HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

WP(C) No.443/2021

Reserved on : 08.03.2021
Pronounced on:17.03.2021

Navneet R. Jhanwar ...Petitioner(s)

Through:- M/s Prateek Gattani and
Rahul Sharma, Advocates

V/s

State Tax Officer and others ...Respondent(s)

Through:- Mr. D.C.Raina, Advocate General with
Mr. K.D.S.Kotwal, Dy. AG

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

SANJEEV KUMAR-J

1. The petitioner is aggrieved of and has called in question the refund rejection order passed by respondent No.1 on 02.12.2020 on the ground that the same besides being in utter disregard of the provisions of the Central Goods and Service Tax Act, 2017 ["the Act"] and the Rules framed thereunder, is also in violation of the principles of natural justice.

2. It is submitted that the petitioner having become entitled for refund of excess tax paid in term of Section 54 of the Act, submitted a refund claim before respondent No.1 in FORM-GST-RFD-06. Respondent No.1 instead of directing the refund issued a show cause notice calling upon the petitioner to show cause as to why his refund claim to the extent of amount

claimed should not be rejected or the amount erroneously refunded should not be recovered for the reason that the claim for refund is belated having been filed after the expiry of two years from the relevant date, as per explanation in Section 54(1) of the Act and that in the instant case the period had expired in April, 2020.

3. The petitioner replied to the show cause notice and explained the delay. He relied upon notification No.35/2020-Central Tax dated 03.04.2020 and Notification No.55/2020-Central Tax dated 27.06.2020 issued by respondent No.3, whereby due to outbreak of corona virus pandemic, time limit/due date for various compliances has been extended up to 31.08.2020. The explanation on delay by the petitioner in light of the aforesaid notifications of respondent No.3 was accepted and accordingly, the application of the petitioner for refund was processed by respondent No.1. He, however, without serving further show cause notice upon the petitioner, determined the claim for refund and in terms of the order impugned dated 02.12.2020 rejected the same being not tenable in law. It is this order of respondent No.1 dated 02.12.2020, which is assailed in this petition.

4. As is noticed in the beginning, the impugned order has been assailed primarily on the ground that no opportunity of being heard was ever granted to the petitioner before passing the impugned order. The show cause notice issued to the petitioner was only with respect to his claim being barred by limitation and the same was explained by the petitioner by filing written response. The explanation tendered by the petitioner was

accepted by respondent No.1. It is, thus, contended that once the claim of refund filed by the petitioner was found to be within time, it was incumbent upon respondent No.1 to put the petitioner again on show cause notice as to the merits of the claim, once it had proposed to reject the refund claim.

5. Learned counsel for the petitioner has invited our attention to Section 54 of the Act and Rule 92 of the Central Goods and Service Tax Rules, 2017 [“the Rules of 2017”], wherein it is specifically provided that no order rejecting the claim of refund shall be passed unless the person claiming refund is given an opportunity of being heard.

6 Mr. D.C.Raina, learned Advocate General appearing for the respondents takes a preliminary objection with regard to the maintainability of the petition. He contends that in view of the availability of alternative remedy against the impugned order under Section 107 by way of appeal before the Appellate Authority, this Court ought not entertain this petition.

7. Having heard learned counsel for the parties and perused the record, we find it appropriate to first deal with the objection raised by Mr. Raina, learned Advocate General.

8. It is true that any order passed by the adjudicating authority including an order passed under Section 54 of the Act read with Rule 92 of the Rules of 2017 is appealable before the appellate authority and the appellate authority is empowered to make such further enquiry, as may be necessary and pass such order as it thinks just and proper, confirming, modifying or annulling the decision or order appealed against, but shall have no power to remand the case to the adjudicating authority that has

passed the impugned order. However, contention of learned counsel for the petitioner is that the impugned order is not only cryptic but in sheer violation of the principles of natural justice. The petitioner, who was entitled to hearing before passing of the rejection order in terms of proviso to Rule 92(3) of he Rules of 2017, has been denied such opportunity and, therefore, the order impugned is fundamentally flawed and such order, which is passed in violation of the principles of natural justice and is violative of Article 14 of the Constitution of India is amenable to challenge by way of writ petition under Article 226 of the Constitution of India, availability of alternative remedy notwithstanding. We agree with the learned counsel for the petitioner.

9. It is trite that alternative remedy is not a complete bar to the entertaining of writ petition filed for enforcement of any of the fundamental rights or where there has been a violation of principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of statute are under challenge. Hon'ble the Supreme Court has, thus, recognized some exceptions to the Rule of alternative remedy in the case of **Wirlpool Corporation v. Registrar of Trademarks,, (1998) 8 SCC 1**. In paragraph Nos. 14 & 15 the Supreme Court observed thus:-

> "14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for

> the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".
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> 15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise it jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitution law as they still hold the field." In view of the aforesaid, we are of the view that in the instant case where the petitioner has alleged violation of principles of natural justice, exercise of writ jurisdiction by this Court is not barred by availability of equally efficacious statutory remedy of appeal provided under Rule 107 of the Rule of 2017.

10. Admittedly, the claim for refund was initially sought to be rejected by respondent No.1 on the ground that it was barred by limitation. Section 54 of the Act provides a period of two years for making an application for refund from the relevant date. The delay, however, was

explained by the petitioner by bringing it to the notice of respondent No.1 two notifications dated 03.04.2020 and 27.05.2020 issued by respondent No.3 providing for extension of limitation upto 31.08.2020 on account of lockdown due to outbreak of corona virus pandemic. Respondent No.1 was quick to realize the mistake and treated the claim for refund filed by the petitioner in time. Having done so, respondent No.1 proceeded to determine the claim of the petitioner on merits. As mandated by Rule 92 and is also the demand of principles of natural justice, no notice of show cause was given to the petitioner to explain as to why his claim for refund may not be rejected on merits. A unilateral decision was taken and the petitioner was conveyed the outcome of such decision i.e. rejection of the claim of the petitioner.

11. Learned counsel for the petitioner is correct that with regard to the passing of order of rejection of the refund claim of the petitioner on merits, he was never put on notice nor was any opportunity of being heard ever afforded to him. It is, thus, apparent that the impugned order passed by the adjudicating authority i.e. respondent No.1 herein traverses beyond the scope of show cause notice, which was served upon the petitioner to show cause as to why his claim should not be rejected having been filed beyond limitation.

12. Viewed thus, impugned order of rejection of refund claim of the petitioner is not inconformity with the proposal made in the show cause notice that was served upon the petitioner when the adjudicating authority found it barred by limitation. The grounds on which the impugned order

has been passed were never proposed to the petitioner nor was he ever given any opportunity to explain his position. It is, thus, clear case of violation of principle of natural justice as also proviso to Rule 92(3) of the Rules of 2017. In the similar set of circumstances, Madras High Court in the case **R. Ramadas v. Joint Commissioner of C.Ex., Puducherry, 2021 (44) G.S.T.L. 258 (Mad.)** observed thus:-

> "7. It is a settled proposition of law that a show cause notice, is the foundation on which the demand is passed and therefore, it should not only be specific and must give full details regarding the proposal to demand, but the demand itself must be in conformity with the proposals made in the show cause notice and should not traverse beyond such proposals."

13. Observations of the Madars High Court in paragraph No.11 of the aforesaid judgment are equally noteworthy and are reproduced hereunder:-

> "11. The very purpose of the show cause notice issued is to enable the recipient to raise objections, if any, to the proposals made and the concerned Authority are (sick) required to address such objections raised. This is the basis of the fundamental Principles of Natural Justice. In cases where the consequential demand traverses beyond the scope of the show cause notice, it would be deemed that no show cause notice has been given for that particular demand for which a proposal has not been made.

14. The instant case is fully covered by the aforesaid judgment of the Madras High Court, which, we find has very succinctly enunciated the law on the point.

15. For the foregoing reasons, we allow this petition, quash the impugned order and remand the case back to respondent No.1 for passing order afresh after putting the petitioner to proper show cause notice and after affording him a reasonable opportunity of being heard.

(Sanjay Dhar)
Judge

(**Sanjeev Kumar)**
Judge

JAMMU.
17.03.2021
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Whether the order is speaking : Yes
Whether the order is reportable: Yes