IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

VATAP-227-2018 (O&M)

Date of Decision: 27.3.2019

Excise & Taxation Commissioner, Haryana

....Appellant.

Versus

M/s Uttar Pradesh Rajkiya Nirman Nigam Ltd. and another

...Respondents.

CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL.

PRESENT: Ms. Mamta Singla Talwar, DAG, Haryana, for the appellant.

AJAY KUMAR MITTAL, J.

CM-5787-CII-2019

Amended application for condonation of delay in filing the appeal is taken on record subject to all just exceptions. CM stands disposed of accordingly.

VATAP-227-2018 (O&M)

1. This appeal been filed by the revenue under Section 36 of the Haryana Value Added Tax Act, 2003 (in short "the Act") against the order dated 19.4.2017 (Annexure A-3) passed by the Haryana Tax Tribunal (hereinafter referred to as "the Tribunal") in STA No. 123 of 2014-15, claiming the following substantial questions of law:-

(a) The Haryana Value Added Tax Act, 2003 and the Haryana Value Tax Rules, 2003 nowhere cast a liability on the contractee to deduct tax from the payment made to the sub-contractor. Instead Rule

33(2) casts a liability on the contractee to deduct tax from the payment made to the contractor. In other words, it can be concluded that the valuable consideration on which the tax is to be imposed is what the contractor receives from the contractee and not what the sub-contractor receives from the contractee. The Hon'ble Karnataka High Court in the case of **Skyline Constructions and Housing Pvt. Ltd. Vs. Authority for Advance Ruling** reported as **(2011) 37 VST 290 (Karn)** has held that, "we are of the opinion that the question of law formulated hereinabove is to be held that the consideration for execution of works contract executed refers to consideration received by the principal contractor and does not include the consideration received and paid to the sub-contractor." Further, the Hon'ble Haryana Tax Tribunal in the case reported as **(2009) 34 PHT 344 (HTT) (FN Tribunal)** in para 21 has categorically stated that, "The contractee's liability to deduct tax on the total valuable consideration for the execution of whole contract which he pays to the contractor is absolute and cannot be diluted by the act of subcontracting". In other words it can be stated that a contractor remains a contractor even in respect of the part of the contract executed by the sub-contractor. So, in this case were not the lower authorities right in imposing tax on the total value consideration the appellant contractor received from the contractee and not just on the differential amount passed on by the contractor to the sub-contractor?

(b) The natural corollary of the aforementioned para 5 (a) is that the profit made by the appellant contractor is part of the total valuable consideration to be paid by the contractee to the appellant contractor agreed upon by them at the time of formation of the contract. Also in the case **DLF Industries Ltd. Vs. State of Haryana (2000) 120 STC 569 (P&H)** the Hon'ble High Court has held that, "The property transferred in goods by the sub-contractor is to be assessed in the hands of contractor. Where the contractor assigned part or full works contract to the sub-contractor for execution and such sub-contractor had used his own material in execution of such contract, the value of property transferred in execution of works contract is to be assessed in the hands of main contractor and not in the hands of sub-contractor?"

(c) The Hon'ble Haryana Tax Tribunal held that charging sales tax on the profit earned by the appellant contractor on rendering of services for execution of the works contact through subcontractees would result in two deemed sales. Charging tax on two deemed sales would result in double taxation which shall be in violation of Article 366 (29A)(b) of the Constitution of India (46th amendment, 1982) and also in dissonance of the principles laid down by the Hon'ble Supreme Court of India in the case of **Larsen and Turbo (supra).** In instant case the lower authorities never charged tax on two deemed sales. There is only one deemed sale i.e. the appellant contractor to the contractree on which tax was imposed. So was it not a single deemed sale and were not the lower authorities right in charging sales tax on the profit margin received by the appellant after making necessary deductions as prescribed by the HVAT Act and the Rules made therein?

(d) Any other question of law which may arise from the facts and circumstances of this case, which this Hon'ble Court deems fit?

2. Briefly stated, the facts necessary for adjudication of the instant appeal as narrated therein may be noticed. During the assessment year 2009-10, the assessee received two work orders, i.e., one from the Employees State Insurance Corporation (ESIC), Faridabad for renovation/ face lifting of Regional Office Building of ESIC and another for Special

Repair Work of Staff Quarters, Sector 29, Faridabad from Employees Provident Fund Organization (EPFO) for ₹ 4,57,98,984/- and ₹ 20,65,078/-, respectively. Respondent No.1 gave sub-contract of ₹ 4,05,46,280/- to various sub-contractors for execution of the same and deducted TDS of ₹ 16,21,240/- and deposited the same into Government treasury. The consideration amount of ₹ 73,17,782/- was retained by the assessee and no amount of tax was paid on this amount. Respondent No.1 made payments of ₹ 4,05,46,280/- on account of execution of above said two work contracts to the sub-contractors. However, the contractee did not deduct the tax at source from the payments made to respondent No.1. But respondent No.1 deducted TDS @ 4% from the payments made to the sub-contractors during the period from 1.4.2009 to 31.3.2010 and paid the same to the Assessing Authority. The Assessing Authority vide order dated 29.3.2013 (Annexure A-1) framed the assessment besides levying tax on ₹ 73,17,782/- on the difference of the amount received by the assessee from the contractees and the amount of payments made by the assessee to the sub-contractors, created a demand of ₹ 15,64,890/- on account of tax and penalty. Feeling aggrieved by the order, Annexure A-1, respondent No.1 filed an appeal before the Joint Excise and Taxation Commissioner (Appeals) [for brevity "the JETC (A)"]. the JETC(A) vide order dated 20.1.2014 (Annexure A-2) dismissed the said appeal. Still dissatisfied by the order, Annexure A-2, respondent No.1 filed an appeal before the Tribunal. The Tribunal vide order dated 19.4.2017 (Annexure A-3) allowed the appeal and set aside the order passed by the Assessing Authority and affirmed by the JETC(A). Hence, the present appeal. Since, the appeal filed by the revenue was barred by limitation, amended CM-5788-CII-2019 has been filed under Section 5 of the Limitation Act, 1963 (in short "the 1963 Act") for condonation of 445 days' delay in filing the appeal.

3. We have heard the learned counsel for the appellant.

4. The primary question that arises for consideration in this appeal is whether there was sufficient cause for condonation of delay of 445 days in filing the appeal.

5. Examining the legal position relating to condonation of delay under Section 5 of the 1963 Act, it may be observed that the Supreme Court in **Oriental Aroma Chemical Industries Ltd. v. Gujarat Industrial Development Corporation and another, (2010) 5 SCC 459** laying down the broad principles for adjudicating the issue of condonation of delay, in paras 14 and 15 observed as under:-

> "14. We have considered the respective submissions. The law of limitation is founded on public policy. The legislature does not prescribe limitation with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature. To put it differently, the law of limitation prescribes a period within which legal remedy can be availed for redress of the legal injury. At the same time, the courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time.
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> 15. The expression "sufficient cause" employed in

> Section 5 of the Indian Limitation Act, 1963 and similar other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which sub serves the ends of justice. Although, no hard and fast rule can be laid down in dealing with the applications for condonation of delay, this Court has justifiably advocated adoption of a liberal approach in condoning the delay of short duration and a stricter approach where the delay is inordinate-**Collector (L.A.) v. Katiji N. Balakrishnan v. M. Krishnamurthy and Vedabai v. Shantaram Baburao Patil.**"

6. It was further noticed by the Apex Court in **R.B. Ramlingam v. R.B. Bhavaneshwari 2009(1) RCR (Civil) 892** as under:-

> ".....It is not necessary at this stage to discuss each and every judgment cited before us for the simple reason that Section 5 of the Limitation Act, 1963 does not lay down any standard or objective test. The test of "sufficient cause" is purely an individualistic test. It is not an objective test. Therefore, no two cases can be treated alike. The statute of limitation has left the concept of "sufficient cause" delightfully undefined, thereby leaving to the Court a well-intentioned discretion to decide the individual cases whether circumstances exist establishing sufficient cause. There are no categories of sufficient cause. The categories of sufficient cause are never exhausted. Each case spells out a unique experience to be

dealt with by the Court as such." It was also recorded that:-

> "For the aforestated reasons, we hold that in each and every case the Court has to examine whether delay in filing the special leave petition stands properly explained. This is the basic test which needs to be applied. The true guide is whether the petitioner has acted with reasonable diligence in the prosecution of his appeal/petition...."

7. From the above, it emerges that the law of limitation has been enacted which is based on public policy so as to prescribe time limit for availing legal remedy for redressal of the injury caused. The purpose behind enacting law of limitation is not to destroy the rights of the parties but to see that the uncertainty should not prevail for unlimited period. Under Section 5 of the 1963 Act, the courts are empowered to condone the delay where a party approaching the court belatedly shows sufficient cause for not availing the remedy within the prescribed period. The meaning to be assigned to the expression "sufficient cause" occurring in Section 5 of the 1963 Act should be such so as to do substantial justice between the parties. The existence of sufficient cause depends upon facts of each case and no hard and fast rule can be applied in deciding such cases.

8. The Apex Court in **Oriental Aroma Chemical Industries Ltd. and R.B. Ramlingam's cases (supra)** noticed that the courts should adopt liberal approach where delay is of short period whereas the proof required should be strict where the delay is inordinate. Further, it was also observed that judgments dealing with the condonation of delay may not lay down any

standard or objective test but is purely an individualistic test. The court is required to examine while adjudicating the matter relating to condonation of delay on exercising judicial discretion on individual facts involved therein. There does not exist any exhaustive list constituting sufficient cause. The applicant/appellant is required to establish that inspite of acting with due care and caution, the delay had occurred due to circumstances beyond his control and was inevitable.

9. According to the learned State counsel, the appeal was allowed on 19.4.2017 and the said order was despatched on 1.5.2017 to the department and the same was put up for examination before the officers at Head Office. During the said process, the file got misplaced and could not be traced. However, the Refund Committee at Head Office on 19.5.2018 while examining the case of another dealer M/s JMC Projects Ltd., Gurgaon ordered that the order passed by the Tribunal in M/s Uttar Pradesh Rajkiya Nirman Nigam Ltd. should be assailed in the High Court. Thereafter, the copy of the order dated 19.4.2017 was applied before the Tribunal which was received by the appellant on 20.6.2018. The final proposal to file appeal was approved by the Commissioner on 2.7.2018. After getting permission from the Legal Remembrancer, Haryana on 26.7.2018, the matter was sent to the office of Deputy Excise and Taxation Commissioner (ST), Faridabad for filing the appeal. Finally, the appeal was filed on 18.9.2018 in this Court. Therefore, the appeal could not be filed in time. It was urged that the delay, if any, has occurred in the aforesaid circumstances in filing the appeal before this Court. Learned State counsel further argued that the delay was unintentional and due to the circumstances beyond the control of the appellant.

10. Learned State counsel relied upon the plethora of judgments reported in **State of Nagaland v. Lipok AO and others AIR 2005 SC 2191; State of Karnataka and others v. Vivekananda M. Hallur and others 2013 (1) RCR (Civil) 578; State of U.P. and others v. Harish Chandra and others AIR 1996 SC 2173; Collector, Land Acquisition, Anantnag and another v. Mst. Katiji and others, AIR 1987 SC 1353; State of Haryana v. Chandra Mani and oithers AIR 1996 SC 1623; State (NCT of Delhi) v. Ahmed Jaan 2008(4) RCR (Civil) 126; State of Tamil Nadu v. Anbai Kingston Phillips and others 2015(6) RCR (Civil) 323** and **State of Jharkhand through SP, CBI v. Lalu Prasad @ Lalu Prasad Yadav, AIR 2017 SC 3389** relating to guidelines to be followed for condonation of delay. Suffice it to notice that the legal principles enunciated in these pronouncements are unexceptionable, however, these being based on its own facts do not advance the case of the appellant.

11. We do not find any ground to condone the colossal delay of 445 days in filing the appeal. The question regarding whether there is sufficient cause or not depends upon each case and primarily is a question of fact to be considered taking into totality of events which had taken place in a particular case. In the present case after appreciating the matter it cannot be said that there was sufficient cause for condonation of delay. However, the appeal was required to be filed within the stipulated period of limitation of 60 days. But the appellant filed the present appeal on 18.9.2018, after a delay of 445 days. The plea of the appellant as mentioned above would not satisfy the test of sufficient cause. The explanation of the appellant is bereft of justification for the delay caused in filing the appeal keeping in view the totality of facts and circumstances of the present case.

12. In view of the above, finding no merit in the application bearing CM-5788-CII-2019 for condonation of 445 days' delay in filing the appeal, the same is hereby dismissed and consequently, the appeal is dismissed as time barred.

(AJAY KUMAR MITTAL)
JUDGE

March 27, 2019
gbs

(MANJARI NEHRU KAUL)
JUDGE

Whether Speaking/Reasoned	**Yes**
Whether Reportable	**Yes**