IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

Date of Decision: 21.01.2021

(1) <u>CWP No.19815-2020</u>

GOLDEN ENTERPRISES ....PETITIONER..

VS.

COMMISSIONER OF CUSTOMS AND ANOTHER

....RESPONDENTS..

(2) <u>CWP No.19726-2020</u>

SUPER OIL COMPANY ...PETITIONER

VS.

COMMISSIONER OF CUSTOMS AND ANOTHER

....RESPONDENTS..

(3) <u>CWP No.20188-2020</u>

LUDHIANA REFINERIES ...PETITIONER

VS.

COMMISSIONER OF CUSTOMS AND ANOTHER

....RESPONDENTS..

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

Present : Mr. Aman Garg, Advocate,
for the petitioner (in CWP No.19815-2020).

Mr. Deepak Gupta, Advocate,
for the petitioner in CWP Nos.19726 and 20188 of 2020.

Mr. Tejinder Joshi, Advocate,
for the respondent.

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SANT PARKASH , J.

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

This common order shall dispose of the aforesaid writ petitions bearing CWP Nos.19815, 19726 and 20188 of 2020 involving common question of facts and law. The petitioner(s) have filed the present writ petitions under Article 226 & 227 of the Constitution of India, seeking quashing of show cause notice(s) of finalization of provisionally assessed bills of entry, beyond a period of 8-9 years.

For the sake of convenience, the facts are borrowed from CWP No.19815 of 2020. The petitioner-private limited company during the period 2012-2013 vide twenty two (22) Bills of Entry, imported "Pressed Distillated", which the respondent provisionally assessed in terms of Section 18(1)(b) of the Customs Act 1962 (for short, "Act") and drew representative samples for testing from laboratory. However, after expiry of 8-9 years from the date of filing of bill of entry, the respondent has issued impugned notice(s) for framing final assessment according to Section 18(2) of the Act, despite the orders of this Hon'ble Court dated 31.08.2018 passed in CWP No.4134 of 2017 regarding quashing of show cause notice. Hence, the present writ petition(s).

Learned counsel for the petitioner submits that show-cause notice was issued on 20.05.2010 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.

In support of his pleas, learned counsel has placed reliance on ***Siddhi Vinayak Syntex Private Limited vs Union of India*** **2017 (352) E.L.T. 455**; Special Leave Petition (C) No. 18214 of 2017 – ***Union of India and others vs M/s Siddhi Vinayak Syntex Private Limited***, decided on 28.07.2017; **Parimal Textiles vs. Union of India, 2018(8), GSTL 361** and that of Hon'ble Supreme Court in **State of Punjab vs. Bathinda District Co-op. Milk P. Union Limited, 2007(217) ELT 325**.

Counsel for the respondents has contended that the bills of entry are assessed provisionally under Section 18 of the Act and on payment of provisional customs duty, clearance of consignment is allowed. For determination of proper classification, random representative samples were drawn by the department in the presence of representative of the importer and sent to Central Revenue Control Laboratory (for short "CRCL") for testing. The CRCL vide letter dated 08.03.2018 clarified that the goods have characteristics of base oil and stated that no other technical term can be assigned to such goods. In this way, the importer has mis-declared the description and classification of the imported goods. Further vide letter dated 27.02.2019, the Assistant Commissioner, Office of the Directorate General of Valuation, Mumbai was requested to supply the NIDB Data (National Import Database) in respect of Base oil chapter No.27101960 for the period of September, 2007 to December, 2007 and April 2009 to March, 2013 for redetermination of value of imported goods i.e. base oil. Reply to the aforesaid letter has been received vide e-mail on 01.03.2019. Thereafter, for the finalization of provisional assessment under

Section 18 of the Act, the letters dated 13.10.2020 and 04.11.2020 have been issued for personal hearing calling upon the importer to attend the personal hearing but, the importer has not appeared for personal hearing, rather preferred present petition(s) before this Court. He further contends that Section 18 of the Act does not prescribe any limitation period to frame final assessment. The department has not accepted judgment of this Court in case of **Gupta Smelter Pvt. Ltd. v. Union of India,** ***2019 (365) ELT 77*** and an appeal has been filed before Hon'ble the Supreme Court, which is still pending decision.

Learned counsel further submits that the provisions of Section 11-A of the Act only provide that order should be passed within the period prescribed, as far as possible. There is no definite time limit prescribed. In any case, the petitioner will not suffer any prejudice as he will be afforded due opportunity before passing order against him. The matters which were transferred to the call book have now been taken up in view of the revised Circular No. 1023/11/2016-CX dated 8.4.2016 and thereafter notices had been issued to the petitioner for hearing.

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

Admittedly, in the present case Bills of Entry were filed 8-9 years back from the date of impugned notice(s) and neither there was any petition of petitioners pending before Competent Court nor was any stay of any court, thus, there was no reason to withhold framing of final assessment. The contention of learned counsel for the respondents that the department has gone up in appeal before the Hon'ble Supreme Court also does not carry any substance since there is no stay order.

Similar issue, as involved in these petitions, has been answered by this Court vide judgment dated 31.08.2018 rendered in case of **Gupta Smelter Pvt. Ltd. (supra)** and judgment dated 02.08.2018 rendered in **CWP No.10530 of 2017, M/s GPI Textiles Limited v. Union of India & others**, decided on 02.08.2018. In the case of **M/s GPI Textiles Limited (supra)**, while dealing with all the 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.
> >
> > xx xx xx
>
> (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.

xx xx xx

(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 itself 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.”

The issue involved in all the present petitions is squarely covered by judgment of this Court in **M/s GPI Textiles Limited case (supra) and Gupta Smelters Pvt. Ltd. case (supra)** and**,** thus all the petitions are accordingly allowed. The impugned notices for framing final assessment of provisional assessment are hereby quashed in all the cases.

(JASWANT SINGH)
JUDGE

(SANT PARKASH)
JUDGE

21.01.2021
sonika/avin

whether speaking/reasoned: Yes/No
whether reportable: Yes/No