

AFR**Court No. - 18**

Case :- WRIT - C No. - 29052 of 2021

Petitioner :- Principal Commissioner Cgst And Central Excise Lucknow
And Anr

Respondent :- M/S Bushrah Export House Two Star Lucknow And Anr.

Counsel for Petitioner :- Kuldeepak Nag K.D.Nag

Counsel for Respondent :- Vibhanshu Srivastava

Hon'ble Pankaj Bhatia,J.

Heard the counsel for the petitioner and Sri Jayant Kumar assisted by Sri Vibhanshu Srivastava, the counsel for the respondents.

The present petition has been filed challenging the appellate order dated 13.08.2021 passed by the Additional Commissioner (Appeals), Customs, GST and Central Excise whereby the Appeal No.31-GST/2020 has been allowed. The said appeal is stated to have been preferred by the respondents against the Order-in-Original dated 24.04.2020 passed by the Deputy Commissioner, Central Excise and Service Tax, Division-I, Lucknow whereby the claim of the respondents was rejected.

The facts, in brief, are that the respondents moved an application seeking refund of the CGST through their application dated 20.02.2020 claiming an amount of Rs.1,84,17,252/- on the tax paid inputs of the Goods, which was ultimately exported by the respondents. It is claimed that after verifying the claims, prima-facie an acknowledgment was issued to the respondents and a provisional order dated 04.03.2020 allowing partial refund amounting to Rs.1,65,75,526.80 was granted on a provisional basis out of the total refund claimed. When the

claims of the respondent were subjected to scrutiny, the department was of the view that the provisional refund granted to the respondents was erroneous refund and, as such, a show cause notice dated 07.04.2020 was issued to the respondents calling upon the respondents to show cause as to why the application for grant of refund may not be rejected and further why the recovery of the sanctioned amount should not be initiated against the respondents and why the recovery of Input Tax Credit of the remaining amount should not be initiated along with the interest thereupon. The show cause notice is contained in Annexure no.2 to the writ petition.

From perusal of the show cause notice, it is clear that the allegations were that the respondents had claimed the Input Tax Credit in the form of IGST against the supply received from three Tax Payers named therein. It was further alleged that one of the supplier namely M/s Risuddeen Kamruddin Shekh had issued 132 invoices totaling to Rs.10,02,08,500/- in the month of January 2019, similarly one supplier namely M/s Sagar Rajendra Sonvane had issued 84 invoices totaling to Rs.6,38,07,492/- in the month of March 2019 and similarly M/s Ahmed Tax had issued 10 invoices in the month of April 2019 totaling to Rs.9,70,666/-, 18 invoices in May 2019 totaling to Rs.17,81,692/- and three invoices in the month of June 2019 totaling to Rs.3,07,592/-. It was further alleged that as per the E-way Bill Rules contained in Chapter XVI of the CGST Rules 2017, the information was required to be furnished prior to the commencement of the movement of the goods and generation of e-way bill by the registered

person, which has not been done. This fact was revealed to the department on the scrutinizing of GSTR-2A return filed by the respondents. It was further alleged that all these three suppliers named above had done huge volume of business in a very short span of time and subsequently their registration was canceled.

The respondents were called upon to show cause and to produce the invoices raised by the said suppliers / taxpayers and e-way bills generated in the process so as to ascertain if the goods were indeed received by the respondents and the Input Tax Credit has been claimed in accordance with the Section 16(2) of the CGST Act 2017. It has been alleged that despite asking for the same, the respondents failed to produce the same and thus, they were asked to show cause as to why the action as prescribed in the show cause notice may not be taken. It is claimed that the respondents did not give the reply which led to the passing of the order dated 24.04.2020 (Annexure no.3). In the said order, it has been recorded that the taxpayer did not respond against the charges raised in the show cause notice and neither did the taxpayer appear on the personal hearing date and thus agreeing with the allegations levelled in the show cause notice, a view was formed by the Deputy Commissioner that the suppliers to the respondents had actually not supplied the goods in the absence of their being any e-way bill generated in favour of the respondents and thus the following order came to be passed :

"(i). I reject the remaining 10% of the Refund claim amounting to Rs. 18,41,725/-.

(ii). I confirm the recovery of Input Tax Credit of the

remaining refund amount i.e. Rs. 18,41,725/- under Section 74 read with Section 16 of the CGST Act, 2017 read with the IGST Act, 2017.

(iii). I confirm that the refund to the taxpayer has erroneously been made and accordingly, the already sanctioned amount to the tune of Rs. 61,18,640/- may be recovered under Section 74 of the CGST Act, 2017, read with the IGST Act, 2017.

(iv). I confirm the interest on the above points (ii) and (iii) under Section 50 read with Section 54 of the CGST Act, 2017, read with the IGST Act, 2017.

(v). I impose the penalty amounting to Rs.79,60,365/- under Section 74 of the CGST Act, 2017, read with the IGST Act, 2017.

(vi). I impose the penalty amounting to Rs.79,60,365/- under Section 122 (1)(viii) of the CGST Act, 2017 for obtaining refund fraudulently, read with the IGST Act, 2017.

(vii). I impose the penalty amounting to Rs.79,60,365/- under Section 122 (1)(xiv) of the CGST Act, 2017 for transporting taxable goods without the cover of specified documents i.e. e-way bill, read with the IGST Act, 2017."

The respondents aggrieved against the said order preferred an appeal before the Additional Commissioner (Appeals) CGST, Lucknow wherein it was specifically stated that the inputs received by the respondents were sent from Surat to the warehouse of the respondents at Surat where they were processed and subsequently the goods were exported through ICD Kanpur after transporting the goods from Surat to Kanpur. They placed reliance upon the notification No.GSL/GST/Rule-138 (14)/B.19 dated 19.09.2018 issued by the Commissioner of State Tax, Gujarat State Ahmadabad wherein the authority had issued a notification providing that e-way bill was not required to be generated for intra-city movement of any goods irrespective of the value.

Placing reliance on the said notification, the respondents argued before the Commissioner (Appeals) that the foundation for passing of the order, namely non-generation of e-way bills had no basis as the goods were received by the respondents from suppliers at Surat at their office at Surat and thus there was no requirement of the generation of e-way bill by the suppliers. The Commissioner (Appeals) agreeing with the contentions as raised by the respondents proceeded to allow the appeal by means of the impugned judgment dated 13.08.2021 whereby, the appeal was allowed and the order under challenge was set aside and further directions were issued to sanction the refund of amount of Rs.18,41,725/- to the appellant.

The department has preferred the present writ petition challenging the said order in view of the fact that the appellate tribunal has not been created as prescribed under the statute and the petitioner cannot be left remedy-less in the absence of creation of the statutory tribunal.

Sri K. D. Nag appearing on behalf of the petitioner argues that in view of the averments as made in the memo of the appeal, the respondents admit that the goods were transported from Surat to ICD Panki Kanpur for its further export without the e-way bills and in view of the statement as contained in the memo of appeal, the appellate authority has erred in allowing the appeal.

Subsequent to the filing of the appeal, a supplementary affidavit was filed duly sworn by one Sri Rakesh Srivastav wherein he had specifically stated that no e-way bills were ever annexed with the appeal and they were not produced

before the learned Additional Commissioner (Appeals). The said averments made in paragraph 7 of the supplementary affidavit were sworn on the basis of the records.

The counsel for the respondents had drawn my attention to the specific assertions made highlighting that the invoices depicting the purchase of the goods by the respondents were duly produced through an excel sheet filed during the pendency of the appeal on 02.03.2020. The appellate authority in the impugned order also recorded that in view of the e-way bills, the respondents were entitled to the benefit of the notification dated 19.09.2018 and on the said foundation had allowed the appeal. This court finding contradictions in the supplementary affidavit filed by the department and the stand taken by the respondents had called for the records of the case before the Commissioners (Appeals), which has been produced today. I have perused the record which contain the invoices whereby the goods were supplied by the suppliers to the respondents at Surat.

In view of the records as produced today, prima-facie the supplementary affidavit filed by Sri Rakesh Srivastava, prima-facie does not appear to be correct. Sri K. D. Nag clarifies that the affidavit was filed based upon the copy of the memo of the appeal served by the respondents to the department and there was no deliberate error or misleading of the facts. The court accepts the said explanation offered by Sri Nag with a advice that the department should be careful in future in filing such affidavit.

Coming to the facts leading to the present case, the show cause notice as issued to the petitioner had made three

precise allegations that the supplier of the goods to the respondents had supplied the goods without generation of the e-way bills which was contrary to the E-Way Bill Rules and thus, the claim of the respondents was liable to be rejected. That being the nature of the allegations levelled in the show cause notice, the submission of Sri K. D. Nag that the goods sent from Surat to Kanpur for export did not carry e-way bills as admitted by the respondents in their memo of appeal, cannot be accepted as it is well settled that the allegations as levelled in the show cause notice should be clear and specific and the findings cannot go beyond the allegations as levelled in the show cause notice.

It is well settled that the show cause notice is issued to make the noticee understand the allegation and facts as are levelled in the show cause notice and it is aimed that putting the noticee to whom the show cause notice is issued on guard, this view has been expressed by the Hon'ble Supreme Court in the case of ***Oryx Fisheries Private Limited vs. Union of India and others; (2010) 13 SCC 427***, judgment of the Supreme Court in the case of ***Siemens Public Communication Networks Private Limited and another vs. Union of India and others reported at (2008) 16 SCC 215*** and explaining in ***Gorkha Security Services vs. Government of NCT (2014) 9 SCC 105***. In the present case, the show cause notice is confined to the allegations against the respondents receiving the supplies of goods without the e-way bills, which fact has been dealt with by the appellate authority after perusing the invoices that the goods were supplied to the respondents from Surat to Surat and thus, the notification dated

19.09.2018 was clearly in favour of the respondents.

In the present case, no allegations were levelled in the show cause notice to the effect that the respondents had transferred the finished goods for export from Surat to Kanpur without e-way bill as such the arguments of Sri Nag on that count are without any foundation and thus liable to be rejected.

In view of the specific finding by the Commissioner (Appeals) that the goods were received by the respondents through e-way bills within the same city, there was no requirement of generation of e-way bills as provided under the notification dated 19.09.2018, the said finding has not been shown to be perverse or in any way arbitrary or illegal in the arguments as raised by Sri Nag and referred to above.

In view thereof, no interference is called for in the appellate order.

The writ petition lacks merit and is ***dismissed***.

Order Date :- 5.9.2022

VNP/-