

Allahabad High Court

M/S Shyam Sundar Sita Ram Traders vs State Of U.P. And 2 Others on 20 March, 2023

Bench: Pankaj Bhatia

HIGH COURT OF JUDICATURE AT ALLAHABAD

?Court No. - 6

Case :- WRIT TAX No. - 991 of 2021

Petitioner :- M/S Shyam Sundar Sita Ram Traders

Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- Pranjal Shukla

Counsel for Respondent :- C.S.C.

Hon'ble Pankaj Bhatia,J.

Heard Sri Pranjal Shukla, learned Counsel for the petitioner and learned Standing Counsel.

The present petition has been filed by the petitioner challenging the order dated 17.05.2021 (Annexure No.9) passed by the respondent no.3, Assistant Commissioner, Commercial Tax, Bareilly, whereby the application filed for revocation of cancellation of registration has been rejected, as well as the order dated 14.09.2021 passed by the Additional Commissioner, Commercial Tax, respondent no.2 in Appeal No.APL1/057/2021, whereby the appeal has been dismissed.

The contention of the Counsel for the petitioner is that the petitioner is a registered Proprietorship firm and is doing the business in accordance with the Act and Rules. On 15.12.2020, the petitioner changed its business address and in this regard, the petitioner moved an amendment application, which was approved by the department on 09.02.2021. It is stated that on 03.01.2021, a survey was conducted by the department at the earlier place of business and it was found that the firm is not existing/ running from the registered place. It is stated that a show cause notice was issued on 11.02.2021 (Annexure No.3) wherein it was alleged that the registration is liable to be cancelled on the basis of information received from STF that the firm is not existing/ running at the registered place.

It is stated that in absence of the reply to the show cause notice dated 11.02.2021, the registration of the firm was cancelled vide order dated 31.03.2021 cancelling the registration on the ground that as per the information received, the firm was indulged in availing fake ITC credit from bogus firm. It was recorded that the reply given by the petitioner was not satisfactory as at the time of survey, no business activity was found at the given address. It was also recorded that the amendment as alleged was not given before the survey and was an after thought.

It is stated that the petitioner thereafter moved an application under Section 30 of the GST Act seeking revocation of cancellation of the registration. It is alleged that without issuing any show cause notice prior to taking decision on the application seeking revocation, an order came to be passed on 17.05.2021 rejecting the application of the petitioner. In the said order, it was mentioned that despite notice dated 22.04.2021, no reply has been submitted. Aggrieved by the order dated 17.05.2021, the petitioner preferred an appeal which came to be dismissed mainly on the foundation that in terms of the information received from various sources, ITC reversal orders were passed and nothing was found with regard to the said firm at the time of survey.

The contention of the Counsel for the petitioner is that the cancellation of the registration can be resorted to only when the conditions specified in sub-section 2 of Section 29 of the GST Act are attracted. To analyse the said submission, Section 29(2) is quoted hereinbelow:

"29. Cancellation or suspension of registration.

(1) ...

(2) The proper officer may cancel the registration of a person from such date, including any retrospective date, as he may deem fit, where,-

(a) a registered person has contravened such provisions of the Act or the rules made thereunder as may be prescribed; or

(b) a person paying tax under section 10 has not furnished returns for three consecutive tax periods; or

(c) any registered person, other than a person specified in clause (b), has not furnished returns for a continuous period of six months; or

(d) any person who has taken voluntary registration under sub-section (3) of section 25 has not commenced business within six months from the date of registration; or

(e) registration has been obtained by means of fraud, wilful misstatement or suppression of facts:

Provided that the proper officer shall not cancel the registration without the person an opportunity of being heard:

[Provided further that during pendency of the proceedings relating to cancellation of registration, the proper officer may suspend the registration for such period and in such manner as may be prescribed.] ..."

The Counsel for the petitioner argues that in none of the clauses as enumerated in Section 29(2) and as recorded above, non-availing ITC credit as is alleged against the petitioner, can be a ground for cancellation. He further argues that in the show cause notice, the only allegation levelled was that nothing was found in the premises in question. He places reliance on the judgments of this Court in the case of DRS Wood Products Lucknow vs State of U.P. and others, decided on 05.08.2022 in Writ-C No.21692 of 2021 and in the case of Apparent Marketing Private Limited vs State of U.P. and others, decided on 05.03.2022 in Writ Tax No.348 of 2021.

The Counsel for the petitioner further argues that for availment of credit, the stand of the respondents is that they are issuing a show cause notice for recovery of the credit wrongly availed as is clear from the perusal of the counter affidavit.

In the light of the said averments as contained in the counter affidavit, he argues that on the one hand, the stand of the respondents is that the firm is not existent whereas on the other hand, steps are being taken for recovery of the ITC allegedly wrongly taken under Section 74 of the CGST Act and both of them cannot go simultaneously.

The Counsel for the respondent argues that at the time of survey, nothing was found in the firm in question and the approval relied upon by the petitioner was subsequent to the survey, as such, he argues that the same is after thought.

Be that as it may, from the perusal of the order passed in appeal as well as the order cancelling the registration, it is apparent that the respondents have committed error while deciding the issue on the ground that several firms were availing wrong ITC credit and were essentially bogus firms. This Court in the case of Apparent Marketing Private Limited (Supra) has already dealt with the said issue and has recorded that once registration is granted, the same could be cancelled only in terms of the conditions prescribed under Section 29(2) and allegedly being a bogus firm is not a ground enumerated under Section 29(2). Thus following the said judgment and coupled with the fact that the respondents themselves have initiated proceedings against the firm under Section 74, the order rejecting the application for revocation was a wrong exercise of power by the department. The appellate order is equally bad, inasmuch as, no such ground was mentioned before passing the order of cancellation and, thus the impugned orders 17.05.2021 and 14.09.2021 are set aside.

It is made clear that the respondent would be at liberty to conclude the proceedings, if any initiated under Section 74 of the Act as per the stand taken in the counter affidavit.

The writ petition is allowed.

Order Date :- 20.3.2023 akverma