CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 50962 of 2019 [SM]

[Arising out of Order-in-Appeal No. BHO-EXCUS-002-APP-463-18-19 dated 14.12.2018 passed by the CA, CGST, Raipur]

M/s Vijay Pratap
House No. 69,
Chandepur, Chandawak
Distt. Jaunpur (C.G.) **...Appellant**

Vs.

The Commissioner (Appeals)
Central GST,
Central Excise and Customs,
GST Bhawan, Tikrapara,
Raipur (C.G.) **...Respondent**

APPEARANCE:

Shri Varun Gaba, Advocate for the Appellant
Ms. Tamanna Alam, Authorised Representative (DR) for the Respondent

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING : 15.10.2019
PRONOUNCED ON : 07.11.2019

FINAL ORDER No. 51436/2019

RACHNA GUPTA

In the present appeal the order-in-appeal No. 002-463/18-19 dated 14.12.2018 dismissing the appeal at threshold on the point of it being beyond the period of limitation has been assailed.

2. Facts of the appeal in brief are :

The appellant is in the business of retail sale of liquor in malls under the license from Chhattisgarh State Excise department. Department's case is that the services provided by the government or a local authority by way of granting permission/licenses have been subjected to Service Tax under reverse charge w.e.f. 01.04.2016 by virtue of notification No. 18/2016-ST dated 01.03.2016. Department received an intelligence that the appellant is engaged in evasion of service tax by not paying the same on license amount paid by him to Chhattisgarh State Excise department for obtaining license for conducting the aforesaid business of retail sale liquor in malls. An investigation was conducted vide show-cause notice No. 4900 dated 15.05.2017. Service Tax amount of Rs. 26,70,281/- for the period May, 2016 to February, 2017 was proposed to be recovered along with the interest at the appropriate rate and the proportionate penalties. In addition, the penalty for non-filing of statutory ST-3 returns, including the said taxable services was also proposed to be imposed. The said proposal was confirmed by the Original Adjudicating Authority vide order-in-original No. 10/AC/2017 dated 05.12.2017. The appeal thereof as was filed on 25.09.2018 has been dismissed on ground of limitation vide the impugned order-under-challenge. Being aggrieved the appellant before this Tribunal.

3. I have heard Shri Varun Gaba, Advocate for the appellant and Ms. Tamanna Alam, A.R for the department.

It is submitted on behalf of the appellant that the order-in-original dated 05.12.2017 was never received by the appellant. It came to their knowledge only when the appellant received a call from the department for recovery. The order was received vide an e-mail dated 27.07.2018. Learned Counsel for the appellant has impressed upon the affidavit of Shri Sadanand Singh the Manager of appellant sworn on 12.02.2019 about receiving the order on 27.07.2018. It is submitted that the appeal filed on 25.09.2018 is within the statutory period permissible for filing the said appeal. Learned Counsel has also impressed upon that the factum of the receipt of e-mail was also brought to the notice of Commissioner (Appeals), but he has, miserably, ignored the same while holding the appeal as being barred by time. While impressing upon the merits of the case, it is submitted that the licensee fee paid to the Chhattisgarh State Government is not taxable as a retrospective exemption has been given by the government on the same in Finance Act (2) of 2019 dated 01.08.2019. Circular No. 354/136/2019 dated 11.10.2019 as issued by the government is also impressed upon submitting that it clarifies for no service tax on ground of liquor license by the state government against consideration in the form of licensee fee or application fee by whatever name called during the period from 01.04.2016 to 30.06.2017.

Finally, impressing upon that the appellant otherwise has a good case to succeed, his grievance cannot be set aside at a threshold on the ground of it being barred by limitation. Order is accordingly prayed to be set aside and appeal to be allowed.

While rebutting these submissions learned A.R. has submitted that Commissioner (Appeals) vide the impugned order has not touched the merits of the case, any arguments on merits before this Tribunal is not only a futile exercise and wastage of precious public time. It is submitted that the Commissioner (Appeals) has dismissed the appeal for not being filed within the period of 60 days not even in the period of subsequent 30 days and accordingly the appeal has rightly being dismissed being barred by time. Justifying the order-under-challenge, present appeal is prayed to be dismissed.

After hearing both the parties, it is observed and held as follows :

Since apparently and admittedly the order assailed in the present appeal is passed only on the ground of limitation, touching the merits of the case is not possible at this Tribunal level. Hence, the adjudication herein is confined only qua the issue i.e. whether Commissioner (Appeals) has rightly held the appeal before him to be barred by time.

Relevant Provision for filing appeal is Section 35 of Central Excise Act, 1944 which reads as follows :

> (1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Commissioner of Central Excise , may appeal to the Commissioner of Central Excise (Appeals) hereafter in this Chapter referred to as the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order :
>
> ***Provided*** that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.
>
> (1A) The Commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:
>
> ***Provided*** that no such adjournment shall be granted more than three times to a party during hearing of the appeal.
>
> (2) Every appeal under this Section shall be in the prescribed form and shall be verified in the prescribed manner.

Thus the appeal can be filed in a period of 60 days from the date of communication of the said decision to the aggrieved person. Commissioner (Appeals) has a power to condone delay of subsequent 30 days in case some sufficient cause preventing the appellant to present the appeal within the said time is shown to him.

The order which was appealed before Commissioner (Appeals) was passed on 05.12.2015. It was received by the appellant vide an e-mail dated 27.07.2018 as was received by Shri Sadanand Singh, Manager of the appellant. The appeal before Commissioner (Appeals) was filed on 25.09.2018. It is also observed from the record that show-cause notice to appellant was issued on 15.05.2017, no reply to the said show-cause notice was given by the appellant. However, the original adjudicating authority afforded an opportunity of personal hearing to the appellant on 04.10.2017 when Shri Manoj Kumar, Accountant of the appellant appeared on its behalf, but for just requesting an adjustment. The next date of personal hearing was accordingly fixed on 01.11.2017 where on the appellant did not appear nor opted to appear subsequently except submitted a letter dated 26.10.2017, enclosing a copy of order of High Court of Chhattisgarh dated 04.09.2017. Thus the order-in-original was passed considering said letter as submission on behalf of the appellant.

This perusal makes it clear that there is no denial on part of the appellant for receiving the show-cause notice and no apparent demand for seeking an opportunity to reply. The initial adjudicating proceedings were also in his notice and even his employee appeared on 04.10.2017. Apparently and admittedly there is no effort on part of the appellant to enquire the status of his proceedings till he received the e-mail dated 27.07.2018. From the order-in-appeal para-3 thereof, it is rather observed that the appellant while filing an appeal before Commissioner (Appeals) had also filed an application praying for condonation of delay of 24 days on the ground that the said order was received over e-mail on 27.07.2018 by Shri Sadanand Singh, Manager of the appellant who underlined part from para 3 of 01 A. The said application amount to dismissal in view of the order of Commissioner (Appeals) dismissing the appeal as a whole on ground of limitation.

At this stage grounds of appeal taken are perused. It is observed that date of receiving the e-mail is still mentioned as 27.07.2018. The affidavit of Shri Sadanand Singh as impressed upon by the learned Counsel also records the date of receipt of e-mail as 27.07.2018. The appeal, however, is silent as to why this e-mail was forwarded from the department, nor the learned Counsel had enlightened the bench for the same. However, perusal of order-under-challenge itself shows that Commissioner (Appeals) got conducted an enquiry about the dispatch of the order-in-original dated 05.12.2017 and it came on the record that the letter was dispatched through Speed-Post consignment No. ECO809530031N on 05.12.2017 itself.

Reverting back to the affidavit herein para-3 thereof reads as follows :

"That on telephone information by the Range Officer regarding recovery of demand confirmed under order-in-original dated 05.12.2017, I immediately approached the Range Officer and requested for a copy of such order and accordingly received the same over e-mail dated 27.07.2018.

It becomes clear that the e-mail of 27.07.2018 was not a suo-moto e-mail but on the demand of the appellant who could not have got the copy of the order due to his unavailability at the address to which the copy of order was dispatched. It is apparent voluntary act of the appellant as was mentioned in application praying of condonation leading to non of diligence to pursue his matter. We are of the opinion that it rather amounts to acceptance of the order-in-appeal. In the given circumstances the date of communication cannot be extended to the date of receipt of e-mail. General Clauses Act about issue and notices and presumption for those to be received within 15 days of dispatch has to be accepted.

Finally, in view of entire above discussion, I hold that the appellant herein has committed an intentional delay despite that the pendency of proceedings and even the order-in-original was in his notice. The date of information about recovery proceedings is also missing in the appellant's submission. The reasons quoted by the appellant due to which he was prevented from filing the appeal in time are, therefore, not sufficient explanation for the delay. Learned Commissioner is held to have no error while holding the appeal barred by time and dismissing the same. Otherwise also there was no statutory power with the Commissioner (Appeals) to condone the delay of more than 30 days beyond 60 days during which the appeal was otherwise to be filed. As has been clarified by Hon'ble Apex Court in the case of **Singh Enterprises Vs. CCE, Jamshedpur reported as 2008 (221) ELT 163 (SC)** holding :

> *'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, 1964 (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 month 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.'

As a consequence, the appeal in hand is hereby **dismissed**.

[Pronounced in the open Court on 07.11.2019]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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