IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 17812 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI
HONOURABLE MS.JUSTICE HARSHA DEVANI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

PADMINI EXPORTS & 1 - Petitioner(s)
Versus
UNION OF INDIA & 2 - Respondent(s)

==========

Appearance :
MR PARESH M DAVE for Petitioners
MR RJ OZA for Respondents

==========

CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 04/07/2012

ORAL JUDGMENT

(Per : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. By this petition under Article 226 of the Constitution of India, the petitioners have challenged the Order-in-Appeal No.285/2003 (102-AHD)Cus/Comm(A)/AHD dated 22.9.2003 passed by the Commissioner of Customs (Appeals), Ahmedabad, whereby the appeal preferred by the petitioners has been dismissed for non-compliance with the provisions of section 129E of the Customs Act, 1962.

2. The petitioner firm is engaged in various business activities including export of fabrics made from 100% polyester filament yarn. The Central Government in exercise of powers conferred by section 75 of the Customs Act, 1962 and section 37 of the Central Excise Act, 1944, has framed the Rules called the Customs & Central Excise Duties Drawback Rules, 1995 (hereinafter referred to as “the Drawback Rules”) whereunder, the Central Government is given power to fix rates at which drawback would be allowed to exporters of specified goods. Sub-Serial No.54.04 of the Drawback Schedule covered goods of the description, “all fabrics including sarees, dhotis and odhanies made of man-made staple fibers and filament yarn”. The goods exported by the petitioners are admittedly covered under SS No.5404 of the Drawback Schedule and therefore, the petitioners were eligible for drawback thereunder. The rate of 20% of F.O.B. (Free on Board) value subject to a maximum of 62 per kg of filament yarn content was prescribed under the above schedule, subject to certain conditions. If those conditions were not satisfied by the exporter, then drawback at the rate of 17% of FOB value was allowed.

3. The petitioners exported various consignments of the

goods falling under SH No.5404 during the period from December 1995 to May 1996 under the claim of drawback. The petitioners filed claims for drawback for all such exports before the third respondent who was competent officer for verifying and sanctioning the claims of drawback for exporters of Surat. It is an undisputed fact that all these drawback claims were duly scrutinized, verified and thereafter, sanctioned by the third respondent by August 1996 and the amounts of drawback were also disbursed and paid by August 1996.

4. The petitioners' claim was at the rate of 17% F.O.B. value because the petitioners did not satisfy condition (b) of the Drawback Schedule and fell within the ambit of condition (c) inserted vide second public notice dated 1.8.1995. It may be noted that subsequently, various communications came to be issued by the Drawback Commissioner clarifying that the maximum limit of Rs.62/- per kg of filament yarn content would also apply to the cases covered under Note (c) of the Drawback Schedule. However, it was stated that the same would be applicable to pending cases only.

5. Vide two show cause notices dated 22.2.2000 and 27.3.2000 for exports made from 16.12.1995 to 25.5.1996 and 03.1.1996 to 27.1.1996 respectively, the third respondent invoked rule 16 of the Drawback Rules for recovery of erroneously paid drawback on the ground that drawback at a higher amount without applying the maximum limit of Rs.62/- per kg was sanctioned in favour of the petitioners and therefore, such erroneously paid drawback was recoverable under section 142 of the Customs Act, 1962 read with rule 16

of the Drawback Rules. The show cause notices culminated into an Order-in-Original dated 5.7.2000 demanding alleged excess amount of drawback erroneously paid to the petitioners. Being aggrieved, the petitioners preferred an appeal and stay application before the Commissioner (Appeals), Ahmedabad. It appears that in the meanwhile, the Commissioner (Appeals) had heard and decided eight similar appeals vide order dated 28.6.2000 allowing the appeals of similar exporters and holding that there was nothing wrong in allowing drawback as per rates claimed by the exporters and demands were also time-barred. Against the said order, the Commissioner of Customs, Gujarat had preferred revision applications before the Joint Secretary, Government of India who vide final order No.198-205/2002 dated 28.6.2002, had allowed the revision applications filed by the Department. The said common order came to be challenged before this Court by way of writ petitions being Special Civil Application No.12084 of 2002 and other cognate matters. By a judgement and order dated 31.1.2003, the petitions were disposed of with a view to enable the petitioners therein to approach the revisional authority for reconsideration of the matter in accordance with law. The said applications at the relevant time were pending before the revisional authority. In the meanwhile, the stay applications filed by the petitioners came up for hearing whereupon, in the light of the fact that in other matters, the matters were pending before the revisional authority, the petitioners requested that the petitioners' appeal be kept in abeyance and in the meanwhile, the recovery be stayed. However, the second respondent passed stay order No.18/2003 directing the petitioners to deposit the entire drawback amount confirmed under the Order-in-Original. The petitioners thereupon, on 24.4.2003, made an application for

reconsideration of the stay order. By miscellaneous order No.4/2003, the application came to be rejected. Thereafter, the appeal was fixed for hearing on merits on 10.9.2003. When the petitioners appeared before the second respondent for hearing of the appeal, second respondent inquired about the pre-deposit and on being informed that the amount of drawback was not deposited by the petitioners, by the impugned order dated 22.9.2003, the second respondent dismissed the appeal. Being aggrieved, the petitioners have filed the present petition.

6. As can be seen from the facts noted hereinabove, 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 judgement 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 CBEC. 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 AR4 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 CBEC 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, CBEC 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 and interest, if any, has been paid erroneously or the amount so paid is in excess of what the claimant is entitled to, the claimant shall, on demand by a proper officer of Customs, repay the amount so paid erroneously or in excess, as the case may be, and where the claimant fails to repay the amount it shall be recovered in the manner laid down in sub section (1) of section 142 of the Customs Act, 1962. 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.

19. In ***Government of India v. Citedal Fine Pharmaceuticals, Madras (****supra), the Supreme Court has, in the context of rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules 1956, which did not provide for any period of limitation, held thus:*

> *"6. Learned counsel appearing for the respondents urged that Rule 12 is unreasonable and violative of Article 14 of the Constitution, as it does not provide for any period of limitation for the recovery of duty. He urged that in the absence of any prescribed period for recovery of the duty as contemplated by Rule 12, the officer may act arbitrarily in recovering the amount after lapse of long period of time. We find no substance in the submission. While it is true that Rule 12 does not prescribe any period within which recovery of any duty as contemplated by the Rule is to be made, but that by itself does not render the Rule unreasonable or violative of Article 14 of the Constitution. In the absence of any period of limitation it is settled that every authority is to*

exercise the power within a reasonable period. What would be reasonable period would depend upon the facts of each case. Whenever a question regarding the inordinate delay in issuance of notice of demand is raised. it would be open to the assessee to contend that it is bad on the ground of delay and it will be for the relevant officer to consider the question whether in the facts and circumstances of the case notice or demand for recovery was made within reasonable period. No hard and fast rules can be laid down in this regard as the determination of the question will depend upon the facts of each case."

20. In ***Collector of Central Excise, Jaipur v. M/s.Raghuvar (India) Ltd.*** *(supra), the Supreme Court held that any law or stipulation prescribing a period of limitation to do or not to do a thing after the expiry of period so stipulated has the consequence of creation and destruction of rights and, therefore, must be specifically enacted and prescribed therefor. It is not for the courts to import any specific period of limitation by implication, where there is really none, though courts may always hold when any such exercise of power had the effect of disturbing rights of a citizen that it should be exercised within a reasonable period.*

21. In ***Torrent Laboratories Pvt. Ltd v. Union of India*** *(supra), a Division Bench of this Court in the context of rule 57-I of the Central Excise Rules, 1944 held that in absence of any provision with regard to specific period of limitation, reasonable period of limitation has to be read into the rule.*

22. Thus, it is a settled legal proposition that where a statutory provision does not prescribe any period of limitation for exercise of power thereunder, a reasonable period has to be read therein. As to what is a reasonable period would depend upon the facts of each case.

23. Examining the facts of the present cases in the light of the aforesaid legal position, in all these cases, drawback had been paid to the petitioners between December 1995 and August 1996. Thereafter, despite a clarification having been issued as regards the

interpretation of condition (c) of the Note under SS No.5404(1)(i) of the Drawback Schedule, no action was taken by the concerned authorities at the relevant time. It is only after a period of more than three years that show cause notices came to be issued to the petitioners seeking to recover the differential amount of drawback erroneously paid to them. Judging the period of delay from the armchair of a reasonable man, under no circumstances can the period of more than three years be termed to be a reasonable period for recovery of the amount erroneously paid. As held by the Supreme Court in the case of ***Collector of Central Excise, Jaipur v. M/s.Raghuvar (India) Ltd.*** *(supra), where no period of limitation is prescribed, the courts may always hold that any such exercise of powers which has the effect of disturbing the rights of citizen should be exercised within a reasonable period of time. In the present case, the drawback had been paid more than three years prior to the issuance of the show cause notices, and despite the fact that clarification in respect of condition (c) of the Note under SS No.5404(1)(i) of the Schedule had been issued way back in the year 1996, no efforts were made to recover the drawback paid to the petitioners at the relevant time. Thus, the petitioners were entitled to form a belief that the matter has attained finality and arrange their finances accordingly. Now, when after a period of more than three years has elapsed, if the respondents seek to recover the amount of drawback paid, it cannot be gainsaid that such exercise of powers would have the effect of disturbing their rights. Under the circumstances, reading in the concept of reasonable period in rule 16 of the Rules, this court is of the view that the show cause notices in question were clearly time barred.*

26. In the light of the aforesaid discussion, in the opinion of this court, though rule 16 of the Drawback Rules does not provide for any period of limitation, a reasonable period has to be read into the said rule. As observed hereinabove, in the facts of the present case, the show cause notices which have been issued after a period of more than three years from the date when the drawback came to be paid to the petitioners, cannot by any stretch of imagination be said to have been issued within a reasonable period of time. Under the circumstances, the show cause notices have to be held to be bad on the ground of being time barred. Once the

show cause notices are held to be invalid, the very substratum of all the orders passed pursuant thereto, including the impugned orders would fall, rendering the same unsustainable."

7. Applying the aforesaid decision to the facts of the present case, it may be recalled that the show cause notices in question came to be issued in February 2000 in respect of drawback paid prior to August 1996. Under the circumstances, by no stretch of imagination, can the show cause notices be said to have been issued within a reasonable time. Under the circumstances, the show cause notices have to be held to be bad on the ground of being time-barred. Once the show cause notices are held to be invalid, the very substratum of the order passed pursuant thereto including the impugned order would fall, rendering the same sustainable.

8. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned Order-in-Appeal No.285/ 2003 (102-AHD)Cus/Comm(A)/AHD dated 22.9.2003 passed by the Commissioner of Customs (Appeals), Ahmedabad is hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.

[AKIL KURESHI, J.]

[HARSHA DEVANI, J.]

parmar*