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HIGH COURT OF CHHATTISGARH, BILASPUR**Order Reserved on 15.03.2022****Order delivered on 24/03/2022****WPT No.10 of 2022**

- M/s Kay Pan Sugandh Pvt. Ltd. Through its Authorized Signatory, Mr. Ramgopal Agnihotri, S/o Late Dhani Ram Agnihotri, aged about 59 years, Plot No.75-76, Sector-A, Sirgitti Industrial Area, Bilaspur - 495004 (CG)

---- Petitioner**Versus**

- Director General of GST Intelligence, Through the Principal Additional Director General, West Block-8, Wing No.6, 2nd Floor, RK Puram, New Delhi -110066.

---- Respondent

For Petitioner

: Mr. G. Tushar Rao, Sr. Advocate
assisted by Mr. Aditya Kumar &
Mr. Pankaj Agrawal, Advocates.

For Respondent

: Mr. Maneesh Sharma, Advocate.

Hon'ble Mr. Justice Parth Prateem Sahu**CAV Order**

1. Petitioner, who is engaged in manufacturing of pan masala of various brands and retail sale price, is served with show-cause notice, Annexure P-1, under Section 11A (4) of the Central Excise Act, 1944 (for short 'the Act of 1944') read with Section 174 of the Chhattisgarh Goods Service Act, 2017 (for short 'the Act of 2017') stating therein that petitioner misdeclared maximum packing speed of pan masala pouch packing machines installed at petitioner's factory premises and thereby short paid central excise duty. In show-cause notice central excise duty of Rs.41,10,34,000/- is demanded as also imposition of penalty in terms of Section 11AC of the Act of 1944 read with Rules 17 &





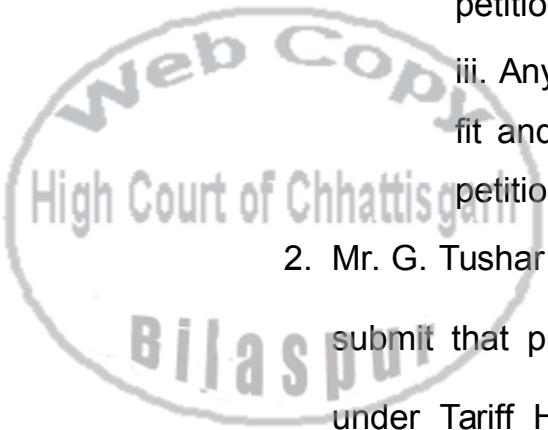
25 of the Central Excise Rules, 2002 (for short 'the Rules of 2002') is proposed. Aggrieved by service of show-cause notice dated 30.3.2020, petitioner filed instant writ petition seeking for following reliefs:-

"i. That, this Hon'ble Court may kindly be pleased to quash and set aside the impugned show cause notice dated 30/03/2020 issued vide F. No.574/CE/47/2016/Inv. by the Principal Additional Director General, Directorate General of GST Intelligence, New Delhi.

ii. Cost of the petition may also be granted to the petitioner.

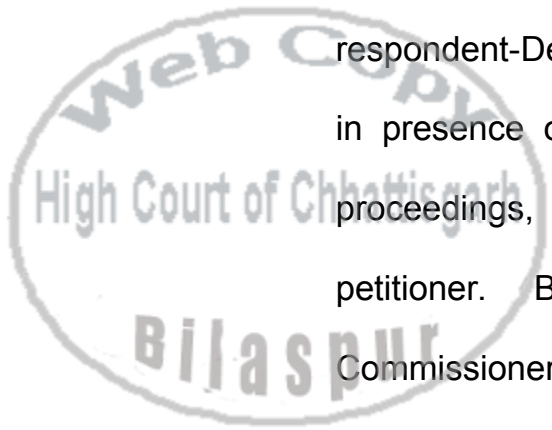
iii. Any other relief, which this Hon'ble Court deem fit and proper, may also kindly be granted to the petitioner, in the interest of justice."

2. Mr. G. Tushar Rao, learned Senior Advocate for petitioner would submit that product in which petitioner is dealing is classified under Tariff Heading- 21069020 of the First Schedule to the Central Excise Tariff Act, 1985 (for short 'the Act of 1985') and it was brought under the Compounded Levy Scheme. The central excise duty is to be paid and collected on the basis of production capacity (deemed manufacture) of notified goods and not on the basis of manufacture and removal of excisable goods. The Central Government in exercise of its power conferred by Section 3A of the Act of 1944, issued Notification dated 1.7.2008 notifying 'Pan Masala Packing Machine (Capacity Determination and Collection of Duty) Rules, 2008 (for short 'the Rules of 2008'). The Rules of 2008 in itself is a complete Code. Under Rule 4 of the Rules of 2008 the only factor relevant to production



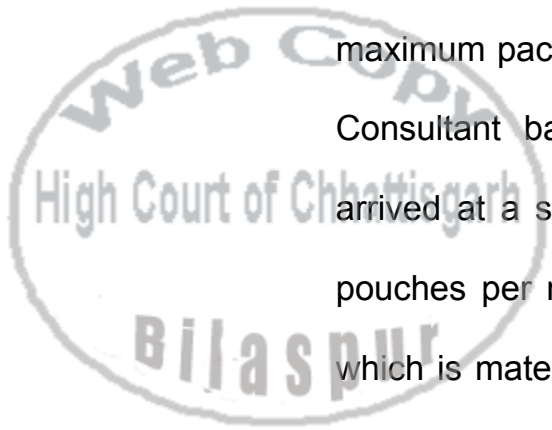


is based on number of pouch packing machines available and operational in factory premises of manufacturer. In the year 2015, vide Notification No.6/2015-CE dated 1.3.2015, central excise duty is to be levied in proportionate with speed of pouch packing machines installed at factory premises of a manufacturer. After issuance of Notification dated 1.3.2015, petitioner submitted Form-1 declaring number of packing machines available and installed at factory premises of petitioner also specifying speed of each Pan Masala Packing Machine (for short 'PMPM'). Pursuant to declaration made, the officers of respondent-Department visited factory premises of petitioner and in presence of independent witnesses conducted panchnama proceedings, verifying correctness of declaration made by petitioner. Based on verification panchnama, the Assistant Commissioner, Central Excise, Division-I, Bilaspur provisionally re-determined capacity of PMPM available in factory premises of petitioner, without there being any technical opinion/report. The authorities of department sent a qualified Chartered Engineer for inspection at factory premises of petitioner and to ascertain actual speed of PMPM, who conducted detailed inspection in presence of Senior Officers; considered efficiency of PMPM in marketable condition and submitted report. The Assistant Commissioner, Central Excise, Division-1, Bilaspur upon considering technical opinion / report of the Chartered Engineer, passed the order dated 27.5.2015 determining final capacity of machines installed and operational at factory premises of petitioner. On 27.5.2015 petitioner submitted declaration Form-1



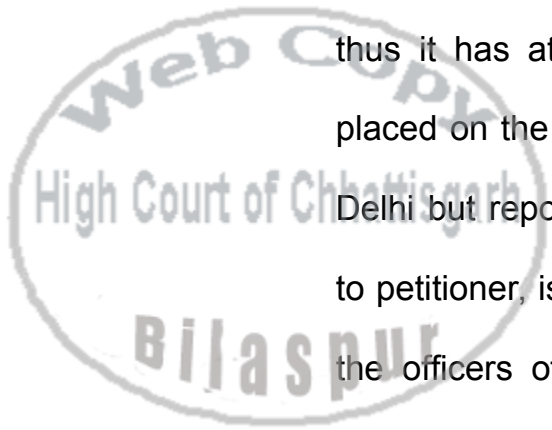


for installation of another machine for manufacturing of pan masala of different weight based on MRP of Rs.1.50 paise, which was also inspected by a Chartered Engineer, who after conducting inspection submitted report on 8.6.2015 based upon which capacity re-determination order was passed on 30.6.2015. Likewise, petitioner got installed new PMPM of MRP Rs.4/-. It was also inspected by Chartered Engineer and based on report, final capacity redetermination order was passed. Respondent Department behind the back of petitioner engaged a Consultant to prepare sweeping general report for determination of maximum packing speed of PMPM (FFS Rotary Machine). Said Consultant based on new formula proposed by respondent, arrived at a speed at which PMPM can be operated and pack pouches per minute. Said technical opinion renders a formula which is materially different from that which had been proposed by respondent as there is mention of multiplication factor of .80. He submits that aforementioned report was by a Assistant Professor from IIT, Delhi. After submission of said report, petitioner submitted an application under the Right to Information Act, 2005 on 24.7.2020 for supply of report submitted by Consultant because that was the sole basis for issuance of impugned show-cause notice to petitioner. However, information as sought for has been denied to petitioner mentioning Section 8 (1) (h) of the Right to Information Act, 2005 against which petitioner preferred an appeal. Impugned show-cause notice is issued by the Principal Additional Director General, Directorate General of GST Intelligence, New Delhi who is having no





jurisdiction to determine capacity of PMPM. Re-determination of capacity of PMPM was as per order of the Assistant Commissioner of Central Excise, hence respondent is having no jurisdiction to issue impugned show-cause notice to petitioner. Provisions of Rule 6 (2) of the Rules of 2008 specifically authorizes Deputy Commissioner or Assistant Commissioner of Central Excise to direct modification in the plan submitted by a manufacturer. The Assistant Commissioner has re-determined capacity of PMPM based on report of Chartered Engineer, which was never challenged or disturbed by any process of law, and thus it has attained finality. In show-cause notice reliance is placed on the report submitted by the Assistant Professor of IIT, Delhi but report based upon which show-cause notice is issued to petitioner, is denied. Even there is no mention as to which of the officers of department has been authorized to seek such report. As impugned show-cause notice has been issued by authority not competent and having no jurisdiction, it is bad in law and liable to be quashed. In support of his contention, he places reliance on judgment rendered in case of **Union of India v. Vicco Laboratories** reported in (2007) 13 SCC 270; **Poona Bottling Co. Ltd. vs. Union of India** reported in 1992 (61) ELT 364 (Kar.); **Godrej & Boyce Mfg. Co. Ltd. vs. Union of India** reported in MANU/MH/3528/2021; **Union of India vs. ITC Limited** reported in 1985 (21) ELT 655 (Kar.); order dated 8.10.2021 in WPT No.2444/2021 (M/s Nkas Services Pvt. Ltd. State of Jharkhand & ors); **Applied Industrial Products Pvt. Ltd. v. CCE** reported in 1992 (61) ELT 364 (Kar.) and **Victory**





Glass and Industries Ltd. vs. CCE reported in **1990 (47) ELT 540 (Kar.)**.

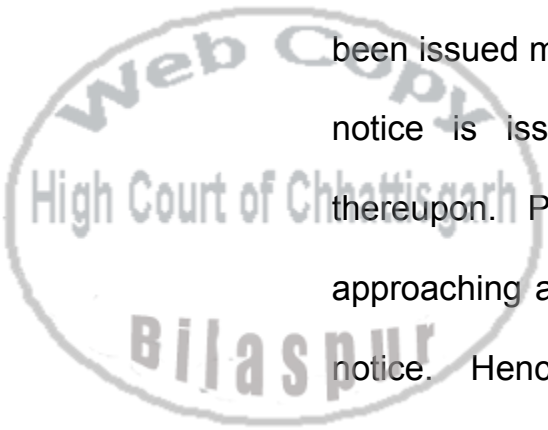
3. Mr. Maneesh Sharma, learned counsel for respondent Department would submit that petitioner has filed this writ petition challenging show-cause notice, which is not maintainable as alternative remedy is available to petitioner of approaching authority concerned by filing reply to show-cause notice. In support of his contention, he places reliance upon judgment of Hon'ble Supreme Court in case of **Trade Tax Officer, Saharanpur vs. Royal Trading Co.** reported in **(2005) 11 SCC 518**; **Commissioner of Income Tax, Gujarat vs. Vijaybhai N Chandrani** reported in **(2013) 14 SCC 661**; order dated 26.6.2019 passed by this High Court in WPT No.22/2019 (M/s RK Associates & Hoteliers Pvt. Ltd. vs. UOI & ors); order dated 27.6.2019 in WPT No.94/2019 (Veer Bhadra Singh vs. UOI & ors).

With respect to authority and jurisdiction of the Principal Additional Director General to issue show-cause notice, he submits that vide Notification dated 10.2.2015 the officers of various ranks of Directorate General of Central Excise Intelligence have been appointed by the Board as the officers of Central Excise of the corresponding ranks for exercise of all powers under the Act of 1944 and the Rules made thereunder. Exercising the powers conferred vide Notification dated 10.2.2015, respondent based on intelligence information of mis-declaration by petitioner of maximum packing speed of PMPM at



which they can be operated, had conducted investigation and found that there is difference in number of funnels mentioned in report provided by Chartered Engineer from that provided by PMPM manufacturers. All machines installed and operated at factory premises of petitioner are having capacity of packing more than 700 pouches per minute, which the petitioner was aware but made declaration of less capacity. Due to wrong mentioning of number of funnels in report of Chartered Engineer than what provided by machine manufacturer, capacity / speed of PMPM has been reduced. Detailed show-cause notice has been issued mentioning all facts as to on what basis show-cause notice is issued; assessing proposed liability and penalty thereupon. Petitioner is having efficacious alternative remedy of approaching authority by way of submitting reply to show-cause notice. Hence, in light of above rulings of Hon'ble Supreme Court as also of this High Court, writ petition challenging show-cause notice is not maintainable.

4. I have heard learned counsel for the parties and perused record of writ petition.
5. Petitioner is engaged in the business of manufacturing of pan masala of various brand names and retail sale price. From the pleadings made in writ petition, it is clear that petitioner got installed different PMPMs of different MRPs at its factory premises. Main grievance raised by learned Senior Counsel for petitioner is with respect to jurisdiction of authority issuing impugned show-cause notice to petitioner. Perusal of impugned





show-cause notice would show that detailed investigation has been conducted by respondent before issuing show-cause notice to petitioner. Investigation was conducted based on intelligence information. In show-cause notice, there is specific mention about difference in speed of PMPM; giving wrong information in report of Chartered Engineer regarding number of funnels in PMPM than that of number of funnels as per report of manufacturer of machines. As per explanation offered by manufacturer of FFS Rotary Pouch Packing Machine, password for enhancing speed of PMPM is also provided to manufacturer of pan masala i.e. petitioner, and thus petitioner is well aware of the fact that PMPM can be operated at a higher speed than the speed declared by petitioner. Reasons assigned in show-cause notice are factual and based on evaluating scientific method. In impugned show-cause notice there is *prima facie* material which warrant explanation from petitioner as to why proposed excise duty should not be charged with penalty.

6. So far as jurisdiction of respondent to issue impugned notice is concerned, Paragraph 1 to 4 of the Circular dated 10.2.2015 read as under:-

“1. Attention is invited to Notification no 38/2001 – C.E (N.T) dt 26-6-2001 as amended from time to time whereby the officers of various ranks of Directorate General of Central Excise Intelligence have been appointed by the Board as the officers of Central Excise of the corresponding ranks for exercise of all powers under the Central Excise Act, 1944 and rules made thereunder, throughout the territory of India.

2. Officers of DGCEI, as Central Excise Officers, issue show cause notices in cases investigated by them.



These Show Cause Notices are adjudicated by either the field Commissioners or by the Commissioner (adjudication). Cases to be adjudicated by Commissioner (adjudication) were specified by the orders of the Board.

3. Pursuant to the Cadre structuring and reorganization of CBEC, new posts in the rank of Principal Commissioners of Central Excise or Commissioners of Central Excise have been created in DGCEI, for various purposes including for adjudication of cases. Additional Director General (Adjudication) in DGCEI shall adjudicate cases where the show cause notices are issued by the officers of DGCEI. The practice of adjudication of DGCEI cases by field Commissioners shall also continue.

7. 4. Powers of the Board under sub-rule 2 of rule 3 of the Central Excise Rules, 2002, have been conferred on Chief Commissioners of Central Excise by notification no. 11/2007-C.E (N.T) dt. 1-3-2007 to specify the jurisdiction of the Commissioner of Central Excise for the purposes of adjudication within his jurisdiction. Director General of CEI has jurisdiction over the ADGs. Now, the jurisdiction of Director General has been extended over to Principal Commissioners/ Commissioners of Central Excise vide notification number 2/15 -C.E. (N.T) dt. 10-02-15 so that he may assign cases, where show cause notices have been issued by the officers of the DGCEI, for adjudication to the field Commissioners also.”

8. In view of Circular dated 10.2.2015 issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Excise & Customs, New Delhi, submission of learned Senior Counsel for petitioner that impugned show-cause notice has been issued by an incompetent authority or authority having no jurisdiction, has no substance and it is hereby repelled.

9. Hon'ble Supreme Court in case of **Union of India vs. Bajaj Tempo Ltd.** reported in **(1998) 9 SCC 281** has held thus:-

“3.It is clear that the question of exigibility to the duty demanded depends on the facts found relating to the process by which the end-product on which duty is demanded came into existence. The items in



question are several and in each case a finding has to be given on the facts pertaining to the particular item. This has not been done by any authority in respect of any of these items or goods. There is thus no finding of fact on which the question of exigibility to excise duty on any of the items or goods can be decided. The appropriate course for the assessee in each case was to reply to the show-cause notice enabling the authorities to record their findings of fact in each case and then if necessary, the matter should have been proceeded to the Tribunal and thereafter to this Court. The trade notice was not decisive of the question either before the Tribunal or in this Court.

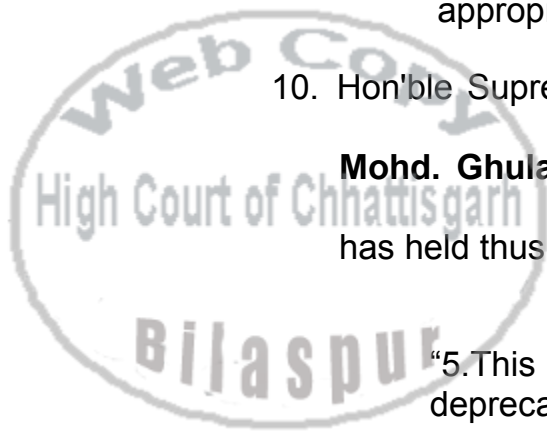
4. We are satisfied that the question of excise duty which has been raised in these matters can be decided only after recording the findings of fact in each case in respect of goods or items given by the appropriate authority.”

10. Hon'ble Supreme Court in case of **Special Director & anr Vs.**

Mohd. Ghulam Ghouse & anr reported in **(2004) 3 SCC 440**

has held 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 not accorded to the writ petitioner even at the threshold by the interim protection granted.”

11. In case of **Trade Tax Officer (supra)**, Hon'ble Supreme held thus:-

“1. These appeals are against the judgment of the Allahabad High Court dated 21-1-2000. The respondent Company were clearing their goods on the basis that they were leather sheets within the meaning of Section 14 of the Central Sales Tax Act. A show-cause notice was issued to them claiming that the items cleared by them were not leather sheets and that a higher duty was required to be paid. The respondents filed a writ petition challenging the issuance of the show-cause notice. The High Court ignoring the well-settled law that against a mere issuance of a show-cause notice a court should be reluctant to interfere, purported to go into the facts and quashed the show-cause notice in a mechanical way. In our view, the approach of the High Court was entirely wrong. All that had been done was that a show cause was issued. After the respondents filed their reply, the notice may have been dropped or if the reply was not satisfactory based on the reply further inquiries could have been made by the appellants. Adjudication proceedings must not be stalled in the manner done by the High Court.”

12. In case of **Oryx Fisheries Pvt. Ltd. vs. UOI** reported in **2011 (266) E.L.T. 422 (SC)**, it was observed as under:-

“28. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing the charge- sheet, cannot, instead of telling him the charges, confront him with definite conclusion of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show cause notice gets vitiated by unfairness and bias and the subsequent proceeding become an idle ceremony.”

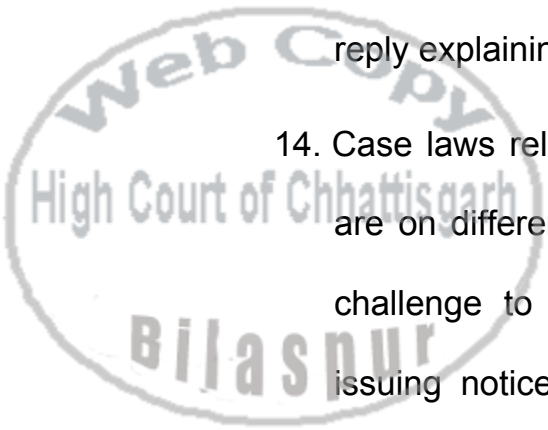
13. In view of above dictum of Hon'ble Supreme Court, if the facts of present case are considered, it would reveal that respondent conducted investigation based on intelligence information. Upon



detailed investigation, as appearing in show-cause notice, it revealed that there was mis-declaration by petitioner, based upon which show-cause notice is issued to petitioner calling upon petitioner to submit reply within a particular period. Respondent has been authorized under Circular dated 10.2.2015 to issue show-cause notice. Hence, in the considered opinion of this Court, impugned show-cause notice cannot be stated to be issued by an authority not having jurisdiction. Petitioner is having efficacious remedy of approaching the authority issuing impugned show-cause notice by submitting reply explaining his case.

14. Case laws relied upon by learned Senior Counsel for petitioner are on different facts. In case of **Vicco Laboratories (supra)**, challenge to notice was made on the ground that authority issuing notice is seeking to reopen and re-litigate the issues which have been finally concluded by decision of the High Court as well as by Hon'ble Supreme Court in favour of writ petitioner therein, therefore, notice has been issued in arbitrary exercise of powers and is an abuse of process of law. Hon'ble Supreme Court considering submissions of learned counsel for parties has held that show-cause notice was nothing but repetition of earlier show-cause notices with slight variations and dismissed appeal.

15. In case of **Poona Bottling Co. Ltd. (supra)** the authority served notice upon petitioner to show-cause why full rate of duty should not be charged on the products, which was replied by petitioner therein. A Division Bench of Delhi High Court came to





conclusion High Court in exercise of powers under Article 226 of the Constitution of India can interfere if there is total lack of jurisdiction or complete non-application of mind and interdicted show-cause notice.

16. In case of **Godrej & Boyce Mfg. Co. Ltd. (supra)**, a Division Bench of High Court of Bombay considering the grounds on which High Court in exercise of jurisdiction under Article 226 of the Constitution of India can interfere with a show-cause notice, came to conclusion that notice issued was by authority who was having no jurisdiction.

17. In case of **M/s Nkas Services Pvt. Ltd. (supra)**, show-cause notice was interdicted by High Court of Jharkhand on the ground that it does not fulfil ingredients of proper show-cause notice.

18. In preceding paragraph this Court came to conclusion that respondent was having jurisdiction to issue notice as per Circular dated 10.2.2015. In impugned notice reasons for issuing show-cause notice have been discussed in very detail. Hence, I am of the opinion that rulings relied upon by learned Senior Counsel for petitioner will not apply to facts of present case.

19. For the foregoing, this writ petition at this stage is pre-mature, it is liable to be and is hereby dismissed at admission stage itself.

Sd/-
(Parth Prateem Sahu)
Judge

roshan/-