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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/2885-2886/2005 - EX[DB] Date **24/03/2011**

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

To :
C.C.E.JAIPUR

N.C.R.B.STATUE CIRCLE C-SCHEME JAIPUR

302005

C.C.E.JAIPUR Appellant

Vs

M/S RATHI BARS LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No.301-302/ 2011 EX[DB]** dated 03-3-11

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 RATHI BARS LTD.
SP-7,RLLCO INDUSTRIAL
AREA,KHUSKHERA BHIWADI
DISTT.ALWAR RAJASTHAN

2. Adv. / Consult
MR.BIPIN GARG
B-1/1289,A-VASANT KUNJ, NEW DELHI

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications, Customs, Excise, I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd. LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file
15. HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing/decision:3.3.2011

Central Excise Appeals Nos.2885 and 2886 of 2005

[Arising out of order in appeal No.118-119(MPM)/CE/JPR-I/2005 dated 19.4.2005 passed by Commissioner(Appeals I), Central Excise, Jaipur.

For Approval and Signature:

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

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 26 of the CESTAT (Procedure) Rules, 1982?	Yes
2	Whether it should be released under Rule 26 of 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 Departmental authorities?	Yes

C.C.E., Jaipur I .. Appellant

Vs.

M/s Rathi Bars Ltd. ... Respondent

Appearance:

Shri N. Anand, Authorized Departmental Representative(DR) for the Revenue and Shri Bipin Garg, Advocate for the respondents

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

FINAL Oral Order No. 301-302/2011-EX

Per Shri Justice R.M.S. Khandeparkar:

Heard the DR for the appellant and the Advocate for the respondents. Since a common question of law and facts arise in both the appeals besides both the appeals arise from a common order passed by the

Commissioner (Appeals), both the appeals were heard together and are being disposed of by this common order.

2. These appeals arise from a common order dated 19.4.2005 passed by the Commissioner (Appeals), Jaipur-I. By the impugned order, the penalty which was imposed by the adjudicating authority in both the matters was reduced to total amount of Rs.8 lakhs. The adjudicating authority by two separate orders dated 7.3.2002 and had in one case imposed penalty of Rs.1,14,24,930/- and in another case, penalty of Rs.17,16,340/-. Being aggrieved, the respondents filed appeals before the Commissioner (Appeals) which came to be allowed as stated above.

3. The respondents are engaged in the manufacture of M.S. CTD Bars classifiable under sub-heading 7214.90 and 7207.90 of the schedule to the Central Excise Tariff Act, 1985. At the material time, the respondents were discharging duty under compounded levy scheme on the basis of Annual Capacity of Production and Induction Furnace Annual Capacity Determination Rules, 1997. The annual capacity of production of the respondents was determined by the Commissioner under order dated 30.9.1997 which was re-determined pursuant to the application of the respondents dated 30.7.1998 by a fresh order dated 16.12.98. Accordingly, the respondents were required to pay Rs.6,85,800/- per month upto 11.9.98 and @ Rs.3,63,267/- per month with effect from 12.9.98, as the respondents had opted to discharge their duty liability in terms of sub-rule 3 of Rule 96ZP of the erstwhile Central Excise Rules, 1944 read with the said Rules, 1997. The respondents failed to discharge the duty liability for the period from September 1997 to September 1999 amounting to Rs.1,14,24,930/-. Subsequently, the respondents deposited the same along with interest calculated thereon. Similarly, for the period from October 1999 to March 2000, the respondents failed to discharge their duty liability to the tune of Rs.21,79,608/- and the same was also deposited by the respondents along with interest for the delayed payment. Two show cause notices dated

17.11.2000 came to be issued to the respondents and the adjudicating authority imposed penalty as stated above.

4. The Commissioner (Appeals) taking into consideration the various judgements and the provisions of law held that the authorities have discretion to impose lesser penalty depending upon the facts of each case. He further held that since the respondents had already deposited the duty with interest before issuance of show cause notices, there was no mens rea or wilful default established by the Department and hence the penalty of only Rs.8 lakhs in total was justifiable.

5. The DR for the appellant placing reliance in the decision in the matter of **Union of India vs. Dharamendra Textile Processors** reported in 2008 (231) ELT 3 (SC) and of the Tribunal in the matter of **C.C.E., Ludhiana vs. APS Associates Pvt. Ltd.** reported in 2010 (262) ELT 782 submitted that in terms of the law laid down by the Supreme Court no discretion is available to the Excise officers and the provision of law comprised under Rule 96ZP(3) of the said Rules is concerned, the penalty imposable is equivalent to the defaulted duty amount or Rs.5,000/- whichever concerned is greater. According to the DR, therefore, the Commissioner erred in reducing the penalty.

6. The Advocate appearing for the respondents on other hand placing reliance in the decision of the Punjab & Haryana High Court in the matter of **Bansal Alloys & Metals Pvt. Ltd. Vs. Union of India** reported in 2010 (260) ELT 343 submitted that the Apex Court in **Dharamendra Textile Processors** had left the issue of virus of the relevant provision out of the scope of decision and that aspect has been dealt with by the Punjab & Haryana High Court in **Bansal Alloys & Metals Pvt. Ltd.** Case and it has been held that there cannot be equal amount of penalty without mens rea being established.

7. The relevant provisions of law in the matter read thus –

" Provided also that where a manufacturer, fails to pay the whole of the amount payable for the month by 10th day of such month he shall be liable to , -

(i) pay the outstanding amount along with interest thereon at the rate of 18% per annum, calculated for the period from 1st day of such month till the date of actual payment of the outstanding amount; and

(ii) a penalty equal to the amount of duty outstanding from 1st day of such month or Rs.5000/- whichever is greater.

8. The provision of law as it stands came up for consideration before the Apex Court in **Dharamendra Textile Processors** and it was observed thus -

> ***"12. The stand of learned counsel for the assessee is that the absence of specific reference to mens rea is a case of casus omissus. If the contention of learned counsel for the assessee is accepted that the use of the expression "assessee shall be liable" proves the existence of discretion, it would lead to a very absurd result. In fact in the same provision there is an expression used i.e. "liability to pay duty". It can by no stretch of imagination be said that the adjudicating authority has even a discretion to levy duty less than what is legally and statutorily leviable. Most of cases relied upon by learned counsel for the assessee had their foundation on Bharat Heavy Electrical's case (supra). As noted above, the same is based on concession and in any event did not indicate the correct position in law.***
>
> ***13. It is a well-settled principle in law that the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Similar is the position for conditions stipulated in advertisements".***

9. Following the said decision while dealing with the relevant provision of law, the Tribunal in **APS Associates Pvt. Ltd.** Case had held thus –

> *"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 96ZO(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 along with 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".

10. It is however to be noted that the Apex Court while dealing with the matter in **Dharamendra Textile Processors** case had specifically excluded the issue relating to virus of the provision comprised under Rule 96ZQ(5). Undisputedly, the rule 96ZO was in relation to ingots whereas the Rule 96ZP relate to hot rerolled which included MS Bars. However, the penalty provision in relation to both the rules is the same. In other words, the Apex Court while delivering the judgment in **Dharamendra Textile Processors** case had kept the issue of virus of such provisions out of purview of the discussion and decision had specifically stated that the Division Bench dealing with the matter shall deal with the challenge about virus of the said rules.

11. After taking note of the decision of the Apex Court in **Dharamendra Textile Processors** case and dealing with the issue as to whether the provision of levying minimum penalty equal to the amount of duty involved without any requirement of mens rea and without any discretion for the concerned authority on the issue of quantum of penalty is

permissible and consistent with the Articles 14, 19, 21 of the Constitution particularly when such provision has been incorporated by subordinate legislation the Punjab & Haryana High Court in **Bansal Alloys & Metals Pvt. Ltd.** case ruled thus –

> ***"15. Applying the above principles to the present situation, the provision for minimum mandatory penalty equal to the amount of duty even for slightest bona fide delay without any element of discretion is beyond the purpose of legislation. The object of the rule is to safeguard the revenue against loss, if any. The penalty has been provided in addition to interest. Mere fact that without mens rea, an can be punished or a penalty could be imposed is not a blanket power without providing for any justification. In the Indian Constitutional scheme, power of legislature is circumscribed by fundamental rights. Judicial review of legislation is permissible on the ground of excessive restriction as against reasonable restriction which is also described as proportionality test.***
>
> ***Conclusion***
>
> ***16. For the above reasons, we hold that the impugned provision to the extent of providing for mandatory minimum penalty without any mens rea and without any element of discretion is excessive and unreasonable restriction on fundamental rights and is arbitrary. Moreover, exercise of such power by way of subordinate legislation is not permissible when rule making authority for levying penalty is limited to default "'with intent to evade duty".***

12. In view of what has been held by the Punjab & Haryana High Court, it is clear that the provision in relation to the penalty on account of default in payment of duty within prescribed period is not to be dealt with as a matter of course nor the authorities lack discretion in quantifying the penalty amount. It is another thing in case where the Department is able to establish the presence of mens rea in relation to default committed by the assessee, however, in the absence of such mens rea being established the authorities do have discretion in quantifying the penalty amount. Undoubtedly, the discretion will have to be exercised judiciously depending upon the facts and circumstances of the case. The discretion in this regard also cannot be construed to be unlimited or unguided.

13. In other words while quantifying the penalty, it is necessary for the adjudicating authority to consider the facts of the case and thereafter, on

application of mind to the same, it has to decide about the quantification of penalty. Undoubtedly, the clearance of the dues along with interest for delayed payment even prior to the issuance of show cause notice would prima facie disclose absence of any mens rea or any intention to evade duty. However, even in such a case the Department is able to bring on record the necessary materials which could reveal the presence of mens rea or intention on the part of the assessee to evade duty, certainly, the same will have to be considered by the adjudicating authority by deciding the matter Merely because the statute provides that in case of default, the same shall be accompanied by the penalty, it would not lead to the conclusion that the penalty is mandatory. Needless to say that our observations are in relation to the relevant statutory provisions which were also for consideration before the Hon'ble High Court of Punjab & Haryana High Court.

14. It is also to be noted that the quantum of penalty should be by a speaking and reasoned order and the order should apparently disclose that the discretion has been judiciously exercised.

15. In the case in hand only challenge to the impugned order is that the Commissioner (Appeals) could not have reduced the penalty which was fixed by the adjudicating authority as the adjudicating authority in that regard had fixed the quantum of penalty equivalent to the duty amount in terms of the provision of law applicable to the facts of the case.

16. As already observed above, the Hon'ble Punjab & Haryana High Court has clearly held that the quantification of penalty should be in the discretion of the adjudicating authority depending upon the facts and circumstances of the case and in the absence of establishment of the mens rea. As there is no material on record to establish any mens rea or wilful default in payment of duty by the respondents, the Commissioner (Appeals) while observing that there was nominal delay in payment of duty in his discretion has reduced the total penalty to the tune of Rs.8 lakhs. We do not

find any arbitrariness in course of its discretion by the lower appellate authority.

17. In view of the above circumstances, we do not find any justifiable ground to interfere with the impugned order and hence the appeals fail and are hereby dismissed.

(Justice R.M.S. Khandeparkar)
President

Rakesh Kumar)
Technical Member

scd/