REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
OLD RED BUILDING, 38,M.G.Marg,CIVIL LINES, ALLAHABAD

Dated: 28/10/2015

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/ 70055 /2015-DB dated 16/10/2015

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the **Central Excise and Salt Act, 1944.**

28.10.15
Asstt. Registrar

Application	Appeal	Name and Address of Appellant
	E/689/2006	VIKAS METROLL P LTD 268 MODEL TOWN SONEPAT, HARYANA

Name and Address of Respondent	CCE KANPUR 117/7, SARVODAYA NAGAR, KANPUR(UP)

Other Appellants and Respondents as per Annexure

Copy To

3Advocate(s) / Consultant(s): SH R.KRISHNAN,ADV
297-E, POCKET-II
PHASE-I, MAYUR VIHAR, DELHI..

4 Bar Association, CESTAT, Delhi
5 Director Publications, Customs, Excise. I.P. Estate, Delhi
6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3
7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaidhyoram Street, T. Nagar, Chennai-17
8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi – 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

13 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar
Regional Bench, Allahabad

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT ALLAHABAD
COURT NO. I

Appeal No. E/689/2006

(Arising out of Order-in-Original No. 10/COMMR/TECH/2005 dated 30.11.2005 passed by the Commissioner of Central Excise, Kanpur).

For approval and signature:

Hon'ble Shri Anil Choudhary, Member (Judicial)
Hon'ble Shri Raju, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	:	Seen
4.	Whether order is to be circulated to the Departmental authorities?	:	Yes

M/s Vikas Metroll (P) Ltd. — Appellant

Vs.

Commissioner of Central Excise, Kanpur — Respondent

Appearance:

Shri A.R. Krishnan, Advocate — for Appellant

Shri Ahibaran, Addl. Commissioner (AR) — for Respondent

CORAM:

SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)
SHRI RAJU, MEMBER (TECHNICAL)

Date of Hearing: 12.10.2015

Date of Decision: 16.10.2015

FO ORDER NO. 70055/2015

Per: Raju

The appellants, M/s Vikas Metroll (P) Ltd., are manufacturer of steel products. The learned Counsel for the appellant submitted and narrated the brief history of the events. In summary it was submitted that the appellants used induction furnace for manufacture of the products. The appellants were liable to pay duty on the basis of Annual Production Capacity under Section 3A of the Central Excise Act. Section 3A required fixation of the capacity of the Furnace by the Commissioner. In 1998, the capacity of the furnace was provisionally fixed by the Commissioner. However, the appellant contested the fixation of capacity on the grounds that they have only one crucible. In March, 1998, the capacity of the production was finally fixed at 5.2 MT. The appellant challenged the order before Tribunal challenging the fixation of capacity and claiming assessment on the basis of actual production. The Tribunal remanded the matter back to the Commissioner. In November, 1998, the Commissioner re-determined the capacity at 4.72 MT. The appellant challenged this order of Commissioner again before Tribunal, seeking assessment on actual production basis. The Trybibunal again remanded the matter back to Commissioner. Department thereafter challenged this remand order of the Tribunal before Hon'ble Supreme Court. The Hon'ble Apex Court allowed the department's contention that once option under Rule 96ZO has been exercised, recourse cannot be had to assessment on the basis of actual production. However, for the purpose of determination of capacity, the matter was remanded back to the Tribunal. The appellant filed a review petition, which was dismissed. In September, 2001, the Tribunal remanded the matter to Commissioner again for determination of capacity. In December, 2005, the Commissioner re-determined the capacity in terms of Rule 96ZO(3) of Central Excise Rules, 1944. The appellants are in appeal against the said order on the grounds that the capacity has been determined incorrectly and also on the grounds that with omission of the section 3A of the Central Excise Act, without any saving clause, the proceedings initiated under the said section cannot continue and would lapse.

2. Learned Counsel for the appellants brought to our attention the decision of the Hon'ble High Court of Gujarat in the case of Krishna Processors Vs. Union of India - 2012 (280) ELT 186 (Guj). In this decision, the Hon'ble High Court has observed as follows: -

> "**17.** However, the aforesaid observations would be subject to what is held in respect of the second question viz., whether after the omission of Section 3A of the Act with effect from 11th May, 2001 proceedings initiated under Rules 96ZQ, 96ZP and 96ZO of the Rules would survive?
>
> **17.1** Dealing with the second question, Section 3A of the Act enables the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. This clause came to be inserted in the Act by the Finance Act, 1997. The reason behind introducing this provision appears to be that in certain sectors like induction furnaces, steel re-rolling mills, etc. evasion of excise duty on goods is substantial and the production is not disclosed accurately and collection of excise on their production capacity is thought of as appropriate. Under the scheme evolved in this provision the annual production capacity of mills and furnaces is determined by the Commissioner of Central Excise in terms of the rules to be framed under Section 3A(2) of the Act by the Central Government. Thereafter, the assessee would be liable to pay duty based on such determination.
>
> **17.2** Rule 96ZQ of the Rules which provides for procedure to be followed by independent processors of textile fabrics, comes into play after the Commissioner of Central Excise determines the annual capacity of production on processed textile fabrics under Section 3A of the Act read with the Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998. Rule 96ZQ proceeds to lay down the manner of payment of duty, payment of interest/penalty and such other incidental matters. Section 3A has been omitted by the Finance Act, 2001 with effect from 11th May, 2001 without any saving clause. On behalf of the Revenue, reliance had been placed upon the decision of the Supreme Court in the case of *General Finance Company v. Assistant Commissioner of Income Tax* (supra) to contend that omission also amounts to a repeal of an enactment and as such, the provisions of Section 6A of the General Clauses Act would be applicable and all proceedings and liabilities incurred under the omitted provisions would be saved. A Constitution Bench of the Supreme Court in the case of *M/s. Rayala Corporation* (supra) held that Section 6 of the General Clauses Act would not apply to the omission of a provision in an Act but only to repeal, omission being different from repeal. The aforesaid view has been

reiterated by another Constitution Bench of the Supreme Court in the case of *Kolhapur Canesugar Works Ltd.* v. *Union of India* (supra) wherein the court agreed that the earlier view taken in *M/s. Rayala Corporation* (supra) that Section 6 of the General Clauses Act only applies to repeals and not to omission and applies when the repeal is of a Central Act or regulation and not of the rule. Insofar as Section 3A of the Act is concerned, the second part would not be applicable since the present case relates to omission of a section. However, the first part namely that Section 6 of the General Clauses Act only applies to repeals and not to omissions would be squarely applicable to the facts of the present case. Reliance placed by the Revenue on the decision of the Supreme Court in the case of *General Finance Company* (supra) is misconceived inasmuch as in the said case the Supreme Court after finding force in the submissions advanced by the learned counsel, observed that it was constrained to follow the two decisions of the Constitution Benches of the Supreme Court in the case of *M/s. Rayala Corporation Pvt. Ltd. and Kolhapur Canesugar Works Ltd.* The court, accordingly held that the view taken by the High Court was not consistent with what was stated by the Supreme Court in the decisions aforesaid and the principle underlying Section 6 of the General Clauses Act as saving the right to initiate proceedings for liabilities incurred during the currency of the Act will not apply to omission of a provision in an Act but only to repeal, omission being different from repeal as held in the said decisions."

2.1 The learned Counsel asserted that after omission of Section 3A of the Central Excise Act, the proceedings initiated under the said Section and the Rules thereunder do not survive. He asserted that in the identical circumstances in the case of M/s Alwar Processors Pvt. Ltd. Vide Final Order No. A/51466/201-EX(DB) dated 12.2.2014, and in the case of M/s Shiv Raj Wires Ltd. Vide Final Order No. 50689-50690/2014-EX(DB) dated 12.2.2014, the proceedings initiated have been set aside.

2.2 The learned Counsel also argued in detail about the manner in which the capacity has been calculated and how the certificate of an Engineer produced by them during the adjudication has been ignored and how the formula for calculating volume has been wrongly applied.

3. Learned AR asserted that in the instant case, the SCN has been issued prior to the omission of Section 3A. It has also been adjudicated prior to omission of Section 3A. He asserted that the appellants have

declared the higher capacity in the declaration in 1997. He supported the findings of the order.

4 We have considered the rival submissions. Before we go into merits of the case the issue to be decided is if the proceedings initiated under Rule 96ZO survive after omission of Section 3A.

4.1 Interpreting the Hon'ble High Court's judgment in case of M/s Krishna Processors (supra), the Tribunal in case of M/s Alwar Processors (supra) has observed as follows: -

> The point of dispute is as to whether the proceedings initiated before 1-3-2001 would survive after omission of Rule 96ZQ without saving clause w.e.f. 1-3-2001 and omission of Section 3A without saving clause w.e.f. 11-5-2001. We find that this issue was considered by the Hon'ble Gujarat High Court in case of *Krishna Processors* v. *Union of India* (supra), wherein Hon'ble High Court considered the following issues :-
>
> > Whether in view of the omission of Rule 96ZQ of the Rules "(i) with effect from 1st March, 2001, the adjudicating authority could thereafter have initiated action for breach thereof by issuance of show cause notice and/or could have continued with the proceedings initiated but not concluded prior thereto?
> >
> > Whether any obligation or liability incurred under Section (ii) 3A of the Act is saved by Section 6 of the General Clauses Act and whether after the omission of Section 3A of the Act with effect from 11th May, 2001 proceedings initiated under the Rules 96ZQ, 96ZP and 96ZO of the Rules would survive?
> >
> > Whether Section 38A of the Act saves all obligations and (iii) liabilities incurred under Rule 96ZQ of the Rules? If yes, whether the said position would prevail even after the omission of Section 3A of the Act?"
>
> 7. The Hon'ble High Court relying upon the judgments in the case of *Rayala Corporation Pvt. Ltd.* reported in (1969) 2 SCC 412 and subsequent judgment of the Apex Court in the case of *Kolhapur Cane Sugar Works Ltd.* reported in 2000 (119) E.L.T. 257 (S.C.) concluded that no proceedings could have been initiated under the omitted Rule 96ZQ after omission of Section 3A w.e.f. 11-5-2001 in absence of any saving clause. The Court further held that all proceedings which were pending as on 11-5-2001, even if initiated prior to omission of Rule 96ZQ would thereafter automatically lapse and no order could be passed if they were not concluded at the time of omission of Section 3A w.e.f. 11-5-2001. In this judgment, the Hon'ble High Court has also considered the judgment of Punjab & Haryana High Court in the case of *Shree Bhagwati Steel Rolling Mills* v. *CCE, Chandigarh* reported in 2007 (207) E.L.T. 58 (P & H) and expressed its disagreement. In view of the above judgment of the Hon'ble Gujarat High Court, which is based on the judgment of the Apex Court in the case of *Rayala Corporation Ltd.* (supra) and *Kolhapur Cane Sugar Works Ltd.* (supra), after omission of Rule 96ZQ w.e.f. 1-3-2001 and omission of Section 3A of the Act without saving clause w.e.f. 11-5-

2007, the proceedings initiated prior to omission which had not been concluded as on 11-5-2001 would lapse. In this case, though, initially the show cause notice issued prior to 1-3-2001 had been adjudicated by the Asstt. Commissioner, the Commissioner (Appeals) had set aside the orders and had remanded the matter for part of the period of dispute to the Asstt. Commissioner for *de novo* adjudication and *de novo* proceedings were concluded in 2004, long after omission of Rule 96ZQ w.e.f. 1-3-2001 and Section 3A w.e.f. 11-5-2001 without any saving clause and therefore the same would lapse. In view of this, we do not find any merit in the Revenue's appeal. The same is dismissed.

4.2 In the instant case the SCN has been issued prior to 1.3.2001, the capacity has not been finalized till date. The last adjudication order has been issued on 9.12.2005, which is much after the omission of Section 3A. It is seen that the facts of this case are identical to the facts in the case of M/s Alwar Processors Pvt. Ltd. No strong arguments or facts have been presented to differ from the case.

4. Respectfully agreeing with decision of the co-ordinate Bench in the case of M/s Alwar Processors Pvt. Ltd, being identical matter, we allow the appeal. The proceedings initiated in the letter of Commissioner dated 14.11.1998 for fixation of capacity different from the declaration originally filed by appellants would lapse, since the same has not been finalized before omission of Section 3A.

(Pronounced in Court on 16/10/15)

Sd/-

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-

(RAJU)
MEMBER (TECHNICAL)

प्रमाणित प्रति/Certified True Copy
03-11-15
Registrar
38, M. G. Marg ... 211001