IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 22.08.2019

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THE HONOURABLE MR. JUSTICE M.SUNDAR

W.P.No.24337 of 2019

M/s.Aurofood (P) Limited
Represented by its Managing Director
Vanur Taluk, T.C.Balam - 605 111
Villupuram District.
... Petitioner

vs.

1.The Appellate Deputy Commissioner (CT)
Cuddalore, Cuddalore District.

2.The Commercial Tax Officer (Main)
Tindivanam, Villupuram District.
... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Mandamus, directing the Tamil Nadu Sales Tax Appellate Tribunal to entertain the Appeal proposed to be filed by the petitioner challenging the Order of Assessment passed by the 2nd respondent without rejecting the same on the ground of limitation and to hear the said appeal on merits in accordance with law and pass such other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of this case and thus render justice.

For Petitioner : Mr.K.M.Aasim Shehzad

For Respondents : Ms.G.Dhanamadhri, Government Advocate.

O R D E R

Mr.K.M.Aasim Shehzad, learned counsel of M/s.BFS Legal (Law Firm) on behalf of writ petitioner and Ms.G.Dhanamadhri, learned Government Advocate, who accepts notice on behalf of both the respondents are before this Court.

2. With consent of learned counsel on both sides, main writ petition is taken up, heard out and is being disposed of.

3. This writ petition has been filed with a prayer to mandamus 'Tamil Nadu Sales Tax Appellate Tribunal' ('TNSTAT' for brevity) to entertain an appeal which is proposed to be filed by writ petitioner, challenging an order of assessment passed by the second respondent. The prayer also states with specificity that it seeks to mandamus TNSTAT to entertain the appeal without rejecting the same on the ground of limitation.

4. In the instant case, it may not be necessary to advert to the trajectory thus far in the light of the nature of the prayer before this Court.

5. It is submitted without any disputation or disagreement that appeal to TNSTAT is now under Section 58 of 'Tamil Nadu Value Added Tax Act, 2006, (Tamil Nadu Act 32 of 2006)', which shall hereinafter be referred to as ' TNVAT Act' for brevity.

6. A perusal of Section 58 TNVAT Act makes it clear that as far as the writ petitioner assessee is concerned, time limit for preferring an appeal before TNSTAT is 60 days from the date on which the order is served on the dealer/assessee. If an appeal is presented beyond the 60 days period, vide proviso to Section 58(1) of TNVAT Act, TNSTAT can condone the delay, but there is a cap of 60 days. Therefore, the total time available for writ petitioner is 120 days and there is no disputation that these 120 days have elapsed.

7. Therefore the question is whether there can be a direction to TNSTAT to condone delay beyond 120 days when there is a statutory cap. When there is a cap, delay cannot be condoned under Section 5 of Limitation Act. Following a long line of case laws of Hon'ble Supreme Court in this regard, this Court passed an order to the effect that delay is not condonable beyond the period of cap when cap for condonation is statutorily prescribed. This is vide an order dated 18.06.2019 in W.P.No.16120 of 2019. Relevant paragraphs are 5, 6, 9 and 10 to 18, which read as follows:

> '5. Learned Revenue counsel, who had accepted notice, brought to the notice of this Court that the aforesaid order made by a Hon'ble Single Judge of this Court has been reversed by a Hon'ble Division Bench of this Court by order dated 10.07.2017 made in W.A.No.952 of 2015. Therefore, the order of the Hon'ble Single Judge referred to

by the writ petitioner cannot be looked into.

6. Be that as it may, relevant portion of the order of Hon'ble Division Bench is contained in Paragraphs 4, 5 and 6, which read as follows:

> '4. In a decision in M/s.Falcon Types Ltd., v. The Customs, Excise & Service Tax Appellate Tribunal, Chennai [C.M.A.No.1161 of 2016, dated 15.06.2016], a Hon'ble Division Bench of this Court, following the decisions in Indian Coffee Worker's Co-op. Society Ltd., v. Commissioner of Commercial Taxes reported in 2002 (I) CTC 406, Singh Enterprises v. Commissioner of Central Excise, Jamshedpur reported in 2008 (221) E.L.T. 163 (SC), Commissioner of Customs & Central Excise v. Hongo India (P) Ltd., reported in 2009 (236) ELT 417 (SC), Gopinath v. CESTAT, Chennai reported in 2013 (32) STR 172 (Mad.), Albert v. Commissioner of Service Tax, Chennai reported in 2015 (37) STR 187 (Mad.) and Saradha Travels v. Commissioner of Service Tax reported in 2015 (3) STR 433 (Mad.), held that the above decisions make it abundently clear that the appellate authority, has no powers to condone the delay, beyond the extendable period.
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> 5. Following the above decisions that the appellate authority has no power to condone the delay, beyond the extendable period, this Court is inclined to set aside the order of the Writ Court, condoning the delay, by setting aside the order of the Appellate Assistant Commissioner.
>
> 6. Hence, the Writ Appeal is allowed. No costs. Consequently, connected Miscellaneous Petition is also closed.'

9. A perusal of the aforesaid provision reveals that the period of limitation prescribed for preferring an appeal is 30 days and the Appellate Authority has power to admit an appeal, presented after the expiry of the period of 30 days, if sufficient cause is shown subject to the rider that it is within a further period of 30 days. In other words, in very simple terms, the time period prescribed for the appeal is 30 days and the Appellate Authority is vested with power to condone delay, but with rider that the delay should not be more than 30 days. In simpler terms, the

maximum time limit available for an assessee to prefer an appeal under Section 51 of TNVAT Act is 30 + 30 = 60days as there is a cap qua delay condonation period.

10. Having extracted the relevant provision, this Court now adverts to two judgments of Hon'ble Supreme Court, which were pressed into service by learned Revenue counsel. The first is a case law being Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and others, reported in (2008) 3 SCC 70. Most relevant paragraph is paragraph 8 and the same reads as follows:

> '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. The other case law referred to by learned Revenue counsel is Commissioner of Customs and Central Excise Vs. Hongo India Private Limited and another, reported in (2009) 5 SCC 791.

12. To be noted, Hongo India Private Limited had been rendered by the Larger Bench i.e., by a three member Bench of Hon'ble Supreme Court of India.

13. Hongo India Private Limited turns on Section 35H of Central Excise Act.

14. Section 35H of the Central Excise Act provides for a reference to the High Court within 180 days from the date of the order of the Appellate Tribunal.

15. Considering the importance and significance, this Court deems it appropriate to extract 35H of Central Excise Act, which reads as follows:

> '35H Application to High Court. —(1) The Commissioner of Central Excise or the other party may, within one hundred and eighty days of the date upon which he is served with notice of an order under Section 35-C passed before the 1st day of July, 2003(not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), by application in the prescribed form, accompanied, where the application is made by the other party, by a fee of two hundred rupees, apply to the High Court to direct the Appellate Tribunal to refer to the High Court any question of law arising from such order of the Tribunal.'

16. The question before the Larger Bench of Hon'ble Supreme Court of India in the case of Hongo India Private Limited was whether a reference can be made beyond 180 days. Answering this question in the negative, Hon'ble Supreme Court held that the law is well settled that in cases of this nature, the

period of limitation is absolute i.e., unextendable by a Court under Section 5 of the Limitation Act. Most relevant part of the conclusion is contained in Paragraph 36 and the same 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.'

17. To be noted, in Section 35-H, there is no provision for condonation of delay at all. Even in such cases i.e., cases where there is neither provision for delay condonation nor cap, the Hon'ble Supreme Court has held that the period of limitation prescribed is absolute and cannot extended. Be that as it may, in Singh Enterprises case, Hon'ble Supreme Court dealt with a case, where there is a provision of condonation of delay, but subject to a cap of 30 days. Dealing with this cap [paragraph 8, which has been extracted and reproduced supra], Hon'ble Supreme Court held that in cases, where such condonation of delay is provided, there is a complete exclusion of Section 5 of the Limitation Act. Therefore factual matrix in Singh Enterprises and case on hand mirror each other.

18. A perusal of Singh Enterprises case and Hongo India principles, brings to light the indisputable position that this Court cannot extend time by invoking provisions of Section 5 of the Limitation Act in cases of this nature.'

8. This Court ultimately held as follows in paragraph No.19:

'19. In the light of the narrative and discussions thus far, writ petition is devoid of merits and the prayer of the writ petitioner cannot be acceded to. Writ petition fails and the same is dismissed. However, there shall be no order as to costs.'

9. In the instant case, the aforesaid considered view of this Court applies in full force. Therefore, this writ petition cannot be entertained.

10. This writ petition fails and the same is dismissed. There shall be no order as to costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

vsm
To
1.The Appellate Deputy Commissioner (CT)
Cuddalore, Cuddalore District.

2.The Commercial Tax Officer (Main)
Tindivanam, Villupuram District.

+1 CC to M/s. B.F.S. Legal, sr 71969.
+1 CC to The Spl. Govt. Pleader(T) sr 72892.

W.P.No.24337 of 2019

SV(CO)
SP(19/09/2019)