HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

D.B. Civil Writ Petition No. 3243/2020

Saraswati Marble and Granite Industries Pvt. Ltd., NH-8, Pasoond, Rajsamand Through Its Director Vimal Kumar Lodha S/o Shri Kanakmal Lodha, Aged About 60 Years, Resident of 94, Panchwati, Opp Alok School, Udaipur (Raj.).

----Petitioner

Versus

1. Union of India, Through Secretary, Department of Revenue, Ministry of Finance, Government of India North Block, New Delhi.
2. Central Board of Indirect Taxes and Customs, Department of Revenue, Ministry of Finance, Government of India, North Block, New Delhi Through Its Chairman.
3. Assistant Commissioner, Central Goods and Service Tax, Division-D, Opp R.K. Hospital, Housing Board, Kankroli, District Rajsamand.
4. Superintendent, Central Goods and Service Tax and Central Excise, Range-XVI, Kankroli, District Rajsamand.
5. Additional Commissioner, Central Excise and Goods and Central Service Tax, 142-B, Sector-11, Hiran Magri, Udaipur.

----Respondents

For Petitioner(s)	:	Mr. Lokesh Mathur
For Respondent(s)	:	Mr. Rajvendra Sarsawat

HON'BLE MR. JUSTICE SANGEET LODHA
HON'BLE MR. JUSTICE DEVENDRA KACHHAWAHA

Order

06 April, 2021

PER HON'BLE MR. SANGEET LODHA,J.

1. This writ petition is directed against orders dated 12.11.19 & 16.12.19, whereby the application preferred by the petitioner for

availing the benefits under Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 ('Scheme of 2019') in respect of the refund amount of Rs.26,80,834/- claiming the same to be amount in arrears in terms of provisions of clause (c) of Section 121 of Finance Act, 2019 (for short "the Act of 2019"), stands rejected by the designated committee.

2. The facts relevant are that pursuant to the proceeding initiated by the adjudicating authority under Section 11 A of Central Excise Act, 1944 against the petitioner for levy of excise duty in respect of process of cutting of marble blocks into marble slabs and tiles, vide order dated 20.11.97, a demand of excise duty to the tune of Rs. 20,80,834/- and penalty of Rs.20,50,000/- was imposed. However, an appeal preferred by the petitioner before the Custom & Service Tax Appellate Tribunal ('the Tribunal') was disposed of by the Tribunal by remanding the matter back to the adjudicating authority. The adjudicating authority vide order dated 18.12.2000 reconfirmed the duty and penalty. On an appeal being filed by the petitioner, vide order dated 23.2.2001, the Tribunal affirmed the demand of duty of Rs.20,80,835/-, however, reduced the penalty imposed u/s 11AC of the Act of 1994 from Rs.20,50,000/- to Rs.5,00,000/-. The petitioner discharged the demand created as aforesaid and also deposited interest amounting to Rs.1,50,000/-. Subsequently, the petitioner challenged the levy of duty by way of a writ petition before this Court taking the stand that cutting of marbles, blocks into marble slabs does not amount to manufacturing activity. The writ petition was allowed by this Court vide order dated 24.8.06 and the order passed by the adjudicating authority creating the demand of excise duty and penalty was quashed and it was directed that the

amount already recovered will be subject to refund u/s 11B of the Act of 1994. Pursuant to the order passed by this Court, the petitioner claimed refund of Rs.26,80,834/- which was sanctioned by the Assistant Commissioner, Central Excise & Service Tax, Udaipur vide order dated 30.8.07. Aggrieved by the decision of this Court, the Revenue preferred a Special Leave Petition (SLP) (converted into Civil Appeal No.5857/07) before the Hon'ble Supreme Court, which was allowed vide order dated 16.10.15 and the order passed by this Court directing refund of the amount of duty, penalty and interest was set aside. Consequently, vide order dated 30.11.17 issued by the Assistant Commissioner, Central Excise & Service Tax, Division D, Kankaroli, the petitioner was directed to refund the amount of Rs.26,80,834/- erroneously granted. The petitioner challenged the legality of the order dated 30.11.17 before this Court by way of Writ Petition being D.B.C.W.P. No.880/18 which was dismissed by this Court vide order dated 26.4.19 and the order dated 30.11.17 was upheld. The SLP preferred by the petitioner against the order dated 26.4.19 passed by this Court was dismissed by the Hon'ble Supreme Court vide order dated 2.7.19. Consequently, the Superintendent, Central Excise, Goods & Service, Range XVI, Kankaroli, raised a demand of Rs.26,80,834/- alongwith interest vide letter dated 23.7.19. Suffice it to say that the demand of refund amount erroneously granted attained finality. The petitioner made an application claiming benefit under the Scheme of 2019 taking the stand that the refund amount claimed falls within the definition of 'amount in arrears' under clause (c) of Section 121 of the Act of 2019. The application preferred by the petitioner was rejected by the designated committee holding that

by virtue of provisions of Section 125(1) (d) of the Act of 2019, the petitioner is not eligible for benefits inasmuch as, the issue pertains to amount refunded erroneously. Hence, this petition.

3. Learned counsel appearing for the petitioner contended that the petitioner is entitled for benefit under the Scheme of 2019 inasmuch as, the amount become recoverable, on account of no appeal having been filed by the petitioner and thus, it falls within the definition of 'amount in arrears' in terms of provisions of Section 121(c) of the Act of 2019. Learned counsel submitted that Section 125(1)(d) of the Act of 2019, disqualifies a declarant from being eligible if a show cause notice under indirect tax enactment for an erroneous refund or refund has been issued to it. Learned counsel would submit that the case of the petitioner is not where a show cause notice for an erroneous refund or refund has been issued rather, it is a case where an order in original has been passed, although, the show cause notice issued was for recovery of erroneous refund/refund. Learned counsel submitted that the designated committee could not have read 'show cause notice relating to erroneous refund/refund' as an issue relating to erroneous refund/refund and thus, the designated committee has seriously erred in rejecting the application preferred by the petitioner seeking benefits under the Scheme of 2019.

4. On the other hand, the counsel appearing for the respondents submitted that the relief under the Scheme of 2019 is available to a declarant who has an amount of arrears and not for refund erroneously made. Learned counsel submitted that by virtue of provisions of Section 125 (d), the petitioner is not entitled to maintain the application for an erroneous refund/refund

and thus, the designated committee has committed no error in rejecting the application preferred by the petitioner.

5. We have considered the rival submissions of the counsel for the parties and perused the material on record.

6. The controversy raised rolls around the provisions of Sections 121 (c) & 125 (1) (d) of the Act of 2019, which may be beneficially quoted:

Section 121(c)

"121. In this Scheme, unless the context otherwise requires:-

xxxx……..xxxxxx

(c) "amount in arrears" means the amount of duty which is recoverable as arrears of duty under the indirect tax enactment, on account of -

(i) no appeal having been filed by the declarant against an order or an order in appeal before expiry of the period of time for filing appeal; or

(ii) an order in appeal relating to the declarant attaining finality; or

(iii) the declarant having filed a return under the indirect tax enactment on or before the 30th day of June, 2019, wherein he has admitted a tax liability but not paid it;"

Section 125 (1) (d)

"125(1) All person shall be eligible to make a declaration under this Scheme except the following namely:-

...xxxxx…….xxxxxxx

(d) who have been issued a show cause notice under indirect tax enactment for an erroneous refund or refund;"

7. Undoubtedly, Section 121(c) defines 'amount of arrears' means the amount of duty, which is recoverable as arrears of duty under the direct tax enactment in the situations specified. It in no

manner deals with the amount of erroneous refund recoverable from the assessee. Moreover, the provisions of Section 125(1) (b) specifically exclude the persons from eligibility to make a declaration under the Scheme who have been issued a show cause notice under indirect tax enactment for erroneous refund or refund. Admittedly, after the SLP filed by the Revenue against the judgment dated 24.8.16 being allowed by the Supreme Court, a show cause notice was issued by the competent authority calling upon the petitioner to show cause and explain within 30 days of receipt of the notice as to why Rs.26,80,834/- refunded to them erroneously should not be recovered from them alongwith interest at the prevailing rates under Section 11A & 11AB respectively of the Act of 1944, which culminated in passing of the order dated 30.11.17. The challenge of the petitioner to the order dated 30.11.17 before this Court failed as also the SLP preferred before the Hon'ble Supreme Court and thus, the demand of the erroneous refund created vide order dated 30.11.17 has attained finality. It is preposterous to suggest that had the matter remained pending before the competent authority pursuant to the show cause notice issued, the petitioner was not entitled to avail the benefits under the Scheme of 2019 by virtue of provisions of Section 125(1)(d) of the Act of 2019 but since the proceedings stand concluded and the refund liability has attained finality, it will not fall within ineligibility contained in Section 125 (1)(d) and shall fall within the definition of 'amount in arrears' so as to make the petitioner entitled to claim benefit under the Scheme of 2019. In the considered opinion of this Court, by virtue of provisions of Section 125(1)(d) of the Act of 2019, a person who has been

served with the notice to show cause under indirect tax enactment for an erroneous refund or refund shall be ineligible to make a declaration under the Scheme to claim benefits thereof and it does not make any difference that the notice to show cause issued stands culminated in passing of the order creating the demand of amount of erroneous refund.

8. For the aforementioned reasons, the writ petition preferred by the petitioner lacks merits, the same is hereby dismissed. No order as to costs.

(DEVENDRA KACHHAWAHA),J **(SANGEET LODHA),J**

Aditya/-