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IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

WPA 7788 of 2025

Amit Agarwal
Versus
Assistant Commissioner, CGST & CX & Anr.

Mr. Vinay Shraff
Mr. Dev Agarwal
Ms. S. Poddar
... For the petitioner

Mr. Vipul Kundalia, Sr. Advocate,
Mr. Tapan Bhanja
Mr. Anindya Kanan
... For the CGST authorities.

1. The instant writ petition has been filed, inter alia, challenging the order in original dated 28th January, 2025 passed by the respondent no.1 under the provisions of WBGST/CGST Act, 2017 (hereinafter referred to as the "said Act"), for the tax period 2017-18 to 2018-19.

2. The petitioner claims to be an individual who was a registered tax payer under the provisions of the said Act and continued to be so until 4th February, 2023.

3. It is the petitioner's case that during the period the petitioner was registered under the provisions of the said Act, a proceeding was initiated under Section 61 of the said Act, which ultimately came to be dropped on the basis of the response filed by the petitioner, vide an order dated 9th March, 2023.

4. Subsequently, on 5th August, 2024 the petitioner claims to be shocked to have received the show cause issued under Section 74 of the said Act in respect of the tax period 2017-18 to 2018 -19.

5. Mr. Shraff, learned advocate appearing in support of the writ petition would strenuously contend that once a proceeding had been initiated by the respondents and the same had been dropped, no further proceedings could have been initiated by the respondents in respect of the selfsame period. He has drawn attention of this Court to the notice issued under Section 61 of the said Act, the response filed by the petitioner in Form ASMT 11 and the consequential order issued by the proper officer dropping the proceedings in ASMT 12.

6. In support of his aforesaid contention that the proper officer having not initiated any consequential proceedings by falling back to Section 61(3) of the said Act, no further notice under Section 74 of the said Act could have been initiated, he has placed reliance on a judgment delivered by the Hon'ble High Court of Punjab and Haryana in the case of ***J.S.B Trading Co. v. State of Punjab,*** reported in (**2024) 169 taxmann.com 9 (Punjab & Haryana**).

7. Independent of the above, he would submit that it is well settled that in respect of the selfsame cause repeated show cause notices cannot be issued. In support thereof, he has relied on the judgment delivered by the Hon'ble Supreme Court in the case of ***Commissioner of***

Central Excise Meerut-II v. Prince Gutka Ltd., reported in **2015 (322) E.L.T. 165 (S.C.)** and the case of ***Duncans Industries Ltd., v. Commissioner of Central Excise, New Delhi***, reported in **(2006) 2006 taxmann.com 1489**. In the context as noted hereinabove, he would submit that although, the petitioner has participated in the proceedings and raised the aforesaid contention, the appropriate authority has not considered the same. Since, this is a point of law, the petitioner has approached this Court by invoking the extra ordinary writ jurisdiction.

8. Mr. Kundalia, learned senior advocate appears on behalf of the CGST authorities. At the very outset, he has drawn the attention of this Court to the fact that the proceedings under Section 61 of the said Act and the proceedings under Section 74 stand on a different footings. By drawing attention of this Court to the show cause notice issued under Section 74 of the said Act he would submit that the circumstances under which such show cause notice has been issued has already been detailed in the show cause notice itself. The proceedings under Section 74 of the said Act cannot be set at naught by this Hon'ble Court in exercise of its extra-ordinary writ jurisdiction, especially when an adjudication order in that regard has been passed. The petitioner has an alternative remedy available before the appellate authority. The petitioner having not approached such authority, no relief should be afforded to the petitioner.

9. Heard the learned advocates appearing for the respective parties and considered the materials on record. *Prima facie*, I find that a notice under Section 61 of the said Act had been issued which was duly responded by the petitioner. On the basis of the response filed by the petitioner the proper officer having found the response to be satisfactory did not proceed further. It is also to be noted that in respect of the selfsame period a show cause notice under Section 74 of the said Act has been issued. In the light of the above and having regard to the contention raised by the petitioner it important to consider whether the respondents having dropped the proceedings under Section 61(3) of the said Act was competent to proceed under Section 74 of the said Act. To appropriately consider the provisions, Section 61 and Section 74 are extracted hereinbelow:-

> ***"61. Scrutiny of returns**.- (1) The proper officer may scrutinize the return and related particulars furnished by the registered person to verify the correctness of the return and inform him of the discrepancies noticed, if any, in such manner as may be prescribed and seek his explanation thereto.*
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> *(2) In case the explanation is found acceptable, the registered person shall be informed accordingly and no further action shall be taken in this regard.*
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> *(3) In case no satisfactory explanation is furnished within a period of thirty days of being informed by the proper officer or such further period as may be permitted by him or where the registered person after accepting the discrepancies, fails to*

take the corrective measure in his return for the month in which the discrepancy is accepted, the proper officer may initiate appropriate action including those under section 65 or section 66 or section 67 or proceed to determine the tax and other dues under section 73 or section 74."

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"***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.*"

10. As would appear from the above, Section 61 of the said Act, *inter alia,* deals with the scrutiny of returns and related particulars furnished by the registered tax payer and the scope and power of the proper officer to verify the correctness of the returns and to inform the registered tax payer of the discrepancies, if any, noticed. If, on the basis of the explanation to be provided by the registered person in response to any notice identifying discrepancy, it is found that the discrepancies do not survive no proceeding is initiated and the same dropped. On the contrary, if the proper officer is of the view that the registered tax payer has failed to furnish proper explanation, appropriate proceedings under the said Act can be initiated. Having regard thereto, in ordinary course the remedy available to the proper officer is to invoke the provisions of Section 61(3) of the said act in case of dissatisfaction. Admittedly, in this case the explanation provided by the petitioner was found to be proper and notice under Section 61 was dropped. The question still remains having regard to the disclosure made in the show cause under Section 74 of the said Act, whether the respondents were competent to initiate proceedings under Section 74 of the said Act for the self-same period. In my view ordinarily, no proceedings under Section 73 of the said Act could have been initiated by the proper officer once, the proper officer had concluded that the proceedings must be dropped on

the basis of the response filed by the petitioner to a notice under Section 61(1) of the said Act. Section 74, however, stands on entirely different footing. One must keep in mind and as would appear from the above, Section 74 deals with case of fraud, willful misstatement or suppression. The proper officer may not be in a position to identify on the basis of the disclosure made by the registered tax payer as to whether there had been fraud committed by the registered tax payer at the time of scrutiny under Section 61 of the said Act. The same may be detected later. The legislature in its wisdom has thought it fit to incorporate the provision of Section 74 of the said Act.

11. Having regard thereto, considering the peculiar facts as noted in the show cause which, *inter alia*, includes “Alert Circular”, the investigation conducted by the officers which revealed the fraudulent activities committed by the petitioner as noted in the aforesaid show cause, in my view the respondents cannot be faulted for having issued the said notice. The judgment relied on by the petitioner delivered in the case of ***J.S.B. Trading Co***. (supra) does not consider the above situation. In my view, the dropping of proceedings under Section 61(3) is not an impediment on the part of the proper officer for initiating proceedings under Section 74 of the said Act, though the same may be an impediment for the proper officer to initiate proceedings under Section 73 of the said Act once the notice under Section 61 is dropped in a given situation. It is well-settled that fraud vitiates all conducts. Admittedly, in this case a specific case of fraud has been made out against

the petitioner. This apart from the conduct of the petitioner it would transpire that immediately after the issuance of the notice under Section 61 of the said Act in the year 2023 the petitioner had applied for and on the basis of such application immediately after dropping of the proceedings, the registration of the petitioner was cancelled. I may note that this is not a case of issuance of multiple show cause notices. The judgment delivered in the case of ***Commissioner of Central Excise Meerut-II*** (supra) deals with a different situation. In the said case the adjudicating authority had dropped the proceedings after issuing a show-cause on the basis of the explanation. Such situation had never arisen in the instant case. No proceedings under Section 73 or 74 had been previously dropped. Having regard thereto, the aforesaid judgment also do not assist the petitioner. On the same reasoning the judgment delivered in the case of ***Duncans Industries Ltd***. (supra) also does not assist the petitioner. Unlike in the above case, this is not a case of final determination of due, for the entire period of 10 years through settlement under Kar Vivad Samadhan Scheme 1998.

12. The writ petition fails and is accordingly dismissed.

Urgent Photostat certified copy of this order, if applied for, be made available to the parties upon compliance of requisite formalities.

(Raja Basu Chowdhury, J.)