
(2014) 08 MAD CK 0253

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 463 of 2007

Emkay Alloys Pvt. Ltd.

APPELLANT

Vs

Commissioner of C. Ex.

RESPONDENT

Date of Decision : 28-08-2014

Acts Referred:

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

Citation : (2014) 309 ELT 31 : (2015) 34 GSTR 211

Hon'ble Judges : R. Sudhakar, J;G.M. Akbar Ali, J

Bench : Division Bench

Judgement

R. Sudhakar, J.—This appeal is directed against the Final Order No. 1425/2005, dated 7-10-2005 passed in Appeal No. E/154/2002 by the Customs, Excise and Service Tax Appellate Tribunal.

1.1. The facts in a nutshell are as under : The appellant is an industry engaged in the manufacture of Ingots and Billets. By Section 81 of the Finance Act, 1997 (Act 26 of 1997), Section 3A of the Central Excise Act, 1944 (for brevity, "the Act") was introduced, which empowers the Central Government to charge Excise duty on the basis of capacity of production in respect of notified goods. Notification Nos. 30/97-C.E. (NT.), dated 1-8-1997 and 31/97-C.E. (N.T.), dated 1-8-1997, notified the specified goods under Section 3A of the Act on which duty is to be levied on the basis of annual capacity of production (for brevity, "the ACP"). The goods manufactured by the assessee fall under the sub-heading No. 7206.90 and 7207.90 and are covered under this provision.

1.2. For the purpose of determining the ACP, the Induction Furnace Annual Capacity Determination Rules, 1997 was introduced. This was notified vide Notification No. 24/97-C.E. (NX), dated 25-7-1997, as amended by Notification No. 44/97-C.E. (N.T.), dated 30-8-1997. The ACP of the any assessee should be calculated by the jurisdictional Commissioner of Central Excise on the basis of the formula set forth in the Induction Furnace Annual Capacity Determination Rules, 1997.

1.3 If a manufacturer having a total furnace capacity of 3 Metric Tonnes installed in his factory so desires, he may from 1-9-1997 to 31-3-1998 or any other financial year, as the case may be, pay a sum of Rs. 5 Lakhs per month in two instalments latest by the last day of each month and the amount so paid shall be deemed to be the full and final discharge of the duty liability for the period from 1-9-1997 to 31-3-1998 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 Section 3A(4) of the Act.

1.4 The assessee in this case desired to make lump sum payment in terms of Rule 96ZO(3) of the Central Excise Rules, 1944 (for brevity, "the Rules"). On such request made by the assessee, it was allowed to discharge duty liability in terms of Rule 96ZO(3) of the Rules. Initially, the jurisdictional Commissioner fixed the ACP by order dated 16-9-1997 in respect of two induction furnaces at 25,600 Metric Tonnes. Since the assessee did not pay the duty in accordance with Rule 96ZO(3) of the Central Excise Rules, a demand notice was issued on 4-5-1998 demanding duty on the basis of the ACP fixed for the period 1-9-1997 to 31-3-1998.

1.5 In the meanwhile, the assessee challenged the ACP order dated 16-9-1997 by filing an appeal before the Tribunal in Appeal No. E/158/2007, alleging that while fixing the ACP, the factum of one of the furnaces not working properly was not taken into account by the jurisdictional Commissioner and, therefore, prejudice is caused.

1.6 Thereafter, in June, 1998, considering the request made by the assessee and the grievance as exposed by them, the jurisdictional Commissioner passed another order determining the ACP at 12,800 Metric Tonnes in respect of one furnace. Thereafter, demand notices were issued for the periods (i) April, 1998 to September, 1998; (ii) October, 1998 to February, 1999; (iii) March, 1998 to July, 1999; (iv) August, 1999 to December, 1999; and (v) January, 2000 to March, 2000.

1.7 The above said five demand notices along with the first demand notice issued on 4-5-1998, in all six demand notices, were adjudicated by the Commissioner of Central Excise and a common order was passed in C. No. V/72/15/77/98-Cx.Adj (Commissioner's Order Sl. No. 53/2001) on 21-12-2001. In this order, the claim of the assessee that he did not opt for the benefit under Rule 96ZO(3) of the Rules for the period after 1-4-1998 was rejected and the alternative plea of abatement claimed under Section 3A(3) of the Act on the ground that there was stoppage of production on various occasions, was also rejected and duty was demanded, apart from imposing penalty and interest.

1.8 Aggrieved by the said order, the assessee appealed to the Tribunal, which confirmed the order passed by the Commissioner and held as under:

"3. After examining the records and hearing Id. SDR, we find that, during the material period, the appellants were working under the Compounded Levy

Scheme under Section 3A of the Central Excise Act. Their ACP was determined by the Commissioner. In terms of the Commissioner's order, they were liable to discharge duty liability on their products from month to month. They committed default, which resulted in the issuance of a show cause notice. The demand of duty was confirmed by the Commissioner as per order dated 21-12-2001, wherein it was noted that no abatement claims of the assessee were pending and hence the entire amount of unpaid duty required to be recovered. The Commissioner, however, kept in abeyance the question whether any penalty was liable to be imposed on the assessee, in view of a general stay order of the Supreme Court, which was in force in favour of similar manufacturers working under the Compounded Levy Scheme. The present appeal is against the demand of duty. We find that the demand is squarely based on the ACP determined by the Commissioner in his earlier order. In this appeal, the appellant has disputed the correctness of the ACP order also. It is not open to us to examine the legality of the ACP order, which is not the subject matter of this appeal. The only question to be examined at our end is whether the demand of duty is in keeping with the ACP order passed by the Commissioner. There is no material on record indicating stay of operation of the ACP order. In the circumstances, we go by the ACP order and hold that the demand of duty raised on the appellants on the basis of the said order is sustainable in law. Accordingly, the impugned order is affirmed and this appeal is dismissed."

1.9 Assailing the said order passed by the Tribunal, the assessee has filed this appeal and the same was admitted on the following substantial question of law:

"Whether the respondent was right in demanding duty on the basis of the provisions of Rule 96ZO(3) of the Rules, when the appellant herein did not file any declaration informing the respondent of its willingness to pay duty on lump sum basis, which is a mandatory requirement under Rule 96ZO(4) for a manufacturer of non-alloy steel ingots to opt for payment of duty on lump sum basis under Rule 96ZO(3)?"

2. We have heard the learned counsel for the appellant and the learned Standing Counsel for the respondent.

3. Before advertng to the merits of the matter, it would be apposite to refer to Rules 96ZO(3) and 96ZO(4) of the Rules, which read as under:

"Rule 96ZO(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 tones, 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 of 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.

Explanation:- For removal of doubts it is hereby clarified that Sub-rule (3) does not apply to an induction furnace unit which ordinarily produces castings or stainless steel products but may also incidentally produce non-alloy steel ingots and billets.

(4) In case a manufacturer wishes to avail of discharging his duty liability in terms of Sub-rule (3), he shall inform the Commissioner of Central Excise, with a copy to the Assistant Commissioner of Central Excise, in the following proforma:

"We _____(name of the factory), located at _____(address) hereby wish to avail of the scheme described in Sub-rule (3) Rule 96ZO, for full and final discharge of out duty liability for the manufacturer of ingots and billets of non-alloy steel under Section 3A of the Central Excise Act, 1944 (1 of 1944).

Dated _____

Sd _____ Name and Designation (With Stamp)""

4. We notice that the Rule 96ZO(1) of the Rules provides that the assessee could opt for payment of duty at the rate of Rs. 750/- Per Metric Tonne at the time of clearance of ingots and billets or for lump sum payment under Rule 96ZO(3) of

the Rules, subject to specifying of requirement under Rule 96ZO(4) of the Rules.

5. The Commissioner, taking note of the option exercised by the assessee under Rule 96ZO(3) of the Rules, held that if the assessee had not opted out of the Compounded Levy Scheme for the subsequent period, namely, 1998-1999 and 1999-2000, it cannot plead that they are outside the purview of Rule 96ZO(3) of the Rules. It was also observed that if the assessee had, in fact, opted out of the Compounded Levy Scheme, they should have paid duty under Rule 96ZO(1) of the Central Excise Rules, which they have not done and, therefore, it is deemed that they are continuing to be under the Compounded Levy Scheme.

6. In Paragraph (13) of the order passed by the Commissioner, anent the abatements claimed under Section 3A(3) of the Act on the ground of stoppages of production on various occasions, it was held that there was no abatement claim pending and no claim was submitted by the assessee. That apart, the Commissioner held that the procedure for sanctioning abatement claim is different and distinct and if the assessee makes such claim, it will be dealt with separately. On this premise, all the demands made under the show cause notices were confirmed by the Commissioner.

7. The Tribunal accepted the finding of the Commissioner that there was a default in discharging the duty liability by the assessee after availing the benefit of Compounded Levy Scheme and held that the show cause notices were rightly issued and the demand was correctly confirmed by the Commissioner by order dated 21-12-2001. The Tribunal also noticed that there was no abatement claim of the assessee pending and, therefore, held that the entire amount is to be recovered. Apropos the plea of correctness of the ACP order raised by the assessee, the Tribunal declined to interfere with the ACP order stating that the same is not the subject matter of the appeal.

8. During the course of arguments, the question of law incidentally raised is that when there is no declaration filed informing their willingness to pay duty on lump sum basis, which is a mandatory requirement of Rule 96ZO(4) of the Rules for opting to payment of duty under Rule 96ZO(3) of the Rules, whether the assessee is liable to discharge duty for the period after 1-4-1998.

9. In the present case, we find that from the beginning, the assessee had claimed that it has opted for compounded levy scheme under Rule 96ZO(3) of the Rules, by making a declaration under Rule 96ZO(4) of the Rules. There is no dispute on this fact and, therefore, it will not lie in the mouth of the appellant to plead that there was no declaration in terms of Rule 96ZO(4) of the Rules.

10. However, consequent to the order passed by the Tribunal in Final Order No. 410/2007 (in Appeal No. E/158/2007), dated 16-4-2007, in a challenge made to the first ACP order dated 16-9-1997, the Tribunal has set aside the first ACP order dated 16-9-1997 for reconsideration by the jurisdictional Commissioner. As there is no first ACP order subsisting, the show cause notice dated 4-5-1998 for the period from September, 1997 to March, 1998 based on the first ACP order

dated 16-9-1997 will have to be reworked only after appropriate ACP order is passed for that period. Therefore, in terms of the order of the Tribunal, the jurisdictional Commissioner will have to pass fresh ACP order after hearing the appellant in terms of the order of the Tribunal and thereafter a show cause notice is to be issued for the period September, 1997 to March, 1998. For this period alone, the appeal is partly allowed by way of remand in terms of the order of the Tribunal dated 16-4-2007 made in Final Order No. 410/2007 (in Appeal No. E/158/2007).

11. As the second ACP order of June, 1998 has not been set aside or challenged in the manner known to law, the show cause notices and the demand insofar as the period after 1-4-1998 would be covered by the second ACP order and we also hold that the assessee having opted to avail of the benefit under the Compounded Levy Scheme by making appropriate declaration in terms of Rule 96ZO(4) of the Rules, is liable to pay duty in terms of Rule 96ZO(3) of the Rules. The appeal of the assessee insofar as it challenges the demand for duty, etc based on the show cause notices issued for the periods (i) April, 1998 to September, 1998; (ii) October, 1998 to February, 1999; (iii) March, 1998 to July, 1999; (iv) August, 1999 to December, 1999; and (v) January, 2000 to March, 2000, stand dismissed and the question of law is answered against the assessee. In the result, this appeal is partly allowed, as stated above. No costs. Consequently, M.P. No. 1 of 2007 is closed.