

(2022) 03 CAL CK 0010

In the Calcutta High Court

Case No : MAT No. 7 Of 2022, I.A. NO.CAN 1 Of 2022

M/S. M. P. Khaitan

APPELLANT

Vs

Designated Committee & Ors

RESPONDENT

Date of Decision : 01-03-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 226

Sabka Vishwas (Legacy Dispute Resolution) Scheme Rules, 2019 — Rule 3, 6, 6(4)

Citation : (2022) 03 CAL CK 0010

Hon'ble Judges : T.S. Sivagnanam, J;Hiranmay Bhattacharyya, J

Bench : Division Bench

Advocate : Dr. Samir Chakraborty, Arnab Chakraborty, Bhaskar Sengupta, Abhijit Biswas, Bhaskar Prasad Banerjee

Final Decision : Disposed Of

Judgement

T.S.Sivagnanam, J

1. In spite of call, none appears on behalf of the respondents. Mr. Bhaskar Prasad Banerjee, learned counsel, who usually represents the respondents, is present in Court. The Court directs Mr. Banerjee to appear in the instant appeal and the respondents are directed to regularise his appointment.

2. This intra-Court appeal filed by the writ petitioner is directed against the order dated 4th October, 2021 in W.P.A. No.12807 of 2021. The appellant had filed the writ petition praying for issuance of a writ of declaration to confirm the correctness of the Form SVLDRS 1 dated December 12, 2019; for issuance of a writ of certiorari to quash the statement dated 6th February, 2020 and the notice of demand dated 26th July, 2021 and for issuance of a mandamus to the respondent to withdraw the said statement as well as the notice of demand and consequently give effect to the Form SVLDRS 1 dated December 12, 2019 filed by the appellant and issue statement under Section 127 of the scheme in Form SVLDRS 3. The learned Single Bench by the impugned order dismissed the writ petition solely on the ground that the appellant had approached the Court after

expiry of the scheme, which expired on 30th June, 2020. The correctness of the order has been questioned before in this appeal.

3. We have heard Dr. Samir Chakraborty, learned senior counsel appearing for the appellant and Mr. Bhaskar Prasad Banerjee, learned counsel for the respondents.

4. The appellant / assessee was issued an order of adjudication dated 24th February, 2009 demanding service tax in respect of the transactions done by the appellant. The said order was challenged by filing an appeal before the Customs Excise and Service Tax Appellate Tribunal, Kolkata (in short the 'Tribunal'). In the said appeal, an application for stay of the order in original was sought for and the Tribunal granted an order of interim stay subject to the condition that the appellant deposits a sum of Rs.20 lakhs within a period of eight weeks. The appellant complied with the said order and filed compliance report dated 2nd June, 2011 evidencing deposit of Rs.20 lakhs between 7th May, 2011 to 16th June, 2011 along with copies of the relevant challans. The appeal was pending before the Tribunal. On 9th September, 2019, Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 was introduced by Finance (No.2) Act, 2019. On the relevant date, the appeal filed by the appellant was pending before the Tribunal thereby making the appellant eligible to file a declaration under the scheme if it so desire.

5. The appellant opted to go under the scheme and submitted a declaration on 12th December, 2019 electronically in Form SVLDRS 1 under Section 125 of the scheme read with Rule 3 of the Sabka Vishwas (Legacy Dispute Resolution) Scheme Rules, 2019. In the said Form, the appellant had mentioned that it had effected a pre-deposit of Rs.20 lakhs in terms of the direction issued by the Tribunal and the tax due was indicated as Rs.10,98,015/-. The appellant was entitled to seek for adjustment of the said amount, which was deposited by the appellant as a condition precedent for grant of stay in terms of Section 124(2) of the Act. The Designated Committee issued Form SVLDRS 2 dated 24th January, 2020 in which the amount pre-deposited was indicated as "0" (zero).

6. Immediately, thereafter, the appellant filed an application under Section 127 of the Act read with Rule 6 of the Rules. Under the said provision, the appellant was entitled to indicate the reasons for disagreement. The appellant indicated that the amount of Rs.20 lakhs pre-deposited by the appellant pursuant to the order passed by the Tribunal should be given credit. The appellant also sought for an opportunity of making written submissions, which was granted. The appellant had made written submissions and also indicated the error, which has occurred while issuance of Form SVLDRS 2 dated 24th January, 2020. The appellant was of the firm hope that the Designated Committee will take note of the error pointed out in exercise of its powers under Section 127 of the Act. However, the same was not done and Form SVLDRS 3 was issued on 6th February, 2020 and the pre-deposit amount was once again indicated as "0" (zero).

7. It appears that there was no written orders communicated to the appellant as to why the pre-deposit amount still continues to be reflected as "0" in spite of the appellant having pointed out the reasons for disagreement by filing an application under Section 127 of the Act read with Rule 6 of the Rules, which was accepted and the appellant was also granted opportunity to file the written submissions.

8. The appellant, therefore, having left with no other option submitted a representation on 19th February, 2020 to the Designated Committee once again pointing out the error and also enclosing all the documents, which were already placed before the Committee along with the application under Section 127 of the Act. No order was passed by the Designated Committee but the appellant was communicated with a notice of demand dated 26th July, 2021. To be noted that the scheme came to close on 30th June, 2020. The demand dated 26th July, 2021 even if it is taken to be a deemed rejection of the application under Section 127 of the Act, it ought to have been communicated to the appellant well before the close of the scheme, i.e. 30th June, 2020, which the Designated Committee failed to do. When the appellant questioned the same by filing the writ petition on 11th August, 2021, the learned Single Bench was of the view that the appellant having approached the writ Court after the close of the scheme, cannot be granted any relief.

9. In our considered view, the object of the scheme has to be looked into while deciding as to what relief the assessee would be entitled. Undoubtedly, the scheme was brought about to encourage settlement of disputes. If the object of the scheme is viewed as one permitting settlement, then obviously the scheme needs to be given a purposive interpretation so that the object sought to be achieved does not get defeated. In our considered view, if the action of the authorities are arbitrary and unreasonable, devoid of reasons and violates Article 14 of the Constitution of India, the arms of the Court under Article 226 of the Constitution of India are long enough to remedy the breach. The designated Committee ought to have given due consideration to the application under Section 127 of the Act read with Rule 6 of the Rules wherein the appellant had clearly pointed out the reason for its disagreement and sought for rectification of the errors. Curiously enough, when the demand dated 26th July, 2021 was issued, not only the amount of duty was shown as Rs.30,98,015/- but the amount, which was shown by the appellant in the declaration in Form SVLDRS 1, namely Rs.10,98,015/- was also demanded. This clearly shows total non-application of mind. It is relevant to take note of certain circulars issued by the department, which throws light as to how the department has understood the purpose of the scheme. One such circular is dated 25th September, 2019, i.e. Circular No.1072/05/2019-CX in which it has been clarified that relief available under Section 124(1)(c) will be applied to the net outstanding amount shown in Form SVLDRS 1 and in respect of all other categories, any money paid before its appropriation is in the nature of a deposit only. Therefore, it was clarified that in respect of declarations made under the other categories, the relief will be applied

to the outstanding amount and only thereafter, the pre-deposits / deposits [Section 124(2)] shall be adjusted.

10. The above circular makes the position lucid and clear and the Designated Committee was wholly unjustified in not taking note of the pre-deposit made by the appellant pursuant to the orders passed by the Tribunal as condition precedent for grant of interim order. Further, the Central Board of Indirect Tax and Customs was conscious of the fact that throughout the country several writ petitions have been filed in various High Courts pointing out the errors, which were apparent in the statement issued by the department pursuant to the declaration filed by the assessee.

11. This necessitated a circular to be issued by the Central Board dated 17th March, 2021 in C.B.I. & C. Instruction No.1/2021-CX. For better appreciation, the same is quoted hereinbelow:-

"C.B.I. & C. Instruction No.1/2021-CX, dated 17-3-2021 F.No.267/41/2021-CX.8

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Indirect Taxes & Customs, New Delhi

Subject: Manual processing of declaration filed under SVLDRS, 2019 in order to comply with the directions of the Hon'ble High Courts-Regarding.

References are being received in the Board from the CGST Zones in respect of Writ petitions filed by aggrieved declarants before various Hon'ble High Courts against the decision of the concerned Designated Committees taken under Sabka Vishwas (Legacy Dispute Resolution) Scheme (SVLDRS), 2019. The cases in which the Hon'ble High Court has decided in favour of the declarant and remanded the matter back to the concerned Designated Committee for fresh decision are referred to the Board for grant of permission for manual processing of the subject declaration so as to comply with the directions of the Hon'ble High Courts.

2. In this regard, it is to inform that one O/o DG (Systems) have expressed an inability in providing the facility for electronic processing of the subject declaration and suggested for manual processing.

3. The matter has been examined in the Board. It is hereby clarified that henceforth all such references for grant of approval of manual processing of the declarations need not be made to the Board and such cases can be processed manually by the concerned Designated Committees upon fulfillment of the following conditions:-

(i) The order of the Hon'ble High Court has been accepted by the Concerned Commissionerate.

(ii) The Ld ASG/Sd. Counsel who had represented the case before the Hon'ble

Court has opined to accept the said order of the Hon'ble Court.

4. All such declarations that have been processed manually may be reported to the O/o DG (Systems) by 15th day of the succeeding month, for purpose of record."

12. Though the above referred circulars have clearly pointed out the relevant statutory provisions and as to how the Designated Committee should act, the case in hand is a clear illustration of total non-application of mind and in such circumstances, the appellant cannot be denied relief by the Writ Court. We had an occasion to consider a case relating to an assessee, who had, while filing the declaration in Form SVLDRS 1 had wrongly mentioned the order in appeal number instead of order in original number. Though full facts were available before the Designated Committee and also pointed out by the assessee therein to the department, the department failed to exercise its jurisdiction under Section 127 of the Act, which necessitated the assessee to approach the writ Court. The learned Writ Court had allowed the writ petition and challenging the said order, the revenue preferred appeal before us in F.M.A. No.917 of 2021. By a judgment dated 4th January, 2022, the appeal was dismissed. It may be relevant to take note of the certain paragraphs of the said decision in the following manner:-

"We have heard the learned counsel for the parties at length. Before we examine the factual matrix, we shall take note of certain provisions of the SVS Scheme. Under Section 120(k) the 'designated committee' has been defined to mean the committee referred to in Section 125. Section 122 defines 'tax due' for the purposes of the scheme. In the case in hand, the tax dues is not in dispute. Section 123 enumerates the reliefs available under the scheme; Section 124 speaks about declaration under the Scheme; Section 126 deals with the issue of statement by Designated Committee and Section 127 deals with rectification of errors. As Section 127 would have a bearing on the case on hand, the same is quoted hereinbelow:

"Section 127. Within thirty days of the date of issue of a statement indicating the amount payable by the declarant, the designated committee may modify its order only to correct an arithmetical error or clerical error, which is apparent on the face of record, on such error being pointed out by the declarant or suo motu, by the designated committee."

The assessee made an application electronically as required under the scheme of 2019. The screen shot of the uploaded SVLDRS-1 shows that the appeal number, the date of appeal, the forum, the order in original number and date are required to be mentioned apart from other details pertaining to the basic excise duty, cess etc. In terms of the notification issued by the Central Government dated 21.08.2019, declaration under Section 125 shall be made electronically in form SVLDRS-1 by the declarant on or before 31.12.2019.

Thus, the issue would be whether the designated committee as constituted in

terms of Section 125 of the scheme was justified in not affording an opportunity to the assessee to rectify such minor technical error. Section 127 deals with rectification of error. The said provision not only provides for correction of the arithmetic error and clerical error which are apparent on the face of the record as pointed out by the declarant or suo motu by the designated authority.....

If such exercise had been done, it would augur well bearing in mind the purpose for which the Central Government brought about the SVS Scheme. Thus if the scheme was brought about with the spirit of settlement then it goes without saying that such spirit of settlement is not a "one way traffic" but mutual, that is both by the revenue and the assessee. Section 127 provides that within 30 days of the date of issue of a statement indicating the amount payable by the declarant, the Designated Committee may modify its order only to correct an arithmetical error or clerical error which is apparent on the face of the record on such error being pointed by the declarant or even suo motu by the Designated Committee. Thus, the said provision empowers the Designated Committee to rectify the errors with regard to the amount payable by the declarant indicated in the statement either suo motu or upon an error being pointed by the declarant. Upon reading the said scheme as a whole this Court is of the considered view that the Designated Committee after scrutinizing the materials on record shall indicate the amount payable by the declarant upon issuing a statement in respect thereof and such exercise has to trigger obviously after an application being made by the declarant. Therefore, it cannot be said that the Designated Committee became functus officio after the last date stipulated in the scheme for making an application as the function of the Designated Committee to decide the claim made under the said scheme starts only upon an application being made.....

On this issue it is beneficial to take note of the decision of the High Court of Gujarat at Ahmedabad in the case of Hitech Projects Private Limited vs. Union of India reported in 2020(39) GSTL 388. More or less identical situation was considered by the Hon'ble Division Bench and the communication rejecting the application was quashed and the Designated Committee was directed to decide the application afresh.

Further, in the case of M/s. Sobha Limited vs. Union of India & Anr. (CWP 10804-2020 (O & M) dated 25.09.2020 the Hon'ble Division Bench of Punjab and Haryana High Court at Chandigarh had considered an identical issue and the order of rejection of the declaration filed in Form SVLDRS-1 was set aside and direction was issued to the designated authority to decide the application afresh. Identical direction was issued in the case of Vaishali Sharma vs. UOI & Anr. reported in MANU/DE/1529/2020. In the said decision the Court went a step further to observe that an opportunity of hearing must have been given to the assessee before rejecting the declaration. Further, we note that in the case of Assam Cricket Association vs. UOI reported in MANU/GH/0280/2020 the department, in fact, considered and accepted to reconsider the application of the

declarant.....”

13. As pointed out earlier, the appellant had exercised the opportunity provided under Rule 6 (4) of the said Rules. Sub Rule (4) of Rule 6 provides for making a written submission, which was exercised by the appellant. The proviso to Rule 6(4) provides that if no such agreement or disagreement is indicated till the date of personal hearing and the declarant does not appear before the Designated Committee for personal hearing, the Committee shall decide the matter based on available records. Thus, even in cases where an ex parte decision is taken, the Committee shall decide the matter based on available records. In the instant case, the appellant had filed electronically Form SVLDRS 2A indicating the disagreement and requesting for rectification of the defect. The appellant also sought for permission to file written submission, which was granted. In the written submission, the appellant had pointed out that opportunity of personal hearing was granted on 20th January, 2020. Further, the appellant had mentioned that the Tribunal had directed deposit of Rs.20 lakhs within a period of eight weeks from the date of the order, and the direction was complied with. The copy of the order passed by the Tribunal was enclosed as exhibit 1. Further, the appellant enclosed the copies of the challan evidencing payment of pre-deposit of Rs.20 lakhs, which was enclosed as exhibit – 2. Further, the appellant also relied on the reply to the frequently asked questions (FAQ), published by the C.B.I. & C dated 30th October, 2019 clarifying that any amount paid as pre-deposit at any appellate proceeding shall be adjusted while issuing the statement indicating the amount payable by the declarant. Therefore, the appellant submitted that it had paid pre-deposit amount of Rs.20 lakhs and produced the copy of the challans evidencing payment of the pre-deposit, requested to issue Form SVLDRS 3 by reckoning the said pre-deposit amount. The Form SVLDRS 2A indicates that all the exhibits were uploaded along with the said Form.

14. If such is the scheme of the Act and the Rules and if the authority has to take a decision based on the records produced by the appellant / assessee, it goes without saying that an order with reasons is required to be passed. Probably, the electronic Form SVLDRS 3 does not specifically provide a column but however, we find from the said statutory form, there is a column indicated as "remarks". If for some reason the Designated committee was of the opinion that the pre-deposit amount of Rs.20 lakhs cannot be reckoned (which cannot be done by the Designated Committee as the statute provides for the same), the Designated Committee was bound to give reasons in the remarks column while issuing Form SVLDRS 3.

15. Therefore, the decision of the Designated Committee has to be held to be devoid of reasons and outcome of total non-application of mind. Thus, we are fully satisfied that the appellant is entitled to the relief sought for.

16. In the result, the appeal is allowed. The order passed in the writ petition is set aside. Consequently, the writ petition is allowed. The Form SVLDRS 3 is set aside and the Designated Committee is directed to reckon the pre-deposit of

Rs.20 lakhs made by the appellant pursuant to the directions issued by the Tribunal and issue fresh Form SVLDRS 3.

17. The learned senior standing counsel appearing for the revenue would submit that the scheme had come to an end on 30th June, 2020 and therefore, the Designated Committee has become functus officio. Similar objection was raised by the revenue in the case of Reckitt Benckiser (India) Pvt. Ltd. & ors. supra) and the same was rejected by holding that the cut off date for filing the declaration or for effecting the payment can come to a close but it is only after such last date the Designated Authority will consider the applications and take a decision in the matter if not done earlier. As pointed out earlier, it is only on 26th July, 2021, the appellant was aware that its representation was not considered by the Designated Committee and it was to be treated as deemed to have been rejected. To be noted that the representation to the Designated Committee was on 9th February, 2020, well before the close of the scheme, i.e. on 30th June, 2020. Therefore, the Designated Committee cannot be stated to have become functus officio while dealing with the declaration of the appellant before us. Therefore, the Designated Committee is required to implement the direction in this appeal.

18. Accordingly, the Designated Committee shall take note of the above direction and issue fresh Form SVLDRS 3 within six weeks from the date of receipt of a server copy of this judgment and order.

19. As we have set aside the demand dated 26th July, 2021, the question of demanding any amount from the appellant would not arise as on date. Needless to state that reasonable time shall be granted to the appellant to effect any payment that may be due and payable after issuance of the fresh Form SVLDRS 3.

20. The appeal and the connected application are disposed of. No costs.

21. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.