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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

EXCISE APPEAL BRANCH

Appeal No. E/1714/2010 - EX[DB] WITH E/S/1718/2010-EX Date 20/12/2010

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S. TRIVENI GLASS LTD.
1, KANPUR ROAD, ALLAHABAD (UP)

M/S. TRIVENI GLASS LTD. Appellant
Vs
C.C.E ALLAHABAD Respondent

I am directed to transmit herewith a certified copy of **Final order No. 858/** STAY ORDER NO. 1013/2010-EX **2010 EX[DB]** dated 19-11-10 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
   C.C.E ALLAHABAD
   38,M.G.MARG, CIVIL LINES, ALLAHABAD
2. Adv. / Consult
   MR.V. LAXMIKUMARAN
   B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029
3. C.D.R
4. ~~J.C.D.R.~~
5. Bar association. CESTAT. New Delhi
6. Director Publications. Customs. Excise. I.P. Estate. New Delhi
7. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
10. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
11. Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
12. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
13. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file
16. HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

DATE OF HEARING : 19/11/2010.
DATE OF DECISION : 19/11/2010.

Excise Stay application No. 1718 of 2010 in Appeal No. 1714 of 2010

M/s Triveni Glass Ltd. — Appellants

Versus

CCE, Allahabad — Respondent

Appearance

Shri B.L. Narasimhan, Advocate – for the Appellants.

Ms. Monika Batra, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Shri Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

STAY Order No. 1013/10-EX Dated : ____________

Per. Shri Justice R.M.S. Khandeparkar :-

Heard. As we are proposed to dispose of the appeal itself, we allowed the application without insisting for pre-deposit and direct the Registry to place the appeal for hearing forthwith.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

DATE OF HEARING : 19/11/2010.
DATE OF DECISION : 19/11/2010.

Excise Appeal No. 1714 of 2010

[Arising out of the Order-in-Appeal No. 74/CE/Alld/2010 dated 23/03/2010 passed by The Commissioner of Central Excise (Appeals), Allahabad.]

For Approval and signature :

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	Yes
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	:	Seen
4.	Whether order is to be circulated to the Department Authorities?	:	Yes

M/s Triveni Glass Ltd. Appellants

Versus

CCE, Allahabad Respondent

Appearance

Shri B.L. Narasimhan, Advocate – for the Appellants.

Ms. Monika Batra, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Shri Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Order No. 858/10-EX Dated : ____________

Per. Shri Justice R.M.S. Khandeparkar :-

Heard the learned advocate for the appellants and DR for the respondent. This appeal arises of order dated 23rd March 2010 passed by the Commissioner (Appeals), Allahabad. By the impugned order, the Commissioner (Appeals) has dismissed the appeal having been filed beyond the extended period of thirty days after the expiry of limitation period prescribed for filing the appeal. The appellants were engaged in manufacture of Tinted Glass and non-Tinted Glass, Mirror Reflective Glass and Oxygen classifiable under chapter heading No. 7002.10, 7002.20, 7006.90 and 2804.90 respectively of the first schedule to the Central Excise Tariff Act, 1985 and were also availing benefit of Cenvat Credit. In terms of order dated 15th December 2008, the Assistant Commissioner, Allahabad confirmed the demand in relation to the Central Excise duty amounting to Rs. 1,30,372/- alongwith the interest thereon and equal amount of penalty. Being aggrieved, the appellants filed the appeal before the Commissioner (Appeals). The said appeal came to be dismissed for having filed beyond the period of 90 days from the date of the intimation of the order passed by the Adjudicating Authority. Hence the present appeal.

2. The facts relevant for the decision are that the order of the Adjudicating Authority was passed on 15th December 2008. The appeal before the Commissioner (Appeals) was filed on 29th June 2009.

3. It is a case of the department that the said order dated 15th December, 2008 was despatched to the appellants on 22nd December 2008 under registered post No. IL.801, however, the same was returned on 26th December 2008 with the postal remark that the factory was closed and receiver was not available. It is the further case that the said order was sent to Range Office for service on the appellants, and the Sector Officer served the same upon the appellants on 25th February 2009. However, the acknowledgement in that regard was misplaced due to the shifting of Range Office. Being so, according to the department, the appeal should have been filed latest by 25th April 2009. The same having not been so filed it was barred by limitation.

4. It is the case of the appellants that the intimation regarding the order dated 15th December 2008 was received by the appellants on 4th May 2009 and, therefore, the appeal filed on 29th June 2009 was within the period of limitation.

5. Before the Commissioner (Appeals) under letter dated 6th June 2010, the Assistant Commissioner, Allahabad was required to clarify the date of service of the copy of the order upon the appellants. Under letter dated 11th of June 2010, the Deputy Commissioner, Allahabad informed that the impugned order was despatched on 22nd December 2008 and was sent vide registered post RAL 801 dated nil, but the same was returned back by the postal authority on 26th December 2008 with remarks that

factory was closed and receiver was not available. Again this order was sent to Range Office for service upon the party. The Range Officer intimated that the said order was served upon the party by Sector Officer on 25th February 2009, but acknowledgement was misplaced due to shifting of Range Office. In support of the said statement a copy of the letter dated 8th January 2010 was enclosed. The records also disclosed a letter dated 8th January 2010 of the Superintendent, Central Excise Allahabad informing that the order was served upon the party by Sector Officer on 25th February 2009. Considering the same, the Commissioner (Appeals) while rejecting the claim of the appellants about receipt of the order of 5th May 2009 held that the appeal was filed beyond the period of 90 days and, therefore, dismissed.

6. The learned advocate for the appellants referring to the affidavit filed on behalf of the appellants and copies of documents placed on record submitted that in the absence of any acknowledgement of copy of the order revealing actual receipt of such copy by the appellants on 25th February 2009, the Commissioner (Appeals) erred in disbelieving the statement of the appellants that the copy was received on 4th May 2009. He further submitted that the affidavit filed by the Deputy General Manager of the appellants has reiterated the said facts and the copies of letters sent by Superintendent or copy of the extract from the employees movement register cannot be sufficient to disbelieve the statement of fact made on oath by the appellants.

On the other hand, the DR has submitted that the records with the Government office reveal service of copy of the order on 25th February 2009 and considering the same mere claim on behalf of the appellants of receipt of copy on 4th May 2009 without any documentary proof cannot be accepted.

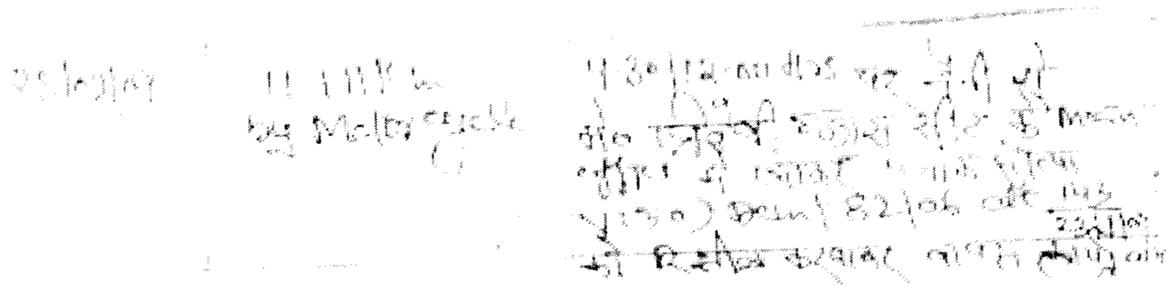
7. As regards, the affidavit filed by the Deputy General Manager of the appellants, it cannot be disputed that he has made a categorical statement that the order dated 15th December 2008 was received by the appellants on 4th May 2009. The said statement has also been verified as true and correct to his knowledge based on the records. However, mere such statement in the affidavit is difficult to be believed for more than one reason.

8. The affidavit has been filed by one Shri R.K. Sinha, stating that he is the Deputy General Manager of the appellants company and he is fully conversant of the facts. The affidavit, however, does not disclose as to since when he has been Deputy General Manager of the appellants company. Affidavit also does not disclose any of fact which could justify his claim that he was fully conversant of the facts of the case. The facts of the case are essentially in relation to the receipt of the copy of the order. His statement regarding the receipt of the copy of order is that the same was received by the appellants. Undoubtedly, appellants are non-living entity. Certainly it must have been received by somebody on behalf of the appellants. Affidavit neither discloses the name of such employee or representative of the appellants'

company who might have received the copy nor refers to any document which could reveal receipt of such copy by particular employee of the appellants company. The disclosure of this fact was absolutely necessary in view of his claim that the statements in the affidavit were made on the basis of records. The verification clause reveals that the statement regarding the receipt of the copy of the order was based on records and not to his personal knowledge. When the matter is in dispute and the appellants are required to establish the fact about receipt of the copy of the order on a particular date, the appellants are required to produce a cogent evidence in that regard. Mere claim based on records without disclosing the description of the records which could reveal the relevant facts in relation to the matter in dispute cannot amount to saying that the party has discharged his burden on the point in issue and that too in the absence of cogent materials in support of his claim. Being so, merely on the basis of the affidavit, it cannot be said that the appellants has established their claim about receipt of the copy of the order on the particular date.

9. As against the above fact, the letter dated 17th March 2010 by Superintendent in relation to the matter in issue discloses that the office had disclosed that the copy of the order was served upon to the appellants on 25th February 2009 by the Sector Officer and in that regard copy of XT-I diary showing journey and service of the copy was sought to be relied upon.

10. The relevant page of the copy of the said diary relating to 25th February 2009 and the journey of the department employee and the service of the copy of the order reads thus :-



The said letter reads thus :-

"<u>OFFICE OF THE RANGE NAINI-III CENTRAL EXCISE & SERVICE TAX DIVISION-I 38, M.G. MARG CIVIL LINES ALLAHABAD</u>

C. No. 20 CE/Misc/2009-10/77 Dated : 17.03.2010

To,

The Superintendent (Tech.),
Central Excise Division – I,
Allahabad.

<u>Subject</u> :- Appeal filed by M/s Triveni Glass Sheet Ltd., against O-I-O No. 313/Dem/2008 dated 15.12.2008 in the case of M/s T.G.L., Iradat Ganj, Allahabad – C/reg.

Please refer to your office letter C. No. V(30) Dem/82/2006 dated 17.03.2006 and Appeal letter C. No. 155/CE/Appl/Alld/09 dated 19.02.2010 regarding date of Service of O-I-O No. 313/Dem/2008 dated 15.12.2008 to M/s Triveni Glass Sheet Ltd., Iradatganj, Ghoorpur, Allahabad.

In this regard this office letter of even C. No. 383 dated 08.01.2010 may kindly be referred to wherein it has already been intimated that the O-I-O was served upon 25.02.2009 by the Sector Officer. The acknowledgement has been misplaced during the course of transfer of files and records from Naini to Allahabad.

In respect of the enclosed page No. 29 of the Appeal paper book it is submitted that date of receipt shown as 04.05.2009 has been made by the party after thought on their own copy of O-I-O served to them on 25.02.2009. In support of which a copy of XT-I Diary showing journey and service of O.I.O. is enclosed.

This is submitted for information please.

Encl. : one page.

Sd/-
Superintendent
Range Naini – III,
C. Ex. Div.-I,Alld."

11. The entry in the diary quoted above clearly disclose endorsement to the effect that the sector officer had gone to the office of the appellant on 25/02/2009 and had delivered the copy of the order. It is not the case of the appellant that the sector officer had delivered something other than the copy of order on 25/02/2009 in their office. It cannot be disputed that the said diary was maintained in regular course of exercise of their duties by the Government employees. There is no allegation of any malafide against the said Government employees. It is not the case of the appellants that the employees who have made the entry was in any manner enimical to the appellants or was interested in frustrating the right of the appellants to file the appeal, or that the employee was to be benefited in any manner by any such entry in the diary. Very fact that the entry was made in the course of exercise of day-to-day duties of the Government employee, it would certainly carry due weight and will have to be accepted as true unless proved to be false or manipulated. In such circumstances, merely because the acknowledgement card

has not been placed on record and with justification that it has been misplaced in the course of transfer of files from Naini to Allahabad, the contention sought to be raised on behalf of the department regarding the service of copy upon the appellants on 25th February 2009 has to be accepted. Indeed the Commissioner (Appeals) having accepted the same, we find no fault with the said finding arrived at by the Commissioner (Appeals) in that regard.

12. Once it is found that the copy was duly served upon the appellants on 25th February 2009 and the appeal was filed on 29th June 2009, it was clearly beyond the period of 90 days. It is settled law that before the Commissioner (Appeals) if the appeal is not filed within the period of 90 days from the date of communication, such appeal cannot be entertained by the Commissioner (Appeals) nor the Commissioner (Appeals) can condone the delay beyond 90 days. It is also settled law that the Appellate Authority also cannot condone the delay in that regard. Considering the same, we do not find any case for interference in the impugned order and hence the appeal fails and is dismissed.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK