

(2002) 08 AP CK 0015

Andhra Pradesh High Court

Case No: Writ Petition No. 14507 of 2002

Abhishek Synthetics Private
Limited

APPELLANT

Vs

Addl. Commissioner of Central
Excise and Another

RESPONDENT

Date of Decision: Aug. 8, 2002

Acts Referred:

- Central Excise Rules, 1944 - Rule 57T, 57U(2)
- Income Tax Act, 1961 - Section 32

Citation: (2003) 6 ALD 80 : (2003) 4 ALT 13

Hon'ble Judges: Motilal B. Naik, J; Dalava Subrahmanyam, J

Bench: Division Bench

Advocate: G. Mohan Rao, for the Appellant; C.V. Ramulu, Senior Central Government Standing Counsel, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Motilal B. Naik, J.

Petitioner company is a holder of Central Excise Registration No. 2/1994, engaged in the manufacture of polyester filament yarn has availed modvat credit on capital goods during the period 1994-95 to the tune of Rs.11,80,000/- and Rs.8,349/- in terms of Rule 57T of the Central Excise Rules, 1944. However, petitioner-company claimed that inadvertently and purely due to ignorance of the relevant provisions of Central Excise law, depreciation in respect of the part of the credit of duty on the capital goods taken was also claimed u/s 32 of the Income Tax Act in the return filed under the Income Tax Act for the accounting year 1994-95. The depreciation claimed for the year 1994-95 was only to an extent of Rs.1,47,500/. However, according to the petitioner, this amount of Rs.1,47,500/- was paid back to the Central Excise department on 19-12-1997 after noticing the said mistake. The credit of duty paid on

certain items of capital goods amounting to Rs.8,349/- taken was also paid back by way of debit against entry No. 89 of P.L.A. dated 19-12-1997.

2. While so, the respondent No. 1 issued a show-cause notice in O.R.No.27/98 Hyderabad-III Adjn dated 17-7-1998 requiring the petitioner to show-cause as to why i) the duty of Rs.11,88,349/- on capital goods taken should not be disallowed and recovered under Rule 57U(2) of CE Rules, 1944; ii) the credit of Rs.1,55,849/- already paid should not be adjusted towards the amount to be recovered; and also why proceedings to impose penalty should not be initiated etc..

3. Though proper representation is made, the Additional Commissioner of Central Excise, Hyderabad-III by an order in Original No.34/9 in O.R.No.27/98-Hyd-III Adjn. Dated nil, passed the following order, viz.,

i) the credit of Rs.11,88,349/- on capital goods, taken has been disallowed and to be recovered under Rule 57U(2) of CE Rules, 1944.

ii) Imposed penalty of Rs.11,88,349/- equivalent to the credit taken under Rule 57U(6) of CE Rules, 1944.

iii) Imposed a penalty of Rs.1.00 lakh under Rule 173Q(bb) of CE Rules, 1944.

iv) And charged interest at 20% on the said amount under Rule 57U(8) read with Section 11AA of CE Act, 1985.

4. Aggrieved by the order passed by the Additional Commissioner of Central Excise, Hyderabad-III, petitioner preferred an appeal before the Commissioner (Appeals), Hyderabad. However, the Appellate Commissioner has confirmed the demand to an extent of Rs.10,32,500/- after giving the credit of Rs.1,47,500/- which was already paid by the petitioner. The Commissioner (Appeals) has given benefit of mandatory penalty and interest but enhanced the penalty of Rs.1,00,000/- imposed under rule 173Q to Rs.3,00,000/- in the Order-in-Appeal No. 122/2001 (H-III) CE dated 11-7-2001.

5. As against the order dated 11-7-2001 made by the Commissioner (Appeals), the petitioner filed an appeal before the Customs, Excise, Gold (Control) Appellate Tribunal, Bangalore (for short "CEGAT") on various grounds. Since there was a delay of more than 60 days in preferring the appeal, the petitioner also filed an application to condone the delay of 60 days u/s 35B(5) of Central Excise Act, 1944. However, the said application to condone the delay was rejected by the CEGAT. Consequently, the appeal filed by the petitioner was also dismissed by an order dated 18-7-2002. It is this order which is challenged before this Court on various grounds.

6. Sri Mohan Vinod, learned counsel for the petitioner submitted that as provided under sub-section 5 of Section 35B of the Central Excise Act, 1944, discretion is given to the appellate authority to condone delay in filing the appeal if justifying reasons

are shown by the party seeking such condonation. Learned counsel submitted, a sworn affidavit was filed along with the petition by the Managing Director of the company elaborately narrating the circumstances leading to filing of the appeal belatedly stating that as he is also associated with politics and had entrusted the matter to one of the staff members to attend to the case, and that the staff member to whom the matter was entrusted had fallen sick could not file the appeal in time and as such there was a delay of 60 days in filing the appeal. Counsel stated, when substantial interests of parties are involved and that in a case of this nature if the delay is not condoned and the appeal is not heard on merits, the petitioner company would have to pay more than Rs. 10 lakhs though the company is not liable to pay such amount, the CEGAT ought to have condoned the delay and heard the appeal on merits. Counsel therefore, stated that this is a fit case for interference by this Court.

7. We have also heard Sri C.V. Ramulu, Senior Central Government Standing Counsel who sustained the impugned order. He submitted that in the affidavit filed by the Managing Director of the petitioner-company seeking condonation of delay, the delay of 60 days has not been properly and satisfactorily explained by the petitioner and as such, the CEGAT was justified in rejecting the said petition and no interference is called for in the impugned order.

8. The point for our consideration is whether there are any justifying reasons for this Court to interfere with the impugned order under Article 226 of the Constitution of India ?

9. Under the Scheme of the Central Excise Act, 1944, as against the orders passed by the departmental appellate authority, aggrieved party is entitled to assail the same by way of an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal, in terms of Section 30B of the said Act. However, such an appeal has to be filed within the time stipulated, but under sub-clause 5 of Section 35B of the Act, the Legislature has given discretion to such authorities to condone delay in preferring the appeal in a given case if the authorities are satisfied that sufficient reasons are assigned by a party which prevented it from filing the appeal within time.

10. In this case petitioner-company is represented by its Managing Director who filed an affidavit swearing to the averments bringing to the notice of the appellate authority that one of his staff members to whom the matter was entrusted fell ill and as such he could not file the appeal in time and this factor has not been brought to the notice of the petitioner-company and the petitioner-company knew about the happenings at a later date and immediately thereafter, steps are taken for filing the appeal.

11. When discretion is available to an authority, to exercise such discretion in a given circumstance in a case where an appeal is filed belatedly, the authority which exercises such discretion has to examine the issue from various aspects, viz.,

whether there is deliberate attempt on the part of the party filing the appeal belatedly or the delay has occasioned on account of the happening of some events which are beyond the control of such party. In the latter case, if the party satisfactorily explains that the delay has occasioned only on account of happening of certain events which are beyond its control and if such delay is not condoned, it would suffer substantial hardship, the appropriate authority under such circumstances may exercise discretion and condone the delay. Nonetheless, when substantial interest of parties are at stake and if the delay is not so abnormal running into years, exercise of discretion is permissible by judicial or quasi-judicial authorities in the interest of justice when such discretion is available to them.

12. In this case, the Managing Director of the petitioner-company, apart from explaining the circumstances under which the delay has occasioned, has also pleaded that if the appeal is not heard on merits, the petitioner-company has to pay more than Rs.10 lakhs towards reversal of modvat credit, which according to the petitioner-company, it is not liable to pay. If the CEGAT condoned the delay of 60 days in filing the appeal and taken the appeal on record, the petitioner-company would have been in a better position to explain the circumstances as to how it is not liable to pay the said amount. Therefore, we are of the view, the CEGAT ought to have condoned the delay of 60 days in filing the appeal by the petitioner-company and disposed of the appeal on merits. In our considered view, since substantial interests of the petitioner-company are involved and the delay is not so abnormal and unexplained, this is a fit case for exercising discretion in terms of sub-clause 5 of Section 35B of the Central Excise Act, 1944. Accordingly, we set aside the impugned order dated 18-7-2002 passed by the CEGAT, South Zonal Bench, Bangalore and allow the petition seeking to condone the delay of 60 days on condition the petitioner-company paying costs of Rs.5,000/- (Five thousands only) to the A.P. State Legal Services Authority, High Court Buildings, Hyderabad, within a period of one week from today On such payment, the petitioner-company shall be entitled to obtain a receipt from the A.P. State Legal Services Authority and submit the same before the CEGAT, Bangalore. On such receipt being filed, the CEGAT, Bangalore shall restore the appeal and proceed to hear the appeal according to law and decide the same on merits.

13. The Writ Petition is allowed in the above terms.