

COMMISSIONER OF CENTRAL EXCISE,
COMMISSIONER, DELHI – III, GURGAON

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v

M/S. KAP CONES, UDYOG VIHAR, PHASE-V, GURGAON

(Civil Appeal No. 5432 of 2015)

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JULY 20, 2015

[DIPAK MISRA AND PRAFULLA C. PANT, JJ.]

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Central Excise Act, 1944 – s. 35 E(4) – Powers of the tribunal to condone delay – On facts, Commissioner filed an application before the tribunal u/s. 35-E(4) within one month of the communication of the order of review - Application also filed for condonation of delay of 8 days – Said delay occurred in review of the order of Commissioner by Committee of Chief Commissioners since reviewing authority received the Commissioner's order three days after its pronouncement and review order which was to be passed within three months from the date of communication was passed after eight days of expiry of the period – Tribunal held that it cannot condone the delay – High Court upheld the said order – On appeal, held: Analysis made by the Full Bench of the tribunal in CCE v. Monnet Ispat & Energy Ltd. that the tribunal has ample power to condone the delay in filing the appeal including the one filed u/s. 35E(4) is correct – Members deciding the lis by the impugned order should have kept themselves abreast to the Full Bench decision – Matter is remanded back to tribunal for consideration of the application for condonation of delay on merits.

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Allowing the appeal, the Court

HELD: The analysis made by the Full Bench of the
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A tribunal-*CCE v. Monnet Ispat & Energy Ltd.* is correct in view of the opinion expressed that “the Tribunal has ample power to condone the delay in filing the appeal including the one filed under Section 35E(4) of the Central Excise Act, 1944. The period which can be condoned in relation to filing of the appeal under Section 35E(4) of the said Act would include the period availed by the review committee in terms of Section 35E(1) or 35E(2) of the said Act. As regards the appeals by the Department in terms of Section 35E(4), the same should be filed within one month from the date of communication of the order under sub-section (1) or sub-section (2) of the said section but not beyond four months from the date of communication of order of the adjudicating authority to the review committee. In case there is any delay in this regard, the same can be condoned in exercise of powers under Section 35B(5), on being satisfied about sufficient cause for such delay and power to condone the delay would include the period availed under Section 35E(1) or (2) by the reviewing committee to decide about filing of the appeal.” The said view is correct. The members deciding the lis by the impugned order should have kept themselves abreast to the Full Bench decision of the tribunal so that there would not have been two views as regards the same proposition. The order passed by the tribunal is set aside and the matter is remanded to it for consideration of the application for condonation of delay on its own merits. [Para 27, 28, 29] [465-C-H; 466-B-C]

Commissioner of Customs and Central Excise v. Hongo India Private Limited and Another (2009) 5 SCC 791 – distinguished.

CCE v. Monnet Ispat & Energy Ltd. 2010 (257) ELT 239

CCE, COMMISSIONER, DELHI – III, GURGAON v. KAP 447
CONES, GURGAON

(Tri-New Delhi) (LB); *Central Excise v. M.M. Rubber Co.* A
1991 (55) ELT 289; *CCE v. Bhillai Wires Ltd.* 2009 (236)
ELT 40; *CCE v. M.M Rubber Co.* 1991 (55) ELT 289 (SC) –
referred to.

Case Law Reference

2010 (257) ELT 239	referred to	Para 4	B
1991 (55) ELT 289	referred to	Para 5	
2009 (236) ELT. 40	referred to	Para 5	C
1991 (55) ELT 289 (SC)	referred to	Para 6	
(2009) 5 SCC 791	distinguished	Para 26	

CIVIL APPELLATE JURISDICTION: Civil Appeal No. D
5432 of 2015.

From the Judgment and Order dated 22.08.2013 in
Central Excise Appeal No. 69 of 2013 (O&M), of the High Court
of Punjab and Haryana at Chandigarh. E

P.S. Patwalia, ASG, J. Smita Rao, Tushar Bakshi and B.
Krishna Prasad for the Appellant.

Dr. G.K. Sarkar, Malabika Sarkar, Susmita Lal and Prasant
Kumar for the Respondent. F

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The respondent, a proprietary concern having two
factories; one situated at 449A, Udyog Vihar, Phase-V,
Gurgaon and the second at Plot No. 29, Secot-5, IMT Manesar,
Gurgaon, is engaged in manufacture of paper cones to wrap
ice-cream cones and cone biscuits and the said items are H

A chargeable to central excise duty. A proceeding was initiated against the firm for filing of input duty credit, capital goods duty credit and further clandestine removal of the finished product. On 15.7.2011, the Commissioner adjudicated the matter and disallowed the Cenvat credit taken and confirmed the demand as indicated in the show cause notice at the time of commencement of the proceeding invoking the extended period under the proviso to Section 11A(1) of the Central Excise Act, 1944 (for brevity, "the Act") and directed for confiscation of the seized goods. The adjudicating authority, as the factual matrix would uncurtain, imposed penalty of Rs.50 lakhs on the proprietor of the firm in exercise of the power under Rule 15 of the Cenvat Credit Rules, 2004. The order passed by the adjudicating Commissioner was received by the concerned jurisdictional Chief Commissioner on 18.7.2011. After receipt of the said order, the Committee of the Chief Commissioners reviewed the same and expressed the opinion that the decision taken by the Commissioner was fallacious inasmuch as he had not imposed penalty under Section 11A(1) which was imposable; and that the Commissioner had overlooked the imposition of penalty on the Manager and Accounts Manager of the respondent firm under Rule 26 of the Central Excise Rules, 2006, which was required in the facts and circumstances of the case. The review order no. 35 of 2011 was issued on 25.10.2011 under Section 35-E(1) of the Act and a direction was issued to the Commissioner to file appropriate application before the Customs Excise and Service Tax Appellate Tribunal (for short, "the tribunal) under Section 35-E(4) for correct determination. The order passed by the Committee was received by the Commissioner on 31.10.2011.

3. In accordance with the order passed by the Committee of Chief Commissioners, the Commissioner filed an application on 16.11.2011 before the tribunal under Section

35-E(4) within one month from the date of communication of the order of review. Be it noted, along with an application filed under Section 35-E(4), an application for condonation of delay was filed for condoning 8 days delay that occurred in review of the order of the Commissioner by the Committee of Chief Commissioners, for the Commissioner's order had been received by the reviewing authority on 18.7.2011 and the review order which was required to be passed within three months from the date of communication was passed after eight days of expiry of the period.

4. It was contended by the revenue before the tribunal that there was genuine reason for eight days delay in issue of the review order under Section 35-E(1) by the Committee of Chief Commissioners and, in any case, when the appeal had been filed within a period of four months of the receipt of the order in original, i.e. 15.7.2011, the delay in issue of the review order under Section 35-E(1) by the Committee of the Chief Commissioners deserved to be condoned. Reliance was placed on the Full Bench Decision of the Tribunal rendered in **CCE v. Monnet Ispat & Energy Ltd.**¹

5. On behalf of the assessee it was urged that the period of limitation prescribed for reviewing authority, the Committee of Chief Commissioner for issuing directions to the Commissioner in respect of adjudication of order for filing an appeal to the tribunal was three months from the date of communication of the order and there was no dispute that the impugned order was received on 18.7.2011 and reviewed order was issued and after expiry of three months, that is, 25.10.2011 and, therefore, the delay could not be condoned as per the principle laid down in **Central Excise v. M.M. Rubber Co.**². To bolster the stand reliance was also placed

¹ 2010 (257) ELT 239 (Tri-New Delhi) (LB)

² 1991 (55) ELT 289

A on the decision referred by the High Court of Himachal Pradesh in *CCE v. Bhillai Wires Ltd.*³

B 6. The tribunal referred to Section 35-E of the Act and interpreting the said provision came to hold that for filing an appeal before the tribunal or the commissioner (appeal) in terms of sub-section (4) OF Section 35-E an order passed by the concerned reviewing authority under Section 35-E (1) or 35E (3) as the case may be, is imperative. The tribunal opined that filing of an application before the tribunal on the basis of the review order issued under Section 35-E (1) or 35 (2) has to be completed within the period of one month from the date of communication of the review order to the adjudicating authority and on that basis posed the question whether the delay in completing the first, that is the issue of order the Committee of Chief Commissioner or the Commissioner under Section 35E (1) of 35 (2) which is to be completed within a period of three months could be condoned by it. It referred to the decision in *CCE v. M.M Rubber Co.*⁴ specially paragraph 18 and came to hold as follows:-

E “Thus, the Apex Court in this case has held that power under section 35E is a power of superintendence conferred on a superior authority to ensure that the subordinate officers exercise their powers under the Act correctly and properly and when a time limit is prescribed for exercise of this power, the same has been exercised within time-limit and an order passed beyond the period prescribed under section 35E(3) would be invalid and ineffective. When an order passed by the reviewing authority after expiry of the limitation period is invalid and ineffective and since such an order is a prerequisite for filing appeal before the Tribunal, there is no question of

³ 2009 (236) ELT 40

H ⁴ 1991 (55) ELT 289 (SC)

condonation of delay. Same view has been taken by the Hon'ble Himachal Pradesh High Court in the case of Bhillai Wires Ltd. (supra). The judgment of the Tribunal in case of Monnet Ispat & Energy Ltd. (supra) is contrary to the law laid down by the Apex Court in its judgment in case M.M. Rubber Co. (supra) which has been followed by Hon'ble Himachal Pradesh High Court in case of Bhillai Wires Ltd. (supra)."

In addition to the aforesaid reasoning the tribunal ascribed another reason that it cannot condone delay in filing as appeal as it has a duty to see before accepting an application filed by the a Commissioner under Section 35E (4) as an appeal against the Commissioner's order is backed by valid order passed by the Chief Commissioner under Section 35E (1). The tribunal held so inasmuch as it has formed the opinion that when a time limit is prescribed by statute for reviewing authority, i.e., that is Committee of Chief Commissioners for exercise of its power of superintendence and if the said authority issues an order under the said provision after the expiry of the period of limitation it would be an invalid and ineffective order and the tribunal has no power to validate and revive such an invalid and ineffective order.

7. Being dissatisfied with the aforesaid order the review preferred Excise Appeal No. 69 of 2013 (O&M) before the High Court Punjab and Haryana at Chandigarh. The High Court after enumerating the facts referred to paragraph 10 and 11 of the tribunal judgment and opined thus:-

"A due consideration of relevant statutory provisions of Section 35(E)(i) and (ii) of the Act reveals that the Tribunal has no jurisdiction to condone delay in an order passed by the Committee of Chief Commissioner's, asking the Commissioner to file an appeal. The power to condone delay relates to filing the application."

A Being of this view, the High Court has affirmed the view expressed by the tribunal and dismissed the appeal. Hence, the present appeal by special leave.

B 8. We have heard Mr. P. S. Patwalia, Learned Additional Solicitor General for Union of India and Dr. G.K. Sarkar, learned counsel for the respondent.

C 9. It is necessary to state at the beginning that there is no cavil over the factual scenario. Therefore, we are only required to scrutinise in the statutory backdrop and regard being had to the amendments from time to time and the proposition stated in the authority in *M.M. Rubber* (supra) whether tribunal has jurisdiction to condone the delay in such a circumstance. We need not have to address the extent of delay and sufficiency of the cause stated in the application for condonation of delay, for the centripodal issue that has arisen for consideration in singularity is whether the tribunal has the jurisdiction or authority to condone the delay.

E 10. To appreciate the controversy, first we shall refer to the legislative history of Sections 35B and 35E of the Act. We shall only note the provisions existing prior to the Finance Act, 1984 and the amendments thereafter made effective from time to time and in this context we shall reproduce the relevant sub-Sections. Prior to the Finance Act, 1984 relevant sub-Sections 3 to 5 of 35B read as follows:-

G “(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.

H (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 A
appealed against such order or any part thereof, file, within
forty-five days of the receipt of the notice, a memorandum
of cross-objections verified in the prescribed manner
against any part of the order appealed against and such B
memorandum shall be disposed of by the Appellate
Tribunal as if it were an appeal presented within the time
specified in sub-section (3).

(5) The Appellate Tribunal may admit an appeal or permit C
the filing of a memorandum of cross-objections after the
expiry of the relevant period referred to in sub-section (3)
or sub-section (4), if it is satisfied that there was sufficient
cause for not presenting it within that period."

11. Before the Finance Act 1984, Section 35E read as D
follows:-

"(1) The Board may, of its own motion, call for and examine
the record of any proceeding in which a Collector of Central
Excise as an adjudicating authority has passed any E
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 collector to apply to
the Appellate Tribunal for the determination of such points
arising out of the decision or order as may be specified F
by the Board in its order.

(2) The Collector of Central Excise may, of his own motion,
call for and examine the record of any proceeding in which
an adjudicating authority subordinate to him has passed G
any decision or order under this Act for the purpose of
satisfying himself as to the legality or propriety of any such
decision or order and may, by order, direct such authority
to apply to the Collector (Appeals) for the determination
of such points arising out of the decision or order as may H

A be specified by the Collector of Central Excise in his order.

(3) No order shall be made under sub-section (1) or sub-section (2) after the expiry of two years from the date of the decision or order of the adjudicating authority.

B (4) Where in pursuance of an order under sub-section (1)
or sub-section (2) the adjudicating authority or the
authorised officer makes an application to the Appellate
Tribunal or the Collector (Appeals) within a period of three
C months from the date of communication of the order under
sub-section (1) or sub-section (2) to the adjudicating
authority, such application shall be heard by the Appellate
Tribunal or the Collector (Appeals), as the case may be,
as if such application were an appeal made against the
D decision or order of the adjudicating authority and the
provisions of this Act regarding appeals, including the
provisions of sub-section (4) of section 35B shall, so far
as may be, apply to such application.”

E 12. The amendment that took place vide Finance Act,
1984 the only change that was brought was in sub-section (3)
of Section 35E whereby the time limit was reduced to one
year from two years, and the rest of the provisions remained
the same. Vide the amendments in 1995, the words “Collector
F of Central Excise” in Section 35B were substituted with
“Commissioner of Central Excise”; whereas in Section 35E,
the word “Collector” was substituted with “the Commissioner”
and in sub-section (1) at the place of words “such collector”
the words “Commissioner or any other Commissioner” were
G added.

13. As per the amendment made vide Finance Act of 2002,
changes were brought in sub-section (3) of Section 35E. The
amended sub-section (3) reads as follows:-

H “(3) The Board or Commissioner of Central Excise, as

the case may be, shall, where it is possible to do so, made order under sub-section (1) or sub-section (2) within a period of six months, but not beyond a period of one year, from the date of the decision or order of the adjudicating authority.” A

14. Thereafter vide Finance Act, 2005, amendments were brought in Section 35E. At the place of “Board”, “Committee of Chief Commissioners of Central Excise” was added. In sub-section (2), the words “such authority” were replaced with “such authority or any Central Excise Officer subordinate to him”. B C

15. Section 35E of Central Excise Act, 1944 (after amendment vide Finance Act, 2008) reads as follows:-

“(1) The Committee of Chief Commissioners of Central Excise may, of its own motion, call for and examine the record of any proceeding in which a Commissioner of Central Excise 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 or any other 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 in its order. D E F

[Provided that where the Committee of Chief Commissioners of Central Excise differs in its opinion as to the legality or propriety of the decision or order of the Commissioner of Central Excise], it shall state the point or points on which it differs and make a reference to the Board which, after considering the facts of the decision or order, if is of the opinion that the decision or order passed by the Commissioner of Central Excise is not legal G H

A or proper, may, by order, direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order, as may be specified in its order.]

B (2) The Commissioner of Central Excise may, of his own motion, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority or any central Excise Officer subordinate to him to apply to the Commissioner (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Commissioner of Central Excise in his order.

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D (3) Every order under sub-section (1) or sub-section (2), as the case may be, shall be made within a period of three months from the date of communication of the decision or order of the adjudicating authority.]

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F (4) Where in pursuance of an order under sub-section (1) or sub-section (2) the adjudicating authority or the authorised officer makes an application to the Appellate Tribunal or the Commissioner (Appeals)] within a period of one month from the date of communication of the order under sub-section (1) or sub-section (2) to the adjudicating authority, such application shall be heard by the Appellate Tribunal or the Commissioner (Appeals), as the case may be, as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeals, including the provisions of sub-section (4) of section 35B shall, so far as may be, apply to such application.

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16. By the said Act, amendments were made to sub-section (3) and sub-section (4) restricting the period for passing of order under sub-section (1) or sub-section (2) to three months from the date of communication of the decision or order of the adjudicating authority and the period for making application after passing of order under sub-section (1) or sub-section (2) was reduced to “one month” instead of “three months”.

17. Vide amendment of 2014, proviso to Clause (3) of Section 35E was added which reads as follows:-

“Provided that the Board may, on sufficient cause being shown, extend the said period by another thirty days.”

18. It is apt to note here that the controversy in the instant case is governed by the 2008 amendments. We have referred to 2014 amendment, as by the said amendment it has been stipulated that the Board has power to extend the time for passing an order under sub-sections (1) and (2) by a period of 30 days. We shall overt to the impact of the same at a later stage.

19. At this juncture, it is necessary to state that the Appellate Tribunal has been conferred power under sub-section 5 to admit an appeal after the expiry of the period referred to in sub-section 3 of the said Section. The tribunal, as has been stated earlier, has ruled that it has no jurisdiction as the competent authority had not passed the order within the period of three months and there was delay of eight days on its part. For the aforesaid view, it has relied upon the decision in *M.M. Rubber* (supra). The question that arose for consideration therein was what was the relevant date for the purpose of calculation of the period of one year provided under Section 35E(1)? In the said case, it was contended before the tribunal by the assessee that the relevant date of the

- A Collector's (adjudicating authority) order for the purposes of Section 35E(3) should be taken as November 28, 1984, the date when the order was passed and not December 21, 1984 when it was received by the Department and on that basis the order of the Board under Section 35E(1) of the Act should be held as beyond the period of one year from the date of decision or order of the adjudicating authority and, therefore, the application before the tribunal under Section 35E(4) of the Act was incompetent. The tribunal accepted the said contention and held that application was not maintainable.

- C 20. Before this Court, it was contended by the revenue that mere writing an order in file kept in the office is no order in the eyes of law and, therefore, limitation would start only from the date of receipt of the order by the revenue. A submission was also canvassed that departmental authorities and the private respondents are to be treated equally as aggrieved persons for the purposes of calculating the time for making the direction under Section 35E(3) of the Act. The Court scanned the anatomy of Section 35 especially Section 35E and proceeded to interpret the words "from the date of decision or order". In that context, the Court referred to number of authorities and proceeded to state thus:-

- F "12. It may be seen therefore, that, if an authority is authorised to exercise a power or do an act affecting the rights of parties, he shall exercise that power within the period of limitation prescribed therefor. The order or decision of such authority comes into force or becomes operative or becomes an effective order or decision on and from the date when it is signed by him. The date of such order or decision is the date on which the order or decision was passed or made : that is to say when he ceases to have any authority to tear it off and draft a different order and when he ceases to have any locus paetentiae. Normally that happens when the order or
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decision is made public or notified in some form or when it can be said to have left his hand. The date of communication of the order to the party whose rights are affected is not the relevant date for purposes of determining whether the power has been exercised within the prescribed time.

13. So far as the party who is affected by the order or decision for seeking his remedies against the same, he should be made aware of passing of such order. Therefore courts have uniformly laid down as a rule of law that for seeking the remedy the limitation starts from the date on which the order was communicated to him or the date on which it was pronounced or published under such circumstances that the parties affected by it have a reasonable opportunity of knowing of passing of the order and what it contains. The knowledge of the party affected by such a decision, either actual or constructive is thus an essential element which must be satisfied before the decision can be said to have been concluded and binding on him. Otherwise the party affected by it will have no means of obeying the order or acting in conformity with it or of appealing against it or otherwise having it set aside."

After so stating, the Court proceeded to hold thus:-

"18. Thus if the intention or design of the statutory provision was to protect the interest of the person adversely affected, by providing a remedy against the order or decision any period of limitation prescribed with reference to invoking such remedy shall be read as commencing from the date of communication of the order. But if it is a limitation for a competent authority to make an order the date of exercise of that power and in the case of exercise of suo moto power over the subordinate authorities' orders, the date on which such power was exercised by making an order

A are the relevant dates for determining the limitation. The ratio of this distinction may also be founded on the principle that the government is bound by the proceedings of its officers but persons affected are not concluded by the decision.”

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21. After so stating, the three-Judge Bench opined that Section 35-E comes under the latter category of an authority exercising its own powers under the Act. It is not correct to equate the Board, as contended by the revenue, to one of the two parties to a quasi-judicial proceeding. The Court further held that the power under Section 35-E is a power of superintendence conferred on a superior authority to ensure that the subordinate officers exercise their powers under the Act correctly and properly and, therefore, it is not correct to equate the Board to one of the two parties to a quasi-judicial proceeding before the Collector and the Board's right under Section 35-E to the exercise of the right of appeal by an aggrieved assessee from an order passed to its prejudice, and, therefore, when a time limit is provided for exercise of such a power, that should be exercised within specified period from the date of the order sought to be reconsidered. After so observing, the Court proceeded to state thus:-

F “...To hold to the contrary would be inequitable and will also introduce uncertainties into the administration of the Act for the following reason. There appears to be no provision in the Act requiring the endorsement, by a Collector, of all orders passed by him to the Board. If there is such a practice in fact or requirement in law, the period of one year from the date of the order is more than adequate to ensure action in appropriate cases particularly in comparison with the much shorter period an assessee has within which to exercise his right of appeal. If, on the other hand, there is no such requirement or practice and the period within which the Board can interfere is left to

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depend on the off-chance of the Board coming to know of the existence of a particular order at some point of time, however distant, only administrative chaos can result. We are, therefore, of the opinion that the period of one year fixed under sub-section (3) of Section 35-E of the Act should be given its literal meaning and so construed the impugned direction of the Board was beyond the period of limitation prescribed therein and therefore invalid and ineffective." A B

22. The said decision has to be understood in its proper context. The core issue that arose for consideration was to the relevant date for the purpose of computation of the period of one year as stipulated under Section 35-E(3) of the Act. The controversy in the case related to the year 1984 and the provision was different. Section 35(3) at that point of time reads as follows:- C D

"35(3). No order shall be made under sub-section (1) of sub-section (2) after the expiry of one years from the date of the decision or order of the adjudicating authority." E

Sub-section (4) of Section 35-E(4) provided that appeals should be filed within a period of three months from the date of communication of the order under sub-section (1) or (2) to the adjudicating authority. The Court has taken note of the fact that period that was given by the legislature to the revenue was one year which is more than adequate to take appropriate action in proper cases in comparison with the much shorter period within which the assessee has to exercise his right of appeal. The Court gave emphasis on the administrative chaos that would result if a further period was granted and accordingly opined that the statutory provision was to be given a literal meaning. As is noticeable, the amendment made by the Finance Act, 2008, the Committee of Chief Commissioners was required to pass an order within three months from the F G H

A date of communication of the decision or the order. This period
of three months is identical to the period of three months
stipulated in Section 35-B of the Act. It is apt to note that sub-
section (4) to Section 35-E of the Act, however, grants right
and authorises the adjudicating authority or adjudicating officer
B to file an appeal within a period of one month from the date of
the decision or the order. The provision also stipulates that if
such an application is made against the decision or order, the
provisions of the Act inclusive of a provision of the sub-section
C (4) of Section 35 so far as may be shall apply to such
applications. We may note with profit that the stipulation as to
the applicability of sub-section (4) to Section 35 has always
existed. However, its relevance, applicability and importance
underwent a change with the amendment made by Finance
D Act, 2008 prescribing a period of three months.

23. Thus, as per the scheme of the Act, sub-section (4) of
Section 35-B(5) of the Act authorises the appellate tribunal to
admit an appeal or permit filing of memorandum of cross-
objections after expiry of relevant period if the tribunal is
E satisfied there was sufficient cause for not presenting the
appeal within that period. As stated earlier, the power under
sub-section (4) of Section 35-B has been made applicable to
appeals preferred following the administrative procedure
prescribed under Section 35-E of the Act. The statutory
F position as it existed in 1984, as we find, has undergone a
change by the amendment made under the Finance Act, 2008.
Under the changed circumstances, it would not be appropriate
to restrict and bar an application of the provisions of sub-
section (4) of Section 35-E to the period after passing of an
G order under sub-sections (1) and (2) of Section 35-E of the
Act. We are inclined to think so as the amendment made by
the Finance Act, 2008, the legislature, in effect, has equated
the period of limitation prescribed under sub-section (3) of
H Section 35-E with the period prescribed for the Committee of

the Chief Commissions under Section 35-E of the Act. Earlier, A
that is, before the Finance Act, 2005, the legislature had
prescribed and given a longer period of limitation to the Board
or the Committee of the Chief Commissioners which could be
two years or one year. The said extended period or concession B
granted to the Board or the Committee of Chief
Commissioners was withdrawn by the Finance Act, 2008. The
only concession available to the revenue is the additional
period of one month. The postulates regarding approval, as
we perceive, is in favour of the assesses as the mandate is C
that the Committee of Chief Commissioners would apply its
mind before recommending to file an appeal, for frivolous and
unnecessary appeals are not filed. In fact, the provision has
been enacted to prevent filing of unwarranted and undeserving
appeals. Simultaneously, it also engrafts a procedure by which D
there is assured transparency and objectivity against loss of
revenue and an erroneous decision goes on unchallenged. In
that event, it would affect the fundamental sanctity behind the
apposite fiscal principle, which is an inseparable part of good
governance. E

24. There can be no scintilla of doubt that an order passed
or decision taken under Section 35-E by the Board/Committee
of Chief Commissioners is the date of the order or decision. It
is not a quasi-judicial order determining a dispute or rights of
parties, for there is no adjudication. We have already referred F
to the proviso that has been added to sub-section (3) to Section
35-E by Finance Act, 2014 wherein it is stipulated that the
Board has the power to extend the time for passing an order
under sub-sections (1) and (2) by a period of 30 days. We are G
disposed to think as it is evident that the legislature is aware
of the fact that there can be delay in filing of the appeals in
spite of the time limit and procedure prescribed in Section
35-E of the Act and, therefore, Section 35-B(4) has been made
applicable to the appellants preferred after necessary approval/ H

A sanction/direction under Section 35-E of the Act. The reduction of the period has ensured equality and parity between the appeals, one preferred by the assessee and the other preferred by the revenue. The only thing is that the appeal preferred by the revenue has to be after satisfaction of conditions mentioned in Section 35-E of the Act. It is difficult to conceive that after the amendment brought in by the Finance Act, 2008 that the legislative intent is to put the revenue or the State at a disadvantage. It is not the intention of the legislature to deny and prevent the revenue from preferring an appeal which is barred by limitation or the delay in preferring an appeal cannot be condoned even if sufficient cause is shown. If such an interpretation is placed after 2008 amendment, it would be counter productive and not in consonance with the legislative intent which is clear as Section 35-B(4) has been made applicable to appeals which are preferred after taking recourse to the mechanism provided under Section 35-E.

25. As stated earlier, we must advert to the proviso inserted to sub-section (3) to Section 35-E by the Finance Act, 2014. The said proviso has a different purport. It empowers the Board to extend the time of passing of an order under sub-sections (1) and (2) by a period of 30 days. Once an order has been passed by the Board in exercise of the said power under the proviso, there would be no need and necessity to file an application seeking condonation of delay for the periods specified, which cannot exceed 30 days. The insertion of the said proviso by Finance Act, 2014 does not negate and is not contrary to the legislative mandate by Section 35-E as it existed prior to or after insertion of the said proviso.

26. Learned counsel has commended us to the decision in *Commissioner of Customs and Central Excise v. Hongo India Private Limited and Another*⁵. In the said case,

⁵ (2009) 5 SCC 791.

the Court was dealing with Section 35-H which relates to limitation for filing a reference to the High Court. In view of the specific language of the said provision which provided only for 180 days period or no further period for filing of a reference, it had been held that the period is not extendable but absolute and in that context it had been held Section 5 of the Limitation Act would not be applicable. Thus, the authority in the said case is distinguishable. Be it noted, the said situation having changed by inserting sub-section 3A in Section 35-H of the Central Excise Act w.e.f. 1.7.1999.

27. At this juncture, we think it appropriate to refer to the Full Bench decision of the tribunal in *Monnet Ispat & Energy Ltd.* (supra). In the said case, interpreting the provisions, the Full Bench of the tribunal has recorded the following conclusion:-

“The Tribunal has ample power to condone the delay in filing the appeal including the one filed under Section 35E(4) of the said Act. The period which can be condoned in relation to filing of the appeal under Section 35E(4) of the said Act would include the period availed by the review committee in terms of Section 35E(1) or 35E(2) of the said Act. As regards the appeals by the Department in terms of Section 35E(4), the same should be filed within one month from the date of communication of the order under sub-section (1) or sub-section (2) of the said section but not beyond four months from the date of communication of order of the adjudicating authority to the review committee. In case there is any delay in this regard, the same can be condoned in exercise of powers under Section 35B(5), on being satisfied about sufficient cause for such delay and power to condone the delay would include the period availed under Section 35E(1) or (2) by the reviewing committee to decide about filing of the appeal.”

A 28. In our considered opinion, the analysis made by the Full Bench is correct in view of the opinion expressed by us in the preceding paragraph and accordingly we hold the said view to be correct. We are obliged to note with profit that the members deciding the lis by the impugned order should have kept themselves abreast to the Full Bench decision of the tribunal so that there would not have been two views as regards the same proposition.

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C 29. Resultantly, the appeal is allowed, the order passed by the tribunal is set aside and the matter is remanded to it for consideration of the application for condonation of delay on its own merits. There shall be no order as to costs.

Nidhi Jain

Appeal allowed.