IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.08.2018

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.1305 of 2018

M/s Presidium Constructions Coimbatore (P) Ltd,
Represented by Suresh Tikamdas Menda, Director,
409, C Block, Lavender, Raheja Enclave,
287 (236), Race Course Road,
Coimbatore - 641 018. ... Appellant/Appellant

Vs.

1. The Commissioner of Central Excise,
Coimbatore - 641 018.

2. The Hon'ble Customs, Excise &
Service Tax Appellate Tribunal,
No:26, Sashtri Bhavan,
Annexe Building, Haddows Road,
Chennai - 600 006. .. Respondents/Respondents

* * *

Prayer : Civil Miscellaneous Appeal filed under Section 35 G of Central Excise Act against the Final Order No.43048/2017 dated 28.11.2017 passed by the Customs, Excise & Service Tax Appellate Tribunal, Chennai, which was received on 21.12.2017.

* * *

For Appellant : Ms.Naveena.D

For Respondents: Mr.K.S.Ramasamy,
Senior Panel Counsel

J U D G M E N T



[Judgement of the Court was delivered by T.S.Sivagnanam, J.]

This appeal by the Assessee is directed against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, ("the Tribunal") in Application No.ST/COD/40235/2017, dated 28.11.2017.

2. The appeal filed by the Assessee was directed against the Order-in-Original in Sl.No.09/2012-Commnr., dated 30.11.2012, wherein, the Adjudicating Authority confirmed the demand of service tax of Rs.47,79,771/- in terms of Section 73(2) read with proviso to Section 73(1) of the Finance Act, 1994 (in short "the Act") ; held the Assessee to be liable to pay appropriate interest in terms of Section 75 of the Act ; imposed a penalty of Rs.5,000/- on the company under Section 77 of the Act and imposed a penalty equivalent to the amount of service tax on the company under Section 78 of the Act for non-payment of service tax by wilful misstatement and suppression of relevant facts from the knowledge of the Department with intent to evade payment of service tax.

3. The appeal filed by the Assessee before the Tribunal was barred by limitation and therefore, an application was filed by the Assessee dated 15.04.2017 to condone the delay of 1557 days in filing the appeal. In the application filed for condonation of delay, the Assessee stated that they could not attend the personal hearing before the Adjudicating Authority, as the communication for personal hearing was not received by them as their business was closed and they vacated the registered premises during May, 2012 itself. Thus, the Assessee pleaded ignorance of the date on which the personal hearing was fixed and subsequently, came to know that an order has been passed on 13.03.2017 based on a communication sent by the Deputy Commissioner of Service Tax with the Order-in-Original passed demanding the service tax. The Assessee said to have addressed the first respondent vide letter dated 03.04.2017 requesting for a certified copy of the order as they have not received the Original. The Department sent a reply dated 05.04.2017 stating that the order was served on one Shri Sudhir N.Sharma, Authorised Signatory of the company on 18.01.2013. The Assessee pleaded that the company closed its business activities in May, 2012 and Shri Sudhir N Sharma left the services during the said month and they had addressed a letter to Shri.Sharma on 07.04.2017 with regard to whether he received the order, who in turn, sent a reply vide the letter dated 11.04.2017 stating that he received the impugned order during January, 2013 from the Superintendent of the Coimbatore III B Range in person, however, he failed to handover the same to the Assessee and furnished a copy of the order on 12.04.2017. Thus, the Assessee contended that the Order-in-Original was served on the ex-employee, who left the services after the business of the Assessee Company was closed down.

4. The Assessee further stated that there is no liability on their part to pay service tax and in spite of the same they have paid a sum of Rs.41,36,422/-, which has been appropriated in the Order-in-Original to the tune of Rs.32,18,458/-, which according to the Assessee, is refundable to them in terms of Section 73 of the Finance Act. Thus, the Assessee pleaded that no undue advantage was taken by the Assessee by delayed filing of the appeal. With these submissions, the Assessee requested the delay to be condoned.

5. The Tribunal, while considering the case, as pleaded by the Assessee, pointed out that though Mr.Sharma was formerly an employee of the company, later, he had been inducted as a Director of the company and, therefore the stand taken by the Assessee is incorrect. Furthermore, by referring to the decision of the Hon'ble Apex Court in Rup Diamonds and others V. Union of India, 1989 (2) SCC 356 and the decision in the case of State of Karnataka V. S.M.Kotrayya and Others, 1996 (6) SCC 267, held that the explanation for condonation of delay was not proper and the delay being inordinate and the explanation not being convincing or persuasive dismissed the application for condonation of delay. Thus, the Assessee is before this Court by way of this appeal.

6. This appeal has been admitted by this Court on 25.06.2018 on the following substantial question of law :

> "Whether dismissal of appeal by rejecting the application seeking condonation of delay in filing of appeal in the facts and circumstances of the case and in law could not be countenanced and appeal needs to be restored to the file of the CESTAT for decision afresh affording opportunity of hearing to the appellants to secure the ends of justice ?"

7. The Court, while admitting the appeal on the substantial question of law recorded the concession given by the learned counsel for the Assessee, based on instructions from her client, that in the event of delay being condoned, the Assessee will forego its claim for refund. This statement was placed on record. Even before us, learned counsel for the Assessee stands by that statement.

8. Heard Ms.Naveena and Mr.K.S.Ramasamy, learned Senior Standing Counsel for the Revenue.

9. Mr.K.S.Ramasamy raised a preliminary objection with regard to the maintainability of the appeal before this Court by contending that no question of law arises for consideration in this appeal. To buttress his submission, learned counsel referred to the decision of the Division Bench of the High Court of Kerala in the case of Mohd. Fariz V. Commissioner of Customs, 2010 (260) ELT 29 (Ker.). In the said decision, the appeal was filed by the Assessee against an order passed by the Tribunal dismissing an application for the condonation of delay in filing the appeal. The Registry of the High Court of Kerala numbered the appeal and when the matter was heard by the Division Bench, identical objection, as raised before us, was raised before the Division Bench of High Court of Kerala. The Division Bench, after taking into consideration Section 130 of the Customs Act, 1962, held that in terms of the said provision, appeal is against every order passed by the Tribunal in an appeal filed before it and the orders passed by the Tribunal are covered by Section 129B of the Act, which provides procedure for hearing and disposal of the appeals before the Tribunal. The Division Bench pointed out that the appeals referred to in Section 129B are valid appeals filed under Section 129A, which are either appeals filed within time or belated appeals entertained by the Tribunal after condoning the delay in terms of order passed under Sub-Section (5) of Section 129A. Thus, the Court held that the Tribunal dismissing the belated appeal on account of rejection of delay condonation petition cannot be treated an order passed under Section 129B in the appeal filed by the appellant. So much so, an order rejecting an appeal after dismissal of delay condonation petition is not an order in appeal, against which an appeal will be maintainable before the High Court under Section 130 of the Act.

10. Therefore, the question would be as to whether the present appeal is maintainable ?

11. Admittedly, in the instant case, the appeal was filed well beyond the period of limitation, to be precise, 1557 days after the expiry of the limitation period. Undoubtedly, the Tribunal has power to condone the delay, if sufficient cause is shown by the Assessee. The Tribunal in the impugned order held that the cause shown by the Assessee is neither persuasive nor convincing and the delay being inordinate, rejected the application.

12. In our considered view, the question of limitation for preferring a statutory appeal is not purely a question of law, but a mixed question of law and fact. Therefore, the interpretation, that is required to be given, is whether on the facts and circumstances of the case was the cause shown by the appellant / Assessee convincing and persuasive and whether it would constitute "sufficient cause" ? If the Court is convinced

to say so, then, the delay is required to be condoned.

13. In our view, the Assessee cannot be left remediless solely on the ground that he has been turned down at the very threshold, that is, at the stage of delay condonation petition. What is important to note from the impugned order is that while dismissing the application for condonation of delay, the Tribunal dismissed the appeal itself. This can be seen from paragraph 7 of the order. One more important factor, which has to be borne in mind, is that unlike in judicial proceedings, before the Tribunal, the appeals are entertained only if the mandatory pre-deposit is paid by the assessee, to prefer the appeal. Since the mandatory pre-deposit is paid, the appeal is numbered along with the application to condone the delay and this is precisely the reason why the Tribunal, while rejecting the condonation of delay application, has dismissed the appeal. Therefore, the order passed in the condonation delay petition, in effect, is an order passed in the appeal petition filed by the Assessee challenging the Order-in-Original dated 30.11.2012, and thus, it is a final order for all purposes, as against which, an appeal is maintainable under Section 130 of the Act.

14. A Division Bench of this Court in the case of M/s.Tiruchitrambalam Projects Ltd. V. CESTAT, 2016 SCC OnLine Mad 11346, considered the question as to whether a writ petition is maintainable against the order similar to that of the impugned order. The Revenue raised an objection that a writ petition is not maintainable and only an appeal will lie to the Division Bench in terms of Section 130 of the Act. The Division Bench in the said decision has held as follows :

> "9. The first reason is that in the second part of paragraph 38 of Rajkumar Shivhare v. Assistant Director, DoE [(2010) 4 SCC 772], the Supreme Court has carved out certain exceptional circumstances, in which, the writ petitions are maintainable. Therefore, the reading of Rajkumar Shivhare by the Division Bench in Metal Weld Electrodes v. CESTAT, Chennai, [2013 Writ L.R. 1041] may not be fully correct. The second reason as to why we cannot agree with the opinion expressed by the Division Bench in Metal Weld Electrodes 2013 Writ L.R. 1041 (paragraph 81) is that the question referred to the Bench has already been answered in paragraph 80. What is stated in paragraph 81, is an opinion, which appears to have been recorded as a corollary to what was recorded in paragraph 80. But, whatever is the answer provided in paragraph 80 to the reference alone can be taken as having arisen directly for consideration before the Division Bench. It is too well settled that a judgment is a precedent for what it lays down and not what follows out of it.

10. Therefore, we are of the considered view that the answer given in paragraph 80 of its decision by the Division Bench in Metal Weld Electrodes, is perfectly correct. But, at the same time, in exceptional circumstances carved out in the second part of paragraph 38 of the decision of the Supreme Court in Rajkumar Shivhare, the writ petitions are also maintainable."

15. Thus, the Division Bench held that there is no absolute bar for entertaining a writ petition as against the orders similar to that of the impugned order in this appeal. But the only rider being such writ petition be heard by a Division Bench.

16. We are respectfully not in agreement with the view expressed in the case of Mohd. Fariz (cites supra) for the reasons assigned above and in particular, that the Tribunal while dismissing the application filed for condonation of delay has also dismissed the appeal because the appeal is also numbered even at the time, when the condonation of delay application is numbered, unlike the proceedings before this Court.

17. In the light of the above reasons, we reject the preliminary objection raised by the learned counsel for the Revenue and hold that the appeal is maintainable.

18. Next we proceed to decide the substantial question of law, which has been framed for consideration. Undoubtedly, the reason given by the Assessee for not being able to present the appeal in time was found to be factually incorrect, because, the ex-employee was subsequently made as a Director of the Company. Therefore, if this fact alone is taken into consideration, the Court may be left with no option, but to affirm the order of the Tribunal. However, the peculiar facts and circumstances of the case precludes us from doing so.

19. The first reason being that after the Show Cause Notice was issued, the Assessee appeared before the authority and while raising objection to the proposal in the Show Cause Notice stated that already an amount of Rs.32,18,458/- was paid by them. Further, the Assessee vide the letter 27.01.2012, accepted that they have paid only a sum of Rs.32,18,458/- towards the service tax liability, and further admitted the balance tax liability of Rs.9,17,964/-. Subsequently, there was a change in the Adjudicating Authority and a fresh personal hearing was fixed on 05.09.2012 and the intimation sent by the Department was returned by the postal authorities with the endorsement that the "addressee left". Thus, there is record to

show that the Assessee was not served with the notice fixing personal hearing. The erstwhile employee and later Director of the petitioner company has accepted that he received the Order-in-Original in person from the Superintendent of the Department during January 2013, but furnished the copy to the company on 12.04.2017. The Revenue has not placed any material to show that the closure of the business, as pleaded by the Assessee, was either factually incorrect or a false statement. The fact that the postal acknowledgement shows that the addressee is no longer carrying on business in the subject premises is clear indicator of the closure of business. Therefore, we are not inclined to accept the stand taken by the Assessee that they did not have effective opportunity to put forth their contentions before the Adjudicating Authority.

20. One more reason, which has convinced us to decide in favour of the Assessee is the Board's Circular 108/2/2009-S.T., dated 29.01.2009, which is wholly in favour of the Assessee pertaining to imposition of service tax on builders. We find that there is no proper adjudication on the effect of the said Circular.

21. Added to that, learned counsel heavily placed reliance on the decision of the CESTAT - Delhi in the case of Krishna Homes V. CCE, Bhopal, 2014 (34) STR 881 (TRI-Del.) and the judgement of the Hon'ble Supreme Court in Commissioner of Central Excise and Customs, Kerala V. L & T Ltd., 2015 (39) STR 913 (SC). The Hon'ble Supreme Court in the said decision has held as follows :

> "23. A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid sections by deducting from the gross

value of the works contract the value of property in goods transferred in the execution of a works contract."

22. Learned counsel for the Assessee contended that the above legal position is fully in favour of the Assessee and therefore, there cannot be any service tax liability fastened on the Assessee. It is further submitted that though such being the legal position, the Assessee has already stated before this Court that whatever has been paid by them will not be claimed by them as refund, which submission has been placed on record.

23. Thus, taking into consideration the above two factors, which are major factors, we are of the considered view that the delay in filing the appeal should be condoned and the appeal should be heard on merits.

24. It is no doubt true that the inordinate delay in filing an appeal cannot be condoned by adopting a very liberal approach. However, it has been held that law of limitation has not been enacted with a view to defeat the rights of parties. It is, in fact, to bring a finality to the proceedings. Ordinarily, an appellant does not stand to benefit by lodging an appeal belatedly unless and until it is established that for certain mala fide reasons, the appeal was lodged well beyond the period of limitation. There is no such material placed before us warranting such a conclusion. In the case of Shoeline V. Commissioner of Service Tax, 2017 (6) G.S.T.L. 226 (SC), the Hon'ble Supreme Court, after taking into consideration various decisions including the decision in Rup Diamonds held that on the peculiar facts of the case, as the service tax levied for the period in question was paid by the appellant therein, allowed the appeal and held that equities would be balanced by not insisting on payment of penalty and interest. Thus, for the above reasons, we deem it appropriate that the appeal filed by the Assessee should be heard on merits.

25. In the result, the substantial question of law, as framed for consideration, is answered in favour of the Assessee and against the Revenue. The appeal is allowed, the delay in filing the appeal before the Tribunal is condoned and the Tribunal is directed to decide the appeal on merits. No costs.



Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

To

1. The Customs, Excise & Service
   Tax Appellate Tribunal,
   No:26, Sashtri Bhavan,
   Annexe Building, Haddows Road,
   Chennai - 600 006.

2. The Commissioner of Central Excise,
   Coimbatore - 641 018.

+1cc to Mr.S.Durairaj, Advocate sr.no.56246
+1cc to Mr.K.S.Ramasamy, Advocate sr.no.56245

C.M.A.No.1305 of 2018

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nr 26/09/2018