

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WP(C) No. 8284/2010**

M/S L.R. SHARMA & CO.

..... Petitioner

Through: Mr. J.K. Mittal with Mr. Arun Gulati,
Ms. Pooja Bahuguna and Mr. Brajesh,
Adv.

Versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Mirza Aslam Beg for Ms. Sonia
Sharma, Adv. for Respondent No.1.
Mr. Mukesh Anand with Mr. Shailesh
Tiwari, Adv. for Respondent Nos. 2
and 3.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE MANMOHAN

ORDER

%

13.12.2010

By this writ petition, preferred under Articles 226 and 227 of the Constitution of India, the petitioner has prayed for issue of a writ of certiorari for quashment of the show cause notice dated 15.10.2010, i.e. Annexure P-1, issued by the Commissioner of Service Tax, the respondent No.2 herein, on the ground that the same is without jurisdiction and violative of the provisions of law and further to issue a writ of mandamus / direction declaring that the petitioner is not liable to pay service tax in respect of laying of long distance pipelines for the purpose of carrying of drinking water, sewerage, untreated effluent water for Delhi Jal Board as per the provisions of the Finance Act, 1994 and to issue other order or direction as may be deemed fit and proper in the facts and circumstances of the case.

2. We have heard Mr.J.K. Mittal, learned counsel for the petitioner and Mr. Mukesh Anand, learned standing counsel for Central Excise and Custom.

3. It is submitted by Mr. Mittal that the notice to show cause is absolutely vulnerable as the levy is totally impermissible. He has referred to various provisions of the Finance Act, 1994 and to the circular No. 80/10/2004-ST dated 17.9.2004 which has clarified, as pleaded, that the construction of the buildings which are used by Government organization established for charitable or philanthropy purposes, etc. are non-commercial in nature and would not attract service tax. He has commended us to paragraph 13.2 of the circular which reads as follows:

“13.2 The leviability of service tax would depend primarily upon whether the building or civil structure is ‘used, or to be used’ for commerce or industry. The information about this has to be gathered from the approved plan of the building or civil construction. Such constructions which are for the use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit are not taxable, being non-commercial in nature. Generally, government buildings or civil constructions are used for residential, office purposes or for providing civic amenities. Thus, normally government constructions would not be taxable. However, if such constructions are for commercial purposes like local government bodies getting shops constructed for letting them out, such activity would be commercial and builders would be subjected to service tax.”

4. Learned counsel has also referred to the amendment that was incorporated in the Finance Act, 1994 by the Finance Act, 2007 by

introducing another taxable service as ‘Works Contract Service’ under sub-clause (zzzza) of Clause (105) of Section 65 of Chapter V of the Finance Act, 1994 and in the service tax vide notification No.23/2007 dated 22.5.2007. He has also drawn inspiration from the circular No.123/5/2010-TRU dated 24.5.2010 whereby the certain aspects have been clarified.

5. It is urged by Mr. Mittal that the petitioner through his Chartered Accountant had submitted a representation to the respondents to highlight the factum that it is not liable to pay the service tax as the activities carried on by it pertain to the public utility service on behalf of the Delhi Jal Board (DJB) and Delhi Metro Rail Corporation Ltd. (DMRC). It is also contended that the Chartered Accountant was heard by the Respondent and thereafter a communication was made rejecting the representation. Thereafter, the petitioner approached this Court by WP(C) No.5471/2010 which was disposed of on 13.8.2010. At this juncture, we think it appropriate to reproduce the relevant part of the said order:

“Mr. Mukesh Anand, learned standing counsel for Customs and Excise Department submitted that the petitioner has already been issued a letter on 28.05.2010 whereby it has been clarified that the petitioner is required to comply with the points mentioned in the letter dated 20.05.2010. Learned counsel has also drawn our attention to the communication made by the office of the Commissioner of Service Tax on 01.07.2010 whereby it has been stated that if the petitioner fails to comply with the summon without lawful excuse, he shall be liable to be punished under law. Learned counsel for the department submitted that this is a summon issued under Section 14 of the Central Excise Act, 1944. In essence, the submission of Mr. Mukesh Anand is that this is a

preliminary proceeding and no coercive steps shall be taken without giving an adequate opportunity of hearing and even if the petitioner is found liable to service tax, the same shall be adjudicated upon where the petitioner shall also be given an opportunity of hearing.

In view of the aforesaid submissions of Mr. Anand, learned standing counsel we are inclined to treat the inquiry a preliminary inquiry and the concerned authority shall afford an opportunity of hearing to the petitioner who can produce the requisite documents highlighting that he is not liable to service tax. If the petitioner has submitted that documents which are available with him or which he is required to produce as per his understanding of the proceeding the preliminary enquiry shall be proceed. To cut short the delay it is directed that the petitioner or his authorised representative shall appear before the authority who had issued the notice on 01.10.2010.

Needless to say, it is a preliminary inquiry and not a demand, and hence, taking of coercive action does not arise. If the petitioner is visited with the demand, liberty is granted to him to approach the appropriate authority as advised in law.

We may hasten to clarify that in view of the submissions by Mr. Anand, learned counsel for the respondent, whatever has been done till today, it will not be in the realm of final enquiry. It needs no special emphasis to state that that the result of the enquiry shall be finalized after considering the stand and stance put forth by the petitioner.”

6. Relying on the same, it is contended by Mr. Mittal that despite the aforesaid order and the stand put forth by the petitioner the respondents have taken a decision directing the petitioner to submit various documents including ST-2 registration certificate, complete contracts for all works done, year wise bills for providing the services and copy of audited balance sheets for the period 2005-06 to 2009-10. It is contended that the same has

been demanded regardless of the order passed by this Court and a show
WP(C) 8284/2010

cause notice has been issued on 15.10.2010. Learned counsel for the petitioner has submitted that the show cause notice is barred by limitation. Learned counsel for the petitioner has commended us to the decisions rendered in *A. Suresh v. State of Tamil Nadu*, AIR 1997 SC 1889 : (1997) 1 SCC 319, *Gupta Sanitary Stores v. Union of India*, AIR 1985 Del. 122, 132 (FB), *Sub-Divisional Inspector of Post, Vaikam and others v. Theyyam Joseph and others*, AIR 1996 SC 1271, *Bakhtawar Singh Bal Kishan v. UOI & Ors.*, (1988) 2 SCC 293 : AIR 1988 SC 1003, *CC, Calcutta & others v. Indian Oil Corporation and another*, (2004) 3 SCC 488 : 2004 (165) ELT 257 (SC) : (2004) 3 SCC 488, *ITW Signode India Ltd. v. Collector of Central Excise*, 2003 (158) E.L.T. 403 (SC), *Hindustan Poles Corporation v. Commissioner of C. Ex., Calcutta*, 2006 (196) E.L.T. 400 (SC) and *State of Punjab v. Bhatinda District Co-op. Milk P. Union Ltd.*, 2007 (217) E.L.T. 325 (SC).

7. Mr. Mukesh Anand, learned standing counsel for Central Excise and Customs, resisting the aforesaid contentions put forth by Mr. Mittal, submitted that in the notice to show cause the statutory provisions have been referred to and a prima facie opinion has been formed but that does not necessarily mean the stand and stance put forth by the petitioner has been totally brushed aside. He has drawn our attention to paragraphs 23 and 24 of the Show Cause Notice date 15.10.2010 which read as follows:

“23. M/s L.R. Sharma & Co., V-17, Green Park Ext.,
New Delhi-110016, are required to produce at the time of

showing cause, all evidence upon which they intend to rely upon in support of their defence. They are also required to indicate in their written reply as to whether they wish to be heard in person before the case is adjudicated failing which it would be construed that they do not wish to be heard in person.

24. If no show cause is shown against the action proposed to be taken, within the stipulated period and / or they don't seek personal hearing and / or they do not appear before the adjudicating authority when the case is posted for hearing, the case will be decided on the basis of evidence available on records."

8. To appreciate the submissions raised at the bar, we have carefully perused the pleadings and the notice to show cause and our previous order. Upon hearing the learned counsel for the petitioner, what we have understood, is that the plea of the petitioner is that it is not required to get itself registered and is not liable to pay service tax. There can be no bar that the petitioner cannot contend before the statutory authority that it is not liable to pay the service tax and hence, there is no necessity for getting itself registered.

9. In this context, we may refer to certain citations which have been emphatically relied upon by learned counsel for the petitioner. In *ITW Signode India Ltd.* (supra), the Apex Court has held thus:

"62. The question of limitation involves a question of jurisdiction. The findings of fact on the question of jurisdiction would be a jurisdictional fact. Such a jurisdictional question is to be determined having regard to both fact and law involved therein. The Tribunal, in our opinion, committed a manifest error in not determining the said question, particularly, when in the absence of any finding of fact that such short-levy of excise duty related to any positive act on the part of the appellant by way of

fraud, collusion, willful mis-statement or suppression of facts, the extended period of limitation could not have been invoked and in that view of the matter no show cause notice in terms of Rule 10 could have been issued.”

10. In ***Bhatinda District Co-op. Milk P. Union Ltd.*** (supra), it has been held thus:

“22. The question as to what would be the reasonable period did not fall for consideration therein. The binding precedent of this Court, some of which had been referred to us hereto before, had not been considered. The counsel appearing for the parties were remiss in bringing the same to the notice of this Court. Furthermore, from a perusal of the impugned notice dated 4.9.2006, it is apparent that the Revisional Authority did not assign any reason as to why such a notice was being issued after a period of 5½ years.

23. Question of limitation being a jurisdictional question, the writ petition was maintainable.

24. We are, however, not oblivious of the fact that ordinarily the writ court would not entertain the writ application questioning validity of a notice only, particularly, when the writ petitioner would have an effective remedy under the Act itself. This case, however, poses a different question. The Revisional Authority, being a creature of the statute, while exercising its revisional jurisdiction, would not be able to determine as to what would be the reasonable period for exercising the revisional jurisdiction in terms of Section 21(1) of the Act. The High Court, furthermore in its judgment, has referred to some binding precedents which have been operating in the field. The High Court, therefore, cannot be said to have committed any jurisdictional error in passing the impugned judgment.”

11. In ***Hindustan Poles Corporation*** (supra), the Apex Court was dealing with an appeal from the show cause notices issued by the Additional Collector of Central Excise, Calcutta – I. In the said case, it was held by their Lordships thus:

“40. Before we part with this case we would like to impress upon the respondent authorities that before issuance of show cause notices the Revenue must carefully take into consideration the settled law which has been crystallized by a series of judgments of this Court. The Revenue must make serious endeavour to ensure that all those who ought to pay excise duty must pay but in the process the Revenue must refrain from sending of indiscriminate show cause notices without proper application of mind. This is absolutely imperative to curb unnecessary and avoidable litigation in Courts leading to unnecessary harassment and waste of time of all concerns including Tribunals and Courts.”

12. On a perusal of the aforesaid decisions, we are of the considered opinion that the present notice to show cause is not a one where the question of limitation can be decided straightaway on law without adverting to intrinsic facts. It is also not a case where it can be said that the revenue has sent an indiscriminate show cause notice without proper application of mind. What is contended by learned counsel for the petitioner and put up as questions of law read as follows:

“I. Whether in the facts and circumstances, the impugned show cause notice dated 15.10.2010 is valid under the law?

II. Whether a show cause notice can be issued after making the best judgment assessment under section 72 of the Finance Act, 1994?

III. Whether the Respondent No.2 is right in simultaneously invoking the provisions of section 72 and 73 of the Finance Act, 1994?

IV. Whether the business activity of the Petitioner of laying of long distance pipeline for the purpose of carrying of drinking water, sewerage and untreated effluent water is covered under sub-clause (zzd) of clause (105) of section 65 of Chapter V of the Finance Act, 1994?”

In our considered opinion the same require to be adjudicated by the adjudicating authority and the show cause on the grounds urged cannot be lanced. However, as the reply to the show cause has not been filed, we grant liberty to the petitioner to file the reply within a period of six weeks and further observe that the competent authority shall adjudicate the controversy taking into consideration the stand put forth by the petitioner from all spectrums and after affording an appropriate opportunity of hearing pass a cogent and reasoned order.

13. The writ petition is accordingly disposed of. No order as to costs.

CHIEF JUSTICE

MANMOHAN, J

DECEMBER 13, 2010
dk