

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
(Appellate Side)

Present: THE HON'BLE JUSTICE RAJARSHI BHARADWAJ

W.P.A 24534 of 2024

Reserved on : 09.12.2024
Pronounced on: 23.12.2024

M/s. Britannia Industries Limited

...Petitioner

-Vs-

Union of India & Ors.

...Respondents

Present:-

Mr. Abhratosh Majumder, Sr. Adv.

Mr. Pratyush Jhunjunwala

Mr. Rahul Tangri

Ms. Taniya Roy

... for the petitioner

Mr. Vipul Kundalia

Mr. Tapan Bhanja

Mr. Anindya Kanan

Mr. Dhirodatto Chaudhuri

Mr. Jasajeet Mukherjee

... .. for the respondents

Rajarshi Bharadwaj, J:

1. The Petitioner is engaged in the manufacture and supply of various food items, including bakery products such as biscuits, bread, cakes, and rusks, along with dairy products. These products are distributed to customers and dealers through the Petitioner's multiple units located across India.

2. On December 16, 2021, the officers of the Directorate General of GST Intelligence (DGGI), Delhi Zonal Unit herein respondent no. 3, conducted a search at the Petitioner's premises in Delhi. During the proceedings, several summonses were issued, statements were recorded and various documents and information were sought from the Petitioner. The Petitioner duly complied with all the requirements during these proceedings.

3. Subsequently, Respondent No. 3 issued a Show Cause Notice (hereinafter referred to as 'SCN') dated August 3, 2024, under Section 74(1) of the CGST Act, 2017, read with Section 20 of the Integrated Goods and Services Tax (IGST) Act, 2017. The SCN sought recovery of ₹1,05,11,99,662 in GST, along with interest under Section 50 and an equivalent penalty under Section 74(1) of the CGST Act, 2017.

4. The SCN contains several allegations against the Petitioner. First, it accuses the Petitioner of wrongfully availing the benefit of an exemption on the supply of "Kulcha" by misclassifying it as "bread" under S. No. 97 of Notification No. 02/2017 - Central Tax (Rate) dated June 28, 2017.

5. Additionally, the SCN denies the reduction of the Petitioner's outward tax liability based on credit notes issued for deficient services and destroyed goods. This denial is grounded on the claim that the corresponding Input Tax Credit (ITC) was not reversed by the suppliers or recipients of such goods, as required under Section 34 of the CGST Act.

6. Further, the SCN alleges non-reversal of ineligible ITC by the Petitioner. Specifically, it points to inputs used in the manufacture of destroyed goods and inputs used for manufacturing sample free goods, both of which fall under the ambit of Section 17(5)(h) of the CGST Act.

7. The Petitioner has filed the present writ petition before this Hon'ble High Court, challenging the SCN. The Petitioner contends that the SCN is without

jurisdiction and has been issued in gross violation of the principles of natural justice.

8. The Learned Counsel appearing on behalf of the petitioner submits that the **SCN invoking the extended period of limitation under Section 74 of the Act is wholly without jurisdiction. The extended period** of limitation of five years under Section 74 is applicable only in cases where fraud, collusion, wilful misstatement, suppression of facts or contravention of provisions with the intent to evade payment of tax is established. Each of these elements necessitates intent to evade duty, as laid down by the Hon'ble Supreme Court in ***Gopal Zarda Udhyog v. Commissioner of Central Excise* reported in 2005 (188) ELT 251 (SC)**. Furthermore, proving fraud or wilful misstatement requires a positive act done with mala fide intent by the assessee, as clarified under Explanation 2 to Section 74 and reiterated by the Supreme Court in ***Uniworth Textiles Ltd. v. CCE* reported in 2013 (288) ELT 161 (SC)**.

9. The impugned SCN failed to substantiate allegations of fraud, suppression or wilful misstatement with evidence. This lack of proof violates established principles, as held in ***Pushpam Pharmaceuticals Company v. Collector of Central Excise* reported in 1995 (78) ELT 401 (SC)** and subsequent decisions in ***Associated Pigments Ltd. v. Superintendent of Central Excise* reported in 1993 (68) ELT 514 (Cal.)** and ***Cosmic Dye Chemical v. CCE* reported in 1995 (75) ELT 721 (SC)**.

10. Moreover, the SCN is devoid of allegations demonstrating mala fide intent on the petitioner's part. For instance, the classification issue concerning Kulcha fails to demonstrate a deliberate intention to evade tax. The extended period of limitation invoked under Section 74 is thus without jurisdiction.

11. Further, the petitioner had disclosed exemption claims on Kulcha to the department through a letter dated December 21, 2021, shortly after the Respondent no.3's visit on December 16, 2021. Despite this, the SCN was

issued on August 03, 2024, after the normal limitation period had expired for FY 2017-18 to FY 2019-20. Such delay has been condemned by the Hon'ble Supreme Court in **Commissioner of C. Ex., Mangalore v. Pals Microsystems Ltd.** reported in **2011 (270) ELT 305 (SC)**.

12. Moreover, the absence of pre-SCN intimation in Form GST DRC-01A renders the proceedings procedurally defective. Rule 142(1A) of the CGST Rules mandates issuance of DRC-01A before initiating proceedings under Section 74. The omission of this step vitiates the validity of the SCN, as held in **M/s New Morning Star Travels v. The Deputy Commissioner (S.T.) & Ors.** reported in **2023 (79) G.S.T.L. 430 (A.P.)**.

13. The extended limitation period in the SCN pertains solely to the classification of Kulcha and does not extend to issues related to credit notes. The demand raised regarding credit notes hinges on the alleged non-compliance with a circular dated June 26, 2024, which imposes additional requirements beyond the statutory provisions of Section 34. This interpretation is incorrect as Section 34 does not mandate proof of ITC reversal by the recipient. The Hon'ble Supreme Court in **Suchitra Components v. CCE** reported in **2007 (208) ELT 321 (SC)** held that oppressive circulars imposing additional restrictions cannot be applied retrospectively.

14. Additionally, the department's insistence on the petitioner verifying ITC reversals is untenable, especially when mechanisms under Section 43 and Rule 73 to Rule 75 of the CGST Rules were non-operational. The Hon'ble Supreme Court in **Superintendent of Taxes, Dhubri & Ors. v. M/s Onkarmal Nathmal Trust** reported in **1976 (1) SCC 766** emphasized that the State cannot benefit from its own lapses.

15. It has been further submitted that the petitioner uses goods exclusively for organoleptic testing by employees to evaluate quality, taste and durability.

These goods are not distributed as free samples to customers. Therefore, the restriction on ITC under Section 17(5)(h) of the CGST Act is inapplicable. The SCN erroneously categorizes such goods as free samples, disregarding the distinction between inputs used for internal testing and those distributed for promotional purposes.

16. The SCN combines demands for six financial years (FY 2017-18 to FY 2022-23), violating the CGST Act, which mandates year-wise determination. Reliance has been placed on the decision in ***Titan Company Ltd. v. The Joint Commissioner of GST & Central Excise*** reported in **2024 (1) TMI 619 (Mad)** by the petitioner in the present case, where such bunching was held impermissible.

17. Submissions of the Learned Counsel for the respondents no. 1,2 and 4 is that the invocation of the extended limitation period under Section 74 of the CGST Act, 2017 is legally valid. The SCN pertains to the financial years 2017-18 to 2022-23. Section 74(10) of the CGST Act, 2017 allows the proper officer to issue an SCN within five years from the date of furnishing the annual return for the relevant financial year where tax was not paid, short-paid or input tax credit (ITC) was wrongly availed or utilized. Moreover, the Central Government, through notifications issued under Section 168A of the Act, has periodically extended the time limits for furnishing annual returns for the financial years 2017-18 to 2019-20. The extended limitation period applies in cases of fraud, wilful misstatement or suppression of facts, leading to tax short payment, erroneous refunds or wrongful ITC utilization. In the present case, the petitioner wilfully misclassified their goods and availed ineligible ITC with mala fide intent to evade tax. Thus, the extended period of limitation has been correctly invoked by Respondent No. 3 as per the law.

18. The issues of limitation, exemption and classification are mixed questions of law and fact that fall under the jurisdiction of the adjudicating

authority. In this regard, reliance has been placed by the respondent authorities on several judgments. In ***Aloke Bhowmick v. Additional Commissioner, CGST & CX Kolkata South Commissionerate in (MAT No. 298 of 2022)***, it was held by the Hon'ble Calcutta High Court that determining whether an SCN is time-barred or involves suppression is a factual issue requiring adjudication by the issuing authority. Similarly, in ***J.S Pigments Pvt. Ltd v. Commissioner of CGST and Central Tax, Howrah*** reported in ***(2022) 381 ELT 45 (Cal.)***, the Court reiterated that extended limitation under Section 11A of the Act involves mixed questions of law and fact. Further, in ***D.C.L. Polyester Ltd v. Collector of Central Excise and Customs, Nagpur*** reported in ***(2005) 181 ELT 190 (SC)***, it was held that determining whether a product falls within a tariff entry is also a mixed question of law and fact.

19. The petitioner's reliance on various judicial precedents to challenge the invocation of the extended limitation period is misplaced and factually distinguishable. In ***Gopal Zarda Udyog (supra)*** the case dealt with a scenario where there was no intent to evade tax. This is different from the present case, where the petitioner suppressed facts with mala fide intent. Similarly, in ***Uniworth Textile (supra)***, the ambiguity was addressed to the Development Commissioner, unlike the present case, where the petitioner knowingly misclassified products. Furthermore, in ***Pushpam Pharmaceuticals Company (supra)***, the case involved known facts between parties, unlike the present case, where intentional suppression was unearthed during investigation.

20. It is further submitted that contrary to the petitioner's claim, the mention of "Discussion and Finding" in the SCN does not reflect prejudgment but rather outlines the investigation's outcome. The SCN merely proposes

charges and provides the petitioner with an opportunity to contest them before an adjudicating authority, distinct from the issuing authority.

21. Section 74(1) of the CGST Act permits the issuance of an SCN in cases of tax evasion due to fraud, wilful misstatement or suppression of facts. The petitioner failed to disclose critical facts even after investigations commenced, reinforcing the invocation of the extended limitation period. The classification of 'Kulcha' as 'Bread' under HSN Code 19059090 and subsequent claims for exemption under Notification No. 2/2017-Central Tariff (Rate) constitute wilful misstatement. Chapter 19 of the HSN and related entries clearly exclude such products from exemption. The '*Common Parlance Test*' as held in ***Signature International Foods India Pvt. Ltd*** reported in **(2019) 20 GSTL 640 (AAR-GST)** confirms that products like 'Kulcha' do not fall under the definition of 'Bread' for exemption purposes.

22. The Hon'ble Supreme Court in ***Commissioner of Customs v. Dilip Kumar and Co.*** reported in **(2018) 361 ELT 577 (SC)** held that the burden of proof for claiming tax exemption lies on the assessee. Ambiguity in exemption notifications must be resolved in favour of revenue. Further, the issuance of Form GST DRC-01A is discretionary and does not prejudice the petitioner, especially when they dispute the entire demand.

23. The respondents submit that the SCN has been issued lawfully and all allegations, including wilful misclassification and suppression of facts, have been substantiated through a thorough investigation. The extended period of limitation is applicable and the proceedings must continue as per the CGST Act, 2017.

24. Upon a thorough examination of the documents presented to the Court and taking into account the arguments put forth by the parties, this Court finds that the writ petition is not maintainable. This Court shall refrain from adjudicating or delving into the merits of the case as the issues raised in the

present writ petition pertain to complex questions of fact and law that are squarely within the jurisdiction of the adjudicating authority under the Central Goods and Services Tax (CGST) Act, 2017. The petitioner's grievances primarily relate to the invocation of the extended period of limitation, allegations of misclassification of goods and denial of Input Tax Credit (ITC). Each of these issues necessitates a detailed factual inquiry, which is outside the purview of this Court in its writ jurisdiction.

25. In *Aloke Bhowmick (supra)* it was held:

"2. The issue as to whether the show cause notice is barred by time and whether there is no allegation of suppression or mis-statement is a factual issue and is not purely a legal question. Secondly, whether the type of service rendered by the appellant was an exempted service is also a factual matter, which needs to be adjudicated by the appropriate authority, who has issued the show cause notice."

26. In *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others* reported in **(1998) 8 SCC 1**, the Hon'ble Supreme Court explained that writ petitions may be entertained against show cause notices where the petitioners seek enforcement of any fundamental rights, where there is a violation of principles of natural justice or where the order or proceedings are wholly without jurisdiction or where the vires of the Act is itself challenged. None of these circumstances are made out in the present petition. Simply alleging that the impugned SNC are without jurisdiction because, according to the petitioners' perception, the exemption covers them, or the nil tax rate notification is insufficient. The usual adjudicatory process, where such a matter can be effectively adjudicated upon, cannot be scuttled by rushing to the writ court and securing stays on the adjudicatory process.

27. It is well-settled that writ courts do not interfere in cases where statutory remedies are available unless there is a clear violation of fundamental rights, lack of jurisdiction, or procedural perversity leading to manifest injustice. The petitioner has not demonstrated any such exceptional circumstances warranting this Court's intervention. Instead, the statutory

framework under the CGST Act provides adequate mechanisms for addressing the petitioner's concerns, including responding to the SCN, participating in adjudication proceedings and availing appellate remedies if dissatisfied with the outcome.

28. This Court emphasizes that this decision should not be construed as expressing any opinion on the merits of the petitioner's claims. The adjudicating authority is directed to independently and impartially decide the matter based on the evidence and submissions presented before it.

29. For the foregoing reasons, the writ petition is dismissed. The petitioner is advised to exhaust the statutory remedies provided under the CGST Act, 2017 including submitting a detailed response to the SCN. This Court reiterates that it shall not interfere in matters requiring fact-finding and adjudication, which fall squarely within the statutory domain.

30. All pending applications are accordingly disposed of.

31. There shall be no order as to costs.

32. Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfilment of requisite formalities.

(RAJARSHI BHARADWAJ, J)

Later:-

After pronouncement of this judgment, the Advocate appearing for the petitioner prays stay of operation of this judgment.

The prayer for stay is considered and rejected.

(RAJARSHI BHARADWAJ, J)

Kolkata

23.12.2024

PA (BS)