Item No.3 & 1 & 2 of suppl. List dated 01.12.22.

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

HEARD ON: 01.12.2022

DELIVERED ON:01.12.2022

CORAM:

THE HON'BLE MR. JUSTICE T. S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

M.A.T No.1663 of 2022
with
I.A. No.CAN 1 of 2022
with
I.A. No.CAN 2 of 2022

M/s. LGW Ltd.
Vs.
The Assistant Commissioner, Service Tax, Division -II & ors.

with

M.A.T No.1765 of 2022
with
I.A. No.CAN 1 of 2022
with
I.A. No.CAN 2 of 2022

M/s. LGW Ltd.
Vs.
The Assistant Commissioner, Service Tax, Division -II & ors.

With

M.A.T No.1766 of 2022

with
I.A. No.CAN 1 of 2022
with
I.A. No.CAN 2 of 2022

M/s. LGW Ltd.
Vs.
The Assistant Commissioner, Service Tax, Division -II & ors.

Appearance:-

Mr. Somnath Ganguly,
Mr. Sukalpa Seal,
Ms. Priyambada Singh ... for the appellant.

Mr. Shiv Shankar Banerjee,
Mr. Tapan Bhanja ... for the CGSt Authority.

<u>JUDGMENT</u>

(Judgment of the Court was delivered by* T.S. SIVAGNANAM, *J.)

1. Since the issues involved in these appeals are common and germane, all the appeals are disposed of by this common judgment and order. For the sake of convenience, we take up MAT 1663 of 2022 for discussion.

Re: I.A. No. CAN 1 of 2022

2. This is an application to condone the delay of 123 days in filing the instant appeal.

3. We have heard Mr. Somnath Ganguly, learned counsel appearing for the appellant duly assisted by Mr. Sukalpa Seal, learned Advocate and Mr. Shiv Shankar Banerjee, learned counsel appearing for the respondents duly assisted by Mr. Tapan Bhanja, learned Advocate.

4. We are satisfied with the reasons assigned in the affidavit filed in support of the application. Accordingly, the delay in filing the instant appeal is condoned.

5. The application for condonation of delay being I.A. No.CAN 1 of 2022 is allowed. There shall be no order as to costs.

Re: MAT 1663 of 2022

6. This intra Court appeal filed by the assessee is directed against the order passed by the learned Single Bench dated 18th August, 2021 in W.P.A. No.11112 of 2021. The said writ petition was filed by the appellant challenging the order passed by the Customs, Excise and Service Tax Appellate Tribunal, Kolkata (for short, "the Tribunal") dated 4th February, 2021. By the said order, the learned Tribunal had dismissed the miscellaneous

applications filed by the appellant for condonation of delay in filing the appeal before the Tribunal against the order passed by the Commissioner of Central Excise and Service Tax (Appeals-I) dated 20th February, 2013. The learned Writ Court was of the view that there is no error in the order passed by the Tribunal as sufficient cause has not been shown by the appellant for condonation of inordinate delay.

7. After elaborately hearing the learned Advocates for the parties and carefully perusing the materials placed on record, we need to point out that the conduct of the appellant is not appreciable. We say so because the appellant did not diligently prosecute the matter before the first appellate authority. The appeal filed by the appellant before the first appellate authority was hopelessly time-barred and the appellate authority had no jurisdiction to condone the delay beyond the time limit prescribed under the statute. Therefore, the appellate authority having left with no option had dismissed the appeal. Aggrieved by the same, the appellant could have immediately preferred an appeal before the learned Tribunal, but once again the appellant was not diligent and there was an inordinate delay in filing the appeal before the Tribunal and in our view, the learned Tribunal

rightly viewed that there is no reasonable explanation given by the appellant for exercising the discretion in his favour.

8. Learned senior standing counsel appearing for the revenue seeks to support the conclusion arrived at by the Tribunal as well as that of the first appellate authority. There is no quarrel on the proposition that the first appellate cannot condone the delay beyond the time limit prescribed under the statute. Therefore, no fault can be attributed to the order passed by the first appellate authority. However, when the matter came before the learned Tribunal, it had enough discretion to examine the factual position and then come to a conclusion.

9. The learned Tribunal was of the opinion that there is inordinate delay and no reasonable explanation had been done. The settled legal position is that none benefits by lodging an appeal belatedly unless and until there are mala fides attributed to the appellant for not preferring the appeal petition within the time prescribed under the statute. Likewise, it is also equally well-settled that a person, who has not been diligent and who has slept over the matter, cannot be

rewarded by the Courts and Tribunal by exercising discretion in his / her favour.

10. Thus, we are required to see as to whether the appellant falls in any one of the aforementioned category of cases. Under normal circumstances, we would have dismissed the appeal right away but however, what has prompted us not to do so is on account of a development which had culminated in an order passed by the Assistant Commissioner of Central Excise, Bidhannagar Division dated 10th April, 2019. By the said order, the authority had sanctioned refund of Rs.13,59,282/- paid on the specified taxable services used for export of goods in terms of notification no.41/2007-ST dated 6th October, 2007 as amended. The remaining amount of Rs.73,912/- claimed as refund was rejected. The said order pertained to a claim for refund for the period from April, 2008 to September, 2008. Initially, the adjudicating authority had held against the appellant and aggrieved over the same, the appellant had preferred an appeal before the Commissioner (Appeals-I), Kolkata challenging the order in original dated 24th March, 2009. The appeal was dismissed by order dated 10th November, 2009 against which the appellant had preferred an appeal before the learned Tribunal.

The Tribunal by an order dated 15th September, 2017 allowed the appeal and remanded the matter back for fresh consideration. On remand, the adjudicating authority granted a de novo hearing agreed with the submissions made by the appellant and consequently sanctioned refund.

11. It is not clear as to whether the appellant had placed the order passed by the Assistant Commissioner, Bidhannagar CGST & CX Division dated 10th April, 2019 accepting the classification as adopted by the appellant in respect of the specified services. In the order passed by the learned Tribunal dated 4th February, 2021, there is no indication as regards the submission, which were made by the appellant.

12. In the light of the above, though we do not fully approve of the conduct of the appellant in not pursuing the matter in a time bound manner, considering the fact that the present claim for refund is for the subsequent period, i.e., from October, 2008 to December, 2008, we are of the view that this aspect of the matter can be taken note of by the learned Tribunal while considering the application for condonation of delay.

13. Thus, taking note of the peculiar facts and circumstances, we are inclined to interfere with the order passed by the learned Tribunal. For the above reasons, the appeal is allowed. The order passed in the writ petition is set aside. Consequently, the writ petition is allowed and the order passed by the learned Tribunal dated 4th February, 2021 is set aside and the Miscellaneous application Nos.77827 of 2019 (COD), 77828 of 2019 (COD) and 77829 of 2019 (COD) are restored to the file of the learned Tribunal to be considered afresh. The learned Tribunal is requested to take note of the observations made by us, more particularly the fact that the department for the earlier period, i.e. from April, 2008 to September, 2008 has accepted the classification adopted by the appellant on the specified services.

14. The learned senior standing counsel appearing for the respondents submitted that on remand, in case the learned Tribunal agrees with the appellant and exercises discretion and ultimately it is held that refund claim is sustainable, the department shall not be made liable for payment of interest for the entire period. We give liberty to the revenue to raise this issue before the learned Tribunal, which shall be considered.

15. Consequently, the appeals being MAT 1765 of 2022 and MAT 1766 of 2022 are allowed along with applications on above observations.

16. There shall be no order as to costs.

17. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNANAM, J)

I agree,

(HIRANMAY BHATTACHARYYA, J.)

NAREN/PALLAB(AR.C)