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

Dated: 16/2/2016

To

Appellant as per address in table below

Respondent as per address in table below

<u>Final Order No. A/ 70072/2016 dated 17/11/2015</u>

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.**

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
	E/1415/2006 EX	PAWAN ALLOYS&CASTING PVT LTD MEERUT ROAD, P.O-JARODA, MUZAFFARNAGAR, UP

Name and Address of Respondent	CCE, MEERUT I OPP SHAHEED PARK, DELHI ROAD, MEERUT

Other Appellants and Respondents as per Annexure

Copy To

3<u>Advocate(s) / Consultant(s</u> SH V.L.KUMARAN,ADV
5, JANGPURA EXTENSION
LINK ROAD, NEW DELHI-14

4 Bar Association, CESTAT, ALLAHABAD

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, Iccon 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

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, REGIONAL BENCH: ALLAHABAD

DIVISION BENCH

Date of Hearing/Order: 17/11/2015

Appeal No.E/1415/2006-EX(DB)

[Arising out of Order-in-Original No.01-03/Commr/MRT-I/2006 dated 31.01.2006 passed by Commissioner of Central Excise, Meerut(Uttar Pradesh)]

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it would 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 Department Authorities?	Yes

Pawan Alloys & Casting Pvt. Ltd Appellant

Vs.

C.C.E., Meerut-I Respondent

Appearance:
Present for the Appellant: Shri B.L. Narasimhan, Advocate
Present for the Respondent: Shri Ajay Kumar (Joint Commissioner) AR

Coram: Hon'ble Shri Anil Choudhary, Member (Judicial)
Hon'ble Shri C.J. Mathew, Member (Technical)

Final Order No. 70072/2016

Per: Anil Choudhary

The appellant Pawan Alloys & castings Pvt. Ltd. is in appeal against Order-in-Original dated 26.02.2003 by which the application for redetermination of annual capacity of production under the compounded Levy scheme was rejected for the year 19 98-1999.

2. This is the 3rd round of litigation. Earlier this appellant had approached this Tribunal in Appeal Number EE/1135/2003 NB (C) and vide Final Order Number 299/04 - NBC dated 18/3/04 this Tribunal allowed the appeal by way of remand with the following directions -

> "We have considered the submissions of both the sides. It has been observed by the Commissioner in the impugned Order that the Appellants had claimed abatement for the first time in their reply dated 28.11.2000. The learned Advocate for the Appellants has submitted that they have claimed abatement of duty from time to time and it is not correct to say that the abatement of duty on account of their factory remaining closed was claimed for the first time in their reply dated 28.11.2000. In support of his contention he has referred to various correspondence, for example, their

letters dated 23.12.97, 7.1.98, 22.1.98. The learned Advocate has also referred to the Panchnama dated 19.9.97 under which one of the panel was sealed by the Central Excise Officers. In view of these facts, we are constrained to remand the matter to the jurisdictional Commissioner for considering the abatement claims said to be on record and also for considering their plea of re-determination of their annual capacity of production for the financial year 1998-99 after affording a reasonable opportunity of hearing to the Appellants and in accordance with law. The Appeal is thus allowed by way of remand."

3. Pursuant to remand the appellant moved before the learned Commissioner stating that the annual capacity of production was wrongly determined provisionally at 6.40 MT taking the two furnaces together of 3.0 MT and 3.4 MT determining the monthly duty levy at Rs.10,66,667/- per month. It is the case of the appellant that the furnace of capacity 3.0 MT was lying sealed with effect from 19/9/97, vide punchnama were drawn and duly signed by the Officers of the Revenue as well as the Director of the appellant, in presence of witnesses. The said fact have also been reiterated

in a subsequent punchnama, drawn on 9/12/97 for sealing of the other furnace of 3.4 MT. A Copy of the punchnama, have been filed before this Tribunal in paper book as Annexure 6 and Annexure 6/4. It is further pointed out by learned Counsel that in spite of admitting the fact that the furnace having capacity 3.0 MT was lying sealed and not in working condition, as the same was lying uninstalled as taken notice of by learned Commissioner in para-16 of the impugned order, but have erred in concluding that as the furnace was available in the factory of production the same has to be included for determining the annual capacity, whether the furnace is working or not. Accordingly the claim of the appellant for re-determining the capacity at 3.4 MT instead of 6.4 MT was rejected.

4. The learned Counsel further states that they have paid the taxes and duty as per the undisputed capacity of 3.4 MT. Accordingly the learned Counsel prays for setting aside the portion of the Impugned Order determining their annual capacity of production at 6.4 MT and the same be declared at 3.4 MT.

5. The learned DR relies on the impugned order. He further states that under Rule 96ZO (3) once on option is given for the financial year for payment of tax under the compounded Levy scheme, the same cannot be changed

midway during the financial year. Further the learned DR for the revenue relies on the ruling of Hon'ble Supreme Court in the case of CCE Vs. Venus Casting (P) Ltd. reported in 2000 (117) ELT 273 (S.C.) wherein the Hon'ble Supreme Court held that once an assessee have availed the procedure under Rule 96ZO(3) of Central Excise Rules, 1944, at their option to cannot switch over during the pendency of the financial year for payment of tax on the basis of actual production.

6. Having heard the rival contentions, we are satisfied that learned Commissioner has erred in determining the capacity of the appellant unit at 6.4 MT. In view of the admitted fact that the furnace of capacity 3.0 MT was lying out of working condition and/or uninstalled, the learned Commissioner is in error taking the capacity of the same on the premises that as the furnaces was available in the factory premises, the same has to be considered for determining annual capacity. According to the rules only the furnace which is installed and put to use is required to be considered for determining the annual capacity. Thus we set aside the impugned order to the extent the annual capacity of production is determined at 6.4 MT and we re-determine the same at 3.4 MT for the period 1998-99. Accordingly the appellant will be liable to pay the duty, if any, unpaid on the capacity as is determined by this Tribunal. We also set aside the amount of penalty determined and fixed vide order dated 19.4.2006 determined by the

Assistant Commissioner in terms of the impugned order. As we have decided the appeal on merits, we do not decide the points of law arising pursuant to amendment vide Finance Act, 2001. Thus the appeal is allowed.

(Dictated and Pronounced in open Court)

(Anil Choudhary)
Judicial Member

(C.J. Mathew)
Technical Member