BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 21.09.2021
CORAM:
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.P.[MD]No.5526 of 2021
and
W.M.P.[MD]Nos.4380 & 11022 of 2021

S.V.M.Tiles,
Vadakkankulam,
Represented by its Proprietor,
S.Mahalingam,
Now at 14/5, Radhapuam Main Road,
Pavalam Nagar, Petharengapuram,
Koliyankulam Post - 627 116.
Tirunelveli District. ... Petitioner

Vs.

The State Tax Officer,
Nanguneri,
Tirunelveli District. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorarified Mandamus, to call for the records on the file of the respondent in GSTIN : 33BERPM0677R1ZM, dated 13.01.2021 and quash the same and consequently direct the respondent to issue a notice and grant an opportunity to submit reply and a personal hearing.

For Petitioner : Mr.M.Azeem
For Respondent : Mr.R.Suresh Kumar
Government Advocate

O R D E R
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The prayer sought for herein is for a Writ of Certiorarified Mandamus, to call for the records on the file of the respondent in GSTIN: 33BERPM0677R1ZM, dated 13.01.2021 and quash the same and consequently direct the respondent to issue a notice and grant an opportunity to submit reply and a personal hearing.

2. The petitioner is a registered dealer on the file of the respondent under the Tamil Nadu Value Added Tax Act, 2006 [in short, 'TNVAT Act'], with TIN No.3335602263. After the Goods and Services Tax Act, 2017 ie., GST Act, had come into effect from 01.07.2017, the petitioner migrated to GST regime with Registration No.GSTIN: 33BERPM0677R1ZM.

3. Based on the returns filed on 17.07.2017, for the period from 01.06.2017 to 30.06.2017, the respondent passed an order dated 17.07.2017, granting credit of a tax of Rs.7,60,172/-. As per Section 140 of the TNGST Act, he is entitled to carry forward the tax credit as on 30.06.2017 to his electronic credit ledger as on 01.07.2017, by filing an application in Form TRAN 1, electronically. Accordingly, the petitioner filed an application in Form TRAN 1 on 06.10.2017. The said application was admitted by the respondent by proceedings dated 06.10.2017 and an Input Tax Credit [ITC] of Rs.7,60,172/- was granted by the respondent.

4. However, on 13.11.2020, the respondent issued an intimation of tax ascertained as being payable under Section 73(5) of the TNGST Act in Form GSTR-01A under Rule 142 (1A) of TNGST Rules.

5. The said intimation issued in this regard by the respondent has been disputed by the petitioner on 05.12.2020. Thereafter, the impugned assessment order dated 13.01.2021, has been passed straightaway whereby, the said ITC credit to the extent of Rs.7,60,172/- was reversed, thereby, the said amount was demanded to be paid along with a penalty of a equal sum ie., 100%. Therefore, felt aggrieved over the said order dated 13.01.2021, the petitioner has filed the present writ petition.

6. Mr.M.Azeem, learned Counsel appearing for the petitioner would contend that, normally, in this kind of orders as that of the one which is impugned herein, the petitioner dealer would be relegated to approach the appellate authority. However, in this case, why the petitioner has chosen to prefer this writ petition is because the principles of natural justice has been violated, as the mandatory provision as has been contemplated under some of the provisions of the Act, since has been violated, as no notice under Section 73(1) of the Act has been issued, on that ground, the petitioner has chosen to prefer this Writ Petition.

7. Elaborating his submissions further, learned Counsel for the petitioner would contend that, under Section 73(5) of the Act, if any intimation is given, the same if it is disputed by the tax payer, then the duty of the proper officer is to issue a notice under Section 73(1) of the Act, followed by the furnishing of a statement under Section 73(3) of the Act. In the case on hand, according to the learned Counsel for the petitioner, neither a notice under Section 73(1) nor a statement under Section 73(3) has been served on the petitioner. Therefore, merely based on the 73(5) intimation, the present order of assessment and impugned demand has been made by slapping a penalty of 100% also against the petitioner. Therefore, on that ground itself, the impugned order is vitiated.

8. However, Mr.R.Suresh Kumar, learned Government Advocate appearing for the respondent, by relying upon the submissions made in the counter affidavit filed, as well as the instructions he has received would contend that, insofar as the serving of notice is concerned, the procedure has been contemplated under Section 169 of the Act ie., TNGST Act, 2017, under which, several modes of services have been provided, out of which, if service is completed in any one such mode, it can be deemed to be a proper service within the meaning of sub-section 2 of Section 169. Expanding his arguments, he would further submit that, under Section 169(1)(d), if the notice or summon or order, whatever passed or issued by the proper officer is made available in the common portal, that can also be deemed to be an effective service within the meaning of Section 169.

9. Therefore, he would contend that notice under Section 73(1) along with Form GST DRC-01 was uploaded or made available in the common portal, thereby the service is to be treated as completed and therefore, the said plea cannot be taken by the petitioner that, there was no notice under Section 73(1) of the Act served on him. If that is the prime and main ground raised by the petitioner under which, if the petitioner has chosen to challenge the present impugned order, the said ground is not available to the petitioner, in view of the aforesaid fact. Therefore, on that ground, the petitioner cannot have successful challenge of the impugned order. Hence, the learned Government Counsel seeks dismissal of this writ petition.

10. I have considered the rival submissions made by the learned counsel for the parties and have perused the materials placed before this court.

11. In order to delve into the issue raised in this writ petition, let me first take the import of Section 73 of the Act, which reads thus:

> ***"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 than the 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 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 penalty leviable under the provisions of this Act or the rules made thereunder.*

(2) The proper officer shall issue the notice under sub- section (1) at least 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 (3), pay the amount of tax along with interest payable thereon under 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 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 from 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. Under Section 73(5), the tax if any is ascertained by the proper officer, he can inform the same in writing to the dealer for making such payment. Here in the case in hand, such an intimation has been made by the respondent ie., the proper officer on 13.11.2020. However, the same has been disputed by filing a reply by the petitioner dated 05.12.2020. In that case, the next course of action to be adopted by the proper officer is to issue notice under Section 73(1) of the Act as quoted hereinabove. In this case, it is a controversy as to whether such 73(1) notice was served on the petitioner or not.

13. Learned Counsel appearing for the petitioner has vehemently contended that, no such notice in whatever mode has ever been served on the petitioner under Section 73(1) of the Act. In this context, it is pointed out by the learned Counsel for the petitioner that in Sl.No.6 of the reference column to the impugned order dated 13.01.2021, they referred to a summary of show cause notice in DRC-01 dated 25.12.2020.

14. By relying upon the said summary of show cause notice dated 25.12.2020, learned Counsel for the petitioner was able to point out that the said summary of show cause notice in DRC-01 dated 25.12.2020 itself is a wrong claim made by the respondent on two reasons. Firstly, there is no such notice in Form DRC-01 was issued on the petitioner as the date of such notice dated 25.12.2020 is a wrong date as that could not have been sent or uploaded on

25.12.2020, since subsequently, the petitioner was able to get the copy of the summary notice dated 25.12.2020, it is to be found that the notice itself was signed on 28.12.2020, by the officer. Moreover, he also pointed out that on 25.12.2020, being a Christmas day, it is a public holiday. Therefore, it is quite natural that the proper officer could have signed the notice on any other day and accordingly, he signed on 28.12.2020.

15. Be that as it may, the further contention of the petitioner side is that, assuming that DRC-01 notice dated 25.12.2020, signed on 28.12.2020, has been uploaded in the common portal, that would not suffice to make a point that notice under Section 73(1) was served on the petitioner.

16. In order to meet this point, learned Government Advocate appearing for the respondent would take aid of Section 169 of the Act, which reads thus:

> "***169. Service of notice in certain circumstances.-*** *(1) Any decision, order, summons, notice or other communication under this Act or the rules made thereunder shall be served by any one of the following methods, namely:-*
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> *(a) by giving or tendering it directly or by a messenger including a courier to the addressee or the taxable person or to his manager or authorised representative or an advocate or a tax practitioner holding authority to appear in the proceedings on behalf of the taxable person or to a person regularly employed by him in connection with the business, or to any adult member of family residing with the taxable persons; or*
>
> *(b) by registered post or speed post or courier with acknowledgement due, to the person for whom it is intended or his authorised representative, if any, at his last known place of business or residence; or*
>
> *(c) by sending a communication to his email address provided at the time of registration or as amended from time to time; or*
>
> *(d) by making it available on the common portal; or*
>
> *(e) by publication in a newspaper circulating in the locality in which the taxable person or the person to whom it is issued is last known to have resided, carried on business or personally worked for gain; or*
>
> *(f) if none of the modes aforesaid is practicable, by affixing it in some conspicuous place at his last known place of business or residence and if such mode is not practicable for any reason, then*

by affixing a copy thereof on the notice board of the office of the concerned officer or authority who or which passed such decision or order or issued such summons or notice.

(2) Every decision, order, summons, notice or any communication shall be deemed to have been served on the date on which it is tendered or published or a copy thereof is affixed in the manner provided in sub-section (1).

(3) When such decision, order, summons, notice or any communication is send by registered post or speed post, it shall be deemed to have been received by the addressee at the expiry of the period normally taken by such post in transit unless the contrary is proved."

17. Relying upon Section 169, learned Government Advocate would contend that, number of modes have been provided as to how service of notice, decision or order or summons or communication to be made or undertaken. Wherein, under Section 169(1)(d) one such mode is, by making it available in the common portal. That means, if a notice or summon is made available in the common portal, that would be suffice to state that there has been a proper service. He also submitted that under sub-section (2) of Section 169, if any notice or summon or decision is communicated, it shall be deemed to have been served on the date on which it is tendered or published. Relying upon this provision, learned Government Advocate would contend that, since the DRC-01 notice has been uploaded in the common portal within the meaning of Section 169(1)(d), it shall be deemed that on that date, the notice has been served on the petitioner, in view of sub-section 2 of section 169. Therefore, the learned Government Advocate canvassed the point that, the notice has been served properly on the petitioner and that point cannot be taken against the revenue and in favour of the dealer.

18. But, if we look at Section 169 of the Act, along with Rule 142 of the TNGST Rules, 2017, [in short, 'the Rules'], it will clearly give a different meaning. For easy reference, Rule 142 of the said Rules is extracted, hereunder:

"142.Notice and order for demand of amounts payable under the Act.- *(1) The proper officer shall serve, along with the*

(a) notice under sub-section (1) of section 73 or sub-section (1) of section 74 or sub- section (2) of section 76, a summary thereof electronically in ***FROM GST DRC-01,***

(b) statement under sub- section (3) of section 73 or sub-section (3) of section 74, a summary

*thereof electronically in **FROM GST DRC-02**, specifying therein the details of the amount payable.*

*(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 section73 or, as the case may be tax, interest and penalty in accordance with the provisions of sub-section (5) of section 74, he shall inform the proper officer of such payment in **FROM GST DRC-03** and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in **FROM GST DRC-04.***

*(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), he shall intimate the proper officer of such payment in **FROM GST DRC-03** and the proper officer shall issue an order in **FROM 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 shall be in **FROM GST DRC-06.***

*(5) A summary of the order issued under sub-section (9) of section 73 or sub-section (9) of section 74 or sub-section (3) of section 76 shall be uploaded electronically in **FROM 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) Any ratification of the order, in accordance with the provisions of section 161, shall be made by the proper officer in **FROM GST DRC-08.**"*

19. Rule 142(1) makes it clear that the proper officer shall serve along with a notice under sub-section (1) of section 73 or sub-section (1) of Section 74 or sub-section 2 of Section 76, a summary thereof, electronically in form GST DRC-01.

20. It means that in case of a notice under Section 73(1) is already served, a summary of the same shall be made in Form GST DRC-01 and it can be electronically served on the dealer.

21. Here in the case in hand, it is the claim of the respondent that, Form GST DRC-01 had been electronically uploaded in the common portal, thereby, the service has been completed, they stated. The relevant portion of the counter affidavit filed in this regard by the respondent reads thus:

> *"3.I humbly submit that the averments made in para 10, 11, 12 & 13, deal with the background of this case and there is nothing to traverse.*
>
> *With respect to the averment in Para 14 & 15, I submit that unlike stated by the petitioner, the notice in DRC-01 has been issued in accordance with the provisions of TNGST Act, 2017. I also submit that as could be seen in the impugned order dated 13.01.2021, the notice in DRC-01 has been duly uploaded and reference number in 211006190016475 dated 25.12.2020 has been duly generated in the portal."*

22. In the said counter, they have stated only that, the notice in DRC-01 has been duly uploaded and Reference Number 211006190016475 dated 25.12.2020, has been duly generated in the portal. It is to be noted that, nowhere it is stated or it is the stand of the respondent that DRC-01 ie., summary of 73(1) has been uploaded along with a notice under Section 73(1).

23. However, what has been mandated under Rule 142 is that the proper officer shall serve along with a notice under sub-section 1 of section 73 or sub-section (1) of section 74 or sub-section (2) of section 76, a summary thereof electronically in FORM GST DRC-01.

24. Therefore, it makes abundantly clear that a notice under Section 73(1) should be served. Thereafter, Section 73(1) notice with the summary of such notice in Form GST DRC-01 shall be electronically served. Here in the case in hand, when they made a service in electronic mode ie., uploading in common portal, they uploaded only DRC-01 summary, but not the 73(1) notice. Therefore, at no stretch of imagination, it should be construed that the respondent has served 73(1) along with a summary of such notice in Form DRC-01, electronically, while uploading the same on 25.12.2020, as claimed by the respondent. When that being the definite stand of the respondent and there has been no other stand taken by the State that, Section 73(1) notice has been served properly on the petitioner, as contemplated under Section 73(1) itself, where the language used by the legislature is that Section 73(1) notice shall be served, hence the plea taken by the revenue that the notice under Section 73(1) has been duly served on the petitioner at the time of uploading DRC-01 summary on 25.12.2020 is unsustainable.

25. Therefore, the point raised by the petitioner side that 73 (1) notice which is a mandatory notice has not been served is well founded and therefore, the same has to be accepted.

26. In view of the above, since Section 73(1) notice which is a mandatory requirement to be served on the petitioner since has not been served, it is a case where principles of natural justice is violated or the provisions of the Statute has been violated. Therefore, on that ground, the impugned order can very well be interfered with.

27. In view of the aforesaid discussions and the reasons made hereinabove, this Court is inclined to dispose of this writ petition with the following order:

> *"the impugned order is quashed and the matter is remitted back to the respondent for reconsideration. While reconsidering the same, the notice under Section 73(1) shall be served on the petitioner and after serving the notice, a summary of the notice in Form DRC-01 shall also be served on the petitioner as contemplated under Section 73(1) r/w. Rule 143(1) of the TNGST Rules and after serving the notice and after giving some time for replying the same and after affording an opportunity of personal hearing, the respondent shall proceed further. Accordingly, a final order shall be passed in accordance with law."*

28. Accordingly, this Writ Petition stands allowed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS III)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

MR

Note: In view of the present lock down owing to

COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

The State Tax Officer,
Nanguneri,
Tirunelveli District.

+1 CC to M/s.SPL.GP (SR-29872[F] dated 22/09/2021)

W.P.[MD]No.5526 of 2021
21.09.2021

MGJ(25.01.2022) 11P 3C