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

Case No. : WP(C)/6322/2023

MS SURYA BUSINEES PRIVATE LIMITED
A PRIVATE LIMITED COMPANY INCORPORATED UNDER THE PROVISIONS
OF THE COMPANIES ACT, 1956 HAVING ITS PLACE OF BUSINESS AT GAR
ALI, JORHAT ASSAM, PIN-785001 AND IN THE PRESENT PROCEEDINGS
REPRESENTED BY SUNIL RANJAN JAIN, THE ,MANAGER OF THE
PETITIONER COMPANY

VERSUS

THE STATE OF ASSAM
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVERNMENT OF
ASSAM,DEPARTMENT OF FINANCE AND TAXATION, ASSAM
SECRETARIAT, DISPUR, GUWAHATI-06

2:THE DEPUTY COMMISSIONER OF STATE TAX
JORHAT-1 CIRCLE
JORHAT ZONE
ASSAM
JEC ROAD
JORHAT
ASSAM
PIN-785001

3:THE COMMISSIONER OF STATE TAXES
ASSAM
KAR BHAWAN
GANESHGURI
GUWAHATI-0

Advocate for the Petitioner : MR. P DAS, MR ANKIT KANODIA,MS. M AGARWAL,MS. N
UPADHYAY

Advocate for the Respondent : SC, TAXATION,

**BEFORE
HONOURABLE MR. JUSTICE N. UNNI KRISHNAN NAIR**

ORDER

Date : 05-03-2026

Heard Mr. A. Kanodia, learned counsel for the petitioner. Also heard Mr. B. Gogoi, learned standing counsel, Taxation Department, Assam appearing for the respondents.

2. The petitioner by instituting the present proceeding has presented a challenge to a show-cause notice in Form GST DRC-01 dated 28-09-2023 issued by the Deputy Commissioner of State Tax, Jorhat 1 Circle, Jorhat Zone, Assam (respondent No. 2) under Section 73 of the Central Goods & Service Tax Act, 2017 and Assam Goods & Service Tax Act, 2017.

3. The facts, in brief, requisite for adjudication of the issue arising in the present proceeding are noticed as under:-

The petitioner is a dealer registered under the Central Goods & Service Tax Act, 2017 (in short "CGST Act, 2017) and Assam Goods & Service Tax Act, 2017 (in short AGST Act, 2017), vide registration bearing No. 18AADCS6480J1ZX. The returns submitted by the petitioner for the period, 2017-18 (July, 2017 to March, 2018), was selected for audit under Section 65 of the AGST Act, 2017. Accordingly, a notice dated 27-09-2022 came to be issued to the petitioner requiring the petitioner to produce its book of accounts and records for the financial year involved along with further documents as

mandatorily required to be furnished for conduct of the audit under the provisions of the GST law. The petitioner had produced the records as mandated and the audit of the same was carried out by the Deputy Commissioner of State Tax, Jorhat 1 Circle, Jorhat Zone, Assam, i.e. the respondent No. 2, herein. On conclusion of the verification of the records of the petitioner in connection with the audit so carried out, the audit observation under the provisions of Rule 101(4) of the AGST Rules, 2017 came to be issued to the petitioner vide communication dated 29-05-2023. In the said audit objection discrepancies noticed during the audit was highlighted and the petitioner was directed to submit his clarifications thereto. The petitioner vide communication dated 07-06-2023, proceeded to submit its clarifications in the matter. On receipt of the said clarifications, an audit report under Section 65(6) of the AGST Act, 2017 came to be issued. With regard to the short-payment of tax, during the audit it having been found that the petitioner had made late payment of tax against the invoices noticed, interest was calculated thereon. With regard to the suppression of turnover as per records and books of accounts, the reply submitted by the petitioner to the audit observations were noted and the objection drawn was ignored. It was further observed that the petitioner had satisfactorily replied regarding un-reconciled turnover. Accordingly, an amount of Rs. 1,34,580/- (Rupees One Lakh Thirty Four Thousand Five Hundred Eighty), was ascertained as the interest payable by the petitioner and the petitioner was directed to pay the said amount. The petitioner deposited the said amount and vide a communication dated 19-06-2023, intimated the same to the authorities and prayed for closure of the matter.

After the said developments had taken place and the audit objections basing on the

clarifications submitted by the petitioner having been closed with imposition of interest on account of late payment of tax, the respondent No. 2 after expiry of around 03 (three) months, proceeded to issue a show-cause notice dated 28-09-2023, invoking the provisions of Section 73(1) of the CGST/ AGST Act of 2017, alleging short payment of the tax for the period of 2017-18. The issue involved having been already reconciled during the audit as carried out for the period 2017-18, the petitioner being aggrieved with the issuance of the such show-cause notice under Section 73(1) of the CGST/ AGST Act of 2017, has instituted the present proceeding assailing the same.

4. Mr. A. Kanodia, learned counsel for the petitioner at the outset submits that once an audit under Section 65 of the Act of 2017 having been concluded, the respondent authorities could not have issued a show-cause notice for the same period, i.e. 2017-18, without considering the audit report issued under Section 65(6) of the AGST Act, 2017 and the payment of the interest by the petitioner in pursuance, thereof. By referring to the provisions of Section 2(13) of the GST Act, 2017, it is submitted that the audit encompasses a detailed verification of the books of account and records which also includes the correctness of the turnover declared, taxes paid, refund claimed and input tax credit (ITC) availed. By referring to the provisions of Sub-Section (7) of Section 65 of the AGST Act, 2017, it is submitted that where the audit conducted under Sub-Section (1) results in detection of tax not paid or short paid or erroneously refunded, or input tax credit wrongly availed or utilized, appropriate proceeding would be permissible to be instituted by the proper officer may initiate action under Section 73 or Section 74 of the Act of 2017. It is submitted that the audit assessment carried out in respect of the

petitioner for the period 2017-18, the entire ITC record was examined and no discrepancy, thereon, was found, inasmuch as, no observations on the said aspect of the matter was included in the audit observations issued under the provision of Rule 101(4) of the AGST Rules, 2017 vide the communication dated 29-05-2023.

5. The learned counsel for the petitioner further submits that the impugned show-cause notice does not refer to the audit memo issued and the final audit report issued by the Audit wing of the department and the show-cause notice was issued without proper appreciation of relevant factors. It was projected that the impugned show-cause notice in Form DRC-01, was issued by projecting that the petitioner had not filed his GSTR-09. However, the DRC-01 wherein the summary of the show-cause has been set out, it has been reflected that the petitioner had filed his annual return in GSTR-09 for the financial year 2017-18. It is, accordingly, submitted that no discrepancy having been noticed in the audit carried out under the provisions of Section 65 of the Act of 2017, it was not permissible for the respondent authorities to invoke the provision of Section 73 of the Act of 2017 and issue the impugned show-cause notice for the same very period, i.e. 2017-18, for which the audit was already completed. The learned counsel for the petitioner has referred to an instruction bearing No. 13/2023-GST dated 26-12-2023, issued by the Principal Commissioner of State Tax-cum-Commissioner of Taxes, Assam, wherein it was stipulated that in cases where the audit proceeding have been completed the notices again issued using IIT Big Data Software needs to be dropped. It is submitted that in respect of the petitioner's returns for the period 2018-19, wherein, audit was also carried out, the subsequent show-cause notices issued came to be dropped. Accordingly, the

learned counsel for the petitioner submits that by applying the same yardsticks, the impugned show-cause notice for the period 2017-18, would also mandate to be dropped by following the stipulation made in the said instruction dated 23-06-2023.

6. In the above premises, the learned counsel for the petitioner submits that the impugned show-cause notice would mandate interference from this Court.

7. Per contra, Mr. B. Gogoi, learned standing counsel, Taxation Department, Assam appearing for the respondents submits that the department having only issued a show-cause notice by invoking the provisions of Section 73(1) of the Act of 2017, it was open for the petitioner to respond, thereto, and clarify the allegations levelled, therein. It is further submitted that the clarifications on being received from the petitioner to the impugned show-cause notice issued to him, the proper officer, in the event, finds the clarifications set out by the petitioner in his reply to the impugned show-cause notice to be satisfactory, was empowered to drop the proceedings. Accordingly, it is submitted that without responding to the impugned show-cause notice the present writ petition would not be maintainable. It is submitted that the impugned show-cause notice has not been issued in continuation with the audit carried out in respect of the petitioner for the period 2017-18, under the provision of Section 65 of the Act of 2017. It is submitted that there is no provision in the GST Act restraining the authorities from issuance of a show-cause notices invoking the provision of Section 73 of the Act of 2017, after completion of the audit under Section 65 of the Act of 2017.

8. Mr. Gogoi further submits that the first issue raised in the impugned show-cause notice is regarding short payment GST to the extent of Rs. 64,25,694/- (Rupees Sixty

Four Lakhs Twenty Five Thousand Six Hundred Ninety Four), while the second issue involved is regarding availment of ITC amounting to Rs. 1,68,052/- (Rupees One Lakh Sixty Eight Thousand Fifty Two) in contravention of the provisions of Section 17(5) of the Act of 2017. It is contended that while the first issue was discussed during the audit assessment, the second issue was not discussed or noticed during the audit assessment. Accordingly, he submits that it cannot be said that the impugned show-cause notice has been issued also with regard to the issues settled during the audit assessment. Mr. Gogoi further reiterates that the provisions of Section 73 or Section 74 of the Act of 2017, does not mandate that proceedings, thereunder, cannot be initiated on issues which has been partly or fully left out to be noticed during the audit assessment carried out under the provision of Section 65 of the Act. In the case on hand, the issue with regard to availment of ITC having admittedly not being considered during the audit assessment, the show-cause notice issued in this connection invoking the provisions of Section 73 of the Act of 2017 would not mandate interference from this Court. Mr. Gogoi has further submitted that it is a settled position of law that show-cause notice issued by statutory authority relying on facts can be challenged before this Court only on the ground that if the facts are even assumed to be correct, no case has been made out against the petitioner. He submits that the said situation has not arisen in the present writ petition and a *prima facie* case having been made out against the petitioner in the show-cause notice, it is for the adjudicating authority to decide the said issues at the first instance, after the reply of the petitioner has been submitted in the matter. Accordingly, he submits that the present writ petition would not be maintainable at this stage.

9. I have heard the learned counsel for the parties and have also perused the materials available on record.

10. The facts noticed, hereinabove, are not in dispute. On an audit having carried out with regard to the returns submitted by the petitioner for the period 2017-18 vide communication dated 29-05-2023, audit observations in terms of the provisions of Rule 101(4) of the Assam Goods and Service Tax Rules, 2017, came to be issued by the respondent No. 2, by the office of the respondent No. 3, herein. The audit observations, on perusal reveals that the petitioner was alleged to have made short payment of tax in GSTR-09. Further there was allegations of suppression of turnover as per records and books of account. The petitioner was also alleged to have failed to produce statutory documents like credit notes in relation to the trade discounts accounted for in the audited annual financial statements which are not permissible under GST. The petitioner was further alleged to have un-reconciled turnover against which tax was not paid. Basing on the said observations, the petitioner was required to submit a reply in the matter. The petitioner is found to have submitted his reply to the audit observations vide communication dated 09-06-2023. The petitioner in the said reply had clarified the observations as raised in the matter. It is also found that in the said reply the petitioner had highlighted about certain market development expenditure debited to customers and consequent reversal of ITC done in GSTR-3B, which has been shown in income side of the audited financial statement and needs to be reduced to ascertain supplies as per GSTR-09. It was projected that a difference of Rs.- 66,62,773/-, existed. The petitioner had also projected that details of such reversal has already been submitted by it along with the ITC

register and the same was again annexed to the said reply. Accordingly, this Court finds that the petitioner in his reply had also dealt with the ITC availed by it during the period in question and had also placed on record the documents in connection with the same. The said reply being submitted, the same was processed and vide communication dated 17-06-2023, the respondent No. 2 proceeded to submit his audit report under Section 65(6) of the Act of 2017. The objection raised with regard to the short payment of tax was ignored, basing on the clarification submitted by the petitioner. However, it was found that the petitioner had made late payment of tax against the invoice notice, therein, for which interest was calculated which was required to be paid by the petitioner. With regard to the suppression of turnover as per records/ book of accounts, objections raised in this connection was also directed to be ignored and it was further highlighted that the petitioner had satisfactorily explained regarding un-reconciled turnover and the objection raised in this connection was also ignored. Accordingly, the interest payable by the petitioner for the delayed payment of tax was computed and set out in the said communication dated 17-06-2023. The petitioner, herein, proceeded to make the payment of interest as computed in his case for the period 2017-18, on account of late payment of tax and having made the said payment and the said aspect of the matter was informed vide communication dated 19-06-2023 to the Assistant Commissioner of Assam State Tax, Jorhat Unit, Jorhat. The amount paid was so paid equally under CGST and AGST Acts.

11. The said developments having taken place, the respondent No. 2 proceeded to issue a summary of show-cause notice in Form GSTDRC-01 on 28-09-2023. The grounds for issuance of the said show-cause notice was reflected, therein, as "Non Filer of GSTR

9". The petitioner was alleged to have not declared its tax liabilities correctly while filling up the annual returns in GSTR-09 and the summary of the under declared tax was set out therein. Along with the said allegations, the petitioner was alleged to have availed excess ITC on account of non-reconciliation of the information. Accordingly, the ITC availed on the commodities of all services, which was held to be inadmissible, was proposed to be recovered.

12. The petitioner in the present proceeding has assailed the said show-cause notice on the ground that the audit having been carried out under the provisions of Section 65 of the Act of 2017 for the period of 2017-18, it was not permissible for the respondents to initiate further proceeding by way of issuance of show-cause notice dated 28-09-2023 invoking the provisions of Section 73 of the Act of 2017. For the purpose of examining the said contention raised by the petitioner in the present proceeding, it is required to notice the relevant provision applicable in this connection under the Act of 2017. Sub-Section (13) of Section 2 of the Act of 2017 defines 'audit' to mean the examination of the records, returns and other documents maintained or furnished by the registered person under the act or rules made thereunder or under any other law for the time being in force, to verify the correctness of turnover declared, taxes paid, refund claimed and ITC availed and also to access his compliance with the provisions of the Act of 2017 or the rules made thereunder. Accordingly, it is seen that the audit encompasses a total verification of the accounts and other contemporaneous records of the dealer.

13. The provision of Section 65 of the Act of 2017 lays down the procedure for carrying out of audit by the tax authorities. Sub-Section (7) of Section 65 being relevant to the

issue arising in the present writ petition, the same is extracted here-in-below:-

“Section 65: Audit by tax authorities.

(7) Where the audit conducted under Sub-Section (1) results in detection of tax not paid or short paid or erroneously refunded, or input tax credit wrongly availed or utilized, the proper office may initiate action under Section 73 or Section 74.”

14. A perusal of the provisions of Sub-Section (7) of Section 65 reveals that where the audit conducted under Sub-Section (1) results of detection of tax not paid or short paid or erroneously refunded, or input tax credit wrongly availed or utilized, the proper officer is empowered to initiate action under Section 73 or Section 74 of the Act. The learned counsel for the petitioner as well as the learned counsel for the respondents are at *adidem* that the impugned show-cause notice issued to the petitioner in the present writ petition was not so issued in continuation with the audit carried out under the provisions of Section 65. The respondent authorities having carried out the audit and issued the audit observations and thereafter, basing on the reply submitted by the petitioner, therein, derived the liability of the petitioner in the final audit report under ADT-02. The discrepancies noticed in the audit report having been dropped and only interest liability being found against the petitioner and the same being confirmed, the petitioner having paid the said liability through DRC-03 dated 17-06-2023 and the matter being informed to the respondent No. 2, no further liability having been noticed in the audit against the petitioner, the stage of invocation of the provision of Sub-Section (7) of Section 65 of the Act of 2017 in the considered view of this Court had not arisen in the matter. The impugned show-cause notice pertains to the same subject matter and the period for

which a detailed audit under Section 65 of the Act of 2017, was already carried out by the authorities and wherein no discrepancy was found concerning any short payment of tax or wrongful availment of ITC. As noticed, hereinabove, the definition of the term audit encompasses within its comprehensive verification by the departmental authorities of the accuracy of the declared turnover, tax liabilities, refund claims and ITC availed by the assessee. The said exercise having been carried out by the respondent authorities and there being no allegation that the petitioner for the purpose had not furnished all the requisite documents/ records, the issuance of the impugned notice, without a circumstance as envisaged under Sub-Section (7) of Section 65 arising in the matter, in the considered view of this Court undermines the audit process carried out and renders the same redundant. The petitioner having discharged his liabilities as ascertained during the audit proceeding, the impugned show-cause notice for the same very purpose would not be maintainable. The provision of Section 73 of the Act of 2017, invoked for the purpose of issuing the show-cause notice mandates that the same would be for the purpose of determination of tax not paid or short paid or erroneously refunded or ITC wrongly availed or utilized for any reason other than fraud or any willful mis-statement or suppression of facts. The said factors basing on which a notice under Section 73 of the Act of 2017, is permissible to be so issued, not being found to have arisen in the case of the petitioner, herein, in the audit report submitted by the respondent authorities, the petitioner having discharged its liability as determined, the proceeding initiated under Section 73 of the Act of 2017 in the facts and circumstances arising in the present matter would not be sustainable.

15. Having drawn the said conclusions, this Court further notices that the out of the 02 (two) issues noticed in the impugned show-cause notice dated 28-09-2023, the issue pertaining to declaration of output tax was already verified during the audit as carried out under the provision of Section 65 of the Act of 2017. The short payment of tax was noticed and discussed in the audit assessment and the same was dropped on account of the clarifications set out by the petitioner in the reply submitted by it to the audit observations issued to it and the petitioner was only found to have made late payment of tax against the invoices noticed therein for which interest was imposed upon it. Accordingly, on the said issue, the present show-cause notice would not be maintainable. With regard to the second issue concerning the availment of excess ITC, it is seen that the said aspect of the matter was also before the respondent authorities during the audit and the petitioner in its response to the audit observations issued to it had dealt with the said aspect of the matter and no inconsistency, thereon, was found by the departmental authorities. The comprehensive audit for the period having been carried out and no discrepancy having been found, therein, issuance of show-cause notice under Section 73 of the Act of 2017, without the situation envisaged under Sub-Section (7) of Section 65 arising in the matter, in the considered view of this Court renders the impugned show-cause liable to be interfered with.

16. This Court also has considered the instruction No. 13/2023-GST dated 26-12-2023, wherein, it has been stipulated that in those cases, where audit proceeding have been completed notices again issued using the IIT Big Data Software needs to be dropped. The said notification further stipulates that cases where returns scrutiny proceedings, have

been completed and the notices again issued using the IIT Big Data Software, needs to be dropped to the extent of paragraph which has already been covered in the previous notice. In the present case this Court having found both the issues involved in the impugned show-cause notice to have been duly considered during the process of audit assessment carried out under the provision of Section 65 of the Act of 2017, the circumstances as envisaged under Sub-Section (7) of Section 65 of the Act of 2017, not arising in the matter, the show-cause notice dated 28-09-2023, was not permissible to be so issued to the petitioner, herein.

17. In view of the above discussions, this Court is of the considered view that the proceeding instituted vide show-cause notice dated 28-09-2023 would not be maintainable and accordingly, the said show-cause notice stands set aside.

18. In view of the above conclusions reached by this Court, the writ petition stands allowed.

JUDGE

Comparing Assistant