**(2015) 07 JH CK 0104**

**In the Jharkhand High Court**

**Case No :** Writ Petition (T) No. 2162 of 2014

B.R. Singh and Co. APPELLANT

Vs

The Commissioner, Central Excise and Service Tax and Others RESPONDENT

**Date of Decision :** 02-07-2015

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 35B(3)
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 20, Order 21 Rule 90

**Citation :** (2015) 40 STR 667

**Hon'ble Judges :** Dhirubhai Naranbhai Patel, J;Ratnaker Bhengra, J

**Bench :** Division Bench

**Advocate :** Sumeet Gadodia, for the Appellant; Deepak Roshan, Advocates for the Respondent

## Judgement

Dhirubhai Naranbhai Patel, J—This writ petition has been preferred against the impugned order dated 4th March, 2014, passed by the Customs, Excise & Service Tax Appellate Tribunal, Eastern Zonal Bench, Kolkata (Hereinafter to be referred to as ''CESTAT, Kolkata''). Vide the said order, Misc. Application No. S.T./ MISC/496/2012, filed for condonation of delay of 536 days in filing Appeal No. S.T.543 of 2012, was dismissed by the CESTAT, Kolkata for there being no reasonable ground for condonation of delay and hence, the stay petition, bearing Stay Petition No. SP 1216 of 2012 and Appeal No. ST 543 of 2012 were also dismissed and therefore, appellant of the said appeal has preferred this writ petition.

Submission made on behalf of the petitioner

2. No intentional delay on the part of the petitioner: Counsel for the petitioner submitted that the Order in Original: 10/S.Tax/Commr/2011 was passed by the Commissioner, Central Excise & Service Tax, Jamshedpur on 1st April, 2011, which was received by this petitioner on 5th April, 2011. Huge liability of approximately Rs. 1,55,00,000/- has been imposed upon this petitioner towards service tax and a penalty of approximately Rs. 1.60 crores has also been

imposed.

The petitioner, thereafter, engaged Advocate Shri R.N. Sarkar and papers were handed over to him on 9th April, 2011. He prepared memorandum of appeal and this petitioner signed the same on 30th May, 2011, but, thereafter, the said Advocate had not filed the appeal. Meanwhile, demand letter dated 13th September, 2012 (Annexure 2 to the Memo of this petition) from the Superintendent, Central Excise, Jamshedpur was received and thereafter, petitioner received the papers from the office of the Advocate Shri R.N. Sarkar on 30th November, 2012.

3. Affidavits sworn in by the partner of the petitioner not appreciated by the CESTAT, Kolkata: It is submitted by learned counsel for the petitioner that an affidavit sworn in by one of the partners of the petitioner-firm, stating in detail the chronological sequence of events that led to the alleged delay in filing the appeal, has also been produced before the CESTAT, Kolkata."

4. Certificate given by the junior to the erstwhile Advocate of the petitioner was not appreciated by the CESTAT, Kolkata: A certificate given by junior to the Advocate Shri R.N. Sarkar, namely Shri Nirmal Kumar Singh was also placed before the CESTAT, Kolkata. In that certificate it was stated that file of the petitioner was taken by Mr. R.N. Sarkar for filing appeal, but, due to his illness the papers could not be completed and appeal could not be filed. Thereafter, papers were returned. Said Advocate R.N. Sarkar later expired on 12.11.2013. Thus, after receipt of the papers on 30th November, 2012, immediately this petitioner appointed Shri Rajiv Ranjan Mittal and Shri Arvind Modi on 2nd December, 2012. They immediately prepared memorandum of appeal in Form ST-5. The memorandum along with petition for condonation of delay and stay petition was signed by this petitioner on 23rd December, 2012 and the appeal was filed before CESTAT, Kolkata on 24th December, 2012.

Thus, there was a delay of 536 days in preferring the appeal under Section 35B(3) of the Central Excise Act, 1944, which was explained showing aforesaid reasons before the CESTAT, Kolkata, but, the same was not properly appreciated by the CESTAT, Kolkata and inspite of there being reasonable grounds, application for condonation of delay was rejected.

Therefore, it has been prayed that order dated 4th March, 2014 passed by the CESTAT, Kolkata in Miscellaneous Application No. S.T./MISC/496/2012 filed in Appeal No. S.T./543/2012-DB may kindly be quashed and set aside, delay of 536 in filing the appeal may be condoned and appeal preferred by this petitioner along with the stay application may be heard on merits and the petitioner ensures that he will sought for no unnecessary adjournment and cooperate with the CESTAT, Kolkata in the matter.

Submissions made on behalf of the respondents:

5. Counsel for the respondents submitted that no error has been committed by

the CESTAT, Kolkata in dismissing the delay condonation application as there is no reasonable explanation of delay of 536 days in preferring the appeal under Section 35B(3) of the Central Excise Act, 1944.

6. Having heard counsel for both sides and looking to the reasons stated in the application praying for condonation of delay and the affidavit sworn by the partner of this petitioner, which was produced before the CESTAT, Kolkata (Annexure 5 to the memo of this petition) and also looking to the letter dated Nil (Annexure 4 to this writ petition) of the Advocate Shri Nirmal Kumar Singh, who was the junior to Advocate R.N. Sarkar, we, hereby, condone the delay in filing the appeal for the following reasons:

"Reasons:

(I) No fault lying on the part of the petitioner: it appears that there is no fault lying on the part of this petitioner at all. Order in Original was received by the petitioner on 5th April, 2011. The papers to prefer appeal was handed over to the Advocate R.N. Sarkar on 9th April, 2011, who prepared a memo of appeal, which was signed by the petitioner on 30th May, 2011 and thereafter, due to ill health of Advocate R.N. Sarkar, papers were returned in the month of November, 2012. Immediately, this petitioner engaged Shri Rajiv Ranjan Mittal and Shri Arvind Modi on 2nd December, 2012, who prepared memo of appeal in Form ST-5 immediately and thereafter papers were signed by this petitioner on 23rd December, 2012 and documents were filed before the CESTAT, Kolkata on 24th December, 2012.

In this context, it is worthwhile to refer to the decision rendered by the Hon''ble Supreme Court in the case of Improvement Trust, Ludhiana Vs. Ujagar Singh and Others, (2010) 159 PLR 777 : (2010) 6 SCALE 173 : (2010) 6 SCC 786 , relevant paragraph of which (para 16) is quoted hereunder:

"16. While considering the application for condonation of delay no straitjacket formula is prescribed to come to the conclusion if sufficient and good ground have been made out or not. Each case has to be weighed from its facts and circumstances in which the party acts and behaves. From the conduct, behaviour and attitude of the appellant it cannot be said that it had been absolutely callous and negligent in prosecuting the matter."

(Emphasis supplied)

In the facts of the present case also, we find no negligence on the part of the petitioner, who took proper and timely steps and the delay was unintentional and occurred only due to lack of communication.

(II) Appeal should have been decided on merits and not on mere technicalities: Looking to the reasons stated by this petitioner for the delay, it appears that there were reasonable grounds for condonation of delay, which were not appreciated by the CESTAT, Kolkata and the Appeal No. S.T. 543/12 (Annexure 7 to this petition) preferred under Section 35B(3) of the Central Excise Act, 1944, was dismissed without going into its merit. But, Since a huge liability of Tax and penalty have been imposed upon this petitioner vide the Order in Original and therefore, in our view, the points taken in the Order in Original should have been decided on merits.

To supplement this reasoning, we again refer to the aforesaid decision, i.e. the decision rendered by the Hon''ble Supreme Court in the case of Improvement Trust, Ludhiana vrs. Ujagar Singh and Others, para 19 of which is quoted hereunder:

"19. In our opinion, the ends of justice would be met by setting aside the impugned orders and the matter is remitted to the executing court to consider and dispose of the appellant''s objections filed under Order 21 Rule 20 CPC on merits and in accordance with law, at an early date. It is pertinent to point out the unless mala fides are writ large on the conduct of the party, generally as a normal rule, delay should be condoned. In the legal arena, an attempt should always be made to allow the matter to be contested on merits rather than to throw it out on such technicalities."

(Emphasis supplied)

(III) Litigants should not suffer due to the fault of their Advocate:

It appears that in the present case all possible steps were taken by the appellant and had there been a timely intimation by its Advocate, delay would not have occurred and therefore the appeal should not have been dismissed merely on the ground of delay because a litigant should not suffer because of ill health of the Advocate as has been held by the Hon''ble Supreme Court in the aforementioned case, i.e. the case of Improvement Trust, Ludhiana vrs. Ujagar Singh and Others, relevant paragraphs (para 15) and of which is quoted hereunder:

"15. Be that as it may, we are of the opinion that the delay in filing the first appeal before the District Judge, Ludhiana, for setting aside the sale has not been so huge warranting its dismissal on such hypertechnical ground. In fact, according to us, the appellant had taken all possible steps to prosecute the matter within time. Had there been an intimation sent to the appellant by Mr. P.K. Jain, its erstwhile advocate, and if even thereafter the appellant had acted callously then we could have understood the negligent attitude of the appellant but that was not the case here. No sooner the appellant came to know about the dismissal of its objection filed before the executing court, under Order 21 Rule 90 CPC it made enquiries and filed the appeal."

(Emphasis supplied)

7. In the light of the aforesaid facts, reasons and judicial pronouncement, We, hereby, condone the delay of 536 days in preferring the appeal against the Order in Original and quash and set aside the order dated 4th March, 2014 passed by the CESTAT, Kolkata in Misc. Application No. ST/MISC/496 of 2012 filed in Appeal No. ST 543 of 2012.

 

8. Therefore, Appeal No. S.T./543/2012-DB and Stay Application No. ST/ Stay/1216/2012 is restored to its original file with the same number before the CESTAT, Kolkata.

9. The delay is condoned with a cost of Rs. 35,000/-, which will be deposited within three weeks from today by this petitioner before the Commissioner of Central Excise and Service Tax, Jamshedpur, State of Jharkhand.

10. This writ petition is, accordingly, allowed and disposed of.