

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CEA No. 11 of 2014 (O&M)

Date of Decision: 30.6.2014

Commissioner, Central Excise, Chandigarh-I

....Appellant

Versus

M/s Patiala Castings (P) Ltd., Mandi Gobindgarh

...Respondent.

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MR. JUSTICE JASPAL SINGH.**

PRESENT: Mr. Kamal Sehgal, Advocate for the appellant.

AJAY KUMAR MITTAL, J.

1. This appeal has been preferred by the revenue under Section 35G of the Central Excise Act, 1944 (in short "the Act") against the order dated 25.7.2013 (Annexure A-2) passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (hereinafter referred to as "the Tribunal") claiming the following substantial questions of law:-

- (i) Whether under the compounded levy scheme, the provisions of erstwhile Rule 96(ZO) permitting imposition of penalty equal to the amount of duty for delay in payment of duty, without any discretion and without having regard to the extent and circumstances of delay, could be held to be ultra vires of the Act and the

constitution of India?

- (ii) Whether mandatory penalty equal to amount of duty on the assessee in case of violation of the provisions of erstwhile Rule 96(ZO) of the Central Excise Rules, 1944 could be waived or reduced at the discretion of any authority having regard to the extent and circumstances of delay in payment of duty?
- (iii) Whether provisions of Section 38A of the Central Excise Act, 1944 inserted by Section 131 of the Finance Act, 2001 (validation of action taken has been provided for by virtue of Section 132 of the Finance Act, 2001) shall be applicable in respect of obligation & liabilities incurred under Rule 96ZO of erstwhile Central Excise Rules, 1944 before the same were omitted, notwithstanding the omission of Section 3A w.e.f. 11.05.2001?

2. Briefly stated, the facts necessary for adjudication of the present appeal as narrated therein are that the assessee is engaged in the business of manufacture of Non-alloy Steel Ingots. It was working under the compounded levy scheme under Section 3A of the Act and was required to pay monthly duty liability in two equal installments, 1st installment latest by 15th of the month and the 2nd installment latest by the last day of the month in terms of Rule 96ZO(3) of the Central Excise Rules, 1944 (in short "the Rules"). The assessee failed to discharge its

duty liability to the tune of ₹ 1,00,00,000/- within the prescribed time limit during the period from 1.7.1998 to 15.3.2000 and, therefore, was liable to pay a penalty equal to the outstanding amount of duty in terms of the Rules. Accordingly, the show cause notice for the recovery of penalty of ₹ 1,00,00,000/- equal to the outstanding amount of duty under Rule 96ZO(3) of the Rules was issued. The said show cause notice was duly replied. The adjudicating authority vide order dated 27.5.2005 (Annexure A-1) imposed penalty of ₹ 1,00,00,000/- equal to the outstanding amount of duty. Feeling aggrieved, the assessee filed an appeal before the Tribunal who vide order dated 25.7.2013 (Annexure A-2) allowed the appeal by relying on the judgment of this Court in **Bansal Alloys & Metals Pvt. Ltd. v. Union of India, 2010 (260) ELT 343 (P&H)**. Hence, the present appeal.

3. After hearing learned counsel for the appellant, we do not find any merit in the appeal. This Court in **Bansal Alloys & Metals Pvt. Ltd's case (supra)** while deciding the question of vires of Rules 96ZO(3), 96ZP and 96ZQ of the Rules held the said provisions to the extent of providing for mandatory minimum penalty without *mens rea* and without any element of discretion as excessive and unreasonable restriction on fundamental rights being arbitrary and were accordingly declared to be ultra vires the Act and the Constitution. It was recorded as under:-

15. Applying the above principles to the present situation, the provision for minimum mandatory penalty equal to the amount of duty even for slightest bonafide delay without any element of discretion is

beyond the purpose of legislation. The object of the rule is to safeguard the revenue against loss, if any. The penalty has been provided in addition to interest. Mere fact that without *mens rea*, an can be punished or a penalty could be imposed is not a blanket power without providing for any justification. In the Indian Constitutional scheme, power of legislature is circumscribed by fundamental rights. Judicial review of legislation is permissible on the ground of excessive restriction as against reasonable restriction which is also described as proportionality test.

Conclusion

16. For the above reasons, we hold that the impugned provision to the extent of providing for mandatory minimum penalty without any *mens rea* and without any element of discretion is excessive and unreasonable restriction on fundamental rights and is arbitrary. Moreover, exercise of such power by way of subordinate legislation is not permissible when rule making authority for levying penalty is limited to default “with intent to evade duty”.

17. The writ petitions of the assesseees are allowed and impugned provisions in Rules 96(ZO), (ZP) and (ZQ) permitting minimum penalty for delay in payment, without any discretion and without having regard to extent and circumstances for delay are held

to be ultravires the Act and the Constitution. In CWP No.8555 of 2010, penalty has been sustained by the Tribunal to the extent of 100% which will stand quashed without prejudice to any fresh order being passed in accordance with law. It is made clear that if penalty has attained finality as in CWP No.18099 of 2009 upto this Court, this order will not affect the finality of such order. The appeals filed by the revenue against the orders of the Tribunal sustaining penalty proportionate to the default will stand dismissed.”

4. Following the aforesaid judgment in **Bansal Alloys & Metals Pvt. Ltd's case (supra)**, Gujarat High Court in **Krishna Processors v. Union of India 2012 (280) ELT 186 (Guj.)** had recorded as under:-

“20.15 The above view taken by this court finds support in the decision of the Punjab & Haryana High Court in the case of Bansal Alloys and Metals Pvt. Ltd. v. Union of India (supra) wherein the court has held that the provision for minimum mandatory penalty equal to the amount of duty even for slightest *bona fide* delay without any element of discretion is beyond the purpose of legislation. The object of the rule is to safeguard the revenue against loss, if any. The penalty has been provided in addition to interest. Mere fact that without *mens rea*, an assessee can be punished or a penalty could be imposed is not a

blanket power without providing for any justification. The court, accordingly, held the provisions of Rules 96ZO, ZP and ZQ permitting penalty for delay in payment, without any discretion and without having regard to the extent and circumstances for delay to be *ultra vires* the Act and the Constitution.”

5. Himachal Pradesh High Court in **Shubh Timb Steel Ltd. v. Union of India 2012 (286) ELT 495 (HP)** in view of the judgment in **Bansal Alloys & Metals Pvt. Ltd's case (supra)** had held in the following terms:-

“7. This issue was discussed threadbare by a Division Bench of the Punjab and Haryana High Court in the judgment cited above wherein after discussing the entire law, the Court held as follows:-

15. Applying the above principles to the present situation, the provision for minimum mandatory penalty equal to the amount of duty even for slightest bonafide delay without any element of discretion is beyond the purpose of legislation. The object of the rule is to safeguard the revenue against loss, if any. The penalty has been provided in addition to interest. Mere fact that without *mens rea*, an can be punished or a penalty could be imposed is not a blanket power without providing for any justification. In the Indian Constitutional scheme, power of

legislature is circumscribed by fundamental rights. Judicial review of legislation is permissible on the ground of excessive restriction as against reasonable restriction which is also described as proportionality test.

16. For the above reasons, we hold that the impugned provision to the extent of providing for mandatory minimum penalty without any *mens rea* and without any element of discretion is excessive and unreasonable restriction on fundamental rights and is arbitrary. Moreover, exercise of such power by way of subordinate legislation is not permissible when rule making authority for levying penalty is limited to default “with intent to evade duty”.

8. We are in agreement with the aforesaid judgment. We feel that when Section 37, which is the rule making power, is clear that penalty can be imposed only when the assessee is guilty of intending to evade the payment of duty, the penalty cannot be imposed without such intention. Furthermore, even when intention may be there, the penalty must be reasonable and cannot, in all cases, be fixed at 100% of the excise leviable. Each case must be decided on its own facts and circumstances. There may be cases where the delay is only of a day

or two and the authorities must be given the discretion to impose the penalty which they feel is reasonable in the facts and circumstances of the case.”

6. In view of the above, no substantial question of law arises in this appeal. Consequently, the appeal is dismissed.

**(AJAY KUMAR MITTAL)
JUDGE**

June 30, 2014
gbs

**(JASPAL SINGH)
JUDGE**