IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CEA No. 31 of 2015 (O&M)

Date of Decision: 14.9.2015

Commissioner, Central Excise Commissionerate, Chandigarh
....Appellant

Versus

M/s Dhiman Industries, Mandi Gobindgarh
...Respondent.

CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MR. JUSTICE RAMENDRA JAIN.

PRESENT: Mr. Sukhdev Sharma, 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 21.8.2014 (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 it was legally correct for the Hon'ble Tribunal to consider the challenge to the vires of Rule 5 of the Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997, in the light of the judgment of the Hon'ble Apex Court in the case of Commissioner of Central Excise, Chandigarh v. PEPSU Steel Rolling Mills reported as 2013(288) ELT 321 (SC), when such a challenge was not laid before the

Hon'ble Tribunal or the Hon'ble High Court or even Hon'ble Supreme Court by the said Party and whether on this very ground alone, the order of Hon'ble Tribunal is not liable to be set aside?

ii) Whether it is legally correct, fair and proper in holding that the interest is chargeable on delayed payment of duty as per the provisions of Rule 96ZP(3) of the Central Excise Rules, 1944 from the 11th day of the month succeeding the month in which the annual capacity of production was determined on final basis by the order of the Hon'ble Supreme Court whereas interest should have been charged under Rule 96ZP(3) from the date when the duty was payable as per Final Order dated 12.05.2000?

iii) Whether under the compounded levy scheme the provisions of erstwhile Rule 96ZP of Central Excise Rules, 1944 permitting imposition of penalty equal to the amount of duty for delay in payment of duty, without any discretion and without having regard to extent and circumstances of delay, could be held to be ultra vires of the Central Excise Act, 1944 and the Constitution of India?

iv) Whether mandatory penalty equal to the amount of duty on the assessee in case of violation of the provisions of erstwhile Rule 96ZP of the Central Excise Rules, 1944 could be waived or reduced at the discretion of the adjudicating authority having regard to extent and circumstances of delay in payment of duty?

v) Whether the provisions of Section 38A of the Central Excise Act, 1944 inserted vide Section 131 of the Finance Act, 2001 (Validation of the action taken has been provided by virtue of the Section 132 of the Finance Act, 2001) shall be applicable in respect of obligation and liabilities incurred under Rules 96ZO and 96ZP of the erstwhile Central Excise Rules, 1944 before the same were omitted, notwithstanding the omission of Section 3A w.e.f. 11.05.2001?

2. The assessee was working under the compounded levy scheme during September, 1997 to March 2000 and opted to discharge their duty liability under Rule 96ZP(3) of the Central Excise Rules, 1944 (for brevity "the Rules") read with Section 3A of the Act. They failed to discharge the duty liability according to the determined annual capacity vide order dated 12.5.2000 and filed an appeal before the Tribunal. The Tribunal vide order dated 5.1.2001 set aside the order and remanded the case back to the Commissioner for re-determination of annual capacity of production. The department filed an appeal before this Court against the order dated 5.1.2001 and this Court vide order dated 21.10.2003 dismissed the said appeal. Thereafter, the department filed Special Leave Petition before the Apex Court. The Apex Court vide order dated

6.7.2001 passed in Civil Appeal No. 8345 of 2004 set aside the order of the Tribunal and restored that of the Commissioner dated 12.5.2000 and also imposed a cost of ₹ 50,000/- upon the respondent. Pursuant thereto, the respondent deposited the duty but without interest and the penalty. The Assistant Commissioner vide letter dated 6.1.2012 directed the respondent to deposit the interest. The respondent filed a representation dated 19.1.2012 before the Commissioner for specific provisions of law for determination of the relevant date for the payment of interest who vide order dated 12.4.2012 (Annexure A-1) clarified that the interest is to be paid as per the provisions and the penalty was not payable as the unit had paid the duty which was payable under the third proviso to Rule 96ZP(3) of the Rules. Feeling aggrieved, the department filed an appeal before the Tribunal who vide order dated 21.8.2014 (Annexure A-2) dismissed the appeal in terms of 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. We have heard learned counsel for the appellant.

4. It is not disputed that the issue raised in this appeal stands concluded by the decision of this Court in **CEA No. 49 of 2012 [M/s Jai Bharat Maruti Ltd. v. Commissioner of Central Excise Delhi-III, Vanijya Nikunj, Udyog Vihar, Phase-Gurgaon (Haryana)]** decided on 12.9.2013 and **CEA No. 39 of 2013 [Commissioner of Central Excise, Chandigarh-II v. M/s Pee Iron & Steel Co. (P) Ltd., Derabassi]** decided on 4.3.2014, where following the earlier decision of this Court in **Bansal Alloys and Metals Pvt. Ltd.'s case (supra),** the appeal filed by the revenue was dismissed. 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.
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> **Conclusion**
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> 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 assessees 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."

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

(AJAY KUMAR MITTAL)
JUDGE

September 14, 2015 **(RAMENDRA JAIN)**
gbs **JUDGE**