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

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W.P.(C) 3424/2017

Date of decision: 2nd November, 2017

IJM CORPORATION BERHAD

..... Petitioner

Through : Mr. Rajesh Jain, Mr. Virag Tiwari,
Ms.Aastha Gandhi, Mr.V.K. Jain, Advocates.

versus

COMMISSIONER OF TRADE & TAXES

..... Respondent

Through : Mr. Satyakam, ASC for
GNCTD with Ms.Trisha, LA, DTT,
GNCTD.

WITH

W.P.(C) 4561/2017

M.V.OMNI PROJECTS (INDIA) LTD.

..... Petitioner

Through : Mr. Rajesh Jain, Mr. Virag
Tiwari, Ms.Aastha Gandhi, Mr.V.K. Jain,
Advocates.

versus

COMMISSIONER OF TRADE & TAXES

..... Respondent

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

WITH

W.P.(C) 5792/2017

DAIMLER FINANCIAL SERVICES (P) LTD.

..... Petitioner

Through : Mr. Rajesh Jain, Mr. Virag Tiwari,
Ms.Aastha Gandhi, Mr.V.K. Jain, Advocates.

versus

COMMISSIONER OF TRADE & TAXES Respondent
Through : Mr. Satyakam, ASC for GNCTD with
Ms.Trisha, LA, DTT, GNCTD.

WITH

W.P.(C) 6059/2017

FEMC- PRATIBHA JOINT VENTURE Petitioner
Through : Mr. Rajesh Jain, Mr. Virag
Tiwari, Ms.Aastha Gandhi, Mr.V.K. Jain,
Advocates.

versus

COMMISSIONER OF TRADE & TAXES Respondent
Through : Mr. Satyakam, ASC for
GNCTD with Ms.Trisha, LA, DTT,
GNCTD.

AND

W.P.(C) 6068/2017

FEMC- PRATIBHA JOINT VENTURE Petitioner
Through : Mr. Rajesh Jain, Mr. Virag
Tiwari, Ms.Aastha Gandhi, Mr.V.K. Jain,
Advocates.

versus

COMMISSIINER OF TRADE & TAXES Respondent
Through : Mr. Satyakam, ASC for GNCTD with
Ms.Trisha, LA, DTT, GNCTD.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MS. JUSTICE PRATHIBA M. SINGH

SANJIV KHANNA, J. (ORAL):

The short question raised in these writ petitions relates to the starting point for computation of interest payable on refunds under Section 42(1)(a) of the Delhi Value Added Tax, 2004 ('Act' for short).

2. With the consent of learned counsels for the parties, we have treated W.P.(C) 3424/2017 filed by IJM Corporation Berhad as the lead case. We also record that we are not dealing with the factual matrix and would be disposing of and deciding the question of law by interpreting the provisions relating to refund in the Act. Adjudicating Authorities would thereafter apply the ratio to the factual matrix and decide the issue i.e. the date from which interest is payable.

3. Initially learned counsel for respondent had raised a preliminary objection on the maintainability of the writ petition in view of the alternative remedy, which was contested by the learned counsel for the petitioner. The said contention, however, was later not pressed by the learned counsel for the respondent with the clarification that the respondent would be entitled to raise the said contention in another case, if required and necessary.

4. IJM Corporation Berhad had filed its VAT Return under form DVAT 16 for the month of March, 2012 on 23rd April, 2012 claiming refund of Value Added Tax ('VAT'/Tax) of Rs.6,38,38,297/-. The petitioner states and claims that interest is due and payable from the date of filing of the Return i.e. 23rd April, 2012 till 3rd October, 2016 when the refund of Rs.6,38,38,297/- was issued.

5. The case of the respondent authorities is that the petitioner/ IJM Corporation Berhad would be entitled to refund in terms of Section 42(1)(a) of the Act after a period of one or two months, as the case may be, from the date of filing of the Return and not from the date of filing of the return.

6. In other words, the issue raised and to be decided is whether interest under Section 42 read with other provisions of the Act, is due and payable to the petitioner/assessee in case of refund from the date of filing of the Return or after the period specified for processing of the refund/returns in terms of clause (a) to sub-Section (3) to Section 38 of the Act.

7. In order to appreciate the controversy and answer the contentions, we would like to reproduce Section 38 which relates to refunds and Section 42 of the Act which relates to interest payment. Section 38 of the Act reads:-

“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 CST 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 tax 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 sub- section (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 sub-section (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 sub-section (3) of this section, no refund shall be allowed to a dealer who has not filed any return due under this Act.”

Section 42 of the Act reads:-

“42. Interest

(1) A person entitled to a refund under this Act, shall be entitled to receive, in addition to the refund, simple interest at the annual rate notified by the Government from time to time, computed on a daily basis from the later of –

(a) the date that the refund was due to be paid to the person; or

(b) the date that the overpaid amount was paid by the person, until the date on which the refund is given.

PROVIDED that the interest shall be calculated on the amount of refund due after deducting therefrom any tax, interest, penalty or any other dues under this Act, or under the Central Sales Tax Act, 1956 (74 of 1956):

PROVIDED FURTHER that if the amount

of such refund is enhanced or reduced, as the case may be, such interest shall be enhanced or reduced accordingly.

Explanation.- If the delay in granting the refund is attributable to the said person, whether wholly or in part, the period of the delay attributable to him shall be excluded from the period for which the interest is payable.

(2) When a person is in default in making the payment of any tax, penalty or other amount due under this Act, he shall, in addition to the amount assessed, be liable to pay simple interest on such amount at the annual rate notified by the Government from time to time, computed on a daily basis, from the date of such default for so long as he continues to make default in the payment of the said amount.

(3) Where the amount of tax including any penalty due is wholly reduced, the amount of interest, if any, paid shall be refunded, or if such amount is varied, the interest due shall be calculated accordingly.

(4) Where the collection of any amount is stayed by the order of the Appellate Tribunal or any court or any other authority and the order is subsequently vacated, interest shall be payable for any period during which such order remained in operation.

(5) The interest payable by a person under this Act may be collected as tax due under this Act and shall be due and payable once

the obligation to pay interest has arisen.”

8. Sub-Section (1) to Section 38 stipulates that the Commissioner shall refund the amount of tax, penalty, and interest, if any, paid in excess of the amount due from him. Sub-Section (2) empowers the Commissioner to first apply such excess or refund towards recovery of any other amount due under the Act or under the Central Sales Tax Act. Sub-Section (3) is subject to sub-Sections (4) and (5) of Section 38 and provides in clause (i) that the refund payable after adjustment, if any, under sub-Section (2) shall be paid within one month from the date on which the Return was furnished, if the tax period is one month. As per clause (ii) when the tax period is quarterly, refund would be issued within two months after the date on which the Return is furnished or the claim for refund is made. We are not concerned in the present case with clause (b) to sub-Section (3) to Section 38 of the Act.

9. For clarity and understanding, we record that the expression ‘tax period’ has been defined in Section 2(zi) of the Act to mean the period prescribed under the Rules. Rule 26 of the Delhi Value Added Tax Rules, 2005 (‘Rules’ in short) prescribes the ‘tax period’ which in some cases, it is pointed out, could be one month and in other cases, the period prescribed is quarter of a year. Thus, clause (i) and (ii) of sub-section 3 to Section 38 of the Act, refer to and mandate refund within one month or two months when tax period is monthly or quarterly, as the case may be.

10. Sub-section (4) to Section 38 authorizes and empowers the Commissioner to issue notice to an assessee as per the provisions of Section 58 of the Act, advising him that audit, investigation or inquiry into his business affairs will be undertaken. In such an event, the amount is to be carried forward to the next tax period as a tax credit in that period. The Commissioner is also entitled to seek additional information under Section 59 of the Act. In the context of the present writ petitions, we have merely adverted to the provisions of sub-section (4) to Section 38, for in these cases, audit or investigations has not been invoked. Sub-section (4) may have its nuances and would have to be considered for interpretation in an appropriate case.

11. Sub-section (5) relates to the power of the Commissioner to demand security from an assessee as a condition for payment of refund within 15 days from the date return is furnished or claim for refund is made. Sub-section (6) states that the Commissioner would grant refund within 15 days from the date the dealer/assessee furnishes security to his satisfaction.

12. Sub-section (7) to Section 38 provide for exclusion of certain period prescribed under clause (a) to sub-section (3). These are:-

The time taken to furnish-

- (i) Security under sub-section (5) to the satisfaction of the Commissioner.
- (ii) The additional information sought under Section 59.

(iii) Returns under Sections 26 and 27.

(iv) Declaration or certificate forms as required under the Central Sale Tax Act, 1956.

Section 26 of the Act refers to periodical furnishing of returns by every registered dealer i.e. the assessee to the Commissioner for each tax period and by such dates as may be prescribed in the prescribed form and manner. Perhaps reference is made to Section 26 in sub-section (7) to Section 38 of the Act, for an assessee/dealer can claim refund vide Form DVAT-21 as prescribed by Rule 34 of the Rules. In clause (d) to sub-section (7) exclusion of time taken to furnish declaration or certificate forms as required under the Central Sale Tax Act, 1956 is prescribed with effect from 18th June, 2012. We are not referring to any other sub-section as reliance is not placed by any of the parties on the said sub-sections.

13. Counsel for the petitioner submits that sub-sections (4) and (5) have been considered and interpreted by a Division Bench of this Court in *Swaran Darshan Impex (P) Ltd. Vs. Commissioner, Value Added Tax and Anr.*, (2010) 31 VST 475 (Delhi). We need not refer to this decision, as the issue raised in these writ petitions, does not specifically relate to interpretation of the said sub-sections.

14. Section 42 relates to interest and sub-section (1) thereof stipulates that an assessee who is entitled to refund shall be entitled to receive, in addition to the refund, simple interest at the annual rate notified by the government from time to time computed on a daily

basis. It fixes the time from which the interest is payable i.e. the date on which refund was due to be paid to the assessee; or the date when the overpaid amount was paid by that person, whichever was later. Interest is payable up to the date on which the refund is given. Sub-section (1), therefore, fixes the starting point and the end point. With reference to the starting point, the date on which the refund was due to be paid to the assessee or the date when the overpaid amount was paid by the assessee, whichever is later is applicable. There is also stipulation in the first proviso with regard to adjustment, deduction etc. with which we are not concerned in the present case. The second proviso stipulates that if the amount of such refund is enhanced or reduced, as the case may be, the interest would be enhanced or reduced accordingly. Explanation to the sub-section (1) states that if the delay in granting the refund is attributable to the assessee, whether wholly or in part, the period of delay attributable to him shall be excluded from the period for which interest is payable.

15. When we harmoniously read Sections 38 and 42 of the Act, which relate to processing of claim for refund and payment of interest, it is crystal clear that the interest is to be paid from the date when the refund was due to be paid to the assessee or date when the overpaid amount was paid, whichever is later. The date when the refund was due would be with reference to the date mentioned in Section 38 i.e. clause (a) to sub-section (3). This would mean that interest would be payable after the period specified in clause (a) to sub-section (3) to Section 38 of the Act i.e. the date on which the refund becomes

payable. Two sections, namely, Sections 38(3) and 42(1) do not refer to the date of filing of return. This obviously as per the Act is not starting point for payment of interest.

16. Counsel for the petitioner faced with the aforesaid position had referred to Section 11 (as it existed prior to amendment w.e.f. 12.9.2013) and sub-section (4) to Section 3 of the Act. For the sake of convenience, we would like to reproduce the two sections, which read as under:-

“11. Net tax

- (1) The net tax payable by a dealer for a tax period shall be determined by the formula:

$$\text{Net Tax} = O - I - C$$

where

O = the amount of tax payable by the person at the rates stipulated in section 4 of this Act in respect of the taxable turnover arising in the tax period, adjusted to take into account any adjustments to the tax payable required by section 8 of this Act.

I = the amount of the tax credit arising in the tax period to which the person is entitled under section 9 of this Act, adjusted to take into account any adjustments to the tax credit required by section 10 of this Act.

C = the amount, if any, brought forward from the previous tax period under sub-section (2) of this section.

- (2) Where the net tax of a dealer calculated under sub-section (1) of this section amounts to a negative value, the dealer shall –

(a) adjust the said amount in the same tax period against the tax payable by him under the Central Sales Tax Act, 1956 (74 of 1956), if any; and

(b) be entitled to claim a refund of any surplus amount and the Commissioner shall deal with the refund claim in the manner described in section 38 and section 39 of this Act.

Explanation: The dealer may elect to adjust the refund as a tax credit in the next tax period.”

X X X XX

“3. Imposition of tax

(1)...

(4) The net tax of a dealer shall be paid within twenty one days of the conclusion of each calendar month.

Explanation.- The obligation to pay the tax arises by virtue of this provision and is not dependent on furnishing a return, nor on the issue of a notice of assessment to the dealer.”

17. Section 11 stipulates that an assessee would be liable to pay net tax, which is determined by the formula stipulated therein. Sub-section (2) states that where the net tax of an assessee calculated under sub-section (1) is in the negative i.e. refund is payable, the dealer shall adjust the amount in the same tax period against the tax payable by him under the Central Sales Tax Act, 1956 and the assessee will be entitled to claim refund of any surplus amount. The Commissioner will deal with the refund claim in the manner prescribed in Sections 38 and 39 of the Act. There is no conflict between Section 11 and the interpretation given by us on the date from which interest is payable

with reference to Section 42 read with Section 38 of the Act. We shall be referring to Section 39 of the Act subsequently. Section 11 is a computation formula, to calculate the tax payable or refundable. It empowers the assessee/dealer to seek adjustment or refund, in case of a negative net tax.

18. Sub-section (4) to Section 3 prescribes the time period within which the assessee/dealer has to make payment of net tax, which is 21 days from the end of the month. The explanation clarifies that this obligation to pay tax is not dependent on the assessee filing his return or issue of notice of assessment by the authorities. The said provision relates only to the date and obligation of the assessee/dealer to pay the tax. We do not understand in what manner the said sub-section would help and assist the contention of the petitioner that interest on refund would be payable from the date when refund return was filed, and not from the date specified in sub-section (3) to Section 38 read with Section 42 of the Act. The assessee would be liable to pay tax under sub-section (4) to Section 3 if net tax is payable. In case of refund, obviously the assessee is not liable to pay tax. Obligation of the assessee to pay tax and date when tax is payable, and the duty and date on which refund is payable by the Revenue need not coincide and could be different as per the statute.

19. The interpretation given by us gets affirmation from Section 39 of the Act, which relates to power to withhold refund in certain cases. Section 39 of the Act reads as under:-

“39 Power to withhold refund in certain cases:

(1) Where a person is entitled to a refund and any proceeding under this Act, including an audit under section 58 of this Act, is pending against him, and the Commissioner is of the opinion that payment of such refund is likely to adversely affect the revenue and that it may not be possible to recover the amount later, the Commissioner may for reasons to be recorded in writing, either obtain a security equal to the amount to be refunded to the person or withhold the refund till such time the proceeding or the audit has been concluded.

(2) Where a refund is withheld under sub-section (1) of this section, the person shall be entitled to interest as provided under sub-section (1) of section 42 of this Act if as a result of the appeal or further proceeding, or any other proceeding he becomes entitled to the refund.”

Sub-section (1) gives power to the Commissioner, who may for reasons to be recorded in writing, either obtain security equal to the amount to be refunded or withhold the refund till such time the proceedings or audit has been concluded. The said power can be exercised as prescribed and stipulated in sub-section (1). Sub-section (2) states that where refund is withheld under sub-section (1), the person would be entitled to interest if as a result of the appeal or further proceedings or any other proceedings, he becomes entitled to the refund. In other words, under sub-section (2), interest would begin from the period specified in clause (a) to sub-section (3) to Section 38 of the Act, albeit the quantum of refund would depend upon the adjudication. To this extent on interpretation of sub-section (2) to Section 38, counsel for the parties are *ad idem*.

20. It has been highlighted to us that there may be cases wherein the assessee himself prefers and files a revised return. There could be a time gap between filing of the original return and the revised return. Questions may arise whether in such cases the assessee would be entitled to interest under Section 42(1) of Act from the date of filing of the original or from the date of filing revised return. This aspect, we would observe, would depend upon the factual matrix of each case. We need not go into the said aspect in detail in the present writ petitions as this is an aspect which the authorities under the Act would have to examine and deal on a case to case basis. Facts would matter and require elucidation and clarity. The cause or reason for filing of revised return, date of the revised return etc. maybe relevant. We have already referred to the explanation to Section 42(1), which states that if the delay in granting the refund is attributable to the assessee, whether wholly or in part, the period of delay attributable to him shall be excluded from the period for which interest is payable. Reference to sub-section (2) to Section 38, could also be made. Revenue could well urge that filing of revised return amounts to filing of return for a new and fresh claim for refund and the earlier return for refund stands withdrawn. The assessee could well submit to the contrary.

21. In the present context, we would not like to go into the multifarious situations which may arise when an assessee files the revised return. It would be more appropriate and proper for the authorities under the Act to examine each and every case wherein a revised return has been filed and thereafter, determine whether the

assessee would be entitled to interest and, if so, from which date, on the findings. We leave the question/issue open.

22. With the consent of the counsel for the parties, it is directed that the authorities will examine the question of interest payable on refund and the date from which it is payable in accordance with the aforesaid dictum and principles. In case of revised return, facts would be examined first and then the issue of the date from which interest is payable would be decided. The said exercise would be completed by the authorities concerned within a period of four months from the date on which a copy of this order is received. We have fixed the aforesaid time period as we perceive and believe, it may take time for both the assessee and the authority to determine and decide in each and every case and the amount of interest payable on refund. We would clarify that starting point or date from which interest commences, has not been modified as the authorities have given four months' time.

23. With the aforesaid observations and directions, the writ petitions are disposed of, without any order as to costs.

SANJIV KHANNA, J.

PRATHIBA M. SINGH, J.

NOVEMBER 02, 2017

j/NA