

(2019) 07 DEL CK 0303

In the Delhi High Court

Case No : Civil Writ Petition No. 1397 Of 2019

Combined Traders

APPELLANT

Vs

Commissioner Of Trade & Taxes

RESPONDENT

Date of Decision : 24-07-2019

Acts Referred:

Delhi Value Added Tax Rules, 2005 — Rule 56
Delhi Value Added Tax Act, 2004 — Section 33, 34, 34(1), 34(2), 35(2), 38(3)(a)(ii),
74, 74(6), 74(7), 74(7)(a), 74(7)(b), 74(8), 74(9)
Central Sales Tax Act, 1956 — Section 5(3), 8(1), 8(4), 9(2)

Citation : (2019) 262 DLT 651 : (2019) 177 DRJ 515

Hon'ble Judges : Dr. S. Muralidhar, J; Talwant Singh, J

Bench : Division Bench

Advocate : Rajesh Jain, Virag Tiwari, V.K. Jain, Ramashish, Shadan Farasat,
Rudrakshi Deo, Amit Sharma, Om Prakash

Final Decision : Allowed

Judgement

Dr. S. Muralidhar, J

1. An interesting question of law involving the interpretation of Section 74 (7) read with Section 74 (8) and (9) of the Delhi Value Added Tax, 2004

(DVAT Act) arises for consideration in the present petition.

2. There have been several earlier rounds of litigation concerning the Petitioner and the Respondent. The background facts are that the Petitioner is a

proprietorship concern engaged in the sale/purchase and export of motor parts, tractor parts, accessories and other allied items. The Petitioner is

registered with the Department of Trade and Taxes (DT & T), Government of NCT of Delhi (GNCTD) under the DVAT Act, 2004 as well as the

Central Sales Tax Act, 1956 (CST Act).

3. The Petitioner had filed a return for the first quarter of 2017-2018 on 11th July, 2017 claiming the refund of Rs.2,94,55,403/-. On 14th September,

2017 the Petitioner submitted eight GSTR forms and seven HSN forms in original along with the GRs, Bill of Lading and other documents

against the sales made under Sections 8(1) and 5(3) of the CST Act.

4. When the refund was not granted within two months as mandated by Section 38 (3) (a) (ii) of the DVAT Act, the Petitioner filed WP(C) No.

8283/2017 in this Court. On 18th September, 2017 the said writ petition was disposed of by this Court directing the DT & T to process the

Petitioner's refund within four weeks and to credit the refund along with interest directly to the Petitioner's account within two weeks.

5. The Petitioner states that on 25th October, 2017 the Value Added Tax Officer (VATO), Ward 17 issued a default notice for assessment of tax and

interest under the CST Act specifically relating to the first quarter of 2017-18. In the said order he acknowledged that GSTR forms for

Rs.30,95,51,062/-had been filed. He accordingly made an assessment of Nil demand.

6. On 8th November, 2017 the VATO sent a further letter without referring to his earlier letter dated 18th October 2017 and assessment order passed

by him on 25th October, 2017, asking the Petitioners to submit, by 13th November, 2017 the sale bills along with GRs, Purchase Vouchers, DVAT 30-

31 and also to disclose the mode of payment to the transporter. The Petitioner replied on 10th November, 2017 pointing out that since the order passed

by this Court on 18th September, 2017 in WP(C) No. 8283/2017 had not been complied with, he had filed Contempt Case (Civil) No. 753/2017 in this

Court, which was listed for hearing on 10th November, 2017.

7. On 15th November, 2017 the VATO withdrew the aforementioned notice. On 8th January, 2018 the VATO passed another order reviewing the

earlier assessment order dated 25th October, 2017. Aggrieved by the said order the Petitioner filed WP(C) No.1081/2018 in this Court on 3rd

February 2018.

8. On 10th January, 2018 the VATO passed a separate order rejecting the refund claim for the first quarter 2017-18. Against this order the Petitioner

filed WP(C) No. 1080/2018 in this Court.

9. As far as WP(C) No. 1081/2018 which challenged the review order dated 8th

January, 2018 is concerned, this Court on 21st February, 2018

disposed of the writ petition with an order, the operative portion of which reads as under:

“(i) The petitioner would file objections within three weeks.

(ii) The Special Commissioner, who is not a part of the Refund Committee, would be, as a special case, appointed to hear and decide the objections raised by the petitioner.

(iii) The Objections Hearing Authority will pass a speaking order within a period of six weeks from the date of filing of objections.

(iv) The petitioner, if aggrieved by the order of the Objections Hearing Authority, will be entitled to challenge the order passed in accordance with law.

(v) In case respondent initiate coercive action for recovery, the petitioner would be entitled to ask for stay and, if the request is rejected, can take

recourse to appropriate remedy.”

10. Pursuant to the above order, the Petitioner filed objections before the Objection Hearing Authority (OHA) on 13th March 2018. When

nothing was heard from the OHA on the objections filed by the Petitioner and the Petitioner’s application for cross-examination was not taken up for

consideration, the Petitioner filed WP (C) No. 3667/2018 in this Court seeking a direction to the OHA to permit cross-examination of the desired

persons as had been mentioned in the Petitioner’s letter dated 12th March, 2018. The said writ petition was disposed of by this Court on 13th April,

2018 with the direction that the proceedings before the Special Commissioner would continue. The Petitioner was permitted to file written

submissions. The period of six weeks granted earlier was extended by another six weeks within which time the OHA was directed to consider the

Petitioner’s objections and contentions including the summoning of the orders from the authorities in the State of Rajasthan and Haryana for which a

specific request was made by the Petitioner and to pass a speaking order.

11. On 17th May, 2018 the OHA passed an order rejecting the objections without summoning the records or allowing cross-examination of the

persons and without dealing with the Petitioner’s written submissions placed on record. Aggrieved by the order dated 17th May, 2018 of the OHA

the Petitioner filed WP(C) No. 7538/2018 which was disposed of on 28th September, 2018 by this Court setting aside the order of the OHA. The said

order requires to be reproduced in full as under:

â??The petitioner is aggrieved by the order of the Special Commissioner of 15 (17).05.2018, which had rejected the appeal against an order of the

VATO - who had demanded Rs.3,18,82,488/-in respect of the Financial Year 2017-18 first quarter.

At the outset, while issuing notice this Court had noticed that the Objection Hearing Authority had virtually not adduced any reasons in respect of the conclusions that the appeal was unwarranted.

The impugned order refers to the inadmissibility of all the 'C' and 'H' Forms claimed by the petitioner however, without any discussion as to why the assessee's claim was unwarranted. Considering that this Court had remitted the matter to the OHA under special circumstances, the least was

expected from that appellate authority was to not only adduce reasons but also deal with the contentions urged before her. Sadly that inadequacy had resulted in yet another avoidable litigation. The impugned order is consequently set aside.

The Objection Hearing Authority shall give fresh hearing and provide full and adequate opportunity to the petitioner to make submissions including as to the validity of the 'C' Forms. A reasoned order dealing with all contentions urged on behalf of the petitioner shall be thereafter made. The entire process shall be completed as expeditiously as possible.

It is open to the OHA to exercise all powers available in law including summoning the records and considering the effect of local State Rules.

Petition is allowed in the above terms. Pending application stands disposed of accordingly.â??

12. The Petitioner points out that in the above order the review order dated 8th January, 2018 passed by the VATO reviewing the earlier assessment

order was left undisturbed and the OHA was asked to dispose of the Petitioner's objections expeditiously. It must be noted there that as far as W.

P. (C) 1080/2018 challenging the VATO's order dated 10th January 2018 rejecting the refund claim for the first quarter of 2017-18 is concerned,

this Court disposed it of by an order dated 9th July, 2018 remitting the matter to the OHA and giving the Petitioner three week's time to file objections.

13. On 13th December, 2018 the ETO-cum-Assessing Authority, Ward-6, Panipat

issued a letter to the Assistant Commissioner, Ward-17, Delhi

stating that the earlier letter dated 3rd January, 2018 declaring the C-forms cancelled stood withdrawn. He also mentioned that the said C-forms

should be considered as declarations and in compliance of Section 8(4) of the CST Act.

14. The Petitioner states that when no hearing took place even after the expiry of three months from the date of the order passed by this Court i.e.

28th September, 2018, the Petitioner's counsel on 3rd January, 2019 visited the office of the OHA to serve DVAT-41 in relation to the objection

dated 13th March, 2018 pending with the OHA. It is stated that the OHA asked the counsel to come again on 4th January, 2019. On 3rd January,

2019 itself the OHA issued a notice for hearing on 8th January, 2019 concerning the objections of first quarter of 2017-18 with reference to this

Court's order dated 28th September, 2018.

15. It is stated by the Petitioner that despite two visits to the office of the OHA on 4th January, 2019, service of the DVAT-41 could not be effected.

Left with no option, the counsel served notice in form DVAT-41 in terms of Rule 56 of the Delhi Value Added Tax Rules, 2005 (DVAT Rules) in

person on the Commissioner in terms of Section 74 (8) of the DVAT Act. The text of the letter so served by the counsel for the Petitioner reads as

under:

Sub.: (i) Filing of DV AT -41 along with documents

(ii) Furnishing of letter NO. 8811 dated 13.12.2018 and other documents

In the matter of M/s Combined Traders TIN 07130038085 Tax Period (1st Qtr. 2017-18)

Sir,

Please find enclosed DV AT -41 and other Letter with documents all dated 03.01.2019. Yesterday I met the Spl. Commissioner Ms. Sonika Singh

(OHA) to accept the above said form and letter along with documents but informed that she will take these documents tomorrow i.e. 04.01.2019 as

she has to check the relevant provision etc. Today, I visited her office to meet the Spl. Commissioner, Ms. Sonika Singh (OHA) at about 12.30 pm but

on my two visits, I have been informed by her staff that Madam (OHA) is busy and unable to meet.

In view of the above, I am filing before your goodself being Commissioner, head of the Department and do the needful in the matter Submitted and prayed accordingly.â??

16. On 8th January, 2019 hearing of the objections took place and all relevant documents were produced before the OHA. The case was adjourned to

11th January, 2019. On 11th January 2019 the matter could not be heard by the OHA due to paucity of time and it was again listed for 16th January, 2019.

Again on that date, the matter could not be heard as the OHA was pre-occupied with some other engagements. On 17th January, 2019 through a

letter dated 16th January, 2019 the Petitioner waived off the right of hearing and requested the OHA to decide the objections on the basis of the grounds, written submissions and judgments placed on record.

17. On 19th January, 2019 the period of 15 days to decide the objection after service of notice on 4th January, 2019 in Form DVAT-41 expired. On

30th January, 2019 the OHA issued a fresh notice of hearing for 11th February, 2019. On 2nd February, 2019 another hearing notice dated 30th

January, 2019 was served on the Petitioner fixing the objections for hearing on 11th February, 2019.

18. On account of the failure of the OHA to decide its objections within the time stipulated in Section 74 (8) DVAT Act, the Petitioner filed the

present petition seeking the relief of quashing of the hearing notice dated 30th January, 2019 and also for declaration that the objection dated 13th

March, 2018 filed by the Petitioner should be deemed to be allowed by the OHA in terms of Section 74(9) of the DVAT Act read with Section 9 (2)

of the CST Act.

19. It must be noted at this juncture that notice was issued in this petition on 11th February 2019. On that date the Court directed that till the next date

of hearing, the OHA would not pass a final order on the objections. On the next date i.e. 6th May 2019, when no counter affidavit was filed, the

Respondents were given a final opportunity to do so within four weeks. The interim order was made absolute during the pendency of the petition.

20. Today the Court found that no counter affidavit has still been filed. Mr. Shadan Farasat, learned counsel appearing for the Respondents stated that

he was prepared to argue the petition without a counter affidavit. Accordingly the

petition was finally heard.

21. Mr. Rajesh Jain, learned counsel appearing for the Petitioner, drew the attention of this Court to the decision in *Shree Chamundi Mopeds Ltd. v.*

Church of South India Trust Association (1992) 3 SCC 1 to urge that the quashing of the earlier order dated 17th May, 2018 of the OHA restoring the

objections to the file of the OHA would result in restoration of the position as it stood on the date of passing an order which had been quashed. In

other words, according to Mr. Jain the three month period within which the objections had to be decided started running from the date of the order of

this Court i.e. 28th September, 2018. Moreover, in terms of Section 74 (8) of the DVAT Act, the fifteen day period after service of the DVAT-41 on

the Commissioner on 4th January 2019 (after repeated attempts by the Petitioner to serve it on the OHA failed) also was crossed without the OHA

taking a decision. Therefore, according to Mr. Jain, under Section 74(9) of the DVAT Act, the OHA should be deemed to have allowed the objection.

He pointed out that on 8th January, 2019 when the Petitioner appeared for hearing before the OHA, the earlier DVAT-41 notice served on the

Commissioner had been placed before her.

22. Mr. Jain also placed reliance on the decision of this Court in *CST v. Behl Construction* (2009) 21 VST 261 (Del) in support of his plea that the

fifteen day period in terms of Section 74 (8) of the DVAT Act was the mandatory time limit and if an order was not passed within that period the

objection would be deemed to have been accepted. Mr. Jain submitted that the time limit under Section 34 (2) of the DVAT Act, which provides that

the Commissioner may make an assessment of tax within one year after the date of the decision of the Appellate Tribunal or Court, would not apply in

the instant case. In the Petitioner's case the re-assessment order was of 8th January, 2018 which had not been disturbed by this Court while

remanding the matter to the OHA on 28th September, 2018. All that the OHA was required to do was to dispose of the objections under Section 74 of

the Act. The order that had been set aside by this Court was the one dated 17th May, 2018 of the OHA passed under Section 74(7) of the Act.

23. In reply, Mr. Shadan Farasat, learned counsel for the Respondent, first submitted that after the order dated 17th May, 2018 had been passed by

the OHA rejecting the earlier objections, the question of three months period

again reviving in terms of Section 74 (6) read with Section 74(8) did not arise. According to him, after the order dated 28th September, 2018 of this Court restoring the Petitioner's objections to the file of the OHA for a fresh disposal, there was no time limit as such for the OHA to dispose of the objections.

24. This Court is unable to agree with the above submissions of Mr. Farasat. To begin with, reference may be made to the relevant statutory provisions of the DVAT Act as under:

Section 74 Objections

(1) Any person who is dissatisfied with

(a) an assessment made under this Act (including an assessment under section 33 of this Act); or

(b) any other order or decision made under this Act;

may make an objection against such assessment, or order or decision, as the case may be, to the Commissioner;

;

(2) A person who is aggrieved by the failure of the Commissioner to reach a decision or issue any assessment or order, or undertake any other

procedure under this Act, within six months after a request in writing was served by the person, may make an objection against such failure.

;

(7) Within three months after the receipt of the objection, the Commissioner shall either

(a) accept the objection in whole or in part and take appropriate action to give effect to the acceptance (including the remission of any penalty

assessed either in whole or in part); or

(b) refuse the objection or the remainder of the objection, as the case may be; and in either case, serve on the person objecting, a notice in writing of

the decision and the reasons for it, including a statement of the evidence on which it is based:

PROVIDED that where the Commissioner within three months of the making of the objection notifies the person in writing, he may continue to

consider the objection for a further period of two months:

PROVIDED FURTHER that the person may, in writing, request the Commissioner

to delay considering the objection for a period of up to three months for the proper preparation of its position, in which case the period of the adjournment shall not be counted towards the period by which the Commissioner shall reach his decision.

(8) Where the Commissioner has not notified the person of his decision within the time specified under sub-section (7) of this section, the person may serve a written notice requiring him to make a decision within fifteen days.

(9) If the decision has not been made by the end of the period of fifteen days after being given the notice referred to in sub-section (8) of this section, then, at the end of that period, the Commissioner shall be deemed to have allowed the objection.â??

25. The above provision has to be read with Rule 56 of the DVAT Rules which reads thus:

â??Rule 56. Delay

(1) A notice for the purpose of sub-section (8) of section 74 shall be in Form DVAT-41.

(2) The notice shall be signed by the person making the objection or his authorised signatory and shall be served in person on the Commissioner or the Value Added Tax Authority deciding the objection.â??

26. The sacrosanct nature of the limitation periods in the above provisions has been emphasized by this Court in CST v. Behl Construction (supra)

where it was observed as under:

â??20. The time-limits of three months, five months, six months or eight months are merely directory: However, if such time-limit expires and the

notice under section 74(8) of the said Act is issued then the period of 15 days would be mandatory. The consequence: of not passing an order is dearly

spelt out and that is that the objections would be deemed to have been accepted. It is apparent that the scheme is not left open-ended as submitted by

the learned counsel for the respondents and wrongly assumed by the Tribunal. If it is contended that it is left at the whim and fancy of the

Commissioner to pass an order when he likes, the answer is, what prevents the objector from issuing a notice under section 74(8) of the said Act and

thereby fixing a terminal date for passing the order? If the contention is that why should the objector issue such a notice as by virtue of section 3.5 (2)

of the said Act he enjoys a virtual stay during the pendency of his objections, the answer is that such an objector would have to choose between the protection of section 35(2) and invoking the deeming provisions of section 74(9). He cannot eat his cake and have it too", as it were. He cannot let the applicable time-limit (and more) slip by, all this while enjoying the virtual stay, and also say, at the end of it without issuing the peremptory 15 days notice under section 74(8) of the said Act, that his objections are deemed to have been accepted. Accepting the contentions of the respondents and the conclusions of the Tribunal would amount to re-writing the provisions which are clear and unequivocal. When the meaning of a statutory provision is clear and without doubt it does not call for any exercise of interpretation. Nor can we introduce a meaning which the Legislature did not intend.

21. For all these reasons we hold that an objection pending before the Commissioner cannot be deemed to have been accepted simply because of the fact that the time specified in section 74(7) of the Delhi Value Added Tax Act 2004 has expired and the Commissioner has not exercised either of the options set out in section 74(7)(a) or 74(7)(b). The deeming provision of section 74(9) of the said Act would get triggered only if the conditions precedent provided under section 74(8) of the said Act are satisfied. We also hold that the Tribunal erred in law in fixing a mandatory period of eight months, within which the Commissioner has to dispose of the objection pending before him under section 74 (7) of said Act particularly, when no such stipulation is provided by the statute.â??

27. As far as this case is concerned, once objections were restored to the file of the OHA by the order dated 28th September 2018 of this Court, the three months period would start to run again from that date. As pointed out in *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association* (supra) where the order under challenge is set aside, it results in restoration of the position that existed on the date of the order that has been quashed. The relevant observations of the Supreme Court in the said decision read as under:

â??Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the

date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. This means that if an order passed by the Appellate Authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the Appellate Authority would be restored and it can be said to be pending before the Appellate Authority after the quashing of the order of the Appellate Authority.â??

28. Learned counsel for the Petitioner is right in his contention that this three-months period not having been adhered to, the procedure under Section 74(8) of the DVAT Act would kick in. The Respondent has not controverted the assertion of the Petitioner that despite best efforts service of notice under DVAT-41 could not be effected in person on the OHA and was ultimately served on the Commissioner on 4th January 2019. Admittedly, the objections were not decided within fifteen days from that date.

29. Mr. Farasat next submitted that the Petitioner had not complied with Section 74 (8) of the DVAT Act since the notice under DVAT-41 was not served â??in personâ? on the OHA but on the Commissioner. He submitted that unless the conditions for applicability of Section 74 (8) of the DVAT Act read with Rule 56 of the DVAT Rules are fulfilled, it cannot be invoked and in support thereof relied on the decision in *Mancheri Puthusseri Ahmed v. Kuthiravattam Estate Receiver* (1996) 6 SCC 185.

30. The above submission appears to overlook the fact that the Respondent has not controverted the statements made on oath by the Petitioner in the petition that despite best efforts to personally serve the DVAT 41 on the OHA he could not do so. It is seen from Annexure P-5 to the petition, that on the copy of the DVAT-41 Form served on the Commissioner by the Petitioner, there is an acknowledgement stamp with the diary no. E-820717 dated 4th January, 2019. The stamp is of the Central Resources Unit, DT& T.

31. Mr. Jain produced before this Court reply received by him from the Public Information Officer (PIO)/Assistant Commissioner in the DT&T, GNCTD dated 22nd February, 2017 in response to an application under the Right to Information Act where in response to the specific question:

â??What is the medium of personal service of documents in the CVATâ?s office generally? How they are received and who receives them?â?, the response received was:

â??Generally, an employee is deployed for receiving letter/DAK to receive the same of personal service of documents in Commissioner (VAT)

Office.â??

32. The above reply appears to be consistent with the general practice in Government offices where services of notice upon public officials are usually

done at one desk where the offices are located. There is a clerk who usually receives all notices and gives an acknowledgement. The Court is

therefore unable to accept the plea of Mr. Farasat that there was non-compliance with Section 74(8) of the DVAT Act read with Rule 56 of the

DVAT Rules.

33. Lastly, Mr. Farasat submitted that in the instant case, the limitation period as stated in Section 34 (2) of the DVAT Act would apply. His

submission was that in terms thereof, there was a one-year period for the Commissioner to deal with the objections.

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

â??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), 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.â??

35. This Court is of the view that Section 34 (2) which has to be read in the context of Section 34 (1) of the DVAT Act would not apply in the facts

and circumstances of the present case, which is essentially concerned with the failure of the OHA to dispose of the objections filed under Section 74

(1) of the DVAT Act. It must be recalled that what was set aside by this Court by its judgment dated 28th September 2018 was the decision dated

17th May 2018 of the OHA under Section 74 (7) of the DVAT Act which is a specific provision dealing with objections whereas Section 34 (2) of the

DVAT Act appears to be a general provision relating to assessments. In the present case there was no occasion for the Commissioner to pass any

order of "assessment". As rightly pointed out by the learned counsel for the Petitioner the re-assessment order dated 8th January, 2018 passed by

the VATO was not disturbed by this Court when it remanded to the OHA the objections of the Petitioner for a fresh consideration.

36. For the aforementioned reasons, none of the submissions of learned counsel for the Respondent merit acceptance. Resultantly, the Court declares

that the objections filed by the Petitioner on 13th March, 2018 should, in terms of Section 74 (7) read with Section 74 (8) and 74 (9) of the DVAT Act

be deemed to have been allowed by the OHA.

37. The writ petition is accordingly allowed. The consequential orders granting the Petitioner's refund together with interest thereon will now be

issued by the DT&T within four weeks from today. The refund and interest amount shall be credited directly to the account of the Petitioner not later

than two weeks thereafter failing which the Respondent will pay the Petitioner compensation of Rs.50,000. If the Petitioner is aggrieved by the orders

regarding refund and interest, it will be open to the Petitioner to seek appropriate remedies in accordance with law.