

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 17902 OF 2024

Vertiv Energy Pvt. Ltd.,]
having its registered office at]
Plot No.C-20, Emerson Network Power]
India Private Limited, Road No.19,]
Wagle Industrial Estate, Thane West,]
Maharashtra – 400 604]...Petitioner

VERSUS

1. **The Union of India,**]
through Ministry of Law & Justice]
Branch Secretariat,]
Aaykar Bhavan, Annex Building]
2nd Floor, New Marine Lines,]
Mumbai – 400 020]
]
2. **Joint Commissioner of CGST & CE**]
Thane, 3rd & 5th Floor, Accel House,]
Road No.22,Wagle Industrial Estate]
Thane – 400 604]
]
3. **Superintendent, Anti Evasion,**]
CGST Thane, Wagle Industrial Estate]
Thane – 400 604]
]
4. **Ld. Joint Commissioner (in-situ),**]
Circle-IV CGST & CX, Audit Thane,]
5th Floor, New Central Excise Bldg,]
Road No. 22, Wagle Industrial]
Estate, Thane – 400 604]
]
5. **Superintendent of Range-VI,**]
Division-VI, CGST, Thane]
Commissionerate, 5th Floor,]
New Central Excise Bldg,]
Wagle Industrial Estate,]
Thane – 400 604]

6. Director General of Audit (Central),]
Mumbai, Audit Bhavan C-25,]
E Block, BKC, Bandra East,]
Mumbai 400 051]...Respondents

WITH

INTERIM APPLICATION NO. 15458 OF 2024

WITH

WRIT PETITION NO. 17902 OF 2024

Director General of Audit (Central), : Applicant/
Mumbai (Org.Respondent No.6)

In the matter of :

Vertiv Energy Pvt Ltd ...Petitioner
Vs.
The Union of India & Ors. ...Respondents

APPEARANCES-

Mr Sriram Sridharan, for the Petitioner.

Mr JB Mishra, a/w Mr Ashutosh Mishra, for the Respondent No. 1-
UOI.

Mr Ram Ochani, a/w, Ms Sangeeta Yadav, for the Respondent Nos.
3 to 5.

Mr Vinod Joshi, a/w, Mr SD Deshpande, for the Respondent No. 6.

CORAM : M.S.Sonak &
Jitendra Jain, JJ.

RESERVED ON : 03 December 2024

PRONOUNCED ON : 06 December 2024

JUDGMENT (Per MS Sonak J):-

1. Heard learned counsel for the parties.
2. The Petitioner challenges Show Cause Notice No.80/JC/THANE/2023-24 dated 07 December 2023 issued under the Central Goods and Services Tax Act, 2017 (“CGST Act”) as being ultra vires and contrary to the law laid down by this Court in **Kiran Gems Private Limited Vs Union of India and Ors.**¹
3. Mr. Sridharan, the learned counsel for the Petitioner, submitted that the impugned show cause notice is issued solely based on the observations of the Central Excise Revenue Audit (“CERA”) audit conducted by the Director General of Audit (Central), Mumbai, functioning under the control of Comptroller and Auditor General (“CAG”). He submitted that in terms of the law as clarified by this Court in *Kiran Gems Private Limited (supra)*, the CAG or its officials have no jurisdiction to audit private companies like the Petitioner.
4. Mr Shridaran, therefore, submitted that the impugned show cause notice, which is entirely based on CAG’s audit, which was itself without jurisdiction, is unsustainable, ultra vires and without jurisdiction. He submitted that in such a situation, interference by this Court is warranted without adverting to the rule of exhaustion of alternate remedies. In addition to *Kiran Gems Private Limited (supra)*, he relied on **East India Commercial Co. Ltd., Calcutta Vs. Collector of Customs, Calcutta**².
5. Mr Sridharan, without prejudice to the above-mentioned contention, submitted that the impugned show causes notice was

¹ 2021 (2) TMI 12 – Bombay High Court

² 1983 (13) E.L.T. 1342 (SC)

issued with a “*pre-determined mindset*”. He submitted that all the documents placed on record by the Petitioner or of the explanation offered by the Petitioner were not considered before issuing the impugned show cause notice. Accordingly, he submitted that the impugned show cause notice is *ex-facie* illegal, untenable and unsustainable.

6. Mr Sridharan finally submitted that the extended limitation period was wrongly invoked in the present case. He submitted that this was not a case of suppression, and the allegations in the impugned show cause notice are cursory backed by no material. He submitted that since the impugned show cause notice was issued beyond the prescribed period of limitation and since the parameter necessary for invoking the extended period of limitation was unavailable, the impugned show cause notice was *ex-facie* without jurisdiction and warrants interference. He relied on **Akhila Sujith Vs Income Tax Officer, International Tax Ward-4(2), Mumbai & ors.**³

7. For all the above reasons, Mr. Sridharan submitted that the impugned show cause notice may be set aside and that the Respondents be restrained from proceeding in pursuance of the same.

8. Mr. Mishra, the learned counsel for Respondent No.1, and Mr. Ochani, the learned counsel for Respondent Nos. 3 to 5, submitted that the CAG or its officials did not audit the Petitioner. The audit, if any, was of the departments. Therefore, the decision in *Kiran Gems Private Limited (supra)* was not even remotely attracted to the present case. They submitted that in any event, the

³ 2024 (9) TMI 152 – Bombay High Court.

decision was appealed and leave has also been granted by the Hon'ble Supreme Court.

9. Mr. Mishra and Mr. Ochani pointed out that CERA was entitled and duty-bound to audit the departments of the Union of India. Since they found serious discrepancies with the Petitioner's returns during such an audit, the same were pointed out to the department. The department offered the Petitioner full opportunity to explain the discrepancies. This was after due application of mind to the material on record and the CERA report. However, no explanation regarding most of the aspects was forthcoming. Therefore, the impugned show cause notice was issued upon independent application of mind. They submitted that the contention about the impugned show cause notice based entirely on the CERA report is misconceived.

10. Mr. Mishra and Mr. Ochani submitted that the ample material is referred to in the impugned show cause notice in support of the suppression allegations, etc. Accordingly, the extended period of limitation was correctly invoked. They submitted that all these matters can be examined once the Petitioner files a response and is granted the opportunity of hearing. However, they submitted that the impugned show cause notice cannot be said to be without jurisdiction to warrant interference at the threshold.

11. Mr. Mishra and Mr. Ochani relied on several decisions referred to in their affidavits to submit that this is not a suitable case to depart from the rule of exhaustion of alternate remedies. They submitted that the decision in *Kiran Gems Private Limited (supra)* is not applicable to the facts of the present case.

12. Mr. Joshi, the learned counsel for Respondent No.6, adopted Mr. Mishra's and Mr. Ochani's arguments. In addition, he clarified that the CAG conducted no audit of the Petitioner but conducted an audit only of the Respondents' department. He referred to paragraph 6 of the affidavit filed on behalf of the 6th Respondent and submitted that the decision in *Kiran Gems Private Limited (supra)* was not at all attracted. He submitted that the decision was challenged before the Hon'ble Supreme Court, and leave was already granted.

13. The rival contentions now fall for our determination.

14. The main challenge in this Petition is based on the Petitioner's interpretation of this Court's decision in *Kiran Gems Private Limited (supra)*. Mr Sridharan submitted that the impugned show cause notice is entirely based on the observations of the CERA audit, functioning under the control of CAG. He submitted that *Kiran Gems Private Limited (supra)*, has already held that CERA or CAG has no authority or jurisdiction to audit private companies like the Petitioner. Therefore, he submitted that the impugned show cause notice, based entirely on CERA/CAG's audit report, is without jurisdiction, ultra vires, null and void.

15. The above premise is entirely misplaced in the facts of the present case. The record explicitly shows that the CERA/CAG never audited the Petitioner Company, as in *Kiran Gems Private Limited (supra)*. The argument is based on a misconstruction or misappreciation of the facts and the ratio in *Kiran Gems Private Limited (supra)*.

16. In *Kiran Gems Private Limited (supra)*, the challenge was to the notice/intimation dated 10 January 2019 proposing a

CERA/CAG audit of the Petitioner. In contrast, in the present case, neither an audit notice nor an audit by the CERA/CAG was issued to the Petitioner. The record shows that the CERA/CAG has audited the Respondents' department, which is admittedly a department of the Union of India.

17. In *Kiran Gems Private Limited (supra)*, the Coordinate Bench of this Court, after referring to the relevant statutory provisions, has concluded in paragraph No.18 that the power of the CAG extends to any office or department of the Government and cannot be construed to extend to a private entity. The provisions of Chapter III of the CAG's (DPC) Act, 1971 envisage that for audit, it shall be the duty of the CAG to conduct an audit of the receipts payable into the Consolidated Fund of India of the Union or a State as applicable and to put such questions or make such observances as the CAG may consider necessary to the person in charge of the office or to call for such information as required for preparation of any account or report pertaining to the concerned Government office or department.

18. Further, in paragraph 23, the Coordinate Bench has held that the statutory responsibility of the CAG is to audit receipts of the Union and States. These receipts include both direct and indirect taxes. It is the duty of the Central Excise Revenue Audit (CERA) to see that sums due to the Government are properly assessed, realized and credited to the Government account. The scheme enacted and envisaged in Chapter III of the CAG's (DPC) Act, 1971 begins with the word "Comptroller or Auditor General to compile accounts of Union and or States.

19. The Court pointed out that the statutory scheme clearly states that the CAG shall, from the accounts compiled by it or by

the Government or any person responsible for preparing in each year accounts showing under the respective heads, the annual receipts and disbursement for the purpose of the Union, each State or each Union Territory and shall submit the same to the President or the Governor or the Administrator, as the case may be. It is in such context that the provisions of Section 16 pertaining to audit of all receipts which are payable into the Consolidated Fund of India and each State and of each Union Territory is required to be construed with respect to the accounts maintained in the Government departments / Corporations belonging to the Government.

20. This is precisely what the CERA/CAG has done in the present case by auditing the accounts of the Respondents department, which is admittedly the department of the Union of India. As noted earlier, this is not a case where any notice was issued to the Petitioner and based upon such notice, the Petitioner was audited. Merely because the returns filed by the Petitioner before the Respondents' department may have been examined in the context of an audit of the Respondents' department does not mean that the CERA/CAG has audited the Petitioner or the Petitioner's accounts.

21. If the Petitioner's argument is stretched to this extent, then CERA/CAG would be disabled from exercising its statutory functions. The Revenue Department of the Union or State deals with cases of individuals and companies who file returns. Suppose the CERA/CAG finds discrepancies or irregularities in such returns chosen for scrutiny. In that case, the Respondents' department cannot be disabled from initiating action simply because CERA/CAG may have pointed out such discrepancies or irregularities during its audit of the department of the Union of India or State Government. The observations in *Kiran Gems Private*

Limited (supra) were made in an entirely different context. By reading the observations out of context, no argument about the show cause notice being ultra vires or without jurisdiction can be sustained.

22. In **Union of India and others Vs. Dhanwanti Devi and others**⁴ the Hon'ble Supreme Court has held that to understand and appreciate the binding force of a decision, it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word, clause or sentence in the judgment cannot be regarded as a full exposition of law. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein or what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved since the generality of the expressions which may be found there is not intended to be an exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. Therefore, the argument based on *Kiran Gems Private Limited (supra)* will have to be rejected since the ratio of *Kiran Gems Private Limited (supra)* will not apply in the facts of the present case.

23. In the reply filed on behalf of Respondent Nos. 3 to 5 it is pleaded and even clarified that the impugned show cause notice

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(1996) 6 SCC 44

was not based entirely on the CERA Audit observations. There are averments which establish that the CAG had not conducted the audit of the Petitioner Company. CAG had only called for the details and the data downloaded from the GSTN from the jurisdictional officers to ascertain the correctness of the revenue realised from the taxpayer which has a direct nexus with the revenue receipt of the Government of India and the States. There is a reference to the provisions of Section 16 of the CAT's (DPC) Act, which provides for audit by the CAG of all receipts payable to the Consolidated Fund of India and of States and Union Territories having a legislative assembly.

24. The Respondent's affidavit states that CAG has neither directly nor indirectly conducted any audit on the records of the Petitioner nor have they visited the Petitioner's offices for conducting the audit. CAG had merely asked the department to submit the relevant documents for their study and analysis with respect to revenue realized from the Petitioner and then noticed the discrepancies. The affidavit states that the impugned show cause notice has been issued by the proper officer empowered to issue such show cause notice under CGST Act, 2017.

25. Since, in this case, we are satisfied that the impugned show cause notice is not based upon any audit undertaken by CERA/CAG and the CERA/CAG has undertaken no audit of the Petitioner, there is no necessity to go into the issue of whether the impugned show cause notice could be quashed or the writ of prohibition could be issued to the Respondents from proceeding any further in this matter. Though we do not propose to decide on this issue because, in this case, the CERA/CAG did not audit the Petitioner, it is still quite doubtful if the impugned show-cause

notice could have been quashed on the ground urged by Mr Sridharan.

26. In the above context, we must refer to **Pooran Mal Vs. The Director of Inspection (Investigation) New Delhi and others⁵**, and **Balwant Singh Vs Director of Inspection⁶** in which there are some observations to the effect that there could be no bar to the use of information gathered from search or seizure, which may eventually be declared as illegal. In the context of Section 132 of the Income Tax Act, *Balwant Singh (supra)* held that there was nothing in Article 19 of the Constitution which forbids the use of evidence obtained as a result of an illegal search. Consistent with this view, the relief of a writ of prohibition to use such information from the documents which had been illegally seized was denied.

27. In *Puranmal (supra)*, the Court held that India's law of evidence is modelled on the rules of evidence that prevailed in English law. Courts in India and England have consistently refused to exclude relevant evidence merely because it was obtained by illegal search or seizure. In any event, we do not pursue this line any further because, in this case, the impugned show-cause notice was not even based on any audit by CERA/CAG.

28. The affidavit also states that adverse material was shared with the Petitioner, and sufficient time was granted to respond and/or submit compliances. However, the petitioner did not satisfactorily respond or comply. The affidavit refers to revenue leakages and adds that the Petitioner will have the opportunity to present their case fully before the adjudicating authority and be granted an opportunity to be heard.

⁵ (1974) 1 SCC 345

⁶ (1969) 71 ITR 550

29. Besides, in this case, we have perused the impugned show cause notice dated 07 December 2023, and we cannot accept that the same is entirely based on the CERA/CAG's audit observations, as contended by Mr Sridharan. The impugned show cause notice reflects the independent application of mind by the adjudicating authority. The audit observations may have been shared with the Petitioner only to enable the Petitioner to offer comments/explanations. Such sharing was a measure of fairness and constituted compliance with the principles of natural justice.

30. The Petitioner's reply and the audit observations were analysed following the CGST Act, 2017, and the Rules made thereunder to arrive at a *prima facie* opinion for issuance of show cause notice. This is reflected in the impugned show cause notice itself, including paragraphs 5 and 6, where there is a reference to the Petitioner's reply, audit observations and their analysis.

31. The argument about the impugned show cause notice being issued with a "*pre-determined mindset*" is also entirely misconceived. By simply making an allegation of this nature without any concrete or serious material to support the same, the show cause notice cannot be questioned. A show cause notice, which only records a *prima facie* opinion, is not like a judgment or an order made after the completion of the adjudication proceedings. Therefore, the contention that the documents submitted by the Petitioner or the explanation offered by the Petitioner have not been considered is misconceived and based upon the same, no case is made out to quash the impugned show cause notice.

32. There is also no infirmity in invoking the extended period of limitation. It is not as if no allegations of suppression or non-

declaration were made in the show cause notice. Such allegations are contained in paragraphs 12 and 12.2 of the show cause notice. At this stage, there is no question of pronouncing whether such allegations are correct. After showing cause, if ultimately the Petitioner can make out a case that there was no suppression or non-declaration, the Petitioner can always urge that the invocation of the extended period of limitation was not legal and proper. However, at this stage, in the facts of the present case, such a contention cannot be upheld. The decision in *Akhila Sujith (supra)* is consequently not attracted in the present case.

33. Even in the context of an extended period of limitation, paragraph 12 of the Respondents' affidavit refers to Explanation 2 to Section 74 of the CGST Act, 2017 and states how the Petitioner failed to submit the required information along with documentary evidence. The affidavit adds that even this finding can be contested by the Petitioner before the adjudicating authority during adjudication proceedings.

34. The impugned show cause notice alleges that the Petitioner has availed ITC over the ITC available in GSTR-2A, wrongly availed and distributed incorrect ISD credit. The Petitioner has neither paid the suppliers within 180 days nor reversed the ITC with interest. There are allegations about incorrect disclosures of the value of supply in the respective returns, resulting in short payment of tax. There are allegations about short payment of tax liability under RCM and non-reversal of ITC regarding obsolete inventory. There are allegations of suppression of the correct supply value in the returns. Based upon all such matters, the impugned show cause notice tentatively alleges evasion of GST to the extent of Rs. 231.78 crores. The show cause notice refers to several e-mails addressed to the Petitioner seeking clarification

from the Petitioner and the alleged circumstances. No such clarifications, along with any documentary evidence or, in any event, satisfactory documentary evidence, were furnished by the Petitioner.

35. Recently, this Court, in the case of **Oberoai Constructions Ltd. Vs. The Union of India and others**⁷, surveyed the precedents on exhausting alternate remedies or entertaining Petitions challenging show-cause notice. Even the decision in *East India Commercial Co. Ltd, Calcutta (supra)*, was considered. By applying the reasoning in the decision, we are satisfied that no case is made to entertain this Petition challenging the impugned show-cause notice.

36. In **Whirlpool Corporation Vs Registrar of Trade Marks, Mumbai and others**⁸ the Hon'ble Supreme Court has held that existence of alternative statutory remedies may not be a constitutional bar to the High Court's jurisdiction but is a self-imposed restriction. The Court held that this restriction of exhaustion of alternate remedies would not operate as a bar (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is violation of principles of natural justice; or (iii) where the order or the proceedings are wholly without jurisdiction, or the vires of an Act is challenged. Here, none of the three contingencies are made out by the Petitioner. The Petitioner is merely attempting to take a chance to see that the adjudication proceedings pursuant to the impugned show cause notice are either stalled or delayed.

37. Considering the above facts, circumstances, and the law on the subject, we are satisfied that no case has been made to

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Writ Petition (L) No.33260 of 2023 & connected matters decided on 11 November 2024

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(1998) 8 SCC 1

entertain this Petition. Accordingly, this Petition is liable to be dismissed and is hereby dismissed with costs of Rs.1,00,000/- (Rupees One Lakh only) payable to K. E. M. Hospital within four weeks from today. The account details are as under :

Bank Account of Hospital	:	Poor Box Charity Fund, K.E.M. Hospital, Mumbai
Bank Account Number of Hospital	:	99350100000877 (S.B.)
Bank and Branch	:	Bank of Baroda, Parel Branch
Address, Tel. No., Fax No. and e-mail of the concerned Bank	:	Bank of Baroda, Madina Manzil, 88, Dr. Ambedkar Road, Mumbai – 400 012, Maharashtra, 022-24713820, dbpare@bankofbaroda.com
MICR Code Number	:	400012246
IFSC Number	:	BARB0DBPARE (5TH Letter is Zero)
PAN	:	AAATK3087D
Type of Account	:	Saving A/C

38. If the Petitioner wishes to respond to the impugned show cause notice, the time to file such response is extended by four weeks from today. This will not preclude the adjudicating authority from granting additional time if the Petitioner makes out a case. The adjudicating authority must, however, grant at least four weeks from today to the Petitioner for filing their reply to the impugned show cause notice.

39. This Petition is dismissed with costs but with the liberty to file a reply within four weeks from today.

40. The rule is discharged.
41. The Interim Application filed by Respondent No.6 does not survive, and the same is disposed of.
42. All concerned to act upon an authenticated copy of this order.

(Jitendra Jain, J)

(M. S. Sonak, J)