GAHC010198292019

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/7501/2019

M/S. WOODLAND WORKS (I) PVT. LTD.
REP. BY ITS DIRECTOR MS. ISHANI CHAKRABORTY, AGED ABOUT 53 YEARS, D/O- SRI RAMENDRA NATH CHAKRABORTY, R/O- BAPAPUNG ROAD, BAPAPUNG, P.O. AND P.S. DIGBOI, DIST- TINSUKIA, ASSAM.

VERSUS

UNION OF INDIA AND 3 ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVERNMENT OF INDIA, MINISTRY OF FIANCE, DEPARTMENT OF REVENUE, NEW DELHI. PIN- 110001.

2:THE COMMISSIONER (AUDIT) OF CENTRAL GOODS AND SERVICES TAX
GST BHAWAN
THIRD FLOOR
KEDAR ROAD
FANCY BAZAR
GUWAHATI
P.O. AND P.S. FANCY BAZAR
DIST.- KAMRUP(M)
ASSAM
PIN NO.- 781001.

3:JOINT/ ADDITIONAL COMMISSIONER OF GOODS AND SERVICES TAX
CGST COMMISSIONERATE
DIBRUGARH
F LANE
MILAN NAGAR
P.O.
P.S. AND DIST- DIBRUGARH
ASSAM
PIN NO.- 786001.

4:ASSISTANT COMMISSIONER OF CENTRAL GOODS AND SERVICES TAX
CGST (AUDIT)
DIBRUGARH AUDIT CIRCLE-II
CENTRAL EXCISE AND SERVICE TAX
AUDIT BRANCH
MANDIR PATH
BAIRAGIMATH
P.O.
P.S. AND DIST- DIBRUGARH
ASSAM
PIN NO.- 786001

Advocate for the Petitioners : Mr. A. Gupta, Advocate

Advocate for the respondents: Mr. S. C. Keyal, SC, GST

BEFORE

HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 21.09.2023

Date of Judgment : 16.10.2023

JUDGMENT AND ORDER (CAV)

The instant writ petition has been filed by the petitioner challenging the demand-cum-show cause notice dated 07.05.2019 as well as the service tax audit conducted by the officers of the Dibrugarh Audit Circle-II.

2. The facts involved in the instant case are that the petitioner herein is a Company incorporated under the provisions of the Companies Act, 2013. The petitioner Company was registered under Section 69 of the Finance Act, 1994 (for short, 'the Act of 1994') read with Rule 4 of Service Tax Rules, 1994. The petitioner Company was issued a Registration Number bearing No.AAACW3347DSD002 for providing various taxable services under the categories of 'Business Auxiliary Services', 'Man Power or Security Agency Services', 'Rent-a-Cab Operator Services', 'Supply of Tangible Goods Services' and 'Works Contract Services'.

3. The respondent No.4 herein had issued a communication on 18.03.2016 informing the petitioner that the petitioner's unit was scheduled to be audited by the Central Excise

& Service Tax Audit Party and the petitioner was requested to submit the various documents for the last 5 years or since the financial year of last audit to the respondent No.4 latest by 05.04.2016. It was further mentioned in the said communication that the petitioner has to keep all the records ready from start of the business for inspection during audit. Pursuant to the said communication, the petitioner on 05.04.2016 submitted the various documents on various dates which would be apparent from a perusal of the documents annexed as Annexure-P-4. It reveals from the said documents that the same related to the period from April, 2012 to March, 2015. It is further seen from the documents enclosed as Annexure-P-4 that the respondent No.4 had made an audit report on 02.02.2017 for the period from April, 2012 to March, 2015.

4. Subsequent thereto, it is also seen from the Annexure-P-1 that the respondent No.4 issued another communication dated 17.08.2017 informing the petitioner that the petitioner's unit would be audited by the Central Excise and Service Tax Audit Party and the petitioner was requested to submit the various documents for the last 5 financial years, i.e. 2012-13 to 2016-2017 or next to the period of the last audit up to 30.06.2017 on 24.08.2017. It is also seen from the records that the petitioner duly participated in the said audit being carried out by the Central Excise and Service Tax Audit Party without any objection. This aspect of the matter is apparent from a perusal of the Annexure-P-5 whereby the Petitioner submitted its reply to the on spot audit objections raised by the team of auditors in pursuance of the service tax audit conducted on the basis of the communication dated 17.08.2017.

5. The record further shows that on 07.05.2019, the Additional Commissioner (Audit) having its Office within the establishment of the respondent No.2 had issued the impugned demand-cum-show cause notice to the petitioner. In the said demand-cum-show cause notice, it was mentioned that during the course of audit undertaken by the Officers of the Dibrugarh Audit Circle-II, Dibrugarh, it was observed that the petitioner had either short paid or not paid service tax against Works Contract Service, Business

Auxiliary Service, Rent-a-Cab Scheme Operator Service, Transport of Goods by Road, Man Power or Security/Detective Agency Service & Legal Consultancy Service during the period from April, 2015 to March, 2017. It was also mentioned that the petitioner had not paid the interest against delayed payment of service tax and also had not paid the late fee on delayed submission of ST-3 return for the period from October, 2016 to March, 2017 and wrongly availed CENVAT credit on input services and capital goods during April, 2015 to March, 2017. On the basis of the statements made in the said demand-cum-show cause notice, the petitioner was asked to reply within 30 (thirty) days from the date of receipt of the said notice as to why the service tax amounting to Rs.32,18,481/- should not be demanded under Section 73 (1) (a) of the Act of 1994; wrong availment of CENVAT Credit of Rs. 22,11,240/- should not be demanded and recovered under Rule 14 of the CENVAT Credit Rules, 2004; non-payment of interest of Rs.10,51,677/- for the period from April, 2015 to March, 2017 should not be demanded and recovered under the point of Taxation Rule, 2011; late fee of Rs. 20,000/- for delay in furnishing the prescribed return in Form ST-3 as provided in Section 70 of the Act of 1994 read with Rule 7C of the Service Tax Rules, 1994 should not be demanded and recovered; interest should not be charged under Section 75 of the Act of 1994 as well as, as to why penalty should not be imposed upon the petitioner under Section 78 of the Act of 1994.

6. It further reveals from the record that the Superintendent of the Central Goods and Service Tax vide communications dated 14.06.2019; 26.06.2019 and 29.07.2019 had fixed various dates for personal hearing of the petitioner and the petitioner was directed to appear before the Joint Commissioner, Central Goods and Service Tax, Dibrugarh on such dates fixed so as to avail the opportunity to be heard either in person or through its authorized representatives with due authorization/vakalatnama in original along with all documentary evidence upon which the petitioner intended to reply in support of defence.

7. The Petitioner instead of submitting his reply to the demand-cum-show cause

notice dated 07.05.2019 had approached this Court challenging the demand-cum-show cause notice by filing the instant writ petition.

8. It reveals that this Court vide an order dated 04.10.2019 permitted the petitioner to submit the detailed response before the authorities within a period of four weeks and further directed that no coercive action be taken against the petitioner pursuant to the proceedings initiated as per the demand-cum-show cause notice dated 07.05.2019 till the next date. The record further reveals that the interim order had been continuing from time to time.

9. The petitioner had also filed an additional affidavit whereby the reply to the demand-cum-show cause notice submitted by the petitioner had been enclosed as Annexure-P-8.

10. The record further reveals that the respondents had also filed a joint affidavit through the Commissioner, Central Goods and Service Tax, Dibrugarh. In the said affidavit, it was mentioned that the communication dated 17.08.2017 was issued as per the allocation of Guwahati Headquarters Audit Schedule at Sl. No.216 (S.Tax) dated 16.08.2017, and subsequently, the show cause notice dated 07.05.2019 was issued after approval of MCM of Guwahati Audit Commissionerate. It was mentioned that all such proceedings were as per Section 174 (2) of the Central Goods and Service Tax Act, 2017 (for short, 'the CGST Act of 2017') read with the erstwhile Act of 1994. It was further mentioned that the Officers of the Central Goods and Service Tax Audit have power to conduct audit as per Section 174 (2) (e) & (f) of the Act of 2017 read with the Act of 1994. The Petitioner had filed an affidavit-in-reply against the affidavit-in-opposition.

11. I have heard the learned counsels for the parties and perused the materials on record. Mr. A. Gupta, the learned counsel for the petitioner submitted that in terms with the Act of 1994, Section 72A was the only provision by which an audit can be directed by the Principal Commissioner of Central Excise or the Commissioner of Central Excise. He submitted that a perusal of Section 72A of the Act of 1994 would show that

the power to direct the special audit has to be on the basis of formation of an opinion, i.e. reasons to believe that any person liable to pay service tax had failed to declare or determine the value of taxable service correctly or has availed and utilized credit of duty or tax paid or has operation spread out in multiple locations and it is not possible or practicable to obtain a true and complete picture of his accounts from the registered premises falling under the jurisdiction of the said Commissioner. The learned counsel for the petitioner submitted that only upon having the reasons to believe of the existence of the circumstances as stipulated in Clauses (i), (ii) & (iii) of Section 72A (1) of the Act of 1994, Principal Commissioner of Central Excise or the Commissioner of Central Excise can direct such person to get his accounts audited by a Chartered Accountant or Cost Accountant nominated by him to the extent or for the period as may be specified by the Commissioner. It is, therefore, the submission of the learned counsel for the petitioner that taking into account vide Section 173 of the Act of 2017, the Act of 1994 stood repealed and only certain things have been saved which have been mentioned in Section 174 of the Act of 2017 on the basis of the said, the learned counsel for the petitioner's submissions were two folds. First, the audit commenced on the basis of the communication dated 17.08.2017, i.e. after coming into effect of the Act of 2017, that too when the Act of 1994 was no longer in force and as such there was nothing which could have been saved by Section 174 of the Act of 2017 as there was nothing pending at that point of time. Secondly, it was further submitted that even assuming for argument's sake, the proceedings under the Act of 1994 was still permissible by virtue of Section 174 (2) (e) of the Act of 2017, then also such audit ought to have been done in terms with Section 72A of the Act of 1994 and for initiating proceedings under Section 72A of the Act of 1994, the Principal Commissioner of Central Excise or the Commissioner of Central Excise had to have reasons to believe about the existence of the circumstances as mentioned at Clauses (i) to (iii) of Sub-Section (1) of Section 72A of the Act of 1994. It is the further submission of the learned counsel for the petitioner that as the entire show cause proceedings has been initiated on the basis of the audit

report and the audit report has been done in violation of Section 174 of the Act of 2017 and even Section 72A of the Act of 1994, the instant show cause proceedings is totally nonest and without jurisdiction.

12. On the other hand, Mr. S. C. Keyal, the learned counsel appearing on behalf of the GST Department submitted that Section 174 (2) (e) categorically mandates that the repeal of the Act of 1994 shall not affect any inspection, enquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery or arrears or remedy in respect of any such duty, tax, surcharge, penalty, fine, interest, right, privilege, obligations, liabilities, forfeiture or punishment, and as such, the repealing of the Act of 1994 shall not affect the right of the respondent authorities to carry out and thereupon take appropriate proceedings under the Act of 1994, more so, when the period relates to when the Act of 1994 was in force. The learned counsel for the respondents further submitted that Section 72A of the Act of 1994 only stipulates the manner in which the power for special audit has to be exercised. The said Section 72A stood repealed by virtue of Section 173 of the Act of 2017. After coming into effect of the Act of 2017, Chapter-XIII relates to audit whereby Section 65 empowers audit by Tax Authorities and by Section 66, a special audit may be carried out in the circumstances mentioned therein. It is, therefore, the submission of the learned counsel for the respondents that after coming into effect the Act of 2017, the power to carry out necessary investigation, enquiry and verification including scrutiny and audit have been saved but the manner in which the audit is to be carried out would be in terms with Chapter-XIII of the Act of 2017 in as much as Section 72A of the Act of 1994 was repealed.

13. Upon hearing the learned counsel for the parties, the point which arises for determination is as to whether the Respondent Authorities could have carried out the audit on the basis of the communication dated 17.08.2017 and on the basis thereof issued the impugned demand-cum-show cause notice?.

14. For the purpose of deciding the said point for determination, this Court finds it relevant to take note of some of the provisions of the Act of 1994. Section 70 of the Act of 1994 relates to Furnishing of Returns. It stipulates that every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency and with such late fee not exceeding Rs.20,000/- for delayed furnishing of return, as may be prescribed. Therefore, from the Scheme of Section 70 of the Act of 1994, it would show that liability to pay service tax would be a self assessment of the tax due by the assessee on the service provided by the assessee himself.

15. Section 72 of the Act of 1994 relates to best judgment assessment. As per the said provisions, the Central Excise Officer is empowered to make assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment. The said power can be exercised by the Central Excise Officer, if any person liable to pay service tax either fails to furnish the return under Section 70 of the Act of 1994, i.e. fails to carry out the self assessment and submit his return and/or if a person liable to pay service tax having made a return, fails to assess the tax in accordance with the provision of Chapter V or Rules made thereunder. The said provision further stipulates the manner in which the best judgment assessment would be carried out.

16. Section 72A of the Act of 1994 relates to special audit. A perusal of Section 72A of the Act of 1994 reveals that the Principal Commissioner of Central Excise or the Commissioner of Central Excise having reasons to believe that any person liable to pay service tax (i) had failed to declare or determine the value of a taxable service correctly; or (ii) had availed and utilised credit of duty or tax paid-(a) which is not within the normal limits having regard to the nature of taxable service provided, the extent of capital goods used or the type of inputs or input services used, or any other relevant

factors as he may deem appropriate; or (b) by means of fraud, collusion, or any willful misstatement or suppression of facts; or (iii) had operations spread out in multiple locations and it is not possible or practicable to obtain a true and complete picture of his accounts from the registered premises falling under the jurisdiction of the said Commissioner may direct such persons, i.e. person liable to pay service tax to get his account audited by the Chartered Accountant or Cost Accountant nominated by him to the extent and for the period as may be specified by the Commissioner. In terms with Sub-Section (2) of Section 72A of the Act of 1994, the Chartered Accountant or Cost Accountant shall within the period specified by the Commissioner, submit a report duly signed and certified by him to the said Commissioner mentioning therein such other particulars as may be specified by him. Sub-Section (4) of Section 72A of the Act of 1994 further stipulates that the person liable to pay tax shall be given an opportunity of being heard in respect of any material gathered on the basis of the audit under Sub-Section (1) and proposed to be utilised in any proceeding under the provisions of the Chapter V or the Rules made thereunder.

17. Section 73 of the Act of 1994, empowers the Central Excise Officer to issue a show cause for recovery of service tax not levied/paid or short-levied or short-paid or erroneously refunded by issuance of a notice within thirty months from the relevant date. The proviso to Sub-Section (1) of Section 73 of the Act of 1994 enlarges the period for issuance of notice from thirty months to 5 years where any service tax has not been levied/paid or short-levied or short-paid or erroneously refunded by reason of (a) fraud; or (b) collusion; or (c) willful mis-statement; or (d) suppression of facts; or (e) contravention of any of the provisions of Chapter V or of the Rules made thereunder with intent to evade payment of service tax.

18. In the backdrop of the above, let this Court take note of the Constitution (101st Amendment) Act, 2016 (for short, Amending Act, 2016) whereby the Constitution of India was amended and the Goods and Service Tax was introduced. By this amendment,

concurrent taxing powers were conferred on the Union as well as the State including the Union Territories. Article 246A was inserted to the Constitution whereby the special provision for levy of GST by both the Union as well as the State was introduced. Article 269A of the Constitution was also inserted to provide for levy and collection of GST in the course of inter-State trade or commerce by the Government of India. Pursuant to the said Amending Act of 2016, the Central Goods and Service Tax Act, 2017 (for short, 'CGST Act of 2017'), the Integrated Goods and Service Tax Act, 2017 (for short, 'IGST Act, 2017') were enacted by the Parliament and the various State Goods and Service Tax Acts were enacted by the State Legislatures for the respective States for levy of GST.

19. Taking into account the point for determination, it is relevant to take note that vide Section 173 of the CGST Act of 2017, it was stipulated that save as provided in the CGST Act, 2017, Chapter V of the Finance Act, 1994 shall be omitted. It is further relevant to note that Section 174 of the CGST Act of 2017 stipulates what was saved. The relevant portion for the purpose of the instant case in respect to Section 174 of the CGST Act of 2017, i.e. Section 174 (2) (e) is reproduced hereinunder:-

(1) ----

"*(2) The repeal of the said Acts and the amendment of the Finance Act, 1994 (hereafter referred to as "such amendment" or "amended Act", as the case may be) to the extent mentioned in the sub-section (1) or section 173 shall not—*

(a) ---

(b) ----

(c) ---

(d) ---

(e) affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification

(including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed."

20. The above quoted portion of Section 174 of the CGST Act, 2017 would reveal that the omission of Chapter V of the Act of 1994 shall not affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if Chapter V of the Finance Act, 1994 had not been so amended or repealed. Therefore, w.e.f. 01.07.2017, i.e. the date on which the CGST Act of 2017 came into force, all such powers which were vested upon the authorities in respect to the period prior to 01.07.2017 pertaining to inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication or other legal proceedings etc. were saved as if the Act of 1994 had not been amended or repealed.

21. Now the question arises as how the authorities would exercise their powers which were saved in respect to the period prior to 01.07.2017. A perusal of Section 174 (2) (e) of the CGST Act, 2017 shows that the various powers of the authorities were saved including the power to scrutiny and audit. However, the procedure in which the power of audit is to be exercised which is Section 72(A) of the Act of 1994 is not saved. Under such circumstances, in the opinion of this Court, the procedure to carry on the audit has to be as per the CGST Act, 2017. The said opinion of this Court is based upon the well settled principle that while interpretating a statue, the Court should interpret the statute in such manner as the statute becomes workable. Reference in this regard is made to the

observation of the Supreme Court in the case of ***Vivek Narayan Sharma and Others vs. Union of India and Others***, reported in ***(2023) 3 SCC 1*** wherein at paragraph No.148, the Supreme Court observed that an interpretation which advances the purpose of the Act and which ensures the smooth and harmonious working should be chosen. Paragraph No.18 is quoted hereinunder:-

> "***148.*** *It is thus clear that it is a settled principle that the modern approach of interpretation is a pragmatic one, and not pedantic. An interpretation which advances the purpose of the Act and which ensures its smooth and harmonious working must be chosen and the other which leads to absurdity, or confusion, or friction, or contradiction and conflict between its various provisions, or undermines, or tends to defeat or destroy the basic scheme and purpose of the enactment must be eschewed. The primary and foremost task of the Court in interpreting a statute is to gather the intention of the legislature, actual or imputed. Having ascertained the intention, it is the duty of the Court to strive to so interpret the statute as to promote or advance the object and purpose of the enactment. For this purpose, where necessary, the Court may even depart from the rule that plain words should be interpreted according to their plain meaning. There need be no meek and mute submission to the plainness of the language. To avoid patent injustice, anomaly or absurdity or to avoid invalidation of a law, the court would be justified in departing from the so-called golden rule of construction so as to give effect to the object and purpose of the enactment. Ascertainment of legislative intent is the basic rule of statutory construction."*

22. Now coming into the facts involved in the instant case, it would be seen that for the period from April, 2012 to March, 2015, audit was duly completed. Subsequent thereto, on 17.08.2017, there was initiation of audit for the period from April, 2015 to 30.06.2017. It further reveals that the petitioner duly participated in the said audit as would be apparent from the Annexure-P-5 that too without any objection or challenge. It is only after the audit was carried out and the impugned demand-cum-show cause notice was issued on 07.05.2019 that the petitioner had assailed the Respondent Authority's power to carry out the audit. As already observed, the provision of Section 73 of the Act of 1994 empowers the Central Excise Officer to issue demand-cum-show cause notice

within a period of 30 months from the relevant date and if it falls within the proviso to Sub-Section (1) of Section 73 of the Act of 1994 within 5 years. This power to do so has been saved under Section 174 (2) (e) of the Act of 2017. It is also seen from Section 174 (2) (e) of the Act of 2017 that not only the said power to make recovery is saved, but to carry out investigation, enquiry and verification (including scrutiny and audit) have also been saved. Under such circumstances, in view of coming into effect the CGST Act of 2017, if any audit is carried out for the purpose of verification or investigation, the same has to be done in terms with Chapter- XIII of the CGST Act of 2017. At the cost of repetition, Chapter-XIII of the CGST Act of 20017 has two Sections, i.e. Section 65 which relates to audit by Tax Authorities and Section 66 which relates to Special audit.

23. This Court further finds it relevant to mention that Section 72A of the Act of 1994 which stipulated the procedure to cause special audit did not survive in view of the Section 173 of the Act of 2017. Under such circumstances if any audit is to be carried out for the period prior to 01.07.2017 that has to be done in terms with either Section 65 or Section 66 of the Act of 2017. Therefore, the audit which was carried out by the respondent authorities by issuance of the notice on 17.08.2017 cannot be said to be without jurisdiction or authority, and consequently, the issuance of the impugned demand-cum-show cause notice dated 07.05.2019 cannot also said to be without jurisdiction or nugatory.

24. Consequently, the question for interference with the said demand-cum-show cause notice as well as the impugned audit so carried out is devoid of any merit for which the instant writ petition stands dismissed.

JUDGE

Comparing Assistant