

Form No. J.(2)
Item No.4

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

HEARD ON: 15.12.2023

DELIVERED ON: 15.12.2023

CORAM:

**THE HON'BLE CHIEF JUSTICE T.S. SIVAGNAM
AND**

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

M.A.T. 1948 of 2023

With

I.A. No. CAN 1 of 2023

**Diamond Beverages Private Limited & Anr.
Vs.**

**The Assistant Commissioner of CGST & CX,
Taltala Division II
Kolkata South Commissionerate & Ors.**

Appearance:-

Mr. Ankit Kanodia

Ms. Megha Agarwal

Mr. Jitesh Sah

.....for the appellants

Mr. Vipul Kundalia

Mr. Soumen Bhattacharjee

.....for the Union of India

Mr. Kaushik Dey

Ms. Ekta Sinha

.....for the CGST Authorities

JUDGMENT

(Judgment of the Court was delivered by T.S. SIVAGNAM, C.J.)

1. This intra-Court appeal by the writ petitioner is directed against the order dated 25th September, 2023 in W.P.A. 22295 of 2023. In the said writ petition, the appellant had challenged a show cause notice dated 16th August, 2023 issued under section 73(1) of the CGST Act, 2017 (for brevity

'the Act'). The learned Single Bench disposed of the writ petition by directing the appellants to submit a reply to the show cause notice and raise all issues of facts as well as on law and also place the decisions on which they placed reliance. Aggrieved by such order, the present appeal has been preferred.

2. We have elaborately heard the learned advocates for the parties. Under normal circumstances, the Court seldom interferes at the stage of the show cause notice unless it is established that the show cause notice was issued without jurisdiction or it suffers from perversity or in cases, where the allegations are absolutely vague and noticee will not be in a position to submit an effective reply. In the instant case what persuades this Court to interfere with the show cause notice is on account of the following facts.
3. The appellants were issued a show cause notice intimating certain discrepancies on 30th December, 2022. The allegation was that the appellants had availed/utilised input tax credit during the financial year 2018-19 on supplies whose registration was cancelled retrospectively. The other allegation was that the appellants had claimed input tax credit arising out of debit notes by suppliers, who have not filed GSTR3B Returns during the financial year 2018-19. The appellants were granted 30 days time to file their reply. The appellants, within the time permitted, submitted their reply on 10th February, 2023 placing necessary information. After receipt of the reply, in which the assessee had pointed out that relevant details have not been furnished, the assessing authority issued another notice dated 1st March, 2023 and purported to have enclosed the relevant details. Thereafter the appellants had submitted their reply to the notice of

intimation of discrepancies on 13th March, 2023. Subsequently, the authority had issued a pre-show cause notice dated 31st March, 2023 in Part A of Form GST DRC-01A. In the said pre-show cause notice, the allegations as mentioned in the notices intimating discrepancies were reiterated. The appellants were advised to pay the tax, as ascertained, failing which, show cause notice will be issued under section 73(1) of the Act. The appellants had submitted their reply to the pre-show cause notice on 11th April, 2023 on perusal of which it appears that it is a very detailed reply giving all the factual details and also placing reliance on certain decisions of this Court as well as the Hon'ble Supreme Court. The appellants specifically sought for an opportunity of personal hearing.

4. Essentially, in the reply the appellants requested the authority to investigate at the supplier's end, where there was an allegation of retrospective cancellation of the supplier's registration and allegations, where the suppliers filed the returns for the concerned financial year. Thus, what was required by the authority to do, was to examine the reply given in the pre-show cause notice and considering the nature of allegations in the pre-show cause notice, it goes without saying that the authority has to investigate or inquire into the matter by taking note of the relevant details at the supplier's end. If that is not done, the true facts will not emerge and consequently, issuance of any show cause notice will be a *fait accompli*. However, in the instant case, the authority has not conducted any such investigation and proceeded to issue the impugned show cause notice dated 16th August, 2023 under section 73(1) of the Act.

5. The learned standing counsel appearing for the respondent pointed out that in the show cause notice, the reply given by the appellants to the pre-show cause notice was considered and thereafter a notice has been issued under section 73(1) of the Act and it is a detailed show cause notice.
6. At the first blush, on perusal of the show cause dated 16th August, 2023, it appears that the submissions made by the appellants in their reply to the pre-show cause notice appears to have been considered. However, on a closer scrutiny of the show cause notice dated 16th August, 2023, it is seen that except extracting the reply given by the appellants, the authority has not dealt with the contentions, which were placed by the appellants in the reply to the pre-show cause notice. Thus, this would be sufficient to hold that the show cause notice dated 16th August, 2023 has been issued without due application of mind.
7. The learned advocate appearing for the appellants placed reliance on the decision of this Court in the case of **Suncraft Energy Private Limited & Anr. vs. The Assistant Commissioner, State Tax, Ballygunge Charge & Ors.** reported in **2023 SCC Online Cal. 2226**. It is submitted that the facts dealt with by this Court in the said case were identical and the Court has allowed the appeal and set aside the orders passed by the authority. It is submitted that the Special Leave Petition filed before the Hon'ble Supreme Court against the said decision was dismissed by the Hon'ble Supreme Court on 14th December, 2023.
8. Be that as it may, this Court is satisfied that since the show cause notice dated 16th August, 2023 has been issued without due application of mind, without considering the reply to the pre-show cause notice and without

conducting any inquiry or investigation at the supplier's end, the show cause notice would call for interference. Thus, the Court is satisfied that the case on hand falls within one of the exceptional circumstances, where the Court will exercise its jurisdiction to interdict a show cause notice.

9. For the above reasons, the appeal is allowed and consequently, the writ petition is allowed and the show cause notice dated 16th August, 2023 is set aside and the matter is remanded back to the adjudicating authority to the stage of pre-show cause notice dated 31st March, 2023.
10. The adjudicating authority shall, first inquire/investigate into the matter from the supplier's end, collect the necessary information, afford an opportunity to the appellants to put forth further submission on such information and thereafter afford an opportunity of personal hearing and then proceed to take a decision as to whether a show cause notice under section 73(1) of the Act has to be issued or otherwise.
11. No costs.
12. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

I agree.

(HIRANMAY BHATTACHARYYA, J.)