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

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\+ **W.P.(C) 8392/2015**

JMC PROJECTS (INDIA) LTD. ..... Petitioner

Through: Mr. V. Lakshmikumaran with Ms.Charanya Lakshmi Kumaran, Advocates.

versus

COMMISSIONER OF TRADE AND TAXES, NEW DELHI & ORS. ..... Respondents

Through: Mr. Satyakam, Additional Standing Counsel for R-1.
Mr. Amit Mahajan, Advocate for UOI/R-2.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE NAJMI WAZIRI

<u>O R D E R</u>

% **12.07.2016**

1. The challenge in this petition is to an order dated 5th June 2015 passed by the Commissioner, Value Added Tax rejecting the application filed by the Petitioner under Section 36A(2) of the Delhi Value Added Tax Act, 2004 ('DVAT Act') for a lower deduction certificate.

2. The Petitioner is undertaking the execution of works contract in respect of two projects one awarded to it by the National Building Construction Corporation Limited ('NBCC') for construction of a museum at the existing garage of the President Estate i.e. Rashtrapati Bhawan the value of which

contract is Rs.66,92,71,798. The other contract awarded by the Central Public Works Department ('CPWD') is for construction of an additional office complex for the Supreme Court of India at the adjoining Pragati Maidan, New Delhi the value of which is Rs. 4,68,25,69,443. Admittedly, both the works contract involved transfer of property in goods as well as provisions of labour and services.

3. In terms of Section 36A(1) of the DVAT Act for discharge of any liability on account of full consideration payable for transfer of property in goods whether in cash or in some other form in pursuance of a contract for value exceeding Rs.20,000, the entity making the payment to the dealer undertaking the works contract is required to deduct tax @ 4% at the time of credit of sum to the account of the contractor or at the time of payment thereof in cash or by any other mode. Admittedly, the Petitioner is a contractor who is registered under the DVAT Act and, therefore, the proviso to Section 36A(1) of the Act which provides for a higher rate of deduction at 6% does not apply.

4. Under Section 36A(2) of the DVAT Act, it is open to the contractor to make an application to the Commissioner, VAT seeking application of a lower deduction. Section 36A (2) of the DVAT Act reads as under:

> "36A(2) Where, on an application being made by the contractor in this behalf, the Commissioner is satisfied that any works contract involves both transfer of property in goods and labour and service, or involves only labour and service and accordingly, justifies deduction of tax on a part of the sum in respect of the works contract or, as the case may be, justifies no deduction of tax, he shall, after giving the contractor a

> reasonable opportunity of being heard, grant him such certificate and for such period as may be appropriate:
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> Provided that nothing in the said certificate shall affect liability of the contractor to pay tax under this Act."

5. Admittedly, in the present case both the works contract involved "transfer of property in goods and labour and service". Along with its application dated 20th January 2015 made to the Commissioner VAT, the Petitioner enclosed the details of the civil materials supplied like sand, aggregate, bricks, electricals, pipes and pipe fittings which were to be incorporated in the two contracts. This was obviously on an estimate basis as the execution of both contracts was in progress. The Petitioner also enclosed with the application a computation of VAT which worked out to Rs.4.65 crores i.e. 0.87% of the contract value towards VAT liability after adjustment of input tax credit "since all the materials are to be procured with the State of Delhi after paying VAT." The Petitioner also enclosed with the application the following documents:

> "(i) Copy of Agreement between the Company and Awarders.
> (ii) Letter of Acceptance
> (iii) Extracts of the terms and condition for the Scope of the work of Contract.
> (iv) Memorandum & Articles of Association of the Company.
> (v) DVAT and CST Registration Certificate."

6. It was pointed out by the Petitioner that if the certificate of lower deduction of tax is not issued, the Petitioner will suffer an irreparable loss and injury inasmuch as huge funds will be blocked. It was estimated that the ultimate amount payable under the DVAT Act would be far less compared to the amount that would stand deducted at 4% from the bills of the

Petitioner.

7. It is the submission of Mr. V. Lakshmikumaran, learned counsel for the Petitioner that as of date there is already a sum of Rs.8.76 crores that has been deducted from the bills submitted by the Petitioner under both works contract whereas, according to the Petitioner in its estimation, even after assessment the ultimate amount that would be payable as VAT would be only about Rs. 4.65 crores.

8. The Petitioner's application was considered and rejected by the Commissioner, VAT by the impugned order was passed on 5th June 2015. A perusal of the order reveals that the Commissioner has recorded the submission of the departmental representative (DR) that “lower deduction of TDS is allowed in cases where **dominant** part of the labour and services or the works involved only labour and services.” (emphasis supplied) The DR appears to have urged that the issue raised by the applicant is an issue of assessment and will be considered at the time of assessment and not in this forum." Thereafter the Commissioner, VAT has observed as under:

> “I have heard the arguments put forth from both the sides and gone through the documents on record. I agree with the views of the D.R., the issue raised by the applicant shall be considered at the time of assessment and not in this forum.”

9. This Court has heard the submissions of Mr. Lakshmikumaran, learned counsel for the Petitioner and Mr. Satyakam, Additional Standing Counsel for the Respondent No.1.

10. The impugned order is essentially a non-reasoned one. The

Commissioner, VAT appears to have taken the easy route of simply agreeing with the submissions of one of the parties. He has abdicated his duty of giving detailed reasons for the conclusion arrived at in his order. This by itself is sufficient for the impugned order to be set aside.

11. The order also appears to proceed on the misconception that Section 36A(2) of the DVAT Act permits the entertaining of a prayer for lower deduction of tax only where "dominant part of the work is labour and service." The word 'dominant' is not to be found in Section 36A(2) of the DVAT Act. In fact, there is nothing in the said provision which suggests that unless the dominant part of the works contract is labour and service, the lower deduction will not be permissible.

12. Also the Commissioner, VAT does not appear to have examined the estimates placed on record by the Petitioner along with the supporting documents to justify its claim for a lower deduction at 0.87%. The Commissioner, VAT could have, for reasons recorded, either agreed or disagreed with the estimates prepared by the Petitioner or with the calculations of the percentage of deduction based on the documents enclosed with the application. The Commissioner, VAT was obliged to discuss the materials and give reasons for his conclusion. However, the impugned order, as already noticed, is totally bereft of any reasoning.

13. Mr. Satyakam, learned counsel appearing for the Respondent No.1 tried to make best of the situation by referring to the counter affidavit filed by the Department which according to him supplied the reasons that would justify the conclusion arrived at by the Commissioner.

14. It is a settled legal proposition that a statutory authority discharging a quasi-judicial function has to spell out the reasons for his conclusion in the order itself. The reasons for such conclusion cannot be supplied subsequently, much less in the form of a counter affidavit by the department to a writ petition that challenges the order. Consequently, the Court does not consider it appropriate to examine the counter affidavit in order to find out what reasons weighed with the Commissioner, VAT for rejecting the Petitioner's application under Section 36 A (2) of the DVAT Act. In fact, the Commissioner, VAT while discharging a quasi judicial function under Section 36A(2) of the DVAT Act is expected to act independently and not under instructions of the Department.

15. For all of the above reasons, the Court sets aside the impugned order dated 5th June 2015. The Commissioner, VAT is directed to decide the application filed by the Petitioner afresh in accordance with law and in light of the above observations of this Court. Considering that considerable time has elapsed since the making of the application and, as pointed out by learned counsel for the Petitioner the contract awarded by the NBCL is almost 80% complete, the Court directs that the Commissioner, VAT to decide the application afresh, without reference to the counter affidavit filed by the Department in the present petition, after hearing the Petitioner, not later than 30 days after receipt of a certified copy of this order. The fresh order of the Commissioner will be communicated to the Petitioner not later than one week thereafter.

16. The petition is disposed of in the above terms.

17. A copy of this order be given *dasti* under the signature of the Court Master.

S. MURALIDHAR, J

NAJMI WAZIRI, J

JULY 12, 2016
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