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Judgment Reserved on 20.11.2020

Judgment Delivered on 08.12.2020

Court No. - 5

Case :- WRIT TAX No. - 646 of 2020

Petitioner :- M/S Indian Oil Corporation Limited

Respondent :- Union Of India And 2 Others

Counsel for Petitioner :- Shubham Agrawal, Sanyukta Singh

Counsel for Respondent :- A.S.G.I., Gaurav Mahajan

Hon'ble Surya Prakash Kesarwani, J.

Hon'ble Dr. Yogendra Kumar Srivastava, J.

(Per Hon'ble Surya Prakash Kesarwani J.)

1. Heard Sri Shubham Agrawal, learned counsel for the petitioner and Sri Gaurav Mahajan, learned counsel for the respondent nos. 2 & 3.

Learned counsel for the petitioner submits as under:

2. This writ petition has been filed for the following relief:-

*“(a) Certiorari quashing and setting aside the SVLDRS-3 dated 26.2.2020 (Annexure No.12) passed by the Designated Committee; (b) Mandamus directing the Designated Committee to accept the SVLDRS-1 Declaration (Annexure No.8) filed by the petitioner. (c) Mandamus directing the respondent No.1 to delete SKO from Fourth Schedule of Central Excise **Tariff Act**, 1944, retrospectively, wef 1.7.17;*

Or in the alternative

*(d) Declaring continued existence/non-deletion of SKO from the Fourth Schedule of Central Excise **Tariff Act**, 1944, after 1.7.17, to be violative of section 174 of Central Goods and Service Tax 2017 and also violative of Entry No.84 of List – I (Union List) of the Seventh Schedule to Constitution of India, which has been amended by the Constitution (One Hundred and First) Amendment Act, 2016.”*

3. This writ petition was heard at length on 20.11.2020 and the submissions made by learned counsels for the parties were noted.

Submission on behalf of the petitioner

4. Learned counsel for the petitioner has submitted as under :-

(i) A show cause notice dated 17.10.2007 under the

Central Excise Act, 1944 was issued to the petitioner for excise duty of Rs.2,96,99,001/- not paid for the period from 01.11.2002 to 31.03.2005. Penalty was also sought to be imposed under Section 11-A of the Central Excise Act 1944 read with Rule 25 of the Central Excise Rules, 2002.

(ii) A scheme known as "Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019" was enacted by Finance (No.2) Act, 2019. Section 124 of the Finance Act, 2019 provides that tax dues relating to a show cause notice pending as on 30.06.2019 for more than Rs. 50 lacs shall be available to a declarant to give him relief of 50% of the tax dues. Section 125(1)(h) of the Act 2019 provides that persons seeking to make declaration with respect to excisable goods set forth in the 4th Schedule to the Central Excise Act, 1944 shall not be eligible to make a declaration under this scheme. Disputed commodity i.e. SKO is mentioned in the 4th Schedule of the Central Excise Act as amended by Taxation Laws (Amendment) Act, 2017 (No.18 of 2017) whereby the 2nd Schedule to the Central Excise Tariff Act was renumbered with certain modifications as 4th Schedule, but inclusion of SKO in the 4th Schedule to the Central Excise Act is not permissible inasmuch as after amendment of entry 84 of List 1 of the 7th Schedule to the Constitution of India, the parliament has power to impose Central Excise duty only in respect of 5 items, namely, petroleum crude, high speed diesel oil, motor spirit, natural gas aviation turbine fuel and tobacco and tobacco products which does not include SKO. Therefore, the SKO could not have been included in the 4th Schedule.

(iii) The application of the petitioner for taking benefit of the aforesaid scheme has been arbitrarily rejected by impugned communication dated 26.02.2020 on the ground that as per Section 125 (1)(h) of the Finance (No.2) Act, 2019 the product i.e. SKO is set forth in the 4th Schedule of Central Excise Tariff Act, 1944 and, therefore, the application to avail benefits of SVLDRS scheme can not be accepted.

(iv) Since SKO is not an excisable goods. Therefore, the petitioner could not have been denied the benefit of SVLDRS scheme by the impugned order/communication dated 26.02.2020.

(v) In view of the amended entry 84 of list 1 of the 7th Schedule of the Constitution (one hundred and 1st Amendment) Act, 2016, the 4th Schedule to the Central Excise Tariff Act mentioning therein SKO by the Taxation Laws (Amendment) Act, 2017 (No.18 of 2017) is violative of Section 174 of the Central GST Act which has repealed the Central Excise Act except with respect to the matters provided in the amended entry 84 of list 1 of the 7th Schedule.

(vi) Since GST is being charged as mentioned in the 4th Schedule (List of goods at 5% rate) at Serial No.164 on "Kerosene PDS", therefore, the existence of SKO (Super Kerosene Oil) in the 4th Schedule to the Central Excise Act showing rate of duty as nil, can not be continued under the Central Excise Tariff Act.

Submission on behalf of the respondents

5. Sri Gaurav Mahajan, learned counsel for the respondent nos. 2 & 3 supports the action of the respondents and the impugned order. He further submits that proper procedure was followed before rejecting the

application of the petitioner.

6. Sri Gaurav Mahajan, further submits that SKO continues to be an excisable goods falling under the 4th Schedule of the Central Excise Act.

Facts

7. Briefly stated facts of the present case are that the petitioner is **engaged in the manufacturing and clearance of various petroleum products** falling under Chapter 27 of the Central Excise Tariff Act, 1985 (hereinafter referred to as “the Tariff Act”). During the period 01.11.2002 to 31.03.2005 petitioner paid Central Excise duty on the basis of Central Excise invoice in which value was shown much lower than actual price recovered by the petitioner from the buyers as per the commercial invoices in respect of Superior Kerosene Oil (SKO). Consequently, a show cause notice dated 17.10.2007 under Section 11 of the Central Excise Act, 1944 (hereinafter referred to as “the Act 1944”) was issued to the petitioner by the Commissioner of Central Excise, Lucknow, requiring them to show cause as to why Central Excise duty amounting to Rs.2,96,99,001/- short paid for the period from 01.11.2002 to 31.03.2005 may not be recovered under Section 11-A and penalty under Section 11-AC of the Act, 1944 read with Rule 25 of the Central Excise Rules, 2002, be not imposed. The petitioner submitted reply dated 17.12.2007 in which the petitioner admitted lower amount shown in the Central Excise invoices and higher amount shown in the commercial invoices but took the stand that subsidy received from the Government will not form part of the value for the purposes of payment of Central Excise Duty. According to the petitioner final order has not yet been passed pursuant to the aforesaid show cause notice. In the mean time, the Finance (No.2) Act, 2019 enacted “Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019” (hereinafter referred to as “Sabka Vishwas Scheme”) which was applied to demands under several enactments

including Central Excise Act, 1944. Section 124 of the Finance (No.2) Act, 2019, provides for relief available under the Scheme. Section 125 provides that all persons shall be eligible to make a declaration under the Scheme except classes of persons provided in Clauses (a) to (h). Relevant Clause (h) of Section 125 (1) of the Finance (No.2) Act, 2019 i.e. Sabka Vishwas Scheme is reproduced below:-

“Section 125 Declaration under Scheme

(1) All persons shall be eligible to make a declaration under this Scheme except the following, namely :-

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h) Persons seeking to make declarations with respect to **excisable goods** set forth in the Fourth Schedule to the Central Excise Act, 1944 (1 of 1944).”

8. Rule 3 of the “Sabka Vishwas (Legacy Dispute Resolution) Scheme Rules, 2019” (hereinafter referred to as “Sabka Vishwas Rules”) provides for declaration under Section 125 electronically. Rule 4 provides for auto acknowledgment. Rule 6 provides for verification of declaration by the designated committee and issue of estimates etc. in Form No. SVLDRS – 3.

9. The designated committee issued the impugned communication dated 26.02.2020 to the petitioner with the remarks as under :-

*“As per Section 125 (h) of the Finance (No.2) Act, 2019, the product i.e. SKO is set forth in the Fourth Schedule of Central Excise Tariff Act, 1944, therefore, the application to avail benefits of SVLDRS Scheme **can not be accepted**”.*

10. Aggrieved with the aforesaid communication, the petitioner has

filed the present writ petition.

Discussion and Findings

11. By the constitution (One Hundred and First Amendment) Act 2016, dated 08.09.2016, Article 246-A was inserted providing for Special Provision with respect to goods and service Tax. By Section 17 of same Amendment Act, the 7th Schedule to the Constitution was amended by substituting in list –1 - Union List, the entry 84 as under :-

Entry 84 of List – 1 – Union List

12. Duties of excise on the following goods manufactured or produced in India, namely :-

“(a) Petroleum Crude; (b) High Speed Diesel; (c) Motor Spirit (commonly known as petrol); (d) natural gas (e) aviation turbine fuel; and (f) tobacco and tobacco products.”

13. In **K.C. Sachdeva Vs. State 1976 Cri.L.J. 1208(para 4)** learned Single Judge has observed that the “Petroleum” includes “Kerosene. In its own case i.e. in **Indian Oil Corporation Limited Vs. Commissioner of Central Excise Vadodara (2010) 12 SCC 750** Hon”ble Supreme Court while referring to the Chapter heading 27 of the erstwhile Central Excise Tariff Act 1985 and Notification No.5/98-CE dated 2.6.1998 and Notification No.5/99-CE dated 28.2.1999 noticed the Notification in which it is mentioned that “Kerosene” is any hydro carbon oil (excluding Colza Oil and white spirit) which has a smoke point of 18 mm or more.

14. It appears that on account of the one hundred and First constitution Amendment Act, 2016, the Goods and Service Tax laws were enacted and Central Excise Act, 1944 was also amended by Act 18 of 2017. By Section 174 of the Central Goods and Service Tax Act, 2017

assented by the President on 12.04.2017 and enforced w.e.f. 01.07.2017 certain enactments including the Central Excise Act, 1944 (except as respects goods included in entry 84 of the Union List of the 7th Schedule to the Constitution) and the Central Excise Tariff Act, 1985, have been repealed with a saving clause in sub – Section (2).

15. By Act 18 of 2017 (w.e.f. 01.07.2017) several amendments were made in the Central Excise Act, 1944. The relevant amended provisions for the purposes of the present case are Section 2(d), Section 2(f) (ii) and the Fourth Schedule to the Act. The Fourth Schedule has been substituted with reference to the provisions of Section 2(d) and Section 2(f)(ii) of the Act, 1944. Section 2(d) and 2(f)(ii) are reproduced below:-

“Section 2(d)

“Excisable goods” means “goods” specified in the **Fourth Schedule** as being subject to a duty of excise and includes salt.

Explanation.- For the purposes of this clause, "goods" includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable”

Section 2(f)(ii)

“Manufacture” includes any process -

(i)

(ii)which is specified in relation to any goods in the section or Chapter notes of the Fourth Schedule as amounting to manufacture; or

(iii)..... and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account.”

16. **Section 3** of the Act, 1944 as amended by Act 18 of 2017 is the charging Section. It provides for **levy and collection** of duty of excise to be called Central Value Added Tax (CENVAT) on all excisable goods which are produced or manufactured in India, at the rates set forth in the Fourth Schedule. Sub-Section 3 of Section 3 empowers the Central Government to provide by Notification rates of duty and tariff values with respect to the articles enumerated in the Fourth Schedule. **Thus, all the items which are enumerated in the Fourth Schedule are**

excisable goods in terms of the provisions of Section 2(d), read with Section 2(f) and are liable to duty at the notified rates under the charging Section 3 of the Act.

17. “Manufacture” is the taxable event under the Central Excise Act, 1944 while under **Section 9 of the CGST Act/UPGST Act, the event of taxation is the supply of goods or services** except the supply of alcoholic liquor for human consumption. **Sub-Section 2 of Section 9 of the CGST Act/UPGST Act** empowers to levy tax on supply of petroleum crude, high speed diesel oil, motor spirit, natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council. **Thus, GST may be levied even on such goods which are excisable goods under the Central Excise Act, 1944. Therefore, Superior Kerosene Oil (SKO) shall continue to be an excisable goods under the Central Excise Act, 1944 even if GST on supply of Kerosene Oil (PDS) is levied under the GST laws.**

18. Perusal of the Fourth Schedule to the Central Excise Act, 1944 and the provisions of Section 2(d) read with Section 2(f)(ii) leaves no manner of doubt that Superior Kerosene Oil is an excisable goods under the Central Excise Act, 1944, even if no rate of duty has been notified by the Central Government under the Act, 1944. Section 125(1)(h) of the Finance (No.2) Act, 2019 (Sabka Vishwas Scheme) specifically excludes applicability of the “Sabka Vishwas Scheme” with respect to excisable goods set forth in the Fourth Schedule to the Central Excise Act 1944. Since the 'SKO’ is an excisable goods set forth in the Fourth Schedule to the Central Excise Act, 1944, therefore, the petitioner was not eligible to make a declaration under the Scheme in view of Section 125 of the Finance (No.2) Act 2019.

19. Perusal of the Fourth Schedule shows that against the goods Superior Kerosene Oil “.....” is appearing under the column rate of duty. Clause 4 of the additional notes to the Fourth Schedule provides that “.....” against any goods denotes that **Central Excise Duty** under this Schedule is not leviable on such goods. It means that S.K.O. is an excisable goods as defined in Section 2(d) read with Section 2(f) and Section 3 (Charging Section) of the Central Excise Act, 1944 but presently no duty is leviable in the absence of rate of duty in the Fourth Schedule to the Act, 1944.

20. Thus, if the “additional notes” to the Fourth Schedule is read together with Section 2(d), Section 2(f)(ii), Section 3 of the Act, 1944 and Section 125 (1) (h) of the Finance (No.2) Act, 2019, it is clear that Section 125(1)(h) merely makes a person not eligible for declaration with respect to the excisable goods which are set forth in the Fourth Schedule to the Act, 1944.

21. Undisputedly, Superior Kerosene Oil is mentioned in the Fourth Schedule although no rate of duty has been provided. If rate of duty has not been provided it shall merely mean that no duty is leviable in the absence of rate of duty. It does not mean that such goods are not excisable. All the goods mentioned in Fourth Schedule to the Act, 1944 shall continue to be excisable goods unless the goods is removed from the Schedule by an amendment. Section 174 of the CGST Act has not repealed the Central Excise Act, 1944 as respect to the goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution. The Central Excise Act, 1944 as amended by Act 18 of 2017 has been enacted with respect to the goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution which includes S.K.O.

22. The petitioner has sought the relief No. (c) and (d) to delete SKO from the Fourth Schedule of Central Excise **Tariff** Act, 1944. There is no such Act. The relief sought is without substance. Apart from this,

inclusion of SKO in the Fourth Schedule of the Act, 1944 is not violative of Section 174 of the CGST Act, 2017, for detailed reasons given in the foregoing paragraphs.

23. **“Sabka Vishwas Scheme” is a complete code in itself.** An earlier scheme known as “Kar Vivad Samadhan” scheme was considered by Hon'ble Supreme Court in the case of **Union of India Vs. Nitdip Textile Processors Pvt. Ltd. 2011 (273) ELT 321 (SC) : (2012)1 SCC 226** and it was held that such a scheme is a complete code in itself.

24. Provisions in Chapter V of the Finance (No.2) Act, 2019, whereby “Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019” has been enacted; is an offer by the Government to settle tax arrears locked in litigation at a substantial discount. Section 124 Finance (No.2) Act 2019 provides the slabs of tax arrears and the discount slabs in percentage for payment by an applicant/declarant to settle the dispute. Section 125 provides that all persons shall be eligible to make a declaration under the Scheme except those mentioned in Clauses (a) to (h). Section 126 empowers the designated Committee to verify the correctness of the declaration made by the declarant under Section 125 in the manner as may be prescribed. Section 127 of the Act empowers the designated Committee to issue statement indicating the amount payable by the declarant and in the event the amount estimated by the designated Committee exceeds the amount declared by the declarant then the designated Committee shall afford an opportunity of hearing to the declarant and thereafter issue a statement in electronic form indicating the amount payable by the declarant. Thereafter, the declarant shall pay the amount through internet banking and on payment, the designated committee shall issue a discharge certificate in electronic form within 30 days of the payment and production of proof. Sub-Section 6 and Sub-

Section 7 of Section 127 provides for withdrawal or deemed withdrawal of Appeal, Revision, Reference or Writs relating to the matter in question. Section 129 provides for certain immunities to the declarant. Section 130 prohibits payment through input tax credit account, refunds and to take input tax credit of the amount deposited under the Scheme. Section 131 provides for removal of doubts. Section 134 provides for removal of difficulties. Section 132 empowers the Central Government to make Rules by notification to carry out the provisions of the Scheme. Section 133 empowers the Central Board of Indirect Taxes to issue orders, instructions etc. Section 135 provides for protection to the Officers.

25. Thus, perusal of the provisions of the Scheme briefly noted above, shows that **the Scheme is a complete Code in itself**. In substance, it is a scheme for recovery of duty/indirect tax to unlock the frozen assets and recover the tax arrears at a discounted amount. Thus, “Sabka Vishwas Scheme”, although a beneficial scheme for a declarant, is statutory in nature which has been enacted with the object and purpose to minimise the litigation and to realise the arrears of tax by way of settlement at discounted amount in an expeditious manner. In other words the scheme is a step towards the settlement of outstanding disputed tax liability.

26. The discussion made in the foregoing paragraphs leaves no manner of doubt that the petitioner/declarant could avail benefit of the “Sabka Vishwas Scheme” only in accordance with the provisions of the Scheme. Section 125(1)(h) of the Act 2019/“Sabka Vishwas Scheme” has specifically excluded persons seeking to make declarations with respect to excisable goods set forth in the Fourth Schedule to the Central Excise Act, 1944. Undisputedly, S.K.O. is an excisable goods set forth in the Fourth Schedule to the Act, 1944. The petitioner was not eligible to make a declaration under the “Sabka Vishwas Scheme” with respect to “S.K.O.”. Therefore, non acceptance of the declaration of the petitioner by the respondents does not suffer from any manifest error of law.

27. For all the reasons aforesaid, we do not find any merit in this writ petition. Consequently, the Writ Petition fails and is hereby **dismissed**.

Order Date :- 08.12.2020/vkg