
(2012) 04 SHI CK 0014

In the High Court Of Himachal Pradesh

Case No : CWP No. 4531 of 2009-I with CEA No. 3 of 2006

Shubh Timb Steel Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 26-04-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 37, 37(4), 37(4)(d), 3A, 6
Constitution of India, 1950 — Article 14, 19, 21

Citation : (2012) 286 ELT 495 : (2013) 20 GSTR 584

Hon'ble Judges : V.K. Ahuja, J;Deepak Gupta, J

Bench : Division Bench

Advocate : Sunset Goel, for the Appellant; Sandeep Sharma, ASGI with Ms. Anita Dogra, CGSC, for the Respondent

Final Decision : Dismissed

Judgement

Deepak Gupta, J.—These two cases are being disposed of by a common judgment, since identical questions are involved in these cases. Central Excise Appeal No. 3 of 2006 has been filed by the revenue. By means of this appeal, the revenue has challenged the order of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), dated 14-9-2005, whereby the penalty was reduced to one lac. According to the Excise Tribunal, the minimum penalty should have been 100% of the excise duty leviable and reliance in this regard was placed on Rule 96ZO of the Central Excise Rules.

2. CWP No. 4531 of 2009 was filed by the assessee whereby the assessee has challenged the ultra vires of Rule 96ZO. Reliance on behalf of the assessee is placed on the judgment delivered by a Division Bench of the Punjab and Haryana High Court in Bansal Alloys and Metals Pvt. Ltd. Vs. Union of India (UOI), in which the rival contentions noticed by the Division Bench of the Punjab and Haryana High Court as follows:

9. Learned counsel for the petitioner submits that even though it may be permissible to provide for penalty for breach of civil obligation without mens rea

or even for absolute offences in strict liability without mens rea in certain cases, legislature could not act arbitrarily and provide for minimum heavy penalty for slightest default. Principle of proportionality was part of reasonableness and even a legislative measure has to pass the test of reasonableness. If a legislative measure is held to be arbitrary, the same can be struck down to enforce fundamental rights under Articles 14, 19 and 21. The rules are beyond the scope of delegated legislation permitted under the Act.

10. Stand of the respondents on the other hand is that u/s 37(4) of the Act, the Central Government could make a rule providing for levy of penalty on contravention of rule with an intent to evade duty regarding removal of excisable goods, accounting for such goods, engaging in manufacture, production or storage of goods without registration. There being no compulsion to imply mens rea, minimum penalty was permissible and was neither arbitrary nor unreasonable and thus, there was no violation of fundamental rights nor the provision was beyond the scope of delegated legislation.

The same contentions are raised before us.

3. Reference may be made to Section 37 of the Excise Act which empowers the Central Government to make rules and Rule 96ZO, which is under challenge in this Court:

Section 37: Power of Central Government to make rules-

(1) to (3) xx xx xx xx

(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 rule, 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 as required u/s 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 two thousand rupees, whichever is greater.

Rule 96ZO: Procedure to be followed by the manufacturer of ingots and billets.-

(1) A manufacturer of non-alloy steel ingots and billets falling under sub-headings 7206.90 and 7207.90 of the Schedule to the Central Excise Tariff Act,

1985 (5 of 1986), shall debit an amount calculated at the rate of Rs. 750 per metric tone 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 173-G of the Central Excise Rules, 1944, subject to the condition that the total amount of duty liability shall be calculated and paid in the following manner-

I. Total amount of duty liability for the period from the 1st day of September, 1997 to the 31st day of March, 1998

(a) a manufacturer shall pay a total amount calculated at the rate of Rs. 750 per metric tone on capacity of production of his factory for the period from the 1st day of September, 1997 to the 31st day of March, 1998, as determined under the Induction Furnace Annual Capacity Determination Rules, 1997. This amount shall be paid by the 31st day of March, 1998;

(b) the amount of duty already paid, together with on-account amount paid by the manufacturer, if any, during the period from the 1st day of September, 1997 to the 31st day of March, 1998, shall be adjusted towards the total amount of duty liability payable under clause (a);

(c) if a manufacturer fails to pay the total amount of duty payable under clause (a) by the 31st day of March, 1998, he shall be liable to pay the outstanding amount (that is the amount of duty which has not been paid by the 31st day of March, 1998) along with interest at the rate of eighteen per cent per annum on such outstanding amount calculated for the period from the 1st day of April, 1998 till the date of actual payment of the outstanding amount.

Provided that if the manufacturer fails to pay the total amount of duty payable under clause (a) 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.

II. Total amount of duty liability for a financial year subsequent to 1997-1998

(a) a manufacturer shall pay a total amount calculated at the rate of Rs. 750 per metric tone on the annual capacity of production of his factory as determined under the Induction Furnace Annual Capacity Determination Rules, 1997. This amount shall be paid by the 31st day of March of the financial year;

(b) the amount of duty already paid, together with on-account amount paid by the manufacturer, if any, during the financial year shall be adjusted towards the total amount of duty liability;

(c) if a manufacturer fails to pay the total amount of duty payable under clause (a) by the 31st day of March, of the relevant financial year, he shall be liable to,--

(i) pay the outstanding amount of duty (that is the amount of duty which has not been paid by the 31st day of March of the relevant financial year) along with interest at the rate of eighteen per cent per annum on such outstanding amount, calculated for the period from the 1st day of April of the immediately succeeding

financial year till the date of actual payment of the whole of outstanding amount;
and

(ii) a penalty equal to such outstanding amount of duty or five thousand rupees, whichever is greater.

(1-A) If any manufacturer removes any of the non-alloy steel ingots and billets specified in sub-rule (1) without complying with the requirements of the provisions of that sub-rule, then all such goods shall be liable to confiscation and the manufacturer shall be liable to a penalty not exceeding three times the value of such goods, or five thousand rupees, whichever is greater.

XXXX XX XX

(3) Notwithstanding anything contained elsewhere in these Rules, if a manufacturer having a total furnace capacity of 3 MT installed in his factory so desires, he may, from the first day of September, 1997 to the 31st day of March, 1998 or any other financial year, as the case may be, pay a sum of rupees five lakhs per month in two equal instalments, the first instalment latest by the 15th day of each month, and the second instalment latest by the last day of each month, and the amounts 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 sub-section (4) of Section 3A of the Central Excise Act, 1944 (1 of 1944):"

XX XX XX XX

Provided also that where a manufacturer 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, he shall be liable to

(i) Pay the outstanding amount of duty alongwith interest thereon at the rate of eighteen per cent per annum calculated for the period from the 16th day of such month or the 1st day of next month, as the case may be, till the date of actual payment of the outstanding amount and

(ii) a penalty equal to such outstanding amount of duty or five thousand rupees, whichever is greater.

4. As per Section 37(4)(d), if an assessee contravenes the provisions of any rule with intent to evade payment of duty, then the goods can be confiscated and the assessee liable to pay penalty not exceeding the duty leviable on such goods or two thousand rupees, whichever is greater.

5. The contention raised is that the Rule Making Authority cannot go beyond the Act and when the Act provides for requirement of mens rea inasmuch as intention must be thereto evade the duty, the Rule could not dispense with such requirement. Reliance has been placed on the judgment of the Apex Court in State of Tamil Nadu and Another Vs. P. Krishnamurthy and Others, and Bombay

Dyeing and Mfg. Co. Ltd. Vs. Bombay Environmental Action Group and Others,

6. This issue was discussed threadbare by a Division Bench of the Punjab and Haryana High Court in the judgment cited above wherein after discussing the entire law, the Court held as follows:

15. Applying the above principles to the present situation, the provision for minimum mandatory penalty equal to the amount of duty even for slightest bona fide delay without any element of discretion is beyond the purpose of legislation. The object of the rule is to safeguard the revenue against loss, if any. The penalty has been provided in addition to interest. Mere fact that without mens rea, an can be punished or a penalty could be imposed is not a blanket power without providing for any justification. In the Indian Constitutional scheme, power of legislature is circumscribed by fundamental rights. Judicial review of legislation is permissible on the ground of excessive restriction as against reasonable restriction which is also described as proportionality test.

16. For the above reasons, we hold that the impugned provision to the extent of providing for mandatory minimum penalty without any mens rea and without any element of discretion is excessive and unreasonable restriction on fundamental rights and is arbitrary. Moreover, exercise of such power by way of subordinate legislation is not permissible when rule making authority for levying penalty is limited to default "with intent to evade duty.

7. We are in agreement with the aforesaid judgment. We feel that when Section 37, which is the rule making power, is clear that penalty can be imposed only when the assessee is guilty of intending to evade the payment of duty, the penalty cannot be imposed without such intention. Furthermore, even when intention may be there, the penalty must be reasonable and cannot, in all cases, be fixed at 100% of the excise leviable. Each case must be decided on its own facts and circumstances. There may be cases where the delay is only of a day or two and the authorities must be given the discretion to impose the penalty which they feel is reasonable in the facts and circumstances of the case.

8. In this case, the CESTAT came to the conclusion that the penalty of one lac is reasonable. This is not an order which could be said to be illegal or without jurisdiction. In view of the above discussion, CWP No. 4531 of 2009 is allowed and the provisions of Section 96ZO permitting the minimum penalty for delay in payment without any discretion and without having regard to extent and circumstances for delay are held to be ultra vires of the Act and the Constitution of India. CEA No. 3 of 2006 filed by the revenue is dismissed. No costs.