IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 04.03.2015

CORAM:

The Honourable Mr. Justice S.VAIDYANATHAN

Writ Petition No.32610 of 2014

M/s.ICMC Corporation Ltd.,
Rep. by its Managing Director,
36, Ambattur Industrial Estate,
Chennai-600 058. .. Petitioner

Vs.

The Commissioner of Appeals II,
Department of Customs,
Office of the Commissioner of Customs (Appeals II),
No.60, Rajaji Salai, Custom House,
Chennai-600 001. .. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of a writ of Mandamus, to direct the respondent to condone the delay of 18 days beyond the statutory period conferred power under him and allow the appeal No.C-3/8240/2014/SEA on the file.

For Petitioner : Mr.J.James

For Respondents : Mr. Rajnish Pathiyil, SCGSC

ORDER

This Writ Petition has been filed, praying for the issuance of a writ of Mandamus, to direct the respondent to condone the delay of 18 days beyond the statutory period conferred power under him and allow the appeal No.C-3/824/2014/SEA on the file.

2. It appears that the petitioner has filed preferred appeals five in number, aggrieved over the assessment orders made by the Deputy Commissioner (Group-V) in respect of the Bills of Entry bearing Nos.C3/822 to 826/O2014-SEA, dated 28.5.2014, 15.5.2014, 1.5.2014, 15.5.2014 and 28.5.2014 respectively, filed by the petitioner for the clearance of the goods declared as Note Book Computers, in and by which, the rate was assessed at 10% CVD charged on RSP basis, by classifying the said goods under CTH/CETH84713010.

3. By order, dated 20.11.2014, the Commissioner of Appeals II, while allowing the rest of the appeal, rejected the appeal in respect of the Bill of entry No.5363496, dated 1.5.2014, on the

ground that it has been filed beyond the time limit prescribed under Section 128 of the Customs Act, 1962 and it is time barred.

4. The petitioner has filed an application for condoning the delay of 18 days in filing the appeal in terms of Provisions of Section 128 (1) of the Customs Act, 1962 (in short, 'the Act'). The reasons lead to filing the appeal belatedly are, that the petitioner was under a dilemma as to whether an appeal is to be filed against the Bill of Entry or a refund application is enough for the differential amount and that they were under the bona fide impression that inasmuch as the previous consignments were under provisional basis, the present Bill of Entry also would be re-assessed at the time of final assessment of the earlier Bill of entries and that they consulted outside legal experts which took considerable time.

5. The learned counsel appearing for the petitioner would submit that the petitioner has a good case on merits and the authority, without considering the sufficient satisfactory grounds for condoning the delay made out by the petitioner, has rejected the appeal on the technical ground of limitation, which would deprive of its substantive right. He would contend that the High Court, being the Court of Record having unlimited jurisdiction, while exercising its inherent powers, can set right the order that was passed by judicial or quasi-judicial authorities, subordinate to it and when the authority, has erred in rejecting the appeal on the technical ground of limitation though acceptable reasons were made out to condone the delay, this Court can interfere with the same. He has sought to place reliance upon the decision of the High Court of Gujarat reported in "Amitara Industries Ltd., versus Union of India" reported in 2014 (205) ELT 322 (Guj.), wherein, while dealing with similar circumstances, it was held that the authority of Commissioner of Appeals, has power to condone the delay of 3 months maximum, however, the writ Court has jurisdiction to entertain the appeal even beyond the period of limitation to obviate extraordinary hardship and injustice. It was also held therein, that the total length of delay being very small and with extremely good ground on merit to sustain, it has opined that non-interference at this stage would cause gross injustice to the petitioner therein. He also relied upon a decision of the Hon'ble Supreme Court reported in "K.C.Sharma and others versus Union of India and others" (1997) 6 SCC 72", wherein, while condoning the delay in filing the Original Application, which was barred by limitation, the Supreme Court has granted the relief. He also referred to order of this Court made in W.P.Nos.4770, 2496 and 2497 of 2013, wherein, this Court while dismissing the writ petition, liberty was granted to the petitioner therein, to file an appeal to the Commissioner of Customs (Appeal), who shall entertain the same, without rejecting on the ground of limitation, but to consider on merits and in accordance with law. He pointed out that when admittedly, the authority, on merits, have allowed four appeals, ought not to have rejected the appeal which was on same merits, on the technical ground of limitation. With these contentions, the learned counsel sought for interference of this Court.

6. On the other hand, learned senior central government standing counsel would urge that this Court may not interfere in extraordinary jurisdiction in the instant case when there is no error in the impugned order. He further contended that the Customs Act is a self-contained Act and a code by itself and in the absence of any specific provision enabling this Court to exercise its power to condone the delay, it has no power to condone the delay. In support of his contentions, he relied upon the decisions of the Hon'ble Supreme Court, reported in "Chahatisgarh State Electricity Board versus Central Electricity Regulatory Commission and others" (2010) 5 SCC 23 and "Commissioner of Customs and Central Excise versus Hongo India Private Limited and another" (2009) 5 SCC 791. Therefore, he prayed for dismissal of the writ petition.

7. Heard the learned counsel appearing on either side and perused the materials placed on record.

8. Section 128 of the Customs Act reads as under:

> "128. Appeals to Commissioner (Appeals)- (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Commissioner of Customs may appeal to the Commissioner (Appeals) within "within sixty days" from the date of the communication to him of such decision or order:
>
> Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.
>
> (1-A) The Commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing;
>
> Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.
>
> (2) Every appeal under this section shall be in the prescribed form and shall be verified in the prescribed manner as may be specified by rules made in this behalf."

8. A reading of the above, it is clear that Section 128(1) prescribes that the appeal must, in the first instance, be filed within sixty days from the date of the communication of the decision or order which is the subject matter of the appeal. The proviso to Section 128 (1) enables the Commissioner (Appeals) to permit the filing of the appeal beyond the sixty days referred to

above provided that he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the sixty days prescribed. However, on a plain reading of the proviso, it does appear that the Commissioner (Appeals) can exercise such power only within a "further period of thirty days". In other words, the appeal can be filed only up to 90 days from the date of communication of the decision or order appealed from. The first sixty days being the initial period and the further thirty days being at the discretion of the Commissioner (Appeals).

9. In the present case, it is not in dispute that the bill of entry is dated 1.5.2014 and the application to file an appeal before the Commissioner (Appeals) should be within sixty days, i.e. on or before 2.7.2014. However, it has been filed on 13.8.2014. It is to be noted that the proviso to Section 128 (1) enables the Commissioner (Appeals) to permit the filing of the appeal beyond the sixty days provided that he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the sixty days prescribed. In fact, while exercising such discretionary power, the authority has condoned the delay in respect of other four items, wherein, the appeals were filed though after expiry of 60 days, however, since they were within the condonable period of 90 days. The present appeal was beyond the statutory period of 90 days and the authority has rightly rejected the same, since he cannot be expected to exercise his discretionary power beyond the permissible period that was prescribed by the statute.

10. As regards the issue whether the High Court has power to condone the delay after the expiry of 30 days period', a useful reference can be made to a decision reported in "Singh Enterprises versus CCE" (2008) 3 SCC 70, wherein, the Hon'ble Supreme Court, interpreted Section 35 of the Central Excise Act, 1944 which is pari material to Section 128(1) of the Customs Act and observed as under in para 8:

> "8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of statute are not vested with jurisdiction to condone the delay beyond the permissible period provided under the statute. The period up to which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Limitation Act, 1963 (in short "the Limitation Act") can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days' time can be granted by the

appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only up to 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days' period." (emphasis added)

11. The above said decision was followed by the Hon'ble Supreme Court in its subsequent decision reported in "Commissioner of Customs and Central Excise versus Hongo India Private Limited and another" (2009) 5 SCC 791, wherein, the question for determination came up before it, was whether the High Court has power to condone the delay in presentation of the reference application under unamended Section 35-H(1) of the Central Excise Act, 1944 beyond the period prescribed, by applying Section 5 of the Limitation Act, 1963 and while answering in the negative, the Supreme Court has held in para 3 to 37 as under:

"35. It was contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. In this regard, we have to see the scheme of the special law which here in this case is the Central Excise Act. The nature of the remedy provided therein is such that the legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If, on an examination of the relevant provisions, it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our considered view, that even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent, the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. In other words, the applicability of the provisions of the Limitation Act, therefore, is to be judged not from the terms of the Limitation Act but by the provisions of the Central Excise Act relating to filing of reference application to the High Court.

> 36. The scheme of the Central Excise Act, 1944 supports the conclusion that the time-limit prescribed under Section 35-H(1) to make a reference to the High Court is absolute and unextendable by a court under Section 5 of the Limitation Act. It is well-settled law that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Limitation Act.
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> 37. In the light of the above discussion, we hold that the High Court has no power to condone the delay in filing the "reference application" filed by the Commissioner under unamended Section 35-H(1) of the Central Excise Act, 1944 beyond the prescribed period of 180 days and rightly dismissed the reference on the ground of limitation.

12. The Customs Act, 1962 itself is a complete Code. Reading various chapters and various sections thereof, it is very clear that it is an Act independent of other provisions. It provides for search, seizure, arrest, confiscation of goods, conveyance, imposition of penalties, settlement of cases, appeals including the appeal to the Supreme Court and hearing before the Supreme Court, period of limitation, offences and prosecution. Thus, it is an independent Act. Therefore, the Customs Act, 1962 is a complete code and the provisions of Section 128 (1) clearly indicate that the provisions of the Limitation Act were to apply only to the extent and during the extended period of 30 days and not beyond. Delay could be condoned by the Commissioner (Appeals) within the extended period of 30 days and thereafter he had no power left in him to entertain any application for condensation of delay or to entertain the appeal itself.

13. In view of the above discussion and having regard to the categoric pronouncement of the Hon'ble Supreme Court in the above mentioned decisions, holding that when the scheme of the special law which herein in this case is the Customs Act and the nature of the remedy provided therein is such that the legislature intended it to be a complete code by itself, which alone should govern the several matters provided by it, it is clear that the provisions of the Limitation Act are necessarily excluded, the benefits conferred therein cannot be called in aid to supplement the provisions of the Act, this Court is of the view that the delay which is beyond the statutory period of limitation, cannot be condoned.

14. In these circumstances, this Court find that the orders passed by the Commissioner (Appeals) are unassailable in law.

15. As regards the authorities relied upon by the petitioner, having regard to the categoric pronouncement of the Hon'ble Supreme Court stated supra, this Court is of the view that the same will not come to aid to the claim of the petitioner since, the same were disposed of by a Division Bench of Gujarat High Court and by a learned single Judge of this Court respectively. In "Amitara

Industries Ltd., case, the Division Bench of Gujarat High Court has, in fact, accepted that no fault can be found with the approach of both the authorities, viz., Commissioner (Appeals) and the Tribunal as far as question of condonation of delay is concerned, but it has observed that none of the authorities have decided the question on merits after the second round of litigation began and therefore, the question of merger would not arise until the matter is decided on merit and hence, the High Court upheld the challenge to the order-in-original treating the circumstances as extraordinary and in such circumstances, the delay came to be condoned. These facts are quite different from the facts involved in the writ petition. As regard the decision in "K.C.Sharma and others" is concerned, it is to be noted that the Hon'ble Supreme Court has followed the doctrine of judgment in rem and condoned the delay and granted the relief since already, there was a finality as regards the validity of the impugned notifications and the similarly placed persons, who made their claim for pension were found eligible to receive the same. Therefore, the facts are not similar to the one involved in the present writ petition. Likewise, the relief granted in W.P.No.4770, 2496 and 2497 of 2013 by this Court, cannot also be extended to the case of the petitioner, since in that case, no issue regarding the delay was considered, but taking note of the fact that the writ petitions were erroneously filed without exhausting the effective alternative remedy, the relief was granted to approach the concerned authority. But in the case on hand, the issue regarding the delay has been considered by the authority in negative, which is confirmed by this Court.

In view of the above, the writ petition is liable to be dismissed and accordingly, it is dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

Suk

To
The Commissioner of Appeals II,
Department of Customs,
Office of the Commissioner of Customs (Appeals II),
No.60, Rajaji Salai, Custom House,
Chennai-600 001.

1 cc to Mr.J.James ,Advocate, SR.No.12749
1 cc to Mr. Rajnish Pathiyil ,Advocate, SR.No.2629

W.P.NO.32610 OF 2014

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