

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CENTRAL EXCISE APPEAL NO. 44 OF 2019**

Aeren Foundation Trust .. Appellant
vs.
Commissioner of Central
CGST-Mumbai West .. Respondent.

Mr. Bharat Raichandani a/w. Ms Pragya Koolwal I/b UBR
Legal for the Appellant.
Mr. P. S. Jetly a/w. J.B. Mishra for the Respondent.

**CORAM: M.S. SANKLECHA, J.
AND M.S.SONAK, J.**

DATE : 18 JUNE 2019.

ORAL JUDGMENT (PER M.S.SONAK, J.):

- 1] Heard learned counsel for the parties.
- 2] On 25th April 2019, we admitted this appeal on the following substantial question of law :

“ Whether in the facts and circumstances of the present case and in law, the Appellate Tribunal was correct and justified in dismissing the application seeking condonation of delay in filing the appeal on the ground that the plea of non-communication of the impugned order to the trustee cannot be considered as sufficient cause for delay in filing the appeal before the Appellate Tribunal?”

- 3] On 21st April 2012, the Additional Director, Directorate General of Central Excise Intelligence, Mumbai Zonal Unit-III issued a show cause-cum-demand notice to the appellant requiring the appellant to show cause as to why it should not be made liable to pay service tax for operating commercial training or coaching center, which service was taxable under

the provisions of Finance Act, 1994. The Additional Commissioner of Service Tax (II), not satisfied with the cause shown by the appellant, by vide order dated 28th May 2013, confirmed the entire demand raised in the show cause notice. The appellant then instituted an appeal before the Commissioner of Service Tax (Appeals-II) which came to be dismissed vide order dated 13th February 2017.

4] The appellant, thereafter, instituted an appeal before the Customs Excise and Service Tax Appellate Tribunal (Tribunal) to question the order-in-appeal dated 13th February 2017. Since, there was delay of 102 days in institution of this appeal, the appellant along with the memo of appeal filed an application for condonation of delay, duly supported by affidavit of Mr. Vinay Agrawal, the Trustee of the appellant. The Tribunal by order dated 23rd July 2018, has however, refused to condone the delay and consequently, dismissed the appeal. Aggrieved by the Tribunal's order dated 23rd July 2018, the appellant has instituted the present appeal which came to be admitted on the aforesaid substantial question of law.

5] Mr. Raichandani, learned counsel for the appellant, submits that the order-in-appeal dated 13th February 2017 was issued on 28th February 2017 and was received at the appellant's office on 20th July 2017. He submits that the order-in-appeal was received by the office staff of the appellant, but the office staff failed to bring the order-in-appeal to the notice of the appellant's Trustee, who was alone empowered to take decisions in the matter. He submits that the appellant came to

know of the disposal of the appeal only after receipt of letter dated 16th November 2017 issued by the jurisdictional office, Division-V, informing that their appeal has already been rejected. Mr. Raichandani submits that the Trustees of the appellant thereafter searched the office record and found the order-in-appeal dated 13th February 2017. Mr. Raichandani submits that service of order-in-appeal upon staff of the appellant does not amount to valid service upon the appellant, which is a Charitable Trust. In any case, he submits that this is a case of a *bona fide* communication gap and therefore, delay ought to have been condoned. He submits that the decision in the case of **Chief Post Master General vs. Living Media India Ltd. - 2012 (227) ELT 289 (SC)** was clearly distinguishable on facts and the Tribunal should have rather applied the principles set out by the Apex Court in **N.BalaKrishnan vs. M. Krishnamurthy - (1998) 7 SCC 123**. For all these reasons, Mr. Raichandani submits that the substantial question of law as framed is required to be answered in favour of the appellant and the delay of 102 days in institution of the appeal before the Tribunal is required to be condoned.

6] Mr. Jetly, learned counsel for the respondent, defends the impugned order on the basis of the reasoning reflected therein. He submits that the order-in-appeal was duly served upon the appellant at the appellant's office address. He submits that no further requirement of personal service upon the Trustees of the appellant can be implied in such matters. He submits that the affidavit-in-support of the application for condonation of

delay does not make out any '*sufficient cause*' and therefore, the Tribunal was justified in making the impugned order and refusing to condone the delay in the institution of appeal. Mr. Jetly, therefore, submits that the substantial question of law as framed is liable to be answered against the appellant.

7] The rival contention now fall for our consideration.

8] The contention that the order-in-appeal was required to be personally served upon the appellant's Trustee in order to constitute valid communication of the order -in-appeal cannot be accepted. The record indicates that the order-in-appeal was duly served at the office of the appellant on 20th July 2017. Even the appellant admits that the order-in-appeal was so received by some staff member of the appellant Trust. Accordingly, it cannot be said that there was no communication of the order-in-appeal to the appellant, merely because such order, may not have been personally served upon the Trustees of the appellant. The service of the order-in-appeal at the appellant's registered address, in the facts and circumstances of the present case, constitutes valid communication for the purpose of period of limitation for filing of appeal to operate.

9] Despite the aforesaid, we note that the delay in institution of appeal was of only 102 days. The record indicates and it is really not disputed that the appellant is a Charitable Trust. The explanation that the order-in-appeal may have been received by some staff member who did not bother to place the same before the Trustees of the appellant can neither be said to be

implausible nor does the same smack of any *mala fides*. The appellant has really not gained anything by instituting the appeal beyond the prescribed period of limitation. Therefore, it cannot be said that no '*sufficient cause*' was made out to explain the delay of 102 days in institution of appeal.

10] The fact position in *Living Media India Ltd. (supra)* upon which considerable reliance has been placed by the Tribunal was quite different from the fact position, in the present case. In the said case, the only explanation for delay of 427 days in instituting the appeal was that the file in question moved from Officer to Officer and hence the delay. In the present case, there does appear to have been serious communication gap between the office staff who may have received the order – in – original and the Trustees of the appellant, who were in a position to take the decision on the institution of the appeal.

11] Taking into consideration the circumstance that the delay is of only 102 days and such delay has been sufficiently explained in the affidavit of appellant's Trustee in support of the application for condonation of delay, we are of the opinion that the delay in institution of the appeal was required to be condoned in the facts of the present case. It does appear that there was a serious communication gap. Besides, as noted earlier, the appellant is a Charitable Trust. Upon cumulative consideration of all these factors coupled with the fact that the delay was of only 102 days, a case had been made out for condonation of delay.

12] In *N.Balakrishnan (supra)*, the Apex Court has held that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the doors against him. If the explanation does not smack of *mala fides* or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that that the delay was occasioned by the party deliberately to gain time, then the Court should lean against acceptance of the explanation. Once the Court accepts the explanation as sufficient, it is the result of the positive exercise of discretion and normally the superior Court should not disturb such findings, unless exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first Court refuses to condone the delay. In such cases, the superior Court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court. The reason for such different stance is that the primary function of a Court is to adjudicate the dispute between the parties and to advance substantial justice. The time -limit fixed for approaching the Court in different situation is not because on the expiry of such time as bad cause would transform into a good cause.

13] Applying the aforesaid principles to the present case, we are satisfied that the delay of 102 days in instituting the appeal before the Tribunal was required to be condoned in the interests of justice by accepting the cause shown by the

appellant as sufficient cause. Therefore, in the present case, whilst we do not accept Mr. Raichandani's contention that in every case involving a Trust, the communication of orders has to be made by service upon the Trustees, nevertheless, we accept Mr. Raichandani's contention that in the present case, sufficient cause was made out to seek condonation of delay of 102 days in the institution of appeal.

14] Accordingly, we answer the substantial question of law as framed in the negative i.e. in favour of the appellant herein and hold that the Tribunal, in the facts and circumstances of the present case and in law was not justified in dismissing the appellant's application for condonation of delay of 102 days in the institution of appeal.

15] The Appeal is therefore, allowed. The appellant's application seeking condonation of delay of 102 days in instituting the appeal is hereby condoned. In the peculiar facts and circumstances of the present case, there shall be no order as to costs.

16] The parties to appear before the Tribunal on 8th July 2019 in order to enable the Tribunal to fix an appropriate date for disposal of the appeal on merits.

(M.S.SONAK, J.)

(M.S.SANKLECHA, J.)