

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH.**

Date of Decision:-20.09.2019

CWP No.5111 of 2018(O&M)

M/s Famina Knit Fabs through its partner.

.....Petitioner.

Versus

Union of India & Ors.

.....Respondents.

**CORAM:- HON'BLE MR. JUSTICE JASWANT SINGH
HON'BLE MR. JUSTICE LALIT BATRA**

Present:- Mr. Jagmohan Bansal, Advocate for the Petitioner.

Mr. Sourabh Goel, Senior Standing Counsel
for respondent nos.1 & 3-UOI.

Mr. Sunish Bindlish, Senior Standing Counsel
for respondent no.2-Directorate of Revenue Intelligence.

JASWANT SINGH, J.

1. The Petitioner-partnership firm through instant petition under Article 226 of the Constitution of India is seeking quashing of show cause notice dated 09.02.2018 (**Annexure P-9**) whereby Assistant Commissioner of Customs, New Delhi has called upon the Petitioner to show cause as to why declared Free on Board (for short 'FOB') value of the exported goods should not be rejected and duty drawback should not be disallowed and recovered from them.

Facts:

2. The few facts emanating from record are that the Petitioner-

Manufacturer Exporter during June' 2010 to March' 2013 exported textile goods claiming benefit of duty drawback as permissible under Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (for short 'Drawback Rules, 1995) which were framed vide Notification No. 37/95-CUS (NT) dated 26.05.1995, in exercise of power conferred by Section 75 of Customs Act, 1962 (for short 'Act, 1962 '), Section 37 of the Central Excise Act, 1944 and Section 93A of the Finance Act, 1994.

As required under Section 50 of the 1962 Act, the Petitioner as and when exported goods, filed shipping bills declaring description, quantity, value, name of buyer etc. A team of Custom Officers i.e. Inspector, Superintendent and Assistant Commissioner physically verified export goods and noted on shipping bill "as per invoice and packing list" or "value reduced for the purpose of duty drawback". The goods were examined and assessed in terms of Section 17 of the 1962 Act. It would be relevant to notice that prior to 8.4.2011, there was no self assessment which was introduced by Finance Act, 2011 w.e.f 8.4.2011. The Petitioner concededly exported goods vide 10 Shipping Bills during 2010 and 2 Shipping Bills during 2012 which are subject matter of present writ petition. The Custom Officers permitted export of goods in terms of Section 51 of the Customs Act, 1962. As conceded by both parties, no separate assessment order was passed and drawback was released after export of goods.

The Petitioner realized export proceeds nevertheless Directorate of Revenue Intelligence (DRI) initiated an investigation against the Petitioner alleging that Petitioner is fraudulently availing duty drawback by grossly overvaluing the goods in the export documents. The DRI searched various premises of the Petitioner on 27.12.2012 and concluded

that Petitioner has mis-declared value of goods which were exported upto 27.12.2012. On the basis of investigation conducted by DRI, Assistant Commissioner of Customs-Respondent No. 3 issued a Show Cause Notice dated 9.2.2018 (**Annexure P-9**) calling upon the Petitioner to show cause as to why declared FOB value of exported goods Rs.52,58,264/- should not be rejected in terms of Rule 8 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 (for short 'Valuation Rules 2007') read with Section 14 of the Act 1962 and re-determined Rs.7,51,181/- in terms of Rules 6 & 8 of the Valuation Rules, 2007. The Petitioner has been further called upon to show cause as to why duty drawback amounting to Rs.4,46,153/- should not be disallowed and recovered from them under Rule 16 of Drawback Rules, 1995.

Legal Submissions:

3. Mr. Jagmohan Bansal, Counsel for the Petitioner opening his case raised four issues namely (i) Reasonable period of limitation to issue show cause notice (ii) Effect of repeal of Drawback Rules of 1995 w.e.f. 01.10.2017 (iii) Absence of mechanism to raise demand of duty drawback and (iv) Power of Respondent to reassess value of goods already exported.

As per counsel for the Petitioner all the four issues go into the roots of jurisdiction of Respondent to issue show cause notice, therefore, this court has jurisdiction to entertain writ petition under Article 226 of the Constitution of India inspite of alternative remedy available under the Customs Act, 1962.

(i) Elaborating afore stated propositions, Ld. Counsel for the Petitioner contended that the Petitioner exported goods in question during April' 2010 to 2012 vide 12 Shipping Bills and impugned notice was issued

on 09.02.2018 (**Annexure P-9**), which would be barred by limitation because it was issued after the expiry of 5 years from the date of export. Under Section 28 of the 1962 Act maximum period prescribed to issue show cause notice is 5 years even in case of fraud, suppression of facts or wilful mis-statement so any demand notice beyond five years is bad in the eyes of law. Rules are piece of subordinate legislation and primary legislation i.e. Customs Act, 1962 has fixed outer limit of 5 years so any notice under any Rule beyond 5 years is bad in the eyes of law. The impugned notice (**P-9**) has been issued under Rule 16 of Drawback Rules, 1995 whereunder no limitation period has been prescribed. Gujrat High Court in the case of **Padmini Exports Vs UOI 2012 (284) ELT 325** and **Pratibha Syntex Ltd 2013 (287) ELT 290** has held that Section 28 of the Act, 1962 is not applicable in such cases of duty drawback, however three years period is reasonable period. Still further, as per judgment of Hon'ble Supreme Court in the case of **State of Punjab versus Bhatinda District Co-Op. Milk P. Union Ltd. 2007 (217) ELT 325** revisional jurisdiction cannot be invoked after a reasonable period of limitation. There are a number of judgments under different statutes wherein Hon'ble Courts time to time have held that no action can be taken after reasonable period of limitation when no limitation period is prescribed under the statute. This Court in the case of **Gupta Smelters Pvt. Ltd. versus Union of India 2019 (365) ELT 77 (P&H)** has set aside show cause notice as it was issued proposing final assessment after the expiry of more than 5 years from the date of drawing samples, receipt of test reports and provisional assessment. This Court has set aside show cause notice in the case of **GPI Textiles Limited versus Union of India 2018 (362) ELT 388 (P&H)** on the ground that show cause

notice was not adjudicated within reasonable period. In the case of **CCE Vs Hari Concast (P) Ltd. 2009 (242) E.L.T. 12**, this court has upheld order of Tribunal which set aside penalty imposed under Central Excise Act, 1944 after 5 years even though no limitation period was prescribed to impose penalty.

(ii) The demand has been raised under Rule 16 of Drawback Rules, 1995 and said Rules have been repealed w.e.f. 01.10.2017. There is saving clause i.e. Rule 20 under Drawback Rules, 2017 however, said Rule does not save proceeding i.e. demand raised under Rule 16 of erstwhile 1995 Rules. Section 159A of the Act, 1962 is not applicable as Rule 20 of Drawback Rules, 2017 saves right of exporters who had not received drawback till the date of introduction of new Rules. As neither Section 159A of Act, 1962 nor Rule 20 of Drawback Rules, 2017 saves demand raised under Rule 16 of Drawback Rules, 1995, the entire proceedings are bad in the eye of law. It is settled law that if reenacted enactment has saving clause which saves few rights and liabilities, Section 6 of General Clause Act (in the present case Section 159A of Customs Act) cannot save other rights and liabilities because different intention appears. Counsel cited judgment of this court in the case of **Hindustan Construction Company Ltd Vs State of Haryana, 2005 (28) RCR (Civil) 352** decided on 21.02.2005 which has been upheld by Hon'ble Supreme Court in **State of Haryana Vs. Hindustan Construction Company Ltd (2017) 9 SCC 463**.

(iii) Section 28 of the Customs Act, 1962 prescribes detail procedure of demand in case of non-payment, short payment of duty or erroneous refund of duty. Rule 16A of the Drawback Rules prescribes procedure of demand in case of non-realization of export proceeds. Rule 16

does not prescribe any procedure to hold any drawback as erroneous and thereafter its demand. Rule 16 only talks of repayment of excess or erroneous Drawback and it does not provide any machinery for determination and demand of erroneous or excess drawback. Erroneous drawback means drawback which has been paid by mistake or error like calculation error and excess drawback means drawback which after re-determination of entitlement of drawback is declared as excess drawback. It is settled law that demand cannot be made in the absence of prescribed mechanism which is absent in Drawback Rules, 1995. In support of his argument, Ld. Counsel cited judgment of Hon'ble Supreme Court in the case of **Commissioner of Central Excise versus Larsen and Toubro 2015 (39) STR 913** and this court judgment in the case of **Laqshya Media Pvt. Ltd. Vs State of Punjab and Others CWP No. 4215 of 2016**.

(iv) Prior to 08.04.2011, there was no self assessment and it was framed by Proper Officer under Section 17 of the Customs Act, 1962 which w.e.f. 08.04.2011 was substituted and as per substituted Section, scheme of self assessment was introduced. The Petitioner exported goods under physical supervision of the Respondent Officers who prior to April' 2011 made assessment and after April' 2011 verified self assessment and either accepted or revised declared value for the purpose of drawback. Section 14 of Act, 1962 and Rule 8 & 6 of Valuation Rules, 2007 prescribe method to determine value of export goods. Neither Section 14 of 1962 Act nor Valuation Rules, 2007 empowers Respondent to reassess value of the already exported goods. The Petitioner at the time of export of goods declared value of goods which was after physical verification assessed. The Petitioner realized export proceeds and accordingly duty drawback was

released.

The goods in question have already been exported so these goods cannot be called as 'export goods' in view of definition under Section 2(19) of Act, 1962 whereas Section 14 of Act, 1962 as well as Valuation Rules, 2007 are applicable to "Export Goods" and not goods which have already been exported. Hon'ble Calcutta High Court in the case of **MM Exports Vs Zonal Director General of Foreign Trade 2001 (133) ELT 558** has held that an assessment cannot be reopened where final assessment has been made. Period of enquiry can be extended without any limit in case where provisional assessment is made. In the present case show cause notice has been issued under Rule 16 of Drawback Rules, 1995 whereby value of goods has been proposed to be re-determined in terms of Section 14 of Act, 1962 read with Valuation Rules, 2007. Neither 1962 Act nor Rule 16 of Drawback Rules, 1995 empowers Respondent to re-assess value of goods which stand exported. Under Punjab VAT Act, 2005; Haryana VAT Act, 2003 and Income Tax Act, 1961 there is specific provision which empowers Assessing Officer to re-assess already framed assessment whereas Respondent in the present case has proposed re-assessment of export goods under Rule 16 of Drawback Rules, 1995 and Section 14 of Customs Act, 1962 but neither Rule 16 nor Section 14 of the Customs Act, 1962 permits re-assessment of export goods.

Section 17 and 51 of the Act, 1962 empower Proper Officer to assess the Shipping Bill which is an appealable order. An exporter can file an appeal under Section 128 of the Act, 1962 and Department can file appeal under Section 129 D of the Act, 1962 seeking quashing/modification of Assessment Order. Department has no power to reassess already

assessed value. As per Section 2(19) of the Customs Act, 1962 “Export Goods” means any goods which are to be taken out of India to a place outside India. Ld. Counsel placed reliance upon judgment of Hon’ble Supreme Court in the case of **Priya Blue Industries Vs CC (Preventive) 2004 (172) ELT 145.**

4. Mr. Sourabh Goyal, Sr. Standing Counsel for the Union of India & Customs-Respondent No. 1 & 3 and Mr. Sunish Bindlish, Sr. Standing Counsel appearing for DRI/Respondent No. 2, on the question of limitation and maintainability of writ petition contended that no limitation period has been prescribed under Rule 16 of Drawback Rules, 1995, therefore, proceedings could be initiated within a reasonable time. It is well settled that what would be ‘reasonable period’ would have to be decided in the facts and circumstances of each case. In support of their contention, Ld. Counsels cited judgment of Hon’ble Supreme Court in the case of **Collector of Central Excise, Jaipur Vs Raghuvar India Ltd. 2000 (118) ELT 311 (SC)**, **Govt. of India Vs Citadel Fine Pharmaceuticals 1989 (42) ELT 515 (SC)** and Karnataka High Court in the case of **Gemini Dying and Printing Mills Limited Vs Commissioner of Customs, Bangalore 2017 (51) STR 255 (Kar.)**, Gujrat High Court in the case of **Dadri Inorganic Private Limited Vs Commissioner of Customs 2010 (260) ELT 61 (Guj)**. Mr. Sunish Bindlish further contended that the judgments cited by counsel for the Petitioners hold that show cause notice should be adjudicated within reasonable period and do not hold that it should be issued within reasonable period.

The Petitioner has alternative remedy in the form of filing reply to show cause notice. The Petitioner should be directed to file reply and

participate in the proceedings initiated pursuant to the show cause notice and Competent Authority shall consider all the submissions including challenge on the ground of delay and pass a detailed speaking order. The Petitioner cannot be permitted to place reliance on amended Section 28 of the Act, 1962 because show cause notice has been issued under Rule 16 of the Drawback Rule, 1995.

Both the State Counsels relied upon Para 13 of judgment of Hon'ble Supreme Court in the case of **Raghuvar (India) Ltd. (Supra)** which reads as under:

“ 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.** Section 11A is not an omnibus provision which provides any period of limitation for all or any and every kind of action to be taken under the Act or the Rules but will be attracted only to cases where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded. ”

On the question of repeal of Drawback Rule of 1995, Mr. Bindlish contended that as per Rule 20(2)(b) of Drawback Rules 2017 claim made by an exporter for the payment of Drawback in respect of goods exported before the commencement of these Rules but not disposed of before such commencement shall be disposed of in accordance with Drawback Rules of 1995 and in the present case an investigation was in progress at the time of repeal of 1995 Rules so proceedings initiated under Rule 16 are saved.

Mr. Sourabh Goyal contended that show cause notice has been issued calling upon the Petitioner to show cause as to why FOB Value of exported goods should not be rejected in terms of Valuation Rules, 2007 and Drawback Rules, 2017 contain identical provision for repayment of erroneous or excess payment of Drawback & interest, therefore, repeal of Drawback Rules, 1995 has no effect on pending cases.

On the question of mechanism both the State Counsels contended that Drawback is sanctioned as some percentage of FOB Value. As per Rule 8 of the Valuation Rules, 2007 which are framed in terms of Section 14 of Act, 1962 the Proper Officer has power to reject declared value, in case he has reason to doubt the truth or accuracy of the value. The Proper Officer after rejecting value may determine value as per Rule 6 of the Valuation Rules, 2007. It clearly shows that there is complete mechanism to reject declared value and determine fresh value. In the present case, the value has been rejected under Rule 8 and show cause notice proposes to reassess value under Rule 6 of the Valuation Rules, 2007. As per Section 75(2)(ab) of the Customs Act, 1962 Central Government may specify the procedure for recovery or adjustment of the amount of any drawback which had been allowed under sub-section (1) or interest chargeable thereon. Section 14 of the Customs Act, 1962 and Valuation Rules, 2007 prescribe procedure to reject declared value and assess value of export goods.

On the question of power to reassess value of goods already exported, Mr. Sourabh Goyal contended that as per definition of phrase 'Drawback' and 'Export' provided under Drawback Rules, 1995; Drawback is granted on account of export of goods so value can be rejected even after

the goods have left India. Demand of drawback can be raised only after export of goods so department has right to re-determine value even after export of goods thus contention of Petitioner is fallacious. Drawback is consequential to export of goods and department as per Valuation Rules has power to reject already assessed value and re-assess value thereof.

Mr. Bindlish contended that DRI has been vested with power of assessment under Section 17 of the Act, 1962 so DRI has power to reopen any assessment and to conduct examination or test which it deems necessary. There is no provision which debars DRI to reopen the assessment and to conduct necessary examination. The DRI had made thorough investigation wherein it was found that Petitioner had mis-declared value of export goods and availed drawback in excess of what he was entitled thus DRI has power to reassess value of goods already exported.

Mr. Bansal, in response/rebuttal to above arguments of Ld. Counsel for the DRI/Customs submitted that question of reasonable period of limitation is applicable at every stage including issue of show cause and judgments cited by him candidly hold so and under Section 28 of the Customs Act, 1962 period of 5 years is prescribed to issue show cause notice even in case of fraud, wilful mis-statement or suppression of facts. Section 75(2)(ab) of Act, 1962 infact supports his case because Government has not prescribed procedure whereas complete procedure has been prescribed under Section 28 of Act, 1962 for raising demand of Customs duty. Similarly, under Rule 16A of Drawback Rules procedure has been prescribed for raising demand of drawback in case export proceeds are not realized.

Mr. Bansal further contended that in case of import or export,

short levied or not levied duty or interest is demanded under Section 28 of the Act, 1962. The duty may be demanded under Section 28 of the Act, 1962 on account of mis-declaration of value or description. The re-determination of value of goods under Valuation Rules, 2007 entails into demand of Customs duty in case of import as well export of goods. The short levied or not levied duty is consequential to re-determination of value under Valuation Rules, 2007, still procedure has been prescribed under Section 28 of the Act, 1962 thus it is wrong to contend that there is no need of machinery under Rule 16 of the Drawback Rules, 1995. In support of his contention he relied upon judgment in case of **Eternit Everest Ltd. Vs UOI** 1997 (89) ELT 28 (Mad) wherein Madras High Court quashed show cause notice issued under Section 11D of the Central Excise Act, 1944 holding that no procedure has been prescribed to raise demand of duty collected in excess of duty liability. Hon'ble Supreme Court in the case of **Shabina Abraham Vs CCE** 2015 (232) ELT 372 (S.C) has held that in the absence of prescribed procedure duty cannot be demanded from legal heir or estate of sole proprietor in case of his death. As per Section 147 of the Income Tax Act, 1961 an Income Tax Officer may reassess already assessed income, similarly as per Section 29 of the Punjab VAT Act, 2005, Designated Officer may re-assess already assessed VAT liability, whereas Customs Officers do not carry any such power to reassess a shipping bill which has already been assessed by them. Rule 1 (3) of Valuation Rules, 2007 categorically provides that rules shall apply to the 'export goods'. Definition of 'export' under Drawback Rules cannot be made at par with 'Export Goods' under Act, 1962.

5. Before advertng to the arguments of both sides, it would be

profitable to look at relevant statutory provisions which are reproduced as under:-

“ **Customs Act, 1962**

Section 2(18) “export” with its grammatical variations and cognate expressions, means taking out of India to a place outside India;

Section 2(19)“export goods” means any goods which are to be taken out of India to a place outside India;

SECTION 14.Valuation of goods-

(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, **the value of the imported goods and export goods shall be the transaction value of such goods, that is** to say, the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf :

Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:

Provided further that the rules made in this behalf may provide for,-

(i) the circumstances in which the buyer and the seller shall be

deemed to be related;

(ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;

(iii) **the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be**, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section :

Provided also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under section 46, or a shipping bill of export, as the case may be, is presented under section 50.

(2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

Explanation. — For the purposes of this section —

- (a) “rate of exchange” means the rate of exchange —
 - (i) determined by the Board, or
 - (ii) ascertained in such manner as the Board may direct, for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;
- (b) “foreign currency” and “Indian currency” have the meanings respectively assigned to them in clause (m) and clause (q) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999).

Section 17 applicable w.e.f. 8.4.2011:

SECTION 17. Assessment of duty. — (1) An importer entering any imported goods under section 46, or **an exporter entering any export goods under section 50**, shall, save as otherwise provided in section 85, **self-assess the duty, if any, leviable on such goods.**

(2) The **proper officer may verify the self-assessment of goods** and for this purpose, examine or test any imported goods or exported goods or such part thereof as may be necessary:

(3) For verification of self-assessment under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, insurance policy, catalogue or other document, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which is in his power to produce or furnish and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.

(4) **Where it is found on verification**, examination or testing of the goods or otherwise **that the self-assessment is not done correctly, the proper officer may**, without prejudice to any other action which may be taken under this Act, **re-assess the duty leviable on such goods.**

(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefore under this Act and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a

speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.

(6) Where reassessment has not been done or a speaking order has not been passed on reassessment, the proper officer may audit the assessment of the duty of the imported goods or export goods at his office or at the premises of the importer or exporter as may be expedient, in such manner as may be prescribed.

Explanation.— For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall continue to be governed by the provisions of section 17 as it stood immediately before the date on which such assent is received.

Applicable prior to 8.4.2011:

SECTION 17. Assessment of duty. — (1) After an importer has entered any imported goods under section 46, or **an exporter has entered any export goods under section 50 the imported goods or the export goods**, as the case may be, or such part thereof as may be necessary may, without undue delay, **be examined and tested by the proper officer.**

(2) **After such examination and testing, the duty, if any, leviable on such goods shall, save as otherwise provided in Section 85, be assessed.**

(3) For the purpose of assessing duty under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, policy of insurance, catalogue or other document, whereby the duty leviable on the

imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which it is in his power to produce or furnish, and thereupon the importer, exporter or such other person shall produce such document and furnish such information.

(4) Notwithstanding anything in this section, imported goods or export goods may, prior to the examination or testing thereof, be permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents produced and the information furnished under sub-section(3); but if it is found subsequently on examination or testing of the goods or otherwise that any statement in such entry or documents or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may, without prejudice to any other action which may be taken under this Act, be re-assessed to duty.

(5) Where any assessment done under sub-section (2) is contrary to the claim of the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification therefore under this Act, and in cases other than those where the importer or the exporter, as the case may be, confirms his acceptance of the said assessment in writing, the proper officer shall pass a speaking order within fifteen days from the date of assessment of the bill of entry or the shipping bill, as the case may be.

SECTION 50. Entry of goods for exportation.

(1) **The exporter of any goods shall make entry thereof by presenting electronically** on the customs automated system to the proper officer in the case of goods to be exported in a vessel or

aircraft, a **shipping bill, and in the case of goods to be exported by land, a bill of export** in such form and manner as may be prescribed:

Provided that the Principal Commissioner of Customs or Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically on the customs automated system, allow an entry to be presented in any other manner.

(2) The exporter of any goods, while presenting a shipping bill make and subscribe to a declaration as to the or bill of export, shall truth of its contents.

(3) The exporter who presents a shipping bill or bill of export under this section shall ensure the following, namely :—

- (a) the accuracy and completeness of the information given therein;
- (b) the authenticity and validity of any document supporting it; and
- (c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.

SECTION 51. Clearance of goods for exportation.

(1) **Where the proper officer is satisfied that any goods entered** for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, **the proper officer may make an order permitting clearance and loading of the goods for exportation :**

Provided that such order may also be made electronically through the customs automated system on the basis of risk evaluation through appropriate selection criteria :

Provided further that the Central Government may, by notification in the Official Gazette, permit certain class of exporters to make deferred payment of said duty or any charges in such manner as may be provided by rules.

(2) Where the exporter fails to pay the export duty, either in full or in part, under the proviso to sub-section (1) by such due date as may be specified by rules, he shall pay interest on said duty not paid or short-paid till the date of its payment at such rate, not below five per cent. and not exceeding thirty-six per cent. per annum, as may be fixed by the Central Government, by notification in the Official Gazette.

SECTION 129D. Powers of Committee of Principal Chief Commissioner of Customs or Chief Commissioner of Customs or Principal Commissioner of Customs or Commissioner of Customs to pass certain orders. —

(1) x x x x x x x

(2) **The Principal Commissioner of Customs or Commissioner of Customs may, of his own motion, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority or any officer of Customs subordinate to him to apply to the Commissioner (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Principal Commissioner of Customs or Commissioner of Customs in his order.**

(3) Every order under sub-section (1) or sub-section (2), as the case may be, shall be made within a period of three months from

the date of communication of the decision or order of the adjudicating authority:

Provided that the Board may, on sufficient cause being shown, extend the said period by another thirty days.

(4) Where in pursuance of an order under sub-section (1) or sub-section (2), the adjudicating authority or any officer of customs authorised in this behalf by the Principal Commissioner of Customs or Commissioner of Customs, makes an application to the Appellate Tribunal or the Commissioner (Appeals) within a period of one month from the date of communication of the order under sub-section (1) or sub-section (2) to the adjudicating authority, such application shall be heard by the Appellate Tribunal or the Commissioner (Appeals), as the case may be, as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeals, including the provisions of sub-section (4) of section 129A shall, so far as may be, apply to such application.

SECTION 28. Recovery of duties not levied or short-levied or erroneously refunded. — (1) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,—

(a) the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, **requiring him to show cause why he should not pay the amount specified in the notice;**

(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,—

- (i) his own ascertainment of such duty; or
- (ii) the duty ascertained by the proper officer, the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.

Provided that the proper officer shall not serve such show cause notice, where the amount involved is less than rupees one hundred.

(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest.

(3) Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (2).

(4) Where **any duty has not been levied or has been short-levied or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of, —**

- (a) **collusion; or**
- (b) **any wilful mis-statement; or**
- (c) **suppression of facts,**

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, **within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not** been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

(5) Where any duty has not been levied or has been short-levied or the interest has not been charged or has been part-paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub-section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to twenty-five per cent. of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.

(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion —

- (i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub-section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein; or
- (ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then, the

proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (5).

(7) In computing the period of one year referred to in clause (a) of sub-section (1) or five years referred to in sub-section (4), the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded.

(8) The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice.

(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 cases 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).

(10) Where an order determining the duty is passed by the proper officer under this section, the person liable to pay the said duty shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.

(11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the 6th day of July, 2011 shall be

deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section.

Explanation 1. — For the purposes of this section, “relevant date” means,—

- (a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;
- (b) 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;
- (c) in a case where duty or interest has been erroneously refunded, the date of refund;
- (d) in any other case, the date of payment of duty or interest.

Explanation 2. — For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of section 28 as it stood immediately before the date on which such assent is received.

Explanation 3. — For the removal of double, it is hereby declared that the proceedings in respect of any case of non-levy, short-levy, non-payment, short-payment or erroneous refund where show cause notice has been issued under sub-section (1) or sub-section (4) as the case may be, but an order determining duty under sub-section (8) has not been passed before the date on which the Finance Bill, 2015 receives the assent of the president, shall, without prejudice to the provisions of sections 135, 135A and 140, as may be applicable be deemed to be concluded, if the payment of duty, interest and penalty under the proviso to sub-section (2) or under sub-section (5), as the case may be, is made in full within thirty days from the

date on which such assent is received.

SECTION 75. - Drawback on imported materials used in the manufacture of goods which are exported – (1) Where it appears to the Central Government that in respect of goods of any class or description manufactured, processed or on which any operation has been carried out in India being goods which have been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has been made under section 51 by the proper officer, or being goods entered for export by post under section 82 and in respect of which an order permitting clearance for exportation has been made by the proper officer, a drawback should be allowed of duties of customs chargeable under this Act on any imported materials of a class or description used in the manufacture or processing of such goods or carrying out any operation on such goods, the Central Government may, by notification in the Official Gazette, direct that drawback shall be allowed in respect of such goods in accordance with, and subject to, the rules made under sub-section (2).

Provided that no drawback shall be allowed under this sub-section in respect of any of the aforesaid goods which the Central Government may, by rules made under sub-section (2), specify, if the export value of such goods or class of goods is less than the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods, or is not more than such percentage of the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such

goods or class of goods as the Central Government may, by notification in the Official Gazette, specify in this behalf :

Provided further that where any drawback has been allowed on any goods under this sub-section and the sale proceeds in respect of such goods are not received by or on behalf of the exporter in India within the time allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), such drawback shall be deemed never to have been allowed and the Central Government may, by rules made under sub-section (2), specify the procedure for the recovery or adjustment of the amount of such drawback.

(1A) Where it appears to the Central Government that the quantity of a particular material imported into India is more than the total quantity of like material that has been used in the goods manufactured, processed or on which any operation has been carried out in India and exported outside India, then, the Central Government may, by notification in the Official Gazette, declare that so much of the material as is contained in the goods exported shall, for the purpose of sub-section (1), be deemed to be imported material

(2) The Central Government **may make rules for the purpose of carrying out the provisions of sub-section (1) and, in particular, such rules may provide –**

(a) for the payment of drawback equal to the amount of duty actually paid on the imported materials used in the manufacture or processing of the goods or carrying out any operation on the goods or as is specified in the rules as the average amount of duty paid on the materials of that class or description used in the manufacture or processing of export goods or carrying out any

operation on export goods of that class or description either by manufacturers generally or by persons processing or carrying on any operation generally or by any particular manufacturer or particular person carrying on any process or other operation, and interest if any payable thereon;

(aa) for specifying the goods in respect of which no drawback shall be allowed;

(ab) for specifying the procedure for recovery or adjustment of the amount of any drawback which had been allowed under sub-section (1) or interest chargeable thereon;

(b) for the production of such certificates, documents and other evidence in support of each claim of drawback as may be necessary;

(c) for requiring the manufacturer or the person carrying on any process or other operation to give access to every part of his manufactory to any officer of customs specially authorised in this behalf by the Assistant Commissioner of Customs or Deputy Commissioner of Customs to enable such authorised officer to inspect the processes of manufacture, process or any other operation carried out and to verify by actual check or otherwise the statements made in support of the claim for drawback.

(d) for the manner and the time within which the claim for payment of drawback may be filed;

(3) The power to make rules conferred by sub-section (2) shall include the power to give drawback with retrospective effect from a date not earlier than the date of changes in the rates of duty on inputs used in the export goods.

Customs Valuation Rules, 2007:

Rule 1. Short title, commencement and application.

- (1) These rules may be called the Customs Valuation (Determination of Value of Export Goods) Rules, 2017.
- (2) They shall come into force on the 10th day of October' 2007.
- (3) **They shall apply to export goods.**

Rule 6. Residual method. (1) Subject to the provisions of rule 3, where the value of the export goods cannot be determined under the provisions of rules 4 and 5, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules provided that local market price of the export goods may not be the only basis for determining the value of export goods.

Rule 8. Rejection of declared value. (1) When the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any export goods, he may ask the exporter of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such exporter, the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, the transaction value shall be deemed to have not been determined in accordance with sub-rule (1) of rule 3.

(2) **At the request of an exporter, the proper officer shall intimate the exporter in writing the ground for doubting the truth or accuracy of the value declared in relation to the export goods by such exporter and provide a reasonable opportunity of being heard, before taking a final decision under sub-rule (1).**

Explanation. - (1) For the removal of doubts, it is hereby declared that -

- (i) This rule by itself does not provide a method for

determination of value, it provides a mechanism and procedure for rejection of declared value in cases where there is reasonable doubt that the declared value does not represent the transaction value; where the declared value is rejected, the value shall be determined by proceeding sequentially in accordance with rules 4 to 6.

(ii) The declared value shall be accepted where the proper officer is satisfied about the truth or accuracy of the declared value after the said enquiry in consultation with the exporter.

(iii) The proper officer shall have the powers to raise doubts on the declared value based on certain reasons which may include -

(a) the significant variation in value at which goods of like kind and quality exported at or about the same time in comparable quantities in a comparable commercial transaction were assessed.

(b) the significantly higher value compared to the market value of goods of like kind and quality at the time of export.

(c) the misdeclaration of goods in parameters such as description, quality, quantity, year of manufacture or production.

Clause (a) and (c) of Rule 2, Rule 16 and 16 A of Drawback

Rules, 1995:

Rule 2 (a) “drawback” in relation to any goods manufactured in India and exported, means the rebate of duty or tax, as the case may be, chargeable on any imported materials or excisable materials used or taxable services used as input services in the manufactured of such goods;

Rule 2 (c) “export” with its **grammatical variations and cognate expressions, means taking out of India to a place outside India or taking out from a place in Domestic Traffic Area (DTA) to a special economic zone** and includes loading of provisions or store or equipment for use on board a vessel or aircraft proceeding to a foreign port;

16. Repayment of erroneous or excess payment of drawback and interest. – Where an amount of drawback and 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 (52 of 1962).

16A. Recovery of amount of Drawback where export proceeds not realized. – (1) *Where an amount of drawback has been paid to an exporter or a person authorized by him (hereinafter referred to as the claimant) but the sale proceeds in respect of such export goods have not been realized by or on behalf of the exporter in India within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), including any extension of such period, such drawback shall be recovered in the manner specified below.*

Provided that the time-limit referred to in this sub-rule shall not be applicable to the goods exported from the Domestic Tariff Area to a special economic zone.

(2) *On receipt of relevant information from the Reserve Bank of India, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall cause notice to be issued to the exporter for production of evidence of realization of export proceeds within a period of thirty days from the date of receipt of such notice and where the exporter does not produce such evidence within the said period of thirty days, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall pass an order to recover the amount of drawback paid to the claimant and the exporter shall repay the amount so demanded within sixty days of the receipt of the said order:*

Provided that where a part of the sale proceeds has been realized, the amount of drawback to be recovered shall be the amount equal to that portion of the amount of drawback paid which bears the same proportion as the portion of the sale proceeds not realized bears to the total amount of sale proceeds:

(3) *Where the exporter fails to repay the amount under sub-rule (2) within said period of sixty days referred to in sub-rule (2), it shall be recovered in the manner laid down in rule 16.*

(4) *Where the sale proceeds are realized by the exporter after the amount of drawback has been recovered from him under sub-rule (2) or sub-rule (3) and the exporter produces evidence about such realization within one year from the date of such recovery of the amount of drawback, the amount of drawback so recovered shall be repaid by the Assistant Commissioner of Customs or Deputy Commissioner of Customs to the claimant.*

Emphasis Supplied

6. From the perusal of above quoted Sections and Rules, scheme

of Customs Act, 1962 regarding export of goods, assessment thereof and Appeal against the assessment order is discernible. At the time of export of goods, an exporter has to file Shipping Bill under Section 50 of the 1962 Act, disclosing description, quantity, value etc. Prior to 8.4.2011 there was no self-assessment whereas w.e.f. 08.04.2011 scheme of self-assessment has been introduced under Section 17(1) of the 1962 Act. The Custom Officers have power to verify self-assessment and for this purpose goods may be examined or tested under Section 17(2) & (3) of the 1962 Act. The Custom Authorities permit export of goods after accepting self-assessment under Section 17 or framing re-assessment under Section 17(4) & (5) read with Section 51 of Act, 1962 which is an appealable order. Under Customs Act, 1962 there is unique feature of review of an order or decision made by an Officer of Customs and direction to file Appeal under Section 129D against the said order. At the time of export, shipping bill is assessed by proper officer and Commissioner may review this order and direct him to file appeal before Commissioner (A) under Section 129D of the Act, 1962. The department has right to file appeal against assessment order as well may issue show cause notice under Section 28 of the Act, 1962 if duty or interest is not levied or short levied or erroneously refunded. A show cause notice under Section 28 of the Act, 1962 may be issued within one year from the relevant date and said period may be extended upto 5 years in case of collusion, wilful mis-statement or suppression of facts.

Drawback Rules, 1995/2017 have been framed under Section 75 of the Customs Act, 1962. Drawback is an export incentive in the form of cash award admissible under Duty Drawback Rules, 1995/2017 which an exporter becomes entitled on export of goods and realization of export

proceeds (foreign currency). In the absence of export of goods or realization of export proceeds, drawback cannot be released and if released, the Proper Officer has power to recover the same from the exporter. Drawback is claimed in the shipping bill itself and no separate application seeking drawback is filed. Section 14 of Act, 1962 talks of transaction value whereas Valuation Rules, 2007 prescribe method and manner to determine value in case Proper Officer finds that transaction value is not true and correct. Neither limitation period has been prescribed nor is there requirement of show cause notice for demand/recovery of duty drawback and its adjudication under Rule 16 of the Drawback Rules, 1995.

7. The conceded position as emerging from the record of case is that the Petitioner exported goods which were examined by a team of Customs Officers who after being satisfied qua description of goods and value thereof permitted export of goods. The Petitioner realized export proceeds within stipulated time and accordingly Respondent released drawback. No drawback claim of the Petitioner was pending on the date of introduction of Drawback Rules, 2017. The goods were exported during 2010-2012 and investigation by DRI which culminated into impugned show cause notice dated 9.2.2018 (**Annexure P-9**) was initiated in December' 2012. Neither limitation period has been prescribed nor is there requirement of show cause notice and its adjudication under Rule 16 of the Drawback Rules, 1995 for recovery of drawback. Prior to 8.4.2011, there was no provision of self assessment which was introduced by Finance Act, 2011 w.e.f. 8.4.2011. No formal assessment order is framed at the time of export of goods; however, permission to export of goods is an assessment of shipping bill which can be challenged by both sides i.e. exporter and

department by filing appeal. Drawback Rules, 1995 have been repealed and Drawback Rules, 2017 have been inserted w.e.f. 1.10.2017 consisting Rule 20 which repeals Drawback Rules, 1995 and saves few act and omissions committed under erstwhile Drawback Rules of 1995.

8. We have heard arguments of counsels of both sides and scrutinized record with their able assistance. We find that below mentioned questions need to be answered for the adjudication of controversy involved:

- i) Whether writ petition under Article 226 is maintainable against impugned show cause notice dated 9.2.2018 (**Annexure P-9**)?
- ii) Whether demand of duty drawback under Rule 16 of the Drawback Rules, 1995 can be made without any reasonable period of limitation?
- iii) Whether reenacted Drawback Rules, 2017 w.e.f. 1.10.2017 save Show Cause Notice dated 9.2.2018 (**Annexure P-9**) issued under Rule 16 of repealed Drawback Rules, 1995?
- iv) Whether Rule 16 of Drawback Rules, 1995 provides complete machinery to declare already paid drawback as erroneous or excess and thus recovery thereof?
- v) Whether Respondent/customs department under Rule 6 & 8 of Valuation Rules, 2007 read with Section 14 of the Customs Act, 1962 has power to reject already assessed value of goods which stand exported?

9. **Q. No. (i)** *Whether writ petition under Article 226 is maintainable against impugned show cause notice?*

The primary issue involved is demand of Duty Drawback, an export incentive. The Petitioner has raised question of limitation, repeal of Drawback Rules, 1995, absence of mechanism to raise demand of drawback and jurisdiction of Respondent to re-assess value of goods already exported.

We are not oblivious of the fact that question of limitation is a mixed question of law and facts. In the present case the dates of export of goods, release of drawback, realisation of export proceeds and issue of show cause notice are undisputed, thus pure question of limitation in law i.e. reasonable period within which a show cause notice may be issued, being question of jurisdiction is involved. As per Respondent no period has been prescribed under Rule 16 of the Drawback Rules, 1995 so no limitation period can be read into said Rule. Hon'ble Supreme Court in umpteen numbers of cases as *cited* by both sides has enunciated that in the absence of period prescribed, every action should be initiated within reasonable period which would depend on facts and circumstances of each case. The authorities appointed under Customs Act, 1962 cannot decide that what is reasonable period of limitation and it is only courts which can decide said question. Para 24 of judgment of Hon'ble Supreme Court in the case of **Bhatinda District Co-op. Milk (Supra)** directly deals with this question which is reproduced as under:

“ 24. We are, however, not oblivious of the fact that ordinarily the writ court would not entertain the writ application questioning validity of a notice only, particularly, when the writ petitioner would have an effective remedy under the Act itself. This case, however, poses a different question. The Revisional Authority, being a creature of the statute, while exercising its revisional jurisdiction, would not be able to determine as to what would be the reasonable period of exercising the revisional jurisdiction in terms of Section 21(1) of the Act. The High Court, furthermore in its judgment, has referred to some binding precedents which have been operating in the field. The High Court, therefore, cannot be said to have committed any jurisdictional error in passing the impugned judgment. ”

This Court in the case of **Hindustan Construction Company**

Ltd. Vs State of Haryana (Supra) while deciding question of maintainability of writ where issue involved was repeal of statute and effect of saving clause, in Para 8 has dealt with similar objection. Para 8 reads as under:

“8. We have given our anxious consideration to the preliminary objection raised by the respondents with regard to the maintainability of the present petition and also the contentions raised by the learned counsel for the petitioner-Company. The rule that the High Court will not entertain writ petition under Article [226](#) of the Constitution of India if an effective alternative remedy is available to the petitioner is not a statutory rule, but is a rule of self-imposed restraint evolved by the Courts and there are well recognised exceptions to this course, some of which have been noticed in [Babu Parkash Chandra Maheswari v. Antrim Zila Parishad \(Now Zila Parishad Muzaffarnagar\)](#), AIR 1969 Supreme Court 556: [State of U.P. and others v. Bridge & Roof Company \(India\) Ltd.](#), 1996(83) A.I.R. (SC) 3515 : (1996)6 SCC 22. and [Kerala S.E.B. v. Kurien E. Kalaithil](#), 2000(4) S.C.T. 242 : AIR 2000 Supreme Court 2573. One of the exceptions carved out by the Courts is that if the order under challenge is *per se* without jurisdiction, the aggrieved party may not be relegated to the alternative remedy of appeal etc. In the present case, the petitioner has challenged the impugned order mainly on the ground that respondent No. 2 did not have the jurisdiction to initiate the proceedings under the 1973 Act. Therefore, we do not find any justification to non-suit it on the ground of availability of alternative remedy. ”

Applying the ratio of afore-cited judgments and having regard to the fact that all the questions raised by Petitioner are question of jurisdiction, we find it appropriate to entertain present writ Petition under article 226 of the Constitution of India and accordingly proceed to answer other questions.

10. Question No. (ii) Whether demand of duty drawback under

Rule 16 of the Drawback Rules, 1995 can be made without any reasonable period of limitation?

All the judgments including judgments of Hon'ble Supreme Court in the case of **Raghuvar (India) Ltd (Supra)** and **Citadal Fine Pharamaceutical (Supra)** cited by counsels for Respondents hold that in the absence of specific period, action should be taken within reasonable period, thus both sides are *at idem* that every action in the absence of prescribed period should be initiated within reasonable period and what would be reasonable period would depend upon facts and circumstances of each case. Gujrat High Court in the case of **Padmini Exports Vs UOI 2012 (284) ELT 325** and **Pratibha Syntex Ltd 2013 (287) ELT 290** while dealing with question of reasonable period of limitation applicable to notice issued under Rule 16 of the Drawback Rules, 1995 and applicability of Section 28 has held that Section 28 of Act, 1962 is not applicable, however three years period is reasonable period to issue show cause notice for raising demand of duty drawback. The counsels for the Respondent contended that present case is of mis-declaration of value so judgments of Gujrat High Court are not applicable.

In response, Counsel for the Petitioner contended that as per Section 28 of Act, 1962 show cause notice cannot be issued beyond 5 years even in case of fraud, wilful mis-statement or suppressions of facts and in the present case prior to 8.4.2011 (10 shipping bills) assessment of shipping bills was framed by Proper Officer-Respondent and after 8.4.2011 (2 shipping bills) assessment qua declared valued was reduced or accepted by Respondent so notice dated 9.2.2018 could not be issued beyond 5 years from the date of assessment/export.

Hon'ble Supreme Court in the case of **Bhatinda District Co-op. Milk (Supra)** while deciding question of reasonable period of limitation for invoking revisional jurisdiction under PGST Act, 1948 applied limitation period prescribed under Section 11(6) of the PGST Act, 1948 and concluded that reasonable period cannot be more than 5 years. Applying said judgment, this court in the case of **Gupta Smelter Pvt. Ltd Vs UOI 2019 (365) ELT 77** has set aside show cause notice which was issued for framing final assessment under Section 18 of Customs Act, 1962 on the sole ground that it was issued after 5 years from the date of bill of entry. This court in the case of **GPI Textiles Ltd. Vs UOI, CWP No. 10530 of 2017** has set aside show cause notice issued under Section 11A of the Central Excise Act, 1944 raising demand of duty on the ground of its non-adjudication within reasonable period. This court in the case of **CCE Vs Hari Concast (P) Ltd. 2009 (242) ELT 12** has held that notice of penalty issued under Central Excise Act, 1944 beyond 5 years is bad in the eye of law even though no limitation period is prescribed for penalty.

From the perusal of judgments cited by both sides, it is quite evident that every action including show cause notice must be issued within reasonable period where no limitation is prescribed. Taking cue from Section 28 of Act, 1962 which prescribes maximum 5 years period to issue show cause notice even in case of fraud, wilful mis-statement and afore-cited plethora of judgments, we find that in every case 3 years period may not be reasonable (as otherwise held by Gujrat High Court in **Pratibha Syntex case (Supra)**), however notice issued after the expiry of 5 years cannot stand in the eyes of law. It would be apt to notice here that goods were exported during 2007-2012 after due verification by Customs officers

and DRI searched premises on 27.12.2012 whereas impugned show cause notice came to be issued on 9.2.2018 means after the expiry of 5 years even from the date of search.

Notice has been issued under Rule 16 and not 16A of Drawback Rules, 1995 so it is admitted fact that foreign currency stands realized thus in the absence of laying down some period as reasonable period, there would never be conclusion of assessment and it would be at the whims and fancies of Respondent to open any assessment at any point of time. Under Customs Act, 1962 every consignment passes through scrutiny of team of Customs officers and there may be mistake on the part of customs officers in one or two cases but cannot be so in every shipping bill. If contention of DRI is accepted, no assessment would conclude till an agency investigates and opines in one or another manner. Respondents have not cited any provision which either declares that no export is complete till NOC is issued by DRI or DRI has unlimited and unguided powers over and above the Customs Officers as well Customs Act, 1962. It would be against the purport and intent of Limitation Act. Period of 5 years for all purposes is reasonable period so we hold that any notice issued under Rule 16 of Drawback Rules, 1995 beyond 5 years from the date of export is bad in the eyes of law and barred by limitation. Accordingly, we answer this question in favour of Petitioner.

11. **Question No. (iii)** *Whether reenacted Drawback Rules, 2017 save Show Cause Notice dated 9.2.2108 (Annexure P-9) issued under Rule 16 of repealed Drawback Rules, 1995?*

In the reply as well during the course of oral arguments and in the written arguments, it is conceded by counsel for the Respondents that

impugned show cause notice dated 9.2.2018 (Annexure P-9) has been issued under Rule 16 of the Drawback Rules, 1995 however, w.e.f. 1st Oct' 2017, Drawback Rules, 1995 stand repealed. An enactment may be repealed without being substituted by another enactment or it may be substituted by another enactment with or without saving clause. Admittedly, this is case of reenactment of Rules with saving clause. In the absence of saving clause, repealed Act or Regulations are saved by Section 6 of the General Clauses Act. Section 6 of the General Clauses Act does not save Rules, however Section 159A of the Customs Act, 1962 inserted w.e.f. 11.05.2001 saves repealed Rules, Regulations, Notifications or Orders issued/framed under Customs Act, 1962. It saves amended, repealed, superseded or rescinded Rule, Regulation, Notification or Order issued under the 1962 Act, however it carves out an exception i.e. 'unless a different intention appears'. It is apt to notice here that Drawback Rules, 1995 and 2017 were/are framed under Section 75 of the Customs Act, 1962. Before proceeding further, it would be profitable to have a look at Section 159A of the Customs Act, 1962 and Rule 20 of the Drawback Rules, 2017 which are reproduced as under:

“ 159A. Effect of amendments, etc. of rules, regulations or orders.

Where any rule, regulation, notification or order made or issued under this Act or any notification or order issued under such rule or regulation, is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescinding shall not-

- (a) revive anything not in force or existing at the time at which the amendment, repeal, supersession or rescinding takes effect; or
- (b) affect the previous operation of any rule, regulation, notification or order so amended, repealed, superseded or rescinded

or anything duly done or suffered there under, or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any rule, regulation, notification or order so amended, repealed, superseded or rescinded; or'

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under or in violation of any rule, regulation, notification or order so amended, repealed, superseded or rescinded; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,

and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the rule, regulation, notification or order, as the case may be, had not been amended, repealed, superseded or rescinded.

Rule 20 of Drawback Rules, 2017:

20. Repeal and saving

(1) **From the commencement of these rules, the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 shall cease to operate.**

(2) **Notwithstanding such cesser of operation-**

(a) **every application made by a manufacturer or an exporter for the determination or revision of the amount or rate of drawback in respect of goods exported before the commencement of these rules but not disposed of before such commencement shall be disposed of in accordance with the provisions of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 as if these rules had not been made;**

- (b) any claim made by an exporter or his authorized agent for the payment of drawback in respect of goods exported before the commencement of these rules but not disposed of before such commencement shall be disposed of in accordance with the provisions of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 as if these rules had not been made;
- (c) every amount or rate of drawback determined under the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 and in force immediately before the commencement of these rules shall cease to operate in respect of goods exported on or after commencement of these rules. ”

Emphasis Supplied

An inevitable conclusion from the reading of afore quoted Section 159A of Act, 1962 is that repealed Rules or Regulations are saved provided different intention does not appear. In the present case, there is specific Rule 20 in Drawback Rules, 2017 which saves few acts committed under Drawback Rules, 1995. As there is specific Rule 20 in Drawback Rules, 2017 saving few rights accrued/created under Drawback Rules, 1995, Section 159A of 1962 Act cannot come into play and we are bound to look into different clauses of Rule 20 to find out that to which extent erstwhile rights and liabilities arising out of Drawback Rules, 1995 are saved. Clause (a) of Rule 20(2) saves applications made for determination or revision of drawback which are still pending; clause (b) saves any claim of drawback which is pending with respect to goods exported prior to commencement of 2017 Rules; and clause (c) provides that any rate or amount of drawback determined under Rules of 1995 shall not be applicable to goods exported after commencement of Rules, 2017.

From the bare reading of aforesaid clauses of Rule 20(2) of Drawback Rules, 2017, it is evident that none of clause deal with drawback claims filed and sanctioned prior to 1.10.2017.

By saving few rights accrued under Drawback Rules, 1995 Government has expressed different intention so Section 159A of 1962 Act becomes inapplicable. Had there been intention to save all rights and liabilities arising from Drawback Rules, 1995, the Government would not have inserted Rule 20(2) in Drawback Rules, 2017 saving only few rights/acts. Had there not been Rule 20(2) in Drawback Rules, 2017 as is in present form and manner, Section 159A of 1962 Act would have come into play and saved all the rights and liabilities arising out of Drawback Rules, 1995.

Contention of counsel for DRI that investigation was pending on the date of repeal of Drawback Rules, 1995 so claim of Petitioner was pending thus Rule 20(2)(b) of Drawback Rules, 2017 saves their action is absolutely mis-conceived because it is conceded position that no drawback claim was pending even at the time of initiation of investigation in 2012 rather DRI initiated investigation qua drawback released prior to December' 2012. It is clear from the bare reading of Rule 20(2)(b) of Drawback Rules, 2017 that it saves any claim which is pending with respect to goods exported prior to 1.10.2017 and in the present case no claim was pending on 1.10.2017.

Further contention of the counsel for Customs that Valuation Rules, 2007 are till date existing and demand is based on Valuation Rules seems to be attractive but does not serve their purpose. Drawback Rules, 1995 or even Drawback Rules, 2017 were/are neither subject to nor

subservient of Valuation Rules, 2007. Drawback Rules are independent and for the sake of determination of quantum of drawback, value of export goods is relevant, however drawback is disbursed on account of export of goods and realisation of export proceeds. Valuation Rules are meant to determine value of export goods whereas Duty Drawback as is evident from the schedule annexed to Duty Drawback Rules, 1995 may also be disbursed on the basis of quantity.

From the reading of Rule 20(2) of Drawback Rules, 2017, it is quite evident that it does not save recovery proceedings of already paid duty drawback. This Court in the case of **Hindustan Construction Company (Supra)** as upheld by Hon'ble Supreme Court and full bench of this court in the case of **Merino Panel Products Ltd Vs DETC CWP No. 11713 of 2006** decided on 28.8.2018 set aside orders passed in revision because only pending revisions were saved and not fresh ones to be initiated. In the said case, order passed by Joint Excise and Taxation Commissioner-cum Revisionary Authority came to be challenged on the ground that after introduction of Haryana VAT Act, 2003, revisionary authority has no jurisdiction to initiate revisionary proceedings, as Section 61 of the HVAT Act saves only pending proceeding of revision. A Division Bench of this Court after discussing at length difference between appeal and revision concluded that appeal is continuation of suit/proceeding whereas revision is not continuation of suit instead is an independent proceeding. It was held that Section 4 of Punjab General Clauses Act, 1898 cannot be considered because Section 61 of Haryana VAT Act, 2003 whereby Haryana Sales Tax Act, 1973 was repealed specifically deals with rights and liabilities arising out of repealed Act of 1973. The Hon'ble Supreme Court as well Full bench

of this court has upheld said Division Bench judgment. Para 25 of the judgment of this court and Para 11 of judgment of Hon'ble Supreme Court read as under:

“ 25. We shall now deal with the provisions of section 4 of the General Clauses Act. A reading thereof shows that unless a different intention appears, the repeal does not affect any right, privilege or obligation or any legal proceedings or remedy in respect of any such right, privilege, obligation, liability etc. By virtue of Section 61 of the VAT Act, the legislature, while repealing the 1973 Act, save the pending application, appeal, revision and other proceedings made or preferred to any authority under that Act and transferred the same for disposal by the officer or authority, who would have had jurisdiction to entertain such application etc. under the new Act. It is, thus, clear that while enacting Section 61 of the VAT Act, a different intention has been expressed by the Legislature. Thus, the effect of the aforesaid repealing clause clearly excludes operation of section 4 of the General Clauses Act. Therefore, that section cannot come to the rescue of the state for defending the action taken by respondent No. 2. ”

“ 11. The legislature, in its wisdom having noticed the limitation and constraints under Section 61 of the Act of 2003, made necessary amendments to the same by Act No. 3 of 2010 on 02.04.2010. Any interpretation saving the revisional power under Section 40 of the Act of 1973, without any proceedings pending on the relevant date, by resort to Section 4 of the Punjab General Clauses Act, 1858 would render the amendment redundant, and an exercise in futility, something which the legislature never intended to do. Such an incongruous interpretation

leading to absurdity has to be avoided. ”

Applying the afore quoted judgments, we find that by inserting Rule 20(2) government has shown its different intention and Rule 20(2) of Drawback Rules, 2017 does not save show cause notices relating to demand of already paid duty drawback, therefore, Respondent cannot initiate or continue with show cause notice (P-9) issued under Rule 16 of erstwhile Drawback Rules, 1995.

12. **Question No. (iv):** *Whether Rule 16 of Drawback Rules, 1995 provides complete machinery to declare already paid drawback as erroneous or excess and thus recovery thereof?*

As per Counsel for the DRI and Customs, Section 14 of the Customs Act, 1962 read with Rule 8 of Valuation Rules, 2007 permits rejection of declared value and redetermination of value even of goods which had already been exported out of country. The DRI officers have been appointed under Section 17 of the Act, 1962 as proper officer for the purpose of assessment and they have power not only to make assessment but also to reopen an assessment already done and for the said purpose DRI is empowered to carry out any examination or test which it deems necessary. There is no provision in law which bars DRI to reopen an assessment. The delegation of powers to DRI would be totally redundant, ineffective and useless if they cannot reopen an assessment. The Valuation Rules, 2007 consist of complete mechanism to assess value of export goods as well as goods which have already been exported. The department under Rule 8 has right to reject already assessed value and re-assess value under Rule 6 of the Valuation Rules. Drawback is sanctioned on export of goods and phrase ‘export’ has been defined under Rule 2(c) of the Drawback Rules, 1995. As

drawback is sanctioned on export of goods, department has right to re-assess value of goods already exported and consequentially raise demand of excess drawback. Demand of drawback under Rule 16 of Drawback Rules, 1995 is consequential so contention of Petitioner that mechanism is absent in Rule 16 of the Drawback Rules, 1995 is fallacious.

Counsel for the Petitioner submitted that as per DRI itself they have been appointed as proper officer under Customs Act, 1962, therefore, there is no occasion to exercise any power which is not vested in Customs Officers-Proper officer. An officer appointed under a particular Act can exercise powers endowed by said Act, hence DRI cannot exercise a power which is not vested in Customs Officers. In case of mis-declaration of value of import or export goods, demand of duty which is calculated as some percentage of CIF/FOB Value is raised under Section 28 of the Act, 1962 which is a complete code in itself whereas Rule 16 of Drawback Rules, 1995 does not provide any such mechanism so contention of Respondent that Valuation Rules, 2007 provide a complete mechanism for Rule 16 of Duty Drawback Rules, 1995 is fallacious.

Counsels for the Respondents heavily relied upon Section 75(2) (ab) of Act, 1962. Rather, we find that Section 75(2) (ab) of Act, 1962 supports case of Petitioner because it provides that Central Govt. may specify procedure for recovery whereas no procedure for recovery except where export proceeds are not realized, has been prescribed under Drawback Rules, 1995. From the reading of Section 28 of Act, 1962 we find that it provides complete mechanism in case duty or interest is not levied or short levied or erroneously refunded. The demand of duty may be on account of mis-declaration of value or description or quantity or

classification but in every case notice is issued under Section 28 of Act, 1962 and procedure prescribed therein is followed. Admittedly, the impugned notice has been issued under Rule 16 of the Drawback Rules, 1995 and not Section 28 of Act, 1962. By saying that Valuation Rules, 2007 provide mechanism, Respondents agree with Petitioner that mechanism is absent in Rule 16 of Drawback Rules, 1995. Rule 16 provides for recovery of Drawback which has been paid erroneously or in excess of what the claimant is entitled to. Rule 16A which was inserted w.e.f. 6th Dec' 1995 prescribes manner for recovery of drawback where export proceeds are not realized. Rule 16 directs claimant to repay erroneously or excess paid drawback on demand by a Proper Officer. The Rule nowhere provides method and manner i.e. machinery to determine and demand any drawback as erroneous or excess. In the present case, the Respondent has proposed to re-assess value of already exported goods and on the basis of proposed reassessed value, demand of duty drawback has been raised. The Rule 16 of Drawback Rules, 1995 does not prescribe any mechanism/machinery to determine or conclude that claimant has availed drawback which is excess or erroneous.

Phrase 'erroneous' has not been defined under the 1962 Act and different Rules made thereunder, however as per different English Dictionaries 'Erroneous' means 'wrong, incorrect, mistake'. To our mind, Rule 16 of Drawback Rules, 1995 is applicable where drawback is released on account of some calculation mistake or other error which needs no adjudication and claimant is duty bound to refund as soon as demanded by proper officer. It is also applicable where after following procedure known to law, it is finally concluded that claimant/exporter was released drawback

more than his actual entitlement. In such circumstances, there is no need to issue within reasonable period show cause notice and its adjudication thus under Rule 16 neither limitation period has been prescribed nor there is requirement of show cause notice and its adjudication. Rule 16 of Drawback Rules, 1995 cannot be straightway applied in a situation like case in hand where at the time of export, value of goods was assessed by Customs Officers; goods stand exported; currency stand realized and drawback stand released. In a situation like present case, due procedure i.e. complete machinery is inevitable which is absent in Rule 16 of Drawback Rules, 1995.

Counsel for the Customs further relied upon phrase 'export' to say that export means taking out of India and drawback is sanctioned after taking goods out of India so value can be re-determined after taking goods out of India. Phrase 'export' as well 'export goods' are defined under Section 2(18) and 2(19) of the Customs Act, 1962 respectively and under Drawback Rules, 1995 which are framed under Customs Act, 1962 phrase 'export' has been defined. The definition of 'export' is same under the Act as well Rules except under Drawback Rules "supply to Special Economic Zone" and "supply of store for use on board a vessel or aircraft" is also taken care of, however qua export of goods out of country, definition is same. Rule 1(3) of Valuation Rules, 2007 categorically holds that these rules are applicable to 'export goods'. Further, Rule 6 & 8 of Valuation Rules, 2007 use phrase 'export goods'. Drawback Rules, 1995 use phrase 'export' and not 'export goods'. Thus, we are bound to give actual effect to both the phrases. Counsels for the Respondents are relying upon Valuation Rules, 2007 where word used is 'export goods' so they cannot borrow

definition of ‘export’ to suggest that Rule 6 and 8 are applicable not only to ‘export goods’ but also goods which had already been assessed by Customs and exported out of India.

Mechanism provided under Section 28 for demand of duty or interest not levied or short levied indicates that mechanism is indispensable and demand may be on account of any reason e.g. mis-declaration of value, description, rate of duty. In case of import of goods, if there is mis-declaration of value, Respondent-department re-determines value and thereafter show cause notice is issued under Section 28 of Act, 1962 even though demand of duty is consequential to re-determination of value.

Export incentive duty drawback is granted in the form of cash and there are other export incentives which are issued by Directorate General of Foreign Trade (DGFT) in the form of instrument. In case it is found that instrument was obtained by collusion, suppression of facts or mis-statement of facts, instrument is cancelled by DGFT under Foreign Trade (Development and Regulation) Act, 1992 and duty is demanded in terms of Section 28 or 28 AAA of the Customs Act, 1962. Section 28 AAA reads as under:

SECTION 28AAA. Recovery of duties in certain cases. —

(1) Where an instrument issued to a person has been obtained by him by means of —

- (a) collusion; or
- (b) wilful misstatement; or
- (c) suppression of facts,

for the purposes of this Act or the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), by such person or his agent or employee and such instrument is utilised under the provisions of

this Act or the rules made or notifications issued thereunder, **by a person other than the person to whom the instrument was issued, the duty relatable to such utilisation of instrument shall be deemed never to have been exempted or** debited and such duty shall be recovered from the person to whom the said instrument was issued:

Provided that the action relating to recovery of duty under this section against the person to whom the instrument was issued shall be without prejudice to an action against the importer under section 28.

Explanation 1.— For the purposes of this sub-section, “instrument” means any scrip or authorisation or licence or certificate or such other document, by whatever name called, issued under the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), with respect to a reward or incentive scheme or duty exemption scheme or duty remission scheme or such other scheme bestowing financial or fiscal benefits, which may be utilised under the provisions of this Act or the rules made or notifications issued thereunder.

Explanation 2.— The provisions of this sub-section shall apply to any utilisation of instrument so obtained by the person referred to in this sub-section on or after the date on which the Finance Bill, 2012 receives the assent of the President, whether or not such instrument is issued to him prior to the date of the assent.

(2) Where the duty becomes recoverable in accordance with the provisions of sub-section (1), the person from whom such duty is to be recovered, shall, in addition to such duty, be liable to pay interest at the rate fixed by the Central Government under section 28AA and the amount of such interest shall be calculated for the period beginning from the date of utilisation of the instrument till the date of recovery of such duty.

(3) For the purposes of **recovery under sub-section (2), the proper officer shall serve notice on the person to whom the instrument was issued requiring him to show cause, within a period of thirty days from the date of receipt of the notice, as to why the amount specified in the notice (excluding the interest) should not be recovered from him, and after giving that person an opportunity of being heard, and after considering the**

representation, if any, made by such person, determine the amount of duty or interest or both to be recovered from such person, not being in excess of the amount specified in the notice, and pass order to recover the amount of duty or interest or both and the person to whom the instrument was issued shall repay the amount so specified in the notice within a period of thirty days from the date of receipt of the said order, along with the interest due on such amount, whether or not the amount of interest is specified separately.

(4) Where an order determining the duty has been passed under section 28, no order to recover that duty shall be passed under this section.

(5) Where the person referred to in sub-section (3) fails to repay the amount within the period of thirty days specified therein, it shall be recovered in the manner laid down in sub-section (1) of section 142.

From the perusal of Section 28 and 28 AAA, it appears that Government has provided complete machinery to recover duty, in case any instrument is wrongfully obtained under Foreign Trade (Development and Regulation) Act, 1992. We find ourselves in agreement with counsel for the Petitioner that if Valuation Rules, 2007 are omnibus, there is no need to issue show cause notice and follow procedure prescribed under Section 28 of Act, 1962. The judgment cited by DRI counsel in the case of **Jain Shudh Vanaspati** (Supra) permits demand of duty under Section 28 of the Act which was short levied or not levied at the time of clearance of goods even though department refrained from filing appeal against assessment order. As noticed by Hon'ble Supreme Court, show cause notice under Section 28 can be issued within five years from the relevant date which is certainly beyond the period prescribed for filing appeal against order passed under Section 47 of the Act, 1962. Rule 16A of the Drawback Rules provides for demand of drawback if export proceeds are not realized within prescribed period or

extended period. Though no adjudication is required in case of non-realisation of export proceeds still Rule 16A of Drawback Rules, 1995 like Section 28 provides mechanism and is applicable after the expiry of period prescribed for filing appeal thus contention of DRI would be correct if demand is raised under Rule 16A of Drawback Rules.

As contended by counsels for Respondents, Rule 6 & 8 of Valuation Rules, 2007 prescribe for rejection of declared value and manner of determination of value at the end of Proper Officer. Prior to 8.4.2011, there was no self assessment and it was made by proper officer and even after 8.4.2011, the proper officer continues to examine goods and either accepts declared value or revises it. In the case in hand, prior to 8.4.2011, assessment was made by Respondent/Customs authorities and w.e.f. 8.4.2011 the value declared by Petitioner was scrutinized and either accepted as such or reduced for the purpose of drawback. The Valuation Rules, 2007 prescribe manner to determine value in case declared value is rejected, however, power to assess or re-assess is embodied in Section 17 read with 51 of Act, 1962. In the absence of specific power under Customs Act, 1962 like power vested under Section 147 of the Income Tax Act or Section 29 of Punjab VAT Act, Customs Officers or DRI officers exercising power of Customs Officer have no authority in law to reject and re-determine value which they assessed at the time of export of goods.

The Valuation Rules, 2007 are not substitute of re-determination of entitlement and demand of already paid duty drawback. The legislature as per its wisdom did not permit demand of duty drawback under Section 28 or 28 AAA even though apart from duty, demand of interest which is compensatory in nature and consequential to demand of

duty, is also provided under said Sections 28 and 28AAA.

Hon'ble Supreme Court in the case of **Commissioner of Central Excise versus Larsen and Toubro (Supra)** while dealing with question of demand of Service Tax from works contractor had held that Service Tax cannot be demanded in the absence of mechanism to determine value of service component in a works contract. On the ground of absence of mechanism, Hon'ble Supreme Court quashed demand of Service Tax for the period prior to 01.06.2007. Hon'ble Supreme Court in relevant Paras 24 to 26 & 43 has held as under:

“ 24. A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines “taxable service” as “*any service provided*”. All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract.

25. In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner.

26. We have already seen that Rule 2(A) framed pursuant to this power has followed the second *Gannon Dunkerley* case in segregating the ‘service’ component of a works contract from the ‘goods’ component. It begins by working downwards from the gross amount charged for the entire works contract and minusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract is to include the eight elements laid down in the second *Gannon Dunkerley* case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different works contracts how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax.

43. We need only state that in view of our finding that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such argument must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services.

”

Relying upon said judgment of Hon’ble Supreme Court, this Court in the case of **Laqshya Media Pvt. Ltd. Versus State of Punjab and Others** set aside demand of advertisement tax on the ground that even though Section 135 of Punjab Municipal Corporation Act, 1976 envisages issuance of a demand notice for recovery of the advertisement tax due on a

prescribed form, however no form, as such has been prescribed. No procedure regarding filing of returns, assessment of Tax and consequently recovery thereof has been prescribed.

Hon'ble Supreme Court in the case of **Shabina Abraham** (Supra) while dealing with question of continuation of assessment proceedings under Section 11/11A of the Central Excise Act, 1944 has held that in the absence of machinery provisions to collect and assess duty, proceedings cannot continue against legal representative/estate of a sole proprietor/manufacture after he is dead. Hon'ble Supreme Court in relevant Paras 19 to 21 has held as under:

“ 19. Learned counsel for the revenue relied upon Section 11 of the Act, which, according to him, indicates that an attachment and sale of excisable goods can belong to a dead person and such attachment and sale can continue notwithstanding the death of such person. Apart from the fact that there is nothing about dead persons in Section 11, Section 11 is limited only to recovery of sums that are due to the Government. The very opening words in Section 11 show that duty and other sums must first be payable to the Central Government under the Act or the rules. If such sums are not “payable” then the provisions of the Section do not get attracted at all. We have seen that the Act contains no machinery provisions for proceeding against a dead person’s legal heirs, such as are contained in the Income Tax Act. Obviously, therefore, duty and other sums do not become “payable” without such machinery provisions. Further, Section 11 deals with modes of recovery of tax payable and does not deal with the subject matter at hand - namely machinery provisions for assessment in the hands of the estate of a dead person and, therefore, does not have much bearing on the matter in issue in the present case. The argument, therefore, as to the insertion of the proviso to Section 11 by an Amendment Act of 2004 so as to provide that if a person from whom some recoveries are due transfers his business to another person, then the excisable goods in the possession of the transferee can also be attached and sold again

leads us nowhere. In fact learned counsel for the appellants also relied on this proviso to argue that the Legislature's need to add the proviso shows that nothing can be read into the Central Excises and Salt Act by implication. As has been stated above, Section 11 deals with an entirely different situation and the addition of the proviso therein is not of much significance as far as the question we have to answer is concerned.

20. Learned counsel for the revenue, however, contended that the principles applied in the case of the Income Tax Act should not be applied to the Central Excises and Salt Act as the latter Act is a tax on manufacture of goods and not on persons. We are afraid this argument cannot be countenanced in view of this Court's judgment in *State of Punjab v. M/s. Jullunder Vegetables Syndicate*, (1966) 2 S.C.R. 457. In that judgment, the question before this Court was whether a dissolved firm could be assessed to sales tax under the East Punjab General Sales Tax Act, 1948, with respect to its pre-dissolution turnover. After analyzing the East Punjab General Sales Tax Act, this Court held :-

“ The scheme of the Act is a simple one. A firm is a dealer; the said dealer is assessable to tax on its turnover, if its turnover exceeds the prescribed limit. It cannot do business while being liable to pay tax under the Act without getting itself registered and possessing a registration certificate. It is assessed to tax under Section 11 of the Act in the manner prescribed thereunder. If it discontinues its business, it shall within the specified time inform the prescribed authority accordingly. A dealer and its partners are jointly and severally responsible to pay the tax assessed on the dealer. But there is no provision expressly empowering the assessing authority to assess a dissolved firm in respect of its turnover before its dissolution. The question is whether such a power can be gathered by necessary implication from the other provisions of the Act.” (at page 461)

The Court went on to say:

“ Though under the partnership law a firm is not a legal entity but only consists of individual partners for the time being, for tax law, income-tax as well as sales-tax, it is a legal entity. If that be so, on dissolution, the firm ceases to be a legal entity. Thereafter, on

principle, unless there is a statutory provision permitting the assessment of a dissolved firm, there is no longer any scope for assessing the firm which ceased to have a legal existence. As in the present case, admittedly, the firm was dissolved before the order of assessment was made, the said order was bad.” (at page 462)

The Court went on to consider various High Court decisions and ultimately concluded as follows :-

“ Strong reliance was placed upon two judgments of this Court. This Court in *C.A. Abraham v. Income-tax Officer, Kottayam*, speaking through Shah, J., held that S. 44 of the Income-tax Act set up a machinery for assessing the tax liability of firms which have discontinued their business. This was followed by this Court again in *Commissioner of Income-tax, Madras v. S.V. AngidiChettiar*. These two decisions are of no help to the Revenue in the present case. Indeed, in a sense they are against it. The Income-tax Act contains an express provision for assessing a dissolved firm. Indeed, but for that provision no assessment could be made under that Act on dissolved firms.

For the foregoing reasons we hold that the High Court was right in holding that the assessment order on the dissolved firm could not be supported under the provisions of the Act. The High Court has given a correct answer to the question propounded for its decision.” (at page 464)

21. This judgment is a complete answer to the contention of learned counsel for the revenue inasmuch as on a parity of reasoning, sales tax is not a personal tax but a tax on the sale of goods. Nevertheless, this Court held that in the absence of any machinery provisions to assess and collect sales tax from a deceased person - in that case it was a dissolved partnership firm - all proceedings against such deceased person/dissolved firm abate. The aforesaid judgment has been followed by this Court in *Khushi Ram Behari Lal & Co. v. Assessing Authority, Sangrur*, (1967) 19 STC 381 and in *Additional Tahsildar, Raipur v. Gendalal*, (1968) 21 STC 263.

”

Madras High Court in the case of **Eternit Everest Ltd.**

(Supra) while dealing with question of recovery of any sum collected by any person as Excise Duty though not payable under Central Excise Act, 1944 has held that in the absence of machinery provisions under Section 11D of the Central Excise Act, 1944 recovery cannot be effected from any person and machinery provided under Section 11A of the Act cannot be invoked.

In the case in hand, Rule 16 of Drawback Rules, 1995 requires to pay drawback which has been availed erroneously or in excess of entitlement. The Rule does not prescribe mechanism to determine and demand any drawback as erroneous or in excess of entitlement. Applying the afore-cited judgments, we find that Rule 16 of Drawback Rules, 1995 does not have machinery to hold and demand any drawback as erroneous or excess and in the absence of mechanism demand is bad in the eye of law. The said Rule even does not provide for show cause notice which indicates that it is applicable after determination of any drawback as excess or erroneous. Rule 16A provides for demand in case of non-realisation of export proceeds. Realisation of export proceeds is *sine qua non* to avail drawback and in case of non-realisation demand is raised under Rule 16A of the Rules. There was no need to insert Rule 16A if Rule 16 covers demand of erroneous and excess drawback in all cases. The counsel for the Respondents are unable to show any other Rule under which procedure has been prescribed to determine any drawback as erroneous or excess and thereafter demand thereof. Thus we are inclined to hold that mechanism is absent under Customs Act, 1962 read with Drawback Rules to hold any drawback as erroneous or excess and demand thereof.

13. The present petition deserves to be allowed on the basis of our

above findings thus it would be academic to deal with any other question.
Therefore, we refrain to answer last question and leave it open.

In view of our above findings, present Petition deserves to be allowed and accordingly allowed. Show Cause Notice dated 09.02.2018 (Annexure P-9) is hereby quashed.

(JASWANT SINGH)
JUDGE

(LALIT BATRA)
JUDGE

September 20th, 2019
Vinay

Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No