

**IN THE HIGH COURT OF JHARKHAND AT RANCHI W.P.(T) No.
2444 of 2021**

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M/s Nkas Services Private Limited. --- --- Petitioner Versus

1. The State of Jharkhand
2. The Commissioner of State Taxes, Ranchi.
3. Deputy Commissioner of State Taxes, Godda. -- --- Respondents ---

CORAM: The Hon'ble Mr. Justice Aparesh Kumar Singh
The Hon'ble Mr. Justice Anubha Rawat Choudhary
Through Video Conferencing

For the Petitioner : M/s. Kartik Kurmy, Nitin Kr. Pasari
Sidhi Jalan, Advovates,

For the State : Mr. Salona Mittal, A.C. to G.A.

08/06.10.2021 Heard learned counsel for the petitioner and the respondents.

2. The Show-cause notice under Section 74 of the JGST Act, 2017 dated 7th June 2021 for the tax period July 2020 - September 2020 (Annexure-1) issued by the Deputy Commissioner of State Taxes (respondent no.3) has been challenged by the petitioner along with the consequential challenge to summary of show-cause notice in FORM DRC-01 dated 07th June 2021 (Annexure-2) issued in exercise of power under Rule 142(1)(a) of the Jharkhand Goods and Services Tax Rules, 2017.

3. On behalf of the petitioner the following grounds have been urged to assail the show-cause notice :-

- (i) The Show Cause Notice (SCN) dated 7th June 2021 is vague;
- (ii) The SCN is without jurisdiction and
- (iii) Proceeding initiated without service of FORM GST-ASMT-10 is void *ab-initio*.

4. Learned counsel for the petitioner Mr. Kartik Kurmy has, in support of the grounds of challenge, made the following submissions.

5. That the impugned show-cause notice is vague and does not disclose the offence and contraventions as it is a mere mechanical reproduction of the provisions of Section 74 without striking of the irrelevant portions. It is thus incapable of any reply and does not fulfill the ingredients of a notice in the eyes of law. Petitioner would be denied opportunity to properly defend itself. It is, therefore, in violation of principles of natural justice. The essential

requirements of proper notice is that it should

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specifically state charges which the noticee has to reply. In this regard reliance is placed on the decision of the Apex Court rendered in the case of ***Oryx Fisheries P. Ltd. Vs. Union of India reported in (2010) 13 SCC 427 (Para 24 to 27)***.

6. In support of the challenge to the summary to show-cause notice contained in Form DRC-01, it is submitted that what is not alleged in the show-cause notice under Section 74 cannot be part of such summary of show cause notice. As per Section 73(1)/74(1) the requirement is of 'notice' and not 'knowledge'. Section 75(7) of the Act contemplates that no demand shall be confirmed on the grounds other than the grounds specified in the notice. Petitioner relies upon the decision of the Apex Court rendered in the case of ***CCE Vs. Shital International reported in (2011) 1 SCC 109 (Para-19)***. It is submitted that the expression used in Section 73/74 requires proper application of mind by the proper officer. The expression 'appears to the proper officer' has not to be a casual act but should show full application of mind by the 'proper officer'. Reliance is placed upon the decision of the Apex Court rendered in the case of ***Dilip N. Shroff Vs. CIT reported in (2007) 6 SCC 329 (Para-86)***. It is further submitted that the CBEC Master Circular No.1053/2/2017-CX dated 10.03.2017 issued in exercise of powers under Section 37B of the Central Excise Act, 1944/Section 83 of the erstwhile Chapter V of the Finance Act, 1994 detailing guidelines for the authorities/field formation under the Central Excise Act, 1944 / Chapter V of the Finance Act, 1994 as to how a show-cause notice under Section 11A of the Act of 1944 and the Act of 1994 should be issued would apply to issuance of show cause notice under Section 73/74 of the JGST Act / CGST Act as the said provisions are *pari materia*. Learned counsel for the petitioner has further urged that the impugned SCN does not contain any foundational facts, such as allegations of fraud or willful misstatement or suppression of facts to evade tax which are *sine qua non* for assumption of jurisdiction to exercise the power under Section 74 of the Act. Therefore, the impugned show-cause notice lacking in jurisdictional fact is unsustainable in law. He relies upon the decisions of the Apex Court rendered in the cases of ***Larsen & Toubro Ltd. Vs. CCE reported in (2007) 9 SCC 617 (para 14 and 18)*** and ***Y. Narayan Chetty Vs. Income Tax Officer reported in (1959) 35 ITR 388 (SC) Page***

392. Lastly learned counsel for the petitioner submits that as per the scheme of the Act, self assessment is the rule and tax assessed by the registered person

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in the self assessed return is directly enforceable under Section 75(12) and under Section 79 of the Act. Under the scheme of the Act, the self assessment can be interfered only in the manner provided under Section 61 which contemplates scrutiny of the returns. It further contemplates service of notice in Form GST ASMT-10 so that discrepancy, if any, pointed out in the return can be rectified by the assessee. Only if he fails to do so and the ingredients of either Section 73 or Section 74 are made out, the proceeding under either of the Sections can be initiated as the foundational facts do suggest. In the instant case no GST ASMT-10 Form was ever served on the petitioner. Contention of the respondents made through the counter affidavit to the contrary have been denied by way of para-11(ii) and (vi) of the rejoinder affidavit. No proof of such service of GST ASMT-10 has been enclosed to the counter affidavit.

7. Learned counsel for the petitioner further submits that alternative remedy is not a bar to invoke writ jurisdiction under Article 226/227 of the Constitution of India, if the party is complaining of breach of fundamental rights or breach of mandatory provisions under the Act or violation of principles of natural justice. It is submitted that the impugned show-cause notice being vague and not disclosing the offences/contravention denies the petitioner of any opportunity to properly defend itself and is therefore clearly in violation of principles of natural justice. Reliance is placed upon the decision of *Oryx Fisheries P. Ltd. (supra)* and also on the decision of *CIT Vs. Chhabil Dass Agarwal reported in (2014) 1 SCC 603 para 15*. It is submitted that the period of dispute under the impugned show cause notice is between July 2020 to September 2020. During the said period the petitioner regularly filed their monthly returns of outward supplies in Form GSTR-1 under Section 38 read with Rule 59, monthly return of self assessment in form GSTR-3B under Section 39 read with Section 59 and Rule 61(5). Annual return/reconciliation statement was also filed in form GSTR 9/GSTR-9C under Section 44 read with Rule 80. Petitioner discharged payment of tax on its outward supplies in accordance with Section 49 of the Act. It is submitted that the proceedings in the instant case were initiated straight away under Section 74 of the Act by serving the impugned show

cause notice on 07.06.2021 along with the summary of show cause notice in DRC-01 on the same date without service of Form GST ASMT-10. Despite follow up by the petitioner with the office of the respondent no.3 through mail

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letter dated 29.06.2021, no response was made. Based on these contentions learned counsel for the petitioner has sought quashing of the impugned show cause notice issued under Section 74 of the Act being in violation of principles of natural justice and lacking in jurisdictional facts to initiate a proceeding under Section 74 of the Act on the allegations that the petitioner has wrongfully availed the input tax credit by reason of fraud or any willful misstatement or suppression of facts to evade tax or not paid or short paid or erroneously got refund of any tax. It is submitted that if the proceedings are allowed to continue on the basis of such an infirm show-cause notice, it would lead to an anomalous results as the adjudication order passed finally would be without any authority of law and lacking in jurisdiction. It would also be in violation of principles of natural justice. Therefore, the impugned show-cause notice and the summary to show-cause notice dated 7th June 2021 be quashed. It is submitted that the respondents may be directed to first serve the notice in GST ASMT-10 before proceeding against the petitioner in accordance with law.

8. Learned counsel for the respondents has objected to the prayer and submissions made by the petitioner. It is submitted that writ jurisdiction is not to be ordinarily invoked in matters concerning imposition of tax. He has placed reliance on the case of *CIT Vs. Chhabil Dass Agarwal reported in (2014) 1 SCC 603 para 11 and 16* as also in the case of *United Bank of India Vs. Satyawati Tandon reported in (2010) 8 SCC 110 para-43 to 45*. It is submitted that the petitioner has an efficacious alternative remedy of appeal after the proceedings are concluded and the order in original is passed. Learned counsel for the respondents has also reiterated the well recognized exceptions to the invocation of writ jurisdiction in the presence of an alternative remedy. It is further submitted that a notice ought not to be struck down, even if strictly not in the format, but if it contains in substance of the matter which a notice must contain. He has referred to the case of *Bihar Plastic Industries Ltd. Vs. State of Bihar & Ors. reported in (2000) 117 STC 346 para-17*. Learned counsel for the respondents has emphatically opposed the contention of the petitioner that service of GST ASMT-10 is a pre

condition for issuance of notice under Section 73/74 of the Act. The word 'may' has been used in Section 61. The language of Section 73/74 also does not suggest that a preliminary determination is to be done prior to issuance of notice. He submitted that in case there is a genuine error in striking out a

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particular item, the same would not lead to a conclusion that a notice itself is to be quashed. On the question of reliance of the petitioner upon the Master Circular dated 10th March 2017 issued by the CBEC, it is submitted that it only provides a guideline and cannot be said to have a binding force in law. Lastly it has been submitted on the part of the State that in case this Court feels inclined to interfere in the impugned show-cause notice, liberty may be granted to the respondents to proceed afresh in accordance with law from the same stage of the proceedings.

9. Learned counsel for the petitioner in reply submits that the show-cause notice was issued well within the statutory period of limitation.

10. We have considered the submissions of learned counsel for the parties and taken note of the grounds urged in the factual canvass of the case pleaded.

11. The impugned notice at Annexure-1 issued under Section 74 of the JGST Act 2017 is quoted hereunder :-

“Office of : Deputy Commissioner

Jurisdiction: Godda:Dumka:Jharkhand

State/UT: Jharkhand

Reference No.ZD2006210001396 Date: 07/06/2021

To

GSTIN/ID:20AADCN0972E1ZZ

Name: NKAS SERVICES PRIVATE LIMITED

*Address: GODDA, LALMATIA AREA, ECL RAJMAHAL,
Godda, Jharkhand, 814165*

Tax Period : JUL 2020 – SEP 2020 F.Y. 2020-21 ARN-NA Date- NA

(Voluntary payment intimation details, if applicable)

Act/ Rules Provisions:

JGST ACT 2017

Show Cause Notice under Section 74

It has come to my notice that tax due has not been paid or short paid or refund has been released erroneously or input tax credit has been wrongly availed or utilized by you or the amount paid by you through the above referred application for intimation of voluntary payment for the reasons and other details mentioned in annexure for the aforesaid tax period.

Therefore, you are directed to furnish a reply along with supporting documents as evidence in support of your claim by the date mentioned in table below. You may appear before the undersigned for personal hearing either in person or through authorized representative for representing your case on the date, time and venue, if mentioned in table below.

Please note that besides tax, you are also liable to pay interest and penalty in

accordance with the provisions of the Act.

Please also note that if you make payment of tax stated above along with up to date interest and penalty @ 25% of tax within 30 days of the communication of this notice, then proceeding may be deemed to have been concluded. Details of personal hearing etc.

Sr.No.	Description	Particulars
1	Section under which show cause notice/statement is	

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	issued	
2	Date by which reply has to be submitted	23/06/2021
3	Date of personal hearing	NA
4	Time of personal hearing	NA
5	Venue where personal hearing will be held	NA

Demand details-

(Amount in Rs.)

Sr. No.	Tax Rate(%)	Turn over	Tax Period		Act	POS (Place of supply)	Tax	Interest	Penalty	Others	Total
			From	To							
1	0	0.00	Jul 2020	Sep 2020	CGST	NA	1,63,17,267.50	17,13,313.08	1,63,17,267.50	0.00	3,43,47,848.08
2	0	0.00	Jul 2020	Sep 2020	SGST	NA	1,63,17,267.50	17,13,313.08	1,63,17,267.50	0.00	3,43,47,848.08
Total							3,26,34,535.00	34,26,626.16	3,26,34,535.00	0.00	6,86,95,696.16

Signature

Name : Arjun Bakshi

Designation: Deputy Commissioner

Jurisdiction: Godda:Dumka:Jharkhand”

12. While testing the propositions advanced by the parties, it is profitable to quote the provision of Section 74(1) of the Act of 2017 hereunder:-

“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 wilful 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.”

13. A bare perusal of the provision indicates that in a case where it appears to a 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 utilized by reason of fraud or any willful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax, which has not been paid or has been short paid or to whom refund has been erroneously 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

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in the notice along with the interest payable thereupon under Section 50 and a penalty equivalent to the tax specified in the notice. In contradistinction to the provision under Section 73 of the Act under the same Chapter-XIV relating to ‘Demands and Recovery’, the ingredients of Section 74 of the Act require either of the following ingredients to be satisfied for proceeding thereunder i.e. that the tax in question has not been paid or short paid or erroneously refunded or the ITC has been wrongly availed or utilized by reason of fraud or any willful misstatement or suppression of facts to evade tax.

14. A bare perusal of the impugned show-case notice creates a clear impression that it is a notice issued in a format without even striking out any irrelevant portions and without stating the contraventions committed by the petitioner i.e. whether its actuated by reason of fraud or any willful misstatement or suppression of facts in order to evade tax. Needless to say that the proceedings under Section 74 have a serious connotation as they allege punitive consequences on account of fraud or any willful misstatement or suppression of facts employed by the person chargeable with tax. In absence of clear charges which the person so alleged is required to answer, the noticee is bound to be denied proper opportunity to defend itself. This would entail violation of principles of natural justice which is a well-recognized exception for invocation of writ jurisdiction despite availability of alternative remedy. In this regard, it is profitable to quote the opinion of the Apex Court in the case of *Oryx Fisheries P. Ltd. (supra)* at para 24 to 27 wherein the opinion of the Constitution Bench of the Apex Court in the case of *Khem Chand versus Union of India [AIR 1958 SC 300]* has been relied upon as well :

“24. This Court finds that there is a lot of substance in the aforesaid contention. It is well settled that a quasi-judicial authority, while acting in exercise of its statutory power must act fairly and must act with an open mind while initiating a show-cause proceeding. A show cause proceeding is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice.

25. Expressions like “a reasonable opportunity of making objection” or “a reasonable opportunity of defence” have come up for consideration before this Court in the context of several statutes. A Constitution Bench of this Court in Khem Chand v. Union of India, of course in the context of service jurisprudence, reiterated certain principles which are applicable in the present case also.

26. S.R. Das, C.J. speaking for the unanimous Constitution Bench in Khem Chand held that the concept of “reasonable opportunity” includes various safeguards and one of them, in the words of the learned Chief Justice, is: (AIR p. 307, para 19)

“(a) An opportunity to deny his guilt and establish his innocence,

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which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;”

27. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing the charge-sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show-cause notice gets vitiated by unfairness and bias and the subsequent proceedings become an idle ceremony.”

15. The Apex Court has held that the concept of reasonable opportunity includes various safeguards and one of them is to afford opportunity to the person to deny his guilt and establish his innocence, which he can only do if he is told what the charges leveled against him are and the allegations on which such charges are based.

16. It is also true that acts of fraud or suppression are to be specifically pleaded so that it is clear and explicit to the noticee to reply thereto effectively [See *Larsen & Toubro Ltd. Vs. CCE, (2007) 9 SCC 617 (para 14)*]. Further in the case of *CCE Vs. Brindavan Beverages (P) Ltd. reported in (2007) 5 SCC 388* relied upon by the petitioner, the Apex Court at para-14 of the judgment has held that if the allegations in the show-cause notice are not specific and are on the contrary, vague, lack details and/or unintelligible i.e. its sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show-cause notice. We do not agree with the contention of the respondent that the notice ought not to be struck down if in substance it contains the matters which a notice must

contain. In order to proceed under the provisions of Section 74 of the Act, the specific ingredients enumerated thereunder have to be clearly asserted in the notice so that the noticee has an opportunity to explain and defend himself.

17. As observed herein above, the impugned notice completely lacks in fulfilling the ingredients of a proper show-cause notice under Section 74 of the Act. Proceedings under Section 74 of the Act have to be preceded by a proper show-cause notice. A summary of show-cause notice as issued in Form GST DRC-01 in terms of Rule 142(1) of the JGST Rules, 2017 (Annexure-2 impugned herein) cannot substitute the requirement of a proper show-cause notice. This court, however, is not inclined to be drawn into the issue whether the requirement of issuance of Form GST ASMT-10 is a condition precedent for invocation of Section 73 or 74 of the JGST Act for the purposes of

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deciding the instant case. This Court finds that upon perusal of Annexure-2 which is the statutory form GST DRC-01 issued to the petitioner, although it has been mentioned that there is mismatch between GSTR-3B and 2A, but that is not sufficient as the foundational allegation for issuance of notice under Section 74 is totally missing and the notice continues to be vague.

18. Since we are of the considered view that the impugned show cause notice as contained in Annexure-1 does not fulfill the ingredients of a proper show-cause notice and thus amounts to violation of principles of natural justice, the challenge is entertainable in exercise of writ jurisdiction of this Court. Accordingly, the impugned notice at Annexure-1 and the summary of show-cause notice at Annexure-2 in Form GST DRC-01 are quashed. However, since this Court has not gone into the merits of the challenge, respondents are at liberty to initiate fresh proceedings from the same stage in accordance with law within a period of four weeks from today.

19. This writ petition is allowed in the manner and to the extent indicated herein above.

(Aparesh Kumar Singh, J.)

(Anubha Rawat Choudhary, J.) Shamim/