DELAY IN EITHER ISSUANCE OF SHOW CAUSE NOTICE OR ADJUDICATION OF SHOW CAUSE NOTICE - ITS EFFECT AND CONSEQUENCES ?.

By

Pradeep K Mittal*[1]
B.Com,LLB,FCS

It is well known, that the adjudication process for levy and recovery of Tax, Duty, Levy, Cess, Penalty, Fine and interest due on thereon, under any law, commences with the issue of a Show Cause Notice (hereinafter called SCN) by the Adjudicating Authority who may be Commissioner or Director or Registrar or any officer below in rank but may be authorized to do so. The concerned departments under different legislations issues circular or office memorandum, from time to time, empowering officers of different levels who can issue SCN and for varying amount. Similarly, the Office Memorandum or Circular are also issued laying down the guidelines and authority of persons who will grant personal hearing to the noticee/assessee and will adjudicate SCN.

2. Almost all laws viz. (i) Income Tax Act, 1961 (ii) Central Excise Act, 1944 (iii) Customs Act (iii) Central Sales Tax Act, (iv) State Sales Tax/Vat Laws (v) Finance Act, 1994 – Service Tax (vi) other Revenue Laws down the time period within which the SCN is required to be

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Advocate: Past Central Council Member, Institute of Company Secretaries of India, New Delhi. E Mail – pkmittal171@gmail.com

issued to the assessee. For example, Section 11A of the Central Excise Act, 1994 dealing with the issue of a SCN reads as under:-

> Section 11A (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 will full mis-statement or suppression of fact or contravention of any of the provisions of this Act or of the rules made there-under with intent to evade payment of duty:-
>
> (a) The Central Excise Officer**, shall within one year from the relevant date,** service notice…….
> (b)……
>
> (2)…….
> (3)…….
> (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 willful mis-statement; or
> (d) suppression of facts;or
> (e) contravention of any of the provisions of this Act or the rules made there under with intent to evade payment of duty;
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> by any person chargeable with duty, the Central Excise Officer, **shall, within five years from the relevant date,**

3. The aforesaid provisions shall also apply to the proceedings under the Finance Act, 1994 – i.e. Service Tax law. The same is the position with respect to Customs Act. However, the period of five years is upper most limit beyond which the demand cannot be raised under any circumstances. If the demand is raised beyond the normal period of one

year or five years, the adjudicating authority may quash or tribunal may set aside the demand so raised in the SCN merely on the ground that the SCN is barred by time. However, the difficulty arises where no time is prescribed for raising the SCN for raising demand in various laws such as:-

a) The Foreign Exchange Management Act, 1996
b) The Foreign Trade (Development) & Regulation Act, 1992
c) Securities & Exchange Board of India Act, 1992;
d) Imports & Export Control Act;
e) Other laws;

4: It needs no elaboration that under Income Tax Act or Companies Act, 2013, Books of Accounts and other records are required are to be legally maintained for a period of 8 years. The Company is free to destroy the records beyond this period. As pointed out above, if the Show Cause Notice is issued under any of the above laws where no upper time limit is prescribed for issuance of SCN – how can company or assessee will respond to such Show Cause Notice and will file effective reply to the SCN, which would, in real sense, defense of the company to the SCN. There are certain Acts which promote and encourage the lethargy on the part of few governmental officials by allowing them to issue Show Cause Notice at any time (may be 10 years or 15 years or 20 years) – most infamous being the Foreign Trade (Development & Regulation) Act, Foreign Exchange Management Act, Import & Export Act and SEBI Act. Once records have been destroyed and if the SCN has been issued after 10 years or 15 years or 20 years, when at that time concerned officers are not in office nor records are available as the same being destroyed, in the absence of effective Reply, the demands of taxes/duties, in all likelihood, shall be confirmed. Whether in any civilized society which is governed by rule of law, such things can be allowed to happen – well, on few occasions, governments has allowed to happen but not the Hon'ble Courts of law.

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5. The Hon'ble Division Bench of the Punjab & Haryana High Court in the case of Neeldhara Weaving Factory Vs. Director General of Foreign Trade MANU/PH/1252/2006 = 2007 (210) ELT 58 P&H, while dealing a where default having taken place in the year 1988-89 and the SCN had been issued on 09.08.2000 i.e. after expiry of 11 years, the Court has observed as under:-

> Accordingly, we do not find any justification for levy of penalty after 14 years of the default. The contention of the counsel for the revenue to the effect that the petitioner having committed default, cannot be permitted to raise these technical pleas, is to be noticed and rejected, being without any merit.
>
> In view of the above discussions, the writ petition is allowed, impugned orders Annexure P13 and P-14 are quashed with no order as to costs.

6. The Single Judge of Madras High Court in the case of Wilco & Co Vs. Union of India MANU/TN/1633/2002 = 2003(151) ELT Madras 49, while dealing with delay of six years in issuance of Show Cause Notice Section 116 of Customs Act has quashed the SCN and subsequent orders passed as there was absolutely no explanation as to why there was a delay of six years in issuance of SCN.

> However, on the question of delay, I am inclined to agree with the contention of learned counsel for the petitioner. In this case, no explanation at all is offered by the Department. Neither in the order of the original authority, Appellate or Revisional Authority, any reason had been stated for the unreasonable delay of more than six years. Even in the present counter filed by the respondents before this Court, there is absolutely no reason as to why there was such a long delay except for contending that delay was not a bar for levy of penalty under Section 116 of the Act. It is further stated that the

petitioner was aware of the report of the short landed quantity immediately after departure of the vessel. I am unable to appreciate as to how the said contention could provide any explanation for the delay beyond six years.

7. The Division Bench of Gujarat High Court in the case of Ani Elastic Industries. Vs. Union of India MANU/GJ/0749/2005= 2008 (222) ELT 340 Gujarat has observed as under:-

FACTS:

4. The facts briefly stated are that the petitioner is a proprietary concern engaged in the manufacturing of Elastic Tapes of various kinds. The petitioner purchased manufacturing unit No. 2005/A G.I.D.C., Chhatral held by the erstwhile unit M/s. Urmi Enterprise in an auction held by the Gujarat State Financial Corporation (GSFC) in July, 1999. After a period of about five years, from the date of the purchase of the aforesaid manufacturing unit, the petitioner was served with a notice dated 11th October, 2004 issued by the respondent No. 4, calling upon the petitioner to pay up the government dues of M/s. Urmi Enterprise within 10 days, failing which action would be taken against the petitioner under Section 11 of the Central Excise Act, 1944 (the Act).

RATIO

14. It is an admitted position that the petitioner has purchased the manufacturing unit belonging to erstwhile M/s. Urmi Enterprise in an auction held by the respondent No. 5 in the year 1999. The impugned order bears out the fact that the dues of M/s. Urmi Enterprise have arisen by virtue of an Order-in-Original dated 8th January, 1998, i.e. more than one and a half year prior to the purchase of the unit by the petitioner. Action has been initiated for recovery of the dues of M/s. Urmi Enterprise from the petitioner by a notice dated 11th October, 2004 which is beyond a period of five years from the date of purchase of the unit by the petitioner. It is a

settled legal position that when a power is conferred by a statute without mentioning the period within which it could be invoked, the same has to be done within a reasonable period, as all powers must be exercised reasonably, and exercise of the same within a reasonable period would be a facet of reasonableness. In the present case, assuming that it is permissible for the respondents to take action under the proviso of Section 11 of the Act in respect of dues which have crystallized prior to the introduction of the proviso to Section 11 of the Act vide the Finance Act, 2004, even then as held by the Apex Court in a catena of decisions such action has to be taken within a reasonable time. In the case of State of Gujarat v. Patil Raghav Natha (supra) the Apex Court has held that when there is no period of limitation prescribed, the power must be exercised within reasonable time. In the said case the power exercised beyond a period of one year was held to have been exercised beyond a reasonable time.

8. The Supreme Court in the case of Government of India Vs. Catadel Fine Pharmaceutical MANU/SC/1098/1989 = 1989 (42) ELT SC 515, while noticing that the Rule 12 of the Central Excise Rules does not provide any period within which the notice is required to be issued for recovery of duty, has observed as under:-

We find no substance in the submission. While it is true that Rule 12 does not prescribe any period within which recovery of any duty as contemplated by the Rule is to be made, but that by itself does not render the Rule unreasonable or violative of Article 14 of the Constitution. In the absence of any period of limitation it is settled that every authority is to exercise the power within a reasonable period. What would be reasonable period would depend upon the facts of each case. No hard and fast rules can be laid down in this regard as the determination of the question will depend upon the facts of each case.

9. The Single Judge of the Hon'ble Allahabad High Court in the case of Dewan Tyres Limited MANU/UP/1698/2014 = 2014(307) ELT 497 Allahabad has quashed the Show Cause Notice as the being incomplete and mis-printed one and held to be not a legal and proper Show Cause Notice.

> 52. Now coming to the last question regarding notice, the Court finds that no valid notice has been issued to petitioners. During course of argument counsel for respondents admitted that copy of notice dated 28-6-2005 which they have filed as Annexure CA-5 clearly shows that it is an incomplete and misprinted notice form and, therefore, the same cannot be said to be a valid notice issued to petitioners and in absence of any valid notice order of penalty cannot be sustained.

10. The Division Bench of the Bombay High Court, in the case of Parekh Shipping Co Vs. Asstt Colletor of Customs MANU/MH/0224/1995 = 1995(80) ELT 781 while dealing with the delay of 12 years in issuance of Show Cause Notice under Section 116 of Customs Act, has observed as under:-

> In our judgment, the submission is correct and deserves acceptance. It surpasses our imagination as to what prompted respondent No. 1 to wait for a duration of 12 years to issue show cause notice. The exercise of powers under Section 116 of the Customs Act, if necessary, must be undertaken within a reasonable time. Shri Venkateswaran submitted that the Customs Excise and Gold Control Tribunal has held that show cause notice issued beyond the period of five years from the date of vessel leaving the Port is arbitrary and unreasonable. In our judgment, the period of five years is more than reasonable. Indeed, the bond executed by the Agents should also be for a duration of five years and in case the respondents desire to proceed against the Agents, action must be taken before the expiry of the period. The bond should not be

kept alive for all time to come and must be limited for a duration of five years from the date of execution. For these reasons, the show cause notice issued by respondent No. 1 cannot be sustained and petition must succeed.

DELAY IN ADJUDICATION OF SHOW CAUSE NOTICE:

11. After having discussed in details consequences ensuing due to delay in issuance of Show Cause Notice – where undisputedly, the High Courts have quashed the Show Cause Notices in the cases cited above, the next point which arises for consideration as to what is effect if there is a delay in adjudication of SCN where SCN has been issued within the time prescribed by law or where no time has been prescribed – within reasonable time. As on many occasions, it so happens, after the filing of reply to the Show Cause Notice, the Noticee/assessee requests the Department to supply either (a) relied upon documents, (b) non relied upon documents (c) cross-examination of the officers of the Department, (d) cross-examination of witness produced by the Department in support of their case (e) cross-examination of officers of the noticee/assessee whose statements had been extracted by the Department under compulsion, coercion and threat and resultantly delay ranging from five years to fifteen years occurs. This has been dealt with the help of following cases.

12. The Division Bench of Bombay High Court in the case of Universal Generics (P) Ltd Vs. Union of India MANU/MH/0438/1993 has observed as under:

> We are not inclined to accede to the submission for more than one reason. In the first instance, the respondents have no explanation why the adjudication proceedings were not completed for ten years. Secondly, imposition of penalty, if at all, after a lapse of ten years is not just and fair. In these circumstances, in our judgment, to accede to the submission of the learned counsel that the

respondents should be permitted to complete the adjudication proceedings cannot be accepted. The petitioners are, therefore, entitled to relief.

3. Accordingly, petition succeeds and rule is made absolute in terms of prayer clause (a). In the circumstances of the case, there will be no order as to costs.

13. The Division Bench of the Bombay High Court in the case of Shirish Harsha Vadan Shah Vs. DD, Enforcement Directorate. MANU/MH/0625/2010 = 2010 (254) ELT 259 Bom. has observed as under:-

FACTS

11. Having taken survey of the law holding the field, the factual matrix of the case in hand, unequivocally go to show that the impugned action is sought to be taken after lapse of period of more than 12 years to adjudicate upon acts and omissions alleged to have been committed in the year 1982. No justification is placed on record to justify inaction for such a long period of 12 years for which petitioner is definitely not responsible.

RATIO:

12. Almost for a period of 12 years, no steps were taken by the respondents to proceed with the adjudication proceedings. No fault can be attributed to the petitioners for this delay and inaction on the part of the respondents. The respondents are not alleging any malice on the part of the petitioner. It is not the case of the respondents that the petitioners are responsible for delaying the proceedings. No justification is to be found in the explanation tendered for causing such enormous delay in the adjudication process. The absence of relevant record due to lapse of more than 12 years is also a factual aspect which needs to be taken into account. In our view, the respondents cannot be allowed to re-open

the proceedings at such a belated stage. If allowed, it would cause serious detriment and prejudice to the petitioner. The Department is not entitled to re-open old matters in this manner. As rightly observed in the earlier Judgment of this Court, if the Department's contention as to limitation were to be accepted, it would be mean that the department can commence adjudication proceedings 20 years, 25 years or 30 years after the original show cause notice which cannot be permitted.

14. The Division Bench of the Hon'ble Bombay High Court in the case of Lanvin Synthetics (P) Ltd Vs. Union of India MANU/MH/2070/2015 = 2015 (322) ELT 429 Bom has observed as under:-

FACT:

3. The complaint of the petitioners is that the show cause notice a copy of which is at 'Exhibit D' was never adjudicated though the petitioners approached the department between April, 1997 and January, 2000. There are several letters during this period and the copies of some of the letters are at 'Annexures E and F'. The petitioners complained that finally by a letter dated 7-4-2014, the second respondent was requested to adjudicate upon the show cause notice.

4. The petitioners, therefore, complained that if for seventeen long years the matter has remained un-adjudicated, then, retention of money paid under protest or deposited without prejudice, would violate the mandate of Articles 14, 19(1)(g), 265 and 300A of the Constitution of India. It is in such circumstances that this Writ Petition has been filed.

RATIO:

12. We can take note of the department's objection with regard to the petitioner's approaching this Court after a lapse of several years

for return of money but certainly we cannot refuse any relief to the petitioners of quashing of the proceedings of the show cause notice once the legal principles are well settled. The period that has been taken in this case for adjudication of the show cause notice cannot be said to be reasonable. If within a reasonable time the proceedings have to be concluded then in the present case 17 years can never be said to be a reasonable period or time.

13. As a result of the above discussion, we make the Rule absolute in terms of prayer clause (a). We quash the show cause notice and we prohibit the respondents from passing any adjudication order in furtherance thereof.

15. The Hon'ble Supreme Court, in the case of State of Punjab Vs. Bhatinda District Coop. Milk Union Ltd MANU/SC/8017/2007 = 2007(217) ELT 325 (SC) while dealing with the revisional jurisdiction of the statutory authority under the relevant Act has observed that a period of three years is a reasonable period within which powers must be exercised - since no time was prescribed for exercise of revisional jurisdiction by the authority.

17. It is trite that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend upon the nature of the statute, rights and liabilities there under and other relevant factors.

18. Revisional jurisdiction, in our opinion, should ordinarily be exercised within a period of three years having regard to the purport in terms of the said Act. In any event, the same should not exceed the period of five years. The view of the High Court, thus, cannot be said to be unreasonable. Reasonable period, keeping in view the discussions made hereinbefore, must be found out from the statutory scheme. As indicated hereinbefore, maximum period of limitation provided for in Sub-section (6) of Section 11 of the Act is five years.

16. The Delhi High Court in the case of Parag Dalmia Vs. Spl Director, Enforcement Directorate MANU/DE/3037/2012, [2012]173CompCas29(Delhi), 192(2012)DLT17, while dealing with the point of issuance of summons to a director for alleged violation of provisions of FERA, has quashed the summon on the ground that these have been issued after 14 years from the date when the alleged had been committed.

> 17. In view of the fact that the alleged offence took place on 28th April, 1987 and for the first time summons were issued to Appellant Parag Dalmia for appearance on 16th July, 2001 i.e. after more than 14 years, I am of the considered view that serious prejudice is caused to the Appellant in leading his defence. This is not a case of delay on account of the acts of the Appellants but because of a casual approach adopted by the Respondent. Hence Criminal l.A. 52/2011 is required to be allowed on this count.

17. The Division Bench of Delhi High Court in the case of Kareemul Hajazi State of NCT MANU/DE/0017/2011, while dealing with the issue of right of an appeal by victim in a criminal prosecution, has observed that the victim can file an appeal within a reasonable period and has further observed as under:-

> Therefore, as is well-established, a reasonable period would have to be inferred from the statutory provisions. [See: State of Punjab and Ors. v. Bhatinda District Coop. Milk P. Union Ltd. MANU/SC/8017/2007 : 2007(11) SCC 363 para 17: "It is trite that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant factors" and Government of India v. Citedal Fine Pharmaceuticals, Madras and Ors MANU/SC/0198/1989: 1989(3) SCC 483 para 6: "In the absence of any period of limitation it is settled that every authority is to exercise the powers within a

reasonable period. What would be reasonable period would depend upon the facts of each case."]

18. The Supreme Court in the case of State of Jharkhand Vs. Shivam Coke Industries MANU/SC/0923/2011, while dealing with the powers of exercising revision suo moto by the competent authority under the Bihar Finance Act, has observed that a period of three years is a normal or reasonable period.

> 44. Now, the question that arises for our consideration is whether the power to exercise Suo motu revisional jurisdiction by the Joint Commissioner in the present cases was exercised within a reasonable period. On perusal of the records, we find that such powers have been exercised within about three years of time in some cases and in some cases soon after the expiry of three years period. Such period during which power was exercised by the Joint Commissioner cannot be said to be unreasonable by any stretch of imagination in the facts of the present case. Three years period cannot be said to be a very long period and therefore, in all these cases, we hold that the power was exercised within a reasonable period of time.

19. The Single Judge of Delhi High Court in the case of Mohan Alwani Vs. Director, Enforcement Directorate MANU/DE/1392/2015, while dealing with the provisions of FERA/FEMA and where neither the relied upon documents had been supplied to the Noticee nor cross-examination of Panchas or Witnesses has been permitted to the Noticee and in the process, there was a delay in adjudication of Show Cause Notice, the Hon'ble Delhi High Court has quashed the Show Cause Notice holding that if delay occurs due to (a) non supply of relied upon documents (b) non availability of panchas and witness for cross examination, in adjudication of Show Cause Notice, it is not excusable as the Department was, at the first instance, duty bound to make available all the above and quashed the SCN and proceedings subsequent thereto.

10. In this circumstances, can it be said that the petitioner was responsible for delay in conclusion of the adjudicatory process. In my view, the answer has to be in the negative. The petitioner, was entitled in law to seek copies of the relied upon documents. The fact that respondents admittedly kept them back till March 2004 clearly shows that either they lacked, for whatever reasons, the interest to prosecute the petitioner or, they had no actionable case against the petitioner.

10.1 The events post 2004 only re-emphasised this aspect of the matter. The petitioner, in the meanwhile, has not only advanced in his age (he is, as per the affidavit 68 years of age) but has also lost, as claimed, crucial evidence to prove his innocence.

10.2 Despite, repeated requests made on behalf of the petitioner to summon panch witnesses, the said request was declined by the respondents. This request attains significance as SCN proceeds on the basis as if the petitioner was the owner of the Minto Road premises. The premises, (since then demolished) was, concededly, a Government accommodation. The reason why the petitioner happened to visit the Minto Road premises would have, perhaps, come to light if, an opportunity was given to the petitioner to cross-examine the panch witnesses, who accompanied the official witnesses at the time of search.

10.3 Similarly, the production of co-noticees who allegedly received moneys distributed by the petitioner was equally important from the point of view of the petitioner. These persons have not been produced for cross- examination at least since 2004; despite a categorical request made in this behalf in the communication dated 27.07.2004 addressed by the petitioner's counsel to the respondents.

10.4 There were no answers forthcoming on behalf of the respondents on these aspects of the matter. There are no answers supplied in the counter affidavit as well. The reason for the same

perhaps is, that these witnesses have either died or are not traceable. Either way, the dis-appearance of evidence which could be crucial to the petitioner's case has occurred on account of the delay on the part of the respondents in concluding the adjudicatory process with due expedition.

20. The Companies Act, 2013 also does not lay down any time period within which the SCN is required to be issued and, therefore, the judgments cited above, could be referred while filing and arguing a petition under Section 482 of Cr PC or a petition under Article 226/227 of the Constitution of India before the concerned High Court having jurisdiction over the Registered Office of the Company. The provisions of Section 468 of Cr PC which fixes a limitation for filing a complaint could be seen and if a complaint has been filed beyond the period prescribed under Section 468 Cr PC, a petition under Section 482 of Cr PC could be filed before High Court seeking quashing of criminal complaint.