IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.06.2018

CORAM:

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN
AND
THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

W.A.No.241 of 2016
and CMP No.4124 of 2016

M/s.Hotel Southson Pvt. Ltd.,
Rep. By its Director K.Murugan,
No.A/4 Bharathi Street,
Swarnapuri, Salem 636 004. ... Appellant

versus

1. The Customs Excise Service Tax
Appellate Tribunal,
No.26 Haddows Road
I Floor, Shastri Bhavan Annex,
Chennai 600 006.

2. The Commissioner of Central Excise (Appeals)
Office of the Commissioner of Central Excise,
No.1 Foulks Compound,
Anai Medu, Salem.

3. The Joint Commissioner,
Office of the Commissioner of Central Excise,
No.1 Foulks Compound,
Anai Medu, Salem.

4. The Assistant Commissioner
Office of the Asst. Commissioner of Customs,
Central Excise & Service Tax,
(Designated Authority for VCES 2013)
Salem -I Division, Teerthamalai Complex,
Veerapandiar Nagar, Salem. ... Respondents

Appeal filed against the order passed by this Court dated 18.12.2015 passed in W.P.No.859 of 2015.

W.P.No.859 of 2015:-

Petition under Article 226 of the Constitution of India, praying for the issue of a Writ of Certiorarified mandamus to call for the entire records connected with the proceedings of the 4th respondent in pursuant to the order C.No.IV/16/80/2013/VCES/S.Tax/PF dt 3.10.2013 and to quash the same and consequently direct the 4th respondent to declare the petitioner is entitled to get benefit of the under Voluntary Compliance of Excise and Service Tax Scheme (VCES)

For appellant : Mr.M.K.Kabir, Senior Counsel for Mr.S.Ashok Kumar

For Respondents : Mr.V.Sundareswaran for RR 2 to 4 Senior Panel Counsel

J U D G M E N T

(Judgment of the Court was delivered by R.SUBRAMANIAN, J.)

The appellant challenges the dismissal of the Writ Petition in WP. No.859 of 2015 dated 18.12.2015, by way of this Intra Court Appeal.

2. Challenge in the Writ Petition was to the order of the 4th respondent, in and by which, the 4th respondent rejected the benefit of Voluntary Compliance of Excise and Service Tax Scheme to the appellant. The said rejection came to be made in the backdrop of the following facts.

3. The appellant had registered itself as a service provider liable to pay service tax for accommodation service and restaurant service. While so, a physical audit came to be conducted on 25.02.2013 and 28.02.2013 during the course of the said audit, the officers of the Central Excise Department found that the appellant is also providing the service of renting of immovable property, which service was not registered with the Authorities. Subsequently, on 19.03.2013, the appellant obtained a Certificate of Registration for Accommodation, Renting of immovable property and other services.

4. The Superintendent of Customs, Central Excise and Service Tax, Salem I, on 16.04.2013 issued a letter to the appellant pointing out that the appellant has not paid the Service Tax payable for the service of renting of immovable property for the period from 01.10.2010 to 28.02.2013. The Service Tax liability for the said period was assessed at Rs.36,10,239/- and certain penalties to the tune of Rs.26,300/- were also proposed. Thereafter, on 21.06.2013, the appellant wrote to the 4th respondent, viz. the Designated Authority for VCES Scheme seeking to declare the income from the renting of immovable

property service as a voluntary disclosure and sought for the benefits of the scheme. The said request of the appellant was rejected by the Designated Authority by its proceedings dated 03.10.2013, it is this rejection that was challenged in the Writ Petition in WP No.859 of 2015.

5. On behalf of the respondents it was contended before the Writ Court that the appellant is not entitled to the benefits of the VCES scheme in as much as the audit was conducted in the premises of the appellant on 25.02.2013 and 28.02.2013 and the same was not completed as on 01.03.2013, namely the cut of date. It was also contended that the provision of renting of immovable property service was unearthed during the course of audit and therefore, the appellant would not be entitled to the benefits of VCES Scheme, in view of the provisions of Section 106 (2)(b) of the Finance Act, 2013.

6. On the interpretation of the provisions of Section 106(2) of Finance Act, 2013, the learned Single Judge concluded that the appellant is not entitled to the benefits of the scheme and the order of rejection passed by the Authority was thus upheld. Aggrieved the appellant is before us by way of this Intra Court Appeal.

7. We have heard Mr.M.K.Kabir, learned Senior Counsel appearing for the appellant and Mr.V.Sundareswaran, learned Senior Panel Counsel appearing for the respondents/Department.

8. The issue involved in this appeal revolves around the interpretation of Section 106 (2) of the Finance Act, 2013, which reads as follows:

> "106.(2) Where a declaration has been made by a person against whom,—
>
> (a) an inquiry or investigation in respect of a service tax not levied or not paid or short-levied or short-paid has been initiated by way of —
>
> (i) search of premises under section 82 of the Chapter; or
>
> (ii) issuance of summons under section 14 of the Central Excise Act, 1944, as made applicable to the Chapter under section 83 thereof; or
>
> (iii) requiring production of accounts, documents or other evidence under the Chapter or the rules made thereunder; or

(b) an audit has been initiated, and such inquiry, investigation or audit is pending as on the 1st day of March, 2013, then, the designated authority shall by an order and for reasons to be recorded in writing, reject such declaration."

9. Section 106(2) lists persons who are not eligible to make a declaration under the VCES Scheme. The first part of Section 106 (2) viz. 106(2)(a) deals with persons against whom an inquiry or investigation in respect of the Service Tax not levied or not paid or short levied or short paid has been initiated by way of (i)search of the premises (ii)issue of summons under Section 14 of the Central Excise Act (iii) requiring production of accounts, documents or other evidence under the chapter or the rules made there under. Section 106 (2)(b) applies to a person against whom an audit has been initiated. The later part of Section 106(2) provides that if such inquiry investigation contemplated under Section 106(2)(a) or the audit contemplated under Section 106(2)(b) is pending as on 01.03.2013, the Designated Authority shall by an order and for reasons to be recorded in writing reject such declaration.

10. Mr.M.K.Kabir, learned Senior Counsel appearing for the appellant would draw our attention to certain clarifications issued by the department on 25.11.2013 with reference to the applicability of the provisions of Section 106(2) and contend that inquiry or investigation or audit referred to under Section 106(2)(a) and (b) should be with reference to the service provided by the assessee for which it holds a registration.

11. According to Mr.M.K.Kabir, learned Senior Counsel, the audit that was held on 25.02.2013 and 28.02.2013 was only in relation to accommodation service and restaurant service. Therefore, the same cannot be extended to the service of renting of immovable property. Since no inquiry or investigation or audit was pending against the appellant in respect of the specific service viz. renting of immovable property service, which the appellant wants to declare voluntarily, as per the declaration dated 21.06.2013, the Designated Authority, viz. the 4th respondent was not justified in rejecting the declaration on the ground that an audit was pending on 01.03.2013.

12. Per contra, Mr.V.Sundareswaran, learned Senior Panel Counsel appearing for the Department would contend that the audit that was conducted on 25.02.2013 and 28.02.2013 was a

General Audit and it was not a piece meal audit for a particular service. According to the learned Senior Standing Counsel, the fact that the appellant had not disclosed the provision of service relating to renting of immovable property by it and since the same was unearthed during the course of audit and the said audit was pending as on 01.03.2013 would disentitle the appellant from claiming the benefits of the VCES Scheme. Even the order impugned in the Writ Petition passed by the 4th respondent rejecting the application of the appellant under VCES Scheme makes it clear that the audit was pending as on 01.03.2013 and therefore, the appellants declaration under VCES Scheme was liable to be rejected in terms of Section 106(2) of Finance Act, 2013.

13. We have considered the rival submissions. Mr.M.K.Kabir learned Senior Counsel appearing for the appellant invites us to place a restricted meaning to the words of "an audit has been initiated" occurring in Section 106(2)(b) as an audit relating to a registered service that is being provided by the appellant. He would attempt to buttress his submission by referring to the clarifications issued by the department on 25.11.2013, which according to him would lead to an inference that the inquiry or investigation or audit contemplated under Section 106(2) should be in relation to the registered service that is being provided.

14. We are unable to agree with the said narrow interpretation placed by the learned Senior Counsel. Two situations are contemplated in Section 106(2) as circumstances that would disentitle a person from making a declaration under the VCES scheme, the first one is pendency of an inquiry or investigation in respect of Service Tax not levied or not paid or short levied or short paid initiated pursuant to a search of the premises, issuance of summons under Section 14 of the Central Excise Act 1944, or requiring production of accounts or other evidence under the Finance Act, 1994, are the Rules made there under. Of course, the above would only be in relation to a service which has already been registered, Section 106(2)(b) stands independent of Section 106(2)(a), it only says where an audit has been initiated and such audit as pending on 01.03.2013. The clarification issued by the Department on 25.11.2013 further directs that the condition should be construed strictly and narrowly. There is also a direction to the concerned Commissioner's to ensure that no declaration is rejected on frivolous grounds or by taking a wider interpretation of the condition enumerated in Section 106(2). The clarification issued further reads as follows:

"If the issue or the period of inquiry,

investigation or audit is identifiable from summons or any other document, the declaration in respect of such period or issue alone will be liable for rejection under the said provision."

15. This clarification itself does not support the interpretation placed by Mr.M.K.Kabir, learned Senior Counsel appearing for the appellant. It is seen from the material on record that the fact that the appellant was also providing service of renting of immovable property, apart from the two registered services viz. accommodation service and restaurant service was unearthed by the Department, during the course of the audit that was held on 25.02.2013 and 28.02.2013. Therefore, the issue regarding provision of the service of renting of immovable property was discovered later on and it is definitely referable to the audit held on 25.02.2013 and 28.02.2013. It is also borne out by records the said audit was pending as on 01.03.2013. Therefore, the claim of the appellant that the audit must be restricted to the services, which are already registered cannot be countenanced.

16. In Uttarkhand Van Vikas Nigam v. Union of India and others, reported in [2015] 81 VST 106, a Division Bench of the Uttarkhand High Court had an occasion to consider the scope of Section 106(2) of Finance Act, 2013, had observed as follows:

" Quite clearly, the intention of the Legislature appears to have been, undoubtedly, to entice large number of persons into paying the service tax dues with the assurance that, if the terms of the Scheme are complied with, they will not have to pay penalty and interest. This is, undoubtedly, for alluring such persons so that there is an increase in the revenue of the Government. But, at the same time, the Legislature was conscious of the criticism that could be levelled against such a Scheme being in the nature of promotion of dishonesty. It, therefore, felt that the scheme should be limited to those cases, where there were no proceedings at all pending and where the concerned assessee may have, out of ignorance which is partly contributed to by the revenue in not taking any sort of action against them, not made payments, which they were otherwise liable to pay. This interpretation of ours appears to be inevitable on the clear language of Section 106 read as a whole and in part."

17. We are an entire agreement with the above observation of

the Division Bench extracted above. Once it is shown that an audit has been initiated and it is pending, there is no scope for restricting the sweep of Section 106(2)(b) to an audit in relation to a particular kind of service. If at an audit, the department is able to unearth a service being rendered by the assessee, which has neither been registered nor been assessed to, it is definitely open to the department to require the assessee to pay the service tax and the penalty payable for providing such service. The rigour of such taxing statute cannot be whittled down by the appellant by seeking to invoke so called voluntary compliance that too after the fact that the service has not been registered or has not been taxed was discovered by the department.

18. We therefore concur with the view of the learned Single Judge and we see no merits in this appeal. The appeal is therefore dismissed, confirming the order of the learned Single Judge. However, in the case of the circumstance, there will be no order as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IX)

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Sub Assistant Registrar

jv

To

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Salem -I Division, Teerthamalai Complex,
Veerapandiar Nagar, Salem.

+1cc to Mr.S.Ashok Kumar , Advocate, S.R.No.36946
+1cc to Mr.V.Sundareswaran , Advocate, S.R.No.37598

W.A.No.241 of 2016
and CMP No.4124 of 2016

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