

(2007) 11 JH CK 0021

Jharkhand High Court

Case No: None

TRF Limited

APPELLANT

Vs

Commissioner of
Central Excise and
Service Tax and Others

RESPONDENT

Date of Decision: Nov. 6, 2007

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 11, 11A, 4
- Constitution of India, 1950 - Article 11AC, 226

Citation: (2008) 1 JCR 504

Hon'ble Judges: M. Karpaga Vinayagam, C.J; Amareshwar Sahay, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Amareshwar Sahay, J.

Heard learned Counsel for the parties.

2. In this writ application, the petitioner has sought to challenge the show-cause notice dated 3.11.2006, issued by the Commissioner of Central Excise and Service Tax, Jamshedpur whereby and whereunder, the petitioner has been asked to show-cause within 30 days as to why-

(a) the duty amounting to Rs. 3,36,15,065.34 (Rupees Three Crores Thirty Six Lakhs Fifteen Thousand Sixty Five and Paise 34 only) be not demanded and recovered from the petitioner in terms of proviso to Section 11A of the Central Excise Act, 1944;

(b) penalty be not imposed on him under the provisions of Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules;

(c) interest on delayed payment of duty in respect of amount of Rs. 3,36,15,065.34 be not demanded and recovered from him in terms of Section 11AB of the Central Excise Act, 1944.

3. In the said notice to show-cause, it has been alleged that the petitioner-Company cleared spare parts of machine like side dumper loader (S.D.L.) manufactured by the petitioner without payment of Excise Duty during the period from October, 2001 to August, 2006 in the garb of trading activity. The petitioner has been charged for contravening provisions of Section 4 of the Central Excise Act, 1944 read with Rule 51-A of the Central Excise Rules, 1944 and Rules 8, 10, 11, 12 and 16 of the Central Excise Rules, 2001. It has also been alleged that the petitioner did not seek any permission from the competent authority nor submitted any intimation to the Department for trading activities as required under the Law during the said period and thereby, the Excise Duty amounting to Rs. 3,36,15,065.34 along with interest and penalty becomes recoverable from the petitioner. By the said notice to show-cause, the petitioner has been given liberty to take help of legal representative and he has also been allowed to produce all evidence upon which, he relied in defence of his case.

4. According to the petitioner, the impugned notice to show-cause was issued on the basis of Rule 51-A of the erstwhile Central Excise Rules as stood earlier which has now been superceded with effect from 1st July, 2001 after introduction of the Central Excise Rules, 2001. Earlier permission was required to be obtained from the Central Excise Authority for the duty paid goods to enter or retain in part in the premises or factory. According to the petitioner, Rule 51-A of the erstwhile Central Excise Rule, 1944 was not in force when such notice to show-cause was issued, but in spite of that on those allegations of contravention of said Rules which was not in force, the notice to show-cause was issued. Therefore, the show-cause notice proceeded upon in an incorrect and illegal basis. Therefore, the same is liable to be quashed.

5. It has further been contended by the petitioner that the impugned show cause notice issued u/s 11A of the Central Excise Act, 1944 is time barred being beyond the period of limitation prescribed u/s 11A of the Central Excise Act, 1944 and the proviso thereof. In support of this contention, reliance has been placed in the case of [Collector of Central Excise, Hyderabad Vs. Chemphar Drugs and Liniments, Hyderabad](#), and in the case of *Prabhu Steel Industries Ltd. v. Collector of Central Excise, Nagpur* reported in 1997 (95) ELT 174 (SC). It has further been contended on behalf of the petitioner that in fact the respondent authorities have already formed an opinion as regards liability or otherwise of the petitioner and therefore, now nothing remains to be determined by the respondent authority, therefore, the same is liable to be quashed. In support of such submissions, reliance has been made in the case of [Siemens Ltd. Vs. State of Maharashtra and Others](#), .

6. On the other hand, on behalf of the respondents, Mr. Mokhtar Khan, has submitted that the writ petition is liable to be dismissed on the ground of it being premature, since no

order has yet been passed by the adjudicating authority and at present, only notice to show-cause has been issued under the provisions of Section 11 of the Central Excise Act, 1944 and as per said provisions, the petitioner is required to file a reply against the proposed action. The petitioner has also been given chance to produce all evidence in support of his case in defence. He would also be provided full opportunity of hearing by the adjudicating authority who after hearing would decide the matter on its merit. It is further contended that it is absolutely wrong to say that the authorities have already determined the issue raised in the notice to show-cause. It has also been contended that it is wrong to say that observation of Rule 51-A of the erstwhile Central Excise Rules, 1944 is the main basis of demand. In fact, the main basis of demand is nonpayment of duty of manufactured produce cleared in the garb of trading of bought out goods. The petitioner did not pay duty on materials recovered during investigation merely on presumption "CENVAT credit not availed".

7. After considering the rival contention of the parties and after careful consideration of the impugned notice to show-cause, we are of the view that presently only the notice to show-cause has been issued to the petitioner on the basis of allegations stated in details in the notice to show-cause making the petitioner prima facie liable for contravention of the provisions of the Central Excise Act and the Rules. The authorities, by the impugned notice to show-cause, have specifically given chance to the petitioner to produce all evidence in defence. He has also been given the liberty to take help of legal representative before any final decision in the matter is taken. Therefore, we are not in a position to accept the submissions of the learned Counsel for the petitioner that the authorities have already fixed the liability by determining the issue raised in the notice.

8. The Supreme Court, in the case of [The Special Director and Another Vs. Mohd. Ghulam Ghouse and Another](#), has held as follows:

Unless the High Court is satisfied that the show-cause notice was totally non est in the eye of the 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.

9. The Supreme Court, in the case of Union of India and Anr. v. Kunisetty Satyanarayana reported in 2006 (12) SCC 28, reiterated the same proposition and held that mere show-cause notice or charge-sheet does not infringe the right of any one. It is only when the final order imposing some punishment or otherwise adversely affecting a party is passed, then the said party can be said to have any grievance. Writ jurisdiction is discretionary jurisdiction and hence, such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet.

10. The decisions of the Supreme Court, in the case of Siemens Ltd. v. State of Maharashtra (supra), cited by the petitioner, is of no help to him since the said decision also propounds the same view that ordinarily a Writ Court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show-cause unless the same inter alia appears to have been without jurisdiction.

11. In that case before the Supreme Court, the facts were totally different. In that case, the appellant Siemens Ltd., a multilocation Company, was having a factory and godown at Kalwe and it used to pay cess for the goods supplied from (he said factory in terms of the provisions of Bombay Provincial Municipal Corporation Act, 1949. It also owned a factory at Aurangabad and its office was at Kharghar. The said factory at Aurangabad and office at Kharghar were located outside the city limits of Navi Mumbai and thus outside the territorial jurisdiction of Bombay Municipal Corporation. The supplies were being made to dealers directly from the factory situated at Aurangabad and office at Kharghar and by notice to show-cause, the Company was directed to make payment of cess with interest in respect of the supplied made by Navi Mumbai parties. On the basis of the facts of that case, the Supreme Court held that the statutory authority had applied its mind and had formed opinion as regards liability of the appellant and only question remained was quantification.

12. Thus, in view of the discussions and findings above and relying on the decisions of the Supreme Court discussed above, we are of the view that the respondent authorities have presently issued the notice to show-cause asking the petitioner to file reply in defence and they have not finally determined the liability as alleged by the petitioner nor it can be said that the notice to show-cause is without jurisdiction and therefore, in such situation, we are not inclined to entertain this writ petition. Accordingly, same is hereby dismissed. The petitioner, if so advised, may raise all the point before the authority concerned by filing their show-cause pursuant to the show-cause notice (Annexure-1) which shall be dealt with and answered by the respondents while passing the final order in accordance with law.

With this observations and directions, this writ petition stands dismissed.

M. Karpaga Vinayagam, C.J.

13. I agree.