IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.03.2015

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THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

W.P.No.6608 of 2015

M/s.Premier Garment Processing,
rep.by its Prop: Ebrahim Sha,
No.29 (Old No.4) Govindan Street,
T.Nagar,
Chennai - 600 017. ... Petitioner

Vs.

1. The Union of India,
represented by its Secretary to
Government, Department of Revenue,
Ministry of Finance,
North Block,
New Delhi

2. The Commissioner of Service Tax (Appeals-II),
26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 600 034

3. The Additional Commissioner of Service TAx,
Service Tax Commissionerate,
MHU Complex, 692, Anna Salai,
Chennai - 600 035. .... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India seeking for the relief of issuance of a writ of ceriorari to call for the records relating to the impugned Order in Original No.5 to 7 of 2011 dated 27.1.2011 (C.No.IV/9/49/2009 STC-ADJ) passed by the 3rd respodnent and quash the same as without authority, without jurisdiction and unsustainable in law.

For Petitioner : Mr.K.Jayachandran

For Respondents : Mr.V.Sundareswaran

O R D E R

The Writ Petition has been filed praying for the relief of issuance of a writ of ceriorari to call for the records relating to the impugned Order in Original No.5 to 7 of 2011 dated

27.1.2011 (C.No.IV/9/49/2009 STC-ADJ) passed by the 3rd respondent and quash the same.

2. It is the case of the petitioner that as against the Order passed by the Commissioner of Service Tax levying service tax of Rs.73 lakhs for the period from July 2003 to September 2006, the petitioner preferred appeal before the Tribunal and the Tribunal granted stay directing the petitioner to pay Rs.20 lakhs as pre-deposit. As against the said order, the petitioner obtained interim order dated 7.12.2007 in M.P.No.1 of 2007 in W.P.No.36541 of 2007 from this Court granting stay of pre-deposit and by final order dated 24.12.2012 in W.P.No.36541 of 2007 directed the Tribunal to dispose of the appeal without pre-deposit. The Additional Commissioner by order dated 26.1.2011 confirmed the demand of Rs.97,11,679/- towards service tax, education cess and Secondary and Higher Education Cess covering the period from October 2007 to March 2010 and also confirmed the demand of interest by imposing penalty. Pursuant to the said order, recovery notice dated 9.10.2013 was also issued. The petitioner preferred appeal before the Commissioner (Appeals) against the Order dated 27.1.2011 and the same was rejected as time barred. Hence, the present writ petition is filed.

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

4. In the present case, it is not in dispute that the appeal has been filed with a delay of 1085 days. It is to be noted that under Section 85(3) of the Finance Act, the appeal to Commissioner (Appeals) was to be filed within three months from the date of communication of the order and as per the proviso to Section 85(3), a further period of three months could be granted where sufficient cause was shown. The Commissioner (Apepals) has no power to condone such abnormal delay.

5. In a similar matter, while considering the delay in filing appeal under Section 128 of the Customs Act, which is pari materia to Section 85 of the Finance Act, 1994, this Court in the order dated 4.3.2015 made in W.P.No.32166 of 2014 has observed as under:

> ''8. On a reading of the above provision, 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).

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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.
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> 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.

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.

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10. 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.

6. In view of the aforesaid decision and discussion, I am not inclined to grant the relief sought for in the writ petition and the same is dismissed. No costs. Consequently, the connected miscellaneous petitions are also dismissed.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

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To

1. The Secretary to Government,
   Union of India,
   Department of Revenue,
   Ministry of Finance,
   North Block,
   New Delhi

2. The Commissioner of Service Tax (Appeals-II),
   26/1, Mahatma Gandhi Road,
   Nungambakkam,
   Chennai - 600 034

3. The Additional Commissioner of Service TAx,
   Service Tax Commissionerate,
   MHU Complex, 692, Anna Salai,
   Chennai - 600 035.

1 cc to Mr.K. Jayachandran, Advocate, Sr. 15340
1 cc to Mr.V. Sundareswaran, Advocate, Sr. 15346

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