IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

Date of Decision:-21.08.2019

CWP No.6862 of 2017(O&M)

Anil Kumar Soni.

......Petitioner.

Versus

Union of India & Ors.

......Respondents.

2

CWP No.6863 of 2017(O&M)

M/s Jaldhara Cotspin (P) Ltd.

......Petitioner.

Versus

Union of India & Ors.

......Respondents.

3

CWP No.6865 of 2017(O&M)

R.K. Soap & Oil Traders.

......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(s).

Mr. Sourabh Goel, Advocate for respondent nos.1 to 3.

Mr. D.D. Sharma, Advocate for respondent nos.1 & 2
(in CWP No.6862 of 2017).

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JASWANT SINGH, J.

CM No.11566-CWP of 2019 in
CWP No.6862 of 2017

Present CM has been filed under Article 226 read with Section 151 of CPC for placing on record copy of judgment passed by this Court in **M/s Harkaran Dass Vedpal** Vs. **Union of India** decided on 22.07.2019 reported as **2019-TIOL-1591-HC-P&H-CUS** as Annexure **P-6**.

For the reasons stated in the CM, the same is allowed and copy of judgment dated 22.07.2019 in **M/s Harkaran Dass Vedpal** Vs. **Union of India** reported as **2019-TIOL-1591-HC-P&H-CUS** is taken on record as Annexure **P-6**. Registry to place the same at appropriate place and paginate the paper book accordingly.

MAIN CASES

By this common order 3 (**three**) Civil Writ Petitions No. 6862 of 2017, 6863 of 2017 & 6865 of 2017 are disposed of as common issue is involved. 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.

2. Civil Writ Petition No. 6862 of 2017 has been filed challenging Show Cause Notice dated 02.04.2009 **(Annexure P-1),** CWP No. 6863 of 2017 challenging Show Cause Notice dated 19.02.2011 **(Annexure P-1)** and CWP No. 6865 of 2017 challenging Show Cause Notice dated 31.03.2009 **(Annexure P-1).**

Brief facts:

3. **CWP No. 6862 of 2017**

The Petitioner, resident of Ludhiana, by qualification is a Chartered Engineer. The Directorate of Revenue Intelligence (DRI) initiated an investigation against Tristar Air Conditioning Pvt. Ltd., Solan alleging mis-declaration of description of goods. The DRI after concluding investigation issued a Show Cause Notice dated 02.04.2009 **(Annexure P-1)** whereby Customs Duty alleging mis-declaration of description was demanded from importer and penalty under Section 112 read with Section 114AA of the Customs Act, 1962 was proposed to be imposed upon the Petitioner. There is no demand of duty from the Petitioner, which has been demanded from importer and impugned show cause notice is confined to penalty *qua* the Petitioner. The Respondent fixed the matter for hearing on 01.04.2017. The Petitioner could not be served notice of hearing on account of change of his address and thereafter second hearing notice dated 10.03.2017 **(Annexure P-4)** was served upon his new address. The Petitioner at this stage sought copy of show cause notice and department vide letter dated 28.03.2017 supplied copy of the show cause notice.

CWP No. 6863 of 2017

The Petitioner is engaged in the manufacturing of textile products. The Petitioner during 2007-2009 imported Tow/Fibre to be used to manufacture yarn. The DRI, Ludhiana initiated an investigation against the Petitioner which culminated into Show Cause Notice dated 19.02.2011 (**Annexure P-1**) alleging mis-declaration of description and value of goods. The Commissioner of Customs, Nhava Sheva, fixed the matter for hearing on 21.08.2012. The Petitioner requested for adjournment and Commissioner of Customs, Nhava Sheva again fixed the matter for hearing on 14.09.2012. The Petitioner appeared for personal hearing and filed Reply dated 13.09.2012 (Annexure P-3). The Adjudicating Authority heard the matter in September' 2012 but did not pass order till March' 2017. The Respondent-Commissioner of Customs, Ludhiana issued hearing Notice dated 23.03.2017 **(Annexure P-5)** for personal hearing on 30.03.2017.

CWP No. 6865 of 2017

The Petitioner is engaged in the manufacture of Soap used for washing of clothes. The Petitioner during 2004-2006 imported Mixed Acid Oil/Acid Oil and Customs Authorities after framing assessment permitted clearance of goods. The DRI initiated an investigation against the Petitioner which culminated into Show Cause Notice dated 31.03.2009 (**Annexure P-1**) alleging mis-declaration of description and value of goods. The Petitioner filed Reply dated 28.06.2010 (**Annexure P-2**) and requested cross-examination of chemical examiner and one witness. The Adjudicating Authority vide Order dated 02.08.2010 (**Annexure P-3**) rejected request of the Petitioner to allow cross-examination, however on appeal Ld. Tribunal set aside order of Adjudicating Authority and vide Order dated 05.03.2012 (**Annexure P-4**) directed the Adjudicating Authority to grant opportunity of cross-examination. It is apt to mention here that Respondent rejected request of Petitioner to permit cross-examination, however show cause notice was not adjudicated. The Respondent vide Notice dated 08.02.2017 **(Annexure P-5)** fixed the matter for personal hearing on 23.02.2017 at Amritsar.

ARGUMENTS

4. Counsel for the Petitioners contended that a period of more than 7 years has expired from the date of show cause notice, however till date no adjudication order has been passed thus present Petitions are squarely covered by judgments of this Court in the case of **GPI Textile Ltd.** Vs. **Union of India and others 2018 (362) ELT 388 (P&H)** and **Harkaran Dass Vedpal** Vs. **Union of India and Others 2019 TIOL 1591 P&H-CUS** and accordingly deserve to be allowed in same terms.

5. The Counsel for the Respondents contended that Petitioners have alternative remedy to file reply and raise all pleas before the authorities, therefore, writ petitions are not maintainable. Ld. Counsel in support of his contention cited judgments in the case of **Orient Ship Agency Pvt. Ltd.** Vs. **Commissioner of Customs** 2013 (296) ELT 3 (Bom.), **T.N. Krishna Iyer** Vs. **A.K. Baig, Asstt. Collector of Central Excise** 2009 (247) ELT 49 (Bom.), **Sova Solar Ltd.** Vs. **Commr. of Cus., C.Ex. & S.T., Durgapur** 2016 (340) ELT 133 (Cal.), **Titaghur Paper Mills Co. Ltd., and another** Vs. **State of Orissa and another** 1983 AIR (SC) 603.

Mr. Sourabh Goel advanced excuse for delay in every Petition. As per learned Counsel, in CWP No. 6862 of 2017 show cause notice could not be adjudicated as there were number of Noticee(s) who are stationed at different places, so service of notices and relied upon documents took time. In CWP No. 6863 of 2017, Petitioner filed interim reply and matter was heard but could not be decided due to pendency of one petition in Hon'ble Delhi High Court regarding jurisdiction of DRI. In CWP No. 6865 of 2017, due to restructuring of cadre, post of Commissioner of Customs (Adjudication) was abolished so matter could not be adjudicated.

CONSIDERATION

6. The preliminary objection of Respondents regarding maintainability of writ in view of alternative remedy is devoid of merits and deserves to be turned down. In the case of ***Orient Ship Agency (Supra)***, the main ground to challenge show cause notice was that it was issued invoking extended period of limitation which can be invoked in the event of collusion, mis-statement or suppression of facts. The said question is a mixed question of law and facts, therefore Bombay High Court refused to interfere and held that question of delayed adjudication has to be decided in each individual case. Judgment in the case of ***T.N. Krishna Iyer (Supra)*** deals with prosecution, judgment in the case of ***Soval Solar Ltd. (Supra)*** and ***Titagur Paper Mills (Supra)*** deal with order passed by Adjudicating Authority. These judgments are distinguishable as present petitions are raising question of reasonable period of limitation as well retroactive amendment and as per judgment of Hon'ble Supreme Court in the case of **State of Punjab** Vs. **Bhatinda District Co-Op. Milk P. Union Ltd.** 2007 (217) ELT 325 writ is maintainable because question of reasonable period of limitation cannot be decided by authorities appointed under relevant statute, thus we find it appropriate to entertain present writ Petitions under article 226 of the Constitution of India.

7. As cited by counsel for the Petitioners, we have decided CWP No. 10889 of 2015 titled as **M/s Harkaran Dass Vedpal** Vs. **Union of India & Ors**. Decided on 22.07.2019 reported as **<u>2019-TIOL-1591-HC-P&H-CUS</u>** (taken on record as **Annexure P-6**) involving identical issue thus it would be profitable to reproduce relevant extracts of said judgment as below:

> **Ratio of Division Bench Judgment in GPI Textiles**
>
> **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 Gujrat High Court in the case of Sidhi Syntex (P) Ltd. Vs UOI, <u>2017 (352) ELT 455</u> 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 Svntex 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 Excise Act. In the present petitions, show cause notices were issued in 2009 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 Cooperative 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 Section11(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 sequal 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. ”

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 commencement of the initial one year notice period for the reasons stated in 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. ”

8. In the present petitions, show cause notice(s) were issued on 02.04.2009, 31.03.2009 & 19.02.2011. Adjudication was never stayed by this Court or any other Court so Respondents were always free to adjudicate show cause notice. The excuse of non-adjudication tendered by counsel for the Respondents might be ground to extend limitation by passing order in terms of proviso to Section 28 (9) or Section 28 (9A), however in the absence of passing any such order, the Respondent-Department cannot absolve itself from its statutory duty in view of judgment of this Court in the case of ***GPI Textile Ltd. (Supra***) and ***Harkaran Dass Vedpal (****Supra*).

In view of judgment of this court in the case of ***GPI Textile Ltd. (Supra***) and ***Harkaran Dass Vedpal (Supra***) (also on record as **P-6**), present petitions are allowed and accordingly show cause notice dated 02.04.2009 **(Annexure P-1)** in CWP No. 6862 of 2017 *qua* Petitioner, show cause notice dated 19.02.2011 **(Annexure P-1)** in CWP No. 6863 of 2017 and 31.03.2009 **(Annexure P-1**) in CWP No. 6865 of 2017 are quashed.

(JASWANT SINGH)
JUDGE

(LALIT BATRA)
JUDGE

August 21, 2019
Vinay

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