

(2024) 12 BOM CK 0057

Bombay High Court

Case No: Writ Petition No. 11698 Of 2023

Blossom Industries Ltd.

APPELLANT

Vs

Union Of India Thr The
Honorable Ministry Of Finance
And Ors

RESPONDENT

Date of Decision: Dec. 18, 2024

Acts Referred:

- Constitution of India, 1950 - Article 226
- Central Goods and Services Tax Act, 2017 - Section 9(1)

Hon'ble Judges: M. S. Sonak, J; Jitendra Jain, J

Bench: Division Bench

Advocate: Vikram Nankani, Shweta Rajan, Aanish Desai, J B Mishra, Ashutosh Mishra,
Rupesh Dube

Final Decision: Disposed Of

Judgement

M. S. Sonak, J

1. Heard learned counsel for the parties.

2. The challenge in this Petition is to the show cause notice bearing No.DGGI/SZU/36-158/2022-23 dated 30 January 2023 (Exhibit-A) issued by the

Directorate General of Goods & Services Tax Intelligence, Surat Zonal Unit.

3. Mr. Nankani, the learned Senior Advocate for the Petitioner, submitted that the Petitioner has entered into a licence agreement for the manufacture

and sale of beer with the 4th Respondent (UBL). He submitted that the impugned show cause notice, notwithstanding the terminology used therein,

proposes a tax on the supply of alcoholic liquor for human consumption. He further submitted that both under Section 9(1) of the Central Goods and

Services Tax Act, 2017 (â€œCGST Act 2017â€) and the Constitutional Scheme, no CGST or IGST could be levied on the sale of alcoholic liquor for

human consumption by any authority other than the State Authority. Accordingly, he submitted that the impugned show cause notice is ex-facie

without jurisdiction, being beyond the legislative and, consequently, the executive competence of the Central Government.

4. Mr. Nankani submitted that the Authority for Advance Ruling, in the matter of United Breweries Limited 2018 (18) C.S.T.L.855 has ruled that the

amounts earned and retained by bottlers such as the Petitioner herein are not liable to GST. He submitted that though this Advance Ruling was at the

behest of UBL, since the Petitioner functions under a licence agreement from UBL, even the Petitioner is entitled to the benefit of this Advance

Ruling. He submitted that such Advance Ruling binds the Respondents, and the issuance of the impugned show cause notice in breach of such

Advance Ruling renders the impugned show cause notice ultra vires and without jurisdiction.

5. Mr. Nankani submitted that the production overhead charges for which the impugned show cause is issued do not amount to consideration for the

supply of service/agreeing to do any act. Accordingly, he submitted that the impugned show cause notice suffers from a fundamental flaw of

assuming a jurisdictional fact. He submitted that the impugned show cause notice warrants interference even for this reason.

6. Mr. Nankani submitted that the subject matter of the impugned show cause notice was, in fact, alcoholic liquor for human consumption. He

submitted that this does not even amount to â€œgoods for the supply of which any GST could be leviedâ€. He, therefore, submitted that the impugned

show cause notice suffers from the fundamental flaw of assuming a jurisdictional fact. For this reason, the impugned show cause notice is ultra vires

and without jurisdiction.

7. Mr. Nankani finally relied on Whirlpool Corporation Vs Registrar of Trade Marks, Mumbai and others AIR 1999 SC 22 to submit that the bar of

alternate remedy would not operate in a case where the authority against whom a writ is filed is shown to have had no jurisdiction or has usurped

jurisdiction without any legal foundation.

8. For all the above reasons, Mr. Nankani submitted that this Petition may be entertained and that the impugned show cause notice should be interfered with.

9. Mr. Mishra, learned counsel for the Respondents, submitted that most of the contentions are based on factual premises that the Petitioner assumed to be true. He submitted that, in any event, the investigation into the factual aspect is imperative, without which the legal principles referred to by Mr.

Nankani can never be applied. He submitted that the impugned show cause notice is not ultra vires for any reason, and in any event, no case is made

out to depart from the rule of exhaustion of alternate remedies. He relied on the decision of the Court in Oberoi Constructions Ltd Vs. The Union of

India Writ Petition (L) No.33260 of 2023 to submit that this Petition may not be entertained.

10. The rival contentions now fall for our determination.

11. At the outset, it is necessary to note that the impugned show cause notice alleges that the Petitioner is paying the IGST on the production overhead

charges received from the Brand Owner for producing Beer from M/s. AB InBev Ltd. (Brand Haywards 5000) regularly but not paying IGST on

production overhead charges received for the Beer of the Brand Owner " UBL production. Further, the impugned show cause notice alleges that

the Petitioner is evading the GST by mis-classifying their product as "DDGS, Husk & Cattle Feed(Spent Grain) under HSN 1104 instead of

HSN 2303 and clearing/supplying the same on 'Nil' GST rate while HSN 2303 attracts GST @5%.

12. The impugned show cause notice refers to the investigation carried out before the same was issued. The impugned show cause notice clarifies

that GST is being demanded for production overhead charges. The impugned show cause notice also takes a tentative view that the process and

supply of service involved in manufacturing the final product is exigible to GST. The impugned show cause notice also notes that for these very

services, the Petitioner has been paying IGST qua the Brand Haywards 500. Still, the Petitioner has been evading the payment of GST regarding

UBL's Brand "Kingfisher".

13. At this stage, it is not for this Court to comment upon the validity of the tentative demand in the impugned show cause notice. However, from the perusal of the impugned show cause notice, it is quite clear that the same is not prima facie a GST demand on the sale of alcoholic liquor for human consumption. Therefore, at least prima facie, neither the bar under the CGST Act 2017 nor the Constitution would apply. A factual investigation into the precise nature of the production overhead charges and the circumstance in which the Petitioner allegedly pays IGST regarding a similar transaction but is avoiding paying IGST regarding the transaction with UBL would be necessary. Accordingly, we cannot hold that the impugned show cause notice is ex-facie without jurisdiction or has been issued without the authority of law.

14. The contention about the Advance Authorities Ruling was duly considered before the show cause notice was issued. The impugned show cause notice refers to the Petitioner's annual report for the F.Y. 2018-19. Shri Vincent Vaz, CFO of the Petitioner, who has incidentally verified this Petition, in his statement dated 11 February 2020, had categorically stated that UBL had advised the Petitioner not to pay the GST relying upon the Ruling dated 28 June 2018 of the Authority for Advance Ruling in Karnataka. However, Mr Vincent Vaz added that he had perused the Advance Ruling guidelines, and the Ruling dated 29 June 2018. He fully agreed that the Petitioner was nowhere a party in the case, and therefore, as per the Advance Ruling guidelines, such Ruling did not apply to the Petitioner's case. Apart from that, even the Advance Ruling obtained by UBL cannot be mechanically applied. Based on the same, we cannot hold that the impugned show cause notice defies this Ruling or that it is otherwise without jurisdiction or ultra vires.

15. The show-cause notice also alleges that M/s UBL's agreement, which was the subject of the Advance Authority Ruling between UBL and their CBUs, was quite different from the agreement between the Petitioner and M/s UBL. The show-cause notice, in clause 4.12, refers to an admission in this regard by Mr. Vincent Vaz. Again, therefore, this introduces a serious factual element, without the investigation of which it cannot be said that the impugned show-cause notice is ultra vires or without jurisdiction.

16. Even Mr. Nankani, based upon the Petitioner's agreement with UBL, attempted to argue on factual aspects. The arguments inter alia would have involved even interpretation of the contractual terms. However, the impugned show cause notice refers to Mr. Vincent Vaz's statement admitting that the agreement between the Petitioner and UBL differs from the agreement, which was the subject matter of the Advance Ruling on which Mr. Nankani relies.

17. The fundamental premise that the impugned show cause notice seeks to levy GST on alcoholic liquor for human consumption cannot be accepted at face value. The Petitioner attempts to misread the impugned show cause notice and, based upon such misreading, interdict adjudication proceedings. This is impermissible, and the principles in Whirlpool Limited (supra) do not apply in such a situation.

18. The impugned show cause notice is not restricted only to the issue of production overhead charges. The Petitioner has classified their product as

DDGS, Husk & Cattle Feed (Spent Grain) under HSN 1104 instead of HSN 2303 and clearing/supplying the same on 'Nil' GST rate while

HSN 2303 attracts GST @5%. There is a serious issue with this classification. The show cause notice alleged that this is nothing but

misclassification. Detailed though tentative reasons have been given in support of this allegation. Indeed, this is a matter that requires a thorough

investigation. Therefore, the impugned show cause notice can never be styled as wholly without jurisdiction or ultra vires to attract the Whirlpool

Limited principle.

19. In Whirlpool Limited (supra) the Hon'ble Supreme Court has held that alternate remedy would not operate as a bar in at least three

contingencies, namely where the Writ Petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation

of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

20. In the present case, there is no question of enforcement of any fundamental rights. This is also not a case of violation of principles of natural

justice. The show cause notice is quite clear and provides the basis for issuing the same. This is also not a case where the proceedings are wholly

without jurisdiction. The issue of assumed jurisdiction raised by Mr. Nankani involves an investigation into seriously disputed questions of fact.

Besides, this is also not a case where the vires has been challenged. Therefore, none of the parameters referred to in *Whirlpool Limited* (supra) are attracted.

21. In *Malladi Drugs and Pharma Limited vs. Union of India and another* (2020) 12 SCC 808, the Hon'ble Supreme Court held that the High Court

was "absolutely correct" in dismissing the writ petition against the mere show-cause notice. In the impugned judgment, the High Court held that

the appellant should first raise all the objections before the authority that issued the show-cause notice. If any adverse order was passed against the

appellant, liberty was granted to approach the High Court.

22. Recently, in *The State of Maharashtra and Others V/s. Greatship (India) Limited* 2022 LiveLaw (SC) 784, the Hon^{ble} Supreme Court, after

referring to its earlier precedents on the subject, held that Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where

statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, for instance, where the very vires of the statute is in question

or where private or public wrongs are so inextricably mixed 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 even then, the Court must have good and sufficient reason to bypass the alternative

remedy provided by statute. The Court observed, "Surely, matters involving the revenue where statutory remedies are available are not such

matters".

23. The Court, after referring to its earlier precedent in *United Bank of India V/s. Satyawati Tondon and Others* (2010) 8 SCC 110 observed that

"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".

24. In *Rattan India Power Limited V/s. The Union of India and Ors.* WP No.3201/2021 decided on 13.03.2023, decided by a coordinate Bench on

13.03.2023, dismissed the Writ Petition by relegating the petitioner to the alternate remedy before the Appellate Tribunal. Upon an exhaustive analysis of precedents on the subject, including the precedent in *Greatship (India) Limited (supra)* and others, the coordinate Bench declined to entertain the Writ Petition *inter alia* on the ground that statutory appellate remedies were available and factual inquiry was necessary to determine whether the jurisdictional facts were established, or not. The coordinate Bench noted that even the Supreme Court had disapproved the High Court's entertaining Writ Petitions involving classification disputes or even the applicability of exemption notification when parties had statutory alternate remedies.

25. In *M/s. Nagen Caterer, Santa Sahi, Buxibuzar, Cuttack V/s. Central Board of Indirect Taxes & Customs & Ors.* 2022 (I) ILR-CUT-729, Commissioner of Central Excise, Haldia V/s. *M/s. Krishna Wax (P) Ltd.* Civil Appeal No.8609/2019 decided on 14.11.2019 and Union of India V/s. *M/s. Auto Ignation Ltd. and Anr* 2002 (2) Mh.L.J. 730 it was held that the writ jurisdiction must be exercised with extreme caution, particularly when statutory remedies are sought to be bypassed. *M/s. Auto Ignation Ltd.* (supra) holds that where a prima facie case has been made out in the show cause notice, it is for the adjudicating authority to decide all the questions, including questions of fact, finally.

26. Recently, in *Oberoi Constructions Ltd (supra)*, this Court surveyed the precedents about exhaustion of alternate remedies. By adopting the reasoning therein, no case is made to interfere with the impugned show cause notice or issue a declaration sought by the Petitioner without verifying the crucial factual aspects.

27. For all the above reasons, we are satisfied that no case is made to interfere with the impugned show-cause notice.

28. This Petition is, therefore, liable to be dismissed, and it is hereby dismissed with no costs order.

After Pronouncement :-

29. At this stage, Mr. Aanish Desai, the learned counsel for the Petitioner, seeks four weeks time to respond to the impugned show cause notice.

30. We accept the request. Accordingly, if the reply is filed to the impugned show cause notice within four weeks from today, the same should be considered for disposal of the impugned show cause notice.