
[2021] 129 taxmann.com 186 (Andhra Pradesh)[28-04-2021]

GST : When an adverse decision is contemplated against an assessee opportunity of hearing to such assessee is indispensable and is required to be followed scrupulously under section 75(4)

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[2021] 129 taxmann.com 186 (Andhra Pradesh)

HIGH COURT OF ANDHRA PRADESH

Ocean Sparkle Ltd.

v.

Assistant Commissioner (ST)

A.V. SESA SAI AND MS J. UMADEVI, JJ.

WRIT PETITION NO. 9162 OF 2021

APRIL 28, 2021

Section 73, read with section 75, of the Central Goods and Services Tax Act, 2017/Section 73, read with section 75, of the Andhra Pradesh Goods and Services Tax Act, 2017 - Demands and recovery - Tax or input tax credit due not involving fraud or misstatement or suppression - Period July, 2017 to March, 2018 - Assessee failed to respond to show cause notice issued under section 73 by way of filing objections - Competent Authority passed an order under section 73 on assessee and confirmed demand upon it - Whether as it is very much evident from a reading of sub-section (4) of section 75 that when an adverse decision is contemplated against an assessee opportunity of hearing to such assessee is indispensable and is required to be followed scrupulously, impugned order was liable to be set aside not only on ground of deviation from mandatory provisions under sub-section (4) of section 75 but also on ground of violation of principles of natural justice - Held, yes - Whether matter was to be remanded to Competent Authority for passing appropriate order afresh after giving notice of hearing to assessee - Held, yes [Paras 7, 8 and 9]

Karan Talwar, learned counsel *for the Petitioner*. **J. Naga Bhushan**, learned Addl. Adv. *for the Respondent*.

ORDER

A.V. Sessa Sai, J. - Heard Sri Karan Talwar, learned counsel for the petitioner and Sri J.Naga Bhushan, learned Additional Advocate General-II for the respondents, apart from perusing the material available on record.

2. The order of assessment bearing Ref. No. ZD370321001535W, dated 17-3-2021, confirming the tax demand of Rs. 57,43,679/- and equal penalty and interest for the period from July, 2017 to March, 2018, passed by 1st respondent herein, is under challenge in the present Writ Petition.

3. The Assessing Authority-1st respondent herein issued a revised show cause notice dated 20-1-2021 under section 73 of the Central Goods and Services Tax Act, 2017 (for short, 'the CGST Act, 2017') read with rule 142(1) of the Central Goods and Services Tax Rules, 2017.

4. According to the learned counsel for the petitioner, the impugned order of assessment passed by 1st respondent is liable to be *set aside* on the sole ground of non-compliance of mandatory provisions of sub-section (4) of section 75 of the CGST Act, 2017.

5. On the other hand, it is vehemently contended by the learned Additional Advocate General-II, representing the respondents, that having failed to respond to the show-cause notice dated 20-1-2021, it is not open for the petitioner herein to raise any objection as to the impugned order of assessment. It is also the submission of the learned Additional Advocate General-II that only after affording full-fledged opportunity to the petitioner herein, 1st respondent-Assessing Authority passed the impugned order of assessment on 17-3-2021. It is the further submission of the learned Additional Advocate General-II that in view of availability of alternative remedy of appeal under section 107 of the CGST Act, 2017 before the Appellate Authority, this Writ Petition is not maintainable before this Court.

6. During the course of arguments, it is brought to the notice of this Court by the learned counsel for the petitioner that the petitioner could not file objections to the show-cause notice within the time stipulated due to certain reasons as mentioned in the writ affidavit, but written objections were filed on 18-3-2021. Though a number of reasons have been pleaded in the writ affidavit for non-filing of the reply to the show-cause notice within the time stipulated, this Court does not propose to go into the said aspect having regard to the facts and circumstances of the case.

7. In order to adjudicate the issue on hand, this Court feels it appropriate to refer to the provisions of the CGST Act, 2017. Chapter XV of the Act deals with 'Demands and Recovery'. Section 73 of the Act deals with 'Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any willful misstatement or suppression of facts'. Section 74 of the Act deals with 'Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason of fraud or any willful misstatement or suppression of facts'. Section 75 of the Act deals with 'General provisions relating to determination of tax'. The provision of law which is germane and relevant for the purpose of adjudication of the issue in the present Writ Petition is sub-section (4) of section 75 of the Act, which reads as under:

"An opportunity of hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is contemplated against such person."

It is very much evident from a reading of the above provision of law that opportunity of hearing is required to be granted where a request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is contemplated against such person. It is also evident from the above provision of law that when an adverse decision is contemplated against any assessee, opportunity of hearing to such assessee is indispensable and is required to be followed scrupulously.

8. In the instant case, admittedly, proposing an adverse action, by way of a show cause notice, 1st respondent initiated action under the above provision of law. It is evident from a reading of the impugned order that on the ground that the petitioner herein failed to respond to the show cause notice by way of filing objections, 1st respondent herein confirmed the demand. When such a course of action is adopted by 1st respondent herein prejudicial to the interest of the assessee, the mandatory requirements of law as provided under sub-section (4) of section 75 of the CGST Act, 2017 are required to be followed scrupulously. Therefore, the impugned order, in the considered opinion of this Court, is liable to be *set aside* not only on the ground of deviation from the mandatory provisions under sub-section (4) of section 75 of the CGST Act, 2017 but also on the ground of violation of principles of natural justice. As such, the contention of the learned Additional Advocate General-II as regards the availability of alternative remedy of appeal under section 107 of the CGST Act, 2017, is liable to be rejected and is, accordingly, rejected.

9. For the aforesaid reasons, the Writ Petition is allowed, setting aside the order of assessment bearing Ref. No. ZD370321001535W, dated 17-3-2021 passed by the 1st respondent herein, and remanding the matter to 1st respondent for consideration of the issue and for passing appropriate orders afresh after giving notice of hearing to the petitioner indicating the date and time of personal hearing. It is made clear that on the date so fixed in the notice of personal hearing, the petitioner or its authorized representative should necessarily be present before 1st respondent for personal hearing without fail. It is also made clear that the objections dated 18-3-2021 said to have been filed by the petitioner herein shall be taken into consideration while passing the order of assessment.

There shall be no order as to costs of the Writ Petition.

Miscellaneous Petitions pending, if any, in the Writ Petition shall stand closed.