

(2021) 01 CESTAT CK 0023

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Central Excise Appeal No. 20007 Of 2021

M/s. Venkateshwara Power Projects Ltd @Hash Commissioner Of Central Tax

Date of Decision : 18-01-2021

Acts Referred:

Central Excise Tariff Act, 1985 — Chapter 17

Citation : (2021) 01 CESTAT CK 0023

Hon'ble Judges : S.S. Garg, J

Bench : Single Bench

Advocate : Jitendra N. Samaiya, C.V. Savitha

Final Decision : Allowed

Judgement

1. The present appeal is directed against the impugned order dt. 09/09/2020 passed by the Commissioner (Appeals), Belgaum whereby the Commissioner (Appeals) has rejected the appeal of the appellant on time bar.
2. Briefly, the facts of the present case are that the appellants are engaged in the manufacture of excisable goods viz. Sugar and Molasses falling under Chapter 17 of the Central Excise Tariff Act, 1985. During the course of detailed verification of the records of the appellant for the period from March 2017 to June 2017, it was noticed by the Revenue that the appellant has availed cenvat credit on certain items viz. HR coils, MS angles, MS channels, MS plates, etc. treating them as capital goods which are ineligible to take cenvat credit. On these allegations, a show-cause notice dt. 23/10/2018 was issued to the appellant proposing to deny cenvat credit of Rs.15,52,986/- along with appropriate interest and imposition of penalty. After following due process, the Assistant Commissioner vide his Order-in-Original No.BEL-EXCUS-000-DIV-AKS-32-2018-19 dt. 18.03.2019 disallowed the cenvat credit of Rs.15,52,986/- along with interest and also

imposed equal penalty. Aggrieved by the said order, appellant filed appeal before the Commissioner (Appeals) and the Commissioner (Appeals), without going into the merits of the case rejected the appeal of the appellant on time bar. Hence, the present appeal.

3. Heard both sides and perused the material on record.

4. Learned counsel for the appellant submitted that the impugned order has been passed without properly appreciating the facts and the law. He

further submitted that the appellant on 12/03/2020 received a letter from the Superintendent informing the appellant that the adjudicating authority had

issued Order-in-Original dt. 18/03/2019 confirming the demand and ordered to recover the credit of Rs.15,52,986/-. He further submitted that they

have never received the Order-in-Original dt. 18/03/2019 and the Superintendent has also not provided them the copy of the said Order-in-Original

along with his letter dt. 12/03/2020. The appellant vide their letter dt. 16/03/2020 informed the Superintendent of Central Tax that till date they have

not received the Order-in-Original and also requested him to provide them the certified copy of the Order-in-Original along with the proof of service of

the said order on them in the past. He further submitted that the Superintendent vide e-mail dt. 17/03/2020 provided them scanned copy of the Order-

in-Original but did not provide any proof about the service of the said Order-in-Original on them in the past and accordingly, the appellant considered

the date of receipt of the Order-in-Original dt. 18/03/2019 passed by the Assistant Commissioner, Central Tax, Belgaum as 17/03/2020 and filed the

appeal before the Commissioner (Appeals) on 19/03/2020 which was within time. He further submitted that the Commissioner (A) while passing the

impugned order has not considered the factual position and has simply assumed that the appeal against the Order-in-Original has been filed after lapse

of 60 + 30 days?? time limit and subsequently dismissed the appeal on time bar. The learned counsel also submitted that the Order-in-Original dt.

18/03/2019 was not received by the appellant and hence, the appellant could not file the appeal earlier. The Department has also not placed any

evidence on record regarding the receipt of the Order-in-Original by the appellant. They have only submitted that the said order was dispatched to the

appellant. Learned counsel also submitted that it has been repeatedly held by the Tribunal and High Court that if the order is sent by post, then the

proof of actual receipt of the said order by the assessee is bound to be produced by the Department and in absence thereof, the date of obtaining the

copy by the assessee from the Department will be treatable as date of receipt of the order. In support of this submission, the appellant relied upon the

following decisions:-

(i) Regent Overseas Pvt. Ltd. vs. UOI: 2017 (6) GSTL 15 (Guj.)

(ii) Farooq Shabbir Noorani vs. CCE: 2018 (359) ELT 650 (Mad.)

(iii) Hindustan Zinc Ltd. vs. CCE: 2020 (4) TMI 41

(iv) Shyam Traders vs. CCE: 2019 (24) GSTL 433

(v) Hotline Electronics Ltd. vs. CCE: 2019 (369) ELT 1579

(vi) G.C. Beverages Ltd. vs. CCE: 2018 (360) ELT 565

4.1 The learned counsel also relied upon the decision of the Division Bench of the Tribunal in the case of Suvarna FMS vs. CCE, Pune-I: 2019 (24)

GSTL 438 (Tri.-Mumbai) wherein it has been held that the Department is under the obligation to adduce documentary proof about the actual service

of the order on the assessee and the Department cannot merely rely upon the Dispatch Register to prove the service of the order on the assessee.

5. On the other hand, the learned AR reiterated the findings of the impugned order.

6. After considering the submissions of both sides and perusal of the material on record, I find that the Assistant Commissioner passed the Order-in-

Original on 18/03/2019 but the same was not actually delivered to the appellant. The appellant only came to know on 12/03/2020 when they received a

letter from the Superintendent informing them about the passing of the Order-in-Original and ordered to recover the credit of Rs.15,52,986/- along with

interest and penalties. Thereafter the appellant vide their letter dt. 16/03/2020 informed the Superintendent that they have not received the Order-in-

Original and requested him to provide the certified copy of the said Order-in-Original and the appellant also requested the Department to provide the

proof of service of the said order on them; but the Superintendent vide his email dt. 17/03/2020 only provided scanned copy of the Order-in-Original

but did not provide any proof of service of the said Order-in-Original on the appellant. Since the Department has failed to prove the delivery of the

Order-in-Original on the appellant, the date on which the appellant has actually

received the scanned copy will be considered as the actual receipt and from that date, the appeal filed before Commissioner (Appeals) was within time. This issue has been considered in various decisions and it has been consistently held that the Department has to give proof of actual receipt of the order by the assessee and in the absence thereof, the date of obtaining copy of the order by the appellant will be considered as the date of receipt of the order. The Division Bench of this Tribunal in the case of *Suvarna FMS vs. CCE* cited supra has held in para 4, 5 and 6 as under:-

4. Revenue has not been able to produce any document from the Postal authorities with regard to the delivery of the order to the applicant prior to that date. They have stated that postal authorities have stated that they do not maintain the record of delivery beyond one year. Since the issue of delivery is more than one year, postal authorities have not given the evidence of delivery.

5. During the course of argument, a submission was made that the applicant had slept over and never enquired about the order after the personal hearing and this shows a negligence on their part. In our view, such submission cannot survive because Revenue itself did not come forward after three months when it should have, for making the recovery as per the order of the Commissioner (Appeals). Amounts were to be recovered and if the applicant is guilty of negligence, Revenue itself is guilty for not initiating action for recovery after expiry of period for filing the appeal. Timely action for recovery is utmost essential to safeguard the interest of revenue. If Revenue itself delays the action of recovery of confirmed dues, then they cannot accuse the other party for negligence.

6. In our view, in absence of any date delivery of order dispatched by speed post earlier, we hold that the order was for the first time received by the applicant on the date as indicated by them. The order was for the first time received on 16th August 2018 and the applicant has filed the appeal on 16th November 2018 which is within the period prescribed for filing the appeal.

Besides this, the other decisions cited supra by the appellant are also squarely in favour of the appellant. Hence, by following the ratio of the above said decisions, I am of the considered view that the impugned order dismissing

the appeal on time bar is not sustainable in law and I set aside the impugned order and remand the case to the Commissioner (Appeals) with a direction to decide the appeal on merits.

7. In the result, appeal is allowed by way of remand.

(Order was pronounced in Open Court on 18/01/2021.)