

\$~17

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

%

Judgment delivered on: 14.05.2015

+

WP(C) No. 5231/2014 & CM 10405/2014

ITD-ITD CEM JV

.... Petitioner

versus

COMMISSIONER OF TRADE AND TAXES

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Rajesh Jain with Mr Virag Tiwari and Mr K.J. Bhat

For the respondent : Mr Sanjay Jain, ASG with Mr Raj Batra, Ms Namisha Gupta and Ms Aastha Jain

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. As recorded in our order dated 19.08.2014 the only plea taken in this petition is that the default assessment notice under sections 32/33 of the Delhi Value Added Tax, 2004 (hereinafter referred to as 'the said Act') which was issued on 09.07.2014, was time barred. The relevant period for assessment is 01.04.2009 to 31.03.2010. Monthly returns were filed for the entire period by the petitioner. According to the learned

counsel for the petitioner the last date for re-assessment as prescribed by section 34 of the said Act would be 31.03.2014.

2. Section 34 of the said Act reads as under:-

34. Limitation on assessment and re-assessment

(1) No assessment or re-assessment under section 32 of this Act shall be made by the Commissioner after the expiry of four years from –

[(a) the end of the year comprising of one or more tax periods for which the person furnished a return under section 26 or 28 of this Act; or]

(b) the date on which the Commissioner made an assessment of tax for the tax period, whichever is the earlier:

PROVIDED that where the Commissioner has reason to believe that tax was not paid by reason of concealment, omission or failure to disclose fully material particulars on the part of the person, the said period shall stand extended to six years.

(2) Notwithstanding sub-section (1), the Commissioner may make an assessment of tax within one year after the date of any decision of the Appellate Tribunal or court where the assessment is required to be made in consequence of, or to give effect to, the decision of the Appellate Tribunal or court which requires the re-assessment of the person.

3. Referring to the proviso to section 34 (1) the learned counsel for the petitioner submitted that it permitted the extension of time up to six years (i.e, up to 31.03.2016 in this case) but, that is subject to the preconditions set out in the proviso being met. It is the case of the petitioner that the proviso has not been specifically invoked by the

respondent nor is there any recording in the default assessment order that the Commissioner/VATO had 'reason to believe' that the tax was not paid because of concealment, omission or failure to disclose fully the material particulars on the part of the petitioner. It was submitted that, therefore, in terms of the decision of this court in **H.M. Industries v. Commissioner of Value Added Tax: 215 (2014) DLT 671 (DB)** the notice of default assessment dated 09.07.2014 was time-barred.

4. Mr Sanjay Jain, the learned ASG, appearing on behalf of the respondent submitted that if one were to examine the default assessment notice dated 09.07.2014 it would be evident that the petitioner was repeatedly taking time to furnish details and did not do so and it is for this reason that the extended period provided in the proviso to section 34(1) was invoked although there is no such express invocation. Mr Jain submitted that though the language used in the proviso is not specifically recorded in the order/notice, if one were to examine the same in detail the ingredients thereof would be reflected in it and, therefore, the respondent was well within his right to pass the order within the extended period of limitation.

5. We have examined the decision of the Division Bench in **H.M. Industries** (*supra*) and we find that the present case is fully covered by the ratio laid down therein. It has been observed by the court as under:-

“10. It is true that proviso to Section 34(1) does not specifically mention that reasons to believe have to be recorded in writing. However, the said requirement has to be read and treated as part and parcel of Section 34(1) of the DVAT Act. The normal period of limitation as prescribed for passing of a default assessment order is four years. No reason or ground is required to be stated under Section 34 (1) if assessment/default assessment is made within the said period. However, when the extended period of six years is invoked, preconditions stipulated in the proviso to Section 34(1) of the DVAT Act must be satisfied. Want of satisfaction of the preconditions would be in realm of absence of jurisdiction. The only way, the Commissioner/competent authority can show that he had applied his mind and had formed requisite “reason to believe” is by recording in writing that the case falls within the proviso to Section 34(1) of the DVAT Act. This may be indicated and stated so in the default assessment order or even in the record. In case, reasons to believe are not recorded or so indicated/mentioned in the default assessment order or in the record, it would lead to an anomalous and aberrant situation. It would be a virtually impossible task for the appellate authorities to first find and decipher the unknown and unrecorded reason to believe and thereupon decide whether the requisite conditions for invoking proviso to Section 34(1) of the DVAT Act were actually satisfied or not. The issue or question raised would be answered on guess work or mere probabilities as to the “reason to believe”. Invoking proviso to Section 34(1) of the DVAT Act certainly imposes civil liability and has adverse consequences, so an assessee must have the right to question and challenge formation of the belief. An effective, decisive and erudite decision would be possible only when there would be no uncertainty and

misgiving as to the “reasons to believe”. This could be easily and without any discern and difficulty avoided by making a note in writing . The “written belief” would be in consonance with the principle and mandate of good governance, fairness, transparency and would curtail arbitrariness and prejudice. Importantly, we would steer clear from the needless debate on whether and what was the “reason to believe”.

XXX	XXX	XXX	XXX	XXX
XXX	XXX	XXX	XXX	XXX

18. As observed earlier, every error or mistake in the return which leads to short payment or non-payment of tax, would not be covered by the proviso to Section 34(1) of the DVAT Act. The said proviso will only apply when the preconditions stipulated therein i.e (1) the Commissioner records reasons to believe that the tax has not been paid; (2) the reason for non-payment of tax should be concealment, omission or failure to disclose full material particulars on the part of the assessee. It is only when the two conditions are cumulatively satisfied and the reasons to believe show a live link or nexus with the concealment, omission or failure to disclose material facts resulting in short payment of tax or non levy of tax, that the proviso to Section 34(1) of the DVAT Act can be invoked.

19. This extended period is an exception and not the rule. So preconditions in the proviso must be satisfied before or with the passing of an order under Section 32 and not afterwards or by the Objection Hearing Authority. The power must be exercised by the Commissioner or the competent authority, before or at the time of passing of the default assessment order. The Objection Hearing authority cannot write or formulate the “reason to believe”. The statutory mandate is that the reason should be recorded by the competent authority/Commissioner and should be before or at the time of passing of the default assessment order. If and had

the authority, passing the default assessment order, recorded the “reasons to believe” on the same lines as the Objection Hearing authority, the outcome and decision possibly would have been different.”

(underlining added)

6. It is, therefore, clear from the said decision that the preconditions for invoking the extended period are that the Commissioner should record reasons to believe that the tax has not been paid and that the reason for non payment of tax should be concealment, omission or failure to disclose full material particulars on the part of the assessee. In the present case no such ‘reason to believe’ has been recorded. The submission made by the learned ASG that the ingredients of the proviso to section 34(1) could be gathered from the default assessment notice cannot be accepted in view of the observations of the Division Bench in **H.M. Industries** (*supra*) which we have already extracted above. To be clear, it has been observed that it would be a virtually impossible task for the appellate authority to first find and decipher the unknown and unrecorded ‘reasons to believe’ and thereupon decide whether the requisite conditions for invoking the proviso under section 34(1) of the said Act were actually satisfied or not. The issue or question raised would be answered on guess work or mere probabilities as to what the

‘reason to believe’ was. It is for these reasons that the Division Bench held that the “reasons to believe” must be disclosed clearly in the record prior to the issuance of the default assessment notice/order or in the said notice/order itself. In the present case, we do not find any such recording.

7. Apart from the fact that the proviso to section 34 (1) of the said Act has not been invoked and the ‘reasons to believe’ have not been recorded in writing, what is shocking is the document which has been placed at page 18 of the rejoinder affidavit filed by the petitioner which is a certified copy of the file noting dated 09.03.2014 of the Assistant Commissioner (HQ). The said noting is reproduced in its entirety herein below:-

“Sub: Request for Extension of time to conduct Audit of Cases pertaining to CWG.

May kindly see the list of cases allotted to this branch for audit of business affairs, for the year 2009-10 & 2010-11. These cases have been recommended for audit by the CVC as these firms were engaged in Common Wealth Games related projects.

It is pertinent to mention here, that all the officers of the Branch are currently engaged in Enforcement duties in accordance with the order of the Competent Authority. Besides, the ensuing Election duties are sure to keep these officer occupied upto mid May, 2014. Since, the cases for the year 2009-10 are due to get time-barred by 31.03.2014, it is important

to seek extension of time limit for these cases for the year 2009-10.

If, agree, we may request the Competent Authority to kindly consider for extension of time-limit as per provision of the Act & Rules (u/s 34 of DVAT).

Sd/-

9-3-14

Asst. Commissioner (HQ)

Addl. Commissioner, (VAT Audit)

Sd/ 10-3-14”

(underlining added)

From the above extract it is evident that the reasons for extending the time for completing the re-assessment proceedings were not the reasons indicated in the proviso to section 34(1) but other purported reasons of pendency of cases, election duty etc. etc. Those purported reasons did not permit the respondent to invoke the extended period of limitation given in the proviso to section 34(1) of the said Act.

8. We, therefore, hold that the default assessment notice dated 09.07.2014 is time barred and is quashed. The revenue may, however, take recourse to such other action as may be permissible in law.

9. The writ petition is allowed to the aforesaid extent. There shall be no order as to costs.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

MAY 14, 2015

kb

