(2016) 06 MP CK 0015

In the Madhya Pradesh High Court

Case No : Writ Petition No. 2117 of 2015

M/s Yashwant Agrawal APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 15-06-2016

Acts Referred:
Finance Act, 1994 — Section 106(2), 111(1)

Citation : (2016) 288 CurTR 225 : (2016) 3 MPLJ 635

Hon'ble Judges : Shri P.K. Jaiswal and Shri Vivek Rusia, JJ.

Bench : Division Bench

Advocate : Shri Vivek Dalal, Advocate, for the Appellant; Shri Prasanna Prasad, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Shri Vivek Rusia, J.—Facts of the case are as under.

Petitioner is engaged in the business of construction of petrol pumps for various oil companies and in addition to this they also worked for construction of road for MPAKVN. The petitioner till 31.05.2007 was registered with the Service Tax Department under the category of Commercial and Industrial Construction Services.

2. That the Central Government has introduced Service Tax Voluntary Compliance Encouragement Scheme, 2013 (for short ''VCES'') w.e.f. 10.05.2013 by way of amendments in the Finance Act, 1994. Under the said Scheme any person may declare his tax dues in respect of which no notice or an order for determination under sections 72, 73 or 73A of the Chapter has been issued or made before the 1st day of March, 2013. The procedure has been prescribed for availing the Scheme. With the intention to avail the benefit under the VCES petitioner submit a declaration in form VCES-1 declaring the tax dues amounting to Rs. 7,19,490/- on 21.06.2013 for the period composite April, 2010 to December, 2012 under the category of "Works Contract". Along with the

declaration petitioner has deposited 50% of the tax dues i.e. Rs. 4,56,973/- vide Challan dated 26.06.2013. Petitioner was also issued acknowledgement under the provisions of subsection (2) of section 107 of the Finance Act, 1994 under Form VCES-2 on 01.07.2013. Thereafter petitioner further deposited 50% of the tax dues i.e. Rs. 4,56,973/- vide Challan dated 26.06.2013. That a show cause notice was issued by the respondents on 17.09.2014 as to why the declaration given by the petitioner under VCES be not rejected on the ground that the show cause notice has already been issued to the petitioner on 16.04.2012 under the same category "Works Contract" for the period from 01.06.2007 to 31.03.2010.

3. Pursuant to the said show cause notice petitioner submit a reply that for the said period from 01.06.2007 to 31.03.2010 petitioner has already deposited tax along with interest on 15.06.2011 and the show cause notice has already been adjudicated on 16.06.2014 and now the final order is under challenge before the Commissioner (Appeal) and the same is pending. Petitioner has also challenged the show cause notice as the same cannot be issued beyond the normal period of one year composite from the date of declaration.

4. The Deputy Commissioner, Service Tax Division, Indore after considering the reply of the petitioner vide order dated 16.10.2014 has passed the final order and rejected the entire claim of Rs. 7,19,490/- on the ground that the notice i.e. the petitioner filed the VCES declaration despite knowing the fact that the show cause notice to them has been issued for the Works Contract service and by virtue of section 106 (1) of the Finance Act, 2013.

5. Being dissatisfied by the order dated 16.10.2014 (Annex. P/1) petitioner filed the present petition before this Court. After notice respondent/Department filed the return denying the averments made in the petition and justifying the impugned order. Thereafter rejoinder and additional return were also filed.

6. We have heard the parties at length.

7. Shri Vivek Dalal, learned counsel for the petitioner submits that VCES was introduced on 10.05.2013 and under which the petitioner submit declaration on 21.06.2013 and the Challan has also been issued after payment of the tax, therefore, by virtue of section 111(1) of the Finance composite Act no notice or action can be taken after the expiry of one year from the date of declaration. The impugned order is without jurisdiction and contrary to the VCES, hence the same is liable to be set aside and the declaration given by the petitioner is liable to be accepted. In support of his contentions, counsel for the petitioner has placed reliance over the decision in the matter of Frankfinn Aviation Services P.Ltd. v. Asstt. Commr., Designated Authority, VCES, Service Tax reported in 2014 (34) S.T.R 165 (Del.) in which in similar facts and circumstances the Court has held that Department cannot reject the declaration under section 106 (1) of the Finance Act, 2013.

8. Per contra Shri Prasanna Prasad, learned counsel for the Department submit that by virtue of section 106(2) an enquiry/investigation/audit is pending against

the petitioner as on 01.03.2013, therefore, the designated authority has rightly rejected the said declaration. He has further submit that the petitioner is having an alternative efficacious remedy by way of appeal to challenge the impugned order dated 16.10.2014 and the present writ petition under Article 226 of the Constitution of India is not maintainable and the same is liable to be dismissed.

9. That it is not disputed that the petitioner was registered with the Service Tax Department till 31.05.2007. It is also not disputed that a show cause notice was issued to the petitioner for the period from 01.01.2007 to 31.03.2010 under the construction service and for the period from 01.06.2007 to 31.03.2010 under the Works Contract Service and the petitioner submit the reply to the said show cause notice and the same was adjudicated by the competent authority and against which appeal is still pending.

10. That the Central Government introduced the VCE Scheme w.e.f 10.05.2013. For ready reference, relevant extract of provisions of the VCE Scheme are reproduced herein below:-

"94 This Scheme may be called the Service Tax Voluntary Compliance Encouragement Scheme, 2013.

95.(1) In this Scheme, unless the context otherwise requires-

(a)"Chapter" means Chapter V of the Finance Act, 1994;

(b)"declarant" means any person who makes a declaration under subsection (1) of section 97;

(c)"designated authority" means an officer not below the rank of Assistant Commissioner of Central Excise as notified by the Commissioner of Central Excise for the purposes of this Scheme;

(d)"prescribed" means prescribed by rules made under this Scheme;

(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.

(2) Words and expressions used herein and not defined but defined in the Chapter or the rules made thereunder shall composite have the meaning respectively assigned to them in the Chapter or the rules made thereunder.

96.(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 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.

97.(1) Subject to the provisions of this Scheme, a person may make a declaration to the designated authority or before the 31st day of December, 2013 in such form and in such manner as may be prescribed.

(2) The designated authority shall acknowledge the declaration in such form and in such manner as may be prescribed.

(3) The declarant shall, or before the 31st day of December, 2013, pay not less than fifty percent of the tax dues so declared under sub-section composite (1) and submit proof of such payment to the designated authority.

(4) 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:

Provided that where the declarant fails to pay said tax dues or part thereof on or before the said date, he shall pay the same on or before the 31st day of December, 2014 along with interest thereon at such activity of manufacture on job work rate as is fixed under section 75 or, as the case may be, section 73B of the Chapter for the period of delay starting from the 1st day of July, 2014.

(5) Notwithstanding anything contained in sub-section (3) and sub-section (4), any service tax which becomes due composite payable by the declarant for the month of January, 2013 and subsequent months shall be paid by him in accordance with the provisions of the Chapter and accordingly, interest for delay in payment thereof, shall also be payable under the Chapter.

(6) The declarant shall furnish to the designated authority details of payment made from time to time under this Scheme along with a copy of acknowledgement issued to him under sub-section (2).

(7) 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 acknowledgement of discharge of such dues to the declarant in such composite form and in such manner as may be prescribed.

98.(1) Notwithstanding anything contained in any provision of the Chapter, the declarant, upon payment of the tax dues declared by him under sub-section (1) of section 97 (sic-107) and the interest payable under the proviso to sub-section (4) thereof, shall get immunity from penalty, interest or any other proceedings under the Chapter.

(2) Subject to the provisions of section 101 (sic-s. 111), a declaration made under sub-section (1) of section 97 (sic-s. 107) shall become conclusive upon issuance of acknowledgement of discharge under section (7) of section 97(sic-s. 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.

99. Any amount paid in pursuance of a declaration made under subsection (1) of section 97 (sic-s. 107) shall not be refundable under any circumstances.

100. Where the declarant fails to pay the tax dues, either fully or in part, as declared by him, such dues along with interest thereon shall be recovered under the provisions of section 87 of the Chapter.

101.(1) Where the Commissioner of Central Excise has reasons to believe that the declaration made by a declarant under this Scheme was substantially activity of manufacture on job work false, he may, for reasons to be recorded in writing, serve notice on the declarant in respect composite of such declaration requiring him to show cause why he should not pay the tax dues not paid or short-paid.

(2) No action shall be taken under sub-section (1) after the expiry of one year from the date of declaration.

(3) The show cause notice issued under sub-section (1) shall be deemed to have been issued under section 73, or as the case may be, under section 73A of the Chapter and the provisions of the Chapter shall accordingly apply.

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 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 composite 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.

107."Procedure for making declaration and payment of tax dues."- (1) 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.

(2) The designated authority shall acknowledge the declaration in such form and in such manner as may be prescribed.

(3) The declarant shall, on or before the 31st day of December, 2013 pay not less than fifty percent of the tax dues so declared under sub-section (1) and submit proof of such payment to the designated authority.

(4) The tax dues or part thereof remaining to be paid after the payment made under sub-section (3) shall be paid by composite the declarant on or before the 30th day of June, 2014.

Provided that where the declarant fails to pay said tax dues or part thereof on or before the said date, he shall pay the same on or before the 31st day of December, 2014 along with interest thereon, at such rate as is fixed under Section 75 or, as the case may be, Section 73B of the Chapter for the period of delay starting from the 1st day of July, 2014.

(5) Notwithstanding anything contained in sub-section (3) and sub-section (4), any Service Tax which becomes due or payable by the declarant for the month of January, 2013 and subsequent months shall be paid by him in accordance with the provisions of the Chapter and accordingly, interest for delay in payment thereof shall also be payable under the Chapter.

(6) The declarant shall furnish to the designated authority details of payment made from time to time under this Scheme along with a copy of acknowledgement issued to him under sub-section (2).

(7) 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 acknowledgement of discharge of such dues to the declarant in such form and in such manner as may be prescribed.

108."Immunity from penalty, interest and other proceeding."- (1) Notwithstanding anything contained in any composite provision of the Chapter, 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 subsection (4) thereof, shall get immunity from penalty, interest or any other proceeding under the Chapter.

(2) Subject to the provision of Section 111, a declaration made under sub-section (1) of Section 107 shall become activity of manufacture on job work conclusive upon issuance of acknowledgement 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 composite period covered by such declaration.

11. That sub-section (2) of section 106 of the Finance Act, 2013 envisages a situation under which a declaration submit by an assesse can be rejected if under sub-section (1) he is entitled to declare his tax dues. In this regard the present case falls under the second proviso of sub-section (1) of section 106 which states that if there is a notice or an order of determination which has been issued to the assesse in respect of any period no declaration shall be made with regard to the tax dues on the same issue for any subsequent period. So far as the contention of Shri Dalal, learned counsel for the petitioner that under sub-section (2) of section 101 no action shall be taken after expiry of one year from the date of declaration is concerned there is no force in it because section 101 deals with the situation where the Commissioner of Central Excise has reasons to believe that the declaration made by the assesse under the Scheme was substantially false then after issuing a notice he may direct the assesse to pay the dues not-paid or short-paid and the show cause notice issued deemed to have been issued under section 73 or 73A as the case may be. So far as section 106 is concerned which is an enabling provision which deals in a activity of manufacture on job work situation where a particular class of assesse are liable to take advantage of the Scheme and submit a declaration. Under section 106 any person may declare his tax dues in respect of which no notice or an order of determination under section 72 or 73 or 73A of the Chapter has been issued or made before the 1st day of March, 2013. Further composite provided that where a notice or an order of determination has been issued to any person, therefore, section 106 debars that person to avail the benefit of the Scheme against whom an order of determination has been issued. In the present case, petitioner submit a

declaration form in which he had wrongly declared that no inquiry or investigation or audit is pending against him which is a basic disqualification to avail the benefit of the Scheme, therefore, by virtue of section 106 the declaration submit by the petitioner was liable to be rejected. Section 101 is applicable to a situation where the assesse is entitled for availing the benefit of the Scheme, however, the issue in respect of tax dues not paid or short-paid is involved activity of manufacture on job work and in such a situation the limitation period of one year is provided. If the issue of entitlement to avail the Scheme is to composite be decided then provisions of section 106 would apply and in the present case respondents/authority has rightly exercised the powers under section 106 by passing the impugned order dated 16.10.2014.

12. In view of the aforesaid discussion, we do not find any substance in this writ petition. It is accordingly dismissed.

