevalent practice in this trade.

This is illustrated by a calculation on following assumptions:

1000 litres of, say, petrol is purchased. Purchase cost, i.e. Rs.42480/- @ Rs.42.48 per litre (inclusive of 20% VAT), which makes out an input tax of Rs.7080/-. Considering standard allowance of 0.6% on account of evaporation made full use of by the dealer, 994 litres of the petrol is sold for Rs.43229/- @ Rs.43.49 per litre (inclusive of 20% VAT). The output tax involved is Rs.7205/-. Thus, the effective tax paid to the

department is Rs.125/- only (Rs.7205-Rs.7080/-).

However, in light of the rule position mentioned above, input tax credit of Rs.43/- for a litres of petrol (@ Rs.42.48) can not be claimed by the dealer and needs to be reduced i.e. the net input tax credit would be Rs.7037/- (Rs.7080-Rs.43). In case the excess input tax credit has already been availed, it will have to be reversed by the excess amount availed. This suggest that next retailer in the chain needs to pay an additional 16.8 paise per litre on account of value addition ignoring the loss on account of evaporation.

The Zonal Joint/Deputy Commissioners must arrange meetings with petrol pump dealers and clarify the legal position to them and advise them to reverse the input credit claimed by them on such evaporated quantities accordingly.

The ward/operational unit officers shall also take suo motu notice of such instances and do the needful in the interest of Government revenue in terms of provisions of Delhi Value Added Tax Act, 2004 and rules framed thereunder.

This issues with the prior approval of the Commissioner, VAT.”

3. The petitioners argue that the direction issued by the Commissioner is without authority of law since it encroaches on the power and functioning of quasi-judicial bodies who are enjoined to take into account all relevant circumstances and facts which include the claim for credit for the evaporation loss said to have been loaded on to the cost at the time of sale to customers. It was submitted that having once claimed tax credit for tax payable on the component despite evaporation loss, at the time of supply, the Commissioner could not have, consistent with logic and consistent with the right of the dealers, at one stroke, directed the assessing authorities to disallow such credit and make reversals.
4. Learned counsel for the Revenue relied upon the powers vested in the Commissioner – more particularly, Section 7. It was urged that the circular cannot be read as a direction to take a particular position with regard to assessment proceedings but has to be construed more as a guidance. Learned counsel emphasized that if the Court were to accept the petitioner’s contentions, the Commissioner would be denuded of its

powers under Section 67(2) of the Act.

5. Section 67 of the VAT reads as follows:

“67 Powers and responsibilities of the Commissioner

(1) The Commissioner shall have responsibility for the due and proper administration of this Act and shall have jurisdiction over the whole of Delhi.

(2) Subject to sub-section (3) of this section, the Commissioner may, from time to time, issue such orders, instructions and directions to any Value Added Tax authorities as he thinks fit for the due and proper administration of this Act and all such persons engaged in the administration of this Act shall observe and follow such orders, instructions and directions of the Commissioner.

(3) No order, instruction or direction may be issued by the Commissioner to a person exercising the power to determine –

(a) a particular objection made or to be made under section 74 of this Act; or

(b) a particular question under section 84 of this Act; so as to require the person to determine the objection or answer the question of a particular person in a particular manner.

(4) Nothing in sub-section (3) shall prevent the Commissioner from issuing general orders, instructions and directions to any person who determines objections under section 74 or answers questions under section 84 of this Act about the manner of determining classes of objections or answering classes of questions.”

6. Section 74 enables a person dissatisfied with an assessment order under the Act to object against it before the Commissioner, who after considering them (i.e. the objections), can make any orders. These objections can be preferred within a period of 60 days from the issuance of the original assessment order. Section 84 which has also been referred to in Section 67 reads as follows:

“84 Determination of specific questions

(1) If any determinable question arises, otherwise than in proceedings before a court, a person may apply in the prescribed manner to the Commissioner for the determination of that question.

(2) Subject to sub-section (3) of this section, an application for the determination of a

determinable question may be made in respect of a proposed transaction, a transaction that is being undertaken, or a transaction has been concluded.

(3) An application for the determination of a determinable question may not be made after –

(a) the Commissioner has commenced the audit of the person pursuant to section 58 of this Act; or

(b) the Commissioner has issued an assessment for the tax period in which the transaction that is the subject of the determinable question occurred.

Explanation.- For the purposes of this sub-section, the Commissioner shall be deemed to have commenced the audit of a person under section 58 of this Act when the Commissioner serves a notice to this effect.

(4) For the purposes of this section, the following shall be determinable questions:-

(a) whether any person, society, club or association or any firm or any branch or department of any firm is or would be a dealer;

(b) whether any dealer is or would be required to be registered under this Act;

(c) the amount of the taxable quantum of a dealer for a period;

(d) whether a transaction is or would be a sale, or requires an adjustment to be made under section 8 of this Act arising out of a sale;

(e) whether a transaction is or would be in the nature of works contract, or transfer of right to use any goods;

(f) whether a sale is not liable to tax under section 7 of this Act;

(g) whether a sale is exempt from tax under section 6 of this Act;

(h) the sale price of a transaction;

(i) the proportion of the turnover or turnover of purchases of a dealer which arises in a tax period, and the time at which an adjustment to tax or tax credit arises;

(j) whether any transaction is or would be the import of goods;

(k) the value of any goods imported into Delhi;

(l) the rate of tax that is payable on a sale or import of goods and the classification of the goods under the Schedules;

(m) whether a transaction is the purchase of goods, or requires an adjustment to be made under section 10 of this Act arising out of a purchase;

(n) the amount of any tax credit to which the dealer is entitled in respect of a purchase or import of goods;

(o) the amount of any tax credit in respect of any used goods purchased by a dealer;

(p) the location of any sale or purchase;

- (q) the application of a composition scheme in the circumstances of the dealer; or*
- (r) the tax period of a dealer.*

(5) The Commissioner shall make the determination within such period as may be prescribed.

(6) Where –

- (a) the Commissioner fails to make a determination under this section within the time Sec. 85 Delhi Value Added Tax Act, 2004 prescribed under sub-section (5) of this section;*
- (b) the person thereafter implements the transaction which is the subject of the application and in the manner described in the application; and*
- (c) the person has, in the application for the determination of the determinable question, indicated the answer to the determinable question which the person believes to be correct (in this section called the “proposed determination”); the Commissioner shall be deemed for the purposes of this Act to have made and issued to the person on the day after the expiry of the prescribed period, a determination of the determinable question in the terms of the proposed determination.*

(7) The Commissioner may –

- (a) direct that the determination shall not affect the liability of any person under this Act with respect to any transaction effected prior to the determination;*
- (b) limit the period for which the determination will apply;*
- (c) limit the transactions to which the determination will apply; and*
- (d) impose such other limitations or restrictions on the determination as seem appropriate.*

(8) If any such question arises from any order already passed under this Act or under the Delhi Sales Tax Act, 1975 (43 of 1975) or the Delhi Sales Tax on Works Contract Act, 1999 (Delhi Act 9 of 1999) or the Delhi Tax on Entry of Motor Vehicles into Local areas Act, 1994 (Delhi Act 4 of 1995), as then in force in Delhi, no such question shall be entertained for determination under this section but such question may be raised in an objection or appeal against such order.

(9) Where –

- (a) the Commissioner has issued to a person a determination in respect of a particular transaction; and*

(b) the person implements the transaction based on the determination issued to him under this section and in the manner described in the application; no assessment may be raised by the Commissioner against that person which is inconsistent with the determination and no penalty may be imposed on the person if the determination is later held incorrect.

(10) The Commissioner may, by notice served on the person, withdraw or qualify a determination issued under this section but such withdrawal or qualification shall not affect the entitlement of any person to rely on the determination with respect to any transaction or action which he has commenced or which he has completed prior to the withdrawal or qualification.”

7. Section 67 empowers the Commissioner to decide or determine specific questions. It places in position an elaborate procedure for determination of such questions; it is not as if all questions can be taken on board and decided as specific questions by the Commissioner. It would be apparent from Section 84 that determinable questions which might call for decisions in a particular assessment proceeding [as long as it is not pending before the Court of law and is not covered by situations spelt-out in Section 84(3)], can be answered by the Commissioner. Such decisions of Commissioner have binding effect on the party in terms of Section 84(9). These proceedings are akin to advance ruling proceedings enacted in various fiscal statutes such as Income Tax Act, Central Excise Act etc.

8. This Court had earlier occasion to deal with a similar question as to the interpretation of a circular which made a policy declaration binding upon assessing authorities, enjoining them to follow a particular interpretation. In *Sita Juneja & Associates and Ors. v. The Commissioner of Sales Tax* (CWP 1932/1998, decided on 22.09.1998), the Division Bench had noticed previous rulings of the Supreme Court in *Orient Paper Mills v. Union of India* 1978 (2) ELT (J345); *State of Madhya Pradesh v. G.S. Dall and Flour Mills* 1991 (187) ITR 478 etc. The Division Bench specially relied on the Supreme Court judgment in *Orient Paper Mills (supra)* that quasi-judicial bodies cannot be controlled by directions issued by a Board or such authority and that no authority howsoever highly placed can exercise powers of judicial or quasi-judicial authority. The Division Bench then went to hold as follows:

“15. The officials of the Sales Tax Department are administrative authorities. However, such of the officials as are vested with jurisdiction to assess the business transactions of the dealers to tax, discharge function which is judicial in nature. The function though administrative is obliged to be performed with judicial approach and hence becomes quasi-judicial. The basis requirements of justice have to be complied with. Rules of natural justice have to be followed. Objectivity has to be maintained. The conclusions arrived at by the assessing authorities have to be based on the material available on record and supported by reasons.

16. Whenever judicial or quasi-judicial power is vested in a person, the decision must be his. Even though he may obtain the assistance of other persons, he cannot be influenced by anyone in coming to the decision. In short, the jurisdiction so conferred can be either be tempered nor tinkered.”

9. It is brought to the notice of this Court that recently, in a decision of the Supreme Court (*Commissioner of Central Excise, Bhopal v. Minwool Rock Fibres Ltd.* 2012 (278) ELT 581), somewhat similar questions had arisen. The Central Excise authorities had relied upon a circular to urge that the Central Board of Excise and Customs had taken a particular view as regards relevant head within which the goods had to be assessed which the adjudicating authorities had to respect. The Court held as follows:

“In our view, the departmental circulars are not binding on assessee or quasi judicial authorities or courts and therefore, in that view of the matter, the circular/instructions issued by the Board, would not assist them.”

10. The Revenue had urged in the course of the proceedings before this Court that Section 67 made a departure from the pre-existing Delhi Sales Tax Act. Learned counsel particularly had emphasized that while deciding *Sita Juneja*, (*supra*) the Division Bench had noticed that no power existed with the Revenue or its authorities to issue such directions. In this Court’s opinion, the existence of Section 67(3) is of no assistance. Facially Section 67(3) supports the submission of the petitioner that no direction of the kind made by the impugned circular could have been issued by the Commissioner. If understood in its proper perspective, the impugned circular dated 23.01.2006 (No. 47/2005-06) in this case cannot be said to fall within the power of the Commissioner at all. In other words, if the circular purports to direct the assessing or quasi-judicial authorities to take a particular view and not grant credit in respect of evaporation loss,

that is not to be interpreted as binding; the assessing authorities, of course, are entitled to take into consideration Revenue's concerns, as are permitted by law, while examining the claims for credit at the point of sale to their customers.

11. In view of the above, it is hereby directed that the impugned circular dated 23.01.2006 (Circular 47 of 2005-06) shall not bind the authorities into taking a particular view to disallow the claims for the evaporation losses claimed as credit by the petitioners at the point of sale to their customers. Such claims shall be examined and taken into account by the assessing authorities on a factual basis. The Revenue's arguments too shall be taken into account. All the assessing officers and other authorities under the Delhi VAT Act shall frame assessments in accordance with law. It is also clarified that during the pendency of the present proceedings, if any assessment has been completed, and assessee is aggrieved on account of the reliance placed on the circular, it shall be open to them to avail of their remedies by way of objections. However, the objection hearing authorities/appellate authorities or the Tribunal shall hear objections or grounds that are filed within six weeks from today. The concerned authorities shall take into account the fact that the present proceedings were pending, and wherever required, may not insist on the strict application of the provisions of limitation, provided the objections/arguments/claims in this regard pursuant to present judgment are preferred within six weeks from today. In view of the above order, the Court does not deem it appropriate to consider larger questions sought to be urged. It is also clarified that these directions shall not be construed as reflection on merits of individual claims of petitioners/before the concerned authority under the enactment. The writ petitions are disposed of in the above terms.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

SEPTEMBER 10, 2012 'ajk'