A M/S THAKKER SHIPPING P. LTD.

v.

COMMISSIONER OF CUSTOMS (GENERAL)

(Civil Appeal No. 7696 of 2012)

B OCTOBER 30, 2012

[R.M. LODHA AND ANIL R. DAVE, JJ.]

Customs Act, 1962 - s. 129A(5) - Condonation of delay under - For delay in filing an application u/s. 129D(4) - C *Permissibility - Held: Customs, Excise and Service Tax Appellate Tribunal is competent to invoke s.129A (5) for condoning the delay - Provisions of s. 129A(1) to (7) have been mutatis mutandis made applicable to the applications u/s. 129D(4) - Legislative intent was to make entire s. 129A* D *supplemental to s. 129D(4) - s. 129A(5) stands incorporated in s. 129D(4) by way of legal fiction - Interpretation of Statutes - Legislative intent - Legal Fiction.*

The question for consideration in the present appeal E **was whether it is competent for the Customs, Excise and Service Tax Appellate Tribunal to invoke Section 129A(5) of the Customs Act, 1962, where an application u/s. 129D(4) of the Act was not made by the Commissioner within the prescribed time, and condone the delay in making such application if it is satisfied that there was** F **sufficient cause for not presenting it within that period.**

Dismissing the appeal, the Court

HELD: 1. It is competent for the Tribunal to invoke G **Section 129A(5) of Customs Act, 1962, where an application under Section 129D(4) has not been made within the prescribed time and condone the delay in making such application if it is satisfied that there was**

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sufficient cause for not presenting it within that period. [Para 20] [943-C]

2. 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". An application made under Section 129D(4) pursuant to the order passed under sub-sections (1) or (2) shall not 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. [Para 12] [939-B-G]

3. 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,

A 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). Section 129A has been incorporated in Section B 129D. Section 129A(5) has become integral part of Section 129D(4) of the Act. [Paras 12 and 13] [939-G-H; 940-A-B-D]

4. Parliament intended entire Section 129A, as far as applicable, to be supplemental to Section 129D(4) and C 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 D 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 E 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 F 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 G presenting it within that period. [Para 14] [940-E-H; 941-A]

Commissioner of Central Excise v. Azo Dye Chem (2000) 120 ELT201 (Tri-Delhi) - not approved.

H *Commissioner of Customs and Central Excise v. Hongo*

India Pvt.Ltd. and Anr. **(2009) 5 SCC 791 - held inapplicable.**

*Delhi Cloth and General Mills Co. Ltd. v. State of Rajasthan and Ors.***(1996) 2 SCC 449: 1996 (1) SCR 518;** *Fairgrowth Investments Ltd.v. Custodian* **(2004) 11 SCC 472: 2004 (5) Suppl. SCR 505;** *UCOBank and Anr. v. Rajinder Lal Capoor* **(2008) 5 SCC 257: 2008 (5) SCR 775 - referred to.**

Case Law Reference:

(2000) 120 ELT 201 (Tri-Delhi)	**Not approved**	**Para 12**
(2009) 5 SCC 791	**held inapplicable**	**Para 16**
1996 (1) SCR 518	**Referred to**	**Para 17**
2004 (5) Suppl. SCR 505	**Referred to**	**Para 18**
2008 (5) SCR 775	**Referred to**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7696 of 2012.

From the Judgment & Order dated 13.08.2010 of the High Court of Judicature at Bombay in Customs Appeal No. 8 of 2009.

Rony O. John, Surti Sabharwal (for Praveen Kumar) for the Appellant.

R.P. Bhatt, K. Swami, Vikas Bansal, B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. The High Court answered in the affirmative the following question:

"Whether the CESTAT has discretionary power under

A Section 129A (5) of the Customs Act, 1962 to condone the delay caused in filing the appeal under Section 129D(3) [sic, 129D(4)] of the said Act, when there was sufficient cause available to appellant for not filing it within the prescribed period before the Appellate Authority".

B 3. The facts leading to the present appeal are these. A container was intercepted by M & P Wing of Commissioner of Customs (Preventive), Mumbai on 11.01.2001. It was found to contain assorted electrical and electronic goods of foreign origin. The said goods were imported by M/s Qureshi C International and the cargo was cleared from Nhava Sheva. The clearance of the goods was handled by M/s Thakker Shipping P. Ltd., the appellant, referred to as the Custom House Agent ('CHA' for short). On physical verification, the value of seized cargo was estimated at Rs. 77,10,000/- as local market value D as against the declared value of Rs. 10,03,690/-. The importer could not be interrogated. On search of premises of CHA, the books relating to import export clearance were not found for verification. In the statement of Vijay Thakker, proprietor of the CHA, recorded under Section 108 of the Customs Act, 1962 E (for short, 'the Act'), he accepted that he attended the import clearance work and introduced the importer to the overseas suppliers and bankers for financial assistance; the bill of entry for the clearance of subject goods had been filed without proper description and correct value and he failed to inform the F Customs Officers about the subject goods, despite having attended the examination of 5% goods prior to the clearance. Accordingly, the inquiry officer recorded his findings.

4. Initially, the appellant's CHA licence was placed under suspension pending inquiry under Regulation 23 of Custom G House Agent Licencing Regulations, 2004 but the suspension order was set aside by the Customs, Excise and Service Tax Appellate Tribunal (for short, 'Tribunal') and CHA licence was restored. The inquiry under Regulation 23, however, proceeded against the CHA on diverse charges. The Commissioner of H Customs (General) Mumbai by his order in original dated

21.07.2004 dropped the proceedings under Regulation 23 by rejecting the findings of the inquiry officer. A

5. The Committee of Chief Commissioners of Customs (for short, 'the Committee') constituted under sub section (1B) of Section 129A of the Act called for and examined the records of the proceedings leading to order in original dated 21.07.2004 passed by the Commissioner of Customs (General) Mumbai (for short, 'the Commissioner') for satisfying itself as to the legality and propriety of the said order. The Committee on consideration of the entire matter directed the Commissioner to apply to the Tribunal for determination of the following points, namely; (1) whether taking into consideration the facts and circumstances noticed in the order, the order of the Commissioner was legally correct and proper; and (2) whether by an order under Section 129B of the Act, the Tribunal should set aside the order of the Commissioner dropping the proceedings against the CHA. B C D

6. The Commissioner, accordingly, made an application under Section 129D(4) of the Act before the Tribunal. As the said application could not be made within the prescribed period and was delayed by 10 days, an application for condonation of delay was filed with a prayer for condonation. The Tribunal on 28.11.2005, however, rejected the application for condonation of delay and consequently dismissed the appeal by the following brief order: E F

> "This appeal has been filed by the applicant Commissioner in pursuance of Order of Review passed by a Committee of Chief Commissioners. In the application for condonation of delay filed by the applicant Commissioner, a prayer has been made for condoning delay of 10 days. In the case of *CCEx. Mumbai vs. Azo Dye Chem*-2000 (120) ELT 201 (Tri-LB), Larger Bench of the Tribunal has held that the Tribunal has no power to condone the delay caused in filing such appeals by the Department beyond the prescribed period of three G H

A months. Even though the said decision was in a central Excise case, the ratio of this decision is equally applicable to Customs cases since the legal provisions under both the enactments are similar.

B 2. Accordingly, following the ratio of Azo Dye Chem (Supra), we have no option but to reject the application for condonation of delay. We order accordingly and consequently, the appeal also stands dismissed".

7. This appeal raises the question, whether it is competent C for the Tribunal to invoke Section 129A(5) of the Act where an application under Section 129D(4) has not been made by the Commissioner within the prescribed time and condone the delay in making such application if it is satisfied that there was sufficient cause for not presenting it within that period.

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8. Learned counsel for the appellant submitted that Section 129D(4) of the Act was self contained and if the application contemplated therein was not made within the prescribed period, the Tribunal has no power or competence to condone E the delay after expiry of the prescribed period. In support of his arguments he relied upon a larger Bench decision of the Customs, Excise and Gold (Control) Appellate Tribunal ('CEGAT') in *Commissioner of Central Excise v. Azo Dye Chem*[1]. He also placed heavy reliance upon a three-Judge Bench decision of this Court in *Commissioner of Customs and* F *Central Excise v. Hongo India Pvt. Ltd. and Another*[2]. Learned counsel for the appellant also placed reliance upon decisions of this Court in *Delhi Cloth and General Mills Co. Ltd. v. State of Rajasthan and Ors.*[3], *Fairgrowth Investments Ltd. v. Custodian*[4] and *UCO Bank and Anr. v. Rajinder Lal Capoor*[5].

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1. (2000) 120 ELT 201 (Tri-Delhi).
2. (2009) 5 SCC 791.
3. (1996) 2 SCC 449.
4. (2004) 11 SCC 472.

H 5. (2008) 5 SCC 257.

9. On the other hand, Mr. R.P. Bhatt, learned senior counsel for the respondent, supported the view of the High Court in passing the impugned order. He submitted that the answer to the question under consideration was dependent on construction of Sections 129D and 129A of the Act.

10. Section 129D (omitting the parts not relevant) reads:

"S.129D. -Power of Committee of Chief Commissioners of Customs or Commissioner of Customs to pass certain orders. - (1) The Committee of Chief Commissioners of Customs may, of its own motion, call for and examine the record of any proceeding in which a Commissioner of Customs as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Commissioner ... to apply to the Appellate Tribunal ... for the determination of such points arising out of the decision or order as may be specified by the Committee of Chief Commissioners of Customs in its order;

... .

(2)..... .....

(3) The Committee of Chief Commissioners of Customs ... shall make order under sub-section (1) .... within a period of three months from the date of communication of the decision or order of the adjudicating authority;

(4) Where in pursuance of an order under sub-section (1) .... Commissioner of Customs makes an application to the Appellate Tribunal .... within three months from the date of communication of the order under sub-section (1) .... such application shall be heard by the Appellate Tribunal .... as if such applications were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeals, including t

A provisions of sub-section (4) of Section 129A shall, so far as may be, apply to such application.

(5) ....."

B We may clarify that sub-sections (3) and (4) of Section 129D have been amended from time to time. What has been reproduced above are the provisions existing at the relevant time.

11. Section 129A (omitting the parts not relevant) reads:

C "S.129. - Appellate Tribunal. -

(1) .....

(2) .....

D (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 Commissioner of Customs, or as the case may be, the other party preferring the appeal.

E (4)On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within F forty-five days of the receipt of the notice, a memorandum of cross-objections verified in such manner as may be specified by rules made in this behalf against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal as if it were an G appeal presented within the time specified in sub-section (3).

(5) The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after expiry of the relevant period referred to in sub-section (3) or sub-

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section (4), if it is satisfied that there was sufficient cause for not presenting it within that period". A

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 Chem1 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 B C D E F G H

A 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).

B 13. 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 C 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 D 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.

E 14. 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 F 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 G 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 H

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. A

15. We do not think that any useful purpose will be served in discussing the cases cited by the learned counsel for the appellant in detail. In none of these cases, the question which has come up for decision in the present appeal arose. We shall, however, briefly refer to these decisions. B

16. In *Hongo India Pvt. Ltd*[2], the question for consideration before this Court was whether the High Court had 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 prescribed period by applying Section 5 of the Limitation Act, 1963. Sub-section (1) of Section 35-H, which was under consideration before this Court, read as follows: C D

> "35-H. Application to High Court. - (1) The Commissioner of Central Excise or the other party may, within one hundred and eighty days of the date upon which he is served with notice of an order under Section 35-C passed before the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), by application in the prescribed form, accompanied, where the application is made by the other party, by a fee of two hundred rupees, apply to the High Court to direct the Appellate Tribunal to refer to the High Court any question of law arising from such order of the Tribunal". E F G

This Court observed that except providing a period of 180 days for filing reference application to the High Court, there was no other clause for condoning the delay if reference was made beyond the said prescribed period. Sections 5 and 29(2) of the Limitation Act were noted. This Court then held that the H

A language used in Sections 35, 35-B, 35-EE, 35-G and 35-H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order and in the absence of any clause condoning the delay by showing sufficient cause
B after the prescribed period, there was complete exclusion of Section 5 of the Limitation Act. In conclusion this Court held that the time limit prescribed under Section 35-H(1) to make a reference to the High Court was absolute and unextendable by the Court under Section 5 of the Limitation Act. In the present
C case, as noted above, the provisions relating to the appeals to the Tribunal have been made applicable to an application made under Section 129D(4) and it has been further provided that such application shall be heard as if it was an appeal made against the decision or order of the adjudicating authority. Any
D delay in presentation of appeal under Section 129A is condonable by the Tribunal by virtue of sub-section (5) thereof. The Tribunal has been invested with the same power for consideration of the applications under Section 129D(4) if it is satisfied that there was sufficient cause for not presenting such application within prescribed period as the provisions relating
E to the appeals to the Tribunal have been made applicable to such applications. *Hongo India Pvt. Ltd*[2] does not help the appellant at all.

17. In *Delhi Cloth and General Mills Co. Ltd*[3]. the concept
F of legal fiction has been explained. This Court observed, "the legal consequences cannot be deemed nor, therefrom, can the events that should have preceded it. Facts may be deemed and, therefrom, the legal consequences that follow".

G 18. In *Fairgrowth Investments Ltd.*[4], the question raised before this Court was whether the Special Court constituted under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (for short, '1992 Act') has power to condone the delay in filing a petition under Section 4(2) of the Act. Dealing with the said question, the Court
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considered various provisions of the Limitation Act, including Sections 5 and 29(2), and ultimately it was held that the provisions of the Limitation Act had no application in relation to a petition under Section 4(2) of the 1992 Act and the prescribed period was not extendable by the Court.

19. In *UCO Bank*.[5], this Court restated, what has been stated earlier with regard to interpretation of statutes, that the court must give effect to purport and object of the enactment.

20. In light of the above discussion, we hold that it is competent for the Tribunal to invoke Section 129A(5) where an application under Section 129D(4) has not been made within the prescribed time and condone the delay in making such application if it is satisfied that there was sufficient cause for not presenting it within that period.

21. In view of the above, the appeal must fail and it fails and is dismissed with no order as to costs.

K.K.T. Appeal Dismissed.