
(2008) 05 GAU CK 0046
In the Gauhati High Court

Commissioner of Customs and Central Excise	APPELLANT
Vs	
Assam Asbestos Limited	RESPONDENT

Date of Decision : 23-05-2008

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35E, 35G
Limitation Act, 1963 — Section 5

Citation : (2008) 4 GLT 230

Hon'ble Judges : Aftab H. Saikia, J;A. Hazarika, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Aftab H. Saikia, J.—Heard Mr. H. Rahman, learned Assistant Solicitor General of India (for short," ASGF) appearing on behalf of the petitioner/Commissioner of Customs and Central Excise, Shillong as well as Dr. A.K. Saraf, learned Counsel assisted by Ms. M.L. Gope, learned Counsel for the respondent.

2. This is an application filed u/s 5 of the Limitation Act, 1963 (for short, "the Act") seeking condonation of inordinate delay of 565 days in preferring the related Central Excise Reference/Appeal.

3. It would be pertinent to quote herein the entire petition filed by the Union of India on 13.10.2007 for seeking condonation of delay in question:

District: Kamrup

The Gauhati High Court

(The High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram and Arunachal Pradesh)

[Civil Appellate Jurisdiction]

Misc. Case No. 3144 of 2007 in Central Excise Ref No. of 2007

To

The Hon''ble Shri Jasti Chelameswar, B.Sc, B.L., the Chief Justice of the Hon''ble Gauhati High Court and His Lordship's other Companion Justices of the said Hon''ble Court.

In the matter of:

An application u/s 5 of the Limitation Act, 1963 praying for condonation of delay in preferring the appeal u/s 35G of the Central Excise Act, 1944 against the impugned Judgment dated 27.5.2005 passed by the Customs, Excise and Service Tax Appellate Tribunal, East Zone Bench, Kolkata in Appeal E-757,769-776/2002 arising out of order in original 28/2002 dated 25.7.2002 passed by the Commissioner of Customs and Central Excise, Shillong. The total delay of 565 days.

And

In the matter of:

Commissioner of Customs and Central Excise, Shillong

...Petitioner/Appellant

Versus

Assam Asbestos Limited, Guwahati

...Opp. Party/Respondent

The humble petition of the petitioner above named-

Most Respectfully Sheweth:

1. That, the petitioner/appellant have preferred an appeal before this Hon''ble Court u/s 35G of the Central Excise Act, 1944 against the Judgment and Order dated 27.5.2005 passed by the Customs, Excise and Service Tax Appellate Tribunal, East Zone Bench, Kolkata in Appeal E-757,769-776/2002, file this appeal before this Hon''ble.Court. The said appeal has been registered and numbered as Writ Petition (C) No. /2007. However, there has been some delay in preferring the writ petition. The present application has been filed citing the reasons for the delay and praying for condonation of the delay in preferring the appeal.

2. That the brief facts of the case are that M/s. Assam Asbestos Ltd., Guwahati is an assessee under the Central Excise Act engaged in the manufacture of Asbestos Cement products (Asbestos Plain Sheet/Corrugated Sheet) and Galvanized Corrugated sheets classified under Central Excise Tariff Heading 6804 and 7210 respectively, they were also availing exemption under Notification No. 4/97-CE dated 1.3.1997 and Notification No. 5/98-CE, dated 2.6.1997 for their Asbestos Cement product. After an investigation by the Department, it was found that the assessee fraudently availed the exemption on Asbestos Cement product in as much as they did not use the quantum percentage) of Fly Ash specified in

the exemption notification to be eligible. The investigation also revealed that they restored to clandestine clearances of Galvanised Corrugated Sheets and thus evaded Central Excise Duty.

3. That these findings of the investigation were based on recovery of private documents and chits maintained by the responsible persons of the factory, which indicated clearly the actual use of fly ash and clearances of Galvanized Sheets. After making a detail investigation, a Show Cause Notice was issued to the assessee proposing demand of duty of Rs. 70,80,468/-. The Commissioner, Central Excise, Shillong vide order-in-original No. 28/2002 confirmed the demand relying upon the private documents, slips, chits and other findings.

4. That the assessee filed appeal against the order-in-original before the Customs, excise and Service Tax Appellate Tribunal. The Tribunal vide its final order No. A-412-420/Kol/2005 in Appeal E-757, 769-776/2002 dated 27.5.2005 which was forwarded by the Assistant Registrar, CESTAT, Kolkata vide its letter dated 16.11.2006, set aside the duty demand confirmed by the Commissioner for alleged fraudulent avilment of Notification No. 4/97-CE and 5/ 98-CE for Asbestos Cement Product and remanded the case for re determination of demand for alleged clandestine clearances of Galvanized Corrugated Sheets.

5. That while setting aside the demand, the CESTAT held that the Commissioner had placed reliance on certain hand written slips of papers maintained by the "semi literate" workers for their own reference in preference to the statements of the Sr. Manager and statutory records. This clearly proved that the Commissioner had

a present mind to confirm the charges against the noticee. The chits clearly exhibits that the word actual" was being used by the workers for the quantity in fact of Bongaigaon Fly Ash and not the entire lot. The CESTAT therefore held that the chits/slips cannot be relied.

6. That the other evidence relied by the Commissioner for confirming charges was that during the material period the assessee did not buy fly ash from BTPS were not traceable as summons issued to them returned undelivered. The CESTAT observed that no other suppliers of BTPS fly ash and to ascertain the existence of the firms. So the conclusion drawn by the Commissioner that no fly ash of BTPS was used is not valid one.

7. That the CESTAT here held that the quantity of final product could not emerge from the quantity of fly ash mentioned in the chits. The CESTAT further held that Commissioner had wrongly based his finding on moisture content of the product in total disregard of the Board's Circular which stipulated that percentage use of fly ash is to be determined basing on the dry weight of the final product and percentage given in moisture content had no relevancy. The Commissioner also ignored the use of fly ash other than BTPS fly ash. The CESTAT also observed that no further efforts were made by the investigation officers to trace out the two suppliers of BTPS fly ash and to ascertain the existence of the firms. So the

conclusion drawn by the Commissioner that no fly ash of BTPS was used is not valid one. The CESTAT, with the above findings set aside the demand confirmed by the Commissioner for Asbestos Cement Product.

8. That the order dated 27.5.2005 passed by the learned CESTAT in Appeal E-757,769-776/ 2002, is not legally sustainable and has been passed without proper appreciation of the materials available on record. Being aggrieved, the present petitioner/appellant has preferred writ petition before this Hon''ble Court u/s 35E(2) of the Central Excise Act, 1944, against the impugned order dated 27.5.2005.

9. That the said writ petition ought to have been preferred within a period of 180 days but in the instant case there has been some delay in filing the appeal. The certified copy of the impugned judgment was received from the CESTAT, Kolkata, only in December, 2006. The matter was examined by the department. Thereafter the same was forwarded to the departmental higher up where it was also scrutinized. In the meantime legal opinion was obtained. After obtaining approval from the concerned Ministry, the required papers were forwarded to the learned Assistant Solicitor General of India, Gauhati High Court for filing the appeal against the impugned judgment and order. The learned Assistant Solicitor General of India took some time to prepare the appeal and it was finally made ready and after being duly vetted, the same is being filed before this Hon''ble Court on.

10. That all this caused a delay of 565 days in preferring the writ petition. There is no negligence on the part of the petitioner in not preferring the writ petition in time. The petitioner believes that the Hon''ble High Court will allow the writ petition in favour of the petitioner. The basis of such belief is presence of good grounds in the present appeal. Hence, the petitioner prays that the delay may be condoned, which has been sufficiently explained herein above and to admit the writ petition.

11. That this application is filed bona fide and in the interest of justice.

In the premises aforesaid, it is, therefore, prayed that your Lordships may be graciously pleased to condone the delay of 565 days in preferring the writ petition against the judgment dated 27.5.2005 passed by the Customs, Excise and Service Tax Appellate Tribunal, East Zone Bench, Kolkata in Appeal E-757,769-776/ 2002 and to admit the writ petition for hearing and/or be pleased to pass any such further, or other order/orders as Your Lordships may deem fit and proper.

And for this act of kindness, your humble petitioner as in duty bound, shall ever pray.

4. Refuting the above averments and contesting this miscellaneous application for condonation of delay, the respondent has filed written objection on 9,10.2007 wherein in paragraph-8 it is stated as under:

8. That with regard to the statements made in paragraph 9 of the application, the deponent deny the statement that the writ petition ought to be filed within 180 days. Further, it is stated that the statements made to the effect that certified copy of the impugned judgment was received from the CESTAT, Kolkata, only in December, 2005 and the matter was examined by the department and thereafter the same was forwarded to the departmental higher up where it was also scrutinized is within the special knowledge of the applicant and as such the applicant is put to the strictest proof thereof. It is stated in this regard that the applicant for the reasons best known to them has failed to disclose any date or dates as to when the matter was examined and by whom and when it was sent to the departmental higher up and when it was scrutinized. It was also not mentioned as to when it was sent to the Assistant Solicitor General of India for filing the Appeal and how much time was taken to prepare the same. It is stated herein that the non-mentioning of the dates and further the non production of the material on record clearly raises the presumption that the statements made therein are incorrect and frivolous.

5. The averments and statements made in the application for condonation of delay as quoted above would explicitly speak itself the extent of callousness and cavalier attitude shown by the petitioner in preferring the miscellaneous application. We are surprised to note that in the application itself somewhere it is termed as writ petition and somewhere it is mentioned as writ appeal. Amazingly, on the other hand, in the nomenclature it is recorded as Central Excise Reference.

6. However, in explaining the delay in question, the petitioner has relied upon paragraph 9 of the miscellaneous application as already quoted wherein significantly no attempt has been made by the petitioner to explain the delay adequately and satisfactorily. We have also noticed that the explanation given in paragraph 9 is simply done in a mechanical manner.

7. In the relevant paragraphs of the application, explaining the delay in question, the petitioner has failed to make out "sufficient cause" as stipulated u/s 5 of the Act which provides:

5. Extension of prescribed period in certain cases--Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfied the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

8. This Court in *State of Tripura v. Pradip Ghosh and Ors.* reported in (2002) 1 GLT 285 , as cited by Dr. Saraf, the learned Counsel for the respondent, relying on the case of *Hon'ble Chief Justice, High Court M.P., Jabalpur and Others Vs. Mohan Kumar and Another*, and *Union of India and Ors. v. Wood Crafts Products Ltd and Anr.* reported in 2001(1) GLT 34 : (2001) 1 GLR 327 , in paragraphs 7 and 8 observed as under:

7. It goes without saying that the delay so occurred have never been properly and sufficiently explained. It is the settled law that if delay is sufficiently explained the same deserves to be condoned in the interest of justice. There must not be any negligence or laches on the part of the party who seeks condonation for the delay caused due to certain unavoidable circumstances. But in the present case, it seems that the State-applicant has not taken any steps to explain such delay. It appears from the records that delay is inexcusable which does not warrant any consideration from this Court.

8. It is seen that generally State is not taking due care to approach the Court for the redressal of any grievance which may arise from the judicial pronouncements. Generally it seems that they carry an impression in each and every case that by throwing an application to the Court, without having sufficient cause the delay will be condoned, The State has taken it as granted that Court will be always lenient in favour of it being a Government wherein the decision of the Government is a collective and institutional one and they cannot be treated at par with the private individual.

9. In consideration of the averments made in this application for condonation of delay as well as taking into account the objection made on behalf of the respondent and having regard to the judicial decision cited above, we are of the firm view that delay in question has not been properly, adequately and satisfactorily explained. Moreover, interestingly in the "cause title" as reflected above, it appears that the condonation has been sought for by the petitioner for the delay in preferring an appeal u/s 35G of The Central Excise Act, 1944 against the Judgment and Order dated 27.5.2005 passed by the Customs, Excise and Service Tax Appellate Tribunal, East Zone Bench, Kolkata, when the said provision of 35-G has already been repealed by The National Tax Tribunal Act, 2005 which has got assent of His Excellency the President of India on 20.12.2005.

10. Be it mentioned herein that from the perusal of the record, it appears that this application has been filed along with the related appeal on 13.6.2007 on the date when this Section 35G itself of the Central Excise Act, 1944 is already non est.

11. In view of the discussion and observation above, we are disinclined to condone the delay in question.

12. Consequently, this miscellaneous application stands dismissed.