CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 880 OF 2011

[Arising out of Order-in-Original No: 117/07/CAC/CC/KAP dated 20th September 2007 passed by the Commissioner of Customs (Export Promotion), Mumbai.]

Nirmal J Agarwal
24 Aram Nagar 1, Picnic Cottage, Versova, Andheri (W)
Mumbai – 400 063 …***Appellant***

versus

Commissioner of Customs (Export Promotion)
New Customs House, Ballard Estate
Mumbai - 400001 ***…Respondent***

WITH

CUSTOMS APPEAL NO: 881 OF 2011

[Arising out of Order-in-Original No: 117/07/CAC/CC/KAP dated 20th September 2007 passed by the Commissioner of Customs (Export Promotion), Mumbai.]

Nisum Global Limited
24 Aram Nagar 1, Picnic Cottage, Versova, Andheri (W)
Mumbai – 400 063 …***Appellant***

versus

Commissioner of Customs (Export Promotion)
New Customs House, Ballard Estate
Mumbai - 400001 ***…Respondent***

AND

CUSTOMS APPEAL NO: 710 OF 2012

[Arising out of Order-in-Original No: 117/07/CAC/CC/KAP dated 20th September 2007 passed by the Commissioner of Customs (Export Promotion), Mumbai.]

Mehul Exports
24 Aram Nagar 1, Picnic Cottage, Versova, Andheri (W)
Mumbai – 400 063 …***Appellant***

versus

Commissioner of Customs (Export Promotion)
New Customs House, Ballard Estate
Mumbai - 400001 ***…Respondent***

APPEARANCE:

Shri Prakash Shah, Advocate for the appellants

Shri Ramesh Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLEDR DM MISRA, MEMBER (JUDICIAL)
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A/86383-86385/2021

DATE OF HEARING: 12/03/2021
DATE OF DECISION: 12/03/2021

PER: C J MATHEW

We dispose off all three appeals of Nirmal J Agarwal, M/s Nisum Global Ltd and M/s Mehul Exports arising from confirmation of demand for recovery of drawback, sanctioned and paid to the respective exporters, in order-in-original no. 117/07/CAC/CC/KAP dated 20th September 2007 of Commissioner of Customs (Export Promotion), Mumbai.

2. The primary contention of Learned Counsel for the appellant is that the demands raised in show cause notice of 24th August 2005 pertain to drawback that had been sanctioned as far back as 1995 to 1998 and, therefore, barred by limitation for which reliance is placed on the decision of the Hon'ble High Court of Gujarat in *Pratibha Syntex Ltd v. Union of India [2013 (287) ELT 290 (Guj.)].* He submits that this delay is not justifiable under any circumstances as even the pretence of investigations as an impediment to initiation of proceedings is not manifest as no statement was recorded after 24th October 2001. He further contends that their request for cross-examination of the suppliers, whose statements were, undeniably, relevant to the findings in the impugned order, was also rejected in contravention of the decision of the Hon'ble High Court of Bombay in *Nagraj Walchand Jain v. G Koruthu, Collector of Central Excise [2000 (123) ELT 50 (Bom.)].* It is also submitted by him that the proposal in the show cause notice for recovery from two individuals having been altered in the impugned order to that of M/s Nisum Global Limited, M/s Mehul Exports and M/s Nisum Export & Finance Limited is tantamount to travelling beyond the framework of the show cause notice and that their contentions in response to the show cause notice had not been disposed off in the impugned order.

3. In view of the several submissions made *supra* it would be appropriate for us to ascertain the circumstance leading to the

impugned order. The appellants are exporters of ‘ready-made garments’. M/s Nisum Exports & Finance Limited had sought drawback of ₹94,75,000/- against claims pertaining to exports effected in October 1998 which was sanctioned in October and November 1998. In November 1998, M/s Nisum Global Limited had been sanctioned ₹ 53,07,600/- that were sought against two claims on exports effected in the same month and, between April 1995 and December 1998, M/s Mehul Exports was sanctioned ₹ 3,40,82,272/- sought against 94 claims on exports made between January 1995 and February 1998. With investigation eliciting the market value of these goods to be less than ₹50 per piece which had been claimed and sanctioned as drawback, it was held by the adjudicating authority that prohibition under section 76 of Customs Ac, 1962 on payment in such circumstances warranted recovery under authority of rule 16 of the Customs and Central Excise Duties Drawback Rules, 1995 besides confiscation of the goods under section 113 of Customs Act, 1962 for overvaluation as well as imposition of penalties under section 114 of Customs Act, 1962.

4. According to Learned Authorised Representative, validity of recovery in the absence of bar of limitation in rule 16 of Customs and Central Excise Duties Drawback Rules, 1995 has been clearly held by the Tribunal in *Sun Exports v. Commissioner of Customs (Exports), Nhava Sheva [2008 (228) ELT 545 (Tri.Mumbai)]* and that the

Hon'ble High Court of Karnataka, in *Gemini Dyeing & Printing Mills Ltd v. Commissioner of Customs, Bangalore [2014 (304) ELT 51 (Kar.)]*, has held that it is not open to the courts to laid down a period of limitation that is not specifically contained in the relevant statute. He contends that the appellants had conceded that the export goods had been over-valued and that, as held by the Hon'ble Supreme Court in *Surjeet Singh Chhabra v. Union of India [1997 (89) ELT 646 (SC)]*, their acceptance of the actual value of procurement sufficed to disregard allowing of cross-examination for establishing otherwise.

5. We find that the entire proceedings is premised on the acceptance of market value of the export goods as being less than the drawback amount claimed and sanctioned to them. We also take note that the Customs, Central Excise Duties Drawback Rules, 1995, invoked by the adjudicating authority and claimed by the Learned Authorised Representative to be invoked without bar of limitation, arises from the power conferred under section 75 of Customs Act, 1962 and section 37 of Central Excise and Salt Act, 1944. The expression 'market price', defined as

> '*in relation to any goods means the wholesale price of the goods in the ordinary course of trade in India.*'

in section 2(30) of Customs Act, 1962, is applicable to section 76 of Customs Act, 1962 which has been enacted to prohibit payment of drawback by proper officer in specific situations that have the effect of deriving undue advantage from a schedule of rates.

6. There is no doubt that rule 16 of the Customs and Central Excise Duties Drawback Rules, 1995 does not prescribe any limitation; indeed it should not have to as the empowerment of the sanctioning authority is limited to computation of eligibility from the scheduled rate. Though the time-limit has been held by the Tribunal to be non-existent in *re Sun Exports,* we find that the decision of the Hon'ble High Court of Gujarat in *re Pratibha Syntex Ltd* has held that

> *'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. We find no record in the impugned order that the bar of limitation was considered by the adjudicating authority or that it was

even raised before him. The appellant did not question the correctness of the valuation of export goods undertaken but did, nevertheless, seek cross-examination of certain persons which had been refused; in the light of the substantial delay between the exports and the initiation of proceedings for recovery, this aspect is relevant. Furthermore, in view of the decision of the Hon'ble High Court of Gujarat *supra* it would be necessary for the adjudicating authority to first decide upon the aspect of limitation before proceeding to consider the propriety of recovery of amounts paid in excess of prohibition of section 76 of Customs Act, 1962 on the basis of disclosure of the 'market price'.

8. In order to enable proper appreciation of these issues now raised, it would be appropriate to set aside the impugned order and remand the matter back to the original authority for disposal of the issues that the appellants may raise. We direct the proceedings be completed within a period of four months from the date of communication of this order.

9. Appeals are accordingly disposed off.

(Operative Part of the Order pronounced in the open court on 12th March 2021)

(Dr. D M Misra)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*