CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 1

Service Tax Appeal No. 56044 of 2014

(Arising out of Order-in-Appeal No. 116 (ST)/RPR-1/2014 dated 10/09/2014 passed by The Commissioner (Appeals), Customs, Central Excise & Service Tax, Raipur (C.G.))

Shri Suman Kumar Roy **...Appellant**
Janta Colony, Gudhiyari,
Raipur (C.G.)

Versus

Commissioner of Customs, Central Excise And Service Tax, Raipur (C.G.) **....Respondent**
35-C, Administrative Area, Arera Hills,
Hoshangabad Road, Bhopal

APPEARANCE:
Shri Manish Saharan, Advocate for the Appellant
Shri Vivek Pandey, Authorised Representative for the Respondent

CORAM : HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing/ Decision: **01.04.2019**

FINAL ORDER NO. 50534/2019

JUSTICE DILIP GUPTA

1. This appeal seeks to assail the order dated 10 September, 2014 passed by the learned Commissioner (Appeals) by which the appeal has been dismissed for the reason that it was not filed within the period stipulated in Section 85 (3A) of the Finance 1994 (hereinafter referred to as the Act).

2. Section 85 (3A) of the Finance Act provides that the appeal shall be presented within a period of two months from the date of receipt of the decision or order of the adjudicating authority but the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month.

3. In the present case the order was passed by the Adjudicating Authority on 26 September, 2012. It is said to have been sent to the Appellant by speed post on 28 September, 2012. The Commissioner (Appeals), on the basis of a report submitted by the Superintendent (STC) Service Tax Department that that the order was sent by speed post on 28 September, 2012, presumed that the order would have been served on the appellant within 15 or 20 days of the date of dispatch, since the report did not mention that the letter had returned undelivered. The Commissioner (Appeals), therefore, observed that since the appeal was filed on 14 July, 2014, there was a delay of approximately 914 days which could not be condoned in view of the decision of the Supreme Court in **Singh Enterprises v/s CCE** reported in **2008 (223) ELT 163 (SC).**

4. The Report of the Superintendent (Adjudication) that has been relied upon by the Commissioner (Appeals) is reproduced below:-

> " As desired find enclosed herewith copy of dispatch register page No. 386 & 387, serial No. 3323 and Speed Post register dated 28.09.2012-3323 (high lighted) for necessary action at your end."

5. After noticing the aforesaid report, the Commissioner (Appeals) observed-

> " On going through the above factual report, I have perused the copy of the dispatch register and entry of Speed Post register dtd. 28.09.2012 and find

> that the impugned Order passing date is 26.09.2012 and the impugned order was posted to the party by Speed Post on 28.09.2012 vide Speed Post Entry No. STC/28.09.2012. Further I also find that the reporting officer of the 'Department has not reported that the same were received back undelivered to their office. In the case of **CCE Vs Mohan Bottling** reported in **2010 (225-ECR 321 (P&H)** it has been held that if notice is sent by speed post and not returned by postal authority it is deemed to have been served. "

6. Learned counsel for the appellant has submitted that the order was not sent on the appellant in accordance with the provision of Section 37 (C) of the Central Excise Act which deals service of decisions, orders, and summons, since it was dispatched by speed post and not registered post with acknowledgment due and, therefore, the learned Commissioner (Appeals) was not justified in holding that the order shall be deemed to have been served on the appellant.

7. Learned Authorized Representative of the Department has, however, supported the impugned order and has placed reliance upon the decision of the Punjab and Haryana High Court in **Commissioner of Central Excise, Ludhiana V/s Mohan Bottling Co. (P) Ltd**. reported in **2010-TIOL-840- HC-P&H-CX**.

8. We have considered the submissions advanced by learned counsel for the appellant and learned Authorized Representative of the Department.

9. In the present case the order of the Adjudicating Authority is dated 26 September, 2012. Section 85 (3A) of the Finance Act that would, be applicable since the order was passed after 28 May, 2012, is reproduced:-

> " 85 (3A). An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, to made on and after which the Finance Bill, 2012 receives the assent of the President, relating to Service Tax, interest or penalty under this Chapter.
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> **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."

10. Section 83 of the Finance Act makes applicable the provisions Section 37 (C) of the Central Excise Act in relation to Service Tax. Section 37(C) of the Central Excise Act, as it stood at the relevant time, is reproduced below:-

> **37-C. Service of decisions, orders, summons, etc**.- (1) Any decision or order passed or any summons or notices issued under this Act or the rules made thereunder, shall be served,-
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> (*a*) by tendering the decision, order, summons or notice, or sending it by registered post with acknowledgment due, to the person for whom it is intended or his authorized agent, if any;
>
> (*b*) if the decision, order, summons or notice cannot be served in the manner provided in clause (*a*), by affixing a copy thereof to some conspicuous part of the factory or warehouse or other place of business or usual place of residence of the person for whom such decision, order, summons or notice, as the case may be, is intended;
>
> (*c*) if the decision, order, summons or notice cannot be served in the manner provided in clauses (*a*) and (*b*), by affixing a copy thereof on the notice-board of the officer or authority who or which passed such decision or order or issued such summons or notice.
>
> (2) Every decision or order passed or any summons or notice issued under this Act or the rules made thereunder, shall be deemed to have been served on the date on which the decision, order, summons or notice is tendered or delivered by post or a copy thereof is affixed in the manner provided in sub-section (1)."

11. Thus, the mode prescribed for service of an order is by tendering the order or sending it by registered post with acknowledgment due to the person for whom it was intended or his authorised agent.

12. In the present case it is not in dispute that the order passed by the Assistant Commissioner (STC) was sent to the appellant by speed post on 28 September, 2012 and was not sent by registered post with acknowledgment due. At the relevant time there was no provision for sending the order by speed post. The Commissioner (Appeals), after noticing that the order was dispatched on 28 September, 2012 by speed post, presumed that it should have been delivered within 15 to 20 days.

13. The contention of the learned counsel for the appellant is that the order can be deemed to have been served only if it is sent by the modes prescribed in the Section 37C of the Central Excise Act and in support of his submission he has placed reliance on the decisions of the Bombay High Court in **Amidev Agro Care Pvt. Ltd. V/s Union of India 2012 (279) ELT 353 (Bom.)** and the **M/s New Drug and Chemical Co V/s Union of India and Another** reported in **2015-TIOL-1089-HC-MUM-CUS.** This decision in **New Drug** has relied upon **Amidev Agro Care Pvt. Ltd**.

14. The Bombay High Court in **Amidev Agro Care Pvt. Ltd** held that it was mandatory on the part of the Revenue to serve a copy of the order of the Adjudicating Authority by registered post with acknowledgment due to the assessee, but since it was sent by speed post, it was not sent in the prescribed manner. It also held that the Tribunal was wrong in relying upon the judgment of the High Court in **Mohan Bottle Pvt. Ltd**., which decision has been relied upon by the learned Authorized Representative. The relevant paragraphs of the judgment are reproduced below:-

> **5**. **As per Section 37C(1)(a), it was mandatory on the part of the Revenue to serve a copy of the order of Commissioner of Central Excise (Appeals) by registered post with acknowledgment due to the assessee. Admittedly in the present case, a copy of the order has not been sent by registered post. In these circumstances, it could not be said that the requirement of Section 37C has been complied with. The CESTAT was wrong in relying upon the judgment of the P&H High Court in the case of Mohan Bottling Company (P) Limited (supra),** as in that case a copy of the order was sent by registered post, whereas in the present case, the order is said to have been sent by speed post and there is no evidence of tendering the decision to the assessee.
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> 6. **In these circumstances, in our opinion the decision of the CESTAT that the requirements of Section 37C have been complied with cannot be accepted**. As per Section 37C(1) (a) of the Central Excise Act, 1944, it was obligatory on the part of the Revenue, either to tender a copy of the decision to the assessee or to sent it by registered post with acknowledgment due to the assessee or its authorized agent. In the present case, neither of the above have been complied with by the Revenue. Accordingly, the contention of the assessee that a copy of the order of

> Commissioner of Central Excise (Appeals) was received for the first time on 26th February 2010 would have to be accepted. Consequently, the decision of the CESTAT that the appeal filed by the assessee was time-barred cannot be sustained.

(emphasis supplied)

15. As noticed above the judgment rendered in **Amidev Agro** was followed by Bombay High Court in **New Drug and Chemical Co**.

16. The decision in **Mohan Bottle Pvt. Ltd** would, therefore, not be of any help to the appellant as in that case the order was dispatched by a registered post which was the mode prescribed under Section 37(C) of the Central Excise Act.

17. It is, therefore, seen that the order dated 28 September, 2012, passed by the Adjudicating Authority, was not sent to the appellant by either of the modes prescribed under Section 37(C) of the Central Excise Act. The deeming provision contained in Sub-Section (2) of Section 37(C) of the Central Excise Act could not, therefore, have been resorted to by the Adjudicating Authority.

18. The Commissioner (Appeals) was, therefore, was not justified in observing that since the order was sent by speed post on 28 September 2012, it should be deemed to have been served on the appellant within 15-20 days from the date of dispatch . The appeal was required to be filed, within 2 months from the date of receipt of the decision or order of the adjudicating authority. According to the appellant, as stated in ground G, the order was received on 22 May, 2014. The appeal, therefore, should have been filed within two months from 22 May, 2014 and it was actually filed on 14 July, 2014. The appeal was, therefore, filed before the Commissioner (Appeals) within the period provided for in Section 85(3A) of the Finance Act.

19. We are surprised that the Commissioner has drawn an inference from the report submitted to him by the Superintendent that the speed post had not returned back, merely because the report did not mention.

20. The Commissioner (Appeals), therefore, committed an illegality in holding that the appeal had been filed not only beyond the statutory period of limitation but also beyond the extended period of limitation provided for under in Section 85(3A) of the Act.

21. The order dated 10 September, 2014 is, accordingly, set aside. The Commissioner (Appeals) shall now decide the appeal on merits.

(Dictated and pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(BIJAY KUMAR)
MEMBER (TECHNICAL)

Rekha