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

+ **W.P.(C) 134/2014**

LOTUS IMPEX Petitioner
Through: Mr. Vinod Srivastava and
Mr. Ravi Choudhari, Advocates

versus

THE COMMISSIONER, DEPARTMENT OF TRADE & TAXES,
NEW DELHI & ANR. Respondents
Through Mr.Satyakam, Additional Standing
Counsel

And

+ **W.P.(C) 135/2014**

LOTUS IMPEX Petitioner
Through Mr. Vinod Srivastava and
Mr. Ravi Choudhari, Advocates

versus

THE COMMISSIONER, TRADE & TAX DEPARTMENT, NEW
DELHI & ANR. Respondents
Through Mr.Satyakam, Additional Standing
Counsel

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

ORDER
19.02.2016

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Dr. S. Muralidhar,J:

CM Nos. 6108/2016 & 6109/2016

1. For the reasons stated therein, the applications are allowed. The amended

writ petition is taken on record.

WP (C) Nos.134/2014 & 135/2014

1. With the consent of the parties, the writ petitions are taken up for final hearing.

2. The Petitioner is a partnership firm registered with the Department of Trade and Taxes (DTT) under the Delhi Value Added Tax Act 2004 (DVAT Act). It is engaged in the business of export of motor vehicles and tractors in Delhi. The Petitioner filed monthly returns of sales and purchase in Form DVAT 16 under Section 26 of the DVAT Act for the period 1st August, 2008 to 31st August, 2008 on 29th September, 2008 claiming refund of Rs.12,07,225/- under Section 38 read with Rule 34 of DVAT Acts and Rules.

3. The Petitioner filed the monthly return for the period 1st October, 2008 to 31st October, 2008 on 28th November, 2008 claiming refund of Rs. 30,42,693.

4. It is stated that under Section 38 (3) (a) (i) of the DVAT Act, the Petitioner was entitled to refund of the aforementioned claims within two months of making them. In other words, in respect of the refund claimed for the period August 1st to 31st 2008, the refund was due by 29th November, 2008 and for the refund claimed for the period 1st to 31st October, 2008 it was due by 28th January, 2009.

5. It is stated that by two separate assessment orders dated 6th October, 2009 (for the periods 1st August to 31st August, 2008 and 1st October, 2008 to 31st October, 2008) the Value Added Tax Officer (VATO) disallowed the input tax credit (ITC) claimed on certain purchases. For the period 1st to 31st August 2008 refund to the extent of Rs. 87, 124 was allowed and the balance Rs. 11,20,

101 was disallowed. For the period 1st October, 2008 to 31st October, 2008, refund to the extent of Rs. 5,12,169 was allowed and the balance Rs. 25,30,534 was disallowed.

6. The default assessment orders aforementioned set out the reasons for the disallowance of refund as under:

"The tax credit for the purchases is not genuine but artificially created since the selling dealers namely M/s Yash Traders, Sachdeva Sons, M/s Standard Motor Cycle House found to be bogus by the Enforcement Survey of these dealers. Consequently the purchases from these dealers are bogus. The report of the VAT (Audit) revealed that purchases of these three dealers were neither verified from the records of selling dealers nor from their bank records. Since these dealers did not purchase goods, they could not sell the same. In view of the above, the transactions with these dealers are on paper only and the benefit of input tax credit is disallowed."

7. Aggrieved by the aforementioned orders, the petitioner filed objections before the Objection Hearing Authority (OHA) under Section 74 of the DVAT Act. By two separate orders dated 11th August 2010 and 21st October 2010, the OHA set aside the aforementioned orders of the VATO and remanded the matters to be heard afresh after giving the objector a reasonable opportunity of being heard. *Inter alia*, it was observed by the OHA in the order dated 11th August 2010 as under:

"5. Input tax credit is governed by Section 9 of the DVAT Act, 2004, and if the same has to be disallowed, it has to be under provisions of the said Section. A plain reading of this Section would reveal that except Section 9 (g), no other sub-section disallows input tax credit on the basis of irregularities committed by the selling dealer. Section 9 (g) has been incorporated in the Act with effect from 1.4.2010 and cannot be implemented for the period of audit with retrospective effect. Orders passed by Assessing Authorities should conform to the provisions of the law, and if the Assessing Authority had intended to disallow ITC

claimed by the Objector, he should have specifically quoted the relevant provisions, which have been violated by the Objector. Hence, orders passed by the Assessing Authority are not as per the then prevailing provisions of law and cannot be upheld.

6. In result, the impugned orders are set aside. However the VATO concerned is directed to assess the case afresh on the above said lines after giving the Objector a reasonable and proper opportunity of being heard."

8. It is stated that the above orders of the OHA was not complied with by the VATO and no fresh orders were passed. The period for passing an order of default assessment in terms of Section 34 of the DVAT Act expired on 31st March 2013. In the absence of any pending proceedings against the Petitioner, the DTT was liable to refund the entire amount of refund as claimed in the return in terms of Section 38 of the DVAT Act.

9. In response to the notice issued in the present writ petitions, a counter affidavit has been filed by the Respondent in each of the petitions on 6th October, 2009. As far as the refund claimed in respect of the period 1st to 31st August 2008, it is stated that the claim for refund in the sum of Rs. 11,20,101 was rejected on the basis of a report given by the Enforcement branch in respect of the selling dealers M/s Yash Traders, M/s Sachdeva Sons and M/s Standards Motor Cycle House. It was stated that neither the books of accounts were provided by the said dealers nor any stock or godown was found at the premises. Accordingly, their respective registrations were cancelled. The claim by the Petitioner in respect of the purchases made from the said dealers for this period was disallowed. Likewise, the refund claimed to extent of Rs. 25,30,534/- for the period 1st to 31st October 2008 was also disallowed for the same reason.

10. It is further stated that pursuant to the orders dated 11th and 21st August 2010 of the OHA, a notice dated 28th July, 2011 was issued to the Petitioner who appeared before the VATO on 8th August, 2011 but not thereafter.

11. A further short affidavit has been filed on 8th September, 2015 by Mr.D.K. Mishra, Special Commissioner, DTT in which it was stated that the dealer failed to appear on 9th August, 2011 before the VATO. It is further stated that “due to transfer of the said officer somehow the matter could not be attended to. It was subsequently discovered and action was initiated on the same.”

12. It is stated that thereafter the dealer was issued a notice under Section 59 (2) of the DVAT Act on 11th July, 2014 to the Petitioner for producing documents as stated therein. The Petitioner appeared before the VATO on 17th July 2014, 25th July 2014 and 31st July 2014 and 8th August 2014. Explaining the reason for initiating the above proceedings, the Respondent has enclosed with the short affidavit, the notes in the files of the DTT. These make reference to the pendency of the present writ petitions and seek approval from the Additional Commissioner (Zone 6) to pursue the matter of the assessee and issue notice by invoking Section 34 of the DVAT Act. In the note sheet the Deputy Commissioner has recorded an endorsement in the following terms: “... I am satisfied that this is a clear case where the dealer has not paid taxes and assessment is necessary to assess the tax due.”

The note suggests that counsel for the DTT had advised that default assessment should be done for the period 2008-09 in the first instance.

13. What is evident from the short affidavit is that a feeble attempt has been

made to justify the initiation of fresh proceedings under Section 59 of the DVAT Act, while offering no satisfactory explanation for allowing the time period for completion of the original default assessment proceedings under Section 32 of the DVAT Act to lapse. The averment in the short affidavit to the effect that "somehow the matter could not be attended to" and that this lapse was "subsequently discovered" belies the fact that but for notice being issued in these writ petitions, the DTT would not have bothered to notice that the refunds claimed by the Petitioner in the returns originally filed were long overdue.

14. Instead of processing the claims for refund in terms of Section 38 of the DVAT Act, the VATO proceeded to pass two fresh default assessment orders under Section 32 of the DVAT Act for the aforementioned periods (1st August to 31st August, 2008 and 1st October, 2008 to 31st October, 2008) on 20th August 2014. For the period 1st to 31st August 2008 the Petitioner's refund claim was disallowed and a fresh tax demand in the sum of Rs. 2,66,349 (including tax, additional tax and interest) was raised. By a separate order of the same date of default assessment of penalty under Section 33 of the DVAT Act for the same period in the sum of Rs. 1,41,130 was passed. For the period 1st to 31st October 2008, the Petitioner's refund claim was disallowed and a fresh tax demand in the sum of Rs. 5,89,041 (including tax, additional tax and interest) was raised. By a separate order of the same date of default assessment of penalty under Section 33 of the DVAT Act for the same period in the sum of Rs. 3,16,316 was passed.

15. It is in the above circumstances that the Petitioner has challenged the above fresh orders of default assessment of tax and penalty by amendments to the present petitions.

16. At the outset, it requires to be noticed that in the fresh orders of default assessment of tax passed on 28th August 2014, the VATO makes no reference to the orders passed by the OHA on 11th August and 21st October 2010 setting aside the original assessment orders dated 6th October, 2009 and remanding the matters to the VATO for deciding afresh. Curiously, in the orders dated 28th August 2014, the VATO states that "I am reviewing the assessment order bearing reference no.....dated 6.10.2009 *suo moto* in exercise of the power conferred by virtue of section 74 B (5)" of the DVAT Act.

17. Apart from the obvious error committed by the VATO in purporting to review a non-existent order, even the requirements of Section 74 B of the DVAT Act were not satisfied and therefore the powers thereunder could not have been invoked. Section 74 B (1) of the DVAT Act states that the Commissioner may at any time within four years from the end of the year in which any order passed by him has been served, on his own motion, rectify any mistake apparent on record and shall within the said period or thereafter rectify any such mistake apparent on the record. When the original assessment orders dated 6th October 2009 of the VATO had been already set aside by the OHA by orders dated 11th August and 21st October 2010, there was simply no question of the Commissioner, and much less the VATO exercising powers under Section 74 B of the DVAT Act to rectify or review such orders.

18. A second problem with the orders dated 28th August 2014 is that although they purport to have been issued under Section 32 of the DVAT Act, in the body of the order it is stated that they have been made under Section 34 of the DVAT Act, on the basis of the permission granted by the Commissioner on 11th July 2014. In order to invoke the extended period of limitation under

Section 34 of the DVAT Act, the Commissioner would, in terms of the proviso to Section 34 (1) of the DVAT Act, have to record reasons for the belief that tax was not paid "by reason of concealment, omission or failure to disclose fully material particulars" on the part of the Assessee. In the present case, there is no such reason to believe recorded by the Commissioner in the above terms and therefore, the jurisdictional requirement for invoking the extended period of limitation under Section 34 of the DVAT Act is not satisfied.

19. This Court has in ***H M Industries v. Commissioner of Value Added Tax 215 (2014) DLT 671 (DB)*** made it clear that the proviso to Section 34 (1) of the DVAT Act providing for an extended period of limitation would apply only when the following two conditions are met:

- (i) that the Commissioner record reasons to believe that the tax has not been paid;
- (ii) the reason for non-payment of tax would be concealment, omission or failure to disclose full material particulars on the part of the assessee.

20. As already noted herein before neither the above two conditions are satisfied in the present case. As far as the Petitioner was concerned, on the date of the aforementioned purchases, the registration of the selling dealers were not cancelled, as pointed out by the OHA in the order dated 11th August 2010.

21. Section 9 (2) (g) of the DVAT Act inserted with effect from 1st April 2010 provides that unless the tax paid by the purchasing dealers has been actually deposited by the selling dealer with the Government or has been lawfully adjusted against output tax liability and reflected in the return filed for the respective tax period, no tax credit shall be allowed to the dealers or class

of dealers. Since the provision is prospective it does not apply to the purchases made by the Petitioner in the months of August and October, 2008.

22. As far as Section 9 (2) (a) of the DVAT Act is concerned it states that no tax credit shall be allowed in the case of goods purchased from a person who is not registered dealer. This would apply, if at all, only where it is able to be shown that the Petitioner was aware at the time of purchase that the selling dealer was in fact not a registered dealer or was a bogus dealer or had not deposited the tax in question. None of these conditions are fulfilled as far as the present case is concerned.

23. There is an even more fundamental problem with the entire exercise of the Respondent passing orders of default assessment of tax and penalty against the Petitioner. Given the history of this litigation, where the Petitioner had to approach this Court for refund due to it in terms of Section 38 of the DVAT Act, the move of the DTT to raise fresh demands of tax and penalty after the Petitioner had succeeded before this Court, appears to be an abuse of the process of law. With the Respondent plainly failing to abide by the discipline of law and pass a fresh assessment order within the stipulated time, the Petitioner was entitled to the refund as claimed. It is only with a view to avoiding the legal consequences that the Respondent has resorted to the issuance of a fresh notice under Section 59 of the DVAT Act. What the DTT did by that process was to give itself a second opportunity of assessing the Petitioner to tax for the aforementioned periods (1st August to 31st August, 2008 and 1st October, 2008 to 31st October, 2008) long after the limitation for doing so expired and only, it seems, to deny somehow the refund due to the Petitioner.

24. Therefore, as far as this Court is concerned, the proceedings sought to be initiated by notice under Section 59 (2) were an abuse of process of law and the consequential orders dated 28th August 2014 of default assessment of tax and penalty for the abovementioned two periods (1st August to 31st August, 2008 and 1st October, 2008 to 31st October, 2008) are hereby quashed.

25. While, in the normal course, the Court may have relegated the Petitioner to the statutory remedy, given that the proceedings initiated afresh by issuance of the notice under Section 59 (2) of the DVAT Act are wholly without legal basis, the Court is of the view that it would not be efficacious or otherwise subject the Petitioner to further rounds of litigation. For the DTT having failed to comply with the earlier order of his Court and pass a fresh order, the refund claimed by the Petitioner for the aforementioned periods (1st August to 31st August, 2008 and 1st October, 2008 to 31st October, 2008) is hereby allowed.

26. The legal position in this regard has been explained by this Court by the order dated 3rd June, 2010 in the case of *Swarn Darshan Impex (P) Ltd v. Commissioner, Value Added Tax*. This Court reiterated the law as explained in *Commissioner Sales Tax v. Behl Construction (2009) 21 VST 261*. It was held that in terms of Section 38 (3) (a) (i) of the DVAT Act, refund has to be made to the Petitioner within two months from the date the return is furnished to the DTT.

27. Consequently, this Court directs the Respondent to refund to the Petitioner the entire amount of refund as claimed in its returns. In view of the notification in file no F (3) 58 fin of 05-06/903 dated 30th November, 2015, The Petitioner is entitled to simple interest @ 6% p.a. from the date the refund

was due till the actual date of payment. The writ petitions are allowed in the above terms, with no orders as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

FEBRUARY 19, 2016

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