(2013) 02 GUJ CK 0031

In the Gujarat High Court

Case No : Special Civil Application No. 434 of 2013

Hem Clearing Agency APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 27-02-2013

Acts Referred:

Citation : (2013) 295 ELT 499

Hon'ble Judges : S.G. Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Paresh M. Dave, for the Appellant; Y.N. Ravani, for the Respondent

Final Decision : Allowed

Judgement

S.G. Gokani, J.—This petition is preferred by the sole propriety concern, which is a licensed Customs House Agent (CHA) and is aggrieved by the decision of the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad (Tribunal for short). Brief facts concerning this petition are as follows:

1.1 The petitioner is required to pay Service tax, since it provides services as a Customs House Agent (CHA). A circular was issued by the Central Board of Excise and Customs (C.B.E. & C. for short), on the basis of which, it was required to pay Service Tax on Agency charges or Attendance charges. The petitioner and all other CHAs; all throughout the country, had been contesting on various grounds for exclusion of reimbursable expenses incurred by them on behalf of their clients for the period from 1st October, 2003 to 31st March, 2008.

1.2 A show-cause notice was issued, proposing to recover a sum of Rs. 4,10,739/- as Service Tax on the ground that various reimbursable expenses incurred for the aforementioned period were not included in the taxable value by the petitioner. Reply to the said notice was also offered on 30th July, 2009. However, the Adjudicating authority in Order-in-Original passed on 30th August, 2011, confirmed such demand of Service Tax to the tune of Rs. 1,94,520/- and dropped the remaining demands.

1.3 Aggrieved by such partial confirmation, the Commissioner (Appeals) was approached with a request for stay, wherein, the petitioner also made deposit of a sum of Rs. 51,035/-, being the Service Tax and 25% penalty amount. The Commissioner (Appeals) vide its order dated 5th January, 2012 rejected such appeal preferred by the petitioner.

1.4 As mentioned, the Customs House Agents; including the petitioner, faced identical situation, they all engaged lawyer to contest through the Association by allocating work to a firm of advocates for preparation of appeals and stay applications.

1.5 On 16th July, 2012, when an inquiry was made by the Superintendent, in-charge of the petitioner area about pendency of the appeal, it was realized by the petitioner that no appeal was preferred for and on his behalf by the Association. He instructed advocate for filing appeal which came to be filed on 18th July, 2012 before the CESTAT. In so doing, delay of 3 months and 1 day was caused, which was explained in a separately moved application for condonation of delay.

2. The CESTAT, after hearing both the sides on 4th December, 2012, dismissed the said appeal as well as the stay application. Therefore, the present petition seeking following reliefs:

(A) That Your Lordships may be pleased to issue a Writ of Certiorari or any other appropriate writ, direction or order, quashing and setting aside Order No. A/1719/WZB/AHD/2012, S/2578/WZB/AHD/2012 and M/2429/WZB/AHD/2012, dated 4-12-2012 (Annexure C) thereby directing the Appellate Tribunal, Ahmedabad (i.e. CESTAT) to hear and decide Stay Application No. ST/S/934/2012 and Appeal No. ST/368/2012 on merits;

(B) That Your Lordships may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate writ, direction or order, directing the CESTAT, Ahmedabad to condone delay in filing Appeal No. ST/368/2012 for hearing the Stay Application and Appeal on merits;

(C) Pending hearing and final disposal of the present petition. Your Lordships may be pleased to restrain the respondents, their servants and agents from taking any action against the petitioner pursuant to Order No. A/1719/WZB/AHD/2012, S/2578/WZB/AHD/2012 and M/2429/WZB/AHD/2012, dated 4-12-2012 (Annexure C) thereby staying its operation and implementation;

(D) An ex-parte ad-interim relief in terms of Para 18(C) above may kindly be granted;

(E) Any other further relief as may be deemed fit in the facts and circumstances of the case may also please be granted.

3. Heard learned Counsel Shri Paresh M. Dave for the petitioner, who fervently argued that though having a very good case on merits, only on technical ground

of delay, substantive rights of the petitioner is marred by the Tribunal. He also further urged that he has a very good case on merits along with other CHAs and despite having shown genuine grounds for such late approach, he has been denied his right to contest on substantive grounds.

3.1 He also relied on a decision in case of Scan Computer Consultancy Vs. Union of India (UOI) and Others, wherein this Court had restored an appeal, which was dismissed on the ground of non-compliance of pre-deposit. This Court held therein that by a mere default in making deposit, a party does not stand to gain anything, as that would delay his own adjudication, nor would such delay in making pre-deposit cause any prejudice to the revenue and therefore, the appeal which has been dismissed for want of compliance of pre-deposit, requires to be restored. In the words of this Court:

10. Applying the aforesaid ratio to the facts of the case, it is apparent that Commissioner (Appeals) committed an error in law when he came to the conclusion that he could not restore that appeal and the only remedy was by way of preferring deposit as directed, the appellant does not stand that, by mere default in making his right to have his case adjudicated. Nor does such a delay in making pre-deposit cause any prejudice to the revenue, in absence of any stay operating in favour of the petitioner. It cannot be lost sight of that right of appeal is statutorily granted and it''s authority, as being a condition for hearing of the appeal on merits. However, that condition cannot be used by the appellate authority for the purposes of denying an appellant the right of adjudication which is otherwise statutorily granted. In a given case, even if no pre-deposit is made, the appeal may not be heard, but having dismissed the appeal for non-compliance of pre-deposit does not permit the appellate authority to refuse to restore the appeal upon compliance being shown.

3.2 Delhi High Court, in case of Commissioner of Customs Vs. Lindt Exports, restored the appeal, dismissed by the Tribunal for non-payment of pre-deposit.

4. Learned Counsel Shri Ravani appearing for the respondents submitted that though affidavit-in-reply has not been filed by the Department, after a long time without explaining a delay in filing the appeal, when a petition was preferred before the Tribunal, it rightly rejected the same on the ground of delay occurred in preferring the appeal, which not having been explained properly much less satisfactorily. He further urged that no interference is desirable in the writ jurisdiction, when the petitioner himself is at fault.

5. On thus hearing both the sides and on examination of the materials on the record, this application deserves to be allowed for the following reasons:

5.1 At the outset, the order impugned if it is looked at, it was noted by the Tribunal that the appellant being a CHA firm, it received order-in-appeal on 17th January, 2012, but, did not prefer appeal within the time prescribed. The Tribunal did not believe the reasons put forth by the appellant-petitioner of his having a. bona fide belief that the receipt of the order of the Commissioner (Appeals) had not arrived for a long time on the ground that in the application for condonation of delay itself, it was specified that such an order was received on 17th January, 2012. The certificate produce of Ahmedabad Customs House Agents Association did not instill any confidence in the Tribunal because according to it, there was no proof to indicate that the petitioner continued as a member of the said Association. It is further the say of the Tribunal that only after the pressure was exerted by the Department for recovery, such an appeal came to be filed, and therefore, such application for condonation of delay has been dismissed.

6. At the outset, it needs to be mentioned that the Tribunal nowhere has questioned its power to condone the delay of about three months period. It was only on account of its doubting the credentials of the petitioner that it chose to reject its request for condonation of delay.

7. We are in agreement with submissions made by the learned counsel for the petitioner that the petitioner is not to gain anything by preferring such an appeal belatedly, when it has already deposited substantial amount from the entire demand of Service Tax and is also ready to abide by any other condition, there is also no justification in denying to condone the delay in the application moved by him. Assuming that the petitioner had received copy of order of the appellate forum on 17th January, 2012, as mentioned by the Tribunal, then also, he has sufficiently explained the reasons for such delay in preferring the appeal. He has shown a bona fide belief that the Association was pursuing the cause of all CHAs jointly, if such ground of genuine belief led the petitioner not to pursue his individual cause; particularly in wake of the certificate of Customs House Agents Association, we have no hesitation in holding that the delay was well explained. Substantive cause of the litigant is far more vital to be considered; when pitted against technicality and the procedural delays. As fundamental issue challenged by the other CHAs is at large before the Tribunal, his case on substantive ground should be permitted to be proceeded with rather than defeating him on technical ground.

8. Resultantly, this petition stands allowed. Order of the Tribunal dated 4th December, 2012 is hereby quashed with consequential reliefs of restoration of Appeal and stay applications. Notice is discharged with no order as to costs. Tribunal shall on affording opportunity of personal hearing to both the sides shall determine the substantive issues.

