

(2023) 08 DEL CK 0122

In the Delhi High Court

Case No : Civil Writ Petition No. 6338 Of 2021, Civil Miscellaneous Application No. 19962 Of 2021

Swatch Group India Pvt Ltd & Ors. Vs Union Of India & Ors

Date of Decision : 16-08-2023

Acts Referred:

Customs Act, 1962 — Section 2(34), 28, 28(8), 28(9), 28(9A), 111(d), 111(m), 112(a), 112(b), 114AA, 124
Finance Act, 1994 — Section 73, 73(4B)(a), 73(4B)(b)

Citation : (2023) 08 DEL CK 0122

Hon'ble Judges : Vibhu Bakhru, J; Amit Mahajan, J

Bench : Division Bench

Advocate : Sandeep Chilana, Prem Kandpal, Snehil Sharma, Abdullah Tanveer, Anjali Jain, Ashok Thakur, Jagriti Rastogi, Satish Kumar, Dhruv, Atri Mandal, Harpreet Singh, Suhani Mathur

Final Decision : Allowed

Judgement

Amit Mahajan, J

1. The present writ petition has been filed, inter alia, praying for quashing of the show cause notice bearing number F. No. DRI/MZU/F/Int-40/2017 dated 14.02.2018 read with the Corrigendum / Addendum dated 28.02.2018 (impugned SCN) issued by respondent No. 2/DRI.
2. Petitioner No. 1 is an importer and an exclusive authorised distributor of Swatch products, and distributes various brands of luxury watches, accessories, etc. The watches and accessories are imported by petitioner No. 1. Petitioner No. 2 and 3 are the Country Manager cum Director and Chief Financial Officer, respectively, of Petitioner No. 1.
3. Respondent No. 2/DRI states that it received credible information that Petitioner No. 1 is importing consignments of branded watches of Swiss origin falling under Customs Tariff item 91021100/ 91021900, from different related overseas suppliers and is resorting to mis-declaration of retail sale prices ("RSP") to evade payment of appropriate customs duty. It was alleged that watches were

notified for retail sale price-based assessment for payment of CVD less abatement.

4. It was alleged that certain authorised retailers of Petitioner No. 2 were changing the MRP. Searches were carried out by the officers of Respondent No. 2 on 17.02.2017 at various premises of Petitioner No. 1 and also at the premises of various retailers.

5. Certain watches valued at ₹ 5,68,87,800/- were detained during the search on 17.02.2017. During the pendency of the investigation, the said watches were seized vide Seizure Memo dated 06.06.2017. Watches worth ₹ 39,47,18,823/- detained from the premises of seven retailers of petitioner No. 1 were also seized vide Seizure Memo dated 31.05.2017, 06.06.2017, 07.06.2017, and 29.06.2017.

6. The investigation culminated in the issuance of the impugned show cause notice dated 14.02.2018 and corrigendum dated 28.02.2018 under Sections 28 & 124 of the Customs Act, 1962 (hereafter 'the Customs Act'), proposing recovery of custom duty of ₹ 38,94,832/- along with interest and penalty, confiscation of the seized watches in terms of Section 111(d) and Section 111(m) of the Customs Act and imposition of penalty under Section 112(b) of the Customs Act. A penalty was also proposed under Section 112(a), 112(b), and Section 114AA of the Customs Act on the officials of petitioner No. 1.

7. It is admitted that the show cause notice was not adjudicated till the date of the filing of the present writ petition on 15.04.2021. The present writ petition has been filed challenging the impugned show cause notice on essentially two counts:

(i) The respondent No. 2 is not a proper officer appointed under Section 2(34) of the Customs Act for the assessment and re-assessment of goods under Section 28 of the Customs Act. Hence, the show cause notice has been issued without any jurisdiction in the light of the judgment passed by the Hon'ble Apex Court in the case of Canon India Private Limited v. Commissioner of Customs : 2021 SCC OnLine SC 200.

(ii) The show cause notice was issued in the month of February 2018, and in terms of Section 28(9) of the Customs Act, the same having not been adjudicated within a period of 12 months, any adjudication now was time-barred.

8. The contesting respondents have filed their replies. It is not denied that in the present case, the impugned SCN was issued by the DRI and, as held by the Hon'ble Apex Court in Canon India Private Ltd. (supra), such notices would be without jurisdiction. It is submitted that after the judgment passed by the Hon'ble Apex Court in Canon India Private Ltd. (supra), the adjudication of the impugned SCN is kept in abeyance in terms of the CBIC instructions dated 17.03.2021. The respondents further submitted that a review petition has already been filed before the Hon'ble Apex Court, and the Hon'ble Supreme Court had, vide its order dated 15.02.2022, permitted oral hearing of the said review

petitions.

9. Mr. Harpreet Singh, the learned Counsel for the respondent submits that a petition has been filed seeking review of the judgment passed by the Hon'ble Apex Court in Canon India Private Ltd. (supra). It is further submitted that the amendments have been carried out in the Customs Act in the Finance Bill, 2022 and the changes have been made in Sub-section 34 of Section 2 of the Customs Act. In terms thereof, more classes of Officers of Customs have been specified as proper officers.

10. It is argued that pursuant to the memorandum explaining the provisions of the Finance Bill, 2022, the Finance Act, 2022, and the validation provisions under Section 97, the legislative intent has been made clear that the officers of the DRI are and were always proper Officers under the Customs Act.

11. Mr. Harpreet Singh, learned Counsel also submitted that, in the present case, the impugned SCN was issued on 14.02.2018, that is, prior to the amendment carried out in Section 28(9) of the Customs Act and therefore would be governed by the said provision as in force prior to its amendment with effect from 29.03.2018.

12. He submits that, prior to the amendment, which was carried out with effect from 29.03.2018, Section 28(9) of the Customs Act did not provide for strict timelines for determining duty under Section 28(8) of the Customs Act.

13. He submitted that in terms of the unamended Section 28(9) of the Customs Act, the concerned authority was required to determine the amount of duty or interest within the period of six months or one year as the case may be, only if it was possible to do so.

14. He contended that in terms of the Circular dated 17.03.2021, it was not possible for the respondent to determine the amount of duty since all Show Cause Notices issued by officer of DRI are kept in abeyance.

15. He has filed the documents to show that from 14.02.2018, that is, the date of issuance of the impugned SCN, efforts were made by the concerned officers, but it was not possible for them to determine the amount of duty. Thus, the relaxation available for such – exception under the pre-amended Section 28(9) of the Customs Act, would be applicable in respect of the impugned SCN.

16. Learned counsel for the petitioner submits that dehors the argument that respondent No. 2 is not a proper officer, the present petition deserves to be allowed in view of provisions of Section 28(9) of the Customs Act, which specifically provides that any show cause notice issued under Section 28 of the Customs Act is required to be adjudicated within a period of 12 months. He submits even if it is to be assumed that respondent No. 2 is the proper officer, the petition still deserves to be allowed in view of the specific provisions of the Customs Act.

17. He relied upon the judgment passed by this Court in *Sunder System Pvt. Ltd. v. Union of India & Ors.* : W.P.(C) 8675/2017 wherein this court had interpreted Section 73(4B) (a) and (b) of the Finance Act, 1994 and held that the statutory authority was bound to decide the show cause notice within the time prescribed. In the absence of such a decision, the show cause notice was liable to be quashed. He submitted that he does not press the issue regarding the jurisdiction of the officers to issue the impugned SCN at this stage and this Court is to consider the question whether the impugned SCN has lapsed and cannot be adjudicated.

Conclusion

18. Since the learned Counsel for the petitioner has contended that the petition be decided de hors the argument that Respondent No. 2 is not a proper Officer, we feel it apposite to confine the present judgment only on the issue, whether the adjudication of the impugned SCN issued on 14.02.2018 is now barred by limitation and has lapsed in view of Section 28(9) of the Customs Act.

19. Section 28(9) of the Customs Act, as in force prior to 29.03.2018 read as under:

"[28. Recovery of [duties not levied or not paid or short-levied or short-paid] or erroneously refunded.

xxxx xxxx xxxx xxxx

(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, [where it is possible to do so], in respect of case falling under clause (a) of 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):"

20. Section 28(9) and 9(A) of the Customs Act pursuant to amendment read as under:

"[28. Recovery of [duties not levied or not paid or short-levied or short-paid] or erroneously refunded.

xxxx xxxx xxxx

(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, [xxx], in respect of case falling under clause (a) of sub- section (1);

(b) within one year from the date of notice, [xxx] 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 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.]..."

21. From a bare perusal of amended Sub-sections (9) and (9A) of Section 28 of the Customs Act, it is evident that the proper officer is bound to pass an order within six months or one year from the date of notice as the case may be, in cases of duties not paid or short-levied or short-paid or erroneously refunded. The said period can be extended for a further period of six months or one year in the cases specified in clause (a) and (b) of Section 9, respectively, by an officer, senior in rank to the proper officer having regard to the circumstances under which the proper officer was prevented from determining the amount of duty or interest within the prescribed period.

22. Further, if the proper officer is unable to determine the duty or interest for the reasons mentioned in Sub-section (9A), the proper officer is required to inform the assessee concerned, the reason for non-determination of the duty or interest, and in such case, the time prescribed in Sub-section (9) apply not from the date of Show Cause Notice but from the date when such reason ceases to exist.

23. However, explanation to Section 28(9) of the Customs Act specifically

provides that in case where the notice has been issued after the 14th day of May, 2015 but before the date on which the Finance Bill, 2018 received the assent of the President, the said notice shall continue to be governed by the provisions of Section 28 of the Customs Act as it stood immediately prior to the amendment.

24. From the above, it is, therefore, clear that, with effect from 29.03.2018, it is mandatory for the proper officer to adjudicate the Show Cause Notices that are issued after the amendment to Section 28(9) of the Customs Act within a period of six months or one year of the date of issuance as the case maybe. The same can be extended for a further period of one year by an officer senior in rank to the proper officer, after considering the circumstances under which the proper officer was prevented from passing an order within the prescribed period.

25. It is significant to note that the provisions of Section 28(9) of the Customs Act were amended by the Finance Act, 2018 (Act, 2013 of 2018). The same came into effect from 29.03.2018. The amended and unamended provisions of Section 28(9) of the Customs Act have been referred above. Pursuant to the said amendment, the words "where it is possible to do so" were deleted from Section 28(9) of the Customs Act and a proviso was inserted, which provided that where a proper officer fails to determine the amount of duty within the specified period any officer senior in the rank to that of the proper officer may extend the period to a further period of six months or one year as the case may be on being satisfied of the existence of the circumstances under which the proper officer was prevented from determining the duty within the specified period. Sub-section (9A) was also inserted by the Finance Act, 2018.

26. It is also significant that an Explanation 4 was inserted by the Finance Act, 2018, which clarified that the show cause notices issued prior to the date on which Finance Bill, 2018 receives the ascent of the President shall continue to be governed by the provisions of unamended Section 28 of the Customs Act.

27. Explanation 4 as inserted vide The Finance Act, 2018 reads as under:

"Explanation 4: For the removal of doubts, it is hereby declared that in cases where notice has been issued for non-levy, not paid, short-levy or short-paid or erroneous refund after the 14th day of May, 2015, but before the date on which the Finance Bill, 2018 receives the assent of the President, they shall continue to be governed by the provisions of section 28 as it stood immediately before the date on which such assent is received."

28. Learned counsel for the petitioner has vehemently contended that the amendment carried out in Section 28 of the Customs Act is only procedural and applying the principles of retroactive amendment, the respondent was bound to pass an order within 12 months of coming into force the amendment to Section 28(9) of the Customs Act. He relied upon the judgment passed by the Hon'ble High Court of Punjab and Haryana in the case of M/s Harkaran Dass Vedpal v. Union of India & Ors.; CWP No. 10889 of 2017, decided on 22.07.2019.

29. We do not agree with the aforesaid contention advanced on behalf of learned counsel for the petitioner. Pursuant to the judgment passed by the Punjab and Haryana High Court in M/s Harkaran Dass Vedpal (supra), a further amendment was carried out by a Finance Act, 2020 dated 27.03.2020. The same, came into effect retrospectively from 29.03.2018. By Finance, Act, 2020, the Explanation 4 to Section 28 of the Customs Act was substituted and the same reads as under :

"Explanation 4: For the removal of doubts, it is hereby declared that notwithstanding anything to the contrary contained in any judgment, decree or order of the Appellate Tribunal or any Court or in any other provision of this Act or the rules or regulations made thereunder, or in any other law for the time being in force, in cases where notice has been issued for non-levy, short-levy, non-payment, short-payment or erroneous refund, prior to the 29th day of March, 2018, being the date of commencement of the Finance Act, 2018 (13 of 2018), such notice shall continue to be governed by the provisions of section 28 as it stood immediately before such date."

30. The intention of the legislation, thus, is apparent that the show cause notices which were issued prior to the Finance Act coming into force the Finance Act, 2014 were required to be governed by unamended Act of Section 28(9) of the Customs Act.

31. Therefore, the question, which requires consideration now is whether in terms of erstwhile Section 28(9) of the Customs Act, the impugned SCN dated 14.02.2018 has lapsed having not been adjudicated within the period of 12 months. In other words, whether in the facts and circumstances of the present case, it was not possible for the Revenue to adjudicate the impugned SCN within the period of 12 months from the date of issuance.

32. The unamended Section 28(9) of the Customs Act, specifically provides that the proper officer 'shall' determine the amount of duty within six months or within one year, as the case may be, from the date of notice. It only provides certain degree of inbuilt flexibility by incorporating the words 'where it is possible to do so'.

33. The phrases "as far as possible" and "as far as practicable" appear in other statutes as well came up for consideration before the Apex Court in C. N. Paramasivam and Another v. Sunrise Plaza: (2013) 9 SCC 460. It is observed that the words "possible" and "practicable" are more or less interchangeable alongwith the other words such as feasible, performable etc. The incorporation of such words gives certain degree of flexibility to the Department such as if some circumstances or insurmountable exigencies arise, which makes the recourse unpracticable or not possible, the authorities can deviate from what was required to be done in terms of the statute. When the challenge is laid to the act of the authorities deviating from the rule, the onus shifts on the authority to prove that it was not practicable or possible to follow the rule. The same is to be adjudicated on the facts and circumstances of each case.

34. The flexibility, at the same time, in our opinion, cannot be equated with the lethargy of the Department or its officers. The Legislature has mandated the show cause notices to be adjudicated within six months or one year as the case may be; it has provided flexibility only to the extent that if the same is not practicable / possible the period can be extended. The phrase 'where it is possible to do so' would only mean that wherever it is not practicable / possible to do certain act, the period can be extended. The same, however, cannot be an endless period without any plausible justification.

35. This Court in *Sunder Systems Private Limited (supra)*, had an occasion to consider Section 73(4B)(a) and (b) of the Finance Act, 1994, which read as under:

"Section 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. –

xxx xxx xxx (4B) The Central Excise Officer shall determine the amount of service tax due under sub-section (2) –

(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 the proviso to sub-section (1) or the proviso to sub-section (4A)."

36. Section 73, as referred to above, contains a provision that is identically worded as the erstwhile Section 28(9) of the Customs Act. This Court, after considering the facts of that case, had allowed the writ petition on the ground that the Show Cause Notice was not adjudicated within the time prescribed.

37. This Court after considering the circumstances as narrated by the Revenue, held as under:

"12. In the present case, from the respondents' list of dates, it is apparent that it was certainly possible for the adjudicating authority to adjudicate upon the show-cause notice issued to the petitioner within a period of one year at least from the conclusion of arguments on 03rd February, 2015, if not earlier.

13. Since that has not been done, the present writ petition is liable to be allowed on the short ground of limitation alone."

38. Learned Counsel for the respondent had tried to justify, by producing the record, that the Department was not in a position to adjudicate the impugned SCN within the period of one year.

39. The various documents produced are mentioned below in a tabular form for ease of reference:

SR. NO.

PARTICULARS

1.

Letter dated 14.03.2018 received from M/s Swatch Group in response to Show Cause Notice.

2.

Letter dated 13.03.2018 received from M/s Swatch Group in response to Show Cause Notice.

3.

Letter received from M/s Swatch Group on 11.04.2018

4.

Letter issued by this Office to DRI in Mumbai with request to provide RUDs to the party on 11.05.2018

5.

Letter received from M/s Swatch Group on 14.05.2018

6.

Letter received from M/s Swatch Group on 14.05.2018

7.

Letter issued by M/s Swatch Group on 18.05.2018 for retraction of certain statements.

8.

Reminder letter issued by this Office to DRI in Mumbai with request to provide RUDs to the party on 28.05.2018

9.

Letter dated 25.06.2018 from M/s Swatch Group for preliminary prayer quashing the SCN.

10.

Letter issued from DRI to this office on 03.07.2018

11.

Letter issued by M/s Swatch Group on 18.07.2018.

12.

Letter dated 07.08.2018 issued by M/s Swatch Group.

13.

Letter dated 27.08.2018 issued by DRI to this office.

14.

Letter dated 25.09.2018 issued by DRI to this office.

15.

Letter dated 30.10.2018 for personal hearing.

16.

Letter issued by M/s Swatch Group on 16.11.2018.

17.

Letter issued by M/s Swatch Group on 26.11.2018.

18.

Personal hearing letter dated 11.02.2019 was issued.

19.

Letter dated 03.04.2019 for personal hearing was issued.

20.

Letter dated 29.04.2019 issued by the officer to DRI in Mumbai for verification of documents.

21.

Letter dated 23.05.2019 issued by this office to DRI in Mumbai for verification of documents.

22.

Letter dated 14.09.2020 issued by M/s Swatch Group.

23.

Personal hearing letter dated 15.10.2020.

24.

Personal hearing dated 23.10.2020.

25.

Letter dated 29.10.2020 issued by M/s Swatch Group.

26.

Personal hearing letter dated 03.11.2020.

27.

Submission filed by the petitioner dated 25.11.2020 with respect to hearing dated 09.11.2020.

28.

Personal hearing letter dated 18.01.2021.

29.

Email dated 01.02.2021 to reschedule the date of personal hearing of 27.01.2021 for 09.02.2021.

30.

Personal hearing letter dated 02.02.2021 wherein personal hearing for 09.02.2021 was granted.

31.

Record of personal hearing on 09.02.2021.

40. It is apparent from the documents and the timelines reflects by them that no sincere efforts have been made by the Department for adjudicating the impugned SCN. Despite being aware of the provisions of the Customs Act, admittedly, no steps were taken by the Department from 29.04.2019 that is the date, the Adjudicating Officer sent a letter to DRI seeking certain clarifications of the documents, and 15.10.2020 when they issued another letter granting personal hearing to the petitioners. It is, thus, admitted that the Department for almost a period of 17 months slept over the matter despite the specific mandate of even the unamended Section 28(9) of the Customs Act that the duty shall be levied within a period of 12 months from the date of issuance of the notice.

41. It is also significant to note that the record of personal hearing dated 09.02.2021 specifically notes that the advocate appearing for the noticee had reiterated its written submissions dated February, 2019. The impugned SCN is stated to have been kept in abeyance thereafter pursuant to the circular dated 17.03.2021.

42. The respondent has merely produced various letters received from the petitioner, DRI, and others, and has contended that some adjournments were asked for by the petitioners. Admittedly, the matter was listed from time to time for a personal hearing. However, no justification has been provided as to why it was not possible for the Department to determine the amount of custom duty within the prescribed period of time.

43. We have perused the documents and letters produced by the Department as referred above. It is seen that for a period of almost three years, various letters were exchanged. The matter was fixed for personal hearing on more than five occasions. No reason has been provided as to why the hearings were not concluded on the said dates and the duties payable, if any, were not determined.

44. We have also perused the instruction dated 17.03.2021 issued to the Principal Additional Director General, Directorate General of Intelligence (DRI). In terms thereof, a decision was taken by the Board to keep the show cause notices referred therein pending. It is significant to note that the instruction categorically mentions about a show cause notice dated 19.03.2019 and that in terms of the judgment passed by the Apex Court in Canon India Private Limited v. Commissioner of Customs (supra), the proceedings in the case have become invalid. It was mentioned that since the notice was dated 19.03.2019, it would get barred by limitation on 18.03.2021 and be kept pending till the decisions is taken by the Board. The said instructions appear to have been issued to extend the period in terms of Section 28(9A) of the Customs Act. In terms thereof, if the proper officer is unable to determine the amount of the duty for the reason of a specific direction being issued by the Board for keeping the matter pending, then the time specified in Sub-section (9) shall apply not from the date of notice but from the date when such reason ceased to exist.

45. It is the case of the Revenue that the amended provision of Section 28 of the Customs Act is not applicable in the present case for the reason that the impugned SCN was issued prior to the Finance Act, 2018, coming into force. Therefore, in our opinion the benefit of extension of limitation as provided under Section 28(9A) of the Customs Act would be applicable only in those cases where the show cause notices have been issued after the enactment of the Finance Act, 2018 since even as per the Revenue the notice issued prior to coming into effect of Finance Act, 2018 would be governed by the unamended provisions.

46. In our view, there is no material to show that it was not possible for the proper Officer to determine the amount of duty within the prescribed period. The mention of the words, "where it is not possible to do so", in our opinion, does not enable the Department to defer the determination of the notices for an indeterminate period of time. The legislature in its wisdom has provided a specific period for the authority to discharge its functions. The indifference of the concerned officer to complete the adjudication within the time period as mandated, cannot be condoned to the detriment of the assessee. Such indifference is not only detrimental to the interest of the taxpayer but also to the exchequer.

47. In the absence of any ground that it was not possible for the officer to determine the amount of duty within the prescribed period, the impugned SCN has lapsed and cannot be adjudicated.

48. The writ petition is allowed in aforementioned terms.