

(2016) 04 MP CK 0009
In the Madhya Pradesh High Court
Case No : C.E.A. No. 25 of 2014

Indore Municipal Corporation	Vs	APPELLANT
Commr. of C. Ex. (A), Indore (M.P.)		RESPONDENT

Date of Decision : 05-04-2016

Acts Referred:

Citation : (2016) 338 ELT 567

Hon'ble Judges : P.K. Jaiswal and Alok Verma, JJ.

Bench : Division Bench

Advocate : S/Shri S.C. Bagadiya, Senior Counsel with D.K. Chhabra, Learned Counsel, for the Appellant; Shri P. Prasad, Counsel, for the Respondent

Final Decision : Disposed Off

Judgement

Alok Verma, J.—This Central Excise Appeal is filed, aggrieved by order passed by the learned Commissioner (Appeals) in Appeal No. IND/CEX/000/APP/357&358/2011, dated 9-9-2011 by which the learned Commissioner (Appeals) disposed of by a common order, filed by the Revenue, Appeal No. 246/2011 and appeal filed by the present Appellant No. 492/2011 and also against the order passed by the learned Custom Excise and Service Tax Appellate Tribunal (hereinafter called "the Appellate Tribunal") in Service Tax Appeal No. 1803/2011.

2. Inadvertently, this appeal was admitted without framing substantial question of law, and therefore, on 23-2-2016, the respondents/department was granted two weeks time; to file a counter affidavit about the receipt of copy of the order dated 22-9-2010. The affidavit was filed by the department on 10-3-2016.

3. In this appeal, following substantial question of law arises for consideration :-

"Whether the learned Tribunal was justified in dismissing the appeal of the appellant on account of delay in filing of appeal before the respondents as the order in original passed by the Additional Commissioner (Appeals) was never delivered to the appellant?"

4. The facts relevant for disposal of this appeal are that appellant is a statutory body under Madhya Pradesh Municipal Corporation Act, 1956 and is constituted under Section 243Q of Constitution of India. The appellant has been providing space for installing the hoardings to the advertising agency and charged advertisement tax for the same. However, such activity of the appellant is not covered under the heading of "Sale of Space or Time for Advertisement".

5. An enquiry was initiated by STTF branch of Chief Commissioner Office, Bhopal and certain information was called from the appellant which was supplied by the appellant on 24-5-2007, 25-8-2007 and 12-10-2007. A show-cause-notice dated 8-6-2009 was received by the appellant in which demand of Service Tax amounting to Rs. 5,09,573/- and Education Cess amounting to Rs. 10,191/- was raised against the appellant for the period from 1-5-2006 to 31-10-2006 and also interest and penalty was also demanded. The appellant filed a reply to the notice on 28-10-2009. The Additional Commissioner of Central Excise Division-Indore passed the order in original Bearing No. 175/ADC/ST/IND/2009-2010, dated 30-3-2010 and confirmed the total demand of service tax amount to Rs. 5,19,764/- under Section 73 of the Finance Act, 1994 and also imposed interest and penalty thereon. Copy of the order passed in original dated 30-3-2010 was not received by the appellant.

6. As the adjudicating authority did not impose any penalty under Section 76 of Finance Act, 1994, therefore, a review order was passed by Commissioner, Customs & Central Excise, Indore which is marked as (Annexure A/4). The Revenue went an appeal against these two orders which was registered as Appeal No. 246/2010 and respondents received notice on 22-9-2010. According to the appellant prior to this date, he did not receive any notice about the orders passed against him. The authorised representative of the appellant appeared for personal hearing on 26-11-2010 and submitted that they had not been able to prepare cross-objections due to non receipt of original order and review order, and therefore, they may be granted a week's time to file cross-objections. Their plea was accepted and cross-objections were filed on 3-12-2010. On the same date, the appellant also filed an appeal against the order passed in original as well as the review order before the appellate authority which was registered as No. 492/2011. The Appellate Authority by the impugned order made following observations in respect of appeal and the cross-objections filed by the appellant :-

"????????????????????"

7.1 First of all, I take up to decide the Appeal No. 246/2010. In this appeal, the only issue to be decided is regarding imposition of penalty against Indore Municipal Corporation, Indore (the Respondent) under Section 76 of the Finance Act, 1994, which was not imposed by the Adjudicating Authority in his impugned Order.

I observe that the Adjudicating Authority has mentioned in his impugned Order

that, "Section 78 has been amended w.e.f. 10-5-2008 vide which provision of Section 76 shall not apply where penalty is payable under Section 78 of the Finance Act, 1994". And perhaps under this notion, he has not imposed any penalty under Section 76 of the Finance Act, 1994. As the demand of Service Tax in this case pertains to the period 1-5-2006 to 30-10-2006 and for this period amendment inserted in Section 78 of the Finance Act, 1994 w.e.f. 10-5-2008, is not applicable, therefore to this extent the Adjudicating Authority has erred in his impugned Order by neither imposing penalty under Section 76 of the Finance Act, 1994 nor having given any finding to waive the same in view of the provisions of Section 80 of the Finance Act, 1994. Thus, I agree with the contention of appellant and hold that penalty under Section 76 of the Finance Act, 1994 is imposable on the respondent the impugned Order is modifiable to this extent and accordingly I hold.

7.2 Further, I observe that after filing of Appeal No. 246/2010 by the revenue on 10-6-2010, copy of the appeal, copy of the impugned Order and copy of the review Order were sent to the respondent on 17-6-2010, with directions to file memorandum of cross objection within 45 days of receipt of this notice and thereafter a series of letters were issued to the respondent for doing the same. All these letters were delivered to the respondents because none of them came back as undelivered. In spite of that the respondent have filed cross objections on 3-12-2010 which is much beyond the prescribed time limit of 45 days to file the same. Therefore without going into merits of the cross objection, it is liable to be rejected on limitation grounds only, accordingly I hold."

7. Against the order passed by the Appellate Authority, the appellant went in appeal before the Customs, Excise and Service Tax Appellate Tribunal, the learned appellate Tribunal passed the following order in this appeal :-

"None present for the appellant nor there is any application for adjournment. Appeal before Commissioner (Appeals) was time barred as is mentioned in Para 7.3 of first appellate order. Adjudication order was dispatched on 1-4-2010 to the appellant but appeal against that order came before learned Commissioner (Appeals) on 3-12-2010 which was after 8 months from the date of communication of adjudication order. Learned Commissioner (Appeals) having no power to condone delay beyond limitation period was right to reject appeal of the assessee. Accordingly, impugned order is uphold and appeal of the assessee is dismissed since the Tribunal has no power to direct the statutory authority to act beyond his statutory jurisdiction.

(Dictated and pronounce in the open Court)"

8. The respondent on behalf of the department filed certain additional documents on record showing that the order in original was sent to the appellant by speed post and also letters were written to the concerning Post Office for supplying the information of delivery of speed post to the appellant. However, no reply was received from the Post Office.

9. The statutory provisions in respect of service of decisions, orders, summons etc. incorporated in Section 37 of Central Excise Act, 1944 (hereinafter called "the Act") as under :-

"37C. Service of decisions, orders, summons, etc. - (1) Any decision or order passed or any summons or notice issued under this act or the rules made thereunder, shall be served, -

(a) By tendering the decision, order, summons or notice, or sending it by registered post with acknowledgment due, to the person for whom it is intended or his authorised agent, if any;

(b) If the decision, order, summons or notice cannot be served in the manner provided in clause (a), by affixing a copy thereof, to some conspicuous part of the factory or warehouse or other place of business or usual place of residence of the person for whom such decision, order, summons or notice, as the case may be, is intended;

(c) If the decision, order, summons or notice cannot be served in the manner provided in clauses (a), and (b), by affixing a copy thereof on the notice board of the officer or authority who or which passed such decision or order or issued such summons or notice.

(2) Every decision or order passed or any summons or notice issued under this Act or the rules made thereunder, shall be deemed to have been served on the date on which the decision, order, summons or notice is tendered or delivered by post or a copy thereof is affixed in the manner provided in sub-section (1)."

10. This apart Section 27 of General Clauses Act, 1897 provides as under :-

"27. Meaning of service by post. - Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression, "serve" or either or the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

11. Learned counsel for the appellant submits that speed post sent by the respondent, never reached to their office. In response, the learned counsel cites the judgment of Punjab and Haryana High Court in case of Commissioner of Central Excise. Ludhiana v. Mohan Bottling Company (Pvt.) Ltd.; 2010 (255) E.L.T. 321 (P & H). In this case, copy of the order was sent by registered post, and therefore, considering the provisions of Section 37C of the Act, Section 27 of General Clauses Act, 1897 held that burden lies on the assessee to rebut the presumption of service when the copy of the order is sent by registered post. The Court observed that the assessee failed to discharge his burden, and therefore, it is sufficient compliance of provisions of Section 37 of the Act.

12. In this case, admittedly copy of the order was sent to the appellant by speed post. Section 27 of General Clauses Act provides that presumption of service would be raised when document is delivered by registered post. So far as the speed post is concerned, the provision has been made in the Central Excise Act, 1944, however, no such corresponding amendment was made in the General Clauses Act. Resultantly, no presumption can be raised in respect of document sent by speed post. However, under Section 114 of Evidence Act, such presumption can be raised against the appellant that when the order was sent to them by speed post, it would have been reached in ordinary course of nature, and therefore, burden lies on the appellant to prove that speed post sent by the respondents was not delivered to them as provided for by sub-section (2) of Section 37C of the Act. When no such evidence is produced by the appellant, it may be presumed that the speed post must have reached the office of the appellant in due course.

13. Coming back to the dismissal of cross-objections filed by the appellant, it was observed by the Appellate Authority that it was not filed within 45 days of the notice received by them. According to provisions of Order 41 Rule 22 of CPC, cross objections should be filed after receiving notice of appeal within 30 days. However, in the Act, no such time period is prescribed. Time fixed by the learned Appellate Authority was fixed by him and there was no statutory provisions against this time period fixed by him and accordingly, when the Authorised representative appeared before the Appellate Authority on 26-11-2010 and he was granted time by the authority to file cross-objections within one week, which was filed on 3-12-2010, and which were taken on record, it cannot be said that cross objections filed by the appellant was not filed in time and were time barred. Accordingly, in considered opinion of this Court, the Appellate Authority and the learned appellate Tribunal erred while taking the cross objections also as time barred. Hence, this Appeal is partly allowed in respect of cross objections filed by the appellant and dismissed in respect of appeal filed by the appellant.

14. Accordingly, the order of the Appellate Authority as well, as learned appellate Tribunal in respect of cross objections filed by the appellant is set aside. The matter is remanded back to the Appellate Authority for disposal of cross objections filed by the appellant according to law.

15. With aforesaid observations and directions, this appeal stands disposed of.