IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CWP No.21075 of 2012
Date of Decision: October 18, 2012

M/s Greenview Land and Buildcon Ltd.

...Petitioner

Versus

The Union of India and others

....Respondents

CORAM: HON'BLE MR.JUSTICE SATISH KUMAR MITTAL
HON'BLE MR.JUSTICE INDERJIT SINGH

Present: Mr. Sandeep Goyal, Advocate,
for the petitioner.

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SATISH KUMAR MITTAL, J.

The petitioner company has filed the instant writ petition for quashing of the order dated 22.06.2012 (Annexure P15) passed by the Customs Excise & Service Tax Appellate Tribunal, Principal Bench, New Delhi.

In the present case, the petitioner company is engaged in the business of development and construction of residential complexes at various locations at Zirakpur (Mohali) in Punjab. The activity of the petitioner company is taxable service under the category of construction of complex services which have been made liable to service tax from 16.06.2005 vide notification dated 07.06.2005. As per the allegation of the revenue, the petitioner company provided the said services during the period from 1.7.2006 to 30.9.2007 without obtaining the requisite registration with the Department of Service Tax and failed to pay service tax amounting to ₹ 19,10,774/- in respect of value of ₹ 1,56,10,902/- received from the said

services provided by them during the relevant period.

After issuing a show cause notice to the petitioner company, to which reply was filed, the Joint Commissioner, Central Excise and Service Tax vide order dated 2.1.2008 (Annexure P6) imposed a tax of ₹ 19,10,774/- along with penalty of equivalent amount under Section 78 of the Finance Act, 1994. Copy of the said order was sent to the petitioner company by registered post on 2.1.2008. Though against the said order the appeal could have been filed within 60 days of the receipt of the said order, yet the petitioner company did not file any appeal against the said order on the pretext that no such order was ever communicated to the petitioner company. It was alleged that when the petitioner company received the letter dated 1.8.2008 from the Superintendent, Central Excise and Service Tax, Range II with regard to payment of the service tax and penalty, the petitioner company came to know that such an order was passed against it. Consequently, on 8.9.2008 the petitioner company filed an appeal before the Commissioner (Appeals), Customs & Central Excise, Chandigarh along with stay application.

The Appellate Authority vide its order dated 23.1.2009 (Annexure P7) dismissed the appeal on the ground of limitation because the same was not filed within the statutory period of sixty days from the date of communication of the order dated 2.1.2008 to the petitioner company as provided under Section 35 of the Central Excise Act, 1944 (hereinafter referred to as `the Act'), and even much beyond the condonable period of 30 days from the date of expiry of the statutory period of 60 days. It has been found as a fact that the order dated 2.1.2008 was sent by registered post, which was deemed to have been received by the petitioner company in view

of Section 37C of the Act.

Feeling aggrieved against the aforesaid order, the petitioner company filed second appeal before the Appellate Tribunal where the petitioner company filed the affidavit of the Director of the company stating that the petitioner company did not receive the order dated 2.1.2008 any time before 14.8.2008. In response to that, the revenue had also filed various documents indicating due service of the said order to the petitioner company. The Tribunal vide order dated 18.4.2011 (Annexure P12), after considering all the material, remanded the matter back to the 1st Appellate Authority to re-consider its earlier order in light of those evidence. The Commissioner of Appeals, Central Excise (1st Appellate Authority) vide order dated 4.1.2012 (Annexure P13), after considering the matter, came to the conclusion that the order dated 2.1.2008 was sent by registered post and not only the dispatch register showing the dispatch of the said letter had been produced but certificate from the Postal Department about the receipt of the said letter was also proved on record which clearly mentioned that the order dated 2.1.2008 was delivered to the addressee on 3.1.2008. Thus, from those record produced by the revenue it was held that in view of Section 37C(1)(a) of the Act the said order was deemed to have been served and it was for the assessee to rebut the presumption which it failed to discharge. Therefore, in view of the said finding of fact, it was held that the appeal filed by the petitioner company on 8.9.2008 against the order dated 2.1.2008 had been filed beyond the condonable period of 30 days from the date of statutory period of 60 days. Therefore, the said delay could not be condoned and the appeal was liable to be dismissed.

The said order of the Appellate Authority has been confirmed

by the Appellate Tribunal vide impugned order dated 30.5.2012. Against the said order, the present petition has been filed.

After hearing the learned counsel for the petitioner and going through the aforesaid orders, we do not find any ground to interfere in the finding of fact recorded by the 1st Appellate Authority as well as the Tribunal. In view of the documentary evidence, both the Appellate Authorities have rightly come to the conclusion that the order dated 2.1.2008 was dispatched by registered post and the same was delivered to the petitioner company on 3.1.2008. The delivery of the said order has not only been presumed but it has also been proved from the certificate of the Postal Department duly indicating that the said order was delivered to the assessee. It has been found as a fact that the address on which the said order was sent is admittedly correct and, therefore, the Appellate Authorities were fully justified that in view of Section 37C of the Act it is to be presumed that the said order was duly delivered to the petitioner company. The presumption under Section 37C of the Act is rebuttable, but to rebut the same, the petitioner company did not lead any cogent evidence. Merely an affidavit of the Director of the petitioner company had been filed again stating that they had not received the order dated 2.1.2008 any time before 14.8.2008. Thus, it cannot be taken as an evidence to rebut the evidence led by the revenue department which clearly established that the registered letter through which the order dated 2.1.2008 was sent was duly delivered to the petitioner company on 3.1.2008. In this regard, the Tribunal has relied upon the judgment of this Court in the case of **CCE, Ludhiana Vs. Mohan Bottling Co.(P) Ltd.,** 2010 (255) ELT 321. We do not find any illegality in the order passed by the Appellate Authority.

As far as the second contention of the learned counsel for the petitioner that the delay in filing the appeal can be condoned by this Court in exercise of writ jurisdiction, cannot be accepted. Undisputedly, against the order dated 2.1.2008 an appeal could have been filed by the petitioner company within 60 days from the date of communication of the said order as provided under Section 35 of the Act, but the same was filed much beyond the condonable period of 30 days from the date of expiry of the statutory period of 60 days as it has been provided in Section 35 of the Act, that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the prescribed period of 60 days, he may allow it to be presented within a further period of 30 days. Beyond the condonable period of 30 days the Appellate Authority has no power to condone the delay. In this regard, the 1st Appellate Authority has relied upon the decision of the Supreme Court in the case of **Singh Enterprises Vs. CCE,** 2008 (221) ELT 163 (SC), wherein it was held as under:-

> "8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period up to which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Indian Limitation Act, 1963 (in short the `Limitation Act') can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to

be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of the Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only up to 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days period."

Thus, in the facts and circumstances of the case, particularly when it was proved that the order dated 2.1.2008 was delivered to the petitioner company on 3.1.2008 and thereafter even a false stand was taken that the same was not delivered, we do not find any illegality in the order passed by the 1st Appellate Authority declining to condone the delay and to hear the case on merits and the said order has been rightly upheld by the Appellate Tribunal.

No merits. Dismissed.

(SATISH KUMAR MITTAL)
JUDGE

October 18, 2012
vkg

(INDERJIT SINGH)
JUDGE