

M/S New Makhan Bhog v. State Of Up And 2 Others

WRIT TAX No. 328 of 2024 | Decision: 2024-03-07 | Allahabad High Court

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Neutral Citation No. - 2024:AHC:43450

Court No. - 1

Case :- WRIT TAX No. - 328 of 2024

Petitioner :- M/S New Makhan Bhog Respondent :- State Of Up And 2 Others Counsel for Petitioner :- Shubham Agrawal Counsel for Respondent :- C.S.C.

Hon'ble Shekhar B. Saraf,J.

1. Heard Sri Shubham Agrawal, learned counsel appearing on behalf of the petitioner and Sri Ravi Shankar Pandey, learned Additional Chief Standing Counsel appearing for the State.

2. This is a writ petition under Article 226 of the Constitution of India, wherein the writ petitioner is aggrieved by the order dated February 22, 2023 passed by the respondent no.3, under Section 74 of the Uttar Pradesh Goods and Services Tax Act, 2017 (hereinafter referred to as the 'Act') and the subsequent order passed in appeal dated January 16, 2023 by the respondent no.2.

3. Mr. Agarwal, learned counsel appearing on behalf of petitioner submits that the order under Section 74 of the Act was passed without granting any opportunity of hearing to the petitioner, and accordingly, there has been violation of principles of natural justice. He submits that this ground was taken up in appeal, but the same was rejected by the Appellate Authority. He relied upon a judgement of this Court penned by Mr. Justice Pankaj Bhatia in M/s Daimond Steel Vs. State of U.P. and 3 others reported in (2023 U.P.T.C. [Vol.114]-960) wherein upon a detailed examination of Section 74 of the Act it has been held that a best judgement assessment cannot be resorted to by the authorities when adjudication is made under Section 74 of the Act. Relevant paragraphs are delineated below :-

"14. Be that as it may, the fact remains that while passing the assessment order, the adjudicating authority assessed the

demand of tax and levied penalty on the basis of some guidelines issued by the Income Tax Authorities and taking the mean average of 8%, which is wholly impermissible while adjudicating Section 74, the said manner of adjudication adopted by the respondents department can at best be termed as best judgment assessment which can be resorted to only under Section 62 and that too only in respect of the persons who have not filed the returns. In respect of the persons who have filed returns, Section 61(3) is very clear under which the department is duly empowered to take action under Sections 73 or 74, in case the returns furnished contain discrepancies and the assessee fails to take corrective measures in respect of the said discrepancies.

15. For taking recourse to Section 74, it is essential that along with search and seizure report, certain specific averment is made with regard to the supply of goods and the non-payment of tax coupled with the fact that the same should be by reasons of fraud, willful misstatement or suppression of facts and an intent to evade the tax. The adjudicating authority clearly erred in assessing and quantifying the demand and levying the penalty by taking recourse to some guidelines issued by the Income Tax Authorities which is impermissible while determining the tax liability under Section 74. The order of the appellate authority is even further bad in law as it discloses no reason, whatsoever for assessing the tax and quantifying the liability. While on the one hand, the appellate authority disapproved the manner in which the adjudicating authority had assessed and quantified the demand of tax and penalty, in the same breath, he proceeds to quantify the tax and imposed penalty without disclosing any reasons whatsoever.

16. On the perusal of the adjudicating authority's order as well as the appellate order, the manner in which the demand has been raised and quantified is not in consonance with the mandate of Section 74 and thus on the ground alone, impugned appellate orders as well as the adjudicating authority's orders are liable to be quashed."

4. Per contra, learned counsel appearing on behalf of the

revenue has placed reliance on the orders passed by the authorities below and submitted that the writ Court should not interfere at this stage. Counsel further prays for time to file counter affidavit in this matter.

5. Upon an examination of the material on record, I find that this will be an exercise in futility to grant time for filing the counter affidavit, as the point involved in this writ petition is only a point of law. Firstly, as held by this Court in *M/s Shree Sai Palace v. State of U.P. and others* (decided on February 21, 2024 Writ Tax No.50 of 2023) this Court has held that if an adverse order is passed under Section 74 of the Act, it is mandatory that opportunity of hearing be granted under Section 75(4) of the Act. On this very basis, the impugned orders do not have any legs to stand and are liable to be quashed and set aside. The relevant paragraph of *M/s Shree Sai Palace* (Supra) is reproduced below :-

"9. The significance of the word "or" in Section 75(4) of the UPGST Act, 2017 cannot be underestimated. The usage of the word "or" extends beyond its disjunctive function; it serves as a pivotal indicator of legislative intent regarding the necessity of providing an opportunity for personal hearing. By incorporating "or" into the statutory language, lawmakers explicitly delineate two distinct scenarios in which the opportunity of personal hearing must be afforded: either upon application by the individual subject to penalty or tax imposition, or in the event of contemplation of an adverse order. Personal hearing represents a fundamental aspect of procedural fairness and natural justice, ensuring that individuals have the opportunity to present their case, respond to allegations, and address any concerns or mitigating factors directly to the decision-maker. It is a vital safeguard against arbitrary or unjust decisions. The inclusion of "or" in Section 75(4) of the UPGST Act, 2017, emphasizes the dual nature of the obligation to provide a personal hearing, accommodating both proactive requests from individuals seeking to defend their interests and reactive responses to adverse orders contemplated by tax authorities. In either scenario, the statutory mandate remains clear: the individual

must be afforded an opportunity for personal hearing before any final determination is made regarding tax or penalty imposition. Moreover, the statutory mandate for personal hearing reflects an acknowledgement of the complex and multifaceted nature of tax and penalty determinations, which often involve intricate legal and factual considerations. Personal hearing provides a forum for nuanced discussion and exploration of these complexities, enabling decision-makers to make well-informed and equitable decisions based on a comprehensive understanding of the circumstances at hand."

6. Furthermore, the judgement relied upon by the learned counsel for the petitioner in M/s Daimond Steel (Supra) is also buttressing the arguments of the petitioner that the adjudication carried out by the authorities below was nothing but a best judgement assessment, and accordingly, is against the principles as established in law.

7. In light of the above findings, impugned orders dated February 22, 2023 and January 16, 2023 are quashed and set aside with a direction upon the authorities to carry out de novo assessment, after granting opportunity of hearing to the petitioner, within a period of three months from date.

8. The instant writ petition is allowed in aforesaid terms.

There shall be no order as to the costs.

Order Date :- 7.3.2024 Dev/-

(Shekhar B. Saraf,J.)

2024-03-14T09:54:40+0530 High Court of Judicature at Allahabad