

Court No. - 3

Case :- WRIT TAX No. - 1265 of 2022

Petitioner :- M/S Abhay Traders

Respondent :- Commissioner Commercial Tax U.P. Lucknow And Another

Counsel for Petitioner :- Aloke Kumar

Counsel for Respondent :- C.S.C., Ankur Agarwal, Gopal Verma

Hon'ble Siddhartha Varma, J.

Hon'ble Arun Kumar Singh Deshwal, J.

(Delivered by Hon'ble Arun Kumar Singh Deshwal, J.)

1. Heard Sri Aloke Kumar, learned counsel for the petitioner, Sri Ankur Agarwal, learned counsel for respondent nos.1 & 2 and Sri Gopal Verma, learned counsel for respondent no.3.

2. Controversy in the present writ petition is that for the A.Y. 2018-19, a notice was served to the petitioner-M/s Abhay Traders on 22.06.2022 indicating that with regard to two purchases made from M/s Raghav Enterprises vide Invoice Detail Nos.94 and 95 on 12 June, 2018 of the value of Rs.2,64,022/- and Rs.8,00,088/-, it was found that there had been no actual supply of goods from M/s Raghav Enterprises to the petitioner. It was also found that M/s Raghav Enterprises was a bogus firm. Under such circumstances, a notice was issued to the petitioner on 22 June, 2022 asking it to reply as to why tax, penalty and interest be not imposed upon the petitioner. It was stated that because the petitioner had made a bogus supply, the Input Tax Credit, which the petitioner had claimed, was wrongly claimed.

3. Learned counsel for the petitioner has submitted that the notice itself was vague and bad in law and, therefore, be quashed and set aside. He further submits that on the

basis of the Special Investigation Branch report, it was concluded that no goods had been supplied from M/s Raghav Enterprises to the petitioner-M/s Abhay Traders and, therefore, the conclusion itself was wrong. However, the Department came to the conclusion that the report submitted by Special Investigation Branch was correct. A notice to that effect was also to have been given to the petitioner so that the petitioner could have replied that in fact, goods were purchased by the petitioner from M/s Raghav Enterprises and, therefore, the Input Tax Credit which the petitioner had claimed was in accordance with law.

4. To substantiate his point, Sri Aloke Kumar, learned counsel for the petitioner, heavily relied upon the judgement and order dated **06.10.2021** passed in **W.P. (T) No. 2444 of 2021 (M/s Nkas Services Private Limited Vs. State of Jharkhand & Others)** of the High Court of Jharkhand at Ranchi.

5. Sri Ankur Agarwal, learned counsel appearing for respondent nos.1 & 2 and Sri Gopal Verma, learned counsel for respondent no.3, essentially made their submissions relying upon Section-74 of the Uttar Pradesh Goods And Services Tax Act, 2017 (hereinafter referred to as the 'Act, 2017'). Relying upon Section 74 (1) of the Act 2017, learned counsel for the respondents stated that the proper officer had yet to conclude to initiate the proceedings. If only it "appeared" to the proper officer that tax had not been paid or short paid or erroneously refunded or where Input Tax Credit had been wrongly availed or utilized by reason of fraud or any wilful statement or suppression of fact, the proceeding could be initiated.

6. Sri Ankur Agarwal, learned counsel for respondent nos.1 and 2 submitted that in the instant case, when it only appeared to the proper officer that the Input Tax Credit had been wrongly availed, the proceedings had been correctly initiated. He also submitted that the challenge was only to a notice under Section 74 (1) of the Act, 2017 and, therefore, it was open for the petitioner to reply to the same at the appropriate stage and before the appropriate authority, and this writ petition was therefore not maintainable. Learned counsel for respondent nos.1 and 2 heavily relied upon the judgement of the Gujarat High Court reported in **2020 (40) G.S.T.L. 439 (Guj.) Cera Sanitaryware Limited Vs. State of Gujarat**. Learned counsel appearing for respondent nos.1 and 2, upon being confronted with the notice that the notice was only to the effect that the petitioner had to reply as to what was the tax, the penalty and the interest to be imposed, he very categorically submitted that when the notice itself was based upon the fact that the petitioner had not been supplied the goods and when that eventuality had yet not been concluded by any proceeding, then it was open to the petitioner to reply also to the effect that M/s Raghav Enterprises actually supplied the goods and that M/s Raghav Enterprises was not a bogus firm on the date of transaction i.e. 12.06.2018.

7. After hearing both the parties and on perusal of the record, it would be proper for this Court to consider the issue of whether the impugned notice can be challenged by way of this writ petition, though remedy of filing reply is available. The issue regarding the proper show cause notice was considered by the Apex Court in the cases of **Gorkha Security Services Vs. Government (NCT of**

Delhi) reported in (2014) 9 SCC 105; Metal Forging & Another Vs. Union of India & Others reported in 2003 (2) SCC 36 as well as in the case of **Commissioner of Central Excise, Chandigarh Vs. Shital International reported in (2011) 1 SCC 109**. In the judgement mentioned above, Apex Court observed that it is trite law that unless the foundation of the case is laid in the show cause notice, the same cannot be treated as proper show cause notice and notice issued in a format without even striking out any relevant portion and without stating clear contraventions committed by the petitioner, will not substitute the requirement of proper show cause notice. Paragraph nos.21 and 22 of the Apex Court judgement in **Gorkha Security Services Vs. Government (NCT of Delhi) (supra)** are being quoted as below:

"21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show cause notice is to make the noticee understand the precise case set up against him, which he has to meet. This would require the statement of imputations detailing the alleged breaches and defaults he has committed so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, considering that it is harshest possible action.

22. The High Court has simply stated that the purpose of a show cause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfill the requirements of principles of natural justice, a show cause notice should meet the following two requirements viz:

- i) The material/grounds to be stated on which, according to the department necessitates an action;
- ii) Particular penalty/action which is proposed to be taken. It is this second requirement that the High Court has failed to omit.

We may hasten to add that even if it is not specifically mentioned in the show cause notice, but it can be clearly and safely discerned from the reading thereof, that would be sufficient to meet this requirement."

8. Hon'ble Apex Court in ***Dilip N Shroff Vs. Joint Commissioner of Income Tax reported in (2007) 6 SCC 329***, has also observed that expression in Section 73/74 of the Act, 2017 "appears to be proper officer" is not to a casual act but should show the full application of mind by proper officer.

9. Purpose of the show cause proceeding is meant to give a person proceeded against a reasonable opportunity of making his objection against the proposed charges as indicated therein as observed by the Hon'ble Supreme Court in the case of ***Khem Chand Vs. Union of India AIR 1958 SC 300***. This judgement was also considered by the Apex Court in ***Oryx Fisheries P. Ltd. Vs. Union of India reported in (2010) 13 SCC 427***. Paragraph Nos.24 to 27 are being quoted as below:

"24. This Court finds that there is a lot of substance in the aforesaid contention. It is well settled that a quasi-judicial authority, while acting in exercise of its statutory power must act fairly and must act with an open mind while initiating a show cause proceeding. A show cause proceeding is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice.

25. Expressions like "a reasonable opportunity of making objection" or "a reasonable opportunity of defence" have come up for consideration before this Court in the context of several statutes. A Constitution Bench of this Court in *Khem Chand v. Union of India*, of course, in the context of service jurisprudence, reiterated certain principles applicable in the present case also.

26. S.R. Das, CJ speaking for the unanimous Constitution Bench in *Khem Chand* held that the concept of 'reasonable opportunity' includes various safeguards and one of them, in the words of the learned Chief Justice, is:

"(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;"

27. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage, the authority issuing the charge- sheet cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show cause notice gets vitiated by unfairness and bias and the subsequent proceeding becomes an idle ceremony."

10. Therefore, from the law laid down by the Apex Court in the judgement mentioned above, it is clear that

requirement of principles of natural justice by a show cause notice can only be met if:

(I) a show cause notice contains the material/ground which, according to the department necessitates an action;

(II) the particular penalty/action which is proposed to be taken. Even if it is not specifically mentioned in the show cause notice **but it can be clearly and safely discerned from the reading thereof that would be sufficient to meet this requirement.**

11. From the perusal of the impugned notice, it is clear that it contains necessary details and grounds, which are the basis for issuing the same. Still, at the tail end of the impugned notice, instead of seeking a reply on the allegation mentioned in the impugned show cause notice issued under Section 74 (1) of the Act, 2017, petitioner was directed to reply with regard to the tax and penalty and it was stated that if no reply was furnished then order under Section 74(9) of the Act, 2017 would be passed. Therefore, the impugned notice because of the facts mentioned in the earlier part of the notice cannot be said to be patently illegal, being without jurisdiction. Therefore, there is no ground for quashing the same under Article 226 of the Constitution of India.

12. Therefore, after considering the submission of parties, the contention made by the learned counsel for the respondents and on the perusal of the record and after taking into account all the observations made by the Apex Court, we are of the view the petitioner should be relegated to the remedy of filing a reply to the impugned show cause notice. Because the notice did contain the details about the foundation of the case, i.e. that there

was no actual supply of goods on 12 June, 2018 by M/s Raghav Enterprises to petitioner, we are not quashing the show cause notice instead we are permitting the petitioner to also reply with regard to the fact that goods were in fact supplied to the petitioner from M/s Raghav Enterprises.

13. Under such circumstances, this writ petition is **disposed of**, allowing the petitioner to file his reply/objection against the impugned notice, along with relevant material, within one month. In his response, it shall be open to the petitioner to specifically submit his explanation regarding the fact that there was an actual supply of goods from M/s Raghav Enterprises.

14. Needless to say, it was open to the petitioner to submit a reply regarding the fact that the taxation, the penalty and the charging of interest were being wrongly made.

15. Further, we direct that the report of the Special Investigation Branch shall not be considered a final report and shall be subject to the decision by the Assessing Authority. The order shall be passed after considering the petitioner's reply, the evidence it might submit and the evidence it may offer.

Order Date :- 14.7.2023

S.Chaurasia