
(2009) 12 P&H CK 0099

In the Punjab And Haryana At Chandigarh

Case No : Central Excise Appeal No. 60 of 2006 (O and M)

Commissioner of Central Excise Commissionerate

APPELLANT

Vs

B.T. Steels Limited

RESPONDENT

Date of Decision : 15-12-2009

Acts Referred:

Central Excise Rules, 1944 — Rule 173G(1), 96ZO, 96ZO(2), 96ZO(3), 96ZQ
Central Excises and Salt Act, 1944 — Section 11AC, 3A, 3A(3)
Income Tax Act, 1961 — Section 271(1)

Citation : (2010) 250 ELT 206

Hon'ble Judges : M.M. Kumar, J; Jaswant Singh, J

Bench : Division Bench

Advocate : Mr. Sanjiv Kaushik, Standing in CEA Nos. 60 of 2006, 81 of 2006, 155 of 2005, 56 of 2008 and 26 of 2004, Gurpreet Singh, Standing in CEA Nos. 39 of 2006 and 159 of 2005 and Puneet Bassi, in CEA No. 55 of 2008, for the Appellant; Jagmohan Bansal in CEA Nos. 55 and 56 of 2008, Surjeet Bhadau in CEA No. 39 of 2006 and R. Kartikeya in CEA No. 81 of 2006 and CEA CEA No. 155 of 2005, for the Respondent

Judgement

M.M. Kumar. J.—This bunch of eight* appeals filed by the appellant-revenue, is proposed to be decided by this common judgment as common questions of law and similar facts are involved. These appeals were earlier decided by different Division Benches of this Court on various dates, and the controversy revolving around the interpretation of Rule 96ZO(3) of the Central Excise Rules 1944 was answered in favour of the dealer-respondent,

2. x x x x The view taken by this Court was that penalty as envisaged under Rule 96ZO(3)(ii) is not inflexible and in all cases it is not necessary that penalty equivalent to the amount of duty must be imposed. This Court also opined that the intention to evade duty must be read in the aforesaid rule and in the absence of any finding concerning intention to evade the duty, no penalty could be imposed or even penalty lesser than the amount equivalent to the amount of duty could be imposed.

3. The matter was taken to Hon''ble the Supreme Court by the appellant-revenue and the view taken by this Court has not been accepted by Hon''ble the Supreme Court. The orders have been quashed and the appeals have been remitted back for decision afresh in the light of the judgment of the Supreme Court rendered in the case of Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, . The aforesaid view taken in Dharmendra Textiles Processors'' case (supra) has been further explained and clarified by Hon''ble the Supreme Court itself in the case of Union of India (UOI) Vs. Rajasthan Spinning and Weaving Mills, . Accordingly, we proceed to notice the issue and decide the same in the light of the judgments of the Supreme Court.

4. Few facts may first be noticed which are being taken from CEA No. 60 of 2006. The revenue has claimed various questions of law by challenging order dated 23.02.2005 (Annexure P2), passed by Customs, Excise & Service Tax Appellate Tribunal, New Delhi (for brevity "the Tribunal"). The facts as noticed in the order dated 06.02.2004, passed by the Assessing Authority are that the dealer-respondent is engaged in the manufacture of non alloy steel ingots falling under sub heading 7206.90 of the Schedule to the Central Excise Tariff Act, 1985 (for brevity "Tariff Act"). u/s 3A of the Central Excise Act, 1944 (for brevity "The Act") the ingots were chargeable to duty on lump sum basis in respect of the period from 01.09.1997 to 31.03.2000. The provision of Section 3A of the Act has to be read with Rule 96ZO of the Rules. The dealer had opted for payment of duty under Rule 96ZO(3) of the Rules which provide for fixing the amount of duty liability according to capacity of furnace installed in a factory. The capacity of the furnace installed in the factory premises of the assessee was determined by the Commissioner, Central Excise, Chandigarh, as follows:

i) 8MT (two furnaces of 4 MT each) during the period 01.09.1997 to 12.02.1998 vide C. No. V(16) C.Levy/IF/22/T/97/14717-19 dated 14.10.1997.

ii) 4MT (one furnace of 4 MT) during 13.02.1998 to 15.10.1998, vide C. No. TV(16)C. Levy/IF/22/T/97/20403-05 dated 15.05.1998.

iii) 3MT (one furnace of 3 MT) from 16.10.1998 to 31.12.1998, and 6 MT (Two furnace of 3 MT each) from 01.01.1999 to 31.03.2000 vide C. No. IV(16)C.Levy/IF/22/T/97/178-79 dated 09.01.2001.

5. It is pertinent to mention that Rule 96ZO was incorporated vide notification dated 01.08.1997 to regulate the payment of duty in respect of non alloy Steel Ingots and Billets falling under sub heading Nos. 7206.90 and 7207.90 of the Schedule to the Central Excise Tariff Act, 1985 (for brevity "The Tariff Act") and hot re-rolled products. The period covered was from 01.09.1997 till 31.03.1998. A manufacturer of ingots billets was required to debit an amount calculated @ Rs. 750/- per metric tonne at the time of clearance of ingots and billets of non-alloy steel from his factory in the account-current, maintained by him under Sub-rule (1) of Rule 173G of the Central Excise Rule, 1944 (for brevity "the Rules") which was subject to the condition and calculation payable under Sub Rule (1) &

(2). This was known as "Compounded Levy Scheme". A notification in that regard was issued on 01.08.1997. The notification provided that if the factory remains closed for not less than seven days then the assessee was to be entitled of abatement of duty in terms of Rule 96ZO(ii) of the Rules.

6. The dealer was required to pay proportionate amount of duty worked out on the basis @ Rs. 5,00,000/- per month for 3 MT furnace under the Rule 96ZO(3). As per sub Rule (2) of Rule 96ZO of the Rules read with Sub-section 3 of Section 3A of the Act, a provision has been made for abatement of duty in case a factory has remained closed for minimum period of 7 days continuously. The dealer claimed benefit of seven abatement under these provisions, which were decided by the Commissioner, Central Excise, Chandigarh, vide order dated 21.03.2000. The following table sums up the decision accepting and rejecting the claims are as under:

Sr. No.

Period for which claim filed

Period of which claim sanctioned

Period for which claim rejected/disallowed

1

10.11.1997 to 17.11.1997

10.11.1997 to 17.11.1997

?

2

02.12.1997 to 09.12.1997

02.12.1997 to 09.12.1997

?

3

24.12.1997 to 31.12.1997

?

24.12.1997 to 31.12.1997

4

31.12.1997 to 08.01.1998

?

31.12.1997 to 08.01.1998

5

24.01.1998 to 09.02.1998

27.01.1998 to 09.02.1998

24.01.1998 to 26.01.1998

6

15.02.1998 to 26.02.1998

17.02.1998 to 26.02.1998

15.02.1998 to 16.02.1998

7

23.03.1998 to 02.04.1998

23.03.1998 to 02.04.1998

?

7. The dealer preferred an appeal against the order dated 21.03.2000 and the Tribunal has partially set aside the order and remanded the case for fresh decision in respect of the claims which were rejected.

8. In respect of the abatement for the period 26.12.1997 to 31.12.1997 and 01.01.1998 to 08.01.1998, the Commissioner had reexamined the matter and held that the claim made by the dealer for abatement was not admissible. The principal reason for the aforesaid view is that the factory of the assessee was not closed as a whole and there was continuous production of ingots. Therefore, as per Sub-rule 2 of Rule 96ZO of the rules read with Section 3A(3) of the Act, the claim of the dealer in respect of the aforesaid period was found not sustainable.

9. In respect of the period commencing from 24.01.1998 to 26.01.1998 also, the Commissioner had re-examined the matter and found that no abatement of the duty was admissible to the dealer for the aforesaid period. The principal reason given by the Commissioner was that the dealer did not comply with the provision of Rule 96ZO(2)(a) as the dealer failed to intimate the closure of factory prior to the date of closure. It could not produce any evidence even at the time of re-examination of the case to prove that the furnace was closed from 24.01.1998 which was the basic requirement of Rule 96ZO(2)(a) of the Rules. However, in respect of the period w.e.f. 15.02.1998 to 16.02.1998, the claim of the dealer has been allowed as the factory had remained closed for the aforesaid two days.

10. The Commissioner also adjudicated afresh about the abatement claim made by the dealer in respect of the period commencing from 10.01.1998 to 13.02.1998. The Commissioner had recorded a categorical finding that both the furnaces remained closed from 27.01.1998 to 08.02.1998 and the abatement of duty has been admitted for the aforesaid 13 days. Likewise, the abatement of

duty in respect of the period commencing from 12.04.1998 to 01.05.1998 has been re-examined and allowed by the Commissioner. Accordingly, he has accepted the claim from 12.04.1998 to 30.04.1998 as the dealer had fulfilled the requirement of the provisions of Rule 96ZO (2) and his factory remained closed as a whole because only one service/furnace was installed during this period. The total period worked out is 90 days. The Commissioner also examined in detail the amount of duty which has remained unpaid and assessed the same to be Rs. 8,38,977/-. Accordingly, the Commissioner ordered the dealer to pay the aforesaid amount under Rule 96ZO(3) of the Rules.

11. With regard to imposition of penalty under Rule 96ZO(3)(ii), the Commissioner has held that the dealer had failed to pay a part of the arrears even after lapse of more than three years and its conduct was devoid of any justification. Referring to the provisions of Clause (ii) of Rule 96ZO(3), the Commissioner held that the manufacturer had failed to pay whole of the amount by the end of the relevant month. The dealer was under obligation to pay penalty equal to the outstanding amount of duty or Rs. 5,000/- whichever is higher. Therefore, the Commissioner ordered imposition of penalty to the tune of Rs. 8,38,977/- which amount was equivalent to the amount of duty. The Commissioner also confirmed the recovery of interest on the amount of duty as per the provisions of Rule 96ZO(3). The order dated 06.02.2004, passed by the Commissioner, was again challenged and the Tribunal accepted the abatement claim in respect of certain period and upheld the order of the Commissioner in respect of some other claims. The Tribunal also deleted the penalty by keeping in view the facts and circumstances of the case and reduced the same to Rs. 50,000/-. The operative part of the order dated 23.02.2005 (Annexure P-2), passed by the Tribunal reads thus:

The learned Counsel has contended that claim for three days i.e. 24.01.1998 to 26.01.1998 has been wrongly disallowed on the ground that intimation regarding the closure of the factory was received only on 27.01.1998, whereas it was sent on 24.01.1998 itself. In our view, this connection (sic. contention?) of the counsel deserves to be accepted. The abatement claims for the period 24.01.1998 to 09.02.1998 was lodged by the appellants on account of closure of their factory during these days. But the adjudicating authority has allowed the abatement only from 27.01.1998 to 09.02.1998. The rejection for the period 24.01.1998 to 26.01.1998 has been made on the ground that intimation regarding the closure of the factory was received in the department only on 27.01.1998. But the adjudicating authority has lost sight of the fact that intimation was sent by the appellants on 24.01.1998 itself and its receipt by the department on 27.01.1998 was not due to any fault on their part but on account of gazetted holidays. Therefore, for this period, the abatement claim could not be rejected and as such, the impugned order in this regard is modified.

Regarding rejection of the claim for other periods as detailed in para 1.3 of the impugned order, we do not find any force in the contention of the counsel that

these had been wrongly disallowed. The appellants are liable to pay the duty amount in dispute for the period in question except for three days i.e. 24.01.1998 to 26.01.1998 for which they are entitled to the abatement of duty.

Therefore, the impugned order confirming the duty demand except for these three days (24.01.1988 to 26.01.1988) is upheld. However, keeping in view the facts and circumstances of the case the penalty imposed equal to the amount of duty is reduced to Rs. 50,000/-. The appeal of the appellants accordingly stands disposed of.

12. Feeling aggrieved by the aforesaid adjudication of the Tribunal, the revenue has approached this Court by claiming that the following questions of law would arise for determination of this Court:

i) Whether intimation of the date of closure of the furnace sent after three days due to intervening holidays can be considered as proper when the Trade Notice issued in this regard clearly provides to send the intimations in such cases through post/telegram?

ii) Whether penalty imposed under Rule 96ZO(3)(ii) upon a manufacturer of non-alloy steel ingots/billets falling under sub heading Nos. 7206.90 and 7207.90 of the Schedule of the Central Excise Tariff Act, 1985 (5 of 1986) and who opted to pay duty u/s 3A of the Central Excise Act, 1944 read with induction Furnace Annual Capacity Determination Rules, 1997, but 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, is mandatory or discretionary in nature?

iii) Whether mandatory equal penalty imposed under Rule 96ZO(3) (ii) can be reduced?

13. On behalf of the revenue, Sarvshri Sanjiv Kaushik, Gurpreet Singh and Puneet Bassi, Advocates have vehemently argued that in Dharmendra Textiles Processors" case (supra), Hon"ble the Supreme Court has specifically dealt with the provisions of Rule 96ZO and 96ZP. According to learned Counsel, the Compounded Levy Scheme or any other scheme is a composite contract between the dealer and the State. Once it has been accepted as a whole then the dealer cannot resile from fulfilling the obligation under the scheme. According to the learned Counsel, there is no discretion vested in the Assessing Authority, Appellate Authority or the Tribunal to reduce the amount of penalty imposable as per Rule 96ZO(3) (ii) namely equivalent to the amount of duty payable. They have maintained that on the plain language of Rule 96ZO of the Rules, no intention to evade duty or make payment of duty is required to be shown or no fraud, misrepresentation or suppression of facts is required to be proved. It has been highlighted by the learned Counsel that the aforesaid situation envisaged by Section 11AC of the Act is not envisaged in Rule 96 ZO. They have also submitted that the abatement claims are required to be strictly covered by Rule 96ZO (2) of the Rule and in the absence of fulfilling the requirement of aforesaid provision, no abatement claim could have been granted by the tribunal. Learned

Counsel have also made submissions on the facts of each case to urge that the abatement claims have been erroneously allowed by the tribunal and the well based findings recorded by the Commissioner have been illegally set aside. In respect of their submissions, they have placed reliance on a judgment of Hon''ble the Supreme Court in the case of Commissioner of Central Excise and Customs Vs. M/s. Venus Castings (P) Ltd., and a Division Bench judgment of Hon''ble the Bombay High Court in the case of Matsyodari Steel Alloys P. Ltd. v. Commissioner of Excise & Customs, Aurangabad 2008 (225) E.L.T. 46 (Bombay).

14. On the first question, the argument raised by the learned Counsel for the revenue is that trade notice bearing No. 31/99 dated 10.08.1999 postulate the mode of communication either by sending telegram or by means of post. In that regard, reliance has been placed on the observation made by the tribunal in the case of 2001 (97) ECR 1 09 , where trade notice No. 31/99 dated 10.08.1999 has been explained.

15. Mr. Jagmohan Bansal, Advocate, Mr. Surjeet Bhadau, Advocate, and Mr. R. Kartikeya, Advocate, on behalf of the dealers-respondents have vehemently argued that every penal action has to precede by a finding of dishonest intention impregnated with fraud and misrepresentation. According to learned Counsel, no penalty could be imposed in cases where the abatement claims made by the dealer were binding especially when such claims have been found to be sustainable to a large extent. They have canvassed that the non-payment of duty cannot be imputed to any malafide intention as the delay has occurred on account of bonafide belief which is based on pending abatement claims. They have also urged that the judgment of Hon''ble the Supreme Court in Rajasthan Spinning & Weaving Mills''s case (supra) has clarified and explained its earlier judgment in Dharmendra Textiles Processors'' case (supra) by observing that unless all the conditions specified u/s 11AC are fulfilled no penalty could be imposed.

16. In respect question No. 1, it has been argued by the learned Counsel for the dealers-respondent that there was no possibility of receiving intimation on account of holidays which was in fact sent on 24.01.1998. According to the learned Counsel, merely because the procedure of intimation by post or by telegram was not adopted, the dealer-respondent should not lose the statutory benefit provided by the Rules. Learned Counsel have also submitted that trade notices issued by the Revenue do not cast any binding obligation requiring the dealer-respondent to send intimation by adopting the same mode especially in the absence of any provision in the statutory Rules. It has further been urged that the tribunal is the last adjudicatory forum for recording of findings on facts and it would not be proper to unsettle those findings.

RE:QUESTION No. 1

17. Having heard the learned Counsel for the parties, we are of the considered view that question No. 1 has to be answered against the revenue and in favour

of the dealer-respondent. The trade notice No. 31/99 dated 10.08.1999 issued by the Commissioner of Central Excise, Chandigarh cannot be applied to the period of 24.01.1988 to 09.02.1998 as such trade notice cannot have any retrospective effect. It is well settled that any instructions or bye-law cannot be issued with retrospective effect nor it can be interpreted so as to give retrospective operation. Therefore, the view taken by the tribunal by giving the benefit for the period from 24.01.1998 to 26.01.1998 to the dealer-respondent is not unwarranted. Accordingly, question No. 1 is decided against the revenue and in favour of the dealer-respondent.

RE:QUESTION Nos. 2 & 3

18. However, on the aforesaid two questions, the judgment rendered by the Hon'ble the Supreme Court in Dharmendra Textiles case (supra), has direct bearing. It has been categorically held that Rule 96ZO and 96ZQ of the Rules do not contemplate exercise of discretion and the plea that the Rules have inbuilt concept of discretion, has been rejected. Hon'ble the Supreme Court has specifically overruled the judgment rendered in Dilip N. Shroff v. Joint Commissioner of Income Tax. 2007 (219) ELT 15. In that case it was held that an element of mens-rea was necessary before penalty could be imposed. However, in Dharmendra Textile's case (supra), the aforesaid view has been overruled on the ground that it has failed to take into account the provisions of Section 271(1) (c) of the Income Tax Act, 1961. It has been laid down that the aforesaid provision was rightly interpreted in the case of Chairman. The Chairman, SEBI Vs. Shriram Mutual Fund and Another, . Accordingly, in the concluding part, Hon'ble the Supreme Court in Dharmendra Textile's case (supra) has held as under:

Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroffs case (supra) was not correctly decided but Chairman, SEBTs case (supra) has analysed the legal position in the correct perspectives. The reference is answered....

19. The judgment in Rajasthan Spinning and Weaving Mill's case (supra) has not deviated from the aforesaid view in respect of Rule 96ZO and, therefore, it continues to hold the field. It is a different matter that in Rajasthan Spinning and Weaving Mill's case (supra), the view taken in Dharmendra Textile's case (supra) in respect of Section 11AC has been further explained. Then it would not result into a conclusion that Dharmendra Textile's case (supra) in so far as Rule 96ZO is concerned, would not hold the field. The aforesaid position has been put beyond any controversy by paragraph No. 5 of the judgment subsequently rendered by Hon'ble the Supreme Court in Union of India v. Krishna Processors 2009 (237) ELT 641. Accordingly, we find nothing in the judgment of Hon'ble the Supreme Court in Rajasthan Spinning and Weaving Mill's case (supra) to form an opinion that Rule 96ZO is not mandatory.

20. In view of the aforesaid discussion, the provisions for imposing penalty under

Rule 96ZO(3)(ii) of the Rules are held to be mandatory and there is no discretion vested in any authority to reduce the aforesaid amount of penalty on the ground that there was no intention of evading payment of duty or commission of fraud, misrepresentation etc. Accordingly, both the questions No. 2 and 3 are answered against the dealer-respondent and in favour of the appellant-revenue.

21. No other argument has been raised. All the eight appeals are accordingly disposed of.