HIGH COURT OF CHHATTISGARH, BILASPUR

WPT No. 22 of 2019

M/s R. K. Associates and Hoteliers Pvt. Ltd. (A Company Incorporated Under The Companies Act, 1956) through its Authorized Signatory, Mr. Rajeev Kumar Gupta, S/o Shri B.K. Gupta, Aged About 44 Years, R/o Lavahandi, Raipur, District : Raipur, Chhattisgarh **--- Petitioner**

Versus

1. Union of India through the Secretary, Department of Revenue, Ministry of Finance, North Block, New Delhi - 110001, District : New Delhi, Delhi

2. Principal Commissioner, Central Goods And Service Tax, Raipur Commissionerate, Central GST Building, Dhamtari Road, Tikrapara, Raipur, District : Raipur, Chhattisgarh

3. Principal Additional Director General Directorate of GST Intelligence, Bengaluru Zonal Unit, Bengaluru No. 112, S.P. Enclave, Adjacent To Karnataka Bank, K. H. Road, Bengaluru., District : Bengaluru, Karnataka **--- Respondents**

WPT No. 25 of 2019

M/s Brandavan Food Products (A Partnership Firm incorporated Under India Partnership Act, 1932) through its Authorized Signatory, Mr. Rajeev Kumar Gupta, S/o Shri B.K. Gupta, Aged About 44 Years, R/o Lavahandi, Raipur, District : Raipur, Chhattisgarh **--- Petitioner**

Versus

1. Union of India through the Secretary, Department of Revenue, Ministry Of Finance, North Block, New Delhi – 110001, District : New Delhi, Delhi

2. Principal Commissioner Central Goods and Service Tax, Raipur Commissionerate, Central GST Building, Dhamtari Road, Tikrapara, Raipur, District : Raipur, Chhattisgarh

3. Principal Additional Director General Directorate of GST Intelligence, Bengaluru Zonal Unit, Bengaluru No. 112, S.P. Enclave, Adjacent To Karnataka Bank, K. H. Road, Bengaluru District : Bangalore Rural, Karnataka **--- Respondents**

WPT No. 27 of 2019

M/s Roop Caterers (A Partnership Firm Incorporated Under Indian Partnership Act, 1932) through its Authorized Signatory, Mr. Rajeev Kumar Gupta, S/o Shri B K Gupta, Aged About 44 Years , R/o

Lavahandi, Raipur, District : Raipur, Chhattisgarh

---- Petitioner

Versus

1. Union of India through the Secretary, Department of Revenue, Ministry of Finance, North Block , New Delhi - 110110., District : New Delhi, Delhi

2. Principal Commissioner, Central Goods and Service Tax, Raipur Commissionerate, Central GST Building, Dhamtari Road, Tikrapara, Raipur, District : Raipur, Chhattisgarh

3. Principal Additional Director General, Directorate of GST Intelligence, Bengaluru Zonal Unit, Bengaluru No. 112, S.P. Enclave, Adjacent To Karnataka Bank, K. H. Road, Benguluru, District : Bengaluru, Karnataka **--- Respondents**

W.P.T. No.28 of 2019

M/s Satyam Caterers Pvt. Ltd (A Company Incorporated under the Act , 1956) through Its Authorized Signatory, Mr. Rajeev Kumar Gupta, S/o Shri B K Gupta, Aged About 44 Years , R/o Lavahandi, Raipur, District : Raipur, Chhattisgarh **--- Petitioner**

Versus

1. Union of India through the Secretary, Department of Revenue, Ministry of Finance , North Block New Delhi - 110001., District : New Delhi, Delhi

2. Principal Commissioner, Central Goods And Service Tax, Raipur Commissionerate, Central G S T Building, Dhamtari Road, Tikrapara, Raipur Chhattisgarh., District : Raipur, Chhattisgarh

3. Principal Additional Director General, Directorate of GST Intelligence, Bengaluru Zonal Unit, Bengaluru No. 112, S.P. Enclave, Adjacent to Karnataka Bank K. H. Road , Bengaluru, District : Bangalore Rural, Karnataka **--- Respondent**

Presence:

For the Petitioner(s)	:	Mr. Chetan Sharma, Sr. Advocate with Mr. Romir S. Goyal, Mr. Kunal Kapoor, Mr. Amrito Das, Mr. Abhinit Das and Mr. Gagan Gupta, for the petitioners.
For respondent No.1	:	Mr. K.G. Yadav, Advocate, appears on behalf of Mr. Gopa Kumar, Asst. Solicitor General
For respondents 2 & 3	:	Mr. Manish Sharma, Advocate

Hon'ble Shri Justice Goutam Bhaduri

CAV ORDER

(Reserved on 15.05.2019)

(Pronounced on 26.06.2019)

1. Heard on admission.
2. The challenge(s) made in these petitions are to the show cause notice issued by respondent no.3. Since the grounds of challenge, facts and question of law involved in these petitions are almost similar, they are simultaneously decided by this common order.
3. The main issue raised in the impugned notice is about the demand of service tax on the license fee paid by the petitioners to Indian Railways for award of license for operation, management and supply of catering services in the Trains of Indian Railways. According to the impugned notice, the petitioners have paid license fees to Indian Railways but have not paid service tax thereon under reverse charge basis.
4. Learned counsel for the petitioners contended that the challenge is to the show cause notice issued to the petitioner(s) by the Principal Additional Director General, Directorate General of GST Intelligence whereby respondent no.3 had proposed to recover the service tax from the petitioners along-with interest and penalties on the license fee by treating the same as consideration towards the "support services" provided by the Indian Railways to the petitioners. It is contended that the petitioners are providing on-board mobile catering service to the train passengers

and the Indian Railways has out-sourced such facility to the petitioners in lieu of license fee received from them. It is contended that the catering charges are recovered as license fee which is predominantly made for getting access to the passengers of the Railways by the outsiders i.e., the petitioners herein. It is further contended that in respect of *Rajdhani, Duranto* Trains and other Mails, the catering charges are included in the train tickets whereas in respect of other Super Fast Express Trains, apart from purchase of train tickets from Indian Railways, the catering charges are directly collected by the caterers from the passengers while the food is provided to them.

5. Learned counsel for the petitioner(s) further submits that the charges are basically meant to have access in the Railways and the entire amount is paid at the time of payment of the license fee by the licensee. He submits that respondent-department has again served the show cause notice asking for payment of the service tax. Demonstrating the fact, counsel submits that if the bid for catering charges is Rs.100/- per plate then in the train while the food is provided including the profit certain amount of Rs.110/- is recovered as such the licence fee of Rs.100/- is already paid which includes all the taxes and charges, therefore, such show cause amounts to double taxation.

6. Referring to ***2016 (333) E.L.T. 5 (Chhattisgarh) Jalaram Transport v. Commissioner of Central Excise*** learned counsel would submit that if double taxation comes to fore, the writ petition would be maintainable. Referring to the show cause notice, it is stated that the show cause notice

also admits the fact that the fee was only meant for utilizing the infrastructure provided by the Railways as such it would be a support service being rendered by the Railways to the caterers. Further referring to clause 2.15 of tender document, he submits that the tender document speaks otherwise to the effect that IRCTC would not provide any infrastructure to the licensee, therefore, it completely contradicts the version of show cause notice.

7. Further referring to Article 12 relating to proprietary rights of Master License Agreement as sovereign contract (Annexure P-6), it is stated that if any property of either party is to be used by the other party for purposes of provision of services including pantry car, etc. under this Agreement then the said party will grant a limited right to use to the other party's property for the specific purpose. Therefore, a limited right was granted to the petitioners for which the licence fee was paid by the petitioners to the Railways, as such, the language of the show cause notice which do not run parallel to the agreement would show that it is premeditated. It is further contended that the show cause notice used the words *"willfully suppressed"* as such, the authority issuing the notice has disclosed its mind that he is holding an opinion against the petitioners.

8. The further contention is that when the terms of the agreement is interpreted, it would show the kind of show cause and the ground of challenge is a pure question of law involved. Referring to case law reported in ***2016 42 STR 625 Deputy Commissioner of Central Excise vs. Sushil & Company*** it was contended that the license fee

has been paid at the time of initial agreement which was meant for providing access to the infrastructure of railways and the amount of fee paid by the licensee is also an admitted fact. As such, the disputed questions of law do not arise at all for consideration.

9. It is stated that the issue as to whether the support service is covered under the Finance Act 1994 of Service Tax Rules, 1994 would be a pure question of law. It is further contended that the department has asked to pay the tax for the period from 2012 to 2016. Referring to Section 66-D contained in Chapter V of the Finance Act, 1994 and Chapter VA of the Finance Act, 2003, it is stated that the Indian Railways was not carrying out any act for which the consideration was paid and the amendment to Section 66-D was not before 01.04.2016, as such, when the support service was not included before 01.04.2016 or any service has found place in 66D(iv), such taxes could not be demanded prior to the said date. The further contention is that the legislative intent of the amendment would show that the show cause suffers from unreasonableness. It is further contended that in respect of taxes which were paid, the petitioners have filed their returns which were subject of audit and way back from the year 2012 to 2016 it was found that the petitioners have filed the correct returns, therefore, after a long time, all of a sudden, the respondents cannot turn back and ask for such tax.

10. The contention is further made that the Law of Limitation would also come into play as it cannot be made wide open for the respondents to call for the service tax when it was

audited by CAG u/s 18 of the Comptroller and Auditor General's (Duties, Powers and Conditions of service) Act, 1971. It is also contended that it is a case of double taxation and no loss is caused to the Union of India as at the time of payment of initial license fee, entire charges were included and therefore, it is a case of revenue neutrality for which the petitioners have already paid the tax and they are were entitled to avail the CENVAT Credit. It is further submitted that the service tax having been paid as would be evident from the return, which shows under the head Taxable Service for which the tax is being paid is for outdoor catering service as such there was no suppression of fact. Referring to the case law of *Pannalal v. State Rajasthan. (1975) 2 SCC 633,* it is stated that rental is a consideration for the privilege granted by the Government and therefore, as per the agreement when the rental is meant for grant of privilege by the Government, it cannot be subject of tax. Counsel referred to the agreement and would submit that the agreement for grant of privilege consequently cannot be a taxable factor.

11. Lastly it is stated that the sovereign functions are not treated as support service inasmuch as providing food by the Railway Board under the sovereign function, consequently no tax can be leviable, as such, the petitions deserve to be considered for admission.

12. Per contra, learned counsel for the respondent opposes the argument and would submit that the petitioners have rushed to the Court only on issuance of show cause notice, therefore, the petitions are liable to be dismissed. He further

submits that the petitioners can freely agitate their grievance before the authority before whom they have been given the opportunity of hearing and instead of placing the grievance before the Authority, they have come to the Court with these petitions. He placed reliance on a decision rendered in case of ***AVM Studio Vs. The Union of India (UOI) and others*** *W.A.Nos. 104 & 105 of 2008 and M.P.Nos.1 of 2008 decided on 11.03.2008* and ***Oryx Fisheries Private Limited Vs. Union of India 2011(266) E.L.T. 422 (SC)***. He further placed reliance in case of *Siemens Ltd. Vs. State of Maharashtra* 2007 (5) STR 3 (SC) and would submit that under the situation, the petitions are liable to be dismissed.

13. Perused the documents filed along-with the petition. Primarily the show cause notice issued to the petitioners is under challenge. A perusal of the said notice would show that preliminary submissions were made by the petitioners' representative(s) and after consideration thereof, the notice under challenge was issued. The show cause notice appears to have been issued after the initial reply. The details of notice purports that the averments of the petitioners were too considered and thereafter, they were given opportunity of hearing in person before adjudication of the case. The said notice further shows that the case is posted for hearing and the petitioners were given opportunity of being heard before any orders have been passed. Reading of the entire show cause notice which runs into 32 pages primarily describes the averments of the parties. The language of show cause notice would show that

after preliminary consideration, the authority issuing the same came to a conclusion that the petitioners have willfully suppressed certain facts of rendering taxable services provided to them. The show cause further speaks that such facts came to fore when the investigation of records was carried out and after examination of records, the authority was of the opinion that suppression of facts exists. According to the show cause notice if suppression of certain facts exists, then in such background, the arguments of the petitioners that the writ petitions would be required to be decided on admitted facts cannot be considered. The suppression destroys all the facts. If certain facts come to fore which were earlier suppressed, then the admitted facts become porous and new facts surface which may require reconsideration. The attention that the issue has generated is predominantly on the mixed question of facts and law. If certain facts emerge which were under the veil, the entire dimension of an issue may be changed.

14. On the other hand, reading of show cause notice would show that the authority issuing notice has reasonably acted upon and narrations have been made that why the authority has come to conclusion by recording such objective satisfaction of fact and has asked for the explanation by way of show cause.

15. The Supreme Court in case of *Oryx Fisheries Pvt. Ltd (supra),* laid down the ratio that the person to whom the show cause notice has been issued must be told the charges against him at that stage. Here the show cause notice would show that those charges of suppression have been arrived at

after consideration of the preliminary submission. On the contrary, the subject show cause notice gives an opportunity to rebut the allegations before Authority to prove their innocence which is also in conformity with the ratio of *Oryx Fisheries Pvt. Ltd (supra).* Para 28 of the said judgment is relevant here and quoted blow:

> "28. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing the charge sheet, cannot instead of telling him the charges, confront him with definite conclusion of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show cause notice gets vitiated by unfairness and bias and the subsequent proceeding become an idle ceremony."

16. Further in the light of the ratio laid down in case of *AVM Studio* decided by the Madras High Court (supra), the activities of the petitioners have been discussed in the show cause notice. The petitioners contend that the said activities do not come within the purview of service tax. When the opportunity of hearing is given, it is well within the domain of the petitioners to explain the fact that the activities carried out by them are not within the taxable income. Thereafter, after consideration of the reply, if the authorities come to a finding that such activity comes within the service of taxable net, then in such a case too that can be subject of challenge. The reiteration of word 'suppression' gives such analogy and if it is found that certain activities which were subject of tax were not disclosed and came to light after investigation then

certainly the authorities have right to adjudicate and determine it.

17. At this stage, since the petitioners have been given opportunity of hearing, the prayer to quash the show cause at the inception would amount to strangulate the issue which is yet to be adjudicated. The analogy of ***Siemen India Ltd. 2007 5 STR***, therefore, would govern the situation that it would not be appropriate to exercise the discretionary jurisdiction of writ and quash the show cause notice by evaluating the language of it as primarily it does not show that it is without jurisdiction. Further it would be wrong to hold that the authority issuing the show cause notice has acted upon with premeditated mind. The language and narration made in the show cause notice do not give such impression to quash the same at the inception. The petitioners have all the right to canvass their grievance before the adjudicating authority by whom they have been given notice to appear and explain their case.

18. In the result, the petitions at this stage are premature and liable to be dismissed as this Court after careful consideration is unable to agree with the contention of the petitioners to admit the case. Accordingly, these petitions are dismissed.

Sd/-
(GOUTAM BHADURI)
JUDGE

Rao