

(2019) 01 BOM CK 0153

In the Bombay High Court

Case No : Excise Appeal Nos. 3, 4 Of 2007

Commissioner Of Customs & Central Excise

APPELLANT

Vs

M/S Shivam Ispat(P), Ltd

RESPONDENT

Date of Decision : 03-01-2019

Acts Referred:

Finance Act, 2001 — Section 121, 131
Central Excise Act, 1944 — Section 3A, 37, 37(3), 37(4)
Central Excise Rules, 1944 — Rule 96ZO, 96ZP, 96ZQ, 96ZO(3)
Constitution Of India, 1950 — Article 14, 19(1)(g), 141

Citation : (2019) 01 BOM CK 0153

Hon'ble Judges : M.S. Sonak, J;Prithviraj K. Chavan, J

Bench : Division Bench

Advocate : A. Desai, Y. Nadkarni, Sanket Kamat

Final Decision : Disposed Off

Judgement

M. S. Sonak, J

1. Heard Ms. A. Desai, learned Counsel for the appellant and Mr. Y. Nadkarni, learned Counsel for the respondent.

2. At the outset, an order was made in Excise Appeals No. 5/2006, 6/2006 and 7/2006 to the effect that the same shall not be placed before the Bench in which one of us (M. S. Sonak, J.) is a party.

3. The learned Counsel appearing for the parties however, state that there is no difficulty, if this Bench takes up the remaining Excise Appeals, since issues raised in these Excise Appeals, stand substantially covered by the ruling of the Hon'ble Supreme Court in the case of M/s Shree Bhagwati Steel Rolling Mills Vs. Commissioner of Central Excise and another(2015 AIR SCW 6453).

4. These two Appeals are directed against the order dated 23.10.2006 made by the Customs Excise & Service Tax Appellate Tribunal (CESTAT), whereby Appeal instituted by the respondent/ Assessee came to be allowed and the Appeal

instituted by the appellant/Revenue for seeking enhancement of penalty imposed by the commissioner, came to be rejected.

5. In these matters, the Deputy Commissioner of Central Excise issued five show cause notices to the respondent/Assessee demanding central excise duty short paid under the provisions of 11A of the Central Excise Act 1944("said Act") read with Rule 96 ZO(3) of the Central Excise Rules 1944 ("said Rules").

6. By an order dated 28.8.2003, the Commissioner of Central Excise confirmed demand made in show cause notices; imposed penalties of Rs.1,00,000'-(Rupees one lakh only) each upon the Assessee in respect of show cause notices and ordered, respondent/Assessee to pay interest on the duties @18% per annum from the date of such amount became due and payable till the date of actual payment in terms of Rule 96ZO(3) of the said Rules.

7. The Assessee thereupon instituted Excise Appeal No. E-3751/03 before the CESTAT impugning the Commissioner's order dated 28.8.2003 in its entirety. The appellant/Revenue also instituted Excise Appeal E/2971/2004 seeking enhancement of the penalty equivalent to the confirmed demand.

8. Vide impugned order dated 23.10.2006, CESTAT allowed the Appeal No. E/3751/2003 instituted by the respondent/ Assessee but rejected the Appeal no. E/2971/2004 instituted by the Revenue. Hence, the present two appeals by the Revenue.

9. The reasoning of the CESTAT is reflected in paragraph 1 of the impugned order which reads thus:-

"After hearing Shri V. M. Doiphode, Ld. Advocate for the appellants and Shri Ajay Saxena, Ld. SDR for the revenue, we find that the demand of duty stands confirmed against the appellants vide the impugned order in terms of the provisions of Rule 96ZO(3). The said order was passed on 12/09/2003, when the provisions of Section 3A were omitted by Finance Act, 2001 without any saving clause. In terms of the Tribunal's decision in the case of Mitra Steel & Alloys Pvt. Ltd., and in the case of Kundil Alloys Pvt. Ltd., demands of duties could not be adjudicated under Rule 96ZO of Central Excise Rules, 1944, subsequent to omission of Section 3A, inasmuch as there was no saving clause. The entire case law was discussed by Bangalore Bench of the Tribunal in the case of Vijaya Steel Ltd.,Vs CCE, Bangalore-II (2006(76) RLT 264 (CESTAT-Bang.)), it was held that in view of the various judgments, show cause notice cannot be confirmed by the Commissioner when the provisions of law have been deleted. Inasmuch as in the present case the impugned order was passed subsequent to omission of Section 3A with effect from 18/05/2001, the impugned order confirming demand of duty is required to be set aside, in the light of the Tribunal's decision discussed supra. We, accordingly, allow the appeal filed by Shivan Ispat Pvt. Ltd."

10. The appellant/Revenue has instituted Excise Appeal No. 3/2007 challenging the impugned order to the extent the same allows Assessee Appeal

No.E/3751/2003 and Excise Appeal No. 4/2007, to the extent, impugned order rejected Revenue's Appeal no. E/2971/2004.

11. Both these Appeals were admitted on 30.7.2007 on the following substantial question of law:-

"Whether the omission of Section 3A of the Central Excise Act, 1944 by Section 121 of the Finance Act, 2001 without any savings clause would affect proceedings in respect of which action had already been initiated?"

12. The aforesaid issue is no longer res integra. The Hon'ble Apex Court in the case of M/s Shree Bhagwati Steel Rolling Mill ruling mainly (supra) by relying upon its earlier judgment in the case of M/s Fibre Boards(P) Ltd., Bangalore Vs. Commissioner of Income Tax, Bangalore,[(2015)376 ITR 596(SC)] has held that omission of Section 3A of the said Act by Section 131 of the Finance Act, 2001, without any saving clause would not affect the proceedings in respect of which action has already been initiated. The Hon'ble Apex Court, by following its earlier view, in the case of M/s Fibre Boards (Supra) had held that "omission" would amount to a "repeal" for the purpose of General Clauses Act, 1897 and, therefore, even after omission Section 3A of the said Act w.e.f. 11.5.2001, pending proceedings would remain unaffected.

13. Since the view taken by CESTAT on the aforesaid issue is in direct conflict with the law laid down the Hon'ble Apex Court in M/s Shree Bhagwati Steel Rolling Mill and M/s Fibre Boards (supra) the same, warrants interference. Therefore, Excise Appeal No. 3 of 2007 instituted by the appellant/Appeal is required to be allowed.

14. In so far as Excise Appeal No. 4 of 2007, again, instituted by appellant/Revenue is concerned, as noted earlier, the same is against CESTAT's impugned order to the extent the same rejects the Revenue Appeal no.E/2971/2004, in which, the Revenue had sought for enhanced penalty equivalent to confirmed demand.

15. In M/s Shree Bhagwati Steel Rolling Mill(supra), one of the issues which fell for consideration before the Hon'ble Apex Court was whether any penalty in excess of Rs.5,000/-(Rupees five thousand only) in terms of levy of Rules 96ZO, 96ZP, 96ZQ would be ultra vires the said Act as well as violative of Articles 14 and 19 (1)(g) of the Constitution of India. The Apex Court answered this issue in favour of the Assessee and held that the issues, to the extent they permit levy of penalties beyond Rs.5000/- (Rupees five thousand only) were indeed ultra vires and therefore unenforceable.

16. The relevant discussion in the aforesaid regard is to be found in paragraphs 38 and 39 in the case of M/s Shree Bhagwati Steel Rolling Mill (supra) which read thus:-

38. Under Section 37(3), the statute itself provides in all cases where no other penalty is provided by the Act that a penalty not exceeding Rs.5,000/-alone can

be levied. Sub-Section(4) is even more telling. Even in cases where there is a clandestine removal of excisable goods, and cases where the assessee intends to evade payment of duty, the assessee is liable to a penalty not exceeding the duty leviable on such goods or Rs.10,000/- whichever is greater. It will be noticed that the Act is very circumspect in laying down penalty provisions. Penalties in given circumstances extend only to Rs.5,000/- and Rs.10,000/- which are small amounts. Further, even where clandestine removal and intent to evade duty are present, yet the authorities are given a discretion to levy a penalty higher than Rs.10,000/- but not exceeding the duty leviable. In a given case, therefore, even where there is willful intent to evade duty and the duty amount comes to say a crore of rupees, the authorities can in the facts and circumstances of a given case, levy a penalty of say Rs.25,00,000/- or Rs.50,00,000/-. This being the position, it is clear that when contrasted with the provisions of the Central Excise Act itself, the penalty provisions contained in Rules 96ZO, 96 ZP and 96 ZQ are both arbitrary and excessive.

39. A penalty can only be levied by authority of statutory law, and Section 37 of the Act, as has been extracted above does not expressly authorize the Government to levy penalty higher than Rs.5,000/-. This further shows that imposition of a mandatory penalty equal to the amount of duty not being by statute would itself make rules 96ZO, 96 ZP and 96 ZQ without authority of law. We, therefore, uphold the contention of the assessees in all these cases and strike down rules 96ZO, 96 ZP and 96 ZQ insofar as they impose a mandatory penalty equivalent to the amount of duty on the ground that these provisions are violative of Article 14, 19(1) (g) and are ultra vires the Central Excise Act."

17. In view of the aforesaid reasoning and conclusion, the appellant/Revenue's Excise Appeal No. 4/2007 cannot be allowed. The only relief applied for appellant/Revenue in its Appeal bearing No.E/2971/2004 before the CESTAT was for enhancement of the penalty equivalent to the confirmed demand which totaled an amount of Rs.1,37,33,863/- (Rupees one crore thirty seven lakhs thirty three thousand eight hundred sixty three only) in respect of five show cause notices. In terms of the ruling of the Hon'ble Apex Court in M/s Shree Bhagwati Steel Rolling Mill (supra) demand or levy in excess of Rs.5000/-(Rupees five thousand only) would amount to demand or levy, otherwise than under the authority of law. Therefore, there would be no point in allowing Excise Appeal 4 of 2007 though, it is necessary to record the contention of Ms. A. Desai that in the event of remand the appellant/Revenue must perhaps get the benefit of any change of judicial view in the meantime. On such hypothetical basis, it would not be appropriate for us to allow Excise Appeal no. 4/2007 particularly since, the view in M/s Shree Bhagwati Steel Rolling Mill (supra) is at present law of the land, binding on us in terms of Article 141 of the Constitution of India.

18. Therefore, both these Appeals are disposed of by making following order:-

ORDER

- i. Excise Appeal No. 4/2007 is dismissed;
- ii. Excise Appeal No. 3/2007 is partly allowed.
- iii. The impugned order dated 23.10.2006 made by the CESTAT, to the extent the same allows the respondent/Assessee's Appeal no.E/3751/2003 is quashed and set aside. The respondent/Assessee's Appeal no.E/3751/2003 is restored to the file of CESTAT and the CESTAT is directed to dispose of the same on its own merits and in accordance with law.
- iv. All contentions of the parties, except, contention based upon the omission to Section 3A of the said Act are left open to be decided by CESTAT.
- v. In the facts and the circumstances of the present case parties shall bear their own costs.