

**HON'BLE SRI JUSTICE U.DURGA PRASAD RAO
AND
HON'BLE SRI JUSTICE T.MALLIKARJUNA RAO**

WRIT PETITION No.5571 of 2021

ORDER: *(per UDPR, J)*

The petitioner prays for writ of mandamus declaring the impugned order AAAR/AP/04(GST)2020, dated 28.09.2020, passed by the Appellate Authority for advance ruling as illegal, arbitrary and to set aside the same and pass further appropriate orders.

2. The petitioner's case briefly is thus:-

(i) The petitioner is a proprietary concern and a leading educational institution providing coaching to students for obtaining educational qualifications viz., Chartered Accountancy Certificate ('CA'), Cost and Works Accountancy Certificate ('ICWA') and their ilk. While so, the petitioner filed application for advance ruling vide Form GST ARA – 01 (as per Rule 104(1)) of CGST Act seeking ruling inter alia on the point whether the coaching/training provided by the applicant for students for the above courses conducted by it fall within the wider meaning of the term

‘education’ and in relation to education and other related aspects. The Advance Ruling Authority (herein after, ‘ARA’) after elaborate hearing passed its ruling vide order AAR No.08/AP/GST/2020, dated 05.03.2020, wherein the ARA held that the applicant was not eligible for the exemption under Entry No.66(a) of Notification No.12/2017-CT(Rate), dated 28.06.2017, as amended. It also gave rulings on the other related issues raised by the petitioner before it.

(ii) Aggrieved by the above rulings, the petitioner filed appeal before the appellate authority for advance ruling and after hearing, the appellate authority dismissed the appeal on 28.09.2020 by confirming the rulings made by the ARA. Aggrieved, the present writ petition is filed by the petitioner.

3. Heard the arguments of learned counsel for petitioner, Sri Y.Sreenivasa Reddy and Sri Suresh Kumar Routhu, learned Senior Standing Counsel for CBIC and learned Government Pleader for Commercial Tax representing for the respondents.

4. (a) The main plank of argument of learned counsel for petitioner is that even by the date of filing of application before ARA on 15.12.2020, the GST has already cancelled the registration

under GST Act of the petitioner and further the Director General of Goods and Services Tax Intelligence (herein after, 'DGGSTI'), Visakhapatnam, had called for certain documents and enquired about the payment of GST on the services provided by the petitioner and the petitioner had submitted the documents called for and also gave the statement submitting that there was no tax on the educational services submitted by him. The copies of summons dated 01.07.2019 and 11.09.2019 were issued to the applicant by the DGGSTI in that regard. Learned counsel would submit that all these facts were succinctly narrated by the petitioner in Para 11 of his application. It was also brought to the notice of ARA that show-cause notice was not issued and no docket proceedings were pending against the applicant by the date of its application. Learned counsel would strenuously argue that the above proceedings would indicate that the DGGSTI had already commenced investigation as against the petitioner even before he filed application before ARA and in that view, in the light of first proviso to sub-section (2) of section 98 of CGST/APGST Act, the ARA should not have admitted the application of the petitioner in

view of the pendency of the proceedings. Learned counsel drew the attention of this Court to the word ‘any proceedings’ mentioned in the said proviso and argued that the said term comprehends within it the investigation also. As such, when the investigation proceedings are pending against the applicant, the application of such applicant shall not be entertained by the ARA in view of the embargo created in the aforesaid proviso. To buttress his arguments, learned counsel referred to Section 70 of CGST/APGST Act. Besides, he also relied upon the following citations:

(i) *Appellate Authority for Advance Ruling, Karnataka v. M/s.Karnataka Co-operative Milk Producers Federation Limited*¹,

(ii) *Appellate Authority for Advance Ruling, Gujarat, v. J.K.Papad Industries*², and

(iii) *Appellate Authority for Advance Ruling, Maharashtra, v. Arihant Enterprises*³.

¹ 2020 (3) TMI 73

² 2021 (10) TMI 60

³ 2019 (11) TMI 397

(b) Learned counsel would submit that since the ARA was already made known that the investigation is pending against the petitioner, the authority ought not to have admitted his application. However, unfortunately, the primary authority has not only admitted his application but also gave rulings in respect of the questions raised by him. Hence, aggrieved by the said order, the petitioner filed appeal and in the said appeal, one of the grounds raised by him is with regard to the error committed by the ARA in admitting his application in view of the already pending investigation. Learned counsel referred Para 8 of the grounds of appeal in this regard. Then, learned counsel referring to the Para 5 of the appellate order, would submit that though the contention raised by the petitioner was mentioned, the appellate authority has not given any finding on the said contention and ultimately dismissed the appeal by confirming the order of the ARA. Learned counsel would thus submit that the original order as well as the appellate order are vitiated as they are against the spirit of the proviso to Section 98(2) of CGST/APGST Act. Learned counsel for petitioner would submit that subsequent to the disposal of the

appeal, the DGGSTI issued show-cause notice dated 09.03.2021 and the petitioner submitted reply. He would thus pray to set aside the order AAR No.08/AP/GST/2020, dated 05.03.2020, passed by the ARA as well as the order AAAR/AP/04(GST)/2020, dated 28.09.2020 and give liberty to the petitioner to agitate his case on all the legal and factual grounds which are available to him and the investigating authorities may be directed to consider those grounds without reference to the observations in the order dated 05.03.2020 of the ARA and the order dated 28.09.2020 of the Appellate Authority.

5. Learned Senior Standing Counsel filed counter and opposed the writ petition. He would submit that the order of the appellate authority is perfectly valid and legal and therefore, there is no requirement to interfere with the same. He prayed to dismiss the writ petition.

6. The point for consideration is whether there are merits in the writ petition to allow?

7. As can be seen, the main thrust of argument of learned counsel for petitioner is that in view of the commencement of the

investigation by the DGGSTI even before the submission of application by the petitioner, the ARA ought not to have admitted his application. In this regard, it is apposite to refer to section 98 of the CGST/AP GST Act, which reads thus:

“98. Procedure on receipt of application:-

(1) On receipt of an application, the Authority shall cause a copy thereof to be forwarded to the concerned officer and, if necessary, call upon him to furnish the relevant records:

Provided that where any records have been called for by the Authority in any case, such records shall, as soon as possible, be returned to the said concerned officer.

(2) The Authority may, after examining the application and the records called for and after hearing the applicant or his authorised representative and the concerned officer or his authorised representative, by order, either admit or reject the application:

Provided that the Authority shall not admit the application where the question raised in the application is already pending or decided in any proceedings in the case of an applicant under any of the provisions of this Act:

Provided further that no application shall be rejected under this sub-section unless an opportunity of hearing has been given to the applicant:

Provided also that where the application is rejected, the reasons for such rejection shall be specified in the order.

(3) A copy of every order made under sub-section (2) shall be sent to the applicant and to the concerned officer.

(4) Where an application is admitted under sub-section (2), the Authority shall, after examining such further material as may be placed before it by the applicant or obtained by the Authority and after providing an opportunity of being heard to the applicant or his authorised representative as well as to the concerned officer or his authorised representative, pronounce its advance ruling on the question specified in the application.

(5) Where the members of the Authority differ on any question on which the advance ruling is sought, they shall state the point or points on which they differ and make a reference to the Appellate Authority for hearing and decision on such question.

(6) The Authority shall pronounce its advance ruling in writing within ninety days from the date of receipt of application.

(7) A copy of the advance ruling pronounced by the Authority duly signed by the members and certified in such manner as may be prescribed shall be sent to the applicant, the concerned officer and the jurisdictional officer after such pronouncement.”

As can be seen, Section 98(2) of the CGST/APGST says that authority may after examining the application and records called for and after hearing the applicant or his authorized representative, by order, either admit or reject the application. Thus, the sub-section (2) says that after hearing the petitioner or his authorized representative, the authority may either admit or reject the

application. However, for admitting the application of the applicant, a qualification is provided in the form of proviso to the said section. The proviso says that the authority shall not admit the application where the question raised in the application is already pending or decided in any proceedings in the case of an applicant under any of the provisions in the said Act. Thus, it is needless to emphasize that the first proviso puts an embargo on the authority of the ARA to admit an application. The said embargo says that where the questions raised in the application are already pending or decided by any proceedings in the case of an applicant under any of the provisions of the CGST/APGST Act, the authority shall not admit the application. The submission of the petitioner herein is that the phrase ‘any proceedings’ encompasses the investigation of an application under the provisions of the Act. To buttress his argument, the petitioner referred to Section 70 of the APGST Act, which reads thus:

70. Power to summon persons 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 (Act No. 5 of 1908).

(2) Every such inquiry referred to in sub-section (1) shall be deemed to be a “judicial proceedings” within the meaning of Section 193 and Section 228 of the Indian Penal Code, 1860. (Act No. 45 of 1860)”

As per the said section, the proper officer under this Act shall have the power to summon any person 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. Such enquiry referred to in sub-section (1) shall be deemed to be judicial proceedings within the meaning of section 193 and 228 of the Indian Penal Code. Thus, the proceedings conducted by the investigating authority under the provisions of this Act shall be construed as judicial proceedings as per the CGST/APGST Act.

8. In *Appellate Authority for Advance Ruling, Karnataka’s case (supra 1)*, the appellate authority for ARA, Karnataka was inter alia considering the argument of the department that the respondent/applicant therein suppressed the factum of investigation that has been initiated by the DGGSTI under the CGST Act and its filing incidental report dated 17.01.2019 and obtained the ruling

from authority for advance ruling by keeping the said authority in darkness and therefore, the said ruling was invalid and void ab initio. In that context, learned appellate authority for Advance Ruling, Karnataka has observed thus:

“6.1. The Appellant submitted that it was brought to their notice by the DGGI, Bangalore Zone Unit, that M/s.KCMPFL (the applicant-respondent) had suppressed vital facts in the application made before the Authority for Advance Ruling about the investigations that had been initiated by the DGGI under the CGST Act, 2017; that investigation was initiated by the Central authority Directorate General of GST Intelligence, Bangalore against the applicant and incident report was issued on 17.01.2019; that this fact of investigations conducted by DGGI against the applicant was not brought to the notice of the Authority; that the Advance Ruling thus obtained by keeping the Authority for Advance Ruling in the dark appears to be not a legal and correct order and therefore it should be appealed against as the subject order of the Authority appears to be invalid ab initio. They referred to the proviso to Section 98(2) of the CGST Act which states that advance ruling cannot be obtained when investigations have been initiated; that it has been brought to their notice that a number of cases have been booked by DGGI across India and in some cases the taxpayers have admitted the stand of the Department and made the payments of differential tax. The Appellant submitted that since huge revenue is at stake, the ruling of the lower Authority should be held as void ab initio.

x x x x x

15. It becomes clear from the above that the respondent KCMPFL made an application for advance ruling on 20th March, 2019 all the while being aware of the investigation being conducted against them by the DGGI, Bangalore. The respondent KCMPFL chose to keep this fact away from the Authority for Advance Ruling at the time of filing the application. The application for advance ruling could not have been made in this case as it is hit by the provisions of Section 98 (2) of the CGST Act in as much as an investigation was already initiated against them by DGGI on the very same issue that was raised before the Authority for Advance Ruling. We therefore hold that the order of the lower Authority is void ab initio as it was vitiated by the provisions of Section 98(2) of the CGST Act.”

9. In ***Appellate Authority for Advance Ruling, Gajarat’s case (supra 2)*** also, the appellate authority for advance ruling, Gujarat was dealing with the term ‘any proceedings’ mentioned in Section 98(2) of CGST Act. In this context, the said authority has observed thus:

“17. The appellant has contended that the proceedings under Section 67 or Chapter XIV of the CGST Act, 2017 are not covered under the term ‘proceedings’ used in the first proviso to sub-section (2) of section 98 of the CGST Act, 2017. We find that this contention of the appellant is not borne out from the plain reading of the said proviso. As per the said proviso, the authority shall not admit the application where the question raised in the application is already pending or decided in any proceedings in the case of an applicant under any of the provisions of this Act. The term ‘any’ used in the said proceedings in the case of an applicant under any of the phrase ‘the

provisions of this Act' leaves no room for any doubt and make it amply clear that the scope of the proviso is wide and it covers any proceedings under any of the provisions of the CGST Act, 2017 with the conditions that such proceedings should be related to the question raised in the application and such proceedings should be in the case of the applicant. In the present case, the proceedings initiated by the DGGI, Surat was in the case of the appellant and it was precisely related to the question raised in the application filed before the GAAR. Therefore, the application of the appellant could not have been admitted by the GAAR in view of the first proviso to sub-section (2) of Section 98 of the CGST Act, 2017.”

10. In ***Appellate Authority for Advance Ruling, Maharashtra's case (supra 3)***, the learned Appellate Authority for Advance Ruling, Maharashtra, was considering the effect of commencement of the investigation prior to the submission of application by an applicant before the concerned advance ruling authority. In that context, it was observed thus:

“165. Thus, it is seen from the above facts of the case that investigations proceedings were approved on 15.01.2019 and the search was conducted on 5.2.2019. The statement of the Director of KOTI u/s 70 was recorded on 5.2.2019, and the statement of M/s Srinivas Kamath (Wholetime Director of KOTI) was recorded on 11.2.2019. The application for advance ruling was filed on 25.2.2019 by the applicant respondent at the behest of KOTI. It becomes clear from the above that there was a deliberate intention on the part of KOTI as well as its applicant-respondent to obtain a decision clandestinely without revealing the issue of investigation being initiated

against KOTI on the very same issue that was raised before the ARA.”

The authority has ultimately set aside the order passed by the ARA declaring the same as void ab initio.

11. Thus, the above jurisprudence tells us that any proceedings referred to in 98(2) proviso encompasses within it the investigation against the applicant as per the provisions of CGST/APGST Act and if by the date of filing of the application before the ARA, already such proceedings were commenced, the ARA shall not admit the application inviting advance ruling. Learned Senior counsel for respondent has not placed any contra citations before us to hold any other view.

12. Coming to the instant case, summons were issued to the petitioner on 01.07.2019 by Senior Intelligence Officer, DGGSTI and the panchanama was recorded on 01.07.2019. Copy of panchnama proceedings filed along with the writ petition contains a detailed examination of the petitioner by the Senior Intelligence Officer. The question numbers 9 to 16 relate to the courses conducted by the petitioner, the registration of the petitioner

institution under GST Act and its payment of tax etc. particulars, which can be said to be concerning to the provisions of the CGST/APGST Act. Therefore, it can be said that the investigation was commenced even prior to the filing of the application by the petitioner before ARA.

13. Having regard to the legal position that when investigation has already commenced prior to the filing of application, the ARA shall not admit the application as per proviso to sub-section (2) of Section 98, we are of the view that the ARA should not have admitted the application in the instant case and issued its ruling. Therefore, the said order dated 05.03.2020 is vitiated by law. This fact was brought to the notice of the appellate authority in the grounds of appeal. Though the said ground is mentioned, unfortunately, the appellate authority has not given its finding on the said ground raised by the petitioner. Therefore, the order of the appellate authority is also vitiated by law. Hence, we find force in the submission of learned counsel for petitioner that both the orders are liable to be set aside.

14. Accordingly, this writ petition is allowed and the order dated 05.03.2020 of ARA and order dated 28.09.2020 of the appellate authority are set aside and the petitioner is given liberty to appear before the appropriate authority and submit his explanation and to take all factual and legal pleas that are permissible under law and the said authority shall consider and proceed in accordance with law without being influenced by the orders passed by the ARA and appellate authority. No costs.

As a sequel, interlocutory applications pending, if any, shall stand closed.

U.DURGA PRASAD RAO, J

T.MALLIKARJUNA RAO, J

23.11.2022
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