FAX : 0532-2400149 REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 03/08/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **A/70571/2016-EX[DB]** dated **27/05/2016**

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
1	E/2700/2011	**L. KANT PAPER MILLS LTD.** VILLAGE-BISAYAKPUR, RANIA, KANPUR (DEHAT)
		Name and Address of Respondent
2		-C.C.E. KANPUR 117/7, SARVODAYA NAGAR, KANPUR 208005.

Copy To

3Advocate(s) / Consultant(s):

AMIT AWASTHI ADVOCATE
7/116A, H-1, 1ST FLOOR, RADHEY
APARTMENT, SWAROOP NAGAR,
KANPUR- 208002

4Bar 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, 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 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032
15 C.D.R. 16 Office Copy 17 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH : ALLAHABAD

Appeal No.E/2700/2011 [DB]

Arising out of O/A No.164/CE/APPL/KNP/2015 dated 19.07.2011 passed by Commr. of Central Excise & S. Tax, Kanpur.

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, 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 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 L. Kant Paper Mills Ltd.

...APPELLANT(S)

VERSUS

Commissioner of Central Excise, Kanpur

...RESPONDENT (S)

APPEARANCE

Shri Anil Kumar Dixit Advocate for the Appellant (s)
Shri M. K. Sarangi Jt. Commissioner, (A.R.) for the Department

CORAM:

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

DATE OF HEARING : 27.05.2016

DATE OF PRONOUNCEMENT : 26-07-2016

FINAL ORDER NO. 70571/2016

Per Mr. Anil Choudhary :

The appellant, a manufacturer of M/s Ingots & Runners Risers falling under Chapter Heading No.7206.90 of CETA,1985, is in appeal against Order-in-Appeal dated 19.07.2011, passed by Commissioner (Appeals) of Central Excise, Kanpur.

2. The brief facts are that under the Notification No.33/97-CE (N.T.) dated 01.08.1997, manufacturer of M/s Ingots etc. were given option to pay duty on the basis of Annual Production Capacity (APC) under Rule 96 ZO(3) of CER, 1944. The appellant opted to discharge duty liability under Rule 96 ZO(3) of CER, 1944 vide their letter dated 26.08.1997. It is further case of the appellant that although they had two furnaces in their factory of about 4.5 M.T. each, they had mentioned in their application that only one was running in condition, and/or use. It is the further case of the appellant that the Ld. Commissioner failed to consider this fact and fixed the total capacity of the furnaces together as annual capacity of 28,800 M.T. for the year 1997-98, and, accordingly, for the period September, 1997 to March, 1998, fixed the proportionate production capacity in respect of the two furnaces at 16,800 M.T. Accordingly, the appellant was directed to pay Rs.15 lakhs on two furnaces (@ 7.5 lakhs per furnaces of 4.5 Tonnes). Thereafter, it was noticed by Revenue that for the month of September, 1997, appellant has cleared 751.080 M.T. of M.S. Ingots but had deposited Rs.3,20,000/- only vide T.C. No.2/97-98 dated 2.9.1997. However, during

Aer

August, 1997, the appellant had cleared 413.605 M.T. attracting duty @ 600/- per M.T. amounting to Rs.2,48,163/- and has deposited a sum of Rs.4,60,000/-. Thus, after adjusting the duty for the month of August, there was surplus of Rs.2,11,837/- lying unutilized. Accordingly, Revenue issued S.C.N. for duty not paid at Rs.8,58,163/- (Rs.15 lakhs-3,20,000-2,11,837). Further interest and penalty with also proposed. The appellant contested, the S.C.N., stating that they were liable to pay duty in respect of only one furnace which was only in running condition, and not for the two furnaces, which fact was stated in their option letter dated 26.8.1997 but the same had not been considered by the Ld. Commissioner, while fixing the annual production capacity vide Final Order dated 19.3.1998.

3. Being aggrieved with the order dated 19.3.1998, passed by the ld. Commissioner, the appellant had preferred an appeal before this Tribunal, which was decided vide Final Order No.A/837/98-NB & M/219/98-NB dated 14.9.1998, whereby, this Tribunal remanded the matter to the Commissioner for passing a speaking order, and accordingly, no demand was tenable, on the basis of earlier order, fixing production capacity dated 19.3.1998. Pursuant to remand by this Tribunal vide Order-in-Original dated 20.2.2006, the Jt. Commissioner have considered the matter re-fixing the duty liability at Rs.9,68,163/-, taking into account, the arithmetical mistake in the earlier order and the show cause notice and further also observed, after going

Aa

through the Order No.64/Commr./Tech/98 dated 19.3.1998, I find that its language was quite clear and had no room for ambiguity. Para two of this order clearly speaks that APC was fixed after conducting the verification for determination of capacity of the crucibles by technical experts. Further observing that pursuant to remand by this Tribunal, the Commissioner have passed Order No.05/Commr./Tech/05 dated 13.10.2005, wherein it is observed that the jurisdictional Assistant Commissioner in his report dated 13.9.1997, have stated that the appellant was having two induction furnaces, two transformers and one standby crucible and both transformers were connected with the power supply. Thus, seeing entire arrangement and availability of two transformers connected with the power supply it is incorrect to say that only one furnace was in operation. Accordingly, it was concluded that the version of the appellant during September, 1997 only one furnace was in operation was not true and they were correctly liable to pay Central Excise duty of Rs.15 lakhs for the month of September, 1997. The Jt. Commissioner further upheld the liability to pay interest and so far penalty is concerned under Rule 173 (Q) read with Rule 210 of CER. He observed that final penalty is to be imposed on the basis of liability to be discharged in accordance with the final APC fixed.

4. Being aggrieved, the appellant preferred an appeal before Ld. Commissioner (Appeals), who vide the impugned order, have

been pleased to reject the appeal upholding the order of the Jt. Commissioner. Being aggrieved, the appellant is in appeal before this Tribunal on the grounds among others, that the demand is bad, in view of repeal or omission of Rule 96 ZO and 96 ZP of CER by Finance Act, 2001, and further urged that the impugned order is a non-speaking order as the authority has failed to apply its mind to the grounds raised and further appreciate the facts of record. This appeal was dismissed for non-making of pre-deposit and non-prosecution vide order dated 17.8.2012.

5. Vide ~~Against~~ the order dated 22.7.2014, passed in R.O.A No. 5528 of 2013, this Tribunal had restored the appeal and also granted stay of the balance demand with interest taking the notice of fact that the appellant had already deposited Rs.5 lakhs. The Revenue had preferred CEA No.99 of 2015, before Hon'ble Allahabad High Court and in final Order dated 31.5.2015, the Hon'ble High Court was pleased to dispose of the appeal with direction to this Tribunal to dispose of the appeal itself on merits within four. ~~Accordingly,~~ months from the date of receipt of certified copy of this order, on receipt of the order of the Hon'ble High Court vide letter of Revenue dated 11.5.2015, received on 18.5.2015, the appeal was fixed for final hearing and notices were issued. The notices were issued on the appellant and the same were returned back as "unserved" with the remark that appellant is not found at the address, the factory is lying closed, as such, notice was issued through jurisdictional Commissioner vide order darted 21.1.2016. It has been informed by the

jurisdictional Commissioner that the Superintendent entrusted to serve the notice found the factory closed and no person was available to receive the notice at the address and accordingly, notice was served by affixture on 25.4.2016, in the presence of two independent witnesses, who had identified the premises. The copy of the report and the Panchanama drawn at the time of affixture of notice have been filed by the Revenue. Finding the service of notice in order, the service of notice is accepted as good.

6. When the case was called on the date fixed i.e. 27.5.2016, the Counsel for the appellant, on record Mr. Anil Kumar Dixit, stated that the appellant have taken back his case records, as such, their Vakalatnama be treated as withdrawn. Accordingly, the Vakalatnama of the Counsel is treated as withdrawn and under the circumstances, it is decided to proceed with the appeal *ex parte*. Heard the learned D.R. and perused the record.

7. The learned A.R. for Revenue have relied on the impugned order and have also produced the copy of order of Hon'ble Supreme Court dated 24.11.2015, in the case of batch of appeals, *Shree Bhagwati Steel Rolling Mills and others Vs. Commissioner of Central Excise reported at 2015 (326) E.L.T. 209*. The Hon'ble Supreme Court in the said ruling, after having considering the issue of repeal and/or omission of Rules 96ZO, 96ZP & 96ZQ with effect from 11.5.2001, have held that although, the levy of

the duty is saved but the levy of penalty and interest are paid and cannot be enforced.

8. Having considered the rival contentions, we find that the Ld. Commissioner in fixing the annual production capacity for the month of September, 1997, have erred in fixing the liability for the two furnaces. It is an admitted fact that the appellant had intimated by their option letter dated 26.8.1997 that they will be operating only one furnace and it appears that Revenue failed to seal the other furnace. Accordingly, in absence of evidence that the appellant operated both their furnaces for the month of September, 1997, the demand for the two furnaces together have been raised on assumption and presumption, which is not tenable. Accordingly, we hold that the appellant is liable to pay duty on the basis of production capacity only for one furnace for the month of September, 1997, or Rs. 7.5 lakhs. The appellant will be liable to pay only the balance demand, after adjustment of the amount of Rs.3,20,000/- and Rs.2,11,857/- and any other payment if made. We further hold that in view of the Law clarified by the Hon'ble Supreme Court in the case of Shree Bhagwati Steel Rolling Mills (Supra), the appellant is not liable to pay any interest and penalty. Accordingly, we allow the appeal in part modifying the impugned order as indicated herein above.

(Pronounced in the open Court 26-07-16)

-Sd- -Sd-

(ANIL G. SHAKKARWAR)
MEMBER (TECHNICAL)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

प्रमाणित प्रति / Certified True Copy

10.8

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