

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA  
CIVIL APPELLATE JURISDICTION  
ORIGINAL SIDE**

RESERVED ON: 10.08.2022  
DELIVERED ON: 23.08.2022

**CORAM:**

**THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM  
AND  
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

**A.P.O.T NO. 148 OF 2013  
I.A. NO. G.A./01/2013 (OLD NO. G.A. 927 OF 2013)  
I.A. NO. G.A./02/2013 (OLD NO. G.A. 928 OF 2013)**

**COMMISSIONER OF SERVICE TAX  
VERSUS  
NARESH KUMAR AND COMPANY PRIVATE LIMITED AND OTHERS**

**Appearance:-  
Mr. K.K. Maity, Adv.**

**....for the Appellant.**

**Mr. J.K. Mittal. Adv.  
Mr. Paritosh Sinha, Adv.  
Mr. Amitava Mitra, Adv.  
Ms. Antara Choudhury, Adv.**

**.....for the Respondents.**

**JUDGMENT**

***(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)***

1. We have heard Mr. K.K. Maity, learned Senior Standing Counsel for the appellant and Mr. J.K. Mittal, learned Counsel assisted by Mr. Paritosh Sinha, Mr. Amitava Mitra, and Ms. Antara Choudhury, learned Advocates for the respondent.
2. There is a delay of 546 days in filing the application. We have perused the affidavit filed in support of the said application and we find that sufficient cause has been shown for not being able to file the application within the period of limitation.
3. Accordingly, the application for condonation of delay being IA No. GA/1/2013 is allowed and the delay in filing the application is condoned.
4. This appeal by the revenue is directed against the order in WP No. 124 of 2011 dated 10.08.2011. The said writ petition was filed by the respondent challenging a show cause notice issued by the appellant department dated 30.03.2010 demanding service tax for the period 2004-2005. By the impugned order, the writ petition has been allowed and aggrieved by such order the appellant department has filed the instant appeal.
5. We have elaborately heard Mr. K.K. Maity, Learned Senior Standing Counsel for the appellant department and Mr. J. K. Mittal, Learned Counsel assisted by Mr. Paritosh Sinha, Mr. Amitava Mitra, and Ms. Antara Chowdhury, learned advocates for the respondent.
6. The show cause notice which was impugned in the writ petition demanded a total service tax of Rs. 1,10,08,867/-. The break up details of the same are under three heads:- (i) Rendering of service to *M/s. Tisco* for

getting coal converted to coke, (ii) intra court transportation of ores in terms of agreements with *M/s. PM International Logistics Limited*, subsidiary of *Tisco* and (iii) processing of Pyroxenite for *M/s. Tisco*. The show cause notice was issued invoking the extended period of limitation as provided under Section 73(1) of the Finance Act, 1994. In terms of Sub-Section 1 of Section 73 where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice. The proviso states that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of (a) fraud; or (b) collusion; or (c) wilful mis-statement; or (d) suppression of facts; or (e) contravention of any of the provisions of the said Chapter or of the rules made thereunder with intent to evade payment of service tax, by the persons chargeable with service tax or his agent, the provisions of Sub-Section 1 of Section 73 shall have effect, as if, for the words “one year”, the words “five years” has been substituted. The explanation states where the service of notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the aforesaid period of one year or five years as the case may be.

7. The respondent writ petitioner at the outset contended that the show cause notice is barred by time in view of Section 73(1) of the Act and the

extended period of limitation as provided for in the proviso to Section 73(1) could not have been invoked as the ingredients were wholly absent.

8. The appellant revenue raised a preliminary objection with regard to the maintainability of the writ petition contending that the question whether the proviso to Section 73 (1) of the Act had been rightly or wrongly invoked involves factual determination and therefore the writ petition should not be entertained. The Learned Writ Court after noting the decision of the Hon'ble Supreme Court in **Whirlpool Corporation Versus Registrar of Trade Marks** <sup>1</sup> opined that the Court would not be justified in dismissing the writ petition at the initial stage without examining the contentions raised in the writ petition that the show cause notice was without jurisdiction. Further taking note of the decision of the Hon'ble Supreme Court in **State of Punjab Versus Bhatinda District Cooperative Milk P. Union Limited** <sup>2</sup> the court held that the question of limitation being a jurisdictional question, a writ petition challenging the validity of the notice on the ground of the same being barred by limitation would be maintainable notwithstanding an alternate statutory remedy. Further the learned Writ Court referred to the decision of the Hon'ble Supreme Court in **State of Madhya Pradesh and Others Versus D. K. Yadav** <sup>3</sup> for the proposition that a Writ Court would be entitled to examine whether the jurisdictional facts are correct or not. With the above reasoning the Court held that the writ petition was maintainable. Having held so, the Court then proceeded to examine the second contention raised by the writ petitioner that the show cause notice was barred by time

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<sup>1</sup> (1998) 8 SCC 1

<sup>2</sup> (2007) 11 SCC 363

<sup>3</sup> AIR 1968 SC 1186

and the ingredients required to be fulfilled for invoking the extended period of limitation being absent, the show cause notice is without jurisdiction. To examine the correctness of the contention, the learned Writ Court had noted the factual position which had occurred prior to the issuance of the impugned show cause notice dated 30.03.2010. These factual details more particularly the action taken by the department and the response given by the assessee is of utmost importance to examine as to whether the extended period of limitation could have been invoked. At this stage it will be beneficial to extract the following portion of the impugned order:-

*According to the petitioner, the petitioner was registered with the Service Tax Department in 2004 and has since then been paying service tax on taxable services rendered by the petitioner.*

*On 18<sup>th</sup> April, 2006, the Directorate General of Central Excise and Intelligence conducted search and seizure at the premises of the petitioner and seized various records relating to service tax, including computer data.*

*It appears that the petitioner received a letter dated 29<sup>th</sup> August, 2006 from the office of the Assistant Commissioner, of Service Tax, Dhanbad alleging that conversion charges for conversion of coal into coke attracted service tax under the category of 'business auxiliary service'.*

*By a letter dated 30<sup>th</sup> October, 2006, the petitioner informed the Assistant Commissioner that conversion of coal into coke amounted to manufacture and was thus exempted from service tax in view of the proviso to Section 65(19) of the Finance Act, 1994.*

*Thereafter the petitioner received another letter dated 30<sup>th</sup> October, 2008 from the Commissioner of Central Excise and Service Tax, alleging that conversion of coal into coke constituted 'business auxiliary service'. The petitioner by its letter dated 12<sup>th</sup> November, 2008 replied to the aforesaid letter of*

*the Commissioner of Central Excise and Service Tax, refunding the contention that conversion of coal into coke constituted business auxiliary service.*

*By a letter dated 9<sup>th</sup> March, 2007 the Superintendent of Central Excise, Paradeep Bench demanded service tax on intra-port transport charges under 'port service' contending that intra-port transportation was covered under the category of port service.*

*By a letter dated 5<sup>th</sup> April, 2007, the petitioner refuted the demand contending that the petitioner was neither a port nor had been authorized by any port and the service rendered by the petitioner did not constitute port service. The petitioner also filed a writ petition being W.P. (c) No. 6660 of 2007 challenging the letter dated 9<sup>th</sup> March, 2007.*

*By an audit spot Memo No. 3 dated 21<sup>st</sup> July, 2009, the Principal Director of Audit, Central Kolkata, sought information and/or documents with regard to intra port charges from 2001-2002 to 2008-2009.*

*Another memo being Audit Spot Memo No. 3 dated 21<sup>st</sup> June, 2009 was issued by the Audits and Accounts Department, calling for documents pertaining to intra port transportation, conversion bill charges and transportation bills for the year 2001-2002 to 2008-2009.*

*Thereafter while conducting audit, the office of the Principal Director of Audit issued audit spot Memo No. 02 dated 21<sup>st</sup> July, 2009 calling for documents related to processing of 'pyroxenite' Service tax is apparently being paid on processing of 'pyroxenite' with effect from 1<sup>st</sup> June, 2007 was made applicable to when service tax 'mining service', under Section 65(105) of the Finance Act, 1994.*

*According to the petitioner, the petitioner submitted various documents pertaining to bills relating to conversion charges on processing of 'pyroxenite', as required.*

*By a letter dated 17<sup>th</sup> December, 2009, the Commissionerate, Service Tax sought information on the same issue of bills on account of processing of pyroxenite. There was further correspondence, after which the impugned show cause notice was issued.*

*To avoid prolixity this Court has not adverted to the details of the correspondence.*

*The Director General of Central Excise has also issued a show cause notice dated 23<sup>rd</sup> April, 2010 for the period from 1<sup>st</sup> October, 2004 to 28<sup>th</sup> February, 2005 demanding service tax of Rs. 6,12,979/-. The aforesaid notice is ex facie barred by limitation.*

*The impugned show cause notice has been issued by the Commissioner of Service Tax in purported invocation of the proviso to Section 73(1) of the Finance Act, 1994 on the vague allegation that the petitioner had not paid appropriate service tax, not disclosed relevant details to the Department and had as such taken all material steps to suppress pertinent facts wilfully, with the sole intention of evading service tax.*

9. On going through the above facts, the learned Writ Court held that there is nothing in the show cause notice to indicate as to how the extended period of limitation under the proviso to Section 73(1) of the Act has been invoked. The learned Writ Court also pointed out that the onus is on the authority issuing the show cause notice to disclose the relevant facts in the show cause notice or documents annexed therewith to show that the show cause notice was within one year from the relevant date, or in case of invocation of the proviso to Section 73(1) of the Finance Act within 5 years from the relevant date. With regard to the computation of the 5 years period, the learned Writ Court placed reliance on the decision of the Hon'ble Supreme Court in **CCE, Ahmedabad-I Versus M. Square Chemical** <sup>4</sup> wherein it was held that 5 years was to be computed by back calculation from the date of the show cause notice and therefore held the show cause notice having been issued on 30.03.2010 there could be no question of

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<sup>4</sup> 2008 (231) E.L.T. 194 (SC)

inclusion of any claim prior to 30.03.2005. Furthermore the Court pointed out that contravention simpliciter of the provisions of Chapter 5 of the Finance Act, 1994 as amended from time to time does not itself attract the proviso to Section 73 (1) of the Act as for invocation of the extended period of limitation, the contravention must be coupled with intent to evade the payment of service tax. After referring to several other decisions of the Hon'ble Supreme Court, it was pointed out that it is not the case of the department as made out in the show cause notice that the writ petitioner has withheld any information in spite of requisitions or has refrained from filing returns in spite of any specific directions to do so. After having held so, Writ Court also took note of the submissions made by the learned advocates for the writ petitioner that conversion of coal into coke does not attract service tax and even if conversion did not amount to manufacture and was covered under "Business Auxiliary Service", Notification No. H/05-ST dated 09.03.2005 exempted processing or production of goods for or on behalf of the clients from service tax and therefore the writ petitioners was exempt under the aforesaid notification. The Court also took note of the arguments of the learned advocate for the respondent that intra court transportation constitute port service with enactments or enforcements of Finance Act, 2010 and prior to the same it was not a taxable service. Further the Court noted that it is not in dispute that after the amendment the writ petitioner have registered themselves as Port Service Provider. Though the learned Writ Court had noted that the submissions with regard to the nature of services rendered by the writ petitioner, no findings on merits were given on those

issues as the court was satisfied that the impugned show cause notice was barred by limitation, accordingly the writ petition was allowed.

10. Mr. K. K. Maity, learned advocate appearing for the appellant submitted that the respondent had suppressed the fact of filing the writ petition before this Court in WP No. 1518 of 2006 which was dismissed by judgment dated 14.01.2009, aggrieved by such order, the respondent preferred appeal before the Hon'ble Division Bench in APO No. 332 of 2009 which was disposed of by judgment dated 08.02.2010 wherein the revenue was granted three months' time to take steps in accordance with law and within the said time period fixed by the Hon'ble Division Bench, the show cause notice was issued and respondent has not mentioned about the said order in the present litigation. Further the learned standing counsel submitted that another writ petition was filed by the respondent challenging the show cause notice issued by the department dated 21.03.2013 which was allowed and challenging the same, the department filed a MAT No. 1293 of 2014 by judgment dated 05.01.2015, the intra court appeal was allowed and the adjudicating authority was directed to decide the matter in accordance with law. It was further submitted that search and seizure operation was conducted in the business premises of the respondent on 18.04.2006 and thereafter the respondent deposited a sum of Rs. 15 lakhs and it is thereafter earlier writ petition was filed.

11. Mr. Mittal, learned Advocate appearing for the respondent submitted that the correct facts are neither being placed before this Court, nor in the show-cause notice issued by the Department. It is submitted that the writ petition in WP 1318 of 2006 was not filed by the respondent herein but it is

by a partnership firm and, therefore, the judgment of the Division Bench in APO No. 332 of 2009 rising out of the order in WP No. 1518 of 2006 is of no relevance to the case on hand. Further, it is submitted that the show-cause notice which was impugned in the writ petition is not a show-cause notice which was issued pursuant to the search and seizure operation conducted on 18.04.2006 but it was pursuant to an audit which was conducted and the audit report appears to have been the basis for the show-cause notice. It is submitted that if proceedings are initiated pursuant to an audit, the Central Board of Excise and Customs has issued various circulars which are in the nature of guidelines referring the functions of the Audit Commissionerates and in this regard, referred to circular No. 985/09/2014-CX dated 22<sup>nd</sup> September, 2014 and has drawn out attention to Clauses 5.1, 5.2, 5.3 and 5.9 of the said circular to explain the procedure that has to be followed and when an audit is conducted, show-cause notice is to be issued by the Audit Commissionerate. That apart the assessee is entitled to an opportunity. It is further submitted that the circular No. 1053/202/2014-CX dated 10.03.2017 was issued which is a master circular on show-cause notice, adjudication and recovery. This master circular rescinds several circular issued from 1980 onwards except 3 circulars and in Paragraph 3.2 of the said circular while dealing with the ingredients for the extended period, it has been mentioned as follows:

**3.2 Ingredients for extended period:** *Extended period can be invoked only when there are ingredients necessary to justify the demand for the extended period in a case leading to short payment or non-payment of tax. The onus of establishing that these ingredients are present in a given*

*case is on revenue and these ingredients need to be clearly brought out in the Show Cause Notice alongwith evidence thereof. The active element of intent to evade duty by action or inaction needs to be present for invoking extended period.*

12. It is therefore, submitted that the entire proceedings are wholly unsustainable and without jurisdiction and the learned Writ Court had rightly quashed the proceedings.

13. When the appeal was heard on 5<sup>th</sup> of August, 2022, we had framed three issues for consideration firstly, whether the writ petition was maintainable as against a show-cause notice, secondly whether the extended period of limitation under Section 73(1) of the Finance Act, 1994 as amended could have been invoked and thirdly, what would be the relevant date for the purpose of computation of the period for invoking the extended period of limitation. On the first issue regarding the maintainability of the writ petition, we referred to the recent decision of the Hon'ble Supreme Court in ***Radha Krishna Industries Versus State of Himachal Pradesh and Others***<sup>5</sup>, wherein the Hon'ble Supreme Court has clearly enumerated the principles as to when a writ petition could be entertained despite availability of a statutory remedy. The writ petitioner had challenged the show-cause notice on the ground of lack of jurisdiction. The learned Writ Court was fully justified in examining such of those facts which were required to decide as to whether the authority lacked jurisdiction in issuing the show-cause notice. Therefore, we find that there is no error in the finding of the learned Writ Court that the writ petition was maintainable. In

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<sup>5</sup> 2021 SCC Online SC 334

any event, the said issue has now become academic as the writ petition which was filed in the year 2011 was allowed by order dated 10.08.2011 against which the present appeal was filed in the year 2011 and we have heard the appeal now and at this stage even assuming we were to hold that the writ petition was not maintainable, it will be too harsh on the assessee to be relegated back to the authority to respond to the show-cause notice. Therefore, the first issue is decided in favour of the respondent writ petitioner.

14. The second issue was as to whether the extended period of limitation could have been invoked. If the issue is answered in favour of the writ petitioner, there may not be a necessity to go into the third issue. As rightly pointed out by the learned Writ Court, the proviso to Section 73(1) of the Act can be invoked only when there is an allegation of fraud or collusion or wilful mis-statement or suppression of facts or contravention of the provisions of the Act or the Rules with intent to evade payment of service tax. Therefore, the show-cause notice should clearly indicate the wilful mis-statement or suppression of facts or fraud or collusion as done by the assessee with an intention to evade payment of tax. On a careful reading of the show-cause notice, it is evidently clear that there is absolutely no whisper of any allegation of wilful mis-statement or suppression of facts or fraud or collusion as committed by the respondent assessee with an intention to evade payment of service tax. In the absence of such factual finding, the extended period could not have been invoked. In the earlier part of this judgment we had noted the factual position by extracting the relevant

portion of the order passed in the writ petition. We have consciously done so to take note of the conduct of the parties. From those facts it is evidently clear that the respondent was registered with the service tax department in the year 2004; during 2006 the Director General of Central Excise and Intelligence conducted search and seizure in the premises of the respondent and seized various records. It is thereafter in August 2006, the Officer from Dhanbad alleged that conversion charges for conversion of coal into coke attracted service tax under the category "Business Auxiliary Service". The respondent immediately sent their reply informing the Officer that the conversion of coal into coke amounts to manufacture, thus exempt from service tax in view of the proviso to Section 65(19) of the Finance Act. Thereafter, another letter was issued by the Commissioner of Central Excise and Service Tax, Ranchi on the same allegation for which the respondent sent the reply in November 2008, reiterating the earlier stand. They have also mentioned that the files may be transferred to Kolkata as their registration is in Kolkata and all the transactions are centralised therein. In March, 2007 the authority at Paradwip demanded service tax on intra-port transport charges. Subsequently, audit query memo was issued in June 2009 and July 2009. It appears that none of the proceedings were taken to the logical end i.e. by issuance of show-cause notice, adjudication and passing of final orders. It is only in the year 2010, the impugned show-cause notice was issued invoking the extended period of limitation, with an iota of any allegation of mis-statement or fraud or collusion committed by a respondent with the intention to evade payment of service tax.

15. Mr. Mittal is right in his submission that the show-cause notice is not a fall out of the search and seizure conducted on 18.04.2006 but it is pursuant to an audit. If such is the situation, was the authority who issued the show-cause notice competent to do so, more particularly, in the light of the circulars relied on by Mr. Mittal. However, we do not wish to give any specific finding on the said issue as we are fully satisfied that the appellant Department could not have invoked the extended period of limitation for issuance of the show-cause notice. With regard to the effect of the judgment of APO 332 of 2009 dated 08.02.2010 we have to point out that the said decision can have no impact in the present case as the appellant therein was a partnership firm and the respondent writ petitioner herein is a Private Limited company. In any event, we tested the correctness of the submissions of Mr. K.K. Maity who had submitted that the Hon'ble Division Bench had granted 3 months time for the Department to proceed in accordance with law and within the said 3 months period the show-cause notice dated 30.03.2010 was issued. Firstly, the said decision cannot be applied to the fact of the case on hand as the appellant therein was a different entity, secondly the Court did not grant any direction extending the period of limitation which the Court was not entitled to do. The period of 3 months was only with regard to the refund of Rs. 15,00,000/- it was directed to be given. The Hon'ble Division Bench held that the amount of Rs. 15 lakhs on being refunded shall be kept by the appellant therein in a short-term fixed deposit and not encash it for a period of 3 months and in the meantime, it will be open to the Department to take steps in accordance with law and upon failure to do so, the appellant therein would be entitled to appropriate

the amount refunded. Thus, the interpretation sought to be given by the appellant is a thorough mis-reading of the judgment of the Hon'ble Division Bench.

16. Mr. Mittal submitted that as against the judgment in MAT No. 1293 of 2014 dated 05.01.2015 review application has been filed by the respondent in RUV No. 33 of 2015 and the same is pending, however, the legal issue in the said case has been settled by the Hon'ble Supreme Court in the case of ***Union of India and Another Versus Intercontinent Consultants & Technocrats Pvt. Ltd.***<sup>6</sup>

17. Mr. Maity had submitted that the respondent had moved a writ petition before the High Court of Orissa in WPC No. 6660 of 2007 and obtained an order of stay restraining the Department from proceeding with the matter and the writ petition was dismissed for non-prosecution on 07.02.2022. The proceedings before the High Court of Orissa cannot impact the present appeal nor it has been shown by the revenue as to what would be the effect of the said writ petition on the cause of action which has led to the present litigation.

18. Thus for all the above reasons we are of the clear view that the learned Single Bench was fully justified in holding that the show-cause notice impugned before it was barred by limitation. Further, we have seen that the learned Writ Court though noted the submissions of Mr. Mittal on the merits of the matter has not rendered any finding on merits and equally so we have also not touched upon the merits of the claim as we uphold the decision of

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<sup>6</sup> (2018) 4 SCC 669

the learned Writ Court quashing the show-cause notice on the ground of limitation. Accordingly, the appeal filed by the revenue fails and is dismissed. No costs.

**(T.S. SIVAGNANAM, J.)**

I agree.

**(HIRANMAY BHATTACHARYYA, J.)**



*(P.A.-PRAMITA/SACHIN)*