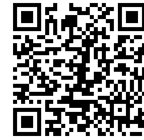
2023:DHC:5833-DB



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 07 August 2023**
Judgment pronounced on: 21 August 2023

\+ W.P.(C) 6430/2022

FLIPKART INDIA PRIVATE LIMITED ...... Petitioner

Through: Mr. Tarun Gulati, Sr. Advocate with Mr. Kishore Kunal & Mr. Parth, Advocates.

versus

VALUE ADDED TAX OFFICER, WARD 300 & ORS.

..... Respondents

Through: Mr. Satyakam, ASC with Mr. Sunny J., Mr. Anil Kumar, Jr. Asst., for GSTO

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA

JUDGMENT

YASHWANT VARMA, J.

1. The present writ petition had been originally preferred seeking the issuance of a direction commanding the respondents to process a refund application dated 24 August 2020 and give effect to a claim for refund of Rs.6,62,74,405/- in terms of Section 38 along with interest in terms of Section 42 of the **Delhi Value Added Tax Act, 2004**[1]**.**

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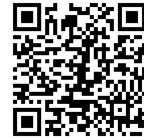
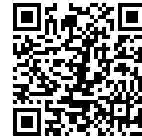
[1] DVAT Act



2. From the record, it would appear that when the matter was taken up on 22 April 2022, the petitioner had agreed to the opening of a bank account in Delhi to facilitate the refund being duly processed and affected. It was in the aforesaid light that the Court framed a direction calling upon the respondents to process the refund claim within a period of two weeks. However, and by the time the matter was taken up next, the respondents had proceeded to pass an order dated 31 May 2022 negating the claim for refund as raised by the petitioner. On the passing of the aforesaid order, the petitioner amended its writ petition questioning the validity of the aforenoted order in addition to the reliefs originally sought.

3. The claim for refund is principally based on the assertion of the petitioner that its application of 31 March 2015 was liable to be decided within the statutory timeframe as prescribed in Section 38(3)(a)(ii) of the DVAT Act. It had asserted that in the absence of any valid claim in respect of an amount due existing at the time when the said application was made, the respondents were bound to acknowledge the same and ensure that the refund was granted within two months. The petitioner also questions the validity of the impugned order dated 31 May 2022 and submits that any claim for refund which had fructified in accordance with the timelines prescribed by Section 38(3)(a)(ii) of the DVAT Act could not have been nullified by any demand of tax that may have either sprung into existence post the period of two months from the filing of the return nor could such an adjustment have been effected during the pendency of objections made by the petitioner with reference to Section 35 of the DVAT Act.



The petitioner contends that Section 35(2) of the DVAT Act restrains the respondents from enforcing the payment of any amount of tax which formed subject matter of contestation before the **Objection Hearing Authority**[2] and thus such an amount cannot be viewed as an amount due and payable under the DVAT Act as envisaged in terms of Section 38(2).

4. In order to appreciate the question which stands raised, it would be pertinent to note the following salient facts. On 09 May 2014, the petitioner submitted a return for the quarter ending 31 March 2014. The self assessment return claimed a refund of Rs.11,40,96,384/- on account of excess Input Tax Credit. On 15 May 2014 and 07 June 2014, the respondents proceeded to issue notices for default assessment of tax referable to Section 32 of the DVAT Act for the period commencing from April 2012 to March 2013. The default assessment notices raised a demand of Rs.3,10,97,964/- inclusive of interest and penalty. The petitioner is stated to have filed objections in respect of the aforesaid notices before the OHA in terms of Section 74 of the DVAT Act.

5. On 31 March 2015, the petitioner submitted a revised return for the quarter ending 31 March 2014. In terms of the revised return, it sought a refund of Rs.11,40,97,349/-. It is the case of the petitioner that bearing in mind the provisions of Section 38(3)(a)(ii) of the DVAT Act, the refund application was liable to be granted within two months from the submission of the revised return and thus latest by 31

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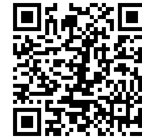
[2] OHA

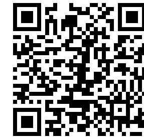


May 2015. It was further averred that in the absence of any enforceable demand in respect of an "amount due" existing between 31 March 2015 and 31 May 2015, the respondents were not entitled to adjust the amount claimed as refundable against any other tax demand that came to be raised subsequently.

6. On 15 June 2015, the respondents proceeded to issue default assessment notices for the period between April 2013 to December 2013. In terms of those notices, a tax demand in the sum of Rs. 62,61,80,251/- inclusive of interest and penalty came to be raised against the petitioner. These default assessment demands were also assailed by the petitioner by filing objections before the OHA on 15 July 2014. On 16 November 2015, the petitioner made a pre-deposit of Rs.1,00,00,000/- in terms of the statutory mandate of Section 73(1) of the DVAT Act. The aforesaid pre-deposit was made in respect of the objections which had been preferred before the OHA pertaining to the default assessment notices for the **Financial Year**[3] 2012-2013 and April 2013 to December 2013. On 08 November 2016, the OHA proceeded to dispose of the aforesaid objections and remanded the matter to the file of the first respondent.

7. Between 23 August 2017 and 15 November 2017, reassessment proceedings for FY 2012-2013 are stated to have been undertaken resulting in a fresh and revised demand of Rs. 4,92,09,468/- inclusive of interest and penalty coming to be raised against the petitioner. These assessments were again challenged before the OHA with

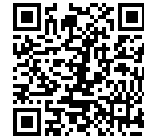
[3] FY



objections being filed on 16 October 2017 and additionally on 14 December 2017 and 15 December 2017.

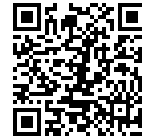
8. Pursuant to the order of the OHA dated 08 November 2016, reassessment proceedings were also undertaken with respect to the period starting from April 2013 to March 2014. The aforesaid proceedings were concluded between 23 November 2017 to 28 November 2017. The revised assessment orders framed in respect thereof were again questioned before the OHA by way of objections which were filed on 15 January 2018. The aforesaid narration thus concludes the events relating to the returns filed with respect to FY 2012-2013 and April 2013 to December 2013.

9. The writ petitioner has also adverted to the additional demands which came to be created thereafter pertaining to FY 2014-2015, January 2013 as well as for the period between April 2013 to June 2013. However, insofar as the original refund application relating to FYs' 2012-13, 2013-14 and 2014-15 is concerned, the same came to be disposed of by an order dated 03 December 2018. The respondents while acknowledging and accepting the claim for refund, which was pegged by the petitioner at Rs.11,40,97,349/- adjusted a sum of Rs.10,74,67,218/- and sanctioned an amount of Rs.66,30,131/- only. The said amount was duly credited to the petitioner's bank account. The petitioner being aggrieved by the aforesaid action filed objections manually on 29 January 2019. It is its case that the said manual filing was done on account of technical problems which beset the portal of the respondents.



10. On 31 October 2019, the OHA passed a detailed order dealing with the twenty-four objections which had been submitted by the petitioner for FY 2012-2013 as well as for the period from April 2013 to December 2013. The said order purports to record a concession made by the petitioner conceding to the tax demand of Rs.1,78,58,003/- but continuing to question the claim of interest and penalty. On due consideration of the objections so raised, the OHA accepted the challenge as raised by the petitioner and quantified the interest payable under Section 42(2) of the DVAT Act at Rs.15,00,000/- as against the original demand of Rs.1,34,63,462/-. The penalty of Rs.1,78,58,003/-, however, was set aside. The OHA, as a consequence to the above framed directions for refund of the pre-deposit.

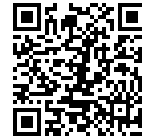
11. The petitioner also refers to further demands which had been raised for FY 2015-2016 and the objections that were filed in respect thereof. Insofar as the claim for refund for FY 2012-2013 and FY 2013-2014 are concerned, the petitioner on 08 July 2020 is stated to have submitted Form DVAT-21 on the portal of the respondents. There is a dispute between parties with respect to non-consideration of the aforesaid refund claim with allegations being leveled by both sides of a failure to comply with the formalities prescribed. Insofar as the petitioner is concerned, it asserts that there were various technical glitches besetting the portal of the respondents and on account of which Form DVAT-21 could not be lodged online. The petitioner also refers to certain documents forming part of the record in support of its allegation of technical glitches and shortcomings which the portal of



the respondents faced. Since the claim for refund was not attended to, the instant writ petition came to be filed sometime in April 2022.

12. Mr. Gulati, learned senior counsel appearing for the petitioner, submitted that the return for the quarter ending 31 March 2014 which had been duly filed on 31 March 2015 had itself claimed a refund of Rs. 11,40,97,349/-. It was pointed out that between the filing of the return for the said quarter initially on 09 May 2014 and the revised return on 31 March 2015, only two notices for default assessment pertaining to the period April 2012 to March 2013 had come to be issued. It was his submission, however, that since those had been questioned by filing objections before the OHA, the mere issuance of those notices could not have constituted a valid ground to deny refund as claimed by the petitioner and as it stood embedded in its return. Mr. Gulati pointed out that the period of two months as prescribed in Section 38(3)(a)(ii) of the DVAT Act had clearly expired on 31 May 2015 and undisputedly at least till that date no enforceable demand existed and which may have justified the respondents in withholding the amount as claimed to be refundable.

13. It was further pointed out that the objections which had been preferred before the OHA for FY 2012-2013 as well as for the period from April 2013 to December 2013 were ultimately accepted by the OHA itself in terms of the order dated 08 November 2016. It was the submission of Mr. Gulati that the respondents deliberately withheld the amount liable to be refunded and continually sought to avoid the statutory obligation as placed while seeking to effect adjustments in respect of demands raised for subsequent periods. This, according to

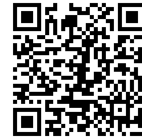


Mr. Gulati clearly goes against the very ethos of Section 38 of the DVAT Act.

14. It was submitted that as would be evident from the impugned order dated 31 May 2022, the amount as claimed by the petitioner has ultimately come to be adjusted in respect of alleged demands which did not relate to the period in question at all.

15. According to Mr. Gulati, the aforesaid submission is addressed without prejudice to the contention of the petitioner that even those subsequent demands cannot be characterized as *"….any other amount due….."*, a phrase which finds place in Section 38(2) of the DVAT Act, and which alone empowers the respondents to effect an adjustment. Mr. Gulati submitted that this would be the undisputed position which would emerge when one bears in mind the objections which had been preferred by the petitioner in terms of the right conferred by Section 74 of the DVAT Act and the statutory restraint which would consequentially come into effect in terms of Section 35(2) thereof.

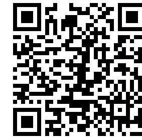
16. It was the submission of Mr. Gulati further that the insistence of the respondents of requiring the petitioner to submit Form DVAT-21 was also wholly misconceived since the refund stood claimed in the return itself. Mr. Gulati submitted that the statute itself draws a distinction between a refund which may come into existence pursuant to an order made by the OHA or the appellate authority and one which is claimed in the return that is submitted by the assessee itself. In case



of the latter, it was the submission of Mr. Gulati that the statute places no obligation upon the assessee to submit Form DVAT-21.

17. Taking the Court through the counter affidavits which had been filed in the present proceedings, Mr. Gulati also drew our attention to a chart showing the dates on which objections were filed for different default assessment notices on the online portal and additionally submitted physically before the respondents. The details as set out in that chart are extracted hereinbelow: -

SR. NO.	**PERIOD**	**ONLINE**	**PHYSICAL FILING**
1.	Annual 2014-15	06.03.2019 **P 40/pg. 345**	08.03.2019 **P41/Pg. 347**
2.	1st Qtr 2015-16	24.12.2019 **P42/Pg. 349**	24.12.2019 **P43/Pg. 357**
3.	2nd Qtr 2015-16		
4.	3rd Qtr 2015-16		
5.	4th Qtr 2015-16		
6.	Annual 2015-16	22.04.2020 **P44/Pg. 358**	26.06.2020 **P45/Pg. 360**
7.	1st Qtr 2016-17	01.04.2021 **P46/Pg. 378**	05.04.2021 **P47/Pg. 356**
8.	2nd Qtr 2016-17		
9.	3rd Qtr 2016-17		
10.	4th Qtr 2016-17		
11.	1st Qtr 2017-18 (was not available on portal. Only on request was provided on 09.06.2022)	20.06.2022 **P51/Pg. 397**	21.06.2022 **P51/Pg. 397**

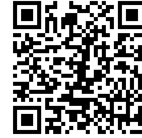


18. It becomes pertinent to note that the said issue itself arises in the backdrop of the respondent having asserted in its original counter affidavit that those objections were not traceable. Mr. Gulati pointed out that the respondents had neither questioned nor doubted the online submission of objections for FY 2014-2015 as well as for the various quarters pertaining to FYs' 2015-2016, 2016-2017 and the first quarter of FY 2017-2018. It was submitted by Mr. Gulati that the submission of those objections on the online portal was sufficient compliance with the requirements placed under the DVAT Act and therefore the stand as taken by the respondents would not sustain.

19. Mr. Gulati proceeding then to the provisions of Section 38 of the DVAT Act itself submitted that this Court has consistently taken the view that the time limits as prescribed therein are mandatory and not discretionary. He firstly relied upon the decision rendered by the Court in **Prime Papers & Packers v. Commissioner of VAT & Anr.**[4] where the aforesaid position was reiterated as under: -

> "**8.** There have been numerous judgements rendered by this Court emphasizing the mandatory nature of the time limit set out under Section 38 of the DVAT Act. Instead of burdening this judgement again with the extracts of those decisions, the Court would only like to set out the list of such decisions as under:
>
> > (i) *Swarn Darshan Impex (P) Limited* v. *Commissioner, Value Added Tax* (2010) 31 VST 475 (Del)
> >
> > (ii) *Lotus Impex* v. *Commissioner DT&T* (2016) 89 VST 450 (Del);
> >
> > (iii) *Dish TV India Ltd.* v. *GNCTD* (2016) 92 VST 83 (Del)

[4] 2016 SCC OnLine Del 4211



(iv) *Nucleus Marketing & Communication* v. *Commissioner of DVAT* [decision dated 12th July 2016 in W.P.(C) 7511/2015]

9. In all of the above judgements, the principles that have been highlighted are:

(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;

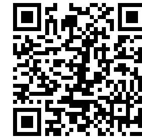
(2) where the Department seeks to invoke Section 59 of the DVAT Act to seek more information from the dealer after picking up the return in which the refund has been claimed for scrutiny, those steps are to be taken within the time frame envisaged under Section 38 of the DVAT Act;

(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.

10. The understanding of the Department regarding the calculation of the time limit under Section 38(3) of the Act being subject to Section 38(7), as was advanced before this Court, does not appear to be consistent with the legislative intent behind the enactment of Section 38 of the Act. It is a time-bound composite scheme which requires, in the first place, the DT&T to take immediate action upon receiving a return in which a refund is claimed. What Section 38(2) expects the Respondent to determine upon examining the claim of refund is whether there is any amount due from the dealer either under the DVAT Act or the CST Act. Such amount should already be found to be due. This is not an occasion, therefore, for the Department to start creating new demands either under the DVAT Act or the CST Act. In any event, even if the Department seeks to initiate the process for creating any fresh demand, that process cannot defeat the time period under Section 38(3)(a)(i) or (ii) for processing the refund claim."

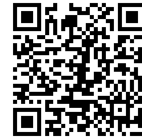
20. Mr. Gulati also drew our attention to the succinct observations as rendered by the Court in **New Age Generators v. The Commissioner, Value Added Tax**[5]**,** where the imperatives of the timelines prescribed in Section 38 of the DVAT Act was underlined in the following terms:-

[5] Order dated 12.07.2016 passed in W.P.(C) 5250/2016



> "**3**. The Court is unable to appreciate the above submission. There are clear time limits set out for making the refund set out under Section 38 (3) of the Delhi Value Added Tax Act, 2004 ('DVAT Act'). There is nothing therein or in the Delhi Value Added Tax Rules, 2005 that permits staggering of the refund payments due to an Assessee. Once an application is found to be in order and has been duly verified by the concerned authority, there can be no justification for not releasing of the refund amount in terms of Section 38 of the DVAT Act. In any event, the time period within which the refund is to be made cannot possibly exceed that stipulated under Section 38 of the DVAT Act. Whatever be the 'fail-safe' mechanism the Commissioner wishes to devise, unless the statute permits staggering of the refund payments through the devise of administrative instructions, it is not permissible for the Department to delay the release of the amounts of refund and interest beyond the period specified under Section 38 of the DVAT Act.
>
> **4.** The Court has been receiving a number of writ petitions on account of the failure of the Department to make refunds in terms of Section 38 of the DVAT Act. It is only after several orders are passed by the Court that the refund application is processed and an order issued. Further, even where orders for refund together with interest is passed, the actual release of the principal refund amount is delayed further. The payment of interest is invariably delayed even further. Resultantly, not only is the dealer getting the refund far beyond the time period specified under Section 38 of the DVAT Act but the Department is ending up paying far more interest on the refund amount than what is permissible or contemplated in terms of Section 38 of the DVAT Act. There has to be some accountability fixed within the Department for the lapses on part of those processing refund application resulting in such unnecessary payment of interest beyond what is permissible. This is an additional reason why the Court refuses to countenance the so-called 'fail-safe' system devised by the Department for staggering the release of refund of payment once a refund application has been processed, verified and found to be in order."

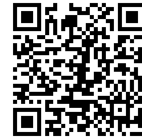
21. It was then submitted that since the claim for refund stood raised and included in the return which was filed, there was no legal obligation placed upon the petitioner to separately move a Form DVAT-21. Mr. Gulati in support of the aforesaid submission relied upon the following passages from **Commissioner of Trade and**



Taxes v. Corsan Corviam Construction S.A.-Sadbhav Engineering Ltd. JV[6]:-

> "**36.** Therefore, what emerges is that, while the OHA ruled on the legal tenability of the order dated 02.08.2017, concerning objections filed under Section 74 of the 2004 Act, it could not have stymied the accrual of interest which was based on a claim lodged by the assessee *via* its revised return. The assessee's right to refund accrued on completion of the timeframe given in Section 38(3)(a)(ii) of the 2004 Act, i.e., on 10.09.2015. The proceedings taken out thereafter, i.e., issuance of notice under Section 59(2) of the 2004 Act on 11.09.2015 followed by a default assessment order dated 02.08.2017 and the adjustment order dated 25.08.2017, were non-est in the eyes of law. The fact that the OHA *via* order dated 26.08.2019 set aside the notice of default assessment dated 02.08.2017, brought to life the claim for refund embedded in the assessee's return with the removal of the clog placed upon it by the assessment order dated 02.08.2017. As a matter of fact, in our view, Rule 34(4) should be read in consonance with the provisions of Section 39 and Rule 34(5)(a) of the 2005 Rules. As correctly argued by Mr. Rajesh Jain, even if the refund is withheld, the assessee would be entitled to interest under Section 42(1) of the 2004 Act when as a result of the appeal or any other proceedings, the assessee becomes entitled to a refund; an aspect which is plainly evident on a bare perusal of Section 39 of the 2004 Act.
>
> > *"39 Power to withhold refund in certain cases*
> >
> > *(1). xxxxxxxxx*
> >
> > *(2) Where a refund is withheld under sub-section (1) of this section, the person shall be entitled to interest as provided under sub-section (1) of section 42 of this Act if as a result of the appeal or further proceeding, or any other proceeding he becomes entitled to the refund."*
>
> **37.** Therefore, according to us, the provisions of Section 42(1) if read with Section 39, make it clear that interest, in any event, was payable to the assessee, from the date when it accrued to the assessee in terms of section 38(3)(a)(ii) of the 2004 Act.
>
> xxx xxx xxx
>
> **48.** Since the claim for a refund made by the assessee was embedded in its return, it did not arise out of an order passed by

[6] 2023 SCC OnLine Del 1900



> the Court or an authority constituted under the 2004 Act, the assessee was not required to file a fresh claim as contended by the revenue under DVAT 21. Thus, Question no. 2, once again, is answered against revenue and in favour of the assessee."

22. We note further from the compilation placed for the perusal of the Court that the aforesaid position stood reiterated in the judgment of **Consortium of Sudhir Power Projects Ltd. and Sudhir Gensets Ltd. v. Commissioner of Delhi Goods and Services Tax**[7] where the Division Bench held as follows:-

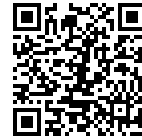
> "**17.** On a closer examination of the facts of this case, we are unable to accept that the petitioner can be denied interest on the amount of refund which has been unjustifiably withheld, mainly for two reasons. First, that there is no dispute that the petitioner is entitled to the refund and his return was required to be considered as an application for the same. The petitioner was not required to approach or pursue the authorities for its claim for refund of excess tax. Second, that the delay in processing claims for refund is endemic to the DVAT authorities and if the same is considered, the delay on the part of the petitioner approaching this court is not long."

23. Seeking to buttress the challenge which was raised in the backdrop of Section 35(2) of the DVAT Act and the submission that once a demand comes to be challenged before the OHA, no adjustment can be made under Section 38(2), Mr. Gulati referred to the following observations as rendered in **Bhupindra Auto International v. Commissioner, Trade & Taxes & Anr.**[8]

> "The petitioner had claimed a direction for refund of excess VAT amounts for certain previous periods. This Court had issued notice and required the respondents to ensure that appropriate orders are made. It is submitted on behalf of the VAT Department and the Govt. of NCT of Delhi that the petitioner is entitled to refund in the first instance but that sometime in January 2016,

[7] 2023 SCC OnLine Del 700

[8] Order dated 10.11.2016 passed in W.P.(C) 9521/2016

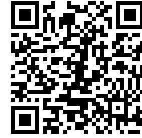


further liabilities arose on account of the later period. This, according to the VAT authorities, entitled them to adjust the amounts payable. They were accordingly withheld under Section 38(2) of the DVAT Act, 2004 [hereafter "the Act"]. It was in these circumstances that on 27.10.2016, the VAT authorities apparently sought to adjust these amounts. In the meanwhile, it was discovered that the petitioner had preferred a petition to the Objection Hearing Authority (OHA) sometime in March, 2016. By virtue of Section 35(2) of the Act, this automatically suspended the order of adjustment of refund amounts. Consequently, the authorities could not have sought to set-off the refund liability towards the demands created for the later period. The OHA, therefore, would have to proceed independently and decide if the petitioner is liable, and if so, to what extent the petitioner is liable for the later period and proceed independently on that basis."

24. Turning then to the question of whether the pre-deposit as made before the OHA could have been adjusted against any other tax dues, it was the submission of Mr. Gulati that a pre-deposit has never been understood to constitute a deposit of tax or duty which could be utilized for the purposes of adjustment. According to Mr. Gulati, the aforesaid position is no longer res integra and stands duly settled in light of the judgment of the Court in **MRF Ltd. v. The Commissioner of Trade and Taxes & Anr.**[9]. Mr. Gulati referred to the following passages from that decision: -

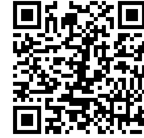
"**3.** Learned counsel for the Revenue contends that the local sales tax authorities' decision not to grant interest on refund amount is justified because the provision of Section 30 of the Delhi Sales Tax Act, 1975 requires that the assessee who wishes to claim refund of tax paid should approach the authority in a particular manner (by filing form ST 21). It is submitted that the interest amounts would be due only from the time that procedure was followed and not before and that interest would be permissible only in accordance with that provision, i.e. Section 30(4) in the event the 90 days elapse. In this case, the judgment of the Court was delivered on 14.05.2015 and the petitioner approached the Sales Tax

[9] 2018 SCC OnLine Del 10624



Department on 22.07.2015 and 20.11.2015. The Delhi Sales Tax authority's appeal by way of special leave before the Supreme Court was disposed of on 28.11.2016. In this background, the Revenue's burden of the song as it were is that since the 21 form was only filed on 25.05.2018 (as without prejudice measure) by virtue of this Court's order dated 09.05.2018, the interest on the refund can be granted having regard to the express provisions of Section 30 of Delhi Sales Tax Act with reference to the date concerned, i.e. 25.05.2018. The Revenue's contention, in this Court's opinion, is untenable. The judgment in *Suvidhe* (supra) emphasized - although in the context of Section 11B (of the Central Excise Act) where the assessee had to approach and make a pre-deposit to the appellate authority-that such deposit sums would not amount to depositing or paying excise duty but rather to avail remedy of an appeal. The Bombay High Court observed as follows in *Suvidhe Ltd.* v. *UOI* 1996 (82) ELT 177 (Bom):

> *1. Rule. By consent rule is made returnable forthwith. Heard parties.*
>
> *2. Show cause notice issued by the Superintendent (Tech.) Central Excise to the petitioner to show cause why the refund claim for Excise Duty and Redemption fine paid in a sum of Rs. 14,07,410/- should be denied under Section 11B of the Central Excise Rules and Act, 1944 (sic) is impugned in the present petition. The aforesaid amount is deposited by the Petitioners not towards Excise Duty but by way of deposit under Section 35F for availing the remedy of an appeal. Appeal of the petitioners has been allowed by the Appellate Tribunal by its Judgment and order passed on 30th of November, 1993 with consequential relief. Petitioners' prayer for refund of the amount deposited under Section 35F has not received a favourable response. On the contrary the impugned show cause notice is issued why the amount deposited should not be forfeited. In our judgment, the claim raised by the Department in the show cause notice is thoroughly dishonest and baseless. In respect of a deposit made under Section 35F, provisions of Section 11B can never be applicable. A deposit under Section 35F is not a payment of Duty but only a pre-deposit for availing the right of appeal. Such amount is bound to be refunded when the appeal is allowed with consequential relief.*
>
> *3. In respect of such a deposit the doctrine of unjust enrichment will be inapplicable. In the circumstances, the petition succeeds. The impugned show cause notice, which*



is annexed at Exhibit-F to the petition, is quashed and the respondents are directed to forthwith refund the aforesaid amount of Rs. 14,07,410/- along with interest thereon at the rate of 15% p. a. from the date of the order of the Appellate Tribunal i.e. from 30th November, 1993 till payment.

4. Rule is made absolute in the aforestated terms. Respondents will pay the petitioners the cost of the petition."

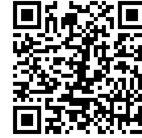
4. The Supreme Court endorsed the view of the Bombay High Court. In *Nestle India Limited* (supra), the Karnataka High Court following the same thread of reasoning, held that the pre-deposit amount was not towards tax but rather to avail the remedy of an appeal. The subsequent judgment in *W.S. Retail* (supra) was rendered especially in the context of the provisions of the Karnataka VAT Act and other enactments. It relied upon the logic in *Suvidhe* (supra) and *Nestle* (supra) and stated as follows:

"42. To the same effect, the Division Bench of the Delhi High Court in Voltas Limited *v.* Union of India *[1999 (112) ELT 34 (Delhi)], also held that the pre-deposit under Section 35F of the Act is a deposit pending appeal and it is not available for appropriation or disbursal by the Revenue Department.*

***Paragraph-7** of the said judgment is also quoted below for ready reference:—*

"7. It cannot be denied that the demand against the petitioner was raised consequent to the order of adjudication. Section 35F of the Act under which the petitioner was required to deposit the amount of Rs. 50 lakhs speaks of 'deposit pending appeal.' It is clear that the amount so deposited remains a deposit pending appeal and is thereafter available for appropriation or disbursal consistently with the final order maintaining or setting aside the order of adjudication."

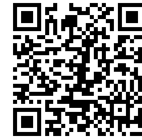
43. The learned Single Judge of the Kerala High Court in Alwaye Sugar Agency *v.* Commercial Tax Officer, Alwaye *2011 (42) VST 517 also dealt with a similar controversy as is involved in the present case and under the provision of 'Amnesty Scheme' announced in Kerala in the Budget Speech of 2010, the learned Single Judge directed that a sum of Rs. 75,000/- deposited by the petitioner-assessee under the said Scheme, cannot be*



adjusted against the interest portion under Section 55C of the Act, which is also akin to Section 42(6) in KVAT Act and the Court allowed the Writ Petition with the following observations:—

> *"More so since, once the Scheme is announced and specified to be commenced from the 1st day of the relevant financial year, for a specified period, it may not be proper for the State/Department to augment the revenue collection by resorting to coercive steps before the defaulters get an opportunity to apply for and obtain the benefit of the Scheme, which otherwise can only defeat or frustrate the Scheme itself and in turn, the 'Policy' of the Government. In the above circumstances, this Court finds that the course pursued by the respondents; issuing Ext. PA rejecting Ext. P2 preferred by the petitioner seeking* ***the amount deposited as a token of willingness to clear the liability availing the benefit of the Scheme*** *proposed in Ext. PI* ***and consciously appropriating the said amount against 'interest' portion under the cover of Section 55C, is not correct or sustainable.*** *Accordingly, Ext.P4 is set aside. The respondents are directed to pass fresh orders quantifying the liability of the petitioner, in the application preferred for extending the benefit under the "Amnesty Scheme", giving credit to a sum of Rs. 75,000/- paid by him vide Ext. P2, as payment towards a portion of the liability under the scheme, and effect appropriation, in tune with the terms of the Scheme."*

5. It is clear from the above discussion that pre-deposit sums which the assessee is compelled to pay to seek recourse to an appellate remedy, do not necessarily bear the stamp or character of tax, especially when it succeeds on the particular plea. That being the case, the insistence upon a procedural step, i.e. filing of a form which is purely for the purpose of administrative convenience cannot in any manner fix the period or periods of limitation when the amounts became due on the question of interest. The fact that the amounts were due and payable from the date the appeal was allowed is not in dispute. In these circumstances, the postponement of the period from when interest became calculable is incomprehensive and illogical. For these reasons the petitioner is entitled to interest calculable from the date when its appeal was allowed by this Court by order dated 14.05.2015. The respondents shall ensure that the amounts are processed and credited to the

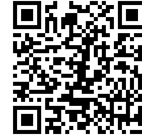


petitioner's account within four weeks. The petition is allowed in these terms."

25. It was further pointed out that the principles laid down in *MRF Ltd.* were again reiterated in **Rakesh Kumar Garg & Ors. v. The Deputy Commissioner of Central Excise, Division - I & Ors.**[10] where the Court had held as under: -

> "**3**. The two-fold submissions have been made on behalf of the petitioners. Firstly, that the amounts paid as pre-deposit (before CESTAT) and pursuant to the directions of this court, while pursuing the appeals under Section 35G, did not bear the character of "tax" and consequently, when relief was finally granted, interest had to be paid from the date of deposit. The other submission is that if the amended Section 35FF (i.e. amended w.e.f. 06.08.2014) were to be treated as prospective, it would be arbitrary as it would deny the benefit of interest upon amounts which never bore the character of tax.
>
> **4**. This court is of the opinion that the petitioners are entitled to relief in view of the consistent view taken in this regard by the courts. In Suvidhe Ltd. v. UOI, 1996 (82) ELT 177 (Bom), it was held that the amount paid as pre-deposit, for pursuing the appellate remedy or for any other reason mandated by law, cannot be treated as a tax as that is only a condition for pursuing the appellate remedy. This view was affirmed by the Supreme Court *in Union of India v. Suvidhe Ltd.,* 1997 (94) ELT A 159 (SC). In *Nestle India Ltd. v. Assistant Commissioner of Central Excise*, 2003 (154) ELT 567 also, a similar view was adopted. The latest judgment of the Karnataka High Court in *M/s W.S. Retail Services v. State of Karnataka,* W.P.(C)No.33176/2017 and connected cases (decided on 14.11.2017) referred to all these decisions as well as the decision of this court in Voltas Ltd. v. Union of India & Ors., 1999 (112) ELT 34 Del.
>
> **5**.We notice that recently in *MRF Ltd. v. The Commissioner of Trade and Taxes & Anr*., W.P.(C)No.3118/2018 (decided on 10.08.2018), this very Division Bench had taken a similar view – in the context of pre-deposits made under the Delhi VAT Act.
>
> **6**. In view of the above discussion, the petitioners' contention that they are entitled to interest from the date of the final order of the CESTAT, is justified and warranted. As to the second submission made with respect to the invalidity of Section 35FF on account of its prospective nature, the court recollects that the

[10] Order dated 26.09.2018 passed in W.P.(C) 11757/2016



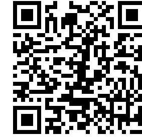
provisions of law ought not to be read in a manner so as to invalidate them. In view of the interpretation preferred by the above judgment, the alleged unconstitutionality no longer subsists."

26. Our attention was also drawn to a recent decision rendered by this Court in **Otis Elevator Company (India) Ltd. v. Commissioner of Value Added Tax & Ors.**[11] where upon noticing *MRF Ltd.*, we had held as follows:-

> "**11**. *MRF Limited* has unequivocally held that a deposit made in terms of a provision connected with the preferment of an appeal cannot be treated to be tax or duty. In fact that is the position which has been consistently held by various courts as would be evident from the discussion which follows. It thus remains undisputed that a pre-deposit cannot partake the character of a tax or duty. This since, it would clearly be connected only with the right of the assessee to pursue an appeal.
>
> xxx xxx xxx
>
> **13**. As is manifest from a clear reading of sub-section (1), the said provision relates to a claim made by a person for refund of an amount of tax paid by him. The express language as employed in Section 30(1) itself takes the case of refund of pre-deposit out from the rigors of the procedural formalities which are contemplated therein. We further note that as in the present case, claims for refund which may arise as a consequence of an order passed by the Appellate Authority or a Court would be governed by Section 30(4) of the Act.
>
> xxx xxx xxx
>
> **15**. In our considered opinion a pre-deposit would become refundable the moment an Appellate Authority comes to hold in favour of the assessee and demands come to be annulled. This principally since pre-deposit is not tax or duty and the refund of which alone is regulated by Section 30(1) of the Act. We note that the decision of the Bombay High Court in *Suvidhe Limited* was assailed before the Supreme Court. While dismissing the appeal of the Union, the Supreme Court in **Union of India Vs. Suvidhe Limited**[12] held as follows:-

[11] Order dated 07.08.2023 passed in W.P.(C) 2859/2022

[12] (2016) 11 SCC 808



> "**3.** The show-cause notice issued by the Superintendent (Tech.), Central Excise to the petitioner to show cause why the refund claim for excise duty and redemption fine paid in a sum of Rs 14,07,410 should not be denied under Section 11-B of the Central Excise Act, 1944 is impugned in the present petition. The aforesaid amount is deposited by the petitioners not towards excise duty but by way of deposit under Section 35-F for availing the remedy of an appeal. Appeal of the petitioners has been allowed by the Appellate Tribunal by its judgment and order passed on 30-11-1993 with consequential relief. The petitioners' prayer for refund of the amount deposited under Section 35-F has not received a favourable response. On the contrary, the impugned show-cause notice is issued as to why the amount deposited should not be forfeited. In our judgment, the claim raised by the Department in the show-cause notice is thoroughly dishonest and baseless. In respect of a deposit made under Section 35-F, provisions of Section 11-B can never be applicable. A deposit under Section 35-F is not a payment of duty but only a pre-deposit for availing the right of appeal. Such amount is bound to be refunded when the appeal is allowed with consequential relief.
>
> **4.** In respect of such a deposit the doctrine of unjust enrichment will be inapplicable. In the circumstances, the petition succeeds. The impugned show-cause notice, which is annexed at Ext. F to the petition, is quashed and the respondents are directed to forthwith refund the aforesaid amount of Rs 14,07,410 along with interest thereon @ 15% p.a. from the date of the order of the Appellate Tribunal i.e. from 30-11-1993 till payment.
>
> **5.** Rule is made absolute in the aforestated terms. The respondents will pay the petitioners the costs of the petition."

16. We further find that the Supreme Court in **Commissioner of Customs (Import), Raigad vs. Finacord Chemicals (P) Ltd. & Others**[13] reiterated the aforesaid position as would be evident from paragraphs 17 and 18 of the report which are extracted hereinbelow:-

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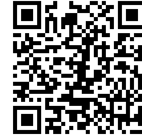
[13] (2015) 15 SCC 697

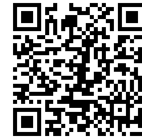


"**17.** It is the order dated 7-8-1996 which was passed by this Court in *Union of India* v. *Suvidha Ltd.* [*Union of India* v. *Suvidha Ltd.*, (2016) 11 SCC 808 : (1997) 94 ELT A-159 (SC)] dismissing the special leave petition which was filed by the Union of India against the judgment of the High Court of Bombay in *Suvidhe Ltd.* v. *Union of India* [*Suvidhe Ltd.* v. *Union of India*, (1996) 82 ELT 177 (Bom)] . Since the special leave petition was dismissed in limine, we would like to reproduce para 2 of the judgment of the High Court wherein the High Court had observed that in case of such deposits, provisions of Section 11-B of the Customs Act (*sic* Central Excise Act, 1944) will have no application. This para reads as under: (*Suvidhe Ltd. case* [*Suvidhe Ltd.* v. *Union of India*, (1996) 82 ELT 177 (Bom)], ELT p. 178)

> "2. Show-cause notice issued by the Superintendent (Tech.) Central Excise to the petitioner to show cause why the refund claim for excise duty and redemption fine paid in a sum of Rs 14,07,410 should be denied under Section 11-B of the Central Excise Rules and Act, 1944 (sic) is impugned in the present petition. The aforesaid amount is deposited by the petitioners not towards excise duty but by way of deposit under Section 35-F for availing the remedy of an appeal. Appeal of the petitioners has been allowed by the Appellate Tribunal by its judgment and order passed on 30-11-1993 with consequential relief. The petitioners' prayer for refund of the amount deposited under Section 35-F has not received a favourable response. On the contrary the impugned show-cause notice is issued why the amount deposited should not be forfeited. In our judgment, the claim raised by the Department in the show-cause notice is thoroughly *dishonest and baseless*. In respect of a deposit made under Section 35-F, provisions of Section 11-B can never be applicable. A deposit under Section 35-F is not a payment of duty but only a pre-deposit for availing the right of appeal. Such amount is bound to be refunded when the appeal is allowed with consequential relief."

(emphasis in original)

18. By another Circular No. 802/35/2004-CX dated 8-12-2004 issued by the Board, the Board emphasised that such amounts should be refunded immediately as non-returning



> of the deposits attracts interest that has been granted by the courts in a number of cases."
>
> **17**. A Division Bench of our Court in **Xerox India Ltd. vs. Assistant Commissioner, Ward-114 (Special Zone) Department of Trade & Taxex Government of NCT**[14] as well as in **Rakesh Kumar Garg vs. Dy. Commr. of Central Excise, Division-I**[15] have taken an identical position. We further find that the issue of pendency of the Special Leave Petition against the judgment in *MRF limited* was duly noted by the Court in **Jiwand Singh and Sons vs. Special Commissioner of Trade and Taxes & Ors.**[16]. However, the legal character of a pre-deposit was again held not to be that of a duty or tax. We thus find that the petitioner is clearly justified in seeking refund of the amount of pre-deposit together with interest computed from the date of the order passed by the Tribunal."

27. Appearing for the respondents, Mr. Satyakam firstly contended that the petitioner itself was responsible for the delay caused in effecting the refund on account of incorrect and incomplete information which had been provided to the Department and thus disabling them from processing the application for refund. Mr. Satyakam drew our attention to the averments as made in paragraph 9 of the original counter affidavit which had been filed and which had spoken of the various discrepancies existing in the manual refund application dated 24 August 2020.

28. It was further submitted by Mr. Satyakam that at the time the aforesaid application came to be made, certain other demands had come to be raised against the petitioner and consequently the respondents were clearly justified in adjusting the refunds claimed against those demands. It was his submission that the refunds which

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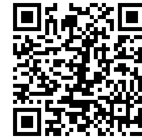
[14] 2018 SCC OnLine Del 13447

[15] Order dated 26.09.2018 passed in W.P.(C) No. 11757/2016

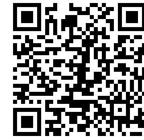
[16] 2023 SCC OnLine Del 463



were claimed by the petitioner were adjusted against tax demands of Rs.23,50,50,928/- which existed as on 06 May 2022 and thus the respondents were clearly justified in proceeding further in accordance with Section 38(2) of the DVAT Act.

29. It was further submitted that the allegation of a technical fault existing on the portal of the respondents is bereft of any material particulars and cannot be countenanced. Our attention was then drawn to the averments made in paragraph 22 of the counter affidavit and which had referred to discrepancies in the form which was submitted by the petitioner as well as its failure to update material particulars on the official portal.

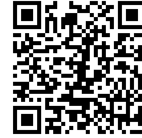
30. We further note that pursuant to the liberty accorded by us on 28 July 2023, the respondents have tendered a further affidavit dated 04 August 2023 dealing with the various objections which are stated to have been filed before the OHA by the petitioner. The subsequent affidavit filed makes the following disclosures with respect to the objections filed for FY 2014-15 and leading up to the first quarter of FY 2017-18. From the averments made in paragraph 4 of the said affidavit, it would appear that the respondents take the position that the objections which stand placed as Annexure P-42, P-43, P-44 and P-45 of the writ petition had not been submitted. The said averment is itself based on a Status Report which has been appended to that affidavit. From the Status Report of 02 August 2023, we note that the Assistant Commissioner (HQ), Soha has observed that the objections relating to the period commencing from the first quarter of FY 2015-2016 to the first quarter of FY 2017-2018 though filed online could



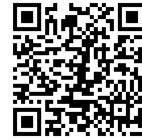
not be disposed of since the petitioner had failed to appear before the concerned OHA for hearing. The second Status Report of 03 August 2023 refers to certain objections filed for the four quarters of FY 2015-2016 and discloses that those objections had not been filed physically. The said Status Report further asserts that certain objections pertaining to the four quarters of FY 2017-18 though filed physically did not carry the accompanying documents.

31. Mr. Satyakam had also drawn our attention to certain communications which stood appended with the original affidavit and in terms of which the Additional Commissioner had asserted that while one objection having a reference number of 433063 dated 06 March 2019 had been filed physically, no other objection that may have been submitted by the petitioner was found in the concerned Branch nor was any other online / offline data received from the then OHA (Special Commissioner-V). The respondents also invited our attention to another communication of 24 August 2022, on which an endorsement appears to the effect that while papers relating to Appeal No. 3973 had been found, the rest were not traceable. It was further submitted by Mr. Satyakam that the order of 31 May 2022 has rightly found the petitioner disentitled to any refund for reasons which stand recorded therein.

32. Having noticed the rival submissions so addressed, we deem it apposite to firstly extract the Table which stands placed on the record and which sets out the details with respect to the amounts which the petitioner claims is refundable:-



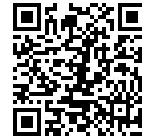
Demand raised in Remand proceedings as per OHA's orders dt. 08.11.2016					Demand as per OHA's Order dated 31.10.2019		Demand on allowance of rectification applications		
Particulars	Assessed	Interest	Penalty	Total Demand	Tax	Interest	Tax	Interest	Total Refund
Refund claimed in Return dated 31.03.2015									11,40,97,349
VAT Orders FY 2012-13									
April	77,13,911	60,83,423	77,13,911	2,15,11,245	77,13,911	15,00,000	77,13,911	1,14,375	
May	8,17,925	6,39,662	8,17,925	22,75,512	8,17,925		8,17,925		
June	3,31,263	2,56,479	3,31,263	9,19,005	3,31,263		3,31,263		
July	4,95,735	3,87,488	4,95,735	13,78,958	4,95,735		4,95,735		
August	11,55,290	8,88,782	11,55,290	31,99,362	11,55,290		11,55,290		
September	7,83,037	5,92,748	7,83,037	21,58,822	7,83,037		7,83,037		
October	8,34,261	6,22,953	8,34,261	22,91,475	8,34,261		8,34,261		
November	10,86,916	7,98,213	10,86,916	29,72,045	10,86,916		10,86,916		
December	6,98,954	5,04,466	6,98,654	19,01,774	6,98,654		6,98,654		
January	5,08,972	3,61,022	5,08,972	13,78,966	5,08,972		5,08,972		
February	4,42,248	3,08,786	4,42,248	11,93,282	4,42,248		4,42,248		
March	29,89,791	20,49,440	29,89,791	80,29,022	29,89,791		29,89,791		
	1,78,58,003	**1,34,93,462**	**1,78,58,003**	**4,92,09,468**	**1,78,58,003**	**15,00,000**	**1,78,58,003**	**1,14,375**	**(1,79,72,378)**
CST Orders FY 2012-13									
January	86,301	74,479	86,301	**2,47,081**					**(2,47,081)**
VAT Orders FY 2013-14									
Ist Qtr.	71,48,215	46,56,132	71,48,215	1,89,52,562	71,48,215	15,00,000	71,48,215		
2nd Qtr.	6,91,153	4,25,201	6,91,153	18,07,507	6,91,153		6,91,153		
3rd Qtr.	70,53,413	40,72,624	70,53,413	1,81,79,450	70,53,413		70,53,413		
4th Qtr.	6,42,882	3,47,685	6,42,882	16,33,449	6,42,882		6,42,882		
	1,55,35,663	**95,01,642**	**1,55,35,663**	**4,05,72,968**	**1,55,35,663**	**15,00,000**	**1,55,35,663**		**(1,55,35,663)**
CST Orders FY 2013-14									
Ist Qtr.	37,14,191	29,82,546	37,14,191	**1,04,10,928**					**(1,04,10,928)**
VAT Orders FY 2014-15									
Ist Qtr.	3,17,968	2,05,155	-	5,23,123					
2nd Qtr.	5,37,830	3,26,977	-	8,64,507					
3rd Qtr.	4,23,658	2,41,311	-	6,64,969					
4th Qtr.	32,45,566	17,28,598	-	49,74,164					
				70,26,763	**70,26,763**				**(70,26,763)**



							Refund due	6,29,04,536
							Subtract: Refund sanctioned as per order dt. 03.12.2018	66,30,131
							Net Refund Pending	5,62,74,405
							Add: Pre-deposit made as per third proviso to Section 73(1) of DVAT Act	1,00,00,000
							Total Refund Pending	**6,62,74,405**

33. We further note that the respondents while doubting the submission of objections in physical form do not question the online submission of objections filed by the petitioner. This is evident from not only the original affidavit that was filed in these proceedings but also from the disclosures made in the affidavit filed pursuant to our order of 28 July 2023. Even the Status Reports which stand appended to the subsequent affidavit do not doubt the submission of objections filed online. This we note, even though the original reports which had been filed by the respondents along with their counter affidavit only spoke of the objections either not being traceable or having not been received from the predecessor OHA.

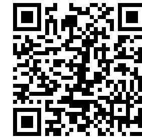
34. In our considered opinion, once the objections had been duly lodged online, the mere fact that the respondents were unable to trace out the objections filed physically would not detract from the right of the petitioners to claim refund. We are further constrained to observe that the various status reports as well as the averments made in this respect relate to the objections which had been filed for FY 2014-15, those pertaining to FY 2015-2016 and the first quarter of FY 2017-



2018. However, the claim for refund which is made in the instant writ petition, undisputedly, relates to and emanates from the return which was submitted for the quarter ending 31 March 2014. Undisputedly all objections which pertained to FY 2012-13 as well as the period for April 2013 to December 2013 had been duly considered and ultimately disposed of by the respondents themselves in terms of the order of the OHA dated 31 October 2019.

35. The factual dispute therefore which is sought to be raised and which relates to the various objections filed for the other quarters is clearly of little significance. As would be manifest from a consideration of Section 38 of the DVAT Act, the claim for refund is to be considered in light of the plain language employed in that provision and principally sub-section (2) thereof which enables the Commissioner to adjust any amount which becomes refundable against tax dues that may exist. Section 38 of the DVAT Act reads as follows:-

> **"38. Refunds**
>
> (1) Subject to the other provisions of this section and the rules, the Commissioner shall refund to a person the amount of tax, penalty and interest, if any, paid by such person in excess of the amount due from him.
>
> (2) Before making any refund, the Commissioner shall first apply such excess towards the recovery of any other amount due under this Act, or under the CST Act, 1956 (74 of 1956).
>
> (3) Subject to sub-section (4) and sub-section (5) of this section, any amount remaining after the application referred to in sub-section (2) of this section shall be at the election of the dealer, either—
>
> (*a*) refunded to the person,—



(*i*) within one month after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is one month;

(*ii*) within two months after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is a quarter; or

(*b*) carried forward to the next tax period as a tax credit in that period.

(4) Where the Commissioner has issued a notice to the person under Section 58 of this Act advising him that an audit, investigation or inquiry into his business affairs will be undertaken or sought additional information under Section 59 of this Act, the amount shall be carried forward to the next tax period as a tax credit in that period.

(5) The Commissioner may, as a condition of the payment of a refund, demand security from the person pursuant to the powers conferred in Section 25 of this Act within forty-five days from the date on which the return was furnished or claim for the refund was made.

(6) The Commissioner shall grant refund within 15 days from the date the dealer furnishes the security to his satisfaction under sub-section (5).

(7) For calculating the period prescribed in clause (a) of sub-section (3), the time taken to—

(*a*) furnish the security under sub-section (5) to the satisfaction of the Commissioner; or

(*b*) furnish the additional information sought under Section 59; or

(*c*) furnish returns under Section 26 and Section 27; or

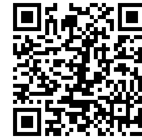
(*d*) furnish the declaration or certificate forms as required under Central Sales Tax Act, 1956,

shall be excluded.

(8) Notwithstanding anything contained in this section, where—

(*a*) a registered dealer has sold goods to an unregistered person; and

(*b*) the price charged for the goods includes an amount of tax payable under this Act;



(*c*) the dealer is seeking the refund of this amount or to apply this amount under clause (b) of sub-section (3) of this section;

no amount shall be refunded to the dealer or may be applied by the dealer under clause (b) of sub-section (3) of this section unless the Commissioner is satisfied that the dealer has refunded the amount to the purchaser.

(9) Where—

(*a*) a registered dealer has sold goods to another registered dealer; and

(*b*) the price charged for the goods expressly includes an amount of tax payable under this Act,

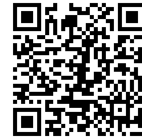
the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section and the Commissioner may reassess the buyer to deny the amount of the corresponding tax credit claimed by such buyer, whether or not the seller refunds the amount to the buyer.

[(10)] Where a registered dealer sells goods and the price charged for the goods is expressed not to include an amount of tax payable under this Act the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section without the seller being required to refund an amount to the purchaser.

[(11)] Notwithstanding anything contained to the contrary in sub-section (3) of this section, no refund shall be allowed to a dealer who has not filed any return due under this Act."

36. The subject of refund is also dealt with by Rules 34 and 57 of the DVAT Rules 2005, which are extracted hereinbelow:

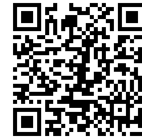
"**34**. **Refund of excess payment.-**
(1) A claim for refund of tax, penalty or interest paid in excess of the amount due under the Act (except claimed in the return) shall be made in Form DVAT-21, stating fully and in detail the grounds upon which the claim is being made.
(2) Only such claim shall be made in Form DVAT-21 that has not already been claimed in any previous return. A claim for refund made in Form DVAT-21 shall not be again included in the return for any tax period.
(3) The Commissioner shall issue notice to any person claiming refund to furnish security under sub-section (5) of section 38, in Form DVAT -21A.



(4) Where the refund is arising out of a judgment of a Court or an order of an authority under the Act, the person claiming the refund shall attach with Form DVAT-21 a certified copy of such judgment or order.
(5) When the Commissioner is satisfied that a refund is admissible, he shall determine the amount of the refund due and record an order in Form DVAT-22 sanctioning the refund and recording the calculation used in determining the amount of refund ordered (including adjustment of any other amount due as provided in sub-section (2) of section 38).
6) Where a refund order is issued under sub-rule (5), the Commissioner shall, simultaneously, record and include in the order any amount of interest payable under sub-section (1) of section 42 for any period for which interest is payable.
(7) The Commissioner shall forthwith serve on the person in the manner prescribed in rule 62, a cheque for the amount of tax, interest, penalty or other amount to be refunded along with the refund order in Form DVAT-22.
(8) No refund shall be allowed to a person who has not filed return and has not paid any amount due under the Act or an order under section 39 is passed withholding the said refund.

57. Refund on account of objection.- The procedure for the refund of any amount due in consequence of an order made pursuant to an objection, or any other proceeding under the Act, shall be that provided in rule 34."

37. We are at the outset constrained to observe that as would be evident from a bare perusal of Rule 34, a claim for refund of tax is liable to be made in Form DVAT-21 only if such a refund is not claimed in the return itself. This clearly emerges from Rule 34(1) which uses the expression *"except claimed in the return"*. The aforesaid position is again reiterated in sub-rule (2) and which stipulates that only such claim for refunds may be made in Form DVAT-21 which have not been claimed in any previous return. It is thus manifest that once a claim for refund stands embodied in the return itself, there is no additional obligation placed upon the assessee to file Form DVAT-21. This position, in any case, stands concluded

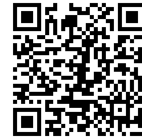


against the respondents in light of the judgments rendered by the Court in *Corsan Corviam* and *Consortium of Sudhir Power Projects*.

38. The failure of the respondents to refund the amount of pre-deposit and even adjusting the sum of Rs. 1,00,00,000/- deposited in that respect on 16 November 2015 is also clearly arbitrary and untenable. Our Court has consistently taken the position that a pre-deposit does not partake the character of a tax or duty. Those are sums which are deposited by an assessee solely for the purposes of pursuing its remedy of appeal. The consistent line as struck in this respect was duly recognized by the Court in its recent decision in *Otis Elevators.* We are thus of the firm opinion that the respondents were neither entitled in law to retain the pre-deposit amount of Rs. 1,00,00,000/- nor could it have been utilized for adjustment purposes.

39. The record would bear out that the objections which had been filed before the OHA for FY 2012-2013 and April 2013 to December 2013 had all been disposed of on 08 November 2016 itself. There thus appears to be no justification or valid ground for the said amount having been unjustifiably retained by the respondents. That then takes us to the principal question of whether the refund as claimed in the revised return of 31 March 2015 could have been adjusted against any other tax dues.

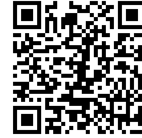
40. Undisputedly, the aforesaid claim for refund stood duly embodied in the revised return filed on 31 March 2015. In terms of the statutory time frame which stands constructed by Section 38(3)(a)(ii) of the DVAT Act, the said amount had become refundable



post 31 May 2015. This since in terms of that provision the refund is to be granted within two months after the date on which the return was furnished or the claim for refund was made. It is also not the case of the respondents that during the period between 31 March 2015 and 31 May 2015 any notices referable to Section 58 or 59 of the DVAT Act had come to be issued against the petitioner.

41. The respondents also cannot possibly seek to justify the retention of the refund claim on account of the default assessment notices which were issued on 15 May 2014 and 07 June 2014. This since the petitioner had duly filed objections before the OHA and in terms of Section 35(2) of the DVAT Act, and the demand as raised in terms thereof could not have been enforced.

42. We note that Section 38(2) of the DVAT Act uses the expression *"recovery of any other amount due under this Act"*. The Commissioner in terms of Section 38(2) is thus entitled to apply any amount found to have been paid by an assessee in excess of the amount due from him before making a refund only if there exists an enforceable demand against that assessee. As is manifest on a conjoint reading of Section 35(2) and 38(2) of the DVAT Act, as long as objections remain pending with the OHA, any amount claimed by the respondents would clearly not answer the description of an amount due or payable as contemplated under Section 38(2). This is also evident from the exposition of the legal position in *Bhupendra Auto International.*



43. Insofar as this aspect is concerned, the respondents could not have justifiably harbored even a vestige of a doubt in light of their own Circular date 10 August 2011 which is reproduced hereinbelow: -

"GOVERNMENT OF NCT OF DELHI DEPARTMENT OF TRADE AND TAXES (POLICY BRANCH) VYAPAR BHAWAN, I.P. ESTATE, NEW DELHI-110002

F.No.6(87)/Policy/VAT/2011/440-445 Dated: 10.08.2011

CIRCULAR NO. 6 OF 2011-12

Subject: Disposal of objections filed under Section 74 of DVAT Act, 2004

On filing the objections against the notice of demand/assessment, the demand so created under assessment or otherwise get stayed by virtue of Section 35(2) of DVAT Act, 2004, and demand gets locked up till the disposal of the objections.

In order to safeguard the interest of revenue and dealers, the Commissioner (VAT) has advised that the objection Hearing Authority should adhere to the time limit of 03 months as provided in Section 74(7) of DVAT Act, 2004.

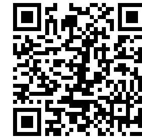
This issues with prior approval of the Commissioner, Value Added Tax.

(G.C. Lohani)
VATO (Policy)

No.F.6(87)/Policy/VAT/2011/440-445 Dated: 10.08.2011

Copy to:-

1. PS to the Commissioner, Value Added Tax, Department of Trade and Taxes. Vyapar Bhawan, I.P. Estate, New Delhi.
2. All Special/Addl./Joint Commissioners, Department of Trade and Taxes, Vyapar Bhawan, I.P. Estate, New Delhi.
3. Dy. Director (Policy) Department of Trade and Taxes.
4. Manager (EDP), Department of Trade and Taxes, with the request to upload the circular on the website of the department.

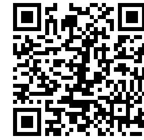


5. President, Sales Tax Bar Association (Regd.), Vyapar Bhawan, I.P. Estate, New Delhi.
6. Guard File.

(G.C. Lohani)
VATO (Policy)"

44. Before concluding, we note that the respondents clearly appear to have acted arbitrarily in making numerous adjustments post 31 May 2015 and thus illegally depriving the petitioner of the refund as claimed. The various adjustments clearly appear to have been made even though objections before the OHA had been duly lodged online by the petitioner. The respondents thus clearly appear to have acted contrary to the clear mandate of Section 38 of the DVAT Act.

45. As would be evident from the refund order of 03 December 2018, an amount of Rs. 10,74,67,218/- came to be adjusted against the refund claim of Rs. 11,40,97,349/-. We find from the record that the objections submitted by the petitioner for FY 2012-2013 and April 2013 to December 2013 had already been allowed by the OHA on 08 November 2016. Pursuant to that order remitting the matter to the assessing authority, reassessment orders for FY 2012-2013 resulting in a revised demand of Rs. 4,92,09,468/- came to be raised vide separate orders passed between 23 August 2017 to 15 November 2017. Similarly, reassessment orders for the period April 2013 to March 2014 resulting in the creation of a fresh demand of Rs. 4,05,72,968/- came to be raised vide separate orders passed between 23 November 2017 to 28 November 2017. Against the said reassessment orders, the petitioner had filed objections before the OHA on 16 October 2017, 14 December 2017, 15 December 2017 and



15 January 2018. The filing of these objections is not disputed by the respondents. In fact, all the twenty-four objections filed for the aforenoted periods had ultimately come to be disposed of by the OHA in terms of its order of 31 October 2019.

46. There thus existed no justification for the respondents adjusting the sum of Rs. 10,74,67,218/- on 03 December 2018. This since evidently the objections were yet to be disposed of by the OHA on that date. We thus find ourselves unable to sustain the stand as taken by the respondents and observe that they clearly acted in flagrant violation of the mandate of Section 38 of the DVAT Act. The writ petitioner is thus entitled to the grant of the writs as prayed for.

47. The writ petition is accordingly allowed. The impugned order dated 31 May 2022 is hereby quashed. The respondents are consequently directed to refund the amount of Rs. 6,62,74,405/- along with interest from the date it fell due bearing in mind the observations made hereinabove. The refund be effected within a period of three weeks from the date of this decision.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

AUGUST 21, 2023
bh/SU