

(2019) 07 BOM CK 0183
In the Bombay High Court
Case No : Writ Petition No. 485 Of 2019

M/s. Mandovi Ispat Pvt. Ltd

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 16-07-2019

Acts Referred:

Central Excise Act, 1944 — Section 37, 37(3)
Central Excise Rules, 1944 — Rule 96ZO, 96ZP, 96ZQ, 96ZO(3)
Constitution Of India, 1950 — Article 14, 19(1)(g)

Citation : (2019) 07 BOM CK 0183

Hon'ble Judges : M.S. Sonak, J;Nutan D. Sardessai, J

Bench : Division Bench

Advocate : V.M. Doiphode, Sarvesh Dinker Kamat Malyeker, Asha A. Desai

Final Decision : Allowed

Judgement

M. S. Sonak, J

1. Heard Mr. V. M. Doiphode along with Mr. Sarvesh Kamat Malyeker, learned counsel for the Petitioner and Ms. Asha Desai, learned Senior Standing Counsel for the Respondent - Commissioner of Central GST.

2. Rule. Rule is made returnable forthwith with the consent and at the request of the learned counsel for the parties.

3. The challenge in this petition is to the order dated 27.02.2018 made by the Commissioner (Appeals), Central GST and Customs, Goa. By the impugned order, the Commissioner (Appeals) has in fact upheld the order dated 18.08.2004 made by the Additional Commissioner, Customs & Central Excise, Panaji, confirming the demand made on the Petitioner and also requiring the Petitioner to pay the interest and penalty. The operative portion of the order dated 18.08.2004 reads thus :

"In respect of the said assessee viz. M/s Mandovi Ispat Pvt. Ltd., M-I, Cuncolim Industrial Estate Goa, I pass the following order :

a) Duty demand of Rs.1,64,917/- (Rupees One Lakh Sixty Four Thousand Nine Hundred and Seventeen Only) raised vide SCN No.F.No.CE/MAR/MIPL/22/SCND/97-08/dtd.02.03.98 is confirmed. In addition, I impose penalty under Rule 96ZO(3) of the Rules on the said assessee, amounting to Rs.1,64,917/- (Rupees One Lakh Sixty Four Thousand Nine Hundred and Seventeen Only) in respect of this SCN.

(b) Duty demand of Rs.6,74,139/- (Rupees Six Lakhs Seventy Four Thousand One Hundred and Thirty Nine Only) raised vide SCN No.F.No.CE/MAR/MIPL/31/SCND/97-98 dated 01.04.98 is confirmed. In addition, I impose penalty under Rule 96ZO(3) of the Rules on the said assessee, amounting to Rs.6,74,139/- (Rupees Six Lakhs Seventy Four Thousand One Hundred and Thirty Nine Only) in respect of this SCN.

(c) Duty demand of Rs.11,86,696/- (Rupees Eleven Lakhs Eighty Six Thousand Six Hundred and Ninety Six Only)raised vide SCN No.F.No. SCN/AC(D)12/98-CX dtd.29.07.98 is confirmed. In addition, I impose penalty under Rule 96ZO(3) of the Rules on the said assessee, amounting to Rs.11,86,696/- (Rupees Eleven Lakhs Eighty Six Thousand Six Hundred and Ninety Six Only) in respect of this SCN.

(d) Duty demand of Rs.13,80,000/- (Rupees Thirteen Lakhs Eighty Thousand Only) raised vide SCN No.F.No.SCN/AC(D)30/98-CX.ADJ dtd.30.12.98 is confirmed. In addition, I impose penalty under Rule 96ZO(3) of the Rules on the said assessee, amounting to Rs.13,80,000/- (Rupees Thirteen Lakhs Eighty Thousand Only) in respect of this SCN.

(e) Duty demand of Rs.9,20,000/- (Rupees Nine Lakhs Twenty Thousand Only) raised vide SCN No.F.No.SCN/AC(DIV)17/99-CX. Adj/dtd.28.06.99 is confirmed. In addition, I impose penalty under Rule 96ZO(3) of the Rules on the said assessee, amounting to of Rs.9,20,000/- (Rupees Nine Lakhs Twenty Thousand Only) in respect of this SCN.

(f) Duty demand of Rs.12,70,000/- (Rupees Twelve Lakhs Seventy Thousand Only) raised vide SCN No.F.No.SCN/DC(D)-41/99-CX.Div.Adj/dtd 21.10.1999 is confirmed. In addition, I impose penalty under Rule 96ZO(3) of the Rules on the said assessee, amounting to Rs.12,70,000/- (Rupees Twelve Lakhs Seventy Thousand Only) in respect of this SCN.

(g) Duty demand of Rs.40,96,774/- (Rupees Forty Lakhs Ninety Six Thousand Seven Hundred and Seventy Four Only) raised vide SCN No.F.No.SCN/DC(D)-21/2000-CX.Div.Adj/dtd.27.03.2000 is confirmed. In addition, I impose penalty under Rule 96ZO(3) of the Rules on the said assessee, amounting to Rs.40,96,774/- (Rupees Forty Lakhs Ninety Six Thousand Seven Hundred and Seventy Four Only) in respect of this SCN.

(h) Duty demand of Rs.20,00,000/- (Rupees Twenty Lakhs Only) raised vide SCN No.F.No.SCN/DC(D)-38/2000-CX-Div.Adj. dtd. 16.05.2000 is confirmed. In

addition, I impose penalty under Rule 96ZO(3) of the Rules on the said assessee, amounting to Rs.20,00,000/- (Rupees Twenty Lakhs Only) in respect of this SCN.

II. M/s. Mandovi Ispat Pvt. Ltd., M-I, Cuncolim Industrial Estate, Goa are ordered to pay the interest due on the duty short paid and confirmed above @ 18% per annum from the due date till the actual date of payment in terms of Rule 96ZO(3) of CER, 1944. The Range Supdt. to work out the correct interest amount."

4. Ms. Asha Desai has raised preliminary objection to the maintainability of this petition by pointing out that as against the impugned order dated 27.02.2018, the Petitioner, has alternate remedy under the provisions of Central Excise Act, 1944. She points out that the impugned order itself states that the appeal is maintainable to the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) as against the impugned order. For these reasons, she urges that the present petition may not be entertained and the Petitioner be relegated to avail an alternate remedy of appeal which is available under the said Act.

5. Mr. Doiphode, learned counsel for the Petitioner submits that one of the main contentions raised by the Petitioner was that the annual capacity of production ought to have been determined on the basis of actual power supply position and not merely the sanctioned power supply position. He points out that there is material on record to suggest that the power supply was constantly interrupted and there was no continuation of uninterrupted power supply available to the Petitioner's unit. He submits that this vital contention of the Petitioner has not been considered by the Commissioner (Appeals), even though, the same was specifically raised. He points out that this Court in its order dated 31.03.1998 in Writ Petition No.157/98 instituted by the Petitioner had also directed the authorities to take into consideration this contention.

6. Mr. Doiphode submits that non consideration of such a vital contention amounts to failure to exercise jurisdiction and consequently, there can be no bar of entertainment of the present petition.

7. Mr. Doiphode further submits that the impugned order has confirmed the direction for payment of interest as well as the penalty by ignoring vital circumstance that the rules under which such penalty and interest came to be levied have already been declared as ultra vires by the Hon'ble Supreme Court in the case of Shree Bhagwati Steel Rolling Mills Vs Commissioner of Central Excise 2015 (326) E.L.T.209 (S.C.). He submits that the imposition or even upholding levy of interest and penalty in the circumstance is an exercise, clearly in excess of jurisdiction. He submits that this is an additional ground as to why this Court should entertain the present petition rather than relegate the Petitioner to the alternate remedy available under the said Act.

8. With the assistance of the learned counsel for the parties, we have perused the impugned order as well as the limited material placed by the parties.

According to us, it cannot be said that the contention of the Petitioner with regard to the determination of annual capacity of production has not at all been considered by the authorities. The issue as to whether the consideration is proper or not is a matter which the Petitioner, can always agitate by instituting an appeal under the provisions of the said Act. In fact, the provisions of appeal, at least in so far as this issue is concerned will be an efficacious remedy in the matter. Therefore, based upon Mr. Doiphode's first contention, we are not persuaded to adjudicate upon this issue in exercise of writ jurisdiction. In case the Petitioner desires to agitate this issue, then, it is open to the Petitioner to institute an appeal against the impugned order before the CESTAT. Such liberty is in fact hereby granted to the Petitioner.

9. However, in so far as the second contention raised by Mr. Doiphode is concerned, the same deserves acceptance in the light of the categorical rulings of the Hon'ble Apex Court in the case of Shree Bhagwati Steel Rolling Mills (supra).

10. The penalty and interest has been levied/upheld in the present matter by reference to the Rule 96ZO(3) of the Central Excise Rules, 1944. In Shree Bhagwati Steel Rolling Mills (supra), the Hon'ble Apex Court has declared the interest and penalty provisions under Rules 96ZO, 96ZP and 96ZQ of the Central Excise Rules, 1944 to be invalid for detailed reasons set out in the said judgment.

11. In paragraphs 38, 39 and 44 of Shree Bhagwati Steel Rolling Mills (supra), this is what the Hon'ble Apex Court has observed.

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, 96ZP 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, 96ZP and 96ZQ without authority of law. We, therefore, uphold the contention of the assesseees in all these cases and strike down Rules 96ZO, 96ZP and 96ZQ 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.

44. We have declared in this judgment that the interest and penalty provisions under the Rules 96ZO, ZP, and ZQ of the Central Excise Rules, 1994 are invalid for the reasons assigned in the judgment. Accordingly, the appeals filed by the Revenue are dismissed and the appeals filed by the assesseees are allowed to the extent indicated above. It may be noted that in an appeal from a judgment of the Allahabad High Court dated 8.11.2012 in SLP (C) No. 9796/2012, it has been held that the levy of penalty under the aforesaid provisions is mandatory in character. In view of what has been held by us today, this appeal will also have to be allowed in the same terms as the other assesseees' appeals which have been allowed. All the aforesaid appeals are disposed of accordingly."

12. In view of the aforesaid, the Additional Commissioner was obviously not justified in levying interest or in imposing any penalty in excess of Rs.10,000/- relying upon the provisions of Rule 96ZO as well as other rules which have now declared as ultra vires by the Hon'ble Apex Court in Shree Bhagwati Steel Rolling Mills (supra). Similarly, the Commissioner (Appeals) was also not justified in upholding such levies despite the fact that the decision of the Hon'ble Apex Court in Shree Bhagwati Steel Rolling Mills (supra) specifically cited before it.

To that extent therefore, the impugned orders warrant interference.

13. The perusal of the memo of appeal instituted by the Petitioner before the Commissioner (Appeals), indicates that this contention was specifically raised by the Petitioner. However, without proper consideration of this contention, the Commissioner (Appeals) vide impugned order, has proceeded to uphold the levy of interest and penalty. From the perusal of the decision in Shree Bhagwati Steel Rolling Mills (supra), the penalty to the maximum extent of Rs.10,000/- could have been sustained. However, the Commissioner (Appeals), has chosen to sustain the penalty far in excess of Rs.10,000/- as prescribed under the said Act.

14. Therefore, we are satisfied that the levy or upholding of interest under Rule 96ZO of the Central Excise Act is an exercise in excess of jurisdiction. Similarly, we are also satisfied that the levy or upholding of penalty in excess of Rs.10,000/- is also an exercise in excess of jurisdiction. To that extent, there is no necessity for relegating the Petitioner to avail an alternate remedy of appeal to the CESTAT. The impugned order to the extent it levies interest and penalty (in excess of Rs.10,000/-) is therefore set aside. The impugned order as well as the order in original to stand modified accordingly.

15. We, however, make it clear that we have not examined the issue as to whether this was a fit case for levy of penalty even upto Rs.10,000/- or not. We have only interfered with the quantum of penalty on the ground that no penalty

in excess of Rs.10,000/- could have been imposed by virtue of Rule 96ZO being declared as invalid by the Hon'ble Apex Court in the case of Shree Bhagwati Steel Rolling Mills (supra). Therefore, if the Petitioner still has any grievance about the levy of penalty to the extent of Rs.10,000/-, the Petitioner, is at liberty to agitate this issue by way of appeal in case, the Petitioner chooses to institute such an appeal.

16. Accordingly, the impugned orders are modified to the aforesaid extent only. In so far as the rest of the issues are concerned, the impugned order is not interfered with but liberty is granted to the Petitioner to avail the alternate remedy by way of an appeal to the CESTAT.

17. Rule is accordingly made partly absolute to the aforesaid extent. In the facts of the present case, there shall be no order as to costs.