17.11.2023
Item No.7
gd/ssd

MAT/1676/2023
IA NO: CAN/1/2023
M/S AVINASH TRANSPORT AND ORS.
VS
THE SUPERINTENDENT, GROUP 2, CGST &
CENTRAL EXCISE CIRCLE 1 ASANSOL
DURGAPUR AUDIT COMMISSIONERATE AND ORS.

Mr. Somnath Ganguli,
Mr. Sandip Choraria,
Mr. Sukalpa Seal
..for the Appellants.

Mr. K.K. Maiti,
Mr. Tapan Bhanja
..for the Respondent/CGST Authority.

Mr. Aryuak Dutt,
Mr. Sujit Mitra
..for the Respondent No.5.

1. This intra court appeal is directed against the order passed by the learned Single Bench dated 2nd August, 2023 in WPA 16707 of 2023.

2. The writ petition was dismissed by the learned Single Bench on the ground that the petitioners have approached the court belatedly challenging a demand which was raised in the year 2019.

3. Aggrieved by such order, the appellants have filed the present appeal.

4. We have heard the learned advocates for either of the parties.

5. The Superintendent Grade-II CGST and CE, Circle-I, Asansol, Durgapur Audit Commissionerate had

issued a spot memo dated 04.01.2018. In Annexure 'B' to the said spot memo it has been recorded as follows:

<table>
<tr><td colspan="6">M/s. Avinash Transport had sub-contracted M/s. Devprabha Construction (P) Ltd for Mining & Exploration Services as per the Agreement dated 23.12.2016. Applicable S. Tax along with Cesses was paid to M/s. Devprabha Construction (P) Ltd by M/s. Avinash Transport as per ledger (verified). M/s. Avinash Transport was eligible to get Input Service Credit on the same but they erroneously reflected the same in their ST-3 return in the Receiver portion of Mining & Exploration Service.</td></tr>
<tr><td rowspan="2">2016-17</td><td>Taxable Value</td><td>ST</td><td>SB Cess</td><td>KK Cess</td><td>Total</td></tr>
<tr><td>214386697</td><td>30014138</td><td>1071933</td><td>1071933</td><td>32158005</td></tr>
</table>

6. The case of the appellant-assessee is that the spot memo clearly records that the assessee had sub-contracted M/s. Devprabha Construction (P) Ltd. for Mining & Exploration Services as per the Agreement dated 23.12.2016. Applicable service tax along with cess was paid to M/s. Devprabha Construction (P) Ltd. by the assessee as per the ledger which was verified. The spot memo also notes that the assessee was eligible to get Input Service Credit on the same but they erroneously reflected the same in their ST-3 return in the Receiver portion of the Mining & Exploration Services. Thus, the assessee's case is that they are eligible for Input Service Credit to the tune of Rs. 32158005/-. The assessee has also submitted a reply to their spot memo on 03.02.2018. After about more than a year the authority issued recovery notice dated 24.04.2019 alleging that the assessee has sought paid

their service tax amount to the tune of Rs.4,75,61,318/-. This demand was based upon a Draft Audit Report No.191/ST/DGP Audit/Gr.-02/17-18 extract of the audit report was enclosed along with the demand. The assessee had submitted reply to the same reiterating the aspect that the spot memo clearly records that the assessee is entitled to Input Service Credit.

7. However, the authority has not considered or adjudicated the correctness of the stand taken by the appellant-assessee and continued to issue demand notices alleging default in service tax liability.

8. At that stage, the petitioners had filed the writ petition assuming the audit being of the department had, prima facie, come to a conclusion that there is a default in payment of service tax liability, such audit para will be forwarded to the concerned jurisdictional officer, who, in turn, will put on the assessee on notice to enable the assessee to respond to the allegation. It is thereafter the case will be adjudicated after affording an opportunity to the assessee and an order will be passed by the jurisdictional officer. However, in the instant case such procedure has not been followed.

9. The learned advocate appearing for the appellants would refer to Section 72A(4) of the Finance

Act, 1994 which provides for an opportunity to be afforded to the assessee.

10. The learned standing counsel appearing for the respondent department submitted that the audit report is not in terms of the said provision, but it is on account of certain other factors or features.

11. Be that as it may, the assessee is entitled to an opportunity and the assessee should be permitted to place its stand before the jurisdictional officer who has to adjudicate the same and thereafter come to a conclusion by passing a speaking order. This procedure having not been adopted in the instant case, we are of the view that appropriate direction needs to be issued to the authority to do so in the matter.

12. Accordingly, the appeal is allowed and the order passed in the writ petition is set aside and the writ petition is disposed of by directing the petitioners to treat the allegations in para 2 of the Draft Audit Report in Draft Audit Report No.191/ST/DGP Audit/Gr.-02/17-18 which was appended to the notice dated 24.04.2019 as a show cause notice and submit their objections within 30 days from the date of receipt of the server copy of this order.

13. Upon such reply/objections being filed, the jurisdictional officer, namely, the concerned Assistant Commissioner of Central GST and Excise shall afford an opportunity of personal hearing to the

authorised representative of the appellants and pass a speaking order on merits and in accordance with law.

14. The appellants will be entitled to submit copies of the earlier replies given by them along with the reply directed to be filed as stated supra.

(T. S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)