

(2019) 08 DEL CK 0182

In the Delhi High Court

Case No : Civil Writ Petition No. 13004 Of 2018

M/S. S. Gurcharan Singh & Sons

APPELLANT

Vs

Commissioner Trade & Taxes & Ors

RESPONDENT

Date of Decision : 22-08-2019

Acts Referred:

Delhi Value Added Tax Rules, 2005 — Rule 56, 65
Delhi Value Added Tax Act, 2004 — Section 9(2)(g), 32, 33, 35(2), 38, 38(2), 42, 42(1), 59, 68, 74, 74(7), 74(8), 74(9)

Citation : (2019) 8 AD(Delhi) 168

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

Bench : Division Bench

Advocate : Varun Nischal, Arif Ahmed Khan, Ramesh Singh, Satyakam, V.S. Malik

Final Decision : Disposed Off

Judgement

Dr. S. Muralidhar, J

1. The Petitioner has approached this Court for a declaration that the objections filed by the Petitioner before the Objection Hearing Authority (OHA) against the assessments for the period 2009-10 (annual) should be deemed to be allowed. One consequential prayer is for setting aside the default notices of assessment of tax, interest and penalty all dated 19th May, 2011. The other consequential prayer is for a direction of the Respondents to refund to the Petitioner Rs.1,34,35,473/- (total) for the periods from May to December 2010, January to March 2011, March 2012, July 2012 and November, 2012 together with the interest in terms of Section 42 of the Delhi Value Added Tax Act, 2004 (DVAT Act).

Background facts

2. The background facts are that the Petitioner is a dealer registered under the DVAT Act, functioning under the jurisdiction of the Value Added Tax Officer

(VATO), Ward No.41. The Petitioner filed the prescribed monthly returns for the periods for each of the months from May to December 2010, January to March 2011, March 2012, July 2012 and November, 2012.

3. On 19th May 2011, notices of default assessment of tax, interest and penalty under Sections 32 and 33 of the DVAT Act were issued by the VATO (Audit). According to the Petitioner, the said assessments were issued by the VATO (Audit) without having jurisdiction and authority in DVAT-50 as per Section 68 of the DVAT Act read with Rule 65 of the DVAT Rules.

4. The first of these orders is for the period ending 30th April, 2009. The relevant portion of the said order reads as under:

"During the course of audit the records/books of the firm were test checked and it has been revealed that during this period the dealer has claimed the ITC to the tune of Rs.37,72,963/- on the strength of the Tax Invoices issued by such dealers ,in whose cases, on the scrutiny of the DVAT system in the department, it was found that all of these dealers showed transactions worth crores in the matter of a very short period of time and have paid very little or nil tax to the deptt. The details of these dealers along with their GTO and tax paid are as follows:

S. No.

Name of the firm & TIN

Dt. of Regn. GTO (2009-10)

VAT deposited

Amount of VAT

shown in the tax invoices issued to the instant dealer Remarks

(details of 5 entities not set out here)

Total 37,72,964/-

Hence, the amount of ITC claim of Rs.37,72,964/-is recovered along with interest@ 15%."

5. As pointed out by learned counsel for the Petitioner, although, there is no express reference in the above order to Section 9 (2) (g) of the DVAT Act, by denying the Petitioner the ITC claims on the ground that there was a doubt about the dealers with whom such transactions had been entered into and that they had paid "very little or nil tax to the department," it is obvious that what the VATO (Audit) was doing was to invoke Section 9(2)(g) of the DVAT Act to deny the above ITC claim to the Petitioner.

6. Aggrieved by the above assessments, the Petitioner filed objections under Section 74 of the DVAT Act before the OHA on 22nd July, 2011. The Petitioner

has enclosed with the petition, a copy of the acknowledgment receipt stated to be issued to it on 22nd July 2011 as Annexure P-5.

7. On 23rd May 2011, another notice of default assessment of tax, interest and penalty under the CST Act, 1956 was issued by the VATO for the periods July, 2009 to March, 2010. Against this order also, the Petitioner filed objections before the Special OHA.

8. On 16th October 2012, refunds for the periods May, 2010 to March, 2011 were adjusted by the adjustment orders passed by the VATO. Aggrieved by the assessment as well as the adjustment orders, the Petitioner filed objections before the OHA under Section 74 of the DVAT Act. By an order dated 22nd March, 2013, the OHA upheld the orders of the Assessing Authority.

9. The Petitioner then filed an appeal before the Appellate Tribunal VAT, which by its order dated 1st April, 2015 allowed the appeal and set aside the order of the OHA dated 22nd March, 2013 as well as the adjustment orders dated 16th October, 2012.

10. On 18th June, 29th June, 2015, 11th July, 2016 and 11th January, 2018, the Petitioner was reassessed with Nil demands under the CST Act for the periods 2009-10 (Annual), 2010-11 (Annual), March, 2012 and 2012-13 (Annual) respectively by the Special OHA. The Petitioner then filed W.P.(C) No.8517/2017 in this Court claiming refund of Rs.1,34,35,473/- for the periods May, 2010 to March, 2011, March, 2012, July, 2012 and November, 2012. However, on account of the pendency of the objections before the OHA for the period 2009-10, the above writ petition was withdrawn.

11. The Petitioner states that on 18th December 2017, the Petitioner personally served notices informing DVAT-41 (24 in number) in terms of Sections 74 (7) and 74 (8) of the DVAT Act read with Rule 56 of the DVAT Rules. On 2nd January 2018, that the period of 15 days from the date of service of notice in Form DVAT-41 expired. According to the Petitioner, since no decision was communicated by the OHA on or before 2nd January, 2018, the OHA became functus officio and the objections were deemed to have been allowed in favour of the Petitioner under Section 74 (9) of the DVAT Act.

12. When nothing was heard from the Respondent, the Petitioner addressed a letter dated 18th April, 2018 requesting the VATO, Ward-41 to issue refunds. The Petitioner also informed the VATO about the objections deemed to be allowed under Section 74 (9) of the DVAT Act.

13. On 9th May 2018, the Assessing Authority wrote a letter to the Petitioner requiring it to submit self-attested copies of the objections in Form DVAT-38 for the purposes of issuing refunds. In compliance with this request, the Petitioner on 14th May 2018, submitted self-attested copies of the objections in Form DVAT-38 along with bank details and a copy of a cancelled cheque.

14. On 16th May 2018, the Petitioner received a letter from the Reader to the

Joint Commissioner informing that they had not received the objections. On 14th June 2018, the Petitioner again personally served notices in DVAT-41 (24 in number) on the Commissioner (VAT) under Section 74 (8) of the DVAT Act read with Rule 56 of the DVAT Rules with a request to issue refunds for the abovementioned periods.

15. For a second time, the 15 days' period in terms of Section 74 (8) of the DVAT Act ended on 29th June 2018, and yet, no decision was communicated to the Petitioner by the OHA. It is accordingly contended that the OHA became functus officio and the Petitioner's objections were deemed to have been allowed for the second time in favour of the Petitioner under Section 74 (9) of the DVAT Act.

16. On 30th August 2018, the Petitioner sent to the Commissioner (VAT) a reminder letter. A similar letter was sent to the VATO, Ward-41. However, nothing was heard from the Respondent.

17. The Petitioner points out that in terms of the screenshot of DVAT Portal of the Petitioner as on 18th November, 2018 at 5.10 pm, no notice under Section 59 of the DVAT Act, was pending against the Petitioner for the periods for which the refunds had been claimed. It is in those circumstances that the present writ petition has been filed.

The present petition

18. When this petition was first listed for hearing, the question that arose was whether the objections filed by the Petitioner before the OHA were still pending. Mr Satyakam, learned Additional Standing Counsel for the Respondent informed the Court at the hearing on 3rd December, 2018 that "till now, the VAT Department has been unable to ascertain as to which official is the appropriate or the concerned OHA". Recording the above statement, the Court adjourned the matter for 21st January 2019.

19. On 21st January, 2019, the following order was passed:

"Learned counsel for the petitioners points out that vide order of the OHA dated 16th January, 2019, its representatives were asked to appear before the OHA in person or through an authorized representative on 18th January, 2019.

Till the next date of hearing, no adverse orders shall be made by the OHA.

20. At the hearing on 9th August, 2019, the Petitioner produced before the Court copy of a notice dated 15th April, 2013 issued to the Petitioner by the OHA informing him that the hearing had been fixed on 13th May, 2013. This was in response to a query posed by Mr Satyakam, learned Additional Standing Counsel for the Respondents that the documents produced as Annexure-5, viz., the acknowledgment issued to the Petitioner when it filed the notice under DVAT-41 was perhaps not a genuine document. On that date, Mr Satyakam sought time for instructions on the aforementioned document.

21. After the said hearing, the Additional Commissioner, Zone-3, Department of

Trade and Taxes filed a counter affidavit dated 21st August, 2019 in which inter alia, it was acknowledged that the Petitioner has claimed refunds for the aforementioned periods in the sum of Rs.1,09,51,562/-. It was further stated that there are several demands of tax, interest and penalty that are pending for the pre-existing period i.e. 2009-10 before the OHA for disposal of objections "claimed to have been filed by the dealer on 22.07.2011". It was stated that the notice dated 15th April, 2013 issued to the Petitioner was for the objections filed by the Petitioner for 2009-10 in DVAT-38 in respect of a demand created for Rs.87,93,473/- by an assessment order dated 16th October, 2012. It was stated that the said objections were decided by the Special OHA by an order dated 18th June, 2015 by reviewing the previous assessment order and creating a Nil demand.

22. Thereafter in paragraphs 10 and 11 of this affidavit it was stated as under:

"10. That in order to confirm authenticity of this receipt in support of filing of 12 Objections through DVAT-38, the letter dated 22/01/2019 was sent to the Assistant Commissioner System Branch stating that M/s Gurucharan Singh & Sons has claimed vide receipt No. 09100000984694 dated 27/07/2011 in support of 12 Objections (DVAT-38) demand of tax and interest, 12 objections (DVAT-38) of penalty (Local) and 9 Objections (DVAT-38) of penalty (CST) were filed online before OHA (Spl. Commissioner Zone-IV) on 27/07/2011. Thereafter, file was sent to system Branch for confirmation of the same on 01/02/2019. The system branch replied as under:

"It seems that receipt has been generated from the old system since the date of receipt pertains to 2011. Unable to find any data from the system regarding receipt generated. if any information is available about the old data system regarding receipt generated data, please provide the same for checking and verifying the receipt".

11. That again letter dated 09.08.2019 was sent to system branch for authentication of the receipt No.- 09100000984694 dated 27/07/2011. The system branch replied as under:

"Concerned ward officer contacted the undersigned and discuss the concerned court matter file sent through e-office. As requested, thee-office file has been pulled up for rechecking of the said receipt No.-09100000984694 dated 22.07.2011. An effort was made again however, as per analysis, this receipt pertains tom year 2011. Any reference regarding the said receipt No.-09100000984694 is not available in the data base available. Hence the receipt cannot be authenticated.

Thus the system branch not authenticated the receipt No. 09100000984694 and the matter requires further investigation."

23. In paragraph 12, it was stated as under:

"12. That further petitioner dealer claimed to have filed objections in DVAT-4 1

before OHA on 18/12/2017 which was also not seems to have been received by any OHA as the reader to Joint Commissioner vide its letter dated 16/05/2018 stated as under:

"As per record available it is hereby stated that these objections are not received in this Branch neither received from any other OHA".

24. It is then stated that the Commissioner (VAT) deputed the OHA on 16th January, 2019 to decide all pending objections, but this Court had by its order 21st January, 2019, directed the OHA not to pass any adverse orders.

In paragraph 15, it is stated as under:

"15. That the Assistant Commissioner, Ward 41 also wrote a letter to OHA, Z-III for records of the dealer and in reply it is submitted by the Reader to Special Commissioner III that no record has been found as well as the transferred files have been checked in the system which provide transferred cases list also. The above said is not traceable. Annexure P5."

25. It was accordingly prayed in the affidavit that the refund claimed by the Petitioner should be disallowed, as it had not filed any objections on 22nd July, 2011 through DVAT-38.

26. Mr Ramesh Singh, learned Senior Standing Counsel today appeared on behalf of the Respondents and suggested that in view of the fact that the Respondents were unable to trace the Petitioner's objections, the Petitioner should be asked to provide the Respondents with one more self-attested copy of the said objections and that this would be decided by the OHA in a time-bound manner.

27. It must be noticed here that the exercise of the Respondents seeking one more set of objections in Form DVAT-38 from the Petitioner already stood completed earlier. It should be recalled here that the on 18th December 2017, the Petitioner personally served on the OHA notices in DVAT-41 (24 in number) in terms of Sections 74 (7) and 74 (8) of the DVAT Act read with Rule 56 of the DVAT Rules. On 2nd January 2018, the period of 15 days from the date of service of notice in Form DVAT-41 expired. The OHA failed to communicate a decision on or before 2nd January, 2018. Thus, the OHA became functus officio and the objections were deemed to have been allowed in favour of the Petitioner under Section 74 (9) of the DVAT Act.

28. A second opportunity was given to the Respondents by themselves when on 9th May 2018, the VATO, Ward-31 wrote to the Petitioner thus:

"To

Sir

Sh. H. S. Chadha, (proprietor of)

M/s Gurucharan Singh & Sons

190, III rd, Floor,

Jor Bagh, New Delhi-110003.

Sub: Issuing of refund for the Period 2010-11, March -2011-12, July 2012 to Nov 2012.

With reference to your letter dt 18/04/2018 on the subject cited above. In this regard, it is to inform you that on tile going through the dealer's profile on the department web portal, it has been found that no details of objections (form DVAT-38), filled before OHA against several demands of tax interest and penalty for the period 2009-2010, were shown on the dealer profile. However you have been claimed in the said letter that dealer had filed on line objection (form DVAT-38) 12 cases? of tax+ interest twelve case of penalty {Local) and nine cases of tax+ Interest, nine cases of penalty (CST) before OHA {Spl. Comm. Zone-IV) on 22-07-2011 vide receipt no 09100000984694.

Keeping in view of above it is therefore, requested to submit the self attested copies of objections (From DV["T-33) may please to submitted to this office immediately so that necessary action should be initiated in respect of issued of said refund."

29. In response thereto, the Petitioner did supply the self-attested copies of Form DVAT-38 by a letter dated 14th May, 2018. The date stamp of 14th May, 2018 of the VATO, Ward-41 on the covering letter written by the Petitioner is annexed as Annexure-P13 to the petition. These documents have not been denied by the Respondents, even in the affidavit dated 21st August, 2019.

30. The mandatory nature of Section 74(8) of the DVAT Act has been emphasized by this Court in Commissioner of Sales Tax v. 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) (i.e., 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."

.....

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."

31. The above position was reiterated by this Court recently in its judgment dated 25th July, 2019 in W.P.(C) No.13272/2018 (M/s Mukesh Agencies v. Commissioner of Trade & Taxes).

32. The whole object behind Section 74 (8) read with Section 74 (9) would stand defeated by requiring a dealer to repeatedly file attested copies of the DVAT-38 long after the deadline within which such objections are required to be decided, have been crossed. The Respondents have been unable to deny by producing any document the fact that the DVAT-38 was initially filed on 22nd July, 2011 i.e. more than 8 years ago and that the DVAT-41 was served on 18th December, 2017. They have also not been able to deny that the self-attested copies of the objections in Form DVAT-38 were submitted on 14th May, 2018. On 14th June 2018, the Petitioner again served notices under DVAT-41. Despite all of the above, the Respondents have chosen not to act on the repeated requests of the Petitioner.

33. Consequently, it is not possible for this Court to accept the plea of Mr Ramesh Singh appearing on behalf of the Respondents that the Petitioner should be asked once again to submit self-attested copies of the objections in Form DVAT-38 and that further time should be given to the OHA to decide those objections.

34. The resultant position is that the three months period specified under Section 74 (8) of the DVAT Act not having been complied with, and the Commission not having notified the Petitioner of its decision within 15 days of service upon him of the notice in Form DVAT-41 in terms of Section 74 (8) of the DVAT Act, the consequence spelt out in Section 74 (9) ensues, viz., that the objections filed by the Petitioner before the OHA "shall be deemed to have been allowed".

35. The Court would also like to add that the reason for denial of the refunds, viz., the demand created by the default assessment orders passed under Sections 32 and 33 of the DVAT Act on 19th May, 2011 is erroneous in law. In that default assessment order the VATO Ward 41 invoked Section 9 (2) (g) of the DVAT Act to deny the Petitioner ITC for the period ending on 30th April 2009 whereas the said provision was inserted with effect from 1st April, 2010. Therefore, it could not have been invoked for the ITC claimed for the period ending on 30th April 2009; or for that matter, for any period, prior to 1st April, 2010.

36 The legal position in this regard has been explained by this Court in its judgment dated 19th February, 2016 in W.P.(C) No.134/2014 (Lotus Impex v. The Commissioner, Department of Trade & Taxes, New Delhi) where it was observed thus:

"21. Section 9 (2) (g) of the DVAT Act inserted with effect from 1st April 2010 provides that unless the tax paid by the purchasing dealers has been actually deposited by the selling dealer with the Government or has been lawfully adjusted against output tax liability and reflected in the return filed for the respective tax period, no tax credit shall be allowed to the dealers or class of dealers. Since the provision is prospective it does not apply to the purchases made by the Petitioner in the months of August and October, 2008."

37. Therefore, in any event, even on merits the Petitioner would in all probability have succeeded before the OHA. For the aforementioned reasons, the objections of the Petitioner are declared as deemed to have been allowed under Section 74 (8) read with Section 74 (9) of the DVAT Act.

Consequently, while setting aside the default notices of tax, interest and penalty, all dated 19th May 2011, issued by the VATO, Ward-41, this Court directs the Respondents to issue refund to the Petitioner in the sum of Rs.1,34,35,473/- for the aforementioned periods i.e. May to December 2010, January to March 2011, March 2012, July 2012 and November 2012, within a period of four weeks from today by issuing appropriate orders in that regard.

38. It is made clear that the Respondents will also, along with the above sum of refund, pay to the Petitioner interest on the refund amount calculated in terms of Section 42 of the DVAT Act and in light of the law explained by this Court in IJM Corporation Berhad v. CT&T (2018) 48 GSTR 102 (Del) as under:

"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 clear 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."

39. The refund amount together with interest to be credited to the account of the Petitioner positively on or before 30th September, 2019 failing which the Respondents will additionally pay the Petitioner compensation of Rs.50,000/-.

40. The writ petition is disposed of in above terms. No costs.