

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

EXCISE APPEAL NO.1 OF 2016

WITH

CIVIL APPLICATION NO.37 OF 2016

M/s. Mohit Ispat Limited
Plot No.339, Kundaim Industrial
Estate, Kundaim, Goa 403 115.

..... Appellant.

Versus

Commissioner of Customs,
Central Excise & Service Tax,
ICE House, Patto, Panaji
Goa – 403 001.

..... Respondents.

Mr. Rajiva Srivastava, Advocate for the Appellant.

Ms. Asha Desai, Standing Counsel for the Respondent.

***Coram : M.S. Sonak &
Prithviraj K. Chavan, JJ.***

Reserved on : 3 January 2019.

Pronounced on : 10 January 2019.

JUDGMENT: (Per M.S. Sonak, J.)

Heard Mr. Rajiva Srivastava for the Appellant-Assessee
and Ms. Asha Dessai for the Respondent-Revenue.

2. At the outset, an order was made in Excise Appeal No(s).
5, 6 and 7 of 2006 that they may not be placed before the Bench in

which one of us (M.S. Sonak, J.) is a party. However, the learned Counsel have stated that there is no difficulty to this Bench taking up the present appeal.

3. By order dated 14 June 2016, this Appeal came to be admitted on the following substantial questions of law :

(i) In the absence of levy of interest in the substantive provision of Section 3A of the Central Excise Act, 1944, whether interest can be levied under Rule 96 ZO which has been framed in exercise of power conferred under the aforesaid Section 3A ?

(ii) Whether confirmation of demand by the Tribunal based on annual production capacity determined by Commissioner of Customs and Central Excise without taking into account factor of electricity is utterly perverse?

(iii) When documentary evidence clearly shows of restricted supply to the Appellant/manufacturer unit during the disputed period for a continuous period of more than seven days, whether abatement as provided in sub clause (3) of Section 3A deniable ? Whether finding of the Tribunal in this regards is perverse ?

4. The challenge in this appeal is to the Judgment and Order dated 8 October 2015 made by the Customs, Excise and Service Tax Appellate Tribunal, (CESTAT) in Appeal No.E/1691/05.

5. Mr. Rajiva Srivastava, the learned Counsel for the Appellant submits that there is no substantive provision under the Central Excise Act, 1944 (said Act) for levy of interest, when it comes to payment of excise duty under Section 3A of the said Act. Therefore, Rule 96 ZO of the Central Excise Rules, framed in pursuance of the powers conferred under Section 3A of the said Act, to the extent such rule provides for levy of interest, is ultra vires the parent Act. He submits that in fact, this has been held so by the Honourable Apex Court in the case of *Shree Bhagwati Steel Rolling Mills vs. Commissioner of Central Excise* ¹. He, therefore, submits that the first substantial question of law is liable to be answered in favour of the Assessee and the impugned Orders, to the extent they levy or confirm the levy of interest, are liable to be set aside.

6. Mr. Srivastava submits that in the present case, the annual production capacity of the Appellant's unit came to be determined without taking into consideration the admitted position that there were severe power cuts/power outages. He submits that this was extremely relevant factor when it came to determination of

¹ 2015 (326) ELT 209 (SC)

annual production capacity. Non-consideration of this very vital and relevant factor renders the findings in the impugned orders, perverse. He again relies on the case of *Shree Bhagwati Steel Rolling Mills* (supra) in support of this contention. On that basis, Mr. Srivastava submits that even the second substantial question of law is liable answered in favour of the Assessee.

7. Mr. Srivastava finally submits that there was material on record which established that the Appellant's unit could not function during the disputed period for continuous spell of more than seven days, basically on account of power cuts which constitute a circumstance beyond the control of the Assessee. He submits that in these circumstances, abatement, as provided under Section 3A(3) of the said Act was liable to be granted to the Appellant's unit. He submits that denial of such abatement, by ignoring the relevant and vital material on record, is a good ground for interference with the impugned orders. On these basis, he submits that even the third substantial question of law is liable to be answered in favour of the Assessee.

8. Ms. Asha Dessai, learned Standing Counsel for the Revenue agrees that the issue relating to levy of interest will have to be decided in favour of the Assessee by taking into consideration the ruling of the Apex Court in the case of *Shree Bhagwati Steel Rolling*

Mills (supra). However, in so far as other two issues are concerned, she submits that there is no case made out to interfere with the impugned Judgment and Order.

9. Ms. Dessai submits that the schemes for levy of duty contemplated by Section 3A of the said Act and Rule 96ZO(3) or Rule 96ZP(3) of the Excise Rules are two alternative procedures to be adopted at the option of the Assessee. If the Assessee opts for procedure under Rule 96ZO(1), he may opt out of the procedure under Rule 96ZO(3) for a subsequent period and seek the determination of annual capacity of production. The Assessee cannot, however, have a hybrid procedure of combining the procedure for the same assessment year. She submits that if the contention of the Assessee, based upon the alleged circumstances relating to power cuts/power outages, is to be upheld, then, that would amount to permitting the Assessee to resort to a hybrid procedure, which is clearly not permissible. She relies on *Commissioner of Central Excise & Customs vs. Venus Castings (P) Ltd.*² and *Union of India and ors. vs. Supreme Steels and General Mills and ors.*³ in support of this contention.

10. She further submits that in any case, in the present

² (2000) 4 SCC 206

³ (2001) 9 SCC 645

proceedings the Assessee had never challenged the determination of the annual production capacity which was worked out by the Authorities in accordance with law. She submits that this is clearly recorded in the impugned Order. She submits that the statements reflected in the impugned Order cannot be questioned before the higher Courts, but will have to be taken as correct unless, the very same authority amends or modifies the same. Even, otherwise, Ms. Dessai submits that it is very clear in the present case that the determination of the annual production capacity was never challenged by the Assessee. On these basis, Ms. Dessai submits that the second substantial question of law neither arises in the present Appeal, nor is the same required to be decided in favour of the Assessee.

11. Finally, Ms. Dessai submits that in the present case, there is absolutely no doubt that the Assessee failed to follow the procedure for claiming abatement in terms of Section 3A(3) of the said Act. Accordingly, there was no question of the Assessee being allowed such abatement. Ms. Dessai submits that even, otherwise, the issue as to whether there were power cuts/power outages during the disputed period or not, is an issue of fact, which may not be gone into in this Appeal, particularly, since this Appeal is required to be decided on the substantial questions of law alone.

12. The rival contentions now fall for our determination.

13. The Assessee, in the present case, is a manufacturer of mild steel ingots, falling under Chapter Heading No.72 of the Central Excise Tariff Act, 1985. There is no dispute that the Assessee had opted for payment of Central Excise duty in terms of Section 3A of the said Act based on the annual production capacity under the provisions of Section 3A of the said Act, read with the provisions of Rule 96ZO(3) of the said Rules, as applicable during the relevant period. For the relevant period i.e. 1/4/1998 to 10/11/1998, the Assessee was required to pay excise duty on the basis of annual production capacity worked out by the Authorities as 6400 MTs, corresponding to furnace capacity of 2 MTs. The due liability, as per the prescribed formula was worked out as ₹ 3,33,333/- per month.

14. There is no dispute that the Assessee failed to pay the entire excise duty as determined as per the prescribed formula. The Assessee contends that the short payment was on account of the fact that there were power cuts/power outages, as a result of which there was no production for most of the days except, perhaps for 29 days. The Assessee contends that the due amount on *pro rata* basis amounting to approximately ₹ 3.17 lacs was, therefore, paid by the Assessee to the Revenue and there was no liability to pay any further amount.

15. The Revenue issued two show cause notices to the Assessee, demanding the amount of excise duty short paid, along with interest at the rate of 18 % per annum from the date till the date of actual payment. The Assessee disputed the liability for payment and sought personal hearing to substantiate such dispute. Ultimately, the Commissioner of Central Excise, after afford of personal hearing, by order dated 12/02/2004, confirmed the demand with interest and further imposed penalty upon the Assessee.

16. The Assessee, aggrieved by the order dated 12/02/2004 appealed to the CESTAT vide Appeal No.E/1691/05. This was disposed of by the impugned order dated 8 October 2015. The CESTAT confirmed the demand with interest, but, set aside the penalty imposed by the Commissioner of Central Excise. The Assessee has, therefore, instituted the present Appeal against the impugned order dated 8 October 2015 to the extent the same upholds the demand along with interest.

17. In so far as the issue of levy of interest is concerned, the Appellant is entitled to succeed on the basis of the ruling of the Honourable Apex Court in *Shree Bhagwati Steel Rolling Mills* (supra).

18. In the present case, the interest upon short payment was demanded and levied on the basis of the Rules which did make provision for payment of interest. However, in the case of *Shree Bhagwati Steel Rolling Mills* (supra), the Apex Court held that such Rules were ultra vires the parent Act since, in the parent Act there was no provision for demand or levy of interest.

19. The relevant discussion on the aspect of demand and levy of interest is found in paragraphs 26 to 31 of the aforesaid Judgment. However, the discussion in paragraphs 30 and 31 is most relevant and read thus :

“30. On merits, the matter is no longer res integra. A Constitution Bench decision of this Court in V.V.S. Sugars v. State of A.P., 1999 (4) SCC 192, has held, following two earlier judgments of this Court, as follows: (SCC p. 195, para 6)

“This Court in India Carbon Ltd. v. State of Assam [(1997) 6 SCC 479] has held, after analysing the Constitution Bench judgment in J.K. Synthetics Ltd. v. CTO [(1994) 4 SCC 276] that interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf. There being no substantive provision in the Act for the levy of interest on arrears of tax that applied to purchases of sugarcane made subsequent to the date of commencement of the amending Act, no interest thereon could be so levied, based on the application of the said Rule 45 or otherwise.”

31. Applying the Constitution Bench decision stated above, it will have to be declared that since Section 3-A, which provides for a separate scheme for availing facilities under a compound levy scheme, does not itself provide for the levying of interest, Rules 96-ZO, 96-ZP and 96-ZQ cannot do so and therefore on this ground the appellant in Shree Bhagwati Steel Rolling Mills has to succeed. On this ground alone therefore the impugned judgment is set aside. That none of the other provisions of the Central Excise Act can come to the aid of the Revenue in cases like these has been laid down by this Court in *Hans Steel Rolling Mill v. CCE (2011) 3 SCC 748* as follows:

“13. On going through the records it is clearly established that the appellants are availing the facilities under the compound levy scheme, which they themselves opted for and filed declarations furnishing details about the annual capacity of production and duty payable on such capacity of production. It has to be taken into consideration that the compounded levy scheme for collection of duty based on annual capacity of production under Section 3 of the Act and the 1997 Rules is a separate scheme from the normal scheme for collection of Central excise duty on goods manufactured in the country. Under the same, Rule 96-ZP of the Central Excise Rules stipulates the method of payment and Rule 96-ZP contains detailed provision regarding time and manner of payment and it also contains provisions relating to payment of interest and penalty in the event of delay in payment or non-payment of dues. Thus, this is a comprehensive scheme in itself and general provisions in the Act and the Rules are excluded.”

[Emphasis supplied]

20. Taking into consideration the aforesaid legal position, the Commissioner of Central Excise was obviously not right in demanding the interest from the Assessee and that the CESTAT was also not right in confirming the demand for interest. To that extent, the impugned judgment and order warrants interference.

21. In so far as the second substantial question of law is concerned, the CESTAT, in paragraph 5.2 of its order dated 8 October 2015, has very clearly recorded that the production capacity worked out by the Authorities was not being challenged by the Assessee in the appeal before the CESTAT. There is really no reason to hold that the Assessee had indeed challenged the determination of the annual production capacity on account of power cuts/power outages and this consideration was not taken into account by the Commissioner or the CESTAT. The Memo of Appeal before the CESTAT has not been produced for our perusal. Even assuming that there was any ground in the Memo of Appeal, it does not appear that such a ground was pressed before the CESTAT.

22. From the contentions recorded by both, the Commissioner, as well as the CESTAT it appears that the Assessee's main contention was in relation to abatement as per Rule 96ZO(2) of the said Rules, as then applicable. Since, there was no express

challenge to the determination of the annual production capacity, the second substantial question of law really does not arise or even if it was to arise, cannot be decided in favour of the Assessee.

22. The rulings in the case of *Bhuwalka Steel Industries Limited vs. Union of India*⁴, as well as the discussion in *Shree Bhagwati Steel Rolling Mills* (supra) at paragraphs 40 to 44 are in the context of considerations relevant for determination of the annual production capacity. It is in this context that the two rulings have held that the aspects like sanctioned load of electrical units are relevant factors which are required to be taken into consideration. As noted earlier, in the present case, since there was no challenge to the determination of the annual production capacity, the rulings relied upon by Mr. Srivastava can be said to be of no assistance to the Assessee.

24. The material on record indicates that the Assessee's main contention was that they were eligible for abatement in terms of Section 3A(3) of the said Act, Rule 96ZO(2) of the said Rules, as then applicable on account of alleged power cuts/power outages during the relevant period.

25. Rule 96ZO(2) provides that where a manufacturer does

⁴ 2003 (159) ELT 147 (Kar.)

not produce the ingots and billets of non-alloy steel during any continuous period of not less than seven days and wishes to claim abatement under sub-section (3) of Section 3A of the said Act, the abatement will be allowed by an order passed by the Commissioner of Central Excise of such amount as may be specified in such order, subject to fulfillment of the following conditions, namely :

- (a) the manufacturer shall inform in writing about the closure to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise with a copy to the Superintendent of Central Excise, either prior to the date of closure or on the date of closure;
- (b) the manufacturer shall intimate the reading of the electricity meter to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, with a copy to the Superintendent of Central Excise, immediately after the production in his factory is stopped along with the closing balance of stock of the ingots and billets of non-alloy steel;
- (c) the manufacturer, when he starts production again, shall inform in writing about the starting of production to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, with a copy to the Superintendent of Central Excise, either prior to the date of

starting production or on the date of starting production;
(d) the manufacturer shall on start of production again along with the closing balance of stock on restarting the factory, intimate the reading of the electricity meter to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise¹, with a copy to the Superintendent of Central Excise;
(e) the manufacturer shall while sending intimation under clause (c), declare that his factory remained closed for a continuous period starting from --hours on -(date) to --hours on -(date).

26. Admittedly, in the present case, there is no material on record to establish that the Assessee had indeed fulfilled the aforesaid conditions prescribed in Rule 96ZO(2) of the said Rules. In fact, there is nothing on record to indicate that such abatement was claimed by the Assessee by following the procedure prescribed under Rule 96ZO(2) of the said Rules. In such circumstances, even the third substantial question of law will have to be answered against the Assessee.

27. The contentions now raised on behalf of the Assessee indeed suggests that the Assessee seeks to follow the hybrid procedure of combining the procedure under Rule 96ZO(3) with that under

Rule 96ZO(1) to which Section 3-A(4) of the said Act is attracted. The Apex Court in *Venus Castings (P) Ltd.* (supra) has already held that this is impermissible.

28. For all the aforesaid reasons, this appeal is partly allowed and disposed of with the following order :

(A) The impugned orders, to the extent they demand/confirm the levy of interest on the Assessee, are quashed and set aside.

(B) However, the impugned orders to the extent they demand or confirm the levy of excise duty as specified, are not interfered with.

(C) There shall be no order as to costs.

29. In view of disposal of the Appeal, the Civil Application does not survive and the same is disposed of accordingly.

Prithviraj K. Chavan, J.

M.S. Sonak, J.