

Court No. - 3

Case :- WRIT TAX No. - 114 of 2024

Petitioner :- Eveready Industries India Ltd. Lko. Thru. Signatory Sh. Sounik Mukherjee

Respondent :- State Of U.P. Thru. Secy. Ministry Finance , U.P. Lko. And Another

Counsel for Petitioner :- Atma Ram Verma

Counsel for Respondent :- C.S.C.

Hon'ble Mrs. Sangeeta Chandra,J.

Hon'ble Brij Raj Singh,J.

1. Heard Sri Rahul Agarwal alongwith Sri Utkarsh Malviya, learned counsel for the petitioner and Sri Rajesh Tiwari, learned Additional Chief Standing Counsel for the State-respondents.

2. This petition has been fled with the following main prayers:-

"Issue a Writ, Order or Direction in the nature of Certiorari quashing the impugned Order passed u/s 74 of the Uttar Pradesh Goods & Service Tax Act, 2017 bearing Reference No.ZD090224180025M dated 19.02.2024 issued in FORM GST DRC-1 a/w the Rectification Order bearing Ref. No.ZD0904244094478 dated 27.04.2024 issued in FORM GST DRC-08, by the Respondent no.2 (Annexure no.1).

(2) Issue a Writ, Order or Direction in the nature of certiorari quashing the impugned Show Cause Notice issued to the petitioner u/s 74 of the UPGST Act vide Reference No. ZD090823132533D dated 07.08.2023 issued in FORM GST DRC-01 by Respondent no.2 (Annexure No.2)."

3. It is the case of the petitioner that the company was registered under Uttar Pradesh Goods and Services Tax Act, 2017 (for short 'the Act'). An audit notice was issued to the petitioner on 05.05.2022 vide FORM GST ADT-01 by the Joint Commissioner (Tax Audit), Commercial Tax, Lucknow, requiring the petitioner to produce books accounts and present its case regarding due discharge of tax liabilities. A Physical visit of the premises of the petitioner was conducted by the Revenue Officials on 11.05.2022. Another notice was issued in FORM GST ADT-01 to the petitioner on 05.01.2023 on similar grounds. The petitioner complied with all the directions issued by the

respondents, however, it was not given any information regarding the action taken in furtherance of audit notices dated 05.05.2022 and 05.01.2023 by the respondent authorities. As per the provisions of Section 65(4) of the Act, if the respondents failed to complete the audit exercise after the lapse of three months from the date of audit, unless the said period has been explicitly extended, it shall be deemed to have concluded upon expiration of the said period. No draft audit report was prepared or issued to the petitioner in FORM GST ADT-02. A show cause notice was issued to the petitioner on 07.08.2023 relying upon the audit FORM GST ADT-01, that were issued on 05.05.2022 and on 05.01.2023. No audit report was ever issued to the petitioner.

4. The impugned show cause notice does not provide any date, place and time of hearing despite the same being mandatory procedure. In the Columns specified for date, place and time of hearing, the show cause notice mentions NA (not applicable) thereby denying the petitioner any opportunity of hearing. The petitioner submitted its reply on 06.11.2023 and in the said reply, the petitioner has specifically prayed that it may be given personal hearing, if the officer is not satisfied with the explanation given in writing to the show cause notice.

5. Learned counsel for the petitioner has argued that despite the mandate of Section 75(4) of the Act providing personal hearing and despite the petitioner specifically asking for personal hearing, no opportunity of personal hearing was granted and the impugned order was passed in violation of settled principles of natural justice.

6. Learned counsel for the petitioner to substantiate his argument, has read out the provisions of Section

75(4) of the Act and has placed reliance upon three judgements of Co-ordinate Benches of this Court in ***Bharat Mint & Allied Chemicals Vs. Commissioner, Commercial Tax & others***, (2022) Vol.48 VLJ 325, ***Writ Tax No.551 of 2023, M/s Mohini Traders Vs. State of U.P. and another*** decided on 03.05.2023 and ***Writ Tax No.44 of 2024, M/s Mahendra Educational Pvt. Ltd. Vs. State of U.P.*** decided on 05.03.2024, copies of such orders passed by Co-ordinate Benches have been collectively filed as Annexure No.9 to the writ petition.

7. Learned Counsel appearing on behalf of the State-respondents has argued that against the impugned order of assessment, the petitioner has a statutory remedy under Section 107 of the Act and all the arguments on the merits of the case, can be dealt with by the appellate authority.

8. Learned counsel for the petitioner has argued that the leading judgment of a Co-ordinate Division Bench in ***Bharat Mint & Allied Chemicals*** (supra) has been relied upon in the case of ***M/s Mohini Traders*** (supra) and ***M/s Mahendra Educational Pvt. Ltd.*** (supra) by two Co-ordinate Division Benches and he has read out the judgment of the Division Bench in ***Bharat Mint & Allied Chemicals*** (supra), wherein the Division Bench has framed two questions to decide; the first related to whether opportunity of personal hearing is mandatory under Section 75(4) of the CGST/UPGST Act 2017; and second question was whether under the facts and circumstances of the case, the impugned adjudication order has been passed in breach of principle of natural justice and consequently, it deserved to be quashed in exercise of powers conferred under Article 226 of the Constitution of India.

9. The Co-ordinate Bench dealt with the notice issued

to the petitioner under Section 75(4) of the Act and observed that under the column meant for the date, time and place of personal hearing, the officer has noted NA (not applicable) and then has quoted the language of Section 75(4) of the Act. To decide the controversy, it is appropriate to quote the judgement of ***Bharat Mint & Allied Chemicals*** (supra) in extenso :-

"8. Section 75(4) of the Act, 2017 reads as under:-

"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."

9. From perusal of Section 75(4) of the Act, 2017 it is evident that opportunity of hearing has to be granted by authorities under the Act, 2017 where either a request is received from the person chargeable with tax or penalty for opportunity of hearing or where any adverse decision is contemplated against such person. Thus, where an adverse decision is contemplated against the person, such a person even need not to request for opportunity of personal hearing and it is mandatory for the authority concerned to afford opportunity of personal hearing before passing an order adverse to such person.

10. In the counter affidavit the respondents have taken the stand that no opportunity of hearing is required before passing the assessment order. In support of their contention the respondents have relied upon the judgment of Hon'ble Supreme Court in Union of India and Others Vs. M/s.Jesus Sales Corporation AIR 1996 SC 1509. Perusal of the judgment in the case of M/s. Jesus Sales Corporation (supra) shows that the observation was made by Hon'ble Supreme Court while interpreting 3rd proviso to Section 4 M(1) of the Imports and Exports (Control) Act 1947, which is reproduced below:

"Provided also that, where the Appellate authority is of opinion that the deposit to be made will cause undue hardship to the appellant, it may, at its discretion, dispense with such deposit either unconditionally or subject to such conditions as it may impose."

11. The aforequoted 3rd proviso of Section 4 M (1) of the Act 1947 does not contemplate any opportunity of personal hearing in contrast to the provisions of Section 75(4) of the CGST/UPGST Act, 2017 which specifically mandates for opportunity of hearing before passing the order. The counter affidavit has been filed by an Officer of the rank of Joint Commissioner, Corporate Circle Commercial Tax, Bareilly who has either not read the aforesaid judgment of Hon'ble Supreme Court or was not able to understand it and in a casual manner the counter affidavit has been filed in complete disregard to the statutory mandate of Section 75(4) of the Act 2017.

12. It has also been admitted in the counter affidavit that except permitting the petitioner to reply to the show cause notice, opportunity of personal hearing has not been afforded to the petitioner. Thus the legislative mandate of Section 75(4) of the Act to the authorities to afford opportunity of hearing to the assessee i.e. to follow principles of natural justice, has been

completely violated by the respondents while passing the impugned order."

10. The Court thereafter observed that the stand taken by the respondents that the petitioner has alternative remedy of appeal under Section 107 of the Act cannot be accepted. Insofar as it is settled law that availability of alternative remedy, is not a complete bar to entertain a writ petition under Article 226 of the Constitution of India and has referred to exceptions that have been carved out to alternative remedy by the Hon'ble Supreme Court with regard to three cases i.e. (i) where there is complete lack of jurisdiction in the officer or authority to take the action or to pass the order impugned; or (ii) where vires of an Act, Rules, Notification or any of its provisions has been challenged; or (iii) where an order prejudicial to the writ petitioner has been passed in total violation of principles of natural justice. There are other exceptions also, which have been mentioned in sub-clauses (iv) to (xi) of the Division Bench judgment, which are being quoted herein-below:-

"(iv) Where enforcement of any fundamental right is sought by the petitioner.

(v) Where procedure required for decision has not been adopted.

(vi) Where Tax is levied without authority of law.

(vii) Where decision is an abuse of process of law.

(viii) Where palpable injustice shall be caused to the petitioner, if he is forced to adopt remedies under the statute for enforcement of any fundamental rights guaranteed under the Constitution of India.

(ix) Where a decision or policy decision has already been taken by the Government rendering the remedy of appeal to be an empty formality or futile attempt.

(x) Where there is no factual dispute but merely a pure question of law or interpretation is involved.

(xi) Where show cause notice has been issued with preconceived or premeditated or closed mind."

11. The Division Bench in the case of ***M/s Mohini Traders*** (supra) has placed reliance upon the judgement rendered in the case of ***M/s Bharat Mint &***

Allied Chemicals (supra) and observed in similar terms in paragraphs 8 and 9 as follows:-

"8. Even otherwise in the context of an assessment order creating heavy civil liability, observing such minimal opportunity of hearing is a must. Principle of natural justice would commend to this Court to bind the authorities to always ensure to provide such opportunity of hearing. It has to be ensured that such opportunity is granted in real terms. Here, we note, the impugned order itself has been passed on 25.11.2022, while reply to the show-cause-notice had been entertained on 14.11.2022. The stand of the assessee may remain unclear unless minimal opportunity of hearing is first granted. Only thereafter, the explanation furnished may be rejected and demand created.

9. Not only such opportunity would ensure observance of rules of natural of justice but it would allow the authority to pass appropriate and reasoned order as may serve the interest of justice and allow a better appreciation to arise at the next/appeal stage, if required."

12. A coordinate Bench sitting at Lucknow in **M/s Mahendra Educational Pvt. Ltd.** (supra) has placed reliance upon the Division Bench Judgement in the case of **M/s Bharat Mint & Allied Chemicals** (supra) and has quoted the observations made in the case of **M/s Mohini Traders** (supra) and observed in paragraph 8 as follows:-

"8. Not only such opportunity would ensure observance of rules of natural of justice but it would allow the authority to pass appropriate and reasoned order as may serve the interest of justice and allow a better appreciation to arise at the next/appeal stage, if required."

13. It has been argued on the basis of observations made by the three Division Benches of this Court that the law is settled insofar as Section 75(4) of the Act is concerned. The officer should not only issue a show cause notice, but also give personal hearing where a request has been received in writing from the person chargeable with tax or penalty or where any adverse decision is contemplated against any such person.

14. Learned counsel for the State-respondents has pointed out that Section 74 of the Act, which relates to determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any willful-

misstatement or suppression of facts. Section 74 of the Act in its entirety is quoted below:-

"Section 74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful-misstatement or suppression of facts.

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent. of such tax

within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded."

15. The action taken against the petitioner under Section 74(9) of the Act does not provide for personal hearing to be given to the concerned person chargeable with tax or penalty. It only states that the proper officer shall after considering the representation, if any, made by the person chargeable with tax determine the amount of tax, interest and penalty due from such person and issue an order.

16. Learned counsel for the petitioner, however, has pointed out that Section 75 of the Act which as has been published in the text book, is under sub-heading of "General Provisions Relating to Determination of Tax". It has been argued that Section 75 of the Act will apply as a general procedure to be adopted in all actions that are proposed under Sections 73 and 74 of the Act and the procedure prescribed under Section 75 of the Act will have to be followed by the tax authorities even for determination of tax under Section 74 of the Act

17. Learned counsel appearing for State-respondents has referred to Section 75 (2) of the Act and says that the language of Section 75(2) of the Act is clear that where any appellate authority or appellate Tribunal or

Court concludes that the notice issued under sub-section (1) of Section 74 of the Act is not sustainable for the reason that the charges of fraud or any willful-misstatement or suppression of fact to evade tax has not been established against the person to whom the notice was issued, the proper officer shall determine the tax payable by such person, deeming as if the notice were issued under sub-section (1) of Section 73 of the Act.

18. It has been argued that sub-clauses of Section 75 of the Act relate to the procedure to be followed by the Officer after remand of the matter by the appellate authority or tribunal or the court and sub-section (4) should be read in that context and it requires that an opportunity of hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty or where an adverse decision is contemplated against such person.

19. It has however been argued by the learned counsel for the petitioner that if such an interpretation is given to Section 75 of the Act and its sub clauses, it would render a situation anomalous and he has read out sub-sections (5), (6), (7), (8) and (9) of Section 75 of the Act. Section 75 of the Act in its entirety is quoted below:-

"Section 75. General provisions relating to determination of tax.

(1) Where the service of notice or issuance of order is stayed by an order of a court or Appellate Tribunal, the period of such stay shall be excluded in computing the period specified in sub-sections (2) and (10) of section 73 or sub-sections (2) and (10) of section 74, as the case may be.

(2) Where any Appellate Authority or Appellate Tribunal or court concludes that the notice issued under sub-section (1) of section 74 is not sustainable for the reason that the charges of fraud or any willful-misstatement or suppression of facts to evade tax has not been established against the person to whom the notice was issued, the proper officer shall determine the tax payable by such person, deeming as if the notice were issued under sub-section (1) of section 73.

(3) Where any order is required to be issued in pursuance of the direction of the Appellate Authority or Appellate Tribunal

or a court, such order shall be issued within two years from the date of communication of the said direction.

(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.

(6) The proper officer, in his order, shall set out the relevant facts and the basis of his decision.

(7) The amount of tax, interest and penalty demanded in the order shall not be in excess of the amount specified in the notice and no demand shall be confirmed on the grounds other than the grounds specified in the notice.

(8) Where the Appellate Authority or Appellate Tribunal or court modifies the amount of tax determined by the proper officer, the amount of interest and penalty shall stand modified accordingly, taking into account the amount of tax so modified.

(9) The interest on the tax short paid or not paid shall be payable whether or not specified in the order determining the tax liability.

(10) The adjudication proceedings shall be deemed to be concluded, if the order is not issued within three years as provided for in sub-section (10) of section 73 or within five years as provided for in sub-section (10) of section 74.

(11) An issue on which the Appellate Authority or the Appellate Tribunal or the High Court has given its decision which is prejudicial to the interest of revenue in some other proceedings and an appeal to the Appellate Tribunal or the High Court or the Supreme Court against such decision of the Appellate Authority or the Appellate Tribunal or the High Court is pending, the period spent between the date of the decision of the Appellate Authority and that of the Appellate Tribunal or the date of decision of the Appellate Tribunal and that of the High Court or the date of the decision of the High Court and that of the Supreme Court shall be excluded in computing the period referred to in sub-section (10) of section 73 or sub-section (10) of section 74 where proceedings are initiated by way of issue of a show cause notice under the said sections.

(12) Notwithstanding anything contained in section 73 or section 74, where any amount of self-assessed tax in accordance with a return furnished under section 39 remains unpaid, either wholly or partly, or any amount of interest payable on such tax remains unpaid, the same shall be recovered under the provisions of section 79.

(13) Where any penalty is imposed under section 73 or section 74, no penalty for the same act or omission shall be imposed on the same person under any other provision of this Act."

20. Learned counsel for the petitioner has also argued that Section 75(4) of the Act would be otiose as if this Court comes to the conclusion that the argument

raised by the learned counsel for the State-respondents is liable to be accepted as Section 74(1) of the Act also contemplates issuance of a notice and calling for a reply. It has been submitted that Sections 73, 74 and 75 of the Act lay down one integrated scheme regarding imposition of tax or penalty and the procedure to be followed by the Taxing Officer.

21. This Court having considered the submissions made by the learned counsel for the parties has gone through the leading judgment in the case of *M/s Bharat Mint & Allied Chemicals* (supra) and finds that the said judgment although has read into the language of Section 75(4) of the Act and the right of "personal" hearing, it has not mentioned any causus omissus on the part of the legislature reading into the statute words like "personal" hearing" as the Act itself only states that an opportunity of hearing shall be given.

22. Order is reserved.

23. Till pronouncement of the judgement, the impugned orders passed by the assessing authority shall remain stayed.

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(Brij Raj Singh, J.) (Sangeeta Chandra, J.)

Order Date :- 3.5.2024

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