

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

PRINCIPAL BENCH – COURT NO. I

EXCISE APPEAL No. 51046 OF 2020

(Arising out of Order-in-Appeal No. 32(SM)CE/JPR/12020 dated June 18, 2020 passed by the Commissioner (Appeals), Central Excise & Service Tax, Jaipur)

M/s Shree Cement Limited

SP 3-II, A-1, RIICO Industrial Area
Khuskhera, Bhiwadi
Distt. Alwar (Rajasthan)

...Appellant

versus

Commissioner Central Excise & CGST

New Central Revenue Building
Statue Circle
Jaipur – 302 005

...Respondent

APPEARANCE:

Shri M.P. Devnath, Advocate for the Appellant
Shri O.P. Bisht, Authorised Representative of the Respondent

CORAM:

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

Date of Hearing/Decision: 22.12.2022

FINAL ORDER NO. 51227/2022

JUSTICE DILIP GUPTA:

This appeal seeks to assail the order dated June 18, 2020, by which the appeal filed by M/s Shree Cement Limited¹ has been dismissed by the Commissioner (Appeals) solely for the reason that it was not filed within the stipulated period provided under section 35(1) of the Central Excise Act, 1944².

2. It transpires from the record that an order was passed by the Assistant Commissioner in January, 2019 (we are specifically

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1. the appellant
 2. the Excise Act

mentioning this fact because the order does not indicate the actual date and only states "**Dated: .01.2019**"), though the parties state that the order was passed on January 18, 2019. Against this order, which confirmed the demand of central excise duty with interest and penalty, an appeal was filed by the appellant before the Commissioner (Appeals) on May 27, 2019. In Form EA-1 against Serial No. 4, the appellant specifically stated that the date of communication of the order appealed against was March 27, 2019.

3. An appeal can be filed before the Commissioner (Appeals) under section 35(1) of the Excise Act within sixty days from the date of the communication of such order. The proviso, however, stipulates that if the Commissioner (Appeals) is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within sixty days, allow it to be presented within a further period of thirty days.

4. The Commissioner (Appeals) has calculated the initial period of sixty days from January 18, 2019 and has come to a conclusion that the appeal should be dismissed on the ground of limitation alone as it was filed after two months and ten days, which is not only beyond the normal period but also beyond the extended period of limitation. In this connection, the Commissioner (Appeals) had sought information from the Assistant Commissioner, who by letter dated February 26, 2020, intimated that the said order dated January 18, 2019 was despatched to the appellant on the same day and copy of the relevant despatch register was also submitted to the Commissioner (Appeals). The Commissioner (Appeals) noted that the Department had submitted sufficient evidence of the despatch of the impugned order dated January 18, 2019 but the appellant had not produced any

evidence to prove that the impugned order was not received by it. The relevant portion of the order passed by the Commissioner (Appeals) is reproduced below :

“6. In this regard on going through the FORM No. E.A. 1 filed by the appellant, it is observed that at S.No. 4 against '**Date of Communication of the order appealed against**' it has been mentioned as '**27.03.2019 (Certified copy as original copy not delivered)**'. Further on going through the contents of the appeal memo and documents attached with appeal memo, I do not find any evidence furnished by the appellant with regard to any correspondence with department regarding non receipt of the Order-in-Original or request for issuance of any certified copy of the order.....

7. **The Assistant Commissioner, CGST Division-D, Bhiwadi was also requested to furnish evidence of factual position regarding issue and communication of the Order-in-Original in the instant case.** In this regard, **I find that the Assistant Commissioner, CGST Division-D, Bhiwadi vide his letter C.No. V(Misc.)05/R-XIX/BHD-D/19-20 dated 26.02.2020 has intimated that the said Order-in-Original dated 18.01.2019 of M/s Shree Cement Ltd. was dispatched on the same day.** Relevant copy of the dispatch Register was also submitted along with the letter dated 26.02.2020, which show the dispatch of the said Order-in-Original on 18.01.2019 itself. **Thus, I find that the department has submitted sufficient evidence of the dispatch of the impugned order on 18.01.2019 itself, whereas the appellant has not produced any evidence proving that the said impugned order was not received by them,** since no correspondence in this regard has been produced by the appellant till date. Mere mentioning in FORM EA-1 that the original order was not delivered do not suffice the requirement in this regard.

8. Despite being asked to furnish evidence of said non receipt of the impugned order, I find that the appellant has not produced any evidence of non receipt of the original order and also not furnished any correspondence with the department evidencing that the copy of the impugned order has been obtained by them afterwards from the concerned authorities. In this regard on going through the annexure attached with letter of the concerned authorities it quite evident that said order in original was duly dispatched to them on 18.01.2019 itself.

9. Since the appeal memorandum in the instant case has been filed beyond the stipulated period of two months as prescribed under Section 35 of the Central Excise Act, 1944, I hold that the appeal in the instant case is liable to be rejected on this itself.”

(emphasis supplied)

5. Shri M.P. Devnath, learned counsel for the appellant submitted that the Commissioner (Appeals) completely failed to appreciate the provisions of section 35(1) of the Excise Act and also the provisions of section 37C of the Excise Act. Elaborating this submission, learned counsel pointed out that section 35(1) of the Excise Act clearly provides that any person aggrieved by any decision or order passed under the Excise Act by a Central Excise Officer may appeal to the Commissioner (Appeals) within sixty days from the date of the communication of such decision or order and, therefore, what was actually required to be ascertained by the Commissioner (Appeals) for the purpose of limitation was the date on which the order was served upon the appellant and not the date on which the order was despatched. Learned counsel for the appellant also placed reliance upon the provisions of section 37C of the Excise Act to contend that

every decision or order can be served only in accordance with the provisions of sub-section (1) of section 37C read with sub-section (2). Sub-section (2) provides that every decision or order passed shall be deemed to have been served on the date on which the decision or order is tendered or delivered by post or a copy thereof is affixed in the manner provided in sub-section (1). Learned counsel, therefore, submitted that if the date of receipt of the impugned order is taken as March 27, 2019, the appeal would be within the period of limitation.

6. Learned authorized representative appearing for the Department has, however, supported the impugned order.

7. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the Department have been considered.

8. In order to appreciate the submissions, it would be appropriate to reproduce section 35(1) of the Excise Act and the same is as follows:

“35. Appeals to Commissioner (Appeals) —

(1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer lower in rank than a Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals) [hereafter in this Chapter referred to as 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.”

9. It would also be appropriate to reproduce section 37C of the Excise Act and the same is as under :

“37C. Service of decisions, orders, summons, etc.—

(1) Any decision or order passed or any summons or notice issued under this Act or the rules made thereunder, shall be served,—

(a) by tendering the decision, order, summons or notice, or sending it by registered post with acknowledgement due, to the person for whom it is intended or his authorised agent, if any;

(b) if the decision, order, summons or notice cannot be served in the manner provided in clause (a), by affixing a copy thereof, to some conspicuous part of the factory or warehouse or other place of business or usual place of residence of the person for whom such decision, order, summons or notice, as the case may be, is intended;

(c) if the decision, order, summons or notice cannot be served in the manner provided in clauses (a) and (b), by affixing a copy thereof on the notice board of the officer or authority who or which passed such decision or order or issued such summons or notice.

(2) Every decision or order passed or any summons or notice issued under this Act or the rules made thereunder, shall be deemed to have been served on the date on which the decision, order, summons or notice is tendered or delivered by post or a copy thereof is affixed in the manner provided in sub-section (1).”

10. It is not in dispute that the date of the order passed by the Assistant Commissioner, which order had been assailed before the Commissioner (Appeals), is January 18, 2019. It is also not in dispute that in Form EA-1 the appellant had specifically stated that the copy of the order was actually served upon the appellant on March 27, 2019. The Commissioner (Appeals) had sought verification from the Office of the Assistant Commissioner regarding the date on

which the order was served upon the appellant and in this connection the Office of the Assistant Commissioner informed the Commissioner (Appeals) that the order was despatched to the appellant on January 18, 2019 and in support thereof a copy of the relevant page of the despatched register was submitted. In our opinion, this was not relevant for the purpose of determination of the period of limitation contemplated under section 35(1) of the Excise Act. What was necessary to be ascertained by the Commissioner (Appeals) for the purpose of limitation under section 35(1) of the Excise Act was the date on which the order was actually served upon the appellant. What is also important to notice is that the mode by which the order was communicated has also not been mentioned nor noticed by the Commissioner (Appeals), leave alone the date on which it was received by the appellant.

11. In fact, the burden was cast by the Commissioner (Appeals) upon the appellant to prove that the order was not received by the appellant since it had been despatched from the Office of the Assistant Commissioner, whereas, it was for the Commissioner (Appeals) to ascertain the date on which the order that was despatched on January 18, 2019 was actually served upon the appellant in order to controvert the submission of the appellant that the order was received only on March 27, 2019.

12. In this view of the matter, when the Department failed to provide any evidence to controvert the submission of the appellant that the order was actually received by the appellant only on March 27, 2019, the appeal shall be deemed to have been filed within the stipulated period of sixty days as it was filed on May 27, 2019. The

order of the Commissioner (Appeals) rejecting the appeal on the ground of limitation cannot, therefore, be sustained.

13. Before parting with this case, we deem it appropriate to mention certain facts. What transpires from the order of the Assistant Commissioner is that even the date on which the order was passed has not been mentioned either at the start of the order or where the Assistant Commissioner has signed the order. This is not the only case in which this fact has come to our notice, for in many earlier orders, it was also noticed that the adjudicating authority or the appellate authority had not indicated the date of the order. This is a fact which needs to be brought to the notice of the Adjudicating Officers so that in future the date on which the order is passed is specifically mentioned in the order. We would also like to mention here that for the purpose of determination of the limitation period, the Department relies upon the date of despatch of the order, whereas it should be the date on which such order were served, which is necessary. This date can be ascertained from the tracking report of Postal Department. The Department should, therefore, maintain the postal tracking report in each case for the purpose of determining the limitation period.

14. The order dated January 18, 2019 passed by the Commissioner (Appeals) is, accordingly, set aside and the appeal is allowed. Since the appeal is of the year 2020, it is expected that the Commissioner (Appeals) shall proceed to decide the appeal on merits expeditiously.

15. A copy of this order may be sent to the Central Board of Indirect Taxes and Customs so that the observations made in

paragraph 13 of this order are brought to the notice of the concerned adjudicating authorities.

(Dictated & pronounced in the open Court)

**(JUSTICE DILIP GUPTA)
PRESIDENT**

**(P.V. SUBBA RAO)
MEMBER (TECHNICAL)**

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