

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
SERVICE TAX APPEAL NO.1 OF 2018

Dr. Yeshwant Dhume,
B-4, Syncourt Building,
near Gomantak Press,
St. Inez, Panaji, Goa 403 401

..... Appellant.

Versus

1. Assistant Commissioner
Service Tax, Designated Authority
VCES CELL, Office of the Commissioner
Central Excise & Service Tax,
ICE House, EDC Complex,
Patto Plaza, Panaji, Goa 403 001.

2. Commissioner of Central Excise &
Customs, Goa (CCE), ICE House,
EDC Complex,
Patto Plaza, Panaji, Goa 403 001.

.... Respondents.

Mr. S. D. Padiyar, and Mr. S. Bhangui, Advocate for the Appellant.

Mr. Priyanka Kamat, Standing Counsel for the Respondents.

Coram : R.M. Borde, &
Prithviraj K. Chavan, JJ.

Reserved on : 5 December 2018

Pronounced on : 14 December 2018.

JUDGMENT: (Per R.M. BORDE, J.)

Heard. Admit.

2. The substantial question of law that arises for consideration of the Appeal is, whether the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) was right in holding the Appeal as not maintainable in the Tribunal. On consideration of the submissions raised by the parties, the Appeal is taken up for final disposal at the admission stage.

3. The Appellant had paid an amount of ₹ 6,79,877/- towards service tax on rentals from February 2009 which comprises of arrears of service tax amounting to ₹ 6,27,965/- and regular service tax payment of ₹ 51,912/- from January to March 2013 vide challan dated 28 March 2013. The Appellant, upon becoming aware of the Voluntary Compliance Encouragement Scheme (VCES) introduced under the Finance Act, 2013 on 27 November 2013, filed declaration under Section 107(1) of the Finance Act, 2013 on 27 November 2013 for waiver of interest on service tax dues paid on renting of immovable property services amounting to ₹ 6,27,965/- which was on account of arrears under the VCES requesting for issuance of “Acknowledgment of Discharge” in terms of Rule 7 of the Service

Tax Voluntary Compliance Encouragement Rules, 2013. The Appellant received a show cause notice on 9 December 2013 issued by the Assistant Commissioner (VCES CELL), Panaji, Goa-Designated Authority seeking to reject the declaration filed under the VCES on the ground that the Appellant had paid the amount before the enactment of the Finance Act, 2013 on 13 May 2013 under which the scheme was introduced. The Appellant replied to the show cause notice and contended that the Scheme is applicable and that the Appellant is entitled to the benefit under the Scheme. The Respondent-Designated Authority, however, rejected the VCES declaration filed by the Appellant by an order dated 6 January 2014 in view of the Circular dated 8 August 2013 issued by the Central Board of Excise and Customs. Since the Scheme does not provide for an express statutory provision for filing an appeal, the Appellant tendered a representation which was not responded to by the Commissioner of Central Excise (Appeals). The Appellant subsequently learnt about the decision of Madras High Court in the case of *Narasimha Mills Private Ltd. vs. Commissioner of Central Excise and ors.* reported in 2015 LawSuit (Mad) 1690 wherein it has been held that the order passed under the VCES is appealable and direction was issued to the Commissioner of Central Excise (Appeals) to take up the appeal and dispose of the same in

accordance with law. The Appeal presented by the Appellant to the Commissioner (Appeals), together with an application for condonation of delay, came to be rejected by the Appellate Authority holding that the same is not maintainable, as well as on consideration of merits. The Appellant preferred an appeal to the CESTAT i.e. the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench at Mumbai which has been dismissed by the Tribunal by an order dated 8 September 2017, holding that the same is not maintainable.

4. The Appellant, to substantiate his contentions, has placed reliance on the Judgment in the matter of ***Narasimha Mills Private Ltd. vs. Commissioner of Central Excise and ors.*** reported in 2015 LawSuit (Mad) 1690. The point for consideration before the Madras High Court was as to whether an appeal under Section 85 of the Act, 1994 would lie against the order of rejection or declaration passed by the Designated Authority under Section 106(2) of the Act, 1994. In paragraphs 11 of the Judgment, the High Court had placed reliance on the Judgment of the Punjab and Haryana High Court in the matter of ***M/s. Barnala Builders and Property Consultant vs. The Deputy Commissioner of Central Excise and Service Tax and ors.*** Passed in Civil Writ Petition No.26929 of 2013, wherein

it has been categorically held that the order passed under the VCES is appealable. In ***Barnala Builders'*** case it has been held :

“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 the correctness of the 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 the 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.”

Approving the view of Punjab and Haryana High Court in the matter as aforesaid, the Court has further observed in paragraphs 14 to 18, as quoted below :

“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.”

5. In view of the judgment cited above, we are of the considered opinion that an appeal under Section 85 of the Act, 1994 would lie against an order of rejection of a declaration passed by the Designated Authority under Section 106(2) of the Act, 1994.

6. So far as the payment of amount of service tax before the date of declaration of the scheme i.e. 10 May 2013 vis-a-vis applicability of the scheme is concerned, reliance is placed on the Judgment in the matter of ***Sadguru Construction Co. vs. Union of India***, delivered by the Division Bench of Gujarat High Court reported in 2014 LawSuit (Guj) 1620. The Appellant herein is similarly placed as in the case of the Petitioner before Gujarat High Court. Gujarat High Court has held that for a valid declaration two of the essential conditions were that the proceedings for either declaration or recovery of the tax dues should not be pending on 1 March 2013, and secondly, that the tax should not have been deposited before the said date. In the instant matter, both the conditions are fulfilled. It would be for the Appellate Authority to consider the Judgment and take a decision in the Appeal.

7. For the reasons as aforesaid, the Appeal deserves to be allowed and the same is accordingly allowed. The order dated 8 September 2017 in Appeal No.ST/85161/17-MUM passed by the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench at Mumbai, confirming the order passed by the Commissioner (Appeals) in File No.A-67/ST/GOA/2015-16 is quashed and set aside and the matter stands remitted to the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench at Mumbai for taking a decision in accordance with the provisions of law and on its own merits. There shall be no order as to costs.

(Prithviraj K. Chavan, J.)

(R.M. Borde, J.)