

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 13744 of 2022

SKP PHARMACHEM

Versus

UNION OF INDIA

Appearance:

UCHIT N SHETH(7336) for the Petitioner(s) No. 1

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

SERVED BY RPAD (N) for the Respondent(s) No. 3

CORAM: **HONOURABLE MS. JUSTICE SONIA GOKANI**

and

HONOURABLE MR. JUSTICE SANDEEP N. BHATT

Date : 07/01/2023

ORAL ORDER

(PER : **HONOURABLE MS. JUSTICE SONIA GOKANI**)

1. This petition is preferred seeking to challenge the non-cancellation of composition permission under Central/Gujarat Goods and Services Tax Act, 2017 (hereinafter referred to as “the GST Act”) by invoking the jurisdiction under Article 226 of the Constitution of India.

2. The facts leading to the present petition are as follows :

2.1 the petitioner is a proprietorship concern. It is duly registered under the GST Acts. The registration was obtained on 26.12.2021. It is averred that the tax consultant of the petitioner erroneously

chose the option of composition under Section of the GST Acts at the time of obtaining the registration. The composition permission was effected from 26.12.2021. It is say of the petitioner that he did not make any supply by making use of such composition permission.

2.2 In March, 2022, the petitioner got an export order pursuant to which the petitioner exported the goods being wholly unaware that it was operating under the composition permission and it was not entitled to export goods under such permission. Respondents also accepted the Letter of Undertaking for allowing without payment of tax.

2.3 It is further averred that the petitioner since came to know of the error committed while applying the registration under the GST at the time of filing return in the month of March 2022. He immediately filed an application for withdrawal from composition levy on 8.4.2022. It cited the export transaction as the reasons for the withdrawal. However, the application for withdrawal was possible on the portal only with prospective effect.

3. The grievance on the part of the petitioner is composition permission was withdrawn with effect from 8.4.2022 i.e. the date on

which the application of the petitioner was made. The portal did not allow him to retrospectively withdraw from the composition permission and hence, the petitioner raised a grievance with the GST helpdesk on 12.5.2022.

4. The reply was received by the petitioner on 6.6.2022 that the portal would allow cancellation of permission only for the financial year in which application has been made. The same was since in the month of April 2022, retrospectively, it would not be feasible.

5. In absence of any positive solution, the petitioner was not in a position to file returns as a regular taxable person for the month of March, 2022, when he had made the export transaction. He filed an application before the jurisdictional officer on 16.6.2022 requesting for cancellation of composition permission with effect from 1.3.2022 to enable him to file returns as regular taxable person under the GST Act.

6. Notice was issued on 27.6.2022 as a return defaulter and calling upon the petitioner to file the pending returns. Another letter was issued by the 2nd respondent authority on 29.6.2022 to the petitioner communicating that he would not be in a position to

retrospectively cancel the composition permission in absence of functionality on the GST portal.

7. Aggrieved petitioner is before this Court making grievance that he has already deposited the tax due as per the returns to be filed under the GST Act. The Officer, being fully aware of the genuine difficulties faced by the petitioner and therefore, his action of treating him as defaulter is seriously challenged with the following prayers :-

A. *This Hon'ble Court may be pleased to issue a writ of mandamus or writ in the nature of mandamus or any other appropriate writ or order directing the respondents to forthwith cancel the composition permission granted under Section 10 of the GST Acts with effect from 1.3.2022;*

B. *This Hon'ble Court may be pleased to issue a writ of mandamus or writ in the nature of mandamus or any other appropriate writ or order quashing and setting aside notice dated 27.6.2022 issued by the petitioner by treating the petitioner as return defaulter;*

C. *Pending notice, admission and final hearing of this petition, this Hon'ble Court may be pleased to direct the respondents to*

accept manual return for the month of the March, 2022 so as to enable filing of regular online returns under the GST Act for the subsequent months;

D. Ex-parte interim relief in terms of prayer C may kindly be granted.

E. Such further relief(s) as deemed fit in the facts and circumstances of the case may kindly be granted in the interest of justice for which act of kindness your petitioner shall forever pray.

8. This Court issued Notice on 20th July, 2022 [Coram: Mr. N.V.Anjaria & Mr. Bhargav D.Karia, JJ].

9. Affidavit-in-reply on behalf of the respondent Nos. 1, 2 & 3 filed by the Principal Commissioner, Central Goods & Services Act and Central Excise, Commissioner, Vadodara I, has challenged some of the versions put forth by the petitioner by stating that he has taken GST registration under composition scheme with effect from 26.12.2021. If the petitioner had erroneously taken the GST registration under composition scheme and was under impression that petitioner was registered as normal/regular taxpayer, then petitioner was supposed to file the GST returns prescribed for

normal and regular taxpayer i.e. GSTR-1M/GSTR-1Q and GSTR-3BM/GSTR-3B Q, for the period from the date of registration i.e. 26.12.2021 till that date when it became aware that petitioner is registered under Composition Scheme under Section 10 of the CGST Act, 2017. The petitioner would have come to know of the said mistake on 20.1.2022 i.e. at the time of filing of monthly/quarterly return prescribed for the period from 26.12.2021 to 31.12.2021 for which the due date was 20th January, 2022. No such effort was made by the Petitioner to know that petitioner did not have registration under normal and regular tax payer. Website also was indicative of the fact that the petitioner has filed CMP-08 returns on 3rd February, 2022. It was the quarterly return specifically prescribed for the taxpayer registered under Compositions Scheme under Section 10 of the CGST Act, 2017 (as amended) read with Rule 62 of CGST Rules, 2017 which action was indicative of fact that it was well aware that their registration is under Section 10 of CGST Act, 2017 and not under normal/regular taxpayers. It is also stand of the respondents that acceptance of Letter of Undertaking would not mean that a taxpayer registered under Composition

Scheme had breached the provisions of Section 10 of CGST Act, 2017.

9.1 Section 10(2) of CGST Act, 2017 provides that the provisions for the registered persons who are eligible/ineligible to opt for registration under section 12(1) of CGST Act, 2017 and there is no bar for taxpayer registered under composition scheme for filing Letter of Undertaking and further acceptance by the department. Rule 96A of the CGST Rule has been relied upon and urged that any registered person wants to avail the option to supply goods or services for export without payment of integrated tax. The rules provides that prior to export, a bond or a Letter of Undertaking in Form GST RED-11 is permissible. He can also apply for change of their registration status from composition to normal/regular taxpayer. An LUT filed under Rule 96A of CGST Rules, 2017 and accepted by the department is valid for a period of the whole financial year for which is is applied. Letter of Undertaking is for the export of goods without payment of GST and required to be filed prior to export. Department cannot ensure that the taxpayer who has applied for Letter of Undertaking would certainly under take the

export of the goods/services is likely to breach the conditions mentioned in Section 10 of CGST Act, 2017. It is not endorsed the interpretation of the petitioner that the department is bound to cancel the permission at least from the date on which the breach of permission was committed by the petitioner. Notice has been issued to a return defaulter under Section 46 of CGST Act for not filing of returns. It is also admitted that there is no such functionality available in the GST-ACES System Dash Board. It is confirmed by the GST-ACES-System Operator vide its email dated 29.7.2022. It is also submitted that there is no provision under the CGST Act or Rules to change the petitioner's registration status, upon receiving application, from the composition taxpayer to regular taxpayer retrospectively .

10. It is also further contended by the respondents that the petitioner is very well aware about their registration status. The request made by the petitioner was not as per CGST Act, the department cannot be alleged a taxpayer of having deprived a taxpayer from the benefit given under Section 10 of CGST Act, 2017 unless and until, the taxpayer has breached the conditions and

therefore, the reliefs as claimed by the petitioner are beyond the law and as there is no cause of action arising for such breach.

11. Rejoinder affidavit has been filed by the petitioner which may not be required to be amplified at this stage. Suffice to note that except the reference of Rule 6(2) of the CGST Rule, 2017 which supports the case of the petitioner that it ceases to be governed by the composition permission immediately from the date of breach of condition. So far as the Circular dated 31.12.2018 is concerned, the petitioner may not be allowed voluntary withdrawal from a date prior to beginning of financial year, in any case such permission is required to be cancelled by the authorities in terms of statutory provisions.

12. We have heard Mr.Uchit N.Sheth, learned advocate for the petitioner and Mr. Priyank Lodha, learned Senior Standing Counsel appearing for the respondent Nos. 1, 2 and 3.

13. Mr. Sheth, learned advocate for the petitioner has relied upon the decision of **Godway Furnicrafts Vs. State of Andhra Pradesh and others** reported in [2021] 95 GSTR 385 (AP). Section 10(1) of the Andhra Pradesh Goods and Services Act, 2017 provided that

where the aggregate turnover of the assessee in the preceding financial year does not exceed Rs. 50 Lakhs, as assessee may opt to pay tax as prescribed at compounded rates. The option exercised by the assessee under sub Section (1) of Section 10 would lapse if his aggregate turnover during the preceding financial year exceeds the limit prescribed under Sub Section (1). The court interpreted the word “preceding financial year” in Section 10(1) of the Act, it cannot be restricted to the period commencing from the goods and services tax regime. By holding that if it is so all the assesseees who had submitted returns with false declarations for the financial year 2017-2018 would escape the liability to pay any tax as there would not be any preceding financial year in the goods and services tax regime for the period 2017-18 and that could not be the intention of the legislature at all. In the matter before the Andhra Pradesh High Court, the assessee was served with a show cause notice in terms of Section 74 and Section 10(5) of the Act where, the demand with interest and penalty was confirmed in the writ petition after the appeal was dismissed. The Hon’ble High Court held that assessee had paid tax under the composition scheme according to the option

exercised in the web portal, for nearly four quarters, but the option exercised by the assessee was self-declaratory, which required the verification. The option which had been exercised by the assessee took time for verification by the authorities otherwise the same would not estop the respondents from directing the assessee to pay tax as regulated under the provisions of the Act, if the option exercised was found to be incorrect.

14. The only question that is required to be addressed by this Court is the application before the jurisdictional officer dated 16.6.2022 which requested for cancellation of composition permission with effect from 1.3.2022 to enable the petitioner to file the returns as regular taxable person under the GST Act could have been denied.

15. The Petitioner's composite permission was effective from 26.12.2021. According to him, it never had supplied by making use of such composition permission be that it may, it had already filed the return which had expected to file in the month of January.

16. Prescribed for those who are availing the composition benefit, admittedly the petitioner has filed CMP-08 returns but not the GSR-

1M/GSTR-1Q and GSTR 3B/M/GSTR-3B Q returns which are meant for regular/normal taxpayers for the period from the date of registration i.e. 26.12.2021 till the date it applied for cancellation to say that it was not aware of the registration under the composition scheme under Section 10 of CGST Act is not something believable and to say that he could come to know this mistake of even while filing of return of his income is also not believable. It is taken the GST registration under the composition scheme, the option is always with the taxpayer and it is his first application for the cancellation of this registration under the composition scheme had come on 8.4.2022. It is case of the petitioner that he got an order for export in March, 2022. He had already exported the goods to say that he was unaware of such operation under the composition permission and was not entitled to the export goods under such permission is not acceptable. It is also not palatable to accept that the tax consultant of the petitioner had erroneously chosen the option of composition under Section 10 of the CGST Act at the time of obtaining the registration and he was suffering. It is different thing that he would like to opt out of this and since Rule 6 of the CGST

Rule to permits him to so do it on the day on which, he makes some breach. The software should permit him to make an application from that day. Rule 6 of the CGST Rule reads as under:-

Rule 6 :- The Validity of composition levy:-

- (1) The option exercised by a registered person to pay tax under section 10 shall remain valid so long as he satisfied all the conditions mentioned in the said section .
- (2) The person referred to in sub-rule (1) shall be liable to pay tax under sub section (1) of Section of from the day he ceases to satisfy any of the conditions mentioned in section 10 or the provisions of this Chapter and shall issue tax invoice for every taxable supply made thereafter and he shall also file an intimation for withdrawal from the scheme in FORM GST CMP 04 within seven days of the occurrence of such event.

17. In the instant case as can be noticed , his expert has been made on 16th March, 2022, as per this provision he ceases to satisfy the conditions mentioned in Section 10 of CGST Rule and therefore, his request for cancellation of registration under the

composition permission shall need to be essentially from the date on which, he had breached the condition stipulated in section 10 of the CGST Act. To that extent, the petitioner is right that the moment he entered into the export transactions would become entitled for composition permission because of provision of Section 10 and his permission is required to be cancelled with effect from the date of export transaction. It is different aspect that it will be for the authority concerned then to decide as to in what manner, he would be liable to pay tax but, that would enable the petitioner to file the returns and pay the taxes as regular taxable persons. The limitation of the software should not become the limitation of the implementation of the statue which otherwise is quite clear on this aspect. Even without entering into the intent of the party concerned his request for cancellation of his composition permission granted under Section 10 of the CGST Act with effect from 16th March, 2022 shall need to redress. The jurisdiction officer has also been categorical of his inability to so permit for want of the options available in the software The helpdesk automatic response did not help him actually only on account of this limitation. Therefore, to

that extent, the petitioner is within his right to seek direction to
cancel his composition permission with effect from his having
made the expert on 16th March, 2022. While acceding to his request
of such permission to be treated to have been cancelled from 16th
March, 2022. We also direct the respondent-authority to take care of
the software. Let their limitations be also addressed by the highest
authority. We also permit the respondent to decide the tax liability in
accordance with law within period of two weeks from the date of
receipt of this order. Let the the effect be given to these directions.

Present petition stands disposed of accordingly.

Direct service is permitted

THE HIGH COURT
OF GUJARAT

(SONIA GOKANI, J)

(SANDEEP N. BHATT, J)

BEENA SHAH

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