Appellant Rep by: Shri N D George, Adv.
Respondent Rep by: Shri Dharmender Singh, AR

CORAM: S K Mohanty, Member (J)
Sanjiv Srivastava, Member (T)

Cus - The appellant-company claimed drawback against goods exported by them described as *PV Suitings along with "woven fabrics of synthetic staple fibre containing 85% or more by weight of synthetic staple fibre* - However, based on investigations, it was found that the goods exported had polyester and viscose in blend viz 65/35, 69/31 & 70/30, hence the drawback in respect of the said goods could have been claimed under S No 551502A of Drawback Schedule - It was alleged that the assessee misdeclared the goods on the export related documents to claim higher drawback than was admissible - The assessee demanded some amount of duty towards payment of excess drawback availed - SCN was issued proposing to disallow drawback, raise demand for recovery of the same and impose penalty and confiscation of imported goods - Such proposals were confirmed upon adjudication - Hence the present appeals.

Held - The Revenue has discharged the onus cast on them to establish that the goods under dispute were correctly classifiable under Sl No 551502A of the Drawback Schedule, as is seen from a reading of the relevant paragraphs of the SCN - Hence the appellant's challenge to the classification does not hold much merit - Besides, it is quite evident that the classification determined by the Revenue is not solely based upon the statement of the first appellant, but is based on material evidences and facts - Moreover, the reasonable time limit as laid down by the Apex Court in case of *Citadel Fine Pharmaceuticals* for exercising the right to recover the inadmissible drawback in terms of Rule 16, should in case of misdeclaration of the export goods should be at least five years from the date of disbursement of drawback to the appellants - As the appellants claimed the inadmissible drawback and the same was disbursed, the demand of interest in respect of the inadmissible amount of drawback from the date of disbursement to the date of payment is justified - Moreover, since the goods have been held liable for confiscation under Section 113(h)(i) of the Customs Act, penalty under Section 114 is justifiable - Perusal of Section 114 shows that penalty under the said section is impossible in respect of the goods held liable for confiscation and it has nothing to do with the actual confiscation of the goods - Hence the goods have been misdeclared by describing them in a manner to avail excess drawback, the goods were liable for confiscation and hence the appellants who were responsible for making such incorrect declaration liable to penalty - Hence the O-i-O is sustained, albeit while also setting aside the confiscation and redemption fine: CESTAT

Assessee's appeal partly allowed

Case laws cited:

Sainul Abideen Neelam - 2013-TIOL-213-HC-MAD-CUS... Para 3.2

Hindustan Ferodo Ltd - 2002-TIOL-782-SC-MISC... Para 3.2

Garware Nylons Ltd - 2002-TIOL-725-SC-CX... Para 3.2

Citadel Fine Pharmaceuticals - 2002-TIOL-680-SC-CX... Para 3.2

ANI Elastic Industries [2008 (222) ELT 340 (Guj)]... Para 3.2

Neeldhara Weaving Factory - 2007-TIOL-135-HC-P&J-EXIM... Para 3.2

Dilip Kumar and Company - 2018-TIOL-302-SC-CUS-CB... Para 4.2

R V Corporation [2012 (281) ELT 470 (GOI)]... Para 4.5

P V Vikhe Patil SSK - 2007-TIOL-419-HC-MUM-CX... Para 4.7

Kanhai Ram Thakedar - 2005-TIOL-76-SC-CT ... Para 4.7

TCP Limited - 2005-TIOL-1607-CESTAT-MAD ... Para 4.7

Pepsi Cola Marketing Co - 2007-TIOL-1417-CESTAT-AHM ... Para 4.7

Ballarpur Industries Limited [2007 (5) STR 197 (TMum)]... Para 4.7

Shiv Kripa Ispat Pvt Ltd - 2009-TIOL-388-CESTAT-MUM-LB... Para 4.8

FINAL ORDER NOS. A/86789-86790/2019

Per: Sanjiv Srivastava:

These appeals are directed against the order in original No 30/2012 dated 28.09.2012 of Commissioner Customs (Exports), JNCH, Nhava Sheva. By the said order Commissioner has held as follows:

i. I deny the drawback amounting to the Rs 1,16,01,967/- availed by the exporter M/s Rolex Textiles Ltd on the blended woven fabrics exported by them under claim of drawback serial no 551202A since 2006-07 as discussed in the foregoing paras.

ii. I allow the drawback calculated to Rs 1,05,63,451/- on the blended woven fabrics exported by M/s Rolex Textiles Ltd at the rate prescribed under serial no 551502A of the Drawback Schedule since 2006-07 as discussed in foregoing paras.

iii. I order recovery of the differential drawback amount of Rs 10,33,516/- claimed in excess by the exporter M/s Rolex Textiles Ltd by claiming drawback under serial no 551202A of the drawback schedule instead of serial no 551502A in terms of provisions of Rule 16 of the Customs, Central Excise and Service Tax Drawback Rules, 1995.

iv. I order appropriation of the differential drawback amount of Rs 9,92,544/- deposited by M/s Rolex Textiles during the investigation.

v. I order recovery of interest on the differential drawback amount from M/s Rolex Textiles, Ltd under the provisions of Section 75A of the Customs Act, 1962.

vi. I order confiscation of polyester viscose blended woven fabrics total amounting to Rs 9,74,45,269?- cleared in past under claim of drawback under serial no 551202A of the drawback schedule under Section 113(h)(i) of the Customs Act, 196. However, I give an option to M/s Rolex Textiles Ltd to redeem the goods on payment of Redemption Fine of Rs 1,00,000/- (Rupees One Lakh only).

vii. I impose a penalty of Rs 1,00,000/- (Rupees One Lakh only) on M/s Rolex Textiles Lt., Bhilwara under Section 114(ii) of the Customs Act, 1962.

viii. I impose a penalty of Rs 1,00,000/- (Rupees One Lakh only) on Shri Sunil Kumar Gilra of M/s Rolex Textiles Lt., Bhilwara under Section 114(ii) of the Customs Act, 1962.

2.1 Appellant claimed drawback under Sl No 551202A of Drawback Schedule, against the goods exported by them by describing them as "PV Suitings along with "woven fabrics of synthetic staple fibre containing 85% or more by weight of synthetic staple fibre"". However on the basis of investigations undertaken, it was found that the goods exported by the appellants were having polyester and viscose in blend viz 65/35, 69/31 & 70/30, hence the drawback in respect of the said goods could have been claimed under S No 551502A of Drawback Schedule. The rate of drawback as per the drawback schedule for the said two headings are as indicated below:

Period	Notfn No	Sl No 551202A		Sl No 551502A	
		Rate %	Cap 'Rs	Rate %	Cap 'Rs
22.11.06 to 31.03.07	**116/2006-Cus (NT)** dtd 22.11.06	10.5	31	10	23
1.04.07 to 31.08.08	**68/2007-Cus (NT)** dtd 16.07.07	13.3	40	12.1	35
1.09.08 to date	**103/2008-Cus (NT)** dtd 29.08.08	11.3	34	15.3	30

2.2 Thus by mis-declaring the goods on the export related documents appellant were claiming drawback higher than the admissible. During the course of investigations various documents relating to procurements of yarn etc and export of the goods were withdrawn. Statement of Shri Sunil Kumar Gilra (Appellant 2), Director with Appellant 1, was recorded. Appellant deposited Rs 9,92,544/- vide demand draft No 771773 dated 24.06.2010 towards the payment of excess drawback availed by them.

2.3 A show cause notice dated 12.05.2011 was issue to the appellants asking them to show cause as to why

- The drawback claimed by them under Sl No 551202A of Drawback schedule , amounting to Rs 1,16,01,967/- should not be disallowed and recovered from them:

- Te drawback calculated as per the rate specified at Sl 551502A amounting to Rs 1,05,68,451/- of Drawback schedule be not allowed to them;

- Differential amount of the drawback claimed and allowed i.e. Rs 10,33,516/- should not be recovered from them under Rule 16 of the Custom, Central Excise Service Tax Drawback Rules, 1995;

- Amount of Rs 9,92,544/- deposited by them be not appropriated against the amounts demanded in term of Rule 16;

- Interest at appropriate rate should not be demanded under Section 75A of Customs Act, 1962;

- The goods against which the drawback has been claimed in excess of admissible drawback be not held liable for confiscation under Section 113(h)(i) of the Customs Act, 1962;

- Penalty should not be imposed on the Appellants under Section 114 of the Customs Act, 1962.

2.3 The show cause notice has been adjudicated by the Commissioner as per the impugned order referred in para 1, supra. Aggrieved by the order of Commissioner, Appellants have filed this appeal.

3.1 We have heard Shri N D George, Advocate for the Appellants and Shri Dharmender Singh, Superintendent, Authorized Representative for the revenue.

3.2 Arguing for the appellants learned Advocate submitted that

- As per the decision of Madras High Court in case of *Sainul Abideen Neelam [2014 (300) ELT 342 (Mad)]* = ***2013-TIOL-213-HC-MAD-CUS***, any statement recorded under section 108 of Customs Act, 1962 is acceptable in evidence, however the same should be supported by material facts and other evidences.

- In case of *Hindustan Ferodo Ltd [1997 (89) ELT 16 (SC)]* **=** ***2002-TIOL-782-SC-MISC*** *and Garware Nylons Ltd [1996 (87) ELT 12 (SC)]* = ***2002-TIOL-725-SC-CX*** it has been held by the

Apex Court that the onus for determining the classification of goods is on the revenue and not the assessee. Hence in the present case it needs to be first determined whether the goods were correctly classifiable under S No 551202A or 551502A of the Drawback Schedule. Revenue has failed to adduce evidences to that effect.

- Though Rule 16 of the Customs Central Excise Service Tax Drawback Rules, 1995 do not provide for any time limit for recovery of the wrongly allowed drawback, but in view of the decision of Hon'ble Supreme Court in case of *Citadel Fine Pharmaceuticals [1989 (42) ELT 515 (SC)] =* ***2002-TIOL-680-SC-CX*** *and Gujarat High Court in ANI Elastic Industries [2008 (222) ELT 340 (Guj)]* the power should have been exercised within a reasonable time.

- It has been held by the Punjab & Haryana high Court in case of *Neeldhara Weaving Factory [2007 (210) ELT 658 (P & H)]* **=** ***2007-TIOL-135-HC-P&J-EXIM*** *,* that penalties imposed belatedly for the offences committed cannot be upheld.
3.3 Arguing for the revenue learned Authorized representative submitted that-

- Goods exported by the appellants are correctly classifiable under Sl No 551502A of the Drawback Schedule, and not under Sl No 551202A as claimed by the appellants. He referred to HSN explanatory notes and the Chapter Notes to Chapter 55 of the Customs Tariff, to argue that the said goods were correctly classifiable under the heading 551502A.

- He referred to the Show Cause Notice and Impugned order to show that the department has adduced sufficient evidences for determining the classification under said Sl No of drawback schedule.

- Since the appellants have misdeclared the goods to get drawback in excess of admissible, they have suppressed and hence even as per section 28 of the Customs Act, 1962 extended period of 5 years is available for making the demand. Even by applying the said criteria demand for the recovery of inadmissible drawback under Rule 16 has been made within reasonable time.

- Penalty is imposed for the offence committed and in case of economic offences it takes considerable time to investigate and determine the offences committed by the white collared offenders. Hence the delays in imposition of penalties etc cannot be ground for setting aside the penalties. In this case there has been not much delay as was in the case before the Punjab and Haryana High Court.
4.1 We have considered the impugned order along with the submissions made in appeal and during the course of argument of appeals.

4.2 The first issue for determination is whether the goods exported by the appellant will fall under Sl No 551202A of the Drawback Schedule or under 551502A. The two entries are reproduced below:

551202A: Dyed Woven fabrics of synthetic staple fibres, containing 85% or more by weight of synthetic staple fibres;

551502A: Other woven fabrics of synthetic staple fibres, containing 85% or more by weight of manmade staple fibre and/ or manmade filament yarn (grey).
From the plain reading of the above two entries it is quite evident that for the goods to fall under heading No 551202A, they should contain by weight 85% or more of synthetic staple fibres, and for classification under 551502A they should contain 85% or more of manmade staple fibre. Chapter Note 1 to Chapter 54 of the Schedule to Customs Tariff Act, 1975, reads as follows:

1. Throughout this Schedule, the term ' man made fibres' means staple fibres and filaments of organic polymers produced by manufacturing processes either:

(a) by polymerisation of organic monomers to produce polymers such as polyamides, polyesters, polyolefins or polyurethanes, or by chemical modification of polymers produced by this process (for example, poly(vinyl alcohol)prepared by the hydrolysis of poly(vinyl acetate)); or

(b) by dissolution or chemical treatment of natural organic polymers (for example, cellulose) to produce polymers such as cuprammonium rayon (cupro) or viscose rayon, or by chemical modification of natural organic polymers (for example, cellulose, casein and other proteins, or alginic acid), to produce polymers such as cellulose acetate or alginates.
The terms "synthetic" and "artificial", used in relation to fibres, mean: synthetic: fibres as defined at (a); artificial : fibres as defined at (b). Strip and the like of heading 5404 or 5405 are not considered to be man-made fibres.

The terms "man-made", "synthetic" and "artificial" shall have the same meaning when used in relation to "textile materials".";
From the above referred chapter note it is quite evident that manmade fibres include both artificial and synthetic fibres. However for the classification purpose distinction has been made "artificial fibres" and "synthetic fibres". Hence the above referred entries of Drawback Schedule when use the phrases "synthetic staple fibre" and "manmade fibre", they definitely refer to the distinction between the synthetic and artificial fibres. If the arguments of the appellants were to be accepted then entry at Sl No 551502A will become otiose and the entry at 551202A will cover all the goods containing 85% or more by weight of "manmade staple fibres". In our view the distinction made in the law needs to be noted for determining the rights of the parties in any proceedings. In case of *Dilip Kumar and Company [2018 (361) ELT 577 (SC)] =* ***2018-TIOL-302-SC-CUS-CB****,* Hon'ble Supreme Court laid down as follows:

"19. The well-settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the Legislature. In Kanai Lal Sur v. Paramnidhi Sadhukhan, AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

20. In applying rule of plain meaning any hardship and inconvenience cannot be the basis to alter the meaning to the language employed by the legislation. This is especially so in fiscal statutes and penal statutes. Nevertheless, if the plain language results in absurdity, the Court is entitled to determine the meaning of the word in the context in which it is used keeping in view the legislative purpose [Assistant Commissioner, Gadag Sub-Division, Gadag v. Mathapathi Basavannewwa, 1995 (6) SCC 355]. Not only that, if the plain construction leads to anomaly and absurdity, the Court having regard to the hardship and consequences that flow from such a provision can even explain the true intention of the legislation. Having observed general principles applicable to statutory interpretation, it is now time to consider rules of interpretation with respect to taxation."
4.3 There is no dispute in respect of the principles of law laid down by the Hon'ble Apex Court in case of Hindustan Ferodo Ltd and Garware Nylons. Plain reading of para 3 to para 11 of the Show Cause Notice reproduced below will make it clear that the revenue has discharged the onus cast on them to establish that the goods under dispute were correctly classifiable under Sl No 551502A of the Drawback Schedule.

"03. The matter was intensely examined with reference to Customs Tariff, Duty Drawback Schedule, Harmonized System of Nomenclature & other technical sources to judge the legality of claim of the exporter under drawback serial no.551202A.

03.1 The exporter has been exporting the Polyester Viscose woven fabrics under the tariff heading 5512 and claiming drawback under serial no.551202A of the drawback schedule which reads as under:

"Dyed Woven fabrics of synthetic staple fibres, containing 85% or more by weight of synthetic staple fibres".
03.2 It is clear from the description given in the drawback schedule against serial no.551202A that to qualify in the drawback serial no.551202A, the fabrics should contain 85% or more by weight of synthetic staple fibre. The exporter is exporting woven fabrics containing Polyester and Viscose in different composition.

03.3 Since the item exported is blend of two fibres i.e. Polyester and Viscose, therefore, initially it is required to ascertain as to whether,

(a) 'Polyester fibres & Viscose fibres' are covered under the definition of 'synthetic fibres' or covered under the definition of artificial fibres or any other?

(b) The fabric containing Polyester and viscose in different composition, being exported by the exporter, falls under the category of woven fabrics of synthetic staple fibres containing 85% or more by weight of synthetic staple fibre and is eligible for drawback under serial no.551202A of the drawback schedule or otherwise?
04. In the Harmonized System of Nomenclature (hereinafter referred as HSN also) the Synthetic Fibres have been explained at page no. 825 as under:

"The basic materials for the manufacture of these fibres are generally derived from coal or oil distillation products or from natural gas. The substances produced by polymerization are either melted or dissolved in a suitable solvent and then extruded through spinnerets (jets) into air or into a suitable coagulating bath where they solidify on cooling or evaporation of the solvent, or they may be precipitated from their solution in the form of filaments.

At this stage their properties are normally inadequate for direct use in subsequent textile processes, and they must then undergo a drawing process which orientates the molecules in the direction of the filament, thus considerably improving certain technical characteristics (e.g. strength).

The main synthetic fibres are:

(i) Acrylic

(ii) Modacrylic

(iii) Polypropylene

(iv) Nylon or other polyamides

(v) Polyester

(vi) Polyurethane

(vii) Polyurethane

Other synthetic fibres include: chlorofibre, flurofibre, polycarbamide, trivinyl and vinylal."
04.1 In the HSN the Artificial Fibres have been explained at page no. 826 as under:

"The basic materials for the manufacture of these fibres are organic polymers extracted from natural raw materials by processes which may involve chemical modification."

04.2 The main artificial fibres are:

(A) Cellulosic fibres, namely:

(i) Viscose rayon

(ii) Cuprammonium rayon

(iii) Cellulose acetate
(B) Protein fibres of animal or vegetable origin, including

(1) Those produced by dissolving mil casein in an alkali.

(2) Other fibres produced in similar manner from the proteins of ground nuts, soya beans, maize (zein), etc.
(C) Alginate fibres: Chemical treatment of various types of seaweed gives a viscous solution, generally of sodium alginate, this is extruded into a bath which converts it into certain metallic alginates. These include:

(1) Calcicum chromium alginate fibres, these are noninflammable.

(2) Calcium alginate fibres…."
04.3 Hence, technical description given in HSN indicates that the Viscose Rayon is a man made fibre and falls under the category of Artificial fibre and not under the category of Synthetic fibre whereas the Polyester falls under the category of Synthetic fibre.

05. To strengthen the technical description given in HSN, matter has been further reinforced by examining on the parameters given in Chapter Note 1 of Chapter 54 of the Customs Tariff Act, 1975 wherein the definitions of Synthetic/Artificial and man made fibre are given. For ease of reference Chapter Note 1 of Chapter 54 of the Customs Tariff is extracted below:

Throughout this Schedule, the term 'man made fibres' means staple fibres and filaments of organic polymers produced by manufacturing process either;

(a) By polymerization of organic monomers to produce polymers such polyamides, polyesters, polyolefins or polyurethanes, or by chemical modification of polymers produced by this process (for example, poly(vinyl) prepared by the hydrolysis of poly(vinyl acetate); or

(b) By dissolution or chemical treatment of natural organic polymers (for example cellulose) to produce polymers such as cuprammonium rayon (cupro) or Viscose rayon, or by chemical modification of natural organic polymers (for example, cellulose, casein and other proteins, or alginic acid) to produce polymers such as cellulose acetate or alginates.

The term "synthetic" and "artificial", used in relation to fibres, mean: synthetic fibres as defined at (a): artificial fibres as defined at (b) Srip and the like of heading 5404 or 5405 are not considered to be man-made fibres.

The term "man-made", "Synthetics" and "artificial" shall have the same meaning when used in relation to "textile materials".
05.1 Thus from the term "man made fibre" defined in Chapter Note 1 of Chapter 54 of the Customs Tariff Act, 1975, two distinctive separately identifiable terms having different technical characteristics i.e. 'synthetic' and 'artificial' emerges. In view of Chapter notes of Chapter 54 Polyester falls under the category of 'synthetic' whereas 'Viscose rayon' falls under the category of 'artificial'. It is also mentioned in the chapter notes that these notes are applicable to the goods falling under chapter 55 also as the same definition extends to throughout the schedule when used in relation to 'textile materials'.

06. Above discussed technical parameters are further reinforced by definition of the Fibre and its classification as per the book 'Basics of Textile & Visual Inspection Systems' published by the Textile Committee and the same is reproduced below:

"A textile raw material generally characterized by flexibility, fineness and high ratio of length to thickness is called a fibre. Fabric or garment is usually identified by the fibre used for its manufacturing. Thus the cotton cloth is the product made out of the cotton fibre, the woolen cloth from the wool fibre and son on. However, we also find the fabrics manufactured from two or more different types of fibres, which are normally called as blended or mixed fabrics. Besides we also come across multi fibre fabrics where in different types of fibres are used for making the fabrics."
The Fibres are classified according to their

I. Source

II. On the basis of their length and diameter.
(A) Classification of fibre (According to its source):

i) NATURAL

(i) Vegetable (cotton, Linen, Jute, Hemp & Ramie etc.)

(ii) Animal (wool, silk etc.)

(iii) Mineral (Asbestos, glass and Metal etc.)
ii) MAN-MADE

(i) Regenerated or Artificial (viscose rayon, cuprammonium rayon, Acetate rayon etc.)

(ii) Synthetic (Nylon, Polyester, Acrylic, Polypropylene etc.)
06.1 From the above definition given in respect of classification of fibre, it appears though both Polyester and Viscose are the man made fibre but these two fibres are further categorized under two different categories namely Synthetic and Artificial respectively.

07. Hence analysis of HSN, Customs Tariff and technical literature of Textile Committee corroborate the intelligence of this office and it appears that the Viscose staple fibres do not fall under the definition of Synthetic staple fibre, instead it is covered by the definition of artificial staple fibre. Therefore, to be eligible for duty drawback under the drawback serial no. 551202A, exported goods i.e. Blended woven fabrics of Polyester and Viscose fibre should have Polyester staple fibre 85% or more by weight as Polyester Staple fibre is the only synthetic staple fibre and remaining i.e. viscose fibre is artificial fibre.

As such, the exporters who are exporting blended woven fabrics of Polyester and Viscose having blend i.e. 65%/35%, 70%/30%, 80%/20% etc. are mis-declaring the description of the exported goods that the exported woven fabrics contained 85% or more by weight of synthetic staple fibre in as much as Viscose is not a synthetic staple fibre and after deducting the weight of viscose from the total weight of fabrics, weight of polyester staple fibre remained less than 85%.

Similarly, texturise yarn is nothing but filament yarn and the exporters who are exporting blended woven fabrics of spun yarn (Polyester or Polyester/Viscose) and texturise yearn are also mis-declaring the description of the exported goods that the exported woven fabrics contained 85% or more by weight of synthetic staple fibre in as much as texturise yearn is nothing but filament yarn and weight of above yarn cannot be added while calculating the weight of yarn of synthetic staple fibre.

8. Further, the General Note 1 of the drawback schedule [Inserted vide Notification no. 81/2006-Cus. dt. 13/7/2006 as amended and superseded time to time vide Notification

*no. **68/2007-Cus (NT)** dt. 16/7/2007 & **103/2008-Cus (NT)** dt. 29/8/2008] states that the tariff items and description of goods in the said schedule are aligned with the tariff items and description of goods in the First Schedule to the Customs Tariff Act, 1975 to the four digit level and General Note 2 stipulates that the General Rules of Interpretation of the First Schedule to the said Customs Tariff Act, 1975 shall mutatis mutandis apply for classifying the export goods listed in the said schedule. Therefore, classification of the impugned item under Customs Tariff Act, 1975 would be applicable to the drawback schedule at four digit level.*

9. Therefore, to find out the correct tariff item number of the drawback schedule pertained to blended woven fabrics of Polyester and Viscose in the ratio 65/35, 69/31, 70/30, 80/20 (herein after referred to as the 'impugned item' also), it is necessary to take resort of Customs Tariff Act, 1975. The Customs Tariff defines the Chapter heading 5512 and 5515 as under:

The Chapter heading 5512 covers, "Woven fabrics of synthetic staple fibres, containing 85% or more by weight of synthetic staple fibre" -

I. Containing 85% or more by weight of polyester staple fibres

II. Containing 85% or more by weight of acrylic or modacrylic staple fibres
Whereas the Chapter heading 5515 coves, "Other woven fabrics of synthetic staple fibres"-

(i) Of polyester staple fibres (mixed with viscose rayon staple fibre, man-made filament, wool or animal hair etc.)

(ii) Of acrylic or modacrylic staple fibre (mixed with man made filament, wool or animal hair etc.)

(iii) Other woven fabrics (mixed with man made filament, wool or animal hair etc.).
10. From the above, it appears that the impugned items are classifiable under Customs Tariff 5515 as "other woven fabrics of synthetic staple fibres mixed with Viscose rayon staple Fibre" in as much as Polyester staple fibres has been mixed with Viscose staple fibre and synthetic staple fibres remained less than 85%. Similarly, if the item manufactured from Polyester spun yarn/Viscose staple fibre and Polyester texturise yarn, the same is classifiable under chapter 55 as Polyester spun yarn and Viscose staple fibre falls under chapter 55 whereas Polyester texturise yarn falls under chapter 54.

Therefore applying the General note 1 & 2 of the drawback schedule, there appears that the impugned item falls under the tariff item number 5515 of the drawback schedule as both Customs Tariff and the drawback schedule are aligned. Similarly the item of Polyester/Viscose and Polyester texturise yarn (man made filament) also falls under the tariff item number 5515 of the drawback schedule.

11. Further, the relevant sub-heading of the tariff item number 5515 of the Schedule 3 of All Industry Rates of Duty Drawback, 2008 are as under:-

			A		**B**	
Tariff Item	***Description of the goods***	***Unit***	***Drawback when Cenvat facility has not been availed***		***Drawback when Cenvat facility has been availed***	
			Drawback Rate	*Drawback Rate per unit in Rs.*	*Drawback Rate*	*Drawback cap per unit in Rs.*
1	*2*	*3*	*4*	*5*	*6*	*7*
5515	*Other woven fabrics of synthetic staple*					

	fibres					
551501	*Containing 85% or more by weight of Man-made Staple Fibre and/or Manmade Filament Yarn (Grey)*	*KG*	*9.2%*	*27*	*2.2%*	*6.5*
551502	*Containing 85% or more by weight of Man-made Staple Fibre and/or Manmade Filament Yarn (Dyed)*	*KG*	*10.3%*	*30*	*2.6%*	*7.6*
551503	*Containing less than 85% by weight of Manmade Staple Fibre and/or Man-made Filament Yarn (Grey)*	*KG*	*7.5%*	*24*	*2.2%*	*7*
551504	*Containing less than 85% by weight of Manmade Staple Fibre and/or Man-made Filament Yarn (Dyed)*	*KG*	*8.6%*	*26*	*2.6%*	*7.9*

From the above drawback schedule, the appropriate tariff item number of the drawback schedule pertaining to impugned item appears to be 551502 which pertains to "other woven fabrics of synthetic staple fibre containing 85% or more by weight of Man-made staple fibre and/or Man made Filament yarn (Dyed)" in as much as Polyester and Viscose both are Man made fibre and Polyester predominant over the viscose in the blended fabrics exported by the exporter."

Commissioner has in para 30 to 35 (reproduced below) of the impugned order referred to the material evidences available on record to hold that the goods are correctly classifiable under Sl No 551502A of Drawback Schedule.

"30. I find from the details provided by the exporter in respect of yarn purchased during the year from 2006-07 onwards proved that the exporter had purchase polyester viscose yarn in which polyester and viscose contents were in the ratio of 65%35%only. I further find that the above blend of yarn was further used in the manufacture of grey fabrics and after processing of the same, resultant finished woven fabrics was exported under claim of drawback under tariff item no. 551020A if the drawback schedule. I find that besides above, the exporter had also purchased 100% polyester texturised yarn.

31. I find that the scrutiny of loon cards provided by the exporter, containing the details regarding type of yarn used in warp & weft pattern for manufacture of exported woven fabrics, proved that the polyester content in the exported woven fabrics was less than 85% by weight of synthetic staple fibers(dyed).

32. the material evidence on record proved that the exporter had procured yarn of polyester and viscose viz, 65/35 wherein polyester staple fiber contained in blended yarn is less than 85% and the said yarn was further used in the manufacture of grey fabrics and after processing of the same, finished woven fabrics was exported under claim of drawback under

serial no.551202A. therefore, the woven fabrics exported by the exporter contained polyester and viscose staple fiber as the exporter had procured blended yarn of polyester and viscose only.

33. it is confirmed from the above that since blended yarn from which the blended fabrics have been manufactured was the bend of polyester and viscose 65/35, the resultant fabrics manufactured out of above blended yarn couldn't have synthetic staple fiver i.e. polyester staple fiver 85%or more by weight of woven fabrics as whatsoever number of threads/ yarn is used in warp or weft, polyester staple fiber which is the only synthetic staple fibers in the resultant woven fabrics always remained less that 85%. Therefore, the blended woven fabrics manufactured by the exported by them under claim of drawback under tariff item no. 551202A could not satisfy the description of the item eligible for drawback schedule as in the blended woven fabrics, polyester staple fiber is the only synthetic staple fiber. Accordingly, the exporter had wrongly claimed the drawback under the serial no. 551202A on the polyester ciscoes blended woven fabrics exported by them.

34. I find that the texturise yarn is nothing but a filament yarn manufactured by applying certain process on synthetic filament yarn and such yarn falls under chapter 54 to the Customs Tariff Act, 1985. Therefore, if 100% polyester texturise yarn is used in the manufacture of blended woven fabrics along with PV yarn, then in such case also synthetic stale remained less than 85% as polyester contained in the PV yarn is the only synthetic staple fiber and polyester contained in texturised yarn is the filament yarn. The weight of polyester filament/texturise yarn cannot be added while calculating weight of polyester staple fiber. As such, in case where PV yarn is mixed with polyester texturise/filament yarn, resultant blended fabrics could not have synthetic staple fiber i.e. polyester staple fiber 85% or more by weight of woven fabrics.

35. As per the above discussions it is confirmed that the appropriate tariff item number of the drawback schedule pertaining to impugned item should be 551502 which pertained to other woven fabrics of synthetic staple fiber containing 85% or more by weight of man made staple fiber and/or man made filament yarn(dyed) in as much as polyester and viscose both are man made fibre and polyester predominant over the viscose in the blended fabrics exported by the exporter. I find that drawback rates under serial number 551202A is lower than the drawback rates under serial number 551202A. Therefore, the exporters had availed drawback in excess of that they actually were entitled."

Hence we do not find any merits in the submissions made by the appellants challenging the classification made by the revenue under Drawback Schedule.

4.4 From the above it is quite evident that the classification determined by the revenue is not solely based upon the statement of Shri Sunil Kumar Gilra , but is based on material evidences and facts. Hence we do not find any merits in the submissions made by the appellants relying on the decision of Hon'ble Madras High Court in case of Sainul Abideen Neelam.

4.5 Rule 16 of the Customs Central Excise Service Tax Drawback Rules, 1995 read as follows:

"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)."

In case of *R V Corporation [2012 (281) ELT 470 (GOI)]*, following was held:-

"8. Government first takes up the "Time bar" aspect of this case proceedings wherein it is an admitted fact that for the involved DBK amounts claimed and sanctioned in 1996-1997 the

original Show Cause Notice was issued on 18-7-2001. Further it is also a fact on record that the applicants herein are contesting that the addendums/corrigendum letters issued thereafter in connection with the above Show Cause Notice should be taken as a fresh Show Cause Notice and if computed from last addendum dated 2-5-2002 the issued Show Cause Notice is "Time barred". Here, Government does not find any legal backing or rationale behind this plea of the applicant. If any further letter/communication is treated as having made all the previous notices as redundant, then the very nomenclature/Identity/purpose and status of existence of the term "Addendum"/"Corrigendum" would stand as extinct/deleted from all the judicial/semi-judicial forums. Therefore such a proposition can neither be taken as logical nor proper. Government, therefore takes up the very initial Show Cause Notice or issued date as the relevant date and rest of addendums/corrigendum letter as precise details clearly pointing out the relevant data/limits/scopes of this case proceedings which have already stood commenced. The Show Cause Notice dated 18-7-2001 was issued within extended time of 5 years and as such Show Cause Notice cannot be treated as time barred. ……"
Affirming this decision of *GOI, Hon'ble Karnataka High Court [2014 (304) ELT 51 (Kar)]* has held as follows:

"27. From the above decisions, it is clear, if the limitation is not prescribed by the Statute, the Court cannot prescribe any limitation. However, in the facts and circumstances of each case, the Court can consider whether the exercise of power had the effect of disturbing rights of a citizen.

28. In the present case, the show cause notice has been issued to the petitioners along with others on 18-7-2001. In the show cause notice all facts have been mentioned. The petitioners have been called upon to show cause as to why penalty should not be imposed on them under Section 114(iii) of the Customs Act, 1962. In the original show cause notice, the petitioners were not asked to show cause as to why the duty drawbacks should not be recovered. However, in the addendum dated 2-5-2002, the petitioners have been asked to show cause as to why the duty drawbacks drawn by them should not be recovered. A careful reading of the addendum shows that the changes to the original show cause notice do not structurally alter the show cause notice. Whatever is alleged in the show cause notice is virtually repeated in the addendum except calling upon the petitioners to show cause as to why the duty drawbacks should not be recovered. Therefore, it cannot be said that the addendum structurally alters the nature of the show cause notice and it is barred by limitation. In fact no limitation has been prescribed for recovery of duty drawbacks. Therefore, I do not find any merit in the contention that the addendum structurally alters the nature of show cause notice and it amounts to fresh show cause notice. When Statute does not prescribe any limitation, the Court cannot prescribe it. However, depending upon the facts and circumstances of each case Court can consider whether the exercise of power has the effect of disturbing the rights of a citizen."
Thus in our view the reasonable time limit as laid down by the Hon'ble Apex Court in case of Citadel Fine Pharmaceuticals for exercising the right to recover the inadmissible drawback in terms of Rule 16, should in case of misdeclaration of the export goods should be at least five years from the date of disbursement of drawback to the appellants. Commissioner has in para 40 to 43 of the impugned order recorded as follows:

"40. the exporter intentionally did not mention in the invoice about the exact blend of the woven fabrics viz. 65/35 ,69/31, 70/30 polyester/ viscose ets and incorrectly mentioned 'woven fabrics of synthetic staple fiver containing 85% or more by weight of synthetic staple fiber' to defraud the EDI system in as much as he was aware of the fact that by mentioning the RTIC number as 5512, drawback serial number as 551202 and description of the goods in the above manner , EDI system would generate the shipping bill with classification of the goods under chapter heading 5512 as well as drawback under DBK heading g 551201A. If the exporters had declared the RITC as 5510, drawback serial no. 551502A and description as ' other wove

fabrics of synthetic staple fiber containing 85% or more by weight of man made staple fiber', the EDI system would have been classified the above goods under heading 5510 and drawback under item serial number 551052A.

41. I find that M/s. Rolex Textiles Ltd mentioned P/V suitings in all the invoices raised by them for export of blended woven fabrics. This clearly suggested that the exporter had not exported woven fabrics manufactured out of 100% spun yarn. This fact was admitted by Shri Sunil Kumar Gilra in his statement dated 31.03.2010 42. Therefore, the drawback availed by the exporter under serial no. 551200A is denied under Ruled 16 of Customs, Central Excise and Service Tax Drawback Rules, 1994 and Drawback under serial no.551502A is allowable under Rules 3 of Customs, central Excise and service Tax Drawback Rules, 1995 as the drawback is admissible under serial no 551502A on the impugned item as enumerated above. Since the drawback admissible under serial no. 551502A is lower than the drawback availed under serial no. 551502A, the excess drawback availed by the exporter is recoverable from them under Rule 16 of the Customer ,Center Excise and Service Tax Drawback Rules, 1995.

43. It is clear from the above that exporter had deliberately not mentioned the full and correct description of the goods in the invoices issued for export of woven fabrics in as much as the exporter was aware of the fact that the impugned item did not contain synthetic staple fiber more than 85%. The deliberate suppression of the correct description of the exported goods showed exporter's intention to avail the higher amount of inadmissible drawback."
4.7 Since appellants have claimed the inadmissible drawback and the same was disbursed to them, hence the demand of interest in respect of the inadmissible amount of drawback from the date of disbursement to the date of payment is justified.. In case of *P V Vikhe Patil SSK [2007 (215) ELT 23 (Bom)] =* ***2007-TIOL-419-HC-MUM-CX*** Hon'ble Bombay High Court has stated as follows:

"10. So far as interest u/s. 11AB is concerned, on reference to text of Section 11AB, it is evident that there is no discretion regarding the rate of interest. Language of Section 11AB(1) is clear. The interest has to be at the rate not below 10% and not exceeding 36% p.a. The actual rate of interest applicable from time to time by fluctuations between 10% to 36% is as determined by the Central Government by notification in the Official Gazette from time to time. There would be discretion, if at all the same is incorporated in such notification in the gazette by which rates of interest chargeable u/s. 11AB are declared.

The second aspect would be whether there is any discretion not to charge the interest u/s. 11AB at all and we are afraid, language of Section 11AB is unambiguous. The person, who is liable to pay duty short levied/short paid/non-levied/unpaid etc., is liable to pay interest at the rate as may be determined by the Central Government from time to time. This is evident from the opening part of sub-section (1) of Section 11, which runs thus :

"Where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person, who is liable to pay duty as determined under sub-section (2) or has paid the duty under sub-section (2B) of Section 11A, shall in addition to the duty be liable to pay interest at such rate ....."
The terminal part in the quotation above, which is couched with the words "shall" and "be liable" clearly indicates that there is no option. As discussed earlier, this is a civil liability of the assessee, who has retained the amount of public exchequer with himself and which ought to have gone in the pockets of the Central Government much earlier. Upon reading Section 11AB together with Sections 11A and 11AA, we are of firm view that interest on the duty evaded is payable and the same is compulsory and even though the evasion of duty is not mala fide or intentional."
Thus we uphold the demand of interest under Section 75 of the Customs Act, 1962. For upholding the demand of interest we also rely on the following decisions

i. Kanhai Ram Thakedar [2005 (185) ELT 3 (SC)] = ***2005-TIOL-76-SC-CT***

ii. TCP Limited [2006 (1) STR 134 (T-Ahd)] = ***2005-TIOL-1607-CESTAT-MAD***

iii. Pepsi Cola Marketing Co [2007 (8) STR 246 (T-Ahd)] = ***2007-TIOL-1417-CESTAT-AHM***

iv. Ballarpur Industries Limited [2007 (5) STR 197 (TMum)]

4.8 Though for the act of misdeclaration the goods were liable for confiscation under Section 113(h)(i) of the Customs Act, 1962, but since they were not available for confiscation or released against any bond or security they could not have been confiscated by the Commissioner. Hence we set aside the order of confiscation and redemption fine imposed, relying on the decision of larger bench of Tribunal in case of *Shiv Kripa Ispat Pvt Ltd [2009 (235) ELT 623 (T-LB)] =* ***2009-TIOL-388-CESTAT-MUM-LB*** wherein following has been held-

"9. We have given careful consideration to the submissions. As rightly pointed by the learned counsel, the Hon'ble High Court of Punjab & Haryana, in Raja Impex case (supra), has rendered decision on identical issue. One of the substantial questions of law placed before the High Court by the department was whether redemption fine under Section 125 of the Customs Act could be imposed where the goods were neither available for confiscation nor cleared under bond/undertaking. The Hon'ble High Court followed the ratio of the Apex Court's judgment in Weston Components case and held that, as the goods in question had been allowed to be cleared without execution of any bond/undertaking by the importer, no redemption fine could be imposed under Section 125 of the Customs Act in lieu of confiscation. Reproduced below is the relevant part of the High Court's judgment.

"12. It may also be noticed here that in the case of M/s. Weston Components Ltd. v. Commissioner of Customs, New Delhi (supra), the goods were released to the assessee on an application made by it and on the execution of a bond by the assessee and in those circumstances, the Hon'ble Apex Court held that the mere fact that the goods were released on the bond being executed would not take away the power of custom authority to levy redemption fine. A reading of the judgment/order of the Hon'ble Apex Court in M/s. Weston Components Ltd. v. Commissioner of Customs, New Delhi (supra), would show that the Apex Court has taken the view that redemption fine can be imposed even in the absence of the goods as the goods were released to the appellant on an application made by it and on the appellant executing a bond. Since the goods were released on a bond the position is as if the goods were available. The ratio of the above decision cannot be understood that in all cases the goods were permitted to be cleared initially and later proceedings were taken for under-valuation or other irregularity, even then redemption fine could be imposed. We are, therefore, not inclined to accept the contention raised by the appellant on this issue and set aside the redemption fine.

13. The reliance of learned counsel for the revenue upon the provisions of Section 125 of the Act is also misconceived. Section 125 of the Act is applicable only in those cases which have been cleared by the concerned authorities subject to furnishing undertaking/bond etc. However, in the present case, admittedly, the goods were cleared by the respondent-authorities without execution of any bond/undertaking by the assessee. Thus, in view of the fact and circumstances of the case, we find no error in the impugned orders. No substantial question of law arises for our determination in the present appeal and the same is hereby dismissed."

(emphasis supplied.)

10. We have also particularly noted a decision of the Tribunal (cited by the learned advocate) which stands upheld by the Supreme Court. In Chinku Exports case, the Tribunal had held the redemption-fine-related issue against the Revenue in para (10) of its order, reproduced below :

"10. In view of the aforesaid findings and analysis, we are of the considered opinion that none of these charges upheld in the order impugned are in fact sustained by our analysis. In this connection we are also surprised to find that the redemption fine of Rs. 2.89 lakhs has been imposed when the goods were not available for confiscation, the same having been exported many years ago. Neither was any bond with a security in any format available with the Department to be enforced. In view of this it is clear that the redemption fine imposed was totally outside the purview of legal provisions in this regard. Therefore, we set aside the order impugned and allow the appeal with consequential relief as per law."

(emphasis supplied).

Dismissing the department's Civil Appeal filed against the above order of the Tribunal, the Apex Court ordered vide 2005 (184) E.L.T. A36 (S.C.) as under:

"We see no reason to interfere with the impugned order. The appeal is dismissed."

(emphasis supplied)

In the result, the view taken by the Tribunal in Chinku Exports case stands affirmed by the Apex Court and consequently the similar view taken by the P & H High Court in Raja Impex case is a binding precedent while the contra decision of the Madras High Court in Venus Enterprises case ceases to be good law on the point. It may be noted contextually that the dismissal, by the apex Court, of the SLP filed by M/s. Venus Enterprises did not have the effect of enhancing the precedent value of the High Court's decision in that case."

4.9 Since the goods have been held liable for confiscation under Section 113(h)(i) of the Customs Act, 1962, penalty under Section 114 of the Customs Act, 1962 is justifiable. From plain reading of the section 114 reproduced below, it is evident that penalty under the said section is impossible in respect of the goods held liable for confiscation and it has nothing to do with the actual confiscation of the goods.

"SECTION 114. Penalty for attempt to export goods improperly, etc. -

Any person who, in relation to any goods, does or omits to do any act which act or omission would ***render such goods liable to confiscation under section 113,*** *or abets the doing or omission of such an act, shall be liable, - ……."*

In view of the fact that we find that the goods have been misdeclared by describing them in a manner to avail excess drawback, the goods were liable for confiscation and hence the appellants who were responsible for making such incorrect declaration liable to penalty.

5.1 In view of discussions as above apart from modifying the impugned order to the extent of setting aside the order of confiscation of goods and imposition of redemption fine, we dismiss both the appeals.

(Order pronounced in the open court on 10.10.2019)

(Paras are numbered as per the original text: ***Editor***)