

[2021] 124 taxmann.com 522 (Andhra Pradesh)/[2021] 44 GSTL 337 (Andhra Pradesh)[20-10-2020]

GST : Where Competent Authority issued on assessee a notice under section 46 dated 15-1-2019 for filing of returns for period from February, 2018 to December, 2018 and thereafter he without waiting for statutory period stipulated under Act passed assessment order under section 62 dated 29-1-2019 on assessee, as assessment order came to be passed without following principles of natural justice, it deserved to be set aside



[2021] 124 taxmann.com 522 (Andhra Pradesh)

HIGH COURT OF ANDHRA PRADESH

S.P.Y. Agro industries Ltd., In re*

C. PRAVEEN KUMAR AND MS. J. UMA DEVI, JJ.

W.P. NO. 15426 OF 2020

OCTOBER 20, 2020

Section 62 of the Central Goods and Services Tax Act, 2017/Section 62 of the Andhra Pradesh Goods and Services Tax Act, 2017 - Assessment - Non-filers of returns - Period February, 2018 to December, 2018 - Competent Authority issued on assessee a notice under section 46 dated 15-1-2019 for filing of returns for period from February, 2018 to December, 2018 - Thereafter he without waiting for statutory period stipulated under GST Act passed assessment order under section 62 dated 29-1-2019 on assessee and directed it to pay huge sum of money including penalty - Whether as assessment order dated 29-1-2019 came to be passed without following principles of natural justice, it deserved to be set aside - Held, yes - Whether matter was to be remanded back to Competent Authority to deal with same afresh in accordance with law - Held, yes [Para 14] [In favour of assessee]

(NR)

S. Appadhara Reddy, Adv. for the Petitioner.

ORDER

C. Praveen Kumar, J. - The present Writ Petition came to be filed seeking issuance of a writ of Mandamus to declare the proceedings of the 5th Respondent *vide* Order OC. No. 26/2019, dated 29-1-2019 in Form GSTR-ASMT 13 insofar as imposing penalty of Rs. 4,27,19,192/- against the Petitioner and consequential proceedings *vide* OC. No. 149/2020, dated 12-8-2020, demanding the Petitioner to pay penalty as being illegal, arbitrary and contrary to the provisions of the Central Goods and Services Tax Act, 2017 ['CGST Act'], and the Andhra Pradesh State Goods and Services Tax Act, 2017 ['AP SGST Act'] and violative of Articles 14 and 21 of the Constitution of India.

2. The facts, in issue, are that:

- (i) The Petitioner herein is a Company and the deponent is the Director of the Company. The said Company is manufacturer of Grain based Extra Neutral Alcohol and also bottles Indian Made Foreign Liquor. The Petitioner after having got itself registered with CGST Act was discharging its GST liability since July 2017 and filing regularly monthly returns in Form GSTR 1 and GSTR 3B.
- (ii) While things stood thus, a notice came to be issued by the 5th Respondent, dated 15-1-2019, under section 46 of CGST Act, for not filing the returns in GSTR 3B for the months of February 2018 to

December 2018 and accordingly was directed to furnish returns within 15 days falling which the tax liability would be assessed under section 62 of CGST Act.

(iii) It is said that, 5th Respondent, *vide* its Order, dated 29-1-2019, and the Corrigendum, dated 12-2-2019, issued assessment Order under section 62 in Form GSTR ASMT-12 ordering to pay the following amounts.

- (a) Rs. 1,04,53,566/- towards IGST, Rs. 1,56,94,370/-towards CGST, Rs. 1,56,94,370/- towards GS/UT GST and Rs. 8,76,886/- towards cess;
- (b) Interest of Rs. 10,13,922/- under IGST, Rs. 14,38,004/- under CGST, Rs. 14,38,004/- under CGST, Rs. 14,38,004/- under SG/UT GST and Rs. 61,670/- cess under section 50 of the CGST Act/AP GST Act.

3. The case of the Petitioner is that, he has paid total GST liability of Rs. 4,69,92,664/- for the period of February 2018 to December 2018 and filed GST DRC-03, and having accepted the GST liability, interest and late fees, as per the provisions of CGST Act, imposing penalty of Rs. 4,27,19,192/- under section 122(1) of CGST Act, AP GST Act, is illegal. It is stated that, 5th Respondent has no power to impose such penalty as per section 62 of CGST Act.

4. The Counsel further pleads that, to impose penalty under section 122 of CGST Act, the procedure under sections 73 and 74 is required to be followed. It is further averred that, without giving any opportunity or notice about imposing penalty, passing an order directing the Petitioner to pay Rs. 4,27,19,191/- as penalty is illegal, improper and incorrect.

5. The Counsel further pleads that, 3rd Respondent has issued a Garnishee Order, dated 31-7-2020, to the 6th Respondent and also to 7th and 8th Respondents for Rs. 5,53,54,009/-, which includes, tax, interest and penalty. Apart from issuing another Garnishee Order by the 4th Respondent to 9th Respondent for Rs. 5,45,71,563/-In other words, the plea of the Petitioner appears to be three fold, viz., 1] Imposing penalty without issuing notice, as violative of principles of natural justice; 2] Jurisdiction on the 5th Respondent to impose penalty; 3] that having collected the amounts by way of tax, interest and attaching properties and collecting the due amount by issuing garnishee orders, directing the Petitioner once again to pay the very same amount would be illegal.

6. The same is disputed by the Counsel appearing for the Revenue. A counter came to be filed stating that, the Petitioner herein has failed to pay GST liabilities and also file periodical returns *i.e.* GSTR-3B for various months within the prescribed due dates. It is stated that, though, the Petitioner has filed GSTR-1 for certain months, but failed to file GSTR-3B returns for the corresponding months.

7. In view of the above, it is urged that, no revenue is actually transferred to the Government, and on the other hand, the customers to whom the Petitioner has issued invoices would avail GST Credit, which the Petitioner has not paid. He further pleads that, failure on the part of the Petitioner to submit GSTR 3B returns within the prescribed time lead the authorities to recover the GST liability, which is inclusive of penalty.

8. Referring to the various factual figures, it has been stated in the counter that, the Petitioner has not paid the amounts voluntary. He pleads that, there is no bar on imposition of penalty under section 122 of CGST Act while issuing assessment order under section 62 of CGST Act, and there is no room for discussion on Sections 73 and 74 of CGST Act. Having regard to the above, it is pleaded that the Writ Petition is liable to be dismissed.

9. Section 73(1) of CGST Act, reads as under:

"(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.

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10. Section 62 of CGST Act, reads as under:

"Assessment of non-filers of returns.

(1) Notwithstanding anything to the contrary contained in section 73 or section 74, where a registered person fails to furnish the return under section 39 or section 45, even after the service of a notice under section 46, the proper officer may proceed to assess the tax liability of the said person to the best of his judgment taking into account all the relevant material which is available or which he has gathered and issue an assessment order within a period of five years from the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates.

(2) Where the registered person furnishes a valid return within thirty days of the service of the assessment order under sub-section (1), the said assessment order shall be deemed to have been withdrawn but the liability for payment of interest under sub-section (1) of section 50 or for payment of late fee under section 47 shall continue."

11. It is to be noted that, section 122 of CGST Act which deals with "Penalty for certain offences" states that, "wherever there is a violation, a taxable person shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher".

12. It is well settled that, as per the procedure contemplated under section 73 and 74 of CGST Act, a show-cause notice has to be necessarily issued and same has to be adjudicated following due process of law. Though, the learned counsel for the Petitioner pleaded that, such a notice was never issued, but no effective reply came to be made in the counter denying the said pleading.

13. In-fact, a perusal of the material on record show that, a notice under Form GSTR-3A came to be issued, on 15-1-2019, for filing of GSTR-3B returns for the period from February to December 2018 under section 46 of CGST Act, which was received, on 15-1-2019, itself. Without waiting for statutory period stipulated under the Act, assessment Order came to be issued in Form GSTR ASMT-13 under section 62 of CGST Act, on 29-1-2019, directing the Petitioner to pay huge sum of money including penalty.

14. In view of the circumstances referred to above, more particularly, the order came to be passed without following the principles of natural justice, the Writ Petition is allowed setting aside the impugned Order, dated 29-1-2019, and consequential proceedings, dated 12-8-2020, and the matter is remanded back to the authorities concerned to deal with the same afresh, in accordance with law, after giving an opportunity of hearing to the Petitioner. No Order as to Costs.

15. Consequently, miscellaneous petitions pending, if any, shall stand closed.

S.K. JAIN

*In favour of assessee.