

(2015) 10 GUJ CK 0067
In the Gujarat High Court

Case No : Special Civil Application No. 9387 of 2015

Ask Me Enterprise

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 17-10-2015

Acts Referred:

Finance Act, 1994 — Section 87

Finance Act, 2013 — Section 10(10C), 104, 105, 106, 106(1)

Citation : (2015) 10 GUJ CK 0067

Hon'ble Judges : Harsha Devani and Abdullah Gulamahmed Uraizee, JJ.

Bench : Division Bench

Advocate : Anand Nainawati, Advocate, for the Appellant; Kartik V. Pandya, Advocate, for the Respondent

Judgement

Harsha Devani, J.—Rule. Mr. Kartik Pandya, learned standing counsel waives service of notice of rule on behalf of the respondent No. 1. Mr. Gaurang Bhatt, learned senior standing counsel waives service of notice of rule on behalf of the respondents No. 2 and 3.

2. Having regard to the controversy involved in the present case which lies in a very narrow compass and with the consent of the learned counsel for the respective parties, the matter was taken up for final hearing today.

3. By this petition, the petitioner has challenged the legality of the letter/communication dated 20.03.2015 of the Designated Authority (VCES Cell), Service Tax, Ahmedabad holding that the petitioner is not eligible under VCES for the reason of not fulfilling the conditions of sub-section (4) of section 107 of the Finance Act, 2013.

4. The facts stated briefly are that the petitioner is, inter alia, engaged in providing cleaning services and manpower recruitment agency services. The audit of the records of the petitioner for the period 2008-09 to 2011-12 was conducted by the Department on 25.06.2013, 27.06.2013, 04.07.2013 and

05.07.2013. The audit report raised five revenue paras and the petitioner accepted four revenue paras and made payment of service tax, interest and penalty and accordingly, four revenue paras were settled. However, the petitioner did not accept the fifth revenue para and did not pay service tax amounting to Rs. 12,97,785/-. The details of the amount demanded in the audit report are reproduced herein below:

5. The Union of India introduced a Scheme being the Service Tax Voluntary Compliance Encouragement Scheme, 2013 (hereinafter referred to as "the VCES") as Chapter VI of the Finance Act, 1994 vide Finance Act, 2013. The Service Tax Voluntary Compliance Encouragement Rules, 2013 (hereinafter referred to as "the rules") came to be notified vide notification dated 13.05.2013. The rules prescribed the form and manner of declaration, form and manner of acknowledgment of declaration, manner of payment of tax dues and form and manner of issuing acknowledgment of discharge of tax dues under the VCES.

6. It is the case of the petitioner, a proprietary firm, that it did not have any knowledge of the service tax law and had been regularly filing ST-3 returns and paying service tax as per its understanding. Therefore, the petitioner had agreed with the four revenue paras raised in the audit report and paid the amount as suggested by the audit officials. However, during the course of audit, the petitioner was not informed by the audit officials regarding the option of availing the benefit of VCES.

7. The petitioner did not agree with the revenue para in audit report demanding Rs. 12,97,785/- for the period 2008-09 to 2010-11, since the service receiver M/s. Avadat Apparels refused to pay service tax and vide letter dated 24.10.2008, informed the petitioner that its unit is exempted from central excise and therefore, service tax was not payable by it to any of its service provider. On the basis of the audit report, a show cause notice dated 18.10.2013 came to be issued to the petitioner demanding service tax amounting to Rs. 12,97,785/- along with interest and penalty.

8. The petitioner with a view to avail the benefit of VCES, filed the form VCES-1 on 05.12.2013 wherein, it was declared that the petitioner had not paid the service tax amounting to Rs. 20,63,957/- for the period April 2008 to December 2012. It is the case of the petitioner that no acknowledgment of declaration in Form VCES-2 was issued to the petitioner even though the rules prescribed for issuance of VCES-2 within seven working days of the receipt of declaration.

9. The petitioner by a letter dated 02.12.2013, informed the Commissioner of Service Tax, Ahmedabad regarding filing of VCES application and that the audit officials did not inform the petitioner about the benefit of VCES scheme and hence, the petitioner continued with normal audit process instead of filing VCES application. The petitioner further informed the Commissioner of Service Tax that it had declared tax dues of Rs. 20,63,597/- under VCES and requested to consider payment of tax amounting to Rs. 7,62,784/- (paid under correct tax

accounting code), Rs. 4,36,401/- (paid wrongly under interest code) and Rs. 48,100/- (paid wrongly under penalty code), totalling to Rs. 12,47,285/- to be considered as payment made in manpower service tax code as part compliance under VCES.

10. As per the provisions of VCES, the person making declaration under form VCES-1 has to pay minimum 50% of the tax dues declared on or before 31.12.2013. By a letter dated 17.12.2013, the petitioner informed the respondent No. 3 - Assistant Commissioner of Service Tax, Ahmedabad that in addition to payment of Rs. 12,47,285/- against the tax dues declared amounting to Rs. 20,63,597/-, additional payment of Rs. 3,08,305/- has been made. Thus, a total amount of Rs. 15,55,590/- (75% of the tax dues declared) was paid by the petitioner and only an amount of Rs. 5,08,007/- was left to be paid. Therefore, the petitioner had fulfilled the mandatory condition of payment of 50% of the declared tax dues on or before 31.12.2013. By a letter dated 14.05.2014, the petitioner requested the third respondent for change in the accounting code of penalty and interest. The Assistant Commissioner of Service Tax, Ahmedabad, by a letter dated 21.05.2014, requested the e-Pay and Accounts Office, Service Tax, Mumbai to rectify the wrong accounting head selected by the petitioner for payment of service tax and change the accounting code of above paid interest and penalty to service tax. By a communication dated 30.05.2014, the e-Pay and Accounts Office, Service Tax, Mumbai informed the Assistant Commissioner of Service Tax, Ahmedabad regarding the correction of accounting head of interest and penalty to service tax. Thus, a total amount of Rs. 6,84,203/- came to be corrected from the accounting code of interest and penalty to service tax. The petitioner, by a communication dated 30.06.2014, informed the third respondent regarding final payment of tax dues declared under VCES. The third respondent by a letter dated 13.08.2014, called upon the petitioner to clarify as to how the amount of Rs. 48,100/- paid in respect of penalty for late filing of ST-3 return as pointed out by audit report under revenue para 3 can be considered as payment against the tax dues declared under VCES. The petitioner submitted its explanation in respect thereto. However, to buy peace of mind and early issuance of acknowledgment of discharge under form VCES-3, the petitioner once again paid Rs. 48,100/- vide challan dated 19.12.2014 and requested to consider the first payment made in penalty code as VCES payment as communicate earlier. The third respondent, by the impugned letter/communication dated 20.03.2015, refused to issue acknowledgment of discharge under form VCES-3 on the ground that the condition prescribed under sub-section (4) of section 107 of the Finance Act, 2013 with respect to full payment of tax dues declared under VCES by 31.12.2014 has not been fulfilled. The third respondent further observed that the amount of Rs. 6,36,103/- under the tax dues declared was liable to be recovered under section 87 of the Finance Act, 1994 without any immunity, that is, penalty and interest which was otherwise likely to be available under section 108 of the Finance Act, 2013 in respect of the "total tax dues" amounting to Rs. 20,63,597/- declared under

VCES-1. The third respondent, accordingly, refused to issue acknowledgment of discharge under form VCES-3 on the ground that the circular dated 25.11.2013 only clarifies that the service tax paid prior to VCES declaration can be adjusted against tax dues declared. According to the third respondent the contention of the declarant that since the accounting code of interest of Rs. 6,36,103/- had been wrongly paid under the head of interest and subsequently the accounting code of the same is changed and therefore the same is now "tax dues" and therefore may be adjusted against total tax dues declared under VCES-1 is not convincing as the said amount is nothing but interest only which has been confirmed by the Audit and also correctly quantified and mentioned in the final audit report dated 11.10.2013 and was paid accordingly at the material period. Now, the plea of the declarant that the same was paid wrongly at the material period is nothing but "an after thought" so as to escape from service tax liability to the tune of Rs. 6,36,103/-. The third respondent accordingly, concluded that the petitioner is not eligible under VCES for the reason of not fulfilling the conditions of sub-section (4) of section 107 of the Finance Act, 2013 and consequently the declared amount of Rs. 6,36,103 was liable to be recovered from the petitioner under the provisions of section 87 of the chapter as specified in section 110 of Finance Act, 2013 without immunity, that is, penalty and interest which was otherwise available under section 108 of the Finance Act, 2013 in respect of total tax dues of Rs. 20,63,597 declared under VCES-1. Being aggrieved, the petitioner has filed the present petition.

11. Mr. Jigar Shah, learned advocate for Mr. Anand Nainawati, learned advocate for the petitioner assailed the impugned order by submitting that at the relevant time when the petitioner paid the amount towards four revenue paras together with interest and penalty, the petitioner was not aware of the existence of the scheme. It was contended that it was the duty of the concerned official to inform the petitioner about the existence of the scheme so as to enable the petitioner to avail of the benefit thereof. It was submitted that the petitioner has satisfied all the requirements of the scheme, the only reason why the benefit under the scheme is sought to be denied is on account of the fact that the petitioner has sought adjustment of the amount wrongly paid towards interest and penalty to the head of service tax. It was pointed out that the respondent pursuant to the request made by the petitioner, had also requested the e-Pay and Accounts Office, Service Tax, Mumbai to correct the accounting head of interest and penalty to service tax and accordingly, the amount of Rs. 6,84,203/- paid under the head of interest and penalty, came to be corrected to the accounting head of service tax. It was submitted that, therefore, the entire amount stood paid as required under the scheme. However, the respondent authorities have sought to deny the petitioner the benefit under the scheme solely on the ground that the petitioner had initially paid an amount of Rs. 6,84,203/- towards interest and penalty and not towards the service tax.

11.1 In support of his submissions, the learned counsel placed reliance upon the decision of the Bombay High Court in the case of Hero Cycles Limited Vs. The

Union of India (UOI) and The Deputy Commissioner of Customs, , wherein the court has held that if the petitioner on account of an inadvertent error chose not to apply for the benefit under the notification, the same would result in denial of the benefit. The court was of the opinion that there is a duty cast on the authority to assess the goods and impose duty according to law which includes a statutory notification, if duty cannot be demanded if otherwise not payable. Once there be a power to assess, there is a corresponding duty to assess according to law. The court held that the fact that the petitioner had paid the duty under mistake of law and/or in the case before it, by oversight, could not result in being assessed to duty which was otherwise not payable. The court was of the opinion that this would be a case of manifest injustice and on the face of it erroneous.

11.2 Reliance was also placed upon the decision of this court in the case of S.R. Koshti Vs. Commissioner of Income Tax, , wherein the court has held thus:

"18. The position is therefore that, regardless of whether the revised return was filed or not, once an assessee is in a position to show that the assessee has been over-assessed under the provisions of the Act, regardless of whether the over-assessment is as a result of assessee's own mistake or otherwise, the Commissioner has the power to correct such an assessment under section 264(1) of the Act. If the Commissioner refuses to give relief to the assessee, in such circumstances, he would be acting de hors the powers under the Act and the provisions of the Act and therefore, is duty bound to give relief to an assessee, where due, in accordance with the provisions of the Act.

19. In the present case, the respondent Commissioner has nowhere stated that the petitioner is not entitled to the relief under section 10(10C) of the Act. In fact, the said position is undisputed. The assessing officer himself had passed an order under section 154 of the Act, granting such relief. In the circumstances, even the order under section 264 of the Act made on 29th March 2004, cannot be sustained.

20. A word of caution. The authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or on not being properly instructed, is over-assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected. This Court, in an unreported decision in case of Vinay Chandulal Satia v. Shri N.O. Parekh., the Commissioner of Income Tax, Special Civil Application No. 622/1981, rendered on 20-8-1981, has laid down the approach that the authorities must adopt in such matters in the following terms :

"The Supreme Court has observed in numerous decisions, including Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd., ; The State of West Bengal Vs. The Administrator, Howrah Municipality and Others, , that the State authorities should not raise technical pleas if the citizens have a lawful right and the lawful

right is being denied to them merely on technical grounds. The State authorities cannot adopt the attitude which private litigants might adopt."

11.3 It was submitted that in the present case, the petitioner is lawfully entitled to the benefit of the VCES as the petitioner has satisfied all requirements thereunder and hence, the respondent authorities could not raise technical pleas and deny the lawful right of the petitioner merely on technical ground. It was, accordingly, urged that the petition deserves to be allowed by setting aside the impugned letter/communication dated 20.03.2015.

12. Opposing the petition, Mr. Gaurang Bhatt, learned senior standing counsel for the respondents No. 2 and 3 reiterated the contents of the affidavit-in-reply of the respondent No. 3. It was submitted that the VCE Scheme is a voluntary scheme enabling the assessee - tax payer to avail the benefit thereunder and that the revenue is under no compulsion to inform and convey to the assessee the fact that he can avail of the benefit of the VCE Scheme which has been brought in force by a statutory amendment. It was submitted that in the present case, the petitioner had himself informed that the amount in question to the tune of Rs. 6,84,203/- had been paid towards the interest and penalty. Therefore, the amount paid towards interest and penalty cannot be considered as tax amount and consequentially, cannot be adjusted against the tax dues declared by the petitioner. The third respondent was, therefore, justified in holding that the petitioner had failed to pay Rs. 6,84,203/-.

12.1 Referring to the impugned letter/communication, it was pointed out that in terms of the circular No. 170/5/2013-ST dated 8th August, 2013, it has been clarified that if the declarant fails to pay at least 50% of declared amount of tax dues by 31st December, 2013, he would not be eligible to avail of the benefit of the scheme. Accordingly, on the same analogy, if the remaining amount is not paid upto 30.06.2014 without interest or upto 31.12.2014 with interest, the declarant would not be eligible to avail of the benefit of the scheme. It was submitted that in the present case, as the petitioner had not paid the entire amount of Rs. 20,63,597/- within the time stipulated under the scheme, it was not entitled to avail of the benefit of the scheme. It was submitted that the Designated Authority (VCES Cell) has duly considered all the aspects of the matter and after due consideration, has come to the conclusion that the petitioner is not eligible for the benefit of the scheme, under the circumstances, there is no warrant for interference by this court.

13. The controversy involved in the present case relates to the question as to whether in the facts and circumstances of the present case, the petitioner can be said to have paid the entire tax dues declared amounting to Rs. 20,63,597/- so as to be entitled to the benefit of the VCE Scheme as contended by the petitioner or whether the petitioner has failed to pay the said amount, inasmuch as, the amount of Rs. 6,36,103/- had initially been paid towards the interest and penalty and hence, cannot be considered as payment under the scheme, as contended by the revenue.

14. A perusal of the Service Tax Voluntary Compliance Encouragement Scheme, 2013 reveals that under section 106(1) thereof, 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 73A of the Chapter has been issued or made before the 1st day of March, 2013. The VCE Scheme, 2013 came to be introduced vide section 104 to 114 of Chapter VI of the Finance Act, 2013 in the Finance Act, 1994. Section 107 of the Finance Act, 1994 provides for the procedure for making declaration and payment of tax dues. Sub-section (1) of section 107 lays down that subject to the provisions of this scheme, a person may make a declaration to the designated authority on or before the 31st day of December, 2013 in such form and in such manner as may be prescribed. Sub-section (3) of section 107 provides that the declarant shall, on or before the 31st day of December, 2013, pay not less than fifty per cent of the tax dues so declared under sub-section (1) and submit proof of such payment to the designated authority. Sub-section (4) of section 107 provides that the tax dues or part thereof remaining to be paid after the payment made under sub-section (3) shall be paid by the declarant on or before the 30th day of June, 2014.

15. In the present case, insofar as compliance with the provisions of sub-section (3) of section 107 of the Act is concerned, there is no dispute. What is disputed is compliance with the provisions of sub-section (4) of section 107 of the Act, inasmuch as, it is the case of the respondents that the remaining tax dues have not been paid by the petitioner before 30th June, 2014. The proviso to section 107 of the Act provides for the payment of the declared amount on or before 31st December, 2014 along with interest thereof as prescribed thereunder. Sub-section (6) of section 107 of the Act provides that the declarant shall furnish to the designated authority details of payment made from time to time under the scheme along with a copy of acknowledgment issued to him under subsection (2). Sub-section (7) of section 107 provides that on furnishing the details of full payment of declared tax dues and the interest, if any, payable under the proviso to sub-section (4), the designated authority shall issue an acknowledgment of discharge of such dues to the declarant in such form and in such manner as may be prescribed. Under section 108 of the Act, the declarant, upon payment of the tax dues declared by him under sub-section (1) of section 107 and the interest payable under the proviso to sub-section (4) thereof, shall get immunity from penalty, interest or any other proceeding under the Chapter. Sub-section (2) thereof provides that subject to the provisions of section 111, a declaration made under subsection (1) of section 107 shall become conclusive upon issuance of acknowledgment of discharge under sub-section (7) of section 107 and no matter shall be reopened thereafter in any proceedings under the Chapter before any authority or court relating to the period covered by such declaration.

16. In the present case, the total amount payable by the petitioner in relation to the tax dues declared under the Scheme is Rs. 20,63,597/-. The petitioner pursuant to the declaration filed under the Scheme, paid total amount of Rs. 14,46,987/- before the due date, namely, 30th June, 2014. In relation to the

remaining amount of Rs. 6,36,103/-, the petitioner by a letter dated 14.05.2014 informed the respondent authorities that it had deposited an amount of Rs. 6,84,203/- under the wrong accounting code for penalty and interest, and requested the respondent Assistant Commissioner of Service Tax, to adjust such amount against the correct accounting code. Pursuant thereto, the Assistant Commissioner of Service Tax, Ahmedabad requested the e-Pay and Accounts Office, Service Tax, Mumbai to rectify the wrong accounting head selected by the petitioner for payment of service tax and change the accounting code of above paid interest and penalty to service tax. Accordingly, the e-Pay and Accounts Office, Service Tax, Mumbai corrected the accounting head of interest and penalty to service tax and duly informed the Assistant Commissioner by a letter dated 30.05.2014. Therefore, the amount of Rs. 6,36,103/- stood adjusted against the correct accounting head of service tax instead of penalty and interest before 30.05.2014. If the aforesaid amount of Rs. 6,36,103/- is taken into consideration towards the payment of the amount of Rs. 20,63,597/- payable by the petitioner under the declaration filed under the scheme, total amount stands paid. However, the respondents have raised a technical objection that such amount was initially paid under the accounting head of interest and penalty and therefore, cannot be considered as having been paid towards service tax and accordingly, the requirements of section 107 of the Act are not satisfied and that the amount not having been paid within due date prescribed under sub-section (4) of section 107 of the Act, the petitioner is not entitled to the benefit under the Scheme.

17. In view of the facts narrated hereinabove, it is evident that before 30th May, 2014, the amount of Rs. 6,36,103 came to be adjusted to the correct accounting head of service tax. Accordingly, an amount of Rs. 6,36,103/- stood paid under the head of service tax. For the purpose of the provisions of subsection (3) of section 107 of the Act not less than fifty per cent of the tax dues declared under sub-section (1) have to be paid to the designated authority, the compliance of which is not disputed inasmuch as the petitioner had deposited an amount of Rs. 14,27,494/- pursuant to the declaration filed under the scheme. Under sub-section (4) of section 107 of the Act, the remaining part of the tax dues has to be paid by the declarant on or before 30th June, 2014 which also stood paid before 30th May, 2014, in view of the adjustment of the amount paid under the wrong accounting code to the correct accounting code of service tax. Therefore, before the 30th day of June, 2014, the total amount declared under the Scheme stood duly paid by the petitioner. However, the respondents have sought to deny the benefit of the Scheme to the petitioner under the specious plea that the amount of Rs. 6,36,103/- had been paid initially under the head of interest and penalty and therefore, the same could not be considered as payment towards service tax, which cannot be countenanced. The respondent authorities cannot be permitted to deny the benefit of the Scheme to the petitioner by taking shelter behind a hyper-technical plea. When such a beneficial Scheme is introduced the respondent authorities in all fairness should inform assesseees

about the benefit thereof and the fact that they can avail of the same.

18. In the present case, it was after the introduction of the Scheme, that the petitioner in ignorance of the Scheme paid the amount payable towards service tax, penalty and interest in relation to four revenue paras. At that point of time, the respondent authorities did not draw the attention of the petitioner to the fact that it could avail of the benefit of the Scheme. However, well within the time limit prescribed under the Scheme, the petitioner in due compliance with the provisions of the section 107 of the Act, submitted a declaration under sub-section (1) thereof and paid more than fifty per cent of the tax dues before 31st December, 2013 as required under sub-section (3) thereof and in order to comply with the provisions of sub-section (4), viz. payment of the remaining amount, requested for adjustment of an amount of Rs. 6,36,103/- paid under the wrong accounting code of interest and penalty to the correct code of service tax, which request was duly acceded to by the respondent authorities and such correction was made before 30th May, 2014. Under the circumstances, when the entire amount as contemplated under the Scheme stood paid before the due date and the petitioner satisfied all other requirements under the Scheme, the respondents are not justified in denying the benefit of the Scheme to the petitioner only on the ground that the amount of Rs. 6,36,103/- had initially been paid towards the interest and penalty. The impugned communication/order which seeks to deny the benefit of the Scheme to the petitioner under such hypertechnical plea, therefore, cannot be sustained.

19. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned letter dated 20.03.2015 of the Designated Authority (VCES Cell), Service Tax, Ahmedabad, Exhibit-12 to the petition, is hereby quashed and set aside. It is held that the petitioner has duly paid the remaining amount of Rs. 6,36,103/- before 30th June, 2014 in compliance with the provisions of sub-section (4) of section 107 of the Act. Consequently, the designated authority shall forthwith, issue acknowledgement of discharge of the declared tax dues by issuing Form VCES-3 in favour of the petitioner. Rule is made absolute accordingly with no order as to costs.