

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present :

The Hon'ble Justice Raja Basu Chowdhury

WPA 4237 of 2025

**Sayan Biswas
versus**

Deputy Commissioner of Revenue, Bally Salkia Charge & Ors.

For the petitioners : Mr. Vinay Kr. Shraff
Mr. Dev Kumar Agarwal
Ms. Swarnwarshi Poddar

For the State : Mr. Md. T.M.Siddiqui, Ld. AGP
Mr. T.Chakraborty
Mr. S. Sanyal

Heard on : 21.07.2025.

Judgment on : **21.07.2025**

Raja Basu Chowdhury, J:

1. The present writ petition has been filed, inter alia, challenging the order passed under Section 73 of the WBGST /CGST Act, 2017(hereinafter referred to as the "said Act") dated 19th July 2024. Although, the writ petition seeks to challenge several issues, however, the petitioner has confined the challenge to the order under Section 73 of the said Act. According to Mr. Shraff, learned advocate appearing for the petitioner, if the challenge succeeds, then

the show cause notice based on which the aforesaid order has been passed also cannot be sustained.

2. The petitioner is engaged in the business of retail of ferrous waste and scrap, remelting scrap ingots. According to the petitioner, a proceeding had been initiated under Section 74 of the said Act on the basis of a show cause dated 29th April 2022 in respect of the tax period April 2019 to March 2020. The said proceeding culminated in the order passed under Section 74 of the said Act dated 20th October 2022. Perusal of the aforesaid order would demonstrate that the petitioner had made voluntary payment upon receipt of the show cause notice which had been accounted for and consequent thereupon, the differential amount of tax, interest and penalty had been levied. The petitioner claims to have preferred an appeal from the aforesaid order under Section 107 of the said Act, which culminated in the order dated 27th December, 2023, whereby the appeal filed by the petitioner stood rejected and the determination confirmed. The petitioner has, however, not challenged the aforesaid appellate order. According to the petitioner since the appellate tribunal is yet to be constituted, the petitioner has not questioned the same.
3. Subsequently, in respect of the self same period, a notice under Section 73 of the said Act had been issued. The petitioner is aggrieved by the inclusion of the claim of ITC availed on inward B2B supply (Including Debit Notes and Amendment) in Table 4(A)(5) of

GSTR-3B. According to the petitioner, the aforesaid figure had already been included in the order passed under Section 74 of the said Act dated 20th October, 2022. As such, the same once again could not have been included in the aforesaid show cause issued under Section 73 of the said Act. The petitioner is also aggrieved by the inclusion of demand for short payment of output tax on outward supply to the extent of Rs.27,178.38/-, each for CGST & SGST which has again been included in the show cause. Independent of the above, the petitioner also seeks to question the demand on account of reverse charge mechanism, inter alia, on the ground that the said demand is vague. No particulars have been disclosed.

4. The other point raised by the petitioner which is more of a preliminary point though argued later is with regard to the very issuance of the show cause notice under Section 73 of the said Act. According to the petitioner once, a show-cause notice under Section 74 of the said Act is issued, no further show-cause notice can be issued for the self-same period. On such ground as well the instant writ petition should succeed.
5. Mr. Siddiqui, Learned Senior Advocate and Additional Government Pleader at the very outset, submits that the scope of issuance of show-cause notice under Sections 73 and 74 of the said Act are entirely different. While the proceedings under Section 74 of the said Act is based on misrepresentation and fraud, such is not the basis for issuance of notice under Section 73 of the said Act. Insofar as

the issue of non-disclosure of particulars of reverse charge mechanism (RCM) is concerned, Mr. Siddiqui has placed reliance on the form GSTR-1 and submits that the details of outward supply are all reflected thereat which also includes the HSM Code. The allegations of the petitioner as regards vagueness are unfounded. No reliance be placed on the same. On the issue of non-consideration of ITC availed on inward B2B supply (Including Debit Notes and Amendment) in Table 4(A)(5) of GSTR-3B, he submits that the petitioner did not disclose adequate documents despite being afforded with an opportunity and in the facts noted hereinabove, the aforesaid order was passed. As such, no interference is called for.

6. Having heard the learned advocates appearing for the respective parties, I notice that the primary contention raised by the petitioner is with regard to the issuance of show-cause notice under Section 73 of the said Act after an order under Section 74 of the said Act in respect of the identical period having been passed. To morefully appreciate the same, the relevant provisions of Section 73 and 74 of the said Act are extracted hereinbelow:

“Section 73. Determination of tax [, pertaining to the period up to Financial Year 2023-24,] not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any willful-misstatement or suppression of facts.-

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or

where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under [section 50](#) and a penalty leviable under the provisions of this Act or the rules made thereunder.

(2) The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under subsection (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under [section 50](#) on the basis of his own ascertainment of such tax or the tax as

ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under [section 50](#) within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent. of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund.

(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.

“74. Determination of tax 207[, pertaining to the period up to Financial Year 2023-24,] not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful-misstatement or suppression of facts.—(1) Where

it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under Section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of Section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under Section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under Section 50 and a penalty equivalent to twenty-five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under Section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

[(12) The provisions of this section shall be applicable for determination of tax pertaining to the period up to Financial Year 2023-24.]

Explanation 1.—For the purposes of Section 73 and this section,—

(i) the expression “all proceedings in respect of the said notice” shall not include proceedings under Section 132;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under Section 73 or Section 74, the proceedings against all the persons liable to pay penalty under [Sections 122 and 125] are deemed to be concluded.”

7. From the aforesaid it would be apparent and clear that the show cause under Section 73 and Section 74 of the said Act are issued on distinct and different basis. While in the case of Section 73 of the said Act what is relevant is determination of tax not paid or short paid or erroneously refunded or wrongfully availed or utilized for any reason other than fraud or any wilful misstatement or suppression of facts to evade tax, while in the case of Section 74 of the said Act the very basis of issuance of the notice is fraud, wilful misstatement or suppression of facts to evade tax. Having regard thereto, I am of the view that the respondents cannot be faulted for having issued two separate notices in respect of the selfsame period, since, the basis for issuance of notices are different.
8. On the second ground raised by the petitioner as regards vagueness of the show notice is concerned, I find that the petitioner did not challenge the show cause notice at any earlier point of time. Be that as it may, upon going through the show-cause notice in Form DRC01, it appears that reference has been made to the liability and the tables in form GSTR-1, a perusal to the forms reveals that the Form GSTR-1 provides for all details of outward supplies of goods or service. Such form, *inter alia*, includes supplies attracting tax on reverse charge in table 4B including details of HSN code in table 12 for outward supplies.
9. From the perusal of the show cause dated 13th May, 2024 it would be apparent that all particulars in relation to tax liabilities on

reverse charge mechanism had been duly provided for, by noting down the relevant reference to the table. This apart, the show-cause appears to have been uploaded in form DRC-01 in compliance of Rule 142 of the WBGST/CGST Rules 2017 (hereinafter referred to as the “said Rules”). Having regard thereto, I am of the view that the aforesaid issue of the show-cause being vague is unsustainable. Independent of the above, I also find that the petitioner chose not to appear before the authorities and make any representation. Only a response to the show cause was filed. Thus, the objection appear to have been taken mechanically without pursuing the same. Consequently, the same is rejected.

10. On the aspect of including ITC availed on account of B2B supply (Including Debit Notes and Amendment) in Table 4(A)(5) of GSTR-3B as noted under point no. 1(I) and 3(M), of the show-cause is concerned, since such issue had already been decided by the authorities pursuant to the show-cause notice issued under Section 74 of the said Act dated 29th April, 2022, I am of the view such issue could not have been included in the subsequent notice and no demand on the basis thereof, could also have been raised simply because the petitioner failed to disclose particulars. Non-disclosure of supporting documents by the petitioner cannot be a ground to absolve the proper officer of its obligation to scrutinise the records. Neither can the same permit the proper officer to impose any demand on such ground especially, when a demand in this regard has already been raised pursuant to the appellate order in Form GST APL 04 dated 27th December, 2023. I find that there is no challenge to such

demand. Though Mr. Shraff would contend that since the Appellate Tribunal is yet to be constituted, the challenge to the same has not been filed. I am, however, unable to accept such contention especially having regard to the fact that the petitioner having chosen to bypass the appellate remedy and having approached this Court by invoking the writ jurisdiction to challenge an adjudication order that too by placing reliance on the order dated 27th December, 2023, cannot now be permitted to hold out that by reasons of non-availability of the appellate tribunal, right of the petitioner to question the same is still reserved. In the facts noted above, the petitioner cannot be permitted to take advantage of non-constitution of the Appellate Tribunal. In view thereof, I find that such demand in Form GST APL04 dated 27th December, 2023 has reached finally and require no further adjudication. Proceeding on the above premise the demand relating to point nos. 1(I) and 3(M) of the show-cause dated 13th May, 2024 stands quashed.

11. The writ petition thus, stands partly allowed to the aforesaid extent. Having regard thereto, the demand raised by the respondents in DRC 07 dated 19th July, 2024 is set aside. The respondents are directed to raise a fresh demand in Form GST DRC -7 on the basis of this order. It is also made clear that the aforesaid matter stands adjudicated without any further recourse to any other statutory remedy from the fresh demand in DRC-7 issued on the basis of the order.
12. With the above observations and directions the writ petition is disposed of.
13. Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance with the requisite formalities.

(Raja Basu Chowdhury, J.)

**Saswata
A.R. (Court)**