Item No.1.

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

HEARD ON: 22.04.2022 & 26.04.2022

DELIVERED ON:26.04.2022

CORAM:

THE HON'BLE MR. JUSTICE T. S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

MAT 311 of 2022
With
I.A. No.CAN 1 of 2022

Eastern Associates Contracts.
VERSUS
Union of India & Ors.

Appearance:-
Mr. Agnibesh Sengupta,
Mr. Debabrata Chakraborty .....**for the appellant.**

Mr. Somnath Ganguli,
Ms. Aishwarya Rajyashree .. **for the CGST Authority.**

JUDGMENT

(Judgment of the Court was delivered by* T.S. SIVAGNANAM*, J.)

1. This intra-Court appeal filed by the writ petitioners is directed against the order dated 18th February, 2022 passed in W.P.A. No.26663 of 2016.

2. The learned Single Bench by the impugned order has disposed of the writ petition by directing the appellant to respond to the show cause notice dated 14th October, 2016 issued by the Commissioner of Central Excise & Service Tax, Audit – II Commissionerate, Kolkata. The appellant approached the writ Court primarily on the ground that the instructions given by the Central Board of Excise and Customs qua the procedure of pre-consultation before issuance of show cause notice has not been adhered to and when the instruction specifically states that the authority, who issued the pre-consultation show cause notice is required to issue the show cause notice has also not been followed. The writ petition was filed in the year 2016 and an order of interim stay was granted on 29th November, 2016. The department has filed their affidavit-in-opposition to which the appellant had filed its reply. Thus, we find that the writ petition was ripe for hearing. When the matter was heard by the learned Single Bench, the Court was of the view that the writ petition was premature though it had been entertained and

direction for affidavits was given and interim order was passed. The learned writ Court thought it fit that the appropriate procedure for the appellant would be to submit its reply to the show cause notice dated 14th October, 2016 and face the adjudication proceeding. Aggrieved by such order, the appellant is before us.

3. We have heard Mr. Agnibesh Sengupta, learned advocate for the appellant and Mr. Somnath Ganguli, learned advocate appearing for the respondents.

4. The Central Excise & Service Tax Commissionerate, Bolpur through the Assistant Commissioner issued notice dated 29th September, 2016. Reference was made to the audit conducted by the officers of Bolpur Commissionerate as well as Audit- II Commissionerate from 11th September, 2013 to 12th September, 2013 and 1st March, 2016 to 4th March,2016 and objections raised by the auditors during audit in respect of non-payment of service tax on cargo handling GTA and management, maintenance or repair services during the period from 2011 - 2012 to 2014 – 2015. It was further stated that since the appellant has not paid the said service tax amount with interest, demand / show cause

notice under the Finance Act, 1994 was contemplated against the appellant for realization of the outstanding amount as mentioned in the notice. Referring to the instruction given by the Central Board dated 21st December, 2015, the appellant was informed that the Commissioner of Central Excise & Service Tax, Bolpur being the adjudicating authority for the proposed show cause notice invited the appellant for a consultation on 13th October, 2016 before issuance of show cause notice in the matter. The appellant had responded to the said show cause notice and appeared for the consultation and has also made certain submissions and produced certain records. The record of the pre-show cause notice consultation in the meeting held on 13th October, 2016 has been minuted as could be seen from the minutes dated 13th October, 2016. It is, thereafter, the show cause notice dated 14th October, 2016 has been issued.

5. It is pointed out by the learned Advocate for the appellant that the show cause notice has been issued by the Commissioner, Central Excise & Service Tax Audit – II Commissionerate, who is not the authority who invited the appellant for pre-consultation and such show cause notice could not have been issued by a

different commissioner as it is in contravention of the instruction issued by the Board dated 13th October, 2016.

6. Further, it is submitted that the show cause notice dated 14th October, 2016 does not whisper anything about the pre-consultation and therefore, the appellant is prejudiced. In this regard, the learned Advocate for the appellant placed reliance on the master circular issued by the Board dated 10th March, 2017 to emphasise the purpose behind issuance of the pre-show cause consultation notice. Therefore, it is submitted that the learned writ Court ought to have decided the contentions raised by the appellant and not relegated the appellant to submit its reply to the show cause notice.

7. Mr. Ganguli, learned senior standing counsel appearing for the revenue seeks to sustain the order passed in the writ petition by contending that the learned writ Court rightly held that the writ petition was premature, the appellant has not been in any manner prejudiced as it can always submit its reply, which will be considered by the adjudicating authority and an order will be passed on merits and in accordance with law after affording a reasonable opportunity of hearing to the appellant.

Therefore, the learned senior standing counsel submits that the appellant may be relegated to the authority and directed to submit its reply to the show cause notice.

8. After we have elaborately heard the learned counsel for the parties, we find that the process of pre-consultation as done in the instant case appears to have not been a statutory procedure but a procedure carved out by the Central Board with a view to promote compliance and to reduce the necessity for issuing the show cause notice. The object behind such process can be culled out from the master circular issued by the Central Board dated 10th March, 2017.

9. If that be the case, then the procedure adopted should be meaningful. Admittedly, the appellant was invited for the consultation. They participated in the consultation, stated to have submitted documents and made submissions. The record of the proceedings has been minuted on 13th October, 2016. Though the learned Advocate for the appellant would contend that the record of pre-show cause notice consultation meeting held on 13th October, 2016, is not comprehensive, it indicates the contentions, which were advanced by the appellant. The net

result is thus if the Central Board has evolved a procedure to balance the interest of the assessee as well as the revenue, such procedure should be given due regard. This is precisely the reason the Central Board in its master circular dated 10th March, 2017 has directed that the authority, who has issued the pre-consultation notice, should be the authority, who shall issue the show cause notice and adjudicate the same in cases where pre-consultation does not resolve the dispute. This is broadly on the principles that the man, who hears shall decide. In the instant case, the appellant was invited for consultation by the Commissioner, Central Excise & Service Tax, Bolpur whereas it is the Audit Commissionerate, who has issued the show cause notice. This procedure is clearly in contravention to the instructions of the Central Board.

10. That apart, we also note that in the show cause notice dated 14th October, 2016 issued by the Audit- II Commissionerate, there is no reference to the pre-consultation process. This, in our view, is incorrect as when the department has evolved a procedure, such procedure should be a meaningful procedure. At least a brief discussion is required to be made as the appellant was invited to participate in the pre-consultation before

issuance of the show cause notice with a view towards trade facilitation and promoting voluntary compliance and to reduce the necessity of issuing the show cause notice in terms of the instruction issued by the Board dated 13th October, 2016.

11. Thus, for the above reason, we are of the view that the show cause notice dated 14th October, 2016 cannot be interfered with.

12. The learned Advocate appearing for the appellant would strenuously contend that if the Court is convinced that the show cause notice dated 14th October, 2016 cannot proceed and the Bolpur Commissionerate has to proceed with the matter, assessee may be directed to be sent to the pre-consultation stage. This, in our view, is not required. The assessee has put down his submissions and the record of the proceedings is available on the file of the Commissioner of Central Excise, Bolpur. Therefore, it would suffice if the matter is remanded back to the Commissioner of Central Excise, Bolpur with a direction to issue a fresh show cause notice where a brief discussion is required to be made with regard to the pre-consultation procedure, which was adopted.

13. As noticed above, from 29th November, 2016, the show cause notice has been stayed. Therefore, the appellant cannot be heard to say or raise the issue regarding limitation and fresh proceedings shall be commenced and concluded in accordance with law.

14. In the result, the appeal is allowed and the order passed in the writ petition is set aside. The show cause notice dated 14th October, 2016 is quashed and the matter is remanded to the file of the Commissioner, Central Excise & Service Tax, Bolpur Commissionerate, West Bengal with a direction to issue show cause notice to the appellant within 15 days from the date of receipt of the server of this judgment and order wherein brief discussion with regard to the pre-consultation procedure, which was adopted shall be given. The appellant is given 30 days' time to give its reply and afforded a opportunity of personal hearing to the authorized representative of the appellant and the show cause notice be adjudicated and a reasoned order be passed on merits and in accordance with law.

15. The appeal and the connected application are disposed of.

16. No costs.

17. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNANAM, J)

I agree,

(HIRANMAY BHATTACHARYYA, J.)

NAREN/PALLAB(AR.C)