$~

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

Date of judgment 12.07.2018

\+ **W.P.(C) 10620/2016 and CM APPL. 17868/2018**

PUNJ LLOYD LTD ..... Petitioner

Through: Mr. Vasdev Lalwani, Mr. Ravi Chandhok and Mr. Rohit Gautam, Advs.

Versus

THE COMMISSIONER VALUE ADDED TAX..... Respondent

Through: Mr. Satyakam, ASC.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A. K. CHAWLA

JUSTICE S. RAVINDRA BHAT

1. The petitioner (hereafter "the company") is aggrieved by the failure of the respondent (hereafter called "DVAT") to process and refund excess amounts payable to it for two periods and has approached this court.

2. The petitioner is, *inter alia,* engaged in the business ofworks contracts transactions and is registered as a dealer under the Delhi Value Added Tax Act (hereafter "the Act"). The company filed periodical returns (hereafter "the returns") for all tax periods of the assessment year 2011-2012 including return filed for the period March 2012 (hereafter "the period") enclosing tax

deduction at source (hereafter "TDS") certificates in original. As of March 2012, the company had an excess amount credit of ₹ 4,60,41,149 it was entitled to. The company contends that this excess amount was inadvertently reflected as carry forward to the next tax period in the return instead of mentioning it in the column pertaining to refund for the subsequent period, which is clear from the fact that no benefit was reflected in the return for the next period. As the petitioner's representations were to no avail, it approached this court by filing W.P. (C) No. 5244/2016, seeking a direction to the DVAT to refund amounts due to it, given the position in law as to its entitlements under Section 38 and 42 of the Act and having regard to the fact that the respondents could no longer process the return and assess the amounts, in view of the limitation under Section 34.

3. This court disposed of the writ petition, on 30 May, 2016, directing as follows:

> *"The case of the Petitioner's is that on 25th April 2012, a return was filed for the tax period March, 2012 claiming the above refund. However, as explained by the Petitioner in para 6 of the Petition, the above amount was "inadvertently reflected as carry forward to next tax period in the Return instead of mentioning in column pertaining to refund." During the course of the hearing, it transpired that the Petitioner never brought this fact to the notice of the concerned Value Added Tax Officer ('VATO').*
>
> *3. It is pointed by Mr Gautam Narayan, learned Additional Standing counsel that since the Petitioner has carry forwarded the refund amount in the returns for the following years, in order to claim the refund the Petitioner will have to file Form-DVAT-21 read with Rule 34 of the Delhi Value Added Tax Rules 2005.*

4. Mr Srivastava, learned counsel appearing-for the Petitioner states that the Petitioner will file Form-DVAT-21 within a period of two weeks from today. If the Form DV AT 21 is so filed, the concerned V ATO will examineand pass an appropriate order in regard to the said claim not later than four weeks thereafter after affording the Petitioner an opportunity of being heard. If aggrieved by such order, it would be open to the Petitioner to seek appropriate remedies in accordance with law."

4. The petitioner proceeded to file Form 21 for claim for refund, as required having regard to the statement of the DVAT's standing counsel, in its writ petition.

5. The company received a notice from the Additional VAT officer (hereafter "AVATO") for hearing under Section 34 of the Act. In response, its counsel appeared and pointed out that the limitation prescribed for scrutinizing documents had expired and that in the absence of an order under proviso to Section 34 and the time period not being extended, further enquiry could not be carried on. Despite this, the petitioner notices. The AVATO noted the arguments and proposed a refund of the amounts claimed without interest and sought the approval of the superior officer. In support of this contention, the company relies upon the noting in the order sheet by the AVATO. It is submitted that a second notice was received by the petitioner despite the noting. Thus, given the limitation prescribed in Section 34 having regard to provisions of section 69 of the VAT act, further enquiry into the matter was barred. Thereafter, on 01.08.2016, the AVATO issued another notice seeking to examine the documents furnished by the company in order to decide the question as to the quantum of demand quantum of refund. Here it is submitted that the company without prejudice to its rights

furnished copies of all returns, all TDS certificates and purchase invoices, which were taken on record and the proceedings were adjourned for further hearing to 12.08.2016. The company's stand before the VAT authorities was that the examination of these areas was barred on account of the decision of this court in the case of *Electoral Systems Private Ltd Vs. Commissioner Value-Added tax* (WP 11382/ 2015), wherein it was held that once limitation for framing an assessment had expired, refund had to be processed as a matter of course, and further examination was barred. Despite this legal position the respondents proceeded to pass an assessment order on 22.08.2016 rejecting the company's contentions. It is submitted that the order of the Objection Hearing Authority (hereafter "OHA") dated 17.09.2012, by which the earlier demands had become final, because the AVATO did not, on remand proceed to pass any order, there was no question of seeking to assess or "re-open" the assessment in the garb of verifying particulars and details. The OHA, by the order dated 17.09.2012, set aside the assessment orders for the period from 2009 to September 2011. It was held that:

> *"In the interest of natural justice, the assessment orders and orders for imposition of penalties set aside. The assessing Authority is directed to provide fair opportunity to the dealer for production of all relevant records and giving explanation on critical issues. Thereafter a reasoned and detailed order be passed with clear analysis of all evidence submitted."*

6. On 08.09.2016, the company received the notice proposing to scrutinize the record and the previous assessment despite the fact that the limitation prescribed in this regard by section 34 had expired. Learned

counsel relied on the decision of a Division Bench of this Court in *Shaila Enterprises v Commissioner of VAT* (WP 5478/2016, decided on 5.08.2016). The petitioner states that section 34 empowers the Commissioner to extend time for completion of assessment by recording reasons. It is submitted that the reasons mentioned that the company had failed to disclose material particulars with respect to deductions claimed on account of labour and services is per se inadmissible. In support of this argument, the company relies upon Section 11, the text of Sections 31, 32 and 34. It is submitted that once the period prescribed by law, to complete the assessment expires, and applying the same in the present case, the court had directed the refund amounts to be paid out within a time stipulated in this regard, further enquiry was foreclosed.

7. The VAT department in its counter affidavit and during the hearing points out that the assessee did not claim any refund, for the relevant period, but instead carried forward the sum not claimed. It is stated that in the present case company filed its return for the tax 2012 for assessment year 2011-12 where it did not seek any refund in the relevant column and had shown the sum of ₹ 4.6 crores as balance carried forward to the next tax period. That amount was not reflected in the next period. The VAT department explains that it was under a misplaced belief that the course suggested by this court was in line with Section 38 (3) (e) and therefore the notice under Section 59 was issued and the time period would be extended by virtue of section 38 (7). It is stated that this mistaken belief led to the confusion. The respondent states such limitation prescribed for default assessment is four years. In the present case, the limitation period expired on

31.03.2016 under Section 34. It was after the period had expired company approached this court through the earlier petition. The company had not claimed the refund earlier; therefore, the department could not be foreclosed from insisting that it would scrutinize documents and materials to decide. In fact, factually refunds would do.

8. It is submitted that in the circumstances that the company approached this court would not in any manner preclude the primary duty of the department to ensure that excess amounts were not refunded and that the amount claimed recorded with the input credits and other payments for which refund was sought. The Learned Counsel also submitted that since the company carried forward the amount in April 2012 and the immediately succeeding month did not reflect that, the question of its seeking any refund does not arise. It was urged that on the other hand that if the company really wished to seek refund, it should have applied for order in a revised return. It's omission in that regard, and the expiry of the period of limitation for filing the revised return, which is one year, prevents it from approaching the court for seeking relief, which was otherwise not available in law.

9. The Learned counsel relies upon the copy of an order made by this court on 08.08.2017 and submits that earlier, in fact a direction was issued to the company to produce documents available with it regarding claim for labour and service charges to the extent of ₹69666711 for 0the period 2010-11. It is submitted that the court recognized that the order passed on 22.08.2016 was after the petitioner had produced 12 TDS certificates out of which ten could not be verified. The Learned counsel submitted that with regard to the order made on 08.08.2017, the scope of the proceedings under

section 34 of the act requires for an enquiry to be conducted into the veracity of the claims with regard to service and labour charges, before the amount claimed as refund can be quantified.

10. It is apparent from the above narration of events that the petitioner had previously approached this court, for a direction that having regard to the circumstances, its refund claims for the period upto March, 2011 ought to be granted. This court, while disposing of the petition, gave a time bound direction. Instead of adhering to it, the respondent/ DVAT department of the Govt. of NCT proceeded to issue the order dated 22.08.2016, denying the claims on the ground that inadequate or unsatisfactory material had been produced by the petitioner. The petitioner's grievance is two-fold. First of all, since the period of limitation for making an assessment on merits had expired, the default assessment became final. In the present case, the original assessment was set aside by the OHA. Following the interpretation given in *Shaila Enterprises* (supra) there was no scope to legally scrutinize the refund claim. In *Shaila*, the Court had ruled as follows:

> *"15. The Court is unable to accept the above submission. Para 5 of the order dated 25th June 2013 is categorical that the AO shall provide sufficient opportunity to the Assessee for seeking any clarification/confrontation on any adverse material and "a speaking order thereafter shall be passed afresh giving proper reasons for allowing/disallowing the refund as per the law.". It was further added "Imposition of penalty shall be consequential to the default of any tax due". There could be, therefore, no manner of doubt that the orders which were the subject matters of the proceedings before the OHA did not survive after the order of the OHA. The AO was required to pass an order afresh. It is for this reason that the Assessee was directed to appear before the AA on 15th July 2013.*

16. The last line of the order of the OHA reads: "The matter may be thereafter be decided in 30 days time". The word „may" was not to give an option to the AO whether or not to pass an order but the option if at all about the time period within which the order was to be passed. It is possible to argue that the AO could have passed the order not within thirty days but soon thereafter in view of the words „may be". However, here the AO appears to have forgotten about the proceedings altogether and not take any action whatsoever. If as contended by the Respondent, the Petitioner failed to appear before the AO on 15th July 2013, the AO was not absolved from passing a fresh order in respect of the refund claimed of the Petitioner. This was his bounden statutory duty.

17. It was pointed out that, in terms of Section 34(2) of the DVAT Act, there is no power with the OHA to remand the matter to the AO. In the event of a remand ordered by the Court or Appellate Tribunal, the fresh decision on remand was required to be taken within one year. It was volunteered by learned counsel for the Petitioner that notwithstanding the above legal position, even if the Petitioner were to assume without admitting that such a power exists with an OHA then in any event the AO was required to pass an order afresh within a maximum period of one year after the date of the order of the OHA. Clearly in the present case no fresh assessment order was passed nor was an order of refund was passed within one year of the date of the order of the OHA.

18. With the notices of default assessment creating the demand by notices dated 5th, 6th and 7th January 2011 for the period 2007-2008 ceasing to exist by virtue of the order dated 25th June 2013 and with no fresh assessment order being passed, there was no legal impediment any longer in granting refund to the Petitioner in respect of the claim made along with its return filed for the month of January 2008. The AO, obviously did not realise the implications of his failure to pass fresh assessment order in terms of the order dated 25th June 2013 of the OHA.

19. This Court has in a series of judgments emphasised the mandatory nature of the time limits under Section 38 of the DVAT Act for processing of the refunds. Reference in this regard may be made to the decision in Swarn Darshan Impex (P) Ltd v Commissioner Value Added Tax (2010) 31 VST 475 (Del), Lotus Impex v. Commissioner DT&T (2016) 89 VST 450 (Del); Dish TV India Ltd v GNCTD (2016) 92 VST 83 (Del), Nucleus Marketing & Communication v. Commissioner of DVAT [decision dated 12th July 2016 in W.P.(C) 7511/2015] and recently in Prime Papers and Packers v Commissioner VAT [decision dated 28th July 2016 in W.P. (C) No. 6013 of 2016]. It has further been clarified by the Court that any action the DT&T proposes to take in the form of reopening the assessment, the period within which the refund is to be issued will have to be taken into account.

20. For instance, in the present case, in respect of the assessment for the period 2007-2008, even if the DT&T wished to revisit them, the limitation under Section 34 of the DVAT Act would apply. There are two periods of limitation under Section 34 of the DVAT Act. One is the period of four years from the end of year comprising one or more time period for which a person furnishes his return and the other is in terms of proviso of Section 34 (1) of the Act where there is an extended period of six years and where the Commissioner has reason to believe that the tax was not paid "by reason of concealment, omission or failure to disclose fully material particulars". In the present case, in respect of the month of January 2008 the time within which it could have been reopened has long been crossed. The DT&T cannot therefore possibly seek to reopen the assessment for 2007-08.

21. The net result is that the refund for the month of January 2008, which the Petitioner has claimed refund along with the return became due to the Petitioner from the expiry of one month thereafter in terms of Section 38 (3) (a) (i) of the DVAT Act. The interest thereon till the date of payment also falls due in terms of Section 42 of the DVAT Act."

In the present case, the assessment for the period 2009 to March, 2011 became final, because the remand order (dated 17.09.2012) was never followed through with a fresh assessment order within the time period. Therefore, even if a fresh four-year period were to have been reckoned, that too ended. The revenue's attempt to either verify the refund claim or to reopen the assessment under Section 34 is therefore, clearly beyond the authority of law. The court does not find any merit in the revenue's argument that the petitioner had wrongly claimed carry forward and ought to have sought refund and that its claim is now barred, because the time period for revising the returns (one year) has since passed. The pattern and structure of the DVAT is such that if an assessment order is not passed, the returns acquire the status of a default assessment; if any unadjusted credit exists, the assessse's right to refund crystallizes. Therefore, in the present case, that the assesssee wrongly showed the refund claim amount as carry forward, or that it did not subsequently reflect it in the later returns, does not preclude its basic refund claim, on which it has maintained a consistent stand. The revenue's argument that refund is impermissible because the period for revising returns is utterly frivolous and baseless. If such an argument were to be countenanced, in every case, the assessee would have to revise its returns wherever it anticipates a refund, or a remand by the OHA. Clearly, it is the duty of the revenue to give consequential effect to the final effect of the OHA's orders, that might set aside assessments. If no order is made within the time limit prescribed, clearly the revenue cannot hold on to the monies which do not bear the character of a valid levy; they have to be refunded.

11. During the pendency of this court's order, the VAT authorities framed assessments under Section 32 and issued penalty notices for the subsequent period 2011-2012 (i.e. after April, 2011). In those assessments, the excess added is to the tune of ₹6,96,66,711/-; appropriate VAT leviable and penalty has been proposed. That is the subject matter of appeal/objections before the OHA. In this view of the matter, the court is of the opinion that the petitioner should seek recourse to the remedies provided by law, in respect of those proceedings for the subsequent period.

12. In the light of the above discussion, it is held that the order dated 22.08.2016 and subsequent notices concerning the period 2009 to end March, 2011 are legally unsustainable; they are hereby quashed, as are also consequent demands and proceedings if any for recovery. The proceedings in respect of later periods, which are subject matter of the petitioner's objections before the OHA, shall be concluded in accordance with law. The petitioner's rights and contentions to make all submissions are reserved in this regard. The petition is allowed in these terms without order on costs.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

JULY 12, 2018