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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Date 12/08/2009

Appeal No. E/4387/2004 - EX[DB]

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S VVS CONCAST LTD.
C-65 TO 67, UPSIDC, INDL. AREA, PHASE-II, ORAI,
DISTT. JALAUN
M/S VVS CONCAST LTD.

Appellant
Vs
Respondent

C.C.E. KANPUR

I am directed to transmit herewith a certified copy of **Final order No.** 512/2009-EX **EX[DB]** dated 03-7-09 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
   C.C.E. KANPUR
   117/7, SARVODYA NAGAR, KANPUR
2. Adv. / Consult
   MR.BIPIN GARG
   B-1/1289,A-VASANT KUNJ, NEW DELHI

3 C.D.R
~~4 J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15 LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
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Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi

COURT-I

Date of hearing/decision: 03.07.2009

Excise Appeal No. 4387 of 2004
[Arising out of order-in-original No. 1/Commissioner/Tech/2004 dated 31.5.2004 passed by the Commissioner, Central Excise, Kanpur].

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri M. Veeraiyan, 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.	Yes
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?	

M/s VVS Concast Limited — Appellant

Vs.

CCE, Kanpur — Respondent

Appearance:

Appeared for the Appellant – Shri Bipin Garg, Advocate with Shri Atul Gupta, Co. Secy.

Appeared for the Respondent – Shri P.K. Singh, DR

Coram: Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri M. Veeraiyan, Member (Technical)

Final Oral Order No. 512/09-EX.

Per Shri Justice R.M.S. Khandeparkar:

Heard learned Advocate for the appellant and learned DR for the respondent and perused the records placed before us.

2. This appeal arises from the order dated 31.05.2004 passed by the Commissioner of Central Excise, Kanpur. The impugned order was passed pursuant to the order of remand of this Tribunal on 15.07.2002 in Appeal No. E/1184/01-NB.

3. The appellants are engaged in production and clearance of M.S. Ingots of non-alloy steel and for the purpose of production of the excisable goods they use induction furnace. Based on the declaration made by the appellant and on verification of installation of the unit by the appellants, the annual production capacity thereof was determined under Order-in-original dated 21.11.1998 as 36131.20 MT. The appellant had declared two furnaces, one 3.5 and another of 2.00 MT capacity and had opted to avail benefit of provisions of Rule 96ZQ (3) for discharge of duty liability on the basis of revised declaration dated 02.02.1999. By their letter dated 17.03.99, it was informed by the appellant that they have closed one induction furnace with the capacity of 2.00 MT and also requested for necessary proceedings in terms of Rule 4 of Induction Furnace Annual Capacity Determination Rules 1997 (hereinafter called as the said rules). On the basis of the revised declaration, the Commissioner by its order dated 24.03.1999 re-determined the annual capacity of production for the period from 02.02.99 onwards for the two furnaces as 11200 MT and 6400 MT for discharge of excise duty liability. While determining the revised annual capacity of production by the party under letter dated 17.03.99, the claim of the party regarding closer of the furnace of 2.00 MT capacity was not accepted by the Commissioner. The appellant under letter dated 08.04.1999 again requested for re-determination of their annual capacity on the ground that the furnace with a capacity of 2.00 MT had been closed permanently w.e.f. 17.03.1999 and the capacity of the existing induction furnace was of 3.5 MT. It was pursuant to this request the proceedings commenced and ultimately the Commissioner of Central Excise, Kanpur by order dated 22.02.2001 passed the following order:

"In exercise of the powers vested in me under Induction Fùrnace Annual Capacity Determination Rules 1997 read with Section -3A of Central Excise Act, 1944, I hereby re-determine the APC of the party M/s V.V.S. Concast Ltd., C-65 to 67 U.P.S.I.D.C., Industrial Area, Phase II, Orai Distt, Jalaun as under:-

A. The APC for the period 02.02.99 to 31.03.99 is fixed as 19315.2 MT [TCF =(4.036 MT + 2.00 MT) *3200]. The earlier APC Order bearing No. 31/COMMR/TECH/99 dated 24.3.99 stands finalized to this extent.

B. Exact APC for the entire financial year 1998-99 shall be calculated on the proportionate basis accordingly and APC for the financial year 1999-2000 is fixed as 12915.2 MT {(TCF=4.036 MT) *3200}.

I also order and require the party to pay the duty liability, along with the dues payable in terms of the provisions of Rule 96ZO of Central Excise Rules' 1944, besides the duty payable in terms of the APC fixation Order bearing No. 31/Commr./Tech/99 dated 24.3.99, for the period 02.02.99 to 31.03.99 and 01.04.99 to 31.03.2000, amounting to (i) Rs. 6.036 *5/3 *100000 * 55/28 = Rs. 19,76,071.00 and (ii) Rs. 4.036 *5/3 * 100000 * 12 = Rs. 80,72,000.00 respectively under Rule 96ZO (3) of Central Excise Rules 1944".

4. Being dis-satisfied with the said order, the appellant preferred an appeal before this Tribunal being Appeal No. E/1184/01-NB which came to be disposed of by order dated 15.07.2002. By the said order, the Tribunal remanded the matter with the following direction:-

"7. In so far as reliance on the invoices/ invoice of the manufacturer/ trader is concerned, we find that it was not the invoice of the manufacturer/ trader but the certificate issued by the person who undertook modification. We note that under Rule 3(a) of the relevant rules, the Commissioner is required to examine the invoice issued by the manufacturer/ trader about the capacity of the furnace. Since there is no mention as to whether such invoice was produced or examined before rejecting the certificate issued for modification of the furnace, we consider it a fit case for remand on this issue. Therefore, the matter is remanded to the Commissioner concerned for examining the original certificate of the manufacturer / trader to find out the capacity of the furnace and then examine this certificate in the light of the Rule 3(a) of the relevant rule and pass appropriate orders after providing the appellants a reasonable opportunity of being heard in person and presenting their case in defence"

5. Pursuant to the remand, the Commissioner, Central Excise, Kanpur noting that the remand was only for determination of the capacity of furnace/ annual capacity of production after examining the original certificate of the manufacturer /trader in light of Rule 3 of the said Rules, on the basis of materials before the Commissioner reiterated its earlier order dated 22.02.2001. In fact, the operative portion of the impugned order reads thus-

"(i) In view of the discussion and findings given above, I reiterate my order-in-original No. 4/Commr./Tech/2001 dated 22.02.2001 with respect to determination of Annual Capacity of Production (APC) of M/s V.V.S. Concast Ltd., C-65 to 67, U.P.S.I.D.C., Industrial Area, Phase-II, Orai, Distt- Jalaun except that APC relevant for the period 02.02.99 to 16.03.99 shall be taken as 19315.2 MT [TCF = (4.036 MT + 2.00 MT) *3200] and the duly liability shall be calculated and discharged by the party on proportionate basis accordingly. Further, the APC relevant for the period 17.3.99 to 31.3.99 shall be taken as 12915.2 MT {(TCF = 4.036 MT) *3200} and the duty liability shall be calculated and discharged by the party on proportionate basis accordingly. The aforesaid modifications in the earlier Order-in-Original No. 4/Commr./Tech/2001 dated 22.02.2001 are being ordered in compliance to Hon'ble Tribunal's Final Order dated 15.07.2002 directing to extend to the assessee the benefit of closure w.e.f. 17.03.99. The APC for the financial year 1999-2000 remains fixed as 12915.2 MT {(TCF = 4.036 MT) *3200}.

(ii) I also order and require the party to pay the duty liability, alongwith the dues payable in terms of the provisions of Rule 96-ZO of Central Excise Rules, 1944 in terms of the APC fixation order bearing No. 4/Commr./Tech/2001 dated 22.02.2001, modified as above, as per the duty rates prevailing during the relevant period".

6. The learned Advocate appearing for the appellants submitted that the appellants had produced sufficient evidence to ascertain the exact capacity of the furnace from March 1999 onwards, pursuant to the modification of the original furnace and there was no justification for the Commissioner to discard the same,

more particularly taking into consideration the provisions of Rule 3 of the said rules. The directions by the Tribunal were to determine the capacity of the furnace bearing in mind the Rule 3 of the said Rules, hence, according to the learned Advocate, there was no difficulty for the Commissioner to determine the capacity of the furnace on the basis of the invoice in relation to the modified furnace submitted by the appellant to the authority.

7. Learned DR on the other hand submitted that bearing in mind the scope of the inquiry which was specified under the remand order by the Tribunal, in view of failure on the part of the appellants to produce the cogent evidence in relation to the original capacity of the furnace, no fault can be found with the impugned order.

8. As already seen above, the Tribunal under order dated 15.07.2002 had specifically directed the Commissioner to examine the invoice issued by the manufacturer/ trader about the capacity of the furnace in the light of Rule 3 of the said rules. The Commissioner on his part while passing the impugned order after taking into consideration the provisions of Rule 3 of the said Rules has observed that the relevant rule mandates the party to produce authentic copy of the manufacturer's/trader's invoice who had supplied or installed the furnace or crucible to the induction furnace unit and not the invoice relating to modifications carried out in the furnace or crucible and in the absence of such evidence, and in spite of opportunity being given to produce the relevant evidence, the party having failed to do so and invoice which had been produced was in respect of charges recovered towards the modification carried out, there is no relevant and valid material for determination of the furnace capacity as prayed for by the appellant.

9. Rule 3 of the said rules prescribe the manner, for ascertaining the annual capacity of the production in a factory wherein the goods are manufactured with the help of any induction furnace unit. Sub-rule (1) thereof provides that the Commissioner of Central Excise shall call for an authenticated copy of the

manufacturer's invoice or trader's invoice, who have supplied or installed the furnace or crucible to the induction furnace unit, and ascertain the total capacity of the furnaces installed in the factory on the basis of such invoice or document. The rule clearly indicates that the ascertainment of total capacity of the furnace has to be done on installation of the furnace. The expression "supplied or installed" obviously discloses the stage at which the ascertainment of the capacity is to be determined under the said provision of law.

9.1 Sub-rule (2) of Rule 3 provides that if the invoice or document referred to in sub-rule (1) is not available for any reason with the manufacturer then the Commissioner shall ascertain the capacity of the furnaces installed in the induction furnace unit on the basis of the capacity of comparable furnaces installed in any other factory in respect of which the manufacturer's invoice or other document indicating the capacity of the furnace is available or, if not so possible, on the basis of any other material as may be relevant for this purpose. It also provide that the Commissioner may, if he so desires, consult any technical authority for this purpose.

10. Considering the sub-rule (2) of Rule 3 of the said rules it was sought to be contended that in any event though the appellant had not produced the invoice of the furnace when it was originally installed, undisputedly, the appellant had produced the invoice for modification of the furnace and the same would satisfy the requirement of sub-rule (2) which uses the expression "any other material". Being so, according to the learned Advocate, the authority below was not justified in discarding the said document, nor the Tribunal's order prohibited the Commissioner from considering the same.

11. It is not in dispute that the appellant did produced invoice and certificate in relation to the modified furnace. What sub-rule (2) of Rule 3 speaks of, when it uses the expression "any other material", is that the document relating to the furnace at a time it was supplied or installed, and not at a time such furnace is

modified. Any document in relation to the modification of the capacity of furnace cannot be a substitute for the document disclosing the capacity of the furnace when it was originally supplied or installed, prior to its modification. Besides, in case of modification of capacity of the furnace, there is a specific provision being rule 4 of the said rule which provides that the capacity of production for any part of the year, or for any change in the total furnace capacity, shall be calculated pro rata on the basis of the annual capacity of production determined in the manner stated in rule 3. In case a manufacturer proposes to increase or reduce the capacity of induction furnace, the 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. Obviously, therefore, there is elaborate procedure prescribed under the said rules for any change to be brought about in the capacity of induction furnace. It specifically provides that before introducing the change in the capacity of the induction furnace, it is necessary for the manufacturer to inform about the proposed change to the Commissioner, at least one month in advance. This provision clearly discloses that in order to ascertain the modified capacity of the furnace, it is necessary for the department to ascertain the capacity of furnace which existed when it was installed and as it exists prior to the modification by following the approved procedure under the said rule, and not otherwise.

12. Undisputedly, the appellant has not followed the procedure as prescribed under rule 4. The invoice or certificate of modified capacity of the furnace cannot be the substitute for the document in relation to the capacity of the furnace at an initial stage when the furnace was originally installed/ supplied. Being so, a document regarding the change of capacity of furnace cannot be within the meaning of the expression "any other material" under sub-rule (2) of Rule 3 of the

said rule. Considering the same as rightly pointed out on behalf of the respondent, no fault can be found with the impugned order discarding the invoice relating to modified capacity to determine the original capacity of the furnace in terms of Rule 3 of the said rule.

13. The Tribunal under order dated 15.07.2007 being fully conversant with the procedure which was required to be followed for determination of the capacity of the furnace had directed examination of certificate in relation to installation and had specifically referred to the Rule 3 of the said rules while directing the Commissioner about the invoice issued by the manufacturer/trader. The expression "trader" obviously referred to the persons dealing in the business of the supply of readymade furnaces. As far as installation is concerned, it can be either by a trader or a manufacturer as well as by the purchaser that is by the person whom the furnace is supplied. However, specific reference to Rule 3 in the order of the Tribunal would indicate necessity of the invoice of the manufacturer of the furnace as the same was supplied to the appellant initially when it was installed for the first time and not the invoice on modification of such furnace. Being so, no fault can be found with the order of the Commissioner for having understood the order of the Tribunal in the manner he has required to understand. In the result we do not find any case made out for interference in the impugned order. Appeal therefore, fails and hereby dismissed.

(Justice R.M.S. Khandeparkar)
President

(M. Veeraiyan)
Member (Technical)

/Pant/