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

Decided on: 8th May, 2019

+ **W.P.(C) 393/2019**

ROCKWELL INDUSTRIES

..... Petitioner

Through: Mr.Puneet Rai, Advocate

versus

COMMISSIONER OF TRADE & TAXES & ANR.

..... Respondent

Through: Mr.Anuj Aggarwal, ASC, GNCTD

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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1. The challenge in this writ petition is to default assessment orders dated 14.11.2018 and consequent refund adjustment order dated 15.11.2018 passed by the authorities under the Delhi Value Added Tax Act, 2004, ("hereinafter referred to as the DVAT Act").

2. The petitioner is engaged in trading of shoe accessories and is registered under the DVAT Act. In accordance with the provisions of the statute, the petitioner pays tax on purchases made within the state ('input tax') which is adjusted against the tax payable on sales ('output tax'). The petitioner claims refunds on account of the fact that its output tax liability is less than the input tax paid. To the extent that the petitioner's sales are inter-state sales, it is entitled to a concessional rate of tax of 2% against C forms.

3. For the quarter 01.01.2014 to 31.03.2014, the petitioner filed a return claiming a refund of ₹17,59,874/-. The failure of the respondents to issue the refund led to the filing of W.P(C) 8762/2018 before this Court. However, after notice was issued in that petition on 21.08.2018, default assessment orders dated 14.11.2018 were passed in respect of five quarters, resulting in a demand of ₹17,66,883/-. These pertain to the fourth quarter of F.Y. 2012-13 and all the quarters of F.Y. 2013-14.

4. Mr. Puneet Rai, learned counsel for the petitioner, submitted that the refund was required to be made within a period of two months from the date of filing of the returns under Section 38(3)(ii) of the DVAT Act. He submitted that the assessment in the present case (for F.Y. 2013-14) had already been made on 12.01.2017 and statutory forms had also been filed. The default assessment orders, according to him, do not reveal any mismatch between the selling dealer and the petitioner, or any finding that the petitioner has concealed material particulars which could justify the invocation of the extended period under Section 34 of the DVAT Act.

5. Mr. Anuj Aggarwal, learned Additional Standing Counsel for the Government of NCT of Delhi, submits that the default assessment orders dated 14.11.2018 are based upon a mismatch in the account of dealers from whom the petitioner had made purchases. Mr. Aggarwal submitted that this justifies the *suo motu* review of the assessment order in the present case.

6. Section 38 of the DVAT Act provides as follows:

“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 1 [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 1 [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 2 [within fifteen days from the date on which the return was furnished or claim for the refund was made.] 3*

[(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; or

(d) furnish the declaration or certificate forms as required under Central Sales Tax Act, 1956,]

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.]”

7. It will be evident from the above that the refund, in respect of the petitioner's quarterly returns, ought to have been made within a period of two months after the filing of the return, i.e. by 25.06.2014. The assessment for the F.Y. 2012-13 was also carried out on 07.06.2014, and for F.Y. 2013-14 on 12.01.2017. The impugned default assessment orders, having been made only on 14.11.2018, could not justify withholding of the refunds which the DVAT authorities ought to have processed already, particularly during the pendency of the petitioner's writ petition in respect of the same.

8. The petitioner has also placed on record a certified copy of the order sheets from the file of the respondents which reveal that the authorities were processing the petitioner's refund claim until 17.09.2018, when the file was put up to the concerned Special Commissioner. It appears that, pursuant to a discussion at the instance of the Special Commissioner, a further note was prepared on 12.11.2018 disclosing the "mismatch at first and second level" and seeking approval for raising a demand of the amounts mentioned. The approval having been granted by the Commissioner on the same date, the impugned default assessment was made and the refund adjustment order was issued.

9. On similar facts, this Court in (*M/s S.K. Engg. Works vs. Commissioner of Delhi Value Added Tax & Anr.*) [W.P.(C) 2124/2017, decided on 02.05.2017] held as follows:-

“1. The Petitioner’s refund application for the 4th quarter of 2013-14 has been pending with the Respondent DVAT Department since 24th June, 2014. The present petition was filed on 4th March, 2017 and notice was issued on 7th March, 2017. On that date, this Court was not informed by the counsel for the Respondent that on 3rd February, 2017, the VATO of Ward No. 49 had in fact passed a notice of default under Section 32 of the Delhi Value Added Tax Act, 2004 (‘DVAT Act’). On the same date, by a separate ‘Adjustment Order’ passed by the VATO the entire amount of refund stood adjusted against a fresh demand of Rs. 3,10,526. Thus the refund amount got reduced to Nil.

2. A copy of the notice of the default assessment tax with interest by the VATO passed on 3rd February, 2017 is placed on record. The reasons for creating a fresh demand reads as under:

“The dealer has claimed refund in 4th Qtr 2013, to the tune of Rs. 1,97,494/-. The amount has been generated after carry forward of ITC of Rs. 95,700/- from 3rd Qtr 2013. On analyzing 2A of the dealer for 3rd Qtr 2013-14 up to the 4th stage the amount of ITC verified is Rs. 97,239/- allowed. Rest of amount of Rs. 1,28,900/- is disallowed. On analyzing 2A of the dealer for 4th Qtr 2013-14 up to the 4th stage the amount of ITC verified is Rs. 3,217/- allowed. Rest of amount of Rs. 1,81,646/- is disallowed. A part from this registration of M/s Sharda Enterprise (07810471786) was cancelled W.E.F.12-12-2013. Therefore, ITC to tune of Rs. In 2013-14 is disallowed.”

3. This court in several judgments including **Swarn Darshan Impex (P) Ltd. v. Commissioner, Value Added Tax (2010) 31 VST 475 (Del)** and **Prime Papers and Packers v. Commissioner VAT (2016)94 VST 347 (Del)** emphasized that the pendency of a refund application should not be viewed by the Department as an opportunity to create a fresh demand particularly if the time limits not only for making the refund but even for re-opening the assessments of previous years has long been crossed.

4. Yet, that is precisely what the Department has done here. The entire exercise indulged in by the VATO as above at the stage of refund is wholly without the authority of law. The re-opening of the assessments of earlier periods is time-barred and not in accordance with the procedure set out for that purpose under the DVAT Act.

5. The Court, therefore, has no hesitation in hereby setting aside the notice of default assessment of tax, interest and penalty dated 3rd February 2017 under Sections 32 and 33 of the DVAT Act and the consequential 'Adjustment Order' of the same date.

6. The Court therefore directs that the refund amount in the sum of Rs. 1,97,494/- together with interest payable thereon under Section 42 of the DVAT Act shall be directly paid into the account of the Petitioner by the Respondent DVAT Department not later than two weeks from today.

7. The Court further directs that the DVAT Department will abide by the above time lines. In the event that the Petitioner has any grievance either on account of non-payment of the refund amount together with interest as directed or non-compliance with any of the above directions, it would be open to the Petitioner to seek appropriate remedies in accordance with law.

8. The petition is allowed in the above terms.”

10. To similar effect is the decision in (**Pradeep Enterprises vs. Commissioner of Trade & Taxes & Anr.**) [W.P.(C) 2583/2017, decided on 19.04.2017] where a default assessment order was set aside as being in abuse of statutory powers.

11. From the facts recited above, it appears to us that in the present case also the default assessment order has been generated only to defeat the refund claim of the petitioner, which, in any event, ought to have been paid well before the impugned orders were made. The impugned default assessment orders expressly state that there is no mismatch between the

selling and purchasing dealers. Yet a demand is sought to be raised in respect of alleged mismatch.

12. Following the judgments of this Court, *inter alia* in ***M/s S.K. Engg. Works (supra)*** and ***Pradeep Enterprises (supra)***, we are of the view that the impugned default assessment orders dated 14.11.2018 and the refund adjustment order dated 15.11.2018 cannot be sustained, and the same are hereby set aside. Consequently, the petitioner is entitled to refund of the amount of ₹17,59,874/- claimed by it. The said amount, along with interest payable under Section 42 of the DVAT Act, shall be disbursed by the DVAT authorities within four weeks from today.

13. The writ petition is allowed in the above terms.

PRATEEK JALAN, J.

S. MURLIDHAR, J.

MAY 08, 2019

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