

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 11.06.2015

CORAM:

The Honourable Mr. Justice S.VAIDYANATHAN

Writ Petition Nos.21799 of 2014
And M.P.No.1 of 2014

Reserved on 24.03.2015

The Narasimha Mills Private Ltd.,
Rep. by its Director,
9/1, Narasimhanicken Palayam,
Coimbatore-641 003.

... Petitioner

Versus

1. The Commissioner of Central Excise (Appeals),
6/7, A.T.D.Street, Race Course,
Coimbatore-641 018.
2. The Assistant Commissioner of Central Excise,
Coimbatore-I Division,
Coimbatore.

... Respondents

Prayer: Writ petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorarified Mandamus, to call for the records of the first respondent in F.No.IV/16/01/ 2014-CCE(A) quash the order/letter dated 11.02.2014 and direct the 1st respondent to take the appeal dated 24.01.2014 preferred by the petitioner against the order dated 15.11.2013 passed by the second respondent u/s.106(2) of the Finance Act, 1994 on file and dispose the same on merit after affording an opportunity of personal hearing to the petitioner.

For Petitioner : Mr.R.Ashokan

For Respondents : Mr.Thirumavalavan

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ORDER

The petitioner is a Pvt. Ltd. company engaged in manufacture of Cotton Yarn and it holds Service Tax Registration for payment of service tax on GRA service received by it. According to the petitioner, they entered into a lease agreement with one M/s.Thiruvalluvaar Textiles Pvt. Ltd. granting lease of its premises for the said company on a monthly rent of Rs.5,00,000/-. The 2nd respondent called upon the petitioner to pay service tax on the lease amount and issued a show cause notice to the petitioner alleging that the petitioner has violated Section 68, 69 & 70 of the Finance Act, 1994 (in short, the Act, 1994) and called upon to submit its explanation to the Additional Commissioner of Central Excise, Coimbatore. The petitioner submitted its reply stating that there is no provision in the lease deed for collection of service tax from the lessee and expressed its willingness to pay the service tax, but requested the authority to waive the proposed interest, penalty and to pay the tax in installments.

2. The Additional Commissioner of Central Excise passed an order dated 28.03.2013 demanding service tax of Rs.21,44,299/- u/s 75 of the Act with recovery of interest u/s 75 of the Act, penalty of Rs.200/- per day for non-registration of their service u/s 77[1][a] of the Act from the first day till the date of compliance along with penalty of Rs.5,000/- u/s 77[2] and penalty of Rs.21,44,299/- u/s 78 of the Act.

3. Aggrieved by the said order, the petitioner preferred an appeal and the 1st respondent vide order dated 27.08.2013, modified the said order by allowing the deduction of the tax. In the meantime, the Government introduced a onetime scheme known as "Service Tax Voluntary Compliance Encouragement Scheme, 2013 [in short, "VCES"] which enables to pay tax dues in two installments subject to certain conditions. To avail the benefits of the scheme, the petitioner submitted a declaration dated 07.10.2013 u/s 107[1] of the Act to the 2nd respondent. The 2nd respondent called upon the petitioner to submit its reply as to why the declaration should not be rejected u/s 106[1] of the Act since show cause notice and order has already been passed u/s 73[2] of the Act. The petitioner submitted its explanation stating that the original order passed was modified on appeal. Despite reply, the 2nd respondent passed an order dated 15.11.2013 rejecting the declaration of the petitioner holding that show cause notice has been issued during the subject period and as such the petitioner is not eligible to avail the benefit of the scheme as per Section 106[1] of the Act and by relying on the Board's circular No.169/4/2013-St dated 13.05.2013.

4. Aggrieved by the rejection of the declaration by the 2nd respondent, the petitioner preferred an appeal dated 24.01.2014 to the 1st respondent herein, u/s 85 of the Act. The petitioner also filed an application seeking stay of recovery of the service tax, interest and penalty. The 1st respondent by its order dated 11.02.2014 returned the appeal filed by the petitioner stating that VCES scheme does not have a statutory provision for filing of appeal against the order rejecting the declaration u/s 106[2] by the designated authority relying on the CBEC Circular 170/5/2013-ST dated 08.08.2013. Unless the appeal is taken on file by the 1st respondent, the petitioner would be denied an opportunity to challenge the correctness of the order passed by the 2nd respondent and the petitioner would be left with no remedy. Hence the Writ Petition.

5. A counter affidavit has been filed on behalf of the respondents. The sum and substance of the counter affidavit is that the Commissioner (Appeals) returned the appeal filed by the petitioner against order of rejection, dated 15.11.2013 as inadmissible on the ground that the VCES does not have a statutory provision for appeal against the rejection of declaration as per Board's Circular No.170/5/2013-ST, dated 8.8.2013 and Sub Section (1) of Section 106 of Chapter VI of the scheme would reveal that only such of those persons against to whom there has been notice or an order of determination under Section 72, 73 and 73A of the Act has been issued or made before 1st day of March, 2013 can make a declaration under the said Scheme and admittedly, in the case of the petitioner, there had been an order of adjudication dated 28.3.2013 by the Additional Commissioner of Central Excise, confirming the service tax liability of the petitioner as demanded in the show cause notice dated 8.12.2012. Therefore, when there had been a notice demanding service tax liability from the petitioner, the petitioner is not entitled to file a declaration under the VCES. Though VCES introduced by way of amendment made by the Finance Bill, 2003, it does not mean that all the provisions of the Act, 1994 are applicable to the scheme. It is also stated that as per Section 85 of the Act, 1994 an appeal can be preferred to the Commissioner (Appeals) against any decision or order passed by an adjudicating authority. But in the present case, the second respondent is not an adjudicating authority, but for the purpose of scheme, he acted only as a "designated authority" for accepting or rejecting the declaration of the assessee. If the assessee complies with Section 106, he can proceed under Section 107 for submitting the declaration as prescribed in it. In this case, Section 106 itself prevented the petitioner from filing declaration under the scheme for availing the benefits. The second

respondent acted as "designated authority" and he is not empowered to decide any lis. Therefore, the order of the first respondent returning the appeal is valid in law and therefore, the respondents sought for dismissal of the writ petition.

6. Heard the learned counsel for the petitioner and the respondents and perused the documents available on record.

7. Mr.R.Ashokan, learned counsel appearing for the petitioner would contend that the first respondent ought to have considered the appeal preferred by the petitioner against the rejection order passed by the second respondent under Section 106 of the Act, 1994 since the VCES is part and parcel of the Act, 1994 introduced by virtue of the Finance Bill, 2013 and hence, all the provisions of the Act, 1994 including the provision for appeal is applicable to the scheme. Therefore, he contended that the as against the order of rejection of declaration under the Scheme, an appeal would lie under Section 85 of the Act, 1994. In support of his contentions, the learned counsel relied upon a decision of the Punjab and Haryana High Court rendered in "M/s.Barnala Builders & property Consultant versus The Deputy Commissioner of Central Excise & Service Tax, Dera BHassi and others" in Civil Writ Petition No.26929 of 2013.

8. The learned counsel appearing for the respondents, while reiterating the averments made in the counter affidavit, would contend that the second respondent cannot be construed as an "adjudicating authority" since he acted only as "designated authority" for the purpose of accepting or rejecting the declaration made by the petitioner and the appeal preferred by the petitioner under Section 85 of the Act, 1994 would lie only against the orders passed by the adjudicating authority. He pointed out that since the petitioner has made declaration in order to avail benefit under the VCES itself has been rejected on the ground that a show cause notice was already issued in respect of the tax dues and therefore, in terms of Section 106(2) of the Act, 1994 and in view of the clarification given in Board's Circular No.170/5/2013-ST, dated 8.8.2013, no appeal would lie before the first respondent. Therefore, the learned counsel sought for dismissal of the writ petition.

9. The only issue involved in this writ petition is, whether an appeal under Section 85 of the Act, 1994 would lie as against the order of rejection or declaration passed by the designated authority under Section 106(2) of the Act, 1994?

10. The main contention raised on behalf of the respondents is that VCES scheme does not have a statutory provision for filing

appeal against the order of rejection of declaration under Section 106(2) passed by the designated authority and that the appeal preferred by the petitioner under Section 85 of the Act, 1994 would not lie since the said provision provides appeal only as against the orders passed by the adjudicating authority and in the present case, the 2nd respondent who passed rejection order, cannot be construed as an adjudicating authority, but only as a designated authority.

11. In similar circumstances, the Punjab and Haryana High Court, in its decision in M/s.Barnala Builders's case, (cited supra), has categorically held that the order passed under VCES is appealable. It has been held so as under:

"The impugned order, in our considered opinion, is appealable, under Section 86 of the Indian Finance Act, 1994, particularly as the scheme under which the petitioner has applied, is part and parcel of the aforesaid Finance Act, by virtue of the Indian Finance Act, 2013. Faced with this situation, counsel for the petitioner has pressed into service circular, dated 08.08.2013, issued by the Central Board of Excise and Customs, stating that such an order is not appealable.

We are unable to accept correctness of instructions issued by the Central Board of Excise and Customs, for the simple reason that after incorporation of the Service Tax Voluntary Compliance Encouragement Scheme into the Finance Act, all other provisions of the Act except to the extent specifically excluded, apply to proceedings under the scheme. The impugned order passed by the Deputy Commissioner of Central Excise and Service Tax would necessarily be appealable under Section 86 of the Indian Finance Act, 1994."

12. While endorsing the above view of the High Court of Punjab and Haryana, this Court is inclined to add some more. The main contention raised on behalf of the respondents is that the appeal preferred by the petitioner under Section 85 of the Act, 1994 would not lie since the said provision provides appeal only as against the orders passed by the adjudicating authority and in the present case, the 2nd respondent who passed rejection order, cannot be construed as "an adjudicating authority", but only as a designated authority.

13. Section 85 of the Act, 1994 is relevant and it reads as under:

"85. Appeals to the Commissioner of Central Excise

(Appeals).-

(1) Any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals).

(2) Every appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(3) An appeal shall be presented within three months from the date of receipt of the decision or order of 4[such adjudicating authority] relating to service tax, interest or penalty under this Chapter 5[,made before the date on which the Finance Bill, 2012 receives the assent of the President]."

14. Therefore, Clause (1) of Section 85 denotes that any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the Commissioner of Central Excise may appeal to the Commissioner of Central Excise. It is pertinent to note that the word "adjudicating authority" has not been defined in the Act, 1994. However, Section 2(a) of the Central Excises and Salt Act, 1944 which deals with the definitions, defines "adjudicating authority" as under :

"Adjudicating authority" means any authority competent to pass any order or decision under this Act, but does not include the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963, Collector of Central Excise (Appeals) or Appellate Tribunal."

15. Section 65B (55) of the Act, 1994 states as under:

"Words and expressions used but not defined in this Chapter and defined in the Central Excise Act, 1944 or the rules made thereunder, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise."

16. Therefore, in terms of Section 65B (55) of the Act, 1994, the definition "adjudicating authority" available under Section 2(a) of the Central Excises and Salt Act, 1944 would equally apply to the Act, 1994. Now it is to be seen that whether the second respondent, the Assistant Commissioner of Central Excise, has acted as an adjudicating authority or as a designated authority?

17. It is pertinent to note that though the second respondent has been described as a designated authority, however, a perusal of the order, dated 15.11.2013 passed by him clearly shows that he has dealt

with the issue on merits regarding the eligibility of the assessee/petitioner to avail the VCES scheme and passed a detailed order, dated 15.11.2013 holding that since the petitioner had been issued with show cause notice dated 8.2.2012 demanding service tax of Rs.21,44,299/- for the period from 1.4.2007 to 31.3.2011, which was confirmed vide original order, dated 28.3.2013 and as such in terms of Section 106(2) of the Act, 1994 and in view of Circular Nos.169 and 170, dated 13.5.2013 and 8.8.2013, the petitioner is not entitled to avail the said scheme. Therefore, when the authority, the second respondent herein has given such a categorical finding on going through the facts and circumstances of the case by applying his mind, his decision, in my considered opinion, would fall within the meaning of "adjudication" which is meant by settled law that "giving or pronouncing a decision or order judicially" and thereby, I have no hesitation to hold that the second respondent has acted as an adjudicating authority and not as a designated authority.

18. Further, it is relevant to note that the Service Tax Voluntary Compliance Encouragement Scheme, 2013 has been introduced by the Central Government, in exercise of the powers conferred by sub-sections (1) and (2) of section 114 of the Finance Act, 2013 (17 of 2013) with effect from 13.5.2013 by Notification 10/2013 and hence, it is not a self-contained code, but is to be construed as a part and parcel of the Chapter V of the Act, 1994 in view of the contents of section 105 of the Finance Act, 2013. Therefore, when the said scheme itself is construed as part and parcel of the Finance Act, all other provisions of the Act except to the extent specifically excluded would automatically apply to proceedings under the scheme and consequently, I am of the view that the order, dated 15.11.2013 passed by the Assistant Commissioner of Central Excise, the second respondent herein is appealable under Section 85 of the Act, 1994.

19. The remedy of appeal is a creation of a statute. In fact, making a provision of appeal in the statute is to give a hope of success to the aggrieved party who has been affected by the adverse order of the decision maker, who, while passing such order, might have misapplied the law, come to an incorrect factual finding, acted in excess of his jurisdiction, abused his powers, was biased, considered evidence which he should not have considered, or failed to consider evidence that he should have considered. To err is human and hence it cannot be expected that all the decision makers would be perfect in their approach in arriving at just conclusions. If any statute or scheme does not make the appeal provision, it would be nothing to mean that the order passed by the authority has become final and conclusive for all the purposes and thereby, giving

uncontrolled and unquestionable powers to the said authority by virtue of which, he becomes as monopoly over the statute and will certainly act in an arrogant manner. In this case, the second respondent is the original authority, whose decision regarding the eligibility of the assessee under the scheme is final even if the said decision may perverse since no appeal provision has been made. Therefore, the entire scheme has virtually been vested exclusively within his control and the party who seeks the benefit under the scheme has to wait for grant of mercy by the authority.

For the foregoing discussion, the impugned order, dated 11.2.2014 passed by the first respondent is hereby set aside. The first respondent is directed to take up the appeal preferred by the petitioner and dispose of the same in accordance with law, after affording an opportunity to the petitioner. No costs. Consequently, connected MP is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

Suk

To

1. The Commissioner of Central Excise (Appeals),
6/7, A.T.D.Street, Race Course,
Coimbatore-641 018.
2. The Assistant Commissioner of Central Excise,
Coimbatore-I Division,
Coimbatore.

+1cc to Mr.R.Asokan, Advocate, S.R.No.29051

W.P.No.21799 of 2014

SV(CO)
CA(23/06/2015)

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