IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE Tmt.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A. No.3309 of 2009

The Commissioner of Central Excise
No.1, Foulk's Compound
Anaimedu, Salem - 636 001 .. Appellant

Vs.

1.M/s.Salem Steel Re-Rolling Mill
PB No.218/96/1, Calicut Road
Nethimedu, Salem - 636 002

2.The Customs Excise & Service Tax
Appellate Tribunal
South Zonal Bench
Shastri Bhawan Annex, 1st Floor
No.26, Haddows Road
Chennai - 600 006 .. Respondents

Civil Miscellaneous Appeal filed under Section 35G of Central Excise Act, 1944, against the Final Order No.797/2009 dated 29.06.2009 passed by CESTAT, Chennai.

For Appellant : Mr.K.Magesh
For Respondent : No Appearance

JUDGMENT
(Delivered by S.MANIKUMAR, J.)

Instant civil miscellaneous appeal is filed against the Final Order of CESTAT, Chennai dated 29.06.2009 made in Final Order No.797/2009, on the following substantial questions of law:

> " i) Whether Hon'ble Tribunal is correct in concluding that Rule 5 will not be applicable when there is change in the parameters resulting in less production when there is no specific condition in the said Rules ibid that Rule would be applicable only to enhanced or when there is no change in the parameters of the furnace?
>
> ii) Is not the formula following as per sub rule

(3) of Rule 3 in respect of annual capacity determined basing on the production during the relevant period sustainable or not?"

2. Short facts leading to the appeal are as follows:

M/s.Salem Steel Re-rolling mills, Nethimedu, Salem, are manufacturers of iron and steel re-rolled products falling under Chapter 72 of the Central Excise Tariff Act, 1985. On the introduction of the compounded levy scheme during the year 1997-98, the Annual Capacity of Production (ACP) of the unit was fixed as 14708.430 MT by the Commissioner of Central Excise, Coimbatore, on the basis of the particulars furnished by respondent No.1, as required by the above compounded levy scheme under Rule 96 ZP of the Central Excise Rules, 1944. Later the respondent No.1 changed some of the parameters of the machinery for manufacturing of the above final products and requested the department to refix their ACP as per the revised parameters. Since the ACP re-determined as per the parameters was less than the actual production of the unit during the year 1996-97 (14708.430 MTs), it was ordered that ACP shall be deemed to be equal to the actual production during the year 1996-97 in terms of Rule 5 of the Hot Re-Rolling Steel Mills Annual Capacity Determination Rules, 1997 (HRRSMACDR'97) and therefore re-determined the annual capacity of the unit of the respondent No.1 as 14708.430 MT. The respondent was also directed to discharge the duty liability as re-determined observing the procedures prescribed under Rule 96ZP of the Central Excise Rules, 1944 up to 31.03.2000 and thereafter on advalorem.

3. Supporting the substantial questions of law, following grounds have been raised.

a) The contention of the Hon'ble CESTAT, South Zonal Bench, Chennai that "Rule 5 of HRRSMACDR'97 will not be applicable when the change in the parameters results in reduction in the annual capacity or production and rule will be applicable in cases where there is no change in Annual Capacity of production or the Annual capacity of production is increased due to change in the machinery of production is not acceptable for the following reasons:

b) A plain reading of Rule 5 of the HRRSMACDR'97 reveals that in case the Annual Capacity determined by the formula in sub rule 3 of Rule 3 in respect of a mill is less than the actual production of the mill during the financial year 1996-97, then the annual capacity so determined shall be equal to the production of the mill during the year 1996-97.

c) Nowhere in the said Rule 5, it is mentioned that if the capacity determined as per the revised parameters submitted by the assessee is less than the actual production of the year 1996-97 then this rule will have no effect on the actual production capacity during the year 1996-97. That is to say Rule 5 has not laid down any specific condition that the Rule would be applicable only to enhance (or) when there is no change in the parameters of the furnace.

d) Further, it is submitted that the Hon'ble Supreme Court in its order dated 20.08.2001 has dismissed the S.L.P. filed by the Steel Re-rollers Council, Erode in which the respondent No.1 is also one of the members, against the Hon'ble High Court order in W.A. No.2036 and 2037/2000 directing the members of the council to deposit a sum of Rs.3 Crores. In the said W.A., the members have prayed the Hon'ble High Court, Chennai to declare Rule 5 of HRRSMCDR'97 as ultra vires. In the SLP, the petitioners (The Steel Re-rollers council, Erode) had prayed for grant of interim stay for the recovery of any unquantified amount from the members of the petitioner, over and above the amount payable as determined and paid under the formula as prescribed under Rule 3 ibid by citing the Rule 5 is contrary to the Compounded Levy scheme. As the highest judicial forum itself has held hte provisions of Rule 5 of HRRSMACDR'97 as valid and stayed the order of the Hon'ble High Court, the impugned orders of CESTAT is liable to be set aside.

4. Mr.K.Magesh, learned standing counsel submitted that pending by way of reference to a Larger Bench decision in the Hon'ble Supreme Court. Order in original has been passed on 09.04.2003 and it has taken six years to travel to this court. For want of service, the matter is pending in the delay stage for eight years.

5. Having regard to the fact that the subject matter is pending on the file of the Hon'ble Supreme Court, instant civil miscellaneous appeal is disposed of, giving liberty to the appellant, to take appropriate decision, if so warrants, after the outcome of the decision, in the reference made.

Civil Miscellaneous Appeal is disposed of, as stated supra. No costs.

Sd/-
Assistant Registrar(CO)

//True copy//

Sub Assistant Registrar

To

1.The Customs Excise & Service Tax
Appellate Tribunal
South Zonal Bench
Chennai - 600 006

Copy TO

The Section Officer,
VR Section, High Court,
Madras.

+1cc to Mr.K.Magesh, Advocate SR.No.18882

asr

C.M.A. No.3309 of 2009

RJ(CO)
GN(02/04/2018)