BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 15.09.2021
CORAM:
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.P.[MD]No.15896 of 2015
and
M.P.[MD]No.1 of 2015

M/s. Texport Industries Pvt. Ltd.,
Represented by its General Manager - Shipping,
Mr.Padmanabhan N.K.
154, 3rd Cross, 5th Main,
Yeshwanthpur Indl. Suburb,
Bangalore - 560 022. ... Petitioner

Vs.

1.The Joint Secretary to the Government of India,
Ministry of Finance, Department of Revenue,
14, Hudcovishla Building, B-Wing,
6th Floor, Bhikajicame Place,
New Delhi - 110 066.

2.The Assistant Commissioner of Customs (BRC),
Custom House, New Harbour Estate,
Tuticorin - 628 004. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari, to call for the records pertaining to the impugned order No.22/2015-Cus dated 30.07.2015 in F.No.373/359/DBK/14-RA of the first respondent and quash the same.

For Petitioner : Mr.G.Derrick Sam
For Respondent No.1 : Mrs.L.Victoria Gowri, Assistant Solicitor General of India
For Respondent No.2 : Mr.B.Vijay Karthikeyan, Standing Counsel

O R D E R
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The prayer sought for herein is for a Writ of Certiorari, to call for the records pertaining to the impugned order No.22/2015-Cus dated 30.07.2015 in F.No.373/359/DBK/14-RA of the first respondent and quash the same.

2. The brief facts which are required to be noticed for the disposal of this writ petition are as follows:

2.1. The petitioner had exported textile garments to United States vide Shipping Bill Nos.1891278, 1889228 & 1879906 dated 01.03.2008, 27/02.2008 and 08.02.2008, under claim for duty drawback. In respect of all the consignments, the buyer was one M/s.INCORP-4004 INCORPORATED. The petitioner was sanctioned duty drawback of an amount of Rs.7,15,378/-. Therefore, the petitioner is bound to produce the bank realization certificates as the evidence of receipt of the export proceeds to the respondent customs so that the duty drawback availed by them as referred to above would be confirmed. Otherwise, it would be recovered from the petitioner by the Customs department.

2.2. It is in this context, the second respondent had issued a demand notice on 15.04.2014, stating that though the petitioner has filed the duty drawback to the extent of Rs.7,15,378/- involved in respect of the export against the three shipping bills mentioned above in the year 2008, under the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, [In short, "the Rules"] and in view of the second proviso to Section 75(1) of the Customs Act, 1962 [hereinafter referred to as "the Act"], if any drawback has been allowed on any goods under the said sub-section and the sale proceeds in respect of such goods are not received from the exporter in India within the time allowed under Foreign Exchange Management Act, 1999 [In short 'FEMA Act'], such drawback should be deemed never to have been allowed.

2.3. By quoting these provisions, the second respondent in the said demand notice therefore required the petitioner to re-pay the drawback amount of Rs.7,15,378/- in respect of the above referred shipping bills with interest within 30 days from the date of receipt of the demand notice.

2.4. In response to the same, the petitioner had given a reply or letter on 22.05.2014, raising certain points. However, the second respondent has proceeded to issue the order-in-original dated 03.07.2014, whereby he has confirmed the substance of the demand notice and directed the petitioner to pay the duty draw back filed by him with interest.

2.5. As against the said order-in-original dated 03.07.2014, the petitioner preferred appeal before the appellate authority ie., the Commissioner of Customs Appeal, Trichy, who also having considered the said appeal rejected the same by confirming the order in original by order dated 09.09.2014. As against the said order in appeal, the petitioner preferred revision before the Central Government ie., the first respondent, who also having confirmed the order passed by the original authority as well as the appellate authority has rejected the said revision through its order dated 30.07.2015. Felt aggrieved over the said order passed by the first respondent / Central Government dated 30.07.2015, the petitioner has filed the present writ petition with the aforesaid prayer.

3. Assailing the said impugned order, Mr.G.Derrick Sam, learned Counsel appearing for the petitioner has made two fold submissions. In the first submission, the learned Counsel for the petitioner would contend that, the duty drawback are provided under the Rules and if at all the exporter has failed to file the evidence to establish that the export proceeds have been realised by him within the time frame as provided under the FEMA Act or the extended period therein, then, the duty drawback allowed to the exporter shall be paid back to the Customs department and such kind of recovery is possible for the Customs department under Rule 16-A of the Rules. Enlarging further of his arguments on this point, learned Counsel would contend that, sub-rule 5 of Rule 16-A was brought in by Notification No.30 of 2011 issued by the Customs Department, Government of India, on 11.04.2011 and by virtue of this sub-rule 5, if the sale proceeds are not realised by an exporter within the period allowed under the FEMA Act, however, such non-realisation of sale proceeds is compensated by the Export Credit Guarantee Corporation of India Ltd. under an insurance cover and the Reserve Bank of India writes off the requirement of realisation of sale proceeds on merits and the exporter produces a certificate from the concerned Foreign Mission of India about the fact of non-recovery of sale proceeds from the buyer, the amount of drawback paid to the exporter or the claimant shall not be recovered.

4. Placing heavy reliance on this sub-Rule 5 of Rule 16-A, learned Counsel would contend that, insofar as the case of the petitioner is concerned, the export had taken place in some time in February and March, 2008. Thereafter, when a demand was made from the importer in the foreign soil ie., US to realise the export proceeds, shockingly, the petitioner came to know that the importer in the foreign soil has become a bankrupt. With a result, the sale proceeds could not be realised. In this context, the compensation by Export Credit Guarantee Corporation of India limited as well as the communication or certificate from Indian Mission of Foreign Country, where the importer is located had been obtained and those documents were filed before the Customs Department. Therefore, since the petitioner has fulfilled the conditions as provided under sub-rule 5, from whom the respondent / Customs shall not recover the drawback already allowed or permitted to.

5. As a second submission, learned Counsel would submit that, under sub-rule 4 of Rule 16-A of the Rules, even if sale proceeds are realised by the exporter after the amount of drawback have been recovered from the exporter under the proceedings under sub-rule 2 or sub-rule 3 and thereafter, the exporter produces the evidence about such realisation within a period of three months from the date of realisation of the sale proceeds, the amount of drawback so recovered shall be repaid by the Customs department to the claimant or the exporter.

6. By relying upon this sub-rule 4, learned Counsel would contend that, even after the draw back amount has been recovered by the Customs department and thereafter, if the importer is able to produce the evidence, of course, within a time frame, either the exporter or the claimant would be entitled to get back such recovered amount of duty draw back from the Customs department. Therefore, sub-ule 4 stretch upon and extends such benefit to that level beneficial to the exporter. Here in the case in hand, even before the recovery has taken place as per the proceedings now initiated under sub-rule 2 of 16-A, since the petitioner is able to produce the evidence ie, the export proceeds cannot be directly realised from the importer in the foreign soil and in this regard, two mode of evidences as exemptions as provided under sub-rule 5 since have been made available to the Customs department at the instance of the petitioner, certainly, the petitioner would be entitled to take the benefit under sub-rule 5 of 16-A. Therefore, the petitioner cannot be compelled to pay back the drawback Customs duty concession availed by them.

7. Making these two fold submission learned Counsel for the petitioner would contend that, when this point was raised before the appellate authority as well as the revisional authority, both authorities have rejected the claim of the petitioner by stating that, the insertion of sub-rule 5 of Rule 16-A has taken effect only from 11.04.2011. Therefore, the benefit accrued or flowing from sub-rule 5 would be made available or applicable to exporters who have exported the goods only after 11.04.2011 and not prior to that and in this context, since the petitioner has exported in the year 2008, ie., well before 11.04.2011, the date on which sub-rule 5 has been inserted, such a benefit cannot be extended to the petitioner and accordingly, they rejected the plea of the petitioner.

8. Learned Counsel would vehemently contend that, such a rejection is bad in law, in view of the settled legal position that, when a concession is given, that too in order to enhance the export to those countries to have large extent of foreign exchange, that kind of beneficial legislation cannot be stated to be a prospective one and such kind of pedantic interpretation cannot be given in such beneficial legislation, of course, by way of subordinate legislation, here it is a rule.

9. Therefore, learned Counsel for the petitioner would contend that, the said reasoning given both by the appellate authority as well as the revisional authority in the orders impugned are liable to be rejected and the order-in-original making a demand from the petitioner to pay back the duty draw back availed by them unmindful of the exception provided under Rule 5 is absolutely untenable and therefore, this writ petition is to be accepted and allowed, he contended.

10. Per contra, learned Standing Counsel appearing for the respondent Customs Department has submitted that, no doubt, sub-Rule 5 of Rule 16-A was inserted only from 11.04.2011. Before 11.04.2011, the prevailing position was that, who have failed to produce the evidence with regard to realisation of export proceeds is not entitled to get duty drawback facility and in such cases, if they had already availed or has been sanctioned the duty drawback facility for their import, the same shall be reversed and that can be recovered from the exporter.

11. Insofar as the export in question for which the petitioner admittedly failed to provide the evidence of realising the export proceeds is concerned, the export has taken place in the year 2008. As per the limitation provided under FEMA Act, within one year period, the evidence to that effect should have been filed by the petitioner / exporter to the Customs department to confirm the availment of duty drawback facility. Here, in the case in hand, the petitioner had not come forward to produce any evidence to that effect till the demand notice was issued in the year 2014. Assuming that sub-rule 5 was inserted in 2011, under which, those kind of exporters can get the benefit of duty drawback, even though they have not produced the evidence of realising the export proceeds, even then, they would be eligible to claim the same, only if the export has taken place after 11.04.2011.

12. Otherwise, if any such export takes place before 11.04.2011 also are to be included under the exemption provision, ie., sub-rule 5, thus there will be a opening of flooding gate, where large number of exporters may come forward to make a claim for re-payment of the duty drawback recovered from them for their failure in producing the evidence. Therefore, such kind of retrospective application of sub- rule 5 cannot be even imagined and therefore, the applicability of sub-rule 5 will only have a prospective effect from 11.04.2011. This has been rightly interpreted and stated by both the appellate authority as well as the revisional authority in the orders impugned.

13. Insofar as the plea raised by the petitioner counsel by citing sub-rule 4 is concerned, learned Standing Counsel for the respondent / Revenue would submit that, that stage has not come in this case as it is a proceedings initiated only under sub-rule 2, followed by the order-in-original which has been appealed and sought for revision, where concurrently, the petitioner failed to get any order in their favour and therefore, unless and until the petitioner come forward to pay back the duty drawback under sub-rule 2, the question of making any such claim afresh to again get back the recovered amount under sub-rule 4 would not arise.

14. In this context, learned Standing Counsel would further submit that, moreover in sub-rule 4, there has been a limitation point. Therefore, within such limitation point, whether the petitioner would be eligible and entitled to claim any such benefit as available under sub-rule 4 is a matter to be decided later on and therefore, by citing sub-rule 4, the petitioner cannot take any shelter under these circumstances because the present proceedings faced by him is initiated only under sub-rule 2.

15. Therefore, the learned Standing Counsel appearing for the respondent would contend that, either under Sub-rule 5 or taking aid of sub-rule 4, the petitioner cannot take any advantage to oppose the move of the Customs Department to recover the duty drawback sanctioned already to him and availed by him, in view of the failure on his part to produce the evidence to establish that the export proceeds has been realised. Therefore, learned Standing Counsel would contend that, the impugned orders are sustainable and therefore, it does not require any interference from this Court.

16. I have considered these arguments and counter arguments made before this Court extensively by the learned Counsel for the parties and have perused the materials placed before this Court.

17. The export in question has in fact taken place in the month of February and March 2008 as against the shipping bills dated 01.03.2008, 27.02.2008 and 08.02.2008, under which the petitioner since had already claimed the duty drawback has to establish that he has received the export proceeds and evidence to that effect should be filed before the Customs Department within the period as contemplated under the Rule. The limitation period for producing evidences is one year under FEMA Act. Therefore, on or before March or February 2009, such evidence should have been produced. Here in the case in hand, no such evidence for realising the export proceeds was produced by the petitioner.

18. However, after five years, only on 15.04.2014, the demand notice has been issued under Section 75 of the Customs Act by the respondents.

19. If we delve into the aspect as to under which provision of law such a right of claiming duty drawback flows to the exporter, it must be only from Section 75 of the Customs Act. Section 75(1) of the Act is relevant in the present issue, which reads thus:

> "**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 clause (a) of section 84 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 an 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)"*

20. Under Section 75(1) of the Act, drawback should be allowed of duties of customs chargeable under the 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. How to allow such duty drawback shall be provided by the Rules to be issued in this regard by the Central Government under sub-section 2 of Section 75. Sub-section 2 of Section 75 empowers the Central Government to make Rules for the purpose of carrying out the provisions of sub-section (1).

21. In exercise of such power under sub-section (2) of Section 75 of the Act, the Central Government issued the Rule called Customs Central Excise Duties and Service Tax Drawback Rules, 1995 vide Notification No.37/95 CUS (N.T) dated 26.05.1995. In the said rule, there is a rule called 16-A under the heading ***"Recovery of amount of Drawback where export proceeds not realised".*** This Rule 16-A was available from 06.12.1995, wherein subsequently certain amendments had been made and insofar as sub-rule 5 which is crucial in the present aspect is concerned, that has been inserted by Notification No.30/2011 dated 11.04.2011. In order to appreciate sub-rule 5 of rule 16-A of the Rules, the same is re-produced hereunder:

> ***"Rule 16-A (5):***
>
> *Where sale proceeds are not realised by an exporter within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), but such non-realisation of sale proceeds is compensated by the Export Credit Guarantee Corporation of India Ltd. Under an insurance cover and the Reserve Bank of India writes off the requirement of realisation of sale proceeds on merits and the exporter produces a certificate from the concerned Foreign Mission of India about the fact of non-recovery of sale proceeds from the buyer, the amount of drawback paid to the exporter or the claimant shall not be recovered."*

22. This sub-rule 5 is an exception to sub-rule 2 and 3 of Rule 16-A. Sub-rule 2 of Rule 16-A reads thus:

*"**Rule 16-A (2):***

If the exporter fails to produce evidence in respect of realisation of export proceeds within the period allowed under the Foreign Exchange Management Act, 1999, or any extension of the said period by the Reserve Bank of India, the Assistant Commissioner of Customs or the Deputy Commissioner of Customs, as the case may be shall cause notice to be issued to the exporter for production of evidence of realisation 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, as the case may be shall pass an order to recover the amount of drawback paid to the claimant and the exporter shall repay the amount so demanded within thirty days of the receipt of the said order."

23. Sub-rule 2 makes it clear that, if the exporter fails to produce evidence in respect of realisation of export proceeds within the period allowed under the FEMA Act, the customs shall cause notice to be issued to the exporter for production of evidence within 30 days and if he failed to produce such evidence, order of demand can be passed to recover the amount of drawback paid to the claimant and the exporter shall repay the amount so demanded within 30 days of receipt of such order.

24. Here in the case in hand, under the procedure established under sub-rule 2 of Rule 16-A, of course under Section 75(1) proviso, the demand notice dated 15.04.2014 was issued.

25. In this context, it is to be noted that, either under Section 75(1) or under Rule 16-A, there has been no specific limitation prescribed as to within which period the notice as contemplated under sub-rule 2 can be issued.

26. When this aspect was pointed out, the learned Standing Counsel appearing for the Customs has stated that, even though there is no specific limitation point provided, these kind of notices can be possibly issued within the five years period.

27. Here in the case in hand, if the five years period starts from the date of export, it is from 2008, which ends at 2013. If the five years period ends, after one year from the date of export, because, that one year period was given to the exporter to produce the evidence, even then, that five years period would start from march 2009. In that case, that five year period would be over by March 2014. Whereas, the demand notice has been issued within the meaning of sub-rule 2 of Rule 16-A only on 15.04.2014. Therefore, this Court, *prima facie* is of the view that, the demand notice dated 15.04.2014 itself is beyond the limitation, assuming that if the limitation is five years period from the date of ending of one year period form the date of export.

28. Be that as it may, let us proceed to explore whether the benefit provided under sub-rule 5 of Rule 16-A of the Rules can be made applicable to the case of the petitioner. In this context, it is the vehement contention of the learned Standing Counsel for the Revenue that, sub-rule 5 admittedly was inserted only on 11.04.2011 by Notification No.30 of 2011. Therefore, it cannot be stated that, the benefit arising out of sub-rule 5 can be made applicable to any exporter who completed his export well before 2011 and one year period to produce the evidence was also over before 2011. Unless and until the rule making authority makes it clear that, sub-rule 5 would have a retrospective application, from a particular date or for a particular period, it cannot be stated that sub-rule 5 will have a retrospective effect.

29. Only in that line, both the appellate authority as well as the revisional authority has taken a stand that sub-rule 5 will not have a retrospective application and it will have only a prospective application from 11.04.2011, before which the export has taken place on behalf of the petitioner. Therefore, he cannot seek shelter under sub-rule 5.

30. In order to answer this controversy, if we look at the right of the exporter to get duty drawback that flows only from Section 75(1) of the Customs Act. Section 75(1) of the Customs Act, which has already been quoted hereinabove enable the Central Government to make rules by notification as to how such a duty drawback shall be allowed by the Customs Department. Therefore, Section 75 of the Customs Act, being a substantive legislation, provide such right to the exporter to claim duty drawback. Under sub-section 1 of section 75 of the Act, there are two provisos, where, we must concern about the second proviso which is prior to the amendment made under Finance Act, 2011 with effect from 08.04.2011, which shall read that, where any drawback has been allowed on any goods under sub-section 1 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 FEMA Act, such drawback shall be deemed never to have been allowed and the Central Goernment may, by rules made under sub-section(2), specify the procedure for the recovery or adjustment of the amount of such drawback. However, by Finance Act, 2011 dated 08.04.2011, the words "except under such circumstances or such conditions as the Central Government may, by rules, satisfy" was inserted. Only pursuant to this insertion made in the second proviso to Section 75(1) of the Act, sub-rule 5 of the Rules was also inserted by the Central Government on 11.04.2011.

31. In this context, it is to be looked into that, Section 75 (1) with provisos were available well before the Rules was framed in the year 1995. The Rules itself was framed in the year 1995, of course, pursuant to sub-section 1 of Section 75. When the Rules was framed including the subsequent advantage of Rule 16-A, the language used in second proviso was without the aforesaid words ie., starting from 'except' ending at 'satisfy' (referred to above). Therefore, till the year 2011, even the second proviso to section 75 (1) did not contain any such exceptional circumstances under which, conditions can be mentioned by the Central Government which is an exemption to the second proviso.

32. This lacuna probably could have been brought to the notice of the legislature as the very duty drawback facility being a concession is given or allowed to the exporters only to enhance the export of this country to earn from foreign exchange. In that case, if the genuine exporter suffered with some circumstances under which they are not able to realise the export proceeds and with a result, if they are not able to produce the evidence to that effect, as contemplated under second proviso to Section 75(1) of the Act, then such kind of exporters would be prejudiced, if the duty drawback already allowed in their favour is recovered from them.

33. Only in order to avoid such a situation, where the genuine exporter should not be affected because of the second proviso to Section 75(1), where a blanket go-by is ordered to the Customs Authority, provided if the exporter has not produced the evidence within the time limit under the Act and in order to plug the hole and to protect the genuine exporters, where, certain genuine circumstances may be available for an exporter to explain that under such circumstances only, the exporter was not able to bring the evidence to produce before the Customs authority to establish that, the export proceeds have been realised or not realised, a remedial measure was necessitated.

34. The aforestated situation triggered the minds of the legislature who made this amendment through the Finance Act, 2011, by inserting the aforesaid words in the second proviso to Section 75 (1) of the Act and that made the Central Government to insert sub-rule 5, three days after the amendment made in Section 75(1) second proviso.

35. Here if we say that the sub-rule 5 would have a prospective application only from 11.04.2011, then what shall be the three days period between 08.04.2011 to 11.04.2011 as the amendment under Finance Act, 2011 in the second proviso to Section 75(1) was made on 08.04.2011.

36. Section 75 was already available in the Customs Act, being a substantive legislation, where, if an amendment has been made like the one under Finance Act, 2011, in second proviso to Section 75(1), such amendment can only be treated as part and parcel of the second proviso which is already available in the statute book, unless and until the Parliament has come forward to specifically state that such an amendment will have a prospective effect.

37. This kind of interpretation is the only possible interpretation, because, the very right of the exporter to get duty drawback concession flows only from sub-section 1 of Section 75 and therefore, since the said right is already available to the exporter, what is the exception to such condition of getting the drawback duty concession or revert back the same also must be available in the very same provision. However, before 2011, that was not available in Section 75(1) and was inserted only in the year 2011. Merely because it was inserted in 2011, in second proviso to Section 75(1), which is a substantive provision, it cannot be stated that the effect of such insertion will have a prospective effect only from 08.04.2011.

38. Moreover, neither the Appellate Authority nor the Revenue Authority has gone into this aspect as to whether the insertion made in second proviso to Section 75(1) will have only a prospective effect and not retrospective effect. Unless and until that issue is decided, sub-Rule 5 of Rule 16-A being a procedural law cannot over ride the substantive law and therefore, if we go to interpret that the procedural law will have a prospective application, then it would automatically destroy the purpose of bringing amendment to second proviso to Section 75(1) by the Parliament, thereby the intention of the Legislature, in this case the parliament, would get defeated.

39. Moreover, this kind of provisions are made available in the Customs Act, as I have discussed earlier, only to enhance the export from this country, in turn to earn from foreign exchange. In the said broader mission, if any genuine exporters are affected because of the conditions imposed in second proviso to Section 75(1) that, if they are not in a position to produce the evidence within a time frame, then they will be loosing the drawback duty filed by them, then in such genuine cases, there must be a protective cover and such protective cover has been inserted in second proviso to Section 75(1), being part of the substantive legislation. Therefore, the second proviso to section 75(1) cannot be effected by giving such narrow and pedantic interpretation with regard to sub-Rule 5 of Rule 16-A. This is what has been done by the appellate authority as well as the revisional authority through the impugned orders.

40. One more argument was advanced by the learned Standing Counsel appearing for the respondent that, if any notification is issued by the Central Government by exercising the powers given to them under any substantive legislation and if any doubt arises as to the applicability including prospectivity or retrospectivity, the interpretation should be given in favour of prospective application. In support of this contention, reliance has been placed by the learned Standing Counsel, on the Constitution Bench judgment of the Supreme Court in the case of ***Commissioner of Customs (Import), Mumbai*** *Vs.* ***M/s.Dilip Kumar and Company****, reported in* ***2018 (361) ELT 577 (SC).***

41. With respect, this Court wants to make it clear that, absolutely there could be no quarrel on the law propounded by the Constitution Bench of the Hon'ble Supreme Court. However, in the case in hand, it is not an interpretation of any notification issued by the Central Government as a Subordinate legislation under rule making power. The interpretation, though seems to have been made directly on sub-Rule 5 of Rule 16-A of the Rules, it goes to the root of the substantive provision namely Section 75(1) second proviso of the Customs Act. Here, as discussed above, second proviso to Section 75(1) of the Customs Act has been amended by Finance Act, 2011 dated 08.04.2011 and such amendment never stated that, it will have only a prospective effect. The reason being that, the right of the exporter to get duty drawback concession is already available under Section 75(1) where the second proviso also is available in the statute book, under which, those who are not able to produce the evidence would not get the concession and therefore, the duty drawback concession should be returned back to the Customs Department.

42. However, that second proviso to Section 75(1) did not contend any saving provision to save the genuine exporters who are in a specific circumstance not able to produce the evidence as contemplated under second proviso. That is the reason why, the insertion has been made through amendment in the year 2011 in the second proviso itself. Therefore, the insertion has become part and parcel of the second proviso to Section 75(1).

43. Therefore, that kind of substantive legislation, since has not so far been put to challenge or an issue has not come as to whether the amendment made to second proviso to Section 75(1) will have only prospective effect, the question of giving interpretation only to the rule ie., sub-rule 5 of Rule 16-A does not arise. Therefore, this Court feels that the principle laid down in the aforesaid decision of the Hon'ble Supreme Court cited by the learned Standing Counsel for the respondent is not applicable to the facts of the present case.

44. Further reason as has been projected by the learned Counsel for the petitioner is sub-Rule 4 of Rule 16-A. In this context, it was argued by the Revenue Counsel that, the stage has not come, as the present proceedings is under sub-rule 2, only, after completing these proceedings, where, the duty drawback availed by the petitioner is recovered from him, thereafter, if the petitioner / exporter come forward to claim the said amount by invoking the rule 4, he has to satisfy the limitation period provided in the sub-rule, therefore, that cannot be taken aid by the petitioner.

45. May be the stage has not come in the present case and moreover, the petitioner has not invoked sub-rule 4 here.

46. Instead, he wants to draw an analogy by citing sub-Rule 4 to state that, sub-rule 4 itself is available in the Rules only to safeguard the genuine exporters. The reason being that, within one year period, as provided under Finance Act, under sub-Rule 2, if the exporter is not able to produce the evidence, then notice has to be given, thereafter, amount can be recovered within 30 days further. After recovering the amount, still if the exporter is able to provide the evidence one chance should be given to him for getting back the recovered amount under sub-Rule 4. Therefore, an analogy can very well be drawn by citing sub-rule 4 that, the very intention of Section 75(1) including second proviso as well as Rule 16-A which includes sub-rule 5 and 4 are mainly meant to protect the genuine exporters.

47. The theory of “Force majeure”, is very well available in import of the commercial transactions throughout the globe. Here, the circumstances mentioned in sub-rule 5 is almost parallel to such situation, where, if the importer in the foreign soil become bankrupt or during the voyage space, if anything happens due to force majeure, even then, whether the exporter should be compelled to produce the evidence that he has not realised the export proceeds? The answer must be no, because, the only intention of requiring the exporter to produce the evidence within one year period is to testify whether the export made by the exporter is a genuine one or not and such kind of genuine export, against which, if he has already filed the duty drawback while import has taken place, whether that can be permissible or not, has to be decided. Only in order to test each and every exporter or export while he availed the duty drawback, this kind of measure has been provided under the Act as well as the Rule. Therefore, it cannot be stretched upon to any imagination that, Rule 5 cannot come for the rescue of the genuine exporter, merely because the Rule has been inserted only on 11.04.2011. The reason being that the substantive provision is already in the Statute Book.

48. Therefore for all these reasons and discussions made herein above, this Court feels that, the impugned order cannot be sustained and therefore, it is liable to be interfered with.

49. In the result, the impugned order is set aside and it is open to the respondent to claim the evidences for the circumstances mentioned under sub-rule 5 of Rule 16-A from the petitioner exporter and on production of the same, or if the same has already been produced, that should be inspected and accordingly, further proceedings shall not be proceeded and the duty drawback already availed by the petitioner cannot be recovered from the petitioner.

50. With these observations and directions, this writ petition is allowed. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (Records)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

MR

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1.The Joint Secretary to the Government of India,
Ministry of Finance, Department of Revenue,
14, Hudcovishla Building, B-Wing,
6th Floor, Bhikajicame Place,
New Delhi – 110 066.

2.The Assistant Commissioner of Customs (BRC),
Custom House, New Harbour Estate,
Tuticorin – 628 004.

+1 CC to M/s.B.VIJAY KARTHIKEYAN, Advocate (SR-29401[F] dated 17/09/2021)

W.P.[MD]No.15896 of 2015
15.09.2021

MGJ(24.01.2022) 14P 4C