

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH.**

CWP No.2098 of 2017(O&M)

Date of Decision:-02.07.2019

**M/s Vishkarma Agriculture Industries through its proprietor Sh.
Mani Ram.**

.....Petitioner.

Versus

Union of India & Ors.

.....Respondents.

**CORAM:- HON'BLE MR. JUSTICE JASWANT SINGH
HON'BLE MR. JUSTICE LALIT BATRA**

Present:- Mr. Jagmohan Bansal, Advocate for the Petitioner.

Mr. Anshuman Chopra, Advocate for the respondents.

JASWANT SINGH, J.

1. Present Writ Petition under Article 226 of the Constitution of India has been filed seeking quashing of Order-in-Appeal dated 03.01.2017 (**Annexure P-11**) whereby Commissioner (A) has dismissed Appeal of the Petitioner on the ground of delay. The Petitioner in alternative has further sought quashing of Order-in-Original dated 21.03.2016 (**P-8**) whereby demand of Central Excise Duty alongwith penalty was confirmed.

2. The Petitioner is engaged in the manufacture of paddy parboiling and paddy drying plants. The Respondent issued a Show Cause Notice dated 07.01.2015 (**P-5**) proposing classification of par

boiling plant under Chapter Heading 84198990 and demanding Central Excise Duty amounting to Rs.44,44,488/- for the period December 2009 to March 2014. Another notice dated 21.04.2015 (**P-6**) was issued raising demand of Rs.20,30,571/- for the period April-July 2014. The Respondent No. 2-Additional Commissioner vide common order dated 21.03.2016 (**P-8**) confirmed both the demands and further imposed penalty under Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2002. As per Section 35 of the Central Excise Act, 1944 and Appeal against an order can be filed within 60 days and Appellate Authority can condone delay upto 30 days.

3. The Petitioner received copy of order on 26.03.2018 (**P-8**), and through courier on 18.05.2016 after making mandatory pre-deposit of 7.5% of duty sent an Appeal to the office of Commissioner (A)-Respondent No. 3. The Petitioner sent Appeal through courier well within limitation period, however, Courier Company could not deliver copy of Appeal in the office of Commissioner (A) and on 07.07.2016 returned back courier to Counsel of the Petitioner. The Proprietor of courier agency has furnished an affidavit dated 08.07.2016 (**P-9**) disclosing fact of receipt of courier, its non-delivery and return to Counsel of the Petitioner. The Petitioner within 4 days from the date of return of courier alongwith application seeking Condonation of Delay filed an Appeal before Commissioner (A) who vide impugned order dated 03.01.2017 (**P-11**) has dismissed the appeal on the ground of delay. Commissioner (A) has held that delay

cannot be condoned so Appeal is liable to be dismissed.

4. Counsel for the Petitioner contended that the issue involved is “correct classification” of paddy parboiling plant and CBEC vide circular dated 19.05.2010 had clarified that product is not dutiable, however, vide circular dated 15.05.2014, CBEC withdrew its earlier circular. The Respondent-department on the basis of fresh circular issued Show Cause Notice on 07.01.2015 (**P-5**) raising demand for the period 2009-14. The question of correct classification is pending before Hon’ble Supreme Court in the case of Jyoti Sales Corporation Civil Appeal No. 6607 of 2017, however, on the question of limitation for the same period, in the case of M/s Kamla Steel Fabricator which is Proprietorship concern of son of Sh. Mani Ram-Proprietor of the Petitioner, Commissioner (A) who had dismissed Appeal of Petitioner vide Order-in-Appeal dated 16.02.2017 has allowed Appeal. Further, Ld. CESTAT, Chandigarh in the case of other identically situated parties vide Final Order No. A/60300-60309/19 dated 19.02.2019 has dropped demand for the period prior to 15.05.2014 and in the present case almost period is prior to 15.05.2014.

It is further contended that, no doubt Commissioner (A) has no power to condone delay but there is plethora of judgments delivered by different High Courts where Hon’ble Courts have either set aside Order-in-Appeal and remanded matter to Commissioner (A) to decide on merits or set aside Order-in-Original holding that demand is not maintainable even though delay was not condoned.

In support of his contention, Ld. Counsel cited judgment

209 (P&H) wherein Order-in-Original was set aside. The department has filed Civil Appeal No. 948 of 2016 before Hon'ble Supreme Court which stands admitted.

Ld. Counsel further on the identical issue cited judgment of Jharkhand High Court in the case of **Adhunik Power Transmission Ltd. Vs. UOI 2015 (329) E.L.T. 58 (Jhar.)**, Madras High Court in the case of **M/s Wabco India Ltd. Vs. Joint Commissioner of Central Excise 2016-TIOL-1281-HC-MAD-CX**, Karnataka High Court in the case of **Apotex Research Pvt. Ltd. Vs. UOI & Others 2017-TIOL-93-HC-KAR-CX**, Karnatak High Court in the case of **Practice Strategic Communications India Pvt. Ltd. C.S.T., Domlur 2016 (45) S.T.R. 47 (Kar.)**, Allahabad in the case of **Central Industrial Security Force Vs. Commr. of CGST & C. Ex. 2018 (14) G.S.T.L. 198 (All.)**, Uttarakhand High Court in the case of **Central Industrial Security Force Vs. Commissioner of Central Excise and Service Tax 2017-TIOL-1055-HC-UKHAND-ST**.

5. Ld. Counsel for the respondent did not dispute the fact that Ld. Tribunal has already dropped demand in the case of other parties for the period prior to 15.05.2014 and the entire period involved in the case of petitioner is prior to 15.05.2014 except two months, however Ld. Counsel contended that the Petitioner was bound to file Appeal within 60 days and Commissioner (A) has rightly held that he has no power to condone delay beyond 30 days. In the absence of power to condone delay, the Commissioner (A) has rightly held that delay cannot be condoned. The department has filed

assailing order passed by this Court in the case of **JCB India Ltd. (supra)**. He further cited judgment of Delhi High Court in the case of **Delta Impex Vs. Commissioner of Customs (ACU), New Delhi 2004(173) E.L.T. 449 (Del.)** and Andhra Pradesh High Court in the case of **Shanti Alloys Pvt. Ltd. Vs. Commissioner of C.Ex., Hyderabad 1999(109) E.L.T. 79 (A.P.)**.

6. Before proceeding further, it would be profitable to have a look at Section 35 of the Central Excise Act under which appeal was filed before Commissioner (A). Section 35 reads as under:-

Section 35. Appeals to Commissioner (Appeals)-

(1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Principal Commissioner of Central Excise or Commissioner of Central Excise, may appeal to the Commissioner of Central Excise (Appeals) hereafter in this Chapter referred to as the Commissioner (Appeals) within sixty days from the date of the Communication to him of such decision or order:

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

(1A) The Commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(2) Every appeal under this section shall be in the prescribed form and shall be verified in the prescribed manner.

7. From the perusal of above quoted Section and law laid down by Hon'ble Supreme Court in catena of judgments, it is quite evident that Commissioner (A) has no power to condone delay

beyond a period of 30 days and in the present case Commissioner (A) has rightly dismissed appeal on the ground of delay. Judgments cited by Ld. Counsel for the Respondent uphold the same view. No doubt, Commissioner (A) cannot condone delay but as held in the judgments cited by counsel for the Petitioner, this Court in exercise of power under Article 226 can set aside Order-in-Original or remand matter to Commissioner (A) after setting aside Order-in-Appeal if court finds that there was delay beyond the control of Petitioner and demand is *prima facie* not sustainable as High courts being custodian of justice are supposed to prevent miscarriage of justice.

8. Having heard arguments of Ld. Counsel for the parties and scrutinized record of the case, the conceded position is that Petitioner made pre-deposit of 7.5% of duty as required under Section 35F of the Act well within normal period of limitation. The appeal was sent through Courier within limitation period, however, Courier Agency did not deliver appeal within limitation period rather returned the same to counsel of the Petitioner who had handed over appeal to Courier, as is evident from the affidavit dated 08.07.2016 (P-9). There is delay of 47 days and Commissioner (A) was competent to condone delay up to 30 days.

9. The common thread running through all the judgments cited by counsel for the Petitioner is that High Court in exercise of its inherent jurisdiction under Article 226 of the Constitution of India can condone delay so as to prevent grave miscarriage of justice and secure the ends of justice even though statutory authority is not competent to condone delay beyond prescribed period of limitation.

High Court is required to examine facts of each case and if it finds that there would be miscarriage of justice and proceedings are illegal, vexatious or without jurisdiction, it may condone delay and ask Appellate Authority to decide appeal on merits.

Hon'ble Supreme Court in the case of **Asian Resurfacing of Road Agency Pvt. Ltd. And Ors. Versus Central Bureau of Investigation 2018(2) RCR (Criminal) 415** while dealing with question of jurisdiction of High Court to entertain petition against order framing charge under Prevention of Corruption Act,1988, in view of bar created by Section 19(3)(c) of the PC Act has held that inherent power of a court setup by constitution is a power that inheres in such Court because it is superior court of record and not because it is conferred by the Code of Criminal Procedure. The Hon'ble Court overruled its earlier judgment in the case of **Satya Narayan Sharma versus State of Rajasthan (2001) 8 SCC 607** wherein it was held that there is blanket ban of stay of trials, therefore, Section 482 cannot be used for the aforesaid purpose. The relevant para 49 reads as under:-

“ 49. It is thus clear that the inherent power of a Court set up by the Constitution is a power that inheres in such Court because it is a superior court of record, and not because it is conferred by the Code of Criminal Procedure. This is a power vested by the Constitution itself, inter alia, Under Article 215 as aforesaid. Also, as such High Courts have the power, nay the duty to protect the fundamental rights of citizens under Article 226 of the Constitution, the inherent power to do justice in cases involving the liberty of the citizen would also sound in Article 21 of the Constitution. This being the constitutional

*position, it is clear that Section 19(3)(c) cannot be read as a ban on the maintainability of a petition filed before the High Court under Section 482 of the Code of Criminal Procedure, the non-obstante clause in Section 19(3) applying only to the Code of Criminal Procedure. The judgment of this Court in **Satya Narayan Sharma v State of Rajasthan**, Manu/SC/0580/2001: (2001)8 SCC 607 at paragraphs 14 and 15 does not, therefore, lay down the correct position in law. Equally, in paragraph 17 of the said judgment, despite the clarification that proceeding can be “adapted” in appropriate cases, the Court went on to hold that there is a blanket ban of stay of trials and that, therefore, Section 482 even as adapted, cannot be used for the aforesaid purpose. This again is contrary to the position in law as laid down hereinabove. This case, therefore, stands overruled.* ”

Applying the ratio of the afore-stated judgments of different High Courts, we are of the considered opinion that impugned order deserves to be set aside and Petitioner must be heard on merits. The demand is not *prima facie* sustainable whereas if present petition is dismissed, the Petitioner would be liable to pay duty, interest and penalty which otherwise is not payable but for the delay. This court cannot act as court of appeal against the order passed by Commissioner (A), however in the present case we find that there is delay of 17 days beyond the competency of Commissioner (A) to condone which has occurred on account of lapse on the part of Courier Agency. Having regard to the fact that delay is minor coupled with the fact that pre-deposit was made within time, therefore, there is no lapse on the part of Petitioner and demand is not *prima facie* maintainable, the present petition

Order-in-Appeal dated 03.01.2017 (**P-11**) is quashed and appeal in the record of Commissioner (A) is restored to its original number. The Petitioner at the first instance shall appear before Commissioner (A) on **07.08.2019** and thereafter as directed by him, and the appeal shall be decided on merits.

(**JASWANT SINGH**)
JUDGE

(**LALIT BATRA**)
JUDGE

July 02, 2019
Vinay

<i>Whether speaking/reasoned</i>	Yes/No
<i>Whether Reportable</i>	Yes/No