

(2012) 01 GAU CK 0023

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 4854/2011 & WP(C) No. 6352/2011

Dharampal Satyapal Limited, Having its Registered Office at 1171, S.P.Mukherjee Marg, New Delhi - 110 006 **APPELLANT**

Vs

Union of India, through Revenue Secretary to the Govt.of India, Ministry of Finance (Department of Revenue) North Block, New Delhi. **RESPONDENT**

Date of Decision : 04-01-2012

Acts Referred:

Central Excise Rules, 2002 — Rule 6, 6
Central Excises and Salt Act, 1944 — Section 11(A)(B), 11(A)(B)
Constitution of India, 1950 — Article 19(1)(g), 19(1)(g), 226, 226

Citation : (2012) 2 GLR 887

Hon'ble Judges : B.K.Sharma, J

Bench : Single Bench

Advocate : For the petitioner : Dr. P. Kumar, Adv. Mr. S.K. Medhi, Adv, For the respondents : Mr. B. Sharma, SC, Central Excise., Advocates appearing for Parties

Judgement

1. Both the writ petitions are against the show cause notices issued by the Commissioner, Central Excise, alleging that the petitioner has abstained from discharging duty payment of Central Excise duty to the tune of the amount indicated in the said notices. The basic facts and the grounds urged towards assailing the said notices being the same, the writ petitions have been heard together. Although, the learned counsel for the parties have argued on the interim prayer but they have advanced arguments substantially touching the merit of their respective cases. In tune with the preliminary objection raised in the counter affidavit filed by the respondents, the learned counsel for the respondents has also argued on maintainability of the writ petitions at this stage.

2. Since the learned counsel for the parties have exclusively referred to the pleadings and the documents annexed to the writ petition being WP(C) No. 4854/2011, primarily the said writ petition is dealt with for appropriate order.

3. I have heard Dr. P. Kumar, learned counsel assisted by Mr. S.K. Medhi, learned

counsel appearing for the petitioner as well as Mr. B. Sharma, learned Standing Counsel, Central Excise. I have also gone through the entire materials on records.

4. As noted above, both the writ petitions are against the show cause notices issued by the Commissioner of Central Excise, Guwahati, by which the petitioner has been called upon to show cause as to why the amounts mentioned in the notices under Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 and The Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 should not be demanded and recovered in terms of the Central Excise Act, 1944. By the impugned notices, the petitioner has also been called upon to show cause as to why interest on the said amounts should not be charged and realized under Section 11(A)(B) of the Central Excise Act, 1944 read with the relevant rules of the aforesaid rules. The petitioner has also been directed to show cause as to why penalty should not be imposed in terms of the said rules. For a ready reference, the relevant portion of one of the notices dated 6.12.2010, is reproduced below :

?On scrutiny of the relevant records, it is noticed that 6314880 nos. pouches of Rajnigandha Pan Masala 4 gm. Pouches (RSP Rs. 6.00 per pouch) only were deemed to be produced with the installed/operated machines during the material period in terms of Rule 5 of the Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008 as detailed in Annexure"A" enclosed herewith. However, the said assessee is found to have manufactured 11890591 nos. of pouches in excess of the quantity deemed to be produced during the material period. This excess production of 11890591 nos. of pouches is attributable to the deemed production by 4 (four) more packing machines (11890591 pouches divided by 3444480 pouches per operating machine per month) (As detailed in AnnexureA enclosed herewith) in respect of which the said assessee did not discharge their duty liability of Rs. 2,04,000/ (4 x Rs. 51 lakhs) at the applicable rate in terms of Notification No. 42/2008CE dated 01.07.2008 i.e. @ Rs. 51 lakhs per operating machine per month. Besides, the fact remains that it is not the intention of the legislature to allow the excess manufactured quantity of finished goods beyond the deemed capacity of manufacture to escape payment of duty. By necessary implication, it follows that the said assessee in the instant case have short paid Central Excise duty by way of deliberate misconstruction of the provisions Rule 5 of the Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008 read with Notification No. 30/2008CE(NT) dated 1.7.2008, as amended. In view of above, it appears that the said assessee have abstained from discharging duty liability to the tune of Rs. 2,04,00,000/ payable on the excess production of 11890591 nos. of pouches of Rajnigandha Pan Masala 4 gm pouch (RSP Rs. 6/ per pouch) in contravention of the provisions of Rule 5 of Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008 reach with Notification No. 42/2008CE dated 01.07.2008 knowing fully well that they are bound by Rule 6 of the Central Excise Rules, 2002 to make proper assessment of

duty payable on excisable goods. M/s. Dharampal Satyapal Limited, Shed No. OS/4/R/24, Industrial Estate, Bamunimaidan, Guwahati 781021 are, therefore, asked to show cause before the Commissioner, Central Excise, Guwahati within 30(thirty) days of receipt of this notice as to why

(a) the said amount of Rs. 2,04,00,000/ (Rupees Two Crores & Four Lakhs) only shall not be demanded and recovered from them in terms of Section 11A(1) of the Central Excise Act, 1944 read with Rule 5 of Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008 and Notification No. 42/08CE dated 01/07/2008 ;

(b) Interest, as applicable, on the aforementioned amount shall not be charged and realized from the said assessee in terms of Section 11AB of the Central Excise Act, 1944 read with Rule 9 of Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008 and

(c) Penalty shall not be imposed on them in terms of subrule (1) of Rule 17 of Pan Masala Packing Machines (Capacity Determination And Collection of Duty) Rules, 2008.

M/s. Dharampal Satyapal Limited, Shed No. OS/4/R/24, Industrial Estate, Bamunimaidan, Guwahati 781 021 are further asked to produce all the relevant documents at the time of showing cause upon which they intend to rely in support of their defense. Besides, the said assessee shall intimate in writing whether they desire to be heard in person and/or through their authorized representative when the case is posted for hearing. If no cause is shown against the proposed action within the stipulated period and/or the said assessee fail to appear before the adjudicating authority, the case shall be decided exparte on the basis of available records without any further reference to them. This notice is issued without prejudice to any other action(s) or proceeding(s) that may be initiated against the assessee in terms of the provisions of the Central Excise Act, 1944 and/or the Rules framed there under and/or any other law for the time being in force.?

5. According to the petitioner, the impugned notices issued under the aforesaid rules of 2008 and 2010 notified under Section 3A of the Central Excise Act, 1944 are in complete derogation of the rules as well as Section 3A of the Act. Referring to the various provisions of the rules, it has been pleaded that the authority has acted without jurisdiction towards issuing the impugned notices in deeming the number of machines instead of actual number of machines and making calculation on that basis.

6. The petitioner has further contended that while other similarly placed manufacturers across the country are being charged in terms of Section 3A and the said Rules on the basis of the actual number of packing machines being operated, the petitioner is being discriminated against by being forced to pay on the basis of imaginative/deemed number of packing machines. According to the petitioner, the impugned notices are violative of Article 19(1)(g) of the

Constitution of India.

7. The respondents have filed their counter affidavit denying the contentions raised in the writ petition. As noted above, they have also raised a preliminary objection on maintainability of the writ petitions. It has been stated that having regard to the facts involved in the case, and more particularly, when the issue raised is at the stage of only show cause notices requiring the petitioner to make their position clear in the matter, this Court exercising its power of judicial review under Article 226 of the Constitution of India, will be reluctant to exercise the said jurisdiction at this stage and that too when the disputed question of facts are involved.

8. Commenting on the merit of the case of the petitioner, it has been contended that Rule 5 of the Rules specifies the quantity of notified goods deemed to be produced by the use of Single Operating Packing Machine with respect to the declared Retail Sale Price (per pouch) and that the petitioner was paying duty on the basis of the deemed production per operating machine. But during the scrutiny of the records of their manufacturing units, it was noticed that they were manufacturing far in excess of quantity deemed to be produced as per the said rule, whereas they were discharging duty only to the extent of per machine wise deemed production.

9. It has been contended by the respondents that the excess production of such goods produced was attributable to the deemed production by additional packing machines, which were escaping levy of duty. According to the respondents, the assessee i.e. the petitioner failed to make proper assessment of their duty liability as required under Rule 6 of the Central Excise Rules, 2002 and with deliberate intention to evade payment of Central Excise duty, abstained from discharging duty payment of Central Excise Duty.

10. The respondents have stated that the impugned show cause notices have been issued to the petitioner in terms of proviso of Section 11A(1) of the Central Excise Act 1944 read with Rule 5 of the Rules. Dealing with the question of maintainability of the writ petition, the respondents in their counter affidavit have contended that the impugned show cause notices have been issued in consonance with the principles of natural justice and that the petitioner ought to have responded to the same instead of invoking the writ jurisdiction of this Court.

11. I have considered the submissions made by the learned counsel for the parties and the materials on record. While Dr. Kumar, learned counsel for the petitioner exclusively referring to the pleadings and the documents annexed to the writ petition and also the relevant provisions of the Acts and Rules, has argued that the impugned show cause notices are beyond jurisdiction of the authority issuing the same, Mr. B. Sharma, learned Standing Counsel, Central Excise, apart from arguing on maintainability of the writ petition at this stage, has argued that the impugned show cause notices being based on relevant facts and authorization in law, the writ petitions are liable to be dismissed.

12. While Dr. Kumar, learned counsel for the petitioner has placed reliance on the decision in *Hemraj Gordhandas Vs. H.H. Dave* reported in 1978(2) E.L.T. J 350(SC), Mr. B. Sharma, learned Standing Counsel, Central Excise has placed reliance on the decision in *Special Director Vs. Mohd. Ghulam Ghouse* reported in 2004 (164) E.L.T. 141 (SC).

13. Since the respondents have raised a preliminary objection regarding maintainability of the writ petition, Dr. Kumar, learned counsel for the petitioner initially argued that the proceeding which is sought to be initiated or has been initiated by the impugned show cause notices, is time consuming and that by the time a decision is arrived at by the authority in the Central Excise, the petitioner will suffer irreparable loss and injury. On being apprised that appropriate direction can be issued for early finalization of the matter, he argued that when the very jurisdiction and competence of the authority in issuing the impugned show cause notices have been raised, the writ petitions are required to be adjudicated upon on merit, exercising the power of writ jurisdiction.

14. The decision on which the learned counsel for the petitioner has placed reliance, is primarily on the interpretation of Taxing Statute. Needless to say that it is well settled that in a taxing statute, there is no room in intendment but regard must be had to the clear meaning of the words. According to the learned counsel for the petitioner, the authority which had issued the impugned notices could not have attributed to the petitioner, excess production of pouches indicated in the impugned show cause notices to be the deemed production by four more packing machines.

15. Mr. B. Sharma, learned Standing Counsel, Central Excise has drawn my attention to the provisions of the rules requiring the declaration to be filed by the manufacturer. Rule 5 of the said rules speaks of quantity deemed to be produced. Rule 6(vii) requires the manufacturer of notified goods to declare the name of the manufacturer of each of the packing machine, its identification number, date of its purchase and the maximum packing speed on which they can be operated for packing of notified goods on various retail sale price. AnnexureD is the order dated 9.8.2010 issued by the Deputy Commissioner of Central Excise notifying the gist of the declaration made by the petitioner which includes the number of pouches deemed to be produced per machine and annual production capacity under Rule 5 of the Rules.

16. AnnexureI to AnnexureD series order dated 9.8.2010 is the declaration made by the petitioner certifying the required declarations furnished to be true and correct in all respect and undertaking that in case of any particulars found to be untrue/incorrect, it would pay the additional amount of excise duty as per provisions of the Act and the Rules of the notifications issued thereunder.

17. The Apex Court in *Mohd Ghulam Ghouse (Supra)* dealing with the question of maintainability of the writ petition challenging legality of show cause notices deprecated the practice of the High Court entertaining writ petitions, questioning

the legality of the show cause notices, stalling of enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. It is only in the case of deriving satisfaction that the show cause notice is totally non est in the eye of law for absolute want of jurisdiction of the authority to investigate into facts, the High Court may entertain a writ petition. In paragraph 5 of the said judgement, it has been observed thus :

¶5. This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless, the High Court is satisfied that the show cause notice was totally non est in the eye of law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine and the writ petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition. Whether the show cause notice was founded on any legal premises is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the Court. Further, when the Court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is accorded to the writ petitioner even at the threshold by the interim protection, granted.?

18. The question necessarily arises as to whether the writ petitions should be entertained at this stage of issuance of show cause notices requiring the petitioner to respond to the same dealing with the queries raised therein. Though, no hurdle can be put against the exercise of the constitutional powers of the High Court, it is an well recognized principle which has gained judicial recognition that the High Court should direct the parties to avail itself all such remedies one or the other before it resort to constitutional remedy.

19. The proceedings under Article 226 of the Constitution of India are not a substitute for a proceeding initiated by the impugned show cause notices. The only enquiry, which this Court can make under Article 226 of the Constitution at this stage, is whether there is prima facie material to sustain the impugned show cause notices. From the narration of facts stated above, I am of the considered opinion that it cannot be said to be a case of proceeding against the petitioner with a misconceived notion. If the authority which has issued the impugned show cause notices, has derived the decision on the basis of the materials on record to ask the petitioner to show cause to meet the allegations made in the impugned notice. It is none of the business of this Court to sit on appeal on such decision exercising its power of judicial review under Article 226 of the Constitution of

India.

20. By the impugned show cause notices, the petitioner has been furnished with the facts to proceed against it in a particular manner and in tune with the principles involved towards compliance of natural justice. They have been asked to meet the queries made in the said notices. Instead of responding to the said show cause notices, they have rushed to this Court raising the aforementioned grounds which they could have easily raised before the said authority by responding to the notices.

21. As has been held by the Apex Court in *UOI Vs. Hindalco Industries* reported in (2003) 5 SCC 194 in the matter of taxation, it is inappropriate for the High Court to interfere in exercise of jurisdiction under Article 226 of the Constitution either at the stage of show cause notice or at the stage of assessment where alternative remedy by way of filing a reply or appeal, as the case may be, is available. Similar view has been expressed in *UOI Vs. Bajaj Tempo Ltd.* Reported in (1998) 9 SCC 281. In the said case also, the assessee instead of replying to the show cause notice, filed writ petition to deny its liability to pay the excise duty demanded. It was held that the appropriate remedy for the assessee was not to file a writ petition but to reply to the show cause notice.

22. On perusal of the facts stated in the writ petition as well as discernible from the impugned show cause notices, what cannot be lost sight of the fact is that disputed facts are also involved in the writ petitions, which cannot be gone into by making a roving enquiry exercising the writ jurisdiction. Such disputed questions of fact be better left open to be resolved by the adjudicating authority, which has issued the impugned show cause notices.

23. The allegations contained in the impugned show cause notices require adjudication on investigation of the disputed facts. The materials on record cannot lead to an interference that the allegations in the show cause notices are wholly nonexistent and that there is no foundation or basis of the allegations. In the writ petitions there is no challenge as to the vires of the statutory provisions governing the matter nor there is any question regarding violation of fundamental rights involved in the said proceedings. On examination of the materials on record, it cannot be said that the notices are *ex facie* nullity and without jurisdiction. The basic facts on the basis of which the authority has assumed jurisdiction on the subject matter to initiate and continue the proceeding, in my considered view, requires investigation and adjudication. The initiation of proceeding cannot, under the circumstances, be said to be unauthorized and without jurisdiction.

24. In *Union of India Vs. Metal Box Co. of India Ltd.* reported in (1996) 11 SCC 122 the Supreme Court made the following scathing observations in the matter of entertaining of the writ petition in such matter:

?we find it difficult to sustain the judgement of the learned Single Judge and of the Division Bench, fare more than one reason. But first we must mention that

the filing of, and entertaining, the writ petition straightway against a notice of demand issued by a Central Excise Officer (Superintendent of Central Excise) in a matter involving valuation was inadvisable. It has been repeatedly deprecated by this court the latest decision being in Executive Engineer, Bihar State Housing Board Vs. Ramesh Kumar Singh, which decision refers to and affirms the ration of the earlier decisions of this Court.?

25. The Apex Court in Asstt. Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd & Others reported in (1985) 1 SCC 260 observed thus :

?3. ???????.Article 226 is not meant to shortcircuit or circumvent statutory procedures. It is only where statutory remedies are entirely illsuited to meet the demands of extraordinary situations, as for instance where the very vires of the stature is in question or where private or public wrongs are so inextricably missed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged.?

26. For all the aforesaid reasons, I am of the considered opinion that the petitioner should respond to the impugned show cause notices first by urging all the grounds including the jurisdictional issue, if available in law. We need not be presumptive that the authority dealing with the matter would be oblivious of the grounds which might be urged by the petitioner responding to the impugned show cause notices, taking into account the totality of the facts and circumstances. It will be a sound discretion not to stall the proceeding initiated by the competent authority through the impugned show cause notices by entertaining the writ petitions. Consequently, the preliminary objection made by the respondents, stands upheld and the writ petitions are dismissed being not maintainable at this stage.

27. The petitioner may respond to the impugned show cause notices dealing with all the grounds urged in the writ petitions. In the event of such response being shown, the authority shall deal with the same towards taking a decision in the impugned show cause notices. Depending upon the outcome of such a course of action, future rights and liabilities of the parties will govern.

28. Before parting with the case records, it is made clear that this order has not touched the merit of the case of the either parties, which shall be decided by the authority dealing with the show cause notices and the reply, if any, furnished by the petitioner. Needless to say that the said authority shall deal with the matter

appropriately and strictly in accordance with law and facts involved.

29. Both the writ petitions are dismissed. There shall be no order as to costs.