



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22-12-2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

WP NOS.14307 TO 14309, 12212

22315 AND 22316 OF 2015

AND

MP NOS.1, 1, 1, 1, 1 AND 1 OF 2015

M/s.Intimate Fashions (India) Private Limited,
Represented by its Deputy General Manager-Finance,
Mr.David Robert Samuel Ponraj,
Thirupporur - Kottamedu High Road,
Nandhivaram,
Guduvancheri - 603 202.

.. Petitioner in WPs 14307 to 14309
and 12212 of 2015

M/s.ABI SHOWATECH (India) Ltd.,
Represented by its Deputy General Manager-Finance,
Mr.M.Ramachandran,
Stone Acre,
No.67, Chamiers Road,
Chennai - 600 028.

.. Petitioner in WPs 22315 and
22316 of 2015

vs.

The Additional Director General of Foreign Trade,
Ministry of Commerce and Industry,
No.26, Shastri Bhavan,
Annexe Building,
Haddows Road,
4th and 5th Floor,
Chennai - 600 006.

.. Respondent in WPs 14307 to 14309
and 12212 of 2015



Director General of Foreign Trade,
Ministry of Commerce,
Udyog Bhavan,
New Delhi.

WEB COPY

.. R-1 in WPs 22315 and 22316
of 2015

Assistant Director General of Foreign Trade,
Ministry of Commerce and Industry,
No.26, Shastri Bhavan,
Annexe Building, 4th Floor,
Haddows Road,
Nungambakkam,
Chennai - 600 006.

.. R-2 in WPs 22315 and 22316
of 2015

WP 14307 of 2015 is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus, calling for the records comprised in File No.04/21/88/00148/AM13/17 dated 31.03.2015 on the file of the respondent, quash the same and consequently direct the respondent to permit transferability and utilisation of the said license and extend the validity period of the license as may be felt necessary by this Court in light of the fact that the petitioner has been put to undue hardship on account of the recovery proceedings during which could not transfer/utilise the said license.

WP 14308 of 2015 is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus, calling for the records comprised in File No.04/21/88/00151/AM13/17 dated 31.03.2015 on the file of the respondent quash the same and consequently direct the respondent to permit transferability and utilisation of the said license and extend the validity period of the license as may be felt necessary by this Court in light of the fact that the petitioner has been put to undue hardship on account of the recovery proceedings during which could not transfer/utilise the said license.

WP 14309 of 2015 is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus, calling for the records comprised in File No.04/21/88/00167/AM13/14 dated 31.03.2015 on the file of the respondent quash the same and consequently direct the respondent to permit transferability and utilisation of the said license and extend the validity period of the license as may be



felt necessary by this Court in light of the fact that the petitioner has been put to undue hardship on account of the recovery proceedings during which could not transfer/utilise the said license.

WEB COPY

WP 12212 of 2015 is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus, calling for the records comprised in File No.04/21/88/00143/AM14 dated 09.02.2015 on the file of the respondent quash the same and consequently direct the respondent to permit transferability and utilisation of the said license and extend the validity period of the license as may be felt necessary by this Court in light of the fact that the petitioner has been put to undue hardship on account of the recovery proceedings during which could not transfer/utilise the said license.

WP 22315 of 2015 is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari, calling for the records of the second respondent viz., F.No.04/66/88/00022/AM14 culminating in the letter F.No.04/66/88/00022/AM14 dated 13.02.2015 and quash the order No.F.No.04/66/88/00022/AM14 dated 13.02.2015.

WP 22316 of 2015 is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari, calling for the records of the second respondent viz., F.No.04/66/88/00039/AM14 culminating in the letter F.No.04/66/88/00039/AM14 dated 16.02.2015 and quash the order No.F.No.04/66/88/00039/AM14 dated 16.02.2015.

For Petitioner in WPs 14307 to
14309 and 12212 of 2015 : Mr.S.Muthuvenkataraman

For Petitioner in WPs 22315
and 22316 of 2015 : Mr.S.Murugappan

For Respondent WPs 14307 to
14309 and 12212 of 2015 : Mr.B.Sudhir Kumar,
Senior Panel Counsel.

For Respondents in WPs 22315
and 22316 of 2015 : Mr.A.Murughan,
Central Government Standing
Counsel.



C O M M O N O R D E R

These writ petitions on hand are instituted questioning the order passed for recovery of excess due credit issued from Status Holder Incentive Scrip (SHIS) Scheme.

2. All the petitioners are Export Oriented Units and under the Scheme, they have availed certain benefits. It is a policy decision, which was being implemented.

3. The respective learned counsels appearing on behalf of the petitioners importantly raised that the order impugned is hit by the Rule of Limitation and thus, the Authorities have no jurisdiction to issue the order impugned. It is passed beyond the period of two years. Thus, liable to be set aside.

4. It is contended that the policy benefit availed are sought to be recovered merely based on the audit objection raised. Audit objections are raised based on the erroneous interpretation of the terms of the Scheme and beyond the scope of the Scheme and thus, the very initiation of recovery proceedings are in violation of the Scheme benefits as promised by the respondents.

5. Even on merits, the petitioners have raised several grounds. The extent of the Scheme benefits conferred and utilisation etc., which all are stated by the petitioners in their affidavits and during submissions.

6. This Court raised a question that an order impugned is the order admittedly passed pursuant to the audit objection raised by the Department of Audit. Thus, in the absence of any adjudication whether the High Court would be in a position to form an opinion with reference to various disputes raised on merits, including the point of limitation.

7. The respective learned counsels for the petitioners contended that they have raised all grounds on merits and as far as the limitation is concerned, it is sufficient, if it is established that the order impugned has been passed beyond the period of two years and similar point was considered by various Hon'ble High Courts and the Hon'ble Supreme Court of India and therefore, the point of limitation is to be considered in these cases and accordingly, the orders impugned are liable to be set aside.

8. It is contended that once the benefits of the Scheme are utilised, then the Authorities have no power to cancel or impose recovery.



WEB COPY

9. The learned Central Government Standing Counsel and the Senior Panel Counsel raised an objection by stating that the audit objection raised by the CRA Audit was taken into consideration by the Authorities Competent for the purpose of issuing the order impugned.

10. In January 2015, the CAG Audit (CRA - Customs Revenue Audit), Chennai, which audited the file, observed that in terms of para 3.16.1 (b) of FTP, Status Holders shall be entitled to a duty credit scrip @ 1% of FOB value of Exports. In terms of para 3.10.3 (b) of the Handbook of Procedures (Volume-I) 2009-2014, an applicant who has availed zero duty EPCG authorisation during the year 2010-2011 or 2011-2012 or 2012-2013 shall not be entitled to SHIS for that year i.e., for exports made during the respective previous years 2009-2010, 2010-2011, 2011-2012. Such SHIS applications will be summarily rejected.

11. It was pointed out by the Audit that the provisions of this para was not extended to 100% Export Oriented Units (EOUs), where the EOUs enjoy the benefit of duty free import/indigenous procurement of goods including capital goods in terms of para 6.2 (b) of the FTP 2009-2014 for the entire period of their status of EOU.

12. Admittedly, the petitioners fell under the category of EOUs. The audit pointed out this provisions for regulating the SHIS duty credit in respect of EOUs has put them in an advantageous position as compared to other Status Holder Exporters, who are denied the SHIS benefit if they avail zero duty EPCG.

13. This Court is of the considered opinion that audit objection raised on the one end and the order impugned based on the other end must be looked into for the purpose of considering the importance involved for adjudication of the disputed issues.

14. Let us look into the order impugned dated 13.02.2015. It is no doubt states that the recovery of excess due credit issued from Status Holder Incentive Scrip (SHIS) License. However, perusal of the order impugned would reveal that the audit objection is the ground for issuing the order requesting to repay the entire duty credit availed by the petitioners.

15. The order impugned further states that the petitioners are requested to repay the entire duty credit availed by them. Thus, for all purposes, it is the demand made by the respondents to repay the SHIS scrip availed by the petitioners.



16. A demand notice or an unadjudicated recovery notice or a show cause notice are to be treated as akin, as show cause notices are issued seeking explanations from the petitioners by setting out the allegations. The demand notices are issued by informing the proposed decision arrived at based on the Rules, Regulations or Guidelines and asking the Addressee to comply with the demand and in such circumstances, the persons who receive the demand notice has an option to comply with the demand or to raise an objection in respect of such demand or to approach the Appellate Authority or Competent Authority for adjudication.

17. Thus, an audit objection culminated into an order of demand or recovery, per se, need not be adjudicated by the High Court at all circumstances. Such demand or recovery being original proceedings of the Authorities, adjudication of the issues involved are imminent with reference to the original records, evidences and in the present case, audit objections. However, no such elaborate objection can be done by the High Court under Article 226 of the Constitution of India. Every act or Rules, contemplates alternate remedy to be exhausted by the aggrieved persons. The legislative intention for providing an appellate remedy is to ensure that the original decisions taken by the Authorities are revisited for the purpose of verifying the correctness of such orders or otherwise. The Appellate Authorities are empowered to verify the original records and evidences for the purpose of deciding the issues. Thus, exhausting the appellate remedy is of paramount importance.

18. The power of judicial review under Article 226 of the Constitution of India is to ensure that the processes through which a decision is taken by the Competent Authorities are in consonance with the provisions of the Statutes and Rules in force, but not the decision itself. Thus, the process of adjudication as contemplated under the Statutes or Rules at no circumstances be undermined or dispensed with by the High Court and in fact, findings both factually and legally to be made by those Competent Authorities are of greater assistance to the High Court for effective exercise of the powers of judicial review under Article 226 of the Constitution of India.

19. Contrarily, based on the affidavits filed by the petitioners and merely considering the counter-affidavits or the xerox copy of the documents and in the absence of original Audit Report and other relevant records if the High Court made a finding, then there is a possibility of error or commission in appreciating certain vital factors and intricacies involved in such Foreign Trade Policies. Thus, an amount of caution is required in order to protect the interest of the parties, so as to avoid prejudice to any of the parties.



WEB COPY

20. As far as the writ petitions on hand are concerned, no doubt, based on the audit objections, the impugned demand is made by passing an order of recovery. However, there was no adjudication of merits or otherwise, with reference to the contentions raised between the parties.

21. The petitioners raised various grounds on merits as well as the ground of limitation. The Quasi Judicial Authorities/Appellate Authorities are empowered to adjudicate factual aspects and also the legal grounds, including the point of limitation. When effective alternate remedy or opportunities are made available to the aggrieved persons, such adjudications need not be dispensed with by the High Court in a routine manner. In the event of adjudication of issues and in the absence of exhausting the alternate statutory remedies, it would not only be premature, but there is a possibility of miscarriage. Thus, at all circumstances, the aggrieved persons are expected to exhaust the alternate remedy contemplated under law.

22. The learned counsels for the petitioners urged this Court by stating that the point of limitation alone is sufficient to set aside the order impugned as it is passed beyond the period of two years, which is contemplated. Further, the Authorities have no jurisdiction or Authority to issue the impugned order.

23. This Court is of the considered opinion that the point of limitation sometimes is tricky issue, but it is not as if the dates are to be verified and the orders are to be set aside by holding that the order impugned is passed beyond the period of two years. The reckoning point, the date on which the cause aroused, conduct of audit by the Competent Authorities, all those relevant factors are to be considered for the purpose of deciding the point of limitation.

24. This apart, the Apex Court of India in number of cases ruled that the period of limitations prescribed in Statutes and Rules are directory under certain circumstances. In number of cases, limitations prescribed in the Statutes are declared as directory. For example, in Cooperative Societies Act, the Act provides completion of a statutory enquiry within a period of three months. The said limitation is construed as directory, considering the point that it may not be practically possible for the Competent Authorities to complete all such enquires in respect of largescale allegations or otherwise or number of verifications or huge number of files are to be dealt with. Various such circumstances were considered and the Courts have held that the limitations prescribed are directory on many



occasions.

25. The contemplation of limitation is to ensure that the actions must be initiated within a reasonable period of time at all circumstances and prolonged initiation would cause prejudice to the parties. Further limitation is essential to avoid excess exercise of powers and also to minimise unnecessary administrative delay. However, the point of limitation is to be considered by adopting a purposive interpretation of the Statutes and such interpretation must be not only constructive but must ensure the purpose and objects sought to be achieved under the particular Act or Rules. The law expects the offenders/delinquents are prosecuted under law. So also the revenue due to the Government are recovered without any lapse. Therefore, the law of limitation is an important factor, which is to be decided based on the facts and circumstances in entirety and more-so with reference to the records available. No one shall be allowed to escape from the liability in a casual manner by merely citing the law of limitation. Limitations contemplated in Statutes are directory on many occasions. Thus, several factual aspects are also to be considered for the purpose of deciding the case on the ground of limitation. Therefore, the Courts cannot adopt an arithmetic procedure of comparing the dates and to quash the orders on the ground of limitation.

26. Therefore, all such disputed facts and legal grounds are required to be adjudicated elaborately by the Competent Authorities as well as by the Appellate Authorities. Now the impugned order has been passed by the Original Authority by way of recovery without conducting any adjudication by providing an opportunity to the petitioners. Thus, the impugned orders cannot be construed as a final order for the purpose of considering the merits and also the legal grounds raised between the parties.

27. When it is not a final order, this Court is of an opinion that the Authorities must adjudicate the issues on merits. When the point of adjudication comes, then it is to be placed before the Competent Authorities for effective adjudication and to take a final decision by conducting an enquiry and by affording opportunities to the parties concerned.

28. In view of the fact that the order impugned is passed merely based on the audit objection without conducting any adjudication, this Court is not inclined to made any finding with reference to the merits as well as the other grounds raised with reference to the facts and circumstances of the case. All such facts and circumstances on merits are to be adjudicated based on the original documents, audit objections and other evidences made available by the parties.



29. In this view of the matter, the order impugned though stated as the recovery order, it is the demand requesting the petitioners to repay the entire duty credit amount availed from the SHIS Scheme. In the order it has been stated that the petitioners are requested to repay their entire due credits availed. Therefore, such a requisition order is to be treated as a demand alone and cannot be construed as final recovery order.

30. When the petitioners are requested by the Authorities to repay the entire due credits, this Court is of the considered opinion that they are bound to conduct an enquiry by affording an opportunity to the petitioners.

31. This being the principles to be followed, the Authority, who issued the demand notice, shall conduct an enquiry by affording an opportunity to the petitioners and decide the issues on merits and in accordance with law, including the legal grounds and the point of limitations raised by the parties. After passing final order by the Original Authority, namely, Additional Director General of Foreign Trade, if at all the petitioners are further aggrieved, then they are at liberty to prefer an appeal to the Director General of Foreign Trade, who is an Appellate Authority for adjudication of the issues. Only after exhausting the line of statutory remedies contemplated, the petitioners have to approach the Court of Law, if any grievance thereafter exist, but not otherwise. For completion of the abovesaid exercise, the petitioners are directed to submit their objections, explanations, documents etc., to the Additional Director General of Foreign Trade, within a period of four weeks from the date of receipt of a copy of this order and on receipt of the objections, explanations, documents etc., from the petitioners, the Competent Authority, namely, the Additional Director General of Foreign Trade shall conduct an enquiry by affording opportunity to the petitioners and decide the issues on merits and in accordance with law, within a period of eight weeks from the date of receipt of a copy of the objections, explanations, documents etc., from the petitioners.

32. With the abovesaid directions, the writ petitions stand disposed of. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Svn

Sub Assistant Registrar



To

1. The Additional Director General of Foreign Trade,
Ministry of Commerce and Industry,
No.26, Shastri Bhavan,
Annexe Building,
Haddows Road,
4th and 5th Floor,
Chennai - 600 006.
2. The Director General of Foreign Trade,
Ministry of Commerce,
Udyog Bhavan,
New Delhi.
3. The Assistant Director General of Foreign Trade,
Ministry of Commerce and Industry,
No.26, Shastri Bhavan,
Annexe Building, 4th Floor,
Haddows Road,
Nungambakkam,
Chennai - 600 006.

+1cc to M/s.K.Magesh, Advocate, Sr.No.69713
+1cc to Mr.S.Murugappan, Advocate, Sr.No.69690
+1cc to Mr.B.Sudhir Kumar, Advocate, Sr.No.69455

WPs 14307 to 14309,
12212, 22315 and
22316 of 2015

KSM(CO)
PM/10/01/2022