THE HON'BLE SRI JUSTICE DILIP B.BHOSALE

AND

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

-

-

CENTRAL EXCISE APPEAL No.12 of 2004

-

JUDGMENT: (per the Hon'ble Sri Justice A.Ramalingeswara Rao)

-

This Central Excise Appeal is filed against the order of the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Circuit Bench at Hyderabad in Final Order No.216 to 219 of 2004, dated 21.01.2004.

2. The following substantial question of law arises for our consideration in the present appeal.

> " Whether in the facts and circumstances of the case, the Hon'ble Tribunal was correct in law in holding that the appellant is not entitled for abatement of duty which is allowable under sub-section (3) of Sec.3A of the Act on the ground that the appellant opted to pay the duty under sub-rule 3 of Rule 96ZO of the Central Excise Rules, 1944."

3. The assessee is the appellant in this appeal. The assessee is a manufacturer of M.S.Ingots falling under Chapter Sub-heading No.72.06 of the schedule of the Central Excise Tariff Act, 1985 which are covered by Section 3A of the Central Excise Act, 1944 (for short, the Act) for levy of excise duty. The assessee opted for payment of duty under the procedure prescribed in Sub-rule (3) of Rule 96ZO of the Central Excise Rules, 1944 (for short, the Rules).

4. The assessee filed an abatement claim in terms of Rule 96ZO of the Rules for the period from 14.10 hours on 23.10.1999 to 00.30 hours on 31.10.1999 on the ground that they did not manufacture ingots from the two furnaces on the

said period. The assessee informed the jurisdictional Deputy Commissioner on 23.10.1999 about the intended closure of the factory from 14.10 hours on 23.10.1999 and also about the intended commencement of the factory from 00.30 hours on 31.10.1999 along with stock position and electricity meter reading as required under Sub-rule (2) of Rule 96ZO of the Rules. The Commissioner allowed an abatement of duty of Rs.1,88,172/- for the period of closure under Sub-section (3) of Section 3A of the Act read with Rule 96ZO (2) of the Rules, by his order dated 10.02.2000. The Central Board of Excise & Customs, New Delhi, examined the records of the said proceedings and directed the Commissioner of Central Excise, Hyderabad-I Commissionerate, Hyderabad to apply to the Customs, Excise and Gold (Control) Appellate Tribunal for the correct determination of the following points arising out of the said order.

> " (a) Whether, after taking into consideration the facts stated above the said Order of the Commissioner is legal, correct and proper, and
>
> (b) Whether by an Order passed under Section 35 C of the Act, the Tribunal should modify or set aside the Order passed by the Commissioner and should disallow the abatement allowed by the Commissioner or pass such other orders as may be deemed fit."

5. The Tribunal, by its final order No.216 to 219 of 2004, dated 21.01.2004, held in favour of the Revenue, based on the judgment of the Supreme Court in **CCE & C V. Venus Castings (P) Ltd..** Challenging the same, the present appeal is filed.

6. We have perused sub-sections (3) and (4) of Section 3A of the Act and also Rule 96ZO(3) of the Rules which read as follows:

> **" Section 3A:- Power of Central Government to charge Excise duty on the basis of capacity of production in respect of notified goods:-**
>
> (1)…
>
> (2)…

(3) The duty of excise on notified goods shall be levied, at such rate as the Central Government may by notification in the Official Gazette specify, and collected in such manner as may be prescribed:

Provided that, where a factory producing notified goods did not produce the notified goods during any continuous period of not less than seven days, duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfils such conditions as may be prescribed.

(4) Where an assessee claims that the actual production of notified goods in his factory is lower than the production determined under sub-section (2), the Commissioner of Central Excise shall, after giving an opportunity to the assessee to produce evidence in support of his claim, determine the actual production and redetermine the amount of duty payable by the assessee with reference to such actual production at the rate prescribed in sub-section (3).

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

(1) …

(2) …

(3) Notwithstanding anything contained elsewhere in these rules, if a manufacturer having a total furnace capacity of 3 metric tonnes installed in his factory so desires, he may, in the beginning of each month from 1st day of August, 1997 to the 31st day of March, 1998 or any other financial year, as the case may be, and latest by the tenth of each month, pay a sum of rupees five lakhs and the amount so paid shall be deemed to be full and final discharge of his duty liability for the period from the 1st day of August, 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 proviso to sub-section (3) or under sub-section (4) of the section 3A of the Central Excise Act, 1944 (1 of 1944)"

7. A reading of Rule 96ZO(3) makes it clear that the said power can be

exercised subject to the condition that the manufacturer shall not avail the benefit under the provisions of Sub-section (3) or under Sub-section (4) of Section 3A of the Act. In the instant case, the assessee has opted for payment of duty under the procedure prescribed under Sub-rule (3) of Rule 96ZO of the Rules and hence precluded from availing the benefit under the provisions of sub-sections (3) and (4) of Section 3A of the Act.

8. This Court in **Sathavahana Steels & Alloys (P) Ltd. V. Government of India** held that when the assessee opted for compound levy in terms of Rule 96ZO(3) of the Rules, it is not eligible to reliefs provided under Sub-rule (1) of Rule 96ZO and the provisions of abatement of duty and redetermination of capacity as contained in sub-sections (3) and (4) of Section 3A of the Act should not be imported into Rule 96ZO(3). The said ratio laid down by this Court was upheld by the Supreme Court in **Commissioner of C.Ex. & Customs V. Venus Castings (P) Ltd.** wherein it was held as follows:

> "…Therefore, it is made clear that the manufacturers, if they have availed of the procedure under Rule 96ZO(3) at their option, cannot claim the benefit of determination of production capacity under Section 3A(4) of the Act which is specifically excluded. We find that the view taken by the Andhra Pradesh High Court in *Sathawahana Steels & Alloys (P) Ltd. v. Government of India* (supra) and the similar view expressed by the Division Bench of the Allahabad High Court in Civil Miscellaneous Writ Petition No.1127 of 1999 *M/s.Jalan Castings (P) Ltd. v. Commissioner of Central Excise & Ors.* Disposed of on February 28, 2000 is reasonable and correct. We overrule the view taken by the Allahabad High Court in *Pravesh Castings (P) Ltd., Kanpur Nagar v. Commissioner of Central Excise, Allahabad & Anr.* (supra)."

9. In view of the authoritative pronouncement of the Supreme Court confirming the view taken by this Court in **Sathavahana Steels & Alloys (P) Ltd.**'s case (2 supra), we answer the substantial question of law raised in the present appeal against the assessee and in favour of the Revenue.

10. The Central Excise Appeal is, accordingly, dismissed. Miscellaneous petitions, if any, also stand disposed of. There shall be no order as to costs.

DILIP B.BHOSALE, J

A.RAMALINGESWARA RAO, J

Date: 21.04.2015

TJMR