

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. III

Service Tax Appeal No. 51024 of 2018

(Arising out of order-in-appeal No. 87/ST/DLH/2017 dated 12.12.2017 passed by the Commissioner (Appeals-I), Central Tax, Goods and Service Tax & Central Excise, Delhi).

M/s JMD Limited

JMD Regent Square
3rd Floor, Main M. G. Road
Gurgaon.

Appellant

VERSUS

Commissioner, Central Excise

R. No. 134, C. R. Building
I. P. Estate, New Delhi.

Respondent

APPEARANCE:

Sh. A. K. Batra, Advocate for the appellant

Sh. Rohit Issar, Authorised Representative for the respondent

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 51094/2023

DATE OF HEARING: 08.08.2023

DATE OF DECISION: 23.08.2023

BINU TAMTA:

The present appeal has been filed against the Order-in-appeal No. 87/ST/DLH/2017 dated 12.12.2017 passed by the Commissioner (Appeals-I) whereby the rejection of the declaration filed by the appellant under Voluntary Compliance Encouragement Scheme, 2013 (VCES) was affirmed.

2. Briefly stated, the appellants were registered with the Service Tax department vide Registration No. AABCJ0244KST001 for the following taxable services:

- (a) Renting of Immovable Property Service
- (b) Security Agency Service
- (c) Construction of Residential Complex Service
- (d) Commercial or Industrial Construction Services
- (e) Business Auxiliary Services
- (f) Special service provided by Builders
- (g) Legal Consultancy Services

The appellant filed the VCES declaration on 27.12.2013 declaring their tax dues as Rs. 1,17,98,160/- for the period 01.04.2012 to 31.12.2012, on account of Rental Services, PLC and Transfer Charges, Residential Construction Services, Commercial Construction Services and Services under reverse charge. The 50% of the declared tax was deposited by the appellant before 31.12.2013 and the remaining was deposited within the prescribed period.

3. The Designated Authority issued the show cause notice dated 24.01.2014 to the effect that an enquiry against the company was initiated by Anti Evasion Branch of the Commissionerate and the same is pending as on 01.03.2013 and therefore it appears that under Section 106 of the Finance Act, 2013 they are not eligible to file the declaration under VCES. The Designated Authority vide order dated 20.01.2016 rejected the declaration, inter-alia observing as under:-

“However, it is seen that as part of the investigation, the Department had asked for documents and moreover a visit under Rule 5A of Service Tax Rules was made by the Department on

18.02.2013 in this regard. Thus, it is seen that as on 01.03.2013 there was an enquiry pending against M/s JMD Limited which was not of the roving nature."

4. The appeal filed by the appellant was also rejected by the impugned order and hence the present appeal has been filed before this Tribunal.

5. We have heard Sh. A. K. Batra, Id. Counsel for the appellant and Sh. Rohit Issar, Id. Authorised Representative for the Revenue and perused the case records.

6. The issue that arises for our consideration are:-

(i) Whether the enquiry or investigation in terms of Section 106(2) of the Finance Act, 2013 on the basis of which the declaration for VCES has been rejected is of a roving nature?

(ii) Whether the show cause notice in question is time barred, having been received by the appellant beyond the specified period of thirty days?

7. Learned Counsel for the appellant has taken us through various Circulars which have been issued from time to time clarifying the issues that has arisen in the course of implementing the VCES Scheme and as also referred to some of the decisions of the Tribunal and also of the Bombay High Court. The main contention of the appellant was that the letter dated 18.02.2013 whereby he has been asked to supply the documents/ information is only of general nature and does not refer to any specific subject with which the enquiry can be said to have been initiated. On the other aspect of the show cause notice being time barred, he submitted that the show cause notice was dated 24.01.2014 but the same was

received by him as per the postal record on 03.02.2014, which is beyond the period of thirty days.

8. Learned Authorised Representative for the Revenue has relied on the findings of the impugned order as well as the Order-in-original passed by the Adjudicating Authority and according to him when the appellant was asked to supply the documents / data/ information, it was clearly initiation of an investigation, which was admittedly before 01.03.2014 and therefore the case squarely falls under Section 106 (2) of the Act and the appellant is not entitled to the benefit of VCES. On the point of issue of show cause notice being time barred, the submission of the learned AR is that the same was issued within the period of thirty days i.e. on 24.01.2014 of the declaration made by the appellant on 27.12.2013.

9. The Service Tax VCES came into effect on enactment of the Finance Bill, 2013 on 10.05.2013. Section 106 of the Act provided for the making of a declaration of tax dues in respect of which no notice or order of determination under Section 72, 73 or 73A has been issued before 01.03.2013. Clause (2) of Section 106 provides for rejection of such a declaration in the eventualities specified therein and sub-clause (a) thereof provides where an enquiry or investigation in respect of service tax not levied or not paid or short levied or short paid has been initiated and which is pending as on 01.03.2013. In view of certain references seeking clarification as regards the scope and applicability of the Scheme, Circular No. 169/4/2013-ST dated 13.05.2013 was issued. The

relevant para of the said Circular concerning the issues at hand is given below:-

What is the scope of Section 106(2)(a)(iii)? Whether a communication from department seeking general information from the declarant would lead to invoking of section 106 (2)(a)(iii) for rejection of declaration under the said section?	Section 106(2)(a)(iii) of the Finance Act, 2013 provides for rejection of declaration if such declaration is made by a person against whom an inquiry or investigation in respect of service tax not levied or not paid or short-levied or short paid, has been initiated by way of requiring production of accounts, documents or other evidence under the chapter or the rules made thereunder, and such inquiry or investigation is pending as on the 1st day of March, 2013. The relevant provisions, beside section 14 of the Central Excise Act as made applicable to service tax vide section 83 of the Finance Act, 1994, under which accounts, documents or other evidences can be requisitioned by the Central Excise Officer for the purposes of inquiry or investigation, are as follows,- (i) Section 72 of the Act envisages requisition of documents and evidences by the Central Excise Officer if any person liable to pay service tax fails to furnish the return or having made a return fails to assess the tax in accordance with the provision of the Chapter or rules made thereunder. (ii) Rule 5A of the Service Tax Rules, 1994 prescribes for requisition of specified documents by an officer authorised by the Commissioner for the purposes specified therein. <u>The provision of section 106(2)(a)(iii) shall be attracted only in such cases where accounts, documents or other evidences are requisitioned by the authorised officer from the declarant under the authority of any of the above stated statutory provisions and the inquiry so initiated against the declarant is pending as on the 1st day of March, 2013.</u> <u>No other communication from the department would attract the provisions of section 106(2)(a)(iii) and thus would not lead to rejection of the declaration.</u>
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9.1 Subsequently, further clarifications were sought and Circular No. 170/5/2013-ST dated 08.08.2013 was issued. It is pertinent to note that in the said circular at Sl. No. 1, clarification was sought with reference to the information sought of ‘roving nature’, the relevant para is quoted below:-

Sl. No.	Issues	Clarification
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1	Whether the communications, wherein department has sought information of roving nature from potential taxpayer regarding their business activities without seeking any documents from such person or calling for his presence, while quoting the authority of section 14 of the Central Excise Act, 1944, would attract the provision of section 106(2)(a)?	Attention is invited to clarification issued at S. No. 4 of the circular No. 169/4/2013-ST dated 13.05.2013, as regards the scope of section 106(2)(a) of the Finance Act, 2013, wherein it has been clarified that the provision of section 106(2)(a)(iii) shall be attracted only in such cases where accounts, documents or other evidences are requisitioned by the authorised officer from the declarant under the authority of a statutory provision. A communication of the nature as mentioned in the previous column would not attract the provision of section 106(2)(a) even though the authority of section 14 of the Central Excise Act may have been quoted therein.
12.	Whether declarant will be given an opportunity to be heard and explain his cases before the rejection of a declaration under section 106(2) by the designated authority?	Yes. In terms of section 106(2) of the Finance Act, 2013, the designated authority shall, by an order, and for reasons to be recorded in writing, reject a declaration if any inquiry/ investigation or audit was pending against the declarant as on the cutoff date, i.e., 1.3.2013. An order under this section shall be passed following the principles of natural justice. <u>To allay any apprehension of undue delays and uncertainty, it is clarified that the designated authority, if he has reasons to believe that the declaration is covered by section 106(2), shall give a notice of intention to reject the declaration within 30 days of the date of filing of the declaration stating the reasons for the intention to reject the declaration.</u> For declarations already filed, the said period of 30 days would apply from the date of this circular. The declarant shall be given an opportunity to be heard before any order is passed by the designated authority.

9.2 Thereafter, Circular No. 174/9/2013-ST dated 25.11.2013 dealt with certain other queries and issues and clarified

the same. The issues concerning the present controversy are quoted below:-

Sl. No.	Issued raised	Clarification
2.	An apprehension was raised that declarations are being considered for rejection under section 106(2) of the Finance Act, 2013, even though the "tax dues" pertain to an issue or a period which is different from the issue of the period for which inquiry/ investigation or audit was pending as on 1.3.2013.	Section 106(2) prescribed four conditions that would lead to rejection of declaration, namely, (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 Finance Act, 1994; or (ii) Issuance of summons under section 14 of the Central Excise Act, 1944; or (iii) Requiring production of accounts, documents or other evidence under the Finance Act, 1994 or the rules made there under; or (b) An audit has been initiated, and such inquiry, investigation or audit was pending as on the 1st day of March, 2013. These conditions may be construed strictly and narrowly. The concerned Commissioner may ensure that no declaration is rejected on frivolous grounds or by taking a wider interpretation of the conditions enumerated in section 106(2). If the issue or the period of inquiry, investigation or audit is identifiable from summons or any other document, the declaration in respect of such period or issue alone will be liable for rejection under the said provision. Examples: (1) If an inquiry, investigation or audit, pending as on 1.3.2013 was being carried out for the period from 2008-2011, benefit of VCES would be eligible in respect of 'tax dues' for the year 2012, i.e., period not covered by the inquiry, investigation or audit. (2) If an inquiry or investigation, pending as on 1.3.2013 was in respect of a specific issue, say renting of immovable

		property, benefit of VCES would be eligible in respect of 'tax dues' concerning any other issue in respect of which no inquiry or investigation was pending as on 1.3.2013. <u>It is also reiterated that the designated authority, if he has reasons to believe that the declaration is covered by section 106(2), shall give a notice of intention to reject the declaration within 30 days of the date of filing of the declaration stating such reasons to reject the declaration. Commissioners should ensure that this time line is followed scrupulously.</u>
3	Whether benefit of VCES would be available in cases where documents like balance sheet, profit and loss account etc. are called for by department in the inquiries of roving nature, while quoting authority of section 14 of the Central Excise Act in a routine manner.	<u>The designated authority/ Commissioner concerned may take a view on merit, taking into account that facts and circumstances of each cases as to whether the inquiry is of roving nature or whether the provision of section 106(2) are attracted in such cases.</u>

10. In order to ascertain whether the enquiry / investigation on the basis of which the declaration of the appellant has been rejected was of roving nature, we need to peruse the letter dated 18.02.2013, which has been relied upon by the Revenue. The said letter reads as:-

"Subject: Service Tax Enquiry – submission of data/ documents-reg.

It is to inform you that an enquiry has been initiated against you by this office regarding proper payment of service tax.

In this regard, you are requested to supply the following data/ documents/ information (self attested) to this office 01.03.2013 on 1130 hrs:-

1. Copy of Service Tax Registration Certificate (ST-2);
2. Copies of Service Tax Returns (ST-3) for the period April, 2011 to June, 2012;
3. Copy of Annual Reports alongwith Profit & Loss Accounts, all schedules and Notes to Accounts for FY 2011-12;
4. List of ongoing projects as on 01.07.2010;
5. Month-wise and project-wise details of demand raised / advances received from prospective buyers of property for the period 01.04.2010 to 31.12.2012 and service tax paid through cash and/ or CENVAT thereon, if any;

Yours sincerely
 Sd/- (R. P. Mittal)
 Superintendent (AE)
 Service Tax, Delhi
 011-40785827

Note: This letter may be treated as issued under Section 14 of the Central Excise Act, 1944 within the meaning of Section 193 and Section 228 of the Indian Penal Code as made applicable to like matters in Service Tax, in terms of Section 83 of the Finance Act, 1994 as amended."

11. The contents of the above letter are of very general nature whereby documents have been asked for without any specific details, which in other words would mean that the enquiry which appears to have been contemplated in terms of the said letter was merely of 'roving nature' and would therefore not call for rejection on that ground under section 106(2) of the Act. In arriving at such a conclusion, we are supported by the decision of the Bombay High Court in **Commissioner of Central Excise, Commissionerate Nagpur-II Nagpur vs. L. V. Construction & Company, Nagpur (2017) 351 ELT 94** whereby the learned Division Bench relying on the circular examined the communication sent by the DGCEI asking for the copies of the balance sheets, agreement, work order, details of payments received and copy of ST-3 returns and held the enquiry to be of a 'roving nature' as there were no specific details for which the enquiry was sought. The relevant para of the judgement is quoted below:-

"On hearing the learned Counsel for the appellant and on a perusal of the orders of the Commissioner and the Tribunal as also the relevant Circulars and the communication of the DGCEI dated 19.2.2013, it appears that there is no scope for interference with the order of the Tribunal in this appeal. The Board Circular, dated 25.11.2013 clarifies that in cases where the documents like the balance-sheets, profit and loss account etc., are called for, by the Department in the enquiries of roving nature, while quoting the authority of Section 14 of the Central Excise Act in a routine manner, the Commissioner concerned would be entitled to take a view on merit, taking into account the facts and circumstances of each case, as to whether the enquiry is of roving nature or whether the provisions of Section 106(2) of the Act are attracted to such cases. It appears on a reading of the communication served by the DGCEI on the respondent -

assessee, dated 19.2.2013, by making a reference to Section 14 of the Central Excise Act that the respondent –assessee was asked to send to the office of the DGCEI the copies of the balance-sheets for the financial years 2008-09 to 2011-12, a copy of the agreement/ work order of each of the contractors involving contract value of more than Rs. 50,00,000/-, details of payments received from each of the contractors involving the contract value of more than Rs.50,00,000/- and a copy of ST-3 Returns filed with the Service Tax Department for those years. On a reading of the communication, dated 19.02.2013, served by the DGCEI on the respondent –assessee, the Tribunal rightly held that by the said communication, the assessee was called by the DGCEI to produce the documents like the balance-sheets, profit and loss account and all the other documents that are mentioned in the said communication, in the enquiry of roving nature without giving any details of any particular transaction or particular matter with regard to which the enquiry was sought to be made. Only by quoting the provisions of Section 14 of the Central Excise Act in the communication dated 19.2.2013, the DGCEI asked the petitioner to produce almost all the documents pertaining to the financial years 2008-09 to 2011-12 without mentioning any reasons for seeking the said documents or without seeking any particular documents pertaining to any particular query. By relying on the Board Circular, dated 25.11.2013 that is clarificatory in nature, the Tribunal rightly held that the adjudicating authority – Revenue should have accepted the declaration filed by the respondent –assessee. While holding so, the Tribunal relied on the two judgements of the Hon'ble Supreme Court that the Board Circulars are binding on the departmental officers and as per the Board Circular, dated 15.11.2013, the declaration made by the respondent –assessee was liable to be accepted. We do not find any illegality in the order of the Tribunal so as to admit the appeal.”

The aforesaid decision squarely applies to the facts of the present case and needless to mention the principle that the Circular is binding on the revenue. The Circular dated 25.11.2013 while referring to the conditions as enumerated in Section 106(2), specifically provides that these conditions may be construed strictly and narrowly.

12. We have no hesitation in accepting the plea taken by the learned Counsel for the appellant that the show cause notice is barred by time. In the present case, the appellant had filed the declaration for VCES on 27.12.2013 and though the notice is shown to have been issued on 24.01.2014, however, as per the postal receipt annexed by the appellant, the said notice was received by him on 03.02.2014, which is beyond the period of thirty days. The

circular dated 08.08.2013 in the clarification stated that the designated authority shall give a notice of intention to reject the declaration within thirty days of the date of filing of the declaration. The giving of notice does not mean mere issuance of the notice and therefore the date of issue of the show cause notice would not be relevant for computing the period of thirty days. The very term 'give' implies in simple terms to allow someone to have or to provide someone something so unless and until the person to whom it has been issued receive the notice the service of notice shall not be complete, the observation of the Apex Court in **MCD vs. Dharma Properties (P) Ltd., (2018) 11 SCC 230**, resolve the controversy in following terms:-

"14. Section 444 prescribes the manner in which notices, etc. are required to be served or issued. The High Court has rightly pointed out that four eventualities are contemplated in Section 444(1). However, the expression "give" does not find mention in any of those eventualities. Mandate of Section 126 is "giving of a notice". Therefore, the question is as to whether at what stage, it would be treated that notice as stipulated in Section 126 has been given. In K. Narasimhiah [K. Narasimhiah v. H.C. Singri Gowda, (1964) 7 SCR 618 : AIR 1966 SC 330] , this Court has held that mere dispatch of notice would not amount to "giving" of notice. "Giving" would be complete only when it has been offered to the person/addressee concerned, even when it is not accepted by him on tendering. Likewise, in Banarsi Debi case [Banarsi Debi v. ITO, (1964) 7 SCR 539 : AIR 1964 SC 1742] , referring to Section 27 of the General Clauses Act, 1897 which deals with the expressions "serve" or "give" or "sent", this Court held that all these expressions, namely, "serve", "give" and "sent" are interchangeable terms and, therefore, notice would be treated to have been issued only when the entire process of sending the notice i.e. from dispatch till the service thereof, is complete."

13. In view of the above principle laid-down by the Apex Court, we are of the considered view that the show cause notice in the present case is time barred and cannot be acted upon. Further, the Circular dated 25.11.2013 in unequivocal words has stated that, Commissioner should ensure that the said time limit of giving the notice within 30 days has to be followed scrupulously.

14. We would like to add that the very nomenclature of the scheme is to promote voluntary encouragement by the assessee to make the declaration of the tax dues. Since the very purpose of introducing the scheme is to motivate the registered assessee who had stopped filing the returns to file returns and pay the taxes. The underlying object is to reduce unnecessary litigation, which is evident from the clarifications made in the Circulars. The VCES Scheme as further clarified in the Circulars needs to be implemented so as to give full play which would not only benefit the assessee but also the revenue. Moreover, we are of the view that the guiding factor to determine whether the enquiry is of roving nature or not so as to call for rejection of the declaration is the clarification provided in the Circular dated 25.11.2013 while referring to the conditions prescribed in Section 106(2) of the Finance Act-

"These conditions may be construed strictly and narrowly. The concerned Commissioner may ensure that no declaration is rejected on frivolous grounds or by taking a wider interpretation of the conditions enumerated in section 106(2)."

15. The impugned order is set aside and the appeal stands allowed. Accordingly, the revenue should accept the declaration filed by the appellant. The appeal is allowed with no order as to cost.

(Order pronounced on 23rd Aug. 2023).

(Binu Tamta)
Member (Judicial)

(P. V. Subba Rao)
Member (Technical)