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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/2500/2004 - EX[DB] Date 08/01/2010

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

To :
M/S HARI OM CASTING
M/S HARI OM CASTING, 122 - L, MODEL TOWN
LUDHIANA
M/S HARI OM CASTING Appellant
Vs
C.C.E.LUDHIANA Respondent

I am directed to transmit herewith a certified copy of **Final order No. 04/2010 EX[DB]** dated 15-12-09 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 SH. HEMANT BAJAJ, ADV., C/O
MR.K.K ANAND
A-5,BASEMENT,LAJPAT NAGAR-III NEW 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 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)
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18. HON'BLE PRESIDENT

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

Excise Appeal No. 2500 of 2004

[Arising out of the Order-in-Appeal No. 89/CE/Appl/Ldh/2004 dated 29/01/2004 passed by The Commissioner (Appeals), Central Excise, Ludhiana.]

For Approval and signature :

Hon'ble 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 would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	:	Seen
4.	Whether order is to be circulated to the Department Authorities?	:	Yes

M/s Hari Om Castings — Appellants

Versus

CCE, Ludhiana — Respondent

Appearance

Shri Hemant Bajaj, Advocate – for the appellant.

Shri B.L. Soni, Authorized Representative (SDR) – for the Respondent.

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

DATE OF HEARING : 15/12/2009.
DATE OF DECISION : 15/12/2009.

FINAL Oral Order No. 04/2010/EX Dated : ____________

Per. Justice R.M.S. Khandeparkar :-

Heard the learned advocate for the appellants and the learned DR for the respondent. The appeal arises from order dated 29th of January 2004 passed by Commissioner (Appeals), Ludhiana. By the impugned order, the Commissioner (Appeals) has dismissed the appeal filed by the appellants against the order of the Additional Commissioner, Ludhiana by order dated 9th April 2003. The Additional Commissioner, Ludhiana while disposing the proceedings initiated consequent to the issuance of 8 show cause notices to the appellants relating to the period from September 1997 to December 1998 had confirmed the demand of duty to the tune of Rs. 17,51,656/- and had directed payment of interest thereon and had also imposed equal amount of penalty in terms of proviso to Rule 96ZO (3) of the Central Excise Rules, 1944. The proceedings were initiated consequent to the issuance of 8 show cause notices, dated 23rd July 1998 for the period of September 1997 and October 1997 demanding the duty to the tune of Rs. 2,33,333/-, dated 27th May 1998 for the period November 1997 and December 1997 demanding the duty to the tune of Rs. 1,53,333/-, dated 19th of June 1998 for the period January 1998 to March 1998 demanding the duty to the tune of Rs. 1,74,998/-, dated 29th of July 1998 for the period April 1998 to June 1998 demanding the duty to the tune of Rs. 4,99,998/-, dated 27th of November 1998 for the period July 1998 to September 1998 demanding the duty to the tune of Rs. 3,74,998/-, two notices dated 18th of December 1998 one for the period of October 1998 demanding the duty to the tune of Rs. 91,666/-, and another for the month of November 1998 demanding the duty to the tune of Rs. 1,16,666/-, and the notice dated 4th of January 1999 for the month of December 1998 demanding the duty to the tune of Rs.

Rs.1,06,666/-, thus totalling to the demand of Rs. 17,51,656/- and the matter was contested by the appellants without any success and consequently the said order dated 9th April 2003 came to be issued and further confirmed by the Commissioner (Appeals) by the impugned order.

2. The appellants are engaged in the manufacture of non-alloy steel Ingots falling under Chapter sub-heading 7206.90 of the Central Excise Tariff Act, 1985. After introduction of the 'production capacity based levy' under Section 3A of the Central Excise Act w.e.f. 1st September 1997, the appellants opted to avail the benefits under the scheme to discharge of their duty liability on monthly basis and by order dated 3rd November 1997, the production capacity of the appellants was determined and consequently the duty liability was fixed at Rs. 1,66,666/- p.m. from September 1997 onwards. The appellants made representation to the Commissioner of Central Excise, Chandigarh on 19th March 1998 protesting against the determination of production capacity on the grounds mentioned in the representation and requested for fresh assessment of capacity of production correctly. Simultaneously the appellants also preferred writ-petition No. 4598 of 1998 before the Hon'ble Punjab & Haryana High Court which came to be disposed of taking note of the fact that the appellants had made representation to the Commissioner of Central Excise and, therefore, directing that the authority shall take appropriate decision on the said representation. Accordingly, the writ-petition was disposed off by order 31st March 1998. The appellants also filed abatement claim which came to be rejected by order dated 21st of May 1998 by the competent authority. Consequent to the Hon'ble High Court's order, the Commissioner also disposed off the representation made by the

appellants and communicated to the same to the appellants under letter dated 5th August 1998. In the said background, said 8 show cause notices came to be issued and adjudicated on under the order dated 9th of April 2003.

3. While assailing the impugned order the learned advocate for the appellants submitted that as per his instructions the appellants were not heard before disposing the representation dated 19th March 1998 and, therefore, the proceedings were conducted ex-parte ignoring the specific direction given by the Hon'ble Punjab & Haryana High Court to decide the matter after hearing the parties. According to the learned advocate the authorities below fail to take note of this aspect of the matter while confirming the duty liability to the appellants. He further submitted that under no circumstances, the appellants could have been made liable to pay penalty of the amount equal to the duty amount by invoking the provisions of law comprised under 96ZO (3) as the rule relating to the equal amount of penalty came into force w.e.f. 1st of May 1998 and, therefore, the provision of penalty could not have been imposed retrospectively. In that regard, attention is sought to be drawn to the decision of this Tribunal in the matter of **R.K. Machine Tools Limited vs. CCE, Ludhiana** reported in **2009 (95) R.L.T. 609 (CESTAT-Del.)**

4. On the other hand, it is sought to be contended on behalf of the Department that the records nowhere disclose that the proceedings in relation to the representation were ex-parte nor there was any grievance made in that regard to that effect by the appellants after receipt of letter dated 5th of August 1998 communicating the order on the said representation. He further submitted that even in the memo of appeal, there is no such ground raised by the appellants. He further

submitted that the law laid down by the Apex Court in **Union of India vs. Dharamendra Textile Processors** reported in **2008 (231) E.L.T. 3 (S.C.)** would apply even to the cases covered by 96ZO (3) and in that regard drew our attention to the decision of the Tribunal in the case of **Hindustan Processors Ltd. vs. CCE, Jaipur** reported in **2009 (243) E.L.T. 372 (Tri. – Del.)**. According to the learned DR therefore no fault can be found in the impugned order even in relation to the imposition of penalty.

5. As regards, the first ground of challenge obviously in the absence of specific ground in that regard being taken in the memo of appeal, the appellants are not entitled to raise the issue at the eleventh hour. In any case, the records do not support the ground sought to be raised in the matter. The impugned order clearly records that the appellants were informed about the decision in relation to the representation dated 19th March 1998 under letter dated 5th of August 1998. It is not the case of the appellants that on receipt of the said letter, the appellants had protested to the effect that the proceedings in relation to the said representation had been ex-parte or that the appellants were not given opportunity of being heard in the matter. Besides, it is also not the case of the appellants that the order so passed was ever challenged by the appellants. It is also pertinent to note that the appellants had even filed abatement claim, which was rejected under order dated 21st of May 1998 and that was also not challenged. Being so, there is absolutely no substance in the ground regarding the alleged ex-parte proceedings.

6. It was also sought to be contended that the option in terms of 96ZO (3) was opted by the appellants under protest. The submission is totally devoid of substance. Once the party has been given option, it is

always for the party to decide whether to opt for particular method prescribed under law in relation to the payment of duty or not and it cannot be said that the exercise was done under protest. Very term "option" discloses that it is left to the choice of the party to decide about the same and depending upon its willingness the party is allowed to opt. The act being out of willingness of the party, it cannot be at the same time be termed as under protest. Even the rule under which the option was exercised clearly discloses that the assessee is allowed to opt for the particular procedure relating the payment of duty as per his desire.

7. As regards, the ground relating to the penalty, undoubtedly the period involved is from September 1997 to December 1998. The provision relating the penalty under Rule 96ZO (3) of the said rules came into force w.e.f. 1st May 1998. Obviously such a penal provision cannot be presumed to be retrospectively enforceable. Being so, the appellants are justified in contending that the authority could not have imposed equal amount of penalty for the period prior to 1st May 1998 that is for the period from September 1997 till April 1998. Neither the Commissioner (Appeals) nor the Adjudicating Authority has considered this aspect of the matter while imposing the penalty. Considering the provisions of law comprised under Rule 96ZO (3) of the said Rules and that the penal provision is not being retrospectively enforceable, the penalty imposed for the period prior to April 1998 has to be quashed. The decision of the Tribunal in Hindustan Processors Ltd. undoubtedly is to the effect that the mandate of the law laid down by Apex Court in Dharamendra Textile Processors case would apply even in the cases under 96ZO (3). However, it is pertinent to note that the decision was in relation to the period from December 1998 onwards i.e. from the time the penal provision had come into force. That by itself cannot be

construed to mean that such penal provision could be retrospectively enforceable.

8. In the result, therefore, the appeal partly succeeds. The penalty imposed for the period prior to 1st May 1998 is hereby quashed. Apart from that, no further interference is called for in the impugned order. The Appeal is accordingly disposed off in the above terms.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK