

# S. MURUGAPPAN

ADVOCATE, HIGH COURT

**ASSISTED BY:**

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**CONSULTANTS:**

CUSTOMS, GST,

FOREIGN TRADE LAWS,

FOREIGN EXCHANGE MANAGEMENT ACT.

## OPINION

1. QUERIST:

M/s. Flextronics Technologies (India) Pvt. Ltd.,  
SVR Fortune, Plot No.70A,  
Electronic City, Phase -1,  
Hosur Road, Bangalore - 560 100.

2. FACTS:

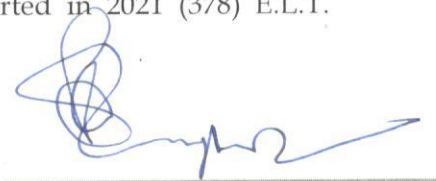
- 2.1 The querist reports that in respect of certain goods imported between 1<sup>st</sup> April 2020 to 30<sup>th</sup> September 2020 due to their wrong classification, there is short payment of duty. This short payment was pointed out by the audit team now when they conducted premises-based audit. It is further reported that the querist agrees that a wrong classification adopted. However, now for issue of any demand under the provisions of Customs Act, the maximum period available i.e. 5 years also has expired. But it is reported that the Customs Authorities intend to issue demand notice by invoking Section 28(4) of the Customs Act, 1962 by alleging suppression, mis-statement etc. and also relying upon an order for excluding the Covid period from 15.03.2020 till 28.02.2022 as per the directions given by the Supreme Court with regard to the limitation.

3. QUERY:

- 3.1 The querist would like to know whether the Customs Authorities can exclude the period between 15.03.2020 and 28.02.2022 for issue of the demand notice now in terms of Section 28(4) of the Customs Act, 1962 mentioned above. The querist also has reported that by adopting the interpretation entertained by the Customs, earlier drawback was also sanctioned to them in separate proceedings.

4. OPINION:

- 4.1 It is true that during Covid period, the Supreme Court passed directions and issued orders for exclusion of certain time for computing the limitation available under various Acts. Initially, based on extensions given periodically, an Order dated 23.09.2021 was issued by Supreme Court reported in 2021 (378) E.L.T.



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241(S.C.). The Court directed that the period between 15.03.2020 and 14.03.2021 needs to be excluded for computing the time limit and under such circumstances, based on the above, certain directions were given as mentioned below, as contained in paragraph 8 of the above Order.

8. Therefore, we dispose of the M.A. No.665 of 2021 with the following directions:-

- (I) In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 02.10.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2021, if any, shall become available with effect from 03.10.2021.
- (II) In cases where the limitation would have expired during the period between 15.03.2020 till 02.10.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 3-10-2021. In the event the actual balance period of limitation remaining, with effect from 3-10-2021, is greater than 90 days, that longer period shall apply.
- (III) The period from 15-3-2020 till 2-10-2021 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996. Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the Court or Tribunal can condone delay) and termination of proceedings.
- (IV) The Government of India shall amend the guidelines for containment zones, to state  

"Regulated movement will be allowed for medical emergencies, provision of essential goods and services, and other necessary functions, such as, time bound applications, including for legal purposes, and educational and job-related requirements."

4.2 Later on, when the second wave of Covid spread, further extensions were given and in terms of Order dated 10.01.2022 reported in 2022 (379) E.L.T. 276 (S.C.), the Apex Court directed that period between 15.03.2020 till 28.02.2022 needs to be excluded. For computing the limitation available under various Acts, further directions given are contained in paragraph 5 of the above Order and these read as follows:

5. Taking into consideration the arguments advanced by Learned Counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A. No. 21 of 2022 with the following directions:



- (I) *The order dated 23-3-2020 is restored and in continuation of the subsequent orders dated 8-3-2021, 27-4-2021 and 23-9-2021, it is directed that the period from 15-3-2020 till 28-2-2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.*
- (II) *Consequently, the balance period of limitation remaining as on 3-10-2021, if any, shall become available with effect from 1-3-2022.*
- (III) *In cases where the limitation would have expired during the period between 15-3-2020 till 28-2-2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 1-3-2022. In the event the actual balance period of limitation remaining, with effect from 1-3-2022 is greater than 90 days, that longer period shall apply.*
- (IV) *It is further clarified that the period from 15-3-2020 till 28-2-2022 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the Court or Tribunal can condone delay) and termination of proceedings.*

4.3 It must be noted that the exclusions mentioned above is to operate for the actions to be taken in respect of cases which arose during that period i.e. 15.03.2020 till 28.02.2022. This will also include the appeals, refund applications, notices etc. which are to be filed/acted upon during the above period on the basis of actions or orders which arose prior to 15.03.2020. Therefore, keeping the above in mind, paragraph 5(3) which reads as follows has to be seen in proper perspective.

- (III) *In cases where the limitation would have expired during the period between 15-3-2020 till 28-2-2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 1-3-2022. In the event the actual balance period of limitation remaining, with effect from 1-3-2022 is greater than 90 days, that longer period shall apply.*

4.4 From the above, it can be seen where the limitation **would have expired** during the period 15.03.2020 and 28.02.2022 notwithstanding the balance period of limitation available, the Supreme Court directed that everyone shall have the limitation period of **90 days from 01.03.2022**. Thus, in respect of all cases where the **actual limitation** expired between 15.03.2020 and 28.02.2022, the limitation is extended by 90 days from 01.03.2022. Now there can be cases where limitation has not expired as on 28.02.2022. In respect of such cases, the second sentence of paragraph 5(III) states that in the event of **actual balance period of limitation** remaining with effect from 01.03.2022 is greater than 90 days then the **longer period shall apply**.





- 4.5 Thus, if actual balance period of limitation is available beyond 90 days with effect from 01.03.2022 then, that period is to be adopted for limitation purposes.
- 4.6 In the present case, the demands for the period ending September 2020 by invoking the extended period are to be issued by end of September 2025. Now, in this case, the actual balance period is available beyond 01.03.2022 for computing the five- year limit and in such a case only **actual available longer period will apply** or in other words, time available will end by September 2025.
- 4.7 This is actual meaning of the directions contained in paragraph 5(III) of the Supreme Court Order dated 10.01.2022. Copies of both the Orders of the Supreme Court are attached. It must be noted that this direction cannot be interpreted to mean that for computing limitation, in any case, the period between 15.03.2020 up to 28.02.2022 is to be excluded as if that period did not exist. The directions given do not carry such a meaning and based on two categories of cases, the Apex Court has given instructions to compute the limitation available in paragraph 5(III) referred to above.
- 4.8 Without prejudice to the above position, it may also be pointed out that there are numerous cases where merely for the reason that classification was wrong, there cannot be a charge of suppression or mis-statement and extended period cannot be invoked on that ground. The reason is that appropriate classification is a question of law and involves interpretation of legal provisions whereas suppression or mis-statement is a question of fact and is related to material particulars in the documents filed with the Customs.



S. MURUGAPPAN

Encl: As above

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**Disclaimer:-** The above opinion is provided based on the information and documents made available to us by the querist and further based on the laws and rules prevalent as on date and the understanding of such provisions by the author and is meant for the private use of the person to whom it is provided without assuming any liability for any consequential action taken based on the views expressed here.