TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

EXCISE APPEAL BRANCH

Appeal No. E/409 /2005,475 /2005 - EX[DB]

Date **04/05/2011**

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

To :
M/S KALYAN AGRO INDUSTRIES CORPORATION
C-14, FOCAL POINT, LUDHIANA

M/S KALYAN AGRO INDUSTRIES CORPORATION Appellant

Vs

C.C.E. LUDHIANA Respondent

I am directed to transmit herewith a certified copy of **Final order No.411-412/ 2011 EX[DB]** dated 21-4-11 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.K K ANAND, ADVOCATE
A-103, DEFENCE COLONY, NEW DELHI-110024

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. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file
14. 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

DATE OF HEARING : 21/04/2011.
DATE OF DECISION : 21/04/2011.

Excise Appeals No. 409 of 2005 and 475 of 2005

[Arising out of the Order-in-Appeal No. 556-557/CE/Appeal/Lud./ 2004 dated 31/08/2004 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 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 Kalyan Agro Industries Corporation — Appellants

Versus

CCE, Ludhiana — Respondent

Appearance

Shri S. Yadav, Advocate – for the Appellants.

Shri I. Beg, Authorized Representative (DR) – for the Respondent

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

FINAL Order No. 411-412/2011-EX Dated : ______________

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

Heard the advocate for the appellants and DR for the respondent. These appeals arise from common order passed by the Commissioner (Appeals) on 31st August 2004. The Commissioner (Appeals) by the impugned order dismissed the appeals filed by the appellants against the Adjudicating Authority's order dated 30th March 2004.

2. The appellants are engaged in manufacture of non-alloy steel Ingots classifiable under sub-heading No. 7206.90 of the Central Excise Tariff Act, 1985. W.e.f. 1st September 1997, the appellants opted for the benefit of the scheme drawn under sub-Rule (3) of Rule 96 ZO of the Central Excise Rules, 1944 for the purpose of discharge of duty liability that is on lumpsum basis per month. Accordingly, they were required to pay the excise duty to the tune of Rs. 5,00,000/- (Rupees Five Lakhs) per month as their capacity of the induction furnace was of 3 M.Ts. During the period from October 1997 to November 1997, the appellants had cleared non-alloy steel ingots without discharging their duty liability to the tune of Rs. 1,35,349/- and during the month of April 1999, there was a short payment of amount to the tune of Rs. 12,500/. The appellants having contravened the provisions of Rule 9 (2) readwith Rule 96 ZO (3) of the said Rules and Section 3A of the Central Excise Act, 1944 readwith Rule

173Q of the Central Excise Rules, 1944, show cause notices dated 24th April 1998 and 2nd November 1999 came to be issued. After adjudication proceedings, the demand for Rs. 1,35,349/- was confirmed alongwith the interest and equal amount of penalty as also the demand for Rs. 12,500/- alongwith interest and equal amount of penalty. Being aggrieved by the said order, the appellants carried the matter in appeal before Commissioner (Appeals) solely on the ground that it was settled law that in case of short payment of duty on account of adjustment of the amount of abetment, the question of imposition of penalty does not arise and that the delay in payment of duty was on the ground of pendency of abetment claim and difficulty experience by the appellants in running the manufacturing process in the factory. The contention was rejected by the Commissioner (Appeals) while dismissing the appeal, hence the present appeals.

3. While reiterating the grounds canvassed before the Commissioner (Appeals), the learned advocate for the appellants drew our attention to the proviso added to Rule 96 ZO (3) of the said Rules and submitted that the provision regarding the penalty was introduced w.e.f. 1st May 1998 and, therefore, in relation to the period from October and November 1997, there was no justification for imposition of 100% penalty. He further submitted that taking into consideration the fact that the factory remained closed for the reasons beyond the control of the appellants, the penal provision comprised under Rule 173Q was also not attracted.

4. The DR on the other hand submitted that though the provision regarding the penalty came to be introduced w.e.f. 1st May 1998, the last proviso introduced by the said amendment clearly provides that even in case of default pertaining to the month of September 1997 to March 1998 the same would be subjected to the penalty and since the period involved is of October and November 1997, applying the said provision of law, no fault can be found with the imposition of 100% penalty in the matter in hand.

5. The learned advocate for the appellants placed reliance in the decision of CESTAT in the matter of **Jaininder Steel Pvt. Ltd. vs. CCE, Bhavnagar** reported in **2010 (255) E.L.T. 88 (Tri. – Ahmd.)** and also **Mittal Alloys vs. CCE, Ludhiana** reported in **2009 (244) E.L.T. 237 (Tri. – Del.)**.

6. On the other hand, the DR has placed reliance in the decision of the Tribunal in the matter of **Hindustan Processors Ltd. vs. CCE, Jaipur** reported in **2009 (243) E.L.T. 372 (Tri. – Del.)**, while distinguishing the decision in **Mittal Alloys vs. CCE, Ludhiana** (supra) case based on the observations made therein in para 46 of the decision.

7. As far as short payment of Rs. 12,500/- is concerned, records nowhere disclose any explanation forthcoming from the appellants in that regard. Only contention which is sought to be

raised is about the difficulty in running the manufacturing process. Certainly that cannot be a justification for non-payment of duty or part thereof which an assessee is liable to pay in terms of the quantification fixed pursuant to the fixation of the capacity of the induction furnace, once the assessee had opted for the scheme under 96 ZO (3) of the said Rules.

8. As regards the amount of Rs. 1,35,349/- is concerned, undisputedly the said amount related to the period of October and November 1997 and the abetment claim in that regard was already rejected and such rejection was confirmed by the Tribunal. In those circumstances, therefore, in the absence of any justifiable cause being shown mere pendency of abetment claim cannot be a ground to avoid the payment of the duty. Certainly if the assessee had succeeded in abetment claim, he could have sought refund of the amount, but pendency of the abetment claim by itself cannot be a ground to delay the payment of duty.

9. As regards the decision of the Tribunal in **Jaininder Steel Pvt. Ltd. vs. CCE, Bhavnagar** (supra) case, the same was delivered on concession made by the parties to the proceedings to the effect that no penalty could be imposed in respect of delayed payment prior to the date of 1st May 1998. In para 3 of the order it has been clearly recorded that :

> "there is no dispute that the Rule 96 ZO (3) of Central Excise Rules, 1944 was introduced from 1/5/98 and

therefore the penalty could not have been imposed in respect of delayed payment prior to that date".

The decision, therefore, does not lay down any law as such on the aspect of non-liability for penalty in relation to the amount payable prior to the date of 1st May 1998.

10. In **Mittal Alloys vs. CCE, Ludhiana** (supra) case, the Division Bench of Tribunal to which one of us was party (Shri Justice R.M.S. Khandeparkar, President) it was held that :

> "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 the 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. Being so, in our considered opinion, mere failure on the part of the appellants to clear the dues by 30/4/98 in terms of such proviso could not warrant levy of penalty as the said amendment had come into force on 1/5/98 and whatever dues remained after 1/5/98, those could be subject to levy of penalty."

11. The relevant proviso reads thus :-

> "provided that if the manufacturer fails to pay the total amount of duty payable for each of the months from September, 1997 to March, 1998 by the 30th day of April, 1998, he shall also be liable to pay a penalty equal to the outstanding amount of duty as on 30th day of April, 1998 or five thousand rupees, whichever is greater".

12. Plain reading of the said proviso would undoubtedly disclose that in case where the assessee fails to pay the duty in relation to the month of September 1997 to March 1998 on or before 30th April 1998 such assessee would be liable to pay the penalty equal to the outstanding amount of duty w.e.f. 1st May 1998. It appears that the law makers have introduced the said provision regarding the liability to pay penalty in case of default in payment of duty payable under Rule 96 ZO (3) on par with the provision under 11AC of the said Act. But, since the provision in that regard was introduced w.e.f. 1st May 1998, liability for 100% penalty had been introduced w.e.f. 1st May 1998 only. Merely because such penalty is made effective from 1st May 1998 even in relation to the amount which was payable and due prior to the said date, the provision cannot said to be effective retrospectively. In fact it has been made effective prospectively that is from 1st May 1998. Being so, whenever the assessee fails to clear the dues in relation to the period prior to 1st May 1998 commencing from September 1997 by 30th April 1998, he could be subjected to the 100% penalty in relation to the amount remaining outstanding as on 1st May 1998.

13. The question, however, in the case in hand is whether in the facts and circumstances of the case such a penalty in terms of the said proviso could be attracted. It is settled law that the liability of the assessee is to be ascertained on the basis of the claim made by the department in the show cause notice issued to the assessee. As regards the claim relating to the month of

October and November 1997 was made under show cause notice dated 24th April 1998. Undisputedly on the said day, department had no occasion to demand penalty in terms of the said proviso as it had not come into force on that day. Considering the same, the observations by the Tribunal in **Mittal Alloys vs. CCE, Ludhiana** (supra) case in particular in para 46 would be squarely attracted in the facts and circumstances of the case. Once it is clear that assessee was not given any opportunity to meet the case regarding the penalty in terms of the proviso in question, the department cannot insist for 100% penalty upon the appellants in terms of the said proviso, merely on the basis of the said provision of law which came into force subsequent to the issuance of show cause notice.

14. This does not mean that the appellants would be absolutely absolved of payment of penalty. Certainly the appellants were at the relevant time required to show cause against the imposition of penalty in terms of Rule 173Q of the said rules. Taking into consideration, the facts and circumstances of the case and also the quantum of the duty which remained to be paid, in our considered opinion penalty of Rs. 20,000/- would be appropriate penalty in the matter.

15. In the result, therefore, the appeal partly succeeds. The penalty imposed in relation to the delay in payment of sum of Rs. 1,35,349/- is reduced to Rs. 20,000/-. No other interference is called for in the impugned order. The appellants, therefore, would

be liable to pay the duty to the tune of Rs. 1,35,349/- alongwith the interest thereon and penalty of Rs. 20,000/- besides amount of Rs. 12,500/- with interest thereon and penalty of equal amount. With this modification, the appeals stand disposed of.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK