IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CENTRAL EXCISE APPEAL NO. 3 OF 2017
WITH
CIVIL APPLICTION NO.13720 OF 2016
IN
CENTRAL EXCISE APPEAL NO.3 OF 2017

ISMT LIMIKTED,
a company incorporated under
the provisions of the Companies
Act, 1956 having its office at
Works C-I, MIDC, Industrial
Area, Ahmednagar-414111 ..APPELLANT

VERSUS

Commissioner of Central
Excise & Customs and Central
Excise Commissionerate,
N-5, Town Centre, CIDCO,
Aurangabad-431003. ..RESPONDENT

Mr Amit A. Yadkikar, Advocate for appellant;
Mr D.S. Ladda, Advocate for respondent

CORAM : P.B. VARALE &
SUNIL K. KOTWAL, JJ.

DATE : 12th DECEMBER, 2017

ORAL ORDER :

Heard Mr. Yadkikar, learned Counsel appearing for the appellant, as well as Mr. Ladda, learned Counsel appearing for the respondent.

2. Though the appellant raises certain questions of law referred to in paragraph-2 of the appeal, in view of the fact situation as well as in view of the order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (hereinafter referred as 'Tribunal' for the sake of brevity), the question for consideration is formed, whether in the facts and circumstances of the case, the Tribunal was justified in dismissing the appeal on the ground that it was filed before the Commissioner (Appeals) beyond period of limitation as per provisions of the Act, namely under Section 35 of the Central Excise Act, 1944?

3. With the consent of the parties, as the issue involved being limited one, the appeal is taken up for final hearing disposal.

4. The facts in brief giving rise to the present appeal can be summarized as follows:

The appellant is manufacturer of various steel equipments and avails credit of duty paid on inputs and utilized the same for payment of excise duty and service charges on the manufactured products. Such benefits can be availed by the appellant in view of the Cenvat Credit Rules, 2004. The Assistant Commissioner, Central Excise and Custom, Ahmednagar Division could not find any favour with the appellant seeking that credit, resultantly, on 13th May, 2008 order was passed for recovery of tax amount to the tune of Rs.2,29,806/- under the provisions of Section 73(1) read with Section 66 of the Finance Act, 1994. The Assistant Commissioner also imposed penalty under the provisions of Act and Rules, namely, Cenvat Credit Rules, 2002. The order then further directed the recovery of the amount.

5. Being aggrieved by the order of the Assistant Commissioner, the appellant within stipulated period, immediately filed an appeal before the appellate forum, namely commissioner (Appeals).

6. The submission of Mr Yadkikar, learned Counsel for the appellant is, as per procedure set out, appellant filed two copy of appeal along with application seeking stay to the order passed by the Assistant Commissioner. Mr Yadkikar, learned Counsel for the appellant invited our attention to the document placed on record at Exh.G page 42 of the paper book, in support of his submission that, not only the copies of appeal were submitted but these were received by the office of the Commissioner. The seal on the said document shows that it was received by the office of Assistant Commissioner on 8th July, 2008. He then invited our attention to document at Exh.H to submit that the stand of appellant is re-iterated by the said communication dated 19th December, 2011.

7. Perusal of the said communication shows that it was informed by the office of the Superintendent of Central Excise, Customs and Service Tax, Ahmednagar to the Superintendent (Appeal), Customs, Central Excise & Service Tax,

Aurangabad that the appellant assessee has filed appeal along with stay application on 8th July, 2008, however, office has not received copy of the Order-in-appeal or any outcome in the appeal, but the request was made to provide copy of the order, if passed for official record.

8. Mr Yadkikar, learned Counsel for the appellant submitted that as per normal procedure being adopted, copies of the appeal were forwarded through courier service. He then invited our attention to Exh.I placed on record to support his submission that the copies of the appeal were forwarded through courier service. Mr Yadkikar, learned Counsel for appellant submitted that as it came to knowledge of appellant that copies were not received by the concerned authorities, the appellant by communication dated 9th July, 2012, resubmitted copies of appeal for the decision.

9. Mr Yadkikar, learned Counsel for appellant submitted that copies were submitted afresh along

with communication dated 9th July, 2012 i.e. in the year 2012 and Commissioner (Appeals), by order dated 20th July, 2012, only on superficial assessment mechanically passed order, thereby dismissed the appeal under erroneous presumption that the appeal was filed beyond period stipulated under the provisions of the Act. He then submitted that, being aggrieved by the order of Commissioner (Appeals), approached the Tribunal i.e. CESTAT. Learned Tribunal also followed same path of Commissioner and dismissed the appeal on mechanical and technical appreciation without considering the facts.

10. Mr Yadkikar, learned Counsel for appellant submitted that learned Tribunal though placed heavy reliance on the judgment of the Apex Court in the matter of **Pallipalayam Spiners Pvt. Ltd. Vs. Commissioner of Central Excise, Salem,** reported in **2008 (9) STR 544,** failed to appreciate that the fact situation in the matter of **Pallipalayam Spiners Pvt. Ltd. (supra),** was totally different

from the facts in the present matter. He submits that the facts were identical with the case of **Milcent Appliances Pvt. Ltd.**, as such reliance was placed on the said judgment, but the Tribunal failed to consider this aspect in its' proper perspective.

11. Mr Yadkikar, learned Counsel for appellant submitted that the appellant is not shy to get decision from the appropriate forum on merits but denial by appropriate forum to decide the matter on merit and only on technical ground of delay, to which the appellant was not at all responsible, such denial would cause serious prejudice to the appellant is the submission of Mr Yadkikar. He submitted that, in view of the directions of this Court, the appellant has filed affidavit on 27th April, 2017 along with communication of the courier company in support of his submission that the appellant forwarded necessary copies to the concerned and appropriate authorities deciding the appeal, these copies were not available in the

concerned office and for that the appellant could not be held responsible.

12. Mr. Yadkikar, learned Counsel for the appellant, by inviting our attention to the judgment of this Court (unreported) dated 27th March, 2012 in Central Excise Appeal No.43 of 2012, submitted that in identical situation, Division Bench of this Court allowed the appeal and directed the Commissioner of Central Excise (Appeals) to decide the appeal afresh on merits.

13. Mr. Ladda, learned Counsel appearing for the respondent vehemently opposed the submissions of appellant and submitted that copy was only received by the office but copy was not received by the competent authority namely Commissioner (Appeals), who was to decide appeal and as such, the appellant failed to file appeal within stipulated period and the authority committed no error in passing orders which are impugned in the present appeal.

14. With the assistance of both the learned Counsel appearing for the parties, we have gone through the material placed on record. Necessary documents are already referred by us in the earlier part of the order. Though stand is taken by learned Counsel for the respondent that the appellant failed to file appeal within stipulated period, we are unable to accept the submissions of learned Counsel. The material placed on record clearly shows that the appellant submitted appeal within stipulated period before the appropriate authority. There is also seal of the concerned office receiving copies of appeal. The stand of appellant is reiterated in the communication dated 19th December, 2011. The affidavit filed by the appellant dated 27th April, 2017 along with communication issued by the authorised representative of courier service show that the appellant forwarded copies of appeal to courier service. Supporting document is placed by way of copy of invoice. The said copy shows that at

Serial No.9 booking delivery of document is referred to destination is Aurangabad.

15. The communication of authorized representative reads that the said parcel was sent by the appellant to the office of Commissioner (Appeals) Central Excise and Customs at Aurangabad through courier service. It further reads that as parcel in question was couriered more than eight years ago, there is no tangible proof of deliver available with First Flight Courier as on date. It further states that if any parcel is undelivered to the addressee then the computer system of company maintains record for such undelivered parcel separately. It further states that perusal of record available in the office of courier service, agency did not find any record of said parcel being undelivered.

16. In our opinion, the appellant discharged his burden of submitting appeals before the competent forum by placing on record necessary

documents in support of his claim. Mr. Yadkikar, learned Counsel for the appellant was also justified in placing reliance on the judgment of Division Bench in M/s. VIP Industries Limited vs. The Commissioner of Central Excise, Aurangabad III in Central Excise Appeal No. 43 of 2012 dated 27th March, 2012. It would be useful for our purpose to refer to relevant observations of the Division Bench. “In the ordinary course, the office of the Assistant Commissioner of Central Excise ought to have forwarded the appeal paper book book to the office of the Commissioner of Central Excise (Appeals) immediately. The delay on the part of the office of the Assistant Commissioner of Central Exercise to forward the appeal paper book to the office of Commissioner of Central Excise (Appeals) cannot be attributed to the assessee so as to dismiss the appeal filed by the assessee as time barred”.

17. Considering all these aspects, we see no reason to take different view than the view taken

by the Division Bench in M/s. VIP Industries Limited (supra).

18. In the result, the order passed by the Customs, Excise and Service Tax, Appellate Tribunal, West Zonal, Bench at Mumbai in Appeal No. ST/641/2012 dated 12th October, 2012 and order of Commissioner of Central Excise & Customs (Appeals), Aurangabad in Final-Order-In-Appeal No.AV(99)147/2012 Dated 20th July, 2012 are quashed and set aside and the matter is restored to Office of Commissioner (Appeals) of Central Excise & Customs, Aurangabad for decision afresh on merit, in accordance with law. The Commissioner (Appeals), Central Excise & Customs, Aurangabad to decide the appeal as expeditiously as possible.

19. The appeal is disposed of accordingly. Consequently, civil application also stands disposed of.

(SUNIL K. KOTWAL, J.) **(P.B. VARALE, J.)**

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