

30.07.2024
Item No.5
gd/ssd

FMA/896/2024
SWADHIN BOSE
VS
THE JOINT COMMISSIONER OF
CGST, BALLYGUNGE DIVISION AND ORS.
IA NO: CAN/1/2024

Mr. Abhratosh Majumdar,
Mr. Avra Majumdar,
Ms. Alisha Das,
Mr. Suman Bhowmik,
Mr. Samrat Das,
Ms. Elina Dey,
Mr. K. Roy
..for the Appellant.

Mr. Bhaskar Prosad Banerjee,
Mr. Abhradip Maity
..for the Respondents.

1. This intra court appeal by the writ petitioner is directed against the order dated 15th May, 2024 in WPA 11595 of 2024.

2. The appellant filed the writ petition challenging the order in original dated 23.02.2023 in and by which the adjudicating authority held that the appellant is liable to pay service tax and cess amounting to Rs.1,60,03,167/- apart from imposing penalty of Rs.10,000/-.

3. The appellant's case is that the adjudicating authority recorded a wrong finding of fact with regard to the nature of business activity carried on by the appellant for which registration has been

obtained by the appellant inasmuch as in the order in original in paragraph 5.3.2 the adjudicating authority states that the appellant is registered with the service tax department for providing interior decoration/designing and works contract service.

4. It is pointed out by the learned senior advocate appearing for the appellant that in the show cause notice dated 31st December, 2020 the department admits the fact that the appellant has registered himself as advertising agency service.

5. Therefore, it is submitted that the adjudication order suffers from perversity and is unreasonable.

6. The second ground of challenge to the adjudication order is by contending that it has been passed in violation of the principles of natural justice inasmuch as the reply dated 12th February, 2021 submitted by the appellant to the show cause notice dated 31st December, 2020 has not been referred to in the order in original. On the contrary, the adjudication officer records as if no reply was submitted by the appellant/assessee.

7. It is not in dispute that the adjudicating authority afforded an opportunity of personal hearing to the appellant and it is a case of the appellant that due to ill-health and the proprietor having been hospitalized could not give proper instructions to the

authorized representative who also did not appear on the date fixed for hearing.

8. Therefore, it is submitted that an opportunity may be granted to the appellant to go before the adjudicating authority to place the entire facts more particularly when notifications which were relied on by the appellant in his reply dated 12th February, 2021 has not been adverted to by the adjudicating authority in the order in original dated 23rd February, 2023.

9. In support of his contention the learned senior advocate for the appellant placed reliance on the decision in the case of *Mahindra & Mahindra Ltd. v. Joint Commissioner (CT) Appeals, Chennai and Another* in (2021) 89 GSTR 269 (Madras).

10. Mr. Bhaskar Prosad Banerjee, learned senior standing counsel appearing for the respondents submitted that the appellant ought to have filed a statutory appeal before the appellate authority in terms of Section 85 of the Finance Act, 1994 as amended and having exhausted the appellate remedy the learned Single Bench was right in refusing to entertain the writ petition. Furthermore, it is pointed out that the writ petition was filed much after the expiry of the period of limitation to file the statutory appeal.

11. After we have elaborately heard the learned advocates for the parties and carefully

considered the materials placed on record, we need to point out that there are certain broad parameters within which the court has to exercise its jurisdiction under Article 226 of the Constitution of India. This aspect was taken note of in *Mahindra & Mahindra Ltd.* and the following parameters were indicated:

- “(i) if there is unfairness in the action of the statutory authority ;
- (ii) if there is unreasonableness in the action of the statutory authority ;
- (iii) if perversity writs large in the action taken by the authority ;
- (iv) if the authority lacks jurisdiction to decide the issue ; and.
- (v) if there has been violation of the principles of natural justice, the court will step in and exercise its jurisdiction under Article 226 of the Constitution of India.”

12. The Hon’ble Supreme Court in *Mafatlal Industries Ltd. v. Union of India* in (1998) 111 STC 467 (SC) equal (1997) 5 SCC 536 held that the jurisdiction of the High Courts under article 226 and that of the honourable Supreme Court under article 32 of the Constitution of India could not be circumscribed by the provisions of the Enactment (Central Excise Act) and they would certainly have due regard to the legislative intent evidenced by the provisions of the Act and would further exercise their jurisdiction consistent with the provisions of the Act. Further, the court directed that the writ petition would be considered and disposed of in

the light of and in accordance with the provisions of section 11B of the Central Excise Act and for such a reason, the power under Article 226 of the Constitution of India has to be exercised to effectuate rule of law and not for abrogating it.

13. In the said decision the court had also referred to the decision of the Hon'ble Supreme Court in *Assistant Commissioner (CT) LTU, Kakinada v. Glaxo Smith Kline Consumer Health Care Limited* in (2020) 77 GSTR 342 (SC) wherein the Hon'ble Supreme Court held that although the power of the High Court under Article 226 of the Constitution is very wide, the court must exercise self imposed restraint and not entertain the writ petition. In paragraph 15 of the said judgment the Hon'ble Supreme Court observed that the High Court may accede to such a challenge and can also non-suit the petitioner on the ground that alternative efficacious remedy is available and that be invoked by the writ petitioner. Further, it was held that when the High Court refuses to exercise the jurisdiction under Article 226 of the Constitution, it would be necessary for the court to record that there was no case of violation of the principles of natural justice or non-compliance of statutory requirements in any manner.

14. In the preceding paragraph we have indicated the broad parameters within which the court can exercise jurisdiction under Article 226 of the

Constitution of India despite existence of an alternate remedy under the relevant statute.

15. In the instant case, we find that though the department had received the reply dated 12.02.2021 to the show cause notice dated 31st December, 2020, the adjudicating authority has recorded a wrong finding of fact stating that the appellant/assessee has not filed its reply.

16. This factual mistake would definitely tantamount to violation of the principles of natural justice as the reply given by the appellant had not been taken note of.

17. The next aspect of the matter is whether the appellant can be faulted for not availing the opportunity of personal hearing afforded to them by the adjudicating authority.

18. Admittedly, the appellant is a proprietorship concern and records having produced to show that the proprietor suffered serious health issues and was hospitalized. The necessary medical records also form part of the stay application. Further, it is not clear as to whether the date of personal hearing was postponed in order to afford an effective opportunity more particularly when the case was transferred to the concerned adjudicating authority pursuant to the orders passed by the Chief Commissioner of Central Tax and Central Excise (Kolkata Zone) to be noted that

the show cause notice was issued on 31st December, 2020, reply was submitted within the time permitted on 12.02.2021 but the case was taken up for adjudication after two years i.e. during February, 2023.

19. Therefore, the adjudicating authority could have granted one more opportunity to the appellant to appear for a personal hearing. This having not been done, would also amount to the violation of the principles of natural justice.

20. For the above reasons, we are inclined to interfere with the order in original dated 23rd February, 2023 and remand the matter to the adjudicating authority for fresh consideration after affording an opportunity of personal hearing to the authorized representative of the appellant.

21. Accordingly, the appeal is allowed. The order passed in the writ petition is set aside. Consequently, the writ petition is allowed and the order in original dated 23rd February, 2023 is set aside and the matter is remanded to the adjudicating authority for fresh consideration. The adjudicating authority shall fix a date for personal hearing on which date the authorized representative of the appellant shall appear without seeking for any adjournment and after considering the oral submissions that may be made including the documents and notifications that may be relied on by the appellant as also the reply submitted

by the appellant, fresh orders be passed by the adjudicating authority on merits and in accordance with law.

(T. S. SIVAGNANAM)
CHIEF JUSTICE

(BIVAS PATTANAYAK, J.)