IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

C/40205/2019

[arising out of Order-in-Appeal No.217/2018-TRY(CUS), dated 06.12.2018 passed by the Commissioner of GST, Service Tax & CE (Appeals), Trichirapalli]

S. MANGALESWARI APPELLANT

Versus

COMMISSIONER OF CUSTOMS, TRICHY RESPONDENT

Appearance:

For the Appellant Shri S. Periasamy, Adv.
For the Respondent Shri S. Govindarajan, AC (AR)

CORAM:

Hon'be Smt. SulekhaBeevi C.S, Member (Judicial)

Date of hearing/decision **28-06-2019**

FINAL ORDER NO. **40892 / 2019**

Brief facts are that on 22.07.2017, the officers of DRI intercepted one Toyota Innova Car bearing Registration No.TN 65 L 2727 nabbed four persons. The officers recovered and seized 73 nos. of foreign gold bars of 24 carat purity, valued at Rs.2,97,50,000/- which were concealed beneath the front seat of the car. These four persons were arrested on 23.07.2017 and proceedings were initiated as per provisions of law. The owner of the Toyoto Innova Car Smt. Mangaleswari, who is the appellant herein, was also issued notice. On coming to know that the car has been seized by the Customs department, the appellant who is the owner of the car had filed an application for provisional release of the vehicle. The said application was considered by the DRI and vide letter dated 15.01.2018, the vehicle was ordered to be provisionally released to the appellant upon furnishing sufficient cash security. Against this order, the appellant filed an appeal before Commissioner (Appeals) on 30.01.2018 and pleaded that the security of Rs.5 Lakhs imposed for provisional release of the vehicle is on the higher side. During the pendency of this appeal, the proceedings initiated as per the show-cause notice issued to the noticees, culminated in passing of Order-in-Original, dated 02.05.2018. Meanwhile, the appellant was given an intimation for personal hearing in respect of their appeal pending before Commissioner (Appeals) against application for provisional release of the vehicle. The Commissioner (Appeals) dismissed the appeal for provisional release vide Order-in-Appeal, dated 31.07.2018 holding that the appeal has been infructuous for the reasons that the proceedings upon the SCN have culminated in passing Order-in-Original, dated 02.05.2018. The appellants, thereafter, filed an appeal before the Commissioner (Appeals) against the order, dated 02.05.2018. The Commissioner (Appeals) vide order impugned herein rejected the appeal as time-barred. Hence this appeal.

2. On behalf of the appellant, the learned Advocate Shri S. Periasamy appeared and argued the matter. He adverted to the findings in the Order-in-Original dated 02.05.2018 with regard to the appellant herein. The appellant is the second wife of Shri R.V.K. Sekar, who was one of the noticee in the proceeding. The vehicle

was given to the appellant by her brother Shri V.G. Sekar in whose name the ownership of the Innova Car stood at that time. The vehicle was transferred to her name by her brother so that appellant could earn for her living. On coming to know that she has got a car, her husband Shri R.V.K. Sekar requested for use of the vehicle for a trip to a temple. She later came to know that her husband was arrested with regard to smuggling of gold in her car. She had given her car to her husband only for going to the temple and that she would not have given the car had she known that it would be used for smuggling of gold. There is no evidence to show her involvement in the smuggling activities. The appellant is a destitute wife and her brother had provided the car only as a means of livelihood. Coming to know that the vehicle is seized she pleaded for provisional release of the vehicle before the investigation officers. After thorough investigation, DRI officers vide letter dated 15.01.2018 had ordered for provisional release of the vehicle on furnishing cash security of Rs.5 lakhs. As she had no means to furnish the cash security of Rs.5 lakhs, she approached Commissioner (Appeals) by filing an appeal on 30.01.2018. The notice for personal hearing in this appeal was fixedas 29.06.2018. On such date, on behalf of the appellant, it was informed to the Commissioner (Appeals) that the proceedings in respect of show-cause notice has culminated by passing Order-in-Original, dated 02.05.2018, wherein, the adjudicating authority directed to confiscate the car with option to redeem the same on payment of redemption fine of Rs.5 lakhs. The adjudicating authority did not impose any penalty on the appellant herein.

2.1. Even though, the above fact of passing of order-in-original was informed to the Commissioner (Appeals), the matter with regard to provisional release of the vehicle was still heard and taken for orders.The Commissioner (Appeals) thereafter passed order on the said appeal on 31.07.2018 holding that the provisional release has become infructuous on account of passing of the Order-in-Original, dated02.05.2018.The redemption fine imposed in the Order-in-Original as well as the security demanded in the provisional release is Rs.5 lakhs.The appellant after conduct of personal hearing was under belief that the prayer for reduction of security amount for provisional release would be in their favor. However, to the appellant's surprise, the Commissioner (Appeals) dismissed the appeal as infructuous without going into the merits of the matter. The said order dismissing the appeal as infructuous was served upon the appellants only on 23.08.2018. The appellant has filed an affidavit before the Tribunal to this effect.

2.2 Aggrieved by such order of dismissing the appeal as infructuous, the present appeal was filed against Order-in-Original, dated 02.05.2018. Since they were anxiously awaiting for the decision in the appeal with regard to provisional release pending before Commissioner (Appeals) there occurred delay in filing the appeal against Order-in-Original, dated 02.05.2018 and the appeal could be filed only on 04.09.2018. The delay occurred only for the reason that the appellant was waiting for the outcome of the appeal preferred against the application for provisional release of the vehicle. Since in the Order-in-Original, dated 02.05.2018, no penalties were imposed against the appellant and the amount directed as redemption fine as well as the security being the same, the appellant sought to prosecute the appeal before the Commissioner (Appeals) in the provisional release proceedings. The appellant argued that the time taken for diligently prosecuting the provisional release application may be excluded for computing the period of limitation.The time that has been consumed for prosecuting the appeal before the Commissioner (Appeals) against the application for provisional release ought to have been excluded. To support this argument, the learned counsel relied upon the decision of the Hon'ble Apex Court in the case of *M/s. M.P. Steel Corporation Vs Commissioner of Central Excise* reported in *2015 (319) E.L.T.373 (S.C.).* The decision in the case of *M/s. Yapp India Automotive Systems Pvt. Ltd., Vs CCE & ST, Pune-I* reported in *2019 (365) E.L.T.109 (Tri.-Mumbai)* as well as the decision in the case of *M/s. Samsung India Electronics P. Ltd. Vs CC (Appeals), Chennai-I* reported in *2018 (362) E.L.T.215 (Mad.)* was also relied upon by the learned counsel for the appellant. He prayed that there was actually no delay in filing the appeal, when the time taken for prosecuting the appeal before Commissioner (Appeals) in respect of provisional release application is excluded.

3. The learned Authorised Representative for the Revenue Shri S. Govindarajan, AC (AR) appeared and argued on behalf of the

department. He submitted that the appellants have filed the appeal against Order-in-Original, dated 02.05.2018 only on 04.09.2018. The appeal ought to have been filed within 90 days including the condonable period as provided in the statute. Thus, the Commissioner (Appeals) rightly rejected the appeal as time-barred. He also relied upon the decision in the case of *M/s. Singh Enterprises Vs Commissioner of Central Excise, Jamshedpur* reported in *2008 (221) E.L.T.163 (S.C.)*.

4. Heard both sides.

5. From the facts of the case as narrated above, it can be seen that the appellant was diligently prosecuting the appeal filed before Commissioner (Appeals) against the order of provisional release. The Deputy Director of DRI vide Order, dated 15.01.2018 had directed for provisional release of the vehicle under provisions of section 110A of the Customs Act, 1962 on deposit of cash security of Rs.5 lakhs. Aggrieved by such order, the appellant being the owner of the vehicle had filed an appeal before Commissioner (Appeals). They were given a personal hearing in this appeal on 29.06.2018 on which date the appellant had informed the Commissioner (Appeals) that the proceedings in respect of the show-cause notice issued, pursuant to the investigation had culminated in passing the Order-in-Original, dated 02.05.2018. Even then the Commissioner (Appeals) has taken another one month to dismiss the appeal observing that the application for provisional release has become infructuous. Had the appellant been

informed that they could file an appeal against the Order-in-Original, dated 02.05.2018, and that the request for provisional release of vehicle has become infructuous on the date of personal hearing itself, the appellant would not have waited or continued to prosecute the appeal against the provisional release order. Thus, it can be seen that all through till the date of filing the appeal against this impugned order on 04.09.2018, the appellant has been consistently and diligently prosecuting her grievances for release of the vehicle. The argument of the learned counsel that the time taken for prosecuting the appeal before the wrong authority should be excluded, therefore, requires consideration. The Hon'ble Supreme Court in the case of *M/s. M.P. Steel Corporation* (supra) has observed as under:-

> "**52.** The present case stands on a slightly different footing. The abortive appeal had been filed against orders passed in March-April, 1992. The present appeal was filed under Section 128, which Section continues on the statute book till date. Before its amendment in 2001, it provided a maximum period of 180 days within which an appeal could be filed. Time began to run on 3-4-1992 under Section 128 pre-amendment when the appellant received the order of the Superintendent of Customs intimating it about an order passed by the Collector of Customs on 25-3-1992. Under Section 128 as it then stood a person aggrieved by a decision or order passed by a Superintendent of Customs could appeal to the Collector (Appeals) within three months from the date of communication to him of such decision or order. <u>On the principles contained in Section 14 of the Limitation Act the time taken in prosecuting an abortive proceeding would have to be excluded as the appellant was prosecuting *bona fide* with due diligence the appeal before CEGAT which was allowed in its favour by CEGAT on 23-6-1998.</u> The Department preferred an appeal against the said order sometime in the year 2000 which appeal was decided in their favour by this Court only on 12-3-2003 by which CEGAT's order was set aside on the ground that CEGAT had no jurisdiction to entertain such appeal. The time taken from 12-3-2003 to 23-5-2003, on which date the present appeal was filed before the Commissioner (Appeals) would be within the period of 180 days provided by the pre-amended Section 128, when added to the time taken between 3-4-1992 and 22-6-1992. The amended Section 128 has now reduced this period, with effect from 2001, to 60 days plus 30 days, which

> is 90 days. The order that is challenged in the present case was passed before 2001. The right of appeal within a period of 180 days (which includes the discretionary period of 90 days) from the date of the said order was a right which vested in the appellant. <u>A shadow was cast by the abortive appeal from 1992 right upto 2003. This shadow was lifted when it became clear that the proceeding filed in1992 was a proceeding before the wrong forum. The vested right of appeal within the period of 180 days had not yet got over.</u> Upon the lifting of the shadow, a certain residuary period within which a proper appeal could be filed still remained. That period would continue to be within the period of 180 days notwithstanding the amendment made in 2001 as otherwise the right to appeal itself would vanish given the shorter period of limitation provided by Section 128 after 2001."

6. The Commissioner (Appeals), who while hearing the appeal also has a duty to inform the appellants at the time of personal hearing that when the show-cause notice has culminated in confirming confiscation of the vehicle, the application for provisional release cannot sustain. In not doing so, on the date of personal hearing itself, and thereafter passing the order after one month which was served much later sufficiently explains the reasons for the delay. In peculiar facts and circumstances of this case, I am of the view that the period taken by the appellant for prosecuting the grievance before the wrong authority ought to be excluded. Thus, when such period is excluded the appeal would be within time. Taking note of these facts and also together with the finding of fact in the Order-in-Original that the appellant had no involvement in the smuggling of the gold, I am of the view that she has to be given a chance to contest her grievance for release of the vehicle on merits. The impugned order rejecting the appeal on the ground of being time-barred is set aside. The appeal is remanded to the

Commissioner (Appeals), who is directed to consider the same on merits.

Appeal allowed by way of remand.

(Dictated and pronounced in open court)

(SULEKHA BEEVI C.S)
MEMBER (JUDICIAL

ksr
02-07-2019

	DRAFT			Remarks
	I	II	III	
Date of dictation	**28.06.2019**			
Draft Order - Date of typing	**01.07.2019**			
Fair Order Typing	**02.07.2019**			
Date of number and date of dispatch	**02.07.2019**			