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

Decided on: 18.02.2014

+ **W.P.(C) 3715/2013, C.M. APPL.6951/2013**

LARSEN & TOUBRO LTD.

..... Petitioner

Through : Sh. Sandeep Sethi, Sr. Advocate
with Sh. Rajesh Jain, Sh. Virag Tiwari and
Sh. K.J. Bhat, Advocates.

Versus

COMMISSIONER OF VALUE ADDED TAX & ANR.

..... Respondents

Through : Sh. Sushil Dutt Salwan, Addl.
Standing Counsel, for GNCT with Sh. Divy
Pratap, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. The writ petitioner is aggrieved by the two orders, i.e. dated 23.04.2013 and 15.05.2013 issued by the respondents (hereafter referred to as "the VAT Commissioner"), proposing to conduct special audit under Section 58A of the Delhi Value Added Tax Act, 2004 (DVAT) for the years 2011-12 and 2012-13.

2. The petitioner argues that the notice was not preceded by any Show Cause Notice eliciting its views and representation to the proposal for special audit. It was submitted that the order straightaway made under Section 58A clearly has adverse civil consequences. Learned counsel submitted that before making such orders, the VAT Commissioner was under an obligation to issue minimum notice and grant adequate time to make representations. Learned counsel relied upon the judgment of the Supreme Court in *Rajesh Kumar v. DCIT* 2006 (287) ITR 91 as well as the subsequent decision in *Sahara India (Firm) v. Commissioner of Income Tax* 2008 (226) ELT 22 (SC). It is highlighted that even though the Supreme Court spelt-out the requirements to give adequate opportunity in the context of proposal under Section 142(2A) of the Income Tax Act, the considerations would be identical even under the Act. Learned counsel also relied upon certain previous orders made by this Court in this regard in respect of the DVAT Act in *Tulip Telecom Limited v. GNCT of Delhi* in W.P.(C) 2039/2010 dated 19.08.2010 and in *S.L. Enterprises v. Commissioner, The Commissioner, VAT Department of Trade and Taxes* in W.P.(C)1700/2010 dated 20.08.2010.

3. The Revenue argued and submits that Section 58A was amended on 16.01.2013 by the Delhi Act No.14/2012. It was argued that the opening phraseology in Section 58A(1) as it stood before the amendment was, "*If, at any stage of the proceeding under this Act*" which was deleted by the amendment. Emphasizing that this deletion

is significant in as much as it enlarges the powers of the VAT Commissioner to propose special audit even before initiation of proceedings, learned counsel submitted that if the legislature had intended that the concerned assessee had to be issued Show Cause Notice prior to special audit, it would have so provided by a suitable amendment. It was also submitted that the language under Section 58A differs from that in Section 142(2A) of the Income Tax Act, in which a proviso was inserted after the judgment of the Supreme Court in *Rajesh Kumar (supra)* providing for opportunity to the assessee of being heard before issue of notice of special audit.

4. Section 58A of the DVAT reads as follows:

“58A. Special Audit

(1) If, the Commissioner, having regard to the nature and complexity of the business of a dealer and the interest of the revenue, is of the opinion that it is necessary so to do, he may direct the dealer by a notice in writing to get his records including books of accounts, examined and audited by an accountant or a panel of accountants or any other professional or panel of professionals nominated by the Commissioner in this behalf and to furnish a report of such examination and audit in the format that he may specify, duly signed and verified by such accountant or panel of accountants or professional or panel of professionals and setting forth such particulars as may be prescribed.

(2) The provision of sub-section (1) shall have effect notwithstanding that the accounts of the dealer have

been audited under any other provision of this Act or any other law for the time being in force or otherwise.

(3) Every report under sub-section (1) shall be furnished by the dealer to the Commissioner within such period as may be specified by the Commissioner:

PROVIDED that the Commissioner may, on an application made in this behalf by the dealer and for any good and sufficient reason, extend the said period by such further period or periods as he thinks fit:

PROVIDED FURTHER that the aggregate of the period originally fixed and the period or periods so extended shall not, in any case, exceed 180 days from the date on which the direction under sub-section (1) is received by the dealer.

4. The expenses of, and incidental to, the examination and audit of records under sub-section (1), (including the remuneration of the accountant or a panel of accountants or professional or panel of professionals) shall be determined and paid by the Commissioner and that determination shall be final."

5. Section 142(2A) of the Income Tax Act before its amendment with effect from 01.06.2007 reads as follows:

"142. Inquiry before assessment

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2A If, at any stage of the proceedings before him, the Assessing Officer, having regard to the nature and complexity of the accounts, volume of the accounts, doubts about the correctness of the accounts, multiplicity of transactions in the accounts or specialised nature of business activity of the assessee, and the interests of the

revenue, is of the opinion that it is necessary so to do, he may, with the previous approval of the Chief Commissioner or Commissioner, direct the assessee to get the accounts audited by an accountant, as defined in the Explanation below sub-section (2) of Section 288, nominated by the Chief Commissioner or Commissioner in this behalf and to furnish a report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed and such other particulars as the Assessing Officer may require:

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6. The Court notices that the declaration of law in *Rajesh Kumar (supra)* was on 01.11.2006. Thereafter the Parliament accepted the determination of the Supreme Court with respect to the need to give reasonable opportunity and inserted the following provisos:

“142. Inquiry before assessment

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2A. XXXXXX

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Provided that the Assessing Officer shall not direct the assessee to get the accounts so audited unless the assessee has been given a reasonable opportunity of being heard.

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7. The Revenue’s contention that the latest amendment to the DVAT Act in the present instance did not incorporate the requirement of issuing notice prior to the special audit order, is insubstantial, in our opinion. Section 142(2A) before this amendment

in 2006 was cast in *pari materia* terms. Interpreting that provision, the Supreme Court was alive to the fact that the order of special audit was likely to cause prejudice, hardship and even great deal of displacement to the assessee. The Court, therefore, read into Section 142(2A), the requirement that the tax administrator ought to issue prior notice and grant reasonable opportunity. That the Parliament assimilated the law and codified it through a proviso is a matter of detail which ought not to be determinative in the circumstances. In the present case, given the *pari materia* terms of both provisions, this Court rules that an identical opportunity in the case of special audit in the Income Tax is necessary to be given through notice by the Commissioner on each occasion when special audit is proposed.

8. In view of the above discussion, the writ petition has to succeed. It is open to the respondents, if so advised, to issue Show Cause Notice and grant reasonable opportunity in line with the Supreme Court's decision in *Rajesh Kumar (supra)* and *Sahara India (Firm) (supra)*. The writ petition is accordingly allowed and the impugned orders quashed.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

FEBRUARY 18, 2014