

2012 (2) ECS (36) (Tri-Ban)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
BANGALORE
SOUTH ZONAL BENCH
COURT – I

(i) **Sunil Kumar Gupta**
(ii) **M/s B.S. Textiles Private Limited**
Versus
The Commissioner of Central Excise & Customs
Hyderabad-III Commissionerate Hyderabad.

COD, Stay & Appeal No: E/COD/346 & 347/2011, E/Stay/1622 & 1625/2011 in E/2642 & 2645/2011

(Arising out of Order-in-Original No: 79/2003 (Commr.) dated 31.12.2003 passed by the Commissioner of Customs & Central Excise, Hyderabad-III Commissionerate, Hyderabad.)

(i) Sunil Kumar Gupta Appellant
(ii) M/s B.S. Textiles Private Limited
Versus
The Commissioner of Central Excise & Customs
Hyderabad-III Commissionerate Hyderabad. Respondent

Appearance

Shri T.V.L. Narasimha Rao, Shri G.P. Sastry, Advocates for the appellant
Ms. Sabrina Cano, Superintendent (AR) for the Revenue

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SHRI P.G. CHACKO, HON'BLE MEMBER (JUDICIAL)
SHRI M. VEERAIYAN, HON'BLE MEMBER (TECHNICAL)

Date of Hearing: 04.09.2012
Date of Decision: 04.09.2012

MISC. ORDER Nos. 655 & 656/2012
STAY ORDER Nos. 1479 & 1480/2012
FINAL ORDER Nos. 598 & 599/2012

“It is the oft-repeated submission of the counsel that the COD applications are liable to be allowed on the sole ground of pendency of their writ petition before the Hon’ble High Court. No judicial authority has been cited before us in support of the plea. We are of the view that the pendency of the writ petition filed by the appellants who were conscious of the

statutory remedy cannot per se constitute a valid ground for condonation of the deliberate delay of over seven years. The appellants have not stated any other valid reason” [Para 4]

[Order per: P.G. Chacko].

1. The appeals and the connected applications are directed against order-in-original No.79/2003 dated 31.12.2003 passed by the Commissioner of Central Excise, Hyderabad-III Commissionerate. These appeals and applications were filed on 9.9.2011 against the commissioner’s order which is said to have been received by the appellants on 8.3.2004. The COD applications filed by the appellants seek condonation of the delay of 2649 days, involved in the filing of the appeals. Moving these applications, the learned counsel for the appellants submits that they were pursuing a writ petition filed in the Hon’ble High Court of Andhra Pradesh and that the writ petition was dismissed as withdrawn on 17.6.2011 and further that the present appeals and applications were filed thereafter. On a perusal of the records, we find that writ petition No.6099 of 2004 was filed by the appellants on 26.03.2004. The counsel for the appellants submits that the writ petition had been admitted and interim stay granted by the Hon’ble High Court and that the Commissioner’s order stood stayed till 17.6.2011. The learned Superintendent (AR) vehemently opposes the COD applications by submitting that the preamble to the Commissioner’s order had clearly guided the appellant to this Tribunal, that in an earlier similar case, they had duly filed appeals with this Tribunal and obtained relief in the form of a remand order, and that the appellants would have sought appropriate equitable relief from the Hon’ble High Court, had they been serious about the present appeals. It is submitted that the appellants, despite the appellate remedy available under Section 35 B of the Central Excise Act and the clear guidance given by the Commissioner through the preamble to his order, chose to file a writ petition and obtain stay of recovery of the adjudged dues. The appellants, after enjoying the benefit of stay for 7 years, chose to withdraw the writ petition and file the present appeals with COD applications. According to the learned Superintendent (AR), this conduct of the appellants is blameworthy.
2. In his rejoinder, the learned counsel submits that the ends of justice demands that the COD applications be allowed.
3. We have given careful consideration to the submissions. The delay involved in the filing of the appeals is to the extent of more than 7 years. The prime reason stated by the appellant is that they were pursuing alternative remedy before the Hon’ble High Court all these years. We have perused the Hon’ble High Court’s judgment dated 17.6.2011 in writ petition No. 6099 of 2004, which reads as follows:

“Mr. Ch.Pushyam Kiran, Advocate, representing Mr. S. Ravi, the Counsel for the petitioners, seeks permission of this Court to withdraw writ petition with liberty to avail appropriate alternative remedy. Permission is granted.

The writ petition is, therefore, dismissed as withdrawn. No costs.”

No relief in equity was granted therein. Therefore, we have got to deal with COD applications on the facts and circumstances placed before us. It appears from the records that the impugned demand of duty is in relation to excisable products which were found to have been clandestinely cleared by the company without payment of duty during the period April – December 1996. It further appears from the records that, in respect of certain goods seized during investigations, a show-cause notice dated 6.1.1998 had been issued demanding duty thereon, proposing confiscation of the goods, proposing penalties, etc. In adjudication of that show-cause notice, the Commissioner demanded duty and imposed penalty by an order dated 8.9.1998. Against that order of the Commissioner, the appellants preferred appeals to this Tribunal under Section 35B of the Central Excise Act. Those appeals came to be allowed by way of remand by this Tribunal by Final Order dated 15.6.1999. Pursuant to the remand order, the Commissioner dropped the demand of duty and allied proposals vide order-in-original No.47/2003 dated 29.8.2003. During the pendency of the remanded matter, a show-cause notice dated 15.12.2000 was issued by the same Commissioner demanding duty on the basis of evidence gathered in the form of private records of the appellants, statements given by them, etc. It was in adjudication of this show-cause notice that order-in-original No.79/2003 dated 31.12.2003 was passed by the Commissioner. From these facts and circumstances, it is evident that the appellants were not ignorant of the appellate remedy under Section 35B of the Central Excise Act. They had the experience of having filed appeals under this provision of law against the Commissioner's earlier order dated 8.9.1998. Therefore, the present submission of the appellants that they were pursuing alternative remedy all these years against the Commissioner's order No.79/2003 *ibid* and hence the delay of their appeals should be condoned does not appeal to us. The appellants' submission that the delay of the appeals is just 'technical' and 'notional' and hence liable to be condoned is a far cry from the reality. We have already stated the undisputed facts and circumstances and have considered the conduct of the parties.

4. It is the oft-repeated submission of the counsel that the COD applications are liable to be allowed on the sole ground of pendency of their writ petition before the Hon'ble High Court. No judicial authority has been cited before us in support of the plea. We are of the view that the pendency of the writ petition filed by the appellants who were conscious of the statutory remedy cannot per se constitute a valid ground for condonation of the deliberate delay of over seven years. The appellants have not stated any other valid reason.
5. In the result, the COD applications are dismissed as bereft of merit and consequently the appeals also get dismissed as time-barred. The stay applications also get dismissed.

(Pronounced and dictated in open Court)