



W.P. No.8611 of 2024

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.04.2025

PRONOUNCED ON : 01.08.2025

CORAM

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P. No.8611 of 2024

and

W.M.P. Nos.9574, 9575 and 9578 of 2024

Bharti Telemedia Limited,
Bharti Crescent, 1, Nelson Mandela Road,
Vasant Kunj, Phase II,
New Delhi 110 070.
Represented by its Power of Attorney,
Mr.Janaka Samarakone

... Petitioner

Vs.

1. Commissioner of Customs
Chennai-II (Imports) Commissionerate,
Customs House, No.60, Rajaji Salai,
Chennai 600 001.

2. Union of India
Represented by the Secretary,
Department of Revenue, Ministry of Finance,
North Block, New Delhi 110 001.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari calling for the records relating to the Impugned Show Cause Notice bearing F.No.CUS/APR/SCN/194/2022-GR 5A



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(DIN:20220973MX000000F778) and dated 15.09.2022 issued by the 1st respondent and quash the same.

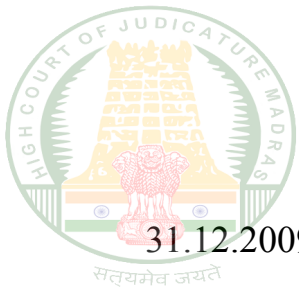
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For Petitioner	: Mr.Tarun Gulati Senior Advocate for Mr.Karthik Sundaram,
For Respondents	: Mr.ARL Sundaresan Additional Solicitor General assisted by Mr.Sai Srujan Tayi Senior Panel Counsel

ORDER

The present writ petition is filed praying to quash the Impugned Show Cause Notice dated 15.09.2022 bearing F.No.CUS/APR/SCN/194/2022-GR 5A (DIN:20220973MX000000F778) passed by the 1st respondent.

2. Petitioner is primarily engaged in the business of setting up, operating and maintaining Direct-to-Home (DTH) Cable through digital and other modes broadcasting service. Petitioner in the course of its business, imports Set Top Boxes ("STB") for installation in its customers' premises. These STB's were imported from Vietnam and Thailand, availing exemption benefits under the ASEAN India Free Trade Area Agreement dated 13.08.2009 (hereinafter referred to as "AIFTA Agreement") in terms of Notification No. 46/2011-Customs dated 01.06.2011 read with Notification No.189/2009-Cus (NT) dated



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31.12.2009, which notified the Customs Tariff [Determination of Origin of

WEB GOODS under the Preferential Trade Agreement between the Governments of

Member States of the Association of Southeast Asian Nations (ASEAN) and the

Republic of India] Rules, 2009 (in short '2009 Rules'). The present writ petition

deals with petitioner's claim of exemption benefits under the AIFTA Agreement

based on the strength of 901 Certificates of Origin (hereinafter referred to as

"COO") issued by the Issuing Authorities in Vietnam and Thailand, during the

period August 2017 to 30.04.2022.

2.1. 1st respondent has issued the Impugned Show Cause Notice bearing F.No.CUS/APR/SCN/194/2022-GR 5A (DIN: 20220973MX000000F778) dated 15.09.2022 and generated on 13.04.2023. The same is challenged by petitioner primarily on the following grounds:

a. The Impugned show cause notice is wholly without jurisdiction, as the same has been issued without following rather ignoring the provisions of the Dispute Resolution Mechanism provided under Article 24 of Appendix 'D' to the AIFTA Agreement;

b. The 1st Respondent does not have the jurisdiction to unilaterally determine the validity of the COOs issued by the Issuing authority in the Exporting Country without cumulatively following the mandatory procedures



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prescribed under Articles 16, 17 and 24 of Appendix 'D' to the AIFTA

Agreement;

c. The 1st Respondent has initiated retroactive checks only in respect of 12 COOs, and all the 901 COOs cannot be rejected on a sampling basis; and

d. There is no basis to invoke the extended period of limitation, and the 1st Respondent has pre-determined the issue.

3. Learned Additional Solicitor General appearing for respondents would submit that as a preliminary issue that writ petition ought not be entertained at the stage of show cause notice.

3.1. It is submitted by the learned counsel for respondent that on a reading of the various provisions contained in the Constitution of India as a whole, more particularly Article 253, “Treaty by itself does not become a law unless Parliament makes a law to give effect to a Treaty”. As such, if Article 24 of Appendix-D to AIFTA Agreement, Dispute Settlement Mechanism (DSM) has to be made binding, it can be made binding only by law made by Parliament.

3.2. That jurisdiction of Proper Officer under Section 28(4) of the Customs Act, 1962, cannot be denuded/whittled down by Article 24 of Appendix D to the AIFTA Agreement. That Section 28(4) of the Customs Act, 1962, would have to be amended or a provision be introduced in the Customs Act



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providing that powers available to the Proper Officer for recovery of duty arising out of transactions with ASEAN countries can be recovered only on exhausting verification/Dispute Settlement Mechanism provided under the AIFTA Agreement. However, no amendment has been made to the Customs Act pursuant to AIFTA Agreement and therefore powers available to the Customs Officer under section 2(2) read with section 28 of the Customs Act remains untouched.

3.3. That concessions under the AIFTA Agreement is given effect to by issuing Notification under section 5(1) of the Customs Tariff Act, 1975. As such, that part of the AIFTA Agreement agreed to be mandatory by use of the words "shall", has been adopted and brought into the Rule book under the Domestic law by framing the 2009 Rules, vide Notification No.189 of 2009 dated 31.12.2009. The said Rules do not provide for Disputes Settlement Mechanism nor denude power available to the officer under the Customs Act, in case of non levy or short levy and non payment or short payment of Customs duties etc.

3.4. Paragraph 16 and 17 in Annexure III to the 2009 Rules are enabling provisions and directory in nature and not mandatory. Object of the present exercise by the respondent authorities is to find out correctness of entitlement of the COO. Rule 5 of the 2009 Rules provides that product shall be deemed to be



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rejected if the AIFTA content is less than 35% of the FOB (“Free on Board”)

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Rules provide for direct method and indirect method for determining value of AIFTA content. Direct method requires $\geq 35\%$ AIFTA content of the country of origin and indirect method requires non AIFTA part equal or less than 65%. The proof of 35%:65% can be examined by any method. One such method is process of verification provided under Paragraph 16 and 17 in Annexure III of 2009 Rules. However the same is not exhaustive.

3.5. If on verification under methods other than Paragraph 16 and 17 in Annexure III of 2009 Rules, DRI on investigation find non AIFTA content value is more than 65% then the necessary corollary is that the value in the country of origin is less than 35%. There is suppression and fraudulent statement regarding non AIFTA inputs in the product to peg it down to 65% or less than 65% to claim AIFTA benefit on the basis of the COO. It is purely a question of fact to be disputed and proved in the course of adjudication. The process of verification under Paragraph 16 and 17 in Annexure III of 2009 Rules is not mandatory but one adopted by the Revenue to determine the legality or prima facie finding that there has been suppression and misstatements for the purpose of bringing it within the eligibility for preferential treatment. There is no embargo in resorting to any method other than that provided under Paragraph 16 and 17 in Annexure III of 2009 Rules to prove the contents of the COO. In other words, it is open to



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the Customs Authorities to adopt any method in enquiring and investigating to arrive the correct value of AIFTA content. Paragraph 16 and 17 in Annexure III of 2009 Rules are not exhaustive nor exclude other methods.

3.6. There is also a dispute about the mode of service of show cause notice, while it is the case of the petitioner that Email ID on which notice is served is that of the Customer Care Email ID viz. 121@in.airtel.com. However, the respondent would submit that in addition to the above Email ID, mails were also addressed to following email IDs viz., sunil.taldar@airtel.com and amit.gautam@airtel.com which are the IDs of the then CEO and Procurement Head viz., Mr.Sunil Taldar and Mr.Amit Gautam respectively. As such, the date on which the show cause notice has been issued should be taken as 16.09.2022 and that should be taken as the date for all purposes including limitation.

4. Before proceeding further it may be necessary to first examine the preliminary issue as to whether this writ petition ought to be entertained at this stage inasmuch as the subject matter of challenge is a show cause notice. In this regard, it may be relevant to refer to the following judgments:

i) Union of India v. Hindalco Industries, reported in (2003) 5 SCC 194:

“12. There can be no doubt that in matters of taxation, it is inappropriate for the High Court to interfere in exercise of jurisdiction under Article 226 of the Constitution either at the stage



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of the show-cause notice or at the stage of assessment where alternative remedy by way of filing a reply or appeal as the case may be, is available ...”

ii) State of U.P. And another v. Anil Kumar Ramesh Chandra Glass Works and another, reported in (2005) 11 SCC 451 :

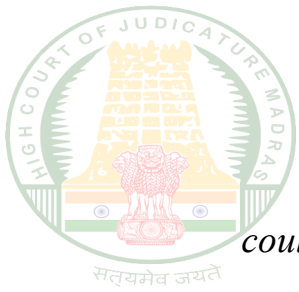
“6. ... In any event, this Court had repeatedly held that Article 226 should not be permitted to be invoked in order to challenge show-cause notices....”

iii) Union of India and another v. Kunisetty Satyanarayana, reported in (2006) 12 SCC 28 :

“15. 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.”

iv) Special Director and another v. Mohd. Ghulam Ghouse and another, reported in (2004) 3 SCC 440 :

“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 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



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could approach the court....”

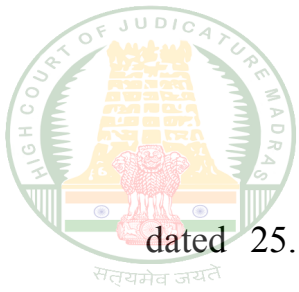
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5. It may be relevant to refer to the judgment of the Hon'ble Supreme Court in the case of *CIT, Gujarat v. Vijaybhai N. Chandrani, reported in (2013) 14 SCC 661* wherein while dealing with the challenge to the order of High Court rejecting the writ petition filed against the show cause notice, it was observed as under:

“14.In the present case, the assessee has invoked the writ jurisdiction of the High Court at the first instance without first exhausting the alternate remedies provided under the Act. In our considered opinion, at the said stage of proceedings, the High Court ought not have entertained the writ petition and instead should have directed the assessee to file reply to the said notices and upon receipt of a decision from the assessing authority, if for any reason it is aggrieved by the said decision, to question the same before the forum provided under the Act.”

6. Keeping in view the above limitations though self imposed in entertaining writ petition at the stage of show cause notice, this Court is not inclined to entertain the present writ petition at the stage of show cause notice for the following reasons:

a) Firstly, petitioner would rely on the order of the Supreme Court in the case of *Kothari Metals Ltd. v. Union of India, in Civil Appeal No. 9010 of 2019*



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dated 25.11.2019 wherein while dealing with the issue raised by assessee /appellants therein regarding efficacy of Article 24 of Appendix 'D' to the AIFTA Agreement, it was found that it ought to be addressed by the High Court and not by adjudicating authority. While question as to efficacy of Article 24 of Appendix 'D' to the AIFTA Agreement would require adjudication by the High Court, it appears that grievance of the petitioner is that while issuing the show cause notice, the process contemplated under Articles 16 to 21 of Appendix 'D' to the AIFTA Agreement incorporated in Annexure III of 2009 Rules, has not been complied. This is distinct from the issue of efficacy of Article 24 of Appendix 'D' to the AIFTA Agreement. The verification process would reach Article 24 of Appendix 'D' to the AIFTA Agreement only after the process under Articles 16 to 21 is exhausted. The challenge is on the premise that procedure under Article 16 to 21 of Appendix 'D' to the AIFTA Agreement is not completed while issuing show cause notice, this is different from the question of efficacy of Article 24 which would arise at a later stage after exhausting the steps/process provided in Article 16 to 21 of Appendix 'D' to the AIFTA Agreement.

b) Secondly, there is generalisation in rejecting more than 880 Certificates of origin thereby disallowing claim of exemption on the basis of merely 12



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certificates. This is an issue which would have to be addressed by Adjudicating Authority. Further, question arises as to the mental element / *mens rea* of petitioner to justify issuance of show cause notice a question of fact and requires consideration of explanation that may be offered.

c) Thirdly and most importantly the following facts centering around the applicability of Section 14(1) of the Customs Act – transaction value i.e. price payable for the goods when sold for export to India may require examination viz.,

(i) On excluding COO verified, how many of the remaining unverified COOs are liable to be severed from the ongoing proceedings due to RVCs exceeding 35%?

(ii) Whether petitioner has suppressed facts while making their declaration under Form-1 under the CAROTAR 2020, with the positive intent of evading duty and availing preferential treatment under the AIFTA.

(iii) Whether in terms of Supplier Agreements, M/s.Bharti Telemedia Limited was to bear the acquisition costs of licences/permissions/royalties to use/embed certain software like Conditional Access System, Bitstream Font, EPG, Dolby and others related to encoding/decoding, transmission/reception, and whether these values were failed to be accounted for in the transaction value and determination of AIFTA content, due to the petitioner's wilful failure to



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disclose with intent to evade duty.

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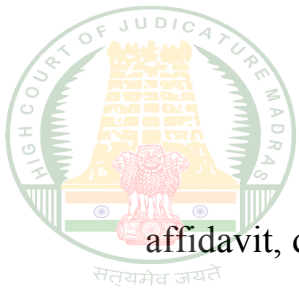
(iv) Whether fluctuations in the regional value content of identical STB models can be explained by M/s.Bharti Telemedia Limited, and whether M/s. Bharti Telemedia Limited have deliberately submitted incorrect invoice values in various documents as alleged in Show Cause Notice, with the intent of wilfully distorting valuation to evade duty.

(v) Whether the Customs authority had not adopted the correct method of valuation in respect of transactions, with respect to which a COO was rejected, given Rule 5(3) of Notification No.189/2009. Moreso, given the fact that different methods was applied by Thailand and Vietnamese authorities, which binds the importing party as well, under said rule.

(vi) Whether petitioner's failure to disclose the relevant values for the calculation of AIFTA content is justified as it constitutes commercially confidential information, thus protected from disclosure under the CAROTAR in terms of CBIC Instruction No. 23/2024 dated 21.10.2024, if not whether lack of disclosure amounts to suppression.

(vii) Which are the specific bills of entries that have been finally cleared, and whether they can be reassessed.

(viii) Whether Show Cause Notice was effectively issued only on 13.04.2023, since petitioner was not in receipt of it till that date as per their



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affidavit, despite the Show Cause Notice bearing the date 15.09.2022.

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(ix) Whether the respondent failed to furnish 'relied upon documents' ("RUDs") cited in the Show Cause Notice as RUDs no. 24, 59 and 60 thereby denying petitioner from responding thoroughly to the averments made in the notice, resulting in violation of principles of natural justice.

7. Keeping in view the above factual issues that requires consideration, this Court would only agree that the present writ petition ought not be entertained at the stage of show cause notice, instead it is only appropriate to direct the petitioner to submit their response/explanation to show cause notice.

8. In view thereof, the writ petitions stands disposed of with liberty to the petitioner to file their objections to the notice within a period of 4 weeks from the date of receipt of a copy of this order. If any such objections/ reply is filed by the petitioner needless to say the Respondents shall consider the same in accordance with law and after affording the petitioner a reasonable opportunity of hearing and thereafter proceed with assessment/ adjudication process keeping in view that this Court has not expressed any view of merits. It is made clear that the above observations are made only for the purpose of deciding whether the writ petition ought to be entertained at this stage and does not reflect any opinion



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of this Court, nor has any issue been decided on merits. The adjudication

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Authority shall decide the matter independently uninfluenced/unfettered by any observations made herein. No costs. Consequently, the connected miscellaneous petitions are closed.

01.08.2025

Speaking (or) Non Speaking Order

Index : Yes/ No

Neutral Citation: Yes/No

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To:

1. Commissioner of Customs
Chennai-II (Imports) Commissionerate,
Customs House, No.60, Rajaji Salai,
Chennai 600 001.
2. The Secretary,
Department of Revenue, Ministry of Finance,
North Block, New Delhi 110 001.



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MOHAMMED SHAFFIQ, J.

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