

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 17248 of 2024

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BHARGAV D. KARIA

and

HONOURABLE MR. JUSTICE PRANAV TRIVEDI

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Approved for Reporting	Yes	No
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M/S KCC BUILDCON PRIVATE LIMITED
 Versus
 THE STATE OF GUJARAT & ORS.

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Appearance:

DR MALKIAT SINGH with MR ARUNKUMAR U SONI(12298) for the Petitioner(s)
No. 1

MS SHRUNJAL SHAH ASSISTANT GOVERNMENT PLEADER for the
Respondent(s) No. 1,2,3,4

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CORAM:HONOURABLE MR. JUSTICE BHARGAV D. KARIA
and
HONOURABLE MR. JUSTICE PRANAV TRIVEDI

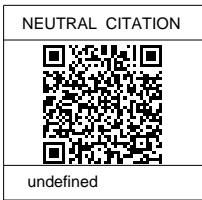
Date : 01/08/2025

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Heard learned advocate Dr. Malkiat Singh with learned advocate Mr. Arunkumar Soni for the petitioner and learned Assistant Government Pleader Ms. Shrunjal Shah for the respondents.

2. Having regard to the controversy arising in the



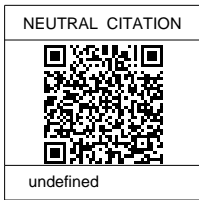
petition which is in narrow compass, with the consent of the learned advocates for the respective parties, the matter is taken up for hearing.

3. Rule returnable forthwith. Learned Assistant Government Pleader Ms. Shrunjal Shah service of notice of rule on behalf of the respective parties.

4. By this petition under Article 227 of the Constitution of India, the petitioner has challenged the legality of the order dated 10.08.2024 passed in Form GST DRC-07 as well as show cause notice dated 29.05.2024 issued under Section 74 of the Gujarat Goods and Services Tax Act, 2017 (For Short “the GST Act”) in Form GST DRC-01.

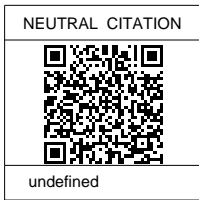
5. The brief facts of the case are as under :-

5.1. The petitioner a Private Limited Company is engaged in the business of constructing and development of infrastructures. A show cause notice dated 08.01.2022 was issued under Section 73 of the Goods and Services Tax Act, 2017 in Form GST DRC-01, which was dropped by the respondent. Thereafter



respondent no. 4 - Sales Tax Officer, Ghatak 24, (Gan) Range-7, Division-3, Gujarat again initiated proceedings under Section 61 of the GST Act read with Rule 99 of the Central/State Goods and Services Rules, 2017 (For Short "the GST Rules") by issuing an intimation in Form GST DRC-01A dated 10.05.2024 proposing the demand amounting to Rs.23,01,066. Thereafter, the impugned notice dated 29.05.2024 was issued proposing the demand amounting to Rs.32,99,801/-

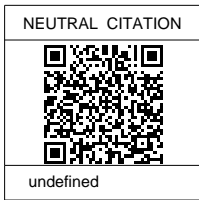
5.2. The petitioner submitted reply dated 06.06.2024 filed before the respondent no. 4 contending that the amount of Rs.1,17,082/- regarding 'Ujjaival Infra Projects' out of which the petitioner has not claimed Rs.99,408/- as ITC and the remaining amount of Rs.17,674/- was paid through DRC-03 on 03.06.2024. With regard to the amount of Rs.3,48,107, it was pointed out that the petitioner has not claimed ITC of Rs.92,896/- and the remaining amount of Rs.2,55,211/- was paid through DRC-03 on 03.06.2024. The petitioner also contended that the petitioner has not committed any fraud, willful misstatement or suppression of facts to evade the tax and therefore, the respondent no. 4 could not have assumed the jurisdiction by



initiating proceedings under Section 74 of the GST Act.

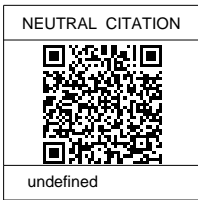
5.3. It is the case of the petitioner that the respondent no. 3 - Assistant Commissioner, Ghatak-24 (Gan) Range-7, Division-3, Gujarat has already initiated proceedings for scrutiny of the returns filed by the petitioner and, therefore, the impugned notice is without jurisdiction. With regard to the 'D.V.K.P. Engineering Services' mentioned in the notice, it was submitted by the petitioner that the ITC amounting to Rs.6,96,982/- as alleged to have been claimed fraudulently by the respondent no. 4, the requisite documents for claiming ITC in compliance of Section 16(2) of the GST Act were uploaded and the details of transactions are also reflected in Form GSTR-2A. It is the case of the petitioner that the respondent no. 4 without considering the reply of the petitioner passed the impugned order on 10.08.2024. It was also the case of the petitioner that the respondent no. 4 has passed the order in violation of Section 75 (4) of the GST Act as no opportunity of hearing was provided before passing the adverse order.

6. Learned advocate Dr. Malkiat Singh with learned advocate



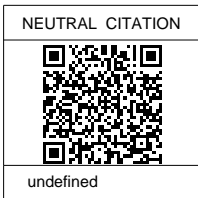
Mr. Arunkumar U. Soni for the petitioner submitted that an opportunity for personal hearing before passing the order was not granted and the petitioner was contacted on phone which was considered as personal hearing, which is impermissible.

6.1. In support of his submissions reliance was placed on the decision of the Hon'ble Delhi High Court in case of ***M/s. Jupiter Exports v. Commissioner of GST*** rendered in *Writ Petition (C) 6673 of 2021 dated 24.07.2023* to submit that Hon'ble Delhi High Court has held that it is settled law that applicability of providing an opportunity aspect is not straight-jacket formula and the same are amenable to being moulded depending upon the facts peculiar to each case and at the same time the requirement of giving reasonable opportunity of being heard before making any order would have adverse consequence on the parties resulting into breach of principles of natural justice. It was, therefore, submitted that fair opportunity ought to have been given to the petitioner so as to exclude the risk of arbitrariness and allegation of whimsical approach in the process of decision making.



6.2. Learned advocate Dr. Malkiat Singh invited attention of the Court to the observations made in paragraph '22' of the aforesaid judgment to submit that after relying upon the decision of the Hon'ble Bombay High Court in the case of **BA Continuum India Pvt. Ltd. v. Union of India and Others** rendered in *W.P (L) No. 3264/2020 decided on 08.03.2021*, the Hon'ble Delhi High Court held that the expression personal hearing or the opportunity of being heard is not a mere empty formality. The provisions of Sections 75(4) and 75(5) of the GST Act is required to be adhered to and cannot be substituted to telephonic conversation. It was, therefore, submitted that had the petitioner been given an opportunity of hearing to explain in detail, the detailed documents submitted along with the reply, the respondent authority could have appreciated and dealt with the same in the impugned order.

7. On the other hand, learned Assistant Government Pleader Ms. Shrunjal Shah for the respondents submitted that the petitioner has been provided sufficient opportunity of hearing as reflected in the impugned Order-in-Original. In support of her submission, reliance was placed on the following averments



made in the affidavit-in-reply filed by the respondent no. 4,
which reads as under :-

“6. It is submitted that in the facts of the present case the petitioner has challenged the show cause notice in Form DRC 01 dated 29.05.2024 and the order in Form DRC-07 dated 10.08.2024 and passed by the answering respondent. In view of the said prayer, it is important to consider the facts of the present case.

i. A show cause notice under Section 61 of the GST Act in Form ASMT-10 dated 15.07.2021 was issued for the difference in Form G.S.T.R. 3B and 2A. Pursuant to such notice reminders dated 01.09.2021, 02.09.2021 were issued. Since no reply was filed by the petitioner, a notice in DRC-01 under Section 73 of the Act dated 08.01.2022 was issued in response to which the petitioner filed a reply. Considering the reply of the petitioners where in the difference between in GSTR 3B and 2A was reconciled an order in DRC-07 dated 13.04.2023 was passed dropping the said proceedings. A copy of such order dated 13.04.2023 is attached at Annexure B to the impugned petition. It is therefore evident with the said notice under Section 73 was only pursuant the scrutiny of returns where in some differences in Form GSTR 3B and 2A were found.

i. Subsequently, proceedings under Section 74 which are on absolutely different issue being Purchases from cancelled dealers and non-genuine tax payers were initiated. Therefore, is no application and violation of Section 6(2) (b) as argued by the petitioners since the subject matter of the proceedings is very different.

ii. A notice in Form DRC-01A dated 10.05.2024 was issued to the petitioners on the ground of purchase from cancelled dealers and non-genuine tax payers and therefore, in violation of Section 16(2) of the GST Act. An amount of Rs.11,62,171/- was alleged to have been short paid and evaded since the ITC was availed from such purchases wherein the sellers dealers were actually cancelled and it was the case of the Respondents that only bills were issued without any actual supply of goods by such sellers. Pursuant to such notice a reply dated 17.05.2024 was filed by the petitioners seeking for more time. Considering such reply an additional time of 10 days was granted after which a notice in DRC-01 was issued on



29.05.2024.

iii. It is submitted that pursuant to such notice the petitioners voluntarily on 03.06.2024 made a payment of Rs.2,72,885/- in Form DRC-03 of the total 11,62,171 alleged in the impugned notice. For the remaining amount the petitioners filed a reply stating that ITC claimed was valid and therefore, no addition was to be made. However, the petitioners did not file any documents substantiate the movement of goods for it is purchases from such cancelled dealers.

iv. Further, on 31.07.2024 the authorized representative of the petitioners further remained physically present before the answering respondent herein to make it submissions. The copy of the office note dated 31.07.2024 evidencing the same is attached herewith and marked as Annexure-R1.

v. Thereafter against the same notice on 05.08.2024 the petitioner filed an additional reply providing Reconciliation of purchases and ITC of one of the cancelled dealers being Ujjwal Infrastructure Project.

vi. However, since the allegation for pertained to bogus purchases wherein the goods have not actually been received by the petitioners, such reconciliation was of no support. Therefore, no evidence with that regard was presented even in the additional reply dated 05.08.2024 even when the petitioners was asked to provide the necessary documents for movement of goods during the personal hearing. Further, in the said reply dated 05.08.2024, the petitioners had sought for personal hearing in their reply. Therefore, pursuant to such reply the answering respondent made a call on 07.08.2024 at 1:50 PM. to their authorized representative i.e. Chartered Accountant Nikunjhai Pataliya who submitted that the necessary documents with regard to the impugned show cause notice already have been filed and for the addition which are accepted, payment has been made voluntarily in Form DRC-03. It was further submitted by him that Section 16 is not applicable in the facts of the present case since the purchases were prior to the order of cancellation of Ujjawal Infrastructure Project and D.V.K.P. Engineering Services and therefore no additional documents are to be provided. The copy of the office note dated 10.08.2024 evidencing the aforementioned communication is attached herewith as Annexure-R2.

vii. It is submitted that therefore, after complete regard to the



provisions of Section 74, the said order has been passed in the case of the present petitioner. Further due opportunity of hearing as mandated by the provisions of the Act has also been granted.

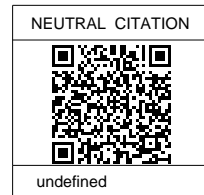
viii. It is further submitted that when there is specific provision in the Act providing for issuance of notice before passing a impugned order and such provisions has been duly complied with, the general provisions under Section 75(4) shall be deemed to have been duly complied. It is submitted that under Section 75(4) an opportunity of hearing is to be granted where a request is received in writing from the person chargeable the Tax and Penalty or any adverse decision is contemplated against such person.

ix. It is submitted that when various notices have been issued from time to time under the provisions of the Act intimating the petitioners of the possible addition and further granting time to file a reply, Section 75(4) o f the Act should be considered as complied with.

x. It is submitted that such general provisions relating to determination of Tax, cannot override the specific provision of the Act in the said regard.

7. It is stated that only purpose of such section is to ensure that there is sufficient opportunity given to an Assessee and the Assessee is put to notice before the adverse order is passed so as to enable him to rely as it deems fit. It is, therefore, submitted that in letter and spirit the said provisions have been duly complied with. Further, the petitioner has an alternative remedy to file an appeal as per the provisions of Section 107 and therefore also the said petition may not be entertained.”

7.1. Referring to the above submissions, it was submitted that as sufficient opportunity of hearing is granted to the petitioner as it is duly recorded in the order sheet by the respondent, as explained in the aforesaid averments made in the affidavit-in-reply, no interference may be made by this Court while



exercising extraordinary jurisdiction under Article 227 of the Constitution of India.

8. Considering the submissions made by the learned advocates for the parties and on perusal of the material on record, it is not in dispute that the respondent no. 4 has recorded the proceedings in the order-sheet which is placed on record on page '180' which clearly shows that on 10.08.2024, the respondent no. 4 called upon the representative of the petitioner on 07.08.2024 on his mobile phone and on the basis of such telephonic conversation, the impugned order was passed. The English Translation supplied by the petitioner of the order-sheet is at page 192/B/1 which is reproduced herein-under :

"A DRC-01 notice was issued to the trader under Section 74 of 10.05.2024 requesting a response by 17.05.2024. The trader requested an adjournment on 17.05.2024, which was granted, providing them with 12 day extension. As they failed to file a response within this extended period, a DRC-01 was issued on 29.05.2024 with a deadline for response set for 29.06.2024. The trader submitted an online reply on 06.06.2024 and requested a personal hearing. On 31.07.2024, the trader's representative, CA Nikunjhai Pataliya, appeared at the office and submitted evidence. Subsequently, on 05.08.2024, the trader made an additional online submission as a further response and indicated 'YES' for a personal hearing. Following this, on 07.08.2024 at 13:50, a telephone conversation was held with their representative, CA Nikunjhai Pataliya (mobile number 99040 39084), during which the trader stated that they had filed DRC-

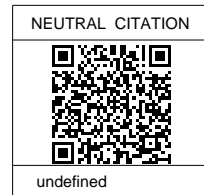


03 for the accepted issues and submitted evidence for the remaining issues, including evidence under Section 16. Upon verification, it was found that GST numbers of Ujjwal Infra Project and DVKP Engineering Services were cancelled prior to purchase, rendering them ineligible as registered traders under Section 16. Discussions were held regarding the tax implications, and the representative stated that they would file an appeal with orders for these issues, agreeing to the issuance of an order. Thus, for three issues where payment was made and evidence was submitted, the case was closed. For the remaining amount, it is resolved to issue a DRC-07 order”

9. On perusal of the above noting made in the order sheet, it is apparent that no personal hearing was granted to the petitioner before passing the impugned order raising demand which is in violation of the provisions of Section 75(4) of the GST Act. We are in complete agreement with the observation made by the Delhi High Court in the case of *M/s. Jupiter Exports (supra)* wherein it is held as under :-

“22. Moreover, the telephonic conversations for a brief period cannot, in our opinion, be a substitute for a personal hearing or for that matter, be construed as a hearing at all. The opportunity of hearing, which the Officer is statutorily required to give to the person against whom an adverse decision is contemplated, is not an empty formality, and is a well-recognised principle of audi alteram partem, which has rightly been incorporated in Section 75(3) and 75(4) of the CGST Act. The principle being that no one should be condemned without the opportunity of hearing.

23. The Hon'ble High Court of Bombay had an occasion to decide a case in somewhat similar circumstances. The petitioner in that case had alleged that the Show Cause Notice was adjudicated without affording any opportunity of personal hearing. The respondent had relied upon the trade notice issued by the department pursuant to the outbreak of the Corona Virus and had contended that the personal hearings were granted through telephone. The Hon'ble



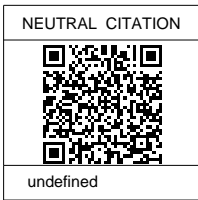
High Court in the case of BA Continuum India Pvt. Ltd. (supra) negated the said contention, and held as under :

"31. It may be mentioned that there were some telephonic conversations between officials working under respondent No.4 and the tax consultants of the petitioner. While respondents would like to contend that such telephonic conversations can be construed to be an extension of hearing, the same has been disputed by the petitioner by contending that those conversations were for very brief periods lasting for about a minute or so in which subordinate officials working under respondent No.4 sought for documents etc. In any event, no record of such telephonic conversations have been maintained. What transpired in such conversations is also not known. Therefore, such telephonic conversations cannot be a substitute for a hearing in person or cannot be construed to be a hearing."

24. We concur with the view taken by the Hon'ble High Court of Bombay. The expression personal hearing or the opportunity of being heard is not a mere empty formality. The same also has to be a meaningful hearing. Moreover, when the law requires that the provisions of Section 75(4) and 75(5) of the CGST Act specifically require that an opportunity of hearing "shall" be granted where the request is received in writing, the same cannot be denied or be substituted by a telephonic conversation. It is also not a case of Revenue that the multiple adjournments were taken by the petitioner in order to delay the adjudication.

25. There is no cavil with the principles laid down by the Hon'ble Apex Court in the judgments relied upon by the respondent. In the decisions cited by the learned Counsel for the respondents, the Hon'ble Apex Court, had in the facts of those cases, concluded that the principles of natural justice were substantially complied with. It is also relevant to note that the decisions were not rendered in the context of statutes that expressly obliged the authorities to do a particular act in a particular manner. In these cases, the parties had complained about the violation of principles of natural justice in administrative decision making of the authorities and not about the decision been taken in violation of terms of a statute where the law specifically required a particular procedure to be followed.

26. Therefore, in the facts of the present case, there is a clear violation of the principles of natural justice. The order has been passed disregarding the specific provisions incorporated by the Legislature in consonance with the well-settled principles of audi alteram partem. We also fail to understand why and how any person with a reasonable understanding of the law could observe that a

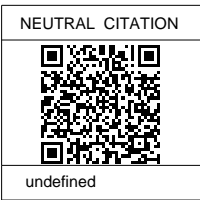


telephonic conversation and the visit of the representative of a party can be considered as a personal hearing.”.

10. We are, therefore, of the opinion that the impugned Order-in-Original is liable to be quashed and set aside. The matter is required to be remanded back to the respondent no. 4 so as to give opportunity of personal hearing to the petitioner to pass fresh *de novo* order to comply with the provisions of Section 75(4) of the GST Act in letter and spirit as held by the Hon'ble Delhi High Court.

11. The petition therefore succeeds and is, accordingly, allowed. The impugned Order-in-Original dated 10.08.2024 is quashed and set aside. The matter is remanded to the respondent no. 4 so as to grant the opportunity of hearing to the petitioner and thereafter pass *de novo* order in accordance with law.

11.1. It is made clear that we have not gone into the merits of the matter and the respondent no. 4 is directed to pass a fresh *de novo* order after taking into consideration the reply and submissions to be made by the petitioners in accordance with law.



11.2. Such exercise shall be completed within a period of **twelve (12) weeks** from the date of receipt of copy of this order.

12. Rule is made absolute to the aforesaid extent with no order as to cost.

(BHARGAV D. KARIA, J)

(PRANAV TRIVEDI, J)

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