

[2023] 157 taxmann.com 617 (Andhra Pradesh)/[2024] 101 GST 789 (Andhra Pradesh)/[2024] 81 GSTL 375 (Andhra Pradesh)[21-11-2023]

GST : Where a notice for audit was uploaded on 14-9-2023 for which assessee gave reply on 28-9-2023 and same reached authority on 3-10-2023 but without considering response of assessee, audit was already finalized on 29-9-2023 and show cause notice under section 73 was issued, since there was no clear 15 working days gap between date of receipt of notice and date of finalization of audit, audit report was finalized within statutory notice period and, hence, same was to be set aside

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[2023] 157 taxmann.com 617 (Andhra Pradesh)

HIGH COURT OF ANDHRA PRADESH

Vardhaman Gold

v.

State of Andhra Pradesh*

RAVI NATH TILHARI AND A.V. RAVINDRA BABU, JJ.

WRIT PETITION NO. 29494 OF 2023

NOVEMBER 21, 2023

Audit - Notice period for finalisation - A show cause notice for audit under section 65(3), though dated 4-9-2023, was uploaded on 14-9-2023 - Response was sent by assessee on 28-9-2023, but without considering assessee's response, audit was conducted and report dated 29-9-2023 was submitted - Based on such report, show cause notice under section 73 was issued on 29-9-2023 itself - HELD : Section 65(3) clearly provides that registered person shall be informed by way of a notice not less than fifteen working days prior to conduct of audit in such manner as may be prescribed - Notice did not comply with sub-section (3) of section 65 inasmuch as there was no clear 'not less than 15 working days' time prior to finalisation of audit - Findings had been finalized by audit officer within statutory notice period - Assessee's reply was dated 28-9-2023, which though reached on 3-10-2023, was submitted within statutory period - Impugned show cause notice as well as findings of audit officer vide report dated 29-9-2023 were to be set aside - Fresh order/report on audit was to be passed after taking into consideration dealer's reply [Section 65 of Central Goods and Services Tax Act, 2017/Andhra Pradesh Goods and Services Tax Act, 2017] [Paras 14, 15 and 17] [In favour of assessee]

B. Abhay Siddhanth Mootha, Ld. Counsel *for the Petitioner*. **T.C.D. Sekhar**, Ld. Govt. Pleader *for the Respondent*.

JUDGMENT

Ravi Nath Tilhari, J. - Heard Sri B. Abhay Siddhanth Mootha, learned counsel for the petitioner and Sri T. C. D. Sekhar, learned Government Pleader for Commercial Tax for the respondents.

2. With the consent of the parties counsels, the petition is being decided finally at this stage.

3. This writ petition under Article 226 of the Constitution of India has been filed for the following relief :-

"It is, therefore, prayed that this Hon'ble Court may be pleased to issue an appropriate writ, order or direction more particularly one in the nature of Writ of Mandamus the order in Form GST ADT-02 in

Reference No. AD371022001269J/GSTIN:37ABYPM0979P1ZD, dated 29-9-2023 issued by the respondent No. 3 on behalf of the respondent No. 2 under Rule 101(5) of the Andhra Pradesh Goods and Service Tax Rules, 2017 levying a tax of Rs. 17,36,445/- (Rupees Seventeen Lakhs Thirty Six Thousand Four Hundred and Forty Five) along with the interest of Rs. 9,61,673/- (Rupees Nine Lakhs Sixty One Thousand Six Hundred and Seventy Three) for the financial years 2017-2018 to 2021-2022 without even considering the reply submitted by the petitioner and one without jurisdiction contrary to the provisions of Section 65 of the Andhra Pradesh Goods and Service Tax Act, 2017 and consequential notice in Form GST DRC-01 in Case Id No. AD AD371022001269J/27-12-2022, dated 29-9-2023 proposing action under section 73/74 of the Andhra Pradesh Goods and Service Tax Act, 2017 as arbitrary, illegal, principals of natural justice, one without jurisdiction and contrary to the provisions of the Andhra Pradesh Goods and Service Tax Act, 2017 and the Rules issued there under apart from being violative of the Fundamental and Constitutional Rights guaranteed to the petitioner under Articles 14, 19, 21 and 300-A of the Constitution of India and consequently *set aside* the Order in Form GST ADT02 in Reference No. AD371022001269J/GSTIN:37ABYPM0979P1ZD, dated 29-9-2023 and consequential notice in Form GST DRC-01 in Case Id No. AD AD371022001269J/27-12-2022, dated 29-9-2023 and pass such order or orders as are deemed fit and proper in the circumstances of the case."

4. Learned counsel for the petitioner submits that the show cause notice for audit under section 65 (3) & Rule 101 (4), though dated 4-9-2023, but was uploaded on 14-9-2023. The petitioner had no 'not less than 15 working days' of statutory period to file the response. The response was sent on 28-9-2023, within the statutory period, but without considering the petitioner's response, within the period of 15 days, the audit was conducted and the report dated 29-9-2023 was submitted. Based on such report, the show cause notice under section 73 has been issued on 29-9-2023 itself. There is violation of the principles of natural justice as also the mandatory statutory provisions.

5. On 16-11-2023, this Court had passed the following order:-

"Heard Sri B. Abhay Siddhanth Mootha, learned counsel for the petitioner.

2. While challenging the impugned show cause notice dated 29-9-2023 (Ex.P1), learned counsel for the petitioner submits that a notice (Ex.P9) dated 4-9-2023 calling objections on the discrepancy was served on 14-9-2023, and before the petitioner could file the reply, within the statutory period of 15 days the order was passed on 29-9-2023. He has referred to Ex.P12 in which "the notice issued date is 14-9-2023". He has also referred to his reply dated 28-9-2023 to submit that the notice was served on 14-9-2023, though it is dated 4-9-2023.

3. The audit proceedings were initiated pursuant to the previously issued show cause notice dated 21-10-2022. However, his submission is that pursuant to the notice dated 4-9-2023 served on 14-9-2023, clear 15 days time was required to be given to the petitioner in view of Section 65(3) of the Andhra Pradesh Goods and Services Tax Act, 2017 (in short, the Act 2017).

4. His further submission is that the petitioner's registration was cancelled on 1-5-2022 and in view of Section 65 of the Andhra Pradesh Goods and Services Tax Act, 2017 (in short, the Act), the audit could not be undertaken against the petitioner, as the petitioner ceased to be a registered person on the date of service of the first notice. He has placed reliance in the case of *Tvl. Raja Stores v. Assistant Commissioner (ST)*, of the Madras High Court that in such a circumstance, the audit could not be initiated.

5. He further submits that in any case the audit should have been completed within 3 months from the date of its initiation but that period expired and there was no permission/extension by the Competent Authority. Consequently, based on such audit report, the impugned show cause notice could not be legally issued.

6. Learned Government Pleader submits that the petitioner has got opportunity to submit the objections pursuant to the impugned show cause notice and the notice under section 73 of the Act has also been issued which are impugned. He submits that all these objections as are being raised here, can be raised before the Authority pursuant to the notices issued.

7. With respect to the petitioner's contention that the petitioner became unregistered after cancellation of the registration, learned Government Pleader submits that in view of the provisions of Sections 25 and 29 of the Act the period of audit, being the period of registration, such audit could be legally made.

8. With respect to the submission of time of completion of audit, learned Government Pleader submits that in view of Section 65, itself it cannot be said that the audit was not completed within statutory period.

9. At present, what we find, *prima facie*, is that though the notice Ex.P9 is dated 4-9-2023 and the period mentioned there under for the petitioner to file the reply was 15 days on receipt of notice, but the petitioner's case is that the notice was received on 14-9-2023, which, *prima facie* is also so evident from Ex.P12, said to be a document of the respondent authorities, and consequently, let the instructions be obtained by the learned Government Pleader with respect to the date of issue and receipt of the notice dated 4-9-2023 by the petitioner.

10. Keeping all the aforesaid submissions/objections open, the matter is listed on 20-11-2023 in the 'Motion List', for instructions as aforesaid."

6. On 16-11-2023, time was granted to the respondent's counsel to obtain instructions.

7. Sri T. C. D. Sekhar, submits today that the notice is dated 4-9-2023 but the same was revised on 4-9-2023 itself. The unrevised notice was uploaded on 4-9-2023. However, the revised notice was uploaded on 14-9-2023. He submits that the report of the audit is pursuant to the revised notice. He submits that the petitioner sent the reply dated 28-9-2023 which was received on 3-10-2023 and consequently could not be considered.

8. Learned Government Pleader however, submits that in view of Section 73 of Andhra Pradesh Goods and Service Tax Act, 2017, the show cause notice can be issued independent of the Audit Report. Consequently, even now the petitioner has opportunity to file response/objections, if any, before the authority pursuant to the show cause notice.

9. We have considered the submissions advanced and perused the material on record.

10. Section 65 of the Andhra Pradesh Goods and Services Tax Act, 2017 (in short, the Act) reads as under:-

"Section 65(3):-

The registered person shall be informed, by way of a notice not less than fifteen working days prior to the conduct of audit in such manner as may be prescribed."

11. Section 65 (3) of the Act clearly provides that the registered person shall be informed by way of a notice not less than fifteen working days prior to the conduct of audit in such manner as may be prescribed.

12. Rule 101 (4) of the Andhra Pradesh Goods and Services Tax Rules, 2017 (in short, the Rules 2017) reads as under:-

"Rule 101(4):-

The proper officer may inform the registered person of the discrepancies noticed, if any, as observed in the audit and the said person may file his reply and the proper officer shall finalise the findings of the audit after due consideration of the reply furnished."

13. Rule 101 (4) of the Rules, 2017, thus also provides that the proper officer may inform the registered person of the discrepancies noticed, if any, as observed in the audit and the said person may file his reply and the proper officer shall finalise the findings of the audit, after due consideration of the reply furnished.

14. From the aforesaid provisions, it is evident that the notice of information that the audit will be conducted is to be given to the registered person and such notice shall be not less than 15 working days, prior to the conduct of audit. The registered person is granted opportunity to file reply and the proper officer shall finalize the findings of the audit after due consideration of the reply furnished. So, before finalizing the findings of the audit, with respect to the discrepancies as noticed for which notice is given the reply is filed, is to be considered. These provisions are towards complying with the principles of natural justice embodied in the statute.

15. In the present case, as mentioned above, the notice does not comply with sub-section (3) inasmuch as there is no clear 'not less than 15 working days' time prior to the conduct of audit. The audit has been finalized on 29-9-2023 based on the revised notice, which notice though revised on 4-9-2023 itself, but was uploaded on 14-9-2023. As such the registered dealer had the information of the notice on 14-9-2023. From that date upto 29-9-2023, there are no clear 15 working days. The findings have been finalized by the Audit Officer

within the statutory notice period, without waiting for completion of the statutory notice period. The petitioner's reply is dated 28-9-2023, which though reached on 3-10-2023, was submitted within the statutory period, and even it be taken that it could not reach in time, as it was sent on 28-9-2023, the audit could not be finalized and the audit report could not be submitted on 29-9-2023.

16. So far as the submission of the learned counsel for the respondents is that under section 73 of the Act, show cause notice can be issued independent of the provisions of Section 65, the same may be correct, but in the present case, what we find from perusal of the show cause notice under section 73, is that there is a reference of the Audit Report dated 29-9-2023, and therefore, it cannot be said that in the present case the show cause notice is independent of the audit report. It is based on the audit report, which in turn is not in accordance with the statutory provisions but is in violation of the principles of natural justice as also the due procedure of law.

17. We accordingly *set aside* the impugned show cause notice under section 73 of the Act as also the findings of the Audit Officer *vide* report dated 29-9-2023, and direct the respondent authorities/competent authorities, to pass fresh order/report on the audit, after taking into consideration the petitioner's reply dated 28-9-2023 received on 3-10-2023 and consequent there upon to proceed further in accordance with law.

18. It is however clarified that if the authorities intend to proceed under section 73 of the Act, independent of any audit under section 65, in that case also they may proceed in accordance with law, but with due notice of the same to the petitioner.

19. The Writ Petition is allowed in part in the aforesaid terms.

No order as to costs.

As a sequel thereto, miscellaneous petitions, if any pending, shall also stand closed.

AJAY

*In favour of assessee.