In the High Court of Judicature at Madras

Dated: 13.03.2017

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The Honourable Mr.JUSTICE K.RAVICHANDRABAABU

W.P.Nos.4336 to 4338 and 5571 of 2017
and
WMP Nos.4521 to 4523 of 2017

P.John Joseph .... Petitioner in W.P.4336/2017

S.Saseedharan ...Petitioner in W.P.4337/2017

N.Sunitha ...Petitioner in W.P.4338/2017

P.Shanmugam ...Petitioner in W.P.5571/2017

Vs.

The Joint Commissioner of Central Excise,
No.1, Foulks Compound,
Anai Road,
Salem 636 001. ...Respondent in all W.Ps.

Prayer in W.P.4336/2017:Writ petition filed under Article 226 of the Constitution of India for issuance of a writ of certiorarified mandamus to call for the records of the respondent in Order in Original SI.No.75/2016-ST (JC) dated 09.11.2016 and quashing the same and consequently, direct the respondent to adjudicate the matter afresh after issuing fresh show cause notice within the jurisdiction of Section 73 of the Finance Act, 1994 by incorporating the materials collected from the Courier Agency.

Prayer in W.P.4337/2017:Writ petition filed under Article 226 of the Constitution of India for issuance of a writ of certiorarified mandamus to call for the records of the respondent in Order in Original SI.No.77/2016-ST (JC) dated 09.11.2016 and quashing the same and consequently, direct the respondent to adjudicate the matter afresh after issuing fresh show cause notice within the jurisdiction of Section 73 of the Finance Act, 1994 by incorporating the materials collected from the Courier Agency.

Prayer in W.P.4338/2017:Writ petition filed under Article 226 of the Constitution of India for issuance of a writ of certiorarified mandamus to call for the records of the respondent in Order in Original SI.No.76/2016-ST (JC) dated 09.11.2016 and quashing the same and consequently, direct the respondent to adjudicate the matter afresh after issuing fresh show cause notice within the jurisdiction of Section 73 of the Finance Act, 1994 by incorporating the materials collected from the Courier Agency.

Prayer in W.P.5571/2017:Writ petition filed under Article 226 of the Constitution of India for issuance of a writ of certiorarified mandamus to call for the records of the respondent in Order in Original SI.No.74/2016-ST (JC) dated 09.11.2016 and quashing the same and consequently, direct the respondent to adjudicate the matter afresh after issuing fresh show cause notice within the jurisdiction of Section 73 of the Finance Act, 1994 by incorporating the materials collected from the Courier Agency.

For Petitioner in all W.Ps.	:	M/s.Naveena.D
For Respondents in W.P. No.4336 to4338/17	:	Mr.V.Sundareswaran Standing Counsel
For Respondent in W.P.5571/17	`:	Mr.K.Magesh For Standing Counsel(C & CE)

C O M M O N O R D E R

In all these writ petitions, the respective writ petitioner is aggrieved against the orders in original dated 09.11.2016, wherein and whereby they were called upon to pay service tax of Rs.42,74,690/-, 45,16,388/-, 42,60,539/-, 13,99,355/- under Section 73(2) of the Finance Act, 1994, interest at the applicable rates under Section 75 of the Finance Act, 1994 and penalty of Rs.42,74,690/-, 45,16,388/-, 42,60,539/-, 13,99,355/- under section 78(1) read with Section 78B(1)(b) of the Finance Act, 1994, a penalty of Rs.10,000/- each under section 77(1)(a) of the Finance Act, 1994 and further penalty of Rs.10,000/- each under Section 77(2) of the Finance Act, 1994 respectively.

2.The petitioners claiming to be co-loaders of M/s. Blue Dart Express Limited, Salem, which is a courier agency, challenged the impugned orders in original, mainly by contending that the same came to be passed in violation of the principles of natural justice, since the respondent relied on certain materials collected from the courier agency later to the hearing conducted and passed the impugned orders of adjudication, in violation of the principles of natural justice, as the respective petitioners were not served with copies of such documents.

3.According to the learned counsel for the petitioners, they are not liable to pay the service tax as demanded in the impugned proceedings, since the service provided by them would only fall under the category of "Goods Transport Agency Service" and not under the category of "Supply of Tangible Goods". Therefore, it is contended that when some materials are collected from the Blue Dart Express Limited and those materials are relied on by the adjudicating authority without furnishing copies of the same, the impugned orders cannot be sustained solely on the ground of violation of the principles of natural justice.

4.Per contra, Mr.V.Sundaresan, learned Standing counsel appearing for the respondent submitted that there is no violation of the principles of natural justice as alleged by the petitioners, since the materials collected from the Blue Dart Courier Service and the information contained therein are not contradicting the statement made by the petitioners themselves on 21.09.2015, 08.09.2015, 08.09.2015 and 25.08.2015 respectively as extracted in the show cause notices itself. In other words, it is the contention of the learned counsel that by not furnishing those materials to the petitioners, no prejudice is caused to them as those materials are only in line with the statements made by the petitioners already.

5.The learned counsel for the petitioners in reply to the above said submission stated that in the reply to the show cause notices, they have stated that some documents in the possession of the Blue Dart will support the case of the petitioners.

6.Heard the learned counsel appearing for the petitioners and the learned Standing counsel appearing for the respondent.

7.These writ petitions are filed against the orders in original. There is no dispute to the fact that before passing the impugned orders, the petitioners were served with show cause notice and they in turn had also given their reply. It is also not in dispute that the petitioners were given an opportunity of hearing. The only grievance of the petitioners before this court in order to maintain these writ petitions challenging the orders in original is that some materials collected by the adjudicating authority after the hearing and placing reliance on those materials, is in violation of the principles of natural justice.

8.In all these writ petitions, the crux of the issue involved in the merits of the matter is as to whether the service rendered by the petitioners would fall under the category of "Goods Transport Agency Service or "Supply of Tangible Goods Service". According to the petitioners, such service rendered by them would only fall under the category of "Goods Transport Agency Service" and not under the category of "Supply of Tangible Goods", as claimed by the department. Undoubtedly, the above question involving factual aspect of the issue having been answered by the adjudicating authority against the petitioners by passing a detailed order, has again to be gone into and decided only by the next fact finding authority viz., Appellate Authority, by considering all the material facts and circumstances and also by applying the relevant provision of law. There is no dispute to the fact that the petitioners have let their vehicles on hire to the Blue Dart Express Limited. But the petitioners claim that they are co-loaders. As rightly pointed out by the learned counsel for the respondent, in the respective statements made by the petitioners, it appears that they have stated that as per the vehicle agreement, they have supplied their vehicles on hire to Blue Dart Express Limited along with driver and that there is no consignment notes issued either by them or Blue Dart Express Limited for the transaction.

9.No doubt, the learned counsel appearing for the petitioners contended that in the reply to the show cause notices, they have disputed certain statements said to have been made, as extracted in the show cause notices. Needless to say that all these contentions have to be gone into and decided only by the Appellate Authority and therefore, this court, at this stage, is not inclined to go into such factual aspects of the matter in order to find out as to which category under which the petitioners would fall. Therefore, the next question that would arise for consideration is as to whether any violation of the principles of natural justice is evident on the face of the impugned orders, as alleged by the petitioners in these cases.

10.A perusal of the respective letters dated 10.10.2016, received from the Blue Dart and statements of the petitioners said to have been given on 21.09.2015, 08.09.2015, 08.09.2015 and 25.08.2015, as extracted in the show cause notices would only appear to be in line with each other and not contradicting one against another. When the statement of the petitioners as extracted in the show cause notices indicate that they have supplied their vehicles on hire to Blue Dart Express Limited along with driver and that no consignee notes are being issued either by the petitioners or by the Blue Dart for the transaction, the letter dated 10.10.2016 of the Blue Dart Express Limited referred to in the impugned orders also indicates that Blue Dart Express Limited has not availed goods transport service from the petitioners. It is further stated in the said letter that the Blue Dart has taken the vehicle on hire and not a transport of goods by road service. Therefore, in my considered view, it appears that the letters obtained from Blue Dart and the recitals contained therein, are in line with the statements made by the respective petitioners and therefore, by not furnishing those details to the petitioners, is not in any way causing prejudice to them. In other words, the original authority has extracted those letter and other invoices received from the Blue Dart in the impugned orders, since those documents are in line with the statements made by the petitioners already. Therefore, I find no violation of the principles of natural justice in these cases by not furnishing those documents to the petitioners, as such non furnishing is not causing any prejudice to the petitioners. In other words, in my considered view, even assuming that those documents are furnished to the petitioners, it is not going to alter their stand as taken by them earlier, in any manner. It is made very clear that these observations are made only for the purpose to hold that there is no violation of the principles of natural justice, however, by leaving the other issues on merits to be considered and decided by the appellate authority.

11.It is well settled that the appellate authority being the fact finding authority as well, is certainly entitled to consider all the objections raised by the petitioners herein before this court, even in respect of the letter issued by the Blue Dart Express Limited and also their invoices, at the time of hearing the appeal. The petitioners are certainly entitled to raise all the objections and grounds in respect of those documents relied on by the adjudicating authority.

12.This Court has decided the similar issue regarding maintainability of writ petition in W.P.(MD) Nos.121 and 122 of 2017 dated 05.01.2017, wherein it has been observed at paragraph Nos.14 to 16 as follows:

> "14.This Court has consistently taken the view that as against the show-cause notice or the order in original, filing of writ petition cannot be entertained by way of short-circuiting the procedures, especially when a statutory remedy is available for the petitioner to go before the competent original or appellate authority, more particularly, when the factual aspects of the matter have to, necessarily, be gone into only by those authorities vested with such power under the statute.
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> 15.At this juncture, it is relevant to quote the following decisions, which were followed by this Court in very many cases while deciding the similar issue:
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> 1) M/s Nivaram Pharma Private Limited rep. by its Director Sardarmal M.Chordia, Madras -vs- The Customs, Excise and Gold (Control) Appellate Tribunal, South

Regional Bench, Madras and others reported in (2005) 2 MLJ 246(DB).

2) United Bank of India -vs- Satyawati Tondon and others reported in (2010) 8 SCC 110.

3) Raj Kumar Shivhare -vs- Assistant Director, Directorate of Enforcement and Another reported (2010) 4 SCC 772.

4) Metal Weld Electrodes -vs- CESTAT, Chennai reported in 2010(299) ELT 3 DB.

16.In the above decisions, it has been held that when an alternative remedy is available, more particularly, in the cases of fiscal nature, invoking of the jurisdiction under Article 226 of the Constitution of India, is not permissible."

13.Therefore, I find that all these writ petitions are not maintainable and accordingly, the same are dismissed without expressing any view on the merits of the matter, as it is for the appellate authority to consider and decide the same. However liberty is granted to the petitioners to file the appeal before the appellate authority within a period of four weeks from the date of receipt of a copy of this order. If any such appeal is filed, the appellate authority shall consider and pass orders on the same on its own merits and in accordance with law, without reference to the limitation, in view of the filing of these writ petitions and the common order passed herein. No costs. The connected miscellaneous petitions are also dismissed.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

vri

To

The Joint Commissioner of Central Excise,
No.1, Foulks Compound,
Anai Road,
Salem 636 001.

+1cc to M/s.S.Durairaj,Advocate sr.15636

+1cc to M/s.S.Durairaj,Advocate sr.15637

+1cc to M/s.S.Durairaj,Advocate sr.15636

+1cc to M/s.V.Sundareswaran,Advocate sr.15520

+1cc to M/s.S.Duraisamy,Advocate sr.15635

+1cc to M/s.K.Magesh,Advocate sr.15552

W.P.Nos.4336 to 4338 and 5571 of 2017

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ss(23/3/2017)