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

REGIONAL BENCH - COURT NO. 02

Service Tax Appeal No. 86522 of 2015

(Arising out of Order-in-Appeal No. PUN-SVTAX-000-APP-0018-15-16 dated 13.05.2015 passed by Commissioner of Service Tax (Appeals), Pune)

M/s Pandhe Constructions Pvt. Ltd. .....**Appellant**
157, Railway Lines, Solapur-413003

VERSUS

Commissioner of Central Excise Pune III .....**Respondent**
ICE House, 41/S, Sassoon Road, Opp Wadia College, Pune-411001

WITH

Service Tax Appeal No. 86523 of 2015

(Arising out of Order-in-Appeal No. PUN-SVTAX-000-APP-0018-15-16 dated 13.05.2015 passed by Commissioner of Service Tax (Appeals), Pune)

M/s Pandhe Infracons Pvt. Ltd. .....**Appellant**
157, Railway Lines, Solapur-413003

VERSUS

Commissioner of Central Excise Pune III .....**Respondent**
ICE House, 41/S, Sassoon Road, Opp Wadia College, Pune-411001

Appearance:

Shri Vidyadhar. S. Apte, Advocate, for the Appellant
Shri Suresh Merugu, Authorized Representative along with Shri Onil Shivadikar, Authorized Representative for the Respondent

CORAM: Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. A/87609-87610/2019

Date of Hearing: 30.04.2019
Date of Decision: 30.04.2019

Per: S.K. MOHANTY

The issue involved in both these appeals is identical and accordingly, the same are taken for hearing together and a common order is being passed. Rejection of applications filed under Voluntary Compliance Encouragement Scheme, 2013 (for short, referred to as "VCES") is the subject matter of present dispute. The applications filed by the appellant were rejected by the authorities below on the ground that the investigations initiated against the appellants were pending as on 01.03.2013 and thus, the said applications cannot be considered for adjudication under Section 106(2) of the Finance Act, 2013.

2. The Learned Advocate appearing for the appellant submits that the summons dated 16.01.2013 issued by the department were not in connection with any specific offence or inquiry and were of general in nature. Thus, he submits that issuance of summons cannot be considered as initiation of investigation proceedings for rejection of the declaration filed under Section 106(2) *ibid*. In this context, he has relied upon the Circular dated 08.08.2013 issued by CBEC, clarifying the issue regarding consideration of certain investigations for the purpose of denying the benefit of VCES. The learned Advocate also referred to the decision of this Tribunal in the case of L.V. Construction & Company Vs. Commissioner of Customs, Central Excise & Service Tax, Nagpur II - 2016 (42) S.T.R. 307 (Tri.-Mumbai), to state that in case of mere enquiry into certain issues, the declaration filed under the VCES cannot be rejected by taking recourse to Section 106(2) *ibid*. The Learned Advocate also referred to the said circular dated 08.08.2013 to state that since the show cause notice was not issued within 30 days from the date of filing of the declaration, rejection of such declaration under the VCES is not proper and valid. He further submits that

since the department has issued the circular, clarifying the period within which the notice has to be issued, such clarification has to be strictly adhered to by the department. In this context, he has relied upon the judgment of the Hon'ble Supreme Court in the case of Ranadey Micronutrients vs. Collector of Central Excise, 1996 (87) E.L.T. 19 (S.C.).

3. On the other hand, the Learned AR appearing for the Revenue reiterates the findings recorded in the impugned order and further submits that the authorities below have rightly rejected the declaration filed by the appellant under VCES inasmuch as on the date of enactment of such scheme, summons were issued to the appellant and matter was under active investigation. Thus, he submits that rejection of declaration under Section 106(2) of the Finance Act, 2013 is proper and justified. With regard to non-issuance of show cause notice within the period of 1 month from the date of declaration, he submits that the statutory provisions contained in the Finance Act, 2013 nowhere specifies regarding issuance of a notice within such stipulated time limit. Hence, he submits that the circular issued by Board contrary to the statutory provisions cannot be acted upon for consideration of the present dispute in favour of the appellant. In this context, he has relied upon the Constitutional Bench judgment of the Hon'ble Supreme Court in the case of Commissioner of Central Excise, Bolpur Vs. Ratan Melting & Wire Industries, reported in 2008 (231) E.L.T. 22 (S.C.).

4. Heard both sides and perused the records.

5. Section 106(2) of the Finance Act, 2013 prohibits filing of declaration under the VCES by the applicant under certain

circumstances. The relevant provisions contained in sub-section (2) of Section 106 *ibid* is extracted herein below:

> "(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 Exicse Act, 1944 (1 of 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 thereunder; or
>
> (b) An audit has been intiated,
>
> 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."

6. On perusal of the above statutory provisions, it transpires that specific enquiry/investigation initiated by the department, requiring production of the relevant records should not be considered for the benefit provided under VCES and the declaration filed by the applicant is liable for rejection, upon compliance of the statutory provisions. We find that the department in this case, had issued the summon dated 16.01.2013 under Section 14 of the Central Excise Act, 1944, calling upon the appellant for submission of records such as, balance sheet, ledger accounts, work orders, invoices and other related service tax records/documents etc., concerning the taxable service

provided by the appellant. Since, the summon issued by the department clearly specified the documents required for verification of the issue regarding discharge of appropriate service tax liability, it cannot be said that the appellant is falling under the execution category provided under Section 106(2) *ibid*. We find that interpreting the said statutory provisions, the CBEC vide Circular No. 170/05/2013-ST dated 08.08.2013 has clarified the issue as under:

Issue	Clarification
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 evidence are requisitioned by the authorized 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.

7. In view of the statutory provisions and clarification issued by CBEC, the case of the appellant is squarely governed under the provisions of Section 106(2) of the Act for non consideration of its declaration filed under the VCES. With regard to the submissions of the appellant that the show cause notice was not issued within 30 days from the date of filing of the declaration, we find that the Finance Act, 2013, governing the VCES nowhere specified the time limit within which the notice has to be issued by the department. The CBEC vide paragraph '12' in the circular dated 08.08.2013 has only clarified maintaining uniformity regarding issuance of notice within 30 days. Since, there is no specific time limit provided under the statute, the circular merely clarifying the position of issuance of show cause notice within specified time limit cannot override the provisions of the legislation and accordingly, the stand taken by the appellant cannot be considered as proper and justified. With regard to validity of the circular, contrary to the statutory provisions, the Constitutional Bench of the Hon'ble Supreme Court in the case of Ratan Melting and Wire Industries (supra) have held that a circular contrary to statutory provisions has no existence in law. The relevant paragraph in the said judgment is extracted herein below:

> "6. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are

> concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."

8. In view of foregoing discussions, we do not find any infirmity in the impugned orders passed by the Learned Commissioner (Appeals). Accordingly, appeals filed by the appellants are dismissed.

(Dictated and pronounced in the open court)

(S.K.Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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