IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P.(T) No. 1991 of 2021
With
W.P.(T) No. 1984 of 2021

M/s. Juhi Industries Pvt. Ltd. ..… Petitioner (in both cases)

Versus

1. The State of Jharkhand.
2. The Commissioner of State Taxes, Ranchi, Jharkhand.
3. Joint Commissioner of State Taxes (Admin), Jamshedpur Division, Jamshedpur, East Singhbhum, Jharkhand.
4. Deputy Commissiner of State Taxes, Adityapur Circle, Jamshedpur, East Singhbhum, Jharkhand.

..... Respondents (in both cases)

CORAM: Hon'ble Mr. Justice Aparesh Kumar Singh
Hon'ble Mr. Justice Deepak Roshan

For the Petitioner : Mr. Kartik Kurmi, Adv.
Mr. N. K. Pasari, Adv.
Ms. Sidhi Jalan, Adv.
For the State : Mr. Sachin Kumar, AAG-II

6/27.6.2022

Per Deepak Roshan, J. Since common issue is involved in both these writ applications and belongs to same assesse for different period as such both are heard together and disposed of by this common order.

2. W.P. (T) No.1991 of 2021 relates to the period from July, 2017 to March, 2018 (AY-2017-18) and W.P. (T) No.1984 of 2021 relates to the period from April 2018 to 31.8.2018 (AY-2018-19).

3. The facts of the case are that on 13-08-2018 a search was conducted in the premises of the petitioner under Section 67 of the JGST Act for irregular claim of input tax credit mainly on the ground (in W.P.(T) No.1991/2021) that the petitioner has claimed input tax credit without making payment of value and tax of the inputs to the supplier within six months which is in contravention of 2nd/3rd proviso to Section 16(2) of the JGST Act. It is also held that credit of Rs.27 lakh (out of total Rs.19.43 Cr. constituting 1%) is not transported in heavy vehicle as per the vehicle numbers. Whereas, the ground for search in W.P. (T) No.1984/2021 is concerned; the petitioner made purchases only from one supplier, and there exist no proof of payment and secondly, on physical verification, difference in stock was found from the stock maintained in

books of accounts.

4. Mr. Kartik Kurmi, assisted by Mr. N. K. Pasari and Ms. Sidhi Jalan learned counsel for the petitioner submits that the proceeding in both the cases started with issuance of summary show-cause notices, both dated 14.9.2018 in Form DRC-01 under Section 74(1) of JGST Act, 2017. The petitioner under *bona-fide* and mistaken belief of law, submitted its concise reply vid letter dated 11-10-2018 in Form DRC-06 explaining that the ITC have been legally claimed by them and the goods have been physically received by them. The Respondent No.4 thereupon passed two separate orders, both dated 25-02-2019 under Section 74(9) of the JGST Act and confirmed tax demand, interest and penalty and issued Summary of Order dated 28-02-2019.

The petitioner filed two separate applications for two separate orders, both dated 2.6.2019, before respondent No.2 under Section 161 of the JGST Act for rectification of certain mistakes. Pursuant thereto; the respondent No.2 passed rectification order for both the periods relating to the above two applications by two separate orders, both dated 3.3.2021 and rectified some errors and subsequent thereto; issued two separate demand notices for the above referred period in Form DRC-08, both dated 3.3.2020.

Learned counsel further submits that no show cause notice under Section 74(1) is issued and served upon the petitioner which fact is not disputed by the respondent in its counter affidavit. Issuance of show cause notice U/s 74(1) of the JGST Act, 2017 is mandatory and imperative in character. Form DRC 01 is not a substitute of show cause notice u/s 74(1). Thus, the entire proceeding in both the cases is without jurisdiction. Since, the foundation of the two proceedings suffer from material irregularity as such they not sustainable being contrary to Section 74(1) of the JGST Act. Thus, the subsequent proceedings/impugned Orders cannot sanctify the same and the entire super structure will have to fall.

Learned counsel further contended that there is no estoppel against statute and reiterated that issuance of show-cause notice u/s 74(1)

of the JGST Act, 2017 is mandatory and imperative in character. Form DRC-01 is not a substitute of show cause notice u/s 74(1). Thus, the entire proceeding is without jurisdiction. He reiterated that the petitioner-company were never issued and/or served with mandatory show-cause notice u/s 74(1) of the JGST Act, hence, the entire proceeding is without jurisdiction and without authority of law. Since service of show cause notice u/s 74(1) is mandatory in character and is requirement of natural justice hence, cannot be give a go-bye or jettisoned. The use of the auxiliary verb “shall” under Section 74(1) indicates that the provision is mandatory and imperative in character. In support of his contention, learned counsel relied upon several judgments.

5. Mr. Sachin Kumar, learned AAG-II submits that notice under Section 74(1) of JGST Act, 2017 i.e. summary of the show-cause notice in Form GST DRC-01 along with the gist of accusation was issued to the petitioner vide notice reference No.934, dated 14.09.2018. In this regard a detailed e-mail was also sent to the e-mail i.d. of the petitioner. Thereafter, petitioner furnished reply in Form GST DRC-06 to the Office of the respondent No.4 on 12.10.2018, which establishes the very fact that proper adjudication process was followed before passing of the impugned order in the both the writ applications.

Learned counsel further submits that during course of hearing before passing of the impugned order the entire record including the RUD (relied upon documents) was supplied to the petitioner. This also shows that the requirement of principles of natural justice has been followed by the respondent before passing the impugned order. He further submits that after considering the reply/representation of the petitioner, the detailed order under Section 74(9) of the JGST Act was passed Form GST DRC-07 i.e. Demand Order was issued against the petitioner. The petitioner had also filed an application for rectification of error against the impugned order in both the cases as well as Form GST DRC-07. The respondent after reviewing the same has framed fresh order dated 03.03.2021 disposing off the rectification application and reducing the liability of the petitioner on 03.03.2021 and on the very

same day Form GST DRC-08 under Section 161 read with 142(7) of the rules was issued to the petitioner. In view of the aforesaid facts, both these writ applications are liable to be dismissed.

6. Having heard learned counsel for the parties and after going through the documents available on record and the averments made in the respective affidavit, it appears that pursuant to the search conducted by the respondents in the premises of the petitioner-company under Section 67 of the JGST Act two summary of show cause notice in Form DRC-01 were issued, one for the period from 01.07.2017 to 13.8.2018 and another for the period from April, 2018 to 31.8.2018 under Section 74(1) of the JGST Act. It further transpires that the petitioner submitted a concise reply for both the DRC-01 vide its letter dated 11.10.2018 and finally two separate orders, both dated 25.2.2019, were passed. Subsequently, the petitioner also filed rectification application for both the period and fresh rectified orders were passed in respect of both these tax periods.

7. Now the law is no more res-*integra*, inasmuch as, Rule 142(1)(a) of the JGST Rules provides that the summary of show cause notice in Form DRC-01 should be issued "along with" the show cause notice under Section 74(1). The word "along with" clearly indicates that in a given case show cause notice as well as summary thereof both have to be issued. As per Rule 142(1)(a) of the JGST Rules, the summary of show cause notice has to be issued electronically to keep track of the proceeding initiated against the registered persona whereas a show cause notice need not necessarily be issued electronically.

8. This Court in the case of ***M/S NKAS Services Pvt. Ltd. vs. State of Jharkhand & Ors.,*** passed in W.P.(T) No. 2444 of 2021 in which one of us (Aparesh Kumar Singh J.) was the member, has taken note of the said position of law and has categorically held that Summary of Show Cause Notice in Form DRC-01 is not a substitute of show cause notice under Section 74(1). The relevant portion of the judgment is set out below-

"13. *A bare perusal of the provision indicates that in a case where it appears to a proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized by reason of fraud or any willful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax, which has not been paid or has been short paid or to whom refund has been erroneously made or who has wrongly availed or utilised input tax credit requiring him to show cause as to why he should not pay the amount specified in the notice along with the interest payable thereupon under Section 50 and a penalty equivalent to the tax specified in the notice. In contradistinction to the provision under Section 73 of the Act under the same Chapter-XIV relating to 'Demands and Recovery', the ingredients of Section 74 of the Act require either of the following ingredients to be satisfied for proceeding thereunder i.e. that the tax in question has not been paid or short paid or erroneously refunded or the ITC has been wrongly availed or utilized by reason of fraud or any willful misstatement or suppression of facts to evade tax.*

14. A bare perusal of the impugned show-case notice creates a clear impression that it is a notice issued in a format without even striking out any irrelevant portions and without stating the contraventions committed by the petitioner i.e. whether its actuated by reason of fraud or any willful misstatement or suppression of facts in order to evade tax. Needless to say that the proceedings under Section 74 have a serious connotation as they allege punitive consequences on account of fraud or any willful misstatement or suppression of facts employed by the person chargeable with tax. In absence of clear charges which the person so alleged is required to answer, the noticee is bound to be denied proper opportunity to defend itself. This would entail violation of principles of natural justice which is a well-recognized exception for invocation of writ jurisdiction despite availability of alternative remedy. In this regard, it is profitable to quote the opinion of the Apex Court in the case of Oryx Fisheries P. Ltd. (supra) at para 24 to 27 wherein the opinion of the

Constitution Bench of the Apex Court in the case of Khem Chand versus Union of India (AIR 1958 SC 300) has been relied upon as well :

> *"24. This Court finds that there is a lot of substance in the aforesaid contention. It is well settled that a quasi-judicial authority, while acting in exercise of its statutory power must act fairly and must act with an open mind while initiating a show-cause proceeding. A show cause proceeding is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice.*
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> *25. Expressions like "a reasonable opportunity of making objection" or "a reasonable opportunity of defence" have come up for consideration before this Court in the context of several statutes. A Constitution Bench of this Court in Khem Chand v. Union of India, of course in the context of service jurisprudence, reiterated certain principles which are applicable in the present case also.*
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> *26. S.R. Das, C.J. speaking for the unanimous Constitution Bench in Khem Chand held that the concept of "reasonable opportunity" includes various safeguards and one of them, in the words of the learned Chief Justice, is: "(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;"*
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> *27. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing the charge-sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show-cause notice gets vitiated by unfairness and bias and the subsequent proceedings become an idle ceremony."*

15. The Apex Court has held that the concept of reasonable opportunity includes various safeguards and one of them is to afford opportunity to the person to deny his guilt and establish his innocence, which he can only do if he is told what the charges leveled against him are and the allegations on which such charges are based.

16. It is also true that acts of fraud or suppression are to be specifically pleaded so that it is clear and explicit to the noticee to reply thereto effectively [See Larsen & Toubro Ltd. Vs. CCE, (2007) 9 SCC 617 (para 14)]. Further in the case of CCE Vs. Brindavan Beverages (P) Ltd. reported in (2007) 5 SCC 388 relied upon by the petitioner, the Apex Court at para-14 of the judgment has held that if the allegations in the show-cause notice are not specific and are on the contrary, vague, lack details and/or unintelligible i.e. its sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show-cause notice. We do not agree with the contention of the respondent that the notice ought not to be struck down if in substance it contains the matters which a notice must contain. In order to proceed under the provisions of Section 74 of the Act, the specific ingredients enumerated thereunder have to be clearly asserted in the notice so that the noticee has an opportunity to explain and defend himself.

17. As observed herein above, the impugned notice completely lacks in fulfilling the ingredients of a proper show-cause notice under Section 74 of the Act. Proceedings under Section 74 of the Act have to be preceded by a proper show-cause notice. A summary of show-cause notice as issued in Form GST DRC-01 in terms of Rule 142(1) of the JGST Rules, 2017 (Annexure-2 impugned herein) cannot substitute the requirement of a proper show-cause notice. This court, however, is not inclined to be drawn into the issue whether the requirement of issuance of Form GST ASMT-10 is a condition precedent for invocation of Section 73 or 74 of the JGST Act for the purposes of deciding the instant case. This Court finds that upon perusal of Annexure-2 which is the statutory form GST DRC-01 issued to the petitioner, although it has been mentioned that there is mismatch between GSTR-3B and 2A, but that is not sufficient as the

> *foundational allegation for issuance of notice under Section 74 is totally missing and the notice continues to be vague.*
> *18. Since we are of the considered view that the impugned show cause notice as contained in Annexure-1 does not fulfill the ingredients of a proper show-cause notice and thus amounts to violation of principles of natural justice, the challenge is entertainable in exercise of writ jurisdiction of this Court. Accordingly, the impugned notice at Annexure-1 and the summary of show-cause notice at Annexure-2 in Form GST DRC-01 are quashed. However, since this Court has not gone into the merits of the challenge, respondents are at liberty to initiate fresh proceedings from the same stage in accordance with law within a period of four weeks from today."*

9. In view of the aforesaid facts and the settled preposition of law, the foundation of the proceeding in both the cases suffers from material irregularity and hence not sustainable being contrary to Section 74(1) of the JGST Act; thus, the subsequent proceedings/impugned Orders cannot sanctify the same. Though, the petitioner submitted their concise reply vide letter dated 11-10-2018; the respondent State cannot take benefit of the said action as summary of show cause notice cannot be considered as a show cause notice as mandated under Section 74(1) of the Act. The Respondent in their counter affidavit dated 07-09-2021 have stated that filing of concise reply by the petitioner proves that show-cause notice have been served upon them. As stated herein above, it is well settled that there is no estoppels against statute. A *bonafide* mistake or consent by the assesse cannot confer any jurisdiction upon the proper officer. The jurisdiction must flow from the statute itself. The rules of estoppels is rule of equity which has no role in matters of taxation.

10. In the case of ***UOI Vs.Madhumilan Syntex Pvt.Ltd*** reported in ***1988(3) SCC 348*** it is held by the Hon'ble Apex Court that power under the statute cannot be taken away by consent of the parties. In that case the Hon'ble Apex Court was seized with interpretation of Section 11A of

the Central Excise Act, 1944 which is *pari materia* to Section 74 of the JGST Act, hence, the ratio of the said judgment would squarely apply to the these cases.

11. As we are of the considered view that the impugned show cause notice in both the cases does not fulfill the ingredients of a proper show-cause notice and thus amounts to violation of principles of natural justice, the challenge is maintainable in exercise of writ jurisdiction of this Court. Accordingly, the summary of show-cause notices dated 14.09.2018 issued in Form GST DRC-01 at Annexure-4 (in both cases), the orders dated 25.02.2019 issued under section 74(9) of JGST Act (in both cases) and also the final orders dated 3.3.2021 passed after rectification at Annexure-11 (in both cases), are hereby quashed and set aside.

However, since this Court has not gone the merits of the challenge, respondents are at liberty to initiate fresh proceedings from the same stage in accordance with law.

12. Consequently, both these writ application stand allowed and disposed of.

(Aparesh Kumar Singh, J.)

(Deepak Roshan, J.)

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