

(1993) 01 MAD CK 0067

In the Madras High Court

Case No : Writ petition No. 1135 of 1989

Pallavan Transport Corporation Limited

APPELLANT

Vs

Assistant Collector of Central Excise and Another

RESPONDENT

Date of Decision : 13-01-1993

Acts Referred:

Constitution of India, 1950 — Article 226, 286, 32

Citation : (1993) 44 ECC 247

Hon'ble Judges : Venkataswami, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. The petitioner, aggrieved by an order of the second respondent dated 16.11.1988, declining to condone the delay in filing the appeal, has filed this writ petition.

2. Brief facts are the following-

The petitioner-Corporation is engaged in providing public transport. It has a workshop in which bodies are constructed on duty-suffered chassis. On and from 1.3.1986, the duty of excise was charged under the Central Excise Tariff Act, 1985 on bus body constructions. The petitioner was compelled to pay duty in respect of such construction activities with effect from 1.3.1986. The duty was paid on ad valorem basis including the cost of the chassis, even though the petitioner is constructing only the body. Be it noted, the chassis had already suffered duty. While so, a notification issued by the Department provided for exemption of the value of the chassis for computing the duty. As the petitioner had already paid duty on the full value for certain number of vehicles, claimed refund in terms of the notification. The petitioner was able to get refund only respect of vehicles cleared after 3.4.1986 and was not successful for the earlier clearances. Against that part of the order which did not grant refund of the excise duty, the petitioner preferred an appeal, and the appellate authority also

confirmed the order of the first authority. Thereafter, the petitioner sought the advice of its counsel, and the petitioner was advised that no useful purpose would be served by filing a further appeal against the order of the appellate authority, in the light of the clear language of the notification. While so, subsequently, notification 265/87 dated 10.12.1987 was issued u/s 11-C of the Act, waiving duty from 1.3.1986 to 2.4.1986. The petitioner came to know about this through its counsel on 23.1.1988. Thereafter, the petitioner preferred an appeal against the order of the appellate authority dated 11.12.1986, with a petition to condone a delay of 1 year and 40 days. The second respondent by the impugned order dismissed the petition for condoning the delay, observing that the delay is not condonable and the reason given was not acceptable. Aggrieved by that order, the present writ petition is filed.

3. Mr. C. Natarajan, learned Counsel appearing for the petitioner, submitted that the second respondent failed to exercise a jurisdiction vested in it judiciously and has not properly appreciated the facts stated in the affidavit filed in support of the petition to condone the delay. According to learned counsel, nowhere in the order under challenge, the reason for the delay has been mentioned, to show that the Tribunal applied its mind. Learned Counsel would contend that the reason was, as per the earlier notification, there was no scope for further appeal, but the subsequent notification with retrospective effect, enabled the petitioner to get a refund, and it was the cause of action for filing a further appeal with a petition to condone the delay. Though this fact was brought to the notice of the Tribunal, it has not both [(sic) been?] appreciated by the second respondent. The learned Counsel also placed reliance on a judgment of the Supreme Court in *Kamala Mills Ltd. Vs. State of Bombay*, , to contend that under similar circumstances, the only remedy available is to file an appeal with a petition to condone the delay or to file a petition for refund or rectification. The petitions filed for refund or rectification had not yielded the desired result. Hence, the appeal was filed with a petition to condone the delay. He also cited a Division bench judgment of this Court in *Sabari Foundry v. State of Tamil Nadu* reported in 86 STC 443, wherein the Division Bench has sustained an order of the Appellate Assistant Commissioner condoning a long delay in filing the appeal on the ground of a subsequent clarification issued by the Board of Revenue in respect of rate of taxation on electric motors,

4. Mr. K. Jayachandran, learned Additional Central Government Standing Counsel, contending contra, submitted that the Tribunal has exercised the jurisdiction properly, and that this Court may not interfere with such exercise of discretionary jurisdiction while exercising the jurisdiction under Article 226 of the Constitution of India. In support of that, he placed reliance on a decision of this Court in *Murali Match Works Vs. CEGAT*, .

5. I have considered the rival submissions, we have seen the circumstances under which the appeal before the second respondent came to be filed belatedly. The Tribunal has simply disposed of the petition by observing as follows:-

We are afraid that we are not able to accede to the plea of the Learned Counsel. The delay of one year and 40 days in preferring the appeal before the Tribunal in our opinion is not condonable and the reason that on legal advice the appeal was not filed earlier is neither convincing nor acceptable. Since the whole delay of one year and 40 days in the presentation of the appeal has not been explained with proper and sufficient cause, we are unable to condone the delay and the application is dismissed, and consequently, we dismiss the appeal also.

It is not quite correct for the Tribunal to observe that the belated presentation has not been explained with proper and sufficient reason,

6. As noticed earlier, the notification issued by the Revenue on 10.12.1987 with retrospective effect from 1.3.1986 was the reason for filing the belated appeal before the second respondent. In the light of the earlier notification, which was prospective in character, the petitioner, on legal advice, did not pursue the matter after the Appellate Collector's order, in order to avoid a futile litigation. Instead of welcoming the attitude of the public undertaking in the facts and circumstances of the case, the Tribunal, unfortunately, has failed to appreciate the same. It is not as if the Tribunal has no power to condone the delay. Section 35-B(5) enables the Tribunal to condone the delay for sufficient cause, without limitation. Can it be said in the circumstances of the case that there was no sufficient cause for condoning the delay? It does not ex facie appear from the order that the Tribunal has appreciated the reason given in the affidavit filed in support of the petition, namely, the notification subsequently published by the Revenue with retrospective effect, which was the main reason for preferring the belated appeal. The decisions cited by the Learned Counsel for the petitioner, though not directly on the point, support the case of the petitioner.

7. The Supreme Court, in *Kamala Mills Ltd. Vs. State of Bombay*, while considering a case of refund on account of subsequent judgment, has observed as follows:- (Pages 634-635 of 16 STC)

What then is the ultimate position in this case? The Act under which tax was recovered from the appellant is valid and so is the charging section valid; the appropriate authorities dealt with the matter in regard to the taxability of the impugned transactions in accordance with the provisions of the Act and in consequence, tax in question was recovered on the basis that the said transactions were taxable under the Act. The appellant contends that the transactions were outside sales and they did not and could not fall under the charging section because of Article 286, and it argues that the tax was levied because both the appellant and the appropriate authorities committed a mistake of fact as well as law in dealing with the question. Assuming- that such a mistake was committed, the conclusion that the transactions in question fell within the purview of the charging section cannot be said to be without jurisdiction or a nullity and the assessment based even on such an erroneous conclusion would claim the protection of Section 20. If, after discovering the mistake, the appellant had moved the appropriate authorities under the relevant provisions of the Act,

its claim for refund would have been considered on the merits. Having failed to take recourse to the said remedy, it may have been open to the appellant to move the High Court under Article 226. Whether or not in such a case, the jurisdiction of the High Court could have been effectively invoked, is a matter on which we propose to express no opinion. As we have pointed out during the course of this judgment, we are not dealing with the scope and effect of the High Court's jurisdiction under Article 226 as well as the scope and effect of this Court's jurisdiction under Article 32 vis-a-vis such claims for refund of tax alleged to have been illegally recovered.

In the result, the appeal fails and is dismissed with costs.

Likewise, the discretion exercised by the Appellate Assistant Commissioner in the light of the clarification issued by the Board of Revenue in condoning the delay, has been upheld by the Division Bench in 86 STC 443.

8. The decision cited by the Learned Counsel for the Revenue, namely, *Murali Match Works Vs. CEGAT*, is distinguishable on facts, in the sense that in that case, the learned Judge has found on facts that there was no good reason for filing a belated appeal before the Tribunal after the High Court disposed of the writ petition. The reason given was that the assessee was awaiting the judgment of the High Court. But the facts of the case on hand stand entirely on a different footing and, therefore, that decision cannot be pressed into service in this case. In the circumstances, I am of the view that the Tribunal has failed to exercise the jurisdiction vested in it and consequently the order is set aside. The delay is condoned as the reason given by the petitioner is sufficient to condone the delay. The second respondent is directed to restore the appeal on file and dispose of the same on merits in accordance with law. The writ petition is allowed. However, there will be no order as to costs.