

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

Appeal No. E/3123/2003 - EX[DB]

Date 26/08/2009

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

To :
HINDUSTAN PROCESSORS LTD.
GUWARDI, CHITTORGARH ROAD, BHILWARA (RAJ.)

HINDUSTAN PROCESSORS LTD.

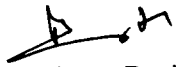
C.C.E. JAIPUR II

Appellant

Vs
Respondent

EX[DB] dated 04-8-09

I am directed to transmit herewith a certified copy of Final order No. 543/2009-
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. JAIPUR II

N.C.R.BUILDING, STATUE CIRCLE, "C" SCHEME, JAIPUR 302005.

2. Adv. / Consult

SH. HEMANT BAJAJ, ADV.,
A-5, BASEMENT,
LAJPAT NAGAR-III, N. DELHI - 24

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 Publications 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 Puniabi Bagh, New Delhi - 110026

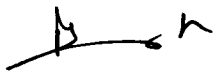
14 Easy Service Tax Online Dot Com Pvt.Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

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)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal No. 3123 of 2003

(Arising out of Order-in-Appeal No. 57/CE/JP-II/2003-COMM. dated 05.08.2003 passed by the Commissioner (Appeals), Central Excise, Jaipur).

DATE OF HEARING : 04.08.2009

DATE OF DECISION : 04.08.2009

FOR APPROVAL AND SIGNATURE :

HON'BLE MR. JUSTICE R.M.S. KHANDEPARKAR, PRESIDENT
HON'BLE MR. M. VEERAIYAN, 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 ?	
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not ?	
3.	Whether their Lordships wish to see the fair copy of the Order ?	
4.	Whether Order is to be circulated to the Departmental Authorities?	

M/s Hindustan Processors Ltd.

Appellant

(Rep by Sh. Hemant Bajaj, Adv.)

VERSUS

CCE, Jaipur

....

Respondent

(Rep. by Sh. P.K. Singh, DR)

CORAM : HON'BLE MR. JUSTICE RMS KHANDEPARKAR, PRESIDENT
HON'BLE MR. M. VEERAIYAN, MEMBER (TECHNICAL)

FINAL ORAL ORDER NO. 543 / 09-EX

PER JUSTICE R.M.S. KHANDEPARKAR :

Heard the learned advocate for the appellant and learned DR for the respondent.

2. This appeal arises from the order dated 05.08.2003 passed by the Commissioner (Appeals) Jaipur. In fact, the matter arises on account of order of remand passed by the High Court of Rajasthan in Central Excise Appeal No. 24/05 under order dated 2nd April, 2008. By the said order, the High Court has set aside the earlier order passed in this appeal by this Tribunal on 22.01.2004 and has directed for afresh decision in the appeal in accordance with law as well as on merits.

3. The challenge to the impugned order is in relation to the penalty imposed upon the appellant on account of delay in payment of duty and in exercise of powers under Rule 96-ZQ(5)(ii) of the Central Excise Rules, 1944.

4. When the matter was taken up for hearing, learned advocate appearing for the appellant sought adjournment of the hearing on the ground that, the appellant wants to move the High Court for review of the order dated 2nd April, 2008 on the ground that, stay order was obtained by placing before the High Court the order of the Madras High Court in **Beauty Dyers vs Union of India (UOI)**, which was passed in Civil Writ Petition Nos. 3249, 5746, 5747 and 19884 of 1999, decided on 20th December, 2001, but, when, in fact, the order of the Madras High Court, which was required to be shown to the Rajasthan High Court, was passed in Writ Petition Nos. 3246, 3247 of

1999 and 4604, 4605 of 2000 on 20th December, 2001. It is the contention on behalf of the learned advocate for the appellant that the attention of the High Court ought to have been drawn to the decision wherein sub-rule (3) of Rule 96-ZQ was declared *ultra vires* and not the one which was shown to the High Court.

5. The learned advocate in that regard has drawn our attention to the decision of the Madras High Court in the matter of **Beauty Dyers vs Union of India & Ors.**, reported in 2002 (52) RLT 636 (Mad.) as well as one reported in 2002 (52) RLT 644.

6. The learned DR, on the other hand, drawn our attention to the decision in the matter of **Beauty Dyers vs Union of India**, 2004 (163) ELT 28 (Mad.), and submitted that, the Madras High Court has no where declared the Rule relevant for the decision in the matter in hand to be *ultra vires*. On the contrary, the decision relied upon by the learned DR, the High Court has proceeded to confirm the duty and penalty liability in terms of the said provisions of law.

7. The request for adjournment, on the ground alleged, was rejected and the learned advocate was asked to proceed to address in the matter on the merits of the case. He accordingly proceeded to argue the matter on merits. Indeed, the request for adjournment was thoroughly uncalled for. Undoubtedly, the decision of the Rajasthan High Court dated 2nd April, 2008 does refer to the decision of the Madras High Court which was reported in 2002 (52) RLT 644, while setting aside the order passed by this Tribunal earlier in this appeal. However, at the same time, the High Court also refers to the decision

of the Supreme Court in the matter of **State of Madhya Pradesh vs Bharat Heavy Electricals**, 1998 (99) ELT 33 (SC), to justify the decision to set aside the order passed by this Tribunal. Being so, the ground on which the matter was sought to be adjourned was devoid of substance.

8. As rightly pointed out by the learned DR, the decision of the Madras High Court, even in the case reported in 2002 (52) RLT 633, nowhere holds the sub-rule (5) of Rule 96ZQ to be *ultra vires*. On the contrary, in the decision relied upon by the learned DR, the Madras High Court has specifically observed that “as held by the Apex Court in 1998 (99) ELT 33 (supra), the penalty mentioned in the abovesaid Rule should be taken as only the maximum amount which would be levied and the assessing authority has discretion even to levy lesser amount depending upon the facts and circumstances of each case.” In other words, the provision regarding the penalty was not held to be *ultra vires*, and, on the contrary, the authorities were expected to comply with the said provision of penalty in accordance with the provisions of law and bearing in mind the ruling in that respect by the Apex Court. Being so, in our considered opinion, there is absolutely no scope for adjournment of the hearing on the ground sought to be alleged.

9. Reverting to the facts of the case, the challenge is restricted to the imposition of penalty and that too on the ground that the delay in payment of duty was not significant and was hardly of few days and in one case it was of hardly one day and secondly that the financial difficulties faced by the appellant did not permit the appellant to clear the dues in time. Drawing our attention to the decision in the

matter of **CCE, Meerut vs Garwal Rolling Mills (P) Ltd.**, 2009 (240) ELT 80 (T-Del), learned advocate for the appellant submitted that, sub-rule (5) cannot be construed to deny discretionary power to the authorities in the matter of imposition of penalty and the amount of penalty should be on the basis of the facts of each case. According to the learned advocate, in a case where the delay is of hardly of few days, the authorities have to exercise their discretion in imposing minimum possible penalty. He further submitted that, the financial difficulties faced by the assessee also should not be ignored and the same should be taken into consideration while fixing the quantum of penalty. Learned DR, on the other hand, submitted that, considering the law laid down by the Apex Court in **Union of India vs Dharamendra Textile Processors**, 2008 (231) ELT 3 (SC) : 2008) 13 SCALE 233, the authorities are left with no discretionary power and the mandatory penalty is to be imposed in accordance with the provisions of law. In that regard, according to the learned DR, financial difficulties cannot be a ground to reduce the amount of penalty.

10. It is not in dispute that there was delay in payment of amount of duty. The delay, so caused, was clearly disclosed in the annexures to the show cause notice and the same has not been disputed by the appellants. The details of payment of duty beyond the due date, as disclosed in the show cause notice, read as under :

**DETAILS OF THE PAYMENT OF DUTY UNDER SECTION 3A BY M/S
HINDUSTAN PROCESSORS LTD., BHILWARA FROM 16.12.98 TO 31.3.99**

MONTH	DUTY REQUIRED TO BE PAID AS PER FINAL ORDER OF THE COMMISSIO- NER	DUE DATE OF PAYMENT	AMOUNT OF DUTY PAID BY DUE DATE	AMOUNT OF DUTY PAID AFTER DUE DATE & DATE OF PAYMENT	DELAY (NO. OF DAYS)	AMOUNT OF INTEREST RECOVERABLE @ 36%	AMOUNT OF DUTY NOT PAID TILL DATE	REMARKS
Dec-98	2052129 (for the period from 16.12.98 to 31.12.98)	31.12.99	1999484	0	0	0	52645	In the month of Feb-99 & March-99 the duty of Rs. 2397741/- has been debited against the refund allowed to the assessee by the Asstt. Commissio ner against abatment claimed under Sec. 3A.
Jan-99 1.1.99 to 21.1.99	2693419	5.1.99	0	2400000/ 11.1.99 1474000/ 14.1.99	6 9	14203 13084	NIL	
22.1.99 to 31.1.99	1129677							
TOTAL	3823096							
Feb-99 1.2.99 to 4.2.99	1751000	15.2.99	613420	986580/ 18.2.99 800000/ 24.2.99	3 9	2919 7101	602000	
15.2.99 to 28.2.99	1251000							
TOTAL	3002000							
Mar-99	2502000	15.03.99	1995200	205000/ 26.3.99 46897/ 27.3.99 152903/ 30.3.99	11 12 15	2224 555 2262	102000	
						42348	756645	

ANNEXURE –A

**DETAILS OF THE PAYMENT OF DUTY UNDER SECTION 3 A BY M/S
HINDUSTAN PROCESSORS LTD., BHILWARA FROM 01.04.99 TO 30.06.99**

MONTH	DUTY REQUIRED TO BE PAID AS PER FINAL ORDER OF THE COMMISSIO- NER	DUE DATE OF PAYMENT	AMOUNT OF DUTY PAID BY DUE DATE	AMOUNT OF DUTY PAID AFTER DUE DATE & DATE OF PAYMENT	DELAY (NO. OF DAYS)	AMOUNT OF INTEREST RECOVERABLE @ 36% on delayed payment	AMOUNT OF DUTY NOT PAID TILL DATE
April, 99	25,02,000/-	15.04.1999	17,00,000/-	2,00,000/- 16.04.1999 5,00,000/- 29.04.1999	01 14	197 6,904/-	1,02,000/-
May, 99 1.05.99 to 22.05.99	17,75,613/-	15.05.1999	8,00,000/-	2,00,000/- 26.05.1999 2,00,000/- 27.05.1999	11 12	2,170/- 2,367/-	11,22,902/-
23.05.99 to 31.05.99	10,95,677/-	23.05.1999		2,00,000/- 28.05.1999 3,48,388/- 29.05.1999	13 06	2,564/- 2,062/-	

TOTAL	28,,71,290/-						
June, 99	37,74,000/-	15.06.1999	15,00,000/-	11,00,000/- 16.06.1999	01	1,085/-	11,74,000/-
			TOTAL	16,48,388/-		17,349/-	23,98,902/-

The above two charts obviously refer to two different show cause notices.

11. The penalty has been imposed from 1st March, 1999. The provision of law which stood w.e.f. 27th February, 1999 in relation to the obligation to pay duty in time and liability to pay interest and penalty in case of delay in payment of duty reads thus :

“5. If any independent processor fails to pay the amount of duty or any part thereof by the date specified in sub-rule (3), he shall be liable to –

(i) pay the outstanding amount of duty along with interest at the rate of thirty-six per cent per annum calculated for the outstanding period on the outstanding amount; and

(ii) a penalty equal to an amount of duty outstanding from his or rupees five thousand, whichever is greater.”

12. The provision of law, as comprised under sub-rule (5) of Rule 96-ZQ of the said Rules, therefore, makes it obligatory to pay interest in case of delayed payment of duty as well as to pay the penalty. The two sub-clauses of said Rule 5 of Rule 96-ZQ clearly disclose that, liability under both the clauses is neither alternative nor optional nor it leaves any discretion either to the authority or to the assessee. The expression “shall be liable to” refers to the obligation to pay interest on the delayed amount of payment of duty as well as to pay the penalty. As regards the amount of penalty is concerned prior

to 28th February, 1999, it was restricted to "equal to an amount of duty outstanding from him at the end of such month". However, w.e.f. 28th February, 1999, the expression "at the end of such month" has been deleted and the same has been quantified as equal to an amount of duty outstanding. The Legislative intent, therefore, is very clear from this amendment to the said Rules that it is not only the obligation of the assessee to pay the penalty equal to an amount of duty outstanding, but there is no discretion left to the authority to alter the amount of penalty. The amount of penalty has been specified to be equal to the amount of duty outstanding. In the case in hand, it is not in dispute that the penalty levied is equal to the amount of duty which was outstanding or which was paid beyond the due date. Being so, considering the provisions of law, there is hardly any room for interference in the impugned order.

13. It is true that, the Tribunal in **Garwal Rolling Mills (P) Ltd.** (supra) had held that, the authority had discretion to lower the amount of penalty and it need not be necessarily equal to the amount of duty outstanding. That was the decision based on the view taken by the Supreme Court in the case of **Hindustan Steel Ltd. vs State of Orissa**, 178 (2) ELT J159 (SC), as also various High Court decisions. However, in view of the decision of the Apex Court in **Dharamendra Textile Processors** (supra), we do not find any case for interference in the impugned order.

14. Once the statute mandates that the assessee who fails to discharge his tax liability within the specified period or by due date, the financial constraints or even the delay of short period, cannot be a

justification to reduce the penalty amount. As the statute requires the penalty to be equal to the amount of duty outstanding and thereafter no discretion left to the authority, for the same reason, it would not be appropriate for the Tribunal to be generous in reducing the penalty amount contrary to the mandate of statute.

15. For the reasons stated above, the appeal fails and is rejected.

(JUSTICE R.M.S. KHANDEPARKAR)
PRESIDENT

(M. VEERAIYAN)
MEMBER (TECHNICAL)

Golay