

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH.**

Date of Decision:-22.07.2019

CWP No.10889 of 2015(O&M)

M/s Harkaran Dass Vedpal.

.....Petitioner.

Versus

Union of India & Ors.

.....Respondents.

AND

CWP No.10537 of 2011(O&M)

M/s Harkaran Dass Deep Chand.

.....Petitioner.

Versus

Union of India & Ors.

.....Respondents.

**CORAM:- HON'BLE MR. JUSTICE JASWANT SINGH
HON'BLE MR. JUSTICE LALIT BATRA**

Present:- Mr. Jagmohan Bansal, Advocate for the Petitioner.

Mr. Anshuman Chopra, Advocate for respondent-UOI.

Mr. R.K. Handa, Advocate for the respondent-DRI.

JASWANT SINGH, J.

1. This order will dispose of two Civil Writ Petitions bearing No. 10889 of 2015 and 10537 of 2011, involving identical issues. The Writ Petitions have been filed under Article 226 of the Constitution of India seeking quashing of Show Cause Notice on the ground of jurisdiction of DRI to issue Show Cause Notice and delayed/no adjudication of impugned

Show Cause Notices raising question of limitation.

2. Civil Writ Petition No. 10889 of 2015 has been filed challenging Show Cause Notice dated 19.03.2009 (**Annexure P-9**) and Civil Writ Petition No. 10537 of 2011 challenging Show Cause Notice dated 20.02.2009 (**Annexure P-6**).

3. The Petitioners-partnership firms are importers of non-edible oil which is used to manufacture soap. The Petitioners during 2003-2006 imported non-edible oil and Customs Authorities permitted clearance thereof on payment of customs duty which was assessed by Proper Officer under Section 17 read with Section 48 of the Customs Act, 1962 (for short '1962 Act'). The Directorate of Revenue Intelligence (for short 'DRI') initiated an investigation against different importers including Petitioners-firms alleging mis-declaration of description and value of imported goods. It was alleged that the petitioner firms were misdeclaring the palm fatty acid distillate, palm acid oil as mixed fatty acid and mixed acid oil. The DRI after completing investigation issued Show Cause Notice dated 20.02.2009 (**P-6**) subject matter in CWP No. 10537 of 2011 raising a demand of short levied custom duty alongwith interest and proposing penalty against petitioner-M/s Harkaran Dass Deep Chand and one M/s Gayatri Sewa Sansthan, while issuing show cause notice dated 19.03.2009 (**P-9**) subject matter in CWP No. 10889 of 2015 raising a similar demand qua petitioner-M/s Harkaran Dass Vedpal.

The show cause notices were issued by DRI, however, it was answerable to Commissioner of Customs. The Petitioners filed present writ petitions assailing aforestated show cause notices on the ground of jurisdiction being issued by not proper officers in terms of Section 2 (34) of the 1962 Act; as also on the ground of limitation and delayed adjudication.

4. The respondent DRI has filed reply on behalf of all the respondents justifying the assigning of the functions of a proper officer to the official of DRI for the purpose of Section 17 & 28 of the Customs Act 1962 including the issuance of the Notification promulgating the Customs (Amendment and Validation) Act as Act No.14 of 2011 retrospectively vesting the jurisdiction to the stated officers.

5. During the pendency of present Writ Petitions, this Court vide order dated 02/08/2018 in **GPI Textiles Ltd. Vs UOI and others 2018 (362) ELT 388 (P&H)** has quashed a Show Cause Notice issued under Section 11A of the Central Excise Act, 1944 on the ground that authorities are bound to decide Show Cause Notice within reasonable period in terms of Section 11A (11) of the Central Excise Act 1944. Further Government vide Finance Act, 2018 has amended Section 28 (9) of the 1962 Act whereby phrase “**where it is possible to do so**” has been omitted and it has been made mandatory to adjudicate show cause notice within stipulated period.

The Petitioners have moved Civil Misc. Applications No. 15804-2018, 15970-2018, 9410-2019 and 9425-2019 seeking disposal of writ petitions in the light of judgment of this court in the case of **GPI Textiles (Supra)** and **amended Section 28 of the Act.**, which were filed on 29.06.2019 with advance copies to the counsel for the respondents, have been allowed and documents taken on record.

6. Mr. Jagmohan Bansal, learned Counsel for the Petitioner contended that case of Petitioners is squarely covered by judgment of this Hon’ble Court in the case of GPI Textile. That apart as per amended Section 28 (9) of the 1962 Act, applying the principles of retroactive amendment,

the Respondent was bound to pass order by 29/03/2019 which Respondent has failed thus show cause notice stands vacated. In support of his contention, Ld. Counsel cited Division Bench judgments of this Court in the case of **Ballarpur Industries Ltd. Vs. State of Punjab (2010) 35 PHT 5 (P&H)** and **State of Punjab Vs. Patiala Co-operative Sugar Mills Ltd. VATAP No. 110 of 2013** decided on 26.02.2014 following the principle of retroactive amendment laid down in **Ballarpur's case**.

7. Mr. Anshuman Chopra, learned Counsel for the Respondents argued that though there was no order restraining department to pass order, however department in view of pending writ petitions and to avoid multiplicity of litigation in view of pendency of various petitions before Hon'ble Supreme Court on the issue of jurisdiction of DRI to issue show cause notice, chose to keep pending adjudication of show cause notice. He further pleaded that amended section 28(9) is not applicable in the case of Petitioners because it is prospective in nature and Explanation 4 to Section 28 specifically provides that notice issued prior to date of amendment of 2018 would be governed by old Section 28 of the Act. Department has filed SLP against judgment of this court in the case of GPI Textile and Hon'ble Supreme Court has already issued notice.

8. Before advertng to arguments of both sides, it would be profitable to notice amended and un-amended Section 28 of the Act and ratio of judgment of this Court in the case of GPI Textile (Supra).

Un-amended Section 28 read as under:

SECTION 28. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. —

- (1) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason

other than the reasons of collusion or any wilful mis-statement or suppression of facts,—

(a) the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been 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 the duty or interest, may pay before service of notice under clause (a) on the basis of,—

(i) his own ascertainment of such duty; or

(ii) the duty ascertained by the proper officer,

the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.

Provided that the proper officer shall not serve such show cause notice, where the amount involved is less than rupees one hundred.

(2) xxxxxxxx

(3) xxxxxxxx

(4) Where any duty has not been levied or has been short-levied or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of, —

(a) collusion; or

(b) any wilful mis-statement; or

(c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied 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.

(5) xxxxx

(6) xxxxx

(7) xxxxx

(8) The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the

amount of duty or interest due from such person not being in excess of the amount specified in the notice.

(9) The proper officer shall determine the amount of duty or interest under sub-section (8)-,

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

(10) xxxxxxxx

(11) xxxxxxxx

Explanation 1, 2, 3 xxxxx

W.e.f. 29/03/2018, Sub-section (9) of Section 28 has been amended and a new Sub-section (9A) alongwith explanation 4 has been inserted.

Amended provisions are reproduced as under:

(9) The proper officer shall determine the amount of duty or interest under sub-section (8),-

(a) within six months from the date of notice, in respect of cases falling under clause (a) of sub-section (1);

(b) within one year from the date of notice, in respect of cases falling under sub-section (4).

Provided that where the proper officer fails to so determine within the specified period, any officer senior in rank to the proper officer may, having regard to the circumstances under which the proper officer was prevented from determining the amount of duty or interest under sub-section (8), extend the period specified in clause (a) to a further period of six months and the period specified in clause (b) to a further period of one year:

Provided further that where the proper officer fails to determine within such extended period, such proceeding shall be deemed to have concluded as if no notice had been issued.

(9A) Notwithstanding anything contained in sub-section (9), where the proper officer is unable to determine the amount of duty or interest under sub-section (8) for the reason that –

- (a) an appeal in a similar matter of the same person or any other person is pending before the Appellate Tribunal or the High Court or the Supreme Court; or
- (b) an interim order of stay has been issued by the Appellate Tribunal or the High Court or the Supreme Court; or
- (c) the Board has, in a similar matter, issued specific direction or order to keep such matter pending; or
- (d) the Settlement Commission has admitted an application made by the person concerned,

the proper officer shall inform the person concerned the reason for non-determination of the amount of duty or interest under sub-section (8) and in such case, the time specified in sub-section (9) shall apply not from the date of notice, but from the date when such reason ceases to exist.

Explanation 4 – For the removal of doubts, it is hereby declared that in cases where notice has been issued for non-levy, not paid, short-levy or short paid or erroneous refund after the 14th day of May, 2015, but before the date on which the Finance Bill, 2018 receives the assent of the President, they shall continue to be governed by the provisions of section 28 as it stood immediately before the date on which such assent is received.

Emphasis supplied

From the perusal of above quoted amended Section 28, it is evident that w.e.f. 29/03/2018 it is mandatory for the proper officer to adjudicate show cause notices in case of custom duty not paid or short levied within 1 year, which may be extended for a further period of 1 year by an officer senior in rank to the proper officer having regard to the circumstances under which the proper officer was prevented from passing

an order within one year. In such an eventuality, if the proper officer fails to pass an order within that extended one year period, then the natural consequence is lapse of the notice. However, if the proper officer for the reasons stated in Sub Section (9A) informs the person concerned for non determination of leviable duty and interest under Sub Section 8, then the initial period of one year for such short levied duty and interest to be determined by the proper officer shall commence from the date such reason ceases to exist. The notices issued for non levy, short levy etc., after 14.05.2015 were to be governed with the earlier provisions of Section 28 in view of Explanation 4 reproduced hereinabove.

Ratio of Division Bench Judgment in GPI Textile:

9. In the case of GPI Textile, a show cause notice dated 27/12/2001 was issued under Section 11A of the Act which remained pending for adjudication till 2016 and on 3.5.2017 Respondent issued notice of hearing which came to be challenged on the ground of inordinate delay in disposal of show cause notice. This court relying upon judgment of Gujarat High Court in the case of **Sidhi Syntex (P) Ltd. Vs UOI, 2017 (352) ELT 455** quashed show cause notice. The operative part of judgment reads as under:

“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 v. M/s. Siddhi Vinavak 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 37B 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 Vinavak 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 Central 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* 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

It is not in dispute that the provisions of Section 11A of the Central Excise Act, 1944 involved in the aforesaid judgment are *para materia* to the provisions of Section 28 of the 1962 Act. From the perusal of above quoted judgment, it can be easily and safely concluded that show cause notices even as per un-amended provisions of Section 28 of the 1962 Act could not be kept pending beyond a reasonable period and authorities were/are duty bound to pass orders within reasonable period of time.

10. Having heard learned Counsel for the parties at length and scrutinized record of the case, the conceded position as emerging in the present petitions is that the DRI issued Show Cause Notice(s) on 20.02.2009 (**Annexure P-6**) and 19.03.2009 (**Annexure P-9**). The Petitioners filed writ petitions before this court assailing the show cause notices *inter alia* on the ground of jurisdiction of DRI to issue show cause

notices. In the CWP No. 10889 of 2015 question of non adjudication of show cause notice was also raised. In none of writ petition, adjudication of show cause notice or its operation was stayed rather an interim order dated 01.09.2015 was passed in CWP No. 10889 of 2015 which is reproduced as under:

“ Adjourned to 24.9.2015. However, the Respondents may proceed with the show cause notice in the meantime. ”

This Court granted liberty to Respondents to proceed with Show Cause Notice, however, concededly **till date** impugned Show Cause Notices have not been adjudicated upon.

11. This Court while deciding GPI Textile Ltd. (Supra) noticed order passed by Hon’ble Supreme Court in SLP(C) No. 18214 of 2017 filed against Siddhi Vinayak Syntex Private Limited. The Respondent-Department/Revenue has filed SLP(C) No. 45051 of 2018 against judgment of this Court in CWP No. 10530 of 2017 (GPI Textile) and Hon’ble Supreme Court vide order dated 03.01.2019 has ordered to tag alongwith SLP(C) No. 18214 of 2017, thus argument of Respondent that their SLP is pending before Hon’ble Supreme Court cannot be accepted because the underlying rationale, reasoning and *ratio decendi* remains operative.

12. Applying the ratio of the Division Bench judgment of this Court in the case of GPI Textiles Ltd. and amended Section 28 of the 1962 Act, this Court finds that present petitions deserve to be allowed on both counts.

13. The Judgment of **GPI Textile** dealt with Section 11A of Central Excise Act, 1944 and present matters relate to Section 28 of Customs Act, 1962 which is *para materia* with Section 11A of Central

and concededly are still pending adjudication inspite of no stay on continuing of proceedings / liberty granted to proceed with the adjudication of the show cause notices. As per judgment of GPI Textile, show cause notice deserves to be quashed if it is pending adjudication beyond a reasonable period and in the present case, notice(s) are pending for more than 10 years which by no stretch of limitation can be held as reasonable period. In GPI Textile this court noticed judgment of Hon'ble Supreme Court in the case of Bhatinda District Co-op. Milk P. Union Limited where 5 years period has been considered as reasonable period for revision.

Retroactive application of the amended provisions of Section 28 of the 1962 Act

14. From the bare perusal of the afore-quoted amended Sub-section (9) and newly inserted (9A) of Section 28 w.e.f. 28.03.2018, it is evident that authorities are bound to pass order within one year from the date of Show Cause Notice in cases of Custom Duty not paid/short levied and said period may be extended for a further period of one year by any officer senior in rank to the proper officer having regard to the circumstances under which proper officer was prevented from passing an order before the expiry/lapse of the initial stipulated one year. Still further in case any circumstance as noticed in Sub-section (9A) exists, the extended period of one year provided in Sub Section 9 shall commence from the date when such reason ceases to exist provided the proper officer informs the person concerned of the reason for such non determination of amount of duty or interest under Sub Section 8. Thus the only outcome of non adjudication by the proper officer within one year without invoking of Sub-section (9A) or within the extended period of one year, if any, by a senior officer in terms

of the first proviso to Sub Section (9) would be lapsing of notice, as provided in the second proviso to the Sub Section (9) of the amended Section 28 of the 1962 Act.

15. The contention of the counsel for the respondents that amended Section 28 is not applicable in the case of Petitioners deserves to be rejected because amendment is not retrospective but it is certainly retroactive. Mandatory limitation would be applicable treating pending show cause notice as if issued on 29/03/2018.

The Division Bench Judgment of this Court, cited by counsel for the petitioner, in **Ballarpur's case**, dealt with Section 11 of the Punjab General Sales Tax Act, 1948 (for short 'PGST Act'). Under Section 11 of PGST Act, 1948, prior to 03.03.1998 no limitation period for framing assessment was prescribed and assessments for the period prior to 1998 were pending. While dealing with question of application of said limitation period of 3 years to assessment years falling prior to 1997-98 in view of the amended provision providing a three year limitation, this Court in the case of **Ballarpur Industries Ltd. Vs. State of Punjab (2010) 35 PHT 5 (P&H)** decided in favour of the assessee and held that assessment of any year falling prior to 1997-98 shall be time barred if it is framed after the expiry of 3 years from 03.03.1998 i.e. date on which limitation period was prescribed. The ratio of the judgment in **Ballarpur's case** was followed by another Division Bench of this Court in **State of Punjab Vs. Patiala Co-operative Sugar Mills Ltd. VATAP No. 110 of 2013** decided on 26.02.2014. The relevant portion of the judgment in **Ballarpur's case**, for ready reference, reads as under:-

“ There is no dispute that **prior to the amendment of**

provisions of Section 11 of the PGST Act w.e.f. 03.03.1998 there was no limitation provided for the assessing authority under Sub Section (1) of Section 11 to assess the amount of tax due from the dealer on the basis of returns if he was satisfied with the returns furnished by the dealer. There was also no limitation provided for the assessing authority to assess the dealer under sub section (3) of Section 11 of the Act and consideration of evidence produced, if any. However, the position was materially altered w.e.f. 03.03.1998 which provided that the assessing authority was required to pass an order of assessment on the basis of returns within a period of three years from the last date prescribed for furnishing the last return in respect of such return for both assessment of tax due under Sub Section (1) as well as sub section (3) of Section 11 of the PGST Act.

It is also not dispute that the notices in the form ST XIV for the assessment years 1995-96 and 1996-97 were issued on 26.04.2001 and 21.04.2001 respectively. The assessment orders under Section 11(3) assessing demand of tax for a sum of Rs.18,18,318/- and Rs.10,51,851/- for the respective assessment years was passed on 27.07.2001. **Therefore it is not disputed that even if the three years period of limitation was to be computed w.e.f. 03.03.1998, the assessment orders for both the assessment years were beyond the period of limitation as per the amended provisions of Section 11(3) of the Act.** It is also not disputed that the learned Tribunal has on consideration of the provisions of PGST Act and ratio of judgments of cited case law has upheld the contention of the petitioner dealer that the amended period of limitation provided under Sub Section (3) being a piece of procedural law would be applicable to the pending cases like the present case. Learned Tribunal has also held that the assessments made by the assessing authority are not legally sustainable. It is also the admitted case of the Stat that the aforesaid findings of the Tribunal have not been challenged by the Sale Tax/Department/Revenue. **Thus, we do not consider it necessary to go into the question as to whether the amended provisions of sub section (1)(3) of Section 11 providing a period of limitation would apply to the pending assessments for the years prior to 03.03.1998 or not as even if the amended provisions are made applicable**

prospectively and limitation of three years is assumed to commence w.e.f. 03.03.1998, admittedly, the assessment orders dated 27.07.2001 are clearly beyond the period of limitation of three years and thus not sustainable in the eyes of law. Hence, there is no ascertainment/determination of the amount of tax due for the said two assessment years either by the assessee petitioner Company under Sub Section (4) of Section 10 or by the Assessing Authority under Section 11 of the PGST Act.

Therefore, in view of the above discussions, we are of the considered opinion that the findings recorded by learned Tribunal vide its impugned order (**Annexure P-15**) that there exists no justification for giving any relief to the petitioner company even after taking into account the limitation concept on the ground that the petitioner company cannot be absolved of their liability to pay purchase tax as per their returns by filing misleading statements, cannot be countenanced and thus are set aside. As a sequel thereto, the impugned order dated 30.01.2005 (**Annexure P-15**) qua the demand of tax for the assessment years 1995-96 and 1996-97 is set aside.

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Emphasis supplied

The afore-stated Amendment of Section 28 came into force w.e.f. 29.03.2018 and in the case of present Petitioners till date no order has been passed. Applying the principles of retroactive amendment, the Respondent was bound to pass order by 28.03.2019 which Respondent has failed. The Respondent has failed to pass order within one year from the date of Show Cause Notice, assuming the date to be 29.03.2018 on the principle of retroactive operation; still further there is nothing on record / to a pointed query to even suggest that the said period was ever extended by one year by any senior officer in terms of the first proviso to Sub Section (9) of amended Section 28. No notice under Sub-section (9A) has been served upon Petitioners by the proper officer seeking the deferment of the

sub-section (9A). By Amendment of 2018, the legislature has made it clear that no Show Cause Notice shall be kept pending beyond a period of 1 year by the proper officer unless and until requirement of Sub-section (9A) are complied with or beyond the extended period of another one year by an order passed by any officer senior in rank to the proper officer detailing the circumstances which prevented the proper officer from passing the order within the initial period of one year.

In the present writ petitions, the Respondent-DRI issued Show Cause Notice on 20.02.2009 (**P-6**) & 19.03.2009 (**P-9**) for short levied custom duty and interest due to mis-declaration of description and value of goods relating to the two partnership firms/petitioners and at that point of time the proper officer was required to pass an order within one year i.e. By 2010 where it was possible to do so. However after the Amendment w.e.f. 29.03.2018, the Respondent was bound either to pass an order within one year i.e. by 28.03.2019 in terms of clause (b) of Sub Section (9) of amended Section 28 or within the extended time of one year in terms of first proviso , which is concededly not the case at hand or the extended period in terms of requirement of Sub Section (9A) which also is not the case at hand. Hence, the inevitable conclusion is that the show cause notices (**P-6**) and (**P-9**) in respective writ petitions will have to be accepted as lapsed.

16. In view of our above findings, we are of the considered opinion that present petitions deserve to be allowed on both counts namely (i) application of ratio laid down by this court in the case of **GPI Textile (Supra)** and (ii) retroactive application of the provisions of Section 28(9), (9A) as amended w.e.f. 28.03.2018 of the 1962 Act. Accordingly, both the Petitions are allowed and Show Cause Notices dated 19.03.2009 (CWP No.

10889 of 2015) and Show Cause Notice dated 20.02.2009 (CWP No. 10537 of 2011) qua the petitioners-partnership firms are quashed.

(JASWANT SINGH)
JUDGE

(LALIT BATRA)
JUDGE

July 22, 2019
Vinay

Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No