CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

Service Tax Appeal No. 50845 of 2017

(Arising out of Order-in-Appeal No.BHO-EXCUS-001-APP-471-16-17 dated 24.11.2016 passed by the Commissioner (Appeals-I), Customs, Central Excise & Service Tax, Bhopal)

M/s Mandi Committee (APMC) **Appellant**
Guna – 473001 (M.P.)

VERSUS

Commissioner, Customs, Central Excise & Service Tax, Ujjain **Respondent**
29, Bharatpuri, Administrative Area,
Ujjain (M.P.)

Appearance

Ms. Kainaat, Advocate – for the Appellant.

Ms. Jaya Kumari, Authorized Representative – for the Respondent

CORAM :
HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing/Decision : 08/01/2024

Final Order No. 50086/2024

Dr. Rachna Gupta

The present appeal has been filed to assail the Order-in-Appeal No. 471-16-17 dated 24.11.2016 .

2. The facts, in brief, are as follows:

2.1 The appellants were found to provide the taxable service under the category of renting of immovable property services but were found to have not discharged their liability. Resultantly, vide show cause notice dated 14.06.2012 a demand of service tax of Rs. 5,15,072/- was proposed (for the period 01.06.2007 to 31.08.2011) on taxable income of Rs. 49,02,586/-. Another show cause notice dated 26 July 2012 for the period 1.09.2011 to 31.03.2012 proposing demand of service tax of Rs. 52,465/- on taxable income of Rs. 5,09,369/-. Appropriate interest and the proportionate penalties were also proposed to be recovered/imposed. Both the show cause notices were adjudicated by order in original No. 37-38/2013-14 dated 14.02.2014. The demand of show cause notice dated 14.06.2012 was dropped on the ground of demand being barred by limit. However, the demand for another show cause notice dated 26.07.2012 was confirmed along with interest and the equal amount of penalty. The department filed an appeal against the order where the demand on the ground of being barred by time has been dropped. The said appeal has been allowed vide order under challenge. Being aggrieved, the assessee i.e. Mandi Committee is before us.

3. We have heard Ms. Kainaat, learned counsel for the appellant and Ms. Jaya Kumari, learned Departmental Representative appearing for the Department.

4. Learned counsel for the appellant has mentioned that the original authority has dropped the demand after observing that the appellant has not suppressed any relevant information from the department as during the relevant period there was doubt about levy of service tax on renting of immovable property till the dispute was put to an end by retrospective amendment made by Finance Act, 2010. Learned counsel, therefore, has acknowledged their liability towards the impugned taxable service for the normal period. However, has objected the confirmation of demand for the extended period. The order under challenge is prayed to be set aside mainly on the ground that the appellant before the

Commissioner (Appeals) was filed beyond the statutory period prescribed under Section 84 of the Finance Act, 1994. It is submitted that Commissioner (Appeals), therefore, was not competent to entertain the appeal. Order is liable to be set aside on this ground itself. Appeal is accordingly, prayed to be allowed.

5. While rebutting the submission, learned Departmental Representative has mentioned that though the present appellant had raised the objection about competence of Commissioner (Appeals) for entertaining the impugned appeal, in their cross-objections filed before Commissioner (Appeals), but Commissioner (Appeals) has still proceeded to adjudicate which is sufficient to reveal that the delay that occurred in filing the appeal before Commissioner (Appeals) was being duly condoned by him. Hence the same cannot be a ground for setting aside the order under challenge. While submitting on merit, it is mentioned that there is no dispute about the impugned activity of the appellant to be a taxable service hence the demand for the entire normal period in both the show cause notices has to be confirmed. Commissioner (Appeals) has committed no error while holding that there was suppression on part of the appellant as they were not disclosing their tax liability. Hence the demand for the entire extended period is also been rightly confirmed. The order is, therefore, prayed to be upheld and the appeal is prayed to be dismissed.

6. Having heard the rival contentions, we observe that there is no dispute that during the relevant period the appellant was rendering "Renting of Immovable Property Service" which is made taxable with effect from May 08, 2010 with the retrospective effect.

The appellant has clearly acknowledged its liability but for the normal period only. The original adjudicating authority has already confirmed the demand under the impugned show cause notices but for the normal period. Commissioner (Appeals) in the order under challenge has confirmed the entire demand including the demand for the extended period as well.

7. We observe that the primary ground to challenge the said order is the competence of Commissioner (Appeals) to condone the delay in filing the appeal beyond four months (3+1 months). Hence without going into the merits of the appeal, we first need to adjudicate said issue. The relevant provision of Section 84 and 85 of Finance Act, 1994, is seen for the purpose. The provision reads as follows:

> **"Appeals to Commissioner of Central Excise (Appeals).**
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> 84. (1) The Principal Commissioner of Central Excise or Commissioner of Central Excise may, of his own motion, call for and examine the record of any proceedings in which an adjudicating authority subordinate to him has passed any decision or order under this Chapter for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority or any Central Excise Officer subordinate to him to apply to the Commissioner of Central Excise (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Principal Commissioner of Central Excise or Commissioner of Central Excise in his order.
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> (2) Every order under sub-section (1) shall be made within a period of three months from the date of communication of the decision or order of the adjudicating authority.
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> (3) Where in pursuance of an order under sub-section (1), the adjudicating authority or any other officer authorised in this behalf makes an application to the Commissioner of Central Excise (Appeals) within a period of one month from the date of communication of the order under sub-section (1) to the adjudicating authority, such application shall be heard by the Commissioner of Central Excise (Appeals), as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Chapter regarding appeals shall apply to such application.
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> Explanation.-For the removal of doubts, it is hereby declared that any order passed by an adjudicating officer subordinate to the

Principal Commissioner of Central Excise or Commissioner of Central Excise immediately before the commencement of clause (C) of section 113 of the Finance (No. 2) Act, 2009, shall continue to be dealt with by the Principal Commissioner of Central Excise or Commissioner of Central Excise as if this section had not been substituted.

SECTION 85. Appeals to the Commissioner of Central Excise (Appeals).—

(1) Any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the Principal Commissioner of Central Excise or Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals).

(2) Every appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(3) An appeal shall be presented within three months from the date of receipt of the decision or order of such adjudicating authority, relating to service tax, interest or penalty under this Chapter, made before the date on which the Finance Bill, 2012, receives the assent of the President:

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 three months, allow it to be presented within a further period of three months.

(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.

(4) The Commissioner of Central Excise (Appeals) shall hear and determine the appeal and, subject to the provisions of this Chapter, pass such orders as he thinks fit and such orders may include an order enhancing the service tax, interest or penalty :

Provided that an order enhancing the service tax, interest or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) Subject to the provisions of this Chapter, in hearing the appeals and making orders under this section, the Commissioner of Central Excise (Appeals) shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Central Excise Act, 1944."

8. From the joint reading of both the sections, it is clear that review order if is required to be passed in terms of Section 84 the appeal before Commissioner (Appeals) has to be filed within three months from the date of receipt of the order or order of such

adjudicating authority which is prayed to be set aside and appeal, if directed under said order has to be filed within one month of the communication of the said order. There is nothing mentioned is Section 84 about power of condonations with Commissioner (Appeals). It is proviso to Section 85 which empowers the Commissioner (Appeals) to condone a period of 30 days (one month) after the expiry of 90 days (3 months). The proviso makes it clear that the Commissioner has no competence to condone the delay beyond 30 days over 90 days. The Hon'ble Supreme Court in the case of **Singh Enterprises Vs. CCE – 2008 (221) ELT 163 (SC)** held as under:

> **"3.** The Division Bench noted that since the Commissioner had no power of condonation beyond the statutorily prescribed period, therefore, the writ petition was without merit. Before the High Court reliance was placed on a decision of this Court in *I.T.C. Ltd.* v. *Union of India* - [1998 (8) SCC 610] to contend that the High Court had the power to condone the delay. This stand was not accepted by the High Court.
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> **4.** In support of the appeal, learned counsel for the appellant submitted that even if it is conceded for the sake of argument that the Commissioner had no power to condone the delay, yet the High Court in exercise of power conferred under Article 226 of the Constitution of India, 1950 (in short the 'Constitution') can condone the delay. It is stated that the power in this regard is untrammeled by any statutory provision.
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> **5.** Learned counsel for the respondents on the other hand supported the orders of the Commissioner and the High Court.
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> **6.** At this juncture, it is relevant to take note of Section 35 of the Act which reads as follows :
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>> **"35. Appeals to Commissioner (Appeals). -** Any person aggrieved by any decision or order (1) 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 :
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>> 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.
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> Every appeal under this section shall be in the prescribed (2) form and shall be verified in the prescribed manner."

> **7.** It is to be noted that the periods "sixty days" and "thirty days" have been substituted for "within three months" and "three months" by Act 14 of 2001, with effect from 11-5-2001."

9. In view thereof, we are of the affirmed opinion that the Commissioner (Appeals) was not competent to condone the delay beyond 30 days over 90 days. In the present case the order-in-original is dated 14.02.2014. Review order is dated 20.05.2014. Thus the review order is not within 3 months as is required under Section 84 of the Act. The said order admittedly was received at Divisional office, Gwalior on 21.05.2014 but the appeal admittedly was filed on 07.07.2014 i.e. much beyond 30 days of receipt of review order and beyond 90+30 days of the order in original. It is already observed above that Commissioner (Appeals) has no statutory power to condone delay in filing appeal before him which is beyond 90+30 days of the communication of order in original. Hence the order under challenge is the order without competence, accordingly, hence is hereby set aside. As a result of the above discussion the demand for the normal period still stands confirmed. Appeal, however, stands allowed.

(Pronounced in Court)

(Dr. Rachna Gupta)
Member (Judicial)

(Hemambika R. Priya)
Member (Technical)

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