IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.09.2021

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

W.P.No.19756 of 2021
and
W.M.P.No.21034 of 2021

M/s.Shri Tyres
Represented by its Proprietor Mr.Ramesh Chand
No.28, Ground Floor,
Shri Hasti Towers, GST Roads,
Pallavaram, Chennai 600 043. ...Petitioner

-Vs.-

State Tax Officer
Chromepet Assessment Circle
Commercial Tax Department
Nandanam, Chennai 600 035. ...Respondent

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the respondent in impugned order vide order No.GST-01/2018-19 dated 25.08.2021 in GSTIN:33AAIPR776L1Z9 and quash the same.

For Petitioner : Mr.Adithya Reddy.

For Respondent : Ms.Amirta Dinakaran,
Government Advocate

O R D E R

Read this in conjunction with and in continuation of earlier proceedings made in previous listing on 17.09.2021, which reads as follows:

> 'At request, list on Tuesday (21.09.2021) under the caption 'ADJOURNED ADMISSION'.'

2. Pursuant to the aforesaid proceedings, captioned writ petition and writ miscellaneous petition therein have been listed in the cause list caption 'ADJOURNED ADMISSION' today.

3. Mr.Adithya Reddy, learned counsel for writ petitioner who was before me submitted that the impugned order has been made

under Section 73 of the 'Central Goods and Services Tax Act, 2017' [hereinafter 'CG&ST Act, 2017' for the sake of convenience and clarity]. To be noted, the impugned order dated 25.08.2021 bearing reference No.GST-01/2018-19.

4. Learned counsel for writ petitioner raised two points and they are as follows:

(a) No personal hearing has been granted and

(b) The procedure prescribed for making the impugned order has not been followed i.e., impugned order was not preceded by Forms GST DRC-01 and GST DRC-01A.

5. Ms.Amirta Dinakaran, learned State counsel, accepted notice on behalf of the lone respondent.

6. Owing to the narrow legal points on which the captioned writ petition turns, with the consent of learned counsel on both sides main writ petition was taken up.

7. Responding to the aforementioned two points raised by the learned counsel for writ petitioner, learned Revenue counsel on instructions submitted that personal hearing has in fact been held and that the records demonstrate that personal hearing was held on 09.07.2021. This douses this first point urged.

8. Be that as it may, learned Revenue counsel on instructions submits that the records do not demonstrate that FORM GST DRC-01 and FORM GST DRC-01A preceded the impugned order.

9. By way of reply, learned counsel for writ petitioner reiterated his second point i.e., procedure proceeding impugned order not been informed.

10. I carefully considered the submissions made by either side and find that the second point enures in favour of writ petitioner and the reasons are as follows:

(a) The requirements of issue of FORM GST DRC-01 and FORM GST DRC-01A have been statutorily ingrained in the rules made under the CG&ST Act i.e., Rule 142 of the CG&ST Rules, 2017, which reads as follows:

'142. Notice and order for demand of amounts payable under the Act

(1) The proper officer shall serve, along with the

(a) notice issued under section 52 or section 73 or

section 74 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130, a summary thereof electronically in FORM GST DRC-01,
(b) statement under sub-section (3) of section 73 or sub-section (3) of section 74, a summary thereof electronically in FORM GST DRC-02, specifying therein the details of the amount payable.

[(1A) The proper officer shall, before service of notice to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, shall communicate the details of any tax, interest and penalty as ascertained by the said officer, in Part A of FORM GST DRC-01A.]

(2) Where, before the service of notice or statement, the person chargeable with tax makes payment of the tax and interest in accordance with the provisions of sub-section (5) of section 73 or, as the case may be, tax, interest and penalty in accordance with the provisions of sub-section (5) of section 74, or where any person makes payment of tax, interest, penalty or any other amount due in accordance with the provisions of the Act [whether on his own ascertainment or, as communicated by the proper officer under sub-rule (1A),] he shall inform the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in FORM GST DRC–04.

[(2A) Where the person referred to in sub-rule (1A) has made partial payment of the amount communicated to him or desires to file any submissions against the proposed liability, he may make such submission in Part B of FORM GST DRC-01A.]

(3) Where the person chargeable with tax makes payment of tax and interest under sub-section (8) of section 73 or, as the case may be, tax, interest and penalty under sub-section (8) of section 74 within thirty days of the service of a notice under sub-rule (1), or where the person concerned makes payment of the amount referred to in sub-section (1) of section 129 within fourteen days of detention or seizure of the goods and conveyance, he shall intimate the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an order in FORM GST DRC-05 concluding the proceedings in respect of the said notice.

(4) The representation referred to in sub-section (9) of section 73 or sub-section (9) of section 74 or sub-section (3) of section 76 or the reply to any notice issued under any section whose summary has been uploaded electronically in FORM GST DRC-01 under sub-rule (1) shall be furnished in FORM GST DRC-06.

(5) A summary of the order issued under section 52 or section 62 or section 63 or section 64 or section 73 or section 74 or section 75 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130 shall be uploaded electronically in FORM GST DRC-07, specifying therein the amount of tax, interest and penalty payable by the person chargeable with tax.

(6) The order referred to in sub-rule (5) shall be treated as the notice for recovery.

(7) Where a rectification of the order has been passed in accordance with the provisions of section 161 or where an order uploaded on the system has been withdrawn, a summary of the rectification order or of the withdrawal order shall be uploaded electronically by the proper officer in FORM GST DRC-08.]'

11. Section 73 of CG&ST Act reads as follows:

'[1]73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than 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 for any reason, other that the reason of fraud or any wilful mis statement 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 so paid or which has been so 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 leviable under the provisions of this Act of the rules made thereunder.

(2) The proper officer shall issue the notice under sub-section (1) atleast three months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section(1), on the person chargeable with tax.

(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section(1) or, as the case may be, the statement under sub-section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section(5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with the interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent. of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section(9) within three years form the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund.

(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.'

12. A careful perusal of Section 73 of the CG&ST Act in conjunction with Rule 142 makes it clear that non adherence to Rule 142 had caused prejudice to the writ petitioner qua impugned order and therefore it is a rule which necessarily needs to be adhered to,if prejudice is to be eliminated in the case on hand. In other words, it is not a mere procedural requirement but on the facts and circumstances of this case, it becomes clear that it tantamount to trampling the rights of writ petitioner.

13. In the light of the narrative thus far, the following order is passed:

(a) The impugned order dated 25.08.2021 bearing reference No.GST-01/2018-19, is set aside, solely on the ground of non adherence to Rule 142 of the CG&ST Rules, 2017 and all other procedural requirements;

(b) As the impugned order is set aside solely on the ground Rule 142 of CG&ST Act, 2017, though obvious it is made clear that no view or opinion on the merits of the matter have been expressed in the instant order;

(c) As sequitur, the respondent shall commence proceedings afresh i.e., de-novo and complete the exercise by adhering to the requirements more particularly requirements under Rule 142 of CG&ST Rules, 2017.

(d) The above de-novo exercise shall be commenced and concluded as expeditiously as the business of the respondent would permit and in any event within twelve weeks from today, i.e., on or before 14.12.2021.

14. Captioned Writ Petition is disposed of with the above directives. Consequently, Writ Miscellaneous Petition is also disposed of as closed. There shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

nsa/sai

To

The State Tax Officer
Chromepet Assessment Circle
Commercial Tax Department
Nandanam, Chennai 600 035.

+1cc to Mr.Adithya Reddy , Advocate, S.R.No.48829
+1cc to the Government Pleader, S.R.No.49145

W.P.No.19756 of 2021
and
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CP[co]
NSK 08/10/2021