



C.M.A.No.1394 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 02.01.2025

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THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**
and
THE HONOURABLE **MR. JUSTICE G.ARUL MURUGAN**

C.M.A.No.1394 of 2014

Food Corporation of India,
District Office
23B Beach Road,
Tuticorin.1
represented by Area Manager

... Appellant

Vs

1.The Asst. Registrar,
Customs, Excise and Service Tax Appellate Tribunal,
26, Sashtri Bhavan, Annexe Building,
Haddows Road,
Chennai.6.

2.Commissioner of Customs, [Appeals]
No.1 Williams Road,
Cantonment,
Trichy.1.

3.The Assistant Commissioner [Refund]
Office of the Commissioner of Customs,
Customs House,
Tuticorin.4.

4.The Superintendent,
Office of the Superintendent of Central Excise



C.M.A.No.1394 of 2014

Customs Circle,
Tuticorin.

... Respondents

PRAYER: APPEAL filed under Section 130(1) of the Customs Act, 1962 read with Section 104 of CPC, against the order of the first respondent dated 11.11.13 made in Appeal No.C/11/2009-DB in Final order No.40573/11 which was received by the appellant on 18.12.13 confirming the order of the second respondent made in Appeal No.15/08 dated 13.10.08 [A.No.C24/65/2007-TTN[CUS] against the order dismissing the appeal for refund by the third respondent herein made in C.No.VIII/20/146/2001/Refund dated 17.8.06.

For Appellant : Mr.D.Baskar

For Respondents : Mr.Rajendran Raghavan (for R2 to R4)
Senior Standing Counsel

Tribunal - R1

J U D G M E N T

(Judgment of the Court was delivered by Dr.ANITA SUMANTH,J.)

This Civil Miscellaneous Appeal has been filed challenging an order of the Customs, Excise and Service Tax Appellate Tribunal (in short 'Tribunal'/'CESTAT') dated 11.11.2013 rejecting the appeal filed by the Food Corporation of India (FCI) and has been admitted on the following substantial questions of law:

1. Whether the order of the first respondent was right in view of the law laid down by the Hon'ble Apex Court rendered in the case of M/s.Thakker Shipping Private Limited Vs.



C.M.A.No.1394 of 2014

Commissioner of Customs, reported in 2013-2 L.W.206, wherein it has been held by the Hon'ble Apex Court that the Tribunal is within the powers to condone the delay, if it is satisfied that sufficient cause for not presenting it within that period?

2. Whether the Tribunal was right in dismissing the appeal on the ground of limitation despite the fact that the delay was explained satisfactorily and that sufficient cause was made for not presenting the appeal within the said period.

3. Whether the provisions of Section 129(a) of the Customs Act can be imported to condone the delay in filing the appeal under Section 128 of the Customs Act.

2. The Ministry of Agriculture had made a request on 26.05.1973 for exemption from payment of customs duty in respect of import of fertilizers.. The representation came to be considered favourably by the Ministry of Finance, and an adhoc exemption order bearing No.408 was issued on 26.07.1973.

3. Under that exemption order, and while accepting the prayer for exemption, import of fertilizers carried on board by various Vessels had been specifically considered. The import of fertilizer by the appellant was by a Vessel by name Kanishka. A Notification had been issued on 11.08.1973 reiterating the contents of exemption order dated 26.07.1973 and the same had also been circulated by the Ministry of Agriculture to all branches of the FCI.

4. Based on the minutes that had been circulated, a request for refund of the duty paid had been made by FCI at various locations including the District Office of FCI in Tuticorin.



C.M.A.No.1394 of 2014

5. To be noted, that the Vessel Kaniskha had offloaded consignments in two locations, one in Tuticorin, with which the present appeal is concerned, the second location being Visakhapatnam. Since the Vessel had berthed in Tuticorin even prior to the issuance of adhoc exemption order on 26.07.1973, delivery had been taken by the appellant on payment of duty under protest.

6. It is thus that representations dated 10.10.1973 and 13.08.1976 came to be made before the 4th respondent, Superintendent of Central Excise, Customs Circle, Tuticorin/R4 seeking refund of the import duty paid. Those representations had come to be rejected by R4 on 25.08.1976 holding that the exemption did not have retrospective effect and would only operate prospectively on and from 26.07.1973.

7. According to the appellant, order dated 25.08.1976 is clearly contrary to the express and implied language of the adhoc exemption order. However, the appellant admittedly took no action as against order dated 25.08.1976 for the reason that the consignment offloaded at Visakhapatnam had also suffered the same fate as the present consignment. As against the denial of refund in that case, an appeal had been filed which travelled to the Bangalore Bench of the CESTAT that ultimately allowed the appeal by its order dated 10.05.2006.

8. Initially, the matter had been pending before the Committee on Disputes



C.M.A.No.1394 of 2014

(CoD) seeking sanction for filing of statutory appeal. It was only on 21.06.2001, that FCI, Visakhapatnam had been permitted to pursue the appeal remedy, which ultimately culminated in favour of FCI by order of the CESTAT, Bangalore dated 10.05.2006.

9. Immediately on receipt of the order from the Visakhapatnam branch of FCI, the appellant yet again made a representation on 13.07.2006 to the Commissioner of Customs seeking refund of the customs duty paid based on the final orders passed by the CESTAT. The Assistant Commissioner (Refund) rejected the request on 17.08.2006 relying on the order of the Superintendent passed on 25.08.1976 and stating that that order had become final and had not been challenged in appeal as against which, a belated appeal was filed before the Commissioner of Customs & Central Excise (Appeals) with a delay of 323 days.

10. This appeal came to be rejected on the ground of bar of limitation, as against which, a further appeal was filed before the Tribunal, which also dismissed the appeal upholding the order of the first appellate authority dated 13.10.2008. It is as against the order of the CESTAT dated 11.11.2013 that the present appeal has been filed.

11. According to the appellant, the aforesaid sequence of events would clearly reveal merit in its claim, particularly seeing as the Ministry of Finance has



C.M.A.No.1394 of 2014

itself taken a conscious view that exemption should be granted and had issued Notification dated 26.07.1973. Hence, its entitlement for refund is clear and categorical.

12. The appellant would rely on the judgements of the Supreme Court in *Union of India V. Paras Laminates*¹, *M.P. Steel Corporation V. Commissioner of Central Excise*² and *Thakker Shipping P. Ltd. V. Commissioner of Customs (General)*³ in support of the argument that there has been sufficient cause for the delay in approaching the appellate authorities.

13. Per contra, Mr.Rajendran, who appears for the Customs Department would vehemently support the orders of the lower authorities including the impugned order of the CESTAT pointing out that there has been substantial delay at all relevant points in time. He would point out that the first order passed by the Superintendent is dated 25.08.1976 and the appellant had made no move to challenge the same till 13.07.2006 when a representation had been made reiterating the request for refund.

14. He would submit that the delay between 1976 and 2006 is fatal to the appellant's case. He would also draw our attention to the relevant provisions of the Customs Act, 1962 (in short 'Act') to say that the Commissioner does not

1 1990 Supreme (SC) 433

2 2015 Supreme (SC) 340

3 2012 Supreme (SC) 776



C.M.A.No.1394 of 2014

have the power to condone delay beyond the specified time period as set out under the statute.

15. On merits, his submission aligns with the order of the Superintendent dated 25.08.1976 to the effect that the adhoc exemption order has been issued on 26.07.1973, subsequent to the date of the bills of entry and hence the Notification would only have prospective effect. He would rely on the judgment of the Supreme Court in *Singh Enterprises V. Commissioner of Central Excise, Jamshedpur and others*⁴ and Delhi High Court in *Delta Impex V. Commissioner of Customs*⁵ and *M.R.Tobacco Pvt. Limited V. Union of India and others*⁶.

16. We have heard both learned counsel and have also studied carefully the facts and legal position canvassed by the parties.

17. The facts, dates and events, are, by and large admitted. Adhoc exemption order dated 26.07.1973 bearing No.408 makes specific mention of six vessels including the consignments carried thereupon, their tonnage, the Ports where they are to discharge and their dates of arrival/expected dates of arrival.

18. In the interests of completion, we would extract the relevant part of the Notification as follows:

The undersigned is directed to refer to the correspondence resting with Ministry of Finance, Department of Revenue & Insurance, New

4 2007 Supreme (SC) 1648

5 2004 Supreme (Del) 106

6 2004(178)ELT137(Del)



C.M.A.No.1394 of 2014

Delhi's letter No.458/17/73-Cus.V dated 4th May 1973 on the above subject and say that the Department of Supply have recently finalized contracts for supply of 263,000 MT of Di-Ammonium Phosphate and 260,000 ANP during 1973-74. Fixtures of vessels detailed below have been received at this and against the above cited contracts.

Sl.No	Name of Vessel	Tonnage	Fertiliser	Port	Arrival Date of Arrival/Expected Date of Arrival
1	KISTAS	8200	Amm.Nit.Phes	Kandla	ETA 23/05/1973
2	HORAIMARU	4960	Di-Amm.Phes	Visakhapatnam	18-05-1973
3	JAG ARTI	10000	Amm.Nit. Phes	Madras	ETA 30/06/1973
4	JAG REKHA	7500	-do-	Vizag	ETA 1 st Week of July 1973
		6500	-do-	Calcutta	ETA -do-
5	PERRAIOS	15000	-do-	Madras	ETA 1 st Week of August 1973
6	KANISHKA	10000	Di.Amm.Phos	Tuticorin	ETA 2nd Week July 1973
	JAYANTI	20000	-do-	Nagapatnam	ETA 3 rd Week July 1973

It is requested that adhoc exemption orders from payment of basic customs duty specified in the First Schedule to the Indian Tariff Act, 1934 and regulatory/auxiliary duty (wherever leviable) may kindly be issued at an early date and communicated to this Department for onward transmission to the FCI at port concerned for further action.

(Emphasis by us)

19. We find that the Vessel Kanishka which has carried consignments that were unloaded both at Tuticorin as well as at Visakhapatnam finds specific mention in that adhoc exemption order. Hence and at the very threshold we



C.M.A.No.1394 of 2014

would reject the contention of learned Senior Standing Counsel as well as the Superintendent in order dated 25.08.1976, holding that the exemption must be denied on the ground that the Vessel had arrived even prior to the date of Notification.

20. The request for exemption by the Ministry of Agriculture is on 26.05.1973 even prior to the estimated/expected date of arrival of Vessel Kanishka. It is hence that the adhoc exemption order has come to be passed on 26.07.1973 specifically referring to Kanishka apart from other Vessels as well.

21. Hence, there is no merit in the denial of the exemption on the ground that the adhoc exemption order is of a later date. The very fact that the Ministry of Finance, in the adhoc exemption order has specifically referred to six Vessels including Kanishka, reveals the specific intention to extend the benefit of exemption to those Vessels. We are hence of the considered view that the present argument under consideration, runs counter to the express and avowed intention under the adhoc exemption order, and would go so far as to say that such submission ought not to have been made at all in view of the specific reference to Kanishka in that order.

22. The contents of the adhoc exemption order have been reiterated in Notification dated 11.08.1973 and have been circulated thereafter to all officers



C.M.A.No.1394 of 2014

of FCI for necessary action. Since the consignment of the appellant had been offloaded even prior to the receipt of the minutes, the appellant has taken delivery of the same upon payment of customs duty and had sought refund of the duty paid on 10.10.1973.

23. We find that the refund application has been addressed to the Superintendent of Central Excise, Customs Circle, Tuticorin with copies addressed to various officers including the Assistant Collector of Central Excise for information and necessary action. In terms of Section 27 of the Act providing for claims for refund of duty, it is the Assistant Commissioner/Deputy Commissioner or an equivalent authority, who is to deal with an application for refund.

24. In such circumstances, we agree with the appellant that the order passed by the Superintendent on 25.08.1976 has no validity at all in the eyes of law insofar as the competent authority to have dealt with the refund application would only be the Assistant Commissioner of Customs. Admittedly, a copy of the application was marked to the Assistant Collector for necessary action and no order has been passed by the Assistant Collector in this regard till date. Hence, the refund application of the appellant dated 10.10.1973 was not dealt with by the authorities at all.



C.M.A.No.1394 of 2014

25. The consignment received at Visakhapatnam Port was identical in content to that of the petitioner's consignments, and the present legal dispute is also identical to the litigation before the Bangalore CESTAT. The CESTAT has considered the argument of prospective application of the Exemption Order, rendering a finding of fact at paragraph 5 of the order, to the effect that '*we are convinced that the Exemption Certificate related only to the Bill of Entry 7273, dated 30-06-1973*'.

26. The above finding of fact would apply to the present matter as well, and as we have already noted earlier, the adhoc exemption order has specifically covered the bills of entry relating to import of fertilizer on board the Kanishka. An additional argument taken in that appeal was that the goods had been imported at Nagapattinam Port and not Visakhapatnam as stipulated in the exemption order, and hence the goods were diverted. This argument has also been rejected by the Tribunal.

27. Importantly, order of the CESTAT dated 10.05.2006 has attained finality and has not been challenged. The Customs Act being a Central Legislation, the exemption order would apply pan India and the view taken by one Commissionerate would bind all other Commissionerates, facts being identical. The ratio of the order of the CESTAT, Bangalore dated 10.05.2006



C.M.A.No.1394 of 2014

would hence apply on all fours to the present matter as well. The claim of the Appellant for exemption is thus liable to be accepted and we do so.

28. This leaves us with the question of limitation. The appellant, as against order dated 17.08.2006, made a representation to the third respondent to re-examine the issue in line with the order of the Bangalore CESTAT. Admittedly, this procedure is irregular and the order of the third respondent ought to have been challenged by way of statutory appeal. This was ultimately done by the appellant, albeit with a delay of 323 days.

29. There is a difference of opinion between the parties as to whether the delay is 323 days or 412 days. We do not find this point very material as in any event it is admitted that the delay is beyond the condonable period for filing of appeal before the Commissioner of Customs (Appeals) under Section 128 of the Act, which is 60 days plus another 30 days.

30. Hence, there is nothing untoward in the order of the Commissioner of Customs (Appeals) dated 13.10.2008 dismissing the appeal on the ground of delay, as the Appellate Commissioner does not have the power to condone delay beyond 30 days. However, the second appeal before the CESTAT also met with the same fate, even though it was filed within the statutory time limit.

31. We are of the considered view that the CESTAT ought to have looked



C.M.A.No.1394 of 2014

into the matter on merits as the reasons for condonation of delay before the Commissioner are compelling. The Appellant's representation before the third respondent had been made on 22.08.2007 and admittedly, no orders have been passed thereupon. Hence, it is quite possible and plausible, that the appellant might have been awaiting orders on the representation which delayed the filing of the statutory appeal. The impugned order of the CESTAT has taken note of none of the aforesaid parameters and has cursorily closed the appeal.

32. In fact, had the CESTAT looked into the merits, it would have noted that the issue stood covered by the order of the co-ordinate Bench. In such an event, judicial discipline would require that the ratio of the order of the Bangalore Bench of CESTAT in the case of *Food Corporation of India Visakhapatnam V. The Commissioner of Customs, Visakhapatnam*⁷ be applied in the present matter as well as the facts and applicable legal position are identical. If at all the Madras Bench of the CESTAT did not concur with the reasoning of the Bangalore Bench, the matter ought to have been referred to a Larger Bench for decision.

33. The substantial questions of law that are admitted touch upon the aspect of limitation alone. We answer these questions in favour of the appellant. As a consequence, and in the fullness of things, the question of exemption must

⁷ Appeal No.C/74/2001 dated 10.05.2006



C.M.A.No.1394 of 2014

also be addressed which, in our view, stands fully covered by the order of the CESTAT, Bangalore dated 10.05.2006, in favour of the Appellant.

34. We do not frame a question of law on the issue of exemption, as that question does not arise directly from the order of the Tribunal dated 11.11.2013. The impugned order dated 11.11.2013 is quashed and the Civil Miscellaneous Appeal is allowed. As a consequence, refund sought under application dated 10.10.1973 of a sum of Rs.1,46,66,016.44 be paid over within a period of six (6) weeks from date of receipt of a copy of this order. No costs.

(A.S.M.,J) (G.A.M.,J)
02.01.2025

Index: Yes/No
Speaking order/Non-speaking order
Neutral Citation: Yes/No
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To

1. The Asst. Registrar,
Customs, Excise and Service Tax Appellate Tribunal,
26, Sashtri Bhavan, Annexe Building,
Haddows Road,
Chennai.6.

2. Commissioner of Customs, [Appeals]
No.1 Williams Road,



C.M.A.No.1394 of 2014

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Office of the Commissioner of Customs,
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Office of the Superintendent of Central Excise
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C.M.A.No.1394 of 2014

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and
MR. G.ARUL MURUGAN,J.

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C.M.A.No.1394 of 2014

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