

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CENTRAL EXCISE APPEAL NO. 174 OF 2016**

Mr. Jitendra Pandey .. Appellant
versus
The Commissioner of Central
Excise & Customs (Appeals) Vapi .. Respondent.

**WITH
CENTRAL EXCISE APPEAL NO. 92 OF 2016**

Kashyap Sweetners Ltd. ..Appellant
versus
The Commissioner of Central
Excise and Customs, Vapi ..Respondent

Mr. T. Vishwanathan a/w. Mr. Jas Sanghvi i/b PDS Legal for the Appellants.
Mr. Pradeep Jetley for the Respondent.

**CORAM: S. C. DHARMADHIKARI &
SMT. BHARATI HARISH DANGRE, JJ.**

DATE : 11TH JANUARY, 2018.

P. C. :

1] These two appeals can be conveniently disposed of by a common order.

2] After perusing the order of the Tribunal impugned in these appeals, we are of the view that there is a substantial question of law raised for our consideration. The same reads as under:

“(i) Whether in the facts and circumstances of the case, the Appellate Tribunal was justified in not condoning the delay in filing

the Appeal before the Appellate Tribunal without appreciating that reason given by the Appellant was justified and there was no *mala fide* reasons or dilatory tactics involved in causing the delay ?

3] With the consent of both sides, we dispose of these appeals by the present order.

4] The appellant is engaged in the business of manufacture of Sorbitol Liquid Glucose classifiable under Chapter 29 of the Central Excise Tariff Act, 1985. There is a Central Excise registration number. assigned and the appellant dispatches the manufactured goods from its factory to customer's premises. There are various purchase orders issued and the same specify the price and the other details including the freight amount to be charged. The exact freight amount could not be estimated at the time of receiving the purchase order. The excess/short recovery of freight from the customer may come due to the fact that subsequent negotiation with the transporter and the rate of transportation prevailing at the time of supplying the goods. It is in these circumstances that when the audit was conducted, team noted that the appellant-assessee collected additional amount from their customer in the name of freight charges and failed to discharge central excise duty on the additional amount collected towards sale of their goods to customers in the name of freight and this resulted in short payment of duty.

5] Therefore, there was a show cause notice issued to the appellant-assessee to which there was a detailed reply filed denying the allegations. However, the order-in-original dated 3rd October 2013 confirms this demand. Aggrieved thereby, an appeal has preferred before the Commissioner (Appeals) Vapi. After the appeal was presented before

the Commissioner, a stay application was moved seeking stay against recovery, pending appeal. However, an order of pre-deposit was made on that stay application which was challenged by filing Writ Petition No. 1855 of 2015 in this Court. In the meanwhile, the appeal was dismissed by the Commissioner (Appeals) on 14th March 2014 despite the appellant-assessee informing the Commissioner that a writ petition was filed against his interim order. Then the appellant sought amendment to the pending civil writ petition and which was granted but eventually this Court found that the appellant has an alternate equally efficacious remedy to challenge even the first order of the appellate authority, hence, the said writ petition was withdrawn on 23rd February 2015 with liberty to file a statutory appeal before the Customs Excise & Service Tax Appellate Tribunal (CESTAT for short).

6] That was filed on 25th April 2015. Thus there was a delay in filing that appeal. A request was made to condone the delay by applying liberal principles, but the CESTAT by the impugned order refused to condone it. Therefore, the delay condonation application and the appeal both have been dismissed by the impugned order.

7] We have heard Mr. Vishwanathan appearing for the appellants-assesses and Mr. Jetley appearing for the Revenue. We have perused the order under Appeal. In the light of the above admitted facts, the Tribunal could not have faulted the assesses. The assesses acted *bonafide* and under legal advise. There was nothing intentional about the act attributed to the appellants-assesses. Thus there was no gross negligence, utter callousness or *malafides* and the delay in filing the appeal was properly explained. In these circumstances the liberal principles should have been applied to condone the delay. The Tribunal

has taken a hyper technical view of the matter as is apparent from paragraphs 4 and 5 of the order under challenge.

8] We do not decide any larger question but surely in the facts and circumstances of the present case, the appellants-assesses were entitled to urge that the period spent in prosecution of this writ petition filed in this High Court under legal advise should be excluded while computing and calculating the period of limitation for filing of the appeal before the CESTAT and on liberal principles such exclusion should have been granted. While condoning the delay a reasonable amount should have been directed to paid as costs to the Revenue. We intend to do precisely that in these appeals.

9] Accordingly, the order under challenge in both the appeals is set aside and delay is condoned. However, in the larger interest of justice, we direct that the assesses shall pay costs quantified at Rs.25,000/- to the Revenue in both the appeals. Costs condition precedent. If proof of payment of costs is produced, the appeal shall stands restored to the file of the Tribunal and to be decided on merits in accordance with law.

(SMT. BHARATI H. DANGRE, J.)

(S. C. DHARMADHIKARI, J.)

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