

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12/7/2018

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

Civil Miscellaneous Appeal No.1424 of 2018

Benq India Pvt Ltd
Building No.9 B, III Floor
DLF Cybr City DLF Phase 3
Gurgoan 122 002.

... Appellant

Vs

The Commissioner of Customs
Chennai II Commissionerate
Custom House, No.60 Rajaji Salai
Chennai 600 001.

... Respondent

Appeal filed under Section 130 of the Customs Act, 1962, to set aside the Final Order No.40019/2018 dated 3/1/2018 passed in Appeal No.C/41707/2017 by the CESTAT, Chennai.

For Petitioner ... Mr.Hari Radhakrishnan

For respondent ... Mr.M.Santhana Raman

O R D E R

(Order of the Court was made by S.MANIKUMAR, J)

Civil Miscellaneous Appeal is filed to set aside the Final Order No.40019/2018, dated 3/1/2018, passed in Appeal No.C/41707/2017, by the CESTAT, Chennai.

2. Short facts leading to the appeal are that the appellant has imported goods described BENQ 24 W LED monitor type TL2405H, BENQ 21.5 LED monitor type GL2250HM and BENQ 24 LED monitor type GL2450HM, as per Bill of Entry No.5523466, dated 21/12/2011. The appellant has classified the three types of monitors under CTH 85285100. This heading covers monitors other than cathode ray tube monitors of a kind solely or principally used in an automatic data processing machine (ADP). The goods falling

under this heading were exempted from levy of BCD.

3. The customs department wanted to classify the goods, under CTH 85285900, i.e., monitors others than those used for ADP. As the goods were urgently needed, the appellant paid the duty, as assessed by the Group, under protest. The appellant, as per letter, dated 10/1/2012, explained to the Deputy Commissioner/Assistant Commissioner, Group 5 A, that the monitors were to be used for ADP only. It was stated that the connectivity of monitors with computer was through primary input ports D-sub, HDM 1 ports were provided in the computers, for transfer of encrypted use, for compressed digital high definition data. This was due to advanced technology. These monitors are used in large frame computers, graphical printer.

4. The Assistant Commissioner of Customs, Group 5 A passed the order-in-Original No.18158/2012, dated 18/1/2012, holding that the monitors were correctly to be classified under CTH 85285900 and no exemption from BCD was available.

5. The appeal made against this order was rejected, as per order in Appeal No.1323 of 2014, dated 30/7/2014 and the same was not served on the appellant. The said order-in-appeal was sent to the old address of the appellant. The appellant came to know about the existence of the impugned Order-in-Appeal when they imported computer LCD monitor, vide subsequent Bills of Entry. The officers of SIIB, seized the goods imported, vide three mahazars, dated 30/6/2017. It was at this point of time that the appellant was confronted with the impugned Order-in-Appeal C.Cus.No.1323/2014, dated 30/7/2014.

6. After receipt of the order copy from the officers of SIIB, the appellant filed an appeal before the Tribunal, along with an application, for condoning the delay of 989 days, in filing the appeal. Tribunal, vide, order, dated 3/1/2018, refused to condone the delay and dismissed the appeal, and the same is extracted hereunder:-

"The main contention put forward by the Id. Counsel is that the person in charge of the imports in the appellant company had left without handing over the documents relating to the appeal to the next person who had take charge. So also, that the consultant who was appearing before the Commissioner (Appeals) did not inform them about the order. When the appellant had knowledge about the appeal pending before the Commissioner (Appeals), it is the duty of the appellant to follow up and track the status of the appeal. The impugned order was passed on 30/7/2014. The

appeal is filed only on 3/8/2017 and there is inordinate delay in filing the appeal. Further, as rightly pointed out by the learned AR, the appellant has not explained each days delay or given sufficient cause for condonation of delay. The contention that the appellant's address had changed and that the department has issued the copy of the order to the old address is not tenable for the reasons that the appellant has failed to intimate the department about the change of address. After the appellant had submitted a letter, dated 10/1/2012, making their submissions in their case, they could have very well made intimation to the department informing the change of address. Having failed to do so, they cannot later contend that their address was changed. Moreover, the address had not changed after 30/7/2014 and before dispatch of the order by the department. These being the facts, we do not find sufficient cause to condone the delay. The miscellaneous application for condonation of delay is dismissed. Consequently, the appeal also stands dismissed."

7. Being aggrieved by the refusal to condone delay, instant Civil Miscellaneous Appeal is filed, on the following substantial questions of law:-

"1. Whether the Hon'ble Tribunal in the present facts and circumstances has erred in dismissing the appeal as barred by limitation though sufficient cause for the delay was explained by the appellant?

2. Whether the Hon'ble Tribunal has erred in depriving the substantive right of the appellant to file an appeal on mere ground there is violation in procedure?

3. Whether the Hon'ble Tribunal had erred in refusing to condone the delay when the issue involved was that of classification of goods which had direct bearing on the frequent imports made by the appellant of identical and similar goods and when the appellant had not deliberately slept over their rights?"

8. Assailing the correctness of the order impugned, Mr. Hari Radhakrishnan, learned counsel for the appellant reiterated the above submissions for the delay. He also invited the attention

of this Court to the observation made in OSA SHIPPING PVT LTD., Vs. COMMISSIONER OF CENTRAL EXCISE, CHENNAI {2015 (325) ELT - 486 (Mad)}, wherein, this Court, while condoning the delay in filing an appeal before the Tribunal, observed that the appellant does not stand to gain anything by delaying the filing of the appeal before the Tribunal, after having paid more than 50% of the demand. He further submitted that the appellant had already deposited the entire duty under protest.

9. Inviting the attention of this Court to a note order, made in respect of Nhava Sheva Customs, with respect to a Bill of Entry No.4540442, dated 3/2/2014, learned counsel for the appellant submitted that monitors can be used with normal TV, DVD Players, gaming consoles, etc., and therefore, they are not to be classified under CTH 85285100.

10. Reason assigned by the appellant for condonation of 989 days are that (i). the person in-charge of the imports in the appellant Company had left without handing over the documents relating to the appeal to the next person who had taken charge. (ii). The consultant who was appearing before the Commissioner (Appeals) did not inform them about the order. So, they could not pursue the appeal in time. Tribunal did not accept the above said reasons.

11. As rightly observed by this Court in OSA SHIPPING PVT LTD., Vs. COMMISSIONER OF CENTRAL EXCISE, CHENNAI {2015 (325) ELT - 486 (Mad)}, the appellant does not stand to gain anything by delaying the filing of the appeal before the Tribunal. Duty has been paid under protest. Dispute to be resolved is as to whether the subject goods fall under the classification or not?

12. Note order of Nhava Sheva Customs with respect to Bill of Entry No.4540442, dated 3/2/2014, placed before us is reproduced.

"Please see note pre page from Docks after examination of the goods covered by Bill of Entry No.4540442 dated 3/2/2014.

The Bill of Entry is assessed under RMS facility.

The issue involved is that the goods covered by the above Bill of Entry i.e., Computer LED Monitor is classified by the party under CTH No.85285100 which entitles the importer for benefit of Notification 24/2005 Sr.17 (which exempts the goods falling under 852851 from whole of customs duty and the same is assessed under the same CTH. However, at the time of examination of the goods at docks, t he

docks officer in his examination report stated that the monitors can be simultaneously used with DVD and game console along with ADP machine and accordingly it appeared that the goods imported is not solely or principally used with ADP machine and hence the goods is physically examined by the docks staff and found that the monitor has three ports - for the ADP machine, second is HDMI port and third for DVD port and hence it is concluded by Docks staff that the imported monitor can be used with DVD player.

However, importer vide letter dated 14/2/2014 has stated that as per the catalogue and service

manual of the product covered by the Bill of Entry there are three ports one is VGA (i.e., computer port), DVD port and HDMI port.

In this regard, kind attention is drawn towards Boards Circular No.33/2007-Cus dated 10/9/2007 which clearly makes a distinction between Computer Monitor and TV/Video Monitors. Accordingly, on perusal of the catalogue and product service manual, it is evident that the Technical Specification given matches with the Technical Specification given in the Board's Circular under the head computer monitors. Also, on examination of the sample brought by the importer, it is seen that the goods is having DVI port and not DVD port as claimed by the Docks staff. Also it is observed as per catalogue and explanation given by the party that the goods does not have S-video input connector, built in tuner cards, etc., which will qualify it as tv/video monitors. Also it is observed that the sample contains HDMI port (which as per party is a digital standard for audio and video transmission) and though the Board circular dated 10/9/2007 is silent regarding the same however on going through the chart of physical characteristics attached to Board's circular it seems that the HDMI port can be covered under Point No.2 under heading TV/Video Monitor which says "These enable the monitors to receive broadcast signals or other video signals from DVD player or video gaming devices. May also additionally have DVI port." Further, as per Board's Circular TV/Video monitors contains wall mounting facility for facilitating television/video viewing and the

aspect ratio for TV is generally 16:9 (for wide angle) whereas computer monitors do not contain these features and the aspect ratio for ADP monitor is generally 16:10 (for wide angle).

In view of the above on going through the technical specification it seems it can be covered under computer monitors (since aspect ratio is 16:10 as per supporting documents submitted by party whereas on the basis of physical specification it seems to be covered under TV/Video monitors.

Since the Board circular is silent with regard to such type of goods, if approved personal hearing may be given to importer for further clarification if required."

Sd/-xxxx
27/2/2014

Sd/-
Gr.VA/B

PH on 3/3/14
JC/Gr.VA.B
3/3/2014

A.O

Kindly see the pre page directions. Importer along with supplier attend P.H on 6/3/14 @ 12 p.m. Submitted for P.H and n/a pls.

It'd/-
6/3/14

Sd/-DC/vab
6/3/14

JC.

Party appeared for hearing and stated the function of HDMI port in monitor. They stated that they would submit written submissions.

सत्यमेव जयते

Sd/- 6.3.2014

AC (VA) .

* * *

Kindly see pre-page noting and Gr.Joint Commissioner instruction as above. The importer along with supplier i.e., M/s. Chee Fui Change the director of BENQ attended for personal hearing in Joint Commissioner chambers at 12.30 p.m. The party submitted the written submissions even No.dated 6/3/2014 placed opposite for kind perusal.

2 (i). As per importer written submissions HDMI connection option given in the monitor is to make the HDMI connectivity with the computer, where

the HDMI port is given in the mother Board of the computer. This connectivity to the Mother Board of the computer is given in the user manual of this monitor. At the time of doing art-work, design, animation & graphics work in the computer software, we required precise color and sharp image of full HD resolution to be shown in the monitor. For this the data has to be transferred at very high speed digitally from the computer to monitor, and the DBMI connectivity is doing this function. That is why, the present mother boards are coming with the HDMI ports. For this requirement, the monitors also has to come with the HDMI connectivity. All the TV/Video monitors, are having composite video and component video connectivity ports to connect with the video source. The imported monitors do not have these ports. So, the imported monitors are manufactured to be usable principally with the computers.

(ii). From 2003 to 2010 the computer monitors were manufactured with the aspect ratio of 16:10. In 2010, the computer industry started to move over from 16:10 to 16:9 because it is cheaper to manufacture 16:9 display. So, at present, whichever make of the computer monitor, whether with HDMI or only with VGA/DVI, invariably, all most all, the LCD or LCD with LED Bakelight monitors are manufactured with the aspect ratio size of 16:9 only.

(iii). Due to space constraint in retail shops & in some home, wall mountable computer monitors are needed, so, now a days, manufacturers started to give wall mountable features additionally. Then the monitor is fixed on the wall, they need a table space of key board only. Even though the wall mountable is given as an additional feature, all these monitors are provided with Ergonomixc feature (swivel & Tilt).

3. In this regard kind attention is drawn towards Board's Circular No.33/2007-Cus dated 10/9/2007 which clearly makes a distinction between computers monitors and TV/Video monitors. Accordingly, on perusal of the catalogue and product service manual, it is evident that the Technical Specification given matches with the technical specifications given in the Board's circular under the head computer monitors. Also, on examination of the sample brought by the importer it is seen that the goods is having DVI port and not DVD port as claimed by the Docks staff. Also, it is observed as per catalogue and explanation given by the party

that the goods does not have S-video monitors. Also it is observed that the sample contains HDMI port (which as per party is a digital standard for audio and video transmission) and though the Board Circular dated 10/9/2007 is silent. In this regard party has clarified functions, technical specification and usage of HDMI port, accepted ratio and wall mount features in the written submissions.

In view of the above, the Docks staff objection that imported monitor is not meant solely or principally for ADP is not sustainable. Since the Technical specification features of the computer monitor as Board Circular 33/2007-Cus dated 10/9/2011 hence, file may be forwarded to Docks if approval and order please.

Sd/-6.3.2014

A.O

S.N.Reddy

Please see note above and pre-pages

2. As above it appears monitor not meant for solely but principally for ADP, AO, Docks' objection may be overruled. File submitted for order please.

Sd/-

Manoj Kumar

Asst.Commr

7/3/2014

JC/Gr.VAB

Notes above refer.

In view of above, goods under question do not appear to be classifiable UCTH 85285900. May like to issue instruction to Docks Officer accordingly.

Sd/- 7.3.2014

Rakesh Kumar Agarwal

Sd/- 7.3.2014

ADC/Docks

13. Sufficiency of cause is certainly a matter to be considered while exercising discretion. At the same time, Courts/Tribunals are bound to consider, as to whether length of delay or reasons assigned, if not accepted, would cause miscarriage of justice. At this juncture, it is worthwhile to consider few decisions of the Hon'ble Supreme Court.

14. In Esha Bhattacharjee v. Raghunathpur Nafar Academy, reported in (2013) 12 SCC 649, the Hon'ble Supreme Court has broadly culled out the principles of law to be considered in the

matter of condonation and it is suffice to extract paragraph No.21 from Esha Bhattacharjee's case,

"21. From the aforesaid authorities the principles that can broadly be culled out are;

21.1. (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

21.2. (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

21.3. (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21.4. (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.6. (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

21.7. (vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9. (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

21.10. (x) If the explanation offered is concocted

or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

21.11. (xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

21.12. (xii) The entire gamut of facts are to be carefully scrutinised and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

21.13. (xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude."

15. Subsequently, after considering the Hon'ble Division Bench judgment of this Court in Tamilnadu Mercantile Bank Ltd., Vs. Appellate Authority, reported in (1990) 1 LLN 457 and decision of the Supreme Court in Esha Bhattacharjee v. Raghunathpur Nafar Academy, reported in (2013) 12 SCC 649, in H.Dohil Constructions Company Private Limited V. Nahar Exports Limited and Another, reported in 2015(1) Supreme Court cases 680, Hon'ble Supreme Court, at paragraph Nos.23 and 24, held as follows:

"23. We may also usefully refer to the recent decision of this Court in Esha Bhattacharjee [Esha Bhattacharjee v. Raghunathpur Nafar Academy, reported in (2013) 12 SCC 649], where several principles were culled out to be kept in Principles (iv), (v), (viii), (ix) and (x) of para 21 can be usefully referred to, which read as under: (SCCp.658-59)

"21.4(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.8. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9 (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is

so as the fundamental principle is that the courts are required to weight the scale of balance of justice in respect of both parties and the said principle cannot be given a total go-by in the name of liberal approach.

21.10. (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

24. When we apply those principles to the case on hand, it has to be stated that the failure of the Respondents in not showing due diligence in filing of the appeals and the enormous time taken in the refiling can only be construed, in the absence of any valid explanation, as gross negligence and lacks in bonafides as displayed on the part of the Respondents. Further, when the Respondents have not come forward with proper details as regards the date when the papers were returned for refiling, the non-furnishing of satisfactory reasons for not refiling of papers in time and the failure to pay the Court fee at the time of the filing of appeal papers on 06.09.2007, the reasons which prevented the Respondents from not paying the Court fee along with the appeal papers and the failure to furnish the details as to who was their counsel who was previously entrusted with the filing of the appeals cumulatively considered, disclose that there was total lack of bonafides in its approach. It also requires to be stated that in the case on hand, not refiling the appeal papers within the time prescribed and by allowing the delay to the extent of nearly 1727 days, definitely calls for a stringent scrutiny and cannot be accepted as having been explained without proper reasons. As has been laid down by this Court, Courts are required to weigh the scale of balance of justice in respect of both parties and the same principle cannot be given a go-by under the guise of liberal approach even if it pertains to refiling. The filing of an application for condoning the delay of 1727 days in the matter of refiling without disclosing reasons, much less satisfactory reasons only results in the Respondents not deserving any indulgence by the Court in the matter of condonation of delay. The Respondents had filed the suit for specific performance and when the trial Court found that the claim for specific performance based on the agreement was correct but exercised its discretion not to grant the relief for specific performance but grant only a payment of damages and the Respondents were really keen to get the decree for specific performance by filing the appeals, they should have shown utmost diligence and come

forward with justifiable reasons when an enormous delay of five years was involved in getting its appeals registered."

16. It is also useful to extract paragraph Nos.14 to 17 of the judgment in Tamilnadu Mercantile Bank's case.

"14. We are unable to agree with the reasoning of the learned Judge that no litigant ordinarily stands to benefit by instituting a proceeding beyond time. It is common knowledge that by delaying a matter, evidence relating to the matter in dispute may disappear and very often the party concerned may think that preserving the relevant records would be unnecessary in view of the fact that there was no further proceeding. If a litigant chooses to approach the Court long after the time prescribed under the relevant provisions of the law, he cannot say that no prejudice would be caused to the other side by the delay being condoned. The other side would have in all probability destroyed the records thinking that the records would not be relevant as there was no further proceeding in the matter. Hence to view a matter of condonation of delay with a presupposition that no prejudice will be caused by the condonation of delay to the respondent in that application will be fallacious. In our view, each case has to be decided on the facts and circumstances of the case. Length of the delay is a relevant matter to be taken into account while considering whether the delay should be condoned or not. It is not open to any litigant to fix his own period of limitation for instituting proceedings for which law has prescribed period of limitation.

17.... Once it is held that a party has lost his right to have the matter considered on merits because of his own inaction for a long time, it cannot be presumed to be non-deliberate delay, and in such circumstances of the case, he cannot be heard to plead that substantial justice deserved to be preferred as against technical considerations. We are of the view that the question of limitation is not merely a technical consideration. Rules of limitation are based on principles of sound public policy and principles of equity. It is a litigant liable to have a

Damocles' sword hanging over his head indefinitely for a period to be determined at the whims and fancies of the opponent?"

17. In the light of the above decisions and note order, we deem it fit that the appellant should be given an opportunity, to pursue the appeal before CESTAT, Madras.

18. Accordingly, this Civil Miscellaneous Appeal is allowed. Final Order No.40019/2018, dated 11/5/2015, passed by the CESTAT, Chennai, is set aside. Delay of 989 days is condoned. No costs.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

mvs.

To

1. The Commissioner of Customs
Chennai II Commissionerate
Custom House, No.60 Rajaji Salai
Chennai 600 001.
2. The Presiding Officer,
Central Excise Sales Tax Appellate Tribunal,
Madras

+1cc to Mr.M.Santhana Raman, Advocate, S.R.No.46538

+1cc to Mr.Hari Radhakrishnan, Advocate, S.R.No.46383

Civil Miscellaneous Appeal No.1424 of 2018

KS (CO)
CS/05/09/18

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