(2014) 11 MAD CK 0060

In the Madras High Court

Case No : Writ Petition Nos. 29929, 24431 of 2014 and M.P. No. 1 of 2014

Ovieya Builders — APPELLANT

Vs

Commr. of C., C.E. and S.T. (Appeals) — RESPONDENT

Date of Decision : 18-11-2014

Acts Referred:
Central Excises and Salt Act, 1944 — Section 14
Finance Act, 1994 — Section 73(1)
Finance Act, 2013 — Section 106(2)

Citation : (2015) 39 STR 397

Hon'ble Judges : T.S. Sivagnanam, J

Bench : Single Bench

Advocate : J.V. Niranjan, Advocate for the Appellant; A.P. Srinivas and S. Thirumavalavan, Advocate for the Respondent;

Judgement

T.S. Sivagnanam, J.

1. The petitioner in W.P. No. 29929 of 2014 seeks for the issuance of writ of Certiorarified Mandamus to quash the order passed by the second respondent, dated 14-3-2014, the order passed by the third respondent, dated 25-4-2014 and the order passed by the first respondent, dated 28-5-2014 and to direct the third respondent to take up the application, dated 24-12-2013, made by the petitioner for settlement of service tax due on the basis of the Voluntary Compliance of Excise and Service Tax Scheme (in short "VCES"). The petitioner/ company is engaged in the activities of construction and they had carried certain construction works for M/s. Shobika Impex Private Limited, which is a 100% export oriented unit, situated in Athur SIDCO Industrial Estate, Vennaimalai Post, Karur.

2. The case of the Department is that, an audit was conducted to the accounts of M/s. Shobika Impex Private Limited and pursuant to the said audit, the Range Officer, Tiruppur-III Range, Tiruppur, sent a letter to the petitioner, dated 7-3-2013, stating that during the course of audit of accounts of M/s. Shobika

Impex Private Limited, it revealed that the petitioner has neither taken out service tax registration nor paid service tax on the services provided by the petitioner, therefore, the petitioner was advised to take service tax registration and follow all the statutory procedures to pay service tax, along with interest, failing which, action will be taken against the petitioner under the Service Tax Law.

3. On receipt of this communication, the petitioner, on 8-3-2013, submitted a detailed representation to the Jurisdictional Officer, who is the competent authority, namely, the Superintendent of Central Excise, Tiruppur Range-III, Tiruppur, wherein it was stated that the petitioner/company is engaged in the construction of residential houses on contract basis to its customers, which are exempted from the payment of service tax, as the concern is not engaged in the construction of more than one house at any site/location and they are not engaged in the construction activities in any residential complex. Further, it is stated that they had undertaken an industrial construction activity at M/s. Shobika Impex Private Limited, Karur, with the activities of construction spread over the years 2008-2009 to 2012-2013 and the first payment of Rs. 3,00,000/- was received during 2008-09. Further, the petitioner stated that no formal contract was entered into with M/s. Shobika Impex Private Limited and they paid the amounts at regular intervals as required by the petitioner. Further the petitioner admitted that they have raised three bills for a total sum of Rs. 1,20,74,403/- and the construction job was carried out and the value collected is inclusive of material used in the construction like, cement, sand, bluemetals, bars, rods, labour charges, etc. The petitioner admitted that they had received a sum of Rs. 1,19,17,813/- (inclusive of TDS) through cheques on various dates from 2008-2009 to 2012-13. The balance of Rs. 1,56,590/- is yet to be received from M/s. Shobika Impex Private Limited. Further, the petitioner furnished a tabulated statement giving the accounts received on account of construction services provided during the respective years, after complying the abatements, the tax due to be paid was worked out at Rs. 3,49,955/-. The petitioner accepted their liability and agreed to pay the tax at the earliest. A difficulty was expressed by the petitioner stating that the registration process with ACES could not be completed, and the application for registration is attempted to be filed, the system reports that their request cannot be processed and they were advised to contact the system administrator and this has occurred on every occasion. Therefore, the petitioner expressed their inability to make payment, since the Indian Bank, Tiruppur, has informed that unless they get registration with ACES, payment will not be accepted. Further, by then, since the Finance Bill, 2013, proposed the Service Tax Voluntary Compliance Encouragement Scheme, the petitioner stated that they wish to avail the benefit under the said scheme. Further, they requested for advice by the Department, as to when the AECS system would accept their application, to enable them to make payment towards their liability. The copies of the Bills issued to M/s. Shobika Impex Private Limited, on the construction activities done by the petitioner and the bank

statements of M/s. Axis Bank for the years 2009-2010 and 2012-2013 were enclosed along with the representation dated 8-3-2013.

4. The Superintendent of Central Excise, did not give any reply to the said representation. But the petitioner was issued with a show cause notice on 31-7-2013 by the Assistant Commissioner of Central Excise, Service Tax and Customs, Tiruppur Division, Tirupur. In the said show cause notice, in paragraph 2.2, the response of the petitioner, dated 8-3-2013, to the Range Officer''s letter dated 7-3-2013, has been mentioned. Nevertheless, there was a proposal made to the petitioner calling upon them to explain as to why a sum of Rs. 3,56,628/- should not be recovered in terms of proviso to Section 73(1) of the Finance Act, 1994, and as to why interest and late fee should not to be demanded and penalty should not be imposed.

5. The petitioner submitted an interim reply, dated 18-9-2013, stating that they admit the tax liability, which was admitted by them in their letter, dated 8-3-2013. However, since they have proposed to avail VCES and being eligible to avail the benefit of the scheme, since there is no enquiry/audit objection, or any action whatsoever has been pending against the petitioner, as on 1-3-2013, the request to the show cause notice has to be kept in abeyance. Thereupon, on 24-12-2013, which is well before the cut off date, the petitioner filed a declaration under VCES, wherein the petitioner stated that, to the best of their knowledge, no investigation/enquiry has been intimated against the petitioner in respect of the service tax dues declared in the VCES declaration. Therefore, the petitioner requested that their application under the scheme to be considered.

6. The second respondent, who is the competent authority, under the scheme, issued a show cause notice, dated 10-1-2014, stating that the show cause notice has been issued by the Assistant Commissioner of Central Excise, Tiruppur Division, to the petitioner, on 31-7-2013, based on the audit report received through fax from the Commissioner of Central Excise, Trichy, and it is found that the audit objection was raised prior to 1-3-2013 and a demand of Rs. 3,56,629/- is pending from April 2008 to December 2012, while show cause notice issued to the petitioner. Hence, it was proposed that as per Section 106(2) of the Finance Act, 2013, the tax dues of Rs. 2,97,873/- pertaining to the period from April 2008 to December 2012, is prima facie, not covered under the VCES 2013. The petitioner/company called upon to submit their reply.

7. The petitioner submitted their reply, dated 28-1-2014, contending that their business was never subjected to audit by the officers of the Service Tax Department till date; the audit objection referred to in the show cause notice, probably, was a third party audit objection raised during the course of audit of M/s. Shobika Impex Private Limited; the fact that the audit objection raised against the petitioner was known to them only vide the show cause notice, dated 31-7-2013, for which they have given their reply, dated 16-9-2013 stating that they propose to file declaration under the VCES as the show cause notice was issued much later to 1-3-2013 and that they are eligible to do so; further, as on

1-3-2013, they were not intimated about any audit, which was pending either with them or with some other third party; apart from that, the petitioner referred to the Service Tax Audit Manual 2011, and in particular, paragraphs 3.2.2 and 3.3.1; by relying upon the said provision of Audit Manual, it was stated that finalizing the audit objection, without letting the notice to take a note of it, is against the spirit and guidance given in the Audit Manual and therefore, the audit objection, even assuming to be existing, should be considered as non-existing, on account of non-fulfilling the guidelines laid down in the Audit Manual.

8. Thereupon, after receipt of the reply given by the petitioner, the second respondent passed the order, dated 14-3-2014 rejecting the petitioner''s application under the VCES, 2013. In the light of the rejection, the show cause notice, dated 31-7-2013 issued by the Commissioner was taken-up for adjudication and by referring to the petitioner''s letters, dated 18-3-2013 and 18-9-2013, wherein the petitioner requested for the show cause notice to be kept in abeyance, the Authority proceeded to consider the matter on merits and accordingly, confirmed the order in the show cause notice, by order, dated 25-4-2014. This order is impugned in Writ Petition No. 29929 of 2014. As against the said order, the petitioner preferred an appeal to the Commissioner of Central Excise (Appeals) and the said appeal is pending. That apart, the petitioner filed an appeal to the Commissioner of Central Excise (Appeals) against the order, dated 14-3-2014, rejecting the petitioner''s application under VCES, 2013. The said appeal was returned as not maintainable, by proceedings, dated 28-5-2014. This order is also impugned in Writ Petition No. 29929 of 2014. In the interregnum, the petitioner filed an application before the Commissioner of Central Excise (Appeals) not to proceed further, pursuant to the appeal filed, as against the order, dated 25-4-2014. Since the petitioner/company has to challenge the order, dated 28-5-2014, rejecting the appeal as not maintainable, which was filed against the order, dated 14-3-2014, rejecting their VCES application and since the same was not considered, the petitioner earlier filed a writ petition in W.P. No. 24431 of 2014 and this Court passed an interim order, in the said writ petition, on 9-9-2014, directing the respondents not to pass any orders until further orders. Therefore, the appeal filed, as against the regular assessment, is now pending before the Commissioner of Central Excise (Appeals) and the earlier writ petition, i.e., W.P. No. 24431 of 2014, is pending, apart from the present writ petition, i.e., W.P. No. 29929 of 2014, challenging three orders, namely, the order rejecting VCES application, the order holding that the appeal is not maintainable against such rejection and the order passed by the Commissioner of Central Excise (Appeals).

9. I have heard the learned counsel for both sides and perused the materials available on record.

10. After hearing the learned counsel appearing for both sides, this Court is of the opinion that the first issue to be considered in these writ petitions is, whether the order, dated 14-3-2014, passed by the second respondent, was valid and

proper. The validity of the subsequent orders would depend upon the result of the validity of the order, dated 14-3-2014.

11. According to the said scheme, the assessee can avail the benefit under the following circumstances:-

"Where a notice or an order of determination has been issued to a person in respect of any period on any issue, for such issue declaration cannot be filed for the next period.

Where in respect of any person

(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

(ii) 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."

12. The application filed under the scheme, which undoubtedly appears to be as that of Samadhan scheme or the Voluntary Disclosure Scheme, the parameters for considering the scheme have been laid down in Clauses (a) and (b) of the scheme, referred to above, which provide for circumstances under which the declaration filed under the VCES 2013 is liable for rejection. The reasons assigned in the impugned order, dated 14-3-2014 is that, an audit has been initiated and therefore, the petitioner''s application is rejected.

13. It has to be pointed out that there was no audit initiated/conducted against the petitioner or in the business premises of the petitioner. This has not been disputed by the Department. However, the petitioner would state that an audit was conducted in M/s. Shobika Impex Private Limited and the petitioner had done certain construction activities in the said company and a communication was sent by the Range Officer to the petitioner on 7-3-2013. It has to be further pointed out that the cut-off date is 1-3-2013 and as on the said date, there was no audit objection. Even assuming that M/s. Shobika Impex Private Limited was the subject matter of audit from 1-3-2013, the petitioner was not put on notice, prior to 1-3-2013. The petitioner was intimated by the Range Officer, Tiruppur Range, on 7-3-2013.

14. The petitioner''s consistent case is that the Range Officer is not the competent authority to initiate any audit. Nevertheless, a reading of the

impugned order shows that the communication, dated 7-3-2013 is only an intimation, probably, with a view to intimate the petitioner that they have to register themselves under the Service Tax regime and pay taxes.

15. Now, let us see the conduct of the petitioner/company after they received the communication. The petitioner did not ignore the communication of the Range Officer, but accepted the same with utmost seriousness. This is manifest by the petitioner''s representation dated 8-3-2013, addressed to the competent authority, namely, the Superintendent of Central Excise, and the contents of the same have been elaborately set-out in the preceding paragraphs of this order, which clearly show the bona fides of the petitioner. Therefore, this Court has no hesitation to hold that as on the date when the application was filed by the petitioner, there was no audit as against the petitioner. Even assuming that there was an audit with M/s. Shobika Impex Private Limited, such audit was not put on notice to the petitioner, by the competent authority, till the show cause notice was issued. The communication of the Range Officer was not an intimation of audit objection. Even assuming if it is considered as an intimation of audit objection, yet the communication on 7-3-2013 was much after the cut off date.

16. Thus the issue that has to be considered by the Authority is, as to whether the petitioner could be considered to be ineligible under the scheme, for which the authority should not be solely guided by the Range Officer''s communication, dated 7-3-2013, which appears to be an advice or notice and the petitioner has taken the advice well and proceeded in accordance with law.

17. In the light of the above, the impugned order, dated 14-3-2014, calls for interference. Accordingly, Writ Petition No. 29929 of 2014 is partly allowed and the impugned order, dated 14-3-2014, is quashed and the matter is remanded to the second respondent for fresh consideration. The second respondent, shall afford an opportunity of personal hearing to the petitioner and after hearing the petitioner, shall pass fresh orders, on merits and in accordance with law, uninfluenced by any of the observations made in the order, dated 14-3-2014 or in the order-in-original, dated 25-4-2014, as expeditiously as possible. Since the matter has been remitted back to the second respondent for consideration, the appeal filed by the petitioner before the first respondent, as against the order-in-original, dated 25-4-2014, shall be kept in abeyance. In the light of the orders passed now, by this Court, in W.P. No. 29929 of 2014, the question of quashing the proceedings, dated 28-5-2014 does not arise for consideration and therefore, the prayer to that extent is rejected. In the light of the order passed by this Court in Writ Petition No. 29929 of 2014, Writ Petition No. 24431 of 2014 stands closed, as no further orders are required.