12.12.2023
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IN THE HIGH COURT AT CALCUTTA
Circuit Bench at Jalpaiguri

MAT 200 of 2023
with
CAN 1 of 2023

KMBD Architect & Engineers Consortium Pvt. Ltd.
Vs.
Assistant Commissioner, CGST & Central Excise, Siliguri & Anr.

Dr. Navin Barik
Ms. Esha Acharya
… … for the appellant

Mr. Ratan Banik
Mr. Biswaraj Agarwal
Mr. Sankar Sarkar
……. for the respondents

1. Appellant has assailed the order dated 05.12.2023 whereby the learned Single Judge has refused to entertain a challenge to the show cause notice issued by the 1st respondent and had directed the respondent authorities to issue a fresh notice for personal hearing to the appellant/assessee in response to the impugned show cause-cum-demand notice.

2. A show cause notice dated 19.08.2020 was issued by the first respondent being the Assistant Commissioner of Central Goods and Services Tax and CX Siliguri Division, Siliguri for short payment of service taxes for the financial years 2014-15, 2015-16, 2016-17 and 2017-18. Writ petitioner had responded to the said show cause notice alleging the same is not maintainable both in law and in fact. He had prayed for a personal hearing.

When date was fixed for personal hearing, petitioner assailed the show cause notice, inter alia, on the ground that the same is time barred. After hearing the parties learned Single Judge declined to interfere in the matter and directed the respondent authorities to issue a fresh notice for personal hearing.

3. Dr. Barik, learned Counsel for the appellant/assessee contends the show cause is based on NSDL data on TDS deposited to the income-tax department by other entities and not pursuant to an independent enquiry by the authorities. Such notice based on income-tax return is prima facie illegal as held in *Sameer Suryakant Gupta vs. Union of India & Ors.*[1] He also contends that the adjudication proceedings ought to be deemed to have concluded as no order has been passed within the time frame envisaged under Section 74(10) of the CGST Act, 2017 (referred to as the Act of 2017). He also contends that a combined show cause-cum-demand notice discloses a closed mind of the respondent authority in the matter.

4. Learned Counsel for the respondent authorities contends that the appellant/assessee has already submitted the jurisdiction of the respondent no. 1 and replied to the show cause notice. Learned Single Judge had taken into consideration such fact and directed the respondent no. 1 to give an opportunity of personal hearing to the appellant/assessee. He is entitled to raise all relevant issues including that of jurisdiction before the authority

[1] 2022 SCC OnLine Bom 6883

concerned without prejudice to the aforesaid, he argues the adjudication proceeding is based on independent investigation and is protected by the saving clause under section 174(2) of the Act of 2017.

5. We have given anxious considerations to the rival submissions made at the Bar. A show cause notice may be challenged at the inception in very rare cases e.g. when the authority concerned lacks jurisdiction to issue the notice.

6. Dr. Barik, learned Counsel has strongly contended that the notice is based on TDS furnished before the income-tax authority and nothing more. Hence, it is untenable in law.

7. We have perused the contents of the show cause notice. The averments in the notice give a different picture. Being alerted by the TDS deposited with the income-tax department, authority concerned initiated an independent investigation into the matter. In the course of the investigation it examined the records and documents of the firm including its audited balance-sheet etc. On the basis of these materials the authorities concerned was of the view that there was a short deposit of service tax for the financial years to the tune of 7,43,625/- for the financial years 2014-15, 2016-17 and 2017-18.

8. This factual matrix clearly demonstrates the show cause cum demand notice was not a mere knee jerk reaction of the first respondent to the TDS deposited with

the income tax department but a product of an independent investigation into the matter.

9. The authority relied upon by Dr. Barik is therefore distinguishable as the impugned show cause notice is not founded on the declaration before the income tax department alone.

10. With regard to issue that the proceeding is time bound, we find substance in the submission of the learned counsel for the respondent authorities that the proceedings for recovery of service tax under the prior legislation (since repealed) is saved by operation by section 174 sub-clause (2) of the Act of 2017. Sub–section 2 of section 174 of the Act of 2017, inter alia, provides that the promulgation of the Act of 2017 shall not affect any right, privilege, obligation, liability accrued under the repealed law and/or any investigation, enquiry adjudication or recovery proceedings of duty, tax, penalty, interest under the repealed law may be instituted or continued as if the earlier law had not been repealed.

11. In view of the aforesaid saving provision, demand cum show cause notice for recovery of short deposit of service tax for the financial years 2014-2015, 2015-2016 and 2017-2018 shall be deemed to have been instituted and continued under the repealed law and cannot be pre-empted with reference to the time frame under section 74 (10) of the Act of 2017. Hence, the impugned show cause notice cannot be said to be ex facie without jurisdiction or time barred.

12. We are also not impressed by the issue that a combined show cause notice cum demand notice discloses a foreclosed mind. The show cause notice was issued upon the appellant assessee after an independent investigation and the recitals therein merely indicate materials which give rise to a reasonable belief in the mind of respondent no. 1 with regard to short payment of service tax and other dues. It would be incorrect to read the averments in the show cause notice in any other manner and treat it as a product of a pre-determined mindset.

13. For these reasons we are of the view no case of patent lack of jurisdiction or legal bar to the issuance of show cause notice cum demand notice has been made out. However the appellant/assessee is entitled to a personal hearing in the matter.

14. We direct the respondent no. 1 to issue notice upon the appellant/assessee within 30 days from date and after giving an opportunity of hearing to him, pass appropriate order in the matter within two months thereof.

15. We clearly have not expressed any opinion with regard to merits of the case which shall be decided independently by respondent no. 1/assessee in accordance with law.

16. With these observations, the appeal is disposed of. In view of disposal of the appeal connected application being CAN 1 of 2023 is also disposed of.

(Apurba Sinha Ray, J.) **(Joymalya Bagchi, J.)**