

**Delta Impex Vs. Commissioner of Customs**

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**SooperKanoon Citation :** [sooperkanoon.com/682621](http://sooperkanoon.com/682621)

**Court :** Delhi

**Decided On :** Feb-13-2004

**Reported in :** 110(2004)DLT209; 2004(73)DRJ417; 2004(93)ECC322; 2004(173)ELT449(Del)

**Judge :** B.C. Patel, C.J. and; Badar Durrez Ahmed, J.

**Acts :** [Customs Act, 1962](#) - Sections 14 and 128; [Limitation Act, 1963](#) - Sections 4 to 24 and 29(2); Central Excise Act - Sections 35 and 35(1); [Payment of Gratuity Act, 1972](#) - Sections 7(7); [Motor Vehicles Act, 1939](#) - Sections 58(2) and 58(3); Sales Tax Act; Uttar Pradesh Sales Tax Act, 1948 - Sections 10, 10(3)B and 68; Uttar Pradesh Sales Tax Rules, 1948; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21; Code of Criminal Procedure (CrPC) - Sections 195

**Appeal No. :** CUS AC No. 9/2003

**Appellant :** Delta Impex

**Respondent :** Commissioner of Customs

**Advocate for Def. :** Nemo

**Advocate for Pet/Ap. :** Piyush Kumar and; Navneet Panwar, Advs

**Judgement :**

B.C. Patel, C.J.

1. The question raised by the learned counsel for the appellant is as under:

'Whether the provision of Section 128 of the [Customs Act, 1962](#) completely bars the Commissioner ( Appeals) from condoning the delay beyond a period of 30 days even in a deserving case and that despite the order made by the Commissioner (Appeals) is it incumbent upon the Tribunal to consider the appeal on merits '

2. The facts of the case relevant for disposal of this appeal are as under:

3. The order in original was made on 5th November, 2001, after hearing the petitioner whereby the demand was confirmed with interest. The said order was challenged by the petitioner by preferring an appeal before the Commissioner of Customs (Appeals) being Appeal No. CCA/424/ACU/2002. The order impugned was received by the appellant on 7th November, 2001. From the order made by the Commissioner of Customs (Appeals), it transpires that the appeal was filed on 13.4.2002; a notice was issued on 14.8.2002, calling upon the appellant that the appeal was not maintainable. The consultant of the petitioner stated that he has nothing more to add to what is stated in the memorandum of appeal. To substantiate his say, for condensation of delay, a medical certificate was produced.

4. The Appellate Authority pointed out that Section 128 of the [Customs Act, 1962](#) ( hereinafter referred to as the Act) stipulates a period of limitation of 60 days from the date of communication of the order for preferring an appeal. The Commissioner was also aware that if the appellant was prevented by sufficient cause from presenting the appeal and such delay is of not more than 30 days, the delay can be condoned, however, if it is beyond 30 days, then the appeal cannot be entertained. As there was delay of more than 30 days, the appeal was dismissed as time barred. Against this order, the Customs Excise and Gold (Control) Appellate Tribunal, New Delhi, was approached by preferring an appeal being No. C-01/03A. The Tribunal dismissed the appeal affirming that the Commissioner ( Appeals ) was not competent to condone the delay. For the said purpose, the Tribunal placed reliance on a decision delivered by the Tribunal in the case of M/S Abhishek Auto Industries v. C.C. Mumbai ( Import), being final order

No. 167/2003-B dated 10-12-2002 in appeal No. C/454/2002-B.

5. Learned counsel appearing before us submitted that in view of the provisions contained in Section 5 of the [Limitation Act, 1963](#) the application for condensation of delay ought to have been considered by the appellate authority and the delay ought to have been condoned. It was further submitted that the Tribunal ought to have entertained the appeal on merits. According to the learned counsel for the petitioner, considering the provisions contained in Section 29(2) of the Indian [Limitation Act, 1963](#) read with Section 5 thereof, irrespective of the fact that the matter was under the Customs Act, the appellate authority ought to have condoned the delay, examined the matter on merits, it could not have dismissed the appeal on the ground that the Commissioner (Appeals) can only condone the delay, if an appeal is presented within a period of 30 days after the statutory period of 60 days in view of Section 128 of the Act. The said Section 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 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.

(2) Every appeal under this Section, shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf'

6. The learned counsel for the petitioner placed reliance on the decision of a learned Single Judge of Allahabad High Court in the case of Jai Hind Bottling Co (P) Ltd v. Commissioner ( Appeals) Central Excise Allahabad, reported in : 2002(146)ELT273(All) . The learned Single Judge observed that Section 35 of the Central Excise Act, no doubt, lays down a period of 60 days to prefer an appeal and also within a further period of 30 days, if the Commissioner ( Appeals) is satisfied that within such period of 30 days, the appeal could not be preferred for the reasons beyond the control of the appellant. The learned Single Judge also

observed that Section 35 of the Central Excise Act does not indicate that Section 29(2) of the Limitation Act read with Section 5 of the said Act, excludes the applicability of the said provisions to Section 35 of the Central Excise Act. It is in view of this, though the appeal was filed beyond 99 days, that the Court remanded the matter with the direction to dispose of the application in the light of the observations made in the said order.

7. A Division Bench of the Andhra Pradesh High Court in the case of Shanti Alloys Pvt Ltd v. CCE Hyderabad, reported in 1999 (109) ELT 79, had an occasion to examine the identical question. The Division Bench pointed out that it cannot be said that the Tribunal has committed any illegality in dismissing the appeal filed against the order of the appellate authority refusing to condone the delay and to entertain the appeal. In view of the specific provision contained in the proviso to Section 35(1) of the Central Excise Act, delay beyond 90 days cannot be condoned. The learned counsel for the petitioner submitted that the decision is *sub silentio* and therefore is of no assistance to the Court.

8. The Right to prefer an appeal is a statutory right, however, it does not mean that there cannot be any restriction on that right to be exercised within a particular period. Parliament has the power to put restrictions on exercise of such power unless exercised within a stipulated period by making a legislation that the right shall be exercised within that stipulated period. After the delay period is over right of appeal cannot be exercised and for that proviso cannot be considered to be bad or unreasonable. Under different statutes, restrictions have been placed on the exercise of the right to prefer appeals. The right of appeal is given to the party aggrieved, but that right is required to be exercised by preferring an appeal within a period of sixty days from the date of communication in view of Section 128 of the Act. At the same time, if the party aggrieved is unable to prefer an appeal within a period of 60 days, but if he prefers an appeal thereafter, within a period of 30 days, then, the Appellate Authority on being satisfied that he was prevented by a sufficient cause from presenting the appeal, may allow the party to present the appeal within a further period of 30 days. Thus, the right is not taken away, but by the prescribed procedure, the right is to be exercised within the period indicated.

9. In case of Collector of C.E.Chandigarh v. Doaba Co-operative Sugar Mills, reported in : 1988(37)ELT478(SC) , the Supreme Court pointed out that the authorities functioning under the Act are bound by the provisions of the Act. If the proceedings are taken under the Act by the Department, the provisions of limitation prescribed in the Act will prevail. In the aforesaid case, the Court also pointed out that in case of Mills India Limited v. Assistant Collector of Customs, reported in 1987(30) ELT 641 (SC), the Court observed that the Customs Authorities acting under the Act were not justified in disallowing the claim as they were bound by the period of limitation provided there in the relevant provisions of the [Customs Act, 1962](#).

10. The period of limitation prescribed by the Act for filing an application being different from the period prescribed under the Limitation Act, by virtue of Section 29(2) of the said Act, it shall be deemed as if the period prescribed by the different Act is the period prescribed by the schedule to the Limitation Act. However, it would be difficult to say that Section 5 of the Limitation Act is intended to be made applicable in view of the proviso to Section 128 of the Act in the instant case.

11. In the case of VAN & CO V. BABUBHAI LALLU BHAI, reported in 1981 GLH 5, a Division Bench of Gujarat High Court, while examining sub-section (7) of Section 7 of the [Payment of Gratuity Act, 1972](#) and the provisions contained in the Limitation Act, pointed out that the provisions in Section 7(7) are inconsistent with Section 5 of the Limitation Act. Sub-section (7) of Section 7 of Payment of Gratuity Act, provides for extension of the period of limitation similar to one which is provided in Section 128 of the Act.

12. 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.

13. The Court is required to examine the scheme of the special law, and the nature of the remedy provided therein. Considering these aspects, the Court will

have to find out whether the Legislature intended to provide a complete code by itself which alone should govern the matters provided by it. On examination of the relevant provisions, if it becomes clear that the provisions of Section 5 of the Limitation Act are necessarily excluded, then the said provisions cannot be called in aid to supplement the provisions of the Act. It is open to the Court to examine whether and to what extent the nature of the provisions contained in Limitation Act in comparison with the scheme of the special law are excluded from operation. When Section 128 of the Customs Act specifically provides the period of limitation and a further period of 30 days only during which the applicant was prevented by sufficient cause from presenting an appeal can be condoned, meaning thereby that the legislature has given a mandate that delay could be condoned only for the specified period, prescribed in the proviso to section 128 of the Act, and not further.

14. In the instant case, a separate period of limitation is provided, as also the period for which delay can be condoned. The Legislature was aware about the provisions contained in Section 5 of the Limitation Act, yet with an intention to curb the delay in taxation matters, it has specially provided that after the statutory period, if there is delay of 30 days, on showing sufficient grounds for delay of 30 days, that can be condoned and no further. Thus, applicability of Section 5 of the Limitation Act is specifically excluded.

15. The expression 'expressly excluded' in sub section 2 of Section 29 of the Limitation Act means an exclusion by express words, i.e. by express reference and not exclusion as a result of logical process of reasoning. In the instant case, there is no question of implied exclusion but, it specifically provides a different period of limitation, as also the period during which, if delay has occurred, it could be condoned.

16. With regard to the applicability of sections 4 to 24 of the Limitation Act ( inclusive) one will have to refer to sub-section (2) of Section 29 of the [Limitation Act, 1963](#). It specifically states that these provisions shall apply only so far as and to the extent to which, they are not expressly excluded by special or local law. Reading the language of Section 128 of the Customs Act and Section 5 of the

Limitation Act, it is very clear that extension of time for a period of 30 days only can be condoned subject to satisfaction and not beyond that. From an examination of Section 128 of the Customs Act, it is very clear that Section 5 of the Limitation Act is expressly excluded as a specific provision is made in Section 128

17. In the case of Mohd Ashfaq v State Transport Appellate Tribunal, : [1977]1SCR563, the Supreme Court had an occasion to examine Section 58(2) of the [Motor Vehicles Act, 1939](#), its proviso and sub-section (3) for renewal of permits. Para 8 of the judgment is reproduced hereunder:-

'8. It is, therefore, clear that sub-section (3) of Section 58 confers a discretion on the Regional Transport Authority to entertain an application for renewal when it is made beyond the time limit specified in the proviso to sub-section (2), but not more than 15 days late and the discretion is to be exercised in favor of entertaining the application for renewal when it is shown that there was sufficient cause for not making it in time. Now the question which arises is: does Section 5 of the [Limitation Act, 1963](#) apply so as to empower the Regional Transport Authority, for sufficient cause, to entertain an application for renewal even where it is delayed by more than 15 days? Section 29, sub-section (2) of the [Limitation Act, 1963](#) makes Section 5 applicable in the case of an application for renewal unless its applicability can be said to be expressly excluded by any provision of the Act. The only provision of the Act sought to be pressed into service for this purpose was sub-section (3). Does sub-section (3) expressly exclude further extension of time under Section 5? If it does, then Section 5 cannot be availed of by the appellant for condensation of the delay. Sub-section (3) in so many terms says that the Regional Transport Authority may condone the delay in making of an application for renewal and entertain it on merits provided the delay is of not more than 15 days. This clearly means that if the application for renewal is beyond time by more than 15 days, the Regional Transport Authority shall not be entitled to entertain it, or in other words, it shall have no power to condone the delay. There is thus an express provision in sub-section (3) that delay in making an application for renewal shall be condonable only if it is of not more than 15 days and that expressly excludes the applicability of Section 5 in cases where an application for renewal is delayed by more than 15 days.'

18. In the case of Commissioner of Sales Tax v. Parson Tools & Plant 35 STC 413, the Supreme Court pointed out as under:-

'Thus the principle that emerges is that if the legislature in a special statute prescribes a certain period of limitation for filing a particular application there under and provides in clear terms that such period on sufficient cause being shown, may be extended, in the maximum, only up to a specified time limit and no further, then the tribunal concerned has no jurisdiction to treat within limitation, an application filed before it beyond such maximum time limit specified in the statute, by excluding the time spent in prosecuting in good faith and due diligence any prior proceeding on the analogy of Section 14(2) of the Limitation Act.'

19. The period of limitation as also condonable period is prescribed and, therefore, if the application is preferred after the expiry of the period indicated in Section 128 and 30 days, the Commissioner was not entitled to condone the delay.

20. Considering the scheme, and language of the Sales Tax Act, it does appear that the application of Section 5 of the Limitation Act, is excluded. This, in the opinion of the Court, is the only possible interpretation as the legislative intent is clear. The period of 60 days is prescribed as limitation for preferring an appeal, secondly the appellate authority has no discretion to extend this period beyond the further period of 30 days, even if sufficient cause is shown. Reading the Section, it is very clear that the Act gives no jurisdiction to the appellate authority to extend the limitation, even in a 'suitable' case for a further period of more than thirty days. It is also required to be noted that delay in disposal of revenue matters adversely affects the steady inflow of revenue and financial stability of the State. The scheme of Section 128 of the Act is, therefore designed to ensure speedy and final determination of fiscal matters within a certain time schedule. It may apparently seem that the provision is harsh but merely because the provision is harsh it cannot be said to be bad. Be that as it may, from the scheme of the Act and the language used in Section 128, the intention of the legislature to exclude the unrestricted application of principles of Section 5 is manifestly clear. The provision contained in the Limitation Act, which the legislature did not, after due

application of mind, incorporate in the Sales Tax Act, cannot be imported into it by analogy. 'The Will of the legislature is the supreme law of the land and commands perfect obedience'. ( Maxwell on Interpretation of Statute, XI Edn.) It is also required to be noted that judicial power is to be exercised for the purpose of giving effect to the will of legislature.

21. It would be worth referring Section 5 of the [Limitation Act, 1963](#) :

5. Extension of prescribed period in certain cases. - Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the 'Court' that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation. - The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.'

22. So far as taxing authorities are concerned, are held as instrumentality of State by the Supreme Court in the case of Smt Ujjam Bai v. State of U.P. : [1963]1SCR778 The Supreme Court observed as under:

' The taxing departments are instrumentalities of the State. They are not a part of the legislature; nor are they a part of the judiciary. Their functions are the assessment and collection of taxes, and in the process of assessing taxes, they have to follow a pattern of action which is considered judicial. They are not thereby converted into courts of civil judicature. They still remain the instrumentalities of the State and are within the definition of 'State' in Article 12.':

23. The above observations were quoted with approval by the Supreme Court in the case of Jagannath Prasad v. State of U.P. : [1963]2SCR850 , and it was held that a sales tax officer under U.P. Sales Tax Act, 1948 was not a 'Court' within the meaning of Section 195 of the Code of Criminal Procedure, although he is required to perform certain quasi judicial function.

24. It is also required to be noted that as pointed out by the Supreme Court in case of Parson Tools & Plant ( supra) the taxing authorities are not 'Court' and therefore, Section 5 of the [Limitation Act, 1963](#), cannot be invoked as that Section empowers the Court to extend the period of limitation on being satisfied. In the case of Parson Tools and Plant (supra) Section 14(2) of the [Limitation Act, 1963](#) was sought to be invoked. However, the Court pointed out that, in terms or in principle, Section 14(2) cannot be invoked for excluding the time spent in prosecuting an application under Section 68 of UP Sales Tax Rules 1948 for setting aside an order of dismissal of appeal in default in computing the period of limitation by filing a revision under Section 10 of the UP Sales Tax Act, 1948. The Court also held that the appellate authority and the judge ( Revisions) Sales tax, exercising jurisdiction under the Sales Tax act are not Courts but are merely administrative tribunals and therefore Section 14 of the Act does not in terms apply to the proceedings before such Tribunals. Section 10(3) B of the UP Sales Tax Act, 1948 reads as under:

'(3-B). The application under sub-Section (3) shall be made within one year from the date of service of the order complained of, but the revising authority may on proof of sufficient cause entertain an application within a further period of six months'.

25. The Supreme Court pointed out that the revising authority has no jurisdiction to extend the limitation for a further period of more than six months. Similar is the situation in the instant case. A further period of 30 days can be extended and not further. Thus when the maximum time limit is specified or a condonable period is prescribed, then only the delay within the specified time or condonable period can be condoned, and no further.

26. In our opinion, considering the aforesaid, the Tribunal has committed no error in dismissing the appeal.