THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 03.06.2010

\+ **WP(C) 3817/2010**

SWARN DARSHAN IMPEX (P) LTD ... Petitioner

– versus –

COMMISISONER, VALUE ADDED TAX & ANR ... Respondents

Advocates who appeared in this case:-
For the Petitioners : Mr O. S. Bajpai, Sr Advocate with Mr Ruchir Bhatia
For the Respondents : Mr H. L. Taneja

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE V.K. JAIN

1. Whether Reporters of local papers may be allowed to see the judgment ? Yes
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in Digest ? Yes

BADAR DURREZ AHMED, J (ORAL)

1. In this writ petition, *inter alia*, the following reliefs have been prayed for :-

> "(i) Issue a writ of mandamus or any other writ, order or direction in the nature thereof directing the respondents to refund the amount of Rs 41,89,487/- due to the petitioner along with interest thereon forthwith;
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> (ii) Issue a writ of certiorari or any other writ, order or direction quashing the impugned notice dated 09.04.2010 under Section 58A for Special Audit;
>
> (iii) Issue a writ of mandamus or any other writ, order or direction in the nature thereof directing the respondents to release the documents/ records seized by way of illegal search.

Mr Bajpai, the learned senior counsel appearing on behalf of the petitioner, at the outset, stated that in this writ petition he would be limiting his submissions to prayer (i) above and that he seeks liberty to raise the issues concerning prayers (ii) and (iii) by way of a separate proceeding. We grant him that liberty.

2. The petitioner is engaged in the business of trading in mobile phones and is registered with the Trade and Taxes Department since 2000. As per the provisions of the Delhi Value Added Tax Act, 2004 (hereinafter referred to as 'the said Act'), the petitioner has been paying taxes in terms of the said Act. The tax paid by making local purchases is the input tax which is either to be adjusted against the tax liability or allowed to be claimed as a refund if the output tax liability is less than the input tax so paid. In view of the aforesaid nature of transactions, the petitioner, for the year 2008-2009 was entitled to refunds in terms of the quarterly returns filed by it under the self-assessment procedure. The entitlement of refunds, as per the petitioner in respect of the three quarters, which are the subject matter of this writ petition, are as under:-

Period	Amount of refund
01.07.2008 to 30.09.2008	Rs 12,99,718/-
01.10.2008 to 31.12.2008	Rs 15,54,232/-
01.01.2009 to 31.03.2009	Rs 13,35,537/-

3. Section 38 of the said Act reads as under:-

"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 Central Sales 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 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 fifteen days from the date on which the return was furnished or claim for the refund was made.

(6) The Commissioner shall grant refund within fifteen 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, 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."

Based upon the said provisions of Section 38, the learned counsel for the petitioner submitted that the refunds were required to be paid to the petitioner within two months of the respective dates of filing of the quarterly returns. According to the petitioner, the refunds ought to have been issued as per the table given below:-

Period	Date of filing the return	Due date for issuance of refund
01.07.2008to 30.09.2008	03.11.2008	02.01.2009
01.10.2008 to 31.12.2008	27.01.2009	26.03.2009
01.01.2009 to 31.03.2009	28.04.2009	27.06.2009

4. We have heard the learned counsel for the petitioner as well as the learned counsel appearing for the respondents. Mr Taneja, who appears on behalf of the respondents, had, on 31.05.2010 taken time to take instructions with regard to the refunds applied for by the petitioner. Today, he states that the first claim of refund of Rs 12,99,718/- would be paid to the petitioner subject to the petitioner furnishing balance security in addition to the security of Rs 5 lacs already furnished by the petitioner. Insofar as the refund of Rs 15,54,232/- is concerned, Mr Taneja submitted that a notice for producing documents under Section 59 of the said Act had been issued on 09.06.2009 to the petitioner which has remained unanswered and, therefore,

there was no question of granting that refund until and unless the petitioner furnished the requisitioned documents. Mr Taneja also submitted that in view of the fact that additional information was sought under Section 59 of the said Act, by virtue of Section 38(4) thereof, the amount of the refund of Rs 15,54,232/- is to be carried forward to the next tax period as a tax credit in that period. Lastly, with regard to the third refund amounting to Rs 13,35,537/-, Mr Taneja submitted that the refund claim is yet to be examined and until that is done, the payment cannot be made. Mr Taneja also submitted generally in respect of all the three claims that the period of two months specified in Section 38(3) and the period of fifteen days mentioned in Section 38(5) of the said Act were merely directory and not mandatory. Mr Taneja also referred to a decision of this Court in the case of ***Commissioner of Sales Tax v. Behl Construction***: ***[(2009) 21 VST 261 (Delhi) = 2009 (162) ECR 110 (Delhi)***] in support of his submission.

5. A plain reading of Section 38, which deals with refunds, makes it clear that by virtue of sub-section (3) thereof, in the case where a person is assessed quarterly, the refund is to be made to the dealer within two months after the date on which the return is furnished or the claim for the refund is made. Of course, it is the dealer's option to elect as to whether the refund is to be made in cash or the said amount is to be carried forward to the next tax period as a tax credit in that period. In the present case, the petitioner has elected for the grant of refunds in cash and has not elected for carrying forward the refund amount to the next tax period. The provisions of Section

38(3) uses the expression "shall" and, therefore, it is clear that the refund has to be made within two months from the date of the return.

6. At this point, it would be appropriate to deal with the submission made by Mr Taneja that the period prescribed in Section 38(3) as also the period prescribed in Section 38(5) of the said Act were merely directory and not mandatory. For this proposition, as pointed out earlier, Mr Taneja placed reliance on a decision of this court in the case of ***Behl Construction*** *(supra)*. We may say straightaway that the decision in ***Behl Construction*** *(supra)* is clearly distinguishable and would not come to the aid of Mr Taneja's submission. ***Behl Construction*** *(supra)* was, first of all, not concerned with the provisions of Section 38 of the said Act, but related to the provisions of Section 74 of the said Act which deals with the objections which an assessee could make against an assessment, order or decision before the Commissioner. Section 74(7) prescribed the period during which the Commissioner was to render his decision either accepting or rejecting the objection by serving on the person objecting, a notice in writing of the decision and the reasons for it. There were two provisos to Section 74(7) of the said Act which permitted extension of time during which the Commissioner could render his decision under Section 74(7). Section 74(7) reads as under:-

> "(7) Within three months after the receipt of the objection, the Commissioner shall either
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> (a) accept the objection in whole or in part and take appropriate action to give effect to the acceptance (including the remission of any penalty assessed either in whole or in part);

or

(b) refuse the objection or the remainder of the objection, as the case may be;

> and in either case, serve on the person objecting, a notice in writing of the decision and the reasons for it, including a statement of the evidence on which it is based:
>
> PROVIDED that where the Commissioner within three months of the making of the objection notifies the person in writing, he may continue to consider the objection for a further period of two months:
>
> PROVIDED FURTHER that the person may, in writing, request the Commissioner to delay considering the objection for a period of up to three months for the proper preparation of its position, in which case the period of the adjournment shall not be counted towards the period by which the Commissioner shall reach his decision."

7. One of the arguments raised in ***Behl Construction*** *(supra)* was that the provisions of Section 74(7) of the said Act were directory and not mandatory. This court agreed with that submission on a consideration of the provisions of Section 74(7) in conjunction with the provisions of sub-sections (8) and (9) of Section 74 which read as under:-

> "(8) Where the Commissioner has not notified the person of his decision within the time specified under sub-section (7) of this section, the person may serve a written notice requiring him to make a decision within fifteen days.
>
> (9) If the decision has not been made by the end of the period of fifteen days after being given the notice referred to in sub-section (8) of this section, then, at the end of that period, the Commissioner shall be deemed to have allowed the objection."

8. While construing the said provisions, in order to decide the issue as to whether the provisions of Section 74(7) were directory and not mandatory, this court examined several decisions of the Supreme Court, including the Constitution Bench decision in the case of ***Bhikraj Jaipuria v. Union of India:*** **(1962) 2 SCR 880**. In ***Bhikraj Jaipuria*** *(supra)*, the Supreme Court observed that where a statute requires that a thing shall be done in the prescribed manner or form but does not set out the consequences of non-compliance, the question whether the provision was mandatory or directory has to be adjudged in the light of the intention of the legislature as disclosed by the object, purpose and scope of the statute. The Supreme Court referred to *Maxwell on Interpretation of Statutes*, 10th Edn., p. 376, wherein it was noted that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. The Supreme Court in ***Bhikraj Jaipuria*** *(supra)* also noted the following observations in the said work:-

> "… It may perhaps be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded."

In ***Bhikraj Jaipuria*** *(supra)*, the Supreme Court also noted the following observations of Lord Campbell in *Liverpool Borough Bank* v. *Turner* [(1861) 30 LJ Ch 379]:-

> "No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

9. Thus, whether a provision is mandatory or directory, has to be gathered from the real intention of the legislature and after examining the scope and purpose of the statute and no hard and fast rule can be laid down for such a determination. Consequently, the fact that the word "shall" as appearing in Section 74(7) was taken to be directory and not mandatory in ***Behl Construction*** *(supra)*, does not *ipso facto* mean that the word "shall" as appearing in Section 38(1) and 38(3), also ought to be construed as being merely directory. The provisions of Section 74 and those of Section 38 operate in entirely different fields and deal with different situations. The legislative intent that is discernible in respect of Section 74(7), in the context of its related provisions, does not necessarily mean that the same legislative intent ought to be applied to the provisions of Section 38. In ***Behl Construction*** *(supra)*, this court had observed that:-

> "8. In sub-sections (8) and (9) of section 74, the legislature has provided for the situation where the commissioner does not dispose of the objections during the applicable period. This, in itself, is indicative of the fact that the legislature was mindful of such a situation and that

> the mere passage of the applicable period without the commissioner disposing the objections one way or the other did not mean that the objections could be deemed to have been accepted or allowed. For this to happen, something more is required and that is exactly what is stipulated in sub-sections (8) and (9). In sub-section (8) it is provided that where the Commissioner has not notified the objector of his decision within the time specified under sub-section (7) (ie., the applicable period), the objector may serve a written notice requiring him to make a decision within fifteen days. And, by virtue of sub-section (9), if the decision is not made by the end of the period of fifteen days after being given the notice referred to in sub-section (8), then, at the end of that period, the Commissioner shall be deemed to have allowed the objection. So, the deeming fiction of sub-section (9) gets triggered only if a notice as stipulated in sub-section (8) is given and the period of fifteen days specified therein expires without any decision from the commissioner. Not otherwise. This is the clear legislative intendment which we can gather upon a plain reading of the provisions of sub-sections (7), (8) and (9) of section 74 of the said Act."

10. Such a situation does not arise in the present case inasmuch as the provisions of Section 38 do not contemplate a situation where the Commissioner does not grant a refund within the stipulated period. The decision in ***Behl Construction*** *(supra)* was in the context of the provisions of Section 74 and those circumstances do not arise in the present case. As pointed out above, what this court has to determine is: what is the legislative intent behind the provisions of Section 38? It is this intent which shall determine whether the stipulations as to time are merely directory or they are mandatory as suggested by the use of the word "shall". On going through all the sub-sections of Section 38 of the said Act, the legislative intent that is clearly discernible is that refunds must be granted to a person entitled within the specific time period stipulated in sub-section (3) thereof.

This intention is further fortified by a look at the provisions of sub-section (7) of Section 38 which stipulates that for calculating the period prescribed in clause (a) of sub-section (3), the time taken to furnish the security under sub-section (5) to the satisfaction of the Commissioner or to furnish the additional information sought under Section 59 or to furnish returns under Sections 26 and 27, "shall be excluded". This provision as to exclusion of time taken in doing the aforesaid acts, is in itself an indication that the legislature was dead serious about the stipulation as to time for making refunds under Section 38 (3) of the said Act. For, if the legislative intent were not so, what was the need or necessity for providing for exclusion of time? Thus, not only do the provisions of Section 38 employ the word "shall", which is usual in mandatory provisions, the legislative intendment discernible from the said provisions also points towards the mandatory nature of the said provisions. Clearly, subject to the exclusion of time provided under sub-section (7) or Section 38, in a case falling under Section 38(3)(a)(ii), the refund has to be made within two months from the date of the return.

11. In the present case, as would be apparent from the tables given above, the first refund was in respect of the return filed on 03.11.2008 and, therefore, in view of Section 38(3), the refund ought to have been made by 02.01.2009. Furthermore, in view of the provisions of Section 38(5), the Commissioner, as a condition of payment of a refund, could demand security from the person within 15 days from the date on which the return was furnished or claim for refund was made. Thus, in the case of the first

refund, the return having been filed on 03.11.2008, the Commissioner could have demanded security from the petitioner by 18.11.2008, that is, within 15 days from the date on which the return was furnished. That was not done. However, the learned counsel for the petitioner informs us that an oral request was made for furnishing a security of Rs 5 lacs much beyond this period and that too has been complied with, as would be apparent from a copy of the letter dated 20.08.2009 (Annexure-I) written by the petitioner's advocate to the Value Added Tax Officer. The said letter clearly indicates that a surety bond of Rs 5 lacs duly executed by M/s M.S.A Exports, who was a registered dealer of Ward-61, has been furnished as directed by the said officer as a condition for release of refund of the said amount of Rs 12,99,718/- for the period 01.07.2008 to 30.09.2008. Despite the said security being furnished, the refund has not been paid by the respondents. And, now, Mr Taneja submits that he has instructions that the said amount would be released to the petitioner on the furnishing of a security for the balance amount. In this regard, we may observe that in the first instance, the requirement of furnishing any security should have been made within 15 days of the filing of the return, that is, by 18.11.2008 inasmuch as the return had been filed on 03.11.2008. That was not done. In fact, there is no formal demand of security from the petitioner at all. The requirement of furnishing the security of Rs 5 lacs was only on the basis of an oral request which was also complied with by the petitioner. Consequently, there is no question of the refund of Rs 12,99,718/- being withheld on the ground that the petitioner should furnish security for the balance amount. The said

refund had become due for payment by operation of the provisions of Section 38(3) of the said Act latest by 02.01.2009. That has not been done. We are clearly of the view that the petitioner is entitled to payment of the refund of the said amount of Rs 12,99,718/- forthwith along with interest thereon to be calculated in terms of Section 42 of the said Act.

12. We now come to the second claim of refund of Rs 15,54,232/-. We find that Mr Taneja has taken the plea that a notice under Section 59 had been issued to the petitioner on 09.06.2009 which has gone unanswered and it is because of this that the refund payment has not been made. First of all, we may point out that the learned counsel for the petitioner stated that the purported notice dated 09.06.2009 issued under Section 59 for production of documents has not been received by the petitioner. Furthermore, the address given in the notice, a copy of which was shown to the petitioner in Court today, is different from the address of the petitioner as given in the petition. The address given in the petition is F-137, Rajouri Garden, New Delhi. The learned counsel also pointed out that all the communications addressed to the respondents are under a letterhead of the petitioner which bears an address which is the same as that given in the petition. However, the address given in the purported notice dated 09.06.2009 is 201, F-8A, Vijay Block, Laxmi Nagar, Delhi. In fact, even the notice under Section 58A of the said Act, a copy whereof is Annexure-V to this petition, shows the address of the petitioner as F-137, Rajouri

Garden, New Delhi. Thus, it can be safely concluded that the notice was not served upon the petitioner.

13. In any event, even if we assume that the said notice was issued by the respondents and that it had been received by the petitioner, it would not change the position in law. Sub-section (4) of Section 38 has to be read with the provisions of sub-section (3) of Section 38. By virtue of the latter provision, the refund had to be paid to the petitioner within two months from the date of the return furnished by him. No such notice under Section 59 requiring additional information had been issued during that period. Consequently, the subsequent purported issuance of notice under Section 59 cannot be taken as a ground for not paying the refund to the petitioner. In this connection, the provisions of sub-section (7) of Section 38 also needs to be examined. The said provision stipulates that for calculating the period prescribed in Section 38(3)(a), the time taken to, *inter alia*, furnish additional information sought under Section 59 shall be excluded. It is obvious that exclusion can only be when the period of limitation itself has not run out. The consequence of this discussion is that the notice under Section 59 in connection with refund has to be issued within the period of two months stipulated in Section 38(3)(a)(ii). As a result, the submission of the learned counsel for the respondents that because of issuance of notice under Section 59 of the said Act, albeit beyond the prescribed time, the refund was not payable, is not tenable.

14. This leaves us with the third claim of Rs 13,35,537/-. In this regard, we find that the return was filed on 28.04.2009 and the period of two months expired on 27.06.2009. In this case, there was no demand for any security within the period of 15 days, as stipulated in Section 38(5). In fact, there has been no demand for security at all. Furthermore, no notice is even claimed to have been issued under Section 59 in respect of the period of this refund. There is, therefore, absolutely no reason for the respondents to withhold the payment of refund to the petitioner.

15. Consequently, we direct that the above three refunds, which have already become due, shall be paid to the petitioner within four weeks along with interest due thereon to be calculated in terms of the provisions of Section 42 of the said Act.

The writ petition stands allowed to the aforesaid extent.

BADAR DURREZ AHMED, J

V.K. JAIN, J

JUNE 03, 2010
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