RAJASTHAN HIGH COURT
सत्यमेव जयते

HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

D.B. Civil Writ Petition No.16702/2023

Goverdhandham Estate Private Limited, Having Its Registered Office At 3-BA-42, Jawahar Nagar, Jaipur, Rajasthan 302004 Through Its Director Mr. Amit Khandelwal.

----Petitioner

Versus

1. State Of Rajasthan, Through Chief Commissioner, State Tax, Goods And Service Tax Department, Jhalana Institutional Area, JLN Marg, Jaipur
2. Joint Commissioner, Circle-A, Zone II, State Tax, Jhalana Institutional Area, JLN Marg, Jaipur
3. Union Of India Through Chief Commissioner, Central Tax, Goods And Service Tax Department, New Central Revenue Building, Statue Circle, Jaipur

----Respondents

Rajasthan High Court
सत्यमेव जयते
Web Copy - Not Official

For Petitioner(s) : Mr. Sandeep Taneja, Advocate with
Mr. Kartikey Sharma, Advocate

For Respondent(s) : Mr. Punit Singhvi, Advocate
Mr. Ayush Singh, Advocate
Mr. Ajay Shukla, Advocate
Mr. Pushpendra Badgoti, Advocate

HON'BLE THE ACTING CHIEF JUSTICE MR. MANINDRA MOHAN SHRIVASTAVA
HON'BLE MRS. JUSTICE SHUBHA MEHTA

Order

REPORTABLE

17/01/2024

1. Heard.

2. This petition is directed against order dated 29.09.2023 to the extent of observations made in the enclosures to the said order that even after accepting the explanation/reply furnished by the petitioner, same does not affect the validity of the show cause notice and the legal liability of the person to discharge tax liability

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under the show cause notice remains ineffective. The petitioner has also prayed for quashing of show cause notice 21.09.2023.

3. The facts necessary for decision of the controversy involved in this petition are that the petitioner, who carries on the business of operating a hotel, is registered under the Goods and Service Tax Act, having GSTIN No.08AACCG4611J1ZQ. He submitted his monthly returns in the prescribed form No.GSTR 3B for the financial year 2017-18. The respondent No.2, however, undertook scrutiny of the returns and thereafter, issued a notice on 01.09.2023 in prescribed form No.GST ASMT-10 intimating certain discrepancies, drawing proceedings under Section 61 of the RGST/CGST Act, 2017 for the financial year 2017-18. The aforesaid notice dated 01.09.2023 stated that the petitioner had availed input tax credit which was not available to him as per Section 17(5) of the RGST Act, 2017. In the notice, it was further detailed out that the ITC on payment made to M/s Kone Elevators India Pvt. Ltd. for purchase of lift and payment made for purchase of Air Conditioners were under block credit as per Section 17(5) of the RGST Act, 2017 and therefore, the same were not available to be availed. On such consideration, it was stated that the petitioner was liable to reverse the tax amounting to Rs.18,44,884/- (SGST amounting to Rs.9,22,442/- and CGST amounting to Rs.9,22,442/-), along with interest under Section 50 of the RGST Act. The petitioner was called upon to furnish explanation on or before 15.09.2023.

4. In response to the said notice, the petitioner submitted a preliminary reply on 15.09.2023. Though in that reply, further time was sought to furnish detailed reply till 01.10.2023, at the

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same time, the petitioner sought to respond by submitting that the company was engaged in the business of operating hotels and payments made to various persons for purchase of elevators and Air Conditioners were made. According to the petitioner, the said equipments are plant and machinery for the purpose of business and are necessary for making outward supply of services to hotel customers. On such factual premise, the petitioner claimed that the provisions contained in clauses (c) and (d) of Section 17(5) of the CGST Act, 2017, which carves out exception of non-availability of ITC are not applicable to "plant and machinery" and claim be excluded from the exception.

5. In sum and substance, the petitioner stand was that the ITC would be available on the plant and machinery which is used for making outward supply of service.

6. The respondents, however, issued a show cause notice under Section 73 of the Act on 21.09.2023, whereby proceedings for tax recovery were initiated.

7. Curiously enough, a communication in FORM No.GST ASMT-12, referable to Rule 99 (3) of the Central Goods and Service Tax Rules, 2017 came to be issued on 29.09.2023, wherein it was stated that the petitioner's reply to notice under Section 61 has been found to be satisfactory and no further action is required to be taken in the matter. Along with the said communication an enclosure was made stating that issuance of ASMT-12 does not affect the validity of show cause notice issued.

8. Despite reply of the petitioner having been found satisfactory and communication in form GST ASMT-12 having been issued in its favour, the show cause notice under Section 73 was not

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withdrawn and proceedings were not dropped. Hence, the present petition was filed.

9. The submission of learned counsel for the petitioner is that once the respondents invoked their jurisdiction under Section 61 of the Act and undertook the scrutiny of return, without considering petitioner explanation on the discrepancies pointed out, upon due application of mind, power under Section 73 of the Act could not be invoked. He would submit that assumption of jurisdiction under Section 73 when the proceedings already been initiated under Section 61, without consideration of the explanation, are without jurisdiction.

10. The second limb of submission of learned counsel for the petitioner is that in any case, once the explanation offered to the discrepancies pointed out in notice under Section 61, ASMT-10 is found to be acceptable, the proceedings under Section 73 could not be drawn on the basis of discrepancy found in the return. Therefore, the proceedings drawn under Section 73 are liable to be quashed. He would also submit that once the explanation offered pursuant to notice under Section 61 is accepted, it is not permissible under the law to still retain jurisdiction to draw proceedings under Section 73 on the basis of discrepancy found in the return.

11. *Per contra*, learned counsel for the respondents would submit that firstly; the notice under Section 61 which was issued to the petitioner was responded by half-hearted reply. However, in any case, explanation offered by the petitioner was duly considered by the competent authority and only when the explanation was not found acceptable, the authority proceeded to

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assume jurisdiction under Section 73. He would also submit that the power under Section 73 could be invoked in terms of provisions contained in sub-section (1) of Section 73 and is, therefore, not confined to discrepancies found in the scrutiny of return.

12. Relying upon the decision of the Division Bench of Allahabad High Court in the case of Nagarjuna Agro Chemicals Pvt. Ltd. Versus State of U.P. and Another (Writ Tax No.336/2023), it is submitted that power under Sections 61 and 73 are independent and separate and it cannot be said that in case where no scrutiny is undertaken, power under Section 73 could not be invoked.

13. We have heard learned counsel for the parties and given our anxious consideration to various submissions made at the bar.

14. In the present case, indisputedly, a notice under form No. GST ASMT-10 was issued to the petitioner on 01.09.2023 under Section 61 of the RGST Act, 2017. The notice clearly stated that during scrutiny of the return for the tax period under reference, discrepancies were noticed. The contents of the said notice clearly show that jurisdiction under Section 61 was invoked having noted certain discrepancies in the return of tax and not on the basis of any other material. The aforesaid notice was replied by the petitioner on 15.09.2023. A perusal of the reply shows that the petitioner, though, sought some time to file detailed reply, nevertheless, offered explanation as to why exception clauses (c) and (d) of Section 17(5) of the CGST Act, 2017 will not be applicable in the case of the petitioner and the petitioner would be entitled to avail ITC on plant and machinery. Thereafter, a show

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cause notice under Sections 7, 9, 50 and 73 of the RGST Act, 2017 was issued to the petitioner.

15. Chapter XII of the RGST Act, 2017 deals with assessment. Section 59 provides for self-assessment. Section 60 makes provision with regard to provisional assessment. Section 61 provides for scrutiny of returns. The aforesaid provision being relevant for adjudication of the controversy involved in the instant writ petition is extracted hereinbelow:-

> "Section 61. Scrutiny of Returns.
> (1) The proper officer may scrutinize the return and related particulars furnished by the registered person to verify the correctness of the return and inform him of the discrepancies noticed, if any, in such manner as may be prescribed and seek his explanation thereto.
> (2) In case the explanation is found acceptable, the registered person shall be informed accordingly and no further action shall be taken in this regard.
> (3) In case no satisfactory explanation is furnished within a period of thirty days of being informed by the proper officer or such further period as may be permitted by him or where the registered person, after accepting the discrepancies, fails to take the corrective measure in his return for the month in which the discrepancy is accepted, the proper officer may initiate appropriate action including those under section 65 or section 66 or section 67, or proceed to determine the tax and other dues under section 73 or section 74."

16. Sub-Section (1) of Section 61 authorises the proper officer to scrutinise the return and related particulars furnished by the registered persons to verify the correctness of the return and inform him of the discrepancies noticed, if any, in prescribed manner and seek his explanation thereto. Sub-Section (2) and Sub-Section (3) deal with different contingencies. While sub-section (2) provides for the course of action that may be adopted

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in a case where explanation is found acceptable, sub-section (3) deals with the procedure to be followed in case no satisfactory explanation is furnished within a stipulated period or where after accepting discrepancy, the person concerned fails to take corrective measures in its return.

17. A fair, logical construction and interpretation of the aforesaid provision would mean that once the proper officer undertakes scrutiny of return and comes across any discrepancies in the said return, he may seek explanation. Where explanation is found acceptable, the registered person is required to be informed accordingly and no further action is required to be taken in this regard. It is only when no satisfactory explanation is furnished within the stipulated period or where discrepancy having been accepted, corrective measures are not taken, the proper officer assumes jurisdiction to initiate appropriate proceedings under Sections 65 or 66 or 67 or proceed to determine the tax and other dues under Section 73 or Section 74. That is discernible on plain reading of the aforesaid provision.

18. In the present case, once notice under Section 61 was issued to the petitioner requiring its explanation pointing out certain discrepancies from the return, the proper officer, before he could assume jurisdiction to issue show cause notice under Section 73 of the Act, was mandated under the law to consider the explanation offered by the petitioner.

19. True it is that the petitioner, when he submitted a reply on 15.09.2023 sought some more time. However, at the same time, the petitioner submitted its preliminary reply also. The course of action which could be adopted in such cases was either to issue a

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communication extending time for giving explanation/detailed reply or to apply mind to whatever reply was submitted before the authority. The statutory scheme engrafted in Section 61 does not allow the authority to invoke powers under Section 73 of the Act and issue show cause notice unless the explanation submitted by the registered person is considered. At this stage, we may notice that the expression contained in sub-section (3) of Section 61 clearly indicates that on the explanation offered, proper officer is required to apply its mind. The expression "in case no satisfactory explanation is furnished" is required to be rationally construed and interpreted to make it meaningful and not empty formality. The aforesaid provision is required to be interpreted in the manner that the explanation offered by the registered person is to be examined by the proper officer. Once an explanation is offered, the proper officer is obliged under the law to examine the same and record its own reasons to conclude whether there is satisfactory explanation furnished.

20. If we look into the notice dated 21.09.2023 issued in purported exercise of power under Section 73 of the Act, we find that the notice nowhere records that the explanation offered by the petitioner was not found to be satisfactory.

21. Though learned counsel for the respondents has submitted that this notice reveals consideration on explanation also, we do not find any such consideration in the said notice. The authority has reproduced the provision contained in Section 17(5) of the Act and it has been recorded as below:-

> "As such, it appears that the input tax credit claimed in the GSTR 3B returns is not available as per

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section 17(5) of RGST Act and Central GST Act for 2017-18 and is inadmissible in accordance with law."

22. The petitioner has specifically stated in its reply that the lift and air conditioners formed part of plant and machinery therefore it is entitled to avail ITC. This specific assertion was not considered anywhere in the show cause notice. Therefore, even assuming that in the show cause notice itself, application of mind could be reflected, we find that the contents of notice under Section 73 fall short of this legal requirement.

23. The submission of learned counsel for respondents that the power under Section 73 could be invoked irrespective of whether satisfaction in terms of Section 61(3) was arrived at or not is misplaced both in law and on facts. Where show cause notice is based on discrepancies found in the return and not on any other independent material, the proper officer is obliged under the law to follow the mandate of Section 61 before invoking jurisdiction under Section 73 of the Act. Present is not a case that on any other material, the proceedings under Section 73 were initiated. Present is, on facts, a case where jurisdiction under Section 73 has been invoked and show cause notice has been issued on the basis of discrepancies found in the return. If that be so, jurisdiction under Section 73 could be invoked only after complying with the mandate of Section 61 and not otherwise. For that reason, reliance placed on the decision of the Division Bench of Allahabad High Court in the case of Nagarjuna Agro Chemicals Pvt. Ltd. Versus State of U.P. (supra) is completely misplaced, being distinguishable. On facts, that was not a case where proceedings under Section 73 were initiated on the basis of

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scrutiny of return. The Department had not initiated any action referable to Section 61 of the Act but independent of that, on certain grounds with regard to classification and consequential tax payable on certain goods. The question which arose for consideration was whether the Department is enjoined to issue a notice under sub-section (3) of Section 61 of the CGST Act, 2017 once returns have been submitted by the assessee before initiating action under Section 74 of the Act or not. While deciding the aforesaid issue, it was held that scrutiny proceedings of return as well as proceedings under Section 74 are two separate and distinct exigencies and therefore, issuance of notice under Section 61(3) cannot be construed as a condition precedent for initiation of action under Section 74 of the Act.

24. At the cost of reiteration, we noticed that present is not a case where jurisdiction under Section 73 has been assumed on ground other than discrepancies found in the return.

25. In the present case, the invocation of jurisdiction under Section 73 is based on discrepancies found in the return. If that be so, the mandate of Section 61 is required to be followed by the proper officer before assuming jurisdiction under Section 73 of the Act.

26. What is apparent from the record is that initially proceedings under Section 73 were initiated without consideration of the explanation offered by the petitioner and during the pendency of those proceedings the authorities did consider the petitioner's explanation and a communication in form GST ASMT -12 was issued to the petitioner on 29.09.2023. This clearly refers to order of acceptance of reply against notice issued under Section 61 of

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the Act. The communication says that with reference to reply submitted by the petitioner, details of which are mentioned in the table given therein the reply submitted by the petitioner has been found to be satisfactory and no further action is required to be taken in the matter. This communication is clearly referable to the provisions contained in Section 61(2) read with Rule 99 of the CGST Rules. Sub-Section (2) of Section 61 clearly states that in case explanation is found acceptable, the registered person shall be informed accordingly and no further action shall be taken in this regard. We may also carefully refer to the provisions contained in Rule 99 which read as below:-

> "99. Scrutiny of returns.- (1) Where any return furnished by a registered person is selected for scrutiny, the proper officer shall scrutinize the same in accordance with the provisions of section 61 with reference to the information available with him, and in case of any discrepancy, he shall issue a notice to the said person in FORM GST ASMT-10, informing him of such discrepancy and seeking his explanation thereto within such time, not exceeding thirty days from the date of service of the notice or such further period as may be permitted by him and also, where possible, quantifying the amount of tax, interest and any other amount payable in relation to such discrepancy.
> (2) The registered person may accept the discrepancy mentioned in the notice issued under sub-rule (1), and pay the tax, interest and any other amount arising from such discrepancy and inform the same or furnish an explanation for the discrepancy in FORM GST ASMT-11 to the proper officer.
> (3) Where the explanation furnished by the registered person or the information submitted under sub-rule (2) is found to be acceptable, the proper officer shall inform him accordingly in FORM GST ASMT-12."

27. Considering the statutory scheme as engrafted in Section 61(2) read with Rule 99 of the Rules, there is clear scheme of

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statute that once the explanation with regard to discrepancy in the return is offered and accepted, further proceedings are not required to be drawn.

28. Learned counsel for the respondents laid much emphasis on the enclosure to ASMT-12. It appears that the proper officer under a misconceived notion of law sought to retain jurisdiction contrary to the provisions of law. Where the discrepancy in the return is found, the law requires explanation to be obtained from the registered person. The power under Section 73 could be invoked only when the explanation offered is not satisfactory. Once the explanation is accepted, no further proceedings could be drawn.

29. In view of above, the show cause notice issued to the petitioner is found against the provisions contained in Section 61 of the Act. Resultantly, the show cause notice as well as the assumption of power under enclosure to ASMT-12 both are declared illegal and unsustainable in law and therefore set aside.

30. Accordingly, the petition stands allowed. No order as to costs.

(SHUBHA MEHTA),J (MANINDRA MOHAN SHRIVASTAVA),ACTING CJ

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