IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

Appeal No. ST/85831/18

(Arising out Order-in- Appeal No. PUN-EXCUS-001-APP-0732/2017-18 dated 29.11.2017 passed by the Commissioner of Central tax (Appeals-I), Pune)

Lavgan Dockyard Private Ltd. Appellant

Vs.

CCE Kolhapur Respondent

Appearance:

Shri Jay Chedda, CA for the appellant
Shri O.M. Shivdikar, AC (AR) for the respondent

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

Date of hearing : 06.08.2018
Date of decision : 06.08.2018

O R D E R No: **A/87149/2018**

Order of the Commissioner of Central tax (Appeals-I), Pune in not going into the merit of the case at the time of final disposal of the appeal on the ground that appeal was filed 69 days after the receipt of order-in-original without a delay condonation application is under challenge before this Tribunal.

2. The contention of the appeal is that order of the adjudicating authority was received at its end on

23.04.2017, as found from the statement of fact placed before the Commissioner (Appeals) but inadvertently due to typographical error in ST-4 form the date of communication of order has been mentioned as 12.04.2017. Appeal being filed on 21.06.2017, Commissioner (Appeals), he erroneously dismissed the appeal on the ground that there was 9 days delay in filing such appeal and the same is hit by *Singh Enterprises 2008 (221) ELT 163 (SC)* and order of Ahmedabad Tribunal passed in *Prithvi Hotels (Gujarat) Pvt. Ltd.* [2013 (31) STR 612] etc.

3. Ld. AR for the department respondent submitted that no irregularity can be found from the order of the Commissioner (Appeals) in view of the fact that no condonation of delay application had been filed, though the same was within the condonable period of further 30 days available at the Commissioner (Appeals)'s end.

4. Heard from both sides and perused the case papers.

5. It is found that the order-in-original dates 31.03.2017 and the statement of fact indicates that it was served upon the appellant on 23.04.2017 i.e. within 3 weeks of such pronouncement of order-in-original but the Commissioner (Appeals) has extracted Section 85(3A) and proviso appended to it to give his finding that he was not competent to condone the subsequent delay in the absence

of an application to that effect. To bring clarity I feel it proper to reproduce the proviso once again here:-

> *"(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.]"*

6. Therefore appeal can be presented within two months from the date of receipt of order-in-original and in the instant case, statement of fact reveal that it was received on 23.04.2017 and the same statement of fact is supposed to be verified by the appellant himself, which is also done in the instant case. The gap between the pronouncement of order-in-original and its communication, going by the date mentioned in the statement of fact is just 23 days. Therefore it cannot be believed to be untrue. Considering the same to be the valid date of receipt of order-in-original, there is no denying of the fact that the appeal was presented within two months i.e. on 21.06.2017. Even if the Commissioner considers it untrue, the proviso provided to Section 85(3A) enables the Commissioner to allow

presentation of appeal on a subsequent stage but the same should be limited to 30 days further. There is a difference in the language imported to Section 85(3A) and Section 86(5) of the Finance Act, 1994. It has also been held in the judgment of the Hon'ble Supreme Court reported in (2008) 7 SCC 169 that there is a difference in extending time for appeal to be presented and condoning delay after presentation of appeal. Hence in view of the proviso enabling the Commissioner (Appeals) to allow the appeal to be presented after two months but within a further period of one month assigning sufficient reason to his satisfaction, such presentation can be accepted by him before proceeding to hear the case in its totality, which is not done at his end. Therefore, in my considered view, the appeal is filed within the stipulated period and to the disagreement of the Commissioner, within his condonable period. Hence the same should have been admitted at his end and the issue could have been settled on merit. Section 86 (1) empowers this Tribunal only to hear appeal against the order of Commissioner (Appeals) passed under Section 85 and not directly against the order of the adjudicating authority. Hence the Order –

7. The Appeal is allowed and the matter is remitted back to the Commissioner (Appeals) for hearing the appeal afresh on merit.

(Operative part pronounced in Court)

Dr. Suvendu Kumar Pati
Member (Judicial)

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