

(2021) 04 CESTAT CK 0004

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 50281 Of 2021

M/s Shambhu Synthetics Pvt. Ltd

APPELLANT

Vs

Commissioner Of Customs

RESPONDENT

Date of Decision : 01-04-2021

Acts Referred:

Customs Act, 1962 — Section 128

Indian Limitation Act 1963 — Section 5

Central Excise Act, 1944 — Section 35, 35(1), 35A, 35B, 35(o)

Finance Act, 1994 — Section 85(3A)

Citation : (2021) 04 CESTAT CK 0004

Hon'ble Judges : Delip Gupta, J;P.V. Subba Rao, Technical Member

Bench : Division Bench

Advocate : Harsimran Kaur, Sunil Kumar

Final Decision : Dismissed

Judgement

1. This appeal is directed against the order dated 11.2.2020 passed by the Commissioner of Customs (Appeals), New Customs House., New Delhi, the Commissioner (Appeals) by which the appeal filed to assail the order dated 31.3.2018 passed by the Additional Commissioner of Customs has been dismissed for the reason that the appeal had been filed even beyond the permissible time limit contemplated under section 128 of the Customs Act 1962, the Customs Act.

2. The records indicate that the appellant received a copy of the order dated 31.3.2018 passed by the Additional Commissioner on 13.4.2018 and the appeal was filed before the Commissioner (Appeals) on 22.7.2018. Section 128 of the Customs Act provides that any person aggrieved by any decision or order may appeal to the Commissioner (Appeals) within sixty days from the date of communication to him of such decision or order but the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be

presented within a further period of thirty days.

3. Ms. Harsimran Kaur, learned counsel for the appellant submitted that though the appeal may have been filed even after ninety days from the date of communication of the order, but the short delay could still be condoned by the Commissioner (Appeals) by excising powers under section 5 of the Limitation Act 1963, the Limitation Act. Learned Counsel, also submitted that even if the Commissioner (Appeals) could not have condoned the delay beyond the extended period of thirty days, still the Tribunal can condone the delay by using its discretionary power. In this connection learned counsel relied upon the following decisions:

(i) Collector, Land Acquisition Anantnag and Another vs. MST. Katiji and others, 1987 (28) E.L.T. 185 (S.C.);

(ii) Kothari Sugars and Chemicals Ltd. vs. Asstt. Commr. of C. Ex.-I, Trichy, 2018 (361) E.L.T. 643 (Mad.); and

(iii) M/s Jagdish Ispat Pvt. Ltd. vs. The Commissioner, Excise Appeal No. 52382 of 2018 (SM) decided on 28.11.2019.

4. Shri Sunil Kumar, learned Authorized Representative for the Department, however, submitted that when section 128 of the Customs Act deals with limitation for filing the appeal and also the period which can be condoned, any delay in filing the appeal beyond the extended period of thirty days contemplated under section 128 cannot be condoned. The contention, therefore, is that the provisions of the Limitation Act would not apply in such a situation.

5. The submissions advanced by learned counsel for the appellant and the learned Authorized Representative for the Department have been considered.

6. The relevant portion of section 128 of the Customs Act, which deals with Appeals to Commissioner (Appeals), is reproduced below:

"128 Appeals to Commissioner (Appeals) (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Principal Commissioner or Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order: PROVIDED that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days."

7. It would seen from the foresaid provision that an appeal can be filed before the Commissioner (Appeals) within sixty days from the date of communication to him of such decision or order. However, the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days. Thus, at best the delay of thirty days beyond the

stipulated limit of sixty days in filing the appeal by can be condoned, provided ofcourse that the Commissioner (Appeals) is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the period of sixty days.

8. This issue came up for decision before the Supreme Court in *Singh Enterprises vs. CCE, Jamshedpur*, 2008 (221) E.L.T. 163 (S.C.). The Supreme Court examined the provisions of section 35 of the Central Excise Act, 1944, which are para materia to the provisions of section 128 of the Customs Act and observed that the delay can be condoned in accordance with the language of the Statute which confers power on the Appellate Authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days, which is normal period for preferring the appeal. It is for this reason that the Supreme Court observed that the Commissioner and High Court were justified in holding that there was no power to condone the delay after expiry of 30 days period and that the provisions of the Limitation Act would not be applicable. Paragraphs 8, 9 and 10 of the judgment are reproduced below:

"8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period upto which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Indian Limitation Act, 1963 (in short the 'Limitation Act') can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days period.

9. Learned counsel for the appellant has emphasized on certain decisions, more particularly, *I.T.C.'s case* (supra) to contend that the High Court and this Court in appropriate cases condoned the delay on sufficient cause being shown.

10. Sufficient cause is an expression which is found in various statutes. It essentially means as adequate or enough. There cannot be any straitjacket

formula for accepting or rejecting the explanation furnished for delay caused in taking steps. In the instant case, the explanation offered for the abnormal delay of nearly 20 months is that the appellant concern was practically closed after 1998 and it was only opened for some short period. From the application for condonation of delay, it appears that the appellant has categorically accepted that on receipt of order the same was immediately handed over to the consultant for filing an appeal. If that is so, the plea that because of lack of experience in business there was delay does not stand to be reason. I.T.C.'s case (supra) was rendered taking note of the peculiar background facts of the case. In that case there was no law declared by this Court that even though the Statute prescribed a particular period of limitation, this Court can direct condonation. That would render a specific provision providing for limitation rather otiose. In any event, the causes shown for condonation have no acceptable value. In that view of the matter, the appeal deserves to be dismissed which we direct. There will be no order as to costs."

(emphasis supplied)

9. The aforesaid decision of the Supreme Court in Singh Enterprises emphasises that the language to the proviso to section 35(1) of the Central Excise Act makes it clear that the appellate authority has no power to allow the appeal to be presented beyond the period of thirty days after the normal period of limitation of sixty days. In such circumstances, the Supreme Court held that there is complete exclusion of section 5 of the Limitation Act.

10. A Division Bench of the Tribunal in Diamond Construction vs. Commr. of Cus., C. Ex. & S.T., Jabalpur, 2020 (35) G.S.T.L. 193 (Tri.-Del.), in which the provisions of section 85 (3A) of the Finance Act 1994 relating to appeals to the Commissioner of Central Excise (Appeals) came up for consideration, after placing reliance upon the decision of the Supreme Court in Singh Enterprises observed that the discretion of the Commissioner to condone the delay is circumscribed by the conditions set out in the proviso and any delay beyond that period cannot be condoned. The relevant portion of the decision is reproduced below:

"7. In order to appreciate the contentions advanced by the parties it would be appropriate to reproduce Section 85(3A) of the Finance Act which is as follows :

"85. Appeals to the Commissioner of Central Excise (Appeals). -

(3A) An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, made on and after the Finance Bill, 2012 receives the assent of the President, relating to Service Tax, interest or penalty under this Chapter:

PROVIDED that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within

a further period of one month."

8. A perusal of sub-section (3A) of Section 85 clearly indicates that an appeal shall be presented within two months from the date of receipt of the order of the adjudicating authority in relation to Service Tax, interest or penalty. It further provides that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month. The discretion of the Commissioner to condone the delay is, therefore, circumscribed by the condition set out in proviso and the delay can be condoned only if the appeal is presented within a further period of one month after the expiry of the statutory period of two months, provided of course, he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within a period of two months.

9. In the present case, admittedly, the order of the adjudicating authority was received by the appellant on 20 September, 2013 but the appeal was presented before the Commissioner on 5 February, 2016. It was clearly not presented within the period of two months nor within the extended period of one month. The Commissioner (Appeals) dismissed the appeal after placing reliance on the decision of Supreme Court in *Singh Enterprises*."

(emphasis supplied)

11. The Delhi High Court also examined a similar situation in *Uttam Sucrotech International (P) Ltd. vs. Union of India*, 2011 (264) E.L.T. 502 (Del.) and observed as follows:

"13. In view of the aforesaid, there can be no scintilla of doubt that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days after expiry of initial 60 days. In the case at hand, the admitted position is that the order passed by the adjudicating officer was received by the petitioner on 29th August, 2006. The appeal was preferred on 28th November, 2006. The Commissioner excluded the date of receipt of the order in original by the petitioner in terms of provision contained in Section 35-O and took note of the fact that the appeal was presented on the 91st day of the period commencing after the said date of receipt, i.e., one day beyond the condonable period of 30 days and, hence, the same could not have been condoned. Similar view has been expressed by the revisional authority."

(emphasis supplied)

12. The decision of the Supreme Court in *Collector, Land Acquisition* would not be of any help to the appellant. The Supreme Court, in the context of section 5 of the Limitation Act, explained "sufficient cause". This decision would be helpful in only considering whether there was 'sufficient cause' to explain the delay beyond sixty days and up to the expiry of period of thirty days. As noted above, section 5 of the Limitation Act would not be applicable for condoning the delay beyond

ninety days, in view of the aforesaid decision of the Supreme Court Singh Enterprises.

13. The Madras High Court in Kothari Sugars relied upon the aforesaid decision of the Supreme Court in Collector, Land Acquisition. This decision would, therefore, also not help the appellant.

14. Learned counsel for the appellant also placed reliance on the decision of a learned Member of the Tribunal in Jagdish Ispat. The learned Member observed that even though the Commissioner (Appeals) committed no error in dismissing the appeal as barred by time since it was filed after a delay of 215 days, but still condoned the delay for the reason that the Tribunal is vested with jurisdiction to condone the delay even beyond the permissible period. In this connection, the learned Member observed as follows:

"Hon'ble Apex Court in Singh Enterprises itself has held that a Tribunal also been a creature of statute, is vested with the jurisdiction to condone the delay beyond the permissible period and there is no such period statutorily provided under Section 35B, Central Excise Act, 1944 as is provided in Section 35 of Central Excise Act, 1944 in respect of the appeals which were to be filed before Commissioner (Appeals) to condonation of delay to a particular period. Thus, I am of the opinion that Tribunal has power to look into that the reason which resulted into delay for filing appeal before Commissioners (Appeals) as to whether same is sufficient enough for the impugned delay to be condoned or not."

(emphasis supplied)

15. The learned Member thereafter examined whether the appellant had made out 'sufficient cause' for condoning the delay and ultimately, for the reasons mentioned in the order, condoned the delay. The operative part of the order is reproduced below:

"12. In view of entire above discussion, it is held that Commissioner (Appeals) had no option but to dismiss the appeal being time barred as the delay was more than 30 days. But keeping in view, the power of this Tribunal and that the delay is attributable to the Counsel of the appellant that the said delay is hereby condoned. Since the decision of Commissioner (Appeals) is not on the merits, the matter is remanded back to Commissioner (Appeals) to take decision on the merits of the impugned appeal."

16. With respect, it is not possible to accept the view taken by the learned Member in the aforesaid decision. The Supreme Court in Singh Enterprises did observe that 'the Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided in the Statute', which means that the delay of thirty days beyond the period of sixty days prescribed in the Statute can be condoned. This is what was stated by the Supreme Court in the next sentence

that 'the period upto which the prayer for condonation can be accepted is statutorily provided'. Section 35B of the Central Excise Act 1944, on which reliance has been placed in the aforesaid decision by the learned Member deals with Appeals to the Appellate Tribunal. It is true that section 35B does not contain a provision similar to section 35, wherein it is provided that an appeal has to be filed within 60 days from the date of the communication of the order but the Commissioner (Appeals) may, if he is satisfied that the appellant is provided by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of sixty days. Section 35 of the Excise Act would apply to A

17. Appeals before the Commissioner (Appeals), whereas section 35B would apply to Appeals before the Appellate Tribunal. Power under section 35B dealing with Appeals to the Appellate Tribunal cannot enable the Appellate Tribunal to condone any delay in filing the appeal before the Commissioner (Appeals) beyond the extended period of thirty days, after the expiry of the normal period of sixty days.

18. The Supreme Court in Singh Enterprises categorically held that any delay beyond the extended period of thirty days after expiry of normal period of sixty days, cannot be condoned since the Statute does not permit and the provisions of section 5 of the Limitation Act would not apply. The decision of the Supreme Court in Singh Enterprises is binding. The decision of the Tribunal in Jagdish Ispat, therefore, does not lay down good law. The Tribunal does not have any power, much less discretionary power, to condone any delay beyond the extended period of thirty days after the expiry of the normal period of sixty days.

19. Such being the position, it is not possible to accept the contentions of learned counsel for the appellant that the provisions of section 5 of the Limitation Act should be invoked even if the delay is beyond the extended period of thirty days or that the Tribunal has a discretionary power to condone any delay in filing the appeal even after the expiry of the extended period of thirty days.

20. The Commissioner (Appeals), therefore, committed no illegality in dismissing the appeal for the reason that any delay beyond ninety days could not be condoned.

21. The appeal before the Tribunal is thus liable to be dismissed and is, accordingly, dismissed.

(Pronounced on 01.04.2021)