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

Decided On : Dec-27-1995

Reported in : (1996)(64)LC435Tri(Chennai)

Judge : S Kalyanam, Vice-, G T V.P., S T K.

Appellant : Shimoga Steels Ltd.

Respondent : Cc

Judgement :
1. This is an application for condonation of delay in the presentation of the appeal before the Tribunal.

2. Shri Ganesh, the learned Counsel for the petitioner submitted that on receipt of the order passed by the original authority rejecting the petitioner's claim for refund on ground of "short landing" under the Customs Act, 1962, the Act for short, the petitioner filed appeal before the Collector of Customs (Appeals), Madras on 1.10.1990 and the Collector (Appeals) passed an order on 7.1.1991 confirming the findings of the original authority on short landing and also rejected the petitioner's claim for relief under Section 23 of the Act. After receipt of the said order on 22.2.1991, as directed in the format of the said order, the petitioner filed revision application before the Govt. of India dated 29.4.1991 and the Revisional authority by his order dated 30.5.1991 which was received by the petitioner on 19.6.1991 rejected the revision application on ground of jurisdiction holding that there was no short landing and the petitioner's claim for relief under Section 23 should be

agitated before the Tribunal under the Act and consequently the petitioner filed appeal on 19.9.1991 and prayed for condonation of delay in the above circumstances.

4. We have considered the submissions made before us. The lower appellate authority while dealing with petitioner's plea for relief on ground of short landing and also for refund in terms of Section 23 of the Act rejected the claim on both grounds and directed the petitioner in the format to prefer revision application. The petitioner preferred revision application in the above circumstances. Since the petitioner bona fide agitated his rights for relief on ground of short landing which is in the exclusive jurisdiction of the Revisional authority of Govt. of India under the Act and since the same came to be negatived on ground of jurisdiction by the considered order which was received by the petitioner on 19.6.1991, the petitioner would be effectively able to exercise his rights of relief under Section 23 only from that date onwards. In other words when the jurisdictional issue is being gone into by the Revisional authority and a finding given against jurisdiction, the petitioner would get cause of action only after receipt of that order deciding the jurisdictional issue. In other words if the Revisional authority had found jurisdiction in him and dealt with the issue of short landing on merits, the petitioner would not have to agitate his rights under Section 23 of the Act. When the Revisional Authority is in seisin of the jurisdictional issue, it would not be possible for the petitioner to simultaneously seek relief though under a different Section before the Tribunal in respect of the same transaction. To agitate two rights of identical issues simultaneously before the two forums is apt to result in judicial conflict and therefore would not normally be permissible. In respect of condonation of delay the relevant questions that should be taken note of are as to whether delay was occasioned for reasons beyond the control of the petitioner and whether the petitioner acted with due diligence without being guilty of latches and whether there is sufficient or proper cause meriting condonation of delay in the factual background of the case set out above. It will be seen that the petitioner had acted bona fide in agitating his rights before the forum where he was directed by the Collector (Appeals) and Revisional Authority went into jurisdictional issue in detail and passed a considered order as stated above. It is only after receipt of the order of the Revisional Authority on 19.6.1991 the petitioner is made aware of the fact

that the Revisional authority had no jurisdiction to go into the matter as there was no short landing and it is only then that the petitioner has an effective cause of action to agitate his rights for relief under Section 23 of the Act. It is also well settled that where there is due diligence on the part of the litigant the Court or quasi-judicial authority should be liberal in the matter of condonation of delay with a view to see that substantial justice is done and in his view of the matter we condone the delay.

6. I have given a careful thought to the order recorded by my learned brother and I have not been able to persuade myself to agree with him that the delay in filing the appeal after three months of the receipt of the order of the Revisional authority as pleaded by the applicant merits condonation. My learned brother has set out the facts. However, for the sake of convenience, I will be briefly referring to the same in my order. The applicant admittedly filed refund claim for part of the goods in respect of which they have paid duty claiming the same as short landed. The Assistant Collector who is the competent authority as per the distribution of work in the Customs House to deal with short landing claims i.e. of manifest clearance department for want of any acceptable evidence in respect of the short landing rejected the claim.

In the appeal before the Collector (Appeals) in their ground of appeal the applicant pleaded for refund on the ground of short landing but at the same time made alternative plea that in any case refund could be given under Section 23(1) of the Customs Act, 1962. The learned Collector (Appeals) dealt with the refund claim in the context of short landing as also in the context of Sections 13 & 23(1) of the Customs Act, 1962 and held as under: (1) There was no case of short landing made out against the carrier for levy of penalty under Section 116 of the Customs Act and correspondingly no basis had been laid for holding that short delivery of the goods may be considered as a case of short landing.

(2) Under Section 13, no case had been made out inasmuch as it has not been shown that the goods had been pilfered.

(3) Under Section 23 relief was available in respect of goods before their clearance for home consumption in case loss/destruction occurred was otherwise

than by theft and that relief would be available only if it was shown to the satisfaction of the Assistant Collector that the goods could not be retrieved and that the goods were no longer available and that the applicant had not made out such a case.

It is thus seen that while the applicant had claimed that the goods had been short landed they sought relief also under Section 23(1) of the Customs Act, 1962 i.e. covering the goods where the goods had been landed but had been lost/destroyed before their clearance from the Customs. The applicant therefore, it is seen, had made a claim before the appellant authority on two mutually exclusive grounds i.e. first ground regarding short landing and second under Section 23(1) of the Customs Act, 1962 that the goods landed had been lost/destroyed before their clearance. Next appeal on each of these two grounds lay before two different fora i.e. the Govt. of India in respect of short landing and before the CEGAT in respect of the goods which had been landed but lost/destroyed before their clearance. There is nothing in law that the applicant could not have filed appeals before two different fora on grounds which the respective forum was competent to go into, but as seen from the grounds of application for condonation of delay, appeal before the Govt. of India was preferred based on the preamble in the order-in-appeal. This preamble clearly brings out the fact that appeal would lie to the Govt. of India only in cases where any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination, under Section 129DD of the Customs Act, 1962. The applicant took a conscious decision that they were pursuing the remedy on ground of short landing. However, in the revision application filed before the Govt. of India the applicant, as seen from the order of the revisional authority, urged the ground for relief under Section 23(1). As rightly pointed out in the order of the Govt.

of India the application for relief under Section 23(1) can only be considered in an appeal before the Tribunal. It is possible that in a case like this, where statutorily jurisdiction has been vested in two fora a person in respect of the same cause of action may take two grounds one of which may fall for consideration within the competence of one forum and other within the competence of another forum and the person aggrieved may therefore pursue the remedy before one forum and may await the outcome in that forum before considering seeking relief in the other forum on the other ground. The cause of action in any case in such a situation would be the impugned order which is the order of the Collector (Appeals) in the present case. Any period of limitation for filing the appeal before the second forum will have to be considered with reference to the date of receipt of the order of the Collector (Appeals). The period during which the matter was pending before the Revisional authority therefore taking into consideration the peculiar facts and circumstances of the case can be condoned. However, the point that falls for consideration is the time within which after receipt of the order of the Revisional authority, the applicant can be allowed to file the appeal before the Tribunal. The applicant has taken over three months for filing the appeal after receipt of the Govt. of India's order. The learned Counsel was specifically asked as to why the applicant took three months time to file the appeal before the Tribunal when in law the limitation had started running from the date of receipt of the order of the Collector (Appeals) and in fact had already run out. He in fairness conceded that he had no reason to adduce as to why the applicant took three months time and he merely made a plea that cause of action for filing the appeal before the Tribunal should be taken to arise after receipt of the Govt. of India's order. This in my humble opinion cannot be accepted in law. No case has been made out as to why the applicant has taken over three months time to file the appeal after receipt o Govt. of India's order, when in law the period available is three months for filing the appeal from the date of receipt of the impugned order. I would like to observe here that in a number of cases some parties after pursuing bona fidely remedy before the High Courts, filed appeals before the Tribunal the Courts directed them to go before the Tribunal, and the question of condoning the delay in those cases has been considered with reference to the date of receipt of the order appealed against and time taken for filing the appeal before the CEGAT after receipt of the order of the High Courts order. The High Courts in a number of cases have left the question regarding condonation of delay even in respect of the period when the matter was pending in the High Courts to be considered by the Tribunal and in some cases the High Courts directed the appeals to be filed before the Tribunal within a reasonable time of four weeks or 30 days.

It is thus seen that even if the applicants bona fidely pursued the remedy in another forum, it was incumbent on the applicants to file appeal expeditiously after the decision of the other forum was communicated without loss of time. In the present case, there is no explanation as to why the applicants took three months to file the appeal before the Tribunal when the arguments/pleas had already been formulated before the Revisional authority and all that they had to do was to reproduce the same in the appeal memoranda. In my view, therefore, the long delay of three months in filing the appeal after receipt of the Govt. of India's order cannot be condoned as sufficient cause has not been shown for condonation of delay of this long period.

The application is therefore dismissed and consequently, the appeal also stands rejected.

Whether in the facts and circumstances of the case delay of three months in filing the appeal before the Tribunal with reference to the date of receipt of the first Appellant authority's order should be condoned for the reason that the appellant had earlier filed revision application against the Appellate authority's order and the said authority while passing the order held that the claim of refund under Section 23 can be considered only by the Appellate Tribunal and therefore the effective cause of action for filing the appeal before the Tribunal arose only on 19.6.1991 when the order of the revisional authority was received, as held by Member (Judicial), Whether in the facts and circumstances of the case, the delay should not be condoned for the reason that the appellant after receipt of the order of the Revisional authority did not file appeal within a reasonable time of four weeks or 30 days when all that the appellant had to do was to reproduce the grounds and the arguments urged earlier before the Revisional authority for the purpose of filing the appeal and when specifically asked by the Bench, the advocate conceded that he had no reason to adduce for long delay of three months taken for filing the appeal, after receipt of the Revisional authority's order, as held by Member (Technical).

Sd/- Sd/-(S. Kalyanam) (V. P. Gulati) Member (J) Member (T) The difference of opinion between the Ld. Vice-President and the Ld.

Member (Technical) of the Tribunal who had originally heard this condonation of delay petition has been referred to me for resolving the difference between them.

2. The Ld. Vice-President had observed in his order that it is well settled that where there is due diligence on the part of the litigant, the court or quasi-judicial authority should be liberal in the matter of condonation of delay with a view to see that substantial justice is done and accordingly he passed the- order condoning the delay. This view was not agreed to by the Ld. Member (Technical) who opined that the delay could not be condoned as sufficient cause had not been shown for the same. He referred to the delay of nearly three months taken by the appellants in filing the appeal before the Tribunal after receipt of the order in Revision passed by the Government of India as a long period. He had observed that their argument had already been formulated before the Revisional Authorities and what they had to do was to reproduce the same in the appeal which they filed before the Tribunal.

3. I have taken into account all the submissions by the Ld. Counsel for the applicants and by the Ld. D.R. for the Respondent. It has been stated by the Ld. Counsel that the observation in the order in Revision Application passed by the Government where they had made a specific reference that the date of receipt of the Revision Application in the Ministry may be indicated was a reasonable hint that the same may be the material date for computing the time limit. On that basis they had filed the appeal before the Tribunal within a period of three months which he contended was not an unduly long period but a reasonably short period. I also find that, as pointed out by the Ld. Counsel, the Ld.

Technical Member had made an observation that when two courses were open to the appellants namely an appeal to the Tribunal as well as a Revision Application before the Government of India, they should have taken care to resort to both the remedies. This observation was questioned by the Ld. Counsel who stated that no litigant would think of filing appeals in different fora, particularly when the impugned order itself contained the direction that they should file a revision application before the Government. I find this explanation is plausible. I am also of the opinion that the time of 3 months taken by them in filing the appeal before the

Tribunal after receipt of the order in Revision passed by the Government of India to be within a reasonable period and in that view of the matter I agree, with respect, with the view expressed by the Ld. Vice-President. The delay is accordingly condoned. The papers may now be placed before the regular Bench for passing the order on the condonation application.

In the light of the majority view, the delay in filing the appeal before the Tribunal is condoned.

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