

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 03.08.2016

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.27001 of 2016 &

W.M.P.No.23198 of 2016

M/s.Raj Petro Specialities Pvt. Ltd.,
Rep. by its Director, Viren B Nanavati,
No.73/1B, Vaikkadu Village,
Manali, Chennai-600 103. ... Petitioner

Versus

- 1.The Principal Commissioner of Central Excise,
Chennai I Commissionerate,
No.26/1, Mahatma Gandhi Road, Chennai-600 034.
- 2.The Assistant Commissioner of Central Excise,
AB Division, Chennai I Commissionerate,
459 (Old No.317), Anna Salai, Teynampet,
Chennai-600 018.
- 3.The Commissioner of Service Tax,
No.692, MHU Complex, Anna Salai,
Chennai-600 035. ... Respondents

Prayer: This Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorari to call for the records relating to the impugned show cause notice issued by the first respondent in Show Cause Notice No.011/2016 (C.No.V/15/27/65/2015-Adj), dated 24.02.2016 and quash the same as arbitrary, unsustainable, contrary to the settled principles of law and contrary to the provisions of the Central Excise Act.

For Petitioner : Mr.K.Jayachandran

For Respondents : Mr.A.P.Srinivas
Senior Panel Counsel

O R D E R

Heard Mr.K.Jayachandran, learned counsel appearing for the petitioner and Mr.A.P.Srinivas, learned Senior Panel Counsel, accepting notice on behalf of respondents. With the consent of the learned counsel on either side, the Writ Petition itself is taken up for final disposal.

2. The challenge in the present Writ Petition is to a Show-Cause Notice, dated 24.02.2016, by which, the respondent has called upon the petitioner to explain as to why an amount of 84,05,685/- quantified under Rule 6(3)(i) of the CENVAT Credit Rules, 2004 towards reversal of CENVAT Credit availed on the exempted service of trading for the years 2011-12 and 2012-13 should not be demanded and recovered from the petitioner under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11 A(4) of Central Excise Act, 1944; why the penalty should not be imposed under Rule 15 of the CENVAT Credit Rules, 2004; why the interest at the appropriate rate should not be recovered under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11AA of Central Excise Act, 1944 and why an amount of Rs.6,21,222/- for the year 2011-12 debited by the petitioner and an amount of Rs.5,04,316/- for the year 2012-13 debited by the petitioner should not be appropriated against the amount demanded as CENVAT credit apart from levying interest and cess.

3. The learned counsel for the petitioner vehemently contended that the impugned Show-Cause notice is not valid and contrary to the settled legal principles, on the ground that Service Tax Commissionerate on the same transaction proposed to demand service tax, whereas, the first respondent treated the same transaction as trading and an exempted service and has demanded an amount under Rule 6(3) of CENVAT Credit Rules. Therefore, both Commissionerate are taking contrary stands and there is an attempt to harass the petitioner. Referring to Audit paras, dated 07.03.2013, it is submitted that the petitioner has given their objections to the same on 27.06.2013, in which, they informed the Authority that they have taken conservative approach to avoid any litigation and decided to reverse pro-rata Input Service Tax Credit applying the provisions of Rule 6(3)(iii) read with Rule 6(3A)(c) of CENVAT Credit Rules, 2004 and they reversed the appropriate input service tax credit for the years 2011-12 and 2012-13. Further, it is submitted that after effecting such reversal, they filed a revision claim under Section 11 B of the Act, on 26.09.2013, pointing out that they had calculated pro-rata service tax CENVAT Credit amount to be reversed as per Rule 6(3A)(c) of CENVAT Credit Rules, 2004 and paid/reversed CENVAT Credit amount of Rs.6,21,222/- for the financial year 2011-12 and reversed CENVAT credit of Rs.5,04,316/- for the financial year 2012-13 respectively. The learned counsel further submits that while the position stood thus, the impugned Show Cause Notice has been issued.

4. By referring to Section 11 A(7) of Central Excise Act, it is submitted that the impugned proceedings initiated after a period of one year is wholly without jurisdiction. That apart, it is submitted that the Hon'ble Supreme Court in the decision of ORISSA BRIDGE & CONSTRUCTION CORPN. LTD., Vs. C.C.E., BHUBANESWAR reported in 2011 (264) E.L.T.14 (S.C), the Hon'ble Supreme Court held that invoking extended period of limitation under Section 11A of the Central Excises and Salt Act, 1944, is not justified.

5. After hearing the learned counsel for the parties elaborately, this Court is of the view that the petitioner cannot maintain this Writ Petition to quash the impugned order, which is only a Show-Cause Notice.

6. The issue as to whether the Show-Cause Notice is barred by limitation in terms of Section 11A(7) of the Central Excise Act is essentially a question of fact. Furthermore, the effect of the earlier proceedings which were initiated pursuant to the audit paras and reply given by the petitioner, the reversal of appropriate input tax done by them and the claim for revision effected by them and the impact of those proceedings on the impugned Show-Cause Notice is also a factual issue. That apart, the action initiated by the petitioner based on audit paras has not attained finality pursuant to the petitioner's claim for refund vide Application dated 26.09.2013. A Show-Cause Notice has been issued to the petitioner on 23.09.2014, by the Assistant Commissioner of Central Excise, A B Division, Chennai I Commissionerate. Therefore, such issue cannot be taken to have attained finality and more particularly, when the petitioner has given a reply to the Show-Cause Notice.

7. In such circumstances, this Court would not be justified in interdicting the proceedings at the stage of Show-Cause Notice, as the decision in the case of ORISSA BRIDGE & CONSTRUCTION CORPN. LTD., referred supra, would not be of much assistance to the case of the petitioner, since in those proceedings, the assessee had exhausted all the channels and the Appeal was against the order passed by the Tribunal.

8. Considering the facts and circumstances of the case, the Hon'ble Supreme Court observed that without laying any proposition of law, in view of the fact of the said case, it was held that the Department was not justified in invoking the extended period of limitation under Section 11A of the Central Excises and Salt Act, 1944. Therefore, the decision was rendered on the facts of the said case and the Hon'ble Supreme Court has also observed that they are not laying any proposition of law. In circumstances, the petitioner has to necessarily subject himself to the proceedings initiated by the first respondent and submit their reply to the Show-Cause notice.

9. In any event the petitioner submits his reply raising all objections, both, factual and legal, the first respondent shall consider the issue as to whether the impugned proceedings is barred by limitation, as first among the several other issues and thereafter take up the other issues for adjudication and pass an order on all issues.

10. For all the above reasons, this Court is not inclined to interfere with the impugned Show-Cause Notice and the Writ Petition fails and the same is dismissed. The petitioner is granted three weeks time from the date of receipt of a copy of this order, to file a reply to the Show-Cause Notice, which shall be adjudicated

as aforesaid.

11. Accordingly, the Writ Petition is dismissed with observation. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

To

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3.The Commissioner of Service Tax,
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Chennai-600 035.

+1 cc to Mr.K.Jayachandran, advocate,sr.43884

+1 cc to M/s.A.P.Srinivas,advocate,sr.44524.

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