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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION***

CUSTOMS APPEAL NO. 25 OF 2019

The Commissioner of Customs, Imports-I ... Appellant

V/s.

Aban Offshore Limited ... Respondent

Mr. Karan Aadik i/b. Maya Majumdar for the Appellant
Mr. Yogesh Patki a/w. Ms. Poorva Garg, Parikshit Barpujari, Jehan
Lalkaka i/b. Mulla and Mulla and CBC for the Respondent

***CORAM : NITIN JAMDAR &
M.S. KARNIK, JJ.***

DATE : 2 JANUARY 2020

P.C. :-

By this Appeal the Appellant – Revenue has challenged the order passed by the Customs, Excise and Service Tax Appellate Tribunal, dated 7 February 2019, dismissing the application filed by the Appellant for condonation of delay in filing an appeal against the Order in Original dated 27 February 2017. The Tribunal has not condoned the delay of 452 days in filing the Appeal by rejecting this Application. Hence, the present Appeal.

2. The Appellant has framed the following questions of law for consideration in this Appeal:-

“(A) Whether in the facts and circumstances of the case Ld. CESTAT was right in dismissing the application for condonation of delay and in observing that even if the application for condonation of delay was to be allowed, the appeal itself could not have been sustained on merits ?

(B) Whether the assessee is liable to pay penalty under Section 114-A of the Customs Act, 1962, of amount equivalent to duty plus interest, as determined by the Committee of Chief Commissioners vide Review order No. 03-R/2017 dated 09.06.2017 under Section 129 D(1) of the Customs Act, 1962 ? and

(C) Whether the issue raised in case No.C/89316/2018 (C/COD/86708/2018) is no longer integra and is squarely covered by the decision of Bharti Airtel [2012 (286) ELT (T)], Mangalore Refinery and Petrochemicals Ltd. [2014(313) ELT 353 (T)] and Suresh Vasudev Baliga [2015(329) ELT 433 (T-Bang)] as in the case of Bharti Airtel and Mangalore Refinery and Petrochemicals Ltd., the department has filed an appeal in the Apex Court and matter is sub-judice ?”

3. The assessment order was passed in respect of the Respondent on 30 March 2015 by the Assistant Commissioner of Customs, and certain benefits of exemption notification were denied to the Respondent. It is the case of the Appellant that the Mumbai Zonal Unit gathered intelligence regarding the Respondent. The Principal Commissioner of Customs adjudicated the case. An order was passed on 27 February 2017. The Committee of Chief Commissioner reviewed the order dated 27 February 2017, and the

Committee opined that the order dated 27 February 2017 is not legal and proper and a review order was passed on 9 June 2017. As per Section 129D(1) of the Customs Act, the Appeal had to be filed within a period of one month. The Appeal was filed by the Appellant thereafter with a delay of 452 days. The Tribunal in the impugned order noted the reasons given by the Appellant - Revenue for the delay and after referring to the decision of the Supreme Court in the case of *The Chief Post Master General v/s. Living Media India Ltd.*¹ found that the reasons were given by the Appellant – Revenue could not constitute sufficient cause as they were general in nature and rejected the application. While rejecting the application, the Tribunal also observed that the legal issue raised by the Appellant is no longer *res-integra*.

4. The Tribunal, after concluding that the delay cannot be condoned, commented that even otherwise the case on merits was not in favour of the Appellant as the issue was no longer *res-integra*. Having concluded that the delay could not be condoned and the application for condonation of delay was to be rejected, the observations on merits of the appeal were made only to narrate that no prejudice will be caused to the Appellant – Revenue even if discretion is used against it. The appeal stood dismissed since the delay was not condoned. The observations on merits were not warranted and were superfluous. In these circumstances, the

¹ 2012(277) E.L.T. 289(S.C.)

questions of law framed on the premise that the Tribunal decided the appeals on merits will not arise for consideration in this Appeal.

5. Though no question of law is expressly framed, the Mr. Karan Aadik, learned Counsel for the Appellant sought to contend that the decision of the Tribunal in not condoning the delay of 452 days suffers from perversity. On this aspect, Mr. Aadik relied upon the decisions of the Division Bench of Gujarat High Court in the case of *Prashant Gamatex Pvt. Ltd. v/s. Commissioner of Central Excise, Ahmedabad-1*² and *Principal Commissioner v/s. Essar Oil Ltd.*³ He has also submitted that adequate reasons were given in the application for condonation of delay. Mr. Yogesh Patki, the learned Counsel for the Respondent relied upon the decision in the case of *Chief Post Master General*, which is also referred to by the Tribunal. He also relied upon the decision of the Division Bench of this Court in *Commissioner of Central Tax & C.Ex., Mumbai v/s. P.N. Writer and Co. Pvt. Ltd.*⁴

6. We are not considering an application for condonation of delay at the first instance. The Tribunal has used its judicial discretion not to condone the delay. The contention before us is that the discretion used is perverse. The reasons in the application for condonation of delay, which is the case made out by the Appellant before the Tribunal have been reproduced in the impugned order,

² 2018(362)E.L.T.751(Guj.)

³ 2017(347)E.L.T.432(Guj.)

⁴ 2019(367)E.L.T.778(Bom.)

and we reproduce the same again in this order:-

" It is stated that due to heavy workload in the section and many Supreme Court, High Court cases to be attended on priority, the subject case may have escaped the scrutiny of concerned officers. Also, it may be noted that the subject Review order was passed in the month of June'17 during the period there is a transition among the officers due to the Annual General Transfer. There is an inflow of new officers in every section and the officers being new to the Section might have inadvertently missed the order of the Committee. Therefore, due to this, delay may have occurred in filing of appeal within the prescribed time.

During the routine scrutiny and updation of pending legal matters, the pendency of action in respect of this case was noted and it was then taken up immediately for filing an appeal in the Hon'ble CESTAT. The delay is deeply regretted and it is humbly requested to the Hon'ble CESTAT to kindly condone the delay and examine the matter on merit.

It is respectfully submitted that the delay of 452 days in filing the present Appeal is unintentional on the part of the Revenue. There is no mala fide intention and it is a genuine oversight which may kindly not be allowed to affect the merit of the case. The delay is sincerely regretted and immediate efforts have been undertaken to avoid recurrence of such delay in the future. All the officers of the department have been cautioned and all such cases having similar circumstances have been examined to ensure no such delay recurs. Corrective measures have already been undertaken to avoid the recurrence of any such delay in the future.

The Revenue has a good case on merits. The Committee in their Review Order dated 09.06.2017 concluded that the adjudicating authority erred in not imposing interest along with the penalty under Section 114A. Therefore, no prejudice will be caused to the Respondent if the delay in filing the above Appeal is condoned, and the same is heard and decided on merits. If the delay is condoned, the Department will have an opportunity to pursue the Appeal on merits as the OIO will attain finality by inclusion of the interest alongwith penalty under Section 114A of the Customs Act, 1962.

The delay is deeply regretted before the Hon'ble Tribunal and it is humbly requested to the Hon'ble Tribunal to kindly condone the delay and examine the matter on merit.”

7. Reading of the reasons would show there are no particulars, and an only general statement is made that there were transfers of officers due to annual general transfers and there was heavy workload. It is not asserted that the officers in charge of filing the appeal had a heavy workload and that too of urgent nature. It is also not stated that the officer in charge of filing the appeal was transferred. Nothing is stated as to who was the officer responsible for filing the Appeal. Faced with such averments, the Tribunal referred to the dicta of the Supreme Court in the case of *Chief Post Master General* that the delay need not be condoned mechanically because the appellant is the Government.

8. In the absence of any particulars, if the Tribunal followed the decision in *Chief Postmaster General*, we cannot hold that the view taken by the Tribunal is perverse.

9. The decisions of the Division Bench of Gujarat High Court relied upon by the learned Counsel relate to the Appeals filed before it, and the Courts were not considering the validity of the view taken by the Tribunal. In the case of *Essar Oil Ltd.*, there was a correspondence placed on record and inaction of a particular officer was referred to and was taken note of. In the case of *Prashant Gamatex Pvt. Ltd.* the Appeal was by the assessee, and there was no question of general transfer and workload of the department. In this case, the assessee had given a reason that the concerned person looking after the business has left the job. These cases thereafter will not assist the Appellant.

10. Since no substantial question of law arises, the Appeal is dismissed.

M.S. KARNIK, J.

NITIN JAMDAR, J.

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