

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 51311 of 2023 [SM]

[Arising out of Order-in-Appeal No. 240(RLM)ST/JPR/2022 dated 17.11.2022
passed by the Commissioner of Central Excise & CGST (Appeals), Jaipur]

M/s. Hi-Tech Enterprises,

A-114, Ashiana Bageecha,
Bhiwadi, Distt.- Alwar,
Rajasthan - 301019

...Appellant

VERSUS

Commissioner of CGST, Alwar

A Block, Surya Nagar,
Alwar, Rajasthan-301001

...Respondent

APPEARANCE:

Shri Ajay K. Mishra, Advocate for the Appellant
Ms. Tamanna Alam, Authorised Representative for the Respondent

CORAM: HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: 21.04.2023
DATE OF DECISION: 21.04.2023

FINAL ORDER No. 50776/2023

DR. RACHNA GUPTA

Present is an appeal against Order-in-Appeal No. 240/2022
dated 17.11.2022 for rejecting the appeal as being barred by time.

The facts relevant for impugned adjudication are as follows:

The appellant is engaged in providing taxable service of
'Outdoor Catering'. The appellant's is a proprietary business of
running canteens, supplying food for labourers/employees in the
factory. Based on the third party evidence department got an
information that appellant despite collecting huge amount out of

providing the said service but has not been discharging the tax liability. Resultantly, the Superintendent, Central Goods & Service Tax Range-XII, Bhiwadi vide letter dated 13.04.2018 and subsequently vide letter dated 31.05.2018 had requested the appellant to provide certain documents. Since nothing was provided, hence, based upon that third party evidence i.e. the evidence from Income Tax Department, a Show Cause Notice No. 9527 dated 16.10.2018 was served upon the appellant proposing demand of Rs.1,43,895/- for the period of 2013-2014 along with interest and penalty. The said proposal was confirmed vide Order-in-Original No. 53/2019-20 dated 01.07.2019, the appeal thereof has been rejected being barred by time.

2. I have heard Shri Ajay K. Mishra, learned Advocate for the appellant and Ms. Tamanna Alam, learned Authorized Representative for the department.

3. Learned counsel for the appellant has mentioned that no communication ever was received by the appellant with respect to the impugned issue. Appellant neither received any letter nor the show cause notice nor even the Order-in-Original. It is only when recovery proceedings got initiated against the appellant and department personally approached the appellant, that the appeal before Commissioner (Appeals) could be filed. This only became the reason for filing the appeal before Commissioner (Appeals) with certain delay. But the Commissioner (Appeals) has failed to appreciate this ground as a reasonable justification for the delay in filing the appeal.

4. Learned DR on the other hand has supported the order under challenge submitted that Commissioner (Appeals) was statutorily restrained from condoning the delay beyond 90 days. It is observed that on the last date of hearing learned DR was required to place on record the documents including dispatch report to prove the service of the show cause notice and the Order-in-Original upon the appellant. Today learned DR has placed on record the service report with respect to the impugned show cause notice and Order-in-Original. Perusal thereof reflects that it is only the dispatch number with respective date thereof, which has been produced. The extract of dispatch register only has been annexed. Law has been settled that issuance and service of notice or of any proceedings are two distinct process/stages. One is that of dispatch and another is that of its receipt by the person for whom the notice/proceedings was dispatched. There have been catenas of decisions that evidence of mere dispatch of the process is highly insufficient to be called as the proof of service.

5. I rely upon the decision of Hon'ble Delhi High Court in **Crl. REV. P. No. 296/2009 decided on 22.05.2009** which dealt with the question as to whether the notice issued was in fact served. It was held that when the notice was dispatched through registered post, in terms of Section 27 of General Clauses Act, 1897, though a presumption should be drawn that service has been affected. But when this provision is read with Section 114 of the Evidence Act, it was held that presumption of service of notice cannot be automatically drawn unless the sender is able to show to the court a delivery report, or a signed acknowledgement due card or the

internet generated report or any such proof of delivery. Hon'ble Supreme Court also in the case of **Harman Electronics (P) Ltd. Vs. National Panasonic reported as 2008 (16) SCALE 317**, emphasized the importance of service on the recipient. While relying upon its earlier decisions in the case of State of **Punjab Vs. Amar Singh Harika reported as 1966 AIR SC 1313** and **Dalmia Cement (Bharat) Ltd. Vs. Galaxy Traders and Agencies Ltd. reported as (2001) 6 SCC 463**, it was held that notice must be received by the recipient. Even an affidavit merely stating that the recipient (accused in those cases) is residing at the given address, in absence of any further proof to support service, cannot be the evidence of service. Thus, it stands concluded that neither show cause notice nor the Order-in-Original is proved to have been served upon the appellant.

6. At this stage, Order-in-Original is perused. Para 18 thereof resides as follows:

"The assessee has not filed the reply to Show Cause Notice. Dates of personal hearing in the case were fixed on 04.06.2019, 11.06.2019 and 18.06.2019, but the assessee neither appeared for personal hearing nor submitted any reply."

7. These observation sufficiently corroborate the contention of the appellant that he received no communication about the impugned proceedings, in fact, there is no proof even of dispatch about two letters as are mentioned to have been served upon the appellant prior issuance of the show cause notice. The Order-in-Original in the present case is itself an order passed ex parte. It has already been observed that the department proceeded against

the appellant based on the third party data. In the given circumstances, I deem it appropriate that matter be remanded back to the original adjudicating authority with the directions that the authority shall be giving a reasonable opportunity of hearing to the appellant and an opportunity to submit requisite documents, if any, by the appellant and then to decide afresh the issues as have been raised in the impugned show cause notice.

8. As far as the order of Commissioner (Appeals) is concerned, apparently and admittedly, the appeal was filed after the period of more than 5 months reckoning from the expiry of period of two months as is permissible to file an appeal against Order-in-Original. Under Section 85(3A) of the Finance Act, 1994, the Commissioner (Appeals) can no doubt condone the delay but for a period of 30 days only. Admittedly, in the present case, delay is much beyond 30 days over and above 60 days provided for filing the appeal. Hence, Commissioner (Appeals) had no option but to reject the appeal. I draw my support from the decision of Hon'ble Apex Court in the case of **Singh Enterprises Vs. Commissioner of C.Ex., Jamshedpur reported as 2008 (221) E.L.T. 163 (S.C.)** vide which Hon'ble Apex Court has held 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 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. Keeping in view of the entire above discussion irrespective that the Commissioner (Appeals) has acted within the statutory bounds but fact that remains, as observed above, is that the appellant had never received any communication. No opportunity to defend himself could ever availed by the appellant. Hence it is deemed to be a fit case to be remanded back to the original adjudicating authority for the *de novo* adjudication. With these observations and directions, the present appeal stands allowed by way of remand.

[Dictated and pronounced in the open Court]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)