IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

CWP No.1517 of 2024
Reserved on:06.09.2024
Pronounced on:20.09.2024

M/s A.M. Enterprises …Petitioner

Versus

State of Himachal Pradesh & Ors. …Respondents

Coram:

Hon'ble Mr. Justice M.S. Ramachandra Rao, Chief Justice.
Hon'ble Mr. Justice Satyen Vaidya, Judge.

Whether approved for reporting?

For the petitioner : Mr. Vishal Mohan, Sr. Advocate with Mr. Goverdhan Lal Sharma and Mr. Praveen Sharma, Advocates.

For the respondents : Mr. Anup Rattan, Advocate General with Mr. Rakesh Dhaulta, Mr. Sushant Kaprate & Mr. Gobind Korla, Additional Advocate Generals and Mr. Arsh Rattan, Ms. Priyanka Chauhan & Mr. Sidharth Jalta, Deputy Advocate Generals.

M.S. Ramachandra Rao, Chief Justice.

In this Writ petition, the petitioner has assailed an order dt. 09.02.2024 **(Annexure P-1)** issued by respondent no.4 by which the said respondent had passed an order for cancellation of petitioner's GST Registration. *Inter alia* the petitioner has also sought a Writ of

Mandamus directing the respondents to revoke the cancellation of the said registration apart from relief to declare Section 16(2)(c) and Rule 86B of the Rules framed *ultra vires* the GST Act, 2017 (in short **"the Act"**) .

2. The impugned order dt. 09.02.2024 **(Annexure P-1)** passed by the 4th respondent records that a Show Cause Notice was issued to the petitioner on 17.01.2024; that a reply to the Show Cause Notice was submitted by the petitioner; and after considering the same, the 4th respondent was of the view that the GST Registration of the petitioner was liable to be cancelled in view of Rule 21(g), which deals with a person "who violates the provisions of Rule 86B for paying short tax in cash" and also Rule 21(b) & Rule 21(e) of the Rules framed under the Act.

payment of tax in cash minimum 1%

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3. Annexed to this order are the reasons contained in two Annexures.

Violation of Rule 86B

4. **Annexure P-1** deals with the alleged violation of Rule 21(g) of the Rules framed under the GST Act, 2017. The said Rule states that the registration granted to a person is liable to be cancelled if the said person violates the provisions of Rule 86B.

Consideration by the Court re: violation of Rule 21 (g)

5. Rule 86B states that a registered person shall not use the amount available in the Electronic Credit Ledger to discharge his liability

towards output tax in excess of 99% of such tax liability, in cases where the value of taxable supply other than exempt supply and zero-rated supply in a month exceeds rupees fifty lakh.

6. Certain data is mentioned therein which indicates that the petitioner has indeed violated the said provision and had used the amount available in Electronic Credit Ledger to discharge his liability towards output tax in excess of 99% from October 2021 to March, 2022, April 2022 to March 2023 & April 2023 to January 2024.

7. No doubt, Rule 21(g) enables cancellation of GST Registration if there is a violation by registered person of Rule 86B, but one has to see whether the violation is serious enough to warrant cancellation of the GST Registration, which would practically mean death of the business of the petitioner.

8. It is not in dispute that the amount available in Electronic Credit Ledger of the petitioner is the petitioner's own money and it has been used to discharge the petitioner's tax liability, though in excess of 99% of such tax liability.

9. It is not as if there has been any default in discharge of tax liability as such by the petitioner, causing any loss to the Department, since the Show Cause Notice itself was issued by the Department on 17.01.2024 for the period October 2021 to March 2022, April 2022 to

March 2023 & April 2023 to January 2024, i.e. almost two years from the date of such violation.

10. It is the contention of the petitioner that Rule 86B lacks statutory backing since there is no provision in the statute supporting it, that Sections 16 & 49 do not provide for the same, and Sections 49A & 49B also do not provide any restriction of the nature indicated in Rule 86B.

11. Petitioner also contended that the cancellation is arbitrary and violates its fundamental rights enshrined in Article 14 of the Constitution and has crippled his business, that Article 19(1)(g) of the Constitution is also violated apart from Article 300A of the Constitution of India.

12. In the reply filed by the respondents, it is firstly contended that the petitioner has a remedy of appeal under Section 107 of the HPGST Act, 2017 to an Appellate Authority constituted under the statute and it is stated that there is an appeal which would lie against the impugned order before the Additional Commissioner (Appeals).

13. It is nextly contended that the violation of Rule 86B of the Act is borne out by record. The respondents contend that Rule 21(g) gives a linkage to the violation of Rule 86B and that Rule 86B is framed under the rule making power under Section 164 of the Act.

14. When there is a challenge to certain Rules framed under the GST Act in the Writ petition, we fail to see how the alternative remedy of

appeal is the appropriate remedy, because a creature of the statute, it is settled law cannot decide on the vires/constitutionality of the provisions of the statute or the rules made thereunder.

15. In ***Magadh Sugar & Energy Ltd. v. State of Bihar***[1], the Supreme Court held:

> ***"20.*** *While a High Court would normally not exercise its writ jurisdiction under Article 226 of the Constitution if an effective and efficacious alternative remedy is available, the existence of an alternative remedy does not by itself bar the High Court from exercising its jurisdiction in certain contingencies. This principle has been crystallised by this Court in Whirlpool Corpn. v. Registrar of Trade Marks22 and Harbanslal Sahnia v. Indian Oil Corpn. Ltd.23 Recently, in Radha Krishan Industries v. State of H.P.21 a two-Judge Bench of this Court of which one of us was a part of (D.Y. Chandrachud, J.) has summarised the principles governing the exercise of writ jurisdiction by the High Court in the presence of an alternative remedy. This Court has observed : (Radha Krishan Industries case21, SCC p. 795, para 27)*
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> *"27. The principles of law which emerge are that:*
>
> *27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.*
>
> *27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternative remedy is available to the aggrieved person.*
>
> *27.3. Exceptions to the rule of alternative remedy arise 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.*

[1] (2022) 16 SCC 428, at page 442

27.4. An alternative remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternative remedy is provided by law..

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

(emphasis supplied)

16. Section 16 of the Act prescribes the eligibility conditions for taking input tax credit and Section 49 prescribes the method of payment of tax, interest, penalty and fee etc.

17. Sub-Section (1) of Section 49 of the Act provides that any deposit made by a person in cash towards tax, interest, penalty and fee or any other amount, will be credited to the *Electronic Cash Ledger* maintained by the GST Portal.

18. Sub-Section (2) of Section 49 of the Act provides for the self-assessment of input tax credit in the Return to be credited to the *Electronic Credit Ledger*.

19. Sub Section (3) of Section 49 of the Act provides for utilization of cash available in the Electronic Cash Ledger towards payment of tax, interest, penalty & fee etc.

20. Sub Section (4) of Section 49 of the Act provides for availing the amount available in the *Electronic Credit Ledger* that may be used for making any payment towards output tax under the GST Act in such manner and subject to such conditions and within such time as may be prescribed.

21. Sub Section (5) of Section 49 of the Act provides for the conditions and restriction imposed for utilization of cash available in the Electronic Cash Ledger and the input tax credit available in the Electronic Credit Ledger.

22. Section 49A of the Act prescribes conditions for utilization of input tax credit provided under Section 49; and Section 49B provides a restriction for utilization of input tax credit.

23. There are no other conditions or restrictions other than the one provided in Sections 49A & 49B of the Act.

24. The respondents have not answered in their reply to the petitioner's contention that Rule 86B of the Act itself is not backed by any statutory provision. Rule 164 enables the Rule making authority to frame the Rule 86B or other Rules, but the Rules must have backing in the main body of the statute. Otherwise the Rule would be *ultra vires*.

25. We do find force in the petitioner's contention that Rule 86B of the Act has no statutory backing and appears to be *ultra vires* the provisions of the HPGST Act, 2017.

26. But we need not base our decision on the said issue.

27. Since the tax liability of the petitioner towards output tax stood discharged, no prejudice has been caused to the respondents. It was unnecessary for the respondents to cancel the GST Registration and they could have considered any other penalty which is more proportionate to the violation of law.

28. In ***Arnab Ranjan Goswami v. Union of India***[2] the Supreme Court held:

> ***"39.*** *A litany of our decisions — to refer to them individually would be a parade of the familiar — has firmly established that any reasonable restriction on fundamental rights must comport with the proportionality standard, of which one component is that the measure adopted must be the least restrictive measure to effectively achieve the legitimate State aim."*

29. In our opinion, the cancellation of GST Registration on the pretext of violation of Rule 86B is a disproportionate punishment imposed on petitioner and is liable to be interfered in exercise of the power conferred on this Court under Article 226 of the Constitution of India.

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[2] (2020) 14 SCC 12 : (2020) 4 SCC (Cri) 663, at page 40

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Consideration by the court of alleged violation of Rule 21(b) and Rule 21 (e)

30. Coming to the 2nd ground for sustaining the cancellation of GST Registration, i.e. Rule 21(b) & Rule 21(e) of the Rules framed under Act, the respondents admit in the **Annexure P-2** to the impugned order that the said decision was taken on the basis of a *"prima facie"* investigation.

31. How a *"prima facie"* investigation could be the basis of an order of cancellation of GST Registration without the investigation being completed, is not explained by the counsel for the respondents. In our opinion, the respondents ought to have waited for the investigation to be completed before imposing the drastic penalty of cancellation of GST Registration.

32. It shocks the conscience of the Court to find an extreme penalty of the nature of cancellation of GST Registration being imposed on a business on the basis of a *"prima facie"* investigation conducted by the respondents.

33. In ***Jayrajbhai Jayantibhai Patel v. Anilbhai Nathubhai Patel***[3]**,** the Supreme Court held:

> *" ... the power of judicial review may not be exercised unless the administrative decision is illogical or suffers from procedural impropriety or it shocks the conscience of the court in the sense that it is in defiance of logic or moral standards but no standardised formula, universally appli-*

[3] (2006) 8 SCC 200, at page 208 :

cable to all cases, can be evolved. Each case has to be considered on its own facts, depending upon the authority that exercises the power, the source, the nature or scope of power and the indelible effects it generates in the operation of law or affects the individual or society. Though judicial restraint, albeit self-recognised, is the order of the day, yet an administrative decision or action which is based on wholly irrelevant considerations or material; or excludes from consideration the relevant material; or it is so absurd that no reasonable person could have arrived at it on the given material, may be struck down. In other words, when a court is satisfied that there is an abuse or misuse of power, and its jurisdiction is invoked, it is incumbent on the court to intervene. It is nevertheless, trite that the scope of judicial review is limited to the deficiency in the decision-making process and not the decision."

(emphasis supplied)

34. The said action of the respondents is thus clearly arbitrary, unreasonable and violates Article 14 of the Constitution of India.

35. Accordingly, the Writ petition is allowed and the impugned order **Annexure P-1** dt. 09.02.2024 is set aside, and the respondents are directed to restore the GST Registration of the petitioner, forthwith.

36. The other issues raised by the petitioner are left open for consideration by the respondents in an appropriate case. No costs.

37. Pending miscellaneous application(s), if any, shall also stand disposed of.

(M.S. Ramachandra Rao)
Chief Justice

(Satyen Vaidya)
Judge

September 20, 2024
(Yashwant)