CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV.

Service Tax Appeal No. 50783 of 2020 [SM]

[Arising out of Order-in-Appeal No.107 (SM) ST/JPR/2020 dated 05.03.2020 passed by the Commissioner (Appeals), Jaipur]

M/s. Ghadshyam Enterprises **...Appellant**
Shop No.223, Opp.New Bus Stand,
Behror - 301701

VERSUS

Commissioner **...Respondent**
Central Goods & Service Tax- Alwar-301001

APPEARANCE:

Mr. Suhrid Bhatnagar, Advocate for the Appellant
Mr. Mahesh Bhardwaj, Authorized Representative for the Respondent

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

DATE OF HEARING/DECISION:**18/08/2021**

FINAL ORDER No. 51782/2021

RACHNA GUPTA

The present appeal has been filed to assail the Order-in-Appeal No. 107/ST dated 5.3.2020 vide which the appeal of the assessee against the Order in Original No.69/2018 dated 16.11.2018 has been dismissed on the ground of being barred by time.

2. I have heard Shri Suhrid Bhatnagar, learned Counsel for the appellant and Shri Mahesh Bhardwaj, learned Authorized Representative for the Department.

3. It is submitted on behalf of the appellant that the appellants have been registered for providing man-power recruitment/supply agency service. However, a show cause notice No.2366 dated 23.11.2017 was served upon them proposing the recovery of service tax amounting to Rs.4191817/- alongwith the interest and the proportionate penalties. It is submitted that the said Show Cause Notice was in-fact, not received by the appellant till the aforesaid Order-in-Original was passed against them and the said order confirming the proposal of the aforementioned show cause notice had also not come to the notice of the appellant till the recovery proceedings were initiated against him. It is thereafter that vide letter dated 20th Feb., 2019 the copy of OIO was requested from the Department. The appellant received the said copy on 20th Feb., 2019 and affidavit to this effect as placed on record, has also been impressed upon. It is submitted that he appeal before Commissioner (Appeals) got filed on 18th April, 2019. It is submitted that since the same was filed within 2 months of receiving the copy of Order-in-Original. Learned Commissioner has wrongly rejected the appeal as being barred by time. The order accordingly, prayed to be set aside and the appeal is prayed to be allowed.

4. To rebut these said contentions learned DR has made emphasis upon the findings arrived at in the Orer-in-Appeal wherein the order has been based upon the report called from the Jurisdictional Assistant Commissioner conveying the dispatch of Order-in-Original on the date of order itself. Impressing upon no

infirmity in those findings, the appeal in hand is prayed to be dismissed.

5. After hearing the parties and perusing the record, it is observed and hold as follows:-

From the Order-in-Original, it is apparent that the appellant could not appear before the Original Adjudicating Authority despite three opportunities for hearing was afforded to the appellant. But from the arguments of the appellant, it is coming apparent that appellant in-fact, was not served with even with the copy of Show Cause Notice which became the reason for him to not to appear before the Original Adjudicating Authority and the same was the reason for acquiring no knowledge of Order-in-Original dated 16.11.2018 till the recovery proceedings got initiated against the appellant. The affidavit to this effect is placed on record.

6. I also find attached the letter dated 20th February, 2019 sent by the Department to the appellant in response to his written request of the even date (20th Feb., 2019) requesting for the copy of OIO. The said document makes it clear that the copy of OIO was provided by the Department to the appellant on 20th Feb., 2019. There is no document on record to falsify the affidavit of the appellant. In the above noticed circumstances, I do not find any other reason to not to rely upon the said deposition. Also for the reason that the report of Jurisdictional Commissioner is the sole reliance for Commissioner (Appeals) to hold the appeal before

him as barred by time. But the said report except creating a deeming fiction is absolutely silent about any cogent evidence for the Order-in-Original to have ever been served upon the appellant. There is no iota of even a whisper in the said report for the Department to ever received the acknowledgement due in respect of the registered AD.

7. Mere dispatch of the order cannot be considered as service. The period of 2 months for filing the appeal has to reckon not from the date of order announced but from the date of receipt of said order by the assessee in terms of Section 35 of Central Excise Act, 1944. Section 37 C further provided the mode of service. In view of those statutory provisions, I do not hold it appropriate to consider the proof of dispatch as sufficient proof of service. I draw my support from the decision of Hon'ble High Court of Madras in the case of Shree Steels vs. CC reported as 2020 TIOL 452 (Mad.) wherein it was held that it is mandatory for the appellate authority to verify as to whether the order challenged before him was duly received by the assessee or not. Mere dispatching of order does not imply the receipt of the same. I am further of the opinion that the above discussed circumstances reflect no fault on part of the appellant for while approaching Commissioner (Appeals) with his grievance. Accordingly, he should not be made to suffer. I draw my support from the decision of this Tribunal Chennai Bench in the case of **M/s. Kumar's Electronics vs. Commissioner of Central Excise**

and Service Tax, Madurai [2020-TIOL-766-CESTAT-MAD] which is held as follows:-

> *".......Appellant should not suffer for no fault on its part and hence, Bench deems it proper to set aside the impugned order with a direction to the First Appellate Authority to pass a fresh order on merits after hearing the appellant and following the principles of natural justice."*

8. Since admittedly no acknowledgement receipt was received by the Revenue, question of the production thereof on the record does not at all arise. In the given circumstances I have no option but to hold that the Original Adjudication order was not received by the appellant prior to 20^{th} February, 2019. The appeal filed before Commissioner (Appeals) on 18.04.2019 was very-much within the period of two months as is required under section 35 of Central Excise Act. Commissioner (Appeals) definitely erred while rejecting the appeal on the ground of being barred by time.

9. The order accordingly, is hereby set aside. Commissioner (Appeal) is directed to decide the matter on merits. Resultantly, the appeal stands allowed by way of remand.

[Dictated and pronounced in the open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita