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IN THE HIGH COURT OF DELHI AT NEW DELHI

NEUTRAL CITATION NO: 2022/DHC/003091



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Date of Decision : 26.07.2022

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W.P.(C) 12358/2018 & CM No.23631/2022

MISAWA IMPEX PVT. LTD.

..... Petitioner

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

versus

COMMISSIONER OF TRADE & TAXES

..... Respondent

Through: Mr Shadan Farasat, ASC with Ms
Hafsa, Advocate for GNCTD.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MS JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

1. This writ petition is directed against the three orders of even date i.e., 13.09.2018, passed under Sections 32 and 33 of the Delhi Value Added Tax Act, 2004 [in short “DVAT Act”] and Central Sales Tax Act, 1956 [in short “CST Act”], respectively.

1.1. The petitioner seeks setting aside of the said orders.

1.2. These orders will be collectively referred to hereafter as ‘impugned assessment orders.’

2. There are several other prayers sought in the writ petition, which are consequential in nature.

3. Before we proceed further, the following facts are required to be noticed for adjudication of the instant writ petition:

3.1. The period in issue, *vis-à-vis* which the impugned assessment orders have been passed is Financial Year (FY) 2011-2012.

3.2. In the normal course, assessment under Section 32 of the DVAT Act required to be completed within the period prescribed under Section 34 of the DVAT Act i.e., within a period of four years.



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3.3. The period of four years would commence from the date indicated in the very same section, depending on whether or not the petitioner's case fell under clauses (a) or (b) of sub-section (1) of Section 34 of the DVAT Act.

3.4. The respondent/revenue could trigger the extended period of limitation for assessment under the proviso appended to Sub-Section (1) of Section 34 of the DVAT Act, in case the concerned Commissioner had 'reason to believe' that tax had not been paid by the assessee by reason of concealment, omission or failure to disclose fully material particulars.

3.5. In the normal course, the period of four years, with regard to the return filed by the petitioner for FY 2011-2012, would come to an end on 31.03.2016.

3.6. The record shows that the respondent/revenue had received an intelligence report from the Regional Economic Intelligence Committee of the Directorate General of Central Excise [in short 'REIC'] on 19.08.2015, which led to the internal note being generated on 03.08.2017.

3.7. This note received the approval of the Commissioner on 09.10.2017 triggering action for invoking the extended period of limitation.

3.8. The record also shows that on 11.10.2017, the petitioner was served with a notice under Section 59(2) of the DVAT Act, whereby it was called upon to furnish a slew of information, which *inter alia*, included the submission of its audited balance sheet, bank record, GR/RRs and the record of inter-state sales and transfer of goods, along with statutory declaration forms.

3.9. It is in this backdrop that the respondent/revenue, in the first instance, proceeded to pass assessment orders on 18.01.2018 [hereafter referred to as "first batch of assessment orders"]

4. The petitioner, being aggrieved, approached this Court by way of a writ petition under Article 226 of the Constitution and challenged one of the orders

from amongst the first batch of assessment orders.

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4.1. The writ petition was numbered as W.P.(C) No. 9203/2018, and the same was allowed *via* order dated 31.08.2018. Consequently, the Court set aside the order dated 18.01.2018; the others were possibly withdrawn by the respondent/revenue. For the sake of convenience, the order passed by the Division Bench on 31.08.2018 is set forth hereafter:

“The petitioner challenges an order dated 18.01.2018 issued under Sections 32/33 of the Delhi VAT Act.

*Sh. Satyakam, learned counsel for the respondents, appearing on advance notice submits at the outset that the impugned order was issued by mistake and that he has instructions to state that it would be withdrawn and the correct orders issued shortly. **In these circumstances, the impugned order is hereby set aside. It is open to the respondents to pass appropriate orders in accordance with law.** The writ petition and the pending applications are disposed of.”*

4.2 This led to the respondent/revenue passing the impugned assessment orders. As noted above, the respondent/revenue passed three assessment orders instead of a common assessment order, which in our view, should have been the methodology adopted, if it was otherwise permissible in law.

4.3. The reason that we make this observation is that the concerned assessing officer had to take a call, as to whether he was assessing the petitioner under the CST Act or under the DVAT Act.

4.4. Section 7 of the DVAT Act prohibits an assessing officer, *inter alia*, from taking cognizance of inter-state sales. Therefore, if the assessing officer was of the view that some of the transactions in issue were local sales because C-Forms were not produced, he should have triggered provisions of the DVAT Act and included them, along with other transactions, which in any case, according to him, were covered by the DVAT Act, being local sales.

5. That apart, the argument advanced on behalf of the petitioner is that the

impugned assessment orders were passed after the prescribed period
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limitation had expired.



5.1. Mr Rajesh Jain, who appears on behalf of the petitioner, says that the extended period of limitation could have been triggered against the petitioner only if the Commissioner had formed an opinion which impelled him to believe that the petitioner had either concealed, omitted or failed to disclose material particulars and hence, failed to pay the requisite tax.

5.2. It is Mr Jain's contention that the record shows that the Commissioner failed to, independently, apply his mind to these aspects which, as noticed above, are set forth in the proviso appended to sub-section (1) of Section 34 of the DVAT Act.

6. On the other hand, Mr Shadan Farasat, who appears on behalf of the respondent/revenue, says that the petitioner failed to respond to the notice issued under Section 59(2) of the DVAT Act, which, in turn, was based on the intelligence report generated by REIC.

6.1. It is also Mr Farasat's contention that the Commissioner did apply his mind to factors set forth in sub-section (1) of Section 34 of the DVAT Act.

6.2. In support of this plea, Mr Farasat has sought to place reliance on the internal note dated 03.08.2017 generated by the respondent/revenue, to which, as noticed above, the Commissioner's approval is appended.

6.3. Pertinently, on 09.10.2017, Commissioner simply approved the view penned down by his subordinates.

7. We have heard the learned counsel for the parties and perused the record. The facts set forth hereinabove are not in dispute.

7.1. The respondent/revenue had passed the first batch of assessment orders on 18.01.2018, which were assailed by the petitioner by filing a writ petition in this Court.

7.2. The writ petition [i.e., W.P.(C) No. 9203/2018] was allowed, inasmuch as the assessment order dated 18.01.2018 was set aside. Leave was granted to the

respondent/revenue to pass appropriate orders, 'in accordance with[the] law.

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7.3. The respondent/revenue, it appears, took this as a green signal from the Court to pass the impugned assessment orders.

8. As noted above, the impugned assessment orders are founded on the intelligence input received by the respondent/revenue as far back as on 19.08.2015.

8.1. We may note that the initial input, for whatever it was worth, was received by the respondents/revenue, well before the date when the period of four years for carrying out assessment in the usual and normal course would have expired.

8.2. In the petitioner's case, with respect to the financial year in issue i.e., FY 2011-2012, the four-year period expired on 31.03.2016.

8.3. Curiously, no action was taken by the respondent/revenue after receiving the intelligence input. The internal note for triggering the extended period of limitation was generated nearly two years after the intelligence input was received.

8.4. As adverted to above, the note was prepared on 03.08.2017, which was approved by the Commissioner on 09.10.2017.

8.5. Therefore, the stand of the respondent/revenue that the trigger for invoking the extended period of limitation was the intelligence note of REIC, which was dated 19.08.2015, seems untenable and tenuous.

9. That apart, the other problem which obtains in the matter, insofar as the respondent/revenue are concerned, is the manner in which the approval has been given by the Commissioner.

9.1. The Commissioner simply appended his signature on the note prepared on 03.08.2017, without independently applying his mind, as to how the intelligence note which was suggestive of the fact that the petitioner had infringed the CENVAT Credit Rules, 2004, would have a bearing on the matter [concerning the petitioner] which related to transactions under the CST Act and the DVAT

Act.

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10. The problem got compounded as the Commissioner did not advert to any of the aspects which are prerequisites for triggering the extended period of limitation i.e., as to how the concealment, omission or failure of the petitioner to disclose material particulars, resulted in his formation of belief that tax had not been paid by the petitioner. Reasons are the link between the material that is brought to the notice of the Commissioner and the formation of the belief that tax has not paid by the assessee. Reasons have to be bonafide and honest. Reasons are required to have a rational nexus with formation of belief. Belief should be based on material which relevant and cogent. The expression 'reason to believe' does not have, in law, the same connotation as "reason to suspect". [See *ITO vs. Lakhmani Mewal Das*, (1976) 3 SCC 757; *S. Ganga Saran & Sons Pvt Ltd., Calcutta vs. ITO and Ors.*, (1981) 3 SCC 143 and *Synfonia Tradelinks Pvt vs. ITO*, (2021) 435 ITR 642.]

10.1. This problem, insofar as the respondent/revenue is concerned, was further enmeshed in legal quagmire when the notice under Section 59(2) of the DVAT Act was issued to the petitioner on 11.10.2017.

10.2. The notice made no reference to the fact that the concerned officer was seeking information detailed out there because he had reason to believe that tax had not been paid by the petitioner on account of the concealment, omission or failure to disclose material particulars.

10.3. As a matter of fact, the law casts an obligation on the revenue to inform the assessee in no uncertain words as to the charge against him i.e., as to whether it is a case for concealment, or omission or failure to disclose material particulars or a sum of one or more infractions.

10.4. The notice dated 11.10.2017, neither has the Commissioner's approval, nor does it allude to any of the aforementioned aspects.

11. Mr Jain, in support of his submission that the impugned assessment orders could not be sustained in law has relied upon the judgment of the



11.1. A bare perusal of the said judgment would show that facts obtaining in that case, are similar, if not identical, to those which obtain in the present case.

11.2. The period in issue is the same as in the instant case i.e., FY 2011-2012; the extended period was invoked in that case as well based on an intelligence; and a notice under Section 59(2) of the DVAT Act was also served as in the instant case. Given this factual matrix, the observations of the Division Bench in *Moral Alloys* appear to be more than apposite.

“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.’ ”



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12. We, are in respectful agreement, with the view taken by the coordinate bench of this Court. The ratio of the judgment is on all fours if one bears in mind the facts obtaining in the instant case.

13. As noted hereinabove, there are too many infractions committed by the respondent/revenue in the instant matter; in particular, there has been no, independent, application of mind as to whether this was a case, in which, the extended period of limitation could have been invoked.

13.1. Thus, for the aforesaid reasons, we are inclined to agree with the petitioner that the impugned assessment orders deserve to be set aside.

13.2. It is ordered accordingly.

14. The writ petition is accordingly disposed of.

15. Consequently, the pending application shall also stand closed.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

JULY 26, 2022 / tr

Click here to check corrigendum, if any