

(2003) 05 PAT CK 0068
In the Patna High Court
Case No : C.W.J.C. No. 3661 of 2001

Balajee Ingot India Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 07-05-2003

Acts Referred:

Citation : (2003) 05 PAT CK 0068

Judgement

Nagendra Rai, J.—The petitioner, a private limited Company registered under the Companies Act, 1956 has filed the present writ application challenging the order, dated 20-10-2000 passed in Appeal No. E/108 of 1999 and Cross-objection No. C.O. 29/1999 by the Eastern Bench, Calcutta of the Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as "the Tribunal"), whereby it has affirmed the order, dated 16-12-1998 passed by the Commissioner of Central Excise, Patna, holding that Section 3A(3) of the Central Excise Act, 1944 (hereinafter referred to as "the Act") abatement is permissible only if the factory as a whole is closed for a period of seven days or more and the abatement is not permissible on closure of one of the furnaces of the factory and on that ground rejected the claim of the petitioner for abatement.

2. The case of the petitioner is that it is producing non-alloy steel ingots and billets from two induction furnaces at Lakhisarai, known as Unit No. I and Unit No. II having the production capacity of 3 M.T. and 4 M.T., respectively.

3. u/s 3 of the Act, the duty is levied on all excisable goods mentioned in the Schedule provided they are produced or manufactured. The Central Government enacted Section 3A of the Act w.e.f. 14-5-1997 by Section 81 of the Finance Act, 1997 (26 of 1997), by which the system of levy of the Central excise duty on non-alloy induction furnaces has been changed. According to the said provision, duty is levied on the basis of the annul production capacity as determined under the aforesaid provision. It is further provided therein that where a factory did not produce the notified goods during any period of not less than seven days then the duty calculated on proportionate basis shall be abated in respect of such

period if the manufacturer of such goods fulfils the conditions as may be prescribed.

4. Unit No. 1 of the petitioner was closed for 59 days from 4th October, 1997 to 18th February, 1998, and Unit No. 2 was closed for 88 days from 31-8-1997 to 23-3-1998. The petitioner claims abatement in terms of the aforesaid provision and, accordingly, a show cause notice, dated 6-10-1998 was issued by the Deputy Commissioner (Technical), Central Excise (M), Patna, asking the petitioner to show cause and file relevant documents in support of its claim of abatement as provided u/s 3A(3) of the Act. A copy of the show cause notice has been annexed as Annexure 3 to the writ petition. The petitioner submitted its show cause and asserted that the induction furnaces were closed for a number of days as stated above, for which due intimation was also given by the petitioner-company in terms of the requirement. The matter was heard by the Commissioner of Central Excise (Respondent No. 3), who rejected the prayer of the petitioner for abatement on the ground that the petitioner did not show any electric meter reading and the closing balance of the finished goods as envisaged under Clauses (c) and (d) of Rule 96ZO(2) of Central Excise Rules, 1944 (hereinafter referred to as "the Rules") and the petitioner's factory, as a whole, was not closed. All the time, either of the units had been functioning and production was going on in the factory. A copy of the said order has been appended as Annexure 5 to the writ petition. Aggrieved by the said order, the petitioner preferred an appeal before the Appellate Tribunal, which has also been dismissed by order 20-10-2000, a copy of which has been annexed as Annexure 6 to the writ petition.

4(A). The petitioner filed the present writ application challenging the aforesaid two orders which was dismissed on 21-3-2001 on the ground of availability of an alternative remedy. The petitioner challenged the aforesaid order in SLP No. (C) No. 6731 of 2001, which gave rise to Civil Appeal No. 4772 of 2001, which was allowed on 30-7-2001 [2001 (133) E.L.T. 22 (S.C)] and the order passed by this Court was set aside primarily on the ground that in the writ petition the constitutional validity of the provision of the Central Excise Act was also challenged and the matter was remitted to this Court. The petitioner made an undertaking before the Apex Court that it would pay the excise duty on the basis of the actual production and on that basis a statement was made on behalf of the respondents that no coercive action would be taken to recover the alleged balance excise duty. The Apex Court also gave an opportunity to the petitioner to amend the prayer portion of the writ application challenging the constitutional validity of the relevant provisions. After the order was received, the matter has been placed before us for disposal.

5. The petitioner, thereafter, filed a petition to add a prayer in the writ petition to challenge the constitutional validity of Section 3A of the Act. The said prayer was allowed.

6. Learned Counsel for the petitioner made three submissions. Firstly, he

submitted that under the charging Section 3 of the Act, the excise duty is levied on all excisable goods as mentioned in the Schedule, which are actually produced or manufactured and not on the basis of the capacity of production and as such the provision of Section 3A of the Act empowering the Central Government to charge excise duty on the basis of the capacity of production in case of manufacture of non-alloy iron, steel ingots and billets is ultra vires. Secondly, he submitted that the abatement u/s 3A(3) of the Act is permissible even if one of the furnaces of the petitioner's factory is closed and it is not necessary that the factory as a whole should be closed. Elaborating this submission, he submitted that if the said view is not taken then the provision will be discriminatory; inasmuch as the factory having one furnace in case of its closure is entitled to the benefit of abatement, whereas, the factory having more than one furnace, in case of closure of one furnace or more furnaces and remaining furnaces in operation will not be entitled to the benefit of the same. He further submitted that as the admitted production in the factory is less than the production determined u/s 3A(2) of the Act, it is entitled to the benefit u/s 3A(4) of the Act.

7. Learned Counsel appearing for the Department, on the other hand, submitted that the provision of Section 3A is not ultra vires, on the other hand, its constitutional validity was challenged before the Apex Court in batch of the cases and in those cases its validity has been upheld and the cases were withdrawn. He further submitted that in terms of the provisions of the Act and relevant rules, the abatement is permissible only when the factory producing notified goods did not produce such goods within the period as provided under the provision. If the factory is not closed or only one of its furnaces is closed no benefit of abatement is permissible. He further submitted that the petitioner's factory has opted for payment of duty on compounding basis under Rule 96ZO(3) of the Rules and as such it cannot claim benefit of abatement u/s 3A(3) of the Act or the benefit of payment of excise duty on actual production in case the actual production is less than the production determined under the provisions of the Act as provided u/s 3A(4) of the Act.

8. Before adverting to the aforesaid submissions advanced at the Bar, it is necessary to state the relevant provisions as well as the decisions having bearing on the questions in controversy, Section 3 of the Act is a charging section. Section 3A of the Act was inserted with effect from 14-5-1997 by Section 81 of the Finance Act, 1997, the relevant part whereof which runs as follows :-

"3A Power of Central Government to charge Excise duty on the basis of capacity of production in respect of notified goods. - (1) Notwithstanding anything contained in Section 3, where the Central Government, having regard to the nature of the process of manufacture or production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such other factors as may be relevant, is of the opinion that it is necessary to safeguard the interest of revenue, specify, by notification in the Official Gazette, such goods as notified goods and there shall be levied and collected duty of

excise on such goods in accordance with the provisions of this section.

(2) Where a notification is issued under Sub-section (1), the Central Government may, by rules, provide for determination of the annual capacity of production, or such factor or factors relevant to the annual capacity of production of the factory in which such goods are produced, by the Commissioner of Central Excise and such annual capacity of production shall be deemed to be the annual production of such goods by such factory :

Provided that where a factory producing notified goods is in operation only during a part of the year, the production thereof shall be calculated on proportionate basis of the annual capacity of production.

(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 re-determine the amount of duty payable by the assessee with reference to such actual production at the rate specified in Sub-section (3)."

9. In exercise of power conferred by Sub-section (2) of Section 3A of the Act, the Central Government enacted the Rules known as Induction Furnace Annual Capacity Determination Rules, 1997, which came into force on 1st of August, 1997, which was applicable with regard to ingots and billets of non-alloy steel falling under sub-heading Nos. 7206.90 and 7207.90 of the Schedule of the Central Excise Tariff Act, 1985 (5 of 1986), for determining the annual capacity of production of a factory if such goods are manufactured in an induction furnace unit. Rule 3 thereof provides for a manner to determine the annual capacity of production. Rule 96ZO was inserted into Rules with effect from 1-8-1997 by M.F. (D.R.) Notification No. 33/97-C.E. (N.T.), dated 1-8-1997 containing procedure to be followed by a manufacturer of non-alloy steel ingots and billets with regard to payment of excise duty. The relevant provision for the purposes of this case are Sub-rules (2) and (3) of the said rule, which are as follows :-

"(2) Where a manufacturer does 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 Central Excise Act, 1944, 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 the

fulfilment 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 Excise, 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 fromhours on(date) to.....hours on.....(date).

(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, from the first day of September, 1997 to the 31st day of March, 1998 or any other financial year, as the case may be, pay a sum of rupees five lakhs per month in two equal instalments, the first instalment latest by the 15th day of each month, and the second instalment latest by the last day of each month, and the amounts so paid shall be deemed to be full and final discharge of his duty liability for the period from the 1st day of September, 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 Sub-section (4) of the Section 3A of the Central Excise Act, 1944 (1 of 1944) :

Provided that for the month of September, 1997 the Commissioner may allow a manufacturer to pay the sum of rupees five lakhs by the 30th day of September, 1997 :

Provided further that if the capacity of the furnaces installed in a factory is more than or less than 3 metric tonnes, or there is any change in the total capacity, the manufacturer shall pay the amount, calculated pro rata :

Provided also that where a manufacturer fails to pay the whole of the amount payable for any month by the 15th day or the last day of such month, as the case may be, he shall be liable to, -

(i) pay the outstanding amount of duty along with interest thereon at the rate of eighteen per cent per annum, calculated for the period from the 16th day of such month or the 1st day of next month, as the case may be, till the date of actual payment of the outstanding amount; and

(ii) a penalty equal to such outstanding amount of duty or five thousand rupees, whichever is greater ;

Provided that if the manufacturer fails to pay the total amount of the duty payable for each of the months from September, 1997 to March, 1998 by the 30th day of April, 1998, he shall also be liable to pay a penalty equal to the outstanding amount of duty as on 30th day of April, 1998 or five thousand rupees, whichever is greater."

Sub-rule (2) prescribes conditions, which have to be followed and fulfilled by a manufacturer of non-alloy steel ingots and billets for claiming abatement, while Sub-rule (3) contains a provision with regard to payment of duty on compounding basis.

10. According to the said provision, the Central Government is empowered to charge excise duty on the basis of the capacity of production in respect of goods as notified in the Official Gazette and after the notification with regard to the notified goods is issued, the Central Government has been empowered by the rules to provide for determination of the annual capacity of production, or such factor or factors relevant for the annual capacity of production of the factory, in which such goods are produced by the Commissioner of Central Excise and such annual capacity production shall be deemed to be the annual production of such goods by such factory. It further provides that where a factory producing notified goods did not produce the notified goods during any continuous period of not less than seven days, abatement of duty calculated on a proportionate basis shall be allowed on fulfilment of the conditions as may be prescribed. It further provides that where the actual production of notified goods of an assessee is lower than the production determined in terms of Sub-section (2), then 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 re-determine the amount of duty payable by the assessee with reference to the actual production at the rate specified in Sub-section (3).

11. In exercise of power under Sub-section (2) of Section 3A, the rules have been framed. The Induction Furnace Annual Capacity Determination Rules, 1997, have been framed for determination of the annual capacity production of the factory if the goods are manufactured in an induction furnace unit. Rule 96ZO contains provision with regard to rate of duty of excise and the conditions to be fulfilled for claiming abatement as well as for payment of excise duty on

compounding basis.

12. Vires of the provisions of aforesaid Section 3A of the Act and Rules and notifications were challenged in various High Courts and certain interim orders were passed. Thereafter, the Union of India challenged the aforesaid orders. Thereafter the said matter as well as the writ application challenging the vires (Civil Appeal Nos. 52-54, 56-58, 60-61 and 63 of 1998) Union of India and Others Vs. Supreme Steels and General Mills and Others, were heard by the Apex Court and disposed of on 15-10-2001. The vires of the Act were not challenged on the ground that the scheme had lapsed and the appellants before the Apex Court agreed to make payment of excise duty according to the said provision on the basis of the actual production for the period of whole year. In view of the aforesaid stand taken by them, the Central Government agreed that the assessment would be made for the whole year and, thereafter, the Apex Court ordered that the excise duty shall be assessed accordingly in respect of the matters not closed and still pending before the concerned authority. The relevant part of the order of the Apex Court is quoted hereinbelow :-

"Learned Counsel for the parties informed that now the matter remains confined to a period of three years only as the scheme so introduced, has since been dropped. Shri Joseph Vellapally and the other learned Counsels appearing on behalf of the manufacturers have stated that they do not challenge the validity of Section 3A, introduced in Central Excise Act, 1944. On the other hand it has been submitted that the excise duty may be charged according to the said provision, on the basis of actual production but for the period of whole year. Shri Harish Salve, learned Counsel appearing for the Union of India submitted that there is no dispute with the offer made and also that the assessment shall be made for whole Period of one year namely the financial year. No dispute thus remains on the point and the excise duty shall accordingly be assessed in respect of matters not yet closed and still pending before the concerned authorities."

13. In the said case, however, the Apex Court decided the question as to whether a manufacturer is entitled to avail the benefit of Sub-section (4) of Section 3A of the Act or not if he is paying excise duty according to the Sub-rule (3) of Rule 96ZO, which provides for payment of excise duty on compounding basis. The Apex Court relying upon the decision of Commissioner of Central Excise and Customs Vs. M/s. Venus Castings (P) Ltd., held that two procedure, namely, one as provided under Sub-section (4) of Section 3A of the Act and the other as provided under Sub-rule (3) of Rule 96ZO of Central Excise Rules are alternative procedures and if the assessee has opted for one, he cannot claim benefit of other.

14. Admittedly, the scheme as envisaged u/s 3A of the Act for levying excise duty on the excisable goods was in operation only for three years and now scheme has been dropped. In this case, question of levy of duty relates to the period from September, 1997 to March, 1998.

15. Learned Counsel for the petitioner relying upon two judgments of the Apex Court, namely, (i) Bhor Industries Ltd., Bombay Vs. Collector of Central Excise, Bombay, and (ii) Moti Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad, submitted that the scheduled goods are subjected to levy under the provisions of the Act only when they are actually produced or manufactured and the goods must be known in the market as such or they must be capable of being sold in the market as goods. There is no dispute about the aforesaid proposition. But the question is whether challenge to the constitutional validity of Section 3A of the Act, Rules framed and notifications issued thereunder does survive for consideration in view of the aforesaid judgments of the Apex Court. The answer is no as the controversy has been settled by the Apex Court as stated above. Thus, the first point raised by the petitioner has no substance. Now, assessment has to be made according to the provision u/s 3A of the Act on the basis of actual production but for the period of whole year.

16. So far as the second point urged on behalf of the petitioner is concerned, the same is with regard to the claim of abatement regarding payment of excise duty by it. Sub-section (3) of Section 3A of the Act provides that the duty on the notified goods shall be levied as may be prescribed by the Central Government by notification in the Official Gazette. Proviso to Sub-section (3) of Section 3A of the Act provides that where a factory producing notified goods did not produce the notified goods during any continuous period of not less than seven days, the duty calculated on proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfils such conditions as may be prescribed. According to the said provision, if the factory as a whole is closed for a period not less than seven days then the question of abatement of duty on proportionate basis arises. It does not speak of a closure of only one or two furnaces in the factory. According to Sub-rule (2) of Rule 96ZO for claiming abatement, the manufacturer has to inform in writing about the closure to the concerned authority either prior to the date of the closure or on the date of the closure. He will also intimate the reading of the electricity meter to the concerned authority 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. Again when he has to start the production, he has to fulfil the conditions as mentioned therein.

17. Thus, from the reading of the provisions of the Act and Rules framed thereunder, it is clear that only on the closure of factory as a whole for a period not less than seven days the question of abatement arises and not on the closure of one or other induction furnaces unit. Admittedly, in the case of the petitioner, both the units were closed but not at the same time as either of the units was always in production. Thus, the authorities rightly held that the petitioner cannot take the benefit of abatement u/s 3A(3) of the Act.

18. Admittedly, in this case, the petitioner has opted for payment of excise duty on compounding basis, according to which payment of duty is based on total furnace capacity installed in the factory. Under the provision of Section 3A of the

Act, the excise duty is to be charged on the basis of the production and the only production capacity of the mills and furnaces is determined by the Commissioner of Excise in terms of the rules framed u/s 3A(2) of the Act by the Central Government. Once the annual production capacity is determined under the Rules as framed u/s 3A(2), the assessee is liable to pay duty on such determination. If the actual production of the notified goods is lower than the production determined by the Commissioner under Sub-section (2) then the Commissioner has to re-determine the amount of duty payable by the assessee with reference to the actual production in terms of Section 3A(4) of the Act. Thus, two modes of payment of excise duty are provided; one u/s 3A(4) and the other under Rule 96ZO(3). Rule 96ZO(3) provides for payment of excise duty on compounding basis.

19. The question as to whether Rule 96ZO is ultra vires the Act or not was considered by the Apex Court in the case of Commissioner of Central Excise and Customs Vs. M/s. Venus Castings (P) Ltd., and the Apex Court held that the same is not ultra vires the Act. It has also been held that if a manufacturer has availed of the benefit of the procedure under Rule 96ZO as his option, then he cannot claim benefit of determination of the excise duty u/s 3A(4) of the Act, which is specifically excluded. The petitioner, admittedly, having availed of the payment of duty under Rule 96ZO(3), now cannot avail the procedure provided u/s 3A(4) of the Act.

20. In the result, there is not merit in this writ application and it is, accordingly, dismissed.

R.S. Gerg, J.

21. I agree.