

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

WRIT PETITION (T) NO. 73 OF 2017

M/s Sarda Energy & Minerals Ltd., Industrial Growth Centre Siltara Mandhar Road Siltara, Raipur, Chhattisgarh (The limited liability company registered under the Companies Act, 1956) having its registered office at 73 A, Central Avenue, Nagpur, Maharashtra, through its Authorised Signatory.

... Petitioner

Versus

1. Union of India, through the Secretary, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs, North Block, New Delhi.
2. Commissioner, Central Excise and Service Tax, Raipur, Central Excise Building, Dhamtari Road, Tikrapara, Raipur (C.G.)
3. Commissioner (Audit), Customs, Central Excise and Service Tax, Raipur, Central Excise Building, Dhamtari Road, Tikrapara, Raipur (C.G.)

... Respondents

For Petitioner	:	Mr. Chandra Shekhar Sharma, Mr. R.K. Sharma and Mr. Amrito Das, Advocates.
For Respondents	:	Mr. Vinay Pandey, Advocate.

Hon'ble Shri Justice P. Sam Koshy

Order on Board

28/06/2017

1. The present writ petition has been filed assailing the demand-cum-show cause notice dated 25.10.2016. Vide the said show cause notice, the Respondents have granted an opportunity to the Petitioner to show cause as to why the amount which the Petitioner has received as an outcome of an arbitration dispute decided by the International Court of Arbitration by mutual consent be not treated as taxable for the purpose of calculating service tax.
2. The Petitioner is assailing the said show cause notice on the ground that the respondent authorities have erred in law inasmuch as the said amount which the Petitioner has received is by virtue of a settlement out of Court in an arbitration dispute. According to the petitioner, the said amount is not any consideration for the services rendered but is the compensation

for the breach of contract at the hands of the company based at Finland, namely, M/s Outotec (Filters), Ove (Finland).

3. Contention of the learned Counsel for the Petitioner is that the said amount which they have received is towards compensation and is not any consideration for the services rendered and therefore it would fall within the exempted category as is defined under Section 66E(e). The further contention of the learned Counsel for the Petitioner is that the plain perusal of the definition of 'service' as is defined under Section 65B(44) also would clearly reflect that the said is an exempted category, as under Section 44A(iii) a transaction in money or actionable claim is exempted from the definition of 'service'. Contention of the learned Counsel for the Petitioner also is that the fact that since they are raising a jurisdictional issue in respect of demand notice issued by the Respondents, the present writ petition is maintainable and this Court in exercise of its powers under Article 226 of the Constitution of India is competent to consider the objections raised by the Petitioner. It is further contended by the learned Counsel for the Petitioner that in the even if the authorities reach to the conclusion that it was a service rendered by the Petitioner, it would fall within the category of export of service and which again would be an exempted category. He also contended that since the text of the show cause notice itself shows that the authorities concerned are predetermined inasmuch as they have already made up their mind that the amount which the Petitioner has received as compensation in the arbitration dispute is leviable of service tax it would be a futile exercise if the Petitioner is made to approach the authorities by submitting their reply to the show cause notice. That they may also be faced with the deterrent of the clause of pre-deposit in the event of an appeal to be preferred and thus prayed for the petition to be entertained on merits.

4. Learned Counsel for the Petitioner relies upon the judgment of the Hon'ble Supreme Court in the case of *Raza Textile Ltd. v. Income Tax Officer, Rampur*, 1973 (1) SCC 633 and which has further been reiterated in the case of *Shrisht Dhawan (Smt.) v. M/s Shaw Brothers*, 1992 (1) SCC 534.

5. Learned Counsel for the Respondents submits that the present writ petition at this juncture is too premature on the ground that the Petitioner has been granted sufficient opportunity to defend their case before the assessing authority and that all the contentions of the Petitioner which they are raising in the present writ petition can also be taken care of by the assessing authority. That the arguments which have been led by the learned Counsel for the Petitioner are all at this juncture presumptive and the petition is too premature. It was also objected by the learned Counsel for the Respondents that the present writ petition has also been filed after a considerable period of time from the date of issuance of show cause notice.

6. Having considered the contentions put forth by either side and on perusal of the records what clearly reflects is that the impugned demand-cum-show cause notice is one which was issued on 25.10.2016. The present writ petition was filed by the Petitioner on 22.5.2017, that is to say that there is a gap of almost about 7 months from the date of issuance of the impugned show cause notice. Further, from the perusal of the show cause notice it also reflects that at the time of the audit the Petitioner had been repeatedly asked to submit certain details on the basis of which audit could be done, but from the contents of show cause notice it reflects that there was a certain element of non-cooperation at the hands of the Petitioner. Thereafter, the authorities of the Respondents have discussed

the entire factual matrix of the case and the legal provisions also and then the show cause notice has been issued.

7. The Hon'ble Supreme Court in the case of *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. & Others*, AIR 1985 SC 330, has observed as follows:

“Article 226 is not meant to short circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to by-pass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. The Supreme Court can take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and there after prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged.”

8. The Hon'ble Supreme Court particularly in the field of taxation on more than a couple of occasions has held that at the show cause stage the writ Court should not entertain the writ petition unless there is a grave error committed by the authorities concerned in exercise of its jurisdiction. The Apex Court in the case of *Union of India v. M/s Hindalco Industries*, 2003 (5) SCC 194, in para 12, in a very categorical term has held as under:

“12. There can be no doubt that in matters of taxation, it is inappropriate for the High Court to interfere in exercise of jurisdiction under Article 226 of the Constitution either at the stage of the show-cause notice or at the stage of assessment where alternative remedy by way of filing a reply or appeal, as the case may be, is available but these are the limitations imposed by the courts themselves in exercise of their jurisdiction and they are not matters of jurisdictional factors. Had the High Court declined to interfere at the stage of show-cause notice, perhaps this Court would not have been inclined to entertain the special leave petition; when the High Court did exercise its jurisdiction, entertained the writ petition and decided the issue on merits, we do not think it appropriate to upset the impugned order of the High Court under Article 136 of the Constitution on a technical ground.”

9. Ordinarily High Court should not embark to decide the factual disputes but relegate the party to submit the reply before the authority concerned who is obliged to decide the same. In *Union of India v. Vicco Laboratories*, 2007 (13) SCC 270, the Hon'ble Supreme Court has held that:

"31. Normally, the writ court should not interfere at the stage of issuance of show-cause notice by the authorities. In such a case, the parties get ample opportunity to put forth their contentions before the authorities concerned and to satisfy the authorities concerned about the absence of case for proceeding against the person against whom the show-cause notices have been issued. Abstinance from interference at the stage of issuance of show-cause notice in order to relegate the parties to the proceedings before the authorities concerned is the normal rule. However, the said rule is not without exceptions. Where a show-cause notice is issued either without jurisdiction or in an abuse of process of law, certainly in that case, the writ court would not hesitate to interfere even at the stage of issuance of show-cause notice. The interference at the show-cause notice stage should be rare and not in a routine manner. Mere assertion by the writ petitioner that notice was without jurisdiction and/or abuse of process of law would not suffice. It should be prima facie established to be so. Where factual adjudication would be necessary, interference is ruled out."

10. Taking into consideration the aforesaid legal proposition as has been settled by the Hon'ble Supreme Court and also considering the submissions made by the learned Counsel for the Petitioner particularly the fact that the amount that they have received whether is non-taxable, this aspect is one which would require consideration by the competent authority after considering the various documents which the Petitioner might be having in their possession like – nature of dispute that was before the International Court of Arbitration and the nature of award that they have received. Whether this would be taxable or not would have to be assessed and determined by the assessing authority based upon the evidence produced before it.

11. It would be inappropriate for this Court to interfere with the show cause notice in exercise of powers under Article 226 of the Constitution of India at this juncture as there is an alternative remedy available to the Petitioner. Further, what is also apparent is the fact that it is not a case where the Petitioner had promptly at the threshold approached the writ Court challenging the show cause notice. The Petitioner for reasons best known to them have waited for almost seven months of time and thereafter have preferred the present writ petition. In spite of having received seven months' time they have not even replied to the show cause notice. All these facts make this Court reluctant to interfere with the impugned show cause notice.

12. For the aforesaid reasons, this Court is of the opinion that it would not be proper at this juncture to interfere with the impugned show cause notice. Accordingly, the present writ petition fails and deserves to be dismissed.

13. In the result, the writ petition is dismissed.

Sd/-
(P. Sam Koshy)
Judge