

GAHC010186892024



2024:GAU-AS:9346

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

Case No. : WP(C)/4694/2024

M/S RASIDUL HOQUE AND ANR
A PROPRIETORSHIP FIRM HAVING ITS OFFICE AT JHAPUSARBARI,
AGOMANI, DHUBRI, ASSAM AND IS REPRESENTED BY ITS PROPRIETOR
RASIDUL HOQUE, THE PETITIONER NO. 2.

2: RASIDUL HOQUE
S/O KESMAT ALI
R/O VILL- JHAPUSABRI
PT. III

P.O. SOUTH JHAPUSABARI
P.S. AGOMANI
DIST. DHUBRI
ASSAM
PIN-78333

VERSUS

THE STATE OF ASSAM AND 3 ORS
THROUGH THE COMMISSIONER AND SECRETARY TO THE GOVERNMENT
OF ASSAM, MINISTRY OF FINANCE AND TAXATION, KAR BHAWNA,
GANESHGURI, GUWAHATI, ASSAM

2: THE PRINCIPAL COMMISSIONER OF STATE TAXES
ASSAM
KAR BHAWAN
G.S. ROAD
DISPUR
GUWAHATI-06.

3: THE DEPUTY COMMISSIONER OF STATE TAXES
DHUBRI-3
DHUBRI
ASSAM

4:THE ASSISTANT COMMISSIONER OF STATE TAX
CIRCLE-3
DHUBRI
UNIT
DHUBRI
ASSA

Advocate for the Petitioner : Ms. N. Hawelia, Advocate
: Ms. M. L. Gope, Advocate
: Ms. N. Gogoi, Advocate

Advocate for the Respondents : Mr. B. Gogoi, SC, Finance

Date of Hearing : 18.09.2024
Date of Judgment : 18.09.2024

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

Heard Ms. N. Hawelia, the learned counsel appearing on behalf of the Petitioners and Mr. B. Gogoi, the learned Standing counsel appearing on behalf of the Finance and Taxation Department of the Government of Assam.

2. The instant writ petition has been filed challenging the Order-in-Original dated 12.08.2024 passed by the Assistant Commissioner of State Tax, Dhubri Zone in respect to the Financial Year April 2023 - March 2024 whereby the authority concerned arrived at an opinion that the Petitioners had resorted to willful mis-declaration of the available ITC and claimed wrongful refund. Accordingly, the Petitioners were directed to pay an amount

of Rs.1,28,99,290/- for the period from March, 2022 to March, 2023 and Rs.87,13,636/- for the period April, 2023 to February 2024. The Petitioners have also assailed the ITC Block Notice issued by the Assistant Commissioner of State Tax dated 12.08.2024.

3. The case of the Petitioners herein is that the Petitioners admittedly had taken refunds on 18.01.2024 for Rs.98,72,907/- for the period March, 2022 to March, 2023 and further on 13.03.2024 another amount of Rs.75,16,516/- for the period April, 2023 to February, 2024. Subsequent thereto, a Show Cause Notice was issued by the Deputy Commissioner of State Tax dated 09.04.2024 in exercise of the powers under Section 74 of the Assam Goods and Service Tax Act, 2017 (for short 'the Act of 2017') asking the Petitioners to show cause as to why the Petitioners should not refund the amount which have been erroneously refunded on 18.01.2024 and 13.03.2024 respectively along with interest and penalty. In the said Show Cause Notice, it was specifically mentioned that the reply should be provided within 30 days from the date of receipt of the notice. The Petitioner thereupon submitted a prayer on 08.05.2024 in FORM GST DRC-06 stating inter alia that the Petitioner would require some more time to submit the reply. In the portal, the Petitioners stated in the optional column for personal hearing that the Petitioners would not avail personal hearing. Thereupon, the Respondent No.4, who is the Assistant Commissioner of State Tax passed the Order-in-Original on 12.08.2024 which had been impugned in the instant proceedings.

4. The challenge so made in the instant proceedings by the Petitioners primarily are:

(i) That in view of Section 74(10) of the Act of 2017, the Respondent No.4

could not have passed one single order for two Financial Years.

(ii) The notice was issued by the Respondent No.3 and the order was passed by the Respondent No.4 and it is the specific submission of the learned counsel appearing on behalf of the Petitioners that it is only the authority who has issued the Show Cause Notice could only pass the impugned order.

(iii) It is the further case of the Petitioners that on 29.05.2023, a notice under Section 61 of the Act of 2017 was issued asking the petitioner to explain the discrepancies within 15 days in respect to the ITC claim for the tax period April 2022 to March 2023. It is the case of the petitioners that the said proceedings were dropped and under such circumstances, no proceedings could have been initiated in respect to the period April, 2022 to March, 2023 by initiating proceedings under Section 74 of the Assam GST Act 2017.

(iv) It is the further case of the Petitioners that this Court ought to exercise the writ jurisdiction in the present facts taking into account that in the statutory appeal provided under Section 107 of the Act of 2017, various defences which the Petitioners could have raised is not available to the Petitioners as the Petitioners failed to submit the show cause.

5. Mr. B. Gogoi, the learned Standing counsel appearing on behalf of the Finance and Taxation Department of the State of Assam submitted that the Petitioners has an alternative and efficacious remedy available under Section 107 of the Act of 2017. He submitted that this is not a case which will come within the exceptional circumstances when this Court should exercise the

jurisdiction under Article 226 of the Constitution. The learned Standing counsel further referred to the recent judgment of the Supreme Court in the case of ***PHR Invent Educational Society Vs. UCO Bank and Others*** reported in ***(2024) 6 SCC 579*** wherein the Supreme Court had categorically observed at paragraph No.23 that the High Court should ordinarily not entertain a writ petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person. The learned counsel further submitted that the Supreme Court had observed that the Rule of self imposed restriction should be applied with great rigor in matters involving recovery of taxes, cess, fees or other types of public money and the dues of banks and other financial institutions. He therefore submitted that in the instant case, as the exceptional circumstances do not exist, the question of exercising the writ jurisdiction under Article 226 of the Constitution do not arise. The learned counsel further submitted that the issues which have been raised in the instant proceedings can very well be agitated before the Appellate Forum under Section 107 of the Assam GST Act, 2017.

6. Replying to the said submission, Ms. N. Hawelia, the learned counsel appearing on behalf of the Petitioners submitted that in the instant case there is a violation of the principles of natural justice and the impugned order which have been passed is wholly without jurisdiction. She submitted that the Petitioners herein were not afforded an additional opportunity to submit the reply to the Show Cause Notice. The learned counsel for the Petitioners submitted that in view of Section 74(10) of the Assam GST Act 2017, there is a requirement of passing separate orders for each Financial Year and in the instant case, there is only one order passed and as such, the impugned order so passed is wholly without jurisdiction.

7. In the backdrop of the above submissions, this Court finds it relevant to take up the issue as to whether the instant writ petition should be entertained. For that purpose, this Court finds it pertinent to refer to paragraph No.23 of the judgment in the case of ***PHR Invent Educational Society (supra)*** which is reproduced herein below:

“23. It could thus be seen that, this Court has clearly held that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person. It has been held that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. The Court clearly observed that, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. It has been held that, though the powers of the High Court under Article 226 of the Constitution are of widest amplitude, still the courts cannot be oblivious of the rules of self-imposed restraint evolved by this Court. The Court further held that though the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, still it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution.

8. From a perusal of the above quoted paragraph, it would show that the High Court should not ordinarily entertain a writ petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person. The Supreme Court further emphasized that this Rule should be applied with great rigor in matters involving recovery of taxes, cess, fees, other types of

public money and dues of the bank and financial institution. It was further observed that though the powers under Article 226 are of widest amplitude, still the Court cannot be oblivious of the Rules of self-imposed restraint evolved.

9. Be that as it may, this Court also finds it very pertinent to take note of the judgment of the Supreme Court in the case of ***M/s Godrej Sara Lee Ltd. Vs. Excise and Taxation Officer cum Accessing Authority and Others reported in (2023) 109 GSTR 402.*** This judgment is being referred to by this Court taking into account that as to under what circumstances the Writ Court can exercise its jurisdiction in spite of availability of an alternative and efficacious remedy. In the said judgment, the Supreme Court observed that in cases (i) Where the writ petition seeks enforcement of any fundamental rights; or (ii) where there is a violation of the principles of natural justice; or (iii) where the order or the proceedings are wholly without jurisdiction; or (v) where the vires of the Act is challenged; or (vi) where pure question of law is raised, this Court, under Article 226 of the Constitution can exercise its jurisdiction in spite of the availability of an alternative remedy.

10. In the backdrop of the settled principles of law, if this Court takes note of the submission so made by the learned counsel for the Petitioners as regards the violation to the principles of natural justice, it is the opinion of this Court that the said submission is misconceived inasmuch as in the instant case the Petitioners were provided an opportunity to submit the reply which the Petitioners failed to do so. It is also seen that the Petitioners acted very casually to the Show Cause Notice and the proceedings initiated and this aspect would be apparent from the lackadaisical attitude shown by the

Petitioners in not making any enquiry after submission of the request for further time. It is also relevant to observe that the Show Cause Notice was issued on 09.04.2024. The Petitioners' request for additional time on 08.05.2024 and three months thereafter the impugned order was passed. Under such circumstances, they cannot complain of violation of natural justice.

11. Insofar as the passing of one composite order dated 12.08.2024 for two financial years and the submission that it amounts to infraction to Section 74(10) of the Assam GST Act, 2017, it is the opinion of the Court that the said submission is misconceived inasmuch as the Authority concerned had the jurisdiction to pass the order. It is a different aspect of the matter that there ought to have been two orders but that aspect do not in the opinion of this Court would render the order without jurisdiction or bad.

12. Under such circumstances, the parameters under which this Court ought to entertain the writ petition are not satisfied. Be that as it may, it is also pertinent to take note of that this Court is not exercising its jurisdiction on the ground that the Petitioners herein have an adequate, alternative and efficacious remedy provided under Section 107 of the Assam GST Act, 2017. It is however apposite to mention that in order that the remedy which is available to the Petitioners is an efficacious and adequate remedy, the Petitioners should also be able to raise all the issues which the Petitioners could have raised in the instant proceedings.

13. Accordingly, this Court for the reasons aforesaid is not inclined to entertain the instant writ petition insofar as the challenge to the impugned

order dated 12.08.2024 on the ground of availability of alternative and efficacious remedy. However, the Petitioner herein would be at liberty to file an appeal under Section 107 of the AGST Act, 2017.

14. It is further observed that non-entertaining of the instant writ petition would not prejudice the Petitioners in such appeal to be filed. In addition to that, the Petitioners would be entitled to raise all the issues which the Petitioners could have legally raised in the instant proceedings and also submits all such documents in their defence before the Appellate Authority.

15. Before parting with the records, this Court finds it pertinent to take note of the submissions made by Ms. N. Hawelia, the learned counsel to that effect that while filing an appeal, there would be a requirement of deposit of 10% of the tax amount. She submitted that as the accounts of the Petitioner No.2 as well as of his relatives have also been blocked as would be apparent from the Show Cause Notice dated 09.04.2024 itself, the Petitioners would not be in a position to file an appeal in view of the mandate of the pre-deposit of 10% of tax amount. This Court had also perused the Show Cause Notice dated 09.04.2024 wherein it is stated that various bank accounts of the petitioner No.2 as well as the other bank accounts of his relatives where the funds were transferred have been frozen on 02.04.2024. Under such circumstances, a question arises as to how the Petitioners would be in a position to make the pre-deposit of 10% of the tax amount.

16. This Court had perused the materials on record and there is no mention as to how much amount/amounts lying in the bank accounts of the Petitioner No.2 and his relatives which have been frozen. There is also no mention as to whether the Petitioners have other bank account(s). It is also

clear from the mandate of Section 107(6)(b) of the Act of 2017 that the pre-deposit of 10% of the tax amount is required to be deposited and there is no provision for waiver by the Appellate Authority. It is well settled that the amount to be paid as pre-deposit is for filing or entertaining the Appeal and not for realization of the tax amount [see ***Union of India Vs. Suvidhe Ltd. reported in (2016) 11 SCC 808***]. Under such circumstances, this Court for balancing the equities and for the interest of justice directs as follows:

(i) In the account(s) which have been frozen as stated in the Show Cause Notice dated 09.04.2024 and if the said accounts are still unoperational on account of the freeze, the Appellate Authority is directed to permit the filing of the Appeal(s) as well as to entertain the Appeal(s) without any pre-deposit subject to the accounts which have been frozen (the details mentioned in the Show Cause Notice dated 09.04.2024), has/have deposit(s) equivalent or more than the amount required to be deposited in terms with Section 107(6)(b) of the Act of 2017.

(ii) The Court further observes and directs that in the eventuality the amount lying in the frozen accounts mentioned in the Show Cause Notice dated 09.04.2024 are not equivalent amount requisite for the pre-deposit in terms with Section 107(6)(b) of the Act of 2017, the Petitioners would have to additionally deposit so much of the amount before the Authority so that the mandate of Section 107(6)(b) of the Act of 2017 is complied with.

(iii) This Court further observes that during the appeal proceedings if the freeze on the accounts mentioned in the Show Cause Notice dated 09.04.2024 is removed, the Petitioners would be required to deposit so much of the amount equivalent to the amount of pre-deposit requisite in terms

with Section 107(6)(b) of the Act of 2017 for the further continuation and adjudication of the appeal. Failure to do so, would entail such consequences as the Appellate Authority would decide as per law.

17. With above observations and directions, the instant writ petition stands disposed of.

JUDGE

Comparing Assistant