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(2016) 04 GUJ CK 0091

In the Gujarat High Court

Case No : Special Civil Application No. 1876 of 2016

Pan Drugs Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 13-04-2016

Acts Referred:

Citation : (2016) 337 ELT 183

Hon'ble Judges : Akil Kureshi and A.Y. Kogje, JJ.

Bench : Division Bench

Advocate : Shri Hasit Dilip Dave, Advocate, for the Petitioner; Ms. Naynaben K. Gadhvi, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Akil Kureshi, J.—Heard learned counsel for the parties for final disposal of the petition. The petitioner has challenged an order dated 18-11-2015 passed by the CESTAT rejecting the petitioner''s application for condonation of delay and thereby confirming an order dated 20-6-2014 passed by the Commissioner (Appeals).

2. The petitioner a manufacturing unit was visited with an order-in-original dated 29-8-2013, under which, the adjudicating authority confirmed a duty demand of Rs. 29.60 lacs with interest. The same authority, later on, issued a corrigendum dated 29-11-2013 and provided certain amendments/corrections in the order-in-original. On 17-2-2014, the petitioner filed appeal before the Appellate Commissioner challenging the said order-in-original dated 29-8-2013, as corrected by corrigendum dated 29-11-2013. Since this appeal was filed beyond a period of 60 days, even counting the limitation from the date of corrigendum dated 29-11-2013, the petitioner preferred an application for condonation before the Commissioner. In such application, the petitioner referred to both the orders of the adjudicating authority, i.e., the order-in-original as well as one correcting the same later on. The petitioner explained the delay by suggesting that the clearance of files could not be done, as expected and, further, that the petitioner

has an excellent case on merits in appeal.

3. The Commissioner (Appeals), however, by his impugned order dated 20-6-2014, rejected such appeal on the ground that the same was filed beyond a period which the Commissioner was authorised to condone. Against such order, the petitioner preferred an appeal before the CESTAT. There was a delay of 78 days in filing such appeal. The petitioner filed application for condonation of such delay. The Tribunal, however, rejected the petitioner''s application of condonation of delay by an order dated 7-7-2015, upon which, the petitioner applied for rectification which also came to be rejected by the Tribunal by an order dated 18-11-2015. Hence, this petition.

4. Having heard learned counsel for the parties and having perused the documents on record, we notice that the petitioner had challenged the order-in-original dated 29-8-2013 which came to be corrected and amended by virtue of corrigendum issued by the competent authority on 29-11-2013. It was only then that the period of limitation would start to run against the petitioner. The Commissioner (Appeals), however, counted the starting point of limitation from the original order dated 29-8-2013. It was, therefore, that the Commissioner held a belief that the appeal was beyond limitation by 118 days, a period which he could not condone. We are not unmindful of the statutory provisions which prescribe the period of limitation of 60 days for filing appeal before the Commissioner and a further period of 30 days, up to which, the Commissioner can condone any delay in filing appeal. Nevertheless, in the present case, the conclusion of the Commissioner that the petitioner''s appeal was beyond such total period of 90 days is not borne out from the record. Counting from the date of corrigendum 29-11-2013, the petitioner''s appeal which was filed on 17-2-2014 was well within the period of 180 days and, in other words, beyond the statutory period of 60 days for filing appeal. Petitioner''s appeal was belated barely about 19 days. The explanation rendered by the petitioner was perfectly valid and delay ought to have been condoned.

5. The petitioner approached the Tribunal. The Tribunal, instead of examining such grievance of the petitioner on merits, rejected the appeal on the ground of delay which was, in any case, was about 78 days and should not have been fatal to the petitioner''s appeal. Our one option could have been, to condone such delay and remand the proceedings before the Tribunal. However, our second option was to strike down the very order of the Commissioner (Appeals) on condonation application of the petitioner and thereby save one full layer of litigation. We adopt the later option.

6. Before closing, we would have to deal with the authority cited by the counsel for the department in case of Raja Mechanical Company Private Limited v. Commissioner of Central Excise, Delhi-I reported in (2012) 12 SCC 613 : 2012 (279) E.L.T. 481 (S.C.) : 2013 (29) S.T.R. 81 (S.C.), in which, in the context of applicability of the principle of merger, it was held that if the appeal is dismissed on the ground of limitation and not on merits, the order would not merge with

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the order passed by the appellate authority. We fail to see the applicability of this principle in the present case.

7. In the result, the petition is allowed. Impugned order dated 18-11-2015 passed by the Tribunal as well as dated 20-6-2014 passed by the Commissioner are set aside. The petitioner''s appeal is restored to the Commissioner (Appeals) after condoning delay. Commissioner shall hear the petitioner''s appeal on merits. Petition is disposed of.

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