

(2002) 12 BOM CK 0099

In the Bombay High Court

Case No : Writ Petition No. 2901 of 2002

Dhan Laxmi Fabrics Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 10-12-2002

Acts Referred:

Citation : (2003) 86 ECC 161

Hon'ble Judges : V.C. Daga, J; J.P. Devadhar, J

Bench : Division Bench

Advocate : S.N. Kantawala, instructed by Kantawala and Co, for the Appellant; S.B. Jaisinghani, A.S.G. and P.S. Jetly, instructed by T.C. Kaushik, for the Respondent

Judgement

1. Heard the learned Counsel for the Petitioner. Here is a case wherein an application seeking condonation of delay by the Petitioners came to be rejected by the impugned order. The petition is to take exception to the said order.

2. It is necessary to refer to certain facts, which are as under:

The Petitioner are engaged in the processing of Textile Fabrics, falling under 52, 54 & 55 of the Central Excise Tariff Act, 1985. On 24.12.1998 provisional order came to be passed by the 4th Respondent determining the installed capacity of the Petitioner's Plant at 14 Chambers. On 24.6.1999 final order came to be passed by the 4th Respondent whereby the number of Chambers of the factory of the Petitioners was determined at 14.98 chambers. This order came to be passed without affording any opportunity of hearing and making of oral submissions.

3. The aforesaid order passed by the 4th Respondent dated 24.6.1999 was placed for legal opinion of the Consultant, who by his letter dated 3.8.1999 opined that this is not an appealable order for want of any preamble informing the assessee so as to what steps to take in case of the contest. The Petitioners were advised to file a detailed representation to the Commissioner of Central

Excise, Mumbai-III. The said opinion of the Consultant is placed on record (Exhibit-C at page 46).

4. In view of the aforesaid advice given by the legal Consultant, the Petitioners made a representation on 1.9.1999 requesting the 4th Respondent to reconsider its decision afresh after affording an opportunity of hearing to the Petitioners. This representation did not fetch even two line reply to the Petitioners.

5. The Petitioners again on 10.3.2000 moved another representation addressed to the 4th Respondent reiterating their earlier representation. Even this second representation did not yield any fruits. In other words, both these representations were kept pending by the 4th Respondent and all the while Petitioners were under impression that their representations are pending, as such they might get some relief.

6. The Petitioners finding that the representations are pending moved a refund application to the Respondent No. 5 on 9.5.2000 in the light of the Judgment of the Tribunal referred to in their refund application. By order dated 7.12.2000 passed by the Respondent No. 5, the refund application came to be rejected.

7. The Petitioners preferred an appeal before the Commissioner of Central Excise (Appeals) against the said order whereby their refund application was rejected. This appeal came to be dismissed by order dated 28.6.2001. Against this order, the second appeal was carried to the CEGAT which is pending.

8. The Petitioners, thereafter, filed appeal against the order-in-original dated 24.6.1999 alongwith an application for condonation of delay. In that application, the grounds disclosed were that advice of the Legal Consultant made Petitioners to believe that the order dated 24.6.1999 was not an appealable order for want of preamble and being in breach of principles of natural justice the Commissioner of Central Excise will consider their representation in its proper perspective and realising the necessity of following principles of natural justice, they may get an opportunity of hearing. The only ground sought to be pressed in service is that the Petitioners believed on the advice of the Consultant since the impugned order did not have the preamble, with the result there was no advice given to the Petitioners as to whether or not the order in question was appealable.

9. The aforesaid application seeking condonation of delay was heard by the Tribunal. The Tribunal was pleased to reject the said application by one line order observing that "on hearing both the sides we find that no satisfactory explanation has been offered by the assessee even after September 1999 till the filing of the appeal on 20.11.2001." Since the application for condonation of delay came to be rejected, as a consequence thereof, the appeal also came to be dismissed.

10. Both these orders are subject matter of challenge in this present petition filed under Article 226 of the Constitution of India.

11. Heard the rival contentions. The learned Counsel for the Petitioners who

reiterated the circumstance which led to file delayed appeal and prayed for condonation of delay and setting aside order dismissing appeal. Mr. Jaisinghani, the learned Additional Solicitor General appearing for the Revenue sought to point out that the petitioners were put on notice by the order in original dated 7.12.2000 and appellate order by the Tribunal that the order dated 24.6.1999 was appealable order, it was expected of the Petitioners to take hint from these orders and ought to have preferred appeal against order dated 24.6.1999.

12. We are of the opinion that this is a case wherein the delay ought to have been condoned by the Tribunal. At this juncture, it would not be out of place to mention that after the order dated 14.6.1999 passed by the Commissioner of Central Excise, Mumbai, advice of the Consultant was taken, who, by his written opinion, had advised the Petitioners to make a representation against this order, possibly holding a view that the order in question was not an appealable order. After receipt of this advice, the Petitioners acted upon the said advice and made representation to the Respondent No. 4 on 1.9.1999. This representation did not yield any result. Consequently, the Petitioners made a second representation on 10th March 2000 i.e. practically after 6 months. Even no cognizance of the said representation was taken by the Commissioner of Central Excise, Mumbai, the Respondent No. 4. Both these representations were kept pending in which request was made to review the order or to pass appealable order. In the circumstances, the advice given by the Consultant and the pendency of the two representations probably led the Petitioners to believe that the advice given by the Consultant was correct advice and the representations made by the Petitioners may fetch some result. So far as the legal opinion given by the Consultant is concerned, it was based on some rulings of the Tribunal wherein tribunal had held that every order should contain preamble informing the assessee as to what steps he should take against the order communicated. The learned Counsel placed one sample Judgment of the Tribunal in 2001 (133) ELT 619 .

13. In the meanwhile, pending the aforesaid representations, the Petitioners moved refund application which ultimately come to be rejected. The said order of rejection came to be challenged in the first appeal and after unsuccessful attempt in the first appeal, again second appeal was preferred before the second Appellate Authority. At this juncture, it would be curious to find that even till today two representations made, have not been decided by the Respondent No. 4. Had these been frivolous representations, nothing prevented the Respondent No. 4 from deciding these representations. If the pendency of the representations, made the Petitioners to believe that they need not challenge the impugned order as their representations, might be considered by the authorities and in that view of the matter, if no appeal was preferred by the Petitioners and ultimately the same was preferred on 20.11.2001; after the final order of the Appellate Authority rejecting the refund claim, it cannot be said that there is no satisfactory explanation.

14. No doubt, there is delay in preferring the appeal but the delay cannot be solely attributed to the Petitioners alone. All have contributed to this delay. Consultant contributed by giving legal advice, may be wrong but bona fide in view of the Judgment of the Tribunal referred to hereinabove. The Respondent No. 4 has also contributed to this delay by keeping the representations for review pending till today, giving false picture that the same is receiving attention. Respondent No. 4 could have rejected the same well within a reasonable time. Had it been so done, the Petitioners would not have been misled. Considering the matter at hand and taking overall view, we feel that the delay ought to have been condoned by the Tribunal. For the reasons stated and accordingly, we condone delay in preferring appeal before Tribunal and set aside the order and direct the Tribunal to restore the appeal on file and decide the same on its own merits. Needless to mention that the order of dismissal of appeal would not survive and the same stands quashed and set aside and the appeal stands restored to the file.

Petition is disposed of in the above terms with no order as to costs.