IN THE HIGH COURT OF BOMBAY AT GOA

EXCISE APPEAL NO. 25 OF 2008

Commissioner of Central Excise,
ICE House, Patto, Panaji,
Goa- 403 001. …. Appellant

Versus

Nazareth Alloys,
67-70, Sancoale Industrial Estate,
Zuarinagar, Goa. ….Respondent

Mr. J. F. Melo, Advocate for the appellant.

**CORAM : F. M. REIS &
K.L. WADANE, JJ.**

Dated : 07th January,2015

ORAL JUDGMENT : (Per F. M. Reis,J.)

Heard Mr. Melo, learned Counsel appearing on behalf of the appellant. None present for the respondent though served.

2. The above appeal came to be admitted by order dated 02/03/2009 on the following substantial questions of law:

> (1) Whether CESTAT was correct in upholding the order dated 22.09.2006 passed by Commissioner (Appeals), Goa, based upon the judgment of its Larger Bench in the case of Bhillai Conductors Pvt. Ltd. V/s. CCE, Raipur - 2000 (125) ELT 781 (Tribunal) which was distinguishable on facts and in law both ?

(2) Whether, the Commissioner (Appeals), Goa was correct in applying the ratio of decision in the case of Bhillai Conductors Pvt. Ltd. V/s. CCE, Raipur - 2000 (125) ELT 781 (Tribunal) ?

(3) Whether Rule 10 read with Rule 25(1)(b) of the Central Excise Rules, 2002 is a procedural law or a mandatory obligation cast upon a manufacture to maintain records of manufacture on day to day basis for safeguarding the interest of Revenue ?

3. We have extensively heard the learned Counsel for the appellant. Upon hearing the learned Counsel for the appellant the only point for consideration is whether the reliance placed by the CESTAT in the judgment of the Larger Bench in the case of "*Bhillai Conductors Pvt. Ltd. Vs. CCE, Raipur*" was justified in the facts and the circumstances of the case. Mr. Melo, learned Counsel for the appellant in the course of his submissions has pointed out that the observations that the said judgment no longer survived in view of the judgment passed by the Division Bench of this Court in the case reported in 2009 BCI 63 in the case of *"Commissioner of Central Excise & Customs Vs. Ram Aluminium P. Ltd."*. The learned Counsel has also brought to our notice the judgment of the Hon'ble Apex Court reported in 2008 (231) E.L.T. 3 (S.C.) in the case of *"Union of India Vs. Dharamendra Textile Processors"*.

4. We have examined the contentions of the learned Counsel and we find that in the impugned order passed by the Appellate Tribunal the main ground on which the confiscation was disallowed was because the appellants have failed to establish mense rea, which would entitle them to confiscate the goods. But, however, in the judgment of the Hon'ble Apex Court in the case of "*Dharmendra Textile Processors*" (supra), it has been observed at paragraphs 12 and 26 thus:-

> *12. The stand of learned counsel for the assessee is that the absence of specific reference to mens rea is a case of casus omissus. If the contention of learned counsel for the assessee is accepted that the use of the expression "assessee shall be liable" proves the existence of discretion, it would lead to a very absurd result. In fact in the same provision there is an expression used i.e. "liability to pay duty". It can by no stretch of imagination be said that the adjudicating authority has even a discretion to levy duty less than what is legally and statutorily leviable. Most of cases relied upon by learned counsel for the assessee had their foundation on Bharat Heavy Electrical's case (supra). As noted above, the same is based on concession and in any event did not indicate thecorrect position in law.*
>
> *26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on*

Clauses also the similar indication has been given.

5. Taking note of the said observations of the Hon'ble Apex Court, the ground on which the order was passed by CESTAT would not prima facie survive. As the respondents have failed to remain present and as the Tribunal has disposed of the appeal, only relying on the case of "***Bhillai Conductors Pvt. Ltd.***" (supra), we find it appropriate in the interest of justice to quash and set aside the order dated 06/09/2007 passed by the CESTAT and to direct the CESTAT to decide the Appeal No. E-399/2006 afresh after hearing the parties in accordance with law. All the contentions of the parties are left open. The substantial questions of law are answered accordingly.

6. The appeal stands disposed of accordingly.

K.L. WADANE, J. F. M. REIS,J.

mv