

(2014) 12 CAL CK 0043
In the Calcutta High Court
Case No : W.P. 24867(W) of 2014

Durgapur Diesel Sales and Service

APPELLANT

Vs

Superintendent (Service Tax) Central Excise

RESPONDENT

Date of Decision : 15-12-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 14
Finance Act, 2013 — Section 106, 106(1), 107, 111, 70

Citation : (2015) 38 STR 1129

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Seba Roy and Sukalpa Seal, Advocate for the Appellant; P.K. Roy and K.K. Maity, Advocate for the Respondent

Judgement

Harish Tandon, J.—After coming in force of the Service Tax Voluntary Compliance Encouragement Scheme, 2013, the petitioners filed a declaration under subsection (1) of Section 107 of the Finance Act, 2013 (hereinafter referred to as "said Act"), admitting the tax dues and the liability for payment thereof pertaining to the period 2010-2012.

2. The authorities rejected the said application invoking the second proviso to sub-section (1) of Section 106 of the said Act as a show cause notice was issued upon the petitioners for short payment of the tax relating to GTA, Maintenance & Repair Service and BAS. The proceeding was initiated on the basis of the said show cause notice, which culminated into an order confirming the demand raised therein. The petitioners have approached the Tribunal and it is stated that the said appeal is pending.

3. The authorities refused to grant declaration as the issue, which was the subject matter of the earlier show cause notice, is an issue in the present proceeding and, therefore, the petitioners are not entitled to a declaration because of the second proviso to Section 106(1) of the said Act.

4. Learned advocate for the respondents was called on to address the Court on the issue whether the declaration can be denied for a period, which was not covered under the earlier proceeding initiated against the petitioners or whether the issues of an earlier proceeding is identical and similar in the instant proceeding.

5. Mr. P.K. Roy, learned advocate appearing on behalf of the respondents after making certain submissions prays for a direction to file affidavits. According to him, the facts are required to be brought before this Court for complete and effective adjudication of an issue involved in this writ petition. Mr. Roy could not deny that the earlier show cause notice was restricted for a period 2005 to 2010. It is also not denied that the declaration under such scheme is for a period 2010 to 2012.

6. The issue, which germane from the respective submissions appears to this Court whether the declaration can be made by an authority under the said scheme for a period, which was not covered under the earlier show cause notice or the authority would decline to grant declaration as some of the period for which the benefit under the scheme is claimed was included in the earlier show cause notice. The facts as enumerated above, which this Court feels are germane to address the issue cropped up herein, are more or less undisputed. This Court decline the prayer of the respondents to file affidavit-in-opposition as the issue of law raised in the writ petition can very well be decided on the admitted facts.

7. The Service Tax Voluntary Compliance Encouragement Scheme, 2013 is a scheme providing an opportunity to a defaulting assessee to make a declaration before the competent authority admitting the liability towards service tax and seeks waiver against imposition of penalty and interest. The said scheme was restricted on the service tax dues between the period from 1st day of October, 2007 to 31st day of December, 2012. It would be relevant to quote the definition of the tax dues assigned in the said scheme, which runs thus:

"(e) "tax dues" means the 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 day of March, 2013."

8. Sub-section (1) of Section 107 of the said Act requires an assessee to make a declaration to a competent authority on or before 31st day of December, 2013 in such form and in such manner as may be prescribed. To set the said scheme in motion it was obligatory on the part of the defaulting assessee to deposit not less than fifty per cent of the tax dues so declared on or before 31st day of December, 2013 and the remaining tax within 30th day of June, 2014. However, a further time till 31st day of December, 2014 was also provided subject to the fulfillment of certain obligations. The declaration was allowed to be set in motion subject to the other provisions of the said scheme.

9. Sub-section (1) of Section 106 of the said Act mandates the assessee to declare the tax dues for which no notice or an order of determination under Section 72 or Section 73 or Section 73A has been issued or made on or before 1st day of March, 2013. Sub-section (1) of Section 106 has two provisos. First proviso relates to ineligibility of a person to make declaration if a return is furnished under Section 70 disclosing his true liability but has not paid disclosed amount of service tax or any part thereof. The second proviso, which has gained significance or importance in the present context postulates that no declaration shall be made of his tax dues where a notice or an order of determination has been issued to the said assessee in respect of any period on any issue if the same issue is the subject matter of the declaration made under the said scheme for any subsequent period.

10. Learned advocate for the petitioners submits that the issues were different and the period, which was the subject matter of the earlier show cause notice, is not covered in the declaration made under the scheme. By placing reliance upon a Division Bench judgment of the Delhi High Court in the case *Frankfinn Aviation Services Pvt. LTD. Vs. Assistant Commissioner, Designated Authority, Vces, Service Tax*, , the petitioners say that the second proviso when speaks of "any issue" must mean that the issue to a service tax liability or quantum of liability itself for a particular period must be pending before the Tribunal or some of the tax authorities or should have been determined.

11. Mr. Roy, learned advocate appearing for the respondents, on the other hand, submits that the petitioners have not disclosed the true liability and have suppressed the fact that a proceeding was initiated against it and/or order came to be passed confirming the demand and the said order is carried to a Tribunal where the matter is pending and, therefore, is guilty of suppression of the material facts and the authorities have rightly refused to make declaration.

12. My endeavour has failed to find out from the impugned order that there is even a remote suggestion on the ground of suppression of the material facts recorded therein. Section 111 of the said Act specifically provides that in the event the designated authority has reason to believe that the declaration does not contend the true and correct facts, the same is liable to fail as a person cannot be allowed to avail the benefit under the said scheme by suppressing the material facts. As indicated above, the case of the authorities is based upon invocation of second proviso to sub-section (1) of Section 106 of the said Act and there is no reflection in the impugned order, which may infer that the authorities have further invoked Section 111 of the said Act. The case not made out by the authorities cannot be allowed to be made at the Bar.

13. The counsel representing the authorities should restrict the argument on the case made out by the authorities and is not supposed to make the case or to bring additional provisions or the facts in support of the ultimate conclusion arrived by the authorities.

14. Be that as it may, since this Court intends to restrict the consideration on second proviso to Section 106(1) of the said Act, which has been applied in extenso by the authorities, let the case be examined on such parameter whether the said provision stands in the way of making declaration in favour of the petitioners. As indicated above, the said scheme was introduced as and by way of amnesty providing an opportunity to a defaulting assessee to admit the liability and to pay the same within the time bound frame to avail the immunity from penalty interest and other proceedings. It would be relevant and pertinent to quote Section 106 to gather the legislative intend behind the incorporation of the said provision, which runs thus:

"106. (1) 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:

Provided that any person who has furnished return under section 70 of the Chapter and disclosed his true liability, but has not paid the disclosed amount of service tax or any part thereof, shall not be eligible to make a declaration for the period covered by the said return.

Provided further that where a notice or an order of determination has been issued to a person in respect of any period on any issue, no declaration shall be made of his tax dues on the same issue for any subsequent period.

(2) Where a declaration has been made by a person against whom.-

(a) an inquiry or investigation in respect of a service tax not levied or not paid or short-levied or short-paid has been initiated by way of-

(i) search of premises under section 82 of the Chapter; or

(ii) issuance of summons under section 14 of the Central Excise Act, 1944, as made applicable to the Chapter under section 83 thereof; or

(iii) requiring production of accounts, documents or other evidence under the Chapter or the rules made thereunder; or

(b) an audit has been initiated,

and such inquiry, investigation or audit is pending as on the 1st day of March, 2013, then, the designated authority shall, by an order, and for reasons to be recorded in writing, reject such declaration."

15. One or foremost thing to invoke the provisions of the said scheme is the declaration by a person as to his tax dues in respect of which no notice or order of determination under the other provisions of the Chapter is issued on or before 1st day of March, 2013. If an issue, which was the subject matter of an earlier notice or on which the determination has already been done in respect of any period, the designated authority was not obliged to issue declaration for any subsequent period on the same issue.

16. The literal meaning, which could be attributed to the second proviso, is that in the event there is a similarity in an issue between an earlier notice or a proceeding, which is finally determined, the same issue shall not be adjudicated and/or determined for any subsequent period. There are two significant words used in the said proviso, namely, "any issue" and "subsequent period". What is standing in the way of the designated authority in making a declaration is the similarity in issue and not the period, which is required to be looked into. If the meaning is restricted to the period, it would frustrate the legislative intent when the expression "subsequent period" is incorporated in the second proviso. The legislative intent, which could be gathered therefrom is that the issue once decided cannot be allowed to be adjudicated and/or reopened for any subsequent period.

17. The Division Bench of Delhi High Court in the above noted report, the facts, which emanates from the said report is that the vocational training institute for air hostesses/Stewards in hospitality and management sector was exempted from the service tax by virtue of the notification dated September 10, 2004. By a subsequent notification dated February 27, 2010, such exemption was withdrawn and the aforesaid institute was brought within the purview of the service tax. The vocational institute paid the service tax till March 31, 2012 but did not deposit the same for the period April 1, 2012 to December 31, 2012. It appears that the proceeding was initiated against the vocational institute by an authority whether it can enjoy the exemption from the service tax and the matter was pending before the trial Court. When declaration under the scheme was made by the vocational institute for non-payment of the service tax from the period April 1, 2012 to December 31, 2012, a point was taken by the respondent authorities that the expression "any issue" appearing in the second proviso to the said Section means any proceeding initiated against the assessee and the issue can be relatable to a liability for payment of the service tax. In the above perspective it is held that the expression "any issue" should be strictly interpreted to an issue as to the service tax liability or quantum of liability for a particular period.

18. This Court does not find that the said judgment can be of any help to the petitioners. The authorities in the impugned order have clearly indicated that the earlier show cause notice was issued for short-payment of the service tax on account of GTA, Maintenance & Repair Service and BAS and have been decided against the petitioners by the adjudicating authority. The issue involved in the said scheme also relates to the non-payment of the service tax on the component of GTA, Maintenance & Repair Service and BAS. The second proviso envisaged an embargo in making a declaration even for a subsequent period on the same issue.

19. This Court, therefore, does not find that the authorities have, in fact, wrongly applied the said provision. The writ petition is devoid of merit and the same is hereby dismissed without, however, any order as to costs.