

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70004 of 2020

(Arising out of Order-in-Appeal No.442-CUS/APPL/LKO/2019 dated 31/07/2019 passed by Commissioner (Appeals) Customs, GST & Central Excise, Lucknow)

Shri Arvind Kumar Soni

(R/o-80, Kasera Toli, Siwan, Bihar-834001)

VERSUS

.....Appellant

Additional Commissioner Customs, Lucknow ...Respondent

(5th Floor Kendriya Bhawan Sector-H, Aliganj, Lucknow)

APPEARANCE:

Shri Anurag Tripathi, Advocate, for the Appellant

Shri Manish Raj, Authorised Representative for the Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.- 70032/2023

DATE OF HEARING : 17 August, 2023

DATE OF DECISION : 17 August, 2023

SANJIV SRIVASTAVA:

This appeal is directed against order in appeal No.442-ST/APPL/LKO/2019 dated 31.07.2019 of the Commissioner (Appeal) Customs GST & Central Excise, Lucknow. By the impugned order following has been held:-

"The impugned order was received by the appellant on 03.01.2019 as declared in the Appeal memo; whereas appeal against the same was filed on 04.04.2019 i.e. after the period of sixty days as stipulated under section 128 (1) of the Customs Act, 1962. Further, a delay of upto thirty days can be condoned as per the said section. However, the present appeal was filed after ninety days from the date of communication of the said order. Hence the appeal is time barred and is dismissed on the same ground."

2. Heard both the sides.

3. The issue involved in the present appeal is in respect of condoning the delay of thirty one days in filing the appeal. Commissioner (Appeals) as per section 128 of the Customs Act, 1962 could have condoned the delay of thirty days. Hon'ble Supreme Court held in case of Singh Enterprises [2008 (221) E.L.T. 163 (S.C.)] categorically held as follows:-

8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period upto which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Indian Limitation Act, 1963 (in short the 'Limitation Act') can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days period.

9. Learned counsel for the appellant has emphasized on certain decisions, more particularly, *I.T.C.'s* case (supra) to contend that the High Court and this Court in appropriate cases condoned the delay on sufficient cause being shown.

10. Sufficient cause is an expression which is found in various statutes. It essentially means as adequate or enough. There cannot be any straitjacket formula for accepting or rejecting the explanation furnished for delay

caused in taking steps. In the instant case, the explanation offered for the abnormal delay of nearly 20 months is that the appellant concern was practically closed after 1998 and it was only opened for some short period. From the application for condonation of delay, it appears that the appellant has categorically accepted that on receipt of order the same was immediately handed over to the consultant for filing an appeal. If that is so, the plea that because of lack of experience in business there was delay does not stand to be reason. *I.T.C.'s* case (supra) was rendered taking note of the peculiar background facts of the case. In that case there was no law declared by this Court that even though the Statute prescribed a particular period of limitation, this Court can direct condonation. That would render a specific provision providing for limitation rather otiose. In any event, the causes shown for condonation have no acceptable value. In that view of the matter, the appeal deserves to be dismissed which we direct. There will be no order as to costs."

4. In view of the decision of the Hon'ble Supreme Court this Commissioner (Appeals) could not have condoned the delay as prayed for by the appellant. After taking the note of the above decision Delhi Bench has in case of *Shambhu Synthetics Pvt. Ltd. vs. Commissioner of Customs, New Delhi* [2021 (378) E.L.T. 208 (Tri.-Del.)] held as follows:-

"6. The relevant portion of Section 128 of the Customs Act, which deals with Appeals to Commissioner (Appeals), is reproduced below :

"128. Appeals to Commissioner (Appeals). - (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Principal Commissioner or Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order :

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days."

7. It would seen from the foresaid provision that an appeal can be filed before the Commissioner (Appeals) within sixty days from the date of communication to him of such decision or order. However, the Commissioner (Appeals) may, if he is satisfied that

the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days. Thus, at best the delay of thirty days beyond the stipulated limit of sixty days in filing the appeal can be condoned, provided of course that the Commissioner (Appeals) is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the period of sixty days.

8. *This issue came up for decision before the Supreme Court in Singh Enterprises v. CCE, Jamshedpur [2008 (221) E.L.T. 163 (S.C.)]. The Supreme Court examined the provisions of Section 35 of the Central Excise Act, 1944, which are pari materia to the provisions of Section 128 of the Customs Act and observed that the delay can be condoned in accordance with the language of the Statute which confers power on the Appellate Authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days, which is normal period for preferring the appeal. It is for this reason that the Supreme Court observed that the Commissioner and High Court were justified in holding that there was no power to condone the delay after expiry of 30 days period and that the provisions of the Limitation Act would not be applicable. Paragraphs 8, 9 and 10 of the judgment are reproduced below :*

"8."

9. *The aforesaid decision of the Supreme Court in Singh Enterprises emphasises that the language to the proviso to Section 35(1) of the Central Excise Act makes it clear that the appellate authority has no power to allow the appeal to be presented beyond the period of thirty days after the normal period of limitation of sixty days. In such circumstances, the Supreme Court held that there is complete exclusion of Section 5 of the Limitation Act.*

10. *A Division Bench of the Tribunal in Diamond Construction v. Commr. of Cus., C. Ex. & S.T., Jabalpur [2020 (35) G.S.T.L. 193 (Tri. - Del.)], in which the provisions of Section 85(3A) of the Finance Act, 1994 relating to appeals to the Commissioner of Central Excise (Appeals) came up for consideration, after placing reliance upon the decision of the Supreme Court in Singh*

Enterprises observed that the discretion of the Commissioner to condone the delay is circumscribed by the conditions set out in the proviso and any delay beyond that period cannot be condoned. The relevant portion of the decision is reproduced below :

"7. In order to appreciate the contentions advanced by the parties it would be appropriate to reproduce Section 85(3A) of the Finance Act which is as follows :

"85. Appeals to the Commissioner of Central Excise (Appeals). - (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."

8. A perusal of sub-section (3A) of Section 85 clearly indicates that an appeal shall be presented within two months from the date of receipt of the order of the adjudicating authority in relation to Service Tax, interest or penalty. It further provides 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. The discretion of the Commissioner to condone the delay is, therefore, circumscribed by the condition set out in proviso and the delay can be condoned only if the appeal is presented within a further period of one month after the expiry of the statutory period of two months, provided of course, he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within a period of two months.

9. In the present case, admittedly, the order of the adjudicating authority was received by the appellant on 20 September, 2013 but the appeal was presented before the Commissioner on 5 February, 2016. It was clearly not presented within the period of

two months nor within the extended period of one month. The Commissioner (Appeals) dismissed the appeal after placing reliance on the decision of Supreme Court in Singh Enterprises."

(Emphasis

supplied)

11. The Delhi High Court also examined a similar situation in Uttam Sucrotech International (P) Ltd. v. Union of India [2011 (264) E.L.T. 502 (Del.)] and observed as follows :

"13. In view of the aforesaid, there can be no scintilla of doubt that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days after expiry of initial 60 days. In the case at hand, the admitted position is that the order passed by the adjudicating officer was received by the petitioner on 29th August, 2006. The appeal was preferred on 28th November, 2006. The Commissioner excluded the date of receipt of the order-in-original by the petitioner in terms of provision contained in Section 35-O and took note of the fact that the appeal was presented on the 91st day of the period commencing after the said date of receipt, i.e., one day beyond the condonable period of 30 days and, hence, the same could not have been condoned. Similar view has been expressed by the revisional authority."

(Emphasis

supplied)

12. The decision of the Supreme Court in Collector, Land Acquisition would not be of any help to the appellant. The Supreme Court, in the context of Section 5 of the Limitation Act, explained "sufficient cause". This decision would be helpful in only considering whether there was 'Sufficient cause' to explain the delay beyond sixty days and up to the expiry of period of thirty days. As noted above, Section 5 of the Limitation Act would not be applicable for condoning the delay beyond ninety days, in view of the aforesaid decision of the Supreme Court Singh Enterprises.

13. The Madras High Court in Kothari Sugars relied upon the aforesaid decision of the Supreme Court in Collector, Land Acquisition. This decision would, therefore, also not help the appellant.

14. Learned Counsel for the appellant also placed reliance on the decision of a Learned Member of the Tribunal in Jagdish Ispat. The Learned Member observed that even though the Commissioner (Appeals) committed no error in dismissing the appeal as barred by time since it was filed after a delay of 215 days, but still condoned the delay for the reason that the Tribunal is vested with jurisdiction to condone the delay even beyond the permissible period. In this connection, the learned Member observed as follows :

"Hon'ble Apex Court in Singh Enterprises itself has held that a Tribunal also been a creature of statute, is vested with the jurisdiction to condone the delay beyond the permissible period and there is no such period statutorily provided under Section 35B, Central Excise Act, 1944 as is provided in Section 35 of Central Excise Act, 1944 in respect of the appeals which were to be filed before Commissioner (Appeals) to condonation of delay to a particular period. Thus, I am of the opinion that Tribunal has power to look into that the reason which resulted into delay for filing appeal before Commissioners (Appeals) as to whether same is sufficient enough for the impugned delay to be condoned or not."

(Emphasis

supplied)

15. The Learned Member thereafter examined whether the appellant had made out 'sufficient cause' for condoning the delay and ultimately, for the reasons mentioned in the order, condoned the delay. The operative part of the order is reproduced below :

"12. In view of entire above discussion, it is held that Commissioner (Appeals) had no option but to dismiss the appeal being time-barred as the delay was more than 30 days. But keeping in view, the power of this Tribunal and that the delay is attributable to the Counsel of the appellant that the said delay is hereby condoned. Since the decision of Commissioner (Appeals) is not on the merits, the matter is remanded back to Commissioner (Appeals) to take decision on the merits of the impugned appeal."

16. *With respect, it is not possible to accept the view taken by the Learned Member in the aforesaid decision. The Supreme Court in Singh Enterprises did observe that 'the Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided in the Statute', which means that the delay of thirty days beyond the period of sixty days prescribed in the Statute can be condoned. This is what was stated by the Supreme Court in the next sentence that 'the period up to which the prayer for condonation can be accepted is statutorily provided'. Section 35B of the Central Excise Act, 1944, on which reliance has been placed in the aforesaid decision by the Learned Member deals with Appeals to the Appellate Tribunal. It is true that Section 35B does not contain a provision similar to Section 35, wherein it is provided that an appeal has to be filed within 60 days from the date of the communication of the order but the Commissioner (Appeals) may, if he is satisfied that the appellant is provided by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of sixty days. Section 35 of the Excise Act would apply to*

17. *Appeals before the Commissioner (Appeals), whereas Section 35B would apply to Appeals before the Appellate Tribunal. Power under Section 35B dealing with Appeals to the Appellate Tribunal cannot enable the Appellate Tribunal to condone any delay in filing the appeal before the Commissioner (Appeals) beyond the extended period of thirty days, after the expiry of the normal period of sixty days.*

18. *The Supreme Court in Singh Enterprises categorically held that any delay beyond the extended period of thirty days after expiry of normal period of sixty days, cannot be condoned since the Statute does not permit and the provisions of Section 5 of the Limitation Act would not apply. The decision of the Supreme Court in Singh Enterprises is binding. The decision of the Tribunal in Jagdish Ispat, therefore, does not lay down good law. The Tribunal does not have any power, much less discretionary power, to condone any delay beyond the extended period of thirty days after the expiry of the normal period of sixty days.*

19. *Such being the position, it is not possible to accept the contentions of Learned Counsel for the appellant that the provisions of Section 5 of the Limitation Act should be invoked even if the delay is beyond the extended period of thirty days or that the Tribunal has a discretionary power to condone any delay in filing the appeal even after the expiry of the extended period of thirty days.*

20. *The Commissioner (Appeals), therefore, committed no illegality in dismissing the appeal for the reason that any delay beyond ninety days could not be condoned."*

5. In view of the above decisions the impugned order cannot be faulted with and is upheld. Appeal is dismissed.

(Dictated and pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS