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IN THE HIGH COURT OF DELHI AT NEW DELHI

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WP (C) 2282/2017

GARG ROADLINES

..... Petitioner

Through: Mr. Ruchir Bhatia, Advocate.

versus

COMMISSIONER, TRADE & TAXES

..... Respondent

Through: Mr. Peeyoosh Kalra, Advocate.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE NAJMI WAZIRI

ORDER

12.04.2017

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1. This writ petition by the Petitioner, Garg Roadlines, an authorized agent of Bharat Petroleum Corporation Limited ('BPCL'), and registered with the Department of Trade and Taxes ('DT&T') challenges the undated and unsigned notice No. F.CD:105350157/Ward 63 posted at the Web ID of the Petitioner for "revision under Section 74 (A) of the orders of the learned Special Commissioner-II/OHA" requiring the Petitioner to appear before the Respondent, Commissioner, Trade & Taxes on 28th February 2017 at 11.30 am.

2. Background to the present petition is that sales of petroleum products and lubricants made by the Petitioner in Delhi include sales in the course of inter-State trade and commerce. It was stated that after tax adjustments, the Petitioner had excess of input tax credit for the tax period and therefore, was

entitled for refund. It is stated that the Petitioner claimed refund in the return filed in July 2010. For the period since then till March 2012, according to the Petitioner, a aggregate refund of Rs. 4,06,24,323 was due to the Petitioner. It is stated that instead of granting the refund due to the Petitioner for the month of July 2010 the Value Added Tax Officer ('VATO') framed a default assessment of tax, interest and penalty under Sections 32 and 33 of the Delhi Value Added Tax Act, 2004 ('DVAT Act'). The Petitioner then filed objections under Section 74 of the DVAT Act before the Objection Hearing Authority ('OHA').

3. By an order dated 14th October 2016 Special Commissioner-II/OHA upheld the objections and set aside the impugned order of the Value Added Tax Officer ('VATO'). Paras 8 and 9 of the said order, which set out the entire context in which the objections of the Petitioner were sustained read as under:

"8. I have gone through the records and documents placed on the file and have heard the both Shri Goel, the learned counsel of the objector as well as Shri Vikas Gupta, the DR in the matter at length. During hearing of the case, comments of the Ward In-charge with regard to the default assessment framed was also sought who in his written submission supported the impugned order on the ground that it is nowhere mentioned that the dealer can make inter-state sales in the licence/agreement dated 31st March 2005 signed between BPCL and the Objector. After hearing the argument of learned counsel and DR and taking into account the facts and the circumstances of the case, it is observed, in the present case that the assessment was framed by rejecting inter-state sales only on the basis of a clarification sought by the then learned AA from BPCL wherein it is mentioned that the dealer is authorized to sale MS/HSD to all customers coming to RO premises for purchase of the same through Nozzle. Apart from that it is also observed that the objector is legitimately fulfilled all the

conditions laid down in the Act to effect interstate sales. Further, on perusal of the contents of the letter of the Territorial Manager, BPCL it seemed that he has not categorically denied the specific query of learned AA who sought clarification that “whether the dealer is allowed to make inter-state sale, i.e., to register dealer of other states Haryana, Punjab, Himachal Pradesh etc.” It is just responded that “the dealer is authorized to sale MS/HSD to all customers coming to RO premises for purchase of the same through Nozzle.” I am of the view that the learned AA is failed to take up the issue further with the authorities of BPCL to clarify the ambiguity on the issue in question as the same was not clarified specifically from BPCL. With regard to this, the learned counsel for the Objector has raised a valid point that it is nowhere mentioned in the letter that the Objector cannot make inter-state sale. The Objector can make sale only through Nozzle which condition the Objector legitimately fulfilled as all sales effected from the RO premises through the Nozzle. It is irrelevant to question whether the objector can make interstate sale or in absence of any prohibition by law.

9. Further, during hearing the case, it is established that the objector has in possession of all the records and also he had furnished the statutory declarations in Form C along with evidence for dispatch of goods. Therefore, I am of the considered view that even if the agreement between M/s. Garg Roadlines and BPCL is prohibiting him to effect central sales, without having any specific reason or prohibition by CST Act or Rules, legitimate transactions of the dealer duly supported with relevant records/documents cannot be denied. Therefore, the impugned order passed by the learned AA cannot be upheld and liable to be set aside. Accordingly, the objection is accepted and the impugned order is set aside. Further, in the interest of justice, the Objector is given one more opportunity to appear before the learned Assessing Authority and to produce the relevant documents in support of his refund claimed. The learned AA is directed to consider the refund claim of the Objector afresh after giving reasonable opportunity of the dealer to be confronted with proper examination of the evidentiary documents/records produced or required to be produced as per rule and facts of the case.”

4. The matter should have normally come to an end with the above order dated 14th October 2016 and the Petitioner ought to have been issued the refund. In this context, it requires to be noticed that Section 38 of the DVAT Act provides that in the case of a monthly return, refund is to be allowed within one month from the date of filing the return and in any other case the refund is to be allowed within two months from the date of filing the return. In the present case under Section 38 (3) (i) of the DVAT Act, refund had to be issued within one month from the date of furnishing of the return by the Petitioner. This obviously was not done. Additionally as pointed out by the Petitioner, Section 38 (4) was not attracted since no notice of audit under Section 58 of the DVAT Act was issued nor any additional information sought under Section 59 of DVAT Act. Section 38 (5) of DVAT Act was also not attracted since no security as condition for issuance of refund was demanded within fifteen days from the date of furnishing the return. In other words there was absolute no impediment for the passing of the refund order. The delay in granting refund has resulted in the Petitioner being entitled to receive interest in terms of Section 42 of the DVAT Act.

5. In several judgments, this Court has explained the law in relation to refund under the DVAT Act. Illustratively the decisions in ***Ingram Micro India Pvt Ltd v. Commissioner, Department of Trade & Taxes (2016) 89 VST 312 (Del)***, ***Prima Papers & Packers v. Commissioner of VAT (2016) 94 VST 347***, ***Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax (2010) 31 VST 475 (Del)*** and ***Vizien Organics v. Commissioner, Trade & Taxes*** [decision dated 19th January 2017 in W.P. (Civil) 10701 of 2016] may be referred to. The legal position has been

clarified by the Commissioner, DVAT in Circular No. 6 dated 15th June 2005, the relevant extract of which reads as under:

“The ward VATO’s shall scrutinize the correctness of the amount of the cash refund claimed and shall pass the refund order in DVAT-22 within a period of 15 days from the date of receipt of the return in the Front Office without fail, unless the return of the dealer has been picked for seeking additional information or audit and in such cases, intimation shall be given by the Audit Wing of the Department/the designated VAT authority of the wing/VATO concerned in Audit wing to the concerned VATO in the Operation Wing within 10 days from the receipt of the return in the Front Office. The DVAT-22 books shall be supplied to each ward by the Caretaking Branch Ward VATO shall issue the refund order in DVAT-22 in triplicate without any cutting or overwriting – one copy shall be sent to the claimant dealer under registered post, one copy shall be sent to VATO (Refund) in the Collection Branch, who shall complete data of refund orders received from different wards in a floppy on daily basis for onward transmission to RBI and the third copy shall be retained by the ward VATO. In case the amount lesser than the amount of refund claimed by the dealer is allowed by the VATO in Operation Wing as refund payable for the reasons other than the reason of set off/adjustment, a covering letter shall be attached with the dealers copy of DVAT-22 explaining the reasons of such reduction and the covering letter as well as dealers copy of DVAT-22 shall be sent to the dealer.”

6. With there being utter laxity on the part of the DT&T in processing the Petitioner’s claim for refund, the Petitioner filed Writ Petition (Civil) No.1541 of 2017 in this Court. On 20th February 2017 the following order was passed:

“WP (C) 1541/2017

Issue notice to the Respondents. Mr. Anuj Aggarwal, Advocate accepts notice for the Respondents.

It is stated by learned counsel for the Respondents that they will

obtain instructions and in case the amounts are not refunded, the Respondents shall indicate by what dates the Petitioner would be refunded the amounts – through tabular chart.

The Respondents are directed to process the Petitioner's case for refund and ensure that the amounts are paid before the next date of hearing.

List on 22nd March 2017.”

7. In the meanwhile, the Petitioner noted that on its Web ID the impugned unsigned and undated notice proposing the revision of the order of OHA under Section 74A of the DVAT Act was uploaded. The said notice reads as under:

“Whereas, your case has been referred to this office for considering it for Revision under Section 74 (A) of the Orders of learned Special Commissioner-II/OHA.

In this regard, I am directed to inform that your case has been fixed for hearing on 28th February 2017 at 11.30 AM. You are hereby directed to appear in person or through authorized representative in respect of your claim along with the following documents:

1. Purpose for which the items are being purchased by the purchasing dealer.
2. Nature of business of the purchasing orders.
3. If purchasing dealer is manufacturer, list of items manufactured or items dealt by him.”

8. The present petition was thereafter filed on 7th March 2017 and came up for first hearing on 10th March 2017. The Court directed by its order dated 10th March 2017 that “on the next date of hearing, all original documents pertaining to the impugned notice along with relevant documents shall be produced in Court.” It was further directed that “no further proceedings shall

be conducted in relation to the impugned notice (Annexure P-1) till the next date of hearing.”

9. Meanwhile, on 22nd March 2017 Writ Petition (Civil) No. 1541 of 2017 was heard. The Court passed the following order in which it took note of the fact of the pendency of the present writ petition:

“The Petitioner has claimed a refund of Rs. 4,06,24,323 along with interest towards excess VAT amount paid by it for various periods. The Respondents were directed on 20th February 2017 to process the Petitioner’s application and make necessary orders; they were also directed to ensure that the amounts were remitted. It is informed by the Respondents, i.e., DVAT Department that on 17th February 2017 a notice was issued under Section 74A of the DVAT Act proposing to revise an order. Though the notice is unclear as to which period is involved, the details of the proposal, as contained in the file produced in Court by the Respondents, clarify that it is in respect of the refund claimed for Rs. 12,55,471 for the second quarter of AY 2010-11. The file further reports that the query which has led to the notice, i.e., “whether the dealer is allowed to make inter-state sale, i.e., to registered dealers of other States Haryana, Punjab and Himachal Pradesh, and the fact that the Assessing Authority failed to take the issue further with authorities of BPCL to clarify the ambiguity”.

It is stated by the counsel for the Respondents that another writ petition, i.e., WP (C) 2282 of 2017 was preferred by the present Petitioner, in which, on 10th March 2017, the show cause notice dated 17th February 2017 and further proceedings emanating therefrom have been stayed. That writ petition is now listed on 12th April 2017.

It is quite evident from the above discussion that only impediment which the Revenue/DVAT has put forward to withhold the Petitioner’s claim for the larger sum of over Rs. 4 crores is the fresh show cause notice under Section 74A issued on 17th February 2017. Considering the circumstances, this Court is of the opinion that the Respondents should, while processing the Petitioner’s claim for refund of Rs. 4 crores, keep aside the amount of Rs. 12,55,471, which is proposed to be adjudicated through the show cause notice

impugned in WP (C) 2282 of 2017. It is ordered accordingly. Needless to add, interest for the balance – (Rs. 4.06 crore – Rs. 12,55,471), payable to the Petitioner excluding interest for the withheld, shall be calculated and paid to the Petitioner. The Respondents shall comply with this direction within three weeks from today.

The petition is accordingly disposed off.

A copy of this order be given *dasti* to parties under the signatures of the Court Master.”

10. In the counter-affidavit filed on behalf of the Respondent, it is stated that the Territory Manager, BPCL by letter dated 2nd June 2014 informed the DT&T that the Petitioner was authorized to sell MS/HSD “to all the customers coming to the retail outlet premises for purchase of the same through nozzle”. It is then stated that the Petitioner had failed to produce any other documents/written permission issued by BPCL permitting it to make interstate sale of MS/HSD. Accordingly, the Assessing Authority (‘AA’) had by its order dated 18th January 2016 rejected the interstate sale shown and treated it as local sale and taxed it accordingly. According to DT&T, the sale of the product has to be from the nozzle installed at the petrol pump and therefore, the Petitioner was authorized to conduct only 'business to consumers' sale and not 'business to business' sale. Since there was no movement of goods from one State to another, to bring it within the ambit of inter-state sale as contemplated by Section 3 of the Central Sales Tax Act, 1956 ('CST Act'), the VATO decided to treat such inter-state sales as local sales.

11. The Respondent however acknowledges that the OHA by the order

dated 14th October 2016 has set aside the above default assessment order. No attempt has been made by the Respondent to point out what it found objectionable in the order of the OHA that warranted the exercise of revisionary powers of the Commissioner under Section 74 A of the DVAT Act.

12. The Court has, therefore, perused the original file to ascertain the reasons that weighed with the Commissioner for deciding to exercise the revisionary power under Section 74A of the DVAT Act. In the main file, there is a note that is undated and unsigned and titled 'Revision of orders of M/s. Garg Roadlines.' It traces out the history of the case including the fact of all C Forms and GRs were verified from the concerned states and transporters and found to be genuine. It also notes that the OHA observed that since the Objector has in his possession all the records including C forms and the proof of dispatch of goods, transactions of the dealer cannot be denied. It also notes that the OHA observed that "even if the agreement between BPCL and Garg Roadlines prohibited him from effecting central sales, without having any specific reason or prohibition by CST Act or Rules, legitimate transaction of the dealer duly supported with relevant records/documents cannot be denied." The note ends with the following paragraph:

"The case of revision arises because of the reply of the HPCL, i.e., which says that M/s. Garg Roadlines is authorized to sale MS/HSD to all the customers coming to the RO premises for purchase of the same through Nozzle. Although there is no dispute that the sale is interstate sale."

13. The above note which was supposed to be considered by the

Commissioner is not referred to in the noting part of the file. The noting part is from pages 1/N up to 14/N. What is relevant for the present purpose is that from pages 1/N to 13/N, the notings speak of the claim for refund. Page 13/N is exclusively on the subject 'refund of July 2010'. In the said note prepared by Mr. Jitendra Kumar, AC, Ward-63 it is *inter alia* noted that "in compliance with the order of the OHA dated 14th October 2006 the fresh order dated 16th November 2016 has been passed by the Assessing Authority thus reducing the demand to NIL." It ends by stating that "in view of the above the case regarding refund of Rs. 12,55,572 for II quarter 2010-11 in respect of M/s. Garg Roadlines (TIN No. 07170291427) is submitted for consideration please." The next page, i.e., 14/N contains the note of the Joint Commissioner (Zone-VI), Anand Kumar Tiwari, dated 21st December 2016. The Joint Commissioner sets out the finding of the OHA and in particular finding that "nowhere in the letter of the Manager, BPCL it is mentioned that the Objector cannot make inter-state sale." Following this, it is noted:

"In the absence of categorical clarification by the BPCL whether inter-state sales can be made by the dealer and also the fact that petrol pumps are licensed to make **retail sale from their outlets**, it is not very clear whether sales of this nature can be effected by the said dealer. It is also likely to give rise to tax loss to the exporting state. It is, therefore, requested that Commissioner (VAT) may invoke the provisions of Revision under Section 74A of the DVAT Act, 2004 for revision of the impugned order of OHA."

14. The above note of the Joint Commissioner is shown as having been placed before the Commissioner, VAT. However, but there is no signature or endorsement of the Commissioner, VAT acknowledging that he has seen and has agreed with the note. In other words, there is nothing to indicate that the Commissioner, VAT took a conscious decision that the revisionary

power under Section 74A should be invoked. What the notings portion of the file next contains are the order sheets in the revision proceedings. This begins with an order dated 17th February 2017 signed by the Commissioner, VAT which simply states:

“The matter of M/s. Garg Roadlines has been received from Joint Commissioner (Zone-VI) for invoking the provisions of revision under Section 74(A) of DVAT Act, 2004 for revision of impugned order of OHA.

Issue notice to M/s. Garg Roadlines and BPCL for 28th February 2017.”

15. Apart from the fact that there are no reasons penned by the Commissioner, VAT on the file justifying the invocation of the revisionary power under Section 74A of the DVAT Act, the above unsigned note titled ‘Revision of orders of M/s. Garg Roadlines’, which forms part of the main file is not even referred to. Even the note prepared by the Joint Commissioner (JC) (Zone-VI) makes no reference to the said note. It gives no justifiable reason for invoking the revisionary power under Section 74 A of the DVAT Act. Even the reasons why the order of the OHA is unacceptable to the DT&T are absent. As noticed earlier, the impugned notice (undated and unsigned) uploaded on the Petitioner's web id proposing the exercise of the revisionary power under Section 74 A DVAT Act is equally vague and without any reasons.

16. There is also no application of mind to the consequences of the decision to invoke the revisionary power under Section 74 A DVAT Act. go in for revision. For instance, the note by the JC fails to note that under Section 38 of the DVAT Act the Department was bound to process the refund

application, which in this case was pending since July 2010, within one month from the date of the filing of the return. It further failed to note that interest had payable under Section 42 of the DVAT Act had by this time grown to a substantial sum by now. The exercise of the power under Section 74 A of the DVAT at this stage would entail an additional burden on the exchequer in the event the attempt was not successful.

17. The power under Section 74A of the DVAT Act is not to be exercised slightly. It is a power coupled with the duty to act responsibly and by the competent authority applying mind to the relevant facts and circumstances of the case. The notes on file proposing the exercise of power under Section 74A of the DVAT Act in this case do not satisfy this basic requirement. In the present case the undated and unsigned notice proposing the exercise of the revisionary jurisdiction was at best vague. It did not satisfy the basic requirement of the law, as explained in ***Commissioner of Central Excise, Bangalore v. Brindavan Beverages (P) Limited 2007 (213) ELT 487 (SC)***, viz., that the grounds should be clearly specified. In other words, “if the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice.”

18. Why this exercise was sought to be undertaken at a stage when the refund was overdue, is not even adverted to. It appears to the Court that apart from the fact that there was a total non-application of mind to the facts of the case, there is sufficient indication from the notes on files that the

invocation of the revisionary powers under Section 74A of the DVAT Act was to delay making the refund which was overdue for over six years. The Court is left no manner of doubt is that this was plainly an abuse of power vested in the Commissioner which calls for disapproval in strongest terms.

19. The Court accordingly sets aside the undated and unsigned notice of the Commissioner, VAT uploaded upholding on the Petitioner's Web ID proposing the invocation of the powers under Section 74A of the DVAT Act to revise the order dated 14th October 2016 of the OHA. Consequently, all the further proceedings undertaken by the Commissioner, VAT by way of revision under Section 74A of the DVAT Act pursuant to the said undated notice also hereby stand quashed.

20. A direction is issued to the Commissioner, VAT to ensure that the refund due to the Petitioner in relation to the monthly returns filed in July 2010 together with the interest accrued thereon is disbursed/paid into the account of the Petitioner not later than 8th May 2017. The DT&T shall also pay costs of Rs. 20,000 to the Petitioner within the same period.

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

S.MURALIDHAR, J

NAJMI WAZIRI, J

APRIL 12, 2017

Rm