Court No. - 6

Case :- WRIT TAX No. - 405 of 2023

Petitioner :- M/S Swati Poly Industries Pvt Ltd
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Nishant Mishra,Yashonidhi Shukla
Counsel for Respondent :- C.S.C.

And

Case :- WRIT TAX No. - 408 of 2023

Petitioner :- M/S Swati Poly Industries Pvt. Ltd.
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Nishant Mishra,Yashonidhi Shukla
Counsel for Respondent :- C.S.C.

Hon'ble Pankaj Bhatia,J.

Heard counsel for the petitioner and learned Standing Counsel for the respondent.

Both the said writ petitions arises out of the same order in respect to different financial years as the issues argued are same, the same are being decided by means of the present common order for the sake of brevity, the facts of Writ Tax No. 405 of 2023 are being recorded.

The contention of the counsel for the petitioner is that a show cause notice was issued to the petitioner on 30.11.2019 (Annexure No. 5), wherein a date was fixed for the petitioner to file his reply to the show cause notice, no date for hearing was fixed as is clear from the perusal of the notice dated 23.07.2020, which is on record as Annexure No. 6. It appears that the petitioner did not file a reply to the show cause notice, as such, a reminder no. 2 dated 18.09.2020 was served upon the petitioner calling upon the petitioner to file a reply on 25.09.2020. Once again no date for personal hearing was fixed in the said communication which is on record as Annexure No. 6.

It is argued that the petitioner did not file a reply on account of Covid situation and on account of the accountant being unwell. As such, an order came to be passed against the petitioner on 01.10.2020 (Annexure No. 2), whereby the demand was quantified against the petitioner under Section 74 of the U.P. GST Act. The

petitioner preferred an appeal against the said order which according to the petitioner was passed without giving opportunity of hearing. As the amount which is required to be deposited for consideration of the appeal, could not be deposited by the petitioner on account of poor financial conditions, the appeal came to be dismissed by means of an order dated 28.11.2020. Both the said order i.e. the order dated 01.10.2020 and the order dated 28.11.2020 are under challenge. In so far as the writ petition relates to challenge of the order dated 28.11.2020, whereby the appeal was dismissed for want of deposit, no interference is called for as it is well settled that the appeal is a creature of statute which can prescribe conditions for availing the said statutory remedy. The petitioner having not complied with the condition for availing statutory remedy of appeal, no fault can be found with the order dated 28.11.2020. However, the fact remains that the appeal has been dismissed without consideration, as such, the doctrine of merger would not apply and the order dated 01.10.2020 will not be deemed to have merged in the order dated 28.11.2020. As the petitioner has also challenged the order dated 01.10.2020 in the present writ petition, the same is to be considered on its merits.

The neat consideration of the counsel for the petitioner is that the proceedings were initiated under Section 74 against the petitioner, the manner of decision making is specified under Sub-Section (4) of Section 75 of the U.P. GST Act, which specifically provides that an opportunity of hearing shall be granted where a request is received in writing from the person chargeable with tax for penalty or where an adverse decision is contemplated against such person.

In the light of the said Sub-Section (4), It is argued that even if no demand in writing for hearing is made out, Section 75(4) makes it mandatory to grant opportunity of hearing where an adverse decision is contemplated. He has placed reliance on the judgment of this Court in the case of ***Bharat Mint & Allied Chemicals Vs. Commr. of Commercial Tax (Writ Tax No. 1029 of 2021, decided on 04.03.2022),*** wherein this Court in Para 9 has held as under:-

"9. From perusal of Section 75(4) of the Act, 2017 it is evident that opportunity of hearing has to be granted by authorities under the Act, 2017 where either a request is received from the person chargeable with tax or penalty for opportunity of hearing or where any adverse decision is contemplated against the person, such a person even need not to request for opportunity of personal hearing and it is mandatory for the authority concerned to afford opportunity of personal hearing before passing an order adverse to such person".

Learned Standing Counsel placed upon instruction has produced the ordersheet which led to passing of the order dated 01.10.2020. The said instructions and the ordersheet do not reveal that any order fixing date for hearing was ever served upon the petitioner. The order itself indicates that two dates were fixed for filing reply as are clear from the perusal of Annexure 6 to the petition. Both the said notices did not fix any date for personal hearing which is a mandatory condition in terms of Section 75(4) of the U.P. GST Act.

The order dated 01.10.2020 also does not reveal that any personal hearing was accorded to the petitioner prior to passing of the order, as such, the inescapable conclusion from the material available on record is that petitioner was not granted personal hearing which is required and is mandatory under Section 75(4), as such, on that ground alone the order dated 01.10.2020 is quashed. The respondents shall be at liberty to conclude the proceedings in accordance with law afresh, if so advised.

Writ Petition No. 408 of 2023 is also allowed. On the same anology and order dated 22.10.2021 impugned therein is quashed.

Order Date :- 10.4.2023
S.A.

Digitally signed by :-
SALMAN AHMAD
High Court of Judicature at Allahabad