

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.11.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE M.S.RAMESH

Writ Appeal No.633 of 2020

M/s. Indriya Construction Company
rep. by its Partner Mr.Gomathi Sankar R
No.13, Sharon Enclave, 19th Street
Tansi Nagar, Velacherry
Chennai 600 042.

..Appellant

Vs.

1. The Additional Commissioner
Chennai Audit II Commissionerate
No.692, 6th Floor, MHU Complex
Nandanam
Chennai 600 035.

2. The Additional / Joint Commissioner of GST &
Central Excise
Chennai South Commissionerate
No.690, MHU Complex, Nandanam
Chennai 600 035.

3. Central Board of Indirect Taxes & Customs
by its Chairman
Ministry of Finance
North Block
New Delhi.

..Respondent

Appeal under Clause 15 of Letters Patent against the
order dated 31.01.2020 made in WP No.34399 of 2019.

WP No.34399 of 2019 PRAYER: PETITION filed under Article 226
of the Constitution of India praying for the issuance of Writ
of Certiorari, calling for the records relating to the
impugned show cause notice No.18/2019 (ADC) dated 23.10.2019
issued by the 1st respondent and to quash the same as contrary
to the Master Circular No.1053/02/2017-CX dated 10.03.2017
issued by the 3rd respondent barred by limitation and without
authority of law.

For Appellant : Mr.M.A.Mudimannan
For Respondent : Mrs.Hema Muralikrishnan

J U D G M E N T
(Delivered by Dr.Vineet Kothari,J)

This writ appeal is directed against the order dated 31.01.2020 dismissing the writ petition, W.P.No.34399 of 2019 filed by the appellant, M/s. Indriya Construction Company, against the Central Excise Department.

2. The writ petition was filed by the petitioner-Assessee on the ground that there was non-compliance on the part of the Adjudicating Authority with the Board's Instruction No.1053/2/2017-CX dated 10.03.2017, paragraph 5.0 which provided for pre-consultation before issuance of Show Cause Notice where the demand against the Assessee is likely to be above Rs.50.00 Lakhs (except for preventive/offence related SCN's). The said paragraph 5.0 of the Board's Circular dated 10.03.2017 is quoted below for ready reference:

"5.0 Consultation with the noticee before issue of Show Cause Notice: Board has made pre show cause notice consultation by the Principal Commissioner/Commissioner prior to issue of show cause notice in cases involving demands of duty above Rs.50 lakhs (except for preventive/offence related SCN's) mandatory vide instruction issued from F.No.1080/09/DLA/MISC/15, dated 21st December 2015. Such consultation shall be done by the adjudicating authority with the assessee concerned. This is an important step towards trade facilitation and promoting voluntary compliance and to reduce the necessity of issuing show cause notice."

3. When the writ petition was taken up at the initial stage on 16.12.2019, the learned counsel for the appellant, Mr.M.A.Mudi Mannan, agreed to the suggestion of the Court and the learned counsel for the Revenue, Mrs.Hema Muralikrishnan, also agreed that even now, after the issuance of Show Cause Notice in question on 23.10.2019, with regard to certain issues of levy of service tax on the Assessee, the Assessee may appear before the Adjudicating Authority in terms of para 5 of Board's Circular quoted above to reduce the area of dispute and to come to a conclusion about the correctness of the issuance of Show Cause Notice to the Assessee on 23.10.2019.

4. Accordingly, the Assessee appeared before the Adjudicating Authority on 02.01.2020 and after hearing both sides, the learned Commissioner/Adjudicating Authority passed a detailed order on 09.01.2020 holding that the Show Cause Notice was properly issued and therefore, the Assessee may now raise objections to the said Show Cause Notice and file his replies thereto, so that the adjudication can be made in pursuance of the said Show Cause Notice dated 23.10.2019.

5. Taking note of the said order dated 09.01.2020, the learned Single Judge disposed of the writ petition, calling upon the petitioner to file his objection to the said Show Cause Notice within two weeks and then the Authority to proceed further, in accordance with law. As far as paragraph 11 of the said Show Cause Notice was concerned, by which the Adjudicating Authority has noted that such pre-consultation was held with the Audit Authority, the learned Single Judge observed that it had become infructuous, since pursuant to the order passed by the Court on 16.12.2019, the Assessee was heard in such pre-consultation by the Adjudicating Authority, in accordance with the Board's Instruction on 02.01.2020, and therefore, paragraph 11 of the impugned Show Cause Notice had become redundant and accordingly, it was set aside.

6. Aggrieved by this innocuous order also, the Assessee is before us in the present intra Court Writ Appeal.

7. The learned counsel for the appellant, Mr.M.A.Mudi Mannan, emphasised that the Assessee had only agreed to appear before the Assessing Authority while the order dated 16.12.2019 was passed. But, since the pre-consultation ought to have been held even prior to the issuance of Show Cause Notice in terms of aforesaid paragraph 5 of the Board's Circular dated 10.03.2017, it was an exercise in futility and Show Cause Notice could not have been issued by the Adjudicating Authority without himself holding the pre-consultation in terms of the said Board's Circular.

8. The learned counsel also drew our attention to the judgment of the same learned Single Judge in the case of Freight Systems (India) Ltd. v. Commissioner of CGST and Central Excise [2019 (368) ELT 506 (Mad.)] wherein for similar non-compliance of the pre-consultation meeting, the learned Single Judge was pleased to quash the Show Cause Notice issued by the Adjudicating Authority and against which, the Department has filed Writ Appeal W.A.No.83 of 2020 and the same is pending in this Court and submitted that the Show Cause Notice in question deserves to be quashed by this Court.

9. Per contra, Mrs.Hema Muralikrishnan, learned counsel for the Revenue submitted that the said Board's Circular, especially paragraph 5, was actually issued by the Board to thrash and sort out certain issues on the basis of audit objection and report of the Audit Commissioner at the pre-Show Cause Notice stage, so that with the production of relevant document and evidence, if the Assessee can satisfy the objections of audit raised in that regard and then the Show Cause Notice for undertaking the adjudication process with regard to such issues may not be unnecessarily taken and that was the pious purpose for which the said Board's Circular was issued.

10. She urged that however, the Assessee in the present case, by invoking the writ jurisdiction of this Court, has defeated the very purpose of issuance of Show Cause Notice and has successfully delayed the same for about one year now and even though a post Show Cause Notice opportunity in terms of the said Circular para 5 was given to the Assessee by the agreement of both the counsel by the learned Single Judge by the order dated 16.12.2019, still the Assessee is not satisfied despite an order passed on 09.01.2020 by the Adjudicating Authority, after giving an opportunity and pre-consultation meeting held with the Assessee. She therefore submitted that the Assessee should now be called upon to file his objections to the Show Cause Notice itself and let the adjudication proceedings take place.

11. Drawing a parallel attention to Section 148 of the Income Tax Act for re-assessment purposes, she urged that since reasons for re-assessment have to be recorded by the Assessing Authority under Section 148 of the Income Tax Act and objections thereto, if any filed by the Assessee, have to be decided by the Assessing Authority, before the re-assessment proceedings in pursuance of Notice under Section 148 of the Income Tax Act are taken, paragraph 5 of the Board's Circular in the present case is something akin to that and if the Adjudicating Authority comes to the conclusion, like it has done in the present case, that Show Cause Notice is proper and justified and the Assessee should now show cause before the Adjudicating Authority by raising his objections by filing reply thereto, the Adjudicating Authority should be permitted and allowed to undertake the adjudication proceedings now and the Assessee has further remedial measures by way of further appeal under the statute itself, if he still feels aggrieved against the adjudication order. Therefore, she submitted that the present Writ Appeal is misconceived and deserves to be dismissed.

12. We have given our earnest consideration to the rival submissions and the material on record.

13. We are of the opinion that invoking of writ jurisdiction by the Assessee in such cases is nothing but an abuse of process of law. The Show Cause Notice itself is a procedure known to the Excise Law and other Tax Laws where the Assessee is called upon to show cause against the issues raised in the Show Cause Notice in terms of principles of natural justice or Audi Alteram Partem and the Assessee is expected to raise his objections and points in the form of reply to the Show Cause Notice before the Assessing Authority. Then, the Adjudicating Authority or the Assessing Authority is expected to decide those issues and objections and pass appropriate Adjudication Order. If the Assessee feels aggrieved by the same, further two appellate forums are available under the law, namely first appeal before the Commissioner (Appeals) and second appeal before the Tribunal. Even thereafter, on the questions of law, the Assessee has a remedy before the High Court and further appeal to the Supreme Court. Therefore, such a series of hierarchical alternative remedial procedures and measures are already envisaged and provided for in the Central Excise Act and similar provisions are available in almost all the taxing statutes.

14. In view of the above, the pre-consultation procedure provided by the Board in its Circular dated 10.03.2017, even though there is no such statutory requirement or provision in the Central Excise Act itself, perhaps was issued with a pious objective of cutting short the controversy before the Show Cause Notice stage itself, is and has been abused by the Assessee in the manner like the present case being illustrative one of that. The Board is, of course, expected to lay down the guidelines for the Assessing Authorities throughout the country to maintain a uniform assessment procedure and in that regard, if such Guidelines have been issued by the Board for a fair objective of cutting short or narrowing down the controversies before issuing Show Cause Notice, perhaps a valid exception to that cannot be taken. But, holding it to be mandatory to that extent where it gives a right to the Assessee to invoke the writ jurisdiction of this Court and then, delaying the proceedings in pursuance of the Show Cause Notice itself, is a clear abuse and misuse of this Guideline laid down by the Board for the benefit of the Assessee as well as the Department. The Board might not have possibly thought of this possible abuse of its Guidelines when it said it was mandatory to hold such pre-consultation, even beyond the provisions of the Act itself.

15. The Assessee, fully being aware that the Constitutional Courts may not find easy time to dispose of such matters quickly, the proceedings in pursuance of such Show Cause Notices or even issuance of Show Cause Notices are successfully delayed for years together, defeating the very purpose for which such Show Cause Notices are issued and possible revenue which can be gathered out of Adjudication Orders passed in pursuance of such Show Cause Notices. This other side of the coin was perhaps not envisaged by the Board when it laid down guidelines in para 5 quoted above.

16. Therefore, the Board should re-look into this aspect of the matter.

17. We are surprised to note that despite agreement before the learned Single Judge on the side of the Assessee to appear before the Adjudicating Authority in pursuance of the said para 5 of the Board's Circular, even ex-post facto issuance of Show Cause Notice, to comply with the formality of a pre-consultation proceedings, the Assessee not only appeared, but raised all the possible points before the Adjudicating Authority which were met and disposed of by the order dated 09.01.2020 holding in the final conclusion that the Assessee needs to be called upon to raise his objections if any to the Show Cause Notice in question, the Assessee still feels aggrieved. The learned Single Judge rightly disposed of the writ petition of the Assessee calling upon him to show cause before the Assessing Authority. Still the Assessee in his own wisdom thought it proper even to challenge such an innocuous order of the learned Single Judge before the writ appellate Court again, perhaps knowing that it will take at least some more time for the Appellate Court also to decide this writ appeal and till then, adjudication proceedings can be delayed. It is precisely this, what is called an abuse and misuse of process of law. The writ jurisdiction is not meant to be invoked in such cases at all.

18. The regular procedure of Show Cause Notice, filing of objections, assessment and appeals are fully provided for in the relevant statutes. Therefore, cutting short that procedure by invoking the writ jurisdiction defeats the very purpose of that procedure provided in the law. The pre-consultation as provided in paragraph 5 of the Board's Circular quoted above was though a hedge provided for the benefit of the Assesseees and the Department to narrow down the controversy, by spilling the litigation over that very thing, the Assessee successfully defeats the purpose of the same and that is what cannot be appreciated at all.

19. We are strongly of the opinion that entertaining the writ jurisdiction at the stage of Show Cause Notice under the taxing statutes unnecessarily allows the Assessee to successfully delay and defeat those proceedings for years together. Therefore, the Court should be very circumspect before entertaining such writ petitions at a very preliminary and pre-mature stage and at least the proceedings before Departmental authorities should not be stayed without giving them an opportunity of hearing and finding serious fault in their stand against the Assessee. The law in this regard has been settled beyond pale of doubt by catena of decisions of various High Courts and Hon'ble Supreme Court. We do not see any need to say anything more on this and if the Assessee has any case on merits to raise his objections before the Adjudicating Authority in pursuance of the Show Cause Notice, which he is definitely free to do so, including relying upon the judgments, if any, which he can draw support from. But, that does not render the very initiation of the proceedings without jurisdiction so as to entitle the Assessee to invoke the writ jurisdiction of this Court.

20. From the facts on record, we are of the clear opinion that the learned Single Judge was more than benevolent in granting this opportunity to the Assessee in terms of para 5 of the Board's Circular even post facto Show Cause Notice and allow him an oppotunity to raise his preliminary objections before the Adjudicating Authority who is supposed to decide the objections and either sustain the said Show Cause Notice or curtail or set aside the same. Once the order thereon was passed, we are of the opinion, as rightly pointed out by the learned counsel for the Revenue, that it is something like upholding the issuance of re-assessment notice under Section 148 of the Income Tax Act and under the Excise Law to justify the issuance of Show Cause Notice itself. Nothing more can be done in such cases by the writ Court and therefore, we feel that the Assessee ought to have approached the concerned Assessing Authority by raising his objections on the merits of the case, so that the proceedings under the Act could have proceeded further.

21. We are, therefore, not inclined to entertain this writ appeal in any manner and we would have imposed costs also on the Assessee for the delay in the proceedings up to this extent. However, we do not impose the same at this stage giving a warning to the Assesseees to avoid invoking writ jurisdiction on such premature stage.

22. With these observations, the Writ Appeal is dismissed. No costs. Consequently, CMP No.8841 of 2020 is also dismissed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

kpl

To

1. The Additional Commissioner
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No.692, 6th Floor, MHU Complex
Nandanam, Chennai 600 035.
2. The Additional / Joint Commissioner of GST &
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3. The Chairman
Central Board of Indirect Taxes & Customs
Ministry of Finance, North Block, New Delhi.

+1cc to Mr.Jayachandran, Advocate, S.R.No.37470
+1cc to M/s.Hema Muralikrishnan, Advocate, S.R.No.37355

W.A.No.633 of 2020

MG(CO)
KKV/22/12/2020