

(2023) 02 CAL CK 0020
In the Calcutta High Court
Case No : WPA No. 7197 Of 2020

GE Power India Limited

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 06-02-2023

Acts Referred:

Central Excise Rules, 1944 — Rule 9(2)
Central Excise Act, 1944 — Section 11A(1), 121(f), 123(b), 124(1), 124(1)(a), 125(1)(a), 125(1)(c), 125(7)

Citation : (2023) 02 CAL CK 0020

Hon'ble Judges : Md. Nizamuddin, J

Bench : Single Bench

Advocate : Tushar Jarwal, Avra Mazumdar, Suman Bhowmik, Samrat Das, Binayak Gupta, K.K. Maiti, Ekta Sinha, Aishwarya Rajyashree

Final Decision : Disposed Of

Judgement

Md. Nizamuddin, J

Heard learned advocates appearing for the parties.

By this writ petition petitioner has challenged the impugned orders dated 12th February, 2020 rejecting the petitioner's applications under Sabka Vishwas (Legacy Dispute Resolution) Scheme (SVLDRS) 2019 and rules thereunder.

Questions of law involved in this writ petition are as hereunder:

(i) Whether on the facts and in the circumstances of the case the impugned orders passed under the 'SVLDRS' 2019, by the respondent authority concerned rejecting the applications of the petitioner by holding that the petitioner submitted the applications in the wrong category as showing "SCN duty pending" and that the two show cause notices in question had already been adjudicated by one order-in-original and upheld by the CESTAT and High Court, is erroneous in law and perverse?

(ii) Whether on the facts and in the circumstances of the case applications filed by the petitioners on the date when the aforesaid scheme was existing, can show cause cum demand notices in question be called 'finally heard' for denying the benefit under the said Scheme when the order-in-original on the show cause notices in question were set aside by the CESTAT and the matter was remanded back to the adjudicating authority for readjudication of the same and in view of the admitted fact that on or before the date of filing the application under the aforesaid scheme no final hearing was taken place and no order was passed by the adjudicating authority after the order of remand by CESTAT on the show cause cum demand notices?

(iii) Whether on the facts and in the circumstances of the case dismissal of the earlier writ petition by this Court confining to the only issue of legality of interim order by the CESTAT passed on Appeal filed by the petitioner asking the petitioner to make pre-deposit of 25% of the disputed tax and which was dismissed for such non-deposit and subsequently the appeal was restored on making payment of such pre-deposit as directed by the appellate authority (CESTAT) and setting aside the order-in-original passed by the adjudicating authority and remanding the matter back to readjudicate the show cause notices in question and admittedly no final hearing took place on the said show cause notices and were not adjudicated afresh and were pending on the date of filing the applications under the aforesaid scheme, impugned order of rejection of the applications under the aforesaid scheme is legal and valid?

(iv) Whether on the facts and in the circumstances of the case and in view of Section 124(1)(a) of the aforesaid Scheme can the 'tax dues' relatable to show cause notices in question be called 'not pending' on 30th June, 2019 or on the date of filing the application under the aforesaid scheme during the existence of the aforesaid scheme?

(v) Whether on the facts and in the circumstances of the case, defence of the respondents in rejecting the application of the petitioner by relying on Section 125(1)(a) of the aforesaid scheme, is tenable in the eye of law?

(vi) Whether on the facts and in the circumstances of the case stand of the respondents that no relief can be granted to the petitioner under the aforesaid Scheme since the same is not in existence now, is tenable in the eye of law though the applications under the aforesaid Scheme were filed before the expiry of the same?

Facts involved in this writ petition, in brief, are as hereunder:

A show cause notice dated 10.03.1997 was issued to the petitioner by Superintendent of Central Excise, Durgapur, calling upon it to show cause as to why short payment of duty of Rs.51,01,958/- for the period from 1.11.1996 to 28.02.1997 should not be demanded from the petitioner under Rule 9(2) of the Central Excise Rules, 1944 read with Section 11A(1) of the Central Excise Act, 1944.

On similar issue, another show cause notice was issued to the petitioner on 22.09.2004 by Commissioner of Central Excise, Bolpur, for the period starting from 16.03.1995 to 31.10.1996 raising a demand of Rs.2,94,18,967/-.

The demand raised in the aforesaid show cause notices were confirmed by a common order-in-original passed by commissioner of Central Excise, Bolpur, against which petitioner filed appeal and stay petition before the CESTAT.

On 09.07.2007 the stay application filed by the petitioner came up for hearing before the CESTAT wherein an order was passed (hereinafter referred to as "Stay Order") directing the petitioner to make a pre-deposit of 25% of the disputed excise duty as a condition precedent for hearing the appeal in question on merits and the date of compliance of the said order was fixed on 17.09.2007.

Thereafter petitioner filed a miscellaneous application on 31.08.2007 before the CESTAT seeking modification of the aforesaid order dated 09.07.2007 which had directed payment of pre-deposit of 25%. In the said modification application, the petitioner prayed that it may be allowed to make the pre-deposit by way of a bank guarantee and not by way of cash. Due to non compliance of the condition of stay, appeal of the petitioner was dismissed by the CESTAT on 19.11.2007.

On 30.03.2009 the restoration application dated 05.12.2007 for restoring the appeal was dismissed by the CESTAT.

On 21.10.2009 the petitioner filed a writ petition being W.P. No. 1064 of 2009 against the aforesaid order dated 19.11.2007 dismissing the appeal for not making pre-deposit of 25% of the disputed tax and order dated 30.03.2009 dismissing restoration application by the CESTAT. The limited ground of challenge in the said writ petition was against the ex parte order dated 19.11.2007 dismissing the appeal of the petitioner by the CESTAT due to non-compliance of making pre-deposit, that it was in gross violation of the principles of natural justice as no hearing notice was given to the petitioner. It further challenged the order dated 30.03.2009 in the said writ petition on the ground that the restoration application of the petitioner for restoration of appeal was dismissed without considering the modification application dated 31.08.2007 filed by the petitioner.

On making pre-deposit in compliance of the order of CESTAT, the appeal filed by the petitioner (Excise Appal No. 219 of 2007), was heard on merit on 18.05.2016 and the CESTAT allowed the appeal of the petitioner by setting aside the order-in-original dated 17.11.2006 and remanded the matter back to the adjudicating authority for de novo consideration on the notices cum demand in question. Consequently, the proceedings with respect to the said two show cause notices dated 10.03.1997 and 22.09.2004 got revived and since then it was pending before the adjudicating authority for fresh adjudication on the date of filing of applications under the aforesaid scheme and is pending even till date and in view of the aforesaid order of the CESTAT restoring the appeal and remanding the matter back for reconsideration, the aforesaid writ petition had already become

infructuous though on 08.09.2016 the said writ petition no. 1064 of 2009 filed by the petitioner was dismissed by this Court for default which could not have any impact on the show cause notices pending for readjudication after the order of remand by the CESTAT.

On 21.08.2019 Central Government floated a scheme called Sabka Vishwas (Legacy Dispute Resolution) Scheme (SVLDRS)- 2019 which provided a one-time measure for liquidation of disputes of Central Excise and Service Tax. Dispute resolution and amnesty are the two components of the said scheme. Under the said scheme any assessee whose show cause notice or appeals arising out of a show cause notice pending as on 30.06.2019 could have opted for the said scheme. The said scheme came into force on 21.08.2019 and on 31.12.2019 the Central Government by Notification No. 07/2019 Central Excise-NT, extended the last date of filing declaration under the scheme from 31.12.2019 to 15.01.2020.

On 15.01.2020 as the show cause notice dated 10.03.1997 and 22.09.2004 were pending for adjudication as on 30.06.2019 before the adjudicating authority after the order of remand by the CESTAT, the petitioner filed two declarations under SVLDRS-2019 for claiming of relief and settlement of its aforesaid pending tax/duty dispute.

The respondents concerned on 12.02.2020 rejected both the aforesaid applications/declarations of the petitioner. The common ground taken by the authority concerned for rejecting both the declarations was that the applications were filed in the wrong category as 'SCN involving duty pending' whereas two show cause notices had been adjudicated by one order-in-original and upheld by the CESTAT and this Writ Court. Further, according to the authority concerned, with respect to the declaration filed for SCN dated 22.09.2004, there is an additional ground of rejection that there was no proof of payment of deposit of Rs.86,00,000/-.

Petitioner submitted that the aforesaid impugned orders rejecting the aforesaid applications of the petitioner are on the aforesaid two grounds as appears from order of rejection being Annexure P-16 and P-17 to the instant writ petition are arbitrary, illegal, bad in law and is perverse and is in total disregard of the very object and purpose of the aforesaid scheme since the respondents authority ignored the factual and legal position that as per Section 123 (b) of the said scheme show cause cum demand notices in question received by the petitioner which was admittedly received before 30th June, 2019, was the 'amount of duty payable' and the said tax due was pending as per Section 124(1)(a) of the aforesaid scheme and as per Section 125(1)(c) of the said scheme no final hearing had taken place on the show cause notices in question after the order of remand on the appeal filed by the CESTAT after restoring the appeal and dismissal of the writ petition by the Writ Court which was filed against the limited issue of conditional interim order of stay on making pre-deposit imposed by the CESTAT and dismissal of the said writ petition for default has no impact on the pendency of adjudication of the show cause cum demand notices after the order

of remand by the CESTAT.

Petitioner in support of his contention relies on several decisions of the Hon'ble Bombay High Court in the case of Jyoti Plastic Works Pvt Ltd. –Vs– Union of India reported in 2020 (43) G.S.T.L 675 (Bom.) and judgment of the Hon'ble Delhi High Court in the case of Mukesh Jain, Proprietor of M/s. Jainsons –Vs– Union of India & Ors. reported in 2022 (11) TMI 1229– Delhi High Court on the proposition of law that if adjudication order on the 'amount of tax' due is set aside by the appellate authority and the matter is remanded back to the adjudicating authority for reconsideration of the issues on merit apart from quantification, it should be treated as pending if no final adjudication order has been passed on the date of filing the application under the aforesaid scheme.

Petitioner relies on a decision of the Hon'ble Bombay High Court in the case of Morde Foods Pvt. Ltd. –Vs– Union of India reported in 2021 (50) G.S.T.L. 43 (Bom.) on the proposition of law that if an assessee was at the stage of show cause notice with no fresh adjudication order after the order of remand by the appellate authority then certainly it will be eligible to file declaration under the said scheme.

Petitioner relies on a decision of the Division Bench of this Court in the case of M/ s. M.P. Khaitan –Vs– The designated Committee & Ors. reported in 2022 (3) TMI 322 – Calcutta High Court on the proposition of law that stand of the revenue that if the scheme has already expired no relief can be granted to the petitioner is not tenable in the eye of law if the application was filed before the date of expiry of the Scheme.

Learned Advocate appearing for the respondents opposes the writ petition by defending the impugned order of rejection of the applications of the petitioner under the said scheme by contending as hereunder:

(i) That appeal filed by the petitioner had already been finally heard before the date of coming into effect the aforesaid scheme and as such petitioner is not eligible to avail the benefit of the said scheme in view of Section 125(1)(a) of the said scheme.

(ii) That the said scheme has already been expired and is not available now, no relief can be granted to the petitioner.

(iii) That in view of dismissal of the writ petition filed by the petitioner before the commencement of the said scheme, petitioner is not entitled to avail the benefit of the said scheme.

(iv) That there was no proof of deposit of the amount disclosed in the scheme.

Respondent in support of his contention has relied on an unreported decision of the Hon'ble Supreme Court dated 18th February, 2022 in the case of M/s. Yashi Constructions –Vs– Union of India in Special Leave to Appeal (C) No. 2070/2022.

Before dealing with contentions of the parties, some provisions of the aforesaid

Scheme being 'SVLDRS' 2019, which are relevant, are quoted hereunder:

121. In this Scheme, unless the context otherwise requires,-

(a).....

.....

(f) "appellate forum" means the Supreme Court or the High Court or the Customs, Excise and Service Tax Appellate Tribunal or the Commissioner (Appeals);

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123. For the purposes of the Scheme, 'tax dues" means –

(a)

(b) where a show cause notice under any of the indirect tax enactment has been received by the declarant on or before the 30th June, 2019, then, the amount of duty stated to be payable by the declarant in the said notice:

Provided that if the said notice has been issued to the declarant and other persons making them jointly and severally liable for an amount, then, the amount indicated in the said notice as jointly and severally payable shall be taken to be the amount of duty payable by the declarant;

.....

.....

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 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;

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 June, 2019;

(b).....

(c) who have been issued a show cause notice, under indirect tax enactment for

an erroneous refund or refund;

.....

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127. (1).....

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(7) Where the declarant has filed a writ petition or appeal or reference before any High Court or the Supreme Court against any order in respect of the tax dues, the declarant shall file an application before such High Court or the Supreme Court for withdrawing such writ petition, appeal or reference and after withdrawal of such writ petition, appeal or reference with the leave of the Court, he shall furnish proof of such withdrawal to the designated committee, in such manner as may be prescribed, along with the proof of payment referred to in sub-section (5).

Considering the facts and circumstances of the case as appears from record and taking into consideration the relevant provisions of the aforesaid Scheme under SVLDRS 2019 particularly on reading together the provisions under Section 121(f), 123(b), 124(1), 125(1)(a), 125(1)(c) and 125(7), I am of the considered opinion that the impugned orders dated 12th February, 2020 rejecting the petitioner's applications under the SVLDRS 2019, are arbitrary, invalid, perverse and not tenable in the eye of law for the following reasons:

(i) On the date of filing of the applications under the aforesaid Scheme on 15th January, 2020 when the aforesaid scheme was valid by virtue of notification issued by the Central Government it can be easily said that the applications under the aforesaid Scheme were filed within time and before the expiry of the aforesaid scheme.

(ii) The show cause cum demand notices in question issued by the adjudicating authority were received by the petitioner before the 30th June, 2019, as per Section 123(b) of the aforesaid scheme and the 'duty' was due and payable by the petitioner and the tax dues were relatable to show cause cum demand notices which were pending adjudication on 30th June, 2019 as per Section 124(1)(a) of the aforesaid Scheme.

(iii) Petitioner could not be called not eligible or excluded to make declaration under the said scheme in view of Section 125(1)(c) of the aforesaid scheme since no final hearing had been taken place on or before the 30th June, 2019, after setting aside of the order-in-original and remanding the matter back by the CESTAT to adjudicating authority concerned for de novo adjudication on the show cause cum demand notices in question which is an admitted factual position and even till date no final order has been passed on the said show cause cum demand notices in question. Respondents have also failed to produce any

document before this Court to establish that after the order of remand by the CESTAT, at any point of time final hearing had been taken place on the show cause cum demand notices in question and that the same have been adjudicated on or before 30th June, 2019.

(iv) The order of the High Court dismissing the writ petition which was filed by the petitioner against the interim order passed by the CESTAT imposing the condition for hearing the appeal of the petitioner to make pre-deposit of 25% of the tax dues and order of dismissing the appeal for non-compliance of the said condition, such order of dismissal of the writ petition will not have any impact on show cause notices cum demand notices pending for hearing after restoration of the appeal of the petitioner by the CESTAT on compliance of the condition of making pre-deposit and remanding back the matter to the adjudicating authority concerned to adjudicate afresh on the notices cum demand notices in question and more particularly when such order of the CESTAT authority restoring the appeal and remanding the matter for readjudication of show cause notices was not further challenged by the revenue authority before any forum and when no final hearing has been taken place before the adjudicating authority concerned after the order of remand by the CESTAT either on or before 30th June, 2019 or even till date, in view of such admitted factual position it can be easily said that the adjudication on the show cause notices in question was pending on the date of filing of the applications under the said scheme.

(v) Question of withdrawal of proceeding relating to disputed 'Duty' pending before the High Court on or before the date of filing the applications as per Section 127 (7) under the aforesaid Scheme does not arise in the facts and circumstances of the case since on the date of filing the applications in question under the aforesaid Scheme no related proceeding was pending before the High Court.

(vi) Unreported judgment of the Hon'ble Supreme Court in the case of M/s. Yashi Constructions -Vs- Union of India relied upon by the respondents has no application in the facts and circumstances of this case.

In view of the discussion and observations made above, this Writ Petition being WPA No. 7197 of 2020 is disposed of by setting aside the aforesaid impugned orders dated 12th February, 2020 rejecting the aforesaid applications of the petitioner filed under SVLDRS- 2019 and the respondents authority concerned are directed to grant appropriate relief to the petitioner under the aforesaid Scheme by reconsidering the aforesaid applications in the light of the observations made in this judgment, after giving opportunity of hearing to the petitioner or its authorised representative.

Whole exercise in the aforesaid regard of reconsideration shall be completed by the respondents authority concerned within a period of 12 weeks from the date of communication of this order. No order as to costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the

parties upon compliance with all requisite formalities.