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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 809 OF 2022

B. Chopda Construction Private Limited

....Petitioner

V/s.

Union of India and Ors.

...Respondents

Mr. Namboodiri Prasannan for Petitioner.

Mr. Dhananjay B. Deshmukh for Respondents.

**CORAM : K.R. SHRIRAM &
MILIND N. JADHAV, JJ.
DATED : 11th JULY, 2022**

P.C. :

1. By consent taken up for hearing at the admission stage itself.
2. Petitioner has impugned a communication dated March 2020 issued by Respondent No.3 rejecting Form SVLDRS-1 dated 17th December 2019 filed by petitioner.
3. Petitioner is engaged in construction of residential and commercial complex and renting of immovable property. Petitioner holds Service Tax Registration No.AACCB4214GST001 for construction of residential and commercial complex and renting of immovable property service which is a taxable service under the Finance Act, 1994. Sometime in February 2018 petitioner received a notice dated 9th February 2018 from the officers of CGST and Central Excise, Audit – II Commissionerate regarding

Excise Audit-2000. Petitioner filed Form ST – 3 returns for the period April 2016 to September 2016, October 2016 to March 2017, April 2017 to June 2017. The GST Commissionerate carried out audit of records of petitioner. During the course of audit, petitioner was informed about outstanding service tax liability in respect of the returns filed and petitioner was asked to pay the same alongwith interest. Petitioner accordingly paid the defaulted service tax amount. The total amount of service tax paid was Rs.80,97,268/-. Petitioner informed the Audit Officers about this payment vide its letter dated 18th March 2019. Petitioner also informed that out of total interest of Rs.27,50,463/-, petitioner had already paid Rs.19,53,530/- and the balance amount of Rs.7,96,933/- will be paid in two installments of Rs.4,00,000/- and Rs.3,96,933/- on 23rd March 2018 and 29th March 2019, respectively.

4. Thereafter, petitioner received another letter dated 10th April 2019 from the authorities in response to petitioner's letter dated 18th March 2019 informing petitioner that payment of service tax during the period from October 2015 to March 2017 was also delayed and the interest has not been paid. Petitioner was directed to pay interest and report compliance. It was also observed during the course of audit that petitioner had made short/delayed payment of service tax of Rs.49,440/- for the year 2016-17 and petitioner was called upon to pay the same alongwith interest for the delayed payment. Petitioner made payment on or about 9th August 2019.

Petitioner was also called upon to pay the late fee applicable on account of delayed payment which was also paid by petitioner. A total of Rs.41,500/- was paid towards late fee.

5. In reference to the audit objections against petitioner and as per dues paid by petitioner, except part of interest amount of service tax already paid, petitioner vide its letter dated 6th September 2019 informed the audit department that they would like to apply for relief under the 'Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019' (herein after referred to as 'SVLDRS'). After the scheme came into force with effect from 1st September 2019, petitioner filed online application Form No.1 under SVLDRS on 17th December 2019. Petitioner declared tax dues under Section 123 (c) of the Finance Act, 2019 (the Act) at Rs.1,39,74,842/- and amount payable under the scheme as per Section 121 (e) of the Act as NIL after availing relief under Section 124(1)(d) of the Act and deduction of Rs.1,14,18,634/- deposited towards service tax, interest and late fees. Respondent No.3 issued Form SVLDRS – 2 dated 28th January 2020 showing the amount payable under the scheme as NIL but granting personal hearing to petitioner on 30th January 2020. Petitioner attended personal hearing and made its submissions. Respondent No.3 by an E-mail dated 19th June 2020 rejected petitioner's declaration on the ground that as per final audit report dated 7th November 2019 the amount of tax dues was not quantified before 30th June 2019. Communications were exchanged but to no avail. As there was no progress petitioner approach this court.

6. Clause (a) of Section 121 of the SVLDRS defines amount declared means the amount declared by the declarant under Section 125. Section 124 speaks about the relief available under the scheme which reads as under :

124. (1) Subject to the conditions specified in sub-section (2), the relief available to a declarant under this Scheme shall be calculated as follows:—

(a) where the tax dues are relatable to a show cause notice or one or more appeals arising out of such notice which is pending as on the 30th day of June, 2019, and if the amount of duty is,—

(i) rupees fifty lakhs or less, then, seventy per cent. of the tax dues;

(ii) more than rupees fifty lakhs, then, fifty per cent. of the tax dues;

(b) where the tax dues are relatable to a show cause notice for late fee or penalty only, and the amount of duty in the said notice has been paid or is nil, then, the entire amount of late fee or penalty;

(c) where the tax dues are relatable to an amount in arrears and,

—
(i) the amount of duty is, rupees fifty lakhs or less, then, sixty per cent. of the tax dues;

(ii) the amount of duty is more than rupees fifty lakhs, then, forty per cent. of the tax dues;

(iii) in a return under the indirect tax enactment, wherein the declarant has indicated an amount of duty as payable but not paid it and the duty amount indicated is,—

(A) rupees fifty lakhs or less, then, sixty per cent. of the tax dues;

(B) amount indicated is more than rupees fifty lakhs, then, forty per cent. of the tax dues;

(d) where the tax dues are linked to an enquiry, investigation or audit against the declarant and the amount quantified on or before the 30th day of June, 2019 is—

(i) rupees fifty lakhs or less, then, seventy per cent. of the tax dues;

(ii) more than rupees fifty lakhs, then, fifty per cent. of the tax dues;

(e) where the tax dues are payable on account of a voluntary disclosure by the declarant, then, no relief shall be available with respect to tax dues.

(2) The relief calculated under sub-section (1) shall be subject to the condition that any amount paid as predeposit at any stage of appellate proceedings under the indirect tax enactment or as deposit during enquiry, investigation or audit, shall be deducted when issuing the statement indicating the amount payable by the declarant:

Provided that if the amount of predeposit or deposit already paid by the declarant exceeds the amount payable by the declarant, as indicated in the statement issued by the designated committee, the declarant shall not be entitled to any refund.

7. Petitioner chose to avail of the scheme because as mentioned under Section 124 (a) petitioner will escape penalty and interest. Who can make a declaration under the scheme is provided in Section 125 which reads as under :

125. (1) All persons shall be eligible to make a declaration under this Scheme except the following, namely:—

(a) who have filed an appeal before the appellate forum and such appeal has been heard finally on or before the 30th day of June, 2019;

b) who have been convicted for any offence punishable under any provision of the indirect tax enactment for the matter for which he intends to file a declaration;

(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.*

8. Under Section 125 (1) all persons shall be eligible to make a declaration except those mentioned therein. Mr. Deshmukh submitted that petitioner would fall under Clause (e) as ineligible person because in petitioner's case there was audit and the amount of duty involved in the audit had not been quantified on or before 30th June 2019. Mr. Deshmukh relied upon rejection letter impugned in the petition where it is stated that the final audit report was issued on 16th July 2019 and since that was after cut off date of 30th June 2019, petitioner became ineligible to be a declarant. Mr. Deshmukh at the same time in fairness agreed that to be ineligible under clause (e) of Section 125 twin conditions have to be met, i.e., (a) declarant should have been subjected to audit; and (b) the amount of duty involved in the audit has not been quantified on or before 30th day of June 2019.

Even if one of the conditions are not met, the ineligibility would not kick in.

9. We have to now examine whether these twin conditions have been met. To answer this, we will also have to consider a Notification No. 5/2019 Central Excise-NT dated 21st August 2019 and Circular 1071/4/2019-CX 8 dated 27th August 2019 issued by Central Board of Indirect Taxes and Customs in which clause (10)(g) reads as under :

(g) Cases under an enquiry, investigation or audit where the duty demand has been quantified on or before the 30th day of June, 2019 are eligible under the Scheme. Section 2(r) defines “quantified” as a written communication of the amount of duty payable under the indirect tax enactment. It is clarified that such written communication will include a letter intimating duty demand; or duty liability admitted by the person during enquiry, investigation or audit; or audit report etc.

10. As per this clause in cases under audit where the duty demanded has been quantified on or before 30th June 2019 are eligible under the scheme. It also clarifies that if the duty liability is admitted by the person during the enquiry, even that would fall within the definition “quantified” under Section 2(r) of SVLDRS.

11. It is true that there was audit of petitioner. To see whether the duty demand was quantified on or before 30th June 2019, let us examine the audit report which was released to petitioner on 9th October 2019. In the audit report the dates on which audit was undertaken is given as 29th March 2019 and 1st April 2019. Though the audit was completed on these two dates the Monitoring Committee held its meeting on 8th July 2019 and the Monitoring Committee issued Minutes of the Meeting on 16th July 2019.

This date of 16th July 2019 is what has been relied upon in the impugned rejection letter. First of all, we are unable to accept that the date on which the audit committee decides to have its meeting and issue Minutes of the Meeting can ever be stated to be the date on which the amount was quantified. Generally, the same members of the audit committee may have to carry out audit of various other declarants and it would be impossible for them to prepare Minutes of the Meeting over night. This is one of the reason the circular dated 27th August 2019 has been issued where it says that 'during the enquiry or audit the liability is admitted by the person in the audit report'. It is expressly provided in the audit report, on the following four objections as under :

Audit Objection Code No. ST CSR072

Audit Para 1 : Interest for delayed payment of Service Tax : During the course of audit & scrutiny of ST-3 returns, it was observed that the assessee has paid the Service Tax after due date. The assessee was requested to pay the interest in terms of Section 75 of Finance Act, 1994.

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Revenue involved Rs.35,30,198 (Interest)

Taxpayer's Agreement /Reasons for Disagreement : The assessee has agreed to pay the interest amount and requested for one week time. Further, they have requested to close the matter since the non payment of interest was not intentional.

Decision of MCM : Para accepted. Pursue for the recovery or else SCN shall be issued.

Vide letter dated 06.09.2019 the assessee has informed that they would like to apply for the relief as per the provisions of the proposed Dispute Resolution Scheme 'Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019' which has been announced as part of Finance (No.2) Bill, 2019 on 5th July 2019.

Audit Objection Code No. ST-CSR073

Audit Para 2 : Late fee for delay in filing of ST-3 Returns : It was observed that assessee has delayed in filing of ST-3 returns. The assessee was requested to pay late fees.

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Revenue involved : Rs.41,500 (Late fee)

Taxpayer's Agreement/Reasons for Disagreement : The assessee has agreed to pay the late fee and requested for one week time for interest payment. Further, they have requested to close the matter. Decision of MCM : Para accepted. Pursue for the recovery or else SCN shall be issued.

Action Taken : Assessee paid the late fee of Rs.16,000/- vide CTIN No. 1907021687 dated 09.08.2019, Rs. 1500/- vide CTIN No. 1907021683 dated 09.08.2019, Rs. 3000/- vide CTIN No. 1907021677 dated 09.08.2019, Rs.500/- vide CTIN No. 1907021235 dated 09.08.2019, Rs.20,000 vide Challan No. 50025 dated 13.03.2019, Rs.500/- vide Challan No. 00520 dated 25.04.2015.

Hence Para closed.

Audit Objection Code No. ST CSR99

Audit Para 3 : Default payment of Service Tax : It was observed that assessee has defaulted in Service Tax payment during the period 2016-17 & April-June, 2017-18. The assessee was requested to pay Service Tax alongwith interest in terms of Section 75 of Finance Act, 1994.

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Revenue involved : ST Rs.80,97,267 + Interest

Taxpayer's Agreement/Reasons for Disagreement : The assessee has agreed and voluntarily paid the Service tax amount of Rs.24,50,000 vide Challan No. 24, Rs.20,99,599 vide Challan No. 84, dated 13.03.2018, Rs.10,000 vide Challan No. 37 dated 05.05.2018, Rs.12,85,277 vide Challan No. 63 dated 11.07.2018 and Rs.12,71,923 vide Challan No. 104 dated 13.07.2018 (Total Rs.81,06,749). Further, they have requested for one week time for interest payment. They have requested to not issue any SCN and close the matter since non/short payment of Service Tax was not intentional.

Decision of MCM : Para accepted. Pursue for the recovery or else SCN shall be issued.

Vide letter dated 06.09.2019 the assessee has informed that they

would like to apply for the relief as per the provisions of the proposed Dispute Resolution Scheme 'Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019' which has been announced as part of Finance (No.2) Bill, 2019 on 5th July 2019.

Audit Objection Code No. ST VSR030

Audit Para 4 : Short/delayed payment of Service Tax on reconciliation of P&L accounts with ST-3 : During the course of audit and scrutiny of financial statements, it was observed that assessee has received advances during the audit period 2013-14 to 2016-17 and the said amount is not included correctly for Service Tax payment. On reconciliation of P&L Accounts with ST-3, it is observed that the assessee has made short/delayed payment of Service Tax. Assessee was requested to pay Service Tax alongwith interest for delayed payment of Service Tax. The detail is as under :

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Revenue involved : ST Rs.49,440 + Interest

Taxpayer's Agreement/Reasons for Disagreement : The assessee is agree to pay Service Tax amount and interest and requested for one week time for payment. They have requested to not issue any SCN and close the matter since non/short payment of Service Tax was not intentional.

Decision of MCM : Para accepted. Pursue for the recovery or else SCN shall be issued.

Action Taken :

Assessee has paid the Service Tax amount of Rs.49,440/- vide CTIN No. 1907021700 dated 09.08.2019.

However, Vide letter dated 06.09.2019 the assessee has informed that they would like to apply for the relief as per the provisions of the proposed Dispute Resolution Scheme 'Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019' which has been announced as part of Finance (No.2) Bill, 2019 on 5th July 2019.

(emphasis supplied)

12. Therefore, as could be seen from the four audit objections mentioned above, the declarant has admitted the duty liability under each head. Since the audit was conducted on 29th March 2019 and 1st April 2019, these would be the dates on which the amount of duty has been quantified.

Therefore, the amount of duty has been quantified on or before 30th June 2019.

13. Mr. Deshmukh relied upon judgment of this court in ***JSW Steel Ltd. vs Union of India and Others*¹** to submit that the court cannot come to a conclusion that the amount has been quantified before 30th June 2019. In our view, this judgment is not applicable to the facts and circumstances of this case. We also have to note that in the letter dated 9th October 2019 from respondents forwarding the audit report, the opening paragraph reads as under :

Please refer to Minutes of MCM for the month of June 2019 (Copy enclosed) pertaining to DAR No.883/2018-19 of M/s. B Chopda Construction Pvt. Ltd. The details of Paras 1, 2, 3 & 4 are as follows:-

(emphasis supplied)

14. Therefore, draft of the Minutes of the Managing Committee has been prepared by June 2019 itself and hence in our view we can safely conclude that though there was audit, amount of duty quantified also has been quantified before 30th June 2019. In our view, therefore, rejection of petitioner's declaration on the ground that final audit report is issued after 30th June 2019 is incorrect.

15. Therefore, we allow the petition in terms of prayer clause – (b) which reads as under :

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(b) Set aside letter F No.CGST/ME/SVLDRS/App/696/Bchopda/19-20 dated March 2020 of Respondent No.3 rejecting Form SVLDRS-1 ARN No. LD1712190001687 dated 17.12.2019 and allow the Petition.

16. Respondents are directed to reconsider the declaration filed by petitioner and issue necessary discharge certificate in Form SVLDRS in accordance with law.

17. Petition disposed.

(MILIND N. JADHAV, J.)

(K.R. SHRIRAM, J.)