

Jaln Spinners Ltd. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-19-1995

Reported in : (1995)LC565Tri(Delhi)

Appellant : Jaln Spinners Ltd.

Respondent : Collector of Central Excise

Judgement :

1. Being aggrieved with the rejection of the appeal by the Collector of Central Excise and Customs (Appeals), Pune, as time-barred, the appellants have filed the present appeal.

2. Brief facts of the case are that, the appellants filed their refund claim before the Assistant Collector of Central Excise & Customs, Aurangabad, which was rejected by him vide his Order-in-Original No.16/92, dated 13th April, 1992. Against that Order of the Assistant Collector, the appellants filed their appeal on 18-2-1993 along with an application for Condonation of Delay. The Collector (Appeals) rejected the application for Condonation of Delay holding as follows: "I have carefully considered the submissions made by the appellants.

I find that in this case there has been a delay over six months in filing appeal from the date of the order appealed against. In this regard provisions of Section 35 are very clear as they require that an appeal should be filed within three months from the date of communication to the appellants of the decision or order appealed against. The proviso to Section 35 further empowers Collector (Appeals) to accept

appeal within a further period of three months if he is satisfied that the appellant was prevented by sufficient cause for presenting the appeal within the prescribed limit of three months. In the present case, the order was known to the appellants on 13-4-1992 and as per their contention was communicated to them on 27-4-1992. Therefore, the appeal should have been normally filed by 27-7-1992 and a further period of three months could have been allowed on genuine reasons, but in no case, can be filed after 27-10-1992. Thus, in view of the specific provisions I am not empowered to condone the delay beyond 27-10-1992. Besides, I find that the appellant has not been able to show sufficient cause for not filing appeal within time. I find that the appellants were quite aware that against order of the Assistant Collector, appeal is to be filed with Collector (Appeals) and it is for this reason that they had in fact, filed an appeal against the earlier order of the Assistant Collector dated 29-8-1985 and also have simultaneously filed a writ petition in the Bombay High Court. In the present case, the appellants have neither filed writ petition against the order of the Assistant Collector nor had filed any appeal. Further, even when the appellants came to know of the Hon'ble Supreme Court decision on 10-9-1992, a period of 2 months and 6 days had already lapsed before their Director Shri Jain met with an accident. Therefore, in spite of initial delay of five months, they still could not file an appeal in another two months and six days. They are thus themselves to be blamed for that and cannot plead for leniency. The Hon'ble Tribunal decision in the case of Bremels Rubber Industries referred to by them, is not relevant as in that case, the Department has given specific assurance to the High Court that it would not oppose the delay on the ground of limitation if the appellants filed appeal within period of two months from the date of order of the High Court. In the present case, no such assurance was given. Further, the period for which Hon Die Tribunal can condone the delay is not restricted whereas the Collector (Appeals) can condone the delay only upto three months. Yet again, even in this case, the appellants were made to file an appeal within two months from the date of the Hon'ble High Court order, whereas in the present case, the appellants have chosen not to file an appeal within two months and six days after coming to know of, the Hon'ble Supreme Court's order and before Shri Jain met with an accident and took another three months and one day to file an appeal from the date of accident.

In view of above, I dismiss application for condonation of delay as under Section 351 am not empowered to condone the delay beyond three months and besides I find that application for condonation of delay is not maintainable on merits either."

3. Arguin'g on behalf of the appellants, Shri R. Santhanam, learned counsel, submitted that the appellants have a good case on merits.

Elaborating, he submitted that the Assistant Collector, Central Excise, Aurangabad, vide his Order-in-Original dated 29-8-1985 confirmed certain demands which were raised by six show cause notices of even dates for Rs. 1,10,81,405.94 and imposed a penalty of Rs. 500/- on the assessee. Aggrieved by the said order, the assessee filed an appeal before the Collector (Appeals), Bombay, along with the stay application. During the pendency of the stay application before the Collector (Appeals), the appellants also approached the Bombay High Court, Aurangabad Bench, and the Court granted ad interim relief on the condition that the appellants would deposit Rs. 56,00,000 against the said demand. Accordingly, the appellants deposited Rs. 56,00,000/- during the period from January 1986 to August 1986. Thereupon the High Court stayed the enforcement of the demand confirmed by the Assistant Collector. The Department moved the High Court with a request for withdrawal of the said amount deposited by the appellants. The High Court on 19-2-1986 allowed the Department to withdraw the said amount of Rs. 56,00,000/- deposited by the appellants subject to the condition that the Department should pay interest at bank rate and refund the amount along with interest provided that the appellants succeed in their Writ Petition. Accordingly, the Department withdrew the said amount of Rs. 56,00,000/- . The Collector of Central Excise (Appeals), Bombay vide his Order-in-Appeal dated 19-4-1991 set aside the said Order-in Original dated 29-8-1985 passed by the Assistant Collector and granted consequential relief to the assessee. Since this order was passed by the Collector (Appeals) during the pendency of the appeal, the appellants moved the application for the withdrawal of their said Writ Petition before the Bombay High Court and also prayed for the direction to the Department to refund the said amount of Rs. 56,00,000/- along with interest. The High Court heard the matter on 19-9-1991 and allowed the appellants to withdraw the Writ Petition.

However, the High Court while passing the said order on 19-9-1991 observed that in their view it is not open to them to consider the question of unjust enrichment in this Writ Petition because of the interim order dated 19-2-1986 by which the Department was allowed to withdraw the above amount on the condition that it would pay interest at the bank rate and refund to the petitioner the amount along with interest if ultimately the appellant succeeds in their Writ Petition.

But the Assistant Collector rejected the refund claim filed by the appellants holding that it is not proved by the appellants that the incidence of the excise duty has not been passed on by the appellants to any other person as required under the amended provisions of Section 11B of the Central Excises and Salt Act, 1944. On the point of sufficient cause for Condonation of Delay by the Collector (Appeals), he submitted that the time consumed in pursuing the Writ Petition and contempt proceedings in the Bombay High Court should either be excluded while computing the period of limitation of three months prescribed under Section 35B of the Central Excises & Salt Act, 1944 or it be treated as a sufficient cause. Elaborating on his submissions he submitted that since the Department did not comply with the order dated 19-9-1991 passed by the Bombay High Court, the appellants moved two contempt petitions on different dates and on 20-4-1992 contempt petition No. 57/92 was heard and it was ordered that the Department should deposit Rs. 56,00,000/- on or before certain date. Against that Order of the Bombay High Court, the Revenue preferred a Special Writ Petition before the Apex Court and the Court on 10-9-1992 rejected the appellants' contention that the amount of Rs. 56,00,000/- deposited by the appellants in the High Court was a deposit for a conditional stay.

The Court further rejected the appellants' contention that the deposit was not a duty within the meaning of Section 11B of the Act.

However, the Court left open the question of legality of the impugned order of the Assistant Collector dated 13-4-1992 and the appellant was to pursue the remedy in that behalf as per the provisions of law.

Thereafter, the appellants filed their appeal against the said order of the Assistant Collector dated 13-4-1992 before the Collector (Appeals) on 18-2-1993. To

support his contention that the time so consumed in pursuing the writ proceedings and contempt proceedings be treated as sufficient cause he cited the case of Madura Coats Ltd. v. Collector of Central Excise, Madurai, 1994 (71) E.L.T. 347 (SC), wherein the Apex Court while disposing of the appeal (Civil) filed before it observed that, in case the appeal is filed by the assessee therein within two weeks from the date of the order before the Tribunal, the appeal shall not be dismissed as time barred and the pendency of the proceedings in the High Court as well as in that Court (Supreme Court) be treated as sufficient cause for condoning the delay. He also cited the case of Indian Steel Rolling Mills Ltd. v. Union of India, 1994 (71) E.L.T. 350 (para 7), wherein the Madras High Court while disposing of the Writ Petition filed before it observed that, since the period of limitation is 90 days from the date of service and there is a provision empowering the Tribunal to condone the delay upto 90 days and as the writ petition has been filed on 20-1-1994, the Court is of the view that there would be no injustice caused to the respondents, if the appellant therein is permitted to file an appeal within a specified period and the Appellate Tribunal to proceed to decide it on merits in accordance with law. He further submitted that Section 14(2) of the Limitation Act, 1963 provides that in computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. To support his contention, he cited the case of Mirah Dekor (P) Ltd. v. Collector of Customs, 1988 (36) E.L.T. 313, wherein it was held that though the said Section 14 of the Limitation Act may not in terms be applicable before the Tribunal, yet the principle of the same would be applicable in judging sufficiency of cause for condonation of delay. To support his contention, he further drew our attention to his (learned counsel, Shri R. Santhanam for the appellant therein) own article which appeared in (1994) 119 J CIR Article 11 and also to the case of State of Maharashtra v. Kamla Mills Ltd. (1994) 94 STC 220 (SC). He further submitted that the time taken for obtaining the certified copy of the order appealed against, that is to say, Order-in-Original No. 16/92, dated 13-4-1992 passed by the Assistant Collector of Central Excise &

Customs is liable to be excluded in computing the period of limitation in every case regardless of the nature of the order and the proceedings in appeal or revision/reference as the case may be in which the correctness of the order is being challenged. In this premises, he contended that the Collector (Appeals) erred in not excluding the time taken for obtaining the certified copy of the said order of the Assistant Collector. He emphasised that even where the certified copy is not required to be enclosed with the Appeal Memorandum, the time taken for obtaining the certified copy of the impugned Order is to be excluded while computing the period of limitation prescribed under the law. To support his contention, he cited the following cases : S.T.Commr., U.P. v. M.D. & Sons, AIRState of U.P. v. Maharaja Narain, AIRJagat Dhis v. Jawahar Lal, AIR 1961 SC 832; and also to the cases reported in 1977 (110) ITR 25; (101) ITR 334; and AIR 1987 SC 1353 - Collector, Land Acquisition, Anantnag v. Katiji.

4. In reply Shri K.K. Dutta, Ld. JDR submitted that under the Proviso to Section 35(1) of the Central Excises and Salt Act, 1944 the Collector (Appeals) has no powers to condone the delay beyond 3 months and since the appeal before him [Collector (Appeals)] was filed beyond 3 months he rightly rejected the appeal as time-barred. As regards the contention of the Ld. counsel that the time requisite for obtaining the copy of the impugned Order-in-Original No. 16/92 dated 13-4-1992 passed by the Collector of Central Excise and Customs and which was appealed against before the Collector (Appeals) should be excluded he contended that it can be excluded only when the assessee was not, furnished with the copy of the order when the notice of the order was served upon him.

In the instant case it was not disputed by the appellants that while serving the notice of the order the copy of the order of the Assistant Collector was served upon him. And in the Memorandum of Appeal, which is on record, the appellants have admitted that it was communicated to them. He also submitted that during the query from the Bench, Shri R.Santhanam, Ld. counsel, has admitted that the appeal before the Collector was filed with the photo copy of the Order-in-Original which was served upon the respondents that is to say the alleged certified copy was never filed along with the Memorandum of Appeal before the Collector (Appeals) as the impugned order. As regards the time consumed in pursuing the

writ proceedings he submitted that in the absence of any stay order or direction to the contrary from] the Hon'ble High Court concerned or the Apex Court the time spent in pursuing the writ petition before these Courts cannot be excluded. He submitted that in view of these facts the case law cited by the appellants is not relevant.

6. Section 35 of the Central Excises and Salt Act, 1944 makes the provision for filing of the appeal before the Collector (Appeals). For ready reference the said Section is reproduced as under :- "Section 35. Appeals to Collector (Appeals). - (1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Collector of Central Excise, may appeal to the Collector of Central Excise (Appeals) (hereafter in this Chapter referred to as the Collector (Appeals) within three months from the date of the communication to him of such decision or order : Provided that the Collector (Appeals) 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.

(2) Every appeal under this section shall be in the prescribed form and shall be verified in the prescribed manner." 7. From a perusal of the said Section it is clear that the Collector (Appeals) can condone the delay of three months if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the time prescribed that is to say the period of three months. In the instant case it is not in dispute that the Order-in-Original of the Assistant Collector No. 16/92, dated 13-4-1992 passed by the Assistant Collector of Central Excise and Customs was communicated to them on 27-4-1992 and the appeal should have been normally filed by 27-7-1992 and a further period of three months in filing the appeal can be condoned if the Collector (Appeals) was satisfied that there was sufficient cause. In the case in hand the appeal was filed beyond the total period of six months. Therefore, in view of the said specific provisions the appeal was rightly rejected by the Collector (Appeals) as time-barred. This Tribunal has consistently taken the same view (see Max Machinery Manufacturing (P) Ltd. v. Collector of Central Excise, Ramesh S. Jain v. Collector of Customs (P), Meghalaya State Electricity Board v. Collector of Customs, 1989 (42) E.L.T.

132. In the case of A. Raman and Co. v. Union of India 1981 (8) E.L.T. 592, a Division Bench of the Hon'ble Gujarat High Court while dealing with the scope of Section 35 of the Act has held that the Appellate Authority has no powers or authority of law to condone the delay, if the appeal is filed beyond period of limitation prescribed under Section 35 of the Central Excises and Salt Act, 1944. Hence in view of this legal settled position the appeal was rightly dismissed as time-barred by the Collector (Appeals). However, the Ld. counsel raised the issue that the appellants applied for the certified copy of the Order-in-Original No.16/92, dated 13-2-1992 and, therefore, the time requisite for obtaining the copy of such order should have been excluded while computing the period of three months and a further period of 3 months as provided under Section 35 ibid. From the impugned order we find that no such contention was raised before the Collector (Appeals). Even before us the Ld. counsel could not point out the date on which the certified copy was applied for and delivered and how much time was spent in obtaining the said copy. On the contrary he admitted before us that no such alleged certified copy was filed along with the appeal before the Collector (Appeals) and what was filed was the photo copy of the Order-in-Original which was served upon the respondents. In the Central Excises and Salt Act, 1944, we have a special provision in the form of Section 35-O which provides for exclusion of time taken for copy. For ready reference the said Section is reproduced below :-

"Section 35-O. Exclusion of time taken for copy. - In computing the period of limitation prescribed for an appeal or application under this Chapter, the day on which the order complained of was served, and if the party preferring the appeal or making the application was not furnished with a copy of the order when the notice of the order was served upon him, the time requisite for obtaining a copy of such order shall be excluded." 8.

From the above, it is clear that the question of exclusion of time taken in obtaining the certified copy arises only when the impugned order that is to say the order against which the appeal is filed is not served upon the party concerned. In the instant case it was not in dispute that the Order-in-Original No. 16/92, dated 13-4-1992 was served upon the respondents. Therefore, the question of exclusion of the time, if any, required in obtaining the certified copy is not to be excluded while computing the period of limitation prescribed under Section 35 of the Act. Even there is nothing on record to

establish that the appellants ever applied for the certified copy and if so, the date on which they applied and the date on which it was delivered.

Under these circumstances, the said contention of the Ld. counsel has no force. As regards the time spent in pursuing the writ proceedings before the Hon'ble High Court and before the Hon'ble Apex Court it may be stated at the outset that in the absence of any Stay Order or direction to the contrary from the Court concerned the time spent in pursuing the writ petition cannot be excluded. In the case of Diwan Lime Co. (P) Ltd. v. Collector of Central Excise, Raipur (Appeal No.E/1779/93-C) the same contention was advanced by the assessee therein on the principles of Section 14 of the Limitation Act and the Tribunal vide its Final Order No. 60/94-C with Misc. Order No. 29/94-C and Stay Order No. 20/94-C, dated 9-2-1994 (to which I was a party) held that "mere filing of the writ petition in the absence of any direction by the High Court concerned cannot by itself be a ground for condoning the delay as held by this Tribunal in the case of Satish Chandra Prahlad Narain v. Collector of Central Excise, Mahabir Metal Convertors, Thane v. Collector of Central Excise, 1986 (24) E.L.T. 39." Against that Final Order of the Tribunal the assessee M/s.

Diwan Lime Co. (P) Ltd. filed their Civil Appeal No. 2488/94 before the Apex Court which was dismissed on 29-4-1994 (see 1994 (73) E.L.T. A59).

That apart from the impugned Order-in-Appeal it is clear that in the instant case the appellants never filed any writ petition against the order of the Assistant Collector No. 16/92, dated 13-4-1992 which was appealed against before the Collector (Appeals). Even when the appellants came to know of the decision of the Apex Court on 10-9-1992, the period of 2 months and 6 days had already lapsed.

9. The other contention of the appellant that they have a strong case for the acceptance of the appeal on merits and, therefore, the same should be regarded as a very good reason for condoning the delay is also wholly without any substance in view of the law laid down by their Lordships of the Apex Court in the case of State of Gujarat v. Sayed Mohd. Baquir El Edross, AIR 1981SC 1921, wherein it was stated in paragraph 3 that "Mr. Phadke also contended that he had a strong case for the acceptance of the appeal on merits and that the same should

be regarded as a very good reason for the condonation of the delay. The contention is wholly without any substance. The abatement stands in the way of the appeal being heard on merits which cannot, therefore, be looked into. "This Tribunal also considered and rejected the same contention while passing the said Final Order No. 60/94-C etc. against which the appeal was dismissed by the Apex Court on 29-4-1994 as aforesaid.

10. In view of the above, we affirm the impugned order-in-original and consequently reject the appeal.

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