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

+ **W.P.(C) 9204/2018**

M/S MALKIAT SINGH & SONS Petitioner

Through: Mr.Arif Ahmed Khan with Mr.Varun
Nischal, Advocates.

versus

COMMISSIONER TRADE & TAXES & ANR. Respondents

Through: Mr.Anuj Aggarwal, Advocate.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE I.S.MEHTA

ORDER
21.05.2019

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Dr. S. Muralidhar, J.:

1. The Petitioner, which is a proprietorship registered under the Delhi Value Added Tax Act, 2004 ('DVAT Act'), functioning under the jurisdiction of the Value Added Tax Officer ('VATO'), Ward No.80 has filed this petition for a direction to the Respondents to issue to the Petitioner refund in the sum of Rs.1,58,99,041/- for the tax periods January to December 2010, January to March 2011, August 2011 and the fourth quarter of 2013-14 for which returns as required under the DVAT Act were duly filed by the Petitioner.

2. It is pointed out that the legitimate refund payable to the Petitioner whose

returns have been assessed/reassessed by the Special Objection Hearing Authority ('SOHA') and Assessing Authority ('AA')/VATO is sought to be denied by the Respondents by relying on the system generated zero (Nil) demand orders issued mechanically by the VATO without application of mind. Copies of such zero demand orders all dated 8th August 2012 have been collectively enclosed with the petition as Annexure 'P1'.

3. Reliance is placed by the Petitioner on the order dated 6th August 2018 passed by this Court in WP(C) 1563 of 2018 (***Arora Enterprises v. Commissioner, Trade and Taxes***) which in turn has referred to earlier orders dated 1st June 2016 in WP(C) 5032 of 2016 (***JBN Impex Pvt. Ltd. v. Commissioner of Trade and Taxes***) and 21st November 2016 in WP(C) 9252 of 2016 (***Aesthetic Packaging v. Commissioner of VAT***).

4. In response to the notice issued in the present petition a counter-affidavit has been filed by the Respondents in which *inter alia* its stated that the refund claims for the periods April 2010 to December 2010 and January to March 2011 and August 2011 have been already rejected by 13 orders of the AA dated 3rd August and 8th August 2012. Aggrieved by the said orders, the Petitioner filed two objection applications in DVAT-38 on 24th September 2012 and 28th May 2015. Two separate orders were passed on 21st February 2017 by the OHA setting aside the above orders of the AA and remanding the cases to the AA for taking a fresh view. The Petitioner was asked to be present before the VATO within 7 days from the issue of the said order. According to the Respondents the Petitioner failed to appear before the VATO pursuant to the above order of the OHA and consequently, the

reassessment could not be done.

5. As regards the demands created against the Petitioner in the sum of Rs.50,07,665/-, the Respondent states that these included penalties and were for various periods i.e. second quarter of 2009, February 2011, March 2011, March 2010 (penalty) and annual 2010 (penalty). The Petitioner filed objections before the OHA against the above demand orders. The OHA rejected the objections by an order dated 21st September 2012. Thereafter, the Petitioner filed appeals before the Appellate Tribunal Value Added Tax ('ATVAT'). By order dated 31st July 2015 the ATVAT remanded the matter back to the VATO for reframing the assessment. It is stated that pursuant to this remand order, the Petitioner did not appear before the VATO and, therefore, the re-assessment could not be finalized. It is stated that the re-assessment for February and March 2011 for which demand was created and penalty imposed, the Petitioner's appeal is pending before the ATVAT.

6. What is overlooked by the Respondents is that the Petitioner is aggrieved by the denial of refund to it pursuant to the assessments already finalized. The refund is sought to be denied by creating fresh demands which for some periods is 'nil' and for others on completely untenable grounds for which orders have already been set aside by the OHA and ATVAT.

7. The Court was faced with a more or less similar situation in the case decided by it on 5th August 2016 in WP (C) 5478 of 2016 (*Shaila Enterprises v. Commissioner of Value Added Tax*). There again the contention of the Respondents was that pursuant to the remand orders passed

by the OHA requiring the Petitioner to again appear before the VATO, the Petitioner did not appear on the date fixed and, therefore, fresh assessment orders could not be passed. It was sought to be contended by the Respondents that in view of the failure of the Petitioner to appear before the VATO the earlier order creating the demand would revive.

8. This Court in *Shaila Enterprises (supra)* negated the said submission pointing out that the earlier orders were set aside by the OHA and the VATO was required to pass an order afresh. It was held by this Court that once there was a remand order the VATO was required to pass a fresh order irrespective of whether the Petitioner appeared or not at the time fixed. In *Shaila Enterprises* the OHA had required the VATO to pass a fresh order within 30 days. This Court held that the VATO could not have avoided passing the order in respect of the refund claimed by the Petitioner and that it was its 'bounden statutory duty to do so.'

9. The Court in *Shaila Enterprises* noted the submission of the Petitioner that in terms of Section 24 (2) of the DVAT Act, the OHA had no power to remand the matter to the VATO. Where a remand has been ordered by the Court or the ATVAT, a fresh decision on the remand had to be taken within 1 year. It was noted that in that case no fresh assessment order or an order of refund was passed within 1 year from the order of the OHA. The Court held as under:

“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) Limited 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.”

Court in *Shaila Enterprises* further observed:

“24. Before parting with the matter, the Court would like to add that this is yet another instance of orders being passed by the officers of the DT&T with total non-application of mind and in ignorance of the legal position. The Court would only like to reiterate that there is an urgent need for an orientation being imparted to the officers of the DT&T in the law and the decisions of the Court explaining the law. In this regard, the court would like to reiterate the observations made by it in *Capri Bathaid Pvt. Ltd. v. Commissioner of Trade & Taxes (2016) 90 VST 143 (Del)*.

“53. The CVAT should also hold regular orientation and training courses for the VAT Authorities at various levels on the law and procedure governing the collection of VAT. The CVAT can also consult the Delhi State Judicial Academy for that purpose.”

25. Due to the careless action of the VATO in the present matter, who issued the 'adjustment order' dated 30th December 2010 unmindful of the law, an interest burden of nearly Rs. 56 lakhs is now placed on the exchequer. A question then arises as to who should be made responsible for this and whether any action on the disciplinary side is not called for? Consequently, the Commissioner, VAT is directed to seek an explanation from the VATO who issued the above 'adjustment order' and to pass appropriate orders on the disciplinary side as he deems fit not later than four weeks from today. A copy of this order be delivered forthwith to the Commissioner, VAT by the Registry through a Special Messenger for compliance with the above direction.

26. The writ petition is allowed and the application is disposed of in the above terms with costs of Rs. 10,000 which, as requested by learned counsel for the Petitioner, shall be paid by the Respondent to the Sales Tax Bar Association not later than 5th September 2016.”

11. It may be noticed that the special leave petition filed against the judgment of this Court in *Shaila Enterprises v. Commissioner of Value Added Tax* was dismissed by the Supreme Court by its order dated 4th January 2017. This was noticed by this Court in its order dated 26th February 2019 in WP 10020 of 2018 (*Blue Star Ltd. v. Commissioner of Trade and Taxes*) where this Court quashed the fresh demand sought to be created at the stage of claim for refund by the Assessee.

12. Reverting to the case in hand, the order passed by the OHA remanding the matter to the VATO is dated 21st February 2017. Although no time limit was set, it is clear that the fresh order to be passed within 1 year from the date of the order was not passed. As far as the order passed by the ATVAT is concerned, it is dated 30th July 2015 and within 1 year thereafter the fresh assessment order had to be passed. Again, the VATO failed to do so. Consequently, with the earlier demands already having been set aside by the OHA and the ATVAT and no fresh orders having been passed by the VATO pursuant to the remand during the time stipulated, there is no justification whatsoever in denying the refund due to the Petitioner.

13. Accordingly, a direction is issued to the Respondents to refund to the Petitioner the sum of Rs.1,58,99,041/- within a period of 8 weeks from today together with interest from the expiry of 1 month from the filing of respective returns in terms of Section 42 of the DVAT Act. If the above directions are not followed it will make the Respondents liable to pay further simple interest @ 6% per annum on the aforesaid sum for the period of delay. The writ petition is disposed of in the above terms.

CM APPL. 35425/2018 (exemption)

14. Allowed, subject to all just exceptions.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MAY 21, 2019

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