

THE HIGH COURT FOR THE STATE OF TELANGANA
*** THE HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN**
AND
THE HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVILI
+ WRIT PETITION No.32108 OF 2017

% Date:20.03.2019

Between:

M/s. Crescent EPC Projects & Technological Services
Ltd., Paigah House, Sardar Patel Road, Secunderabad
represented by its Assistant Vice President.

... Petitioner

v.

\$ The Union of India, through the Secretary (Revenue),
Ministry of Finance, Department of Revenue,
North Block, New Delhi and others.

... Respondents

! For Petitioner

: Sri A.R. Madhav Rao Mihir Gupta
Sri Avinash Desai

^ For Respondents

: Sri B. Narasimha Sarma,
Sri K. Lakshman
(Asst. Solicitor General) and
Sri P. Sriharsha Reddy

< Gist

:

> Head Note

:

? Cases Referred

: Nil

**HONOURABLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
HONOURABLE SRI JUSTICE ABHINAND KUMAR SHAVILI
WRIT PETITION No.32108 OF 2017**

ORDER: *(Per V. Ramasubramanian, J)*

Aggrieved by the rejection of their application under the Voluntary Compliance Encouragement Scheme, 2013 (hereinafter referred to as 'VCES') and a consequential demand made, the assessee of Service Tax under the Finance Act, 1994 has come up with the above writ petition.

2. Heard Mr. A.R. Madhav Rao Mihir Gupta, learned counsel appearing for Mr. Avinash Desai, learned counsel for the petitioner, Mr. K.Lakshman, learned Assistant Solicitor General, appearing for the 1st respondent-Union of India, Mr. B. Narasimha Sarma, learned Senior Counsel appearing for the respondents 2 to 4 and Mr. P. Sri Harsha Reddy, learned counsel appearing for the 4th respondent/Garnishee.

3. On the ground that there were 17 lakhs registered assesses of service tax, but only 7 lakhs assesseees out of them were filing returns and that therefore, a step towards motivating the remaining assesseees to file returns and to pay the taxes due, was essential, the Government introduced a one-time scheme known as VCES, in the budget of 2013. This scheme was introduced in the form of Chapter-VI of the Finance Act, 2013 (for short 'the Act'). This chapter comprised of Sections 104 to 114. Section 106 laid down the eligibility criteria for a person who can make a declaration under the Scheme. It reads as follows:

“106. (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.

(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 (1 of 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.”

4. According to the petitioner, they filed periodic tax returns for the period from October 2010 to March 2013. The period covered by VCES was only from October 2007 to 31-12-2012. The declaration under the Scheme was required to be made on or before 31.12.2013 in respect of taxes unpaid as on 01.03.2013. Two pre-conditions for the eligibility of a person to apply under the Scheme were (1) that audit should not be pending as on 01.03.2013 and (2) that 50% of the taxes due should be paid by 31.03.2013 and the balance paid either by 30.06.2014 or by 31.12.2014.

5. The petitioner herein filed a declaration under the Scheme on 31.12.2013, for the period October 2010 to December 2012. They also

paid 50% of the tax due. The petitioner paid the second installment of tax due on 31.03.2014.

6. However, a notice dated 21.05.2014 was issued calling upon the petitioner to show-cause why the declaration under the Scheme should not be rejected under Section 106(2) of the Chapter VI of the Act, since audit objections were pending at that time. But, the petitioner gave a reply on 28.05.2014, pointing out that audit was not pending as on 01.03.2013, but it commenced only on 01.08.2013.

7. After giving a reply to the show-cause notice, the petitioner also paid the third installment of tax on 26.06.2014. The factum of payment was also intimated to the Department on 30.06.2014.

8. It is relevant to note that the taxes due as per the declaration, were claimed by the petitioner to have been paid partly by way of cash and partly by way of cenvat credit. Therefore, by a letter dated 14.12.2015, the respondents sought clarifications on cenvat credit details. The petitioner gave clarifications on 21.12.2015.

9. But, by a letter dated 10.02.2016, the Assistant Commissioner of Service Tax, who is the 3rd respondent herein informed the petitioner that the VCES declaration filed by the petitioner was not tenable, for the reasons stated therein. The main reason stated in the said communication dated 10.02.2016 was that the petitioner had failed to pay even the tax declared in ST-3 returns and that therefore, the three conditions stipulated in the proviso to Section 106(1) applied. As a result, it was claimed in the said letter dated 10.02.2016 of the Assistant Commissioner that the petitioner cannot

even be given a rejection order, as the case would not fall under Section 106 (2).

10. After issuing the said communication dated 10.02.2016, the respondent issued garnishee notices to the 4th respondent Bank on 21.06.2017 forcing the petitioner to come up with the above writ petition.

11. A counter affidavit has been filed on behalf of respondents 2 to 4. It is contended in the counter affidavit that the petitioner filed ST-3 returns for the period from October 2010 to March 2011 on 25.04.2011; they filed ST-3 returns for the period from April 2011 to September 2011 on 22.12.2011; that the returns for the period from October 2011 to March 2012 were filed on 25.04.2012 and that the returns for the period April 2012 to September 2012 and October 2012 to March 2013 were filed respectively on 25.11.2012 and 25.10.2013. It is further contended in the counter affidavit that under the proviso to Section 106(1) of the Act, any person who has furnished returns under Section 70 of the Act and disclosed his true liability, but has not paid the disclosed amount of service tax shall not be eligible to make a declaration for the period covered by the said return and that since the petitioner has filed the returns, they are not eligible to come under the Scheme.

12. In a sense, the stand taken by the Department in the counter affidavit is two fold, namely, (a) that a person who has filed ST-3 returns is not eligible for the benefit of the Scheme and (b) that in any

case an assessee, who has not paid the disclosed amount of service tax, is not eligible to make a declaration under the Scheme.

13. We have already extracted Section 106 of the Act. Sub-section (1) of Section 106 of Chapter VI of the Act enables every person to file a declaration of his tax dues, if no notice or an order of determination had been made under Section 72/73/73A before 01.03.2013. The first proviso sub-Section (1) of Section 106 of the Act carves out an exception. It says that a person, who has furnished a return under Section 70 and disclosed his true liability, but has not paid the disclosed amount, shall not be eligible to make a declaration, for the period covered by the said return. Therefore, the original understanding of the Department, as reflected in the counter affidavit as though a person who had filed ST-3 returns may not be entitled to file a declaration, is incorrect.

14. It is well settled that the effect of a proviso is to prune the substantial provision or to carve out an exception. The main part of sub-Section (1) of Section 106 of Chapter VI of the Act entitles every person to declare his tax dues, if no notice or determination of the same had been made before 01.03.2013 under Sections 72 or 73 or 73A. Therefore, if the first proviso had not been there, all persons including (1) persons who never filed any returns (2) persons who filed returns which did not disclose the true liability and (3) persons who furnished returns and disclosed their true liability, but not paid the disclosed amount, would all be entitled to file a declaration.

15. But, the first proviso to sub-section (1) to Section 106 of Chapter VI of the Act excludes from the eligibility under Sub-Section (1), persons who belong to the third category, namely, those who filed returns under Section 70 of the Chapter and disclosed their true liability, but had not paid the disclosed amount. Persons belonging to the first and second category, namely, (1) those who never filed returns and (2) those who filed returns but did not disclose the true liability are not excluded by the first proviso.

16. For a person to come within the exclusion enumerated in the first proviso to sub-Section (1) of Section 106 of Chapter VI of the Act, three conditions are to be satisfied, namely, (1) that he has furnished returns under Section 70, (2) that he has disclosed his true liability in the returns and (3) that he has failed to pay even the disclosed service tax. Even in the absence of anyone of these three conditions, a person will not be covered by the first proviso to sub-Section (1). In fact, the very object of introducing VCES in the Budget of 2013, as indicated in the budget speech of the Finance Minister, was to provide a motivation (1) to people who failed to file returns and (2) to people who failed to pay taxes.

17. It is an irony of law that Schemes such as VCES, VDS (Voluntary Disclosure Scheme) or Composition Scheme, are intended for the benefit of defaulters. Therefore, while interpreting the provisions of such Schemes, the Court cannot adopt such an interpretation which will create two different classes of defaulters, greater and smaller or chronic and ordinary.

18. Therefore, all that is required to be done in cases of this nature is to see the object sought to be achieved by such schemes, without violating the express language employed in the Scheme.

19. In this case, the respondents admit (1) that the petitioner had filed ST-3 returns and (2) that the petitioner had disclosed his true liability. The only contention of Mr. B. Narasimha Sarma, learned Senior Standing Counsel for the Department, is that the payment of the amount of service tax as disclosed in the returns, was not made. In other words, it is contended by him that even the amounts of taxes due as per the ST-3 returns were not paid by the petitioner.

20. In the background of such a stand taken by the respondents, we directed, in the course of hearing of the writ petition, the learned Senior Standing Counsel to file a statement containing the details of the tax liability disclosed in the returns and the amount of taxes paid in relation to the same. Accordingly, a tabular statement was filed by the Assistant Commissioner, Service Tax, by way of a letter dated 03.12.2018. The tabulation reads as follows:

Period of the return	Respective Turnover	Tax Liability as per return	Payment		
			Cash	Cenvat Credit	Total
Oct' 2010 to Mar' 2011	58,42,36,813	3,30,43,821	8,28,989	3,18,80,990	3,27,09,979
Apr' 2011 to Sep' 2011	61,64,28,395	3,53,14,950	-	2,94,93,119	2,94,93,119
Oct' 2011 to Mar' 2012	82,06,29,153	4,47,01,005	9,59,871	4,37,69,514	4,47,29,385
Apr' 2012 to Sep' 2012	90,97,25,096	5,23,84,406	1,95,13,353	3,35,65,279	5,30,78,632
Oct' 2012 to Mar' 2013	41,49,61,246	5,12,89,210	4,00,79,363	1,76,99,010	5,77,78,373
Total	3,34,59,80,703	21,67,33,392	6,13,81,576	15,64,07,912	21,77,89,488

21. It is seen from the above tabulation that atleast in respect of three periods, namely, October 2011 to March 2012, April 2012 to September 2012 and October 2012 to March 2013, the total taxes paid by the petitioner both way of cash and by way of cenvat credit, is more than the liability disclosed in the return.

22. Insofar as the period October 2010 to March 2011 is concerned, the above tabulation shows that the total taxes paid both by way of cash and by way of cenvat credit was lesser than the liability reflected in the return. While the tax liability reflected in the return for the period October 2010 to March 2011 is Rs.3,30,43,821/-, the total payment made was only Rs.3,27,09,979/-.

23. After receipt of the copy of the letter dated 03.12.2018, containing the aforesaid tabulation, the learned Counsel for the petitioner produced material to show that the tax liability for the period October 2010 to March 2011 arrived at as Rs.3,30,43,821/- was wrong and that as per the return, the liability disclosed was only Rs.3,27,09,978/-.

24. Therefore, we directed the learned Senior Standing Counsel to check-up. After checking up, the Assistant Commissioner made a working and communicated to the Senior Standing Counsel by his letter dated 06.02.2019 that there was a mistake on the side of the Department and that for the period October 2010 to March 2011, the total liability as per the tax return was only Rs.3,27,09,978/- and that the petitioner had made payment of a sum of Rs.3,27,09,979/-. In other words, the petitioner has paid Re.1/- in excess of the total

liability as disclosed in the return for the period October 2010 to March 2011.

25. Therefore, it is now admitted by the Department that the liability disclosed in the returns for 'four' periods, namely, (1) October 2010 to March 2011, (2) October 2011 to March 2012, (3) April 2012 to September 2012 and (4) October 2012 to March 2013, have been fully paid by the petitioner, partly by way of cash and partly by way of cenvat credit. That leaves us only with one interregnum period, namely, the period from April 2011 to September 2011. According to the respondents, the total liability disclosed in the return for the period April 2011 to September 2011 was Rs.3,53,14,950/-, but the amount paid was only Rs.2,94,93,119/-. The learned counsel for the petitioner fairly concedes that there has been a short payment by the petitioner for the period April 2011 to September 2011. In other words, the petitioner falls squarely within the exclusion under the first proviso to Sub-section (1) of Section 106 of the Act, atleast in respect of the period April 2011 to September 2011. To put it differently, the petitioner has (1) furnished returns under Section 70 of the Act for the period April 2011 to September 2011, (2) disclosed his true liability (3) but not paid the disclosed amount of Service Tax.

26. That takes us to the next question as to whether on account of this default in respect of the period from April 2011 to September 2011, the entire declaration under VCES was liable for rejection or whether the declaration under the VCES was liable to be accepted

atleast in respect of the period covered by the other four returns, namely, (1) October 2012 to March 2011, (2) October 2011 to March 2012, (3) April 2012 to September 2012 and (4) October 2012 to March 2013.

27. For finding an answer to the said question it may be necessary to have a look at the broad features of the scheme. The features are as follows:

(i) The Scheme is intended only to cover the tax dues in relation to the period from 01.10.2007 to 31.12.2012. VCES 2013 is not applicable to the tax due in respect of the period before 01.10.2007 and after 31.12.2012.

(ii) Under the Finance Act, 1994, returns are liable to be filed half yearly. Service Tax returns are neither monthly returns nor quarterly returns nor annual returns, but are half-yearly returns.

(iii) But the period covered by the Scheme is from October 2007 to December 2012, which works out to five years and three months, that could be covered by 10 half yearly returns and a part of the eleventh half yearly return.

28. In simple terms, this period of five years and three months will be covered by ten half yearly returns and a portion of the eleventh half yearly return. The ten half yearly returns that would cover the period to which the scheme relates are October 2007 to March 2008, March 2008 to September 2008, October 2008 to March 2009, March 2009 to September 2009, October 2009 to March 2010, March 2010

to September 2010, October 2010 to March 2011, March 2011 to October 2011, October 2011 to March 2012, March 2012 to October 2012.

29. Though the period covered by the Scheme is about '63' months, (representing 10 half yearly returns and a part of 11th return), the declaration contemplated under the Scheme is only one. The VCES does not contemplate 11 different declarations, each correlatable to one half early return.

30. But, the first proviso to sub-Section (1) of Section 106 of the Act speaks only of "return" and not "returns or declaration". The proviso states that any person who has furnished return under Section 70 of the Act 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 a declaration for the period covered by the said return.

31. It is possible by virtue of Section 13 (2) of the General Clauses Act, 1897 to construe the word "return" in the proviso to Section 106 (1) of the Act to include "returns", but Section 13 of the General Clauses Act applies only where there is nothing repugnant in the subject or context.

32. The proviso to Section 106(1) of the Chapter VI of the Act concludes with the words "by the said return". Therefore, every return, in relation to the period covered by which, a declaration is filed, is sought to be treated as independent, by the proviso to Section 106(1). This is due to the use of the word "return" in the first part and

the use of the words “by the return” in the concluding part of the proviso to Section 106(1).

33. But unfortunately, section 106 does not contemplate the filing of multiple declarations, each co-relating to one half yearly return. Section 106 provides for the filing of only one declaration. Such a declaration could be in respect of the entire period covered by the scheme namely October 2007 to December 2012 or for a part thereof. While it is possible to split the period in respect of which the declaration is filed, into ‘10’ half yearly returns and a part of the 11th half yearly return, it is not possible to split the declaration itself.

34. If the interpretation sought to be given by the learned counsel for the petitioner is accepted, a single composite declaration filed under the Scheme should be split into several fragments and the declaration could be accepted in respect of those fragments which do not fall within the first proviso. If this is done, a declaration under the Scheme will become acceptable in part and liable for rejection in respect of the other part.

35. While the three conditions laid down in the first proviso, namely, (1) filing of the return, (2) disclosure of true liability and (3) non-payment of the disclosed amount of service tax, may have to be applied return-wise, for the purpose of finding out the applicability of the exclusion clause, the declaration as such cannot be split up into two parts one relating to the period which falls within the exclusion clause and another relating to the period which falls within the eligibility criteria.

36. The only way we could understand and interpret the first proviso in sync with the main part of Sub-section (1) of Section 106 of the Act, is to hold (1) that the eligibility of a declarant is to be decided with respect to the whole of the period for which the declaration is filed and (2) that the applicability of the proviso will have to be determined with respect to each of the returns that cover the period in respect of which the declaration is filed.

37. This can be understood better by an illustration. Let us take the very case of the petitioner, who has filed a single declaration for a period covered by six half yearly returns. To find out whether the case of such a declarant falls within the exclusion under the first proviso, we may have to apply all the three tests stipulated in the proviso to each of the six half yearly returns. On the application of the tests laid down in the first proviso to each of the returns, if it is found that the period covered by one out of those six returns falls within the purview of the first proviso, then the whole declaration may become defective. This is why the third condition laid down in the first proviso relates to non-payment of the disclosed amount of service tax *or any part thereof*.

38. As stated earlier, the petitioner filed one single composite declaration for the tax dues in respect of the period October 2010 to March 2013. This period is covered by six returns. While five out of those six returns do not fall within the first proviso to Section 106 (1) of Chapter VI of the Act, one return falls within the purview of the first proviso. Therefore, the declaration becomes defective, as

Chapter-VI does not enable the authorities to split up the declaration into several parts.

39. Hence, we are of the considered view that the rejection of the declaration under the VCES cannot be taken exception to.

40. Drawing our attention to Section 105(2) of the Act, it is contended by the learned counsel for the petitioner that the word “return” should be given the same meaning as assigned to it under the Chapter or the Rules made thereunder. Section 70 of the Act contemplates half yearly returns and hence, it is contended that the declaration could have been accepted at least in respect of the period from October 2010 to March 2011 and October 2011 to December 2012.

41. *But, as we have already pointed out, the returns are divisible, but the declaration is indivisible.* A declaration under the Scheme may have to be dealt with as a single sealed basket of apples and it may not be possible to accept the basket as a whole after throwing out those apples which are rotten. Therefore, we find that the order impugned in the writ petition is unassailable.

42. One more argument was advanced on the basis of Section 111 (1) of the Act. Under Section 111 (1) of the Act, the Commissioner is entitled to serve a notice on the declarant calling upon him to pay the taxes due, which are either not paid or short paid. But, sub-Section (2) of Section 111 of the Act makes it clear that no action under Sub-Section (1) shall be taken after the expiry of one year from the date of the declaration. Therefore, it is contended by the

learned counsel for the petitioner that the rejection order passed on 10.02.2016 in respect of a declaration filed on 31.12.2013 was beyond the period stipulated in Section 111 (2) of the Act.

43. But, the said argument does not hold water. The order dated 10.02.2016 is not one under Section 111 of the Act. Section 111 (1) of the Act applies only to cases where the declaration is found to be substantially false. In this case, the petitioner is not accused of filing a false declaration. The case of the respondents is that the declaration of the petitioner would fall within the first proviso to Section 106(1) of Chapter VI of the Act. Therefore, this contention does not hold good.

44. In view of the above, the impugned order does not suffer from any illegality warranting interference. Hence, the Writ petition is dismissed.

45. The miscellaneous petitions, if any, pending shall stand closed. No order as to costs.

V. RAMASUBRAMANIAN, J

ABHINAND KUMAR SHAVILI

March 20, 2019

Note:

L.R. Copy to be marked.

**B/O.
KTL**