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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C)No.15265 of 2021

M/s. Bright Star Plastic Industries *Petitioner*
Mr. P.K. Harichandan, Advocate

-versus-

Additional Commissioner of Sales Tax ... Opposite Parties
(Appeal) and others

Mr. S.S. Padhy & Mr. S. Mishra, ASC

CORAM:
THE CHIEF JUSTICE
JUSTICE B. P. ROUTRAY

ORDER
04.10.2021

Order No.

4.

Dr. S. Muralidhar, CJ.

1. The Petitioner, who is a dealer registered under the Odisha GST Act, has filed this petition questioning the order dated 5th April, 2021 passed by the Additional Commissioner of CT & GST (Appeal), Bhubaneswar rejecting the Petitioner's appeal questioning the order passed by the learned Proper Officer (LPO) rejecting the Petitioner's application for revocation of cancellation of his registration on 7th January, 2021 under Section 30(2) of the OGST Act.

2. The background facts are that the Petitioner is carrying on the business of manufacturing and trade of Poly Vinyl Chloride (PVC) pipes, high-density polyethylene and low-density polyethylene pipes, scrap iron angles, iron scraps etc. On 14th August, 2020, the

CT & GST Officer, Bhubaneswar (Opposite Party No.2) issued a show cause notice (SCN) in Form GST REG-17 under Rule 22(1) of the OGST Rules, 2017 for cancellation of Petitioner's registration on the ground that "in case, Registration has been obtained by means of fraud, willful misstatement or suppression of facts,".

3. After the Petitioner filed a reply on 19th August, 2020, Opposite Party No.2 by an order dated 25th August, 2020 dropped the proceedings for cancellation of the registration. However, on the very same day, the Opposite Party No.2 issued another SCN for cancellation of registration, this time on the ground that: "you have claimed ITC (Input Tax Credit) of Rs.2,04,650,06 against fake invoices issued by nonexistent supplier".

4. A detailed reply was sent by the Petitioner to the aforesaid SCN on 31st August, 2020. It was pointed out that the Petitioner had purchased G.P. Sheets from M/s. Pawansut Enterprises. The details of the bill numbers, the dates, the value of the goods and the CGST & SGST amounts paid and the total amount were set out in a tabular form. The three invoices were dated 11th April, 2018, 30th April, 2018 and 13th August, 2018. It was further pointed out that the Petitioner had reflected the purchases so made in the return 3B for the relevant showing the total tax paid purchases and tax collected messages and that no mismatch in the return had been intimated to the Petitioner. It was ascertained that the purchases had been made from a dealer, who is registered with the Department, and ITC was being claimed on the basis of the tax

invoices that fulfilled the requirement of law. Reliance was placed on a decision of the Delhi High Court in *On Quest Merchandising India Pvt. Ltd. v. Government of NCT of Delhi (2017) 64 GST 623 (Delhi)*, wherein it was observed that the buyer cannot be put in jeopardy when he has done all that the law requires him to do and further that the purchasing dealer has no means to ascertain and secure compliance of the selling dealer.

5. On 17th October, 2020 an intimation was issued in Form GST DRC-01A Part-A under Section 74(5) of the OGST Act read with Rule 142(1A) of the OGST Rules by Opposite Party No.2 calling upon the Petitioner to pay the tax, interest and penalty amount aggregating to Rs.3,48,066/- on the ground that the 'ITC claimed was against fake invoices issued by nonexistent supplier'. A reply was sent on 2nd November, 2020 by the Petitioner to Opposite Party No.2 asking for being provided with the material in possession of Opposite Party No.2.

6. On 3rd December, 2020, Opposite Party No.2 cancelled the Petitioner's registration with effect from 3rd November, 2020 with the remark "clarification submitted not satisfactory, hence cancelled."

7. On 10th December, 2020 the Petitioner applied under Section 30 of the OGST Act for revocation of the cancellation of registration. On 18th December, 2020, Opposite Party No.2 issued SCN in Form GST REG-23 for rejection of the said application. After the Petitioner filed a reply thereto on 24th December, 2020,

Opposite Party No.2 on 7th January, 2020 rejected the revocation application.

8. On 8th January, 2021 Opposite Party No.2 issued a SCN under 74 (1) of the OGST Act read with Rule 142(1) of the OGST Rules fixing the date of filing the reply to the SCN dated 17th October, 2020 till 8th February, 2021.

9. The Petitioner at that stage filed W.P.(C) No.2708 of 2021 in this Court. The said writ petition was disposed of by this Court on 17th January, 2021 directing the Petitioner to file an appeal before the Appellate Authority. Challenging the order dated 7th January, 2021, the Petitioner filed an appeal before the Additional Commissioner CT & GST (Appeals). The said appeal was rejected by impugned order dated 5th April, 2021.

10. This Court has heard the submissions of Mr. P.K. Harichandan and Mr. Padhy and Mr. Mishra, learned Additional Standing Counsel (ASC) for the Department.

11. The reasoning in the impugned order dated 5th April, 2021 of the Appellate Authority is only that “the preventive measure has been taken by the LPO by cancellation of the registration of the appellate to prevent future fraud or to prevent from recurrence for such the regular claims of the ITC and that is the interest of the Government revenue”. As noted earlier, the cancellation of the Petitioner’s registration was for a very terse reason: “clarification submitted not satisfactory”. As a result, the Court is not in a

position to appreciate the actual reasons that prevailed with either the Appellate Authority or the LPO for cancellation of the Petitioner's GST registration.

12. At the outset, it is noted that Mr. Harichandan confines his submission to the restoration of the Petitioner's registration. According to him, of the 21 transactions of purchase made by the Petitioner during the relevant period, it is only the purchase from one dealer viz., M/s. Pawansut Enterprises, that has attracted the SCN issued to the Petitioner by Opposite Party No.2 on the ground that ITC had been claimed against a fake invoice.

13. It is submitted by Mr. Harichandan that on a collective reading of Section 16 of the OGST Act with Rule 21 of the OGST Rules 2017, there is no provision that enables the cancellation of the registration of the purchasing dealer for any fraud committed by the selling dealer. Secondly, he points out that the cancellation registration of the selling dealer M/s. Pawansut Enterprises took place only on 1st October, 2019 i.e., long after the dates of the purchases made by the present Petitioner from the said dealer. He, therefore, submits that on the date of purchases took place, there was no way that the Petitioner would have known that at some future point in time, the registration of the selling dealer was going to be cancelled.

14. Mr. Padhy, learned ASC for the Department drew the attention of the Court to the reply filed to the present petition where it has been stated that when a field visit was undertaken to the address

shown for the selling dealer, the premises were found to be occupied by some other person and not the selling dealer. From the said visits which were undertaken on 1st July 2019, a conclusion was drawn that the transactions entered into by the present Petitioner with the selling dealer in April and August 2018 were fake transactions.

15. The Court finds merit in the contention of Mr. Harichandan that for the fraud committed by the selling dealer, which resulted in cancellation of a selling dealer's registration, there cannot be an automatic cancellation of the registration of the purchasing dealer. Rule 21 of the OGST Rules reads as under:

“21. Registration to be cancelled in certain cases.

The registration granted to a person is liable to be cancelled, if the said person,-

- (a) ★ does not conduct any business from the declared place of business; or
- (b) issues invoice or bill without supply of goods or services in violation of the provisions of the Act, or the rules made thereunder; or
- (c) violates the provisions of Section 171 of the Act or the rules made thereunder.”

16. None of the three circumstances outlined above, in Clauses (a), (b) & (c) are attracted in the present case. Consequently, Rule 21 of the OGST Rules cannot be invoked by the Department, in circumstances such as the present, to cancel the registration of the purchasing dealer.

17. The decision of the Gujrat High Court dated 10th December, 2020 in Special Leave Application No.15508 of 2020 (*Vimal Yashwantgiri Goswami v. State of Gujarat*) supports the case of the Petitioner. There, in nearly identical circumstances, the High Court came to the conclusion that the cancellation of registration was without any reason and the explanation offered by the registered dealer in response to the SCN issued for cancellation of registration was not even discussed. Here too apart from simply stating that the explanation offered was not 'satisfactory', no reasons have been given by the LPO for cancellation of the petitioner's registration. The appellate order also only proceeds on the basis that this is a preventive measure. It fails to discuss the explanation offered by the Petitioner.

18. To the same effect a decision dated 3rd August, 2021 of the High Court of Telengana at Hyderabad in W.P.No.7063 of 2021 (*M/s. Deem Distributors Private Ltd. v. Union of India*). In the present case, on the dates that the Petitioner entered into the transactions of purchase with M/s. Pawansut Enterprises i.e. April and August, 2018, the GST registration of M/s. Pawansut Enterprises had not been cancelled. That was to take place much later on 1st October, 2019. Therefore, on the date the purchases took place there was no means for the Petitioner to know that entity which had a valid GST number, was in fact non-existent.

19. To attribute fraud in such circumstances to the Petitioner, as a purchasing dealer, the Department would have to satisfy a high threshold of showing that the purchaser indulged in the

transactions with the full knowledge that the selling dealer was non-existent. The Department would have to show that somehow the purchasing dealer and selling dealer acted in connivance to defraud the revenue. This threshold has not been made in the present case. In other words, the Department has failed to show that the Petitioner as a purchasing dealer deliberately availed of the ITC in respect of the transactions with an entity knowing that such an entity was not in existence.

20. For the aforementioned reasons, the impugned order of the LPO rejecting the Petitioner's application for revocation of its cancellation of registration and the impugned appellate order dated 5th April, 2021 rejecting the Petitioner's appeal are hereby set aside. The Department is now directed to restore the Petitioner's registration forthwith by issuing appropriate orders/directions not later than one week from today. The Petitioner will correspondingly now be permitted to file all the return which it could not file on account of the cancellation of the registration.

21. The petition is allowed in above terms. No order as to costs. An urgent certified copy of this order be granted as per rules.

(Dr. S. Muralidhar)
Chief Justice

(B.P. Routray)
Judge