# IN THE HIGH COURT OF JUDICATURE AT BOMBAY BENCH AT AURANGABAD

## TAX APPEAL NO. 03 OF 2006

The Commissioner of Central Excise .. Appellant

**Versus**

M/s Kinetic Engineering Limited .. Respondent

Mrs. Kalpalata Patil Bharaswadkar, Advocate for the Appellant.
The Respondent Sole is served.

**CORAM : S. V. GANGAPURWALA AND A. I. S. CHEEMA, JJ.**
**DATE : 23RD APRIL, 2015.**

**PER COURT :**

. Mrs. Bharaswadkar Patil, the learned counsel for the appellant submits that, the Commissioner Appeals, so also Customs Excise and Service Tax Appellate Tribunal (for short "CESTAT") on erroneous approach have waived the penalty amounting to Rs. 3,41,205/-. According to the learned counsel, the CESTAT has not at all discussed any facts of the matter and only on the ground that the amount of duty was paid by the present respondent/appellant before issuance of show cause notice has held that, no penalty would be leviable. According to the learned counsel, the CESTAT relied upon its judgment of Larger Bench in a case of Commissioner of Central Excise Delhi-III (Gurgaon Vs. Machino Montell (I) Ltd., reported in 2004 (168)

ELT 466 (Tri.-LB). The learned counsel submits that, the judgment in the said case is no longer a good law in view of the judgment of the Apex Court in a case of **Union of India Vs. Dharamendra Textile Processors** reported in ***2008 (231) E.L.T. 3 (S.C.)*** The learned counsel also relies on the judgment of the Apex Court in a case of **Union of India Vs. Mrs. Rajastan Spinning Mills** reported in ***2009(238) E.L.T. 03 (S.C.)***.

2. We have considered the submissions canvassed by the learned counsel for the appellant.

3. This Court while admitting the appeal has framed the following substantial questions of law.

> "1. Whether Commissioner of Appeals and CESTAT were justified in waiving penalty u/S. 11-AC of Central Excise Act, 1944 because the amount of duty was paid before issuing Show Cause Notice?"

4. We have perused the judgment delivered by the Tribunal. The CESTAT while passing the impugned judgment has not at all discussed the facts on record. The judgment of the Tribunal reads as under :

> "1. Vide his impugned order, the Commissioner (Appeals) (dropped the demand of Rs. 1,46,543/- but confirmed the demand of Rs. 3,41,205/-. He also set

> aside the entire penalty imposed ont he respondents. Revenue's grievance is that in as much as part demand of Rs. 3,41,205/- was being confirmed, the Commissioner (Appeals) should not have set aside the entire amount of penalty. However, I find that the said amount of duty was paid the appellants before the issuance of the show cause notice in which case no penalty would be leviable as held by the Larger Bench of the Tribunal in the case of Commissioner of Central Excise Delhi-III (Gurgaon Vs. Machino Montell (I) Ltd., reported in 2004 (168) ELT 466 (Tri.-LB). As such no infirmity in the view taken by the Commissioner (Appeals), and the appeals filed by the revenue is rejected."

5. Only on the count that, the amount has been paid before issuance of show cause notice, it is held that, no penalty is leviable. However, no aspect of fraud has been considered. It was the duty of the tribunal to consider the said aspect, so also the judgments of the Apex Court.

6. In the light of the above, we pass the following order.

7. The impugned judgment is quashed and set aside. The matter is remitted back to the Tribunal for deciding the same afresh with regard to the penalty. The Tax Appeal accordingly is disposed of. No costs.

**[ A. I. S. CHEEMA, J. ]** **[ S. V. GANGAPURWALA, J. ]**

bsb/April 15