(2016) 12 GUJ CK 0005

In the Gujarat High Court

Case No : Tax Appeal No. 417 of 2016

Royal Hygiene Pvt. Ltd. APPELLANT

Vs

Commissioner of Customs & Central Excise RESPONDENT

Date of Decision : 02-12-2016

Acts Referred:

Citation : (2017) 346 ELT 170

Hon'ble Judges : M.R. Shah and B.N. Karia, JJ.

Bench : Division Bench

Advocate : Shri D.K. Trivedi, Advocate, for the Appellant; Shri Sudhir M. Mehta, Advocate, for the Respondent

Final Decision : Allowed

Judgement

M.R. Shah, J. (Oral)—Feeling aggrieved and dissatisfied with the impugned order dated 30-9-2014 passed by the learned Customs, Excise and Service Tax Appellate Tribunal passed in Appeal No. 11775, by which, learned Tribunal has dismissed the said appeal and has confirmed the order passed by the Commissioner (Appeals) dated 6-9-2013 in OIA No. RJTExcus 000APP3711314, by which, the learned Commissioner (Appeals) refused to condone the delay, the original appellant has preferred present Appeal.

2. That feeling aggrieved and dissatisfied with OIA dated 24-7-2012, the appellant herein preferred appeal before the learned Commissioner (Appeals) on 23-11-2012. According to the appellant, they received the copy of OIO on 27-8-2012. Still there was some delay and therefore, along with appeal, appellant submitted application requesting to condone the delay. However, Commissioner (Appeals) did not accept the case on behalf of the appellant that they received OIO on 27-8-2012 and by drawing presumption that as OIO was dispatched on 25-7-2012, it is to be presumed that the appellant himself have received the order within maximum period of 10 days and therefore, having found that appeal has been preferred beyond the normal + condonation period

prescribed in the law and as per provisions of Section 35 of the Central Excise Act and Rules made in this regard, the appellant authority is not vested with the power to condone the delay beyond 60 days + 30 days. Consequently, the learned Commissioner (Appeals) dismissed the appeal on the ground of limitation.

2.1. Feeling aggrieved and dissatisfied with the order passed by the learned Commissioner dismissed the appeal on the ground of limitation, the assessee-appellant preferred appeal before the learned Tribunal and by impugned judgment and order the learned Tribunal has dismissed the said appeal confirming the order passed by the learned Commissioner (Appeals).

2.2. Feeling aggrieved and dissatisfied with the impugned order passed by the learned Tribunal in dismissing the appeal confirming the order passed by the learned Commissioner (Appeals) in not condoning delay, the appellant has preferred present appeal.

3. Having heard the learned advocates for the respective parties and considering the order passed by the learned Commissioner (Appeals), we are of the opinion that learned Commissioner (Appeals) did not accept the case on behalf of the appellant that they received OIA on 27-8-2012 merely on presumption and assumption and on surmises and conjectures. The learned Commissioner (Appeals) has observed that as the OIO was dispatched by Department and sent through RPAD on 25-7-2012 and therefore, considering the period of maximum 10 days as reasonable period for reaching OIO from the date of dispatch from the postal department to the factory of the appellant, the OIO ought to have been reached the appellant latest by 4-8-2012. Therefore, learned Commissioner (Appeals) treated and considered the starting point of limitation from 4-8-2012. The aforesaid finding cannot be sustained for the simple reason that the starting point of limitation is considered merely on presumption and assumption. The learned Commissioner (Appeals) has considered the date of dispatched of the OIO but has not considered in fact on which date the appellant received the copy of OIO. If according to department OIO was sent through RPAD, in that case, department must have received acknowledgment receipt with the signature and seal of the company. The Commissioner (Appeals) could have and ought to have called for the acknowledgment receipt of the RPAD to ascertain on which date the appellant/assessee received the copy of the OIO. The acknowledgment receipt of the RPAD is always with the department. Therefore, department was required to produce the cogent reason to prove the only date of receipt of OIO by the appellantassessee. Once it was the specific case on behalf of the appellant-assessee that they received the copy of the OIO on 27-8-2012 and if either the department and/or Commissioner (Appeals) were disputing the same, thereafter the duty is cast upon them to disprove the same and to prove that OIO was not served on 27-8-2012 but was served earlier than that and it could have been proved by producing the acknowledgment receipt of the RPAD. However, on assumption and presumption it could not have been presumed that OIO ought to have reached the appellant latest by 4-8-2012. On the premise that period of

maximum 10 days has to be considered as reasonable period for reaching OIO from the date of dispatch from the postal department to the factory of the premise.

Under the circumstances, the impugned order passed by the learned Commissioner (Appeals) confirmed by the learned Tribunal cannot be sustained and the matter is required to be remanded to the learned Commissioner (Appeals) to pass appropriate order on the aspect of condonation of delay afresh and in light of the observations made herein above. It will be open for the learned Commissioner (Appeals) to call for the necessary particulars from the department with respect to exact date of receipt of OIO by the appellant either from acknowledgment receipt of RPAD and/or from any other documents such as inward register etc.

4. In view of the above and for the reasons stated above, the impugned order dated 30-9-2014 passed by the learned Customs, Excise and Service Tax Appellate Tribunal passed in Appeal No. 11775 as well as order passed by the Commissioner (Appeals) dated 6-9-2013 in OIA No. RJTExcus000APP 3711314 are hereby quashed and set aside and matter is remanded to the Commissioner (Appeals) to pass order afresh on the aspect of condonation of delay and in light of the observation made herein above. Appeal is allowed to the aforesaid extent. No costs.