IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 24TH DAY OF AUGUST 2016

PRESENT

THE HON'BLE MR.JUSTICE JAYANT PATEL

AND

THE HON'BLE MR.JUSTICE S.N.SATYANARAYANA

WRIT APPEAL NO.1147 OF 2015 (T-RES)

BETWEEN:

M/S. EBLITZ INC
NO.37, 6TH CROSS, 7TH MAIN,
FRIENDS COLONY, ST BED,
KORMANGALA,
BANGALORE-560 034
(REPRESENTED BY ITS PROPRIETOR
MICHAEL GURUPRASAD AGED ABOUT 58 YEARS)
... APPELLANT
(BY SRI SANMATHI E I, ADVOCATE)

AND:

1.ADDITIONAL COMMISSIONER OF SERVICE TAX
SERVICE TAX COMMISSIONERATE,
BANGALORE-560 001

2.COMMISSIONER OF SERVICE TAX (APPEALS)
TRAFFIC & TANSIT MANAGEMENT CENTRE,

BMTC BUILDING,
3RD FLOOR, ABOVE BMTC STAND,
DOMLUR, BANGALORE-560 071

...RESPONDENTS

(BY SRI K V ARAVIND, ADVOCATE)

THIS WRIT APPEAL IS FILED U/S 4 OF THE KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE ORDER PASSED IN THE WRIT PETITION 2578/2015 DATED 05/03/2015.

THIS APPEAL COMING ON FOR PRELIMINARY HEARING THIS DAY, ***JAYANT PATEL J.***, DELIVERED THE FOLLOWING:

JUDGMENT

Admit.

2. Mr.K.V.Aravind, learned Counsel appears for the respondents and waives notice of admission.

3. With the consent of learned Counsel appearing for both the sides, the appeal is finally heard.

4. The present appeal is directed against the order dated 05.03.2015 passed by the learned Single Judge of this Court whereby the learned Single Judge for the

reasons recorded in the order has dismissed the petition.

5. The short facts of the case is that the appellant is an assessee proprietary firm engaged in the Event Management. As per the appellant, it is paying service tax and filing return. However, audit wing of the first respondent visited the premises and the record was collected from the appellant. Ultimately on 09.03.2011 a show cause notice came to be issued calling upon the appellant to show cause as to why the service tax of Rs.23,28,599/- for the period from April 2007 to March 2008 should not be demanded coupled with the interest and penalty. On 23.12.2011 the reply was filed. It appears that thereafter on 31.01.2012 the order was passed by the Assessing Officer, but the appellant did not receive the copy of the order, whereby the amount of service tax and the interest and the penalty as referred

to in the showcause notice was adjudicated. As per the appellant it received the copy of the order only on 11.09.2012. When the recovery staff had taken action it came to know about the order and thereafter the copy was applied and the same was given on 11.09.2012. The appellant preferred the appeal before the second respondent together with the application of condonation of delay contending inter alia that the order was not received and it has been received only on 11.09.2012 and therefore the appeal could not be filed within prescribed period due to non-receipt of the order in original and the delay be condoned. The second respondent after hearing the appellant found that the order was despatched on 16.03.2012 but without verifying the record as to on which date the said order sent through registered post acknowledgement was received by the appellant, on the surmises that the order should have been received within reasonable time, he found that there is delay of 78 days beyond three months and ultimately he dismissed the appeal. Under the circumstances, the appellant had preferred petition before the learned Single Judge. The learned Single Judge found that the appeal ought to have been filed within a period of 90 days and there is no provision under the Act, to condone the delay and therefore the learned Single Judge ultimately dismissed the petition. Under the circumstances, the present appeal before this Court.

6. We have heard Mr.E.I.Sanmathi, learned Counsel appearing for the appellant and Mr.K.V.Aravind, learned Counsel appearing for the respondents.

7. We may at the outset reproduce Section 85 of the Finance Act, which is applicable to the present

matter. Section 85 of the Finance Act provides for appeal to the Commissioner of Central Excise (Appeals) which reads as under:

> "**Appeals to the Commissioner of Central Excise (Appeals).**
>
> "85. [(1)Any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the [Principal Commissioner of Central Excise or] Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals).]
>
> (2) Every appeal shall be in the prescribed form and shall be verified in the prescribed manner.
>
> (3) An appeal shall be presented within three months from the date of receipt of the decision or order of [such adjudicating authority], relating to service tax, interest or penalty under this Chapter [,made before the date on which

the Finance Bill, 2012 receives the assent of the President]:

Provided that the Commissioner of Central Excise (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 :

[(3A) An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, made on and after the Finance Bill, 2012 receives the assent of the President, relating to service tax, interest or penalty under this Chapter:

Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month.]

(4) The Commissioner of Central Excise (Appeals) shall hear and determine the appeal and, subject to the provisions of this Chapter, pass such orders as he thinks fit and such orders may include an order enhancing the service tax, interest or penalty :

Provided that an order enhancing the service tax, interest or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) Subject to the provisions of this Chapter, in hearing the appeals and making order under this section, the Commissioner of Central Excise (Appeals) shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Central Excise Act, 1944 (1 of 1944)."

8. The aforesaid shows that the limitation would begin from the date of receipt of decision of the order and the second aspect is that though normal period of limitation of three months to prefer appeal from the date of receipt of the order, there is power with the appellate authority to condone the delay for further period of three months if he is satisfied that the appellant was prevented by sufficient cause for non-preferring the appeal within the period of three months.

9. It is true that the outer limit is six months for entertaining of the appeal including condonation of delay. However, in order to find out that the limitation would begin from which date, it was obligatory on the part of the respondent No.2 to verify the record of the acknowledgement received, if any, or any other material for ascertaining the date on which the order was received by the appellant. When the appellant made

statement on oath that it received the order only on 11.09.2012 to dislodge or for non-accepting the statement made, there should have been material on record for receipt of the order by the appellant on a particular date. If the material was not there, the second respondent could not proceed on the basis that the order despatched on 16.03.2012 ought to have been received within reasonable time. It is hardly required to be stated that when the statute provides express beginning of the limitation from the date of receipt of the order, unless the receipt is so verified and considered, the limitation cannot be said to have begun. In any case, even if the date of despatch is considered on 16.03.2012 then also within the outer limit of six months, the appeal was already presented on 13.09.2012. Under the circumstances, we find that the second respondent ought to have condoned the delay and ought to have examined the appeal on merits. It also appears that the attention of the learned Single Judge about the proviso to Section 85(3) of the Finance Act, was not brought. Further the sub-section (2) providing for beginning of the limitation from the date of receipt of the order was also not brought to the notice of the learned Single Judge. Under these circumstances, we find that in absence of any material considered the date from which the limitation period ought to have been taken, it was a fit case to condone the delay and to examine the matter on merits.

10. In view of the aforesaid, the impugned order passed by the learned Single Judge as well as by the second respondent dated 25.11.2014 are set aside with the direction that the delay in preferring the appeal is condoned. The appeal No.805/2014 shall stand restored to the file of the second respondent. The

second respondent shall examine the appeal on merits after hearing both the sides.

11. The present appeal is allowed to the aforesaid extent. Considering the facts and circumstances, no order as to costs.

12. In view of the disposal of the appeal, I.A.No.1/2015 does not survive for consideration.

Sd/-
JUDGE

Sd/-
JUDGE

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