Neutral Citation No. - 2023:AHC:78054

AFR

Reserved

Court No.6

Case :- WRIT TAX No. - 1569 of 2022

Petitioner :- M/S Lari Almira House
Respondent :- State Of U.P. And 3 Others
Counsel for Petitioner :- Aloke Kumar
Counsel for Respondent :- C.S.C.

Along - With

Case :- WRIT TAX No. - 1570 of 2022

Petitioner :- M/S Lari Almira House
Respondent :- State Of U.P. And 3 Others
Counsel for Petitioner :- Aloke Kumar
Counsel for Respondent :- C.S.C.

Hon'ble Pankaj Bhatia,J.

1. Both the writ petitions are common in terms of the content and relate to the same assessee although for different years, as such, the same are being decided by means of this common order. For the sake of brevity, the facts of Writ Tax No.1570 of 2022 are being referred to.

2. Both the writ petitions have been filed challenging the order dated 24.01.2022 passed in exercise of the power under Section 74 of the U.P. G.S.T. Act against the petitioner as well as the order dated 30.09.2022 passed by the first appellate authority whereby the appeal was dismissed as beyond limitation.

3. The contention of the counsel for the petitioner is that the appellate authority has erred in dismissing the delay condonation application, however he argues that in the event, this Court finds

that the appellate court had rightly dismissed the application for extension of period of limitation, this Court should hear the matter in respect of challenge to the order dated 24.01.2022 on the grounds which are available for challenge of a quasi judicial order in exercise of the power under Article 226 of the Constitution of India, more so as the doctrine of merger would not apply as the appeal has been dismissed on the ground of limitation and not on merits.

4. On perusal of the appellate order (Annexure no.13), it is clear that the same has been dismissed as being beyond limitation prescribed under Section 104 (4) of the U.P. G.S.T.Act.

5. Considering the law which is clearly well settled by the Supreme Court in the case of ***M.P. Steel Corporation vs. Commissioner of Central Excise 2015(7) SCC 58,*** I do not find any error in the appellate order dated 30.09.2022, whereby the appeal was dismissed on the ground of limitation. However, this Court is to consider the validity of the order dated 24.01.2022 on the limited grounds which are available for judicial review under Article 226 of the Constitution of India as the order dated 24.01.2022 has not merged in the order dated 30.09.2022.

6. The facts, in brief, are that the petitioner claims to be an assessee and holds a valid registration under the U.P. G.S.T. Act. It is claimed that the petitioner had uploaded the relevant documents of sale and inward supply and had claimed input tax credit in accordance with law, however, for the financial year 2017-18, an inspection was carried out by the Deputy Commissioner (SIB), Commercial Tax, Gorakhpur on 20.04.2018 and a Panchanama was prepared in pursuance to the inspection so carried out. The inspection report is on record as Annexure no.2 and 3.

7. It is argued that in terms of the said search and seizure, summons were issued to the petitioner under section 70 of the Act on 28.04.2018, the petitioner appeared in pursuance to the said summons and also filed a reply. Subsequently, after about three years on 02.09.2021, the petitioner was served with a show cause notice under section 74 of the U.P.G.S.T. Act on the basis of the SIB survey report. The said show cause notice is on record as Annexure no.8. Along with the said show cause notice, no relied upon documents were mentioned and the petitioner was not even supplied with a copy of the SIB report. The petitioner asked for adjournment and was waiting for the supply of the SIB report, however, an ex-parte order came to be passed on 24.01.2022 solely based upon the said SIB report (Annexure no.9).

8. The contention of the counsel for the petitioner is that the entire proceedings initiated against the petitioner on 02.09.20221 were based upon the SIB report and without supplying a copy of the SIB report, the petitioner was not in a position to file a reply to the show cause notice. He further argues that the order dated 24.01.2022 is an ex-parte order solely based upon the SIB report and without there being any effort of the department to corroborate the same by means of any evidence whatsoever. He further argues that even if for the sake of argument, it is accepted that in the survey carried out by the SIB, there was some discrepancy in the recording of the materials, it is still incumbent upon the department to establish that the Tax was not paid on the supplies effected by corroborating the same by means of some evidence either in the form of evidences by the purchaser of the said goods or otherwise.

9. He draws my attention to argue that the G.S.T. is payable on supply of goods in terms of Section 7 of the U.P. G.S.T. Act and

the time of payment of the tax is governed by Section 12 and 13 of the U.P. G.S.T. Act and the valuation of the supply of goods is to be done in terms of Section 15 of the U.P.G.S.T. Act, which admittedly has not been done as is clear from the perusal of the order dated 24.01.2022. He argues that it is well settled that any document based upon which the order intended is to be passed should be supplied to the assessee and any non-compliance thereof would render the order bad in law and also in violation of principle of natural justice. He lastly argues that improper returns only give the right to the department to initiate the proceedings under section 74 of the Act, in the light of section 61(3) of the U.P. G.S.T. Act. He also argues that in any event, no right of hearing was accorded to the petitioner which is a mandatory requirement under section 75(4) of the U.P.G.S.T. Act. Specific allegation with regard to non-supply of the SIB report has been made in paragraph 19, 36 and 38 of the Writ Petition.

10. Standing counsel, on the other hand, justifies the order dated 24.01.2022 by arguing that the SIB had found certain discrepancies in the search and seizure carried out at the premises of the petitioner and a copy of the search, seizure and panchnama are available with the petitioner. He further argues that in pursuance to the search and seizure carried out by the SIB, summons were also issued to the petitioner and the petitioner filed a reply to the said summons and thereafter the SIB had forwarded its report.

11. In reply to the contention of the counsel for the petitioner that the SIB report was not provided, it is stated in paragraph 28 of the counter affidavit that the petitioner never demanded the copy of the report and in any case, all important points mentioned in the report were mention in the show cause notice itself. It is further

pleaded in paragraph 43 of the counter affidavit that the report was sent by the SIB on the basis of adverse facts found during the investigation by the SIB Unit and all important points in the SIB report were mentioned in the show cause notice.

12. With regard to the other contentions of the counsel for the petitioner, it has been especially stated in paragraph 42 of the counter affidavit that as the stocks found by the SIB at the time of survey were verified by the petitioner and due to variation of the stocks from the books of account by the trader, the stock has been treated as ‘condemn purchase’. It is further pleaded in paragraph 44 of the counter affidavit that the assessment of duty was done, on the basis of unverified records and stock by the SIB Unit, which has prepared the report on the basis of the verification and not on the basis of eye estimation and thus, on the said foundation, the demand has been created as per the Rules.

13. It is also pleaded that the petitioner was provided with several reasonable opportunities for hearing but no explanation was submitted, as such, an ex-parte order was passed.

14. In the light of the pleadings as referred above, what emerges is that an ex-parte order came to be passed against the petitioner on 24.01.2022, the foundation for passing the said order is the SIB report alone. No opportunity of hearing appears to have been granted to the petitioner nor is the same mentioned in the order dated 24.01.2022.

15. In terms of the scheme of the Act, the power of search and seizure is conferred by virtue of Section 67 of the Act and the power of scrutiny of returns filed is conferred upon the proper officer in terms of Section 61 of the Act. Both the said sections 61 and 67, are step towards the initiation of the proceedings either under

Section 73 or Section 74 of the Act, as the case may be. They in itself do not form any basis for concluding the evasion of tax, which has to be established by following the procedure as prescribed under section 73 and under section 74 of the Act as the case may be. Section 74 from its plain reading confers the power to assess the non-payment of tax on the supply or wrong availment of input tax credit by the reasons of fraud, wilful misstatement or suppression of facts coupled with an intent to evade tax. Irrespective of the outcome of the scrutiny of return under section 61 of the Act or the inspection carried out under section 67 of the Act, the burden of assessing the short payment of tax or wrong availment of input tax credit still lies on the department which is to be discharged by the department.

16. To calculate and assess the non-payment of tax, it is essential that the relevant evidence is carried out by the department in respect of the taxable supplies made by the assessee and non-payment of tax which is required to be done at the time of supply as specified under section 13 of the Act. It is also incumbent on the department to compute the value of taxable supply on the goods on which it is alleged that the tax has either not been paid or short paid or short levied. In addition to the said, the burden is on the department to establish that the said non-payment was on account of fraud, wilful misstatement or suppression of facts. Mere report of inspection and discrepancy in the scrutiny of returns is not enough to assess and levy the tax, the said discrepancies, even if noticed by the department should be corroborated with materials in the form of either the evidence or in any other form as the department may deem fit. Without any corroborative material, merely on the basis of discrepancies found in the scrutiny of

returns or discrepancies found during the inspection is not enough to assess the tax.

17. It is also incumbent upon the department to give the opportunity of hearing as per the Section 75(4) of the Act which is mandatory to be followed by the department. It is equally well settled that any document proposed to be relied upon should be provided to the assessee prior to conclusion of the proceedings.

18. In the present case, the order dated 24.01.2022, clearly falls short of the principle of natural of justice as admittedly the SIB report, which is the foundation was never supplied to the petitioner, no hearing was granted to the petitioner under section 75(4) of the Act and there is prima facie no material other than the SIB report to corroborate the discrepancies as allegedly found by the SIB at the time of scrutiny of returns and inspection.

19. Thus, on all the three grounds, as noted above, the impugned order dated 24.01.2022 is unsustainable and is quashed. The matter is remanded to the adjudicating authority to pass a fresh order after supplying the copy of the SIB report and giving an opportunity of hearing to the petitioner and also an opportunity of filing a reply.

20. Both the writ petitions stand allowed in terms of the said order.

Order Date :- April 12, 2023
VNP/-

[Pankaj Bhatia, J]