



GAHC010070932022

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

Case No. : WP(C)/2565/2022

SANJIB DAS

S/O. LT. JATIN DAS, R/O. NAHORHABI T.E., LAKWAH, P.O. LAKWAH AND
DIST. SIVASAGAR-785688, ASSAM.

VERSUS

THE UNION OF INDIA AND 4 ORS
REP. BY THE MINISTRY OF FINANCE, DEPTT. OF REVENUE, NEW DELHI.

2:THE CHIEF COMMISSIONER OF CENTRAL GOODS AND SERVICE
CENTRAL EXCISE AND CUSTOMS
KEDAR ROAD
GST BHAWAN
GUWAHATI
ASSAM.

3:THE PRINCIPAL GOODS EXCISE AND SERVICE TAX

DIBRUGARH
MILAN NAGAR LANE (F)
P.O. C.R. BUILDING
DIBRUGARH-786001.

4:THE ADDL. COMMISSIONER
CENTRAL GOODS AND SERVICE TAX

DIBRUGARH
MILAN NAGAR LANE (F)
P.O. C.R. BUILDING
DIBRUGARH-786001.

5:THE ADDL. COMMISSIONER
CENTRAL GOODS AND SERVICE TAX



GST BUILDING
D-31A
MG ROAD
UPPER KHATIA
AIZAL
MIZORM

Advocate for the Petitioner : MR. A K GUPTA

Advocate for the Respondent : ASSTT.S.G.I.

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

Date of Hearing : 20.04.2022

Date of Judgment : 13.05.2022

JUDGMENT AND ORDER (CAV)

Heard Mr. R. S. Mishra, the learned counsel for the petitioner and Mr. S. C. Keyal, the learned counsel appearing on behalf of the GST Department.

2. The instant writ petition has been filed challenging the Demand-cum-Show-Cause Notice issued under C.No.V(15)92/ADJ/ST/COMMR /DIB/2020/7125 dated 31.12.2020 as well as the Corrigendum dated 21.02.2022 and for a direction that the respondent authorities should provide an opportunity of pre-show cause notice consultation to the petitioner.

3. The case of the petitioner is that he is a businessman executing contracts primarily work contracts with Public Sector Undertaking or the Government of India Enterprises under the name and style of M/s Sanjib Das. The petitioner is an assessee registered under Section 69 of the Finance Act, 1994 read with Rule 9 of the Service Tax Rules, 1994 bearing registration No.AGVPD4317LST001.

4. It is the case of the petitioner that the Central Board of Excise and Customs had issued a Master Circular on Show Cause Notice, Adjudication and Recovery dated 10.03.2017 on the subject of "**Show Cause Notices, Adjudication Proceedings and Recovery**". In terms with Clause 5 of the said Master Circular, the Central Board of Excise and Customs (for short,

the CBEC) had made pre-show cause notice consultation by the Principal Commissioner/Commissioner prior to the issuance of show cause notice in cases involving demands of duty above Rs.50 lakhs (except for preventive/offence related SCN's) mandatory vide instruction issued from F No.1080/09/DLA/MISC/15 dated 21.12.2015. It was also stipulated that such consultation shall be done by the adjudicating authority with the assessee concerned. It was mentioned that the said is an important step towards trade facilitation and promoting voluntary compliance and to reduce the necessity of issuing show case notice. The petitioner further states in his writ petition that the petitioner was served with a Demand-cum-Show-Cause Notice under C.No.V(15)92/ADJ/ST/COMMR/DIB/2020/7125 dated 31.12.2021 under Section 73 (1) of the Finance Act, 1994 alleging *inter-alia* that on scrutiny of Form 26AS collected from the Income Tax Department, it was seen that the TDS was deducted by the various Service Recipients and as the petitioner did not submit any documents regarding the service provided by him there are reasons to believe that the income amount on which the petitioner paid the income tax was collected against the services provided by the petitioner. It was also mentioned that from a perusal of Form 26AS, it appears that the petitioner had rendered taxable services amounting to Rs.7,95,64,992/- and on such value of services, the service tax amounting to Rs.1,15,97,072/- was required to be paid by the petitioner which the petitioner failed to pay and thereby the petitioner was asked to show cause as to why the service tax amounting to Rs.1,15,97,072/- on the services rendered during the period from F.Y. 2014-15 (October, 2014 to March, 2015) to F.Y. 2017-18 (upto June, 2017) should not be demanded/recovered from the petitioner under the proviso of Section 73 (1) of the Finance Act, 1994; as to why interest at the appropriate rates for the period from the first day after due date till the date of actual payment shall not be charged and recovered for nonpayment of service tax (including Cess) as provided under Section 75 of the Finance Act, 1994 and as to why penalty should not be imposed upon the petitioner separately under the proviso of Sections 77 and 78 (1) of the Finance Act, 1994 for nonpayment and short payment of service tax (including Cess).

5. The petitioner referring to Clause 5 of the Master Circular stipulates that the issuance of the show cause notice dated 31.12.2020 without the pre-show cause consultation is in violation to the Master Circular, and consequently, the issuance of the said show cause notice

is without jurisdiction. The petitioner further states in his writ petition that the petitioner had received the Corrigendum dated 21.02.2022 issued by the respondent No. 4 where by the petitioner was informed that pursuant to the order of the respondent No. 2 regarding reassigning of the adjudicating authority at the level of Additional/Joint Commissioner, the adjudicating authority mentioned at para 15 of the said show cause notice dated 31.12.2020 be read as "*Additional/Joint Commissioner of Central Goods and Services Tax, Aizawl*" instead of "*Additional Commissioner of Central Goods and Services Tax, Dibrugarh*". It is the further case of the petitioner that pursuant to the said Corrigendum, the petitioner received the letter dated 23.03.2022 whereby the petitioner was informed that pursuant to the order of the respondent No. 2, the respondent No. 5 is appointed as the Adjudicating Authority of the show cause notice and the said respondent No. 5 had fixed date for hearing of the said show cause notice on 07.04.2022 and asked the petitioner to appear for personal hearing either online or physically in person or through authorized representative. It is against the said show cause notice as well as the Corrigendum dated 21.02.2022 that the petitioner has approached this Court under Article 226 of the Constitution of India.

6. This Court vide an order dated 07.04.2022 took up the writ petition for consideration. On the said date, the learned counsel appearing on behalf of the GST Department have placed a clarification dated 11.11.2021 whereby the Master Circular No.1053/02/2017-CX dated 10.03.2017 was clarified. In Clause 4 of the said Circular it was clarified that the exclusion from pre-show cause notice consultation is case-specific and not formation specific. In Clause 5 it was mentioned that pre-show cause notice consultation shall not be mandatory for those cases booked under the Central Excise Act, 1994 or Chapter V of the Finance Act, 1994 for recovery of duties or taxes not levied or 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 provision of the Central Excise Act, 1994

or Chapter V of the Finance Act, 1994 or the rules made there under with the intent to evade payment of duties or taxes.

7. This Court on the basis of the said Circular being placed directed the Standing Counsel for the GST Department to obtain instructions if the said authority can make alternative arrangement to have the proceeding in any place in the State of Assam. It was made clear in the said order dated 07.04.2022 that the said observations did not constitute an opinion of the Court and it was only to see if the hearing of the petitioner can be facilitated in the State. This Court further directed that till the next date of listing, the respondent authorities shall not take coercive action against the petitioner. The instant writ petition thereafter came up for consideration before this Court.

8. Mr. R. S. Mishra, the learned counsel for the petitioner submitted that Clause 5 of the Master Circular was mandatory and as such the issuance of the show cause notice without complying with Clause 5 of the Master Circular which stipulates pre-show cause notice consultation is without jurisdiction. The learned counsel for the petitioner further submitted that the clarification as regards the Master Circular came only on 11.11.2021 and the show cause notice having been issued on 31.12.2020 was without jurisdiction as the said clarification came subsequent to the issuance of the show cause notice. In that regard, the learned counsel for the petitioner submitted that in terms with the judgment of the Supreme Court of India rendered in the case of ***M/s Suchitra Components Ltd. vs. Commissioner of Central Excise, Guntur*** reported in ***AIR 2007 SC (Supp) 987*** it was held that a beneficial circular has to be applied retrospectively while oppressive circular has to be applied prospectively. The learned counsel for the petitioner further submitted that prior to the issuance of the impugned show cause notice dated 31.12.2020, the Department on an earlier occasion had issued a show cause notice under CNo.V(30)24/ST/SIR/SCN/ACJ/2016-17/5903 dated 08.12.2016 on similar facts and on the same set of allegations for the period from 2011-12 to 2013-14 & 2015-16 (April-September) under Section 73 (1) of the Finance Act, 1994 invoking extended period of limitation contending *inter-alia* that the Departmental Officers had conducted enquiry against the petitioner and that though the petitioner had rendered taxable services but did not discharge the service tax. The learned counsel for the petitioner further submitted that it is the settled position of law that when the first show

cause notice was issued, all the relevant facts were in the knowledge of the authorities, and as such, while issuing the second and the third show cause notices on the same/similar facts for covering the same period or subsequent period, could not be taken as suppression of facts on the part of the assessee as the facts were already in the knowledge of the authorities. In that regard, the learned counsel for the petitioner placed reliance upon the judgment of the Supreme Court rendered in the case of **Nizam Sugar Factory vs. Collector of Central Excise, A.P.**, reported in **(2006) 11 SCC 573**, and more particularly, upon the Paragraph No. 11 of the said judgment wherein the Supreme Court had observed that allegation of suppression of facts against the appellant cannot be sustained when the first show cause notice was issued all the relevant facts were in the knowledge of the authorities. The Supreme Court further observed in the said paragraph that while issuing the second and the third show-cause notices, the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. On the basis of the said judgment, the learned counsel for the petitioner, therefore, submits that the entire basis of the said show cause notice which is suppression of facts is totally nonexistent in view of the judgment of the Supreme Court in the case of **Nizam Sugar Factory** (supra) and the issuance of the show cause notice dated 08.12.2016.

9. On the other hand, Mr. S. C. Keyal, the learned counsel appearing on behalf of the GST Department submitted that the said Circular dated 11.11.2021 is clarificatory in nature and as such shall apply retrospectively from the date of issuance of the Master Circular, and therefore, submitted that reading the said Circular dated 11.11.2021 with the Master Circular, the petitioner is not entitled to a pre-show cause notice consultation. Mr. S. C. Keyal, the learned counsel for the GST Department further submits that the Master Circular does not take away the power of the authority to issue show cause notice as the power has been conferred by the statute and consequently, the issuance of the said show cause notice dated 31.12.2020 cannot be held to be without jurisdiction. Mr. Keyal further submits that the said Circular dated 11.11.2021 is clarificatory in nature and being clarificatory in nature, the said Circular operates from the date of issuance of the Master Circular and in that regard refers to the judgment of the Supreme Court of India rendered in the case of **WPIL Ltd., Ghaziabad vs. Commissioner of Central Excise, Meerut, U.P.**, reported in **(2005) 3 SCC 73** and



refers to Paragraph 15 of the said judgment wherein the Supreme Court had held that the clarificatory notification would take into effect retrospectively as the said notification merely clarifies the position and makes explicit what was implicit. Mr. S. C. Keyal, the learned counsel appearing on behalf of the GST Department further submits that the judgment of the Supreme Court of India in the case of **M/s Suchitra Components Ltd.** (supra) is not applicable to the facts of the instant case inasmuch as the Circular dated 11.11.2021 is a Circular relating to the procedure which have clarified Clause 5 of the Master Circular and as such the said Circular to be oppressive or beneficial does not arise. Mr. S. C. Keyal, the learned counsel appearing on behalf of the GST Department further submitted that the principle of law laid down in **Nizam Sugar Factory** (supra) does not apply to the fact of the instant case inasmuch as the appellant before the Supreme Court in pursuant to the said show cause notice had responded which has not been done so by the petitioner herein.

10. I have heard the learned counsels for the parties and given my anxious consideration to the matter. First this Court would like to deal with the question as to whether the Circular dated 11.11.2021 is clarificatory in nature thereby clarifying the Master Circular dated 10.03.2017.

11. A Perusal of the said Circular dated 11.11.2021 stipulates that the concept of pre-show cause notice consultation in Central Excise and Service Tax was introduced vide the Board's instructions dated 21.12.2015 as a trade facilitation measure. Thereupon in para 5 of the Master Circular No.1053/02/2017-CX dated 10.03.2017, the said principle of pre-show cause notice consultation was reiterated. Subsequent thereto, a reference was received from the DGGI to clarify whether the DGGI formation fell under the exclusive/inclusive category of the CBEC instructions (supra) dated 21.12.2015 or otherwise and in that regard it was clarified that the exclusion from pre-show cause notice consultation is case-specific and not formation specific. In Clause 5 of the said Circular it was reiterated that the pre-show cause notice consultation shall not be mandatory for those cases booked under the Central Excise Act, 1944 or Chapter V of the Finance Act, 1994 for recovery of duties or taxes not levied or paid or short levied or short paid or erroneously refunded for the reason mentioned in sub-clauses (a) to (e) of Clause 5. A perusal of the said Circular does not bring anything new. What it does is that it clarifies the Board's instructions dated 21.12.2015 which was reiterated in the

Master Circular dated 10.03.2017, and as such, the said Circular, in view of the judgment of the Supreme Court rendered in the case of **WPIL Ltd., Ghaziabad** (supra) is to be considered to operate retrospectively from the date of the Board's instructions dated 21.12.2015 read with Master Circular dated 10.03.2017. As the stand taken by the respondent authorities in the impugned show cause notice dated 31.12.2020 that the petitioner had suppressed material facts, the same would come within the exception as mentioned in Clause 5 (d) of the Circular dated 11.11.2021 and as such it was not mandatory for respondent authorities to have a pre-show cause notice consultation. Another aspect also needs to be looked into, i.e., whether the authority which had issued the Demand-cum-Show Cause Notice dated 31.12.2021 had the authority to do so. The power so exercised by the authority is a statutory power conferred upon the respondent authorities under Section 73 of the Finance Act of 1994 and as such the issuance of the said show cause notice cannot be said to be without jurisdiction.

12. Now coming to the question as to whether there was suppression of facts in the case of the petitioner. Taking into consideration that this Court is at the stage of deciding whether the said Demand-cum-Show Cause notice dated 31.12.2020 is beyond the jurisdiction and this Court having held that the respondent authorities issuing the Demand-cum-Show Cause Notice have exercised the authority within the realm of the Finance Act, 1994, this Court would not like to go into the said question as any opinion rendered may affect the petitioner or the respondent as the case may be.

13. At this stage, another aspect needs to be taken into consideration as regards the legality and validity of the Corrigendum dated 21.02.2022 whereby the adjudicating authority mentioned in para 15 of the Demand-cum-Show Cause Notice dated 31.12.2020 was to be read as "*Additional/Joint Commissioner of Central Goods and Services Tax, Aizawl*" instead of "*Additional Commissioner of Central Goods and Services Tax, Dibrugarh*".

14. The learned counsel for the petitioner submits that it would be difficult for the petitioner for doing the hearing before the authority at Aizawl. In this regard it is relevant to note that vide communication dated 23.03.2022, the petitioner was informed that he may appear for personal hearing either online or physical in person or through his authorized representative. The fixing of the adjudicating authority is on account of administrative



exigencies. The petitioner has been permitted either to appear in person or carry out the hearing online. This Court is of the opinion that no interference is called for to the said Corrigendum.

15. Considering the above and taking into consideration that the petitioner has approached this Court and the matter has been pending adjudication, this Court deems it proper to permit the petitioner to submit his show cause reply within a period of 30 (thirty) days from the date of this judgment before the adjudicating authority as mentioned in the Corrigendum dated 21.02.2022. Upon furnishing the said show cause reply, the respondent adjudicating authority, i.e., the respondent No. 5 is directed to offer the petitioner an opportunity of hearing either online or physically in person or through the authorized representative.

16. It is made clear that the observation made in this judgment is only as regards the powers of the authority to issue the show cause notice and as to whether the Circular dated 11.11.2021 is clarificatory and would apply retrospectively. No observations have been made as regards the legality and/or validity of the demand for which the show cause notice dated 31.12.2020 was issued. Under such circumstances, the adjudicating authority shall decide without being influenced by the observation made herein above. The petitioner would be entitled to take all such pleas in his reply as permissible under law.

17. With the above observation and direction this writ petition stands disposed of.

JUDGE

Comparing Assistant