(2015) 03 MAD CK 0376

In the Madras High Court

Case No : Writ Petition Nos. 5457 and 5458 of 2015

Hindustan Apparel Industries — APPELLANT

Vs

The Assistant Commissioner of Customs (EPCG) and Others — RESPONDENT

Date of Decision : 18-03-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35, 35-H(1)
Customs Act, 1962 — Section 128, 128(1)
Limitation Act, 1963 — Section 10, 11, 12, 13, 14

Citation : (2015) 323 ELT 344

Hon'ble Judges : S. Vaidyanathan, J

Bench : Single Bench

Advocate : Hari Radhakrishnan, for the Appellant; A.P. Srinivas, Advocates for the Respondent

Judgement

S. Vaidyanathan, J.—The Writ Petitions in W.P. Nos. 54457 and 5458 of 2015 have been filed, praying for the relief of issuance of a writ of certiorari to call for the records pertaining to the Order-in-Original No. 15733/2011 dated 25.04.2011 of the 1st respondent and the Notice dated 01.01.2015 in C.No.HQRS/ARC/38/2014-Hyd-IV of the 2nd respondent and quash the same respectively.

2. It is the case of the petitioner that the petitioner obtained EPCG License No. 0330001418 dated 11.10.2001 from JDGFT, Mumbai for import of capital goods duty free under Notification No. 49/2000 dated 27.04.2000 and though the petitioner has fulfilled the export obligation within the stipulated time and applied to the DGFT for redemption certificate and obtained redemption letter, the 1st respondent passed the impugned order-in-original No. 15733/2011 dated 25.04.2011 demanding Rs. 2,00,000/- along with interest. Commissioner of Appeals dismissed the appeal preferred against the said order in the Order in appeal No. 57 of 2015 dated 30.1.2015 holding that he has no power to condone the delay. The 2nd respondent issued a demand notice dated 1.1.2015 for payment of duty along with interest as per the impugned order-in-original No.

15733 of 2011 dated 25.4.2011. Hence, the present writ petitions are filed challenging the impugned order passed by the 1st respondent and the 2nd notice issued by the 2nd respondent.

3. Heard the learned counsel appearing on either side and perused the materials placed on record.

4. Section 128 of the Customs Act reads as under:

"128. Appeals to Commissioner (Appeals)- (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Commissioner of Customs may appeal to the Commissioner (Appeals) within "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.

(1-A) The Commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing;

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

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

5. On a reading of the above provision, it is clear that Section 128(1) prescribes that the appeal must, in the first instance, be filed within sixty days from the date of the communication of the decision or order which is the subject matter of the appeal. The proviso to Section 128(1) enables the Commissioner (Appeals) to permit the filing of the appeal beyond the sixty days referred to above provided that he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the sixty days prescribed. However, on a plain reading of the proviso, it does appear that the Commissioner (Appeals) can exercise such power only within a "further period of thirty days". In other words, the appeal can be filed only up to 90 days from the date of communication of the decision or order appealed from. The first sixty days being the initial period and the further thirty days being at the discretion of the Commissioner (Appeals).

6. In the present case, it is not in dispute that the appeal has been filed with a delay of 1346 days. It is to be noted that the proviso to Section 128(1) enables the Commissioner (Appeals) permits the filing of the appeal beyond the sixty days provided that he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the sixty days prescribed. In fact, while

exercising such discretionary power, the authority can condone the delay upto 90 days on sufficient cause shown by the petitioner for not filing the appeal in time. The present appeal was beyond the statutory period of 90 days and the authority has rightly rejected the same, since he cannot be expected to exercise his discretionary power beyond the permissible period that was prescribed by the statute.

7. As regards the issue whether the High Court has power to condone the delay after the expiry of 30 days period, a useful reference can be made to a decision reported in Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others, (2008) 1 CLT 709 : (2008) 1 CTC 707 : (2008) 124 ECC 1 : (2008) 150 ECR 1 : (2008) 221 ELT 163 : (2007) 14 SCALE 610 : (2008) 3 SCC 70 : (2008) 12 VST 542 : (2008) AIRSCW 1461 : (2007) 8 Supreme 533 , wherein, the Hon''ble Supreme Court, interpreted Section 35 of the Central Excise Act, 1944 which is pari material to Section 128(1) of the Customs Act and observed as under in para 8:

"8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of statute are not vested with jurisdiction to condone the delay beyond the permissible period provided under the statute. The period up to which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the 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 up to 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."

(emphasis added)

8. The above said decision was followed by the Hon''ble Supreme Court in its subsequent decision reported in Commissioner of Customs and Central Excise Vs. Hongo India (P) Ltd. and Another, (2009) 223 CTR 225 : (2009) 163 ECR 199 : (2009) 236 ELT 417 : (2009) 315 ITR 449 : (2009) 7 JT 83 : (2009) 4 SCALE 374 : (2009) 4 SCR 1197 : (2009) 21 STT 90 : (2009) 3 UJ 1555 : (2009) 24

VST 298 , wherein, the question for determination came up before it, was whether the High Court has power to condone the delay in presentation of the reference application under unamended Section 35-H(1) of the Central Excise Act, 1944 beyond the period prescribed, by applying Section 5 of the Limitation Act, 1963 and while answering in the negative, the Supreme Court has held in para 3 to 37 as under:

"35. 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 which here in this case is the Central Excise Act. The nature of the remedy provided therein is 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 Sections 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, is 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.

36. The scheme of the Central Excise Act, 1944 supports the conclusion that the time-limit prescribed under Section 35-H(1) to make a reference to the High Court is absolute and unextendable by a 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 Limitation Act.

37. In the light of the above discussion, we hold that the High Court has no power to condone the delay in filing the "reference application" filed by the Commissioner under unamended Section 35-H(1) of the Central Excise Act, 1944 beyond the prescribed period of 180 days and rightly dismissed the reference on the ground of limitation.

9. The Customs Act, 1962 itself is a complete Code. Reading various chapters and various sections thereof, it is very clear that it is an Act independent of other provisions. It provides for search, seizure, arrest, confiscation of goods, conveyance, imposition of penalties, settlement of cases, appeals including the appeal to the Supreme Court and hearing before the Supreme Court, period of limitation, offences and prosecution. Thus, it is an independent Act. Therefore, the Customs Act, 1962 is a complete code and the provisions of Section 128(1) 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 condensation of delay or to entertain the appeal itself.

10. In view of the above discussion and having regard to the categoric pronouncement of the Hon''ble Supreme Court in the above mentioned decisions, holding that when the scheme of the special law which herein in this case is the Customs Act and the nature of the remedy provided therein is such that the legislature intended it to be a complete code by itself, which alone should govern the several matters provided by it, it is clear that the provisions of the Limitation Act are necessarily excluded, the benefits conferred therein cannot be called in aid to supplement the provisions of the Act, this Court is of the view that the delay which is beyond the statutory period of limitation, cannot be condoned.

11. In view of the aforesaid decisions and discussion, I am not inclined to grant the relief sought for in the writ petitions and the same are dismissed. No costs. Consequently, the connected miscellaneous petitions are also dismissed.