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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CUSAA-47/2017

Date of decision: 1st February, 2018

JITENDER BHASIN

..... Appellant

Through Mr. Pradeep Gupta, Mr. Parinav Gupta,
Ms. Mansi Gupta and Mr. Moazzam Ali,
Advocates.

versus

COMMISSIONER OF CUSTOMS & ANR.

..... Respondents

Through Mr. Sanjeev Narula, Sr. Standing
Counsel for Customs with Mr. Abhishek Ghai,
Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL)

Appellant, Jitender Bhasin, has filed the present appeal under Section 130A of the Customs Act, 1962 (Act, for short) impugning orders dated 20th October, 2014 and 2nd February, 2017 passed by the Customs, Excise and Service Tax Appellate Tribunal (Tribunal for short) in appeal No. 57641/2013.

2. The aforesaid appeal has a rather peculiar history, and has resulted in anomalous and confusing orders of the Tribunal as noted below.

3. By order dated 11th December, 2017, we had framed the following substantial question of law:-

“Whether the Customs, Excise and Service Tax Appellate Tribunal was right in passing the order dated 2nd February, 2017 and dismissing the application for rectification on the ground that the Tribunal does not have any power of review and hear the appeal on merits notwithstanding the fact that the appellant had filed an application that there was error apparent on the face of the order dated 20th October, 2014.”

This order also records statement of the appellant that the present appeal may be treated as directed against the order dated 2nd February, 2017. Respondents were required to ascertain and file an affidavit whether the application enclosed as Annexure P-11 (page-222) was argued before the Tribunal when the order dated 24th February, 2017 was passed. Reference in fact was to the order and hearing before the Tribunal on 7th September, 2016. Affidavit has not been filed and it is stated that the respondents are not in a position to file any such affidavit. Therefore, we are not adjourning the appeal to enable the respondents to file an affidavit.

4. We would now note the peculiar factual matrix of the present case.
5. The appellant had filed Appeal No. 57641/2013 before the Tribunal on 25th May, 2013 impugning order-in-original dated 20th March, 2007 passed by the commissioner of Central Excise (Adj.). Appellant professed being unaware of the order dated 20th March, 2007 and that this order was never served on him, till Assistant Commissioner of Customs (Recovery) had informed him about the adjudication order against M/s. Chopco Fashions. He was then served with the copy of the order-in-original dated 20th March, 2007 by hand on 25th February, 2013. Accordingly, the appeal

filed before the Tribunal on 25th May, 2013 was within time, as copy of the impugned order-in-original was served on 25th February, 2013.

6. The appeal was taken up for consideration and an interim order dated 15th September, 2014 was passed in favour of the appellant. Notwithstanding the fact that it was the case of the appellant that the appeal was filed within time, Tribunal vide order dated 15th September, 2014 had directed the appellant to explain purported delay.

7. The appeal was next taken up for hearing on 20th October, 2014 and was dismissed, recording:-

“Vide interim order dated 833/2014 dated 15.9.2014, Revenue’s objection as regards the appeal being barred by limitation was taken not of and the applicant was directed to explain the delay, matter was adjourned to today. On matter being called today, one Mr. Ritesh appeared and submitted that he is given his vakalatnama on behalf of Mr. P. Gupta another advocate today itself.

2. Learned DR strongly objects to the said request of the advocate who is not even an advocate on record inasmuch as he has not filed his vakalatnama.

We note that there is no explanation at (sic) to whether inspite of period of one month and five days no COD application stand filed by the appellant. Inasmuch as the appeal is admittedly beyond the normal period of limitation, we find no reason to keep the same on record. Accordingly, the appeal is dismissed as barred by limitation along with the dismissal of stay petition.”

8. The appellant thereafter filed an application for rectification under Section 129A (7) of the Act dated 5th December, 2014 (Annexure P-11 to the writ petition), contending that the appeal preferred was within the prescribed period of three months from the date of communication of the order-in-original. Hence, there was an error apparent in the order dated 20th October, 2014, for the issue was whether the appeal was preferred within limitation period, and not whether delay in filing of the appeal should be condoned. The appellant had clearly contended that there was no issue or question of condonation of delay, as the starting point of limitation would be the date of communication of the order to the appellant and not the date on which the order under challenge was passed.

9. Aforesaid miscellaneous application came up for hearing before the Tribunal on 6th July, 2015, and was dismissed in default, recording that on the application being called, there was no representation or request for adjournment. The appellant thereafter filed another application on 4th August, 2015 to restore the Appeal No. 57641/2013, stating that his counsel had reached the Tribunal at 11:00 clock on 6th July, 2015, but by then the miscellaneous application had been dismissed in default. Due to heavy rain and traffic jam, counsel for the appellant could not to reach and appear in the matter on the first call.

10. This application filed on 4th August, 2015 was taken up for hearing on 10th February, 2016 and adjourned to 13th February, 2016 with a direction to the departmental representative to seek comments from the Commissioner and file a detailed date chart. The appellant was asked to file a better application for condonation of delay.

11. Pursuant to the said directions, the appellant filed a detailed application for condonation of delay on 9th June, 2016, with the prayer that the delay, if any, may be condoned. The appellant had referred to and relied on Sub-Section 3 to Section 129A and was asserting that the appeal preferred was within time, for the starting point for limitation would be the date of communication of the impugned order and not the date of passing of the order.

12. The aforesaid applications were taken up for hearing and were allowed by the Tribunal vide order dated 7th September, 2016, which for the sake of completeness, is reproduced below:-

“The applicant has filed this Misc. application for restoration of Appeal No. 57641/2013, which was dismissed by the Tribunal vide order dated 20.10.2014 for non-filing of the COD application. Against the order of dismissal, the applicant has filed the Misc. application for restoration of appeal, which was dismissed vide order dated 6.7.2015 for non-prosecution. Thereafter, the applicant has filed another Misc. application, praying for restoration of the appeal on the ground that due to heavy rain and traffic jam, the Counsel of the applicant reached the Court room at 11.00 hrs. on 6.7.2015 and by the time he reached the Court, the matter was called and order dictated, in dismissing the Misc. application of the applicant.

2. Considering the peculiar facts and circumstances of this case, we allow this Misc. application and list the COD application for hearing on 30.9.2016 Misc. application is disposed of.”

13. This order dated 7th September, 2016 has not been challenged by the appellant or the respondent. In terms of the aforesaid directions, the

application for condonation of delay (referred to as COD) was taken up for hearing before the Tribunal on 30th September, 2016. Application for condonation of delay was taken up for hearing with the appeal on, 24th February, 2017, when the following order was passed:-

“5.After hearing both sides and on perusal of records, it appears that on 20.10.2014, this Tribunal dismissed the appeal as barred by limitation alongwith the dismissal of stay petition. The RoA application No. 56198/2014, C/COD/56199/2014 in C/57641/2013-CU was also dismissed by the Tribunal.

6. By following our earlier order (supra), we are unable to hear the application on merit. The Tribunal has no power to review its own order as per the ratio laid down in the following cases:

- (i) ITO vs. ITAT & Another -229 ITR 651 (Pat.)
 - (ii) Deeksha Suri vs. ITAT -232 ITR 395 (Del.)
- There is no mistake apparent on record.

7. Hence, the CoD application is without merit and the same is dismissed alongwith the appeal.”

14. We are in agreement with the appellant that the aforesaid reasoning cannot be sustained in view of the peculiar facts and circumstances of the present case and also in view of the order dated 7th September, 2016. As noticed above, this order dated 7th September, 2016 has attained finality and even if the said order was contrary to law, the same cannot be reviewed or recalled. Moreover, the principal and core issue, which arises for consideration, is different. The primary aspect, which has to be examined and answered, is the date on which the order-in-original dated 20th March, 2007 was communicated and served on the appellant and whether the stand

of the appellant that this order was communicated and served for the first time on 25th February, 2013 was correct. It is case of the appellant that the appeal was not time barred. Counsel for the respondent before us had submitted that the assertion of the appellant that the order-in-original dated 20th March, 2007 was not communicated and was served for the first time on 25th February, 2013 is wrong and fallacious. The factual dispute would have to be examined by the Tribunal. In view of the stand of the assessee, the Tribunal would have to decide whether or not the appeal preferred by the appellant was within limitation. Issue would also arise whether limitation period would commence or taken from the date of the impugned order, date on which the order was issued or sent by post or the date on which the order was served. The second aspect/issue is a question of law. Factual and legal aspects are interconnected. In case the Tribunal comes to the conclusion that the date of the order or the date of issue would be the starting point of limitation, then the Tribunal would have to examine and decide the question of condonation of delay.

15. We have deliberately not commented on merits and have refrained from going into factual matrix. This aspect has to be examined by the Tribunal.

16. In view of the aforesaid position, we partly allow the present appeal and answer the question of law in favour of the appellant-assessee and against the revenue with an order of remand to the Tribunal to decide the questions/aspects noted above. We clarify that we have not gone into the merits of the issue raised, i.e., whether the appeal preferred by the appellant

is within limitation or not. This is the core issue which would be decided by the Tribunal.

17. In order to cut short delay, the parties are directed to appear before the Tribunal on 27th February, 2018, when a date of hearing would be fixed.

18. With the aforesaid observations and directions, the appeal is disposed of without any order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

FEBRUARY 1st, 2018
MR/NA/VKR



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