

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

Appeal No. ST/87331,87352/18

(Arising out of Order-in- Appeal No. NA/GST A-III/MUM/391/17-18 dated 31.01.2018 & NA/GST A-III/MUM/352-353/17-18 dated 20.01.2018 passed by the Commissioner (Appeals)-III, GST & CX, Mumbai)

Shlok Media Pvt. Ltd.

Appellant

Vs.

CCGST & CX, Mumbai West

Respondent

Appearance:

Shri Devender Jain, Advocate for the appellant
Shri O.S. Shivdikar, AC (AR) for the respondent

CORAM:

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

Date of hearing : 16.11.2018

Date of decision : 18.12.2018

O R D E R No: A/88133-88134/2018

Disposal of two appeals filed by the appellant before the Commissioner (Appeals III), GST & CX, Mumbai against adjudication orders confirming duty demand, interests and penalties solely on the ground of belated filing and non-payment of pre deposit is the subject matter of the appeal before this Tribunal.

2. Contention of the appellant, as submitted by Learned C.A. Shri Devendra Jain, is that Appellant could not file the said appeal before the Commissioner (Appeals) within two months of receipt of the order but filed the same within 30 days thereafter with a prayer for condonation of delay explaining sufficient grounds for such delay but that was not accepted by the Commissioner (appeals). Further he submitted that out of total tax liability due on the appellant that was over 90 lakhs, 70 lakhs some odd were already paid by it which could have been adjusted towards pre-deposit amount but as the same has not gone on record, he gave his finding that no pre-deposit was specifically made against the duty demand etc. Ultimately the appeal has been dismissed under section 35F of the Central Excise Act that was applicable to service tax matters also. He further contended that appellant was not provided with the opportunity of being heard on the merit of the case for which he prayed for dismissal of the order passed by the Commissioner (Appeals).

3. In response to such submissions the Learned AR for the department Shri O.S. Shivdikar submitted that Orders-in-Original were passed on 30/31.08.2016 but the appellant filed these appeals on 09.08.2017 claiming that it was received at their end on 15.06.2017 for which the Commissioner had rightly given his finding. Further he

disputed the contention of the appellant that substantial portion of the duty liability was discharged. Since both the OIOs and OIA revealed that duty demand of ₹7,72,500/- and ₹13,28,013/- respectively against avilment of cenvat credit on capital goods not recorded in the CC register were confirmed by those orders along with interests and penalties, Section 35F bars the appeal bereft of pre deposit for which interference by this appellate court is uncalled for.

4. Perused the case record including the OIA. It is found from paragraph 8 of the OIA that OIOs were received admittedly by the appellant on 15.06.2017 that is after 9 months 3 days and 14 days of the orders passed on 20.08.2014 and 31.08.2016. It was also recorded by the Commissioner appeals that no documentary evidence was furnished by the appellant concerning the receipt of OIOs. At the same time he had brought it on record that the Punjab National Bank had taken possession of the immovable property of the appellant on 22.08.2016 that was just a week before pronouncement of OIOs but he rejected the appellant grounds for delayed filing of appeal before him on further ground that the 4th Floor of Indus House was taken over by Punjab National Bank while OIOs were dispatched to B53 of Indus House. While considering the submissions of the appellant that they had requested the department to issue user id and password on

04.03.2017 and also requested the department to provide them the proof of delivery of impugned order on the appellant, he refused to acknowledge those as sufficient ground as appellant had stated in the appeal memo that on 09.08.2017, they sought proof of delivery but actually the letter of request was dated 24.08.2017 that is after a gap of 2 weeks. Order-in-Appeal at para 10 indicates that appeal was unsustainable in view of section 35F of Central Excise Act which has made mandatory provision concerning pre deposit of 7.5% duty demand and penalty and the same had not been complied with.

5. On close scrutiny of the documents on record and OIA, it is apparently clear that acknowledgment of receipt of orders in original by the appellant vide exhibit E contains the date of receipt as 15.06.2017. The ground of rejection of delay condonation petition by the Commissioner (Appeals) indicates that appellant had applied to the Department in writing on 24.08.2017 i.e. two weeks before filling of appeal, as held by Commissioner, but no finding is forthcoming as to if any previous proof of delivery of OIOs on the appellant was established. Therefore the date referred in the acknowledgment vide Exhibit E has to be accepted as the date of delivery of OIOs on the appellant. The Commissioner has relied upon the decision of the Hon'ble Supreme Court pronounced in respect of Singh

Enterprises vs. Commissioner of C. Ex., Jamshedpur 2008 (221) E.L.T. 163 (S.C.) and by the CESTAT, Chennai in S. Benjamin's case 2013 (295) ELT 91 and given his finding that appeal before the Commissioner has to be filed within two months or at the maximum within the condonable delay period of further 30 days. Date of receipt being admitted by the Commissioner himself to be 15.06.2017 and appeal being filed on 08.09.2017, delay is only about 3 weeks over the normal appeal period and not even a month which was within the condonable period available with the Commissioner. Further having, been acknowledged that possession of appellant office was taken over by the Punjab National Bank authorized officer during the corresponding period, the Commissioner (Appeals) should not have refused to condone the delay on such narrow technical ground that flat number is different since there might be possibility that both the flats were being possessed by the appellant. It has been held by the Hon'ble Supreme Court in 1987 (28) ELT 15 that when substantial justice and technical consideration are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay and there is no presumption that delay was occasioned deliberately.

6. In another decision, reported in (2001) 9 SCC 106, Hon'ble Supreme Court has observed that where the delay is of a few days, the court should adopt a liberal approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of few days. Whether the delay is inordinate, the consideration of prejudice to the opposite party will be a relevant factor calling for a more cautious approach, but in the latter case where the delay is of few days, no such consideration may arise, and such a case deserves a liberal approach. The Hon'ble Supreme Court also observed that in exercise of discretion on the facts of each case, keeping in mind that in construing the expression "sufficient cause", the principle of advancing substantial justice is of prime importance.

7. In respect of non-payment of statutory pre deposit amount for filing of appeal, appellant contention that 80 per cent of duty liability has been discharged by them has not been supported by any documentary evidence. Going by the statutory provision appeal should not have been entertained or admitted for hearing bereft of statutory pre deposit but the moment it is admitted for hearing, such failure on the part of appellant would have been pointed out to it enabling it to make pre deposit so as to ensure natural justice and not to dismiss the appeal at the end of hearing, after completing the entire exercise of appeal proceedings.

Further having regard to the fact that 10 per cent pre deposit vide challan as exhibit A is filed at this end, no further discussion is required to be done on pre deposit.

8. Section 86 (7) dictates the Tribunal to follow the same procedure as it exercises and follows in hearing the appeals and pronounces orders under Central Excise Act 1994 and the Central Excise Rules. Section 35C empowers this Tribunal to confirm, modify or annul the decision of the order appeal against, which indicates that the merit of the decision is to be assessed by the Appellate Tribunal. In the instant case, as found from the order of the Commissioner (Appeals), no merit concerning tax liability of the appellant has been discussed and the appeal filed by him was rejected as not maintainable as hit by the period of limitation.

9. Section 35B (b) empowers the Appellate Tribunal to entertain appeal against an order passed by the Commissioner (Appeals) under Section 35A and in view of Sub-Section 4 to Section 35A, such order of the Commissioner (Appeals), at the time of disposal of appeal before him, shall state the points for determination, the decision thereon and the reasons for such decisions. Hon'ble Supreme Court in Saheli Leasing & Industry Ltd. – 2010 (253) ELT 705 (SC) also proposed a guideline to be

followed by quasi judicial authority. In the instant case such a decision with reason on the merit of the appeal is not forthcoming.

10. Since this Appellate Tribunal cannot go beyond the order of the Commissioner (Appeals) to scrutinize the merit of the decision of the adjudicating authority, it is a fit case which necessitates re-adjudication of both the appeals by the Commissioner (Appeals) as under Section 35A (3). He is also empowered to make such further enquiry as may be necessary in order to pass such order as he may think proper and not to confine his views on the merits of the order of the adjudicating authority. Hence the order-

11. Both the appeals are allowed and the delay of 3 weeks in filing appeal before the Commissioner (Appeals-III) is condoned at this end. Pre-deposit having been made at this end, matter is remanded back to him for re-adjudication on the basis of observation made as above.

(Pronounced in Court on 18.12.2018)

Dr. Suvendu Kumar Pati
Member (Judicial)