**(1997) 10 AP CK 0010**

**In the Andhra Pradesh High Court**

**Case No :** Writ Petition No. 27480 of 1997

K.P. Steels Limited — APPELLANT

Vs

Commissioner of Customs and Central Excise, Hyderabad — RESPONDENT

**Date of Decision :** 27-10-1997

**Acts Referred:**
Central Excises and Salt Act, 1944 — Section 3A

**Citation :** (1998) 1 ALD 192 : (1998) 1 ALT 746 : (1998) 99 ELT 44

**Hon'ble Judges :** V. Bhaskara Rao, J;S.S. Mohammed Quadri, J

**Bench :** Division Bench

**Advocate :** Ravi, for the Appellant; B. Adinarayana Rao, Central Government Standing Counsel, for the Respondent

## Judgement

Syed Shah Mohammed Quadri, J.—The petitioners seeks a Writ of Mandamus directing the respondents to redetermine the annual capacity of the petitioner''s unit on the basis of his application in accordance with the Hot Re-rolling Mills Annual Capacity Determination Rules, 1997 after verification of the distances between the opinion centres in the finishing mill at the petitioner''s factory.

2. To appreciate the grievance of the petitioner, it would be necessary to refer to the relevant facts. The petitioner is engaged in the business of manufacture of M. S. Cold Twisted Deformed bars. The process involves heating and re-heating furnace and then rolling mills. It is a common ground that the goods manufactured by the petitioner are excisable under Tariff Items 7214.90 of the Central Tariff Act, 1985, for short ''Tariff Act'', and the excise duty is payable under the provisions of the Central Excise Act, 1944, for short ''CE Act''. By Section, 3A of the Central Excise Act, the Central Government is empowered to levy excise duty on the goods presumed to have been manufactured by virtue of the production capacity of a factory. The Commissioner of Central Excise is the competent authority to determine the annual capacity of the factory. The determination has to be made in accordance with Hot Re-rolling Mills Annual Capacity Determination Rules, 1997, for shorts. "Capacity Determination Rules,

 

1997". In accordance with the said Rules and the formula prescribed therein, a provisional determination may be made under Rule 3(3) of the Rules. Thereafter, the Commissioner is to determine the annual capacity finally and pass appropriate orders accordingly. In the instant case, the petitioner''s annual capacity has been determined provisionally taking factor (d) in the formula as 342 mm. on the basis of verification report of the Superintendent of Central Excise whereas the petitioner''s return shows factor (d) as 256 mm. The petitioner says, immediately after the provisional determination, he filed an application for re-determination of factor (d) as the determination was made behind the back of the petitioner. It is submitted that the report erred in taking note of the rough data at the end of the roughing mill instead of at the end of the finishing mill and that has resulted in huge liability for the petitioner.

3. Mr. Adinarayana Rao, the learned Standing Counsel for the Central Government who took notice of the Writ Petition, filed before us a Xerox copy of the letter dated 11th September, 1997. In the said letter, the Superintendent of Central Excise inter alia stated as follows :-

"In the declaration filed by the assessee it is observed that the assessees have declared only the parameters relating to finishing stand of second row only i.e., Mill consisting of S7 to S10. The parameters of the two Rolling Mills have been verified and are furnished as under :-

1st Rolling Mill consisting of 6 stands (S1 to S6)

d = 342 mm.

n = rpm of the drive 720 rpm

i = reduction ratio of gear box and pully system 47 thereof.

2nd Rolling Mill consists of 4 stands (S7 to S10)

d = 267 mm. (as against 256 mm. declared by the assessees)

n = 720 rpm

i = 0.46

From the above it is evident if the parameters declared by the assessees relating to 2nd row are taken into consideration duty payable would be very less as it gives less annual capacity. Further it is to submit that for arriving at the annual capacity of the mill parameters at 1st row i.e., S1 to S6 may please be taken into consideration."

4. Sri Ravi, the learned Counsel for the petitioner filed two additional affidavits to show that the roughing mill has a pinion centered distance of 342 mm. and the finishing mill has a pinion centered distance of 256/257 mm. and submits that a direction may be issued to the respondents to re-verify the (d) factor and pass final order under proviso to sub-rule (3). He also submits that a direction may be issued to the respondents to receive the duty treating 256/257 mm. as the (d)

 

factor. Sri Adinarayana Rao, the learned Standing Counsel on the other hand says that the determination is provisionally made on the basis of the report of the Superintendent of Central Excise, which is subject to the final determination by the Commissioner. He contends that in accordance with the rules, the petitioner is liable to pay duty pursuant to the provisional determination based on the report and prays that the (d) factor as given by the petitioner may not be accepted by this Court.

5. The short question which arises for determination by us is what appropriate orders may be passed in this writ petition.

6. Under the Rules, a formula has been prescribed for determining the annual capacity. The formula prescribed under sub-rule (3) of Rule 3 is as follows :

"(3) the annual capacity of production of hot re-rolled products of non-alloy steel in respect of such factory shall be deemed to be as determined by applying the following formula :-

Annual capacity 1,885 x 10 (raised to 4) x d x n x i x e x w x no of utilised hours in metric tonnes)

Where

d Nominal diameter of the finishing mill in millimeters n Nominal revolutions per minute (RPM on the drive) i Reduction ratio of the gear box w Weight kilogram per metre of the re-rolled product, the value of ''e'' in the formula shall be deemed to be 0.30 in case of low speed mills and 0.75 in case of high speed mills."

7. From the above formula, it is clear that the (d) factor is an important factor in determining the annual capacity and that determination fixes the liability for payment of the excise duty. It will be appropriate to note here sub-rule (4) of Rule 3 which is as follows :

"(4) The Commissioner of Central Excise shall, as soon as may be, after determining the total capacity of the hot re-rolling mill installed in the factory as also the annual capacity of production, by an order, intimate to the manufacturer :

Provided that the Commissioner may determine the annual capacity of the hot re-rolling unit on provisional basis pending verification of the declaration furnished by the hot re-rolling mills and pass an order accordingly. Thereafter, the Commissioner may determine the annual capacity, as soon as may be, and pass an order accordingly."

8. A perusal of the above Rules shows that the Commissioner of Central Excise is under an obligation to determine expeditiously the total capacity of hot re-rolling mill installed in the factory and also the annual capacity of the production. However, the proviso says that the Commissioner may determine the annual capacity of the hot re-rolling unit on provisional basis pending verification of the

 

declaration furnished by the hot re-rolling mills and pass an order thereon. There is a provision to make final determination of annual capacity and pass orders thereon.

9. Inasmuch as the determination made by the second respondent has been done on the basis of the report of the Central Excise, which is done without notice to the petitioner, we are inclined to accept the submission that the determination is only a provisional determination and that a final determination has to be made by the Commissioner. Before such a determination is made, we direct the Commissioner to give notice to the petitioner of the date and time of the inspection by the concerned authority for purposes of noting the (d) factor and other relevant facts, to take into consideration such objections and points raised by the petitioner and decide the annual capacity and other relevant facts based thereon.

10. It is further submitted that in a given case, it is possible that the products may be marketed at the end of the roughing mill and also at the end of the finishing mill. If that is the case, the Commissioner may also decide as to the annual capacity of production of the petitioner duly taking into consideration those factors. We direct the Commissioner to make final determination within one month of the receipt of a copy of this order.

11. We are, however, not inclined to accept the contention of the learned Counsel for the petitioner that pending determination, the petitioner may be permitted to pay the duty on the basis of the (d) factor given by the petitioner. The petitioner shall pay the duty as determined provisionally by the second respondent pending final determination.

12. The Writ Petition is disposed of accordingly.

 