IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2323 OF 2001
WITH
CIVIL APPLICATION NO. 8418 OF 2005

M/s. Balaji Steel Re-Rolling Mills,
a registered Partnership Firm,
having its office at F-22,
M.I.D.C. Area, Chikalthana,
Aurangabad through it's partner-
Shri Ashok H. Agrawal,
Age 47 years, Occu. Business,
R/o. Aurangabad ...Petitioner

versus

1) The Union of India,

2) The Attorney General of India,
Supreme Court of India Building,
Dr. Bhagwandas Road,
New Delhi – 110 001.

3) The Asstt. Registrar,
Custom Excise & Gold (Control)
Appellate Tribunal
(West Regional Bench),
3rd Floor, Karimji House,
P.N.B. Building,
Sir P.M.Road, Fort,
Mumbai – 400 002.

4) The Commissioner of
Central Excise and Customs,
Aurangabad Commissionerate,
N-5, Town Centre,
CIDCO, Aurangabad – 431 003.

5) The Assistant Commissioner (Tech.)
Central Excise & Customs,
N-5, Town Centre,
CIDCO, Aurangabad – 431 003.

6) The Superintendent,
Range TR-III,
Central Excise and Customs,
N-5, Town Centre,
CIDCO, Aurangabad – 431 003. ...Respondents

.....

Mr. R.M. Sharma, advocate for the petitioner
Mrs. Kalplata Patil Bharaswadkar, advocate for respondent Nos. 4 to 6

.....

**CORAM : A. V. NIRGUDE AND
V. K. JADHAV, JJ.**

DATED: 5TH JANUARY, 2015

JUDGMENT (PER JADHAV, J.) :-

1. By this petition, the petitioner, *inter-alia*, raises a challenge to vires of Section 3-A of the Central Excise and Salt Act, 1944. The petitioner is also seeking directions to respondent No.4 to re-determine the annual capacity of production after considering report of the Chartered Engineer produced on record by measuring the correct “d” factor, having technical expertise, knowledge and experience and also seeking further directions to respondent No.4 to determine the duty payment in accordance with the actual production as claimed by the petitioner. The petitioner has prayed to quash and set aside the impugned judgment and order passed by respondent No.3 Tribunal in Appeal bearing E/363/99-Bom and application No. E/COD/357/99/ Bom. dated 10.1.2001.

2. Mr. Sharma, the learned counsel appearing for the petitioner

submits that the prayer clauses “E” and “F” may be considered at present and the petitioner does not want to press prayer clauses A to D.

3. Brief facts, giving rise to the present petition, are as follows:-

a. The petitioner is a registered partnership firm engaged in business of sale, distribution and manufacture etc. of hot rolled products of non-alloy steel. For short, the petitioner is a re-rolling steel Mill. In order to determine the annual capacity of the petitioner unit at Aurangabad, a Chartered Engineer had been engaged to measure the parameters. Accordingly, by order dated 30.9.1997, respondent No.4 had determined and fixed the annual production capacity of Re-rolling Mill of the petitioner of 3419 MT per annum and excise duty liability was fixed at Rs.85,475/- per month. However, respondent No.4 Commissioner thereafter, on 16.6.1998 was pleased to revise his order and enhanced the annual production capacity from 3419 MT per year to 7831.676 MT per year and also re-determined the excise duty liability from Rs.85,475/- per month to Rs.1,95,792 per month.

b. Being aggrieved by the same, the petitioner had preferred an appeal under the provisions of Section 35-B of the Central Excise Act, 1944 alongwith an application for condonation of delay. The appeal was filed on 1.2.1999. However, the learned Tribunal by order dated 10.1.2001 communicated on 25.1.2001 was pleased to reject the application for condonation of delay. Being aggrieved by the said order dated 10.1.2001, the petitioner, has filed present writ petition.

4. The learned counsel appearing for the petitioner submits that the order dated 16.6.1998 is exparte order. The petitioner has made representation on various occasions and requested the respondent No.4 Commissioner to re-consider the said order. However, by letter dated 21.12.1998, office of respondent No.4 has communicated the petitioner to prefer an appeal against order dated 16.6.1998. Learned counsel for the petitioner thus, submits that the appeal is within limitation from the date of said communication dated 21.12.1998 and further, even if there is delay in preferring appeal, the petitioner is prevented from preferring appeal within limitation for the reason that his representations were kept pending and finally the authority has communicated at later stage to the petitioner to prefer an appeal. The learned counsel, therefore, submits that the petitioner is prevented from sufficient cause to prefer an appeal within limitation and thus, make out a case for condonation of delay. The learned Tribunal has

erred in rejecting the application for condonation of delay.

5. Mrs. Bharaswadkar, the learned counsel for respondent Nos. 4 to 6 submits that the petitioner had knowledge about the order passed on 16.6.1998 and the petitioner ought to have preferred appeal within a period of three months from that date, as provided under Section 35-B (3) of the Central Excise Act 1944. The learned counsel thus submits that the Tribunal has rightly rejected the application for condonation of delay.

6. We have heard the arguments canvassed by the learned counsel for the respective parties. We have also perused the documents placed on record.

7. On perusal of the order dated 16.6.1998, *prima facie*, it appears that opportunity of hearing was not extended to the petitioner before passing the said order. However, it is for the Appellate Tribunal to consider it at the time of hearing of the appeal. On 29.6.1998, 3.11.1998 and 12.11.1998, the petitioner had submitted in writing the representations against the order dated 16.6.1998. In the representation dated 29.6.1998, the petitioner had earnestly requested respondent No.4 to reconsider the decision or otherwise, the petitioner had no option but to close the Mill. In the

representation dated 3.11.1998, the petitioner by giving reference to his earlier representation, requested the respondent No.4 to re-determine the case and further requested to intimate the petitioner at the earliest whether his representation has been accepted or otherwise. In the representation dated 12.11.1998, it appears that the petitioner by referring letter issued by respondent No.4 Commissioner dated 6.10.1998, which was received by the petitioner on 28.10.1998, furnished certain information and also clarified certain things point-wise and lastly requested the respondent No.4 Commissioner to kindly re-determine production capacity based on the actual production for the period of September, 1997 to March/April 1998 onwards. It appears from the contents of representation dated 12.11.1998 that respondent No.4 Commissioner sought certain information and also clarification of the petitioner on certain points. Thus, inference could be drawn that the petitioner's representation were under consideration till 21.12.1998. As it appears from the contents of letter dated 21.12.1998 the respondent No.4 Commissioner has finally communicated the petitioner that his request dated 3.11.1998 cannot be accepted and matter cannot be re-opened. It is also communicated to the petitioner that the impugned order, if not accepted, the petitioner can always file an appeal against the same.

8. In view of the provisions of Section 35-B (3) of the Central Excise Act, 1944, the petitioner ought to have preferred appeal within a period of three months from the date of order. However, we are of the considered opinion that the petitioner was prevented from sufficient cause to prefer an appeal within limitation. The petitioner's representations were kept pending for long time. It is well settled that the length of delay is no matter but acceptability of explanation is the only criteria. We do not find any negligence or inaction or want of bonafides on the part of petitioner while applying for condonation of delay. The petitioner has thus made out a case for condonation of delay of four months in preferring appeal before the Appellate Tribunal as provided under Section 35-B of the Central Excise Act, 1944.

9. In ordinary course, we would have remanded the matter to the Appellate Tribunal with the aforesaid observations. Initially, the hearing of appeal alongwith application for condonation delay was fixed on 19.5.1999 and the Appellate Tribunal had dismissed the appeal for default on that day. Consequently, the petitioner immediately filed an application for setting aside the order of dismissal of appeal. However, the Appellate Tribunal by order dated 24.5.2000 rejected the application for restoration. Being aggrieved by the same, the petitioner had filed writ petition No. 3704 of 2000

before this Court and accordingly by order dated 6.9.2000, this Court has quashed and set aside the order passed by the Appellate Tribunal and further directed the learned Tribunal to decide the application for condonation of delay within a period of 3 months. This Court while passing the said order has observed that the approach of the Tribunal is too technical and it may lead to grave injustice or miscarriage of justice in seeking statutory remedy of appeal. Even then the Appellate Tribunal by impugned order dated 10.1.2001 has rejected the application for condonation of delay on technical ground.

10. In view of above observations, we pass the following order:-

A) The writ petition is partly allowed.

B) The impugned order dated 10.1.2001 passed by the appellate Tribunal, in application No. E/COD/357/99/Bom is hereby quashed and set aside.

C) The delay of four (04) months caused in preferring appeal No. E/363/1999-Bom is hereby condoned. The application No. E/COD/357/99/Bom is accordingly allowed.

D) The Appellate Tribunal is hereby directed to decide the

Appeal No. E/363/1999-Bom on its own merits in accordance with law, as expeditiously as possible, preferably within a period of six months from today.

11. Rule is made absolute in the above terms.

12. In the circumstances, there shall be no order as to costs.

13. In view of disposal of writ petition, civil application No. 8418 of 2005 is also disposed of.

(V. K. JADHAV, J.) **(A. V. NIRGUDE, J.)**

rlj/