IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CEA No. 55 of 2015 (O&M)

Date of Decision: 28.11.2015

Commissioner of Central Excise Commissionerate, Ludhiana

....Appellant

Versus

M/s Midland Alloys & Steel Pvt. Ltd., Ludhiana

...Respondent.

1. Whether the Reporters of the local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? Yes
3. Whether the judgment should be reported in the Digest?

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

PRESENT: None.

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 11.11.2013 (Annexure A-1) 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 96ZO 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 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 96ZO of the Central Excise Rules, 1944 could be waived or reduced in the discretion of the adjudicating authority having regard to extent and circumstances of delay in payment of duty?

2. A few facts necessary for adjudication of the present appeal as narrated therein may be noticed. The assessee was engaged in the manufacture of hot rolled products of non alloy steel. The respondent opted to avail the scheme described under Rule 96ZO(3) of the Central Excise Rules, 1944 (for brevity “the Rules”) w.e.f. 1.9.1997 for full and final discharge of duty liability under Section 3A of the Act. They were required to pay duty liability of ₹ 3,33,333/- per month w.e.f. 1.9.1997 in two equal installments, the first installment latest by the 15th day of each month and the second by the last day of each month, for having capacity of 2.00 Mts. of their Induction Furnace installed in the factory premises. They failed to discharge the duty liability amounting to ₹ 13,33,131/- ₹ 18,96,331/- and ₹ 15,96,107/-, respectively, during the period April, 1998 to September, 1998, October, 1998 to March, 1999 and April, 1999 to September, 1999. Accordingly, three show cause notices dated 26.10.1999, 13.10.1999 and 19.11.1999, respectively were issued to the

respondent for taking penal action under Rule 96ZO(3) of the Rules. The adjudicating authority vide order dated 20.3.2003 imposed penalty equal to the duty amount outstanding, i.e. ₹ 48,25,769/- on the respondent under Rule 96ZO(3) of the Rules. Feeling aggrieved, the assessee filed an appeal before the Commissioner (Appeals) who vide order dated 22.1.2004 directed the assessee to pay an amount of ₹ 12,00,000/- as pre-deposit for hearing of the appeal. However, the respondent failed to deposit the required amount and the appeal was dismissed in default. Against the order dated 22.1.2004, the assessee filed an appeal before this Court and this Court vide order dated 1.11.2004 remanded the matter back to the Commissioner (Appeals). Thereafter, the Commissioner (Appeals) vide order dated 30.3.2006 reduced the penalty to ₹ 25,00,000/-. Still dissatisfied, the assessee filed an appeal before the Tribunal against the imposition of penalty of ₹ 25,00,000/-. The Tribunal vide order dated 25.8.2006 further reduced the penalty to ₹ 25,000/-. Against the order dated 25.8.2006 the revenue filed an appeal before this Court which is pending adjudication. The revenue also filed an appeal before the Tribunal against the order dated 30.3.2006 passed by the Commissioner (Appeals) reducing the penalty to ₹ 25,00,000/-. The Tribunal vide order dated 11.11.2013 (Annexure A-1) 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. Though none has put in appearance on behalf of the appellant-revenue, however, from a perusal of the appeal, we find that the Tribunal had relied upon the decision of this Court in **Bansal Alloys & Metals Pvt. Ltd.'s case (supra)**. The issue was with regard to levy of

penalty which was reduced by the Commissioner (Appeals).

4. 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.

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 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. The Supreme Court in **Civil Appeal No. 4280 of 2007 (M/s. Shree Bhagwati Steel Rolling Mills v. Commissioner of Central Excise and another)** and other connected cases while delving into similar issue had upheld the view of this Court in **Bansal Alloys & Metals Pvt. Ltd's case (supra)** and struck down Rules 96ZO, 96ZP and 96ZQ. The Apex Court had observed as under:-

> "38. Under Section 37(3), the statute itself provides in all cases where no other penalty is provided by the Act that a penalty not exceeding Rs.5,000/- alone can be levied. Sub-Section(4) is even more telling. Even in cases where there is a clandestine removal of excisable goods, and cases where the assessee intends to evade payment of duty, the assessee is liable to a penalty not exceeding the duty leviable on such goods or Rs.10,000/- whichever is greater. It will be noticed that the Act is very circumspect in laying down penalty provisions. Penalties in given circumstances extend only to Rs.5,000/- and Rs.10,000/- which are small amounts. Further, even where clandestine removal and intent to evade duty are present, yet the authorities are given a discretion to levy a penalty higher than Rs.10,000/- but not exceeding the duty leviable. In a given case, therefore, even where there is willful intent to evade

duty and the duty amount comes to say a crore of rupees, the authorities can in the facts and circumstances of a given case, levy a penalty of say Rs.25,00,000/- or Rs.50,00,000/-. This being the position, it is clear that when contrasted with the provisions of the Central Excise Act itself, the penalty provisions contained in Rules 96ZO, 96 ZP and 96 ZQ are both arbitrary and excessive.

39. A penalty can only be levied by authority of statutory law, and Section 37 of the Act, as has been extracted above does not expressly authorize the Government to levy penalty higher than Rs.5,000/-. This further shows that imposition of a mandatory penalty equal to the amount of duty not being by statute would itself make rules 96ZO, 96 ZP and 96 ZQ without authority of law. We, therefore, uphold the contention of the assessees in all these cases and strike down rules 96ZO, 96ZP and 96 ZQ insofar as they impose a mandatory penalty equivalent to the amount of duty on the ground that these provisions are violative of Article 14, 19(1)(g) and are *ultra vires* the Central Excise Act."

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

7. There is a delay of 414 days in re-filing the appeal. CM No. 22213-CII of 2015 has been filed for condonation of 414 days' delay in re-filing the appeal. Since the appeal has been dismissed on merits, no

further orders are required to be passed in the application for condonation of delay in re-filing the appeal and the same is disposed of as such.

(AJAY KUMAR MITTAL)
JUDGE

November 28, 2015 **(RAMENDRA JAIN)**
gbs **JUDGE**