IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: ST/87553/2018

Arising out of:	Order-in-Appeal No. NSK/EXCUS/000/APPL/ 338/17-18 dated 16/03/2018
Passed by:	Commissioner (Appeals), Central Excise & GST, Nashik.

	Appellants – Represented by:
Anisha Deepak Tank	Shri , Advocate
versus	
	Respondent – Represented by:
CCE & ST, Nashik	Shri S.B. Mane, Assistant Commissioner

Date of hearing: 28/11/2018
Date of pronouncement: 21/02/2019

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Hon'ble Shri Ajay Sharma, Member (Judicial)

ORDER NO: A/85342 / 2019

The present Appeal has been filed from the Order dated 16.03.2018 passed by the Commissioner (Appeals), Central Excise & GST, Nashik.

2. The appellants are engaged in providing services under the category of "renting of immovable property". A voluntary compliance encouragement scheme (VCES) was introduced by the government which came into effect w.e.f. 10.5.2013. The appellant filed VCES

declaration which was sought to be filed by the appellant for the demands which have been raised against them. In the said declaration the appellant had indicated that they have paid their dues on 2.5.2013, which is prior to the coming into operation of the VCES scheme. Since it was paid prior to the insertion of VCES Scheme, therefore, a show cause notice dated 25.11.2013 was issued to the appellant for rejection of declaration under the said scheme and ultimately that issue was settled by this Tribunal vide order dated 29.12.2017 in appellant's own case being Appeal No.ST/86978/2014 tiled as Anisha Deepak Tank versus CCE, Nashik. In the said order the tribunal while following the decision of the Hon'ble High Court of Gujarat in the case of Sadguru Construction Company versus Union of India reported in 2014-TIOL-630-HC-AHM-ST quashed the aforesaid show cause notice dated 25.11.2013 and held that the appellant's declaration under VCES Scheme needs to be accepted. The relevant paragraphs of the said decision are extracted as under:-

> " xxx xxx xxx
> 4. The relevant facts that arise for consideration are, appellant herein filed VCES declaration which was sought to be filed by the appellant for the demands which have been raised against them; in the declaration appellant had indicated that they have paid the dues, on 02/05/2013 before the VCES scheme came into effect from 10th May 2013. Both the lower authorities have held that since the dues were clearly paid prior to operationalization of the VCES 2013, the VCES declaration was rejected relying upon the Board's clarification No. 174/9/2013-ST dated 25/11/2013.
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> 5. We find that issue nor more *res integra.* Identical issue

came up for consideration before the Hon'ble High Court of Gujarat in the case *of Sadguru Construction Company v. Union of India* 2014-TIOL-630-HC-AHM-ST. In the said case their Lordships have recorded the facts which are that amounts due from the petitioner therein were paid after 01/03/2013 much before enactment of VCES 2013 on 10/05/2013 and the VCES declaration was filed with the authorities which was rejected. After considering the entire scheme as promulgated by Finance Act, 2013, their Lordships has held as under:

> *"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 Section 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 under Section 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.*
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> *16. Combined reading of Section 106 with Section 105(1)(e) would make it clear that the position of a declarant vis-a-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."*
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> 6. It can be seen that even the CBEC clarification dated 08/08/2013 on the issue was also considered by the Hon'ble High Court and in paragraph 31 quashed and set aside the communication which rejected the VCES declaration.
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> 7. Respectfully following the *ratio* of the said judgment of the High Court we hold that the impugned orders are unsustainable and liable to be set aside and we do so.
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> 8. The impugned orders are set aside and the appeals are allowed."

3. In the meantime a show cause-cum-demand notice dated 24.10.2014, which is in issue before me in the present Appeal, was issued to the appellant demanding the amount of service tax of Rs.5,10,920/- with interest and penalty and also for appropriating the amount of Rs.5,10,920/- deposited by the appellant on 2.5.2013 under the VCES scheme on the ground that the said amount was deposited by the Appellant prior to the coming into force of the VCES Scheme. The demand in the said show cause notice was confirmed by both the authorities below along with interest and penalty.

4. I have heard learned Counsel for the Appellant and learned Authorised Representative for the Revenue and perused the records. The learned counsel for the appellant drew my attention to his submission before the learned Commissioner during the course of hearing in which he informed the Commissioner that the appeal pertaining to rejection of declaration under the VCES Scheme is

pending before the tribunal and therefore a request was made for awaiting the outcome of the same. Although the impugned order has been passed after the passing of the order of this Tribunal dated 29.12.2017 in Appeal No. ST/86978/2014, but still the Commissioner rejected the aforesaid submission of the Appellant on the ground that the aforesaid appeal i.e. Appeal No. ST/86978/2014 is not maintainable before the tribunal as per the VCES scheme and therefore he decided the appeal on merits and confirmed the demand with interest and penalty through the impugned order. While going through the order dated 29.12.2017 of the Tribunal in appellant's case concerning VCES scheme, I find that the ground of non-maintainability of Appeal before this Tribunal, which has been given by the Commissioner while rejecting the submission of the appellant in the present case, has not been argued anywhere by the revenue in that Appeal No.ST/86978/2014.

5. Once the issue has been decided by the Tribunal in favour of appellant it can't be reopened by any of the authorities below. The Commissioner has erred in recording the finding on the admissibility of the declaration filed by the appellant under the VCES Scheme. Nothing has been produced on record nor it is the case of revenue that the aforesaid order dated 29.12.2017 has been challenged by the revenue in appeal. Unless the order dated 29.12.2017 of the tribunal is set aside or stayed in appeal by the Hon'ble High Court, the

Commissioner has no authority or power to comment upon the jurisdiction of the tribunal. He has to follow it. The present issue is arising out of the rejection of declaration filed by the appellant under the VCES scheme. Rejection of declaration under VCES Scheme is the foundation of the present dispute and the Department is demanding service tax of Rs.5,10,920/- with interest and penalty, only due to the rejection of declaration made by the Appellant. Now since the declaration made by the Appellant under the VCES Scheme has been upheld by the Tribunal vide order dated 29.12.2017 and since the said order has not been challenged by the Revenue anywhere, therefore the show cause-cum-demand notice dated 24.10.2014 cannot survive. As a result of which the impugned order is set aside and the appeal filed by the appellant is allowed with consequential relief, if any.

(Pronounced in Court on 21/02/2019)

(Ajay Sharma)
Member (Judicial)

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