IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.11.2023

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THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P. No.11423 of 2021 and
W.M.P. No.12139 of 2021

M/s.Deluxe Knitting Mill,
Rep. by its Managing Director,
SF. No. 50, Deluxe Avenue, Kasipalayam
Road, Opp. Nallur Eswaran Kovil,
Kangayam Road, Tirupur,
Tamil Nadu - 641 606. .. Petitioner

Vs.

Deputy Commissioner of Customs (BRC-DBK) Chennai-IV,
Rajaji Salai, Customs House,
Chennai-600 001. ..Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari to call for the records in the impugned order-in-Original No.82270/2021 dated 26.03.2021 passed by the Respondent and quash the same.

For Petitioner : Mr.T.Ramesh

For Respondent : Mr.S.Gurumoorthy
Senior Panel Counsel

ORDER

The only question that arises for consideration is whether the impugned recovery proceedings of drawback for alleged non-realization of export proceeds can be sustained having been made after close to 12 years since the subject export.

2. The impugned recovery proceeding has been challenged on the premise that the impugned order of adjudication has been made almost after 8 years from the date of shipping bill. As a matter of fact, all these shipping bills relates to the period of 2004-09 in respect of which rebate / drawback was granted which was sought to be recovered on the premise that the petitioner had not furnished documentary evidence to indicate that the sale proceeds in respect of export has been realized vide show cause notice dated 17.08.2010, to which, reply was filed by the petitioner on 14.09.2010 enclosing evidence in the form of Chartered Accountant Certificate revealing that the petitioner had realized the sale proceeds in respect of the subject exports. After a hiatus of more than 7 years, a second show cause notice dated 10.03.2017 was issued proposing once again to recover the rebate/ drawback in respect of the very same shipping bills/ transaction. A reply was once again filed on 20.03.2017

along with . Thereafter, notice for personal hearing was issued and the petitioner submitted Chartered Accountant Certificates as proof of realization of exports to the respondent.

3. It is the submission of the learned counsel for the petitioner that the impugned order is arbitrary inasmuch as it has been made after almost 12 years since the subject export. It is submitted that though a notice was originally issued on 17.08.2010, which was duly responded by the petitioner immediately, there was no response until the second notice came to be issued on 10.03.2017. It is submitted that though there is no provision prescribing statutory limitation for recovery proceedings, in the absence of statutory prescription any action ought to be made within a reasonable time. Any state action ought to stand scrutiny of fairness and reasonableness failing which it would fall foul of Article 14 of the constitution. In this regard, reliance was sought to be placed on the following judgments wherein Courts have consistently held that the absence of statutory prescription of limitation would only mean that action ought to be taken within a reasonable time. Further, under the Customs Act, 1962, the limitation for recovery of duty/ rebate even in the cases where duty has not been levied or not paid in view of collusion or suppression of fact, the limitation prescribed is 5 years from the relevant date.

4. To the contrary, it is submitted by the learned Senior Standing counsel for the respondent that in the absence of the time limit being prescribed one cannot read any limitation into the said provision.

5. To a pointed question as to whether the Chartered Accountant Certificate would constitute a valid basis for discharging burden of realization of sale proceeds in respect of the export. It was submitted by learned counsel for both parties that Circular No.5 of 2009 provides that Chartered Accountant Certificate is one of the modes for proving compliance with the requirement for claiming the benefit of rebate. As found supra the same was furnished by the petitioner along with its reply dated 14.09.2010 and again in response to the notice dated 10.03.2017. The impugned proceeding insofar as it finds to the contrary is unsustainable as being contrary to material on record.

6. More importantly, this Court finds that there is merit inthe submission of the learned counsel of the petitioner that there is unreasonable delay in compliance of impugned proceedings. It is trite law that any action with regard to which a limitation is not prescribed ought to be taken within a reasonable time. Now, what would constitute reasonable time would depend on the scheme of the Act. It may be relevant to

bear in mind the provisions relating to recovery of duty which has been short levied or short paid, the limitation of 6 months/ 1 year was prescribed in cases where there is short levy of duty and in cases where the duty has not been levied or paid in view of collusion or suppression of facts, the limitation prescribed is 5 years during the relevant period.

7. Before proceeding further, it may be relevant to refer to the following judgments wherein this Court had held that in the absence of prescription of limitation by the statute for taking any action or passing order it must be done within a reasonable period.

i. *S.B. Gurbaksh Singh v. Union of India (1976) 2 SCC 181:*

"15... It may well be that for an exercise of the suo motu power of revision also, the revisional authority has to initiate the proceeding within a reasonable time. Any unreasonable delay in exercise may affect its validity. What is a reasonable time, however, will depend upon the facts of each case."

ii. *J.M. Baxi & CO v. UOI – 2016 (336) ELT 285 (Mad):*

"17. .. Though the statute does not prescribe a period of limitation for passing an order of adjudication, the law is well settled that anything in respect of which no period of limitation is prescribed, should be done at least within a reasonable time. What is reasonable time, would depend upon the facts and circumstances of each case...."

iii. *Santosh- kumar Shivgonda Patil v. Balasaheb Tukaram Shevale, 2009 (9) SCC 352:*

"Thus, we can safely say that the law is well settled that when there is no period of limitation prescribed for taking action under any provision of law, the same should be taken within a reasonable period, which would depend upon the facts of

the case and the provisions of the Act under which action has to be taken. This is necessary, also because if any right has accrued in favour of a person or party by passage of time, same cannot be unsettled by a statutory authority at any time or after an indefinite period, as the same would amount to unsettling a settled position, which can only be done within a reasonable period, and not at any time in the future after an unlimited period."

iv. J. Sheik Parith v. Commissioner of Customs reported in 2020 SCC OnLine Mad 15651:

"As regards what would construe a reasonable period for completion of proceedings where no time period or limitation had been set out in the relevant statute, Courts have held that such proceedings should be completed within a reasonable period, also taking note of the scheme of limitation prescribed in other provisions in that statute, where relevant.

(emphasis supplied)

8. Apart from the above judgments, the learned counsel for the petitioner also places reliance on the judgment of this Court in the case of *Lakshmi Machine Works Limited vs. The Joint Secretary and others* in W.P.Nos.2714 to 2716 of 2004 dated 26.03.2019 wherein dealing with the challenge to recovery of drawback sanctioned erroneously, on the premise that though no limitation has been prescribed, the proceedings having been initiated after reasonable period is unsustainable, it was held as under:

"7. It is no doubt true that Rule 16 of the Customs, Central Excise Duties and Service Tax Drawback Rules 1995, does not prescribe a period for claiming refund of erroneous excise payment of drawback. But it does not mean that in the absence of any time prescribed, such a refund can be claimed according to the respondents own whims and fancies. It is a well settled proposition laid down in various decisions, that in circumstances

where the statute does not prescribe time limitation, such an exercise should be completed within a reasonable period. The stand of the respondents in the revision is that in the absence of a provision for time limitation, the ground of limitation cannot be sustained."

9. The learned Judge thereafter proceeded to place reliance upon the judgment of the Hon'ble Supreme Court in the case of *Government of India vs. Citedel Fine Pharmaceuticals* reported in *1989 (42) E.L.T. 515 (S.C.)* while proceeding to hold that though no reasonable time has expressly been prescribed for recovery of drawback, it may be necessary to draw an analogy from Section 28 of the Customs Act, 1962, to fix what may constitute a reasonable time within which the recovery must be of short levy/ short paid duty, rebate must be recovered. The following portions of the judgment is relevant and thus extracted below:

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

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

17. As noticed earlier, the drawback claims in all these petitions relate to the period between December 1995 to 1996, in relation to which, show cause notices came to be issued in February 2000. Thus, in all the cases, drawback claims had been processed and cleared before issuance of the clarification vide letter dated 20th September 1996 by the Commissioner (Drawback) with the approval of the Chairman of C.B.E. & C. On a close reading of the said letter, it is apparent that the same envisages finalization of pending drawback claims in the light of the clarification issued therein, namely, that the maximum ceiling has to be inferred even in cases where goods are not exported under AR and/or exporter is unable to furnish the certificate as required under condition (b) of the Note to SS No. 5404 (1) in respect of which drawback is payable at the rate of 17% of the FOB value. Thus, while issuing the initial clarification on 20th September 1996, the instructions issued by the C.B.E. & C. were to the effect that the same should be applicable only to pending drawback claims. Subsequently, by the clarification issued vide letter dated 19th August 1999, C.B.E. & C. clarified that the earlier clarification of 20th September 1996 was operative from the date of issuance of the original notification and was not only prospective. It appears that it is only pursuant to the subsequent letter dated 19th August 1999, that the show cause notices have been issued in February 2000. Thus, though the Customs Authorities were well aware about the clarification in respect of the drawback paid on goods falling under condition (c) of the Note below sub-serial No. 5404 (1) of the Schedule, no action was taken at the relevant time to recover the drawback paid to the petitioner beyond the ceiling limit provided thereunder. It is only in February 2000, after a period of more than three years that by issuance of show cause notices, differential amount of drawback was sought to be recovered from the petitioners. The revisional authority in the earlier order dated 28th June, 2002 has held that the Drawback Rules do not provide for any time limit and as such there is no time limit for issue of demand notice for recovery of drawback paid erroneously or in excess under rule 16 of the Rules.

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

10. Importantly, no appeal has been filed by the Revenue against the above order of this Court in the case of *Lakshmi Machine Works* Ltd. In the present case, what is now sought to be recovered relates to drawback in respect of shipping bills for the period 2004-09, after almost 12 years, which in my view cannot be considered to be reasonable. The period of 12 years taken for passing the impugned order for recovery of drawback allegedly sanctioned erroneously does not stand the scrutiny of reasonableness and is thus liable to be set aside. The writ petition stands disposed of. No costs. Consequently, connected miscellaneous petition is closed.

01.11.2023

Speaking (or) Non Speaking Order
Index:Yes/No
Neutral Citation: Yes/No
spp/shk

MOHAMMED SHAFFIQ, J.

spp/shk

To:
Deputy Commissioner of Customs (BRC-DBK) Chennai-IV,
Rajaji Salai, Customs House,
Chennai-600 001.

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