

(2015) 09 AHC CK 0029

In the Allahabad High Court

Case No : Central Excise Appeal No. 178 of 2015

Commissioner of Customs and Central Excise

APPELLANT

Vs

Barnala Steel Industries Ltd.

RESPONDENT

Date of Decision : 04-09-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 37, 37(3), 38, 38A
General Clauses Act, 1897 — Section 6

Citation : (2015) 9 ADJ 670 : (2016) 332 ELT 591

Hon'ble Judges : Tarun Agarwala, J;Surya Prakash Kesarwani, J

Bench : Division Bench

Advocate : K.C. Sinha and R.C. Shukla, for the Appellant; B.J. Agrawal and P. Agrawal, Advocates for the Respondent

Judgement

Surya Prakash Kesarwani, J—We have heard Sri R.C. Shukla, learned counsel for the appellant and Sri Arvind Shikariya holding brief of Sri Piyush Agarwal, learned counsel for the respondent-assessee.

2. This Central Excise Appeal has been filed raising following substantial question of law:

"whether under the facts and circumstances of the case penalty equal to the amount of the duty under Rule 96ZP(3) of the Central Excise Rules, 1944 is leviable on the respondent"?

3. Learned counsel for the appellant submits that the substantial question of law raised in this appeal is covered by the decision of Hon'ble Supreme Court in the case of Commr. of Cus. and Cen. Exc. Coimbatore Vs. Kannapiran Steel Re-Rolling Mills, (2011) 263 ELT 22 and Commissioner of Central Excise, Mumbai 2011 (267) E.L.T. 438 (S.C.)

In the light of the above judgments he submits that the penalty under Rule 96ZP(3) of the erstwhile Central Excise Rules, 1994 (hereinafter referred to as "the Rules") is mandatory and, therefore, the Tribunal should not have imposed

penalty equal to the amount of duty. He further submits that even though Rule 96ZP(3) was omitted in the year 2001 but since the show cause notice was issued to the respondent prior to the date of omission and, as such, the proceedings shall not lapse in view of provisions of Section 38A of the Central Excise Act, 1944 (hereinafter referred to as "the Act").

4. Learned counsel for the respondent submits as under:

"(i) Rule 96ZP(3) was omitted by notification No. 6 of 2001 and CE (N.P.) dated 11.5.2001 without any saving clause and, therefore, the appellants could not have passed the order in original dated 13.11.2003. He submits that the provisions itself was not available as on the date on which the order was passed by the adjudicating authority.

(ii) Rule 96ZP was enacted by the Central Government in exercise of powers conferred under Section 37(3)/(4) of the Act and, therefore, even if it is found that the penalty proceedings were saved by Section 38A of the Act yet in the absence of any intention to evade of payment of duty, no penalty could have been imposed.

(iii) The provisions of Rule 96ZP(3) were declared ultra vires by different High Courts and, therefore, no penalty was leviable. Under the circumstances, even if part of penalty has been sustained by the Tribunal, the order cannot be interfered with in this appeal. In support of his submissions he relied upon various judgments."

5. We have considered the submissions of learned counsel for the parties and perused the record.

6. Briefly stated the facts of the present case are that the respondents are engaged in the manufacture of M.S. Bar falling under Chapter sub heading No. 7214.90 of the schedule to the Central Excise Tariff Act, 1985. They opted for compounded levy scheme under Rule 96ZP(3) of the Rules for full and final discharge of their duty liability based on annual capacity of production. As per provisions of Rule 96ZP the payment of duty was required to be made on monthly basis by the 10th day of the month. For the months of August, 1999 to December, 1999 the Central Excise Authorities found that the respondent deposited the excise duty after few days of the due dates, along with interest. On these facts, the show cause notice was issued by the Superintendent of Central Excise Range IV Muzaffar Nagar dated 29th February, 2000 requiring the respondent to show cause that why penalty equal to the amount of duty be not imposed under Rule 96ZP(3) of the Rules for delayed payment of duty. Another show cause notice dated 18th April, 2000 was issued due to delay of few days in depositing the amount of duty for the months of January, February and March, 2000. The said show cause notices were adjudicated and an order in original dated 13.11.2003 was passed by the Assistant Commissioner of Division I Meerut imposing penalty of Rs. 13,30,000/- under Rule 96ZP(3). Being aggrieved the appellant as well as the respondent assessee preferred appeals before the

Commissioner (Appeals) Customs and Central Excise-Meerut-I. The present appellant has filed appeal for enhancement of penalty to the extent of the amount of delayed payment of duty while the respondent assessee filed the appeal to strike down the penalty. The appeal of the present appellant was rejected and the appeal of the respondent assessee was partly allowed and the penalty was reduced to 1,50,000/- by the Commissioner (Appeals) vide order dated 22nd June, 2004. Aggrieved with the said appellate order the present appellant as well as the respondent assessee preferred appeals before the Customs, Excise and Service Tax Appellate Tribunal, New Delhi who dismissed the appeal of the respondent-assessee and partly allowed the appeal of the present appellants by enhancing the penalty to Rs. 3 lacs. Aggrieved with the aforesaid order of the Tribunal, the present appeal has been filed by the appellant.

7. The provisions of Rule 96ZP(3) was enacted by the Central Government in exercise of powers conferred under Section 37(3)/(4) of the Act. For the sake of convenience and reference, the provisions of Section 37(3)/(4) of the Act and the erstwhile Rule 96ZP(3) of the Rules as amended by the Finance Act 2000, are reproduced below:

"Section 37(3)- In making rules under this section, the Central Government may provide that any person committing a breach of any rule shall, where no other penalty is provided by this Act, be liable to a penalty not exceeding five thousand rupees.

(4) Notwithstanding anything contained in Sub-section (3), and without prejudice to the provisions of section 9, in making rules under this section, the Central Government may provide that if any manufacturer, producer or licensee of a warehouse-

(a) removes any excisable goods in contravention of the provisions of any such rules, or

(b) does not account for all such goods manufactured, produced or stored by him, or

(c) engages in the manufacture, production or storage of such goods without having applied for the [registration] required under section 6 or

(d) contravenes the provisions of any such rule with intent to evade payment of duty, then, all such goods shall be liable to confiscation and the manufacturer, producer or licensee shall be liable to a penalty not exceeding the duty leviable on such goods or [ten thousand rupees,] whichever is greater."

Rule 96ZP(3): Notwithstanding anything contained elsewhere in these rules, a manufacturer may, in the beginning of each month from 1st day of September, 1997 to the 31st day of March, 1998 or any other financial year, as the case may be, and latest by the tenth of each month, pay a sum equivalent to one-twelfth of the amount calculated at the rate of Rs. 300/- multiplied by the annual

capacity in metric tonnes, as determined under sub-rule (3) of rule 3 of the Hot Re-rolling Mills Annual Capacity Determination Rules, 1997, and the amount so paid shall be deemed to be full and final discharge of his duty liability for the period from the 1st day of September, 1997, to the 31st day of March, 1998, or any other financial year, as the case may be, subject to the condition that the manufacturer shall not avail of the benefit, if any, under the proviso to Sub-section (3) or under Sub-section (4) of the section 3A of the Central Excise Act, 1944 (1 of 1944):

Provided that in respect of the non-alloy steel hot re-rolled products, manufactured or produced by a re-rolling mill in which the nominal centre distance of the pinions in the pinion stand is up to 160 millimeters, the sum payable under this sub-rule shall be calculated as if to the letters and figures "Rs. 300/- ", the letters and figures "Rs. 150/-" were substituted:

Provided further that for the month of September, 1997, the manufacturer may pay the amount due for the said month by the 30th of September, 1997:

Provided also that if a manufacturer makes a change in the capacity of re-rolling installed in his factory, or there is any change in the total re-rolling capacity installed, he shall pay the amount, calculated pro rata:

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

(i) the outstanding amount of duty along with interest thereon at the rate of eighteen per cent per annum calculated for the period from the 11th 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 him at the end of such month or five thousand rupees, whichever is greater:

Provided further that if the manufacturer fails to pay the total amount of the 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 the 30th day of April, 1998 or five thousand rupees, whichever is greater:]

Provided also that where a manufacturer has paid the amount during any month on the basis of provisional determination of annual capacity and subsequently the annual capacity is determined on final basis, the manufacturer shall pay the whole of the differential amount recoverable for the relevant months by the tenth of the month succeeding the month in which the annual capacity is determined on final basis."

8. Section 37 of the Act confers power on the Central Government to make rules. Sub-section (1), Sub-section (2) and Sub-section (2A) of Section 37 are not relevant for the purposes of this case. The relevant provisions are Sub-section

(3) and Sub-section (4) of Section 37 of the Act which have been reproduced above. Perusal of Sub-section (3) shows that the Central Government may frame rules to provide that any person committing breach of any rule shall, where no other penalty is provided by this Act, be liable to a penalty not exceeding Rs. 5,000/-. Sub-Section 4 Clause (d) provides that notwithstanding anything contained in Sub-section (3) and without prejudice to the provisions of Section 9, the Central Government may provide that if any manufacturer, producer or licensee of a warehouse contravenes the provisions of any such rule with intent to evade payment of duty then such goods shall be liable confiscation and the manufacturer, producer or licensee shall be liable to penalty not exceeding the duty leviable on such goods or Rs. 10,000/- which ever is greater. Thus penalty not exceeding Rs. 5,000/- could be provided under Sub-section (3) while the rules framed under Sub Section 4 could provide for penalty for contravention of the provisions of any rule with intent to evade payment of duty, for a sum not exceeding duty leviable on such goods or Rs. 10,000 which ever is greater. Thus by rules framed under Sub Section 4, minimum penalty of Rs. 10,000 and a maximum penalty not exceeding the duty leviable on such goods could be provided. Rule 96ZP(3) has been framed to ensure that payment of monthly excise duty is made by a manufacturer within the time prescribed under the rules and as a deterrent penalty has been provided for delayed deposit of duty.

9. Rule 96ZP(3) has to be harmoniously read with the rule making power of the central government under Sub-section (4) of Section 37 of the Act which provides the minimum and maximum penalty subject to the condition that there should be an intention to evade payment of duty. Thus, penalty under Rule 96ZP(3) may be levied on assessee only if he intended to evade payment of duty. In other words, in the absence of intention to evade payment of duty, penalty is not leviable under Rule 96ZP(3).

10. From perusal of the show cause notices we find that there is no allegation of intention to evade payment of duty by the respondent. The only allegation is of late payment of central excise duty. In the order in original the adjudicating authority recorded a finding of fact that the interest on late payment of duty has already been deposited by the respondent-assessee along with duty much before issuance of the show cause notice.

11. Before the adjudicating authority the respondent-assessee, amongst other contentions, also contended that penalty cannot be imposed as there was no malafide on his part. He also relied upon the judgment of Hon''ble Supreme Court in the case of Hindustan Steel Ltd. v. State of Orissa 1978 ALD 159 wherein it was held that an order imposing penalty for failure to carry out a statutory obligation was the result of a quasi criminal proceedings and that penalty would not ordinarily be imposed unless a party either acted deliberately in defiance of law or was guilty of contumacious conduct or acted dishonestly in conscious disregard of its obligation. The Supreme Court further held that penalty would also not be imposed merely because it was lawfully to do so.

12. The assessee offered an explanation for delayed deposit of duty along with interest. The adjudicating authority, while passing the order in original, had not disputed the bona fide of the respondent-assessee for delay in deposit of the monthly duty and that there was no intention to evade payment of central excise duty. The adjudicating authority imposed the penalty observing as under:

"In the instant cases, there is no doubt that the party has contravened the provisions of erstwhile Central Excise Rules, 1944 and has rendered itself liable to penalty but there was no intention to evade payment of central excise duty.....

From the above discussions and findings it goes to prove that although party has paid duty much before issue of show cause notice even then party cannot escape from penalty provision."

13. Accordingly, the adjudicating authority imposed a penalty of Rs. 13,30,000/- in respect of three show cause notices.

14. In the appeal, the Commissioner (Appeals) Customs and Central Excise, Meerut-I reduced the penalty following certain orders/judgments of Hon"ble Supreme Court. The appellate authority observed that the respondent assessee could not discharge their duty liability in time due to financial constraints and they deposited the entire duty and paid interest much before issuance of show cause notice. Briefly on these findings the penalty was reduced by the appellate authority to Rs. 1,50,000/-. The Tribunal by the impugned order has increased the penalty to Rs. 3 lacs observing that the penalty confirmed by the Commissioner (Appeals) is too low.

15. In the memorandum of appeal there is no allegation that the findings of the authorities that the amount of duty could not be deposited by the respondent-assessee due to financial constraints and that there was no intention to evade payment of central excise duty; is incorrect or perverse. The adjudicating authority has itself recorded a finding of fact that there was no intention to evade the payment of central excise duty on the part of the respondent-assessee. No material has been placed on record by the appellant to establish that the stand taken by the respondent-assessee regarding the financial constraints or no intention to evade payment of duty are incorrect. Thus, on the facts of the case, penalty was not leviable on the respondent-assessee under Rule 96ZP(3) of the Rules.

16. In the case of Bansal Alloys and Metals Pvt. Ltd. Vs. Union of India (UOI), (2010) 260 ELT 343 : (2011) 1 ILR (P&H) 913 , the High Court held the penalty provision of Rule 96ZO, ZP and ZQ to be ultra vires the Act and the Constitution.

17. In the case of Commissioner of Customs and Central Excise Vs. Sunder Ispat Ltd., (2014) 28 GSTR 284 , the Andhra Pradesh High Court held that penalty under Rule 96 ZO (3) is not leviable in view of the fact that penalty provision of Rule 96ZO, ZP and ZQ of the rules were declared ultra-vires by Punjab and

Haryana High Court in the case of Bansal Alloys and Metals Pvt. Ltd. Vs. Union of India (UOI), (2010) 260 ELT 343 : (2011) 1 ILR (P&H) 913 and similar declarations were made by the High Court of Uttarakhand in Commissioner of Customs and Central Excise v. Amrit Varsa Isapat (P) Ltd. 2013 (2) GSTR 581 (Uttarakhand) and High Court of Shubh Timb Steel Ltd. Vs. Union of India, (2012) 286 ELT 495 : (2013) 20 GSTR 584 .

18. In the case of Krishna Processors Vs. Union of India, (2012) 280 ELT 186 , the Gujrat High Court held the penalty provisions of Rule 96ZP(3) of the Rules, prescribing the penalty exceeding Rs. 5,000/- to be without authority of law and beyond the rule making power conferred under Section 37(3) of the Act.

19. Similar view was expressed by the Gujrat High Court in the case of Sunland Metal Recycling Industries Vs. Union of India, (2014) 310 ELT 736 : (2014) 3 GLR 2748 : (2014) 44 GST 501 : (2014) 27 GSTR 99 .

20. We are in agreement with the view taken by the High Courts as noted above.

21. Under the circumstances, penalty under Rule 96ZP(3) of the Rules was not imposable on the respondent-assessee. However, since the respondent-assessee has not challenged the impugned order of the Tribunal and, therefore, penalty as levied by the Tribunal cannot be interfered.

22. So far as the submissions of learned counsel for the respondent that Rule 96ZP(3) has been omitted in the year 2001 and as such no penalty order could have been passed by the adjudicating authority, is concerned we find no substance in it. In our view the proceedings are saved by the provisions of Section 38 of the Act. A Full Bench of this Court in the case of Simbhauli Sugar Mill Ltd. v. Union of India 2006 (205) E.L.T. 141 (All.) held as follows:

"19. The section validates any action taken under any such rule at any time between 28.2.1944 and 11.5.2001, when it received the assent of the President and Section 38A was for all purposes to be deemed to be on the Statute book, notwithstanding anything contained in any judgment or order of any court. It legalizes any action taken under any rule under the Act in spite of its amendment, supersession repeal or rescission. A joint reading of Sections 131 and 132 leads to the only conclusion that any proceedings initiated under Rule 10 would continue irrespective of the fact that it was omitted without any saving clause in either Rule 10 or Section 11A and also irrespective of the judgment of the Court, as they are saved by Section 38A.

23. The aforesaid note, which is in the nature of the object which is sought to be achieved by the insertion, has some significance to help us to decipher the intention sought to be achieved by the insertion. Rule 10 which laid down the procedure for refund of duty erroneously refunded was omitted without any saving clause. Some High Courts, including our, held that proceedings stood lapsed, while the Mandya Pradesh High Court held that the proceedings would not lapse and could continue under Section 11A. The authoritative

pronouncement in Kolhapur Sugarcane case ((supra)) approved the Allahabad view and held that neither the proceedings were saved by the General Clauses Act nor by any other provision in the Act. This reflected directly on the revenue of the State and under these circumstances Section 38A was introduced to cure the defect of the deletion and provide the remedy by enacting the section which, to an extent, is in pari materia with Section 6 of the General Clauses Act. In a way, the deficiency found in notification omitting Rule 10 and Act 25 of 1978 introducing Section 11A are sought to be remedied. The intention of the legislature is crystal clear that proceedings initiated under Rule 10 would not lapse but could be taken to its logical conclusion for which Section 38A has been introduced.

24. Section 38A uses the words "amendment", "repealed", "superseded" and "rescinded" with regard to such rule. "Amendment" has come up for consideration before various courts, its implication was also considered by the Apex Court in the case of Bhagat Ram Sharma Vs. Union of India (UOI) and Others, AIR 1988 SC 740 : (1987) 4 JT 476 : (1987) 2 SCALE 1097 : (1988) 1 SCR 1034 , after noting with approval the statement of law made in Sutherland's Statutory Construction, (3rd Edition Vol. 1 at page 477) while considering the distinction between "repeal" and "amendment", speaking through Sen J, it held in para 18 thus "Amendment is, in fact a wider term and it included abrogation or deletion of a provision in an existing Statute. If the amendment of an existing law is small, the Act professes to amend; if it is extensive, it repeals a law and re-enacts it... "Black's Law Dictionary (6th Ed.) defines amendment to mean to change or modify for the better, by removing defects, or to correct or revise. The Random House Dictionary defines it as-to alter, modify, rephrase for the better. A three Judge Bench in State of Orissa and Others Vs. Titaghur Paper Mills Company Limited and Another, AIR 1985 SC 1293 : (1986) 1 ARBLR 135 : (1985) 2 SCALE 410 : (1985) SCC 280 Supp : (1985) 3 SCR 26 : (1985) 60 STC 213 . while examining the implication of the word "supersede" and "supersession" occurring in a notification issued under Orissa Sales Tax Act, after examining several dictionaries held it to signify "repeal and replacement". Black's Law Dictionary and Random House Dictionary also define it as such. The word "delete" has been used interchangeably with "omit" in Kolhapur Sugarcane (supra), and has been defined in Black's Law Dictionary as- to erase, remove or strike out, while Random House Dictionary defines it as- strike out, remove, erase or expunge. "Rescind" has been defined in Black's Law Dictionary - as annul, cancel or abrogate from the beginning, revoke, while Random House Dictionary describes it as to abrogate, revoke or repeal. It is oft repeated and applied that "words take their colour from the company they keep" this broad linguistic rule or practice applies even when no general words are used. They should be understood together, as Stamp J. observed in Dourne v. Norwich Crematorium Ltd. (1967) All pp 576 as P. 578. "English words derive colour from those which surround them. Sentences are not mere collection of words to be taken out of the sentence defined separately by reference to the dictionary or

decided cases, and then put back into the sentence with the meaning which you have assigned to them as separate word..... "

25. Considering the entire gamut of different meaning assigned to the words used in Section 38A, it would be apparent that though the Legislature has used the word "amendment", which is a word of very wide import, yet it goes on to use the word "repeal" "rescind" and "superseded" which all are genre of amendment, therefore, it would be safe to say that the legislature has purposely used all the words together to further enlarge the scope of the section, or as "abundant caution". Even otherwise the exercise of omission of Rule 10 and enacting Section 11A would squarely fall within "supersession" as used in Section 38A."

23. In view of the above discussion, we find no merit in this appeal. The question of law is answered against the appellant and in favour of the respondent-assessee.

24. The appeal fails and is hereby dismissed. However, there shall be no order as to costs.