

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 30.09.2016

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
27.09.2016	30.09.2016

Coram

The Hon'ble Mr.Justice **T.S. SIVAGNANAM**

W.P.No.26310 of 2016 &
W.M.P.No.22567 & 22578 of 2016

M/s.Days Inn Deccan Plaza
 (A Unit of Deccan's Park)
 No.36, Royapettah High Road,
 Chennai – 600 014.
 Rep., by its General Manager,
 R.Gowrishankar

... Petitioner

Vs

1.Commissioner of Service Tax (Appeals)-I
 26/1, M.G.Marg, Nungambakkam,
 Chennai – 600 034.

2.Additional Commissioner of Service Tax,
 Service Tax II Commissionerate,
 "Newry Towers" 3rd Floor, 2054-I
 2nd Avenue, Anna Nagar,
 Chennai – 600 040.
 Previously located at M.H.U.Complex,
 No.692, Anna Salai, Nandanam Chennai -35.

... Respondents

Prayer :-This Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus,

to call for the records of the second respondent order in original NO.114/2010, dated 29.10.2010, and quash the same and further direct the second respondent to pass a fresh order.

For petitioner .. Mr.A.P.Ayyam Perumal

For Respondents .. Mr.A.P.Srinivas SSC for RR1&2

ORDER

Heard Mr.A.P.Ayyam Perumal, learned counsel for the petitioner and Mr. A.P.Srinivas learned Senior Standing counsel appearing for the Revenue and with the consent on either side, the Writ Petition itself is taken up for final disposal.

2. The petitioner in this Writ Petition challenges an order-in-original passed by the second respondent, dated 29.10.2010, in and by which, the second respondent disallowed Cenvat Credit availed by the petitioner and demanded the same under Rule 14 of the Cenvat Credit Rules, read with Section 73(1) of the Finance Act, 1994, apart from demanding interest and imposing penalty.

3. Against the order-in-original, dated 29.10.2010, the petitioner was entitled to file an appeal before the Commissioner

(Appeals), Chennai, however, the petitioner did not file the appeal within the period of limitation as stipulated under Section 85 of the Finance Act and there was a delay of seven months and 11 days in filing the appeal before the Commissioner (Appeals). The Commissioner (Appeals) rejected the appeal by order dated 01.12.2014, as it was filed beyond the statutory period of limitation and the Appellate Authority has no power to condone the delay. For over one year, the petitioner took no steps to question the order passed by the Commissioner (Appeals), as they could have gone before the Tribunal, namely, the CESTAT against the order passed by the Commissioner (Appeals). However, the petitioner did not take any steps to challenge the said order of the Commissioner (Appeals), by exhausting the remedy available under the Act, which provided for a further appeal to the CESTAT. After waiting for about one year, the Department issued a recovery notice, dated 08.12.2015, and the demand was not complied with. This was followed by another notice dated 08.01.2016. Thus, effectively, the petitioner had been given one full year, after the order passed by the Appellate Authority rejecting his appeal to comply with the demand made in the order-in-original. At that juncture, on 27.01.2016, the petitioner filed a Writ Petition before this Court in W.P.No.5194 of 2016, to quash the order-in-appeal and direct the Appellate Authority to decide the appeal on

merits. This Court after taking into consideration the decision of the Hon'ble Supreme Court in the case of ***Albert and Co., vs. Commissioner of Service Tax*** reported in ***2015 37 STR 187 (Mad)***, dismissed the Writ Petition by order dated 22.02.2016. The petitioner preferred Writ Appeal before the Hon'ble Division Bench against the said order in W.A.No.589 of 2016. The Hon'ble Division Bench by an elaborate order after referring to various decisions on the point, dismissed the Writ Appeal and the operative portion of the judgment is as follows:-

37. Section 85 of the Finance Act, is similar to Section 128 of the Customs Act, 1962; Section 34(3) of the Arbitration and Conciliation Act, 1996; Section 125 of the Electricity Act, 2003; Section 35-G of the Central Excise Act, 1944 and the statutes referred to above, are self contained Acts and codes by themselves. The High Court or the Supreme Court, as the case may be, cannot direct the appellate authority to condone the delay, beyond the extended period of limitation. Courts have also interpreted that when the legislative intent is reflected in the provisions of the special laws, excluding the provisions of Limitation Act, then the authorities under the statute, cannot exercise powers to condone the delay. On the aspect of the Court, exercising powers under Article 226 of the Constitution of India, to condone the delay, we

are of the view that the decision of this Court in Indian Coffee Worker's Co-operative Society Ltd., 's case, squarely applies to the case on hand, wherein, a Hon'ble Division Bench held as follows:

(c) While the High Court exercising the jurisdiction under [Article 226](#) of Constitution of India, approves the correctness of the order of the appellate authority, it has no power to direct the appellate authority to consider the appeal on merits as otherwise it would be nothing but Court extending the period of limitation.

(d) Even if the High Court accepts the explanation given by the assessee for not filing the appeal within the period prescribed under the Act, it cannot direct the appellate authority to consider the matter on merits as the High Court exercising jurisdiction under [Article 226](#) of Constitution of India, cannot re-write the provisions of the Act.

4. The above order has become final and the petitioner has not carried the matter to the Hon'ble Supreme Court. The present attempt of the petitioner in this Writ Petition is to challenge the order-in-original, which was passed on 29.06.2010., i.e., after six years, after having failed in all their earlier attempts before the Appellate Authority and before this Court i.e., both before the Single Bench as well as the Hon'ble Division Bench.

5. The learned counsel for the petitioner would vehemently contend that the impugned order-in-original suffers from manifest errors and therefore, it can be interfered in a Writ Petition. In this regard, the learned counsel for the petitioner referred to the factual averments set out in paragraph 19 of the affidavit filed in support of the Writ Petition. Further, it is submitted that the extended period of limitation cannot be invoked, as the first show cause notice was issued upto March 2008 and the second show cause notice for the period from April 2008 and August 2008 and when such was the circumstances, the question of invoking extended period would not arise because there cannot be any suppression of fact, since the Department was fully aware of the facts. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of ***Nizam Sugar Factory vs. Collector of Central Excise, A.Ps.***, reported in ***2006 (197) E.L.T., 465 (S.C.)***.

6. The next contention raised by the learned counsel is that the impugned order-in-original has been passed on assumptions and presumptions, though in paragraph 12 of the impugned order, the respondent has accepted that they collected tax, but erroneously denied input tax credit and without conducting proper investigation,

the order has been passed. It is further submitted that though the petitioner had filed the form ST-3 returns for the relevant financial year i.e., 2007-08, and the receipt of the same has been acknowledged by the department on 20.04.2008, an erroneous findings has been rendered, as if, ST-3 returns has not been filed. Further, it is submitted that the petitioner relied upon certain case laws and the second respondent has not even discussed about the case laws. On the above submissions, the learned counsel seeks for setting aside the order-in-original.

7. The learned Senior Standing counsel appearing for the Revenue referred to the dates and events and submitted that this belated challenge to the impugned proceedings, should be out rightly rejected. It is further submitted that the petitioner has not made out any case for interference in a Writ jurisdiction, the principles of natural justice has been fully complied with, the petitioner had been afforded opportunity, his objections were considered and clear cut finding has been recorded by the second respondent in the impugned order and in this regard, reference was made to paragraph 13 onwards of the impugned order.

8. After hearing the learned counsels at great length, this

Court is of the considered view that the present challenge to the order-in-original passed in 2010, has to necessarily fail. This conclusion is supported by the following reasons. Firstly as set out in the preceding paragraphs, the petitioner had exercised the option of filing an appeal, but they were not diligent in prosecuting the matter by filing the appeal within the period of limitation. Admittedly, the appeal was filed beyond the condonable limit.

9. In the Writ Petition, which was filed challenging the order passed by the Appellate Authority in W.P.No.5194 of 2016, the petitioner has elaborately raised various grounds touching upon the merits of the assessment made on them. Though the prayer sought for is to set aside the order passed by the Appellate Authority and to direct the appeal to be heard on merits, nevertheless the contentions as regards the merits of the assessment have been raised. The said Writ Petition was dismissed and such order was confirmed by the Hon'ble Division Bench. The Writ Petition itself was filed after one year i.e., in January 2016. This delay was not explained, after which the petitioner preferred an Writ Appeal and the Writ Appeal was dismissed by the Hon'ble Division Bench in June 2016. After the dismissal of the Writ Petition, the petitioner has resorted to the present attempt to question the validity of the order-in-original. The

order-in-original stood merged with the order passed by the Appellate Authority dated 01.12.2014, though the appeal was dismissed as being filed beyond the condonable limit. This order was confirmed by the Writ Court as well as by the Hon'ble Division Bench. Therefore, the petitioner cannot have a second round of litigation challenging the very same orders stating that they can raise the issues regarding the merits of the assessment.

10. As pointed out earlier, when they filed the previous Writ Petition, merits of the petition was canvassed, therefore, once over again the petitioner cannot be allowed to raise the same grounds and the petitioner is estopped from doing so.

11. With regard to the contention that extended period of limitation cannot be invoked and the applicability of the decision in the case of **Nizam Sugar Factory**(supra), it is relevant to note that in the petitioner's case, two show cause notices relating to a two different periods. The case before the Hon'ble Supreme Court, three show cause notices were issued for the same period and the Hon'ble Supreme Court faulted the third notice stating that the same could not have been issued invoking larger period on the ground of suppression, when the department was fully aware of the facts, while

issuing the first show cause notice and the second show cause notice. Therefore, the decision in the case of ***Nizam Sugar Factory***(supra), will not apply to the facts of the present case.

12. The another contention raised by the petitioner is that they have been denied input credit, inspite of the department having accepted the fact that the tax has been collected.

13. The findings recorded by the second respondent is that the petitioner mislead the department to believe that the Management Consultancy services availed by them is relatable to all taxable output services rendered by them and thereby, they are eligible for cenvat credit of service tax paid on the said input service. Apart from that, they failed to file the cenvat credit proforma as stipulated under Rule 9(9) of the Service Tax Rules, 1994, and failed to declare the services in the ST-3 Return in any other manner and but for the Internal Audit Team of the Service Tax Commissionerate conducting an audit, such wrong availment of Cenvat Credit would not have come to the notice of the Department. This finding is sufficient to invoke the extended period of limitation under Rule 14 of the Cenvat Credit Rules 2004, read with Section 74 of the Finance Act, 1994.

14. After discussing about the factual details, the second respondent recorded that the service rendered by AHPL to the petitioner in the capacity of full-fledged Operator of the Hotel and arranging catering, rooms and thereby promoting hospitality service of the Five Star Hotel comparable standards. Secondly, service rendered by AHPL cannot be allowed as eligible input service for the petitioner so as to provide the relief in terms of Rule 6(5) of the Cenvat Credit Rules. The findings rendered by the second respondent is perfectly justified and valid.

15. The other contention raised by the learned counsel for the petitioner is that the second respondent has committed a factual error by stating as if, the petitioner has not filed their returns in form ST-3. However, on a perusal of the impugned order, it is seen that the second respondent has not recorded such a finding, but what has been recorded is that the petitioner has failed to file Cenvat Credit Proforma, as stipulated under the Rule and failed to declare the service in the ST-3 return in any other manner. Thus, the submission made on behalf of the petitioner also does not merit consideration.

16. For all the above reasons, no grounds have been made to interfere with the impugned order and the present attempt of the

petitioner is only to resurrect a stale claim, apart from the entire attempt being barred by principles of estoppel. For all the above reasons, no grounds have been made out by the petitioner to interfere with the impugned order.

In the result, the Writ Petition fails and it is dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

30.09.2016

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Index :Yes/No
Internet :Yes/No

To

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Chennai – 600 034.
2. Additional Commissioner of Service Tax,
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Chennai – 600 040.

T.S.SIVAGNANAM, J.
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Pre-Delivery O r d e r in

W.P.No.26310 of 2016 &
W.M.P.No.22567 & 22578 of 2016

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