IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.02.2023

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

W.P. No.2924 of 2023 and
W.M.P. Nos.3023 and 3025 of 2023

M/s.Liberty Clothing Company,
represented by its Proprietor
Mrs.Meharaj ... Petitioner

vs.

1.The Union of India,
(represented by its Secretary),
Ministry of Finance,
Department of Revenue,
New Delhi.

2.The State of Tamil Nadu,
(represented by its Secretary),
Commercial Taxes and Religious B2 Department,
Fort St. George,
Chennai – 600 009.

3.The Deputy Commissioner,
Office of the Deputy Commissioner of
Central GST and Central Excise,
Tirupur Division,
51, Elementary School Street,
Kumar Nagar,
Tirupur – 641 603. ... Respondents

Prayer: Writ petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari calling for the records on the file of the third respondent in FORM GST DRC-01 being Show Cause Notice bearing SCN SL.NO.14/2022-DC-GST dated 29.12.2022 and quash the same as being without its jurisdiction and authority of law.

For petitioner	:	Mr.R.Senniappan
For respondents	:	Mr.T.Ramesh Kutty, Standing Counsel for R1 and R3 Mr.K.Vasantha Mala, Government Advocate for R2

ORDER

By consent of both the parties, this writ petition has been taken up for final disposal at the admission stage itself.

2.This writ petition has been filed, challenging the Show Cause notice dated 29.12.2022, issued by the third respondent in FORM GST DRC-01.

3.The petitioner has challenged the impugned show cause notice dated 29.12.2022 issued by the third respondent in FORM GST DRC-01 on the following grounds:

a)The condition requiring the buyer to prove the payment of tax by the supplier of goods and services is unreasonable and beyond the control of the buyer. According to the petitioner, they have paid the tax to their seller, which is not disputed by the respondents. Only on account of the cancellation of registration of the seller, the respondents have issued the impugned show cause notice to the petitioner, which is arbitrary and illegal;

b)The respondents have not adhered to the provisions of Sections 42(3) of the GST Act 2017 as well as 43-A of the very same Act, which makes it clear that the respondents will have to enquire both the buyer (petitioner) as well as the seller. According to the petitioner, since the show cause notice has been issued only to them, the same is arbitrary and illegal. According to the petitioner, the respondents have predetermined the issue in the impugned show cause notice.

4.Learned counsel for the petitioner relies upon the following authorities in support of his contention that enquiry will have to be held by the respondents only after giving notice to the buyer as well as to the seller:

1)W.P. (MD) Nos.2127 of 2021 etc. batch dated 24.02.2021 in the case of M/s.D.Y.Beathel Enterprises vs. The State Tax Officer (Data Cell);

2)W.P. No.15340 of 2022 dated 21.06.2022 in the case of

M/s.G.K.Shetty Builders Pvt. Ltd. vs. The Joint Commissioner and another;

According to them, the petitioner, being a buyer, had paid the tax liability to the seller and therefore, the impugned show cause notice cannot be issued to them alone.

5.Heard Mr.R.Senniappan, learned counsel for the petitioner, Mr.T.Ramesh Kutty, learned Standing Counsel, who accepts notice on behalf of the respondents 1 and 3 and Mrs.K.Vasantha Mala, learned Government Advocate, who accepts notice on behalf of the second respondent.

6.Learned Standing Counsel appearing for the respondents 1 and 3 would submit on instructions that the Central Authority has already made a communication to the State Authority that the notice will have to be sent to the supplier from whom the petitioner had purchased the goods. He would also submit that only in accordance with the procedure established under the CGST Act 2017, further proceedings will be initiated by the respondents. He would submit that the present writ petition is not maintainable on the ground that the petitioner has challenged the show cause notice even without submitting a detailed reply to the same. According to him, the contention of the petitioner as raised in this writ petition can be considered only after they send a reply to the impugned show cause notice and not before that.

7.Admittedly, a challenge has been made in this writ petition only to a show cause notice. The petitioner contends that they are not liable to pay the tax as they state that they have already paid the tax to their supplier. However, the respondents, as seen from the impugned show cause notice, have informed the petitioner that the tax amount has not been paid to them either by the buyer (petitioner) or by the supplier. It is also brought to the notice of the petitioner in the impugned show cause notice that the GST registration of the supplier has already been cancelled in the year 2019 and till date, the tax amount has not been paid for the subject supplies. The petitioner relies upon Sections 42(3), 43-A and 16(2) of the GST Act 2017 and also the judgments rendered by this Court referred to supra in order to substantiate their claim that before passing any assessment order, the respondents will have to enquire both the petitioner as well as the seller. The following Sections of the GST Act 2017 has to be necessarily adhered to by the respondents before passing final orders:

Sections 42(3), 43-A and 16(2) of the CGST Act 2017 are extracted hereunder:

*“ '**42.**Matching, reversal and reclaim of input tax credit-*

....

(3)Where the input tax credit claimed by a recipient in respect of an inward supply is in excess of the tax declared by the supplier for the same supply or the outward supply is not declared by the supplier in his valid returns, the discrepancy shall be communicated to both such persons in such manner as may be prescribed.'

*'**43-A.**Procedure for furnishing return and availing input tax credit (1)Notwithstanding anything contained in sub-section (2) of Section 16, Section 37 or Section 38, every registered person shall in the returns furnished under sub-section (1) of Section 39 verify, validate, modify or delete the details of supplies furnished by the suppliers.*

(2)Notwithstanding anything contained in Section 41, Section 42 or Section 43, the procedure for availing of input tax credit by the recipient and verification thereof shall be such as may be prescribed.

(3)The procedure for furnishing the details of outward

supplies by the supplier on the common portal, for the purposes of availing input tax credit by the recipient shall be such as may be prescribed.

(4)The procedure for availing input tax credit in respect of outward supplies not furnished under sub-section (3) shall be such as may be prescribed and such procedure may include the maximum amount of the input tax credit which can be so availed, not exceeding twenty per cent of the input tax credit available, on the basis of details furnished by the suppliers under the said sub-section.

(5)The amount of tax specified in the outward supplies for which the details have been furnished by the supplier under sub-section (3) shall be deemed to be the tax payable by him under the provisions of the Act.

(6)The supplier and the recipient of a supply shall be jointly and severally liable to pay tax or to pay the input tax credit availed, as the case may be, in relation to outward supplies for which the details have been furnished under sub-section (3) or sub-section (4) but return thereof has not been furnished.

(7)For the purposes of sub-section (6), the recovery shall be made in such manner as may be prescribed and such procedure may provide for non-recovery of an amount of tax or input tax credit wrongly availed not exceeding one thousand rupees.

(8)The procedure, safeguards and threshold of the tax amount in relation to outward supplies, the details of which can be furnished under sub-section (3) by a registered person,-

(i)within six months of taking registration;

(ii)who has defaulted in payment of tax and where such default has continued for more than two months from the due date of payment of such defaulted amount,

shall be such as may be prescribed.'

*'**16.**Eligibility and conditions for taking put tax credit.*

(2)Notwithstanding anything contained in this Section, no registered persons shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,-

(a)he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

[a(aa)the details of the invoice or debit note referred to in clause(a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under Section 37;]

(b)he has received the goods or services or both.

Explanation – For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services

(i)where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii)where the services are provided by the supplier to any person on the direction of and on account of such registered person.]

(c)subject to the provisions of [section 41 or section 43A], the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d)he has furnished the return under Section 39;

Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or service or both, other than the supplies on which tax is payable on reverse charge basis, *the amount toward the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest therein, in such manner as may be prescribed:*

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.' "

8.In fact, in the decisions relied upon by the learned counsel for the petitioner, both the Hon'ble Judges of this Court have consistently held that Section 42 of the CGST Act 2017 referred to supra has to be necessarily adhered to by the respondents. Being a show cause notice, that too when the same has been issued on account of non payment of the GST as per FORM GST DRC-01, this Court cannot entertain this writ petition at this stage. Necessarily the petitioner will have to submit a reply to the impugned show cause notice, raising the contentions that have been raised in this writ petition. On receipt of the same, it is for the respondents to consider it, on merits and in accordance with law. However, the respondents will have to adhere to the aforementioned

Sections and also give due consideration to the decisions of this Court referred to supra, before passing final orders.

9.For the foregoing reasons, this writ petition is disposed of by directing the petitioner to submit an additional reply raising the contentions that have been raised in this writ petition to the respondents, within a period of three weeks from the date of receipt of a copy of this order. On receipt of the said additional reply, the respondents, after affording a personal hearing to the petitioner, shall pass final orders, on merits and in accordance with law, as expeditiously as possible. Consequently, connected W.M.Ps stand closed. No costs.

03.02.2023

vga
Index: Yes/No

ABDUL QUDDHOSE, J.

vga

To

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(represented by its Secretary),
Ministry of Finance,
Department of Revenue,
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2.The State of Tamil Nadu,
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Commercial Taxes and Religious B2 Department,
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