

(2014) 08 P&H CK 0052

High Court Of Punjab And Haryana At Chandigarh

Case No: C.M. No. 4587 of 2011 and C.W.P. No. 17768 of 2010

Shree Kangra Steel Pvt. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: Aug. 19, 2014

Acts Referred:

- Constitution of India, 1950 - Article 226, 227

Citation: (2014) 176 PLR 700

Hon'ble Judges: Fateh Deep Singh, J; Ajay Kumar Mittal, J

Bench: Division Bench

Advocate: Jagmohan Bansal, Advocate for the Appellant; Ferry Sofat for Ranjna Shahi, Advocate for the Respondent

Judgement

Ajay Kumar Mittal, J.

CM. No. 4587 of 2011

Written statement on behalf of the respondents filed along with the application is taken on record subject to all just exceptions.

CM stands disposed of accordingly.

C.W.P. No. 17768 of 2010

1. In this writ petition filed under Articles 226/ 227 of the Constitution of India, the petitioner has prayed for issuance of a writ in the nature of certiorari for quashing Rule 96ZO(3)(ii) of the Central Excise Rules, 1944 (in short "the Rules") being ultra-vires of the Rule making power of the respondent. Further prayer has been made for quashing order dated 13.5.2010 (Annexure P-10) passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (hereinafter referred to as "the Tribunal"). The facts necessary for adjudication of the instant writ petition as narrated therein are that the petitioner is engaged in the manufacturer of non-alloy

steel ingots/billets falling under sub-heading No. 7206.90 of First Schedule to the Central Excise Tariff Act, 1985. During the period in question, the petitioner was covered under Compound Levy Scheme and was required to pay lump sum amount on the basis of capacity instead of actual production of the goods. Further, as per Rule 96ZO(3) of the Rules, the petitioner was also liable to pay penalty equal to the amount of duty outstanding. The Commissioner vide order dated 3.11.1997 (Annexure P-1) determined the annual capacity of induction furnace of the petitioner. As the actual production of the petitioner was less than the capacity determined by respondent No. 2, the petitioner vide order dated 28.3.1998 (Annexure P-2) opted to pay the duty in terms of Rule 96ZO(1) of the Rules. The petitioner also requested respondent No. 2 to permit clearance of goods @ Rs. 750/- per MT. The petitioner filed CWP No. 1163 of 2000 before this Court and this Court vide order dated 31.1.2000 (Annexure P-3) directed the respondents to determine its actual production and thereafter compute excise duty on that basis. It was further directed that the department would be free to compute the excise duty on the basis of annual capacity production but would recover duty only on the basis of actual production. Thereafter, vide letter dated 21.3.2000 (Annexure P-4) the petitioner was directed to deposit a sum of Rs. 5,49,360/- as a difference between the duty paid and duty payable as per actual production. This Court vide order dated 14.7.2000 (Annexure P-5) vacated the interim order and also disposed of the writ petition vide order dated 19.8.2000 (Annexure P-6). However, the department issued five show cause notices to the petitioner raising the demand of Rs. 2,27,000/- per month on the basis of capacity of production determined. To avoid interest and penal action, the petitioner deposited a sum of Rs. 45,70,500/- and interest amounting to Rs. 8,45,000/-. The adjudicating authority vide order dated 13.7.2004 (Annexure P-8) confirmed the demand of Rs. 52,08,952/- and also imposed penalty of an equal amount. Feeling aggrieved, the petition filed an appeal before the Commissioner (Appeals) who vide order dated 17.9.2004 (Annexure P-9) allowed the appeal and dropped the demand. Being dissatisfied, the department filed an appeal before the Tribunal. The Tribunal vide order dated 13.5.2010 (Annexure P-10) set aside the order of the Commissioner (Appeals) and restored that of the adjudicating authority. Hence, the present writ petition.

2. Learned counsel for the assessee relied upon the decisions of the Gujarat High Court in Krishna Processors Vs. Union of India, and that of Himachal Pradesh High Court in Shubh Timb Steel Ltd. Vs. Union of India, wherein following the judgment of this Court in Bansal Alloys and Metals Pvt. Ltd. Vs. Union of India (UOI), the issue has been decided in favour of the assessee.

3. On the other hand, learned counsel for the revenue supported the order passed by the Tribunal.

4. After hearing learned counsel for the parties, we find merit in the petition. This Court in Bansal Alloys & Metals Pvt. Ltd's case (supra) deciding the question of vires

of Rules 96ZO(3), 96ZP and 96ZQ of the Rules held the said provisions to the extent of providing for mandatory minimum penalty without mens rea and without any element of discretion as excessive and unreasonable restriction on fundamental rights being arbitrary and were accordingly declared to be ultra vires the Act and the Constitution. It was recorded as under:--

"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.

Conclusion

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".

17. The writ petitions of the assessees are allowed and impugned provisions in Rules 96(ZO), (ZP) and (ZQ) permitting 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 the Act and the Constitution. In CWP No. 8555 of 2010, penalty has been sustained by the Tribunal to the extent of 100% which will stand quashed without prejudice to any fresh order being passed in accordance with law. It is made clear that if penalty has attained finality as in CWP No. 18099 of 2009 upto this Court, this order will not affect the finality of such order. The appeals filed by the revenue against the orders of the Tribunal sustaining penalty proportionate to the default will stand dismissed."

5. Following the aforesaid judgment in Bansal Alloys & Metals Pvt. Ltd's case (supra), Gujarat High Court in Krishna Processors's case (supra) had recorded as under:--

"20.15 The above view taken by this court finds support in the decision of the Punjab & Haryana High Court in the case of Bansal Alloys and Metals Pvt. Ltd. v. Union of India (supra) wherein the court has held that 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 assessee can be punished or a penalty could be imposed is not a blanket power without providing for any justification. The court, accordingly, held the provisions of Rules 96ZO, ZP and ZQ permitting penalty for delay in payment, without any discretion and without having regard to the extent and circumstances for delay to be ultra vires the Act and the Constitution."

6. Himachal Pradesh High Court in Shubh Timb Steel Ltd's case (supra) in view of the judgment in Bansal Alloys & Metals Pvt. Ltd's case (supra) had held in the following terms:--

"7. 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 bonafide 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".

8. 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."

In view of the above, the present writ petition is allowed and the order impugned herein is set aside. The matter is remitted to the Tribunal to decide the same afresh in accordance with law keeping in view the judgment of this Court in Bansal Alloys &

Metals Pvt. Ltd" s case (supra).