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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 18.05.2022

+ **W.P.(C) 5407/2020 & CM APPL. 19473/2020**

GULATI ENTERPRISES

.....Petitioner

Through: Mr Vineet Bhatia, Advocate.

versus

CENTRAL BOARD OF INDIRECT

TAXES AND CUSTOMS & ORS.

.....Respondents

Through: Mr Harpreet Singh with Ms Suhani
Mathur, Advocates.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MS JUSTICE TARA VITASTA GANJU

[Physical court hearing/ hybrid hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL) :

1. This writ petition is directed against the show cause notice dated 21.05.2020, issued by the respondents/revenue.
2. To be noted, the impugned show cause notice dated 21.05.2020 has been issued to several other entities/persons, including the petitioner proprietorship concern, and its authorised signatory, namely one, Mr Tarun Gulati. The relevant part of the said show cause notice is extracted hereafter:

“13.55. M/s Gulati Enterprises, 316, FIE Patparganj Industrial Area, Delhi (GSTIN 07AAGPK8981Q1ZQ) is hereby called upon to show cause to the Additional / Joint Commissioner, CGST Commissionerate, Delhi East, C.R. Building, I.P. Estate, New Delhi, within 30 days of the receipt of this Show Cause Notice as to why –

TAX OF IGST of Rs. 58,77,631/-, CGST of Rs. 53,57,374/-, SGST of Rs. 53,57,374/- & Cess of Rs. 5,44,45,143/- on goods cleared clandestinely should not be demanded and recovered from them under proviso to Section 74(1) along

with interest payable thereon under Section 50 of the CGST Act., 2017 read with relevant provisions of the IGST Act, 2017, the Delhi / the Haryana State GST Act, 2017 & Section 11 of the GST (Compensation to States Act).

Penalty equivalent to the tax specified in (i) above be not imposed upon them under Section 74 and Section 122 (1) of the CGST Act, 2017 read with relevant provisions of the IGST Act, 2017, the Delhi / the Haryana SGST Act, 2017 & Section 11 of the GST (Compensation to States Act).

13.56 Mr. Tarun Gulati, Authorised signatory, M/s Gulati Enterprises, 316, FIE Patparganj Industrial Area, Delhi (GSTIN 07AAGPK8981Q1ZQ) is also called upon to show cause to the Additional Commissioner/Joint Commissioner, CGT Commissionerate Delhi (East) having office at C.R. Building, I.P. Estate, New Delhi within 30 days of the receipt of this Show Cause Notice as to why penalty should not be imposed upon him under Section 122(I) of the CGST Act, 2017 and Section 122(1) of the Haryana/Delhi SGST Act, 2017.

3. The petitioner has assailed the aforementioned part of the show cause notice on the ground that the mandatory requirement of pre-show cause notice consultation, as embedded in Rule 142 (1A) of the Central Goods and Service Tax Rules, 2017 [in short '2017 Rules'], as it obtained at the relevant point in time i.e., when the show cause notice was issued, has not been adhered to.

4. Mr Vineet Bhatia, who appears on behalf of the petitioner, in support of this plea, submits that the mandatory requirement of pre-show cause notice consultation, as provided in the aforementioned Rules, has to be read with Section 74 of the CGST Act, 2017 [in short 'the CGST Act'].

4.1 Mr Bhatia contends that, as a matter of fact, the regime after the

CGST Act and Rules kicked in i.e., from 01.07.2017 had left no scope for the respondents/revenue to move away from the requirement of a pre-show cause consultation notice.

4.2. In this behalf, Mr Bhatia has also referred to a statutory form i.e., GST DRC-01A. Mr Bhatia contends that a brief perusal of the form i.e., GST DRC-01A, would show that the respondents/revenue were required to not only crystalize the tax and cess components, but also the period for which it was claimed.

4.3. Besides this, Mr Bhatia also emphasised the fact that a perusal of the aforementioned form would show that the respondents/revenue are also required to “furnish the grounds” and the “quantification” of the goods/services, based on which tax and cess is claimed.

4.4. Concededly, in this case, no pre-show cause consultation notice, as required in the statutory form, was served on the petitioner.

5. Mr Harpreet Singh, who appears on behalf of the respondents/revenue, says at the relevant point in time i.e., when the impugned show cause notice dated 21.05.2020 was issued, the statutory form referred to hereinabove was not activated on the web portal.

5.1. It is therefore Mr Singh’s contention that it is on account of this reason that a pre-show cause consultation notice could not be issued to the petitioner.

6. That said, Mr Singh says that because the authorised signatory of the petitioner proprietorship concern gave a voluntary statement before the concerned officer, it obviated the need for issuing a pre-show cause consultation notice.

6.1. In other words, the argument is that everything that the pre-show

cause consultation notice would envisage, was captured in the voluntary statement given by the aforementioned authorized signatory of the petitioner concern i.e., Mr Tarun Gulati.

7. Having heard the learned counsel for the parties, in our view, the issue raised in the present case is no longer *res integra*.

8. A coordinate bench of this Court in the judgment rendered on 05.04.2021, passed in W.P.(C.) 5766/2019, titled ***Back Office IT Solutions Pvt. Ltd. v. Union of India & Ors.*** [2021 SCC OnLine Del 2742] dealt with a somewhat similar situation. The Court was called upon to render a decision in the context of a master circular dated 10.03.2017, which also had a provision for pre-show cause notice consultation. The provision for pre-show cause notice consultation was captured in paragraph 5.0 of the aforementioned master circular.

8.1. In that case, amongst others, one of the defences that the revenue had taken was that the regime of pre-show cause notice consultation would not apply, where it was a case of prevention, and/or where the show cause notice related to an offence committed by the assessee. In the facts and circumstances arising in the said case, the coordinate bench had held that the exceptions did not apply in that case.

8.2 Having held so, the Court ruled that the requirement of pre-show cause notice consultation, as set forth in paragraph 5.0 of the master circular, was mandatory, as it was also in line with an earlier instruction dated 21.12.2015.

8.3. The aforementioned aspects were referred to in paragraph 5 and 5.1 of the judgment in ***Back Office IT Solutions Pvt. Ltd.***, which reads as follows:

“5. *Having heard the learned counsel for the parties,*

we are of the view that what requires to be noticed, in the first instance, is the relevant paragraph contained in the 2017 Master Circular, which is, extracted hereafter:

“5.0 Consultation with the noticee before issue of Show Cause Notice : Board has made pre show cause notice consultation by the Principal Commissioner/Commissioner prior to issue of show cause notice in cases involving demands of duty above Rs. 50 lakhs (except for preventive/offence related SCN's) mandatory vide instruction issued from F. No. 1080/09/DLA/MISC/15, dated 21st December 2015. Such consultation shall be done by the adjudicating authority with the assessee concerned. This is an important step towards trade facilitation and promoting voluntary compliance and to reduce the necessity of issuing show cause notice.”

[Emphasis is ours]

5.1. A perusal of the aforesaid extract, taken from the 2017 Master Circular, would show that respondent no. 3 has made pre-show cause notice consultation by the Principal Commissioner/Commissioner before issuance of a show cause notice [in cases involving demands concerning duty above Rs.50,00,000/-] mandatory in line with the provisions of the 2015 instruction.”

9. As noted right in the beginning of the narration of facts, after 09.10.2019, the legislature has, in our view, removed the clutter of exceptions which were obtaining in the aforementioned master circular by simply stating the following in sub-rule (1A) of Rule 142 (unamended) of the 2017 Rules :

“142...

*(1A) The proper officer **shall**, before service of notice to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, **shall** communicate the details of any tax, interest and penalty as ascertained by the said officer, in Part A of FORM GST DRC-01A.” [Emphasis is ours]*

9.1. We may also note that with effect from 15.10.2020 i.e., after the impugned show cause notice was issued, Rule 142(1A) has undergone a change, inasmuch as the word ‘shall’ has been replaced with ‘may’. As to what would be the impact of the amendment need not be considered by us in this case, as admittedly the show cause notice was issued prior to 15.10.2020 i.e., on 21.05.2020. The amended provision, with effect from 15.10.2020, reads as follows:

“142...

(1A) The proper officer may before service of notice to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, communicate the details of any tax, interest and penalty as ascertained by the said officer, in Part A of FORM GST DRC-01A.”

10. Therefore, having regard to the position which obtained prior to 15.10.2020, we would have to hold that pre-show cause notice consultation was mandatory under the unamended Rule 142 (1A).

11. Insofar as the arguments advanced by Mr Singh are concerned, we are of the opinion that these arguments cannot save the day for the respondents/revenue.

11.1. The first argument was that since the aforementioned statutory form was not activated on the web portal maintained by the respondents/revenue, pre-show cause notice consultation notice could not have been issued. As is rightly argued by Mr Bhatia, the respondents/revenue could have made an attempt by serving on the petitioner, albeit manually, the very same statutory form.

11.2. The other argument advanced by Mr Singh that because the

authorised signatory of the petitioner i.e., Mr Tarun Gulati had made a voluntary statement, the requirement of issuing a pre-show cause consultation notice stood satisfied, as all that the respondents/revenue would have said in the pre-show cause consultation notice was put to the authorised signatory petitioner proprietorship concern at the time of recording his statement, is untenable. This very argument was advanced on behalf of the revenue before another coordinate bench of this Court in the matter of ***Omaxe New Chandigarh Developers Pvt. Ltd. v. Union of India & Ors.*** [W.P.(C.) 12653/2019]. The Court via judgement dated 05.04.2021 rejected the submission and while doing so made the following observations

“3.3. Insofar as the captioned writ petitions are concerned, as noted above, the defence taken by the contesting respondents is that pre-show cause notice consultation had occurred and, in that context, reliance is placed upon the statements made by the petitioners’ officials [pursuant to summons issued to them], before the Senior Intelligence Officer under Section 14 of the Central Excise Act, 1944, as made applicable to Service Tax matters vide Section 83 of the Finance Act, 1994.

3.4. We are of the view that “voluntary statements” recorded before the Senior Intelligence Officer cannot constitute pre-show cause notice consultation as envisaged in the paragraph 5 of the 2017 Master Circular. Consultation entails discussion and deliberation. There is back and forth between parties concerned with the consultative process, leading to, metaphorically speaking, often, separation of wheat from the chaff.

3.5 A voluntary statement is, at best, a one-way dialogue made before an authority which often does not, as in this case, take a decision as whether or not next steps in the matter are required to be taken. It is not in dispute that the show cause notices impugned in the captioned writ petitions dated 11.04.2018 (W.P.(C) 12653/2019) & 24.04.2018

(W.P.(C) 7842/2020) were issued by an officer of the rank of Additional Director General. Therefore, it cannot be said that voluntary statements made by the officials of the petitioners before the Senior Intelligence Officer would constitute a preshow cause notice consultation, as stipulated under paragraph 5 of the 2017 Master Circular.”

12. In view of what is observed hereinabove in ***Omaxe New Chandigarh Developers Pvt. Ltd.***, the result can be no different in this case as well.

12.1. A voluntary statement cannot substitute a statutory notice, which is contemplated under Rule 142(1A) of the 2017 Rules.

13. Accordingly, the prayer made in the writ petition is allowed.

13.1. The impugned show cause notice dated 21.05.2020 is set aside.

13.2. This, however, will not prevent the respondents/revenue from issuing a pre-show cause consultation notice, in the prescribed form. The respondents/revenue will, thus, be at liberty to take next steps in the matter, once the said notice is issued, *albeit* as per law.

14. The writ petition is disposed of in the aforesaid terms. Consequently, pending application shall stand closed.

(RAJIV SHAKDHER)
JUDGE

(TARA VITASTA GANJU)
JUDGE

MAY 18, 2022/tr

[Click here to check corrigendum, if any](#)