

(2014) 05 GUJ CK 0011

In the Gujarat High Court

Case No : Special Civil Application No. 2866 of 2014

Sadguru Construction Co.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 01-05-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 14
Finance Act, 1994 — Section 70, 72, 73, 73A, 73B
Finance Act, 2013 — Section 105, 105(1)(e), 106, 107, 108

Citation : (2014) 36 STR 3 : (2015) 81 VST 95

Hon'ble Judges : Sonia Gokani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Paresh M. Dave, Advocate for the Appellant; Rituraj M. Meena, Advocate for Respondent No. 1 and Mr. Y.N. Ravani, Advocate for Respondent No. 2, Advocate for the Respondent

Judgement

Akil Abdul Hamid Kureshi, J.—Petitioners have challenged an order dated 31.12.2013 passed by the Deputy Commissioner of Service Tax, Rajkot as a designated authority under the Service Tax Voluntary Compliance Encouragement Scheme, 2013 (hereinafter referred to as "the Scheme") framed under Chapter VI of the Finance Act, 2013. The petitioners have further prayed that the designated authority should issue fresh acknowledgment in the prescribed form of the petitioners' tax liability of Rs. 45,76,476 /- in terms of the petitioners' declaration dated 30.12.2013. The petitioners have also questioned the validity of the clarification to point No. 8 in a circular dated 8.8.2013 issued by the Central Board of Excise and Customs ("CBEC" for short).

2. Brief facts are as under:-

2.1 Petitioner No. 1 is a partnership firm engaged in the business of construction. Petitioner No. 2 is one of its partners. On 8.3.2013 preventive officers of the Service Tax Department conducted inquiry at the premises of the petitioners regarding the petitioners' unpaid service tax dues. Statements of the

representatives of the firm were recorded. Documents and registers were seized. According to the petitioners various post dated cheques were taken from the petitioners under duress. Against such post dated cheques during the period between 9.3.2013 to 15.4.2013, the petitioners deposited total sum of Rs. 35.51 lakhs with the department. On 14.7.2013 the petitioners deposited further amount with the department so that inclusive of the previous deposit of Rs. 35.51 lakhs, the total deposit with the department made by the petitioners came to Rs. 47,79,770/-. This was towards the petitioners' unpaid service tax liability upto 31.3.2013 as per the calculations of the department.

3. Under the Finance Act, 2013, the legislature introduced the said Scheme of 2013 under Chapter VI of the Act. Under certain circumstances a person could make a declaration to the designated authority of his tax dues. Upon acceptance of such declaration the designated authority would grant immunity from penalty, interest and other proceedings as per section 108 of the Finance Act, 2013 covering such tax dues. The controversy is with regard to the correct interpretation of term "tax dues" defined in section 105(1)(e) of the Finance Act, 2013.

4. On 24.8.2013 the petitioners declared tax dues of Rs. 43,61,719/-. The petitioners filed a revised declaration on 30.12.2013 and revised the amount of tax dues to Rs. 45,76,476/-. This amount included the sum of Rs. 35.51 lakhs deposited by the petitioners with the department between 9.3.2013 till 15.4.2013. Case of the petitioners is that in terms of section 105(1)(e) tax dues would include any service tax which remained unpaid as on 1.3.2013. Since these amounts remained unpaid on 1.3.2013, it would qualify to be categorized as tax dues. The case of the department, however, is that these amounts were deposited before 10.5.2013 when the Scheme was promulgated. The declaration of amount, therefore, could not be a declaration under the Scheme. On such premise the designated authority issued a show cause notice on 13.9.2013 calling upon the petitioners to clarify the following issue:-

On perusal of the application made by you, it is seen that a preventive case was booked by HQ preventive wing Rajkot on 08.03.2013 for non-payment of Service Tax dues for the period from 2008-09 to 2012-13 and you have paid the Tax dues liability of Rs. 35,51,820/- between the period from 09.03.2013 to 15.04.2013. The Service Tax Voluntary Compliance Encouragement Scheme (VCES) has come into effect from 10.05.2013. As per the Circular 170/5/2013-ST dated 08.08.2013 issued by Ministry of Finance, Department of Revenue "if any tax dues" have been paid prior to the enactment of the scheme, any liability of interest or penalty thereon shall be adjudicated as per the provisions of Chapter V of the Finance Act, 1994 and paid accordingly.

In the present case, you have paid the tax dues amount prior to enactment of Voluntary Compliance Encouragement Scheme i.e. before 10.05.2013.

Under the circumstances narrated above, your claim under VCES, 2013 is liable

to be rejected. In case you have any say in the matter or would like to submit any documentary evidences, you may remain present before the undersigned on 18th or 19th or 20th of September, 2013 at 1100 hrs at the above mentioned address. In case you do not turn up or no correspondence is received from you in writing till the above mentioned dates, it will be presumed that you do not have a say in the matter and the decision will be taken ex-parte on the available records with this office.

5. The petitioners replied to such show cause notice under communication dated 21.9.2013 and contended that amount of Rs. 31.51 lakhs was deposited after 8.3.2013 i.e. after the cut-off date on 1.3.2013. Such amount, therefore, would also qualify under the Scheme of 2013.

6. The designated authority, however, by his impugned order dated 31.12.2013 acknowledged the declaration of the petitioners only to the extent of tax dues to the tune of Rs. 10,24,656/-. This was an amount we may recall deposited by the petitioners after 10.5.2013. In the impugned order the designated authority has not assigned any reason. However, apparently he stuck to his position indicated in the show cause notice and bifurcated the declaration of the petitioners in two parts concerning tax dues which were deposited after 10.5.2013; he accepted the declaration. Regarding the amounts deposited before 10.5.2013 but after 1.3.2013 he, as provided in a clarification contained in circular dated 8.8.2013 and did not cover the said amount of Rs. 31.51 lakhs under the certificate of acknowledgment of the declaration of the petitioners.

7. After receiving such acknowledgment the petitioners made further representations to the respondents without any response from the respondents. Hence this petition.

8. Learned counsel Mr. Paresh Dave for the petitioners taking us through various provisions of the Scheme contended that the legislature defined the term "tax dues" in a particular manner, which would include tax dues which remained unpaid on 1.3.2013. The respondents cannot rely on any circular or clarification to override statutory provision. The intention of the legislature while framing the Scheme was clear and was to give benefit to all declarants covering all tax dues, which remained unpaid on 1.3.2013. He submitted that circular cannot override statutory provision. In support of his contention, he relied on the decision of this Court in case of Inter Continental (India) Vs. Union of India (UOI) and Others,

Counsel drew our attention to the other similar schemes framed by the Parliament in the past for comparison. He pointed out that Kar Vivad Samadhan Scheme, 1998 contained similar amnesty provisions where the term "tax arrear" was defined differently. Thus, when the Parliament desired that only that amount of tax arrear which remained unpaid on the date of the scheme would qualify for immunity, it was so specifically provided in other schemes.

9. On the other hand, learned counsel Shri Ravani for the department opposed the petition contending that the intention of the Scheme of 2013 was to give

immunity to the tax declared by a person under the Scheme. In the present case, the petitioners had already paid the tax even before the Scheme was promulgated. Quite apart from clarification contained in the circular dated 8.8.2013 the petitioners' declaration qua such amounts was rightly rejected by the designated authority.

10. We may, in order to resolve the controversy, peruse the provisions contained in the Scheme of 2013. The scheme was framed on 10.5.2013 as part of Chapter VI of Finance Act, 2013. Section 105 contains definitions. Clause (e) of sub-section(1) of section 105 defines tax dues as under:-

(e) "tax dues" means the service tax due or payable under the Chapter or any other amount due or payable u/s 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.

11. Section 106 of the Finance Act, 2013 pertains to making of a declaration of tax dues and circumstances under which such declarations shall be valid, which section reads as under:-

106. Person who may make declaration of tax dues.-(1) Any person may declare his tax dues in respect of which no notice or an order of determination u/s 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 u/s 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.

Where a declaration has been made by a person against (2) whom,- an (a) 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 u/s 82 of the Chapter; or

(ii) issuance of summons u/s 14 of the Central Excise Act, 1944 (1 of 1944), as made applicable to the Chapter u/s 83 thereof; or

(iii) requiring production of accounts, documents or other evidence under the Chapter or the rules made thereunder; or an (b) 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. Section 107 pertains to procedure for making declaration and payment of tax dues which reads as under:-

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 per cent of the tax dues so declared under subsection(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 subsection(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 rate as is fixed u/s 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 subsection(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 acknowledgment 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 acknowledgment of discharge of such dues to the declarant in such form and in such manner as may be prescribed.

13. Section 108 pertains to immunity from penalty, interest and other proceedings and reads as under:-

108. Immunity from penalty, interest and other proceedings.- (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 107 and the interest payable under the proviso to sub-section(4) thereof, shall get immunity from penalty, interest or any other proceeding under the Chapter.

(2) Subject to the provisions of section 111, a declaration made under sub-section (1) of section 107 shall become conclusive upon issuance of acknowledgment 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 period covered by such declaration.

14. Section 114 of Finance Act, 2013 authorizes the Central Government by issuing notification to make rules for carrying out the provisions of the Scheme. In exercise of such powers, the Central Government has framed the rules called Service Tax Voluntary Compliance Encouragement Rules, 2013."

15. From the provisions contained in the Scheme of 2013, it can be seen that in terms of sub-section (1) of section 106 any person can make declaration of his tax dues in respect of which no notice or an order of determination under sections 72 or 73 or 73A of the Finance Act, 1994 has been issued before 1.3.2013. Sub-section (2) of section 106 essentially provides that in cases where any inquiry or investigation against declarant is initiated for non-payment or short-payment of service tax dues which is pending on 1.3.2013, the designated authority would reject the declaration of such a person. In turn, the term "tax dues" defined u/s 105(1)(e) means service tax or tax payable for the period between 1.10.2007 to 31.12.2012 but not paid as on 1.3.2013.

16. Combined reading of section 106 with section 105(1)(e) would make it clear that the position of a declarant vis-à-vis his service tax dues would have to be ascertained as on 1.3.2013. If any proceedings for determination of the tax dues of a person have been initiated before 1.3.2013, declaration of such a person would not be accepted. Likewise, arrear of tax which could be declared in such declaration would be the service tax due or payable for the period between 1.10.2007 to 31.12.2012 and which sum is not paid before 1.3.2013. In plain terms, therefore, if any service tax is due and payable by a person for the aforesaid period, the same would be included in the definition of the expression "tax dues" if the same has not been paid as on 1.3.2013.

17. In the present case, admittedly the disputed amount of taxes were deposited by the petitioners with the department after 1.3.2013. However, the same having been deposited before 10.5.2013 that is the date on which the scheme was framed, the department contends that such amount cannot form part of the declaration under the Scheme. In our opinion, the contention ignores the statutory provisions contained in the Scheme of 2013. As we have noticed, the declaration can be made in terms of section 106 of tax dues. The term "tax dues" is defined in section 105(1)(e). If we accept the stand of the department that any tax which is deposited before 10.5.2013 cannot form part of a declaration, the same would substantially mutilate the definition of term "tax dues" contained in section 105(1)(e). If the intention of the legislature was to exclude any tax deposited before the framing of the scheme, the same could have been provided in plain language. On the contrary, the legislature excluded from the purview of declaration only those taxes which were already paid by 1.3.2013. The period

between 1.3.2013 and 10.5.2013 would, by necessary application of the provision of the scheme, be covered for declaration under the Scheme itself. In our understanding, for a valid declaration two of the essential conditions were that the proceedings for either declaration or recovery of the tax dues should not be pending on 1.3.2013 and secondly that the tax should not have been deposited before the said date. In the present case, both the conditions were fulfilled.

18. The respondents, as we have noticed, rely on clarification issued by CBEC in the circular dated 8.8.2013. In response to a query whether the person who has made the payment of tax dues before the Scheme was notified and would later on make a declaration under the Scheme, would such a declaration be valid, the response was that the immunity from interest and penalty is only for tax dues declared under the Scheme. If any tax has been paid prior to the enactment of the Scheme, liability of interest and penalty would be adjudicated as per the Finance Act, 1994. For several reasons this clarification cannot be pressed in service in the present case. It is well settled in law that an authority cannot, through a circular or clarification, override the provisions of the statute. If the clarification thus runs counter to the statutory provision, the same would be invalid. We have already held that the Scheme permits a person to declare his tax dues, even the amount deposited before 10.5.2013, as long as the same was done after 1.3.2013. If the concept of making a declaration under the Scheme which cannot be done till the Scheme is formulated is brought into operation, the very same clarification to Point No. 4 would run counter to this principle. The query here was whether a party against whom an inquiry, investigation or audit has been initiated after 1.3.2013 can make declaration under the scheme? Answer to the question was, there is no bar from filing of a declaration in such cases.

19. There is one more reason why the said clarification would not cover the case of the petitioners. The query was concerning a person who has made payment of his tax dues before the Scheme was framed. In the present case, the amount of Rs. 35.51 lakhs deposited after 1.3.2013 at the relevant time was never offered as a tax by the petitioners. The same was only deposited under duress.

20. Under ordinary circumstances, therefore, the petitioners would have contested the department's assertion that certain service tax was short paid. The department, therefore, would have initiated show cause notice proceedings for adjudication and recovery of taxes. The petitioners would have full opportunity to contest such claim of the department. Only thereafter the adjudicating authority could have passed appropriate order. Only if the demand was confirmed, that the petitioners' tax liability would have been crystallized. In the present case, till the Scheme was framed the amount thus remained with the department by way of a deposit. Once the scheme was framed, the petitioners made a declaration and even included such sum of Rs. 35.51 lakhs by way of a declaration of their tax dues. Thus the admission on the part of the petitioners

that the service tax was short-paid, came only by way of declaration under the Scheme. The clarification thus even for this reason would not cover the situation on hand.

21. In the result, the impugned communication dated 31.12.2013 annexed at Annexure-K to the petition is quashed to the extent the designated authority failed to cover the additional sum of Rs. 35.51 lakhs against the item "tax dues" declared. The said authority shall, therefore, issue a fresh acknowledgment or amend the acknowledgment forwarded to the petitioners under communication dated 31.12.2013 so as to include the said additional sum of Rs. 31.51 lakhs as tax dues declared in addition to Rs. 10,24,656/- for which such acknowledgment has already been issued. Petition is allowed. Rule is made absolute to the above extent.