

IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 13.06.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

and

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

Writ Appeal No.589 of 2016

C.M.P.No.7766 of 2016

R.Gowrishankar ... Appellant

-vs-

1. The Commissioner of Service Tax (Appeals)-I,  
26/1, M.G.Marg, Nungambakkam,  
Chennai 600 034.
2. The Additional Commissioner of Service Tax,  
Service Tax II Commissionerate,  
"Newry Towers", 3<sup>rd</sup> Floor, 2054-I,  
2<sup>nd</sup> Avenue, Anna Nagar, Chennai-40. .... Respondents

Writ Appeal filed under Clause 15 of Letters Patent,  
against the order dated 22.02.2016 in W.P.No.5194 of 2016.

WP.No.5194 of 2016: Writ Petition filed under Article 226 of the  
Constitution of India praying this Court to issue a Writ of  
Certiorified Mandamus to call for the records of the First  
Respondent in Order in Appeal No.10/2014(M-ST) dated 01.12.2014  
and quash the same and further direct the First Respondent to  
decide the Case on Merit.

For Appellant : Mr.K.Senguttuvan

For Respondents : Mr.A.P.Srinivas,  
Senior Standing Counsel for  
Customs

## JUDGMENT

[Judgment of the Court was made by S.MANIKUMAR, J.]

Challenge in this appeal is to an order, made in W.P.No.5194 of 2016, dated 22.02.2016, passed by the Writ Court, declining to set aside the order made in the condone delay petition filed by the petitioner to condone 223 days in filing the appeal before the Commissioner of Service Tax (Appeals)-I, Chennai, 1<sup>st</sup> respondent herein.

2. Short facts leading to the appeal are that the appellant suffered an Order in Original No.114 of 2010, dated 29.10.2010, passed by the Additional Commissioner of Service Tax, Service Tax-II Commissionerate, Chennai, 2<sup>nd</sup> respondent herein, by which, he has disallowed CENVAT Credit of Rs.13,51,316/- and Rs.1,26,776/- and demanded the same from the appellant, vide Show Cause Notice No.122/09, dated 03.04.2009 and No.23/2009, dated 28.07.2009 respectively, under Rule 14 of the CENVAT Credit Rules, 2004, r/w. Section 73(1) of the Finance Act, 1994. He also demanded interest, applicable at the rate payable on the above mentioned demands, under Rule 14 of the CENVAT Credit Rules, 2004, r/w. Section 75 of the Finance Act, 1994. In the same order, he also imposed penalty of Rs.14,78,092/-, under Rule 15(4) of the CENVAT Credit Rules, 2004, r/w. Section 78 of the Finance Act, 1994. However, penalty was restricted to 25% of the said amount, if the tax dues along with applicable interest determined is paid along with the reduced penalty, within 30 days from the date of receipt of the order, in terms of proviso to Section 78 of the Finance Act.

3. Being aggrieved by the same, the appellant filed an appeal under Section 85 of the Finance Act, to the Commissioner of Service Tax (Appeals)-I, Chennai, 1<sup>st</sup> respondent herein, with a delay of 223 days in filing the appeal. The reason for the delay is that the person, dealing with service tax matters, in their organisation, had left the service, leaving the relevant papers in disarray. Upon perusal of the records, the 1<sup>st</sup> respondent noticed that the date of issue of the Order-in-Original was 29.10.2010; copy of the order was received by the appellant on 01.11.2010; and the appeal was filed on 12.09.2011. As per Section 85 of the Finance Act, 1994, as it existed during the material point of time (prior to 28.05.2012), an appeal ought to have been filed before the Commissioner (Appeals), within three months from the date of communication of the order and the Commissioner (Appeals) is empowered to condone the delay of a further period of three months, if he is satisfied that the appellant was preferred by sufficient cause from presenting the

appeal. As the delay was beyond the condonable period, provided under the statute, the 1<sup>st</sup> respondent herein, vide order in Appeal No.10/2014(M-ST), dated 01.12.2014, dismissed the appeal.

4. Being aggrieved by the abovesaid order, the appellant has filed W.P.No.5194 of 2016, for a Writ of Certiorarified Mandamus, to quash the Order-in-Appeal No.10 of 2014, dated 01.12.2014 passed by the 1<sup>st</sup> respondent herein and consequently, direct the 1<sup>st</sup> respondent to decide the case on merits. On behalf of the department, the Assistant Commissioner of Central Excise, in-charge of legal section, filed a counter affidavit, opposing the prayer sought for and further contended that the Commissioner (Appeals) has no power to condone the delay beyond the statutory period. Reliance has been placed on the decisions in Singh Enterprises v. CCE, Jamshedpur reported in 2008 (221) ELT 163 (SC), Commissioner of Customs & Central Excise v. Hongo India (P) Ltd., reported in 2009 (236) ELT 417 (SC), Gopinath v. CESTAT, Chennai reported in 2013 (32) STR 172 (Mad.), Albert v. Commissioner of Service Tax, Chennai reported in 2015 (37) STR 187 (Mad.) and Saradha Travels v. Commissioner of Service Tax reported in 2015 (3) STR 433 (Mad.).

5. In the counter affidavit, the Assistant Commissioner of Central Excise has further contended that though the Commissioner (Appeals) has dismissed the statutory appeal on 01.12.2014, writ petition has been filed only on 27.01.2016, with a delay of 400 days and that there was not only delay, but laches on the part of the appellant. A contention has also been made that recovery proceedings have already been initiated by the department, vide C.No.IV/16/145/2008-SU0201, dated 08.12.2015, followed by a reminder, dated 08.01.2016.

6. After considering the decisions in Kranti Associates Pvt. Ltd., v. Masood Ahmed Khan reported in 2011 (273) ELT 345 and Collector, Land Acquisition, Anantnag and another v. Mst.Katiji and others reported in 1987 (28) ELT 185 (SC) and Albert v. Commissioner of Service Tax, Chennai reported in 2015 (37) STR 187 (Mad.) and on the facts and circumstances of the case, by observing that there is no error or illegality in the order passed by the Commissioner (Appeals), dated 01.12.2014, writ Court, vide order, dated 22.02.2016, dismissed the writ petition. Being aggrieved by the same, the instant appeal has been filed.

7. The main contentions of the appellant are that when the order passed by the Additional Commissioner of Service Tax, Chennai, 2<sup>nd</sup> respondent herein, is against the principles of natural justice and goes to the root of of the matter, denying fair opportunity, the Writ Court ought to have directed the 1<sup>st</sup> respondent herein to decide the case, on merits.



8. According to Mr.K.Senguttuvan, learned counsel for the appellant, when the Commissioner of Service Tax (Appeals)-I, Chennai, does not enjoy the power to condone the delay, beyond the statutory period, an aggrieved person has no other alternative remedy, except to approach this Court, under Article 226 of the Constitution of India and having regard to the grievances of the appellant, the Writ Court ought to have condoned the delay. He also submitted that when the appellant has raised an important question that the quasi-judicial authority ought to have recorded reasons for condoning the delay, the Writ Court has failed to advert to the same.

9. Learned standing counsel for the Revenue submitted that there is no material irregularity in the order impugned and prayed for dismissal of the appeal. In support of the rival contentions, both the learned counsel relied on several decisions.

Heard the learned counsel appearing for the parties and perused the materials available on record.

10. Now let us consider the decisions relied on by the learned counsel appearing for both parties.

11. In Collector, Land Acquisition, Anantnag and another v. Mst.Katiji and others reported in 1987 (28) ELT 185 (SC), an appeal was preferred by the State of Jammu & Kashmir, arising out of a decision, enhancing compensation, in respect of acquisition of lands for public purpose to an extent of nearly Rs.14 Lakhs, by making an upward revision of the order of 800% (From Rs.1000/- per kanal to Rs.8000/- per kanal). Violation of principles of natural justice has also been raised. The appeal was dismissed as time barred, being 4 days beyond time. On the above facts and circumstances, the Hon'ble Supreme Court, at Paragraph 3, ordered as follows:

"3. The legislature has conferred the power to condone delay by enacting Section 51 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice--that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

"1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the 'State' which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even handed manner. There is no warrant for according a stepmotherly treatment when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to

approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-grata status. The Courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even handed justice on merits in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time barred, is therefore, set aside. Delay is condoned. And the matter is remitted to the High Court. The High Court will now dispose of the appeal on merits after affording reasonable opportunity of hearing to both the sides."

The above judgment deals with the delay in preferring an appeal, against the enhanced compensation for the lands acquired. General principles of law in the matter of considering an application filed to condone the delay have been set out and the reported judgment does not deal with a case, where the statute has prescribed an outer time limit for filing an appeal.

12. In Bhag Singh v. Major Daljit Singh reported in 1987 (32) E.L.T. 258 (SC), while considering the scope of Section 5 of the Limitation Act and on the facts and circumstances of the case, the Hon'ble Supreme Court, at Paragraph 2, held as follows:

"It is well settled that while considering an application for condonation of delay under Section 5 of the Limitation Act, 1963, the Court should not take too strict and pedantic stand which will cause injustice but to consider it from the point of view which will advance the cause of justice. In the instant case, the appellants are agriculturists living in villages and the applicant is also a very young person having little knowledge about the steps that are to be taken. Moreover, he has clearly stated that he came to know of the pendency of the appeal filed by his father as one of the appellants only recently on 4<sup>th</sup> August, 1972 and the application was made on August 5, 1972. Considering all these facts and circumstances, it is felt that for the ends of justice and fair play, the application under Section 5 of the Limitation Act should be allowed as sufficient cause has been made out for the condonation of delay in filing the application for bringing on record the legal representative of the deceased."



Judgement in Bhag Singh's case (cited supra), is not applicable to the facts on hand, as it has not dealt with the special provision, Section 85 of the Finance Act. The above reported judgment deals with the application of Section 5 of the Limitation Act, for condoning delay in filing an application, to bring the legal representatives of the deceased, pending civil appeal.

13. In K.K.S.Kader Mohideen Sahib v. Joint Secretary, M.F. (D.R.), reported in 2002 (139) E.L.T. 558 (Mad.), drawback claims were rejected. Appeal filed with a delay of 30 days was rejected. The revisional authority confirmed the same. Writ of Certiorarified Mandamus was sought for, challenging the order of the revisional authority. This Court, by observing that when on the same set of facts similarly placed exporters were allowed drawback claims, merely because there was a delay on the part of the petitioner therein in not preferring the appeals, he cannot be deprived of its legitimate claims for drawback and accepting the reasons for the delay, set aside the impugned order therein, and directed the respondents therein to entertain the appeal and passed orders on merits, with regard to the drawback claims filed by the petitioner. In the reported case, a learned single Judge, has considered a decision of a Hon'ble Division Bench of this Court in Maheswari Fireworks Industries v. Commercial Tax Officer and Others reported in Vol. 121 STC 272, wherein, this Court, while considering the power of this Court to condone the delay in respect of appeals or revisions pending before the quasi-judicial authorities, held that the limitation applicable to the appellate authority cannot be made applicable to this Court, while exercising jurisdiction under Article 226 of the Constitution of India.

14. In Jai Hind Bottling Company (P) Ltd., v. Commr. (Appeals) C.Ex., Allahabad reported in 2002 (146) ELT 273 (All.), there was a delay of 99 days in filing an appeal to the Commissioner of Appeals. As per Section 35 of the Central Excise Act, 1944, for filing an appeal, 60 days' time is provided and if the Commissioner (Appeals) is satisfied that the appellant was prevented by sufficient cause from presenting the appeal, within the aforesaid period of sixty days, he may allow it to be presented within a further period of 30 days. On the facts and circumstances of the case, the Allahabad High Court held that Section 5 r/w. Section 29(2) of the Limitation Act, is applicable even in the case where there is a time limit prescribed in the Special Act. Decision in Jai Hind Bottling Company's case (cited supra), has been decided on 07.08.2002, by a learned single Judge of the Allahabad High Court, after considering the decisions in Collector, Land Acquisition, Anantnag and another v. Mst.Katiji and others reported in 1987 (28) ELT 185 (SC), Eureka Forbes Ltd., v. Union of India [1998 (98) ELT 591 (All.)] and ITC Ltd., v. Union of India [1998 (101) ELT 9 (SC)]. In

Eureka Forbes Ltd., 's case (cited supra). It is the view of the Allahabad High Court that Sections 5 and 29(2) of the Limitation Act, have been excluded expressly by the provision of the Central Excise Act and so saying, the Court held that the Commissioner (Appeals) has not properly exercised the jurisdiction, in accordance with law. Decision in Eureka Forbes Ltd., 's case (cited supra), cannot be applied at this juncture, in the light of the subsequent pronouncements of the Hon'ble Apex Court, which are dealt with, in the later paragraphs of this judgment. ITC's case (cited supra), is on alternative remedy.

15. 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 the 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 summarised the legal position as hereunder:

"(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), as follows:

"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. " सत्यमेव जयते

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 8<sup>th</sup> 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. "

16. In Kathiravan Pipes Pvt. Ltd., v. CESTAT, Chennai, reported in 2007 (5) STR 9 (Mad.), the challenge was to the correctness of the order passed by the Tribunal, dated 14.08.2006, whereby, the petitioner was non-suited, by declining to condone the delay of 25 days in filling the appeal. Reason assigned for condonation of delay was that the petitioner therein was suffering from viral fever. Accepting the same, at

Paragraphs 5 and 6, the Writ Court held as follows:

"5. It is well settled principle of law that the technicalities and substantial justice are pitted against each other and the Courts would always lean in favour of substantial justice rather than technicalities for non-suiting the petitioner on the ground that the appeal has not been filed within the time stipulated in spite of the fact that the authorities are conferred with the power to condone the delay. Likewise, the limitation prescribed is not for destruction of statutory right and is only to give finality without protracting the matter endlessly.

6. Here is the case where the petitioner sought for condoning the delay 25 days and a part of which has been explained by producing the medical certificate. Hence, this Court is of the view that the second respondent ought to have condoned the delay and allowed the petitioner to have their case decided on merits. But, that course has not been adopted and the order of the second respondent has also been confirmed by the Tribunal. This Court is of the view that the orders of respondents 1 and 2 are to be set aside and the delay in filing the appeal can be condoned."

Here again, absolutely, there is no question or answer by the writ Court, as to whether, the Court has powers to condone the delay, beyond the statutory period, provided for filing an appeal.

17. In Assistant Collector of Central Excise & Customs v. Marimuthu reported in 2007 (212) ELT 29 (Mad.), a learned single Judge, while testing the correctness of an order, made in I.A.No.187 of 1999 in an unnumbered appeal, declining to condone the delay of 131 days in filing the appeal, considered the scope of Section 5 of the Limitation Act and after considering the expression, "sufficient cause", explained in the decision in State of Haryana v. Chandra Mani reported in 1996 (3) SCC 132, held that the first appellate Court has shut out the opportunity of preferring the statutory appeal, by refusing to condone the delay. Marimuthu's case (cited supra), is not rendered, with reference to the provisions of Service Tax or any other special enactments.

18. In Indian Sulphacid Industries Ltd., v. Union of India reported in 2008 (227) ELT 194 (P & H), the appeal filed by the petitioners therein was dismissed by the Commissioner (Appeals), as time barred. A Writ Petition was filed. Referring to the decisions of the Hon'ble Supreme Court in Vidyacharan Shukla v. Khubchand Baghel reported in AIR 1964 SC 1099, Hukamdev Narain Yadav v. Lalit Narain Mishra reported in 1974 (2) SCC 133 and Union of India v. Popular Construction Co., reported in 2001 (8)

SCC 470, a Hon'ble Division Bench of Punjab and Haryana High Court, set aside the order of rejection and directed the Commissioner (Appeals) to consider the case of the petitioners therein, by taking into account the fact, as to whether, the petitioners therein were prevented by sufficient cause from filing the appeal. In the above reported case, earlier on 05.09.2007, the Hon'ble Division Bench had considered the question, as to whether, Section 5 of the Limitation Act, would apply to Section 35 of the Central Excise Act and by applying the above referred judgments, directed the appellate authority to consider the sufficient cause, shown within the meaning of Section 5 of the Limitation Act.

19. In N.Balakrishnan v. M.Krishnamurthy reported in 2008 (228) E.L.T. 162 (SC), there was an ex-parte decree. Application was filed to set aside the same, which was dismissed for default. Another application was moved to condone the delay of 883 days, to set aside the order of dismissal for default. On revision, the Court dismissed the said application, on the ground that, "If the appellant was careful enough to verify about the stage of the proceedings at any point of time and had he been misled by the counsel then only it could have been said that due to the conduct of the counsel the party should not be penalised." On appeal, the Hon'ble Supreme Court, at Paragraphs 8 to 15, held as follows:

"8. Appellant's conduct does not on the whole warrant to castigate him as an irresponsible litigant. What he did in defending the suit was not very much far from what a litigant would broadly do. Of course, it may be said that he should have been more vigilant by visiting his advocate at short intervals to check up the progress of the litigation. But during these days when everybody is fully occupied with his own avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities, and to visit him with drastic consequences.

9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in reversional jurisdiction, unless the exercise



of discretion was on whole untenable grounds or arbitrary or perverse. But it is a different matter when the first cut refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

10. The reason for such a different stance is thus: The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

11. Rule of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim *Interest reipublicae ut sit finis litium* (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide *Shakuntala Devi Jain Vs. Kuntal Kumari* [AIR 1969 SC 575] and *State of West Bengal Vs. The Administrator, Howrah Municipality* [AIR 1972 SC 749].

13. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the

explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss.

14. In this case explanation for the delay set up by the appellant was found satisfactory to the trial court in the exercise of its discretion and the High Court went wrong in upsetting the finding, more so when the High Court was exercising revisional jurisdiction. Nonetheless, the respondent must be compensated particularly because the appellant has secured a sum of Rs. Fifty thousand from the delinquent advocate through the Consumer Disputes Redressal Forum. We, therefore, allow these appeals and set aside the impugned order by restoring the order passed by the trial court but on a condition that appellant shall pay a sum of Rupee Ten thousand to the respondent (or deposit it in this court within one month from this date).

15. The appeals are disposed of accordingly."

Though in the above reported case, it is observed by the Hon'ble Apex Court that, "the primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice and the time limit fixed for approaching the court, in different situations is not because on the expiry of such time a bad cause would transform into a good cause." In N.Balakrishnan's case (cited supra), condonation of delay in filing an appeal to set aside the ex-parte decree was filed and while exercising the discretion under Section 5 of the Limitation Act, 1963, the Hon'ble Apex Court observed as above. Decision in N.Balakrishnan's case (cited supra), is inapposite to the facts on hand, where the special statute provides for a specific period of limitation, for an appeal to be filed.

20. 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, where 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, yet in exercise of the powers, under Article 226 of the Constitution of India, the High Court can condone the delay and such power is untrammelled by any statutory provision. Rejecting the above contention, at Paragraph 8, the 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."

21. 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 the 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)

22. In Pay and Accounts Officer (East) v. Income-Tax Officer, TDS-III, Chennai, reported in 2010 (251) ELT 510, there was a delay of 708 days in filing an appeal and the same was dismissed by the Income-Tax Appellate Tribunal. Before this Court, by way of Tax Case Appeal, the following substantial

questions of law, were formulated,

"1. Whether in the facts and circumstances of the case, the Tribunal has ascertained its discretion in refusing to condone the delay in filing appeal in a proper legal perspective?

2. Whether in the facts and circumstances of the case, the Tribunal has committed a legal error in not appreciating and applying the decision of the Supreme Court in 2005(3) SCC 752 rendered in identical circumstance?

3. Whether in the facts and circumstances of the case, the Appellate Tribunal has rightly applied the test of liberal and pragmatic approach as to the sufficiency of case involving red tapism in the matter of condonation of delay under Section 5 of Limitation Act?"

After considering the decisions in Collector, Land Acquisition, Anantnag v. Mst.Katiji and others [1987(28) ELT 185], State of Haryana v. Chandra Mani [AIR 1996 SC 1623], Vedabai @ Vaijayanatabai Baburao Patil v. Shantaram Baburao Patil and others [(2002) 253 ITR 799] and Bharat Auto Center v. Commissioner of Income-Tax and another [(2006) 282 ITR 366 (Allababad)] and by observing that a litigant does not stand to benefit by resorting to delay, but he runs a serious risk and Courts are not respected on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so, a Hon'ble Division Bench of this Court, set aside the order of the Income-Tax Tribunal and remitted the matter back to the Income-Tax Appellate Tribunal for fresh consideration on merits.

23. 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 this Court, for allowing the 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 preferred an appeal before the Supreme Court. Along with the appeal, the appellant filed an application for condonation of delay of 160 days. Contentions were raised before the 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, 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 was also made that, by virtue of the impugned order therein huge liability has been created against the appellant and if the appeal is not entertained, it will suffer irreparable injury. Learned counsel appearing for the 3<sup>rd</sup> respondent therein has submitted that in view of the plain language of the proviso to Section 125 of the Electricity Act, the 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 prescribed special limitation, for filing an appeal against any decision or order of the Tribunal. Reliance was also 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, 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, including the above reported cases, the 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 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.

24. In Senior Superintendent of Post Office v. Union of India reported in 2011 (24) STR 168 (Guj.), a Hon'ble Division Bench of the Gujarat High Court, while testing the correctness of the order of dismissal of an appeal, filed after one year and also the plea that the appellate authority has power to condone the delay upto three months, at Paragraph 4, ordered as follows:

"4. In that view of the matter, we find no illegality in the order under challenge. Counsel for the petitioner, however, drew our attention to the judgment of this Court in the case of D.R. Industries Ltd. and Anr. v. Union of India and ors. reported in : 2008 (3) G.L.H. 662 : 2008 (229) E.L.T. 24 (Guj.) to contend that even in such cases where there is statutory limit to which delay can be condoned, the High Court in its extraordinary power can, in appropriate cases, interfere. To the proposition laid down in the said decision, we are not joining the issue. In a given case, an aggrieved person can knock the doors of the High Court seeking redressal against the orders in original and the High Court, in its extraordinary powers under writ jurisdiction of Article 226 of the Constitution, may for valid reasons, to obviate extreme hardship or injustice, entertain a challenge even beyond the period of limitation prescribed. In the present case, however, we are not inclined to adopt such a course for the simple reason that the amount of service tax and penalty demanded is not very large. Further, in any case it is a question of payment of tax from one Central Government Department to another Central Government Department. Looking to the facts and circumstances of the case, we are not inclined to exercise extraordinary discretionary jurisdiction and, therefore, the petition is dismissed."

25. In Texcellence Overseas v. Union of India reported in 2013 (293) ELT 496 (Guj.), there was a delay of five months in filing the appeal. Commissioner (Appeals) declined to condone the delay. Relying on the judgment of the Apex Court in Singh Enterprises v. CCE, Jamshedpur reported in 2008 (221) ELT 163 (SC), the Tribunal confirmed the order of the Commissioner (Appeals). Contentions were made that the authorities have examined the issue, on merits. Seeking reversal of the orders, the petitioner therein placed reliance on decisions in D.R. Industries Ltd. and Anr. v. Union of India and ors. [2008 (3)

G.L.H. 662 : 2008 (229) E.L.T. 24 (Guj.)] and Senior Superintendent of Post Office v. Union of India [2011 (24) STR 168 (Guj.)]. On the facts and circumstances of the case, the Gujarat High Court, at Paragraph 11, held as follows:

"In the instant case, as the petitioner has approached this Court urging to invoke extraordinary jurisdiction relying on the decision of D.R. Industries Ltd. and Anr. v. Union of India and ors. (supra), recognising that this Court has extraordinary powers in appropriate case to interfere even while upholding the contention that there is statutory limitation to which delay can be condoned by the authorities. We ourselves have earlier in case of Senior Superintendent of Post Office v. Union of India (supra) recognised that if an aggrieved person knocks the door of High Court seeking redressal under writ jurisdiction for valid reasons, to obviate extraordinary hardship and injustice such challenge can be entertained even beyond the period of limitation."

Here again, the Hon'ble Division Bench of Gujarat High Court has observed that when an aggrieved party knocks at the door of the High Court, seeking redressal, under writ jurisdiction for valid reasons, to obviate the extraordinary hardship and injustice, such challenge can be entertained, even beyond the period of limitation. The said view is on the basis of the decision in D.R. Industries Ltd. and Anr. v. Union of India and ors. (supra), wherein, the Gujarat High Court held that in appropriate cases, extraordinary powers of the High Court can be exercised to condone the delay. Texcellence Overseas's case (cited supra) has been followed in Amitra Industries Ltd., v. Union of India reported in 2014 (305) E.L.T. 322 (Guj.).

26. 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."

27. In JCB India Ltd., v. Union of India reported in 2014 (301) ELT 209 (P & H), on the facts and circumstances of the case, a Hon'ble Division Bench of Punjab and Haryana High Court, at Paragraph 14, held as follows:

"We are conscious of the prohibition enacted by Section 35F of the Act against condoning delay beyond 30 days, but proceed to consider whether the dropping of similar show cause notices, served upon the petitioner, is sufficient to issue a writ in favour of the petitioner."

28. In Sunchan Trading Co., v. CESTAT, Chennai reported in 2014 (306) ELT 279 (Mad.), there was a delay of 105 days in filing the appeal and the appellate Tribunal, which rejected the application for condonation of delay, dismissed the appeal, on the grounds that sufficient cause has not been shown. While considering the correctness of the order of the Tribunal, dismissing the appeal as time barred, a Hon'ble Division Bench of this Court, at Paragraph 8, held as follows:

"8. It is a settled legal position that the law of limitation has not been enacted for the purpose of defeating the rights of the parties and if a person has not been diligent and acted in a mala fide and with deliberate intention presented the appeal belatedly for certain other reasons, then, it would be a case, where, the Court would not exercise discretion in condoning the delay. From the facts stated above, the case on hand does not appear to be one such case as there is no dispute regarding the communications between the appellant and the department, and even in the communication, dated 08.09.2008, the Commissioner has observed that if the appellant does not accept the order, dated 14.03.2008, it is open to them to move the higher appellate forum."

29. In Ravi Pharmaceuticals Private Ltd., v. Union of India reported in 2014 (306) E.L.T. 474 (Guj.), following the decision in D.R. Industries Ltd. and Anr. v. Union of India and ors. [2008 (3) G.L.H. 662 : 2008 (229) E.L.T. 24 (Guj.)], a Hon'ble Division Bench of the Gujarat High Court remitted the matter to the adjudicating authority to consider the case of the



petitioner therein, after providing him an opportunity.

30. In *Rusapi Containers v. Commissioner (Appeals)* reported in 2014 (36) STR 508 (Guj.), following *D.R. Industries Ltd.'s* case (cited supra) and on the facts and circumstances of the case, a Hon'ble Division Bench of the Gujarat High Court held that the delay was due to the lapse on the part of the consultant and/or his assistant and as there was sufficient cause for condonation of delay, set aside the orders.

31. In *Thanjai Study Centre v. Commissioner of Central Excise, Tiruchirapalli* reported in 2015 (324) ELT 514, a Hon'ble Division Bench of this Court considered the issue, as to whether, the Tribunal was right in rejecting the appeal filed by the appellant for condoning the delay. Based on the orders of the Tribunal in *Trichy Institute of Management Studies (P) Ltd., v. Commissioner* [2011 (22) STR 533], the Bench held as follows:

"It is settled legal principle that the law of limitation has not been enacted with an intention to defeat the rights of the parties. If the appellant's guilty of deliberately not filing the appeals within time for certain mala fide reasons, that would be a different matter. However, from the facts, we have seen that there is no such deliberate or mala fide intention in preferring the appeal memorandums belatedly. Therefore, the Tribunal ought to have exercised discretion in the matter and condoned the delay."

The said judgment has been rendered solely, on the basis of an order of the Tribunal, which has no binding force. Further, reading of the above reported judgment shows that the revenue has not raised any question, as to whether, the appellate authority or tribunal, as the case may be, has jurisdiction to condone the delay, beyond the extended period of delay.

32. In *M/s.Kwang Jin India Auto Systems v. Commissioner of Customs (Appeal)* [W.P.No.23715 of 2014, dated 25.08.2015], the impugned order therein came to be passed by the Commissioner of Customs, who dismissed the appeal, as time barred. Accepting the contentions of the learned counsel for the petitioner therein that there was no show cause notice or personal hearing, and by observing that there was violation of the principles of natural justice and that the order of the Original Authority should be defended before the Appellate Authority only on merits, directions have been issued, permitting the petitioner therein, to represent the appeal papers before the appellate authority and on such representation, the appellate authority should entertain the same and pass orders. No doubt the Writ Court issued the abovesaid directions, but reading of the abovesaid order shows that there is no question and discussion, as to whether, the Court, in exercise of powers, under Article 226 of the Constitution of India, is empowered to issue such directions

to the appellate authority to condone the delay in filing the appeal.

33. In *Saradha Travels v. Commissioner of Service Tax* reported in 2015 (3) STR 433 (Mad.), appeal was filed with a delay of one year and six months. The Tribunal dismissed the appeal. Adverting to the substantial questions of law, 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."

34. *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 were, (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.

35. Section 85 and 86 of the Finance Act, deal with appeals to the Commissioner of Central Excise (Appeals) and Appellate Tribunal respectively, are extracted hereunder:

"84. (1) The Commissioner of Central Excise may, of his own motion, call for and examine the record of any proceedings in which an adjudicating authority subordinate to him has passed any decision or order under this Chapter for the purpose of satisfying

himself as to the legality or propriety of any such decision or order and may, by order, direct such authority or any Central Excise Officer subordinate to him to apply to the Commissioner of Central Excise (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Commissioner of Central Excise in his order.

(2) Every order under sub-section (1) shall be made within a period of three months from the date of communication of the decision or order of the adjudicating authority.

(3) Where in pursuance of an order under sub-section (1), the adjudicating authority or any other officer authorised in this behalf makes an application to the Commissioner of Central Excise (Appeals) within a period of one month from the date of communication of the order under sub-section (1) to the adjudicating authority, such application shall be heard by the Commissioner of Central Excise (Appeals), as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Chapter regarding appeals shall apply to such application.

Explanation.- For the removal of doubts, it is hereby declared that any order passed by an adjudicating officer subordinate to the Commissioner of Central Excise immediately before the commencement of clause (C) of section 112 of the Finance (No. 2) Act, 2009, shall continue to be dealt with by the Commissioner of Central Excise as if this section had not been substituted.]

85.(1) Any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals).

(2) Every appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(3) An appeal shall be presented within three months from the date of receipt of the decision or order of such adjudicating authority relating to service tax, interest or penalty under this Chapter, made before the date on which the Finance Bill, 2012 receives the assent of the President.

Provided that the Commissioner of Central Excise (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.

(3A) An appeal shall be presented within two months from the date of receipt of the decision or



order of such adjudicating authority, made on and after the Finance Bill, 2012 receives the assent of the President, relating to service tax, interest or penalty under this Chapter:

Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month.";

(4) The Commissioner of Central Excise (Appeals) shall hear and determine the appeals and, subject to the provisions of this Chapter, pass such orders as he thinks fit and such orders may include an order enhancing the service tax, interest or penalty:

Provided that an order enhancing the service tax, interest or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) Subject to the provisions of this Chapter, in hearing the appeals and making orders under this section, the Commissioner of Central Excise (Appeals) shall exercise the same powers and follow the same procedure as he exercise and follows in hearing the appeals and making orders under the Central Excise Act, 1944] (1 of 1944).

86. (1) Any assessee aggrieved by an order passed by a Commissioner of Central Excise under section 73 section 83A[xxxx], or an order passed by a Commissioner of Central Excise (Appeals) under section 85, may appeal to the Appellate Tribunal against such order "within three months of the date of receipt of the order".

(1A) (i) The Board may, by notification in the Official Gazette, constitute such Committees as may be necessary for the purposes of this Chapter.

(ii) Every Committee constituted under clause (i) shall consist of two Chief Commissioners of Central Excise or two Commissioners of Central Excise, as the case may be.

(2) The Committee of Chief Commissioners of Central Excise may, if it objects to any order passed by the Commissioner of Central Excise under section 73 or section 83A [xxxx], direct the Commissioner of Central Excise to appeal to the Appellate Tribunal against the order.

Provided that where the Committee of Chief Commissioners of Central Excise differs in its opinion against the order of the Commissioner of Central Excise, it shall state the point or points on which it

differs and make a reference to the Board which shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner of Central Excise is not legal or proper, direct the Commissioner of Central Excise to appeal to the Appellate Tribunal against the order.

(2A) The Committee of Commissioners may, if he objects to any order passed by the Commissioner of Central Excise (Appeals) under section 85, direct any Central Excise Officer to appeal on his behalf to the Appellate Tribunal against the order:

Provided that where the Committee of Commissioners differs in its opinion against the order of the Commissioner of Central Excise (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional Chief Commissioner who shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner of Central Excise (Appeals) is not legal or proper, direct any Central Excise Officer to appeal to the Appellate Tribunal against the order.

Explanation.- For the purposes of this sub-section, "jurisdictional Chief Commissioner" means the Chief Commissioner having jurisdiction over the concerned adjudicating authority in the matter.

(3) "Every appeal under sub-section (2) or sub-section (2A) shall be filed within four months from the date on which the order sought to be appealed against is received by the Committee of Chief Commissioners or, as the case may be, the Committee of Commissioners.";

(4) The Commissioner of Central Excise or any Central Excise Officer subordinate to him] or the assessee, as the case may be, on receipt of of a notice that an appeal against the order of the Commissioner of Central Excise or the Commissioner of Central Excise (Appeals) has been preferred under sub-section (1) or sub-section (2) or sub-section (2A)] by the other party may, notwithstanding that he may not have appealed against such order or any part thereof, within forty-five days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Commissioner of Central Excise or the Commissioner of Central Excise (Appeals), and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).

(5) The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in

sub-section (1) or sub-section (3)]" or sub-section (4) if it is satisfied that there was sufficient cause for not presenting it within that period.

(6) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall, irrespective of the date of demand of service tax and interest or of levy of penalty in relation to which the appeal is made, be accompanied by a fee of, -

a) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;

b) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees;

c) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees:

Provided that no fee shall be payable in the case of an appeal referred to in sub-section (2) or sub-section (2A) or a memorandum of cross-objections referred to in sub-section (4).

(6A) Every application made before the Appellate Tribunal, -

a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or

b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees :

Provided that no such fee shall be payable in the case of an application filed by the Commissioner of Central Excise or Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be under this sub-section.

(7) Subject to the provisions of this Chapter, in hearing the appeal and making orders under this section, the Appellate Tribunal shall exercise the same powers and follow the same procedure as it exercise and follows in hearing the appeals and making orders under the Central Excise Act, 1944 (1 of 1944)."

36. It is now well settled by the Hon'ble Supreme Court in Singh Enterprises v. CCE, Jamshedpur reported in 2008 (221) ELT 163 (SC), Commissioner of Customs & Central Excise v. Hongo India (P) Ltd., reported in 2009 (236) ELT 417 (SC), Chhattisgarh State Electricity Board v. Central Electricity Regulatory Commission reported in 2010 (5) SCC 23, Section 5 of



the Limitation Act cannot be applied, beyond the condonable period.

37. Section 85 of the Finance Act, is similar to Section 128 of the Customs Act, 1962; Section 34(3) of the Arbitration and Conciliation Act, 1996; Section 125 of the Electricity Act, 2003; Section 35-G of the Central Excise Act, 1944 and the statutes referred to above, are self contained Acts and codes by themselves. The High Court or the Supreme Court, as the case may be, cannot direct the appellate authority to condone the delay, beyond the extended period of limitation. Courts have also interpreted that when the legislative intent is reflected in the provisions of the special laws, excluding the provisions of Limitation Act, then the authorities under the statute, cannot exercise powers to condone the delay. On the aspect of the Court, exercising powers under Article 226 of the Constitution of India, to condone the delay, we are of the view that the decision of this Court in Indian Coffee Worker's Co-operative Society Ltd., 's case, squarely applies to the case on hand, wherein, a Hon'ble Division Bench held as follows:

"(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."

38. In the light of the above discussion and decisions, we are not inclined to interfere with the order of the Writ Court. Hence, Writ Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

-s/d-

Assistant Registrar(CSIV)

True Copy

Sub-Assistant Registrar

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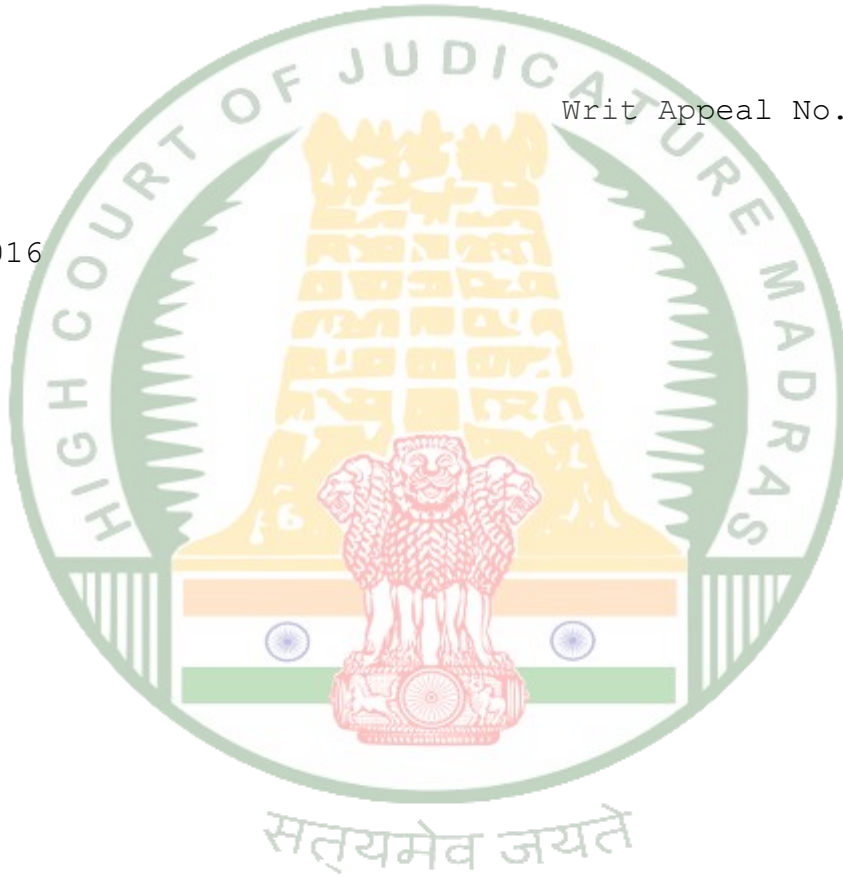
1.The Commissioner of Service Tax(Appeals I)  
26/1 M.G.Marg, Nungambakkam Chennai-34

2.The Additional Commissioner of Service Tax  
Service Tax II,Commissionerate  
'Newry Towers, 3rd floor 2054-1  
2nd Avenue Anna Nagar Chennai-40

+2 ccs to M/s.K.Sengottuvan Advocate sr.33002

Writ Appeal No.589 of 2016

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aa30/06/2016



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