IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4344 OF 2010

Shree Bhagwan Fabrics Ltd.
(Formerly known as M/s.Visen Fabrics)
a Company incorporated under the Companies
Act, 1956 and having its Registered Office at
N-131/1, MIDC, Industrial Area, Tarapur,
District- Thane. … Petitioner.

V/s.

1. The Union of India, through the Secretary, Ministry of Finance, Department of Revenue, North Block, New Delhi- 110 001.

2. The Commissioner of Central Excise Mumbai III having his office at 4th Floor, Vardaan Trade Centre, MIDC, Wagle Industrial Estate, Thane- 400 064.

3. The Assistant Commissioner of Central Excise, Mumbai III having his office at 4th Floor, Vardaan Trade Centre, MIDC, Wagle Industrial Estate, Thane 400 064. … Respondents.

Mr.Prakash Shah with Mr.Jas Sanghavi i/b. PDS Legal for the petitioner.

Ms.Shalaka Gujar for the respondents.

CORAM : A.S.OKA AND A.K.MENON, JJ.

DATE : 21st November 2017.

ORAL JUDGMENT : (Per A.S.Oka, J.)

By this petition filed under Article 226 of the Constitution of India, the petitioner has claimed a declaration that Rule 96ZQ of the Central Excise Rules, 1944 (for short "the said Rules") is illegal and null and void and is liable to be struck down.

2. By the order-in-original passed by the Assistant Commissioner of Central Excise (Exh.B to the petition), the Assistant Commissioner confirmed the interest liability of the petitioner under Rule 96ZQ(ii) of the said Rules and imposed penalty of Rs.4.5 lakh. The said order has been confirmed in appeal. The order-in-appeal was challenged by the petitioner before the Customs, Excise and Service Tax Appellate Tribunal (for short "Appellate Tribunal") by filing an appeal. The said appeal was disposed of by order dated 22nd November 2002. The matter was carried by the Revenue before this Court. The appeals preferred by the Revenue were allowed by order dated 14th July 2009. The Division Bench of this Court restored the order-in-original imposing penalty of Rs.4.5 lakh. The Division Bench held that Rule 96ZQ was mandatory in nature. That is the reason why the order of the Appellate Tribunal reducing the penalty amount to Rs.5,000/- was set aside by the Division Bench and the order-in-original imposing penalty of Rs.4.5 lakh was restored.

3. The present petitioner challenged the order of the Division Bench by preferring Civil Appeal No.2864/2010. Though the said appeal was dismissed by the Apex Court, it was observed that dismissal of the appeal will not preclude the petitioner from challenging the constitutional validity of Rule 96ZQ. We must note here that M/s.Visen Fabrics is shown as an assessee in all the orders which are referred above. In the order-in-original, it is stated that the present petitioner is the proprietor of M/s.Visen Fabrics.

4. Our attention is invited to the decision of the Apex Court in the case of ***Shree Bhagwati Steel Rolling Mills v. Commr. of Central Excise***[1]**.** In paragraph- 44, the Apex Court held that the interest and penalty provisions under Rules 96ZO, 96ZP and 96ZQ of the said Rules are invalid.

5. In view of the pronouncement of law by the Apex Court in the case of ***Shree Bhagwati Steel Rolling Mills*** (supra), Rule 96ZQ, the submission of the learned counsel appearing for the petitioner is that the order of penalty will have to be set aside. The learned counsel appearing for the respondents supported the impugned order.

6. We have given careful consideration to the submissions. In the case of ***Shree Bhagwati Steel Rolling Mills*** (supra), the Apex Court

1 2015 (326) ELT 209 (SC)

has held that Rule 96ZQ is invalid. As observed earlier, the order-in-original imposing penalty of Rs.4.5 lakh was restored by this Court on the ground that clause (ii) of sub-rule (5) of Rule 96ZQ of the said Rules was mandatory. In view of pronouncement of the law by the Apex Court in the case of ***Shree Bhagwati Steel Rolling Mills*** (supra), the order imposing penalty in exercise of powers under Rule 96ZQ of the said Rules cannot be sustained.

7. Accordingly, the order imposing penalty will have to be quashed and set aside. As far as order dated 14th July 2009 passed by the Division Bench of this Court is concerned, the same proceeds on the basis that Rule 96ZQ is mandatory in nature. Therefore, in view of subsequent decision of the Apex Court in the case of ***Shree Bhagwati Steel Rolling Mills*** (supra), the decision of this Court dated 14th July 2009 becomes inoperative. Accordingly, we dispose of this petition by passing the following order:

<u>O R D E R</u>

(i) Prayer clause (a) does not survive in the light of the decision of the Apex Court in the case of ***Shree Bhagwati Steel Rolling Mills*** (supra);

(ii) Rule is made absolute in terms of prayer clause (b);

(iii) If the petitioner has already paid the penalty in terms of the order which is set aside, the respondents shall refund the said amount to the petitioner as expeditiously as possible and within a period of one month from the date this judgment is uploaded on the server;

(iv) The petitioner became entitled to refund at least on 24th November 2015 when the decision in the case of ***Shree Bhagwati Steel Rolling Mills*** (supra) was pronounced. We, therefore, direct the respondents to refund the amount of penalty, if paid by the petitioner, together with an interest at the rate of 6.5% from 24th November 2015 till the date of payment.

(A.K.MENON, J.) (A.S.OKA, J.)