

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70085 of 2021

(Arising out of Order-in-Appeal No.GZB/CX/000/APPL-MRT/325/2019-20 dated 29/01/2020 passed by Commissioner (Appeals) CGST, Meerut)

M/s Divyansh Infracon Pvt. Ltd.

.....Appellant

(H.No.407 & 408, Near DPS,
Indirapuram, Ghaziabad)

VERSUS

Commissioner, Central Excise & Service Tax, Meerut

....Respondent

(Division-VI, Ghaziabad)

APPEARANCE:

Absent on Call for the Appellant

Shri A.K. Choudhary, Authorized Representative for the Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.-70504/2024

DATE OF HEARING : 12.07.2024

DATE OF DECISION : 12.07.2024

SANJIV SRIVASTAVA:

When the matter was called, none appeared on behalf of the appellant. No prayer for adjournment has been received. It is found from the record that the matter has been listed on 14.05.2024 & 29.05.2024 and appellant was absent on call on both the dates. Notices were also issued to the appellant but the same are received back to the Tribunal.

2.0 On 29.05.2024 matter was adjourned with the directions mentioned as below:-

"When the matter was last listed, it was adjourned for today as none appeared on behalf of the appellant. Notices

were issued both to the appellant and their Counsel. Notice issued to the appellant has been returned back undelivered and the notice issued to the Counsel for the appellant has not returned.

2. Today also no one has appeared on behalf of the appellant nor has any adjournment request been received. In the interest of justice, matter is adjourned to 26 June, 2024. In terms of proviso to Section 35C (1A) of the Central Excise Act, 1944, I want to make it clear that if the appellant either in person or through his counsel fails to appear on the next date of hearing, matter will be taken up for consideration without granting any further adjournment. List on 26 June, 2024."

3.0 Therefore, it appears that the appellant is either not interested in the proceeding or is not available for pursuing this matter. Rule 20 of CESTAT Procedure Rules, 1982 provide as follows:

Rule 20. Action on appeal for appellant's default. - Where on the day fixed for the hearing of the appeal or on any other day to which such hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may, in its discretion, either dismiss the appeal for default or hear and decide it on merits:

Provided that where an appeal has been dismissed for default and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing, the Tribunal shall make an order setting aside the dismissal and restore the appeal."

4.0 In the case of Balaji Steel Re-Rolling Mills Ltd - 2014-TIOL-92-SC-CX-LB, Hon'ble Supreme Court held that CESTAT should have issued a speaking order on merits even if the

appellant himself or through his counsel does not appear. Relevant excerpts from the said decision is reproduced below:

"11) From a perusal of the aforesaid provisions, we find that the Act enjoins upon the Tribunal to pass order on the appeal confirming, modifying or annulling the decision or order appealed against or may remand the matter. It does not give any power to the Tribunal to dismiss the appeal for default or for want of prosecution in case the appellant is not present when the appeal is taken up for hearing.

12) A similar question came up for consideration before this Court in The Commissioner of Income-Tax, Madras vs. S. Chenniappa Mudaliar, Madurai 1969 (1) SCC 591 = 2002-TIOL-1456-SC-IT-LB wherein this Court considered the provisions of Section 33 of the Income-tax Act, 1922 and Rule 24 of the Appellate Tribunal Rules, 1946 which gave power to the Tribunal to dismiss the appeal for want of prosecution. For ready reference, Section 33(4) of the Income Tax Act, 1922 and Rule 24 of the Appellate Tribunal Rules, 1946 are reproduced below:

Section 33(4) of the Income Tax Act, 1922

"33(4). The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner."

Rule 24 of the Appellate Tribunal Rules, 1946

"24. Where on the day fixed for hearing or any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may dismiss the appeal for default or may hear it ex parte."

Considering the aforesaid provisions, this Court held as under:

"7. The scheme of the provisions of the Act relating to the Appellate Tribunal apparently is that it has to dispose of an appeal by making such orders as it thinks fit on the merits. It follows from the language of Section 33(4) and in particular the use of the word "thereon" that the Tribunal has to go into the correctness or otherwise of the points decided by the departmental authorities in the light of the submissions made by the appellant. This can only be done by giving a decision on the merits on questions of fact and law and not by merely disposing of the appeal on the ground that the party concerned has failed to appear. As observed in Hukumchand Mills Ltd. v. CIT, the word "thereon" in Section 33(4) restricts the jurisdiction of the Tribunal to the subject-matter of the appeal and the words "pass such orders as the Tribunal thinks fit" include all the powers (except possibly the power of enhancement) which are conferred upon the Appellate Assistant Commissioner by Section 31 of the Act. The provisions contained in Section 66 about making a reference on questions of law to the High Court will be rendered nugatory if any such power is attributed to the Appellate Tribunal by which it can dismiss an appeal, which has otherwise been properly filed, for default without making any order thereon in accordance with Section 33(4). The position becomes quite simple when it is remembered that the assessee or the CIT, if aggrieved by the orders of the Appellate Tribunal, can have resort only to the provisions of Section 66. So far as the questions of fact are concerned the decision of the Tribunal is final and reference can be sought to the High Court only on questions of law. The High Court exercises purely advisory jurisdiction and has no appellate or revisional powers. The advisory jurisdiction can be exercised on a proper reference being made and that cannot be done unless the Tribunal itself has passed proper order under Section 33(4). It follows from all this that the Appellate

Tribunal is bound to give a proper decision on questions of fact as well as law which can only be done if the appeal is disposed of on the merits and not dismissed owing to the absence of the appellant. It was laid down as far back as the year 1953 by S.R. Das, J. (as he then was) in CIT, v. Mtt. Ar. S. Ar. Arunachalam Chettiar that the jurisdiction of the Tribunal and of the High Court is conditional on there being an order by the Appellate Tribunal which may be said to be one under Section 33(4) and a question of law arising out of such an order. The Special Bench, in the present case, while examining this aspect quite appositely referred to the observations of Venkatarama Aiyar, J. in CIT v. Scindia Steam Navigation Co. Ltd. indicating the necessity of the disposal of the appeal on the merits by the Appellate Tribunal. This is how the learned judge had put the matter in the form of interrogation:

"How can it be said that the Tribunal should seek for advice on a question which it was not called upon to consider and in respect of which it had no opportunity of deciding whether the decision of the Court should be sought."

Thus looking at the substantive provisions of the Act there is no escape from the conclusion that under Section 33(4) the Appellate Tribunal has to dispose of the appeal on the merits and cannot short-circuit the same by dismissing it for default of appearance."

13) Applying the principles laid down in the aforesaid case to the facts of the present case, as the two provisions are similar, we are of the considered opinion that the Tribunal could not have dismissed the appeal filed by the appellant for want of prosecution and it ought to have decided the appeal on merits even if the appellant or its counsel was not present when the appeal was taken up for hearing. The High Court also erred in law in upholding the order of the Tribunal."

5.0 Accordingly appeal has been taken up for consideration on merits on the basis of records and after hearing the Authorized Representative for the revenue.

6.0 From the records and perusal of the impugned order it is evident that the appeal of the appellant has been dismissed by observing as follows:-

"The Hon'ble Apex Court, in the case of Singh Enterprises Vs CCE, Jamshedpur, as reported in 2008(221) ELT 163, have held that-

"Appeal to Commissioner (Appeals) - Limitation - Condonation of delay - Appeal filed after 21 months from date of service of order dismissed by Commissioner (Appeals) - Writ petition filed against impugned order dismissed by High Court - Appeal to be filed within 60 days from date of communication of order - Delay condonable up to further period of 30 days on sufficient cause being shown - Appellate authority having no power to allow appeal presented beyond the said 30 days - Impugned orders sustainable - Section 35 of Central Excise Act, 1944. (paras 2, 3, 8]"

Similarly, Hon'ble High Court of Calcutta, in the case of Bengal Investments Ltd. Vs Asstt. Commissioner (TARC), Service Tax-I, as reported in 2016 (42) S.T.R. 817, have held that-

"Appeal to Commissioner (Appeals) Limitation Condonation of delay Statutory power of Commissioner (Appeals) to condone delay - Commissioner (Appeals) having no statutory power to condone delay beyond 30 days, rightly dismissing appeal for delayed filing Said statutory provision requires to be strictly construed - Any other approach would make statutory provision otiose and open floodgate of writ petitions before High Court - No infirmity in orders of lower authorities - Writ appeal

dismissed - Section 85(3A) of Finance Act, 1994-Article 226 of Constitution of India. [para 9]"

The said order was maintained by the Hon'ble Apex Court, as reported in 2016(42) STR J274."

7. I find that appellant had filed the appeal before the Commissioner (Appeals) beyond the period which could have been condoned by the Commissioner (Appeals) as per Section 35 of the Central Excise Act. Judgment relied upon by Commissioner (Appeals) has clearly laid down that Commissioner (Appeals) has no Authority to condone the delay beyond 30 days. That being so by application of the said provision of the Central Excise Act and the decision of the Hon'ble Supreme Court in the order of Singh Enterprises [2008(221) ELT 163 (SC)] holding as follows, I do not find any merits in this appeal:

"8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period upto which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Indian Limitation Act, 1963 (in short the Limitation Act) can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days time can be granted by the appellate authority to entertain the appeal.

The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act.

The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days period.

9. Learned counsel for the appellant has emphasized on certain decisions, more particularly, I.T.C.s case (supra) to contend that the High Court and this Court in appropriate cases condoned the delay on sufficient cause being shown.

10. Sufficient cause is an expression which is found in various statutes. It essentially means as adequate or enough. There cannot be any straitjacket formula for accepting or rejecting the explanation furnished for delay caused in taking steps. In the instant case, the explanation offered for the abnormal delay of nearly 20 months is that the appellant concern was practically closed after 1998 and it was only opened for some short period. From the application for condonation of delay, it appears that the appellant has categorically accepted that on receipt of order the same was immediately handed over to the consultant for filing an appeal. If that is so, the plea that because of lack of experience in business there was delay does not stand to be reason. I.T.C.s case (supra) was rendered taking note of the peculiar background facts of the case. In that case there was no law declared by this Court that even though the Statute prescribed a particular period of limitation, this Court can direct condonation. That would render a specific

provision providing for limitation rather otiose. In any event, the causes shown for condonation have no acceptable value. In that view of the matter, the appeal deserves to be dismissed which we direct.”

8. Appeal is dismissed.

(Dictated and pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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