CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Service Tax Appeal No. 86757 of 2019

(Arising out of Order-in-Appeal No. PK/30/MC/17-18 dated 08.08.2017 passed by the Commissioner of CGST & Central Excise (Appeals-II), Mumbai.)

M/s Klarissa Property Developers P Ltd. ....Appellant
103, D-Wing Falcon Castle,
S B Marg, Lower Parel,
Mumbai, Maharashtra - 400013

VERSUS

Commissioner of CGST & Central Excise, Mumbai Central ....Respondent
4th Floor, Central Excise Building,
Churchgate, Mumbai,
Maharashtra – 400 020

APPERANCE:

Shri Aman Haria, C.A. for the Appellant
Shri Onil Shivadikar, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85488 / 2022

Date of Hearing: 13.05.2022
Date of Decision: 20.05.2022

Rejection of the application filed under the Service Tax Voluntary Compliance Encouragement Scheme (VCES), 2013 by the Appellant declaring Service Tax liability of Rs. 5,15,000/- in respect of construction of residential complex due for the period from October, 2007 to December, 2012 on the ground of pendency of enquiry initiated against it before 01.03.2013 that suffered an adjudication process and gone on appeal to the Commissioner of CGST & Central Excise (Appeals-II), Mumbai is assailed in this appeal.

2. I have heard submissions from both the sides and perused the case record as well as the relevant texts of the VCES, 2013 introduced vide Chapter 6 of the Finance Act, 2013. It has been submitted by the learned Counsel for the Appellant Mr. Aman Haria that Appellant is a sister concern of M/s. Kamla Mills Ltd. who had also undergone the similar process and received a favourable order from this Tribunal vide its order passed in appeal No. ST/87780/2017 as reported in *2018-TIOL-1607-CESTAT-MUM* allowing the appeal for the period of dispute and the ground agitated therein, that had found acceptance by the Tribunal, is the same to that of the present appeal. He also submitted that in the instant case no show-cause notice was issued within 30 days as per CBEC Circular but personal hearing letter in form VCES-1 was sent to the Appellant on 18.08.2015 i.e. after laps of one and half years of filing of such declaration, which is contrary to Section 111 sub Clause 2 of the Finance Act, 2013 wherein it has been clearly stipulated that in case of failure to make true declaration no action shall be taken under sub-Section 1 of Section 111 after the expiry of one year from the date of such declaration, for which the order passed by the adjudicating authority that has been confirmed by the Commissioner (Appeals) is unsustainable in the eyes of law.

3. *Per contra*, learned Authorised Representative for the Respondent-Department Mr. Onil Shivadikar, in drawing attention to the judgment passed by the Hon'ble Supreme Court in the case of *Commissioner of Central Excise, Bolpur Vs. Ratan Melting & Wire Industries* reported in *2008 (231) ELT 22 (S.C.)* and order passed by this Tribunal in the case of *M/s. Pandhe Constructions Pvt. Ltd. Vs. Commissioner of Central Excise, Pune-III reported in 2019 (4) TMI 1968 CESTAT-Mumbai,* had submitted that the grounds available in the order passed by the Single Member Bench of this Tribunal in *M/s. Kamla Mills Ltd. supra* had also been dealt by the Division Bench of this Tribunal in the above referred judgment of *M/s. Pandhe Constructions Pvt. Ltd.* and it was held therein that since no specific time limit was provided under the statute, CBEC Circular No. 170/5/2013-ST dated 08.08.2013 prescribing maintenance of uniformating in issuing notice within 30 days of such filing of declaration under the VCES cannot override the provisions of legislation, for which it cannot be considered as proper and justified. In passing such an order the Division Bench of this Tribunal had followed the *ratio* from the judgment of the Hon'ble Supreme Court pronounced in respect of *Ratan Melting & Wire Industries* (Res.) cited supra wherein it has been clearly held that Government Circular/Clarification issued are meant for the understanding of the statutory provisions which are not binding on the courts and it is for the court to declare which particular provision of the statute provides for what and looking at it from another angle, a Circular which is

contrary to the statutory provisions has in reality no existence in law. Drawing attention of this Bench to the provisions contained in Section 106(2) of the Finance Act, 2013, he argued that since enquiry was pending against M/s. Kamla Group (including Appellant) the designated authority had rightfully rejected the declaration made by the Appellant under the Scheme that has been confirmed by the Commissioner (Appeals) in his above noted order, for which interference of the Tribunal is uncalled for.

4. Upon going through the case record and relevant documents, it can be noticed that there is a stipulation under Section 106(2) that if any enquiry, investigation or audit is pending on 01.01.2013, VCES declaration shall be rejected. However, no such documentary evidence/proof of such pending enquiry as define in Section 2(g) of the CrPC or investigation under Section 2(h) of the CrPC was found to be available in its true sense that would empower invocation of jurisdiction by the Central Excise Officer under Section 14 of the Central Excise Act except that a letter of authorisation bearing no. 6/2013 was issued on dated 20.02.2013 by the Assistant Commissioner authorising the Superintendent of Anti-evation Consideration Cell to carryout necessary **verification** of service provided by M/s. Kamla Group or its associated company and Service Tax liability that has been discharged by them before the deadline prescribed in the scheme i.e. before 01.03.2013. On verification of the documents submitted by the Appellant, at the instance of learned Authorised Representative, it is further noticed that summons under

Section 14 of the Central Excise Act, 1944, equally applicable to Service Tax matters, was being issued to the Manager of M/s. Kamla Group by the same authorised Superintendent of Anti-evation Construction Cell on dated 18.11.2013, which is much after the deadline prescribed under the Act. Be that as it may, without reference to the Circular that had stipulated the time limit of 30 days, which can be taken as an advisory note since no instruction was available therein that after the laps of 30 days no notice can be issued for violation of Section 106(2) of the Finance Act, 2013, the stipulation contained in Section 111(2) with a limitation period of one year to take action against any false declaration cannot be bypassed by the designated authority, since it is the dictate of the Statute itself. Further Appellant had also made declaration on 18.12.2013 stating that no enquiry investigation or audit was pending against it as on 1st day of March, 2013 as evidence in sub-Section 2 of Section 106 of the Act (Exhibit at page 78 of the appeal memo). In the instant case notice for personal hearing proposing rejection of application filed under VCES was issued to the Appellant on 1st September, 2015 (page 80 of the appeal memo) which is admittedly after laps of one year of filing of the VCES application on 18.12.2015 and therefore such a proceeding including rejection order is liable to be quashed as unsustainable in law.

5. At this juncture it is worthwhile to answer to the submissions of learned Departmental Representative on the points agitated by him. The answers can be inferred from the following points:-

(i) In the CESTAT there is no difference between an order passed by the Single Member Bench or by a Division Bench in view of the fact that unlike the High Court procedure under the Later Patent Act, no Single Member Bench's order is appealable before the Division Bench.

(ii) The order of M/s. Kamla Mills Ltd. was passed on dated 22.03.2018 while the order in *M/s. Pandhe Constructions Pvt. Ltd.* was passed on 30.04.2019 and no reference is made to the judgment passed in M/s. Kamla Mills Ltd. that had followed the judicial precedent set by this Tribunal in the following cases:-

(a) Abhi Engineering Corporation Vs. Commissioner of Central Excise & Customs, Nagpur – [2015-TIOL-2197-CESTAT-MUM],

(b) Sidhi Vinayaka Enterprises Pvt. Ltd. Vs. Commissioner of Service Tax, Raipur – [2016 (43) STR 474 (Tri.-Del.)] [2016-TIOL-1325-CESTAT-DEL],

(c) V.S. Enterprises Vs. Commissioner of Central Excise & Customs, Nagpur [2017 (52) STR 151 (Tri.-Mumbai)] [2017-TIOL-299-CESTAT-MUM],

Apparently for the reason that it was not placed or argued before the Division Bench.

(iii) CBEC Circular dated 08.08.2013 referred above clearly stipulated that <u>to avoid undue delay and uncertainty</u>, the designated authority shall give notice of intention to reject the declaration within 30 days of filing of such declaration or from the date of issue of such Circular. It has never prohibited the competent authority to issue notice after 30 days of such filing of declaration that would entail application of the *ratio* set by the Hon'ble Supreme Court in the judgement of *Ratan Melting & Wire Industries* (Res.) cited supra which had clearly held that only Circular which is contrary to the statutory provision has no existence in the eye of law.

(iv) Further reference to the judgment of *Ratan Melting & Wire Industries* (Res.) would clarify that the Court and not the Executive has been empowered to declare what a particular provision of statute said and on the instant issue a series of decisions, referred in para-5(ii) above, have said that 30 days period is to be strictly and scrupulously followed.

(v) In the event of contradictory decisions by the different Benches of the Tribunal, the normal practice followed here is to refer the matter to the Hon'ble President for constitution of a Larger Bench. In the instant case there arise no such requirement in view of the fact that this finding is based on the limitation prescribed under Section 111(2) of the Finance Act, 2013 and not on the Circular of the CBEC dated 08.08.2013.

(vi) Section 108 of the Finance Act, 2013 also provides immunity to the Appellant from any other proceeding under this Chapter except under provision of Section 111, which in the instant case is time barred and inapplicable. Hence the order.

ORDER

6. The appeal is allowed and the order passed by the Commissioner of CGST & Central Excise (Appeals-II), Mumbai vide Order-in-Appeal No. PK/30/MC/17-18 dated 08.08.2017 rejecting the VCES application filed by the Appellant is hereby set aside.

(Order pronounced in the open court on 20.05.2022)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad