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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 13.11.2024*

\+ SERTA 6/2024 CM APPL. 12283/2024 CM APPL. 12284/2024 CM APPL. 47048/2024
PRINCIPAL COMMISSIONER, CGST PRINCIPAL COMMISSIONER, CGST .....Appellant
Through: Mr. Aditya Singla, SSC CBIC with Mr. Raghav Bakshi, Advocate.

versus

M/S. FEDERAL MOGUL GOETZE INDIA LIMITED & ANR. .....Respondents
Through: Mr. Vivek Sarin and Mr.Dhruv Dev Gupta, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

VIBHU BAKHRU, J. (*ORAL*)

CM APPL. 12284/2024 (delay)

1. For the reasons stated in the application, delay of 88 days in filing the present appeal is condoned.

2. Accordingly, the present application is disposed of.

SERTA 6/2024 CM APPL. 12283/2024 CM APPL. 12284/2024 CM APPL. 47048/2024

3. The Revenue has filed the present appeal under Section 35G of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 (hereafter the **1994 Act**) impugning order No. 50304/2023 dated 13.03.2023

in Service Tax Appeal No.51340/2018 passed by the learned Customs, Excise and Service Tax Appellate Tribunal (hereafter **the CESTAT**).

4. The controversy in the present appeal relates to the respondent's (hereafter **the tax payer**) application under the Voluntary Compliance Encouragement Scheme (hereafter *VCES*), which was introduced by virtue of Chapter VI of the Finance Act, 2013 (hereafter **the 2013 Act**).

5. The tax payer is a company engaged in the business of manufacturing and dealing in automobile parts. The tax payer was registered with the Service Tax Department under the category of Interior Decorator, MGC, Communication Training, MRS, ITS, Legal Consultancy Services falling under Section 65 (105) of Chapter V of the 1994 Act.

6. On 22.09.2010, an audit was conducted by the Service Tax Department and it was reported that the tax payer had wrongfully availed of cenvat credit amounting to ₹1,34,18,976/- during the period from 2007-08 to 2011-12. Thereafter, on 19.10.2012, a show cause notice (hereafter **the SCN**) was issued to the tax payer alleging wrongful availing of cenvat credit in regard to the service tax paid on "medical insurance services" provided to the tax payer's employees during the period from 2007-08 to 2011-12.

7. On 11.12.2013, the tax payer, being desirous of availing the benefit of VCES, submitted a declaration as required under Section 107 of the 2013 Act declaring its service tax dues amounting to ₹7,22,89,051/- from the year 2007-08 to 2011-12. In accordance with the terms of the VCES, the tax payer deposited an amount of ₹3,61,44,524/- being 50% of the declared service tax liability under VCES.

8. The Designated Authority proposed to reject the tax payer's application under VCES on the ground that it was ineligible in terms of

Section 106 of 1994 Act and the Designated Authority communicated the same to the appellant by a letter dated 09.01.2014. The second paragraph of the said letter sets out the grounds on which the rejection was proposed. The same is reproduced below:

> "In this regard, it is informed that audit of your company has been done by this Commissionerate and an IAR No.174/10-11 dated 22.09.2010 has been to you. Further a Demand Cum Show Cause Notice No.132/ST/GGN/2012-13 dated 19.10.2012 has been also issued for the period provided in the VCES scheme and the same is pending as on 01.03.2013".

9. Subsequently, the tax payer's application was partly rejected by an order-in-original dated 24.05.2016, on the aforesaid grounds, namely: (a) that the internal audit report had determined the liability; and (b) that the show cause notice had been issued covering this period under declaration and the same was pending on the cut off date i.e. 01.03.2013. The Designated Authority held that the declaration to the extent of ₹3,14,73,211/- was ineligible as the issues involved related to the intellectual property service (Royalty) amounting to ₹1,57,59,730/- and an import of services of a value of ₹1,57,13,481/-, which were also a part of the audit report.

10. On the said basis, the tax payer was found ineligible to file a declaration in respect of the said liability under Section 106(1) of the 2013 Act. However, the tax payer's declaration for the balance amount of ₹4,08,15,840/- was accepted.

11. The tax payer appealed the said decision before the Commissioner (Appeals-I) Central Tax/GST (hereafter **the Appellate Authority**). However, the same was dismissed by an order in appeal dated 12.12.2017.

12. The tax payer preferred an appeal against the said order in appeal before the learned CESTAT, which allowed the same in terms of the impugned order.

13. The only controversy, which was required to be addressed, was whether the tax payer was ineligible to furnish a declaration under VCES in terms of Section 106 (1) of the 2013 Act on account of the audit report dated 22.09.2010 and the SCN.

14. It is relevant to refer to Section 106 (1) of 2013 Act. The same is set out below:

> "**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 under section 72 or section 73 or section 73A of the Chapter has been issued or made before the 1 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 there under, 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."

15. The learned CESTAT found that the audit report in question could not be considered as an order of determination under Sections 72 or 73 or 73A of 1994 Act and, therefore, the fact that an audit report had been issued prior to the cut off date did not render the tax payer ineligible for claiming the benefit of VCES. The relevant extract of the impugned order is set out below:

> "10. We now address the second issue to determine whether an Audit report forms determination of liability under section 106(1) & 160(2) of the Finance Act, 2013. We note that the Commissioner (Appeals) has rejected the appellant's VCES declaration on the ground that the working of the audit through the Internal audit report was the determination of liability by the Central Excise Officer. To appreciate this argument we need to go back to the wording of the section 106(1) of the Finance act 2013. Section 106(1) reads as follows:
>
> > 106. (1) any person may declare his tax dues in respect of which no notice or in 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:.....
>
> 10.1 An order of determination under sections 72, 73 or 73A would be an order in relation to a show cause notice issued under such indirect tax enactment. An audit report cannot be regarded as an order of determination. If that be the case, it would render clause (b) of section 106(2) infructuous. In this regard, we note that the High Court of Bombay, in the case **Pace Setter Business Solutions Pvt Ltd Vs Union of India has** held the following:
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> > "17. Upon hearing both sides and perusing the impugned order, we are of the view that the payment which has been made and for the past audit objection, for an earlier period cannot be utilised to reject the application as is now made by the present writ petitioner. The application invoking VCES has to be considered and if at all rejected, it must be on the touchstone of the paragraphs of the VCES, 2013 and the wording thereof. The scheme

itself cannot be defeated by holding that on the earlier occasion parties like the petitioners have accepted their liability...

19. The authorities need not be so anxious to protect the government revenue and reject the applications, as are made in the present case by closing the files instantaneously. They have to apply their mind. They must consider the application in accordance with the paragraphs of the scheme. They must pass an order in accordance therewith. In the circumstances, finding that the conclusions reached are unsustainable in law we quash and set aside the impugned order. We direct that the application shall be considered in accordance with law, as expeditiously as possible. While considering the application, the authorities shall not be influenced by the earlier conclusions. By keeping open all the contentions of the parties for being raised during the course of consideration of the application, we allow the writ petition. No order as to costs."

16. Mr. Singla, the learned counsel appearing for the Revenue contended that an audit report also contains the determination of the service tax liability and, therefore, the tax payer's liability had been determined prior to the tax payer's filing his declaration under Section 107 of the 2013 Act. He submitted that, therefore, the tax payer was ineligible to avail the benefit of the VCES since its liability stood determined in terms of the audit report.

17. We do not find any merit in the said contention. The question is not whether any exercise for determining the service tax dues had been conducted or whether an ascertainable quantum of outstanding service tax had been reported. The opening sentence of Section 106 of the 2013 Act is unambiguous, and expressly provides that any person may make a declaration with respect to the dues in respect of which *"no notice or an order of determination under Section 72 or Section 73 or Section 73A of the*

Chapter had been issued or made before the 1st day of March, 2013". Thus, for the said exception to apply, it would be necessary that an order of determination under Section 72, Section 73 or Section 73A of the 1994 Act had been issued. Clearly, an audit report is not an order of determination under either of the aforesaid sections, as mentioned in the opening sentence of Section 106 (1) of the 2013 Act.

18. Insofar as the issuance of the SCN is concerned, there is no cavil that SCN was a limited notice in respect of service tax dues relating to the medical insurance services provided to the tax payer's employees. The tax payer's declaration under Section 107 of the 2013 Act was not in respect of the said dues. The order-in-original dated 24.05.2016 also indicates that the tax payer was entitled to file a declaration in respect of the dues that were not covered by an earlier demand cum show cause notice. On that basis, the tax payer's declaration was partly allowed.

19. Thus, since the SCN did not cover any of the dues in respect of which a declaration was filed, the tax payer cannot be deprived of the benefit of VCES. We find no infirmity with the decision of the learned CESTAT in allowing the tax payer's appeal.

20. Clearly, no substantial question of law arises for consideration of this Court, in this appeal.

21. The present appeal is dismissed. Pending applications, if any, are also stand disposed of.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

NOVEMBER 13, 2024

A *Click here to check corrigendum, if any*