IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.12073 of 2018

One Touch Medicals Products Pvt. Ltd. a company having its office at C1, EPIP Industrial Area District Vaishali through its Director Raj Kumar Choudhary son of late B.L. Choudhary, Kankarbagh, District – Patna.

.... Petitioner

Versus

1. The Commissioner of Central G S T & Central Excise, Patna II Commissionrate having its office at Central Revenue Building, Bir Chand Patel Path, Patna.
2. Additional Commissioner, Central Excise & Service Tax, Patna.
3. Dy. Commissioner, Central Excise & Service Tax, Patna.
4. Asst. Commissioner of Central GST & Central Excise Vaishali Division, Hajipur.
5. Superintendent, Central Excise & Service Tax, Patna.

.... Respondents

Appearance :

For the Petitioner/s : Mr. D.V.Pathy, Advocate

For the Respondent/s : Mr. S.D Sanjay (Addl. Soc. Gen.)
Mr. Anjani Kr. Saran, Asst. S.G.

CORAM: HONOURABLE THE CHIEF JUSTICE

And

HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date: 03-08-2018

This writ application has been preferred for setting aside the notice dated 16.02.2018, as contained in Annexure-10, to the writ application, issued by respondent no. 4 directing recovery of Central Value Added Tax (in short 'CENVAT') Credit and Penalty for the period 2009-10 under Section 11 of the Central Excise Act, 1944 read with Section 174 of the Central GST Act.

2. Mr. D.V. Pathy, learned counsel for the petitioner submits that the order of assessment said to have been passed on 19.03.2014 was not served upon the petitioner as no copy of the same was made available to him by the Assessing Authority. It is submitted that when a notice was issued by respondent no. 4 directing payment of the amount of CENVAT credit as also penalty totaling Rs. 35,10,657/-, the petitioner moved in appeal before the Commissioner (Appeals), Customs, Central Excise and Service Tax, Patna on the grounds *inter alia* that initiation of recovery proceeding is not justified.

3. The Commissioner (Appeals) however held that the fact non-service of the order in original could not be proved to the contrary by the department but at the same time the Commissioner held that since attested copy was served under letter dated 19.06.2017 an appeal could be filed against such order.

4. It is further stated that during pendency of the appeal before the Commissioner, the petitioner received a communication that the notice dated April, 2018 issued under Section 142(1)(c)(ii) of the Customs Act has been cancelled, but vide impugned Annexure-12 to the writ application, the Commissioner (Appeals) concluded that the appellant has taken an effort only to nullify their failure to file their appeal within the stipulated period and has chosen to file the appeal against the recovery proceedings initiated against them. The Commissioner (Appeals) observed that because the impugned letter dated 08.02.2018 has been cancelled and withdrawn, the request for appeal has become infructuous. he refused to accept the other request of the appellant to direct the respondent to provide them a certified copy of the order-in-original dated 19.03.2014 in view of the facts available on the record clearly establishing that the relevant order in original dated 19.03.2014 was communicated to the appellant in form of an attested copy which is as good as certified copy of the order taking into account the fact that the said order in original was attested by the Superintendent (Adjn), Central Excise (Headquarters) Patna. Learned counsel submits that the Commissioner (Appeals) could not appreciate that the petitioner was deprived of his valuable right to appeal against the order dated 19.03.2014 due to non-availability of the original order.

5. On the other hand, Mr. S.D. Sanjay, learned Solicitor General representing the Union of India (Department of Central Excise) would submit that in view of the categorical finding recorded by the Commissioner as contained in Annexure-'12' to the writ application, the petitioner, if aggrieved by the order of the Commissioner (appeals) could have availed the statutory remedy before the Central Excise and

Service Tax Appellate Tribunal (in short the "CESTAT"). It is submitted that the petitioner has admittedly not preferred any appeal against the order dated 19.03.2014 despite that the petitioner was served with the attested copy of the order dated 19.03.2014. The petitioner has not denied that he was served with the attested copy of the order which was appealable in nature.

6. Having heard learned counsel for the parties and upon perusal of the records, we find that under Section 35H of the Central Excise Act an appeal is provided against the assessment order within a period of 60 days from the date of service of the order.

7. The contention of the petitioner is that the said section empowers the Commissioner to condone a delay of only up to 30 days if reasonable causes shown and in view of such statutory provision filing of an attested copy of the order in original would not be sufficient to condone the delay in filing of the appeal before the Commissioner (Appeal) but fact remains that the petitioner has not availed the statutory remedy of Appeal against the order dated 19.03.2014.

8. We are not willing to go into the merits of the contention at this stage as we find from Annexure-12 that there is a finding to the effect that the petitioner was served with a duly attested copy of the order dated 19.03.2014, and the Commissioner (Appeals) has found that there is no denying the fact that the appellant (present petitioner) had received the attested copy of the said order. He has referred the contents of the letter dated 19.06.2017 written by the petitioner. Against the impugned order as contained in Annexure-'12' passed by Commissioner (Appeals), the petitioner has got statutory remedy before 'CESTAT', therefore, finding that the petitioner has got the statutory remedy against the impugned order dated 19.03.2014 as well as the order contained in Annexure-'12' to the present writ application, we are not inclined to exercise our powers in extra-ordinary writ jurisdiction to entertain the present writ application. The petitioner, if so advised, may avail the statutory remedies in accordance with law.

9. The writ application stands dismissed with a liberty to seek statutory remedy in accordance with law.

(Rajendra Menon, CJ)

(Rajeev Ranjan Prasad, J)

Rajeev/-

AFR/NAFR	
CAV DATE	
Uploading Date	06.08.2018
Transmission Date	