(2007) 08 AHC CK 0256

In the Allahabad High Court

Shivam Traders APPELLANT

Vs

Commissioner, Trade Tax RESPONDENT

Date of Decision : 23-08-2007

Acts Referred:

Citation : (2008) 17 VST 413

Hon'ble Judges : Vikram Nath, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Vikram Nath, J.—With the consent of learned Counsel for the parties, this revision is being disposed of finally at the admission stage itself, as the matter has not been decided by the Tribunal on merits but the second appeal of the dealer has been dismissed on the ground of delay.

2. Heard Sri Nishant Misra, learned Counsel for the applicant and learned Standing Counsel for the opposite party.

3. The first appeal of the dealer pending before the Deputy Commissioner (Appeals) was decided against the dealer by order dated December 18, 2002 relating to the assessment year 1997-98 (U.P.). Against the said order time barred second appeal was filed on March 14, 2007, i.e., beyond the prescribed limit by three years eleven months and seventeen days. The appeal was accompanied by an application for condonation of delay which was supported by an affidavit stating therein that the proprietor of the firm had suffered with a head injury in an accident and was confined to bed from December 20, 2002 till February 15, 2007. In support of the same it filed medical prescription of Swasthik Hospital & Heart Centre, New Delhi. The Tribunal by the impugned order was not satisfied with the explanation tendered and accordingly rejected the delay condonation application by the impugned order dated March 22, 2007 and consequently the appeal was also dismissed.

4. Aggrieved by the same, present revision has been filed. At the time of filing of

this revision the following order was passed on April 22, 2007:

Heard learned Counsel for the parties.

The Tribunal has dismissed the second appeal of the revisionist on the ground of delay and laches.

Learned Standing Counsel prays for and is granted three weeks time to obtain instructions with regard to the date of service of the first appellate order on the assessee, as in his application dated March 14, 2007 filed before the Tribunal for the condonation of delay, the assessee had stated in para 2 that the first appellate order was not served upon him and he got the certified copy only on March 12, 2007. If this fact is correct, the question of limitation may not arise at all for the filing of the second appeal. List on May 21, 2007.

5. Pursuant to the aforesaid order the learned Standing Counsel has filed a counter-affidavit. In para 4 of the same it is alleged that the order dated December 18, 2002 passed by the appellate authority was served upon Sri Sunil Kumar on December 29, 2002, who was the authorised representative of the applicant. It has further been stated in para 6 of the counter-affidavit that Sunil Kumar has been acting as authorised representative on earlier occasions and has been receiving the order on behalf of the dealer. Along with the counter-affidavit the receiving dated October 29, 2002 as also two previous receiving dated May 11, 2000 have been annexed.

The question of law which has been sought to be raised in this revision , is as to whether the view taken by the Tribunal was too technical in rejecting the delay condonation application rather than having exercised its discretion in affording hearing on merits instead of shutting it out on technicalities.

6. Learned Counsel for the applicant has relied upon various decisions of the apex court and has also submitted that the proprietor of the dealer had actually met with an accident and was admitted for treatment of head injuries. Further submission of learned Counsel for the applicant is that from the perusal of the annexures attached to the counter-affidavit, the signature of Sunil Kumar on receiving dated December 29, 2002 is different from the receiving dated May 11, 2007 and therefore the averments made in the delay condonation application of having not received the order ought to have been accepted and in fact after obtaining the certified copy in March 2007 the second appeal was immediately filed. It was within the time-frame prescribed under law in absence of any proper and valid service.

7. Be that as it may, I do not find any reasons as to why dealer would not have filed the second appeal within time and what advantage it could have gained by not filing appeal in time. The apex court in various decisions has held that in the matters of condonation of delay pedantic approach should not be adopted. It must be examined as to whether party applying for condonation of delay was gaining any benefit by causing such delay and if no such benefit or motive can be

noticed ordinarily delay should be condoned.

Present case relates to imposition of tax. If the dealer is permitted to file second appeal and it is heard on merits, it may succeed and may not be liable to pay tax. Such an opportunity should be given to a party who may be entitled to establish that it was not liable to pay any tax. Liability of unlawful tax is not comprehended in law.

8. In view of the facts and circumstances and reasons stated above, in my opinion it will be just and proper that the second appeal of the dealer may be decided on merits. The impugned order of the Tribunal rejecting the delay condonation application is set aside. The delay in filing the second appeal is condoned. The Tribunal is directed to decide the appeal on merits.

9. With the aforesaid observations/directions, revision is allowed. There shall however be no order as to costs.

