

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

Appeal No. E/5352/2004 - EX[DB]
E/5619/2004-EX

Date 18/05/2010

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

To :
C.C.E.LUDHIANA
F-BLOCK RISHI NAGAR, LUDHIANA
C.C.E.LUDHIANA

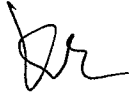
M/S APS ASSOCIATES PVT.LTD.

(VICE VERSA)

Appellant
Vs
Respondent

2010 EX[DB] dated 27-4-10

I am directed to transmit herewith a certified copy of Final order No. 383-384/
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

M/S APS ASSOCIATES PVT.LTD.

PHASE-V FOCAL POINT, LUDHIANA

2. Adv. / Consult

~~17/5~~ ASMITA NAYAK, ADV.,
A-5, BASEMENT
LASPATNAGAR-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 Company Law Institute of India Pvt Ltd., No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

9 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017

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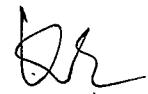
11 Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

12 LAWCRUX Advisors Pvt Ltd, LAW House.1-8, Sector - 10, Faridabad 121003 (Harvana)

13 Office Copy

14 Guard file

15 HON'BLE PRESIDENT.


Assistant Registrar
(Excise Appeal Branch)

16 Tax India Online.Com (P) Ltd.
Unit No.1, 2nd Floor, Vasant Aracade, Nelson Mandela Road,
Vasant Kunj, New Delhi-70

**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

DATE OF HEARING : 27/04/2010.

DATE OF DECISION : 27/04/2010.

Excise Appeal No. 5352 of 2004

CCE, Ludhiana

Appellants

Versus

M/s APS Associates Pvt. Ltd.

Respondent

Excise Appeal No. 5619 of 2004

M/s APS Associates Pvt. Ltd.

Appellants

Versus

CCE, Ludhiana

Respondent

[Arising out of the Order-in-Appeal No. 511/CE/Api/Ldh/2004 dated 29/07/2004 passed by The Commissioner (Appeals), Central Excise Commissionerate, Ludhiana.]

For Approval and signature :

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

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- | | | |
|---|---|------|
| 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 |
-

Appearance

Shri Virendra K. Choudhary, Authorized Representative (DR) – for the Appellants.

Ms. Asmita Nayak, Advocate – for the Respondent.

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

FINAL Order No. 383-384/10-EE Dated : _____

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

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

2. We have heard learned advocate for the assessee and learned DR for the department in both the matters.
3. Both the appeals arise from common order passed on 29th of July 2004 by Commissioner (Appeals), Ludhiana. By the impugned order, the Commissioner (Appeals) modified the order passed by the Adjudicating Authority. By the said order the Adjudicating Authority had ordered recovery of Rs. 2,00,000/- (Rupees Two Lakhs) being the outstanding amount out of the total amount of duty of Rs. 10,66,666/- alongwith interest @ 18% and imposition of penalty of equal amount i.e. Rs.

10,66,666/-. The Commissioner (Appeals) has reduced the penalty amount to Rs. 2,00,000/-.

4. The assessee who is the appellant in appeal No. 5619 of 2004 and the respondent in appeal No. 5352 of 2004 were engaged in manufacture of M.S. Ingots classifiable under Chapter sub-heading 7206.90 of the Central Excise Tariff Act, 1985. They had opted to avail the compounded levy scheme as described under sub-Rule (3) of Rule 96 ZO of the Central Excise Rules, 1944 for full and final discharge of their duty liability for the month of the said product. The Commissioner under order dated 14th October 1997 fixed their duty liability at Rs. 5,33,333/- p.m. on the basis of furnace capacity of 3.2 M.T. Accordingly, the assessee was required to deposit the duty in two equal instalments, the first instalment latest by 15th day of each month and second instalment by last day of each month for the purpose of full and final discharge of their duty liability in terms of the said compounded levy scheme under the said provisions of law. The assessee, however, commenced paying the duty @ Rs. 4,33,333/- p.m. on the basis of their claim that the working capacity of their furnace was 2.6 M.T. and not 3.2 M.T. The assessee also filed their claim that the working capacity of their furnace was 2.6 M.T. and not 3.2 M.T. The assessee also filed writ-petition No. 3688 of 1998 in the Hon'ble Punjab & Haryana High Court on the said basis and the Hon'ble High Court by order dated 12th of August 1998 stayed the order of the Commissioner

dated 14th of October 1997 and allowed the assessee to pay the dues @ Rs. 4,33,333/- p.m.

5. Meanwhile, the appellants under their application dated 28th October 1997 requested the Commissioner to re-determine the duty liability on the basis of the working capacity of their furnace i.e. from 2.6 M.T. instead of 3.2 M.T. The said request came to be rejected on 19th February 1998. However, having realised that the order dated 14th October 1997 would be subjected to review by the Appellate Authority, in order to invoke the said remedy the appellants withdrew the writ-petition filed in the Hon'ble Punjab & Haryana High Court on 23rd April 1999.

6. The assessee, however, filed another writ-petition in Hon'ble Punjab & Haryana High Court under writ-petition No. 17388 of 1999 and therein by interim order dated 15th December 1999 sought direction to the Commissioner to re-determine the duty liability on the basis of actual production in the factory of the assessee. The Apex Court at that time was seized with the matter involving the issues relating to the interpretation and application of Rule 96 ZO (3) and sub-Section (4) of Section 3A of the said Act in the matter of **Commissioner of Central Excise & Customs vs. Venus Castings (P) Ltd.** reported in **2000 (117) E.L.T. 273 (S.C.)**. It was disposed of on 5th April 2000 holding that :

"Rules 96ZO and 96 ZP provide for procedure to be followed by the manufacturer of ingots and billets and hot re-rolled products respectively. Sub-rule (3) thereof envisages a composition method of payment of duty. Such payment is treated to be in full discharge of duty liability. The Rule specifically excludes application of Section 3A (4). But manufacturers opting for this composite scheme cannot claim abatement. The schemes contained in Section 3A (4) of the Act and Rule 96 ZO (3) or Rule 96 ZP (3) of the Excise Rules are two alternative procedures to be adopted at the option of the assessee. If the assessee opts for procedure under Rule 96 ZO (1) he may opt out of the procedure under Rule 96 ZO (3) for a subsequent period and seek the determination of annual capacity of production. An assessee cannot have a hybrid procedure of combining the procedure under Rule 96 ZO (1) to which Section 3A (4) of the Act is attracted. The claim by the respondents is a hybrid procedure of taking advantage of the payment of lumpsum on the basis of total furnace capacity and not on the basis of actual capacity of production. Such a procedure cannot be adopted at all, for the two procedures are alternative schemes of payment of tax. Therefore, it is made clear that the manufacturers, if they have availed of the procedure under Rule 96 ZO (3) at their option, cannot claim the benefit of determination of production capacity under Section 3A (4) of the Act which is specifically excluded. On the reasoning adopted by us and bearing in mind that in taxation measures composition schemes are not unknown and when such scheme is availed of by the assessee it is not at all permissible for him to turn around and ask for regular assessment, we think, there is no substance in the contention urged on behalf of the respondents."

Considering the law laid down as above by the Apex Court, the Hon'ble Punjab & Haryana High Court dismissed the writ-petition filed by the assessee on 10th July 2002.

7. During the scrutiny of the RT-12 returns submitted by the assessee for the month of July 1998 and August 1998 it was revealed that the assessee had not paid any duty for those months and consequently a show cause notice came to be issued on 29th January 1999. The same was contested by the assessee on the ground that the assessee had requested for redetermination of their annual capacity but was wrongly rejected by the Commissioner. The Adjudicating Authority, after considering their submissions confirmed the demand of duty to the tune of Rs. 10,66,666/- on the ground that the same amount was not paid on the due date and while giving credit to the amount of Rs. 8,66,666/- already paid, ordered payment of the balance amount alongwith interest @ 18% and imposed penalty of equal amount of duty i.e. Rs. 10,66,666/-. Being dis-satisfied, the matter was carried by the assessee before the Commissioner (Appeals) and it was disposed of by the impugned order whereby the penalty amount was reduced to Rs. 2,00,000/-.

8. It is the contention on behalf of the assessee that the authority erred in ignoring the fact that the total working capacity of the furnace of the appellants was 2.6 M.T. and, therefore, it could not have insisted for the payment of duty to the tune of Rs. 10,66,666/-. It is the contention on behalf of the department that

taking into consideration, the law laid down by the Apex Court in the case of **Union of India vs. Dharamendra Textile Processors** reported in **2008 (231) E.L.T. 3 (S.C.)**, the Commissioner (Appeals) had no discretion to reduce the penalty and as there was default in payment of duty of Rs. 10,66,666/-, consequently the penalty had to be of the equal amount. According to the department, payment of part of the duties subsequent to the due date could not absolve the assessee from the payment of penalty to the tune of whole of the duty amount.

9. It is a matter of record that the Apex Court in **Venus Castings (P) Ltd.** case has clearly held that the assessee having exercised the option and agreed for the procedure for payment of duty in terms of Rule 96 ZO (3), is not entitled to subsequently opt out of the scheme before the expiry of the year for which the assessee has commenced the payment of duty. It is also a matter of record in the case in hand, that the Commissioner under order dated 14th October 1997 had fixed the duty liability of the assessee to be Rs. 5,33,333/- p.m. on the basis of working capacity of their furnace to be of 3.2 M.T. The said order remained unchallenged. It is true that the assessee was all the while contending that the working capacity of their furnace was 2.6 M.T. and, therefore, their duty liability could not exceed Rs. 4,33,333/-. However, it is also a matter of record that the assessee neither succeeded in getting the order dated 14th October 1997 modified nor could obtain any relief in that regard

from the Hon'ble High Court, except some interim order for a temporary period.

10. It is also undisputed fact that even though the assessee was contending that the working capacity of their furnace to be 2.6 M.T. and on that amount the duty amount could not exceed Rs. 4,33,333/- p.m., the assessee failed to pay the duty even at the rate of 4,33,333/- for the month of July and August 1998 when it became due and payable. The compounded levy scheme as comprised under Rule 96 ZO (3) of the said Rules is concerned, it is very clear as regards the obligation of the assessee opting for the said scheme in relation to the procedure of payment of duty and the same specifically provides that the amount of duty is required to be paid as and when it falls due, and in case of failure to do so, the manufacturer has to pay penalty equal to such outstanding amount of duty or Rs. 5,000/-, whichever is greater. The rule clearly provides that where a manufacturer fails to pay the whole of the amount payable for any month by the 15th day or the last day of such month, as the case may be, he shall be liable to pay the outstanding amount of duty alongwith interest thereon at the rate of 18% p.a., calculated for the period from the 16th day of such month or the 1st day of next month, as the case may be, till the date of actual payment of the outstanding amount and a penalty equal to such outstanding amount of duty or five thousand rupees, whichever is greater. In other words, the amount for each month is payable by two instalments, one by 15th of the month for which it pertains

to, and another by 1st of the succeeding month. If one fails to pay the same accordingly, then the amount becomes outstanding. If both the instalments are not paid by 1st of succeeding month, then whole of the amount payable for that month becomes outstanding for that month and penalty would be payable equal to whole of the outstanding amount for the month. Subsequent payment will not be of any consequence for the purpose of penalty amount.

11. The expression "outstanding amount of duty" is proceeded by the word "such". The first expression refers to whole of the amount falling due and payable for every month. Being so, as rightly pointed out by the learned DR, the penalty liability will have to be considered on the basis of the duty liability which falls due and payable and where the default occurs in that regard. Merely because part of the duty is paid subsequently it will not amount to full and final discharge of liability as regards the obligation to suffer the penalty for failure to comply with the obligation under the said scheme. Considering the decision of the Apex Court in **Dharamendra Textile Processors** case, therefore, the department is justified in contending that the Commissioner (Appeals) could not have interfered with the order passed by the Adjudicating Authority imposing the penalty of equal amount of duty.

12. For the reasons stated above, therefore, the challenge to the impugned order at the instance of the assessee fails whereas

the appeal filed by the Department succeeds. Accordingly, the appeal filed by the assessee is dismissed and appeal filed by the department is allowed. The impugned order to the extent it reduces the penalty is set aside and the penalty amount, as specified by the Adjudicating Authority is restored and confirmed.

13. The appeals are accordingly disposed of in above terms.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

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