

SUPREME COURT OF INDIA

Commissioner of Customs & Central Excise

Vs.

Hongo India (P) Ltd.

S.L.P. (C) No.14467 of 2007

(S.H. Kapadia and Aftab Alam JJ.)

04.12.2008

ORDER

1. A short question which arises for determination in this Special Leave Petition is: whether the High Court was entitled to condone the delay of 16 days in filing the Reference Application by the Commissioner under Section 35H(1) of the *Central Excise Act, 1944*?
2. The High Court came to the conclusion, vide its impugned judgment, that it has no power to condone the delay as there is no provision in the 1944 Act to exclude impliedly or expressly the application of Section 29(2) of the *Limitation Act*.
3. Learned counsel appearing on behalf of the Revenue contended that in this case there was a delay in making the Reference Application under Section 35H(1) of the 1944 Act. He further contended that under Section 35H, since the Reference Application lay to the High Court, the said Court had inherent jurisdiction to condone the delay and the analogy drawn by the impugned judgment to Section 35, which refers to the power of the Commissioner under the Act, would not be proper particularly when the jurisdiction of the High Court cannot be compared with the statutory authority of the Commissioner under Section 35 of the 1944 Act.
4. At the very outset, it may be stated that in the case of *Commissioner of Central Excise, Mumbai Vs. Punjab Fibres Ltd.*¹, a Division Bench of this Court has opined in a similar case that the High Court has no power to condone the delay in the presentation of the Reference Application under Section 35H(1) of the 1944 Act. In coming to the said conclusion, it has been held that Section 5 of the Limitation Act would not apply. In this connection, reliance was placed on the provisions of Section 35 (which refers to Appeals to the Commissioner under the 1944 Act). Further, it has been held that vested rights accrue in favour of the assessee and, consequently, a strict view of the period of limitation prescribed under the 1944 Act should be applied. Consequently, it has been held that the High Court had no authority to condone the delay in the filing of the Reference Application under Section 35H(1) of the 1944 Act.

5. With respect, we have doubts about the correctness of the judgment in the case of Punjab Fibres Ltd. (supra). Firstly, it may be noted that we are concerned with the jurisdiction of the High Court and not the authority of the Commissioner to condone the delay. The Reference Application was required to be made by the Commissioner to the High Court. It was not required to be made to the authority under the Act. The powers of the High Court were not circumscribed by the statutory provisions. The power of the High Court to condone the delay cannot be circumscribed by the provisions of Section 35. Secondly, in this case, we are concerned with the scope of Section 35H and not with Section 35 of the 1944 Act. Under Section 35H, on an application for reference, the High Court exercises its advisory jurisdiction in a case where it is of the opinion that the substantial question of law of public importance arises. Therefore, in such a case, there is no question of a vested right accruing in favour of either parties.

6. For the afore-stated reasons, we direct the Office to keep this matter before the Hon'ble the Chief Justice for appropriate directions referring this matter to a larger Bench of this Court.

¹2008 (223) E.L.T. 337