

S. MURALIDHAR & NAJMI WAZIRI JJ.

Petitioner Through: Mr. Rajesh Jain and Mr. Virag Tiwari, Advocates.

Respondent Through: Mr. Gautam Narayan, Addl. Standing Counsel with Mr. R.P. Iyer, Advocate.

O R D E R

Dr. S. Muralidhar, J.:

1. Issue notice to the Respondent in WP (C) Nos. 6746/2016 & 6747/2016. Mr. Gautam Narayan, learned Additional Standing Counsel accepts notice on behalf of the Respondent.

2. This is yet another instance of the Department of Trade & Taxes ('DT&T'), Government of NCT of Delhi acting in blatant violation of the statutory provisions of the Delhi Value Added Tax Act, 2004 ('DVAT Act') and the decisions of the Courts.

3. The background facts are that the Petitioner is engaged in the sale and purchase of mobile phones of brands like Samsung, Apple, HTC etc. The Petitioner, a registered dealer under the DVAT Act, states that it has been paying taxes at the time of purchase of the phones and claims the tax paid as input tax credit in terms of Section 9(1) of the DVAT Act.

4. It is stated that in the first three quarters of 2013-14 in the return filed by the Petitioner, the excess tax credit, which stood accrued was carried forward to the next tax period in terms of Section 11 (2) (b) of the DVAT Act. After the amendment to Section 11(2) of the DVAT Act with effect from 12th September 2013, the credit earned for the fourth quarter of 2013-14 could not be carried forward to the next tax period.

Therefore, in the return filed for the fourth quarter of 2013-14 on 25th April 2014 a refund of ₹ 68,83,331/- was claimed, which on a revised return filed by the Petitioner got reduced to ₹ 53,81,316/-.

5. The Petitioner states that it was pursuing its refund claim. On 27th May 2016 a survey operation was undertaken by the officials of the DT&T in the premises of the Petitioner which, according to the Petitioner, was in contravention of Sections 59 and 60 of the DVAT Act. Meanwhile, on account of the failure of the DT&T to issue the refund, due to the Petitioner for the fourth quarter of 2013-14, WP(C) No. 5584/2016 was filed in this Court.

6. WP(C) No. 5584/2016 was heard on 3rd June, 2016. While directing issuance of notice, the Court recorded the assurance of Mr. Gautam Narayan, learned Additional Standing Counsel for the Respondent that "the Petitioner's application will be examined and necessary orders would be passed and the admissible amount of refund together with interest will be released before the next date of hearing". The case was then directed to be listed on 19th July, 2016. The Court did not assemble on that date and the petition was adjourned for today.

7. The above order became necessary as there was an obvious failure by the Respondent to grant refund due to the Petitioner for the fourth quarter of 2013-14 together with interest due thereon in terms of Section 38 of the DVAT Act. The Court has, in numerous judgments delivered on the issue, emphasized that while it is open to the DT&T to take appropriate action to recover what it perceives to be turnover that may have escaped assessment, such action cannot result in postponement of the refund beyond the mandatory time frame set out under Section 38 of the DVAT Act. The legal position has been summarized by this Court in its recent order dated **28th July 2016 in WP (C) No. 6013/2016 (Prime Papers and Packers vs. Commissioner of VAT) where the Court has discussed the earlier decisions in Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax (2010) 31 VST 475 (Del), Lotus Impex v. Commissioner DT&T (2016) 89 VST 450 (Del), Dish TV India Ltd. v. GNCTD (2016) 92 VST 83 (Del) and Nucleus Marketing & Communication v. Commissioner of DVAT [decision dated 12th July 2016 in W.P.(C) 7511/2015]**. The principles summarized in the said decision reads as under:

"9. ...(1) the mandatory nature of the time limits under Section 38 of the Act for the processing and issuing of refunds have to be scrupulously adhered to by the Department;

(2) where the Department seeks to invoke Section 59 of the DVAT Act to seek more information from the dealer after picking up the return in which the refund has been claimed for scrutiny, those steps are to be taken within the time frame envisaged under Section 38 of the DVAT Act;

(3) even where the Department seeks to invoke Section 39 of the Act, that action again has to be taken within the time frame in Section 38(3) of the DVAT act."

8. Further in para 18 of the decision in **Prime Papers and Packers vs. Commissioner of VAT (supra)**, this Court noted as under:

"18. The Court is constrained to observe that there have been a large number of petitions filed in this Court by dealers awaiting the processing of their refund claims. Despite numerous judgments of this Court and circulars issued by the Commissioner VAT, including Circular No. 6 of 2005 and recently the Order dated 21st July 2016, the problem of delayed refunds persists. The frequent transfers of VATOs and the lack of any orientation and training as regards their statutory responsibilities cannot constitute a valid justification for delaying the refunds due to the dealers. The Court would urge the Commissioner VAT to review the issue of grant of refunds on priority basis so that the process is streamlined and his instructions regarding speedy disposal of refunds is strictly followed. He must initiate disciplinary action against those officers of the DT&T who are found disobeying the instructions issued by the Commissioner from time to time in this regard. The Commissioner should undertake a periodic review, at least once in two weeks, as to how many refund applications have been processed and within what time. Responsibility should be fixed on derelict officers and disciplinary proceedings

initiated where there is a clear breach of the statutory duties. The collective failure of such officers is imposing a huge interest burden on the exchequer which is clearly avoidable.”

9. Reverting to the case on hand, it appears that instead of processing the Petitioner’s refund due for the fourth quarter of 2013-14, five notices were issued under Section 59(2) of the DVAT Act by the Assistant Value Added Tax Officer (‘AVATO’), Ward-64 on 8th June, 2016 requiring the Petitioner to produce documents pertaining to the period 1st April 2012 to 31st March 2013, 1st April 2013 to 31st March 2014, 1st April 2014 to 31st March 2015, 1st April 2015 to 31st March 2016, 1st April 2016 to 27th May 2016 and directing the Petitioner to attend the office of the AVATO on 16th June 2016 at 11 am. On 14th June 2016 another set of notices were issued under Section 59(2) of the DVAT Act for the same period as the notices dated 8th June 2016, directing the Petitioner to attend the office of the AVATO on 22nd June, 2016 at 11 am.

10. In the meanwhile, the Petitioner had requested the Enforcement Branch of the DT&T to hand over to it the documents, papers book etc. which were taken from its premises during the survey. Another reminder was sent on 16th June 2016, but no reply was received. On 22nd June, 2016 the Petitioner filed a reply to all the notices issued on 14th June 2016 which had been served on the Petitioner on 21st June, 2016.

11. On 27th June, 2016 the AVATO issued another notice under Section 59(2) of the DVAT Act in connection with refund claimed for the fourth quarter of 2013-14 i.e. 1st January 2014 to 31st March, 2014. On 1st July, 2016 the Petitioner appeared and sought an adjournment. At this hearing, the Petitioner requested the AVATO to show the Petitioner the order issued in form DVAT-50, which authorized the AVATO to initiate the proceedings under Section 59(2) of the DVAT Act.

12. It may be noted at this stage that under Section 68(2) of the DVAT Act where the Commissioner delegates his powers under Chapter X “the delegate shall carry and produce on demand evidence in the prescribed form of the delegation of these powers when exercising the powers”. Therefore, there had to be a DVAT-50 in the name of the AVATO, Ward-64 which permitted him to exercise powers under Section 59 of the DVAT Act and to proceed to make any assessment thereafter.

13. The Petitioner states that the Petitioner was not shown DVAT-50 despite request. Mr. Rajesh Jain, learned counsel for the Petitioner, drew the attention of the Court to the order sheet penned by the AVATO on 1st July 2016, where he states “the counsel has requested to provide the DVAT-50 but the same is not available”. This itself should have been a sufficient reason for the AVATO not to have further proceeded in the matter as he should have been aware of the legal requirement spelt out in Section 68 (2) of the DVAT Act. Unfortunately, it appears that the AVATO persisted with the matter.

14. On 2nd July, 2016 the AVATO recorded the following order:

“Sh. Virag Tiwari, Counsel of M/s Teleworld Mobiles Pvt. Ltd. was (sic) appeared on 01.7.20 16 in Assessment case for the year 2012-13 to 2016-17 (till 27.5.2016). He has

requested for adjournment of the case sine a die till documents received from visiting Enforcement Team. It is clarified that all the documents to be considered for assessment are available on records and copies of the same was provided to M/s Teleworld Mobiles Pvt. Ltd. through the counsel. Hence the request of Counsel cannot be accepted and no adjournment can be allowed further. It seems that M/s Teleworld Mobiles Pvt. Ltd. has nothing to say on the discrepancies mentioned on available records. However, if the dealer want to say anything more, last opportunity is allowed to submit the same by 05.7.2016, before keeping the case for orders.

Accordingly notice issued.”

15. What transpired next is not in dispute. The Petitioner did go to the office of the AVATO on 5th July 2016 with two written replies in its possession. The AVATO was on leave on 5th July 2016. Therefore, no hearing could take place on that date. What transpired thereafter is, to say the least, inexplicable. The AVATO decided to take up the matter sitting in chambers on Saturday 9th July 2016, which was an official holiday, without issuing any further notice to the Petitioner. ON that day, he simply reserved the matter for orders. This conduct of the AVATO is not understandable.

16. The AVATO's failure to inform the Petitioner that he was going to take up the matter on 9th July 2016 is simply unacceptable from the point of a statutory authority exercising judicial powers. The AVATO then proceeded on 12th July 2016 to pass the notices of default assessment of tax and interest for each of the four quarters of 2013-14 and March 2013 under Section 32 of the DVAT Act creating demands in excess of the refund due. On the same day, the AVATO also passed a notice of default assessment of penalty under Section 33 of the DVAT Act for the fourth quarter of 2013-14. The default notices of assessment of tax, interest and penalty issued by the AVATO on 12th July 2016 for the four quarters of 2013-14 have been challenged in WP (C) Nos. 6746/2016. The challenge in WP(C) No. 6747/2016 is to the default assessment dated 12th July, 2016 for tax and interest for the month of March, 2013.

17. In W.P. (C) No. 5584/2016 a reply has been filed by Mr. Pravesh Ranjan Jha, Joint Commissioner, confirming that the above demands have been created by the AVATO by passing the aforementioned notices of default assessments of tax, interest and penalty on 12th July, 2016. It is simply asserted that in view of the demands created and the penalties imposed, no refund is due to the Petitioner.

18. The notices of default assessments of tax and interest and penalty bristle with numerous illegalities. First, as already noticed instead of processing refunds within the time granted under Section 38 of the DVAT Act, the AVATO compounded the problem by seeking to re-open the assessments for the earlier years including the period for which the refund was claimed using the order passed by this Court recording the assurance of the learned counsel for the respondent on 3rd June, 2016 in WP(C) 5584/2016 as a trigger. This is totally contrary to the law explained in several judgments which have been referred to hereinabove.

19. Secondly, with the AVATO himself acknowledging that the authority in DVAT-50 was not available, there was no question of him proceeding further in the matter and issuing notices of default assessments of tax, interest and penalty in the manner that he has done.

20. Thirdly, in an obvious violation of the principles of natural justice, with the AVATO by not informing the Petitioner of the adjourned date of hearing when he failed to attend office on 5th July 2016, which was the date fixed. took up the matters in his chamber on 9th July 2016 which, being a second Saturday, was a holiday and then reserved the matter for orders on 12th July 2016. The notices of default assessment of tax and interest and penalty are undoubtedly in violation of the principles of natural justice and patently illegal.

21. The Court does not consider it necessary to do say anything more to demonstrate the patent illegality attached to the actions of the AVATO, triggered as they were by the order dated 3rd June 2016 passed by this Court. The Court, therefore, has no hesitation in setting aside the notices of default assessment of tax and interest and penalty dated 12th July 2016 issued by the AVATO which are the subject matter of challenge in WP (C) Nos. 6746/2016 and 6747/2016.

22. The matter, however, cannot end there. The Court is concerned about the conduct of the several officials of the DT&T, who seem to be acting not only in contravention of the various provisions of the DVAT Act, but also in wilful disobedience of the law explained by this Court in several of its decisions. Although, circulars and orders may have been issued by the Commissioner VAT from time to time, they appear to have no impact on the behaviour of the officials of the DT&T. On a daily basis, this Court has been faced with several petitions where instances of blatant and wilful disobedience of the statutory provisions by the officials of the DT&T have come to light and time and again the Court has had to intervene to set right the violations.

23. Considering the inexcusable conduct of Mr. O. P. Singh, the AVATO of Ward-64 in the present case, which appears to have the endorsement of Mr. Pravesh Ranjan Jha, the Joint Commissioner, who filed the reply affidavit in WP (C) No. 5584/2016, clearly supporting the actions of the AVATO, the Court considers it necessary to impose exemplary costs on the DT&T for unnecessarily increasing litigation and forcing the Petitioner to come back to the Court for relief. WP (C) Nos. 6746/2016 and 6747/2016 are accordingly allowed and the applications filed therein are disposed of with costs of ₹ 20,000 in each petition which will be paid by the DT&T to the Petitioner within one week from today.

24. Further, a direction is issued to the Commissioner (VAT) to issue notices on the administrative side of the DT&T to both Mr. O. P. Singh the concerned AVATO as well as Mr. Pravesh Ranjan Jha, the Joint Commissioner who endorsed the illegal actions of Mr. O. P. Singh to explain why the costs imposed should not be recovered from their respective salaries and an adverse entry not be made in their Annual Confidential Reports. The Commissioner (VAT) shall, after hearing the said officers and considering their replies, pass appropriate orders in accordance with law.

25. As far as W. P. (C) No. 5584 of 2016 is concerned, it is directed that the refund due to the Petitioner for the fourth quarter of 2013-14 together with interest due thereon up to the date of issue of refund shall be credited to the account of the Petitioner through RTGS not later than 8th August, 2016. The Commissioner (VAT) will personally ensure the compliance of the above direction and himself file an affidavit of compliance in the Registry within two days thereafter i.e. on or before 10th August 2016. If there is noncompliance with this direction it will be open to the Petitioner to apply to this Court for directions. W.P. (C) 5584 of 2016 is allowed in the above terms.

26. A certified copy of this order be delivered forthwith to the Commissioner (VAT) by the Registry through a Special Messenger for compliance with the directions issued in paras 23 to 25 of this order.

27. A copy of this order be given dasti under the signature of Court Master.

