

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.1.2017

C O R A M

THE HON'BLE MR. JUSTICE HULUVADI G. RAMESH
AND
THE HON'BLE Dr. JUSTICE ANITA SUMANTH

Civil Miscellaneous Appeal Nos.210 and 212 of 2015
and
Review Application Nos.37 and 38 of 2015
in
CMA SR NO 40650 and 40653 of 2014
and
M.P. No 2 & 2 of 2014

M/s.V.K.P.K.Arivithurai & Brothers,
Partnership Firm rep. by its Partner
P.K.Kuttalingam,
1/307, Rajapalayam Main Road,
Dhalavaipuram 628 188.

Virudhunagar District. Tamil Nadu. Appellant/Appellant in
both CMAs

Vs

1. Customs Excise and Service
Tax Appellate Tribunal,
rep. by its Assistant Registrar,
Sastri Bhavan, Chennai 600 006.
2. Commissioner of Central Excise,
Central Revenue Building,
NGO 'A' Colony, Tirunelveli 627 007.
3. Commissioner of Central Excise (Appeals)
Lal Bahadur Shastri Marg,
Central Revenue Buildings,
Madurai 625 002.
4. Joint Commissioner of Central Excise,
Office of the Commissioner
of Central Excise,
Central Revenue Building,
NGO 'A' Colony, Tirunelveli 627 007.

5. Additional Commissioner of Central Excise,
Office of the Commissioner of
Central Excise,
Central Revenue Building,
NGO 'A' Colony, Tirunelveli 627 007.

Respondents in
both CMAs

V.K.Palappa Nadar Firm,
rep. by its Sole Proprietor,
K.Ammaiyappan,
1/281, Rajapalayam Main Road,
Dhalavaipuram 626 188.
Virudhunagar District.

Review Petitioner

vs.

1. Customs Excise and Service
Tax Appellate Tribunal,
Sastri Bhavan Annexe Building,
No.26, Haddows Road, Chennai 600 006.

2. The Commissioner of Central Excise,
Central Revenue Building,
NGO 'A' Colony, Tirunelveli 627 007. Respondents in both the
Review Applications

Prayer:- Civil Miscellaneous Appeal No.210 of 2015 filed under
Section 35G of the Central Excise Act, 1944, against the Final
Order No.40080/2013 dated 27.2.2013 in Appeal No.E/215/2011
passed by the first respondent Appellate Tribunal and
consequently set aside the duty, penalty and interest confirmed
by the fourth respondent vide De-novo order in Original
No.04/JC/CE/2009 dated 17.2.2009.

Civil Miscellaneous Appeal No.212 of 2015 filed under
Section 35G of the Central Excise Act, 1944, against the Misc.
Order No.42676/2013 dated 12.11.2013 in E/ROM/41028/2013 in
Final Order No.40080/2013 dated 27.2.2013 in Appeal
No.E/215/2011 passed by the first respondent Appellate Tribunal
and consequently set aside the duty, penalty and interest
confirmed by the fourth respondent vide Denovo order in Original
No.04/JC/CE/2009 dated 17.2.2009.

Review Applications filed under Order XVIII Rule 1 CPC
r/w Section 114 CPC to review the order passed by this court in
C.M.A.SR.Nos.40650 and 40653 of 2014 and M.P.Nos.2 of 2014 dated
4.12.2014.

Prayer in CMA SR 40650 and 40653 of 2014 :

Appeals Under Section 35 G. of the Central Excise Act 1944 against the order dated 16.12.2009 made in Miscellaneous order No 643 of 2009 and Final Order 40080 of 2013 dated 27.02.2013 on the file of the Customs & Excise Service tax Appellate Tribunal, Chennai.

MP 2 & 2 of 2014 in CMA SR 40650 and 40653 of 2014:

These Petition filed order section 5 of Limitation Act praying to condone the delay of 1409 and 199 days in filing the appeal in CMA SR 40650 & 40653 Of 2014.

For Appellant/in both CMA's
Review Petitioner : M/s.G.RM.Palaniappan
Mr.Shriram Panchu,
Senior Counsel for
M/s.C.Saravanan

For R2 to R5 in both CMA's : Mr.G.M.Syed Nurullah Sherif, CGSC
assisted by
and for R2 Review Petitioner Mr.B.Sasidaran
R1- Tribunal in both CMA's M/s. A. Nishwar Jeelan
& Review Petitioner

COMON JUDGMENT

(Judgment of the Court was delivered by Huluvadi G.Ramesh, J.,)

The civil miscellaneous appeals have been filed by the assessee viz., V.K.P.K.Arivuthurai & Brothers, challenging the order passed by the Customs Excise & Service Tax Appellate Tribunal (CESTAT) in the Final Order No.40080 of 2013 dated 27.2.2013 in Appeal No.E/215/2011 and Miscellaneous Order No.42676 of 2013 dated 12.11.2013 in E/Rom/41078/2013 in Final Order No.40080 of 2013 dated 27.2.2013 in Appeal No.E/215/2011.

2. The Review Applications have been filed by the assessee viz., V.K.Palappa Nadar Firm challenging the order passed by a learned Single Judge of this court in C.M.A.SR Nos.40650 and 40653 of 2014 alongwith petitions to condone the delay in filing such civil miscellaneous appeals as against the order passed by the CESTAT in Miscellaneous Order No.643 of 2009 dated 16.12.2009 and the Final Order No.40080 of 2013 dated 27.2.2013.

3. Though two different Firms are involved in the proceedings, since the issue revolves around production and clearance of branded Chewing Tobacco under the guise of unbranded Chewing Tobacco, both the civil miscellaneous appeals and the revision applications are taken up for common disposal.

4. It transpires that on the strength of intelligence report of DGCEI, the officers attached to Headquarters Preventive Unit visited the units of the assessees on 8.6.2001, and found that there were suppression of production of Chewing Tobacco falling under the overhead No.2404.41 41, illicit removal of the same under the guise of unbranded Chewing Tobacco without payment of duty. After having inspection of the stocks and accounts of the firms, it was found that they had declared to be manufacturing unbranded Chewing Tobacco. On verification, the stock of finished Chewing Tobacco was found to be 193 kgs. and no statutory accounts and financial accounts were available there and one accountant by name P.K.Rathinavelsamy was interrogated and private accounts kept in the factory under his control were recovered under a statement and on further enquiry, the said Rathinavelsamy said to have revealed that Central Excise Accounts, bills and all related documents were available in the office of M/s.V.K.P. & Co., Dhalavaipuram and the particulars relating thereto would be known only to Sri.Ammaiyappan, that the raw material, tobacco and other flavoring agents used to be brought from VKP & Co., mixed in the unit and packed in gunny bags, that the packets so received would be weighed and the accounts would be entered into the chits and given to Sri.Ammaiyappan, that the details of gunny bags ready for despatch used to be informed to Sri.Ammaiyappan over phone and then he used to visit the unit with bills and documents and despatch the goods, that the goods were generally used to be sent to North Arcot and South Arcot Districts through ABT Parcel Service and Southern Roadways, that the finished stock of Chewing Tobacco was ascertained as 193 kgs and semi-finished goods as 584 kgs and only private accounts were maintained by him were handed over to the officers for perusal. It appears that on further verification of the godown stock register maintained for each factory for the stock held at all the four units, it was found that there was an excess of raw tobacco to the extent of 7902 kgs and it appears that when inspection was conducted with regard to VKP Firm, correspondence by M/s.TLG Radhakrishnan & Sons, Thirupathur alongwith some materials were seized.

5. Based on the incriminating materials, the assessment order was passed by the assessment officer viz., Additional Commissioner, calling upon assessee viz., M/s.V.K.P.K.Arivuthurai and Brothers to pay the duty to the tune of Rs.48,74,828/- under section 11A(1) of the Central Excise Act, with penalty of Rs.48,74,828/- under section 11AC, a further penalty of Rs.1,00,000/- under Rule 173Q and Rule 25 of Central Excise Rules and penalty of Rs.50,000/- each as against the Firm and Sri.P.K.Rathinavelsamy under sections 209A of the Central Excise Rules read with Rule 26 of the Central Excise Rules. Similarly, a demand of duty to the tune of

Rs.38,78,141/- was made against the assessee viz., V.K.Palappa Nadar Firm alongwith a equal penalty and a further penalty of Rs.1,00,000/- under Rule 173Q and rule 25 of Central Excise Rules.

6. It appears that while passing the order, the assessment officer took into account the escapement of excise duty by way of not maintaining the statutory accounts and only maintaining private accounts and having recovered certain incriminating materials and material objects and also private accounts that were maintained and also on the statement of one P.K.Rathinavelsamy, accountant, the Additional Commissioner assessed the duty and penalty as against the assessees.

7. It appears that the matters were taken up in appeal before the Commissioner (Appeals), who passed an order on 13.4.2005. As against that order, the matter was taken up to CESTAT, which by Final Order Nos.1419 to 1421 of 2005 dated 6.10.2005, remanded the matters to the original authority for fresh adjudication after affording opportunity to the assessees. Thereafter, on the applications filed by the assessee, the CESTAT, by Miscellaneous Order No.412 to 414 of 2008, dated 30.9.2008 issued further direction to the original authority to supply all the relied upon documents to the assessees.

8. Accordingly, the de novo order in original was passed by the assessing officer on 17.2.2009. It seems that the assessees had approached the CESTAT once again challenging the de novo order and the CESTAT, by way of Miscellaneous Order Nos.642 and 643 of 2009 dismissed the applications filed by the assessee holding that the assessees had approached the Tribunal directly without exhausting the remedy of appeal before the appellate authority. Thereafter, the assessees had approached the Commissioner (Appeals), who had dismissed the appeals of the assessees as time barred, by his order dated 31.1.2011. Thereafter, the assessees had approached the Tribunal challenging the order passed by the Commissioner (Appeals). The Tribunal had also dismissed the appeals filed by the assessees holding that the Commissioner (Appeals) has no power to condone the delay. The rectification applications filed by the assessees were also dismissed by the Tribunal, by its order dated 12.11.2013. Aggrieved against the same, the civil miscellaneous appeals are filed by the assessees.

9. Learned Senior Counsel appearing for the appellants/assessees vehemently argued that neither the CESTAT nor the Commissioner (Appeals) has applied the mind and also having raised a substantial question of law with regard to limitation, the provisions under section 14 of the Limitation Act have to be interpreted liberally to condone the delay in terms of the ratio laid down by the Supreme Court in the

decision in M.P.STEEL CORPORATION v. COMMISSIONER OF CENTRAL EXCISE ((2015) 7 SCC 58), wherein at para 34 of the order, the Apex Court has held as under:-

"It now remains to consider the decision of a two-Judge Bench in P.Saradhy v. S.B.I ((2000) 5 SCC 355). This judgment has held that an abortive proceedings before the appellate authority under Section 41 of the Tamil Nadu Shops and Establishments Act, 1947 would attract the provisions of Section 14 of the Limitation Act inasmuch as the appellant in this case had been prosecuting with due diligence another civil proceeding before the appellate authority under the Tamil Nadu Shops and Establishments Act, which appeal was dismissed on the ground that the said Act was not applicable to the nationalised banks and that, therefore, such appeal would not be maintainable. This Court made a distinction between "civil court" and "court" and expanded the scope of Section 14 stating that any authority or tribunal having the trappings of a court would be a "court" within the meaning of Section 14. It must be remembered that the word "court" refers only to a proceeding which proves to be abortive. In this context, for Section 14 to apply, two conditions have to be met. First, the primary proceeding must be a suit, appeal or application filed in a civil court. Second, it is only when it comes to excluding time in an abortive proceeding that the word "court" has been expanded to include proceedings before tribunals."

10. Therefore, the word word "court" refers only to a proceeding which proves to be abortive and as per Section 14 of the Limitation Act, it must satisfy that the primary proceeding must be a suit, appeal or application filed in a civil court and secondly, it is only when it comes to excluding time in an abortive proceeding that the word "court" has been expanded to include proceedings before tribunals. In that context, the learned counsel sought to contend that so far as the application of Section 14 is concerned when an appeal has been preferred before another court under a mistaken impression, the assessee would be given an advantage of extension of time and the appeal has been filed as per the stipulation provided under section 14 of the Limitation Act viz., 60 + 30 days time and accordingly sought to contend that there is no delay in the matter and further, sought to contend that there is no such extension of time for having having not supplied the documents which were, throughout, pressed by the assessee. Accordingly, the learned counsel for the assessee sought to contend that both the CESTAT and the Commissioner (Appeals) passed the orders on the point of delay without looking into the factual position viz., non-supply of documents and accordingly sought to contend that it is a fit case for remand and re-consideration of the case on merits and

proper adjudication of the matter to render principles of natural justice.

11. Per contra, learned counsel appearing for the Department would contend that necessary documents sought for by the assessee were supplied to the assessee and it is recorded in the de novo order in original as evident from page No.77 to 80 of the typed set of papers wherein the list of documents furnished to the assessee and the dates and events that had taken place from June 2001 to January 2009 find place. This shows that there is no proper care or attention shown by the assessee in the conduct of the case. Apart from that it is clearly indicated that while adjudicating the matter, the documents which were not supplied to the assessee were not relied upon and the Commissioner (Appeals) as well as the CESTAT had observed about the casual approach on the part of the assessee in extending their co-operation for disposal of the matter.

12. We are of the view that the Apex Court, has of course, interpreted the provision of Section 14 of the Limitation Act and its expansion of scope holding that any authority or tribunal having the trappings of a court would be a "court". But the conduct of the assessee in dragging the matter from the year 2001 to 2013 and ultimately, when the order came to be passed, which gives rise to the present appeals clearly establishes the very casual approach that is being adopted by the assessee and what is more pertinent to note is that at page 80 of the typed set of papers, the acknowledgment made by the assessee for receipt of several documents have been shown which clearly shows that all the documents that were relied upon for adjudication were received by the assessee during February 2002 and it appears that some documents were missing, but, however, such documents have not been relied upon in the adjudication adverse to the interest of the assessee. Moreover, looking into the case from its threshold it is clear that there is a non-maintenance of the accounts in respect of certain quantity of the raw materials, finished product and non-finished product for which assessments were made and also that has been recovered and private accounts is maintained instead of maintaining regular accounts. So only on technicality, the assessee is fighting the matter. Moreover, even the order was passed in due course of principles of natural justice viz., show cause notice had been issued which was responded seeking certain documents and those documents were supplied and only thereafter, the order has been passed imposing penalty as indicated above.

13. Admittedly, the issue is a long drawn one. It is pending for more than 15 years. In the event of remand, it has to go once again before the assessing officer or before the

Commissioner (Appeals) which would not serve any useful purpose, rather, it is seen that statement from the accountant is also said to have been recorded, and also there is a clear admission on the part of the assessee with regard to manufacturing of tobacco related goods without declaring to the Department which attracts duty under the Central Excise Rules. Even assuming that certain documents were not supplied, the fact remains that it is explained that those documents were not relied upon by the assessing officer at the time of passing the order.

14. Further, the statement of the accountant as well as that of the assessee has been recorded relating to chewing tobacco by way of finished and unfinished goods to the tune of 193 Kgs and 900 kgs and the same were said to be seized. Such being the factual matrix of the case, the assessee, on receipt of show cause notice, the assessee, instead of paying the duty imposed and suffering a penalty, had opted to fight the issue by exchange of communications contending that some documents were not supplied. Having seen the conduct of the assessee, as seen at pages 77 to 80 of the typed set of papers, we do not find any scope to extend any benefit and exemption for the assessee.

15. So far as the review order is concerned, we have gone through the order passed by the Division Bench of this court passed while disposing of the civil miscellaneous appeals at SR stage alongwith the petitions to condone the delay and we are of the view that having found the attitude of the assessee, the Division Bench has come out with a remark that all is not well with the attitude of the assessee and in order to review such order by interfering with the order passed by the Division Bench and to pass a fresh order, patent error or illegality has to be pointed out.

16. The Division Bench of this court, after considering the factual aspects in detail, has observed in paragraphs 24 to 26 of the impugned order passed that there is no bona fide on the part of the assessee in seeking to condonation of delay and it is only with the defiant intention to delay the process of recovery. The order passed by the Division Bench does not warrant interference to recall the order in the review applications and accordingly, the review applications are liable to be dismissed. However, we are of the view that the cost of Rs.50,000/- imposed in the revision petitions to be waived and accordingly, the same is waived in the facts and circumstances of the case.

17. In the result, the civil miscellaneous appeals and the review applications are dismissed. No costs.

s/d-
Assistant Registrar(CCC)

//True Copy//

Sub-Assistant Registrar

To

1. The Customs Excise and Service
Tax Appellate Tribunal,
26 Haddows Road, Sastri Bhavan,
Chennai 600 006.
2. The Commissioner of Central Excise(Appeals)
Lal Bhaghadur Shastri Marg ,
Central Revenue Building, Bibikulam,
Madurai 625 002.
3. The Commissioner of Central Excise
Central Revenue Building NGO 'A'Colont
Tirunelveli 627 007.
4. Joint Commercial Of Central Excise
Office of the Commissioner of Central Excise
Central Revenue Building
NGO 'A' Colony,
Tirunelveli 627 007.

+1 CC to Mr. G.M. Syed Nurullah Sherif, CGSC, sr 2335
+2 Ccs to Mr. G.R.M. Palaniappan, Advocate sr 2963
+1 CC to Mr. C. Saravanan, Advocate sr 2519

C.M.A.Nos.210 & 212 of 2015 &
Rev Appl Nos.37 and 38 of 2015

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