

Gujarat High Court

Yasho Industries Limited vs Union Of India on 24 June, 2021

Bench: Bela M. Trivedi, Ashokkumar C. Joshi

C/SCA/7388/2021

CAV JUDGMENT DATED: 24/06/2021

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 7388 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE BELA M. TRIVEDI

Sd/-

and

HONOURABLE DR. JUSTICE ASHOKKUMAR C. JOSHI

Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? NO 2 To be referred to the Reporter or not ?

YES 3 Whether their Lordships wish to see the fair copy of the judgment ? NO 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution NO of India or any order made thereunder ?

===== YASHO INDUSTRIES LIMITED Versus UNION OF INDIA ===== Appearance:

MR ABHISHEK RASTOGI, ADVOCATE WITH MR BHAVESH B CHOKSHI(3109) for the Petitioner(s) No. 1, 2 for the Respondent(s) No. 1, 2, 3 ===== CORAM:HONOURABLE MS. JUSTICE BELA M. TRIVEDI and HONOURABLE DR. JUSTICE ASHOKKUMAR C. JOSHI Date : 24/06/2021 CAV JUDGMENT (PER : HONOURABLE MS. JUSTICE BELA M. TRIVEDI)

1. The petitioners by the present petition filed under Article 226 C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 of the Constitution of India have challenged the Summons dated 12.4.2021 (Annexure-A) issued under Section 70 of the Central Goods and Services Tax Act, 2007 (herein after referred to as 'CGST Act"), calling upon the petitioners to give evidence and produce the documents as mentioned therein in connection with the inquiry initiated against the petitioners. The petitioners also have sought directions against the respondent No.3 to issue refund/allow

recredit of INR 3 Crore paid by the petitioners on 9.2.2021 vide Form No.GST DCR-03 (Annexure-F). The petitioners have also sought direction to quash and set aside the impugned Circular dated 5.7.2017 (Annexure-B), in connection with the assignment of functions to the officers as the 'proper officers' in relation to the various functions of the CGST Act and the Rules made thereunder.

2. The petitioner No.1 is a public limited company engaged in the business of manufacturing and exporting specialized chemicals having its factory set up at GIDC Plot Nos.2514, 2515, 2505/A Phase-IV, Vapi and the petitioner No.2 is the Factory Manager of the petitioner No.1. The petitioner Company is the holder of Advance Authorization Licences C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 granted in terms of the Scheme set out in Chapter-IV (AA Scheme) of Foreign Trade Policy 2015-2020. It appears that the Directorate of Revenue Intelligence, Kolkata Zonal Unit vide the Communication dated 11.11.2020 addressed to the Mumbai Office of the petitioner No.1, had intimated that an inquiry was initiated against the petitioner and other importers, who had incorrectly availed the benefits of EOU Scheme extra in terms of the Customs Notification Nos.78/2017-Cus, 79/2017-Cus, and 48/2017-Cus respectively, and also simultaneously availed the benefit of refund of duty paid on the goods exported towards fulfillment of the export obligation. Being aggrieved by the said communication the petitioner had preferred a writ petition bearing No.WP(L) No.8839 of 2020 before the Bombay High Court in which the Bombay High Court, vide the order dated 8.1.2021 issued the notice to the concerned respondents.

3. As per the further case of the petitioners, the manufacturing unit of the petitioners at Vapi was visited by the officers of the respondent No.3 on 9.2.2021 in connection with the said inquiry and during the said visit, a sum of Rs.3 crore was recovered from the petitioners on the alleged incorrect IGST C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 refunds. The copy of the Form DRC-03 in respect of the payment of INR 3 crore has been produced at Annexure-F. According to the petitioners, the said payment was made by the petitioners under extreme duress and not on their own volition and the same was reflected in the column of 'reasons', where it was stated that the said amount was paid under protest towards an inquiry in connection with an incorrect claim of double benefits. It is further case of the petitioners that subsequent to the said visit the respondent No.3 issued the impugned summons invoking Section 70 of the CGST Act, calling upon the petitioners to remain present on 21.4.2021 to give evidence and/or to produce documents namely tender statement, copy of advance authorization under which refund of IGST was claimed and on which raw material was imported duty free and quantification of refund claimed till date on advance authorization under which refund of IGST has been claimed and on which raw material was imported duty free. According to the petitioners, they are facing two parallel investigating proceedings namely the proceedings initiated pursuant to the communication dated 11.11.2020 by the DRI, Kolkata Zonal Unit and the proceedings instituted by the respondent No.3 vide the C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 impugned summons, invoking Section 70 of the CGST Act and hence, the petition has been filed.

4. The learned Advocate Mr.Abhishek Rastogi appearing with the learned Advocate Mr.Bhavesh Chokshi for the petitioners, at the outset, challenging the jurisdiction of the respondent No.3 in issuing the summons, submitted that the power to issue summons in terms of Section 70 of the

CGST Act vests exclusively with the 'Proper Officer' as defined in Section 2(91) of the said Act. Pressing into service Section 167 of the CGST Act, Mr. Rastogi submitted that the delegation of powers by the Commissioner has to be specified by way of the Notification as contemplated in the said section. According to him, the respondent No.3 is an officer of Directorate General of Goods and Services Tax Intelligence (DGGI) and holds the designation of a Senior Intelligence Officer and his appointment under the CGST Act could be traced to the Notification dated 1.7.2017 and thus, the respondent No.3 is appointed as a Central Tax Officer and is in the rank of Superintendent under CGST Act. Elaborating the said arguments, Mr.Rastogi submitted that since the respondent No.3 did not hold the designation of the C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 Commissioner, the specific function under Section 70 has to be assigned to him by a Commissioner in the Board as contemplated under Section 2(91) and such assignment has to be through the medium of Notification in the light of Section 167 of the CGST Act.

5. Placing reliance on the decision of the Supreme Court in case of Canon India Pvt. Ltd. Vs. Commissioner of Customs, reported in 2021 SCC Online SC 200, Mr.Rastogi submitted that the entrustment of functions is a vital ingredient in the proper exercise of the powers by an authority. The respondent No.3, in the instant case, having wrongly assumed the jurisdiction by virtue of Circular dated 5.7.2017 to issue the summons the same is without jurisdiction.

6. Assailing the impugned Circular dated 5.7.2017, Mr.Rastogi submitted that Section 2(91) is merely a definition clause, which does not confer any powers to assign the functions. The said Circular also makes reference to Section 20 of the IGST, which merely incorporates by reference, certain provisions of the CGST Act and makes them applicable to the IGST Act. Since the delegation of powers by the C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 Commissioner under Section 167 of the CGST Act has to be effectuated through a Notification, such power cannot be exercised in any manner, except in the manner prescribed in Section 167. Mr.Rastogi, to substantiate his submissions, has relied upon the decision of the Supreme Court in case of Atlas Cycle Industries Ltd. Vs. State of Haryana, reported in 1971 (2) SCC 564; in case of Food Corporation of India Vs. Commissioner of Commercial Taxes, reported in (1999) 116 STC 173 (Patna); in case of Suresh Kumar Bansal Vs. Union of India, reported in 2016 (43) STR (Delhi); in case of Hukam Chand Shyal Lal Vs. Union of India, reported in (1976) 2 SCC 128 and in case of Mackinnon Mackenzie and Company Limited Vs. Mackinnon Employees Union, reported in (2015) 4 SCC

544.

7. In an another limb of his arguments, the learned Advocate Mr.Rastogi vehemently submitted that the coercive action of the respondent No.3 has culminated into the recovery of an amount of Rs.3 crore from the petitioners without issuance of any show-cause notice or finalization of demand pursuant to the adjudication. Placing reliance on the decision of Punjab C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 and Haryana High Court in case of Century Metal Recycling Vs. Union of India, reported in 2009 (234) ELT 234 (P&H), he submitted that unless there is an assessment and demand, the amount deposited by the petitioners, even though termed as voluntary, cannot be appropriated. The reliance has also been placed on the interim order passed by this Court

in case of Bhumi Associate Vs. Union of India, in Special Civil Application No.3196 of 2021, whereby the Court had issued the guidelines with regard to the recovery of amount made at the time of search/inspection proceedings under Section 67 of the CGST Act. Mr.Rastogi lastly submitted that the action of the respondent No.3 is also in violation of the principles of natural justice and that the parallel proceedings against the petitioners on the same issue are not sustainable.

8. At the outset, it may be noted that the submissions made by the learned Advocate Mr.Rastogi for the petitioners, though may appear or sound very attractive, the Court has not found any substance in the same. In order to appreciate his submissions it would be beneficial to reproduce the relevant provisions of CGST Act and IGST ACT. The definition of C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 'Proper Officer' is contained in Section 2(91) of the CGST Act, which reads as under:-

"Section 2. In this Act, unless the context otherwise requires,-

(91) "Proper Officer" in relation to any function to be performed under this Act, means the Commissioner or the officer of the Central Tax who is assigned that function by the Commissioner in the Board."

9. Section 70 empowers the proper officer under the Act to summon any person to give evidence and produce documents in connection with the inquiry initiated against him and the said proceedings are deemed to be judicial proceedings within the meaning of Section 193 and Section 228 of IPC. Section 70 reads as under:-

"70. Power to summon person to give evidence and produce documents.-

(1) The proper officer under this Act shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry in the same manner, as provided in the case of a Civil Court under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

(2) Every such inquiry referred to in sub-section (1) shall C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 be deemed to be a "judicial proceedings" within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860)."

10. Chapter XV of CGST Act pertains to demand and recovery and Section 74 falling therein pertains to the determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason of fraud or any willful misstatement or suppression of facts. Since the petitioner had made payment of Rs.3 crore under Section 74(5) as per Form GST DRC-03, the relevant part of Section 74 is reproduced as under:

"Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any willful- misstatement or suppression of facts.-

74(1) Where it appears to the 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 so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilized input tax credit, requiring him to show cause as to why he should not pay the amount specified C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) to (4) xxx (5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder. (7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable. (8)xxx (9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub- C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilized relates to or within five years from the date of erroneous refund."

11. Since the learned Advocate Mr.Rastogi has placed heavy reliance on Section 167 pertaining to the delegation of powers by the Commission is reproduced as under:-

"167. Delegation of Powers.-

The Commissioner may, by notification, direct that subject to such conditions, if any, as may be specified in the notification, any power exercisable by any authority or officer under this Act may be exercisable also by another authority or officer as may be specified in such notification."

12. Since the impugned Circular dated 5.7.2017 has been issued in exercise of the powers conferred by Section 2(91) of CGST Act read with Section 20 of IGST Act, it may be noted that Section 20 of the IGST Act pertains to the application of the provisions of CGST Act to the IGST Act mutatis mutandis.

13. From the bare reading of Section 70 of the CGST Act, it clearly emerges that the proper officer has the power to C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 summon any person whose attendance he considers necessary either to give evidence or to produce the documents in any inquiry in the same manner in the case of a Civil Court under the CPC. Now, as per the definition of 'proper officer' as contained in Section 2(91), a 'proper officer' in relation to any function to be performed under the CGST Act means the Commissioner or the officer of the Central Tax, who is assigned that function by the Commissioner in the Board. It is pertinent to note that as stated in the petition itself, the respondent No.3 is an officer of Directorate General of Goods and Services Tax Intelligence (DGGI) holding the designation of Senior Intelligence Officer, who was appointed as the Central Tax Officer with all the powers under the CGST Act and IGST Act and the Rules made thereunder, as are exercisable by the Central Tax Officers of the corresponding rank of Superintendent as specified in the Notification No.14 of 2017-CT dated 1.7.2017 issued by the Central Board of Excise and Customs. It is further pertinent to note that the respondent No.3 being the officer of the Central Tax and the Superintendent under the CGST Act by virtue of the said Notification dated 1.7.2017, he was also assigned the C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 powers of proper officer by the Board vide Circular dated 5.7.2017 issued in exercise of the powers conferred by Clause (91) of Section 2 of the CGST Act read with Section 20 of the IGST Act. Therefore, the respondent No.3 is a proper officer in relation to the function to be performed under the CGST Act as contemplated under Section 2(91), and as such, was entitled to issue summons under Section 70 of the CGST Act in connection with the inquiry initiated against the petitioner.

14. The submission of Mr.Rastogi that the said assignment of function has to be by way of Notification and not by way of Circular in view of Section 167 of the CGST Act is thoroughly misplaced. Section 167 of the CGST Act pertains to the delegation of powers by the Commissioner exercisable by any authority or officer under the Act to be exercisable also by another authority or officer as may be specified in the Notification. So far as Section 2(91) is concerned, it pertains to the proper officer in relation to any function to be performed under the CGST Act to be the Commissioner or the officer of Central Tax, who is assigned that function by the Commissioner in the Board. Here the Board means the C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 "Central Board of Indirect Taxes and Customs" as defined in Section 2(16) of the CGST Act. Vide the Circular dated 5.7.2017 the said Board namely the Central Board of Excise and Customs in exercise of the powers conferred by Section 2(91) of the CGST Act read with Section 20 of the IGST Act and subject to Section 5(2) of the CGST Act has assigned the officers the functions as that of proper officers in relation to the various Sections of the CGST Act and the Rules made thereunder, and as such the Superintendent of Central Tax has been assigned the function of Section 70(1) of the CGST Act. Thus, there being no delegation of powers by the Commissioner, the provisions contained in Section 167 of the CGST Act could not be said to have been attracted, nor was there any necessity to issue Notification as sought to be submitted by Mr.Rastogi. There could not be any disagreement to the proposition of law laid down by the Supreme Court in case of Canon India Pvt. Limited (supra) relied upon by the learned Advocate Mr.Rastogi that when a statute directs that the things to be done in a certain way, it must be done in that way alone. However, in the instant case, the Board has assigned the officers to perform the function as proper officers in relation to various Sections of C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 CGST Act and the Rules made

thereunder by issuing the Circular in question, the question of issuing Notification for delegation of powers by the Commissioner as contemplated under Section 167 of the CGST Act does not arise. Mr.Rastogi appears to have misread the powers of the Board to assign the officers to perform the function as proper officers in relation to the various Sections of the CGST Act, as the delegation of powers by the Commissioner to the other authority or the officer as contemplated in Section 167 of the CGST Act. The Court, therefore, does not find any substance in the submission of Mr.Rastogi that the respondent No.3 was not the 'proper officer' as per the definition contained in Section 2(91) of the CGST Act, and therefore, had no powers to issue summons under Section 70 of the CGST Act.

15. The Court also does not find any force in the submission made by Mr.Rastogi that two parallel proceedings in connection with the same issue were not sustainable. It may be noted that the communication dated 11.11.2020 was issued by the Directorate of Revenue Intelligence, Kolkata Zonal Unit, requesting the office of the C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 petitioner at Mumbai to furnish details of the imports and exports during the period from 23.10.2017 till the date in the prescribed proforma was in relation to the inquiry in connection with the incorrect availment of double benefits i.e. exemption of IGST on the input material imported under Advance Authorization/EOU Scheme and refund of IGST paid of goods imported, whereas the respondent No.3 has issued summons to the petitioner at Vapi in relation to the inquiry in connection with the refund of ITC under the CGST Act. It is needless to say that the proceedings of issuing summons under Section 70 of the CGST Act are the proceedings of judicial nature and the petitioners are bound to respect the same, and cooperate with the inquiry. As such, no prejudice is going to be caused to the petitioners if the statement is tendered or the documents are produced as required by the respondent No.3.

16. It may be noted that in the writ petition filed by the Bombay office of the petitioner before the Bombay High Court challenging the communication dated 11.11.2020 issued by the Directorate of Revenue Intelligence, Kolkata Zonal Unit, there is no interim order passed in favour of the C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 petitioner restraining the respondent authorities from proceeding further with the inquiry proceedings initiated against the petitioner.

17. As regards the payment of Rs.3 crore made by the petitioners on 9.2.2021 vide Form GST DRC-03 under Rule 142(2) and 142(3) of the GST Rules (Annexure-F), it may be noted that for the particulars at Sr. No.3 i.e. "cause of payment", it is shown as "voluntary" and at Sr.4 i.e. "section under which voluntary payment is made", it is shown as "Section 74(5)". At the bottom of the table in the said Form, at Sr. No.8 with regard to "reasons", it has been mentioned that "enquiry in connection with the incorrect claim of double benefit, that is exemption of IGST, Advance Authorization and Refund of IGST: under protest". Relying upon the said endorsement "under protest" the learned Advocate Mr.Rastogi submitted that the said payment was made by the petitioners under duress and was not made voluntarily. Of course, he categorically admitted that there was no search or seizure proceedings conducted by the officers of the respondent No.3 as contemplated under Section 67 of the CGST Act. He also conceded that there was no C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021 complaint made by the petitioner before the grievance cell or before any authority of the respondent that the said payment was made under duress and was not made voluntarily.

18. Though Mr.Rastogi has placed heavy reliance on the interim order passed by this Court in case of Bhumi Associates (supra), it may be noted that apart from the fact that the said order is an interim order, the guidelines issued in the said interim order appear to have been issued in connection with the voluntary payment made by the person during the course of search and seizure proceedings conducted under Section 67 of the CGST Act. Admittedly, no search and seizure proceedings have taken place under Section 67 of the Act, in case of the petitioners. In the instant case, the petitioners having made payment under Section 74(5), they appear to have informed the Proper Officer of such payment in the Form GST DRC-03 (Annexure-F) as contemplated in Rule 142(2) of the said Rules. It is needless to say that the said payment shall be dealt with or adjusted by the concerned respondent No.3 in accordance with law more particularly as per the provisions contained in Section 74 of the CGST Act.

C/SCA/7388/2021 CAV JUDGMENT DATED: 24/06/2021

19. In that view of the matter, the Court does not find any merit in the petition. The petition is dismissed in limine.

Sd/-

(BELA M. TRIVEDI, J) Sd/-

(A. C. JOSHI,J) V.V.P. PODUVAL