09.06.2023
Item Nos.19 &
S/L -2 Item No.1
gd/ssd

MAT/1038/2023
IA NO: CAN/1/2023
M/S. SUDERA REALTY PRIVATE LIMITED
VS
UNION OF INDIA AND ORS.
with
MAT/1062/2023
IA NO: CAN/1/2023
THE COMMISSIONER(PRINCIPAL COM)OF CST AND CX.KOLKATA SOUTH COMMISSIONERATE.
VS
M/S. SUDERA REALTY PVT. LTD. AND ORS.

Mr. J.K. Mittal,
Mr. Paritosh Sinha,
Mr. Amitava Mitra,
Mr. Subhadip Banerjee
..for the Appellant in MAT/1038/2023.

Mr. K.K. Maiti,
Ms. Ekta Sinha
..for the Appellant in MAT/1062/2023.

Mr. Vipul Kundalia,
Ms. Sarda Sha
..for the Union of India.

1. These intra court appeals have been preferred by the writ petitioner/assessee as well as the department.

2. Aggrieved by the order passed in the writ petition dated 05.06.2023, the appellant/assessee had challenged the show cause notice dated 23rd December, 2020 issued under Section 73 of the Finance Act, 1994 read with Section 174 of the CGST Act, 2017.

3. The leaned Writ Court has dismissed the writ petition on the ground that the petitioner has approached the Writ Court after lapse of two years and four months from issuance of the show cause notice.

4. It is submitted by Mr. Mittal, learned advocate appearing for the appellant in MAT 1038 of 2023 that though the show cause notice was issued on 23rd December, 2020 and reply was filed on 5th February, 2021, questioning the jurisdiction of the authority as a preliminary objection no action was taken by the authority to adjudicate the show cause notice. Since the assessee contended that the show cause notice is without jurisdiction and suffers from the jurisdictional error, the same was challenged in the writ petition.

5. It has been held by the Hon'ble Supreme Court that the bar of entertaining a writ petition when there is a statutory remedy available is not an absolute bar and the Hon'ble Supreme Court has carved out certain exceptions as to when and under what circumstances a writ can be entertained challenging a show cause notice. One such exception is when the jurisdiction of the authority is questioned. Precisely, in the instant case the assessee has questioned the jurisdiction of the authority, therefore, the said issue can be considered in a writ proceedings. We, however, make it clear that disputed questions of fact cannot be

adjudicated while considering the jurisdictional issue. Therefore, we are of the view that the writ petition should be heard and decided on merits.

6. Mr. Mittal, to buttress his submission that writ petition is maintainable placed reliance on the decision of the Hon'ble Supreme Court in *Magadh Sugar & Energy Ltd. v. State of Bihar reported* in *2021 SCC OnLine SC 801* and the decision of the Hon'ble Supreme Court in *Godrej Sara Lee Ltd. v. Excise & Taxation Officer* reported in *2023 SCC OnLine SC 95*.

7. The Revenue is on appeal in MAT 1062 of 2023 against the penultimate portion of the order passed in the writ petition whereby the learned Writ Court has made certain observations against the Commissioner of CGST & CX, Kolkata, South Commissionerate and directed a copy of the order be forwarded to the Chief Commissioner to fix responsibility for the lapse in concluding the impugned proceedings.

8. It is submitted by Mr. Maiti, learned senior standing counsel for the Revenue that the time limit under the Central Excise Act, 1944 for adjudication is six months in cases where the normal period of limitation of issuance of show cause notice is invoked and in the light of the language in Section 11A(11) of the Central Excise Act and in Section 73(4)B of the Finance Act, 1994 the words "where it is possible to do

so” should be construed as directory and not mandatory. The department would further contend that in terms of Section 73(4)B of the Finance Act, 1994, there is a time limit of six months from the date of issuance of notice for determining the amount of service tax due, in respect of cases falling under sub-section (1) within one year from the date of notice where it is possible to do so in respect of cases falling under Proviso to sub-section (1) or the Proviso to sub-section 4A.

9. It is submitted by Mr. Mittal that there are decisions of the High Court of Delhi which have interpreted the words “where it is possible to do so” to be mandatory and not directory. In any event, this is arguable issue and therefore, we are of the view at this juncture, no adverse observations should have been made against the Commissioner of CGST & CX, Kolkata South Commissionerate. Therefore, that portion of the order passed by the learned Writ Court is required to be set aside.

10. In the result the appeals filed by the assessee and the department are allowed and the order passed in the writ petition is set aside and the writ petition is restored to the file of the learned Writ Court with the direction to the respondent/department to file their affidavit-in-opposition within three weeks from

date of receipt of the server copy of this order; reply, if any, be filed within a period of two weeks thereafter.

11. The Registry is directed to list the writ petition before the appropriate Bench after a period of five weeks.

(T. S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)