IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10088 OF 2015

M/s. Sai Service Private Limited } Petitioner
versus
The Union of India and Ors. } Respondents

WITH
WRIT PETITION NO. 3099 OF 2016

The Federation of Automobile }
Dealers Association and Ors. } Petitioner
versus
The Union of India and Ors. } Respondents

Mr. Bharat Raichandani with Mr. Mahesh Raichandani i/b. Mr. B. J. Raichandani for the petitioners.

Mr. Pradeep S. Jetly with Mr. Sham Walve for respondent nos. 1 and 2.

Ms. P. S. Cardozo with Mr. Sham Walve for respondent no. 3.

Ms. Sushma Bhende – AGP for respondent no. 4.

CORAM :- S. C. DHARMADHIKARI &
PRAKASH. D. NAIK, JJ.

DATED :- MARCH 27, 2017

P.C. :-

1. By Writ Petition No. 10088 of 2015, the petitioner seeks the following relief:-

"(a) that this Hon'ble Court be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the Petitioner case and after going into the validity and legality thereof quash letter F. No. DGCEI/MZU/I & IS 'A'/12(3)/10/2015 dated 24.06.2015 (Exhibit "A")"

2. When this writ petition was filed in this court way back on 8th September, 2015, the challenge was to a communication from the Directorate General of Central Excise Intelligence dated 24th June, 2015. That communication, copy of which is at page 19 of the paper book, reads as under:-

"F. No. DGCEI/MZU/I & IS 'A'/12(3)/10/2015
Mumbai:- 24th June, 2015

To,
M/s. Sai Service Pvt. Ltd.,
High Street Phoenix,
Phoenix Mill Compound,
462, S. B. Marg,
Mumbai – 400 013

Gentlemen,

Sub: Service Tax enquiry-reg

An enquiry to ascertain facts relating to payment of Service Tax is being carried out under the provisions of Chapter V of the Finance Act, 1944.

2. In connection with the above enquiry, the following documents/information for the period from July, 2012 till April, 2015 are required by this office:-

(i) Amount of Incentive/Bonus received from M/s. Maruti Suzuki India Ltd., if any,

(ii) Details of Service tax paid on the aforementioned Incentive/Bonus and proof of payment thereof.

> 3. The above information/documents are sought under the provisions of Section 83 of Chapter V of the Finance Act, 1994 read with Section 14 of the Central Excise Act, 1944.
>
> Yours faithfully,
> (S. M. Jalui)
> Senior Intelligence Officer"

3. The petitioner has clarified that it is engaged, *inter alia*, in the sale of motor vehicles and spare parts thereof. It is an authorised dealer for sale of cars manufactured by M/s. Maruti Udyog Limited (MUL). The petitioner purchases these vehicles from MUL and sells the same on its own account to various customers. The assertion in the petition and even of Mr.Raichandani learned counsel appearing for the petitioner, during his oral arguments, is that the petitioner renders no service in the subject transaction, namely, purchase of vehicles from the MUL. It is submitted by him that in terms of the agreement with MUL, MUL offers certain target based incentives to the petitioner. The incentive is in the nature of reduction from the sale price of the cars/spare parts. These are in the nature of discount offered to the petitioner either in the form of cash discount or quantity discount. The Revenue thought it to bring it in the ambit of "service" and as understood by the Finance Act, 1944.

4. The allegation is that for earlier years this very issue was raised by the Revenue. They issued a show cause notice dated 22nd August, 2008. That was adjudicated. As far as this legal aspect is concerned, on 22nd June, 2009, the order-in-original was passed, in which, the third respondent observed that the activities cannot be brought within the definition of the term "taxable service" as understood by the Finance Act, 1994. It is an incentive received from the MUL under taxable head of "business auxiliary" service and defined under section 65(19) of the Finance Act, 1994. Mr. Raichandani would submit that this order has been accepted by the Department. Now, with very same allegations, a fresh show cause notice has been issued and that too during the pendency of this writ petition. This court, therefore, must proceed to decide as to whether that show cause notice is maintainable or otherwise.

5. Mr. Raichandani would submit that ordinarily this court would not entertain a challenge to a show cause notice and quash it in writ jurisdiction, however, if the show cause notice is *ex-facie* without jurisdiction, its issuance is completely vitiated in law, then, there are certain known exceptions and in writ jurisdiction, this court can interfere.

6. Mr. Raichandani, in the alternative, submits that assuming without admitting that the legal position has changed from the time the earlier show cause notice was adjudicated and which adjudication is accepted, the fundamental and basic factual position cannot be held to be altered. The law understands the term "service" and as defined earlier and even now in a certain way. There is no change therein. Merely because from 1st July, 2012 onwards there has been a change in the definition of the term "taxable service" appearing in section 65B(44) of the Finance Act, 1994, yet, the word "declared service" being included therein and an exception carved out in that behalf will not take within the amended provision the activities of the petitioner, which remain the same. The business activities, therefore, do not partake the nature of a service. That is always a sale of goods and subject to the local tax or a sales tax imposed by the State Legialature, then, the central levy can never be said to be attracted. For all these reasons, he would submit that the show cause notice should not be allowed to be adjudicated. According to Mr. Raichandani, all facts are placed before this court in the affidavit in reply and the hearing on the show cause notice and passing of an order of adjudication is nothing but a empty formality.

7. Ms. Cardozo appearing for the respondents raised an objection to the maintainability of the writ petition and submits that the copy of the show cause notice, on careful perusal, would reveal that the Revenue understands the controversy not as projected by Mr. Raichandani, but otherwise. She submits that the inquiry was initiated by the officers of Service Tax (III) Commissionerate, Mumbai against the petitioner. That was on the issue of non payment of service tax on incentives received from MUL and others. There were other issues as well. The investigation revealed that the petitioner before us had obtained Centralised registration with Pune II Commissionerate with effect from 7th May, 2015 and hence, the Additional Commissioner, Service Tax-III, Mumbai, by letter dated 16th February, 2016, forwarded the case file to the office of the said Commissioner, namely the Additional Commissioner, Service Tax-III, Mumbai for further investigation. That is how further investigation was carried out for the period, namely, financial year 2011-12 to financial year 2015-16. The summonses were issued. The officers of the petitioners were interrogated. There were certain documents seized. Inquiries were also made with M/s. Maruti Suzuki India Limited and by seeking month-wise details of incentives received. In the meanwhile, since the centralised registration was obtained, the files were transferred to the

Commissioner at Mumbai for further investigation. The requisite information was not supplied and therefore, further communications were addressed and post institution of the writ petition as well. True it is that there was an earlier show cause notice issued and further true it is that the adjudication order passed in those proceedings were accepted by the Revenue. Still, post institution of this writ petition, it was found that there was no stay or prohibition against investigation. The investigation carried out revealed that though the petitioner is an authorised dealer of cars manufactured by Maruti Suzuki India Limited, the vehicles were purchased from the said Maruti Suzuki India Limited. The stock was managed and then the vehicles were sold to the customers from the stock of the petitioner under the invoice of the petitioner and there was a margin between the purchase price and the sales price. They are traders/dealers in cars. However, the trading in goods being non taxable activity under the service tax up to 30th July, 2012, the activity was brought under negative regime or negative list from 31st July, 2012 onwards. The show cause notice alleges that the version of the petitioner could not be ascertained as throughout there was non-cooperation, the requisite information and details were not supplied. The supplying of the same was intermittent. The statement of one Mr.Nagesh Dattatraya Bhandary was recorded.

On being asked about the stand on the incentives issued and non submission of the information during the period from April, 2011 to March, 2016, the statement of this gentleman was that they have neither paid nor are paying the service tax on the incentives from M/s.MUL. That contention in details has already been submitted vide letters dated 14th July, 2016, 18th July, 2016 and 26th August, 2016.

8. We are of the firm view, on reading of these materials, that the show cause notice, though referring to the earlier adjudication, its acceptance, has further alleged that after the law was amended, it was necessary to probe and investigate the matter. The investigation and the statements, which were recorded during the course thereof, revealed, as provided in para 7 of the show cause notice and in great details (question answer-wise), that the various incentives were received on account of satisfactory services in various fields, namely, puchase/delivery of goods, namely, vehicles/spare parts, sale of the goods, the servicing of the vehicle parts and customer satisfaction etc. That is for achieving commercial success. The allegations that are made and from para 12.1 onwards would reveal as to how the matter was approached by the Revenue earlier and post the amendment.

9. Mr. Raichandani would only read para 14(a) of the show cause notice and to submit that the law has evolved, according to the Revenue, but it has not evolved to such an extent as to take within its import a sale of goods and subject to a levy of sales tax under the Sales Tax Act. Therefore, the Revenue cannot go back and re-adjudicate whether the activity undertaken by the petitioner is a service. The activity remains the same. We do not think that we should conclude the issue only by reading this sub-para of para 14. Even if para 14 is to be read, it must be read with the preceding paragraphs and allegations therein. It may be that there is substance in the contention about the nature of the activity, but we cannot forget and overlook the fact that the law has indeed undergone a change. It is in these circumstances and when the allegations raised are post the law changing and as noted above, we do not think that we can go into the factual issues. The projection by Mr.Raichandani is that the activity is the same, the issue as understood is same as in the earlier round. That would require the matter to be probed and in further details on facts. We do not think that within the limited parameters of writ jurisdiction this matter can be decided. In other words, this matter does not come within the exceptions carved out and noticed above. The show cause notice will have to be adjudicated independent of the version the Revenue projects and places

before this court. There is a distinct obligation in the adjudication officer. In these circumstances, by clarifying that the adjudication shall proceed without in any manner being influenced by the stand of the Revenue reflected in the affidavit in reply so also on its own merits and in accordance with law, that all contentions, including those in this writ petition can be raised, we dispose of the writ petition.

10. As far as Writ Petition No. 3099 of 2016 is concerned, Mr.Raichandani submits that it is filed by the Federation of Automobile Dealers Association. He fairly states that the show cause notice, as issued to the petitioner in Writ Petition No.10088 of 2015, has not been issued to individual dealers and members of this association. In view thereof, presently we do not think that we should entertain a wider challenge and that too in a representative capacity. Keeping open the challenge for being raised not only by the association at a later stage, but equally by the individual members, we dispose of this petition. We clarify that all contentions of all parties are kept open and we express no opinion thereon.

(PRAKASH.D.NAIK, J.) **(S.C.DHARMADHIKARI, J.)**