CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 60956 of 2019

[Arising out of Order-in-Appeal No. LUD-EXCUS-001-APP-2250-2271-2019 dated 28.03.2019 passed by the Commissioner of Customs (Appeals), Ludhiana]

M/s S K Petrochem **……Appellant**
A-20, Milap Nagar, Uttam Nagar,
New Delhi-110059

VERSUS

Commissioner of Customs, Ludhiana **……Respondent**
ICD GRFL, G.T. Road, Sahnewal,
Ludhiana, Punjab - 141001

APPEARANCE:

Shri Naveen Bindal and Shri Aman Garg, Advocates for the Appellant

Shri Anurag Kumar, Authorized Representative for the Respondent

CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 61697/2025

DATE OF HEARING: 11.11.2025
DATE OF DECISION: 21.11.2025

P. ANJANI KUMAR:

M/s S.K. Petroleum, the appellants, assail the order dated 28.03,2019, passed by Commissioner of Customs, Ludhiana.

2. Briefly stated the facts of the case are that the appellants imported consignments of 'Rubber Processing Oil', vide 15 Bills of entry, during 13.09.2011 to 18.09. 2012, classifying the same under

CTH 2710.1990; the consignments were provisionally assessed under section 18(1)(b) of the Customs Act, 1962; Test reports received from Punjab Test House, Ludhiana and CRCL, New Delhi, during February 2012 to February 2013, indicated that the aromatic compounds in the impugned goods were more than 50%; Accordingly, it appeared that the imported goods were appropriately classifiable under CTH 27079900. A show Cause Notice, dated 24.02.2016 along with a corrigendum dated 13.10.2016, was issued to finalise assessments; Order in Original was issued on 29.12.2017 confirming the differential duty of Rs 45 Lakhs; on an appeal filed by the appellants, Commissioner (Appeals) upheld the original order vide order dated 29.12.2019.

3. Shri Naveenn Bindal, Learned Counsel for the appellants submits that impugned order is bad in law, contravenes the provisions of Customs Act, 1962 and the Principles of Natural Justice for the following reasons.

- the order dated 29.12.2017, issued to finalise assessment, is clearly time barred as the assessment has been made after expiry of five years from the date of provisional assessment; no reasons are explained in the impugned orders for delay in finalising assessment.
- As per supplementary instructions provided in CBEC's Customs manual, final assessment has to be made within six months of provisional assessment;

- though Section 18 provides no time period for finalising the assessment, it has to be made within reasonable time;
- After finalisation of assessment, if any duty is due from importer, then it becomes a case of short payment of duty which only be recovered under Section 28 of the Act.
- Show Cause Notice can only be issued after finalisation of assessment; the date of such finalisation is the 'relevant date' as per Section 28 of the Act; demand confirmed under Section 28 even without issuing a Show Cause Notice, is illegal; in the absence of show cause notice, recovery of confirmed duty is not permissible.
- Provisional assessment is made under Section 18(1) of the Act but there was no provision under the Act for finalisation of assessment from provisional assessment; Section 18(2) and (3) deals with after effect of finalisation of assessment but itself do not give power to finalise the provisional assessment; therefore, it was incumbent upon the revenue to issue Show Cause Notice.
- Provisions to issue final assessment came on 29.03.2018 after introduction of (1A) in Section 18 of the Act; but the said section would apply to import/export that take place after 29.03.2018;

3. Learned Counsel for the appellants relies upon the following cases.

- *Bihar Foundry and Castings Ltd (2025) 151 GSTR 628(Jharkhand)*
- *Gupta Smelter Pvt Ltd 2019(365) ELT 77(P&H) and 2020(371) ELT 659 (P&H)*
- *SAH Petroleum Ltd 2017(358) ELT 483(Tri-Mumbai)*
- *Hindustan Motors Ltd 2010(262) ELT 350 (Tri-Chennai)*
- *ITC Ltd 2006(203) ELT 532 (SC)*
- *Thermax Ltd 2015(317) ELT100(TRI-Mumbai)*
- *Electro Parts India Pvt Ltd 2018(364) ELT 834 (Tri-All)*

3. Shri Anurag Kumar, Learned Authorised Representative for the Revenue, reiterates the findings of the impugned orders and submits that the action taken against the appellants is on the basis of Scientific evidence, correct legal classification and proper adherence to procedures. Summary of his submissions are

- CRCL report is categorical in saying that the imported oil does not satisfy the specifications BIS 15078:2001 in as much as viscosity and the percentage of aromatic compounds; classification is correctly arrived at CTH 27079900;
- The appellants claim of alternate classification under CTH 2713 cannot be accepted as the imported oil was ready to use RPO and not a residual extract; thus, the reliance n the case of Sah Petroleum is not correct;
- Section 18 does not lay down any time period; CBIC's instruction that the finalisation be completed within 6 months' can not override the statutory position; reliance on the case of Bihar foundry is misplace as the issue pertains to post 2018 and Show cause Notices were issued after 6-9 years; in the instant case it was issued in shorter period.

- It's incorrect that the impugned goods were interjected due to DRI alert; DRI alert was a legitimate intelligence input; the goods proved to be mis-declared;
- Principles of natural justice were not violated as number of opportunities were given to the appellant; cross examination of CRCL Chemist was not allowed as it was not an absolute right.
- Its incorrect to say that Section 28 is for Recovery; demand directly flows from Section 18 and issuing a separate SCN is redundant and unnecessary; Section 28 is not enforcing recovery, rather it is enforcing the demand crated by Section 18;
- Section 18 as it existed contained the inherent power to finalise the assessment; sub-section (2) of Section 18 says that when duty leviable on such goods is assessed finally…….; it means the officer had power to finalise the assessment; section 18(1A) introduced later is only clarificatory.

4. Heard both sides and perused the records of the case. The brief issues involved in the case are as to whether the classification and valuation arrived at by the Revenue are correct and as to whether the Revenue could proceed to conform the differential duty without issuing a show cause notice under section 28 after five years of assessing the imported goods provisionally. We find that the importer declared the impugned goods as 'Rubber Processing Oil' (RPO); after getting the samples tested from CRCL, Revenue came to the conclusion that the impugned goods were not RPO as

declared as they deviated in certain characteristics like viscosity and total percentage of compounds. The appellants submit that the reports given by CRCL indicate that the impugned products fail to satisfy the specifications for RPO and do not indicate as to what the product in question was; revenue enhanced the value of the imported goods in an arbitrary manner; there is no evidence of any value of contemporaneous imports of identical goods; there is no evidence to the effect that the actual transaction value of the goods was suppressed and that the differential payment was made through non-banking channels and in the absence of any evidence, enhancement of value is not tenable. However, learned counsel for the appellants argued mainly on the legal issues and therefore, we are not giving our findings on the merits of the case.

5. Learned Counsel for the Revenue submits that the authorities did not adhere to the time frame for finalisation of provisional assessment. We find that though there is no time limit prescribed under Section 18, it does not give licence to the authorities to finalise the assessments at their sweet will. We find that as per CBEC manual deals with Provisional assessment under Chapter 7. As per the manual, in terms of instructions issued vide F. No. 512/5/72-Cus VI dated 23-4-1973; F. No, 571/7/77-Cus VI dated 9-1-1978 and the circular No 17/2011-Cus dated 8-4-2011, provisional assessments must be finalised expeditiously, well within 6 months. The manual gives exception to cases involving machinery contracts or large project imports, where imports take place over a long period. It is understandable if the period of six months' spills

over to a few more months and not certainly 5-6 years. We find that it's incorrect to say, at least for the departmental officers, that the CBEC instructions cannot override the statutory provisions. That is not the spirit of manual of instructions either. Courts and tribunal have been consistently holding that wherever statute has not provided time limits, the same needs to be done in the overall time frame of the statute. If a demand cannot be issued after a period of 5 years, provisional assessments too cannot be finalised beyond that period, there too without valid reasons. In the instant case we find therefore, that there has been inordinate delay and there too a demand is issued after 5 years and therefore, the proceedings are vitiated.

6. We find that the Hon'ble Supreme Court held in the case of ITC 2006 (203) ELT 532(SC) held that finalisation of provisional assessment sine qua non for issuance of notice under Section 11A. The same was reiterated by Delhi High Court in the case of ITC Ltd 2010(250)ELT 189 and it was also followed by the Tribunal in the case of Thermax Ltd 2015(317) ELT100 (Tribunal-Bom). Hon'ble Supreme Court held in the case of ITC Ltd (Supra) that:

> **17.** Section 11A of the Act provides for a penal provision. Before a penalty can be levied, the procedures laid down therein must be complied with. For construction of a penal provision, it is trite, the golden rule of literal interpretation should be applied. The difficulty which may be faced by the Revenue is of no consequence. The power under Section 11A of the Act can be invoked only when a duty has not been levied or paid or has been short-levied or short-paid. Such a proceeding can be initiated within six months from the relevant date which in terms of sub-section (3)(ii)(b) of Section 11A of the Act (which is applicable in the instant case) in a case where duty of excise is provisionally assessed

under the Act or the Rules made thereunder, the date of adjustment of duty after the final assessment thereof. A proceeding under Section 11A of the Act cannot, therefore, be initiated without completing the assessment proceedings.

18. Ranganathan, J. in *Ujagar Prints (II)* v. *Union of India*, [(1989) 3 SCC 488] defined the word "levied" in the following terms :

"...The word "levied" is a wide and generic expression. One can say with as much appropriateness that the Income-tax Act levies a tax on income as that the Income-tax Officer levies the tax in accordance with the provisions of the Act. It is an expression of wide import and takes in all the stages of charge, quantification and recovery of duty, though in certain contexts it may have a restricted meaning..."

19. The question as to non-levy or short-levy of an excise duty would arise only when the levy had been laid in accordance with law. When a duty is levied, it becomes payable which in turn would mean legally recoverable.

20. In *New Delhi Municipal Committee* v. *Kalu Ram* [(1976) 3 SCC 407], the word "payable" has been defined in the following terms :

"The word "payable" is somewhat indefinite in import and its meaning must be gathered from the context in which it occurs, "payable" generally means that which should be paid."

21. Concededly, in terms of the provisions of the Act and the Rules framed thereunder, the amount becomes payable only in the event, the assessee does not deposit the amount levied within a period of ten days from the date of completion of the order of assessment. A provisional assessment is made in terms of Rule 9B *inter alia* at the instance of the assessee. Such a recourse is resorted to only when the conditions laid down therein are satisfied, viz., where the assessee is found to be unable to produce any document or furnish any information necessary for assessment of duty on any excisable goods.

22. Whereas provisional duty is levied in terms of Sub-Rule (1) of Rule 9B, final assessment is contemplated under Sub-Rule (5) thereof by reason of which the duty provisionally assessed shall be adjusted against the duty finally assessed and in the event, the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee will pay the deficiency or will be entitled to a refund, as the

case may be. Ultimately, thus, the liability of the assessee would depend upon the undertaking of exercises by the assessing officer to complete the assessment proceeding as contemplated under the Rules.

23. On a plain reading of the provisions of the Act and the Rules framed thereunder, we have no doubt in our mind that the Tribunal was correct in its finding that the impugned show cause notices were illegal.

24. The question came up for consideration before this Court in *Serai Kella Glass Works Pvt. Ltd*. v. *Collector of C. Excise, Patna* [1997 (91) E.L.T. 497 = (1997) 4 SCC 641] wherein this Court clearly opined :

"Section 11A deals with recovery of duty not levied or not paid or short-levied or short-paid or erroneously refunded. Proceedings under Section 11A have to be commenced with a show-cause notice issued within six months from the relevant date. "Relevant date" has been defined under sub-section (3)(ii) to mean in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof.

After final assessment, a copy of the order on the return filed by the assessee has to be sent to him. Duty has to be paid by the assessee on the basis of the final assessment within ten days' time from the receipt of the return. No question of giving any notice under Section 11A arises in such a case. It is only when even after final assessment and payment of duties, it is found that there has been a short-levy or non-levy of duty, the Excise Officer is empowered to take proceedings under Section 11A within the period of limitation after issuing a show-cause notice. In such a case, limitation period will run from the date of the final assessment. The scope of Section 11A and Rule 173-I are quite different. In this case, the provisional assessment earlier made by the proper officer has been quashed and pursuant to the direction of the High Court, the proper officer has made the final assessment. No question of failure of issuance of show cause notice under Section 11A arises in this case. Even otherwise, we do not find any infirmity in the order of the Tribunal."

25. The said decision has been relied upon by the Tribunal in arriving at its finding. The learned Additional Solicitor General would contend that the said decision was rendered in a different fact situation. We do not agree, as the ratio is clearly decipherable therefrom.

> **26.** The said decision was noticed by a Division Bench of this Court in *M/s. Duncans Industries Ltd*., *Calcutta* v. *Commissioner of Central Excise, New Delhi* [2006 (8) SCALE 463].

7. We find that Hon'ble Punjab and Haryana High Court held in the case of Gupta smelters Pvt Ltd 2019(365) ELT 77(P&H) that:

> **11.** After hearing Learned Counsel for the parties, we find merit in the submissions made by Learned Counsel for the petitioner. It is evident from the record that import of goods in the present case was made by the petitioner more than five years prior to the issuance of notice and provisional assessment. More than five years prior to issuance of show cause notice, even the representative samples had also been drawn and the test reports from the laboratory were received, but still the department thought it appropriate to sleep over the matter for five years. Issue as to what should be the reasonable time in the absence of statutory period prescribed in the Act for taking any action was considered by Hon'ble the Supreme Court in State of Punjab v. Bhatinda District Co-op. Milk P. Union Limited, 2007 (217) E.L.T. 325, wherein it was opined that five years would be the reasonable period in the absence of any time prescribed in the Act.
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> **12.** Issue was further considered by this Court in M/s. GPI Textiles Limited's case (supra), where notice issued beyond five years period under the Central Excise Act, 1944, was as set aside as the period was found to be unreasonable. Earlier two judgments of the Gujarat High Court in Siddhi Vinayak Syntex Private Limited v. Union of India, 2017 (352) E.L.T. 455 and Parimal Textiles v. Union of India, 2018 (8) G.S.T.L. 361 were also referred to therein. Relevant para Nos. 13 to 16 therefrom are extracted below :-
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> "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 [dated] 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 v. 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 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 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."

13. Another fact, which was pointed out by Learned Counsel for the petitioner was that under Section 18 of the Act there is no period provided for framing final assessment after the goods are released, however, in Chapter 7 of the Board's Manual, the period provided is six months. Even under Section 28 of the Act for issuance of a notice for recovery of any duty not levied or short levied or erroneously refunded, the period is one year, which is extendable to five years in case of collusion or wilful misstatement or suppression of facts.

8. In the case of same appellant, Hon'ble Court held 2020 (371) ELT 659(P&H) that:

6. Having heard Learned Counsel for the parties and scrutinized the record, we find that this Court in case of Gupta Smelters (supra) after noticing all the arguments of Respondents and relying upon judgment of this Court in the case of GPI Textiles Ltd. v. Union of India, CWP No. 10530 of 2017 decided on 2-8-2018 [2018 (362) E.L.T. 388 (P & H)] has held that final assessment under Section 18 of Customs Act, 1962 cannot be made after the expiry of five years from the date of bill of entry. Admittedly, in the present case Bills of Entry were filed 7-8 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 respondent-Department is deflecting from its responsibility by taking plea of one order dated 24-3-2011 passed by Tribunal-CESTAT, in case of M/s. Sonia Overseas Pvt. Ltd. said order nowhere inhibits respondent from framing final assessment of any importer. The Bills of Entry in question are having no concern with order passed by said order of Tribunal. Interestingly, the respondent did not raise this plea while earlier matter of petitioner company was adjudicated on identical issue by this Court, even though at that point of time also the position was same. The respondent-Department has taken this frivolous plea just to conceal their negligence/incompetency and mislead this Court, which cannot be appreciated. Hence the said plea is rejected.
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> **7.** The issue involved in all the present petitions is squarely covered by judgment of this Court in case of Gupta Smelters Pvt. Ltd. v. Union of India & Anr., CWP No. 4137 of 2017, decided on 31-8-2018 (P-6), thus all the petitions deserve to be allowed and accordingly allowed. The impugned notices for framing final assessment of provisional assessment are hereby quashed in all the cases.

9. Though some of the decisions as above, are rendered in the context of section 11A of Central Excise Act, 1944, we find that the Section 11A of Central Excise is *Pari Materia* with Section 28 of the Customs Act,1962. Therefore, the above cases are squarely applicable to the instant case.

10. Coming to the demand of differential duty under Section 28, learned counsel for the appellants submits that no order finalising the assessment was issued and no-Show Cause Notice was issued under Section 28. Revenue argues that demand under Section 28 is an offshoot of provisional assessment under section 18 and no separate Show Cause Notice is required; as the appellant did not pay differential duty, the provisions of section 28 are attracted. We find that this argument is without logic. In that case, there was no

need to provide a relevant date, under Section 28, for cases finalised under Section 18. Section 28 provides that in a case where duty is provisionally assessed under Section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be. We find that having not passed an order finalising the provisional assessment, Revenue has not made out a case for confirmation of the demand under Section 28, there too without a Show Cause Notice. We find that this is violation of Principles of Natural Justice, coupled with the denial of cross-examination.

11. in view of the above, we are of the considered opinion that the provisions of Section 28 are not attracted unless the provisional assessment is finalised. Therefore, the proceedings in the impugned case and the impugned orders do not have the force of Law and therefore, not maintainable. Accordingly, we set aside the impugned order and allow the appeal.

(Order pronounced in the open court on 21/11/2025)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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