

GAHC010272032024



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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/6807/2024

SHRI SHAMBHU PRASAD
S/O LATE BAJRANGI PRASAD MAHATO, RESIDENT OF BOKO, NH 17,
BOKO, KAMRUP ASSAM781123

VERSUS

THE STATE OF ASSAM AND ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM, DEPARTMENT OF FINANCE AND TAXATION, DISPUR ASSAM

2:THE PRINCIPAL COMMISSIONER STATE TAX
KAR BHAWAN
G S ROAD
DISPUR GUWAHATI 781006

3:THE ASSISTANT COMMISSIONER OF STATE TAX
GUWAHATI B-7
ZONE B
GUWAHATI KAR BHAWAN
G S ROAD
DISPUR GUWAHATI 781006 ASSA

Advocate for the Petitioner : MR. R S MISHRA, MS. N PARASAR,MR. A K GUPTA

Advocate for the Respondent : SC, FINANCE AND TAXATION,

BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA

ORDER

08.01.2025

Heard Mr. R.S. Mishra, learned counsel for the petitioner. Also heard Mr. B. Gogoi, learned Standing Counsel SGST.

2] In this case, the petitioner was issued a Summary of the Show Cause Notice dated 29.09.2023 in the GST DRC-01. In the said Summary of the Show Cause Notice, it was mentioned that the Show Cause Notice was attached. Along with the said Summary of the Show Cause Notice, there was an attachment to the determination of tax dated 29.09.2023. The petitioner did not reply to the Show Cause Notice in view of the fact that there was no Show Cause Notice attached to the Summary of the Show Cause Notice. Pursuant thereto, the Order dated 29.12.2023 was issued in GST DRC-07. To the said Order uploaded in GST DRC-07, there was an attachment stating the manner in which the determination was made. The reason assigned for passing of the said order was that the taxpayer had not replied or contested the notice, and as such, had been agreed with the terms of the notice. It is relevant to mention that the attachments to both the GST DRC-01 as well as the GST DRC-07 did not contain any signature of the Proper Officer. It is the grievance of the petitioner that the petitioner was not provided with the opportunity of hearing as provided under Section 75 (4) of the CGST/AGST Act, 2017 before passing of the order dated 29.12.2023 and being aggrieved, the writ petition has been filed.

3] Learned counsel for the petitioner submits that it is the requirement in terms of Rule 142 of the Central Goods and Services Tax Rules, 2017 (for short, 'the Rules of 2017') that the notice under Section 73 has to be issued and a summary thereof is to be additionally issued electronically in Form GST DRC-01. The learned counsel for the petitioner further submits that under no circumstances the attachment to the GST DRC-01 can be said to be a Show

Cause Notice in as much as in the said attachment, there is no mention that the petitioner is required to show cause and that the said attachment to the DRC-01 does not contain the signature of the Proper Officer and it is the mandate of Rule 26 of the Rules of 2017 that the Show Cause Notice had to be authenticated with digital signature or through E-signature as specified under the provisions of the Information Technology Act, 2000 or verified by any other mode of signature or verification as notified by the Board in that behalf. In that regard, the learned counsel for the petitioner has submitted that the learned Division Bench of the Telangana High Court in the case of M/s Silver Oak Villas LLP vs. the Assistant Commissioner ST {WP(C) No.6671/2024} vide its judgment and order dated 14.03.2024 had dealt with Rule 26 of the Rules of 2017 and categorically opined that since the impugned order therein was an unsigned document, it lost its efficacy in the light of Rule 26 (3) of the Rules of 2017 as well as the Telangana Goods and Services Tax Act, 2017 and the Rules framed therein under. It was also observed therein that the Show Cause Notice as also the impugned order would not be sustainable and deserved to be set aside and quashed. The learned counsel further submitted that in the case of A.V. Bhanoji Row vs. Assistant Commissioner (ST) & Others, reported in (2024) 123 GSTR 432, the learned Division Bench of the Andhra Pradesh High Court had observed that as there was no signature of the Proper Officer, the same was treated to be void and inoperative. (B) The learned counsel further submitted that in the case of Nkas Services Private Limited vs. State of Jharkhand & Others, reported in (2022) 99 GSTR 145, the learned Division Bench of the Jharkhand High Court had dealt with the question as regards issuance of a Summary of Show Cause Notice in GST Form DRC-01 and held that the Summary of the Show Cause Notice as issued in Form GST DRC01 cannot be a substitute to the requirement

of a proper Show Cause Notice. The learned counsel had also referred to another judgment of the Karnataka High Court in the case of LC Infra Projects Pvt. Limited vs. Union of India and Others, reported in (2020) 73 GSTR 248.

4] Per contra, the learned standing counsel for the Finance and Taxation Department of the Government of Assam submits that the respondent authorities have issued the Summary of the Show Cause Notice in Form DRC-01 which was accompanied by the determination of tax which as per the respondents would have provided all the details so that the petitioners could have submitted the reply. The learned counsel, however, fairly submits that there is no separate Show Cause Notice apart from the determination of tax enclosed to the Summary of the Show Cause Notice. On the question of lack of signatures in the attachments to the GST DRC-01 as well as the GST DRC-07, the learned counsel fairly submitted that the materials on record do not show that there is/are any signature(s) in the attachment to the Summary to the Show Cause Notice as well as Summary to the Order issued in Forms GST DRC01 and GST DRC-07 respectively. He however submitted that in the attachments it is mentioned as 'Sd- Proper Officer'. The learned counsel further submitted that when the Summary of the Show Cause Notice as well as the Summary of the Order are uploaded in GST DRC-01 and GST DRC-07, the same are duly authenticated in the portal with digital signatures and without such authentication, the portal cannot be operated.

5] I have heard the learned counsels for the petitioners as well as the respondents.

6] From the materials on record as well as the submissions so made by the learned counsels for the petitioner it appears that the petitioner has approached this Court alleging infraction to the various provisions of the Central Act, the

State Act as well as the Rules framed thereunder. It is also the case of the petitioner that the principles of natural justice have been violated as is not only a statutory mandate but also violative of Article 21 of the Constitution.

7] From the perusal of the records, it would show that in the Summary of the Show Cause Notices issued in GST DRC-01 to the petitioner in the writ petition, there is a mention therein that there is a Show Cause Notice attached. It is the case of the respondents that the said attachment wherein determination of tax is mentioned is the Show Cause Notice. The question therefore arises as to whether the said attachment can be said to be a Show Cause Notice as per the mandate of both the Central Act as well as the State Act and the Rules made therein under. It would be apposite to take note of that in all these cases, the Summary of the Show Cause Notices have been issued in terms with Section 73. At this stage, this Court would briefly take note of Section 73. A perusal of Section 73 would show that the said provision is set into motion when it appears to the Proper Officer that:-

(a) Any tax has not been paid; or

(b) Any tax short paid; or

(c) Any tax erroneously refunded; or

(d) Where input tax credit had been wrongly availed or utilized. for any reason other than the reason of fraud or any willful misstatement or suppression of facts to evade tax.

8] Taking into account that it is only in the circumstances referred to above, the Proper Officer is required to issue a Show Cause Notice, therefore, the Show Cause Notice is required to specifically mention the reason(s) and the circumstances why the provision of Section 73 had been set into motion. The

person against whom the said Show Cause Notice is issued would only have an adequate opportunity to submit a representation justifying that the prerequisites for issuance of Show Cause Notice is not there if and only if the reason(s) for issuance of the Show Cause is specifically mentioned in the Show Cause Notice.

9] Section 73 further stipulates that upon consideration of the representations, if any, the Proper Officer shall pass the order under Section 73 (9) determining the amount of tax, interest and penalty.

10] It is also apposite to mention that Section 73 (2) and Section 73 (10) are interconnected in as much as Section 73 (10) stipulates that within three years from the due date for furnishing the annual return for the financial year, the order under Section 73 (9) can be passed. In terms with Section 73 (2), the Show Cause Notice is to be issued within three months prior to the time limit prescribed in Section 73 (10).

11] In addition to the above, it would also show from conjoint reading of Subsection (1) (2) (3) and (4) of Section 73 that the legislature had categorically distinguished the Show Cause Notice from the Statement which is required to be issued by the Proper Officer or in other words, irrespective of Statement to be issued in terms with Sub-section (3) of Section 73, there is a requirement of issuance of a Show Cause Notice by the Proper Officer.

12] At this stage, it is also pertinent to mention that in Section 73, there is no mention of issuance of a Summary of Show Cause Notice. The requirement of issuance of a Summary of the Show Cause Notice is seen in Rule 142 of the Rules of 2017. Rule 142 (1) (a) and (b) is relevant for which the same is quoted herein below:-

“142. Notice and order for demand of amounts payable under the Act.-(1) The

proper officer shall serve, along with

(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 DRC01,

(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.”

13] From a perusal of the above quoted Rule, it would show that in addition to the Show Cause Notice to be issued under Section 73 (1) and the Statement of determination of tax under Section 73 (3), there is an additional requirement of issuance of a Summary of the Show Cause Notice in GST DRC-01 and the Summary of the Statement in GST DRC-02. The natural corollary from the above analysis is that the issuance of the Show Cause Notice and the Statement of determination of tax by the Proper Officer are mandatory requirement in addition to the Summary of Show Cause Notice in GST DRC-01 and Summary of the Statement in GST DRC-02.

14] The judgment of the learned Division Bench of the Jharkhand High Court in the case of Nkas Services Private Limited (supra) had also dealt with a similar issue and categorically held that a Summary of a Show Cause Notice issued under GST DRC-01 cannot substitute the requirement of a proper Show Cause Notice. Similarly, in the case of LC Infra Projects Pvt. Limited (supra), the learned Single Judge of the Karnataka High Court had also observed that the issuance of a Show Cause Notice is sine qua non to proceed with the recovery of interest payable thereon under Section 50 of the Act and penalty leviable

under the provisions of the Act or the Rules.

15] From the above analysis, this Court is of the view that the Summary of the Show Cause Notice along with the attachment containing the determination of tax cannot be said to be a valid initiation of proceedings under Section 73 without issuance of a proper Show Cause Notice. The Summary of the Show Cause Notice is in addition to the issuance of a proper Show Cause Notice. Under such circumstances, this Court is of the opinion that the impugned order challenged in the instant writ petition is contrary to the provisions of Section 73 as well as Rule 142 (1) (a) of the Rules as the said impugned Orders were passed with issuance of a proper Show Cause Notice.

16] Whether the determination of tax as well as the order attached to the Summary to the Show Cause Notice in GST DRC-01 and the Summary of the Order in GST DRC-07 can be said to be the Show Cause Notice and order respectively, this Court duly dealt with what would constitute a Show Cause Notice, the Statement as per Section 73 (3) as well as the Summary to the Show Cause Notice in GST DRC-01 and Summary of the Statement in GST DRC02. This Court had also opined above that the statement to be provided by the Proper Officer in terms with Section 73 (3) cannot be said to be a Show Cause Notice which is required to be issued in terms with Section 73 (1). Therefore, the submission of the respondents that the statement attached to the Summary of the Show Cause Notice is the Show Cause Notice is completely misconceived and contrary to Section 73 (1) and 73 (3).

17] Be that as it may, a very pertinent contention had been made by the learned counsel appearing on behalf of the petitioner to the effect that the attachments to both the Summary of the Show Cause Notice and Summary of the Order have no value as the same contains no authentication of the Proper

Officer. In that regard, the learned counsels referred to Rule 26 (3) of the Rules and the judgment in the cases of M/s Silver Oak Villas LLP (supra) and A.V. Bhanoji Row (supra).

18] Rule 26 (3) of the Rules of 2017 categorically stipulates as to how notices, certificates and orders are to be authenticated. The said Sub-Rule is reproduced herein under:- "26.(3) All notices, certificates and orders under the provisions of this chapter shall be issued electronically by the proper officer or any other officer authorised to issue such notices or certificates or orders, through digital signature certificate [or through E-signature as specified under the provisions of the Information Technology Act, 2000 (21 of 2000) or verified by any other mode of signature or verification as notified by the Board in this behalf.]"

19] A perusal of the above quoted Sub-Rule would show that notices, certificates and orders under the provisions of Chapter III shall be issued electronically by the Proper Officer or any other officer authorized to issue such notices or certificates or orders through digital signature certificate or through e-signature as specified under the provisions of the Information Technology Act, 2000 or verified by any other mode of signature or verification as notified by the Board in that behalf. It is relevant to take note of that Chapter III of the Rules of 2017 pertains to Registration whereas in respect to Demand and Recovery, it is Chapter XVIII.

20] Now therefore a question arises as to whether Rule 26 (3) can be applicable to Chapter-XVIII when the said Sub-Rule on refers to Chapter-III. In the case of M/s Silver Oak Villas LLP (supra), the learned Division Bench of the Telangana High Court had applied Rule 26 (3) of the Rules of 2017 even to Chapter-XVIII of the Rules of 2017. In the case of A.V. Bhanoji Row (supra), the learned Division Bench of the Andhra Pradesh High Court held that the signatures

cannot be dispensed with and Sections 160 and 169 cannot save an order, notice, communication which did not contain a signature. In another judgment of the learned Division Bench of Delhi High Court in the case of RAILSYS Engineers Private Limited vs. Additional Commissioner of Central Goods and Services Tax (Appeals-11) and Anr., reported in (2023) 112 GSTR 143, the Delhi High Court held that there was a requirement of at least putting the digital signatures on the Show Cause Notice and Order in Original.

21] A perusal of the provisions of Section 73 would show that the Show Cause Notice is required to be issued by the Proper Officer, the Statement under Section 73 (3) is to be issued by the Proper Officer as well as the Order under Section 73 (9) is required to be passed by the Proper Officer. Section 2 (91) of the Act defines who is the Proper Officer meaning thereby either the Commissioner or the Officer who had been specifically entrusted by the Commissioner. As it is the statutory mandate that it is only the Proper Officer who has the authority to issue Show Cause Notice and the Statement and pass the order, the authentication in the Show Cause Notice, Statement as well as the Order by the Proper Officer is a must and failure to do so, makes the Show Cause Notice, Statement and Order ineffective and redundant.

22] It is also important to note that the Act only stipulates that notice would be issued and order would be passed by the Proper Officer. The manner in which the Proper Officer would authenticate the notice(s) or the order(s) in so far as other Chapters of the Rules of 2017 is silent except Chapter-III. Taking into account the utmost necessity of the authentication by the Proper Officer, this Court is of the opinion unless appropriate insertion are made in the Rules or notification are issued as per the directions of the Board to fill the void in the Rules of 2017, the authentication in the manner stipulated in Rule 26 (3) of the

Rules of 2017 has to be applied as and when the Proper Officer is required to issue notice or Statement and pass Order in terms with the Act.

23] This Court has duly perused the Summary of the Show Cause Notices wherein the petitioner was only asked to file his reply on a date specified. There was no mention as to the date of hearing and the Column was kept blank. However, the petitioner had sought for an opportunity of hearing which was however not given. In this regard, if this Court takes note of Section 75 (4) of both the Central Act as well as State Act, it would be seen that it is the mandate of the said provision that an opportunity of hearing should be granted when a request is received in writing from the person chargeable with tax or penalty or when any adverse decision is contemplated against such person. The mandate of Section 75 (4) of both the Central and State Act are safeguards provided to the assesseees so that they can have a say in the hearing process.

24] It is also seen that in the reply to be submitted in Form GST DRC-06, there is an option given for personal hearing at Sl. No.7. As stated above, the petitioner had specifically filled up the Column as "Yes" wherein the option for personal hearing was mentioned. In spite of that, there was no opportunity of hearing afforded to those petitioner.

25] The learned Division Bench of the Chhattisgarh High Court in the case of Mahindra & Mahindra Limited (supra) had categorically observed that when the statute contains a mandate of hearing, the same has to be granted, else it would render the provision porous.

26] This Court is of the opinion that when the statute is clear to provide an opportunity of hearing, there is a requirement of providing such opportunity. In fact a perusal of the Form GST DRC-01 enclosed to the writ petition shows that

details have been given as regards the date by which the reply has to be submitted; date of personal hearing; time of personal hearing and venue of personal hearing. It is seen that in the Summary of the Show Cause Notice only the date for submission of reply has been mentioned. In respect to other details as stated above have been mentioned to as 'NA'. It may be that the Proper Officer assumed that based on the reply he/she may proceed with the adjudication depending as to whether the person to whom the notice is issued had opted for personal hearing or not. But in a case where no reply is filed, a question arises whether the Proper Officer can pass an adverse order without providing an opportunity for hearing. The answer has to be in the negative else it would render the second part of Section 75 (4) redundant.

27] On the basis of the above analysis and determination, this Court is of the view that the Summary of the Show Cause Notice in GST DRC-01 is not a substitute to the Show Cause Notice to be issued in terms with Section 73 (1) of the Central Act as well as the State Act. Irrespective of issuance of the Summary of the Show Cause Notice, the Proper Officer has to issue a Show Cause Notice to put the provision of Section 73 into motion. The Show Cause Notice to be issued in terms with Section 73 (1) of the Central Act or State Act cannot be confused with the Statement of the determination of tax to be issued in terms with Section 73 (3) of the Central Act or the State Act. In the instant writ petitions, the attachment to the Summary of Show Cause Notice in GST DRC-01 is only the Statement of the determination of tax in terms with Section 73 (3). The said Statement of determination of tax cannot substitute the requirement for issuance of the Show Cause Notice by the Proper Officer in terms with Section 73 (1) of the Central or the State Act. Under such circumstances, initiation of the proceedings under Section 73 against the

petitioners in the instant batch of writ petitions without the Show Cause Notice is bad in law and interfered with. This Court further noticed that the Show Cause Notice and the Statement in terms with Section 73 (1) and 73 (3) of both the Central Act or the State Act respectively are required to be issued only by the Proper Officer as defined in Section 2 (91). Additionally, the order under Section 73 (9) is also required to be passed by the Proper officer. The Summary of the Show Cause Notice, the Summary of the Statement under Section 73 (3) and the Summary of the Order passed in terms with Section 73 (9) are to be issued in GST DRC-01, GST DCR-02 and GST DRC-07 respectively. The issuance of the Summary of the Show Cause Notice, Summary of the Statement and Summary of the Order do not dispense with the requirement of issuance of a proper Show Cause Notice and Statement as well as passing of the Order as per the mandate of Section 73 by the Proper Officer. As initiation of a proceedings under Section 73 and passing of an order under the same provision have consequences. The Show Cause Notice, Statement as well as the Order are all required to be authenticated in the manner stipulated in Rule 26 (3) of the Rules of 2017. Accordingly, this Court is of the opinion that the Impugned Order challenged in the writ petition are in violation of Section 75 (4) as no opportunity of hearing was given as already discussed herein above.

28] Accordingly, the impugned order dated 29.12.2023 issued by the respondent no.3 is hereby set aside and quashed. This Court also cannot be unmindful of the fact that it is on account of certain technicalities and the manner in which the impugned order was passed, this Court interfered with the impugned order and hence set aside and quashed the same. It is also relevant to take note of that the respondent authorities were under the impression that issuance of attachment of the determination of tax which was attached to the

Summary of the Show Cause Notice would constitute a valid Show Cause Notice.

29] Under such circumstances, in the interest of justice, this Court while setting aside the impugned order dated 29.12.2023, grants liberty to the respondent authorities to initiate de novo proceedings under Section 73, if deemed fit for the relevant financial year in question. This Court further observes and directs that the period from the date of issuance the Summary of the Show Cause Notice in Form GST DRC-01 dated 29.09.2023 Cause Notices upon the petitioner till the date a certified copy of the instant judgment is served upon the Proper Officer, be excluded while computing the period prescribed for passing of the order under Section 73 (10) of the Central Act as well as the State Act as the case may be.

30] With the above observations and directions, the writ petition stands disposed of.

JUDGE

Comparing Assistant