

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
NEW DELHI**

PRINCIPAL BENCH - COURT NO. 1

**Service Tax Appeal No. 51592 of 2016**

**M/s Diamond Construction** ..... **Appellant**  
Near Paras STD, Parasia  
District – Chhindwara - 480 441 (M.P.)

Versus

**Commissioner of Customs, Central Excise & Service Tax** ..... **Respondent**  
Jabalpur (M.P.)

**With**

**Service Tax Appeal No. 51593 of 2016**

(Arising out of common Order-in-Appeal No. BHO-EXCUS-002-APP-333-334-15-16 dated 11.02.2006 passed by the Commissioner (Appeal), Central Excise & Service Tax, Raipur)

**M/s Sai Shree Construction** ..... **Appellant**  
Near LIC Office  
Parasia, District – Chhindwara - 480441 (M.P.)

Versus

**Commissioner of Customs, Central Excise & Service Tax** ..... **Respondent**  
Jabalpur (M.P.)

**APPEARANCE:**

Shri Bipin Garg & Sh. Himanshu Bansal, Advocates for the Appellant  
Shri R. K. Manjhi, Authorised Representative for the Respondent

**CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT  
HON'BLE MR. V. PADMANABHAN, MEMBER (TECHNICAL)**

**FINAL ORDER NO. 50340 – 50341/2019**

Date of hearing/ decision : 19.02.2019

**PER JUSTICE DILIP GUPTA :**

These two appeals seek to assail the order dated 11 February, 2016 by which the Commissioner (Appeals) Customs, Central Excise & Service Tax, Raipur has dismissed the appeals as having been filed beyond the period of two months and the extended period of one month from the date of communication of the Order.

2. It would be appropriate to first state the necessary facts. The Order was passed by the Additional Commissioner of Customs & Central Excise, Bhopal on 30 August, 2013. This order was admittedly served upon the appellant on 20 September, 2013. Section 85(3A) of the Finance Act, 1994 provides that an appeal can be filed before the Commissioner (Appeals) within two months from the date of receipt of the decision or order of such 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.

3. In the instant case the order was served upon the appellant on 20 September, 2013 but the appeal was presented before the Commissioner (Appeals) on 05 February, 2016 after a period of almost two years and five months. It is, therefore,

clear that the appeal was not filed within a period of two months or even within the extended period of one month. The Commissioner (Appeals), after placing reliance upon the decision of the Supreme Court in **Singh Enterprises vs. Commissioner of C. Ex., Jamshedpur** reported in **2008 (221) ELT 163 (S.C.)** dismissed the appeal for this reason.

4. It is contended by the learned Counsel for the appellant that there was good and sufficient cause that prevented the appellant from preferring the appeal within the period stipulated period provided for in Section 85(3A) of the Finance Act and for this purpose an affidavit of Advocate has also been filed before the Tribunal on 15 February, 2019. It is stated in the affidavit that the learned Counsel was under the impression that his office had filed the appeal against the order dated 30 August, 2013, but he subsequently came to know that the appeal was not filed and the appeal was filed when he conveyed this fact to the appellant. Learned Counsel for the appellant submitted that the delay should be condoned and in support of his submission he has placed reliance upon a decision rendered by a learned member of the Bench of the Tribunal at Mumbai in **Uapp India automotive Systems Pvt. Ltd., vs. CCE&ST, Pune-I** reported in **2019 (365) ELT 109 (Tri. Mumbai)** and also on the decision of the Supreme Court in **M. P. Steel Corporation vs. Commissioner of Central Excise** reported in **2015 (319) ELT 373 (S.C.)**. Learned Counsel, therefore, vehemently urged that the delay in filing the appeal should be condoned.

5. Learned Representative of the Department has, however, placed reliance on the decision of the Supreme Court in **Singh Enterprises** and has contended that in view of the provisions of Section 85(3A) of the Act, the Tribunal, at best can condone the delay of one month after the expiry of the statutory period of two months. It is his submission that the Division Bench of the Tribunal at Mumbai subsequently in Appeal No. ST/89394/2018 (**Muktabai Govind Pawar vs. CC,CE&ST, Aurangabad**) held that the Commissioner (Appeals) cannot condone the delay in filing the appeal after the expiry of the extended period of one month under the proviso to sub section (3A) of Section 85 of the Act. Learned Representative of the Department has also placed before the Tribunal the decision of the other Benches of the Tribunal and submitted that the decision of the Supreme Court in **M. P. Steel Steel Corporation** would not come to the aid of the appellant.

6. We have considered the submissions advanced by both the parties.

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 05 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**.

10. The provision of Section 35 of the Central Excise Act, 1944 relating to appeals before Commissioner (Appeals) had come up for consideration before the Supreme Court in **Singh Enterprises**. Section 35 of the Central Excise Act, 1944 provides that any person aggrieved by any decision or order passed under the Act, 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. The provisions of Section 35 of the Central Excise Act, 1944 are paramateria with Section 85(3A) of the Finance Act. The Supreme Court held that the period upto which the prayer for condonation can be accepted is limited by the proviso to sub section (1) of Section 35 of the Act and the position is crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of thirty days after the expiry period of sixty days. In other words, the appellate authority can entertain the appeal by condoning the delay only upto 30 days beyond the normal period for preferring the appeal, which is 60 days. The Commissioner (Appeals) was,

therefore, justified in dismissing the appeal on the ground of limitation.

11. The decision of a learned member of the Mumbai Bench of the Tribunal in **Yapp India Automotive Systems Private Limited** seeks to distinguish the decision of the Supreme Court in **Singh Enterprises** by merely observing that the appeal that was filed before the Supreme Court was against an order of the High Court dismissing a Writ Petition under Article 226 of the Constitution and so the principles would not be applicable when the jurisdiction of the Tribunal is invoked. It is for this reason that the learned member observed that the Tribunal cannot be divested of its power to condone the delay for a period even beyond the extended period of one month.

12. We express our inability to accept this conclusion drawn by the learned member as the artificial distinction drawn by the learned member is without any basis. The decision in **Yapp India Automotive Systems Private Limited** is completely contrary to the law laid down by the Supreme Court. The principle of law laid down by the Supreme Court is binding on all.

13. The decision of the Supreme Court in **M. P. Steel Corporation** will not come to the aid of the appellant as it is in connection with Section 14 of the Limitation Act, 1963.

14. The Division Bench of the Mumbai Tribunal in **Muktabai Govind Pawar** held that the Tribunal would have no power to condone the delay after the expiry of the extended period of one month.

15. The Commissioner (Appeals), therefore, did not commit any illegality in dismissing the appeal. The present appeal is, therefore, dismissed.

(Dictated & pronounced in the open Court)

**(JUSTICE DILIP GUPTA)**  
**PRESIDENT**

**(V. PADMANABHAN)**  
**MEMBER (TECHNICAL)**

Pant