

HIGH COURT OF UTTARAKHAND AT
NAINITAL

THE HON'BLE CHIEF JUSTICE MS. RITU BAHRI
AND
THE HON'BLE JUSTICE SRI RAKESH THAPLIYAL

Review Application MCC No. 1 of 2022

In

Special Appeal No. 123 of 2022

Between:

Vinod Kumar

.....Appellant

And

Commissioner Uttarakhand
State GST and others

.....Respondents

Counsel for the appellant	:	Mr. S.K. Posti, learned Senior Counsel assisted by Mr. Ashutosh Post, learned counsel
Counsel for the review applicant/respondents	:	Mr. Shobhit Saharia, learned Special Counsel along with Mr. Mohit Maulekhi and Ms. Pooja Banga, learned Brief Holder

Upon hearing the learned Counsel, the Court made the following:

Judgment: (per Mr. Rakesh Thapliyal, J.)

The instant Review Application has been preferred for reviewing the judgment and order passed by this Court dated 20.06.2022, whereby the Special Appeal was allowed and the judgment and order passed by the learned Single Judge dated 30.09.2021, passed in Writ Petition (M/S) No. 1553 of 2021 was set aside and the matter was remanded back to the learned Single Judge for consideration on merits, holding that the writ petition is maintainable.

2. When this writ petition came up before the learned Single Judge, the argument was advanced by the learned counsel for the petitioner that as the Appellate Tribunal has not yet been constituted in the State of Uttarakhand as provided under Section 109 of GST Act, hence the writ petition is maintainable. The learned Single Judge directed the State counsel to get instructions in the matter as to whether the Appellate Tribunal has been constituted in the State of Uttarakhand or not. On the date fixed, it was informed to the Court that no Appellate Tribunal has yet been constituted as per Section 109 of the Act. Subsequently, the aforesaid writ petition was dismissed by the learned Single Judge on 30.09.2021.

3. Aggrieved against the judgment dated 30.09.2021, the instant Special Appeal was preferred, which was allowed on 20.06.2022 by holding that the writ petition is maintainable and simultaneously, by allowing the Appeal the matter was remanded back to the learned Single Judge for consideration on merits.

4. The learned counsel for the parties informed to this Court that thereafter, the learned Single Judge disposed of the writ petition by judgment and order dated 18.08.2022 with the direction that "in an event if the petitioner deposits the entire defaulted amount, including the penalty and interest payable on it (if not already deposited by the petitioner), as it was standing on the date of cancellation of the GST registration, his prior registration would be considered to be renewed by

the respondents within a period of three weeks from the date of depositing the said amount.” The order passed by the learned Single Judge dated 18.08.2022 was not challenged by either of the parties.

5. Subsequently, after the disposal of the writ petition by the learned Single Judge by judgment dated 18.08.2022, the present Review Application has been preferred on behalf of respondent Nos. 1 & 2 on 26.09.2022 along with the Delay Condonation Application (IA/2/2022), wherein the counter affidavit was called by this Court by order dated 21.10.2022, since no counter affidavit was filed, Mr. S.K. Posti, learned Senior Counsel was appointed as an Amicus Curiae to argue to the case *pro bono* by order dated 18.11.2022.

6. With the consent of the learned Amicus Curiae and the learned counsel for the review applicant, the delay of 63 days in preferring the Review Application is hereby condoned; accordingly, the Delay Condonation Application stands disposed of.

7. The main genesis of filing of the Review Application in the present case is that the office of the Commissioner, State Tax, Uttarakhand, in exercise of powers conferred under sub-Section (1) and sub-Section (3) of Section 5 read with clause (91) of Section 2 of the Uttarakhand Goods and Service Tax Act, 2017 (Act No. 06 of 2017) and the rules framed thereunder, passed an order on 30.06.2017 and at Sl. No. 10, the Assistant Commissioner of State Tax, State Goods and Service Tax

Officer has been assigned the functions of proper officer under the Uttarakhand Goods and Service Tax Act, 2017.

8. By referring the said order dated 30.06.2017, the learned counsel for the review applicant submits that since the Assistant Commissioner, who is declared as “proper officer”, is assigned the functions to discharge in exercise of the power conferred by Sub Section (1) and Sub Section (3) of Section 5 read with Section 2(91) of the Uttarakhand Goods and Service Tax Act, 2017 and hence as per Section 107 of the Act, the Appeal shall lie to the Commissioner.

9. At this juncture, certain relevant provisions of the Act, namely the Uttarakhand Goods and Service Tax Act, 2017 are being extracted herein as below:-

10. Proper Officer is defined under Section 2(91) of the Act which reads as under:-

2(91). “proper officer” in relation to any function to be performed under this Act, means the Commissioner or the officer of the State tax who is assigned that function by the Commissioner;

11. Section 29 of the Act pertains to cancellation (or suspension) of registration and sub Section (1) of the said Section stipulates that the “proper officer” shall cancel the registration. Section 29(1) of the Act is also being reproduced herein as below:

29(1) The proper officer may, either on his own motion or on an application filed by the registered person or by his legal heirs, in case of death of such person, cancel the registration, in such manner and

within such period as may be prescribed, having regard to the circumstances where, —

12. Section 107 of the Act pertains to the Appeals to Appellate Authority and the same is also being extracted herein as under:

“107. Appeals to Appellate Authority.-(1)

Any person aggrieved by any decision or order passed under this Act or the Central Goods and Services Tax Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.

(2) The Commissioner may, on his own motion, or upon request from the Commissioner of Central tax, call for and examine the record of any proceedings in which an adjudicating authority has passed any decision or order under this Act or the Central Goods and Services Tax Act, for the purpose of satisfying himself as to the legality or propriety of the said decision or order and may, by order, direct any officer subordinate to him to apply to the Appellate Authority within six months from the date of communication of the said decision or order for the determination of such points arising out of the said decision or order as may be specified by the Commissioner in his order.

(3) Where, in pursuance of an order under subsection (2), the authorised officer makes an application to the Appellate Authority, such application shall be dealt with by the Appellate Authority as if it were an appeal made against the decision or order of the adjudicating authority and such authorised officer were an appellant and the provisions of this Act relating to appeals shall apply to such application.

(4) The Appellate Authority may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months or six months, as the case may be, allow it to be presented within a further period of one month.

(5) Every appeal under this section shall be in such form and shall be verified in such manner as may be prescribed.

(6) No appeal shall be filed under sub-section (1), unless the appellant has paid—

(a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and

(b) a sum equal to ten per cent of the remaining amount of tax in dispute arising from the said order, in relation to which the appeal has been filed which may extend maximum upto twenty five crore rupees.

[Provided that no appeal shall be filed against an order under sub-section (3) of Section 129, unless a sum equal to twenty-five per cent of the penalty has been paid by the appellant.]

(7) Where the appellant has paid the amount under sub-section (6), the recovery proceedings for the balance amount shall be deemed to be stayed.

(8) The Appellate Authority shall give an opportunity to the appellant of being heard.

(9) The Appellate Authority may, if sufficient cause is shown at any stage of hearing of an appeal, grant time to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(10) The Appellate Authority may, at the time of hearing of an appeal, allow an appellant to add any ground of appeal not specified in the grounds of appeal, if it is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable.

(11) The Appellate Authority shall, after making such further inquiry as may be necessary, pass such order, as it thinks just and proper, confirming, modifying or annulling the decision or order appealed against but shall not refer the case back to the adjudicating authority that passed the said decision or order:

Provided that an order enhancing any fee or penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund or input tax credit shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order:

Provided further that where the Appellate Authority is of the opinion that any tax has not been paid or short-paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised, no order requiring the appellant to pay such tax or input tax credit shall be passed unless the appellant is given notice to show cause against the proposed order and the order is passed within the time limit specified under section 73 or section 74.

(12) The order of the Appellate Authority disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for such decision.

(13) The Appellate Authority shall, where it is possible to do so, hear and decide every appeal within a period of one year from the date on which it is filed:

Provided that where the issuance of order is stayed by an order of a court or Tribunal, the period of such stay shall be excluded in computing the period of one year.

(14) On disposal of the appeal, the Appellate Authority shall communicate the order passed by it to the appellant, respondent and to the adjudicating authority.

(15) A copy of the order passed by the Appellate Authority shall also be sent to the Commissioner or the authority designated by him in this behalf and the jurisdictional Commissioner of Central tax or an authority designated by him in this behalf.

(16) Every order passed under this section shall, subject to the provisions of section 108 or section 113 or section 117 or section 118 be final and binding on the parties."

13. Adjudicating Authority is also defined under Section 2(4) of the Act, which reads as under:-

“2(4) “adjudicating authority” means any authority, appointed or authorised to pass any order or decision under this Act, but does not include the Commissioner, Revisional Authority, the Authority for Advance Ruling, the Appellate Authority for Advance Ruling, the Appellate Authority and the Appellate Tribunal.”

14. By referring the aforesaid provisions of the Act, learned counsel for the review applicant submits that from the conjoint reading and harmonious construction of the aforesaid provisions of the Act, it is clear that the Assistant Commissioner being the “proper officer” is very much with the jurisdiction to pass an order for cancellation of GST registration and falls within the definition of “adjudicating authority”, as defined under Section 2(4) of the Uttarakhand Goods and Service Tax Act, 2017.

15. It is further submitted by the learned counsel for the review applicant that admittedly an Appeal is provided under Section 107(1) of the Act against any decision or order passed under the Uttarakhand Goods and Service Tax Act, 2017 by an adjudicating authority and under Section 2(4) of the Act, the Commissioner has been excluded being the adjudicating authority.

16. He further submits that since the Assistant Commissioner of State Tax has been assigned the functions of “proper officer” under the Uttarakhand Goods and Service Tax Act, 2017 by an order dated 30.06.2017, passed by the Commissioner of State Tax of Uttarakhand, Dehradun, by invoking the powers conferred under sub-Section (1) and sub-Section (3) of Section 5 read with clause (91) of Section 2 of the

Uttarakhand Goods and Service Tax Act, 2017 and the Rules framed thereunder, therefore, for all purposes, the Appeal shall lie before the Appellate Authority i.e. the Commissioner of State Tax.

17. It is contended by the learned counsel for the review applicant that since the adjudicating authority, as defined under Section 2(4) of the Act is the Assistant Commissioner, and as such, the judgment passed by this Court on 20.06.2022 is required to be reviewed wherein this Court draw a conclusion in para 12 that the order has not been passed by the Commissioner, but it has been passed by the Assistant Commissioner of GST, whereas as per Section 2(4) of the Uttarakhand Goods and Service Tax Act, 2017 is *pari materia* with the definition of “adjudicating authority” provided in Himachal Pradesh Goods and Service Act, 2017, and as such, it is evident that the expression “adjudicating authority” does not include among other authority, the Commissioner.

18. The said conclusion was drawn by this Court by framing question that “whether the Assistant Commissioner of GST, whose order is challenged in this case, is an adjudicating authority, or not? And this question was dealt by this Court in the light of the judgment rendered by the Hon’ble Supreme Court in the case of ***Radha Krishan Industries Vs. State of Himachal Pradesh and others, (2021) 6 Supreme Court Cases 771*** wherein the power to levy a

provisional attachment of the bank accounts by the Commissioner of GST was questioned.

19. This matter came up before the Hon'ble Supreme Court against the judgment rendered by the Hon'ble High Court of Himachal Pradesh, whereby the writ petition was dismissed and the Hon'ble Supreme Court took into consideration the provisions of Section 107 of the Himachal Pradesh Goods and Service Tax Act, 2017 (H.P. Act), as well as to Section 2(4) of the H.P. Act, which defines the adjudicating authority and gave a finding.

20. The question, as framed by this Court, has been considered in para 11, 12, 13, 14 and 15 of the judgment under review, which are being reproduced herein as below:-

“11) It is apparent from Sub-Section (1) of Section 107 of the Uttarakhand Act that any person aggrieved by any decision under the Act or the Central Goods and Services Tax Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within the time frame. Now the question is - whether the Assistant Commissioner of GST, whose order is challenged in this case, is an adjudicating authority, or not? This question came before the Hon'ble Supreme Court in the case of Radha Krishan Industries Vs State of Himachal Pradesh and others, (2021) 6 Supreme Court Cases 771, wherein the power to levy a provisional attachment of the bank accounts by the Commissioner of GST was questioned. Upon such challenge before the Hon'ble High Court of Himachal Pradesh, the said writ petition was dismissed. Thereafter, the matter went to the Supreme Court in a Special Leave Petition. The Hon'ble Supreme Court took into consideration the provision of Section 107 of the Himachal Pradesh Goods and Services Tax Act, 2017 (hereinafter referred to as 'the H.P. Act') as well as Section 2(4) of the H.P. Act, which defines adjudicating authority, and gave a finding. It is appropriate to take note of the fact that Sub-Section (1) of Section 107 of the H.P. Act, which is almost *pari materia* with the Sub-Section (1) of the Section 107 of the

Uttarakhand Act, which provides a forum for appeal against an order passed by an adjudicating authority. Section 2(4) of the H.P. Act provides that “adjudicating authority” means any authority, appointed or authorised to pass any order or decision under this Act, but does not include the Commissioner, Revisional Authority, the Authority for Advance Ruling, the Appellate Authority for Advance Ruling, the Appellate Authority and the Appellate Tribunal.

12) Section 2(4) of the Uttarakhand Act defines “adjudicating authority” to mean any authority, appointed or authorised to pass any order or decision under this Act, but does not include the Commissioner, Revisional Authority etc. The provisions of the Uttarakhand Act is *pari materia* with the definition of “adjudicating authority” provided in the H.P. Act. At paragraph 66 of the said judgment, the Hon’ble Supreme Court held that from the above definition, it is evident that the expression “adjudicating authority” does not include among other authorities, the Commissioner. In this case, the order has not been passed by the Commissioner, but it has been passed by the Assistant Commissioner of GST.

13) Section 3 of the Uttarakhand Act provides for the appointment of the class of officers which includes the Principal Commissioner of State Tax, Special Commissioner of State Tax, Commissioner of State Tax, and also the Assistant Commissioner of State Tax.

14) Section 5 provides for powers of officers. Section 5 of the Uttarakhand Act reads as under:

5. Powers of officers. –(1) Subject to such conditions and limitations as the Commissioner may impose, an officer of State tax may exercise the powers and discharge the duties conferred or imposed on him under this Act.

(2) An officer of State tax may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of State tax who is subordinate to him.,

(3) The Commissioner, may subject to such conditions and limitations as may be specified in this behalf by him, delegate his powers to any other officer who is subordinate to him.

(4) Notwithstanding anything contained in this section, an Appellate Authority shall not exercise the powers and discharge the duties conferred or imposed on any other officer of State tax.

15) Sub-Section (91) of Section 2 provides for the “proper officer” in relation to any function to be performed under this Act, means the Commissioner or the officer of the State tax who is assigned that functions by the Commissioner. Thus, it is apparent that the office of the Assistant Commissioner acts under the aegis and control of the Commissioner, and nowhere in the Uttarakhand Act, it is provided that he shall act independently to the duties assigned to him by the Commissioner. Therefore, the observation of the Hon'ble Supreme Court, i.e., the Commissioner is not an adjudicating authority, hence an appeal will not lie against the orders passed by him under Section 107 of the Uttarakhand Act shall also be applicable to any orders passed by the Assistant Commissioner, be it attachment of property or cancellation of GST registration number.

21. We examine the question, as framed by this Court wherein this Court drew a conclusion that under Section 2(4) of the Act, since this provision is *pari materia* with the definition of adjudicating authority provided in H.P. Act and since the office of the Assistant Commissioner acts under the aegis and control of the Commissioner, and nowhere in the Uttarakhand Act, it is provided that he shall act independently to the duties assigned to him by the Commissioner and hence an Appeal will not lie even against the orders passed by the Assistant Commissioner, be it attachment of property or cancellation of GST registration.

22. It is contended by the learned counsel for the review applicant that, firstly, the order passed by the office of the Commissioner of State Tax, Dehradun on 30.06.2017, whereby the assignment of function to “proper officer” under the Uttarakhand Goods and Service Act, 2017 has been assigned to Assistant Commissioner has not been challenged, therefore, for all purposes, pursuant to the said order dated 30.06.2017,

the Appeal will lie before the Commissioner by virtue of Section 107 of the Act. Learned counsel for the review applicant also submits by referring the order dated 30.06.2017 that as per the schedule as mentioned in this order, the word “proper officer” is used, hence there is assignment only in terms of Section 2(91) of the Uttarakhand Goods and Service Act, 2017.

23. He further submits that from conjoint reading of Section 29(1) read with Section 2(91) and Section 2(4) of the Uttarakhand Goods and Service Act, 2017, the order of cancellation of registration has been passed by the Assistant Commissioner and hence the Appeal will lie under Section 107(1) of the Act before the Commissioner.

24. He further submits that even as per Section 2(4) of the Uttarakhand Goods and Service Tax Act, 2017, it clearly defines that “adjudicating authority” excludes the Commissioner and as per order dated 30.06.2017, the Assistant Commissioner, being an officer under the Act is a proper officer and in terms of Section 29(1) is an adjudicating authority, as defined under Section 2(4) of the Act and hence, for all purposes, the Appeal will lie before the Commissioner.

25. It is also contended by the learned counsel for the review applicant that here in the present case, the Assistant Commissioner cancelled the registration of GST of the writ petitioner and the writ petitioner/appellant himself preferred an Appeal before the Appellate Authority and that is the reason, by relief No. 3, the writ

petitioner /appellant was praying for direction to decide the Appeal.

26. The learned counsel for the review applicant also placed reliance on a judgment rendered by the Hon'ble Supreme Court in **Civil Appeal No. 5121 of 2021, *the Assistant Commissioner of State Tax and others Vs. M/s Commercial Steel Limited***, decided on 03.09.2021.

27. Having heard the arguments of the learned Amicus Curiae for the appellant and the learned counsel for the review applicant and also perused the judgment relied upon by this Court. we are of the view that since by order dated 30.06.2017, the Assistant Commissioner of State Tax, State Goods and Services Tax Officer has been assigned the functions of proper officer under the Uttarakhand Goods and Service Tax Act, 2017 by invoking powers conferred under sub Section (1), sub Section (3) of Section 5 read with clause (91) of Section 2 of the Uttarakhand Goods and Service Act, 2007 (Act No. 06 of 2017) and the Rules framed thereunder, which has not been challenged by the writ petitioner in the writ petition, whereby the Assistant Commissioner, who passed the order of cancellation of GST registration, is admittedly is an adjudicating authority as per Section 2(4) of the Act, which excludes the Commissioner and is also a proper officer in terms of Section 29(1) of the Act and hence the Appeal will lie against an order passed by such officer, i.e. Assistant Commissioner to the Commissioner.

28. Since after the remand order, the writ petition was disposed of by the learned Single Judge on 18.08.2022, which has not been assailed and for a limited purposes the review application has been preferred whether an Appeal will lie before the Commissioner against an order passed by the Assistant Commissioner, therefore, the Review Application is being allowed, in part.

29. Consequently, the judgment and order passed by this Court on dated 20.06.2022 is reviewed and modified by holding that since the Commissioner has assigned the functions under the Act to the Assistant Commissioner and due to this assignment, the Assistant Commissioner being an officer under the Act is a proper officer in terms of Section 2(91) and also an adjudicating authority in terms of Section 2(4) of the Act and hence the Appeal will lie against the order passed by the Assistant Commissioner, before the Commissioner.

Ritu Bahri, C.J.

Rakesh Thapliyal, J.

Dt: 24th June, 2024

Mahinder/