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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 23rd March, 2018*

+ CEAC 12/2018 & CM Nos.11635-36/2018

GOLDEN TOBACCO LIMITED

..... Petitioner

Through: Mr. Balbir Singh, Senior Advocate
with Mr. Siddharth Garg, Advocate

versus

**CUSTOMS EXCISE SERVICE TAX APPELLATE TRIBUNAL &
ANR.**

..... Respondents

Through: Mr. Sanjeev Narula, CGSC with Mr.
Abhishek Ghai, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

CHANDER SHEKHAR, J.

This judgment and order shall dispose of the present appeal under Section 35G of the Central Excise Act, 1944 against the order passed by the Customs, Excise & Service Tax Appellate Tribunal (hereinafter referred to as CESTAT/Tribunal) in Misc. Order No.50078-79/2018 dated 21.2.2018.

2. It is stated in the appeal that the Tribunal has rejected the application for restoration of appeal on the ground that there was a delay of more than 22 years, which was extraordinary and the Tribunal had no power to condone the same. The Tribunal failed to appreciate that the Appellant had already deposited an amount of Rs.21.26 crores, which exceeds the amount of Rs.18.83 crores; that the Tribunal had directed the Appellant to pre-deposit vide its order dated 19.08.1993. In doing so, the Tribunal failed to consider that in

Kisaan Gramdyog Sansthan and Ors. vs. Commissioner of Central Excise, Kanpur, (2015) 10 SCC 629, where pre-deposit was made belatedly, the Supreme Court passed an order directing restoration of appeal and hearing of appeal on merits in accordance with law, and without reference to the period of limitation. This principle of law has also been laid down by the Madras High Court in ***Classic Builders (Madras) (P.) Ltd. vs. Customs, Excise & Service Tax Appellate Tribunal, (2016) 54 GST 435 (Madras)*** and Madhya Pradesh High Court in ***Avtar & Company vs. Union of India, C.E.A. No. 11/2015 decided on 30.11.2015***. The Tribunal failed to appreciate that it has been held even by Gujarat High Court in ***Scan Computer Consultancy vs. Union of India, 2006 (204) EL T 43 (Guj.)*** that even if no pre-deposit was made, the appeal may not be heard, but having dismissed the appeal for non-compliance of pre-deposit does not prohibit the Appellate Authority to refuse to restore the appeal upon compliance being shown. The Tribunal also failed to consider that it has been also held in several cases by Supreme Court, including in ***Collector, Land Acquisition, Anantnag vs. Mst Katiji & Ors., (1987) 2 SCC 107***, that Courts must adopt liberal and justice oriented approach in condoning the delay. The Tribunal failed to appreciate that it was only because the Appellant was facing a financial crunch that the pre-deposit could not be made within the prescribed time. The Tribunal failed to consider that the Appellant was declared a sick unit by Board for Industrial and Financial Reconstruction ('BIFR'), who had directed to make the pre-deposit in installments. The BIFR approved the scheme of rehabilitation vide its Order dated 16.12.2002, which came into existence in the year 2003 and all the liabilities were payable as per the scheme. It was

submitted that accordingly the Appellant has made the pre-deposit in installments till March, 2011. The present appeal by the Appellant raises the following questions of law for consideration:

- “(i) Whether, the impugned order is passed in violation of the statutory right of the Appellant to contest the appeal as provided under Central Excise Act 1944?
- (ii) Whether, the dismissal of the restoration application will cause undue hardship to the Appellant inspite of compliance of the condition of pre-deposit as per the direction of Ld. Tribunal?
- (iii) Whether, delay in meeting the pre-deposit requirement, which is procedural will extinguish the primary substantive right of appeal of the Appellant?
- (iv) Whether there is any delay for filing application for restoration?
- (v) Whether the Appellant has a good prima facie case?”

3. That the Appellant (GTC) was engaged in manufacture of cigarettes in Baroda. Earlier the Appellant was getting cigarettes manufactured by its own other factory at Mumbai and from other franchisee units namely M/s Sri Chandra Tobacco Ltd., Hyderabad (SCT), M/s Suvarna Tobacco Ltd., Hyderabad (SFTPL) and Universal Tobacco Ltd, Hyderabad (UTC). The Appellant submits that they were working with the franchisee's on principal to principal basis. The Appellant was not at all a manufacturer of the cigarettes at Hyderabad. However, the Appellant being the brand owner' of cigarettes manufactured by its other franchisee's in Hyderabad, who were made a co-noticee in the show cause notices issued by Commissioner Central Excise, Hyderabad to the franchisee's on 25.03.1988. By way of these notices, all the noticees, including the Appellant, were called upon to show why duty of central excise amounting to Rs.12,34,32,231/- from SCT/GTC, Rs. 9,06,49,075/- from SFTPL/GTC and Rs.1,82,74,850/- from UTC/GTC should not

be jointly and severally demanded under the provisions of Section 11 A of the Central Excise Act 1944. That pursuant to the Show Cause Notices, adjudication proceedings took place before the Commissioner Central Excise (Adj.), Delhi and the then Collector, Central Excise, Delhi. Order dated 10.07.1992 in Original no. 25/92 confirmed the excise duty demands amounting to Rs. 12,34,32,231/- on SCT/GTC, Rs. 9,06,49,075/- on SFTPL/GTC and Rs.1,82,74,850/- on UTC/GTC, and imposed a penalty of Rs 9,00,000/- on the Appellant.

4. An Appeal bearing no. 5237 of 1992 was filed by the Appellant before the Tribunal against the aforesaid Order dated 10.07.1992. The Appellant also filed a stay Application bearing No. E/STAY /2961/92-D along with the Appeal, seeking stay of the order dated 10.07.1992 and waiver of the pre-deposit of the excise duty and penalty imposed therein. The Tribunal vide its order dated 19.08.1993 disposed of the Stay Application with the direction that the Appellants before it, should deposit Rs 12 crores in the case of SCT and Rs. 5 crores in the case of SFTPL and Rs.1 ,82, 7 4,850/- in the case of UTC, totaling to Rs. 18.83 crores, within a period of three months from the date of receipt of the said order, for consideration of the Appeal on merits. When the Appellant as well as SCT, SFTPL and UTC, due to severe financial difficulties, could not comply with the Order dated 19.08.1993, the time for pre-deposit was further extended by three months vide Order of Tribunal dated 27.01.1994. When UTC due to severe financial losses could not comply with the order of pre-deposit of Rs.1,82,74,850/-, since its factory closed long back and there was no production at all since 1987-88, it approached Andhra Pradesh High Court by way of a Statutory Appeal, praying

for a complete waiver of the requirement to pre-deposit the duty, contending, *inter alia*, that it was not possible for it to pre-deposit 100% of the duty amount within three months. Andhra Pradesh High Court after considering UTC's hardship, directed the Ld. Tribunal vide order dated 04.04.1994, to not dismiss the appeal of UTC for non-compliance of the Section 35F of the Act, subject to UTC depositing half of the amount within four weeks from that day. When UTC's Appeal came up for hearing before the Tribunal, and UTC was unable to pay the amount, the Tribunal again dismissed the appeal on 18.07.1994 for non-compliance of the pre-deposit condition. Thereafter, with regard to SCT, SFTPL and the Appellant, various proceedings took place before this High Court. Ultimately, by orders dated 03.05.1994 and 26.08.1994, this High Court confirmed the order of the Tribunal. Thereafter, when the Appellant approached the Supreme Court against the order of this High Court, it granted an extension to Appellant to pre-deposit up to December, 1994. The Appellant made similar application for extension of time before the Tribunal, as per the direction of the Supreme Court dated 13.01.1995, granting liberty to approach the Tribunal. After hearing submissions on 19.01.1995, the Tribunal directed the Appellant to jointly deposit an amount of Rs. 1 Crore upfront within two weeks and the balance of Rs. 16 crores within four weeks thereafter. With great difficulty, the Appellant arranged and advanced Rs. 1 crore each to SCT and SFTPL, that was deposited before the Tribunal on 02.02.1995. Thereafter, the Appellant was unable to deposit the balance amount of Rs. 16 crores and moved a similar application for extension of time before the Tribunal, that directed deposit in two installments of Rs. 8 crores each, one by 29.11.1995 and another by

31.01.1996. Thereafter, the Appellant moved one more application on 08.12.1995 for extension of time, since the factories of SCT and SFTPL were closed for several months, due to threats of the Central Excise Officers to stop clearances and close the factories for non-payment of the duty amount and the Appellant also did not have financial resources to pay the said amount of Rs. 16 crores. At last, the Appellant moved one more application, explaining all problems of financial hardship for not depositing the amount and requested for extension of time, since the Appellant was at the verge of closure. The Tribunal vide Order dated 08.12.1995 directed deposit by two pay orders and two cheques totaling to Rs. 1 crore, failure to deposit which would result in dismissal of appeals. However, due to heavy financial burden on the Appellant itself and also burden of the joint liability of the job workers of SCT and SFTPL, it could not deposit the amount as directed by the Tribunal and its appeals were dismissed on 07.02.1996. Upon the undertaking of the Appellant before the Andhra Pradesh High Court that it would give Bank Guarantee of 50% of the duty amount imposed on UTC, the High Court allowed the Appellant to deposit 50% of amount, i.e. Rs 90,00,000/- in four weeks. However, due to financial crunch, the said Rs. 90,00,000/- was paid by Appellant on behalf of UTC in six installments of Rs. 15 lakhs each by 26.09.1997. Since, the net worth of the Appellant completely eroded during the Financial Year 1995-96, it made a reference to BIFR under Section 15(1) of Sick Industrial Companies Act, 1985. The Appellant was declared sick in the year 1997 vide Order no. 17/97 passed by BIFR on 03.04.1997. Thereafter, a rehabilitation Sanctioned Scheme-02 was approved by the BIFR vide Order dated 16.12.2002, with cut-off date as

31.12.1998. Paragraph Q of the scheme relates to the dues of the Central Government, i.e. Income tax and Excise. Paragraph Q(f) specifically provided that *"To agree for refund/withdrawal of amounts blocked in pre-deposit amounts due to conditions imposed for hearing the appeals and not to impose such conditions of pre-deposit in future for hearing of appeals against disputed liabilities during the rehabilitation period"*. The Commissioner Excise preferred an appeal before the AAIFR in the year 2005 challenging the order dated 16.12.2002, however, the same was dismissed vide order dated 18.07.2005 'on the ground of limitation. Thus, the Order of BIFR dated 16.12.2002 attained finality and is binding on the Respondent. In view of the specific provision in SS-02, the Tribunal ought to have admitted the appeal of the Appellant without any imposition of pre-deposit. The net worth of Appellant turned positive during the financial year ended 31.03.2007 and the BIFR vide its order dated 29.06.2007 discharged the Appellant from the purview of SICA/BIFR with a direction, inter alia, that the unimplemented provisions of SS-02 would be implemented by all concerned agencies and their implementation would be monitored by the Appellant under the purview of the BIFR. After the said discharge of the Appellant from the purview of BIFR, excise duty on plain cigarettes was increased 5 times in the Union Budget 2008. As a result of the same, the domestic volume of the Company came down drastically and the accumulated losses continuously increased. Hence, the last installment of Rs. 2.06 crores could not be paid. Even by then, the Appellant had already deposited Rs. 21.26 crores, which was more than the entire pre-deposit amount of Rs 18.83 crores as directed by the Tribunal. As per the order of BIFR, the Appellant,

therefore, paid Rs. 21.26 crores in installments till March 2011, except the last installment. In the meanwhile, in a similar matter with regard to the appeals of the other manufacturing companies, namely Kanpur Cigarettes Pvt. Ltd. (KCL) and J&K Cigarettes Ltd. (JKC) (independent companies, manufacturing for Appellant), the Tribunal set aside the demand and allowed the appeals of these Companies and the Appellant on 21.03.2001. Against this order of the Tribunal, the excise department went in appeal till the Supreme Court, which vide order dated 31.07.2008, remanded the matter for hearing afresh with regard to the duty liability and flow back. The Tribunal after hearing the appeals of KCL, JKC and GTC bearing Appeal nos. E/5239, E/5238, E/5235-36/92-D, passed Order no. 751-754/2010 dated 27.10.2010, holding that the Appellant was not a manufacturer and no excise duty liability of the manufacturers KCL and JKC can be demanded from the Appellant.

5. During the pendency of the scheme, the Income-tax department issued notice of attachment of properties of the Appellant. The Appellant filed an application before the BIFR stating violation of the scheme by the Income-tax department and withdrawal of the attachment notice. The BIFR was pleased to issue direction to the Income-tax department to withdraw the notice which the department challenged before AAIFR. The AAIFR also rejected the appeal and upheld the order of BIFR. In the meanwhile, the Appellant filed an application for extension of the sanctioned scheme on the ground of violation of the scheme by the Income-tax department by issuing the attachment notices and that it could not make the last installment before the Tribunal. The BIFR rejected the claim of the Appellant. Thereafter, the Appellant preferred an appeal

before AAIFR, however, the same was also rejected. Thereafter, the Appellant challenged the Order of AAIFR before this Court by way of a Writ Petition, however, the same was withdrawn, and the statement of counsel was recorded that he would file a Modified Draft Rehabilitation Scheme (MDRS) as per majority opinion of AAIFR, before BIFR. Accordingly, the Appellant filed MDRS before BIFR. In the meanwhile, AAIFR dismissed the application of the Income-tax department for attaching the properties of Appellant during the rehabilitation period. The Income-tax department challenged the order of AAIFR before this Court, however, the petition was dismissed. Thereafter, the Department preferred S.L.P. No. 26747 of 2012 (C.A. No. 5038 of 2016), which on 31.08.2012 directed the Department to not alienate the properties of the Appellant. The Supreme Court disposing of C.A. No.5038 of 2016 (S.L.P. (C) No. 26747/2012) vide Order dated 12.05.2016 held that the MDRS is not maintainable, and that the Income-tax Department shall be entitled to take steps for attachment of properties of the Appellant as per provisions of Income-tax Act and shall be entitled to sell the same. Accordingly, the Income-tax department attached the properties of the Appellant. In the meanwhile all the consortium Banks also took possession of other properties of the Appellant which were mortgaged to them. Thereafter, Income-tax appeal nos. 5996/Mum/1993, 1055/Bom/94 and 1056/94 preferred by the Appellant, which were pending before the Income Tax Appellate Tribunal, were allowed vide Order dated 07.03.2017, holding that there was no flow back to the Appellant. As soon as the Order no. 751-754/2010 dated 27.10.2010 was passed by the Tribunal, the management of the Appellant directed the concerned person to file

the application for restoration of appeal, in the present case, who informed that after consulting the counsel, restoration application had been filed. However, thereafter the concerned person retired and left the Appellant. When the restoration application filed by Appellant was not listed on board before the Tribunal for hearing for a long period, the Appellant made an enquiry from the Registry of the Tribunal and learnt that no such application was on its record and consequently, the applications were not listed for hearing. The Appellant searched for the relevant files in its office, wherein the inter office memo informing the filing of the restoration application was found, but the restoration application was not found. It transpired that the concerned person had not taken any confirmed action in the matter and probably did not ensure that the said restoration application was filed. It is submitted that in fact, there was no delay at all as the Appellant was under the shelter of BIFR till May, 2016, and if at all there was a delay, then that is only of 14 months. This was a bona fide mistake and same may be condoned. The Appellant also filed with the said restoration application before the Tribunal, an Affidavit in support of its contentions on condonation of the said delay.

6. Learned Senior Counsel for the appellant submitted that the Tribunal has erroneously dismissed the application for restoration on the ground of extraordinary delay, without appreciating the law and facts of the present case. It is also submitted that there is no concept of any extraordinary delay in law, particularly when the facts show the reasonable cause, duly supported by an affidavit. The appellant was under the shelter of BIFR in May, 2016. It is also submitted that the appellant was having a good *prima facie* case in its favour and

the joint liability demand and penalty was imposed without any cogent evidence and in violation of the principles of natural justice. The Court must adopt liberal and justice oriented approach in condoning the delay. The Tribunal failed to consider that the right to prefer an appeal is a statutory right touching the substantive right of the appellant. The Tribunal failed to appreciate that the appellant had already deposited an amount of Rs.21.26 crore, which exceeds the amount of Rs.18.83 crore. The impugned order is not only perverse and erroneous but also has failed to take judicial precedents in its true spirit.

7. We have gone through the order of the Tribunal. The Tribunal noticed in the impugned order that there is a delay of more than 22 years, which is extraordinary and the Tribunal has no power to condone such extraordinary delay. Hence, the application for condonation of delay in filing the restoration application was rejected. Consequently, the application for restoration was also dismissed.

8. There is no doubt, as is evident from the record that the delay in filing the application for restoration of appeal is about 22 years. The appellant has filed the restoration application as per convenience and after two decades. They were granted sufficient time by the Tribunal in the light of the order of the Supreme Court for extension of time for making the pre-deposit, but they failed to deposit even after a lapse of three years from the date of passing the pre-deposit order dated 19.1.1993.

9. The list of dates and events filed by the appellant itself demonstrate sheer negligence and lack of bona fide, and is as under:-

A	<u>DATE</u>	<u>Description</u>	<u>Remarks</u>
1.	10.07.1992	Order passed by the Commissioner confirming demand of duty of around Rs.23 crores besides imposing penalty.	
2.	19.1.1993	Stay Order passed	Tribunal Directed pre deposit of Rs.18.83 Crores
3.	7.2.1996	Appeal dismissal Order passed by the Tribunal.	
4.	3.4.1997	BIFR Order declaring appellant sick Company.	
5.	16.12.2002	BIFR Order sanctioning Scheme	Excise duty liability in question was taken into account.
6.	18.7.2005	Central Excise Department challenged BIFR Scheme before the AAIFR which was dismissed	
7.	1995 to 2011	Appellant deposited an amount of Rs.21.26 crores	
8.	27.10.2010	Tribunal in identical case involving appellant and other job worker manufacturers held that duty liability is only to be confirmed against the manufacturer job worker and appellant cannot be made liable to duty.	
9.	December 2010	Managing Director directed Vice President (Law) to file restoration application with the Appellate Tribunal.	
10.	28.08.2011	Vice President Confirmed that Restoration application has been filed.	

11.	2017	On coming to know that there is no restoration application pending, Appellant filed fresh Restoration Application on account of compliance of pre-deposit.	
12.	21.02.2018	The Tribunal vide its impugned order dated 21.02.2018 has held that "Tribunal has no power to condone this extraordinary delay".	

10. We have quoted the facts, as narrated in the grounds of appeal, in paragraphs 2 to 6 above, and would observe that the appellant has tried to obfuscate facts. The appellant having suffered an adverse Order in Original dated 10th July, 1992 deciding the show cause notices dated 25th March, 1988, had filed appeals before the tribunal with applications seeking waiver of pre-deposit. As per the Order in Original, the appellant was liable to pay Rs.23.22 Crores in all, the break-up being Rs.12.34 crores, 9.06 crores and Rs.1.82 crores in respect of transactions or manufacture undertaken by SCT, SFTPL and UTC respectively. Penalty imposed was in addition. Tribunal by order dated 19th August, 1993 had directed the appellant to deposit Rs.12.0 crores, Rs.5.0 crores and Rs.1.82 crores in the three cases (Rs.18.83 crores in all) within three months as a pre-condition and stipulation for hearing the appeals on merits.

11. The appellant had challenged the pre-deposit order before the High Court and the Supreme Court, with alternative prayer for extension of time for compliance. Extension of time was granted and terms were also modified. However, the terms imposed were not

adhered to and complied as only part payments were made. Non-compliance is admitted.

12. The Tribunal on 7th February, 1996 dismissed the appeals for failure of the appellant to make the pre-deposits. The order of dismissal and non-compliance was made nearly three and a half years after the Order in Original dated 10th July, 1992 and the order of the Tribunal directing pre-deposit dated 19th January, 1993. Thus, sufficient time and opportunity was granted

13. The order of dismissal of the appeal dated 7th February, 1996 was not challenged for 22 years. In 2017, the appellant woke from slumber and moved a miscellaneous application for restoration of the appeal primarily on the pretext that disputed tax had been paid. This delay of 22 years cannot be condoned on vague assertions and general statements that law of condonation of delay is liberal and justice would prevail if the appeals are heard on merits for payments have been made. Such pleas are specious and deserve rejection.

14. As noticed above, show cause notice for clandestine manufacture/sale etc. was issued on 25th March, 1988. The Order in Original was passed on 10th July, 1992. Recoveries obviously had to be made, especially once the Order in Original had become final. Mere recoveries or even payment after years cannot result in restoration of the appeals or justify condonation of delay in moving the restoration application.

15. Appellant states that, pursuant to the orders passed in October, 2010 in cases of independent companies, in December, 2010, Vice-President (Law) was asked to file restoration application in the appeals before the Tribunal. The plea is not substantiated. It is accepted that no restoration application was filed. Contention that the

appellant company was not aware of default by the Vice-President (Law) and had assumed that the restoration application had been filed, is moonshine, doctored and apparently false for it is accepted that till 2017 no attempt was made to ascertain and verify whether the application was listed and the order passed. Copy of the application is not on record and could never be located.

16. Contention that proceedings were pending before BIFR and therefore, restoration application could not be filed, is again not the true reason and cause for not filing restoration application. Tribunal had dismissed the appeals for non-payment of the pre-deposit on 7th February, 1996, a year before the appellant was declared as sick company by BIFR vide order dated 3rd April, 1997. Exact date when the reference application was filed before the BIFR is not indicated. Reference application before the BIFR was registered as Case No.17/97. A scheme was approved and sanctioned on 16th December, 2002. As per the appellant, BIFR had directed refund/withdrawal of pre-deposit and had directed non imposition of pre deposit during the rehabilitation period. No application was filed before the Tribunal for revival of the appeals. Net worth of the appellant turned positive during the financial year ending 31st March, 2007 and the BIFR vide order dated 29th June, 2007 had discharged the appellant from purview of the enactment relating to sick companies, though as per the appellant direction to implement provisions of the scheme and monitoring before the BIFR had continued. Even thereafter, no application was filed before the Tribunal for ten years, till 2017. The appellant clearly accepted the order of the Tribunal and did not seek revival of the appeals and hearing on merits.

17. In view of the aforesaid discussion, we do not find any valid ground or reason to interfere with the impugned order. The appellant has been grossly negligent and derelict. Their inaction reflects acceptance and abandonment. The appellants have failed to show good cause and justification. On the other hand, their conduct lacks *bona fide* and manifests recklessness. This careless attitude and indifference is unacceptable.

18. There is no doubt that liberal construction of the words 'sufficient cause' can be put when there is neither negligence nor inaction nor want of bona-fides imputable to the applicant. However, in this case, there is not only negligence, but also inaction as well as the petition lacks bona-fides. There is virtually no explanation for a substantial portion of period spanning over 22 years. The list of dates and events itself demonstrate that for years, the appellant was inactive and in a state of acceptance and a vague description of events is submitted, which only demonstrates their lack of bona fide and gross negligence. Hence, we do not find any flaw or infirmity in the order of the Tribunal, rejecting the application for condonation of delay in filing the restoration application and accordingly dismissing the application for restoration. Judgments relied by the appellant are based on facts, hence, are not of any help, in view of the facts of the present appeal, which are glaring and deserve no indulgence and leniency.

19. In view of the aforesaid discussion, we do not find any ground to issue notice in the present appeal impugning the order dated 21.2.2018, dismissing the application for condonation and to direct restoration of Excise Appeal No.5237/1992 to hear the same on

merits. As the appeal is dismissed without issue of notice, we do not impose costs. All the pending applications are also dismissed.

CHANDER SHEKHAR, J

SANJIV KHANNA, J

MARCH 23, 2018

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