

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CEA No.60 of 2013 (O&M)
Date of decision: 28.01.2014**

Commissioner of Central Excise, Commissionerate, Delhi III, Gurgaon

.....Appellant

Vs.

M/s Leading Solution India P. Limited

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MS. JUSTICE ANITA CHAUDHRY**

Present: Mr.Sukhdev Sharma, Advocate for the appellant.

Mr. M.P.Devnath, Advocate for the respondent.

Ajay Kumar Mittal,J.

1. This appeal has been preferred by the revenue under Section 35G of the Central Excise Act, 1944 (in short, "the Act") against the order dated 26.7.2012, Annexure A.3 passed by the Customs Excise and Service Tax Appellate Tribunal, New Delhi (in short, "the Tribunal"), claiming following substantial questions of law:-

- i) Whether the Tribunal has power to condone the delay under Section 35B(5) of the Central Excise Act, 1944 in case of Departmental Appeal filed after Review Committee decision under Section 35E *ibid*?
- ii) Whether the divisional bench of the Tribunal was bound by larger bench decision in the case of *CCE Raipur v. Monet*

Ispat & Energy Limited (2010 257 ELT 339) or it could have taken different view without referring the matter to the larger bench?

iii) Whether the divisional bench of the Tribunal was justified in relying on the earlier decision of the Tribunal in the case of *CCE, Mumbai vs. Azo Dye Chem.* 2000(120) ELT 201 – Tribunal-Lb) which was based on a totally different statutory provisions as were applicable at that time as clearly observed by the larger bench in the case of *CCE, Raipur v. Monet Ispat and Energy Limited?*

iv) Whether the aforesaid impugned order of the Hon'ble Tribunal needs to be set aside in view of Supreme Court decision in the case of *Thakker Shipping Pvt. Limited v. Commissioner of Customs (General)*, 2012(285) ELT 321?"

2. A few facts relevant for the decision of the controversy as available on the record, may be noticed. The respondent-assessee was engaged in the manufacture of High Foamed Coaxial Cables 1/2", 7/8" and High Foamed super Flexed Coaxial Cables 7/8" falling under Chapter sub heading 85442010 to the first schedule to the Central Excise Tariff Act, 1985. Later on the assessee vide its letter dated 24.11.2008 intimated change of its name from M/s Leading Solution India P. Limited to L.S.Cable India Pvt. Limited w.e.f 25.11.2008. It is now engaged in the manufacture of excisable goods namely Flexible Foam Dielectrical RF Feeder Cable, Super Flexible Foam Dielectrical RF Feeder Cable, Flexible Foam Dielectrical Aluminum RF Feeder Cable and Low Loss Flexible Foam Dielectrical RF Feeder Cable chargeable to Central Excise duty under Chapter 85 of the Central Excise Tariff. It obtained Central Excise registration under Section 6 of the Act for manufacture of finished goods. It imports certain inputs which are exempt from custom duty under notification dated 1.3.2005 as

amended subject to following the procedure prescribed under the Customs (Import of goods on concessional rate of duty for the manufacture of Excisable goods) Rules 1996 (in short, “the Rules”). The assessee in accordance with the provisions of these rules applied to the jurisdictional Central Excise authority for registration which was granted to it. The department alleged that the assessee imported certain goods by declaring their false description in the documents and in this manner, wrongly availed duty exemption under notification dated 1.3.2005. It was on this basis that show cause notice dated 22.4.2010, Annexure A.1 was issued to the assessee as to why exemption from whole of the duty of customs be not denied to it and penalty be not imposed under section 112(a) and 114(a) of the Act. The adjudicating authority vide order dated 28.2.2011, Annexure A.2 dropped the proceedings against the assessee holding that the goods had been rightly classified by it and that the exemption availed by it was applicable to it. The said order was reviewed by the committee constituted by the department and it was held that the order passed by the adjudicating authority was not legal and proper and therefore appeal was required to be filed by the department before the Tribunal. Accordingly, the appeal was filed on 1.8.2011 alongwith application for condonation of delay of 63 days in filing the appeal. The Tribunal vide order dated 26.7.2012, Annexure A.3 dismissed the appeal holding that there was no provision for condonation of delay in filing the review appeal under Section 35E(4) and also relied upon the judgment of the larger bench of the Tribunal in *Azo Dye Chem's* case (supra). Hence the present appeal by the revenue.

3. We have heard learned counsel for the parties and perused the record.

4. The point that arises for consideration in this appeal is whether in case of delay in filing the appeal where the Committee of Chief Commissioner of Central Excise takes a decision to file an application to the Tribunal beyond the period of one month from the date of communication of the order in terms of section 35E(4) of the Act, the Tribunal is competent to condone the delay for sufficient cause under Section 35B(5) of the Act.

5. It may be noticed that Section 35E(4) of the Act is *pari materia* to section 129D(4) of the Customs Act, 1962 (in short, “the 1962 Act”) whereas Section 35B(5) of the Act and Section 129A(5) of the 1962 Act are similar. The Hon'ble Apex Court in *Thakker Shipping Pvt. Limited's* case (supra) held that Section 129A(5) of 1962 Act stands incorporated in Section 129D(4) of 1962 Act by way of legal fiction and has to be given effect to and in such circumstances, it could not be said that the Tribunal had no power to condone the delay. It was held as under:-

“From the plain language of Section 129D(4), it is clear that Section 129A has been incorporated in Section 129D. For the sake of brevity, instead of repeating what has been provided in Section 129A as regards the appeals to the Tribunal, it has been provided that the applications made by the Commissioner under Section 129D(4) shall be heard as if they were appeals made against the decision or order of the adjudicating authority and the provisions relating to the appeals to the Tribunal shall be applicable in so far as they may be applicable. Consequentially, Section 129A(5) has become integral part of Section 129D(4) of the Act. In other words, if the Tribunal is satisfied that there was sufficient

cause for not presenting the application under Section 129D (4) within prescribed period, it may condone the delay in making such application and hear the same.

“Parliament intended entire Section 129A, as far as applicable, to be supplemental to Section 129D(4) and that is why it provided that the provisions relating to the appeals to the Tribunal shall be applicable to the applications made under Section 129D(4). The expression, “including the provisions of sub-section (4) of Section 129A” is by way of clarification and has been so said expressly to remove any doubt about the applicability of the provision relating to cross objections to the applications made under Section 129D(4) or else it may be said that provisions relating to appeals to the Tribunal have been made applicable and not the cross objections. The use of expression “so far as may be” is to bring general provisions relating to the appeals to Tribunal into Section 129D(4). Once the provisions relating to the appeals to the Tribunal have been made applicable, Section 129A(5) stands incorporated in Section 129D(4) by way of legal fiction and must be given effect to. Seen thus, it becomes clear that the Act has given express power to the Tribunal to condone delay in making the application under Section 129D(4) if it is satisfied that there was sufficient cause for not presenting it within that period.”

6. Further, The Tribunal while rejecting the prayer of the appellant for condonation of delay had relied upon its decision in *Azo Dye Chem's* case (supra). The judgment in *Azo Dye Chem's* case (supra) was overruled by the Apex Court with the following observations:-

“12. Section 129D(4) makes it clear that where an application is made by the Commissioner to the Tribunal in

pursuance of an order under sub-section (1) within a prescribed period from the date of communication of that order, such application shall be heard by the Tribunal as if it was an appeal made against the decision or order of the adjudicating authority and the provisions regarding appeals under Section 129A to the Tribunal, in so far as they are applicable, would be applicable to such application. The crucial words and expressions in Section 129D(4) are, “such application”, “heard”, “as if such application were an appeal” and “so far as may be”. The expression “such application”, inter alia, is referable to the application made by the Commissioner to the Tribunal in pursuance of an order under sub-section (1) of Section 129D. The period prescribed in Section 129D for making application does not control the expression “such application”. It is difficult to understand how an application made under Section 129D(4) pursuant to the order passed under sub-sections (1) or (2) shall cease to be “such application” merely because it has not been made within prescribed time. If the construction to the words “such application” is given to mean an application filed by the Commissioner before the Tribunal within the prescribed period only, the subsequent expressions “heard”, “as if such an application were an appeal” and “so far as may be” occurring in Section 129D(4) of the Act may be rendered ineffective. The view of the larger Bench of the CEGAT in Azo Dye Cheml and the reasons in support thereof do not commend to us. We are unable to accept the view adumbrated by the CEGAT. The clear and unambiguous provision in Section 129D(4) that the application made therein shall be heard by the Tribunal as if it was an appeal made against the decision or order of the adjudicating authority and the provisions of the Act regarding appeals, so far as may be, shall apply to such application leaves no manner of doubt that the provisions of

Section 129A (1) to (7) have been mutatis mutandis made applicable, with due alteration wherever necessary, to the applications under Section 129D(4).”

7. In view of the above, the order dated 26.7.2012, Annexure A.3 passed by the Tribunal being legally unsustainable is hereby set aside. The substantial questions of law are answered accordingly. The appeal stands allowed. The matter is remanded to the Tribunal to decide afresh regarding sufficiency of reasons for condonation of delay in filing the appeal in accordance with law.

(Ajay Kumar Mittal)
Judge

January 28, 2014
'gs'

(Anita Chaudhry)
Judge