IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 26.03.2019

CORAM:

THE HONOURABLE MR. JUSTICE M.S. RAMESH

W.P.NOS.2714 TO 2716 OF 2004

M/S.LAKSHMI MACHINE WORKS LIMITED,
SRKV POST, P.N.PALAYAM,
COIMBATORE-641 020 ... PETITIONER IN ALL WPS.

VS.

1.THE JOINT SECRETARY,
(REVISIONARY AUTHORITY)
GOVT. OF INDIA,
MINISTRY OF FINANCE,
NEW DELHI.

2.THE COMMISSIONER OF CUSTOMS &
CENTRAL EXCISE,
COIMBATORE COMMISSIONERATE,
COIMBATORE.

3.THE UNDER SECRETARY,
(DRAWBACK DIRECTORATE)
GOVERNMENT OF INDIA,
MINISTRY OF FINANCE,
NEW DELHI.

... RESPONDENTS IN WP.2714 & 2715/04

1 THE SECRETARY, GOVERNMENT OF INDIA,
MINISTRY OF FINANCE, DEPARTMENT OF REVENUE,
NEW DELHI.

2 THE UNDER SECRETARY
(DRAWBACK DIRECTORATE)GOVERNMENT OF INDIA
MINISTRY OF FINANCE,
NEW DELHI.

... RESPONDENTS IN WP.NO.2716/04

COMMON PRAYER: Writ Petitions filed under Article 226 of the Constitution of India, praying for an issuance of a Writ of Certiorari, calling for the records pertaining to the impugned order Nos.465/2002 & 15/2003 dated 31.12.2002 and 16.01.2003 and the impugned letter dated 04.05.1990 respectively, passed/issued by the first respondent and to quash the same.

For Petitioner
in all WPs. : Mr.T.Ramesh

For Respondent-2: Mr. K.S.Ramaswamy,
Standing Counsel for C & CE

For Respondent
Nos.1 & 3 : No appearance

C O M M O N O R D E R

The petitioner herein is a Registered Manufacturer and Exporter under Central Excise Act,1944 and Customs Act, 1962, involved in the Manufacture and Export of Textile Machineries. Vide shipping bill Nos.11 and 29 dated 18.07.1986 and 13.02.1987 respectively, the petitioner claimed for a drawback, which came to be sanctioned through drawback orders dated 29.11.1987 and 22.07.1988. The drawback allowed came to be subsequently extended on 28.06.1998.

2.As per the drawback brand rate sanctioned letter dated 19.10.1987, the drawback rate per machine should be extended only if the FOB exceeded to Rs.14 Lakhs. On 04.04.1989, the respondent had issued a show cause notice, calling upon the petitioner to offer their explanation as to why the drawback amount of Rs.2,64,390/- should not be recovered, in terms of Rule 16 of the Customs and Central Excise Duties Drawback Rules,1971. Consequently, the Adjudicating Authority had passed an order dated 16.10.1989, dropping further proceedings of the case by holding that the drawback rate had not appeared on the FOB value of the export goods and when the respondent had preferred an appeal before the Commissioner of Appeals, the appeal came to be allowed on 17.12.1990, holding that the aforesaid FOB value of the goods had not exceeded Rs.14 lakhs as prescribed in the rate fixation letter dated 19.10.1987.

3.In the mean time, the drawback fixation letter dated 19.10.1987 came to be withdrawn on 04.05.1990 and the show cause notice dated 28.05.1990 was also issued for the recovery of the drawback amount. The petitioner had submitted that their reply stating that since they had given the FOB value after detecting the discount, it became lesser than Rs. 14 Lakhs and with the discount the value was more than 14 Lakhs. The conditions stipulated in the rate letter would be met if the element of discount was not considered and therefore prayed to drop further proceedings. As against the order in appeal dated 17.12.1990, petitioner had preferred a revision before the first respondent herein which came to be rejected on 31.12.2002. These writ petitions are now have been filed challenging this order passed in revision.

4.The learned counsel for the petitioner submitted that claiming refund of erroneous excise payment of drawback is time barred, since the same has not been made within a reasonable time. The learned counsel for the petitioner submitted that in view of Section 28 of the Excise Act, the reasonable period could be within a period of six months and as such, the present impugned recovery letter dated 04.05.1990, which has been made after almost three years, cannot be sustained. The learned counsel for the petitioner further submitted that the suo motu withdrawal letter dated 04.05.1990 without a show cause notice or enquiry also cannot be sustained and is in violation of the principles of natural justice.

5.The learned standing counsel for the Department submitted that Rule 16 of the Customs, Central Excise Duties and Service Tax Drawback Rules-1995, does not prescribe time limitation and by placing reliance on the adjudication given in the impugned orders in revision, submitted that the orders have been properly made.

6.I have given careful consideration to the submissions made by the respective counsels.

7.It is no doubt true that Rule 16 of the Customs, Central Excise Duties and Service Tax Drawback Rules-1995, does not prescribe a period for claiming refund of erroneous excise payment of drawback. But it does not mean that in the absence of any time prescribed, such a refund can be claimed according to the respondents' own whims and fancies. It is a well settled proposition laid down in various decisions, that in circumstances where the statute does not prescribe time limitation, such an exercise should be completed within a reasonable period. The stand of the respondents in the revision is that in the absence of a provision for time limitation, the ground of limitation cannot be sustained.

8.The learned counsel for the petitioner relied upon a decision reported in 2012 (284) E.L.T. 490 (Guj.) [Padmini Exports v. Union of India] to substantiate the proposition that a show cause notice should be issued within a reasonable time. In the said petition, the Gujarat High Court has placed reliance on the decision of the Hon'ble Apex Court reported in 1989 (42) E.L.T. 515 (S.C) [Government of India v. Citedal Fine Pharmaceuticals] and held as follows:

> "6. As can be seen from the facts noted he rein above, at the relevant time when the petition came to be filed, matters involving identical issue were pending

before the revisional authority. Subsequently, the revisional authority by an order dated 31-12-2003, rejected the review applications filed by the said petitioners. Being aggrieved by the said order dated 31-12-2003 as well as the earlier order dated 28-6-2002 passed by the revisional authority whereby, the revision filed by the revenue had been allowed, the affected parties preferred writ petitions before this Court being Special Civil Application No. 2039 of 2004 and other cognate matters. Vide judgment and order of even date, this Court for the reasons stated in the said order, allowed the petitions and set aside the orders impugned therein. It is an accepted position that the controversy involved in the present case stands concluded by the above referred decision of this Court wherein it has been held thus :

16. In the light of the facts and contentions noted hereinabove, the sole question that arises for consideration in this group of petitions is as to whether the concept of reasonable period is required to be read into rule 16 of the Drawback Rules which does not prescribed any period of limitation for recovery of drawback erroneously paid.

17. As noticed earlier, the drawback claims in all these petitions relate to the period between December 1995 to 1996, in relation to which, show cause notices came to be issued in February 2000. Thus, in all the cases, drawback claims had been processed and cleared before issuance of the clarification vide letter dated 20th September 1996 by the Commissioner (Drawback) with the approval of the Chairman of C.B.E. & C. On a close reading of the said letter, it is apparent that the same envisages finalization of pending drawback claims in the light of the clarification issued therein, namely, that the maximum ceiling has to be inferred even in cases where goods are not exported under AR-4 and/or exporter is unable to furnish the certificate as required under condition (b) of the Note to SS No. 5404 (1) in respect of which drawback is payable at the rate of 17% of the FOB value. Thus, while issuing the initial clarification on 20th September 1996, the instructions issued by the C.B.E. & C. were to the effect that the same should be applicable only to pending drawback claims. Subsequently, by the clarification issued vide letter dated 19th August 1999, C.B.E. & C. clarified that the earlier clarification of 20th September 1996 was operative from the date of issuance of the original notification and was not only prospective. It appears that it is only pursuant to the subsequent letter dated 19th

August 1999, that the show cause notices have been issued in February 2000. Thus, though the Customs Authorities were well aware about the clarification in respect of the drawback paid on goods falling under condition (c) of the Note below sub-serial No. 5404 (1) of the Schedule, no action was taken at the relevant time to recover the drawback paid to the petitioner beyond the ceiling limit provided thereunder. It is only in February 2000, after a period of more than three years that by issuance of show cause notices, differential amount of drawback was sought to be recovered from the petitioners. The revisional authority in the earlier order dated 28th June, 2002 has held that the Drawback Rules do not provide for any time limit and as such there is no time limit for issue of demand notice for recovery of drawback paid erroneously or in excess under rule 16 of the Rules.

18. rule 16 of the Drawback Rules provides that where an amount of drawback a/id interest, if any, has been paid erroneously or the amount so paid is in excess of what the claimant is entitled to, the claimant shall, on demand by a proper officer of Customs, repay the amount so paid erroneously or in excess, as the case may be, and where the claimant fails to repay the amount it shall be recovered in the manner laid down in sub-section (1) of section 142 of the Customs Act, 1962. Thus, apparently rule 16 of the Rules does not provide for any time limit for making recovery of excess drawback paid erroneously. The question, therefore, is when rule 16 does not prescribe any period of limitation, whether action can be taken thereunder after any length of time, or whether the concept of reasonable period has to be read into it. In this regard, it is by now well settled by the Supreme Court in a catena of decisions that if the statute does not prescribe any period of limitation, the power thereunder has to be exercised within a reasonable time. What would be a reasonable period would, of course, depend upon the facts of each case.

19. In Government of India v. Citedal Fine Pharmaceuticals, Madras (supra), the Supreme Court has, in the context of rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956, which did not provide for any period of limitation, held thus :

6. Learned counsel appearing for the respondents urged that Rule 12 is unreasonable and violative of Article

14 of the Constitution, as it does not provide for any period of limitation for the recovery of duty. He urged that in the absence of any prescribed period for recovery of the duty as contemplated by Rule 12, the officer may act arbitrarily in recovering the amount after lapse of long period of time. 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. Whenever a question regarding the inordinate delay in issuance of notice of demand is raised, it would be open to the assessee to contend that it is bad on the ground of delay and it will be for the relevant officer to consider the question whether in the facts and circumstances of the case notice or demand for recovery was made within reasonable period. 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.

20. In Collector Of Central Excise, Jaipur v. Raghuvar (India) Ltd. (supra), the Supreme Court held that any law or stipulation prescribing a period of limitation to do or not to do a thing after the expiry of period so stipulated has the consequence of creation and destruction of rights and, therefore, must be specifically enacted and prescribed therefor. It is not for the courts to import any specific period of limitation by implication, where there is really none, though courts may always hold when any such exercise of power had the effect of disturbing rights of a citizen that it should be exercised within a reasonable period.

21. In Torrent Laboratories Pvt. Ltd. v. Union of India (supra), a Division Bench of this Court in the context of rule 57-1 of the Central Excise Rules, 1944 held that in absence of any provision with regard to specific period of limitation, reasonable period of limitation has to be read into the rule.

22. Thus, it is a settled legal proposition that where a statutory provision does not prescribe any period of limitation for exercise of power thereunder, a reasonable

period has to be read therein. As to what is a reasonable period would depend upon the facts of each case.

23. Examining the facts of the present cases in the light of the aforesaid legal position, in all these cases, drawback had been paid to the petitioners between December 1995 and August 1996. Thereafter, despite a clarification having been issued as regards the interpretation of condition (c) of the Note under SS No. 5404(1)(i) of the Drawback Schedule, no action was taken by the concerned authorities at the relevant time. It is only after a period of more than three years that show cause notices came to be issued to the petitioners seeking to recover the differential amount of drawback erroneously paid to them. Judging the period of delay from the armchair of a reasonable man, under no circumstances can the period of more than three years be termed to be a reasonable period for recovery of the amount erroneously paid. As held by the Supreme Court in the case of Collector Of Central Excise, Jaipur v. Raghuvar (India) Ltd. (supra), where no period of limitation is prescribed, the courts may always hold that any such exercise of powers which has the effect of disturbing the rights of citizen should be exercised within a reasonable period of time. In the present case, the drawback had been paid more than three years prior to the issuance of the show cause notices, and despite the fact that clarification in respect of condition (c) of the Note under SS No. 5404(1)(i) of the Schedule had been issued way back in the year 1996, no efforts were made to recover the drawback paid to the petitioners at the relevant time. Thus, the petitioners were entitled to form a belief that the matter has attained finality and arrange their finances accordingly. Now, when after a period of more than three years has elapsed, if the respondents seek to recover the amount of drawback paid, it cannot be gainsaid that such exercise of powers would have the effect of disturbing their rights. Under the circumstances, reading in the concept of reasonable period in rule 16 of the Rules, this court is of the view that the show cause notices in question were clearly time-barred.

26.In the light of the aforesaid discussion, in the opinion of this court, though rule 16 of the Drawback Rules does not provide for any period of limitation, a reasonable period has to be read into the said rule. As observed hereinabove, in the facts of the present case, the show cause notices which have been issued after a period of more than three years from the date when the drawback came to be paid to the petitioners, cannot by any stretch of imagination be said to have been issued within a reasonable period of time. Under the circumstances, the show cause notices have to be held to be bad on the ground of being time-barred. Once the show cause notices are held to be invalid, the very substratum of all the orders passed pursuant thereto, including the impugned orders would fall, rendering the same unsustainable.

7. Applying the aforesaid decision to the facts of the present case, it may be recalled that the show cause notices in question came to be issued in February 2000 in respect of drawback paid prior to August 1996. Under the circumstances, by no stretch of imagination, can the show cause notices be said to have been issued within a reasonable time. Under the circumstances, the show cause notices have to be held to be bad on the ground of being time-barred. Once the show cause notices are held to be invalid, the very substratum of the order passed pursuant thereto including the impugned order would fall, rendering the same sustainable. ”

The above observation of the Gujarat High Court by placing a reliance on the decision of the Hon'ble Supreme Court is self-explanatory.

9.In the instant case, the two shipping bill Nos.11 and 29, dated 18.07.1986 and 13.02.1987, wherein the sanctioned letter fixing erroneous rate was made on 17.10.1987. The recovery letter came to be issued on 04.04.1989 and adjudication came to be made on 16.10.1989. The withdrawal was shown on 04.05.1990 and the show cause notice was issued on 28.05.1990. The only explanation given in the impugned order in the revision is that since Rule 16 of the Customs, Central Excise Duties and Service Tax Drawback Rules,1995 does not prescribe a time limitation, the ground of limitation cannot be relied upon.

10.The Customs, Central Excise Duties and Service Tax Drawback Rules were framed by invoking Section 28 of the Customs Act. Section 28 of the Act, which relates to recovery of duties, short levies duties or erroneously refunded within its prescribed time limitation of six months from the relevant date, from the date of notice. Though the section relates to recovery of duties, an analogy can be drawn from the said provisions for identifying what a “reasonable time” could be in a case of this nature, since Rule 16 of the Customs, Central Excise Duties and Service Tax Drawback Rules,1995 has been framed by invoking the powers conferred under Customs Act. By drawing an analogy from

Section 28 of the Customs Act and applying it to the facts of the present case it is seen that the notice, being one made after a period of six months, cannot be held to be done within a reasonable time.

11.As such, by applying the ratio laid down by the Gujarat High Court following the decision of the Hon'ble Apex Court extracted above, this Court is of the view that the impugned orders passed in these Writ Petitions are liable to be rejected on the ground of delay. Hence, these three Writ Petitions stand allowed. Consequently, the impugned orders No.465/2002 dated 31.12.2002 and 15/2003 dated 16.01.2003 passed by the 1st respondent and the impugned letter dated 04.05.1990, issued by the 1st respondent respectively are quashed. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

jrs

To

1.The Joint Secretary,
(Revisionary Authority)
Govt. of India,
Ministry of Finance,
New Delhi.

2.The Commissioner of Customs & Central Excise,
Coimbatore Commissionerate,
Coimbatore.

3.The Under Secretary,
(Drawback Directorate)
Government of India,
Ministry of finance,
New Delhi.

4.The Secretary,
Government of India,
Ministry of Finance,
Department of Revenue,
New Delhi.

+1cc to Mr.T.Ramesh, Advocate sr.29036
+3cc to Mr. K.S.Ramaswamy, Advocate sr.28957

WP.Nos.2714, 2715 & 2716 of 2004

pvs(co)
nr 11/07/2019