

\$~
*
45
+

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P. (C) 2528/2013

COMMUNICATION WORLD Petitioner
Through: Mr. Ruchir Bhatia, Advocate.

versus

COMMISSIONER, TRADE AND TAXES AND
ANR Respondents
Through: Mr. Sanjoy Ghose, Additional
Standing counsel.

And

46
+

W.P. (C) 3119/2013 & CM No. 5916/2013

COMMUNICATION WORLD Petitioner
Through: Mr. Ruchir Bhatia, Advocate.

versus

COMMISSIONER, TRADE AND TAXES Respondent
Through: Mr. Sanjoy Ghose, Additional Standing
counsel.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE NAJMI WAZIRI

ORDER
27.07.2016

%

Dr. S. Muralidhar, J.:

1. The Petitioner, Communication World, a dealer registered under the Delhi Value Added Tax Act, 2004 ('DVAT Act') has filed these two writ petitions against the Commissioner, Trade & Taxes. In W.P. (C) No. 2528 of 2013, the Petitioner *inter alia* has prayed for a direction to the Respondent to refund a sum of Rs. 81,81,066 due to the Petitioner along

with interest for the period May 2007 and July 2007. In W. P. (C) No. 3119 of 2013, the prayer is to quash the notice dated 4th April 2013 issued to the Petitioner by the Respondent under Section 74A (2) of the DVAT Act proposing to revise an order dated 9th October 2009 passed by the Objection Hearing Authority ('OHA')/Additional Commissioner setting aside the notices of default assessment of tax, interest and penalty under Sections 32 and 33 of the DVAT Act.

2. The Petitioner states that it is engaged in the business of telephony and undertakes purchase and sale of CDMA handsets as a distributor of M/s. Drive India. It also provides CDMA connection as a service provider of Tata Teleservices Limited ('TTL'). The Petitioner filed monthly returns for May 2007 and July 2007 in which it claimed refund of excess tax credit. The refund claim for May 2007 was Rs. 70,87,097 and for July 2007 it was Rs. 11,02,969. It is stated that in terms of Section 38 of the DVAT Act, the refund was required to be issued within one month from the date of filing of the monthly returns. Accordingly, the last date of refund for the aforementioned periods was 27th July 2007 and 28th September 2007 respectively.

3. The Petitioner states that no notice of audit under Section 58 of the DVAT Act was issued nor any additional information under Section 59 sought as envisaged under Section 38 (4) of the DVAT Act. Further, no security as a condition for issuance of refund was demanded within 15 days from the date of filing of monthly returns as contemplated under Section 38 (5) of the DVAT Act.

4. On 27th July 2008 the Petitioner filed a reminder for grant of refund. It is pointed out that in terms of Circular No. 6 dated 15th June 2005 issued by

the Commissioner, Trade & Taxes, the VATO of the concerned Ward is supposed to scrutinize the correctness of the amount of the cash refund claimed and pass the refund order in DVAT -22 within a period of 15 days from the date of receipt of the return in the Front Office without fail unless the return of the dealer has been picked up for seeking additional information or audit. In that event, an intimation would be given by the Audit Wing of the Department/designated VAT authority/VATO concerned within 10 days from the receipt of the return in the Front Office. Meanwhile, the Petitioner also became entitled to interest in terms of Section 42 (1) of the DVAT Act.

5. The Petitioner states that a notice under Section 59 (2) of the DVAT Act from VATO, Ward-96 was received and thereafter notices of default assessments of tax, interest and penalty under Sections 32 and 33 of the DVAT Act respectively were issued for the months of May 2007, July 2007 and March 2008. These were challenged by filing objections before the OHA under Section 74 of the DVAT Act. The said objections were allowed by the OHA by an order 9th October 2009.

6. *Inter alia* it was argued before the OHA by the Respondent that the Petitioner was being granted subsidy by TTL in order to attract the customers from whom they could generate revenue from call charges etc. The subsidy was given soon after the purchase to enable to sellers to sell the handsets at prices well below the market price. The subsidy therefore ought to be included in the sale price. The OHA negatived the above contention by pointing out that the Petitioner was liable to pay tax at the rates specified in Section 4 of the DVAT Act on sales effected by it. The Petitioner was also entitled to claim input tax credit ('ITC') on turnover of purchases as provided in Section 9 of the DVAT Act. The ITC to which a

purchasing dealer was entitled would be equal to the output tax liability of his selling dealer and it could not be different from the output tax liability of the selling dealer on that transaction. M/s. Drive India was the selling dealer from whom the Petitioner had made the purchases. Consequent upon the grant of subsidy by TTL to the Petitioner the output tax liability of the seller had not reduced. The subsidy given by TTL was not towards the sale of handsets but the service charges to be received from the customers. As far as the Respondent was concerned, it was entitled to levy and collect value added tax ('VAT') at the price at which the end customer buys the handsets.

7. The OHA held, by referring to the decision in *Neyveli Lignite Corporation Limited v. Commercial Tax Officer, Cuddalore* [2001] 124 STC 586a (SC); *Rashtriya Chemicals and Fertilisers Limited v. State of U.P.* (1996) 101 STC 487 (All); *Natraj Organics Limited v. Assistant Commissioner (Assessment) Sales Tax, Muzzaffarnagar* (1995) 96 STC 261 (All); *Bongaigaon Refinery and Petrochemicals Limited v. Commissioner of Taxes, Assam* (2003) 131 STC 37 (Gau); *TISCO General Office Recreation Club v. State of Bihar* (2002) 126 STC 547 (SC), and *Andhra Agencies v. State of A.P.* (2008) 14 SCC 540 that subsidy cannot form part of the sale consideration. The OHA concluded that "the default assessments were made to defeat the claim of refund of the Objector." The OHA was also surprised "at the action of the VATO who, in order to inflate the demands, added the amount of refund to the figure of demand instead of reducing it." It is also pointed out that the concept of fair market value under Section 2 (l) of the DVAT Act also stood satisfied as the value at which goods were sold was that at which they would be sold between unrelated parties in the open market in Delhi.

8. Till more than three years after the above order, nothing was done by the Respondent to challenge to the above order of the OHA. This has led to the Petitioner filing W.P. (C) No. 2528 of 2013 for a direction to the Respondent to make good the refund due to it for the above periods. Notice was issued in the petition on 22nd April 2013.

9. Meanwhile, notices of default assessments of tax, interest and penalty were passed on 26th December 2008 for the periods 2006-07 and 2007-08 raising a total demand of Rs. 2,25,20,281 towards tax and interest and penalty of Rs. 1,02,09,037. The objections filed by the Petitioner against the said notices of default assessments of tax, interest and penalty were disposed of by an order dated 16th December 2009 by another OHA, i.e., the Joint Commissioner, Zone-V. This OHA held that the levy of tax was appropriate. He held that the selling of handsets below the purchase price would eventually result in the loss to the dealer and thus in order to compensate, TTL was paying subsidy to the dealer. Although the purchase price of the dealer was reduced, he could still claim the entire ITC on the basis of tax invoices issued prior to the release of the subsidy. As a result the Department lost revenue. Despite there being no value addition, it had to allow ITC on the higher purchase price. Therefore, it was concluded that “the levy of tax is appropriate and the default assessment orders are upheld regarding levy of tax is appropriate”. The OHA further held that merely because a claim made by the dealer was not allowed, the return filed cannot be branded as false, misleading or deceptive. Therefore, the notice of assessment of penalty was set aside.

10. Aggrieved by the above order dated 16th December 2009 of the OHA the Petitioner filed a review application which is stated to be pending.

11. On 4th April 2013 the following notice was issued by the Respondent to the Petitioner under Section 74A (2) of the DVAT Act:

“Whereas it appears that in the order No. 981 dated 9th October 2009 passed under Section 74 of Delhi Value Added Tax, 2004 read with Section 32 and 33 of the said Act by Objection Hearing Authority/Additional Commissioner-II for the assessment period May 2007, July 2007 and March 2008 in your case,

(i) a certain turnover of sales which has not been brought to tax or has been brought to tax at lower rate or has been incorrectly classified, or any claim is incorrectly granted or that the liability to tax is understated, or

(ii) the order is erroneous, in so far as it is prejudicial to the interest of revenue;

And whereas it has been decided to revise the above stated order under Section 74A of the Delhi Value Added Tax, 2004. Therefore, in view of the above, you are hereby directed to appear, before the undersigned at the above mentioned address on 17th April 2013 at 11 am in person or through authorized representative along with books of accounts, copy of contract with Tata Teleservices Limited (TTSL) and all relevant documents, failing which an order in this regard shall be passed on merits as per law.”

12. The Petitioner then filed Writ Petition (Civil) No. 3119 of 2013 challenging the said notice on the ground that it had been arbitrarily issued by the Respondent only to delay the grant of refund to the Petitioner. In the said writ petition, on 14th May 2013 while notice was directed to be issued, the Court also granted a stay of the operation of the said notice. Thereafter, on 23rd July 2013 a direction was issued to the Respondent to deposit the entire amount of refund along with interest payable under the provisions of the DVAT Act within a period of two weeks from that date. The said order was ultimately complied with by the Respondent on 30th March 2016 by

depositing a demand draft in the sum of Rs. 1,24,01,725 (inclusive of interest up to date).

13. This Court has heard the submissions of Mr. Ruchir Bhatia, learned counsel for the Petitioner and Mr. Sanjoy Ghose, learned Additional Standing counsel for the Department.

14. Mr. Bhatia submitted that the order dated 9th October 2009 of the OHA had comprehensively negated the case of the Respondent and there was no ground for the Respondent to seek to revise the said order. Referring to the decision of this Court in ***Challenger Computers Limited v. Commissioner of Trade & Taxes, Delhi (2015) VST 469 (Del)*** he submitted that ITC could be claimed only to the extent of the output tax and the subsequent discount or subsidy offered to the purchasing dealer would not affect the ITC claimed. He submitted that notice issued under Section 74 A (2) of the DVAT Act was bad in law as it was a mere reproduction of the provision without specifying the ground on which the order dated 9th October 2009 of the OHA was sought to be revised. He placed reliance on the decisions in ***Commissioner of Central Excise, Bangalore v. Brindavan Beverages (P) Limited 2007 (213) ELT 487 (SC)***; ***Amrit Foods v. Commissioner of Central Excise 2005 (190) ELT 433 (SC)***; ***Rawani Dal & Flour Mills v. Commissioner of Sales Tax, Orissa (1992) 86 STC 409 (Orissa)*** and ***Om Shri Jigar Association v. Union of India (1994) 209 ITR 608 (Guj)***. He also referred to the decision of this Court in ***Swarn Darshan Impex (P) Limited v. Commissioner, Value Added Tax (2010) 31 VST 475 (Del)*** and the decision dated 19th February 2016 in Writ Petition (Civil) No. 134 of 2014 (***Lotus Impex v. The Commissioner, Department of Trade & Taxes***).

15. Countering the above submissions, Mr. Sanjoy Ghose, learned Additional standing counsel for the Department, submitted that the Court should issue a time-bound direction for disposal of both the review petition filed by the Petitioner as well the revision petition proposed by the Department so that the conflicting views of the OHAs could be reconciled. On merits he urged that the widest possible meaning had to be given to the expression 'sale' in Section 2(1)(zc) of the DVAT Act. Mr. Ghose submitted that the word 'sale' would include anything that would go to enhance the value of the product sold. In this case, according to Mr. Ghose, the subsidy granted by TTL to the Petitioner was to compensate for the reduced price at which the handsets were to be sold and therefore constituted the 'other valuable consideration' which formed part of the sale price. Mr. Ghose referred to a letter issued by another dealer M/s. Shyam Telecom Limited confirming that they were collecting VAT on the subsidy as well.

16. At the outset, the Court notes that the review petition filed by the Petitioner to challenge the order of the OHA dated 16th December 2009 is not under challenge in these petitions. The Court is therefore not called upon to examine that order. Further, the Court is required to examine whether there is any justification in the Respondent seeking to revise the order dated 9th October 2009 of the OHA. Therefore it would be no answer to direct the disposal of the revision petition without first deciding that question.

17. The expression 'sale' in Section 20(1)(zc) of the DVAT Act has been widely defined to mean "any transaction of property in goods by one person to another for cash or for deferred payment or for other valuable consideration (not including a grant or subvention payment made by one

government agency or department, whether of the Central Government or of any State Government, to another) and includes - ...” The words in the brackets points to the fact that a ‘grant or subvention payment’ made by one government department to another is not intended to be included in the sale price. It is not considered part of the ‘other valuable consideration’ for which there could be a transfer of property in goods from one person to another.

18. The short question that arises in the present cases is whether the subsidy granted to the Petitioner by TTL in respect of the handsets sold by it could be termed as 'other valuable consideration' and therefore, could be included in the sale price?

19. In ***Neyveli Lignite Corporation Limited v. Commercial Tax Officer, Cuddalore*** (*supra*) the issue was whether the retention price received by the Appellant, a manufacturer of fertilizers, from the Government of India, could form part of the sale price and be included in the turnover for the purpose of the Tamil Nadu General Sales Tax Act, 1959. The Supreme Court answered the question in the negative. It held that the payment made by the government to a manufacturer "could not be regarded as a discharge of any liability or obligation by the Government towards the purchase of the fertiliser." The two payments received by the manufacturer, viz., the subsidy and the price fixed under the Control Order were independent of each other. The subsidy under the Government Scheme did not form part of the bargain between the manufacturer and the purchaser of the fertilizer. The amount given by the Government under the administrative scheme of furnishing subsidy was not part of the sale price or consideration for the sale of fertilizers by the Appellant (manufacturer) and did not form part of the ‘turnover’ for the purposes of the Tamil Nadu General Sales Tax Act,

1959.”

20. In ***Rashtriya Chemicals and Fertilizers Limited v. State of U.P.*** (*supra*), the Allahabad High Court reiterated that the subsidy given by the Government of India to the manufacturer of fertilizers is not covered within the definition of turnover under Section 2 (i) of the U.P. Sales Tax Act, 1948. In the context of the amount received by an oil refinery from the pool account, being the difference between the ex-refinery price of petroleum products and retention price fixed by the Oil Co-ordination Committee set up by the Ministry of Petroleum, the Gauhati High Court in ***Bongaigaon Refinery and Petrochemicals Limited v. Commissioner of Taxes, Assam*** (*supra*) held it to be in the nature of a subsidy and not part of the sale price for purposes of taxation under the Assam General Sales Tax Act, 1993.

21. In ***Tisco General Office Recreation Club v. State of Bihar*** (*supra*), a dealer ran a canteen for the benefit of officers and employees of the TISCO. It sold the food items in the canteen at prices fixed by the Managing Committee. The prices were below the cost price. To make good the loss, as a staff welfare measure, TISCO gave lumpsum subsidies to the dealer. The subsidies were not relatable to any particular item of food. It was held by the Supreme Court in that case that “the lump sum subsidies made *ex gratia* could not be regarded as valuable consideration in respect of the sale or supply of goods and were not part of the sale price and consequently did not form part of the gross turnover of the Appellant for the purposes of sales tax under the Bihar Finance Act, 1981.”

22. In ***Andhra Agencies v. State of A.P.*** (*supra*), the Supreme Court held that “the basic issue can be better appreciated by way of an illustration.

Hypothetically, taking the sale price to be Rs. 100, the tax to be paid by the selling dealers has to be on 100. He may collect 90, after giving discount. If the sale price of the intermediate seller is Rs. 110 his liability to pay tax shall be on Rs. 10, i.e., Rs. 110-100. The Department's stand is that it should be 20, i.e., 110-90. This stand will not be correct if the first settler has paid tax on 110."

23. In the present case M/s. Drive India was the selling dealer from whom the Petitioner, as the purchasing dealer, has made the purchase of the handset. The grant of subsidy by TTL to the Petitioner did not go to reduce the output tax liability of the seller. The subsidy was for the purpose of generating revenue from call charges etc paid by the consumer. It was not towards the sale of handsets. It, therefore, did not affect the sale price of the handsets. In the light of the law explained in the above decisions, the Court holds that the subsidy offered by TTL to the Petitioner cannot be included in the sale price for the purposes of VAT.

24. The order dated 9th October 2009 of the OHA sustaining the objections filed by the Petitioner against the notices of default assessments of tax and penalty for May 2007, July 2007 and August 2008 is upheld as laying down the correct legal position.

25. Learned counsel for the Petitioner is right in his contention that the notice issued to the Petitioner under Section 74A (1) of the DVAT Act is unsustainable in law. Section 74A (1) reads as under:

"Section 74 A-

(1) After any order including an order under this section or any decision in objection is passed under this Act, rules or notifications made thereunder, by any officer or person subordinate to him, the Commissioner may, of his own motion or upon information received by him, call for the record of such order and examine

whether -

(a) any turnover of sales has not been brought to tax or has been brought to tax at lower rate, or has been incorrectly classified, or any claim is incorrectly granted or that the liability to tax is understated, or

(b) in any case, the order is erroneous, in so far as it is prejudicial to the interest of revenue, and after examination, the Commissioner may pass an order to the best of his judgment, where necessary."

26. It is obvious that the notice dated 4th April 2013 issued under Section 74A (1) of the DVAT Act reproduces the mere words of the above provision without indicating the specific ground on which the Respondent proposes to revise the order dated 9th October 2009. As explained in ***Commissioner of C. Ex, Bangalore v. Brindavan Beverages (P) Limited*** (*supra*), unless the grounds in the show cause notice (SCN) are specified it is not possible for the Assessee to answer such SCN. In other words, "if the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the notice was not given proper opportunity to meet the allegations indicated in the show cause notice."

27. Likewise in ***Amrit Foods v. Commissioner of Central Excise, U.P.*** (*supra*) the Supreme Court held that the Assessee had to be put on notice as to the exact nature of contravention for which the Assessee was liable under the provisions of Rule 173Q of the Central Excise Rules, 1944. Otherwise the notice would be bad in law. The same legal position has been reiterated in ***Rawani Dal & Flour Mills v. Commissioner of Sales Tax, Orissa*** (*supra*) and ***Om Shri Jigar Association v. Union of India*** (*supra*).

28. For the above reasons, the impugned notice dated 4th April 2013 under

Section 74A(2) of the DVAT Act is held to be bad in law and is accordingly quashed.

29. The writ petitions are allowed and the pending application are disposed of with the following directions:

(i) The order dated 9th October 2009 passed by the OHA setting aside the notices of default assessments of tax, interest and penalty for the periods May 2007, July 2007 and August 2008 is upheld. The Petitioner is entitled to the refund claimed for the said periods along with interest.

(ii) Accordingly the sum of Rs. 1,24,01,725 which has been deposited in the Court will be handed over by the Registry to the authorized representative of the Petitioner together with interest accrued thereon, within one week from today.

(iii) The notice dated 4th April 2013 issued to the Petitioner under Section 74A(2) of the DVAT Act seeking to revise the order dated 9th October 2009 of the OHA is hereby set aside.

30. There shall be no orders as to costs.

S.MURALIDHAR, J

NAJMI WAZIRI, J

JULY 27, 2016

Rm