IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.12476 OF 2019

Hindustan Coca-Cola Beverage Pvt. Ltd. … Petitioner
Vs.
Union of India and others … Respondents

Mr. Vikram Nankani, Senior Advocate a/w. Mr. Jitendra Motwani and Ms. Rinkey Jassuja i/b. M/s. Economic Laws Practice for Petitioner.
Mr. Pradeep S. Jetly, Senior Advocate a/w. Mr. J. B. Mishra for Respondents.

CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.

Reserved on : FEBRUARY 08, 2021
Pronounced on: MAY 21, 2021

P.C. : (*Per Ujjal Bhuyan, J.*)

Heard Mr. Vikram Nankani, learned senior counsel for the petitioner and Mr. Pradeep S. Jetly, learned senior counsel for the respondents.

2. By filing this petition under Article 226 of the Constitution of India, petitioner seeks quashing of show cause notice dated 09.05.2019 issued by respondent No.3.

3. By the impugned show cause-cum-demand notice dated 09.05.2019, respondent No.3 has called upon the petitioner to show cause as to why irregular CENVAT credit of Rs.2,02,30,256.00 for the period from April, 2014 to June, 2017 wrongly availed of by the petitioner should not be recovered under section 11A(4) of the Central Excise Act, 1944 read with Rule 14 of the CENVAT Credit Rules, 2004; interest at the appropriate rate on the aforesaid amount should not be recovered from the petitioner under section 11AA of the Central Excise Act, 1944; and as to why penalty should not be imposed under Rule 15

of the CENVAT Credit Rules, 2004 read with section 11AC of the Central Excise Act, 1944.

4. Petitioner is a company incorporated under the Companies Act, 1956 having its factory at Bhiwandi Wada Road, Palghar, Maharashtra. Petitioner is engaged in the business of manufacturing, selling and distribution of beverages under the brand name of Coca-cola, Thums Up, Sprite, Fanta, Limca etc.

5. It is stated that petitioner has 25 units at different locations across India. For each of the units, petitioner had obtained separate registration under the provisions of the Central Excise Act, 1944 (briefly 'the Act' hereinafter).

6. According to the petitioner, as per terms of sale agreement with the customers, it sold the goods on Free on Road (FoR) basis, thus the risk and reward of ownership of the goods passed on to the distributors at their destination. In the course of business, petitioner availed CENVAT credit on various inputs and input services used in the manufacture of the final products as per rule 2(k) and (l) of the CENVAT Credit Rules, 2004. It is stated that petitioner availed CENVAT credit of service tax paid on transportation charges incurred in transportation of its products from its factories / depots to the customer places.

7. Petitioner has stated that rule 2(l) of the CENVAT Credit Rules, 2004 (CENVAT Credit Rules) underwent a change post 01.03.2008. Prior to 01.03.2008, 'input service' meant amongst others any service used by the manufacturer whether directly or indirectly in or in relation to the manufacture of final products and clearance of final products from the place of removal. Thus, according to the petitioner prior to 01.03.2008, the credit even beyond the place of removal was eligible to the assessee for transportation of goods from the place of removal i.e., factories / depots to the premises of the customers. Post 01.03.2008, the

definition of 'input service' in rule 2(l) of the CENVAT Credit Rules was amended. As per the amended definition, 'input service' means any service amongst others used by the manufacturer whether directly or indirectly in or in relation to the manufacture of final products and clearance of final products upto the place of removal. Thus, as per the amended definition, no credit in respect of the input services availed of beyond the place of removal would be available to the assessee.

8. It is stated that investigation was initiated in August, 2018 by the Directorate General of GST Intelligence, Mumbai Zonal Unit in relation to the CENVAT credit availed of by the petitioner in respect of service tax paid on transportation charges incurred for transportation of the products from the factories / depots to the premises of the customers on the ground that the said service availed by the petitioner was not an eligible input service as per provisions of rule 2(l) of the CENVAT Credit Rules. During the course of investigation, statements of several officers of the petitioner were recorded by the investigating authorities.

9. Pursuant to such investigation, respondent No.3 issued the show cause-cum-demand notice dated 09.05.2019 which has been impugned by the petitioner.

10. Petitioner has assailed the legality and validity of the impugned show cause-cum-demand notice dated 09.05.2019 on several grounds. It is submitted that CENVAT credit on outward goods transport agencies (GTA) is eligible to the petitioner even post 01.03.2008. It is contended that respondent No.3 failed to appreciate that petitioner is eligible to avail CENVAT credit of service tax paid on transportation charges incurred for transportation of its products from its factories / depots to the customer places. According to the petitioner this view is fortified by several decisions of the Supreme Court.

10.1. Another ground on which the show cause-cum-demand notice has

been impugned is that it is contrary to the circular dated 08.06.2018 of the Central Board of Indirect Taxes and Customs. It is submitted that the investigation and the consequential show cause-cum-demand notice pertain to alleged wrongful availment of CENVAT credit of outward transportation beyond the place of removal. Respondent No.3 has invoked the extended period of limitation under section 11A(4) on the ground that petitioner with *mala fide* intent to avail ineligible CENVAT credit had fraudulently contravened various statutory provisions. Referring to the circular dated 08.06.2018 more particularly to paragraph 7 thereof, it is contended that no new show cause notice issued on the basis of the said circular should invoke the extended period of limitation in cases where an alternative interpretation was taken by the assessee.

10.2. Petitioner has also assailed the impugned show cause-cum-demand notice on the ground that allegation of suppression of facts is totally incorrect and misplaced. Therefore, question of invoking extended period of limitation does not arise.

11. Respondent No.2 has filed two reply affidavits, one dated 14.01.2021 and the other dated 29.01.2021. Respondent No.2 besides responding to the averments made by the petitioner on merit has also questioned maintainability of the writ petition. It is stated that Directorate General of GST Intelligence, Mumbai Zonal Unit had issued 19 show cause notices to 19 units of the petitioner. While 5 show cause notices have been adjudicated upon, petitioner filed two writ petitions against two show cause notices, one before the Gujarat High Court and one before the Bombay High Court. The writ petition filed before the Gujarat High Court was disposed of as withdrawn on 16.09.2019. Therefore, the present writ petition may not be entertained and the petitioner may be relegated to the forum of the adjudicating authority.

12. Petitioner has filed rejoinder affidavits to the two reply affidavits of respondent No.2. Regarding the show cause notice impugned before

the Gujarat High Court, it is submitted that the writ petition filed by the petitioner was withdrawn as an outcome of the hearing before the Gujarat High Court whereafter reply was filed by the petitioner to the show cause notice. Without considering the contentions advanced by the petitioner in the reply, the adjudicating authority passed order-in-original dated 29.11.2019 upholding the demand. This has been challenged by the petitioner again before the Gujarat High Court in Special Civil Application No.4023 of 2020 in which Gujarat High Court has issued notice on 13.02.2020.

13. Detailed submissions have been made by Mr. Nankani, learned senior counsel for the petitioner in support of the challenge to the show cause-cum-demand notice dated 09.05.2019. Besides contending on merit that petitioner is eligible to the credit of the input services from the place of removal despite the amendment made, he has also relied upon the circular dated 08.06.2018 of the Central Board of Indirect Taxes and Customs to submit that there is no case at all for invocation of the extended period of limitation to issue the show cause-cum-demand notice to the petitioner. On that count itself, the show cause-cum-demand notice is liable to be interfered with being beyond limitation and thus without jurisdiction. He submits that the authority was required to first decide the jurisdictional facts before issuing the show cause-cum-demand notice.

14. However, Mr. Jetly, learned senior counsel for the respondents submits that present is not a case where the writ jurisdiction of the High Court under Article 226 of the Constitution of India should be invoked. A show cause notice has been issued to the petitioner. Petitioner can certainly contest the show cause notice by submitting its reply which will be followed by an adjudication by the adjudicating authority. The adjudication process is a quasi-judicial one where full opportunity of hearing will be provided to the petitioner. If the order-in-original passed pursuant to such adjudicating process goes against the petitioner or the

petitioner is aggrieved by the same, he has adequate and efficacious remedy for redressal of his grievance. Reference has been made to the writ petition filed by the petitioner before the Gujarat High Court which was withdrawn to contest the show cause notice by filing reply. He, therefore, submits that the writ petition may be dismissed.

15. Submissions made by learned counsel for the parties have been duly considered.

16. From a perusal of the show cause-cum-demand notice dated 09.05.2019 it is seen that according to respondent No.3, information was received that petitioner was engaged in the business of manufacturing and supply of various beverages and packaged drinking water. Petitioner supplied its products from the factories and depots all over India. In the course of transportation of goods from its factories and depots to customers, petitioner hired goods transport agencies (GTA) and made payments to them. Petitioner had availed CENVAT credit on the service tax paid on the transportation charges incurred for transportation of its products from its factories and depots to the place of the customers which according to respondent No.3 is not eligible to the petitioner as per rule 2(l) of the CENVAT Credit Rules post amendment. After analyzing the materials on record and statements of various officers of the petitioner which were recorded during investigation, it has been observed that CENVAT credit on input services is eligible for outward transportation upto the place of removal. Assessee was not eligible for taking CENVAT credit on the service tax paid on transportation charges incurred for transportation of goods from depots and factories to the place of the customers i.e., beyond the place of removal. Referring to the amendment, it is contended that it is only upto the place of removal that any service appears to have been treated as input service for allowing CENVAT credit thereon. Post amendment, the benefit which was admissible earlier even beyond the place of removal would now get terminated at the place of removal. CENVAT credit cannot travel beyond

the point of removal. Respondent No.3 has further alleged that petitioner had intentionally and deliberately suppressed the fact of taking CENVAT credit of outward GTA service and with *mala fide* intent to avail ineligible CENVAT credit had fraudulently contravened various statutory provisions. Had the investigation not been initiated, such availment of ineligible CENVAT credit by the petitioner would not have been unearthed. Therefore, section 11A(4) of the Act would be applicable to enable invocation of the extended period of limitation. In the above backdrop, the show cause-cum-demand notice has been issued by invoking section 11A(4) of the Act read with section 174 of the Central Goods and Services Tax Act, 2017. Consequently, petitioner has been called upon to show cause as to why irregular CENVAT credit of Rs.2,02,30,256.00 for the period from April, 2014 to June, 2017 wrongly availed of should not be recovered under section 11A(4) of the Act read with Rule 14 of the CENVAT Credit Rules together with recovery of interest and imposition of penalty. Along with the petitioner, five of its officers have also been show caused as to why penalty should not be imposed separately on each of them under rule 26(2)(ii) of the Central Excise Rules, 2002.

17. We find that against a similar show cause-cum-demand notice dated 05.06.2019 petitioner had filed a writ petition before the Gujarat High Court which was registered as Special Civil Application No.15203 of 2019. The said writ petition was dismissed on 16.09.2019 by giving liberty to the petitioner to file reply to the show cause notice. Order dated 16.09.2019 of the Gujarat High Court is as under:-

> "1. After arguing at length, learned Senior Advocate Mr. Vikram Nankani seeks permission to withdraw the present petition with a view to file reply to the impugned show-cause notice dated 04.06.2019. He submitted that though the petitioner was required to file reply within 30 days from the date of receipt of the notice, the same has not been filed as the petitioner was contemplating to file petition in the High Court. According to him, the petitioner shall now file reply on or before 23.09.2019 on which the date of next hearing is fixed by the respondent authority - Additional Director General DGGI.

> 2. In view of the above, the permission, as prayed for, is granted. The petitioner shall file reply to the impugned show cause notice on or before 23.09.2019. It is clarified that the Court has not gone into the merits of the case and it will be open for the petitioner to raise all the contentions as may be legally permissible. It is expected that the respondent authority shall consider the reply filed by the petitioner in accordance with law.
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> 3. Subject to the said observations, the petition is dismissed as withdrawn."

18. After hearing learned counsel for the parties and upon due consideration, we also feel that it would be more appropriate if petitioner responds to the impugned show cause-cum-demand notice by filing reply and thereafter if respondent No.3 is not satisfied with the show cause reply, the matter may be adjudicated by the adjudicating authority. We say this because adjudication on the show cause-cum-demand notice would require dealing with a wide range of issues involving facts and factual aspects. A Writ Court would not be the appropriate forum to deal with and adjudicate on such issues. Interference by the Writ Court at this stage would not be justified. Since by the impugned show cause-cum-demand notice, petitioner was asked to show cause within 30 days of the date of receipt of the notice which period had expired and since the matter was pending before this Court all this while with the order dated 08.02.2021 clarifying that as the matter was heard and has been reserved for judgment, impugned show cause notice dated 09.05.2019 should not be proceeded with till delivery of judgment, we grant further 30 days time from today to the petitioner to file reply to the show cause-cum-demand notice dated 09.05.2019 whereafter law will take its own course. We make it clear that we have not expressed any opinion on merit and all contentions are kept open.

19. Subject to the above observations, the writ petition is dismissed. However, there shall be no order as to cost.

(MILIND N. JADHAV, J.) **(UJJAL BHUYAN, J.)**

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