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## 2022 (3) TMI 490 - MADRAS HIGH COURT

### **M/S. V.R.S. TRADERS VERSUS ASSISTANT COMMISSIONER (STATE TAXES) POONAMALLEE ASSESSMENT CIRCLE VARADHARAJAPURAM, CHENNAI**

Writ Petition Nos.1607, 1609 and 1613 of 2022 And WMP.Nos.1744, 1747 and 1750 of 2022

**Dated: - 10-2-2022**

**Validity of Show cause notice (SCN) u/s 74 - Violation of principles of natural justice - Notice u/s 74(5) was issued but No notice was issued u/s 74(1) - Mandatory requirement to issue notice u/s 74(1) - HELD THAT:-** What has been proposed by the revenue would be intimated by way of notice under Sub Section 5 of Section 74 of the Act initially to the assessee/dealer, who on receipt of the same may or may not accept and once he accepted there would be a conclusion. However, if he does not accept the proposal sent by the Revenue under Section 74(5) of the Act, the next course of action to be followed is to issue a notice under Section 74(1) of the Act.

Under Section 74(1) notice is an independent notice to be issued in DRC-01, whereas the notice under Section 74(5) was to be issued in DRC- 01A. Herein the case in hand, admittedly DRC-01A was issued, thereafter straightaway the respondent revenue proceeded to pass the impugned assessment order - notice under Section 74(1) of the Act, which is also mandatory to be issued before passing the impugned order of assessment has not been issued in this case. In the absence of any such notice, the proceedings, which is culminated in the order of assessment, which is impugned herein, is, no doubt, vitiated.

This Court has no hesitation to hold that the impugned order cannot stand in the legal scrutiny and in that view of the matter, these writ petitions are disposed of.

### **Judgment / Order**

**Honourable Mr.Justice R.Suresh Kumar**

**For the Petitioner : Mr.G.Natarajan**

**For the Respondents : Mr.NRR.Arun Natarajan Special Government Pleader**

### **ORDER**

The prayer sought for herein is for a Writ of Certiori, quashing the impugned order GSTIN: 33CDVPR5729K1ZP/2017-2018, 33CDVPR5729K1ZP/2019-2020 and 33CDVPR5729K1ZP/2018-2019 respectively dated 05.08.2021 passed by the first respondent on the grounds of violation of principles of natural justice.

2. The petitioner is a sole proprietary concern, they engaged in the business of iron and steel scrap.

The petitioner is registered under GST with GSTIN Nos: 33CDVPR5729K1ZP/2017-2018, 33CDVPR5729K1ZP/2019-2020 and 33CDVPR5729K1ZP/2018-2019 respectively dated 05.08.202.

3. That the petitioner had filed return under the GST Act regularly, while so, as per the investigation of the Department concerned, a communication in Form No. DRC-01A dated 15.10.2020 was issued to the petitioner alleging that some of the suppliers, who have supplied iron and steel scrap to the petitioner were either non-existent or were not conducting any business therefore, the petitioner had wrongly availed Input Tax Credit i.e., ITC during the period 2017- 2018 to 2019-2020, on such purchase of an amount of ₹ 3,60,02,382/- (Rupees Three crores sixty lakhs two thousand three hundred and eighty two). When such notice was issued in DRC-01A, which is the notice necessarily to be issued under Section 74(5) of CGST Act, 2017(in short, 'the Act'), the said notice has been replied by the petitioner on 19.10.2020, not accepting the said proposal issued under the notice in DRC-01A.

4. Thereafter the respondent Revenue has passed the order dated 05.08.2021 under Section 75(1) of the Act, whereby, an assessment has been made, where not only ITC reversal under Section 74 of the Act, but also the penalty under Section 74(5) of the Act has been made, thereby, the assessment order has been issued with instructions that the electronically generated summary of the order specifying the ITC reversal, penalty and interest payable by the petitioner is also electronically uploaded in the common portal.

5. Assailing the said order of assessment dated 05.08.2021, the petitioner has moved this writ petition with the aforesaid prayer.

6. When this writ petition came up for hearing on 08.02.2022, after hearing the learned counsel appearing for the petitioner, this Court passed the following order:

*“In this matter, it is an issue raised by the learned counsel for the petitioner that, before reversal of the alleged wrong claim of input tax credit under Section 74(5) of the Central Goods and Services Tax Act [CGST Act], an option has to be given to the petitioner/assessee, either, he wants to pay tax and penalty and in this regard, notice in Form DRC-01A under Rule 142(1) of the CGST Rules should have been issued which they have admittedly issued on 15.10.2020 and 16.10.2020. In response to the said notice in DRC-01A, the petitioner had given a reply on 19.10.2020 not accepting the proposal issued under the notice in DRC-01A. Thereafter, the next procedure to be followed by the Revenue is that under Section 74(1) of the CGST Act, further notice in DRC-01 should have been issued and an opportunity should have been given, then only final order with regard to reversal as has been done herein, has to be made. However, admittedly, since there has been no notice in DRC-01 under Section 74 (1) of the CGST Act, the proceedings culminated in the impugned order is vitiated.*

*2.Only to this pointed query, Mr.N.R.R.Arun Natarajan, learned Special Government Pleader seeks shorter accommodation to get instructions as to whether the Revenue has issued DRC-01 notice under Section 74(1) of the CGST Act before passing the order impugned.*

*3.In view of the limited controversy to be resolved as stated supra and to pass orders on this matter, post this matter on **10.02.2022** immediately after admission under the caption 'for orders'.”*

7. In view of the aforesaid, a specific query was raised on the basis of the ground urged by the petitioner's side as to whether any notice under Section 74(1) of the Act was issued before passing the impugned order.

8. Mr.NRR.Arun Natarajan, learned Special Government Pleader appearing for the respondent, on instructions would submit that, except the notice i.e., DRC-01A, no further notice i.e., DRC-01 under Section 74(1) was issued.

9. Section 74(1) of the GST Act reads thus:

*“74(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.”*

10. Sub Section 5 of Section 74 reads thus:

*“The person chargeable with tax may, before service of notice under Sub-Section(1), pay the amount of tax along with interest payable under Section 50 and a penalty equivalent to fifteen per cent. Of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper office in writing of such payment.”*

11. Therefore the first step, if the revenue wants to initiate proceedings under Section 74 of the Act, has to serve a notice to pay the amount of tax along with interest payable under Section 50 and a penalty equivalent to 15% of such tax 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.

12. Therefore, what has been proposed by the revenue would be intimated by way of notice under Sub Section 5 of Section 74 of the Act initially to the assessee/dealer, who on receipt of the same may or may not accept and once he accepted there would be a conclusion. However, if he does not accept the proposal sent by the Revenue under Section 74(5) of the Act, the next course of action to be followed is to issue a notice under Section 74(1) of the Act as has been quoted herein above.

13. Therefore a Section 74(1) notice is an independent notice to be issued in DRC-01, whereas the notice under Section 74(5) was to be issued in DRC- 01A. Herein the case in hand, admittedly DRC-01A was issued, thereafter straightaway the respondent revenue proceeded to pass the impugned assessment order.

14. The DRC-01 notice under Section 74(1) of the Act, which is also mandatory to be issued before passing the impugned order of assessment has not been issued in this case. In the absence of any such notice, the proceedings, which is culminated in the order of assessment, which is impugned herein, is, no doubt, vitiated.

15. Therefore, this Court has no hesitation to hold that the impugned order cannot stand in the legal

scrutiny and in that view of the matter, these writ petitions are disposed of with the following orders:

“The respective impugned orders in these writ petitions are hereby quashed. All these three matters are remitted back to the respondent for re-consideration. While re-considering the same, they shall commence the proceedings from where, it has already been stopped i.e., till DRC-01A notice, which means, they should issue DRC-01 notice to the petitioner and thereafter after giving a fair opportunity of being heard to the petitioner, necessary orders shall be passed with regard to the assessment, if any.”

16. With these directions, these writ petitions are disposed of accordingly.

No costs. Connected miscellaneous petitions are closed.