THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

C.E.A.NO.191 OF 2018

JUDGMENT: {Per the Hon'ble Sri Justice Ramesh Ranganathan}

This appeal, under Section 35G of the Central Excise Act, 1944, is preferred against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, Hyderabad (CESTAT) in appeal No.E/31081/2016 dated 08.05.2018. Against the order passed by the Commissioner of Central Excise and Customs (Appeals), the appellant herein invoked the jurisdiction of the CESTAT, Hyderabad preferring an appeal along with an application to condone the delay of 2059 days (i.e. approximately five years) in filing the appeal before the Tribunal.

In the order under appeal, the Tribunal observed that the justification put forth by the learned counsel for the appellant, that the Managing Director had sent a copy of the order in original to his advocate for filing the appeal and, further, there was no follow up from him, was not properly evidenced nor were any efforts made by them for filing the appeal within time; the reasons put forth, in the grounds, for condonation of the delay were not acceptable; and the appellant had not put forth convincing evidence which needed consideration for condoning the delay of approximately five years. The application, for condonation of the delay, was dismissed and, consequently, the appeal also stood dismissed.

Section 86 of the Finance Act, 1994 relates to appeals to the Appellate Tribunal and, under Sub-Section (1) thereof, an assessee, aggrieved by the order passed by the Principal Commissioner of Central Excise or the Commissioner of Central Excise under Section 73 or Section 83A or an order passed by the Commissioner of Central Excise (Appeals) under Section 85, may appeal to the Appellate Tribunal against such order within three months from the date of receipt of the order. Section 86(5) of the Finance Act enables the Appellate Tribunal to admit an appeal, after expiry of the relevant period referred to in sub-Section (1) or sub-Section (3) or sub-Section (4), if it is satisfied that there was sufficient cause for not presenting it within that period.

As against the three months' period stipulated in Section 86(1) of the Finance Act for preferring an appeal, the present appeal was filed before the CESTAT with a delay of approximately five years after the adjudication order was passed by the Commissioner. The Tribunal has assigned reasons for holding that sufficient cause, for not presenting the appeal within the period stipulated in Section 86(1) of the Finance Act, had not been shown. Under Section 35G of the Central Excise Act, an appeal would lie to this Court, from every order passed in appeal by the appellate Tribunal, if the Court is satisfied that the case involves a substantial question of law. In the present case, the Tribunal has assigned reasons, for its refusal to exercise discretion under Section 86(5) of the Finance Act, to condone the inordinate delay of five years in preferring the appeal. Such exercise of discretion, in our view, does not give rise to a substantial question of law warranting exercise of jurisdiction under Section 35G of the Central Excise Act, to entertain the appeal.

Since Sri C.V.Narasimham, learned counsel for the appellant, has placed reliance on certain judgments of the Supreme Court, of this Court and the Delhi High Court, it is necessary to refer thereto. In **N.Balakrishnan v. M.Krishnamurthy**[1], the lower Court had condoned the delay of 883 days in filing the appeal. In an appeal preferred against such an order the Supreme Court held that, while sometimes delay of the shortest range may be uncondonable due to want of an acceptable explanation, in certain other cases, the delay of a very long range can be condoned as the explanation thereof is satisfactory; once the Court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior Court should not disturb such a finding, much less in revisional jurisdiction, unless exercise of discretion is on wholly untenable grounds or is arbitrary or perverse; and exercise of discretion, by the Court below to condone the delay, should not be interfered with, save where exercise of such discretion is either perverse or is wholly arbitrary.

In **Kalathi Brothers Construction Co. Pvt. Ltd. v. C.C.E. & Customs, Visakhapatnam-II**[2], the delay in preferring the appeal to the CESTAT was 780 days. A Division Bench of this Court observed that, on an appeal filed by the very same assessee against another order before another Bench of the Tribunal, the delay was condoned, though the period of delay was almost the same. In the present case, the delay is of five years, and it is not as if, in a similar appeal filed by the appellant, the delay was condoned by the Tribunal.

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[1] **2008(228) E.L.T. 162 (S.C.) : (1998)7 S.C.C. 123**
[2] **Order in C.E.A.No.114 of 2017 dated 21.08.2017**

In **Kotdwar Steels Ltd. v. Commissioner of Central Excise, Meerut**[3], the question that arose for consideration was whether the CESTAT was justified in refusing to condone the delay of 493 days in filing the appeal on the ground that it had no jurisdiction to condone the delay of more than 30 days. Placing reliance on the judgment of the Supreme Court, in **N.Balakrishnan**[1], a Division Bench of the Allahabad High Court held that there was no dispute that the ownership of the appellant was in transition, and had ultimately changed; the employee dealing with excise matters had left the company without revealing that the impugned order was passed, there was no *mala fides* or any dilatory tactics attributed to the appellant, and the CESTAT took a technical view in refusing to condone the delay. As noted hereinabove, the question of law which arose for the consideration of the Division Bench of the Allahabad High Court was whether the CESTAT was justified in refusing to condone the delay of 493 days in filing the appeal on the ground that it had no jurisdiction to condone the delay of more than 30 days.

Section 86(5) of the Finance Act confers jurisdiction on the CESTAT to condone the delay in filing the appeal beyond the three months' period stipulated in Section 86(1) of the Finance Act. The question which arises for consideration is not of absence of jurisdiction, but of the validity of the exercise of discretion by the Tribunal in refusing to condone the delay in preferring the appeal. In the order under appeal, the Tribunal has refused to condone the delay after examining the explanation furnished by the appellant for the delay. The Tribunal has assigned reasons for its

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[3] **2017(356) E.L.T. 417 (Allahabad)**

satisfaction that the explanation furnished by the appellant, for the inordinate delay in filing the appeal of 2059 days, was wholly unsatisfactory.

In **Satackline Sustems Private Ltd. v. The Commissioner of Customs & Central Excise**[4], the appellant had filed an appeal before the CESTAT along with an application to condone the delay of ten months fifteen days, and the said application was dismissed by the Tribunal. While holding that no question of law arises in cases of this nature, the Division Bench observed that a statutory right of appeal cannot be rendered redundant by dismissal of an application to condone the delay on technical grounds. The jurisdiction conferred on this Court, under Section 35G of the Central Excise Act, can be exercised only if a substantial question of law arises for its consideration. Exercise of discretion by the Tribunal, in refusing to condone the inordinate delay of around five years, does not give rise to a substantial question of law warranting exercise of jurisdiction under Section 35-G of the Central Excise Act. Unlike in **Satackline Sustems Private Ltd.**[4], where the delay was less than a year, the delay, in the present case, is of around five years. Accepting the submission of Sri C.V.Narasimham, learned counsel for the appellant, that delay is not a relevant factor, would enable any person to prefer an appeal several decades after an order is passed by the appellate authority, rendering the very object of prescribing a period of limitation, for preferring an appeal, illusory and redundant.

In **Mukesh Kumar v. Commissioner of Customs**[5], the order does not reflect the extent of delay in preferring the appeal.

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[4] Judgment in C.E.A.No.31 of 2016 dated 18.08.2016
[5] 2015(322) E.L.T. 201 (Delhi)

The Division Bench of the Delhi High Court took note of the fact that certain family problems and financial hardships had resulted in the delay, and that the delay should be condoned. As the aforesaid order of the Delhi High Court does not even record the extent of the delay, reliance placed thereupon, in an appeal preferred against the order of the Tribunal refusing to condone the delay of five years in preferring the appeal before it, is misplaced.

As noted hereinabove, in the present case, all that the appellant had stated, as explanation for the inordinate delay of five years in preferring the appeal, is that the Managing Director had sent a copy of the order to the advocate for filing the appeal, but the advocate had not filed the appeal in time. No explanation is furnished by the appellant as to why no follow up action was taken by the Managing Director of the appellant. The explanation furnished by the appellant, that the matter could not be followed up with the advocate because of difference in management, is vague and the Tribunal found it unacceptable. The present appeal is preferred against the order of the Tribunal refusing to exercise discretion to condone the delay. As we are satisfied that such exercise of discretion does not suffer from any error, much less an error which gives rise to a substantial question of law, we see no reason to exercise discretion to interfere.

While Sri C.V.Narasimham, learned counsel for the appellant, would contend that the appellant has an excellent case on merits, the fact remains that the Tribunal has dismissed the application to condone the delay and, consequently, the appeal. It would be wholly inappropriate for us, for the first time in proceedings under Section 35G of the Central Excise Act, to examine the appeal on its merits, when the Tribunal has refused to entertain the appeal on the ground of inordinate delay, in filing the appeal, of around five years.

The appeal fails and is, accordingly, dismissed. There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand dismissed.

(RAMESH RANGANATHAN, J)

(D.V.S.S.SOMAYAJULU, J)

24th October 2018
RRB