

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

CWP No. 4134 of 2017 (O&M)

Date of decision: 31.8.2018

M/s Gupta Smelter Private Limited

.. Petitioner

VS

Union of India and another

.. Respondents

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

Present: Mr. Jagmohan Bansal, Advocate, for the petitioner.

Mr. Tajender K. Joshi, Advocate, for the respondents.

Rajesh Bindal, J.

This order will dispose of two writ petitions bearing CWP Nos. 4134 and 4135 of 2017, as common questions of law and facts are involved therein.

Challenge in the writ petition is to the show cause notice issued to the petitioner proposing final assessment on the basis of test reports received.

In CWP No. 4134 of 2017, the petitioner imported Zinc Skimming vide Bill of Entry No. 4752691 dated 26.9.2011. The goods were detained. Representative samples were drawn, however, the goods were released provisionally on 1.10.2011. The samples were sent for testing. The report of the laboratory was received on 20.1.2012, whereas the show cause notice for assessment has been issued for 25.1.2017.

In CWP No. 4135 of 2017, the petitioner imported Zinc Skimming vide two Bills of Entry No. 3137295 dated 6.4.2011 and 4653896 dated 15.9.2011. The goods were detained. Representative samples were drawn, however, the goods were released provisionally on 19.4.2011 and 22.9.2011. The samples were sent for testing. The reports of the laboratory were received on 21.7.2011 and 15.2.2013, whereas the show cause notices for assessment have been issued on 9.2.2017.

Learned counsel for the petitioner submitted that at the time of provisional release of goods whatever amount of duty was assessed, the same was paid.

Learned counsel for the petitioner further submitted that show cause notices issued for assessment deserve to be set aside on short ground of delay in issuance thereof, namely, the same have been issued more than five years after the goods were imported, provisionally assessed and released on payment of duty so assessed. In support of the plea, reliance has been placed upon judgment of this Court in CWP No. 10530 of 2017 – M/s GPI Textiles Limited vs Union of India and others, decided on 2.8.2018.

He further submitted that even the reports of testing from the laboratory cannot possibly be relied upon. In fact, zinc skimming is a waste product which contains zinc metallic as well as oxide form. It is such a product that every sample from one container gives different results. A petition was filed by M/s Gupta Agri Care bearing CWP No. 7296 of 2014, seeking a direction for drawing fresh samples for re-testing of the detained imported goods. In that case, the laboratory at the first instance had reported

that the metallic contents in the sample drawn was 98.5%, whereas the same laboratory in the fresh sample drawn reported the metallic content to be less than 70%. After the receipt of the second report, the proceedings initiated were dropped.

It was further submitted that if in any product metallic content is 98.5%, the same would be totally hard, whereas skimming is always semi solid, difference of which can be made out with naked eyes.

Learned counsel for the petitioner further submitted that though Section 18 of the Customs Act, 1962 (for short, 'the Act'), does not provide for any period for final assessment after the goods have been released on provisional assessment but Chapter 7 of the Board's Manual, provides that the assessment be finalized within six months. He further referred to Section 28 of the Act, which provides for issuance of a notice for recovery of any duty not levied or short levied or erroneously refunded within a period of one year. The period is extendable to five years in case of collusion or willful mis-statement or suppression of facts. The case of the petitioner does not fall in that category.

On the other hand, learned counsel for the respondents did not dispute the fact that notices have been issued more than five years after the goods were released after provisional assessment, after drawing the samples. However, he submitted that due to the workload in the department some times the assessments are delayed. The same should not yield any benefit to the petitioner as he had mis-declared the goods.

After hearing learned counsel for the parties, we find merit in the submissions made by learned counsel for the petitioner. It is evident

from the record that import of goods in the present case was made by the petitioner more than five years prior to the issuance of notice and provisional assessment. More than five years prior to issuance of show cause notice, even the representative samples had also been drawn and the test reports from the laboratory were received, but still the department thought it appropriate to sleep over the matter for five years. Issue as to what should be the reasonable time in the absence of statutory period prescribed in the Act for taking any action was considered by Hon'ble the Supreme Court in State of Punjab vs Bhatinda District Co-op. Milk P. Union Limited 2007 (217) E.L.T. 325, wherein it was opined that five years would be the reasonable period in the absence of any time prescribed in the Act.

Issue was further considered by this Court in M/s GPI Textiles Limited's case (supra), where notice issued beyond five years period under the Central Excise Act, 1944, was as set aside as the period was found to be unreasonable. Earlier two judgments of the Gujarat High Court in Siddhi Vinayak Syntex Private Limited vs Union of India 2017 (352) E.L.T. 455 and Parimal Textiles vs Union of India 2018 (8) G.S.T.L. 361 were also referred to therein. Relevant para nos. 13 to 16 therefrom are extracted below:-

“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.”

Another fact, which was pointed out by learned counsel for the petitioner was that under Section 18 of the Act there is no period provided for framing final assessment after the goods are released, however, in Chapter 7 of the Board's Manual, the period provided is six months. Even under Section 28 of the Act for issuance of a notice for recovery of any duty not levied or short levied or erroneously refunded, the period is one year, which is extendable to five years in case of collusion or willful mis-statement or suppression of facts.

Another fact highlighted by the petitioner, which remained undisputed was that in M/s. Gupta Agri Care's case (supra), after a direction was issued by this Court when the samples were re-drawn and tested, the metallic contents found in the sample of similar type were 70%, as against the earlier report of 98.5% and the proceedings in that case were dropped by the department.

For the reasons mentioned above, the writ petitions are allowed. The proceedings initiated by the respondents for framing of assessment are set aside.

(Rajesh Bindal)
Judge

31.8.2018
vs

(Amit Rawal)
Judge

Whether speaking/ reasoned

Yes/No

Whether Reportable

Yes/No