

Prajakta Vartak

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2574 OF 2024

M/s. Sheesha Sky Lounge Hospitality
And Services Pvt. Ltd.

...Petitioner

Versus

Union of India & Anr.

...Respondents

Mr. Bharat Raichandani with Ms. Bhagrati i/b. UBR Legal Advocates for
Petitioner.

Mr. Karan Adik with Mr. S. D. Deshpande for Respondents.

CORAM: G. S. KULKARNI &
AARTI SATHE, JJ.

DATE: 12 MARCH 2026

Oral Judgment (Per: - G. S. Kulkarni, J.)

1. Rule. Rule made returnable forthwith. With the consent of the parties,
taken up for final hearing.

2. A short question which raises for consideration in this petition under
Article 226 of the Constitution of India is “as to whether the impugned show
cause notice dated 30 December 2020 could have been issued by respondent
no.2, bypassing the mandatory requirements prescribed under Sections 37B and
37C of the Central Excise Act, 1944, read with Circular No. 1053/2/2017-CX
dated 10 March 2017 issued by the Government of India, Ministry of Finance
(Department of Revenue), Central Board of Excise & Customs, New Delhi,
(CBEC) and subsequent Circular No.1076/02/2020-Cx dated 19 November
2020 stipulating issuance of a notice in regard to a pre-show cause consultation.

3. The facts lie in a narrow compass:- The petitioner is a company, *inter alia*, engaged in running two non-air-conditioned rooftop restaurants at Andheri and Lower Parel in Mumbai. It is the petitioner's case that on 01 July 2012, the Government granted exemption to restaurants having air-conditioning and a licence to serve liquor vide Notification No.25/2012-ST (at serial no.19). Thereafter, by a further notification dated 01 March 2013 bearing No.03/2013-ST, the earlier Notification No.25/2012-ST (*supra*) was amended and the condition regarding licence to serve liquor was omitted. It is the petitioner's contention that indisputedly the petitioner's restaurants do not have air-conditioning or central heating during any period of the year.

4. It is the petitioner's case that there was a clarificatory Circular No.173/8/2013-ST dated 07 October 2013 issued by the CBEC wherein it was clarified that services provided by non-air-conditioned or non-centrally air-heated restaurants are exempt from service tax.

5. It is on such backdrop, the petitioner contends that on 29 December 2020, the petitioner's Chartered Accountant received an e-mail from respondent No.2 with the subject '*Service Tax inquiry in respect of income declared in ITR/TDS vis-a-vis Taxable Service Value and short payment of Service Tax for the period October 2014 to June 2017*', calling upon the petitioner to submit certain information within three days. It is stated that immediately on the next day, the impugned show cause notice dated 30 December 2020 was issued by respondent no.2 demanding service tax of Rs.1,26,03,575/- along with a proposal to recover

interest and impose penalty. It is on such backdrop, the present petition has been filed.

6. Mr. Raichandani, learned counsel for the petitioner, at the outset would submit that the impugned action on the part of respondent no.2 in issuing the show cause notice is illegal, as it clearly breaches the mandate of Section 37-C of the Central Excise Act, 1944, The reason being that it is evident from the show cause notice that the provisions invoked are Section 73/72 of the Finance Act, 1994, as made applicable in terms of Section 174 of the Central Goods and Services Tax Act, 2017 (**CGST Act**). It is Mr. Raichandani's contention that apart from the breach of the provisions of the Central Excise Act, the impugned action is also contrary to the circulars dated 10 March 2017 and 19 November 2020 issued by the CBEC. He has drawn our attention to the relevant clauses of the said circulars, and more importantly paragraph 5 of the circular dated 10 March 2017, which reads thus:-

“5.0 Consultation with the noticee before issue of Show Cause Notice: Board has made pre show cause notice consultation by the Principal Commissioner/Commissioner prior to issue of show cause notice in cases involving demands of duty above Rs. 50 lakhs (except for preventive/ offence related SCN's) mandatory vide instruction issued from F. No. 1080/09/DLA/MISC/15, dated 21st December 2015. Such consultation shall be done by the adjudicating authority with the assessee concerned. This is an important step towards trade facilitation and promoting voluntary compliance and to reduce the necessity of issuing show cause notice.”

7. Our attention is also drawn to a similar condition required to be followed by the Department, which has been made mandatory by the circular dated 19 November 2020 with regard to holding pre-show cause notice consultations.

Clause 4 of the said circular reads thus:-

“4. Due to the above change in monetary limits of adjudication and to lend clarity on this issue, it is hereby clarified that “Pre-show cause notice consultation with assessee, prior to issuance of SCN in case of demands of duty is above Rupees 50 Lakhs (except for preventive/offence related SCN’s), is mandatory and shall be done by the Show Cause Notice issuing authority.”

8. It is therefore his submission that the circulars, which are binding on the Department, have been completely overlooked while issuing the impugned show cause notice. Mr. Raichandani submits that a similar issue had fell for consideration before this Court in a batch of writ petitions in **Rochem Separation Systems (India) Pvt. Ltd. Versus The Union of India & Ors.**¹, wherein the coordinate Bench of this Court, considering the position in law in regard to the said circulars as well as several decisions of different High Courts, quashed and set aside similar actions on the part of the Department. He therefore submits that on this ground alone, the petition deserves to be allowed.

9. On the other hand, Mr. Adik, learned counsel for the Revenue, has drawn our attention to the reply affidavit justifying the issuance of the show cause notice. It is his contention that sufficient intimation was issued to the petitioner, including by issuance of a summons; however, the petitioner avoided to appear before respondent no.2, and eventually the impugned show cause notice had to be issued. Our attention in this regard is drawn to paragraph 11 of the reply affidavit filed on behalf of the Department by Shri. Jagdish Kumar, Assistant Commissioner of CGST & Central Excise, Mumbai, the relevant contents of

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which are required to be noted which read thus:-

“11. With reference to the contents of paras 4.10 to 4.12 of the Petition, I say and submit that para 5 of the Board' Circular no 1053/2/2017-CX dated 10.03.2017 which requires pre show cause notice consultation is reproduced as under:-

'Board has made pre-show cause notice consultation by the principal commissioner / commissioner prior to issue of show cause notice in cases involving demands of duty above Rs.50 lakhs (except for preventive/offence related SCN's) mandatory vide instruction issued from F.No.1080/09/DLA/MISC/15 dated 21st December, 2015. Such consultation shall be done by the adjudicating authority with the assessee concerned. This is an important step towards voluntary compliance and reduces the necessity of issuing SCN.' [Emphasis added]

In the present case, the petitioner, on being telephonically contacted by the jurisdictional officers informed that their C.A could appear only after 7th January 2021. Thus, the petitioner did not exhibit any willingness to voluntarily comply before the last date of issuance of SCN. Had the petitioner appeared in response to the summons dated **29.12.2021** and offered satisfactory clarification before the last date of issuance of SCN, possibly the SCN would not have been issued. In absence of cooperation on the part of the Petitioner it became necessary for the department to issue SCN to protect Government revenue. With regard to the case laws cited by the Petitioner it is submitted that the facts of these cases are at variance from the facts of the present case such viz. (i) the Petitioner did not present himself in response to summons dated 29.12.2020, (ii) the Petitioner informed that his C.A could appear on or after 07.01.2021 only i.e. 7 days after the last date of issuance of SCN. Therefore, ratio of the cited case law is not applicable to the present case.”

10. It is Mr. Adik's contention to the effect that once sufficient notice was issued to the petitioner by issuance of summons, hence it was not necessary for respondent no.2 to issue a notice for a pre-show cause consultation, prior to issuing the impugned show cause notice to the petitioner.

11. On such premise, we have heard the learned counsel for the parties and perused the record.

12. At the outset, we may observe that the provisions of the Central Excise Act, 1944, stand attracted being made applicable by the provisions of the Section 83 of the CGST Act. In the present circumstances, since the issue concerns a demand of service tax, Section 37B of the Central Excise Act becomes relevant, which provides for “Instructions to Central Excise Officers”, making it mandatory for such officers to observe and follow the directions of the Board. Section 37-B reads thus:-

“37B. Instructions to Central Excise Officers.--The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963), may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on [such goods or for the implementation of any other provision of this Act], issue such orders, instructions and directions to the Central Excise Officers as it may deem fit, and such officers and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the said Board:

Provided that no such orders, instructions or directions shall be issued-

(a) so as to require any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the [Commissioner of Central Excise (Appeals) in the exercise of his appellate functions.”

13. Also Section 37-C, which provides for the ‘Service of decisions, orders, summons, etc.’, is required to be strictly followed. The said provision also needs to be noted which reads thus:-

“37C. Service of decisions, orders, summons, etc.--(1) Any decision or order passed or any summons or notices issued under this Act or the rules made thereunder, shall be served,-

(a) by tendering the decision, order, summons or notice, or sending it by

registered post with acknowledgment due [or by speed post with proof of delivery or by courier approved by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963)], to the person for whom it is intended or his authorised agent, if any;

(b) if the decision, order, summons or notice cannot be served in the manner provided in clause (a), by affixing a copy thereof to some conspicuous part of the factory or warehouse or other place of business or usual place of residence of the person for whom such decision, order, summons or notice, as the case may be, is intended;

(c) if the decision, order, summons or notice cannot be served in the manner provided in clauses (a) and (b), by affixing a copy thereof on the notice-board of the officer or authority who or which passed such decision or order or issued such summons or notice.

(2) Every decision or order passed or any summons or notice issued under this Act or the rules made thereunder, shall be deemed to have been served on the date on which the decision, order, summons or notice is tendered or delivered by post [or courier referred to in sub-section (1)] or a copy thereof is affixed in the manner provided in sub-section (1).”

14. The CBEC in exercise of the powers conferred under Section 37-B, issued a Master Circular dated 10 March 2017, the contents of which have been noted hereinabove, providing for a mandatory requirement of a pre-show cause notice consultation. This position has been reiterated in the subsequent Circular dated 19 November 2020 (*supra*). Thus, there is substance in the contentions as urged on behalf of the petitioner that such legal requirements could not have been forgone. In the present case, it is quite clear that the mandate of the said circular has been completely breached, as no notice for a pre-show cause consultation was issued by Respondent No. 2 prior to the issuance of the impugned show cause notice. Clearly, in view of the mandatory nature of the circulars, a notice requiring pre-show cause consultation was an essential prerequisite. The contentions as urged on behalf of the respondents that a prior intimation in view of a summons being issued, would suffice, hence, a notice for a pre-show cause

consultation was not required to be issued, cannot be accepted, as such submission militates against the mandatory requirements stipulated under the said circulars.

15. The legal position in such context has also been considered by this Court in the case of **Rochem Separation Systems (India) Pvt. Ltd. (supra)**. In the said decision, the Division Bench of this Court, after referring to several earlier judgments passed by the following order:-

“ORDER

- (a) The impugned show cause notices are hereby quashed and set aside.
- (b) The Revenue is given the opportunity to carry out the pre-consultative process by issuing a pre-consultation notice within four weeks from the date this order is uploaded.
- (c) If such a pre-consultation notice is issued, the Assesseees must file their replies within two weeks of their receipt.
- (d) The pre-consultation process must be completed one way or the other, in accordance with law, within a period of a further six weeks from the date of receipt of the Assesseees' replies.
- (e) Depending on the outcome of the pre-consultation process, the Revenue would be entitled to issue fresh show-cause notices.
- (f) The period of limitation from 30 January 2023 until the fresh show cause notices are issued (if at all), within the timeline indicated above, shall not be counted for the purpose of limitation.
- (g) The exclusion of limitation which we have directed above shall be in addition to any other exclusion or extension that the Revenue can claim under the law. This includes exemptions or extensions granted due to the COVID-19 pandemic.”

16. In the light of the above discussion, we are of the clear opinion that the petition needs to be allowed by setting aside the impugned show cause notice.

Hence the following order:-

ORDER

- i. The impugned show cause notice dated 30 December 2020 issued by respondent no.2 is quashed and set aside.
- ii. Respondent no.2 is directed to grant to the petitioner an opportunity of a hearing by adopting a pre-consultation process, before issuing any show cause notice. A notice for such pre-consultation shall be issued to the petitioner within a period of three weeks from today.
- iii. The pre-consultation process shall be completed in accordance with law within a period of six weeks from the date of receipt of the notice by the petitioner. Respondent no.2 shall thereafter take necessary steps based on the outcome of the pre-consultation process, i.e. to take a decision whether the facts and circumstances warrant issuance of a fresh show cause notice.
- iv. Needless to observe that insofar as limitation is concerned, as the petitioner was bonafide pursuing the present petition, the period of limitation from the date of institution of the petition on 28 July 2021 shall not be counted, in the event a fresh show cause notice is to be issued.
- v. It is also clarified that the exclusion of limitation as directed, shall be in addition to any other exclusion or extension that the Revenue can claim under the law, which includes exemptions or extensions granted during the Covid-19 pandemic.
- vi. All contentions of the parties on such hearing are expressly kept open.
- vii. Rule is made absolute in the aforesaid terms. No costs.

(AARTI SATHE, J.)

(G. S. KULKARNI, J.)