IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing/Order: 6.3.2018

Appeal No. ST/50286/2018-SM

(Arising out of Order-in-Appeal No. 30/Central Tax/Appl-II/Delhi/2017/887 dated 16.10.2017 passed by Commissioner , CGST & Central Excise, New Delhi)

CGST, New Delhi — Appellant

Vs.

M/s SMCC Construction India Pvt. Ltd. — Respondent

Appearance

Shri G.R. Singh, D.R. - for the appellant

Shri Varun Gaba, Advocate - for the respondent

CORAM: Hon'ble Mr. Ashok Jindal, Member (Judicial)

Final Order No. 50861/2018

Per Ashok Jindal:

Revenue is in appeal against the impugned order.

2. The facts of the case are that for the period 2004-2008, certain audit objections were raised for availment of inadmissible Cenvat credit by the respondent along with interest and proceedings against the respondent were closed. Later on, the respondent filed an application under Voluntarily Compliance Encouragement Scheme, 2013, on 25.9.2013 for the period 2008-2012 for reversal of inadmissible Cenvat credit taken by them. The said declaration was

rejected in terms of Section 106(1) of Finance Act, 2013. On appeal, the ld. Commissioner (Appeals) relying on the decision in the case of ***Pace Setter Business Solutions Pvt. Ltd. Vs. Union of India*** - 2015 (52) STR 11 (Bom.) allowed the benefit of VCES 2013 to the respondent. Against the said order, Revenue is before me.

3. The ld. AR submits that in terms of Section 106(1), there is a bar on the assessee to take the benefit of that scheme in a case where show cause notice has been issued or liability of service tax has been determined under Section 72 or Section 73 or Section 73A of the Finance Act. It is his contention that for the period prior to the period for which VCES is filed there was a determination of their service tax liability, therefore, as per Section 106 (1) of the Finance Act, 2013, the respondent are not entitled to take the benefit of the said scheme. He also submits that the ld. Commissioner (Appeals) has relied on the decision in the case of ***Pace Setter Business Solutions Pvt. Ltd.*** (supra) as in that case the Hon'ble High Court has entertained the issue in a writ petition filed by the petitioner. Therefore, the same is not applicable to the facts of this case.

4. On the other hand, the ld. Counsel appearing on behalf of the respondent reiterated the findings of the impugned order.

5. Heard both sides. Considered the submissions.

6. The short issue involved in the matter is that whether in the facts and circumstances of the case, the provisions of Section 106(1) of Finance Act, 2013 debars the respondent not to take benefit of the scheme or not. Admittedly, for the earlier period, during the course of audit an objection was raised and respondent immediately reversed the Cenvat credit along with interest proceedings against the respondent were closed. The issue raised by the Revenue is that as the order of determination of their service tax liability, therefore, the respondent are not entitled to avail the benefit of Section 106(1) of the Finance Act, 2013. The said issue has been examined by the ld. Commissioner (Appeals) in the impugned order has observed as under:

> "(iv) I observe that the Adjudicating Authority has relied upon sub-section (3) and (4A) of Section 73 of the Finance Act, 1994 to hold that the relevant audit para of IAR No.95/08 is an 'order of determination' made against the appellant. As there is no allegation that the relevant audit para is an 'order of determination' under Section 72 or Section 73A of Finance Act, 1994 and such allegation has been levelled only in respect of Section 73 of the Finance Act, 1994. I proceed to examine as to whether the relevant audit para (which is admittedly closed upon payment of entire dues with interest by the appellant) is an 'order of determination' under Section 73 of the Finance Act, 1994. I note that there is no dispute that no Show Cause Notice has been issued to the appellant in respect of relevant issue of the VCES declaration. This being the undisputed position, no order of determination can be issued to the appellant as an 'order of determination under Section 73' can be issued only pursuant to the issuance of a Show Cause Notice. The Adjudicating Authority is

misconstrued to hold that the audit para of IAR No. 95/08 is an 'order of determination' whereas sub-sections (3) & (4A) of Section 73 of Finance Act 1994 speak of waiver of Show Cause Notice and without issuance of SCN, no order of determination can be made under Section 73 of the Finance Act, 1994. Further, there is no allegation that pursuant to audit para, proviso to these sub-sections has been invoked against the appellant in respect of the issue of VCES declaration. What is important to note is the admittance of Adjudicating Authority that ' the audit para similar to the issue of VCES declaration stands closed upon payment of entire dues by the appellant along with interest'. Thus, it is an admitted position that no Show Cause Notice has been issued to the appellant in respect of the relevant audit para. When no Show Cause Notice has been issued to the appellant, there can be no 'order of determination' as an 'order of determination' under Section 73 of the Finance Act, 1994 is dependent upon the issuance of Show Cause Notice.

(v) I note that the similar issue has also come up for decision before the Hon'ble High Court of Mumbai in **Pace Setter Business Solutions Pvt. Ltd. Vs. UOI** – 2017 (52) STR 11 (Bom.). In this case, the audit of petitioner has been conducted for the period 2005-06 to 2007-08 and an audit observation has been raised. Pursuant thereto, the petitioner has paid the amount of Rs.13,33,972/- along with interest and the audit para has been closed. After that, the petitioner has declared an amount of Rs.47.33 Lacs under VCES 2013. Their declaration has been rejected holding that the issue on which the VCES declaration has been filed is similar to the issue revealed by the audit party (as mentioned above). Feeling aggrieved, the petitioner has filed a writ petition before the Hon'ble High Court. It has been held by the Hon'ble Court that **"we are of the view that the payment which has been made and for a 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....we allow the writ petition."** The ratio of this judgement is squarely applicable to the instant case. Further, as discussed above, there is no other objection barring the similarity of the issue of VCES declaration to an earlier audit para, which according to the afore-cited judgement, is not sustainable. To sum up, I hold that (a) the audit para is not an 'order of determination' under Section 73 of the Finance Act, 1994 (b) Section 106(1) of the Finance Act, 1994 is not invocable in the instant case and (c) the VCES declaration of appellant cannot be rejected on the only ground that the VCES declaration has been filed on an issue which is similar to the issue of an earlier audit para. In the light of these findings, the CVES declaration of appellant is not rejectable."

7. Further, I find that the similar issue came up before the Honble High Court of Bombay in the case of ***Pace Setter Business Solutions Pvt. Ltd.*** (supra) wherein on the identical facts the Hon'ble High Court hold that the assessee is entitled to avail the benefit of the scheme. In that circumstances, I do not find any infirmity in the impugned order. The same is upheld.

8. In result appeal filed by the Revenue is dismissed.

(Dictated & pronounced in open Court)

(Ashok Jindal)
Member (Judicial)

RM