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* IN THE HIGH COURT OF DELHI AT NEW DELHI
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\+ W.P.(C) 10152/2018

JAY SHYAM & COMPANY ..... Petitioner
Through: Mr Rajesh Jain, Mr Virag Tiwari, Mr Deepak Gupta and Mr Ramashish, Advocates.

versus

COMMISSIONER OF TRADE & TAXES ..... Respondent
Through: Mr Shadan Farasat, ASC for GNCTD with Ms Rudrakshi Deo, Advocates.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE TALWANT SINGH

O R D E R
% **13.08.2019**

CM 39577/2018 (exemption)

1. Allowed, subject to all just exceptions.

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2. The Petitioner has approached this Court for a direction to the Respondent Department of Trade and Taxes ('DT&T') to grant it refund in the sum of Rs.16,05,666/- for the first quarter of 2017-18.

3. The Petitioner is registered under the Delhi Value Added Tax Act, 2004 ('DVAT Act') and is engaged in the trading of electronic appliances, wires,

etc. The Petitioner has been making local purchases of electronic appliances and then selling them to registered dealers under the Central Sales Tax Act, 1956 ('CST Act') after charging tax of 2% as applicable under Section 8 (1) of the CST Act.

4. It is explained in the petition that for the first quarter of 2017-18, the original return was first filed on 9th August, 2017 for refund of Rs.15,86,413/-. Later, the return was revised on 26th August, 2017, marginally increasing the refund amount to Rs.16,05,666/-.

5. On 4th October, 2017, the Additional Value Added Tax Officer ('AVATO') issued a notice under Section 59 of the DVAT Act, calling for the records for the purposes of assessment. In terms of Section 38 (3) (a) (ii) of the DVAT Act, the refund claimed in the return had to be processed and issued within two months from the date of filing of the return i.e. 9th October, 2017. The Petitioner states that on 20th November, 2017, in terms of Rule 4 of the Central Sales Tax (Delhi) (Rules), 2005 ('CST, Delhi Rules'), the reconciliation return for the interstate stocks/sales in Form-9 was filed and that thereby, the Petitioner complied with the requirements of Section 38 (7) (d) of the DVAT Act.

6. Pursuant to the notice issued on 4th October 2017, the assessment in respect of the above period under the CST Act was completed by the assessment order dated 11th January 2018, raising Nil demand.

7. Thereafter, the Petitioner kept pursuing the matter of grant of the refund

amount with the Respondent. When all attempts at getting the refund failed, the present petition was filed on 24th September, 2018.

8. Notice was first issued in this petition on 26th October 2018, when the Respondent was directed by this Court "to ensure that appropriate processing of the refund claim made in view of the assessment order, which is a part of the record". On the next date i.e. 12th December 2018, the following order was passed:

> "Learned counsel for the respondent submits that in compliance of the previous order dated 26.09.2018, the refunds were in fact processed; however, those orders were erroneous, and that the Revenue proposes, after issuing notice, to proceed with review/rectification.
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> List on 18th March, 2019."

9.Today, Mr. Shadan Farasat, learned counsel for the Respondent, produced before the Court a copy of an order passed by the VATO, Ward-41 on 15th March, 2019 whereby the assessment was purported to be made for the same period i.e. for first quarter of 2017-18, this time creating a demand of Rs.10,42,774/-.

10. Mr. Farasat for the Respondent submitted that although the order dated 12th December, 2018 recorded that the Respondent sought to review/rectify the refund orders, what was sought to be conveyed by the Respondent even on that date was that it proposed to undertake reassessment of the Petitioner's return for the aforementioned first quarter of 2017-18. His grievance was that despite notices to the Petitioner, it did not come forward to participate in the reassessment proceedings.

11. Mr. Rajesh Jain, learned counsel for the Petitioner, points out that the above exercise of undertaking reassessment when refunds were overdue was plainly illegal in view of the settled law, explained by this Court in several decisions including ***Swarn Darshan Impex Pvt. Ltd. v. Commissioner VAT 2010 (31) VST 475 (Del)***, ***Lotus Impex v. Commissioner DT &T (2016) 89 VST 450 (Del)*** and ***Dish TV India Ltd. v. GNCTD (2016) 92 VST 83 (Del)***. In short, his submission was that the Petitioner's refund could not be stopped only because the Respondent chooses to create a demand, pursuant to the reassessment undertaken long after the expiry of the two months period in terms of Section 38 (3) (a) (ii) of the DVAT Act, within which the refund had to be processed.

12. Mr. Farasat, learned counsel for the Respondent, on the other hand, insisted that if the Petitioner was aggrieved by the reassessment order passed on 15th March, 2019, its remedy was to challenge it in accordance with law, which meant filing objections thereto before the Objection Hearing Authority ('OHA') and, thereafter, before the Appellate Tribunal, and then this Court.

13. The above submissions have been considered. The legal position as regards creating a demand at the stage when refund is overdue is well settled in a large number of decisions of this Court. In ***Swarn Darshan Impex Pvt. Ltd. v. Commissioner VAT*** (*supra*), it was observed 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 requiting 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 3 also needs to be examined. The said provision stipulates that for calculating the period prescribed 1n 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."

14. The above decision has been consistently followed by this Court in the later judgments including ***Lotus Impex v. Commissioner DT &T*** (*supra*) and ***Dish TV India Ltd. v. GNCTD*** (*supra*)

15. Consequently, this Court has no hesitation in holding that the exercise undertaken by the Respondent which resulted in the re-assessment order dated 15th March, 2019, creating a demand afresh for the first quarter of 2017-18 is, unsustainable in law. The reassessment exercise appears to have been undertaken at a stage long after the refund amount was due. The refund due could not have been stopped by creating a fresh demand pursuant to such reassessment exercise.

16. In that view of the matter, the impugned order dated 15th March, 2019 passed by the VATO, Ward 41, creating a fresh demand for the first quarter of 2017-18 against the Petitioner is hereby set aside.

17. The Respondent is now directed to ensure that the refund amount for the first quarter of 2017-18 together with interest in terms of Section 42 of the DVAT Act and consistent with the law explained in ***IJM Corporation Berhad v. CT&T (2018) 48 GSTR 102 (Del)*** is credited to the account of the Petitioner not later than 14th September 2019, failing which the Respondent will pay an additional compensation of Rs.50,000/- to the Petitioner.

18. It is clarified, however, that the making of the above refund would not preclude the Respondent, if permissible in law, from undertaking a reassessment exercise for 2017-18. The rights and contentions of the Petitioner *qua* such exercise are reserved to be urged at the appropriate stage.

19. The petition is disposed of in above terms.

S. MURALIDHAR, J.

TALWANT SINGH, J.

AUGUST 13, 2019
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