IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.11.2024

THE HON'BLE DR.JUSTICE ANITA SUMANTH
AND
THE HON'BLE MR.JUSTICE G.ARUL MURUGAN

W.P.Nos.14476 to 14481 of 2009

M/s.Sagar Enterprises,
No.25, A South Mariamman Koil Street,
Jeevanandapuram Lawspet,
Puducherry. ... Petitioner
[in W.P.Nos.14476, 14479, 14480, 14481 of 2009]

M/s.Sooraj Graphics,
No.25, Kamarajar 1st Street,
Indira Nagar,
Puducherry. ... Petitioner
[in W.P.Nos.14477 & 14478 of 2009]

versus

1.Customs, Excise and Service Tax Appellate Tribunal,
Haddows Road,
Chennai - 600 006.

2.The Commissioner of Customs,
Tuticorin. ... Respondents
[in all WPs]

Common Prayer: Petitions filed under Article 226 of the Constitution of India praying to issue a writ of certiorari, calling for the records and to quash the impugned order Nos.378, 379, 380, 381, 382 & 383/2009 C. Ex. dated 06.04.2009 passed by the first respondent as ultra vires and against articles 14, 19(1)(g) and 265 of the Constitution of India in so far as denial of the benefit cum duty to the petitioners are concerned respectively.

For Petitioner [in all WPs]	:	Mr.M.Karthikeyan
For Respondents [in all WPs]	:	Mr.Rajendran Raghavan Senior Panel Counsel, for R2 R1 – Tribunal

C O M M O N O R D E R

[*Order* of the Court was made by ***Dr.ANITA SUMANTH, J.***]

The petitioners challenge orders of the Customs, Excise and Service Tax Appellate Tribunal (in short 'CESTAT') rejecting the applications for condonation of delay of 59 days seeking refund of amounts paid towards fine and penalty that were set aside in appeal.

2. We have heard Mr.M.Karthikeyan, learned counsel for the petitioners and Mr.Rajendran Raghavan, learned Senior Panel Counsel for the second respondent.

3. The admitted sequence of dates and events are as follows:-

(i) Sagar Enterprises, petitioner in W.P.Nos.14476, 14479, 14480 & 14481 of 2009 and Sooraj Graphics, petitioner in W.P.Nos.14477 & 14478 of

2009 had filed bills of entry on 27.01.2005, 06.01.2005, 17.02.2005, 10.03.2005, 08.04.2005 and 24.03.2005 respectively for import of used photocopiers.

(ii) On 16.02.2005, 20.04.2005, 04.04.2005, 19.01.2005, 01.03.2005 and 18.03.2005, Orders-in-original were passed to the effect that the imports had been occasioned without valid licences and confiscating the goods. Fine and penalty were imposed upon the petitioners.

(iii) Challenging the orders of the adjudicating authority, the petitioners filed appeals before the Commissioner (Appeals).

(iv) On 11.05.2005, a larger bench of the CESTAT-Delhi in the case of *Atul Commodities Pvt. Ltd. Vs. Chief Commissioner, Cochin and Hyderabad*[1] decided the dispute as to whether the second hand photocopiers are capital goods, in the affirmative.

(v) On 04.07.2005, 05.07.2005, 05.07.2005, 30.03.2005 and 04.07.2005, the first appeals filed by the petitioners came to be allowed by the appellate authority following the decision of the larger bench of CESTAT in *Atul Commodities*[2] in favour of the petitioners.

1 (2005 (184) ELT 135-Tri-LB)
2 Foot Note Supra (1)

(vi) The revenue filed appeals as against the order of the first appellate authority before the CESTAT.

(vii) On 28.07.2005, applications were made seeking refund of fine and penalty pursuant to the orders of the appellate authority dated 04.07.2005, 05.07.2005, 05.07.2005, 30.03.2005 and 04.07.2005.

(viii) On 17.04.2007 (5 applications) and 16.04.2007 (1 application) the refund claims were rejected vide orders-in-original passed by the Assessing Officer who proceeded to rely on a decision of the Kerala High Court in the case of *CC, Cochin V. Atul Commodities Pvt. Ltd.*[3] that had reversed the decision of the larger bench of the CESTAT.

(ix) Appeals were filed before the Commissioner of Customs & Central Excise (Appeals) that came to be rejected on 28.08.2008 reiterating the decision of the Kerala High Court in the case of *Atul Commodities*[4].

(x) On 28.01.2009, the petitioners filed second appeals against the Appellate Commissioner's orders before the CESTAT along with applications for condonation of delay for a period of 59 days.

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3 . (2006 (202) ELT 392 (Ker.)
4 Foot Note Supra (3)

(xi) On 24.02.2009, the Supreme Court, in Civil Appeal No.2999 of 2007, *Atul Commodities Pvt. Ltd. Vs. Commissioner of Customs, Cochin*[5] reversed the order of the Kerala High Court, confirming decision dated 11.05.2005 of the Larger Bench of the CESTAT in the case of *Atul Commodities*[6] holding that used photocopiers constitute capital goods and hence do not require a licence for import.

(xii) On 30.03.2009, based on the judgment of the Supreme Court dated 24.02.2009, appeals filed by the revenue came to be dismissed.

(xiii) It would have been appropriate for the assessee's appeals to have been heard along with the revenue's appeals and disposed on 30.03.2009 itself as the entirety of the facts would have been before the Tribunal to be considered in proper perspective. However, the applications for condonation of delay came to be dismissed on 06.04.2009 by way of separate orders, impugned in these appeals.

4. Mr.M.Karthikeyan, learned counsel for the petitioners would reiterate the above sequence of facts. He would point out that the delay was insignificant in quantum, and had been caused only in account of the

5 (2009-TIOL-24-SC-CUS)]
6 Foot Note Supra (1)

erroneous impression carried by the appellant that the dispute would be decided in the appeals filed by the revenue and hence there was no reason for the assessee to file separate appeals. Hence the delay was not wilful or wanton and ought to have been condoned by the appellate authority.

5. Per contra, Mr.Rajendran Raghavan, learned Senior Panel Counsel for the second respondent would point out that the petitioners are regular assessees engaged in litigation on several fronts and are hence well aware of the proper procedure to be followed in such matters. The orders of rejection had admittedly been served on them and there is no justification in their approaching the Tribunal belatedly.

6. Reliance is placed on the judgments of the Supreme Court in (i) *State of Jharkhand and others Vs. Ambay Cements and another*[7] and (ii) *ITC Ltd. Vs. Commissioner of Central Excise*[8] and the decision of the Gauhati High Court in *Namrup Engineer Company Vs. The Union of India and 3 others*[9] .

7 (2004 (11) TMI 319)
8 (2019 (9) TMI 802)
9 (2003 (10) TMI 54)

7. In *Ambay Cements*[10], there is no reference to a petition for condonation of delay. What is referred to by learned standing counsel is an observation in para 26 of the judgement to the effect that, whenever the statute prescribes that a particular act is to be carried out in a particular manner, failure to so comply will lead to severe consequences. In our view, this decision is of absolutely no assistance to the revenue in the present matter.

8. In the case of *Namrup Engineer Company*[11], the delay was in filing of an appeal before the Commissioner (Appeals). The limitation for filing of the first appeal is 60 days further extended to a period of 30 days within which the appellant may seek and obtain condonation at the discretion of the authority. The Gauhati High Court held that there was no provision for condonation of delay of a period over and above the 60 days provided. This situation also does not arise in the present case and hence reliance on this decision is also misplaced.

9. In the case of *ITC Ltd.*[12], the Supreme Court has expressed the view that claims for refund cannot be entertained unless the order of assessment or

10 Foot Note Supra (7)
11 Foot Note Supra (9)
12 Foot Note Supra (8)

self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the scope of Section 27 to set aside the order of self-assessment and reassess the duty for the purposes of effecting refund.

10. Thus, in the event an assessee is aggrieved by any order, which would include an order of self-assessment, unless such order is modified under Section 128 or other relevant provisions of the Act, refund cannot be claimed as a matter of right.

11. In the present case, the petitioners had challenged the orders-in-original in terms of which the penalty and fine were initially levied and succeeded in the first appeals. It is pursuant to those orders that applications for refund had been filed. As against appellate orders dated 04.07.2005, 05.07.2005, 05.07.2005, 30.03.2005 and 04.07.2005, the Revenue had filed appeals that had come to be dismissed on 30.03.2009. No Civil Miscellaneous Appeal has been filed as against the same and order dated 30.03.2009 in favour of the assessee attained finality .

12. In light of the decision of the Tribunal dated 30.03.2009, the entitlement of the petitioners to the refund cannot be questioned and

Mr.Raghavan fairly does not dispute this position. Thus, there is no reason for us to remit the matter back to the Tribunal and it would suffice to state that the conclusion of the Tribunal in the impugned orders is set aside.

13. Let a representation be made by the petitioners before the second respondent for refund of the amounts remitted, which shall be paid over to them along with applicable interest, in accordance with law, within a period of four (4) weeks from date of receipt of the applications.

14. In the result, these Writ Petitions are allowed. No costs.

[A.S.M.J.,] [G.A.M.J.,]
19.11.2024

Speaking order
Index : Yes
Neutral Citation : Yes

sri

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