IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 01.10.2019

CORAM

THE HONOURNABLE MR.JUSTICE K.RAVICHANDRABAABU

W.P.No.3929 of 2019
and
W.M.P.No.4359 of 2019

GE T & D India Limited
rep. by Senior Manager-
Indirect Taxes, S.Sivaramakrishnan,
19/1, GST Road, Pallavaram,'
Chennai - 600 043. ...Petitioner

Vs.

The Commissioner of GST and Central Excise,
Office of the Commissioner of GST and Central Excise,
No.1, Foulke's Compound, Anai Road,
Salem - 636 001. ...Respondent

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the records of the file of the respondent in proceedings Order in Original No.11/2018 (CE-Commissioner) dated 31.10.2018 and to quash the same.

For Petitioner : Mr.Joseph Prabakar

For Respondent : Mr.Rajnish Pathiyil,
Senior Central Government
Standing Counsel.

O R D E R

Challenge made in this writ petition is against the Order in Original No.11/2018 dated 31.10.2018.

2. The case of the petitioner is as follows:

One M/s. Sri.Jai Ganesh Enterprises, Hosur, is engaged in manufacture of control panels. The petitioner had entered into a contract with the said M/s.Sri Jai Ganesh Enterprises for job work. In this contract, it was agreed that certain materials would be supplied by the petitioner free of cost to M/s. Sri Jai Ganesh Enterprises and they would add some materials and after completion of job work, would send the job worked materials to the petitioner. M/s.Sri Jai Ganesh Enterprises paid Excise Duty upon clearance of the job worked goods to the petitioner. While so, the Department contended that there was under valuation by M/s.Sri Jai Ganesh Enterprises. Accordingly, Show Cause Notice No.1/2018 was issued to M/s.Sri Jai Ganesh Enterprises demanding excise duty of Rs.12,96,27,909/- along with interest and penalty under section 11AC of the Central Excise Act, 1944. In the same notice, the department also proposed to levy penalty on four partners of M/s.Sri Jai Ganesh Enterprises. In the same notice, the petitioner was directed to show cause as to why penalty under Rule 26 of Central Excuse Rules 2002 should not be imposed on the petitioner for inducing M/s.Sri Jai Ganesh Enterprises to commit the offence. The respondent issued a letter dated 02.05.2014 to the petitioner calling details of job work done by M/s. Sri Jai Ganesh Enterprises and the petitioner filed a detailed reply on 29.05.2014. While so, the respondent adjudicated the matter and passed the impugned order also imposing penalty of Rs.1.50 crores on the petitioner under Rule 26 of Central Excise Rules 2002. No personal hearing was given to the petitioner before passing the impugned order. As the contract of job work was on principal to principal basis in terms of the definition of term "manufacturer " occurring in Section 2(f) of the Central Excise Act, 1944, M/s.Sri Jai Ganesh Enterprises was solely responsible for payment of excise duty. Therefore, the petitioner cannot be proceeded against for any objections that may be raised by the department as regards the valuation method adopted by M/s.Sri Jai Ganesh Enterprises. Since the impugned order was passed in gross violation of principles of natural justice, the present Writ Petition is filed.

3. The respondent filed a counter affidavit wherein it is stated as follows:

The petitioner had given job work to M/s.Sri Jai Ganesh Enterprises and had also supplied certain materials free of cost which ultimately not included in the value of the finished goods cleared by M/s.Sri Jai Ganesh Enterprises which consequently, failed to discharge the Central Excise Duty liability on the same. A show cause notice dated 04.01.2018 was served on M/s.Sri Jai Ganesh Enterprises on 05.01.2018 and the Order in Original was passed on 31.10.2018, after affording an opportunity of personal hearing on four occasions. Therefore, it is incorrect to state that the matter was adjudicated after four years when in fact, the matter was adjudicated in the span of ten months. When the petitioner has chosen not to participate in the adjudication process and failed to submit a reply to the show cause notice dated 04.01.2018, the petitioner cannot now allege that no opportunity was given, more so, when four opportunities of personal hearing were given on 14.06.2018, 21.06.2018, 27.06.2018 and 16.08.2018. Only after providing sufficient opportunities of personal hearing, the matter was decided on merits. The petitioner having failed to participate in the adjudication process, has now chosen to allege that the job work was on principal to principal basis, at this stage, for the first time, before this Court by filing the present writ petition. Notwithstanding the same, it is stated that the Adjudicating Authority has clearly brought out the fact that the petitioner herein was aware of the valuation method adopted by M/s.Sri Jai Ganesh Enterprises and that the relationship between the petitioner and M/s.Sri Jai Ganesh Enterprises was that of a Principal - Job Worker and therefore, the petitioner was found to be liable for the penalty under Rule 26 of the Central Excise Rules, 2002.

4. Mr.Joseph Prabakar, learned counsel for the petitioner submitted as follows:

The impugned order referred to the reply submitted by the petitioner dated 29.05.2014 even prior to the issuance of the show cause notice. In that reply, the petitioner has specifically stated that the relationship between the petitioner and M/s.Sri Jai Ganesh Enterprises is of principal to principal basis and therefore, the job worker would be construed as manufacturer under section 2(f) of the Central Excise Act. Accordingly, the job worker is liable to pay the excise duty. Therefore, the above contention raised by the petitioner ought to have been considered by the Adjudicating Authority, even though the petitioner has not filed any reply to the show cause notice. In other words, it is in view of the reply already given by the petitioner dated 29.05.2014, there is no necessity for them to file a reply to the show cause notice. He further contended that the petitioner was not given any personal hearing even though the impugned order referred as though such opportunity was given.

5. Learned counsel for the Revenue on the other hand, contended as follows:

Admittedly, the petitioner has not filed reply to the show cause notice and therefore, they are not entitled to seek for personal hearing as a matter of right. Section 33A of the Central Excise Act, 1944, contemplates that only when a party so desires for an opportunity of personal hearing, it would be given by the Adjudicating Authority. Insofar as the contention raised by the petitioner that his reply dated 29.05.2014 is not considered in the impugned order, is concerned, it is to be noted that the Adjudicating Authority has discussed at paragraph E of the order and found that the relationship between the petitioner and M/s.Sri Jai Ganesh Enterprises is principal - job worker basis and that the petitioner is also aware that M/s.Sri Jai Ganesh Enterprises has not followed the pattern by including the value of free supply materials in computation of the assessable value for payment of Central Excise duty. Therefore, the impugned order was rightly passed by imposing penalty on the petitioner and if at all they are aggrieved, it is for them to work out their remedy by way of appeal against the said order.

6. Heard both sides.

7. The challenge made in this Writ Petition is against the Order in Original dated 31.10.2018. There is no dispute to the fact that as against the above said order, a statutory appeal remedy is available to the aggrieved person before the Customs, Central Excise and Service Tax Appellate Tribunal. However, the present Writ Petition is sought to be maintained by the writ petitioner mainly by contending that the principles of natural justice is violated. It is vehemently contended that the Adjudicating Authority has not afforded an opportunity of personal hearing to the petitioner. It is also the contention of the petitioner that, even otherwise, the reply filed by the petitioner dated 29.05.2014, even prior to the issuance of the show cause notice, ought to have been considered in detail.

8. There is no dispute to the fact that before passing the impugned order, the show cause notice was issued to the petitioner and that the petitioner has not chosen to file any reply. No doubt, the learned counsel for the petitioner contended that in view of the earlier reply submitted by the petitioner dated 29.05.2014, there is no need for the petitioner to file a reply to the show cause notice. I am unable to agree with the above submissions for the simple reason that the issuance of show cause notice has emerged only after receiving the letter submitted by the petitioner on 29.05.2014. Therefore, if the Adjudicating Authority has chosen to issue the show cause notice even after receipt of such reply and make some allegations therein against the petitioner, it is for the petitioner to file a suitable reply to the said notice and agitate the matter before the Adjudicating Authority. In this case, the petitioner has not chosen to file any reply. A person to whom a show cause notice is issued, if chooses not to respond to the same, is to be construed as a person not denying the allegation so long as the said show cause notice itself is not put to challenge by him on any other ground/ reason legally sustainable. Therefore, failure to file reply and participate in the adjudication process would certainly lead to draw an adverse inference against such person.

9. At this juncture, it is to be seen that even without a reply, whether a personal hearing is liable to be given to the petitioner. As rightly pointed out by the learned counsel for the Revenue Section 33A of the Central Excise Act, 1944, contemplates granting of an opportunity of personal hearing to a

party in a proceedings, only if the party so desires. Therefore, such request for personal hearing must emerge from the reply filed against the show cause notice. In this case, no such reply was filed. Therefore, there is no meaning in contending that no personal hearing was given to the petitioner.

10. While coming to the next submission on the reply dated 29.05.2014 submitted by the petitioner, I am of the view that when admittedly, the said reply was filed much before the show cause notice and if the show cause notice is issued later containing some allegations, unless and until such allegations are met out by way of filing a reply, the petitioner is not justified in stating that the said reply filed earlier ought to have been considered as the reply to the show cause notice. In any event, the Adjudicating Authority has made some findings and observations at paragraph 'E' of the order for imposing penalty on the petitioner as well. This Court, at this stage is not expressing any view on the merits of the findings rendered by the Adjudicating Authority for imposing penalty on the petitioner, as this matter has to be agitated further before the next fact finding authority, namely the Appellate Authority by filing a regular appeal. As this Writ Petition is sought to be maintained only on the ground of the alleged violation of principles of natural justice and in view of the findings rendered supra that no such violation is found in this case, I am of the view that this is a matter to be further agitated only before the Appellate Authority by filing regular appeal.

11. Accordingly, without expressing any view on the merits of the contentions raised by both parties on the findings rendered in the impugned order, the Writ Petition is disposed of by granting liberty to the petitioner to file regular appeal within a period of four weeks from the date of receipt of a copy of this order. If any such Appeal is filed, the concerned Appellate Forum shall consider the appeal on its own merits and pass orders in accordance with law, without reference to the period of limitation. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (Insp Cell)

//True Copy//

Sub Assistant Registrar

vsi

To

The Commissioner of GST and Central Excise,
Office of the Commissioner of GST and Central Excise,
No.1, Foulke's Compound, Anai Road,
Salem - 636 001.

+1cc to Mr. Rajnish Pathiyil, Advocate, S.R.No. 84378
+1cc to Mr. Joseph Prabakar, Advocate, S.R.No. 84156

W.P.No.3929 of 2019

MG(CO)
GN(01/11/2019)