THE HON'BLE SRI JUSTICE G.CHANDRAIAH
AND
THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

C.E.A.NO.4 OF 2005

JUDGMENT **(Per the Hon'ble Sri Justice G.Chandraiah)**

Heard the learned counsel for the appellant and Standing Counsel for the Central Excise, for the State of Telangana.

2. The appellant is the assessee and is involved in the manufacturing of Hot re-rolled products of non-alloy steel viz., M.S. Flats, angles, bars and rods. It initially filed declaration under the statute for determining unit's annual capacity of production (ACP), describing its furnace as of 'pusher type' and accordingly, based on verification, the Commissioner, by proceedings dated 30.8.1997, fixed the ACP at 1592 mts. per annum and imposed duty liability at Rs.19,900/- per month. Again based on a revised declaration by the assessee dated 10.9.1997, the Commissioner determined the ACP as 3145 MT per annum and liability was imposed at Rs.78,625/- per month. The case of the assessee is that their furnace was having a screw pusher mechanism by which material is charged and there is no contrived movement of the material by way of conveyor belt or chain in the furnace of the assessee's factory and hence the furnace of the assessee has to be treated only as 'batch type' and accordingly the unit's ACP has to be determined for imposing monthly duty liability. The assessee though initially filed declaration under the statute describing the furnace as 'pusher type', based on which monthly duty liability was fixed at Rs.78,625/- by the order of the Commissioner dated 16.9.1997, subsequently realizing the mistake that the furnace is 'batch type' and not 'pusher type', filed revised declaration along with Chartered Engineer's Certificate for re-determination of duty liability. Based on the report of the Range Superintendent dated 19.5.1998, the Commissioner, by order dated 27.10.1998, rejected the claim of the assessee and ordered to treat the furnace of the assessee as 'pusher type' and duty liability as determined in order dated 16.9.1997 was confirmed. Aggrieved by the same, the assessee filed appeal before the Customs, Excise and Gold (Control) Appellate Tribunal, South Regional Bench, Madras (for short 'CEGAT') in Final Order No.581/1999. By order dated 17.3.1999, the Tribunal holding that as the Commissioner has applied only the first of two tests i.e., that there is a presence of pushing mechanism by which material is charged into furnace and as the report of the said Superintendent who had inspected, was silent

with respect to the second test, as to whether there is any movement of materials inside the furnace, while the furnace is heating the same, set aside the order-in-original No.CEX- 29/98 dated 27.10.1998 passed by the Commissioner and remitted the matter back for de novo consideration after giving opportunity to the assessee. The Commissioner was given liberty to cause re-verification / re-inspection of the furnace of the assessee by any technical authority to enable him to apply the aforementioned two tests in the mater and was directed to make available the result of the technical authority to the assessee before considering the matter on de novo basis. After remand, the Commissioner required the National Institute of Secondary Steel Technology (NISST) based in Mandi Gobindgarh, Punjab, to cause verification of the furnace of the assessee. Accordingly, a team of officers of NISST visited the furnace of the assessee on 30.10.1999 and on verification, issued certificate dated 8.11.1999 stating that the furnace of the assessee is 'pusher type'. The said report was made available to the assessee and eventually, based on the certificate of NISST dated 8.11.1999, the Commissioner concluded that the furnace of the assessee is 'pusher type' and rejected by the claim of the assessee by Order (Original) No.C.Ex06/2000 dated 10.2.2000. Challenging the same, the assessee filed appeal on the file of Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Bengaluru. By the impugned order dated 23.8.2004, the appeal was dismissed. Aggrieved by the same, the present appeal by the assessee.

3. The learned counsel for the assessee contended that, as directed by the CEGAT in its remand order dated 17.3.1999, for determining the furnace as 'pusher type' two tests, are to be fulfilled viz., (1) that there should be a pusher mechanism, by which the charged material is pushed into the furnace and (2) that there should be movement of the material inside the furnace while heating is on. The case of the appellant, as stated above, is that their furnace was having a screw pusher mechanism by which material is charged and there is no contrived movement of the material by way of conveyor belt or chain in the furnace of the appellant's factory and hence the furnace of the appellant has to be treated as batch type only and accordingly the unit's ACP has to be determined for imposing monthly duty liability. In other words, he contended that in order to treat a furnace as pusher type, there shall be a mechanism installed inside the furnace for the purpose of automatic operations and whereas in the present case, there is no mechanism installed inside the furnace for the purpose of automatic operation and the movement of the material while the same is heated inside the furnace. He also alternatively contended that

the finding that the furnace is of 'pusher type' is not sufficient to determine the annual production capacity of a mill under Hot Re-rolling Mills Annual Capacity Determination Rules, 1997 and it has to be further examined as to what is the type of the mill that is installed in the factory and if the mill is slow speed mill, then the furnace cannot be held to be having pusher type furnace as the same cannot be installed for a low speed mill. He stated that the mill of the assessee is low speed mill and this factor has not been taken into consideration by the NISST team. He submitted that the authorities without considering these aspects, found that the assessee is having furnace with pusher type mechanism, thereby treating it as high speed mill and fixed higher annual production capacity and demanded higher duty. In support of this contention, the learned counsel also relied on the judgments reported in SURINDRA STEEL ROLLING MILLS vs. COMMISSIONER OF C. EX., CHANDIGARH[1] and V.V.S. CONCAST LTD. vs. COMMISSIONER OF CENTRAL EXCISE, ALLAHABAD[2].

4. The learned Standing Counsel for the Central Excise, supporting the impugned order of the Tribunal, sought to dismiss the appeal.

5. This court admitted the appeal to consider the following questions of law:

1. Whether the order dated 23.8.2004 passed by the Hon'ble CESTAT upholding respondent order bearing No.CS.06/2000, dt. 10.02.2000 determining the duty liability of the appellant under Hot Re-rolling Steel Mills Annual Capacity Determination Rules 1997, is proper and correct.

2. Whether in the facts and circumstances of the case the finding of the Hon'ble CESTAT that the furnace installed in the appellant's factory is pusher type furnace (continuous) is proper and correct.

6. From the above, the only controversy is whether the furnace of the appellant is 'pusher type' or 'batch type' for determination of ACP (annual production capacity) for levying monthly liability. For this, the authority below had relied on the certificate dated 8.11.1999 issued by NISST. The said certificate was issued by the NISST, after due verification of the furnace of the assessee in its presence and also in the presence of Central Excise Range Officer and also the Manager of the NISST. The conclusions in the said certificate, which are based on technical observations, are extracted as under for better appreciation:

1. The observation No.12 clearly indicates that there is a pusher mechanism by which the material is charged / fed into the furnace.

2. The observation Nos.3, 4 and 5 clearly indicate that there is movement of the material inside the furnace while the material is getting heated for

> rolling from back end of furnace to the front side door towards burner end (from where it is taken manually for rolling.).

7. From the material on record, it could be seen that the above report of the NISST was given to the assessee in advance and after affording personal hearing and as the assessee has not lead any rebuttal evidence in the form of any Chartered Engineer's Certificate, the authority below has categorically recorded finding on technical aspect that the subject furnace of the assessee is 'pusher type' and rejected the claim of the assessee.

8. Further from the material on record, it could be seen that the primary authority has not only taken the report of the NISST, but also examined the annual production based on the declarations filed by the assessee itself and the claim of the assessee with regard to the nature of mill being run by it. The relevant discussions of the lower authority, which is apposite to meet the contentions of the learned counsel for the appellant, are extracted as under:

> 28. Average production for last five years is 2652.182 mts and not 2000 mts. as stated by the assesses and also average for last three years is 3112.716 mts whereas the assessee tried to put it up at 2136 mts.
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> 29. A study of actual production by the assesses vis-à-vis capacity determined during 1997-98 and 1998-99 shows that actual production always exceeded the production as determined under the rule;
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> 30. Assessees states that there is no mechanical contrivance to move the material like conveyor belt or chain and no continuity of the material as well as the movement of hot material inside the furnace and no automatic mechanism to take out the material from the furnace and also states that their furnace is not continuous furnace where an uninterrupted cycle in which the charged material is added constantly. But the assessee does not dispute the observations points nos. 3, 4 and 5 made by the NISST in their technical report which clearly indicate that there is movement of material inside the furnace while the material is getting heated for rolling from back end of furnace to the front side door towards burner end (from where it is taken manually for rolling.)
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> 31. The assesses letter dated 14-12-99 has an enclosure in which Mr.R.P.Bhatia, Chartered Engineer and Zonal Chairman of Steel Re-rolling mills Association of India, Mandi Gobindgarh has certified that the most of steel re-rolling mills working in country are low speed mills and further explained that the small sized units have low furnace capacity which are box/batch type. But it is a general statement and nowhere it is mentioned that Sri R.P.Bhatia has physically inspected the mill of the assessee to declare their furnace is of batch type. And also the enclosure to Sri R.P.Bhatia's letter is irrelevant in the instant case since we are not entering into any debate also where by installing such pusher mechanism the production output of furnace could be doubled as envisaged in the formula of capacity assessment but we have to decide the type of furnace of the assesses on available evidence.
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> 33. Where as a team of officers from National Institute of Secondary Steel Technology, Mandi Gobindgarh, a reputed Government organization has visited the assesses unit, inspected the reheating furnace, recorded the information some of which is verified by themselves and some of which is obtained from the assesses in the observation sheet where all the three parties i.e., assesses, Central Excise Range Officer and the manager of NISST have appended their signatures showing the transparency of inspection and arrived to the conclusion point with respect to the CEGAT's observations and declared the furnace is of pusher type.

9. In view of the above extracted findings, based on certificate of NISST and the material on record, the contention of the learned counsel for the assessee that the mill is low speed mill and the authorities treating it as high speed mill, fixed higher annual production capacity and demanded higher duty, cannot be countenanced and the judgments cited in this regard are not applicable to the facts of the case.

10. In our considered opinion, the questions of law framed for consideration form part of questions of fact, on which the primary authority has categorically recorded finding based on report of the technical committee and the same has been concurred by the appellate Tribunal and on re-appreciation of the entire material on record, we do not find any legal infirmity or irregularity to interfere with the same.

10. For the forgoing reasons, we do not find any merit in the appeal and the same is dismissed. No costs.

11. Miscellaneous petitions pending if any, shall stand closed.

G.CHANDRAIAH,J

CHALLA KODANDA RAM,J

DATE:24.06.2015

AVS

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[1] 2003(155) E.L.T. 175 (Tri.-Del.)

[2] 2002(139) E.L.T. 81 (Tri.- Del.)