Commissioner of Central Excise Vs Kanishk Steel Industries Limited

Court: Madras High Court

Date of Decision: Dec. 11, 2014

Acts Referred: Central Excises and Salt Act, 1944 â€" Section 11A, 3, 35G, 3A, 3A(2)

Citation: (2015) 318 ELT 190 : (2015) 33 GSTR 28

Hon'ble Judges: R. Sudhakar, J; R. Karuppiah, J

Bench: Division Bench

Judgement

R. Sudhakar, J.

1. Civil Miscellaneous Appeal Nos. 950 to 952 of 2007 filed by the Revenue as against the order of the Customs, Excise and Service Tax

Appellate Tribunal were admitted on the following substantial questions of law:

1. Whether in the event of change in any of the parameters of hot re-roll mills as prescribed in sub rule (2) of Rule 4 of HRSMACD Rules, 1997,

the annual capacity will still not be determined in terms of formulae as prescribed in sub rule (3) of Rule 3 of HRSMACD Rules, 1997?

2. Whether, when the Annual capacity so determined under sub rule (3) of Rule 3 of HRSMACD Rules, 1997, is still less than the actual

production of 1996-97, would not provision of Rule 5 of HRSMACD Rules, 1997, come into operation?

3. Whether the SLP filed by the department (SLP No. 3400/2003) against the decision of the Honourable High Court, Haryana & Punjab in the

case of Commissioner of C. Ex., Chandigarh-I Vs. Doaba Steel Rolling Mills, was admitted by the Honourable Apex Court and the same is

pending disposal, is CESTAT correct in relying on the judgment of Honourable High Court (H&P), which has not reached finality in deciding the

issue in favour of the assessee?

2. The first substantial question of law has no relevance because the provisions of Hot Re-rolling Steel Mills Annual Capacity Determination

(HRSMAD) Rules, 1997, more particularly, Rule 4(1) provides the answer and the same reads as follows:

4(1) The capacity of production for any part of the year, or any change in the total hot re-rolling mill capacity, shall be calculated pro rata on the

basis of the annual capacity of production determined in the above manner stated in rule 3.

(2) In case a manufacturer proposes to make any change in installed machinery or any part thereof, which tends to change the value of either of the

parameters "d" "n" "e" "l" and "speed of rolling" referred to in sub-rule (3) of sub-rule 3, such manufacturer shall intimate about the proposed

change to the Commissioner of Central Excise in writing, with a copy to Assistant Commissioner of Central Excise, at least one month in advance

of such proposed change, and shall obtain the written approval of the Commissioner before making such change. Thereafter the Commissioner of

Central Excise shall determine the date from which the change in the installed capacity shall be deemed to be effective.

3. Therefore, any change in parameters of the hot re-roll mill necessarily has to fall back on Rule 3. It is neither the case of the assessee nor the

case of the Department that Rule 3 does not apply. Therefore there is nothing for this Court to answer the first substantial question of law as the

Rule themselves provides answer.

4. With regard to the third substantial question of law, which was admitted on 16.4.2007, on which date the decision of the Punjab and Haryana

High Court in the case of Commissioner of C. Ex., Chandigarh-I Vs. Doaba Steel Rolling Mills, was pending before the Supreme Court, it is seen

that the Supreme Court has given a finality to the issue by rendering a decision dated 06.07.2011 reported in Commissioner of Central Excise,

Chandigarh Vs. Doaba Steel Rolling Mills, settling the issue holding that Rule 5 of the HRSMACD Rules, 1997 would be attracted for

determination of the annual capacity of production of the factory when any change in the installed machinery or any part thereof is intimated to the

Commissioner of Central Excise in terms of Rule 4(2) of the said Rules. For better clarity, we extract the relevant portion of the findings of the

Supreme Court hereunder:

23. We do not find any reason to depart from these well settled principles to be applied while interpreting a fiscal statute. Therefore, bearing in

mind these principles and the intent and effect of the statutory provisions, analysed above, the conclusion becomes inevitable that Rule 5 of the

1997 Rules will be attracted for determination of the annual capacity of production of the factory when any change in the installed machinery or any

part thereof is intimated to the Commissioner of Central Excise in terms of Rule 4(2) of the said Rules.

5. Therefore, the third substantial question of law becomes academic in view of the decision rendered by the Supreme Court cited supra.

6. Now we are left with only one substantial question of law, viz., the second substantial question of law, which reads as follows:

2. Whether, when the Annual capacity so determined under sub rule (3) of Rule 3 of HRSMACD Rules, 1997, is still less than the actual

production of 1996-97, would no provision of Rule 5 of HRSMACD Rules, 1997, come into operation?

7. To answer this substantial question of law, we may have to traverse little bit to the facts of the case, which are relevant for the disposal of the

appeals.

8. The respondent/assessee is engaged in the manufacture of hot- rolled products of Iron and Steel and were working under the Compounded

Levy Scheme of Rule 96ZP of the Central Excise Rules, 1944 read with Section 3A of the Central Excise Act, 1944, whereby they are liable to

pay duty on excisable goods on the basis of the determination, with regard to the Annual Capacity Production of the factory in which such goods

are produced, by a competent officer specified under the Rules. The Commissioner of Central Excise passed an order dated 16.1.2004

determining the Annual Capacity Production (ACP) for the period 1.9.1997 to 26.7.1999. Another ACP order has also been passed for the

period 27.7.1999 to 31.12.1999. Consequent to the ACP orders, it appears, six show cause notices were issued on various dates, viz., 3.9.98 (2

Nos.), 23.2.1999, 20.4.1999, 29.9.1999 and 13.1.2000. The case was adjudicated by the Adjudicating Authority by order dated 28.9.2001 in

Order-in-Original No. 21 of 2001, whereby duty was demanded under Section 11A of the Central Excise Act, 1944 read with Rule 96ZO(3) of

the Central Excise Rules,1944. The penalty and interest imposed under Rule 96ZO(3) of the Central Excise Rules, 1944 were kept in abeyance in

view of the pendency of the issue before the Supreme Court. Subsequently, another order was passed dated 19.3.2002 in Order-in-Original No.

7 of 2002 imposing penalty in the following manner:

i) I impose a penalty of Rs. 1,22,80,577/- (Rupees One crore twenty two lakhs eight thousand five hundred and seventy seven only) against the

assessee under Rule 96ZP(3) of Central Excise Rules, 1944.

ii) The assessee are also liable to pay interest under Rule 96ZP(3) of Central Excise Rules, 1944, for the above said amount calculated for the

relevant period.

iii) The assessee shall pay the above mentioned penalty and interest amounts immediately.

9. Challenging all these orders, it appears appeals have been filed by the assessee before the Tribunal.

10. The Tribunal took up the appeal in Appeal No. E/1418/2004 relating to the six show cause notices issued prior to 1.2.2000 and came to the

conclusion that these show cause notices were not passed based on any valid order of the Commissioner determining the ACP of assessee''s

factory and therefore the Tribunal set aside the demand of duty and allowed the appeal. The assessee has also challenged the consequential penalty

order in Appeal No. E/1418/2004. The Tribunal set aside the order of penalty, since the appeal challenging the main issue was dismissed on the

ground that no ACP order was passed in relation to the six show cause notices demanding duty.

11. Hence, the Tribunal was left with deciding the issue in Appeal Nos. E/567/2004 and E/348/2001 filed challenging the ACP orders dated

16.1.2004 and 1.2.2000 respectively. The Tribunal rejected the findings of the Commissioner, who applied Rule 5 of the HRSMACD Rules,

1997 and determined the ACP for the relevant period. The Tribunal was persuaded to hold so on a common order decided on 16.12.2004 in

view of the law that prevailed at that point of time. The relevant portion of the order of the Tribunal reads as follows:

After giving our careful consideration to the submissions, we find that the question whether Rule 5 of ACD Rules is applicable to the facts of this

case can be settled in the light of the Tribunal''s larger bench decision in the case of Sawanmal Shibumal Steel Rolling Mills (Supra) wherein it was

held that Rule 5 was not applicable where there was a change of parameters of the factory resulting in reduction of production capacity. The

decision of the High Court in the case of Doaba Steel Rolling Mills (supra) is also to the same effect. Hence we have invariably to arrive at the

conclusion that both the orders of the Commissioner determining ACP by applying Rule 5 are unsustainable in law and further that ACP requires to

be determined afresh for the relevant periods in terms of Rule 3(3) of ACD Rules. We, therefore, set aside the orders of the Commissioner and

remand the case to him for a fresh determination of ACP in terms of Rule 3(3) ibid instead of determining ACP by applying Rule 5. As regards the

effective date, after examining the facts presented before us by both sides, we notice that the assessee had specified a date (16.8.97) in their letter

dated 13.8.97 as the date from which they would be working with changed parameters. That letter was acknowledged by the Superintendent of

Central Excise on 14.8.97. A verification team visited the factory, acting upon the above letter, on 2.9.97. However, the Commissioner did not

determine a specific date in terms of Rule 4(2) of ACD Rules. Of course, such date was irrelevant for the Commissioner who wanted to apply

Rule 5 for the ACP determination. Now that Rule 5 has given way to Rule 3, the date become relevant and we have got to fix it. In the above

circumstances, the date (16.8.97) specified by the party in their letter dated 13.8.97 should be treated as the date from which the changed

parameters of the mill would be applicable, for both the Tor & Section Mills. Insofar as the subsequent change or parameters of the Tor Mill is

concerned, the situation is different. We have already noted that no specific date of change of parameters of this Mill was discernible from the

assessee"s letters dated 15.10.98 and 27.7.00. The fact, which thus emerges, is that the assessee themselves did not specify any date for

commencement of work of their Tor Mill with changed parameters. In such a situation, the dated (27.7.99) of the assessee"s second letter, shall be

treated as the effective date of change of parameters of the Tor Mill. In the order dated 1.2.2000, the Commissioner has rightly accepted this

date.

12. In short, based on the decisions in the case of 2001 (94) ECR 1 55 and Commissioner of C. Ex., Chandigarh-I Vs. Doaba Steel Rolling Mills,

, the Tribunal came to hold that Rule 5 will have no application and remanded the matter to the Original Authority to pass ACP orders for the

entire period. The relevant portion of the order of the Tribunal is extracted herein for better clarity:

15. In the result, we set aside both the ACP orders and allow these two appeals by way of remand, directing the Commissioner to redetermine

the ACP of the assessee"s factory in terms of this order. He may pass a common order covering the entire period. Needless to say that the

assessee shall be given a reasonable opportunity of being heard.

13. Thereafter, the Department filed Miscellaneous Petitions raising a plea that in the operative part of the final order, no direction has been issued

to the Commissioner to requantify the demand of duty in terms of the ACP to be redetermined by him. Such Miscellaneous Petitions have been

disposed of by the Tribunal by order dated 27.12.2005 in Miscellaneous Order Nos. 557 to 560 of 2005, which reads as follows:

This application filed by the department points out a mistake in the final order passed by this bench in the captioned appeals. Apart from this, ld.

SDR points out a duplication of appellant"s name in the cause title of the Final Order. The cause title mentioned the names "M/s.Kanishk Steel

Industries Ltd." and "M/s. Kanishk Steels Ltd." as appellants. It is pointed out that there is only one appellant, which is M/s.Kanishk Steel

Industries Ltd.. This submission is not contested. Accordingly, it is ordered that the name ""M/s.Kanishk Steels Ltd."" be deleted from the cause

title.

2. Yet another grievance made by the department is that the operative part of the final order did not specifically direct the Commissioner to

requantify the demand of duty in terms of the ACP to be redetermined by him. Ld.SDR has stated reasons for the prayer for incorporating a

specific direction to the above effect in the final order. Again, there is no serious challenge to this prayer. In the circumstances, we modify the first

sentence of para-15 as under:-

In the result, we set aside both the ACP orders and allow these two appeals by way of remand, directing the Commissioner to redetermine the

ACP of the assessee''s factory in terms of this order as also to requantify the demand of duty accordingly.

3. The final order will be reads as amended by this order. The department''s application stands allowed

14. We find that the Tribunal in this case, as pointed out above, has been persuaded to pass an order based on the decision of the Punjab and

Haryana High Court in the case of Commissioner of C. Ex., Chandigarh-I Vs. Doaba Steel Rolling Mills, . However, the Supreme Court, on

appeal by the Revenue, clearly held that Rule 5 states that 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. Hence Rule 5 will have to be taken into consideration for

determination of the Annual Capacity Production even when there is any change in the installed machinery or any part thereof is intimated to the

Commissioner of Central Excise in terms of Rule 4(2) of the said Rules.

15. For better clarity, the reasoning of the Supreme Court in paragraph 18 of the decision reads as follows:

18. As noted above, Section 3A was inserted in the Act to enable the Central Government to levy Excise duty on manufacture or production of

certain notified goods on the basis of annual capacity of production to be determined by the Commissioner of Central Excise in terms of the Rules

to be framed by the Central Government. Section 3A of the Act is an exception to Section 3 of the Act - the charging Section and being in nature

of a non obstante provision, the provisions contained in the said Section override those of Section 3 of the Act. Rule 3 of 1997 Rules framed in

terms of Section 3A(2) of the Act lays down the procedure for determining the annual capacity of production of the factory. Sub-rule (3) of that

Rule contains a specific formula for determination of annual capacity of production of hot rolled products. This is the only formula whereunder the

annual capacity of production of the factory, for the purpose of charging duty in terms of Section 3A of the Act, is to be determined. Second

proviso to subsection (2) of Section 3A of the Act contemplates re-determination of annual production in a case when there is alteration or

modification in any factor relevant to the production of the specified goods but such re- determination has again to be as per the formula prescribed

in Rule 3(3) of the 1997 Rules. It is clear that sub-rule (2) of Rule 4, which, in effect, permits a manufacturer to make a change in the installed

machinery or part thereof which tends to change the value of either of the parameters, referred to in sub-rule (3) of Rule 3, on the basis whereof

the annual capacity of production had already been determined, would obviously require re-determination of annual capacity of production of the

factory/mill, for the purpose of levy of duty. It is plain that in the absence of any other Rule, providing for any alternative formula or mechanism for

re-determination of production capacity of a factory, on furnishing of information to the Commissioner as contemplated in Rule 4(2) of the 1997

Rules, such determination has to be in terms of sub- rule (3) of Rule 3. That being so, it must logically follow that Rule 5 cannot be ignored in

relation to a situation arising on account of an intimation under Rule 4(2) of the 1997 Rules. Moreover, the language of Rule 5 being clear and

unambiguous, in the sense that in a case where annual capacity is determined/redetermined by applying the formula prescribed in sub-rule (3) of

Rule 3, Rule 5 springs into action and has to be given full effect to.

16. In the result, the Supreme Court gave a finding that Rule 5 of the 1997 Rules will be attracted for determination of the annual capacity of

production of the factory when any change in the installed machinery or any part thereof is intimated to the Commissioner of Central Excise in

terms of Rule 4(2) of the said Rules. We have already extracted the relevant portion, viz., paragraph 23, of the decision of the Supreme Court. At

the risk of repetition, we again extract the same as follows:

23. We do not find any reason to depart from these well settled principles to be applied while interpreting a fiscal statute. Therefore, bearing in

mind these principles and the intent and effect of the statutory provisions, analysed above, the conclusion becomes inevitable that Rule 5 of the

1997 Rules will be attracted for determination of the annual capacity of production of the factory when any change in the installed machinery or any

part thereof is intimated to the Commissioner of Central Excise in terms of Rule 4(2) of the said Rules.

17. In the present case, the findings of the Tribunal that Rule 5 of the HRSMACD Rules will not apply is the core issue that has to be considered.

In the light of the decision of the Supreme Court reported in Commissioner of Central Excise, Chandigarh Vs. Doaba Steel Rolling Mills, on

remand, the competent authority has to determine the same. As a consequence, if duty, penalty and interest is leviable, the competent Authority is

entitled to proceed further as provided under the relevant provisions of the Rules by following the procedure prescribed. It is needless to say that

opportunity will be given to the assessee so as to avoid an allegation of violation of principles of natural justice.

18. Accordingly, we answer the second substantial question of law in favour of the Revenue and against the assessee. The appeal is allowed.

19. C.M.A.Nos. 748 to 751 of 2008 filed challenging the miscellaneous order of the Tribunal dated 27.12.2005 in Misc. Order Nos. 557 to 560

of 2005 were admitted by this Court on the following substantial question of law:

Whether in the event of re-determination of ACP as remanded by the Honourable Tribunal and any duty is determined as demandable, the

adjudicating authority can impose penalty under Rule 96ZP(3) of Central Excise Act, 1944

20. In the light of the decision rendered in C.M.A.Nos. 950 to 952 of 2007 answering the second substantial question of law in favour of the

Revenue following the decision of the Supreme Court and permitting the competent Authority to proceed further by following the procedure

prescribed in the relevant Rules, the question of law admitted by this Court in C.M.A.Nos. 748 to 751 of 2008 is also answered in favour of the

Revenue and against the assessee. The appeals are allowed.

21. C.M.A.No. 3549 of 2005 filed challenging the order passed by the Tribunal was admitted by this Court on the following substantial questions

of law:

1. Whether it can be said that the respondents had complied with Rule 4(2) of Hot Re-rolled Steel Mills Annual Capacity Determination Rules,

1997, while seeking for altered ACP which has been countenanced by the tribunal by the impugned order.

2. Whether the Tribunal was right in entertaining the appeal without statutory compliance of pre deposit as stipulated under section 35G of Central

Excise Act, 1944.

22. The first substantial question of law becomes academic, as the entire order passed by the Original Authority has to be re-considered by the

competent Authority in terms of the HRSMACD Rules. The second substantial question of law was admitted by this Court when the matter is

pending in appeal before the Tribunal. Now the Tribunal had finally disposed of the matter and the same has been challenged before this Court and

this Court has taken up the appeal for final disposal. Hence, the second substantial question of law is also academic at this point of time.

23. Accordingly, both the substantial questions of law are not required to be answered for the above reason and this appeal is disposed of on the

basis of the earlier appeals allowed in favour of the Revenue.

24. In the result, all the above appeals are ordered as above.