IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CM No. 12782-CWP of 2019 in/and
Civil Writ Petition No. 9863 of 2017 (O&M)
Date of Decision: 22.10.2019

M/s. Shri Ram Agro Chemicals Pvt. Ltd. through its Director Shri Amit Jain, Tohana, District Fatehabad, Haryana

..... Petitioner

Versus

Union of India and others

..... Respondents

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

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

Mr. D.D. Sharma, Sr. Standing Counsel, Indirect Taxation for respondent Nos. 1 & 2/DRI.

Mr. Sunish Bindlish, Sr. Standing Counsel, Indirect Taxation for respondent No. 3/Customs Deptt.

****

JASWANT SINGH, J.

CM No. 12782-CWP of 2019

Present application moved by the applicant-petitioner is for disposal of the present writ petition in terms of judgment dated **21.08.2019** passed by this Court in ***CWP No. 6862 of 2017***, titled ***"Anil Kumar Soni Versus Union of India and others"***, as also to be taken on record as **Annexure A-1**.

Upon notice of the application, a reply dated 24.09.2019 on behalf of respondent No. 3/Customs Department and an additional affidavit dated 30.09.2019 of Sh. S.K. Mall, Commissioner of Customs, NS-I, JNCH, Maharashtra, has been filed. Separate reply dated Nil has been filed on behalf of respondent No. 2/DRI.

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Registry has separately page marked the paper-book of the aforesaid application.

MAIN CASE

1. Through the instant Civil Writ Petition, the petitioner is assailing Show Cause Notice dated 17.05.2007 **(Annexure P-1)** on the ground of jurisdiction of DRI to issue Show Cause Notice and delayed/no adjudication of impugned Show Cause Notice.

2. The conceded position as emerging from record is that the petitioner-a Private Limited Company is engaged in the manufacture of Zinc Sulphate who during 2003-2006 imported its raw material i.e. Zinc Ash and Zinc Skimming. The Customs Authorities after framing assessment permitted clearance of goods, however, Directorate of Revenue Intelligence (for short 'DRI') initiated an investigation against the petitioner which culminated into Show Cause Notice dated 17.5.2007 **(P-1**) alleging mis-declaration of value of goods. The petitioner at the first instance filed an application dated 5.12.2008 before Settlement Commissioner who vide order dated 21.8.2009 (**Annexure P-3**) rejected the application and relegated the petitioner to the Adjudicating Authority. The petitioner filed reply dated 27.9.2012 (**Annexure P-4**) before Adjudicating Authority, who fixed the matter for personal hearing; and the petitioner on 22.10.2012 attended the personal hearing. The respondent did not adjudicate show cause notice inspite of filing reply and conclusion of hearing on 22.10.2012. The respondent vide Notice dated 25.4.2017 **(Annexure P-7)** again fixed the matter for personal hearing on 9.5.2017 and the petitioner filed present petition seeking quashing of show cause notice on the ground of

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non/delayed adjudication.

ARGUMENTS:

3. Mr. Jagmohan Bansal, counsel for the petitioner contended that a period of more than twelve (12) years have expired from the date of show cause notice, however till date no adjudication order has been passed, thus present petition is 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), Anil Kumar Soni Vs UOI CWP No. 6862 of 2017** decided on **21.08.2019** and **Harkaran Dass Vedpal** Vs. **Union of India and Others 2019 TIOL 1591 P&H-CUS** and accordingly deserves to be allowed in same terms.

4. Mr. Sunish Bindlish, counsel for Customs/respondent No. 3 contended that the petitioner has alternative remedy to file reply and raise all pleas before the authorities, therefore, writ petition is not maintainable. Learned counsel in support of his contention cited judgments in the case of ***Simplex Infrastructure Ltd Vs. UOI 2015 (321) ELT A208 (SC), CC Vs Charminar Nonwovens Ltd 2004 (167) ELT 372 (SC), Punjab Tractors Ltd. Vs UOI 1999 (113) ELT A 181 (SC)***. He further submitted that delay took place on account of non-cooperative attitude of the petitioner or on account of the dispute regarding the jurisdiction of DRI to issue show cause notice. The department has filed SLP against judgment of this court in the case of ***GPI Textiles (Supra) and Gupta Smelters***, therefore, it would be appropriate to adjourn the matter to await outcome of the SLP. On the question of retroactive application of amendment of Section 28(9) of the Customs Act, 1962 and judgment of this court in the case of **Harkaran**

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Dass Vedpal Vs Union of India contended that at the time of delivering said judgment Second and Fourth Explanation was not brought to the notice of this Court. He also contended that Officer Senior in rank to proper officer in terms of amended Section 28(9A) of 1962 Act has on 26.3.2019 extended period for 1 year, as matter could not be adjudicated on account of pendency of petition before this Court.

CONSIDERATION

5. The preliminary objection of the respondents regarding maintainability of writ in view of alternative remedy is devoid of merits and deserves to be turned down. We while adjudicating case of **Anil Kumar Soni Vs UOI CWP No. 6862 of 2017** decided on **21.08.2019** (available on record as Annexure A-1 with **CM No. 12782 of 2019**) have dealt in detail with same objection, nevertheless counsel for the respondent inspite of being well aware of said judgment is harping on the question of alternative remedy. The present petition is 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 Constitution of India.

6. As cited by counsel for the petitioner, we have decided CWP No. 10889 of 2015 titled as **M/s Harkaran Dass Vedpal** Vs.**Union of India & Ors**. reported as **2019-TIOL-1591-HC-P&H-CUS** and based thereupon **Anil Kumar Soni Vs UOI CWP No. 6862 of 2017** decided on **21.08.2019,**

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involving identical issue(s), thus it would be profitable to reproduce relevant extracts of said judgment in ***M/s. Harkaran Dass Vedpal's case (supra)*** 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, 2017 (352) ELT 455 2017-TIOL-911-HC-AHM-CX 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/-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*

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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.

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11. This Court while deciding GPI Textile Ltd. (Supra) noticed order passed by Hon'ble Supreme Court inSLP(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

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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:-*

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" 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*

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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

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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.* ***"***

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7. In the present petition, show cause notice was issued on 17.5.2007 and except a bald averment, there is nothing on record to cull out that petitioner did not cooperate in the adjudication. The Settlement Commission rejected application of the petitioner on 21.8.2009 and thereafter, there was neither any stay order passed by any court nor any other legal hurdle, thus the respondent was free to adjudicate show cause notice, however respondent opted to keep matter in abeyance. Concededly, the petitioner filed reply on 27.9.2012 and attended personal hearing which took place on 22.10.2012. No explanation is coming forth for non-adjudication after rejection of application by Settlement Commission and at the most conclusion of personal hearing held on 22.10.2012. Thus, excuse tendered by counsel for the respondents for non-adjudication is unfounded and is rejected.

8. Counsel for the Customs Department/respondent No. 3 vehemently pleaded that show cause notice could not be adjudicated due to pendency of present writ petition before this court and Officer Senior in rank to the Proper Officer in terms of the amended Section 28(9A)(c) of the Customs Act, 1962 has on 26.3.2019 extended period of adjudication for further one year. He further contended that Chief Commissioner applied his mind to the facts of the case and the circumstances under which the Proper Officer was prevented from determining the amount of duty or interest, starting from the issuance of show cause notice, the issuance of the subsequent corrigendum, the appointment of the common adjudicating authority, continuance of the case in the “call book” category, the pendency of the present civil writ petition before this Court.

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Per contra counsel for the petitioner contended that neither prior to the alleged/purported extension order dated 26.3.2019 opportunity of hearing was granted nor till date copy of said order has been communicated. Thus, in the absence of communication there is no sanctity of the said purported order in the eyes of law. In support of his contention, he cited judgment of this Hon'ble Court in the case of **A.B. Sugar Ltd. Vs State of Punjab Manu/PH/1155/2009, Aabhas Spinners Pvt Ltd. Vs UOI 2010 (260) ELT 554 (P&H)** and judgment of Hon'ble Supreme Court in the case of **Assistant Collector of Customs Vs Charan Das Malhotra MANU/SC/0605/1971**. Mr. Bansal further contended that stand of respondent is self contradictory in as much as alleged order dated 26.3.2019, as per reply to Civil Misc No. 12782 of 2019 filed by respondent, has been passed under amended Section 28(9) of 1962 Act, whereas reason assigned have been borrowed from Section 28(9A) of 1962 Act. The petitioner has filed present petition seeking quashing of show cause notice on the ground of non-adjudication and this Court has not stayed adjudication thus Clause (c) of Section 28 (9A) is apparently inapplicable and seems to be invoked just to mislead this Court.

9. We find that the present petition is squarely covered by judgment of this Court in case of **GPI Textile Ltd.** Vs **Union of India and others 2018 (362) ELT 388 (P&H),** and our judgment rendered in **Anil Kumar Soni Vs UOI CWP No. 6862 of 2017,** decided on **21.08.2019 (Annexure A-1)** and **Harkaran Dass Vedpal** Vs **Union of India and Others 2019 TIOL 1591 P&H-CUS,** nevertheless we deem it appropriate to deal with aforesaid argument of the Respondent *qua* extension of period

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of adjudication.

Mr. Bindlish, in Court on 04.10.2019 alongwith an additional affidavit dated 30.9.2019 of Sh. S.K. Mall, Commissioner of Customs, produced photocopy of entire record of the Commissioner of Customs relating to show cause in question. We have examined the photocopy of record as well as order/noting dated 26.3.2019. We find that on 26.3.2019 extension was sought by Commissioner but there is no order passed by the Chief Commissioner. It is interesting to note that as per affidavit dated 30.9.2019, Chief Commissioner has granted extension after application of mind and examining facts and circumstances which prevented Commissioner from passing order under Section 28(8) of 1962 Act, whereas factually, there is no order passed by Chief Commissioner leaving aside any application of mind. Noting of 26.3.2019 reads as under:

> *"In this case, a show cause notice dated 17.05.2017 was issued by ADJ, DRI, Delhi & a corrigendum dated 12.07.2018 was issued subsequently. Vide Notification no. 77/2018-CUS(NT) dated 23.08.2018, Commissioner (Import) JNCH has been appointed as the common Adjudicating Authority.*
>
> *The case continued in call book in view of the dispute involving M/s Mangli Impex. Subsequently, the case was taken out of call book and hearing was fixed on 12.04.2017.*
>
> *The Noticee has approached the Hon'ble P&H seeking quashing of the SCN on the ground of delay in adjudication. The matter is pending before the Hon'ble HC.*
>
> *In view of the amendment of Section 28 of CA, 1962 in the FA, 2018, AA is requested that as a measure of abundant caution, extension of the period of adjudication for a further period of one year may kindly be accorded."*

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From the perusal of the above noting, it is evident that Commissioner has proposed extension but there is no order on the part of Chief Commissioner leaving aside application of mind and reasoned order. Commissioner of Customs in his affidavit dated 30.9.2019 has used word 'noting' which itself shows that no order of extension was passed and it is just a noting on the file on the part of authorities other than Chief Commissioner. As no order of extension, as otherwise vehemently pleaded by Mr. Bindlish, has been passed, contention on behalf of the respondents that Chief Commissioner has granted extension of one year to adjudicate impugned show cause notice is ill founded.

10. Before parting with judgment, we deem it appropriate to deal with question of extension under Section 28(9) and (9A) of 1962 Act. As cited by counsel for the petitioner, this Court in the case of **A.B. Sugar Ltd. Vs State of Punjab Manu/PH/1155/2009** has dealt with similar provision**.** As per Section 11(10) of Punjab General Sales Tax Act, 1948 Commissioner for the reasons to be recorded in writing may extend period of three years for the passing the order of assessment for such further period as he may deem fit. Division Bench of this Court, where one of us (Jaswant Singh, J.) was a part of the Bench, in **A.B. Sugar Ltd. (Supra)** held that Commissioner even though not provided in the PGST Act is bound to afford an opportunity of hearing and communicate such order of extension to concerned dealer. Para 13 of said judgment is extracted below:

> *"13. When we apply the aforesaid principles to the facts of the present case and examine the provisions of Section 11(10) it becomes evident that there is no prohibition incorporated by the legislation to follow the principles of natural justice. Even otherwise there is no*

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legislative intendment either in the preceding or in the succeeding provisions to imply any such prohibition to comply with the principles of natural justice. Therefore, it follows that the principles of natural justice are inherent and have to be read in Sub-section (10) of Section 11 of the Act expressly required the Commissioner cognizance in writing for extending the period of three years provided by Section 11(3) for passing the order of assessment. As already observed in the preceding paras, the process of recording reason cannot be a unilateral act of the Commissioner. The association of the assessee to reach the correct reasons and whether any such reason was justified or not, would be essential, therefore, the so called order dated April 16, 2004 extending the period of limitation passed by the Commissioner cannot be relied upon by the Respondent. The other impelling reason for reaching the aforesaid conclusion is that no such order has even been communicated to the petitioner-assessee. It is well-settled that communication of the order passed by the Government in sine qua non in order to confer on such a letter the character of an order. In that regard reliance may be placed on a judgment of honourable the Supreme Court delivered by a Constitution Bench in the case of Bachittar Singh Vs. State of Punjab MANU/SC/0366/1962 : (1962) Supp. 3 SCR 713. The aforesaid view has been repeatedly followed in a number of cases including the judgment of honourable the Supreme Court rendered in State of Assam Vs. Kirpanath Sarma MANU/SC/0057/1966: AIR 1967 SC459. It is evident from the paper book that the order has neither been communicated nor it has been placed on record, which further shows the hesitation on the part of the respondent to be transparent in their conduct. Accordingly, the order extending the period of limitation passed under Section 11(10), cannot stand judicial scrutiny and is thus liable to be set aside."

11. For the sake of comparison and better understanding of applicability of ratio of judgment of **A.B. Sugar (Supra**), Section 11(10) of PGST Act and Section 28(9) & (9A) of Customs Act, 1962 as amended w.e.f. 29.03.2018 are reproduced below in juxtaposition:

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Section 11 Assessment of tax.	**Section 28 Recovery of duty**
(10) The Commissioner may, for reasons to be recorded in writing, extend the period of three years, for passing the order of assessment for such further period as he may deem fit.	*(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*

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	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.* ***(Emphasis Supplied)***

12. Hon'ble Supreme Court in the case of **Assistant Collector of Customs Vs Charan Das Malhotra (Supra)** while dealing with question of extension of period to issue show cause notice in terms of proviso to Section 110(2) of 1962 Act has held that extension of period to issue show cause notice ensues civil consequences, thus Commissioner of Customs is bound to grant opportunity of being heard prior to passing order of extension of period to issue show cause notice.

Division Bench of this Court wherein one of us was member of Bench (Jaswant Singh, J.) in **Aabhash Spinners (Supra)** while dealing with question of extension of period of show cause notice under Section 110(2) read with Section 124 of 1962 Act has held that an order would not assume

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the character of an order unless and until it is communicated to the Petitioner as per prescribed mode. The petitioner (therein) filed writ petition before this court seeking release of goods and non-issuance of show cause notice within six months as required under Section 110(2) of 1962 Act was one of grounds. The Commissioner of Customs, Amritsar as per affidavit filed by DRI passed an order extending the period of limitation to issue show cause notice, however in the manner prescribed under Section 153 of 1962 Act, order extending period to issue show cause notice was not served upon the Petitioner though later on it was produced in court. In Para 35 and 36 has been observed as under:

> ***" 35.*** *The matter does not end here. The respondents having passed the order on 20-7-2009, were required to communicate the same by virtue of mandatory provision of Section 153 of the Act. According to the aforesaid provision any order made or decision taken under the Act, is required to be served either by tendering the order/decision or sending it by registered post to the person to whom it is intended or to his agent. Clause (b) of Section 153 of the Act further states that if the order or decision etc. could not be served in the manner prescribed by clause (a) i.e. by tendering etc. then it can be served by affixing it on the notice board of the customs house. It has remained undisputed that the order extending the period beyond six months has not been served on the petitioner-Company by registered post or by tendering the same to them or to their agent till date. An order would not assume the character of an order until and unless it is communicated to the petitioner as per the prescribed mode. The aforesaid proposition of law has been laid down by a Constitution Bench in Bachittar Singh's case (supra) on which reliance has been rightly placed by the learned counsel for the petitioner-Company. Therefore, as on date the period of six months has expired from the date of detention of the goods i.e. 22/23-1-2009. Once the period of six months has expired then time barred order*

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cannot be re-opened by passing any fresh order. In any case, no such new order has been passed. Accordingly, the provisions of Section 110(2) of the Act would come in operation which provides for extension of period of six months by another period of six months. It is well settled that the order extending the period of six months is required to be passed and communicated to the petitioner when initial period of six months had not expired. In that regard reliance may be placed on the principles laid down by Hon'ble the Supreme Court in the case of S.S. Gadgil v. Ms. Lal Chand and Company, AIR 1965 SC 171 and a Division Bench judgment of this Court rendered in the case of Shreyans Industries Ltd. v. State of Punjab, (2008) 18 VAT and Service Tax Cases 493 (Punjab and Haryana). We also find support from the judgment of Calcutta High Court rendered in the case of Bibhuti Bhusan Bag (supra). In somewhat similar circumstances the Calcutta High Court in para 14 has observed as under:-

> *"14. The said purported order extending the aforesaid period of six months on 3rd November, 1966 was not communicated to or served upon the petitioners until December 16, 1966. In the case of Nripendra Nath Mazumdar v. N.M. Bardhan and others, reported in AIR 1959 Calcutta 219, it was held that where an order is made which affects the rights of a person the order must be communicated to such person in order to make it complete and effective. The date of the order is the date on which it is made known to the affected party. In the instant case the said order dated 3rd of November, 1966, extending the period of six months under the aforesaid proviso was certainly an order which affected the rights of the petitioners. In that view of the matter the said order could not become effective until the said order was communicated to the petitioners. The said order was communicated to the petitioners only on the 16th of December, 1966, i.e., after the expiry of the period of six months from the date of seizure. In the premises, I am of the view that the said order was made on the day when it was communicated to the said petitioners, i.e., on the 16th*

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December, 1966, i.e., after a right to get back the goods seized became vested in the petitioners. In the case of Director of Supplies and Disposals, Calcutta v. Member, Board of Revenue, Government of West Bengal, reported in 11 Sales Tax Cases 589, a Division Bench of this Court consisting of Lahiri, C.J. and Bachawat, J. approved of the aforesaid decision of Nripendra Nath Mazumdar v. M.N. Bardhan, (supra), and observed as follows :

> *" * * * * where the order of the Board of Revenue was not pronounced in open court, the date of passing of the order is the date on which the order was communicated to the parties and not the date on which the order was actually signed by the Member, Board of Revenue without notice to the assessee."*

In the case of Lala Shri Bhagwan and another v. Ram Chand and another, reported in AIR 1965 SC 1767, it was held that the authorities or bodies which are given jurisdiction by statutory provisions to deal with rights of citizens should act judicially in dealing with matters entrusted to them. "An obligation to act judicially may also in some cases, be inferred from the scheme of the relevant statute and its material provisions. In such a case, the authority or body must act in accordance with the principles of natural justice before exercising its jurisdiction and its powers; the obligations to follow the principles of natural justice need not be expressly imposed. Power to determine questions affecting the rights of citizens, would impose the limitation that the power should be exercised in conformity with the principles of natural justice."

36. *Similar principles have been followed by the Division Bench judgment of Gujarat and Delhi High Courts in the cases of Vadilal Industries Ltd. (supra) and Neha Cosmetics (supra) in respect of similar provisions of Section 37(C)(a)(b) & (c) of the Central Excise Act, 1944. However, there is a direct judgment of Madras High Court in the case of Redington India Limited (supra) in respect of Section 153.* ***"***

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13. As per Section 28(9) of 1962 Act, as re-produced hereabove in Para-11, an **officer senior in rank** to Proper Officer **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.

As per Section 28(9A) of 1962 Act, as re-produced hereabove in Para-11, **for the reasons stated in clause (a) to (d), the Proper Officer shall inform** concerned person the reason for non-determination of duty or interest under sub-section (8).

As per sub-section (9) of Section 28 of 1962 Act, an officer senior in rank to Proper Officer may extend period and he is required to record the circumstances which prevented Proper Officer from determining the amount of duty. As per sub-section (9A) of Section 28 of 1962 Act, the Proper Officer for the reasons specified under clause (a) to (d) may extend period and he is bound to inform the concerned person.

13. From the reading of sub-section (9) and (9A) of Section 28 of 1962 Act with judgment of this Court in the case of **A.B. Sugar Ltd. Vs State of Punjab Manu/PH/1155/2009, Aabhas Spinners Pvt Ltd. Vs UOI 2010 (260) ELT 554 (P&H)** and **Assistant Collector of Customs Vs Charan Das Malhotra,** we can easily cull out that authorities are bound to **(i)** divulge circumstances under which Proper Officer was prevented from passing order [28(9)] or record reasons [28(9A)] **(ii)** afford opportunity of hearing prior to passing order of extension and **(iii)** communicate copy of extension order passed either under sub-section (9) or (9A) of Section 28 of

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the 1962 Act.

We are not impressed with the argument of respondents that neither is there requirement to afford opportunity of personal hearing nor communication of extension order to the party concerned. As per respondent extension order is an administrative order and does not affect rights of the party. On the face of it, the contention of the respondent is unreasonable, fallicious and contrary to settled law. As per the amended Section 28(9) if show cause notice is not adjudicated within one (01) year, it stands vacated, thus right of party is certainly affected and he has every right to know reason of extension of period of adjudication of show cause notice. The vacation/lapsing of time period for adjudication of show cause notice results into immunity to party from duty liability proposed in the show cause notice. We are not oblivious of the fact that if extension order is not communicated, possibility of passing ante dated order cannot be ruled out.

14. In the case in hand, the respondent is vehemently pleading that petitioner is governed by un-amended Section 28(9) of the 1962 Act as well argued that Chief Officer i.e. officer Senior in rank to Proper Officer-Commissioner of Customs has passed an order under amended section 28(9) of the Act. Concededly, neither opportunity of hearing was granted prior to the purported extension order dated 26.03.2019 passed under Section 28(9) of 1962 Act nor said order was communicated. As per respondent itself order dated 26.03.2019 has been passed under Section 28(9) of the 1962 Act even though basis of said order is Clause (c) of Section 28(9A) of the 1962 Act. Clause (c) of Section 28 (9A) can be invoked in case an interim order of stay is passed by Appellate Tribunal or High Court or Supreme Court. In

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the present case, matter is pending before this Court and any stay was never granted rather petition itself has been filed seeking quashing of Show Cause Notice on the ground of non-adjudication.

Under Section 28 (9) as well Section 28 (9A) of 1962 Act, competent officer is bound to pass some order assigning reasons/circumstances for non-adjudication and communicate to concerned person. The officer passing order is further bound to afford opportunity of hearing prior to passing extension order and in the absence of passing reasoned order coupled with its communication to concerned person, the Respondent-Department cannot absolve itself from its statutory duty mandated under Section 28(9) of 1962 Act as well laid down in by this Court in the case of ***GPI Textile Ltd. (Supra***) and ***Harkaran Dass Vedpal (****Supra*). Thus argument of counsel for the Respondent that extension order was passed on 26.3.2019 pales into insignificance.

In view of judgment of this Court in the case of ***GPI Textile Ltd. (Supra***) and ***Harkaran Dass Vedpal (Supra*)**,* present **petition** is **allowed** and accordingly show cause notice dated 17.5.2007 **(P-1)** is quashed.

(JASWANT SINGH)
JUDGE

October 22, 2019 **(LALIT BATRA)**
'dk kamra' **JUDGE**

Whether Speaking/reasoned	*Yes/No*
Whether Reportable	*Yes/No*

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