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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

**Decided On :** Apr-22-2003

**Reported in :** (2003)(88)ECC695

**Judge :** S Peeran, R K Jeet

**Appellant :** Krm International Ltd.

**Respondent :** Cc

**Judgement :**

1. The stay application and appeal were taken up together for consideration on the short issue that the Commissioner (Appeals) had not condoned the delay of 30 days in filing the appeal. As the issue lies in a short compass, the stay application is allowed granting waiver of pre-deposit and appeal is taken for disposal as per law.

2. Appellants contend that they had not received the communication of Order-in-Original in time. It was received by them on 16.7.2001 and they had 60 days to file the appeal. It is contended that during the relevant period the Commissioner had powers to condone the delay for another 30 days on sufficient cause being shown. It is also contended that the Order-in-Original was not served on them but was served on the agent who had not been empowered to receive the same on their behalf.

They pleaded that the time taken for intimation by the agent to them should be excluded. They had also given several reasons in their application for condonation which, according to them, has not been considered by the Commissioner and hence the order is not a speaking order.

3. Ld. Counsel Shri S. Murugappan has filed an affidavit on behalf of the Director to the effect that the Order-in-Original was served on one Smt. Kanchana employed in their company who had left the organisation w.e.f. 22.7.2001. Nobody was looking after that work for a few weeks.

Nobody could peruse the necessary papers and take necessary action within the prescribed time limit and, therefore, appeal filed was within the condonable period and the Commissioner ought to have condoned the delay. Ld. Counsel also relied on the Apex Court judgment rendered in the case of CC Cochin v. Trivandrum Rubber Works Ltd., 2999 (64) ECC 179 (SC) : 1999 (106) ELT 9 (SC) wherein the Apex Court has laid down that the service of notice on the clearing agent cannot be construed as a valid service on the importer.

4. Ld. DR defended the order and submitted that the copy of the order was also served on the appellant as per the report filed. However, DR could not file the acknowledgement for having served on Shri S. Siddoji Rao, Manager-Imports & Exports of M/s. KRM International Ltd. on 19.10.2001.

5. We have carefully considered the submissions made by both sides.

Appellant's appeal came to be dismissed on the ground that it has been filed beyond 30 days, the time limit set for the Commissioner to condone the delay in the matter. It is contended that the notice served on (sic) the Commissioner was not proper and there was no service on the appellant and to this effect, affidavit has been filed. Further, it has been stated that one Smt. Kanchana employed by the appellant had left the organisation and nobody had taken care of the work pertaining to this matter. It is stated that all these grounds had been urged and the Ld. Commissioner ought to have taken them to condone the delay.

Thus, the order is not a speaking order. On our careful consideration, we notice that the Commissioner ought to have given further opportunity to explain the delay that appeal has been filed within 30 days after the expiry of initial period of 60 days. As there is no clear cut finding and that both sides are now before the Tribunal and are contesting the issue with regard to service/non-service of notice, therefore, it is but proper that the matter is remanded to Commissioner (Appeals) to reconsider the issue pertaining to appeal being in time and that Commissioner has no powers to condone the delay. The stay application is also allowed by granting waiver and appeal being remanded to the Commissioner (Appeals) for de novo consideration.

Appeal is allowed by way of remand.

6. I have gone through the order recorded by learned brother Shri S.L.

Peeran, and I am not able to persuade myself to agree with the view taken by him for the reasons mentioned in the succeeding paragraphs.

7. The learned Commissioner (Appeals) has given a very categorical finding and has held in his order that the appellant himself has shown the date of communication of the decision as on 12.7.2001 in the appeal form CA-1, submitted to the Commissioner (Appeals). The endorsement in the order-in-original shows that the CHA received the original and his copy on 12.7.2001. The learned Commissioner (Appeals) has also noted that it was reported by the group that the order meant for the importer was handed over to the CHA, based on the authorisation given to the CHA by the importer to undertake all the customs clearance formalities on behalf of the importers. While the importer-appellant has not disputed the fact of the CHA receiving their copy too on 12.7.2001, during personal hearing before the Commissioner (Appeals), the importer-appellant stated that they received the order in original through their CHA on 16.7.2001 at Bangalore vide the CHA's letter dated 14.7.2001 and as such the appeal filed on 15.10.2001 was well within the condonable period. The learned Commissioner (Appeals) has also noted that there was no dispute regarding the communication of the order to the CHA duly authorised by the appellant, on 12.7.2001 and the time limit being "sixty days" expired on 10.9.2001. This period of 60 days for filing

the appeal can be further extended by 30 days i.e. up to 10.10.2001 by the Commissioner, provided he was satisfied that the appellant was prevented from filing the appeal by sufficient cause within the period of 60 days". In the instant case the appeal was filed before the Commissioner (Appeals) on 15.10.2001 i.e. beyond the condonable period of 30 days. The power to condone the delay by another 30 days beyond the initial period of 60 days also thus expired on 10.10.2001. Therefore, Commissioner (Appeals) cannot condone the delay beyond the statutorily fixed period which expired on 10.10.2001 and as against that the appeal was filed only on 15.10.2001. The Commissioner (Appeals) also further noted that even if the contention of the assessee that he received the order only on 16.7.2001 from the CHA and this date were to be reckoned for the sake of argument, the initial period for filing the appeal expired on 14.9.2001 and the extendable period on 14.10.2001. The Commissioner (Appeals) has also noted that if the CHA who was authorised by the appellant to receive the order had taken some days to convey the order to the appellant, the appellant has to blame only his CHA and the date of receiving the order from the CHA is not relevant for the purpose of Section 128 of the Customs Act, 1962.

8. The point for consideration and decision is whether the Commissioner (Appeals) has power to condone the delay beyond the statutory period of 60 days extendable by another 30 days. Section 128 of the Customs Act was amended with effect from 11.5.2001 by Section 109 of the Finance Act, 2001 (4 of 2001) and after the amendment the words used therein is "within 60 days", and in terms of the proviso to the said Section the appeal can be filed within a further period of "30 days". Prior to amendment, the words used were "within three months" and within a further period of "three months". I observe that the issue is no longer res integra as it has been decided by the Tribunal in the case of TN Tobacco Co. v. CCE/CC, Coimbatore, 1998 (28) RLT 73 which has referred to 16 judgments including the judgments of the Hon'ble Apex Court and the High Courts on this point. Similarly the Larger Bench of the Tribunal in the case of CCE, Meerut v. Lalchand Anand and Anr., 1986 (23) ELT 530 comprising of Five Members has laid down the law that there is no power for the Statutory authorities to condone the delay beyond the statutorily fixed period.

9. In view of the above judgments, I have no hesitation to hold that the appeal is required to be dismissed as no useful purpose would be served by remanding the matter to the Commissioner (Appeals) to decide the matter de novo when the Commissioner (Appeals) does not have power to condone the delay beyond the statutory period as noted above.

10. I therefore uphold the impugned order and dismiss the appeal and consequently the stay petition also stands dismissed.

In view of the difference of opinion, the following questions arise for determination by the third Member.

Whether the impugned order is required to be rejected by allowing the stay application and the matter remanded back to the Commissioner (Appeals) for de novo consideration as held by Member (J) Whether the stay application and the appeal is required to be dismissed by upholding the order of the Commissioner (Appeals) as held by Member (T) While Ld. Member (Judicial) proposed to remand the case to the lower appellate authority, after allowing the stay application, Ld. Member (Technical) was of the view that both the stay application and the appeal should be dismissed. Hence the matter before me as Third Member.

2. Examined the records. The relevant facts are that the original authority passed an order against the appellants on 10.7.2001; that the appellants' CHA received the order on 12.7.2001; that the CHA delivered the order to the appellants on 16.7.2001, that an appeal was filed with the Commissioner (Appeals) against the said order on 15.10.2001; that an application for condonation of delay was also filed with him; and that the lower appellate authority rejected the appeal as time-barred.

4. It is not in dispute that, at the relevant time, the period of limitation for filing any appeal with the Commissioner (Appeals) under Section 128 of the Customs Act, 1962 was sixty days and that the said appellate authority was authorised to condone any delay in the filing of such appeal upto a maximum of 30 days. In the present case, the lower appellate authority took 12.7.2001 (the date on which the appellants' CHA received the order-in- original) as the date of receipt of the order

by the appellants, and accordingly found that the appeal against that order had been filed beyond even the condonable period of 30 days. This finding certainly cannot be faulted if it be assumed that the appellants had received the order-in-original on 12.7.2001. The plea raised by the appellants in the present appeal is that they had received the order-in-original only on 16.7.2001 and, therefore, the period of limitation under Section 128 of the Customs Act should be reckoned from that day, in which case the last day of the -period of 30 days condonable by the Commissioner (Appeals) will be 14.10.2001.

Undisputedly, that day was Sunday, a holiday for the office of the Commissioner (Appeals). Such terminal holidays will be occluded for the purpose of computing the period of limitation and accordingly the appeal filed on 15.10.2001 should be held to be within the condonable period of 30 days. Then it is upto the Commissioner (Appeals) to decide whether sufficient reasons to his satisfaction have been stated by the appellants to show that the delay is condonable. But the moot question which is to be resolved, at the outset, in this case is whether the date of receipt of the order-in-original by the CHA can be reckoned as the date of receipt of the order by the appellants. The lower appellate authority has, as already noted, recorded a finding on this question against the party.

5. In this appeal, the appellants have relied on the Tribunal's decision rendered in the case of CCE v. Trivandrum Rubber Works Limited, 1992 (39) ECC 152 (T) : 1992 (62) ELT 360 (T) and have contended that, as the CHA had nothing to do with the imported goods or any proceedings connected therewith after clearance of the goods, they had no authority to receive the order of adjudication. Ld. Counsel for the appellants submits today that the cited decision of the Tribunal has been upheld by the Hon'ble Supreme Court in CCE, Cochin v.Trivandum Rubber Works Ltd., 1999 (64) ECC 3 79 (SC) : 1999 (106) ELT 9 (SC).

6. It was open to the appellants to authorise the CHA for the specific purpose of receiving the order of adjudication on their behalf. It is submitted by Ld. Counsel that such authorisation had not been given in this case. The Commissioner (Appeals) has recorded a finding to the contrary on the basis of some "group report", copy of which was never given to the appellants. Ld. Counsel further

submits that, though a specific reason had been stated by the appellants in their delay condonation application, the same was not examined by the Commissioner (Appeals), who in the impugned order, observed that no reasons had been stated by the party for condonation of delay. This observation indicates non-application of mind. For all these reasons, according to Ld. Counsel, the order of remand made by Ld. Member (Judicial) is quite justifiable.

7. Ld. DR, on the other hand, points out that there is no specific challenge in this appeal against the finding of Ld. Commissioner (Appeals) that the appellants had specifically authorised their CHA to receive the order of adjudication on their behalf. In the absence of such challenge, the CHA should be considered to have received the order under due authorisation and accordingly the date of receipt of the order for the purpose of computing the period of limitation under Section 128 of the Customs Act, would be 12.7.2001. Ld. DR therefore would support the order recorded by Ld. Member (Technical).

8. On a careful consideration of the rival submissions, I find that Ld.

Commissioner (Appeals) has relied on a "group report" to arrive at the finding that the appellants had authorised the CHA to receive the order of adjudication on their behalf. It is not in dispute that any such report was not made available to the appellants. Though this infirmity in the proceedings of the lower appellate authority has not been brought to the fore in this appeal, the same, nonetheless, requires to be remedied so as to avoid miscarriage of justice. This is because whether the CHA had received the order-in-original, as authorised agent of the appellants, on 12.7.2001 is the basic question which will decide the appellants' case one way or the other. In such a situation, a remand of the matter is the only option.

9. There is yet another aspect of the impugned proceedings which also calls for remand. The appellants had specifically raised a ground in their condonation application that they had been misguided by the preamble to the impugned order, wherein the Additional Commissioner had advised them to prefer appeal, if aggrieved against his order, to the Commissioner (Appeals) within three months from the date of receipt of the order. Though this ground can hardly hold ground in view of the amended provisions of Section 128 of the Customs Act, it can certainly

be a valid ground for the Commissioner (Appeals) to decide on the question whether the party had valid reasons for filing the appeal belatedly. If one goes by the original authority's advice given in the preamble to its order, one may prefer appeal against the order to the Commissioner (Appeals) within three months from the date of receipt of the order. In the case of the present appellants, the appeal filed with the Commissioner (Appeals) would have been found to be well within the condonable period of 30 days. Ld. Counsel today has relied on a decision of this Tribunal in support of his argument that the wrong advice given in the preamble to the order is a valid ground in an application for condonation of delay of the appeal filed thereagainst.

The cited decision is Pious Pharmaceuticals Pvt Ltd. v. CCE, Mumbai, 2001 (137) ELT 649 (T-Mumbai). Ld. Commissioner (Appeals) has not applied his mind to the above ground raised by the appellants in their application for condonation of delay. He has simply observed that no reason was stated for condonation of delay. Non-application of mind is thus apparent from the record.

10. In view of my findings already recorded, the order recorded by Ld.

Member (Judicial) has to be concurred with. It is ordered accordingly.

In terms of the majority order stay application is allowed granting waiver and the appeal is remanded to Commissioner (Appeals) for de novo consideration.

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