

Collector of Central Excise Vs. Shree Durga Glass (P) Limited

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-28-1986

Reported in : (1986)(8)LC707Tri(Delhi)

Appellant : Collector of Central Excise

Respondent : Shree Durga Glass (P) Limited

Judgement :

1. Five applications Nos. 28 to 32/1986-A for condonation of delay in relation to five appeals Nos. E. 2718-2722/85-A filed by the Collector of Central Excise, Bhubaneswar, with M/s. Shree Durga Glass (P) Ltd., Orissa as respondents, came up before Special Bench 'A' consisting of Members Shri Harish Chander and Shri V.P.Gulati. In separate orders bearing Nos. Misc. Order No. 99 to 103/1986-A, the two learned Members expressed different opinions on the applications. Member Shri Harish Chander held that the five applications for condonation of delay should be dismissed as being hit by limitation (and consequently the corresponding appeals and stay applications should also be dismissed).

Member Shri Gulati however held that the delay in all the five cases should be condoned.

2. In view of the difference in opinion, these matters have been referred to me as President for decision in terms of Sub-section (1) of Section 35D of the Central Excises and Salt Act, read with the proviso to Sub-section (5) of Section 129C of the Customs Act. Hearing on these matters took place on 25-6-1986, when Shri

B.R. Tripathi, SDR, appeared for the applicant Collector, and Shri A.N. Haksar, with Miss Nisha Srivastava, advocates, appeared for the respondents. After hearing both sides, orders were reserved. Shri Haksar was requested to file copies of certain judgments relied upon by him. This has since been done.

3. The facts of the case have been set out in detail in the orders of the two learned Members. It is therefore not necessary to recapitulate them.

4. On behalf of the applicant Collector, Shri Tripathi referred to the relevant dates. He submitted that the appeals had been despatched by registered post on 28-11-1985. They should have been received by 2-12-1985, but were received only on 4-12-1985. He stated that normally the postal transit should not have taken more than 5 or 6 days (sic).

The applicants had shown due diligence in despatching the appeals before the expiry of the limitation period, but for reasons beyond their control they had been received two days late. He submitted that the delay should be condoned.

5. Shri Tripathi cited the judgment of the Hon'ble Supreme Court in the case of Ramlal and Ors. v. Rewa Coalfields Ltd. (AIR 1962 SC 361). He referred to para 8 of that judgment, in which it has been observed that what the party applying for condonation has to show is why he did not file the appeal on the last day of limitation prescribed. In other words, the party would not have to explain the delay during the whole of the period of limitation. Shri Tripathi submitted that condonation of delay should not be refused merely on the ground that the applicant could have despatched the appeals earlier. It was sufficient to show that the applicant had acted with due diligence. This had been made clear in para 12 of the above judgment wherein it had been observed that the scope of enquiry in such a case would not justify examining why the party was sitting idle during all the time available to it.

However, considerations of bona fides or due diligence were material and relevant.

6. Shri Tripathi submitted that power was vested in the Tribunal to condone delays in such cases. The power vested in an authority should be exercised if there were

good grounds for doing so, which according to him was the position in this case.

7. Shri Tripathi then cited the judgment of the Hon'ble Supreme Court in the case of Ajit Singh Thakur Singh and Anr. v. State of Gujarat (AIR 1981 SC 733). That was a criminal i appeal, in which it was held that an event occurring after the expiry of the period of limitation could not be a sufficient cause for delay. (That decision is not relevant to the present case.) 8. Shri Tripathi thereafter referred to the judgment of the Hon'ble Supreme Court in the case of State of West Bengal v. Administrator, Howrah Municipality and Ors. (AIR 1972 SC 749). In para 29 of that judgment the Hon'ble Supreme Court had quoted its observations in the case of Ramlal v. Rewa Coalfields Ltd. (supra) to the effect that the words "sufficient cause" should receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides was imputable to the appellants. He submitted that in the interests of substantial justice the delay in this case should be condoned. Shri Tripathi also cited a judgment of the Hon'ble Supreme Court in the case of State of Uttar Pradesh v. Bahadur Singh and Ors.

(1983 ECR 1556D). In this case the High Court had dismissed a writ petition under Articles 226 and 227 of the Constitution on the ground of delay. The Hon'ble Supreme Court reversed the decision of the High Court, observing inter alia that in such a case no period of limitation had been prescribed. (That decision is not relevant to the present case.) 9. Finally, Shri Tripathi referred to the decision of the Tribunal in the case of Collector of Customs, Bombay v. Godrej Soap Ltd (1985 (21) ELT 529). In that case the Tribunal had condoned the delay. In arriving at this decision the Tribunal had observed that no special indulgence could be shown to the Government which in similar circumstances was not to be shown to any individual suitor. At the same time, taking a practical view of the working of Government without being unduly indulgent, it was held that on the facts of the case the delay in filing the appeal had been sufficiently explained. The delay was accordingly condoned.

10. On these grounds Shri Tripathi submitted that the view expressed by Member Shri Gulati was the correct view and that the delay in these cases should be condoned.

11. Replying on behalf of the respondents, Shri Haksar referred to the submissions of the learned SDR at the original hearing as set out at page 4 of the order of Member (Shri Harish Chander). In the communication dated 15-1-1986 received from the SDR it had been stated that the appeal along with the stay application was despatched by air mail on 28-11-1985. Shri Haksar pointed out that under the Indian postal regulations there was no specific provision for sending any inland mail by air. It was entirely the discretion of the postal authorities how an article was sent. He termed the reference to "air mail" as a red herring.

12. With reference to the case of Ajit Singh Thakur Singh cited by Shri Tripathi, Shri Haksar pointed out that the implication of that decision was that the cause of delay should be some event occurring before the expiry of the limitation period. Shri Tripathi himself had stated that in the normal course a postal article despatched from Bhubaneswar would take 5 to 6 days to reach the Tribunal's office at New Delhi.

Nevertheless, the appeals had been despatched only on 28-12-1985, that is, just 5 days prior to 2-1-1986. In other words, the appellant had in effect allowed the limitation to expire even at the time of despatch the appeals. It could not therefore be said that the delay in filing was due to some unavoidable happening before the expiry of the limitation period.

13. Shri Haksar submitted that the Bench would be concerned solely with the question whether the delay in filing the appeals had been satisfactorily explained. The merits of the appeal itself were not relevant to this decision. The Bench drew his attention to the observations of the Hon'ble Supreme Court in para 7 of its judgment in the case of Rarnlal v. Rewa Coalfields Ltd. The Hon'ble Supreme Court had quoted with approval the observations of the Madras High Court that "the words" "sufficient cause" [ought to receive] a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fide is imputable to the appellant". He was asked whether this would not imply that the merits of the case should not be excluded from consideration. Shri Haksar reiterated that the merits should not be taken into account for the purpose of deciding the question of limitation.

14. Shri Haksar submitted that the case was squarely covered by the decision of the Hon'ble Orissa High Court in the case of Brajabandhu Nanda v. Commissioner of Income-tax, Bihar & Orissa 1962 (44) ITR 668.

In that case, which arose out of the Indian Income-tax Act, 1922, appeals to the Income-tax Appellate Tribunal (ITAT) were sent by registered post from Cuttack on 2-4-1954 and received in Bombay on 7-4-1954. This was one day after the expiry of the limitation period of 60 days prescribed by Section 33 of the Indian Income-tax Act. An application for condonation of delay was made to the ITAT. The ITAT held that there was no sufficient cause shown to the delay and dismissed the appeals as time-barred. The matter went up in reference to the Orissa High Court. The High Court observed that the assessee did not appear to have explained why he waited for 56 days after he received the order of the Appellate Assistant Commissioner and that he appeared to have no justification for the delay. Accordingly, the Orissa High Court held that in the facts and circumstances of the case there was not sufficient cause for not presenting the appeals within the prescribed period; and that the delay in postal delivery could not be considered as constituting sufficient cause for not presenting the appeals within the prescribed period.

15. Shri Haksar submitted that in the above case even a delay of one day in filing an appeal, which delay was attributed to postal transit, had been held as not sufficient cause for condonation. A fortiori the present case, where the delay was of two days, did not merit condonation. He submitted that if the appellants had despatched their appeal on 28-11-85, knowing that 5 to 6 days was the normal period in postal transit, whereas limitation expired on 2-12-1985, they were guilty of negligence and the power to condone delays should not be exercised in their favour. He further submitted that the Collector's sanction for filing the appeal was communicated only on 25-11-1985. In other words, 83 or 84 days had been taken only to convey the sanction.

This also was an undue delay.

16. For the above reasons Shri Haksar submitted that the delay in these cases should not be condoned.

17. In reply, Shri Tripathi referred to his earlier submission that the normal period for postal transit from Bhubaneswar to New Delhi was 5 to 6 days. He submitted that the period could have been 5 days, and in that case an article despatched on 28-11-1985 should have reached New Delhi on the 5th day, that is on 2-12-1985, which would have been within time.

18. Referring to the judgment of the Orissa High Court relied upon by Shri Haksar, Shri Tripathi pointed out that this judgment had been delivered in 1960. Stress had been laid in the judgment on the fact that the appellant had waited till the 56th day to send his appeal.

Subsequently the Supreme Court, in its decision in the case of Ramlal v. Rewa Coalfields Ltd. and in another case had held that delay within the period of limitation did not have to be explained. Therefore the above decision of the Orissa High Court should not stand in the way of the delay being condoned.

19. At this stage Shri Haksar requested permission to cite another judgment of the Orissa High Court which he submitted would be very relevant. On being permitted to do so, he cited the High Court's judgment in the case of Kella Appalaswamy and Sons v. Commissioner of Income-tax, Orissa reported in 1977 (106) ITR 487. In this case it had been held that unusual postal delay could be a ground for condonation.

However, in the cases before us there was no unusual delay. Since this judgment was delivered on 4-12-1975, it could be taken as an authority to the effect that only unusual postal delay could be a ground for condonation.

20. Shri Tripathi replied that each case had to be considered on its own merits. For the reasons already given, he submitted that in the present cases condonation was merited and should be given.

21. I have carefully considered the views of the two learned Members who heard these matters at the initial stage, as well as the submissions of the learned representatives of both sides.

22. The basic facts are that these appeals were despatched (using that term to cover the handing over of the communication to the post office for transmission by Registered Post) 5 days before the/ expiry of the limitation period. They reached the office of the Tribunal on the 7th day, that is, two days after the expiry of the normal period of limitation.

23. The reasons for delay, as explained by the Department, have been set out in detail in the order of Member Shri Harish Chander. There is no dispute that the appeal was despatched a few days prior to the expiry of the period of limitation. It has been clearly laid down by the Hon'ble Supreme Court in the case of Ramlal v. Rewa Coalfields Ltd. that the party filing the appeal cannot reasonably be called upon to explain its conduct during the whole of the period of limitation prescribed, and that what the party has to show is why he did not file an appeal on the last day of limitation prescribed. In view of this pronouncement condonation of delay cannot be refused merely on the ground that the appeal was despatched only a few days before the expiry of the period of limitation, provided there is no negligence or inaction or want of bona fides on the part of the appellant.

24. The question then arises whether the delay should be condoned on the ground that it was attributable to delay in postal transit.

25. On the question of delay due to postal transit, Shri Haksar placed reliance on two judgments of the Orissa High Court. In the first case, namely that of Brajabandhu Nanda, the decision, which was adverse to the applicants for condonation, was based on the ground that they had waited till the 56th day (the period admissible being 60 days) before despatch their appeal, and that this delay had not been explained. In other words, it proceeded on the basis that the delay within the period of limitation had to be explained. In the light of the subsequent judgment of the Hon'ble Supreme Court, the above criterion would no longer hold good. This judgment would not therefore give any support to the respondents in this case.

26. The second judgment, also of the Orissa High Court, on which Shri Haksar placed reliance, was that in Kella Appalaswamy and Sons. This was under the Income-tax Act, 1961. In this case the memorandum of appeal to the Appellate

Tribunal and a money order for the fee were both sent on the same day, namely 13-1-1971. Whereas the memorandum of appeal was received on 15-1-1971, the money order remittance was received only on 27-1-1971. The last day for filing the appeal expired on 22-1-1971. In these circumstances the assessee applied to the Income-tax Appellate Tribunal to condone the delay. However, the Tribunal held that the postal delay could not be the sufficient cause for condoning the delay in filing of the appeal, and dismissed it as barred by limitation. On a reference made to the orissa High Court, the Hon'ble High Court held that the ITAT had failed to exercise its jurisdiction to condone the delay when there was sufficient cause. The High Court referred to its previous decision in the case of Brajabandhu Nanda, on which the ITAT had placed reliance on coming to its conclusion. The High Court observed that the answer rendered by the earlier full bench, namely that the delay in postal delivery could not be considered as constituting sufficient cause for not presenting the appeals within the prescribed period, was in the facts and circumstances of the earlier case. Referring to the facts of the case before it, the High Court observed that, where an assessee transmitted the appeal 9 days before limitation was to set in, in the facts of the case, it could not be said that there was any negligence or default on the part of the assessee. It held that the postal delay in this case was of an unusual type and could not be taken to be an event of the ordinary run. If ITAT had looked at the matter with an open mind and being conscious of the fact that it had jurisdiction to condone the delay, it would not have come to the conclusion that the appeal deserved to be dismissed as barred by limitation. Ultimately the High Court held that the order of the ITAT rejecting the appeal as barred by time was incorrect in law. It also awarded costs to the assessee.

27. This case was not cited by learned advocate for the respondents in the first instance. It was cited by him in reply to the point made by Shri Tripathi that the judgment of the orissa High Court in the Brajabandhu Nanda case had been superseded by the subsequent judgment of the Hon'ble Supreme Court in the case of Ramlal and Ors.. Shri Haksar pointed out that the Kella Appalaswamy judgment was delivered in December 1975, much after the Supreme Court judgment in the Rmalal case. Nevertheless reliance had been placed on the judgment of the same High Court in the Brajabandhu Nanda's case. He therefore

argued that the considerations applied in that case still hold good.

28. With great respect to the learned advocate for the respondents, it is difficult to see how the judgment in the Kella Appalaswamy case could be said to be in favour of the respondents. The first and most salient fact is that whereas in the Brajabandhu Nanda case the ITAT's refusal to condone the delay was upheld, in the Kella Appalaswamy case such refusal was held to be incorrect in law.

29. Secondly, it would not be correct to hold that the Orissa High Court in this case relied upon or referred with approval to the earlier decision of the same High Court in the Brajabandhu Nanda case. It was the ITAT which had relied upon that earlier judgment in refusing the condonation of the delay. The High Court necessarily had to discuss that judgment. Significantly, in doing so, the High Court observed that the answer rendered by the Full Bench (in the previous case) was in the facts and circumstances of that case. Again, the High Court observed as follows:- "...we are of the view that the Tribunal has failed to exercise jurisdiction vested in it under Sub-section (5) of Section 253 of the Act having been misled by the conclusion indicated by the Full Bench of this court in Brajabandhu Nanda's case (1962) 44 ITR 668 (Orissa) (FB). The conclusion was not a rule for every case but was the conclusion reached on the facts and in the circumstances of that case." There is no reference in this judgment to the judgment of the Hon'ble Supreme Court in the Ramlal case and therefore this judgment cannot be cited as an authority for taking a view different from that of the Hon'ble Supreme Court. In any event, the Tribunal is bound by the judgment of the Hon'ble Supreme Court. But the whole tenor of the Orissa High Court judgment in this case was against the application of limitation. This may also be seen from the following observations at the end of the judgment:- "It must always be remembered as was pointed out by Lord Buck-master in Montreal Street Railway Company v. Normandin (1917) AC 170 (PC) that all rules of this type are nothing but provisions intended to secure proper administration of justice. It is, therefore, essential that they should be made to serve and be subordinate to that purpose. In the case of State of Gujarat v. Ramprakash P. Puri (1970) 2 SCR 875 (SC), the Supreme Court pointed out that procedure is the hand-maid and not a mistress of law, intended to subserve and facilitate the course of justice and not to govern or obstruct it.

Like all rules of procedure this rule demands a construction which would promote this cause." 30. It therefore appears to me that the judgment of the Hon'ble Orissa High Court in the Kella Appalaswamy case gives no support to the stand of the respondents.

31. Neither side placed reliance before me on any judicial decision specifying what might be considered a reasonable time for a registered letter to reach the addressee. There are some other enactments which could have a bearing on the issue. Section 27 of the General Clauses Act, 1897, reads as under :- "27. MEANING OF SERVICE BY POST. - Where any (Central Act) or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post." Although this section refers to "the time at which the letter would be delivered in the ordinary course of post" I have not been able to find any decisions which would give a more specific meaning to this clause with reference to registered letters. The Companies Act, 1956, also contains analogous provisions. Thus, Section 53, relating to "service of documents on members by company", provides as follows:- (i) in the case of a notice of a meeting, at the expiration of forty-eight hours after the letter containing the same is posted, and (ii) in any other case, at the time at which the letter would be delivered in the ordinary course of post." In this, case there is in certain circumstances, a presumption that an ordinary letter would be delivered within 48 hours after its posting.

There is however no such quantification in regard to a registered letter.

32. In these circumstances the question whether the appeals in these cases were posted sufficiently in time, so that the appellant could reasonably have expected that they would reach the Tribunal within the period of limitation, has to be decided on the basis of commonsense and everyday experience. Fortunately this is a

matter where even the ordinary layman can claim some experience.

33. In the present case, the appeals were handed over to the postal department at Bhubaneswar ("despatched") on 28-11-1985, If they had been delivered to the Tribunal Office in New Delhi on 2-12-1985, i.e.

the 5th day starting from 28-11-1985, they would have been taken as being within time. They were actually delivered on the 7th day. Shri Tripathi stated at the outset that the normal period of postal transit was 5 or 6 days. He later amended this to say that the appeals could have been delivered in 5 days. There is no particular basis for either of these figures of 5 or 6 days. The condonation application does not refer to any normal transit period. The question regarding the time normally taken by articles in postal transit is one where even a layman can claim to speak with some experience. It appears to me that when it comes to sending an article from a State capital to the Union capital, an official might be justified in assuming that 5 days was a sufficient time. No doubt if he were to exercise abundant or superabundant caution, he might proceed on the basis that postal transit could take 7 days, or 10 days, or even more. But there is a point beyond which abundant caution may amount to cynicism. It is not physically impossible, if the post office functions with reasonable efficiency, for a registered article handed in at Bhubaneswar to be delivered at New Delhi within 3 or 4 days. I do not think a citizen should be required to assume that a Government Department like the Post Office will not function with reasonable efficiency, and should be required as a matter of course to make allowance for inordinate delays on its part.

34. Shri Haksar quite naturally, stressed that if Shri Tripathi himself conceded that postal transit would ordinarily take up to 6 days, the department must be held guilty of negligence. I do not however think it would be fair to decide the case solely on the basis of the initial submission of Shri Tripathi, which he apparently made without realising its implications. (Strictly, what Shri Tripathi had mentioned was "5 or 6 days").

35. Shri Haksar also referred to the "red herring" in the explanation given for delay by the Assistant Collector. This was the Assistant Collector's statement that the appeals were "sent specifically by Air Mail with the specific apprehension that the

receipt of the Appeal in Tribunal might get delayed in transit if despatched by ordinary Registered Post". Shri Haksar argued that there was no provision for an ordinary letter being specifically sent by air mail. Whether or not there was such a provision, and whether or not it was availed of, does not materially affect the case. Nor does the point appear to have been raised before the Bench which first heard the matter. I do not therefore consider it necessary to go further into this aspect of the Assistant Collector's explanation. However, the learned SDR would be well advised, when an opportunity offers itself, to clarify the above-mentioned statement of the Assistant Collector.

36. It is not easy to decide, In a borderline case like the present, whether the period between the date of posting of the appeals and the date of expiry of limitation was such as could be said to be reasonably sufficient for the appeal to be delivered in time. Any mathematical certainty in such a situation is obviously not possible. At the same time, if the admission or otherwise of an appeal were to depend only on what must necessarily be a fairly subjective estimate, the resulting position cannot be considered as satisfactory. Fortunately one is not left wholly without guidance in such a situation. As mentioned in para 13 above, in the case of *Ramlal v. Rewa Coalfields Ltd.* where the subject has been dealt with extensively, the Hon'ble Supreme Court has endorsed the principle that the words "sufficient cause" ought to receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fide is imputable to the appellant. Therefore the authority which is called upon to condone delay has also to consider whether its decision is such as to advance substantial justice, provided of course there is no negligence etc. If "substantial justice" is a material consideration when construing "sufficient cause", the nature of the case and consequences of refusing to condone delay would necessarily have to be taken into account by the deciding authority. Factors such as the monetary stakes involved and the importance of the issue raised would be relevant for this purpose.

37. It therefore one takes into account the observations of the Hon'ble Supreme Court regarding "substantial justice", made in this very context, there is an escape from the unsatisfactory situation that the application of limitation, where postal transit is involved, would have to depend on purely subjective estimates. In my

view this furnishes an important guidance in the present cases.

38. The question would arise whether this is a case where no negligence nor inaction nor want of bona fide is imputable to the appellant. The appellant is an official of the Central Excise Department, and no question of want of bona fides arises. Although no undue indulgence is to be shown to Government departments, it has been observed (vide the judgment of the Hon'ble Kerala High Court reported in AIR 1971 Kerala 211 quoted by Member Shri Harish Chander in para 8 of his order) that we have to take a practical view of the working of Government. In these cases necessary action had to be taken by the Department to decide that an appeal should be filed, to draft the appeals and to despatch them.

This was done in 5 days less than 3 months. It cannot therefore be said that there was either negligence or inaction on the part of the appellant. This is therefore a case where the consideration of "advancing substantial justice" becomes very relevant.

39. The appeals in these cases relate to a question having relation to the value for the purpose of assessment of the goods manufactured by the respondents. It is a continuing question and it involves tax liability from the point of view of the respondents and tax revenue from the point of view of the applicant. Further, a question of law relating to principles of valuation is involved. In the circumstances I consider that substantial justice requires that the appeals be heard and the issues duly decided. Disposal of the appeals without consideration of their merits purely on the basis of a delay of 2 days would not be in consonance with the principle of advancing substantial justice.

40. In short, I hold that in despatching the appeals by registered post 5 days prior to expiry of limitation period the applicant has not been guilty of negligence or inaction or want of bona fides. Substantial, justice requires that the delay of 2 days be condoned. I hold that there is sufficient cause to condone the 2 day's delay in filing of the 5 appeals under consideration. The point of difference referred to me is decided accordingly.

41. These 5 applications are returned to the Bench which first heard them for passing appropriate orders in conformity with my decision. The Bench is not however required to hear the appeals on merits.

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