

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CWP No. 10530 of 2017 (O&M)

Date of decision: 2.8.2018

M/s GPI Textiles Limited

.. Petitioner

VS

Union of India and others

.. Respondents

**Coram: Hon'ble Mr. Justice Rajesh Bindal
Hon'ble Mr. Justice Amit Rawal**

Present Mr. Jagmohan Bansal, Advocate, for the petitioner (s).
Mr. Anshuman Chopra, Advocate, for the respondents.

Rajesh Bindal, J.

1. This order will dispose of two writ petitions bearing CWP Nos. 10530 and 10707 of 2017, involving identical issues.
2. Civil Writ Petition No. 10530 of 2017 has been filed challenging show cause notices dated 27.12.2001 (Annexure P-1), 28.8.2002 (Annexure P-2), 3.1.2003 (Annexure P-3), 2.4.2003 (Annexure P-4), 4.8.2003 (Annexure P-5).
3. In Civil Writ Petition No. 10707 of 2017, challenge has been made to show cause notice dated 13.9.2006 (Annexure P-1).
4. Challenge has also been made to circular dated 29.9.2016 issued by the Ministry of Finance (Department of Revenue), Central Board of Excise & Customs, New Delhi, in both the writ petitions.

5. Learned counsel for the petitioner primarily argued that proceedings in the case in hand deserve to be quashed only on account of inordinate delay in disposal thereof. Show cause notices were issued way back in the years 2001, 2002, 2003 and 2006. Thereafter, the department remained silent. The reasons assigned in the notice was regarding audit objection raised by the AG (Audit), Shimla, pertaining to the year 2000-01. Section 11A of the Central Excise Act, 1944 (for short, 'the Act'), deals with recovery of duty not levied or not paid or short levied or short paid or erroneously refunded. Sub-section (11) thereof provides that as far as possible in normal cases, the proceedings should be concluded within a period of six months, whereas in the case of fraud, collusion, etc., the period prescribed is one year. In the case in hand, the proceedings are pending for the last more than 16 years when fresh notice for date of hearing was issued on 3.5.2017.

6. In support of plea, reliance was placed upon judgment of Gujarat High Court in Siddhi Vinayak Syntex Private Limited vs Union of India 2017 (352) E.L.T. 455. In the aforesaid case, even the order passed 17 years after the issuance of show cause notice was set aside. It was further submitted that Special Leave Petition (C) No. 18214 of 2017 – Union of India and others vs M/s Siddhi Vinayak Syntex Private Limited filed against the aforesaid order was dismissed by Hon'ble the Supreme Court on 28.7.2017, as far as the merits of the controversy concerned. Hon'ble the Supreme Court had issued notice only to examine the question as to whether Circular No. 162/73/95-CX dated 14.12.1995, issued by the Central Board of Excise and Customs, Department of Revenue, Ministry of Finance,

Government of India, is in conformity/ authorized by the provisions of Section 37-B of the Central Excise Act, 1944.

7. Further reliance was placed upon subsequent order passed by the Gujarat High Court in Parimal Textiles vs Union of India 2018 (8) G.S.T.L. 361, which is to the same effect.

8. Reliance was also placed upon judgment of Hon'ble the Supreme Court in State of Punjab vs Bhatinda District Co-op. Milk P. Union Limited 2007 (217) E.L.T. 325, where period of five years was held to be reasonable in the absence of any time provided in the Act. The case in hand is even better. The maximum period provided herein is one year.

9. Learned counsel for the petitioner further submitted that issue regarding keeping the cases pending on account of transfer thereof in the call book has also been dealt with by Gujarat High Court.

10. On the other hand, learned counsel for the respondents submitted that show cause notices were issued to the petitioner on the basis of audit objection raised by AG (Audit), Shimla. As the audit objection was contested by the department, as per Circular No. 385/18/98/CX dated 30.3.1998, the cases were transferred to the call book. The provisions of Section 11-A of the Act only provide that order should be passed within the period prescribed, as far as possible. There is no definite time limit prescribed. In any case, the petitioner will not suffer any prejudice as he will be afforded due opportunity before passing any order against him. The matters which were transferred to the call book have now been taken up in view of the revised Circular No. 1023/11/2016-CX dated 8.4.2016 and thereafter notices had been issued to the petitioner for hearing. Delay in the

cases where the revenue of the department is involved, should not be treated as fatal.

11. Heard learned counsel for the parties and perused the paper book.

12. Relevant provisions of Section 11A (1), (4) and (11) of the Act are reproduced hereunder:-

“Section 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.-

(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,-

(a) the Central Excise Officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(b) the person chargeable with duty may, before service of notice under clause (a), pay on the basis of,-

(i) his own ascertainment of such duty; or

(ii) duty ascertained by the Central Excise Officer,

the amount of duty along with interest payable thereon under section 11AA.

XX

XX

XX

(4) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of-

- (a) fraud; or
- (b) collusion; or
- (c) any wilful mis-statement; or
- (d) suppression of facts; or
- (e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,

by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 11AA and a penalty equivalent to the duty specified in the notice.

xx

xx

xx

(11) 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);
- (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) or sub-section (5)."

13. Similar issue was considered by Gujarat High Court in M/s Siddhi Vinayak Syntex Private Limited's case (supra). Judgments of different High Courts were referred to and it was summed up that delay in conclusion of proceedings pursuant to show cause notices after a long gap

without proper explanation, is unlawful and arbitrary. The Court further examined the fact as to whether transfer of proceedings to call book in view of circular dated 14.12.1995 can be said to be a reasonable explanation. The opinion expressed was that the mandate of law cannot be diluted by issuing circular especially when there is no power to issue such directions regarding transfer of cases to call book. Relevant paras 23 and 24 thereof are extracted below:-

“23. Insofar as the show cause notice in the instant case is concerned, the same has been issued under section 11A of the Act. Proceedings under section 11A of the Act are adjudicatory proceedings and the authority which decides the same is a quasi-judicial authority. Such proceedings are strictly governed by the statutory provisions. Section 11A of the Act as it stood at the relevant time when the show cause notice came to be issued, provided for issuance of notice within six months from the relevant date in ordinary cases and within five years in case where the extended period of limitation is invoked. Section 11A thereafter has been amended from time to time and in the year 2011, various amendments came to be made in the section including insertion of sub-section (11) which provides that 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);

(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) or sub-section (5).

24. Thus, with effect from the year 2011 a time limit has been prescribed for determining the amount of duty of excise where it is possible. It cannot be gainsaid that when the legislature prescribes a time limit, it is incumbent upon the authority to abide by the same. While it is true that the legislature has provided for such abiding by the time limit where it is possible to do so, sub-section (11) of section 11A of the Act gives an indication as to the legislative intent, namely that as far as may be possible the amount of duty should be determined within the above time frame, viz. six months from the date of the notice in respect of cases falling under sub-section (1) and one year from the date of the notice in respect of cases falling under sub-section (4) or sub-section (5). When the legislature has used the expression "where it is possible to do so", it means that if in the ordinary course it is possible to determine the amount of duty within the specified time frame, it should be so done. The legislature has wisely not prescribed a time limit and has specified such time limit where it is possible to do so, for the reason that the adjudicating authority for several reasons may not be in a position to decide the matter within the specified time frame, namely, a large number of witnesses may have to be examined, the record of the case may be very bulky, huge workload, non-availability of an officer, etc. which are genuine reasons for not being able to determine the amount of duty within the stipulated time frame. However, when a matter is consigned to the call book and kept in cold storage for years together, it is not on account of it not being possible for the authority to decide the case, but on grounds which are extraneous to the proceedings. In the opinion of this court, when the legislature in its wisdom has prescribed a particular time

limit, the C.B.E. & C. has no power or authority to extend such time limit for years on end merely to await a decision in another case. The adjudicatory authority is required to decide each case as it comes, unless restrained by an order of a higher forum. This court is of the view that the concept of call book created by the C. B. E. & C., which provides for transferring pending cases to the call book, is contrary to the statutory mandate, namely, that the adjudicating authority is required to determine the duty within the time frame specified by the legislature as far as possible. Moreover, as discussed hereinabove, there is no power vested in the C. B. E. & C. to issue such instructions under any statutory provision, inasmuch as, neither section 37B of the Central Excise Act nor Rule 31 of the rules, envisage issuance of such directions. The concept of call book is, therefore, contrary to the provisions of the Central Excise Act and such instructions are beyond the scope of the authority of the C. B. E. & C. Transferring matters to the call book being contrary to the provisions of law, the explanation put forth by the respondents for the delay in concluding the proceedings pursuant to the show cause notice 3.8.1998 cannot be said to be a plausible explanation for not adjudicating upon the show cause notice within a reasonable time. In view of the settled legal position, as propounded by various High Courts, with which this court is in full agreement, the revival of proceedings after a long gap of ten to fifteen years without disclosing any reason for the delay, would be unlawful and arbitrary and would vitiate the entire proceedings.”

14. In the aforesaid case, Gujarat High Court had set aside the order passed after a long delay in pursuance to the show cause notice issued.

15. The judgment of Gujarat High Court was challenged by the revenue before Hon'ble the Supreme Court by filing Special Leave Petition (C) No. 18214 of 2017 – Union of India and others vs M/s Siddhi Vinayak Syntex Private Limited, in which notice has been issued only to the extent as to whether Circular No. 162/73/95-CX dated 14.12.1995, issued by the Central Board of Excise and Customs, Department of Revenue, Ministry of Finance, Government of India, is in conformity/ authorized by the provisions of Section 37-B of the Central Excise Act, 1944. The order on merit has been upheld vide order dated 28.7.2017.

16. The view expressed in M/s Siddhi Vinayak Syntex Private Limited's case (supra) was subsequently followed by Gujarat High Court in Parimal Textiles' case (supra), where again belated order passed after issuing show cause notice, was set aside.

17. Section 11A(11) of the Act provides that Cental Excise Officer shall determine the amount of duty within six months in case notice has been under Sub-section 1 thereof, whereas in the case of fraud, collusion, etc., the period prescribed is one year. No doubt, the words 'where it is possible to do so' have been used, however, that will not stretch the period to decades as is in the cases in hand.

18. In Bhatinda District Co-op. Milk P. Union Limited's case (supra), Hon'ble the Supreme Court upheld a Division Bench judgment of this Court where opinion expressed was that where no period of limitation is provided for exercise of any power, any notice issued more than five years thereafter was held to be unreasonable.

19. For the reasons mentioned above, we find that the notices in the present cases having been issued more than decade back and the proceedings having not been concluded within reasonable time, the same deserves to be quashed.

Ordered accordingly.

The petitions stand disposed of.

(Rajesh Bindal)
Judge

2.8.2018
vs

(Amit Rawal)
Judge

Whether speaking/ reasoned

Yes/No

Whether Reportable

Yes/No