IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	11.02.2020
Pronounced On	13.03.2020

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.No.11386 of 2014

Suprasesh General Insurance
Service & Brokers (P) Limited,
[Represented by its Managing Director,
Mr.Sunder Raman],
"Century Plaza", 6L & M, 6th Floor,
Teynampet, Chennai – 600 018. ... Petitioner

Vs.

The Assistant Commissioner /
Designated Authority (VCES)
Office of the Commissioner of
Service Tax,
Newry Towers, No.2054-1,
II Avenue, Anna Nagar,
Chennai – 600 004. ...Respondent

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records on the files of the respondent herein in his Order No.001/2014 [VCES] dated 28.01.2014 and quash the same, while directing the respondent to issue to the petitioner an acknowledgement of discharge of dues in Form-VCES3.

For Petitioner : Mr.N.Sriprakash

For Respondent : M/s. Hema Muralikrishnan
Standing Counsel.

O R D E R

The petitioner is aggrieved by the impugned order dated 28.01.2014 passed by the respondent rejecting the declaration filed by the petitioner under the Service Tax Voluntary Compliance Encouragement Scheme, 2013.

2. By the impugned order, the petitioner's application for settling dispute under the said scheme has been rejected on two

counts namely:-

(i) that the petitioner was not entitled to settle the dispute as the declaration filed by the petitioner was not in terms of Section 106 (1) of the Finance Act, 2013 in as much as notice and orders had been issued to the petitioner for the preceding period on the same issue.

(ii) that the payment made by the petitioner on 09.04.2013 cannot be considered for settling dispute under the aforesaid scheme.

3. The petitioner had been subjected to six Show Cause Notices for a period of commencing from 16.07.2001 to September 2011. Out of the six Show Cause Notices, the first Show Cause Notice was adjudicated, which went up to the Tribunal. The Tribunal vide Final Order No.1287 of 2008 dated 17.11.1980 had partly allowed the appeal's and partly rejected.

4. The demand for the period prior to 10.09.2004 was set aside and for the period after 10.09.2004 upto March 2006 was upheld. The petitioner took up the issue before the Division Bench of this Court. The Division Bench of this Court by its order, allowed the petitioner's appeal in (2015) 86 VST 160 (Mad). The revenue took up the issue on further appeal before the Hon'ble Supreme Court and the same is pending in SLP.Nos.11840 and 11841 of 2016.

5. The petitioner admits that remaining 5 Show Cause Notice proceedings have been kept pending for adjudication and await for final disposal of the departments appeal in SLP. Nos. 11840 and 11841 of 2016.

6. For the period in dispute in the present case that is for the period beginning from 01.10.2007 to 31.12.2012, the petitioner availed the benefit of the Service Tax Voluntary Compliance Encouragement Scheme announced vide the Finance Act, 2013. However, before the Finance Act, 2013 was enacted, the petitioner deposited a sum of Rs.43,19,603/- on 09.04.2013 and the balance amount of Rs.3,97,566/- on 05.06.2013.

7. The petitioner thereafter filed a declaration in Form VCES-1 in terms of Service Tax Voluntary Compliance Encouragement Scheme, 2013 on 26.07.2013 to settle the case by declaring tax dues for the period commencing from July 2012 to December 2012. Form VCES-2 was acknowledged on 30.07.2013 by the respondent. The petitioner was thereafter issued with a Show Cause Notice dated 14.08.2013 by the Designated Authority. The

petitioner replied to the same on 11.11.2013, which has culminated in the impugned order rejecting the petitioner's application. The petitioner stated that it had incurred service liability for the period 1.07.2012 to 31.12.2012 in terms of Rule 9(c) of the Place of Provision of Service Rules, 2012, which became effective from 01.07.2012. The show cause notices and the orders-in-original referred to in Paragraph 2.0 of the Show Cause had nothing to do with the aforesaid rules which was clear from the periods covered by such show cause notices and orders-in-original as elaborated in the annexure to the Show cause. Besides, in those cases, the issue involved was whether the services provided, the benefit of the Export of Services Rules, 2005 was availed. Those cases did not involve the issue relating to liability or otherwise from 01.07.2012 in terms of Place of Provision of Service Rules, 2012. The rules in question have been framed under Section 66C of Chapter -V of the Finance Act, 1994. The rules operate only from 01.07.2012. The payments made by the petitioner under VCES was in compliance with the said rules. Therefore, the proposal to invoke the Second Proviso to Section 106(1) of the Act is also unjustified.

8. In support of the present writ petition, the learned counsel for the petitioner drew my attention to the decision of the different High Courts dealing with almost the identical situation relating to aforesaid scheme eligibility on amounts paid prior to passing of the Finance Act, 2013 in Sadguru Construction Co. Vs. Union of India, (2015) 81 VST 95 (Guj) and in Suprasesh General Insurance Services and Brokers (P) Ltd., Vs. Commissioner of Service Tax, (2015) 86 VST 160 (Mad) and in Premier Associates v. Assistant Commissioner of Service Tax, (2018) 49 GSTR 1 (Karn).

9. The learned counsel also drew attention to the decision of the Kerala High Court in Alwaye Sugar Agency v. Commercial Tax Officer, Alwaye and others, (2011) 42 VST 517 (Ker), wherein, the Court considered an identical situation and held that if benefit is not given, it would lead to a very anomalous situation.

10. The learned counsel for the respondent submits that the impugned order cannot be challenged in this writ petition as the petitioner has an alternate remedy by way of appeal under Section 84 of the Finance Act, 1997 and therefore, the writ petition was liable to be dismissed.

11. The learned counsel for the respondent further submitted that the issue as to whether payments made prior to enactment of Finance Act, 2013, can be considered for settling dispute under the aforesaid scheme, is clearly covered against the petitioner by the decision of the Calcutta High Court in Durgapur Diesel

Sales and Service Vs. Superintendent (Service Tax) Central Excise, Durgapur, (2015) 59 taxmann.com 407 (Calcutta), wherein, the decision of the Delhi High Court has been distinguished. The learned counsel for the respondent also submitted that the payment were made prior to the enactment of the Finance Act, 2013, the aforesaid payment cannot be considered for the purpose of the Service Tax Voluntary Compliance Encouragement Scheme, 2013 in the light of the clarification of Central Board Excise and Customs (CBEC) in circular No.170/58/2013-ST, dated 08.08.2013.

12. I have heard the learned counsel for the petitioner and the learned Standing Counsel for the respondent. I have also perused the provisions of the Finance Act, 2013, in terms of which the Service Tax Voluntary Compliance Encouragement Scheme, 2013 was announced.

13. From the facts disclosed by the petitioner, it is noticed that the petitioner has issued with six different periodical Show Cause Notices for the period commencing from 16.07.2001 to September 2011 as detailed below:-

Sl.No.	SCN No.	Date	Period		Service Tax demanded (Rs.)
			From	To	
1	36/2006	25.09.2006	16.07.2001	Mar '06	1,42,44,880
2	27/2008	12.02.2008	Apr '06	Nov '07	1,47,59,000
3	158/2009	16.04.2009	Dec '07	Dec '08	1,07,73,577
4	71/2010	30.03.2010	Jan '09	Dec '09	38,00,956
5	42/2011	28.02.2008	Jan '10	Dec '10	12,05,932
6	49/2011	22.03.2012	Jan '11	Sep '11	19,73,599

Issue in all the Show Cause Notices deal with the demand for service tax on the commission paid (retained) by the petitioner in the course of provision of re-insurance business to foreign insurance companies.

14. Persons who are eligible to avail the benefit of aforesaid scheme has been specified under Section 106 (1) of the Finance Act. Section 106 reads as under:-

"106 (1) PERSON WHO MAY MAKE DECLARATION OF TAX DUES:- 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 73 A 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 made 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 or 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 (1 of 1944)

(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."

15. During the Budget speech on 28.02.2013 when the Finance Bill 2013 was introduced, the Finance Minister has stated the reasons for providing for such a Scheme in the Finance Bill. Paragraph 183 of the Budget speech is re-produced below:

"183. While there are nearly 17,00,000/- registered assessees under service tax, only about 7,00,000/- file returns. Many have simply stopped filing returns. We cannot go after each of them. I have to motivate them to file returns and pay the tax dues. Hence, I propose to introduce a one-time scheme called 'Voluntary Compliance Encouragement Scheme'. A defaulter may avail of the scheme on condition that he files a truthful declaration of service tax dues since 01.10.2007 and makes the payment in one or two instalments before prescribed dates. In such a case, interest, penalty and other consequences will be waived. I hope to entice a large number of assessees to return to the tax fold. I also hope to collect a reasonable sum of money.”

16. The Government has also made rules of Commissioner effect to the aforesaid scheme by virtue issued notification No.10/2013- Service Tax, dated 13.05.2013. On 13.05.2013, the Government of India, Ministry of Finance (Department of Revenue), Central Board of Excise and Customs, New Delhi has also issued a clarification, wherein, it has been clarified and further clarification dated 08.08.2013 at Serial No.8, it has been clarified as under:

“S.No.8:

8	A person has made part payment of his 'tax dues' on any issue before the scheme was notified and makes the declaration under VCES for the remaining part of the tax dues. Will he be entitled to the benefit of non-payment of interest/penalty on the tax dues paid by him out side the VCES, i.e., (amount paid prior to VCES)?	No. The immunity from interest and penalty is only for “tax dues” declared under VCES. If any “tax dues” have been paid prior to the enactment of the scheme any liability of interest or penalty thereon shall be adjudicated as per the provisions of Chapter V of the Finance Act, 1994 and paid accordingly.”

17. The Scheme came into force with effect from 10.05.2013 after the Finance Act, 2013 was enacted. The Scheme was intended for only those service taxes defaulters who had registered with, but had failed to file returns and therefore to motivate them to file returns of tax and pay tax, the aforesaid scheme was introduced. It is evident from the budget speech of the Finance Minister on 28.02.2013 at the time of presentation of the budget speech and from the reading of the 2nd proviso to Section 106(1) of the Finance Act, 2013, as per which 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.

18. In this case, admittedly, the petitioner has been issued with the Show Cause Notice to demand service tax from the petitioner on the commission received by the petitioner on its re-insurance business. The case has also been adjudicated by the Commissioner of Service Tax vide Order-in-Original No.2/2007 dated 31.01.2007, wherein, the demand of Rs.1,42,44,880/- was confirmed. This issue is now pending before the Hon'ble Supreme Court.

19. Similarly, vide Order in Original No.19/2010 dated 03.11.2010, the Commissioner has confirmed the demand for the period between December 07 to December 08. On the date of the writ petition, an appeal against the said order was said to be pending before the CESTAT while rest of the show cause notices were pending adjudication and were awaiting the order of the Honourable Supreme Court.

20. The Finance Act, 1994 was completely overhauled in the Finance Act, 2012. For the first time, the definition of expression "service" was introduced in Section 65B(44) of the Finance Act, 1994. Thus, any activity carried out by any person for another consideration was "service" liable to tax under Section 66B of the Finance Act, 1994. It included, "declared service" enumerated in Section 66E of the Finance Act, 1994.

21. Under these circumstances, service of every description was liable to tax except those which fell within the purview of the "negative list" in section 66D of the Finance Act, 1994. Certain categories of services were specifically exempted in public interest vide Mega Exemption Notification No. 25/2012-ST dated 30.07.2012.

22. Since Export of Service Rules, 2005 introduced by Notification No.9/2005-ST dated 03.03.2005 and Taxation of Services (Provided from outside India And Received in India) Rules, 2006 introduced by Notification No.11/2006-ST dated 19.04.2006 became redundant in the light of the amendment in the Finance Act, 2012 new set of rules came to be framed. Place of Provision of Services Rules, 2012 replaced Export of Service Rules, 2005 introduced by Notification No.9/2005-ST dated 03.03.2005 and Taxation of Services (Provided from Outside India And Received in India) Rules, 2006 introduced by Notification No.11/2006-ST dated 19.04.2006. Thus, the petitioner cannot state that neither a notice nor an order of determination had been issued to the petitioner in respect of any period on any issue prior to the Scheme.

23. The amendment in the Finance Act, 2012 did not introduce service tax on "intermediary or insurance intermediary" service for the first time. It was liable to tax all along in terms of

section 65(105)(zl) of the Finance Act, 1994 w.e.f. 01.05.2006 prior to that the service.

24. In fact, the case of the petitioner that it was exempt from payment of tax in terms of Export of Service Rules, 2005 was rejected by the Tribunal vide Final Order No.1278/08 dated 17.11.2008 and by Commissioner of Central Excise vide Order in Original No. 19/2010 dated 03.11.2010. Thus, for the earlier period also, the petitioner has been held liable to pay tax for up for the normal period of limitation.

25. Thus, mere change in the provisions in the Finance Act, 1994 vide Finance Act, 2013 did not alter the nature of levy of service tax on the services provided by the petitioner. Even according to the Department, the petitioner was not exempted from payment of service tax under the provisions of the Export of Service Rules, 2005. For the period after 01.07.2012, Rule 9 (c) of the Place of Provisional Rules, 2012 specifically continued the levy on services provided by the petitioner. The issue is the same issue in respect of which it has been issued with Show Cause Notice.

26. Therefore, I am of the view, it is not open for the petitioner to contend that it was entitled to avail the benefit of the Scheme in the light of 2nd proviso to Section 106 of the Finance Act, 2013. Further, the scheme under the Finance Act, 2013 is not available to an assessee who has filed returns under Section 70 of the Finance Act, 1994, but had failed to pay tax.

27. It is evident that a person like the petitioner were not in the contemplation of the Service Tax Voluntary Compliance Encouragement Scheme, 2013. Since the petitioner was not eligible to the aforesaid scheme, the denial of the benefit of aforesaid scheme in the light of the clarification of the Central Board of Excise and Customs, New Delhi vide clarification dated 13.05.2013 bearing reference Circular No.169/4/2013-S.T is not relevant.

28. Thus, it is clear that the Service Tax Voluntary Compliance Scheme, 2013, is not intended for a person like the petitioner.

29. The decision of the Gujarat High Court in Sadguru Construction Co. Vs. Union of India, (2015) 81 VST 95 (Guj) referred by the learned counsel for the petitioner, did not deal with the situation contemplated under Section 106(1) and 2nd proviso to Section 106(1) of the Finance Act, 2013. The said decision has merely dealt with the situation, where, the petitioner therein like the petitioner herein had paid the amount before the Finance Act, 2013 came to be passed. Therefore, I am of the view that the said decision is also of no relevance to the

case of the petitioner. In case the petitioner was entitled to avail the benefit of the aforesaid scheme, the said decision would have come to rescue of the petitioner.

30. The decision of the Uttarakhand High Court in Uttarakhand Van Vikas Nigam Vs. Union of India and Others, (2015) 81 VST 106 (Uttarakhand) followed the decision of the Gujarat High Court in Sadguru Construction Co. Vs. Union of India, (2015) 81 VST 95 (Guj) is also not relevant for the same reason.

31. In the light of the above discussion, it is unnecessary for me to deal with the contra view of the Calcutta High Court rendered in Durgapur Diesel Sales and Service Vs. Superintendent (Service Tax) Central Excise, Durgapur, (2015) 59 taxmann.com 407 (Calcutta).

32. Therefore, this Writ Petition is liable to be dismissed and is accordingly dismissed. No cost.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

ssi/jen

To

The Assistant Commissioner /
Designated Authority (VCES)
Office of the Commissioner of Service Tax,
Newry Towers, No.2054-1, II Avenue,
Anna Nagar, Chennai - 600 004.

+1 cc to M/s.Hema Muralikrishnan, Advocate Sr.No. 22631

+1 cc to Mr.N,Inbarajan, Advocate Sr.No. 22631

W.P.No.11386 of 2014

SR(CO)
RMP(15/07/2020)