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

+ **W.P.(C) 7842/2018**

ITD-ITD CEM JV

..... Petitioner

Through

Mr. Rajesh Jain, Mr. Virag Tiwari
&Mr. Ramashish, Advocates

Versus

COMMISSIONER OF TRADE & TAXES

..... Respondent

Through

Mr. Satyakam, ASC for GNCTD with
Mr. Satish Chauhan, VATO

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

07.08.2019

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Dr. S. Muralidhar, J.:

1. The Petitioner seeks a direction to the Respondent Commissioner of Trade and Taxes to grant refund of Rs.6,26,56,549/- for the fourth quarter of 2013-2014.

2. The Petitioner a joint venture group is engaged in executing works contracts for the Delhi Metro Rail Corporation ('DMRC'). It has been registered under the Delhi Value Added Tax Act, 2004 (DVAT Act) since 2007. The Petitioner has been filing its returns in terms of Section 26 of the DVAT Act read with Rules 26 to 28 of Delhi Value Added Tax Rules, 2005 (DVAT Rules).

3. For the fourth quarter 2013-2014, the Petitioner filed its return in form DVAT-56 on 9th May, 2014 wherein it claimed a refund of Rs. 3,64,66,651/- under Section 11 (2) (b) of the DVAT Act. The above return was finally revised on 2nd January and the refund claimed was enhanced to Rs. 6,26,56,549/-. The revision became necessary as a result of the Petitioner adopting the Accounting Standard-7 applicable to Engineering Construction Contracts (ECC).

4. On 17th September, 2014 the Value Added Tax Officer (VATO) issued notice to the Petitioner under Section 59(2) of the DVAT Act for the period 2013-14 to appear on 30th September 2014. Apparently, no hearing took place on the appointed date. Nearly three years thereafter on 29th March, 2017 notices of default assessment of tax, interest and penalty were issued under Sections 32 and 33 of the DVAT Act for the entire year of 2010-2011 invoking the extended period. A demand of tax in interest in the sum of Rs.8,80,89,920/- was created. Penalty of an equal amount was also imposed under Section 86 (10) of the DVAT Act.

5. On 27th May, 2017 the Petitioner filed two objections against the above default notices before the Special Commissioner i.e. the Objection Hearing Authority (OHA). In terms of Section 35(2) of the DVAT Act, by virtue of the above objections being pending for the OHA, the demand created remained stayed till their resolution.

6. On 1st March, 2018 a fresh notice under Section 59(2) was issued for the period 2013-2014 the hearing of which got concluded on 31st March, 2018.

On 31st March, 2018 notices of default assessment of tax, interest and penalty was issued under Sections 32 and 33 for the entire year of 2013-2014. A demand of Rs.66,26,780/- was created and penalty of equal amount was imposed under Section 86(10) of the DVAT Act. On 5th April, 2018 the Petitioner filed the review application which was rejected by the VATO on 7th May, 2018.

7. Thereupon the Petitioner filed two objections on 30th May, 2018 under Section 74 of the Act before the Special Commissioner i.e. OHA. The contention of the Petitioner is that as far as the refund due to it for the fourth quarter of 2013-2014, it was entitled to refund of Rs.4,94,02,989/- (excess tax credit Rs. 6,26,56,549/- less tax and penalty Rs.1,32,53,560/-) along with interest.

8. It is pointed out that the non-grant of refund is violative of Section 38 of the DVAT Act. The refund was due within a period of two months from the date of filing of the return if claim was made in the return. Under Section 38(4) if any notice of audit, investigation or inquiry has been issued under Sections 58 and 59 of the DVAT Act, the amount shall be carried forward to the next tax period.

9. The case of the Petitioner is that at the time when the return for the fourth quarter of 2013-2014 was filed no proceedings were pending since no notice either under Sections 58 or 59 of the DVAT Act were issued to the Petitioners within the time period specified under the DVAT Act. No security in terms of Section 38 (5) was demanded. Since no order of carry

forward of refund had been passed by the Commissioner the question of applicability of Section 38 (4) of the DVAT Act also did not arise. Consequently, it is argued that Section 38 (7) does not apply and the two-month period provided under Section 38(3) (a) (ii) became mandatory.

10. Reliance is placed in the decision of this Court in ***Swarn Darshan Impex Pvt. Ltd. v. Commissioner VAT 2010 (31) VST 475 (Del)***. Reference is also made to the judgment dated 19th February, 2016 in W.P(C) No.134-135/2014 (***M/s. Lotus Impex v. Commissioner of VAT***) and the order dated 19th August, 2016 in WP(C) No.7351/2016 (***M/s. Balaji Digital Solution Pvt. Ltd. v. CVAT***).

11. It is submitted by Mr. Rajesh Jain, learned counsel for the Petitioner that apart from the denial of refund being contrary to Sections 38, 39 and 42 of the DVAT Act, it was also contrary to Circular No. 6/2005-2006 (File No.VAT/Policy/2005/796) dated 15th June, 2005 which required the VATOs to process refunds in a time bound manner. This was followed by Circular No.12/2005-2006 dated 6th July, 2005 obliging the VATO to furnish a report regarding cases where refund have been claimed in the return and the details of disposal of such cases. Reference is also made to Circular No. 36/2005-2006 dated 19th October, 2005 where the Ward Authorities were advised to send the refund cases in DVAT- 22 with a typed covering letter containing the information sought by the circular. It is stated that when even this did not improve the position, Circular No. 3/2009-2010 dated 16th June, 2009 was issued stating that if refund applications were not processed without delay individual responsibility would be fixed and reflected in the assessment of

the officer concerned.

12. It is further contended that since the refund was not given to the Petitioner within two months as per Section 38 (3)(a)(ii) of the DVAT Act, the Petitioner was entitled to interest in terms of Section 42(1) of the DVAT Act. Reliance is also placed on the decision of the Allahabad High Court in ***Siddhant Chemicals vs. Union of India 2014 (307) ELT 44.***

13. In response to the notice issued to it, the Respondent has filed short counter affidavit on 7th March, 2019 stating *inter-alia* that the claim of the Petitioner was pre-mature as several demands of tax interest and penalties for the pre-existing and the current period were pending against the Petitioner as per the details available on the DVAT portal. The objections filed by the Petitioner before OHA was pending consideration. In Para 6 of the counter affidavit in a tabular form the demand of tax, interest and penalty qua the Petitioner were shows as under:-

S.No.	Period	Tax+Interest	Penalty
1.	4 th Quarter 2007	2,41,87,872/-	2,90,60,687/-
2.	Annual 2010-11	8,80,89,920/-	4,66,96,421/-
3.	Annual 2013-14	66,26,780/-	66,26,780/-
Total		Rs. 20,12,98,460/-	

14. The contention is that for the purpose of Section 38 (2) of the DVAT Act, the demand will have to be treated as an amount recoverable thereunder. In terms of Section 35(2) the amount should be treated as ‘suspended’ till a decision has been made by the OHA. It is accordingly

submitted that the question of refund under Section 38 of the DVAT Act would have to await the decision of the OHA.

15. Mr. Satyakam, learned counsel for the Respondent, contends that since the demands were pending before the OHA the refund could not be processed and will have to await the final outcome of the proceedings before the OHA. He acknowledges that the above reply was filed on 7th March, 2019 when the demand for 2013-2014 (annual) was still pending. However, that demand has now been set aside by the order dated 2nd July, 2019 of the OHA. A copy of the said order has been placed before the Court. It is stated that proceedings pursuant to the remand are in progress before the VATO.

16. The Court finds that of the above three demands set out in a tabular form, the demand for the fourth quarter of 2007 is clearly time barred and not tenable as such. In the rejoinder filed to the above counter affidavit the Petitioner has pointed out how by an order dated 23rd December, 2011 the OHA had already set aside the demand for 2007 fourth quarter and remanded the matter to the VATO for a fresh assessment but no fresh assessment order had been passed even after the expiry of statutory limitation period of one year from 14th February, 2012 prescribed under Section 34(2) of the DVAT Act. The demand for annual 2013-2014 has already been set aside. While the demand for annual 2010-2011 is pending consideration before the OHA, the question is whether the mere pendency of that demand can deprive the Petitioner of its refund.

17. As far as the demand for 2010-2011 is concerned, for the same period an

assessment was made by the VATO (Audit) on 16th July, 2014 which was challenged in this Court by the Petitioner by filing WP(C) No. 6335/2014 questioning the jurisdiction of the VATO. By a judgment dated 3rd October, 2016 this Court set aside the aforementioned assessment order dated 16th July, 2014. On that date WP(C) No. 4901/2015 relating to refund of Rs.9,94,35,199/- for the month of July, 2010 was allowed by this Court. The Respondent challenged the above order dated 3rd October, 2016 in WP(C) No.6335/2014 in the Supreme Court in SLP(C) (CC) No.9334/2017 which was dismissed by the Supreme Court on 7th July, 2017.

18. The fresh default notices of assessment under Section 59(2) were issued on 17th February, 2017 which was challenged by filing WP(C) No. 2703/2017. Since no stay was granted by the Court the Respondent passed a default assessment order on 29th March, 2017, leading the Petitioner to file CM No. 14557/2017 in the said pending Writ Petition No.2703/2017. This was disposed of on 18th April, 2017 requiring the Petitioner to avail the statutory remedy. Two objections were filed on 27th May, 2017 before the OHA which are still pending. It is stated that notwithstanding that those assessments were framed on 29th March, 2017 relating to 2010-2011.

19. The mere fact that the demand created subsequent to the claim for refund and during its pendency for an earlier period cannot deprive the Petitioner of its claim for refund. In order to appreciate the above submissions it is necessary to refer to Section 38 of the DVAT Act which reads as under:

“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; 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) to (11) omitted since they are not immediately relevant for the case on hand]

20. Under Section 38 (3) (a) (ii) the refund has to be processed within two months from the date of filing of the return if the claim is made in the return. In terms of Section 38 (4) if a notice of audit, investigation or inquiry has

been issued under Sections 58 and 59 of the DVAT Act, then the amount shall be carried forward to the next tax period. In the Petitioner's case when the return for the fourth quarter 2013-2014 was filed claiming the above refund amount, no such proceedings were pending. In other words, there was no notice either under Section 58 and 59 of the DVAT Act had been issued to the Petitioner within two months from the date of filing of such return claiming the refund. This was true even of the revised return filed in January, 2015. Consequently, the Respondent did not pass any order under Section 38 (4) carrying forward the refund amount.

21. Even in terms of Section 38(5) no security was demanded. The security on the making of a refund claim is required to be demanded within 15 days. A further 15 days is granted to the person concerned to arrange the security. No order demanding security was passed in the present case under Section 38(5) of the DVAT Act whether within 15 days or thereafter. In other words, this is not a case for Section 38 (7) of the DVAT Act applies.

22. Resultantly, as far as the fourth quarter of 2013-2014 is concerned, the two-month period under Section 38 (3) (a) (ii) of the Act mandatorily applied. The Respondent was under a statutory obligation to grant refund to the Petitioner within that time period. The Court agrees with learned counsel for the Petitioner therefore that in the present case there is breach of Section 38 of the DVAT Act.

23. The argument of the counsel for the Respondent is that on account of the pendency before the OHA of the proceedings pertaining to the demand for

2010-2011 the refund claim for the fourth quarter of 2013-2014 cannot be processed, is not a legally acceptable proposition. The proceedings contemplated under Section 38(4) were that pending prior to the expiry of the two month period within which the refund had to be granted. Where a demand is sought to be created much later than the two-month period, that cannot come in the way of the refund being granted.

24. In *Swarn Darshan Impex v. Commissioner VAT (supra)* it was observed by this Court as under:

"16. In any event, even if we assume that the said notice was issued by the respondents and that it had been received by the petitioner, it would not change the position in law. Sub-section (4) of Section 38 has to be read with the provisions of sub-section (3) of Section 38. By virtue of the latter provision, the refund had to be paid to the petitioner within two months from the date of the return furnished by him. No such notice under Section 59 requiring additional information had been issued during that period. Consequently, the subsequent purported issuance of notice under Section 59 cannot be taken as a ground for not paying the refund to the petitioner. In this connection, the provisions of sub-section (7) of Section 38 also needs to be examined. The said provision stipulates that for calculating the period prescribed in Section 38(3)(a), the time taken to, inter alia, furnish additional information sought under Section 59 shall be excluded. It is obvious that exclusion can only be when the period of limitation itself has not run out. The consequence of this discussion is that the notice under Section 59 in connection with refund has to be issued within the period of two months stipulated in Section 38(3)(a)(ii). As a result, the submission of the learned counsel for the respondents that because of issuance of notice under Section 59 of the said Act, albeit beyond the prescribed time, the refund was not payable, is not tenable."

25. This was subsequently reiterated in *M/s. Lotus Impex v. Commissioner of VAT (supra)* and *M/s. Balaji Digital Solution Pvt. Ltd. v. CVAT (supra)*. Consequently, the Court finds no legal impediment in the Petitioner's refund being processed for the fourth quarter of 2013-2014. The pleas of the Respondents are accordingly rejected.

26. As regards interest due to the Petitioner on the refund amount, the relevant provision is Section 42 (1) of the DVAT Act. The legal position on the scope of that provision is explained in the decision of this Court in *IJM Corporation Berhad v. Commissioner of Trade & Taxes*. The Petitioner has in ground I of the writ petition set out the calculation of interest up to 25th July 2018 as under:

Quarter 2013-14	Amount of refund (Rs.)	Due date of payment	Amount of interest in terms of Sec 42(1) (a) of the Act till 25.7.2018 (1476 days) & (1240 days)
IV	3,64,66,651/- 2,61,89,898/-	9.7.2014 2.3.2015	88,47,909/- 53,38,434/- Total 1,41,86,343/-

27. Learned counsel for the Respondent while not disputing the correctness of the above calculation states that the Respondents will act in accordance with the law explained in the above decision regarding calculation of interest on the refund amount and abide by any time-bound direction issued by this

Court.

28. Accordingly, a direction is issued to the Respondent to issue the order granting refund to the Petitioner for the fourth quarter of 2013-14 as claimed together with interest due and ensuring that the refund amount together with interest is credited to the account of the Petitioner on or before 31st August, 2019. As pointed out by learned counsel for the Petitioner that the above calculation of interest is upto 25th July, 2018. The said interest amount will now be calculated upto the date of payment or 31st August, 2019 whichever is later.

29. The failure to make the payment of refund together with interest on or before 31st August, 2019 will make Respondent liable to pay to the Petitioner costs of Rs. 50,000/-.

30. The writ petition is disposed of in the above terms.

31. A copy of order be issued *dasti* under the signatures of Court Master.

CM Appl. No. 30061/2018 (Exemption)

32. Exemption allowed, subject to all just exceptions.

S. MURALIDHAR, J.

TALWANT SINGH, J.

AUGUST 07, 2019/mw