Court No. - 6 *AFR*

Case :- WRIT TAX No. - 4 of 2022

Petitioner :- M/S Daimond Steel
Respondent :- State Of Up And 3 Others
Counsel for Petitioner :- Aloke Kumar
Counsel for Respondent :- C.S.C.

AND

Case :- WRIT TAX No. - 5 of 2022

Petitioner :- M/S Daimond Steel
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 said writ petitions arise out of the similar proceedings against the petitioner, although in respect of the different financial years.

2. For the sake of brevity, the facts of Writ Tax No.4 of 2022 are being recorded.

3. By means of the said writ petition, the petitioner challenges the order dated 03.06.2021 passed by the respondent no.3 as well as the order in appeal dated 13.07.2021 preferred against the order dated 03.06.2021.

4. The facts in brief are that the petitioner is a partnership concern and is duly registered with the GST Department. The petitioner claims that all the inwards and outwards supply was duly reflected on the portal of the department and the petitioner uploaded the supply made by him in GSTR-1 and after claiming the Input Tax Credit as reflected in GSTR-2A, filed his return in the form of GSTR-3B claiming the benefit of Input Tax Credit. It is argued that the returns filed were accepted and were never questioned and no proceedings were initiated in the case of the petitioner.

5. It is argued that an inspection was carried out on the business premises of the petitioner on 31.10.2019 and a *Panchanama* was drawn wherein the stock present in the business premises was recorded and certain papers were seized in exercise of powers under Section 67 of the GST Act.

6. The contention of the Counsel for the petitioner is that the search and seizure memo was not in accordance with law, however, the said issue is not agitated before this Court and no relief to that extent has been sought. It is stated that search and seizure was carried out by the SIB Authorities. The petitioner objecting to the manner in which the search and seizure was carried out, moved an application along with an affidavit on 18.12.2019 and thereafter nothing transpired. On 08.01.2021, the respondent no.3 issued a notice under Section 74 of the UPGST Act for the period July, 2017 to March, 2018 (Annexure-7 to the writ petition). It is argued that in the said notice, the date for filing the reply was mentioned as 22.01.2021 and, the date and the time for personal hearing was also mentioned as 22.01.2021 but the venue of personal hearing was not disclosed as is clear from the perusal of the notice (Annexure-7). Alongwith the said show cause notice, the petitioner was also supplied with the summary of show cause notice dated 08.01.2021 in the form of GST DRC-01 (Annexure-8).

7. It is argued that in the show cause notice, in the column indicating the brief fact of the case “Adverse material found in SIB” was mentioned and in the column of grounds for issuance of the show cause notice, it was again mentioned that “Adverse material found in SIB”. The petitioner further argues that yet another notice was issued calling upon the petitioner to submit reply by 24.12.2020. In the said notice also, the report of the SIB was mentioned. It is argued that in all the notices, there is a reference to the SIB report, which was the

foundation for issuance of the notice under Section 74, however, the said report was never supplied to the petitioner. Despite that, the petitioner submitted his reply on 08.01.2021. It is specifically alleged that neither at the time of issuance of show cause notice nor on the date of hearing any evidence whatsoever was adduced against the petitioner, even the SIB reply was never produced, however, an order came to be passed on 03.06.2021 under Section 74 of the UPGST Act wherein the demand of tax and penalty was quantified against the petitioner at Rs.14,84,099.82/-. He draws my attention to the order passed under Section 74, wherein on the basis of the SIB report and the documents referred therein as well as some ex-parte submission by the department wherein it had claimed that 20% profit should be deemed to be appropriate, as against which, the Assessing Authority was of the view that even under the Income Tax Act, 1961, 8% profit would be an appropriate estimate and on the said basis quantified the demand and penalty against the petitioner. The petitioner preferred an appeal against the said order on various grounds. The appellate authority decided the appeal and partly allowed the same. While allowing the appeal held that on the basis of the provisions of the Income Tax Act, the manner of assessment done by the adjudicating authority cannot be justified, however, without disclosing any basis, whatsoever, quantified the tax and penalty at Rs.9,30,969.60/-. The said order is under challenge before this Court as the Appellate Tribunal has not yet been constituted.

8. The contention of the Counsel for the petitioner Sri Aloke Kumar is that for invoking the powers under Section 74, it is essential that all the documents proposed to be relied upon should be provided, which has not been done in the present case. He further argues that in terms of the mandate of Section 74, it is essential that the demand of tax be quantified after considering the supply of goods, the time and value of supply and after recording that the petitioner did not pay the tax,

which he was required to pay. He further argues that from the perusal of the order of the adjudicating authority as well as the appellate authority, it is clear that while adjudicating the issues, the department has assessed the demand and penalty on the basis of the best judgment assessment which is possible only when recourse is taken to Section 62 and the said best judgment assessment procedure is neither prescribed nor contemplated under Section 74.

9. The Counsel for the petitioner further argues that the recourse to the guidelines issued to the Income Tax Authorities cannot be invoked for completing the assessment as has been done by the adjudicating authority. He further argues that the appellate authority has not recorded any reasons whatsoever for quantifying the tax and penalty, although the same was substantially reduced from what was assessed by the adjudicating authorities.

10. Learned Standing Counsel, on the other hand, tries to justify the demand on the ground that on the basis of search and seizure carried out, huge quantity of the stock, which was not quantified property, was found in the business premises and on the said basis, the department has rightly assessed the duty and penalty against the petitioner.

11. Considering the said submissions at the bar, it is essential to note the scheme of the UPGST Act.

12. In terms of the provisions of the GST Act, the tax is leviable on the supply of goods as specified under Section 7 and the said tax is to be paid at the time of supply of goods, which is clarified under Chapter IV of the UPGST Act. The value on which the tax is to be levied flows from Section 15 of the Act, which mandates the manner in which the value of the taxable supply is to be done. Chapter IX of the said Act prescribes for filing of the returns by the assessee and Chapter X

mandates the payment of tax, interest, penalty and other amounts on the basis of the returns filed as prescribed under Chapter IX of the said Act. Chapter XIV of the Act confers the power on the authorized officers with regard to the inspection, search, seizure and arrest and Chapter XV prescribes for demands and recovery in respect of the tax not paid or short paid or erroneously refunded or input tax credit wrongly availed. The distinction between assessment under Sections 73 and 74 is that Section 73 prescribes for normal determination of tax and Section 74 prescribes for determination of tax not paid for the reasons of fraud, willful misstatement or suppression of facts coupled with intent to evade payment of tax. It is clear in the present case that department has taken recourse to Section 74 for assessing the demand of tax and penalty leviable.

13. The sole basis for issuance of the show cause notice under Section 74 was the SIB report, which finds mention in the notice as well as the additional notice served upon the petitioner. No material in the form of the SIB report was ever supplied to the petitioner as is contended by the petitioner specifically in the writ petition in paragraph 31. Although in the counter affidavit, it has been stated that the SIB report was never demanded by the petitioner, however, on the request of the assessee, the same was given at the time of assessment proceedings and he had submitted a return reply against the said report. In the impugned order, there is no mention of SIB report being supplied to the petitioner or his counsel or consideration of the alleged reply while passing the impugned order.

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.

17. Accordingly, the appellate order dated 13.07.2021 and the order dated 03.06.2021 challenged in Writ Tax No.4 of 2022 and the appellate order dated 13.07.2022 and the order dated 09.06.2021 challenged in Writ Tax No.5 of 2022 are quashed.

18. Both the writ petition stand ***allowed***.

19. Any amount deposited by the petitioner shall be refunded to the petitioner on his moving an appropriate application in accordance with law.

Order Date :- 06.04.2023

akverma (Pankaj Bhatia, J)