

IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 21.06.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

Writ Appeal No.428 of 2016
C.M.P.No.6202 of 2016

E.T.A.General Pvt. Ltd.,
rep., by its Additional General Manager (Commercial)
Mr.B.T.Prabahar ... Appellant/Petitioner.

-vs-

1. The Additional Commissioner of Central Excise,
Office of the Commissioner of Central Excise,
Chennai Commissionerate,
26/1, Mahatma Gandhi Marg,
Nungambakkam, Chennai 600 034.
2. The Commissioner of Service Tax (Appeals-II),
No.2054, 2nd Avenue, Newry Towers,
12th Main Road, Anna Nagar, Chennai-40.
... Respondents/Respondents.

Writ Appeal filed against the order, dated 15.02.2016 in W.P.No.5501 of 2016. Writ Petition filed under Article 226 of the Constitution of India prying to issue a Writ of Certiorari calling for the records of the 2nd respondent in Order in Appeal No.349/15(STA II) dated 30.11.2015 passed by the 2nd Respondent and quash the same as arbitrary and illegal.

For Appellant : Mr.Joseph Prabakar

For Respondents : Mr.A.P.Srinivas,
SPC (C & CE)

JUDGMENT

[Judgment of the Court was made by S.MANIKUMAR, J.]

Writ Appeal is directed against the order made in W.P.No.5501 of 2016, declining to issue a Writ of Certiorari, to quash the Order-in-Appeal No.349/2015 (STA-II), dated 30.11.2015, passed by the Commissioner of Service Tax (Appeals-II), Chennai, the 2nd respondent herein.

2. Facts deduced from the materials on record are that the Additional Commissioner of Central Excise, LTU, Chennai, passed an order of assessment on 29.02.2012. Appeal filed before the Commissioner of Central Excise (Appeals), Chennai, was rejected on the ground that it was filed beyond the period of limitation. Correctness of the said order has been tested in W.P.No.21811 of 2013, on the ground that the period of limitation has to be calculated, taking into account, the date of impugned order and not the date on which, the appeal was preferred. Adverting to the submissions, a learned single Judge of this Court in W.P.No.21811 of 2013, dated 13.08.2013, passed the following orders,

"4. There is no dispute that prior to 28.05.2012, three months time was given to file appeal against the order passed by the Statutory Authority. There will be a grace time of three months after the expiry of initial three months to file the appeal along with an application to condone the delay. That was the position prior to 28.05.2012. However, the position has undergone a sea change after Finance Bill, 2012, thereby reducing the period to file appeal from three months to two months and the grace period from three months to one month. The first respondent proceeded as if the date on which the appeal was preferred should be taken as the crucial date. Since the appeal was preferred after the Amendment came into force and having found that the appeal was preferred beyond the period of three months, it was rejected.

5. The materials available on record clearly show that the order passed by the original authority was on 29.02.2012. The Amendment came into force on 28.05.2012. Therefore, the petitioner is justified in its contention that the appeal should have been taken up on file in accordance with the regulations in force prior to 28.05.2012. In case the time limit prescribed for filing an appeal i.e., three months is taken into account, it cannot be said that the appeal was barred by limitation. In my view, the first respondent was not justified in rejecting the appeal on the ground of limitation.

6. In the result, the impugned order, dated 24.07.2013 insofar as the petitioner is concerned, is set aside. The first respondent is directed to register the appeal, if the same is otherwise in order and decide it on merits and as per law."

3. Order impugned before the appellate authority is dated 09.03.2012. Appeal has been filed on 14.08.2012. Admittedly, it

is within the extended period of limitation. The cause shown for the delay in filing the appeal is that the original impugned order was referred to the learned counsel for opinion. The entire set of papers were misplaced by the junior counsel and on 06.08.2012, the papers were traced. Thereafter, the appeal was prepared and filed. Thus, the delay of two months and seven days in filing the appeal, has been explained as beyond the reasonable control of the appellant.

4. After the orders in W.P.No.21811 of 2013, the Commissioner of Service Tax (Appeals), has taken up the appeal and after considering the decisions of the Tribunal in M/s.Didar Motors v. CST [Final Order No.40010 to 40012 of 2015, dated 07.01.2015] and OSA Shipping Pvt. Ltd., v. CCE, Chennai [Final Order No.40146 of 2015, dated 03.02.2015], On the aspect of limitation, the Commissioner of Service Tax (Appeals-II), at Paragraph 9.1 and 9.5, observed as hereunder:

"9(i). It is observed that the date of receipt of the impugned order is 09.03.2012 and the appeal was filed on 14.08.2012. During the material period, as per Section 85(3) of the Act (as it stood before 28.05.2012), an appeal to Commissioner (Appeals) shall be presented within three months from the date of receipt of the decision or order of such adjudicating authority. As per Proviso to the said Section, where sufficient cause was shown, an appeal can be allowed to be presented within a further period of three months. In this case the appeal was filed after expiry of first normal 3 months period and after expiry of further period of 2 months and 7 days. Hence, the appeal falls under proviso to Section 85 ibid which provides that where sufficient cause was shown, an appeal can be allowed to be presented within a further period three months.

.....
9(v).In the present case, misplacement by a learned advocate cannot be the sufficient cause for condonation of delay of 2 months and 7 days in filing the appeal since the law officers are expected to be more vigilant and alert in complying with the provisions of law. Therefore, the appeal is liable for rejection as time barred."

5. The appellate authority, vide order, dated 30.11.2015, has dismissed the appeal both on delay and merits. The abovesaid order passed by the Commissioner of Service Tax (Appeals-II) in Order-in-Appeal No.349/2015 (STA-II), dated 30.11.2015, is challenged in W.P.No.5501 of 2016. Though before the Writ Court, the appellant has contended that earlier, in W.P.No.21811 of 2013, dated 13.08.2013, this Court has already directed the

Appellate Authority to register the appeal and therefore, the Commissioner of Service Tax (Appeals-II), ought not to have dismissed the appeal, as time barred and a further contention has been made that when the appeal is held as time barred, the appellate authority ought not to have decided the appeal, on merits and therefore, the writ petition is maintainable, having regard to the objection of the respondent that an appeal remedy is provided under the statute to challenge the correctness of the order of the appellate authority, before CESTAT, W.P.No.5501 of 2016 has been dismissed on 15.02.2016 and thus, the present appeal.

6. By inviting the attention of this Court to the order made in W.P.No.21811 of 2013, dated 13.08.2013, Mr. Joseph Prabakar, learned counsel for the appellant submitted that when this Court had already held that the Commissioner of Central Excise (Appeals), was not justified in rejecting the appeal on the ground of limitation and further directed the said authority to register the appeal, if the same is otherwise in order and to decide the same on merits, it is not open to the appellate authority to examine the sufficiency of the cause shown, for condonation.

7. Placing reliance on a decision of the Allahabad High Court in Commissioner of Customs, Central Excise & Service Tax v. M/s. Monsanto Manufacturer Pvt. Ltd., reported in 2014-TIOL-550-HC-ALL-ST, learned counsel for the appellant submitted that CESTAT, Madras, ought not to have gone into the merits of the case, when the appeal has been held as time barred.

7. To sustain the order, impugned before us, Mr. A.P. Srinivas, learned counsel for the Revenue submitted that the Order-in-Appeal No.349 of 2015 (STA-II), dated 30.11.2015, passed by the Commissioner of Service Tax (Appeals-II), can always be challenged before CESTAT, Madras. He further submitted that when there is an alternative remedy under the statute, there is no material irregularity in the impugned order, directing the appellant to go before the CESTAT and in such circumstances, the order impugned before this Court, does not call for any interference. He prayed for dismissal of the writ appeal.

Heard the learned counsel appearing for the parties and perused the materials available on record.

8. As stated supra, when the Additional Commissioner of Central Excise, LTU, passed an order for assessment, dated 29.02.2012, correctness of the same has been tested before the Commissioner of Central Excise (Appeals). Vide order, dated 24.07.2013, he has rejected the appeal, as time barred. When the said order, dated 24.07.2013, was tested in W.P.No.21811 of

2013, the Writ Court, vide order, dated 13.08.2013, has categorically held that the Commissioner of Central Excise (Appeals), was not justified in rejecting the appeal, on the ground of limitation. The writ Court has also directed him to register the appeal, if the same is otherwise in order and decide it, as per the law.

9. Reasons assigned for condonation of two months and seven days, are that the papers were handedover to the learned counsel; they are misplaced, traced out and thereafter, an appeal was filed. Question to be considered by this Court is that when the Writ Court, vide order, dated 13.08.2013, has already directed the Commissioner of Central Excise (Appeals), to register the appeal, would it be open to him, to examine the bona fides or the sufficiency of the cause shown. In the instant case, what the Commissioner of Central Excise (Appeals), has done is that, he has examined the sufficiency of the cause shown and held that misplacement of the papers by the learned Advocate, cannot be a sufficient cause for condonation of delay of two months and seven days, in filing the appeal and that the appellant was not vigilant in complying with the provisions of law.

10. When the Writ Court, vide order in W.P.No.21811 of 2013, dated 13.08.2013, has already directed the Commissioner of Service Tax (Appeals) to register the appeal, if the same is otherwise in order, we are of the considered view that it is not open to the appellate authority to examine the cause and to reject the appeal, as time barred. Aggrieved over the direction of this Writ Court in W.P.No.21811 of 2013, dated 13.08.2013, to directly register the appeal, instead of giving directions to examine the sufficiency of cause shown, the department could have preferred an appeal or even sought for review. Either of the above, has been done by the Department. Therefore, the directions of the Writ Court made in W.P.No.21811 of 2013, dated 13.08.2013, ought to have been complied with, by registering the appeal and thereafter, the appellate authority ought to have decided the appeal, on merits, instead of re-visiting the cause shown for condonation and reject the appeal, on the grounds of limitation. No doubt, earlier in W.P.No.21811 of 2013, dated 13.08.2013, the Writ Court has not delved into the cause, for the delay, but there is a clear direction to register the appeal.

11. In Commissioner of Customs, Central Excise & Service Tax v. M/s.Monsanto Manufacturer Pvt. Ltd., reported in 2014-TIOL-550-HC-ALL-ST, while declaring the demand as beyond the period of one year, the Tribunal, entered into the merits of the appeal filed by the assessee and passed an adverse order. Before the Allahabad High Court, one of the substantial questions of law raised by the assessee, was when the Tribunal having held that proceedings were barred by limitation, has committed any

illegality in deciding the question on merits. Whether the finding of the Tribunal on merits, is liable to be set aside?"

12. While addressing the abovesaid substantial question of law, decision of the Hon'ble Supreme Court in State Bank of India v. B.S.Agricultural Industries reported in 2009 (5) SCC 121, has been pressed into service, wherein, the Hon'ble Supreme Court had an occasion to deal with a situation, where the consumer forum held that the complaint was barred by limitation, but nonetheless had proceeded to decide the issue on merits. Dealing with the issue, which is similar to the case on hand, at Paragraph 12, the Hon'ble Supreme Court in State Bank of India's case (cited supra), held as follows:-

"12. As a matter of law, the consumer forum must deal with the complaint on merits only if the complaint has been filed within two years from the date of accrual of cause of action and if beyond the said period, the sufficient cause has been shown and delay condoned for the reasons recorded in writing. In other words, it is the duty of the consumer forum to take notice of Section 24A and give effect to it. If the complaint is barred by time and yet, the consumer forum decides the complaint on merits, the forum would be committing an illegality and, therefore, the aggrieved party would be entitled to have such order set aside."

Applying the ratio of the Supreme Court in State Bank of India v. B.S.Agricultural Industries reported in 2009 (5) SCC 121, the Allahabad High Court in Commissioner of Customs, Central Excise & Service Tax v. M/s.Monsanto Manufacturer Pvt. Ltd., reported in 2014-TIOL-550-HC-ALL-ST, answered the question of law in favour of the assessee.

13. Judgment of the Supreme in State Bank of India's case (cited supra), followed in Commissioner of Customs's case (cited supra), squarely applies to the facts on hand, wherein, CESTAT, Madras, while dismissing the appeal as time barred, has entered into the merits of the case and dismissed the same, on merits. In the words of the Hon'ble Supreme Court, that would be an illegality.

14. Though Mr.A.P.Srinivas, learned counsel appearing for the Revenue submitted that the correctness of the order impugned before us, can be decided in an appeal before the CESTAT and prayed to sustain the order, dated 15.02.2016 in W.P.No.5501 of 2016, in the light of the above discussion and the decision in State Bank of India's case (cited supra), we are not inclined to

accept the said contention. When the Hon'ble Supreme Court has described the manner of disposal of an appeal, as illegality, the same can be corrected by this Court, in exercise of the powers under Article 226 of the Constitution of India and no useful purpose would be served in relegating the appellants to approach the alternative remedy. Courts have held that a writ petition is maintainable, when the act committed is per se illegal, and contrary to the statute.

15. In the light of the above discussion and decisions, we are inclined to interfere with the order of the Writ Court as well as the Order-in-Appeal No.349/2015 (STA-II), dated 30.11.2015, passed by the Commissioner of Service Tax (Appeals-II) and the same are set aside.

16. Mr.A.P.Srinivas, learned counsel appearing for the Revenue, submitted that there is a change in the Office of the Commissioner of Service Tax (Appeals). Inasmuch as the order of the Commissioner of Service Tax (Appeals) is set aside, in entirety, declaring the same as illegal, a fresh exercise on the merits of the case, has to be done. The Commissioner of Service Tax (Appeals) is directed to take the appeal and decide the same, on merits, without being influenced by any of the observations or discussions in the earlier order, dated 30.11.2015, as it has been now set aside by this Court. The Commissioner of Service Tax (Appeals) is further directed to decide the appeal, in accordance with law, by following the procedure contemplated under the Statute, within a period of three months, from the date of receipt of a copy of this order. It is made clear that there should be any further adjudication on delay.

17. Writ Appeal is allowed. No costs. Consequently, connected Miscellaneous Petition is also closed.

skm

s/d-

Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

To

1. The Additional Commissioner of Central Excise,
Office of the Commissioner of Central Excise,
Chennai Commissionerate, 26/1, Mahatma Gandhi Marg,
Nungambakkam, Chennai 600 034.

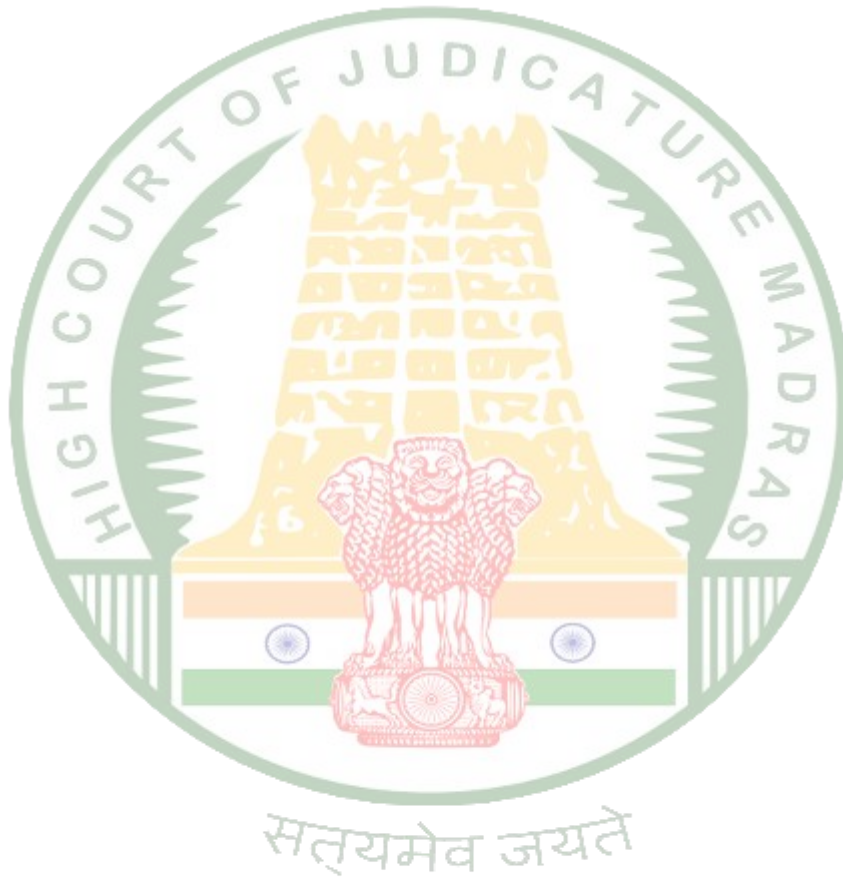
2. The Commissioner of Service Tax (Appeals-II),
No.2054, 2nd Avenue, Newry Towers,
12th Main Road, Anna Nagar, Chennai-40.

+ 1 cc to Mr.Joseph Prabakar, Advocate, SR 34527

+ 1 cc to Mr.A.P.Srinivas, Advocate SR 34377

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