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* IN THE HIGH COURT OF DELHI AT NEW DELHI
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\+ **W.P.(C) 3937/2015 & CM APPLs 7035/2015 (for stay), 8055/2015 (modification of order dated 22nd April 2015)**

SIEMENS LTD ..... Petitioner
Through: Mr. Gajendra Maheshwari with Ms. Swati Thapa, Advocates.

versus

THE COMMISSIONER,
DEPARTMENT OF TRADE AND TAXES & ANR ..... Respondents
Through: Mr. Satyakam, Additional Standing counsel.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

O R D E R
% **16.03.2016**

1. This writ petition by the Petitioner, Siemens Limited, seeks quashing the Form DSC-3 dated 23rd July 2014 issued by the Respondents rejecting the Petitioner's request under the Delhi Tax Compliance Achievement Scheme 2013 ('Amnesty Scheme') for waiver of penalty for the quarters II, III and IV for the year 2006-07.

2. The claim of the Petitioner for waiving the penalty under the Amnesty Scheme of the Department of Trade & Taxes ('DT&T'), Government of National Capital Territory of Delhi ('GNCTD') [Respondent No. 1] forms the subject matter of the petition.

3. The Petitioner, which is engaged in the business of trading in goods across the sectors like power and gas, wind power and renewable, power generation services energy management, mobility and building technology, is a dealer registered in Delhi under the Delhi Value Added Tax Act, 2004 ('DVAT Act')

4. It is stated that the building technology business which was originally acquired by the Petitioner was demerged and a new company, i.e., Siemens Building Technology Private Limited ('SBTPL') was formed. On 1st January 2007, SBTPL was again merged with the Petitioner herein as a going concern.

5. Under the aegis of the demerged concern in the year 2006-07, an order was received by the Petitioner for supply of building technology goods that were manufactured/available outside India. Consequent upon the said order, the Petitioner placed an identical order on the foreign supplier and effected a 'sale in course of import' under Section 5 (2) of the Central Sales Tax Act, 1957 ('CST Act'). Correspondingly, in the returns filed under the DVAT Act, an exemption was claimed in respect of the above sales.

6. A default assessment order was passed by the Value Added Tax Officer ('VATO') on 12th July 2010 disallowing the above exemption on the ground that the turnover was relatable to the 'direct exports to foreign countries from Delhi' and was not supported by any documents proof. The Petitioner's objection against the aforementioned assessment order was

disposed of by the Objecting Hearing Authority ('OHA') by an order dated 10th May 2011 with a direction to the VATO to frame a fresh assessment order after verifying the books of accounts and the supporting documents available with it in view of the sale conducted under Section 5 (2) of the CST Act, i.e., High Seas Sale and Sale Occasioning Import. Further, the interest and penalty levied were quashed.

7. Consequent upon the remand and the fresh hearing, the VATO passed rectification orders dated 13th July 2012 separately for the four quarters for the year 2006-07 and partly allowed the exemption claimed to the extent that the turnover was not supported by the documents. Tax and interest were levied under the CST Act and penalty under Section 86 (12) of the DVAT Act was also imposed. The Petitioner states that since it was unable to trace all the documents in view of the difficulty in tracking the files due to frequent transfer of records during the mergers and demergers, it decided to pay the tax and interest as determined by the rectification orders.

8. However, as far as the penalty was concerned, the Petitioner preferred an appeal before the OHA, i.e., the Special Commissioner-I. This appeal was rejected by the OHA by an order dated 1st February 2013 on the ground that the Petitioner had subsequently deposited the tax and interest. Aggrieved by the aforementioned order dated 1st February 2013, the Petitioner filed an appeal before the Appellate Tribunal ('AT'), Value Added Tax, New Delhi.

9. During the pendency of the aforementioned appeal, the DT&T, GNCTD announced an Amnesty Scheme. Section 107 was inserted under the DVAT

Act with effective from 12th September 2013 and it reads as under:

> "107. Amnesty Scheme(s)- Notwithstanding any to the contrary contained in this Act and Rules thereto, the Government may by notification in the official gazette, notified Amnesty Scheme (s) covering payment of tax, interest, penalty or any other dues under the Act, which relate to any period ending before 1st day of April, 2013, and subject to such conditions and restrictions as may be specified therein, covering period of limitation, rates of tax, tax, interest, penalty or any other dues payable by a class of dealers or classes of dealers or all dealers."

10. By a notification dated 20th September 2013 the Amnesty Scheme was notified. Section 2 (1) (d) of the Amnesty Scheme defined 'tax dues', as under:

> "(d) "tax dues" means-
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> (i) tax due or payable by the dealers, registered or required to be registered, under the Act or the Central Sales Tax Act, 1956 for the period beginning from the 1st day of April 2005 and ending on the 31st day of March 2013, but not paid or partly paid till the 31st day of August 2013 and calculated in accordance with sub-Clause (1), (2) and (3) of clause 3 of the Scheme' and
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> (ii) tax due and payable under the Central Sales Tax Act, 1956 or the erstwhile Delhi Sales Tax Act 1975 (43 of 1975) or the Delhi Sales Tax on Works Contract Act, 1999 (Delhi Act 9 of 1999) or the Delhi Sales Tax on Right to Use Goods Act, 2002 (Delhi Act 13 of 2002) or the Delhi Tax on Entry of Motor Vehicles into Local Areas Act, 1994 (Delhi Act 4 of 1995) for the period prior to 1st April 2005, but not paid or partly paid till the 31st day of August 2013 and calculated in accordance with sub-Clause (4) of clause 3 of the Scheme; and
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> (iii) tax due and payable by a person who is liable to deduct tax at source under Section 36A of the Act in accordance with

the provisions of said Section for the period 1st day of April 2005 and ending on 31st day of March 2013 but not paid or partly paid till the 31st day of August 2013, and calculated in accordance with sub-clause (5) of clause 3 of this Scheme.

Explanation I – "Tax dues" includes the amount of tax assessed in terms of notice of assessment or assessment order issued under any of the Acts referred to in this sub-clause, whether pending in objection/revision before the objection hearing authority (OHA) or in appeal/revision before appellate authority/Tribunal or any higher court, including writ petition and special leave petition.

Explanation.-2- Where a notice of assessment or assessment order has been issued to a person in respect of some default(s), the term "tax dues" shall also include tax dues relating to default(s) not covered in the notice of assessment or assessment order for the same tax period.

Explanation.-3- This Scheme does not cover cases of notice of assessment of penalty issued under any of the relevant Acts and without having any relation to tax deficiency."

11. Further para 3 of the Amnesty Scheme sets out the procedure for calculation of tax dues and the relevant portion thereof reads as under:

"3. **Procedure for Calculation of Tax Dues**- (1) Tax dues in respect of sub-clause (i) of clause 2(l)(d) by the dealer on whom notice of assessment under section 32 of the Act has not been served shall be calculated by him in the following manner;

(i) The dealer shall first determine the commodity wise taxable turnover in respect of which declaration is to be made under this Scheme;

> (ii) He shall then ascertain the rate of tax of that commodity applicable as per Schedules appended to the Act for the period under declaration.
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> (iii) Tax dues shall be calculated by multiplying the rate of tax as per item (ii) above in respect of every class of commodity stated at item (i) above."

12. An amendment was made to the Amnesty Scheme by a further notification dated 30th January 2014 whereby clause 3 (2) of the Scheme was amended to insert after the word 'demand', the words 'or the demand of penalty in relation to such tax dues'. Further at the end of sub-clause and before the explanation, the following words were added: 'The dealer shall however not be entitled to claim any refund by virtue of such waiver'.

13. The Petitioner filed an application before the Nodal Officer under the Amnesty Scheme on 26th December 2013 on the strength of Question No. 13 of the Frequent Asked Questions ('FAQ') which provided for waiver of penalty. The Petitioner informed that it had already paid the demand of tax and interest in terms of the rectification orders. The said application was examined in terms of clause 4 of the Amnesty Scheme and was rejected on 13th December 2014. The Petitioner received acknowledgment of discharge by Form DSC-3 dated 23rd July 2014 issued by the Respondent rejecting the Petitioner's application under the Amnesty Scheme.

14. Aggrieved by the above rejection of application, the Petitioner filed the present writ petition.

15. At the first hearing, i.e., on 22nd April 2015 notice was issued in this writ petition. On 5th May 2015 the Court directed that the Respondent should not take any coercive measures. The Respondent has since filed a reply to which a rejoinder has been filed by the Petitioner.

16. Mr. Gajendra Maheshwari, learned counsel for the Petitioner, submitted that the Petitioner's case is answered by the FAQs issued by the DT&T explaining the Amnesty Scheme. Mr. Maheshwari further submitted that under Explanation 1 to Clause 2(1)(d) of the Amnesty Scheme, the term 'tax dues' was extended to the cases pending in the appeal before the AT. The case of the Petitioner did not fall within the ambit of Explanation 3 to Clause 2 (i) (d) of the Scheme which states that the Scheme will not cover the cases of assessment of penalty without having any relation to tax deficiency. In the present case amount of penalty was levied on the amount of tax deficiency. Question 13 of the FAQ makes it clear that even when the penalty is challenged but the tax and interest is paid, the dealer is entitled to avail the benefit of the Amnesty Scheme. He submitted that there was no rational basis to justify the denial of the benefit of the scheme. He pointed out that even though the Respondent gave no reasons for rejecting the Petitioner's application for waiver of penalty, and no appeal was preferred against it, remanding the matter to the authorities for a fresh decision.

17. Countering the above submissions, Mr. Satyakam, learned Additional Standing counsel for the Respondents submitted that although the reasons have been spelt out in the order rejecting the claim of the Petitioner under the Amnesty Scheme, the Petitioner was not entitled to claim any such

benefit. According to Mr. Satyakam, even in terms of the amended clause (2) (1) (d) of the Amnesty Scheme, the amount of penalty which alone was challenged before the Appellate Authority did not form part of the 'tax dues'. He submitted that the FAQs were not binding on the Respondents and had no legal basis. Further, it is the case of the Respondent that the Petitioner did not fall within the ambit of the Amnesty Scheme. He further submitted that the FAQs carried an unambiguous and clear disclaimer that "this paper is an attempt to answer the frequent queries in a simple language. For an authentic legal interpretation, the Scheme itself should be referred."

18. Mr. Satyakam submitted that where the tax and interest has been fully paid prior to 31st August 2013, one of the pre-requisites for applicability of the Amnesty Scheme is not satisfied. In other words, unless the tax and interest was either not paid or partly paid as on 31st August 2013 the question of applicability of the Amnesty Scheme did not arise. He illustrated this submission by giving an example of Rs. 100 as tax, Rs. 50 as interest and Rs. 100 penalty. Of this the tax and interest are fully paid by 31st August 2013 and a sum of Rs. 50 is paid towards penalty. According to Mr Satyakam, in such instance the penalty paid would be adjusted towards the tax due but there would be no waiver of the balance penalty. Even where the tax and interest are paid and no penalty is paid and such penalty is challenged, then the dealer would not be entitled to avail of the Amnesty Scheme. The dealer would not be entitled to either refund of any excess amount or waiver of penalty.

19. Having considered the above submissions, it appears to the Court that

the interpretation sought to be placed by the Respondents on the relevant clause is not consistent with the overall purpose of the Amnesty Scheme. The main purpose was to incentivise self-compliance by the dealer with the tax demand. While it is true that the Petitioner had paid tax and interest for the period in question even prior to the Amnesty Scheme, the fact remains that the Petitioner had challenged the levy of penalty for the same period and the said challenge is pending in the appeal before the AT. As righty pointed out by learned counsel for the Petitioner, it is anomalous that the person who pays part tax and interest would be entitled, while calculating the tax dues, under clause 3 of the Amnesty Scheme to seek waiver of penalty whereas the person who paid the tax and interest and challenged the levy of penalty would not be entitled to seek waiver. In other words the Scheme is sought to be interpreted in such a manner that compliance with part of the demand, i.e., payment of tax and interest but not penalty, would make a person ineligible to the Amnesty Scheme qua the penalty amount under challenge whereas a person who defaults in paying the tax and interest as well as penalty would be entitled to be benefit of the Amnesty Scheme and claim waiver of penalty.

20. Reading of FAQ Nos. 2 and 13 brings out the approach of DT&T. The answers provided therein recognize the claims for waiver of penalty even where there has been an excess payment of tax or payment of an advance tax. The said FAQ Nos. 2 and 13 read as under:

> "Q2: In case of survey cases where default assessment is pending, and where advance cheque has been collected by the enforeem.ent team at the time of survey and encashed; can such advance, payment be adjusted from the amount of tax deficiency stated by the team in its

report? If yes, where the amount of advance tax is more than the tax dues, can that excess payment be carry forward by the declarant and adjusted from his future tax liability?

Yes, the advance tax collection can be adjusted by the declarant from his tax dues. Any excess payment can also be adjusted from his future VAT liability. However, he shall file the relevant details along with the DSC-1.

Also, what about the case where the dealer admits his tax liability and deposits the same within 3 days of the survey?

It would not be applicable since Section 87 (6) was inserted w.e.f. 1st April 2013 and the Amnesty Scheme covers the tax dues upto 31st March 2013.

Q.13. Where tax and interest have been admitted and paid, however, penalty is under challenged? Can VVAS be applied for amount of penalty in relation to such tax? If yes, how DSC-1 to be filed since nothing would be payable?

Yes, the dealer can file DSC-1, along with proof of payment of tax and interest, to avail the benefit?"

21. While it is true that there is a disclaimer in the FAQs which states that a correct legal interpretation of the Scheme itself should be referred, in the considered view of the Court, the stand taken by the Respondents in the FAQs is consistent with the object of the Amnesty Scheme would constitute an instance of *contemporanea expositio* and would bind the DT&T.

22. The Court finds that no reasons have been given by Respondent No. 2 in the so-called order dated 23rd July 2014 in DSC Form 3 for rejecting the claim of the Petitioner. However, instead of setting aside the said order on

that ground alone, and sending the matter back to Respondent No. 2 for a fresh decision, the Court considers it appropriate to examine the question of the Petitioner's entitlement to be considered under the Amnesty Scheme in this proceeding itself, particularly in view of the stand taken by the Respondents on the interpretation of clause 2 (1) (d) of the Amnesty Scheme.

23. The Court notes that the DT&T has not denied that the Petitioner satisfied the other conditions under the Amnesty Scheme. In other words the Petitioner falls within the ambit of Explanation I to clause 2 (1) (d) and outside the scope of Explanation 3 thereof. The Court is of the view that it would be anomalous for a defaulter of payment of tax, interest and penalty to avail of the Amnesty Scheme but not one who has defaulted only in the payment of penalty. The idea is to incentivise payment of taxes and not dis-incentivise compliance. In the case on hand, the Petitioner having paid the tax and interest, ought not to be denied the Amnesty Scheme only because the penalty is the subject matter of challenge by it before the AT. Since in any event the case of the Petitioner does not fall under Explanation 3, the penalty can be considered as forming part of the tax dues and from that point of view it can be said that there was only a apart payment thereof before 31st August 2013. This is the interpretation that the DT&T itself recognised in the FAQs.

24. For the aforementioned reasons, the impugned order dated 23rd July 2014 passed by Respondent No. 2 rejecting the claim of the Petitioner is set aside.

25. It is held that the Petitioner is entitled to claim the benefit of the said Amnesty Scheme. Consequently, a direction is issued to the Respondents to pass an order not later than two weeks from today granting waiver of penalty levied on the Petitioner thereby allowing its claim under the Amnesty Scheme.

26. The petition is allowed in the above terms. The pending applications also stand disposed of. Order be given *dasti.*

S.MURALIDHAR, J

VIBHU BAKHRU, J

MARCH 16, 2016
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