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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/3540/2010 - EX[DB]   Date **05/07/2011**

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

To :
M/S BHARAT PETROLEUM CORPORATION LTD.,
MANGLIA INSTALLATION, MANGLIA-SANWER
ROAD, MANGLIA, DISTT. INDORE.
453771

M/S BHARAT PETROLEUM CORPORATION LTD., Appellant

Vs

C.C.E. INDORE Respondent

STAY ORDER NO. 674/2011-EX
MISC ORDER NO. 372/2011-EX

I am directed to transmit herewith a certified copy of **Final order No.500/ 2011 EX[DB]** dated 27-6-11

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. INDORE
MANIK BAGH PALACE, POST
BOX NO. 10, INDORE 452001 (M.P.)

2. Adv. / Consult
MR.ASHUTOSH UPADHYAY, ADVOCATE
4, KISHAN COLONY-567, M.G.ROAD, OPPOSITE HIGH COURT, INDORE (M.P.)

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

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

Date of hearing: 27.06.2011

Excise COD Application No. 466 of 2010 in
Excise Appeal No. 3540 of 2010

M/s Bharat Petroleum Corporation Ltd. Appellants

Vs.

CCE, Indore Respondent

Present for the Appellants : Sh. A. Upadhyay, Advocate
Present for the Respondent : Sh. V. Choudhary, DR

Coram: Hon'ble Sh. Justice R.M.S. Khandeparkar, President
Hon'ble Sh. M. Veeraiyan, Member (Technical)

Misc Order No. 372/2011 -EX

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

Heard Learned Advocate for the appellants and DR for the respondent.

2. This is an application for condonation of delay of 111 days in filing the appeal.

3. The order impugned is dated 08.03.2010. It is a case of the appellants that the copy thereof was served upon them on 20.09.2010 and they filed the appeal on 08.10.2010.

4. When the matter came up for hearing on 14.03.2011, there was no sufficient material in support of the said contention, and therefore at the request of the learned Advocate for the appellants further time was granted. The appellants filed an affidavit of one Shri Babu J. Baby, the Chief

Installation Manager of the appellant company being affidavit dated 21.04.2011 which states that though the copy of the order dated 08.03.2010 was served upon one of the employees of the contractor of the appellants on 17.03.2010, he never handed over the said copy to the appellants. It was pursuant to the enquiry with the department that the appellants learnt about receipt of such copy by such employee of the contractor and thereupon the appellants submitted their clarification under letter dated 23.09.2010 to the department and obtained another copy of the order from department on 23.09.2010.

5. The contention of the appellants in this regard are seriously disputed by the department while contending that the impugned order was served by following the procedure prescribed under the law and it was duly received by the appellants on 17.03.2010 and the same is evident from the delivery slip of the postal authorities, the contents of the affidavit filed by the Chief Installation Manager of the appellants are also disputed.

6. Learned Advocate for the appellants while contending that there is sufficient cause for condonation of delay on the grounds mentioned in the affidavit filed on behalf of the appellants sought to rely upon the decisions in the matter of **Shah Milk Processor Pvt. Ltd**. vs. **CCE (Adjn.)** reported in 2009 (236) ELT 18 (Guj), **Sri Vasavi Agencies** vs. **CCE, Visakhapatnam-sI** reported in 2008 (227) ELT 185 (A.P.), **Newton Engg. & Chemicals Ltd.** vs. **CCE, Vadodara** reported in 2009 (235) ELT 192, **Shree Ganesh Steel Rolling Mills Ltd.** vs. **CCE (Adjud.)** reported in 2009 (235) ELT 471 and **Yarnar Packs** vs. **CC&CE, Hyderabad-IV** reported in 2007 (219)

ELT 343 in support of the claim for condonation of delay. He further submitted that the appellants have very goods case on merits and the department had failed to establish that the appellants had collected revised price and in that regard sought to rely upon the decision in **Bharat Petroleum Corporation Ltd.** vs. **CCE, Raipur** reported in 2002 (144) ELT 672 alongwith **Commissioner** vs. **Bharat Petroleum Corporation Ltd.** reported in 2003 (156) ELT A326 (SC), **BPCL** vs. **Commissioner** reported in 2003 (158) ELT 833, **BPCL** vs. **CCE, Noida** reported in 2007 (207) ELT 121, **Sr. Terminal Manager, IOC Ltd.** vs. **CCE, Coimbatore** reported in 2007 (212) ELT 536 and **National Organic Chemical Industries Ltd.** vs. **CCE, Mumbai-VI** reported in 2003 (157) ELT 494.

7. On the other hand, the DR submitted that the records nowhere disclose that inspite of having received the copy of the order on 17.03.2010 the appellants had no opportunity to have excess to the said copy of the order till 27.09.2010. Therefore, according to the DR, there is no case for condonation of delay. Even in relation to the merits of the case, it is the contention on behalf of the department that there is absolutely no case for the appellants as the fact that the prices were revised in terms of the revision of price carried out under the order issued by the Ministry of Petroleum which the appellants were bound to comply with and the said aspect had never been disputed by the appellants, and hence there is hardly any case on merits in favour of the appellants. As regards the point relating to the service of copy of the order upon the respondent, the DR placed reliance in the decision in the matter of **Naresh Kumar Rameshchand Gupta** vs. **Collector of Customs (P) Bombay** reported in 1984 (18) ELT 578 and **FIL**

Industries Ltd. vs. **CCE, Jammu** reported in 2008 (227) ELT 490 and in relation to the point of limitation reliance is placed in the matter of **Euro Cotspin Ltd.** vs. **CCE, Chandigarh** reported in 2008 (225) ELT 475.

8. As regards the issue relating to the condonation of delay, there is no dispute that the order sought to be challenged is dated 08.03.2010 and the appeal was filed only on 08.10.2010. It is the contention of the appellants that the copy of the order stated to have been served on 17.03.2010 was received by the one Sh. Suraj who was the employee of the contractor by name Shri Mahesh Sharma. He was the Contractor of the appellant at the relevant time. Said Suraj had never handed over the said copy to the appellants and, therefore, they had no knowledge of the order delivered on 23.09.2010. It is their case that since the excise officers insisted for recovery of the amount, they enquired about the matter and they came to know from the department that said Suraj had acknowledged of the receipt of the copy of the order and the same was revealed to them on 23.09.2010 whereupon they immediately requested for another copy and after obtaining the same, filed the present appeal.

9. The original application for condonation of delay undoubtedly states that the copy of the order was served on Shri Suraj who was working with the Contractor at the relevant time and that the said Suraj left the job with Contractor without handing over the order to the appellants. The application also states that sh. Suraj was not authorized person for receipt of the copy of the order. The said contention has been reiterated in the affidavit filed by Chief Installation Manager on 11.04.2011.

10. It is pertinent to note that the acknowledgement of receipt of the copy of the order by Shri Suraj on 17.03.2010 is not in dispute. It is the contention of the appellants that said Suraj was in the employment of their contractor and said Suraj left the employment without handing over the copy of the order. It is also their contention that Sh. Suraj was not authorized person to receive the copy of the order. Apart from these statements the appellants have not bothered to place on record any material in support of their contention that Sh. Suraj was in fact the employee of their contractor. The fact that Shri Suraj left the job prior to filing of the appeal, the fact that Sh. Suraj was not available for filing any affidavit in support of their claim at the time of filing of the appeal. It is also pertinent to note that neither in the original application nor even in the affidavit of the Chief Installation Manager, there is even a whisper about absence of knowledge to the appellants of the receipt of such copy of order by Sh. Suraj prior to 23.09.2010. Affidavit in para 3 only speaks lack of knowledge of acknowledgement given by Sh. Suraj regarding the receipt of copy and not regarding lack of knowledge of the order to the appellants prior to 23.09.2010. The statement that only on acknowledgement by Sh. Suraj being shown to them, they came to know about the order is neither substantiated by any material on record nor any such statement is found in the original application for condonation of delay. Affidavit is a piece of evidence in support of pleadings. It cannot travel beyond the case pleaded in the application. Application nowhere discloses any lack of knowledge of the order to the appellant prior to 23.09.2010.

11. It is pertinent to note that the fact that the copy addressed to the appellants was received by Sh. Suraj is not disputed by the appellants. If said Suraj was not the employee of the appellants, one fails to understand as to how the appellants could confirm the signature of Suraj as having received the copy of the order sent to the appellants. There is neither any affidavit of Mahesh Sharma alleged contractor for appellants nor any other document on record to show that the said Suraj was not the employee of the appellants.

12. Besides, once the postal authorities confirmed about service of the copy of the order upon the appellants presumption under Section 27 of the General Clauses Act arise. Bearing the same in mind, it was necessary for the appellants to place on record sufficient material to justify their contention about absence of their knowledge of the receipt of order prior to 23.09.2010.

13. The matter relating to condonation of delay depends upon the facts of each case. The condonation of delay can be only on the ground of sufficient cause being shown for the delay caused. Sufficient cause would necessarily relate to the facts which cause delay in filing the appeal. Merely because in one case delay had been condoned considering the facts of that case unless the facts are similar the decisions in relation to the condonation of delay which are sought to be relied upon on behalf of the appellants which were delivered in the peculiar facts and circumstances of the case, can be of no help to the appellants to justify the delay in the matter in hand.

14. Even otherwise as rightly submitted by the DR, we find that even on merits, there is hardly any case to be considered in the matter in hand. The case against the appellants as was correctly understood by the appellants and summarise by them in their own reply to the show cause notice was as under:-

> "It has been alleged in the show cause notice that in respect of duty paid stocks lying at the BPC depots, fed by BPC, Manglia terminal, as on the date of implementation of Education cess i.e. 09.07.2004, the duty paid MS/HSD/SKO were sold at the revised price and thereby collected Education Cess and so collected Education cess should be deposited with the Central Government under Section 11D of the Central Excise Act, 1944. The SCN also proposes to demand duty u/s. 11D from BPCL in respect of MS/HSD/SKO sold to M/s Hindustan Petroleum Corporation Ltd. (HPCL) and M/s Indian Oil Corporation Ltd. (IOCL) on payment of appropriate duty and subsequently sold as a trader by them at revised prices".

15. Perusal of the entire reply to the show cause notice as well as the impugned order nowhere discloses the appellants having disputed the fact that there was revision of price of the product. It is neither disputed nor can be disputed that the revision of price of product in question is controlled by the Ministry of Petroleum and once the price is revised by the Ministry of Petroleum the person dealing with such product has no option but to follow the direction of the Ministry in that regard. That being the settled law, an assessee disputing the revision of price by the assessee in relation to such product will have to rebut the presumption which arises once the factum of revision of price by the Ministry is not disputed. In the case in hand, we do not find that it was a case of the appellants that inspite of revision of price by the Ministry, the appellants did not adopt the revised price of the product in question. Being so, there is hardly any case even on merits in favour of the appellants.

16. The reference to various cases is sought to be made by learned Advocate for the appellants to contend that the demand under Section 11D would not be maintainable. In our considered opinion, reference to all those cases is thoroughly unwarranted in the facts of the case in hand. In none of those cases, the issue was whether in view of revision of price by the Ministry, the persons dealing with such product which are always subject to price control by the Ministry, is bound to follow the revision of price or not. Since we are dealing with the matter in relation to the said issue which was not the subject matter of any of those decisions, none of those decisions can be of any help in the matter in hand.

17. For the reasons stated above, in our considered opinion, there is no case made our for condonation of delay of 111 days and hence miscellaneous application fails and is hereby dismissed.

Justice R.M.S. Khandeparkar
President

M. Veeraiyan
Member (Technical)

Pant

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

Date of hearing: 27.06.2011

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri M. Veeraiyan, 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 should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3	Whether Their Lordships wish to see the fair copy of the Order?	[illegible]
4	Whether Order is to be circulated to the Departmental authorities?	[illegible]

Excise Stay No. 3324 of 2010 and Excise Appeal No. 3540 of 2010

(Arising out of order in original No. 04/COMMR/CEX/IND/2010 dated 08.03.2010 passed by the Commissioner, Central Excise & Customs, Indore).

M/s Bharat Petroleum Corporation Ltd. Appellants

Vs.

CCE, Indore Respondent

Present for the Appellants : Sh. A. Upadhyay, Advocate

Present for the Respondent : Sh. V. Choudhary, DR

Coram: Hon'ble Sh. Justice R.M.S. Khandeparkar, President
Hon'ble Sh. M. Veeraiyan, Member (Technical)

STAY order no. 674/2011 - EX
FINAL Order No. 500/2011-EX

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

In view of order passed today in condonation of delay application No. 466 of 2010 the appeal, the stay application and the appeal both do not survive and stand dismissed accordingly.

Justice R.M.S. Khandeparkar
President

M. Veeraiyan
Member (Technical)

Pant