IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CENTRAL EXCISE APPEAL NO.69 OF 2015

Commissioner of Customs, Central Excise
& Service Tax, N-5, Town Centre,
CIDCO, Aurangabad ..APPELLANT

VERSUS

M/s. Vir Alloys & Steel Co. P. Ltd.,
A-2/1, MIDC, Ahmednagar ..RESPONDENT

Mr D. S. Ladda, Advocate for appellant

CORAM : PRASANNA B. VARALE
AND
S. M. GAVHANE, JJ.

DATE : 10th July, 2018

ORAL ORDER:

Heard Mr Laddha, learned Counsel appearing for the appellant.

2. Perusal of the order sheet shows that on 19th December, 2017, notice was issued by this Court to the respondent. Further record shows that the report is received by the office stating that the notice of respondent was tried to be served by the process server and the watchman, who was attending the company premises, after having discussion with the owner of the company, informed that the company is closed since 12 to 15 months. The report also shows that panchnama to this effect is not made. Be that as it may.

3. The appellant challenges the order passed by the Central, Excise & Service Tax Appellate Tribunal (CESTAT), Mumbai, dated 25th April, 2013, being final order No.A/391/13/EB/C-II. The substantial question of law framed for consideration and submitted before this Court is, "whether the Tribunal was correct in holding that Rule 96ZO of the Central Excise Rules, 1994 as ultra vires and holding that the penalty is not imposable on respondent, when the Rule 96ZO has been formulated under Section 37 of the Central Excise Act, 1044 vide Notification No.33/97-CE(NT) dated 01.08.1997, when as per the Section 37(4)(a) of the Central Excise Act, the Government of India has the powers to make the Rules with regard to penalty of an amount equivalent to the duty involved”.

4. The grounds of appeal submitted before this Court include reference to a decision on which the learned tribunal placed reliance, viz. the judgment of the Punjab and Haryana High Court, in the matter of Bansal Alloys & Metals P. Ltd. (2010 (260) ELT 343). The copy of the order passed by the Tribunal is placed on record and the observations of the learned Member of the Tribunal read thus :-

> " The revenue is in appeal against the impugned order for dropping the penalty on the respondent which was proposed in the show-cause notice to be imposed as per Rule 96ZO(3) of the Central Excise Rules, 1944.
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> 2. Heard both sides.

> 3. The issue came up before the Hon'ble High Court of Bansal Alloys & Metals P. Ltd. 2010 (260) ELT 343 (P&H) wherein the Hon'ble High Court declared that Rule 96ZO is ultra vires. As the Rule itself is declared ultra vires, therefore no penalty can be imposed on the respondent. Accordingly, appeal filed by the revenue is dismissed." (emphasis supplied)

5. In the grounds, further the appellant Revenue states that the decision has not reached finality yet and the Revenue has filed an appeal before the Hon'ble the Apex Court in CWP No.18099 of 2009, against the said decision. It is seems that while setting out the grounds, the appellant committed an error in referring the number of proceedings as the proceedings before the Hon'ble the Supreme Court, whereas it seems that CWP No.18099 of 2009 is the number of proceedings, which was before the Hon'ble Punjab & Haryana High Court and against the decision of Punjab and Haryana High Court, a Special Leave Petition was preferred before the Hon'ble the Supreme Court.

6. The Hon'ble the Apex Court was pleased to consider the issue insofar as the validity of Rule 96ZO as well as the other two issues which fell for consideration before the High Court, namely, (I) whether “omission” of the compounded levy scheme in 2001 wipes out the liability of the Assessee for the period during which the scheme was in operation, and (II) whether the letter of demand of interest for delayed payment was liable to be set aside on the ground of delay.

7. The Hon'ble the Apex Court, considering the bunch of civil appeals as well as the Special Leave Petitions filed by the respective parties, including the appeals filed by the Revenue, dealt with these issues in detail. It will not be out of place to refer to the issues considered by the Apex Court and the same read thus:

> “2. This batch of appeals raises questions relating to the demand for interest and penalty Under Rules 96ZO, 96 ZP and 96 ZQ of the Central Excise Rules, 1994, which were framed in order to effectuate the provisions contained in Section 3A of the Central Excise Act, 1994. Several High Courts have struck down the said Rules relating to penalty as being ultra vires the parent provision and violative of Articles 14 and 19(1)(g) of the Constitution. Most of the appeals in this batch are, therefore, by the Union of India. However, before dealing with the said appeals, it is necessary to first segregate Civil Appeal No.4280 of 2007 which raises a slightly different question from the questions raised in the other appeals and decide it first.
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> 3. The question which arises for decision in the said appeal is the demand, by means of a letter dated 19.8.2005, for payment of interest for delayed payment of central excise duty under Section 3A of the Central Excise Act, 1944.”

8. Now insofar as the Rule 96ZO is concerned, an attempt was made by the learned Senior Advocate appearing for the Revenue to submit before the Court that the appellant could not have raised the issue at a belated stage. It will be again useful for our purposes to refer to certain observations by the

Hon'ble the Apex Court made while considering the issue as well as the arguments advanced by the learned Counsel appearing for the respective parties.

> "31. Applying the Constitution Bench decision stated above, it will have to be declared that since Section 3A which provides for a separate scheme for availing facilities under a compound levy scheme does not itself provide for the levying of interest, Rules 96 ZO, 96 ZP and 96 ZQ cannot do so and therefore on this ground the appellant in Shree Bhagwati Steel Rolling Mills has to succeed. On this ground alone therefore the impugned judgment is set aside. That none of the other provisions of the Central Excise Act can come to the aid of the Revenue in cases like these has been laid down by this Court in <u>Hans Steel Rolling Mill v. Commnr. of Central Excise</u>, as follows:
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> "13. On going through the records it is clearly established that the appellants are availing the facilities under the compound levy scheme, which they themselves opted for and filed declarations furnishing details about the annual capacity of production and duty payable on such capacity of production. It has to be taken into consideration that the compounded levy scheme for collection of duty based on annual capacity of production under Section 3 of the Act and the 1997 Rules is a separate scheme from the normal scheme for collection of Central excise duty on goods manufactured in the country. Under the same, Rule 96-ZP of the Central Excise Rules stipulate the method of payment and Rule 96-ZP contains detailed provision regarding time and manner of payment and it also contains provisions relating to payment of interest and

penalty in event of delay in payment or non-payment of dues. Thus, this is a comprehensive scheme in itself and general provisions in the Act and the Rules are excluded." (at page 751)

32. We now come to the other appeals which concern themselves with penalties that are leviable under Rules 96 ZO, 96 ZP and 96 ZQ. Since the lead judgment is a detailed judgment by a Division Bench of the Gujarat High Court reported in Krishna Processors v. Union of India, and followed by other High Courts, we will refer only to this decision.

33. On the facts before the Gujarat High Court, there were three civil applications each of which challenged the constitutional validity of the aforesaid rules insofar as they prescribed the imposition of a penalty equal to the amount of duty outstanding without any discretion to reduce the same depending upon the time taken to deposit the duty. The Gujarat High Court struck down the aforesaid Rules on the basis that not only were they ultra vires the Act but they were arbitrary and unreasonable and therefore violative of Articles 14 and 19(1)(g) of the Constitution.

35. However, insofar the reasoning of the High Court is concerned on the aspects stated hereinabove, we find that on all three counts it is unexceptionable. First and foremost, a delay of even one day would straightaway, without more, attract a penalty of an equivalent amount of duty, which may be in crores of rupees. It is clear that as has been held by this Court, penalty imposable under the aforesaid three Rules is inflexible and mandatory in nature. The High Court is, therefore, correct

in saying that an assessee who pays the delayed amount of duty after 100 days is to be on the same footing as an assessee who pays the duty only after one day’s delay and that therefore such rule treats unequals as equals and would, therefore, violate Article 14 of the Constitution of India. It is also correct in saying that there may be circumstances of force majeure which may prevent a bonafide assessee from paying the duty in time, and on certain given factual circumstances, despite there being no fault on the part of the assessee in making the deposit of duty in time, a mandatory penalty of an equivalent amount of duty would be compulsorily leviable and recoverable from such assessee. This would be extremely arbitrary and violative of Article 14 for this reason as well. Further, we agree with the High Court in stating that this would also be violative of the appellant’s fundamental rights under Article 19(1)(g) and would not be saved by Article 19(6), being an unreasonable restriction on the right to carry on trade or business. Clearly the levy of penalty in these cases of a mandatory nature for even one day’s delay, which may be beyond the control of the assessee, would be arbitrary and excessive. In such circumstances, this Court has held in Mohammed Faruk vs. State of Madhya Pradesh and Others.

The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency-national or local-or the necessity to maintain essential supplies, or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that no case for imposing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved.” (at page 161)

36. <u>The direct and immediate impact upon the fundamental right of the citizen is that he is exposed to a huge liability by way of penalty for reasons which may in given circumstances be beyond his control and/or for delay which may be minimal. The possibility of achieving the object of deterrence in such cases can be achieved by imposing a less drastic restraint. In point of fact when we contrast these provisions with Section 37 of the Act, it becomes clear how arbitrary and excessive they are.</u>

37. Section 37(3) and 37(4) of the Central Excise Act reads as follows:-

“Section 37. Power of Central Government to make rules. —

(3) In making rules under this section, the Central Government may provide that any person committing a breach of any rule shall, where no other penalty is provided by this Act, be liable to a penalty not exceeding five thousand rupees.

(4) Notwithstanding anything contained in sub-section (3), and

without prejudice to the provisions of section 9, in making rules under this section, the Central Government may provide that if any manufacturer, producer or licensee of a warehouse —

(a) removes any excisable goods in contravention of the provisions of any such rule, or

(b) does not account for all such goods manufactured, produced or stored by him, or

(c) engages in the manufacture, production or storage of such goods without having applied for the registration required under section 6, or

(d) contravenes the provisions of any such rule with intent to evade payment of duty, then, all such goods shall be liable to confiscation and the manufacturer, producer or licensee shall be liable to a penalty not exceeding the duty leviable on such goods or ten thousand rupees, whichever is greater;

38. <u>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</u>

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 96 ZO, 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 96 ZO, 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, 96 ZP 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.

9. The Hon'ble the Apex Court then arrived at a conclusion and same reads thus:-

"44. Conclusion :

We have declared in this judgment that the interest and penalty provisions under the Rules 96 ZO, ZP, and ZQ of the Central Excise Rules, 1994 are invalid for the reasons assigned in the judgment. Accordingly, the appeals filed by the Revenue are dismissed and the appeals filed by the assessees are allowed to the extent indicated above. It may be noted that in an appeal from a judgment of the Allahabad High Court dated 8.11.2012 in SLP (C) No. 9796/2012, it has been held that the levy of penalty under the aforesaid provisions is mandatory in character. In view of what has been held by us today, this appeal will also have to be allowed in the same terms as the other assessees' appeals which have been allowed. All the aforesaid appeals are disposed of accordingly."

(emphasis supplied)

10. Moreover, the issue for consideration in the present appeal was decided by the Hon'ble the Apex Court in the matter of Shree Bhagwati Steel Rolling Mills vs. Commissioner of Central Excise and others, reported in (2015) AIR(SCW) 6453.

11. Considering the decision of the Hon'ble the Apex Court referred to above, we are of the opinion that the appeal is devoid of any merit. Resultantly, same is dismissed and disposed of accordingly.

(S. M. GAVHANE, J.) **(PRASANNA B. VARALE, J.)**

sjk