(2025) 01 CESTAT CK 1544

In the Customs, Excise And Service Tax Appellate, New Delhi

Case No : Service Tax Appeal No. 50724 of 2019 [DB]

M/s. Bridge & Roof Co. (India) Ltd. @APPELLANT @Hash Commissioner of Central GST & Central Excise, Jodhpur @RESPONDENT

Date of Decision : 01-01-2025

Acts Referred:
Central Goods and Service Tax Act, 2017 — Section 37C, 37C(1)
Central Excise Act, 1944 — Section 37C, 37C(1)(a)
Finance Act, 1994 — Section 83
Indian Post Office Act, 1898 — Section 28

Citation : (2025) 01 CESTAT CK 1544

Hon'ble Judges : Dr. Rachna Gupta, Member (J);Hemambika R. Priya, Member (T)

Bench : Division Bench

Advocate : Tarun Chatterjee, Saurav Basu, Jayakumari

Final Decision : Allowed

Judgement

Dr. Rachna Gupta

1. Present appeal is filed to assail the Order-in-Appeal (O-I-A) bearing no. 89/2019 dated 24.01.2019 vide which the appeal against the Order-in-Original (O-I-O) bearing no. 114/2016 dated 25.10.2016 has been rejected on the grounds of limitation holding that the appeal filed on 02.11.2017 is beyond permissible condonable time limit of one month hence cannot be condoned.

2. The facts in brief as resulted into impugned order are as follows: -

2.1 M/s Bridge & Roof Company (India) Ltd., the appellant, is registered under Service Tax Department for providing taxable service namely Erection Commissioning and Installation Services and also Transport of Goods by Road Service.

2.2 During the course of audit of appellant’s record, it was observed that the taxable service like Commercial or Industrial Building and Civil Structure Services and Works Contract Service were also got added to appellant’s registration on

14.06.2007 and 23.08.2007 respectively. It was also observed that the appellant entered into a contract with M/s BHEL for construction of Civil Steel Structure and Architecture Works dated 15.12.2006. Since January 2007 itself the appellant starting taking benefit of Works Contract (composition scheme for payment of service tax) Rules, 2007 despite that said benefit was not available, since January 2007, on the strength of single agreement dated 15.12.2006 as the Works Contract Services became taxable w.e.f. 1.06.2007.

2.3 Based on these observations the appellant is observed to be liable to pay service tax amounting to Rs. 59,60,047/-on the taxable value 5,38,84,114/- received during the period April 2011 to September 2013. The appellant had paid the service tax under composition scheme of an amount of Rs. 22,94,884/-. Hence service tax amount to Rs. 36,65,163 was proposed to be recovered along with interest and the appropriate penalty was proposed to imposed on the appellant vide show cause notice no. 81/2014 dated 20.5.2014. The said proposal has been confirmed vide the aforesaid OIO. The appeal against the said order has been dismissed / rejected vide the impugned OIA on the technical ground of limitation. Being aggrieved the appellant is before this tribunal.

3. We have heard Shri Tarun Chatterjee and Shri Saurav Basu, learned Advocate for the appellant and Ms. Jayakumari, Authorized Representative for the department.

3.1 It is mentioned by the ld. Counsel for the appellant that the Order-in-Original dated 25-10-2016 was received by the appellant from the Superintended on 20-07-2017 and the appeal before the Commissioner (Appeals) was filed on 02-08-2017. Thus the appeal is filed within the prescribed time. It is alleged that ld. Commissioner (Appeals) failed to appreciate that the Assistant Commissioner (Adjudication) vide letter dated 15-01-2019 informed that the Order-in-Original under challenge is dispatched on 25-10-2016 and the said order is not returned undelivered. Commissioner (Appeals) has also failed to appreciate that the department has not brought any record evidencing that the the Order-in-Original was dispatched at the proper address of the appellant and was delivered to the appellant .

3.2 The requirement of section 37C (1) of Central Goods and Service Tax Act, 2017, in case of service by speed post is proof of delivery is not brought on record. Hence, rejection of the appeal on the presumption is per se bad in law and is not sustainable. The appellant relied upon following decisions of this Tribunal : -

i. Duggar Fibre Pvt. Ltd. Versus Commissioner of Ex. CUS. & CGST, Delhi (Para-11)

ii. Commr. of CGST, CUS & C. Ex., Dehradun Versus SBL Pvt. Ltd. (Para-3)

iii. M.T. & N. International Corporation Versus Commr. of CUS., Chennai-VII Commissionerate. (Para-5)

3.3 It is further submitted that on merits, the issue involved stands already decided by this Hon'ble Bench for the earlier period in favour of the appellant by final order No. 58254-58255/2017, dated 01-12-2017.

4. Learned Departmental Representative, on the other hand, submitted that the show cause notice was served upon the appellant on the same address, which was received by them on20.05.2014. The appellant file the reply to the said SCN vide letter dated12.08.2016. Even the adjudicating authority provided personal hearing to the appellant 30.08.2016. Ld. DR submitted that, in the given circumstances, it is not possible that the copy of order in original, as was dispatched at the same address of the appellant was not received by him. Otherwise, also there lies presumption in favor of delivery of the dispatched process, and the receipt thereof. Thus there can be no reasonable explanation for the delay that occurred while filing the appeal before Commissioner (Appeals). Hence there is no infirmity in the order under challenge, the present appeal is therefore prayed to be dismissed.

5. Having heard the rival contentions of both the parties, we observe that the moot question to be adjudicated is:

"Whether sending of order by speed-post complies with the provision of section 37C(1)(a) of the Central Excise Act i.e whether proof of dispatch of a process can supplement the proof of service there of?"

6. Foremost, we peruse section 37C of the Central Excise Act which has been made applicable to service tax matter by virtue of section 83 of the Finance Act, same is reproduced below:

37C. Service of decisions, orders, summons, etc.

(1) Any decision or order passed or any summons or notices 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 acknowledgement due or by speed post with proof of delivery or by courier approved by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963, to the person for whom it is intended or his authorized agent, if any;

7. We observe that Commissioner (Appeals) has cited and relied upon the unamended section 37C of the Central Excise Act, which indicated that the order had been sent by registered post. However, this section had been amended in 2013. The relevant portion of the unamended section 37C of Central Excise Act is reproduced below:

"SECTION 37C. — (1) Any decision or order passed or any summons or notices 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).

On perusal of the aforesaid amended provision, it is clear that after the words "sending it by registered post with acknowledgment due" the words i.e. "or by speed post with proof of delivery" has been inserted.

8. In the present case the order was not dispatched by registered post. The order was sent by speed post and under the amended section 37C, there should be proof of delivery also. In the present case, admittedly, there is no proof of delivery since what has been stated by the Assistant Commissioner in his comments is that the speed post which was sent to the appellant containing the order in original did not return to the office.

9. In M/s. Premier Garment Processing Vs. The Customs, Excise & Service Tax Appellate Tribunal, South Regional Bench, Annexe, Nungambakkam, Chennai - 600 006 and another, reported in 2015 (39) STR 812 (Mad) after considering the contentions of rival parties, a Hon'ble Division Bench of this Court, held:

It is evident from Section 37C (1) (a) of the Act, prior to 10.5.13, service through speed post was not one of the modes of service of orders, decisions, summons, etc. On and from 10.5.13, speed post was made as one of the modes of service for orders, decisions, summons, etc., provided it is supported by proof of delivery. Therefore, it is clear that proof of service is mandatory for the service effected through speed post on and after 10.5.13, but prior to 10.5.13, service through speed post not being a recognised/approved mode of service as per the provisions of the Act, any service effected through speed post is not binding on the appellant/assessee.

It is trite law that limitation has to be reckoned only from the date when the actual service has been effected, subject to fulfilling the mandatory requirement of showing proof of delivery.

10. Hon’ble High Court Mumbai, also in the case Amidev Agro Care Pvt. Ltd. v.

UOI. reported as (2012) 26 STR 299 (Bom.) held that Order Is To Be Served On The Assessee Or His Agent By Registered Post A.D. Or Any Other Mode Specified In Section 37C and mere proof of dispatch of order is not sufficient compliance of the section.

11. The instant issue is squarely covered by the decision of the Hon'ble Gujrat High Court in REGENT OVERSEAS PVT. LTD. VS. UNION OF INDIA, 2017 (6) G.S.T.L. 15 (Guj.), the appellant states that the Hon'ble High Court at Para 8 held:

"8. Thus, under clause (a) of sub-section (1) of Section 37C of the Act, in case of service of notice by speed post, the same has to be with proof of delivery. To put it differently, service by speed post is valid provided there is proof of delivery. In the present case, it is an admitted position that the letter of personal hearing was sent to the petitioners through speed post; however, through details of date of despatch, etc., have been produced on record by the learned counsel for the respondents, including tracking number, there is no material by way of proof of delivery to the petitioners; whereas, on the other hand, it is the specific case of the petitioners that they have not received the notice for personal hearing. Thus, in view of the mandate of Section 37C of the Act, which provides for notice by speed post with proof of delivery, it is incumbent upon the respondents to furnish proof of delivery. In the absence of any proof of delivery, it cannot be said that that there is effective service of notice, as contemplated under Section 37C of the Act. (Emphasis). In the absence of service of notice of personal hearing, the petitioners or their representative could not remain present before the adjudicating authority during the course of personal hearing and hence, the impugned order which has been passed ex parte is clearly in breach of principles or natural justice".

12. In Saral Wire Craft Pvt. Ltd. v. CC. CE & ST 2015 (7) TMI 894 – SUPREME COURT were adjudication order was served on kitchen boy of the assessee, it was held to be not a proper service. As per section 37C of the Central Excise Act, 1944, notice must be served to the person for whom it is intended or his authorized agent under proof of acknowledgement. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The judgment lays down the pre-requisite for issuance of notice. Any notice issued in violation of section 37C is not valid. It is worth mentioning that section 37C has been made applicable to service tax also by virtue of section 83 of the Finance Act, 1994. Hence, the principle laid down in the judgment shall mutatis mutandis apply to notice served in service tax cases also.

13. In Jay Balaji Jyoti Steels Ltd. v. Cestat, Kolkata (2015 (1) TMI 859 – ORISSA HIGH COURT where order was sent by speed post, it was held that post office issues receipt for both – by registered post and by speed post. Hence, both have to be treated as registered post in view of section 28 of Indian Post Office Act, 1898. Only difference between the two is that charges payable are normally

higher for ‘speed post’ for delivery at any early date. Further, insertion of ‘or by speed post with proof of delivery’ after the words ‘sending it by registered post with acknowledgement due’ in section 37C(1)(a) of Central Excise Act, 1944 w.e.f. 10.05.2013 is clarificatory and procedural amendment. It is curative since various courts had held that communication of notices through speed post was in consonance with law.

14. There already has been the decision in favour of appellants in their own case i.e. M/s Bridge & Roof Company (India) Ltd. Vs CCE Jaipur by this Tribunal final order no. 58254-58255/2017 dated 01-12-2017. This decision was brought to the notice of the Commissioner (Appeals) but he chose to dismiss the appeal on technical and mechanical ground of limitation.

15. We are also conscious that if delay is not condoned, the appeal goes out of consideration at the threshold. We are conscious that Apex Court in the case of COLLECTOR, LAND ACQUISITION ANANTNAG AND ANOTHER Vs. MST. KATIJI AND OTHERS - 1987 (28) ELT 185 (SC) has held that no one shall prefer to cause prejudice to himself by a belated appeal. We are also conscious of the Apex Court judgment in the case of N.Balakrishna Vs. M.Krishnamurthy - 2009 (228) ELT 162 (SC). Reason of delay has primacy over length of delay.

16. In the present case, no doubt there occurred a delay in filling the appeal before Commissioner (Appeals) but the same was within the condonable powers of the Commissioner (Appeals) but he didn’t call for the explanation from the appellant. The appeal has been dismissed simply holding that there is no request on record seeking condonation of delay in filing the appeal. The order is clear to hold that no opportunity of personal hearing was given to the appellant nor any reasonable time to file the miscellaneous application. To our opinion, the very basic principle of Principles of Natural Justice has been violated by Commissioner (Appeals). In view thereof and the above discussed decisions, we hereby set aside the impunged order of Commissioner (Appeals). Since there are no findings with respect to the merits of the Order in original as was appealed before Commissioner (Appeals) we hereby remand the matter back to Commissioner (Appeals) to decide the appeal on its merits after giving the proper opportunity of being heard to the appellant. The Commissioner (Appeals is required to decide the matter with in three months of the receipt of the present order

17. In the light of entire above discussion, we hereby allow the present appeal by way of remand.

[Order pronounced in the open court on 01.01.2025]