

(2023) 02 DEL CK 0049

In the Delhi High Court

Case No : Civil Writ Petition No. 771 Of 2023, Civil Miscellaneous No. 2993 Of 2023

M/S Jutla & Co.

APPELLANT

Vs

Commissioner Of Vat & Anr

RESPONDENT

Date of Decision : 09-02-2023

Acts Referred:

Delhi Value Added Tax Act, 2004 — Section 5(2), 34, 34(1), 34(2), 35(2), 38, 42, 42(1), 74, 74(7), 74(7)(a), 74(7)(b), 74(8), 74(9), 75(8)

Citation : (2023) 02 DEL CK 0049

Hon'ble Judges : Vibhu Bakhru, J; Amit Mahajan, J

Bench : Division Bench

Advocate : Mohit Gautam, Satyakam, Pallavi Singh

Final Decision : Disposed Of

Judgement

Vibhu Bakhru, J

1. The petitioner has filed the present petition, inter alia, praying that the respondents be directed to refund an amount of ₹14,12,185/- along with interest in terms of Section 42 of the Delhi Value Added Tax Act, 2004 (hereafter 'the DVAT Act'). The petitioner had filed its Value Added Tax (VAT) return for the quarter 01.04.2017 to 30.06.2017, on 28.09.2017. According to the petitioner, in terms of the said return, refund of ₹14,12,185/- of VAT was due for the said period.

2. The Assessing Officer (hereafter 'the AO') did not accept the said returns and framed a default assessment of VAT for the year 2014-15 and 2016-17 by assessment orders, both dated 18.06.2018.

3. The petitioner filed its objections before the Objection Hearing Authority (hereafter 'the OHA'). However, the same were dismissed by an order dated 22.12.2020. The petitioner appealed the said order dated 22.12.2020 before the Delhi Value Added Tax Appellate Tribunal (hereafter 'the Tribunal').

4. The Tribunal noted that the petitioner had, during the course of proceedings before the OHA, submitted various documents including copies of ledger accounts, original cash vouchers, original purchase bills and other expense bills in compliance with the directions issued by the OHA. The petitioner claimed that it was entitled to exemption in respect of certain charges towards labour expenses etc. The Tribunal was of the view that the OHA ought to have considered the said documents but the order dated 22.12.2020 passed by the OHA did not reflect that any of the said documents were considered. Accordingly, by an order dated 17.09.2021, the Tribunal set aside the order dated 22.12.2020 passed by the OHA and remanded the matter to be considered afresh. The operative part of the order dated 17.09.2021 passed by the Tribunal reads as under:

"10. As a result, while disposing of both these appeals, and setting aside the impugned order dated 22/12/2020 passed by learned OHA, the matter is remanded to the learned OHA for decision afresh, after taking into consideration the relevant material, out of the documents which were produced before learned OHA vide letter dated 7/10/2020, while keeping in view provisions of section 5(2) of the Act, and 3(1) of DVAT Rules, 2005, and after affording to the dealer a reasonable opportunity of being heard."

5. Concededly, the OHA has not passed any order pursuant to the remand by the Tribunal.

6. The petitioner claims that it is now entitled to refund on the ground that the time for the OHA to pass an order has elapsed and therefore, its return claiming a refund of ₹14,12,185/- stands. The petitioner also claims that it is entitled to refund along with interest under Section 42(1) of the DVAT Act. According to the petitioner, it is not required to file any separate application for claiming refund. In view of the decision of this Court in *Swarn Darshan Impex (P) Ltd. v. Commissioner, Value Added Tax & Anr*: (2010) 31 VST 475 (Del), the VAT Authority is required to process the refund of VAT within the prescribed period.

7. Mr. Gautam, the learned counsel appearing for the petitioner, also relied on the provisions of Section 74 of the DVAT Act and submitted that since the OHA did not pass any order after the matter was remanded by the Tribunal, it is deemed that the objections raised by the petitioner in respect of the default assessments are allowed.

8. He also referred to the decision of this Court in *Shaila Enterprises v. Commissioner of Value Added Tax*: (2016) 94 VST 367 and on the strength of the said decision, contended that the OHA was required to pass an order within a period of one year as stipulated under Section 34(2) of the DVAT Act.

9. Mr. Satyakam, learned counsel appearing for the respondent, countered the said submissions. He contended that no notice has been issued by the petitioner under Section 74(8) of the DVAT Act, requiring the OHA to render its decision within a period of fifteen days; therefore, the deeming provision of Section 74(9)

of the DVAT Act was not triggered.

10. He also referred to the decisions of the Coordinate Bench of this Court in Commissioner of Sales Tax v. BEHL Construction: ILR (2009) 3 Del 599 and Combined Traders v. Commissioner of Trade & Taxes: (2019) 262 DLT 651.

Reasons & Conclusions

11. At the outset, it is relevant to refer to Section 34 and Section 74 of the DVAT Act. The same are set out below:

"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."

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74. Objections

(1) Any person who is dis-satisfied 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;

PROVIDED that no objection may be made against a non-appealable order as defined in section 79 of this Act:

PROVIDED FURTHER that no objection against an assessment shall be entertained unless the amount of tax, interest or penalty assessed that is not in dispute has been paid [failing which the objection shall be deemed to have not

been filed:]

[PROVIDED ALSO that the Commissioner may, after giving to the dealer an opportunity of being heard, may direct the dealer to deposit an amount deemed reasonable, out of the amount under dispute, before such objection is entertained.]

PROVIDED ALSO that only one objection may be made by the person against any assessment, decision or order.

PROVIDED ALSO that in the case of an objection to an amended assessment, order, or decision, an objection may be made only to the portion amended.

[PROVIDED ALSO that no objection shall be made to the Commissioner against an order made under section 84 or section 85 of this Act if the Commissioner has not delegated his power under the said sections to other Value Added Tax authorities.]

(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.

(3) An objection shall be in writing in the prescribed form and shall state fully and in detail the grounds upon which the objection is made.

(4) The objection shall be made –

(a) in the case of an objection made under sub-section (1) of this section, within two months of the date of service of the assessment, or order or decision, as the case may be; or

(b) in the case of an objection made under sub-section (2) of this section, no sooner than six months and no later than eight months after the written request was served by the person:

PROVIDED that where the Commissioner is satisfied that the person was prevented for sufficient cause from lodging the objection within the time specified, he may accept an objection within a further period of two months.

(5) The Commissioner shall conduct its proceedings by an examination of the assessment, or order or decision, as the case may be, the objection and any other document or information as may be relevant:

PROVIDED that where the person aggrieved, requests a hearing in person, the person shall be afforded an opportunity to be heard in person.

(6) Where a person has requested a hearing under sub-section (5) of this section and the person fails to attend the hearing at the time and place stipulated, the Commissioner shall proceed and determine the objection in the absence of the person.

(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.

(10) Where on the date of commencement of this Act a dispute under the Delhi Sales Tax Act, 1975 (43 of 1975) has been pending before a sales tax authority referred to in section 9 of the Delhi Sales Tax Act, 1975 (43 of 1975), the dispute shall be disposed of within a period of five years from the date of the commencement of this Act.

(11) Where the dispute referred to in sub-section (10) of this section has not been decided within the time required, the dispute shall be deemed to have been resolved in favour of the dealer.”

12. It is apparent from the plain language of Sub-section (2) of Section 34 of the DVAT Act that the Commissioner is required to make an assessment of tax within one year after the date of any decision of the Appellate Tribunal or a court. However, the said provision is applicable only where an assessment is required to be made in consequence of or to give effect to the decision of the Appellate Tribunal or the court that requires a reassessment. In the present case, the default assessment was framed. The petitioner had filed objections against the said assessment. The petitioner had not succeeded before the OHA in the first

round but had prevailed in the appeal filed before the Tribunal.

13. In compliance of the order dated 17.09.2021 passed by the Tribunal, the OHA is required to decide the petitioner's objections afresh. However, the default assessments have not been set aside.

14. In *Shaila Enterprises v. Commissioner of Value Added Tax* (supra), the OHA had remanded the matter to the AO with the direction to pass an order afresh within a period of thirty days. The AO failed to pass a fresh assessment order. In this context, the Court observed that the AO had not passed a fresh assessment order within a period of one year as required under Section 34(2) of the DVAT Act. The Court also observed that this Court had, in a series of judgments, emphasised the mandatory nature of the time limits under section 38 of the DVAT Act. The said decision does not apply in the facts of this case because in the present case, the Tribunal has remanded the matter to OHA without disturbing the default assessment framed by the AO. Thus, applying the time limit for passing an assessment order does not arise.

15. Undisputedly, in the view of the decision in *Shaila Enterprises v. Commissioner of Value Added Tax* (supra), where the matter is remanded to the assessing authority for framing an assessment / reassessment, the limitation as prescribed under Section 34(2) of the DVAT Act would be applicable. However, the provision of Section 34(2) of the DVAT Act does not apply where the matter is remanded to the OHA to consider the objections without disturbing the assessment.

16. The aforesaid issue was considered by a Coordinate Bench of this Court in *Combined Traders v. Commissioner of Trade & Taxes* (supra). In the said case, this Court referred to the decision of the Supreme Court in *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association CSI Cinod Secretariat*, Madras: (1992) 3 SCC 1 and had observed that where an order under challenge is set aside, it would result in the restoration of the position that existed on the date that the order was quashed. In the present case, by an order dated 17.09.2021, the Tribunal quashed the order dated 22.12.2020 passed by the OHA. Thus, proceedings before the OHA are now at the same stage as obtaining on 22.12.2020.

17. In *Combined Traders v. Commissioner of Trade & Taxes* (supra), the Court further held that in the given facts – which are somewhat similar to the facts in the present case – provisions of Section 34(2) of the DVAT Act are not applicable. The relevant extract of the said decision is set out below:

"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:

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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."

18. In the given facts, the provisions of Section 74 of the DVAT Act are applicable. Undeniably, the OHA was required to pass an order within the period as prescribed under Section 74 of the DVAT Act. However, the failure on the part of the OHA to pass an order within the stipulated period does not automatically result in the objections being treated as allowed unless two conditions are satisfied. First, that a written notice requiring the OHA to make a decision within a period of fifteen days has been served in accordance with Section 74(8) of the DVAT Act, and second, the OHA has failed to render the decision within the said period.

19. In this context, it is relevant to refer to the decision of the Commissioner of Sales Tax v. BEHL Construction (Supra). In that case, this Court has observed as under:

"14. The time limits of three (3) months, five (5) months, six (6) months or eight (8) 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 clearly 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 35(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

day notice under section 75(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.

15. 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 only get triggered 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. Consequently, both the questions of law are decided in favour of the revenue/appellant and against the respondents. While this will not alter the outcome in Behl Construction, as indicated above, it sets right the position in law which the Tribunal had erroneously taken and which was being followed in other cases before the Tribunal.”

20. In the present case, it is not disputed that the petitioner has not served any notice under Section 74(8) of the DVAT Act, therefore, the provisions of Section 74(9) of the DVAT Act have not come into play. As held in Commissioner of Sales Tax v. BEHL Construction (supra), it is mandatory that a notice under Section 74(8) of the DVAT Act is issued for triggering the deeming provisions of Section 74(9) of the DVAT Act.

21. Accordingly, in the given facts, the petitioner’s prayer for refund of the amount of ₹14,12,185/- along with interest cannot be acceded to at this stage. However, we consider it apposite to direct the concerned OHA to pass an appropriate order, in compliance with the order dated 17.09.2021 passed by the Tribunal, as expeditiously as possible.

22. We also clarify that the petitioner is not precluded from issuing a notice as required under Section 74(8) of the DVAT Act.

23. The petition is disposed of in the aforesaid terms. The pending application is also disposed of.