

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.06.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE D.KRISHNA KUMAR

C.M.A.No.1161 of 2016

M/s.Falcon Tyres Ltd.,
Rep., by its Authorised Signatory,
Shri Chander Kothari .. Appellant/Appellant

versus

1. The Customs, Excise & Service Tax Appellate Tribunal,
No.26, Shastri Bhavan Annexe Building, Ist Floor,
Haddows Road, Chennai 600 006. .. Respondent/First
Appellate Authority
2. The Commissioner of Customs (Seaport-Import),
Rajaji Salai, Custom House,
Chennai 600 001. .. Respondents/
Respondent

Prayer: Civil Miscellaneous Appeal is filed under Section 130(1) of the Customs Act, 1962, against the Final Order No.40100 of 2016, dated 25.01.2016 in C3/376/2007-DB on the file of Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai 600 006.

For Appellant : Mr.N.Viswanathan

For 2nd respondent : Mr.T.Chandrasekaran, CGSC

R1 Tribunal

JUDGMENT

(Judgement of this Court was made by S.MANIKUMAR, J.)

Civil Miscellaneous Appeal is directed against the Final Order No.40100 of 2016, dated 25.01.2016, passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai 600 006, declining to entertain the appeal, as time barred.

2. Short facts leading to the appeal are that the appellant submitted a Bill of Entry on 26.08.2006, for import of natural rubber and the goods were assessed. Part of goods were cleared duty-free and part of goods were cleared on payment of appropriate customs duty on 13.09.2006. Appellant has contended that the order of assessment, dated 26.08.2006, was erroneous, on the grounds that the imported goods are classifiable under CTH 4001 22 00 under CN 21/2002 Sl.No.491, which attracts duty at the rate of 20% + Nil + 2% + 4%, and at the time of assessment, the goods were classified under CTH 400110.10, which attracts higher duty and at the time of assessment, the same was not noticed by them. The appellant has contended that when they opted for reassessment of bill of entry, the same was not accepted by the Deputy Commissioner of Customs (DEEC), Customs House, Chennai and thus, in the abovesaid circumstances, an appeal was filed before the Commissioner of Customs (Appeals), Chennai, with delay. They has prayed to condone the delay, as a special case. That apart, they have also submitted an application for refund of excess duty. While considering the prayer for condonation, the Commissioner of Customs (Appeals), Chennai, has summarised their case, as hereunder:

"This is an appeal filed by M/s.Falcon Tyres Limited, Mysore-17 (hereinafter referred to as appellant) against the order of assessment in B/E.No.283864, dated 26.08.2006, in case of import of "Natural rubber SIR 20". The revenue classified the goods under CTH 40011010 at a rate of duty of 70% BCD + 0% CVD + 2% CESS and 4% Addl. Duty. Part consignment was allowed duty free clearance under advance licence and the rest was cleared on payment of duty by cash. The appellants sought for reassessment of the Bill of Entry for change of classification to CTH 40012200.

In the grounds of appeal and written submissions, the appellants had averred that the "natural rubber SIR 20 grade (Technical Specified Rubber)" would fall under CTH 40012200 as per CN 21/2002 Sl.No.491, attracting duty @ 25% + Nil + 2% + 2% + 4% whereas they had paid higher duty due to wrong classification. Shri.Bijur, Purchase Officer appeared for the personal hearing on behalf of the appellant and reiterated what they stated in the appeal."

On the aspect, as to whether, the appeal filed beyond the condonable period, can be entertained, vide order, dated 26.07.2007, the Commissioner of Customs (Appeals), ordered as hereunder:

"I find that the order of assessment is dated 29.08.2006 and the duty was paid on 13.09.2006 whereas the appeal has been filed on 03.04.2007 in the instant case. As per Section 128 of Customs Act, 1962, any

appeal before Commissioner (Appeals) is required to be filed within the statutory provisions of 60 days with a further condonable period of 30 days. The appeals in the instant case have been filed on 03.04.2007 which is beyond the extendable period also. Hence, the appeals is liable to be rejected as time barred.

Since the appeal is decided on the limitations of time, I am not going into the merits of the case."

Being aggrieved by the dismissal of the appeal, as time barred, the appellant has filed an appeal to the CESTAT, Chennai. After hearing both sides, the CESTAT, Chennai, has rejected the appeal, as hereunder:

"Appellant's contention is that they have filed appeal not against bill of entry but against rejection of reassessment by the department which is not justified. On perusal of copy of note sheet file which is marked as AC(EDI)/DC(EDI)/DC(Gr.7) on 20.02.2007, we find that appellant cannot agitate that this is an order and this was not issued to the appellant. Therefore, the appeal is filed against Bill of Entry and not against any letter or order issued by the AC. Accordingly, we do not find any infirmity in the impugned order. Commissioner (Appeals) has no powers to condone delay beyond condonable period. Respectfully, following the judgment of the Hon'ble Supreme Court in the case of Singh Enterprises v. CCE, Jamshedpur reported in 2008 (221) ELT 163 (SC), the impugned order is upheld. Appeal is rejected."

Being aggrieved by the Final Order No.40100 of 2016, dated 25.01.2016, passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai, under Section 129B of the Customs Act, 1962, r/w. Section 35C of the Central Excise Act, 1944 r/w. Section 86(7) of the Finance Act, 1994, instant Civil Miscellaneous Appeal is filed, on the following substantial questions of law,

"(1) Whether the Tribunal was correct in traversing beyond the scope of the appeal filed by the appellant to hold that the note sheet challenged by them before the first appellate authority cannot be agitated as the same is neither an order nor issued to the appellant, when the said issue was not the subject matter of the order impugned in the appeal disposed of by the tribunal?

(2) Whether the tribunal was correct in not considering the substantial issue involved in the subject case in the admitted collection of the excess customs duty on the goods imported without the

authority of law, which the customs authorities suo mottu were required to refund by invoking the provisions u/s. 17 or atleast sec.149 r/w.153 of the Customs Act, as has been held in number of judicial pronouncements, whereas the appellant was made to go through various procedures to be ultimately denied justice?

3. Whether the decision of the tribunal is required to be set aside in the light of the authoritative pronouncements of the Bombay High Court in the case of Hero Cycles v. UOI reported in 2009 (240) ELT 490 (Bom) approved by the Hon'ble Supreme Court as reported in 2010 (252) ELT A103 (SC)?

4. Whether the tribunal committed judicial indiscipline in not following the decision of the coordinate bench in the case of Gabriel India Ltd., v. CC (Imports) Nhava Sheva reported in 2014 (314) ELT 387 (Tri-Mumbai)?

3 By inviting the attention of this Court to a recent judgment of the Hon'ble Apex Court in M.P.Steel Corporation v. Commissioner of Central Excise reported in 2015 (7) SCC 58, Mr.N.Viswanathan, learned counsel for the appellant submitted that CESTAT, Chennai, ought to have condoned the delay in filing the appeal. In the reported judgment, the Hon'ble Supreme Court considered the applicability of Section 14 of the Limitation Act, to an appeal, filed under Section 128 of the Customs Act, 1962. Section 14 of the Limitation Act, 1963, deals with exclusion of time of proceeding bona fide in Court, without jurisdiction and the said Section is extracted hereunder:

"(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of the appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court

which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation - For the purpose of this section, -

a. in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

b. a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

c. misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."

The said judgment rendered, with reference to Section 14 of the Limitation Act, cannot be made applicable to the facts of this case, for the reason that it is not a case of the appellant that they had prosecuted the appeal in some other Court or forum.

4. Perusal of the material on record shows that when the appellant has sought for re-assessment of Bill of Entry, which according to them, classifiable as CTH 40011010, instead of CTH 40012200, the Department has noted as hereunder:

"Notes above for 'OOC' cancellation may please to seen. This is a case of reassessment by changing the CTH where rate of duty difference is 50%. Once the assessment order is final and goods are cleared means, the importer has to approach the Commissioner (Appeals) forum for remedy. Hence, at this juncture, we may not entertain 'OOC' cancellation for reassessment."

5. Thereafter, the appellant has preferred an appeal to the Commissioner of Customs (Appeals), Chennai, with delay. Though, before this Court, Mr.N.Viswanathan, learned counsel appearing for the appellant contended that the Commissioner of Customs (Appeals), has not properly appreciated the fact that the appeal was filed only against the internal memorandum, dated 20.02.2007, issued by the Deputy Commissioner of Customs (EDI), rejecting the request for reassessment, with a direction to the appellant to approach the Commissioner (Appeals), for further

remedy, which was communicated to the appellant on 23.02.2007, we are not inclined to accept the said contentions, for the reason that perusal of Memorandum of Appeals filed before the Commissioner of Customs (Appeals) shows that the appeal was filed only against the assessment order, dated 26.08.2006 and not against the decision or order, made in the request, for re-assessment. For better understanding, Col.Nos.3 and 4 of the Appeal filed before the Commissioner of Customs (Appeal), are reproduced hereunder:

3) Designation and address of the officer passing the decision or order appealed against and the Date of decision or order	The Dy. Commissioner of Customs, EDI, Custom House, Chennai 600 001. Against the assessment B.E.No. 283864/ 36, 26.08.2006 TRB Challan No.98599328/13.09.07
4) Date of Communication of the decision or order Appealed against to the appellant	23.02.2007

6. Material on record further discloses that there was no challenge to the internal memorandum, dated 20.02.2007, issued by the Deputy Commissioner of Customs (EDI), rejecting the request for reassessment made by the appellant and stated to have been communicated to the appellant on 23.02.2007, Ground No.7 made in the instant appeal is factually incorrect.

7. Contention of Mr.N.Viswanathan, learned counsel for the appellant that the assessment made on 26.08.2006, was not opposed, due to inadvertant mistake and that therefore, the Tribunal ought to have condoned the delay, by applying the law laid down in the recent judgment of the Supreme Court in M.P.Steel Corporation v. Commissioner of Central Excise reported in 2015 (7) SCC 58, also cannot be countenanced, for the reason that admittedly, assessment has been made on 26.08.2006; refund application has been made on 23.12.2006; and application for permission to cancel OOC and re-assess the Bill of Entry, has been made only on 03.02.2007. In this regard, Office Note, dated 02.02.2007, has already been extracted.

8. Section 128 of the Customs deals with filing of appeals to the Commissioner (Appeals) and the said Section is extracted hereunder:

"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 three months 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 three months, allow it to be presented within a further period of three months.

(2) Every appeal under this section, shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."

9. On the aspect, as to whether, the appellate authority is empowered to condone the delay of the extendable period, let us consider few decisions of the Hon'ble Apex Court, rendered under various enactments, wherein specific time limit has been provided, for filing an appeal.

(i) In *Indian Coffee Worker's Co-op. Society Ltd., v. Commissioner of Commercial Taxes* reported in 2002 (I) CTC 406, the question considered by a Hon'ble Division Bench of this Court was, as to whether, the High Court, while exercising Article 226 of the Constitution of India, can direct the appellate authority to consider the appeal, on merits, when such appeal was filed, after the expiry of 30 days, from the last date, on which, appeal should have been filed. The issue arose out of a decision of the Special Tribunal, which dismissed the petition, declining to condone the delay. While considering the scope of Section 31 of the Tamil Nadu General Sales Tax Act, 1959, a Hon'ble Division Bench of this Court, observed that Tamil Nadu General Sales Tax Act, 1959, clearly lays down that an appeal has to be filed within thirty days from the date of receipt of the order and that an appeal may be admitted beyond that period, if the appellate authority is satisfied that the appellant had sufficient cause for not presenting the appeal within the said period. After considering the decisions in *Mohd. Ashfaq v. State Transport Appellate Tribunal, U.P.*, [AIR 1976 SC 2161], *K.Ganesh v. State of Tamil Nadu* [1988 STC (VOL.68) 84], *Kanaka Durga Agro Oil Products Ltd., v. Commercial Tax Officer, Benz Circle, Vijayawada* and another [2000 STC (Vol.119) 387] and *Union of India v. M/s.Popular Construction Co.*, [2001 (4) CTC 213], a Hon'ble Division Bench of this Court has held as follows:

"(a) An appeal under Section 30(1) of the Tamil Nadu General Sales Tax Act, 1959 has to be filed within 30 days before the appellate Assistant Commissioner. The appellate Assistant Commissioner is empowered to condone the delay for further period of 30 days if sufficient cause for not presenting the

appeal in time is shown and satisfied by the appellate authority.

(b) Under no circumstances, the appellate authority has power to condone the delay beyond 30 days.

(c) While the High Court exercising the jurisdiction under Article 226 of Constitution of India, approves the correctness of the order of the appellate authority, it has no power to direct the appellate authority to consider the appeal on merits as otherwise it would be nothing but Court extending the period of limitation.

(d) Even if the High Court accepts the explanation given by the assessee for not filing the appeal within the period prescribed under the Act, it cannot direct the appellate authority to consider the matter on merits as the High Court exercising jurisdiction under Article 226 of Constitution of India, cannot re-write the provisions of the Act."

It is worthwhile to extract the reported judgments considered in Indian Coffee Worker's Co-op. Society Ltd., 's case (cited supra), which are reproduced hereunder:

"In Mohd. Ashfaq v. State Transport Appellate Tribunal, U.P., [AIR 1976 SC 2161], the Supreme Court was considering Section 58 of the Motor Vehicles Act. The Supreme Court has ruled as under:-

"Section 58 of the said Act provided that a permit may be renewed on an application made for such purposes, provided that the application for renewal of a permit shall be made (a) in the case of stage carriage permit or public carrier's permit, not less than 120 days before the date of expiry; and (b) in any other case not less than 60 days before the date of its expiry. Sub-section (3) of that Section further provided that: " Notwithstanding anything contained in the first proviso to subsection(2), the Regional Transport Authority may entertain an application for the renewal of a permit after the last date specified in the said proviso for the making of such an application, if the application is made not more than 15 days after the said last date and is accompanied by the prescribed fee. "

Thus, sub-section(3) vested in the Regional Transport Authority a power to entertain an application for renewal of a permit even if it is beyond time, but in that case the time should not be more than fifteen days. The question for consideration was, whether sub-section (3) could be said to

expressly exclude the provisions of Section-5 of the Limitation Act which gives unlimited power to the Court or a Tribunal to excuse the delay irrespective of the number of days of delay? Considering this question, the Supreme Court held:

" It is therefore, clear that sub-section (3) of Section 58 confers a discretion on the Regional Transport Authority to entertain an application for renewal when it is made beyond the time-limit specified in the proviso to sub-section (2), but not more than 15 days late and the discretion is to be exercised in favour of entertaining the application for renewal when it is shown that there was sufficient cause for not making it in time. Now, the question which arises is : does Section 5 of the Limitation Act, 1963 apply so as to empower the Regional Transport Authority, for sufficient cause to entertain an application for renewal even where it is delayed by more than 15 days? Section 29, sub-section (2), of the Limitation Act, 1963 makes Section 5 applicable in the case of an application for renewal unless its applicability can be said to be expressly excluded by any provision of the Act. The only provision of the Act sought to be pressed into service for this purpose was sub-section (3). Does sub-section (3) expressly exclude further extension of time under Section 5? If it does, then Section 5 cannot be availed of by the appellant for condonation of the delay. Sub-section (3) in so many terms says that the Regional Transport Authority may condone the delay in making of an application for renewal and entertain it on merits provided the delay is of not more than 15 days. This clearly means that if the application for renewal is beyond time by more than 15 days, the Regional Transport Authority shall not be entitled to entertain it, or in other words, it shall have no power to condone the delay. There is thus an express provision in subsection (3) that delay in making an application for renewal shall be condonable only if it is of not more than 15 days and that expressly excludes the applicability of Section 5 in cases where an application for renewal is delayed by more than 15 days. "

11. It has to be noted that even though in the provisions of the Act (Section 58 of the Motor Vehicles Act of Uttar Pradesh), the wordings "condonable only if it is of not more than 15 days" are not there, the Supreme Court so held on the basis of the wordings employed in the provisions of the Act,

which read thus:-

"may entertain an application for the renewal of a permit after the last date specified in the said proviso for the making of such an application, if the application is made not more than 15 days after the said last date."

12. The next decision is the one reported in K.Ganesh v. State of Tamil Nadu [1988 STC (VOL.68) 84]. That was a case where a petition was filed to condone the delay of 211 days in filing the Tax Case Revisions against the order of the Sales Tax Appellate Tribunal, Coimbatore. The Revisions were filed under Section 38 of the Tamil Nadu General Sales Tax Act. According to Sub-section-1 of Section-38, a petition can be preferred to the High Court within 90 days from the date of which copy of the order is served. By virtue of the 8th Amendment Act 1986 which came into effect on 15/12/1986, the High Court may within a further period of forty-five days, admit a petition preferred after the expiration of the said period of ninety days, if it is satisfied that the petitioner had sufficient cause for not preferring the petition within the said period. In the said Ruling, a Division Bench of this Court held that the period prescribed in the statute (local law) is clear and that further Section 29 of the Limitation Act specifically provided that Sections 4 to 24 would apply only insofar as and to the extent to which they are not expressly excluded by such special or local law. The Court, in that case, ruled that there is an express exclusion of Section 5 of the Limitation Act.

13. The next ruling that can be usefully referred to is the one reported in Kanaka Durga Agro Oil Products Ltd., v. Commercial Tax Officer, Benz Circle, Vijayawada and another [2000 STC (Vol.119) 387]. That was a case arising under Andhra Pradesh General Sales Tax Act. In that case, the petitioner agreed for the proposed assessment and gave a letter of consent to that effect. However, long thereafter, the petitioner filed an appeal against the said assessment order with a delay of 533 days. The assessee in that case raised a contention that a turnover of Rs.76,72,260/- representing the sale of oil extracted from oil cakes was subjected to a higher rate of tax unlike oil extracted from oil seeds, on the basis of the decision in RAJASHREE OILS & EXTRACTIONS' case (1998) 111 STC 668 (AP) [FB] in which entry 24 [a] of the First schedule to the Andhra Pradesh General Sales Tax Act, 19 57 was declared unconstitutional. The appellate

authority dismissed the appeal on the ground of delay. The Court ruled as under:-

" If the special statute prescribed a particular period of limitation for preferring the appeal, the appeal has to be necessarily filed within that date. If there is a provision for condonation of delay and sufficient cause is shown, the appellate authority can condone the delay if it is satisfied with the reasons for the delay. The proviso to Section 19[1] as it originally stood empowered the appellate authority to admit an appeal after a period of 30 days, if it is satisfied that the dealer had sufficient cause for not preferring the appeal within the prescribed period of 30 days subject to the payment of the admitted tax due. Under the amended provision, the delay can only be condoned up to a further period of 30 days. "

14. In a recent Judgment, the Supreme Court of India, in Union of India v. M/s. Popular Construction Co., [2001 (4) CTC 213], considered Section 34 of Arbitration and Conciliation Act, 1996 and ruled that when the statute positively prescribes 90 days as time limit for the purpose of filing an application under Arbitration Act, that provision is to condone the delay for a further period of 30 days only and Section 5 of the Limitation Act does not apply in view of express exclusion and scheme of the Act and delay beyond a period of 30 days after expiry of the original period of limitation cannot be condoned. It will be useful to quote in verbatim, the exact wordings employed by the Supreme Court, which reads thus:-

" As far the language of Section 34 of 1996 Act is concerned, the crucial words are " but not thereafter" used in the proviso to subsection(3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the Court could entertain an application to set aside the Award beyond the extended period under the proviso, would render the phrase 'but not thereafter' wholly otiose. No principle of interpretation would justify such a result. "

(ii) In Singh Enterprises v. Commissioner of Central Excise, Jamshedpur reported in 2008 (221) E.L.T. 163 (SC), the Hon'ble Apex Court considered a case, wherein, the Commissioner dismissed the appeal on the grounds that it was time barred and beyond the period of 30 days from the expiry of period of 60

days, prescribed for filing the statutory appeal. The High Court dismissed the writ petition. Before the Supreme Court, arguments were advanced that even though the Commissioner has no power to condone the delay, in exercise of the powers, under Article 226 of the Constitution of India, yet the High Court, can condone the delay, and such power is untrammelled by any statutory provision. Rejecting the above contention, at Paragraph 8, the Hon'ble Apex Court held as follows:

"8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period upto which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Indian 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 upto 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."

(iii) In Commissioner of Customs & Central Excise v. Hongo India (P) Ltd., reported in 2009 (236) ELT 417 (SC), the Hon'ble Apex Court considered a question, as to whether, High Court has power to condone the delay, in presentation of a reference application, under unamended Section 35H(1) of the Central Excise Act, 1944, beyond the prescribed period, by applying Section 5 of the Limitation Act, 1963. After considering the

decisions in Singh Enterprises v. CCE, Jamshedpur reported in 2008 (221) ELT 163 (SC), at Paragraphs 18 to 20, the Hon'ble Apex Court held as follows:

"18) In the earlier part of our order, we have adverted to Chapter VIA of the Act which provides appeals and revisions to various authorities. Though the Parliament has specifically provided an additional period of 30 days in the case of appeal to the Commissioner, it is silent about the number of days if there is sufficient cause in the case of an appeal to Appellate Tribunal. Also an additional period of 90 days in the case of revision by Central Government has been provided. However, in the case of an appeal to the High Court under Section 35G and reference application to the High Court under Section 35H, the Parliament has provided only 180 days and no further period for filing an appeal and making reference to the High Court is mentioned in the Act. In this regard, it is useful to refer to a recent decision of this Court in Punjab Fibres Ltd., Noida (supra). Commissioner of Customs, Central Excise, Noida is the appellant in this case. While considering the very same question, namely, whether the High Court has power to condone the delay in presentation of the reference under Section 35H(1) of the Act, the two-Judge Bench taking note of the said provision and the other related provisions following Singh Enterprises v. Commissioner of Central Excise, Jamshedpur, (2008) 3 SCC 70 concluded that "the High Court was justified in holding that there was no power for condonation of delay in filing reference application."

19) As pointed out earlier, the language used in Section 35, 35B, 35EE, 35G and 35H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days. Even otherwise, for filing an appeal to the Commissioner, and to the

Appellate Tribunal as well as revision to the Central Government, the legislature has provided 60 days and 90 days respectively, on the other hand, for filing an appeal and reference to the High Court larger period of 180 days has been provided with to enable the Commissioner and the other party to avail the same. We are of the view that the legislature provided sufficient time, namely, 180 days for filing reference to the High Court which is more than the period prescribed for an appeal and revision.

20) Though, an argument was raised based on Section 29 of the Limitation Act, even assuming that Section 29(2) would be attracted what we have to determine is whether the provisions of this section are expressly excluded in the case of reference to High Court. 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 here in this case is Central Excise Act. The nature of the remedy provided therein are 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 Section 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, 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. The scheme of the Central Excise Act, 1944 support the conclusion that the time limit prescribed under Section 35H(1) to make a reference to High Court is absolute and unextendable by 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 Act.”
(emphasis supplied)

(iv) In Chhattisgarh State Electricity Board v. Central Electricity Regulatory Commission reported in 2010 (5) SCC 23, the question which arose before the Hon'ble Supreme Court, was whether, Section 5 of the Limitation Act, 1963, can be invoked by the Court, for allowing an aggrieved person to file an appeal, under Section 125 of the Electricity Act, 2003, after more than 120 days, from the date of communication of the decision of the order of the Appellate Tribunal for Electricity. In the reported case, the appellant challenged the order of the Central Regulatory Authority, before the Tribunal. Vide order, dated 17.05.2007, the Tribunal allowed the appeal. Being aggrieved, the appellant therein preferred an appeal before the Hon'ble Supreme Court. Along with the appeal, the appellant filed an application for condonation of delay of 160 days. Contentions were raised before the Hon'ble Apex Court that though the appeal was filed more than 140 days, counted from the date of Tribunal's order, in terms of the provisions to Section 125 of the Electricity Act, 2003, the Apex Court can extend the time to file an appeal to a maximum of 60 days only and the power under Section 5 r/w. Section 29(2) of the Limitation Act can be exercised for condonation of delay beyond the period of 120 days. Decision in Mukri Gopalan v. Cheppilat Puthuapurayil Aboobacker [(1995) 5 SCC 5] was pressed into service. Besides, a contention has also been made that, by virtue of the impugned order therein, huge liability has been fastened against the appellant and if the appeal is not entertained, it will suffer irreparable injury. Learned counsel appearing for the 3rd respondent therein, has submitted that in view of the plain language of the proviso to Section 125 of the Electricity Act, the Hon'ble Supreme Court has no power to extend the period for filing an appeal beyond 120 days and if the provisions of the Limitation Act is invoked, it would negative the legislative intent, which has prescribed a special limitation, for filing an appeal against any decision or order of the Tribunal. Reliance has also been placed on the decision of the Hon'ble Apex Court in Popular Construction Company's case (cited supra), Singh Enterprises's case (cited supra) and Hongo India Private Ltd., 's case (cited supra). Section 125 of the Electricity Act, 2003, reads as follows:

“125. Appeal to Supreme Court:- Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908 (5

OF 1908):

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Sections 5 and 29 of the Limitation Act, 1963, are extracted hereunder:

"5. Extension of prescribed period in certain cases.- Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908) , may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation.-- The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

29. Savings.- (1) Nothing in this Act shall affect Section 25 of the Indian Contract Act, 1872 (9 of 1872).

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.

(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law.

(4) Sections 25 and 26 and the definition of "easement" in Section 2 shall not apply to cases arising in the territories to which the Indian Easements Act, 1882 (5 of 1882), may for the time being extend."

After considering several decisions, the Hon'ble Supreme Court, at Paragraphs 20, 25 to 27 and 32, held as follows:

"20. Section 125 provides for an appeal to this Court against any order or decision of the Tribunal which can be filed within 60 days from the date of communication of the decision or order of the Tribunal. The limitation placed on the jurisdiction of this Court is that the appeal can be entertained only on one or more of the grounds specified in Section 100 of the Code of Civil Procedure. Proviso to Section 125 empowers this Court to entertain the appeal within a further period not exceeding 60 days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period. In other words, an appeal under Section 125 can be filed within a maximum period of 120 days if this Court is satisfied that there was sufficient cause for not filing the same within 60 days from the date of communication of the decision or order appealed against.

25. Section 125 lays down that any person aggrieved by any decision or order of the Tribunal can file an appeal to this Court within 60 days from the date of communication of the decision or order of the Tribunal. Proviso to Section 125 empowers this Court to entertain an appeal filed within a further period of 60 days if it is satisfied that there was sufficient cause for not filing appeal within the initial period of 60 days. This shows that the period of limitation prescribed for filing appeals under Sections 111(2) and 125 is substantially different from the period prescribed under the Limitation Act for filing suits etc. The use of the expression 'within a further period of not exceeding 60 days' in Proviso to Section 125 makes it clear that the outer limit for filing an appeal is 120 days. There is no provision in the Act under which this Court can entertain an appeal filed against the decision or order of the Tribunal after more than 120 days.

26. The object underlying establishment of a special adjudicatory forum i.e., the Tribunal to deal with the grievance of any person who may be aggrieved by an order of an adjudicating officer or by an appropriate commission with a provision for further appeal to this Court and prescription of special limitation for filing appeals under Sections 111 and 125 is to ensure that disputes emanating from the operation and implementation of different provisions of the Electricity Act are expeditiously decided by an expert body and no court, except this Court, may entertain challenge to the decision or order of the

Tribunal. The exclusion of the jurisdiction of the civil courts (Section 145) qua an order made by an adjudicating officer is also a pointer in that direction.

27. It is thus evident that the Electricity Act is a special legislation within the meaning of Section 29 (2) of the Limitation Act, which lays down that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the one prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and provisions contained in Sections 4 to 24 (inclusive) shall apply for the purpose of determining any period of limitation prescribed for any suit, appeal or application unless they are not expressly excluded by the special or local law.

32. In view of the above discussion, we hold that Section 5 of the Limitation Act cannot be invoked by this Court for entertaining an appeal filed against the decision or order of the Tribunal beyond the period of 120 days specified in Section 125 of the Electricity Act and its proviso. Any interpretation of Section 125 of the Electricity Act which may attract applicability of Section 5 of the Limitation Act read with Section 29(2) thereof will defeat the object of the legislation, namely, to provide special limitation for filing an appeal against the decision or order of the Tribunal and proviso to Section 125 will become nugatory."

In Chhattisgarh State Electricity Board's case (cited supra), the Hon'ble Apex Court held that Section 5 of the Limitation Act cannot be invoked by the Court to allow an appeal to be filed, under Section 125 of the Electricity Act, 1963, after more than 120 days.

(v) In Gopinath v. CESTAT, Chennai reported in 2013 (32) STR 172 (Mad.), after considering the decision in Singh Enterprises v. Commissioner of Central Excise, Jamshedpur [2008 (221) E.L.T. 163 (SC)], this Court, at Paragraphs 16 and 17, held as follows:

"16. In the order passed in Order in Original No.96 of 2009 dated 16.12.2009, appeal was filed before the Commissioner of Central Excise (Appeals) on 26.12.2011, acknowledged on 29.12.2011 beyond the period of three months plus discretionary period of three months. Tribunal rightly referred to the

decision in 2008 (221) E.L.T. 163 (S.C) [Singh Enterprises v. Commissioner of Central Excise, Jamshedpur] holding that a statutory authority is not vested with power to exercise any discretion beyond the period stipulated by law and that the appeal filed beyond the prescribed period of limitation is not maintainable as being barred by limitation.

17. It is well settled law that once the period of limitation has run itself out, the Appellate Authority does not have power to condone the delay in filing the appeal beyond the maximum period prescribed under the Act. Referring to Singh Enterprises case [2008 (221) E.L.T. 163 (S.C)], Tribunal has rightly dismissed the appeal. We do not find any infirmity in the order of the Tribunal and no substantial questions of law involved in this appeal and the appeal is dismissed."

(vi) Albert v. Commissioner of Service Tax, Chennai reported in 2015 (37) STR 187 (Mad.), was a case of an ex-parte adjudication and an appeal was filed with delay. CESTAT, Madras, dismissed the appeal, as time barred. Substantial questions of law raised before this Court, are, (1) Whether the Appellate Tribunal is right in upholding the order of the Commissioner (Appeals), dated 07.08.2012, dismissing the appeal as time barred? and (2) Whether the Appellate Tribunal ought to have entertained the appeal and set aside the order of the Commissioner (Appeals) in the interest of justice to offer opportunity to the Appellant to defend itself? Accepting the contentions of the learned counsel appearing for the Commissioner of Service Tax that the period of limitation prescribed for hearing of the appeal, by the Appellate Tribunal, under Section 85(3) of the Finance Act, 1994, cannot be extended, and after referring to the decisions in Singh Enterprises v. Commissioner of Central Excise, Jamshedpur [2008 (221) E.L.T. 163 (SC)], JMJ Constructions v. Assistant Commissioner of Central Excise, Salem and others [(2012) 56 VST 256 (Mad.)], Earbis Engineering Co. Ltd., and another v. Deputy Commissioner of Sales Tax, Ballygunge Charge and another [(2012) 56 VST 258 (WBTT)], Gopinath & Sharma v. CESTAT, Chennai [2013 (32) STR 172 (Mad.)] and Gopinath & Sharma v. CESTAT [2013 (32) STR J78(SC)], a Hon'ble Division Bench of this Court dismissed the Civil Miscellaneous Appeal. Substantial question of law, as to whether, the Tribunal ought to have condoned the delay and entertained the appeal, has been held against the appellant therein. There is no reason, as to why, the reported judgment cannot be made applicable to the instant appeal.

(vii) In Saradha Travels v. Commissioner of Service Tax reported in 2015 (3) STR 433 (Mad.), an appeal was filed with a

delay of one year and six months. The Tribunal dismissed the appeal. Adverting to the substantial questions of law, raised by the appellant therein, at Paragraph 9, this Court held as follows:

"9. The Tribunal relied on the decision of the Honourable Supreme Court reported in 2008 (221) ELT 163 (SC) (Singh Enterprises v. CCE, Jamshedpur) which is followed by this Court in the decision reported in 2013-tiol-168-HC-Mad (M/s.Gopinath and Sharma V. CESTAT) and dismissed the appeal on the proposition that the Commissioner (Appeals) cannot condone the delay beyond the stipulated period."

10. Reading of the decisions, extracted supra, makes it abundantly clear that the Commissioner of Customs (Appeals), the appellate authority, has no powers to condone the delay, beyond the extendable period and therefore, in the instant case, without adverting to the merits, appeal has been dismissed. CESTAT, Chennai, has concurred with the said decision. Perusal of the material on record shows that the appellant, at the time of filing the instant appeal, has not raised any substantial questions of law, on the aspect of limitation. By way of memo, dated 13.06.2016, the appellant has raised the following substantial questions of law,

"(1) Whether in the facts and circumstances of the case, the 1st respondent Tribunal was correct in not considering the fact that there being no "lis" arising out of the order of assessment passed in the Bill of Entry, dated 26.08.2006 which warranted the adjudication by the Commissioner of Customs (Appeals) inasmuch as the Revenue had already conceded and did not at all dispute the eligibility of the appellant herein to the benefit of the classification of the goods imported by them under Chapter Sub-Heading 40 01 22 00 to the Customs Tariff Act and the attendant benefit to Notification No.21/2002, dated 01.03.2002 (Serial No.191) resulting in collection of the excess duty from them amounting to Rs.2,55,560/- without the authority of law, and therefore, in such a factual position the ratio laid down by the Hon'ble Delhi High Court in the judgment reported in 2010 (250) ELT 30 (Del.), should have been applied to their case?

(2) Whether the Tribunal was correct in not following the recent judgment of the Hon'ble Supreme Court in 2015 (390) ELT 373 (SC) which held that in a case where an applicant is not guilty of negligence, lapse, inaction or pretended mistake, intentionally for delaying proceedings or harassing the opposite party and was prosecuting their case with due-

diligence and in good faith, the principles of Section 14 of the Limitation Act, 1963, should be applied even by the quasi judicial bodies exercising powers under Section 128 of Custom Act, 1962, thereby failing to follow the ratio of the said judgment and finding fault with the Commissioner of Customs (Appeals) for not considering and disposing of the application for condonation of delay, dated 29.03.2007/03.04.2007 filed by the appellant?

11. In the foregoing paragraphs, we have already discussed about the inapplicability of the above reported judgment in M.P.Steel Corporation v. Commissioner of Central Excise reported in 2015 (7) SCC 58, to the facts on hand. As the appeal filed before the Commissioner of Customs (Appeals), has been rejected, as time barred and confirmed by the CESTAT, Chennai, we are of the considered view that there is no obligation on the authorities to advert to the merits of the case.

12. Observation of the Tribunal that the appellant cannot agitate the order, dated 20.02.2007, as it was not issued to the appellant, though contended by the learned counsel, as erroneous and not legally sustainable, and that the said ground was not the reason for the lower appellate authority to dismiss the appeal and in such circumstance, the instant appeal filed in this Court, can be entertained on Substantial Question of Law No.1, we are not inclined to accept the same, for the reason that, even taking it for granted, the Tribunal has made the abovesaid observation, that would not render a time barred appeal to be entertained by the appellate authority, beyond the extendable period of limitation. Observations made by the Tribunal, germane to the statutory period of limitation, alone requires to be considered by this Court. A litigant has to fall or succeed on the merits of his case, with reference to the statutory provisions of the Statute and cannot take advantage of any observation of the Court or the Tribunal.

13. When the appeal itself is time barred and when the appellate authority or the CESTAT, Chennai, cannot condone the delay, in terms of the statutory provisions, prescribing a specific period of limitation, in the light of the discussion and decisions, extracted supra, we are of the considered view that the substantial questions of law raised by the appellant cannot be held in favour of the appellant. Consequently, the Civil Miscellaneous Appeal is dismissed. No costs.

14. After the pronouncement of the orders, Mr.N.Viswanathan, learned counsel appearing for the appellant prayed that the competent authority be directed to consider the application for refund. We are not inclined to issue any

positive directions, for refund. It is for the appellant to work out his remedy in accordance with law.

Sd/-
Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

To

1. The Customs, Excise & Service Tax Appellate Tribunal,
No.26, Shastri Bhavan Annexe Building,
Haddows Road, Chennai 600 006.

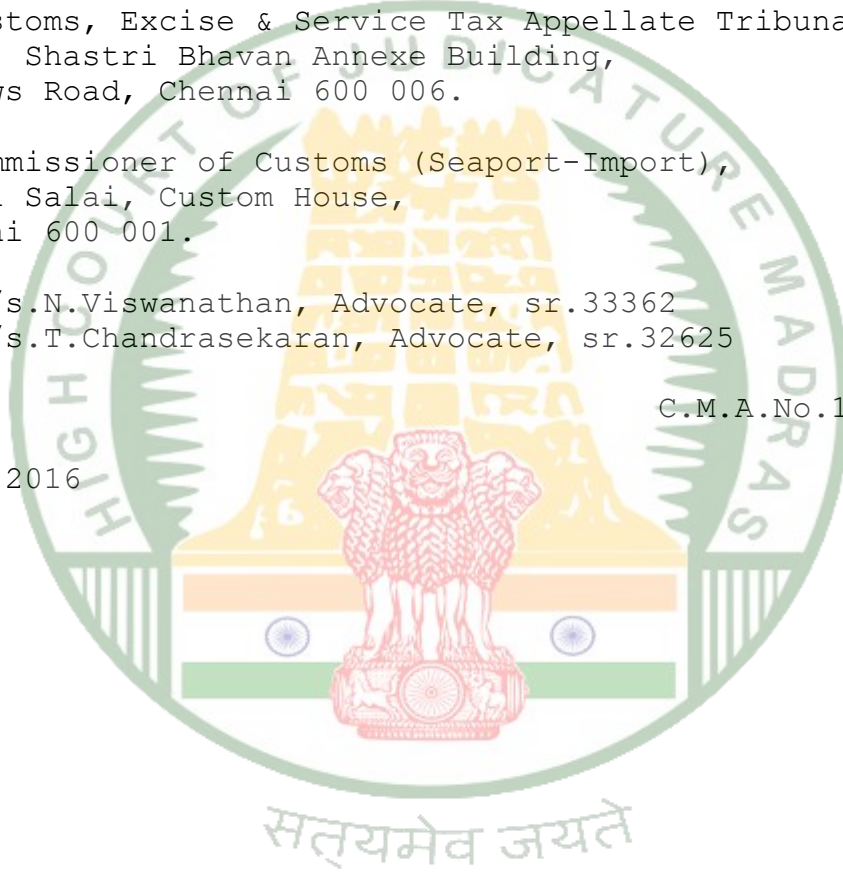
2. The Commissioner of Customs (Seaport-Import),
Rajaji Salai, Custom House,
Chennai 600 001.

1 cc to M/s.N.Viswanathan, Advocate, sr.33362

1 cc to M/s.T.Chandrasekaran, Advocate, sr.32625

C.M.A.No.1161 of 2016

rsk co
kra 11.07.2016



WEB COPY