

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 14392 OF 2018**

Vishal Enterprises .. Petitioner
VS.
Union of India and ors. .. Respondents.

Mr. Bharat Raichandani a/w. Ms Pragya Koolwal I/b UBR Legal
for the Petitioner.

Mr. Karan Adik a/w. Ms Maya Majumdar for Respondent NO.2.

**CORAM: M.S. SANKLECHA, J.
AND M.S.SONAK, J.
DATE : 14 JUNE 2019.**

PC

- 1] Heard learned counsel for the parties.
- 2] Mr. Bharat Raichandani, learned counsel for the petitioner, on the basis of instructions, states that the petitioner does not press reliefs in terms of prayer clauses (a) and (b) of this petition. The statement is accepted.
- 3] In view of the aforesaid, the main challenge in this petition is to the order-in-original dated 31st January 2017 made by Additional Commissioner of Service Tax – I (respondent No.3) confirming *inter alia* demand of service tax of Rs.35,06,153/-.
- 4] As against the impugned order dated 31st January 2017, the petitioner had in fact instituted an appeal to the Commissioner (Appeals). However, this appeal was instituted not only beyond the prescribed period of limitation, but also

beyond the period of 30 days condonable by the Commissioner (Appeals). Therefore, following the decision of the Hon'ble Supreme Court in ***Singh Enterprises vs. Commissioner of Central Excise, Jamshedpur – 2008 (221) E.L.T. 163 (SC)***, the Commissioner of Appeals declined to entertain the appeal, as being time barred. By virtue of prayer clauses (a) and (b), the petitioner had in fact questioned the order of Commissioner (Appeals) dated 3rd January 2018 and had also sought for relief of condonation of delay in institution of such appeal. However, as noted earlier, these reliefs have not been pressed.

5] Mr. Raichandani submits that the impugned order dated 31st January 2017 depicts that the Adjudicating Authority has acted in flagrant disregard to the law and has violated the principles of natural justice. He submits that before the Adjudicating Authority, the petitioner has specifically contended that the petitioner was entitled to the benefit of exemption notification since, the petitioner, was providing services to defence and other Government establishments. He submits that such contention was rejected on the sole ground that the petitioner failed to produce the exemption notification before the Adjudicating Authority. He submits that no opportunity was granted to the petitioner to produce such notification and the Adjudicating Authority in any case, ought to have been presumed to have known about such notification. Mr. Raichandani, therefore, submits that the impugned order warrants interference, notwithstanding the fact that the petitioner failed to institute an appeal against the same within

the prescribed period of limitation before the Adjudicating Authority.

6] Mr. Karan Adik, learned counsel for the respondent No.2, points out that the petitioner not only delayed in institution of the appeal against the impugned order, but that there is further inordinate and unexplained delay in the institution of this petition as well. He points out that since there is no explanation for the inordinate delay in the institution of present petition, the same may be dismissed. In any case, he points out that the petitioner did not even specify the notification upon which it was relying upon or make out any case as to how it was covered under such exemption notification. He submits that such grounds belatedly raised may not be covered in this petition, particularly, since there is no error of jurisdiction pointed out.

7] Mr. Raichandani had relied upon the following decisions in support of his contention that this Court can always examine the legality or otherwise of the order -in-original, even though the appeal against such order may have been dismissed as time barred.

(i) Panoli Intermediate (India) Pvt. Ltd. vs. Union of India – 2015 (326) E.L.T. 532 (Guj);

(ii) Electronic Corporation of India Limited Vs. Union of India & anr. - 2018 -TIOL-484-HC-AP-CX-LB.

8] In *Panoli Intermediate (India) Pvt. Ltd. (surpa)* the Full Bench of the Gujarat High Court was dealing with a reference. At paragraph 31, the Full Bench has answered the questions which arose in the reference, in the following terms.

“31. We may now proceed to answer the question
(1) Question No.1 is answered in negative by observing that the limitation provided under Section 35 of the Act cannot be condoned in filing the appeal beyond the period of 30 days as provided by the proviso nor the appeal can be filed beyond the period of 90 days.

(2) The second question is answered in negative to the extent that the petition under Article 226 of the Constitution would not lie for the purpose of condonation of delay in filing the appeal.

(3) On the third question, the answer is in affirmative, but with the clarification that

A) The petition under Article 226 of the Constitution can be preferred for challenging the order passed by the original adjudicating authority in following circumstances that

(A.1) The authority has passed the order without jurisdiction and by assuming jurisdiction which there exist none, or

(A.2) Has exercised the power in excess of the jurisdiction and by overstepping or crossing the limits of jurisdiction, or

(A.3) Has acted in flagrant disregard to law or rules or procedure or acted in violation of principles of natural justice where no procedure is specified.

B) Resultantly, there is failure of justice or it has resulted into gross injustice.

We may also sum up by saying that the power is there even in aforesaid circumstances, but the exercise is discretionary which will be governed solely by the dictates of the judicial conscience enriched by judicial experience and practical wisdom of the judge.”

(emphasis supplied)

9] In *Electronic Corporation of India Limited (supra)*, again, the Full Bench of the High Court of Andhra Pradesh/Telangana, in a similar matter, has answered the reference, holding that a writ petition would lie against an order-in-original against which an appeal was filed and dismissed as time barred or no appeal had been preferred as it would have been time barred, provided sufficient grounds are made out warranting exercise of the power of judicial review under Article 226 of the Constitution of India. In this regard, it was also not be necessary for the writ petitioner to assail the orders, if any, dismissing his appeal as time barred, be it by Appellate Authority or Tribunal in the event he chose to invoke such appellate remedy. On the scope of judicial review in such matters, the Full Bench has in fact followed the ruling of the Full Bench of the Gujarat High court in *Panoli Intermediate (India) Pvt. Ltd. (supra)*.

10] Upon due consideration of the contention raised by Mr.Raichandani, we are satisfied that the contention as raised neither relates to jurisdiction of the Adjudicating Authority nor can it be said that the Adjudicating Authority has acted in flagrant disregard to the law or violated principles of natural justice. The petitioner's plea with regard to the applicability of exemption notification was quite vague, inasmuch as the petitioner did not even bother to specify the exemption notification in question. Besides, in order to avail the benefit of exemption notification, it was for the petitioner to establish that the petitioner fulfilled the conditions with regard to supply to the specified agency. Merely raising a contention that the

petitioner was entitled to benefit of exemption notification, really does not suffice in such matters.

11] Upon perusal of the order-in-original, we cannot say that the benefit of exemption notification was declined to the petitioner only because the petitioner failed to produce the exemption notification. In any case, these are really grounds which the petitioner, ought to have raised in appeal and these are not the grounds as contemplated in paragraph 31(3)(A) of the decision of the Full Bench in *Panoli Intermediate (India) Pvt. Ltd. (supra)*.

12] Besides, we find that though the impugned order was made on 31st January 2017, this petition has been instituted some time in August 2018. Even if some reasonable allowance is made for the circumstance that the petitioner had instituted appeal, which was itself time barred before the Appellate Authority, there is no explanation whatsoever for the delay between 3rd January 2018 and August 2018 in instituting present petition. This is an additional reason for not entertaining the present petition.

13] For the aforesaid reasons, we dismiss this petition.

14] In the facts and circumstances of the present case, there shall be no order as to costs.

(M.S.SONAK, J.)

(M.S.SANKLECHA, J.)