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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 1849/2016 & CM No. 7914/2016 (for stay)

Reserved on: March 16, 2016

Decision on: March 30, 2016

ITD-ITD CEM JV

..... Petitioner

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

versus

COMMISSIONER OF TRADE & TAXES

..... Respondent

Through: Mr. Gautam Narayan, Additional
Standing Counsel with Mr. R.A. Iyer, Advocate
and Mr Pradeep Verma, Assistant Commissioner
(Audit)/Special Zone.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VIBHU BAKHRU

J U D G M E N T

30.03.2016

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Dr. S.Muralidhar,J:

1. The challenge in this writ petition by the Petitioner, ITD-ITD CEM, a joint venture group, which is engaged in executing the works contract for Delhi Metro Rail Corporation ('DMRC') and has been registered with Ward No. 107 (Special Zone) with the Department of Trade & Taxes ('DT&T'), Government of National Capital Territory of Delhi ('GNCTD'), is to the notice dated 9th February 2016 issued under Section 59 (2) of the Delhi Value Added Tax Act, 2004 ('DVAT Act') along with the letter dated 24th February 2016 issued by the Assistant Commissioner (VAT Audit).

2. The Petitioner states that it has been filing its returns regularly with the DT&T and also making other statutory compliances in terms of the provisions of the DVAT Act and Delhi Value Added Tax Rules 2005 ('DVAT Rules'). It is stated that during the year 2009-10, the Petitioner filed monthly returns in form DVAT 16, which returns were taken to be notice of assessment under Section 31 of the DVAT Act.

3. On 2nd August 2013, a notice for audit of the business affairs was issued to the Petitioner by the Value Added Tax Officer ('VATO') under Section 58 of the DVAT Act in form DVAT-37 asking it to produce documents indicated in the notice. In response to the above notice, the Petitioner appeared on several dates before the VATO and produced documents including records, books of accounts, invoices, details of purchases (DVAT-30 & 31) apart from the audit report including the balances sheet and chart showing the method of claiming deductions towards various expenses claimed in the return.

4. The limitation of four years for making the default assessment for the period 2009-10 expired on 31st March 2014. Till that time, no assessment notice under Section 32 of the DVAT Act was framed as the proceedings continued thereafter. It is stated that the audit proceedings which were initiated on 2nd August 2013 concluded on 23rd June 2014. The audit report, prepared on 4th July 2014, *inter alia* covered the period from 1st April 2009 to 31st March 2010. It was a month-by-month analysis of the returns filed. It calculated month-wise, the gross turnover. At the end of audit report, a demand of Rs.14,43,95,186 towards tax, Rs.10,61,40,115 towards interest, Rs.36,84,90,564 towards penalty (a total sum of Rs. 61,90,25,865) was proposed.

5. The VATO issued default notices of tax, interest and penalty under Sections 32 and 33 of the DVAT Act on 4th/9th July 2014. However, in these default notices, no mention was made of any concealment, omission or failure by the Petitioner in furnishing any material particulars although the audit report adverted to these aspects.

6. The Petitioner filed Writ Petition (Civil) No. 5231 of 2014 in this Court challenging the aforementioned default notices, essentially on the ground of limitation. The point urged before this Court was that in terms of Section 34 (1) (a) of the DVAT Act, no assessment or reassessment under Section 32 of the DVAT Act could be carried out by the Commissioner after the expiry of four years from the end of the year for which the person furnished a return under Section 26 or 28 of the DVAT Act. With the four year limitation calculated from the end of the year 2009-10 having expired on 31st March 2014, the default notices under Sections 32 and 33 of the DVAT were time barred.

7. At this juncture, it requires to be noticed that the proviso to Section 34 (1) extends the period of limitation up to six years where the Commissioner “has reason to believe that tax was not paid by reason of concealment, omission or failure to disclose fully material particulars”.

8. During the course of hearing of the above Writ Petition (Civil) No. 5231 of 2014, the learned Additional Solicitor General of India appeared on behalf of DT&T and urged that although the default notices had not expressly invoked the proviso to Section 34 (1) of the DVAT Act, they impliedly did so if one were to examine in detail the ingredients of the said notices. The Petitioner had repeatedly been taking time to furnish the details and did not do so.

9. The Court by its final order dated 14th May 2015 held that the default notices under Sections 32 and 33 of the DVAT Act dated 9th July 2014 were barred by limitation. In paras 7 and 8 of the judgment dated 14th May 2015 it was observed as under:

“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 up to mid May, 2014. Since, the cases for the year 2009-10 are due to get time-barred by 31.03.2014, it is important W.P.(C) No.5231/2014 Page 8 of 9 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 9th July 2014 is time barred and is quashed. The revenue may, however, take recourse to such other action as may be permissible in law.”

10. On 23rd December 2015 the Special Commissioner (Special Zone) passed an order under Section 67 (2) of the DVAT Act assigning the Petitioner’s case to Mr. Praveen Verma, Assistant Commissioner to take recourse to such other action in light of the judgment dated 14th May 2015 passed by this Court in Writ Petition (Civil) No. 5231 of 2014.

11. Pursuant to the above order passed by the Special Commissioner (Special Zone), a note was prepared by the DT&T on 26th November 2015 regarding coercive action available to it. The note referred to opinion of an advocate that if the facts so justified, the DT&T can avail of the extended period of limitation of six years. The matter was then assigned to Mr. Brijesh Sharma, AC (Audit) for further necessary action. Thereafter the Commissioner, DT&T assigned the matter to Mr. Praveen Verma, Assistant Commissioner (VAT Audit). On 1st January 2016 Mr. Praveen Verma prepared a detailed note for the consideration of the Additional Commissioner (VAT Audit) in which he noted that the six years’ period was to expire on 31st March 2016. In the note, it was *inter alia* observed as under:

“In the case of M/s. ITD ITD CEM JV, while scrutinizing

DVAT-16 (returns filed by the dealer for the year 2011-12) it has been observed that the dealer has claimed exemption/deduction towards labour, services and like charges more than the permissible limit as specified under Rule 3 of DVAT Rules, 2005. In the financial year 2009-10, the dealer has shown his taxable turnover as Rs. 88,89,16,555 whereas he has claimed deductions to the tune of Rs. 274,20,36,059. Under normal circumstances, if a dealer deductions of Rs. 274,20,36,059 then his gross turnover should be 1096,81,44,236. It appears that the dealer has concealed a substantial part of his turnover, thereby, apparently avoiding/under-calculating his tax liabilities. It is the reason to believe that due tax has not been paid by the dealer and there is every likelihood of concealment, omission or failure to disclose full material particulars on the part of the dealer.”

12. The note therefore proposes that the Commissioner, VAT is to allow extension of time for assessment for the period 2011-12 up to six years in terms of the proviso to Section 34 of the DVAT Act and the above extension is required “for the purpose of verifying concealment etc. after scrutiny of records of the dealer for the year 2009-10.”

13. When the above note was placed before the Additional Commissioner (Audit) who made, in his handwriting, an endorsement referring to “as the Assessing Authority has clearly indicated high possibility of concealment, omission or failure to disclose full material particulars on the part of the dealer resulting in lower gross turnover and tax liability.”

14. With the Commissioner, VAT having approved the above note, a notice under DVAT-37 was duly issued to the Petitioner on 7th January 2016 proposing a special audit be conducted for the year 2009-10. The Petitioner replied on 12th January 2016 objecting to the above notice on the ground that it was without jurisdiction. When the VATO disagreed with the objection, Writ Petition (Civil) No. 713 of 2016 was filed by the

Petitioner challenging the re-initiation of the audit proceedings.

15. When the writ petition was finally disposed of on 1st February 2016, Mr. Gautam Narayan, learned panel counsel for the DT&T produced a letter dated 30th January 2016 written by the Assistant Commissioner (VAT Audit Branch) in which it was stated that DT&T did not want to insist on fresh audit proceedings under Section 58 of the DVAT Act. The Court then passed the following order:

“1. Aggrieved by the issuance of an Audit Notice dated 7th January 2016 by the Commissioner of Trade and Taxes in Form DVAT-37 in exercise of the powers under Section 58 of the Delhi Value Added Tax Act, 2004 read with Rule 46 of the Delhi Value Added Tax Rules, 2005, the Petitioner ITD-ITD CEM JV has filed this writ petition.

2. Earlier, a notice of Audit dated 2nd August, 2013 had been issued to the Petitioner by the Commissioner, Department of Trade and Taxes, Government of NCT of Delhi (GNCTD) and pursuant thereto an Audit Report dated 4th July, 2014 was prepared after scrutinizing the books of account of the Petitioner. This led to a notice of default assessment of tax being issued under Section 32 of the Act on 9th July, 2014. Additionally, a notice of penalty of the same date was issued under Section 33 of the Act. Both these were challenged by the Petitioner in this Court by filing W.P.(C) 5231/2014. The challenge was on the ground that given the relevant assessment period was 1st April, 2009 to 31st March, 2010, the default assessment and penalty notices under Sections 32 and 33 of the Act issued on 9th July, 2014 were time barred.

3. By a judgment dated 14th May, 2015, this Court quashed the default assessment notices as being time barred. Para 8 of the said order reads as under:

“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.”

4. It is, thereafter, that the impugned Audit Notice dated 7th January, 2016 was issued stating that an audit is required to be undertaken for the very same period, i.e., 1st April, 2009 to 31st March, 2010.

5. On the previous date, i.e., 27th January, 2016, this Court had, while directing notice to be issued to the Respondent, ordered that the Value Added Tax Officer (VATO) would not pass any order in respect of the impugned notice. Learned counsel for the Respondent had stated that he would take instructions in the matter.

6. Today, Mr Gautam Narayan, learned Additional Standing Counsel for the Respondent, has produced before the Court a letter dated 30th January, 2016 addressed to him by the Assistant Commissioner, VAT Audit Branch of the Department of Trade and Taxes, GNCTD which, *inter alia*, states that in light of the observations of this Court on the previous date, the Department of Trade and Taxes, GNCTD “does not want to insist on fresh audit proceedings under Section 58 of the DVAT Act, 2004 and the Audit Notice issued for the same shall be withdrawn with the permission of the Hon’ble High Court”. The letter proceeds to state that the Department intends to initiate fresh assessment proceedings under Sections 32 and 33 of the DVAT Act on the basis of the records available with it and other material facts/documents submitted by the dealer during the audit proceedings concluded earlier.

7. While, Mr Rajesh Jain, learned counsel appearing for the Petitioner, submits that no further proceedings are warranted, the contention of Mr Narayan is that the right of the Department to initiate further proceedings in accordance with law has already been reserved by this Court in para 8 of its order dated 14th May 2015 and, therefore, the Department is within its right to proceed further in accordance with law.

8. In light of the instructions given to Mr Narayan in the letter dated 30th January 2016 addressed to him, the prayer in the present petition does not survive. The said letter states that the Respondent does not wish to proceed with the Audit

proceedings and is withdrawing the Audit Notice dated 7th January, 2016. The said statement is taken on record and the impugned notice dated 7th January 2016 is treated as having been withdrawn by the Respondent.

9. As far as further action that the Respondent states it intends to take is concerned, this Court does not consider it necessary to express any opinion whatsoever on the legality of such action as that would be a hypothetical exercise at this stage. The Court also does not consider it necessary to add anything to what has been already stated by it in the order dated 14th May, 2015 as far as the permissible course of action for the Department to take is concerned.

10. The writ petition is disposed of in the above with no order as to costs.”

16. After the above order of the Court, the impugned notice dated 9th February 2016 was issued by the Assistant Commissioner (VAT Audit) to the Petitioner, which reads as under:

“Assessment of tax liabilities of M/s. ITD ITD CEM JV is required to be done under Section 32 and 33 of DVAT Act for the year 2009-10 as there are reasons to believe that there has been suppression of gross turnover as shown by the dealer in DVAT returns filed by the dealer for the period concerned. Accordingly, Section 34 of DVAT Act is being invoked with the approval of Competent Authority. The assessment under Section 32 and 33 of DVAT Act read with Section 34 of DVAT Act shall be done on the basis of dealer’s records, and findings thereon, available with this department.

An opportunity is hereby given to the dealer to submit any additional information other than what has already been submitted by the dealer, concerning assessment of tax liabilities for the year 2009-10, which he may find relevant to be submitted, before assessment is framed. It is, therefore, directed that the same may be submitted to the undersigned on or before 16th February 2016.”

17. The Petitioner then filed a detailed objection, by its letter dated 15th

February 2016 wherein various grounds were taken why re-assessment proceedings under Sections 32 and 33 of the DVAT Act could not be initiated.

18. On 24th February 2016 the Assistant Commissioner (Special Zone VAT) responded to the above letter dated 15th February 2016 in which the Petitioner was asked to furnish additional information before 2nd March 2016.

19. Aggrieved by the above order, the Petitioner filed the present writ petition. At the first hearing, i.e., on 2nd March 2016 while accepting notice, Mr. Gautam Narayan, learned Additional Standing counsel for the DT&T, stated that he would produce the file in which the reasons to believe that the turnover of the Petitioner/dealer has escaped assessment for the period in question, have been recorded. Mr. Narayan also stated that “till the next date, no order will be passed pursuant to the impugned notice issued to the Petitioner under Section 59 (2) of the DVAT Act, 2004.”

20. Thereafter, the petition was finally heard on 16th March 2016. Mr. Narayan produced the original file and also prepared a compilation of the relevant documents filed by the Petitioner.

21. The file contains the notings, already referred to hereinabove. At the outset it requires to be noticed that on a perusal of the records produced before the Court, it is seen that in the chart prepared by the DT&T for the period April 2009 to March 2010, the Petitioner disclosed gross turnover of Rs. 424,34,40,248 in relation to which it claimed exemption in the sum of Rs. 274,20,36,059. In making the fresh proposal on 29th January 2016 for invoking the extended period of limitation, the approach of the

Assistant Commissioner (VAT Audit) was to infer from the figure of deduction of Rs. 274,20,36,059 filed by the Petitioner in its returns, that it should have been Rs. 1096,81,44,236. The emphasis was *inter alia*, on what ought to have been the gross turnover. The basis for this estimation was the permissible standard deduction of 25% of the total value of the contract towards labour, services and other like charges, where the actual expenses on these heads is not ascertainable and an Assessee is unable to provide the requisite documentation as proof of the expenses incurred. In this context, Rules 3 (1) and (2) of the DVAT Rules are relevant.

22. There is a basic misconception in this approach inasmuch as there was absolutely no material for the Assistant Commissioner (VAT Audit) to have “reasons to believe” that the Petitioner had concealed “a substantial portion of its turnover”. The gross turnover was being taken as Rs. 424,34,40,248 whereas the claim of deduction was in the sum of Rs. 274,20,36,059. As it was urged in the course of hearing by Mr. Narayan, the case of the DT&T is that there is no material produced by the Petitioner to justify the claim of the above entry, i.e., far above the permissible limit of 25% in terms of Rule 3 (2) of DVAT Rules. Mr. Narayan repeatedly urged before this Court that this rule must be read as forming part of the “reasons to believe” recorded by the Assistant Commissioner (VAT Audit) in the noting dated 29th January 2016 of the file and this formed the basis of issuance of the notice to the Petitioner. Mr. Narayan further submitted that since it was only a notice and not an assessment order, it would be open to the Petitioner to appear before the Assistant Commissioner (VAT Audit) and place the entire documents available to it to substantiate the claim for exemption in the sum of Rs.274,20,36,059.

23. The law is well settled that the reasons for reopening the re-assessment by invoking the extended period of limitation under Section 34 of the DVAT Act have to be recorded in the file was explained by this Court in *H.M. Industries v. Commissioner of Value Added Tax (2015) 78 VST 382 (Del)* :

“The said “reasons to believe” have to be formed by the Commissioner. Secondly, the said expression “reasons to believe” must have nexus and live link with failure to pay tax because of concealment, omission or failure to disclose material particulars by the Assessee. Thus, the Commissioner is required to form an opinion in the nature of “reasons to believe” that there was failure, omission or concealment to disclose material particulars which had the effect of short-payment or non-payment of tax. The “reasons to believe” and satisfaction of any of the three stipulations are a jurisdiction precondition and a mandatory requirement which must be met to apply and seek benefit of extended period of six years.”

24. Turning to the case on hand, it is not legally permissible for the DT&T at this stage to supply fresh reasons to believe, other than what is recorded in the file. While the reasons recorded in the file speak of the concealment by the Petitioner of “substantial part of his turnover”, the real reason as transpired during the course of hearing is regarding excessive claim of exemption made by Petitioner.

25. There is, therefore, certainly no failure/omission on the part of the Petitioner to furnish material particulars which forms the basis of re-assessment in terms of the proviso to Section 34 of the DVAT Act. The proviso is very clear that there has to be “concealment, omission or failure to disclose fully material particulars” by the Petitioner. In relation to the claim for exemption there is nothing in the “reasons to believe” as recorded by the Respondent to show that there was any concealment or omission or failure by the Petitioner to disclose material particulars. As

already noted, the reasons to believe talk of "suppression of gross turnover". The materials gathered by the DT&T, if any, ought to have a live nexus to the formation of the belief that there is escapement of turnover from assessment. The reasons to believe as recorded make no reference to any such material. In fact, a tabular chart prepared by the DT&T placed before the Court refers to the very figures of gross turnover, works contract and sale of capital goods, as disclosed by the Petitioner in the return filed.

26. Mr Narayan referred to the audit report and urged that the said report should form the basis for the reasons to believe that exemption far in excess of what was permissible and supported by the disclosed documents had been claimed by the Petitioner. He further urged that since the note on the file referred to the audit report, it cannot be said that the reasons to believe as recorded were not based on such audit report.

27. There are several difficulties in accepting the above submission. As already noticed, the reasons to believe as recorded are about "suppression of gross turnover" and not about claim of excess exemption. Secondly, the audit report formed the basis of the previous round of litigation. It will be recalled that the notice of default assessment of tax dated 9th July, 2014 was based on the said audit report and the said notice was quashed by this Court by the order dated 14th May 2015 in W.P.(C) 5231/2014 on the ground that it was time barred. Merely because the Court in the said order reserved the right of the DT&T "to take recourse to such other action as may be permissible in law" did not permit it to initiate one more round of litigation on the very same material. That would be an abuse of the process of law. Such other action would have to be based on some

fresh material. Thirdly, the Court cannot possibly read into the reasons as recorded in the file, all of the above fresh reasons being put forth by the DT&T to justify what is a legally indefensible course of action.

28. There is yet another issue that has been raised by the Petitioner which concerns the power and jurisdiction of the Assistant Commissioner (VAT Audit). It is seen that the assignment to Mr. Praveen Verma, Assistant Commissioner (VAT Audit) to undertake the task of issuance of notice of reopening the reassessment was made by the order dated 23rd December 2015 of the Special Commissioner (Special Zone) under Section 67 (2) of the DVAT Act. Under Section 67 (2) of DVAT Act there is no power of delegation as such but the power to issue orders “for the due and proper administration” of the DVAT Act and “all such persons engaged in the administration of this Act shall observe and follow such orders, instructions and directions of the Commissioners.” It is not understood how the Special Commissioner (Special Zone) could have delegated powers in terms of Section 67 (2) of DVAT Act and in particular, the power of reopening the reassessment to the Assistant Commissioner (VAT Audit). Interestingly, the impugned notice is issued by the Assistant Commissioner (VAT Audit) and not the Assessing Officer who has been duly empowered to issue it.

29. A further issue that arises is that in re-opening an assessment in exercise of the powers under Section 34 of the DVAT Act, the VATO concerned is expected to act independently and not under the dictates of any superior officer. Here, as the file notings show, the Additional Commissioner (VAT Audit) prepared a note proposing the re-opening of assessment which was approved by several of the superior officers up to

the level of the Commissioner, VAT.

30. For all the aforementioned reasons, the Court holds the impugned notice dated 9th February 2016 issued under Section 59 (2) of the DVAT Act along with the letter dated 24th February 2016 issued by the Assistant Commissioner (VAT Audit) to be unsustainable in law and they are hereby quashed. The writ petition is allowed in the above terms but with no order as to costs. The pending application is also disposed of.

MARCH 30, 2016

Rm

S. MURALIDHAR, J

VIBHU BAKHRU, J

