In the High Court of Judicature at Madras

Dated : 04.12.2018

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Mr.Justice N.SATHISH KUMAR

Civil Miscellaneous Appeal No.2813 of 2018

M/s.The Narasimha Mills,
Coimbatore-31. ...Appellant/Apepllant

Vs

The Commissioner of Central Excise
& Service Tax,
No.6/7, ATD Street, Race Course Road
Coimbatore 641 608. ...Respondent/Respondent

APPEAL under Section 35G of the Central Excise Tax Act, 1944 as made applicable under Section 83 of the Finance Act, 1994 against Final Order No.41910 of 2018 dated 14.6.2018 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai in ST/COD/ 41724/2017 in ST/42357/2017 and to direct the Tribunal to dispose of the appeal in ST/42357/2017 filed by the appellant on merits.

For Appellant : Mr.K.Jayachandran

For Respondent : Mr.K.Ramasamy, JSC

Judgment was delivered by T.S.SIVAGNANAM,J

This appeal filed by the assessee under Section 35G of the Central Excise Act, 1944 as made applicable under Section 83 of the Finance Act, 1994 is directed against the final order passed by the Customs, Excise and Service Tax Appellate Tribunal (for brevity, the Tribunal) dated 14.6.2018 rejecting the appeal filed by the assessee against Order-in-Appeal No.279/ 2013 dated 27.8.2013 as barred by limitation and on the ground that there was no reason for condonation of the delay of 1553 days in filing the appeal.

2. The above appeal has been filed raising the following substantial questions of law :

"i. Whether, in the facts and circumstances of the case, the Tribunal is right in rejecting the application seeking condonation of delay in filing the appeal when the appellant had established their bona fides in pursuing the matter ? And

ii. Whether the Tribunal is justified in rejecting the application seeking condonation of delay in filing the appeal before it without going into the merits of the issue, on which issue, the Coordinate Bench of the Tribunal has held that the penalty, in such circumstances of the case, was not imposable ?"

3. We have heard Mr.K.Jayachandran, learned counsel for the appellant and Mr.K.S.Ramasamy, learned Junior Standing Counsel for the Revenue.

4. The issue, which falls for consideration in this appeal, is as to whether the appellant had shown sufficient cause for not having preferred any appeal before the Tribunal within the period of limitation.

5. The facts are not in dispute and it is admitted that there is a delay of 1553 days in filing the appeal. What is required to be seen is as to whether the appellant was able to explain the delay and as to whether the explanation would amount to showing sufficient cause for condonation of delay. In our considered view, the facts clearly show that the reason for the delay has been explained and in our opinion, the explanation offered is reasonable and convincing. We hold that the appellant had shown sufficient cause in not being able to prefer the appeal within the period of limitation.

6. We support such a conclusion with the following findings :

The appellant was issued a notice dated 08.2.2012 to show cause as to why a sum of Rs.21,44,299/-, being the service tax payable by the appellant towards the services rendered by them under the category of renting of immovable property service for the period from 01.4.2007 to 31.3.2011, should not be demanded from them under the provisions of Section 73(1) of the Finance Act by invoking the Proviso to Section 73(1) namely by invoking the extended period. There was also a proposal to demand interest and levy penalty. The assessee filed their objections and the Adjudicating Authority, vide Order-in-Original dated 28.3.2013, confirmed the proposals in the said show cause notice and demanded service tax of Rs.21,44,299/-, levied interest and imposed penalty.

7. Aggrieved by the said Order-in-Original dated 28.3.2013, the assessee preferred an appeal before the Commissioner of Customs, Central Excise and Service Tax (Appeals), Coimbatore-18. In that appeal, apart from contesting on merits, it was submitted that the larger issue as to whether there was any liability to pay service tax was subjudice. It was also contended that the Department did not give proper set off to the amounts paid towards the property tax and the tax deducted at source, which was deducted.

8. The First Appellate Authority did not agree with the assessee on merits, however accepted their case with regard to set off and ultimately, the demand stood reduced to around Rs.19 lakhs. Even prior to filing of the appeal before the First Appellate Authority, the assessee paid Rs.15 lakhs, being a part of service tax demanded. After the First Appellate Authority reduced the demand to Rs.19 lakhs, it is stated that the remaining amount was also paid and that the entire service tax liability stood settled.

9. It appears that the assessee was advised to file an application under the Voluntary Compliance Encouragement Scheme (VCES), so that they could get immunity from payment of interest and penalty. It also appears that the assessee was not correctly advised that they would not be in a position to contest the merits of the matter before the Authority under the VCES. Therefore, the application filed under the VCES was rejected by order dated 15.11.2013 on the technical ground with regard to issuance of notice.

10. Aggrieved by the said order dated 15.11.2013, the assessee preferred an appeal before the Commissioner of Appeals. However, it was returned on 11.2.2014 stating that there was no provision for an appeal to the Commissioner. This order was put to challenge by the assessee by filing a writ petition, which was disposed of by this Court by order dated 11.6.2015 with a direction to the Commissioner of Appeals to dispose of the appeal on merits.

11. Accordingly, the Commissioner of Appeals took up the matter and dismissed the appeal by order dated 22.1.2016. This order was put to challenge before the Tribunal. However, the Tribunal dismissed the appeal by order dated 25.10.2017. Before the Tribunal, it appears that the assessee was questioned as to whether they had challenged the order dated 27.8.2013, to which, the assessee explained that they pursued the matter under the VCES as they were advised to do so. Not convinced with the explanation, the Tribunal dismissed the appeal by order dated 25.10.2017. Immediately thereafter, i.e. within about 30 days, the assessee filed an appeal before the Tribunal on 28.11.2017

challenging the Order-in-Appeal dated 27.8.2013. As there was enormous delay, together with the appeal, the assessee filed a miscellaneous application for condoning the delay. This miscellaneous petition as well as the appeal were dismissed by the impugned order on the ground that the delay had not been properly explained.

12. As already observed earlier, the explanation offered by the assessee is reasonable and convincing. Even assuming that the assessee was pursuing a wrong remedy, still the conduct of the assessee appears to be bona fide. Therefore, if the assessee was pursuing a relief in a bona fide manner, though ultimately it did not yield fruitful results to their satisfaction, the Court needs to test the conduct of the assessee in such circumstances. Thus, we are of the considered view that though the delay appears to be inordinate, it has been properly explained and the assessee has been prosecuting the matter bona fide before a different forum and they should not be non suited on the ground that they belatedly filed an appeal before the Tribunal. For the above reasons, we are of the considered view that the delay in filing the appeal should be condoned.

13. The Tribunal relied upon the decision of this Court in the case of Triveni Alloys Ltd. Vs. CESTAT, Chennai [reported in (2014) 306 ELT 617]. We find that the factual matrix in the said decision is slightly different from the case on hand, which appears to be unique.

14. Thus, we allow the above civil miscellaneous appeal, set aside the order passed by the Tribunal dated 14.6.2018 and condone the delay in filing the appeal before the Tribunal. The Tribunal is directed to take the appeal on file and decide the same on merits and in accordance with law. The substantial questions of law are answered in favour of the assessee. No costs.

s/d-
Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

To

The Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Chennai.

+1 CC to Mr.K.Jayachandran, Advocate sr 82823.
+1 CC to Mr.K.S.Ramasamy, Advocate sr 83609.

CMA.No.2813 of 2018

SSI(CO)
SP(31/12/2018)