

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No. 79609 of 2018

(Arising out of Order-in-Appeal No. 08-10/ST/KOL/2013 dated 20.02.2013 passed by Commissioner (Appeals-I), Kolkata)

M/s. LGW Ltd.

(Narayanpur, P.O. Rajarhat-Gopalpur, 24 Pargans (North), Kolkata-700136)

Appellant

VERSUS

Commr. of Service Tax & Central Excise, Kolkata

(180, Rajdanga Main Road, 3rd Floor, Kolkata-700107)

Respondent

With

Service Tax Appeal No. 79610 of 2018

(Arising out of Order-in-Appeal No. 08-10/ST/KOL/2013 dated 20.02.2013 passed by Commissioner (Appeals-I), Kolkata)

M/s. LGW Ltd.

(Narayanpur, P.O. Rajarhat-Gopalpur, 24 Pargans (North), Kolkata-700136)

Appellant

VERSUS

Commr. of Service Tax & Central Excise, Kolkata

(180, Rajdanga Main Road, 3rd Floor, Kolkata-700107)

Respondent

And

Service Tax Appeal No. 79611 of 2018

(Arising out of Order-in-Appeal No. 08-10/ST/KOL/2013 dated 20.02.2013 passed by Commissioner (Appeals-I), Kolkata)

M/s. LGW Ltd.

(Narayanpur, P.O. Rajarhat-Gopalpur, 24 Pargans (North), Kolkata-700136)

Appellant

VERSUS

Commr. of Service Tax & Central Excise, Kolkata

(180, Rajdanga Main Road, 3rd Floor, Kolkata-700107)

Respondent

Service Tax Appeal No. 79609-79611 of 2018

APPEARANCE :

Mr Rip Das, Chartered Accountant for the Appellant(s)

Mr. J. Chattopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.77729-77731/2023

Date of Hearing : 28th November 2023

Date of Decision: 22-12-2023

PER R. MURALIDHAR:

Consequent to the Order passed by the Hon'ble Calcutta High Court setting aside the Final Order Nos.75144-75146/2023 dated 22.03.2023, the Appeals have been restored and the same have been taken up for Final Hearing.

2. The Learned Representative of the Revenue, took the preliminary objection to the effect that the appellant's Appeal before the Commissioner (Appeals) was dismissed by him on the ground that the Appeals were filed much beyond the condonable period power available to him. Hence, it is submitted that the Tribunal has to go into the merits of the case, only after the appellants cross the hurdle of time bar in terms of Section 85 of the Finance Act 1994. He also submits that the reason adopted by the Commissioner (Appeals) was affirmed and approved by the Hon'ble Supreme Court in the case of **Singh Enterprises Vs CCE Jamshedpur – 2008 (221) ELT 163 (SC)**. This judgement was again followed by the Hon'ble Apex Court on several occasions and is being followed by various High Courts and Tribunals consistently till date. He further submits that as on date the Supreme Court's judgement is in force and is binding on all the other authorities and Courts under its jurisdiction. Hence, he prays that the Appeals should be dismissed.

3. The Learned Authorized representative of the Appellant, Sri Rip Das, Chartered Accountant, relies on the observations and

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directions of the Hon'ble Calcutta High Court vide their Order dated 01.12.2022 and submits that this was not followed by this Tribunal while passing the Final Order Nos.75144-75146/2023 dated 22.03.2023. Subsequently considering their fresh WPs, the Hon'ble High Court vide their and Order dated 19.06.2023, took note that the directions / observations of the High Court were not considered and the High Court directed the same should be followed. He submits, that in another case, the Appellant had filed refund claims before the Adjudicating Authority for the period April to September 2008 which came to be rejected by him. On an Appeal before the Commissioner (Appeals), he dismissed their Appeal. Being aggrieved by the OIA, the appellants filed Appeal before this Tribunal. After going through the facts and merits of the case, this Tribunal was pleased to allow their Appeal by way of remand order to the Adjudicating authority to consider the merits afresh. On the basis of this Final Order No. 77983/2017 dated 15.09.2017, the Adjudicating authority took up the de-novo proceedings and granted the refund. He submits that in the present case also similar type of refunds are involved. Since the present refunds have been rejected at the lower levels, the Tribunal is required to consider the merits of the case as has been done in the Final Order No. 77893/2017 dated 15.09.2017 in the earlier case and to pass suitable order in the present proceedings, so that the appellant gets the refunds. Since the same issue stands decided by the same Tribunal in respect of the same appellant, he prays that the present Appeals should also be decided on merits on the same grounds. He submits, in view the latest Order dated 19.06.2023 of the High Court, dismissal of the Appeals on the ground of time-bar is erroneous and the Appeals are to be decided only the basis of the merits as has been observed by the High Court. Accordingly, he submits that the present Appeals should be allowed with consequential relief.

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4. Since on the date of Hearing on 28th November 2023, the full details of the Writ Petitions filed by the appellant at the first and second stages [2022 and 2023] were not available and the averments made by the appellant vis-à-vis the Orders passed by the High Court had to be gone into, the Tribunal directed the appellants to file a list of documents with the CESTAT Registry by 6th December 2023. The documents sought for by the Bench were provided by the appellant on 6.12.2023 and the same have been taken on record and have been considered.

5. We have heard both the sides, perused the Appeal papers and other documents and case laws placed / argued before us.

6. In the present case, we are required to look into the statutory provisions governing Appeal filing before the Commissioner (Appeals) as is canvassed by the Authorized Representative of the Revenue and the merits of the case as is being canvassed by the Appellant citing the observations / directions of the High Court as per their Order dated 1.12.2022.

7. Since the details of filing of the Appeals before the Commissioner (Appeals), it is important to consider the same along with the statutory provisions towards time limit set for filing the Appeals. We have to go through the chronological events in the present Appeals. The following Table shows the details of the Orders passed along with the delay in filing the Appeals by the appellant at various stages:

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SI No.	Order-in-Original & Date	Date of receipt by the appellant	Date of receipt of Appeal petition in the office of the Commissioner (Appeals)	No. of Months Delay	Date of Receipt of OIA	Date of filing Appeal before Tribunal	No. of days delay in filing Appeal before Tribunal
1.	31/Refund/S T/D-II/Kol/08 dated 13.01.2009	24.01.2009	24.08.2012	43 Months (Time Limit for filing the Appeal) : 3 months + 3 months	OIA Nos.- 08-10/2013 dated 20.02.2013	15.10.2018	1900 + days
2.	07/Refund/S T/D-II/Kol/09 dated 24.03.2009	12.04.2009	24.08.2012	40 Months (Time Limit for filing the Appeal) : 3 months + 3 months	-do-	-do-	1900 + days
3.	26/Refund/S T/D-II/Kol/09 dated 30.06.2009	11.07.2009	24.08.2012	37 Months (Time Limit for filing the Appeal) : 3 months + 3 months	-do-	-do-	1900 + days

8. From the above Table, the following observations emerge:

- 1) The Appellant had filed Three Refund claims for the period October 2008 to December 2008 before the Adjudicating Authority.
- 2) The Refund claims were partly allowed / rejected vide the Orders in Originals (OIO) passed by the Adjudicating authority on 24.01.2009 12.04.2009, and 11.07.2009 respectively.

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- 3) Being aggrieved by these OIOs, the appellant has filed the Appeals before the Commissioner (Appeals) on 24.08.2012 in respect of all three Appeals.
- 4) The normal period for filing the Appeal before the Commissioner (Appeals) in 3 months.
- 5) Admittedly, the Appeals have been filed with a delay of 43 months, 40 months and 37 months.
- 6) The Commissioner (Appeals) has passed the Order In Appeals (OIAs) on 20.02.2013, wherein the Appeals have been dismissed on the ground of Time Bar. Since the Appeals have been dismissed on this ground, the Commissioner (Appeals) has not gone into the merits of the case. Since the conditions for filing the Appeal have not been fulfilled, there is no necessity/no scope for him to go into the merits of the case.
- 7) Being aggrieved by the OIAs, the Appellant has filed the Appeals before the CESTAT (Tribunal) on 15.10.2018, with a delay of over 1900 days.
- 8) The Tribunal vide Final Order Nos.75003-75005/2021 dated 4.2.2021, has held no cogent reason has been adduced by the appellant towards the enormous delay and hence did not find any reason to condone the delay of over 1900 days and dismissed the Appeal on this ground itself.
- 9) Being aggrieved by the Final Orders, the Appellant filed Writ Petitions (WPs) before the Single Member of the Hon'ble Calcutta High Court. He did not see any error on the part of the Tribunal in not condoning the delay and dismissed the WPs filed by the appellant.
- 10) Being aggrieved, the appellant filed WPs before the Divisional Bench of the Hon'ble High Court.
- 11) The Hon'ble Calcutta High Court vide its Order dated 1.12.2022, noting the pleading of the appellant that on similar issue of refund, after rejection of the same at lower levels, the Tribunal has passed a favourable order and consequently they were granted refund, held that condonation is to be considered in the light of these facts and directed the Tribunal to hear the Appeals afresh.

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- 12) Consequent to the Hon'ble Calcutta High Court's Order dated 1/12/2022, this Tribunal restored the Appeals vide Misc. Order Nos. 75016-75018/2023 dated 30.01.2023.
 - 13) The Restored Appeals were listed for Final Hearing on 12.03.2023 before the Tribunal.
 - 14) The Tribunal, after going through the case history and after noticing that the Appeals before the Commissioner (Appeals) were filed much beyond the period prescribed under Section 85 (3), dismissed the appeals and passed the Final Order Nos 75144-75146/2023 dated 22.03.2023.
 - 15) Being aggrieved by these Final Orders, the Appellant filed Writ Petitions before the Hon'ble Calcutta High Court.
 - 16) The Hon'ble Calcutta High Court vide their Order dated 19.06.2023, has set aside the Final Order Nos 75144-75146/2023 dated 22.03.2023 and remanded the matter back to the Tribunal to give due consideration to the observations made by the High Court in their earlier Order dated 1.12.2022.
 - 17) Consequently, the Tribunal has Restored the Appeals, and they have been taken for Final Hearing on 28.11.2023. After hearing both sides, the appellant has been granted time till 6th December to file a list of documents called for by the Tribunal. These documents have been filed by the appellant on 6th December 2023. The same have been taken into consideration while passing the present Final Order.
9. It would be important to go through the statutory provisions with regard to the time allowed for filing the Appeals before the Commissioner (Appeals) and the Tribunal. The relevant extracts of the Finance Act 1994 are reproduced below :

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).

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(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

SECTION 86. Appeals to Appellate Tribunal. —

(1) Save as otherwise provided herein an assessee aggrieved by an order passed by a Principal Commissioner of Central Excise or Commissioner of Central Excise under section 73 or section 83A by a Commissioner of Central Excise (Appeals) under section 85, may appeal to the Appellate Tribunal against such order within three months of the date of receipt of the Order.

10. A careful reading of the above provisions would clarify that while in respect of Appeals before Commissioner (Appeals) to be filed under Section 85, both the time limit for filing the Appeal as well as the condonable period by him are prescribed, in respect of the Appeals to be filed before Tribunal, only the time limit for filing has been prescribed. Thus, while the power to condone is conditional for the Commissioner (Appeals), the power to condone is unrestricted and open for the Tribunal.

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11. As per Proviso to Section 85 (3) and Proviso to Section 85 (3A), the Commissioner (Appeals) can condone the delay of a maximum of 3 months for the Appeals filed prior to the enactment of Finance Bill 2012, restricting the power to condone the delay of a maximum of One month after enactment of the Finance Act 2012. The present issue falls under Section 85(3).

12. The Proviso to Section 85 (3) clearly brings out the Legislative intent of allowing only restricted power to the Commissioner (Appeals) to condone the delay.

13. Vide the amendment carried out to Section 85 under the Finance Bill 2012, the power to condone has been reduced from 3 months to 1 month. This once again shows that it is a considered, deliberated, clear intent of the Legislature to prescribe the specific time limit for condonation of delay by the Commissioner (Appeals).

14. Coming to the facts of the present Appeals, admittedly the Appellant has filed the Appeals before the Commissioner (Appeals), after more than **43 months, 40 months and 37 months**, way beyond the condonable period of **Three Months** by the Commissioner (Appeals) as prescribed under Section 85 (3), during the period under consideration. The Commissioner (Appeals) has dismissed the Appeals on the ground of the delayed filing itself, without going into the merits the case.

15. The Commissioner (Appeals), in the impugned OIAs has held as under:

2. I find that as per ST-4 of the appeal, the date of communication of impugned Order-in-Original as detailed in Para 1, Supra has been mentioned herein below:-

SI	Order-in-Original No. & Date	Date of receipt by	Date of receipt of
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No.		the appellant	Appeal petition in the office of the Commissioner (Appeals-I)
1.	31/Refund/ST/D-II/Kol/08 dated 13.01.2009	24.01.2009	24.08.2012
2.	07/Refund/ST/D-II/Kol/09 dated 24.03.2009	12.04.2009	24.08.2012
3.	26/Refund/ST/D-II/Kol/09 dated 30.06.2009	11.07.2009	24.08.2012

3. As per the provisions of section 85(3) of Finance Act, 1994, during the relevant period, the appeal should be filed within 3(three) months from the communication of the order or decision against which the appellant prefers to file an appeal. Further, the proviso to section 85(5), ibid empowers the Commissioner (Appeals) to allow the filing of the appeal within a further period of 3(three) months, if the appellant shows sufficient cause, which prevented him to file the appeal within the statutory period of 3 (three) months from the date of receipt of the decision or order of such adjudicating authority.

4. I find that the subject 3(Three) appeals were received in this office after the period of 3 years 7 months and 1 day (three years seven months and one day), 3 years 4 months and 1 day (three years seven months and one day), 3 years 4 months and 13 days (three years four months and thirteen days) and 3 years 1 month and 14 days (three years one month and fourteen days) respectively, along with an application for condonation of delay for late filing of the appeal in respect of all the 3 (three) appeals. The cause of delay mentioned by the appellant in all the three applications for condonation of delay are that; their office was under repair and in the process and due to inadvertence the relevant documents including the Orders-in-Original got misplaced in their office; the dealing executive of the Service Tax matters resigned from the

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service of the Company and left without handing over of charge and due to his absence, the Company was handicapped and could not pursue the matter. However, I find that as per proviso to Section 85(3) of Finance Act, 1994, Commissioner (Appeals) is empowered to condone only a delay of (3) three months, provided the appellant shows sufficient cause, which prevented him to file the appeal within the statutory period of 3 (three) months, whereas in the present appeals the delay is more than 3(three) months. Hence the 3 (three) appeals filed by the appellant are barred by limitation of time and so they are not admissible.

5. In view of the above facts, I pass the following order:-

ORDER

The 3(Three) appeals filed against the Orders-in-Original No. 31/Refund/ST/DDII/Kol/-8 dated 13.01.2009, 07/Refund/ST/D-II/Kol/2009 dated 24.03.2009 and 26/Refund/ST/D-II/Kol/09 dated 30.06.2009 passed by the Assistant Commissioner of Service Tax, Division-II, Kolkata are disallowed for late filing of the appeals.

16. Section 85 (3) makes it mandatory for the appellant to fulfill the condition therein. Proviso to Section 85 grants power to condone by 3 months to the Commissioner (Appeals), provided sufficient cause for such delay is explained by the appellant. In the present case, the Commissioner (Appeals) has recorded the details of cause cited by the appellant for seeking the condonation. However, finding such explanation is to be considered by him only when the Appeal is filed within the period of 3 months after the normal time limit of 3 months [which would be 6 months in total], and noting that the Appeals have been filed with a delay of 3 years 7 months, 3 years 4

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months and 3 years 1 month, he has dismissed the Appeals on this ground itself, without there being any necessity to go to the explanation given by the appellant towards the delay.

17. Therefore, when this condition of filing the Appeal within the condonable period of 3 months has not been fulfilled, **there is no other statutory provision, requiring him to either go into the explanation towards delay nor hear the case on merits and pass the order to this effect.**

18. In this case, being aggrieved by the OIAs passed by the Commissioner (Appeals) dismissing the appeals on the ground of time bar, the appellant has preferred the present three Appeals before the Tribunal again with a delay of 1900 + days. Admittedly, in terms of Section 86, the Tribunal has unrestricted power to condone the delay. Though there are no specifics as to how the COD is to be considered, the condonation is granted subject to the appellant providing proper reason / explanation for filing the appeal in a delayed manner. The condonation is not a matter of right but is subject to the appellant bringing in proper justification towards the delayed filing.

19. In the present case, the Appellant had filed Miscellaneous Application for Condonation of Delay, stating reasons as under :

1. Being aggrieved by the said Appeal Order passed by the Ld. CCE (A), your petitioner preferred to file this petition before this Honourable Bench and your petitioner humbly prays before your honour's to hear the application on merit only and to set aside the Appeal Order passed by the Ld. CCE(A). Your petitioner also humbly prays before this Honourable Bench to condone the delay in filing the Appeal Petition for no intentional delay on the part of your Appellant. Further, to state that if the Appeal Petition is not filed on time then your petitioner is the only sufferer and no

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public at large is affected by such delay. The Court would always lean in favour of substantial justice rather than technicalities for non-suiting the petitioner on ground that appeal has not been filed within the time stipulated in spite of the fact that authorities are conferred with power to condone the delay.

2. That Your Appellant craves leave to urge, to add, to alter, to amend or to adduce further Statement of Facts/Any other reasons for such delay on or before the date of appeal hearing.

20. The Tribunal after granting opportunity of Hearing, wherein Shri Rip Das, Chartered Accountant represented the appellant, has held as under :

3. After going through the said Miscellaneous Applications, I did not find any cogent reason for such inordinate delay in filing the appeals before the Tribunal. Mere filing of an application signed by Authorized Signatory of the appellant company does not serve the purpose for condoning such delay, wherein no plausible reason has been mentioned in the application for such an excessive delay. [Emphasis supplied]

21. Thus it is clear that the appellant failed to bring in any proper, cogent grounds towards the delayed filing of appeals, which were filed after more than 1900 days. When the COD petition was taken up for Hearing on 04.02.2021, from the Final Orders passed, it is seen that **there is no whisper about any argument by the Appellant on the point about their subsequent refund claim being granted on similar issues as per the Final Order passed by the Tribunal in 2017, for canvassing the present COD petition.** Hence, the Tribunal dismissed their COD Misc petition along with the Appeals filed on the ground that no cogent explanation has been given for filing the appeals with such a huge delay.

22. Even the Hon'ble High Court in its Order dated 01.12.2022 has observed as under :

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11. It is not clear as to whether the appellant had placed the order passed by the Assistant Commissioner, Bidhannagar CGST & Division dated 10th April, 2019 accepting the classification adopted by the appellant in respect of the specified services. In the order passed by the learned Tribunal dated 4th February, 2021, there is no indication as regard the submission, which were made by the appellant.

23. It speaks of the great legal acumen of the appellant in approaching the Hon'ble High Court by disclosing only the part history of the case, effectively concealing the reason for which the Commissioner (Appeals) had dismissed the Appeals, necessitating them to file their Appeals before the Tribunal. This is being discussed in the subsequent paragraphs

24. The Hon'ble Calcutta High Court vide their Order dated 9.11.2022, has held as under [Relevant extracts] :

9. The learned Tribunal was of the opinion that there is inordinate delay and no reasonable explanation had been done. The settled legal position is that non benefits by lodging an appeal belatedly unless and until there are mala fides attributed to the appellant for not preferring the appeal petition within the time prescribed under the statute. Likewise, it is also equally well-settled that a person, who has not been diligent and who has slept over the matter, cannot be forwarded by the Courts and Tribunal by exercising discretion in his/her favour.

10. Thus, we are required to see as to whether the appellant falls in any one of the aforementioned category of cases. Under normal circumstances, we would have dismissed the appeal right away but however, what has prompted us not to do so is on account of a development which had culminated in an order passed by the Assistant Commissioner of Central Excise, Bidhannagar Division dated 10th April, 2019. By the said order, the authority had sanctioned refund of Rs. 13,59,282/- paid on the specified taxable services used for export of

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goods in terms of Notification No. 41/2007-ST dated 6th October, 2007 as amended. The remaining amount of Rs. 73,912/- claimed as refund was rejected. The said order pertained to a claim for refund for the period from April, 2008 to September, 2008. Initially, the adjudicating Authority had held against the appellant and aggrieved over the same, the appellant had preferred and appeal before the Commissioner (Appeals-I), Kolkata challenging the Order in Original dated 24th March, 2009. The Appeal was dismissed by order dated 10th November, 2009 against which the appellant had preferred and appeal before the learned Tribunal. The Tribunal by an order dated 15th September, 2017 allowed the appeal and remanded the matter back for fresh consideration. On remand, the adjudicating authority granted a de novo hearing aggrieved with the submissions made by the appellant and consequently sanctioned refund.

11. It is not clear as to whether the appellant had placed the order passed by the Assistant Commissioner, Bidhannagar CGST & Division dated 10th April, 2019 accepting the classification adopted by the appellant in respect of the specified services. In the order passed by the learned Tribunal dated 4th February, 2021, there is no indication as regard the submission, which were made by the appellant.

12. In the light of the above, though we do not fully approve of the conduct of the appellant in not pursuing the matter in a time bound manner, considering the fact that the present claim for refund is for the subsequent period, i.e., from October, 2008 to December, 2008, we are of the view that this aspect of the matter can be taken note of by the learned Tribunal while considering the application for condonation of delay.

13. Thus, taking note of the peculiar facts and circumstances, we are inclined to interfere with the order passed by the Learned Tribunal. For the above reasons, the appeal is allowed. The order passed in the writ petition is set aside. Consequently, the writ petition is allowed and the order passed by the learned Tribunal dated 4th February, 2021 is set

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aside and the *Miscellaneous application Nos. 77827 of 2019 (COD), 77828 of 2019 (COD) and 77829 of 2019 (COD)* are restored to the file of the learned Tribunal to be considered afresh. The learned Tribunal is requested to take note of the observations made by us, more particularly the fact that the department for the earlier period, i.e. from April, 2008 to September, 2008 has accepted the classification adopted by the appellant on the specified services.

25. This High Court Order, on its own does not condone the delay in filing the appeal before the Tribunal, but has directed the Tribunal to consider the other facts brought in before the High Court, so as to condone the delay, restore the Appeals and consider the facts brought in by the appellant with regard to subsequent refund claims being granted. As per the directions of the Hon'ble High Court, admittedly, this Tribunal vide its Order Nos.75016-75018/2023 dated 30.01.2023, restored the Appeals.

26. From the above Order of the High Court, it is observed that the primary issue before them was the non-condonation of the delay by the Tribunal while dismissing the Appeals. Based on other factual details about refund being granted for the subsequent period, brought in for the first time by the appellant before the High Court, it has taken cognizance of the same and having felt that the appellant was a genuine victim and had a good case, the case was remanded to the Tribunal.

27. On going through the Writ Petition No.1663/2022 and other Two Writ Petitions filed before the High Court, it is seen that the appellant has nowhere come out with the fact of their Appeals before the Commissioner (Appeals) were dismissed on account of delayed filing, in terms **the proviso to Section 85 (3)**, which was cited by the Commissioner (Appeals) for dismissing the Appeals. **Therefore, the issue as to whether the delay which occurred in filing the**

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Appeal before the Commissioner (Appeals) was condonable or not, which was most crucial point to be considered by the High Court, was not an issue at all before the Hon'ble High Court. If this fact was properly disclosed by the Appellant, who was required to do so in all fairness, as the same is very much part of the OIAs passed by the Commissioner (Appeals), the High Court would have deliberated this issue in detail and passed their Order. This amounts to concealment of material facts before the Hon'ble High Court.

28. It is seen from their pleadings before the Hon'ble High Court, that they have only played the victim card, without actually revealing the fact that their initial Appeals before the Commissioner Appeals were dismissed with proper reason, by citing the statutory provisions. As seen in the above Paragraphs, the findings given by the Commissioner (Appeals) in the impugned OIAs are as under [relevant portion]:

4. I find that the subject 3(Three) appeals were received in this office after the period of 3 years 7 months and 1 day (three years seven months and one day), 3 years 4 months and 1 day (three years seven months and one day), 3 years 4 months and 13 days (three years four months and thirteen days) and 3 years 1 month and 14 days (three years one month and fourteen days) respectively, along with an application for condonation of delay for late filing of the appeal in respect of all the 3 (three) appeals. The cause of delay mentioned by the appellant in all the three applications for condonation of delay are that; their office was under repair and in the process and due to inadvertence the relevant documents including the Orders-in-Original got misplaced in their office; the dealing executive of the Service Tax matters resigned from the service of the Company and left without handing over of charge and due to his absence, the Company was handicapped and could not pursue the matter. **However, I find that as per proviso to Section 85(3) of Finance Act, 1994, Commissioner (Appeals) is empowered to condone only a delay of (3) three months,**

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provided the appellant shows sufficient cause, which prevented him to file the appeal within the statutory period of 3 (three) months, whereas in the present appeals the delay is more than 3(three) months. Hence the 3 (three) appeals filed by the appellant are barred by limitation of time and so they are not admissible.

29. As observed supra, the appellant has concealed and misguided the Hon'ble High Court, which in its good faith on the belief that the appellant was the victim, ordered the Appeals to be restored and to be taken up for Final Hearing.

30. The Appeals came up for Final Hearing on 22.3.2023. Admittedly the same Authorized Representative Sri RIP Das, Chartered Accountant was once again representing the Appellants. In the course of arguments by both the sides, the Departmental Representative of Revenue drew the attention to the issue of the delay in filing the Appeals before the Commissioner (Appeals). In such a case, the Tribunal is bound to go through the details of the impugned OIAs, so as to understand the cause of dismissal of the Appeals in the OIAs. After going through the OIAs, it was found that the Commissioner (Appeals) had dismissed the Appeals in terms of Section 85(3) on account of time bar without going into merits. In such a case the only point to be considered by the Tribunal was to check as to whether the dismissal by the Commissioner (Appeals) was proper or not. If it was proper, the Appeals before Tribunal would also be dismissed. If the dismissal by the Commissioner (Appeals) is not proper, then the Appeal would be heard on merits. Having found that the Appeals have been filed beyond the condonable period of Three Months, the Tribunal dismissed the Appeals vide Final Order Nos.75144-75146 /2023 dated 22 3.2023 holding as under :

On entertaining the appeal, the Ld.Commissioner (Appeals) found that the appeal was filed beyond time limit prescribed under

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Section 85 (3) of Finance Act, 1994, wherein it is prescribed that the appeal is required to be filed within three months from the communication of the Order-in-Original. The period of limitation can be extended for another three months by showing sufficient reasons for delay in filing the appeal. As the appeals have filed before the Ld.Commissioner (Appeals) beyond time limit prescribed, therefore, the same were dismissed as time barred by the Ld.Commissioner (Appeals).

2. Against the said order, the appellants are before me.

3. ***It is undisputed by the appellants that they have filed the appeals before the Ld.Commissioner (Appeals) against the Order-in-Original beyond six months time limit prescribed under Section 85 (3) of Finance Act, 1994 as observed by the Ld.Commissioner (Appeals) herein above.***

4. In that circumstances, I hold that the appellant has filed the appeals beyond the time limit prescribed under Section 85 (3) of Finance Act, 1994. Accordingly, I do not find any infirmity with the impugned order and the same is upheld.

5. The appeals filed by the appellants are dismissed as time barred.

31. It is noted from the records that on the date of Final Hearing on 22.3.2023, the Authorized Representative (AR-Appellant) of the appellant, Chartered Accountant Sri Rip Das has appeared argued the case. There is nothing on record to state that he had opposed the view taken by the Bench to dismiss the Appeal on the ground that the Appeals were filed way beyond the condonable period before the Commissioner (Appeals). They have not disputed that the Appeals were filed beyond Six Months [3 months for filing appeal + 3 months available to Commissioner (Appeals) for condonation]. **Nor is there any evidence that he has brought to the knowledge of the Tribunal that the observations of the High Court on merits are required to be considered and the same was not considered by the Bench. He was also present when the**

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Order was dictated in the open Court. He did not raise any objection for the reasons cited by the Tribunal for dismissing the Appeals in the Final Orders being dictated by the Hon'ble Member (Judicial).

32. Immediately after the Final Order Nos.75144-75146/2023 dated 22.03.2023, were passed by the Tribunal, the appellant with quick footed dexterity, which by now has become the hallmark of the appellant, he has immediately once again filed the WP before the High Court playing out his victim card. This time around, their ground was that the observations made by the High Court were not considered while passing the Final Orders. ***Conveniently, once again the Appellant did not brief the Hon'ble High Court about the details of provisions of Section 85 (3), nor did they state that they brought to the notice of the Tribunal the earlier observations / directions of the High Court vide their Order dated 01.12.2022.***

33. During the Hearing on 19.6.2023, the Hon'ble High Court, did not get proper assistance with reference to the interpretation of the Section 85(3), nor about the Supreme Court's judgment rendered in the year 2008, which is still in force and is being referred to in all such cases where the Condonation is the issue. Such non- disclosure about the Section 85 provisions by the appellant before the Hon'ble High Court, has resulted in the following order being passed [relevant extracts] :

Heard learned advocates appearing for the parties.

By this writ petition, petitioner has challenged the impugned order dated 22nd March, 2023 passed by the Customs, Excise & Service Tax Appellate Tribunal, Kolkata on the order of remand made by the Hon'ble Division Bench of this Court by the order dated 1st December, 2022 in MAT No. 1663 of 2022 by directing the learned Tribunal to consider afresh the appeal in question filed by the petitioner which was

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dismissed on the ground of limitation, by taking note of the observation of the Hon'ble Division Bench more particularly about the fact that the department for the earlier period i.e. from April, 2008 to September, 2008 has accepted the classification adopted by the petitioner on the specified services, while considering for condonation of delay in filing the appeal in question. I have perused the aforesaid impugned order of the Tribunal dated 22nd March, 2023 and on perusal of the same, I do not find a single word in the aforesaid impugned order with regard to specific direction of the Hon'ble Division Bench of this Court dated 1st December, 2022 where the tribunal was specifically asked to take the aforesaid observation which was made by the Hon'ble Division Bench of this Court in paragraph 13 of the said order to consider the earlier period in question relating to which the department has accepted the classification adopted by the petitioner in his specified services.

Considering the facts and circumstances of the case as appears from record and submission of the parties, I am of the view that the aforesaid impugned order is total non-application of mind and is non-speaking order and I am also of the view that no useful purpose will be served in keeping the writ petition pending and the matter should be remanded back to the sales tax authority tribunal to pass a fresh order after taking into consideration the observation made by the Hon'ble Division Bench of this Court in paragraph 13 of the aforesaid judgment dated 1st December, 2022.

With the observation and direction, these writ petitions being WPA 12130 of 2023, WPA 13253 of 2023 and WPA 13689 of 2023 are disposed of.

34. Considering the above chronological events in the present case, wherein multiple Writ Petitions have been filed before the Hon'ble Supreme Court, resulting in their Orders, in the present proceedings, the Tribunal has taken utmost care to discuss the entire issue threadbare for arriving at the conclusion. Proper opportunity has been given to the appellant to present his submissions and they

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have been allowed to file further documents. All these have been taken into consideration, for arriving at the final conclusions.

35. Before, going into the observations / directions of the Hon'ble High Court which were said to have been overlooked and not considered, it would also be important to first go into the details as to whether there exists a scope to do so or not by the Tribunal.

36. The Tribunal first of all, is required to consider as to whether the dismissal by the Appeals by the Commissioner (Appeals) was proper or not.

37. The relevant portions of Section 85 (1), (2) and (3) are extracted below :

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

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to be presented within a further period of three months. [Emphasis supplied]

38. A careful reading of the above statutory provisions would clarify that in respect of Appeals before Commissioner (Appeals) to be filed under Section 85 (3), both the time limit for filing the Appeal as well as the condonable period by him are prescribed. The Commissioner (Appeals) can condone the delay of a maximum of 3 months. Thus, as a thumb-rule, it is taken that the appellant has a maximum period of 6 months to complete this Appeal filing.

39. The Section 85 (3) and Section 86 clearly bring out the Legislative intent of allowing restricted power to the Commissioner (Appeals) and unrestricted power to the Tribunal. ***Further the amendment carried out to Section 85 by way of 85(3A), vide the Finance Bill 2012 wherein the power to condone has been reduced from 3 months to 1 month, once again shows that it is a considered, deliberated, specific intent of the Legislature to prescribe the specific time limit to condone the delay by the Commissioner (Appeals).***

40. Coming to the facts of the present Appeals, there is absolutely no dispute and also clearly admitted by the Appellant that they have filed the Appeals before the Commissioner (Appeals), after more than **43 months, 40 months and 37 months**, way beyond the condonable period of **Three Months** by the Commissioner (Appeals) as prescribed under Section 85 (3). Noting the same, he has held as under in the OIAs:

4. *I find that the subject 3(Three) appeals were received in this office after the period of 3 years 7 months and 1 day (three years seven months and one day), 3 years 4 months and 1 day (three years seven months and one day), 3 years 4 months and 13 days (three years four months and thirteen*

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days) and 3 years 1 month and 14 days (three years one month and fourteen days) respectively, along with an application for condonation of delay for late filing of the appeal in respect of all the 3 (three) appeals.
However, I find that as per proviso to Section 85(3) of Finance Act, 1994, Commissioner (Appeals) is empowered to condone only a delay of (3) three months, provided the appellant shows sufficient cause, which prevented him to file the appeal within the statutory period of 3 (three) months, whereas in the present appeals the delay is more than 3(three) months. Hence the 3 (three) appeals filed by the appellant are barred by limitation of time and so they are not admissible.

41. From the statutory provisions, we do not find anything to the effect that :

- (a) If the appeal is filed beyond 3 months + 3 months, the Commissioner (Appeals) is required to go through the reasons / explanation given for delayed filing and give any findings on the same.
- (b) If the appeal is filed beyond 3 months + 3 months, the Commissioner (Appeals) is required to dwell into the merits of the case and give any findings on the same.

42. Therefore, when admittedly the Appeals have been filed beyond 3 months + 3 months, we do not find that any infirmity has crept in, in the OIAs passed by the Commissioner (Appeals). We hold that he was correct in dismissing the Appeals on this count.

43. The next question that arises is as to whether the Tribunal is empowered to go into the condonation power of the Commissioner (Appeals) and can it direct him to condone the same by way of any power vested in the Tribunal.

44. We find that the issue as to whether the higher appellate forum like Tribunal, High Court or Supreme Court, can review the dismissal

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of the Appeals by the Commissioner (Appeals) on account of time bar, has been dwelt in detail by the Hon'ble Supreme Court in the following cases :

2008 (221) E.L.T. 163 (S.C.)

SINGH ENTERPRISES Vs CCE JAMSHEDPUR

8.*The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period upto which the prayer for condonation can be accepted is statutorily provided.* It was submitted that the logic of Section 5 of the Indian Limitation Act, 1963 (in short the 'Limitation Act') can be availed for condonation of delay. **The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days period.**

10. Sufficient cause is an expression which is found in various statutes. It

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essentially means as adequate or enough. There cannot be any straitjacket formula for accepting or rejecting the explanation furnished for delay caused in taking steps. **In the instant case, the explanation offered for the abnormal delay of nearly 20 months is that the appellant concern was practically closed after 1998 and it was only opened for some short period. From the application for condonation of delay, it appears that the appellant has categorically accepted that on receipt of order the same was immediately handed over to the consultant for filing an appeal.** If that is so, the plea that because of lack of experience in business there was delay does not stand to be reason. *I.T.C.*'s case (supra) was rendered taking note of the peculiar background facts of the case. **In that case there was no law declared by this Court that even though the Statute prescribed a particular period of limitation, this Court can direct condonation. That would render a specific provision providing for limitation rather otiose. In any event, the causes shown for condonation have no acceptable value. In that view of the matter, the appeal deserves to be dismissed which we direct.** There will be no order as to costs.

45. In this case, the issue was that of the Appeal under Section 35 was filed before Commissioner (Appeals) in respect of Central Excise matters. Under this Section 35, the Appeal is required to be filed within 60 days and condonation can be granted if it is filed within the next 30 days. This Section 35 of CEA 1944, which is applicable for Central Excise cases, is *para materia* with Section 85 of the Finance Act 1994, which is applicable for Service Tax cases. While the condonable period was 30 days in case of Central Excise Appeals, the same is for Three (3) months for the Service Tax matters during the period under dispute.

46. The Hon'ble Apex Court has unequivocally held that once the condonable period of 30 days is exceeded, the Commissioner (Appeals) has no power to condone the same. It has also gone on to hold that even Section 5 of the Limitation Act, is fully excluded since

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the statute itself prescribes the specific period upto which the condonation can be granted. It further holds that, even Supreme Court cannot be vested with the power to condone this delay before the Commissioner (Appeals), since any such action would render the specific provision otiose.

47. This judgment of Supreme Court, which is in force as on date, has been relied on several occasions in several subsequent Supreme Court and High Court judgements. Some of the these cases discussed below :

2010 (257) E.L.T. 3 (S.C.)

AMCHONG TEA ESTATE Vs UNION OF INDIA

4. The appellant herein challenged the order dated 9-7-2003 passed by the Deputy Commissioner, Central Excise, Gauhati by filing an appeal before the Commissioner (Appeals). ***The said appeal was filed on 6-10-2004 and by an order dated 15-10-2004, the Commissioner (Appeals) rejected the application filed by the petitioner seeking condonation of delay on the ground that the appeal is barred under the provisions of Section 35 of the Central Excise Act.***

5. The aforesaid order of the Commissioner (Appeals) was challenged before the learned Single Judge of the Gauhati High Court. ***By an order dated 3-6-2008, the learned Single Judge held that sufficient ground is not made out for condonation of delay, even assuming that such a power is vested on the Commissioner (Appeals) to condone delay beyond a period of 30 days. The said order of the learned Single Judge was challenged before the Division Bench of the High Court, which dismissed the appeal holding that the Commissioner (Appeals) did not have the power and jurisdiction to condone such delay beyond a maximum period of 30 days after expiry of the earlier 60 days as contemplated in the said provisions.***

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6. The learned counsel appearing for the appellant sought to submit that the language used in Section 35, it could be presumed there is power to condone the delay on showing of sufficient cause. Necessarily then, the provisions of Section 5 would apply and, hence the Commissioner (Appeals) would have the power and jurisdiction to condone the delay even beyond a period of 30 days as laid down in Section 35.

7. **We are unable to agree with the aforesaid view propounded by the learned counsel for the appellant for the simple reason that under the proviso to Section 35 a period of limitation came to be prescribed, which being a special law would override the general law as provided in Section 35 of the Act. In this connection we may rely on a decision in Singh Enterprises v. Commissioner of Central Excise, Jamshedpur & Ors., reported in [(2008) 3 SCC 70], wherein this Court has held that the proviso to sub-section (1) of Section 35 makes the position crystal clear that the Appellate Authority has no power to condone the delay beyond the period of 30 days and that the language used makes the position clear that the Legislature intended to entertain the appeal by condoning the delay only upto the 30 days and not 60 days.**

8. **In our considered opinion, the aforesaid decision of this Court fully applies to the facts of the present case also and, therefore, we find no error in the judgment and order of the High Court.**

48. In above case, the Supreme Court has once again reiterated their interpretation on the time limit set for the condonation to be granted by the Commissioner (Appeals).

49. In the following case in respect of the Electricity Act 2003, the issue cropped up regarding the power to condone the delay by Supreme Court:

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.1315 OF 2010
OIL & NATURAL GAS CORP.LTD.
Vs GUJARAT ENERGY TRANSMISSION
CORPORATION. LTD. & ORS ...
[Judgement dated 1st March 2017]
[Three Member Bench]
[Relevant extracts]

2. The present appeal was presented before the Registry of this Court on 7.2.2008. An office note recorded that the appeal was barred by 71 days. The appeal was listed before the Bench on 29.1.2010 on which date this Court condoned the delay and admitted the appeal. When the matter was taken up for hearing today, Ms. Ranjeeta Ramachandran, learned counsel appearing for the 1st respondent raised a preliminary objection that **this Court could not have condoned the delay of 71 days in view of the language employed in Section 125 of the Act and further the condonation of delay by this Court was done without notice to the respondent and hence, deserves to be recalled and as a sequitor, the appeal has to be dismissed without any adverting to the same on merits.**

3. Section 125 of the Act reads as follows:-

“125. Appeal to Supreme Court.--(1) Any person aggrieved by any decision or order of the Appellate Tribunal, may, **file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal**, to him, on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908 (5 of 1908):

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, **allow it to be filed within a further period not exceeding sixty days.**”

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5. On a plain reading of the aforesaid provision, **it is clear as crystal that this Court, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the period of 60 days from the date of communication of the decision or order of the appellate tribunal to him, may allow the same to be filed within a further period not exceeding 60 days. It is quite clear that this Court has the jurisdiction to condone the delay but a limit has been fixed by the legislature, that is, 60 days.**

7. The two-Judge Bench placed reliance on Singh Enterprises vs. C.C.E., Jamshedpur & Ors.³ and Commissioner of Customs and Central Excise v. Hongo³ (2008) 3 SCC 70 6 India Private Limited & Ar.⁴ and came to hold that **Section 5 of the Limitation Act cannot be invoked by this Court for maintaining an appeal filed against the decision or order of the tribunal beyond the period of 120 days in view of the prescription under Section 125 of the Act and the proviso appended thereto**

11. In the instant case, as is noticeable, the judgment was 5 (2015) 7 SCC 58 8 reserved on 18.9.2007 and pronounced in open court on 28.9.2007. Therefore, the date of communication would be 28.9.2007 as per the principle laid down in Chhattisgarh State Electricity Board (supra). We entirely concur with the said view. In the case at hand, the certified copy was applied through email on 9.10.2007 and delivered on the same date. **Be that as it may, the date of communication is 28.9.2007 and, therefore, the appeal preferred under Section 125 of the Act should have been filed within 60 days, i.e., 27.11.2007, to come within the period of limitation and further to be entitled to get the benefit of Section 5 of the Limitation Act, he should have filed the appeal within a further period of 60 days, i.e., 26.9.2008. Thus calculated, there is total delay of 71 days and 11 days beyond the expiry of 60 days the limit that is stipulated under Section 125 of the Act.**

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19. Another aspect needs to be adverted to. Mr. Agrawal submits that when the delay in review was condoned by this Court, the appellant should not be permitted to raise a preliminary objection. **Suffice it to say, it is not an application under Section 5 of the Limitation Act which is to be entertained by the Court. We are singularly concerned with entertaining of an application for condonation. If the delay is statutorily not condonable, the delay cannot be condoned.**

50. In the above case, the issue was whether the Supreme Court, for the Appeals preferred before it, whether it can condone the delay of over 60 days of condonable period. After going through the Section 125 of the Electricity Act 2003, it held that it has no power to do so and held that even Section 5 of the Limitation Act, cannot overcome the time limit of 60 days specified under Section 125. In this case, mere delay of 71 days [11 days over the specified condonation of period of 60 days] was considered enough to deny the condonation and it was held that the issue need not be heard on merits.

51. From the above judgements of Hon'ble Supreme Courts discussed supra, it is crystal clear that Commissioner (Appeals) has no power to condone the delay beyond 30 days / 90 days. The judgments affirm and approve the decision of the Commissioner (Appeals). Further as held by Supreme Court, there is no power vested with the Tribunal, High Court and Supreme Court to condone this delay of more than 30 / 90 days occurring before the Commissioner (Appeals).

52. Therefore, relying on the above Supreme Court decisions, we hold that there is no power vested with this Tribunal to set aside the Appeals already dismissed by the Commissioner (Appeals), particularly when we find no infirmity in his doing so after finding

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that the Appeals were filed with a delay of 43 months, 40 months and 37 months respectively.

53. Consequently when the OIAs are upheld, the present Appeals of the appellant are dismissed.

54. In view of our holding that there is no infirmity in the OIAs passed and no further powers are available with the Tribunal to condone the delay denied by the Commissioner (Appeals) as held by Supreme Court in the cited cases, with due respect to the Hon'ble High Court, we state that we have no occasion to visit the directions/observations of the Hon'ble High Court vide their Order dated 1.12.2022

55. Though we are not required give our comments on the observations / directions of the Hon'ble High Court, still we have spent some time to go through the factual details. Our observations with regard to the points raised by the Appellant before the High Court on their Refund Claims for the period April to September 2008 and the chronological details are under :

Refund for the period	:	April to Sept 2008
Date of Order in Original	:	24.03.2009
Date of filing Appeal before Commissioner (Appeals)	:	09.07.2009
Date of OIA passed	:	11.11.2009
Date of filing Appeal before Tribunal	:	11.02.2010
Final Order by Tribunal remanding the matter	:	15.09.2017 / 05.03.2018
Refund granted by Asst Commissioner	:	10.04.2019

56. In the above case :

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- a) The appellant has filed their Appeal before the Commissioner (Appeals) within 4 months, i.e well the time limit of 6 months.
- b) They have filed the Appeal before the Tribunal within 3 months from the date of OIA, which is well within the time limit.
- c) Therefore, in that case, the Commissioner (Appeals) did not dismiss the Appeal on account of time limit, but had rejected the same on merits.
- d) Accordingly, before the Tribunal there was no issue about the Appeal being dismissed on account of time-bar by the Commissioner (Appeals) unlike in the present case.
- e) The Tribunal had to decide the Appeal on merits alone.
- f) The Tribunal went into the merits and finding that proper justification has not been done, remanded the matter back to the Adjudicating authority.

57. Since in that case, the matter was being contested purely on merits both at Commissioner (Appeals) level and at the Tribunal level, unlike in the present case, the Tribunal took up the appeals and decided the issue on merits. On the other hand, the Appellant has filed the present Appeals with a delay of 37 to 43 months and they were rejected by the Commissioner (Appeals) on that count alone. Even before the Tribunal, the Appeals were filed with a delay of over 1900 days. However, due to the High Court's Order dated 1.12.2022, the appellant was able to get over the hurdle of this enormous delay, resulting in taking up of these Appeals by the Tribunal for Final Hearings. Therefore, the earlier Final Orders dated 15.09.2017, cited by the appellant by the appellant is clearly distinguishable on facts. Hence, that Final Order cannot be applied

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to the facts of the present case.

58. As has been observed by us in the earlier paragraphs, the appellant has resorted to concealment of material facts before the Hon'ble High Court, always projecting as if some grave error has been committed in his case, though he was fully aware that he had absolutely no case whatsoever before the Tribunal. Another very interesting point which has come to our observation is required to be shared to throw light on the modus operandi of the appellant in pursuing the present Appeals.

59. During the WP before the High Court, the appellant has been harping about the refund claim filed for the earlier period April 2008 to September 2008 for which the OIO was passed on 24.03.2009. The Appeal before the Commissioner (Appeals) was filed on 9.7.2009.

60. For the next period October 2008 to December 2008, (the present litigation), the OIOs were passed on 24.01.2009, 12.04.2009 and 11.07.2009. The Appeals were filed on 24.12.2012 [delay of 43 months], 12.04.2012 [delay of 40 months] and on 11.07.2012 [delay 37 months].

61. It can be seen that on the day the appellant filed his Appeal for the earlier period on 9.7.2009, he had two OIOs dated 24.1.2009 and 12.04.2009 (pertaining to present refund claims) already on hand. Even the third OIO was with him within next 2 days on 11.7.2009. Therefore, it is clear that the appellant was very much operating and functioning definitely till 9.7.2009. But he failed to file any Appeals in respect of these OIOs. The reason given by the appellant towards delayed filing [37 to 43 months] as recorded by the Commissioner (Appeals) in the OIA is as under:

The cause of delay mentioned by the appellant in all the three applications for condonation of delay are that; their office was under repair and in the process and due to inadvertence the relevant

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documents including the Orders-in-Original got misplaced in their office; the dealing executive of the Service Tax matters resigned from the service of the Company and left without handing over of charge and due to his absence, the Company was handicapped and could not pursue the matter.

62. Therefore, their explanation that their dealing executive had resigned and left without handing over the charge and his absence cannot be taken on face value as they themselves had filed an Appeal in another case on 9.7.2009. At-least till that date, this person would have been available.

63. Having filed the Appeal before Commissioner (Appeals) with such huge delay, which was dismissed, still they did not take any steps to file the Appeal before Tribunal within the stipulated period of 90 days. Once again they filed the Appeals before the Tribunal with a delay of over 1900 days. This time even the lame excuses of their office being repaired, their executive resigning etc., were also not given. It was simply stated that since no one stands to gain by delayed fining, the condonation should be granted. This is almost like claiming the condonation as a matter of right.

64. As has been observed in the cited Supreme Court's judgements, even a mere delay of 11 days and delay of 20 months from the time stipulated has been taken as enough to dismiss the Appeal. In the present case, when the explanation for the COD was not found to be acceptable and the Appeals were dismissed both by the Tribunal and the Single Judge of the High Court, the appellant weaved a set of lie, by taking the example of another Final Order of this Tribunal, wherein the dismissal of the Appeal by the Commissioner (Appeals) was on a totally different ground. They concealed the fact that in the case of the present Appeals they were dismissed initially by the Commissioner (Appeals) in terms of Section 85 (3). With such

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concealment and lies, they were able to get a reprieve from the Hon'ble High Court time and again, for the delay of over 5 years before the Tribunal in the present Appeals.

65. The observations given by us under the Para 50 to 53, clarify that respecting the directions of the Hon'ble High Court about the issue raised by the appellant has been considered (though not required to be considered) and we have come to a conclusion that in any view of the matter, that Final Order of 2017, passed in respect of a normally dismissed appeal of the Commissioner (Appeals), would not have any bearing whatsoever in the outcome of the present case, which is based on the dismissal by Commissioner (Appeals) on account of time bar, leaving no scope for any other higher forum to interfere with the same.

66. We summarily dismiss the Appeals for detailed findings given in the Paras 30 to 53.

(Pronounced in the Open Court on 22-12-2023)

Sd/-
(R. Muralidhar)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Pooja