

[2023] 152 taxmann.com 22 (Andhra Pradesh)/[2023] 75 GSTL 134 (Andhra Pradesh)/[2023] 98 GST 702 (Andhra Pradesh)[19-06-2023]

GST : Scrutiny of returns under section 61 of CGST Act is not an essential condition for initiating proceedings to demand tax under section 74

GST : Provisional attachment of bank account could not be held illegal when objections/reply had not been filed against notice

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[2023] 152 taxmann.com 22 (Andhra Pradesh)

HIGH COURT OF ANDHRA PRADESH

Devi Traders

v.

State of Andhra Pradesh*

U. DURGA PRASAD RAO AND SMT. VENKATA JYOTHIRMAI PRATAPA, JJ.

W.P. NO. 3659 OF 2023

JUNE 19, 2023

Demand and recovery - Scrutiny of returns - Period 1-4-2018 to 31-03-2019 - Demand of tax was raised under section 74 of CGST Act without having recourse to scrutiny under section 61 - Assessee contended that proper officer should first conduct scrutiny of returns and if any discrepancies were found, notice should be issued and if there was failure to give satisfactory explanation then he should proceed to take action under section 74 - Department contended that proper officer could directly invoke section 74 - HELD: Sections 73 and 74 are not controlled by section 61 as reference to same is absent - Section 74 uses "where it appears" conferring wide scope as information may be from any credible source - Proper officer may proceed under section 74 based on action under section 61 on scrutiny of returns or section 65 on audit or some other fact - Argument against initiation of proceedings by show cause notice under section 74 without scrutiny of returns under section 61 was to be rejected [Sections [74](#), read with section [61](#), of Central Goods and Services Tax Act, 2017/Andhra Pradesh Goods and Services Tax Act, 2017] [Para 11] [In favour of revenue]

Provisional attachment - Bank account - ITC Fraud - It was alleged that assessee had wrongly passed on input tax credit without supply of goods - HELD: When notice was issued, assessee had not filed objections/reply to notice - Provisional attachment could not be concluded as illegal - However, since it was informed that show cause notice was received after expiry of time granted for reply, assessee should file explanation - Adjudicating Authority was to be directed to consider reply and pass order after granting opportunity for personal hearing [Sections [83](#) of Central Goods and Services Tax Act, 2017/Andhra Pradesh Goods and Services Tax Act, 2017] [Para 14] [In favour of revenue]

CASE REVIEW

Vadivel Pyrotech (P.) Ltd. v. Asstt. Commissioner (ST) [[2022](#)] [144 taxmann.com 179](#)/[[2023](#)] [95 GST 10/68 GSTL 120](#)/[[2022](#)] [1 Centax 286 \(Mad.\)](#) (para 10) distinguished.

CASES REFERRED TO

Vadivel Pyrotech (P.) Ltd. v. Asstt. Commissioner (ST) [2022] 144 taxmann.com 179/[2023] 95 GST 10/68 GSTL 120/[2022] 1 Centax 286 (Mad.) (para 5), *Union of India v. Deoki Nandal Aggarwal* AIR 1992 SC 96 (para 9) and *Doypack Systems (P.) Ltd. v. Union of India* 1988 (36) E.L.T. 201 (SC) (para 9).

B. Abhay Siddanth Mootha for the Petitioner. **Sri. Y.N. Vivekananda**, Ld. Govt. Pleader for the Respondent.

ORDER

U. Durga Prasad Rao, J. - Petitioner prays for writ of mandamus declaring the show cause notice dated 6-7-2022 in Form GST DRC-01-A issued under section 74(1) r/w rule 142(1)(a) of A.P. Goods and Services Act, 2017 (for short "APGST Act) by the 3rd respondent and consequent attaching of bank account of the petitioner maintained with 4th respondent bank without at first issuing notice under section 61 of APGST Act calling for explanation of the petitioner and even without passing final assessment order u/s 74 of APGST Act is illegal, arbitrary and without jurisdiction and contrary to the provisions of APGST Act and consequently to set aside the show cause notice dated 6-7-2022 and direct the respondents to release the petitioner's bank account.

2. Petitioner's case succinctly is thus:

- (a) Petitioner was trading in groundnut and registered under the rolls of 3rd respondent having GST identification No. 37DPKPB1913PIZM. The petitioner was regularly filing return till August, 2019 and thereafter he suffered huge loss and wound up his business in August, 2019 and consequently his GST registration was cancelled w.e.f August, 2019.
- (b) while so, a show cause notice dated 6-7-2022 in Form GST DRC-01-A under section 74(1) r/w rule 142(1)(a) of APGST Act was issued to him by the 3rd respondent alleging that as per the information provided by the Additional Director, DGGI, Visakhapatnam the petitioner has fraudulently claimed Input Tax Credit of Rs. 11,84,600 (IGST) for Financial Year 2018-19 which was adjusted in the TRP towards GSTR3B return liability of sum of Rs. 10,45,400/- for the period August, 2018 to August, 2019, however it came to light that the petitioner passed the fraudulent ITC invoices to the purchasers. Thus the petitioner was called for either to submit explanation by 13-7-2022 or to pay tax Rs. 11,84,600/- along with interest and penalty equivalent to tax amount u/s 74(1) and 172 of IGST Act, 2017.
- (c) The petitioner's case is that he received above show cause notice on 16-7-2022 i.e., after the expiry of time granted for submitting explanation. Therefore, the petitioner personally approached respondent No. 3 and submitted that all the business transactions of the petitioner firm were genuinely covered by e-way bills generated for each supply with the vehicle numbers and concerned locations and the purchasers were genuine traders situated in the State of Telangana and supplies were made to them during the course of inter-state supply and that he has not committed any fault. However, the 3rd respondent refused to accept the objections raised by the petitioner on the ground that the time stipulated in the show cause notice for filing objections was over. He did not consider the submission of the petitioner that he received notice only on 16-7-2022 and informed to the petitioner that final assessment order would be issued in due course.
- (d) Petitioner's grievance is that though final assessment order was not yet passed, in the meanwhile, the salary account of the petitioner was attached and from out of the salary credited to the said account, amounts are being deducted towards recovery of the tax amount. Such recovery shall not arise till passing of the final assessment orders but the attachment was made prior to the final assessment order which is a provisional attachment. A provisional attachment can be made u/s 83 of APGST Act by the Commissioner of Taxes only. Such a provisional attachment order was also not passed and communicated to the petitioner. It is not known whether any final assessment order has been passed by the 3rd respondent.
- (e) Further case of the petitioner is that as per AP GST Act, GST is a self assessment regime whereunder, every taxable person has to submit his monthly/annual income in relevant forms, basing on which the extent of tax liability will be determined by the authorities. If the proper officer comes to opinion that return filed by the assessee was faulty or there was discrepancy or he claimed excessive ITC than entitled or claimed fraudulent ITC, the proper officer has the power to

scrutinize returns u/s 61 of the APGST Act and issue notice to the taxable person to furnish explanation. On receiving explanation the proper officer shall pass order either accepting or rejecting the return filed by the assessee. If satisfactory explanation is not provided by the assessee, proceedings under section 73 or 74 of the APGST Act can be initiated. In the instant case even without calling for any explanation from the petitioner in terms of section 61 of the APGST Act, respondent No. 3 issued show cause notice u/s 74 of the APGST Act which is contrary to the scheme of the Act. Therefore the show cause notice is vitiated by law. Added to it, 3rd respondent has not furnished material relied upon by the department for disallowing the ITC. Hence the writ petition, challenging the show cause notice u/s 74 of the Act and consequential attachment of the bank account of the petitioner.

3. Respondent No. 3 filed counter opposing the writ petition *inter alia* contending thus:

- (a) It is firstly contended that writ petition is not maintainable inasmuch as, the petitioner has efficacious alternative remedy of filing appeal. Nextly it is contended that the petitioner filed return from May, 2018 to February, 2019 and NIL return from March, 2019 to August, 2019. Meanwhile reference was received from Additional Director, DGGI, Visakhapatnam dated 31-5-2022 and also a letter dated 5-7-2022 from Joint Commissioner (ST) Kadapa informing that the petitioner has utilized ITC of Rs. 11,84,600/- during 2018-19 on worth of transport of goods of Rs. 2,09,08,000/-. Basing on instructions of Joint Commissioner (ST) Kadapa intimation Form GST DRC-01A was issued for payment of Rs. 11,84,600/- on 6-7-2022.
- (b) Until receiving of information from DGGI, Visakhapatnam it was felt that whatever returns filed by the petitioner were correct. Hence action was not initiated u/s 61 of the APGST Act. However, the petitioner who was new entrant to his business seemingly done huge business within a short span of time. Therefore on receiving the information from DGGI, Visakhapatnam and Joint Commissioner (ST) Kadapa action was initiated u/s 74 of the APGST Act by issuing form GST 01A and in order to protect the revenue of the State, simultaneously the bank account of the petitioner was attached. The petitioner could have produced revenue records like transport receipts, bank payment details, toll gate receipts etc., to prove that his transactions were genuine.
- (c) When the taxable person has given misstatement of facts, action u/s 74(1) of the APGST Act will have to be initiated unless and until he proved himself correct. The impugned notice is only an intimation to pay tax and the same is served properly as per the provisions of the Act.
- (d) It is further contended that when there is discrepancy between GST of Registr and GSTR 3B then only notice u/s 61 of the Act will be issued. On the other hand, where ITC has been wrongly availed or utilized by reason of fraud or any wilful mistake or suppression of facts to evade tax, then the notice u/s 74(1) will be issued as to why the assessee should not pay amounts specified in the notice along with the interest and penalty.
- (e) It is further submitted that the petitioner before vacating the register premises did not inform to the proper officer and not fulfilled obligation of filing closing letter and also not filing return as per section 45 r/w rule 81 of the APGST Act, 2017.
- (f) Finally it is submitted that it would only to protect revenue of the State the impugned provisional attachment order was issued. Respondent thus prayed to dismiss the writ petition.

4. Heard arguments of learned counsel for the petitioner Sri B. Abhay Siddanth and learned Government Pleader for Commercial Taxes Sri Y.N. Vivekananda.

5. The main plank of argument of learned counsel for the petitioner is that in terms of section 61 of APGST Act, the proper officer has to first of all conduct scrutiny of return submitted by the petitioner for the relevant period with reference to records produced by the petitioner and if any discrepancies are found in the return, then the proper officer shall issue notice to the petitioner to explain those discrepancies and in case of failure on the part of the petitioner to give satisfactory explanation or failure to rectify the discrepancy, then only the proper officer can take up the proceedings under section 74 of the Act. Learned counsel would lament that in the instant case without scrutinizing the return for the Assessment Year 2018-19 u/s 61 and without finding any discrepancies and issuing notice to explain discrepancies and most importantly, without passing any reasoned order thereon, the 3rd respondent has directly issued notice u/s 74 of the Act which is per se illegal and without jurisdiction.

- (a) Next, he would argue that the notice u/s 74 of the Act was served on him only after expiry of the time granted to submit the reply. Even though the petitioner approached the 3rd respondent and requested to receive the reply and relevant record he unduly rejected his request on the lame pretext that it was submitted after the stipulated time. Hence the principles of natural justice were a casualty in this case and thereby the impugned show cause notice is liable to be set aside. To buttress his contention that without following the procedure u/s 61 of the Act, notice u/s 74 cannot be issued, learned counsel placed reliance on *Vadivel Pyrotech (P.) Ltd. v. Assistant Commissioner (ST)* [2022] 144 taxmann.com 179/[2023] 95 GST 10/68 GSTL 120/[2022] 1 Centax 286 (Mad.)/MANU/NT/8253/2022, Circle-II, Commercial Tax Department.
- (b) Learned counsel further argued that without receiving the reply and passing final order u/s 74 of the Act deciding the innocence or fraudulent intention of the petitioner in claiming ITC, the 3rd respondent got attached the bank account of the petitioner which is against law. Learned counsel thus prayed to allow the writ petition.

6. Per contra, learned Government Pleader while supporting the impugned notice would argue that as per the scheme of APGST Act, the proper officer may, in terms of section 61 of the Act scrutinize the return filed by a registered person with reference to the relevant records produced by him and if he finds any discrepancies, the proper officer can issue notice to the registered person calling for his explanation relating to the discrepancies and if he fails to give suitable explanation or having admitted the discrepancies, if he fails to rectify such discrepancies, then the proper officer may initiate appropriate action u/s 65 or 66 or 67 or proceed to determine tax and other dues u/s 73 or 74. Learned Government Pleader would strenuously argue that in the circumstances stated in section 61, the proper officer may treat un-answered or un-rectified discrepancies as willful mis-statements or suppression of facts to evade tax or wrongly availed ITC by fraud in terms of section 74 and may proceed further and issue show cause notice as to why action cannot be initiated. Learned Government Pleader would thus submit that one of the channels to initiate proceedings u/s 74 is to commence the scrutiny proceedings u/s 61 and culminate with section 74. However, proceedings u/s 61 is not the only way to lead to section 74. On the other hand, learned Government Pleader would argue, in a given case, basing on the information available, if it appears to the proper officer that the registered person has not paid the due tax or short paid or tax was erroneously refunded or ITC was wrongly availed or utilized by reason of fraud or any willful misstatement or suppression of facts was made to evade tax, then basing on such information, the proper officer can directly invoke section 74 and issue show cause notice to the registered person in Form GSTDRC-01 under rule 142 of APGST Rules, which was precisely done by the 3rd respondent in this case. Learned Government Pleader would thus conclude that scrutiny u/s 61 is not always sine qua non for taking up proceedings u/s 74, rather in exigent circumstances, proper officer can directly invoke section 74 and also attach the assets of the registered person for protecting the interest of the Government revenue. Learned Government Pleader would further submit that the decision cited by the petitioner has no relevancy. He would further argue that the petitioner has an alternative efficacious remedy of appeal as against the impugned notice and that apart, since the matter is at the stage of show cause notice, he can submit his explanation/objection which will be considered as per law. He thus prayed to dismiss the writ petition.

7. Points for consideration are:

- (1) Whether proceedings u/s 74 of APGST Act cannot be independently initiated without having recourse to the scrutiny u/s 61 of the said Act ?
- (2) Whether the attachment of the bank account of the petitioner is illegal?
- (3) To what extent ?

8. **POINT No. 1:** To answer this point the scheme of APGST Act, 2017 with reference to the filing of returns by the registered person, their evaluation and taking up of consequential proceedings has to be perused.

- (a) As per section 59, APGST Act adopts the self-assessment methodology whereunder, every registered person shall make self-assessment of the tax payable under the said Act and furnish a return for each tax period as specified u/s 39.
- (b) Section 39(1) obligates a registered person to furnish returns. As per section 39(1) every registered person, other than an input service distributor or a non-resident taxable person or a person paying

tax u/s 10 or section 51 or section 52, shall furnish return for every calendar month showing inward and outward supply of goods or services or both ITC availed, tax payable, tax paid and other relevant particulars. Then, *inter alia*, section 39(8) speaks that a registered person who is required to furnish return shall furnish NIL return for every tax period whether or not any supply of goods or services or both have been effected during such tax period.

- (c) Then sub-section 9 of section 39 gives scope for rectification of defects occurred in the returns. It lays down that if a registered person after furnishing return discovers any omission or incorrect particulars thereon other than as a result of scrutiny audit, inspection or enforcement activity by the tax authorities, he shall rectify such omission or incorrect particulars within time permitted, subject to payment of interest.

Thus section 39 speaks about filing of monthly return and rectification of mistakes by self-disclosure of the registered person.

- (d) Then section 61 of APGST Act speaks of scrutiny of returns. It should be noted that since self-assessment method is followed under this Act, the department sometimes may take up random scrutiny of returns. In that context section 61 says the proper officer may scrutinize the return and related particulars furnished by the registered person to verify the correctness of the return and if he notices any discrepancy, he will seek explanation from the registered person. In case explanation is found acceptable no further action be initiated. However, in case no satisfactory explanation is furnished within the stipulated time or after accepting the discrepancies, if the registered person fails to take corrective measures in his return, the proper officer may initiate appropriate action u/s 65 or sections 66 or 67 or proceed to determine the tax and other dues u/s 73 or section 74.

Perhaps relying to the above provision, the writ petitioner, it appears, vehemently argued that initiation of scrutiny u/s 61 and follow up procedure thereunder are the *sine qua non* for taking action u/s 74 of the APGST Act. However, before resolving this controversial issue, some other relevant provisions have also to be perused.

- (e) Then section 65 deals with audit of the accounts of a registered person by the tax authorities. We have seen in the section 61 that on failure of registered person to either answer the notice in the return or correct the discrepancies, one of the courses opened to the proper officer is to conduct audit of the accounts of the registered person.
- (f) It should be noted that section 65 is not guided by section 61 alone. Even without following section 61 also audit of accounts can be undertaken. In this regard section 65 says that issuing notice to the registered person, the Chief Commissioner or any officer authorized by him may undertake audit for such period as may be prescribed. Unlike section 61 which is confined to scrutiny of return and relevant materials furnished by the registered person, audit u/s 65 is a wider exercise of verification of books of accounts and other documents of the registered person for a specific period. After conclusion of audit, the proper officer shall inform his findings to the registered person. Where the audit results in detection of non-payment of the tax or short payment or erroneous refund of tax or ITC being wrongly availed or utilized, the proper officer may initiate action u/s 73 or section 74.

Thus, it is manifestly clear that section 73 and 74 are not controlled by section 61 alone as argued by the petitioner. The proceedings u/s 74 can be taken up by resorting to the audit of accounts u/s 65 also.

- (g) Then section 74 says that where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where ITC has been wrongly availed or utilized by reason of fraud or any willful mis-statement or suppression of facts to evade tax was made, he shall serve notice to the person chargeable with the tax to show cause as to why he should not pay the amounts specified in the notice.

9. It should be carefully observed that section 74 starts with the clause "where it appears to the proper officer that any tax has not been paid". The word "appears" has a wider amplitude subsuming in it not only 61 and 65 but also any other credible information from a different source. If the intendment of legislature is to make section 74 bound by section 61 and 65 alone, that fact would have been clearly depicted in section 74. However, we will not find any specific reference to section 61 or 65 in section 74 except the usage "where it appears"

- (a) It should be noted that literal or strict interpretation is essential for fiscal, tax and penal laws and the Court cannot abridge or elongate the meaning of those statutory provisions, particularly, when the language employed therein is plain, unambiguous and simple. The apex Court has reiterated the strict rule of interpretation in a slew of decisions. In *Union of India v. Deoki Nandal Aggarwal* AIR 1992 SC 96=MANU/SC/0013/1992 the apex Court observed thus:

"14.** ** *. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there."

In *Doypack Systems (P.) Ltd. v. Union of India* 1988 (36) E.L.T. 201 (SC)/AIR 1988 SC 782=MANU/SC/0300/1988 the Apex Court observed thus:

"58. The words in the statute must, *prima facie*, be given its ordinary meaning. Where the grammatical construction is clear and manifest and without doubt, that construction ought to prevail unless there are some strong and obvious reasons to the contrary. Nothing has been shown to warrant that literal construction should not be given effect to.

59. It has to be reiterated that the object of interpretation of a statute is to discover the intention of the Parliament as expressed in the Act. The dominant purpose in construing a statute is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. That intention, and therefore the meaning of the statute, is primarily to be sought in the words used in the statute itself, which must, if they are plain and unambiguous, be applied as they stand."

(b) The above statutory interpretative jurisprudence depicts that when the statute is clear, plain and unambiguous Court has to make a literal interpretation by obliging the Parliamentary supremacy, for, the legislation is the domain of legislative body but not the Court. In the present case as already stated *supra* the phrase "where it appears" is a free, unfettered and unbound usage made by legislature and therefore in our view, the source for the proper officer to proceed under this provision can be held to be either under section 61 or 65 or some other information but cannot be constricted to section 61 or 65 alone to reach section 74 cannot be accepted. Thus in essence, the source for the proper officer to proceed u/s 74 may be either section 61 or 65 or some other fact. Therefore, we are constrained to reject the contra argument of the petitioner.

10. The decision of High Court of Madras (Madhurai Bench) in *Vadivel Pyrotech (P.) Ltd.* case (*supra* 1) cited by the petitioner can be distinguished on facts. In that case the writ petitioner filed his return for the Assessment Year 2018-19 and later it was taken up for scrutiny by the proper officer u/s 61 of Tamil Nadu Goods and Services Taxes Act (TNGST Act) by issuing notice in Form ASMT - 10 dated 22-12-2021 by pointing out certain discrepancies between GSTR3B GSTR 1 and GSTR 2A returns filed by the petitioner calling upon him to pay the tax of Rs. 13,54,250/-along with interest. The petitioner submitted his explanation in Form ASMT 11 by furnishing relevant details. Then his grievance is that six months thereafter respondent officer enquired the petitioner over pone as to whether the petitioner had paid the tax, interest and penalty demanded *vide* order dated 9-5-2022. Till then except issuing notice u/s 61 of the Act no further proceedings were taken up to his knowledge and no order was passed. Thereafter on enquiry by the petitioner, he came to know that an order dated 9-5-2022 was passed by the respondent and summary notice in GST DRC 01 and order in GST DRC 07 were uploaded in the GST portal. In GST DRC 01 show cause notice certain defects/discrepancies were pointed out which are different from the defects/discrepancies mentioned in the Form ASMT -10, dated 22-12-2021 which was earlier issued u/s 61. Challenging the same the writ petition was filed wherein the grievance of the petitioner was that without passing an order on explanation submitted by him to the show cause notice issued in Form ASMT 10 u/s 61, the respondent officer straight away issued show cause notice in GST DRC 01A and passed order in GST DRC -07 u/s 74 by showing different set of discrepancies which is illegal. Agreeing with his contention learned single Judge of High Court of Madras (Madhurai Bench) observed thus:

(e) It is thus clear that any proceeding in GST DRC-01A/1 culminating in an Order in GST DRC-07, if pursuant to Scrutiny under section 61 of the TNGST Act ought to be preceded by issuance of Form ASMT 10. In the present case, though ASMT 10 was issued on 22-12-2021 pointing out certain discrepancies, the GST DRC-01 dated 15-2-2022 and the impugned order in GST DRC-07 dated 9-5-

2022 are made on the basis of issues that are completely different from what was set out in Form ASMT 10 dated 22-12-2021. As this Court is of the view that ASMT 10 is mandatory before proceeding to issue GST DRC-01, failure to issue the same in respect of the discrepancies forming the subject matter in GST DRC-01 dated 15-2-2022 culminating in GST DRC 07 dated 9-5-2022 would vitiate the entire proceedings. It is trite law that when the Act prescribes the method and manner for performing an act, such act shall be performed in compliance with the said method and manner and no other manner."

11. Thus it is clear that the above observation was made by learned single Judge in the factual back ground that at the inception itself the proceedings were taken worth u/s 61 of TNGST Act but not u/s 74 as in our case. Therefore, the above decision is of no avail to the petitioner.

Accordingly, this point is decided against the petitioner.

12. *POINT No. 2:* As can be seen that the main allegation under impugned notice dated 6-7-2022 is that the petitioner has passed fraudulent ITC to the purchasers without actual supply of goods/services. In that context while issuing show cause notice to the petitioner, respondent authorities seems to have made provisional attachment of the bank account of the petitioner by resorting to section 83 of APGST Act.. Since the petitioner has not so far filed his objections/reply to the notice, at this juncture it cannot be concluded that the attachment is illegal.

13. Thus on conspectus of facts and law, we find no merits in the writ petition. However, since it is the submission of the petitioner that he received impugned show cause notice only on 16-7-2022 *i.e.*, after expiry of time granted for submitting explanation which was dated 13-7-2022 and though this fact was brought to the notice of the 3rd respondent he refused to receive the explanation and relevant documents, we, in the interest of justice, considered it apposite to permit the petitioner to submit his explanation along with relevant material.

14. Accordingly, this writ petition is disposed of giving liberty to the petitioner to file his explanation/objections along with the relevant materials before the 3rd respondent within three (3) weeks from the date of receipt of copy of this order, in which case the 3rd respondent shall receive the said explanation and material and consider the same after affording an opportunity of personal hearing to the petitioner and pass appropriate order in accordance with governing law and rules expeditiously. No costs.

As a sequel, interlocutory applications, if any pending, shall stand closed.

GK

*In favour of revenue.