

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 994 of 2021

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ALKEM LABORATORIES LIMITED

Versus

UNION OF INDIA

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Appearance:

ADITYA R PARIKH(8769) for the Petitioner(s) No. 1

NOTICE SERVED BY DS(5) for the Respondent(s) No. 1,2,3,4

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CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA

and

HONOURABLE MR. JUSTICE ILESH J. VORA

Date : 04/02/2021

ORAL ORDER

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. By this writ application under Article 226 of the Constitution of India, the writ applicant, a public limited company, has prayed for the following reliefs;

“(A) that this Hon'ble Court be pleased to issue a Writ of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India after going into the validity and legality thereof quash the order dated 21.10.2020 (Annexure-A) issued by Respondent No.2.

(B) that this Hon'ble Court be pleased to issue a Writ of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India after going into the validity and legality thereof direct re-adjudication of the show cause notice dated 05.003.2020 after following the principles of natural justice.

(C) that this Hon'ble Court be pleased to issue a Writ of Mandamus or any other appropriate writ, order or

direction ordering and directing the Respondent No.2 by himself, his subordinates, servants and agents, pending disposal of the present petition not to recover amount imposed vide impugned order dated 21.10.2020 and stay the execution and other proceedings thereof.

(D) that this Hon'ble Court be pleased to issue a Writ of Certiorari or an other appropriate writ, order or direction under Article 226 of the Constitution of India after going into the validity and legality thereof quash the order dated 24.11.220 (Annexure "N") uploaded on GST Portal by Respondent No.2.

(E) that this Hon'ble Court be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the petitioner case and after going into the validity and legality thereof to lift the attachment of the factory premise of the petitioner and quash impugned notice dated 17.12.220 (Annexure "B") issued by the Respondent No.2.

(F) for ad-interim reliefs in terms of prayer (a), (b) (c), (d) and (e) above;

(G) for costs of this Petition;

(H) For such and other reliefs as the nature and circumstances of the case may require."

2. The writ applicant also seeks to challenge the validity of the recovery notice dated 17th December, 2020 issued in Form GST DRC-16, inter alia, attachment of the factory premise of the writ applicant under Section 79 of the CGST Act, 2017. The order of attachment appears to be the consequences of the order dated 21st October, 2020 uploaded on the GST Portal on 24th November, 2020.

3. The subject matter of challenge in the present application is to the order passed by the Asst. Commissioner of State Tax

(Enforcement) Division-6, Vadodara dated 21st October, 2020, by which, the liability of the writ applicant to pay a particular amount towards service tax with penalty came to be fixed. The operative part of the order reads thus;

“Thus any lease or license to occupy land is a supply of service under the SGST and CGST Acts of 2017.

Further service provided by the assessee or your good self is covered under entry at serial No.16 (Heading No.9972, Real Estate Services) of Notification No.11/2017-Gujarat State Tax (Rate) dated 30.06.2017. Accordingly, real estate services are liable to tax at 9% SGST and 9% CGST.

The assess in your good self has received consideration of Rs.7,12,12,150/-. As per MOU and same value is consideration as taxable value of supply of services tax CGST Act. 01.07.2017 to 31.03.2018 Rs.64,09,092/- and SGST Act 01.0.2017 to 31.03.218 Rs.64,09,092/- interest of SGCT Rs.38,45,453/- and Rs.38,45,453/- of CGST Act. And also levied penalty of Rs.64,09,092/- of SGST Act and Rs.64,09,092/- CGST Act.”

4. Being dissatisfied with the aforesaid order, the writ applicant is here before this Court with the present writ application.

5. At the outset, we should have declined to entertain this writ application as the impugned order dated 21st October, 2020 is an appealable order. The appeal would lie under Section 107 of the Act, 2017. However, it appears from the materials on record that the order came to be passed without giving any opportunity of hearing to the writ applicant. In such circumstances, we thought fit to entertain this writ application.

6. We have heard Mr. Raichandani, the learned counsel

assisted by Mr. Aditya R. Parikh, the learned counsel appearing for the writ applicant and Mr. Chintan Dave, the learned AGP appearing for the State-respondents.

7. On 28th January, 2021, this Court passed the following order;

1. *We have heard Mr. Bharat Raichandani, the learned counsel assisted by Mr. Aditya R. Parikh, the learned counsel appearing for the writ applicant and Mr. Chintan Dave, the learned AGP appearing for the State Respondents.*

2. *The short point involved in this writ application is, whether the impugned order dated 21.10.2020 (at Annexure-A*

to this writ application) could be said to have been passed in violation of the principles of natural justice, inasmuch as the principal argument of the learned counsel appearing for the writ applicant is that, no opportunity of personal hearing was given to the writ applicant by the authority concerned before passing the impugned order.

3. *On the other hand, Mr. Dave, the learned AGP would submit that, ample opportunities were given to the writ applicant, however, those opportunities were not availed by the writ applicant.*

4. *We would like to know from Mr. Dave whether any notice was issued by the authority concerned to the writ applicant informing about a particular date fixed for the personal hearing in the matter. We take notice of the fact that the writ applicant did file his replies to the different notices issued by the respondents, however, the picture is not clear whether any opportunity of personal hearing was given to the writ applicant or not. Mr. Dave shall take appropriate instructions in this regard and revert to us with the necessary information by the next date of hearing. If any notice was issued to the writ applicant for*

personal hearing, the copy of the same shall be placed on record along with the proof of receipt of such notice by the writ applicant. We also request Mr. Dave, the learned AGP to go through the provisions of Section 75 of the GST Act, 2017 and try to examine the matter keeping the said provisions in mind.

5. Post this matter on 04.02.2021 on top of the Board."

8. Pursuant to the aforesaid order, an affidavit-in-reply has been filed on behalf of the respondent No.2. The same reads thus;

"4. The petitioner in the present writ petition has challenged the legality and validity of the order dated 21.10.2020 passed by the respondent authorities principally on the ground that there is a gross violation of the principles of natural justice as no opportunity of personal hearing was ever granted before passing the impugned order. In this regard on 28.01.2021 this Hon'ble Court has directed the respondent authorities to file appropriate affidavit in reply on the aspect of grant of opportunity of personal hearing.

5. It is most respectfully submitted before this Hon'ble Court that the respondent authorities had issued notice in FORM DRC-01A to the petitioner on 27.01.2020. In the said notice the petitioner was called upon to submit reply on or before 10.02.2020. A copy of the notice dated 27.01.2020 is annexed hereto and marked as Annexure-A. Thereafter, another show-cause notice in FORM GST DRC-01 was issued upon the petitioner in 05.03.2020. In the said notice the petitioner was called upon to respond within a period of thirty days from the date of receipt of show-cause notice. A copy of notice dated 05.03.2020 is annexed hereto and marked as Annexure-B. Thereafter, again on 15.06.2020 the petitioner was issued another wherein the petitioner was called upon to respond within a period of seven days. A copy of notice dated 15.06.2020 is annexed hereto and marked as Annexure-C. Thereafter, again on 29.07.2020 the petitioner was once again requested to submit the details as called for. A copy of notice dated 29.07.2020

along with the acknowledgment of the postal department is annexed hereto and marked as Annexure-D Colly.

6. This Hon'ble Court vide order dated 28.01.2021 had also directed the respondent authorities to examine the provisions as contained in Section 75 of the Gujarat Goods and Services Tax Act, 2017 in the context of present proceedings . In this regard if the provisions as contained in Sub-Section 5 of Section 75 of the Gujarat Goods and Services Tax Act, 2017 are examined then it will be clear that to adjourn the proceedings for sufficient cause being shown by the dealer is purely within the domain of the respondent authorities. In the facts of the present case no sufficient cause was ever shown by the petitioner and therefore the provisions of Sub-Section 5 of Section 75 of the Gujarat Goods and Services Tax Act, 2017 will not render any assistance to the petitioner."

9. It all started with the issue of notice in FORM GST DRC-01-A (intimation of tax ascertained as being payable under Section 74(5) of the Act). It appears that the writ applicant responded to the same by filing reply dated 18th February, 2020. The reply reads thus;

"1. At the outset, we would like to submit that there were no lease/sub-lease of Land to third party by Alkem Laboratories Ltd. (Alkem).

2. In this regard, we enclosed herewith Memorandum of Understanding "MOU" entered between Alkem Laboratories Ltd. and Third Party in respect of sales of land and transfer of Title/interest in respect of the said land after subdivision of plot. The MOU clearly defined the scope and nature of Transaction which says First party i.e. Alkem Laboratories Ltd. Intends to sell these property and subsequently transfer all its right /Title/Interest of the said land/property to Third Party. (Refer the attached MOU).

3. Further, the said plot were being transferred to the

Third Party with prior approval/from GIDC. The same is being re-confirmed by GIDC authority vide its letter dated 24.12.20019. (Refer the attached letter provided by GIDC pertaining to this transaction).

4. Based on the above factual position as per MOU and GIDC clarification, it can be clearly inferred that impugned transaction between Alkem Laboratories Ltd., and Third Party were purely in the nature for Sale of Land / Transfer Title/ Interest and therefore falling under the scope of Entry-5 of Schedule III, which shall be treated neither as a supply of goods nor a supply of services as per Section 7 of the Central Goods and Services Tax Act, 2017

5. Further such transaction were non-taxable under pre-GST as well and the same treatment has been contained in Post-GST era.

6. As there is no supply of Goods and Services in the instant case in view of above facts and legal provision, liability of Tax, Interest and Penalty payment does not arises."

10. As the aforesaid reply was not found satisfactory, a show-cause notice came to be issued dated 5th March, 2020, calling upon the writ applicant to show-cause as under;

"You (M/s. Alken Laboratories Limited, GST No.24AABCA9521E123 for the principal place of business premises situated as Plot No.289 & 290, G.I.D.C, Ankleshwar-393002) are therefore hereby called upon to show cause to the Assistant Commissioner of State Tax, Enforcement Div-6, Vadodara on 23.03.2020 as to why:-

I. Lease hold plot no. Block No.2925 to 2929, 3031 to 3042 & 3127 to 3132 Admeasuring 49,629 sq. mtrs. Panoli Industrial Estate which was sub-divided into 9 sub plots, and were sub leased for long term having assessable value of Rs.7,12,12,150/- should not be considered and classified as supply of Services of long term lease of industrial plots under SAC heading No.9972 under Gujarat Goods & Services Tax Act, 2017.

II. Tax should not be calculated at @ 18% under Section 74(1) of Gujarat Goods & Services Tax Act, 2017.

III. Interest should not be calculated at @ 24% under

Section 50(3) of Gujarat Goods & Services Tax Act, 2017?

IV. Penalty should not be imposed 100% under Section 4(9) of Gujarat Goods & Services Tax Act, 2017."

11. To the aforesaid show-cause notice, the writ applicant responded by addressing a letter dated 27th March, .2020. The same reads as under;

"To,

Asst. Commissioner of State Tax (I),

Enforcement Division-6, Vadodara

Sir,

Sub: SCN in the case of Alkem Laboratories Ltd. GST No.28AABCA9521EIZ3.

Ref: AC-SGST (ENF) DIV-6/VAD/2019-20/B-1058 dtd. 05.03.2020.

We are in receipt of your SCN mentioned above in which you have proposed to demand GST on amount of Rs.7,12,12,150/- on the assignment of rights in the lands (Plot No. Block No.2925 to 2929, 3031 to 3042 & 3127 to 3132, Admeasuring 49,629 sq. mtrs. Panoli Industrial Estate by us to various parties. You have also demanded from us consequential interest @ 24% and penalty u/s.4(9).

At the outset we submit that, we do not agree with the said demand. We need some time to prepare our detailed representation regarding the subject matter.

We also wish to avail a personal hearing in this matter.

Our written submissions in this regard will be submitted to you in Part B of Form GST DRC-01 A in due course.

Thanking You,

GST No.24AABCA9521EIZ3.

For Alken Laboratories Ltd."

12. According to the concerned authority, many opportunities were given to the writ applicant by issuing various notices, however, the writ applicant failed to respond

to such notices.

13. At this stage, we must refer to few provisions of law. Section 75(4) and Section 75(5) of the Act reads as under;

“(4) An opportunity of hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty or where any adverse decision is contemplated against such person

(5) The proper officer, shall, if sufficient cause is shown by the person chargeable with tax, grant time to the said person and adjourn the hearing for reasons to be recorded in writing

Provided that no such adjournment shall be granted for more than three times to a person during the proceedings”

14. Section 78 of the Act reads thus;

“Section 78- Initiation of recovery proceedings.

Any amount payable by a taxable person in pursuance of an order passed under this Act shall be paid by such person within a period of three months from the date of service of such order failing which recovery proceedings shall be initiated;

Provided that where the proper officer considers it expedient in the interest of revenue, he may, for reasons to be recorded in writing, require the said taxable person to make such payment within such period less than a period of three months as may be specified by him.”

15. A perusal of the provisions of Section 78, referred to above, would indicate that no recovery proceedings can be initiated against the assessee before the expiry of three months from the date of the service of the order. It is not in dispute that in the case on hand, within one month, the

proceedings came to be initiated in the form of attachment of the factory premises.

16. Having regard to the materials on record, one thing is for sure that no opportunity of personal hearing was given to the writ applicant by the concerned authority before passing the impugned order. Although a specific request in this regard was made, yet, the impugned order came to be passed without affording any opportunity of hearing. Section 75(4), referred to above, makes it abundantly clear that an opportunity of hearing has to be given, more particularly, in those cases where a request is received in writing from the person chargeable with tax or penalty and without any adverse decision is contemplated against such person.

17. We are of the view that we should give one opportunity to the writ applicant to appear before the respondent No.2 and make good his case

18. In the result, this writ application succeeds and is hereby allowed. The impugned order passed by the respondent No.2 dated 21st October, 2020, Annexure-A to this writ application is quashed and set aside. As the main order has been quashed and set aside, the order of attachment dated 17th December, 2020 also stands quashed and set aside. The entire matter is remitted to the respondent No.2 for fresh consideration. The respondent No.2 shall issue a notice to the writ applicant, fixing a particular date for hearing, and on that particular date, that may be fixed, the writ applicant himself or through his legal representative shall appear before the respondent No.2

and make his submissions. The respondent No.2 shall, thereafter, proceed to pass the final order in accordance with law. We clarify that we have otherwise not gone into the merits of the matter. We have only addressed ourselves on the question whether the impugned order should be quashed on the ground that no opportunity of hearing was given to the writ applicant. The writ application stands disposed of accordingly.

(J. B. PARDIWALA, J)

(ILESH J. VORA, J)

Vahid

