IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 29/07/2019

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

W.P.No.22144 of 2019
&
W.M.P No.21415 of 2019

The Executive Officer
Bargur Selection Grade Town Panchayat
Bargur - 635 104
Krishnagiri District .. Petitioner

Vs.

1. The Commissioner (Appeals)
Office of the Commissioner of GST and Central Excise (Appeals) Coimbatore
Circuit Office & Salem Commissionerate
No.1, Foulke's Compound, Anai Road
Salem - 636 001

2. The Deputy Commissioner of Central Excise
O/o. The Deputy Commissioner of Central Excise
Service Tax Cell, Hosur-I Division, Thally Road
Hosur - 635 109
Krishnagiri District

3. The Assistant Commissioner of Central Excise
Hosur I Division, Thally Road
Hosur - 635 209
Krishnagiri District

4. The Branch Manager
Indian Bank
Bargur Branch
Krishnagiri Main Road
Bargur, Krishnagiri District ... Respondents

Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorari to call for the records relating to the impugned proceedings issued by the 2nd respondent in C.No.V/17/13/2015-STC-Adj Order-in-Original No.07/2016 ST dated 19.12.2016 as confirmed by the order of 1st respondent in A.No.74/2017/CTA-II/CO-ST Order-in-Appeal No.199/2018-ST dated 13.12.2018 and to quash the same.

For Petitioner : Mr.G.Sankaran

For Respondents : Mr.G.M.Syed Nurullah Sheriff
Standing Counsel

ORDER

Mr.G.Sankaran, learned counsel on record for writ petitioner is before this Court. Mr.G.M.Syed Nurullah Sheriff, learned Standing Counsel accepts notice on behalf of Respondents 1 to 3.

2. To be noted, Respondent No.4 is Branch Manager of a Bank i.e., Indian Bank, Bargur Branch in which the writ petitioner has an account. As the fourth respondent is only a formal party, more in the nature of a Garnishee, there is no disputation that this writ petition can be disposed of at the admission stage with the consent of learned counsel for writ petitioner and standing counsel for Respondents 1 to 3. Therefore, main writ petition is taken up with consent of learned counsel for writ petitioner and standing counsel for respondents 1 to 3.

3. Short point on which the entire writ petition now turns is limitation.

4.An order dated 13.12.2018 bearing reference A.No.74/2017/CTA-II/CO-ST being Order-in-Appeal No.199/2018-ST made by the first respondent has been called in question. This order shall hereinafter be referred to as 'impugned order' for the sake of convenience and clarity.

5.There is no disputation or disagreement that impugned order has been made by the first respondent in a statutory appeal pertaining to Service Tax. What is of utmost significance is vide the impugned order, first respondent has dismissed the appeal on the point of limitation without going into merits of the case. This has been articulated by the first respondent with clarity and specificity in the impugned order in the concluding paragraph and the relevant portion of the concluding paragraph reads as follows:

> ' 06...........In view of the law declared by the Hon'ble Supreme Court and that there is no dispute about the date of receipt of the impugned order and the fact of delay beyond the period of 90 days, the appeal is time barred and liable for rejection without going into merits of the case.'
>
> (underlining made by this Court to supply emphasis and highlight)

6. In the aforesaid backdrop, certain dates become relevant. The order-in-original being order dated 19.12.2016 bearing reference C.No.V/17/13/2015-STC-Adj made by the second respondent was received by the writ petitioner on 22.12.2016. Therefore, writ petitioner ought to have filed the statutory appeal before the first respondent within two months i.e., on or before 21.02.2017.

7. If such an appeal is filed with delay, there is no disputation or disagreement before this Court that the first respondent Appellate Authority has powers to condone the delay, but subject to a cap of one month. Therefore, one month cap expires on 21.03.2017. Under such circumstances, the appeal before the first Appellate Authority, no doubt, was filed only on 01.08.2017. To be noted, these dates are undisputed dates. Therefore, Appellate Authority rejected the appeal as time barred without going into the merits of the case.

8. In this regard, the only point that arises for consideration is, whether a statutory Appellate Authority can condone delay beyond the cap, when the statute provides for a cap. Hon'ble Supreme Court has repeatedly held that whenever there is a cap qua delay condonation in a statute, an Authority or Court has no powers to condone delay beyond the cap or upper limit as the legal principle is that Section 5 of Limitation Act stands ousted. Though there is a long line of authorities and a catena of case laws qua this aspect, this principle is clearly articulated by Hon'ble Supreme Court in the following judgments, which are instructive:

> ' i) Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and others, reported in (2008) 3 SCC 70; and
> ii) Commissioner of Customs and Central Excise Vs. Hongo India Private Limited and another, reported in (2009) 5 SCC 791.'

9. Most pithy paragraphs in this regard are paragraph 8 in Singh Enterprises case and Paragraph 36 in Hongo India Private Limited case.

10. Paragraph 8 in Singh Enterprises case reads as follows:

> '8.The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of statute are not vested with jurisdiction to condone the delay beyond the permissible period provided under the statute. The period up to which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Limitation Act, 1963 (in

short "the Limitation Act") can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days' time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only up to 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days' period.'

(Underlining made by me to supply emphasis and to highlight)

11. Paragraph 36 in Hongo India Private Limited case reads as follows:

'36. The scheme of the Central Excise Act, 1944 supports the conclusion that the time-limit prescribed under Section 35-H(1) to make a reference to the High Court is absolute and unextendable by a court under Section 5 of the Limitation Act. It is well-settled law that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Limitation Act.'

12. This Court also has followed the aforesaid ratio laid down by Hon'ble Supreme Court in its order dated 18.06.2019 made in W.P.No.16120 of 2019 [M/s.Amman Agencies Vs.The Appellate Deputy Commissioner(CT)].

13. Faced with the aforesaid scenario, learned counsel for writ petitioner submitted that jurisdiction of the second respondent to initiate proceedings itself is being assailed on

legal grounds. However, a perusal of the grounds of appeal before first Appellate Authority reveals that this point has not been raised before the Appellate Authority. When this point has not been raised before the Appellate Authority, it cannot be gainsaid that Appellate Authority fell error in rejecting the appeal as time barred as the Appellate Authority has made it clear that he is rejecting the appeal as time barred without going into merits of the matter. In this writ petition, impugned order is the order of the Appellate Authority and hence this Court will perambulate within the four corners of the grounds which were raised qua challenge to the order of the Appellate Authority. It needs no elaboration or elucidation to say that it will be unfair to the Appellate Authority if this Court holds that the Appellate Authority should have gone into the points which were not raised before the Appellate Authority. In the aforesaid back drop, Appellate Authority has not expressed any opinion on merits of the matter and rejected the appeal only on limitation point.

14. In the light of the aforesaid authoritative pronouncements of Hon'ble Supreme Court, this Court finds no grounds to interfere with the impugned order of the first respondent.

This writ petition fails and the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

gpa

To

1. The Commissioner (Appeals)
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   Indian Bank
   Bargur Branch
   Krishnagiri Main Road
   Bargur, Krishnagiri District

+1 cc to Mr.G.Sankaran, Advocate, S.R.No.65404

+1 cc to M/s.G.M.Syed Nurullah Sheriff, Advocate, S.R.No.64724

W.P.No.22144 of 2019 &
W.M.P No.21415 of 2019

NMI(CO)
SSM(16/09/2019)