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

Application No. E/COD/86540/2018
along with
Appeal No. E/88856/2018

(Arising out of Order-in- Appeal No. SM/CGST&CX/BHIWANDI/APP-99 dated 17.04.2018 passed by the Commissioner, CGST & CX, Parel, Mumbai)

M/s. Omkareshwar Engineering Appellant

Vs.

CCGST & CX, Mumbai Respondent

Appearance:

Shri S.V. Nair, Advocate for the appellant
Shri Anil Chaudhary, AC (AR) for the respondent

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

Date of hearing : 17.12.2018
Date of decision : 11.01.2019

O R D E R No: **A/85063 / 2019**

COD application which was heard on 17.12.2018 is taken up for final order.

2. The contention of the applicant is that there was labour unrest and strike for which staff and workers were not cooperating the management and due to such non-cooperation attitude appellant was unable to trace the

correct date of receipt of impugned order as the same was received by staff from whom the order was recovered and appeal was filed that caused delay of 38 days.

3. Learned counsel for the appellant, in referring to copies of police report etc. annexed to COD vide exhibit A pleaded that those documents would reveal unrest and strike by the staff not only in the month of November 2016 to September 2017 and December 2017 to January 2018 but argued that the unrest continued even when the matter was adjudicated upon and appeal was heard by the Commissioner (Appeals). He pointed out that due to such strike and unrest in the factory appeal could not be filed even before the Commissioner (Appeals) within the stipulated time and that formed the sole ground of rejection of appeal by the Commissioner (Appeals). He prayed for lenient consideration of the delay Condonation petition so as to ensure justice to the appellant.

4. Learned AR for the department objected the petition but conceded to the point raised by the appellant that Commissioner (Appeals) also had not heard the appeal on merit as there was delay of filing of appeal for over 60 days which were beyond his condonable period as prescribed under the Excise Act.

5. Heard from both sides and perused the case records as well as the annexed document which indicated that there was strike and unrest in the factory and jurisdiction police station namely Dahanu and Dy. Commissioner of Labour, Boisar were intimated by the appellant regarding such unrest.

6. Appellant claims that the copy of the order of the Commissioner (Appeals) is served on one staff contrary to the Rule which is contrary to the decision of the Hon'ble High Court of Chattisgarh at Bilaspur reported in 2017 (345) ELT 357 (Chattisgarh) and the same is miscarriage of justice as pointed out in the judgment of the Hon'ble Supreme Court in the decision reported in 2015 (322) ELT 192 (SC).

7. Be that as it may, the delay of 38 days in filing appeal which appellant attributes to the strike and unrest in its factory appears to be sufficient cause for the purpose of Condonation. 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.

8. In another decision, reported in (2001) 9 SCC 106, the 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.

9. I therefore condone the delay and admit the appeal for hearing. 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.

10. 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.

11. As found from the order of Commissioner (Appeals), instead of taking up the issue of limitation at the earlier point of time, he had rejected the appeal after conclusion of hearing of the same on the ground of limitation and not touched on the merit of the case.

12. 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 readjudication 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.

13. Admittedly, there was delay in filing appeal by the appellant at the Commissioner (Appeals) end and the delay being 60 days he is not empowered by the statute to condone the delay. In view of the decision of this Tribunal in Yapp India Automotive decision dated 21.06.2018/10.07.2018, delay of 60 days in filing appeal before the Commissioner (Appeals) is also condoned at this end and the matter is remanded back for readjudication by the Commissioner (Appeals).

(Pronounced in Court on 11.01.2019)

Dr. Suvendu Kumar Pati
Member (Judicial)

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