

(2014) 09 DEL CK 0451
In the Delhi High Court
Case No : St. Appl. 32 of 2013

H.M. Industries

APPELLANT

Vs

Commissioner of Value Added Tax

RESPONDENT

Date of Decision : 26-09-2014

Acts Referred:

Central Sales Tax Act, 1956 — Section 9(2)
Delhi Value Added Tax Act, 2004 — Section 26, 28, 28(1), 32, 32(1)
Income Tax Act, 1961 — Section 143(2), 143(3), 147

Citation : (2015) 215 DLT 671

Hon'ble Judges : V. Kameswar Rao, J; Sanjiv Khanna, J

Bench : Division Bench

Advocate : Rajesh Jain and Virag Tiwari, Advocates for the Appellant; V.K. Tandon and Yogesh Saini, Advocates for the Respondent

Judgement

Sanjiv Khanna, J.—This appeal under Section 81 of Delhi Value Added Tax Act, 2004 ("DVAT Act", for short), read with Section 9(2) of the Central Sales Tax Act, 1956 ("CST Act" for short) pertains to the 4th quarter return for the tax period 2006-07. The substantial question of law admitted for hearing vide order dated 14.8.2013 reads as under:

"Whether VAT Tribunal was right in holding that proviso to Section 34(1) is applicable to the facts of the present case?"

2. By the impugned order dated 14.6.2013 the Appellate Tribunal, Value Added Tax (Tribunal, for short), Delhi has held that the default assessment under Section 32 of the DVAT Act was within limitation as extended period of six years in terms of proviso to Section 34(1) of the DVAT Act would be applicable.

3. Section 34 of the DVAT Act, prescribes limitation period for completing assessment and re-assessment. Section 34(1) of the DVAT Act is reproduced below:

"Section 34:

(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 date on which the person furnished a return under Section 26 or Sub-section (1) of Section 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 full material particulars on the part of the person, the said period shall stand extended to six years."

4. Section 34(1) of the DVAT Act, simply stated stipulates that no assessment or re-assessment 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.

5. Section 34(1) refers to orders of assessment or reassessment under Section 32 of the DVAT Act. Therefore, the reason to believe must be formed before or at the time when the order of assessment or reassessment under Section 32 of the DVAT Act is passed. The said orders are different from the adjudication by the objection hearing authority under Section 74 of the DVAT Act. The objection hearing authority does not pass an assessment or reassessment order under Section 32 of the DVAT Act. It would be, therefore, relevant to refer to Section 32 of the DVAT Act, which reads:

"Section 32. Default assessment of tax payable--

(1) If any person--

(a) has not furnished returns required under this Act by the prescribed date; or

(b) has furnished incomplete or incorrect returns; or

(c) has furnished a return which does not comply with the requirements of this Act; or

(d) for any other reason the Commissioner is not satisfied with the return furnished by a person;

the Commissioner may for reasons to be recorded in writing assess or reassess to the best of his judgment the amount of net tax due for a tax period [or more than one tax period by a single order so long as all such tax periods are comprised in one year.]

xxx xxx xxx

(2) Where the Commissioner has made an assessment under this Section, the Commissioner shall forthwith serve on that person a notice of assessment of the amount of any additional tax due for that tax period.

xxx xxx xxx

Explanation.--A person may, if he disagrees with the notice of assessment, file an objection under Section 74 of this Act."

Sub-section (1) to Section 32 states that default assessment can be made when the return is not furnished by the prescribed date; or incorrect or incomplete return has been furnished or the return furnished does not comply with the requirements of the said Act or for any other reason the Commissioner is not satisfied with the return furnished by the person. Unless the conditions of Section 32(1) of DVAT Act are satisfied, default assessment cannot be made and if made will be liable to be struck down/set aside. Sub-section (1) to Section 32 permits and authorises the Commissioner for recording of reasons in writing, assess or re-assess to the best of his judgment the amount of net tax due for a tax period. Sub-section (2) to Section 32 stipulates that the Commissioner, after making default assessment under the Section, shall forthwith serve on that person a notice of assessment of the amount of any additional tax due for that tax period. Satisfaction of the conditions set out in Section 32(1) would not on its own amount to satisfaction of the condition stated in the proviso to Section 34(1) to claim benefit of the extended period of limitation. The two provisions operate independently in their own fields and have a distinct and different purpose to serve. In a given case satisfaction of conditions stated in the proviso to Section 34(1) might justify invocation of Section 32 and vice versa, but despite every chance of overlap, satisfaction of the individual requirements of the two sections should be examined independently. The default assessment has to be made within the period of limitation prescribed under Section 34 of the DVAT Act; four years in normal circumstances or six years if the specified conditions laid down in the proviso are satisfied.

6. Whether conditions stated in Section 32(1) have been satisfied or not, is a

matter relating to merits and therefore would relate to confines or four corners of jurisdiction in a different way. The default assessment can be challenged by way of filing objections, consequent adjudication and appeals. But, the proviso to Section 34(1) of the DVAT Act, for the purpose of extended period of limitation of six years does not postulate formation of believe or opinion by the Objection Hearing Authority or the appellate forums. Formation and recording of the reasons to believe has to be by the competent authority before or at the time of passing the default assessment order.

7. The reasoning given by the tribunal to uphold the default assessment order, which was passed after four years but within six years from the date on which return for the 4th quarter of assessment year 2006-07 was furnished, reads:

"Section 34(1)(a), as quoted above, states that no assessment or re-assessment shall be made after the expiry of four years from the date of furnishing of a return. However, proviso to Section 34(1) stipulates that where the Commissioner has reason to believe that tax was not paid by reason of concealment, omission or failure to disclose full material particulars on the part of the person, the said period shall stand extended to six years. Since the appellant has failed to submit the "C form quarter-wise, as required under second proviso to Sub-rule (11) of Rule 12 of the Central Sales Tax (R&T) Rules, 1957, there was an omission on the part of the appellant in this case. Hence, as per proviso to Section 34(1) of the Act, the period of limitation stands extended to six years. We are, therefore, of the considered view that the assessment is not barred by limitation in view of the above provision."

8. The error made by the Tribunal in the impugned order is that they examined and formed the belief that there was "omission" on the part of the appellant assessee and, therefore, extended period of six years would apply. But, the mandate of the DVAT Act is that it is the Commissioner, who should have formed the said opinion/belief by recording "reason to believe" regarding concealment, omission or failure on the part of the assessee, resulting in non-payment or short payment of tax. It is stated that in exercise of powers under Section 68 of the DVAT Act, the Commissioner, by issue of a notification, has delegated his powers under Sections 32 and 34 of the DVAT Act to the Value Added Tax Officer and Joint Commissioners. We are not required to examine the validity of the said delegation in this appeal as no such question has been raised. We will therefore proceed with the assumption that the Value Added Tax Officer was the competent authority, authorized under the proviso to Section 34(1) of the DVAT Act.

9. It is true that proviso to Section 34(1) does not specifically mention that reasons to believe have to be recorded in writing. However, the said requirement has to be read and treated as part and parcel of Section 34(1) of the DVAT Act. The normal period of limitation as prescribed for passing of a default assessment order is four years. No reason or ground is required to be stated under Section 34(1) if assessment/default assessment is made within the said period. However, when the extended period of six years is invoked, preconditions stipulated in the

proviso to Section 34(1) of the DVAT Act must be satisfied. Want of satisfaction of the preconditions would be in realm of absence of jurisdiction. The only way, the Commissioner/competent authority can show that he had applied his mind and had formed requisite "reason to believe" is by recording in writing that the case falls within the proviso to Section 34(1) of the DVAT Act. This may be indicated and stated so in the default assessment order or even in the record. 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 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".

10. The expression "reason to believe" finds reference in Section 147 of the Income Tax Act, 1961, a provision related to opening of an assessment already made under Section 143(3) or regular assessment for the first time where notice under Section 143(2) of the said Act was not issued. The aforesaid expression in DVAT Act is, therefore, *pari materia* and enacted keeping in mind the similar provision under the Income Tax Act. The Supreme Court in *S. Ganga Saran and Sons (Pvt.) Ltd., Calcutta Vs. Income Tax Officer and Others*, , observed that expression "reasons to believe" is stronger than the words "if the Assessing Officer is satisfied". A belief must be honest and tested on the ground whether a reasonable person, based upon reasonable grounds, would have formed the said belief. "Reasons to believe" is not the same as mere suspicion, gossip or rumour. "Reasons to believe" are not a reason to suspect. Fishing or roving inquiry under the proviso is not permissible. The words "material facts" was earlier elucidated by the Supreme Court in *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, , as an expression which refers to primary facts, the duty of which is upon the assessee to disclose but does not refer to factual or legal inferences which could be drawn from the primary facts. Once the assessee had disclosed the primary facts then he cannot be faulted on the ground that he has not indicated further factual and legal inference. The duty cast upon the assessee is to disclose fully and truly all material primary facts, which he should not have suppressed, misrepresented or falsified i.e. the

assessee should not have concealed, failed or omitted to mention the full material facts.

11. Thus, the extended period of limitation under proviso to Section 34(1) of the VAT Act confers wide but not plenary power. The precondition for exercise of power under the proviso should be shown to be satisfied by recording of reasons in writing and reasons should be intelligible and legibly demonstrated and testify. The objectiveness in the subjective satisfaction of the competent authority in the "reason to believe" can be subjected to challenge, verified and tested. The Supreme Court in *Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das*, has held that the "reasons to believe" must show live link or nexus between the material which was not disclosed by the assessee and the formation of belief that there was concealment, omission or failure on the part of the assessee.

12. 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 4 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.

13. In the present case, the undisputed position is that the appellant assessee for the 4th quarter relating to tax period 2006-07 had filed his return on 30.4.2007, so the default assessment as per Section 34 of the DVAT Act should have been completed on or before 1.5.2011. However, the default assessment

was made on 11.5.2011, which is after four years but within six years.

14. We have read the default assessment order dated 11.5.2011. We are reproducing the entire order itself:

"Notice of default assessment of tax and interest under Section 9(2) of the CST Act. Whereas I am satisfied that the dealer has furnished incomplete return or incorrect return or furnished a return does not comply with the requirements of CST Act, 1956 read with Delhi Value Added Tax Act, 2004 for the following reasons:

Present Sh. H.K. Sharma, Advocate and Mr. Oberoi, Prop. for reconciliation of sale 2006-07, Sale Summary, DVAT-30, detail of C forms filed. The GTO of the firm is Rs. 5820011/-, Inter State sale against C form for Rs. 938815/-, sale @ 10% for Rs. 20535/- and sale @ 12.5% for Rs. 13860/-, Return filed. DVAT-51 filed. Hence form value of Rs. 300465/- (consolidated in above form) disallowed, sale form filed IInd and 3rd qtr. So tax @ 6% on Rs. 300465/- is the demand in CST. Pending C form Rs. 50175/-. So tax @ 6% on Rs. 50175/- is the demand in CST. Audited balance sheet is filed.

The dealer is hereby directed to pay tax of an amount of Rs. 21038 (Twenty one thousand thirty eight only) and furnish details of such payment in Form DVAT-27A along with proof of payment to the undersigned on or before 08-06-2011 for the following tax period(s)--

Worksheet and Assessment Summary are enclosed for reference."

15. A reading of the default assessment order dated 11th May, 2011, would indicate that the assessing authority has recorded that the return furnished was incomplete or incorrect and did not comply with the requirements of CST Act read with DVAT Act. In the first paragraph, the authority mechanically used the expressions in Section 32 of the DVAT ACT i.e. "furnished incomplete return" "incorrect return" and "furnished a return which does not comply with the requirements of DVAT and CST Act", rather than specifying a "precise default". Thereafter, in the next paragraph it stands recorded that there was reconciliation of sale summary, DVAT 30, details of "C" form filed, Interstate sales as declared against "C" form was Rs. 9,38,815/-, and DVAT 51 was also filed (Date of DVAT 51, is not indicated). The authority, thereafter observed that form value of Rs. 3,00,465/- was consolidated in one form and, therefore, disallowed from the sale in the second and third quarter. Tax demand stood created. Amazingly, the tax demand was created and the default assessment passed was for the fourth quarter. It is not clear from the above reasons, why and for what account, any opinion or belief was formed that there was concealment, omission or failure on the part of the assessee to disclose material facts. What is apparent from the aforesaid is that the full details were filed by the assessee in form DVAT 30 and 51, etc. but on legal interpretation, consolidated "C" form was not acceptable. This fact has been also noticed by the Tribunal in the impugned reasoning. The fact that the appellant had filed consolidated form was not concealed or omitted.

The position that the appellant has relied upon consolidated "C" form was known to the authority. It was neither concealed nor omitted nor was there any failure. Facts were on record and available. The reasoning/order proceeds as if there was no difference between the limitation periods of four or six years; and even more the limitation period of six years would inevitably apply as a matter of routine. No attempt stands made to invoke the proviso to Section 34(1) by referring to the pre-requisites stipulated therein and to justify as to why the extended period should apply. It is devoid and bereft of "reason to believe".

16. Thus, on reading of the default assessment order, we do not find that there is any averment or assertion that there was concealment, omission or failure on the part of the appellant assessee to furnish material particulars. The default assessment order dated 11.5.2011, therefore, will falter and not meet the statutory requirements. It is not the case of the respondent-revenue nor has it been asserted that there is another document or note, recording "reason to believe" by the Commissioner/authority.

17. As observed earlier, every error or mistake in the return which leads to short payment or non-payment of tax, would not be covered by the proviso to Section 34(1) of the DVAT Act. The said proviso will only apply when the preconditions stipulated therein i.e. (1) the Commissioner records reasons to believe that the tax has not been paid; (2) the reason for non-payment of tax should be concealment, omission or failure to disclose full material particulars on the part of the assessee. It is only when the two conditions are cumulatively satisfied and the reasons to believe show a live link or nexus with the concealment, omission or failure to disclose material facts resulting in short payment of tax or non levy of tax, that the proviso to Section 34(1) of DVAT Act can be invoked.

18. The appellant assessee had filed objections under Section 74 of the Act before the Objection Hearing Authority and had specifically pleaded that the default assessment was barred by limitation. The Objection Hearing Authority observed that the reconciliation return in Form DVAT-51 under the Delhi Value Added Tax Rules, 2005 had to be filed within 3 months from the end of the each quarter but in exercise of power conferred under Rule 49A of the Delhi Value Added Tax Rules, 2005 read with provisions of CST Act and the rules framed therein, the Commissioner, Value Added Tax had extended the time for furnishing of the reconciliation return in Form DVAT-51. Further, the statutory forms in the instant case deposited on 9.5.2011, did not conform to Rule 12(1) of the Central Sales Tax (Registration & Turnover) Rules, 1957. Reference was to the requirement that the appellant assessee should have furnished separate "C" forms for each quarter of the financial year and not a single form for all the quarters of a financial year. The matter was remanded by the Objection Hearing Authority to the Assessing Officer. It is noticeable that the Objection Hearing Authority did not deal with the contention/challenge to the exercise of jurisdiction after four years, being barred by limitation for want of recording "reasons to believe". The Objection Hearing Authority, cannot record "reason to believe".

These, as per the statute, should be recorded by the Commissioner/competent authority and that too, before or at the time of passing of the default assessment order under Section 32 of the DVAT Act. The reason is simple that the power conferred must be exercised in the manner prescribed and mandated, especially when it is a jurisdictional pre-condition and requirement. Section 34(1) postulates and prescribes upper time limit for passing of the default assessment order as four years, but extends the said period to six years on satisfaction of pre-conditions laid down in the proviso. This extended period is an exception and not the rule. So pre-conditions in the proviso must be satisfied before or with the passing of an order under Section 32 and not afterwards or by the Objection Hearing Authority. The power must be exercised by the Commissioner or the competent authority, before or at the time of passing of the default assessment order. The Objection Hearing authority cannot write or formulate the "reason to believe". The statutory mandate is that the reason should be recorded by the competent authority/Commissioner and should be before or at the time of passing of the default assessment order. If and had the authority, passing the default assessment order, recorded the "reasons to believe" on the same lines as the Objection Hearing authority, the outcome and decision possibly would have been different.

19. It was in these circumstances that the appellant assessee had approached the Tribunal, who, without adverting and examining whether the "reasons to believe" should have been recorded by the Commissioner/competent authority as per the requirement of Section 34(1) of the DVAT Act, themselves examined and decided the question whether the proviso to Section 34(1) would be applicable or not. The default assessment order as recorded does not disclose and states as to why and for what reason the Commissioner/competent authority had formed the belief that there was concealment, omission or failure to disclose full material particulars. In the absence of satisfaction of the said condition and requirement, the extended period of six years cannot be invoked to pass the default assessment order. The question of law is, accordingly, answered in favour of the appellant and against the revenue.

The appeal is disposed of. No cost.