

(2019) 07 DEL CK 0300

In the Delhi High Court

Case No : Civil Writ Petition No. 13272 Of 2018, Civil Miscellaneous Application No. 51615 Of 2018

M/S Mukesh Agencies

APPELLANT

Vs

Commissioner, Trade & Taxes & Ors

RESPONDENT

Date of Decision : 25-07-2019

Acts Referred:

Delhi Value Added Tax Rules, 2005 — Rule 56
Central Sales Tax Act, 1956 — Section 9
Delhi Value Added Tax Act, 2004 — Section 38, 38(3), 38(3)(a), 42, 42(1), 74(7), 74(7)(a), 74(7)(b), 74(8), 74(9)

Citation : (2019) 262 DLT 516 : (2019) 7 AD(Delhi) 176

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

Bench : Division Bench

Advocate : Varun Nischal, Arif Ahmed Khan, Gauri Grover, Satyakam, P.W. Tapri, Akshay Allagh

Final Decision : Allowed

Judgement

Dr. S. Muralidhar, J

1. The Petitioner is aggrieved by the failure of the Respondents and in particular the Objection Hearing Authority (OHA) to dispose of the

Petitioner's objections filed against the assessment order for the second quarter of 2009-10.

2. The facts in brief are that the Petitioner is a proprietorship registered under the Delhi Value Added Tax Act, 2004 (DVAT Act) as well as under

the Central Sales Tax Act, 1956 (CST Act). For the second quarter of 2009-10, the Value Added Tax Officer (VATO) framed notices of default

assessment of tax, interest and penalty under Section 9 of CST Act on 6/7th January, 2011 creating demand of tax and interest as well as penalty.

3. On 3rd March, 2011 the Petitioner filed objections against the above notices of default assessment in Form DVAT-38 along with acknowledgment

dated 3rd March 2011. Copies of the form DVAT-38 along with the acknowledgement received by the Petitioner have been enclosed as Annexure P-4 (collectively) to the petition.

4. According to the Petitioners since nothing was heard in response to the above objections, the Petitioner submitted a letter/application on 25th

September, 2018 before the concerned OHA and requested for a personal hearing. The Petitioner states that it also filed written submissions. It is

stated that since OHA refused to accept the said letter/application sent to the OHA through speed post on 26th September, 2018.

5. In accordance with Provision 74 (8) of the DVAT Act read with Rule 56 of the DVAT Rules, the Petitioner served a notice in Form DVAT-41 on

the concerned OHA on 15th October, 2018 which, according to the Petitioner, the OHA refused to accept. The Petitioner states that three separate

notices were served in person on the OHA and he also sent a letter through speed post on 15th October, 2018.

6. The contention of the Petitioner is that since the period of 15 days after service of the above DVAT-41 on the OHA expired on 30th October, 2018

and no decision of the OHA was communicated to the Petitioner, the objections should be deemed to be allowed under Section 74 (9) of the DVAT

Act.

7. The Petitioner mentions in the petition that in a companion writ petition for the pending refunds i.e. W.P.(C) 9809/2019, the Petitioner filed an

application seeking to amend the said writ petition to incorporate developments pertaining to the refund claimed by the Petitioner for the said period i.e.

second quarter of 2009-10. This Court by an order dated 20th November, 2018 granted liberty to the Petitioner to file a fresh petition and that is how

the present petition has been filed.

8. In response to the notice issued in the present petition, a counter affidavit has been filed by the Joint Commissioner, Department of Trade and

Taxes (DT&T), GNCTD in which, inter alia, in para 1 of the para-wise reply it is acknowledged that the Petitioner did file objections under Section

74(7) of the DVAT Act before the OHA against the notices of the default assessment of tax and interest on 3rd March, 2011. It is also

acknowledged that the Petitioner by a letter dated 15th October, 2018 issued notice under Section 74(8) read with Rule 56 of the DVAT Rule to the OHA seeking consideration of the objections.

9. According to the Respondents, the OHA by a letter dated 18th October, 2018 replied to the said notice and dispatched it by speed post to the

Petitioner. However, it was returned to the OHA on 25th October, 2018 with a remark that the addressee by that particular name does not exist on

that particular address. It is on the above basis that it is sought to be contended by Mr. Satyakam, learned counsel for the Respondents that the

consequences spelt out in Section 74(8) read with Section 74 (9) of the DVAT Act would not result in such circumstances since the Respondents

were not inactive after receipt of the notice from the Petitioner. They in fact sent a reply to it and it is the Petitioner who did not get back to them.

10. The mandatory nature of Section 74(8) of the DVAT Act has been emphasized by this Court in Commissioner of Sales Tax vs. M/s Behl

Construction (2009) 21 VST 261 (Del) where it was held:

“8. In sub-sections (8) and (9) of section 74, the legislature has provided for the situation where the commissioner does not dispose of the

objections during the applicable period. This, in itself, is indicative of the fact that the legislature was mindful of such a situation and that the mere

passage of the applicable period without the commissioner disposing the objections one way or the other did not mean that the objections could be

deemed to have been accepted or allowed. For this to happen, something more is required and that is exactly what is stipulated in sub-sections (8) and

(9). In sub-section (8) it is provided that where the Commissioner has not notified the objector of his decision within the time specified under sub-

section (7) (ie., the applicable period), the objector may serve a written notice requiring him to make a decision within fifteen days. And, by virtue of

subsection (9) if the decision is not made by the end of the period of fifteen days after being given the notice referred to in sub-section (8), then, at the

end of that period, the Commissioner shall be deemed to have allowed the objection. So, the deeming fiction of sub-section (9) gets triggered only if a

notice as stipulated in sub-section (8) is given and the period of fifteen days specified therein expires without any decision from the commissioner. Not

otherwise. This is the clear legislative intendment which we can gather upon a

plain reading of the provisions of sub-sections (7), (8) and (9) of section 74 of the said Act.

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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 d1e 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??

11. Consequently, it is not open to the Respondents to now contend that merely because they have sent a reply to the DVAT-41 notice of the Petitioner they may not be asked to proceed to pass the order within 15 days of the date of receipt of DVAT-41. With the time limit being sacrosanct, the failure to pass an order on the objection within 15 days of the receipt of the notice in DVAT-41 would result in the consequences spelt out in Section 74(9) of the DVAT Act getting attracted. In other words, in the present case there can be no manner of doubt on account of failure of the OHA to pass an order within 15 days of the receipt of the notice from the Petitioner in DVAT-41. The objections filed by the Petitioner way back on 3rd March, 2011 should be deemed to have been allowed.

12. The demand created by the VATO for the second quarter of 2009-10 stands quashed by virtue of the present order. The Respondent will now proceed to process the refund claims of the Petitioner for the said period including the later periods covered by Writ Petition (Civil) No.9809/2018. The order granting refund together with the interest due on the refund amount shall be passed within four weeks and refund amount together with interest found payable shall be credited to the Petitionerâ??s account not later than 15th September, 2019. The failure to do so will entail the Respondents having to pay compensation of Rs. 50,000/- to the Petitioner. If the Petitioner is aggrieved by the order; it will be open to the Petitioner to seek appropriate remedies in accordance with law.

13. The Court is coming across a large number of petitions which complain of the Respondent not issuing interest on refund amounts, thus compelling the Petitioners to come to this Court for that relief. This conduct of the Respondent is inexplicable in view of the clear legal position explained by this Court in IJM Corporation Berhad v. CT&T (2018) 48 GSTR 102 (Del) as under:

â??15. When we harmoniously read sections 38 and 42 of the Act, which relate to processing: of claim for refund and payment of interest, it is crystal dear that the interest is to be paid from the date when the refund was due to be paid to the assessee or date when the overpaid amount was paid, whichever is later. The date when the refund was due would be with reference to

the date mentioned in section 38, i.e., clause (a) to sub-section (3).

This would mean that interest would be payable after the period specified in clause (a) to sub-section (3) to section 38 of the Act, i.e., the date on

which the refund becomes payable. Two sections, namely, sections 38(3) and 42(1) do not refer to the date of filing of return. This obviously as per

the Act is not starting point for payment of interest.â??

14. This Court, therefore, expects the Respondent to be mindful of the above legal position and pass appropriate orders.

15. The writ petition is allowed and the application disposed of in the above terms. Copy of this order be given dasti under the signature of the Court

Master.