BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED:**05.01.2017**

CORAM:
THE HONOURABLE **MR.JUSTICE K.RAVICHANDRABAABU**

W.P.(MD)Nos.121 and 122 of 2017
and
W.M.P(MD)Nos.95 and 96 of 2017

M/s.Sundaram Motors,
(Now M/s.TVS & Sons Private Limited),
Represented by its CFO & Global President-Finance,
No.7-B, West Veli Street,
Madurai. ... Petitioner in both W.Ps

Vs.

1.The Joint Commissioner,
Office of the Commissioner of Central Excise
Customs and Service Tax,
No.4, Lal Bahadur Sastri Road, Bibikulam,
Madurai - 625 002.

2.The Commissioner of Central Excise,
Customs and Service Tax,
No.4, Lal Bahadur Sastri Road, Bibikulam,
Madurai - 625 002. ... Respondents in both W.Ps

PRAYER in W.P(MD)No.121 of 2017: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari calling for the records in file bearing File No.C.No.V/ST/15/105/2016-Adjn comprising of Show Cause Notice No.23/2016, dated 08.12.2016 on the file of the first respondent and quash the same.

PRAYER in W.P(MD)No.122 of 2017: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus forbearing the respondents from issuing further Show Cause Notices for the years 2012-2013 to 2015 -2016 in violation of principles of natural justice without causing verification of the material available on record.

(In both W.Ps)
For Petitioner : Mr.N.Venkataraman, Senior Counsel for M/s.S.P.Maharajan
For Respondents : Mr.S.Gurumoorthy

COMMON ORDER

W.P(MD)No.121 of 2017 is filed by the petitioner aggrieved against the show-cause notice, dated 08.12.2016 issued by the first respondent calling upon them to show-cause as to why an amount of Rs.82,49,788/- should not be disallowed and recovered under Rule 14 of the Cenvat Credit Rules 2004 r/w Rule 6(3A)(C)(iii) of CCR and Proviso to Section 73(1) of the Finance Act, 1994 and interest at the rate prescribed under Section 75 of the Finance Act 1994 and penalty under Rule 15(3) of the Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994 and also penalty under Section 77 (2) of the Finance Act, 1994.

2. The other Writ Petition in W.P(MD)No.122 of 2017 is filed seeking for a direction forbearing the respondents from issuing any show-cause notices for the years 2012-2013 to 2015-2016.

3. Heard the learned senior counsel appearing for the petitioner and perused the materials placed before this Court.

4. These matters are listed before this Court for admission.

5. The learned senior counsel appearing for the petitioner vehemently contended that though the petitioner is questioning the show-cause notice issued by the first respondent in W.P(MD)No.121 of 2017, still this Court can entertain the writ writ petition since there is gross violation of principles of natural justice and that there is an error apparent on the face of the record. The learned senior counsel thus submitted that as the present impugned show-cause notice came to be issued ignoring various communications made between the parties for the past four years, the same is to be construed as an outcome of non-application of mind and thus, there is an error apparent on the face of the record. He further contended that the impugned show-cause notice has not given material particulars so as to enable the petitioner to meet the questions that are to be answered under the show-cause notice. The learned senior counsel, after inviting the attention of this Court to various communications made between the parties for the past four years, has further submitted that the first respondent, before issuing the show-cause notice, failed to consider those details and thus the impugned show cause notice is to be considered as in violation of principles of natural justice. Therefore, the learned senior counsel prayed for entertaining this Writ petition. Based on the above submissions, the learned Senior Counsel prayed for issuing Mandamus also in the other writ petition.

6. The learned senior counsel in support of his submissions relied on the decision of the Division Bench of Nagpur Bench of Bombay High Court in ***Mrs. Nirmal Laxminarayan Grover v. Appropriate Authority (Income-Tax Department) and others*** reported in ***1997(223) ITR page No.572.***

7. I have given my careful consideration to the above said submissions made by the learned senior counsel.

8. It is not in dispute that the show-cause notice was issued by the Authority, who is having absolute jurisdiction to issue the same. The petitioner neither questions such jurisdiction nor the competency of the first respondent.

9.Therefore, the next question that would arise for consideration is as to whether the show-cause notice, on the face of it, is illegal warranting interference by this Court.

10. In my considered view, perusal of the show-cause notice issued by the competent authority, who has absolute jurisdiction to issue the same, would reveal that there is no reason for this Court to conclude that the impugned show-cause notice is ex-facie illegal or something is wrong therein apparent on the face of it. The first respondent has stated in the show-cause notice that during the course of audit accounts it was noticed by the Audit Officers that the assessee was engaged in sale of various branded Automobile Vehicles and spare parts to their customers and that they charge VAT for such sale of vehicles and spare parts; that they do servicing of such vehicles for which they charge service charges from their customers and pay service tax for the same and that during the course of such service they also sell the parts required for the vehicle for replacement and that the assessee was availing Cenvat Credit on input services such as Manpower Recruitment, Rent, Courier, Security Service, Machinery-Rent, Telephone Service, Labour Charges, manpower supply etc. It is also stated in the show-cause notice that the assessee had not maintained separate accounts for availing the Service tax credit on such common input services for servicing and trading(sale of spare parts). After saying so, the first respondent has also stated in other paragraphs of the show-cause notice that the assessee, who is not entitled to take the entire cenvat credit on the input services which are not used in providing any of the taxable output services and are eligible to take only proportionate Cenvat credit of service tax on common input services used for providing the taxable output service, has however taken Cenvat credit of service tax paid on their input services.

11. Thus, it is the categorical statement of the first respondent in the show-cause notice that the petitioner has availed the Cenvat credit. On the other hand, it is seen that the case of the petitioner as well as the submissions made by the learned senior counsel appearing for the petitioner is to the effect that they have not availed such Cenvat credit and they also intimated the same on various occasions to the respondents. Needless to say that this disputed question of fact has to, necessarily, be gone into and decided only by the adjudicating

authority, after considering the petitioner's objections to the show-cause notice and all materials placed by them with such objection, even assuming by way of repetition.

12. The above stated facts and circumstances would further disclose that there are certain particulars and discussions made by the first respondent in the show-cause notice itself. Therefore, this Court is of the view that the contention of the learned senior counsel appearing for the petitioner that the show-cause notice lacks material particulars, cannot be accepted. Whether such reasonings stated in the show-cause notice are correct or not, is for the adjudicating authority to finally determine, after considering the objections to be filed by the petitioner while passing the order in original, of course by giving due opportunity of hearing to the petitioner. Needless to say that any view expressed in the show cause notice or opinion formed therein against the petitioner, is only a prima facie view or opinion of the authority and not the final conclusion itself. After all, it is only calling upon the petitioner to show cause. Absolutely no prejudice would be caused to the petitioner if they reply to the show cause notice.

13. When such being the factual position, I do not think that the learned senior counsel is right in his contention in justifying the maintainability of the Writ Petition challenging the show-cause notice. No doubt, this Court can entertain a writ petition challenging the show cause notice, provided the very jurisdiction of the authority, who issued the show cause notice, is questioned or if it appears to the Court that the show cause notice, on the face of it, is erroneous and illegal. In my considered view none of the above conditions are satisfied in this case. No doubt, the learned senior counsel for the petitioner relied on the decision of the Division Bench of Nagpur Bench of Bombay High Court to contend that absence of material particulars in the show-cause notice would amount to violation of principles of natural justice. Needless to say that each case has to be considered on its own merits, depending on the facts and circumstances of that particular case. In this case, I have already pointed out as to how the above said contention of the learned senior counsel for the petitioner is not correct and as to how the show-cause notice was issued by disclosing certain particulars. Needless to say that the question as to whether the particulars given in the show cause notice are relevant or material particulars and would ultimately require for adjudication, is for the adjudicating authority to consider and decide, since the adjudicating authority being the first fact finding authority has to decide the issue involved in the show cause notice after considering all the materials placed before him, however, uninfluenced by any of the views or opinions expressed in the show cause notice. Therefore, at this stage, this Court cannot get into the shoes of the adjudicating authority

and find out as to whether the particulars furnished in the show cause notice would necessarily warrant the petitioner to show cause or not. Therefore, I find that the above decision relied on by the learned senior counsel, which is also factually distinguishable, is not helping the petitioner in any manner.

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.

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:

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.

17. Insofar as the other writ petition in W.P(MD)No.122 of 2017 is concerned, the petitioner seeks for a Mandamus forbearing the respondents from issuing further show-cause notices for the year 2012-2013 to 2015-2016. I do not think that the petitioner can seek such blanket relief preventing the competent authority from exercising his statutory power or discharging his duties and functions vested under the statue. Therefore, I find that the above prayer also cannot be entertained. Accordingly, the same is liable to be rejected.

18. Accordingly, both the Writ Petitions are dismissed as not maintainable. However the petitioner is given liberty to file explanation to the show-cause notice, dated 08.12.2016 within a

period of four weeks from the date of receipt of a copy of this order. On receipt of such explanation, the adjudicating authority will pass orders, after giving due opportunity of personal hearing also to the petitioner, on merits and in accordance with law, as expeditiously as possible. No Costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(P&A)

/True copy/

Sub Assistant Registrar

To

1.The Joint Commissioner,
Office of the Commissioner of Central Excise,
No.4, Lal Bahadur Sastri Road, Bibikulam,
Madurai - 625 002.

2.The Commissioner of Central Excise,
Customs and Service Tax,
No.4, Lal Bahadur Sastri Road, Bibikulam,
Madurai - 625 002.

+2 cc to M/s.S.P.Maharajan, Advocate in SR.Nos. 741 & 742

CSL/SS-3/SAR-III/09.01.2017 : 6P/5C

W.P.(MD)Nos.121 and 122 of 2017
05.01.2017