

**Mark Auto Industries Vs. Cce**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Sep-15-2000

**Reported in :** (2000)(72)ECC113

**Judge :** K Sreedharan, N T C.N.B.

**Appellant :** Mark Auto Industries

**Respondent :** Cce

**Judgement :**

1. Assessee is the appellant. Along with appeal it has also filed petition seeking stay of recovery of the amounts covered by the orders passed by authorities below. In other words, appellant prayed for waiver of pre-deposit as contemplated by Section 35F of the Act for entertaining the appeal. On hearing the petitioner, we felt that the appeal itself can be disposed of at this stage. So we heard Learned Counsel representing the appellant and the Learned Departmental Representative at length. We are disposing of the appeal.

Appellants are engaged in the manufacture of motor vehicle parts falling under Chapter Heading 8708 and 9401 of the Central Excise Tariff Act. Certain components/inputs were received free of cost by the appellant from M/s. Maruti Udyog Ltd. While determining the value of goods manufactured utilising the inputs received from Maruti Udyog enhanced value was not included, in the sense that duty element, sales tax, freight charges were not taken into consideration. Hence show cause notice was issued. Assessee disputed the claims put forth in the show

cause notice. The adjudicating authority by its order dated 26.2.99 confirmed duty demand of Rs. 8,09,944 and Rs. 19,02,425 out of the amounts claimed in the two show cause notices. In respect of the said amount, on account of the failure of the assessee to pay it on time, penalty amounting to Rs. 1.5 Lakhs and Rs. 4 Lakhs was also imposed. Assessee went in appeal before the Commissioner. Appeal to the Commissioner was filed on 24.1.2000. That was beyond the period of limitation fixed by Section 35 of the Act. Consequently, the Commissioner rejected the appeals.

Hence, assessee has come up in appeal before this Tribunal.

3. Adjudicating authority passed order on 26.2.99 confirming duty demand of Rs. 8,09,944 and Rs. 19,02,425 and also imposed penalties of Rs. 1.5 Lakhs and Rs. 4 Lakhs respectively. As per Section 35 of the Act aggrieved party should have preferred appeal within three months from the date of communication of the decision to him. Learned Counsel representing the appellant submitted that the order of adjudication was not served on the assessee until he got a duplicate copy long subsequent to the date of order. As a result of this non-supply of the original order, the assessee contended that appeals filed within thirty days of receipt of a copy of the order should have been entertained by the Commissioner. Since the Commissioner did not entertain the appeals and examine the correctness or otherwise of the decision of the lower authority on merits, the appellate order is liable to be interfered with.

4. As stated earlier, adjudicating authority passed the impugned order on 26.2.99 Departmental Representative placed before us the records maintained by that authority to show that copy of that order was sent by registered post to the assessee. Postal authorities were also addressed to get information regarding actual date on which the registered parcel was served on the assessee. Superintendent of Post Offices Gurgaon informed the departmental authorities that the registered letter was delivered to the addressee on 1.3.99. We do not find any reason to doubt the correctness of the certificate given by the postal authorities. It therefore follows that the assessee got the copy of the order of adjudication on 1.3.99. Period of three months fixed under Section 35(1) should be computed from

that date. That period of three months will expire on 31st May, 1999. As per Clause (1) of Section 35, appeal in this case should have been filed on or before 30th May, 1999. Proviso to Clause (1) allows the appellate authority power to condone a delay of three months. That will take us to 30th August, 1999. On the facts of this case, since the copy of the adjudication order was served on the assessee on 1.3.99, appeal ought to have been filed on or before 30.5.99. With a petition for condonation of delay, assessee could have filed appeal upto 30th August, 1999. Any delay thereafter could not be condoned by the appellate authority because the proviso is in the following terms: Provided that the Commissioner may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of three months.

A reading of the proviso makes it clear that any delay beyond three months was not condonable by the appellate authority. In the instant case appeal was filed on 24.1.2000, beyond the period of condonation permissible. So, the appellate authority was not at all competent to condone the delay to entertain the appeal. The appeal was correctly dismissed as barred by limitation.

5. According to the Learned Departmental Representative, when the appellate authority's decision rejecting the appeal as time barred is found to be correct, this Tribunal cannot go into the merits of the claim that may be agitated by the assessee. This argument, we are afraid, cannot be accepted. Appellate authority has, in this case, rightly rejected the appeal on the ground of limitation. As a result of that, adjudicating authority's order got itself merged in the order of the appellate authority. In other words, the decision rendered by the adjudicating authority has to be taken as having been endorsed by the appellate authority as well. That decision, as endorsed by the appellate authority is open to challenge before this Tribunal. When the assessee comes up before this Tribunal questioning the correctness or otherwise of the order, this Tribunal cannot only go into the question of correctness or otherwise of the order passed by the Commissioner on the point of limitation but also can examine the issues on merit. If the argument of the Learned Departmental Representative that the Tribunal cannot go into the merits of the claim is accepted, it will lead to disastrous consequences. The

second appellate authority is well within its jurisdiction to go into the correctness or otherwise of the decision rendered by primary authority even when the decision of the first appellate authority on the question of limitation is against the assessee. The effect of the dismissal of the appeal as barred by limitation gets the approval of the appellate authority on the points decided by the adjudicating authority. The order so got approved is under challenge before this Tribunal.

6. The lower appellate authority did not entertain the appeal before it on the ground of bar of limitation. So, there was no speaking order.

Consequently, it was contended that the order of the adjudicating authority did not merge with the order passed by the Commissioner (Appeals) and so, this Tribunal cannot go into the merits of the case.

It was also contended that this Tribunal can go into the correctness or otherwise of the order passed by the Commissioner (Appeals) only. The order of the Commissioner (Appeals) was perfectly legal because the appeal having been filed beyond six months from the date of the communication of the order of the primary authority, the Commissioner had no power to entertain the same. That conclusion reached by him was unassailable. This being the legal position, this Tribunal cannot find fault with the disposal of the appeal. Appeal before the Tribunal has, therefore, only to be dismissed, without going into the merits of the contentions raised by the party. In support of this argument, Division Bench decision of the Madras High Court in Central Board of Excise and Customs v. Ashok Leyland, Madras Assessee in that case challenged the order passed by the Deputy Collector of Customs in appeal before the Appellate Collector. That appeal was rejected as barred by limitation. Thereafter, assessee filed revision petition before the Central Board of Excise & Customs. Board rejected review petition on the ground that the original order had merged with the appellate order. This view taken by the Central Board was challenged before the High Court in writ petition, a learned Single Judge quashed the order of the Board and directed to hear the review petition on merits. The Board took up the matter in appeal. So, the Division Bench was concerned with the question as to whether the Deputy Collector's order got merged in the order passed by the Appellate Collector. According to their

Lordships, when the appellate authority did not entertain the appeal on the ground of bar of limitation, there was no effective appeal and so, merger will not take place. The Bench observed "It is only when the appellate authority entertains the appeal and deals with it on merits, the order of the original authority should be taken to have merged in the order of the appellate authority". From this observation, it was contended that the principle of merger cannot come into play.

7. A Constitution Bench of the Supreme Court examined a question whether the High Court can examine the correctness or otherwise of the order passed by an authority situated within its territorial jurisdiction when appeal against it was dismissed by appellate authority located outside its territorial limits in *Collector of Customs, Calcutta v. East India Commercial Co. Ltd.* .

The orders therein were passed by authorities constituted under the Customs Act, one within the territorial limits of the High Court and the appellate authority outside. Dealing with this issue, their Lordships observed that an appellate authority may do three things, (i) may reverse the order under appeal, (ii) may modify that order, and (iii) it may merely dismiss the appeal. In all these situations, the effect has been held to be the same. Their Lordships observed that the order of the appellate authority confirming the order appealed against is as efficacious as any other order of reversal or modification. What their Lordships observed is "In all these three cases after the appellate authority has disposed of the appeal, the operative order is the order of the appellate authority whether it has reversed the original order or modified it or confirmed it. In law, the appellate order of confirmation is quite as efficacious as an operative order as an appellate order of reversal or modification". When the appellate authority dismisses the appeal as barred by limitation, it confirms the order of the primary authority. The order so confirmed is now under challenge before this Tribunal. If this Tribunal is not to go into the correctness or otherwise of that order, aggrieved assessee will be denied of remedy against the order of assessment. The dismissal of the appeal as barred by limitation cannot lead to such situation denying him the right of appeal conferred by the Statute.

8. Statement of law made by the Madras High Court that only when the appellate authority entertains the appeal and deals with it on merits, the order of the original authority should be taken to have merged in the order cannot be stated to be good law in view of the decision of the Supreme Court in V.M. Salgaocar & Bros. P. Ltd. etc. v. Commissioner of Income Tax 2000 (38) RLT 619 (SC). According to their Lordships, even when an appeal to the Supreme Court is dismissed by non-speaking order, the doctrine of merger applies. This must apply to the non-speaking orders passed by all appellate authorities as well. Hans Metal v. CCE, Kanpur this Tribunal is not empowered to go into the merits straightaway without considering whether the appeal filed by the party before the first appellate authority was in time or not. This was so done even after observing "It is well settled position that order in original merges with the order in appeal passed by the first appellate authority and the appeal against such an order is maintainable before the second appellate authority". When the adjudicating authority's order got merged in the order passed by the Appellate Commissioner whether on merit or on limitation, the said order is open to challenge before this Tribunal. In this view, we are not in a position to agree with the conclusions reached by the learned Member that this Tribunal cannot go into the merits of the order of the primary authority.

10. On merits, it is admitted that duty liability has been imposed on the assessee by adding tax elements to the assessable value. This is clearly against the decision of the Supreme Court in Dai Ichi Karkarla case . In the light of the said decision, the order passed by the adjudicating authority is unsustainable. So we set aside the order of the adjudicating authority in its entirety, that is, duty liability as also penalty.

11. In view of what has been stated above, the appeal is allowed with consequential relief to the appellants.

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