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

+ **W.P.(C) 10153/2018 and CM APPL.39578/2018 (stay)**

MORAL ALLOYS PRIVATE LTD.

..... Petitioner

Through: Mr.Rajesh Jain with Mr.Virag Tiwari
and Mr.Ramashish, Advocates.

versus

COMMISSIONER OF TRADE & TAXES

..... Respondent

Through: Mr.Satyakam, ASC with
Mr.R.K.Ahuja, VATO Ward 8.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

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13.08.2019

Dr. S. Muralidhar, J.:

1. The Petitioner, which is a private limited company engaged in the business of ferrous and non-ferrous metals, has filed this petition seeking the quashing of the impugned order of default assessment of tax and penalty and interest, dated 18th January, 2018 passed by the Assistant Value Added Tax Officer ('AVATO') Ward No.8 under Sections 32 and 33 of the Delhi Value Added Tax Act, 2004 ('DVAT Act').

2. The Petitioner is registered under the DVAT Act as well as the Central Sales Tax Act, 1956 ('CST Act'). Between 30th May, 2011 and 26th June, 2013 the Petitioner filed its returns for all the months of 2011-12, both under

the DVAT Act as well as the CST Act. Against the purchases made during the aforementioned tax periods, the Petitioner paid tax of which credit was taken in terms of Section 2 (r) read with Section 9 (1) of the DVAT Act. Annexures 2A and 2B were filed, as per the verification report, which were found to be matching.

3. The Petitioner points out that in terms of Section 34 (1) of the DVAT Act, the AVATO was under a statutory obligation to frame the assessment for the above period within 4 years from the end of 2011-12. In terms thereof, according to the Petitioner, the limitation period to frame the assessment expired on 31st March 2016.

4. On 11th October 2017 a system-generated notice under Section 59(2) of the DVAT Act was uploaded, proposing to frame assessment for the period 2011-12. The notice was beyond 4 years of the expiry of the period of limitation. According to the Petitioner, the notice failed to indicate any reasons containing the justification for invoking the extended period of limitation for reassessment in terms of the proviso to Section 34 (1) of the DVAT Act. The present writ petition has been filed principally, on the ground that the impugned orders were contrary to the legal requirement in terms of Section 34 (1) (a) read with the proviso thereto of the DVAT Act.

5. On 26th September, 2018 while directing notice to be issued in the Petition, this Court restrained the Respondent from taking coercive action. In response to the notice, a counter-affidavit has been filed by the Respondent in which *inter alia* a preliminary objection was taken that the

impugned order is appealable under Section 74 of the DVAT Act and that the Petitioner has an efficacious remedy of filing objections before the Objection Hearing Authority ('OHA'). It is submitted that proper approval was obtained on 9th October 2017 from the Commissioner of VAT before invoking the power under the proviso to Section 34 (1) of the DVAT Act. The file notings in this regard have been enclosed as Annexure 'R1'.

6. It is further submitted in the counter-affidavit that the Petitioner failed to produce the requisite document in the form of Declaration C as per Rule 12 of Central Sales Tax (R&T) Rules, 1957 as well as GRs, which would show the movement of goods from one state to other in terms of Section 3 (a) of the CST Act. Accordingly, the AVATO decided to treat the central turnover reported by the Petitioner within the state and proceeded to assess it accordingly.

7. The Respondent states in the counter-affidavit that it was 'only by inadvertence that the local as well as central turnover has been assessed in the same default notice which ought to have been issued separately to the same effect by the same Assessing Authority.' It is further volunteered that this was only a 'technical problem' and that the Court should permit the Assessing Authority to issue two separate orders i.e. one under the DVAT Act and the other under the CST Act to the same effect. In support of this contention reliance is placed on the order dated 4th October, 2017 of the Supreme Court in Civil Appeal Nos. 15605-08 of 2017 [*Commissioner of Trade and Taxes v. M/s. Ahluwalia Contracts (India) Ltd.*].

8. The reopening of the assessment is sought to be justified by the Respondent on the basis of a report received from the Director General of Central Excise Intelligence ('DGCEI') on 13th April, 2017, which purportedly provided specific information concerning the present Petitioner to the effect that it had, along with other firms passed on 'inadmissible cenvat credit on the cenvatabale invoice without physical delivery of goods.' It is pointed out that despite the notice dated 11th October, 2017 issued to the Petitioner under Section 59 (2) of the DVAT Act, calling upon it to produce the necessary documents, the Petitioner chose not to appear, ultimately leading to the passing of the impugned orders of default assessment dated 18th January, 2018, which were framed on the principles of best judgment assessment.

9. In the rejoinder filed to the above counter-affidavit, the Petitioner seeks to distinguish the order of the Supreme Court in ***Commissioner of Trade and Taxes v. M/s. Ahluwalia Contracts (India) Ltd.*** (*supra*). It is pointed out that the said case was under the Delhi VAT Amnesty Scheme 2013, where a statutory presumption was to be drawn under Clause 8 (1) of the scheme as if no declaration had been filed by the dealer. There, no issue had been raised with respect to assumption of jurisdiction; the issue was only regarding the delegation of powers by the Commissioner to the Addl. Commissioner for exercising powers under the Scheme.

10. It is further pointed out that the Commissioner himself had issued various circulars on 9th June 2011, 13th January, 2008, 2nd February, 2017 and 5th February, 2018 under Section 67 (2) of the DVAT Act about timely

completion of assessment proceedings. It is accordingly submitted that combining the CST and DVAT assessments into one assessment order cannot be just 'a technical problem'. It is also pointed out that in case of other concerns, whose names figured in the report of DGCEI, the default notices issued by the department were withdrawn by them and the fresh assessment sought to be made resulted in nil demand.

11. Mr. Rajesh Jain, learned counsel appearing for the Petitioner, placed reliance on the decision of this Court in ***H M Industries v. Commissioner of Value Added Tax (2015) 78 VST 382 (Del)*** as regards the scope of the powers of reassessment under Section 34 of the DVAT Act. He also referred to the order passed by the OHA on 31st July 2019 in the case of ***Brilliant Metals Pvt. Ltd.*** against whom, in similar circumstances, acting on the same report of the DGCEI, the reassessments were sought to be opened.

12. Mr. Satyakam, learned Addl. Standing Counsel appearing for the Respondent, on the other hand, drew the Court's attention to the file notings and showed that there had been application of mind by the department before reopening the assessment in the instant case. He submitted that the report of the DGCEI was voluminous and, that therefore, there was sufficient material justifying the reopening of the assessment.

13. Section 34 of the DVAT Act reads as under:

“34. Limitation on Assessment and Re-Assessment

(1) No assessment or re-assessment under section 32 of this Act shall be made by the Commissioner after the expiry of

four years from:

- (a) the end of the year comprising of one or more tax periods for which the person furnished a return under section 26 or 28 of this Act; or
- (b) the date on which the Commissioner made an assessment of tax for the tax period, whichever is the earlier:

PROVIDED that where the Commissioner has reason to believe that tax was not paid by reason of concealment, omission or failure to disclose fully material particulars on the part of the person, the said period shall stand extended to six years.

(2) Notwithstanding sub-section (1) of this section, the Commissioner may make an assessment of tax within one year after the date of any decision of the Appellate Tribunal or court where the assessment is required to be made in consequence of, or to give effect to, the decision of the Appellate Tribunal or court which requires the re-assessment of the person.”

14. In the present case, the reopening of the assessment is sought to be done beyond the period of 4 years and before the expiry of 6 years of the assessment period. The jurisdictional requirement for invoking the extended period of 6 years is that the Commissioner should note the reasons to believe that the tax was not paid and that the failure to pay such tax should be on account of ‘concealment, omission or failure’ by the Assessee to disclose ‘full material particulars’. Elaborating on the above expressions this Court in ***H M Industries (supra)*** observed as under:

“5. Section 34 (1) of the DVAT Act, simply stated stipulates that no assessment or reassessment under section 32 should be made by the Commissioner after expiry of four years from the

date on which the person has furnished return under section 26 or under section 28(1) of the DVAT Act. Sub-clause (b) to section 34(1) is not relevant and applicable. The proviso extends the period of limitation to six years but only when the Commissioner has reasons to believe that tax was not paid by the reason of concealment, omission or failure to disclose material particulars on the part of the person, i.e., the assessee. In such specified circumstances, the extended period of six years is applicable. The proviso noticeably mandates satisfaction of two conditions. It refers to the formation of "reasons to believe" by the Commissioner. The said "reasons to believe", have to be formed by the Commissioner. Secondly, the said expression "reasons to believe" must have nexus and live link with failure to pay tax because of concealment, omission or failure to disclose material particulars by the assessee. Thus, the Commissioner is required to form an opinion in the nature of "reasons to believe" that there was failure, omission or concealment to disclose material particulars which had the effect of short-payment or non-payment of tax. The "reasons to believe" and satisfaction of any of the three stipulations are a jurisdiction precondition and a mandatory requirement which must be met to apply and seek benefit of extended period of six years."

15. It was further observed as under:

"10...In case, reasons to believe are not recorded or so indicated/mentioned in the default assessment order or in the record, it would lead to an anomalous and aberrant situation. It would be a virtually impossible task for the appellate authorities to first find and decipher the unknown and unrecorded reason to believe and thereupon decide whether the requisite conditions for invoking proviso to section 34(1) of the DVAT Act were actually satisfied or not. The issue or question raised would be answered on guess work or mere probabilities as to the "reason to believe". Invoking proviso to section 34(1) of the DVAT Act certainly imposes civil liability and has adverse consequences, so an assessee must have the right to question and challenge

formation of the belief. An effective, decisive and erudite decision would be possible only when there would be no uncertainty and misgiving as to the "reasons to believe". This could be easily and without any discern and difficulty avoided by making a note in writing. The "written belief" would be in consonance with the principle and mandate of good governance, fairness, transparency and would curtail arbitrariness and prejudice. Importantly, we would steer clear from the needless debate on whether and what was the "reason to believe".”

“14. Pertinently, in the proviso to section 34(1), the language of the section postulates that there should be failure, omission or concealment to disclose full material facts. Once, material particulars have been stated or disclosed and were in the knowledge of the authorities but action under section 32 of the VAT Act is not taken within four years, extended period of limitation of six years under the proviso to section 34(1) of the DVAT Act would not be available. This would be a reasonable and correct way to read section 34(1) and the proviso. Normal and prescribed period of limitation for passing of a default assessment order is four years. This is a reasonable and judicious period for the competent authority to act under section 32 of the DVAT Act. Abnormal delay and time gap, between the assessment periods and the date of default assessment orders, can cause prejudice to the assessee, who may not be able to procure and produce evidence and material. With the passage of time, relevant material and evidence tend to disappearance and dissipate. Limitation of four years is by no stretch or consideration, as an exiguous or minimal period. Thus, in cases where there are mistakes, errors or wrong claims have been made, but the full material facts have been disclosed, extended period of limitation for six years would not be applicable. The default assessment in such cases where material facts are disclosed should be made within four years. Once material facts are duly disclosed, conditions stipulated in the proviso to section 34(1) of the DVAT Act that there should be concealment, omission or failure to disclose full particulars, would be missing and absent. The extended period of limitation

of six years would only apply if there is omission, concealment or failure to disclose material particulars and the said reasons should be recorded in writing to constitute "reasons to believe". Thus and in this manner sections 32 and 34(1) operate independently and in their own fields."

16. To summarise the legal position explained in the above decision:

- (i) The normal period of limitation for passing of a default assessment order under Section 32 of the DVAT Act, where material facts are disclosed, is four years.
- (ii) The extended period of limitation of six years would only apply if there is omission, concealment or failure to disclose material particulars.
- (iii) The proviso to Section 34 mandates satisfaction of two conditions. The first is formation of "reasons to believe" by the Commissioner. Such "reasons to believe" for reopening of assessment should be recorded in writing.
- (iv) Secondly, the "reasons to believe" must have nexus and live link with failure to pay tax as a result of concealment, omission or failure to disclose material particulars by the Assessee.
- (v) The "reasons to believe" and satisfaction of any of the three stipulations are a jurisdiction precondition and a mandatory requirement which must be met to invoke the extended period of six years.

17. Keeping the above legal position in view, the Court proceeds to examine the records produced by the Respondent. The notings on file in the present case reveal that the trigger for the reopening of the assessment was the report of the DGCEI according to which Amit Gupta, Director of Progressive Alloys India Pvt. Ltd., along with associated registered dealers viz., M/s. Forward Minerals and Metals Pvt. Ltd., M/s. Unnati Alloys Pvt. Ltd., M/s. Moral Alloys Pvt. Ltd. and M/s. Brilliant Metals Pvt. Ltd. were passing on inadmissible CENVAT credit on the 'cenvatable invoice' without physical delivery of goods. The report observed that the period for which the exercise was carried out by the DGCEI pertained to Financial Years 2011-12 and 2012-13 and that this period had become time barred. It was then noted that since the DGCEI had raised serious doubts over the working of the Assessee firm the 'possibility of evasion of tax by the firm cannot be ruled out.'

18. The above note fails to meet the statutory threshold for the assumption of jurisdiction under the proviso to Section 34 (1) (a) of the DVAT Act for the purpose of reassessment. In other words, the twin requirements of (i) the Commissioner having to form the requisite 'reason to believe', and (ii) for such reasons to have a live nexus with the failure to pay tax as a result of the Assessee's concealment, omission or failure to disclose material particulars, is not fulfilled in the present case. It is trite that 'reason to believe' is different from 'reason to suspect'.

19. The statutory requirement is that there must be reason to believe that

there has been some omission, concealment or failure by the Assessee to disclose full material particulars. There is nothing in the file noting, much less in the notice dated 29th October, 2017, which suggests that the Commissioner had arrived at a subjective satisfaction that tax was not paid on account of the Petitioners 'concealment, omission or failure to disclose full material particulars.'

20. The only basis appears to be the report of the DGCEI. This *per se* could not have formed the basis in the absence of further independent inquiry undertaken by the Commissioner even if of a preliminary nature. It is one thing to say that the Petitioner had violated the provisions of the Central Excise (CE) Act, but another to immediately infer that it also violated the provisions of the DVAT Act.

21. In this context, the decision of the Andhra High Court in ***Alumeco India Extrusion Ltd. v. CTO (2010) 27 VST 419 (AP)*** is relevant. There again, assessments under the Andhra Pradesh Value Added Tax Act, 2005 ('APVAT Act') were sought to be reopened on the basis of a copy of a Show Cause Notice ('SCN') issued by the Central Excise Department for alleged violations by the Assessee the CE Act. There, the High Court noted that the proceedings under the CE Act did not culminate in adjudication and remained pending at the stage of the SCN. It was in those circumstances that it was observed as under:

“If the petitioner has violated the provisions of the APV AT Act or the APGST Act or the Rules made thereunder, he could have been issued a show-cause notice on an enquiry under that Act and not based merely on the show-cause notice issued by

the Central Excise Department.

It was also open to the authorities under the APV AT Act and the APGST Act to have caused an independent enquiry and to have arrived at an independent conclusion regarding the nature of the transactions of the petitioner. In the present case, all that has been relied upon is the show-cause notice issued by the Central Excise Department and, in the absence of any adjudication under the said Act, no assessment order/reassessment orders could have been passed under the APVAT Act or under the APGST Act solely on the basis of the show-cause notice issued by the Central Excise Department.”

22. In the present case, it is noted from the order of the OHA allowing the objections of Brilliant Metals Pvt. Ltd., in whose case also a reassessment was undertaken for 2012-13 on the basis of the very same report of the DGCEI, that in each of the above cases in the proceedings under the Central Excise Act the adjudication orders confirming the wrongful claim of CENVAT credit have been quashed and set aside by the CESTAT and also by the Commissioner (Appeals). The entire basis that those transactions were mere ‘paper transactions’ was found to be not sustainable. It requires to be noted that the demands of duty and penalty raised by the Central Excise Department had been set aside by the authorities. Therefore, the very basis of the reopening of the assessment in the present cases ceased to exist.

23. As rightly pointed out by Mr. Jain the facts in *Commissioner of Trade and Taxes v. M/s. Ahluwalia Contracts (India) Ltd.* (*supra*) were entirely different. The issue revolved around the powers of delegation of the Commissioner in the context of the amnesty scheme.

24. Admittedly, in the present case in the reassessment proceedings the Respondent has sought to make no distinction between the liability under the DVAT and that under the CST Act. In terms of Section 5 of the DVAT Act these two could not be combined. There is no question of treating this as a mere 'technical problem' and permitting the Respondents to repeat the exercise by proceeding against the Petitioner separately. Apart from the facts that this is not merely a 'technical problem', such exercise would be clearly time barred at this stage.

25. For the aforementioned reasons the Court holds that the reopening of the assessment in the present case by the Respondent by invoking the extended period of 6 years in terms of the proviso to Section 34 (1)(a) of the DVAT Act was bad in law. The impugned assessment orders dated 18th January, 2018 under Sections 32 and 33 of the DVAT Act as well as the notices dated 11th October, 2017 under Section 59 (2) of the DVAT Act are hereby set aside.

26. The petition is allowed in the above terms but in the circumstances no orders as to costs. The pending application stands disposed of.

S. MURALIDHAR, J.

TALWANT SINGH, J.

AUGUST 13, 2019/tr