IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.01.2018

Date of Reserving the Order	Date of Pronouncing the Order
05.01.2018	18.01.2018

Coram

The Hon'ble Mr.Justice T.S. SIVAGNANAM

W.P.No.36494 of 2015
and MP.Nos.1 and 2 of 2015
and M.P.No.1 of 2015 in
W.P.No.9496 of 2014

W.P.No.36494 of 2015

M/s.Shapoorji Pallonji Infrastructure Capital Company Pvt.Ltd
"SREYAS VIRAT" No.14, First Floor, Third Cross Road,
Raja Annamalaipuram, Chennai 600 028,
Represented by K.Venkata Rao ... Petitioner

Vs.

1.Commissioner of Service Tax,
Service Tax III Division, Newry Tower,
Ground Floor, Plot No.2054, 1st Block,
2nd Main Road, II Avenue,
Anna Nagar, Chennai 600 040.

2.Assistant Commissioner of Service Tax
Service Tax III Division, Newry Tower,
Ground Floor, Plot No.2054, 1st Block,
2nd Main Road, Chennai 600 040. ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, calling for the records comprised in the impugned notice bearing Ref.C.No.IV/09/103/2015-ST III ADJ dated 12.10.2015 issued by the respondent No.1 and quash the same as illegal, arbitrary and violative of Articles 14, 19(1)(g) and 300A of the Constitution of India and in the light of the order of this Hon'ble Court dated 02.04.2014 passed in W.P.No.9496 of 2014.

For Petitioner : Mr.Sujith Ghosh for Mr.Arunkarthik Mohan

For Respondents : Mr.V.Sundareswaran Senior Panel Counsel

M.P.No.1 of 2015 in W.P.No.9496 of 2014

Assistant Commissioner of Service Tax
Service Tax III Division, Newry Tower,
Ground Floor, Plot No.2054, 1st Block,
12th Main Road, IInd Avenue
Chennai 600 040. ... Petitioner/Respondent

Vs.

M/s.Shapoorji Pallonji Infrastructure Capital Company Pvt.Ltd
"SREYAS VIRAT" No.14, First Floor, Third Cross Street
Raja Annamalaipuram, Chennai 600 028,
Rep. by its Authorized Signatory Mr.R.Suresh ... Respondent / Petitioner

Prayer: Miscellaneous Petition filed under Article 226 of the Constitution of India, praying to modify the order in W.P.No.9496 of 2014 dated 02.04.2014 by enabling the competent adjudicating authority to adjudicate the matter after issuing show cause notice and pass order in accordance with law.

Prayer in WP.No.9496 of 2014: Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari to call for the records comprised in the impugned Demand Notice bearing Ref. C. No.IV/16/13/2014/Gr.VI dt 28.3.2014 and quash the same as illegal arbitrary and unconstitutional and pass such further or other orders.

For Petitioner: Mr.V.Sundareswaran
For Respondent: Mr.Arun Karthik Mohan

COMMON ORDER

The writ petition in W.P.No.36494 of 2015 was filed by the petitioner for issuance of a Writ of Certiorari, to quash the show cause notice issued by the first respondent dated 12.10.2015 as being illegal, arbitrary and violative of Articles 14, 19(1)(g) and 300A of the Constitution of India and in the light of the order passed in W.P.No.9496 of 2014 dated 02.04.2014. The writ petition was allowed by order dated

04.02.2016 primarily for the reason that the impugned show cause notice is contrary to the order passed in W.P.No.9496 of 2014 dated 02.04.2014. Against the order dated 04.02.2016, the respondents preferred an appeal before the Division Bench in Writ Appeal No.342 of 2016. The Division Bench allowed the appeal and remanded the writ petition to be considered afresh along with M.P.No.1 of 2015 in W.P.No.9496 of 2014. The said writ petition namely, W.P.No.9496 of 2014 was filed by the petitioner, challenging the proceedings dated 28.03.2014, by which, the second respondent stated that it is noticed that the petitioner's have paid the service tax for the period from 01.07.2012 to 31.12.2013 under protest and stopped paying service tax for the period from 01.01.2014 in view of the new agreement dated 26.12.2013 entered into with the service receiver and that the non-payment of the service tax appears to be incorrect since the activity of generating electricity does not amount to the process of manufacture or production of the goods and the activity undertaken by the petitioner does not fall under the negative list as contended by them and therefore, the petitioner was requested to pay the service tax for the months of January to March 2014 immediately (on or before 31.03.2014) under intimation to the second respondent, failing which appropriate action to recover the same will be initiated against the petitioner.

2.The writ petition was disposed of by order dated 02.04.2014 by directing the petitioner to submit their objections as to how they are not liable to pay service tax by treating the proceedings dated 28.03.2014 as a show cause notice and the respondents were directed to consider the same and pass orders in accordance with law after giving an opportunity of personal hearing to the petitioner Company. The respondents were restrained from taking any coercive steps to recover the service tax till final orders are passed. The respondents filed M.P.No.1 of 2015 in W.P.No.9496 of 2014 praying for modification of the order dated 02.04.2014 passed in W.P.No.9496 of 2014 enabling appropriate adjudicating authority to issue show cause notice and adjudicate the matter in accordance with law.

3.The learned counsel appearing for the petitioner after elaborately referring to the factual matrix drew the attention of the Court to Paragraph No.9 of the affidavit filed in support of the writ petition in which the various dates and events have been furnished in a tabulated form. It is submitted that after the writ petition was disposed of, the second respondent issued a notice dated 24.06.2014 seeking information of the income accrued during January to March 2014, which details were provided by the petitioner vide letter dated 08.07.2014. While so, the Superintendent of Central Excise by letter dated 09.09.2014 called for further information as to whether the income includes operation, maintenance and insurance charges.

The petitioner submitted their clarification on 16.09.2014, stating that the amount received is towards generation of electricity and not towards operation, maintenance or repair services and submitted the copy of the agreement with Samalpatti Power Company Private Limited. For nearly one year no action was initiated and by notice dated 02.09.2015, once again the second respondent sought for details of income received during the period in issue and service tax payable thereon. Subsequently, by another notice dated 19.09.2015, the second respondent sought for copies of the Invoices issued by the petitioner during the relevant period.

4.According to the petitioner, though all the details were available with the second respondent, they once again furnished the same by letters dated 22.09.2015 and 23.09.2015. It is thereafter the petitioner was served with the copy of the modification petition in M.P.No.1 of 2015, in which they sought leave of this Court to modify the previous order. However, without obtaining any orders from the Court, the impugned show cause notice dated 12.10.2015 was issued which has been challenged in this Writ Petition. Therefore, it is submitted that the issue would be as to whether the petition for modification is maintainable and it is for the revenue to sustain such petition by advancing arguments at first which will be countered by the petitioner suitably. The learned counsel for the petitioner would fairly submitted that if M.P.No.1 of 2015 is to be allowed by this Court and the order in W.P.No.9496 of 2014 is to be modified, then W.P.No.36494 of 2015 is to be dismissed and therefore, the revenue should first argue M.P.No.1 of 2015. In the light of the said submission, the Court called upon the learned Senior Panel Counsel for the revenue to make submissions on the modification petition in M.P.No.1 of 2015.

5.The learned Senior Panel Counsel appearing for the respondents submitted that the impugned order in W.P.No.9496 of 2014 dated 28.03.2014 is only an intimation/communication and it is not a show cause notice. In this regard, the learned counsel referred to Section 73(1) of the Finance Act and relied on the decision in the case of Metal Forgings Vs. Union of India reported in 2002 (146) E.L.T. 241 (S.C.). It is submitted that without a show cause notice, adjudication cannot be done and the petitioner themselves in their affidavit filed in W.P.No.9496 of 2014 in ground No.C in Page No.4 have admitted that the impugned proceedings dated 28.03.2014 has been issued without issuing any show cause notice. Further, it is submitted that the impugned communication dated 28.03.2014 was issued by the Assistant Commissioner who is not empowered to adjudicate cases exceeding Rs.5 lakhs and it is the Joint Commissioner of Central Excise who can exercise such powers in terms of Circular No.80/1/2005-S.T, dated 10.08.2005. Further, after the petitioner sent their representation dated 17.04.2014 and raised objections that the demand notice issued by the department is vague and cryptic; statutory provisions under which demand is made have not been cited and quantification of demand is absent, the Revenue moved this Court by filing M.P.No.1 of 2015. It is submitted that the Code of Civil Procedure is not applicable to writ proceedings and the prayer sought for by the petitioner is maintainable and though the respondents did all that is possible to list M.P.No.1 of 2015 in W.P.No.9496 of 2014 along with W.P.No.36494 of 2015, the same was not listed and therefore, the revenue has approached the Court for modification of the order and permitted the appropriate authority to issue show cause notice. The learned Senior Panel Counsel placed reliance on the decision in the case of Puran Singh Vs. State of Punjab reported in (1996) 2 SC 205. Further, it is submitted that the Court cannot confer power on an incompetent person and therefore, the first respondent was justified in issuing the impugned show cause notice as otherwise the matter would become time barred. In support of such contention, reliance was placed on the decision in the case of ABI International Vs. Additional Commissioner of CUS. (Imports), Chennai reported in 2004 (164) E.L.T. 18 (Mad.)

6.The learned counsel appearing for the writ petitioner who is the respondent in M.P.No.1 of 2015 vehemently contended that the petition for modification is not maintainable and though the provisions of Code of Civil Procedure are not applicable to writ proceedings yet the principles analogous to the Code of Civil Procedure should be applied. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of Public Service Commission, Uttaranchal Vs. Mamta Bisht and others reported in (2010) 12 SCC 204. Further, it is submitted that the law will protect only the vigilant and a review petition if has to be filed, the period of limitation is only 30 days and the present application filed by the petitioner beyond the said period without an application for condonation of delay is not maintainable. The writ petition was disposed of on 02.04.2014 and after 17 months, the miscellaneous petition has been filed and the same is liable to be rejected. In support of such contention, reliance was placed on the decision of the High Court of Delhi in the case of Smt.Sarla Devi Jain Vs. Union of India (UOI) reported in AIR 2006 Delhi 12. Further, it is submitted that the writ petitioner did not contend that the proceedings dated 28.03.2014 was a show cause notice but it is the revenue which contended so and recorded by the learned Judge in Paragraph No.4 of the order dated 02.04.2014. The learned counsel referred to Order 47 Rule 1 of CPC and pointed out that none of the parameters mentioned therein stand attracted to the present modification petition and therefore, the petition deserves to be dismissed. Further, the pecuniary jurisdiction as raised by the learned counsel for the revenue in the course of argument was not mentioned in M.P.No.1 of 2015. It is submitted that without the Court granting the prayer in M.P.No.1 of 2015, the impugned show cause notice dated 12.10.2015 could not have been issued. Further, the respondent after collecting all materials have now changed color and taken a different stand in the impugned show cause notice. The delay in filing the Miscellaneous Petition has not been explained and the respondents were aware of the full details as it was disclosed by the petitioner by letter dated 08.07.2014 and if they were aggrieved, they could have immediately filed the application for modification and for nearly one year, no action was taken by the respondents though the petitioner had furnished all the details sought for along with their letter dated 16.09.2014.

7.Further, with regard to the pecuniary jurisdiction, it is submitted that in terms of Section 73 of the Finance Act, 1994", it is the Central Excise officer who is entitled to recover any service tax which has not been levied or paid or has been short levied or paid erroneously refunded and the provision was amended by the Finance Act, 18/2005, prior to which, instead of the word "Central Excise officer", the word "Assistant Commissioner/ Deputy Commissioner" was mentioned. The definition of the term "Central Excise officer" has to be seen from Section 2(b) of the Central Excise Act, 1944 and the definition includes an Assistant Commissioner of Central Excise to mean a Central Excise Officer. Further, in terms of Rule 3 of the Service Tax Rules, 1944, the appointment of officers for exercising powers for two purposes, namely, for territorial jurisdiction within which they can exercise power and with regard to the specific taxable service in relation to which they can exercise powers and there is no classification based on monetary limits under Rule 3. In this regard, notification No.22/2014 dated 16.09.2014 was referred to, a notification issued in exercise of powers under Rule 3 of the Service Tax Rules. Referring to Section 83(A) of the Finance Act, it is submitted the said provision deals with power of adjudication with regard to penalty by a Central Excise Officer who may be designated by notification in the official gazette. One such notification being notification No.30/2005-ST, dated 10.08.2005 which fixes the monetary limit of Central Excise Officer for the purposes of adjudging penalty and not tax. The circular relied on by the revenue dated 10.08.2005 is not a notification under Section 83(A) and therefore cannot have force of law. On the above grounds, the learned counsel submitted that the petition for modification is liable to be dismissed and consequently, the impugned show cause notice has to be held to be bad in law.

8.In reply, the learned counsel for the revenue would submit that much of the argument is directed against the counsel who appeared for the revenue in the earlier proceedings and the writ petition was disposed of at the admission stage and at no point of time, the counsel made a submission that the impugned proceedings dated 28.03.2014 is a show cause notice. However, it is the Court which directed the petitioner to treat the impugned proceedings as a show cause notice and since the communication dated 28.03.2014 is not a show cause notice, the Department be granted liberty to the appropriate authority to issue a show cause notice quantifying the amount and proceed in accordance with law.

9.Heard Mr.Sujith Ghosh, learned counsel for Mr.Arunkarthik Mohan, learned counsel for the petitioner and Mr.V.Sundareswaran, learned Senior Panel Counsel for the respondents and perused the materials placed on record.

10.The result of W.P.No.36494 of 2015 hinges upon what relief the revenue is entitled to in M.P.No.1 of 2015 in W.P.No.9496 of 2015. Record of the proceedings show that W.P.No.9496 of 2014 was disposed of at the admission stage. In the said writ petition, the sole respondent was the second respondent in W.P.No.36494 of 2015, namely, the Assistant Commissioner of Service Tax. The prayer in the writ petition was to issue a writ of Certiorari by calling for the records comprised in the impugned demand notice dated 28.03.2014 and quash the same. The Court while disposing of the writ petition on 02.04.2014 in paragraph No.2 briefly stated about who the petitioner was and what was the effect of the impugned proceedings; paragraph No.3 sums up in brief the contention of the learned counsel for the writ petition; paragraph No.4 is the submission of the learned counsel for the revenue; paragraph No.8 is the operative portion of the order, wherein the Court directed that the impugned proceedings be treated as a show cause notice and the writ petitioner was directed to submit their objections. In pursuance thereto, the writ petitioner submitted their reply dated 17.04.2014. It is seen subsequent thereto, there has been several correspondence between the second respondent and the petitioner calling for documents, invoices, etc. The petitioner stated that there is unexplained silence between 16.09.2014 and 02.09.2015. However, the petitioner cannot make a big issue out of this as they appear to have been not prejudiced on account of it as they unreservedly responded to the notices dated 02.09.2015 and 19.09.2015. The petitioner conceded to the request made by the respondent for furnishing copies of invoices which were furnished on 22.09.2015 and 23.09.2015. Immediately thereafter, the Miscellaneous Petition has been filed on 09.10.2015 for modification. One more reason which will work against the writ petitioner is that though the Court stipulated a time frame for the second respondent to pass orders, the petitioner did not approach the Court complaining of any violation of the time frame fixed. Therefore, I am of the view that the petitioner was not prejudiced in any manner on account of no action being taken by the Revenue between 16.09.2014 and 02.09.2015.

11.The next aspect to be seen is as to whether the petition for modification is maintainable. In Puran Singh's case, the Hon'ble Supreme court pointed out that many procedures prescribed in the Code of Civil Procedure are responsible for delaying the delivery of justice and causing delay in securing the remedy available to a person who pursues such a remedy and the High Court should be left to adopt its own procedure for granting relief to the persons concerned and the High Court is excepted to adopt the procedure which can be held to be not only reasonable but also expeditious.

12.Learned counsel for the writ petitioner concedes to the legal position, but his submission is that though the provision of Civil Procedure Code are not applicable in writ jurisdiction by virtue of provisions of Section 141 CPC, the principles enshrined therein are applicable (see Public Service Commission, Uttaranchal vs. Mamta Bisht and others (supra)). Expanding his argument further on the same platform, the learned counsel for the petitioner would contend that if a review had to be filed, it could have been done within a period of thirty days and beyond thirty days unless an application is filed for condonation of delay, the review petition cannot be entertained and the power for review has a limited scope and is normally used for correction of a mistake. The learned counsel drew support to the said submission by referring to the decision in Smt.Sarla Devi Jain vs. Union of India.

13.There can be no dispute to the legal position that a review petition is not an appeal in disguise. The grounds of review are clearly circumscribed under Order 47 Rule 1 CPC. However, it has to be borne in mind that the present proceedings is a writ proceedings arising under a taxation statute. The prayer sought for in M.P.No.1 of 2015, in my considered opinion, cannot be construed as a prayer to review the order passed in the writ petition.

14.As noticed above, the Court while disposing of W.P.No.9496 of 2014 by order dated 02.11.2014 directed the petitioner to treat the communication dated 28.03.2014 as a show cause notice. In paragraph No.4, the Court has recorded that the counsel for the revenue submitted that the impugned order is only a show cause notice. However, the learned counsel for the Revenue would emphatically submit that he never made such a concession, this Court cannot make a rowing enquiry into the said submission but would adopt the safest approach which would stand the test of legal scrutiny, namely, by considering the operative portion of the order, in other words, the decreetal portion of the order where direction was issued. If such would be the appropriate interpretation, then the Court is required only to look into paragraph No.8 of the order in W.P.No.9496 of 2014. This is more so because the Court did not examine the merits of the matter. Thus if the decreetal portion of the order is read, it is the Court which directed the petitioner to treat the proceedings dated 28.03.2014 as a show cause notice. The prayer sought for in the miscellaneous petition is to permit the revenue to issue a show cause notice by an appropriate authority. Would this amount to review of the earlier order? In my considered view, it will not for the reason that the decreetal portion of the order as contained in paragraph No.8 is to answer to a proceedings by treating it as a show cause notice. In the place of "such proceedings", a show cause notice is sought to be issued by the appropriate authority after quantifying the amount which is mandatory under Section 73(1) of the Act. Without a proper show cause notice, adjudication cannot take place.

15.Furthermore, on a reading of the proceedings dated 28.03.2014, it is clear that it is only an intimation. This is on account of the fact that the petitioner stopped paying service tax from 01.01.2014. Therefore, the second respondent requested the petitioner to pay service tax, failing which stated that action for recovery will be initiated. Thus, the communication/intimation dated 28.03.2014 cannot be treated as a show cause notice nor can be treated as a demand but only as an intimation. It would have been well open to the petitioner assessee to respond to the letter dated 28.03.2014 stating that they are not liable to pay service tax. Instead they approached this Court and challenged the said proceedings. In my considered view, the petitioner cannot be stated to be aggrieved by the communication dated 28.03.2014. Had the petitioner sent a reply to the communication, in all probabilities, they would have been visited with the show cause notice which would have been adjudicated in the normal course. Therefore, I am of the view that the petition for modification cannot be construed as a review petition but only to modify the earlier order by permitting issuance of a show cause notice instead of treating the communication dated 28.03.2014 as a show cause notice, which is not feasible as it is not in accordance with Section 73(1) of the Act.

16.As rightly pointed out by the learned counsel for the revenue in W.P.No.9496 of 2014, the petitioner themselves have stated that the impugned communication has been issued without issuing show cause notice. In the representation dated 17.04.2014, the petitioner has pointed out that the communication dated 28.03.2014 does not provide the provision of the Finance Act which the petitioner has contravened and the petitioner has not been informed as to on what revenue the Department has sought to levy service tax in order to quantify the demand, which is mandatory. The Hon'ble Supreme Court in the case of Metal Forgings vs. Union of India pointed out that the law requires notice to be issued under specific provision of law and not as a correspondence or part of an order. The notice must also indicate the amount demanded and call upon the assessee to show cause that if he has any objection for such demand. This decision was taken into consideration by the Hon'ble Division Bench in W.A.No.342 of 2016 dated 02.09.2016 while remanding the matter to this Court for fresh consideration. Therefore, I am unable to countenance the stand taken on behalf of the petitioner.

17.The learned counsel for the petitioner vehemently contended that the revenue have slept over the matter and the Department having not been vigilant should not be permitted to now take such a stand and seek for modification of the order in the writ petition. It is further submitted that the respondent could have mentioned the matter before the Court and got the miscellaneous petition listed for hearing and having not done so should not be permitted to do so as this distance of time. In reply, the learned counsel for the revenue would submit that he made a request to the Court to tag M.P.No.1 of 2015 in W.P.No.9496 of 2014 along with W.P.No.36494 of 2015. However, the matter was not listed and the writ petition alone was disposed of. To verify the correctness of the said stand, the Court verified the order sheet and found that the Court has recorded on 21.07.2016 that there was a request for modification petition to be heard. Therefore, the interest of revenue cannot be put to jeopardy on account of technicalities or on account of the fault committed by the Court in not listing M.P.No.1 of 2015 along with this writ petition.

18.During the course of argument, the learned counsel for the revenue submitted that the second respondent has no jurisdiction to issue a show cause notice on account of the circular dated 10.08.2005. This contention has not been specifically pleaded in the affidavit filed in support of M.P.No.1 of 2015 and has been vehemently opposed by the learned counsel for the petitioner by placing reliance on the judgment in the case of Kalyan Singh Chouhan vs. C.P.Joshi reported in 2011 (11) SCC 786 on the object and purpose of pleadings.

19.I have my own doubts as to whether the decision in the case of Kalyan Singh Chouhan vs. C.P.Joshi arising out of an election petition and the observations contained therein with regard to the object and purpose of pleadings can be applied to a writ proceedings where decisions are taken based on affidavits and petitions. However, I do not propose to render any findings on the said aspect as in the affidavit filed in support of M.P.No.1 of 2015, the respondents have not stated about the circular dated 10.08.2005 and therefore, I do not propose to deal with the submission of the learned counsel for the revenue based on the said circular. Secondly, it may not be necessary for this Court to consider the counter submission of the learned counsel for the petitioner by attacking the validity of the circular and that it does not have the force of law. The issue is left open. For all the above reasons, this Court holds that the respondents are entitled to seek for modification of the order in W.P.No.9496 of 2014.

20.In the result, M.P.No.1 of 2015 in W.P.No.9496 of 2014 is allowed as prayed for and the order passed in W.P.No.9496 of 2014 dated 02.04.2014 is modified to the following effect and paragraph No.8 of the order in W.P.No.9496 of 2014 shall stand substituted as follows:

> "8.In the result, the writ petition is disposed of by permitting the appropriate authority of the respondent Department to issue a show cause notice to the petitioner, afford them an opportunity to submit their reply and after hearing the authorized representative of the petitioner in person, adjudicate the matter in accordance with law. Till orders of adjudication are passed, no coercive action shall be initiated against the petitioner for recovery of service tax. The writ petition is disposed of with the above directions."

21.In W.P.No.36494 of 2015, the petitioner has challenged the show cause notice dated 12.10.2015. It is contended that the impugned notice is most precarious and mischievous as has been issued based on information collected from the petitioner in furtherance to the demand notice dated 28.03.2014. In the preceding paragraphs, it has been held that the proceedings dated 28.03.2014 is neither a show cause notice nor a demand but a mere intimation to call upon the petitioner to remit service tax as it appears they abruptly stopped payment of service tax for the period from 01.01.2014. Therefore, it is a misnomer to term the proceedings dated 28.03.2014 as a demand notice. The petitioner states that the Department acted mischievously in issuing the impugned notice after collecting information from the petitioner and they have changed their stand in the impugned notice. Firstly the petitioner without any demur furnished information sought for by the Department and based on such information the impugned notice has been issued. I hardly see any mischief in doing so. Change of "colour" is alleged. Unless and until a stand is specifically taken and subsequently a totally different stand is taken, there could be a change. In the present proceedings no stand could be stated to have been taken in the proceedings dated 28.03.2014. It being only an intimation, nothing more flows from it. The intimation to pay service tax is on account of the conduct of the petitioner in abruptly having stopped remitting service tax from 01.01.2014. Thus, it is clear that the allegation which the petitioner has to meet has been spelt out for the first time in the impugned show cause notice. For the above reasons, the argument put forth by the learned counsel for the petitioner cannot be countenanced.

22.The learned counsel for the petitioner contended that the impugned show cause notice could not have been issued without leave of the Court, it amounts to by passing the order of this Court and is a wilful disobedience and disregard to the order of the Court and abuse of law. Record of proceedings show that M.P.No.1 of 2015 in W.P.No.9496 of 2014 was filed on 12.10.2015 and was pending. On 27.01.2016, when W.P.No.36494 of 2015 was listed for hearing, the learned counsel for the petitioner wanted the modification petition to be heard, this has been recorded by the Court as follows:

> "Learned counsel appearing for the petitioner wants the modification application to be heard. Hence, post the matter on 04.02.2016.
>
> Interim order already granted is extended till then.
>
> sd.
> 27.01.2016

23.Thus the petitioner had pressed for hearing of the modification petition. However, on 04.02.2016, the writ petition in W.P.No.36494 of 2015 alone was listed and M.P.No.1 of 2015 in W.P.No.9496 of 2014 was not listed, and the writ petition was disposed of. The revenue cannot be prejudiced on account of non-listing of M.P.No.1 of 2015. In the factual background could the respondent Department be faulted for issuing the impugned show cause notice, is the conduct of the Department in violation of the order in W.P.No.9496 of 2014 or contumacious. The answers to all the above queries should lean and be answered in favour of the Revenue. M.P.No.1 of 2015 was presented before the Registry of this Court on 09.10.2015 and after completion of formalities was registered on 12.10.2015, the impugned show cause notice is dated 12.10.2015. The date on which M.P.No.1 of 2015 was presented being much prior to the date of the impugned show cause notice, it was issued when the matter was pending. The plea of the Department is that any further delay in issuance of show cause notice, would render it as time barred. Protective proceedings in form of show cause notices or assessments are permissible under taxation laws. Rights conferred under law cannot be defeated by technicalities. Even assuming the impugned show cause notice was not issued, the Revenue would be entitled to seek for exclusion of the time during which M.P.No.1 of 2015 was pending while computing limitation for issuance of show cause notices. Thus, I conclude that there is no violation of the order in W.P.No.9496 of 2014 much less willful violation in issuing the impugned show cause notice. Thus the impugned show cause notice can be adjudicated as according to law, giving liberty to the petitioner to canvass all points.

24.Consequently, W.P.No.36494 of 2015 is dismissed and the petitioners are granted thirty days time from the date of receipt of a copy of this order to submit their reply to the show cause notice which shall be adjudicated in accordance with law after affording an opportunity of personal hearing to the authorized representative of the petitioner. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

cse/dna

To

1.The Commissioner of Service Tax,
Service Tax III Division, Newry Tower,
Ground Floor, Plot No.2054, 1st Block,
2nd Main Road, II Avenue,
Anna Nagar, Chennai 600 040.

2.The Assistant Commissioner of Service Tax
Service Tax III Division, Newry Tower,
Ground Floor, Plot No.2054, 1st Block,
2nd Main Road, Chennai 600 040.

+2 ccs to Mr.Arun Karthik Mohan Advocate sr 3962 & 4639
+1 cc to Mr.V.Sundareswaran Advocate sr 3869

W.P.No.36494 of 2015
and MP.Nos.1 and 2 of 2015
and M.P.No.1 of 2015 in W.P.No.9496 of 2014

nrjk(co)
aa30/01/2018