



WEB COPY

W.P(MD).No.2562 of 201



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 12.10.2022

CORAM

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P(MD).No.2562 of 2012
and
M.P(MD)Nos.1 and 2 of 2012

M/s.Saraf Trading Corporation Private Limited,
Represented by its Director,
Mr.Ulhas V.Saraf,
Saraf House,
P.O.Box No.570, Marar Road,
Wellington Island,
Kochi-682 003.

... Petitioner

Vs.

1.The Joint Secretary to the Government of India,
Ministry of Finance,
Department of Revenue,
No.14, Hudco Vishala Building,
B Wing, 6th Floor, Bhikaji Cama Place,
New Delhi-110 066.

2.The Commissioner of Customs,
Custom House,
Tuticorin-628 004.

3.The Assistant Commissioner (Drawback)
O/o The Commissioner of Customs,
Custom House,
Tuticorin-628 004.

...Respondents



W.P(MD).No.2562 of 201

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari, to call for the records pertaining to the impugned order No.373-374/11-cus, dated 21.12.2011 passed by the 1st Respondent in F.No.373/22-23/Dbk/10-RA and quash the same.

For Petitioner : Mr.Hari Radhakrishnan
For Respondents : Mr.N.Dilip Kumar
Senior Standing Counsel
Assisted by Mr.K.Prabhu
Junior Standing Counsel

ORDER

This writ petition is filed challenging the impugned order, dated 21.12.2011 passed by the 1st Respondent, whereby, revision application filed under Section 129 DD of the Custom Act, 1962 against the Order-In-Appeal No.04/2011, dated 21.08.2010 passed by Commissioner of Custom and Central Excise (Appeals), Trichy rejecting the rebate claim of the Petitioner as being barred by limitation was confirmed.

2. The Petitioner is the Director of the Company, by name, M/s.Saraf Trading Corporation Private Limited and now registered under the Companies Act. The Petitioner was engaged in trading and export of tea to various countries.



WEB COPY

3.The Central Excise duty was levied on bulk tea with effect from 01.06.1999. The Petitioner procured duty paid tea and exported the same to various countries. It is submitted by the learned counsel for the Petitioner that the Customs and Central Excise Duty (Drawback) Rules, 1995, provides for grant of drawback @ Rs.2/- per kg which is equivalent to the Central Excise duty paid on the Bulk Tea. Rule 12 of Central Excise Rules, 1944, provided for rebate of Central Excise duty subject to export of goods vide Notification No.41/94 CE(NT), dated 22.09.1994. As per this notification, all excisable goods falling under the Schedule to the Central Excise Tariff Act, 1985, were eligible for rebate of duty paid thereon, subject to export and fulfilment of the conditions set out therein.

4. Admittedly, the Petitioner has exported tea during the Period 10.07.2000 to 27.04.2001. It was submitted by the learned counsel for the Petitioner that as an exporter, the Petitioner was entitled to the benefit of all Industrial Rate of Duty Drawback or Brand Rebate of Duty Drawback or rebate under the Central Excise Law. The Petitioner claiming the benefit under the Industrial Rate of Duty Drawback prior to the impugned period continued to do so ignorant of the fact that the Industrial Rate of Duty



Drawback has been withdrawn from 01.06.2000. It was submitted that the 3rd

Respondent had also sanctioned the Industrial Rate of Duty Drawback.

WEB COPY

5. It is submitted by the learned counsel for the Petitioner that Circular No.25/Cus-33/2000, dated 30.03.2000, clarifies that Duty Drawback must be processed within three working days and in manual cases within 5 days and any delay would be viewed seriously. The relevant portion is extracted below:

“2.One of the recommendations which has to be put into effect immediately reproduced below”

“The Committee recommends that Electronic Data Interchange (EDI) system, the drawback claims should be cleared within with 3 working days and in manual cases within 5 days. Any clearance beyond the prescribed limits should be viewed seriously and supervisory officer should go into the reasons for delay in setting of such claims.”

3.The Commissioners are, therefore, requested to ensure that the above instructions are strictly followed. Any deviations should be viewed seriously and corrective action taken.”

6. It was submitted that though the Petitioner lodged his claim for all Industrial Duty Drawback between 10.07.2000 and 27.04.2001, the Drawback was issued only on 18.07.2000, 31.05.2002 and 18.07.2002, that is nearly after two years of filing the claim, contrary to the suggestion/recommendation/instructions of the Board. Importantly, even by the time Drawback claimed by the Petitioner was sanctioned the time limit for



filing the Rebate claim had expired in terms of Section 11 B of the Central Excise Act, which provides that any Rebate ought to be claimed within a period of one year from the relevant date.

7. It is submitted that the petitioner was eligible to claim relief from the duty incidence either under the Customs and Central Excise Duty (Drawback) Rules, 1995, or as per Rule 12 of the Central Excise Rules, 1944. However, it was submitted that the petitioner had opted to claim Duty Drawback instead of Rebate as the procedure for claiming Duty Drawback was simple and no claim had to be made separately as the filing of shipping bill itself was treated as claim subject to export.

8. While so, the petitioner was served with two show cause notices bearing No.C No.VIII/22/8/2002-DBK and No.C.No VIII/22/8/2002-DBK, dated 22/11/2002 calling upon the firm to show cause as to why the amount of drawback to the tune of Rs 84,006/- and Rs. 25,54,375/- respectively should not be recovered under Rule 16 of the Customs and Central Excise Duty (Drawback) Rules, 1995, on the ground that effective from 01.06.2000, there was no Industrial Rate of Drawback for the bulk tea in the Schedule appended to the Customs and Central Excise Duty (Drawback) Rules, 1995. The show



cause notices also proposed to recover interest on the said amount of Drawback and also to impose penalty under Section 117 of the Customs Act, 1962. It is submitted that the Petitioner in view of the exports was nevertheless entitled to the benefit of Brand rate of Duty Drawback as well as Rebate, though the benefits are mutually exclusive.

9. It is submitted that the petitioner filed W.P(MD)No.205 of 2003 before this Court seeking for a writ of Certiorarified Mandamus to quash the show cause notices and to treat the Drawback allowed for the exports as Rebate under the Central Excise Rules, 1944, This Court while dismissing the above writ petition vide order dated 20.11.2008 permitted the petitioner to file its objections to the impugned show cause notice to the Assistant Commissioner of Customs (Drawback), Tuticorin, within fifteen days from the date of receipt of a copy of the order and on receipt of the objections the Assistant Commissioner was directed to pass appropriate orders thereon on merits and in accordance with the law within a period of eight weeks thereafter. This Court further observed that it was open to the petitioner to approach the appropriate authorities to claim Rebate from the concerned Central Excise authorities who would decide the issue on merits and in accordance with law.



10. The Petitioner in terms of the above order of this Court had submitted his objections to the said show cause notice. However, the objections were rejected vide Order-in-Original, dated 01.06.2009 and the Petitioner was directed to repay the Drawback of Rs.33,31,186/-. The Petitioner also preferred an appeal against the order, dated 01.06.2009, whereby, the Duty Drawback, which was sanctioned was ordered to be recovered. On 20.06.2009, the Petitioner filed an application before the Assistant Commissioner of Central Excise claiming Rebate of duty for the goods exported under the Central Excise Act, 1944. The appeal against order, dated 01.06.2009 was dismissed vide order dated 28.01.2010 by the Commissioner of Customs Appeal, against which a Revision Application was filed by the Petitioner under Section 129 DD of the Customs Act, which was also dismissed vide order dated 21.12.2011. In the meanwhile, on 11.06.2010, the claim of Rebate which was lodged by the Petitioner under the Excise Act also came to be rejected on the ground that there was a delay in filing the Rebate claim. The appeal that was filed challenging the rejection also came to be rejected vide order dated 22.03.2011. On 15.02.2012, the revision which was filed challenging the rejection of Rebate by the Appellate Commissioner was also rejected. Aggrieved by the same, the Petitioner has now preferred this writ petition.



11. It was submitted by the learned counsel for the Petitioner that the only reason for rejecting the claim for Rebate was the fact that the claim was lodged beyond the period of limitation. It was submitted that the benefit with reference to export is made as a matter of public policy and in public interest. Therefore, it must be viewed liberally and the benefit must not be rejected by taking a technical view. It was further submitted that in any view, the Respondents ought to have seen that the Petitioner had been vigilant and had lodged the claim and asserting his rights before the various forums including the sanctioning authority, appellate authority as well as this Court, of his right to the benefit in view of the export though by way of Duty Drawback. If the time spent before the other forums in claiming the benefit of an export by way of Drawback is excluded, the claim of Rebate would be well within the period of one year.

12. In this regard, a calculation sheet is also submitted, which is extracted below:

*“A. Total period of days = Date of filing 1st Shipping bill (-)
Date of filing of rebate claim
= 26.07.2000-20.06.2009
= 3252 days*

*(a) Period to be excluded = Date when drawback ought to have
been disposed off in terms of Board
Circular No.25/2000 - Cus. Dated*



WEB COPY

W.P(MD).No.2562 of 201



*30.03.2022 (-) Date when drawback
was sanctioned*

= 29.07.2000-31.05.2002

= 672 days.

*(b) Period to be excluded = Date of filing of writ petition
challenging the show cause notice
dated 22.11.2002 (-) Date on which
order in writ petition No.205 of 2003
and 7888 of 2003 was made ready to
the Petitioner*

= 02.01.2003 – 02.03.2009

= 2252 days

*B. Total period to be excluded = a+b above i.e. 672+2252=
2944 days*

*Days taken to file the rebate claim -----A-B = 3252-
2944 = 302*

*Therefore, rebate claim was filed with the jurisdictional
officer within time."*

13. A reading of the calculation sheet would indicate that once the above periods are excluded, the time taken for claiming Rebate would only be 302 days. Thus, the claim for Rebate, according to the Petitioner would be within a period of one year in terms of Section 11 B of the Central Excise Act. In this regard, reliance was sought to be placed by the learned counsel for the Petitioner on the Judgment of the Hon'ble Supreme Court in the case of **M.P.Steel Corporation Vs Commissioner of Central Excise** reported in **2015 (319) E.L.T.373 (S.C.)**. The relevant portion from the order extracted below:

34. ...Like Section 34 of the Arbitration Act, Section 128 of the Customs Act is a Section which lays down that delay cannot be



condoned beyond a certain period. Like Section 34 of the Arbitration Act, Section 128 of the Customs Act does not lay down a long period. In these circumstances, to infer exclusion of Section 14 or the principles contained in Section 14 would be unduly harsh and would not advance the cause of justice. It must not be forgotten as is pointed out in the concurring judgment in Consolidated Engineering that:

“Even when there is cause to apply Section 14, the limitation period continues to be three months and not more, but in computing the limitation period of three months for the application under Section 34(1) of the AC Act, the time during which the applicant was prosecuting such application before the wrong court is excluded, provided the proceeding in the wrong court was prosecuted bona fide, with due diligence. Western Builders [(2006) 6 SCC 239] therefore lays down the correct legal position.”

35. Merely because Parson Tools also dealt with a provision in a tax statute does not make the ratio of the said decision apply to a completely differently worded tax statute with a much shorter period of limitation Section 128 of the Customs Act. Also, the principle of Section 14 would apply not merely in condoning delay within the outer period prescribed for condonation but would apply de hors such period for the reason pointed out in Consolidated Engineering above, being the difference between exclusion of a certain period altogether under Section 14 principles and condoning delay. As has been pointed out in the said judgment, when a certain period is excluded by applying the principles contained in Section 14, there is no delay to be attributed to the appellant and the limitation period provided by the concerned statute continues to be the stated period and not more than the stated period. We conclude, therefore, that the principle of Section 14 which is a principle based on advancing the cause of justice would certainly apply to exclude time taken in prosecuting proceedings which are bona fide and with due diligence pursued, which ultimately end without a decision on the merits of the case.

41. The language of Section 14, construed in the light of the object for which the provision has been made, lends itself to such an



interpretation. The object of Section 14 is that if its conditions are otherwise met, the plaintiff/applicant should be put in the same position as he was when he started an abortive proceeding. What is necessary is the absence of negligence or inaction. So long as the plaintiff or applicant is bonafide pursuing a legal remedy which turns out to be abortive, the time beginning from the date of the cause of action of an appellate proceeding is to be excluded if such appellate proceeding is from an order in an original proceeding instituted without jurisdiction or which has not resulted in an order on the merits of the case. If this were not so, anomalous results would follow. Take the case of a plaintiff or applicant who has succeeded at the first stage of what turns out to be an abortive proceeding. Assume that, on a given state of facts, a defendant appellant or other appellant takes six months more than the prescribed period for filing an appeal. The delay in filing the appeal is condoned. Under explanation (b) of Section 14, the plaintiff or the applicant resisting such an appeal shall be deemed to be prosecuting a proceeding. If the six month period together with the original period for filing the appeal is not to be excluded under Section 14, the plaintiff/applicant would not get a hearing on merits for no fault of his, as he in the example given is not the appellant. Clearly therefore, in such a case, the entire period of nine months ought to be excluded.

42. Section 14 has been interpreted by this Court extremely liberally inasmuch as it is a provision which furthers the cause of justice. Thus, in Union of India v. West Coast Paper Mills Ltd., (2004) 3 SCC 458, this Court held:

“14.--- In the submission of the learned Senior Counsel, filing of civil writ petition claiming money relief cannot be said to be a proceeding instituted in good faith and secondly, dismissal of writ petition on the ground that it was not an appropriate remedy for seeking money relief cannot be said to be defect of jurisdiction or other cause of a like nature within the meaning of Section 14 of the Limitation Act. It is true that the writ petition was not dismissed by the High Court on the ground of defect of jurisdiction. However, Section 14 of the Limitation Act is wide in its application, inasmuch as it is not confined in its applicability only to cases of defect of jurisdiction but it is applicable also to cases where the prior



WEB COPY

proceedings have failed on account of other causes of like nature. The expression other cause of like nature came up for the consideration of this Court in Roshanlal Kuthalia v. R.B. Mohan Singh Oberoi[(1975) 4 SCC 628] and it was held that Section 14 of the Limitation Act is wide enough to cover such cases where the defects are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstance, legal or factual, which inhibits entertainment or consideration by the court of the dispute on the merits comes within the scope of the section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right.

Similarly, in India Electric Works Ltd. v. James Mantosh, (1971) 1 SCC 24, this Court held:

“7. It is well settled that although all questions of limitation must be decided by the provisions of the Act and the courts cannot travel beyond them the words or other cause of a like nature must be construed liberally. Some clue is furnished with regard to the intention of the legislature by Explanation III in Section 14(2). Before the enactment of the Act in 1908, there was a conflict amongst the High Courts on the question whether misjoinder and non-joinder were defects which were covered by the words or other cause of a like nature. It was to set at rest this conflict that Explanation III was added. An extended meaning was thus given to these words. Strictly speaking misjoinder or non-joinder of parties could hardly be regarded as a defect of jurisdiction or something similar or analogous to it.”

43. As has been already noticed, Sarathys case i.e. (2000) 5 SCC 355 has also held that the court referred to in Section 14 would include a quasi-judicial tribunal. There appears to be no reason for limiting the reach of the expression prosecuting with due diligence to institution of a proceeding alone and not to the date on which the cause of action for such proceeding might arise in the case of appellate or revisional proceedings from original proceedings which prove to be abortive. Explanation (a) to Section 14 was only meant to clarify that the day on which a proceeding is instituted and the day on which it ends are also to be counted for the purposes of Section



14. This does not lead to the conclusion that the period from the cause of action to the institution of such proceeding should be left out. In fact, as has been noticed above, the explanation expands the scope of Section 14 by liberalizing it. Thus, under explanation (b) a person resisting an appeal is also deemed to be prosecuting a proceeding. But for explanation (b), on a literal reading of Section 14, if a person has won in the first round of litigation and an appeal is filed by his opponent, the period of such appeal would not be liable to be excluded under the Section, leading to an absurd result. That is why a plaintiff or an applicant resisting an appeal filed by a defendant shall also be deemed to prosecute a proceeding so that the time taken in the appeal can also be the subject matter of exclusion under Section 14. Equally, explanation (c) which deems misjoinder of parties or a cause of action to be a cause of a like nature with defect of jurisdiction, expands the scope of the section. We have already noticed that the India Electric Works Ltd. judgment has held that strictly speaking misjoinder of parties or of causes of action can hardly be regarded as a defect of jurisdiction or something similar to it. Therefore properly construed, explanation (a) also confers a benefit and does not by a side wind seek to take away any other benefit that a purposive reading of Section 14 might give. We, therefore, agree with the decision of the Madhya Pradesh High Court that the period from the cause of action till the institution of appellate or revisional proceedings from original proceedings which prove to be abortive are also liable to exclusion under the Section. The view of the Andhra Pradesh High Court is too broadly stated. The period prior to institution of the initiation of any abortive proceeding cannot be excluded for the simple reason that Section 14 does not enable a litigant to get a benefit beyond what is contemplated by the Section - that is to put the litigant in the same position as if the abortive proceeding had never taken place.

What applies to the facts of this case: the limitation period in Section 128 pre-amendment or post amendment."

(emphasis supplied)



14. In view of the fact that the Petitioner had claimed Duty Drawback erroneously which was also accepted by the Revenue on the bonafide belief of their entitlement of the same and had pursued the claim of benefit in view of exports, bonafide though before the wrong forums. This Court finds that the limitation must be reckoned after excluding the time spent in pursuing the claim for Drawback bonafide before the wrong forum/authority. The above conclusion is arrived also taking into account the nature of the benefit which is to promote export in larger public interest and that the sanction of Drawback itself was not in conformity with the Circular which requires the claim of Duty Drawback to be processed within three days and in manual cases within 5 days instead the Drawback has been sanctioned almost after two years.

15. It is submitted by the learned Standing Counsel for the Respondents that the benefit of drawback and rebate are mutually exclusive and therefore, it may not be permissible for the Petitioner to lodge a claim in this case at the same time. Though the above benefits are mutually exclusive, this Court had only expressed that the time spent claiming drawback erroneously ought to be excluded, while reckoning the limit for claiming rebate. This Court has not expressed any view on the legality of the claim of merits with regard to rebate.



16. It was further submitted by the Petitioner that if it has erroneously claimed Drawback, but was entitled to the benefit of rebate, a duty is cast on the Assessing Authority to grant the benefit irrespective of whether the assessee out of ignorance or by a mistake failed to make a claim of the eligible benefit.

17. This Court finds that there is a merit in the submission of the learned counsel for the Petitioner that the duty of the Assessing Authority is not only to levy and collect taxes but also to extend the benefit which the Petitioner is otherwise entitled in law. In this regard, it may be useful to refer to the judgment in the case of **Ramco Cement Distribution Co. P. Ltd. v. Deputy Commercial Tax Officer** reported in **1972 SCC OnLine Mad 429 : (1974) 33 STC 180**, which reads as under:

3.But, in a matter where the statute itself gave exemption and if that exemption has been inadvertently not claimed by the petitioner, it is certainly a case where the taxing authorities also should equitably view the situation and render justice. That such a turnover is not liable to tax cannot be disputed after the decision of the Supreme Court. If it is established by the petitioner that such a turnover has been included in the original assessment order, then this court would be perpetrating an illegality if the order of the respondent were to be upheld.

18. It is submitted by the learned counsel for the Petitioner that they may be permitted to claim rebate under the Central Excise Law and until the



rebate claim is decided within a particular time frame, that may be fixed the respondent may not resort to coercive proceedings to recover the duty drawback.

19. For all the above reasons, this Court finds that the Petitioner is entitled to the benefit of excluding the period spent before the other authorities/forums to advance the cause of justice. The appropriate authority shall consider the Rebate claim after excluding the above period, set out in the Table referred to in Paragraph No.13. It is open to the appropriate Respondent to examine the correctness of the Table as said set out at Paragraph No.13, while examining the claim for exclusion for the said period or reckoning the period of limitation with regard to the claim for Rebate. If on such exclusion, the claim of Rebate is found to be within time, the appropriate Respondent shall proceed to dispose of the Petitioner's claim for Rebate within a period of three months from the date of receipt of copy of this order.

20. The writ Petition stands disposed of on the above terms. No costs. Consequently, connected miscellaneous petitions are closed.

12.10.2022

Index : Yes / No
Internet : Yes/ No
sn



W.P(MD).No.2562 of 201



WEB COPY

- To
- 1.The Joint Secretary to the Government of India,
Ministry of Finance,
Department of Revenue,
No.14, Hudco Vishala Building,
B Wing, 6th Floor, Bhikaji Cama Place,
New Delhi-110 066.
 - 2.The Commissioner of Customs,
Custom House,
Tuticorin-628 004.
 - 3.The Assistant Commissioner (Drawback)
O/o The Commissioner of Customs,
Custom House,
Tuticorin-628 004.



WEB COPY



W.P(MD).No.2562 of 201

MOHAMMED SHAFFIQ, J.

sn

W.P(MD).No.2562 of 2012

12.10.2022