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IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 7511/2015

NUCLEUS MARKETING & COMMUNICATION Petitioner
Through: Mr. A.K. Babbar with Mr. Surinder
Kumar, Mr. Bhagat Tripathi, Ms. Amita
Babbar, Advocates.

versus

COMMISSIONER OF DELHI VALUE ADDED TAX,
DEPARTMENT OF TRADE & TAXES Respondent
Through: Mr. Naushad Ahmed Khan, ASC
(Civil) with Ms. Astha Nigam, Advocate.

With

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W.P.(C) 8104/2015

NUCLEUS IMPEX PVT. LTD Petitioner
Through: Mr. A.K. Babbar with Mr. Surinder
Kumar, Mr. Bhagat Tripathi, Ms. Amita
Babbar, Advocates.

versus

COMMISSIONER OF DELHI VALUE ADDED TAX,
DEPARTMENT OF TRADE & TAXES & ANR Respondents
Through: Mr. Naushad Ahmed Khan, ASC
(Civil) with Ms. Astha Nigam, Advocate.

And

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W.P.(C) 8393/2015

NUCLEUS IMPEX PVT. LTD Petitioner
Through: Mr. A.K. Babbar with Mr. Surinder
Kumar, Mr. Bhagat Tripathi, Ms. Amita
Babbar, Advocates.

versus

COMMISSIONER OF DELHI VALUE ADDED TAX,
DEPARTMENT OF TRADE & TAXES & ANR Respondents
Through: Mr. Naushad Ahmed Khan, ASC
(Civil) with Ms. Astha Nigam, Advocate.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE NAJMI WAZIRI

ORDER
12.07.2016

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Dr. S. Muralidhar, J.:

1. Nucleus Impex Pvt. Ltd ('NIPL') is the Petitioner in W.P.(C) Nos. 8104 & 8393/2015 and Nucleus Marketing & Communication ('NMC') in W.P.(C) 7511/2015. They are dealers duly registered under the Delhi Value Added Tax Act, 2004 ('DVAT Act') and Central Sales Tax Act, 1956 ('CST').

2. The essential grievance of the Petitioners is against the failure by the Respondent, Commissioner, Delhi Value Added Tax ('DVAT') to grant refund together with interest due to the Petitioners in accordance with Section 38 of the DVAT Act. In the case of NMC the refund together with interest was due for the months of November 2012 for the year 2012-13 and in the case of NIPL it was due for the 3rd and 4th quarter for 2012-13 as well as 1st, 2nd, 3rd and 4th quarters of 2013-14.

3. The case of the Petitioners is that they have been filing returns as and when due under the DVAT Act. For the month of November 2012, the return was filed on 27th December 2012 claiming refund of Rs. 20,46,725. It is submitted that in respect of the said claim, the due date for issuance of

refund in terms of Section 38 of the DVAT is 27th February 2013. As regards the quarterly returns for the 3rd and 4th quarter relating to 2012-13, returns were filed on 31st October 2013 (revised) and 26th April 2013 (original) respectively. The respective due dates for issuance of the refund as claimed in these returns were 31st December 2013 and 26th June 2013 respectively.

4. As regards the returns for 2013-14 the revised returns for the 1st and 2nd quarter were filed on 16th July 2014 claiming refund and for the 3rd and 4th quarter on 28th March 2015 (all revised returns) claiming refund. While the due date for issuance of refund for the 1st and 2nd quarter for 2013-14 was 16th September 2014, the refund for 3rd and 4th quarter for 2013-14 was due on 28th May 2015.

5. It is submitted that during the period in question, the dealers had less output tax payable and more input tax credit ('ITC') and such refund was due as indicated in the return. Further, a reference is made to Circular No. 6 issued by the Commissioner, VAT on 15th June 2015 in terms of which the Petitioners have the right to receive the refund within 15 days from the date of filing of the return where the return is not picked up for audit. It is stated that the said Circular issued under Section 67 (2) of the DVAT Act is binding on the VATO and yet no refund has been made till date. It is asserted that neither was the refund issued to the Petitioner within 15 days nor was the case picked up for audit nor any security under Section 38 (5) of the DVAT Act demanded. No notice was issued under Section 59 (2) of the DVAT Act within 10 days from the date of filing return.

6. The main plank of the submission of Mr. A.K. Babbar, learned counsel appearing for the Petitioner, is based on the decision of this Court in

Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax (2010) 31 VST 475 (Del) which was subsequently followed by this Court in *Dish TV India Limited v. Government of NCT of Delhi (2016) 92 VST 83 (Del)*

7. Pursuant to the notices issued in these petitions, counter-affidavits have been filed in W.P.(C) Nos. 8104 and 8393/2015 by the Respondent. In the first place, it is urged that an alternative remedy is available to the Petitioners under the DVAT Act since any return filed by the dealer is deemed to be a notice of assessment under Section 31 (1) (b) of the DVAT Act and if the Commissioner had failed to issue any assessment or order to that effect then the person aggrieved by such failure can file an objection before the Objection Hearing Authority ('OHA') under Section 74 (2) of the DVAT Act. If the dealer is still aggrieved by the decision of the OHA, an appeal can be preferred before the Appellate Tribunal (AT) under Section 76 (1) of the DVAT Act.

8. As regards the preliminary objection raised by the Respondent, the Court finds that the matter pertains to the delay in processing and issuing the refund due to the Petitioners. For the reasons discussed hereinafter it would be seen that even in the matter of processing of the refund claim, the Respondent has not adhered to the time limits set out in Section 38 of the DVAT Act and in Circular No. 6 issued by the Commissioner, VAT under Section 67 (2) of the DVAT Act. Relegating the Petitioner, in the circumstances, to the alternative remedy of going before the OHA would only further delay the refund and therefore, is not considered to be efficacious. The preliminary objection is, accordingly, rejected.

9. It is submitted by the Respondent that a survey was undertaken by the

Enforcement Branch in the business premises of the Petitioners on 17th October 2014 wherein not only some variation in cash and stock was found but also it was admitted by the dealer that it was engaged in making purchases “from suspicious dealers’ thereby claiming false ITC and false refunds. It is stated that the Petitioner voluntarily surrendered the ITC claimed in respect of the transaction with M/s. Eagle Trade Mart.

10. As regards the failure to make refund, it is stated that in view of the survey undertaken it became necessary to ask the Petitioner to place the documents on record for the satisfaction of the Assessing Authority, before assessing/processing of refund. Since the Petitioner had not filed any requisite documents, the Respondent was constrained not to issue the refund.

11. Interestingly the counter affidavit of the Respondent is silent on the failure by the Respondent to process the refund application within the time stipulated under Section 38 of the DVAT Act. It is also silent on the failure to comply with the Circular No. 6 issued by the Commissioner, VAT which is binding on the VATO.

12. It is pointed out by Mr. Babbar, learned counsel for the Petitioners that the counter-affidavit filed on 16th December 2015 adverting to the survey undertaken in the business premises of the Petitioners fails to mention that even prior to the filing of the counter-affidavit, the OHA on 30th November 2015 allowed the objections filed on 12th May 2015 by NIPL to the 3rd quarter of 2014-15. A copy of the order in Form DVAT 40 dated 30th November 2015 passed by the OHA has been placed on record. It adverts to the notice issued under Section 59 (2) of the DVAT Act to NIPL by the AVATO following the survey conducted, seeking information and record

for not one but two assessment years. Later while framing assessment for 3rd quarter of 2014-15 the AVATO covered assessment for more than one AY (2013-14 and 2014-15). This resulted in default assessment orders dated 31st March 2015 being issued by the AVATO for the 3rd quarter of 2014-15 under Sections 32 and 33 of the DVAT Act to which the objections were filed before the OHA. The OHA has referred to the fact that the survey team had in the course of the survey collected two cheques of Rs. 13,30,790 from the Petitioner towards tax and Rs. 2,66,158 towards penalty without framing any assessment under the DVAT Act. The OHA has in respect of the above actions concluded as under:

“As such, there appears to be tax collection prior to the framing of assessment in the orders. There is documentary evidence on record that proves collection of advance tax and penalty is unlawful, and same was paid in protest under coercion and duress. The facts of the case clearly indicate that no assessment was framed prior to the collection/deposit of tax and penalty sums above mentioned, hence not within the framework of law. Objector is eligible to seek refund of above stated advance tax and penalty paid as per the established provisions of law after satisfying the Ward Officer showing proof of payment of the same.”

13. It is surprising that the Respondent has, while filing the counter-affidavit on 16th December 2015, concealed the above fact of OHA having found the survey undertaken to be illegal. The Court further notices that the OHA has, in the same order, adversely commented on the fact that although the notices of default assessments of tax, interest and penalty had been issued by the AVATO for the relevant tax period of 3rd quarter of 2014, yet disallowance of ITC on the purchases made from M/s. Eagle Trade Mart pertained to the earlier year 2013-14. It has been pointed out that the case of disallowance of the ITC ought to have been taken into

consideration in a separate assessment order and not to be clubbed in the assessments for the aforesaid 3rd quarter of 2014. The OHA has also observed that the Petitioner had submitted evidence regarding the functionality of the alleged cancelled dealer, M/s. Eagle Trade Mart, through ward records and replies obtained under the RTI. Consequently, the OHA had concluded that the claim of the surveying Enforcement Officers that M/s. Eagle Trade Mart was a cancelled dealer, “appears to be totally wrong, deceptive, incorrect and false, which is why, the Advance Tax Collection/Deposit of Rs. 13,30,790 (tax) and Rs. 2,66,158 (penalty) is most unlawful, obnoxious and contrary to the facts and circumstances of the case. Therefore, on this count too, the impugned assessment orders being null and void do not survive.”

14. The OHA has held the Petitioner to be eligible for the refund of tax and penalty paid for the tax period under which no assessment has been framed till then. It is also to be noted that the above order of the OHA has attained finality. Consequently, the main ground urged in the counter-affidavit for not processing the refund application appears to be entirely without basis, both factually and legally. In any event the fact remains that the survey undertaken was not a justification for the Respondent to not process the refund applications under Section 38 of the DVAT Act.

15. Section 38 of the DVAT Act reads as under:

"38. Refunds- (1) Subject to the other provisions of this section and the rules, the Commissioner shall refund to a person the amount of tax, penalty and interest, if any, paid by such person in excess of the amount due from him.

(2) Before making any refund, the Commissioner shall first apply such excess towards the recovery of any other amount due under this Act, Or under the Central Sales Act, 1956 (74 of 1956).

(3) Subject to sub-section (4) and sub-section (5) of this section, any amount remaining after the application referred to in sub-section (2) of this section shall be at the election of the dealer, either-

(a) refunded to the person, -

(i) within one month after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is one month;

(ii) within two months after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is a quarter; or

(b) carried forward to the next tax period as a tax credit in that period.

(4) Where the Commissioner has issued a notice to the person under Section 58 of this Act advising him that an audit, investigation or inquiry into his business affairs will be undertaken or sought additional information under Section 59 of this Act, the amount shall be carried forward to the next period as a tax credit in that period.

(5) The Commissioner may, as a condition of the payment of a refund, demand security from the person pursuant to the powers conferred in section 25 of this Act within fifteen days from the date on which the return was furnished or claim for the refund was made.

(6) The Commissioner shall grant refund within fifteen days from the date the dealer furnishes the security to his satisfaction under sub-section (5).

(7) For calculating the period prescribed in clause (a) of subsection (3), the time taken to-

(a) furnish the security under sub-section (5) to the satisfaction of the Commissioner; or

(b) furnish the additional information sought under section 59; or

(c) furnish returns under section 26 and section 27, shall be excluded.

(8) Notwithstanding anything contained in this section, where-

(a) a registered dealer has sold goods to an unregistered person; and

(b) the price charged for the goods includes an amount of tax

payable under this Act;

(c) the dealer is seeking the refund of this amount or to apply this amount under clause (b) of sub-section (3) of this section; no amount shall be refunded to the dealer or may be applied by the dealer under clause (b) of subsection (3) of this Section unless the Commissioner is satisfied that the dealer has refunded the amount to the purchaser.

(9) Where-

(a) a registered dealer has sold goods to another registered dealer; and

(b) The price charged for the goods expressly includes an amount of tax payable under this Act, the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section and the Commissioner may reassess the buyer to deny the amount of the corresponding tax credit claimed by such buyer, whether or not the seller refunds the amount to the buyer.

(10) Where a registered dealer sells goods and the price charged for the goods is expressed not to include an amount of tax payable under this Act the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section without the seller being required to refund an amount to the purchaser.

(11) Notwithstanding anything contained to the contrary in subsection (3) of this section, no refund shall be allowed to a dealer who has not filed any return due under this Act."

16. It is seen that in the first place there are strict time limits laid down under Section 38 (3) read with Section 38 (7) of the DVAT Act. For taking any action under Section 38 (8) or 38 (9) or 38 (11) the dealer would have a notice in the first place by the Commissioner. Such notice would have to be only issued in such a manner that the time limit prescribed under Section 38 (3) of the DVAT is not exceeded. Where notice is already issued under Section 58, or additional information sought under Section 59 of the Act, it is only in the circumstances under Section 38 (4) of the DVAT Act, the refund amount sought shall be carried forward to the next

tax period as a tax credit in that period. In other words there are several options available to the Commissioner, VAT or his delegates in response to the application for refund. All these options have to be exercised in such a manner that the time limit under Section 38 (3) is adhered to. Obviously, the proceeding under Section 38 cannot result in reopening of concluded assessment. The statutory rejection for that course of action is entirely different. In other words, having missed the bus on the question of the reopening of a concluded assessment for whatever reason, the Commissioner cannot indirectly at the time of processing the application for refund seek to reopen a concluded assessment.

17. As rightly pointed out by learned counsel for the Petitioner, the law explained by this Court in *Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax* (*supra*) appears to squarely apply in the facts and circumstances of the present case. In the said decision, the Court analyzed Section 38 (3) as under:

“5. A plain reading of Section 38, which deals with refunds, makes it clear that by virtue of sub-section (3) thereof, in the case where a person is assessed quarterly, the refund is to be made to the dealer within two months after the date on which the return is furnished or the claim for the refund is made. Of course, it is the dealer's option to elect as to whether the refund is to be made in cash or the said amount is to be carried forward to the next tax period as a tax credit in that period. In the present case, the petitioner has elected for the grant of refunds in cash and has not elected for carrying forward the refund amount to the next tax period. The provisions of Section 38(3) uses the expression "shall" and, therefore, it is clear that the refund has to be made within two months from the date of the return.”

18. The Court in *Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax* (*supra*) next considered whether Section 38 of the DVAT Act was directory or mandatory. While distinguishing the decision in *Commissioner of Sales Tax v. Behl Construction (2009) 21 VST 261*

(*Del*), the Court observed as under:

“10. Such a situation does not arise in the present case inasmuch as the provisions of Section 38 do not contemplate a situation where the Commissioner does not grant a refund within the stipulated period. The decision in ***Behl Construction (supra)*** was in the context of the provisions of Section 7 4 and those circumstances do not arise in the present case. As pointed out above, what this court has to determine is: what is the legislative intent behind the provisions of Section 38? It is this intent which shall determine whether the stipulations as to time are merely directory or they are mandatory as suggested by the use of the word "shall". On going through all the sub-sections of Section 38 of the said Act, the legislative intent that is clearly discernible is that refunds must be granted to a person entitled within the specific time period stipulated in sub-section (3) thereof. This intention is further fortified by a look at the provisions of sub-section (7) of Section 38 which stipulates that for calculating the period prescribed in clause (a) of sub-section (3), the time taken to furnish the security under sub-section (5) to the satisfaction of the Commissioner or to furnish the additional information sought under Section 59 or to furnish returns under Sections 26 and 27, "shall be excluded". This provision as to exclusion of time taken in doing the aforesaid acts, is in itself an indication that the legislature was dead serious about the stipulation as to time for making refunds under Section 38 (3) of the said Act. For, if the legislative intent were not so, what was the need or necessity for providing for exclusion of time? Thus, not only do the provisions of Section 38 employ the word "shall", which is usual in mandatory provisions, the legislative intendment discernible from the said provisions also points towards the mandatory nature of the said provisions. Clearly, subject to the exclusion of time provided under sub-section (7) or Section 3 8, in a case falling under Section 38(3)(a)(ii), the refund has to be made within two months from the date of the return.”

19. The Court in ***Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax (supra)*** also rejected the argument that the issuance of notice to the dealer under Section 59 of the DVAT Act could delay the grant of refund. The Court observed as under:

“13. In any event, even if we assume that the said notice was issued by the respondents and that it had been received by the petitioner, it would not change the position in law. Sub-section (4) of Section 3 8 has to be read with the provisions of sub-section (3)

of Section 38. By virtue of the latter provision, the refund had to be paid to the petitioner within two months from the date of the return furnished by him. No such notice under Section 59 requiring additional information had been issued during that period. Consequently, the subsequent purported issuance of notice under Section 59 cannot be taken as a ground for not paying the refund to the petitioner. In this connection, the provisions of sub-section (7) of Section 38 also needs to be examined. The said provision stipulates that for calculating the period prescribed in Section 38(3)(a), the time taken to, *inter alia*, furnish additional information sought under Section 59 shall be excluded. It is obvious that exclusion can only be when the period of limitation itself has not run out. The consequence of this discussion is that the notice under Section 59 in connection with refund has to be issued within the period of two months stipulated in Section 38(3)(a)(ii). As a result, the submission of the learned counsel for the respondents that because of issuance of notice under Section 59 of the said Act, albeit beyond the prescribed time, the refund was not payable, is not tenable.”

20. The Court is of the view that in view of the law explained in the above decision, the failure by the Respondent to process the refund claimed by the Petitioners for all the above tax periods appear to be wholly unjustified. It is no longer open to the Respondent to raise an objection to the grant of refund claimed together with interest.

21. In view of the matter, a direction is issued to the Respondent to process the claim refund made by the Petitioners for the aforementioned periods as set out in the three writ petitions and issue appropriate orders granting refund together with interest in terms of Section 38 of the DVAT Act within a period of eight weeks from today and in any event not later than September 10, 2016. If there is any failure by the Respondent to comply with the directions, the Petitioners shall seek appropriate relief in accordance with law.

22. The petitions are allowed in the above terms with no orders as to costs.

23. Order be given *dasti*.

S.MURALIDHAR, J

NAJMI WAZIRI, J

JULY 12, 2016

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