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

\+ W.P.(C) 1740/2015

B.L.GOEL &CO. ..... Petitioner

Through: Mr. Rajesh Jain, Advocate along with Mr. Virag Tiwari, Advocate.

versus

ASSTT. COMMISSIONER, DESIGNATED AUTHORITY VCES, SERVICE TAX ..... Respondent

Through: Mr. Amit Bansal, Advocate along with Mr. Akhil Kulshrestha, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

<u>O R D E R</u>

% **02.11.2016**

The petitioner is aggrieved by the rejection of its application under the "Service Tax Voluntary Compliance Encouragement Scheme 2013" (hereinafter referred to as "the scheme"). The petitioner is engaged in construction activity for a period from 01.04.2010 to 31.03.2011. The petitioner was subjected to investigation on the ground that it had not filed returns of the service tax. During the course of investigation, it voluntarily deposited ₹1,00,46,808/- as service tax liability for the concerned period. The admitted liability was accepted by the department and the petitioner paid the amount by 04.05.2011. In this background, it approached the respondents with a declaration claiming a benefit of the scheme for the period w.e.f 01.07.2012 to 31.12.2012, on 30.12.2013. The revenue/respondent rejected the application mainly on the ground that the declaration could not be pursued and had to be rejected by reason of Second Proviso to Section 106(1). It was stated that when the petitioner/ assessee deposited the tax along with interest and penalty which led to the closure of investigation under Section 73(3), the consequent closure amounted to a determination that precluded the application for benefit under the scheme.

The petitioner contends that the impugned order is *per se* illegal and contrary to Section 106(1) of the Act. Learned counsel states that the second proviso clearly contemplates the determination that it is an order proceeded by all the appropriate steps such as issuance of the show-cause notice, grant of opportunity and a reasoned decision. To be eligible to make a declaration under the scheme that could be accepted, the pre-condition contemplated by the statute is that no investigation should be pending and that the issue which was previously settled through a determination, could not be the basis or a ground, for making a declaration under the scheme. It is stated that since neither of the pre-conditions was existent, baring the application, the respondent's rejection was contrary to law.

Learned counsel for the revenue relies upon the text of Section 73(3) and submits that in the case of short levying or non-levying of any amount payable towards service tax, two courses are open, one-the assessee itself can make a self assessment and deposit an amount and the second-the concerned officer can make a determination in terms of explanation to first proviso to Section 73(3). In this case, since the assessee voluntarily surrendered the amounts due along with the interest, the acceptance of such surrendered amounted to a determination that precluded it from making it an application under the scheme.

This court is of the opinion that the revenue's contentions are entirely unjustified. The second proviso to section 106(1) which is relevant for the present purposes reads as follows:-

"106. Person who may make declaration of tax dues.

(1) Any person may declare his tax dues in respect of which no notice or an order of determination under section 72 or section 73 or section 73A of the Chapter has been issued or made before the 1st day of March, 2013:

Provided that any person who has furnished return under section 70 of the Chapter and disclosed his true liability, but has not paid the disclosed amount of service tax or any part thereof, shall not be eligible to make declaration for the period covered by the said return. Provided further that where a notice or an order of determination has been issued to a person in respect of any period on any issue, no declaration shall be made of his tax dues on the same issue for any subsequent period."

Since the provision refers to Section 73, it would be useful to reproduce that provision as well

"73. Recovery of Service tax not levied or paid or short levied or short paid or erroneously refunded

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the [Central Excise Officer] may, within 'eighteen months' from

the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-

(a) fraud; or
(b) collusion; or
(c) wilful misstatement; or
(d) suppression of facts; or
(e) contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax, by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "eighteen months", the words "five years" had been substituted.

Explanation. - Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of 'eighteen months' or five years, as the case may be.

(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under subsection (1) in respect of such service tax, and inform the [Central Excise Officer] of such payment in writing, who, on receipt of such

information shall not serve any notice under sub-section (1) in respect of the amount so paid :

Provided that the [Central Excise Officer] may determine the amount of short payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the [Central Excise Officer] shall proceed to recover such amount in the manner specified in this section, and the period of [eighteen months] referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

[Explanation. l] For the removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the [Central Excise Officer], but for this sub-section.

Explanation 2.-For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made there under shall be imposed in respect of payment of service-tax under this sub-section and interest thereon."

The object of Section 73(3) is to provide alternatives in the event if there is a short levying or short payment was an erroneous request- spoken of by Section 73(1). In the main body of Section 73(3), it is open to the assessee *"on the basis of its own ascertainment thereof"* to inform the concerned officer about the event and in such case, the officer is precluded from issuing the notice.

The proviso to Section 73(3) confers independent power upon the concerned officer to determine that amount of short payment/ erroneous revision etc. which is not paid and recovered. The explanation deals with interest under Section 73 upon the amount of short payment.

The proviso of Section 106 on the other hand was introduced as a part of the scheme; it mandates that in the event of determination with respect to *"an issue",* or in the event of pendency of an investigation under Section 106 (3) or in the event a notice is issued to a person in respect of *"any period or any issue"* the declaration under the scheme cannot be processed. In the present case, all that happened for the previous period (i.e. 01.04.2010 – 31.03.2011) was an investigation; it did not culminate in an order-adverse or favourable- to the petitioner. The latter accepted its liability and paid the full amounts due along with interest-depositing it by 04.05.2011. In these circumstances, the revenue's submissions that the mere acceptance of such amount resulted *"in a determination"* is unsupportable in law. The determination spoken of in the Second proviso to Section 106(1) invariably refers to a determination by the concerned officer under proviso to Section 73(3). The stage up to which that determination could actually be made was never reached in the present case – during the course of investigation itself as the assessee/petitioner admitted its liability and deposited all amounts with interest. In the circumstances, the court hereby quashes the impugned order dated 27.10.2014. Consequently, direction is issued to the respondents to take on record the petitioner's declaration under the scheme for relevant period i.e. 01.07.2012 to 31.12.2012 dated 30.12.2013 and process it in accordance with law. The orders on such application shall be made expeditiously preferably within four months from today.

The writ petition is allowed in the above term. No costs.

S. RAVINDRA BHAT, J

DEEPA SHARMA, J

NOVEMBER 02, 2016

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