

Collector of Central Excise and Vs. Papyrus Papers Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-28-1989

Reported in : (1989)(24)ECC150

Appellant : Collector of Central Excise and

Respondent : Papyrus Papers Ltd.

Advocate for Def. : Shri. A.K. Virmani, Shri. Virmani

Judgement :

G.P. Agarwal, Member (J) for himself and for Harish Chander, Member (J), I.J. Rao, Member (T) and D.C. Mandal, Member (T) 1. This appeal is directed against the impugned order-in-appeal No.86/WB/82 dated 18-3-1982 passed by the Appellate Collector, Customs & Central Excise, Calcutta.

(i) That the impugned order-in-appeal was passed by the Appellate Collector of Central Excise, Calcutta on 18-3-1982.

(ii) That the present appeal filed by the department against the impugned order-in-appeal was received in the Registry on 23-12-1982 without any application for condonation of delay in filing the appeal.

(iii) That at the time when the impugned order-in-appeal was passed by the Appellate Collector on 18-3-1982 there was no provision for appeal in the Central Excises & Salt Act. However, the Central Government was conferred with the revisional power under erstwhile section 36(2) of the Central Excises & Salt Act

either suo motu or otherwise to call for and examine the record of any proceeding in which any decision or order has been passed under erstwhile Section 35 or 35A of the Act for the purpose of satisfying itself as to the correctness, legality or propriety of such decision or order. This power of revision was subject to a period of limitation of one year in terms of second proviso to Sub-section (2) of Section 36. For ready reference the said Sub-section (2) of Section 36 insofar as relevant is reproduced as below -"Revision by Central Government - (1) ***** (2) The Central Government may, of its own motion or otherwise, call for and examine the record of any proceeding in which any decision or order has been passed under Section 35 or Section 35 A of this Act for the purpose of satisfying itself as to the correctness, legality or propriety of such decision or order and may pass such order thereon as it thinks fit: Provided ***** Provided further that no proceedings shall be commenced under this sub-section in respect of any decision or order (whether such decision or order has been passed before or after the coming into force of this sub-section) after the expiration of a period of one year from the date of such decision or order; Provided ***** (iv) That the impugned order-in-appeal was communicated to the authorities concerned on 12/13-4-1982 and that the Government suo motu called for the record of the proceedings of the instant case and started examining the correctness, legality or propriety of the impugned order in terms of Sub-section (2) of Section 36 of the Act well within the period of one year as provided in the second proviso to the said Sub-section (2) of Section 36.

(v) That meanwhile the Central Excises & Salt Act, 1944 was amended by the Finance (No. 2) Act of 1980 making provisions for the constitution of this Tribunal and substituting a new Chapter VIA in place of erstwhile Chapter VIA in the Central Excises & Salt Act, 1944 whereby Sections 35,35A and 36 of the Act were replaced. The result of this amendment was that the power of revision of the Central Government was taken away and instead a provision was made to file the appeal before this Tribunal against the order of the Appellate Collector with the condition that such appeal should be filed within 3 months from the date of the communication of the impugned order. These provisions appear in new Section 35B of the Act and sub-sections (2) and (3) which are relevant for the purpose of this appeal reads thus -"35B. Appeals to the Appellate Tribunal -(1)***** (2) The Collector of Central Excise may, if he is of opinion that an order passed by the

Appellate Collector of Central Excise under Section 35, as it stood immediately before the appointed day, or the Collector (Appeals) under Section 35A, is not legal or proper, direct any Central Excise Officer authorized by him in this behalf (hereafter in this Chapter referred to as the authorized officer) to appeal on his behalf to the Appellate Tribunal against such order.

(3) Every appeal under this section shall be filed within three months from the date on which the order, sought to be appealed against is communicated to the Collector of Central Excise, or, as the case may be, the other party preferring the appeal.

(vi) It needs to be mentioned here that in order to remove any difficulty which may arise in giving effect to the aforesaid new provisions in the Central Excises & Salt Act, 1944, the Central Government was conferred with the powers to pass any general or special order which appears to be necessary or expedient for the purpose of removing such difficulty, under Sub-section (3) of Section 50 of the Finance (No. 2) Act of 1980. Exercising these powers the Central Government passed "The Customs, Central Excise & Gold (Control) Removal of Difficulties Order, 1982 making the provisions of this Order enforceable from 11th day of October, 1982.

Paragraph 3 of the said Order provides that the period within which the appeal against any order passed before the appointed day (i.e.

11th October, 1982) by the authorities concerned, in our case Appellate Collector, may be filed shall be six months from the date on which the impugned order is communicated to the Central Excise or to the other party preferring the appeal. The said paragraph 3 is extracted below for ready reference - "3. The period within which an appeal against any order passed before the appointed day, by - (a) the Central Board of Excise and Customs or the Appellate Collector of Central Excise under section 35 of the Act, as it stood immediately before that day; or (b) the Central Board of Excise and Customs or the Collector of Central Excise under Section 35A of the Act, as it stood immediately before that day, may be filed, shall, without prejudice to the provisions of Sub-section (5) of Section 35B of the Act, be six months from the date on Which the said order is communicated to the Collector

of Central Excise, or, as the case may be, the other party preferring the appeal.

(vii) That admittedly the present appeal was filed after the constitution of this Tribunal in accordance with the provisions of new Section 35B of the Central Excises & Salt Act. During the pendency of the appeal an application for condonation of delay, was also filed alongwith an affidavit of Shri Ashok Kumar Banerjee, Assistant Collector of Central Excise swearing on oath that against the impugned order-in-appeal a proposal was sent to the Central Government for review under erstwhile Section 36 but the Ministry concerned under their letter dated 16-10-1982 sent back the papers with the advice to consider filing of appeal before this Tribunal under new Section 35B. Accordingly as per provisions the appeal should have been, filed within six months, i.e. by 11-10-1982 but the appeal was "made" (hereinafter to be remembered that "not filed" on 18-12-1982 and the delay in preferring the appeal be condoned in the following circumstances - "Board's letter dated 16-10-1982 alongwith the papers as aforesaid was received on 22-10-1982 and put up to Superintendent (Rev.) on the same date. The said file was received back in the section of the receiving order from Additional Collector on 24-11-1982.

30-11-1982 - The Assistant Collector of the Division was asked to furnish relevant papers required for filing appeal.

4-12-1982 - Order from the Collector for filing appeal to CEGAT was received.

5-12-1982 to 17-12-1982 - Preparation of the Paper Book. 18-12-1982 - File submitted with relevant papers to CEGAT. Under the circumstances, stated above the humble appellant prays for the condonation of delay for the period from 11-10-1982 to 18-10-1982 (18-12-1982) in terms of Section 35B(5) of the Central Excises & Salt Act, 1944." 3. The COD application was taken up for hearing by the referring Bench on 8-7-1987. Arguing on the application for condonation of delay it was contended by the learned Departmental Representative, relying on the decision of this Tribunal rendered in the case of Collector of Central Excise, Bombay v. Crescent Dyes & Chemicals Ltd., 1984 (16) E.L.T. 445 that this Bench should in the first instance satisfy itself as to whether there was, indeed delay in filing the appeal during the prescribed period of limitation. Elaborating on her

arguments it was contended by the Departmental Representative that though the impugned order passed by the Appellate Collector is dated 18-3-1982, it was issued only on 12-4-1982 as would appear from the endorsement appearing on the impugned order. She stated that this order was served on the appellant on 12-4-1982 or a day after. She emphasised that there was no right of appeal at that time and there was only a remedy of revision under Section 36(2), as it then stood. The right of appeal in such matter came to be conferred for the first time on 11-10-1982 when this Tribunal was constituted. In such an event, according to her, limitation for filing the appeal according to the decision rendered in the case of Collector of Central Excise, Bombay v. Crescent Dyes & Chemicals Ltd., supra would start running from 11-10-1982 and therefore, the appeal presented in the Tribunal on 23-12-1982 would be within the period of 3 months as provided under new Sub-section (3) of Section 35B of the Act. In the alternative it was contended that under Removal of Difficulties Order, 1982, six months limitation for filing the appeal is available from the date of communication of the order i.e. to say from 12-4-1982 or 13-4-1982. So calculated, this period of six months of limitation would expire on 13-10-1982 and since the Department has explained the delay from 12-10-1982 onwards the delay if any, in preferring the appeal be condoned. In this connection reliance was placed on the principles of law enunciated by the Hon'ble Supreme Court in the case of Collector, Land Acquisition, Anantnag v. Mst.

Katiji 4. Countering the arguments it was contended by the learned counsel for the respondent that limitation in such a case is not to be computed from 11-10-1982 when the right of appeal was conferred for the first time. Reliance was placed on a decision rendered by this Tribunal in the case of Photo India, Madras v. Collector of Customs, -1985 (21) E.L.T. 750. To the alternative submission made by the learned Departmental Representative it was contended that there was no sufficient cause for condoning the delay.

5. Since after hearing both the parties the Bench felt that there was conflict in the decisions of this Tribunal on the point as to the date from which limitation for filing appeal has to be computed, the Bench directed that the paper may be placed before the Hon'ble President for the constitution of a Larger Bench in accordance with law. That is how the case has come up for hearing before this Larger Bench.

6. When the case was called for hearing Shri A.S. Sunder Rajan, learned JDR duly assisted by Shri S. Chakraborti, JDR at the outset submitted that admittedly when the new provisions of Chapter VIA came into force and the Tribunal was constituted on 11-10-1982 the impugned order-in-appeal dated 18-3-1982 was the subject matter of revision before the Central Government in terms of erstwhile Section 36(2) of the Act and on the constitution of the Tribunal the present appeal was filed. In these circumstances the present appeal should be treated either as "Revision converted into appeal" or in the alternative the revision so pending before the Central Government be deemed to have been transferred to the Tribunal to be disposed of as an appeal filed before it in terms of Sub-section (2) of Section 35P of the Act.

7. Alternatively, he submitted that there was no delay in filing the appeal. Elaborating on his arguments he submitted that there was no right of appeal at the relevant time and there was only a remedy of revision under Section 36 of the Act, as it then stood and that the right of the appeal in respect of such matters came to be conferred for the first time on 11-10-1982 when the new provisions of the Act came into force and the Tribunal was constituted. Consequently, the period of three months provided for filing the appeal under new Section 35B of the Act would run from the date when the appeal provisions came into force, i.e. from 11-10-1982. So computed, the instant appeal would be within time. To support his contention he drew our attention to the certain observations made in paragraph 8(h) and also to paragraph 8(i) of the decision rendered in the case of Collector of Central Excise v. Crescent Dyes & Chemicals Ltd., 8. Alternatively, further he submitted that it is admitted position that earlier before the setting up of the Tribunal the Revenue had the remedy of exercise of revisionary power for which limitation was one year under erstwhile Section 36(2) of the Act. In fact, the impugned Order was taken up for revision by the Government. However, in the meanwhile law was amended and the Tribunal set up and instead of the earlier remedy of revision, right of appeal conferred. Therefore, the appellant in the matter of appeal should have the same limitation of one year which was available in the case of exercise of review or revisionary powers. In this connection, he drew our attention to a decision rendered by this Tribunal in the case of Collector of Central Excise, Ahmedabad v. Anil Starch Products Ltd., 1987 (30) E.L.T. 307.

While drawing our attention to the said case Shri Sunder Rajan with his usual frankness also submitted that the said contention which he has advanced in the instant case was also raised by him in the said case but was repelled. He made it clear that he is reiterating the said contention so that the said case of Collector of Central Excise v. Anil Starch, 9. Concluding his arguments he submitted that if ultimately it is found that the instant appeal was not filed within time then the delay in preferring the appeal be condoned in view of the explanation given in the application for condonation of delay applying the ratio of the decision rendered in the case of Collector, Land Acquisition, Anantnag v. Mst. Katiji, Collector of Central Excise v. Sarabhai Chemicals, 1986 (26) E.L.T. 1057. He also drew our attention to pages 138 and 139 of the Agarwal's Commentaries on the Limitation Act to show that where either appeal is converted into revision or where revision is treated as an appeal the delay may be condoned under the discretionary powers of the Court under Section 5 of the Limitation Act, 1963, if there is no other legal impediment. He also drew our attention to the case of Agarwal Nazarali v. State of Bombay, 10. Countering the contentions raised by the learned Departmental Representative Shri A.K. Virmani, learned counsel for the respondent submitted as follows - (1) The question of treating the revision proceedings pending before the Government under erstwhile Section 36(2) of the Act into the appeal under new Section 36B of the Act or the question that the revision proceedings so pending shall be deemed to have been transferred to this Tribunal on the day of its constitution in terms of Sub-section (2) of Section 35P of the Act does not arise in the instant case for the simple reason that according to the Department itself the Government returned the papers to the authorities concerned for filing the appeal before the Tribunal in terms of Section 35B of the Act, if so advised. On receipt of the papers the Collector concerned vide his order dated 4-12-1982 authorised the Assistant Collector to file the present appeal.

(2) As regards the contention of the learned Departmental Representative that since the right of appeal was conferred for the first time on 11-10-1982 limitation of three months as provided under new Section 35B of the Act would run from the date when the appeal provisions came into force, i.e. from 11-10-1982. Shri Virmani, learned counsel for the respondent, submitted that this approach is wrong as would appear from the decision rendered by this Tribunal in the case of Photo

India, Madras v. Collector of Customs, supra. He, however, submitted that the law laid down in the case of Collector of Central Excise v. Crescent Dyes & Chemicals, supra is not a good law.

(3) As regards the other contention of the learned Departmental Representative that the appellant in the matter of the appeal should have the same limitation of one year which was available in the case of exercise of review or revisionary powers under erstwhile Section 36(2) of the Act, Shri Virmani, learned counsel for the respondents submitted that the said contention which is now tried to be re-agitated was rightly repelled by the Tribunal in the case of Collector of Central Excise, Ahmedabad v. Anil Starch Products Ltd., supra and added that the said decision does not require any reconsideration as nothing new has been pointed out by the learned Departmental Representative to support his prayer for reconsideration of the said case of Anil Starch Products Ltd. (4) As regards, the plea for the condonation of delay Shri Virmani, learned counsel for the respondent submitted that there was no sufficient cause for the delay as would appear from the "Chart of Events" submitted by the appellants. In this connection he cited the following case law -Collector of Central Excise v. Hindustan Lever Ltd., 1986 (24) E.L.T. 639.

(3) Collector of Customs v. Calcutta Hardware Stores, 1985 (22) E.L.T. 590.

11. After replying to the contention raised by the learned Departmental Representative in the order in which these were advanced, Shri Virmani, learned counsel for the respondent submitted that the appeal itself is not entertainable because there is no proper and legal authorisation by the Collector as required under Sub-section (2) of Section 35B of the Act. In this connection, he drew our attention to the authorisation dated 14-12-1982 on record to show that it is a sort of general authorisation which does not fulfil the mandatory requirement of Sub-section (2) of Section 35B of the Act.

12. In his rejoinder Shri Sunder Rajan, learned Departmental Representative submitted that the authorisation dated 14-12-1982 is quite in accordance with the provisions of Sub-section (2) of Section 35B of the Act and therefore, the appeal is entertainable being competent.

13. We have considered the submissions and the case law cited by the parties.

14. As regards the contention of the learned Departmental Representative that the present appeal should be treated as "Revision converted into appeal" or in the alternative the revision which was pending before the Central Government under erstwhile Sub-section (2) of Section 36 of the Act be deemed to have been transferred to the Tribunal in terms of Sub-section (2) of Section 35P of the Act to be disposed of as an appeal filed before it, we are of the considered opinion that in the facts and circumstances of the case this contention has no force. To begin with the revision proceedings relating to the impugned order dated 18-3-1982 which were pending with the Central Government under erstwhile Section 36(2) were never transferred to the Tribunal either expressly or by implication in terms of Section 35P of the Act. On the contrary it would appear from the affidavit of Shri Ashok Kumar Banerjee, Assistant Collector of Central Excise that the Ministry under their letter dated 16-10-1982 sent back the papers relating to the revision with the advice to consider filing of appeal before this Tribunal under Section 35B of the Act. The said averments made by the deponent insofar as relevant are extracted below - "That against the impugned order-in-appeal No. 86/WB/82 dated 18-3-1982 a proposal was sent to the Govt. of India for review of the said order-in-appeal under Section 36 of the Central Excises & Salt Act, 1944 as it stood immediately before the setting up of the Appellate Tribunal but the Ministry under their letter F.No. 198/B/6/2/5/82 - CX.V. dated 16-10-1982 sent back the papers with the advise to consider filing of appeal before the Appellate Tribunal under Section 35B of the Central Excises & Salt Act, 1944." On receipt of the papers from the Government the Collector of Central Excise concerned proceeded under Sub-section (2) of Section 35B of the Act and ultimately passed an order dated 4-12-1982 authorising the Assistant Collector (Tribunal & Review), Collectorate of Central Excise & Customs, West Bengal, Calcutta to act on his behalf in the matter of filing appeal etc. before the Tribunal under Section 35B(2) of the Act.

And it is in pursuance of this authorisation the Assistant Collector had filed the instant appeal with the request (para 5 of his forwarding letter) that the appeal be admitted as provided under Section 35B(5) of the Act and subsequently also filed an application for condonation of delay affirming in his affidavit that "as per

provisions the appeal should have been filed within six months, i.e. by 11-10-1982 but the appeal was made on 18-12-1982. The delay of preparing the appeal is due to the following reasons," stated in the affidavit. Under these circumstances it is difficult to accept the contention of the learned Departmental Representative that the present appeal be treated as "Revision converted into appeal" for the simple reason that at no stage any revision petition was pending before this Tribunal which can be converted into appeal nor the Government itself had sent the papers which were pending for revision under erstwhile Section 36 (2) of the Act in terms of Sub-section (2) of Section 35P of the Act. On the other hand the Government vide its letter dated 16-10-1982 as referred to above, sent back the papers with the advice to consider the filing of the appeal before the Appellate Tribunal under new Section 35B of the Act. Needless to say that neither in memorandum of appeal nor in the covering letter forwarding the appeal there is any such prayer. In the absence of such prayer it is doubtful as to whether Shri Sunder Rajan, learned Departmental Representative who appears in the Tribunal on behalf of the Collector strictly in accordance with his directions can raise the said contention on behalf of the Collector of Central Excise, Calcutta. That apart, for the reasons mentioned above we reject the said contention of the learned Departmental Representative.

15. As regards the other submission of the learned Departmental Representative that there was no delay in filing the appeal for, the right of appeal in respect of such matters came to be conferred for the first time on 11-10-1982 when the new provisions of the Act relating to the appeals came into force and the Tribunal was constituted and consequently the period of three months provided for filing the appeal under sub-section 3 of Section 35B of the Act would run from the date when the appeal provisions came into force i.e. from 11-10-1982, it would suffice to say that such interpretation is not available in the presence of the provisions of Section 35B of the Act and particularly of the "Customs, Central Excise & Gold (Control) Removal of Difficulties Order, 1982". Provisions of Sub-section (3) of Section 35B as extracted above unequivocally requires the filing of the appeal within three months from the date on which order sought to be appealed against is communicated to the Collector of Central Excise or to the other party preferring the appeal, as the case may be. In the instant case, it is admitted to the appellant that

the impugned order was communicated either on 12-4-1982 or a day thereafter. In order to avoid any difficulty which may arise due to the amendments made in the Central Excises & Salt Act (relating to the provisions for appeal) by the Department or by the concerned party the Legislature itself empowered the Central Government under Sub-section (3) of Section 50 of the Finance (No. 2) Act, 1980 to pass any general or special order to do anything not inconsistent with the amended provisions which appear to be necessary or expedient for the purpose of removing the difficulty. In exercise of those powers the Central Government did issue the "Customs, Central Excise & Gold (Control) Removal of Difficulties Order, 1982" dated 11-10-1982 providing for a larger period of six months for filing the appeal against the order of the Appellate Collector of Central Excise passed under erstwhile Section 35 of the Act from the date on which the said order was communicated to the Collector of Central Excise instead of a period of three months as provided in the amended Sub-section (3) of Section 35B of the Act. In other words, the Central Government made a transitional provision of six months period of limitation for filing the appeal instead of a period of three months as provided in the new Section 35B. It deserves to be mentioned here that at the time of the enforcing of the new provisions i.e. Section 35B of the Act and the constitution of the Tribunal this larger period of six months was still available to the appellant-Collector of Central Excise because the impugned order was communicated to him either on 12-4-1982 or 13-4-1982. So counted, from this date of communication of the order to him the period of six months would have expired on 13/14-10-1982, i.e. after the constitution of the Tribunal. On the point of clarity the period of six months as provided under paragraph 3 of the "Customs, Excise & Gold (Control) Removal of Difficulties Order, 1982" was available to the appellants, which he failed to avail.

16. It is true that the following observations made in paragraph 8 of the decision rendered by Special Bench "C" in the case of Collector of Central Excise v. Crescent Dyes & Chemicals, supra support the contention of the learned Departmental Representative wherein it was observed in unequivocal terms that the period of limitation prescribed for such an appeal should be reckoned from the date when the right of appeal for the first time had been conferred. The relevant para of the said judgment may be extracted with advantage which runs thus - "8(h)

Limitation is procedural and has retrospective applicability unless expressly stated to the contrary. There is no provision in the amendments made to the Central Excises and Salt Act restricting the period of limitation prescribed therein to only those cases/appeals that are to be instituted after the amendment had come into force. The time lag between the enactment of the provisions in Section 35B(3) and the date when they were brought into force also leads to the conclusion, in one view, that the period of limitation prescribed therein is applicable to pending proceedings as well.

Nor, unfortunately, is a provision analogous to Section 30 of the Limitation Act, 1963, enacted so as to save cases in which the larger period of limitation prescribed under the repealed provision is still to run out even though the shorter period made applicable by the amended provision had expired.

(i) even so, it is reasonable to infer that when a larger period of limitation or no period of limitation at all has been provided under a repealed provision and a shorter period of limitation or a period of limitation for the first time, as the case may be, is prescribed in a provision taking the place of the repealed provision, such shorter period of limitation or limitation prescribed for the first time, will apply from the date when the repealed provision ceases to govern pending actions; (j) again if a statutory right of appeal within a prescribed period had been conferred in the place of a revision without any period of limitation or a much larger period of limitation, as the case may be, the period of limitation prescribed for such an appeal should be reckoned from the date when the right of appeal for the first time had been conferred." 17. From a conjoint reading of sub-para (i) and (j) as extracted above, it would appear that while observing in sub-para (i) that it is reasonable to infer that when no period of limitation at all has been provided under a repealed provision or a period of limitation for the first time is prescribed in a provision (appeals) taking the place of the repealed provision relating to revision, such limitation prescribed for the first time for the appeal will apply from the date when the repealed provision ceases to govern pending actions (revision), and again in sub-para (j) that if a statutory right of appeal within a prescribed period had been conferred in the place of a revision without prescribing a period of limitation, or a much larger period of limitation, as the case may be, the period of

limitation prescribed for such an appeal should be reckoned from the date when the right of appeal for the first time had been conferred, the Bench deciding the case had in their mind the observations made by their Lordships of the Hon'ble Supreme Court in the case of Syed Yusuf v. Syed Mohammad, A.I.R. 1967 S.C. 1318, wherein their Lordships while dealing with a situation where no period of limitation for filing a suit of a particular nature was prescribed under the old Limitation Act, 1908 but a period for filing such a suit was prescribed under the new Limitation Act, 1963, interpreted Section 30 of the new Limitation Act, 1963, and held that *ex facie*, Section 30 applies to a suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908. Now, if the Limitation Act, 1908 did not prescribe any period of limitation for an application under Section 4 of the Act, then it was an unlimited period and if the present Act prescribed any period of limitation for such application, then it will be a case where the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act and the application under Section 4 in that case would then be required to be made within a period of ninety days next after the commencement of the Limitation Act, 1963.

18. But here in the instant case we are having Paragraph 3 of the Customs, Central Excise and Gold (Control) Removal of Difficulties Order, 1982 which is a transitional provision and provides for a larger period of 6 months for filing the appeal from the date on which the order appealed against is communicated instead of a statutory period of 3 months as provided under Sub-section (3) of Section 35B of the Act.

The said paragraph 3 of the said Order, 1982 is not in *pari materia* with Section 30 of the Limitation Act, 1963. Therefore, the observations made by their Lordships of the Hon'ble Supreme Court in the case of Syed Yusuf v. Syed Mohammed, *supra* are not applicable to the instant case. Further, it appears from the decision rendered in the case of Collector of Central Excise v. Crescent Dyes & Chemicals, *supra* that while making the said observations in para 8, the provisions of Sub-section (3) of Section 50 of the Finance (No. 2) Act, 1980 and the Customs, Central Excise and Gold (Control) Removal of Difficulties Order, 1982 were not noticed, nor they were brought to the notice of the Bench, otherwise the

observations would have been different.

Further, in sub-para 8(h) as extracted above of the decision the Bench has observed that unfortunately there is no "provision analogous to Section 30 of the Limitation Act, 1963, enacted so as to save cases in which the larger period of limitation prescribed under the repealed provision is still to run out even though the shorter period made applicable by the amended provision had expired". These observations in our considered opinion are not correct for the simple reason that a larger period of six months has been prescribed under paragraph 3 of the "Customs, Central Excise and Gold (Control) Removal of Difficulties Order, 1982 instead of 3 months period provided under Sub-section (3) of Section 35B of the Act as discussed by us above. Further on this point a Special Bench of this Tribunal in the case of Collector of Central Excise v. Anil Starch Products Ltd., 1987 (30) E.L.T. 307 while dealing with the question of limitation under Sub-section (3) of Section 35B had an occasion to say that it is not for the Bench to say as to what would happen if limitation expired before the Tribunal was set up. The said observations are reproduced below in extenso - "6. Taking up first the question of limitation under Section 35B, Sub-section (3) is quite clear that appeal has to be filed within three months from the date on which the order sought to be appealed against is communicated to the Collector of Central Excise, or, as the case may be, the other party preferring the appeal. Admittedly and undoubtedly the appeal had been presented long after limitation under this provision had expired. It is not for us to say as to what should happen if limitation expired before the Tribunal was set up" 19. In the result we feel unable to agree with the observations made in the case of Collector of Central Excise v. Crescent Dyes & Chemicals, supra and hold that the limitation would run from the date of communication of the order as provided under Sub-section (3) of Section 35B of the Act read with paragraph 3 of the Customs, Central Excise and Gold (Control) Removal of Difficulties Order, 1982 and not from the date i.e. to say from 11-10-1982 on which the right to appeal was conferred for the first time on the appellant-Collector of Central Excise and the new provisions came into force.

20. The other contention raised by the learned Departmental Representative that the appellant in the matter of appeal should have the same limitation of one year

which was available in the case of exercise of review or revisionary powers under erstwhile Section 36(2) of the Act, has also in our considered opinion no force for the reasons given in the case of Collector of Central Excise v. Anil Starch Products Ltd., 1987 (30) E.L.T. 307 with which we agree and find no reason to reconsider it.

21. The other submissions of the learned Departmental Representative that under the Removal of Difficulties Order, 1982 six months limitation for filing the appeal was available to the department from the date of communication of the order, i.e. from 12-4-1982 or 13-4-1982. So calculated, this period of six months of limitation would expire on 13-10-1982 or 14-10-1982 onwards the delay in preferring the appeal be condoned keeping in view the principles of law enunciated by the Hon'ble Supreme Court in the case of Collector, Land Acquisition, Anantnag v. Mst. Katiji, (1987) 13 E.C.C. 27 (S.C.), cannot also in our considered opinion be accepted as no case for condonation of the delay is made out. In the instant case it is admitted to the department that the appeal was received in the Registry on 23-12-1982. Thus, there was a delay of 70 days even calculated from 14-10-1982 as contended by the learned Departmental Representative. From the letter dated 16-10-1982 of the Central Government under which the papers were sent to the Collector of Central Excise we find that while forwarding the papers to him the department made it clear that the papers are returned for further action at his end, as may be considered necessary under Section 35B of the Act and also expressly drew his attention to para 7 of the Board's instructions issued from F. No. 296/112/82-CX-9 on 11-10-1982 - which relates to the constitution of the Tribunal and the procedure relating to the filing of the appeals. It is admitted to Shri Ashok Kumar Banerjee, Assistant Collector of Central Excise in his affidavit that the said letter dated 16-10-1982 along with the papers was received by the Collector of Central Excise on 22-10-1982 and put up to Supdt. (Rev.) on the same date and the said file was received back in the section after receiving order from Additional Collector on 24-11-1982. The said averments made in the affidavit runs thus - "Board's letter dated 16-10-1982 along with the papers as aforesaid was received on 22-10-1982 and put up to Supdt. (Rev.) on the same date. The said file was received back in the section after receiving order from Additional "Collector on 24-11-1982." 22. From the aforesaid averments it is clear that the file was dealt with leisurely from 23-10-1982. There is no cogent and possible explanation from 23-

10-1982 to 24-11-1982. Even it appears to us that no attempt was made to explain the delay. From the ('Chart of events') as extracted in Paragraph 2 (vii) above it is clear that the draft appeal was prepared on 26-11-1982 and the Assistant Collector concerned was asked to furnish relevant papers required for filing the appeal on 30-11-1982 and that thereafter order from the Collector for filing the appeal to the Tribunal was received on 4-12-1982. For the onwards delay, i.e., from 5-12-1982 to 17-12-1982 it is said in the ('Chart of events') that the paper book was got prepared and the appeal was submitted with the relevant papers to the Tribunal on 18-12-1982 (when in fact the appeal was received on 23-12-1982 in the Registry - a fact not disputed by the learned Departmental Representative at the time of hearing of the appeal). The time said to have been consumed for preparation of the paper book from 5-12-1982 to 17-12-1982 itself indicates that nobody was serious about the running of the period of limitation and everything was done in a casual and leisurely manner.

Recently the Hon'ble Supreme Court in the case of Union of India v. Tata Yodogawa Ltd., 1988 (38) E.L.T. 739 (SC) refused to condone the delay in somewhat similar circumstances, even after accepting that the Government being impersonal takes longer time than the private bodies or the individuals. Besides from the aforesaid admitted facts it is clear that the appeal was received in the Registry of the Tribunal on 23-12-1982 and not on 18-12-1982 as contended by the appellants in the "Chart of events". No attempt was made to explain this delay from 18-12-1982 to 23-12-1982 when the appeal was filed. In other words, there is not even a whisper to explain this delay. From the narration of these facts it is clear that there is no sufficient cause to explain the delay.

23. In view of the above we are satisfied that the appellant has failed to make out any sufficient cause to condone the delay. Hence, the application for condonation of delay is dismissed.

24. However, the matter does not rest here, since Shri A.K. Virmani, learned counsel for the respondent had attacked the very maintainability of the appeal on the ground that there was no authorisation much less a legal authorisation in favour of the Assistant Collector who has signed and filed the appeal in terms of

Sub-section (2) of Section 35B of the Act. To support his contention he drew our attention to Sub-section (2) of Section 35B of the Act and the "authorisation" on record. In reply the learned Departmental Representative could not say anything except to draw our attention to the said authorisation, submitting that it is according to law.

25. We have considered the submissions and find much force in the contention raised by Shri A.K. Virmani, learned counsel for the respondent. To appreciate the controversy in hand it would be useful to extract the said Sub-section (2) of Section 35B of the Act and also to reproduce the "authorisation" in dispute.

"(2) The Collector of Central Excise may, if he is of opinion that an order passed by the Appellate Collector of Central Excise under Section 35, as it stood immediately before the appointed day, or the Collector (Appeals) under Section 35A, is not legal or proper, direct any Central Excise Officer authorized by him in this behalf (hereafter in this chapter referred to as the authorized officer) to appeal on his behalf to the Appellate Tribunal against such order." "COLLECTORATE OF CENTRAL EXCISE & CUSTOMS : WEST BENGAL : CALCUTTA CUSTOM HOUSE (ANNEXE) : 15/1, STRAND ROAD : CAL-CUTTA-700 001.

I hereby authorise Assistant Collector (Tribunal & Review), Collectorate of Central Excise & Customs, West Bengal, Calcutta to act on my behalf in the matter of filing appeal/applications/cross objections/statement of references before the Customs, Excise & Gold (Control) Appellate Tribunal in terms of Sections 35B(2) and 35B(4), 35E(I), 35G(I) and 35G(2) of the Central Excises & Salt Act, 1944.

C.No. V-GL(2) 60-CE/WB/Review/82/78590-91E Dated 14-12-1982 Copy forwarded to:- 1. East Regional Bench, Customs, Excise & Gold (Control) Appellate Tribunal, Bamboo Villa, 7th Floor, 169, Acharja Jagdish Ch. Bose Road, Calcutta-14.

2. Special Bench of Customs, Excise and Gold (Control) Appellate Tribunal, 37, Nehru Place, New Delhi.

26. From a mere reading of the said authorisation it is clear that it is of a general nature and not with reference to any particular matter and was not sufficient to show that the Collector had authorised the Assistant Collector to file the present appeal as required under Sub-section (2) of Section 35B of the Act. It is significant to note that identically worded "Authorisation" which was also given by the Collector of Central Excise, Calcutta (who is the appellant in this appeal also) was the subject-matter of dispute before this Tribunal in appeal No. E/463/85-C in the case of Collector of Central Excise, Calcutta v. Shalimar Paints Ltd., and the Tribunal after hearing the parties vide its order No. 697/88-C dated 12-9-1988 [since reported in 1989 (41) E.L.T. 83] held that the said authorisation being of a general nature was not in terms of Sub-section (2) of Section 35B of the Act and therefore, the appeal filed by the Assistant Collector was not maintainable for, it was filed by an officer of the Excise Department who was not authorised by the Collector to file it. We agree with the reasonings and conclusion given in the said case of Collector of Central Excise v. Shalimar Paints Ltd., and would also like to add as under - (i) From a simple analysis of the said Sub-section (2) of Section 35B of the Act as extracted above it would be clear that it is in two parts namely - (a) The first part of the Sub-section relates to the power of the Collector, Central Excise to form his opinion about the legality or propriety of the order passed by the Appellate Collector of Central Excise under erstwhile Section 35; and (b) the second part gives him power to direct any Central Excise Officer who is authorised by him in this behalf to appeal on his behalf to the Tribunal against such order when it is not actually filed by him.

27. The words "in this behalf" appearing in the second part of this Sub-section namely "direct any Central Excise Officer authorised by him in this behalf to appeal on his behalf to the Appellate Tribunal against such order" are significant and lead to the only conclusion that the direction to the authorised officer to file appeal on his behalf must be specific to file a particular appeal. In other words direction of a general nature to act on his behalf in the matter of filing appeal/applications/cross objections/statement of references before the Tribunal in terms of Section 35B(2) etc. cannot be said to be a direction to the Central Excise Officer by him to file appeal "in this behalf". It is significant that the words "in this behalf" appearing in Sub-section (2) of Section 35B does not find a place in Sub-section (2) of Section

129A of the Customs Act which also deals with the power of the Collector of Customs to direct the proper officer to appeal on his behalf to the Tribunal against an order passed by the Appellate Collector of Customs under the erstwhile Section 128 when it is found by him that such order was not legal or proper. For comparison the said Sub-section (2) of Section 129A of the Customs Act may be reproduced as below - "(2) The Collector of Customs may, if he is of opinion that an order passed by the Appellate Collector of Customs under Section 128, as it stood immediately before the appointed day, or the Collector (Appeals) under Section 128A, is not legal or proper, direct the proper officer to appeal on his behalf to the Appellate Tribunal against such order." 28. Thus, from the inclusion of the words "in this behalf" in Section 35B(2) of the Central Excises and Salt Act it is clear that under the Central Excises and Salt Act the direction to file the appeal before this Tribunal on behalf of the Collector, Central Excise must be with reference to a particular matter and a direction of a general nature to act on his behalf in the matter of filing appeal/applications/cross-objections/statement of references before this Tribunal under the various provisions of the Act would not satisfy the requirement of Sub-section (2) of Section 35B of the Act. However, we would like to make it clear that whether the "Authorisation" of a general nature would satisfy the requirement of Sub-section (2) of Section 129A of the Customs Act is not a question before us therefore, whatever we have stated here would not apply if any such question arises under Customs Act at any point of time to come and we leave this question open.

29. Before we part with the case we would also like to say that the provisions of Sub-section (2) of Section 35E of the Central Excises and Salt Act are not merely directory or empty formalities. A plain reading of the said Sub-section leaves no doubt that the compliance with the requirement of it is mandatory. This was the view which was taken by this Tribunal in the case of Collector of Central Excise, Calcutta v. American Refrigerator Co. Ltd., 1984 (15) E.L.T. 428. We respectfully agree with it.

30. In view of the above we are constrained to hold that the appeal is not maintainable being filed by an officer of the Excise Department who was not authorised by the Collector to file it.

31. In the result we dismiss the appeal as not maintainable and also being barred by time.

32.01 [Order per : P.C. Jain, Member (T)]. - I have carefully gone through the proposed order prepared by learned brother Shri G.P.Agarwal and proposed to be concurred in by the other 3 learned brothers namely S/Shri Harish Chander, Judicial Member, I.J. Rao, Technical Member and D.C. Man-dal, Technical Member.

32.02 I regret respectfully that I am unable to agree to the conclusion regarding limitation in respect of appeals filed against orders passed under Sections 35 or 35A of the Central Excises and Salt Act as they stood before 11-11-1982 which were liable to revision under sub-sections (1) and (2) of Section 36 before 11-10-1982.

32.03 Facts have been set out lucidly in brother Agarwal's order. I need not, therefore, recapitulate them.

33.01 After going through Supreme Court's judgment in the case of Syed Yusuf v. Syed Mohammed [A.I.R. 1967 S.C. 1318] referred to in para 17 of the proposed order, I am of the considered view that para 3 of the Removal of Difficulties Order (hereinafter referred to as the said Order) is not applicable to the instant case. The said Order, as the name implies should alleviate the difficulties caused by commencement of a new Act in place of an old one. Para 3 of the said Order extracted in sub-para (iv) of para 2 (factual backdrop) merely enlarges the period of appeal to six months from the date on which the order passed by the Central Board of Excise and Customs or the Appellate Collector of Central Excise under Section 35 of the Central Excises Act, or, passed by the Central Board of Excise and Customs or the Collector of Central Excise under Section 35A of the Central Excises Act (hereinafter referred to as the Act) as it stood immediately before the appointed date, from the ordinary period of three months laid down in Section 35B of the new provisions of appeals. It is apparent that the said Order did not go far enough to alleviate the hardship caused on account of prescription of the shorter period of limitation in the new provision (Section 35B) as against a period without limitation or larger period of one year of revision proceedings prescribed in

erstwhile Section 36 of the Act against orders passed under the old Sections 35 and 35A.33.02 It could happen, as it happens in the instant case, that the larger period of one year for revision proceedings against orders passed under the old provisions of Sections 35 and 35A was yet to run out before commencement of the new provisions w.e.f. 11-10-1982, even though the shorter period of 3 months prescribed under the new provisions of Section 35B or the larger period of six months prescribed in the said Order had already expired or was about to expire within a few days.

33.03 The new provisions (Section 35B) providing for a shorter period of 3 months in such cases, therefore, appear to confiscate the existing cause of action arising from the Appellate Collector's or Central Board of Excise and Customs Order by way of power to revise such orders vested in the Central Government in terms of the old provisions of Section 36. Limitation provisions, therefore, enacted by the new provisions should be construed liberally and it is in this context that the observations of the Tribunal in Collector of Central Excise v. Crescent Dyes & Chemicals Ltd. extracted in para 16 of the proposed order require to be appreciated. In my view such observations of the Tribunal emanate from the converse of the following observations of the Hon'ble Supreme Court in para 3 in Syed Yusuf v. Syed Mohd. mentioned supra:- "Now the Hyderabad Limitation Act did not apply to a suit for recovery of possession of a wakf property. The result was that under the corresponding law in force in Hyderabad, there was no limitation for such a suit. In other words, the period of limitation prescribed for the suit by the corresponding law in Hyderabad was an unlimited period. Article 142 of the Indian Limitation Act, 1908 applies to a suit for recovery of possession of the wakf property. As it prescribed a shorter period of limitation for the institution of the suit, Section 30 enabled the plaintiffs to institute the suit within a period of two years after April 1, 1951. The Part B States (Laws) Act, 1951 while extending the Indian Limitation Act, 1908 to Hyderabad thus allowed the plaintiffs reasonable time to institute the suit for recovery of the property. The extension of the Indian Limitation Act, 1908 to Hyderabad and the consequential change in law prescribing a shorter period of limitation did not confiscate the existing cause of action and must be regarded as an alteration in the law of procedure for the enforcement of the cause of action.

We must, therefore, apply the normal rule that the law of limitation applicable to the suit is the law in force at the date of the institution of the suit." 33.04 In other words, from the above emphasised portion it is apparent conversely that if the shorter period prescribed by the new provisions confiscates the existing cause of action, the normal rule i.e. the law of limitation as is available on the date of institution of the appeal should not apply. From that point of view, it would be reasonable to reckon the limitation in such cases as the instant case, from the date of commencement of new provisions in Section 35B. The ratio of Tribunal's decision in Collector of Central Excise v. Crescent Dyes and Chemicals which is well reasoned is applicable in the instant case; otherwise the cause of action arising out of the order passed under the old Section 35 by the Appellate Collector gets confiscated. It would be unreasonable to impute an intention to the new provisions which would abrogate the existing causes of action without any express words to that effect. This is on account of the fact that a provision similar to Section 30 of the Limitation Act, 1908 (or for that matter Limitation Act, 1963) has not been incorporated in the new appeal provisions of the Act. Looked at from this angle, the appeal is within time and the question of condonation of delay in filing the appeal does not arise.

33.05 Further, the reasoning given in para 18 of the proposed order for discarding the Tribunal's observation in C.C.E. v. Crescent Dyes & Chemicals does not, in my respectful view, appear to be correct on facts. The so-called larger period of six months prescribed by the said Order should be seen not with reference to the new provisions in Section 35B but it should be seen with reference to the period of limitation prescribed under repealed provisions i.e. Section 36 of the Act as it stood before the appointed date wherein a larger period of one year was prescribed. This is what is the ratio of Syed Yusuf v. Syed Mohd. It would not, therefore, be correct to say that said Order prescribed a period of limitation larger than prevalent under the old provisions.

34.01 In any case, even if the said Order is strictly read and the limitation in the instant case is not taken to run from 11-10-1982 i.e.

the date of inception of the new provisions, there is a strong case for condonation of the delay in view of the following facts:- (i) There was a larger period of limitation under the old provisions of Section 36; (ii) This was a transitional period for filing of appeals before the Tribunal; and (iii) There is lack of any clear legal authority for taking the view that in such existing causes of action the time limit as prescribed in the new provision would apply in cases where there was a larger period of limitation under the old or repealed provisions and that period had not yet expired and no provisions on the lines of Section 30 of the Limitation Act, 1908 or of 1963 have been enacted in the Central Excises Act.

35. The aforesaid findings are however, only of academic effect so far as this appeal is concerned. I agree to the finding in para 30 of the proposed order that appeal is not maintainable for lack of proper authority. The appeal is dismissed on that count.

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