

(2014) 02 AHC CK 0003
In the Allahabad High Court
Case No : Central Excise Appeal No. 7 of 2014

Kundan Castings Pvt. Ltd.

APPELLANT

Vs

Deputy Commissioner of Central Excise

RESPONDENT

Date of Decision : 17-02-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35B, 35B(3), 35G, 37C, 37C(1)

Citation : (2015) 316 ELT 446

Hon'ble Judges : Dhananjaya Yashwant Chandrachud, C.J;Devendra Kumar Arora, J

Bench : Division Bench

Advocate : Anand Swamp Rai and Pankaj Bhatia, Advocates for the Appellant;
R.S. Chauhan, Advocates for the Respondent

Judgement

1. This appeal has been filed by the assessee under Section 35G of the Central Excise Act, 1944 against an order of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), dismissing an appeal on the ground of limitation. Though several questions of law have been raised, the following question would be sufficient for disposal of the appeal.

"Whether in the facts and circumstances of the case there can be a deemed service of the order on the appellant merely because it was sent under registered cover and no acknowledgment was received more so than there was a specific rebuttal in the form of affidavit filed by the appellant."

On 10 December, 2008, a notice to show cause was issued to the appellant and to its Director to explain as to why Cenvat credit amounting to Rs. 97,990/-, which had been taken and utilized should not be demanded together with interest and why a penalty under the Cenvat Credit Rules should not be imposed. Both the appellant and its Director filed a reply on 15 December, 2008 and 16 January, 2009. An order of adjudication was passed by the Deputy Commissioner, Central Excise on 18 March, 2009, confirming the demand and imposing a penalty in the like amount on the appellant and its Director. Appeals

were filed by the appellant and its Director before the Commissioner (Appeals), Lucknow. The appeal filed by the appellant was dismissed on 23 November, 2009 and that filed by its Director was dismissed on 28 January, 2010.

2. The order of the Commissioner (Appeals) was challenged by the appellant's Director before the CESTAT. The CESTAT allowed the appeal filed by the Director of the appellant. On 1 May, 2010 and on 4 May, 2010 the Superintendent Appeals informed the appellant that the appeal filed by the appellant had already been decided on 23 October, 2009 by the Commissioner (Appeals). On 17 June, 2010, the appellant served a letter in the office of the Commissioner (Appeals) stating that the order passed in the case of the appellant had not been served and requested that a copy of the order may be remitted to the appellant for which copying charges were duly deposited. There was no response to the letter. Thereafter on 13 June, 2011, the appellant wrote to the Chief Commissioner, Central Excise, Lucknow, seeking a direction for the issuance of a certified copy of the order passed by the Commissioner (Appeals). On 24 June, 2011, the Superintendent in the office of the Commissioner (Appeals), informed the appellant that the order-in-appeal had been dispatched by the registered post on 1 December, 2009. On 3 August, 2011, the Superintendent, Central Excise, called upon the appellant to deposit the amount outstanding in terms of the order dated 23, November, 2009. The appellant thereupon filed an affidavit on 27 February, 2012 before the Commissioner (Appeals) stating that the order-in-appeal had not been served and once again sought a certified copy thereof. The Commissioner (Appeals) by an order dated 10 December, 2012 directed the appellant to furnish a certificate from the postal authorities, stating that the order has not been received. Eventually, on 20 October, 2012 in pursuance of a request for disclosure of information under the Right to Information Act, a photocopy of the order-in-appeal was provided to the appellant. The appellant filed an appeal before the CESTAT on 17 January, 2013 and filed a Miscellaneous Application contending that the appeal was within time from the date of the actual communication of the order. The appeal has been dismissed by the impugned order of the Tribunal.

3. Under Section 35B(3) of the Central Excise Act, 1944, the appeal before the Tribunal against an order passed by the Commissioner has to be filed within a period of three months from the date on which the order sought to be appealed against is communicated. However, under sub-section (5), the Tribunal is permitted to admit an appeal after the expiry of the relevant period referred to in sub-section (3), if it is satisfied that there was sufficient cause for not presenting it within that period.

4. Section 37C(1) provides for service of decisions, orders, summons and notices. Clause (a) of sub-section (1) of Section 37C provides inter alia that a decision or order passed under the Act or Rules, shall be served by tendering it or sending it by registered post with acknowledgment due, to the person for whom it is intended or his authorized agent, if any. Sub-section (2) of Section

37C provides, among other things, that every decision or order passed under the Act or Rules shall be deemed to have been served on the date on which it is tendered or delivered by post or a copy thereof is affixed in the manner provided in Sub-section (1).

5. For the purposes of computing the period of limitation under Sub-section (3) of Section 35B, what is relevant is the date on which the order which is sought to be appealed against is communicated. Section 37C provides for the mode of service. Under clause a(i), a decision or order has to be served by tendering it or by sending it by registered post with acknowledgment due. Sub-section (2) contains a deeming clause under which the decision or order shall be deemed to have been served on the date on which it is either tendered or delivered by post or a copy thereof is affixed.

6. In the present case, the Tribunal has held that since the appellant was heard through its representative by the Commissioner (Appeals) after which the appellate order was passed on 23 November, 2009, the appellant ought to have checked up with the office of the Commissioner (Appeals), if the order was not received. This in our view, begs the question of when the order of the Commissioner (Appeals) was communicated. Once the legislature has stipulated that the period of limitation under Section 35B(3) commences only upon the communication of the order which is sought to be appealed against, the Tribunal ought to have applied its mind precisely when the order under appeal was communicated. That question could not have been answered by finding fault that the appellant did not verify with the office of the Commissioner (Appeals) when the proceedings were disposed of. The Tribunal also relied upon a letter dated 24 June, 2011 by the Superintendent in the office of the Commissioner (Appeals) to the Advocate, who appeared before the Commissioner (Appeals) informing him that the order-in-appeal dated 23 November, 2009 had been sent by registered post and had been received by the appellant on 1 December, 2009. The Tribunal did not satisfy itself of the actual receipt of the order by the appellant on 1 December, 2009 and has merely relied upon a letter addressed by the Superintendent to the Advocate, who had appeared before the Commissioner (Appeals). It was the obligation of the Tribunal to decide in the first instance as to whether, as contended on behalf of department, a copy of the appellate order had been received by the appellant on 1 December, 2009. This exercise having not been carried out, in our view, the Tribunal was not justified in dismissing the appeal. Moreover, if an appeal is not filed within the period of three months, the Tribunal has the power to condone the delay under sub-section (5) of Section 35B if sufficient cause is shown. The question of condonation would, of course, arise only when the Tribunal comes to the conclusion that the appeal was not filed within three months from the date of communication of the order.

7. In view of this discussion, we are of the view, that the appropriate order to pass in the appeal is to quash and set aside the order of the Tribunal dated 24 September, 2013 and to restore the proceedings back to the Tribunal for

consideration afresh. The Tribunal shall reconsider on remand as to whether the order of the Commissioner (Appeals) was actually communicated to the appellant on 1 December, 2009 as contended by the department. We leave it open to the appellant in the alternative to move the Tribunal with an appropriate application for condonation of delay.

8. The question of law as framed is dealt with in the aforesaid terms. The appeal shall accordingly stand disposed of.