

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CEA No. 77 of 2005 (O&M)

Date of Decision: 23.4.2014

Commissioner, Central Excise Commissionerate, Ludhiana

...Appellant

Versus

M/s K.C. Alloys & Steel Castings, Ludhiana

...Respondent.

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

PRESENT: Mr. Sunish Bindlish, Advocate for the appellant.

None for the respondent.

AJAY KUMAR MITTAL, J.

1. This order shall dispose of a bunch of three appeals bearing CEA Nos. 77 of 2005, 63 and 129 of 2006 as according to the learned counsel for the appellant (s), the issue involved in these cases is identical. For brevity, the facts are being extracted from CEA No. 77 of 2005.

2. 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 15.2.2005 (Annexure A-3) passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (hereinafter referred to as "the Tribunal"). In this appeal, the following substantial question of law has been framed:-

“Whether on the facts and circumstances of the case, the Tribunal was justified in reducing the penalty levied on the assessee under Rule 96ZO(3) (ii) of the Central Excise Rules, 1944?”

3. The assessee is engaged in the business of manufacture of Non-alloy Steel Ingots falling under Chapter 72 of the Schedule to the Central Excise Tariff Act, 1985 which were chargeable to duty upto 31.3.2000 in terms of Section 3A of the Act read with notification dated 1.8.1997. The assessee opted to pay duty on lump-sum basis in terms of Rule 96ZO(3) of the Central Excise Rules, 1944 (for brevity “the Rules”). The monthly duty liability of the assessee was determined at ₹ 5,00,000/-, which was to be discharged in two installments, first installment by 15th of the month and the second installment by the last day of the month. During the month of December, 1997, the assessee failed to discharge its full duty liability. Accordingly, the assessee was issued show cause notice for recovery of ₹ 1,12,903/- along with interest and penalty. The Adjudicating Authority vide order dated 27.8.2003 (Annexure A-1) confirmed the duty amounting to ₹ 1,12,903/- along with interest and also imposed penalty of an equal amount under Rule 96ZO (3) of the Rules. Feeling aggrieved, the assessee filed an appeal before the Commissioner (Appeals) who vide order dated 27.2.2004 (Annexure A-2) reduced the penalty to ₹ 30,000/-. Against the order dated 27.2.2004 (Annexure A-2), the revenue filed an appeal before the Tribunal. The Tribunal vide order dated 15.2.2005 (Annexure A-3) dismissed the appeal. Hence, the present appeal.

4. Learned counsel for the revenue submitted that though this Court has held the provisions of Rule 96ZO(3) of the Rules to be ultra

vires in **Bansal Alloys & Metals Pvt. Ltd. v. Union of India, 2010 (260) ELT 343 (P&H)** in so far as it did not confer any discretion on the authority to levy lesser penalty. According to the learned counsel, the Special Leave Petition filed against the said decision is pending in the Hon'ble Supreme Court.

5. After hearing learned counsel for the appellant(s), we do not find any merit in the appeal. This Court in **Bansal Alloys & Metals Pvt. Ltd's case (supra)** 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.”

6. Further, 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.)** decided the issue in favour of the assessee therein by observing 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.”

7. 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)** while deciding the issue in favour of the assessee 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.”

8. In view of the above, the substantial question of law is answered accordingly. Consequently, all the appeals are dismissed.

**(AJAY KUMAR MITTAL)
JUDGE**

April 23, 2014
gbs

**(JASPAL SINGH)
JUDGE**

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CEA No. 63 of 2006 (O&M)

Date of Decision: 23.4.2014

Commissioner of Central Excise Commissionerate, Ludhiana
...Appellant

Versus

M/s Shiv Durga Ispat, Ludhiana

...Respondent.

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

PRESENT: Mr. Sunish Bindlish, Advocate for the appellant.

None for the respondent.

AJAY KUMAR MITTAL, J.

Delay of 130 days in refiling the appeal is condoned.

For orders, see **CEA No. 77 of 2005 (Commissioner,
Central Excise Commissionerate, Ludhiana v. M/s K.C. Alloys &
Steel Castings, Ludhiana).**

**(AJAY KUMAR MITTAL)
JUDGE**

April 23, 2014
gbs

**(JASPAL SINGH)
JUDGE**

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CEA No. 129 of 2006 (O&M)

Date of Decision: 23.4.2014

Commissioner of Central Excise Commissionerate, Jalandhar
(Headquarters at Chandigarh)

...Appellant

Versus

M/s Karan Processors, Ajnala Road, Amritsar

...Respondent.

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

PRESENT: Mr. Sunish Bindlish, Advocate for the appellant.

None for the respondent.

AJAY KUMAR MITTAL, J.

Delay of 439 days in refiling the appeal is condoned.

For orders, see **CEA No. 77 of 2005 (Commissioner,
Central Excise Commissionerate, Ludhiana v. M/s K.C. Alloys &
Steel Castings, Ludhiana).**

**(AJAY KUMAR MITTAL)
JUDGE**

April 23, 2014
gbs

**(JASPAL SINGH)
JUDGE**