

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

W.P.(C) 8913/2014 & CM 20411/2014 (for stay)

Reserved on: February 25, 2016

Date of decision: March 02, 2016

CAPRI BATHAID PRIVATE LIMITED

..... Petitioner

Through: Mr. Rajesh Jain with Mr. Virag Tiwari,
Mr. K.J.Bhat, Mr. Mukul Guupta and Mr. Rajesh
Agarwal, Advocates.

versus

COMMISSIONER OF TRADE & TAXES

..... Respondent

Through: Mr. Sanjay Ghose, Mr. Gautam Narayan
and Ms. PratishthaVij, Advocates.

WITH

+

W.P.(C) 1228/2015 & CM 2151/2015 (for stay)

SANYOG ENTERPRISES PRIVATE LIMITED

..... Petitioner

Through: Mr. Rajesh Jain with Mr. Virag Tiwari,
Mr. K.J.Bhat, Mr. Mukul Guupta and Mr. Rajesh
Agarwal, Advocates.

versus

COMMISSIONER OF TRADE & TAXES

..... Respondent

Through: Mr. Sanjay Ghose, Mr. Gautam Narayan
and Ms. PratishthaVij, Advocates.

WITH

+

W.P.(C) 3069/2015 & CM 5488/2015 (for stay)

NUTEK ESTABLISHMENTS

..... Petitioner

Through: Mr. Rajesh Jain with Mr. Virag Tiwari,
Mr. K.J.Bhat, Mr. Mukul Guupta and Mr. Rajesh
Agarwal, Advocates.

versus

COMMISSIONER OF TRADE & TAXES

..... Respondent

Through: Mr. Peeyoosh Kalra with Ms. Mahua
Kalra, Advocates.

WITH

+

W.P.(C) 5080/2015 & CM 9199/2015 (for stay)

SHAKTI METAL CO.

..... Petitioner

Through: Mr. Rajesh Jain with Mr. Virag Tiwari,
Mr. K.J.Bhat, Mr. Mukul Guupta and Mr. Rajesh
Agarwal, Advocates.

versus

COMMISSIONER OF TRADE & TAXES

..... Respondent

Through: Mr. Sanjay Ghose, Mr. Gautam Narayan
Ms. PratishthaVij and Mr. R.A. Iyer, Advocates.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VIBHU BAKHRU

J U D G M E N T

02.03.2016

%

Dr. S. Muralidhar, J:

1. These are four writ petitions by the dealers registered under the Delhi Value Added Tax Act, 2004 ('DVAT Act') raising similar questions

concerning the exercise, by the officers under the DVAT Act, of the powers of survey, search, seizure and assessment. They are accordingly being disposed of by this common judgment.

W.P. (C) 8913 of 2014

2. In this writ petition filed by Capri Bathaid Private Limited (CBPL), the facts are that a survey was undertaken in the premises of CBPL by the Department of Trade & Taxes ('DT&T') on 4th September 2014. According to the DT&T a shortage of stock of the value of Rs. 6,79,463 and excess of cash in the sum of Rs. 247 was detected. On 22nd July 2014 CBPL filed its return for the first quarter of 2014 declaring local sales turnover of Rs. 86,66,077. Against the gross output tax liability of Rs. 4,44,728, CBPL claimed input tax credit ('ITC') of Rs. 5,11,175. CBPL deposited a sum of Rs. 74,500. According to CBPL, the claim of ITC was found matching with the output tax liability declared by the selling dealers as per the verification report in Form 2A and 2B available on the website of the DT&T. On 27th September/1st October 2014 the Assistant Value Added Tax Officer, Enforcement-I (AVATO Enf-I) issued default notices of assessment of tax, interest and penalty under Sections 32 and 33 of the DVAT Act. This was printed in pre-printed format which stated that "the dealer has not furnished returns/furnished incomplete returns or incorrect returns/furnished a return that does not comply with the requirements of Delhi Value Added Tax Act, 2004/any other person." None of the above alternative grounds were checked in the order. It was *inter alia* stated that the dealer had wrongly claimed ITC of Rs. 5,16,028 with regard to some purchase from "the non-functional dealer" during 2013-14 which was being disallowed under

Section 9 (2) (g) of the DVAT Act. The said order for default assessment of tax and interest for the first quarter of 2014, pegged the taxable turnover at Rs. 90,86,880 and computed the tax at Rs. 5,50,013 and interest at Rs. 5,199. By a separate order of the same date, penalty of Rs. 5,50,013 was levied under Section 86 (10) of DVAT Act.

W.P. (C) 1228 of 2015

3. In this writ petition filed by Sanyog Enterprises Private Limited (SEPL), the facts are that SEPL is a registered dealer under the DVAT Act and is engaged in trading and reselling of medicines, diagnostic kits etc. SEPL was initially registered within the territorial jurisdiction of Ward 68. It filed an application for amendment for change of principal place of business which fell under the territorial jurisdiction of Ward 62 with effect from 1st April 2011. It is stated that records of SEPL have not been transferred by the Respondent to Ward 62 till date.

4. SEPL filed its return for the second quarter of 2014 on 18th November 2014 declaring a local turnover of Rs. 115,61,15,039. Against the gross output tax liability of Rs. 5,80,46,355, SEPL claimed ITC of Rs. 5,59,23,931. SEPL deposited a sum of Rs. 15,48,664. On 29th December 2014 one machine generated unsigned notice under Section 59 (2) of DVAT Act was issued by the VATO Ward 68 on the website of DT&T under the dealer's login ID directing SEPL to submit details in respect of the purchases made in the fourth quarter 2013-14 and the first quarter 2014-15 from the two dealers, M/s. Krishna International and M/s. S.K. Enterprises.

5. On 5th January 2015 the business premises of SEPL was searched by the

Assistant Commissioner (Enforcement-I) [AC (Enf I)]. A shortfall of cash in the sum of Rs. 23,60,580 was found. On physical verification, the stock was found matching with the figure noted in the record. SEPL furnished its reply on 7th January 2015 to the unsigned notice dated 29th December 2014 under Section 59 (2) of the DVAT Act. On 12th January 2015, the AC (Enf I) was informed by SEPL that there was no mismatch on the website of the DT&T in the year 2013-14 and 2014-15 with regard to the purchases from M/s. Krishna International and M/s. S.K. Enterprises and that the selling dealers duly reflected the sales made in their respective returns. At the time the purchases were made from the selling dealers, they were shown as 'active' on the website of the DT&T. On 14th January 2015 the AVATO Enf-I issued default notices of assessment of tax, interest and penalty under Sections 32 and 33 of the DVAT Act.

6. The aforementioned order which is in pre-printed format passed by the AVATO Enf-I stated that the dealer had wrongly claimed ITC in respect of the purchases made from M/s. Krishna International and M/s. S.K. Enterprises during 2013-14 were from "non-functional dealers" and was reversed to the extent of Rs. 48,00,042 under Section 9 (2) (g) and other provisions of the DVAT Act. The turnover assessed was Rs. 23,60,480, the tax assessed was Rs. 48,000,42 and the interest was Rs. 17,754. By a separate order passed on 14th January 2015, the AVATO Enf-I levied a penalty of Rs. 48,00,042 under Section 86 (10) read with Section 33 of the DVAT Act.

W.P. (C) No. 3069/2015

7. In this petition by M/s. Nutek Establishments ('NE'), a proprietorship concern registered as a dealer under the DVAT Act, the facts are that NE is engaged in manufacturing and trading of electrical/electronic wires, other goods etc. It was initially registered with Ward 57. Due to change of place of business with effect from 1st April 2009, NE filed an amendment application in terms of which it claimed to fall under the territorial jurisdiction of Ward 63. It is stated that records of NE, however, have not been transferred by the DT&T to Ward 63 till date.

8. NE filed its return for the second quarter of 2014 on 3rd November 2014 declaring a local turnover of Rs. 89,19,535. Against the gross output tax liability of Rs. 4,45,977, NE claimed ITC in the sum of Rs. 11,62,405. A search took place in the premises of NE by a team of DT&T led by AC Enf-I on 9th December 2014. Stock was found short by Rs. 41,595 and cash by Rs. 3,712.

9. The AC Enf-I was informed by NE by its letter dated 12th December 2014 that there was no mismatch on the website of the DT&T as regards the purchase made from M/s. Globe Enterprises in the first and second quarter of 2013-14 and that the cheque deposited in lieu of the tax and penalty demanded be returned or not encashed therein.

10. On 13th January 2015, the AVATO Enf-I passed two orders - one, a default notice of assessment of tax and interest under Section 32 of the DVAT Act and other a default notice of assessment of penalty under Section 33 read with Section 86 (10) of the DVAT Act for the second quarter of

2014. In the aforementioned order under Section 32 of the DVAT Act, it was mentioned that NE had voluntarily surrendered ITC claimed in respect of the local purchase of goods from M/s. Globe Enterprises amounting to Rs. 4,31,685 during financial year 2013-14. The assessed turnover was Rs. 45,307 and the tax assessment however was Rs. 4,33,950. The total tax assessment together with interest worked out to Rs. 4,40,192. The penalty levied by an order of the same date was in the sum of Rs. 4,33,950.

W.P. (C) 5080/2015

11. In this petition by M/s. Shakti Metal Co. (SMC), a registered dealer under the DVAT Act, the facts are that SMC has been dealing in iron and steel items. The Joint Commissioner (JC) in the DT&T issued an order dated 14th January 2015 under Section 60 of the DVAT Act authorising a team of officers to enter and search the premises of SMC and seize documents etc. SMC, through its proprietor Mr. Jagdish Rai Gupta gave an undertaking on the same date that it would not claim ITC on the purchases made from the 'suspicious' dealers and that it would provide all the details of the 'suspicious' dealers pointed out by the DT&T within three days. SMC claimed in the said letter that all the purchases were genuine and there was no mismatch in the Forms 2A and 2/B as regards the purchases made from the dealers in question.

12. Nevertheless on 25th February 2015, the AVATO Enf -I passed two separate orders, the first being a notice of default assessment of tax and interest and the other for penalty. This was for the third quarter of 2013-14 and under Sections 32 and 33 of the DVAT Act in a pre-printed format. The

order/notice of default assessment of tax and interest stated that SMC had made purchases and availed ITC from non-functioning/suspicious dealers for the period 2013-14 and 2014-15 and therefore, the ITC was reversed. The assessed turnover was Rs. 1,55,051 and the tax assessed was Rs. 12,88,828 together with interest of Rs. 22,246. By the second order dated 3rd March 2015 under Section 33 of the DVAT Act, penalty was also levied in the sum of Rs. 12,88,828.

13. It may be mentioned that while the jurisdiction qua SMC was that of VATO/AVATO of Ward 48, the aforementioned orders were passed by the AVATO Enf -I.

Issues that arise for consideration

14. In all the above writ petitions, notices were issued by the Court and interim orders were passed restraining the Respondents from taking any coercive steps. The Respondents have filed a reply in each of the petitions.

15. The following common issues arise for consideration in the four petitions:

- (i) Whether the AVATO Enf-I who undertook the survey, search and seizure operation and later passed the default assessment orders of tax, interest and penalty, was duly empowered to do so in terms of the DVAT Act?
- (ii) Whether the AVATO Enf-I could have proceeded to reverse the ITC claimed during an earlier period and could such reversal take place in the order of default assessment for a different period?

Analysis of the relevant provisions of the DVAT Act

16. In order to address the above questions, the provisions of the DVAT Act have to be examined in some detail.

17. Chapter XI of the DVAT Act is titled ‘Value Added Tax Authorities and Appellate Tribunal’. Section 66 deals with the Value Added Tax (VAT) Authorities and reads as under:

“66. Value Added Tax Authorities

(1) For carrying out the purposes of this Act, the Government shall appoint a person to be the Commissioner of Value Added Tax.

(2) To assist the Commissioner in the administration of this Act –

(a) the Government may appoint as many [Special] Commissioners of Value Added Tax, Value Added Tax Officers and such other persons with such designations as the Government thinks necessary; and

(b) the Commissioner may, with the previous sanction of the Government, engage and procure the engagement of other persons to assist him in the performance of his duties;

in this Act referred to as “Value Added Tax Authorities”.

(3) The Commissioner and the Value Added Tax authorities shall exercise such powers as may be conferred, and perform such duties as may be required, by or under this Act.

(4) The powers exercised by the Value Added Tax authorities for the making of assessments of tax, the computation and imposition of penalties, the computation of interest due or owed, the computation of the entitlement and the amount of any refund, the determination of specific questions under section 84, the making of general rulings under section 85, and the conduct of audit or investigations shall, for the purposes of this Act, be the administrative functions.”

18. Under Section 66 (3), the Commissioner of Value Added Tax ('CVAT') and the VAT Authorities can exercise only such powers and perform such duties as may be required by or under the DVAT Act. Section 66 (4) clarifies that the powers exercised by the VAT Authorities for the making of assessments of tax, the computation and imposition of penalties, the computation of the entitlement and the amount of any refund, the determination of specific questions under Section 84, the making of general rulings under Section 85 and the conduct of audit or investigations shall be the 'administrative functions'.

19. Section 67 (1) of the DVAT Act states that the CVAT shall have jurisdiction over the whole of Delhi and shall have responsibility for the due and proper administration of the DVAT Act. Under Section 67 (2) the CVAT may, from time to time, issue such instructions, orders and directions to any VAT Authority as he thinks fit for the due and proper administration of the DVAT Act and all such persons engaged in the administration shall observe and follow such orders, instructions and directions of the CVAT. Under Section 67 (4), the CVAT can issue general orders, instructions and directions to any person.

20. Section 68 which talks of delegation of CVAT's powers, reads as under:

“68. Delegation of Commissioner’s powers

(1) Subject to such restrictions and conditions as may be prescribed, the Commissioner may delegate any of his powers under this Act to any Value Added Tax authorities.

(2) Where the Commissioner delegates his powers under Chapter X, the delegate shall carry and produce on demand evidence in the

prescribed form of the delegation of these powers when exercising the powers.

(3) Where the Commissioner has delegated a power to a Value Added Tax Authority, the Commissioner may supervise, review and rectify any decision made or action taken by that Authority.

Explanation- The exercise of this power of supervision, review or rectification will not lead to the issue of an assessment or re-assessment after the expiry of the time referred to in section 34 of this Act.

(4) Notwithstanding any law or doctrine to the contrary, the power delegated by the Commissioner to a person to determine an objection under section 74 of this Act may be exercised by that person, even though the person determining the objection is equal in rank to the person whose decision is under objection”

21. Under Section 70 of DVAT Act, the CVAT shall have the power to notify and publish any forms. Under Section 70 (6), every notification issued by the CVAT shall be published in the Official Gazette and shall not have any effect prior to such publication.

22. The above delegation of CVAT's powers under Section 68 of the DVAT Act has to be read along with Rule 65 of the Delhi Value Added Tax Rules, 2005 ('DVAT Rules') which reads as under:

“65. Officers to carry and produce authorizations

(1) Where the Commissioner wishes to appoint an officer or other person to exercise any of the powers in Chapter X of the Act, the grant of authority to exercise the powers shall be in Form DVAT-50 and shall be issued by the person empowered by the commissioner in this regard.

(2) The grant of authority shall –

- (a) be limited to a period not exceeding three years;
- (b) be to a specific person; and
- (c) expire on the retirement, resignation or transfer of the person;

Provided that an authority granted may be renewed.

(3) Every officer or other person authorised by the Commissioner under sub-rule (1) shall –

- (a) carry the authorization in Form DVAT-50, with him when purporting to exercise any of the powers conferred under Chapter X of the Act; and
- (b) produce the authorization in Form DVAT-50, if requested by the owner or occupier of any premises where he proposes to exercise these powers.”

23. There is another important aspect as regards search and seizure. Under Section 60 (6) of DVAT Act, every search or seizure made under this Section as far as possible are to be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973 (‘Cr PC’) relating to searches or seizures made under the Cr PC. Under Section 165 (3) Cr PC, only the officer in charge of a police station or a police officer making an investigation may authorize a subordinate officer to carry out search and seizure by a written order recording reasons for requiring such subordinate officer to do so as well as specifying the place to be searched and as far as possible the thing for which the search is to be made.

24. The combined reading of Sections 60, 66 and 68 of the DVAT Act read with Rule 65 of the DVAT Rules reveals the following position:

- (i) The CVAT may delegate any of his powers to any VAT Authority.

(ii) Where the CVAT delegates his powers under Chapter X of DVAT Act (which deals with audit, investigation and enforcement), the delegate shall carry and produce on demand, evidence in the prescribed form, of the delegation of these powers when exercising the powers.

(iii) Where the CVAT has delegated his power to a VAT Authority, he may supervise, review and rectify any decision made or action taken by such VAT Authority.

(iv) Where the CVAT wishes to appoint an officer to exercise any of the powers of audit, investigation and enforcement, he shall issue the grant of authority for the exercise of such powers notified in Form DVAT-50. The authority shall be issued by the person empowered by the CVAT in that regard. The grant of authority in terms of Rule 65 (2) is to be for a period not exceeding three years. The grant of authority shall be to a specific person and expire on the retirement, resignation or transfer of the person.

(v) Rule 65 (3) mandates that every officer or other person authorized by the CVAT under Rule 65 (1) shall carry the authorization in Form DVAT-50 with him when purporting to exercise any of the powers conferred under Chapter X of DVAT Act.

(vi) Such officer is required in terms of Rule 65 (3) (b) of the DVAT

Rules to produce the authorisation in Form DVAT -50, if requested by the owner or occupier of any premises where he proposes to exercise these powers.

Orders of delegation of powers

25. At this juncture, it must be noticed that there have been empowerment orders issued by the Commissioner under Section 68 (2) to various DVAT officers exercising powers under different sections. One such order issued under Section 68 of DVAT Act is dated 12th November 2013, the opening paragraph of which reads as under:

“In supersession of all previous orders on the subject, I, Prashant Goyal, Commissioner of Value Added Tax, Department of Trade & Taxes, Government of NCT of Delhi, in exercise of the powers conferred by Section 68 of the Delhi Value Added Tax (DVAT) Act, 2004 (Delhi Act 3 of 2005) read with Rule 48 of the Delhi Value Added Tax Rules 2005 do hereby delegate my powers specified in Column Nos. 3 under Section mentioned in column No. 2 to the Officers shall exercise the powers and perform the duties concomitant with such powers, within their respective jurisdictions. The order shall come into force with immediate effect.”

26. Below the above paragraph, a table is set out in which the first column indicates the S.No., the second column indicates the relevant provisions of the Act, the third column contains a description of the powers under the said provision and the fourth column states the designation of the officer to whom the power is delegated. Illustratively, reference can be made to Serial Nos. 8, 9, 18, 21, 22, 24, 30 and 31 of the above order which read as under:

S.No.	Section of the Act	Description of powers	Designation of the officer to whom power delegated
8.	32	All powers to assess or reassess to the best of his judgment the amount of net tax due for a tax period or more than one tax period by a single order so long as all such tax periods are comprised in one year and when such an assessment has been made, then to serve upon that person a notice of assessment of the amount of additional tax due for that tax period.	All Officers appointed under sub-section (2) of section 66 of the Delhi Value Added Tax Act, 2004, not below the rank of Assistant Value Added Tax Officer
9	33	All powers to make and serve on the persons a notice of assessment of the penalty that is due under the Act.	All Officers appointed under sub-section (2) of section 66 of the Delhi Value Added Tax Act, 2004, not below the rank of Assistant Value Added Tax Officer.
18	59 (1)	All powers of inspection of records, books of accounts, registers and other documents, maintained by a dealer, transporter or operator of a warehouse at all reasonable times.	All Officers appointed under sub-section (2) of section 66 of the Delhi Value Added Tax Act, 2004 not below the rank of Assistant Value Added Tax Officer.
21	59 (4)	All powers to retain, remove, take copies or extracts or cause copies or extracts to be made of the said records, books of account, registers, & documents without fee by the person in whose custody the records, books of account, registers & documents are held.	All Officers appointed under sub-section (2) of section 66 of the Delhi Value Added Tax Act, 2004 not below the rank of Assistant Value Added Tax Officer.
22	60 (1)	All powers to inspect goods kept at any business premises by a dealer,	All Officers appointed under sub-section (2) of section 66 of the Delhi Value Added Tax Act, 2004

		transporter or operator of a warehouse at all reasonable times.	not below the rank of Assistant Commissioner, VAT.
24	60 (3)	All powers to serve an order to owner and any person who is in immediate possession or control of any records, books of accounts, registers, other documents or goods, that he shall not remove or part with or otherwise deal with them except with the previous permission.	All Officers appointed under subsection (2) of section 66 of the Delhi Value Added Tax Act, 2004 not below the rank of Assistant Value Added Tax Officer.
30	63	All powers to issue/serve notice in Form DVAT-29 to the person recorded as the owner of the goods requiring the person to redeem the property and to make written order for sale or disposal of any goods, goods vehicle or any other property, as per the requirement of Rule 41 of the DVAT Rules, 2005	All Officers appointed under subsection (2) of section 66 of the Delhi Value Added Tax Act, 2004 not below the rank of Additional/Joint Commissioner concerned.
31	64	All powers for detention and seize of goods where dealers fails to provide information, fails to permit the inspection, seizure of goods in respect of which default is committed.	All Officers appointed under subsection (2) of section 66 of the Delhi Value Added Tax Act, 2004 not below the rank of Assistant Value Added Tax Officer.

27. What is significant as far as the above delegation of powers by the CVAT is concerned is that, in the first place, the officers to whom powers have been delegated are to exercise the powers and perform the duties of such powers "within their respective jurisdictions". This is critical since it

conveys the intention that the exercise of powers by an officer is to be restricted to a certain jurisdiction. For instance, in terms of the above order, the officer not below the rank of AVATO will not exercise the power vested under Sections 32 and 33 of the DVAT Act vis-a-vis a dealer who is outside the ordinary jurisdiction of such officer. Otherwise, officers who are delegated such powers could begin to exercise such powers in respect of dealers not within their jurisdiction. That apart, there can be an overlapping of the exercise of jurisdiction by different officers that can result in undue harassment of the dealer and administrative chaos.

28. In this light, in ***Commissioner of Sales Tax, UP v. Sarju Prasad Ram Kumar 1976 (37) STC 533 (SC)***, an order of assessment passed by the Assistant Sales Tax Officer (ASTO), Sector II, Lucknow was challenged as being without jurisdiction on the ground that only the ASTO, Sector III could exercise jurisdiction over the Assessee's circle. The Supreme Court held that since it was not shown that the ASTO, Sector II, had also been conferred with jurisdiction to assess the dealers in Sector III by the Commissioner, the only possible conclusion was that the ASTO, Sector II, had no jurisdiction to assess the dealers in Sector III.

29. In ***K. Packirisamy v. Deputy CTO (Enforcement-I) 2006 (147) STC 368 (Mad)***, the challenge by way of a writ petition was to an order of the Deputy Commercial Tax Officer of the Enforcement Wing whereby a tax amount of Rs. 1 lakh was collected from the Petitioner. The ground was that the Enforcement Wing is not vested with any jurisdiction to levy tax. Referring to Section 41(3) of the Tamil Nadu General Sales Tax Act, 1959, the Madras

High Court held that the levy and collection of the said tax by the Enforcement officer was without jurisdiction.

30. In a similar context under the Customs Act, 1962 in ***Commissioner of Customs v. Syed Ali 2011 (26) ELT 17 (SC)*** where the question arose as to delegation of the powers of the Commissioner of Customs to a 'proper officer' the Supreme Court observed as under:

“14. From a conjoint reading of Sections 2 (34) and 28 of the Act, it is manifest that only such a customs officer who has been assigned the specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice under Section 28 of the Act. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose in as much as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions. Moreover, if the Revenue's contention that once territorial jurisdiction is conferred, the Collector of Customs (Preventive) becomes a “proper officer” in terms of Section 28 of the Act is accepted, it would lead to a situation of utter chaos and confusion, in as much as all officers of customs, in a particular area be it under the Collectorate of Customs 1 (Imports) or the Preventive Collectorate, would be “proper officers”. In our view therefore, it is only the officers of customs, who are assigned the functions of assessment, which of course, would include reassessment, working under the jurisdictional Collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and the consignments had been cleared for home consumption, will have the jurisdiction to issue notice under Section 28 of the Act.”

31. Another feature of the above order issued by the CVAT under Section

68 (2) of the DVAT Act is that no officer below the rank of AVATO has been authorized to exercise any other function under the DVAT Act. This is significant since in the present petitions, the powers of assessment have been exercised by the AVATO Enf-I without there being a delineation of the specific jurisdiction of the AVATO Enf-I in relation to the ward in question within the jurisdiction of which the Assessee in question falls. In the absence of such a specific order, it is the jurisdictional VATO, and not the AVATO Enf-I, who will continue to exercise the power of assessment *vis-a-vis* the Assessee.

The order in Form DVAT-50

32. In the counter affidavit filed by the Respondent, it is contended that the Officer who carried out the survey, search and seizure operation on the dealers was duly authorised to do so by an order issued in Form DVAT-50. What has been enclosed is a grant of authority in Form DVAT-50 issued by the CVAT on 15th October 2014. This order has been signed by the Special Commissioner (HR). The three notes appended below the said order read as under:

“1. Authority for issuance of DVAT 50 has been granted under Rule 65 (1) of DVAT Rules, 2005 to Special Commissioner (HR) by Commissioner, Department of Trade and Taxes vide diary no. 1593 dated 25th September 2014.

2. Specific deployment orders will be issued by the concerned Zonal Incharge authorizing the officials to carry out enforcement survey under Section 60 of DVAT Act, 2004.

3. As and when the officer/official is transferred out of department and relieved this DVAT-50 shall stand cancelled

immediately from the date of relieving in respect of the officer/official concerned.”

33. The above authority is valid upto 31st March 2015. Around 268 named officers of designations ranging from the AC cum VATO, AVATO and VAT Inspector (‘VATI’) have been authorized to carry out the audit, investigation and enforcement functions under the DVAT Act and DVAT Rules. Significantly, there is no authorization to carry out the powers of assessment.

34. It requires to be noticed that Section 68 (2) of DVAT Act talks of delegation of the CVAT's powers under Chapter X. Section 68 (3) talks of the powers to supervise, review and rectify any decision made or taken by the VAT Authority to whom such powers have been delegated. The explanation to Section 68 (3) makes it clear that the exercise of such power of “supervision, review or rectification will not lead to the issue of an assessment or reassessment after the expiry of the time referred to in Section 34 of this Act.”

35. The above provision has been highlighted to underscore the fact that there has to be a specific power to make an assessment delegated to a VAT Authority by the CVAT and in the absence of the delegation of such power, the said delegate cannot exercise the power of assessment. In the present cases, nothing has been shown to the Court regarding authorization of the AVATO Enf-I to make any assessment and pass orders under Sections 32 or 33 of the DVAT Act. As already noticed, the order issued by the CVAT under Section 68 (2) of the DVAT Act on 12th November 2013 delegates

such power under Sections 32 and 33 to all officers not below the rank of AVATO.

36. The second aspect of the matter is that the authorization under the DVAT Act was issued by the Special Commissioner (HR) who in turn stated that he had been granted authority for issuing Form DVAT-50 by the CVAT by an order dated 25th September 2014. Although the said order dated 25th September 2014 purportedly issued by the CVAT under Section 68 (2) of DVAT Act read with Rule 65 (1) of DVAT Rules has not been produced before the Court, there is no means to doubt that there does exist such an order.

37. However, the fact remains that the order dated 15th October 2014 issued by the Special Commissioner which was valid only till 31st March 2015, directed the officers named therein only to carry out the audit, investigation and enforcement functions under Chapter X of the DVAT Act and did not delegate the assessment functions in terms of Sections 32 and 33 of DVAT Act. Consequently, the Court has no hesitation in holding that the default notices of assessment of tax and penalty passed by the AVATO Enf-I were wholly without jurisdiction.

Validity of the search and seizure

38. That, however, does not bring an end to the enquiry into the validity of the search and seizure operations. As far as W.P. (C) 8913 of 2104 by CPBL is concerned, on the date of the survey conducted in the premises of CPBL on 4th September 2014, there was no authorisation in From DVAT-50. The one that has been produced is dated 15th October 2014. Clearly therefore,

that survey was without the authority of law.

39. Further, it appears that specific form DVAT-50 is in the form of a template order. It requires the AVATO Enf-I to carry out a search and seizure operation. It has been issued by the JC. For instance, the order dated 9th December 2014 in the case of M/s. Nutek Establishments (Petitioner in W.P. (C) No. 3069 of 2015) issued by the JC (E-I) reads as under:

“The under mentioned officers/ officials of the Department of Trade & Taxes are hereby deputed to enter and search the premises of MIS Nutek Establishments F-278, Sec-I, DSIDC Bawana Indl.Area Delhi and any other dealer found functioning at the same premises; and to inspect the accounts and other documents and seize any documents, records/ accounts etc. and take any action under section 60 of the Value Added Tax Act, 2004 as may be necessary.

Sh. Om Prakash, Asst Commissioner
Sh. Rakesh Kumar, AVATO
Sh. Avinash Kumar, AVATO
Sh. Ramesh Kumar, VATI”

40. Unless the JC (E-I) was specifically authorized under Section 68 (2) of the DVAT Act read with Rule 65 (1) of the DVAT Rules, he could not have issued the above order in Form DVAT-50. No such authorisation has been produced before the Court. Significantly, the Form DVAT-50 issued by the Special Commissioner on 15th October 2014 does not authorize the JC (E-I) to carry out any of the functions in respect of search and seizure. Consequently, the JC in turn could not have issued any form DVAT-50 authorizing the AC/AVATO/VATI to carry out search and seizure operations. In none of these cases has the DT&T been able to produce the proper order authorizing the AC/AVATO/ VATI to carry out survey, search

and seizure operations.

41. Yet another aspect is that there is a basic misconception that the VAT Authorities are to mechanically exercise the power of survey under Section 59 of the Act followed immediately by a search and seizure operation under Section 68 of the DVAT Act. This has been adversely commented upon by the Court in two orders in the recent past.

42. In an order dated 27th January 2016 in W.P. (Civil) No. 714 of 2016 (*Shree Ashtvinayak Gems & Stone Pvt. Ltd. v. Commissioner, Trade & Taxes, Delhi*), the Court observed as under:

“5. Section 60 of the Act sets out the jurisdictional requirement for invocation of the power under Section 60(2)(f). It mandates that the Commissioner must have reasonable grounds to believe that “any person or dealer is attempting to avoid or evade tax or is concealing his tax liability in any manner”. This satisfaction of the Commissioner has to be based on materials that are available on record. It ought not to be mechanically exercised, using a cyclostyled form, as has been done in the present case. The notice dated 19th January 2016, the date of the sealing, sets out only one the ground, in a pre-printed form, that the dealer “failed to produce the books of accounts till 7:30 PM in spite of issue of notice under Section 59 of the DVAT Act 2004”. This obviously does not satisfy the statutory requirement under Section 60(2)(f) of the Act.

6. The facts as set out in the petition that the decision reveal that the decision to invoke the powers under Section 60(2)(f) of the Act was taken in undue haste virtually in continuation of invocation of the power under Section 59 of the Act to search the premises for information and documents. Sufficient opportunity was not afforded to the Petitioner to explain why, if at all, it was unable to produce the documents and information sought by the Department. Also, there could not be an automatic presumption that since the Petitioner failed

to produce the documents at once it was attempting to avoid or evade tax or was concealing its tax liability.”

43. Subsequently, similar observations were made in an order dated 3rd February 2016 in W.P. (C) No. 1820 of 2013 (*Larsen and Toubro Limited v. Govt. of NCT of Delhi*) .

Carry forward of the ITC reversal

44. There is another aspect of the matter in relation to the orders of assessment of tax and penalty. It is noticed that while the tax period in each of the assessment orders is for the various quarters of 2014, the reversal of the ITC which has resulted in enhancement of the tax amount pertains to an earlier period. In particular, in each of the cases, reversal of ITC was claimed for 2013-14, which in view of amendment to Section 11 (2) of the Act with effect from 12th September 2013 cannot be carried forward beyond 31st March 2014. The dealers had filed returns in respect of the earlier period and therefore, there could not be revision or reassessment of the tax computed for those periods by reversal of the ITC claimed for that period without following the due process as envisaged under the DVAT Act. It was not open to the AVATO Enf-I, who was not authorized to make any assessment, to adjust the ITC reversal pertaining to an earlier period ending on 31st March 2014 in the returns filed for the different quarters of 2014-15.

45. The second difficulty is that none of the dealers were notified about the purchases made by them being characterized as purchases from non-existent/suspicious selling dealers. No opportunity was afforded to the Petitioners of any hearing and no materials gathered substantiating the case

of the DT&T were furnished to them. The specific case of the dealer in each of the petitions is that the verification report matched the Forms 2A and 2B in relation to such purchases. Therefore, the orders of default notices of assessment of tax, interest and penalty are held to be bad in law on this ground as well.

The penalty orders

46. Lastly, turning to the orders of assessment of penalty, these again appear to have been passed mechanically under Section 86 (10) of DVAT Act. Neither clause (a) or (b) of Section 86 has been mentioned in the default notices of penalty. While passing these penalty orders, the returns filed by the dealers have not been taken into account. Further, no notice was separately issued to the dealers prior to the passing of the penalty orders. In similar circumstances, this Court in ***Bansal Dyechem Pvt. Ltd. v. Commissioner of Income Tax (2016) 87 VST 58 (Del)*** held the penalty order to be invalid.

47. In the above connection, the Court's attention was drawn to Section 87 (6) of the DVAT Act which reads as under:

“87 (6) If –

(a) A person is liable to pay penalty under Section 86 of this Act; and

(b) the person voluntarily discloses to the Commissioner, in writing, the existence of the tax deficiency, during the course of proceedings under Section 60; and

(c) makes payment of such tax deficiency within three working days of the conclusion of the said proceedings,

the amount of the penalty otherwise due, against the admitted and paid tax, shall be reduced by eighty per cent.”

48. It must be noticed that the above provision only talks of the person making payment of such tax deficiencies on “his own” within three working days of conclusion of the proceedings undertaken under Section 60 of DVAT Act. By no means does Section 87 (6) of the DVAT Act enable the officers who undertake a search and seizure operation under Section 60 of DVAT Act to collect tax dues on the spot. This is wholly impermissible in law and will lead to unhealthy practice of arm-twisting a dealer into parting with alleged tax dues without there even being an order of assessment. The tax demand crystallises only upon an assessment. In any event, even if a dealer volunteers to deposit the disputed tax amount, he should be asked to deposit the said amount in the counter designated for that purpose. There is no question of the members of the search team collecting such payment. The CVAT should issue clear instructions in this regard. It should also be made clear that if any of the officers of the DT&T are found violating the instruction, they would be subject to disciplinary proceedings.

Existence of an alternative remedy

49. Learned counsel for the Respondent did raise an objection as to the maintainability of these petitions on the ground that the Petitioners had an alternative statutory remedy of filing objections before the Objection Hearing Authority and thereafter the Appellate Tribunal against the orders of default assessments of tax, interest and penalty.

50. While ordinarily the Court might have been inclined to entertain the

above preliminary objection, in the facts and circumstances of the present cases, where the issue raised touches upon the jurisdiction and powers of the VAT Authorities which in turn directly impacts the question of the legality and validity of the actions of the VAT Authorities, relegating the Petitioners to the statutory remedies would neither be expedient nor efficacious. In the considered view of the Court, as noticed hereinbefore, the VAT Authorities have in these cases proceeded on a basic misconception of the scope of their powers and authority. Interdiction by the Court, in the exercise of its powers under Article 226 of the Constitution, of the continued exercise by the VAT Authorities of powers that they do not possess becomes an imperative.

Summary of conclusions

51. To sum up the conclusions of the Court:

- (i) The survey operation undertaken in each of the petitions was without authority of law inasmuch as the Officer who undertook such operation acted without jurisdiction and contrary to the order issued by the CVAT on 12th November 2013 under Section 68 (2) of the DVAT Act.
- (ii) The order in Form DVAT-50 issued by the Special Commissioner on 15th October 2014 did not permit the enforcement officer to carry out any assessment and therefore, orders of default assessment of tax, interest and penalty passed by the AVATO Enf-I under Sections 32 and 33 of the DVAT Act were without the authority of law.
- (iii) The Joint Commissioner who issued the deployment orders

authorising the AVATO Enf-I to undertake the search and seizure was not specifically authorized to do so in terms of the order dated 12th November 2013 issued by the Commissioner under Section 68 (2) of the DVAT Act. This therefore, vitiates the entire survey, search and seizure operation undertaken by the teams of the DT&T so deployed.

(iv) There could not be a revision or reassessment of the tax computed for the periods of 2013-14 for which returns were filed, by reversal of the ITC claimed for that period without following the due process as envisaged under the DVAT Act. It was not open to the AVATO Enf-I who was not authorized to make any assessment, to adjust the ITC reversal pertaining to an earlier period ending on 31st March 2014 in the returns filed for the different quarters of 2014-15.

(v) The penalty orders under Section 86 (10) read with Section 33 of the DVAT Act were bad in law.

(vi) Section 87 (6) of the DVAT Act does not enable the officers who undertake the search and seizure operation under Section 60 of DVAT Act to collect tax dues on the spot from the dealer whose premises is searched.

(vii) The VAT Authorities have in these cases proceeded on a basic misconception of the scope of their powers and authority. Interdiction by the Court, in the exercise of its powers under Article 226 of the Constitution, of the continued exercise by the VAT Authorities of powers that they do not possess becomes an imperative.

Afterword

52. The Court would like to impress upon the CVAT that given the frequency with which the Court has been constrained in the recent past to interfere with the illegal exercise of powers and jurisdiction by the VAT Authorities, it has become imperative for the CVAT to issue clear instructions/directions to the VAT Officers to follow regarding the scope of their powers and jurisdiction. The delegation of powers and the jurisdiction of the VAT Authorities must be specific and leave no room for ambiguity. It must be ensured that there is no possible overlapping of the exercise of powers and jurisdiction by different VAT Authorities. The CVAT should issue clear instructions that no VAT Authority will collect in cash or by cheque any alleged tax demand on the spot/field while undertaking a survey, or a search or seizure operation. In this regard, it should also be made clear that if any of the officers of the DT&T are found violating any of the instructions, they would be subject to disciplinary proceedings.

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.

54. A submission was made by learned counsel for the Respondent that the present order should not preclude the DT&T from proceeding against any of the Petitioners afresh in accordance with law. The Court makes it clear as far as the survey, search and seizure operation, and the consequential order passed by way of default notices of assessment of tax and penalty which

have been impugned in the present petitions are concerned, the Court has, for the reasons elaborated hereinbefore, held them to be without authority of law. If the DT&T seeks to proceed against the Petitioners hereinafter it will do so strictly in accordance with law and subject to such action being tested for its legality in terms of the DVAT Act and DVAT Rules.

55. The writ petitions are allowed and the pending applications are disposed of in the above terms but, in the facts and circumstances of the case, with no orders as to costs.

MARCH 02, 2016
Rk

S. MURALIDHAR, J

VIBHU BAKHRU, J