Commissioner of Central Excise Vs. Kalyani Sharp (India) Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Nov-02-2002

Reported in : (2003)(159)ELT338Tri(Mum.)bai

Judge : K Kumar, S T C.

Appellant : Commissioner of Central Excise

Respondent : Kalyani Sharp (India) Ltd.

Judgement :

1. The application for condonation of delay has been filed by the Commissioner of Central Excise, Pune-I stating that the departmental appeal was sent to the Assistant Registrar, CEGAT, Mumbai on 19-4-2000 by registered speed post. However, the address mentioned was, Assistant Registrar, Laxmi Building, Sir P.M. Road, Fort, Mumbai. The COD application has been filed in May, 2002 and has been received in the CEGAT office on 22-5-2002. Shri M.K. Gupta, learned Joint CDR who appeared on behalf of the department stated that the impugned Order-in-Original is dated 31-12-98 which was reviewed by the Board in its order dated 10-12-99 but the same was received by the Commissioner on 13-2-2000. He contended that the departmental appeal was to be filed by 13-5-2000 and was duly handed over to the post office on 19-4-2000.

The department came to know on 16-5-2002 after about 2 years that the appeal has not been received in the CEGAT. Hence, a fresh appeal with application for COD has been filed on 22-5-2002. He was not in a position to throw any light as to where the post office had delivered the appeal papers filed in February, 2000. There is also no evidence as to the receipt of the appeal papers in the Joint CDR's office located in Laxmi Building or its subsequent handing over to the CEGAT office.

He submitted that in view of the provisions of Section 35E(4) read with the provisions of Section 35B of the Central Excise Act, 1944, the delay should be condoned. He further submitted that the Larger Bench decision of CEGAT in the case of CCE, Mumbai v. Azo Dye Chem. - 2000 (120) E.L.T. 201 (Tribunal-LB) needs review by a five Members Bench.

2. Shri V.S. Nankani, learned Advocate for the respondents submitted that Section 35E gives no power to CEGAT to condone the delay in filing the application in pursuance of a review order passed by the Board. He also submitted that no evidence of postal enquiry regarding the delivery of the appeal has been brought on record. He pointed out that in terms of Rule 7 of CEGAT (Procedure) Rules an application can be said to be filed only when it is received and endorsed by the Assistant Registrar. He also pointed out that only when an application under Section 35E(1) is filed with CEGAT then only the same can be termed as an appeal under Section 35E(4). In the instant case, since no application was filed before the CEGAT within stipulated period of three months, the provisions under Section 35B(5) for condoning the delay in filing the appeal cannot be applied in this case. He also cited the following case laws while opposing the application for condonation of delay :-(I) CCE, Mumbai v. Sandeep Properties Pvt. limited - 1999 (112) E.L.T. 822 3. Having heard both the sides and after perusing the records of the case, we find that in this case the Order-in-Original dated 31-12-98 was reviewed by the Board by its order dated 10-12-99. In terms of the same, the Commissioner was required to file an application with the Tribunal within three months. It is strange that in such an important case, the appeal papers were sent to the Assistant Registrar by a junior officer namely, Superintendent of the Commissionerate. He did not take care to ensure that the address on the forwarding letter dated 17-4-2000 bore the correct address of CEGAT. When the direction was issued by the Board to the Commissioner to file an application to CEGAT, he should have ensured that the application is sent to the correct address

and should not have delegated the work to a junior officer like Superintendent. It is also seen that in two years no enquiry was made regarding the matter either with the CEGAT office or the post office. If no acknowledgement was received after sending the application to CEGAT, the Commissioner's office should have made enquiry to ascertain whether the application was indeed received by the CEGAT or not. There is no explanation forthcoming in the application for condonation of delay for such glaring mistakes.

4. The arguments advanced by the learned Counsel for the respondents has merit that as per settled case law, the CEGAT has no power to condone the delay in filing the application by the department under Section 35E(4) of Central Excise Act, 1944 as held by the Larger Bench in the case of CCE, Mumbai v. Azo Dye Chem. - 2000 (120) E.L.T. 201 (Tribunal-LB). Following the said decision, we dismiss the application for condonation of delay and consequently the main application filed beyond time-limit allowed, i.e. 3 months.

5. Before parting with the order, we would like to mention that the Board may devise suitable procedure for ensuring that its directions to file an application as a result of review of orders passed by Commissioners are implemented within a prescribed time-limit of three months.