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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 25.09.2023

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W.P.(C) 6196/2020 & CM APPL. 22196/2020

B.L. GOEL AND CO.

..... Petitioner

Through: Mr. Rajesh Jain, Mr. Virag Tiwari &
Mr. Ramashish, Advs.

Versus

ADDITIONAL DIRECTOR GENERAL OF GST
INTELLIGENCE, GURUGRAM ZONAL
UNIT & ANR.

.... Respondents

Through: Mr. Harpreet Singh, Mr. Jatin
Kumar Gaur & Mr. Akshay Saxena,
Advs.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J. (Oral)

1. The petitioner has filed the present petition impugning a show cause notice dated 10.07.2020 (hereafter '**the impugned show cause notice**') calling upon the petitioner to show cause, within a period of thirty days as to why the service tax amounting to ₹2,67,26,113/- should not be demanded and recovered from the petitioner by invoking the extended period of limitation under Section 73 of the Finance Act, 1994 (hereafter '**the Finance Act**').

2. The controversy in the present petition relates to the petitioner's liability for payment of the service tax on works contracts executed



during the period of 2014-15 to 2017-18.

3. The petitioner is engaged in the business of construction of residential complexes, schools, government buildings, parking facilities etc. on works contract basis. Undisputedly, the said activities fall within the definition of 'works contract' under Section 65B (54) of the Finance Act.

4. A show cause notice dated 23.04.2019, was issued to the petitioner in respect of its liability to pay service tax for the aforesaid period. This show cause notice dated 23.04.2019 was premised on the information received from the Gurugram Zonal Unit of the Directorate General of GST Intelligence (DGGI) and the investigation carried on by the authorities pursuant, thereto. The Revenue Authorities had received information to the effect that the petitioner had constructed several commercial and residential projects, and had paid the service tax on the 'works contract' by availing the benefit of Notification No.24/2012-S.T. and Notification No.30/2012-S.T. According to the Revenue Authorities, the petitioner had wrongly declared part of its taxable income as exempted from service tax, and had not paid the service tax correctly. Based on the said information, investigations were conducted and statements of the authorised signatory of the petitioner was recorded. The Revenue Authorities also collected the running account bills and payment vouchers issued by the petitioner to its customers as well as the copy of the financial accounts of the petitioner for the relevant years – financial years 2013-14 to 2017-18.



5. The show cause notice dated 23.04.2019 mentioned that the petitioner had executed works for nine entities including M/s Charms India Pvt. Ltd. and New Okhla Industrial Development Authority (NOIDA). Summons were issued to the said entities and some of them submitted copies of their running account bills and ledger accounts in respect of the works executed by the petitioner. Based on the investigation conducted, the Revenue Authorities concluded that the petitioner had short paid the service tax for the relevant period. After adjusting the negative values of the services, the revenue authorities proposed to raise an aggregate demand of ₹5,34,58,093/- (₹1,92,01,985/- plus ₹3,42,56,108/-).

6. While the proceedings relating to the show cause notice dated 23.04.2019 were pending, the Finance (No.2) Act, 2019 was enacted. Chapter V of the Finance Act introduced the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 (hereafter '**the Scheme**'). In terms of the Scheme, assesseees were granted an opportunity to make a declaration and avail the reliefs as provided under Section 124 of Chapter-V of the Finance (No. 2) Act, 2019.

7. Section 124 of Finance (No. 2) Act, 2019 is set out below:

“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.”

8. As is apparent from Sub-section (1) of Section 124 of the Finance (No. 2) Act, 2019, the Scheme covered various categories and entailed varied reliefs depending on the category in which an assessee falls. It is apparent that the legislative intent was to cover a wide range of cases. The Finance Minister of India, in her speech in the Parliament, had expressed concern regarding the huge backlog of pending litigations from the pre-GST (Goods and Services Tax) regime. She emphasized that an amount exceeding ₹3.75 lakh crore was blocked in litigation in service tax and excise, which required unloading for business to continue. The objective of the Scheme was to allow quick closure of pending litigations centering around service tax and excise duty. The Scheme covered twenty- nine separate enactments. Further, in terms of Clause (c) of Section 122 of the Finance Act (No. 2), 2019, the Central Government was empowered to include, by a notification in the official gazette, any other enactment within the scope of the Scheme.

9. The Scheme covered a wide variety of cases. This also included the matters where no dispute or proceedings were pending. In cases where disputes were pending and show cause notices were issued, the assessee had the option to make a declaration and pay the reduced tax. Even in cases where there were no proceedings pending, the assessee



was entitled to voluntarily make a disclosure and pay the taxes due.

10. In the present case, since the show cause notice dated 23.04.2019 was pending, the petitioner made a declaration under Section 124 of the Finance (No. 2) Act, 2019. The copy of the declaration indicates that the petitioner's declaration was under the category 'Litigation'. In terms of the Scheme, the petitioner paid a sum of ₹2,67,29,046.50/- being 50% of the proposed tax demand (that is, 50% of ₹5,34,58,093/-).

11. The petitioner's declaration was accepted and a Discharge Certificate dated 15.05.2020 (hereafter '**the Discharge Certificate**') was issued under Section 127(8) of the Finance (No. 2) Act, 2019. In terms of Section 129(1) of the Finance (No. 2) Act, 2019, the issuance of a Discharge Certificate is conclusive of the matter and the time period.

12. It is the petitioner's case that in terms of Section 129 of the Finance (No. 2) Act, 2019, no proceedings can be initiated in respect of service tax for the period 2014-15 to 2017-18 and no further demands can be raised. The petitioner claims that the impugned show cause notice is, thus, liable to be set aside.

13. The impugned show cause notice indicates that it is premised on the basis that the petitioner had issued certain invoices for free of cost (FOC) material to one of its employers – M/s Charms India Pvt. Ltd. According to the Revenue, the petitioner's authorised representatives had not disclosed that the petitioner had issued FOC bills during the relevant period. According to the Revenue, the value of FOC material provided by M/s Charms India Pvt. Ltd. to the petitioner was chargeable



to service tax to the extent of 50%. It is also the Revenue's case that the authorised representative of the petitioner had made a false and misleading statement by stating that the petitioner had issued only running bills during the relevant period and that the petitioner had produced all such running account bills.

14. In addition, the impugned show cause notice is also premised on the basis that the petitioner had provided works contract services to NOIDA and the petitioner's liability was determined on an erroneous assumption that the NOIDA was a body corporate. According to the Revenue, NOIDA is not a body corporate and therefore, the petitioner would have to bear the full liability for the works contract services and not just 50% of the said liability.

15. It is the Revenue's case, as set up in its counter affidavit, that the Discharge Certificate would not absolve the petitioner from the liability as proposed under the impugned show cause notice as the petitioner had voluntarily made an incorrect statement.

16. Mr. Harpreet Singh, learned counsel appearing for the Revenue submits that in terms of Section 129(2)(c) of the Finance Act (No.2), 2019, the Discharge Certificate is not conclusive as to the matter and the time period stated therein in case of a voluntary disclosure, wherein material particulars furnished in the declaration are, subsequently, found to be false. He also submitted that in terms of Section 129(2)(b)(ii) of the Finance (No. 2) Act, 2019, the impugned show cause notice is not proscribed, as it is for a different matter for the same period.



17. It is relevant to refer to section 129 of the Finance (No.2) Act 2019. The same is set out below:

“129. (1) Every discharge certificate issued under section 126 with respect to the amount payable under this Scheme shall be conclusive as to the matter and time period stated therein, and—

- (a) the declarant shall not be liable to pay any further duty, interest, or penalty with respect to the matter and time period covered in the declaration;
- (b) the declarant shall not be liable to be prosecuted under the indirect tax enactment with respect to the matter and time period covered in the declaration;
- (c) no matter and time period covered by such declaration shall be reopened in any other proceeding under the indirect tax, enactment.

(2) Notwithstanding anything contained in sub-section(1), —

- (a) no person being a party in appeal, application, revision or reference shall contend that the central excise officer has acquiesced in the decision on the disputed issue by issuing the discharge certificate under this scheme;
- (b) the issue of the discharge certificate with respect to a matter for a time period shall not preclude the issue of a show cause notice, —
 - (i) for the same matter for subsequent time period; or
 - (ii) for a different matter for the same time period;
- (c) in a case of voluntary disclosure where any material particular furnished in the declaration is subsequently found to be false, within a period of one year of issue of the discharge certificate, it shall be presumed as if the declaration was never made and proceedings under the applicable indirect tax enactment shall be instituted.”

18. We are unable to accept the contentions advanced on behalf of the Revenue. The assumption that Section 129(2)(c) of the Finance



(No. 2) Act, 2019 is applicable, is *ex facie* erroneous. The petitioner had not made a declaration under the category of ‘Voluntary Disclosure’. The petitioner’s declaration was under the category of ‘Litigation’. This was because the concerned authority had issued a show cause notice dated 23.04.2019, which was pending adjudication.

19. As stated above, the Scheme has a wide sweep. It not only covered cases where a dispute was pending but it also offered immunity to assesseees who voluntarily came forward to make a true disclosure of their tax liability. A plain reading of Clause (c) of Section 129(2) of the Finance (No. 2) Act, 2019 indicates that the voluntary disclosure pertains to material particulars furnished in the declaration and not a statement recorded during the course of the investigation. The impugned show cause notice is premised on the basis that the statement of the authorised representative of the petitioner, which was recorded during the course of investigation, was misleading.

20. The contention that the subject matter of the impugned show cause notice and the show cause notice dated 23.04.2019 is different, is also unpersuasive. There is no dispute that the subject matter of both the show cause notices is the petitioner’s service tax liability during the period 2014-15 to 2017-18. The Revenue Authorities had commenced an investigation to ascertain the petitioner’s correct tax liability for the said period by invoking the extended period of limitation as provided under Section 73 of the Finance Act. The show cause notice dated 23.04.2019 indicates that the investigation covered the extent of services rendered by the petitioner. Summons were also issued by the



Revenue Authorities to various entities for whom the petitioner had executed the construction works. The Revenue Authorities had also collected bills and invoices from the said entities. Merely because one of the entities had not furnished the bills which would have enabled the Revenue Authorities to verify the petitioner's liability does not in any manner render the subject matter of the show cause notice dated 23.04.2019 any different from subject matter of the impugned show cause notice.

21. In view of the above, we find merit in the petitioner's contention that the impugned show cause notice is not sustainable and is liable to be set aside. The Discharge Certificate issued to the petitioner is conclusive of the subject matter of the impugned show cause notice.

22. The impugned show cause notice is, accordingly, liable to be set aside.

23. In view of the above conclusion, it is not necessary to examine the contents of the impugned show cause notice. Nonetheless we have also briefly examined the same. As noticed above, the impugned show cause notice is premised on two assumptions. First, that the petitioner is liable to pay the service tax on FOC (free of cost) material supplied by the employer (in this case M/s Charms India Pvt. Ltd.). And second, that NOIDA is not a corporate entity and therefore, the petitioner is liable to bear the entire service tax liability.

24. Clearly, the assumption that the petitioner is liable to pay tax on FOC material supplied by M/s Charms India Pvt Ltd. is *ex facie* erroneous. The said issue is covered by the decision of the Supreme



Court in *Commissioner of Service Tax & Ors v. Bhayana Builders Private Limited & Ors.: (2018) 3 SCC 782*. The Supreme Court in the said judgment held that on first principle, the value of free supply items, which are not a part of the contract between the service provider and the service recipient has no relevance in determination of the value of taxable services. Para 16 of the said decisions reads as under:

“16. In fact, the definition of "gross amount charged" given in Explanation (c) to Section 67 only provides for the modes of the payment or book adjustments by which the consideration can be discharged by the service recipient to the service provider. It does not expand the meaning of the term "gross amount charged" to enable the Department to ignore the contract value or the amount actually charged by the service provider to the service recipient for the service rendered. The fact that it is an inclusive definition and may not be exhaustive also does not lead to the conclusion that the contract value can be ignored and the value of free supply goods can be added over and above the contract value to arrive at the value of taxable services. The value of taxable services cannot be dependent on the value of goods supplied free of cost by the service recipient. The service recipient can use any quality of goods and the value of such goods can vary significantly. Such a value, has no bearing on the value of services provided by the service recipient. Thus, on first principle itself, a value which is not part of the contract between the service provider and the service recipient has no relevance in the determination of the value of taxable services provided by the service provider.”

25. The second assumption that the petitioner is liable to pay the full tax for construction of the Multilevel Car Parking at Sector 3, NOIDA, which was executed pursuant to the contract between the petitioner and NOIDA, as NOIDA is not a body corporate, is also *ex facie* erroneous. Interestingly, the show cause notice dated 23.04.2019 expressly sought



to impute liability on the petitioner on the ground that NOIDA did not qualify as a government authority but was a body corporate. This is clearly reflected in paragraph 7.4 of the show cause notice dated 24.03.2019 which reads as under:

“7.4Whereas it appears that, neither NOIDA qualify as a “governmental authority” as defined in the mega exemption notification nor it has been vested with powers and authority as defined in article 243 W of the Constitution to enable NOIDA function as an institution of self-government. NOIDA has been constituted under Uttar Pradesh Industrial Area Development Act, 1976 [UP Act No.6 of 1976]. As per the said Act, NOIDA has been set up for development of certain areas in the UP state into industrial and urban township and as per Section 3of the Act, NOIDA is a body corporate.”

26. The impugned show cause notice seeks to espouse a view contrary to that as stated in the show cause notice dated 24.03.2019.

27. Section 3(2) of the Uttar Pradesh Industrial Area Development Act, 1976 referring to ‘NOIDA’ expressly states that “The Authority shall be a body corporate.” Thus, NOIDA has been constituted as a body corporate under the said statute. In view of the express provisions of Section 3 of the Uttar Pradesh Industrial Area Development Act, 1976, the premise that NOIDA is not a body corporate is fundamentally flawed.

28. The Revenue has proceeded on an *ex facie* erroneous premise that NOIDA is not a body corporate on the basis that NOIDA had explained that it was neither a company registered under the Companies Act, 1996 nor a business entity registered as a body corporate. NOIDA does not require to be registered under any Act as a body corporate, as it has been



constituted by the Uttar Pradesh Industrial Area Development Act, 1976 as a body corporate. Thus, clearly the Revenue has misunderstood the response received from NOIDA as is reflected in the impugned show cause notice.

29. The Supreme Court in the case of *Commissioner of Income Tax (TDS) Kanpur & Anr. v. Canara Bank: (2018) 9 SCC 322* had explained the difference between an entity, which is not created by a statute but is created in accordance with the provision of the statute and an entity that has been established and brought into existence by a statute. In case of a company, incorporated under the Companies Act, 2013, the company is required to be created in accordance with the provisions of the Companies Act, 2013 but in case of NOIDA, the said authority is established under the Uttar Pradesh Industrial Area Development Act, 1976. Paragraphs 20, 30, 31, 32 and 33 of the said decisions are relevant and are set out below:

“20. In *Sukhdev Singh*, the Court had occasion to consider the status of company incorporated under the Companies Act. The Court held that company incorporated is not a company created by the Companies Act. In para 25, following as held:

“25. A company incorporated under the Companies Act is not created by the Companies Act but comes into existence in accordance with the provisions of the Act. It is not a statutory body because it is not created by the statute. It is a body created in accordance with the provisions of the statute.”

30. Now, we revert back to the provisions of the 1976 Act. The very preamble of that Act reads



“an Act to provide for the constitution of an Authority for the development of certain areas in the State into industrial and urban township and for matters connected therewith.”

31. Thus, the Act itself provides for constitution of an authority. Section 2(b) of the 1976 Act defines “authority” as authority constituted under Section 3 of the Act. Section 3 which is very relevant for the present case is as follows:

“3. Constitution of the Authority. – (1) The State Government may, by notification, constitute for the purposes of this Act, an authority to be called (name of the area) Industrial Development Authority, for any industrial development area.

- (2) The Authority shall be a body corporate.
- (3) The Authority shall consist of the following :—
 - (a) The Secretary to the Government, Uttar Pradesh, Industries Department or his Nominee not below the rank of Joint Secretary-ex official. Member Chairman
 - (b) The Secretary to the Government, Uttar Pradesh, Public works Department or his nominee not below the rank of Joint Secretary-ex official. Member
 - (c) The Secretary to the Government, Uttar Pradesh, Local Self-Government or his nominee not below the rank of joint Secretary-ex official. Member
 - (d) The Secretary to the Government, Uttar Pradesh, Finance Member Department or his nominee not below the rank of Joint Secretary-ex official. Member
 - (e) The Managing Director, U.P. State Industrial Development Corporation-ex official. Member
 - (f) Five members to be nominated by the State Government by notification. Member
 - (g) Chief Executive Officer. Member-Secretary



- (4) The headquarters of the Authority shall be at such place as may be notified by the State Government.
- (5) The procedure for the conduct of the meetings for the Authority shall be such as may be prescribed.
- (6) No act or proceedings of the Authority shall be invalid by reason of the existence of any vacancy in or defect in the constitution of the Authority.

32. When we compare the provisions of Section 3 of the 1976 Act with those of the State Financial Corporation Act, 1951, it is clear that the establishment of corporation in both the enactments is by a notification by the State Government. In the present case, notification has been issued in exercise of power of Section 3, the Authority has been constituted. It is useful to extract para 2 of the Notification dated 12-4-1976:

“2. The Governor is hereby further pleased, in exercise of the powers under Section 3 of the said Act, to constitute, in respect of the abovementioned industrial development area, for the purposes of the said Act, and Authority to be called the “New Okhla Industrial Development Authority”, consisting of the following, namely –

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|-------|---|--|
| (i) | Secretary to the Government, Uttar Pradesh, Industries Department, ex officio | Member Chairman
[Under clause (a)] |
| (ii) | Secretary to the Government, Uttar Pradesh, Public Works Department, ex officio | Member
[Under clause (b)] |
| (iii) | Secretary to the Government, Uttar Pradesh, Local Self-Government, Department, ex officio | Member
[Under clause (c)] |
| (iv) | Secretary to the Government, Uttar Pradesh, Finance Department, ex officio | Member
[Under clause (d)] |
| (v) | Managing Director, U.P. State Industrial Development Corporation Ltd. ex officio | Member
[Under clause (e)] |
| (vi) | Chairman, U.P. State Electricity Board, ex officio | Member
[Nominated under clause (f)] |



(vii)	Chief Engineer, U.P. Jal Nigam Board, ex officio.	Member [Nominated under clause (f)]
(viii)	Chief Engineer, Irrigation Department U.P., ex officio	Member [Nominated under clause (f)]
(ix)	Chief Town and Country Planner, U.P., ex officio	Member [Nominated under clause (f)]
(x)	District Magistrate, Bulandshahr, ex officio.	Member [Nominated under clause (f)]
(xi)	Chief Executive Officer.	Member-Secretary [Under clause (g)]

33. This Court having already laid down in Dalco Engg. that establishment of various financial corporations under the State Finance Corporation Act, 1951 is establishment of a corporation by an Act or under an Act. We are of the view that above ratio fully covers the present case and we have no doubt that the Authority has been established by the 1976 Act and it is clearly covered by the Notification dated 22-10-1970. It is further relevant to note that composition of the Authority is statutorily provided by Section 3 of the 1976 Act itself, hence, there is no denying that the Authority has been constituted by the Act itself.”

30. In view of the above, the petition is allowed and the impugned show cause notice is set aside. The pending applications are also disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

SEPTEMBER 25, 2023/‘gsr’