IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.08.2018

C O R A M:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

C.M.A.Nos.1691 to 1700 of 2018
and Connected Miscellaneous Petitions

M/s. Rane NSK Steering Systems Pvt Ltd.,
No.14 Rajagopalan Salai,
Vallancherry Village,
Guduvancherry,
Kancheepuram 603 202. ... Appellant in all the appeals

v.

The Commissioner of Central Tax &
Central Excise, Chennai III Commissionerate
Now GST - Chennai Outer Commissionerate
Newry Towers, No.2054.
I Block, II Avenue, 12th Main Road
Anna Nagar,
Chennai 600 040. ... Respondent in all the appeals

Civil Miscellaneous Appeal filed under Section 35 G of the Central Excise Act, 1944, to answer the substantial questions of law in favour of the appellant and set aside the Final Order No.41159 to 41168of 2017, dated 29/6/2016, passed by the Tribunal.

For appellant ... Mr.G.Natarajan

For Respondent ... Mr.S.Rajasekar
for Mrs.R.Hemalatha,
Senior Counsel for CT & CE

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COMMON JUDGMENT
(Judgment of the Court was made by S.MANIKUMAR, J)

Instant Civil Miscellaneous Appeals are filed against the common order, passed in Final Order Nos.41159-41168 of 2017, dated 29/6/2016, on the file of CESTAT, on the following substantial questions of law:-

> “1. Whether the Tribunal is correct in upholding the order of the Commissioner (Appeals), which has been passed ex-parte in violation of the principles of natural justice?

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2. Whether Tribunal is correct in dismissing the appeal filed by the appellant, on the only ground that the order of the Commissioner (Appeals) dismissing the appeal on the ground of delay is correct, on the basis of the conclusion that the Commissioner (Appeals) did not have the power to condone a delay of more than thirty days, when there is no such restriction on the powers of the Commissioner (Appeals) to condone the delay in filing beyond 30 days?

3. Whether the Tribunal is correct in coming to the above conclusion when the main provisions of Section 35 (1) do not prescribe a mandatory time limit for filing the appeal?

4. Whether the Tribunal is correct in not appreciating the difference between the provisions of Section 35 (1), 35 B (3) and 35 B (3) of the Central Excise Act, 1944 and coming to a conclusion that the Commissioner (Appeals) is not having any powers to condone a delay beyond 30 days, which is contrary to the plain provisions of Section 35?

5. Whether the Tribunal is correct in not deciding the appeal on merits, when the issues are squarely covered in favour of the appellant on merits?"

2. Supporting the substantial questions of law, Mr.G.Natarajan, learned counsel for the appellant submitted that as per Section 35 of the Central Excise Act, 1944, when any person aggrieved by any decision or order passed under Central Excise Act, 1944, by a Central Excise Officer lower in rank than a Principal Commissioner of Central Excise or Commissioner of Central Excise) may appeal to the Commissioner of Central Excise (Appeals), within sixty days, from the date of communication to him of such decision or order. Proviso to the said Section states that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days. The commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded to writing. Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal. Every appeal under this section shall be

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in the prescribed form and shall be verified in the prescribed manner.

3. Referring to Section 35 of the Central Excise Act, 1944, dealing with filing of the appeals before Commissioner (Appeals) and Section 35B of the said Act, dealing with filing of appeals before the Tribunal and in particular, usage of the expression, as the case may be, in the explanation to Section 35B, Mr.G.Natarajan, learned counsel for the appellants submitted that the time limit of sixty days for filing appeals before the Commissioner (Appeals) under the Central Excise law has not been preceded by a mandatory expression “shall”. When the same statue prescribes the time limit for filing appeals before various appellate forums in a different language, the different intention of the legislature has to be inferred. While the time limit for filing appeals before the Tribunal is prescribed as a mandatory condition, the power of the Tribunal to condone any delay in filing the appeal within such mandatory time limit, has been prescribed without any limits. According to the appellants, where the time limit for filing the appeal before the commissioner (Appeals) is not prescribed as a mandatory condition, the power to condone the delay in filing the appeal thereunder, should not be interpreted to restrict the power of the Commissioner (Appeals) to condone any delay beyond the period prescribed therein, if sufficient cause is shown for the delay.

4. Learned counsel for the appellants have further submitted that the proviso to sub section (1) of Section 35 of the Central Excise Act, 1944 is not laying down any restriction on the authority of the Commissioner (Appeals) to condone any delay in filing the appeal beyond the prescribed period and it is the discretionary power either to condone the delay or not to condone the delay, when such delay is upto 30 days. The proviso is not curtailing the power of the Commissioner (Appeals) to condone any delay beyond thirty days and when it was the intention of the legislature, the proviso would have been worded differently.

5. Learned counsel for the appellants further submitted that as per the settled principles of interpretation, a proviso carves out an exception to the main enactment and in the absence of the proviso, the main enactment would cover the subject covered in the proviso also. With regard to filing of appeals before the Tribunal, he further submitted that as per sub section (3) of Section 35B, an appeal shall be filed within three months, which is a substantial mandatory requirement and that no appeal can be filed after the expiry of the three months period. Sub Section (5) of Section 35 B grants a discretionary power to the Tribunal to condone any delay, without any limit, if sufficient cause was shown.

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6. Referring to sub-Sections (3) and (4) to Section 85 of the Finance Act, 1994, relating to Service Tax, learned counsel for the appellant further submitted that an appeal before Commissioner (Appeals) shall be filed within 3 months / 2 months respectively and in the absence of any proviso thereunder, no appeal can be filed before Commissioner (Appeals), after the expiry of the said 3/2 months. But the proviso under these sub sections (3)/(3A) carves out an exception whereby the Commissioner (Appeals) can done a delay upto a further period of three months/one month respectively, if sufficient cause is shown. He further submitted that as against the above scheme of the language, Section 35 (1) adopts a different style, where no mandatory time limit for filing the appeal has been prescribed in the main enactment part of section 35(1) and in such a situation, the proviso thereunder cannot be understood carve out an exception to what is not prescribed in the main enactment. He also submitted that both the appellate authorities below have proceeded on the basis, as if the Commissioner (Appeals) has no power to condone a delay beyond 30 days and therefore, dismissal of the appeal on the ground of delay is not at all sustainable in law.

Heard the learned counsel for the appellant and perused the materials available on record.

7. A bare reading of Section 35 of the Central Excise Act, 1944, makes it clear that any person aggrieved by any decision or order passed under the Central Excise Act by a Central Excise Officer, lower in rank than a Principal Commissioner of Central Excise or Commissioner of Central Excise) may appeal to the Commissioner of Central Excise (Appeals), within sixty days from the date of communication to him of such decision or order.

8. If for any sufficient cause, the appellant was prevented from presenting the appeal within the aforesaid period of 60 days, then the Commissioner of Appeals shall allow the appeal to be presented within a further period of 90 days. Thus, it could be seen that beyond 90 days, the Commissioner of Appeals has no bar to condone the delay in filing an appeal to the Commissioner.

9. As per explanation to Section 35 B (3) of the Central Excise Act, 1944, an appeal under this Section shall be filed within three months from the date on which order sought to be appealed against is communicated to the Principal Commissioner of Central Excise, or Commissioner of Central Excise, or, as the case may be, the other party, preferring the appeal.

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10. Section 85 of the Finance Act, 1944 deals with appeals to the Commissioner of Central Excise (Appeals) and the said Section is extracted hereunder:

"(1) Any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the Principal Commissioner of Central Excise or Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals).

(2) Every appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(3) An appeal shall be presented within three months from the date of receipt of the decision or order of such adjudicating authority, relating to service tax, interest or penalty under this Chapter made before the date on which the Finance Bill, 2012 receives the assent of the President:

Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of three months.

(3A) An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, made on and after the Finance Bill, 2012 receives the assent of the President, relating to service tax, interest or penalty under this Chapter:

Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month.

(4) The Commissioner of Central Excise (Appeals) shall hear and determine the appeal and, subject to the provisions of this Chapter, pass such orders as he thinks fit and such orders may include an order enhancing the service tax, interest or penalty:

Provided that an order enhancing the service tax, interest or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) Subject to the provisions of this Chapter, in hearing the appeals and making order under this section, the Commissioner of Central Excise (Appeals) shall exercise the same powers

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and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Central Excise Act, 1944 (1 of 1944)."

11. Though the learned counsel for the appellant stressed the expression "as the case may be", employed in the explanation to Section 35 B (3) of the Central Excise Act, 1944 is suggestive that an appeal could be filed beyond the period of 90 days, and in the light of the sufficient cause, stated supra, CESTAT, Madras, ought to have condoned the delay of 112 days in filing the statutory appeal to the appellate authority, we are not inclined to accept the said contention, for the reason that a bare reading of Section 35 of the Central Excise Act, 1944 and the explanation thereof, makes it clear that appeal under the said Section shall be filed within three months from the date on which the order sought to be appealed. The usage of the expression, "as the case may be", is referable only to the appellate authority, before whom the appeal is filed i.e., the Principal Commissioner of Central Excise or the Commissioner of Central Excise, as the case may be.

12. That apart, in Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur, {2008 (221) ELT - 163 (SC)}, the Hon'ble Apex Court, dealt with a similar case as to whether the Tribunal has powers to condone beyond the statutory period prescribed for filing an appeal.

13. Short facts leading to the file of appeal in Singh Enterprises's case are as hereunder:-

> "2. Challenge in this appeal is to the order passed by a Division Bench of the Jharkhand High Court dismissing the writ petition filed by the appellant. Before the High Court, appellant had challenged the order passed by the Commissioner (Appeals), Central Excise and Service Tax, Ranchi, dismissing the appeal filed by the appellant under Section 35 of the Central Excise Act, 1944 (in short the 'Act'). The said order was challenged before the High Court by filing a writ petition. The Commissioner had dismissed the appeal only on the ground that it was filed after 21 months of the date of service of the original order and the appellate authority did not have power to condone the delay beyond the period of 30 days from the date of expiry of period of 60 days prescribed for filing the statutory appeal.

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3. The Division Bench noted that since the Commissioner had no power of condonation beyond the statutorily prescribed period, therefore, the writ petition was without merit. Before the High Court, reliance was placed on a decision of this Court in I.T.C.Ltd., Vs. Union of India {1998 (8) SCC 610} to contend that the High Court had the power to condone the delay. This stand was not accepted by the High Court."

14. After considering Section 35 of the Central Excise Act, appeals to Commissioners, the Hon'ble Apex Court, held as follows:-

"8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the statute. The period upto which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Indian Limitation Act, 1963 (in short the 'Limitation Act') can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is

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complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore, justified in holding that there was no power to condone the delay after the expiry of 30 days period.

9. Learned counsel for the appellant has emphasized on certain decisions, more particularly, I.T.C's case (supra) to contend that the High Court and this Court in appropriate cases condoned the delay on sufficient cause being shown.

10. Sufficient cause is an expression which is found in various statutes. It essentially means as adequate or enough. There cannot be any straitjacket formula for accepting or rejecting the explanation furnished for delay caused in taking steps. In the instant case, the explanation offered for the abnormal delay of nearly 20 months is that the appellant concern was practically closed after 1998 and it was only opened for some short period. From the application for condonation of delay, it appears that the appelalnt has categorically accepted that on receipt of order the same was immediately handed over to the consultant for filing an appeal. If that is so, the plea that because of lack of experience in business, there was delay does not stand to be reason. I.T.C.'s case (supra) was rendered taking note of the peculiar background facts of the case. In that case there was no law declared by this Court that even though the Statute prescribed a particular period of limitation, this Court can direct condonation. That would render a specific provision providing for limitation rather otiose. In any event, the causes shown for condonation have no acceptable value. In that view of the matter, the appeal deserves to be dismissed which we direct. There will be no order as to costs.”

15. Judgment in Singh Enterprises case is squarely applies to the facts on hand.

16. Under similar circumstances, a Hon'ble Division Bench of this Court, in R.Gowrishankar Vs. 1. The

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Commissioner of Service Tax (Appeals) – I, Chennai and another, held as follows:-

> "36. It is now well settled by the Hon'ble Supreme Court in Singh Enterprises v. CCE, Jamshedpur reported in 2008 (221) ELT 163 (SC), Commissioner of Customs & Central Excise v. Hongo India (P) Ltd., reported in 2009 (236) ELT 417 (SC), Chhattisgarh State Electricity Board v. Central Electricity Regulatory Commission reported in 2010 (5) SCC 23, Section 5 of the Limitation Act cannot be applied, beyond the condonable period.
>
> 37. Section 85 of the Finance Act, is similar to Section 128 of the Customs Act, 1962; Section 34(3) of the Arbitration and Conciliation Act, 1996; Section 125 of the Electricity Act, 2003; Section 35-G of the Central Excise Act, 1944 and the statutes referred to above, are self contained Acts and codes by themselves. The High Court or the Supreme Court, as the case may be, cannot direct the appellate authority to condone the delay, beyond the extended period of limitation. Courts have also interpreted that when the legislative intent is reflected in the provisions of the special laws, excluding the provisions of Limitation Act, then the authorities under the statute, cannot exercise powers to condone the delay. On the aspect of the Court, exercising powers under Article 226 of the Constitution of India, to condone the delay, we are of the view that the decision of this Court in Indian Coffee Worker's Co-operative Society Ltd.,'s case, squarely applies to the case on hand, wherein, a Hon'ble Division Bench held as follows:
>
> "(c) While the High Court exercising the jurisdiction under Article 226 of Constitution of India, approves the correctness of the order of the appellate authority, it has no power to direct the appellate authority to consider the appeal on merits as otherwise it would be nothing but Court extending the period of limitation.
>
> (d) Even if the High Court accepts the explanation given by the assessee for not filing the appeal within the period prescribed under the Act, it cannot direct the appellate authority to consider the

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matter on merits as the High Court exercising jurisdiction under Article 226 of Constitution of India, cannot re-write the provisions of the Act."

38. In the light of the above discussion and decisions, we are not inclined to interfere with the order of the Writ Court. Hence, Writ Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed."

17. Though reasons assigned, may appear to be sufficient, statute does not provide condonation beyond the period provided therefor. If the prayer is accepted, then it would be amounting to adding words to the enactment.

18. In the light of the discussion and decision of the Hon'ble Supreme Court in Singh Enterprises's case and that of this Court in R.Gowri Shankar's case, we are of the view that there is no error in rejecting the appeals filed beyond the statutory period therefor.

19. Substantial questions of law raised are answered against the appellant.

Accordingly, Civil Miscellaneous Appeals are dismissed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

mvs

To

The Commissioner of Central Tax &
Central Excise
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Now GST - Chennai Outer Commissionerate
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+1cc to Mr.S.JaiKumar , Advocate SR.No. 54227
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C.M.A.Nos.1691 to 1700 of 2018

ASK(05/10/2018)

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