REGISTERED / AD

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

Dated: 24/11/2015

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/ 70065/2015- dated 26/10/2015

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.**

SBS Asstt. Registrar

Application	Appeal	Name and Address of Appellant
	E/53479/2014SM	AVADH ALLOYS PVT LTD VILL- VHELNA MUZAFFARNAGAR(UP)

Name and Address of Respondent	CCE MEERUT I EXCISE CHOWK, UNIVERSIT MANGAL PANDEY NAGAR, I 250005

Other Appellants and Respondents as per Annexure

Copy To

3 Advocate(s) / Consultant(s): RINKI ARORA,ADV
82-MISSION COMPUND
SAHARANPUR(UP)-247001

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), Vaithyaram 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 AND SERVICE TAX APPELLATE TRIBUNAL, REGIONAL BENCH : ALLAHABAD

Ex. Appeal No.53479/14

Arising out of OIA No.170-CE/APPL/MRT-I/2013 dated 17.12.2013 passed by Commissioner of Central Excise (Appeals), Meerut I

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

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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 His Lordship wishes to see the fair copy of the Order? : Seen
4. Whether Order is to be circulated to the Departmental Authorities? : Yes.

M/s Avadh Alloys Pvt. Ltd. ...APPELLANT(S)

VERSUS

Commissioner of Central Excise, Meerut I RESPONDENT (S)

APPEARANCE

Mr.Rinki Arora, Adv. for the Appellant (s)
Shri V.K.Shastri, A.C. (A.R.) for the Department

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

DATE OF HEARING & PRONOUNCEMENT : 26. 10. 2015

Final ORDER NO. 70065/2015

Per Mr. Anil Choudhary :

The Appellant, M/s Avadh Alloys Pvt. Ltd., is in Appeal against Order-in-Appeal No. 170-CE/APPL/MRT-I/2013 dated 17.12.2013 passed by Commissioner of Central Excise (Appeals), Meerut I.

2. Brief facts are that the appellants are engaged in the manufacture of M.S.Strips and under the provisions of Section 3A, the duty was payable on deemed production under Notification 32/97-CE dated 01.08.1997. The appellants filed declaration dated 20.08.1997 under Hot Re-Rolling Steel Mills Annual Capacity Determination Rules, 1997 and opted for payment of tax under the Scheme read with Rule 96ZP sub-rule 3. The ld.Commissioner determined Annual Capacity of Production (ACP) vide letter/order dated 23.07.1998 whereby, the ACP of the appellants' unit was fixed at 7368 MT. As permissible under Rule 4 (2) of the Hot Re-Rolling Steel Mills Annual Capacity Determination Rules, 1997, the appellants revised the parameter (determining factors) under permission granted by the ld.Commissioner pursuant to which vide Order dated 19.08.1998/29.10.1998, the ACP was re-determined on 1968 MT, but in view of the provisions of Rule 5, which provided that in case the annual capacity determined by the formula in Rule 3 (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 and equal to the actual production of the mill during the financial year 1996-97. Accordingly, the actual production for the financial year 1996-97, was 4641 MT, the revised capacity was determined on 4641 MT i.e. per annum w.e.f. 09.09.1998. The

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appellants had again filed declaration dated 25.11.1998 in respect of revised parameter for which permission was granted. The revised capacity was determined at 2180 MT per annum. However, in terms of Rule 5 (as introduced vide Notification 45/97-CE dated 30.08.1997) annual capacity was retained 4641 MT per annum based on the actual production for the year 1996-97. The appellants challenged both the orders determining ACP before this Tribunal and this Tribunal in Appeal No.E/204/99-NB being Final Order No.A/457/99-NB (DB) dt. 03.06.1999 and Appeal No.E/1571/99-NB being Final Order No.A/56/2000-NB (DB) dated 06.01.2000, allowed the appeals of the appellant assessee holding that the capacity re-determined in terms of Rule 3 (3) read with Rule 4 (2), shall be applicable and not the actual capacity based on the financial year 1996-97, the actual production by virtue of Rule 5, as Rule 5 does not deal with revised parameter.

3. Being aggrieved, the Revenue preferred an appeal before the Hon'ble High Court of Allahabad vide Central Excise Reference Application No. 48 of 2000, which was dismissed on limitation vide Order dated 19.02.2007. Thereafter, the Revenue preferred an appeal before the Hon'ble Supreme Court. In a bunch of appeals decided together vide order dated 06.07.2011, the issue was decided in favour of the Revenue, where the Hon'ble Apex Court held that as the formula is prescribed for determination of capacity given in Rule 3 (3) and the same is referred in Rule 5, thus, where the actual production is higher, for the financial year 1996-97 in comparison to the ACP

determined in terms of Rule 3 (3) read with Rule 4 (2) ACP will be taken as ACP for the financial year, 1996-97.

4. Several periodical show-cause notices have been issued on the appellants during the pendency of the aforementioned adjudication/appeals, which are as follows :

Sl. No.	File No.	Date	Period of show-cause notice	Amount involved
1.	V(30)Dem/167/99	01.04.1999	Sep.98 to Nov.98	Rs.2,18,655/-
2.	V(30)Dem/181/99	04.05.1999	Dec.98 to Jan.99	Rs.1,30,381/-
3.	V(30)Dem/183/99	17.05.1999	Feb.99 to March.99	Rs.1,25,817/-
4.	V(30)Dem/251/99	31.08.1999	April.99 to July.99	Rs.2,45,100/-
5.	V(30)Dem/371/99	31.12.1999	Aug.99 to Nov.99	Rs.2,45,100/-
6.	V(30)Dem/103/2000	19.04.2000	Dec.99 to March,2000	Rs.2,45,100/-
			Total	**Rs.12,10,153/-**

5. Vide OIO dated 27.02.2013, all the afore-mentioned show-cause notices were adjudicated in terms of Order dated 06.07.2011 and differential duty of Rs.12,10,153/- was demanded along with equal amount of penalty under Rule 96ZP (3) of the Central Excise Rules, 1944 and interest. Being aggrieved, the appellant preferred an appeal before the ld.Commissioner (Appeals). The appellant did not contest differential duty, but disputed imposition of penalty and demand of interest. The ld.Commissioner (Appeals) vide his impugned order dated 17.12.2013, adjudicated the appeal and confirmed the OIO. Being aggrieved, the appellant before this Tribunal.

6. The ld.Counsel for the appellants states that the issue of capacity determination, relates to interpretation of statute and this Tribunal has decided in their favour as well as the Hon'ble High Court is in favour of the assessee. The issue remains sub-judice and the findings of the Final Order of the Hon'ble Apex Court dated 06.07.2011, are in favour of the Revenue. In this view of the matter, no penalty is excisable. The ld.Counsel draws my attention that the provisions of Section 3A, are deleted in March, 2001 by the Act 14 (1), 2001 w.e.f. 11.05.2001. It is further pointed out that there being no sharing clause in the amending Act deleted Section 3A, the pending proceedings are not saved. Accordingly, as held by the Hon'ble Gujarat High Court in the case of Krishana Processsors Vs. Union of India : 2012 (280) ELT 186 (Guj.), which was followed by this Tribunal in the case of Alwar Processors Pvt. Ltd. : 2014 (308) ELT 720, wherein in view of the division of Section 3A of the Act by amending, the Act without any saving clause of pending proceeding, will be held abated. As such, there was no question of interest and penalty imposable on the appellant.

7. The ld.DR relies on the impugned order and also relies on the ruling of the Hon'ble Madras High Court in the case of Triveni Alloys Ltd. Vs. CESTAT, Chennai, wherein it has been held that in case of manufacture of re-rolling steel under similar facts and circumstances, annual capacity was fixed and the appellant failed to discharge the duty liability. Therefore, show-cause notice was issued demanding payment of differential duty as prescribed under Section 11 of the Act with interest and penalty under Rule 96ZP (3) of Central Excise Rules,

1944 and the appellant had not raised any objection. It was held that the appellant is payable interest and penalty on the differential duty.

8. Having considered the rival submissions, I find that the appellant in the present case, had disputed in respect of annual capacity determination rate right from the very beginning and they also got favourable order of this Tribunal as indicated above. The Revenue did not succeed before the High Court also and it was only by the final order of the Hon'ble Supreme Court dated 6th July, 2011 with the matter of capacity production held in favour of the Revenue. In this view, I hold that no case of deliberate default is made out against the appellant. I also hold that the differential duty became payable only on pronouncement of the order of the Hon'ble Supreme Court dated 06.07.2011. It is admitted fact that the appellant paid the differential duty (50% was paid during pendency of appeal and the balance was paid soon after passing of the OIO). Thus, there is no deliberate delay on the part of the appellant. In this view of the matter, I hold that the appellant would be liable to interest w.e.f. 30th day of service of OIO on the amount of duty paid belatedly, if any. Such interest, shall be calculated by the adjudicating authority and intimated to the appellant. The appellant is also at liberty to calculate the interest payable, if any, in terms of this order and filed the same for approval of the adjudicating authority. Thus the appeal is allowed in part. Penalty imposed is set aside and the interest is payable as indicated above.

(Dictated and pronounced in the open Court)

Sd/-

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

प्रमाणित प्रति / Certified True Copy

सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण / (C.E.S.T.A.T.)
[illegible] इलाहाबाद-211001