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

Reserved on : 09.11.2022
Pronounced on : 29.03.2023

\+ **VAT APPEAL 31/2022**

COMMISSIONER OF TRADE AND TAXES .....Appellant

Through : Mr Rajeev Aggarwal, ASC with Ms Shilpa Singh, Ms Divyanshi Bansal and Ms Shaguftha Hameed, Advocates.

versus

Corsan Corviam Construction S.A.-Sadbhav Engineering Ltd. JV .....Respondent

Through : Mr Rajesh Jain with Mr Virag Tiwari and Mr Ramashish, Advocates.

\+ **WP(C) 11505/2022**

Corsan Corviam Construction S.A.-Sadbhav Engineering Ltd. JV .....Appellant

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Mr Rajesh Jain with Mr Virag Tiwari and Mr Ramashish, Advocates.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE TARA VITASTA GANJU
[Physical Hearing/Hybrid Hearing (as per request)]

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RAJIV SHAKDHER, J.:

Preface:

1. The above-captioned statutory appeal is preferred by the revenue and is directed against the order dated 20.06.2022 passed by the Delhi Value Added Tax Appellate Tribunal, Delhi [hereafter referred to as "Tribunal"]. The Tribunal, *via* order dated 20.06.2022, ruled in favour of the respondent, i.e., Corsan Corviam Construction SA-Sadbhav Engineering Ltd. JV, [hereafter referred to as "the assessee"]. Thereafter, the assessee was impelled to file the above-captioned writ petition, as the order dated 20.06.2022 was not being implemented by the revenue.

2. The two actions, thus, centre around the issue concerning the assessee's claim for interest on an amount which stands already refunded. The assessee claims interest for the period commencing from the date when two months elapsed [which in turn would commence from the date when the return was filed], and running till the date when the refund was paid. This relief is sought by the assessee in terms of the provisions of Section 38(3)(a)(ii) read with Section 42 of the Delhi Value Added Tax Act, 2004 [hereafter referred to as the "2004 Act"].

3. The rate at which interest could possibly be granted, even as per the assessee, would be simple interest at the rate notified by the Government; to

be computed in accordance with the provisions of Section 42 of the 2004 Act.

4. The revenue, on the other hand, claims that since the refund arose in favour of the assessee, pursuant to the order dated 26.08.2019 passed by the Objection Hearing Authority, [in short, "OHA"], the interest would run from the date when a claim for refund is made. The claim for refund, according to the revenue, is required to be made in the prescribed form, i.e., DVAT-21.

5. The foregoing are the broad contours of the issue that arises for consideration.

6. However, for determining the issue at hand, the following facts are required to be noticed:

i) The assessee filed its revised return on 10.07.2015 for the fourth quarter of the Financial Year (FY) 2014-15 [hereafter referred to as the "relevant tax period"].

ii) Since the assessee's tax period arises every quarter, in terms of Section 38(3)(a)(ii), in the ordinary course, it would be entitled to the refund within two months after the date on which the return was furnished, which, as indicated above, was filed on 10.07.2015. Therefore, the two-month period would end on 10.09.2015.

iii) The assessee was refunded Rs. 1,25,60,785/- for the relevant tax period on 14.08.2020, in Form DVAT-22.

(iv) The notified rate of interest, we were informed, is 6% (simple) per annum.

(v) The assessee was issued a notice under Section 59(2) of the 2004 Act, calling upon it to submit the relevant records on 11.09.2015, i.e., after the expiry of two months from the date of furnishing the return, as prescribed

under Section 38(3)(a)(ii) of the 2004 Act.

vi) The assessee did not elect for having the amount claimed as a refund in the return to be carried forward to the next tax period as a tax credit; which was an option available under Section 38(3)(b) of the 2004 Act.

vii) The assessee, while filing its revised return on 10.07.2015, had claimed a larger amount as the refund, i.e., Rs. 2,56,57,120/- in terms of Section 38 of the 2004 Act.

viii) A notice of default assessment of tax and interest [hereafter referred to as "notice of default assessment"] was issued for the relevant tax period under Section 32 of the 2004 Act on 02.08.2017, raising a demand amounting to Rs. 1,25,60,785/-.

ix) It is in this context that the Commissioner of Trade and Taxes, *via* order dated 25.08.2017, granted the assessee a partial refund out of the amount claimed in the return, after adjusting the amount set forth in the notice of default assessment issued under Section 32 of the 2004 Act. Consequently, the assessee was issued a refund order restricted to Rs 1,30,96,335/-.

x) Since the order dated 25.08.2017 did not direct payment of interest on Rs. 1,30,96,335/-, the assessee was constrained to approach this Court *via* a writ action, i.e., W.P. (C) 12876/2018. This Court disposed of the writ petition on 22.07.2019, and while doing so, held that the assessee was entitled to interest for the period spanning between 11.09.2015 and 14.09.2017, in terms of Section 42 of the 2004 Act, read with Rules 34 and 36 of the Delhi Value Added Tax Rules, 2005 [hereafter referred to as the "2005 Rules"].

xi) The Court *via* the very same order had fixed an end date by which interest was required to be paid, *albeit* with a caveat that if it was not paid by

the given date, compensatory cost amounting to Rs. 50,000/- would also have to be forked out. The end date fixed was 16.08.2019.

(xii) Notably, on the partial refund amounting to Rs. 1,30,96,335/- remitted to the assessee, the revenue in consonance with the aforementioned order of the High Court, paid Rs. 15,82,874/- as interest to the assessee.

(xii)(a) This aspect of the record has been brought to the fore to highlight the fact that insofar as the partial refund was concerned, the Court applied the statutory principle outlined in Section 42 of the 2004 Act and Rules 34 and 36 of the 2005 Rules.

7. The remaining refund i.e., Rs.1,25,60,785/-, which, as indicated above, stands already paid, followed the following trajectory.

(i) Against the notice of default assessment dated 02.08.2017, the assessee filed objections before the OHA on 09.10.2017. These objections were allowed by the OHA on 26.08.2019.

(ii) Since once again there was procrastination in refunding the amount, the assessee instituted a writ action in this Court, i.e., W.P. (C)11040/2019. This court *via* order dated 18.10.2019 disposed of the writ petition with a direction to the revenue to decide the petitioner's refund claim within eight (8) weeks.

(iii) Before eight (8) weeks could come to an end, the OHA initiated a *suo moto* review of the proceedings. The OHA ruled in favour of the assessee. Resultantly, the assessing authority passed a consequential order reducing the demand raised on 02.08.2017 to "nil". This order was passed on 06.12.2019. The order also directed the assessee to claim the refund *via* the prescribed form, i.e., DVAT 21, in terms of Rule 34(4) of the 2005 Rules.

(iv) Apparently, the assessee did file an application in Form DVAT-21

for the refund of Rs. 1,25,60,785/-, *albeit* manually on 16.03.2020. Because there was a delay, once again, in remitting the amount, the assessee instituted a writ petition, i.e., W.P. (C) 5260/2020.

(v) During the pendency of the said writ petition on 14.08.2020, revenue issued a refund order, sans interest, amounting to Rs. 1,25,60,785. The assessee attempted to keep the writ alive, since it had not obtained the entire relief as sought in the writ action. However, the writ petition was disposed of on 20.08.2020, having regard to the fact that the assessee had an efficacious alternate remedy available to it under the 2004 Act.

(vi) Thus, liberty was given to the assessee to take recourse to an appeal/objection *qua* the direction contained in the order dated 14.08.2020, whereby revenue had declined grant of interest. Accordingly, on 02.08.2021, the assessee filed its objections against the order dated 14.08.2020 passed by the OHA. The objections filed by the assessee were dismissed on 23.09.2021 by the Special Commissioner.

(vii) The Special Commissioner was of the view that interest could not be granted to the assessee as it had not claimed the refund *via* the prescribed form, i.e., Form DVAT-21, as required under Rule 34(4) of the 2005 Rules.

(viii) Being aggrieved, the assessee preferred an appeal with the Tribunal. The Tribunal, *via* the impugned order dated 20.06.2022, allowed the appeal and held that the assessee was entitled to interest commencing from 11.09.2015 till the date of receipt of the refund amount, i.e., 14.08.2020.

8. It is in this context, as noticed at the very beginning of the narration, that two cross-actions have been lodged in this Court. The revenue has preferred the above-captioned appeal against the Tribunal's order dated 20.06.2022, while the assessee's writ action, which is a mirror image of the

revenue's appeal, seeks implementation of the Tribunal's order dated 20.06.2022.

9. It is against this backdrop that the following questions of law were framed in the revenue's appeal by a Coordinate Bench of this Court.

> *"I. Whether the Ld. Tribunal in the impugned order failed to comply with the statutory intent and purport of Section 38 of the DVAT Act read with sub-rule (4) to Rule 34 of the DVAT Rules, 2005?*
>
> *II. In case a refund arises in favour of the Assessee pursuant to an Order passed by the OHA/Special Commissioner under the DVAT Act, whether such an Assessee for the purpose of claiming such refund is not mandatorily required to follow the provisions of sub-rule (4) to Rule 34 of the DVAT Rules and thereby need not file a fresh Claim for refund in form DVAT-21 along with a certified copy of such Order passed by the OHA/Special Commissioner?*
>
> *III. Whether the Ld. Tribunal was right in not following the view taken by it qua a similar matter?"*

Submissions of the Counsel:

10. Arguments on behalf of the revenue were advanced by Mr Rajeev Agarwal, while arguments on behalf of the assessee were put forth by Mr. Rajesh Jain.

11. Broadly, Mr Agarwal made the following submissions:

(i) First, since the refund order, whereby Rs. 1,25,65,785/- was paid to the assessee, arose in favour of the assessee out of the OHA's order dated 26.08.2019, the assessee had rightly been directed to file a claim in that behalf in the prescribed form, i.e., DVAT-21. The logical sequitur of this factual position would be that interest would accrue to the assessee after the expiry of two (2) months commencing from the date when a claim is lodged in the prescribed form, i.e., Form DVAT-21. In support of this plea, reference was made to the provisions of Section 38(3)(a)(ii) of the 2004 Act

and Rule 34(1) and (4) of the 2005 Rules. To emphasize the submission made that refund arose out of the order dated 26.08.2019 passed by OHA, reliance was placed on the Supreme Court judgement rendered in ***E.D. Sassoon & Co. Ltd. v. CIT,*** AIR 1954 SC 470.

(ii) Second, a claim for refund is not a constitutional right; it is a statutory right, and hence would require strict compliance with the provisions contained in the Statute and the Rules framed thereunder.

(iii) Third, the assessee had, in fact, claimed the refund by lodging its claim in the prescribed form, i.e., DVAT-21, *albeit* on 16.03.2020, and therefore interest would run after the expiry of two months from the said date.

(iv) The Tribunal has taken a contrary view to the one taken in the impugned order. In this regard, reference was made to the order dated 09.03.2022, passed in Appeal No. 332/ATVAT/2021, titled ***M/s. Gupta Traders v. Commissioner of Trade and Taxes, Delhi.***

12. Mr Rajesh Jain, after taking us through the history of the case, something which has been broadly captured hereinabove, reiterated the submissions made before the Tribunal. It was emphasized that the assessee had claimed the refund in the revised return filed on 10.07.2015. While a part of the refund was allowed on 25.08.2017, the remaining amount was withheld due to a notice of default assessment issued on 02.08.2017.

12.1 The fact that the notice of default assessment was untenable in law came to the fore with the OHA passing the order dated 26.08.2019, which was given effect on 06.12.2019 by the assessing authority. This, however, did not efface the fact that the assessee had claimed interest in its return on the entire amount, i.e., Rs.2,56,57,120/-. Because no notice either under

Section 58 or Section 59 had been issued, the assessee was entitled to the refund after the expiry of two months, commencing from the date when the revised return was filed. Two months from that date came to an end on 10.07.2015 and therefore, the notice issued on 11.09.2015 could have had no legal impact on the trigger date stipulated for the grant of refund in Section 38(3)(a)(ii) of the 2004 Act.

12.2 In support of this plea, reliance was placed on the following Judgements:

(i) ***Swarn Darshan Impex (P) Ltd. V. Commissioner, Value Added Tax and Anr,*** 2010 SCC OnLine Del 4697

(ii) ***IJM Madras Corporation Berhad and others v Commissioner of Trade and Taxes,*** 2017 SCC OnLine Del 11864.

12.3 Furthermore, the date when interest had to accrue to the assessee was frozen by this Court when it disposed of WP(C) 12876/2020 *via* the order dated 22.07.2019. In this order, the Court made it clear that on Rs.1,30,96,335/-, the assessee would be entitled to interest for the period spanning between 11.09.2015 and 14.09.2017. The fact that revenue complied with this direction of the Court supports the submission that the period for calculating interest would get triggered from 11.09.2015.

12.4 The demand raised on 02.08.2017, amounting to Rs.1,25,60,785/- *qua* the relevant tax period, was wrongly adjusted on 25.08.2017, without following the procedure for recovery provided in Section 43(6) of the 2004 Act. The revenue was not only required to follow the process outlined in the said provision, but was also required to issue a certificate in the prescribed form, i.e., DVAT 25, as per the provisions of Rule 37(3) of the 2005 Rules.

12.5 Although revenue could not have adjusted Rs.1,25,60,785/- by taking

recourse to the provisions of Section 38(2) and Rule 34(5), a perusal of the adjustment order dated 25.08.2017 would show that the refund became due on 11.09.2015, the order of adjustment otherwise being non-est in law.

12.6 Upon the OHA allowing the objections of the assessee filed under Section 74(1) of the 2004 Act against the notice of default assessment dated 02.08.2017, issued under Section 32 of the 2004 Act—self-assessment made by the assessee *via* revised return under Section 31 of the 2004 Act, came to life. In other words, the refund did not arise out of the order dated 26.08.2019; it only removed the veil that had been illegally placed on the claim for refund.

12.7 Any assessment order passed under Section 32 of the 2004 Act cannot become the basis for recovery/adjustment under Section 38(2) read with Rule 34(5) of the 2005 Rules. [See ***ITD-ITD CEM JV v Commissioner of Trade and Taxes,*** (2021) 86 GSTR 105 (Del); Para 19 and 23.]

12.8 Rule 34(4) comes into play only when a refund arises from an order passed by the OHA. Since the assessee had claimed the refund *via* its revised return filed on 10.07.2015, it was not required to claim the refund by filing form DVAT-21. Importantly, neither the notice of default assessment dated 2.08.2017 issued under Section 32 of the 2004 Act, nor the OHA's order dated 26.08.2019, advert to the issue concerning interest. The OHA's order confined itself to the demand of tax, which was pegged at Rs.1,25,60,785/-. Therefore, for the revenue to contend that the refund arose out of the OHA's order dated 26.08.2019 is misconceived.

12.9 Resultantly, Rule 34(4) of the 2005 Rules would have no application. The assessee was not obliged to lodge its claim for refund in Form DVAT-21. The contents of Form DVAT-21 clearly suggest that the said

form is not required to be filed in those cases where the refund is embedded in the assessee's return. [See ***Commissioner of Income Tax, Bombay v. Scindia Steam Navigation Co. Ltd,*** (1962) 1 SCR 788, ***T.D. Kumar and Brothers (P) Ltd. v. Commissioner of Income Tax, Calcutta,*** (1967) 63 ITR 67 and ***Commercial Taxes Officer, Special Circle I, Jaipur v. Badri Narain Sita Ram and Another,*** 1979 SCC OnLine Raj 238].

12.10 Even in cases where proceedings are pending and refund is withheld in the exercise of powers conferred under Section 39 of the 2004 Act, on the grounds mentioned therein, the assessee would be entitled to interest as provided in Section 42(1), if, as a result of an order passed in appeal or any other proceedings, the assessee becomes entitled to a refund. [See ***Ranbaxy Laboratories v. Union of India,*** (2011)10 SCC 292 (Paras 13 and 19)].

Reasons and Analysis:

13. We have heard the learned counsel for the parties and perused the record. The following broad facts, as noticed above, are not in dispute:

(i) The revised return was filed on 10.07.2015. In the revised return, the assessee claimed a refund amounting to Rs.2,56,57,120/-.

(ii) *Via* order dated 25.08.2017, the revenue granted partial interest to the assessee, after adjusting Rs.1,25,60,785/- out of Rs.2,56,57,120/-. Thus, at this stage, the refund was confined to Rs.1,30,96,335/-.

(iii) The adjustment of Rs.1,25,60,785/- was made as notice of default assessment dated 02.08.2017 had been issued which was, however, set aside by the OHA *via* order dated 26.08.2019.

14. Given this situation, what one requires to examine is: whether the assessee's right to interest fructifies immediately, upon the expiry of the

period prescribed under Section 38(3)(a)(ii) of the 2004 Act. The relevant part of the said provision, for the sake of convenience, is extracted hereafter:

> *"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 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)."*

14.1 Clearly, a plain reading of the said provision would show that subject to other provisions of the very same Section and the Rules, the Commissioner is obliged to refund the tax, penalty and interest, if any, paid by an assessee, which is more than the amount due from it. Furthermore, before ordering a refund, the Commissioner is empowered to apply the excess amount towards the recovery of any other amount, *inter alia*, due under the 2004 Act. The assessee/dealer, on the other hand, is given the right

to elect whether it would receive the refund or have it carried forward to the next tax period as a tax credit.

14.2 In those cases where the assessee/dealer elects to recover the refund, interest accrues in favour of the assessee/dealer depending on the tax period for which the refund is claimed. For assesses/dealers, where the tax period for claiming the refund is one month, interest would accrue from the date one month elapses after the date of filing of the return or the date when the claim for refund is lodged. Where, however, the assessee/dealer's tax period for claiming the refund is a quarter, interest accrues two months after the return is filed or a claim for refund is made. [See Section 38(3)(a)(i)&(ii)].

14.3 Sub-section (4) of Section 38 makes it amply clear that if a notice is issued under Section 58 or additional information is sought under Section 59 of the 2004 Act, the refund will be carried forward to the next tax period as a tax credit.

14.4 Sub-section (5) of Section 38 vests discretion in the Commissioner to grant the refund against security, pursuant to powers conferred on him under Section 25 of the 2004 Act*, albeit* within forty five (45) days from the date on which the return is furnished or claim for refund is made.

14.5 Once security is furnished by the assessee/dealer, to the satisfaction of the commissioner, the refund is required to be granted within fifteen (15) days.

15. It is crystal clear that strict timelines have been set forth in the 2004 Act for the grant of refund. In the instant matter, since the revised return was filed on 10.07.2015, the refund in terms of Section 38(3)(a)(ii) of the 2004 Act accrued in favour of the assessee on 10.09.2015. Admittedly, the notice under Section 59(2) of the 2004 Act seeking additional information

was issued only thereafter, i.e., 11.09.2015. This notice led to the issuance of the notice of default assessment dated 02.08.2017, giving rise to a demand amounting to Rs.1,25,60,785/- *via* order dated 02.08.2017; which was, ultimately, set aside by the OHA *via* order dated 26.08.2019. Rule 34(4), which is invoked by the revenue, has no application to the instant case, as is evident upon a plain reading of Sub-rule (1) and (4) of the said Rule. For the sake of convenience, the said provisions are set forth hereafter.

> *" 34 Refund of excess*
> ***(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 may, for reasons to be recorded in writing, issue notice to any person claiming refund to furnish security under sub-section (5) of section 38 in Form DVAT 21A, of an amount not exceeding the amount of refund claimed, specifying therein the reasons for prescribing the security.*
> ***(4) Where the refund is arising out of a judgement 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 judgement 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 subsection (2) of section 38).*
> *(5A) The order for withholding of refund/furnishing security under section 39 shall be issued in Form DVAT-22A.*
> *(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."*
>
> [Emphasis is ours]

16. Clearly Sub-rule (1) of Rule 34 requires the lodgement of a claim for the refund for tax, penalty or interest paid in excess of the amount due under the

2004 Act in Form DVAT-21, save and except where a claim is made in the return itself. The instant case is one where a claim for the refund was made in the revised return. Likewise, Sub-rule (4) of Rule 34 would have no application as this provision alludes to lodgement of a claim for refund in form DVAT-21, where a refund arises out of a judgement of a court or an order of the authority constituted under the 2004 Act.

17. A perusal of the order dated 26.08.2019 shows that the OHA only examined the sustainability of the demand raised under Section 32 of the 2004 Act. The OHA found that the demand was not sustainable and, accordingly, set it aside.

17.1 The OHA, in a brief order, concluded that ITC was wrongly denied to the assessee, i.e., the objector, since it had in its possession valid tax invoices and there was no dissonance in the 2A-2B mismatch report of the purchasing and selling dealer. OHA noted that the "*Assessing authority in the assessment order has not brought any material to prove collusion between purchasing dealer and selling dealer and also [did] not invoked [sic: invoke] Section 40A of the DVAT Act*". Accordingly, the assessee's objections were accepted and the impugned order dated 02.08.2017 passed under Section 32 of the 2004 Act was set aside.

17.2 Liberty was also given to the AO to initiate suitable proceedings under the 2004 Act/2005 Rules against the assessee if there was any material to invoke Section 40A of the 2004 Act, subject to the limitation period prescribed in the 2004 Act.

17.3 Broadly, Section 40A deals with a situation where two or more persons or dealers arrive at an arrangement which the Commissioner is satisfied has been entered into to defeat the application or the purpose or any

provision of the 2004 Act. In such a situation, the Commissioner can not only declare the arrangement null and void as regards the application and purpose of the 2004 Act, but is also empowered to provide for an increase or decrease in the amount of tax payable by any person or dealer who is affected by the arrangement, whether or not such dealer or person is a party to the arrangement, *albeit* in such a manner as is considered appropriate, to counteract any tax advantage obtained by the dealer from or under the arrangement.

18. 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."*

19. 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.

20. Insofar as the submission of the revenue is concerned, that the Tribunal failed to follow its own precedent in ***M/s. Gupta Traders***, in our view, the submission is mis-conceived. ***M/s Gupta Traders*** case is completely distinguishable.

20.1 This was a case where the assessee did not challenge the adjustment order by filing objections before the OHA. Furthermore, the assessee had also not asserted in its application that it was seeking refund based on the claim put forth in the return.

20.2 It appears that the assessee was claiming refund only as a consequence of reduction made *qua* penalty. Pertinently, the OHA in this case, as it appears, had returned the finding that the return filed by the assessee was false, misleading and deceptive. The Tribunal in the instant case, in our view, came to a correct conclusion. The facts obtaining in the instant matter make the order passed by the Tribunal in ***M/s Gupta Traders*** case completely distinguishable.

21. Before we conclude, we may also refer to the judgement of the

Supreme Court in ***Union of India v. VKC Footsteps India Pvt. Ltd.,*** 2021 SCC OnLine SC 706, cited on behalf of the revenue in support of the submission that refund is not a constitutional right, but a statutory right. We cannot quibble with this proposition.

21.1 ***VKC Footsteps India*** case dealt with the issue whether refund based on inverted duty structure can be granted on input services as well. It is in this context the Court ruled that the refund on account of inverted duty structure was available only against input tax levied on goods, and not services. The Court, in this context, examined Section 54(3) of the Central Goods and Services Tax Act, 2017 and the Rules made thereunder, more particularly, in the backdrop of Rule 89(5). In our view, this judgement does not shore up the case of the revenue.

22. Likewise, the decision rendered by the Supreme Court in ***E.D. Sassoon & Company Ltd. v. The Commissioner of Income Tax, Bombay City,*** (1995) 1 SCR 313 has no application whatsoever. This was a case where the Supreme Court was called upon to rule as to who would bear the liability for tax *qua* managing agency commission earned for the "broken period". The facts, as discernible from the judgement, show that E.D. Sassoon & Company were managing agents for many companies. While the managing agency agreement was operable; with the consent of those companies *qua* whom they were appointed as managers, the agreement was assigned to another set of entities.

22.1 It is in this context that the Court was called upon to determine whether E.D. Sassoon & Company would be liable to bear the tax liability with respect to the unexpired period of the agency agreement *qua* which rights had been assigned to the other entities. It is this period which was

referred to as the "broken period".

22.2 The plurality view, based on the terms of the agreement and case law on the issue, was that E.D. Sassoon & Company had neither earned any income for the broken period, nor did any income accrue to it *qua* the same. Instead, what it had transferred to the assessee, according to the court, was merely the expectation of earning commission and not the commission which it had earned or that which had accrued to it.

22.3 The attempt of Mr Agarwal to draw mileage from this judgement, in our opinion, is completely misconceived. It is our view that words and expressions used in a judgement are to be understood in the contextual backdrop in which they are used. It is dangerous at times to use the meaning accorded to a word and/or expression in the context of a statute different from the one being considered. Judgements, as is often said, cannot be read as Euclid's theorem.

Conclusion:

23. Thus, for the foregoing reasons, we are of the view, that Sub-rule 34(4) of the 2005 Rules had no applicability in the present case. The provision which did apply was Section 38(3)(a)(ii) of the 2004 Act insofar as the assessee is concerned. Thus, Question no.1 is answered against revenue and in favour of the assessee.

24. 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 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.

25. Insofar as Question no. 3 is concerned, that is also answered against the revenue and in favour of the assessee since in the appeal arising from the impugned order, in our opinion, the Tribunal has reached the correct conclusion.

26. Accordingly, the order dated 20.06.2022 passed by Tribunal in Appeal No 296/2021 is sustained. Consequently, the assessee will be entitled to interest at the rate of 6% (simple) per annum for the period spanning between 11.09.2015 and 14.08.2020. Interest for the said period will be quantified on the principal amount refunded to the assessee i.e., Rs.1,25,60,785/-.

27. The revenue will pay interest within four (4) weeks of receipt of a copy of the judgement. Resultantly, WP (C) 1150/2022 is allowed in the aforesaid terms, while VAT APPEAL 31/2022 preferred by the revenue is dismissed.

RAJIV SHAKDHER
(JUDGE)

TARA VITASTA GANJU
(JUDGE)

MARCH 29TH, 2023 /pmc