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IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.662/2023

FOMENTO RESORTS AND HOTELS LTD., a Company incorporated under Indian Companies Act, 1956 having its registered office at Cidade De Goa, Vainguinim Beach, Panaji, North Goa, Goa, through its Authorised Representative Rakesh kumar jain, S/o Mr. Chandan Mal Khater, R/o Flat no-803 building No-2, Kamat Raoyale, Caranzalem, Goa- 4003002.

... PETITIONER

Versus

1. UNION OF INDIA, through the Secretary, Department of Revenue, Ministry of Finance, PO/PS- North Block, Parliament Street, New, Delhi-110001.

2. CENTRAL BOARD OF INDIRECT TAXES & CUSTOMS, Through its Chairman, Department of Revenue, Ministry of Finance, North Block, Central Secretariat, New Delhi-110011.

3. THE COMMISSIONER OF CGST AUDIT (II), Pune B-Wing, 4th Floor, GST Bhawan, ICE House, 41/A, Sasson Road, Pune-411001.

4. DEPUTY COMMISSIONER OF CGST (AUDIT II), Pune Commissionerate 4th Floor, GST Bhavan, Patto Panaji, Goa-403001.

5. JOINT COMMISSIONER OF CGST (AUDIT II), Pune Commissionerate, A-Wing, 3rd Floor, GST Bhawan, Sasson Road, Pune-411001.

6. JOINT COMMISSIONER OF CGST (DIV-II), Goa Commissionerate, GST Bhawan, Patto Plaza, Panaji, Goa -403001.

7. ASSISTANT COMMISSIONER OF CGST (DIV-II), Goa Commissionerate, GST Bhawan, 7th Floor, Patto Plaza, Panaji, Goa -403001

...RESPONDENTS

Mr Sandeep Sachdeva with Mr Damodar Vaidya (through VC), Mr Devang Bhashim, Mr Akhil Parrikar and Mr Mayank Goyal (through VC), *Advocates for the Petitioner.*

Ms Asha Desai, Senior Standing Counsel *for Central Government* with Advocate Ms N. Volvoikar.

CORAM: **DEVENDRA KUMAR UPADHYAYA, CJ. & M. S. SONAK, J.**

Reserved on: **10th JANUARY 2024**

Pronounced on: **13th FEBRUARY 2024**

JUDGMENT:

1. Heard Mr Sandeep Sachdeva with Mr Damodar Vaidya, Mr Devang Bhashim, Mr Akhil Parrikar and Mr Mayank Goyal for the petitioner and Ms Asha Desai, learned Senior Standing Counsel for Central Government with Ms N. Volvoikar for the respondents.

2. Rule. The Rule is made returnable immediately at the request of and with the consent of the learned counsel for the parties.

3. The petitioner challenges the validity of Circular No.3/3/2017-GST dated 05.07.2017, Circular No.31/05/2018-GST dated 09.02.2018 and Circular No.169/01/2022-GST dated 12.03.2022 (impugned circulars) mainly on the ground that the Central Board of Indirect Taxes and Customs (Board) had no powers to issue the same and based thereon to confer any power of assignment of functions of the 'proper officer' upon Central Tax Officers for issuing an audit report under Section 65(6) or show cause notices under Section 73 or 74 r/w. Section 65(7) of the Central Goods and Services Tax Act, 2017 (CGST Act).

4. The petitioner, based upon the above, also challenges the action of the Audit Authority issuing the audit report and the consequent three show cause notices viz. (i) show cause notice dated 26.04.2023 issued by Respondent No.4 under Section 73

of the CGST Act, (ii) show cause notice dated 09.05.2023 issued by Respondent No.4 under Section 74 of the CGST Act, and (iii) show cause notice dated 08.08.2023 issued by Respondent No.5 under Section 74 of the CGST Act, 2017 (impugned show cause notices).

5. The petitioner's main contention in this petition is that the impugned circulars are invalid and *ultra vires*. As a consequence, the fourth and fifth respondents, relying upon the impugned circulars, have usurped jurisdiction to issue the audit report and the impugned show cause notices.

6. Mr Sachdeva submitted that there is no provision under the CGST Act to assign the functions of a proper officer as defined under Section 2(91) of the CGST Act. He submitted that the impugned circulars, which purport to assign such functions of a proper officer, rely upon the provisions of Section 2(91) of the CGST Act and Section 20 of the Integrated Goods and Services Tax Act, 2017 (IGST Act) as being the source of its powers. He submitted that neither of these provisions confer any power upon the Board to assign the functions of proper officers.

7. Mr Sachdeva relies on *Cannon India Pvt. Ltd. v/s. Commissioner of Customs – 2021 SCC OnLine SC 200* to submit that the power of assigning functions of a proper officer upon a customs officer cannot flow from the definition clause under Section 2(34) of the Customs Act, 1962. He submitted that the definition under Section 2(34) of the Customs Act and

Section 2(91) of the CGST Act are almost *pari materia*. Therefore, the law laid down in *Cannon India Pvt. Ltd. (supra)* would squarely apply and, based upon the definition clause in Section 2(91) of the CGST Act, the Board would have no power to assign the functions of the proper officer to any central tax officers.

8. Mr Sachdeva submitted that the impugned circulars conflict with the respondent's stand in its Circular No.07/2022-Customs dated 31.03.2022. He submitted that this circular acknowledges the error in relying upon the definition clause as constituting the source of power and rectified the lacuna pointed out by the Hon'ble Supreme Court in *Cannon India Pvt. Ltd. (supra)* by inserting sub-sections (1A) and (1B) to Section 5 of the Customs Act and simultaneously changing the definition of the proper officer under Section 2(34) of the Customs Act, 1962. Mr Sachdeva submitted that since no such amendments have been made to the CGST Act or the IGST Act, the law laid down in *Cannon India Pvt. Ltd. (supra)* would squarely apply and based upon the same the impugned circulars would have to be set aside.

9. Mr Sachdeva relied upon the general principle that taxation's power must be clear and specific. He submitted that in case of any ambiguity, the benefit of interpretation must be extended to the assessee and not the revenue. He submitted that the position for interpreting any exemption provision or any exemption notification may be otherwise. He relied on

Commissioner of Customs (Import), Mumbai v/s. Dilip Kumar And Company & Ors. - (2018) 9 SCC Page 1 to support this proposition.

10. Mr Sachdeva finally submitted that it is the settled position in law that where a show cause notice is issued based upon an invalid circular, such show cause notice can always be challenged before the Writ Court without having to show cause and face any adverse order from any officer or any authority lacking jurisdiction over the subject matter. He relied on *Commissioner of Customs v/s. Sayed Ali And Anr. - (2011) 3 SCC 537* to support this contention.

11. Based on the above contentions, Mr Sachdeva submitted that the Rule in this petition ought to be made absolute by granting the petitioner reliefs in terms of prayer clauses (a), (b) or in the alternate prayer clause (c) of the petition.

12. Ms Asha Desai, learned Senior Standing Counsel submitted that this petition is pre-mature because the same was directed only against the show cause notices. She submitted that the objections now raised could always be raised in response to the show cause notices. Only if the petitioner was aggrieved by the orders made could the petitioner question such orders and also the impugned circulars that conferred powers upon the officers who had issued the show cause notices. Accordingly, Ms Desai raised a preliminary objection to the maintainability of the present petition on the ground that the petitioner had alternate

and efficacious remedies by responding to the show cause notices or otherwise resorting to the remedies of appeal, etc. under the CGST Act.

13. Without prejudice, Ms Desai submitted that there was no infirmity in the impugned circulars since they were issued in the exercise of powers conferred by Sections 3, 5, 168 r/w. Section 2(91) of the CGST Act. She submitted that in such matters, the quotation of the precise legal provision or even the quotation of an incorrect legal provision is not important as long as the power for assignment of the functions of a proper officer is vested in the authority issuing the impugned circulars. She, therefore, submitted that the challenge to the impugned circulars deserves to be rejected.

14. Ms Desai submitted that *Cannon India Pvt. Ltd. (supra)* was distinguishable because it dealt with the issue of whether the DRI officers could be conferred the power to issue show cause notices under the Customs Act, 1962. She pointed out that in the present case, even the petitioner has accepted the position that the Audit Commissionerate Officials could be appointed as Central Tax Officers. She pointed out that the impugned circulars had merely assigned the functions of a proper officer on Central Tax Officers and not upon some officials of DRI, as was the case in *Cannon India Pvt. Ltd. (supra)*. Accordingly, she submitted that the law laid down in *Cannon India Pvt. Ltd. (supra)* was not applicable to the facts of the present case.

15. Ms Desai relied upon a decision of the Gujarat High Court in the case of *Yasho Industries Limited v/s. Union of India (Special Civil Application No.7388 of 2021 decided on 24.06.2021)* to submit that a challenge similar to the one raised in the present petition was rejected, *inter alia* by relying upon the very same judgments which Mr Sachdeva has now relied upon. Ms Desai submitted that the present petition does not challenge any taxing provisions, and, therefore, the decisions in *Dilip Kumar (supra)* or *Sayed Ali (supra)* are inapplicable.

16. Ms Desai pointed out that the petitioner filed a reply to the show cause notices, and pursuant to the same, the Assistant Commissioner of Central GST, by order dated 29.12.2023, has already disposed of the impugned show cause notices by confirming certain demands and dropping others. She submitted that there was no challenge to the order dated 29.12.2023, which, in any case, was appealable under the provisions of the CGST Act. She, therefore, submitted that this is yet another reason why this Court ought not to entertain the present petition.

17. For all the above reasons, Ms Desai submitted that this petition may be dismissed.

18. The rival contentions now fall for our determination.

19. This petition came up for consideration on 26.09.2023, on which date, at Ms Desai's request, time was granted to the respondents to file their reply. On 23.10.2023, Ms Desai sought

further two weeks to file reply. She stated that no coercive steps would be taken till the next date. Accordingly, this was recorded in our order dated 23.10.2023.

20. The respondents then filed Misc. Civil Application No.2711/2023 (F) seeking leave to proceed with the adjudication but Ms Desai stated that if any order is made, the same would not be enforced against the petitioner until further orders are made in this petition. Mr Sachdeva pointed out that the issue of jurisdiction had been raised.

21. Accordingly, by our order dated 28.11.2023, we allowed the respondents to proceed with the adjudication by recording Ms Desai's statement that in case any order was made, the same would not be enforced against the petitioner until further orders in this petition. Further, liberty was also granted to the petitioner to press the issue of jurisdiction before the authorities. The authorities were also directed to consider this issue when making its orders. It was clarified that the orders should not be given effect until further orders in this petition.

22. The adjudication proceeded, and the Assistant Commissioner of Central GST, by order dated 29.12.2023, disposed of the show cause notices by confirming certain demands and dropping others. The operative portion of the order dated 29.12.2023 reads as follows:-

“ORDER

(i) I confirm the demand of Rs.16,61,634/- (Rupees Sixteen Lakhs Sixty-One Thousand Six Hundred Thirty-Four only) towards taxes short paid during the period 2017-18, 2018-19, 2019-20 and 2020-21;

(ii) I drop the demand of Rs.4,18,900/- (Rupees Four Lakhs Eighteen Thousand Nine Hundred only) demanded as short payment on mini bar services;

(iii) I drop the demand of Rs.1,26,00,000/- (Rupees One Crore Twenty-Six Lakhs only) on receiving consideration (waiver of loan) for outward supply;

(iv) I drop the demand of interest of Rs.6,74,947/- (Rupees Six Lakhs Seventy-Four Thousand Nine Hundred and Forty-Seven only) on wrong availment and utilization of input tax credit on alleged violation of Rule 36(4) of the CGST Rules, 2017;

(v) I confirm the demand of interest in respect of demand confirmed at Sl. No.(i) above only and hold that no interest is payable in view of the demand being dropped at Sl. No. (ii) and (iii) above;

(vi) I impose a penalty of Rs.16,61,634/- (Rupees Sixteen Lakhs Sixty-One Thousand Six Hundred Thirty-Four only) in terms of Section 73(11) of the CGST Act, 2017.”

23. By our order dated 28.11.2023, we had permitted the respondents to proceed with the adjudication and make any order disposing of the show cause notices. Still, we had clarified that such orders should not be given effect until further orders in this petition. Therefore, we do not think that it would be appropriate to dismiss this petition without going into the issue of challenge to the impugned circulars and the impugned show cause notices.

24. If the petitioner succeeds in establishing that the impugned circulars deserve to be quashed, then, as a corollary, the impugned show cause notices may have to be interfered with on the ground that they were not issued by the “proper officer” as defined under Section 2(91) of the CGST Act. However, if we conclude that the impugned circulars suffer from no legal infirmity, then perhaps leave will have to be granted to the respondents to give effect to the order dated 29.12.2023, and liberty would have to be granted to the petitioner to challenge the order dated 29.12.2023 by resorting to the remedies provided under the CGST Act. Therefore, the main issue involved in this petition concerns the legality and validity of the impugned circulars.

25. To appreciate the challenge, we have to first refer to some of the provisions of the CGST Act, which was enacted to make provision for the levy and collection of tax on inter-state supply of goods or services or both by the Central Government and by the matters connected therewith or incidental thereto.

26. Section 2(91) of the CGST Act defines “proper officer” in relation to any function to be performed under the CGST Act, means the Commissioner or the officer of the Central Tax who is assigned that function by the Commissioner in Board.

27. Section 3 of the CGST Act empowers the Government to appoint certain prescribed classes of officers for the purposes of the Act. The classes of officers have been described in Clauses (a) to (i), and a proviso to this Section provides that the officers appointed under the Central Excise Act, 1944 shall be deemed to be officers appointed under the provisions of the CGST Act.

28. Section 4(1) of the CGST Act provides that the Board may, in addition to the officers as may be notified by the Government under Section 3, appoint such persons as it may think fit to be the officers under the CGST Act. Section 4(2) provides that without prejudice to the provisions of subsection 1, the Board may, by order, authorise any officer referred to in Clauses (a) to (h) of Section 3 to appoint officers of central tax below the rank of Assistant Commissioner of Central Tax for the administration of the CGST Act. The term “Board” is defined under Section 2(16) to mean the Board constituted under the Central Boards of Revenue Act, 1963.

29. The audit provisions are contained in Chapter XIII of the CGST Act, comprising Sections 65 and 66. Section 65 is concerned with the audit by the tax authorities, and Section 66 is concerned with the special audit. Sub-sections (1) to (5) of

Section 65 provide for audit provisions, and sub-section (6) provides that on the conclusion of the audit, the “proper officer” shall, within 30 days, inform the registered person, whose records are audited, about findings, his rights and obligations and reasons for such findings. Sub-section (7) of Section 65 then provides that when an audit conducted under sub-section (1) results in the detection of tax not paid or short paid or erroneously refunded, or input tax credit wrongly availed or utilised, the “proper officer” may initiate action under section 73 or section 74 of the CGST Act.

30. Thus, under Section 65(6) of the CGST Act, the “proper officer”, as defined under Section 2(91), has to inform the registered person, whose records are audited, about the findings, his rights and obligations and the reasons for such findings. Secondly, under Section 65(7), it is the “proper officer” who may initiate action under Section 73 or 74 where the audit conducted under sub-section (1) results in the detection of tax not paid or short paid or erroneously refunded, or input tax credit wrongly availed or utilised.

31. In the present case, there is no dispute that the tax authorities audited the petitioner’s accounts under Section 65 of the CGST Act. On the conclusion of the audit, the Deputy Commissioner (Circle-VI Goa) CGST Audit-II Commissionerate, Pune, vide the communication dated 15.11.2022, informed the petitioner of the audit report and called upon the petitioner to discharge its statutory liabilities in

this regard as per the provisions of the CGST Act. This communication, along with the accompanying audit report, was issued to the petitioner under Section 66(6) of the CGST Act.

32. By communication dated 27.10.2022, the petitioner filed a detailed response to the audit report, though the same was styled as a preliminary reply to the GST audit observations. Each of the audit objections was sought to be responded to by the petitioner. This response is at Exh. H Colly from pages 158 to 236 (B) of the paper book of this petition.

33. Upon due consideration of the petitioner's response to the audit report following impugned show-cause notices were issued to the petitioner:-

(i) show cause notice dated 26.04.2023 issued by Deputy Commissioner of CGST (Audit-II) (Respondent No.4) under Section 73 of the CGST Act,

(ii) show cause notice dated 09.05.2023 issued by Deputy Commissioner of CGST (Audit-II) (Respondent No.4) under Section 74 of the CGST Act, and

(iii) show cause notice dated 08.08.2023 issued by Joint Commissioner of CGST (Audit-II) (Respondent No.5) under Section 74 of the CGST Act, 2017.

34. The impugned circulars constitute respondents no.4 and 5 as “proper officers” as defined under Section 2(91) of the CGST Act authorised to issue the above-referred impugned show cause notices. However, the petitioner contends that the impugned circulars are legally infirm mainly on the ground that the Board had no powers to issue the same and, based thereon, to confer any power of assignment of functions of “proper officer” upon the central tax officers for issuing the audit report under Section 65(6) or the show cause notices under Section 73 or 74 r/w. Section 65(7) of the CGST Act. The petitioner contends that if the impugned circulars are set aside, then it would be apparent that the communication of the audit report under Section 65(6) or the issue of the impugned show cause notices under Sections 73 or 74 r/w. Section 65(7) of the CGST Act would be by the officers who were not the “proper officers” as defined under Section 2(91) of the CGST Act. The petitioner contends that, as such, the entire exercise of communicating the audit report or issuing the impugned show cause notices would be an exercise without jurisdiction and consequently liable to be set aside.

35. The petitioner, vide Exh. A (pages 103 to 129) has placed on record the Board’s notification dated 19.06.2017 issued in the exercise of powers under Section 3 r/w. Section 5 of the CGST Act and Section 3 of the IGST Act, by which the Government has appointed the officers listed at (a) to (l) and the Central Tax Officers subordinate to them as “Central Tax Officers” and vested in them all the powers under both the said Acts and Rules made

thereunder with respect to the jurisdiction specified in the tables given below the notification.

36. Mr Sachdeva submitted that the above notification dated 19.06.2017 merely provides for the appointment of Central Tax Officers for exercising powers in the respective territorial jurisdiction and that this notification does not provide for any assignment/entrustment of the functions of such officers to act as “proper officers” under the CGST Act, IGST Act and rules made thereunder. Mr Sachdeva also submitted that in any case, in terms of Section 2(91) of the CGST Act, the Central Government cannot assign the functions of a “proper officer” to the central tax officers since such assignment has to be made by the “Commissioner in the Board”. He, therefore, submitted that the above notification dated 19.06.2017 is not very relevant for determining whether the fourth and the fifth respondents were validly assigned the functions of “proper officer” under Section 2(91) of the CGST Act.

37. The first of the impugned circulars is dated 05.07.2017 (Exh. B Colly at pages 130 to 131), and the same reads as follows:

“ Circular: 3/3/2017-GST dated 05-Jul-2017

Proper officer relating to provisions other than Registration and Composition under CGST Act

Circular No. 3/3/2017-GST, dated 5-7-2017

F. No.349/75/2017-GST

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject: Proper officer relating to provisions other than Registration and Composition under the Central Goods and Services Tax Act, 2017 - Regarding.

In exercise of the powers conferred by clause (91) of section 2 of the Central Goods and Services Tax Act, 2017 (12 of 2017) read with Section 20 of the Integrated Goods and Services Tax Act (13 of 2017) and subject to sub-section (2) of section 5 of the Central Goods and Services Tax Act, 2017, the Board, hereby assigns the officers mentioned in Column (2) of the Table below, the functions as the proper officers in relation to the various sections of the Central Goods and Services Tax Act, 2017 or the rules made thereunder given in the corresponding entry in Column (3) of the said Table :-

TABLE

<i>S. No.</i>	<i>Designation of the officer</i>	<i>Functions under Section of the Central Goods and Services Tax Act, 2017 or the rules made thereunder</i>
(1)	(2)	(3)
1.	<i>Principal Commissioner/Central Tax</i>	<i>of i. Sub-section (7) of Section 67</i> <i>ii. Proviso to Section 78</i>
2.	<i>Additional or Joint Commissioner of Central Tax</i>	<i>i. Sub-sections (1), (2), (5) and (9) of Section 67</i> <i>ii. Sub-section (1) and (2) of Section 71</i> <i>iii. Proviso to section 81</i> <i>iv. Proviso to sub-section (6) of Section 129</i> <i>v. Sub-rules (1), (2), (3) and (4) of Rule 139</i> <i>vi. Sub-rule (2) of Rule 140</i>
3.	<i>Deputy or Assistant Commissioner of Central Tax</i>	<i>i. Sub-sections (5), (6), (7) and (10) of Section 54</i> <i>ii. Sub-sections (1), (2) and (3) of Section 60</i> <i>iii. Section 63</i> <i>iv. Sub-section (1) of</i>

Section 64

v. Sub-section (6) of Section 65

vi. Sub-sections (1), (2), (3), (5), (6), (7), (9), (10) of Section 74

vii. Sub-sections (2), (3), (6) and (8) of Section 76

viii. Sub-section (1) of Section 79

ix. Section 123

x. Section 127

xi. Sub-section (3) of Section 129

xii. Sub-sections (6) and (7) of Section 130

xiii. Sub-section (1) of Section 142

xiv. Sub-rule (2) of Rule 82

xv. Sub-rule (4) of Rule 86

xvi. Explanation to Rule 86

xvii. Sub-rule (11) of Rule 87

xviii. Explanation 2 to Rule 87

xix. Sub-rules (2) and (3) of Rule 90

xx. Sub-rules (2) and (3) of Rule 91

xxi. Sub-rules (1), (2), (3), (4) and (5) of Rule 92

xxii. Explanation to Rule 93

xxiii. Rule 94

xxiv. Sub-rule (6) of Rule 96

xxv. Sub-rule (2) of Rule 97

xxxvi. Sub-rule (2), (3), (4), (5) and (7) of Rule 98

xxvii. Sub-rule (2) of Rule 100

xxviii. Sub-rules (2), (3), (4) and (5) of Rule 101

xxix. Rule 143

xxx. Sub-rules (1), (3), (4), (5), (6) and (7) of Rule 144

xxxi. Sub-rules (1) and (2) of Rule 145

xxxii. Rule 146

xxxiii. Sub-rules (1), (2), (3), (5), (6), (7), (8), (10) (11) (12) (14) and (15) of Rule 147

xxxiv. Sub-rules (1), (2) and (3) of Rule 151

xxxv. Rule 152

xxxvi Rule 153

xxxvii. Rule 155

xxxviii. Rule 156

4. Superintendent of Central Tax

i. Sub-section (6) of Section 35

ii. Sub-sections (1) and (3) of Section 61

iii. Sub-section (1) of Section 62

iv. Sub-section (7) of Section 65

v. Sub-section (6) of Section 66

vi. Sub-section (11) of Section 67

vii. Sub-section (1) of Section 70

viii. Sub-sections (1), (2), (3), (5), (6), (7), (9) and (10) of Section 73

ix. Sub-rule (6) of Rule 56

x. Sub-rules (1), (2) and (3) of Rule 99

xi. Sub-rule (1) of Rule 132

xii. Sub-rule (1), (2), (3) and (7) of Rule 142

xiii. Rule 150

5. *Inspector of Central Tax*

i. Sub-section (3) of Section 68

ii. Sub-rule (17) of Rule 56

iii. Sub-rule (5) of Rule 58

2. It is requested that suitable trade notices may be issued to publicize the contents of this circular.

3. Difficulty, if any, in implementation of the above instructions may please be brought to the notice of the Board. Hindi version would follow.”

38. The second impugned circular is dated 09.02.2018, and the same is at Exh. B Colly on pages 132 to 133 of the paper book. This circular provides that the Board has now decided that certain additional central tax officers shall also be empowered to issue show cause notices or exercise powers and discharge duties conferred or imposed under the CGST Act as specified. In a

sense, therefore, the second impugned circular dated 09.02.2018 adds to or modifies the first impugned circular dated 05.07.2017.

39. The third impugned circular dated 12.03.2022 is again in continuation of the second impugned circular dated 09.02.2018 and purports to amend the said circular. This circular inter alia provides that the central tax officers of the Audit Commissionerate and Directorate General of Goods and Services Tax Intelligence (DGGSTI) shall exercise the powers only to issue show-cause notices. A show cause notice issued by them shall be adjudicated by the competent central tax officer of the Executive Commissionerate in whose jurisdiction the noticee is registered. This circular also deals with the show cause notices issued by officers of DGGSTI, with which we are not concerned in the present petition. Thus, the main circular is the circular dated 05.07.2017.

40. The main circular dated 05.07.2017 provides that the Board issues the same in the exercise of powers conferred by Section 2(91) of the CGST Act r/w. Section 20 of the IGST Act. The circular also refers to Section 20 of the IGST Act and Sections 3 and 5 of the CGST Act. Mr Sachdeva, however, contended that none of the sections quoted confer power upon the Board to assign the functions of “proper officer” to the officers listed in the circular dated 05.07.2017. He submitted that Section 2(91), which is the principal provision based upon which the Board claims to have assigned functions of the “proper officer”, is a definition clause. Such a clause cannot constitute a

source of power for such assignment. He almost entirely relied upon *Canon India Pvt. Ltd. (supra)* to support this contention.

41. *Canon India Pvt. Ltd. (supra)*, in the context of the definition of “proper officer” under Section 2(34) of the Customs Act, 1962, had declared the Central Board’s notification dated 02.05.2012 assigning functions of “proper officer” on certain officers as ultra vires on the short ground that Section 2(34) did not confer any powers on any authority to entrust any functions to officers. The Hon’ble Supreme Court held that Section 6 was the only Section which provides for the entrustment of functions of Customs officers to other officers of the Central or the State Government or local authority. Therefore, if it was intended that officers of the Directorate of Revenue Intelligence who are officers of the Central Government should be entrusted with the functions of the Customs officers, it was imperative that the Central Government should have done so in the exercise of its power under Section 6 of the Act.

42. The Court noted that the reason why such a power is conferred on the Central Government is obvious, and that is because the Central Government is the authority which appoints both the officers of the Directorate of Revenue Intelligence, which is set up under the Notification dated 04.12.1957 and the officers under the Customs Act, 1962. It was in this context that the Court relied on *Commissioner of Customs v/s. Sayed Ali (supra)*.

43. In *Commissioner of Customs v/s. Sayed Ali (supra)*, the Hon'ble Supreme Court, again in the context of the definition of "proper officer" under Section 2(34) of the Customs Act, 1962, held that it was clear from a mere look of the definition clause that only such officers of customs who have been assigned specific functions would be "proper officers". Specific entrustment of functions by either the Board or the Commissioner of Customs was, therefore, the governing test to determine whether the "officer of customs" was the "proper officer".

44. The Court held that from a conjoint reading of Section 2(34) and 28 of the Customs Act, it was manifest that only such a customs officer who had been assigned specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Customs Act is competent to issue notice under Section 28 of the Customs Act. The Court held that any other reading of Section 28 would render the provisions of Section 2(34) of the Customs Act otiose in as much as the test contemplated under [Section 2\(34\)](#) of the Act is that of specific conferment of such functions upon the "customs officers" or "officers of customs".

45. Although Mr Sachdeva is right in submitting that the definitions of "proper officer" under Section 2(34) of the Customs Act, 1962 and Section 2(91) of the CGST Act are similar, the issue involved in *Canon India Pvt. Ltd. (supra)* or *Sayed Ali*

(*supra*) was different from the issue involved in the present case. The ratio of *Canon India Pvt. Ltd. (supra)* and *Sayed Ali (supra)* was that the Board, relying upon the definition clause under Section 2(34), could not have assigned functions of the “proper officer” upon the officers of DRI, who were admittedly not the “customs officers” or “officers of customs”, which was one of the prerequisites under Section 2(34) of the Customs Act, 1962.

46. Section 2(91) of the CGST Act *inter alia* provides that in relation to any functions to be performed under the CGST Act, means the Commissioner or the officer of the central tax who has assigned that function by the Commissioner in the Board. Thus, the only substantive difference between the definition of “proper officer” under the Customs Act, 1962 and the “proper officer” under the CGST Act is that the expression “officer of customs” appearing in Section 2(34) of the Customs Act is replaced with the expression “officer of central tax” in Section 2(91) of the CGST Act.

47. In *Canon India Pvt. Ltd. (supra)* and *Sayed Ali (supra)*, the notifications or the circulars impugned therein were struck down because an officer of DRI was not an “officer of customs” as provided under Section 2(34) of the Customs Act. In the present case, however, there is no dispute and no such dispute was ever raised about the officers of the Audit Commissionerate, which includes respondents no.4 and 5 as being the “officers of central tax”. In paragraph 5 of the written submissions filed by Mr Sachdeva on behalf of the petitioner, it is clearly stated that “*the*

petitioner is not disputing the appointment of Audit Commissionerate as Central Tax Officers. In fact, the petitioner is raising the challenge with regard to the source of power of the Board in assigning functions of proper officer to Audit Commissionerate. To reiterate, the core of the challenge in this petition is not of the manner of assignment rather the enabling provision for such assignment of function as Proper Officer.”

48. The above admission is more than sufficient to distinguish the decisions in *Canon India Pvt. Ltd. (supra)* and *Sayed Ali (supra)*. As noted above, the issue involved in both these decisions was whether an officer of DRI could be appointed as a “proper officer” in terms of Section 2(34) of the Customs Act without the Central Government designating officers of DRI as “customs officers”. Since it is admitted that the officers of the Audit Commissionerate are central tax officers, based upon the decisions in *Canon India Pvt. Ltd. (supra)* and *Sayed Ali (supra)*, at least, the assignment of functions by the Board to the central tax officers vide the impugned circulars, cannot be faulted. Therefore, the contention-based upon *Canon India Pvt. Ltd. (supra)* and *Sayed Ali (supra)* cannot be accepted.

49. In *Yasho Industries Limited (supra)*, a Division Bench of the Gujarat High Court comprising Bela M. Trivedi, J. (as Her Ladyship then was) and Ashokkumar C. Joshi, J. rejected a contention similar to what is now raised on behalf of the petitioner in the present petition. The Division Bench also distinguished *Canon India Pvt. Ltd. (supra)* and *Sayed Ali*

(*supra*). The relevant observations in this regard are found in paragraph 14, which reads as follows:-

“[14] The submission of Mr. Rastogi that the said assignment of function has to be by way of Notification and not by way of Circular in view of Section 167 of the CGST Act is thoroughly misplaced. Section 167 of the CGST Act pertains to the delegation of powers by the Commissioner exercisable by any authority or officer under the Act to be exercisable also by another authority or officer as may be specified in the Notification. So far as Section 2(91) is concerned, it pertains to the proper officer in relation to any function to be performed under the CGST Act to be the Commissioner or the officer of Central Tax, who is assigned that function by the Commissioner in the Board. Here the Board means the "Central Board of Indirect Taxes and Customs" as defined in Section 2(16) of the CGST Act. Vide the Circular dated 5.7.2017 the said Board namely the Central Board of Excise and Customs in exercise of the powers conferred by Section 2(91) of the CGST Act read with Section 20 of the IGST Act and subject to Section 5(2) of the CGST Act has assigned the officers the functions as that of proper officers in relation to the various Sections of the CGST Act and the Rules made thereunder, and as such the Superintendent of Central Tax has been assigned the function of Section 70(1) of the CGST Act. Thus, there being no delegation of powers by the Commissioner, the provisions contained in Section 167

of the CGST Act could not be said to have been attracted, nor was there any necessity to issue Notification as sought to be submitted by Mr. Rastogi. There could not be any disagreement to the proposition of law laid down by the Supreme Court in case of Canon India Pvt. Limited (supra) relied upon by the learned Advocate Mr. Rastogi that when a statute directs that the things to be done in a certain way, it must be done in that way alone. However, in the instant case, the Board has assigned the officers to perform the function as proper officers in relation to various Sections of CGST Act and the Rules made thereunder by issuing the Circular in question, the question of issuing Notification for delegation of powers by the Commissioner as contemplated under Section 167 of the CGST Act does not arise. Mr. Rastogi appears to have misread the powers of the Board to assign the officers to perform the function as proper officers in relation to the various Sections of the CGST Act, as the delegation of powers by the Commissioner to the other authority or the officer as contemplated in Section 167 of the CGST Act. The Court, therefore, does not find any substance in the submission of Mr. Rastogi that the respondent No.3 was not the 'proper officer' as per the definition contained in Section 2(91) of the CGST Act, and therefore, had no powers to issue summons under Section 70 of the CGST Act."

50. The observation in *Canon India Pvt. Ltd. (supra)* in the context of the Central Board's notification dated 02.05.2012 to

the effect that Section 2(34) of the Customs Act does not confer any powers on any authority to entrust any functions to officers must be read in the context of the attempt to confer powers on any authority to entrust any of the functions under the Customs Act to officers other than “officers of customs”. This was because powers were purported to be assigned to the officers of DRI, who were admittedly not the officers of customs or who admittedly had not been entrusted with the functions of officers of customs.

51. Given the law in *Union of India v/s. Dhanwanti Devi And Others – (1996) 6 SCC 44*, this would be a proper manner of construing the precedent in *Canon India Pvt. Ltd. (supra)* or *Sayed Ali (supra)*. In such matters, it would not be proper to read a sentence or a word torn out of the context in which such sentence or word may have been employed. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be the exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, not be profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein.

52. Though the impugned Circular dated 05.07.2017 does, inter alia, refer to Section 2(91) of the CGST Act, it is not as if this definition clause is the source of power under which the impugned circular is issued. Section 3 of the CGST Act, as noted

earlier, empowers the Government, by notification, to appoint certain classes of officers for the purposes of the CGST Act. Accordingly, in the exercise of powers conferred by Section 3 r/w Section 5 of the CGST Act and Section 3 of the IGST Act, the Central Government, vide notification dated 19.06.2017, has already appointed certain central tax officers and central tax officers subordinate to them for the purposes of the CGST Act and vested in them all powers under the CGST Act and IGST Act and Rules made thereunder with respect to the jurisdiction specified in the tables given below the said notifications.

53. Thus, in the present case, not even any dispute was raised about the officers referred to in the impugned circulars being central tax officers. Section 4 of the CGST Act provides that the Board may, in addition to the officers as may be notified by the Government under section 3, appoint such persons as it may think fit to be the officers under the CGST Act. Without prejudice to the provisions of sub-section (1) of Section 4, the Board may, by order, authorise any officer referred to in clauses (a) to (h) of Section 3 to appoint officers of central tax below the rank of Assistant Commissioner of Central Tax for the administration of the CGST Act.

54. Section 5 of the CGST Act provides that subject to such conditions and limitations as the Board may impose, an officer of central tax may exercise the powers and discharge the duties conferred or imposed on him under the CGST Act. An officer of central tax may exercise the powers and discharge the duties

conferred or imposed under the CGST Act on any other officer of central tax who is subordinate to him. Similarly, the Commissioner may, subject to such conditions and limitations as may be specified in this behalf by him, delegate his powers to any other officer who is subordinate to him. However, Section 4, which begins with a non-obstante clause, provides that an Appellate Authority shall not exercise the powers and discharge the duties conferred or imposed on any other officer of central tax.

55. Now, the analysis of the notification dated 19.06.2017 and the impugned circulars makes it clear that the Central Government and the Board have exercised powers vested in them by Section 3 and 5, respectively, in the context of assigning the functions of “proper officer” upon the Commissioner or the officers of the Central Tax. The Central Government has issued the notification dated 19.06.2017 in the exercise of powers conferred by Section 3 r/w. Section 5 of the CGST Act constitutes the Commissioner of Central Tax (Audit) and Central Tax officers subordinate to him as central tax officers. About this, not even any dispute was raised on behalf of the petitioner. The impugned circular dated 05.07.2017 is issued by the Board which is the proper authority in terms of Section 2(91) of the CGST Act. This is the reason why reference was made to Section 2(91) of the CGST Act.

56. Section 5 of the CGST Act provides that subject to such conditions and limitations as the Board may impose, an officer of

central tax may exercise the powers and discharge the duties conferred or imposed on him under the said Act. Further, Section 5 of the CGST Act *inter alia* provides that an officer of central tax may exercise the powers and discharge the duties conferred or imposed under the said Act on any other officer of central tax who is subordinate to him. By the impugned circular dated 05.07.2017, the Board has *inter alia* assigned the Deputy or the Assistant Commissioner of Central Tax to function as a “proper officer” in relation to the CGST Act. This includes clause (v) of Section 65(6) concerning the communication of the audit report on the conclusion of the audit. The respondent no.4 in the present case is the Deputy Commissioner of CGST (Audit). Consequently, he was the “proper officer” to communicate the audit report under Section 65(6) of the CGST Act to the petitioner vide the communication dated 15.11.2022.

57. Similarly, the other two impugned circulars have assigned the functions under Section 74 to subordinate officers of central tax by specifying the monetary limits. Based upon the monetary limits so prescribed, respondents no.4 and 5 have issued the impugned show cause notices. The impugned circulars very clearly assign the powers to issue notices under Sections 73 and 74 of the CGST Act. These circulars cannot be said to be legally infirm on the grounds alleged by the petitioner or otherwise. Accordingly, no case is made out to either strike down the impugned circulars or the impugned show cause notices on the ground that they were not issued by the “proper officer” as defined under Section 2(91) of the CGST Act.

58. Merely because the impugned circular dated 05.07.2017 refers to Section 2(91) of the CGST Act as one of its sources of power, no case is made out to strike down the impugned circulars on the ground that the Board had no power to issue the same by reference to the said section. As noted above, the source of power is contained in other provisions of the CGST Act, which were also referred to in the impugned circular. In such matters, the real issue is whether the impugned circulars are intra vires and not whether any correct provision quoting the source of power was stated or there was an omission to quote the correct source.

59. In *Municipal Corporation of the City of Ahmedabad v/s. Ben Hiraben Manilal – (1983) 2 SCC 422*, the Hon'ble Supreme Court has explained that the exercise of power, if there is indeed power, will be referred to a jurisdiction when the validity of the exercise of that power is in issue, which confers validity upon it and not to a jurisdiction under which it would be nugatory, though the Section was not referred, and a different or a wrong section of different provisions was mentioned. A wrong reference of the provision under which the Government takes action will not *per se* vitiate that action for it can be justified under some other power if the Government could lawfully do that act.

60. *Ben Hiraben Manilal (supra)* was also cited with approval by the Constitution Bench in *Union of India And Anr. v/s. Tulsiram Patel – (1985) 3 SCC 398*, where it was held that even the mention of a wrong provision or the omission to mention the

provision which contains the source of power will not invalidate an order where the source of such power exists.

61. In *N. Mani v/s. Sangeetha Theatre And Others – (2004) 12 SCC 278* the Hon’ble Supreme Court has held that it is well settled that if any authority has a power under the law, then merely because while exercising that power, the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law. *N. Mani (supra)* was followed with the approval in *Ram Sunder Ram v/s. Union of India And Others – (2007) 13 SCC 255*.

62. For all the above reasons, we are satisfied that no case is made out to strike down the impugned circulars or the impugned show cause notices inter alia on the ground that such show cause notices were issued by the officers who were not the “proper officers” as defined under Section 2(91) of the CGST Act.

63. Accordingly, this petition fails, and the Rule is hereby discharged without any order for costs. The respondents are permitted to give effect to the order dated 29.12.2023 disposing of the impugned show cause notices, subject no doubt to the petitioner’s right of challenge to the order dated 29.12.2023 in accordance with law and on its own merits.

64. The rule is accordingly discharged without any order for costs.

M. S. SONAK, J.

CHIEF JUSTICE

SUCHITRA
NANDAN SINGBAL

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