IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P.(T) No. 5364 of 2022

M/s LMB Sons ..... Petitioner

Versus

1. The Union of India through the Secretary, Ministry of Finance.
2. The Directorate General of Goods and Services Tax (Intelligence) Regional Unit, Sakchi, Jamshedpur.
3. The Additional Director, the Directorate General of Goods and Services Tax (Intelligence) Regional Unit, Sakchi, Jamshedpur.
4. The Additional Commissioner, Central Goods & Services Tax & Central Excise, Central Revenue Building, Main Road, Ranchi. .....Respondents

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CORAM: Hon'ble Mr. Justice Rongon Mukhopadhyay
Hon'ble Mr. Justice Deepak Roshan

For the Petitioner : Mr. Rahul Lamba, Adv.
: Mr. Aditya Khandelwal, Adv.
For the Res.-CGST : Mr. P.A.S.Pati, Adv.
Ms. Ranjana Mukherjee, Adv.
For the UOI : Mr. Anil Kumar, ASGI
For the DGGI : Mr. Ratnesh Kumar, Adv.

CAV on :-03.10.2023 **Pronounced on:-09/10/2023**

Per Deepak Roshan, J. The instant application has been preferred for the following reliefs:-

(i) For issuance of an appropriate writ(s)/ order(s)/ direction(s) including a writ of certiorari for quashing/ setting aside the Order In Original, dated 19.05.2022 and bearing reference No. 31/ST/ADC/ RAN/2022, passed by Respondent No.4 (Annexure-3) whereby the petitioner has been imposed with the liability of (i) service tax amounting to Rs.1,23,52,604 /for the period 2015-16 to 2017-18 (Upto June, 2017) under Section 73(2) of the Finance Act, 1994 along with applicable interest under Section 75 of the Finance Act, 1994, (ii) Penalty amounting to Rs.10,000/under section 77(2) of the Finance Act, 1994, (iii) Penalty amounting to Rs.1,23,52,604/under Section 78 of the Finance

Act, 1994, since the said order is bad in law, has been passed beyond the prescribed period of limitation and is against the Provisions of the Finance Act, 1994 read with the rules under Service Tax Rules, 1994.

(ii) For issuance of an appropriate writ(s)/order(s)/ direction(s) including a writ of certiorari for setting aside the DemandCum-Notice to Show Cause, dated 23.10.2019 and bearing reference no. F. No. 34/DGCEI/JRU/ ST/SCM/Gr.B/2018, issued by Respondent No.3 (Annexure-1) since the said Demand cum Notice to Show Cause is illegal, barred by period of limitation, arbitrary, unreasonable and against the provisions of the Finance Act, 1994 read with the prescribed rules under Service Tax Rules, 1994.

(iii) For issuance of any other appropriate Writ(s), order(s), and/ or direction(s), as Your Lordships may deem fit and proper in the facts and circumstances of this case and in the interest of justice.

2. The brief facts as disclosed in the instant writ application is that the Petitioner is primarily engaged in the business of renting of immovable property and was registered under the provisions of the Finance Act, 1994 having registration no. AADFLO737ASD001 and was regularly filing its service tax returns and had duly paid its service tax liabilities.

Respondent No. 2 conducted a search on 23.10.2018 at the office premises of the Petitioner. Respondent No.3 issued a Demand cum Notice to Show Cause, dated 23.10.2019 bearing No. F. No. 34 / DGCEI / JRU/ ST/ SCM/Gr.B/2018/3005, to the Petitioner for the period April, 2014 to June, 2017 by invoking extended period of limitation and impose a service tax

liability of Rs.1,23,52,604/for the period 2014-15 to 2017-18 (Upto June, 2017) and had also proposed to impose penalties.

Pursuant thereto, the petitioner on 09.02.2021 had filed its reply to the allegation of the Respondent Department. Thereafter, the Respondent No.4, after a substantial delay, had passed the Order-in-Original, dated 19.05.2022 bearing No. 31/ST/ADC/RAN/2022, adjudicating Demand cum Show Cause Notice bearing No. F. No. 34 /DGCEI/JRU/ST/SCM/Gr.B/2018/3005 dated 23.10.2019.

3. The case of the petitioner is that the Impugned Order was provided to the Petitioner on 27.05.2022 and the same is ex-facie bad in law as has been passed beyond the period of limitation prescribed under Section 73 (4B) of the Finance Act, 1994 and the Instruction dated 18.11.2021 issued by the Central Board of Indirect Taxes and Customs.

4. Mr. Rahul Lamba, learned counsel for the petitioner made following submissions: -

(i) The impugned proceedings have been made for alleged suppression of facts under Proviso to Section 73(1) of the Finance Act, 1994 by invoking the extended period of limitation of five years for initiation of proceedings, but the Order-in-Original does not reflect any finding as to the willful suppression of facts or fraud for invoking the extended period of limitation. Reliance is placed on the case of *Uniworth Textiles Limited Versus Commissioner of Central Excise, Raipur [(2013) 9 SCC 753]*.

(ii) The impugned Order-in-Original is also in teeth

of the period prescribed under Section 73(4B) of the Finance Act, 1994 as the same has been issued approximately after three years from the date of issuance of SCN on 23.10.2019.

(iii) The Order-in-Original has been passed after the delay of 02 months 11 days from the last date of personal hearing and, therefore, is in teeth of the Circular dated 10.03.2017 (Annexure-6 series) which has been reiterated in the later Circular dated 18.11.2021.

(iv) SCN bearing F. No.34 / DGCEI / JRU / ST / SCM/Gr.B/2018/3006 dated 23.10.2019 (Annexure-1) is different from the SCN bearing F.No.34 / DGCEI/JRU/ST/SCM/Gr.B/2018/3005 adjudicated upon by the Assessing Authority.

Relying upon the aforesaid submissions, Mr. Lamba contended that the impugned order is fit to be quashed and set aside.

5. Mr. P.A.S.Pati, learned counsel for the respondent No.4 submits that the adjudication order issued against SCN bearing ref. no. F. No. 34/ DGCEI/ JRU/ ST/ SCW/Gr. B/2018/3005 is valid and sustainable as this order is issued against the same SCN which were provided to the petitioner. The petitioner was fully aware of this SCN dated 23.10.2019 issued to them, as they have always replied to the letters issued for fixing personal hearing date and also submitted defense reply against the same said SCN.

Mr. Pati further contended that the petitioner has referred Section 73(4B) of the Finance Act, 1994, which stipulates that:

"(4B) *The Central Excise Officer shall determine the*

> *amount of service tax due under sub-section (2)-*
> *(a) within six months from the date of notice where it is possible to do so, in respect of cases falling under sub-section (1);*
> *(b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to sub-section (1) or the proviso to sub-section (4A)].”*

Thus, it can be clearly seen that there is no prescribed limit for passing an adjudication order. However, in the matter of ***Yangir Properties and Trading vs. Union of India (Civil Application No. 16615 of 2020)***, Hon’ble Gujarat High Court has held that:-

> ***“****When the legislature has used the expression "where it is possible to do so", it means that if in the ordinary course it is possible to determine the amount of duty within the specified time frame, it should be so done. The legislature has wisely not prescribed a time limit and has specified such time limit where it is possible to do so, for the reason that the adjudicating authority for several reasons may not be in a position to decide the matter within the specified time frame, namely, a large number of witnesses may have to be examined, the record of the case may be very bulky, huge workload, non-availability of an officer, etc. which are genuine reasons for not being able to determine the amount of duty within the stipulated time frame.****”*

He further submits that the petitioner was granted sufficient opportunity to defend their case by the adjudicating authority by fixing date for personal hearing on 11.09.2020, 08.10.2000, 19.02.2021, 04.03.2021, 27.10.2021, 23.12.2021, 20.01.2022 and 08.03.2022 through virtual mode as well as in physical mode in the light of Instruction dated 21.08.2020 issued by the Central Board of Indirect Taxes & Customs, but they failed to appear for the same. They never appeared on the date of personal hearing and always requested for next hearing date on the ground of some medical issues.

He lastly submits that the petitioner was having an alternative remedy for preferring appeal but it chooses not to file an appeal instead, filed writ application; as such the same may be dismissed.

6. Mr. Ratnesh Kumar, learned counsel for the respondent Nos.2 and 3 has adopted the counter affidavit and submissions made by the learned counsel for the respondent No.4.

7. In reply to the aforesaid submissions, Mr. Lamba reiterated the contention made by him and submits that the Petitioner was never in receipt of notice for personal hearing scheduled for, 20.01.2022 and 08.03.2022 being the alleged dates for personal hearing mentioned in the Impugned Order. The last opportunity of personal hearing was communicated to the Petitioner for personal hearing fixed on 23.12.2021.

He reiterated that the last date of personal hearing provided to the Petitioner was 23.12.2021 but the subsequent dates of personal hearing which have been alleged by the Respondent in the Impugned Order is only to cover up their delay and latches and specifically their miserable failure to comply with Clause 4.3 of the instruction, dated 18.11.2021, issued by the Central Board of Indirect Taxes and Customs read with the Master Circular No. 1053/ 02/ 2017 - CX dated 10.03.2017.

8. Having heard learned counsel for the parties and after going through the averments made in the respective affidavits and the documents annexed therein, it transpires that the main issues raised by the petitioner are as follows: -

(a) Show cause Notice which has been adjudicated was not served to the petitioner and seems to be not in existence.

(b) The impugned order has been passed in violation of the Circulars issued by the Central Board of Indirect Taxes and Customs.

(c) Impugned order is without jurisdiction as the same has been passed beyond the normal period of limitation and in the absence of the jurisdictional facts for invoking the extended period of limitation, the impugned order is bad in law.

9. So far as the first issue raised by the petitioner with regard to non-existent of SCN which has been adjudicated is concerned; it appears that the petitioner was in receipt of the SCN dated 23.10.2019 with no. *"SCN bearing No. F. No.34 / DGCEI / JRU / ST / SCM/ Gr.B/ 2018/3006"* dated 23.10.2019 (Annexure-1) but the same is different from the SCN bearing No. *"F.No.34/ DGCEI/ JRU/ ST/ SCM/ Gr.B/2018/3005"* which has been adjudicated upon by the Assessing Authority; but the fact remains that the petitioner always replied to the letter issued for fixing personal hearing date and also submitted defense reply against the said SCN. As such, we are not inclined to interfere on this first issue that the SCN which has been adjudicated was not served to the petitioner, inasmuch as, it appears that there is some typographical error with respect to the number indicated in the Show Cause Notice.

10. So far as contention no.3 is concerned i.e., with regard to jurisdictional issue and period of limitation; we are also not inclined to interfere with this issue as the same can be adjudicated by the appropriate authority as

it involves factual interpretation. The petitioner would be at liberty to refer this issue, if so advised.

11. So far as issue no.2 is concerned that the impugned order has been passed in violation of Circular issued by the Central Board of Indirect Taxes and Customs; it appears that it is a well-established principle of law that circulars or instructions are legally binding on the Revenue Department and the violation of the same will make the actions of the Respondent, illegal and ex-facie bad in law. This principle of law has been upheld by the Hon'ble Apex Court in its judgment passed in the case of ***Pradip J Mehta v. CIT*** reported in ***(2008) 14 SCC 283, paragraph 27***.

> ***"27.*** *This Court in a catena of decisions, has held that the circulars issued by the Department are binding on the Department. See K.P. Varghese v. ITO [(1981) 4 SCC 173 : 1981 SCC (Tax) 293] , UCO Bank v. CIT [(1999) 4 SCC 599] , CCE v. Dhiren Chemical Industries [(2002) 2 SCC 127] , etc. In all these cases it has been held that the circulars issued under the Income Tax Act or the Central Excise Act are binding on the Department. It may be noted that in the circulars issued by the Commissioner of West Bengal, reference has been made to the correspondence resting with the Ministry of Finance (Department of Revenue) Letter No. 4/22/61-IT(AT) dated 25-11-1961, wherein it is stated that the Department's view has all along been that an individual is (sic not) "not ordinarily resident" unless he satisfies both the conditions in Section 4-B(a) i.e. (i) he must have been a resident in nine out of ten preceding years; and (ii) he must have been in India for more than two years in the preceding seven years. In the present case, the circular issued by the Board in which the opinion of the Central Government, the Ministry of Finance (Department of Revenue) Letter No. 4/22/61-IT(AT) dated 25-11-1961 has been noted, the interpretation similar to the one put by the various High Courts on Section 4-B has been accepted to be the correct position.***"***

Further it is also a well-established principle of law that if law prescribes a manner in which a power has to be exercised, then such power can be exercised only in

such manner. This has been recently reiterated by the Hon'ble Apex Court in its judgment passed in the case of ***Dharani Sugars & Chemicals Limited v. Union of India*** reported in (***2019) 5 SCC 480, Para 55***.

> ***"55.*** *The matter can be looked at from a slightly different angle. If a statute confers power to do a particular act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any manner other than that which has been prescribed. This is the well-known rule in Taylor v. Taylor [Taylor v. Taylor, (1875) LR 1 Ch D 426] , which has been repeatedly followed by this Court. Thus, in State of U.P. v. Singhara Singh [State of U.P. v. Singhara Singh, (1964) 4 SCR 485 : AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2)] , this Court held: (Singhara Singh case [State of U.P. v. Singhara Singh, (1964) 4 SCR 485 : AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2)] , SCR pp. 490-91 : AIR p. 361, para 8)*
>
> > *"8. The rule adopted in Taylor v. Taylor [Taylor v. Taylor, (1875) LR 1 Ch D 426] , Ch D at p. 431 is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of Section 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on magistrates the power to record statements or confessions, by necessary implication, prohibited a magistrate from giving oral evidence of the statements or confessions made to him."*
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> *Following this principle, therefore, it is clear that RBI can only direct banking institutions to move under the Insolvency Code if two conditions precedent are specified, namely, (i) that there is a Central*

> *Government authorisation to do so; and (ii) that it should be in respect of specific defaults. The Section, therefore, by necessary implication, prohibits this power from being exercised in any manner other than the manner set out in Section 35-AA.***"**

11. In the instant case, admittedly, the Respondent Department has violated Clauses 14.10 of the Master Circular No. 1053/ 02/2017-CX dated 10.03.2017, and Clause 4.3 of the Instructions dated 18.11.2021 issued by the Central Board of Indirect Taxes and Customs. Clause 14.10 of the said Master Circular, issued by the Central Board of Indirect Taxes and Customs, is reproduced herein below for ready reference:

> ***"14.10*** *Issue and Communication of Order: In all cases where personal hearing has been concluded, it is necessary to communicate the decision as expeditiously as possible but not later than one month in any case, barring in exceptional circumstances to be recorded in the file. The order is required to be communicated to the assessee in terms of provisions of Section 37C of the CEA 1944.***"**

The re-emphasizing the binding nature and importance of Clause 14.10 of the Master Circular, the Central Board of Indirect Taxes and Customs has again issued an Instruction dated 18.11.2021. Clause 4.3 of the said Instructions provides as under:

> ***"4.3*** *On the issue of delay in issuance of adjudication order within stipulated period of one month after final personal hearing has been conducted and non-recording of reason for the delay, reference is invited to para 14.10 of the Master circular No. 1053/02/2017-CX dated 10.03.2017 wherein, interalia, it has been stated that:*
> *"14.10 Issue and Communication of Order: In all cases where personal hearing has been concluded, it is necessary to communicate the decision as expeditiously as possible but not later than one month in any case, barring in exceptional circumstances to be recorded in the file. The order is required to be communicated to the assessee in terms of provisions of Section 37C of the CEA 1944"*
> *Audit has observed that in certain cases, adjudication*

> *orders have been issued beyond stipulated period and no justification has been recorded in the file explaining delay. It is, therefore, reiterated that timelines of completing adjudication process must be followed and in exceptional cases of delay beyond stipulated period, reasons for the delay must be recorded on file***."**

Therefore, Clause 4.3 of the aforesaid Instruction read with Clause 14.10 of the said Master Circular, provides the manner in which the adjudication order has to be passed by the Respondent Department. Both the Instruction and the Circular provides that the adjudication order must be communicated within one month from the closure of personal hearing.

12. In the instant case, it is admitted that the Impugned Order/ Adjudication Order was not communicated to the Petitioner within one month from the closure of the personal hearing and there are no reasons recorded by the Respondent for the delay in communicating the Impugned Order beyond the stipulated period of one month after closure of the personal hearing. Consequently, the Impugned Order is in clear contravention of the said circulars of the Revenue Department.

So far as the quantification of delay in communication of the Impugned Order is concerned, there are two scenarios. One is considering the alleged date of last personal hearing as provided in the Impugned Order. Other is considering the valid and lawful date of last personal hearing. As per the alleged date of last personal hearing i.e., 08.03.2022 as provided in the Impugned Order is concerned, the Impugned Order was communicated to the security guard of the building, where the Petitioner has its office, on

27.05.2022 i.e., after 2.5 months against the required period of 1 month.

13. At this stage it is also pertinent to clarify the submission of the Petitioner that the alleged date of last personal hearing in the Impugned Order, which is 08.03.2022, and also the alleged date of personal hearing on 20.01.2022, cannot be considered to be valid personal hearing since no prior notice for such personal hearings were served by the Respondents to the Petitioner. In this regard, it is relevant to refer the Master Circular again.

Clause 14.3 of the said Master Circular, issued by the Central Board of Indirect Taxes and Customs, provides that separate notice for each personal hearing shall be made/served to the noticee. Clause 14.3 is reproduced herein below for ready reference:

> ***"14.3*** *Personal hearing: After having given a fair opportunity to the noticee for replying to the show cause notice, the adjudicating authority may proceed to fix a date and time for personal hearing in the case and request the assessee to appear before him for a personal hearing by himself or through an authorised representative. At least three opportunities of personal hearing should be given with sufficient interval of time so that the noticee may avail opportunity of being heard. Separate communications should be made to the noticee for each opportunity of personal hearing. In fact separate letter for each hearing/extension should be issued at sufficient interval. The Adjudicating authority may, if sufficient cause is shown, at any stage of proceeding adjourn the hearing for reasons to be recorded in writing. However, no such adjournment shall be granted more than three times to a noticee."*

In the present case since there was no prior notice served to the Petitioner for the alleged personal hearings on 20.01.2022 and 08.03.2022, therefore both the alleged personal hearings are in contravention to Clause 14.3 of the said Circular. Thus, both the alleged

personal hearings cannot be considered to be valid personal hearings. The last personal hearing, as provided in the Impugned Order, for which notice was served to the Petitioner was on 23.12.2021.

Accordingly, considering 23.12.2021 as the last date of valid personal hearing, the Impugned Order dated 19.05.2022 which was communicated to the petitioner on 27.05.2022, has thus been communicated to the Petitioner six months after the last valid personal hearing. Accordingly, the Impugned Order is in violation to Clause 14.10 of the Master Circular dated 10.03.2017 read with Clause 4.3 of the Instruction dated 18.11.2021 issued by CBIC which provides for communication of the adjudication order within one months from the conclusion of personal hearing.

The Hon'ble High Court of Bombay in a similar matter, vide its judgment passed in the case of ***Infra Dredge Services (P) Ltd. v. Union of India***, reported in ***2020 SCC OnLine Bom 2056***, has held the following:

> ***"5.*** *The Petitioner appeared for hearing on 3 January 2019 and submitted documentary evidence. By the impugned order dated 29 July 2019 the Commissioner confirmed the demand totalling to Rs. 18,31,80,394/- under Section 73 of the Act was confirmed. Hence this Petition.*
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> *6. We have heard learned counsel for the parties. Learned counsel for the Petitioner relied upon the decisions in the case of Shivsagar Veg Restaurant v. Asstt. Commr. of Income Tax, Mumbai and EMCO Ltd. v. Union of India. He submitted that there is not only delay of six months from conclusion of the argument till pronouncement of order but because of this delay gross errors have occurred in the order which has caused severe prejudice to the Petitioner. Learned counsel also relied upon the Circular issued by the Central Board of Excise and Custom dated 10 March 2017 laying down guidelines for adjudicating authorities while adjudicating the matters, more particularly Clause 14.10 thereto. It is contended that in view of this the*

Writ Petition be entertained without relegating the Petitioner to the appellate remedy.

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*17. The Division Bench in the case of **EMCO Ltd.** has emphasized that when the proceedings are disposed of expeditiously by the authorities, it ensures there is an application of mind and litigants are satisfied that their submissions have been considered. A Circular by the Central Board of Excise and Customs dated 10 March 2017 also directs a decision be taken expeditiously where the hearing has been concluded, and the decision be communicated expeditiously.*

18. Considering these peculiar facts, we are of the opinion that the Writ Petition can be entertained to set aside the order. The Commissioner will have to take a fresh decision.

19. In the circumstances, the impugned order dated 12 July 2019 passed by the Respondent No. 2 is quashed and set aside. The proceedings are restored to the file of Respondent No. 2.....”

14. Now it is no more *res integra* that the provisions of the circulars are binding on the Respondent Department and they have to be followed and complied by the Respondent Department. The Respondent Department cannot give a go by or make the said provisions of the circular otiose.

15. In view of the aforesaid discussions, we are of the considered opinion that interest of justice would be sufficed by remitting this case back to the Respondent No.4 to pass a fresh order after giving an opportunity of hearing as the impugned order has been passed against the prescribed period as indicated in aforesaid Circular.

Consequently, the matter is remitted back to the respondent No.4 to pass a fresh order after giving opportunity of personal hearing to the petitioner and pass a fresh order.

16. It goes without saying that since we have not

gone on the submissions of the petitioner with regard to other issues and merits of the case; the petitioner would be at liberty to raise those issues before the respondent no.4.

17. With the aforesaid directions indicated hereinabove, the instant application stands allowed. Pending I.A., if any, is also closed.

(Rongon Mukhopadhyay, J.)

(Deepak Roshan, J.)

Jharkhand High Court, Ranchi
Dated:- 09/10/2023
Fahim/-AFR-