

(2002) 11 JH CK 0039

In the Jharkhand High Court

Case No : Tax Application No. 1 of 2002

Bharat Ingots and Steel Co. Pvt. Ltd.

APPELLANT

Vs

Commissioner of Central Excise and Others

RESPONDENT

Date of Decision : 18-11-2002

Acts Referred:

Central Excise Rules, 1944 — Rule 96ZO(3)

Central Excises and Salt Act, 1944 — Section 35H, 3A(4)

Citation : (2003) 51 BLJR 30 : (2003) 86 ECC 411 : (2003) 155 ELT 238

Hon'ble Judges : V.K. Gupta, C.J.; Amareshwar Sahay, J

Bench : Division Bench

Advocate : Binod Poddar, S.L. Agrawal and Darshana Poddar Mishra, for the Appellant; P.K. Prasad, for the Respondent

Judgement

1. This an application u/s 35-H of the Central Excise Act, 1944. The following questions of law have been formulated by the petitioner, which the petitioner desires the Tribunal to refer to this Court for adjudication :

"1. Whether in view of CWJC No. 482 of 1998(R) filed before this Hon'ble Court on February 19, 1998 and orders dated December 10, 1998 and August 16, 1999 passed thereon and the application made pursuant thereto for payment of duty on the basis of actual production in terms of Section 3-A(4) of the Central Excise Act, 1944 on January 4, 1999 and thereafter the Tribunal misdirected itself in holding that the applicant had opted for payment of duty with reference to capacity of production under Rule 96ZO (3) of the Central Excise Rules, 1944 during the entire period from December, 1998 to January, 2000 and its purported findings in this behalf are arbitrary, unreasonable and perverse?

2. Whether the Tribunal misdirected itself in rejecting the applicant's claim for payment of duty with reference to actual production under the provisions of Section 3-A(4) in respect of the financial years 1998-99 and 1999-2000?

3. Whether the Tribunal was justified in upholding the imposition of penalty of

Rs. 28.00 lakhs and charging of interest under Rule 96ZO (3) without considering and/or dealing with the various contentions of the applicant, inter alia, that the said provision had no application and that in any event there was no mens rea, on its part warranting the imposition of any penalty and/or maximum penalty?

4. Whether the purported findings of the Tribunal upholding the demand for duty of Rs. 28.00 lakhs and penalty of Rs. 28.00 lakhs and charging of interest under Rule 96ZO (3) are based on any material and/or have been arrived at by ignoring the relevant materials and/or by taking into consideration irrelevant and/or extraneous materials and/or are otherwise arbitrary, unreasonable and perverse?"

2. The dispute between the parties revolves around the interpretation of the Section 3-A of the Central Excise Act, 1944 (which has since been repealed) and Rule 96ZO (3) of the Central Excise Rules, 1944. The subject matter of controversy is whether under the aforesaid repealed Section 3-A of the Act (which was undoubtedly in operation at the relevant time) the assessee-petitioner is liable to pay duty of Central Excise in terms of Sub-section (4) thereof or whether the petitioner is liable to pay duty in terms of Sub-rule (3) of Rule 96ZO (supra). The period or the periods for which the duty of Central Excise is liable to be paid for one or the other of the aforesaid alternatives is also the subject matter of dispute in this application. Reliance has been put by the parties on the judgment of the Supreme Court in the case of Commissioner of Central Excise and Customs Vs. M/s. Venus Castings (P) Ltd., , as also upon the judgment of the Supreme Court in the case of Union of India and others v. Supreme Steel and General Mills and others reported in 2001 (47) RLT 129 (SC). The ratio of the aforesaid two judgments clearly indicates and lays down that for the period already spent, or the period which has already passed by, the assessee once having exercised the option of paying the duty of Central Excise linked with one of the aforesaid two alternatives, can not subsequently turnaround in the same year and ask for change of the mode of pay (change over from one alternative to another in the period already passed by). For future of course, the assessee has the right to change the option and revert to an alternative other than the one he had originally opted for. The Commissioner of Central Excise in the order passed by him, which was the subject matter of appeal before the Tribunal, had made the following observations :--

"5.6 I find that the assessee vide their letter C. No. BISCO/98-99/CE/289 dt. 04.01.1999 made an application regarding payment of C. Ex. Duty based on actual production pursuant to the order dt. 10.12.1998 of Hon"ble Patna High Court Ranchi Bench for consideration showing the details of actual production, actual clearance along with the duty payable and paid by them for the period from Sept. '97 to Dec. '98 which was rejected by the department since the assessee had opted to discharge the duty liability under Sub-rule (3) of Rule 96-ZO of CER. '44 under which there is no provision for payment of duty on the basis of claimed actual production under Sec. 3-A of CEA. '44."

3. The Communication dated 4.1.1999 upon which the Commissioner had made

the reference, reads thus :--

".....

Dear Sir,

Respectfully we would like to draw your kind attention that validity of Section 3-A of Central Excise Act, 1944 was challenged before the Hon"ble High Court Patna at Ranchi Bench which have been dismissed in July 1998 on the ground of the pendency of similar controversy before the Apex Court.

The Hon"ble Apex Court has given a decision to the extent that "it will be open to the manufacturer to submit the application on the basis of Actual production and, if any such application is submitted the same shall be duly considered by the competent-Authority in accordance with the Rules."

Sir, we are the manufacturer of Non-alloy Steel Ingots falling under chapter heading 7206.90 and the same is covered under the provision of Section 3-A of Central Excise and Salt Act, 1944, and also within the list of appellant i.e. M/s. Bharat Ingots and Steel Co. (P) Ltd. (a photocopy of Interim Order is enclosed for ready reference and records).

As per the above existing order, we are submitting herewith quantity of actual production since 01.09.1997 i.e. the date of enforcement of Section 3-A of Central Excise Act, 1944, (enclosed in Annexure-A) and duty payable or refundable, for your kind approval.

You are requested to kindly issue an order for necessary implementation of above referred interim order.

Thanking you,

Yours faithfully, For BHARAT INGOTS AND STEEL CO. PVT. LTD. Sd./- DIRECTOR

Encls : as above.

Copy to : The Assistant Commissioner, Central Excise, Jamshedpur Division-I, 5, E-Road, Bistupur, Jamshedpur-831001."

4. As will be evident, the aforesaid communication was sent pursuant to the orders passed by the Supreme Court and Patna High Court. If, therefore, the Supreme Court and Patna High Court had permitted the assessee to submit application on the basis of actual production and also directed the Revenue to consider the said application, it clearly meant that, notwithstanding the pendency of the proceedings either in the Supreme Court or in the High Court with respect to the vires of Section 3-A of the Act, both the Courts were of the view that the assessee had the right to ask for a change in the option as against the one originally mentioned, because according to both the Courts the assessee's right to opt for paying duty in further linked with the actual production cannot be tinkered with or taken away. This is despite the assessee having originally exercised the option of paying the duty in terms of Sub-rule (3)

of Rule 96ZO. It also therefore, clearly meant that both the Supreme Court as well as Patna High Court were of the view that even while the production activities were going on and the assessee had originally exercised the option under sub-rule (3) of Rule 96ZO, it has the right to withdraw that option and ask the Revenue that now it intended to pay the duty of Central Excise in accordance with Sub-section (4) of Section 3-A of the Act. Looked from any angle, therefore, we have no hesitation in holding that the aforesaid Communication dated 4.1.1999 was in the nature of an exercise of option by the assessee that the assessee at and from that stage wanted to pay the duty of Central Excise in accordance with Sub-section (4) of Section 3-A of the Act linked with the actual production and not in accordance with Sub-rule (3) of Rule 96-ZO. Perhaps the respondents misdirected themselves in not construing the aforesaid communication in the aforesaid manner and spirit. The Commissioner of Central Excise, therefore, erred in dismissing the appeal of the assessee. The Tribunal also fell in the same error by ignoring the aforesaid communication of the assessee in the perspective in which it was made.

5. While disposing of this application, therefore, we hereby direct the Tribunal to refer to us the following questions of law for our hearing and decision :--

I. Whether, in the light of the option having been exercised by the assessee (petitioner) vide his Communication dated 4.1.1999 the assessee-petitioner was liable to pay the duty of Central Excise in accordance with Sub-Rule (3) of Rule 96-ZO or was it liable to pay the duty of Central Excise in accordance with Sub-section (4) of Section 3-A of the Central Excise Act, 1944 (as it stood at the relevant time) and if so, the relevant period or periods thereof?

II. Depending upon the answer to the aforesaid question, is the assessee-petitioner is liable to pay penalty and if so with respect to which period and at which rate?