IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

910 WRIT PETITION NO. 10747 OF 2014

M/S. NATURAL SUGAR AND ALLIED INDUSTRIES LTD., OSMANABAD
VERSUS
THE COMMISSIONER (APPEALS) CENTRAL EXCISE AND CUSTOMS, AURANGABAD AND ANOTHER
...
Advocate for Petitioners : Mr. V. D. Hon i/by Mr. Ashwin V. Hon
Advocate for Respondents : Mr. Dwarkadas S. Ladda

CORAM : R. M. BORDE
K. L. WADANE, JJ.
DATE : 6th April, 2017

ORDER:

1. The petition is filed for quashment of the order dated 30.07.2014 passed by the Commissioner (Appeals), Central Excise and Customs Aurangabad and the order dated 31.12.2013, passed by the Additional Commissioner, Central Excise, Customs and Service Tax, Aurangabad.

2. The petitioner is a company registered under the provisions of the Companies Act, 1956, having central excise registration certificate and is engaged in manufacturing of excisable goods viz. sugar, molasses and special denatured spirit/rectified spirit. The petitioner has taken CENVAT credit on the capital goods inputs and input services as permitted in law.

The Respondent No.2- Additional Commissioner of Central Excise, issued show cause notices to the petitioner making certain demands. By order dated 31.12.2013, the demands were confirmed. Aggrieved thereby, the petitioner preferred appeal to the Commissioner (Appeals) under section 35 of the Central Excise Act raising certain questions and contended that electricity is not a excisable goods under the provisions of the Excise Act and as such action of the authority is contrary to the provisions of law.

3. The appeal tendered by the petitioner has been dismissed on the ground that same is preferred after lapse of condonable period i.e. 104 days. It is observed that section 35 of the Central Excise Act, 1944 mandates presentation of appeal to the Commissioner (Appeals) within 60 days from the date of communication of the decision. Proviso to section 35 empowers the Commissioner (Appeals) to allow presentation of appeal beyond 30 days on completion of expiry of initial period of sixty days provided under the law. Since the appeal was presented by the petitioner beyond 104 days of the prescribed condonable delay, same is not maintainable.

4. Counsel appearing of the petitioner submits that although section 35 provides bar on entertaining the appeal presented beyond the prescribed period provided under the Act, in exercise of extraordinary jurisdiction under section 226 of the Constitution of India, this Court can direct the appellate Court to condone the delay and entertain the appeal.

5. The contentions raised by the petitioner cannot be accepted in view of the decision of the Supreme Court in the case of **Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and others, reported in (2008) 3 SCC 70.** The Supreme Court has observed in para 8 of the judgment that "Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days' period prescribed under the Act". In the matter of **Commissioner of Customs and Central Excise Vs. Hongo India (P) Ltd., reported in 2009(03) LCX0009,** the Supreme Court has observed that the High Court has no power to condone the delay in filing 'reference application' under unamended section 35H(1) of the Central Excise Act, 1944 beyond prescribed period of 180 days. The provisions of section 35 are para materia with the aforesaid provisions. As such, it

would be impermissible for this court to direct condonation of delay.

6. Placing reliance on the judgment in the matter of **Patel Brother Vs. State of Assam and others, reported in (2017) 2 SCC 350,** it is contended by the respondents that the legislative intent is to exclude operation of section 5 of the Limitation Act and as such, the appeal cannot be directed to be entertained. The matter arising before the Supreme Court was in respect of the Sales Tax and VAT under Assam Value Added Tax Act, 2003 and in identical situation, the Supreme Court has ruled that there is exclusion of provisions of section 5 of the Limitation Act and delay beyond the prescribed period of limitation is not liable to condoned under the scheme of the said Act.

7. For the reasons recorded above, we are of the view that the decision rendered by the Commissioner (Appeals) cannot be faulted.

8. The counsel appearing for the petitioner submits that in the event this court comes to the conclusion that the Commissioner (Appeals) cannot entertain the challenge, it would be permissible for the Court to examine the same in exercise of powers

under Article 226 of the Constitution of India. It must be noted that if the alternate remedy is barred by virtue of limitation and is not available to the petitioner, the challenge which is liable to be raised before alternate forum shall not be examined in exercise of extraordinary under Article 226 of the Constitution The submission made on behalf of the petitioner for examining the correctness of the orders is not liable to be accepted. Writ petition is devoid of substance. Hence stands dismissed.

(K. L. WADANE, J.) **(R. M. BORDE, J.)**

JPC