(2003) 12 KL CK 0028

In the High Court Of Kerala

Case No : Writ Petition (C) No. 36418 of 2003

Bannari Amman Steels (P) Ltd. APPELLANT

Vs

Commissioner of Central Excise RESPONDENT

Date of Decision : 19-12-2003

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35

Citation : (2004) 2 KLT 197

Hon'ble Judges : G. Sivarajan, J

Bench : Single Bench

Advocate : C.S. Gopalakrishnan Nair, for the Appellant; P.S. Sreedharan Pillai, S.C.G.S.C., for the Respondent

Final Decision : Allowed

Judgement

G. Sivarajan, J.—Petitioners are manufacturers of M.S. Ingots and non alleged steel. They are assessees under the Central Excise Act and the Rules and are clearing goods after payment of duty. Petitioners are presently aggrieved by the rejection of their appeal Nos. 305/2003 CE and 306/2003 CE by the Commissioner of Central Excise (Appeals), Kochi by order dated 5.11.2003 (Ext.P13). The said appeals were rejected by the 1st respondent on the ground that appeals are belated. The 1st respondent has noted that the appeals were filed on 27.10.2003 while the petitioners have received the impugned orders on 9.4.2002. The petitioners had stated that these appeals were sent by post under certificate of posting on 22.6.2002 and therefore the appeals should be treated as having been filed within time. The petitioners had also enclosed a copy of the certificate of posting issued by the post office. The 1st respondent observed that there is no dispute about the fact that the petitioners had sent the memorandum of appeals against the impugned orders by post and through certificate of posting on 22.6.2002 and that the date on which the appeals were sent by post falls within the condonable period u/s 35 of the Central Excise Act, 1944. However, the 1st respondent observed that when appeals are sent by post, the date on which the appeals are received in the office of the Commissioner of Central Excise (Appeals) is to be taken as the date for determining the period of limitation u/s 35 and that in the instant case none of the two appeals were received earlier and that the petitioners had subsequently filed copies of these appeals on 27.10.2003. The 1st respondent noted that the Bombay, Calcutta and the Gujarat High Courts, and the Tribunal have held that the date of filing of the appeals would be the date of receipt of the appeal papers in the office of the appellate authority. The 1st respondent thus took the view that the appeals were filed beyond the condonable period provided u/s 35 of the Central Excise Act, 1944.

2. Learned counsel for the petitioners submitted that the petitioners have got a very strong case in the appeals and that the 1st respondent must be directed to consider the appeal on merits.

3. I have also heard the learned counsel representing the senior Central Government standing counsel for the Government of India appearing for respondents. The 1st respondent admittedly did not consider whether there are sufficient cause for condoning the delay in filing the appeals. According to the 1st respondent the delay is beyond the condonable period. In the circumstances, the question to be considered is as to whether the appeals can be treated as filed within time and/or as to whether the 1st respondent can condone the delay in filing the appeal beyond the period provided in Section 35 of the C.E.Act.

4. Gujarat High Court in Narandas Vallabhram Parmar and Anr. v. The Union of India and Ors. (1978 E.L.T.695) considered the case where the appeal was sent by registered post, and the same was received after the period of limitation provided u/s 35 of the Central Excise Act. The court, held that in a case where the appeal was invited by post; the post office being an agent of the authorities, the appeal sent before the expiry of the period of limitation provided u/s 35 must be deemed to have been filed in time. This decision is followed by the Allahabad High Court in Jhabboo Lal Kesara Rolling Mills Vs. Union of India (UOI) and Others, where also it was held that where the appeal was despatched to the appellate authority prior to the expiry of the period of limitation in that case it would not be barred by limitation.

5. A Special Bench of the Tribunal in Simplex Electronics v. Collector of Customs 1989 (42) ELT 451 (Tribunal) following the aforesaid two decisions held that since the appellant, had despatched the appeal before the expiry of limitation it should be deemed that the appeal was filed by the appellant in time. Of course in all those cases the appellate authority had received the appeal belatedly. In the instant case the appellate authority did not receive the appeal which was; sent by post under certificate of posting. To that extent there is a difference. However, the appellate authority has no case that the certificate of posting produced by the petitioner is a bogus or not a genuine one. In this context it is relevant to keep in mind the principles stated by a Division Bench of this Court in Standard Treads Pvt. Ltd. Vs. Collector of Central Excise, wherein it was observed that the

court has to see and be vigilant that technical consideration should not be allowed to be pitted against each other, keeping in mind that substantial justice would have a preference because nobody can be understood properly in a claim of vested right of injustice, which would be the result.

6. Admittedly the petitioner had produced copies of the appeals before the appellate authority belatedly. In the circumstances, in the light of the aforesaid decisions I direct the appellate authority to dispose of the appeals which were rejected by the impugned order on merits in accordance with law. For the said purpose the impugned order Ext.P3 is set aside.

Writ Petition is allowed as above.