

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 25.05.2016

+ **W.P.(C) 6040/2013 & CM No.13299/2013**

PIONEER PUBLICITY CORPORATION PVT. LTD. Petitioner

versus

COMMISSIONER, VALUE ADDED TAX & ORS. Respondents

Advocates who appeared in this case:

For the Petitioner : Mr A. S. Chandhoik, Senior Advocate with Mr Ruchir Bhatia, Mr Ritish Kumar, Ms Mallika Ahluwalia & Mr Dipender Chauhan, Advocates.

For the Respondents : Mr Satyakam, Additional Standing Counsel for R-1 to 3.

Mr Rahul Kaushik, Senior Standing Counsel CBEC with Mr Bhavishya Sharma for R-4.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The Petitioner has filed the present petition under Article 226/227 of the Constitution of India, *inter alia*, praying as under:

“(A) Issue a writ of prohibition, or any other writ, order or direction of like nature, restraining the Respondents from acting upon or taking any action in pursuance to the impugned notices and the impugned proceedings/action;

- (B) Issue a writ of prohibition or any other writ, order or direction in the nature thereof thereby restraining the respondents from levying VAT on the transaction of rendering service on which Petitioner has duly paid service tax;
- (C) Issue a writ of certiorari or any other writ, order or direction in the nature thereof quashing the proceedings initiated vide notice dated 23.06.2010, 24.04.2012, 08.05.2013, 23.06.2013, 26.07.2013 & 21.08.2013 and impugned penalty orders dated 26.07.2013;
- (D) Issue a writ of certiorari or any other writ, order or direction in the nature thereof quashing impugned notices of default assessment of tax and interest issued u/s 32 and notices of assessment of penalty u/s 33 dated 04.09.2014;
- (E) In the alternate if this Hon'ble Court holds otherwise then to issue a writ of certiorari or any other writ, order or direction in the nature thereof thereby quashing assessments made by Respondent No.4 treating the transaction in question as service transaction;

And also to issue writ of mandamus or any other writ, order or direction in the nature thereof thereby directing Respondent No.4 to refund the amount so collected on the transaction in question to the Petitioner in as much as there cannot be simultaneous levy of both sales tax/VAT and service tax on the same transaction; and in the alternative to transfer the tax collected from the Petitioner to Respondent No.1”

2. The Petitioner impugns various notices issued under Section 59 of the Delhi Value Added Tax Act (hereafter the ‘DVAT Act’) calling upon

the Petitioner to submit details for the purposes of assessing the Petitioner's turnover chargeable to tax under the DVAT Act. Further, the Petitioner also impugns Penalty orders dated 26th July, 2013 passed by Value Added Tax Officer (VATO) under Section 86(14) of the DVAT Act. The aforesaid impugned notices (being notices dated 23rd June, 2010, 24th April, 2012, 8th May, 2013 and 21st August, 2013) were duly responded to by the Petitioner by inter alia asserting that it is not assessable to tax under the DVAT Act.

3. The Petitioner procures outdoor media space such as unipoles, kiosks, bridge panels, etc. from the Government Agencies and Corporations such as Delhi Metro, MCD, etc.. The Petitioner states that the said media space is used by it for display of advertisements of its clients and the Petitioner is not engaged in any other activity.

4. According to the Petitioner, the Petitioner is rendering services chargeable to Service Tax under the Finance Act, 1994 and, therefore, cannot be assessed under the DVAT Act.

5. While this petition was pending consideration, the Petitioner was served with the notices of default assessment under Section 32 of the DVAT Act for Financial Years 2010-11, 2011-12 and 2012-13, assessing

the Petitioner's taxable turnover at Rs.1,12,59,64,384/-, Rs. 1,20,91,72,662/- and Rs. 1,24,70,92,642/- respectively and consequently raising a demand of VAT of Rs.21,16,00,327/-, Rs.20,45,03,397/- and Rs 18,75,33,691/- for the respective Financial Years. In addition, the Petitioner has also been served with the notices of penalty dated 4th September, 2014 under Section 33 of the DVAT Act.

6. The notices of default assessment indicates that the VATO has assessed the Petitioner's turnover as exigible to VAT after concluding that the agreements entered into by the Petitioner with its clients constituted transfer of the right to use various display sites and, therefore, fell within the expanded definition of 'sale' under Section 2(1)(zc)(vi) of the DVAT Act.

7. The Petitioner has also submitted in the alternative that if it is found that the transactions entered into by it constitutes 'sale' within the meaning of Section 2(1)(zc)(vi) of the DVAT Act , the Service Tax Authority may be called upon to refund the Service Tax charged on the transactions entered into by the Petitioner with its clients.

8. There is considerable merit in the Petitioner's contention that levy of

Service Tax and Value Added Tax are mutually exclusive. The question whether the transaction entered into between the Petitioner and its clients can be constituted as a 'sale' within the meaning of Section 2(1)(zc)(vi) of the DVAT Act is required to be answered keeping in view the principles as reiterated by this Court rendered on 2nd May, 2016 in W.P.(C) No.1625/2014 (*Tim Delhi Airport Advertising Pvt. Ltd. v. Special Commissioner –II, Department of Trade & Taxes & Ors.*)

9. Accordingly, we set aside the impugned default assessment orders and notices of penalty dated 4th September, 2014 and remand the matter to the VATO to consider it afresh in the light of the principles as reiterated in *Tim Delhi Airport Advertising Pvt. Ltd. (supra)*. The penalty orders dated 26th July, 2013 passed under Section 86 (14) of the DVAT Act are also set aside.

10. The Petitioner will furnish the requisite details, if not already furnished before, in response to the impugned notices issued under Section 59 of the DVAT Act. The VATO shall consider the same and pass a reasoned order after affording the Petitioner an opportunity to be heard.

11. It is clarified that all rights and contentions of the Petitioner are open

and if the Petitioner is aggrieved by the order passed by the VATO, it shall be at liberty to initiate appropriate proceedings. It is further clarified that if it is found that the transactions entered into by the Petitioner are chargeable to tax under the DVAT Act, the Petitioner would also be at liberty to initiate appropriate proceedings for refund of service tax paid under the Finance Act, 1994. Needless to mention that if such proceedings are initiated, the same shall be considered in accordance with law.

12. The petition and the pending application are disposed of. However, in the circumstances, the parties are left to bear their own costs.

VIBHU BAKHRU, J

S.MURALIDHAR, J

MAY 25, 2016
MK