O - 27

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION
ORIGINAL SIDE

CEXA/1/2009
IA NO.GA/1/2009 (GA/56/2009)

M/S. BENGAL HAMMER INDUSTRIES (P) LTD.
-Versus-
UNION OF INDIA & ORS.

BEFORE:
The Hon'ble T.S. SIVAGNANAM, ACTING CHIEF JUSTICE
-And-
The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA
Date : 3rd May, 2023.

Appearance :
Mr.Arijit Chakraborty, Adv.
Mr.N.K. Chowdhury, Adv.
Mr.D. Sharma, Adv.
..for the appellant.

Mr. K.K. Maiti, Adv.
Mr.Tapan Bhanja, Adv.
..for the respondent.

The Court : This appeal by the assessee under Section 35G of the Central Excise Act, 1944 (for brevity 'The Act') is directed against the order dated 25th June, 2008 passed by the Customs, Excise & Service Appellate Tribunal, East Zonal Bench, Kolkata (Tribunal). The appeal was admitted on 8th April, 2009 on the following substantial question of law :

> *"Whether the Tribunal below substantially erred in law in dismissing the appeal filed by the appellant without*

appreciating that refixation of annual capacity of production made by the Commissioner, on reviewing his own order, without issuing any show cause notice and without giving an opportunity of hearing inasmuch as the order of the Commissioner was contrary to the principles of natural justice and fair play?"

We have heard Mr. Arijit Chakraborty, learned counsel assisted by Mr. N.K. Chowdhury, learned advocate appearing for the appellant/assessee and Mr. K.K. Maiti, learned standing counsel assisted by Mr. Tapan Bhanja, learned advocate appearing for the respondent/department.

The short issue which falls for consideration is whether the proceedings initiated by the Joint Commissioner (Technical) pursuant to his order dated 3rd August, 1999 by issuing a notice to show cause cum demand demanding central excise duty on the ground that the annual production capacity of the appellant had been re-fixed pursuant to a circular issued by the Board dated 13th November, 1999 was valued in the eye of law. The question would be whether the order passed by the Commissioner of Central Excise, Calcutta – II dated 3rd April, 1998 which was holding the field and accepted by the department could have been unilaterally revised by a subordinate authority, namely, the Joint Commissioner solely due to a circular issued by the Board. It is not in dispute that the Commissioner of Central Excise had fixed the annual capacity of the assessee under the Hot Re-rolling Steel Mills Annual Capacity

Determination Rules, 1997 by order dated 3rd April, 1998. By the said order the Commissioner after examining the submissions made by the assesssee and after considering the particulars declared by the assessee under the Rules and the notification dated 30.8.1997 and after re-verification based on a request made by the assessee and taking into consideration the report given by the Assistant Commissioner, Central Excise, Howrah, North Division, re-determined the annual capacity of the appellant/assessee as 20326.919 MT and 14228.843 MT (70% non alloy steel) and fixed duty liability for the year 1997-98. The said order further stated that the remaining 30% of the annual capacity of production, i.e. 6098.076 MT alloy steel as declared by the assessee or the actual production of alloy steel whichever is higher, is to be cleared after discharging the central excise duty liability under Section 3 of the Central Excise Act, 1944. After the instruction given by the Board, the Commissioner of Central Excise appears to have unilaterally re-determined the annual production capacity of the appellant and admittedly no opportunity was granted to the appellant/assessee to place materials as no show cause notice was issued by the Commissioner proposing to re-determine the annual capacity purportedly to be based upon the instruction given by the Board. This unilateral decision taken by the Commissioner by determining the annual capacity on the entire quantity, that is, 100 per cent. The Joint Commissioner had re-determined the duty liability and issued show cause notice. Though the appellant had submitted their reply to the show cause notice on 30th July, 2004 stating that they have been manufacturing both alloy and non-alloy steel products and their alloy steel products were approximately 30 per cent and non alloy steel were 70 per cent, they had approached the Commissioner of Central Excise stating that they would have manufacturing 70 per cent of non-alloy steel and 30 per cent of alloy steel of annual capacity of the production which was declared by them by letter dated 9th September, 1997 and they would be paying central excise duty on non-alloy steel as per demanded capacity on pro rata basis and for alloy steel they would be paying duty at 15 per cent on ad valorem after observing the central excise formalities. Based on the request letter given by the assessee dated 9th September, 1997 the Commissioner of Central Excise by order dated 16th October, 1997 re-fixed the duty liability. By further letter dated 27th March, 1998 of the assessee they requested the Commissioner to fix the duty liability at 70 per cent of the total capacity of the production for non alloy steel products and 30 per cent would be paid by them under the provisions of Section 3 of the Act. The Commissioner examined the matter and by order dated 3rd April, 1998 determined the annual capacity of the unit 20326.919 MT and 14228.843 MT (70 per cent non-alloy steel) and, accordingly, fixed the duty liability.

Regarding 30% of the alloy steel products it was ordered that the same was to be cleared from the factory under the provision of Section 3 of the Act. Subsequently, a corrigendum was also issued on 22.9.1998. Based on the said order Joint Commissioner of Central Excise also determined the duty liability. Thereafter, the show cause notice-cum-demand was issued on 28.5.2001 stating that the assessee was required to pay duty as per the capacity determined by the Commissioner on the entire determined quantity and not on 70% of the determined capacity. The assessee, therefore, contended that when no appeal had been preferred against the original order of the Commissioner determining the annual capacity at 70%, re-fixation could not be done by 100%. This contention was not accepted by the adjudicating authority and passed an order on 10.8.2004 affirming the demand proposed in the show cause notice.

Aggrieved by the same, the assessee preferred an appeal before the Commissioner of Central Excise, Calcutta redirecting the stand taken by them in the reply to the show cause notice. The Commissioner by an order dated 11.2.2005 dismissed the appeal solely on the ground that the jurisdictional Commissioner had reviewed the earlier determination and superseded the same by determining the annual capacity of the assessee for the material period in the light of the Board's letter dated 13.11.1998. However, the issue agitated by the assessee was not considered by the appellate authority. Aggrieved by the order passed by the appellate authority the assessee preferred appeal before the tribunal. The Tribunal non-suited the assessee solely on the ground that the assessee did not challenge the order passed by the Commissioner re-determining the annual production capacity. On perusal of the grounds of appeal filed before the Tribunal by the assessee we find that specific contention raised by the assessee was that the earlier order passed by the Commissioner attained finality accepted by the department not appealed against the review, the order could not have been done unilaterally by an officer, who is junior in rank than the Commissioner. This contention raised by the assessee was not considered by the Tribunal. Interestingly, identical issue has been raised in respect of the other assessees, who are also carrying on similar production activities and one such case travelled up to the Tribunal in the case of *Hooghly Ispact Ltd.* and in appeal no.E-718-719 of 2001 [Commissioner of Central Excise-IV vs. Hooghly Ispat Ltd.] The Tribunal by judgment dated 22.1.2022 dismissed the appeal filed by the department and affirmed the order passed by the Commissioner of Central Excise [Appeals] was granted relief in favour of the said assessee. The learned Tribunal pointed out that the availment of MODVAT credit by the said assessee was lawful. The contention of the department which is similar to the contention raised before us stating that the order of the

Commissioner originally fixing the annual production capacity was not in accordance with the clarification issued by the Board dated 19.11.1998. The Tribunal pointed out that the order passed by the Commissioner was never withdrawn or challenged by the department before higher forum and, therefore, held that the said assessee had rightly discharged the duty burden. Similar issue also arose before the Tribunal in the case of *Hooghly Ispat Ltd. vs. Commissioner of Central Excise-IV* in appeal no.E-813 of 2002 and by order dated 18.2.2003 the learned Tribunal had allowed the appeal accepting the stand taken by the assessee that they had discharged the duty burden based on the determination of the annual production capacity by the Commissioner and the said order having not been challenged before the higher forum, unilaterally the annual capacity cannot be re-fixed. The Tribunal in the said decision also noted the other decision of the Tribunal on the similar point. Thus, the Tribunal did not go into this aspect though the same was specifically canvassed by the assessee in the appeal before the learned Tribunal. The question thus would be whether the department can be directed to take a different stand when they have not preferred any appeal against those decisions of the Tribunal which were decided in favour of those assessees on an identical issue. In this regard, it would be beneficial to refer to the decision of the Hon’ble Supreme Court in the case of Birla Corporation Ltd. vs. CCE, 2005 69 RLT 580 (SC). The Hon’ble

Supreme Court held when a same question arises for consideration on identical fact, the revenue cannot be permitted to take a different stand and it was pointed out that earlier appeal involving the identical issue was not pressed and dismissed and the revenue having taken a conscious decision to accept the principles laid down in the said order cannot be permitted to take opposite stand in a different manner and if the same is permitted, the law will be in a state of confusion and will place parties as well as the assessee in a quandary. The said decision of Birla Corporation (Supra) as well as the other decisions on the point were relied on by the Hon'ble Supreme Court in the case of Indian Oil Corporation Versus CCE Baroda; 2006 (76) RLT 548 (SC) and in the case of Commissioner of Central Excise Mumbai Vs. Bigen Industries Limited; 2006(197) ELT 305(S.C.) and Jindal Dye Intermediate Limited Versus Collector of Customs, Mumbai ; 2006(197) ELT 471. The law laid down in the above decision is quite clear that once the department has accepted the orders passed in identical issue considering the scope of the revision of the annual production capacity of those units who are also carrying similar group of activities, the department has precluded from taking a different stand in other cases more particularly, in the case of the assessee.

Thus, we find that assessee had made out sufficient grounds for us to interfere with the order passed by the learned Tribunal.

For the above reasons, the appeal filed by the assessee is allowed and the order passed by the learned Tribunal is set aside and consequently, the orders passed by the first appellate authority and the Joint Commissioner of Central Excise are set aside and the demand is quashed.

The substantial question of law framed for consideration is answered in favour of the assessee.

Consequently, GA/1/2009 stands closed.

(T.S. SIVAGNANAM)
ACTING CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)

S.Das/pkd/GH.