CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>MUMBAI</u>

REGIONAL BENCH – COURT NO.1

Excise Appeal Nos.89565 to 89569 of 2013

[Arising out of Order-in-Appeal No.NGP/EXCUS/000/APPL/795-799/13-14, dt.29.08.2013, passed by the CCE & C, Nagpur]

M/s Bilt Graphic Paper Products Ltd **……Appellant**
Ballarpur Paper Mills, Ballarpur, Dist: Chandrapur

VERSUS

Commissioner of Central Excise **……Respondent**
Customs & Central Excise, Nagpur

Appearance:
Ms. Ankita Agarwal, Advocate for the Appellant
Shri Sanjay Hasija, Supdtt. (A.R.) for the Respondent

CORAM:
HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

FINAL ORDER NO.A/85910-85914/2019

Date of Hearing: 12.04.2019
Date of Decision: 16.05.2019

PER: D.M. MISRA

Heard both sides. These appeals are filed against No.NGP/ EXCUS/000/APPL/795-799/13-14, dt.29.08.2013, passed by the CCE Nagpur.

2. In the impugned order, the learned Commissioner (Appeals) dismissed the appeals filed by the Appellant before him on the ground of delay in filing the appeals before him by one day. Thus, the short issue involved for determination in the present appeals is:

whether the learned Commissioner (Appeals) should have condoned the delay of 1 day when the appeals were filed beyond the statutory limit of 60 days and condonable period of 30 days.

3. The learned Advocate or the Appellant vehemently argued that there is a delay of 31 days (including condonable limit of 30 days) in addition to the statutory limit of 60 days; thus the delay of one day beyond the condonable period of 30 days ought to have been condoned by the learned Commissioner (Appeals) as the said delay was unintentional and bonafide. It is her intention that the concerned person Shri Mayadhar Mantri, who looks after the excise work, went on leave on 18.07.2013 to attend some emergency work in his family and resumed duty only on 20.08.2013, and the appeal was filed by them on 23.08.2013. Further she has submitted excluding the date of receipt and the date of filing, there is delay y of 30 days only. She submits that the said delay ought to have been condoned by the learned Commissioner (Appeals) and the appeal should have been decided on merit. She has further submitted that even though it is considered that there was delay of 31 days, instead of 30 days, the learned Commissioner (Appeals) has power to condone the delay beyond the condonable period of 30 days prescribed under Section 35 of Central Excise Act, 1944. In support, she refers to the judgment of the Tribunal in case of Yapp India Automotive Systems Pvt. Ltd Vs CCE & ST Pune-I - 2019 (365) ELT 109 (Tri-Mum.), Garg Industries Vs CCE Noida - 2018 (7) TMI 1194 – CESTAT Allahabad.

4. The learned A.R. Shri N.N. Prabhudesai for the Revenue has submitted that it is now well settled principle of law as laid down by Hon'ble Supreme Court in the case of Singh Enterprises Vs CCE Jamshedpur – 2008 (221) ELT 163 (SC) that the Commissioner does not have power to condone the delay beyond the condonable period of thirty days in addition to the statutory limit of sixty days for filing appeal prescribed under Section 35 of Central Excise Act, 1944. The learned A.R. has further submitted that the date of filing of the appeal cannot be excluded. It is only the date of receipt of the OIO to be excluded in computing the statutory time period of 60 days, and not the last date of filing appeal. Further, he submitted that this principle has been laid down by Hon'ble Delhi High Court in the case of Uttam Sucrotech International (P) Ltd Vs UoI - 2011 (264) ELT 502 (Del). It is his contention that the jurisdictional High Court in Raj Chemicals Vs UoI - 2013 (287) ELT 145 (Bom.), following the principles laid by Hon'ble Supreme Court held that the Commissioner (Appeals) cannot condone the delay beyond the condonable period of 30 days in addition to the statutory limit of 60 days. Since the judgment delivered by the Tribunal in Yapp India Automotive Systems Pvt. Ltd's case and Garg Industries' case is contrary to the statutory provisions and the principles of law laid down in the judgment of the jurisdictional Bombay High Court in Raj Chemicals' case, hence, the same is per incurium and cannot be considered as binding precedent. In support, the learned A.R. for the Revenue refers to the judgment in the case of Municipal Corporation of Delhi Vs Guram Kaur - (1989) 1 SCC 101.

5. Heard both sides and perused the records.

6. There is no dispute of the fact that the Order-in Original against which the appeals were filed on 23.08.2013 before the learned Commissioner (Appeals), had been communicated to the Appellant on 24.05.2013. Thus, excluding the date of receipt , the appeals were on the 91st day from the date of communication of the order. The appellants claim that the date of filing of the appeal be also excluded in computing the condonable period of 30 days, in our opinion, cannot be acceptable in view of the judgement of Hon'ble Delhi High Court in the case of Uttam Sucrotech International (P) Ltd.(supra). Hence, admittedly, there has been delay of one day in filing the appeal which is beyond the statutory period of sixty days and also the condonable limit of 30 days prescribed under Section 35 of Central Excise Act, 1944.

7. The moot point is : whether the Commissioner (Appeals) or the Tribunal is vested with the power to condone the delay in filing the appeal before the Commissioner (Appeals) beyond the condonable limit of 30 days in addition to the statutory limit of 60 days prescribed under the Central Excise Act, 1944. The issue is now no more res-integra and covered by the decision of Hon'ble Supreme Court in Singh Enterprises' case (supra). Also, dealing in detail while disposing the petition filed under Article 226 of Constitution of India Hon'ble Bombay High Court in Raj Chemicals' case (supra), observed as follows:-

> 5. The Central Excise Act, 1944 is a special Act governing the levy, collection and recovery of Central Excise duty on goods manufactured or produced in India. In sub-section (1) of Section 35, the Legislature has mandated that an appeal before the Commissioner (Appeals) has to be filed within sixty days from the

> date of the communication of the order. Under the proviso, the Commissioner (Appeals) is permitted to allow the appeal to be filed within a further period of thirty days on sufficient cause being shown to his satisfaction. In other words, the clear intent of Parliament was that the power to condone the delay can be exercised only subject to sufficient cause being shown and to an extent of an outer limit of thirty days beyond the period of sixty days prescribed for filing of an appeal. Now, it is well settled that while construing whether the special law, within the meaning of Section 29(2) of the Limitation Act, 1963 expressly excludes the provisions of Sections 4 to 24 of the Limitation Act, 1963, regard must be had to the over all scheme of the Act. Where the scheme of the Act indicates that the Legislature intended that an Appellate Authority should entertain an appeal by condoning a delay up to a certain period, that would evince a clear intent to exclude the provisions of Section 5 of the Limitation Act, 1963. In the present case, the clear provision is that an appeal has to be filed within sixty days and beyond that a delay up to thirty days can be condoned. The delay in excess of thirty days cannot be condoned by taking recourse to the provisions of Section 5 of the Limitation Act which would stand expressly excluded within the meaning of Section 29(2). The High Court, in the exercise of its jurisdiction under Article 226 of the Constitution, cannot permit or direct an infraction by the authorities created by a statute of the provisions of the statute under which they are constituted. When a period of limitation is prescribed for filing of an appeal and the extent of the power to condone the delay is also prescribed by the statute, the exercise of the writ jurisdiction under Article 226 of the Constitution would clearly be not warranted to direct the adjudicatory or appellate authority to breach the provision for limitation."

8. From the aforesaid judgment, there should not be an iota of doubt about the power/jurisdiction vested either with the Commissioner (Appeals) or with the Tribunal in condoning the delay beyond the condonable period of 30 days in addition to the statutory limit of 60 days prescribed under Section 35 in filing the appeal before the Commissioner (Appeals). We agree with the submission of the Ld. A.R that for the Revenue that the judgments of Tribunal in Yapp India Automotive Systems Pvt. Ltd's case and Garg Industries' case(supra) being contrary to the statutory provisions and the principle of law laid down by the Hon'ble Supreme Court and jurisdictional High Court , hence *per incurium*, and consequently cannot be considered as binding precedent. In the result, the

impugned order is upheld and the appeals are being devoid of merit, accordingly, dismissed.

(Order pronounced in the open court on 16.05.2019)

(D.M. Misra)
Member (Judicial)

CBB