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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Appeal No. E/58 TO 94 /2008 –SM[BR] Date 12/06/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. CHANDIGARH
C.R. BUILDING, PLOT NO. 19, SECTOR 17-C,
CHANDIGARH 160017
C.C.E. CHANDIGARH Appellant

Vs

M/S BIRLA TEXTILES MILLS Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 923 -959 /2008 –SM[BR] dated 28.5.2008

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar

(SM Appeal Branch)

Copy to :
1. Respondent
(1-37) M/S BIRLA TEXTILES MILLS
SAI ROAD, BHATOULI KHURD, BADDI, DISTT-SOLAN(HP)
2. Adv. / Consult SHRI S.C.KAMRA ADV. & SHRI G.K. MAHAJAN ADV.
B-2/210 [BASEMENT] SAFDARJUNG ENCLAVE NEW DELHI-29

3. S.D.R.
~~4. J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7. M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. Nidheshak publications, I.P.Estate, new Delhi
11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, NEW DELHI
COURT NO. II

Excise Appeal No. 58-94 of 2008-SM

(Arising out of Order-in-Appeal No. 505-541/CE/CHD/07 dated 29.10.2007 passed by the Commissioner (Appeals), Central Excise, Chandigarh)

For approval and signature

HON'BLE MR. S.S. KANG, VICE PRESIDENT

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3.	Whether their Lordships wish to see the fair copy of the order?	
4.	Whether order is to be circulated to the Departmental authorities.	

CCE, Chandigarh Appellant

Vs.

M/s Birla Textile Mills & Others Respondent

Appearance:
Shri B.S. Suhag, DR - For appellant
Shri S.C. Kamra, Advocate with Sh. G.K. Mahajan, Advocate - For respondent

CORAM:
HON'BLE MR. S.S. KANG, VICE PRESIDENT

Date of Hearing: 28.5.2008

Final Order No. 923-959/08-SM dated 28-5-08

Per S.S. Kang:

Heard both sides. Common issue is involved in these appeals, therefore, are being taken up together.

2. The Revenue filed these appeals against the common impugned order whereby the Commissioner (Appeals) dismissed the appeals filed by Revenue as time-barred. The brief facts of the case are that Section 35E of Central Excise Act was amended with effect from 11.5.2007 whereby the period for review of the order passed by the adjudicating authority was reduced from one year to three months. The Commissioner (Appeals) in the impugned order held that the review order was passed after the amendment to the provisions of Section 35E of Central Excise Act, therefore, the amended provisions are applicable. As the review order is not passed within three months as per the amended provisions, therefore, the appeals are time-barred.

3. The contention of the Revenue is that the adjudication order was passed on 12.7.2006 and at that time the period for reviewing the order was one year. The review order was passed within one year and the amending provisions are not retrospective in nature, therefore, the review order was passed within the time provided under the Act. The Revenue relied upon the decision of the Hob'ble Bombay High Court in the

case of **Electrofronts Vs. Union of India** reported in 2003 (162) ELT 1182 where the Hon'ble High Court held that the amendment to Section 35 of the Act, in absence of anything in it to show that it is retrospective, does not affect the right of the parties which has accrued to them on the date of passing of the order-in-original. The contention of the Revenue is that as the orders-in-original were passed on 12.7.2006 and at that time the period to review the order was one year hence the finding that review order is to be passed in view of amended provision is not sustainable.

4. The contention of the respondent is that the provisions of Section 35E was amended without any saving clause, therefore any review order passed after amendment i.e. 11.5.2007 beyond the period of three months is time-barred.

5. In this case the Commissioner (Appeals) dismissed the appeals as time-barred. The Commissioner (Appeals) held that after the amendment to provisions of Section 35E of the Act with effect from 11.5.2007 the review order has to be passed within a period of three months.

6. I find that in this case the adjudication orders were passed on 12.7.2006 prior to amendment to Section 35E of the Act and this issue is now settled by the Hon'ble Bombay High Court in the case of **Electrofronts** (supra) relied upon by the Revenue. The Hon'ble Bombay High Court held as under :-

> "We have carefully looked into amended Section 35 amended by Amending Act of 2001 but do not find it either expressly or by necessary implication respective in operation. Section 35 prior to its amendment or subject thereto is identical except that of limitation providing for appeal and power to condone delay for maximum period in presenting appeal. Hence, in order to find out whether the period of limitation provided for enforcement of appellate remedy is in a sense procedural or a part of any procedure by which right of appeal may be enforced, reference to the scheme of the section will not make any difference. Section 35 provides for important statutory right of appeal to the Commissioner (Appeals). Every such appeal has to be filed within the prescribed period of limitation. Under unamended section it was 3 months (now sixty days). Filing of appeal within a period of limitation is essential. The right of appeal is subject to its enforcement within the prescribed period of limitation. Section 35 imposes specific period of limitation upon such right of appeal. The compliance of conditions of section is essential. Section imposes limitation

upon such statutory right of appeal. The compliance with the requisite period of limitation provided is essential to the enforcement of right of appeal. The appeal must be filed within the prescribed period of limitation from the date of the order. After the expiry of time-limit provided under the section right of appeal is not only time-barred but it stands extinguished subject to power of condonation of delay to a maximum period provided in the proviso to Section 35 of the Act. Thus, the right of appeal is only enforceable to use the words of the original Act"........**may appeal to the.......within three months"**. In other words, no right of appeal shall exist after three months, (of course subject to condonation of delay for further 3 months only). Unless right of appeal is exercised strictly in terms of Section 35 the right of appeal shall get extinguished. If that be so, the limitation provided under unamended Section 35 was a inseparable part of the substantive right of appeal provided by the section. Thus, amended Section 35 in absence of anything in it to show that it is retrospective, does not affect the right of the parties which has accrued to them on the date of passing of the order-in-original by the adjudicating authority.

Assuming, contrary to the above option expressed, that the requirement that appeal must be filed within 3 months subject to getting delay condoned for a further maximum period of 3 months, does not take away the substantive right of appeal but merely bars the remedy, even then, the Revenue is not in a better position. Where the question arises whether a statute has a retrospective operation, it is usual to divide statute into two classes, the one where the new statute affects only the existing practice and procedure of the Courts for enforcing such rights. The distinction between the two kinds of statutes was explained by Dixon J. (as he then was) in *Kraljevich v. Lake View & Star Ltd.* (1945) 70 C.L.R. 647. It is observed:

"The presumptive rule of construction is against reading a statute in such a way as to change accrued rights title to which consists in transactions passed and closed or in facts or events that have already occurred. In other words, liabilities that are fixed, or rights that have been obtained, by the operation of the law upon facts or events for, or perhaps it should be said against, which the existing law provided, are not be disturbed by a general law governing further rights and liabilities unless the law so intends, appears with reasonable certainty. But, when the alteration in the law relates to the mode in which rights and liabilities are to be enforced or realized, there is no reason to presume that it was not intended to apply to rights and liabilities already existing and its application in reference to them will depend rather upon its particular character and the substantial effect that such an operation would produce"

Statute of limitation is often classed as procedural statute. But it would be unwise to attribute a prima facie retrospect effect to all statutes of limitation. Two classes of cases can be considered. An existing statute of limitation may be altered by enlarging or abridging the time within which proceedings may be instituted. If the time is enlarged whilst the person is still within time under the existing law to institute a cause of action the statute might well be classed as procedural. Similarly, if the time is abridged whilst such person is still left with time within which to institute a cause of action, the abridgment might again be classed as procedural. But if the time is enlarged when a person is out of time to institute a cause of action so as to enable the action to be brought within the new time or is abridged so as to deprive him of time within which to institute it whilst he still has time to do so, very different consideration could arise. The cause of action which can be enforced as a very different thing to a cause of action the remedy for which is barred by lapse of time. Statutes which enable a person to enforce a cause of action which was then barred or provide a bar to an existing cause of action by abridging the time for its institution could hardly be described as merely procedural. They would affect substantial rights.

As indicated hereinabove, the litigant has a substantive right of appeal, law providing that right cannot be said to be mere procedural law. On the canvas of the aforesaid settled principle of law, in the present case, as indicated hereinabove, amendment to Section 35 is not merely procedural but it takes away substantive right of the parties to file appeal once the period of limitation is lost

> of course subject to right to claim condonation of delay for a specified period, the outer limit of which is provided in the proviso to the said section. Once that outer limit is over the right of appeal is lost. After expiry of the period for appeal right stands extinguished. We thus hold that the amendment to Section 35 of the Act has no retrospective effect. The appeals preferred by the petitioners were unaffected by change in law as it related to determination of substantive rights of the parties and the same were required to be decided in the light of law of appeal as it existed on the date of order-in-original. Petitioners, therefore, were entitled to file appeals within 3 months from the date of the order and well within their rights to apply to the Commissioner (Appeals) to allow them to present appeal within a further period of 3 months subject to condonation of delay for the reasons disclosed. As such, the appellate authority, the respondent No. 3 ought to have considered the appeals on the basis of unamended Section 35. In this view of the finding reached by us, order of the Commissioner (Appeals) and confirmation thereof by the CEGAT cannot be sustained. The same stands set aside."

7. In view of the above decision of the Hon'ble Bombay High Court and view taken by the Commissioner (Appeals) is not sustainable. ~~hence set aside~~. The Commissioner (Appeals) has dismissed the appeals as time-barred and has not gone into

the merits of the appeals. Hence the impugned orders are set aside and the matter is remanded to the Commissioner (Appeals) to decide the appeals on merits after affording an opportunity of hearing to the respondents.

(Dictated & pronounced in open Court)

(S.S. KANG)
VICE PRESIDNET

RM