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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 5583/2016

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Reserved on: 23rd November, 2017

Date of Decision: 8th January, 2018

TELEWORLD MOBILES PVT.LTD.

..... Petitioner

Through Mr. Rajesh Jain, K.J. Bhat and Astha
Gandhi, Advocates.

versus

COMMISSIONER OF TRADE & TAXES

..... Respondent

Through Mr. Gautam Narayan, ASC with Mr.
R.A. Iyer, Advocate and Mr. Dinesh Gondyan,
AC, Mr. Santosh Kr. Gupta, AVATO and Mr.
Satya Prakash Dabas, AVATO.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MS. JUSTICE PRATHIBA M. SINGH

SANJIV KHANNA, J.

Teleworld Mobiles Pvt. Ltd., a company incorporated under the Companies Act, 1956 and an assessee under the Delhi Value Added Tax Act, 2004 (Act, for short), claims that they were illegally subjected to operations under Sections 59 and 60 of the Act on 27th and 28th May, 2016 at their business premises.

2. The petitioner has filed the writ petition for the following reliefs:-

“(a) declare the order of empowerment dated 23.3.2016 issued by the Commissioner to the extent it confers powers of appointment on Special Commissioner as illegal and without jurisdiction;

(b) declare the entire exercise of investigation, search and seizure conducted on 27 and 28.5.2016 u/s 59 and 60 of the Act, as illegal;

(c) direct the respondent to release and return the seized records, documents, bill books, ledgers, invoices, inventories etc., as neither any Panchnama was drawn nor any list of seized documents/records was prepared under acknowledgement of the petitioner;

(d) issue a Writ of Mandamus or any other Writ, order or direction;

(e) pass any other order or orders, direction or directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”

3. The grounds on which the aforesaid action is challenged in the present writ petition for the sake of convenience are reproduced below:-

"A. Because the exercise of investigation and enforcement covered u/s 59 and 60 of the Act fall under Chapter X of the Act. For any officer to exercise the power in any of these two Sections, was statutorily required to carry an authority in form DVAT 50. This is the mandate of Section 68(2) read with Rule 65 of the Delhi Value Added Tax Rules, 2005 (in short 'the Rules'). The officers who visited the premises on 27.5.2016 did not carry any DVAT 50 with them. They were repeatedly asked to produce the DVAT 50 issued in their name, but they did not show any such authority issued by the Commissioner. Therefore, in the absence of any authority

given by the Commissioner, the operation was illegal at the nascent stage itself. Even when the request was made through a letter dated 31.5.2016 to give copy of DVAT 50, petitioner's request did not meet any response from the Deptt.

B. Because the order of empowerment dated 23.3.2016 issued by the Commissioner is not in accordance with the provisions of Section 68(2) read with Rule 65(1) of the Rules. Section 68 (2) reads as under:-

"Where the Commissioner delegates his powers under Chapter X, the delegate shall carry and produce on demand evidence in the prescribed form of the delegation of these powers when exercising the powers."

In terms of Section 68(1) read with sub-section (2), the Commissioner has issued an order of delegation vide No.F.6(7)/DVATIL&J/2013-14/748 dated 12.11.2013. As per the said order, powers u/s 59(1), (2), (3), (4) and Section 60(1) of the Act, could be exercised by all the officers within their respective jurisdiction not below the rank of Asstt. Value Added Tax Officer, whereas powers u/s 60(2) could not be exercised by the jurisdictional officers below the rank of Asstt. Commissioner, VAT. Through this order of delegation, the Commissioner has appointed the jurisdictional officers of the above stated ranks to exercise and discharge the functions provided under the above provisions of the Act. Nowhere from the reading of Section 68, it comes out that the Commissioner can delegate his power of appointment unto another VAT authority. This is also specifically stated in Rule 65(1) of the Rules, which reads as under:-

"Where the Commissioner wishes to appoint an officer or other person to exercise any of the powers in Chapter X of the Act, the grant of authority to exercise the powers shall be in form DVAT 50 and shall be issued by the person empowered by the Commissioner in this regard."

As per the petitioner's understanding, the power of appointment of an officer to exercise authority under Chapter X vests with the Commissioner only. That authority is to be given in form DVAT 50. From the later part of sub-rule (1), it is the empowered officer or authority who has to issue the DVAT 50 in favour of the person who stands appointed by the Commissioner himself. Thus, it is only the authorities who have been delegated powers through order dated 12.11.2013, which has not been modified till date, with respect to the powers available u/s 59 and 60 of the Act, the empowered authority could have issued DVAT 50 in their name only. The Commissioner by issuing this order of empowerment on 23.3.2016 has conferred upon the Special Commissioner two powers i.e. to appoint an officer or person to exercise the powers under Chapter X, and (b) to grant authority to the officer/person so appointed in form DVAT 50. That way, through the order of empowerment, the Commissioner has exceeded his jurisdiction which is not vested in him. Thus, any exercise of investigation and enforcement carried out by persons who have been appointed by the Special Commissioner and been issued DVAT 50 is without the authority of law.

C. Because the officers who visited the premises to carry out the proceedings were not even jurisdictional officers. The Commissioner, in terms of Section 68 of the Act, had delegated his authority unto various VAT authorities for the various provisions of the Act. Such VAT authorities could only be the jurisdictional officer and none else, when read in terms of the order dated 12.11.2013 issued by the Commissioner. Petitioner has been registered with the Deptt. since 1996 at the address of PD-29/A, Pitampura, Delhi 110034. The said address falls within the jurisdiction of Ward 64 with which all statutory compliances and obligations, as are mandated upon the petitioner under the Act, are being complied with. This includes filing of returns, statements, assessments etc. The officers who visited the premises were not the

jurisdictional officers. It is true that as per Rule 65(1), the Commissioner can delegate his authority to issue DVAT 50 upon any VAT authority, but he is only to issue the authority for the appointment of officers who have been chosen for that work by the Commissioner. When the Commissioner himself through order dated 12.11.2013, had chosen the jurisdictional VATOs/Asstt. Commissioners to carry out the work u/s 59 and 60 of the Act, then there lies no power or authority with other VAT authorities in issuing DVAT 50 in somebody else's name, ignoring the order dated 12.11.2013 issued by the Commissioner.

D. Because the entire exercise of survey, search and seizure was carried out between 5.30 pm of 27.5.2016 till 3.30 am on 28.5.2016. How this exercise is to be done, law has been laid down by this Hon'ble Court in its judgment of Larsen & Toubro and that of Capri Bathaid Pvt. Ltd. The officers were required to record reasons as to why the search and seizure operation is to be carried out. As per sub-section (2) of Section 60, seizure of any record could have been carried out if the Commissioner has the information in his possession or has reasonable grounds to believe that any person or dealer is attempting to avoid or evade taxes or is concealing his tax liability. Recording of those reasons was not only required in terms of Section 60(2) but it has also been made necessary in terms of Section 60(6) through which the provisions of CrPC relating to search and seizure apply *mutatis mutandis*. No such recording has been done nor the petitioner has been confronted with any such reason.

E. When the books of accounts, records, Balance Sheets, billbooks etc. were seized, then it was incumbent upon the officers to have summoned at least two witnesses to vouch for those proceedings. When the entire exercise went on for about 10 hours, it is surprising to see that no witnesses were summoned, which was necessary in terms

of Section 100(4) of CrPC which applies to such proceedings under the VAT Act.

F. Because seizure of records when made either u/s 60(2)(c), then as per Section 62(1) of the Act, the Commissioner is under an obligation to give a dealer or the person present on his behalf, as the case may be, receipt for the same and obtain acknowledgement of the receipt so given to him. To the shock of the petitioner, neither any Panchnama was drawn nor any list of seized documents was prepared. Where Section 62(1) calls upon the Commissioner to obtain an acknowledgement of the documents seized from the dealer's premises, the question of such acknowledgement does not arise when no list of documents had ever been prepared. This is not only suggested u/s 62(1) but is also well laid down u/s 100(5) of the CrPC which reads as under:-

"The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found, shall be prepared by such officer or other person and signed by such witness; but no person witnessing a search under this Section shall be required to attend the court as a witness of the search, unless specially summoned by it."

The casual manner in which this entire exercise has been done despite the law laid down by this Hon'ble Court in the above said judgments, speaks volumes about the callous approach of the Deptt. in following the law in its letter and spirit."

4. A reading of the said grounds would indicate that the challenge is predicated on the following:-

(i) Violation of Section 68(2) read with Rule 65 of the Delhi Value Added Tax Rules, 2005 (Rules, for short) as the officers, who had

conducted the search did not carry and show Form DVAT-50 in spite of repeated requests.

(ii) Violation of the order of the Commissioner F.6(7)/DVAT/L&J/2013-14/748 dated 12th November, 2013 for the following reasons:-

(a) The operations under Section 60 and Rule 65(1) were undertaken by the non-jurisdictional Assistant Value Added Tax Officer.

(b) Non-jurisdictional officers below the rank of Assistant Commissioner were also part of the team, which had carried on operations under Section 59 and sub-sections (1) and (2) of Section 60.

(iii) Order of empowerment dated 23rd March, 2016 issued by the Commissioner is invalid as the Commissioner cannot delegate the said power to the Special Commissioner, and hence the entire operation was unauthorised and contrary to law.

(iv) Search and seizure operations under Section 60(2) of the Act were without complying with Section 100(4) and (5) of the Code of Criminal Procedure, 1973 (Code, for short) as no *Panchnama* was prepared and no independent witnesses were joined.

(v) The officers had taken away with them various records, balance sheets, bill books, ledger, etc. for different years without giving any receipt or preparing a *panchnama*. Reliance is placed upon statement of Manpreet Singh, Director of the petitioner company recorded on 27th May, 2016.

(vi) The survey and seizure operations were carried out between 5.30 P.M. on 27th May, 2016 till 3.30 A.M. on 28th May, 2013. The survey and seizure operations were contrary to law as they were not conducted within reasonable hours.

5. The respondents in their counter affidavit deny that search and seizure operations under sub-section (2) to Section 60 of the Act were undertaken. Thus, Section 100 of the Code was not attracted and summoning of independent witness was not required. It is asserted that only "Investigation" in terms of power conferred under Sections 59 and 60 (1) of the Act was undertaken on the basis of authorization under DVAT-50 dated 27th May, 2016 issued by the Special Commissioner. Reliance is placed upon annexures R-2 and R-3 to the counter affidavit. It was denied that any records, books of accounts, register, other documents and goods were seized. Thus, no *panchnama* was drawn.

6. The respondents submit that Commissioner vide order dated 23rd March, 2016, in exercise of power under Section 68 of the Act read with Rules 48 and 65, has empowered all officers, not below the rank of Special Commissioner, to appoint an officer or person to exercise power under Chapter-X to grant authority in Form DVAT-50. Special Commissioner (Endorsement -I) vide order dated 27th May, 2016 after recording that he had information in his possession and had reasonable grounds to believe that the petitioner was attempting to avoid or evade tax or concealing his liability, had given authorization to conduct operations under Section 60(1) at the premises of the petitioner at (i) PD-29A, Pitam Pura, Delhi-100 034, (ii) 67 Harsh Vihar, Pitampura, and (iii) G-52, Aggarwal City Plaza,

Manglam Place, Sector-3, Rohini, Delhi-85, to Mr. Dinesh Gondyan, Assistant Commissioner, Mr. Arvind Kumar, Assistant Commissioner, Mr. Satya Prakash, AVATO, Mr. Vijay Kumar, AVATO, W-71, Mr. Abhishek Kumar, AVATO and Mr. Ramesh Kumar, VATI. On the same day itself, while granting authority in the Form DVAT-50, Special Commissioner recorded that the authority would be valid from 26th May, 2016 till 27th May, 2016.

7. The note of the Assistant Commissioner dated 23rd May, 2016, enclosed as Annexure R-1, is elaborate and records reasons such as failure to file return for the fourth quarter of 2015-2016, accumulation of stock during last three years which showed purchases more than the sales and the miniscule amount of tax paid. The said note prepared by Assistant Commissioner was approved by the higher officers, including the Commissioner, before authorization under DVAT-50 was issued on 27th May, 2016. It is also stated that the Form DVAT-50 was shown to the dealer/petitioner at the time of the operation.

8. The petitioner in the rejoinder affidavit has stated that Form DVAT-50 was never shown to the petitioner/dealer at the relevant time. Authorization was invalid and illegal, being in favour of non-jurisdictional Value Added Tax Officers and in favour of several non jurisdictional low ranked officers like Assistant Value Added Tax Officer and Inspector. The Commissioner had not issued authorization or authority in Form No. DVAT-50 and had only endorsed the file notings of the Assistant Commissioner. The petitioner have relied upon CCTV footage as well as the photographs in support of their contention that records including sale

bills, purchase vouchers, ledger and other documents were seized and taken away by the officers. Some photographs in support have been enclosed as Annexure P-9 to the rejoinder affidavit.

9. In view of the version and the assertions made by the petitioner in the rejoinder affidavit with reference to the CCTV footage, a Division Bench of this Court vide order dated 26th May, 2017, had directed:-

“1. Mr. Gautam Narayan informs the court that pursuant to the order dated 3rd July, 2016, no coercive steps have been taken against the Petitioner and further that no such coercive steps shall be taken till the next date of hearing.

2. The main prayer in the present petition is for declaring the order of empowerment dated 23rd March, 2016 issued by the Commissioner (VAT) to the extent it confers powers of appointment on Special Commissioner, as illegal and without jurisdiction. It also seeks a declaration that the entire exercise of investigation ‘search and seizure’ conducted on 27th and 28th May, 2016 in the business premises of the Petitioner under Sections 59 and 60 of the Delhi Value Added Tax Act, 2004 (DVAT Act) as illegal.

3. There is a specific prayer ‘c’ which reads as under:-

(c) direct the respondent to release and return the seized records, documents, bill books ledgers, invoices, inventories etc., as neither any Panchnama was drawn nor any list of seized documents/records was prepared under acknowledgement of the petitioner.

4. In the writ petition there is a specific averment at para No.11 which reads as under:

11. When petitioner continuously pursued its refunds, then, instead of granting the same, it was visited by a team of Enforcement Officers on 27.5.2016 without carrying any DVAT 50 in their favour. On demand, no such authority

was shown during the period of ten hours i.e. between 5.30 pm on 27.5.2016 to 3.30 am on 28.5.2016. The said survey caused u/s 59 and 60 of the Act was wholly without the authority of law. While conducting this operation, provisions of Section 60(2) and (6) of the Act were flouted in as much as neither any reasons were recorded nor any Panchnama was drawn nor any witnesses were summoned. The whole exercise went on from 5.30 pm on 27.5.2016 and continued till 3.30 am of 28.5.2016. Two statements of ShriManpreet Singh Sethi, Director, of the petitioner were recorded (Annexure P-6 Colly), one of which is on a preprinted proforma. None of these two statements bear the signatures of any of the visiting officers. Various records like Balance Sheets, Bill Books, Ledgers etc. for various years were seized. Where Section 62(1) mandates upon the Commissioner to give a receipt to the dealer or the person from whom records, books of accounts and other documents were seized, no such receipt was prepared, what to speak of taking any acknowledgement from the petitioner. This was also contrary to para 9 of the guidelines dated 29.4.2016 issued by the Joint Commissioner (Enforcement-I).

5. A reply was filed by the Respondent/the DVAT deparment supported by an affidavit of Mr. Ranjeet Singh, the Joint Commissioner, Enforecement -I branch specifically advertng to the visit by the Officers of the DVAT Department to the business premises of the Petitioner. It is stated in Paras 5.10 to 5.12 as under:

5.10. The records, books of accounts, registers, other documents as well as the goods of the Petitioner at the said premises were inspected by the said officers. An inventory of thirty two pages was prepared, recording the particulars as well as unique IMEI number of each of the phone found at the premise, This inventory was duly countersigned by

the Director of the Petitioner herein. A true copy of the inventory dated 21 7 th / 28th May, 2016 is annexed herewith and marked as Annexure R4.

5.11. The statements at Annexure P-6 (Golly) to the Petition were written by the said Director of the Petitioner in his own hand and duly signed by the said Director. A true copy of the Statements written and signed by the Director of the Petitioner in his own hand is annexed herewith and marked as Annexure R-5.

5.12. No records, books of accounts, registers, other documents or goods were seized from the business premises of the Petitioner.”

6. In other words there is a categoric assertion by the DVAT Department that no record, registeres, goods or documents were seized from the business premises of the Petitioner.

7. A rejoinder has been filed to the said counter affidavit by the Petitioner supported by the affidavit of Mr. Manpreet Singh Sethi, the Director of the petitioner company. Para 7 (a) and 7 (b) of the rejoinder affidavit assert as under:-

(a) no two independent witnesses were summoned to vouch the proceedings. This was essentially required in terms of Section 100 (4) of CrPC when the exercise went on for about 10 hours and stretched to early morning of 28.5.2016.

(b) no panchnama was prepared of the seized records when in fact during this entire exercise, sale bills, purchase vouchers, ledger and other documents were seized from the premises for which the petitioner has CCTV footage as well as photographs in its possession. Copies of some photographs which establish that records were seized and taken away by the members of the team are enclosed as Annexure P9 Colly. Petitioner has recording of CCTV of

the enforcement proceedings which can also be produced for the perusal of this Hon'ble Court. That way, the submissions made by the Respondent that they have not seized and taken away the records that too on an Affidavit are false and attracts proceedings for perjury.

8. Mr. Rajesh Jain, learned counsel for the Petitioner, has produced before the court a CD and photographs dated 28th May, 2016 being the photographs taken from the CCTV footage available in the CCTV installed in the business premises of the petitioner at G-52, Manghlam Place, Rohini, New Delhi-1100085.

9. Mr. Rajesh Jain played the said CCTV footage in this court on a laptop brought by the Director of the Petitioner which is approximately 8 minutes. CCTV footage bearing the date stamp '5/27/2016' beginning at '17:07:54 and ending on 17:24:02'.

10. He submitted that this is not the entire CCTV footage and stated that he would have the footage of the earlier portion and the later portion. He seeks permission to place on record the CCTV footage of the search to the extent available in the hard-disc of the CCTV installed in the abovesaid premises which will be encrypted with a hash value. One copy of the hard disc be filed in the court in a sealed cover and another copy of the ssame be supplied to the counsel for the respondent. Counsel for the Petitioner will tender the CCTV footage along with an affidavit under Section 65 B of Indian Evidence Act. This be done not later than two weeks from today. It is understood that the original hard disc be preserved containing the original CCTV footage in case, it is required for verification by the Respondent.

11. After seeing the CCTV footage Mr. Ranjeet Singh, the Joint Commissioner, Enforcement -I branch, will inform the Court by the next date preferably on affidavit the names and designations of the officials of the DVAT Department who figure in the CCTV footage.

12. Mr. Jain will also file the photographs in chronological sequence in a sealed covers. A copy of the same be furnished to the counsel for the Respondent in advance.”

10. In response to the directions given in the said order, the petitioner has filed photographs in chronological sequence in a sealed cover and a copy was furnished to the respondents.

11. Ranjeet Singh, Joint Commissioner, Enforcement-I Branch has filed his affidavit sworn on 2nd August, 2017 stating that in the CCTV footage only two officers, namely, Satya Prakash, AVATO (Branch-I) and Vijay Kumar, AVATO (Ward-71) could be seen.

A. Statutory Provisions

12. In order to decide the present controversy, we would have to first make reference to Sections 59, 60 and 68 of the Act and Rule 65 and Form DVAT-50, which are as under:-

“59. Inspection of records

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

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60. Power to enter premises and seize records and goods (Rule 22(2) & 48)

(1) All goods kept at any business premises by a dealer, transporter or operator of a warehouse shall at all reasonable times be open to inspection by the Commissioner.

(2) Where the Commissioner, upon information in his possession or otherwise has reasonable grounds to believe that any person or dealer is attempting to avoid or evade tax or is concealing his tax liability in any manner and for the purposes of administration of this Act, it is necessary so to do, the Commissioner may-

(a) enter and search any business premises or any other place or building;

(b) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (a) where the keys thereof are not readily available;

(c) seize and remove any records, books of account, registers, other documents or goods;

(d) place marks of identification on any records, books of account, registers and other documents or make or cause to be made extracts or copies thereof without charge;

(e) make a note or any inventory of any such money or goods found as a result of such search or place marks of identification on such goods; and

(f) seal the premises including the office, shop, godown, box, locker, safe, almirah or other receptacle.

(3) Where it is not feasible to remove any records, books of account, registers, other documents or goods, the Commissioner may serve on the owner and any person who is in immediate possession or control thereof, an order that he shall not remove or part with or otherwise deal with them except with the previous permission of the Commissioner.

(4) Where any premises have been sealed under clause (f) of sub-section (2), of this section or an order made under sub-section (3) of this section, the Commissioner may, on an application made by the owner or the person in

occupation or in charge of such shop, godown, box, locker, safe, almirah or other receptacle, permit the de-sealing or release thereof, as the case may be, on such terms and conditions including furnishing of security for such sum in such form and manners as may be directed.

(5) The Commissioner may requisition the services of any police officer or any public servant, or of both, to assist him for all or any of the purposes specified in subsection (2) of this section.

(6) Save as otherwise provided in this section, every search or seizure made under this section shall as far as possible be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to searches or seizures made under that Code.

Explanation: The powers under this section may also be exercised in respect of a dealer or a third party for the purposes of undertaking an audit or to assist in recovery.

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68. Delegation of Commissioner's powers (Rule 48)

(1) Subject to such restrictions and conditions as may be prescribed, the Commissioner may delegate any of his powers under this Act to any Value Added Tax authorities.

(2) Where the Commissioner delegates his powers under Chapter X, the delegate shall carry and produce on demand evidence in the prescribed form of the delegation of these powers when exercising the powers.

(3) Where the Commissioner has delegated a power to a Value Added Tax Authority, the Commissioner may supervise, review and rectify any decision made or action taken by that Authority.

Explanation. The exercise of this power of supervision, review or rectification will not lead to the issue of an

assessment or re-assessment after the expiry of the time referred to in section 34 of this Act.

(4) Notwithstanding any law or doctrine to the contrary, the power delegated by the Commissioner to a person to determine an objection under section 74 of this Act may be exercised by that person, even though the person determining the objection is equal in rank to the person whose decision is under objection.

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Rule 65. Officers to carry and produce authorisations

(1) Where the Commissioner wishes to appoint an officer or other person to exercise any of the powers in Chapter X of the Act, the grant of authority to exercise the powers shall be in Form DVAT-50 and shall be issued by the person empowered by the commissioner in this regard.

(2) The grant of authority shall –

(a) be limited to a period not exceeding three years;

(b) be to a specific person; and

(c) expire on the retirement, resignation or transfer of the person; PROVIDED that an authority granted may be renewed.

(3) Every officer or other person authorised by the Commissioner under sub-rule (1) shall –

(a) carry the authorization in Form DVAT-50, with him when purporting to exercise any of the powers conferred under Chapter X of the Act; and

(b) produce the authorization in Form DVAT-50, if requested by the owner or occupier of any premises where he proposes to exercise these powers.

FORM DVAT 50

[Refer *rule 65*]

GRANT OF AUTHORITY BY THE COMMISSIONER

The Commissioner of Value Added Tax, Delhi do hereby appoint the following officials holding the designation, mentioned against their name for carrying out audit, investigation and enforcement functions under Delhi Value Added Tax Act and Rules:

S. No.	Name	Designation

This authority would be valid for the period from _____ to _____ (not exceeding three years).

Seal of authority

Signature

Name

Date

Designation"

B. Interpretation of statutory provisions

13. Section 59 of the Act relates to inspection of records, which means all records, books of accounts, registers, other documents etc. maintained by a dealer, transporter or operator of warehouse at all reasonable times, and states that the said records will open to inspection by the Commissioner. Sub-section (2) stipulates that the Commissioner may for proper

administration, subject to the conditions prescribed, require the dealer etc. to produce before him records, books of accounts, registers and other documents. and answer such questions and prepare and furnish additional information relating to his activities or activities of other persons. The Commissioner under sub-section (3) is empowered to require a person referred to be sub-section (2) to prepare and provide documents and verify answer given to any question in the manner specified by him. Sub-section (4) empowers the Commissioner to take away copies of extracts or cause copies or extracts to be made of the records, books of account, registers etc. without fee by the person in whose custody the records, books of account, registers and documents are held. A reading of Section 59 would indicate that it relates specifically to inspection of records specified therein. The records would mean books of accounts, registers etc. maintained by the dealer etc. The inspection exercise has to be undertaken at reasonable times.

14. Section 60 as per the heading relates to the power to enter premises and seize records and goods and also carry out search and seizures. Sub-section (1) relates to power to inspect the goods kept at any business premises of the dealer, transporter etc. at all reasonable times. The said power is somewhat akin to and expands the scope of the power given for inspection of books etc. under Section 59. The power under sub-section (2) is, however, far greater and wider, for it stipulates that where the Commissioner upon information or otherwise has reasonable grounds to believe that any person or dealer is attempting to avoid or evade payment of tax or concealing his tax liability, he may enter and search any business premises or building. The Commissioner also has power to break open the

lock of any door, box, locker, safe etc., seize and remove the records, books of accounts, registers etc., place marks for identification on any records, make a note or inventory of money or goods found and seal the premises including the office, shop, godown etc. Under sub-section (3) it is stipulated that where it is not possible to remove the records or goods, the Commissioner may serve on the owner or the person who is in immediate possession and control thereof, an order not to remove or part with or otherwise deal with them without prior permission.

15. We need not refer to sub-sections (4) and (5) in the context of the present case. However, reference is required to be made to sub-section (6), which stipulates that every search and seizure made under this Section shall be as far as possible in terms of the provision relating to search and seizure under the Code i.e. Code of Criminal Procedure.

16. Section 68 of the Act deals with the power of the Commissioner to delegate any of his powers under the Act to any Value Added Tax Authorities. Sub-section (2) is relevant, for it relates to delegation of power under Chapter-X, and states that the delegate shall carry and produce on demand evidence in the prescribed proforma while exercising the power. Sub-section (3) states that where the Commissioner has delegated power to a Value Added Tax authority, he may supervise, review and rectify any decision made or action taken by that authority. Object and purpose behind this provision has been elucidated and explained below.

17. Rule 65 is a specific provision relating to the power of delegation given to the Commissioner for exercise of different powers under Chapter-X. It stipulates that where the Commissioner wishes to appoint an officer or person to exercise powers under Chapter-X of the Act including grant of

authority to exercise the powers, the same shall be in the Form DVAT-50 and shall be issued by the person empowered by the Commissioner in this regard. Sub-rule (2) stipulates that grant of authority would for a period not exceeding three years; shall be to a specified person and expire on retirement, resignation or transfer of the person.

18. Section 66 of the DVAT Act reads as under:-

“66. Value Added Tax Authorities

(1) For carrying out the purposes of this Act, the Government shall appoint a person to be the Commissioner of Value Added Tax.

(2) To assist the Commissioner in the administration of this Act –

(a) the Government may appoint as many 1 [Special] Commissioners of Value Added Tax, Value Added Tax Officers and such other persons with such designations as the Government thinks necessary; and

(b) the Commissioner may, with the previous sanction of the Government, engage and procure the engagement of other persons to assist him in the performance of his duties; in this Act referred to as “Value Added Tax Authorities”.

(3) The Commissioner and the Value Added Tax authorities shall exercise such powers as may be conferred, and perform such duties as may be required, by or under this Act.

(4) The powers exercised by the Value Added Tax authorities for the making of assessments of tax, the computation and imposition of penalties, the computation of interest due or owed, the computation of the entitlement and the amount of any refund, the determination of specific

questions under section 84, the making of general rulings under section 85, and the conduct of audit or investigations shall, for the purposes of this Act, be the administrative functions."

Section 66 states that the Government shall appoint a person, i.e., a Commissioner of Value Added Tax, and to assist him in the administration, the Government may appoint Special Commissioners, Value Added Tax Officers and others with designations as the Government thinks necessary. The Commissioner, with the sanction of the Government, can also procure engagement of others. All of them, i.e., the Commissioner and others are designated and referred to as Value Added Tax authorities.

19. The power of delegation given under Section 68 is of importance, for the enactment i.e. the Act invariably uses the expression "the Commissioner" and does not define and prescribe functions and powers *inter-se* the Value Added Tax authorities. This is left to the Commissioner, who in exercise of power under Section 68 can delegate and prescribe functions, powers and jurisdiction to the Value Added Tax authorities. This power is exercised by means of notification(s) issued by the Commissioner. This authority of delegation of power and functions is vested with the Commissioner subject to restrictions and conditions as may be prescribed. These restrictions and conditions can be prescribed by Rules. Chapter-X, as noted above, deals with audit, investigation and enforcement and the chapter conferring powers requires that the delegate shall carry and produce on demand evidence in the prescribed form while exercising powers delegated to him by the Commissioner.

20. At this stage we would refer to Rule 48, which reads as under:-

"48. Conditions upon delegation of powers by the Commissioner

Without prejudice to the provisions of section 68, the Commissioner may delegate any of his powers to any person not below the rank of an Assistant Value Added Tax Officer, but he may delegate his powers-

(a) under sub-sections (1) and (2) of section 60, to a person not below the rank of a Value Added Tax Officer;

(b) under section 61, to a person not below the rank of a Value Added Tax Inspector; and

(c) under section 84, to a person not below the rank of Special Commissioner."

Rule 48 restricts power of the Commissioner and states that without prejudice to the provisions of Section 68, the Commissioner would not delegate any of his power to an officer not below the rank of Assistant Value Added Tax Officer. Clauses (a), (b) and (c) state that delegation of power under Sub-Sections 1 and 2 to Section 60 would be to a person not below the rank of Value Added Tax Officer; under Section 61 would be to a person not below the rank of Value Added Tax Inspector; and under Section 84 would be to a person not below the rank of Special Commissioner, respectively. Rule 48, therefore, supports the view that the Commissioner is entitle to delegate his power under sub-Sections 1 and 2 of Section 60 of the Act to an officer not below the rank of Value Added Tax Officer, in case of Section 61 not below the rank of Value Added Tax Inspector and in case of Section 84 not below the rank of Special Commissioner.

21. The Commissioner has issued notification dated 23rd March, 2016, which reads as under:-

“Sub: Empowerment by Commissioner, VAT, under Rule 65 of the DVAT Rules, 2005.

In exercise of powers available under Rule 65 of the DVAT Rules, 2005 read with Section 68 of the DVAT Act, 2004 (Delhi Act 3 of 2005) and Rule 48 of the DVAT Rules, 2005, I, S.S. Yadav, Commissioner, Value Added Tax, Government of NCT of Delhi, do hereby empower all officers appointed under sub-section (2) of Section 66 of the DVAT Act, 2004, not below the rank of Special Commissioner to appoint an officer or a person to exercise any of the powers in Chapter X of the Delhi Value Added Tax (DVAT) Act, 2004 (Delhi Act 3 of 2005) and to grant authority to the officers/persons so appointed, in Form DVAT 50 for exercise of the powers by them under the aforesaid Chapter of the Act.

The order shall come into force with immediate effect.”

This notification states that the officer not below the rank of Special Commissioner can appoint officer or person to exercise powers under Chapter X of the Act. It also empowers an officer not below the rank of the Special Commissioner to grant authority to such officer/persons so appointed in Form DVAT 50 for exercise of powers by them. The Rules, as elucidated, nowhere stipulate and postulate that the Commissioner cannot delegate his power for issue of authorization under Chapter X. On the other hand Rule 65 and Form DVAT-50 state to the contrary.

22. One of the primary contentions raised by the petitioner, that the Commissioner alone has the power to issue Form DVAT-50 under Section 68 of the Act, albeit this power cannot be delegated, falters and fails. The

Commissioner has delegated the said power to Special Commissioner, who in turn authorizes specific officers to undertake investigation, search etc. This, it is submitted, violates the principles of sub-delegation. Maxim of *delegatus non potest delegare* is invoked to assert that delegation to Special Commissioner to issue DVAT 50 is ultra vires under Sections 68 read with 66 and 67 of the Act. Reliance is placed under ***Sahni Silk Mills Pvt. Ltd & Anr. Vs. ESIC*** 1994 (5) SCC 346. We are not impressed with the said argument, which in the context of the present Statute has to be rejected. Decision in ***Sahni Silk Mills (Supra)*** observed that the Courts are rigorous in requiring the power to be exercised by the persons or the bodies authorized by the statutes. It is essential that the delegated power should be exercised by the authority on whom it is conferred and no one else. Yet, given the administrative set up extreme judicial aversion to delegation is unacceptable, for in many statutes delegation is authorized expressly or by necessary implication. Thus, the maxim quoted above is not applied universally. Reference was made to ***Barium Chemicals Ltd. Vs. Company Law Board*** AIR 1967 SC 295 and other decisions wherein it had been observed that delegation mechanism is merely a rule of construction and sub delegation may be permissible and can be sustained if permitted by express provision or necessary implication. Reference in support was made to ***Halsbury's Laws of England*** Vol.1 (4th Edn.), and ***Harishankar Bagla & Anr. Vs. State of M.P.*** (1955) 1 SCR 380, where power to sub-delegate was upheld because the statute itself had enumerated classes of persons to whom the power could be delegated or was sub-delegated by the Central Government.

23. When we turn to the enactment in question, as noticed above, enactment itself refers to the Commissioner and its powers, and that there is a provision dealing with and specifying power, function and jurisdiction of the VAT authorities. The Commissioner has been given authority to delegate powers to subordinate authorities. Thus there is an express and clear provision of delegation. The statute in fact mandates delegation. It is in exercise of these powers that the notification / circular dated 23rd March, 2016 was issued by the Commissioner to confer powers to issue authorization on the Special Commissioner. We do not think said power can be held to be contrary to the prescribed statutory provision. The conduct of search or survey/investigation operation requires issue of authorization. The Commissioner has, by notification / order of empowerment dated 23rd March, 2016, conferred the said power upon Special Commissioner. Thus the Special Commissioners are authorized to issue an authorization in DVAT -50. The authorization in Form DVAT-50 would authorize the person named with their rank to conduct survey/investigation or search. Authorized officers should not be below the rank of Value Added Tax Officer for operations under Section 60(1) and (2) of the Act. There is a difference between issue of authorization and officers who are authorized to conduct survey/ investigation or search. The contention of the petitioner, if accepted, would warrant accepting the position that the Special Commissioner must himself undertake the search and seizure. The power to authorize survey/ investigation or search is different and distinct from the power exercised by the officers so authorized and who actually undertake the search and survey. The argument of the

petitioner does not take notice of the aforesaid position and is therefore fallacious and wrong.

24. We would concede that there is ambiguity and difficulty in Rule 65 of the Act but the same has to be interpreted in a pragmatic and in a practical manner. It stipulates that where the Commissioner wishes to delegate his power for grant of authority to exercise power, the delegate will issue the authority letter in Form DVAT-50. The authority will be given to a person empowered by the Commissioner in this regard. Sub – Rule 2 stipulates that grant of authority will be to a specific person and limited to a period not exceeding three years and would expire earlier on retiring, resignation or transfer. Authority in terms of time can, however, be extended. This is also clear from Sub-Rule 3 which stipulates that the person, who is authorized to undertake search and survey shall carry with him authorization Form DVAT-50 while exercising any of the power contained under Chapter X and shall produce such authorization in Form DVAT -50 at the request of the owner / occupier. This also becomes clear when we look at Form DVAT - 50. The said form is not required to be filled by the Commissioner when he delegates his power to issue authorization to Special Commissioner. The Form has to be filled up when power is conferred and authorization is given to a particular officer by name for carrying out audit /enforcement function under Chapter X.

25. In terms of the discussion above, we would, therefore, reject the contention of the petitioner challenging the *vires* of empowerment order dated 23rd March, 2016 on the ground that it exceeds the power of

delegation granted to the Commissioner under the Act and the Rules. The order is upheld.

26. Our attention was drawn to ***Capri Bathaid Pvt. Ltd v. Commissioner of Trade and Taxes***, W.P.(C) 8913/2014 wherein after referring to the Act and Rules the following principles were elucidated:-

"24. The combined reading of Sections 60, 66 and 68 of the DVAT Act read with Rule 65 of the DVAT Rules reveals the following position:

(i) The CVAT may delegate any of his powers to any VAT Authority

(ii) Where the CVAT delegates his powers under Chapter X of DVAT Act (which deals with audit, investigation and enforcement), the delegate shall carry and produce on demand, evidence in the prescribed form, of the delegation of these powers when exercising the powers.

(iii) Where the CVAT has delegated his power to a VAT Authority, he may supervise, review and rectify any decision made or action taken by such VAT Authority.

(iv) Where the CVAT wishes to appoint an officer to exercise any of the powers of audit, investigation and enforcement, he shall issue the grant of authority for the exercise of such powers notified in Form DVAT-50. The authority shall be issued by the person empowered by the CVAT in that regard. The grant of authority in terms of Rule 65 (2) is to be for a period not exceeding three years. The grant of authority shall be to a specific person and expire on the retirement, resignation or transfer of the person.

(v) Rule 65 (3) mandates that every officer or other person authorized by the CVAT under Rule 65 (1) shall carry the authorization in Form DVAT-50 with him when

purporting to exercise any of the powers conferred under Chapter X of DVAT Act.

(vi) Such officer is required in terms of Rule 65 (3) (b) of the DVAT Rules to produce the authorisation in Form DVAT -50, if requested by the owner or occupier of any premises where he proposes to exercise these powers."

27. We do not perceive and believe that there is any conflict between the aforesaid principles and what has been held above and the ratio in ***Capri Bathaid Pvt. Ltd (Supra)***. In fact our findings concur and resonate the aforesaid principles. In ***Capri Bathaid Pvt. Ltd (Supra)*** delegation and empowerment of Special Commissioner to issue authorization in Form No. DVAT-50 was accepted and judgment proceeds on validity of the delegation of authority. The point of distinction between ***Capri Bathaid Pvt. Ltd (Supra)*** and the present case is that in the former case notification / order of delegation dated 12th November, 2013 and order dated 15th October, 2014 were under examination. By the latter order the Special Commissioner was empowered to authorize jurisdictional officers stipulated in the notification dated 12th November, 2013 to carry out audit and enforcement function under Chapter X of the Act. The delegation order dated 12th November, 2013 in different columns had specified the jurisdictional officer authorized to exercise power under Sub-sections 1 and 4 of Section 59 and Sub-sections 1 and 3 of Section 60. This was because of the wording of the notification dated 12th November, 2013, paragraph 1 of which reads:-

"In supersession of all previous orders on the subject, I, Prashant Goyal, Commissioner of Value Added Tax, Department of Trade & Taxes, Government of NCT of Delhi, in exercise of the powers conferred by section 68 of the Delhi Value Added Tax (DVAT) Act, 2004 (Delhi Act 3 of 2005) read with rule 48 of the Delhi Value

Added Tax Rules, 2005 do hereby delegate my powers specified in column Nos. 3 under Section mentioned in column no. 2 to the Officers specified in column 4 of the table appended below and direct that these officers shall exercise the powers and perform the duties concomitant with such powers, within their respective jurisdictions. The order shall come into force with immediate effect."

28. Our attention was drawn to another decision of Division Bench of this Court in Writ Petition (C) No. 1820/2013, ***Larsen and Tubro Limited and Another versus Government of NCT of Delhi and Others*** and other connected matters wherein impact and affect of the decision in ***Capri Bathaid Private Limited*** (supra) was considered. Paragraph 7 of this decision refers to decision in ***Capri Bathaid Pvt. Ltd (Supra)*** which with reference to delegation order dated 15th March, 2013 had empowered officers under Section 60(2) of the Act of the rank of VATO and above to exercise powers "within their respective jurisdiction". Similarly, in paragraph 8 in ***Larsen and Toubro Ltd. (Supra)***, the Division Bench specifically made reference to decision in ***Capri Bathaid Pvt. Ltd (Supra)*** and delegation notification dated 15th October, 2014. On this basis the respondents had relied upon the authority issued by the Special Commissioner on 25th September, 2014, a date prior. This contention was not accepted. The Court also rejected the contention that the Commissioner had duly approved and granted authority in view of the file notings on 25th September, 2014. Reference is also made to another order of delegation passed by the Commissioner dated 28th August, 2015 with retrospective effect from 1st April, 2015. The validation action with retrospective effect, it was observed, had no authority of law. The Division Bench was also

critical of the manner in which powers under Chapter X had been exercised in the said case.

29. The empowerment order dated 23rd March, 2016, to the contrary does not state or put any restriction when an officer not below the rank of Special Commissioner grants authority and empowerment to the officer/persons so appointed. In these circumstances, we accept the contention of the respondents that empowerment order dated 23rd March, 2016 would necessarily override the order dated 12th November, 2013 in respect of delegation of power under Chapter X of the Act. Of course, this does not mean that the Special Commissioner can appoint an officer contrary to Rule 48 and empower a person below the rank of Value Added Tax Officer in case investigation is to be done under sub-sections (1) and (2) to Section 60 of the Act. As per the empowerment order dated 23rd March, 2016, the requirement that the power under Chapter X of the Act would be only exercised by the jurisdictional officer as specified in the order dated 12th November, 2013 would no longer be applicable. This is not the requirement stipulated and mentioned in the empowerment order dated 23rd March, 2016.

30. The petitioner has stated that Form DVAT 50 was never shown to the petitioner/dealer at the relevant time. This is a disputed question of fact and in view of the fact that the respondents had placed on record Form DVAT-50, we would accept their version. We would add that the respondents should ensure that when the said form is shown to the dealer at the time of the search or survey/investigation, signatures of the party ought to have been obtained to avoid such controversy.

31. The next question, which arises for consideration, is whether the exercise of power by the Special Commissioner in Form DVAT-50 dated 27th May, 2016 is in accordance with law. As recorded above, we have accepted the contention of the respondents that in the present case only inspection of records, i.e. books of accounts, etc. and the goods was undertaken under Section 59 and sub-section (1) to Section 60 of the Act. As per the respondents, this is not a case in which search and seizure operations were undertaken under sub-section (2) to Section 60. Having held so, we would observe that certain lapses and failures on the part of authorities are apparent. These are listed below:-

- (i) Contrary to Rule 48, Form DVAT 50 had authorised officers below the rank of Value Added Tax Officer to undertake inspection under sub-section (1) to Section 60. This is impermissible and contrary to Rule 48.
- (ii) Contrary to mandate of sub-section (1) to Section 59 and sub-section (1) to Section 60 of the Act, that inspection of the books of accounts, etc., goods kept in business premises would be undertaken at reasonable time, the inspection commenced at 1730 hours (5.30 P.M.) in the evening on 27th May, 2016 and had continued till 0330 hours (3.30 A.M.) on 28th May, 2016.
- (iii) The Special Commissioner was aware and conscious that the inspection under the two Sections would take time and, therefore, vide Form DVAT 50 had authorised inspection on 26th and 27th May, 2016. The authorities, therefore, should have commenced inspection at a reasonable time ensuring that the inspection is not to be carried out at mid-night and

beyond. Surprisingly, the authorization dated 27th May, 2016, empowers inspection for a day earlier on 26th May, 2016.

(iv) Respondents in the counter affidavit have denied and refuted that any books, records, etc. were seized. CCTV footage/photographs that books of accounts were seized and taken away from premises G-52, Aggarwal City Plaza, Mangalam Palace, Rohini, New Delhi-85 was accepted by the respondents in the subsequent affidavit of Mr. Ranjit Singh, Joint Commissioner (Enforcement-1 Branch) sworn on 2nd August, 2017, which refers to Satya Prakash and Vijay Kumar as officers who had seized and taken away books of accounts. The seizure was without preparing *pachnama* and in the absence of any witnesses. This was impermissible and beyond the scope and power under Sections 59 and 60(1) of the Act. Moreover, the respondents changed their stand and stance once they were compelled to accept and admit that the books of accounts and records, including bill books, etc. were taken away from Rohini office. The respondents submit that the books of accounts and records were removed and taken to the principal place of business to ensure compliance with Section 48 read with Rule 42 of the Rules. This, as per the petitioner, is an afterthought and is unacceptable and books of accounts and records were never returned. Without answering and determining the dispute/issue regarding return of books and papers, we would observe that even if there was violation of the aforesaid provision, the books of accounts, documents, etc. could not have been seized and taken away from the said shop. Moreover, correct factual position regarding removal of the books of accounts, etc. should have been accepted and stated in the counter affidavit

and not concealed and accepted only after evidence to show the said removal was produced by the petitioner. It is obvious that a dealer would have to maintain bill books, etc. at every place of business.

32. Counsel for the respondents have submitted that illegality of seizure or survey or investigation would not affect admissibility and relevancy of the evidence collected. The said evidence as per the respondent is admissible and decisions in *R.M. Malkani versus State of Maharashtra*, (1973) 1 SCC 471 and *Pooran Mal versus Director of Inspection (Investigation), New Delhi and Others*, (1974) 1 SCC 345 are relied upon. These decisions may partly support the case of the respondents, but we would not like to enter into the said controversy and issue as this would be a matter examined during the course of the assessment proceedings. In case incriminating evidence and material has been found and collected, it is open to the respondents to rely upon the same and the petitioner to contest in accordance with law. We do not express and give final affirmative binding finding.

33. If the contention and the pleas of the petitioner are rejected, they can be burdened with tax, interest and penalty. However, there is no provision in the Act under which the authorities can be burdened with any penalty or costs for the wrongs committed by them in violation of the provisions of the Act. In these circumstances, having held that the respondents have acted contrary to the provisions of the Act and the Rules, we are of the opinion that they must be burdened with penalty in form of costs. This is necessary and required to ensure that such lapses do not happen in future and are not repeated. Such conduct and misconduct cannot be condoned and

overlooked. Having considered the nature of lapses and also ensure that such instances are not repeated, we are inclined to impose penalty in form of costs of Rs.50,000/- on the respondents. Rs.25,000/- would be paid to the petitioner within a period of six weeks from the date a copy of this order is received by the respondents and the balance amount would be deposited with the Delhi State Legal Services Authority. The writ petition is accordingly disposed of. We would clarify that imposition of costs would not in any manner affect the adjudication proceedings and would not be treated as expressing any opinion on the issues and questions, which may arise during the course of assessment. This is a separate aspect on which we do not make any comment.



(SANJIV KHANNA)
JUDGE

(PRATHIBA M. SINGH)
JUDGE

JANUARY 8th, 2018
NA/VKR/ssn