

GAHC010203392024



2024:GAU-AS:11625

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

Case No. : WP(C)/5686/2024

M/S AKBAR ALI MIR AND ANR
A PROP. FIRM HAVING ITS OFFICE AT NORTH TOKRERCHARA PART I,
DHUBRI, ASSAM, AND IS REP. BY ITS PROPRIETOR AKBAR ALI MIR, THE
PET. NO-2

2: AKBAR ALI MIR
S/O- BELLAL ALI MIR
R/O- VILLAGE- NORTH TOKREECHARA PART I
P.O AND P.S- GOLAKGANJ
DIST- DHUBRI
ASSAM

VERSUS

THE STATE OF ASSAM AND 3 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM, MINISTRY OF TAXATION AND FINANCE, KAR BHAWAN
DISPUR, GUWAHATI-6.

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

3: THE DEPUTY COMMISSIONER OF STATE TAXES
DHUBRI ASSAM

4: THE ASSISTANT COMMISSIONER OF STATE TAXES
DHUBRI
CIRCLE -3 ASSAM

Advocate for the Petitioner : MS. N GOGOI, MS. N HAWELIA
Advocate for the Respondent : SC, TAXES,

**BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY**

JUDGMENT

12.11.2024

The petitioner in the present writ petition, preferred under Article 226 of the Constitution of India, has assailed an Order-in-Original dated 06.09.2024 passed under Section 74 of the Central Goods and Services Tax [CGST] Act, 2017/Assam Goods and Services [AGST] Act, 2017 for the period : April, 2022 – March, 2024 and a Summary of the Order dated 06.09.2024 in Form GST DRC-07 under Rule 142[5] of the corresponding Rules by the respondent no. 4. A direction has also been sought for not to give effect to the impugned Order-in-Original dated 06.09.2024 and the Summary of the Order dated 06.09.2024.

2. The petitioner no. 2 carries out his business in coal under the name and style of petitioner no. 1 with a Certificate of GST Registration no. 18BMGPM0289L3Z1. The petitioner has averred that the petitioner is entitled to Input Tax Credit [ITC] in respect of purchase of coal under the provisions of the Central Goods and Services Tax [CGST] Act, 2017/Assam Goods and Services [AGST] Act, 2017. The petitioner has contended that all the refunds were duly sanctioned and disbursed after causing full enquiry and the respondent no. 4 is the jurisdictional officer in so far as causing enquiry in respect of the assessment of the petitioner is concerned and the petitioner is entitled to get refund of ITC on zero-rated supplies made by it.

3. The petitioner has stated that a Show Cause Notice under Section 61 of AGST Act, 2017 stood issued to it by the respondent no. 4 on 03.04.2023, followed by Form GST ASMT-10 under Rule 99[1] of corresponding rules on 04.04.2023. By the said Show Cause Notice, the petitioner was directed to explain the reasons for the discrepancies noticed regarding excess ITC claim of Rs. 45,07,221.34 during the scrutiny of the return for the tax period from April, 2022 to March, 2023. In response to the said Show Cause Notice, the petitioner submitted a reply in Form GST ASMT-11 on 10.04.2023.

4. Thereafter, the respondent no. 3 on 08.04.2024 had issued a Demand –cum- Show Cause Notice under Section 74[1] of the AGST Act, 2017 for the periods : 2022-23 and 2023-24 and a Summary of Show Cause Notice dated 09.04.2024 in Form GST DRC-01 under Rule 100[2] and Rule 142[1][a] of the corresponding rules stating that the petitioner had claimed two erroneous refunds amounting to Rs. 1,11,23,972/- during the year : 2022-23 and 2023-24 in the following manner :-

[i] On 23.09.2022, the taxpayer claimed a refund of Rs. 34,30,591/- for the tax period from October 2021 to August 2022 by stating the reason of refund as 'Refund of ITC on export goods and services without payment of tax'. Consequently, the refund was sanctioned on 29.09.2022 for Rs. 34,30,591/- [Rs. 15,70,591/- under IGST + Rs. 18,60,000/- under CESS].

[ii] On 13.03.2024, the taxpayer claimed another refund of Rs. 76,93,381/- for the tax period from September, 2022 to February, 2024 by stating the reason as 'Refund of ITC on export goods and services without payment of tax'. Consequently, the refund was sanctioned on 13.03.2024 for Rs. 76,93,381/- [Rs. 34,03,781/- under IGST + Rs. 37,000/- under CGST + Rs. 37,000/- under SGST + Rs. 76,93,381/- under CESS].

4.1. The respondent no. 3 had further mentioned that upon verification, it was found that the petitioner had not received any ITC during the period from October, 2021 to February, 2024 against which the refund was claimed.

5. By the Demand –cum- Show Notice dated 08.04.2024, the Adjudicating Authority finding the alleged discrepancies/anomalies grave in nature posing serious threat to the interest of revenue, freezed the bank account of the petitioner bearing no. 916020065245871 as well as accounts bearing – A/c no. 916020080314082 & A/c no. 922020037714238 - of two other persons viz. Abdul Khalek and Sahida Bibi, all accounts maintained at Axis Bank, Dhubri Branch, had been freezed on and from 02.04.2024.

6. In response to the Demand –cum- Show Cause Notice dated 09.04.2024, the petitioner stated to have submitted a reply to the Show Cause Notice in Form GST DRC-06 and in the said Reply, the petitioner requested to re-fix the matter after four weeks to enable the petitioner to go through the Notice and to check its own documents and papers as well as the transactions for the periods and do the needful thereafter.

7. Thereafter, the respondent no. 4 on 12.08.2024 had issued a Summary of Show Cause Notice dated 12.08.2024 for the periods : 2022-23 and 2023-24 in Form GST DRC-01 under Rule 100[2] and Rule 142[1][a] of the AGST Rules stating that the petitioner had claimed two erroneous refunds amounting to Rs. 34,30,591/- for the year : 2022-23 and Rs. 76,93,381/- for the year : 2023-24 in the following manner :-

[i] On 29.09.2022, the taxpayer claimed a refund of Rs. 34,30,591/- for the year 2021-22 by stating the reason of refund as 'Refund of ITC on export goods and services without payment of tax'. Consequently, the refund was sanctioned on 29.09.2022 for Rs. 34,30,591/- [Rs. 15,70,591/- under IGST + Rs. 18,60,000/- under CESS].

[ii] On 13.03.2024, the taxpayer claimed another refund of Rs. 76,93,381/- for the tax period from September, 2022 to February, 2024 by stating the reason as 'Refund of ITC on export goods and services without payment of tax'. Consequently, the refund was sanctioned on 13.03.2024 for Rs. 76,93,381/- [Rs. 34,03,781/- under IGST + Rs. 37,000/- under CGST + Rs. 37,000/- under SGST + Rs. 76,93,381/- under CESS].

7.1. The respondent no. 3 had further mentioned that upon verification, it was found that the petitioner claimed ITC fraudulently without receiving appropriate ITC during the period from March, 2022 to February, 2024 against which the refund was claimed.

8. The Order-in-Original under Section 74 came be passed by the respondent no. 4 as the Adjudicating Authority on 06.09.2024 with a demand of Rs. 2,41,78,961/- as tax, interest and penalty for the period from April, 2022 to March, 2024 and the petitioner had been directed to make payment by 06.10.2024 failing which proceedings would be initiated against

the petitioner to recover the outstanding dues.

9. Heard Ms. N. Hawelia, learned counsel for the petitioner and Mr. B. Gogoi, learned Standing Counsel, Finance & Taxation Department for all the respondents.

10. Ms. Hawelia, learned counsel for the petitioner has submitted that though in response to the Demand –cum- Show Cause Notice dated 08.04.2024, the petitioner had immediately submitted a reply seeking time to examine the records and documents at its disposal so as to enable it to file an effective reply and thereafter, in the reply so submitted, the petitioner sought re-fixation of the case of hearing after four weeks, but the Adjudicating Authority without giving any heed to the said prayer of the petitioner, had proceeded to pass the Order-in-Original under Section 74, impugned in this writ petition. Ms. Hawelia has further contended that initially, it was the respondent no. 3 who had issued the Demand –cum- Show Cause Notice and the petitioner submitted its reply seeking re-fixation of the case. But, subsequently, the respondent no. 4 issued a Demand –cum- Show Cause Notice, also under Section 74 of the AGST Act, for the same period. As the petitioner sought time in respect of the Demand –cum- Show Cause Notice issued by the respondent no. 3, the petitioner did not submit any reply to the Summary of Show Cause Notice dated 12.08.2024 as the petitioner intended to take part in the hearing of the proceedings initiated by the respondent no. 3. The respondent no. 4 without affording any kind of opportunity of hearing proceeded to pass the impugned Order-in-Original on 06.09.2024 illegally foisting liability upon the petitioner, in violation of the principles of natural justice. It is, thus, the contention of Ms. Hawelia that the two Adjudicating Authorities cannot initiate two parallel proceedings and as such, the action on the part of the respondent authorities are clearly in violation of the provisions of the CGST/AGST Act, 2017. Ms. Hawelia has further submitted that the Demand –cum- Show Cause Notices were issued for two assessment years in block and such block show cause notices are not permissible under the law and as such, the impugned Order-in-Original passed by the respondent no. 4 as the Adjudicating Authority is non-est in law.

11. In response, Mr. Gogoi, learned Standing Counsel, Finance & Taxation Department has submitted that the petitioner has an adequate, efficacious and statutory remedy under

Section 107 of the CGST/AGST Act, 2017. He has submitted that the law is settled that in case of matters pertaining to revenue when an alternative, efficacious, adequate and statutory remedy is available to the assessee, a writ petition under Article 226 of the Constitution of India is not ordinarily to be entertained unless the petitioner has been able to make out an exceptional case. It is his contention that the petitioner has not been able to make out an exceptional case here to entertain this writ petition. Mr. Gogoi has further submitted that after receipt of the Demand –cum- Show Cause Notice, the petitioner by submitting a reply had sought time for four weeks to enable it to go through the documents and records at its disposal and thereafter, to submit an effective reply. But, after approaching the Adjudicating Authority with such reply, the petitioner did not revert back to the Adjudicating Authority to submit its reply traversing the contentions raised in the Demand –cum- Show Cause Notice. He has further submitted that in the reply so submitted, the petitioner had himself stated that the petitioner did not need any personal hearing. It is his contention that it is not a case of not providing an opportunity of being heard and as such, the petitioner's case is not a case of violation of the principles of natural justice. Mr. Gogoi has further contended that the Adjudicating Authority after issuance of the Demand –cum- Show Cause Notice had waited for sufficient period of time and the impugned Order was passed after elapse of a reasonable period of time.

12. I have given due consideration to the submissions of the learned counsel for the parties and have gone through the materials on record.

13. It is well settled that ordinarily in revenue matters, the court does not entertain a petition for a writ under Article 226 of the Constitution of India, where the petitioner has a statutory remedy, which without being unduly onerous, provides an adequate and efficacious remedy. The High Court in its writ jurisdiction, does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not act as a court of appeal against a decision of a court or tribunal or an adjudicating authority to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon a statutory remedy provided by the governing statute for obtaining relief. Where it is open to the aggrieved petitioner to

move another tribunal, or even itself to another jurisdiction for obtaining redress in the manner provided by the governing statute, the High Court normally does not permit, by entertaining a petition under Article 226 of the Constitution of India, the machinery created by the statute to be bypassed and will leave the party applying to it to seek resort to the machinery so set up. [Ref : Thansingh Nathmal vs. the Superintendent of Taxes, Dhubri and others, reported in AIR 1964 SC 1419].

14. The High Court also has the discretion to entertain or not to entertain a writ petition. 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.

15. In so far as the case in hand is concerned, it has not emerged that there was total violation of the principles of natural justice. The ground which is urged is that after submission of the reply by the petitioner seeking time, the Adjudicating Authority did not apprise the petitioner about the next date of hearing in connection with the Demand –cum- Show Cause Notice under reference. The petitioner, in its reply submitted after the Demand –cum- Show Cause Notice, had itself mentioned that it would not avail the opportunity of personal hearing. *Prima facie* the case is not one which falls in the category of no notice and no opportunity of hearing. There is a distinction between a case where there is total violation of the rule of *audi alteram partem* with no notice and no opportunity of hearing and a case where there is violation of a facet of the rule of *audi alteram partem* in that the assessee was not afforded any adequate and effective notice and/or proper opportunity of hearing. It does not emerge from the facts of the case that the petitioner was not provided with any kind of prior opportunity and hearing before issuance of the impugned Order-in-Original.

16. In the case in hand, it is not the case of the petitioner that the petitioner did not receive the Demand –cum- Show Cause Notices. On receipt of the Demand –cum- Show Cause Notices, the petitioner ought to have replied to the said Demand –cum- Show Cause

Notices. By issuance of a show cause notice, a noticee is asked to respond to the proposed action. With issuance of a show cause notice, the rights and obligations of the parties are not decided finally. The event of issuance of a show cause notice is a step towards taking a final decision in the matter by the competent authority. A tentative view taken in the process cannot be deemed to be the final view taken in the matter. The final view is dependent on the response received from the noticee and if the noticee is able to show sufficient cause as to why no action as contemplated under the show cause notice should be taken the final view may altogether be different. In the case in hand, with the petitioner not availing the opportunity of submitting a reply to the show cause notice after seeking time for four weeks and to submit an effective reply and declining to avail any personal hearing to one Show Cause Notice and by not responding to the other Show Cause Notice, it is not open for the petitioner to raise a ground that it was a case of no notice and no opportunity of hearing.

17. Sub-section [1] of Section 107 of the CGST Act, 2017/AGST Act, 2017 has provided for an appeal to the Appellate Authority. As per Section 107[1] any person aggrieved by any decision or order passed under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act by an Adjudicating Authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person. Sub-section [4] of Section 107 has provided that the Appellate Authority may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of one month. A mandate is embedded in sub-section [8] of Section 107 for the Appellate Authority to give an opportunity to the appellant of being heard.

17.1. A condition of pre-deposit is incorporated in sub-section [6] of Section 107 to the effect that no appeal shall be filed under sub-section [1], unless the appellant has paid - [a] in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and [b] a sum equal to ten per cent of the remaining amount of tax in dispute arising from the said order, subject to a maximum of twenty-five crore rupees, in relation to which the appeal has been filed.

18. As regards the contention advanced on behalf of the petitioner that a composite order have been passed for two financial years and the same was in violation of Section 74 of the AGST Act, 2017, this Court is of the *prima facie* view that the contention is misconceived as an Adjudicating Authority has the jurisdiction to pass such a composite order. Rather than a composite order, an order for each financial year would have facilitated a better adjudication but a composite order passed by the Adjudicating Authority cannot be said to have been passed without jurisdiction. In any view of the matter, it is open for the petitioner to raise all such issues in a statutory appeal before the Appellate Authority.

19. In view of the fact that an adequate, efficacious and statutory remedy has already been provided to assail an order like the Order-in-Original dated 06.09.2024 before the Appellate Authority, this Court is of the view that this writ petition preferred under Article 226 of the Constitution of India is not to be entertained at this stage, reserving the liberty to the petitioner to avail statutory remedy of appeal under Section 107 of the CGST/AGST Act, 2017. It is accordingly observed.

20. The petitioner has further contended that the bank account of the petitioner maintained at Axis Bank, Dhubri Branch had been freezed on 02.04.2024 and due to such freezing, the petitioner is not in a position to deposit the pre-deposit amount @ 10% required in preferring the statutory appeal under Section 107 of the CGST/AGST Act, 2017. Apart from the bank account of the petitioner, two other bank accounts – A/c no. 916020080314082 belonging to Abdul Khalek & A/c no. 922020037714238 belonging to Sahida Bibi – which are also maintained at Axis Bank, Dhubri Branch were also freezed with the allegation that the refund amounts were transferred to those accounts. Ms. Hawelia, learned counsel for the petitioner has submitted that in a writ petition, W.P.[C] no. 4694/2024 involving similar issues, a co-ordinate bench of this Court has extended a benefit to the petitioner therein, who is similarly situated like the petitioner herein, by directing the Appellate Authority to permit the said petitioner to file an appeal without pre-deposit, subject to the bank account[s] which had been freezed, had deposit[s] equivalent or more than amount required to be deposited in terms of Section 107[6][b] of the Act, 2017. Ms. Hawelia has, thus, submitted that similar

benefit should be extended to the petitioner herein as its bank account has remained freezed since 02.04.2024.

21. In reply, Mr. Gogoi, learned Standing Counsel, Finance & Taxation Department has submitted that such direction, as directed in the Judgment and Order dated 18.09.2024 passed in the writ petition, W.P.[C] no. 4694/2024, can be made herein also with similar terms and conditions.

22. In the writ petition, W.P.[C] no. 4694/2024, the bank account of the petitioner therein stood freezed with issuance of a demand –cum- show cause notice under Section 74 of the Assam Goods and Service Tax Act, 2017. While not entertaining the writ petition, it was observed that if the account[s] freezed by the order of the Adjudicating Authority was still unoperational on account of the freeze, the Appellate Authority would permit filing of the appeal as well as to entertain the appeal without insisting on pre-deposit subject to the account[s] which had been freezed, had deposit[s] equivalent or more than amount required to be deposited in terms of Section 107[6][b] of the Act of 2017. It was further observed therein that in the eventuality the amount lying in the freezed account[s] mentioned in the show cause notice was/were not equivalent for the pre-deposit in terms of Section 107[6][b] of the Act of 2017, the petitioner therein was permitted to deposit additionally so much of the amount before the Appellate Authority so as to fulfill the mandate under Section 107[6][b] of the Act of 2017.

23. As the case of the petitioner herein appears to be similarly situated with the petitioner in the writ petition, W.P.[C] no. 4694/2024, this Court is of the considered view that while not entertaining the writ petition, the same can be disposed of with the following observations and directions balancing the equities and for the interest of justice as well as having regard to the fact that the bank account[s] of the petitioner has/have remained freezed and unoperational since 02.04.2024, a date prior to issuance of the Demand –cum- Show Cause Notice dated 08.04.2024 :-

[i] If the account[s] of the petitioner, as mentioned in the Demand –cum- Show Cause

Notice dated 08.04.2024, have remained freezed and is/are still unoperational, the Appellate Authority shall permit the petitioner to file the statutory appeal and on filing of the said appeal by the petitioner, the Appellate Authority shall entertain that appeal without insisting for pre-deposit, subject to the condition that the account[s] which has/have been freezed [the details of which are mentioned in the Demand –cum- Show Cause Notice dated 08.04.2024], has/have deposit[s] equivalent or more than the amount required to be deposited in terms of Section 107[6][b] of the CGST/AGST Act, 2017.

[ii] It is further observed that in the event the amount[s] lying in the freezed account[s], mentioned in the Demand –cum- Show Cause Notice dated 08.04.2024, is/are not equivalent requisite for the pre-deposit of 10% in terms of Section 107[6][b] of the CGST/AGST Act, 2017, the petitioner shall be granted a liberty to deposit amount before the Appellate Authority so as to fulfill the mandate incorporated in Section 107[6][b] of the CGST/AGST Act, 2017.

[iii] It is further observed that during the appeal proceedings if the freeze on the accounts mentioned in the Demand –cum- Show Cause Notice dated 08.04.2024 is removed, the petitioner would be required to deposit so much of the amount equivalent to the amount of pre-deposit requisite in terms of Section 1107[6][b] of the CGST/AGST Act, 2017 for the further continuation and adjudication of the appeal. Failure to do so would entail such consequences as the Appellate Authority decides as per law.

24. With the observations made and direction given above, the writ petition stands disposed of.

JUDGE

Comparing Assistant