REGISTERED SPEED POST

सत्यमेव जयते

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F. No. 371/11/DBK/15-RA/3958 Date of Issue : 04.08.2021

ORDER NO. 173 /2021-CUS (WZ)/ASRA/MUMBAI DATED 26.07.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

Applicant	:	M/s. Gemini Exports, Mumbai.
Respondent	:	The Commissioner of Customs (Export), Air Cargo Complex, Mumbai.
Subject	:	Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order in Appeal No. MUM-CUSTM-AXP-APP- 636 & 637/14-15 dated 13.01.2015 passed by the Commissioner of Customs (Appeals), Mumbai-III.

ORDER

This Revision Application has been filed by M/s. Gemini Exports, Mumbai. (hereinafter referred to as "the applicant") against the Order in Appeal No. MUM-CUSTM-AXP-APP- 636 & 637/14-15 dated 13.01.2015 passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. The brief facts of the case are that a Demand-Cum-Notice to Show Cause vide F. No. S/3- Misc-125/2010 DBK-EDI dated 07.07.2011 was issued to the applicant under Rule 16 of Customs, Central Excise Duties & Service Tax Drawback Rules.1995 read with Section 75 A(2) of Customs Act 1962 proposing to recover Drawback amount of Rs. 15,104/- along with the interest out of the total amount of drawback of Rs. 1,93,745/- (Rs. One Lakh Ninety Three Thousand Seven Hundred Forty Five only) paid to them, for the exports made by them, under the shipping bills as per details enclosed with the notice.

3. This recovery of excess drawback was necessitated as per Ministry's Circular No. 64/2003-Cus dated 21.7 2003, which stated that the Agency Commission is to be restricted to 12.5% of the FOB value of goods exported and any amount exceeding this limit should be deducted from the FOB value for granting export benefits under various export promotion schemes including the duty drawback scheme. The applicant exporter had exported the goods under the enclosed S/Bills and claimed and received the higher drawback which was not admissible to them by claiming Agency Commission exceeding the permissible limit of 12.5%.

4. Thereafter, the Deputy Commissioner of Customs, Drawback (EDI) ACC vide Order in Original No. DC/RNV/230/12 ADJ.ACC dated 20.01.2012 confirmed the demand of Drawback amount of Rs.15,104/- along with interest at applicable rate under Rule 16 of Customs, Central Excise Duties & Service Tax Drawback Rules.1995 read with Section 75 A(2) of Custom Act 1962.

5. Being aggrieved with the aforesaid Order in Original, the applicant filed appeal before Commissioner of Customs (Appeals), Mumbai-III who vide Order in Appeal MUM- CUSTM-AXP-APP- 636 & 637/14-15 dated 13.01.2015 (impugned Order) dismissed the appeal filed by the applicant and upheld the Order in Original No. DC/RNV/230/12 ADJ.ACC dated 20.01.2012

6. Being aggrieved by the impugned Order the applicant has filed the present Revision Application mainly on the following grounds:-

6.1. It is revealed under the DARPG query that the recoveries are made on the basis of audit objection because the formula for deduction of commission was not fed into the EDI system. If the formula is not fed into the system even after almost a decade (the 12.5% limit was imposed in 1998) then the Customs officials are responsible for the lapse & SCN should be issued to those responsible & recovery should be made from them instead of holding the exporter responsible illegally & effecting recovery by abuse of official position without the exporter having committed any wrong.

6.2 The audit objection is against the wrong doings of the officials of the department & the audit objection cannot be applied to the exporters & illegal recoveries made from the exporters. Why this principle is not observed by the ACC Customs is difficult to comprehend. The innocent exporter cannot be punished by high handedness & abuse of official position.

6.3 As per the legal requirements, the SCN should be issued by the department within 12 months from the date of the audit, The SCN does not specify any such audit report & whether the SCN is issued within 12 months from the date of the audit. Therefore the SCN is illegal on this count itself & not tenable. The CBEC Circular No. 534/30/2000-CX, dated 30-5-2000 issued from F. No. 208/13/2000-CX.6 is binding on the department & the SCN should clearly show that the said circular is complied with. [Annexure 9 attached to the submissions made before the Commissioner (Appeals)]. The ACC Customs cannot violate all the provisions of the law & recover money illegally from the exporters.

Commissioner (Appeals) has failed to address the legal issues in the order in appeal. Therefore it is incumbent on the RA, GOI to establish that the SCN is legally valid before upholding the prosecution of the exporters.

6.4 The Customs officials are simply indulging into abuse of official position by not only asking the refund of the excess amount but require the exporter to bear the penal rate of interest for 4 years from their pocket though they are not at fault. The Customs officials were informed that the interest cannot be collected if the exporter pays on demand but they did not heed to the request. Please see Annexure 1 collectively. The matter was taken up with the /ACC Customs officials individually. Further, please see the minutes of the Chief Commissioners Open House Meeting. The customs could not have demanded interest initially; therefore the SCN is not legally tenable. The customs did not relent on the interest payment so as to honour the vested legal rights of the exporter. The RA, GOI cannot support & permit such illegality on the part of the ACC, Customs officials. Thus, the exporter is left with no alternative but to raise voice against the atrocities of the customs officials. It is essential that appropriate action is taken is taken to ensure that the written word of the law is upheld & justice meted out to the exporter. It is not the question of payment of Rs. 15104/-alone but the way the law is

implemented in this country. The relevant extract of Rule 16 of the Duty Drawback Rules, 1995 reads as under:

Quote:

RULE 16. Repayment of erroneous or excess payment of drawback and interest. -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 (52 of 1962).

Unquote:

From the plain reading of the law, it is crystal clear that in case there is erroneous payment of the drawback or interest or both then the same is to be recovered from the exporter. It cannot be read into the law, when there is a specific provision in the law for recovery of the drawback or interest or both then the interest on the said amount is to be recovered from the exporter. The authority cannot recover interest on the refund to be made by the exporter without the law authorizing the recovery of interest. For this we rely on 2003 (158) E.L.T. 791 (Sett. Comm.) IN RE : WHIRLPOOL OF INDIA LTD. Wherein it is ruled that Interest not to be charged from applicant there being no provision of interest in Customs Notification. Similarly, in this case there is no provision in Rule 16 of the Duty Drawback Rules, 1995 for the recovery of interest. Please see Annexure 2 of the submissions made before the Commissioner (Appeals).

Further, they rely upon, 2008 (228) E.L.T. 545 (Tri.- Mumbai) in case of Sun Exports Versus Commr. of Cus. (EXP), Nhava Sheva wherein it is ruled that it is only in respect of Rule 3 of the said rules, where the drawback rate/amount is being contemplated that there is a mention of 'subject to the provisions of Customs Act and CE Act. Therefore Section 75 A (2) of the Customs Act, 1962 cannot be brought in for the recovery of the interest. Please see Annexure 3 attached to the submissions made before the Commissioner (Appeals). Therefore once again it is established that interest on the refund sought from the exporter cannot be claimed by the department. It is essential that the settled issues are respected by the authorities.

6.5 From the copy of the SCN (Annexure 2) it can be observed that the period of duty drawback payment is ranging from April '06 through March 2007 & there is recovery of as low as Rs. 2 to be made. There is no recovery of more than Rs. 2000 in case of any S/B. Any sane person will understand that no exporter will cheat for Rs. 2 or less than Rs. 2000 on purpose. Please note that the SCN is issued in 2011 i.e. after a lapse of more than 4 years & the SCN demanded interest from the exporter, which is entirely illegal. The SCN does not give any information about how the excess amount is calculated therefore SCN is not valid to that effect. The department should understand that FOB value given in the S/B is statistical value & not the true FOB value of the S/B therefore no recoveries can be made on that basis. Please note that the SC has ruled that one line conclusive orders are unacceptable. A reasoned speaking order has to be issued. For this we rely on case law 2011. (22) S.T.R. 105 (S.C.) in case of ASSTT. COMMR., COMMERCIAL TAX DEPARTMENT Versus SHUKLA & BROTHERS. The said order clearly hold that "order passed by authorities to give reasons for arriving at conclusion showing proper application of mind - Violation of either of them, in the given facts and

circumstances of a case, vitiate the order itself. Therefore it is incumbent on the RA, GOI to fist establish the excess payment in terms of the law before confirming the recovery. Please see Annexure 3 attached to this submission.

6.6 The SCN (Annexure 2) does not specify that how the excess has been arrived at. The department should be transparent in its working & whatever be the facts of the Case should be revealed. It is not acceptable that in the first instance, the customs officials do not carry out the task diligently & thereafter chase the exporter for recovery by abuse of official position. Therefore, once again, the single line conclusive order for recovery is not valid as per the Apex court of this country & cannot be overlooked. The SCN in itself therefore needs to be set aside & the case closed because continuing litigation for less than Rs. 2000 is not worthwhile & this has been accepted by the CBEC by way of a circular. Please see Annexure 11 attached to the submissions made before the Commissioner (Appeals).

6.7 The Customs officials carry out the assessment of the duty drawback amount & release the same through the EDI system. The S/B contains all the information including the commission amount therefore there was no reason for the customs officials to make excess payment of the drawback amount in the first instance. No information about the duty drawback amount assessment is given to the exporter. Therefore, there is no way that the exporter is in a Position to know whether the duty drawback is correctly disbursed or not. Under, these circumstances, the exporter cannot be held liable for excess disbursement & made to pay penal interest because of the inefficiency of the customs officials. The Commissioner (Appeals) has failed to address the issue therefore the RA, GOI needs to comply with the law.

6.8 Please refer to Annexure 5 attached to the submissions made before the Commissioner (Appeals). This is a copy of the matter being taken up with the CBEC. The reply posted on the website is also placed on record. The issues raised in the complaint/grievance was forwarded to the Sahar Air Cargo Complex. In reference to the reply, please note the following:

i. The department does not find anything wrong that the correct formula has not been fed into the EDI system & therefore nobody is accountable but the exporter has to bear the brunt of it.

ii. The reply shows that SCN is issued due to CERA objection. However audit is of the department & the wrongs committed by the department pointed out in the CERA audit cannot result into the issuance of SCN to the exporter.

iii. The department demands interest, which is not permitted in the Duty Drawback Rules, 1995, Rule 16 specifically because these are specific. The exporter was never informed about the duty drawback calculations & the disbursement details therefore the exporter was in no position to refund the excess, if any. There is no excess in terms of the FOB value finally assessed in the S/B s & not challenged/varied.

iv. The department does not think it is necessary to establish the excess before the demand can be raised.

v. The department does not think it is necessary to have a threshold for avoiding frivolous litigation. Please refer to the citation of TECHNO ECONOMIC SERVICES PVT. LTD. appearing at Annexure 4 of the submissions made before the Commissioner (Appeals).

vi. The department fails to give the formula for calculating the duty drawback.

vii. The restriction on commission is in the law since 2003 (As acknowledged in the reply, however even this is wrong) but the same could not be fed into the system even in 2006/07 also then why the exporters should be punished for the lapses instead of the culprits.

viii. The 12.5 % restriction exists since 1998 & the department has been allowing drawback on the full commission value as a matter of practice as is apparent therefore this cannot be abruptly denied & recovery allowed.

6.9 The restriction of Commission is applicable since 1998 but in 2007 there is error committed & detected by the audit & then after 4 years the notice for recovery is issued to demand refund with penal interest which is not as per the law but then the exporter is being chased to effect the payment by way of the abuse of authority. This cannot be the way of functioning of the Government of India therefore it is essential that complete investigation may be ordered in the matter of lapses & appropriate action taken. If we are at fault then we are willing to pay the money back to the government. The above submissions were made before the Commissioner (Appeals) but there is no ruling given. Therefore we hold the RA responsible to consider the same & issue the reasoned order as held essential by the apex court.

6.10 The RA, GOI should decide the issue of the merits arising out of the facts mentioned hereinabove. The issue is already decided by the Gujarat High Court. (Please see Annexure 4 attached to this submission). For this we rely on 2013 (287) E.L.T. 290 (Guj.) in case of Pratibha Syntex Ltd. Versus Union Of India & it is ruled that 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. In our case, the Drawback recovery notice is issued after more than 4 years without giving any particulars of how the excess has been arrived. Further, it is pertinent to reiterate that the Customs department does not specify to the exporter while disbursing the drawback to the exporter that how the Drawback claim amount has been arrived at by the department therefore the exporter has no knowledge of any discrepancy at any point of time. The ratio *decidendi* of the citation clearly applies in our case because the facts are exactly the same that is the Customs department disbursed the drawback after completing the assessment on their own in respect of shipment effected by the exporter under the All Industry Rate & the exporter was not given any information about how the Drawback amount was arrived at. Thereafter, SCN has been issued after more than 4 years without spelling out that how the recovery amount is determined. Therefore, there is no reasonableness visible in terms of

time & recovery values in respect of the shipments & the impugned order needs to be set aside.

The applicant in view of its submissions/grounds as aforesaid has prayed that the impugned order may please be set aside & the drawback amount paid to the exporter be regularized & recovery of Rs.15104/- is set aside.

7. A personal hearing in this case was held on 11.03.2021 through video conferencing which was attended online by Shri Rajiv Gupta, Consultant on behalf of the applicant. He reiterated the submissions already made. He mentioned and relied on Gujarat High Court judgement in case of Pratibha Syntex Ltd. Versus Union of India [2013 (287) E.L.T. 290 (Guj.)] regarding reasonable period for recovery being three (3) years. He was informed of Punjab and Haryana High Court Judgement in Famina Knit Fabs Vs UOI [2020(371) E.L.T. 97 (P&H)]. He submitted that interest is not recoverable as excess drawback was given to them by error of the Department. He mentioned case of Sun Exports in this regard.

8. In its additional submissions made during previous personal hearing held on 02.08.2018 the applicant submitted copy of Order in Original No. AC/RGB/2924/16-17/DBK(XOS) ACC dated 07.12.16, and further pointed out that in case of Bulk Drugs, the order clearly acknowledges that RBI vide Master Circular No. 14/2014-15 dtd. July 01, 2014 authorizes AD category-I banks only to negotiate the bills, provided the amount of undrawn balance is considered normal in the particular line of export trade, to a maximum of 10% of the full export value. Therefore, if the shortfall in realization is lesser than the permissible limit then no action is required to be initiated against the exporter for short realization & proceedings are not legally tenable in such circumstances & need to be dropped. This *ratio decidendi* squarely applies in this case & therefore the proceedings need to be dropped.

9. Government has carefully gone through the relevant case records available in case files, oral / written submissions and perused Order-in-Original and the impugned Order-in-Appeal.

10. In the instant case the applicant exporter had exported the goods under the S/Bills and claimed and received the higher drawback which was not admissible to them by claiming Agency Commission exceeding the permissible limit of 12.5% of the F.O.B. value, totally amounting to Rs.15,104/-. The said amount of Drawback was proposed to be recovered vide Demand cum Notice to show cause dated 07.07.2011. Vide Order in Original No. DC/RNV/230/12 ADJ.ACC dated 20.01.

2012 the Deputy Commissioner of Customs, Drawback (EDI) ACC confirmed the demand of Drawback amount of Rs.15,104/- along with interest at applicable rate under Rule 16 of Customs, Central Excise Duties & Service Tax Drawback Rules, 1995 read with Section 75 A(2) of Custom Act 1962. On appeal being filed by the applicant, the Commissioner of Customs (Appeals), Mumbai-III vide Order in Appeal MUM- CUSTM-AXP-APP- 636 & 637/14-15 dated 13.01.2015 dismissed the appeal filed by the applicant and upheld the Order in Original No. DC/RNV/230/12 ADJ.ACC dated 20.01.2012

11. Now the applicant has filed the present revision application on the various grounds mentioned at para 6 supra.

12.1 As regards the contention of the applicant that the Customs could not have demanded interest initially; therefore the SCN is not legally tenable, Government observes that under Section 75A(2) of the Customs Act, 1962 the said provision as was in force prior to 11-5-2007, read as under :

> *"(2) Where any drawback has been paid to the claimant erroneously, the claimant shall, within a period of two months from the date of demand, pay in addition to the said amount of drawback, interest at the rate fixed under Section 28AA from the date after the expiry of the said period of two months till the date of recovery of such drawback."*

However, the provisions of said Section 75A (2) had been substituted w.e.f. 11-5-2007 by Section 98 of the Finance Act, which read as under: (i.e. after its substitution on 11-5-2007] :-

> *"(2) Where any drawback has been paid to the claimant erroneously or it becomes otherwise recoverable under this Act or the rules made thereunder, the clamant shall, within a period of two months from the date of demand, pay in addition to the said amount of drawback, interest at the rate fixed under Section 28AB and the amount of interest shall be calculated for the period beginning from the date of payment of such drawback to the claimant till the date of recovery of such drawback."*

Hence, prior to 11-05-2007, period of two months from the date of demand was very much available to the exporter for paying back the erroneously paid drawback and to avoid interest liability. However, after 11-05-2007 interest liability is incurred with effect from the date of payment of such drawback to the claimant till the date of recovery of such drawback. As all the shipping bills in the instant case were related to the period prior to 11-05-2007, the applicant could have paid

the drawback amount of Rs.15,104/- within two months of receipt of the Demand-Cum-Notice to Show Cause dated 07.07.2011 and avoided payment of interest in terms of provisions of Section 75A(2) of the Customs Act, 1962, as it existed then. Therefore, when Demand-Cum-Notice to Show Cause dated 07.07.2011 has rightly proposed recovery of excess drawback amount, demand of interest as per Section 75A(2) of Customs Act, 1962 cannot vitiate the Demand-Cum-Notice to Show Cause dated 07.07.2011 since the quantum of excess recoverable drawback has been correctly proposed in the said notice.

12.2 As regards the contention of the applicant that there is no provision in Rule 16 of the Duty Drawback Rules,1995 for the recovery of interest and Section 75A(2) of the Customs Act cannot be brought in for the recovery of interest, Government observes that in a similar issue of payment of interest on erroneously paid drawback amount, In Re:-C.P.S. Textiles Pvt. Ltd., based on the audit objection demand notice was issued to the exporter for refund of excess paid drawback to the Department. The Original authority confirmed the demand amount of Rs. 1,00,142/- and also ordered recovery of interest on the said amount after expiry of 60 days from the date of issue of demand Notice till the date of payment of the said amount. On appeal being filed by the exporter against the said Order in Original, the Commissioner (Appeals) set aside the Order demanding interest from the exporter on the ground that it was not demanded vide the demand notice referred above. Aggrieved with the Order in Appeal, the Department filed Revision Application which was disposed off by GOI vide Order No.333-334/2005 dated 21.11.2005 allowing the Revision Application by holding that on erroneously paid drawback amount interest is also chargeable in terms of Section 75(A)2 of the Customs Act, 1962. Aggrieved with the said Order of GOI, the exporter filed Writ Petition No. 5871 of 2006 before Hon'ble Madras High Court. Vide its judgement dated 3-12-2009 [2010(255)E.L.T.228(Mad.)] Hon'ble Madras High Court while rejecting the said writ petition filed by the exporter categorically held as under :-

13. insofar as the interest is concerned Section 75A(2) of the Customs Act, 1962 reads as follows :-

> *"(2) Where any drawback has been paid to the claimant erroneously or it becomes otherwise recoverable under this Act or the rules made thereunder, the claimant shall, within a period of two months from the date of demand, pay in addition to the said amount of drawback, interest at the rate fixed under section 28-AB and the amount of interest shall be calculated for the*

period beginning from the date of payment of such drawback to the claimant till the date of recovery of such drawback."

On reading of Section 75A(2) of the Customs Act, it is clear that when the claimant is liable to pay the excess amount of drawback he is liable to pay interest as well. The section provides for payment of interest automatically along with excess drawback. No notice need be issued separately as the payment of interest become automatic, once it is held that excess drawback has to be repaid.

12.3 Government also observes that the facts of case laws relied upon by the applicant in this regard viz. 2003(158)E.L.T.791 (Sett.Comm.) In Re: Whirlpool Of India Ltd. and 2008 (228) E.L.T.545(Tri-Mumbai) in case of Sun Exports are different from the present case in as much as in Whirlpool of India, the Settlement Commission held that there was no provision for recovery of interest in the Customs Notification No. 204/92-Cus., dated 19-5-92 as amended, therefore the applicant is not liable to pay such interest under the Customs Act, 1962; and in the case of Sun Exports, Tribunal Mumbai in the context of periods of limitation for recovery of duty/interest in duty drawback cases and observed that as there is no limitation provided under Rule 16 of the Duty Drawback Rules and the Duty Drawback Rules are not subject to the provisions of Section 28 of the Customs Act or Section 11A of the Central Excise Act, no limitation can be read into Rule 16 of the Duty Drawback Rules, 1995.

12.4 In view of the clear finding as recorded by the Hon'ble Madras High Court in its judgement (supra), Government does not find any substance in applicant's contention that there is no provision in Rule 16 of the Duty Drawback Rules,1995 for the recovery of interest and Section 75A(2) of the Customs Act cannot be brought in for the recovery of interest and also that SCN is not legally tenable. Further, reliance placed on the case laws by the applicant (para 12.3 above) is also misplaced.

12.5 Government from Annexure –I (Minutes of Open House Meeting held on 30.11.2011) observes that this issue (recovery of excess drawback erroneously paid to the applicant) was also raised in a Bi-monthly Open House meeting held under the Chairmanship of Chief Commissioner of Customs Zone-III and Chief Commissioner of Customs Zone-I, vide points for discussion [point No. 7(c)] and the Chair viewed that the department was correct in issuing the Demand-cum-show Cause Notice as excess drawback was erroneously paid to the claimant and that the deficiency in system or on the part of the officials cannot be ground to

forego recovering of the drawback erroneously paid to the claimant. Incidentally, the provisions of Rule 16 of Customs, Central Excise Duties and Service Tax Drawback Rules 1996 as well as Section 75 A (2) of the Customs Act, 1962 were duly discussed in the meeting (as per minutes of the meeting) in favour of the Department.

12.6 The applicant has also contended that the SCN issued does not give any information about how excess is calculated and therefore, SCN is not valid. Perusal of the details enclosed to SCN it is revealed that the said enclosure shows the exports made under Shipping Bills, the amount of Drawback claimed and amount of excess Drawback claimed. The show cause notice clearly mentions that as per Ministry's Circular No.64/2003-Cus dated 21.07.2003, the Agency Commission is to be restricted to 12.5% of the FOB value of goods exported and any amount exceeding this limit should be deducted from FOB value for granting export benefits ..... Hence the excess Drawback claimed as shown in the enclosure to SCN is the amount of drawback which exceeded/ more than the limit of 12.5% of the FOB value in respect of each shipping Bill. The basis for the demand has been clearly set out. The onus has now been cast upon the applicant to show instances where demand has been raised even where Agency Commission is less than 12.5% of FOB Value. The applicant has not pointed out any such factual discrepancy in the SCN to assail the quantification of demand therein and hence these submissions cannot be given any credence. The averment of the applicant that FOB value given in S/B is statistical value & not true FOB Value of the S/B therefore no recoveries can be made on that basis is also an afterthought and an argument for the sake of an argument. Needless to say, the FOB value has been declared by the applicant themselves as the proper value of goods. Therefore, this contention about the FOB value not being factual cannot sustain.

12.7 Perusal of Order in Original reveals that the adjudicating authority has recorded brief facts as well as findings before arriving at Order part and hence the Order in Original is passed giving reasons before arriving at a conclusion. Hence ratio of the Hon'ble Apex Court judgement in Asstt. Commissioner, Commercial Tax Department v. Shukla & Brothers Bombay - 2010 (254) E.L.T. 6 (S.C.) = 2011 (22) S.T.R. 105 (S.C.)has no applicability in the instant case.

12.8 The applicant has also contended that there is no recovery of more than Rs.2000/- in case of any S/B and continuing litigation for less than Rs.2000/- is

not worthwhile & this has been accepted by the Board by way of Circular (Instruction F.No. 390/Misc./163/20100-JC, dated 20.1.2010). Government observes that in the instant case the recovery of excess drawback of Rs.15,104/- paid was proposed vide show cause notice which was subsequently confirmed. There is nothing in the Duty Drawback Rules, 1995 which prevents the Department from recovering excess availed drawback of the amount below Rs. 2000/-. So far as Instruction F.No. 390/Misc./163/20100-JC, dated 20.1.2010 (Annexure-11) is concerned, it prescribes monetary limits for filing Departmental appeals before CESTAT and High Courts in order to reduce Government litigations and the said Instructions cannot be made applicable for recovery of Government dues. Hence the said instruction has been issued in an entirely different context and hence is not applicable for making recovery of Government dues. Moreover, while replying to grievances raised by the applicant before the Member (Customs)/ Chairman, CBEC, New Delhi (discussed at para 13 below) the applicant was correctly informed that *"As per law, there is no basic amount for which Show Cause Notice is to be issued as they are Government dues" (Sl. No 4).*

13. As regards the contentions/grievances raised by the applicant before the Member (Customs)/ Chairman, CBEC, New Delhi (para 6.8 supra) the reply of the Department posted on website (Annexure-5) was as under:-

> *This office is in receipt of the aforementioned grievance received from you through e-mail. As part of follow- up enquiries were made with the Drawback Section, Air Cargo Complex, Sahar. It has been intimated by the Drawback Section, Air Cargo Complex that: "The grievance of the complainant is that the correct formula in respect of Commission was not fed into the EDI system, resulting in excess payments being made to the exporters and the exporters should not be penalized for the mistakes of the Department. The Show Cause Notices, in cases of excess payment of Drawback on account of Commission paid in excess of 12.5%, were issued in consequent to CERA Objection. These were issued in more than a thousand cases and there is no intent to target one person or company. 1. While the exporter has no role in determining drawback, the excess amount has been paid, which is recoverable with interest, as the exporter has benefited from the drawback availed by him in excess of what is entitles to him. A scrupulous and diligent exporter should have returned the excess drawback sanctioned to him immediately and in such cases no interest would have been payable by him. 2. The issues, being judicial, may be raised before the appropriate adjudicating Authority. 3. As per the law, the drawback which is paid in excess of the actually entitled drawback can be recovered any time. 4. As per law, there is no basic amount for which Show Cause Notice is to be issued as they are Government dues. 5. The Agency Commission is declared by the*

exporter on the Shipping Bill. As per Circular No. 64/2003- Cus dated 21.07.2003, the Agency commission is to be restricted to 12.5% of the FOB value of goods exported and any amount exceeding the limit should be deducted from the FOB value for granting export benefits under various promotion schemes including the duty drawback scheme."

From the aforesaid reply of the Department, it is observed that all the grievances of the applicant were duly addressed and necessary reply was submitted to the applicant. Moreover, as the aforesaid clarification has been issued by the Apex body of the Department of Customs and Excise, hence there is no scope to digress therefrom.

14. The applicant has relied on case of Pratibha Syntex Ltd. Versus Union Of India 2013 (287) E.L.T. 290 (Guj.) wherein it is ruled that 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. Government notes that Hon'ble Punjab and Haryana High Court in its judgement Judgement in Famina Knit Fabs Vs UOI [2020(371) E.L.T. 97 (P&H)] observed as under:-

"Hon'ble Supreme Court in the case of Bhatinda District Co-Op. Milk (supra) while deciding question of reasonable period of limitation for invoking revisional jurisdiction under PGST Act, 1948 applied limitation period prescribed under Section 11(6) of the PGST Act, 1948 and concluded that reasonable period cannot be more than 5 years. Applying said judgment, this Court in the case of Gupta Smelter Pvt. Ltd. v. UOI - 2019 (365) E.L.T. 77 has set aside show cause notice which was issued for framing final assessment under Section 18 of Customs Act, 1962 on the sole ground that it was issued after 5 years from the date of bill of entry. This Court in the case of GPI Textiles Ltd. v. UOI, C.W.P. No. 10530 of 2017 = 2018 (362) E.L.T. 388 (P & H) has set aside show cause notice issued under Section 11A of the Central Excise Act, 1944 raising demand of duty on the ground of its non-adjudication within reasonable period. This Court in the case of CCE v. Hari Concast (P) Ltd. - 2009 (242) E.L.T. 12 has held that notice of penalty issued under Central Excise Act, 1944 beyond 5 years is bad in the eye of law even though no limitation period is prescribed for penalty.

"From the perusal of judgments cited by both sides, it is quite evident that every action including show cause notice must be issued within reasonable period where no limitation is prescribed. Taking cue from Section 28 of Act, 1962 which prescribes maximum 5 years period to issue show cause notice even in case of fraud, wilful misstatement and afore-cited plethora of judgments, we find that in every case 3 years period may not be reasonable (as otherwise held by Gujarat High Court in Pratibha Syntex case

(supra), however notice issued after the expiry of 5 years cannot stand in the eyes of law.....

(Government further observes that litigation in the matter of limitation is being further agitated by the Department by filing Special Leave Petition (Civil) in Hon'ble Supreme Court against the aforesaid Judgements of Hon'ble Punjab and Haryana High Court as indicated below:

1. Union of India v. GPI Textiles Limited - 2019 (367) E.L.T. A242 (S.C.)]
2. Union of India v. Gupta Smelter Pvt. Ltd. - 2020 (371) E.L.T. A240 (S.C.)]
3. Union of India v. Famina Knit Fabs - 2021 (375) E.L.T. A16 (S.C.)]

These appeals have been preferred by the Department on the premise that the period of limitation is such cases could be in excess of 5 years. Since the exporters (viz. M/s GPI Textiles Limited, M/s Gupta Smelter Pvt. Ltd. and M/s Famina Knit Fabs) in those cases are not in appeal before Hon'ble Apex Court the admissibility of recovery proceedings for erroneously paid drawback upto period of 5 years has been sustained).

Thus, as per Hon'ble Punjab & Haryana High Court's observations in aforesaid judgements where no limitation period was provided for exercise of any power, period up to 5 years for exercise of such power was reasonable. Therefore, reliance placed by the applicant on Gujarat High Court Judgement in Pratibha Syntex case (supra) which held that 'three year's period is reasonable period to issue show cause notice for raising demand of duty drawback' is misplaced.

15. The applicant relying on CBEC Circular No. 534/30/2000-CX dated 30.05.2000 has also contended that the SCN should be issued by the department within 12 months from the date of the audit; that the SCN does not specify any such audit report & whether the SCN is issued within 12 months from the date of the audit. Therefore the SCN is illegal on this count itself & not tenable. Government observes that this Circular had been issued subsequent to the amendment made in Section 11A of the Central Excise Act, 1944 relating to issue of Notices providing for approval of Chief Commissioners and Commissioners as the case may be and is related to issuing of SCNs under the Central Excise Act. Moreover, the present case relates to recovery of inadmissible drawback under Rule 16 of Customs, Central Excise Duties & Service Tax Drawback Rules.1995 which does not prescribe any time limit for recovery of erroneous sanction of drawback. However, as held by the Hon'ble Punjab & Haryana High Court in cases discussed above, the reasonable time in such cases has been held to be five years. In this light the contentions of the applicant vis-à-vis the CBEC Circular No.

534/30/2000-CX dated 30.05.2000, are not applicable to recovery of drawback under the provisions of the Customs Act, 1962.

16. The Order in Original No. AC/RGB/2924/16-17/DBK(XOS) ACC dated 07.12.16, and RBI vide Master Circular No. 14/2014-15 dtd. July 01, 2014 relied upon by the applicant (para 8 supra) does not, in any manner, advance the cause of the applicant, being distinguishable on facts as the same relates to writing off of export bills upto 10% of the invoice value which has remained outstanding and turned out to be unrealizable despite all efforts made by the exporter.

17. In view of the foregoing discussion, Government does not find any infirmity in Order in Appeal No. MUM- CUSTM-AXP-APP- 636 & 637/14-15 dated 13.01.2015 passed by the Commissioner of Customs (Appeals), Mumbai-III and therefore upholds the same.

18. Revision Application is rejected being devoid of merits.

Shrawan 26/7/21

(SHRAWAN KUMAR)
Principal Commissioner & ex-Officio
Additional Secretary to Government of India.

ORDER No. 173 /2021-CUS(WZ)/ASRA/Mumbai DATED 26.7.2021

To,

M/s. Gemini Exports,
A 201-202, Navprabhat Estate,
Zakaria Bunder Road, Sewri (West),
Mumbai -400 015.

Copy to:

1. Commissioner of Customs (Export), Air Cargo Complex, Sahar, Andheri (East) Mumbai 400 099.
2. Commissioner of Customs (Appeals), Mumbai Zone-III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Centre, Kurla Road, Marol Mumbai, 400 059.
3. Deputy Commissioner of Customs Drawback, Air Cargo Complex, Sahar, Andheri (East) Mumbai 400 099.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard file.
6. Spare Copy.