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

22-27.

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ST.APPL. 7/2010

SHRUTI FASTENERS LTD.

..... Petitioner

Through: Mr. Rajesh Jain, Advocate with
Mr.Virag Tiwari and Mr.K.J. Bhat, Advocates.

versus

COMMISSIONER OF VALUE ADDED TAX Respondent

Through: Mr. Santosh Kumar Tripathi,
Additional Standing counsel.

WITH

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ST.APPL. 4/2012

SHRUTI FASTENERS LTD.

..... Petitioner

Through: Mr. Rajesh Jain, Advocate with
Mr.Virag Tiwari and Mr.K.J. Bhat, Advocates.

versus

COMMISSIONER OF VALUE ADDED TAX Respondent

Through: Mr. Santosh Kumar Tripathi,
Additional Standing counsel.

WITH

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ST.APPL. 5/2012

SHRUTI FASTENERS LTD.

..... Petitioner

Through: Mr. Rajesh Jain, Advocate with
Mr.Virag Tiwari and Mr.K.J. Bhat, Advocates.

versus

COMMISSIONER OF VALUE ADDED TAX Respondent

Through: Mr. Santosh Kumar Tripathi,
Additional Standing counsel.

WITH

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W.P.(C) 812/2013 & CM APPL 1548/2013

SHRUTI FASTENERS LTD. Petitioner
Through: Mr. Rajesh Jain, Advocate with
Mr.Virag Tiwari and Mr.K.J. Bhat, Advocates.

versus

COMMISSIONER OF VALUE ADDED TAX Respondent
Through: Mr. Santosh Kumar Tripathi,
Additional Standing counsel.

WITH

+ **W.P.(C) 813/2013 & CM APPL 1550/2013**

SHRUTI FASTENERS LTD. Petitioner
Through: Mr. Rajesh Jain, Advocate with
Mr.Virag Tiwari and Mr.K.J. Bhat, Advocates.

versus

COMMISSIONER OF VALUE ADDED TAX Respondent
Through: Mr. Santosh Kumar Tripathi,
Additional Standing counsel.

AND

+ **W.P.(C) 814/2013 & CM APPL 1552/2013**

SHRUTI FASTENERS LTD. Petitioner
Through: Mr. Rajesh Jain, Advocate with
Mr.Virag Tiwari and Mr.K.J. Bhat, Advocates.

versus

COMMISSIONER OF VALUE ADDED TAX Respondent
Through: Mr. Santosh Kumar Tripathi,
Additional Standing counsel.

CORAM:
DR. JUSTICE S.MURALIDHAR
MR. JUSTICE VIBHU BAKHRU

ORDER

15.10.2015

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ST.APPEAL. Nos. 7/2010, 4/2012 and 5/2012

1. These appeals by the Assessee under Section 81 of the Delhi Value Added Tax Act, 2004 read with Section 45 of the Delhi Sales Tax Act, 1975 ('DSTA') are directed against the impugned common order dated 9th/13th July 2010 passed by the Appellate Tribunal Value Added Tax ('AT') under Section 43 (6) of the DSTA read with Section 9 of the Central Sales Tax Act, 1956 ('CSTA') for Assessment Years (AYs) 2000-01, 2001-02 and 2002-03.

Background Facts

2. The brief facts leading to the present appeals are that an assessment order under the DSTA for the period 2000-01 was passed in respect of the Appellant/Assessee on 30th September 2002 and a demand of Rs.6,82,380 was made. On 31st March 2003 the assessment order for the period 2001-02 was finalized by raising a demand of Rs.1,32,970 and on 31st March 2004 the assessment for the period 2002-03 was finalized for Rs.2,09,630.

3. On 25th May 2007 a complaint was received against the Appellant Assessee that he had been filing sales tax returns by using false 'C' forms and evading taxes. The said complaint was forwarded by the Commissioner, Value Added Tax to the Deputy Commissioner under cover of a letter dated 14th June 2007.

4. On 10th July 2007 a show cause notice was issued by the Value Added Tax Officer ('VATO'), Ward-90 to the Appellant-Assessee stating that a complaint had been received regarding gross irregularities committed by it in the AY 1999-00 pertaining to sales of zips and buttons. The allegations in respect of the misuse of 'C' forms for the financial year 2002-03 were also

mentioned. The Assessee was asked to appear before the VATO on 17th July 2007 along with books of accounts for the year 1996-97, 1997-98, 1998-99, 1999-2000, 2000-01, 2001-02 and 2002-03 and sales tax account register pertaining to all invoices of 'C' form, ST-4, ST-49 and H form submitted to the sales tax office.

5. On 17th July 2007 the authorized representative of the Assessee wrote a letter to the VATO requesting for a copy of the complaint and sought an adjournment. Further time was sought on 28th August 2007. On 10th October 2007 the following order was passed by the VATO:

“As per direction of higher authorities assessment order for the year 2000-01 examined and observed that it is a fit case to reassess under Section 24 of the DST Act 1975 (Repeated) according S.T 15 issued for 29th October 2007.”

6. A similar order was passed in respect of AYs 2001-02, 2002-03. The further proceedings resulted in reassessment orders being passed on 10th October 2008 creating demands of Rs. 48,67,284, Rs, 71,62,323 and Rs.48,79,881 for the AYs 2000-01, 2001-02 and 2002-03 respectively.

7. By a common order dated 31st April 2009 the appeals filed by the Appellant were disposed of by the Appellate Authority with a direction to the Appellant to again appear before the VATO within 15 days along with the documents. The further challenge by the Appellant to the said order of the Appellate Authority was negated by the AT on 13th July 2010. Aggrieved by the aforementioned order of the AT, the Assessee has filed the present three appeals.

Questions of law

8. On 2nd January 2011, this Court framed the following questions of law for consideration:

“(i) Whether the Tribunal was justified in upholding the reassessment orders when before issuing the notice in form ST-15, no reasons have been indicated/recorded by the Ld. VATO on the order sheet?

(ii) Whether the reassessment proceedings in terms of Section 24(2)(b) are not barred by limitation and on this ground were the orders not required to be quashed and set aside?

(iii) When the Delhi Sales Tax Act, 1975 stood repealed and the power of reassessment were not saved under Section 106(2) of the Delhi VAT Act, 2005 then could the Assessing Authority have the jurisdiction to issue notice under Section 24 when by 31.3. 2005, no proceedings against any of the above Assessment Order was pending?”

Question (i)

9. The narration of facts as noted hereinbefore show that no ‘reasons to believe’ were formally recorded by the VATO on the file prior to initiating the proceedings under Section 24 of the DSTA. All that was stated in the order dated 10th October 2007 was that the assessment was being reopened “as per direction of higher authorities.” After it became apparent to the Court that there was no order of the VATO separately recording the ‘reasons to believe’, learned counsel for the Respondent was asked to produce before the Court the relevant file notings. The original file, as well as the photocopies of the relevant pages, was produced by learned counsel for the Respondent. It showed that a complaint was received on 24th May 2007 in the office of the Commissioner against the Appellant. This was then forwarded by the Commissioner under cover of letter dated 14th June 2007 to the Deputy Commissioner (IX). On the basis of the said complaint,

the VATO on 10th July 2007 issued a show cause notice to the Appellant. This was not in compliance with Section 24 (1) DSTA.

10. Section 24 (1) DSTA states that where, after a dealer has been assessed under Section 23 of the DSTA, the Commissioner has ‘reasons to believe’ that the whole or any part of the turnover of a dealer in respect of any period had escaped assessment to tax then the Commissioner may reopen the assessment by issuing a notice to the dealer and after giving the dealer an opportunity of being heard proceed to determine the tax payable to the best of his judgment. The power of the Commissioner under Section 24 (1) can in terms of Section 10 DSTA be delegated but not to a person lower in rank to an assessing officer.

11. While in the present case, there is no dispute that the VATO was authorised to reopen the assessment, it is plain that the jurisdictional requirement under Section 24 (1) of the DSTA that reasons must be recorded by the VATO himself, as the officer issuing the notice of reassessment on the ground that there were ‘reasons to believe’ that the whole or any part of the turnover of a dealer in respect of any period had escaped assessment to tax, was not complied with. All that was said by the VATO was that he was issuing notices for reopening of the assessment under Section 24 (1) DSTA “as per direction of higher authorities.” This is not a mere procedural irregularity that can be condoned by remanding the matter to the VATO for a fresh reassessment proceeding. It goes to the very root of the matter since what is sought to be done under Section 24 of the Act is to re-open an assessment.

12. The above legal position has been explained in several decisions. In ***Samagya Consultants (P) Ltd. v. CST T 2001 (122) STC 512 (Del)*** this ***ST.Appl. Nos.7/2010, 4/2012, 5/2012 & W.P. (C) Nos. 812/2013, 813/2013 & 814/2013*** Page 6 of 10

Court referred to the decision in ***Sales Tax Officer v. Uttareshwari Rice Mills 1972 (30) STC 567*** and held:

“the legislative intent is also clear because of the expression used in Section 24 itself i.e. ‘Commissioner has reasons to believe’. The powers of the assessing officer to reopen assessment, though wide, are not plenary. The words used in the statute are ‘reason to believe’ and not ‘reason to suspect’. The expression ‘reason to believe’ postulates belief and existence of reasons for that belief. It postulates that the assessing officer holds the belief induced by the existence of reasons for holding such belief.”

13. In ***Samagya Consultants (P) Ltd. (supra)***, since the notice for reopening the assessment was issued without recording such reasons, it was held to be ‘indefensible’. The matter travelled up to the Supreme Court and the Department’s appeal was dismissed by an order dated 23rd April 2008, which read:

“We agree with the view taken by the High Court that in the absence of any recorded satisfaction for re-opening the concluded assessment of the assessee for the year 1996-97 by the assessing authority, the assessment could not be re-opened.”

14. In ***Jagdish Cold Storage & Ice Factory v. The Commissioner of Sales Tax, Delhi 2007-08 (46) DSTC J-1 (Del)*** a similar issue was addressed to the Court. It is noticed that Circular No.7 of 2001-02 dated 3rd March 2001 has been issued by the Commissioner of Sales Tax after the judgment in ***Samagya Consultants (P) Ltd. v. CST (supra)*** to the following effect:

“Therefore it is emphasised upon all the Assessing Authorities that the aforesaid observations of the Hon’ble Delhi High Court be strictly adhered to and before issuing the notice in form ST-15 under the aforesaid provision of Section 24, the reasons therefore invariably recorded in the Order-Sheet. Non-compliance will be viewed seriously.”

15. The Court in ***Jagdish Cold Storage & Ice Factory (supra)*** noted that in that case there were no reasons recorded for re-opening the assessment. It

was then observed in paras 10 and 11 as under:

“10. It is rather unfortunate that in spite of this mandate recorded by the Commissioner, the Respondents have chosen to take a stand that it is not necessary to record reasons before issuing a notice for reopening a completed assessment. It is well settled in law that circulars issued by governmental authorities are binding upon the subordinate authorities. There is absolutely no reason, in this particular case, for the respondents to act in a manner contrary to the Circular issued by the Commissioner. That apart, we have gone through *M/s. Samagya Consultant Pvt. Ltd.* The Division Bench has specifically recorded that there must be an existence of reason on which belief is founded before a notice is issued. It is not necessary for the notice to state the reasons, but there must be existence of those reasons.

11. An Assessing Officer cannot view the reopening of a completed reassessment as a mechanical task because it can have serious consequences for the assessee and that is why it has been specifically mentioned in the Income Tax Act that there must be reasons to believe that a completed assessment must be reopened. This is also the interpretation given by this Court to Section 24 of the Delhi Sales Tax Act, 1975. The power to reopen an assessment is quite clearly not a plenary power, even though the power is wide. Therefore, it is mandatory upon the Assessing Officer to have some material on record and also to consider that material and thereafter record reasons why a completed assessment is sought to be reopened.”

16. The above legal position was reiterated in the decision dated 17th August 2007 in Writ Petition (Civil) No. 6545 of 2002 (***Prashant Software Ltd. v. Commissioner of Sales Tax***). It was again observed as under:

“This is an extremely unfortunate situation where despite Circulars issued by the Commissioner of Sales Tax, the Respondent are bent on asserting that it is not at all necessary that reasons should be recorded before initiating steps to reopen a completed assessment. Apart from a violation of the law, it would be of no avail to an Assessee if it does not know what weighed in the mind of the assessing

authority for reopening the assessment. It is for this reason that the Commissioner of Sales Tax issued the above circulars that there must be a record of the reasons. Otherwise, it is impossible for any Assessee to know why the assessment was reopened or what prompted the assessing authority to initiate the action taken by it. Even a court which is called upon to judicially review the decision of the assessing authority to reopen the assessment would be unable to fathom the reasons, if they are not recorded anywhere.”

17. In light of the legal position explained in the above decisions, the Court concludes that in the present case the jurisdictional requirement of the VATO having to record the ‘reasons to believe’ preceding the issuance of the show cause notice to the Assessee under Section 24 (1) DSTA was not complied with. Consequently, the entire re-assessment proceedings are bad in law.

18. Question (i) is answered in the negative, i.e., in favour of the Assessee and against the Department. The orders passed by the VATO for reopening the assessments for AYs 2000-01, 2001-02 and 2002-03 are held to be unsustainable in law.

19. Since the appeals succeed on question (i), the Court does not consider it necessary to answer the other two questions framed for consideration. In any event, it may be noticed that as far as the issue of limitation is concerned, learned counsel for the Assessee stated that in view of the decision of this Court dated 2nd May 2014 in Review Petition No. 420/2012 in W.P. (C) No. 974/2010 (*Kumagai Skanska HCC Itochu Group v. The Commissioner of Value Added Tax*) he was not pressing the said issue at this stage.

Conclusion

20. ST. Appeal Nos. 7/2010, 4/2012 and 5/2012 are accordingly allowed, and the impugned order dated 9th/13th July 2010 of the AT and the corresponding orders of the Appellate Authority and the VATO are set aside.

21. Writ Petition (Civil) Nos. 812, 813 and 814/2013 have been filed challenging the order passed in the re-assessment proceedings pursuant to the reopening of the assessments for AYs 2000-01, 2001-02 and 2002-03. With the reopening of the above assessments having been held to be unsustainable in law, the orders passed consequent upon such reopening of the assessment are also required to be set aside. It is ordered accordingly.

22. The Writ Petition (Civil) Nos. 812/2013, 813/2013 and 814/2013 are accordingly allowed but in the circumstances with no order as to costs. CM Nos. 1550/2013 and 1552/2013 are disposed of.

S. MURALIDHAR, J

VIBHU BAKHRU, J

OCTOBER 15, 2015

Rk/dn