

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

CWP-9340-2021

DATE OF DECISION:-17.05.2021

M/S SWATI MENTHOL & ALLIED
CHEMICALS LTD. AND ANR.

...PETITIONERS...

V.

COMMISSIONER, GST & CENTRAL EXCISE
COMMISSIONERATE, CHANDIGARH & ORS.

...RESPONDENTS...

**CORAM: HON'BLE MR. JUSTICE JASWANT SINGH
HON'BLE MR. JUSTICE SANT PARKASH**

Present: Mr. Rajat Mittal, Advocate and
Mr. Anuj Dewan, Advocate,
for the petitioners.

Mr. Anshuman Chopra, Advocate,
for the respondents.

SANT PARKASH, J.

*(The aforesaid presence is being recorded through video conferencing
since the proceedings are being conducted in virtual court)*

The prayer in the present petition is for issuance of a writ in the nature of certiorari seeking quashing of show cause notices dated 02.03.2010 (Annexures P-1 and P-2) and dated 06.05.2010 (Annexure P-3) proposing to recover the deficit in payment of excise duty etc. on the ground of 11 years' delay in adjudication till now.

Brief facts of the case are that petitioner No.1 is engaged in

the manufacture of Menthol Crystal/Powder/Solution, falling under

Chapter Sub-Heading 2906 1100 and De-mentholised Oil (DMO), peppermint oil, terpinenes, etc. falling under Sub-heading 330125 90 of the First Schedule of the Central Excise Tariff Act, 1985 (for short' 1985 Act). Petitioner No.2 is the Managing Director of petitioner No.1. Between 2005-2010, the petitioner purchased raw material for manufacturing final products from suppliers based out in Jammu & Kashmir. During 2008-2010, investigations were carried out by the respondent-department against various units in Uttar Pradesh engaged in the manufacture of Menthol Crystal/Powder/Solution, falling under Chapter Sub-Heading 2906 1100 and De-mentholised Oil (DMO), peppermint oil, terpinenes, etc. falling under Sub-heading 330125 90 of the 1985 Act. The unit of the petitioner was also investigated. Upon investigation by the officer of Central Excise of Meerut-II, Commissionerate, respondents No.2 and 3 issued show cause notices to the petitioner and its managing director alleging that the petitioner has been availing Cenvat credit on inputs, namely, "Menthol/Menthol flakes and Mentholised Oil (DMO), Deterpinated Menthol and like inputs" against fake invoices issued by the J&K and North East based units by showing supply of raw materials without supply of goods, and that the petitioners were utilizing the Cenvat Credit so availed, towards the payment of Central Excise duty on their final products for domestic as well as for export of goods and thereafter were claiming the rebate of duty so paid on the exported goods. Vide these show cause notices dated 02.03.2010 (Annexures P-1 and P-2), the respondents proposed a demand of Rs.11.26 crore of Cenvat credit along with interest and penalty. Further rebate

amounting to Rs.7.11 crore claimed on export was also demanded. Vide show cause notice dated 06.05.2010 (Annexure P-3) issued to the Managing director of petitioner No.1 for the period April 2009 to February 2010, proposing demand of Rs.7.33 lakh of Cenvat Credit along with interest and penalty. The petitioner filed a detailed reply against the aforesaid show cause notices but no proceedings were conducted in respect of the above-mentioned show cause notices issued to the petitioners from 2010-2018. Number of correspondences were exchanged between the Office of the Principal Commissioner, GST & Central Excise Commissionerate, Chandigarh fixing various dates of hearing but the hearing never materialized. Vide letter dated 10.10.2018, it was informed to the petitioners that personal hearing fixed in the aforementioned show cause notices before the Commissioner, Central GST Commissionerate, Chandigarh has been adjourned *sine die* for time being and next date of hearing will be informed later on. Aggrieved by the non-adjudication of the show cause notices issued to the petitioners for more than 10 years, the petitioners have approached this Court by way of present petition.

Learned counsel for the petitioners submits that show-cause notices were issued on 02.03.2010 and 06.05.2010 and a period of more than 10 years has elapsed, still it has not been adjudicated upon without any fault on the part of the petitioner. He has placed reliance on Section 11 A of the 1944 Act which deals with recovery of duty not levied or not paid or short levied or short paid or erroneously refunded. Sub section (11) thereof provides that as far

as possible in normal cases, the proceedings should be concluded within a period of six months, whereas in the case of fraud, collusion etc., the period prescribed is one year. In the case in hand, the proceedings are pending for the last more than 10 years.

Counsel for the petitioner(s) submits that present case is squarely covered by a Division Bench Judgment of this Court in case bearing **CWP No.11990-2020**, titled as **"M/s Mentha & Allied Products LTd. through its Authorised representative Satya Narain vs. Commissioner, Central Goods and Service Tax, Chandigarh"**, decided on 04.12.2020.

Learned counsel for the respondents does not dispute the aforesaid fact and has no objection if the instant petition be decided in terms of **M/s Mentha case (supra)**.

We have heard learned counsel for the parties and perused the record.

Similar issue, as involved in the present petition, has also been answered by this Court vide judgment dated 02.08.2018 rendered in **M/s GPI Textiles Limited case (supra)**, wherein while dealing with all the aforesaid pronouncements relied upon by the petitioner as also the provisions of Act, the following has been observed as under:-

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

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

(1) Where any duty of excise has not been levied or

paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,-

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

(i) his own ascertainment of such duty; or

(ii) duty ascertained by the Central Excise Officer, the amount of duty along with interest payable thereon under section 11AA.

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

(a) fraud; or

(b) collusion; or

(c) any wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest

payable thereon under section 11AA and a penalty equivalent to the duty specified in the notice.

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(11) The Central Excise Officer shall determine the amount of duty of excise under sub-section (10)-

(a) within six months from the date of notice where it is possible to do so in respect of cases falling under sub-section (1);

(b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under sub-section (4) or subsection (5)."

13. Similar issue was considered by Gujarat High Court in M/s Siddhi Vinayak Syntex Private Limited's case (supra). Judgments of different High Courts were referred to and it was summed up that delay in conclusion of proceedings pursuant to show cause notices after a long gap without proper explanation, is unlawful and arbitrary. The Court further examined the fact as to whether transfer of proceedings to call book in view of circular dated 14.12.1995 can be said to be a reasonable explanation. The opinion expressed was that the mandate of law cannot be diluted by issuing circular especially when there is no power to issue such directions regarding transfer of cases to call book. Relevant paras 23 and 24 thereof are extracted below:-

"23. Insofar as the show cause notice in the instant case is concerned, the same has been issued under section 11A of the Act. Proceedings under section 11A of the Act are adjudicatory proceedings and the authority which decides the same is a quasi-judicial authority. Such proceedings are strictly governed by the statutory provisions. Section 11A of the Act as it stood at the relevant time when the show cause notice came to be issued, provided for issuance of notice within six

months from the relevant date in ordinary cases and within five years in case where the extended period of limitation is invoked. Section 11A thereafter has been amended from time to time and in the year 2011, various amendments came to be made in the section including insertion of sub-section (11) which provides that the Central Excise Officer shall determine the amount of duty of excise under sub-section (10) –

(a) within six months from the date of notice where it is possible to do so, in respect of cases falling under sub-section (1);

(b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under sub-section (4) or sub-section (5).

24. Thus, with effect from the year 2011 a time limit has been prescribed for determining the amount of duty of excise where it is possible. It cannot be gainsaid that when the legislature prescribes a time limit, it is incumbent upon the authority to abide by the same. While it is true that the legislature has provided for such abiding by the time limit where it is possible to do so, sub-section (11) of section 11A of the Act gives an indication as to the legislative intent, namely that as far as may be possible the amount of duty should be determined within the above time frame, viz. six months from the date of the notice in respect of cases falling under sub- section (1) and one year from the date of the notice in respect of cases falling under sub-section (4) or sub-section (5). When the legislature has used the expression "where it is possible to do so", it means that if in the ordinary course it is possible to determine the amount of duty within the specified time frame, it should be so done. The legislature has wisely not prescribed a time limit and has specified such time limit where it is

possible to do so, for the reason that the adjudicating authority for several reasons may not be in a position to decide the matter within the specified time frame, namely, a large number of witnesses may have to be examined, the record of the case may be very bulky, huge workload, non-availability of an officer, etc. which are genuine reasons for not being able to determine the amount of duty within the stipulated time frame. However, when a matter is consigned to the call book and kept in cold storage for years together, it is not on account of it not being possible for the authority to decide the case, but on grounds which are extraneous to the proceedings. In the opinion of this court, when the legislature in its wisdom has prescribed a particular time limit, the C.B.E. & C. has no power or authority to extend such time limit for years on end merely to await a decision in another case. The adjudicatory authority is required to decide each case as it comes, unless restrained by an order of a higher forum. This court is of the view that the concept of call book created by the C. B. E. & C., which provides for transferring pending cases to the call book, is contrary to the statutory mandate, namely, that the adjudicating authority is required to determine the duty within the time frame specified by the legislature as far as possible. Moreover, as discussed hereinabove, there is no power vested in the C. B. E. & C. to issue such instructions under any statutory provision, inasmuch as, neither section 37B of the Central Excise Act nor Rule 31 of the rules, envisage issuance of such directions. The concept of call book is, therefore, contrary to the provisions of the Central Excise Act and such instructions are beyond the scope of the authority of the C. B. E. & C. Transferring matters to the call book being

contrary to the provisions of law, the explanation put forth by the respondents for the delay in concluding the proceedings pursuant to the show cause notice 3.8.1998 cannot be said to be a plausible explanation for not adjudicating upon the show cause notice within a reasonable time. In view of the settled legal position, as propounded by various High Courts, with which this court is in full agreement, the revival of proceedings after a long gap of ten to fifteen years without disclosing any reason for the delay, would be unlawful and arbitrary and would vitiate the entire proceedings.”

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

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

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

17. Section 11A(11) of the Act provides that Cental Excise Officer shall determine the amount of duty within six months in case notice has been under Sub-section 1

thereof, whereas in the case of fraud, collusion, etc., the period prescribed is one year. No doubt, the words 'where it is possible to do so' have been used, however, that will not stretch the period to decades as is in the cases in hand.

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

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

The aforesaid reproduction clearly reveals that the subject matter in the present petition is squarely covered by the ratio of pronouncement in the case of **M/s GPI Textiles Limited (supra)**.

In view of the aforesaid discussion, impugned show cause notices having been issued long back more than a decade are not sustainable in the eyes of law, and thus, deserve to be quashed. Ordered accordingly.

Present petition stands allowed accordingly.

(JASWANT SINGH)
JUDGE

(SANT PARKASH)
JUDGE

17.05.2021

sonika

whether speaking/reasoned:
whether reportable:

Yes/No
Yes/No