

Reserved on : 13.04.2016
Delivered on : 20.04.2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated: 20.04.2016
CORAM:

THE HON'BLE Mr. JUSTICE M.DURAISWAMY

W.P.No.34481 of 2015
and M.P.No.1 of 2015

V.R.Mohanraj
Proprietor of M/s.VMBK Promoters,
No.328, West Avenue Road,
M.K.B.Nagar, Vyasarpadi,
Chennai - 600 036. ... Petitioner

Vs.

- 1.The Commissioner of Service Tax - I,
Newry Towers, No.2054,
Second Avenue,
Anna Nagar,
Chennai - 600 040.
- 2.The Joint Commissioner of Service Tax,
Newry Towers, No.2054,
Second Avenue,
Anna Nagar,
Chennai - 600 040. ... Respondents

Petition filed under Article 226 of The Constitution of India praying to issue a writ of certiorarified mandamus to call for the records on the file of the 2nd respondent vide proceedings in Order-in-Original No.32/2015-ST-1 dated 17.08.2015 and to quash the same and further direct the 1st respondent to pass orders considering the detailed reply letter dated 06.07.2015 filed by the petitioner and issue VCES Form No.3.

For Petitioner : Mr.T.R.Senthil Kumar
For Respondents : Mr.A.P.Srinivas,
Standing Counsel

O R D E R

The petitioner has filed the above Writ Petition to issue a writ of certiorarified mandamus to call for the records on the file of the 2nd respondent in order dated 17.08.2015 and to quash the same and to further direct the 1st respondent to pass orders considering the detailed reply letter dated 06.07.2015 filed by the petitioner and issue VCES Form No.3.

2. According to the petitioner, he is the Sole Proprietor of M/s.VMBK Promoters having registered with the Service Tax Commissionerate. During the course of investigation conducted in the premises of the Company, all the properties at Mahalingapuram, Chennai by the Officers of Director General of Customs, Excise Intelligence Wing, it was found that the petitioner had provided services as Marketing Agent to M/s.VIP Housing and Properties and M/s.VIP City for selling residential plots, flats and villas on commission basis, but failed to collect Service Tax on the consideration received as commission. The petitioner was served with a summon dated 03.09.2013 to appear before them and explain the non-payment of Service Tax for the commission payments received. In response to the summons, the petitioner appeared before the authority and filed his Income Tax returns with audited Balance Sheet and Profit and Loss Accounts. In the statement, he has not raised any bills or invoices for the receipt of the commission payments, but he received the commission based on the incentive statement generated by the details of business transaction in the Agent Code Number. The petitioner admitted that he has not registered under the Service Tax Department and therefore, not collected Service Tax either from M/s.VIP Housing and Properties and M/s.VIP City for selling residential plots, flats and villas on commission basis. Since the Assessee stopped doing real estate business since 01.04.2012, he wished to pay Service Tax liability under the Voluntary Compliance Encouragement Scheme 2013 introduced by the Finance Act 2013. As per Section 107 of the Voluntary Compliance Encouragement Scheme, a declarant is required to make his application on or before 31.12.2013 and the applicant is required to pay 50% of the tax declared and the balance 50% of tax to be paid on or before 30.06.2014. Sub-Section 4 provides that where the declarant fails to pay the said tax dues or part thereof on or before the said date, he shall pay the same on or before 31.12.2014 along with interest thereon, at such rate as is fixed under Section 75 or as the case may be 73B of the Chapter for the period of delay starting from 01.07.2014. Once the entire tax is paid, the declarant gets immunity from penalty and interest as per Section 108. As per Section 111 of the Finance Act, 2013, where the Commissioner of Central Excise has reasons to believe that the declaration made by a declarant under this Scheme is substantially false, he may,

for the reasons recorded in writing, serve notice on the declarant in respect of such declaration requiring him to show cause why he should not pay the tax due not paid or short paid. According to the petitioner, the notice issued by the 2nd respondent without recording of reasons of the Commissioner of Central Excise is invalid in law. Further, the petitioner contended that the 2nd respondent further ignored the reply filed by the petitioner relying upon the Central Board of Excise and Customs, Circular dated 08.08.2013 which has clarified many issues on Voluntary Compliance Encouragement Scheme.

3.The respondents in their counter have stated that pursuant to the summon issued on 03.09.2013, the petitioner appeared on 18.11.2013 and produced copies of IT returns and financial documents like P & L Accounts and Balance Sheets and gave a statement to the Investigating Officer stating that he got registered with the Department after commencement of investigation and he would pay the Service Tax liability, which might work out to around Rs.28,00,000/- for the period from 2009 to 2011-12 and he desired to avail VCES for his earlier Service Tax dues. While filing the application in Form VCES-1 on 23.12.2013, the petitioner declared Service Tax liability aggregating to Rs.25,69,325/- for the years 2010-11 and 2011-12 alone. However, scrutiny of the financial documents submitted by the petitioner revealed that the petitioner did not disclose the income earned during the financial year 2009-10 and mis-declared the value for the financial year 2010-11 by availing initial exemption of Rs.10,00,000/- despite crossing the limit during the previous financial year 2009-10 thereby making him ineligible for the same. In view of the suppression of the value for the financial year 2009-10 and mis-declaration of the value for the financial year 2010-11, the 1st respondent termed the declaration filed by the petitioner as substantially false and authorized issue of show cause notice under Section 111 of the Finance Act, 2013. In view of the monetary limit for the purpose of adjudication vide Circular dated 23.08.2007 as modified by Circular dated 11.03.2008 issued by the Central Board of Excise and Customs, proceedings initiated against the petitioner in show cause notice dated 09.12.2014 issued under Section 73 of the Finance Act, 1994 culminated in the order dated 17.08.2015 passed by the 2nd respondent.

4.Mr.T.R.Senthil Kumar, learned counsel for the petitioner submitted that the 1st respondent has not given personal hearing to the petitioner and thereby violated the principles of natural justice.

5.In support of his contentions relied upon the judgment reported in [2015] 63 Taxmann.com 266 (Gujarat) [ASK Me Enterprise Vs. Union of India] wherein the Division Bench of the Gujarat High Court held that the Assessee is entitled to the

benefit of Voluntary Compliance Encouragement Scheme on the ground that the scheme was within the knowledge of the Assessee at the time of audit, so that the interest/penalty had not been paid wrongly and the Assessee had sought adjustment of wrongly paid interest/penalty towards VCES 'tax dues' by correction in accounting codes, thereby, had discharged the 'tax dues' before the due dates.

6.Mr.A.P.Srinivas, learned Standing Counsel appearing for the respondents submitted that the 2nd respondent had passed the impugned order after considering all the objections raised by the petitioner and the 2nd respondent has categorically given reasons for not accepting the contentions of the petitioner in the impugned order, therefore, the order passed by the 2nd respondent is perfectly correct and the Writ Petition is liable to be dismissed.

7.In support of his contentions, the learned counsel relied upon the following judgments:

(i)2014 (35) S.T.R. 695 (Guj.) [Ramilaben Bharatbhai Patel Vs. Union of India] wherein the Division Bench of this Court held as follows:

"5.The learned counsel for the petitioner, however, raised two fold contentions. He firstly contended that the shortfall was due to a bona fide calculation error. The amount involved was very small. He secondly contended that under Section 110, the tax short-paid could be recovered with interest, but the declaration itself cannot be rejected.

6.To our mind, neither of the two contentions can be accepted. The scheme makes no difference between tax dues which are short-paid due to bona fide error and one which flows from deliberate inaction. There is no power for waiving or relaxing the condition of depositing 50% tax dues flowing from Section 107. It would not be possible for this Court to exercise writ jurisdiction to direct the authority, in plain terms, which the statutory provision does not permit.

7.Coming to the second contention, the scheme envisages depositing the tax dues in two stages. Only after the taxes are fully deposited stage-wise that the declaration under Section 107 would be accepted. Section 110 only pertains to recovery of the taxes declared, but not paid. This provision has no bearing on the invalidity of declaration when the declarant fails to deposit the taxes as provided in sub-sections (3) and (4) of Section 107. If we interpret Section 110, as urged by the learned counsel for the petitioner, that it encompasses both the cases of delay

in depositing the taxes at the first stage of sub-section (3) of Section 107 and second stage of sub-section (4) of Section 107, the proviso to sub-section (4) would be rendered wholly redundant. If as suggested, shortfall in the taxes could be accepted after charging interest under Section 110, there was no need to make special proviso for extending time for depositing the remaining of the taxes under sub-section (4) of Section 107. Further, Section 110 pertains to compulsory recovery of taxes with interest. Sub-sections (3) and (4) of Section 107 refer to voluntary tax deposit by a declarant in terms of the scheme. Both these operate in separate fields."

(ii) 2015 (37) S.T.R. 922 (Cal.) [Parijat Vyappar (P) Ltd Vs. Union of India] wherein the Calcutta High Court held that the person who voluntarily declares to pay Service Tax, if commits defaults in complying the provisions of the said Scheme, the authorities are bound to take action under the provisions which provides for steps to be taken for non-compliance of any provisions of the said Scheme. Further, the Calcutta High Court held that the proviso is applicable only in respect of sub-section (4) of Section 107 and cannot be stretched to sub-section (3) of Section 107 and the authorities can take recourse under Section 110 of the said Act, in the event, any default is committed under the said Scheme.

(iii) 2014 (35) S.T.R. 65 (P & H) [Barnala Builders & Property Consultants Vs. Dy. C.C.E & S.T., Dera Bassi] wherein the Division Bench of the Punjab and Haryana High Court held that the order passed by the Deputy Commissioner of Central Excise and Service Tax would necessarily be appealable under Section 86 of the Finance Act, 1994. Further, the Division Bench held that after the incorporation of Voluntary Compliance Encouragement Scheme into Finance Act, all other provisions of the Act except to the extent specifically excluded, apply to the proceedings under the Scheme.

8. In the report dated 24.11.2014, submitted for the approval of the Commissioner, it has been stated that the petitioner has mis-declared the VCES declaration filed on 23.12.2013. Instead of filing the declaration for the total tax payable to the extent of Rs.26,93,388/-, he has projected the tax liability at Rs.25,69,324/-, which is short by Rs.1,24,064/-. As per Section 108 (1) of the Finance Act, the declarant can get immunity against interest liability and penalty to be imposed only for the amount paid under the scheme. In the case of the petitioner, since the declarant appears to be not declared his correct tax liability, as per the report, he may not get the immunity from the interest and penalty or any other proceedings to be initiated for the amount short paid.

9. Further, in the report it has been stated that since the declarant had suppressed the taxable income for the financial year 2009-10 and also availed Rs.10,00,000/- SSI exemption irregularly during the financial year 2010-11, the declarant is liable to be issued with show cause notice, demanding the differential tax amount of Rs.1,24,064/- along with interest and also liable to be penalized in terms of Section 78 of the Finance Act, 1994.

10. On a perusal of the impugned order, it is also clear that pursuant to the summons dated 03.09.2013 and 12.11.2013 issued by the Investigating Officer, the petitioner appeared before them on 18.11.2013 and furnished the copies of the Income Tax returns. The petitioner had filed his reply dated 06.07.2015 before the 2nd respondent. The 2nd respondent also afforded personal hearing on 21.07.2015, 06.08.2015 and 12.08.2015. The petitioner was represented by his counsel before the 2nd respondent on 12.08.2015 and submitted that no penalty be imposed in their case since they have paid the entire Service Tax dues prior to issuance of show cause notice. Therefore, it is clear that the 2nd respondent has given an opportunity of personal hearing to the petitioner and he was also represented by his counsel before the 2nd respondent. The petitioner also filed his reply before the 2nd respondent, which was also considered by the 2nd respondent. Therefore, from the above, it is clear that there is no violation of principles of natural justice committed by the respondents. That being the case, the impugned order being an appealable order, the Writ Petition cannot be entertained. The judgment relied upon by the learned counsel for the respondent reported in 2014 (35) S.T.R. 65 (P & H) [Barnala Builders & Property Consultants Vs. Dy. C.C.E & S.T., Dera Bassi] squarely applies to the facts and circumstances of the present case. Therefore, without exhausting the alternative remedy by way of an appeal, the Writ Petition cannot be entertained. Therefore, it is open to the petitioner to challenge the impugned order before the Commissioner (Appeals) by way of an appeal.

11. In these circumstances, the Writ Petition is rejected. No costs. Consequently, the connected miscellaneous petition is closed.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1.The Commissioner of Service Tax - I,
Newry Towers, No.2054,
Second Avenue, Anna Nagar,
Chennai - 600 040.

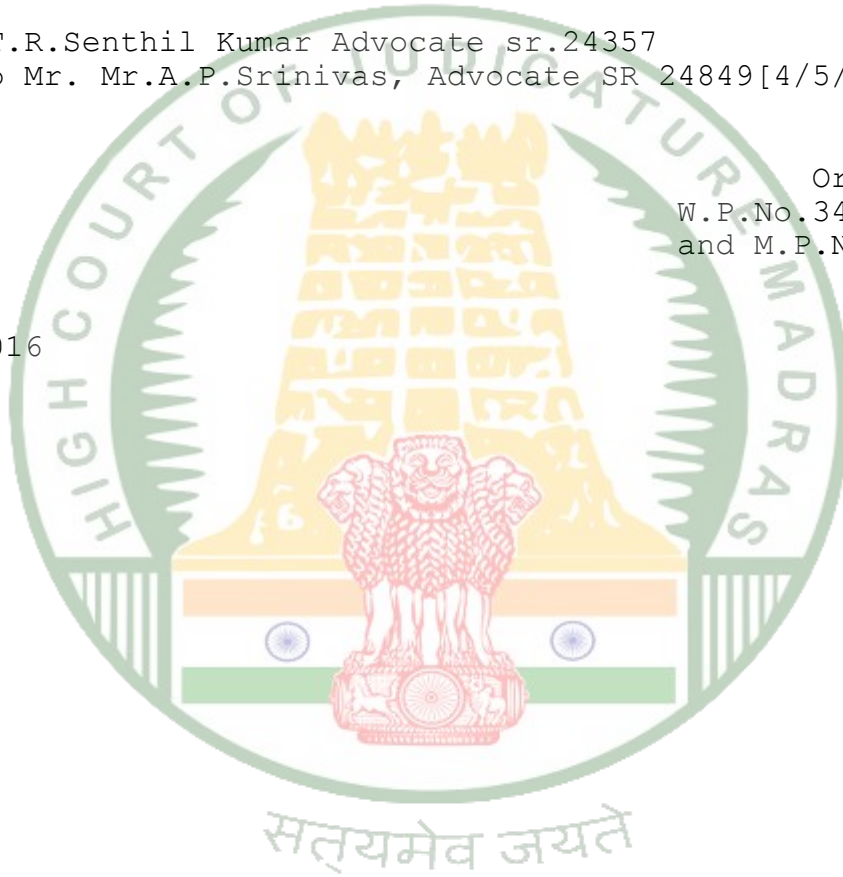
2.The Joint Commissioner of Service Tax,
Newry Towers, No.2054,
Second Avenue, Anna Nagar,
Chennai - 600 040.

+1 cc to T.R.Senthil Kumar Advocate sr.24357

+ 1 CC to Mr. Mr.A.P.Srinivas, Advocate SR 24849[4/5/16]

Order made in
W.P.No.34481 of 2015
and M.P.No.1 of 2015

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