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IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)
ORIGINAL SIDE

CORAM:

THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

CEXA/46/2024
IA NO: GA/1/2024
M/S SHANTI SERVICES
VS
COMMISSIONER OF SERVICE TAX I KOLKATA AND ANR.

HEARD ON : 20.12.2024
DELIVERED ON : 20.12.2024

Appearance:

Ms. Micky Chowdhury, Adv.
Mr. B.N. Pal, Adv.

...for the appellant.

Mr. Kaushik Dey, Adv.
Mr. Tapan Bhanja, Adv.

...for the respondent.

(Judgment of the Court was delivered by T.S. Sivagnanam, C.J.)

1. This appeal filed by the assessee under Section 35G of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 is directed

against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, Kolkata in Service Tax Appeal No. 76005/2015 dated 26th August, 2024. The assessee has raised the following substantial questions of law for consideration:--

i. Whether the Learned Tribunal erred in not appreciating that the appellant is entitled to the benefit of VCES admittedly having been made payment of entire principal tax dues of Rs.51,22,900/- after 1st March, 2013 being the permitted time frame under the scheme as settled in several judgements including in case of Sadguru Construction Co.-Vs-UOI reported in 2014(36)STR3(Guj.), Apna Awas Construction Vs. Chief Commissioner of Customs reported in 2019(26) G.S.T.L 289 (Pat.), Dr. Yeshwant Dhume Vs. Assistant Commissioner of Service Tax Panaji reported in 2019(369) E.L.T.181(Bom.) and Premier Associates Vs. Assistant Commissioner of Services reported in (2018) 49 GSTR1(Karn.) and the respondent having no defence at all to the substantive entitlement of the appellant under the VCES Scheme ?

ii. Whether the Learned Tribunal failed to appreciate that the Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs, Circular no. 170/5/2013-ST dated 8th August, 2013 informed the public that the rejection of VCES, 2013 is not an appealable order?

iii. Whether the Learned Tribunal erred in holding that the appellant failed to challenge the rejection of VCES by appeal and the concerned Government department is contesting the issue of appealability from the order of rejection of VCES, 2013 before the Hon'ble Supreme Court of India in the case of Dy. Commissioner v. Barnala Builders and Property Consultants and the said matter is still pending for final adjudication before the Hon'ble Supreme Court of India?

iv. Whether the Learned Tribunal erred in holding that the rejection of VCES is appeal-able order inspite of the issue being pending before the Hon'ble Supreme Court?

2. We have heard learned Advocate appearing for the appellant/assessee and learned standing Counsel appearing for the respondent department.

3. The short issue which falls for consideration is whether the designated authority under the provisions of the Service Tax Voluntary Compliance Encouragement Scheme (hereinafter referred as the scheme) was justified in rejecting the assessee's declaration filed under the scheme on 23rd July, 2013, by a communication dated 25th July, 2014 on the ground that certain sums of money were deposited by the assessee prior to coming into force of the scheme. The adjudicating authority while considering the submission made by the assessee opined that the sums of money paid by the assessee prior to 10th May, 2013 when the scheme was introduced cannot be reckoned as payment under the scheme and, therefore, the declaration was deficient and cannot be considered. With

this reasoning the assessing officer did not adjudicate the show-cause notice but proceeded to confirm the demand made in the show-cause notice alleging short payment of service tax and also appropriating the amount already paid by the assessee and directing payment of interest and penalty under Section 75 and 78 of the Finance Act, 1994, as amended, respectively.

4. The learned Tribunal while considering the correctness of the order passed by the adjudicating authority dated 4th August, 2015 partially agreed with the assessee and by the impugned order held that adjudicating authority has gone beyond the scope of show-cause notice and, therefore, the adjudication order was set aside and the matter was remanded back to the adjudicating authority.

5. The moot question which ought to have been considered was whether the assessee was required to challenge the communication dated 25th July, 2014 by which the declaration submitted by the assessee under the scheme was held to be deficient inasmuch the payments made by the assessee prior to 10th May, 2013 when the scheme came into force cannot be taken as payment under the scheme. Firstly, we find that the communication dated 25th July, 2014 cannot be construed to be an order in the strict sense for an appeal to be preferred. That apart, the CBEC by Circular dated 8th August 2013 issued certain clarifications with regard to the implementation of the scheme and in Query No. 13 it has been clarified that the scheme does not have a statutory provision for filing of

an appeal against the order for rejection of declaration under Section 106(2) by the designated authority.

6. The clarification issued by the Central Board has not been modified and revised by the Board but in fact reiterated by the Board while contesting matters before the Hon'ble Supreme Court, which could be seen from the decision in the case of *Deputy Commissioner Vs. Barnala Builders and Property Consultant, (2016) 44 STR J69 (SC)* and page 70 of the stay petition and *Deputy Commissioner Vs. Barnala Builders and Property Consultants 2015) 38 STR J424 (SC).* Therefore, the respondent department is stopped from taking a stand that the order of rejection passed by the designated authority under Section 106(2) is an appealable order. In any event, the adjudicating authority held that the declaration filed by the assessee under the scheme was not maintainable on account of non compliance of the condition and, therefore, proceeded to confirm the demand made in the show-cause notice. This order of the adjudicating authority was put to challenge before the learned Tribunal. Thus in effect, the communication which was sent to the assessee rejecting the declaration stood merged with the order passed by the adjudicating authority which was the subject matter of challenge before the Tribunal. Therefore, the assessee cannot be non-suited on the said ground.

7. Having come to such a conclusion the only thing that requires to be considered is whether the payment which was made by the assessee

prior to 10th May, 2013 when the scheme came into force can be taken into consideration for the purposes of considering whether the assessee would be entitled to the benefit under the scheme. Going by the clarification issued by the Central Board, we find that the Central Board has made it clear that in terms of Section 106(2) of the Finance Act, 2013 the designated authority shall, by order, and for reasons to be recorded in writing, rejected a declaration, if any, enquiry/investigation or audited was pending against declarant as on the cut-off date i.e. 1st March, 2013. Thus, cut-off date under the scheme which is sacrosanct and cannot be ignored by the department. In this regard, we are guided by the decision of the Hon'ble Division Bench of the High Court of Gujarat at Ahmedabad in the case of *Sadguru Construction Co. Vs. Union of India 2014 (36) STR 3 (Guj.).* The fact of the said case are more or less identical. In the said case, the assessee had deposited the amount of tax after 1st March, 2013, which was fixed as the cut-off date under the scheme. But this deposit was made prior to 10th May, 2013 when the scheme was modified. The department contended before the Court that such payment cannot form part of the declaration of the scheme.

8. This argument made by the department was rejected by taking note of the statutory provisions contained in the scheme of 2013 and more particularly, the definition of the term "tax dues" as defined in Section 105(1)(e) of the Act. Under the said provision "tax dues" means service tax due or payable under the chapter or any other amount due or

payable under Section 73A thereof, for the period beginning from the 1st day of October 2007 and ending on the 31st day of December 2012, including a cess leviable thereon under any other Act for the time being in force but not paid as on the 1st March, 2013.

9. Thus, the cut-off date fixed under the scheme is the very crucial factor and this aspect was noted in the case of *Sadguru Construction (supra)* and it was held that if the intention of the legislature was to exclude any tax deposited before framing of the scheme, the same could have been provided in plain language. On the contrary, the legislature excluded from the purview of declaration only those taxes which were already paid by 1st March, 2013 and, therefore, the period between the 1st March, 2013 and 10th May, 2013 would, by necessary implication of the provision of the scheme, be covered for declaration under the scheme itself.

10. We respectfully agree with the conclusion arrived at by the Hon'ble Division Bench in the *Sadguru Construction (supra).*

11. As mentioned earlier, the two of the payments which were made by the assessee were on 19th March, 2013, a sum of Rs.15,00,000/- in challan No.00307 and Rs.70 lakh on 12th April, 2013 by challan no. 00280. Thus these two payments are to be reckoned the payments under the scheme as these payments were made after the cut-off date namely 1st March, 2013.

12. Therefore, we are of the view that the assessee is entitled to the benefit under scheme and the declaration of the assessee should be accordingly processed.

13. In the result, the appeal is allowed and the order passed by the learned Tribunal is set aside, as well as the order passed by the adjudicating authority be set aside and the communication dated 25th July, 2014 passed by the designated authority rejecting the assessee's declaration is also set aside and the designated authority is directed to consider the application and proceed to take a decision in accordance with the scheme.

14. Accordingly, the substantial questions of law are answered in favour of the assessee.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

I agree.

(HIRANMAY BHATTACHARYYA, J.)

pkd/GH.