

**(2012) 08 MAD CK 0131**

**Madras High Court**

**Case No:** Writ Petition No. 10318 of 2012 and M. P. No's. 1 and 2 of 2012

JMJ Constructions

APPELLANT

Vs

Assistant Commissioner of  
Central Excise, Salem and Others

RESPONDENT

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**Date of Decision:** Aug. 13, 2012

**Acts Referred:**

- Constitution of India, 1950 - Article 226
- Finance Act, 1994 - Section 73(3), 85, 85(3)

**Citation:** (2013) 38 STT 182 : (2012) 56 VST 256

**Hon'ble Judges:** M. Jaichandren, J

**Bench:** Single Bench

**Advocate:** P. Jagadeesan, for the Appellant; V. Sundareswaran, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

M. Jaichandren, J.

Heard the learned counsel for the petitioner, as well as the learned counsel appearing on behalf of the respondents. It has been stated that the petitioner-firm was involved in the business of construction of civil foundations, for the erection of communication towers, by M/s. Bharat Sanchar Nigam Limited, during the assessment years 2005-2006 and 2006-2007. The respondent-Department had considered the construction activity of the petitioner as a taxable service covered under the category of commercial and industrial construction service, and that, therefore, the petitioner is liable to pay service tax, with effect from September 10, 2004. Hence, the petitioner had paid the service tax, along with the interest, on March 7, 2007 and March 26, 2008, for the years 2005-2006 and 2006-2007, before any show-cause notice had been issued to the petitioner. The petitioner was under the impression that it had paid the entire service tax, in terms of section 73(3) of the Finance Act, 1994. However, the Assistant Commissioner of Central Excise, Salem-I Division, the first respondent herein, had issued a show-cause notice, dated April 21,

2008, demanding service tax, as well as interest and also proposing to levy penalty. In the said notice it was also stated that the service tax and interest, already paid by the petitioner, may be appropriated.

2. It has been further stated that the petitioner had given a written explanation for the said show-cause notice. The first respondent had proceeded to pass an order-in-original, dated October 31, 2008, without accepting the explanation submitted by the petitioner, demanding the payment of service tax of Rs. 1,25,014 and the interest of Rs. 15,486, and imposing a penalty of Rs. 1,25,014, under the provisions of the Finance Act, 1994. Aggrieved by the said order of the first respondent, dated October 31, 2008, the petitioner had preferred an appeal before the second respondent. However, there was a delay of 525 days in filing the said appeal. Therefore, the petitioner had filed an application to condone the delay of 525 days in filing the appeal. However, the second respondent, without considering the facts and circumstances of the case, had refused to condone the delay stating that he does not have the power, as per section 85 of the Finance Act, 1994, to condone the delay of over three months. Accordingly, he had passed the order, dated January 27, 2011, rejecting the appeal filed by the petitioner, as time-barred.

3. It has been further stated that the petitioner had preferred an appeal before the third respondent challenging the order of the second respondent, dated January 27, 2011. The third respondent had passed a cryptic order, dated October 21, 2011, dismissing the appeal, by stating that the delay cannot be condoned. In such circumstances, the petitioner has preferred the present writ petition before this court, under article 226 of the Constitution of India.

4. A counter-affidavit had been filed on behalf of the respondents stating that the impugned orders passed by the respondents concerned are in accordance with the provisions of section 85 of the Finance Act, 1994. It has also been stated that, as per section 85(3) of the said Act the appeal had to be filed within three months from the date of receipt of a copy of the order. A further period of three months is available, under the proviso to section 85(3) of the Act, for condoning the delay in the filing of the appeal. After the said period there is no provision in the Finance Act, 1994, or in the rules framed thereunder, for the condonation of the delay in the filing of the appeal. In view of the submissions made by the learned counsel appearing for the petitioner, as well as the respondents, and on a perusal of the provisions of section 85 of the Finance Act, 1994, it is clear that there is no power vested in the appellate authority to condone the delay of over six months in preferring the appeal. As such, this court is of the considered view that the present writ petition, filed by the petitioner, is liable to be dismissed. Hence, it is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.