

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

FRIDAY, THE 29TH DAY OF JUNE 2012/8TH ASHADHA 1934

WP(C).No. 16408 of 2009 (U)

PETITIONER(S) :

**M/S.PENTAGON BUILDERS, 6/160,
NEAR MALABAR CHRISTIAN COLLEGE, KANNUR ROAD,
CALICUT - 573 011, REPRESENTED BY IT'S MANAGING PARTNER,
MR.DR.K.M.ASHIK.**

BY ADV. SMT.K.LATHA

RESPONDENT(S) :

- 1. GOVERNMENT OF INDIA,
REPRESENTED BY SUPERINTENDENT,
DEPARTMENT OF CENTRAL EXCISE AND SERVICE TAX DIVISION.**
- 2. THE ASSISTANT COMMISSIONER OF CENTRAL EXCISE,
OFFICE OF THE ASST.COMMISSIONER OF CENTRAL EXCISE,
KOZHIKODE DIVISION, HOUSEFED COMPLEX,
SASTRI NAGAR, ERANHIPALAM, CALICUT - 673 006.**
- 3. THE COMMISSIONER OF CENTRAL EXCISE (APPEALS),
OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE,
ERNAKULAM.**

**BY ADV. SRI.THOMAS MATHEW NELLIMOOTTIL, SC, CBEX
BY SRI.SHAIJ RAJ T.K., GOVERNMENT PLEADER**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
29-06-2012, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

AMV

APPENDIX

PETITIONER(S) EXHIBITS :

- P1. : COPY OF THE T.R.6 CHALLAN DATED 29.03.2007 OF RS.13,43,781/- (RUPEES THIRTEEN LAKHS FORTY THREE THOUSAND SEVEN HUNDRED AND EIGHTY ONE ONLY) PAID BY THE PETITIONER.**
- P1A. : COPY OF THIS REFUND APPLICATION IN FORM R CENTRAL EXCISE SERIES NO.2AA FILED BY THE PETITIONER BEFORE THE SECOND RESPONDENT DATED 28.05.2007 IS PRODUCED HERewith AND MARKED AS.**
- P2. : COPY OF THE NOTICE NO.C.NO.IV/10/32/07-ST/5974 DATED 30.08.2007 ISSUED BY THE SECOND RESPONDENT TO THE PETITIONER.**
- P2A. : COPY OF THE SHOW CAUSE NOTICE NO.118/2007 DATED 09.11.2007 ISSUED BY THE SECOND RESPONDENT TO THE PETITIONER.**
- P3. : COPY OF THE REPLY TO SHOW CAUSE NOTICE DATED 27TH NOVEMBER 2007 FILED BY THE PETITIONER BEFORE THE SECOND RESPONDENT.**
- P3A. : COPY OF THE LETTER DATED 24.07.2007 FILED BY THE PETITIONER BEFORE THE SECOND RESPONDENT.**
- P3B. : COPY OF THE LETTER FOR SUBMISSION OF AGREEMENTS AND SALE DEEDS DATED 23.10.2007 FILED BY THE PETITIONER BEFORE THE SECOND RESPONDENT.**
- P3C. : COPY OF THE POINTS OF ARGUMENTS DATED NIL FILED BY THE PETITIONER BEFORE THE SECOND RESPONDENT.**
- P4. : COPY OF THE ORDER IN ORIGINAL NO.20/2008 (S.T.) (REFUND) DATED 24.03.2008 ISSUED BY THE SECOND RESPONDENT TO THE PETITIONER.**
- P5. : COPY OF THE CIRCULAR ISSUED BY THE COMMISSIONER (SERVICE TAX), CBEC, NEW DELHI, DATED 29TH JANUARY 2009.**
- P6. : COPY OF THE JUDGMENT IN W.P.(C) NO.12019 OF 2008 DATED 2ND MARCH 2009 OF THE HON'BLE HIGH COURT OF KERALA.**

RESPONDENTS' EXHIBITS : NIL

/TRUE COPY/

P.A.TO JUDGE

AMV

P.R.RAMACHANDRA MENON, J

W.P. (C) NO. 16408 of 2009 (U)

Dated this the 29th day of June, 2012

JUDGMENT

The Petitioner, who is a building contractor, is virtually claiming the benefit flowing from Ext.P5 Circular dated 29.01.2009, with regard to the payment/refund of service tax. After considering the issue projected before the second respondent, the refund claim dated 28.05.2007 preferred by the petitioner was rejected as inadmissible vide Ext.P4 order, however, making it clear that the claimants was free to file a fresh refund claim, service tax was paid on any building unit which was not sold so far or being retained for personal use, on showing sufficient documentary evidence, subject of course within the parameters under Section 11B in particular, the limitation clause. The petitioner is challenging the said order and seeks to direct the third respondent, appellate authority, to admit the appeal

(proposed to be filed by the petitioner) against Ext.P4 after condoning the delay.

2. Heard, the Government Pleader as well, who submits that there is no merit or bonafides in the writ petition and that the statutory period for preferring appeal by virtue of Section 85 of the Finance Act, 1994 is already over. The maximum extent of delay that can be condoned by the concerned authority on satisfactory explanation, is for a further period of three months, which is also over. Once the statutory period, in this regard is over, it cannot be widened by this Court invoking the jurisdiction under Article 226; more so, in view of the law declared by a Division Bench of this Court in **Assistant Commissioner of Central Excise Vs. Krishna Prasad** in [2005 (4) KLT 947]. Reliance is also sought to be placed on the decisions rendered by the Apex Court, in this regard, as borne by **Singh Enterprises Vs. Commissioner of C.EX.**

**Jamshedpur [2008 (221) E.L.T.163 (S.C.)] and
Amchong Tea Estate Vs. Union of India [2010 (257)
E.L.T.3 (S.C.)].**

3. On going through the materials on record, it is seen that there is no case for the petitioner that the petitioner has preferred any appeal against Ext.P4. On the other hand, the lapse on the part of the petitioner stands conceded. The mandate under Section 85 of Finance Act, 1994 can't be given a go-bye. The statute specifically prescribes the appeal period, also conferring power upon the appellate authority to condone the delay, once satisfactory explanation is offered, to a maximum extent of 'three months'; beyond which, there is no power at all. This being the position, no writ of mandamus will lie to the third respondent to consider or act contrary to provisions of the statute. Question whether the discretionary jurisdiction of

the Court under Article 226 can be invoked, can only be answered in the negative, in view of the law declared by the Apex Court as per the decisions cited supra.

4. In the above circumstances, interference is declined. The writ petition fails and the same is dismissed accordingly.

Sd/-
P.R.RAMACHANDRA MENON,
JUDGE