CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Service Tax No. 51169 of 2018

(Arising out of Order-in-Appeal No. BHO-EXCUS-001-676-17-18 dated 31.01.2018 passed by the Commissioner (Appeals), Central Tax, Customs & Central Excise, Bhopal)

Estate Officer,
MP Housing and Infrastructure
Development Board, Circle- Jabalpur **...... Appellant**
Hathi Tal Colony, Jabalpur

VERSUS

The Principal Commissioner, Central Tax
Customs & Central Excise, **......Respondent**
30-C. Adminsitrative Area, Arera Hills, Bhopal

Appearance:

Mr. Sandeep Mukherjee, Chartered Accountant for the Appellant

Dr. Radhe Tallo, Authorized Representative of the Department

CORAM :

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

DATE OF HEARING: 02.06.2023

FINAL ORDER NO. 50775/ 2023

JUSTICE DILIP GUPTA:

The Estate Officer of Madhya Pradesh Housing Development Board, Jabalpur is aggrieved by the order dated January 31, 2018 passed by the Commissioner (Appeals) that dismisses the appeal for two reasons, namely, that it was filed beyond the period prescribed under section 85(3A) of the Finance Act, 1994[1] and for the reason that the statutory requirement of pre-deposit was not satisfied.

---

1. **the Finance Act**

2. Shri Sandeep Mukherjee, learned consultant appearing for the appellant has submitted that a satisfactory explanation had been offered by the appellant as to why the appeal could be filed within the initial period of two months as contemplated under section 85 (3A) of the Finance Act and also even beyond the extended period of one month, but this explanation has not been examined by the Commissioner (Appeals) and the appeal has been dismissed only for the reason that the Commissioner (Appeals) had no power to condone the delay beyond three months in view of the provision of section 85(3A) of the Finance Act.

3. Dr. Radhe Tallo, learned authorized representative appearing for the Department has submitted that in view of the decision of Supreme Court in **M/s. Singh Enterprises** vs. **Commissioner of Central Excise, Jamshedpur**[2], the Commissioner (Appeals) was justified in dismissing the appeal for the reason that it was not filed even within the extended period of one month after the expiry of the initial period of two months.

4. The submissions advanced by learned consultant for the appellant and the learned authorized representative appearing for the Department have been considered.

5. Section 85 (3A) of the Finance Act, which relates to filing of the appeal before the Commissioner (Appeals), is reproduced below:

> **"85. Appeals to the Commissioner of Central Excise (Appeals). -**

---

2. 2008(221) E.L.T. 163 (S.C.) Civil Appeal No. 5949 of 2007, decided on 14-12-2007

> (3A) An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, made on and after the Finance Bill, 2012 receives the assent of the President, relating to Service Tax, interest or penalty under this Chapter:
>
> PROVIDED that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month.

6. A perusal of sub-section (3A) of Section 85 clearly indicates that an appeal shall be presented within two months from the date of receipt of the order of the adjudicating authority in relation to Service Tax, interest or penalty. It further provides that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month. The discretion of the Commissioner to condone the delay is, therefore, circumscribed by the condition set out in proviso and the delay can be condoned only if the appeal is presented within a further period of one month after the expiry of the statutory period of two months, provided of course, he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within a period of two months.

7. In the present case, it is clear from the order passed by the Commissioner (Appeals) that the order dated March 28, 2017 passed by the Additional Commissioner was received by the appellant on April 03, 2017. This finding has been recorded by the Commissioner (Appeals) on the basis of the statement made by

the appellant in the Service Tax Form-IV enclosed with the memo of appeal.

8. Thus, the appeal could have been filed by June 02, 2017 and only one month further delay could have been condoned by the Commissioner (Appeals), provided a satisfactory explanation was offered by the appellant for this period of one month. The appeal was filed on January 16, 2018 with a delay of about 278 days.

9. In **Singh Enterprises**, on which reliance has been placed by the learned authorized representative appearing for the Department, the Supreme Court observed as follows:-

> " 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 sixty days 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. In the present case, admittedly, the order of the adjudicating authority was received by the appellant on 20 September, 2013 but the appeal was presented before the Commissioner on 05 February, 2016. It was clearly not presented within the period of two months nor within the extended period of one month. The Commissioner (Appeals) dismissed the appeal after placing reliance on the decision of Supreme Court in Singh Enterprises.

10. The provision of Section 35 of the Central Excise Act, 1944 relating to appeals before Commissioner (Appeals) had come up for consideration before the Supreme Court in Singh Enterprises. Section 35 of the Central Excise Act, 1944 provides that any person aggrieved by any decision or order passed under the Act, may appeal to 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. The provisions of Section 35 of the Central Excise Act, 1944 are paramateria with Section 85(3A) of the Finance Act. The Supreme Court held that the period upto which the prayer for condonation can be accepted is limited by the proviso to sub section (1) of Section 35 of the Act and the position is crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of thirty days after the expiry period of sixty days. In other words, the appellate authority can entertain the appeal by condoning the delay only upto 30 days beyond the normal period for preferring the appeal, which is 60 days. The Commissioner (Appeals) was, therefore, justified in dismissing the appeal on the ground of limitation.”

(emphasis supplied)

10. Such being the position, it is not possible to accept the contention of learned counsel for the appellant that the provisions of section 5 of the Limitation Act should be invoked even if the delay is beyond the extended period of thirty days or that the Tribunal has a discretionary power to condone any delay in filing the appeal even after the expiry of the extended period of 30 days.

11. The second contention of learned counsel for the appellant that the requirement of pre-deposit should have been waived by the Commissioner (Appeals) cannot also be accepted.

12. The Supreme Court in **Narayan Chandra Ghosh** vs. **UCO Bank and Others**[3] , examined the provisions contained in section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 relating to pre-deposit in order to avail the remedy of appeal. The provisions are similar to the provisions of the Finance Act. The Supreme Court emphasised that when a Statue confers a right to appeal, conditions can be imposed for exercising of such a right and unless the condition precedent for filing appeal is fulfilled, the appeal cannot be entertained. The Supreme Court, therefore, held that deposit under the second proviso to section 18(1) of the Act, being a condition precedent for preferring an appeal, the Appellate Tribunal erred in law in entertaining the appeal. The Supreme Court also held that the Appellate Tribunal could not have granted waiver of pre-deposit beyond the provisions of the Act. The

---

3. (2011) 4 SCC 548

relevant portion of the judgment of the Supreme Court is reproduced below:

> "7. **Section 18(1) of the Act confers a statutory right on a person aggrieved by any order made by the by the Debts Recovery Tribunal under Section 17 of the Act to prefer an appeal to the Appellate Tribunal. However, the right conferred under Section 18(1) is subject to the condition laid down in the second proviso thereto. The second proviso postulates that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less.** However, under the third proviso to the sub section, the Appellate Tribunal has the power to reduce the amount, for the reasons to be recorded in writing, to not less than twenty-five per cent of the debt, referred to in the second proviso. **Thus, there is an absolute bar to entertainment of an appeal under Section 18 of the Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, a pre- deposit of fifty per cent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. The language of the said proviso is clear and admits of no ambiguity.**
>
> 8. **It is well-settled that when a Statute confers a right of appeal, while granting the right, the Legislature can impose conditions for the exercise of such right,** so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory. Bearing in mind the object of the Act, the conditions hedged in the said proviso cannot be said to be onerous. **Thus, we hold that the requirement of pre-deposit under sub-section (1) of Section 18 of the Act is mandatory and there is no reason whatsoever for not giving full effect to the provisions contained in Section 18 of the Act. In that view of the matter, no court, much less the Appellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the**

> **Statute. We have no hesitation in holding that deposit under the second proviso to Section 18(1) of the Act being a condition precedent for preferring an appeal under the said Section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement**.
>
> 9. The argument of learned counsel for the appellant that as the amount of debt due had not been determined by the Debts Recovery Tribunal, appeal could be entertained by the Appellate Tribunal without insisting on pre-deposit, is equally fallacious. Under the second proviso to sub-section (1) of Section 18 of the Act the amount of fifty per cent, which is required to be deposited by the borrower, is computed either with reference to the debt due from him as claimed by the secured creditors or as determined by the Debts Recovery Tribunal, whichever is less. Obviously, where the amount of debt is yet to be determined by the Debts Recovery Tribunal, the borrower, while preferring appeal, would be liable to deposit fifty per cent of the debt due from him as claimed by the secured creditors. **Therefore, the condition of pre-deposit being mandatory, a complete waiver of deposit by the appellant with the Appellate Tribunal, was beyond the provisions of the Act, as is evident from the second and third provisos to the said Section.** At best, the Appellate Tribunal could have, after recording the reasons, reduced the amount of deposit of fifty per cent to an amount not less than twenty-five per cent of the debt referred to in the second proviso. **We are convinced that the order of the Appellate Tribunal, entertaining appellant's appeal without insisting on predeposit was clearly unsustainable and, therefore, the decision of the High Court in setting aside the same cannot be flawed."**
>
> **(emphasis supplied)**

13. The principles laid down in the aforesaid decision of the Supreme Court in **Narayan Chandra Ghosh** were reiterated by

the Supreme Court in **Kotak Mahindra Bank Pvt. Limited** vs. **Ambuj A.Kasiwal & Ors.**[4]

14. The Commissioner (Appeals), therefore, committed no illegality in dismissing the appeal. The present appeal is, accordingly, dismissed.

(order dictated and pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(RAJEEV TANDON)
MEMBER (TECHNICAL)

Archana

4. Civil Appeal No. 539 of 2021 decided on 16.02.2021