

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 8503 of 2023**

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M/S M GROUP

Versus

ASSISTANT COMMISSIONER OF STATE TAX

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Appearance:

MR.AVINASH PODDAR(9761) for the Petitioner(s) No. 1

MS ANCHAL A PODDAR(13386) for the Petitioner(s) No. 1

MR PRANAV TRIVEDI, AGP for the Respondent(s) No. 1,2,3

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CORAM: HONOURABLE MR. JUSTICE BIREN VAISHNAV

and

HONOURABLE MRS. JUSTICE MAUNA M. BHATT**Date : 26/10/2023****ORAL ORDER****(PER : HONOURABLE MR. JUSTICE BIREN VAISHNAV)**

1. Rule returnable forthwith. Mr. Pranav Trivedi, learned AGP appearing for the respondents waives service of notice of rule. With the consent of learned advocates for the parties, the matter is taken up for final hearing today.

2. Heard Mr. Avinash Poddar, learned advocate for the petitioner and Mr. Pranav Trivedi, learned AGP appearing for the respondent.

3. By way of this petition, under Article 226 of the Constitution of India, the petitioner has challenged the order dated 06.04.2022 passed by the competent authority under Section 73 of the GST Act (for short 'the GST Act').

4. Facts in brief would indicate that the petitioner - a partnership firm is running in the name and style of 'M/s. M Group'. It is the case of the petitioner that it is engaged in the supply of manpower services for installation of fiber optics etc. On 17.07.2021, the petitioner received a notice in Form ASMT-10 under section 61 of the Act for financial year 2018-19. It was the case of the department while issuing notice that the petitioner ought to have provided reasons for discrepancy in the input tax credit. The petitioner responded vide letter dated 17.09.2021 providing an explanation with documentary evidences in respect of input tax credit claimed in GSTR-3B.

4.1 Thereafter, on 03.12.2021, a show-cause notice under Section 73 of the Act for DRC-01 was issued to the petitioner inter alia stating that the petitioner had claimed excess input tax credit to the extent of Rs.46,85,584/-. The petitioner was asked to show cause as to why an order not be passed. An assessment order was thereafter passed on 06.04.2022 which is the subject matter of this petition.

5. Mr. Avinash Poddar, learned advocate for the petitioner would submit that having satisfied the authorities on the discrepancy notice under Section 61 of the Act by a response on 17.09.2021, though a show-cause notice under Section 73 was issued on 03.12.2021 asking the petitioner to respond by 19.12.2021, apart from the fact that no date for personal hearing was suggested in the notice, in fact the petitioner could not respond to such notice as one of the persons was trying to secure anticipatory bail. The additional ground raised during the course of arguments was that apparently when

the assessment order is read, the figure is reworked in the assessment order at Rs.35,02,643/- whereas in the final order of assessment, the figure is worked out at Rs.46,91,684/-. Had an opportunity of hearing been given to the petitioner, it would have satisfied the assessing authority that the order was bad. Essentially it was the case of the learned counsel for the petitioner that in accordance with the provisions of Section 75(4) of the Act the order was passed in violation of principles of natural justice inasmuch as an adverse decision was taken against the petitioner, which was otherwise contemplated but not passed in accordance with the principles of natural justice by giving an opportunity of hearing.

5.1 Mr. Poddar would rely on the decision of the Division Bench of this court in Special Civil Application No. 11332 of 2022. He would rely on para 13 of the decision to indicate that the court recording the submission had suggested that if there was a violation of principles of natural justice, the order of the assessing authority ought

to be set aside only on this ground providing a fresh opportunity of hearing.

6. Mr. Pranav Trivedi, learned AGP appearing for the respondents would rely on a decision of the larger bench of this court in the case of Panoli Intermediate (India) Ltd. vs. Union of India where the larger bench of this court while framing questions on the maintainability of a petition under Article 226 of the Constitution of India and also where a statutory remedy was provided under the Excise Act, could a petition under Article 226 of the Constitution of India be entertained for the purposes of condoning the delay in filing the appeal. Reliance was placed on para 31 of the decision wherein the question was answered in the negative.

7. In rejoinder, Mr. Poddar, learned advocate for the petitioner has placed reliance on the recommendations of the 52nd GST Council meeting.

8. Having heard learned advocates for the respective parties, few admitted facts which need to be indicated are as under:

(a) A discrepancy notice was issued on 17.07.2021 to which the petitioner responded on 17.09.2021.

(b) The discrepancy notice did not lay out any figures on discrepancy, however when the petitioner responded to the discrepancy notice on 17.09.2021, a detailed show-cause notice under Section 73 of the Act was issued on 03.12.2021 assessing that the petitioner was liable to pay Rs.46,85,584/- towards claiming input tax credit.

(c) The petitioner was required to file his response on or before 19.12.2021 which the petitioner admittedly did not. The defence of the petitioner is that since one of the partners was engaged in pursuing his remedy for securing anticipatory bail, the petitioner could not respond to the notice.

(d) The assessment order was accordingly passed wherein a discrepancy in the figures as referred to hereinabove was noticed.

8.1 Though the order relied upon by Mr. Poddar in **Special Civil Application No. 11332 of 2022** indicates that in case there is violation of principles of natural justice and an order is passed without an opportunity of hearing, proceedings need to be remanded, also, drawing attention of the court to the provisions of sub-section 11 of Section 107 of the Act, the submission of learned advocate for the petitioner would be that ultimately the appellate authority would not be in a position to remand the proceedings to the competent authority and therefore to undertake an exercise of appeal would be futile is also something that this court is unable to accept.

8.2 Admittedly, even if it is the contention of the petitioner that there was a violation of principles of

natural justice inasmuch as an adverse order which was contemplated was passed without giving an opportunity of hearing, the petitioner in fact though had a remedy of filing an appeal has chosen not to do so. The decision in the case of **Panoli Intermediate (India) Pvt. Ltd.** (Supra) where the larger bench of this court has held that jurisdiction under Article 226 of the Constitution of India cannot be exercised for condoning delay in filing an appeal which was otherwise time barred would prevent us from exercising jurisdiction and help the petitioner. However, we leave it at that.

9. It will be open for the petitioner to file an appeal with an application for condonation of delay in filing such appeal explaining the circumstances which are available to suggest to the appellate authority that the petitioner was prevented by way of a sufficient cause in filing such an appeal. This we are inclined to observe in light of the recommendations of the 52nd GST council which so as to facilitate measures of trade has opined that the time

period for filing appeals under Section 107 will be allowed in case such appeals are filed against orders which have been passed on or before 31.03.2023 up to 31.01.2024. The relevant portion of the GST recommendations read as under:

B. Measures for facilitation of trade:

Amnesty Scheme for filing of appeals against demand orders in cases here appeal could not be filed within the allowable time period:

The Council has recommended providing an amnesty scheme through a special procedure under section 148 of CGST Act, 2017 for taxable persons, who could not file an appeal under section 107 of the said Act, against the demand order under section 73 or 74 of CGST Act, 2017 passed on or before the 31st day of March, 2023, or whose appeal against the said order was rejected solely on the grounds that the said appeal was not filed within the time period specified in sub-section (1) of section 107. In all such cases, filing of appeal by the taxpayers will be allowed against such orders upto 31st January 2024, subject to the condition of payment of an amount of pre- deposit of 12.5% of the tax under dispute, out of which at least 20% (i.e. 2.5% of the tax under dispute) should be debited from Electronic Cash Ledger. This will facilitate a large number of taxpayers, who could not file appeal in the past within the specified time period.”

10. As far as the counsel's submissions that the appellate authority will not be in a position to undertake exercise of remedy in light of sub-section 11 of section 107 of the Act, while filing an application for condonation of delay, the applicant - petitioner can suggest in what manner there has been a violation of principles of natural justice in light of the fact that while issuing notice on 03.12.2021, the assessment order indicates a discrepancy in figures inasmuch as the show-cause notice initially under DRC-01 indicated a figure of Rs.46,85,584/- whereas the assessment order indicates discrepancy of Rs.35,02,643/- whereas in the final order again a figure of Rs.46,91,684/- is indicated. All these circumstances shall be taken into consideration by the appellate authority in the application for condonation of delay which otherwise can be decided in accordance with law.

11. With the aforesaid observations, the petition is disposed of. It is clarified that this court has not entered into the merits of the matter. It shall be open for the

appellate authority while considering the application for condonation of delay to take into consideration the aspects raised in this petition as well as the observations made in this order and the recommendations of the GST Council. Rule is discharged.

(BIREN VAISHNAV, J)

(MAUNA M. BHATT,J)

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