1IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.01.2015

CORAM

The Hon'ble MR.SANJAY KISHAN KAUL, CHIEF JUSTICE
AND
The Hon'ble MR.JUSTICE M.M.SUNDRESH

W.P.Nos.28134 to 28137 of 2008 and
5040 and 5041 of 2011

Khivraj Motors Pvt. Ltd.
No.623, Anna Salai,
Chennai 600 006. .. Petitioner in W.P.No.28134, 28135/08

Khivraj Tech Park PVT Ltd.,
No.1, Sidco Industrial Estate,
Guindy, Chennai-32. .. Petitioner in W.P.No.28136, 28137/08

M/s. Express Infrastructure
Pvt. Ltd.,
Express Estates
No.2, Club House Road, Mount Road
Chennai-2
Represented by its
Chief Financial Officer, .. Petitioner in W.P.No.5040 & 5041/11

-vs-

1.Union of India,
Rep. By its Secretary,
Ministry of Finance, Department of Revenue,
Government of India, North Block,
New Delhi.

2.The Chairman,
Central Board of Excise and Customs,
North Block, New Delhi.

3.The Commissioner of Service Tax,
MHU Complex, Nandanam,
Anna Salai, Chennai-35. .. Respondents in all the WPs.

Petitions filed under Article 226 of the Constitution of India praying for issue of Writ of (1) Declaration, to declare the impugned CBEC Circular No.98/1/2008-ST dated 04.01.2008 issued by the second respondent as ultra vires to the provisions of Cenvat Credit

Rules, 2004, to the provisions of 66, 94(2)(eee) of the Finance Act, 1994, as amended, Articles 14, 19(1)(g), 265 and 300A of the Constitution of India, in so far as the petitioner is concerned (in W.P.28134/08, 28136/08 5040/11) (2)prohibition to prohibit the 3rd respondent from proceedings with the impugned show cause notice No.341/08, 340/08 respectively dt. 23.10.2008 and pass such further or other orders (in W.P.28135/08 & 28137/08) (3)certiorari calling for the records on the files of the 3rd respondent herein in show cause notice No.32/11 dt. 21.2.11 (in W.P.5041/11 respectively.

For Petitioners in all WPs. : Mr.Aravind P.Datar, S.C. For Mr.K.Vaitheeswaran

For Respondents : Mr.V.Sundareswaran, CGSSC

COMMON ORDER

(Order of the Court was made by The Hon'ble Chief Justice)

Learned counsel for the Revenue, at the inception itself, states that the following portion of the show cause notices in question may be treated as withdrawn:

> ''... This position was also clarified by CBEC vide Circular No.98/1/2008-ST dt.4.1.08 which is reproduced under:
>
> ''Commercial or industrial construction service or works contract service is an input service for the output namely immovable property. Immovable property is neither subjected to central excise duty nor to service tax. Input credit of service tax can be taken only if the output is a 'service' liable to service tax or a 'goods' liable to excise duty. Since immovable property is neither 'service' or 'goods' as referred to above, input credit cannot be taken.''

The effect of the aforesaid, thus, is that it is conceded that the circular will not have an application to the case at hand.

2.Despite the aforesaid position, learned senior counsel for the petitioners continued with his elaborate submissions by referring to catena of judgments and contending that this Court must and must alone quash the circular in question, as that is the prayer made in the petitions. He submitted that the petitioners would not be satisfied with anything other than this, as the petitioners will not get any relief othewise, since he is convinced that the department would pass an adverse order.

3.We are unable to accept the contention of the learned senior counsel. The effect of the statement made by the learned counsel for the Revenue is that the impugned notice does not anymore refer to the circular. It is not a matter which rests at this, as the reference to the circular earlier made stands specifically obliterated. It has been acknowledged that the effect of the same is that the circular is not applicable to the case at hand. It cannot be said that because the circulars are of guidance to the department having been issued under Section 37-B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994, no officer would be able to ignore it. When a circular is conceded as not applicable, there is no question of perceived threat.

4.Among the catena of judgments in the same line, learned senior counsel has referred to the judgment of the learned Single Judge (as he then was) in Madras Bar Association and Others vs. CBDT and others, (1995) 216 ITR 240. Learned senior counsel has specifically invited our attention to the conclusion of the learned Single Judge, wherein he had observed that in those type of cases before the Court, the conclusion, as arrived at in All Gujarat Federation of Tax Consultants vs. CBDT, (1994) 76 Taxman-Tax Reports 307, would not be an appropriate relief permitting assessment to be done de hors the circular. The rationale for the same is stated to be the threat posed by the impugned circular being real and substantial and thus, concluded that since they are guidelines and instructions, they must be quashed. However, we find that, in substance, what the learned Single Judge rejected was what was perceived to be a futile contention of the Revenue that there was no need to quash the circular issued and the same can be allowed with a mere clarification of the position.

5.In the present case, the circular has been conceded to have no application to the case of the petitioners. That position enuring, we see no point in going into the merits of the circular, i.e., whether it is valid or invalid, violative of the provisions of the Act or the Constitution, since that would be an academic exercise and this Court, certainly, is not exercising an advisory jurisdiction. In case, where there is really a perceived threat that this issue can be examined. There is, in fact, no threat to the petitioners, except a perceived apprehension possibly arising after the past experience of the learned senior counsel with the Revenue department - may not be unreasonable. We may also note that current professed policy of the Government of India to make the tax regime friendly and not oppressive to the assessee.

6.In view of the aforesaid, we take the statement of the learned counsel for the Revenue on record and dispose of the writ petitions, leaving the question of validity of the circular open, but making it clear that in view of the concession, it would have no application to the case of the petitioners. Parties to bear their own costs.

7.The petitioners, having not filed their response to the show cause notices, as requested by the learned senior counsel, are granted six (6) weeks time to file their response to the notices.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Secretary to the Union of India,
Ministry of Finance, Department of Revenue,
Government of India, North Block,
New Delhi.

2.The Chairman,
Central Board of Excise and Customs,
North Block, New Delhi.

3.The Commissioner of Service Tax,
MHU Complex, Nandanam,
Anna Salai, Chennai-35.

+ 6 ccs to Mr.K. Vaitheeswaran, Advocate SR.4612 & 4613

W.P.Nos.28134 to 28137 of 2008 and 5040 and 5041 of 2011

RV(CO)
Eu 10.02.15