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

\+ W.P.(C) 1774/2020 & CM APPL. 6159/2020 (for interim relief)

MUKESH JAIN, PROPRIETOR OF M/S JAINSONS ..... Petitioner

Through: Mr. Bharat Bhushan & Ms. Nidhi Gupta, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Ms. Manisha Agrawal Narain, CGSC, Ms. Rakshita Goyal, Mr. Sandeep Singh & Ms. Mona Dureja, Advocates for UOI/R-1.
Mr. Akshay Amritanshu, Mr. Samyak Jain & Mr. Divyansh Singh, Advocates for R-2 & 3.

% Date of Decision: 22nd November, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

1. The Petitioner herein is willing to avail Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019, (hereinafter referred to as the 'Scheme') enacted as Part V of the Finance (No.2) Act, 2019. The Petitioner has filed the present petition aggrieved by the amount of tax determined as payable by the Designated Committee.

2. The facts giving rise to the present petition are that on 11th December,

2009, the officers of Central Excise ('the Department') visited the premises of the Petitioner, seized the goods found available at the premises and resumed the records. The Petitioner was served with the Show Cause Notice ('SCN') dated 14th March, 2011, proposing a demand and recovery of Central Excise Duty amounting to Rs. 1,34,66,456/- from the Petitioner along with the interest. An amount of Rs. 51,60,000/- paid during investigation was proposed to be appropriated towards the said demand. The SCN was adjudicated vide order dated 31st October, 2012 ('order-in-original'), and the adjudicating authority confirmed the demand of Central Excise Duty for an amount of Rs. 1,11,35,419/- after correcting the calculation errors. It is a matter of record that the Department filed no appeal against the said order-in-original dated 31st October, 2012 and accepted the determination of Central Excise Duty at Rs. 1,11,35,419/-.

3. The Petitioner - Assessee, filed an appeal against the order-in-original before Customs Excise and Service Tax Appellate Tribunal (CESTAT) ['Tribunal']. The appeal filed by the Petitioner was disposed of vide order dated 06th October, 2017, whereby the Tribunal set aside the order-in-original and remanded the matter to the adjudicating authority for passing *de novo* orders.

4. Post the remand, the matter has remained pending for adjudication before the adjudicating authority. In the meantime, the Scheme was enacted. The relevant provisions of the Scheme on which the Petitioner relies upon are:

a. The cases pending at adjudication or appellate stage will be covered under litigation category.

b. The 'Tax dues' in this category will be equal to tax amount disputed in

appeal if the case is pending at appellate stage and equal to amount proposed to be recovered in SCN if the SCN is pending at original adjudication stage. If 'Tax dues' exceeds Rs. Fifty lacs there will be Tax Relief equal to 50% of 'Tax Dues'.

c. Pre-deposits will be reduced from the amount payable.

5. The Petitioner was willing to avail the said Scheme and it, accordingly, filed its declaration in Form SVLDRS-1 under the Scheme on 26th December, 2019 in the litigation category and specified the details of Duty as determined in the order-in-original and determined the amount payable as Rs. 4,07,709.50. The Designated Committee, however, issued Form No. SVLDRS-3 and determined the amount payable by the Petitioner as Rs. 15,73,228/- on the basis of demand of duty raised in SCN. For arriving at the aforesaid amount, the Designated Committee has considered the amount of Central Excise Duty proposed to be recovered in the SCN dated 14th March, 2011 and not the reduced amount determined by the adjudicating authority in the order-in-original. The Petitioner is aggrieved by the aforesaid computation of tax dues by the Designated Committee and states that the same was contrary to the Scheme.

6. Learned counsel for the Petitioner states that the Designated Committee failed to appreciate that the order-in-original dated 31st October, 2012, passed by the adjudicating authority had two parts. The findings of the adjudicating authority whereby a part of the demand was set aside in SCN was not challenged by the Department. He states that since Department elected not to file any appeal against the said part of the order-in-original reducing the demand, the same had attained finality.

He states that with respect to the other part of the order, whereby the adjudicating authority had determined that Central Excise Duty of Rs. 1,11,35,419/- is payable by the Petitioner, the same was a subject matter of the appeal filed by the Assessee before the Tribunal and has now been remanded to the adjudicating authority for fresh adjudication. He emphasises that it is only that part of the Central Excise Duty demand which was determined in the original order that remains outstanding. He, therefore, states that necessary corollary in the aforesaid facts is that the SCN dated 14th March, 2011, should be read to be limited to the demand as crystallised in the order-in-original dated 31st October, 2012.

7. He states that, however, the Designated Authority relying upon the order of the Tribunal which set aside the order-in-original, has erroneously concluded that the demand of Rs. 1,34,66,456/- as raised in the SCN stands revived. He states that the amount of Central Excise Duty which should have been taken into consideration by the Designated Committee for the Scheme in the facts of the case is the reduced demand as determined in the order-in-original dated 31st October, 2012.

8. He further, states that the perusal of the Tribunal's order dated 06th October, 2017, at page nos. 109, 110 and 111 discloses that the computation of Central Excise Duty at Rs. 1,11,35,419/- determined by the adjudicating authority was correction of the calculation of errors, which had crept in the SCN dated 14th March, 2011. He states that therefore, the reduction of demand of Central Excise Duty in the order of the adjudicating authority dated 31st October, 2012, is a consequence of the correction of the calculation errors in the SCN dated 14th March, 2011 and for this reason additionally the demand in the SCN cannot be relied upon by the Designated

Committee.

9. He relies upon the judgment of the High Court of Bombay in ***Jyoti Plastic Works Pvt. Ltd. v. Union of India, 2020 (43) G.S.T.L. 675 (Bom.)*** wherein the Court in similar facts, where the matter was pending with the adjudicating authority for remand, held that the Central Excise Duty amount ascertained in order-in-original is the relevant figure, which should be taken into consideration by Designated Committee for determining the amount of tax payable by the Assessee for seeking the benefit of the Scheme. The High Court of Bombay rejected the contention of the Department therein that the dues mentioned in the show cause-cum-demand notice, can be relied upon in a matter. He also relied upon the judgment of ***Jaswal Neco Ltd. v. Commissioner of Customs, Vishakhapatnam, 2015 (322) E.L.T. 561 (S.C.)*** and ***Servo Packaging Ltd. v. CESTAT, Chennai, 2016 (340) E.L.T. 6 (Mad.)*** to contend that in the absence of an appeal filed by the Department against the order of the adjudicating authority to the extent it set aside the demand in the SCN, the said setting aside has become final. He relies upon the said judgments to contend that the Assessee cannot be placed in a worse situation as a result of his appeal succeeding and the order-in-original and remanded for a fresh adjudication. He states that the fresh adjudication in the remand shall be restricted to the demand determined in the order-in-original.

10. In reply, learned counsel for the Respondent states that since the order-in-original dated 31st October, 2012, in which part of the demand was set aside has been quashed by the Tribunal and the case has been remanded for *de novo* adjudication, there are no instructions in the order of the Tribunal that the *de novo* proceedings are only for the demand confirmed for the order-in-original and therefore, the necessary conclusion is that a fresh

adjudication of the SCN has to be carried out. He states that on the basis of the facts of the case and statutory provision of Section 123(b) of the of the Finance (No.2) Act, 2019, the Committee has correctly dealt with the Petitioner's application in determining the demand as per the SCN.

11. He states that the calculation of tax payable by the Petitioner under the Scheme, if the Petitioner had not appealed against the order-in-original would have been considered in 'arrears category' and the tax dues would have been worked out on the basis of Rs. 1,11,35,419/- (i.e., the amount of Central Excise Duty determined by the adjudicating authority). However, since the Petitioner has filed an appeal and as a consequence of the order passed by the Tribunal, the order-in-original has been set aside and the issue remanded, the case has been considered in 'litigation category' and tax dues have been worked out on the basis of Rs. 1,34,66,456/- (i.e., the amount of demand proposed in the SCN).

12. We have heard the learned counsel for the parties. The facts in the present writ petition are not in dispute. Learned counsel for the Respondent admits that the Department was satisfied with the demand of Rs. 1,11,35,419/- determined in the order-in-original and no appeal was filed by the Department against the portion of the demand which was set aside by the adjudicating authority. He further states that the Department has not filed any appeal against the judgment of the Bombay High Court in ***Jyoti Plastics Pvt. Ltd.*** (supra). In the said judgment, the High Court after considering Section 123(b) of the Finance (No.2) Act, 2019, has held that the situation which arises due to the setting aside of the order-in-original by the Tribunal to facilitate the remand order is not contemplated in clause (b).

13. The Petitioner herein filed an appeal against the demand determined

at Rs. 1,11,35,419/- in the order-in-original. The Tribunal returned a finding that the adjudicating authority had failed to comply with the requirements of Section 9D of the Central Excise Act, 1944, (the 'Act') as no opportunity of examination and cross-examination of witnesses was extended to the Petitioner herein. The Tribunal, therefore, set aside the order-in-original and remanded the matter to the adjudicating authority with a direction to afford reasonable opportunity to the Assessee in accordance with Section 9D of the Act.

14. The Respondent has also not disputed the contention of the Petitioner that the reduction in the demand from Rs. 1,34,66,456/- in the SCN to Rs. Rs. 1,11,35,419/- in the order-in-original was on account of correction in calculation mistakes in the SCN.

15. It is also not disputed by the Respondent that the quantification of tax dues of Rs. 1,11,35,419/- by the adjudicating authority was accepted by the Department. This is, infact, evident from the order of the Tribunal wherein the departmental representative defended the order-in-original before the Tribunal.

16. In our considered opinion, in the facts of this case that in the *de novo* proceedings the SCN survives only for adjudication of tax dues of Rs. 1,11,35,419/-. We therefore, find merits in the submissions of the learned counsel for the Petitioner that for determining the amount payable by the Petitioner under the Scheme, the amount of tax dues to be taken into consideration would be for Rs. 1,11,35,419/- i.e., the amount confirmed by the original authority in the first round of litigation since the said assessment was accepted by the Department. The Petitioner cannot be prejudiced on account of the order of remand in the appeal filed by it, which resulted in the

order-in-original being set aside for re-determination. The case of the Petitioner is also covered by the judgment in ***Jyoti Plastics Pvt. Ltd.*** (supra), which has been accepted by the Department.

17. The stance taken by the Department in relying upon the SCN for determining the tax dues at Rs. 1,34,66,456/- is contrary to its stand before the CESTAT, wherein it accepted the determination of tax dues at Rs. 1,11,35,419/-. The said stance by the Department creates an anomalous situation as it causes prejudice to the Petitioner who has, infact, succeeded in its appeal and the matter is pending in remand. The inconsistency of the stance of the Department is further evident from the fact that if the appeal had been pending when the Scheme was announced the Petitioner's tax dues would have been admittedly, determined by the Respondent as per the order-in-original and not SCN. Therefore, the submissions of the Respondent cannot be accepted as the same will lead to an absurdity and make the scheme arbitrary.

18. In this regard, it would also be relevant to refer to the judgment of this Court in ***Seventh Plane Networks Private Limited v. Union of India and Others, 2020 SCC OnLine Del 2446*** wherein the Court has held that a liberal interpretation has to be given to the scheme as intent is to unload the baggage relating to legacy disputes under the Central Excise and Service Tax and to allow the businesses to make a fresh beginning.

19. Thus, in this view of the matter, since the Petitioner herein seeks to avail the benefits of the Scheme and is willing to pay the tax dues determined as per the demand raised in the order-in-original, he cannot be denied the said option and he cannot be put in a worse-off situation for having succeeded in his appeal.

20. In light of the above, we direct that the disputed tax dues in respect of the Petitioner would be the amount confirmed by the original authority in the first round of litigation of Rs. 1,11,35,419/-. The determination of tax by the Designated Committee in Form No. SVLDRS-3 is set aside.

21. This Court vide its order dated 17th February, 2020, had permitted the Petitioner to deposit the admitted amount of tax. Thus, the Respondent is directed to issue a fresh Form No. SVLDRS-3 to the Petitioner and determine the tax dues on the basis of Rs. 1,11,35,419/- under Section 127 of the Act and accompanying Rules.

22. Accordingly, the present writ petition along with the pending application is disposed of in the aforesaid terms.

MANMEET PRITAM SINGH ARORA, J

MANMOHAN, J

NOVEMBER 22, 2022
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