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HIGH COURT OF CHHATTISGARH, BILASPUR

TAXC No. 22 of 2018

- Bharat Sanchar Nigam Limited General Manager, Telecom, District Administrative Building, Raipur Fafadih Chauk, Raipur, District Raipur, Chhattisgarh, Pin 492001

---- Appellant

Versus

1. Central Excise & Service Tax Appellate Tribunal, Through President, West Block No.2, R.K.Puram, New Delhi
2. Commissioner, Central Excise and Customs (Appeal-I) Central Excise Building Raipur, Dhamtari Road, Tikrapara, Raipur, Chhattisgarh 492001

-----Respondents

For Appellant	:	Shri Sandeep Dubey, Advocate
For Respondents	:	Shri Maneesh Sharma, Advocate

Hon'ble Shri PR Ramachandra Menon, Chief Justice &
Hon'ble Shri Justice Parth Prateem Sahu
Order on Board

Per PR Ramachandra Menon,CJ

13.08.2019

1. The order passed by the CESTAT (Custom Excise and Service Tax Appellate Tribunal, New Delhi) declining interference and dismissing the appeal filed by the appellant against the order passed by the Commissioner (Appeals) in dismissing the First Appeal for inordinate delay, is subjected to challenge in this case preferred in terms of Section 35G of the Central Excise Act, 1944.

2. Heard the learned counsel representing the appellant and the standing counsel representing the department.

3. The factual matrix reveals that the appellant who is a Public Sector Company belonging to the Central Government, had availed Cenvat Credit facility under Cenvat Credit Rules, 2004 for the period in question and had filed returns accordingly before the competent authority. However, taking note of the fact that the credit availed by the appellant was not correct or sustainable, either on facts or in law, a show-cause notice was issued by the Additional Commissioner on 19.04.2006.

4. The learned counsel for the appellant submits that a detailed reply was submitted in response to the show-cause notice as to the relevant facts and figures, which however, were not considered properly and adjudication was finalised as per Annexure A/3, order dated 30.03.2007.

5. It is the case of appellant that the original order passed by the adjudicating authority was never served to the appellant till 07.02.2012 and immediately on receipt of the same, Annexure A/6 appeal was preferred before the Commissioner (Appeals) on 12.03.2012 with an application for condoning the delay, referring to the sequence of events. However, the Commissioner rejected the appeal for inordinate delay of 'four years and eleven months' as per Annexure A/2 order dated 27.04.2012, which was put to challenge before the Tribunal by a further appeal in terms of the relevant provisions of law.

6. The learned counsel submits that the Tribunal unfortunately passed a cursory order as borne by Annexure A/1 dated 02.02.2018, simply dismissing the appeal on the ground of delay, virtually affirming the order passed by the Commissioner (Appeals) and without entering into the merits of the case. This made the appellant to feel aggrieved and hence the appeal.

7. The learned counsel representing the department submits that there is absolutely no merit with regard to the contentions raised by the appellant as to the receipt of the original order. It is stated that the order dated 30.03.2007 was sent by registered post on 04.04.2007, as taken out by the Tribunal in opening paragraph of the order under challenge. The learned counsel further submits that the appellant themselves have admitted in Annexure A/4, as to the receipt of a copy of the order on 18.01.2012, as discernible from the opening paragraphs of Annexure A/4 which read as follows:

> "Kindly refer above letter No. which was received by the undersigned on 18.01.2012 though this order was previously received by this office on our request made vide letter No.A Service Tax/Appeal/32/ST/RPR/3 dated 01.11.2008.
>
> The above case was attended by Shri S.C.Goldar, Sr.AO and Shri P.K.Khare, JAO on 16.03.2007. Both the officers were transferred from this office in the year 2008 and 2009 respectively. Apart from this Shri N.K.Sahoo, CAO/IFA has also been transferred from this office."

8. The receipt of the order is also conceded in Annexure A/5 proceedings dated 07.02.2012 submitted by the appellant before the Superintendent, Central Excise, Raipur. The operative portion of the said order reads as follows :

> "The above referred letter was collected by Shri V.S.Patel, Accounts Officer (Cash) O/o GMTD Raipur on <u>03.02.2012</u>.

> In this respect your kind attention is drawn against the above order passed by the Additional Commissioner, Central Excise H.Q. on 30.03.2007.
>
> Though the above order was passed on 30.03.2007 but original order was not received till date. However, on the request of this office letter No.A Service Tax/Appeal/32/ST/RPR/3 dt 01.11.2008, the copy of the ahbove order was made available vide your letter no. ST/BSNL/Misc.Corres/RPR/R-ST/06/2007/419 dated 06.11.2008 which was received on 15.11.2008."

9. From the above, it is quite evident that the appellant was in receipt of the order on the basis of their request dated 01.11.2008, at least on 15.11.2008 and still, there was no move from the part of the appellant to challenge the proceeding by filing an appeal within the stipulated time.

10. Learned counsel for the appellant submits that the delay has been properly explained and the same was sought to be condoned by Annexure A/6 dated 10.12.2012. The so called reason for condoning the delay of '4 years and 11 months' is as given below:

> "Ref:Order No.32/ST/RPR/ADC/ dated 30/03/2007 received on dated 18.01.2012
> L.No.V(CH.72) 15-95/ADC/RPR/2006/Adj 7032 Dated 30.03.2007
>
> With reference to the aforesaid order, this is to bring to your kind attention that BSNL, A Govt of India Enterprise, haven't received the aforesaid Order in Original until today.
> It came first into our Notice on the request intimated vide our Letter A Service Tax/Appeal/32/ST/RPR/3 dt 01.11.2008 to your Service Tax Department, Revenue Building Office. But due to emergence of unavoidable circumstances, whereby, our Office had been shifted to New Building, moreover our Officer In charge, CAO/IFA including other official have been

> transferred from our Office. Concomitantly, non-receipt of an aforesaid Order has deprived us from responding.
> Owing to which, we were deprived from filing the Appeal. That there is nothing intentional or deliberate on the part of the BSNL, A Govt of India Enterprise, but due to unavoidable circumstances that the Appeal is not been filed"

11. It was after considering the said explanation, that the Commissioner (Appeals) passed Annexure A/1 order holding that the said explanation was not satisfactory, dismissing the petition for condoning the delay and as a natural consequence, the appeal as well. The correctness of the said proceeding was put to challenge before the Tribunal who noted that the original order dated 30.03.2007 was despatched by registered post on 04.04.2007. In addition to that, the appellant was given a copy of the order on 11.12.2007, despite which the appeal was filed before the Commissioner(Appeals) only on 12.03.2012, as noted in the opening paragraph of the order under challenge.

12. With regard to the prescribed time within which the appeal has to be preferred, the Tribunal made a reference to the Section 85 of the Finance Act, 1994 and the law declared by the Apex Court in **Singh Enterprises Vs Commissioner of C.Ex Jamshedpur** reported in (2008) 150 ECR 1 (SC). Accordingly, the correctness of the verdict passed by the Commissioner(Appeals) in dismissing the appeal was upheld by passing Annexure A/1 order, which is sought to be interdicted by this Court.

13. With regard to service of the order, first of all, it is to be noted that the original order was sent by registered post on 04.04.2007. A copy of the order was requested for by the appellant way back in the year '2008' and the same was served to them, on more than one occasion, as conceded by them in Annexure A/4 and A/5. Despite this, the appeal was admittedly preferred only in the year '2012' with a petition for condoning the delay as shown in Annexure A/6, which we have already extracted above. The acceptability of the explanation was considered by the Commissioner (Appeals), who held it against the appellant, which came to be affirmed by the Tribunal as well.

14. We are aware of the ruling rendered by the Apex Court as per decision reported in (1998) 7 SCC 123 in **N Balakrishnan Vs M Krishnamurthy** to the effect that 'extent' of delay is not the matter which weighs much, but the 'explanation'. The explanation offered by the appellant as per Annexure A/6 is virtually regarding shifting of the office or transfer of some of the employees, which cannot be considered as proper explanation, much less any satisfactory explanation. It was accordingly that non-satisfaction was recorded by the Commissioner (Appeals), in turn leading to Annexure A/9 order which came to affirmed by the Tribunal as per Annexure A/1 order dated 02.02.2018. We find no tenable ground to interfere. We also find support from the ruling rendered by the Apex Court reported in AIR (1970) SC 470 in **Rabindra Nath Bose and others Vs Union of India and others** to the effect that the power of this Court is not to extend relief to persons who are resting in arm chair; unmindful of their rights.

15. The learned counsel representing the respondent submits that the mandate of Section 85 of the Finance Act, 1994 is very clear and that the appeal had to be preferred within three months. It is also stated that the statute stipulates the maximum time limit which could be condoned by the authority concerned. The said power cannot be extended any further, which otherwise would amount to re-writing the statute. It is stated that this question was considered by this Court by a common judgment dated 17.05.2019 in bunch of appeals having the lead case Writ Appeal No.262 of 2019 (authored by one of us- PR Ramachandra Menon, CJ).

16. We are aware of the said judgment. The legal position was explained with reference to the law declared by the Apex Court in **Oil and Natural Gas Corporation Limited Vs Gujarat Energy Transmission Corporation Limited & Others** reported in (2017) 5 SCC 42.

17. We do not find any tenable ground to interfere. Accordingly, the appeal is dismissed.

Sd/-
(PR Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

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