

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
(Constitutional Writ Jurisdiction)
APPELLATE SIDE**

Present:

The Hon'ble Justice Krishna Rao

WPA 575 of 2021

IA CAN 1 of 2021

Aloke Paul

Versus

**Deputy Commissioner, CGST &
Central Excise & Ors.**

Dr. Navin Barik
Mr. Sujit Basu
Ms. Esha Acharya

.....For the Petitioner.

Mr. Ratan Banik
Mr. Saptarshi Banik

.....For the respondent nos. 1, 2 & 3.

Mr. Raja Saha
Mr. Subham Chanda

.....For the SJDA.

Hearing Concluded On : 14.06.2023

Judgment on : 24.07.2023

Krishna Rao, J.:

1. The petitioner has filed the present writ application challenging the letter dated August 7, 2020, letter dated September 16, 2020 and the Order dated March 6, 2018 issued by Superintendent, CGST and Central Excise, Range III, Siliguri Division imposing penalty of Rs. 7,58,764/- upon the petitioner under Section 78 of the Finance Act, 1994.
2. The petitioner is engaged in the service of providing vehicle on hire on a monthly basis with the respondent no. 5 i.e. the Siliguri Jalpaiguri Development Authority as on required basis since the year 2009 and also started providing vehicle to respondent no. 4 being North Bengal Development Department since the year 2012.
3. The Assistant Commissioner, Head Quarter, Anti-Evasion Unit for the first time on August 11, 2015 issued a letter to the petitioner for verification of Service Tax liability under the Finance Act, 1994 and requested the petitioner to submit necessary documents within seven days from the date of receipt of the letter.
4. On receipt of the said letter, the petitioner came to know that the service relating to "Rent-a-Cab" is also taxable service and required to be registered before the said Service Tax Department, accordingly, the petitioner got registration on September 10, 2015. As there was delay in complying with the letter dated August 11, 2015, the respondent no.2

again issued a letter dated August 26, 2015 and requested the petitioner to submit the document at the earliest.

5. After getting the registration of Service Tax, the respondent no. 2 had again issued a notice for enquiry of Service Tax liability on September 17, 2015 and the petitioner was asked to appear and produce the documents as mentioned in the said notice. As the petitioner was required to submit the details, the petitioner has requested the North Bengal Development Department for providing the service tax for the services provided so as to enable the petitioner to pay the service tax as demanded by the respondent no.2.
6. By a letter dated January 27, 2017, the Superintendent, CGST, Central Excise, and Service Tax, Siliguri Division had issued a demand notice requesting the petitioner to file ST-3 Return for the period from October–March 2015-16 and April–September 2016-2017 within seven days from the date of receipt of the notice.
7. On August 7, 2020, the respondent no. 3 had issued a letter calling upon the petitioner to deposit an amount of Rs. 7,58,764/- including cess under Section 73(1) of the Finance Act, 1994, late fee for the period from 2010-2011 to 2014-2015 under Section 70(1) of the Finance Act, 1994 and penalty of Rs. 30,000/-. The said notice was issued to the petitioner during the peak of Covid-19 pandemic and the petitioner could not deposit the same. Accordingly, the respondent no.3 issued a letter dated September 16, 2020 calling upon the petitioner for

depositing of the said arrears in terms of the letter dated March 6, 2018. On receipt of the letter dated March 6, 2018, the petitioners enquired how an order is passed without any proceeding and requested for supply of the copy of the order but the respondents refused to supply the copy of the order to the petitioner.

- 8.** Mr. Naivn Barik, learned Advocate representing the petitioner submitted that without issuing any show cause notice and without giving any opportunity of hearing, a notice of demand of service tax was issued to the petitioner on August 7, 2020 and September 16, 2020 by directing the petitioner to deposit the amount of Rs. 7,58,764/- and a penalty of Rs. 30,000/-. Mr. Barik submits that the respondents have directed the petitioner to deposit the said amount along with penalty without any demand as the petitioner has not received any demand from the respondents for the said amount.
- 9.** Mr. Barik submitted that the purported order in original was passed on March 6, 2018 but the same was neither served to the petitioner nor informed to the petitioner. The petitioner came to know only after receipt of the letters dated August 7, 2020 and September 16, 2020.
- 10.** Mr. Barik submitted that the respondent no.1 had also issued notice to the Branch Manager, State Bank of India, No.1, the Dabgram Surya Sen Street, to 'Debit Freeze' the account of the petitioner. On receipt of the said letter, the respondent No. 6 has credited an amount of Rs.

6,30,000/- as the said amount was available in the account of the petitioner.

11. Mr. Barik submitted it is mandatory that the show cause notice is to be issued if the tax department contemplates any action against the petitioner but in the present case, no show cause notice was issued to the petitioner. He also submits that no notice of demand and no opportunity of hearing was given to the petitioner.
12. Mr. Barik submitted that even the petitioner has not received the order in original dated March 6, 2018 as the said order was never communicated to the petitioner and thus the respondents have violated the established procedure of law.
13. Mr. Barik submitted that the entire proceedings as stated in the letter dated August 7, 2020 and September 16, 2020 has been issued without any legal basis and in violation of the provisions of law and thus the same is required to be set aside. He submits that the respondents have illegally and without adopting any legal process have freezed the account of the petitioner.
14. Mr. Barik by relying upon the judgement reported in **(2015) 14 SCC 523 (Saral Wire Craft Private Limited vs. Commissioner of Customs, Central Excise and Service Tax and Others)** and submitted that the specific language of Section 37-C(1)(a) of the Act which requires that an order must be tendered on the person

concerned or his authorised agent, in other words, on no other person, to ensure efficaciousness.

15. Mr. Barik by relying upon the judgement reported in **2022 SCC Online Cal 4069 (Commissioner, Central CGST and CX Haldia Commissionerate and Others –vs- Haldia Petrochemicals Ltd. and Others)** and submitted that Sub-Section (2) of Section 37C of the Act would also be relevant, which states that every decision under the Act or the rules shall be deemed to have been served on the date on which the decision is tendered or delivered by post or courier referred to in Sub-Section(1) of Section 37C. Therefore, proof of delivery is mandatory condition to establish proper service of the decision.
16. Mr. Barik relied upon the judgment passed in the case of **M/s. RU's Marketing and Creative Unit vs. The Commissioner of Service Tax by the Hon'ble Madras High Court on December 11, 2017** and submitted that since there is no proof of even tender or delivery of the letter enclosing a copy of the order to the addressee by post, the deeming fiction in Sub-Section (2) of Section 37C read with Section 27 of the General Clauses Act, 1897 is not attracted.
17. Mr. Barik relied upon the judgment reported in **1995 Supp (3) SCC 462 (Pushpam Pharmaceuticals Company vs. Collector of Central Excise, Bombay)** and submitted that the act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts

are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it supersession.

18. Mr. Barik relied upon the judgement reported in **(1995) 6 SCC 117 (Cosmic Dye Chemical vs. Collector of Central Excise, Bombay)** and submitted that the main limb of Section 11-A provides limitation of six months. In cases, where the duty is not levied or paid or short-levied or short-paid or erroneously refunded, it can be recovered by appropriate officer within six months from the relevant date. (The expression “relevant date” is defined in section itself.) But the said period of six months gets extended to 5 years where such non-levy, short levy, etc., is “by reason of fraud, collusion or any wilful misstatement or supersession of facts or contravention of any of the provisions of this Act or of the rules with intent to evade payment of duty”.
19. Mr. Barik relied upon the judgment passed in **Civil Appeal No. 6060 of 2003 (M/s Uniworth Textiles Ltd. vs. Commissioner of Central Excise, Raipur) dated 22.01.2013** and submitted that “*supersession of facts*” can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it supersession. It is settled law that mere failure to declare does not amount to wilful supersession.

- 20.** Mr. Barik relied upon unreported judgment passed by the coordinate bench of this Court in **WP No. 912 of 2013 (Simplex Infrastructures Limited vs. Commissioner of Service Tax, Kolkata) dated 07.04.2016** and submitted that mere failure to disclose a transaction and pay tax thereon or a mere misstatement or mere contravention of the Central Excise Act or Finance Act, 1994, as amended, or any Rules framed thereunder, is not sufficient for invocation of the extended period of limitation. There has to be a positive, conscious and deliberate action intended to evade tax, for example, a deliberate misstatement or suppression pursuant to a query, in order to evade tax.
- 21.** Mr. Barik relied upon the judgement reported in **(2009) 13 SCC 448 (Union of India vs. Rajasthan Spinning and Weaving Mills)** and submitted that an incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.
- 22.** Mr. Ratan Banik, learned Advocate representing respondent nos. 1, 2 & 3 submitted that on receipt of an information that the petitioner is providing “Rent-a-Cab” Service and supplying vehicles to various Government Departments and Private concerns on hire basis and also providing Man power services and other businesses but had not taken any Service Tax Registration as required under Section 69 of the Finance Act, 1994 read with Rule 4 of the Service Tax Rules, a letter was issued to the petitioner for submitting necessary documents for verification of Service Tax Liability but the petitioner has not submitted

any reply and on receipt of reminder dated August 26, 2015, the petitioner had submitted some documents.

23. Mr. Banik submitted that on completion of investigation proceeding, a show cause notice was issued to the petitioner by speed post dated February 5, 2016 but the petitioner has not submitted any reply. The petitioner was also directed to appear for personal hearing on several dates as per the convenience of the petitioner but the petitioner did not appear in any of the dates for his personal hearing. On January 25, 2018, the petitioner had submitted his request for fixing a date for personal hearing, accordingly, a date was fixed on January 29, 2018 but the petitioner did not appear. The petitioner requested for fixing the date after March' 2018 but the respondents were of the view that several opportunities were provided to the petitioner but the petitioner has not appeared before the authorities and on March 6, 2018, the Adjudicating Authority had passed an order and the said order was duly sent to the petitioner by speed post on March 14, 2018 at the registered address of the petitioner.

24. Mr. Banik submitted that the show-cause notice and the Order in Original was sent to the petitioner in conformity with the provisions of Section 37C of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 and Section 169, Sub-Section 1(b) of the CGST Act. Mr. Banik relied upon the judgment reported in **AIR 2014 SC 3057 (M/s Ajeet Seeds Limited vs. K. Gopala Krishnaih)** and submitted that Section 27 of the General Clauses Act gives rise to a presumption

that service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to aver in the complaint that in spite of return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice.

- 25.** Mr. Banik submitted that the allegation made by the petitioner with respect of non receipt of show cause notice and Original Order was never raised before the Adjudicating Authority when the petitioner has prayed for several dates for personal hearing.
- 26.** Mr. Banik submitted that there is a provision under Section 85 of the Act for preferring an appeal against the order impugned but the petitioner instead of filing an appeal has filed the present writ application. He submits that after the expiration of the period of appeal, the respondents have initiated a proceeding under Section 87 of the Act and issued notices to the petitioner to deposit the amount but when the petitioner has not deposited the same, the respondents have collected the amount after freezing the Bank Account of the petitioner in terms of Sections 87 and 88 of the Act read with Sections 79, 142 (8) (a), 173 and 174 of CGST Act.
- 27.** Mr. Banik submitted that the extended period of five years under Section 73 (i) of the Finance Act, 1994 was invoked in the show-cause notice as the entire fact of evasion came to the light only after initiation of enquiry by the Department, thus penalty and interest was imposed

upon the petitioner as per the specific provision of law as well as the notifications issued from time to time.

- 28.** Mr. Banik submitted that onus to take registration is upon the petitioner and non registration with the Service Tax Department indicates malafide intention of the petitioner to keep his Taxable activities suppressed from the Tax authorities. He submits that while deciding the issue, the Adjudicating Authority had discussed the said issue in detail.
- 29.** Mr. Banik submitted that the extended period of five years under Section 73 (i) of the Finance Act, 1994 was invoked in the show cause notice as the entire fact of evasion came to the light only after initiation of enquiry by the Department and thus penalty and interest was imposed as per the specific provision of law as well as Gazette notification published from time to time.
- 30.** Mr. Banik submitted that as per Notification No. 1/2006, Service Tax, New Delhi dated March 1, 2006, Service Tax is leviable under Section 66 of the Finance Act, calculated on the value of the gross amount charged by such service provider by providing the taxable service. He submits that renting of a cab under the definition of taxable service and the percentage and/or calculation of Service Tax would be on 40% of the gross amount charged. He submits that the same view was followed in the subsequent Notification No. 26/2012 dated June 20, 2012.

- 31.** Admittedly, the petitioner is engaged in the business of rent-a-cab since the year 2012 but the petitioner got registration before the Service Tax Department only on September 10, 2015 vide Registration No. AEPPP5296QSD001. Prior to the registration, the Respondent No.2 had issued a letter dated August 11, 2015 calling upon the petitioner for verification of Service Tax Liability and only after receipt of the said letter, the petitioner got registration.
- 32.** The main grievance of the petitioner is that, the show cause notice was not served upon the petitioner and without giving an opportunity of hearing, the Adjudicating Officer had passed the order and the copy of the order was not served to the petitioner. The Respondent No. 2 had issued show cause upon the petitioner on February 5, 2016. The show cause notice was sent to the petitioner by speed post dated February 9, 2016. On January 2, 2018, a notice was issued to the petitioner informing the petitioner that the Respondent No. 2 is pleased to grant an opportunity of personal hearing any seven working days from January 9, 2018 to January 12, 2018 and January 15, 2018 to January 17, 2018. On receipt of the said notice, the petitioner by his representation requested the respondent for fixing the date on January 25, 2018. On receipt of the representation of the petitioner, the respondent again on January 17, 2018 issued notice further informing the petitioner that a personal hearing is fixed on January 29, 2018. On receipt of the said notice, again the petitioner had sent a letter requesting the respondent to re-fix the date after March' 2018.

Considering the above documents, this Court found that the petitioner has received show cause notice and requested the respondent to refile the dates and thus the argument made by Mr. Barik that show cause notice is not served upon the petitioner is not sustainable.

- 33.** As regard to the service of order dated March 6, 2018, as per the submission made by Mr. Banik and Annexure A4 page 79 of Affidavit-in-Opposition filed by the respondents no. 1, 2 and 3 (wrongly mentioned as a reply on behalf of the Commissioner of CGST and CX Siliguri Commissionerate), the order was sent to the petitioner by speed post dated March 14, 2018. Relying upon the said document, Mr. Banik submitted that it was sent to the registered address of the petitioner and as such provisions of Section 37C of the Central Excise Act has been fulfilled. As per the case of the respondents that for the purpose of confirmation of delivery of the said letter on June 12, 2023, a letter was issued to the Postmaster, Siliguri for providing delivery confirmation of the speed post dated March 14, 2018 but in reply it was intimated that the speed post article mentioned in the letter could not be traced due to non-availability of records as the period of reservation of record is only six months as per the directorate letter dated April 26, 2002.

Section 37-C of the Central Excise Act, 1944 reads as follows :

“[37C. Service of decisions, orders, summons, etc.--(1)
Any decision or order passed or any summons or notices issued under this Act or the rules made thereunder, shall be served,--

(a) by tendering the decision, order, summons or notice, or sending it by registered post with acknowledgment due for by speed post with proof of delivery or by courier approved by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963)], to the person for whom it is intended or his authorised agent, if any;

(b) if the decision, order, summons or notice cannot be served in the manner provided in clause (a), by affixing a copy thereof to some conspicuous part of the factory or warehouse or other place of business or usual place of residence of the person for whom such decision, order, summons or notice, as the case may be, is intended;

(c) if the decision, order, summons or notice cannot be served in the manner provided in clauses (a) and (b), by affixing a copy thereof on the notice-board of the officer or authority who or which passed such decision or order or issued such summons or notice.

(2) Every decision or order passed or any summons or notice issued under this Act or the rules made thereunder, shall be deemed to have been served on the date on which the decision, order, summons or notice is tendered or delivered by post [or courier referred to in sub-section (1)] or a copy thereof is affixed in the manner provided in sub-section (1).]"

In the case of **Saral Wire Craft Private Limited (Supra)**, the Hon'ble Supreme Court held that an order must be tendered on the person concerned or his authorised agent, in other words, on no other person, to ensure efficaciousness.

The respondents by relying upon the judgement of **M/s Ajeet Seeds Ltd. (Supra)** submitted that Section 27 of General Clause Act could be profitably imported and in such a situation service of notice is deemed to have been effected on the sender unless he proves that it

was really not served and that he was not responsible for such non-service.

In the case of ***M/s RU's Marketing and Creative Unit (Supra)***, the Hon'ble Division Bench of Madras High Court held that it is clear that after the word "*sending it by registered post with acknowledgement due*" the words i.e. "*or by speed post with proof of delivery*" has been inserted. The aforesaid amendment itself would clearly shows that the amendment sought to be made is not only clarificatory in nature but also purely procedural for the purpose of communication of decisions/orders/summons to the parties.

In the case of ***Commissioner, Central CGST and CX Haldia Commissionerate and Others (Supra)***, the Hon'ble Division Bench of this Court held that:

"7. Section 37C of the Central Excise Act, 1944 (for short 'the Act') deals with service of decisions, orders, summons etc. Clause (a) of sub-section (1) of section 37C would be relevant for the case on hand. It states that any decision or order passed or any summons or notice issued under the Act or the rules made there under shall be served by tendering the decision, order or summons or notice, sending it by speed post with acknowledgement due or by speed post with proof of delivery or by courier approved by the Central Board of Excise and Customs constituted under the Central Board of Revenue Act, 1963 to the person for whom it is intended or his authorised agent, if any. Clause (a) of section 37C(1) underwent an amendment and the words "or by speed post with proof of delivery or by courier approved by the Central Board of Excise and Customs" was inserted with effect from 10th May, 2013. Thus, the statutory provision contemplates four methods of service of the decision, the first of

which is tendering the decision on the assessee, secondly by sending it by registered post with acknowledgment due, thirdly by speed post with proof of delivery and fourthly by the approved courier.

8. *Sub-section (2) of section 37C of the Act would also be relevant, which states that every decision under the Act or the rules shall be deemed to have been served on the date on which the decision is tendered or delivered by post or courier referred to in sub-section (1) of section 37C. Therefore, proof of delivery is a mandatory condition to establish proper service of the decision.”*

In the present case, the final order was passed on March 6, 2018 and the same was alleged to have been sent to the petitioner on March 14, 2018. The postal receipt which the respondents are relying upon reveals as follows : “M/s Alok Kumar Paul, R/o Siliguri” and Postal Receipt No. EW 853279819IN. Admittedly, there is no acknowledgement due or any track report. It is also admitted by the respondents that the postal authorities have informed the respondents that “*the Speed Post articles mentioned above could not be traced at the end due to non-availability of the relevant record as the period of preservation of record is 6 (six) months as per the directorate letter dated April 26, 2002*”.

It is the basic Principle of Law long settled that if the manner of doing a particular is prescribed under any statute, the must be done in that manner or not at all.

In view of the above, Section 27 of the General Clause Act will not come in aid to the respondent. The respondents failed to show any

material that the impugned order dated March 6, 2018 was served upon the petitioner.

34. The respondents have already realised the amount from the petitioner and the same is lying with the respondents, therefore, to safeguard the interest of revenue at this stage, it is not proper to direct the amount to be returned to the petitioner as this Court has not gone into the merit of the matter.
35. Accordingly, the impugned order dated March 6, 2018 is set aside and remanded the matter back to the Adjudicating Authority to decide the matter afresh by allowing the petitioner to file reply to show cause and after giving an opportunity of hearing to the petitioner, the Adjudicating Authority shall dispose of the said matter within a period of eight weeks from the date of receipt of this order. The petitioner is directed to appear before the Authority without fail and in case, if the petitioner fails to appear consecutive two dates, the respondents are free to take decision in the absence of the petitioner.
36. It is made clear that if the Adjudicating Authority decides the same in favour of the petitioner or if it is found that any excess amount realised from the petitioner, shall be returned to the petitioner, if the petitioner applied for.
37. **WPA 575 of 2021** is thus **allowed**. Consequently, **IA No. CAN 1 of 2021** is **disposed of**.

Parties shall be entitled to act on the basis of a server copy of the Judgment placed on the official website of the Court.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Krishna Rao, J.)