

2012 (2) ECS (60 ) (Tri-Ban)

CUSTOMS, EXCISE & SERVICE TAX APPELATE TRIBUNAL  
SOUTH ZONAL BENCH AT BANGLORE  
BENCH – DIVISION BENCH  
COURT- 1

Date of hearing: 08.08.2012

Date of decision:08.08.2012

**Miscellaneous Application No. 447/2012**  
**Stay Application No. 1502/2011**  
**Service Tax Appeal No. 2446 of 2012**

**Shri. G. P. Josekuttan,**  
**Versus**  
**Commissioner of Central Excise, Cochin.**

[Arising out of Order-in-Original No. 53/2011/ST dated 27.04.2011, passed by the  
Commissioner of Central Excise, Customs & Service Tax Cochin]

For approval and signature:

**Hon'ble Shri P. G. Chacko, Member (Judicial)**  
**Hon'ble Shri M. Veeraiyan, Member (Technical)**

Shri. G. P. Josekuttan,  
9B, Link Heights,  
Panampilly Nagar,  
Kochi – 682036

Appellant

Versus

Commissioner of Central Excise,  
Cochin.

Respondent

Appearance:

Mr. Unnikrishnan, Consultant for appellant

Mr. Ganesh Havanur, Additional Commissioner (AR) for respondent

**CORAM**

**Hon'ble Shri P. G. Chacko, Member (Judicial)**  
**Hon'ble Shri M. Veeraiyan, Member (Technical)**

MISC ORDER NO : 642/2012 dated 08.8.2012  
FINAL ORDER NO : 576 /2012 dated 08.8.2012  
STAY ORDER NO : 1440/2012 dated 08.8.2012

**“The plea of the learned consultant for transmitting the appeal to the Commissioner (Appeals) or for issuing other directions to the Commissioner (Appeals) cannot be accepted as we do not have equitable powers. Such a course of action can invite more appeals of this nature from ill-advised parties. In any case, such a course of action will not be in keeping with this Tribunal’s tradition of deciding matters in accordance with the relevant provisions of law. The statute is supreme and its provisions have to be given effect to in all circumstances. It is our view that we should not deviate from this basic line.” [Para 5]**

**Order per: P. G. Chacko**

1. The stay application filed by the appellant seeks waiver of pre-deposit and stay of recovery in respect of the adjudged dues. When this application came up before this Bench on 3.7.12, a preliminary objection was raised by the learned Additional Commissioner (AR) who pointed out that the impugned order was passed by the Joint Commissioner and an appeal against it should have been preferred to the Commissioner (Appeals). This objection was intimated to the appellant, where upon he filed the miscellaneous application praying for passing appropriate orders.
2. Today, the learned consultant for the appellant reiterates the above prayer. However, it is his submission that the appeal against the Joint Commissioner’s order happened to be filed with this Tribunal in terms of the ‘preamble’ to that order, which specifically stated that any appeal against that order should be preferred to this Tribunal. The learned consultant further points out that, after filing of this appeal, the appellant realized his mistake and filed an appeal with the Commissioner (Appeals) on 22.6.2012 but this appeal was returned on 25.6.2012 on the ground that the delay of more than one year involved in the filing of the appeal was not condonable by the Commissioner (Appeals). The learned Addl. Commissioner (AR) points out that a corrigendum to the ‘preamble’ to the order-in-original was issued to the appellant within 13 days from the date of dispatch of the order and that this corrigendum was duly acknowledge by the appellant on 2.6.2011. The submissions made by the learned consultant with regard to the filing of appeal with the Commissioner (Appeals) and its return and also the submissions made by the learned Addl. Commissioner (AR) regarding the issue of corrigendum are evidenced by the respective documents presented to us today.
3. There is a fervent plea from the learned consultant for the appellant that the appeal before us be transmitted to the learned Commissioner (Appeals) in the interest of justice. This plea has been vehemently opposed. At this stage, without prejudice to his earlier submissions, the learned consultant prays for a direction to the learned Commissioner (Appeals) to accept the party’s appeal after condoning the delay in the above facts and circumstances.
4. We have given careful consideration to the submissions of both sides. The undisputed facts are that the order-in-original was received by the appellant on

23.5.2011, that it was accompanied by a 'preamble' which stated to the effect that the aggrieved party may appeal to the CESTAT, South Zonal Bench, Bangalore, that the present appeal and stay application were filed by the party on 12.10.2011, that, after filing this appeal, the appellant filed an appeal against the order-in-original with the Commissioner (Appeals) on 22.6.12 and the same was returned as time barred on 25.6.12, that, after dispatch of the order-in-original with its defective preamble to the party, the original authority issued a corrigendum within 13 days correcting its advice to the party by stating that an appeal against the order would lie to the Commissioner (Appeals), that this 'corrected preamble' issued by the original authority was received by the party on 2.6.2011 but this fact was not disclosed anywhere in the memorandum of the appeal, stay application or miscellaneous application. It is also evident that the appellant had statutory period of three months from the date of receipt of the order-in-original to prefer an appeal to the Commissioner (Appeals) under Section 85 of the Finance Act, 1994. Even after expiry of this period, the appellant could have filed appeal within a further period of three months with a request to the Commissioner (Appeals) for Condonation of the delay on sufficient grounds. Unfortunately, the present appeal was filed with this Tribunal at a time when much time was left for appellant to prefer an appeal to the Commissioner (Appeals). According to the tenor of submissions made by the learned consultant, the appellant was ill advised. Seemingly, he blindly chose to go by the defective preamble to the order-in-original rather than by the provisions of the statute. Even after receipt of the corrected preamble to the order-in-original, the appellant did not care to take corrective measures. He proceeded to file the present appeal. At the same time, we have also found palpable carelessness on the part of the Registry which ought to have noted that an appeal against a Joint Commissioner's order was not appealable to this Tribunal and accordingly, should have returned the memorandum of the appeal and connected papers forthwith. Had the Registry done so, perhaps, the appellant would have taken corrective action and sought justice from the Commissioner (Appeals). Unfortunately, in this case, this also did not come through. In this connection, it is noteworthy that the Joint Commissioner was cited as respondent in the appeal and the designation of the authority passing the impugned order was shown as Joint Commissioner. The very Cause Title of the memorandum of the appeal was enough for the Registry to return the appeal to the appellant. In the totality of all these facts and circumstances, the appellant is still before the Tribunal with an appeal which is not maintainable.

5. Nevertheless, the plea of the learned consultant for transmitting the appeal to the Commissioner (Appeals) or for issuing other directions to the Commissioner (Appeals) cannot be accepted as we do not have equitable powers. Such a course of action can invite more appeals of this nature from ill-advised parties. In any case, such a course of action will not be in keeping with this Tribunal's tradition of deciding matters in accordance with the relevant provisions of law. The statute is supreme and its provisions have to be given effect to in all circumstances. It is our view that we should not deviate from this basic line.

6. In the above view of the matter, we have no option but to dismiss this appeal as not maintainable. Consequently, the two applications also get dismissed.

(Pronounced and dictated in open court)