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IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 1 OF 2021

M/s Excellency Services, Through its Proprietor Mr. Brian Cosme Fernandes, aged 43 years, having its office at Office No. 1, 4th floor, Reliance Plaza, Margao-Goa. ...Petitioner

Versus

1. Union of India, Through its Secretary, Ministry of Finance, Department of Revenue, having its office at North Block, New Delhi, Delhi 11001.
2. Central Board of Excise & Customs, Through its Chairman, having its of. at North Block, New Delhi, Delhi 11001.
3. Office of the Commissioner of Central Goods & Services Tax, Goa, having its office at 2nd Floor, GST Bhavan, EDC Complex, Plot No. 6, Patto, Panaji, Goa 403001.
4. Additional Commissioner of Central Goods & Services Tax, Goa, having its office at 2nd Floor, GST Bhavan, EDC Complex, Plot No. 6, Patto, Panaji, Goa 403001.
5. Superintendent of Central GST, Range-IV, Margao, having its office at 4th floor, Blessing Pioneer Commercial Complex, Opposite District & Session Court, Margao, Goa 403 601. ...Respondents

Mr. Vinoj K. Daniel, Advocate *for the Petitioner.*
Ms. Asha A. Desai, Senior Central Government Standing Counsel *for the Respondents.*

CORAM: M.S. SONAK &
M. S. JAWALKAR, JJ.
DATED: 14th September 2021.

ORAL JUDGMENT:

1. Heard Mr. Vinoj Daniel, the learned Counsel for the petitioner, and Ms. Asha Desai, the learned Senior Central Government Standing Counsel for the respondents.

2. The challenge in this Petition is to the following:

> *a. For a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction to quash and set aside Impugned Notices i.e (i) Letter dated 11.12.2020 bearing ref. no GOA/CGST/ADJ/ADC/37/2020-21 issued by Superintendent of Central, GST i.e. Respondent no. 5 bearing DIN no. 20201268UF00002782B and (ii) Show Cause Notice dated 15th December 2020 bearing ref. no. F. no. GOA/CGST/ADJ/ADC/37/ 2020-21(ST) issued by respondent no. 4 against the petitioner herein.*

3. The challenge to the show cause notice dated 15.12.2020 is based on non-compliance with the requirements set out in para 5 of the Master Circular dated 10.03.2017 on the subject of show cause notice/adjudication and recovery-reg.

4. Para 5 of the Master Circular reads as follow:

> *"5.0 Consultation with the noticee before issue of Show Cause Notice: Board has made pre show cause notice consultation by the Principal Commissioner/ Commissioner prior to issue 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 21st December 2015. Such consultation shall be done by the adjudicating authority with the assessee concerned. This is an important step towards trade facilitation and promoting voluntary compliance and to reduce the necessity of issuing show cause notice".*

5. In this case, before the issue of show cause notice dated 15.12.2020, the respondents did issue a notice dated 11.12.2020 in purported compliance with the requirements of pre-consultation in terms of para 5 above. However, though this notice is dated 11.12.2020, it was in fact dispatched by e-mail or rather served by e-mail on 14.12.2020. This pre-consultation notice required the petitioner to attend the consultation process, which was scheduled on 15.12.2020 at 11:30 a.m.

6. Mr. Vinoj Daniel, the learned Counsel for the petitioner, in our opinion, has correctly pointed out that the issue of notice dated 11.12.2020 and its service on the petitioner on 14.12.2020 was nothing, but, paying of lip service to the requirements of para 5 of the Master Circular. Based on the same, it is apparent that there was no intention on the part of the respondents to genuinely comply with the requirement of pre-consultation. This is further evident from the fact that though, the hearing insofar as consultation is concerned, was fixed on 15.12.2020 at 11:30 a.m., the impugned show cause notice was also issued on 15.12.2020 itself. In such circumstances, we are satisfied that the notice dated 11.12.2020 does not amount to proper compliance with the requirements to para 5 of the Master Circular.

7. Based on the aforesaid, we granted the petitioner interim relief and restrained the respondents from proceeding in terms of the show cause notice dated 15.12.2020. This was by our order dated 06.04.2021, which reads as follows:

> *Heard the learned Counsel for the parties.*
>
> *2. In the peculiar facts of the present case, when, the notice for pre-consultation was issued just one day prior, we entertain this Petition despite availability of alternate remedy to the Petitioner.*
>
> *3. We issue Rule and grant an ad interim relief in terms of prayer clause (b) of this Petition. Such an ad interim relief shall operate till 21st June, 2021 in the first instance.*
>
> *4. During the operation of this ad interim relief, the Petitioner shall appear before Respondent No.4 on 28th April, 2021 at 11.00 a.m., so that there is pre-consultation in the matter. In terms of the master*

circular, such pre-consultation is a step towards trade facilitation and promoting voluntary compliance. Both the parties should, therefore, make genuine attempts to see that the issues relating to payment of dues are sorted out. We make it clear that there will be no further necessity of issuing any pre-consultation notice to the Petitioner now that the hearing for the purpose of pre-consultation is fixed on 28th April, 2021 at 11.00 a.m.

5. Rule is now made returnable on 21st June, 2021 peremptorily. Liberty is granted to the Petitioner to apply for extension of the ad interim relief should that been necessary.

6. Ms. Dessai, the learned Senior Central Govt. Standing Counsel for the Respondents waives service on Rule.

8. In terms of para 4 of our order dated 06.04.2021, notice was issued to the petitioner to attend the consultation process on 28.04.2021. In the sheet for recording the pre-consultation as proposed by and on behalf of the respondents, this is what was stated:

"Today Sh. Brian Cosme Fernandes, Proprietor, M/s Excellency Services, Goa & Sh. Parimal Kulkarni, CA appeared online at Webex platform at 11:00 A.M. for the pre-consultation as directed by the Hon'ble High Court of Bombay at Goa vide its order dated 06.04.21.

> *Sh. Parimal Kulkarni, CA stated that their services from 2014 are non-taxable as it was mainly provided outside the taxable territory in Portugal & that's why they filed NIL returns or not filed returns. However, as they were not knowing about the taxability aspect and therefore in some returns, they filed the details wrongly. Also, that no penalty can be imposed.*
>
> *He further added that they are submitting detailed reply to the SCN.*
>
> *The pre-consultation meeting ended at 11:40 AM."*

9. The aforesaid were only draft minutes and therefore, the copy of the same was forwarded to the petitioner and the petitioner was given the option of modifying the minutes in terms of para ix of the instructions issued by CBIC on 21.08.2020 and thereafter, return it within three days from the receipt of the e-mail.

10. The petitioner, complied and dispatched its version of the minutes. This version was ultimately accepted and the accepted version of the minutes is to be found on pages 233 to 236 of the paper book and bears the signature of Pradnyasheel Jumle, JC, CGST, Goa.

11. Now, if the minutes of the pre-consultation held on 28.04.2021, accepted by both the parties, are perused, then, it is clear that the only correction made on behalf of the respondents to the minutes proposed by the petitioner reads thus:

> *"The above submissions are taken on record".*

12. Thereafter, the petitioner was neither informed that the pre-consultation has concluded nor was any further date fixed for pre-consultation. Ms. Desai, however, relied on communication dated 28.05.2021 addressed to the petitioner, in which, the petitioner was required to file show cause/demand notice within seven days. Ms. Desai submits that from this it is clear that pre-consultation had concluded without any result.

13. According to us, despite an opportunity granted by us, there has been no genuine pre-consultation in this case. The mere taking on record the petitioner's submissions without anything further, can be hardly styled as some genuine pre-consultation.

14. In **Omaxe Ltd. & Another Vs. Union of India & Others**, Writ Petition (C) No. 7842/2020 decided on 05.04.2021 by the Hon'ble Division Bench of Delhi High Court, it is held that voluntary statements recorded by the Senior Intelligence Officer cannot constitute pre-show cause notice consultation as envisaged in para 5 of the Master Circular.

Consultation entails discussion and deliberation. There is back and forth between the parties concerned with the consultative process, leading to metaphorically speaking, often separation of wheat from the chaff. A voluntary statement is, at best, a one-way dialogue made before an authority that often does not, as in this case, decide as to whether or not any further steps are required to be taken in the matter.

15. In this case, as noted above, there has not been any consultation process as such, involving a two-way dialogue with a genuine effort to either redress the grievance or narrow down the area of dispute.

16. Mr. Vinoj Daniel submits that in the absence of genuine pre-consultation, the show cause notice dated 15.12.2020 may be set aside. Thereafter, liberty can always be granted to the respondents to issue fresh show-cause notice, if they so desire, by keeping open the question of limitation as well as competence to issue a fresh show-cause notice because according to him, such issue is pending before the Hon'ble Supreme Court in **Principal Commissioner, Central Excise, Service Tax, and Central Tax Commissionerate Vs. Amadeus India Pvt. Ltd.**, SLP (C) Diary No(s). 35886/2019. He pointed out to the order dated 04.11.2019 made in the said Petition, which reads as follows:

"Delay condoned.

Learned Additional Solicitor General submits that if a fresh show-cause notice is to be issued as directed by the High Court after pre-consultation, the Department may be given liberty to revive the earlier show cause notice to obviate any objection in regard to limitation.

Issue notice confined to the above issue, returnable in eight weeks.

17. According to us, in the peculiar facts of this case, there is no need to quash the impugned show-cause notice. This is because in this case, a notice of pre-consultation was issued, but such notice was not adequate notice. Thereafter, we granted liberty to the respondents to actually go through the process of pre-consultation. In this, even the petitioner, participated. However, we agree with Mr. Vinoj Daniel, the learned Counsel for the petitioner that despite the opportunity, the respondents did not hold any genuine pre-consultation. Therefore, the show cause notice need not be set aside, but directions will have to be issued to the respondents to once again act on the liberty granted by us to attempt a genuine consultation process before the respondents proceed to adjudicate the show cause notice dated 15.12.2020. Such a course of action will meet the ends of justice because then there will be substantial compliance with para 5 of the Master Circular and in the peculiar facts of this case, both the parties will get an opportunity to see if their disputes are sorted out or at least, the area of the dispute is narrowed down to the extent possible.

18. Ms. Desai states that the pre-consultation meeting can now be scheduled for 27th September 2021 at 11:30 a.m. Accordingly, the petitioner/its representative will have to attend this hearing, if they are genuinely interested in pre-consultation. No separate notice will be issued to the petitioner to attend these consultation proceedings.

19. Accordingly, we dispose of this Petition by making the following order:

(a) The respondents will once again hold the consultation process with the petitioner. In such proceedings, the respondents will be guided by the observations of the Delhi High Court in the case of **Omaxe Ltd.** (supra) referred to by us above;

(b) The consultation process will be concluded within two months from today;

(c) Until the pre-consultation process concludes one way or the other, the show cause notice dated 15.12.2020 will not be proceeded with;

(d) We make it clear that we have not examined the merits of the dispute and therefore, all contentions of all parties on merits are left open;

(e) There shall be no order as to costs;

20. All concerned to act on an authenticated copy of this order.

M. S. JAWALKAR, J. **M. S. SONAK, J.**

VAIGANKAR ESHA SAINATH
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Date: 2021.09.15 17:49:04 +05'30'