

GAHC010260422023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/6960/2023

M/S. PEPSICO INDIA HOLDINGS PVT. LTD.,
HAVING ITS OFFICE AT PLOT NO. 1D, 1E, TIRUPATI AND ASSOCIATES P
LTD., BRAHMAPUTRA INDUSTRIAL PARK, GOURIPUR, VILLAGE- SILA,
MOUZA- SILASINDURI, KAMRUP, ASSAM-781101, REPRESENTED BY
THEIR AUTHORIZED SIGNATORY MR. CHITWAN PRABHAKAR.

VERSUS

THE UNION OF INDIA AND 3 ORS
REPRESENTED BY THE SECRETARY, MINISTRY OF COMMERCE AND
INDUSTRY, GOVERNMENT OF INDIA, HAVING OFFICE AT UDYOG
BHAWAN, NEW DELHI-110107.

2:THE ADDITIONAL COMMISSIONER
OFFICE OF PRINCIPAL COMMISSIONER
GST AND EXCISE COMMISSIONERATE
GST BHAWAN
KEDAR ROAD
MACHKHOWA
GUWAHATI-781001.

3:SUPERINTENDENT
RANGE 1F
GOODS AND SERVICES TAX
GUWAHATI DIVISION-I
ROOM NO. 215
GST BHAWAN
KEDAR ROAD
MACHKHOWA
GUWAHATI-781001.

4:PRINCIPAL COMMISSIONER

CGST AND EXCISE COMMISSIONERATE
GST BHAWAN
KEDAR ROAD
MACHKHOWA
GUWAHATI-781001

Advocate for the Petitioner : MRS. R BORAH

Advocate for the Respondent : DY.S.G.I.

BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY

ORDER

Date : 13.12.2023

Heard Mr. R. Shah, learned Senior Counsel through virtual mode, assisted by Mr. D. Borah and Mr. J. Mishra, learned counsel for the petitioner, and Mr. S.C. Keyal, learned Standing Counsel, GST for the respondents.

2. In this writ petition instituted under Article 226 of the Constitution of India, assail is made by the petitioner company to a Demand-cum-Show Cause Notice bearing E-File no. GEXCOM/ADJN/GST/ADC/297/2023 dated 05.09.2023 [Annexure-2] issued by the respondent no. 2 under Section 73[1] of the Central Goods and Services [CGST] Act, 2017, whereby, the petitioner company has been called upon to show cause as to why [i] Input Tax Credit [ITC] wrongly availed amounting to Rs. 19,51,41,111/- [including Rs. 3,96,96,249.60/- [CGST], Rs. 3,94,92,435.50 [SGST], Rs. 11,58,62,136.13/- [IGST] & Rs. 90,290/- [Cess]] for the Financial Year : 2017-2018; in terms of Section 73[1] of the CGST Act, 2017 r/w Notification no. 09/2023-Central Tax dated 31.03.2023 and the corresponding section under the Assam SGST Act, 2017 r/w Section 20 of the IGST Act, 2017; [ii] applicable interest on the wrongly availed ITC in

terms of Section 50 of the CGST Act and the corresponding Section under the Assam SGST Act, 2017 r/w Section 20 of the IGST Act; and [iii] penalty on the wrongly availed and utilized ITC as mentioned in Point no. [i] above in terms of Section 73 [9] of the CGST Act, 2017 and the corresponding Section under the Assam SGST Act, 2017 r/w Section 20 of the IGST Act, 2017; should not be demanded and recovered.

3. Section 73 of the CGST Act has provided for determination of tax not paid or short paid or erroneously refunded or Input Tax Credit [ITC] wrongly availed or utilized for any reason other than fraud or any willful misstatement or suppression of facts. As per sub-section [1] of Section 73, where it appears to the Proper Officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.

4. As per the Demand-cum-Show Cause Notice dated 05.09.2023, it has appeared to the respondent no. 2 as the Proper Officer that there is an un-reconciled ITC amounting to Rs. 19,51,41,111/- as reflected in the GSTR-9C for the Financial Year : 2017-2018 and the noticee-petitioner company is liable to

reverse the wrongly availed and utilized ITC amounting to Rs. 19,51,41,111/- under Section 73[1] of the CGST Act, 2017 along with applicable interest under Section 50 of the CGST Act, 2017 and penalty under Section 73[9] of the CGST Act, 2017. The said notice has been issued finding discrepancy purportedly under Section 61 of the CGST Act, 2017.

5. The contention advanced on behalf of the petitioner is that provisions contained in Section 61 of the CGST Act, 2017 r/w Rule 99 of the CGST Rules, 2017 require the Proper Officer to scrutinize the return and related particulars furnished by the registered person to verify the correctness of the return with reference to the information available with him. In the event any discrepancy is noticed, the Proper Officer has to issue a notice to the registered person in FORM GST ASMT-10 informing him of such discrepancy and has to seek explanation thereto within the prescribed time period. On receipt of the notice, the registered person may accept the discrepancy mentioned on the notice and pay the tax, interest and any other amount arising from such discrepancy and inform the same or furnish an explanation for the discrepancy in FORM GST ASMT-11 to the Proper Officer. Where the explanation furnished by the registered person is found to be acceptable, the Proper Officer shall inform him accordingly in FORM GST ASMT-12 and no further action shall be taken thereafter. In case no satisfactory explanation is furnished within the stipulated period of being informed by the Proper Officer or where the registered person, after accepting the discrepancies fails to take the corrective measure in his return for the period in which the discrepancies accepted, the Proper Officer may proceed to determine the tax and other dues under Section 73 of the CGST Act, 2017.

6. It is the further contention of the petitioner that as per the impugned Demand-cum-Show Cause Notice, the alleged discrepancy is that the petitioner company did not submit information in Table 14 in FORM GSTR-9C and as a result, there was a mismatch with the details furnished in FORM GSTR-9. FORM GSTR-9C with Table 14 contains details as to 'Reconciliation of ITC declared in annual return [GSTR-9] with ITC availed on expenses as per Audited Annual Financial Statement or books of account'. By Notification no. 56/2019-Central Tax dated 14.11.2019, Notification no. 79/2020-Central Tax dated 15.10.2020, Notification no. 30/2021-Central Tax dated 30.07.2021, Notification no. 14/2022-Central Tax dated 05.07.2022 & Notification no. 38/2023-Central Tax dated 04.08.2023, submission of information in Table 14 of FORM GSTR-9C has been made optional for the Financial Years : 2017-2018, 2018-2019, 2019-2020, 2020-2021, 2021-2022 & 2022-2023. It is, thus, contended that since submission of information in Table 14 if FORM GSTR-9C has been made optional, there cannot be any error or discrepancy from the non filing of information on the part of the petitioner company in Table 14 of FORM GSTR-9C.

7. With such contentions, it has been contended that the mandatory conditions precedent required for invoking the provisions of Section 73[1] of the CGST Act, 2017 for issuance of the impugned Demand-cum-Show Cause Notice are palpably absent in the case in hand.

8. Mr. Keyal, learned Standing Counsel, GST on the basis of instructions received by him vide Communication bearing no. V-3[3]/Law/HC/GHY/2023/110

dated 11.12.2023 has submitted that the petitioner company was informed several times regarding the discrepancy vide Letters, dated 31.05.2022, dated 13.01.2023, dated 03.02.2023 & dated 23.03.2023 respectively, by the authority viz. the Comptroller and Auditor General [CAG]. It has, however, been admitted that the Form GST ASMT-10 was not issued by the Range. He has contended that non-issuance of Form GST ASMT-10 does not result in violating the basic principles of natural justice since the impugned Demand-cum-Show Cause Notice has been issued to the petitioner company as the assessee and the same is in conformity with the principles of natural justice. Reliance is placed in the decisions of the Hon'ble Supreme Court of India in Union of India vs. Polar Marmo Agglomerates Ltd., reported in 1997 [96] ELT 21 [SC], and Union of India and others vs. Coastal Container Transporters Association and others, reported in [2019] 20 SCC 446.

9. In response, Mr. Shah, learned Senior Counsel for the petitioner has submitted that the issues in this writ petition are not relatable to any disputed questions of fact but the issues are relatable to non-adherence to the statutory prescription prescribed in the CGST Act, 2017 and the CGST Rules, 2017. The issues raised are whether there was existence of jurisdictional fact for the Proper Officer to issue the impugned Demand-cum-Show Cause Notice under sub-section [1] of Section 73 of the CGST Act, 2017 at the time of its issuance. It is, thus, contended that if the question of lack of jurisdiction is involved, a writ petition under Article 226 of the Constitution of India is not only maintainable but also entertainable. He has placed reliance in a three-Judges Bench decision in Magadh Sugar & Energy Ltd. vs. State of Bihar and others, reported in 2021 SCC OnLine SC 801, wherein references have also been made

to the decisions in Whirlpool Corporation vs. Registrar of Trademarks, Mumbai, reported in [1998] 8 SCC 1, and Harbanslal Sahni vs. Indian Oil Corporation Ltd., reported in [2003] 2 SCC 107, to buttress his such submissions.

10. The matter would require further examination.

11. Issue notice, returnable on 22.01.2024.

12. As Mr. Keyal, learned Standing Counsel, GST has appeared and accepted notice on behalf of all the respondents, no formal notices need to be issued to the respondents. Mr. Borah, learned counsel for the petitioner shall, however, furnish requisite nos. of extra copies of the writ petition along with annexures, to Mr. Keyal by tomorrow.

13. The respondents in Polar Marmo Agglomerates Ltd. [supra] were served with a notice to show cause as to why the agglomerated marble should not be exigible to excise duty under Tariff Heading 68.07. The Hon'ble Supreme Court of India found that the question involved was a question of fact, "Whether the properties and characteristics of agglomerated marble remain the same as those of excavated marble?" Having found the High Court going into the questions of fact to resolve the question, it has been observed that the High Court should not have interfered, in a writ petition, at the stage of show cause notice to take over the fact finding investigation. In Coastal Container Transporters Association [supra], the Hon'ble Supreme Court of India has observed that the writ petition under Article 226 of the Constitution of India was preferred at the stage of show cause notice and had further found that the case was neither a

case of lack of jurisdiction nor it involved any violation of principles of natural justice so as to entertain the writ petition at the stage of show cause notice. It was found that there was a serious dispute with regard to classification of service and as such, the respondents ought to have responded to the show cause notice by placing materials in support of their stand instead of approaching the High Court questioning the show cause notice. In *Magadh Sugar & Energy Ltd.* [supra], the High Court declined to entertain the writ petition on the ground that the dispute between the parties was factual in nature and interference was declined without observation that it would be appropriate that the dispute be adjudicated in terms of the statutory remedy. The Hon'ble Supreme Court of India has observed that while the High Court would normally not exercise its writ jurisdiction under Article 226 of the Constitution of India if any effective and efficacious alternate remedy is available, the existence of an alternate remedy does not by itself bar the High Court from exercising its jurisdiction in certain contingencies. References have been made to the decisions in *Whirlpool Corporation* [supra] and *Harbanslal Sahni* [supra] to observe that there could be exceptions to the rule of alternate remedy where [a] the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; [b] there has been a violation of the principles of natural justice; [c] the order or proceedings are wholly without jurisdiction; or [d] the vires of a legislation is challenged. An alternative remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case.

14. The issues raised in the present writ petition, *prima facie*, are not relatable to any disputed questions of fact. The petitioner has raised a contention that the

statutory prescriptions contained in Section 61 and Section 73 of CGST Act, 2017 r/w Rule 99 of the CGST Rules, 2017 have not been adhered to and without adherence to the conditions precedent, that is, issuance of notice to the registered person in Form GST ASMT-10 to provide the noticee either to accept or not to accept the discrepancy or to furnish an explanation for the discrepancy in Form GST ASMT-11 or not to furnish any explanation, at a period of time anterior to the impugned Demand-cum-Show Cause Notice, the Proper Officer could not have assumed jurisdiction to issue the Demand-cum-Show Cause Notice under sub-section [1] of Section 73 of the CGST Act, 2017. Prior to issuance of a show cause notice under Section 73[1] of the CGST Act, 2017, it is mere discrepancy. At that stage, the alleged discrepancy would only be a discrepancy simplicitor but at the stage of issuance of Demand-cum-Show Cause Notice under Section 73[1] of the CGST Act, 2017, there is formation of a *prima facie* opinion on the part of the Proper Officer that there is an act, which is in violation of the statutory obligation cast on the noticee. Admittedly in the case in hand, the Form GST ASMT-10 was not issued to the petitioner. A contention has also been raised that the CAG is not the Proper Officer to issue any kind of letters regarding the discrepancy.

15. *Prima facie*, this Court finds force in the above contentions advanced by the petitioner that an act of issuance of the impugned Demand-cum-Show Cause Notice dated 05.09.2023 under Section 73[1] of the CGST Act, 2017 by the Proper Officer was without compliance of the mandatory conditions precedent, prescribed under the CGST Act, 2017 and the CGST Rules, 2017, more particularly, the provisions of Section 61 of the CGST Act, 2017 r/w Rule 99 of the CGST Rules, 2017, to derive jurisdiction to issue such a Demand-cum-

Show Cause Notice under Section 73[1] of the CGST Act, 2017, impugned herein. In view of the same, it is ordered that the operation of the impugned Demand-cum-Show Cause Notice bearing E-File no. GEXCOM/ADJN/GST/ADC/297/2023 dated 05.09.2023 [Annexure-2] shall remain stayed, till the returnable date.

16. The respondent GST authorities shall file their response in the meantime.

17. The Communication bearing no. V-3[3]/Law/HC/GHY/2023/110 dated 11.12.2023, placed by Mr. Keyal, be kept with the case record by marking the same as Document-'X'.

JUDGE

Comparing Assistant