

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 08.01.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH

C.M.A. NO. 3192 OF 2014

M/s.Rank International
rep. by its Sole Proprietor
Mr. R.Syed Badruddin
No.11 C, Kannagi Nagar,
1st Street, P.N.Road
Tirupur 641 602.

...Appellant/Appellant

- Vs -

1. The Commissioner
Custom House
New Harbour Estate
Tuticorin 628 004.

2. The Customs, Excise & Service
Tax Appellate Tribunal
No.26, Shastri Bhavan Annexe Building
Haddows Road
Chennai 600 006.

.. Respondents

Appeal filed under Section 130 of the Customs Act against the order dated 4.11.13 passed by the Customs, Excise & Service Tax Appellate Tribunal, Chennai in Final Order No.40686 of 2013.

For Appellant : Mr.P.V.S.Giridhar for M/s.Giridhar & Sai

For Respondents: Mr.A.P.Srinivas for R-1

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order passed by the Customs, Excise & Service Tax Appellate Tribunal in dismissing the appeal filed by the appellant/importer, the appellant/importer is before this Court by filing the present appeal by raising the following questions of law :-

"1) Whether the Tribunal was justified in refusing to entertain application for condonation of delay when appeal against identical common order has already been entertained, interim stay granted and is pending adjudication before the Tribunal?

2) Whether the Tribunal erred in not liberally construing the power under Section 129A (5) in favour of the appellant?

3) Whether or not the principles underlying condonation of delay under Section 129A (5) of the Customs Act akin to the well settled principles under Section 5 of the Limitation Act?

4) Is not the reasoning and the findings rendered by the Tribunal perverse, given the absence of positive evidence to show that the appellant was served with the copy of the order impugned before the Tribunal?

5) Did not the Tribunal err in construing the date of communication of the order as date of knowledge of the order for the purpose of Section 129A (5) of the Customs Act?"

2. The facts, as could be culled out from the records, is that the appellant/importer imported Computerised Embroidery Pattern Making Machine with Plotter under Bill of Entry No.323944 dated 5.6.03 and cleared the goods availing the benefit of exemption under notification No.21/02 dated 1.3.02, whereby countervailing duty, cess and SID were not levied. The DRI took up investigation of the matter after a period of time and after investigating the matter, issued a show cause notice dated 28.2.05 calling upon the importer/appellant to pay differential duty, but for the benefit of the above notification, and such show cause notice was issued in terms of proviso to Section 28 (1) of the Customs Act. The show cause notice, inter alia, demanded for confiscation of the imported goods, penalty and interest.

3. The Joint Commissioner of Customs passed an order at the first instance on 29.11.05 confirming the demand made in the show cause notice together with interest and penalty. In the appeal filed by the appellant/importer, the Commissioner (Appeals) confirmed the order of the Joint Commissioner by order dated 27.6.06. The appellant/importer pursued the matter before the Tribunal and the Tribunal, by order dated 30.4.07, set aside the order of the appellate authority vide a common order relating to several imports and remanded the matter back to the Commissioner of Customs, Tuticorin, to examine afresh, to avoid multiplicity of proceedings and to maintain consistency in the findings.

4. On remand, the Commissioner of Customs, Tuticorin, passed an order de novo on 30.3.09. The order, once again, came to be challenged by the present appellant/importer before the Tribunal and the Tribunal, once again, set aside the order of the Commissioner and remanded the matter back by order dated 20.10.09. Thereafter, on 21.10.10, the Commissioner of Customs, Tuticorin, passed the 2nd de novo order adjudicating the case and passed the following order :-

"(i) I confirm the misdeclaration of the description of the goods, viz., Computerized embroidery Pattern making machine with plotter, imported vide Bill of Entry No.323944/dt. 05.06.2003 and hold that the description of the said machine as "Computerized Embroidery Machines" and order denial of duty exemption in terms of Notification No.21/02-Cus dated 01.03.2002 vide List No.31 (Sl. No.07).

(ii) I confirm the duty assessable as Rs.8,81,368/= as against Rs.3,03,319/= assessed and demand the differential duty amount of Rs.5,78,050/= under Section 28 of the Customs Act, 1962, as provided therein.

(iii) I order appropriate interest to be paid under Section 28AB of the Customs Act, 1962.

(iv) I order confiscation of the subject machine imported and covered under the above Bill of Entry, which was seized under a mahazar dated 08.09.2004, under Section 111 (m) of the Customs Act, 1962. However, I give an option to M/s.Rank International, Tirupur, to redeem the goods on payment of a fine of Rs.3,00,000/= (Rupees Three Lakhs only) under Section 125 of the Customs Act, 1962.

(v) I impose a penalty of Rs.2,50,000/= (Rupees Two Lakhs and fifty Thousand only) on M/s.Rank International, Tirupur, under Section 114A of the Customs Act, 1962.

(vi) I impose a penalty of Rs.2,50,000/= (Rupees Two Lakhs and fifty Thousand only) on M/s.Adarsh Shipping and Services, Tuticorin, under Section 112 (a) of the Customs Act, 1962."

5. The above order, it appears, was communicated to the appellant, but delay had occurred in filing the appeal for which reasons have been stated in the affidavit filed in support of the application for condonation of delay. The reasons, as set out in detail in the affidavit filed in support of the application for

condonation of delay, together with other facts of the case, as found in paragraph-21, are extracted hereunder for better clarity :-

"21. Similarly it is just and necessary that the delay in filing the appeal be also condoned. The delay is neither willful nor wanton but for the bonafide reason of me not having had personal knowledge of the impugned order. In fact I came to know about the order only on 30.01.2013 and got hold of a physical copy of the order from the indenting agent on 31.01.2013. there are no records in my office showing receipt of the original of the order in 2010. The financial year 2010 and 2011 was very bad for my business, which was hit hugely by the recession in the economy. I visited Haj on a pilgrimage in November 2010 for prayers inter alia seeking God's blessings for resurrection and revival of my business. Key staff members who managed the affairs of my business deserted me and left my concern in November and December, 2010 just when I was not present. It is likely that even if the order had been dispatched by the respondent, my office staff had misplaced. These are the circumstances and the reasons for not filing of an appeal in time. If the time period is calculated from date of knowledge i.e., 30.01.13 there is no delay in filing the appeal. However, calculating from the date of order, there is a delay which needs to be condoned in the interest of justice. As the original of the order is not available, its copy has been procured and being filed with a petition to dispense with production of the original."

6. The reasoning, as shown in the affidavit, was not accepted by the Tribunal and the appeal was dismissed stating that the other co-noticees have received the order and filed appeal on time. Further, the Tribunal had observed that the appellant/importer did not pursue the matter properly before the 2nd adjudication proceeding and, therefore, for the fault of the appellant, the delay cannot be condoned. Challenging the said proceedings, the present appeal has been filed contending that the Tribunal has failed to look into the prima facie case and bona fides of the appellant and the sincerity of the appellant in pursuing the matter from the first instance and, further, the Tribunal also failed to take into consideration the reasons stated for non-appearance at the later stage, which has been explained in detail in para-21 of the affidavit, which has been extracted above.

7. Heard the learned counsel appearing for the appellant/importer and the learned standing counsel appearing for the 1st respondent and also perused the documents available in the typed set of papers.

8. In order to test the bona fides of the appellant/importer and his sincerity in pursuing the matter, this Court called upon the appellant/importer to deposit an amount of Rs.2 Lakhs as condition precedent to hear the appeal, which has been complied with by the appellant/importer and proof towards such deposit has also been produced before this Court. In such circumstances, this Court is inclined to proceed with the matter by examining the substantial issue relating to delay in filing the appeal and the explanation given thereof.

9. The reason for non-appearance of the appellant/importer before the Tribunal has been explained stating that as the appellant/importer was on Haj pilgrimage in November, 2010, the affairs of the company was left at the hands of the staff, who had mismanaged the same and, therefore, the appellant/importer was in a quandary. On a perusal of the materials available on record, we find some justification in the explanation given by the appellant/importer, he being the sole proprietor. Further, the plea taken by the appellant/importer is acceptable for the reason that it is a case of proper import after assessment by an appropriate officer in the month of June, 2003 and, thereafter, investigation was mooted by the DRI, which culminated in the show cause notice in February, 2005. The appellant has been pursuing the matter from the stage of show cause notice, adjudication, appeal before the Commissioner, further appeal before the Commissioner (Appeals) and, thereafter, before the Tribunal in the first round. On remand by the Tribunal, the appellant/importer diligently pursued the matter before the Commissioner of Customs in the first de novo proceedings and once again on appeal to the Tribunal and subsequent remand order dated 20.10.09, pursued the matter sincerely in the 2nd de novo proceeding before the Commissioner of Customs. Thereafter, as rightly pointed out by the learned counsel for the appellant/importer, when the order came to be passed by the Commissioner in the 2nd de novo proceedings, the appellant/importer was not present personally, since he was on pilgrimage. From that point on, as pleaded by the appellant/importer, there appears to be some mismanagement of the affairs on the part of the staff in not pursuing the matter, consequent upon which delay occurred.

10. In the above backdrop, in view of the conduct of the appellant/importer in showing his bona fide by making the deposit as ordered by this Court reaffirming his sincerity in pursuing the matter, we find that his intention in pursuing the appeal is bona fide and the inaction that resulted in the delay, as attributed by the Tribunal to the appellant/importer, is only on account of the appellant/importer going on pilgrimage and, therefore, the inaction can be attributed only to the staff while the appellant/importer was away and the plea of mis-placement of the order, as pleaded by the appellant/importer is acceptable in the circumstances as aforementioned. In such view of the matter, this Court is of the

considered view that the Tribunal should have taken a lenient view in condoning the delay. The dismissal of the appeal thereof, without considering the explanation offered by the appellant/importer, is erroneous and is liable to be set aside.

11. The above view of this Court in condoning the delay on the explanation submitted by the appellant/importer is further fortified by the decision of the Supreme Court in 2013 (5) CTC 547 (Esha Bhattacharjee V. Managing Committee of Raghunathpur, Nafar Academy and others), wherein the Apex Court enunciated the following guidelines:

"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.

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."

12. The parameters in para 15 (i), (ii), (iii), (vi), (viii), (ix) and (xii), enunciated by the Supreme Court in the above case, can be invoked for deciding the present appeal. As a result, this appeal is liable to be allowed.

13. Accordingly, this appeal is allowed. The order passed by the Tribunal is set aside and the delay in filing the appeal before the Tribunal is condoned. The Tribunal is directed to take up the appeal along with the application for waiver of pre-deposit, if any, and consider the same on merits and in accordance with law and pass orders thereon as expeditiously as possible. It is further made clear that while considering the application for waiver of pre-deposit, if any, the Tribunal may also take note of and give credit to the deposit of Rs.2 Lakhs already made by the appellant/importer in pursuance to the order passed by this Court.

GLN

-s/d-

Assistant Registrar (CS-III)

Dt:23/1/2015

True Copy

Sub-Assistant Registrar

To

1. The Commissioner
Custom House
New Harbour Estate
Tuticorin 628 004.

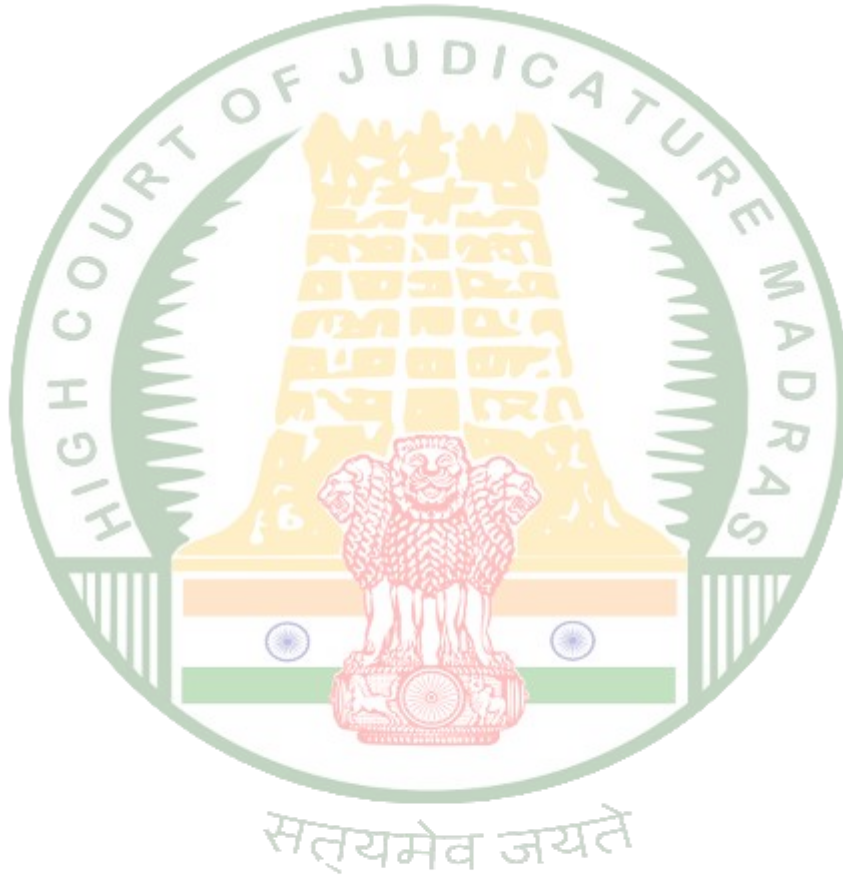
2. The Customs, Excise & Service
Tax Appellate Tribunal
No.26, Shastri Bhavan Annexe Building
Haddows Road, Chennai 600 006.

+ 1 cc to Mr.Giridhar & Sai, Advocate SR 1364

+ 1 cc to M/s.A.P.Srinivasa, Advocate SR 1144

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