

(2008) 03 GUJ CK 0067
In the Gujarat High Court

Case No : Special Civil Application No's. 4973, 11860 and 27055 of 2006

D.R. Industries Ltd. and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 13-03-2008

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q(1)
Central Excises and Salt Act, 1944 — Section 11AB, 11AC, 35, 35(1), 35A(4A)
Constitution of India, 1950 — Article 14, 226
Limitation Act, 1963 — Section 10, 11, 12, 13, 14

Citation : (2008) 127 ECC 61 : (2008) 153 ECR 61 : (2008) 229 ELT 24 :
(2008) 3 GLH 662

Hon'ble Judges : Ravi R. Tripathi, J;M.S. Shah, J

Bench : Division Bench

Advocate : Paresh M. Dave, in Special Civil application Nos. 4973 and 11860 of 2006 and P.J. Kanabar, in Special Civil application No. 27055 of 2006, for the Appellant; Harin Raval, Asstt. Solicitor General, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Shah, J.—All these petitions challenge the constitutional validity of the proviso to Sub-section (1) of Section 35 of the Central Excise Act, 1944 ("the Act" for short) in so far as it provides that the power of the Commissioner (Appeals) to condone the delay in filing the appeal beyond the period of 60 days is confined to delay for a further period of 30 days only.

2. In Special Civil Application No. 4973 of 2006, the Deputy Commissioner of Central Excise & Customs, Division I, Ankleshwar passed order dated 26.6.2002 confirming the demand of excise duty to the tune of Rs. 19,01,364/- with interest at the appropriate rate in terms of Section 11AB of the Act and also imposing penalty of Rs. 5,00,000/- on the petitioner Company in terms of erstwhile Rule 173Q(1) of the Central Excise Rules, 1944. The petitioner preferred an appeal against the said order before the Commissioner (Appeals), Central Excise & Customs, Vadodara on 11.2.2003 alongwith an application for

condoning the delay. The petitioner contended that although the impugned order was handed over by the Superintendent, Central Excise to their consultant in July, 2002, the same was not handed over to the petitioner and that the petitioner Company received the order only on 27.1.2003 and, therefore, the appeal filed on 11.2.2003 was within the limitation period of 60 days. It was contended in the alternative that if there was delay, there was sufficient cause for the delay in presenting the appeal beyond the limitation period of 60 days and, therefore, the delay may be condoned.

The Commissioner (Appeals) took the view that the impugned order was served upon the petitioner in July, 2002 and, therefore, the time limit of 60 days for filing the appeal expired in September, 2002. The Commissioner (Appeals) can condone the delay only for a period upto 30 days after expiry of the limitation period of 60 days and, therefore, the total period of 90 days having expired in October, 2002, the Commissioner (Appeals) had no power to condone the delay beyond the period of 30 days after expiry of the limitation period of 60 days. The Commissioner (Appeals) also referred to the decision of the Bombay Bench of the Tribunal in *Mayur Steel Co-op. v. Commissioner of Customs, Ahmedabad* 2004 (176) ELT 107 (Tri. Mumbai) and the decision of the Delhi Bench of the Delta Impex Vs. Commissioner of Customs, taking the view that the Commissioner (Appeals) had no power to condone the delay in filing the appeal beyond the total period of 90 days from the date of service of the impugned order.

3. Similarly in Special Civil Application No. 11860 of 2006, the Order-in-Original was passed by the Joint Commissioner, Central Excise & Customs, Daman on 29.4.2004. The petitioner preferred an appeal with an application for condonation of delay on 13.2.2006 stating that the order was received on 5.5.2005. The reason for the delay was that the Director of the petitioner Company met with a serious road accident and got multiple fractures and had to undergo prolonged hospitalization and rest. There was thus delay of 589 days in filing the appeal. The Commissioner (Appeals) held that he had no power to condone the delay beyond the period of 30 days after expiry of the limitation period of 60 days. Reliance was placed on the decisions of the Delhi High Court in *Delta Impex* 2004 (93) ECC 373 and *M.R. Tobacco Pvt. Ltd.* 2004 (94) ECC 373.

4. In Special Civil Application No. 27055 of 2006, the Order-in-Original was passed on 25.11.2004 confirming the demand of Rs. 8,69,280/- with interest at the appropriate rate u/s 11AB of the Act and also imposing penalty of equal amount u/s 11AC of the Act. The petitioner received the said order on 24.12.2004 and filed the appeal before the Commissioner (Appeals) u/s 35 of the Act on 31.3.2005. The petitioner also preferred an application for condonation of delay of 37 days. By order dated 19.5.2005, the Commissioner (Appeals) dismissed the appeal as time barred.

5. It is pertinent to note that in all the three cases, the concerned petitioners challenged the above orders of the Commissioner (Appeals) before the Customs, Excise and Service Tax Appellate Tribunal. In all the three cases, the Tribunal

confirmed that the Commissioner (Appeals) had no power to condone the delay beyond the powers given to him under the proviso to Section 35(1) of the Act.

6. The petitioners have thereupon filed these petitions and have challenged the constitutional validity of the proviso to Sub-section (1) of Section 35 of the Central Excise Act, 1944 in so far as the power of condonation of delay conferred on the Commissioner (Appeals) is confined to a period of only 30 days. The said Section reads as under:

35. Appeals to Commissioner (Appeals), - (1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Commissioner of Central Excise, may appeal to the Commissioner of Central Excise (Appeals) [hereafter in this Chapter referred to as the Commissioner (Appeals)] within sixty days from the date of the communication to him of such decision or order:

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

7. Mr Paresh M Dave and Mr PJ Kanabar, learned Counsel for the petitioners have raised the following contentions for the purpose of challenging the constitutional validity of the above provision as violative of Article 14 of the Constitution:

7.1 It is submitted that all the appellants belong to one class viz. assessees. However, under Chapter VI-A of the Central Excise Act, two artificial classes of assessee-appellants are created -

(i) those who have to file appeal before the Commissioner (Appeals) u/s 35(1) of the Act;

(ii) those who have to file appeal before the Appellate Tribunal u/s 35B(1) of the Act against a decision/order passed by the Commissioner of Central Excise either as an adjudicating authority or as an appellate authority.

The discrimination is two fold:

In the matter of the period stipulated for filing the appeal. For the first category, the limitation period is 60 days while such period for the second category is 90 days. But the real invidious discrimination, according to the learned Counsel for the petitioners, is that while u/s 35B(5) the Appellate Tribunal has been vested with the power to condone the delay of any length of period, if sufficient cause is shown, but the power of condoning delay conferred on the Commissioner (Appeals) under the proviso to Section 35(1) is only the maximum period of 30 days beyond the limitation period of 60 days. It is submitted that there is no rational basis for providing shorter period of limitation for the first category of assessee - appellants and thereafter also prescribing a very restricted power of condoning delay. Thus, hostile discrimination is meted out to this class of

assessee - appellants. This challenge to the constitutional validity raised in the present petitions was never raised before the Delhi High Court in the two reported decisions.

7.2 By prescribing a shorter period of limitation and also prescribing only a limited power of condoning delay for the appeals u/s 35(1) of the Act, no objective is sought to be achieved. Objectives like early disposal of appeals, collection of revenue, etc., are common to all appeals. Hence, such restriction on the power of the appellate authority u/s 35(1) in the matter of condonation of delay is arbitrary and discriminatory.

7.3 The Commissioner (Appeals) entertains appeals against the orders passed by the Assistant Commissioner, Deputy Commissioner or Additional Commissioner of Central Excise. The Appellate Tribunal entertains First Appeals against the orders of the Commissioner as an adjudicating authority or Second Appeals against the orders of the Commissioner (Appeals). It is only a fortuitous circumstance whether the adjudicating authority shall be Commissioner or any officer subordinate to him. The same question may be involved before a Deputy Commissioner and before a Commissioner. The difference in their jurisdiction may only depend upon the amount of duty involved. However, assessees who are otherwise similarly situate are classified in two different categories and thus by treating similars differently discrimination is meted out against the assessee whose cases are adjudicated by an officer subordinate to the Commissioner because in their case the power of condonation of delay conferred on the Commissioner (Appeals) is only for a period of 30 days upon expiry of the limitation period of 60 days. On the other hand, the Appellate Tribunal hearing first appeal or second appeal against the order of the Commissioner is granted unlimited power to condone the delay beyond the limitation period of 90 days.

7.4 The burden of justifying such differentiation and discrimination lies on the State, but the State has failed to discharge the onus. Reliance is placed on the decisions in *State of AP v. G. Ramakishan* (2001) 1 SCC 323, *Union of India Vs. M/s Popular Construction Co.*, and *Aashirwad Films Vs. Union of India (UOI) and Others*, and also on the decision dated 6.4.2006 of the Full Bench of the Andhra Pradesh High Court in *G. Narasimha Murthy Vs. District Collector and Others*,

8. On the other hand, Mr Harin Raval, learned Assistant Solicitor General has opposed the petitions.

(i) Mr Raval has invited our attention to the legislative history and pointed out that prior to the amendment of the Excise Act in 1980, against the order of the adjudicating officer, the appeal lay only before the Board of Revenue or the officer authorized by the Central Government viz. the Collector of Central Excise & Customs (Appeals) and the period of limitation for filing such appeal was three months from the date of communication of the order without any reference either way regarding power to condone delay. By Finance Act, 1980, the Parliament accepted the public demand for setting up of an independent

Appellate Tribunal for Customs and Central Excise matters somewhat similar to the set up on the direct taxes side and the demand had been endorsed by the Estimate Committee of Parliament. Accordingly, Finance Act, 1980 provided for setting up an Appellate Tribunal to hear appeals in respect of Customs, Central Excise and Gold Control matters independent of the Executive machinery charged with the responsibility of day to day administration of revenue laws. For doing so, entire Chapter VI-A of the Excise Act was substituted with effect from 11.10.1982. While this new Chapter conferred on the Appellate Tribunal power to entertain appeals within three months with further power to condone the delay if sufficient cause was shown, simultaneously the power of the Collector (Appeals) in the matter of condonation of delay was restricted to a further period of three months after expiry of the limitation period of three months for filing the appeal. Thereafter vide Act 22 of 1995, the word "Collector (Appeals)" was substituted by the word "Commissioner (Appeals)".

However, by Finance Act, 2001, in case of Commissioner (Appeals) the period of limitation was curtailed from three months to 60 days and the period for condoning delay was curtailed from a further period of three months to a further period of 30 days. Sub-section (4A) inserted in Section 35A relating to procedure in appeal also requires the Commissioner (Appeals) to endeavour to hear and decide every appeal within a period of six months from the date of filing. Reference is also made to the speech of the then Finance Minister on 28.2.2001 while presenting the Union Budget 2001-02. Reference is also made to the letter 28.2.2001 of the Joint Secretary (Prev.), Department of Revenue in the Ministry of Finance, Government of India.

(ii) It is also submitted that appeal is a creature of the statute and, therefore, any person seeking to file the appeal has to file the appeal within such period of limitation as may be provided for in the statute. The right to appeal being a statutory right can be circumscribed by the conditions in the grant. Right to appeal is neither an absolute right nor an ingredient of natural justice [Vijay Prakash Mehta 1988 (4) SCC 402].

(iii) It is further submitted that when the right of appeal is provided under an Act, the limitation thereof must also be provided therein [Subal Paul Vs. Malina Paul and Another, The Central Excise Act is a special enactment for levy, collection and recovery of the Central Excise. It is a self contained code providing for adjudication and conferring a right of appeal against the orders of different adjudicating authorities before different appellate fora and with different periods of limitation.

(iv) The assessee preferring appeals before the Commissioner (Appeals) cannot be treated as belonging to the same class as the assessee who file appeals before the Appellate Tribunal. The seats of the Appellate Tribunal are very limited. When Finance (No. 2) Act, 1980 was enacted, the seats of the Tribunal were only at Delhi, Bombay, Madras and Calcutta, whereas the Commissioner (Appeals) was almost in each and every State. It was, therefore, not arbitrary or

unreasonable on the part of the Parliament in providing a longer period of limitation with power to condone delay without any limit on the Appellate Tribunal located at only four metro cities within the country. As against that, the period of limitation of 60 days with a further condonable period of maximum 30 days was sufficient for the assessee to challenge the orders of an Excise Officer before the Commissioner (Appeals) who is having his office in each State and sometimes at more than one place in a State.

9. We have heard the learned Counsel for the parties and given anxious consideration to the rival submissions. As per the settled legal position, right to appeal is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in a judicial or quasi-judicial adjudication. The right to appeal is a creature of the statute and, therefore, such right can be circumscribed by the conditions in the grant. It is not the law that adjudication by itself, following the rules of natural justice, without any right of appeal would be violative of any constitutional or statutory right. If the statute gives a right to appeal upon certain conditions, it is upon fulfillment of those conditions that the right becomes vested and available to the appellant [Vijay Prakash Mehta 1988 (4) SCC 402]. Where a right of appeal is provided under an Act, limitation thereof must also be provided in the Act. Accordingly, when the Parliament confers the right of appeal u/s 35(1) of the Central Excise Act, the Parliament also has the power to restrict the right by providing for a specific period of limitation. The Parliament also has the equal power to provide for the maximum period of condonable delay.

10. While enacting the Limitation Act, 1963 providing for limitation of suits and other proceedings, the Parliament provided in Section 5 of the said Act that on the appellant satisfying the Court that there was sufficient cause for not preferring the appeal or application within a period of limitation as prescribed in the Act, the Court will have the power to condone the delay. Sub-section (2) of Section 29 of the Limitation Act also provides that where any civil or local law prescribes a period of limitation different from the period prescribed by the schedule in the Limitation Act, the provisions contained in Sections 4 to 24 of the Limitation Act shall apply only in so far as and only to the extent to which they are not expressly excluded by the civil or local law. Thus, applicability of the provisions of Section 5 of the Limitation Act enacted by Parliament may as well be curtailed by another enactment made by the Parliament. It is, therefore, open to Parliament to provide only a limited period of condonable delay while conferring a right of appeal on an assessee aggrieved by an order of an adjudicating authority below the Commissioner of Central Excise & Customs.

11. We may also refer to the decision of the Delhi High Court in *M.R. Tobacco Pvt. Limited Vs. Union of India (UOI) and Others*, wherein a Division Bench of the Court reiterated its view in *Delta Impex Vs. Commissioner of Customs*, that the Commissioner (Appeals) has no power to condone the delay beyond a further period of 30 days from the expiry of the time within which the appeal ought to

have been filed, that the Central Excise Act, 1944 is a complete code and the provisions of Section 35 clearly indicate that the provisions of the Limitation Act were to apply only to the extent and during the extended period of 30 days and not beyond. Delay could be condoned by the Commissioner (Appeals) within the extended period of 30 days and thereafter he had no power left in him to entertain any application for condonation of delay or to entertain the appeal itself. The above decision of the Delhi High Court in M.R. Tobacco case was challenged before the Hon"ble Supreme Court. The Apex Court dismissed SLP (Civil) No. 20552 of 2004 in the following terms:

In view of the fact that the provisions of the Limitation Act, 1963 have no application in relation to proceedings under the Central Excise Act and furthermore in view of the fact that the Act as a special statute deals with the matter relating to limitation, the High Court cannot be said to have committed any error in following the judgment of this Court in India House Vs. Kishan N. Lalwani, We find no merit in this petition. The SLP is dismissed.

In view of the aforesaid decision, there could be no room for doubt that the maximum time limit to file an appeal before the Commissioner (Appeals) u/s 35 of the Central Excise Act is 60 + 30 days i.e. 90 days. The Commissioner has no power to condone the delay beyond the further period of 30 days from the expiry of the limitation period of 60 days within which the appeal ought to have been filed. The aforesaid decision dated 11.5.2007 is reported in M.R. Tobacco Pvt. Ltd. v. Union of India 2007 (213) ELT A115 (SC).

12. We may also note at this stage that even where the revenue is aggrieved by an order of an adjudicating authority, suo motu power of initiation of appeal conferred on the Commissioner u/s 35E(3) of the Act is also to be exercised within a period of three months. This period was earlier one year, but is now reduced to three months by Finance Act, 2007 - that is - within three months from the date of communication of the decision or order of the adjudicating authority subordinate to him, the Commissioner of Central Excise may direct the subordinate officer to apply to the Commissioner (Appeals) for determination of such points arising out of the decision or order as may be specified by the Commissioner of Central Excise in his order. Thereafter within a period of one month (reduced from three months by Finance Act, 2007) from the date of communication of such order, the adjudicating authority or authorized officer shall make an application before the Commissioner (Appeals) raising the points for determination.

It is thus clear that persons aggrieved by the order of the adjudicating authority lower in rank than the Commissioner are now treated more or less as the same class, whether the aggrieved party is an assessee or the revenue. It is, therefore, not possible to accept the contention urged by the learned Counsel for the petitioners that the Parliament has treated equals as unequals. "Equality before law" means that among equals the law should be equal and should be equally administered, that like should be treated alike.

13. We also find considerable substance in the submission made by Mr Raval, learned Assistant Solicitor General that if we look at the legislative history, it becomes clear that prior to Finance Act, 1980 the appeal lay only before the Board of Revenue or the Collector of Central Excise (Appeals) and there was no further appeal. Only a revision lay before the Central Government. Hence, after establishment of the Appellate Tribunal, there was justification for fixing the maximum period for which delay could be condoned by the Collector (Appeals) because the Appellate Tribunal, which would be hearing the second appeal, was also being vested with the power to condone the delay in filing the appeals beyond the period of limitation. In other words, it stood to reason that if two successive appellate authorities were going to have power to condone delay for unlimited periods, there would be lot of uncertainty for a long period of time. Certainty and early finality are desirable features for expeditious tax recovery. We are, therefore, of the view that there was nothing unreasonable on the part of the Parliament in providing that the power of Collector (Appeals) of condoning delay was restricted to a limited period.

14. We are also of the view that assessee preferring appeals before the Commissioner (Appeals) cannot be treated as belonging to the same class as assessee preferring appeals before the Appellate Tribunal. The seat of the Appellate Tribunal - Customs, Excise & Service Tax Appellate Tribunal - is in a very few places. In fact, in the year 1980, the provisions of Section 35(1) were amended for curtailing the period of limitation from three months to 60 days and the condonable period from three months to 30 days. While the office of the Commissioner (Appeals) was to be found in each and every State and sometimes at more than one place in a State, the principal seat of the Appellate Tribunal was at Delhi and its benches were to be found only in three other metro cities of Bombay, Calcutta and Madras. Even now the Appellate Tribunal has its benches in only 5 cities in addition to its principal seat at Delhi. Assessee carrying on their business at far away places cannot, therefore, be expected to file appeals before the Appellate Tribunal as expeditiously as they would be in a position to file the appeals before the Commissioner (Appeals) in their respective States. Hence, assessee preferring appeals before the Appellate Tribunals are in a different class as compared to assessee filing appeals before the Commissioner (Appeals). We, therefore, do not find any substance whatsoever in the petitioners' contention that the assessee preferring appeals before the Commissioner (Appeals) and the assessee preferring appeals before the Appellate Tribunal belong to the same class. The edifice of the petitioners' argument must, therefore, fall to the ground.

15. We may now refer to the decision of the Full bench of the Andhra Pradesh High Court on which strong reliance was placed by Mr Kanabar for the petitioner. The writ petitions were filed before the Andhra Pradesh High Court against the orders of the Andhra Pradesh Administrative Tribunal (A.P.A.T.). When the applications made by the employees (applicants) were dismissed for default, Rule 17 of the Andhra Pradesh Administrative Tribunal (Procedure) Rules, 1989

provided for a period of limitation of 30 days for making the application for restoration. Such applications for restoration made beyond a period of 30 days were dismissed on the ground that the Tribunal had no power to condone the delay beyond the specified period. What appealed to the Full Bench of the Andhra Pradesh High Court in striking down Rule 17(2) of the said Rules in so far as the said Rule provided for limitation period of 30 days was the discrimination between the applications for restoration being filed by the applicants after their original applications were dismissed for default on the one hand and the absence of any such period of limitation for the respondents while moving the applications for setting aside the ex-parte orders on the other hand. The Andhra Pradesh High Court, therefore, held that when the APAT (Procedure) Rules did not provide for any period of limitation for making an application by the respondents for orders of review/setting aside ex-parte orders, the applicants before the Tribunal cannot be discriminated against by being subjected to the period of limitation of only 30 days for making an application for setting aside orders dismissing original applications for default especially when the applicants may not be aware about such orders being passed.

16. Similarly, whether a person is aggrieved by an order of the Commissioner of Central Excise as the original authority or by an order of the Commissioner (Appeals) as the appellate authority, the period of limitation for approaching the Appellate Tribunal is the same, whether the aggrieved party is an assessee or the revenue. Thus, there is no discrimination in the matter of the length of period for which the delay can be condoned by the Appellate Tribunal, whether the appellant is an assessee or the revenue.

17. In view of the above discussion, it is not necessary to refer to or deal with the decisions cited by the learned Assistant Solicitor General for the proposition that there is a presumption about constitutionality of a statute nor is it necessary to refer to or deal with the decisions cited by the learned Counsel for the petitioners as regards the burden of justifying differentiation or discrimination.

18. We, therefore, do not find any merit in any of the contentions raised on behalf of the petitioners for challenging the constitutional validity of the proviso to Sub-section (1) of Section 35 of the Central Excise Act, 1944 in so far as the Parliament has provided for the limitation period of 60 days for filing an appeal before the Commissioner (Appeals) and in so far as the power to condone the delay conferred on the Commissioner (Appeals) is only for a period of 30 days after expiry of the limitation period of 60 days.

19. As regards the contention that there may be extra-ordinary cases where assessees may not be in a position to challenge the order of the adjudicating authority before the Commissioner (Appeals) within a period of 90 days from the date of communication of the order, we are of the view that in such extra-ordinary cases where an assessee can show extra ordinary circumstances explaining the delay and also gross injustice done by the adjudicating authority, the assessee may invoke the writ jurisdiction of this Court. Hence, in cases

where the assesseees have suffered gross injustice and they could not file appeals before the Commissioner (Appeals) within a period of 90 days from the date of communication of the order-in-original on account of circumstances beyond their control, such assesseees can invoke the powers of this Court under Article 226 of the Constitution but, of course, not as a matter of right.

20. In the facts of these cases, the learned Counsel for the petitioners attempted to satisfy us that there was sufficient cause for their not filing the appeals within a period of 90 days before the Commissioner (Appeals). However, we are not inclined to consider this request at this stage. We leave it open to the petitioners to file fresh petitions for invoking the writ jurisdiction of this Court under Article 226 of the Constitution for the purpose of challenging the orders-in-original passed by the adjudicating authorities. As and when such writ petitions are filed, we will deal with the facts in each individual case.

21. Subject to the above liberty granted to the petitioners for filing fresh substantive petitions for challenging the orders-in-original of the adjudicating authorities, we dismiss these petitions in so far as they have challenged the constitutional validity of the proviso to Sub-section (1) of Section 35 of the Central Excise Act, 1944.

22. Subject to the above liberty, the petitions are dismissed. Rule is discharged.