



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

% **Judgment reserved on :14 September 2023**
Judgment pronounced on: 21 September 2023

+ **W.P.(C) 2491/2023 & CM APPL. 9539/2023**

FEMC PRATIBHA JOINT VENTURE Petitioner

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

versus

COMMISSIONER OF TRADE AND TAXES.... Respondent

Through: **Mr. Rajeev Aggarwal, ASC
with Ms. Shaguftha Hameed,
Mr. Prateek Badhwar, Advs.**

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

DHARMESH SHARMA, J.

1. This writ petition under Article 226 and 227 of the Constitution of India filed by the petitioner is directed against the respondent thereby assailing the impugned adjustment order dated 18 November 2022 and default notices of tax & interest for certain years, to be detailed hereinafter, under the Delhi Value Added Tax Act, 2004¹.

FACTUAL BACKGROUND

2. Briefly stated, the petitioner is a Joint Venture Group that had been engaged in the execution of work contracts for Delhi Metro Rail

¹ DVAT Act



Corporation Ltd.² and discharged its VAT liability under the DVAT Act as well as under the Central Act. For the purposes of executing various projects for DMRC, it had been making local purchases after bearing tax thereupon while on the other hand DMRC had also been deducting TDS on the gross turnover of the petitioner. The petitioner claimed refund of excess tax credit which arose due to Input Tax Credit³, the credit of which was brought forward for a sum of Rs. 17,10,15,285/- for the 4th quarter of 2015-16 and of Rs. 5,44,39,148/- for the 1st quarter of 2017-18, along with the applicable interest as under Section 42 of the Delhi Value Added Tax Act of 2004. The original return for the above-mentioned quarter for 2015-2016 was filed on 12 May 2016, wherein a refund of Rs. 18,49,00,377/- was claimed. Subsequently, a revised return was filed on 31 March 2017 claiming refund of Rs. 17,10,15,285/-. In so far as the 1st quarter of FY 2017-2018 is concerned, the revised return claiming a refund of Rs. 5,44,39,148/- was filed on 29 March 2019 by the petitioner

3. Shorn of unnecessary details, the petitioner asserts that the refund claimed for the assessment year 2015-2016 was pending for a long period of time and ultimately sent a letter dated 09 November 2022 requesting the respondent to consider its application for refund but instead it received the impugned adjustment order vide letter reference No. 66240 dated 18 November 2022. On the petitioner sending a letter dated 07 December 2022 to the Assistant Value

² DMRC

³ ITC





Added Tax Officer⁴, objecting to the passing of the impugned order dated 18 November 2022 for the same being in violation of Section 38 (2) of the Act, it was made aware of the default notices of tax & interest dated 30 March 2020 for the 2nd, 3rd and 4th quarter 2015-2016; dated 23 March 2021 for the 1st and 4th quarter 2016-2017 under the Central Sales Tax Act 1956⁵; dated 30 March 2021 towards Annual Assessment for the year 2016 and lastly 26 March 2022 towards the 1st quarter of 2017-2018.

4. The aforesaid narrative is to be understood in the background scenario to the effect that the default assessment for the 1st quarter of 2015-2016 was framed by the respondent on 03 September 2016, which was challenged before the Objection Hearing Authority⁶ and eventually the objections for FY 2014-2015 as well as 1st quarter of 2015-16 were decided on 04 February 2019, whereby the demands were set aside and yet the refund was not released. In the meanwhile, vide letter dated 16 March 2018, the petitioner had made a request for release of the refund for 2015-16, pending objections suggesting that since the refund sought was Rs. 17,10,15,285/- as against the demand of Rs. 3,08,49,661/-, the balance amount of Rs. 14,01,65,624/- could be refunded along with interest.

5. On the respondent being unresponsive, the petitioner preferred a Writ Petition bearing No. W.P. (C) 2105/2018, before this Hon'ble Court seeking the refund for 2014-15. The same was allowed on 22 May 2019, and consequently an order for refund of Rs. 32,11,62,907/-

⁴ AVATO

⁵ CST

⁶ OHA





including interest was allowed, and thereafter, DVAT-22 was issued on 27 May 2019. However, being aggrieved of short payment of interest, the petitioner approached this Court again, resulting in this Court passing an order dated 30 July 2019 followed by another order dated 27 September 2019 awarding differential interest. The said orders were assailed before the Supreme Court in the SLP Diary No. 39956/2019 (later converted to civil appeal) and the operation of the aforesaid order has been stayed vide order dated 18 December 2019 and the matter is still *sub judice*.

6. As regards the impugned default notices, it is important to note that the certified copies thereof were evidently only made available to the petitioner on 17 January 2023, and apparently such notices were not served upon the petitioner prior thereto. It bears repetition that the revised return for 1st quarter of 2017-18 claiming a refund of Rs. 5,44,39,148/- was filed on 29 March 2019 by the petitioner. Apparently, even for the said period, a default assessment had been passed *ex parte* by the AVATO on 26 March 2022, and the copy of the order was only provided to the petitioner on 30 January 2023. In the impugned assessment order, a demand of Rs. 5,13,69,367/- was raised, claiming the additional tax amount of Rs. 3,02,34,329/- along with additional interest of Rs.2,11,35,038/-, and the same has also been adjusted with the refund claimed in the returns filed by the petitioner.

7. Aggrieved thereof, the petitioner has approached this Court seeking the following relief:-



- “a) quash and set aside the adjustment order dated 18.11.2022 for being without jurisdiction;
- b) quash and set aside the unsigned default notices of assessments dated 30.3.2020, 23.3.2021, 30.3.2021 & 26.3.2022;
- c) direct the respondent to grant refund of Rs.17,10,15,285/- for 4th quarter of 2015-16 and Rs.5,44,39,148/- for the 1st quarter of 2017-18 along with interest as per sec 42 of the Act;
- d) issue a Writ of Mandamus or any other Writ, order or direction;
- e) issue a Writ of Certiorari or any other Writ, order or direction;
- f) pass any other order or orders, direction or directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”

8. Needless to state that the notice on the petition was issued to the respondent and a counter affidavit is filed through Ms. Sarita Sharma, GST Officer dated 18 May 2023, wherein although it is conceded that the revised returns dated 31 March 2017 and 29 March 2019 for the 4th quarter of 2015-2016 and 1st quarter of 2017-2018 respectively were filed by the petitioner claiming refund, the petitioner did not respond to several notices issued under Section 59 (2) of DVAT Act thereby calling upon it to submit certain documents for the relevant tax period, and therefore, the impugned notices of default assessment came to be issued and notified as also uploaded on the DVAT Portal; and for the petitioner failing to comply with the default notices within the statutory limitation period, refund of Rs. 17,10,15,285/- and Rs. 5,44,39,148/- have been adjusted against the pending demand vide impugned adjustment order dated 18 November 2022. Additionally, the maintainability of the writ petition is challenged for there being



available an efficacious alternate statutory remedy provided under Section 74 of the DVAT Act. Heavy reliance was placed on the decisions in **Assistant Commissioner of State Tax v. Commercial Steel Ltd.**⁷; **Prodair Air Products India Private Limited v. Deputy Commissioner of State Tax**⁸, besides **MSC Enterprises v. Government of NCT of Delhi & Ors.**⁹ and **Anjney Loys Pvt. Ltd. vs. Commissioner of State Goods & Services Tax & Anr.**¹⁰

ANALYSIS AND DECISION

9. Having considered the submissions addressed by the learned counsels for the rival parties, at the outset, we have no hesitation in holding that the impugned adjustment order dated 18 November 2022 falls foul of Section 38 of the DVAT Act, which provides 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 1 [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]

⁷ [MANU/SC/0801/2021]

⁸ [2022 SCC OnLine Ker 423 : (2022) 97 GSTR 140],

⁹ [WP(C) N0.7243/2020 (D.O.D. : 30.09.2020)]

¹⁰ [WP(C) N0.2212/2021 (D.O.D.: 12.04.2022)]



(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

(51 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 1 price charged for the goods expressly includes an amount of tax payable under this Act,

the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section and the Commissioner may reassess the buyer to deny the amount of the corresponding tax credit claimed by such buyer, whether or not the seller refunds the amount to the buyer.

[(10)] Where a registered dealer sells goods and the price charged for the goods is expressed not to include an amount of tax payable under this Act the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section without the seller being required to refund an amount to the purchaser.

[(11)] Notwithstanding anything contained to the contrary in sub-section (3) of this section, no refund shall be allowed to a dealer who has not filed any return due under this Act.]

10. *Abridging long academic dissertation*, this Court in a recent decision in **Flipkart India Private Limited v. Value Added Tax Officer, Ward 300 & Ors.**¹¹, had an occasion to refer and examine a plethora of case law viz. **Prime Papers & Packers v. Commissioner**

¹¹ W.P. (C) 6430/2022 decided on 21.08.2023





of VAT & Anr.¹²; **New Age Generators v. The Commissioner, Value Added Tax**¹³; **Commissioner of Trade and Taxes v. Corsan Corviam Construction S.A.-Sadbhav Engineering Ltd. JV**¹⁴; **Consortium of Sudhir Power Projects Ltd. and Sudhir Gensets Ltd. v. Commissioner of Delhi Goods and Services Tax**¹⁵; **Bhupindra Auto International v. Commissioner, Trade & Taxes & Anr.**¹⁶; **MRF Ltd. v. The Commissioner of Trade and Taxes & Anr.**¹⁷; **Rakesh Kumar Garg & Ors. v. The Deputy Commissioner of Central Excise, Division - I & Ors.**¹⁸; **Otis Elevator Company (India) Ltd. v. Commissioner of Value Added Tax & Ors.**¹⁹ replete with the *ratio decidendi* that on a pure and simple construction of Section 38(3) (a) (ii) of the DVAT Act, a pre-deposit does not partake the character of tax or duty, and thus the Tax Department is neither entitled in law to retain the pre-deposit amount in question nor could it utilize the same for adjustment purposes towards tax liability for different assessment years. In the decision by this Court in ***Flipkart India Private Limited v. Value Added Tax Officer, Ward 300 & Ors.*** (*supra*), on a conspectus of the case law, the following principles of law were reiterated to the effect:

¹² 2016 SCC OnLine Del 4211

¹³ Order dated 12.07.2016 passed n W.P.(C) 5250/2016

¹⁴ 2023 SCC OnLine Del 1900

¹⁵ 2023 SCC OnLine Del 700

¹⁶ Order dated 10.11.2016 passed in W.P.(C) 9521/2016

¹⁷ 2018 SCC OnLine Del 10624

¹⁸ Order dated 26.09.2018 passed n W.P.(C) 11757/2016

¹⁹ Order dated 07.08.2023





- (i) that the time limit for processing and issuing of refunds has to be *scrupulously* adhered to by the department in terms of Section 38 of the Act; and
- (ii) that wherever the department seeks to obtain necessary information under Section 59²⁰ of the DVAT Act from the dealer after filing of return, *steps be taken within time limit* envisaged under Section 38 of the DVAT Act; and
- (iii) that it is only when an enforceable demand in the nature of tax or duty is pending against the assessee that any amount of pre-deposit can be adjusted and not otherwise; and

²⁰ 59 Inspection of records Rule:

Rule: Nil **Form: Nil**

- (1) All records, books of accounts, registers and other documents, maintained by a dealer, transporter or operator of a warehouse shall, at all reasonable times, be open to inspection by the Commissioner.
- (2) The Commissioner may, for the proper administration of this Act and subject to such conditions as may be prescribed, require –
 - (a) any dealer; or
 - (b) any other person, including a banking company, post office, a person who transports goods or holds goods in custody for delivery to, or on behalf of any dealer, who maintains or has in his possession any books of accounts, registers or documents relating to the business of a dealer, and, in the case of a person which is an organisation, any officer thereof; to –
 - (i) produce before him such records, books of account, registers and other documents;
 - (ii) answer such questions; and
 - (iii) prepare and furnish such additional information;
 - relating to his activities or to the activities of any other person as the Commissioner may deem necessary.
- (3) The Commissioner may require a person referred to in sub-section (2) above, to – (a) prepare and provide any documents; and
 - (b) verify the answer to any question;
 - in the manner specified by him.
- (4) The Commissioner may retain, remove, take copies or extracts, or cause copies or extracts to be made of the said records, books of account, registers and documents without fee by the person in whose custody the records, books of account, registers and documents are held





(iv) that in case the time limit prescribed under Section 38 of the DVAT Act is not adhered to, the department has no legal right to justify retention of the amount of pre-deposit.

11. *A fortiori* the impugned adjustment letter dated 18 November, 2022 cannot be sustained in law since the mandate of Section 38 read with Section 39²¹ and 59 of the DVAT Act was not followed. Therefore, the petitioner is entitled to the refund claimed.

12. All said and done, in so far as issuance of the impugned default notices of tax & interest is concerned, in light of the case of the respondent that revised return dated 31 March 2017 was filed for the 4th quarter 2015-16 and notices under Section 59(2) DVAT Act dated 19 February 2016, 27 May 2016 and 25 May 2018 were not complied with by the petitioner, the only recourse in law is to file a statutory appeal under Section 74 of the DVAT Act and it would be open to the petitioner to raise all objections regarding untenability of the impugned default notices of tax & interest including under Section 34 of the DVAT Act with regard to the limitation prescribed for assessment or re-assessment.

²¹ Power to withhold refund in certain cases Rule:

Rule: Nil	Form: 22A
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- (1) Where a person is entitled to a refund and any proceeding under this Act, including an audit under section 58 of this Act, is pending against him, and the Commissioner is of the opinion that payment of such refund is likely to adversely affect the revenue and that it may not be possible to recover the amount later, the Commissioner may for reasons to be recorded in writing, either obtain a security equal to the amount to be refunded to the person or withhold the refund till such time the proceeding or the audit has been concluded.
- (2) Where a refund is withheld under sub-section (1) of this section, the person shall be entitled to interest as provided under sub-section (1) of section 42 of this Act if as a result of the appeal or further proceeding, or any other proceeding he becomes entitled to the refund.



13. In view of the foregoing discussion, the instant Writ Petition is partly allowed to the effect that the impugned adjustment order dated 18 November 2022 is hereby quashed and the respondent is consequently directed to refund the amount of Rs. 17,10,15, 285/- for the 4th quarter of 2015-16 and also Rs. 5,44,39,148/- for the 1st quarter of 2017-18 along-with interest as per Section 42 of the DVAT Act from the date it fell due till realisation. The refund be effected within a period of three weeks from the date of this decision. However, in so far as the impugned default notices are concerned, subject to just exceptions, the petitioner is given the liberty to challenge the same by way of statutory appeal before the Appellate Tribunal as per the law.

14. The writ petition stands disposed of accordingly. The pending application also stands disposed of.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

SEPTEMBER 21, 2023

SP/Sadique

