BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 09.09.2021

CORAM:

THE HON'BLE MR.JUSTICE R.SURESH KUMAR

W.P.(MD)No.6969 of 2021 and
MP(MD) No.5360 of 2021

M/s.Susee Auto Sales& Services Pvt Ltd.,
Represented by its Authorised Signatory,
No.25 Tamil Sangam Road,
Madurai - 625 001. ...Petitioner

Vs.

1. Assistant Commissioner of GST & CE (Tech),
Madurai-I Division,
Central Revenue Building,
Bibi Kulam,
Madurai 625002.

2.Commissioner of CGST & CE (Appeals)
Central Revenue Building, Bibikulam,
Madurai-625002. ... Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, to call for the files relating to Order-in-Original No.MAD-ST-000-ASC-031/18 dated 30.08.2018 of the first respondent and quash the same and the related Order-in-appeal No.19/2021 dated 10.03.2021 for the second respondent with direction to the first respondent to re-adjudicate the SCN No.9/2017 (S.TAX) dated 27.07.2017 after receiving reply and providing opportunity of hearing to the petitioner.

For Petitioner :Mr.N.Murali for Mr.R.Raghavan

For Respondents :Mr.K.Prabhu
Standing Counsel

O R D E R

The Prayer sought for in this Writ Petition is for Certiorarified Mandamus, to call for the files relating to Order-in-Original No.MAD-ST-000-ASC-031/18 dated 30.08.2018 of the first respondent and quash the same and the related Order-in-appeal

No.19/2021 dated 10.03.2021 for the second respondent with direction to the first respondent to re-adjudicate the SCN No.9/2017 (S.TAX) dated 27.07.2017 after receiving reply and providing opportunity of hearing to the petitioner.

2.The petitioner is an assessee under the first respondent and in respect of service tax, a show cause notice was issued on 27.07.2017, on the ground that there has been non-payment of service tax to the tune of Rs.2,98,973/- on legal charges paid to advocates for the period from 2012-2013 to 2016 -2017, short payment of service tax on business auxiliary services during the period from 2012-2013 to 2016-2017, non-payment of security service under reverse charge mechanism for the period from 2012-2013 to 2016-2017, non-payment of service tax on renting immovable property service during the period 2015-2016 and 2016-2017, also the show cause notice covered for the alleged short/non-payment of service tax on repair, reconditioning, restoration and other similar service due to reconciliation of taxable values between profit and loss account, during the period from 2012-2013 to 2016-2017, also non- payment of service tax in respect of freight charges paid under reverse charge mechanism during the period from 2012-2013 to 2016-2017 and also reversal proportionate cenvat credit of Rs.4,36,649/- under rule 6 (3) of Cenvat Credit Rules, 2004, for the period 2012-2013 to 2015-2016.

3.After such show cause notice was served on the petitioner, according to the Revenue, three opportunities were given to reply and personal hearing was also offered to the petitioner, however, none of the chances given by the Revenue has been utilised by the petitioner/assessee. Therefore, the Assessing Authority has proceeded further and passed an order in original, dated 30.08.2018.

4.According to the petitioner, the said order in original, dated 30.08.2018 was received by the petitioner only on 04.09.2018, thereafter, an appeal was filed as against the said order in original, since there has been a pre-requisite of deposit of 7.5% of the tax demand, for preferring an appeal to the Appellate Authority, that amount also was paid by the petitioner on 20.09.2018 and thereafter, according to the petitioner, the appeal papers have been sent, instead of to the Appellate Authority, to the Original Authority itself. Subsequently, no further movement has been taken place, and after a long time, the petitioner had came to know that the appeal filed by the petitioner had been before the Original Authority, which is the wrong Forum, therefore, in this regard, though some communications had been given, or request had been made to the Appellate Authority, since the same was not considered, the petitioner had decided to prepare a fresh appeal and file it before the Appellate Authority, accordingly, the appeal has been filed before the Appellate Authority with the delay of 815 days.

5.The Appellate Authority having taken the appeal filed by the petitioner, has decided to reject the same on the ground that the Appellate Authority does not have power or jurisdiction to condone the delay of 815 days, in view of Section 85(3) of Finance Act under which, appeal shall be presented within three months from the date of receipt of the order relating to service tax, penalty and interest, with the provision of further period of three months for filing of appeal with sufficient cause. Therefore, beyond six months period, absolutely there is no scope for the Appellate Authority to entertain the appeal, they could not entertain the appeal after condoning such a huge delay of 815 days, therefore, on that ground, the appeal filed by the petitioner with the condonation of delay petition, at the condone delay stage itself was rejected through the impugned order dated 10.03.2021. Therefore, having found no other option, the petitioner is constrained to file this Writ Petition, challenging the order in original, dated 30.08.2018.

6.Heard Mr.N.Murali appearing for the petitioner, who would submit that on receipt of the order in original dated, 30.08.2018 on 04.09.2018, with a clear intention to prepare an appeal, pre-requisite deposit of 7.5% of demanded tax has been paid on 20.09.2018 and thereafter, appeal was prepared and filed before the Original Authority wrongly, due to some inexperienced staff of the petitioner/assessee at that time, as the very business of the petitioner had completely come down. The mistake is an inadvertent one occurred at the end of the assessee side, and therefore, if at all, the said appeal has been filed in a wrong Forum, the same can very well be returned to the assessee, enabling the assessee to file an appeal before the Appellete Authority/proper Forum. However, the said issue had come to the light only long after and when they prepared a fresh appeal and file it before the Appellate Authority, there has been a delay of 815 days, therefore, in order to condone such a delay, when a request was made, the Appellate Authority having considered the same, rejected that on the ground of no power/ jurisdiction to condone the delay beyond the period as contemplated under Section 85(3) of the Finance Act, 1984 and on that sole ground, the petitioner's appeal since has been rejected at the condone delay stage itself, having left with no other option, the petitioner has filed the present Writ Petition. In this context, the learned counsel appearing for the petitioner would also submit that, the appeal filed by the petitioner before the Appellate Authority may be directed to be taken on file and to be decided on merits.

7.Per contra, Mr.K.Prabhu, the learned Standing Counsel appearing for the respondents would submit that, though three or more chances were given, after show cause notice dated 27.07.2017 issued to the petitioner, none of the chances were utilised by him and thereafter, once the order in original was passed on 30.08.2018 and the same was served on the petitioner, then only, he had come forward to pay the pre-requisite deposit of 7.5% of the demanded tax. However, simultaneously, whether he has preferred any appeal before the Appellate Authority is not known to the Assessing Authority. In this regard, though it was claimed by the petitioner that he has filed the appeal before the wrong Forum, in this regard, it is also made clear by the Appellate Authority that no such appeal was filed earlier, before the present appeal filed at the Appellate Authority with the delay of 815 days. Hence, it has become clear that, whatsoever the appeal filed by the petitioner/assessee, it must be within the time of limitation, as per section 85(3) of the Act and therefore, if there is no such appeal filed, belated appeal with huge delay cannot be accepted, therefore, the Appellate Authority has rightly rejected the same.

8.I have considered the rival submissions made by the learned counsel appearing for the petitioner and the learned Standing Counsel appearing for the respondents and perused the materials placed before this Court.

9.In this case, admittedly, the order in original was passed on 30.08.2018, of course, after giving due opportunity to the petitioner, which the petitioner cannot deny. On receipt of the order in original on 04.09.2018, pre-requisite deposit of 7.5% of demanded tax was paid by the petitioner on 20.09.2018, that is, within 15 days, based on which, it is claimed by the petitioner that, the appeal papers have been prepared and sent, instead of Appellate Authority, it was sent to the Original Authority, that is, the Assessing Authority. If at all the petitioner had no intention to prefer an appeal within the time prescribed, in this regard, he would not have come forward to make pre-requisite deposit of 7.5% of demanded tax and this has been admittedly done by the petitioner. Therefore, the claim made by the petitioner can be *prima facie* accepted. Subsequently, when the petitioner came to know, of course, after a long date, that it was a wrong Forum, before which, the appeal was filed by the petitioner, he had come forward to rectify the same and filed a fresh appeal before the Appellate Authority, for which, there has been huge delay of 815 days.

10.No doubt, in view of the statutory limitation prescribed, the Appellate Authority can not condone such a huge delay and therefore the reason stated by the Appellate Authority, in this regard, to that extent can be accepted. Further, it is to be taken note of that, the petitioner had paid the pre-requisite deposit of 7.5% of demanded tax, in this context, though he made an attempt to file an appeal, but he had chosen the wrong Forum by mistake or by mis-conception of the Forum, due to various reasons at the end of the assessee side. In view of the said factual circumstances, this Court feel that in such peculiar circumstances, the appeal filed by the petitioner can be entertained by the Appellate Authority. This Court by exercising its extraordinary power under Article 226 of the Constitution of India, can very well condone the delay in filing the appeal before the Appellate Authority for the very peculiar reasons as discussed above.

11.In view of the aforesaid facts and circumstances, this Court is inclined to dispose of the Writ Petition with the following orders.

12. That there shall be a direction to the second respondent/Appellate Authority, to entertain the appeal filed by the petitioner as against the order-in- original, made by the first respondent, dated 30.08.2018, in MAD-ST-000-ASC-031/18 and accordingly decide the said appeal on merits and in accordance with law. In view of the aforesaid direction to the Appellate Authority to entertain the appeal and to decide the same on merits, the challenge against the order in original, dated 30.08.2018, in this Writ Petition need not be traversed. It is made clear that on receipt of this order, the petitioner shall make a request to the Appellate Authority along with a copy of this order, to entertain and decide the appeal filed by the petitioner on merits as referred to above.

13.With the above directions, this Writ petition is disposed of. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (P&A)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

vrn/tmg

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1. The Assistant Commissioner of GST & CE (Tech),
   Madurai-I Division,
   Central Revenue Building,
   Bibi Kulam,
   Madurai 625002.

2.The Commissioner of CGST & CE (Appeals)
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