IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.04.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.SUDHAKAR
and
THE HONOURABLE Ms.JUSTICE K.B.K.VASUKI

Civil Miscellaneous Appeal No.181 of 2015
& M.P.No.1 of 2015

The Indian Hume Pipe Co. Ltd.,
represented by its Deputy Controller of Taxation
Ashok D.T.
Construction House,
5, Walchand Hirachand Road,
Ballard Estate, Mumbai,
Maharashtra - 400 001.

.. Appellant

versus

1. Customs, Excise and Service Tax
Appellate Tribunal,
1st Floor, Shastri Bhavan Annex Building,
No.26, Haddows Road,
Chennai - 600 006.

2. Commissioner of Customs and Central Excise
(Appeals),
No.1, Williams Road, Cantonment,
Tiruchirapalli - 620 001.

3. Deputy Commissioner of Central Excise,
Pon Nagar, Medical College Road,
Thanjavur - 613 007.

..Respondents

PRAYER: APPEAL filed under Section 35G(1) of the Central Excise Act against the order dated 22.07.2013 made in Final Order No.40386 of 2013 dated 22.07.2013 in ST/COD/741/2011 in ST.Stay 407/2011 in ST/623/2011-DB on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr.K.Ashok Kumar
For Respondents : Mr.T.Chandrasekaran, SCGSC - R2 &R3

J U D G M E N T
(Delivered by R.SUDHAKAR,J.)

Aggrieved by the order of the Tribunal in dismissing the appeal filed by it, the assessee is before this Court by filing the present appeal. Mr.T.Chandrasekaran, learned Standing Counsel entered appearance for the second and third respondents. By consent of both sides, this appeal is admitted on the following substantial questions of law raised by the appellant :-

> "i) Whether Tribunal (CESTAT) was right in dismissing an application for condonation of delay (COD Application), when the reasons for delay given by the applicant has not even been disputed much less disbelieved?
> ii) Whether CESTAT fell in error in passing an order which militates against the scope and ambit of Section 5 of the Limitation Act 1963, in the light of the preceding in question of law?
> iii) Whether the Tribunal can ignore the merits of the matter wherein indusputably it is a covered order and dismiss the appeal itself in dismissing the COD application?
> iv) Is not the dismissal of the COD application by CESTAT perversity in the eye of law leading to anomaly when undisputedly it is a covered matter>
> v) In a fiscal Statute, can a Tribunal give a complete go by to the undisputed facts that the assessee has been highly compliant and diligent while considering a COD application to take on file a Statutory Appeal which in any case is covered by an earlier order of CESTAT itself with regard to the similar contract with the same contractee?
> vi) As a corollary to the preceding question of law, has not the Tribunal passed an order against the fundamental first principles of service tax?"

2. The brief facts of the case are as follows:

The appellant/assessee is a Public Limited Company engaged in the work of executing turnkey projects for construction of pipe lines. The appellant company was awarded a contract by the TWAD Board. On 20.04.2009, the third respondent issued a show cause notice to the appellant alleging that the services rendered by the appellant is taxable and hence, they propose to demand service tax along with interest and penalty. In response to the said notice, the appellant filed a reply dated 25.6.2009 stating that for an identical work for the TWAD Board, for the earlier period, service tax was not levied. Not satisfied with the reply, the third respondent adjudicated the case and confirmed the demand made. Aggrieved by the said order, the appellant preferred an appeal before the second respondent, who confirmed the said demand.

3. As against the said order, the appellant once again went before the Tribunal, however, with a delay of 323 days contending that the order of the Commissioner (Appeals) received by them was misplaced in the office and the person responsible for pursuing the matter on the legal side, namely, Shri.Ashok D.T., Deputy Controller of Taxation was pre-occupied with his daughter's marriage held on 23.11.2010 and the reception held on 27.11.2010. It was also stated that on resuming duty, he found that the order has been misplaced in some other file and hence, it skipped his attention. Only when the Department tried to recover the dues, it came to the notice that an order has been passed and the limitation to file the appeal has lapsed. Immediately, they filed an application before the Tribunal for condonation of delay. It was also stated that with regard to show cause notices issued by different Commissionerates, viz., 27 in number, appeals have been preferred within the time. Hence, the delay is not willful.

4. The Tribunal, by order dated 18.10.2010, dismissed the application holding that mere misplacement of the file cannot be a sufficient reason for condonation of delay.

5. Aggrieved by the order of the Tribunal, the appellant is before this Court.

6. Learned counsel appearing for the appellant submitted that the appellant has been diligently filing appeals in respect of the identical issue before the Tribunal. Due to the pre-occupation of the person, who is in-charge of the legal side, coupled with the misplacement of the order in some other file arose delay. Hence, the delay is not willful. When the appellant is diligently filing 27 appeals, there is no reason for them in not pursuing this matter alone, more so, on an earlier occasion, in an identical circumstance, the Tribunal had decided the issue in favour of the appellant. Hence, there is sufficient cause in not filing the appeal within the prescribed time.

7. Heard learned counsel appearing for the appellant and the learned Standing Counsel appearing for the respondents and perused the materials placed before this Court. Learned counsel appearing for the appellant filed additional documents enclosing the details of the receipt of the order of the Commissioner (Appeals) and the reasons for not filing the appeal within the time on account of the pre-occupation of the Deputy Controller of Taxation.

8. We have perused the documents and the reasons given by the appellant. We find that the reasons given by the appellant in not filing the appeal appear to be bona fide. Further, by condoning this

delay, the plea of the appellant that substantial justice has been met based on the earlier order of the Tribunal has to be kept in mind. It is to be noted that in identical circumstances, in respect of the very same contract, the Tribunal has decided the issue in favour of the appellant.

9. From a perusal of the documents available on record, it is clear that the delay of 323 days had occurred due to the misplacement of the order of the Commissioner (Appeals), as has been stated by the appellant before the Tribunal. The finding of the Tribunal that the appellant has not shown sufficient cause, which prevented them in filing the appeal, does not merit acceptance in view of the decision of the Supreme Court in Collector, Land Acquisition - Vs- Mst. Katiji & Ors. (1987 (167) ITR 471 (SC)), wherein the Supreme Court has held "the expression “sufficient cause” employed by the Legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice. Further, the Supreme Court also held that when substantial justice and technical considerations are pitted against each other, the 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”.

10. In a recent judgment of the Supreme Court in 2013 (5) CTC 547 (Esha Bhattacharjee V. Managing Committee of Raghunathpur, Nafar Academy and others), the Apex Court has enunciated the following guidelines to be adopted while deciding matters relating to condonation of delay :-

> "15. From the aforesaid authorities the principles that can be broadly be culled out are:
>
> (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an Application for condonation of delay, for the Courts are not supposed to legalise injustice but are obliged to remove injustice.
>
> (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.
>
> (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the Counsel or litigant is to be taken note of.

(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the Courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The Concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former Doctrine of Prejudice is attracted, whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the Courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the Application are fanciful, the Courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of Law of Limitation.

(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

(Emphasis supplied)

11. The parameters as laid down in para 15 (i), (ii), (iii), (vi), (ix) and (xii), by the Supreme Court in the above case, can be invoked for deciding the present appeal.

12. The further guidelines issued in paragraph 16 of the above-said decision are as follows:

16. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are :

(a) An Application for Condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the Courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

(b) An Application for Condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

(c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

(d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters."

13. In an identical circumstance, this Court, by order dated 06.02.2015, in C.M.A.No.3215 of 2006, following the above-said judgment allowed the appeal filed by the Revenue, thereby condoned the delay.

14. Accordingly, following the above-said decision of the Supreme Court and that of this Court, we pass the following order:

(i) The substantial questions of law are answered in favour of the appellant/assessee and against the respondents/Revenue. This Civil Miscellaneous appeal is allowed. Consequently, M.P.No.1 of 2015 is closed.

(ii) The order passed by the Tribunal is set aside and the delay in filing the appeal before the Tribunal is condoned subject to the appellant paying a sum of Rs.5,000/- (Rupees five thousand only) to the Chief Justice Relief Fund towards costs within a period of two weeks from the date of receipt of a copy of the order.

(iii) The Tribunal is directed to take up the appeal and decide the same on merits.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To
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Appellate Tribunal,
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Thanjavur - 613 007.

+ 1 cc to M/s. K.Ashok Kumar, Advocate SR.22702

+ 1 cc to M/s.T.Chandrasekaran, Advocate SR.22662

PPA(CO)
EU 13.05.2015