(3) is of unsound mind and stands so declared by a competent authority; or

(4) has been removed or dismissed from the service of the State Government or Central Government or a body corporate owned or controlled by such Government; or

(5) has, in the opinion of the State Government, such financial or other interest as is likely to prejudicially affect his functions as the President or a member."

4. In the counter affidavit, the ground for cancellation of the selection of the petitioner is that the petitioner was an office bearer of a political party, and therefore, his working as a Member of the District Consumer Commission would be prejudiced. It is to be noted that in the impugned order, no reason whatsoever was provided and this explanation has been provided only in the counter affidavit. Supplanting of reason by way of a counter affidavit cannot be a substitute for having providing reasons in the main order itself. (see: Mohinder Singh Gill & another vs The Chief Election Commissioner, New Delhi and others, reported in 1978 (1) SCC 405).

5. In any event, we find that the reason provided in the counter affidavit is flimsy and does not fall in any of the clauses for disqualification as prescribed in Rule 5 of the Rules. The petitioner has himself informed to this Court that if he was appointed as a Member of the District Consumer Commission, he would have given resignation from the post that he was holding. Under such circumstances, we find that the impugned order is without any merit and deserves to be quashed and set-aside.

6. Accordingly, the impugned order dated March 1, 2023 and subsequent communication dated March 14, 2023 are quashed and set-aside. In the event, there is any vacancy of the post of Member of the District Consumer Commission, the petitioner should be appointed within eight weeks from date.

7. The writ petition is allowed.

(2024) 9 ILRA 1472
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.
THE HON'BLE MANJIVE SHUKLA, J.

Writ Tax No. 1396 of 2024

Hcl Infotech Ltd. ...Petitioner
Versus
Commissioner, Commercial Tax & Anr. ...Respondents

Counsel for the Petitioner:
Atul Gupta

Counsel for the Respondents:
C.S.C.

Law of taxation – Constitution of India,1950 - Article 226 - The Central Goods and Services Tax Act, 2017- Section 61 -Show cause notice under Section 74 CGST Act,2017 under challenge-previous proceedings under Section 73 CGST Act,2017 already dropped-no allegation of fraud or suppression of facts- notice lacked jurisdiction as it did not specify any fraud, wilful misSt.ment, or suppression of facts, which are necessary to invoke Section 74- show cause notice quashed-possibility of fresh proceedings allowed if necessary conditions are met-petition allowed. (Paras 19, 20, 21, 22, 25,26 and 27)

HELD:

We take note of the fact that Section 73 of the CGST Act gives power to the adjudicating authority to initiate proceedings for recovery of wrongly availed or utilized Input Tax Credit along with interest and penalty for any reason other than the reason of fraud or any wilful mis-St.ment or suppression of facts to evade tax. It is to be taken note of that Section 73 comes into play in all other circumstances except the cases where Input Tax Credit has been wrongly availed or utilized due to fraud or any wilful misSt.ment or suppression of facts to evade tax. Thus, from bare reading of Section 73 of the CGST Act, it becomes crystal clear that if the proceedings under Section 73 of the CSGT Act have been finalized, they cannot be reopened except the case where the Input Tax Credit has wrongly been availed or utilized due to fraud or any wilful mis-St.ment or suppression of facts to evade tax. (Para 21)

We find that proceedings initiated against the petitioner for availing or utilizing the excessive ITC have already been finalized by the Respondent No. 2 and the proceedings were dropped vide order dated 30.12.2023 therefore, the said proceedings could have been reopened under Section 74 of the CGST Act only if the adjudicating authority was prima facie satisfied that the petitioner has availed or utilized Input Tax Credit due to any fraud or any wilful mis-St.ment or suppression of facts to evade tax. The field of operation of Section 73 and 74 of the CGST Act is altogether different i.e. Section 73 operates in all other cases of wrongly availed or utilized Input Tax Credit for any reason other than fraud or wilful mis-St.ment or suppression of facts and Section 74 comes into play when the excessive Input Tax Credit has been availed due to some fraud or wilful mis-St.ment or suppression of facts. Thus it is patently manifest that for deriving the jurisdiction to initiate proceedings under Section 74 of the CGST Act, the adjudicating authority must expressly mention in the Show Cause Notice that he is prima-facie satisfied that the person has wrongly availed or utilized Input Tax Credit due to some fraud or a wilful mis-St.ment or suppression of facts to evade tax and that must be specifically spelled out in the Show Cause Notice. Once the aforesaid basic ingredient of the Show Cause Notice under Section 74 of the CGST Act is missing, the proceedings become without jurisdiction as the adjudicating authority derives jurisdiction to proceed under Section 74 of the CGST Act only when the basic ingredients to proceed under Section 74 are present. (Para 22)

We find that the impugned Show Cause Notice does not make even a whisper of the fact that petitioner has wrongly availed or utilized Input Tax Credit due to any fraud, or wilful mis-St.ment or suppression of facts to evade tax therefore, the proceedings initiated against the petitioner under Section 74 of the CGST Act are without jurisdiction for the lack of basic ingredients required under the said clause. So far as the argument advanced by the learned counsel appearing for the respondents that the writ petition against the Show Cause Notice is not maintainable, is concerned, we find that it is consistent view of the Hon'ble Supreme Court that if the Show Cause Notice is without jurisdiction, then the same can be challenged by filing writ petition before the High Court under Artilce 226 of the Constitution of India. (Para 25)

In the present case, we do not find that the basic ingredients required for initiating proceedings under Section 74 of the CGST Act are present in the impugned Show Cause Notice dated 30.12.2023. Therefore, the entire exercise including the Show Cause Notice is without jurisdiction and thus this writ petition under Article 226 of the Constitution of India is maintainable. (Para 26)

In view of the aforesaid reasons, we are of the categorical view that the impugned Show Cause Notice dated 03.08.2024 in its present form lacks basic ingredients to proceed in the matter under Section 74 of the CGST Act. Therefore, the impugned Show Cause Notice dated 03.08.2024 and the entire exercise initiated pursuant thereto is absolutely without jurisdiction and is liable to be quashed. (Para 27)

Petition allowed. (E-13)

List of Cases cited:

1. U.O.I. Vs Hindalco Industries, (2003) 5 SCC 194

2. Raj Bahadur Narain Singh Sugar Mills Ltd. Vs U.O.I., 1996 (88) E.L.T. 24 (S.C.)

3. CCE Vs H.M.M. Ltd., 1995 (76) E.L.T. 497 (S.C.)

(Delivered by Hon'ble Shekhar B. Saraf, J.
&
Hon'ble Manjive Shukla, J.)

1. Heard Sri Atul Gupta, learned counsel appearing for the petitioner and Sri Ankur Agarwal, learned Standing Counsel appearing for the respondents.

2. Petitioner has filed this writ petition challenging therein the Show Cause Notice No. ZD090824020702H dated 03.08.2024 issued by the Deputy Commissioner, State Tax, Sector-2 NOIDA, U.P. under Section 74 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the 'CGST Act').

3. Facts of the case, in brief, are that the petitioner is a public limited company and under the erstwhile regime it had centralised Service Tax registration in the State of U.P. and was procuring various input services to supply the IT services and had availed CENVAT Credit of the Service Tax and Cess paid thereon in terms of the CENVAT Credit Rules, 2004. Thereafter the Goods and Services Tax (GST) was introduced w.e.f. 01.07.2017 and for the purposes of GST petitioner got itself registered under the new regime vide GSTIN 09AADCH0305F1Z4. Since on the appointed date i.e. on 01.07.2017, the petitioner had unutilized CENVAT Credit of Service Tax, Education Cess Secondary & Higher Education Cess and Krishi Kalyan Cess amounting Rs. 5,47,57,755 as such said amount was transferred into the GST regime by filing Form GST TRAN-1 in terms of Section 140 of the CGST Act.

4. The petitioner out of the aforesaid carried forward transitional credit transferred the Input Tax Credit amounting Rs. 3,28,25,979/- under Section 140(8) of the CGST Act to the persons having same PAN and registered in the States of Gujarat, Himachal Pradesh, Karnataka and Rajasthan therefore, the net transitional credit remained with the petitioner in State of Uttar Pradesh amounting to Rs. 2,19,31,776/-. The petitioner in the month of March, 2018 reversed Rs. 25,31,801/- pertaining to carried forward credit of Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess in GSTR-3B return filed for the month of March, 2018.

5. The Department issued a notice under Section 61 of the UPGST Act in Form GST ASMT-1 bearing reference no. ZD0904231397471 dated 29.04.2023 whereby the alleged discrepancies in the returns filed for the FY 2017-18 based on alleged scrutiny of such returns were intimated to the petitioner. Petitioner filed his reply on 05.07.2023 wherein it was categorically stated that there are no discrepancies and further clarified that the transitional credit of Rs. 2,19,31,776 has been claimed in accordance with provisions of Section 140(1) and Section 140(9) of the CGST Act and out of such total transitional credit, an amount of Rs. 25,31,801/- pertaining to Cess was already reversed.

6. Thereafter on 30.09.2023 a Show Cause Notice under Section 73 of the CGST Act was issued to the petitioner whereunder for the period from July, 2017 to March, 2018 a demand of Rs. 5,76,12,310/- along with interest and penalty was proposed. The petitioner submitted a detailed reply on 18.11.2023 to the aforesaid Show Cause Notice issued

under Section 73 of the CGST Act. The petitioner in its reply submitted that credit of Rs. 2,19,31,776/- has been claimed under Section 140(1) and 140(9) of the CGST Act and further out of such credit of Rs. 2,19,31,776/- and amount of Rs. 25,31,801/- pertaining to Cess was already reversed. The petitioner in its reply also clarified that Section 140(9) allows the registered person to take credit on the amount of service tax, which was earlier reversed due to non-payment of consideration, on payment of the consideration within a period of three months from the appointed date.

7. The Deputy Commissioner, State Tax, Sector-2 NOIDA, U.P. after considering the reply submitted by the petitioner and carrying out the verification of the documents and amounts passed the adjudication order No. ZD0912236703957 on 30.12.2023 whereby proceedings initiated against the petitioner under Section 73 of the CGST Act were dropped.

8. The Respondent No. 2 once again on the same facts has issued Show Cause Notice to the petitioner on 03.08.2024 under Section 74 of the CGST Act wherein it has been stated that the CENVAT closing balance of the petitioner in June 2017 was Rs. 4,16,00,772/- whereas petitioner had availed ITC amounting Rs. 5,47,57,755/- as such petitioner had availed excessive ITC amounting Rs. 1,31,56,983/-.

9. Learned counsel appearing for the petitioner has submitted before this Court that regarding the same issue of claim of the petitioner for Input Tax Credit earlier proceedings were drawn by issuing a Show Cause Notice under Section 73 of the CGST Act and ultimately Respondent No. 2, on being satisfied with the reply submitted by the petitioner and after verification of the documents and amounts, dropped the proceedings vide order dated 30.12.2023 as such now again the same issue cannot be reopened by issuing a Show Cause Notice to the petitioner under Section 74 of the CGST Act.

10. Learned counsel appearing for the petitioner has argued that Section 73 and 74 of the CGST Act are independent from each other and they operate in different facts and circumstances. In the case of excessive claimed ITC, the proceedings are to be drawn under Section 73 of the CGST Act and once the said proceedings are concluded, same cannot be reopened. So far as Section 74 of the CGST Act is concerned, proceedings can be drawn under the said section where the adjudicating authority has some evidence and information to make out a reasonable belief that the excessive ITC has been availed by reason of fraud or any wilful mis-statement or suppression of facts to evade Tax.

11. Learned counsel appearing for the petitioner has further argued that the adjudicating authority derives jurisdiction to initiate proceedings under Section 74 of the CGST Act only after his prima-facie belief that the assessee has wrongly availed or utilized ITC by reason of fraud, or any wilful mis-statement or suppression of facts. He further submits that Section 74 of the CGST Act gives extended period of limitation to initiate proceedings thereunder, therefore unless in the Show Cause Notice it is categorically mentioned that the adjudicating authority has some information or evidence to make out a prima-facie belief that the assessee has wrongly availed or utilized ITC by reason of fraud, or any wilful mis-statement or suppression of facts, the proceedings under

Section 74 of the CGST Act would be without jurisdiction and cannot be carried out.

12. It has been argued on behalf of the petitioner that for the same amount of Input Tax Credit availed by the petitioner, once the proceedings under Section 73 have been dropped in favour of the petitioner, same cannot be reopened under Section 74 of the CGST Act by simply stating that the petitioner had availed excessive Input Tax Credit.

13. It has also been argued on behalf of the petitioner that since the Show Cause Notice issued under Section 74 of the CGST Act does not contain the essential ingredients for initiating proceedings under Section 74 of the CGST Act, as there is no mention in the impugned Show Cause Notice that petitioner has wrongly availed or utilized ITC by reason of fraud, or any wilful mis-statement or suppression of facts, the impugned Show Cause Notice dated 3.8.2024 is absolutely without jurisdiction.

14. Learned counsel appearing for the petitioner, to buttress his arguments, has relied on following judgments rendered by the Hon'ble Supreme Court:-

(i) Union of India Vs. Hindalco Industries, (2003) 5 SCC 194.

(ii) Raj Bahadur Narain Singh Sugar Mills Ltd. Vs. Union of India, 1996 (88) E.L.T. 24 (S.C.)

(iii) CCE Vs. H.M.M. Limited, 1995 (76) E.L.T. 497 (S.C.)

15. Sri Ankur Agarwal, learned Standing Counsel appearing for the respondents has argued that initially proceedings against the petitioner carried out under Section 73 of the CGST Act were dropped and later on, since the adjudicating authority is of the view that petitioner has availed or utilized excessive ITC by suppression of material facts, as such proceedings under Section 74 of the CGST Act have been initiated against the petitioner by issuing impugned Show Cause Notice dated 3.8.2024.

16. Learned Standing Counsel appearing for the respondents has also argued that the petitioner has approached this Court at the stage of Show Cause Notice therefore, this writ petition in its present form is not maintainable and petitioner may raise all the points before Respondent No.2 and there the issues raised by the petitioner shall be considered in accordance with law.

17. We have considered the arguments advanced by the learned counsels appearing for the parties.

18. For analysing the arguments advanced by the learned counsels appearing for the parties, it would be apt to have a brief look of Section 73 and 74 of the CGST Act. Section 73 & 74 of the CGST Act are delineated below:

"Section 73 of CGST Act, 2017

73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful mis-statement or suppression of facts.—

(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 utilised for any reason, other than the reason of fraud or any wilful-

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 utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.

(2) The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 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) or, as the case may be, the statement under sub-section (3), 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) Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent. of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within three 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 utilised relates to or within three years from the date of erroneous refund.

(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.

Section 74 of CGST Act, 2017

74. Determination of tax not paid or short paid or erroneously refunded or

input tax credit wrongly availed or utilised by reason of fraud or any willful-misstatement or suppression of facts.—

(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 utilised by reason of fraud, or any wilful-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 utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(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) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five percent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(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 equivalent to ten percent of tax or ten thousand, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under sub-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 utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded."

19. It has been argued on behalf of the petitioner that they were having CENVAT Credit of the Service Tax and Cess amounting Rs. 5,47,57,755/- in terms of the CENVAT Credit Rules, 2004 and after the enforcement of GST regime w.e.f. 01.07.2017 the aforesaid amount was transferred Input Tax Credit (ITC) by filing Form GST TRAN-1 in terms of the Section 140 of the CGST Act. Out of the aforesaid amount of Rs. 5,47,57,755/- petitioner availed Input Tax Credit amounting Rs. 3,28,25,979/- and thereafter amount of Rs. 2,19,31,776/- transitional credit remained balance with the petitioner in State of Uttar Pradesh. Petitioner also reversed Rs. 25,31,801/- pertaining to carried forward cess.

20. We find that proceedings under Section 73 of the CGST Act were initiated against the petitioner by issuing a Show Cause Notice on 30.09.2023 whereby petitioner was required to show cause in respect of the excessive ITC availed by the petitioner during the period from July, 2017 to March 2018. Petitioner filed a detailed reply and after considering the said reply and verification of the documents and the amounts, Respondent No. 2 passed order on 30.12.2023 whereby the proceedings in respect of excessive ITC availed by the petitioner, were dropped.

21. We take note of the fact that Section 73 of the CGST Act gives power to the adjudicating authority to initiate proceedings for recovery of wrongly availed or utilized Input Tax Credit along with interest and penalty for any reason other than the reason of fraud or any wilful mis-statement or suppression of facts to evade tax. It is to be taken note of that Section 73 comes into play in all other circumstances except the cases where Input Tax Credit has been wrongly availed or utilized due to fraud or any wilful mis-statement or suppression of facts to evade tax. Thus from bare reading of Section 73 of the CGST Act, it becomes crystal clear that if the proceedings under Section 73 of the CSGT Act have been finalized, they cannot be reopened except the case where the Input Tax Credit has wrongly been availed or utilized due to fraud or any wilful mis-statement or suppression of facts to evade tax.

22. We find that proceedings initiated against the petitioner for availing or utilizing the excessive ITC have already been finalized by the Respondent No. 2 and the proceedings were dropped vide order dated 30.12.2023 therefore, the said proceedings could have been reopened under Section 74 of the CGST Act only if the adjudicating authority was prima facie satisfied that the petitioner has availed or utilized Input Tax Credit due to any fraud or any wilful mis-statement or suppression of facts to evade tax. The field of operation of Section 73 and 74 of the CGST Act is altogether different i.e. Section 73 operates in all other cases of wrongly availed or utilized Input Tax Credit for any reason other than fraud or wilful mis-statement or suppression of facts and Section 74 comes into play when the excessive Input Tax Credit has been availed due to some fraud or wilful mis-statement or suppression of facts. Thus it is patently manifest that for

deriving the jurisdiction to initiate proceedings under Section 74 of the CGST Act, the adjudicating authority must expressly mention in the Show Cause Notice that he is prima-facie satisfied that the person has wrongly availed or utilized Input Tax Credit due to some fraud or a wilful mis-statement or suppression of facts to evade tax and that must be specifically spelled out in the Show Cause Notice. Once the aforesaid basic ingredient of the Show Cause Notice under Section 74 of the CGST Act is missing, the proceedings becomes without jurisdiction as the adjudicating authority derives jurisdiction to proceed under Section 74 of the CGST Act only when the basic ingredients to proceed under Section 74 are present.

23. The Hon'ble Supreme Court in the case of **Raj Bahadur Narain Singh Sugar Mills Ltd. Vs. Union of India, reported in 1996 (88) E.L.T. 24 (S.C.)** has held as follows:-

"9. We have set out the relevant parts of the show cause notice. It speaks of an erroneously granted rebate. There is no mention in it of any collusion, wilful mis-statement or suppression of fact by the appellants for the purposes of availing of the larger period of five years for the issuance of a notice under Rule 10. The party to whom a show cause notice under Rule 10 is issued must be made aware that the allegation against him is of collusion or wilful misstatement or suppression of fact. This is a requirement of natural justice. It is also the law, laid down by this Court in *Collector of Central Excise v. H.M.M. Limited – 1995 (76) E.L.T. 497.* It has been said there with reference to Section 11A of the Central Excises and Salt Act, 1944, which replaced Rule 10, that if the authorities propose to invoke the proviso to Section 11A(1), the show cause notice must put the assessee to notice which of the various commissions and omissions stated in the proviso is committed to extend the period from six months to five years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the authorities. The defaults enumerated in the proviso were more than one and if the authorities placed reliance on the proviso, it had to be specifically stated in the show cause notice which was the allegation against the assessee falling within the four corners of the said proviso."

24. The Hon'ble Supreme Court in the case of **CCE Vs. H.M.M. Limited,** reported in **1995 (76) E.L.T. 497 (S.C.)** has held as follows:-

"2.The assessee contended before the Additional Collector of Central Excise that the show cause notice was time barred under the main part of Section 11A since it was issued after the expiry of the period of six months stipulated therein but the Additional Collector sustained the notice on the ground that it was within five years impliedly holding that the purported action was under the proviso to Section 11A of the Act. There is no dispute that the show cause notice cannot be sustained under sub-section (1) of Section 11A unless the proviso is attracted. Admittedly, it is beyond the period of limitation of six months prescribed under Section 11A (1) but it is within the extended period of 5 years under the proviso to that sub-section. Now in order to attract the proviso it must be shown that the excise duty escaped payment by reason of fraud, collusion or wilful misstatement or suppression of fact or contravention of any provision of the Act or of the Rules made thereunder with

intent to evade payment of duty. In that case the period of six months would stand extended to 5 years are provided by the said proviso. Therefore, in order to attract the proviso to Section 11A (1) it must be alleged in the show cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or wilful misstatement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been noticed or that the assessee was a guilty or wilful misstatement or suppression of fact. In the absence of such averments in the show cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11A(1) of the Act. The Additional Collector while conceding that the notice had been issued after the period of six months prescribed in Section 11A(1) of the Act had proceeded to observe that there was wilful action of withholding of vital information apparently for evasion of excise duty due on this waste/by-product but counsel for the assessee contended that in the absence of any such allegation in the show cause notice the assessee was not put to notice regarding the specific allegation under the proviso to that sub-section. The mere non-declaration of the waste/by-product in their classification list cannot establish any wilful withholding of vital information for the purpose of evasion of excise duty due on the said product. There could be, counsel contended, bona fide belief on the part of the assessee that the said waste or by-product did not attract excise duty and hence it may not have been included in their classification list. But that per se cannot go to prove that there was the intention to evade payment of duty or that the assessee was guilty o f fraud, collusion, misconduct or suppression to attract the proviso to Section 11A(1) of the Act. There is considerable force in this contention. If the Department proposes to invoke the proviso to Section 11A(1), the show cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The de- faults enumerated in the proviso to the said sub-section are more than one and if theexcise department places reliance on the proviso it must be specifically stated in the show cause notice which is the allegation against the assessee falling within the four comers of the said proviso. In the instant case that having not been specifically stated the Additional Collector was not justified in inferring (merely because the assessee had failed to make a declaration in regard to waste or by- product) an intention to evade the payment of duty. The Additional Collector did not specifically deal with this contention of the assessee but merely drew the inference that since the classification list did not make any mention in regard to this waste product it could be inferred that the assessee had apparently tried to evade the payment of excise duty."

25. We find that the impugned Show Cause Notice does not make even a whisper of the fact that petitioner has wrongly availed or utilized Input Tax Credit due to any fraud, or wilful mis-statement or suppression of facts to evade

tax therefore, the proceedings initiated against the petitioner under Section 74 of the CGST Act are without jurisdiction for the lack of basic ingredients required under the said clause. So far as the argument advanced by the learned counsel appearing for the respondents that the writ petition against the Show Cause Notice is not maintainable, is concerned, we find that it is consistent view of the Hon'ble Supreme Court that if the Show Cause Notice is without jurisdiction then the same can be challenged by filing writ petition before the High Court under Artilce 226 of the Constitution of India.

26. In the present case, we do not find that the basic ingredients required for initiating proceedings under Section 74 of the CGST Act are present in the impugned Show Cause Notice dated 30.12.2023. Therefore the entire exercise including the Show Cause Notice is without jurisdiction and thus this writ petition under Article 226 of the Constitution of India is maintainable.

27. In view of the aforesaid reasons, we are of the categorical view that the impugned Show Cause Notice dated 03.08.2024 in its present form lacks basic ingredients to proceed in the matter under Section 74 of the CGST Act. Therefore, the impugned Show Cause Notice dated 03.08.2024 and the entire exercise initiated pursuant thereto is absolutely without jurisdiction and is liable to be quashed.

28. Accordingly, this writ petition is allowed. The Show Cause Notice dated 03.08.2024 is quashed leaving it open for Respondent No. 2 to initiate fresh proceedings under Section 74 of the CGST Act against the petitioner by issuing a fresh Show Cause Notice containing the basic ingredients regarding fraud or wilful mis-statement or suppression of facts to evade tax, if they so exist.

(2024) 9 ILRA 1482
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2024

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ A No. 21492 of 2023
connected with other cases

Vinod Kumar Srivastava ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner
Avdhesh Narayan Tiwari, Shivendu Ojha, Sr. Advocate

Counsel for the Respondents:
C.S.C.

A. Service Law – Salary - U.P. Secondary Education Service Selection Board, 1982 - Sections 18 & 33G(8) - The U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 - The action of St. terminating services and stopping salary on 09.11.2023 was against the statutory provisions as well as the dictum of Hon'ble Apex Court. The GO of 09.11.2023 had created the entire chaos in the St. of U.P. as far as regularization of candidates appointed prior to 30.12.2000. (Para 29)

In the St. *ad hocism* has been going on for last 40 years in the aided Institutions. The Government from time to time had inserted various provisions in the Act of 1982 for regularising the services of teachers who were appointed either on *ad hoc* basis or against a short term vacancy. The candidates had been litigating the matter before this Court either for getting their salary post appointment, or for getting their services regularised. Many of the