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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/545 /2005-546 /2005 - EX[DB] Date 21/10/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S R.K.MACHINE TOOLS LTD.
854,R.K.INDUSTRIAL AREA-A,LUDHIANA
141003
M/S R.K.TOOLS LTD. Appellant

Vs

C.C.E. LUDHIANA Respondent

I am directed to transmit herewith a certified copy of **Final order No. 789-790/ 2009 EX[DB]** dated 07-10-09

passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
C.C.E. LUDHIANA
CENTRAL EXCISE HOUSE, 'F' BLOCK, RISHI NAGAR, LUDHIANA 141001 (PUNJAB)
2. Adv. / Consult
MR.V. LAXMIKUMARAN
B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029
3 C.D.R
~~4 J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15 LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
16 Office Copy
17 Guard file
18.HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

19, M/S R.K.MACHIN TOOLS LTD.
845,R.K.INDUSTRIAL AREA LUDHIANA

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi
COURT-I

Date of hearing: 07.10.2009
Date of decision: 07.10.2009

Excise Appeal No. 545 & 546 of 2005

[Arising out of order in original No. 661-662/CE/Appeal/Ldh/04 dated 29.12.2004 passed by the Commissioner (Appeals) Central Excise, Ludhiana]

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982.	Yes
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Y

M/s R.K. Machine Tools Limited — Appellant

Vs.

CCE, Ludhiana — Respondent

Appearance:

Appeared for the Appellant – Shri B.L. Narshimhan with Shri Abhishek Anand, Advocates

Appeared for the Respondent – Shri R.K. Verma, JDR

Coram: Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Oral Order No. 789-790/09-EX

Per Shri Justice R.M.S. Khandeparkar:

Since common questions of law and facts arise in both these appeals and they were heard together and are being disposed of by this common order.

2. We have heard learned Advocate for the appellants and learned DR for the respondent.

3. Learned Advocate for the appellants state that the only challenge in the appeals is to the levy of penalty and the duty liability has already been discharged by the appellants.

4. The only issue which is sought to be canvassed is that in view of the fact that the dispute in the matter in hand related to the period from September 1997 to December 1997 and the penal provision in the form of sub-rule (3) to Rule 96ZO of the Central Excise Rules 1944 came into force w.e.f. 01.05.1998, the same cannot be applied retrospectively and, therefore, imposition of penalty for whatever default had occurred in relation to the period prior to May 1998 was bad in law.

5. The facts in the matter in hand are not in dispute. Penalty was sought to be levied on account of default in payment of duty in terms of provisions of law within the stipulated period in exercise of powers under Rule 96ZO(3) of the said Rules. The penalty has been levied equivalent to the amount of duty defaulted which was not paid within the period prescribed under the law.

6. Drawing our attention to the decision of the Tribunal in the matter of M/s Mittal Alloys vs. CCE, Ludhiana in Excise Appeal No. 2952/2004-Ex (BR) delivered on 20.05.2009, learned Advocate appearing for the appellants submitted that the Tribunal has already held that the provisions under sub-rule (3) of Rule 96ZO are not retrospective in operation being penal provision and on the same ground the order imposing 100% penalty should be set aside. On the other hand, learned DR submitted that the Tribunal in the said decision has indeed held that the provisions are not retrospective in operation and, therefore, the ruling in case of Union of India vs. Dharamendra Textile Processors reported in 2008 (231) ELT (SC) would not be attracted.

7. The decision in Mittal Alloy case reads thus:-

> 44. The last point for consideration is on account of penalty. The impugned order discloses the imposition of penalty to the tune of amount of duty demanded. It is the contention of the appellant that the facts on record do not disclose intention to evade the payment of duty but the circumstances which could not enable the appellant to continuously manufacture the product and therefore, it is not a fit case for levy of penalty. He also submitted that there were already applications filed for abatement claim and this aspect ought to have been considered while dealing with the aspect of penalty. On the other hand, the learned SDR submitted that there is no discretion left to the authorities in the matter for imposition of penalty and hence according to the learned SDR the imposition of penalty does not warrant interference in the facts of the case. Attention is also drawn in this regard to the decision of the Apex Court in Dharamendra Textile Processors case(supra).
>
> 45. In the matter in hand, records apparently disclose that the appellant had been pursuing the remedy under sub-rule (2) of Rule 96ZO i.e. abatement claim, that the appellants were not able to establish the claim is totally different thing. It has also been the case of the appellant right from the beginning that there was stoppage of production intermittently as also disturbance to the production by some other company M/s. Ishar Alloy (P)

Ltd. Undoubtedly, the Revenue authorities do not appear to have considered all these aspects while dealing with the matter of imposition of penalty. It is however, submitted on behalf of the respondent that there is no discretion left for the authorities and once the manufacturer is found to have defaulted, consequence provided under the statute would have follow and result in imposition of penalty. It has also to be noted that the Apex Court in Dharamendra Textile Processors case has clearly ruled that the concept of discretion in the matter of imposition of penalty is foreign to the proceedings under Rule 96ZO. However, one aspect is required to be considered and that is the provision regarding penalty in relation to the default in payment of duty under Rule 96ZO (3) was introduced by way of amendment to the said Rules which came into force with effect from 1.5.98. Considering the same, it is the contention on behalf of the appellant that penalty, if at all, could be levied for the period from 14.7.98 and thereafter and not prior to that. The learned SDR however, submits that the proviso to sub-rule (3) of 96ZO required the arrears of duty to be paid by 10th March, 98 failing which the manufacturer would be liable to pay the penalty.

46. At the outset, it is to be noted that all these arguments which are adduced on the basis of amendment of sub-rule (3) of 96ZO were not canvassed before the original authority either by the appellant or the respondent nor the impugned order disclose application of mind by the adjudicating authority in that regard. It is for the first time, and that too at the time of disposal of the appeal, the issue is sought to be raised. Nevertheless, the fact remains that the proviso requires the manufacturer to clear the dues by 30.4.98 and at the same time it is not in dispute that amended part of the rule and notification came into force with effect from 1.5.98. It is nowhere on record that appellant had opportunity to know the contents of those provisions prior to 1.5.98. In order to apply any penal provision it is necessary that party should get the opportunity to defend its right in that regard. This proviso was not applied to the matter in hand at the original stage and on the basis of such amended provision, the Revenue wants to saddle appellants with the penalty. The same cannot be allowed unless it is established by the department that the appellants had opportunity to know the amended notification.

8. Applying the said ruling to the facts of the case, the appellants are justified in contending that the authorities could not have imposed penalty equal to the amount to the duty payable by the appellants and the impugned order to that extent is liable to be set aside.

9. The appeals accordingly succeed. The impugned order imposing penalty in exercise of power under Rule 96ZO (3) of the said rules is hereby set aside. Accordingly, the appeals are allowed in the said terms.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

/Pant/