

IN THE CUSTOMS, EXCISE & SERVICE TAX  
APPELLATE TRIBUNAL,  
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-SM

COURT -IV

**Service Tax Appeal No.ST/53154/2018-ST [SM]**

[Arising out of Order-in-Appeal No.725 (CRM) CE/JDR/2018 dated 06.07.2018 passed by the Commissioner (Appeals), Central Excise & CGST, Jodhpur]

**M/s. Shri Om Prakash Sharma ...Appellant**

**Vs.**

**CE & CGST, Udaipur**

**... Respondent**

Present for the Appellant : Ms.Asmita Nayak, Advocates  
Present for the Respondent: Ms.Tamanna Alam, D.R.

**Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)**

**Date of Hearing/Decision: 07/12/2018**

**Final ORDER NO. 53434 /2018**

**PER: RACHNA GUPTA**

The present appeal is against Order of Commissioner (Appeals) bearing No. 725 dated 06.07.2018.

2. It is submitted on behalf of the appellant that Commissioner (Appeals) has failed to accept the grounds as submitted before him specifically that the copy of order of Original Adjudicating Authority was received by the appellant only on 10<sup>th</sup> August, 2015. It is due to the said reason that the appeal was filed before Commissioner (Appeals) on 21<sup>st</sup>

January, 2016 and that the same was well within the period of limitation but the Commissioner (Appeals) in sheer ignorance thereof has dismissed the appeal on the ground of limitation. Ld. Counsel has relied upon the case of **CCE, Ludhiana vs. Best Dyeing reported in 2012 (27) STR 97 ( P & H)** to impress upon that when there is no evidence to prove that the order was ever served upon the appellant, no interference is warranted in the discretion in allowing the application seeking the condonation of delay. He has also relied upon the decision of **Eblitz Inc. vs. Additional Commissioner, Service Tax, Bangalore reported in 2016 (45) STR 163 (Kar.)**, wherein it was held that limitation begins from the date of receipt of order. The order is accordingly prayed to be set aside and the appeal is prayed to be decided on merits.

3. While rebutting these arguments, Id. D.R. has relied upon **Singh Enterprises vs. CCE, Jamshedpur reported in 2008 (221) E.L.T. 163 (S.C.)** to impress upon that Commissioner (Appeals) has no discretion to condone the delay beyond a period of 90 days. The present appeal was filed before him beyond the said period of 90 days. Hence, Commissioner (Appeals) had no other option but to dismiss the appeal on limitation. Order is accordingly, prayed to be upheld.

4. After hearing both the parties and perusing the record, it is observed that the appellant is the sub-contractor of M/s.

Siwal Builders & Developers. Initially an audit was conducted against the said main contractor. It is from the record recovered from M/s. Siwal Builders & Developers that the notices were sent to the appellant herein. The appellant's contention is that his address, as was available with the main contractor, was his old address and that he had shifted to a different place in Jaipur. The affidavit of the appellant to this effect is on record wherein it is deposed, in addition, that the appellant never received the impugned show cause notice. There is no proof of delivery/service by the Department. It is apparent from the Order-in-Original that the assessee did not file reply to the show cause notice nor attended the personal hearing as were fixed by the Assistant Commissioner. Ex-parte Order-in-Original dated 31.12.2014 support the appellant contention that too in absence of any proof of service of either show cause notice or any subsequent notice of personal hearing upon the appellant. It is also apparent that the said order was dispatched at the old address of the appellant.

5. Though Department's contention is that the same was dispatched vide registered post and no acknowledgement due has been received. But in view of the above discussed facts and circumstances, the mere dispatch of OIO by registered post is not sufficient.

6. As per Section 35 of Central Excise Act, appeal to Commissioner lies within 60 days from the date of communication of the decision or order passed by the Officer lower in rank than the Commissioner (Appeals). Thus, it is the date of communication which is relevant for reckoning of the said period of 60 days. Once, it was brought to the notice of the Commissioner (Appeals) that the order in Original was never communicated to him and that it was never served upon him in the way as is required under Section 37 C of the Central Excise Act. I opine that it was mandatory for Commissioner (Appeals) to look into the said aspect. The copy of Order-in-Original, apparently and admittedly, was received by the appellant only on 10<sup>th</sup> August, 2015. That too, it was not the certified copy. But still the Commissioner (Appeals) has held the appeal to be delayed for one year and 20 days. The period of limitation i.e. 60 days condonable by Commissioner (Appeals) for another 30 days has to reckon from 10.08.2015. Resultantly, **Singh Enterprises (Supra)** as relied by Department is not applicable to present facts. The finding of Commissioner (Appeals) is therefore opined to be wrong in view of the above observed circumstances.

7. The appellant herein has filed an affidavit deposing that the order got communicated to him only on 10.08.2015. While relying upon the decision of **M/s. T. Prabhakara Rao vs. Commissioner, Central Excise, Hyderabad-III reported in**

**2009 (238) ELT 791 (Tri.-Bangalore)**, wherein it was held that appellant can prove non-receipt of order by filing affidavit and that the same is not rebutted for want of the proof of dispatch by the Revenue for no acknowledgement produced, the Tribunal is empowered to condone the delay, I hereby condone the impugned delay.

8. However, keeping in view that the Commissioner (Appeals) has dismissed the appeal in *limini* on limitation and has not given any findings on the merits of the appellant, I hereby remand the matter to Commissioner (Appeals) for adjudication on merits. Resultantly, appeal in hand is allowed by way of remand.

[Operative part pronounced in the Open Court]

**(RACHNA GUPTA)**  
**MEMBER (JUDICIAL)**

Anita