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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 10156/2015 & CM Nos. 25028 & 28227 of 2015

VAYAM TECHNOLOGIES LTD.

..... Petitioner

Through: Mr. Rajesh Jain and Mr. Virag
Tiwari, Advocates.

versus

COMMISSIONER OF TRADE & TAXES

..... Respondent

Through: Mr. Gautam Narayan, ASC with
Mr. R.A. Iyer, Advocate.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

26.05.2016

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Dr. S. Muralidhar, J.

1. The challenge in this petition is to system generated notices dated 19th June 2015, 17th July 2015, 17th August 2015, 19th August 2015 and 7th October 2015 issued to the Petitioner by Value Added Tax Officers (VATOs) of the Department of Trade & Taxes ('DT&T') of different Wards under Section 59 (2) of the Delhi Value Added Tax Act, 2004 (DVAT Act), uploaded on the DT&T's website.

2. During the pendency of this petition, 13 further system generated notices, each dated 16th November 2015 issued to the Petitioner were also uploaded on the website by the VATO of Ward-3.

3. The Court was informed during the hearing on 4th March 2016 by Mr. Gautam Narayan, learned Additional Standing counsel appearing for the

DT&T, that on 24th September 2015, the Commissioner of VAT had passed an order under Section 67 (2), 68 and 106 of the DVAT Act read with Section 9 of the Central Sales Tax Act, 1956 ('CST Act') to the effect that the Assistant Commissioner, Ward-206 who would exercise jurisdiction as far as the Petitioner is concerned and that this had to be read with the order dated 12th November 2013 issued by the Commissioner (VAT) *inter alia* delegating the powers of assessment and re-assessment under Section 32 of the DVAT Act to all officers not below the rank of the Assistant VATO. The Court recorded in para 6 of its order dated 4th March 2016 as under:

"6. Mr Narayan, ASC on instruction of Mr M. K. Aggarwal, Assistant Commissioner, states that all the notices issued to the Petitioner hereinbefore i.e. the notices which have been challenged in the present petition as well as the 13 notices dated 16th November 2015 referred to in civil miscellaneous application No. 28227/2015 should be treated as withdrawn by the DT&T. It is accordingly recorded. Mr Narayan states that Mr M. K. Aggarwal will now issue a fresh notice to the Petitioner under Section 59(2) of the DVAT Act."

4. At that stage Mr. Rajesh Jain, learned counsel appearing for the Petitioner, drew the attention of the Court to one of the grounds urged in petition on which he desired the Court to give a ruling. The said ground reads as under:

"A. Because the impugned notices u/s 59(2) are required to be struck down for being issued in the absence of rules being framed under the provisions of Section 102(2) (z) of the Act. Section 102(2)(z) empowers the Government to make rules laying down the conditions subject to which the Commissioner may require any dealer or any other person to produce before him such record, books of accounts, registers and other documents and answer such queries and furnish such additional information sought by the Commissioner. In the case of *Sreenath Travel Agency & Am. Vs. Lt. Governor of Delhi & Ors.* reported as AIR 2004 Delhi 1, impounding of the vehicle

done u/s 207 of the Motor Vehicles Act, 1988 was set aside by this Hon'ble Court because no rules had been framed under the Act laying down the manner in which the vehicles would be impounded. Reliance is also placed upon the judgment of the Hon'ble Bombay High Court in the case of *Garware Shipping Corporation Ltd. & P.R. Sawant Vs. J.H. Joglekar, Addl, Collector of Customs* reported as 1984 (15) ELT 375. There also, confiscation of the ship carrying smuggled goods was set aside when no rules were framed by the Government for precaution required to be taken U/S 115(2) of the Customs Act, 1962 (Annexure P10). The word 'prescribed' has been defined U/S 2(y) of the Act which means prescribed by the rules made under the Act. Had the conditions been prescribed under the Rules, there would not have been much difficulty in avoiding the situation in which the matter stands landed up today."

5. Mr. Jain pointed out that no rule had been framed under Section 102 (2) (z) of the DVAT Act in regard to the exercise of the power under Section 59 (2) thereof. According to Mr. Jain, in the absence of such a Rule, a 'dealer' registered under the DVAT Act cannot be called upon by the Commissioner or other officer mentioned in Section 59 (2) of the DVAT Act, to produce records, books of accounts etc.

6. At that stage, Mr. Narayan referred to the decision of this Court in ***The Commissioner, VAT v. A.K. Woollen Industries*** (order dated 19th February 2015 in Sales Tax Appeal No. 65 of 2014) and submitted that absence of such a rule will not preclude the exercise of the powers under Section 59 (2) of the DVAT Act. The Court then adjourned the case to enable learned counsel for the Respondent to examine the issue and for the learned counsel for the Appellant to examine whether Rules of a similar nature had been framed in the VAT statutes of other States.

7. Mr. Jain has since placed on record his written submissions enclosing the details of the statutes in other States. Mr. Jain points out that in at

least 10 VAT statutes, there exists a similar provision enabling the Commissioner to call for production of records subject to such conditions "as may be prescribed". In these 10 States, Rules have been framed in terms of the said provision. A tabulation of such State Acts and the corresponding Rules in the said States are set out as under:

S.No.	State VAT Act	Section	VAT Rules	Rule
1.	Assam VAT Act 2003	74 (1)	Assam VAT Rules 2005	40
2.	Bihar VAT Act 2005	56 (1)	Bihar VAT Rules 2005	35
3.	Gujarat VAT Act 2003	67 (1)	Gujarat VAT Rules 2006	48 (notice in form 401)
4.	J&K VAT Act 2005	66 (1)	J&K VAT Rules, 2005	66
5.	Jharkhand VAT Act 2005	70 (1)	Jharkhand VAT Rules 2006	39
6.	Maharashtra VAT Act 2002	64 (1)	Maharashtra VAT Rules 2005	70 (notice in form 603)
7.	Manipur VAT Act, 2004	64 (1)	Manipur VAT Rules, 2005	41
8.	Odisha VAT Act 2004	73 (1)	Odisha VAT Rules 2005	75
9.	Tripura VAT Act 2004	59 (1)	Tripura VAT Rules 2005	44
10.	West Bengal VAT Act 2003	66 (1)	West Bengal VAT Rules 2005	94

8. In the VAT statutes of 12 other States, the expression "subject to such conditions as may be prescribed" does not follow the words conferring the power to call for records. The following tabular column gives the names of the 12 statutes and the corresponding provision:

S.No.	State Act	Section
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1.	Uttarakhand VAT Act, 2005	42 (1)
2.	UP VAT Act, 2008	45 (1)
3.	Tamil Nadu VAT Act, 2006	65 (1)
4.	Sikkim VAT Act, 2005	62
5.	Puducherry VAT Act, 2007	55 (1)
6.	Nagaland VAT Act, 2005	64 (1) (b)
7.	Meghalaya VAT Act, 2003	84 (5)
8.	Madhya Pradesh VAT Act, 2002	63 (1)
9.	Kerala VAT Act, 2003	44 (1)
10.	Karnataka VAT Act, 2003	52 (1)
11.	Himachal Pradesh VAT Act, 2005	32 (1)
12.	Haryana VAT Act, 2003	29 (1)

9. Mr. Jain further points out that there were other provisions of the DVAT Act, for e.g., Sections 5 (2), 6 (2), 8 (1), 9 (1) , 14 (2) , 59 (2), 68 (1) and 92 (1), which used the words ‘subject to such conditions as may be prescribed’ and the DVAT Rules contains provisions in respect of each of the above provisions of the DVAT Act. However, it is only in respect of Sections 59 (2) of the DVAT Act that no rules have been framed despite Section 102 (2) (z) of the DVAT Act providing for it. Relying on the decision of the Supreme Court in **Dr. Subramanian Swamy v. State of Tamil Nadu (2014) 5 SCC 75**, Mr. Jain submitted that in the absence of any rules being framed thereunder, the power under Section 59 (2) of the DVAT Act cannot be exercised. He further relied on the decisions in **Goa Central Cooperative Consumers v. Bhagwant Narayan Tendulkar (1998) 4 SCC 527** and

Telecom Employees Cooperative Housing Society Limited v. Scheduled Castes, Scheduled Tribes, Minority Communities & Backward Classes Improvement Centre ILR 1990 Kar 3320.

10. Mr. Jain submitted that there were numerous instances where the power under Section 59 (2) had been exercised by the VATOs indiscriminately, as an instrument of harassment. He illustratively referred to the following instances:

- “(a) to seal premises for non-production of books of accounts;
- (b) to make default notice of assessment of tax, interest and penalty, ignoring that Section 59 falls under Chapter X, whereas Section 32 and 33 for making assessments fall under Chapter VI of the Act;
- (c) to illegally deny/block the refund;
- (d) to block the downloading of forms under the Central Act; when no such provision exists under Rule 5 (4) of the Central Sales Tax (Delhi) Rules, 2005;
- (e) to seek explanation/reason for shortfall in the deposit of tax as compared to the earlier years;
- (f) to reopen the concluded assessments on multiple occasions;
- (g) to mop up maximum amount of penalty by issuing multiple notices in a tax period/financial year, as each offence, if committed, would attract penalty of Rs. 50,000 under Section 86 (14) of the Act.”

11. Mr. Jain also referred to Form 401 corresponding to Sections 67, 70 or 70A of the Gujarat Value Added Tax Act, 2003 which requires the applicant to produce before the Assessing Officer (‘AO’) documents the description of which is given therein. Likewise he also referred to the requirement of a separate notice under Rule 75 (1) of the Gujarat VAT Rules 2006 for production of accounts etc. He also referred to Form VAT 401 issued under Rule 75 (1) of the Odisha VAT Rules 2005 and Form 603 under Rule 70 of the Maharashtra VAT Rules 2005.

12. Countering the above submissions Mr. Narayan referred to the decision in *Orissa State (Prevention & Control of Pollution) Board v. Orient Paper Mills (2003) 10 SCC 421*. According to him, the failure to frame a Rule would not invalidate the exercise of the statutory power. According to him, there were sufficient guidelines under Section 59 (2) of the DVAT Act to prevent its misuse. He submitted that apart from the fact that the decision of this Court in *The Commissioner, VAT v. A.K. Woollen Industries (supra)* was against the Assessee on this point, the Court in the said decision reiterated the settled legal position as explained in *Gannon Dunkerley and Co. v. State of Rajasthan 1993 (88) STC 204*, *Sudhir Chandra Nawn v. Wealth Tax Officer, Calcutta 1968 (69) ITR 897 (SC)* and *Mahim Patram Pvt. Ltd. v. Union of India 2007 (6) VST 248*.

13. The above submissions have been considered. Section 59 of the DVAT Act reads as under:

“59. Inspection of records

(1) All records, books of accounts, registers and other documents, maintained by dealer, transporter or operator of a warehouse shall, at all reasonable times, be open inspection by the Commissioner.

(2) The Commissioner may, for the proper administration of this Act and subject to such conditions as may be prescribed, require –

(a) any dealer; or

(b) any other person, including a banking company, post office, a person who transports goods or holds goods in custody for delivery to, or on behalf of any dealer, who maintains or has in his possession any books of accounts, registers or documents relating to the business of a dealer, and, in the case of a person which is an organisation, any officer thereof; to

(i) produce before him such records, books of account, registers and other documents;

(ii) answer such questions; and

(iii) prepare and furnish such additional information;

relating to his activities or to the activities of any other person as the Commissioner may deem necessary.

(3) The Commissioner may require a person referred to in sub-section (2) above, to

(a) prepare and provide any documents; and

(b) verify the answer to any question;

in the manner specified by him.

(4) The Commissioner may retain, remove, take copies or extracts, or cause copies or extracts to be made of the said records, books of account, registers and documents without fee by the person in whose custody the records, books of account, registers and documents are held.”

14. A plain reading of the above provision indicates that the Commissioner can exercise the powers under Section 59 (2) of the DVAT Act to call upon the dealer or any other person to produce records, books of accounts etc. for (i) the proper administration of the DVAT Act and (ii) subject to such conditions "as may be prescribed." The expression 'as may be prescribed' has to be interpreted as requiring Rules to be framed in the matter of inspection of production of records. In ***Dr. Subramanian Swamy v. State of Tamil Nadu*** (*supra*) the Supreme Court was interpreting Section 45 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 ('TNHRCE Act') which envisages the appointment of an Executive Officer ('EO') by the Commissioner HRCE, subject to such conditions as may be prescribed. In that context, the Supreme Court observed as under:

“60. Section 2(16) CPC defines the term "*prescribed*" as prescribed by the rules. Further, Section 2(18) CPC defines

rules as rules and forms as contained in the First Schedule or made under Section 122 or Section 125 CPC. Sections 122 and 125 CPC provide for power of the High Court to make rules with respect to its own functioning and procedure. Therefore, it appears that when the legislature uses the term "prescribed", it only refers to a power that has simultaneously been provided for or is deemed to have been provided and not otherwise. Similarly, Section 2(n) of the Consumer Protection Act, 1986 defines "prescribed" as "prescribed by rules made by the State Government or as the case may be, by the Central Government under the Act".

61. Section 45 of the 1959 Act provides for appointment of an Executive Officer, subject to such conditions as may be *prescribed*. The term "prescribed" has not been defined under the Act. Prescribed means prescribed by rules. If the word "prescribed" has not been defined specifically, the same would mean to be prescribed in accordance with law and not otherwise. Therefore, a particular power can be exercised only if a specific enacting law or statutory rules have been framed for that purpose. (See *Manohar Lal Chopra v. Seth Hiralal AIR 1962 SC 527*, *Hindustan Ideal Insurance Co. Ltd. v. LIC AIR 1963 SC 1083*, *Maharashtra SRTC v. Babu Goverdhan Regular Motor Service (1969) 2 SCC 746* and *BSNL v. BPL Mobile Cellular Ltd (2008) 13 SCC 597*)."

15.1 In *Goa Central Cooperative Consumers v. Bhagwant Narayan Tendulkar* (*supra*), the Supreme Court interpreted Section 45 of the Maharashtra Cooperative Societies Act, 1960 which provided that:

"45. Restrictions on other transactions with non-members – Save as is provided in this Act, the transaction of a society with persons other than members, shall be subject to such restrictions, if any, as may be prescribed."

15.2 In the above context, the Supreme Court observed as under:

"4. It appears that the transaction to come under Section 45 must be subject to such restriction as may be prescribed. Admittedly, no rule has been prescribed by which any restriction in respect of such transaction has been imposed. Therefore, Section 45 is also not attracted."

16.1 The third decision relied upon by Mr. Jain is ***Telecom Employees Cooperative Housing Society Limited*** (*supra*) where the Karnataka High Court was interpreting Section 38 of the Bangalore Development Authority Act, 1976 which stated that “subject to such restrictions, conditions and limitations as may be prescribed, the Authority shall have power to lease, sell or otherwise transfer any movable or immovable property which belongs to it, and to appropriate or apply any land vested in or acquired by it for the formation of open spaces or for building purposes or in any other manner for the purpose of any development scheme.”

16.2 In that context, the Karnataka High Court observed that the power under Section 38 is unavailable “unless those restrictions, conditions and limitations are prescribed” and concluded that “when power is made available, conditional upon prescription, the phrase ‘subject to’ in the context meaning only conditional upon, the exercise of power in the absence of such prescription is illegal.”

17. There is a clear distinction between the wording of the provisions considered in the above decisions, and Section 59 (2) of the DVAT Act. It is not as if there are no guidelines in Section 59 (2) of the DVAT Act to indicate under what circumstances the Commissioner may require production of books of accounts, records etc. Apart from the fact that the Commissioner has to exercise the power for 'the proper administration' of the DVAT Act, he has to make assure that what is being asked to be produced, in the form of books of accounts and other documents, are "related to the activities" of either the person to whom such notice is issued or any other person as the Commissioner may deem necessary.

The Commissioner has to decide what document should be asked to be produced. It is another matter that there have been instances of misuse of the powers. The Court has had to step in to correct such misuse. That by itself, however, does not make the provision bad in law.

18. It also does not mean that in the absence of a Rule, the power under Section 59 (2) is incapable of being exercised. It is in this context that the language used in Section 45 of TNHRCE Act or Section 45 of the Maharashtra Cooperative Societies Act, 1960 or Section 38 of the Bangalore Development Authority Act, 1976 became relevant. In each of the above instances, the language of the provision was such that the exercise of the power was dependent on the framing of the Rules. However, Section 59 (2) of the DVAT Act is so worded that it can be given effect to even in the absence of the rules.

19.1 In the above context, the decision of the Supreme Court in ***Orissa State (Prevention & Control of Pollution) Board v. Orient Paper Mills*** (*supra*) is relevant. The question that arose in the said decision was whether in the absence of any Rules framed under Section 19 of the Air (Prevention and Control of Pollution) Act, 1981 ('Air Act'), the power in terms of the said provision could be exercised. Section 19 (1) of the Air Act reads as under:

“19. Power to declare air pollution control areas – (1) The State Government may, after consultation with the State Board, by notification in the Official Gazette, declare (in such manner as may be prescribed), any area or areas within the State as air pollution control area or areas for the purposes of this Act.”

19.2 The Supreme Court first dealt with the expression ‘such manner as may be prescribed’ and distinguished the said expression from the expressions ‘in the manner prescribed’ or ‘in the prescribed manner’ used

in certain other statutes. It is then observed as under:

“In one of the cases decided by this Court, to be referred later in this judgment “as may be prescribed” has been held to mean “if any”. It is thus clear that such expression leaves the scope for some play for the workability of the provision under the law. The meaning of the word “as” takes colour in context with which it is used and the manner of its use as prefix or suffix etc. There is no rigidity about it and it may have the meaning of a situation of being in existence during a particular time or contingent, and so on and so forth. This is to say, something to happen in a manner, if such a manner is in being or exists, if it does not, it may not happen in that manner. Therefore, the reading of the provision under consideration makes it clear that manner of declaration is to be followed “as may be prescribed” i.e., “if any” prescribed.

13. Thus, in case manner is not prescribed under the rules, there is no obligation or requirement to follow any, except whatever the provision itself provides viz., Section 19 in the instant case which is also incomplete in itself even without any manner being prescribed as indicated shortly before to read the provision omitting this part “in such manner as may be prescribed”. Merely by absence of rules, the State would not be divested of its powers to notify in the Official Gazette any area declaring it to be an air pollution control area. In case, however, the rules have been framed prescribing the manner, undoubtedly, the declaration must be in accordance with such rules.”

19.3 The Supreme Court reiterated in para 15 that

“the power which vests in an authority would not cease to exist simply for the reason that the rules have not been framed or the manner of exercise of the power has not been prescribed. So far as Section 54 of the Act is concerned, it only enumerates the subjects on which the State Government is entitled to frame rules.”

19.4 The Court in that process referred to the decision of the Constitution Bench in *T. Cajee v. U. Jormanik Siem AIR 1961 SC 276* as well as decision in *Surinder Singh v. Central Government (1986) 4 SCC 667*. In the latter decision, the Supreme Court observed as under:

“Where a statute confers powers on an authority to do certain acts

or exercise power in respect of certain matters, subject to rules, the exercise of power conferred by the statute does not depend on the existence of rules under the statute expressly provides for the same. In other words framing of the rules is not condition precedent to the exercise of the power expressly and unconditionally conferred by the statute. The expression 'subject to the rules' only means, in accordance with the rules, if any. If rules are framed, the powers so conferred on authority could be exercised in accordance with these rules. But if no rules are framed there is no valid and the authority is not precluded from exercising the power conferred by the statute.

20. Therefore, in the present case the Court is unable to accept the submission of Mr. Jain that in the absence of any rules being framed under Section 102 (2) (z) read with Section 59 (2) of the DVAT Act, the power of the Commissioner under Section 59 (2) of the DVAT Act to call upon a person to produce the books of accounts and other documents cannot be exercised.

21. In that view of the matter, the Court concurs with the view expressed by the co-ordinate Bench of this Court in ***The Commissioner, VAT v. A.K. Woollen Industries*** (*supra*).

22. Mr. Jain earnestly pleaded that a direction should be issued to the Respondent to frame rules in exercise of the power under Section 102 (2) (z) of the DVAT Act.

23. There are a few limitations on the scope of the powers of this Court under Article 226 of the Constitution. One such limitation is the inability to issue a *mandamus* to the Respondent/Executive to frame a rule in respect of any particular topic or issue and in a specific manner. That is the prerogative of the Executive.

24. However, that does not preclude the Petitioner, along with other

dealers, to make a representation to the Government of NCT of Delhi and in particular to the DT&T that Rules in terms of Section 102 (2) (z) read with Section 59 (2) of the DVAT Act should be framed. They can draw the attention of the GNCTD to the provisions in the ten other states which have VAT statutes. If such representation is made, the Court has no doubt that it will receive adequate and serious consideration in the hands of GNCTD and specifically, the DT&T, particularly since such a rule will serve the salutary purpose of guiding the officers in the exercise of their powers and serve to also act as a check on the possible abuse of powers.

25. No other directions are called for. The writ petition and pending applications are disposed of in the above terms.

S.MURALIDHAR, J

VIBHU BAKHRU, J

MAY 26, 2016

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