

GAHC010101742023



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

Case No. : WP(C)/2747/2023

AYURSUNDRA HOSPITALS (GUWAHATI) PVT. LTD AND ANR
(FORMERLY KNOWN AS AYURSUNDRA HEALTH CARE PVT. LTD.) A
COMPANY INCORPORATED UNDER THE PROVISIONS OF THE COMPANIES
ACT, 1956 AND HAVING ITS REGISTERED OFFICE AT AHOMGAON,
BHABANANDA BORO PATH, NH-7, GARCHUK, OPPOSITE DPS SCHOOL,
GUWAHATI-781035, ASSAM AND REPRESENTED BY ITS COMPANY
SECRETARY MR. BALWANT SINGH, SON OF MR. GOBIND SINGH, AGED
ABOUT 34 YEARS, RESIDENT OF HOUSE NO. 35, RODALI PATH, LAL
GANESH, ODALBAKRA, GUWAHATI-781034.

2: ABHIJIT HAZARIKA
S/O- LATE KRISHNAMURTY HAZARIKA
R/O- HOUSE NO. 6
JIVAGIRI
SOUTH SARNIA ULUBARI
GUWAHATI-781007

VERSUS

UNION OF INDIA AND ANR
THROUGH UNDER SECRETARY GOVERNMENT OF INDIA, MINISTRY OF
FINANCE (DEPARTMENT OF REVENUE), NORTH BLOCK, NEW DELHI.

2:PRINCIPAL COMMISSIONER

GST AND CENTRAL EXCISE COMMISSIONERATE
GUWAHATI
GST BHAWAN
KEDAR ROAD
MACHKHOWA
GUWAHATI-781001

Advocate for the Petitioner : MR. SHANTANU SARMA

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

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

ORDER

Date : 22.05.2023

Heard Mr. S.K. Sarma, learned counsel for the petitioners and Mr. S.C. Keyal, learned standing counsel for the GST, appearing for all the respondents.

2. By filing this writ petition under Article 226 of the Constitution of India, the petitioners have prayed for quashing the order-in-original no. 63/Pr.Commr./ST/GHY/2022-23 dated 13.12.2002, passed by the Principal Commissioner, GST and Central Excise Commissionerate, Guwahati (respondent no. 2) and to forebear from giving effect to the said order. As an interim measure, the petitioners have prayed for stay of the operation of the said order dated 13.12.2022.

3. The petitioner no. 1 is a company registered under the service tax laws as a clinical establishment providing healthcare services, health check-up and diagnosis services. The petitioner no. 2 is a share-holder as well as Director of the petitioner no. 1 company. It is projected that vide notification no. 25/2012-S.T. issued by the Govt. of India, Ministry of Finance, Department of Revenue, the healthcare services provided by clinical establishments from payment of service tax. During financial year 2016-17, the total turnover of the petitioner no. 1 company was Rs.24,29,48,042/-, out of which the gross receipts from diagnosis/ diagnostic services was Rs.24,27,22,650/- and concessions

provided therein was Rs.45,19,838/-. Accordingly, the net receipts from the diagnostic services i.e. sale of services was Rs.23.82,02,812/-. It is projected that as per Circular no. 97/8/2007-S.T. dated 23.08.2007, issued by the Central Board of Excise and Customs, New Delhi, persons who are exempted need not file ST-3 return and therefore, it is claimed that the exempted revenue receipts of Rs.23,82,02,812/- for the said financial year 2016-17 was not reported in the service tax return, while disclosing other items.

4. A show-cause notice dated 26.10.2021 was issued upon the petitioner no. 1 by the respondent no. 2, proposing to initiate proceedings for recovery of service tax of Rs.23,82,02,812/-, which was disclosed in their income tax returns for financial year 2016-17. The respondent no. 2 had also proposed to invoke extended period of limitation as per proviso to Section 73(1) of the Finance Tax Act, 1994, on the ground of suppression of facts and non-filing of return. In reply dated 02.11.2021 filed by the petitioners, it was stated that vide notification no. 30/2011-S.T., w.e.f. 01.05.2011, health care services was exempt from service tax and after introduction of negative list regime, vide notification no. 25/2011-S.T., the levy of service tax was exempt on health care services rendered by clinical establishment and it was claimed that the petitioner no. 1 was not liable to pay service tax for the financial year 2016-17. The audited annual financial statement for financial year 2016-17 was submitted to show that the disputed receipts were on account of diagnostic services.

5. However, the respondent no. 2, by the impugned order- in-original, rejected the contention of the petitioners and (1) confirmed the demand of service tax including cesses amounting to Rs.3,57,30,422/- under Section 73(2) of the Finance Act, 1994; (2) directed interest to be paid on the

confirmed amount at the rates applicable in terms of Section 75 of the Finance Act, 1994; (3) imposed penalty of Rs.3,57,30,422/- in terms of Section 78 of the Finance Act, 1994; (4) imposed penalty of Rs.1,000/- in terms of Section 77(1) of the Finance Act, 1994 for failure to furnish information and produce documents requisitioned by the department; (5) option was given to the petitioner no. 1 to pay reduced penalty equivalent to 25% of the amount of penalty imposed under Section 78, subject to payment of confirmed service tax, interest and reduced penalty within 30 days of the date of the receipt of the order.

6. The learned counsel for the petitioner contends that the show-cause notice did not put the petitioner no. 1 to clear notice of the intention of the respondent no. 2, and that the impugned order was passed on different considerations, which were not disclosed in the show-cause notice. It was submitted that the issue of exemption from service tax was not dealt with in a lawful manner and due consideration of the notification by which levy of service tax was exempt on health care services rendered by clinical establishment and the contention of the petitioners that the petitioner no. 1 was not liable to pay service tax for the financial year 2016-17 was not properly addressed. Accordingly, by referring to stand taken in the writ petition, the learned counsel for the petitioners has prayed for interim relief in terms of the prayer made in the writ petition.

7. The learned standing counsel for the respondents has submitted that the contentions raised by the petitioners were all addressed in the impugned order. It was submitted that by the impugned order, the respondent no. 2 had decided the case on facts and has extensively referred to the

statutory provisions. Thus, it was submitted that the writ petition would not be maintainable and it was submitted that the writ petition be dismissed by relegating the petitioners to avail the alternative and efficacious remedy available to the petitioners under the Goods and Services Tax Act, 2017 before the Customs, Central Excise and Service Tax Appellate Tribunal, East Regional Bench, Kolkata.

8. On the issue of alternative remedy, we may profitably refer to the case of *Whirlpool Corporation v. Registrar of Trademarks, Mumbai, (1998) 8 SCC 1*, where it was held that an alternative remedy is not a bar to the exercise of the writ jurisdiction of the High Court (i) if the writ petition is filed for enforcement of fundamental rights; (ii) where there has been a violation of the principles of natural justice; (iii) where the order or the proceedings are wholly without jurisdiction; (iv) or when the vires of an Act is challenged. None of the herein before referred situations exist in this case.

9. In the case of *Radha Krishan Industries v. State of Himachal Pradesh, AIR 2021 SC 2114; 2021 STPL 4310 SC*, the Supreme Court of India had observed in connection with availability of alternative remedy as follows:-

27. The principles of law which emerge are that:

27.1.(i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;

27.2.(ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;

27.3.(iii) Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;

27.4.(iv) An alternate remedy by itself does not divest the High Court of its powers

under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;

27.5.(v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

27.6.(vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.

28. These principles have been consistently upheld by this Court in Seth Chand Ratan v Pandit Durga Prasad, (2003) 5 SCC 399, Babubhai Muljibhai Patel v Nandlal Khodidas Barot, (1974) 2 SCC 706, and Rajasthan SEB v. Union of India, (2008) 5 SCC 632, among other decisions.

(Extracted from STPL, paragraphs may not match with AIR citation.)

10. In response to the show-cause notice received by the petitioner no. 1, they had submitted their reply. On a perusal of the impugned order-in-original, it cannot be said that the points urged by the petitioners in their reply were not considered. The respondent no. 2, *inter alia*, had dealt with the issue of limitation; discussed the effect of non-disclosure of correct taxable value of return and that in return the petitioners had declared values pertaining to their service tax liability on reverse charge basis only; gave its justification why the petitioners were liable to pay service tax despite the two exemption notifications referred to by the petitioners. Moreover, although the respondent no. 2 took note of the copies of audited financial statement for financial year 2016-17 and ST-3 return filed for the period of April, 2016 to September, 2016 and October, 2016 to March, 2017 it was also observed to the effect that the petitioners had not responded to the communications made before issuing the show-cause notice to ascertain their tax liability. Accordingly, it was held that failure to

disclose position in conformity with the position in balance sheet amounted to suppression of correct taxable value and accordingly, the tax liability was confirmed as already indicated herein before.

11. Thus, in the opinion of the Court, all the points urged by the learned counsel for the petitioners before us has been dealt with by the respondent no.2 in the impugned order. Therefore, in the considered opinion of the Court, the impugned order-in-appeal may be erroneous, but it cannot be said that the order was wholly without jurisdiction. It is not in dispute that opportunity of personal hearing was given by the respondent no. 2. The writ petition is not for enforcement of fundamental rights or to challenge the vires of any statute. Therefore, under the parameters set out by the Supreme Court in the case of *Whirlpool Corporation (supra)*, this writ petition to assail the impugned order- in-original no. 63/Pr.Commr./ST/GHY/2022-23 dated 13.12.2002, passed by the Principal Commissioner, GST and Central Excise Commissionerate, Guwahati (respondent no. 2) would be hit by the alternative and efficacious remedy available to the petitioners to prefer an appeal before the appellate authority competent to deal with the issues raised in this writ petition.

12. Therefore, under the unique facts of this case, the Court is inclined to restrain itself from entertaining this writ petition in view of alternative and efficacious remedy available to the petitioners under the Goods and Services Tax Act, 2017 before the Customs, Central Excise and Service Tax Appellate Tribunal, East Regional Bench, Kolkata. It has not been disputed that the said appellate tribunal is not functional.

13. Therefore, this writ petition is dismissed at the motion stage

without issuing notice to the respondents.

14. The Court is inclined to provide that this writ petition was filed on 16.05.2023 and therefore, the period from 16.05.2023 (date of filing) till 22.05.2023 (the date of this order), shall be considered to be the period when the petitioners were bona fide pursuing their remedy before this Court, i.e. a wrong forum.

15. There shall be no order as to cost.

JUDGE

Comparing Assistant