IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.504 OF 2023

M/s. Vishal Earthmovers India
Pvt. Ltd. & Anr. ...Petitioners

Versus

The Union of India & Ors. ...Respondents

Mr. Shreyas Shrivastava a/w Mr. Saurabh R. Mashelkar for Petitioners.
Mr. M. P. Sharma a/w Ms. Kavita Shukla and Ms. Ram Ochani for Respondents.

CORAM : M. S. Sonak &
Jitendra Jain, JJ.
DATED : 29 November 2024

PC.:-

1. Heard learned counsel for the parties.

2. The Petitioners seek the following substantive reliefs by instituting this petition in terms of prayer clauses (a) and (b) :-

> *"(a) That this Hon'ble Court be pleased to issue writ of Certiorari or any other appropriate writ, order or direction in nature of certiorari calling for the record and proceedings and quash and set aside impugned order in Form SVLDRS 3 bearing No.L110220SV300561 dated 11/02/2019 issued by the respondent No.6 thereby directing Respondent No.6 their servants and agents to treat the declaration / application filed by Petitioner has valid declaration;*
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> *(b) That this Hon'ble Court be pleased to issue a Writ of Mandamus or any other appropriate writs, orders or directions under Article 226 of the Constitution of India ordering and directing the Respondents to forthwith accept the declaration in Form SVLDRS 1 under ARN No.LD1611190000276 dated 16/11/2019 filed by the Petitioner and further directing Respondents their servants and agents to issue discharge certificate under section 127 of the Scheme;"*

3. On 21 October 2016, the Petitioners were served with a show cause notice requiring the Petitioners to show cause why specific

amounts be not recovered from the Petitioners. Based upon the same, an Order-in-Original (O-I-O) was passed on 4 February 2019, demanding from the Petitioners an amount of Rs.1,03,16,150/- towards credit which was incorrectly availed and utilised; Rs.3,68,36,058/- towards service tax inclusive of education cess and secondary and higher education cess; and Rs.8,47,842/- towards service tax under reverse-charge on receipt of services of transport of goods by road. The aggregate of these three amounts works out to Rs.4,80,00,050/-

4. The Petitioners appealed against the O-I-O dated 4 February 2019 before the Customs Excise and Service Tax Appellate Tribunal (CESTAT), and such appeal is pending adjudication.

5. On 1 September 2019, the Government of India launched the Sabka Vishwas (Legacy Dispute Resolution) Scheme 2019 (SVLDR Scheme).

6. Since the Petitioners' appeal was pending, they filed an application in Form SVLDRS-1 on 16 November 2019 to avail themselves of Amnesty under the scheme. They were issued an acknowledgement stating that, as per the verification report, all dues had already been paid.

7. On 23 December 2019, the Petitioners were issued Form SVLDRS-2 by the Designated Committee showing disputed tax dues of Rs.4,80,00,050/-. The Petitioners were also given a notice for a personal hearing should the Petitioners not agree with the estimated amount payable, as determined by the Designated Committee. The Petitioners were heard on 8 January 2020. The Petitioners made additional submissions on 13 January 2020, and finally, Form SVLDRS-3 was issued on 11 February 2020. By this, the tax dues were determined at

Rs.4,80,00,050/- and the Petitioners were called upon to deposit an amount of Rs.38,21,796/- to avail of the benefit of Amnesty under the Scheme. This amount had to be deposited within 30 days of communication in Form SVLDRS-3.

8. The Petitioners disputed the amount determined by the Designated Committee and addressed communications to that effect vide letters dated 20 March 2020, 30 July 2020, and 31 August 2020. Since there was no response, the Petitioners instituted the present petition.

9. Even if the extension granted on account of the COVID-19 pandemic is considered, admittedly, the Petitioners did not make the payment of Rs.38,21,796/- under the Scheme within the period initially indicated or during the extended period. The Petitioners have raised no grievances about the hearing afforded to them. The Petitioners only contend that the determination by the Designated Committee is incorrect to the extent it has included the amount of Rs.1,03,16,150/- towards credit, which was incorrectly availed, though according to the Petitioners, the same was never utilised by them. Since this contention was not acceptable to the Respondents, the Petitioners have instituted this Petition seeking the above reliefs.

10. Mr. Shrivastava, learned counsel for the Petitioners, submitted before us that the Petitioners, at the highest, had only availed CENVAT credit of Rs.1,03,16,150/-but had not utilised the same. He, therefore, submitted that there was no question of considering the said amount of Rs.1,03,16,150/- for determining tax dues. He submitted that this CENVAT Credit could have been reversed at the highest and, according to him, has been reversed.

11. Mr. Shrivastava submitted that tax dues, without prejudice to the Petitioners' contentions, should, therefore, have been determined at Rs.3,68,36,058/- + Rs.8,47,842/- = Rs.3,76,83,900/- and not Rs.4,80,00,050/-. He submitted that the Petitioners were always ready and willing to pay 50% of this amount after reducing the pre-deposited amount consistent with the Scheme. He submitted that the denial of this benefit, in the circumstances of this case, is arbitrary and is, in fact, contrary to the SVLDR Scheme.

12. Mr. Shrivastava referred to the definition of "amount of duty" under clause 2(d) of the Scheme and pointed out that it does not cover input credit availed but not utilised. He also referred to clauses 123 and 124 of the Scheme and, based on them, submitted that the inclusion of Rs.1,03,16,150/- was patently erroneous, and the amount of tax due should have been determined by excluding the said amount.

13. Mr. Sharma and Mr. Ochani countered Mr. Shrivastava's submissions by contending that the CENVAT Credit has not only been availed but has been utilised by the Petitioners. They referred to the O-I-O dated 4 February 2019 and the memo of appeal filed by the Petitioners challenging the same. They submitted that the total amount of duty disputed in the appeal was Rs. 4,80,00,050/-. Therefore, in terms of clauses 123 and 124 of the Scheme, the amounts determined by the Designated Committee were correct. They submitted that since this amount was required to be deposited based on the tax dues worked out by the Designated Committee, which the Petitioners never deposited within the prescribed period, no relief should be granted to the Petitioners in this petition.

14. Mr. Sharma and Mr. Ochani relied upon the decision of the Hon'ble Supreme Court in ***M/s. Yashi Constructions vs. Union of India &***

Ors. Petition for Special Leave to Appeal (C) No.2070 of 2022 decided on 18 February 2022 and submitted that this Court cannot extend the period for making a deposit under the Amnesty scheme.

15. The rival contentions now fall for our determination.

16. The Petitioners' contentions that the CENVAT credit in this case was only availed but not utilised were raised but rejected in the O-I-O dated 4 February 2019. In this regard, we refer to the discussion in paragraph 26 of this order, which reads as follows: -

> *26. In this case the first issue is of wrong availment of Cenvat Credit to the extent of Rs. 1,03,16,150/- to be considered for adjudication. In the instant case the assessee failed to produce to the investigating officers the eligible documents prescribed under Rule 9 of CENVAT Credit Rules 2004, against the Credit shown as availed and utilized in their ST-3 returns. They also failed to produce any certified ledgers or documents in this regard to the investigating officers. Even their representatives Shri B. D. Singh director of M/S Vishal Earthmover (1) Private Limited and Shri Rajan Mashelkar consultant at the time of personal hearing on 16.01.2019 requested to give them one week time for producing necessary documents in this regard. However, even after two weeks they failed to produce such documents for verification. Thus, I find that allegations in the notice are not disproved by the assessee and the same stands against them. Thus, as they have contravened the provisions of Rule 9 of the Cenvat Credit Rules, 2004 they are not eligible for the entire Cenvat credit of Rs.* ***1,03,16,150/- wrongly availed and utilized by them. The irregular credit taken and utilised is therefore liable to be disallowed and recovered*** *from them along with interest under proviso to section 73(1) read with Section 75 of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004. They are also liable for penal action under Section 78 of the Finance Act, 1994 read with Rule 15(4) / 15(3) of the Cenvat Credit Rules, 2004.*
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> [Emphasis supplied]

17. At this stage, we cannot decide whether the findings and observations in the O-I-O dated 4 February 2019 are correct. For that, the Petitioners have already instituted an appeal before CESTAT, which is said to be pending. However, the fact remains that in terms of the O-I-O, the taxes demanded from the Petitioners were Rs.4,80,10,050/-,

which includes Rs.1,03,16,150/- being credit availed and utilised as per the O-I-O.

18. There is not much ambiguity about the amount demanded in the O-I-O. In any event, in the Petitioners' appeal memo before CESTAT against Columns 13, 14 and 24, the Petitioners have pleaded as follows:-

13	(i) Amount of tax, if any, demanded for the period of dispute	Rs.1,03,16,150/- + Rs.3,68,36,058 + Rs.8,47,842 is the service Tax is the amount demanded for the period in dispute.

14	(i) Whether tax or penalty/ interst is deposited; (ii) if not, whether any application for dispensing with such deposit has been made. (A copy of the challan under which the deposit is made shall be furnished).	7.5% of Service Tax confirmed amount is required to be deposited., hence required amount is Rs.4,88,47,892/. An amount of 1,34,80,586/- and Rs. 66,97,643/-has been deposited by the Appellants prior to issue of Show Cause Notice and appropriated and the said fact has been noted at Page 26 of the impugned order. Thus the condition of mandatory pre-deposit of seven and a half percent of service tax amount under Section 35 F of the Central Excise Act, 1944 has been complied with. Thus the Appeal deserves to be entertained.

24	Reliefs claimed in appeal	Appellants pray 1) Order of confirmation of Service Tax of Rs.1,03,16,150/- + Rs. 3,68,36,058/- Rs. 8,47,842/-, and 2) Penalty of Rs.1,03,16,150/-, Rs.3,68,16,150/- Rs. 8,47,842/ ,may be set aside. The impugned Order in original itself may be set aside and grant of such other reliefs as may be warranted by the facts and circumstances of the case.

19. Under clause 124 of the Scheme, subject to the conditions specified in subclause (2), the relief available to a declarant under the Scheme is to be *inter alia* calculated as follows:-

> *(a) where the tax dues are relatable to a show cause notice or one or more appeals arising out of such notice which is pending as on the 30th day of June, 2019, and if the amount of duty is, –*
>
> *(i) rupees fifty lakhs or less, then, seventy per cent of the tax dues ;*
>
> *(ii) More than rupees fifty lakhs, then, fifty per cent, of the tax dues;*

20. The expression "tax dues" for the purposes of the Scheme is to be determined in terms of clause 123. This clause *inter alia* provides that where a single appeal arising out of an order is pending as of 30 June 2019 before the Appellate Forum, the total amount of duty which is being disputed in the appeal shall be the tax dues. Clause 2(d) of the said Scheme defines amount of duty to mean the amount of Central Excise Duty, the Service Tax and the Cess payable under the indirect tax enactment.

21. On a conjoint reading of the provisions of the Scheme and considering the finding that this was not a case of the credit being availed but not utilised, we cannot fault the calculations made by the Designated Committee and communicated to the Petitioners. The entire argument before us proceeded on the without-prejudice premise that the credit may have been wrongly availed, but the same was never utilised. This premise, at least for the purposes of determining the amount payable under the Scheme, is not correct.

22. The correctness of these contentions can also be tested in the pending appeal, but for the purposes of this Scheme, the Petitioners were required to proceed based on the total amount of duty disputed in the Appeal, which was Rs.4,80,00,050/-, as stated above. Therefore, the Designated Committee, by referring to the provisions of the Scheme, determined the total amount of duty disputed in appeal, Rs.4,80,00,050/-. Based on that and after making necessary adjustments for the pre-deposited amount, the Petitioners were called

upon to deposit Rs.38,21,796/- within the prescribed Period. Since this amount was not deposited within the specified period or even the extended period, we cannot say that the Respondents acted illegally or arbitrarily and interfere with their decision.

23. In effect, the Petitioners urge this Court to adjudicate upon the merits of the determination, including the merits of the O-I-O dated 4 February 2019, and, upon such determination, exclude the amount of Rs.1,03,16,150/-. After excluding this amount, the Petitioners wish to calculate a total duty amount at Rs.3,68,36,058/- + Rs.8,47,842/-. The Designated Committee could not have undertaken such an exercise, and consequently, this Court cannot undertake it to consider the grant of Amnesty under the Scheme.

24. At this stage, Mr. Shrivastava submits that the Petitioners will represent the Respondents, if necessary, by depositing Rs. 38,21,796/- for grant of benefit under the Scheme along with interest. He also submitted that the Petitioners would be willing to pay interest at a reasonable rate on this amount. He submits that there was a genuine dispute on quantification, and considering the object of the Scheme, the Respondents should accept this amount and grant the Petitioners Amnesty under the Scheme.

25. If the Petitioners make a representation in the above terms, the Respondents may dispose of it expeditiously and in accordance with the law. The Respondents would also consider the objective of introducing such a Scheme and advert to the peculiarities of the Petitioners' case.

26. Mr. Shrivastava has contended before us that the decision of the Hon'ble Supreme Court in the case of ***M/s. Yashi Constructions***

(supra) may not apply because in that case, there was no dispute about the calculations. At least from the order dated 18 February 2022 placed before us, it does not appear that there was any dispute about the calculations. Still, the Petitioners failed to deposit the amount within the time limit provided under the Scheme.

27. Thus, we dismiss the petition. However, if the Petitioners make a representation in the above terms, we direct the concerned Respondent to dispose of such representation in accordance with the law and its merits within a reasonable period.

28. There shall be no order for costs.

29. All concerned to act on an authenticated copy of this order.

(Jitendra S. Jain, J.) **(M. S. Sonak, J.)**