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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.7793 OF 2021

M/s. Meritas Hotels Pvt. Ltd.
a registered company having its office
at Plot No. 137, Old Mumbai-Pune
Highway, Khandala, Maharashtra 410401. ..Petitioner

VS.

1. The State of Maharashtra
through the Government Pleader,
High Court, Mumbai

2. The Union of India
through the Revenue Secretary,
Department of Revenue, Ministry of
Finance having his office at 128-A/North
Block, New Delhi

3. The Commissioner of State Tax
having his office at 8th Floor, GST Bhavan,
Nesbit Road, Mazgaon, Mumbai 400010.

4. The Deputy Commissioner of Sales Tax
E-610, LTU-IV, Mumbai, having his
office at 4th Floor, Old Building, Cabin
No. D-3, GST Bhavan, Mazgaon, Mumbai 400010

5. The Joint Commissioner of Sales Tax
(Appeals -IV), having office at 3rd floor,
B Wing, GST Bhavan, BKC Complex Bandra ..Respondents

Mr. Rahul Thakar i/b. Mr. C. B. Thakar for petitioner.

Smt. Nisha Mehra, AGP for respondent Nos.1, 3 to 5-State.

**CORAM : DIPANKAR DATTA, CJ &
M. S. KARNIK, J.**

DATE: DECEMBER 3, 2021

JUDGMENT (PER M. S. KARNIK, J.) :

1. Invoking the jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner challenges the action on the part of the respondent no.5 in refusing to accept and entertain the appeal preferred by the petitioner against the impugned assessment order dated April 20, 2019 passed under Section 62 of the Maharashtra Goods and Services Tax Act, 2017 (hereafter "the said Act" for short). Initially the appeal was tried to be filed manually by the petitioner on November 20, 2019 and thereafter on January 10, 2020 through the electronic mode.

2. It is the case of the petitioners that there was a delay in filing the GST returns for the month of February 2019 on account of financial crunches. The petitioner could not file the tax payable return on the GSTN portal as the GSTN portal did not allow filing of the return tax. A notice dated March 26, 2019 was issued by the respondent no.4 upon the petitioner for non-filing of the return for the month of February 2019. The impugned summary assessment order dated April 20, 2019 in Form GST ASMT-13 under section 62 of the MGST Act, 2017 fixing the liability of tax amount of Rs.20,96,888/- along with interest of Rs.32,502/- and

penalty of Rs.23,06,577/- was made. The physical true copy of the assessment order dated April 20, 2019 was not served on the petitioner nor was the same uploaded on the GSTN portal. The scanned copy of the impugned assessment order dated April, 20, 2019 was sent by email dated April 20, 2019 to the General Manager of the petitioner company. This email communication remained to be reported by the General Manager to the management of the petitioner company. The petitioner filed GSTR-3B for the month of February 2019 on June 14, 2019 on the basis of actual books of accounts. At the time of filing of the GSTR-3B for the month of February 2019, the petitioner company was not aware of the impugned assessment order. The petitioner came to know about the impugned assessment order only when their bank account came to be attached on July 1, 2019. The petitioner applied for certified true copy of the impugned assessment order on November 5, 2019. As the impugned assessment order was not available online, the petitioner had to file physical appeal by obtaining certified true copy on November 6, 2019. The petitioner even tried to file online appeal on the GSTN portal on January 10, 2020, after the order was uploaded on GSTN portal on January 8, 2020. The status on the portal was showing that there is a delay in filing the appeal.

3. Learned counsel for the petitioner submits the respondent no.5 is not justified in refusing to accept and entertain the appeal tried to be filed by the petitioner under

sub-section (1) of Section 107 of the said Act. Learned counsel submits that the impugned assessment order was passed unilaterally, without granting any opportunity of hearing to the petitioner and hence, the impugned assessment order violates the principles of natural justice. In the absence of giving any opportunity to the petitioner, the respondent no.4-Deputy Commissioner was not justified in assessing the tax liability under Section 62 of the said Act on the best judgment basis and without granting the Input Tax Credit (ITC) to the petitioner. It is further submitted that the penalty levied is much more than the tax assessed which renders the impugned assessment order *ex-facie* illegal. Learned counsel vehemently submitted that the physical true copy of the impugned assessment order was not served on the petitioner nor the same was uploaded on the GSTN portal, in which case, refusal to accept and entertain the appeal on the ground of delay in filing thereof is unjustified. Learned counsel was at pains to point out that, as an abundant caution, the appeal was filed on November 20, 2019 manually as the certified true copy of the impugned assessment order was served on the petitioner only on November 6, 2019. Learned counsel further urged that the period of three months for presenting the appeal under sub-section (1) of Section 107 of the said Act shall have to be regarded from January 8, 2020, being the date on which the summary order in DRC-07 was uploaded online on the GST portal by the respondent no.4-

Deputy Commissioner. It is thus the contention of learned counsel for the petitioner that the appeal filed was well within limitation. In the alternative, it is the contention of learned counsel for the petitioner that despite existence of the remedy of a statutory appeal, it is open for the petitioner to challenge the impugned assessment order by way of a writ petition under Article 226 of the Constitution of India, as the same is passed in complete breach of the principles of the natural justice without affording any opportunity to the petitioner to contest the tax liability. Learned counsel relied upon the decision of the Gujarat High Court in the case of **Gujarat Tate Petronet Limited Vs. Union of India**¹ in support of his submission.

4. Learned AGP appearing on behalf of Respondent nos.1, 3 to 5, on the other hand, supported the action on the part of the respondent no.5 in refusing to accept and entertain the appeal on account of the mandate of sub-section (1) and (4) of Section 107 of the said Act. Learned AGP submitted that admittedly the scanned copy of the impugned assessment order dated April 20, 2019 having been sent by email to the petitioner on April 20, 2019, the resultant failure on the part of the petitioner to avail the remedy of appeal within a period of three months as contemplated by sub-section (1) of Section 107 of the said Act or within the extended period of one month provided under sub-section (4) of Section 107 of the said Act,

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disentitles the petitioner from claiming any relief in this writ petition. It is the submission of learned AGP that, consequently, the statutory remedy of appeal had become time barred. Learned AGP further submitted that it is not now open for the petitioner to challenge the impugned assessment order by way of a writ petition as this would frustrate the very object of prescribing the period of limitation under the said Act.

5. We have heard learned counsel for the parties, perused the petition and the annexures thereto. An order of assessment of tax liability was passed under Section 62 of the said Act on April 20, 2019. On the very same day, the scanned copy of the impugned assessment order was communicated to the General Manager of the petitioner company. It is the case of the petitioner that the email received on April 20, 2019 remained to be reported by the General Manager to the Management of the petitioner company. It is after the attachment of the bank account of the petitioner on July 1, 2019 upon initiation of recovery proceedings against the petitioner that an application for certified true copy came to be made on November 5, 2019. The certified true copy was made available on November 6, 2019. The appeal under Section 107(1) of the said Act was attempted to be filed in the physical form on November 20, 2019 which the respondent no.5 refused to accept or even acknowledge the receipt thereof. The impugned assessment order was uploaded on GSTN portal only on January 8, 2020

whereupon the petitioner tried to file online appeal on the GSTN portal on January 10, 2020. The point that arises for consideration in the present petition is, whether in the facts of the present case, the period of limitation for the purpose of filing an appeal under Section 107(1) of the said Act would commence from the date when the impugned assessment order is uploaded on the GSTN portal or from the date of service upon the petitioner of the scanned copy of the impugned assessment order by email on April 20, 2019.

6. To appreciate the controversy, it is material to refer to the relevant provisions of the said Act. As the impugned assessment order is passed under Section 62 of the said Act, sub-section (1) of Section 62 which has some relevance is reproduced, which reads thus :-

“62(1) Notwithstanding anything to the contrary contained in section 73 or section 74, where a registered person fails to furnish the return under section 39 or section 45, even after the service of a notice under section 46, the proper officer may proceed to assess the tax liability of the said person to the best of his judgment taking into account all the relevant material which is available or which he has gathered and issue an assessment order within a period of five years from the date specified under section 44 for furnishing of the annual return for the financial year to which the tax not paid relates.”

7. Sub-section (1) of Section 107 of the said Act provides

that any person aggrieved by an order passed under Section 62(1) of the said Act may appeal to the appellate authority (in the present case the appellate authority being the respondent no.5) within the period of 30 days from the date of communication of the order. The relevant provisions of Section 107 germane for the present case reads as under :-

“107. (1) Any person aggrieved by any decision or order passed under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.

(4) The Appellate Authority may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months or six months, as the case may be, allow it to be presented within a further period of one month.

(5) Every appeal under this section shall be in such form and shall be verified in such manner as may be prescribed.

8. A reading of sub-section (1) of Section 107 of the said Act indicates that from the date of communication of the impugned assessment order passed by the adjudicating authority, the appeal to the appellate authority has to be filed within three months. In the present case, the impugned assessment order passed by the respondent no.4

was communicated by email to the General Manager of the petitioner on April 20, 2019. It is not the case of the petitioner that the General Manager was not competent and/or not authorised to receive the communication of the impugned assessment order on behalf of the petitioner. Failure on the part of the General Manager to inform the petitioner regarding receipt of the impugned assessment order will not have the effect of extending the period of limitation prescribed under sub-section (1) of Section 107 of the said Act. The language of sub-section (1) or (4) of Section 107 of the said Act leaves no scope for any ambiguity. The period of three months prescribed will commence from the date on which the said decision or order is communicated to the petitioner. Sub-section (4) of Section 107 of the said Act provides for a window enabling the assessee to present the appeal within a further period of one month, if the appellate authority is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months. It is well settled that the right of appeal is a natural or inherent right but has to be regulated in accordance with the laws in force at the relevant time, the conditions having to be strictly fulfilled.

9. The submission of learned counsel for the petitioner that the limitation prescribed by sub-section (1) of Section 107 of the said Act will commence from the date when the impugned assessment order is uploaded on the GSTN portal

is in the teeth of the provision of sub-section (1) of Section 107 of the said Act which prescribes filing of an appeal within three months from the date on which the said decision or order is communicated to such person. It is well settled that the Court cannot add or subtract the words to a statute or read something into it which is not there. This is precisely what learned counsel for the petitioner wants us to do. The submission of learned counsel for the petitioner that except for communication of the impugned assessment order on the GSTN portal, all other communications are to be disregarded for the purpose of sub-section (1) of Section 107 of the said Act, is fallacious and too far fetched.

10. We may then take a note of Chapter XIII of the Maharashtra Goods and Services Tax Rules, 2017 (hereafter “the Rules” for short) which deals with appeals and revisions. Sub-rule (1), (2) and (3) of Rule 108 reads as under :-

“108 (1) An appeal to the Appellate Authority under sub-section (1) of section 107 shall be filed in **FORM GST APL 01**, along with the relevant documents, either electronically or otherwise as may be notified by the Commissioner, and a provisional acknowledgement shall be issued to the appellant immediately.

(2) The grounds of appeal and the form of verification as contained in **FORM GST APL 01** shall be signed in the manner specified in rule 26.

(3) A certified copy of the decision or order appealed

against shall be submitted within seven days of filing the appeal under sub-rule (1) and a final acknowledgement, indicating appeal number shall be issued thereafter in **FORM GST APL 02** by the Appellate Authority or an officer authorised by him in this behalf:

Provided that where the certified copy of the decision or order is submitted within seven days from the date of filing the **FORM GST APL 01**, the date of filing of the appeal shall be the date of the issue of the provisional acknowledgment and where the said copy is submitted after seven days, the date of filing of the appeal shall be the date of the submission of such copy.

Explanation.- For the provisions of this rule, the appeal shall be treated as filed only when the final acknowledgment, indicating the appeal number, is issued."

11. A brief reference to sub-rule (2) of Rule 108 is required to be made which provides that the grounds of appeal and form of verification as contained in Form GST APL-01 shall be signed in the manner specified in Rule 26. Rule 26 provides for the method of authentication and apart from the applications, replies, appeals, it is provided that any other documents required to be submitted under the provisions of these rules shall be so submitted electronically with digital signature certificate or through e-signature as specified under the provisions of Information Technology Act, 2000 or verified by any other mode of signature or verification as notified by the board in this behalf. Sub-rule

(2)(c) of Rule 26 provides for the documents to be signed or verified through electronic verification code, in the case of company, by the chief executive officer or authorised signatory thereof.

12. At this juncture, it is material to refer to Rule 108 which is reproduced herein before. Sub-rule (1) of Rule 108 provides that the appeal under sub-section (1) of Section 107 shall be filed in Form GST APL-01, along with the relevant documents, either electronically or as notified by the Commissioner. Sub-rule (3) provides that a certified copy of the decision or order appealed against shall be submitted within seven days of filing the appeal under sub-rule (1). The proviso to sub-rule (3) prescribes that the certified copy of the decision or order if submitted within seven days from the filing of the Form GST APL-01, the date of filing of the appeal shall be the date of the issue of the provisional acknowledgment and where the said copy is submitted after seven days, the date of filing of the appeal shall be the date of submission of such copy. It is also relevant to refer to the explanation under sub-rule (3) which provides that for the provisions of Rule 108, the appeal shall be treated as filed only when the final acknowledgment, indicating the appeal number, is issued.

Rule 108 no doubt prescribes that the appeal has to be filed electronically, but it no where prescribes that the same is to be filed only after impugned assessment order is uploaded on GSTN portal online. On the contrary, at the

time of filing the appeal electronically, it is not even the requirement that the certified copy of the decision of the appeal is to be submitted, for the certified copy of the impugned assessment order can be submitted within seven days of filing the appeal. The proviso to sub-rule (3) of Rule 108 stipulates the consequence of filing the certified copy within seven days and also the consequence of filing the certified copy after seven days from the date of filing of appeal.

13. We may also note the statutory command by the legislation as regards limitation and there is the postulate that the delay can be condoned for a further period of one month, subject to the satisfaction of the appellate authority that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months prescribed by sub-section (1) of Section 107 of the said Act. It needs to be emphasized that the policy behind the said Act on the constitution of special adjudicatory forum, is meant to expeditiously decide the grievances of a person who may be aggrieved by the order of an adjudicatory authority. In this context, we may usefully refer to para 20 of the decision of the Hon'ble Supreme Court in the case of **Assistant Commissioner (CT) LTU, Kakinada and ors. Vs. Glaxo Smith Kline Consumer Health Care Limited**². Their Lordships dealt with the principle regarding the statutory command by the

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legislation as regards the limitation, the relevant portion of paragraph 20 which reads thus :-

"20. 15. From the aforesaid decisions, it is clear as crystal that the Constitution Bench in Supreme Court Bar Assn. v. Union of India, (1998) 4 SCC 409, has ruled that there is no conflict of opinion in Antulay case [A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602] or in Union Carbide Corpn. Case [Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584] with the principle set down in Prem Chand Garg v. Excise Commr., AIR 1963 SC 996. **Be it noted, when there is a statutory command by the legislation as regards limitation and there is the postulate that delay can be condoned for a further period not exceeding sixty days, needless to say, it is based on certain underlined, fundamental, general issues of public policy** as has been held in Union Carbide Corpn. case [Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584]. As the pronouncement in Chhattisgarh SEB v. Central Electricity Regulatory Commission, (2010) 5 SCC 23, lays down quite clearly that the policy behind the Act emphasising on the constitution of a special adjudicatory forum, is meant to expeditiously decide the grievances of a person who may be aggrieved by an order of the adjudicatory officer or by an appropriate Commission. The Act is a special legislation within the meaning of Section 29(2) of the Limitation Act and, therefore, the prescription with regard to the limitation has to be the binding effect and the same has to be followed regard being had to its

mandatory nature. **To put it in a different way, the prescription of limitation in a case of present nature, when the statute commands that this Court may condone the further delay not beyond 60 days, it would come within the ambit and sweep of the provisions and policy of legislation. It is equivalent to Section 3 of the Limitation Act. Therefore, it is uncondonable and it cannot be condoned taking recourse to Article 142 of the Constitution."**

14. We may then refer to paragraph 21 of the decision in **Assistant Commissioner (CT) LTU, Kakinada** (supra) which reads thus :-

"21. A priori, we have no hesitation in taking the view that what this Court cannot do in exercise of its plenary powers under Article 142 of the Constitution, it is unfathomable as to how the High Court can take a different approach in the matter in reference to Article 226 of the Constitution. The principle underlying the rejection of such argument by this Court would apply on all fours to the exercise of power by the High Court under Article 226 of the Constitution."

15. We now advert to the exposition of the Hon'ble Supreme Court in the case of **Titaghur Paper Mills Co. Ltd vs State Of Orissa**, which finds a reference in paragraph 17 of the decision in **Assistant Commissioner (CT) LTU, Kakinada** (supra), which reads thus:

"17. We may usefully refer to the exposition of this Court in **Titaghur Paper Mills Co. Ltd. & Anr. Vs. State of**

Orissa & Ors. wherein it is observed that where a right or liability is created by a statute, which gives a special remedy for enforcing it, the remedy provided by that statute must only be availed of. In paragraph 11, the Court observed thus:

"11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the Prescribed Authority under subsection (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under subsection (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned assessment orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Waterworks Co. v. Hawkesford* [(1859) 6 CBNS 336, 356] in the following passage:

There are three classes of cases in which a liability may be established founded upon statute. . . . But there is a third class, viz. where a liability not existing at

common law is created by a statute which at the same time gives a special and particular remedy for enforcing it.... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspapers Ltd.* (1919 AC 368) and has been reaffirmed by the Privy Council in *AttorneyGeneral of Trinidad and Tobago v. Gordon Grant & Co. Ltd.* (1935 AC 532) and *Secretary of State v. Mask & Co.* (AIR 1940 PC 105). It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.”

16. In the present case, having regard to the express provisions of sub-Section (1) and (4) of Section 107 of the said Act, we have no manner of doubt, that for the purpose of limitation, the date of communication of the impugned assessment order is to be regarded as April 20, 2019 viz the date on which the order was sent by email to the petitioner. In the facts of this case, having regard to the express and unambiguous language of sub-section (1) of Section 107 of the said Act, we do not find any force in the contention of learned counsel for the petitioner, that the date of uploading of the impugned assessment order on the

GSTN portal has to be regarded as the date of communication for the purpose of calculating limitation. We have no hesitation in holding that the petitioner failed to avail of the remedy provided by the said Act for filing of an appeal within the period prescribed and therefore rightly not accepted and entertained by the appellate authority beyond the extended statutory limitation period of one month in terms of sub-section (4) of Section 107. In support of the view that we take, a profitable reference needs to be made to paragraph 24, 25 and 26 of the decision in the case of **Assistant Commissioner (CT) LTU, Kakinada** (supra) which reads thus :-

"24. Reliance was then placed on a three Judge Bench decision of this Court in ITC Ltd. & Anr. Vs. Union of India. In that case, the High Court had dismissed the writ petition on the ground that the petitioner therein had an adequate alternative remedy by way of an appeal under Section 35 of the Central Excise Act. Concededly, this Court was pleased to uphold that opinion of the High Court. However, whilst considering the difficulty expressed by the petitioner therein that the statutory remedy of appeal had now become time barred during the pendency of the proceedings before the High Court and before this Court, the Court permitted the petitioner therein to resort to remedy of statutory appeal and directed the appellate authority to decide the appeal on merits. This obviously was done on the basis of concession given by the counsel appearing for the

Revenue as noted in paragraph 2(1) of the order, which reads thus:

"2. The High Court has dismissed the writ petition filed by the petitioner on the ground that there is an adequate alternative remedy by way of an appeal under Section 35 of the Central Excise Act. Learned counsel for the petitioner submits that the petitioner will face certain difficulties in pursuing this remedy:

(1) This remedy may not be any longer available to it because the appeal has to be filed within a period of three months from the date of the assessment order and delay can be condoned only to the extent of three more months by the Collector under Section 35 of the Act. It is pointed out that the petitioner did not file an appeal because the Collector (Appeal) at Madras had taken a view in a similar matter that an appeal was not maintainable. That apart, the petitioner in view of the huge demand involved filed a writ petition and so did not file an appeal. In the circumstances of the case, we are of the opinion that the ends of justice will be met if we permit the petitioner to file a belated appeal within one month from today with an application for condonation of delay, whereon the appeal may be entertained. **Learned counsel for the Revenue has stated before us that the Revenue will not object to the entertainment of the appeal on the ground that it is barred by time. In view of this direction and concession, the petitioner will have an effective alternative remedy by way of an appeal.**

(emphasis supplied)

25. In that case, it appears that the writ petition was filed within statutory period and legal remedy was being pursued in good faith by the assessee (appellant).

26. Suffice it to observe that this decision is on the facts of that case and cannot be cited as a precedent in support of an argument that the High Court is free to entertain the writ petition assailing the assessment order even if filed beyond the statutory period of maximum 60 days in filing appeal. The remedy of appeal is creature of statute. If the appeal is presented by the assessee beyond the extended statutory limitation period of 60 days in terms of Section 31 of the 2005 Act and is, therefore, not entertained, it is incomprehensible as to how it would become a case of violation of fundamental right, much less statutory or legal right as such."

(Underlining by us)

17. The decision relied upon by the petitioner in the case of **Gujarat Tate Petronet Limited** (*supra*) is rendered in a different fact situation. The petitioner therein approached the adjudicating authority time and again for uploading the order on the GST portal, however, the adjudicating authority was unable to do so due to certain technical issues. The order passed by the adjudicating authority was not served nor was it uploaded on the GST portal and due to non-availability of the refund order, the petitioner could not prefer the appeal in the electronic form as required under the GST laws. Reverting to the facts of the present case,

though the petitioner was in receipt of the impugned assessment order by email on April 20, 2019 itself, the petitioner applied for certified true copy of the order dated April 20, 2019 on November 5, 2019, only after the recovery proceedings were initiated against the petitioner by attaching the bank account on July 1, 2019. The petitioner has by such belated action lost the statutory remedy of appeal. Consequently, in view of the law laid down by the Apex Court, it is not possible for us to entertain the petitioner's challenge to the impugned assessment order.

18. In the light of the above discussion, we are of the considered opinion that it was incumbent upon the petitioner to file the appeal within the statutory period of limitation prescribed by sub-section (1) and sub-section (4) of Section 107 of the said Act, to be reckoned taking into consideration the date of communication of impugned assessment order as April 20, 2019, which the petitioner failed to do. Consequently, we find no merit in the writ petition. The writ petition is dismissed with no order as to costs.

(M. S. KARNIK, J.)

(CHIEF JUSTICE)