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

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**W.P.(C) 5478/2016**

**SHAILA ENTERPRISES**

..... Petitioner

Through: Mr. Vineet Bhatia, Advocate with  
Ms. Neha Choudhary, Advocate.

versus

**COMMISSIONER OF VALUE ADDED TAX**

..... Respondent

Through: Mr. Ramji Srinivasan, Senior Advocate  
With Mr. Satyakam, ASC with Mr. Rajesh Goel,  
Addl. Commissioner, DT&T, GNCTD.

**CORAM:**

**JUSTICE S. MURALIDHAR**

**JUSTICE NAJMI WAZIRI**

**ORDER**

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**05.08.2016**

**Dr. S. Muralidhar, J.:**

1. The Petitioner Shaila Enterprises is a Hindu Undivided Family, the Karta of which is Mr. Gyan Chand Khattar. Its registered office is at Jhandewalan, New Delhi. The Petitioner is registered as dealer under the Delhi Value Added Tax Act, 2004 ('DVAT Act'). The Petitioner states that it is engaged in the business of trading in cement.

2. The Petitioner filed its return for the period of month of January, 2008 on 28<sup>th</sup> February 2008, claiming refund of Rs. 1,02,08,179. In terms of Section 38(3) (a) (i) of the DVAT Act, with the return being filed on monthly basis, the date on which the refund was due to the Petitioner was 27<sup>th</sup> March 2008.

3. In terms of Section 38 (4) of the DVAT Act, it was open to the Commissioner, if he sought to make inquiries while processing the refund, to go in for an audit of the business affairs of the Petitioner under Section 58 of the DVAT Act or seek additional information under Section 59 of the DVAT Act. In the present case, none of these steps were taken by the Respondent/Department of Trade & Taxes ('DT&T'). Consequently, the time limit in terms of Section 38(3) (a) (i) commenced from 27<sup>th</sup> March 2008. In terms of Section 42(1) DVAT Act, the interest on the refund due also started accruing from that date. According to the Petitioner, as of 31<sup>st</sup> May 2016 the interest worked out at 6% on the refund due worked out to Rs. 50,12,356.

4. The Petitioner states that it is a major supplier to 'Ready Concrete Mix' plants. It is stated that many of these plants are located outside Delhi and therefore the sales of cement take place as inter-state sales. The Petitioner makes purchases locally from local registered dealers against tax invoices after paying VAT to its selling dealers. IT thereafter makes inter-state sales. This results in excess input tax credit which generates a refund for the Petitioner.

5. While no action was taken on the refund claim, on 30th December 2010, the following 'Adjustment Order' was passed by the Value Added Tax Officer ('VATO'):

"This is in response to your application for refund submitted in form DVAT-16 on 28-2-2008 claiming a refund of Rs. 10208179 (Rs. One crores two lacs eight thousand one hundred seventy nine only) and the said application has been examined

by the Department. However, the refund (Refund Allowed) of Rs.0 (Rs. Zero Only) cannot be granted to you because of following reasons:

The amount of refund claimed by you has been adjusted completely against the following outstanding demand

The said amount of demand has not been paid by you till date, neither stayed by any authority/court and is recoverable from you.”

6. What is noticeable from the above order, which has been enclosed with the counter affidavit filed by Mr. Rajesh Goyal, Additional Commissioner, DT&T, is that it refers to the refusal to grant refund because of the "following reasons" but there are no reasons stated below the said line. It again states that the refund claim “has been adjusted completely against the following outstanding demand” and again there is blank below this line.

7. In short, the above order makes no sense. The most crucial parts of the so called adjustment order are completely missing. As it transpired, on that date i.e. 30th December 2010 there was no outstanding demand that had been determined for the aforementioned period for which the refund was claimed. Yet the VATO signed the order mechanically without application of mind.

8. What happened thereafter is interesting. One week after the so called adjustment order, on 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> January 2011, the VATO (Ward 73) Mr. Vijay Kumar Bansal passed notices of default assessment of tax and interest as well as penalty under Section 32 and section 33 of the DVAT Act and under Section 9 (2) of the Central Sales Tax Act, 1956 for the following periods:

| Period<br>month                                                      | 2007-08 | DVAT             |                | CST              |
|----------------------------------------------------------------------|---------|------------------|----------------|------------------|
|                                                                      |         | Tax+Intt.<br>Rs. | Penalty<br>Rs. | Tax+Intt.<br>Rs. |
| May                                                                  |         | --               | --             | 78,735           |
| June                                                                 |         | 5,93,573/-       | 7,16,180/-     | 53,142           |
| July                                                                 |         | 1,15,421/-       | 1,33,207/-     |                  |
| Sept.                                                                |         | 15,37,808/-      | 17,53,101/-    |                  |
| Oct.                                                                 |         | 3,97,948/-       | 4,46,772/-     |                  |
| Nov.                                                                 |         | 5,89,349/-       | 6,51,281/-     |                  |
| Dec.                                                                 |         | 12,95,435/-      | 13,99,513/-    |                  |
| IVth Qtr (2007-08) Rejection of refund amounting to Rs.1,02,08,179/- |         |                  |                |                  |

9. Aggrieved by the above notice of default assessment of tax, interest and penalty, the Petitioner filed objections under Section 74 of the DVAT Act before the Special Commissioner i.e., the Objection Hearing Authority ('OHA'). It is stated that the objection was also filed against the aforementioned adjustment order dated 30<sup>th</sup> December 2010 by which the Petitioner's refund claim was rejected *in toto*.

10. The OHA on 25<sup>th</sup> June 2013 passed an order, the relevant portion of which reads as under:

"3. Sh. Vineet Bhatia, (Adv) presented the case on behalf of the objector. The Department was represented by Sh. Anil Kumar, VATO. The counsel assailed impugned orders on the ground that the Assessing Authority (AA), had not given sufficient opportunity to submit the relevant documents in support of claim of refund and also that it was not confronted with the adverse report of VATI on non functioning of Transporters. It has been stated by the objector that the major supplies of the objector is to "Ready Concrete Mix" Plants at Gurgaon (Haryana) and nearby areas in view of ban of hot mix plants in Delhi. As such majority of sales of 'Cements' is interstate (Central Sale). The counsel

averred that he has in possession necessary documents with regarding to the transporters, all the 'C' forms and other documents which shall prove that interstate sale took place and the goods were actually transported through the transporters in question. The counsel also assailed the levy of penalties.

4. In view of the above observations and considering the submission of the objector, I feel that in the interest of natural justice another opportunity may be afforded to the objector to present books of account and other relevant records/documents pertaining to refund claim sale as may be required by AA. The Ld AA shall carryout examination / verification of all documents such as tax invoices, retail invoices, statutory forms, mode of payments, G.Rs, R.C of interstate punchers, copy of assessment orders if any etc., as per the laid down procedures contained in the various circulars on claim of refunds and as per the provisions of DVAT Act.

5. Ld AA shall provide sufficient opportunity to the objector for seeking any clarification/confrontation on any adverse material and a speaking order thereafter shall be passed afresh giving proper reasons for allowing /disallowing the refund as per the law. Imposition of penalty shall be consequential to the default of any tax due.

6. The objector is directed to appear before the AA/NA on 15/07/2013. The matter may be thereafter be decided in 30 days time.”

11. According to the Petitioner, despite appearing before the Assessing Officer (‘AO’) on 15<sup>th</sup> July 2013 pursuant to the above order and submitting all the documents, no order was passed, by the AO. However, according to the Respondent DT&T, the Petitioner never appeared before the AO on 15<sup>th</sup> July 2013 pursuant to the above order.

12. The Petitioner has filed a rejoinder affidavit asserting that the Petitioner did appear before the AO on 15<sup>th</sup> July 2013, and submitted the whole set of documents.

13. In the present proceedings under Article 226 of the Constitution of India, the Court does not consider it necessary to go into the disputed question whether in fact the Petitioner appeared before the AO on 15<sup>th</sup> July 2013. What the Court, however, proposes to do is to examine the legal position even assuming that the Petitioner did not appear before the AO on 15<sup>th</sup> July 2013 as asserted by the Respondent. In the event that the Petitioner had not appeared before the AO on 15<sup>th</sup> July 2013 as directed by the OHA, the AO was nevertheless required in law to proceed to pass an assessment order since the earlier order passed by him, which was challenged before the OHA and in respect of which the OHA passed the above order dated 25<sup>th</sup> June 2013, did not survive.

14. An attempt was made by Mr. Ramji Srinivasan, learned senior counsel appearing for the Respondent, to urge that the OHA had not actually set aside the order of the AO, which was the subject matter of the objection before the OHA, and that in the event of the Petitioner not appearing before the AO on 15<sup>th</sup> July 2013 the earlier order passed by the AO creating the demand for the aforementioned period in 2007-08 would somehow revive.

15. The Court is unable to accept the above submission. Para 5 of the order dated 25<sup>th</sup> June 2013 is categorical that the AO shall provide sufficient opportunity to the Assessee for seeking any clarification/confrontation on any adverse material and “a speaking order thereafter shall be passed afresh

giving proper reasons for allowing/disallowing the refund as per the law.”. It was further added “Imposition of penalty shall be consequential to the default of any tax due”. There could be, therefore, no manner of doubt that the orders which were the subject matters of the proceedings before the OHA did not survive after the order of the OHA. The AO was required to pass an order afresh. It is for this reason that the Assessee was directed to appear before the AA on 15<sup>th</sup> July 2013.

16. The last line of the order of the OHA reads: “The matter may be thereafter be decided in 30 days time”. The word ‘may’ was not to give an option to the AO whether or not to pass an order but the option if at all about the time period within which the order was to be passed. It is possible to argue that the AO could have passed the order not within thirty days but soon thereafter in view of the words ‘may be’. However, here the AO appears to have forgotten about the proceedings altogether and not take any action whatsoever. If as contended by the Respondent, the Petitioner failed to appear before the AO on 15<sup>th</sup> July 2013, the AO was not absolved from passing a fresh order in respect of the refund claimed of the Petitioner. This was his bounden statutory duty.

17. It was pointed out that, in terms of Section 34(2) of the DVAT Act, there is no power with the OHA to remand the matter to the AO. In the event of a remand ordered by the Court or Appellate Tribunal, the fresh decision on remand was required to be taken within one year. It was volunteered by learned counsel for the Petitioner that notwithstanding the above legal position, even if the Petitioner were to assume without admitting that such a

power exists with an OHA then in any event the AO was required to pass an order afresh within a maximum period of one year after the date of the order of the OHA. Clearly in the present case no fresh assessment order was passed nor was an order of refund was passed within one year of the date of the order of the OHA.

18. With the notices of default assessment creating the demand by notices dated 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> January 2011 for the period 2007-2008 ceasing to exist by virtue of the order dated 25<sup>th</sup> June 2013 and with no fresh assessment order being passed, there was no legal impediment any longer in granting refund to the Petitioner in respect of the claim made along with its return filed for the month of January 2008. The AO, obviously did not realise the implications of his failure to pass fresh assessment order in terms of the order dated 25<sup>th</sup> June 2013 of the OHA.

19. This Court has in a series of judgments emphasised the mandatory nature of the time limits under Section 38 of the DVAT Act for processing of the refunds. Reference in this regard may be made to the decision in **Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax (2010) 31 VST 475 (Del)**, **Lotus Impex v. Commissioner DT&T (2016) 89 VST 450 (Del)**; **Dish TV India Ltd. v. GNCTD (2016) 92 VST 83 (Del)**, **Nucleus Marketing & Communication v. Commissioner of DVAT** [decision dated 12th July 2016 in W.P.(C) 7511/2015] and recently in **Prime Papers and Packers v. Commissioner, VAT** [decision dated 28th July 2016 in W.P. (C) No. 6013 of 2016]. It has further been clarified by the Court that any action the DT&T proposes to take in the form of reopening the assessment, the



period within which the refund is to be issued will have to be taken into account.

20. For instance, in the present case, in respect of the assessment for the period 2007-2008, even if the DT&T wished to revisit them, the limitation under Section 34 of the DVAT Act would apply. There are two periods of limitation under Section 34 of the DVAT Act. One is the period of four years from the end of year comprising one or more time period for which a person furnishes his return and the other is in terms of proviso of Section 34(1) of the Act where there is an extended period of six years and where the Commissioner has reason to believe that the tax was not paid “by reason of concealment, omission or failure to disclose fully material particulars”. In the present case, in respect of the month of January 2008 the time within which it could have been reopened has long been crossed. The DT&T cannot therefore possibly seek to reopen the assessment for 2007-08.

21. The net result is that the refund for the month of January 2008, which the Petitioner has claimed refund along with the return became due to the Petitioner from the expiry of one month thereafter in terms of Section 38(3)(a) (i) of the DVAT Act. The interest thereon till the date of payment also falls due in terms of Section 42 of the DVAT Act.

22. The Court finds that along with the counter affidavit, the Respondent has now enclosed a notice dated 6<sup>th</sup> July 2016 issued under Section 59(2) of the DVAT Act, requiring the Petitioner to produce documents and records for the period 1<sup>st</sup> May 2007 to 31<sup>st</sup> December 2007. Since the time limit for making any re-assessment of the said period has long been closed, the said

notice is obviously contrary to law. The said notice need not be acted upon by the Petitioner and will not be pursued by the DT&T hereafter.

23. The Court, accordingly directs the Respondent DT&T to pay to the Petitioner the aforementioned refund amount with the interest thereon up to the date of payment on or before 5<sup>th</sup> September 2016. The Court makes it clear that the amount through RTGS should be deposited in the Petitioner's account on or before that date. Any non-compliance of this direction will entitle the Petitioner to seek appropriate remedy in accordance with law.

24. Before parting with the matter, the Court would like to add that this is yet another instance of orders being passed by the officers of the DT&T with total non-application of mind and in ignorance of the legal position. The Court would only like to reiterate that there is an urgent need for an orientation being imparted to the officers of the DT&T in the law and the decisions of the Court explaining the law. In this regard, the court would like to reiterate the observations made by it in *Capri Bathaid Pvt. Ltd. v. Commissioner of Trade & Taxes (2016) 90 VST 143 (Del)*.

“53. The CVAT should also hold regular orientation and training courses for the VAT Authorities at various levels on the law and procedure governing the collection of VAT. The CVAT can also consult the Delhi State Judicial Academy for that purpose.”

25. Due to the careless action of the VATO in the present matter, who issued the 'adjustment order' dated 30<sup>th</sup> December 2010 unmindful of the law, an interest burden of nearly Rs. 56 lakhs is now placed on the exchequer. A question then arises as to who should be made responsible for this and whether any action on the disciplinary side is not called for?

Consequently, the Commissioner, VAT is directed to seek an explanation from the VATO who issued the above 'adjustment order' and to pass appropriate orders on the disciplinary side as he deems fit not later than four weeks from today. A copy of this order be delivered forthwith to the Commissioner, VAT by the Registry through a Special Messenger for compliance with the above direction.

26. The writ petition is allowed and the application is disposed of in the above terms with costs of Rs. 10,000 which, as requested by learned counsel for the Petitioner, shall be paid by the Respondent to the Sales Tax Bar Association not later than 5<sup>th</sup> September 2016.

**S.MURALIDHAR, J**

**NAJMI WAZIRI, J**

**AUGUST 05, 2016**  
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