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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 21.10.2021

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THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P.No.8907 of 2020

M/s. Indian Oil Corporation Limited,
Lube Blending Plant,
Tondiarpet,
Chennai-600 081.

... Petitioner

Vs.

The Commissioner of Central Excise & GST,
26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.

... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of certiorarified mandamus calling for records in Form SVLDRS-1 bearing ARN No.LD2112190001108 dated 21.12.2019 on the file of the Respondent herein and to quash the entry made rejecting the Declaration filed on the ground of ineligibility as illegal, unconstitutional and direct the Respondent to issue SVLDRS Form-4.

For Petitioner : Mr.Muthu Venkatraman

For Respondent : Mrs.Hema Muralikrishnan
Senior Standing Counsel

O R D E R

The petitioner, a Public Sector Undertaking has challenged an order passed by the sole respondent, Commissioner of Central Excise and GST rejecting the application of the petitioner for settlement of disputes under the Sabka Viswas (Legacy Dispute Resolution) Scheme, 2019 (Scheme/SVLDRS Scheme).



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2. The petitioner is engaged in the manufacture of lubricants that fall under Chapters 27, 34 and 38 of the First Schedule to the Central Excise Tariff Act, 1985 (in short 'Act'). The supply was made without the payment of duty on the strength of exemption Notifications issued during the period September, 2013 and June, 2014, as per which, supplies made as against international competitive bidding to power projects did not carry the incidence of duty.

3. The petitioner had committed an error in the returns filed with the Central Excise Department mentioning Serial No.336 instead of 338 of Notification No.12/2012 - Central Excise dated 17.03.2012 in regard to some supplies of lubricants effected by it. The Department adopted the view that the commodity supplied, being lubricant, was only used as a coolant/lubricating agent and hence did not entitle the petitioner to the exemption sought.

4. A show cause notice thus came to be issued on 18.09.2014 to which a response were filed by the petitioner culminating in an Order-in-original that travelled in appeal before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT). Since the SVLDRS Scheme had been rolled out pending appeal, the petitioner sought settlement of the dispute arising under the aforesaid show cause notice, which has come to be rejected by way of the impugned order dated 21.12.2019. Hence the present Writ Petition.

5. The case of the petitioner is that the show cause notice dated 18.09.2014 specifically refers to 'lubricants' falling under Chapter 27 of the first schedule to the Act. Thus the dispute sought to be resolved would have to be seen in the context of the lis arising from the show cause notice relating to the declaration.

6. The Scheme, for its part, excludes certain category of disputes from its cover in terms of Section 125 thereof including those 'with respect to excisable goods set forth in the Fourth Schedule to the Central Excise Act, 1944'

7. There was some discussion between the petitioner and respondent in regard to whether at all the declaration would be maintainable. The petitioner had, vide its mail dated 25.11.2019



sought a clarification and a confirmation that only those products that were still subject to the levy of central excise at the time of transition into GST would remain outside the purview of the scheme and that litigation in regard to all other goods would be covered by the Scheme.

8. In response to the aforesaid mail, on 26.11.2019, the Officer on Special Duty (OSD) confirmed, referring to the 101st Amendment of the Constitution of India, that only Petroleum crude, high speed diesel, motor spirit, natural gas, aviation turbine fuel and tobacco and tobacco products still fall under the ambit of central excise and thus, only cases relating to the aforesaid commodities would fall outside the purview of the SVLDRS Scheme.

9. The petitioner would also point out that the lubricants were subject to levy of Goods and Services Tax (GST) in terms of the GST Act, 2017. Thus, only petroleum products that continue to be charged to central excise duty would fall outside the ambit of the Scheme and not lubricants. In fact, the clarification given by the OSD supports their case.

10. They would also point out that the 4th schedule to the Act which described lubricating oil under Tariff Item 2710 19 80 prescribed a '.....' rate in the column 'rate of duty'. Note (4) of the General Rules of Interpretation under Schedule 4 confirmed the position that where the rate of duty was blank, '.....', as against any goods stipulated under the 4th Schedule, then central excise duty would not be leviable on such goods. Thus, and since the rate of duty as against 'lubricants' was blank, the mere mention of the commodity in the 4th schedule would not be a bar to the consideration and acceptance of the petitioner's application under the SVLDRS Scheme.

11. The petitioner relies on the decision of the Delhi High Court in the case of Vaishali Sharma V. Union of India (2020 (40) TSTL 441 (Del.)) urging that the Scheme was intended to reduce pendency of litigation and benefit tax payers and hence should be liberally construed.

12. In Indian Oil Corporation V. Union of India and two others (2020 -TIOL-2122-HC-ALL-CX), the commodity in question was Superior Kerosene Oil (SKO). The Division Bench of the



Allahabad High Court considered an SVLDRS application filed by the same petitioner as before me though a different unit. The application had come to be rejected on the identical premise as in the present matter and similar contentions as advanced in this case came to be considered by the Court that held adverse to the petitioner therein.

13. The Bench has gone on a plain reading of Section 3 of the Central Excise Act, 1944, the charging Section, which states that central excise would be leviable on all excisable goods which are produced or manufactured in India at the rates set forth in the 4th schedule. Thus, according to the Bench, irrespective of whether a positive number is stated alongside the commodity, the mere mention of that commodity in the schedule would disentitle the manufacturer of those goods to avail of the benefit of the SVLDRS Scheme.

14. As regards the contention that GST was being charged in respect of SK0, the Bench held that both CE and GST were concurrent levies and that SK0 continued to be excisable under Central Excise Act, 1944, even if it were liable to GST. Paragraph Nos.16 and 17 rejecting the contention of Indian Oil Corporation in that Writ Petition are extracted below:

16. Section 3 of the Act, 1944 as amended by Act 18 of 2017 is the charging Section. It provides for levy and collection of duty of excise to be called Central Value Added Tax (CENVAT) on all excisable goods which are produced or manufactured in India, at the rates set forth in the Fourth Schedule. Sub-Section 3 of Section 3 empowers the Central Government to provide by Notification rates of duty and tariff values with respect to the articles enumerated in the Fourth Schedule. Thus, all the items which are enumerated in the Fourth Schedule are excisable goods in terms of the provisions of Section 2(d), read with Section 2(f) and are liable to duty at the notified rates under the charging Section 3 of the Act.

17. "Manufacture" is the taxable event under the Central Excise Act, 1944 while under Section 9 of the CGST Act/UPGST Act, the event of taxation is the supply of goods or services except the supply of alcoholic liquor for human consumption. Sub-Section 2 of Section 9 of the CGST Act/UPGST Act empowers to levy tax on supply





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(c) who have been issued a show cause notice, under indirect tax enactment and the final hearing has taken place on or before the 30th day of June, 2019;

(d) who have been issued a show cause notice under indirect tax enactment for an erroneous refund or refund;

(e) who have been subjected to an enquiry or investigation or audit and the amount of duty involved in the said enquiry or investigation or audit has not been quantified on or before the 30th day of June, 2019;

(f) a person making a voluntary disclosure,–

(i) after being subjected to any enquiry or investigation or audit; or

(ii) having filed a return under the indirect tax enactment, wherein he has indicated an amount of duty as payable, but has not paid it;

(g) who have filed an application in the Settlement Commission for settlement of a case;

(h) persons seeking to make declarations with respect to excisable goods set forth in the Fourth Schedule to the Central Excise Act, 1944.

(2) A declaration under sub-section (1) shall be made in such electronic form as may be prescribed.

18. We are concerned with Section 125(1)(h) that excludes persons seeking to make declarations with respect to excisable goods set forth in the 4th schedule to the Central Excise Act, 1944. One of the questions that arises is as to what constitutes 'excisable goods'.

19. This question came to be raised and answered in the case of Moti Laminates Pvt. Ltd. V. Collector of Central Ex., Ahmedabad (1995 (76) ELT 241), wherein a three Judge Bench of the Hon'ble Supreme Court held that the charge to levy covered excisable goods mentioned in the schedules, provided they were subject to the processes of production and manufacture. The specific question of law upon which judgment was rendered was whether under Section 35L of the Central Excise and Salt Act, 1944, various goods mentioned in the schedule of excise tariff are dutiable as such or they would be 'excisable goods' as defined under the Act only when they are marketable or capable of being marketed.



20. The Bench refers to an earlier judgment in Indian Cable Co. Ltd. V. Collector of Central Excise, Calcutta (1994 (74 ELT 22)), wherein the marketability of goods was held to be a pre-requisite for the levy of duty. After having traced the development of law through a series of judgments, the Bench states at paragraph 10 that 'any goods produced or marketed, ipso facto do not attract duty, unless they are marketable or capable of being marketed.....' They continue to say at paragraph 10 as follows:

10. Having traced the development of law that any goods produced or manufactured ipso facto do not attract duty unless they are marketable or capable of being marketed, we may now examine the dutiability of goods captively consumed. Prior to 1979 no duty was levied on such goods. But, as stated earlier, after amendment of rules 9 and 49 captively consumed goods become exigible to duty. The rationale for not treating such goods as excisable was same that since such goods were not brought to the market for buying and selling they could not be subjected to duty. But when the Rules were amended a fiction was created that any article produced or manufactured if captively consumed was statutorily presumed to satisfy the test of marketability. But this presumption can be rebutted if it is established that the article produced and captively consumed was neither goods nor marketable nor capable of being marketed. The duty is attracted not by captive consumption of any article but it must be a good within the meaning of the Act which apart from having a distinctive name and known as such must be marketable or capable of being marketed. In Bhore Industries (supra) crude PVC films manufactured by the appellants as intermediate product used for captive consumption in manufacture of leather cloth, jute matting and PVC tapes were held not to be excisable goods on the test of marketability. In Collector of Central Excise v. Amhalal Sarahhai Enterprises 1989(43) ELT 214 the manufacturers produced starch hydrolysate which was captively consumed and fell under item 1-E of the Central Excise Tariff. It was held to be goods, no doubt, but it was observed that from a practical point of view it was apparent that the goods were not marketable consequently they were not exigible to duty.



21. The thrust of the aforesaid observations would lead one to the conclusion that the incidence of duty must not be looked at a mechanical event but a constructive one, that contains all incidents of a taxable event. Thus, to attract levy of duty, as the Hon'ble Supreme Court says, a practical point of view must also be called into play to determine whether the goods are marketable or capable of being marketed. Though in that case the Court was concerned with whether the commodity in question was capable of being marketed as a distinct and marketable product, the observations made would apply to the present scenario as well, since in the present case, there is no rate of duty that is set out alongside 'lubricants' that may be applied to a transaction of manufacture and sale of the said lubricant.

22. Thus, even though the product in this case is marketable, it does not answer to the question of 'excisable goods' as, practically there can be no levy of duty thereupon in the absence of a stipulated rate and applicable rate of duty. Thus, notwithstanding that the language of Section 125(h) of the SVLDRS Scheme uses the phrase 'with respect to excisable goods set forth in the Fourth Schedule to the Central Excise Act, 1944', the use of the word 'excisable' cannot be seen to be cosmetic, but must contain some purpose. Mere mention of the commodity without the rate of tax would serve no purpose as far as excisability is concerned, seen in the context of the judgement in Moti Laminates (supra).

23. In HLG Trading V. Union of India (2016 (331) ELT 561), a Division Bench of this Court considered a challenge by traders of yarn and fabric to various Trade Notifications issued and at paragraph 19, the Bench categorises excisable goods as follows:

19. A combined reading of Section 3(1) and 5A (1) of the Central Excise Act, 1944 together with the Schedules under the Central Excise Tariff Act, 1985 would show that all goods produced or manufactured in India can be classified into the following categories:

(i) Goods which are not excisable, in view of the fact that they are not even mentioned in the Schedules to the Central Excise Tariff Act, 1985.

(ii) Goods which are excisable at nil rate of duty, in view of the fact that they are included in the Schedule to the Central Excise Act, 1985, but the rate of duty is indicated in those schedules as zero.



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(iii) Goods which are excisable at the rates specified in the Schedules under the Central Excise Tariff Act, 1985, but which are granted exemption, in terms of a Notification issued under Section 5A of the Central Excise Act, 1944.

24. Though the Writ Petitions came to be dismissed, the categorisation of goods at clause (ii) above reiterates the position that one of the classes of goods covered by the Act are those that are excisable at 'nil' rate of duty. Such goods, though included in the schedules to the Act have not been attributed with a positive rate of duty, such rate merely indicated as '0' or '.....'. In my considered view, though this class of goods may continue to be part of the schedule, only such goods as have been attributed with a positive rate of tax would attract the exclusion as per Section 125(h) of the SVLDRS Scheme.

25. In Wallace Flour Mills (supra) the Hon'ble Supreme Court reiterated the well settled proposition that the taxable event in the Scheme of the Central Excise and Salt Tax Act is the manufacture/production of the excisable article, though the incidence/collection of duty may be at a later stage for administrative convenience.

26. In this case, the taxable events of 'manufacture' and 'removal' stand crystallised and the petitioner has remitted GST in regard to the transactions. However, the transaction becomes academic in context of Central Excise levy in the absence of a positive rate of duty. Thus, qua Central Excise, the taxable event is merely illusory and nothing more.

27. In Handloom Weavers C-operative Society Ltd. (supra), a Division Bench of this Court held that the mere fact the goods are exempt from duty does not remove them from the ambit of excisability. At paragraph 7, the Bench states as follows:

7. We are unable to agree with the contention of the learned Counsel. We are of the view that the words "as being subject to a duty of Excise" in the definition of the term "excisable goods" are only descriptive of the goods specified in the First Schedule, and have no reference to the factum of their Liability to duty. In fact, it is seen that some of



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the rate of duty as 'NIL'. It could not be contended that these goods are not 'excisable goods'. In this connection, we may also refer to [Section 3](#), which is the charging section, which provides for the levy and collection of excise duty on all excisable goods. Produced or manufactured in India at the rate set forth Schedule, thereby showing that excisable goods in the, definition in the section refer only to the description of the goods in column (2) of the First Schedule, and not to the rate of duty in column (3) of that Schedule. The exemption granted by the Notification of the Central Government made on 24.4.1962. only exempts handloom fabrics from the levy of excisable duty and it does not change the nature and character of the goods as excisable goods within the meaning the Act. The Notification proceeds on the assumption that the handloom fabrics are excisable goods. If the handloom fabrics are not excisable goods, there was no need or occasion for exempting the same from the levy of excise duty. We are unable to agree with the learned Counsel for the petitioner that once the handloom fabrics are exempted from excise duty, they cease to be excisable goods. As we have already pointed out, the character as excisable goods does not depend on the actual levy of duty, but on the description as excisable goods in the First Schedule to the Act. We are, therefore, unable to interfere with the orders of the respondents.

28. There is no quarrel with the proposition that exempt goods continue to be excisable goods, though the rate of duty is stipulated as 'nil'. However, that is not the question that arises for consideration before me. It is nobody's case that lubricants are exempt from central excise duty. Undoubtedly, they figure as goods under Schedule 4. However, the rate of duty stipulated is '....' and, in my considered view, lubricants cannot be considered to be excisable goods, in such circumstances, for the purposes of the SVLDRS Scheme. The SVLDRS Scheme has been brought into to weed out pending litigations where possible and where the litigation falls within the limits set out under the Scheme. The interpretation of the clause under the Scheme must thus in line with this avowed object and any conflict that arise in interpretation must be resolved in favour of the assessee.



29. I find support for this conclusion in Circular No.1071/4/2019 – CX 8 dated 27.08.2019, wherein, at paragraph 6, it is stated as follows:

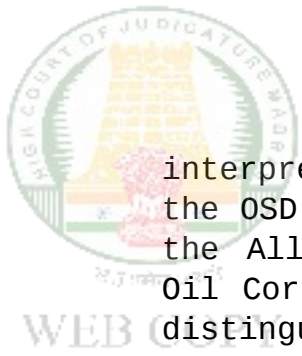
6. It may be appreciated that the ambit of this Scheme is wide enough to cover all kinds of pending disputes, including call book cases, except for a few categories. The exclusions are firstly, cases in respect of goods that are still subject to levy of Central Excise such as specified petroleum products and tobacco i.e. goods falling in the Fourth Schedule to the Central Excise Act, 1944. Secondly, cases for which the taxpayer/noticee has already been convicted in a Court of law. Thirdly, cases under adjudication or litigation where the final hearing has taken place on or before 30.06.2019. Fourthly, cases of erroneous refunds. Lastly, cases which are pending before the Settlement Commission.

30. Section 125(h) specifically uses the term 'excisable goods'. The Hon'ble Supreme Court in Moti Laminates (supra) provides guidance on how the term 'excisable' should be understood and interpreted. The rate of duty mentioned alongside lubricants under the 4th schedule is '.....' and as rightly clarified by the Departmental Officer on Special Duty, it is only some of the products in the 4th schedule, such as Petroleum crude, high speed diesel, motor spirit, natural gas, aviation turbine fuel and tobacco and tobacco products, that are to be construed as 'excisable goods' to determine the exclusions under the SVLDRS Scheme. The 101th amendment substitutes Entry 84 of the Union List to state that duties of excise shall be on the following goods manufactured or produced in India, namely,

- (a)petroleum crude;
- (b)high speed diesel;
- (c)motor spirit (commonly known as petrol);
- (d)natural gas;
- (e)aviation turbine fuel; and
- (f)tobacco and tobacco products.

The interpretation of Section 125 of the Scheme has to be seen in this context only as otherwise, the object of the Scheme will not be achieved.

31. Neither the judgment of the Hon'ble Supreme Court in the case of Moti Laminates (supra), the General Rules of



interpretation to Schedule 4 of the Act nor the Clarification of the OSD have been brought to the notice of the Division Bench of the Allahabad High Court while considering the case of Indian Oil Corporation (supra) and for these reasons, this decision is distinguishable.

32. In the light of discussion as aforesaid, this Writ Petition is allowed. No costs.

Sd/-

Assistant Registrar (CS-IV)

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Sub Assistant Registrar

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To

The Commissioner of Central Excise & GST,
26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.

+1CC to M/s.S.Muthu Venkataraman, Advocate, SR.No. 54173

W.P.No.8907 of 2020

RGN(CO)

B.VC (02/11/2021)