IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CEA No. 72 of 2015 (O&M)

Date of Decision: 8.2.2016

Commissioner of Central Excise, Central Excise Commissionerate, Chandigarh-II

....Appellant

Versus

M/s Pee Iron and Steel Company (P) Ltd., Bhankerpur, Dera Bassi

...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?
3. Whether the judgment should be reported in the Digest?

CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MRS. JUSTICE RAJ RAHUL GARG.

PRESENT: Mr. Kamal Sehgal, 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 orders dated 30.8.2005 (Annexure A-2) passed by the Commissioners (Appeals) and dated 26.3.2015 (Annexure A-3) 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 a the discretion of any authority having regard to the 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 non alloy steel ingots. 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 to 31.5.1999 for full and final discharge of duty liability under Section 3A of the Act. The company was required to pay the outstanding amount of duty along with interest at the rate of 18% per annum calculated for the period from 11th day of such month till the date of actual payment of the outstanding amount and penalty equal to amount of duty outstanding at the end of such month or ₹ 5,000/- whichever was greater. The respondent filed declaration under Rule 3(1) of the Induction Furnace Annual Capacity Determination Rules, 1997 qua their Induction Furnace of 3.3 MT capacity. The respondent was required to discharge its duty liability amounting to ₹ 58,73,798/- during the period September, 1997 to May, 1999 which it

failed to do so. Accordingly, six show cause notices dated 14.7.1998, 3.11.1998, 27.11.1998, 1.2.1999, 28.4.1999 and 9.6.1999, respectively were issued to the respondent proposing thereunder imposition of penalty for late deposit of duty. The adjudicating authority vide order dated 31.1.2005 (Annexure A-1) confirmed the demand of duty of ₹ 58,73,798/-, but vacated the demand of ₹ 16,51,202/- as the said amount had already been deposited. The penalty of equal amount and interest under Rule 96ZO(3)(i) of the Rules was also imposed upon the respondent. Feeling aggrieved, the assessee filed an appeal before the Commissioner (Appeals) who vide order dated 30.8.2005 (Annexure A-2) set aside the demand of duty and interest and also reduced the penalty from ₹ 58,73,798/- to ₹ 1,00,000/-. Against the order, Annexure A-2, the revenue filed an appeal before the Tribunal. The Tribunal vide order dated 26.3.2015 (Annexure A-3) following the judgment of this Court in **Bansal Alloys & Metals Pvt. Ltd. v. Union of India, 2010(260) ELT 343 (P&H)** dismissed the appeal. Hence, the present appeal.

3. We have heard learned counsel for the appellant-revenue.

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, 96ZP and 96ZQ of the Rules held the said provision 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. It was declared to be *ultra vires* the Act and the Constitution being arbitrary. 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".
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> 17. The writ petitions of the assessees are allowed and impugned provisions in Rules 96ZO, 96ZP and 96ZQ 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 to the extent noted hereinbefore. 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.

(AJAY KUMAR MITTAL)
JUDGE

February 8, 2016
gbs

(RAJ RAHUL GARG)
JUDGE