

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****SPECIAL CIVIL APPLICATION NO. 8940 of 2017****With****SPECIAL CIVIL APPLICATION NO. 8967 of 2017****With****SPECIAL CIVIL APPLICATION NO. 8968 of 2017****TO****SPECIAL CIVIL APPLICATION NO. 8971 of 2017****With****SPECIAL CIVIL APPLICATION NO. 9498 of 2017****TO****SPECIAL CIVIL APPLICATION NO. 9501 of 2017**

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PARIMAL TEXTILES & 2....Petitioner(s)

Versus

UNION OF INDIA & 2....Respondent(s)

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Appearance:

AMAL PARESH DAVE, ADVOCATE for the Petitioner(s) No. 1 - 3

MR PARESH M DAVE, ADVOCATE for the Petitioner(s) No. 1 - 3

CHINTAN H DAVE, ADVOCATE for the Respondent(s) No. 1 , 3

MR SUDHIR M MEHTA, ADVOCATE for the Respondent(s) No. 2

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CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI

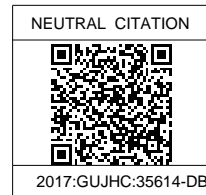
and

HONOURABLE MR.JUSTICE A.Y. KOGJE**Date : 06/11/2017****ORAL ORDER****(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. These petitions arise in common background. We may refer to facts from Special Civil Application No.8940/2017.



2. The petitioners have challenged the order-in-original dated 28.2.2017. They have also challenged the show cause notice dated 27.6.2000 which led the said order-in-original being passed.
3. The petitioners are engaged in textile business. Disputes between the petitioners and the department concerns the petitioners' process known as Draw Winding of yarns. The department issued show cause notice dated 27.6.2000 contending inter-alia that during the visit by the excise authority of the unit of the petitioners, it was found that there were two Draw Winding units in the premises where the process was going on for its own purpose as well as on job work basis. For such purpose, the petitioners had not obtained any registration certificate from the Central Excise authority nor were they maintaining any central excise records. According to the department, the input i.e. Partially Oriented Yarn (POY) and the final product i.e. yarn were two distinct products having different names, characteristics and use and therefore, the process amounted to a manufacturing activity. Under the show cause notice, the petitioners were asked to state why central excise duty of Rs.32.93 lacs not be recovered with interest and penalty. The petitioners replied to such show cause notice and opposed the proposal. After that the issues remained dormant at the end of the department for years together. Case of the petitioners is that in the meantime the unit closed down. The petitioners sold off the premises to developers. The petitioners did not receive any further notices from the department reviving the show cause notice herein till finally the petitioners learned that the adjudicating authority had passed the said order-in-



original dated 28.2.2017.

4. This order-in-original the petitioners have challenged in the present petition mainly on the ground that the department did not take any steps for adjudication for nearly 17 years. After that without ensuring that the notices were served, department proceeded ex-parte against the petitioners and passed the order which is in gross violation of the principles of natural justice.
5. Case of the department is that similar issue was pending before the Tribunal and, therefore, under the directives from the Government these and cases of similar nature were kept in the call book. In the department's parlance the term "call book" means that a case is kept under suspension from further hearing under certain circumstances.
6. Under similar circumstances, one of the entities Siddhi Vinayak Syntex Pvt Ltd. had approached this Court and asked for similar relief. Division Bench of this Court by a judgment dated 7.3.2017 in Special Civil Application No.19437/2016 allowed the petition making the following observations :

"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

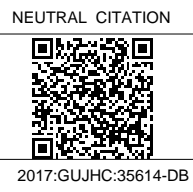


of the case may be very bulky, huge workload, non-availability of an officer, etc. which are genuine reasons for not being able to determine the amount of duty within the stipulated time frame. However, when a matter is consigned to the call book and kept in cold storage for years together, it is not 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 CBEC 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 CBEC, 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 CBEC 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 CBEC. 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.



25. Examining the matter from another angle, it is the stand of the respondents that the matter was kept in the call book for all these years to await the outcome of a similar case in the case of M/s. Siddharth Petro Products Limited and others, which was pending before the Appellate Tribunal. In such a situation, the decision in the case of the petitioner should be governed by the decision of the Appellate Tribunal. However, the respondents after keeping the matter in the call book for fifteen years, have thereafter chosen not to follow the outcome of the other matter wherein the show cause notice had been dropped by the adjudicating authority, and the Appellate Tribunal had dismissed the appeal, albeit on grounds other than on merits.

26. Moreover, as is evident from the facts noted hereinabove, the respondents while consigning the matter to the call book did not deem it fit to inform the petitioner about it. Since in other cases, such proceedings had been dropped, the petitioner had reason to form a bona fide belief that the proceedings in its case had also been dropped. During the interregnum the petitioners position has changed considerably. In view of the fact that the factory of the petitioner company has been closed down and sold, it cannot be gainsaid that even if the petitioner was served with the notice of personal hearing, it would be difficult for it to defend the case inasmuch as in view of the lapse of time and intervening circumstances, the evidence might have been lost. After seventeen years, the persons who were conversant with the case may not be available, documentary evidence may have been displaced. Thus, the delay in deciding the proceedings, that too without bringing it to the notice of the petitioner that the case was transferred to the call book and was therefore pending, causes immense prejudice to the petitioner. The revival of the proceedings, therefore, is in complete breach of the principles of natural justice and hence, the impugned show cause notice and the order-in-original passed pursuant thereto, cannot be sustained.



27. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned Order-in-original No.AHM-EXCUS-003-040-15-16 dated 11.3.2016 as well as the Show Cause Notice F.No.V.54/15-29/OA/98 dated 3.8.1998 are hereby quashed and set aside. Rule is made absolute with no order as to costs.”

7. We are informed that the department carried the issues before the Supreme Court. The Supreme Court has however entertained the department's appeal to the limited extent of deciding whether circular issued by CBEC providing that the proceedings be kept in call book is in conformity with the provisions of section 37B of the Central Excise Act. It can thus be seen that the judgment of the High Court rendered in identical facts is not disturbed by the Supreme Court insofar as its main impact on quashing the show cause notice and the order-in-original is concerned. Even without going into the question whether the circular of CBEC was valid or not, the judgment of the Division Bench in case of Siddhi Vinayak would apply in the present cases. In all cases, the department had issued show cause notices sometime in the year 2000. These proceedings were kept in call book without intimating the noticees. Without service of any further notices on the petitioners, the order-in-original came to be passed by the adjudicating authority.
8. In the result, in all cases, the show cause notices followed by the order-in-original are set aside. All petitions are disposed of accordingly.

C/SCA/8940/2017

ORDER

NEUTRAL CITATION



2017:GUJHC:35614-DB

(AKIL KURESHI, J.)

raghu

(A.Y. KOGJE, J.)