
[2024] 160 taxmann.com 22 (Andhra Pradesh)[04-01-2024]

GST : Where show cause notice under section 74 of CGST Act was challenged, absence of explicit mention of suppression did not necessarily render it invalid, as suppression was question of fact determined based on reply; thus, writ petitions were generally not entertained against mere issuance of show cause notices.

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[2024] 160 taxmann.com 22 (Andhra Pradesh)

HIGH COURT OF ANDHRA PRADESH

RKEC Projects Ltd.

v.

Additional Commissioner*

RAVI NATH TILHARI AND HARINATH N., JJ.

WRIT PETITION NO. 32046 OF 2023

JANUARY 4, 2024

Show cause notice - Suppression - Limitation - Assessee challenged show-cause notice issued by Revenue Authority under section 74 of Central Goods and Services Tax Act, 2017 - Assessee contended that notice was invalid because it did not mention suppression as required under section 74 and should have been issued under section 73 instead - Assessee also argued that notice was barred by limitation - HELD : Show cause notice did contain grounds for its issuance, even if suppression was not explicitly mentioned - Suppression was question of fact and could be determined by Revenue Authority based on reply submitted by assessee - High Court observed that mention of a specific provision in notice was not determinative of its nature, which depends on content - High Court additionally emphasized that writ petitions should not normally be entertained against mere issuance of show cause notices, and assessee should first respond to notice and raise objections before Revenue Authority - Writ petition was dismissed, but assessee was given option to approach competent authority by filing reply and raising objections [Sections 73 and 74 of Central Goods and Services Tax Act, 2017/Andhra Pradesh Goods and Services Tax Act, 2017] [Paras 18, 21, 23 and 24] [In favour of revenue]

CASE REVIEW

Uniworth Textiles Ltd. v. Commissioner of Central Excise [2013] 31 taxmann.com 67 (SC) (para 18); *Vijaya Venkata Durga Oil Traders v. Commercial Tax Officer* [2014] 52 taxmann.com 2/[2015] 49 GST 83 (A.P.) (para 19) distinguished.

Tikona Infinet (P.) Ltd. v. State of Andhra Pradesh [2023] 157 taxmann.com 284/2024 (81) G.S.T.L. 475/102 GST 217 (A.P.) (para 22) followed.

CASES REFERRED TO

Uniworth Textiles Ltd. v. Commissioner of Central Excise [2013] 31 taxmann.com 67 (SC) (para 3), *Vijaya Venkata Durga Oil Traders v. Commercial Tax Officer* [2014] 52 taxmann.com 2/[2015] 49 GST 83 (A.P.) (para 3) and *Tikona Infinet (P.) Ltd. v. State of Andhra Pradesh* [2023] 157 taxmann.com 284/2024 (81) G.S.T.L. 475/102 GST 217 (A.P.) (para 5).

ORDER

1. Heard Sri S.Dwarakanath, learned senior counsel assisted by Sri S. Vijay Adithya, learned counsel appearing for the petitioner and Ms. Santhi Chandra, learned Standing Counsel for respondent Nos.1 and 3.

2. By means of this writ petition under Article 226 of Constitution of India, the petitioner is challenging the proceedings for the assessment of tax for the tax period 2017-18 initiated *vide* show-cause notice dated 21-9-2023. The prayer is reproduced as under:-

"the Hon'ble Court may be pleased to issue a Writ of Prohibition or any other appropriate writ or order or direction restraining the 1st Respondent from proceeding with the assessment for the tax period 2017-18 initiated *vide* show cause notice dated 21-9-2023 as being barred by limitation without jurisdiction inconsistent to admitted facts and contrary to Section 140(3) of the Central Goods and Services Tax Act 2017 and pass"

3. The challenge is on the ground that the notice has been issued under section 74 of the Central Goods and Services Tax Act, 2017 (for short 'CGST Act'), though the ingredients for initiation of the proceedings *i.e.* 'suppression' is not made out. The notice does not contain the reasons and particulars of any suppression. He places reliance in the case of *Uniworth Textiles Ltd. v. Commissioner of Central Excise* [2013] 31 taxmann.com 67 (SC) and *Vijaya Venkata Durga Oil Traders v. Commercial Tax Officer* [2014] 52 taxmann.com 2/[2015] 49 GST 83 (AP).

4. Learned Senior Counsel however submits that the notice could have been under section 73 but not under section 74 of CGST Act.

5. Learned counsel for the respondents has raised objection that the challenge to the show-cause notice on the ground of challenge is not sustainable at this stage under Article 226 of Constitution of India. The petitioner is granted opportunity of hearing and to the show-cause notice, he may submit the reply. She placed reliance in the judgment *Tikona Infinet (P.) Ltd. v. State of Andhra Pradesh* [2023] 157 taxmann.com 284/2024 (81) G.S.T.L. 475/102 GST 217 (AP)/[W.P. No. 28743 of 2023, dated 9-11-2023.

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

7. The submission is that the show-cause notice does not mention any 'suppression'.

8. Section 74(1) of the CGST Act reads as under:

"74. Determination of tax 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."

9. Learned senior counsel placed much reliance on *Explanation 2* of Section 74 of CGST Act which reads as under:-

"*Explanation 2:* For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer."

10. We have perused the show cause notice (Ex.P1). It contains the grounds for its issuance, such as in Paras 5, 7, 8 & 9, which reads as under:-

"5. From the statutory provisions mentioned above, it appears that the taxpayer is not eligible to transition the credit of duty paid on inputs lying in stock as on 30-6-2017, *vide* Table-7a of the TRAN-1 filed by the

taxpayer (RUD-3), for the following reasons:

- (i) In the earlier Service Tax regime, the taxpayer is registered with Service Tax Registration Certificate No. AACCR9682AST001 To be eligible to transition the credit, the taxpayer was not liable for registration under the existing law [Service Tax Law].
- (ii) The taxpayer was providing works contract service and it appears that they were not availing of the benefit of notification No. 26/2012- Service Tax, dated the 20th June, 2012, which is a conditional exemption notification.
- (iii) The taxpayer was availing the benefit of exemption in terms of Sl.No.12A (a), 13(a) & 14 of Notification No. 25/2012-ST dated 20-6-2012 and abatement *vide* Sl.No.1 of Notification No. 24/2012-ST dated 6-6-2012, as reflected in the ST-3s filed for the Half-Year Ending 30-9-2016, 31-3-2017 & 30-6-2017, in respect of Works Contract Service, which appears to be outside the scope of the provisions of Section 140(3) of the CGST Act, 2017

7. CONTRAVENTIONS:

7.1 Section 59 of the CGST Act provides:

Every registered person shall self-assess the taxes payable under this Act and furnish a return for each tax period as specified under section 39.

Section 59 - Self-assessment

In the age of liberalisation, huge amount of trust and faith have been posed on the taxpayers. Revenue department allows the tax payer to determine his tax liability by himself. Since tax liability is determined by the tax payer himself, therefore, the term is labelled as self-assessment. Section 59 of CGST Act covers self-assessment under GST regime. In the course of day to day business, a tax payer will do self-assessment and determine tax liability according to each and every sale invoice. The self-assessment is to be completed, except in the case of "provisional assessment", with regard to value and rate of tax etc., at the time and place of supply so that correct tax liability is ascertained and discharged. The other aspect of self-assessment is that at the end of tax period, the assessee is required to furnish a return electronically specified under section 39 also certifying correctness of the data furnished and tax paid for each tax period to the taxation department so that departmental officials are able to scrutinise correctness of payment of taxes. Self-assessment is applicable to all the taxable persons under GST.

It appears that the taxpayer contravened the provisions of Section 59 of the CGST Act, 2017 and rendered themselves liable to penalty under section 125 of the CGST Act, 2017. Section 125 reads:

Section 125: General penalty (Relevant Rule 142)

Any person, who contravenes any of the provisions of this Act or any rules made thereunder for which no penalty is separately provided for in this Act, shall be liable to a penalty which may extend to twenty five thousand rupees.

8. It appears that since the taxpayer is registered under the Service Tax Law, they are not eligible to transit the cenvat credit pertaining to the existing law, under the provisions of Section 140(3) of CGST/APGST Act, 2017. However, they have carried forward the credit to GST as a dealer. Further, the carrying forward of credit under section 140(3) is a conditional one, *viz.*, the taxpayer shall be availing Notification No. 26/2012-ST which the taxpayer has not fulfilled. The acts of the taxpayer attract the provisions of *Explanation (ii)* to Section 74 of the CGST Act, 2017, *viz.*, (i) non- declaration of facts and (i) non-declaration of information, with an intention to avail transition credit fraudulently unless noticed by the audit. Therefore, it appears that the irregularly availed transitional input tax credit is recoverable by invoking extended period of limitation and penalty can be imposed under the provisions of Section 74 (1) of the CGST Act. 2017.

9. In terms of the above statutory and recovery provisions, it appears that the taxpayer wrongly carried forward the transition credit of Rs. 1,75,30,798/- *vide* Table 7a of the Transitional Credit/Stock Statement filed by the taxpayer and the said amount is recoverable along with interest and penalty."

11. In view of the above, we are not convinced with the submission that the show cause notice does not contain the reasons for its issuance.

12. As per the *Explanation 2*, suppression shall mean non-declaration of facts or information, which a taxable person is required to declare in the return, statement, report or any other document furnished under the Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer. The question if there is suppression or not can be determined by the authority, considering the reply, if so filed. 'Suppression' is a question of fact. In view of the explanation, whether the facts upon which show cause notice has been issued, constitute suppression or not cannot be determined at this stage in the exercise of writ jurisdiction. Use of word 'suppression' is not conclusive. Similarly, if this expression is not used in the show cause notice it cannot be said conclusively that there is no suppression. The petitioner by filing reply to the show-cause notice can demonstrate before the authority that there was no suppression. Besides, 'suppression' alone is not the ground under section 74(1) of CGST Act. Fraud or/and willful misstatement are also the grounds for issuance of show cause notice in evading tax etc.

13. The impugned show cause notice was issued on 21-9-2023. In the prayer clause, as reproduced above, the impugned notice was said to be barred by limitation. However, the learned senior counsel during arguments, on the same being pointed out by learned standing counsel that the notice is not barred by limitation, also submitted that the notice was within the period of limitation of three years for the notice even under section 73.

14. So, the impugned show cause notice issued mentioning under section 74 but on the grounds it has been issued, even if not mentioning 'suppression', would be within the period of limitation under section 73 as well, as it is submitted by the learned counsels for the parties that the limitation was upto 30-9-2019 under section 73.

15. So, even if the submission of learned counsel for the petitioners be acceptable, though we are not expressing any view on that aspect, no fault can be found in the notice and it cannot be said to be without jurisdiction or barred by limitation, under section 73 and therefore having been issued under section 74 to overcome the bar of limitation.

16. In *Uniworth Textiles Ltd. (supra)*, the Hon'ble Apex Court held that the show cause notice must fulfill the requirement of the proviso to Section 28 of the Customs Act, 1962 (as was in that case) which finds application only when specific and explicit averments challenging the fides of the conduct of the assessee are made in the show-cause notice, which requirement in that the show-cause notice in that case failed to meet.

17. In *Uniworth Textiles Ltd. (supra)*, there was challenge to the order. From the evidence adduced by the appellant therein, it was observed that one will draw an inference of *bonafide* conduct in fact of the appellant therein. In the said case, it was held that the burden of proving *malafide* conduct under the proviso to Section 28 of Customs Act lies with the Revenue, that in furtherance of the same, no specific averments were mentioned in the show cause notice which was the mandatory requirement for commencement of action under the proviso to Section 28. There was also nothing on record to display a willful default on the part of the appellant therein. Consequently, it was held that the extended period of limitation under proviso of Section 28 could not be invoked against the appellant.

18. In the present case, in view of the submissions advanced as also the admitted position that the limitation period for notice under section 73 did not expire on the date the impugned notice was issued, the question of extended period of limitation for issuance of notice under section 74 is not involved. Had it been, the contention of the learned counsel for the petitioner that the period of limitation for issuance of notice under section 73 had expired but any such notice was not issued and consequently to overcome the bar of limitation, the notice was issued under section 74 even without satisfying the requirements of Section 74 the consideration might have been different.

19. In *Vijaya Venkata Durga Oil Traders (supra)*, the Division Bench of High Court of Judicature at Hyderabad considered the judgment in *Uniworth Textiles Ltd. (supra)*. It was held that if the allegations in the show cause notice accepted as true show that the dealer had committed willful evasion of tax and the finding recorded in the assessment order establish that the assessee had willfully evaded tax, it would suffice to extended period of limitation in terms of Section 21(5) of APVAT Act, 2005 notwithstanding that the show-cause notice did not refer to Section 21(5) and did not specifically use the words 'wilful evasion of tax'. It was further held that it was, therefore, necessary to refer to the contents of show cause notice.

20. The aforesaid judgment cited by learned counsel for the petitioner, does not support his contentions. On the contrary from the said judgment, the relevant part being reproduced shortly, what follows is that the contents of the show cause notice determine the true nature of the notice as to under which provision it has been issued, notwithstanding that it does not refer a particular provision or it does not specifically use the words as mentioned in the Section.

".....If the allegations in the show-cause notice, accepted as true, show that the dealer had committed willful evasion of tax, and the finding recorded in the assessment order establish that the assessee had willfully evaded tax, it would suffice to extend the period of limitation in terms of Section 21(5) of the Act notwithstanding the show-cause notice does not refer to Section 21(5) and does not specifically use the words wilful evasion of tax. It is, therefore, necessary for us to refer to the contents of show cause notice."

21. In the present case we find that the show cause notice mentioned the grounds for its issuance. Even if it be taken that the 'suppression' is not mentioned, to meet the requirement of Section 74 to issue the notice. It is not the submission of the learned counsel for the petitioner that it does not meet the requirements of Section 73. Further the submission is that the notice should be under section 73 but it mentions under section 74. We are of the view that mere mention of a provision would not be determinative of the notice under that section. It depends upon the contents.

22. In W.P.No.28743 of 2023 decided on 9-11-2023, the Coordinate Bench of this Court held in paras 26 to 30 as follows; on the point of entertainability of the writ petition against the show cause notice.

"26. In *Special Director v. Mohd. Ghulam Ghouse* (2004) 3 SCC 440 the Hon'ble Apex Court deprecated the practice of High Courts entertaining writ petitions questioning the legality of show cause notices stalling enquiries as proposed and retarding investigative process. The Hon'ble Apex Court held that unless the High Court is satisfied that the show cause notice was totally *non est* in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, the writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition.

27. It is apt to refer paragraph-5 of *Mohd. Ghulam Ghouse (supra)* as under:

"5. This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless the High Court is satisfied that the show-cause notice was totally *non est* in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition. Whether the show-cause notice was founded on any legal premises, is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court. Further, when the court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted."

28. In *CCE v. Krishna Wax (P) Ltd.* (2020) 12 SCC 572 the Hon'ble Apex Court reiterated that it is well settled that writ petition should normally not be entertained against mere issuance of show cause notice. The said matter pertained to the Central Excise Act. It was held that excise law is a complete code in itself and it would normally not be appropriate to writ court to entertain writ petition under Article 226 of the Constitution of India and that the person concerned must first raise all the objections before the authority who had issued the show cause notice and the redressal in terms of the existing provisions of the law could be taken resort to if an adverse order is passed against such person.

29. It is apt to refer paragraphs-14 and 15 of *Krishna Wax (P) Ltd. (supra)* as under:

"14. It has been laid down by this Court that the excise law is a complete code in itself and it would normally not be appropriate for a writ court to entertain a petition under Article 226 of the Constitution and that the person concerned must first raise all the objections before the authority who had issued a

show-cause notice and the redressal in terms of the existing provisions of the law could be taken resort to if an adverse order was passed against such person. For example in *Union of India v. Guwahati Carbon Ltd.* [*Union of India v. Guwahati Carbon Ltd.*, (2012) 11 SCC 651] , it was concluded; "The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under Article 226 of the Constitution", while in *Malladi Drugs & Pharma Ltd. v. Union of India* [*Malladi Drugs & Pharma Ltd. v. Union of India*, (2020) 12 SCC 808] , it was observed:

"... The High Court, has, by the impugned judgment held that the appellant should first raise all the objections before the Authority who have issued the show-cause notice and in case any adverse order is passed against the appellant, then liberty has been granted to approach the High Court ...

... in our view, the High Court was absolutely right in dismissing the writ petition against a mere show-cause notice."

15. It is thus well settled that writ petition should normally not be entertained against mere issuance of show-cause notice. In the present case no show-cause notice was even issued when the High Court had initially entertained the petition and directed the Department to *prima facie* consider whether there was material to proceed with the matter."

30. In the present case, APGST Act is also a complete code and consequently, we are of the considered view that the petitioner should respond to the show cause notice raising all such objections, as may be raised before the authority issuing the show cause notice and in case any adverse order is passed and the petitioner feels aggrieved, the petitioner may then have recourse to the appropriate proceedings."

23. For all the aforesaid reasons we are of the considered view that the present writ petition against the impugned show cause notice is not liable to be entertained.

24. The Writ Petition is dismissed, however, leaving it open to the petitioner to approach the competent authority by filing reply and raising such objections as may be open under law and as may be advised.

25. No order as to costs.

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

RITA

*In favour of revenue.