



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **23.08.2021**

CORAM

THE HON'BLE MR.JUSTICE R.SURESH KUMAR

W.P. (MD)No.14474 of 2020

and

W.M.P(MD) .No.12112 of 2020

(Through Video Conference)

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Madhucon Projects Limited,
Represented by GVLN Sastry,
Manager (F&A)

.. Petitioner

Vs.

The Commercial Tax Officer,
Ettayapuram,
Tuticorin District-628 902.

.. Respondent

Prayer: Writ Petition is filed under Article 226 of Constitution of India, to issue a Writ of Certiorari, to call for the records relating to Assessment Order CST Asst.No.764868/2011-12, dated 09.09.2020, passed by the respondent, quash the same as arbitrary and illegal.

For Petitioner : Mr.Joseph Prabhakar

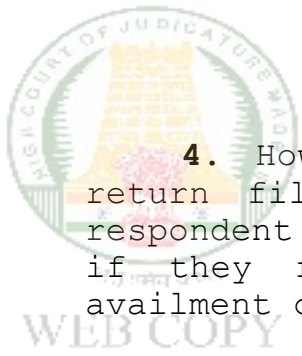
For Respondent : Mr.R.Suresh Kumar
Government Advocate

ORDER

Prayer sought for herein is for a Writ of Certiorari, to call for the records relating to Assessment Order GST Asst.No.764868/2011-12, dated 09.09.2020, passed by the respondent, quash the same as arbitrary and illegal.

2.That the petitioner is an EPC Contractor engaged in the business of Construction of various Infrastructure projects and is executing various works across India. It had undertaken construction of roads in the State of Tamilnadu for NHAI, accordingly, the petitioner had obtained registration under the Tamil Nadu Value Added Tax Act, 2006, with registration No.TIN-33841602409 and CST No.764868. The petitioner also registered under VAT legislations in various other States including the State of Andhra Pradesh.

3.The petitioner has been regularly filing the returns and accordingly, insofar as the Assessment Year 2011-2012, the petitioner has already filed a self-return under Section 22 of the TNVAT Act [in short 'the Act'] and the same having been accepted, according to the petitioner, it is a deemed acceptance, therefore, there ends the matter.



4. However, even in respect of such a deemed acceptance on return filed under Section 22 of the Act, it is open to the respondent revenue to reopen the case under Section 27 of the Act, if they found that there is any escaped turnover and wrong availment of input tax credit.

5. Accordingly, in this regard, the respondent had issued a pre-assessment notice on 17.04.2017, that has been replied by the petitioner on 30.08.2017, however, again a pre-assessment notice dated 16.11.2017 was issued, and, that was also replied by the petitioner on 24.11.2017, further pre-assessment notice then also was issued on 12.12.2017, which was also promptly replied by the petitioner on 29.12.2017. Insofar as the 12.12.2017 pre-assessment notice is concerned, it is the case of the petitioner that, based on the said pre-assessment notice, no further proceedings can be initiated, and therefore, in order to meet out the said pre-assessment notice, reply was submitted by the petitioner on 29.12.2017.

6. However, the respondent, on 27.02.2018, passed an order of re-assessment under Section 27 of the Act, and made a demand of payment of tax to the extent of Rs.3,64,92,113/- (Rupees Three crores sixty four lakhs ninety two thousand one hundred and thirteen only). Felt aggrieved over the said order, the petitioner had moved a writ petition before this Court in W.P.(MD).No.9119 of 2018, where a learned Judge of this Court, by order, dated 12.11.2018, after having considered the case and counter case projected by the parties in the writ petition, has come to the following conclusion:

"5. It is true that the petitioner was given an opportunity of personal hearing on 18.12.2017. But then, such an personal hearing will have to be granted after issuing a show cause notice. I have already come to the conclusion that the communication dated 12.12.2017 is not a show cause notice at all. It is only a communication under Section 63 of the Act.

6. The learned counsel appearing for the petitioner also drew my attention to the fact that all the pre assessment notices, proposed to levy tax @ 5%. But in the impugned order tax has been levied under 14.5%. There is a clear discrepancy between the tax proposed and the tax levied.

7. The learned counsel for the petitioner was ready to point out many more such errors characterizing the impugned proceedings.

8. I am of the view that the order impugned will have to be set aside on the short ground that the show cause notice as contemplated under Section 27(2) of



the Act, was not issued. Therefore, the order impugned in this writ petition is set aside.

9.The matter is remitted to the file of the respondent who shall issue a proper show cause notice and after affording an opportunity of personal hearing to the petitioner herein pass order in accordance with law.

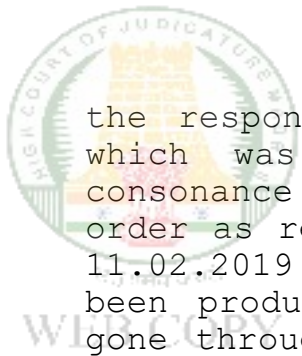
10.Accordingly, this writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed."

7.Therefore, the sum and substance of the issue, which was concluded by the order passed by this Court in the earlier round of litigation is that, the notice dated 12.12.2017 is not at all a show cause notice, therefore, for that purpose, the subsequent order passed under Section 27 (2) of the Act, dated 27.02.2018, is liable to be interfered with, accordingly, after having quashed the said order, the learned Judge had remitted the matter to the file of the respondent, who shall issue a proper show cause notice, and after affording an opportunity of personal hearing to the petitioner herein, pass order in accordance with law.

8.Pursuant to the said order passed by this Court, it was expected by the petitioner that, a proper show cause notice under proviso to Section 27(1) and (2) of the Act would be issued, and thereafter, an opportunity of being heard would be given to the petitioner, after the petitioner made a response to the show cause notice, and thereafter only, if at all, any further order to be passed invoking Section 27(1) and (2) of the Act, that kind of order of Assessment would be passed. However, on the contrary, the respondent straight away, according to the petitioner, has proceeded to pass an order of Assessment under Section 27 (1) and (2) of the Act, by impugned order dated 09.09.2020, therefore, challenging the same, the present writ petition has been filed.

9.Heard Mr.Joseph Prabhakar, learned counsel appearing for the petitioner, who would submit that, though there has been an appeal provided against the order impugned before the Appellate Deputy Commissioner, since the respondent Assessing Authority has issued the impugned order in violation of the provisions of the Act as well as the direction mandatorily given by this Court in the earlier round of litigation and therefore, on that ground, the impugned order is put under challenge in this writ petition, he contended.

10.In support of the said ground, the learned counsel invited the attention of this Court that, at the time of admission of this case, since in the impugned order, dated 09.09.2020, it was referred to an alleged notice dated 11.02.2019, with regard to the personal hearing to be held on 28.02.2019, since it was argued on behalf of



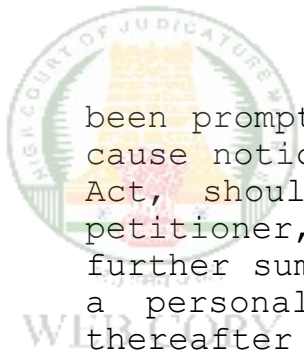
the respondent revenue that 11.02.2019 is the show cause notice, which was issued against the petitioner in pursuance or in consonance with the direction given by this Court in the earlier order as referred to above, dated 12.07.2018, the said notice dated 11.02.2019 was directed to be produced, and the said order having been produced before this Court by the revenue, and after having gone through the same, the learned Judge heard the matter, at the admission stage, had a *prima facie* view that, the said notice dated 11.02.2019, is not at all a proper show cause notice, within the meaning of Section 27(1) and (2) proviso, as has been directed by this Court in the earlier order, and therefore, on that *prima facie* ground, interim order was granted.

11.The learned counsel for the petitioner would further submit that, if we look at the notice dated 11.02.2019, issued by the revenue, which is, according to the revenue, is in lieu of the show cause notice or pre assessment notice, dated 12.12.2017, certainly, even a layman cannot accept it as a show cause notice, because, the language used in a cryptic four or five lines notice is nothing but a summon issued to the petitioner to appear for a personal hearing to be held on 28.02.2019, therefore, it has become clear, that, the order passed by this Court has not been complied with and the mandatory requirements of issuance of show cause notice, to establish that what is their proposal to impose a tax by way of re-assessment under Section 27 of the Act, since has not been given by way of proper show cause notice, the entire proceedings, which is culminated in the impugned order is vitiated, therefore, on that ground itself, the impugned order is liable to be interfered with, he contended.

12.Per contra, the learned Government Advocate appearing for the respondent has relied upon the earlier pre-assessment notice, issued more than one time, that is, on 17.04.2017, 16.11.2017 and 12.12.2017 therefore, according to the learned Government Advocate, the present notice referred to by the respondents, dated 11.02.2019, is not a show cause notice or a pre-assessment notice, but it is only a summon to the petitioner to appear for a personal hearing, which is a last agenda to be followed or complied with by the respondent, before concluding the proceedings under Section 27 of the Act, therefore, the same cannot be construed, as if, that it is not in accordance with a style of a show cause notice, and therefore, on that ground, it cannot be stated that the impugned proceedings is vitiated.

13.I have considered the said rival submissions made by the learned counsel appearing for the parties and have perused the materials placed before this Court.

14.No doubt, there has been a pre-assessment notice dated 17.04.2017, 16.11.2017 and 12.12.2017 and in all these time, it has



been promptly replied by the petitioner, and followed which, a show cause notice as contemplated under the proviso to Section 27 of the Act, should have been issued, and after getting reply from the petitioner, if at all any documents to be verified in this regard, a further summon can be issued to the production of the documents, and a personal hearing can also be given to the petitioner, and thereafter only, the final order under Section 27 of the Act, can be made. This is what contemplated as a procedure to be adopted by the Assessing Authority, while making an order under Section 27 of the Act, for the alleged escaped turnover or wrong availment of input tax credit.

15. However, without issuing a show cause notice, since, on the basis of the pre-assessment notice, they proceeded to pass a final order on 27.02.2018, making an assessment and demand of the tax, that was under challenge before this Court in the first round of litigation, where, a learned Judge of this Court, as has been quoted hereinabove, has concluded that the pre-assessment notice, dated 12.12.2017, is not at all a show cause notice, and therefore, the impugned order therein was set aside and the matter was remitted to the respondent with a direction that, who shall issue a proper show cause notice and after affording an opportunity of personal hearing to the petitioner to pass orders in accordance with law.

16. When such a direction was given by this Court, where the Court has declared that the 12.12.2017 pre-assessment notice is not at all a show cause notice, the respondent cannot treat the 12.12.2017 pre-assessment notice as a show cause notice, as within the meaning of the proviso to Section 27 of the Act, a show cause should have been issued, where, clearly the alleged escaped turnover or whatever it may be the reason for reopening it under Section 27 of the Act, should have been spelt out and ultimately, the proposal must have been clearly demarcated stating that, this is how the Assessing Authority has come to the conclusion that there has been an escape of tax turnover therefore, the tax, percentage of tax and the total tax proposed to be levied or imposed against the petitioner including the penalty etc., shall be given in the show cause notice with which the respondent shall ask the petitioner to give a show cause, and thereafter, after affording an opportunity of personal hearing, final orders should have been passed.

17. When this has been specifically directed by this Court in the earlier order, now the impugned order has been passed by merely stating that there has been a notice issued on 11.02.2019. A copy of the notice dated 11.02.2019 also has been filed before this Court, which reads thus:

"As per the reference cited above You are hereby summoned to produce all the documents, connected to the pre assessment notice issued by this office for the year 2011-2012 under CST Act before me on the 28th day



of February 2019 at 11.00 A.M. O' clock at Commercial Tax Officer Office, Ettayapuram and be in attendance until the inquiry is over.

Given under my hand and the seal this day 11.02.2019."

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18.On reading of this notice/summon there can be no doubt that it is only a summon to the petitioner to appear for a personal hearing, this should have been proceeded by a proper show cause notice as indicated by the order of this Court referred to above. However, no such show cause notice, admittedly had been given by the respondent, therefore, the present move, by issuing this notice, dated 11.02.2019 for personal hearing followed by the impugned order dated 09.09.2020, cannot be permitted to stay, as it would run contra to the procedure established under Section 27 of the Act and also the order passed by this Court. In that view of the matter, this Court has no hesitation to hold that the impugned order does not stand in the legal scrutiny for the reasons stated above, and accordingly, it is liable to be interfered with.

19.In the result, 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, a proper show cause notice as per proviso to Section 27 of the Act, indicating the circumstances, under which, the respondent found that there is an alleged escaped turnover within the meaning of Section 27 or wrong availment of input tax credit and the rate of tax to be levied on this alleged escaped turnover, shall be properly issued. And after issuing such show cause notice with the proposal, the petitioner shall be given an opportunity to respond the same by way of reply, and after getting the reply, if any further documents to be verified, such opportunity shall be given to production of records, and after production of records and after hearing the petitioner by way of personal hearing for which separate summon to be issued, the final assessment order shall be passed either confirming the proposal or otherwise."

20.These procedure, which are contemplated under Section 27 of the Act shall be scrupulously followed without any default, and by following these procedure, the issue can be concluded by the respondent by passing the final order under Section 27(1) or (2) of the Act. The needful, as indicated above, shall be completed within a period of three months from the date of receipt of a copy of this order, for which the petitioner Assessee shall cooperate.



21.With these directions, this writ petition is disposed of. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (AD-II)

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// True Copy //

/ /2021

Sub Assistant Registrar(CS)

PJL

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 Commercial Tax Officer,
Ettayapuram,
Tuticorin District-628 902.

+1 CC to M/s.GP (SR-27042[F] dated 24/08/2021)

W.P. (MD)No.14474 of 2020

23.08.2021

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