IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL

WEST ZONAL BENCH AT MUMBAI

Appeal No. ST/86302/18

(Arising out Order-in-Appeal No. PUN-EXCUS-001-APP-405/2017-18 dated 05.10.2017 passed by the Commissioner of Central Excise & Service tax, Pune I)

Yapp India Automotive Systems Pvt. Ltd. Appellant

Vs.

CCE & ST, Pune I Respondent

Appearance:

Ms. Mithila Shelar, Advocate for the appellant
Shri Dilip Shinde, (AR) for the respondent

CORAM:

Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)

Date of hearing : 15.06.2018

Date of decision : 21.06.2018

O R D E R No: **A/86775 / 2018**

Refusal by the Commissioner (Appeals) to condone the delay of 79 days to file appeal against adjudication order passed by the Joint Commissioner, Central Excise, Pune II is challenged before this Tribunal along with a prayer to set aside the said adjudication order on the ground stated in the appeal memo. As per the statement of the appellant, notice was received on 17.08.2016 during the absence of commercial head who was attending audit at Chennai plant and the person in charge of Excise matter left his job for which it could not go to the notice of the appellant to prefer appeal within the stipulated time and it was filed on 03.01.2017 immediately upon their knowledge. Citing several case laws including the one passed by this Tribunal in *Supreme Fibre Glass Inc.* reported in 1995 (79) ELT 167 and *Saral Wire Craft Pvt. Ltd.* 2017 (15) STR 237 (SC), the ld. Counsel for the appellant Ms. Mithila Shelar argued that Commissioner (Appeals) order is not sustainable in law. Otherwise also justifiable delay can be done by this Tribunal, as submitted by her.

2. Heard the ld. AR Shri Dilip Shinde on behalf of respondent department who submitted that when there is specific mandate in the statute for the Commissioner to condone delay upto 30 days beyond the period of appeal of 60 days of receipt of notice, and the Commissioner (Appeals) has rightly passed the order in not condoning delay beyond 30 days, which is in conformity to the order passed by the Hon'ble Supreme Court in the case of *Singh Enterprises* 2008 (221) ELT 163 (SC). Therefore he argued that the said order of the Commissioner needs no interference by the Tribunal.

3. On rival submission of parties, it can be held that there was admitted delay of 79 days inclusive of 30 days condonable period available with the Commissioner but the ground cited by the appellant that the person in charge of

Excise matter left the job and the matter could not go to the commercial head of the company who was out of station in connection with audit in Chennai plant appear to be reasonable. Procedure is a handmade of judiciary system enumerated to put a curb on the uncertainty and bring an end to the litigation but on that score alone, substantial justice cannot be jeopardised.

3.1 The other grounds mentioned in the appeal memo including classification of taxable service and tax liability of the appellant is required to be adjudicated upon by the Commissioner (Appeals) to promote ends of justice. In such circumstances, I find it a fit case where delay can be condoned at this end and the matter can be remanded back for fresh adjudication by the Commissioner (Appeals). Hence the Order –

4. The delay of 79 days is condoned and the order passed by the Commissioner (Appeals) is set aside. The matter is remanded back to the Commissioner (Appeals) for fresh adjudication.

(Pronounced in Court on 21.06.2018)

Dr. Suvendu Kumar Pati
Member (Judicial)

//SR

Dated: 10.07.2018

1. Rectification by way of addendum has been necessitated to give clarity to the Order passed above since Tribunals are under legal obligation to pass speaking and reasoned orders to ensure that decision is reached according to law and not emerged as a result of caprice, whims and fancies as *ratio* contained in *Singh Enterprises* judgment referred above has not been brought on record. It has been held in Sunita Devi Singhania's case reported in AIR 2009 SC (Supp.) that principles of natural justice envisaged that a mistake committed by the Tribunal in not noticing the facts involved would attract the ancillary and incidental power of the Tribunal to discharge its functions. Further, Section 35 C sub-clause (2) of the Central Excise Act, applicable to service tax matters as per Section 86 sub-clause (7), provides for such rectification of orders by way of amendments to be made within six months of the order. They are*:*

(i) If any maistake apparent on record is noticed, the court **may** rectify the same on its own;and

(ii) If any mistake is brought to its notice by either of the parties to the appeal, its **shall** make such amendment.

2. Being empowered by such discretionary power referred in point no.(i) above and spirited by the order of the Hon'ble Apex court cited *supra*, the following amendments by way of rectification is made to the order pronounced on dated 21.06.2018

3. It was pointed out during the course of hearing of appeal by ld. AR Shri Dillip Shinde for the respondent that in *Singh Enterprises* case, power of Hon'ble High Court/ Hon'ble Supreme Court to direct condonation of delay when the statute prescribed particular period of

limitation was discussed and the same was held in the negative for which this Tribunal is also not competent to condone such delay beyond 60 plus 30 days of receipt of the order-in-original to file appeal before Commissioner (Appeals).

4. Perused the judgment in detail and it is found that the Division bench of the Hon'ble High Court, before whom writ petition was preferred by the present appellant against the order of Commissioner (Appeals), while refusing condonation of delay and dismissing the appeal had given their findings to the effect that the Commissioner had no power of condonation beyond the statutory prescribed period and the argument of the Appellant before the Hon'ble High Court that in exercise of power conferred under Section 226 of Constitution of the India it can do so, was held by the Hon'ble High Court to be not sustainable. The said order was apparently passed because Writ of Certiorari, which is normally issued in cases where court or Tribunal or other legal authority have passed the order without jurisdiction, in excess of jurisdiction vested on them or against the principle of natural justice was not invocable since no such irregularity was found in the order of the Commissioner (Appeals).

5. The same dismissal order was challenged before the Hon'ble Supreme Court which also had given its finding that proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority had no power to allow the appeal to be presented beyond the period of 30 days after expiry of 60 days, which was the normal period for preferring appeal and therefore the argument by the Appellant that Section 5 of the Indian Limitation Act, 1962 can be

invoked for Condonation of Delay was not sustainable. Rather the Hon'ble Apex Court had held that there was complete exclusion of Section 5 of the Limitation Act. It was also held by the Hon'ble Supreme Court in the said decision that in the case law referred, there was no law declared by this Court (SC) that even though the statute prescribed a particular period of limitation this Court can direct condonation. While holding that such a situation would render a specific provision providing for limitation otiose, the Hon'ble Supreme Court had also found the causes shown for condonation have no acceptable value for which appeal was also dismissed and the order of Commissioner in not condoning delay attained finality.

6. At the outset it has to be pointed out that nowhere in the said *Singh Enterprises* judgment, jurisdiction of this Tribunal has been questioned as against the order of Commissioner (Appeals). Writ was preferred in the jurisdictional High Court. The only reference regarding jurisdiction of the Tribunal has been found in para 8 wherein it has been mentioned that the Commissioner of central excise as also the Tribunal being creatures of statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the statute and the period upto which the prayer for condonation is statutorily provided.

7. It is needless to mention here that such condonable period of 30 days beyond the statutory period of appeal, which is given to the Commissioner (Appeals) is found substituted in Section 35B(5) with the word "after the expiry of relevant period" without any specific mention of the days or months to admit such appeal but such provision relates to

the appeal filed /to be filed before the Tribunal and not before the Commissioner (Appeals). Therefore from the observation made by the Hon'ble Supreme Court in para 8, it cannot be concluded that reference to this Tribunal is made in the judgement in connection with the matter of refusal by the Commissioner (Appeals) to condone the delay.

8. Be that as it may, from the ratio of *Singh Enterprises* it cannot be said that only because prescribed period of limitation was over, the Hon'ble Supreme Court declined to interfere in the order since the ground taken by the appellant therein, *viz*. closure of factory and lack of experience in business attributed to such delay, was not acceptable to the Hon'ble Supreme Court as the Division bench had observed that the "causes shown for condonation have no acceptable value."

9. Going by the bare comparison between the proviso to Section 35 dealing with power of the Commissioner (Appeals) permitting Appellant to present appeal after 60 days (not exceeding 30 more days) and the Section 35 (B) sub-Section 5 in admitting appeal after the due date, it can be said that the Commissioner (Appeals) is empowered to permit appellant to present appeal by extending the time while Appellate Tribunal is empowered to admit appeal in condoning delay, though for filling cross objection, it is having similar power to that of the Commissioner (Appeals) to extend time for such filling of cross objection. With reference to Section 128 of the Customs Act it has been held by the Hon'ble Supreme Court in Consolidated Engineering Case [(2008) 7 SCC 169] that there is vital distinction between extending time and condoning delay and in the said case as well as in a recently

decided case i.e. M.P. Steel Corporation Vs. Commissioner of Central Excise (DOJ 23.04.2015), though application of Limitation Act to the Tribunal was refused, it has been held that the principle of Limitation Act can be applied. It was held that Section 14 of the Limitation Act which is a principle based on advancing the cause of justice would certainly apply to exclude time taken in prosecuting proceedings which are bona-fide and with due diligence pursued, which ultimately ends without a decision on the merit of the case and applying principle of Section 6, the court said that the principles of Limitation Act (Section 5 to 14) are points of consideration to the fact that the courts always lean in favour of advancing the cause of justice where a clear case is made out for so doing.

10. Therefore, for the purpose of determining a period of limitation prescribed for any suit, appeal or application by any such special or local law, the principles contend in Section 4 to 24 may be resorted to advance the cause of justice and not to abort the proceedings on narrow technical grounds though the policy concerning such stipulation of time in intended to afford protection to litigants. The principle of the saving clause under Section 29 of Limitation Act may also be taken into consideration since the jurisdiction of this Appellate Tribunal has not been expressly excluded. This reasoning is further fortified by the fact that Article 323B (i) of the Constitution of India empowers this Tribunal to deal with any matter incidental to the matter specified in clause (a) to (h) including levy, assessment collection and enforcement of any tax etc. and it would be against the spirit of law if the legality of such taxability

could not be scrutinized by the Tribunal on such technical considerations.

11. Now coming to the jurisdiction of this Tribunal to condone the delay at this end, it is also imperative to have a look at the provision contained in Section 35C clause 1 which reads as follows:-

“The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such order thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be after taking additional evidence, if necessary”.

12. From the bare text of Section 35C it can very well be said that without modifying or annulling the decision appealed against, the tribunal can refer the case back to the authority which passed such decision with directions as the appellate tribunal may think fit including a direction for fresh adjudication or decision. Therefore, even though no irregularity in dismissing the appeal on ground of limitation may be found from the order of the Commissioner (Appeals) still then the same needs to be adjudicated by him as spirit of the entire formation of Appellate Tribunal precludes the Tribunal to hold a finding directly against the order of the first adjudicating authority without the same being scrutinised by the Commissioner (Appeals) under Section 35(A), may be under Sub-section (4), and such scrutinisation by Commissioner (Appeals) cannot be done unless delay is condoned at this end in

invoking the **principle**s of saving clause 29 of the Indian Limitation Act read with Section 5 of the same.

13. For the reasons discussed above the order stands modified as follows:

The delay of 79 days in filing appeal before the Commissioner (Appeals) is condoned. The matter is remanded back to the Commissioner (Appeals) for fresh adjudication.

(Pronounced in the Court on dated 10.07.2018)

(Dr. Suvendu Kumar Pati)
Member (Judicial)