

(2012) 11 JH CK 0032
In the Jharkhand High Court
Case No : Tax Case No. 14 of 2001

The Commissioner of Central Excise, Jamshedpur	APPELLANT
Vs	
M/s Vikas Steel, Bokaro	RESPONDENT

Date of Decision : 05-11-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A(1), 3A

Citation : (2013) 3 AJR 378 : (2013) 294 ELT 197

Hon'ble Judges : Prakash Tatia, C.J.;Jaya Roy, J

Bench : Division Bench

Advocate : Deepak Roshan, S.C. and Amit Kr., Rupa Kumari, for the Appellant;

Final Decision : Dismissed

Judgement

1. Heard the counsel for the petitioner. Nobody appears for the respondent in spite of the service.
2. The assessee is manufacturer of the re-rolled product of non-alloy steel falling under Chapter-72 of the Schedule to the Central Excise Tariff Act, 1985, on such product, duty of the Excise is leviable in terms of the provisions of Section 3A of the Central Excise Act, 1944 read with Rule 96 ZP of the of the Central Excise Rules, 1944, based on the capacity of production of their factory. The Assessee was served with the show-cause notice dated 12.3.1999 (Annexure-2). In the show cause notice, it was specifically stated that the Annual Capacity of Production in respect of the assessee, was fixed at 3044.531 metric ton. This Annual Capacity of Production for petitioner"s unit for the year 1996-97 was determine under Sub-rule 3 of Rule 3 of the Annual Capacity Determination Rules 1997 framed in exercise of power conferred under Sub Section(2) of Section 3A of the Central Excise Act, 1944. As per the Clause-5 of the notice, the allegation was that, though Annual Capacity of Production determined for the assessee"s unit was 3044.531 metric ton but actual annual production in the mill of the assessee during the same financial year 1996-97, was 6095.795 metric ton. In the notice, it was stated that as such in terms of the provisions of the Rule-5 of

the said Rules, the Annual Capacity of production for the purpose of levy of duty in terms of the Section 3A of the Central Excise Act, 1944 shall be deemed to be 6095.795 metric ton, and therefore, the assessee is required to pay the duty on the above quantity of the said goods instead of 3044.5 metric ton.

3. Assessee submitted its reply to show cause notice and the order passed by the Assessing Officer dated 4.6.1999, it has been observed that the annual capacity of the production in the case of the assessee's unit was fixed 3044.531 metric ton and since the production in the assessee's mil was 6095.795 metric ton, therefore, in view of the Rule 5, the said 6095.795 metric ton is required to be deemed provision in view of the Rule 5, and therefore, the Assessing Officer fixed the Annual Capacity of Production in respect of the mill of the assessee is 6095.795 metric ton under the Rule 5 of the Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 with effect from 1st September, 1997, the assessee, is therefore, directed to pay the differential duty payable by them during 1997-98 and 1998-99 in pursuance of the order dated 4.6.1999. It is also held that the penalty leviable on the interest shall be payable as per the provisions of the Rule 96ZR.

4. The Customs Excise & Gold Control Appellate Tribunal (CEGAT), Eastern Bench, Kolkata vide order dated 15.5.2001, set aside the said order by observing that the Commissioner has fixed the annual capacity in terms of the Sub Rule (3) of Rule 3 of the said Rules of 1997 whereas the Revenue's case is that it is Rule 5, which has to be applied. The tribunal held that "in absence of any suppression on the part of the assessee, it was not open to the Commissioner to review his own order retrospectively".

5. In view of the said decision of the tribunal dated 15.5.2001, the Revenue has preferred this Tax petition.

6. Learned counsel for the Revenue, Sri Deepak Roshan vehemently submitted that the Rule 5 has full application to the facts of the case and once the production is higher than the annual production capacity determined under the Sub Rule (3) of Rule 3 above, by virtue of the Rule 5, the duty is leviable on the actual production it is higher than C.A.P. determined under Sub Rule 3 of Rule 3. In view of the above reasons, the tribunal's order is absolutely contrary to the law.

7. We have considered the submissions of the learned counsel for the petitioner and perused the order passed by the Assessing Officer dated 4.6.1999 and the order passed by the CEGAT dated 15.5.2001.

8. It appears that the show cause notice was given to the assessee on the basis of the fact that under Rule 3A of the Rules of 1944, the notification No. 32/97-C.E.(N.T.) dated 1.8.1997 was issued and the Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 were framed providing for determination of annual capacity of production of hot rolled products of non-alloy steel in respect of such industries. The procedure is given in the Sub Rule (3) of the Rule-3 that

how the annual capacity of production of such mills will be determined.

Sub Rule (3) of the Rule-3 is as under:-

(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 = $1.885 \times 10^{-4} \times d \times n \times i \times w \times$ Number of utilized hours (in metric tons)

Where:

d= Nominal centre distance of the pinions in the pinion stand in millimeters

n= Nominal revolutions per minute (RPM) of the drive

i= Reduction ratio of the gear box or of the pulley system or combination thereof

w= Weight in Kilogramme per meter 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

the value of "w" factor in the formula for the high speed mills shall be deemed to be 0.45 and for the low speed mills shall be deemed to be as under:-

Explanation :- For the purposes of this rule :-

(a) a high speed mill means a mill which produces hot rerolled products at a speed of 8.5 metres per second or more and a low speed mill means a mill which produces hot rerolled products a speed less than 8.5 metres per second.

(b) nominal centre distance is the pinion centre distance of the pinion stand connecting the last rolling mill drive of the finishing mill excluding any pinch roll Such a pinch roll is not a finishing stand.

Rule 5 of the said Rules of 1997 is as under:

5. In case, the annual capacity determined by the formula in sub-rule (3) of rule-3 in respect of a mill, is less than the actual production of the mill during the financial year 1996-97, then the annual capacity so determined shall be deemed to be equal to the actual production of the mill during the financial year 1996-97

9. For the financial year 1996-97 assessee's unit annual production capacity was determined under Sub Rule (3) to be 3044.531 metric ton.

10. It appears that there was no dispute with respect to the actual production of the assessee's unit for financial year 1996-97 and the assessee itself furnished the relevant documents on the basis of which, it has been held that actual production of the assessee's unit was 6095.795 metric ton against determined (estimated) production capacity of 3044.531 metric ton. The Assessing Officer was, therefore, rightly asked to pay the duty on the above quantity in view of the

Rule 5. The assessee in response to the said show cause notice dated 12.3.1999, in its reply dated 5.5.1999, replied that annual production capacity was rightly determined for the year 1996-97 and it appears that the assessee did not chose to contest the issue of its actual production of 6095.795 metric ton and it only pleaded that it furnished the correct information to the Department and the assessee will pay all demanded duty under protest in view of the fact that the matter is pending before the Hon"ble Supreme Court involving the same issue.

11. The assessee approached the CEGAT, where it has been observed that, in absence of any suppression on the part of the assessee, it was not open to the Commissioner to review his own order retrospectively obviously, for the determination of the annual production capacity. But, it appears from the show cause notice dated 12.3.1999, issued much after end of the financial year 1996-97, 1997-98 that the assessee was asked to show cause (a) as to why annual capacity for the payment of the levy of duty be not determined 6095.795 metric ton, (b) as to why the deferential duty not paid during the period September, 1997 to March, 1999 on account of annual capacity so determined be not recoverable from the assessee u/s 11A(1) of the Central Excise Act, 1944, (c) as to why the interest at the rate of 18 per cent per annum should not be recovered from the assessee under Rule 96 ZP(3) of the said Rules along with the outstanding amount of duty from the 11th day of the month of duty liability till the date of actual payment of the outstanding amount and (d) as to why a penalty equal to the amount of duty outstanding from him at the end of such month or Rs. 5,000/- whichever is greater be not recovered from the assessee under Rule 96 ZP(3) of the said Rules.

12. There appears to be no dispute on facts in view of the fact that admittedly the annual capacity determined by the assessee under Sub Rule 3 of Rule 3 of the Rules of 1997 was 3044.531 metric ton against which the actual production of the petitioner's mill was 6095.795 metric ton. Rule 5 provides that if the actual production is higher then the duty will be levied according to the higher production and not in accordance with the determination of the annual capacity of production under Sub Rule 3 of Rule 3 of the Rules of 1997.

13. The dispute may be because of further declaration made by the Assessing Officer that annual capacity of production of assessee's unit under Rules of 1997 w.e.f. 01.09.1997 will be as per actual production of the year 1996-97 and demanded differential duty for the year 1997-98 and 1998-99.

14. The Commissioner of the Central Excise in its order dated 4.6.1999, passed the order of determination of annual capacity of production in respect of the year with effect from 1.9.1997, obviously only on the basis of actual annual production of assessee's unit in the year 1996-97 and it has not re-determined the annual production capacity under Sub-Rule 3 of the Rule 3 for subsequent years. The operative part of the order is as under:

In view of foregoing discussions, I fix annual capacity of production in respect of

mill of the assessee as 6095.795 MT under Rule 5 of the Hot Re-rolling Steel Mills Annual Capacity Determination Rule 1997 w.e.f. from 1.9.97. The assessee is directed to pay the differential duty payable by them during 1997-98 and 1998-99 in pursuance of this order forthwith. The penalty and interest shall be leviable as per provisions of Rule 96ZR.

15. However, for determination of the annual capacity of the production of Hot Re-rolling products of non-alloy steel is provided under Sub Rule 3 of Rule 3. A complete formula has been prescribed as to how this annual capacity of production will be determined. It appears that the determination of the annual production capacity for such mill has its own object and such provision has been made so as to see the industrialists who are engaged in such industry, should not avoid the duty by any means below the annual production capacity determined by the authorities under the Rules of 1997. To make more precise, these Rules are to prevent the duty below production capacity of the units. Therefore, the annual capacity of production is determined under sub-Rule 3 of Rule 3. So far higher production to the annual production capacity is concerned, that is not reduced to the annual capacity of production where actual production is higher than the annual production capacity determined under sub-Rule 3 of Rule 3 of the Rules of 1997. To make it more clear, Rule 5 has been enacted, which provides that in case the annual capacity determined by the formula under sub-Rule 3 of Rule 3 in respect of a mill is less than the actual production by a mill during the financial year 1996-97, then annual capacity so determined shall be deemed to be the equal to the actual production of the mill during the financial year 1996-97. Therefore, duty leviable is according to the actual production in case if it exceeds the capacity of production determined under sub-Rule 3 of Rule 3.

16. However, the language in Rule 5 declared that the actual production of the mill during the financial year 1996-97, if is more than the annual capacity of production determined, then that actual production shall be deemed to be annual capacity of production so determined under Rule 3(3) but it has been restricted for the year 1996-97 only. The Rule 5 is nowhere says that the said actual production shall be the annual capacity of production determined under sub-Rule 3 of Rule 3 for subsequent years. Therefore, for subsequent years, if the annual capacity of the production is required to be determined, then that can be determined again under sub-Rule 3 of Rule 3 of the Rules of 1997. Obviously, the facts of the previous year's production may be relevant, but it is required to be determined only in accordance with the sub-Rule 3 of Rule 3 of the Rules of 1997 and the previous years' production itself cannot be the sole criteria for determination of the annual capacity of production in such industries.

17. The tribunal, in its order, has observed that "the Commissioner could not have reviewed its earlier order to give effect it retrospectively. From the order impugned passed on 04.06.1999 we found retrospective effect given to the annual capacity of production determined vide order dated 04.06.1999 which is

apparent from the operative part of the order. It appears that in view of the show cause notice, which is relating to the demand of the differential duty for the produce of the year 1996-97, and for determination of the annual capacity of production, some confusion may have crept and the another confusion may be because of the reason that in the Rules of 1997, it has been provided that if the actual production of the industry is more than the annual capacity of the production determined by the formula under sub-Rule 3 of Rule 3, then in that situation, the capacity so determined under sub-Rule 3 of Rule 3 shall be deemed to be equal to the actual production of the mill. Such confusion could have been avoided by saying that the duty leviable for the produce of the mill in excess to the annual capacity of production determined by the formula under sub-Rule 3 of Rule 3 will be the quantity leviable for the duty. In Rule 5, even after declaring that actual production of the mill will be the annual capacity of the production shall be determined by the formula under sub-Rule 3 of Rule 3, but it has been restricted to apply for only financial year 1996-97. Then it cannot be applied for subsequent years as per the Rule 5 also. Therefore, in view of the Rule 5 also, even actual production of previous year i.e. for the financial year 1996-97, by application of the deeming Clause under Rule 5, that is not the basis annual capacity of production for the subsequent years, as has been declared by the Commissioner in its order, which has passed the order by declaring the actual capacity of production of the petitioner's unit to be 6095.795 metric ton w.e.f. 1.9.1997 without following the procedure as provided under sub-Rule 3 of Rule 3 of the Rules of 1997. Therefore, we are of the view that there is no merit in the Revenue's this petition. At this juncture, it will be relevant to mention here that the tribunal also has not committed any illegality in holding that the show cause was issued on 12.3.1999 proposing the recovery of the differential duty from the period 1997-98 and 98-99 and that notice was barred by the period of limitation of six months. There is no illegality in the said finding also. Therefore, the petition deserves to be dismissed. Hence, this petition is, hereby, dismissed.