ORDER O – 360

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)
ORIGINAL SIDE

CEXA/5/2005
M/S. CREATIVE POLYPACK LTD.
VERSUS
COMMISSIONER OF CENTRAL EXCISE, KOLKATA-II, COMMISSIONERATE

BEFORE :
THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI
AND
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ
Date : 8th February 2024.

Appearance:
Mr. Bhaskar Prosad Banerjee, Advocate
Mr. Abhradip Maity, Advocate
...for the respondent.

1. Case called out. None appears for the appellant to press the appeal. Sri Bhaskar Prasad Banerjee, learned senior standing counsel (indirect taxes) for the respondent is present.

2. The appeal of the appellant was dismissed by the Tribunal by order dated 31.08.2004, which is reproduced below:-

> *"Heard Shri P.R. Biswas, Consultant for the appellant and Shri T.K.Kar, SDR for the Revenue. Shri Kar submits that the appeal to the Commr. of Appeal was filed beyond the period of 90 days. Commr. of Appeal was not competent to condone the delay of more than 30 days. He has dismissed the appeal as time barred. We find that the appeal in this case was not filed within the prescribed time limit of sixty days to the Commissioner of Appeals. The Appeal was filed even beyond the further period of 30 days, the delay of which cannot be condoned by the Commr. of Appeals. He was not competent to condone the*

delay. Since it is a settled legal position that Commr. of Appeal has no power to condone the delay beyond 30 days, we dismiss the appeal as non-maintainable."

3. The appeal was admitted by this Court by order dated 24.03.2005, on the following substantial questions of law:-

"(i) Whether the expression used in the proviso to Section 35 of the Central Excise Act, 1944 attracts and the scheme thereof attracts Section 2992) of the Limitation Act and expressly bars the application of Section 4 to 24 thereof to the extent of taking away the jurisdiction of the Commissioner of Appeal to condone the delay beyond 30 days after the period of limitation of 60 days provided in this Section itself?

(ii) Whether a default in the form of debiting the Cenvat Credit account claiming the unpaid duty for the interregnum period after the expiry of the fortnight for which the duty is paid and the last date for payment of such duty would attract the ingredients of the provisions for imposing penalty under Rule 173 inconsistent with the Provisions of Section 11A and 11A(c) in the absence of any intent to evade payment of duty or otherwise?

(iii) Whether on a true and proper interpretation of the proviso inserted in rule 57AB(1)(b) of the Central Excise Rules, 1944 by notification bearing No.48/2000-CE(NT) dated August 18, 2000 and other relevant provisions of the Central Excise Act and Rules, the Tribunal was correct in law in upholding the demand for Cenvat Credit of Rs.10,91,183/-?"

4. We find that the substantial question of law no.(i) is covered by the judgment of Hon'ble Supreme Court in the case of Singh Enterprises v. Commissioner of Central Excise, Jamshedpur reported in 2008 (221) ELT 163 (SC) and in

view thereof, the substantial question of law no.(i) deserves to be answered in negative i.e. in favour of the revenue and against the assessee and it is held that delay foe the period beyond the condonable period as provided under Section 35 of the Central Excise Act, 1944 cannot be condoned by the Commissioner (Appeal).

5. Since we have answered the substantial question of law no.(i) in favour of the revenue and against the assessee, therefore, the substantial questions of law nos.(ii) and (iii) need not be answered and in fact they do not arise from the order of the Tribunal.

6. For the reasons afore-stated, the appeal is dismissed.

(SURYA PRAKASH KESARWANI, J.)

(RAJARSHI BHARADWAJ, J.)

S. Kumar