

In the High Court of Judicature at Madras

Dated : 02.1.2018

Coram :

The Honourable Mr. Justice T.S. SIVAGNANAM

Writ Petition Nos. 8881 & 9870 to 9872 of 2017 &
WMP. Nos. 9789, 9790 & 10859 to 10864 of 2017

M/s. Tablets (India) Ltd., rep.
by Director, Chennai-81.

...Petitioner

Vs

The Assistant Commissioner,
B Division, Chennai -1
Commissionerate, No. 459,
Ananda Complex, Anna Salai,
Teynampet, Chennai-18.

...Respondent

PETITIONS under Article 226 of The Constitution of India praying for the issuance of Writs of Certiorari to call for the records of the case relating to the impugned show cause notices Nos. 962/1995, 958/1995 and 960/1995 dated 14.11.1995 and 1085/1995 dated 09.12.1995 issued by the respondent and quash the same.

For Petitioner : Mr. T. Ramesh

For Respondent : Mr. Rabu Mahohar, SPC and
Dr. S. Seethalakshmi, SPC

COMMON ORDER

Heard both. By consent, the writ petitions are taken up for joint disposal.

2. The petitioner is a company registered under the Companies Act, 1956, engaged in the manufacture of pharmaceutical products. The challenge in these writ petitions is to show cause notices dated 14.11.1995 and 09.12.1995.

3. The preliminary objection raised by the learned Senior Panel Counsel for the Revenue is with regard to the maintainability of the writ petitions contending that writ petitions against show cause notices are not maintainable, as the petitioner should be relegated to the Authority concerned to participate in the personal hearing and contest the matters on merits.

4. The preliminary objection raised by the Revenue is not impressive for the reason being that the show cause notices are dated 14.11.1995 and 09.12.1995 and that the adjudication is sought to be done in February 2017. Thus, this Court is inclined to consider as to whether the action initiated by the Department at this juncture during February 2017 to adjudicate the show cause notices issued in the year 1995 is just and proper.

5. The petitioner availed the benefit of exemption notification bearing Notification No.29/88 Central Excise dated 01.3.1988 applicable to single ingredient formulation and cleared medicaments by payment of concessional rate of duty at 10% ad volarem. In the show cause notices, it has been alleged that the concessional rate of duty at 10% claimed based on the said exemption notification namely Notification No.29/88 dated 01.3.1988 is allowable only if the pharmaceutical aid employed in the manufacture of single ingredient is therapeutically inert and the diluent in question called as di calcium phosphate used in the manufacture of the tablets concerned is not only found to be a calcium supplement, but also an active ingredient.

6. Therefore, the respondent proposed to deny the benefit and disallow the claim for exemption as per Notification No.29/88 and called upon the petitioner to show cause as to why the differential duty on the clearance of the tablets concerned during the period between April 1992 and February 1994 should not be demanded. The petitioner was also permitted to seek for an opportunity of personal hearing. The petitioner also submitted their objections on 19.1.1996 to the show cause notices.

7. It may not be necessary for this Court to go into the merits of the case, as the petitioner, in their objections, sought to contend that the benefit of the said Notification, as availed by it, is just and proper and that there was no cause to deny the benefit of the said exemption notification.

8. In terms of Section 11A of the Central Excise Act, 1944, the duties, which have not been levied or not paid or short-levied or short-paid or erroneously refunded, can be recovered. However, the Statute provides a time limit, within which, such proceedings are to be initiated under Sections 11A(11) (a) and (b), which read as follows :

"The Central Excise Officer shall determine the amount of duty of excise under Sub-Section (10)

(a) within six months from the date of notice where it is possible to do so, in respect of cases falling under Sub-Section

(1); and

(b) within one year from the date of notice where it is possible to do so, in respect of cases falling under Sub-Section (4)."

9. In terms of the above provision, in respect of cases falling under Section 11(1) of the said Act, the period stipulated is six months and in respect of cases falling under Sub-Section (4) of Section 11A of the said Act where extended period of limitation is invoked, the period is one year.

10. The learned Senior Panel Counsel for the Revenue would contend that both in Clauses (a) and (b) of Section 11A(11) of the said Act, it has been provided that time limit has to be adhered to only in cases where it is possible to do so and not a rigid time frame is fixed for the Central Excise Officer to effect recovery of duties not levied or not paid or short levied or short paid or erroneously refunded. Thus, the respondent seeks to justify their action in attempting to adjudicate the show cause notices after a period 22 years by referring to the expression 'where it is possible to do so' and would state that in the instant case, it was meant to adjudicate the show cause notices for the reasons set out in the counter.

11. Admittedly, in the impugned show cause notices, there is no indication that the show cause notices have been issued as a protective measure or for what reason, they have been issued. However, in the counter affidavit, the respondent seeks to explain something, which is not contained in the impugned show cause notices. The settled legal principle is that when the correctness of an order is tested by a Court in a Writ of Certiorari, the respondent, defending such an action, is entitled to rely upon as to what has been stated in the order, which is sought to be set aside and that the respondent cannot substitute fresh reasons in the form of a counter affidavit.

12. However, in the instant case, the respondent seeks to substitute reasons not only by way of a counter affidavit alone, but also by way of an additional counter affidavit. On a reading of the counters, it is seen that there has been an audit conducted by the Central Excise Revenue Audit (CERA) and that the audit report pointed out that the petitioner is not entitled to the benefit of Notification No.48/77. This has led to the issuance of the impugned show cause notices.

13. As pointed out earlier, the impugned show cause notices do not state that the proceedings have been initiated based upon the audit report. What is interesting to note from the counter affidavits is that the Department/Assessing Officer did not

accept the audit objections, but contested the same. In other words, the Department was of the firm view that the availment of the benefit of the said exemption notification as approved by the Department in the petitioner's case was proper. Nevertheless, on such contest, the audit objections were converted into Statement of Fact Verification (SFV). This conversion appears to have taken place during the period 1994-95 as could be seen from SFV No.313/94-95 i.e much before the opportunity of personal hearing granted to the petitioner on 19.1.1996. Even at that juncture, the respondent did not put the petitioner on notice about the audit objections and the contest by the Department on such audit objections.

14. In the counter affidavit, it has been further stated that since the settlement memo was not received from the CERA, the case was kept in the Call Book. Once again, the petitioner was kept in dark and was not intimated about these proceedings, which were taking place administratively. For 22 years, the matters remained in cold storage and all of a sudden, a notice was issued to the petitioner on 28.2.2017 directing them to appear for a personal hearing on 22.3.2017. This has necessitated the petitioner to come before this Court.

15. When the cases came up for hearing on the earlier dates, this Court directed the respondent to file an affidavit to show as to whether the transfer of the case to the Call Book was informed to the petitioner. Accordingly, the additional counter affidavit dated 13.11.2017 has been filed accepting the fact that there is no intimation to the assessee about the transfer of the show cause notices to the Call Book. Thus, absolutely the petitioner had no knowledge as to what was the reason for not passing the adjudication order on the impugned show cause notices. Though an opportunity of personal hearing was offered on 19.1.1996, it has to be seen as to whether this could be a reason for not being able to pass an order within the time permitted under Section 11A(11)(a) of the said Act.

16. Admittedly, the reason for impossibility of adjudicating the show cause notices cannot be put against the assessee, as the Department was contesting the audit objections. Therefore, this Court is convinced that the reasons contained in the counter affidavit as well as in the additional counter affidavit do not justify the action in keeping the impugned show cause notices pending without being adjudicated for 22 years.

17. In the decision in the case of J.M.Baxi & Co. Vs. Government of India [reported in (2016) 336 ELR 285 (Mad.)], a show cause notice for short landing of cargo was put to challenge. However, the writ petition was dismissed and the matter was taken on appeal. One of the contentions raised before

the Hon'ble Division Bench of this Court was that the order of adjudication was passed after eight years of the discharge of the cargo and five years of the issuance of the show cause notice, which cannot be considered to be reasonable. The Hon'ble Division Bench observed that though the Statute does not prescribe a period of limitation for passing an order of adjudication, the law is well settled that anything, in respect of which, no period of limitation is prescribed, should be done at least within a reasonable time and that what is reasonable time would depend upon the facts and circumstances of each case.

18. In the decision in the case of Lanvin Synthetics Private Ltd. Vs. Union of India [reported in (2015) 322 ELT 429 (Bom.)], a show cause notice issued to the petitioner therein was put to challenge on several grounds, one of which being that for 17 long years, the matter remained unadjudicated and that the Authorities should not be permitted to proceed with the adjudication. The Hon'ble Division Bench pointed out that they see no reason for the Revenue/Department not passing an adjudication order for 17 long years and that the petitioner therein cannot be faulted for approaching the Court belatedly. The explanation, which was offered by the Revenue before the Court that they were unable to trace the file was rejected and it was held that the law postulates early end to such proceedings and the fact that there is no period of limitation prescribed does not mean that the proceedings initiated could be concluded at the sweet will and fancies of the Department. The case on hand is, in fact, a better case than the decision in Lanvin Synthetics Private Ltd.

19. As mentioned earlier, for 22 years, the respondent has not passed an order of adjudication though the personal hearing concluded on 19.1.1996. From the counter affidavits, it is seen that on the date when personal hearing was conducted, the matter has already been transferred to the Call Book and was kept pending. If that be so, the assessee ought to have been put on notice in respect of the factual position, which was not done. Thus, it is clear that the respondent, who had been then adjudicating the proceedings, proceeded with the adjudication despite the fact that they were contesting the audit objections. The reason now sought to be given for resurrecting the matter after 22 years is absolutely fallacious and cannot be accepted. Hence, the impugned show cause notices are liable to be quashed.

20. It is important to note that the Central Board of Excise and Customs issued a circular bearing Circular No.1053/02/2017-CX dated 10.3.2017, which is in supersession of the earlier circular, which dealt with several issues and one such issue pertains to Issue and Communication of Order as per Paragraph 14.10, which states that in all cases where personal hearing has

been concluded, it is necessary to communicate the decision as expeditiously as possible, but not later than one month in any case, barring in exceptional circumstances to be recorded in the file and that the order is required to be communicated to the assessee in terms of the provisions of Section 37C of the Central Excise Act, 1944.

21. It is also important to note that in paragraph 4 of the additional counter affidavit filed by the respondent, the respondent referred to Board's Circular No.162/73/95/CX dated 14.12.1995 to justify their action by stating that there is no specific mention about the intimation to the assessee in respect of transfer to the Call Book.

22. The reliance on the Board's Circular dated 14.12.1995 is of little avail to the respondent, since, in the recent circular dated 10.3.2017 in Paragraph 9.4, it has been made clear that a formal communication should be issued to the noticee where the case has been transferred to the Call Book. Even assuming that such a condition was not found in the earlier circular dated 14.12.1995, principles of natural justice would require the noticee to be intimated that the case has been transferred to the Call Book.

23. This Court finds one more reason to hold that the respondent is not justified in not passing the order of adjudication, as the present case appears to have not fallen in any of the Clauses found in Paragraph 9.3 of the the Master Circular dated 10.3.2017, which deals with transfer of Call Book cases. Above all, merely because an audit party had raised an objection, ipso facto, that cannot be the sole reason for issuing the show cause notices, as the Adjudicating Authority is a Quasi Judicial Authority and is legally bound to adjudicate the case independently and judiciously taking into consideration the audit objections by the CERA/CRA, reply of the Department, reply of the party, relevant legal provisions, case laws on the subject and relevant circulars of the Board, if any. Furthermore, it has been directed that the show cause notices have to be independently examined and independent finding has to be incorporated. In the instant case, from the counter affidavits, it is not clear as to the date of audit objections and presumably, it must be prior to the show cause notices dated 14.11.1995 and 09.12.1995. Further, the show causes notices do not refer to the same. Be that as it may, on the date when the show cause notices were taken up for adjudication, the case was converted into SFV, which was not made known to the assessee.

24. For all the above reasons, the writ petitions are allowed and the impugned show causes are quashed. No costs. Consequently, the connected WMPs are closed.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To
The Assistant Commissioner, B Division, Chennai -1
Commissionerate,
No.459, Ananda Complex, Anna Salai, Teynampet, Chennai-18.

RS

+1cc to Dr.S.Seethalakshmi, Senior Counsel sr.No.155
+2cc to Mr.T.Ramesh, Advocate Sr.No.122 & 121
+1cc to M/s.B.Rabu Manohar, Advocate Sr.No28

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WP.Nos.8881 & 9870 to 9872/2017 &
WMP.Nos.9789, 9790 & 10859 to 10864
of 2017

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