IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.1

Excise Appeal No.587 of 2012

(Arising out of Order-in-Appeal No.68-69/KOL-II/2012 dated 06.06.2012 passed by Commissioner of Central Excise (Appeals), Kolkata-II.)

M/s. Indo Steel Forge Private Limited
(190, Girish Ghosh Road, Belurmath, Howrah-711202.)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-II

.....Respondent

(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

WITH

Excise Appeal No.593 of 2012

(Arising out of Order-in-Appeal No.68-69/KOL-II/2012 dated 06.06.2012 passed by Commissioner of Central Excise (Appeals), Kolkata-II.)

M/s. Indo Steel Forge Private Limited
(190, Girish Ghosh Road, Belurmath, Howrah-711202.)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-II

.....Respondent

(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

APPEARANCE

NONE for the Appellant (s)
Shri S.Mukhopadhyay, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO.76670-76671/2023

DATE OF HEARING : 12 September 2023
DATE OF DECISION : 12 September 2023

Per : ASHOK JINDAL :

These appeals are filed by the appellants against the impugned orders wherein annual capacity of production was determined without issuance of the show cause notice.

2. The facts of the case are that the appellant was engaged in manufacture of Non-Alloy Hot Re-rolled Iron & Steel products and after introduction of capacity based production under section 3A, the appellant's monthly duty liability was determined by the Commissioner of Central Excise, Kolkata-II vide his letter dated 28.08.1998 for the period from September 1997 onwards. Thereafter, the Joint Commissioner vide his letter dated 10.08.1999 and 21.09.1999 ordered that percentage wise apportionment of Non-alloy and Alloy Steel is not permissible and therefore the appellants have to pay Rs.1,24,252/- in place of earlier order of Commissioner of Central Excise, Kolkata-II dated 28.08.1998. From the letter of Joint Commissioner, it will be seen that the letter was issued on 10.08.1999 and 21.09.1999, whereas the dispute related to and from 01.09.1997 to 31.03.1998 and for the month of April, 1999. The appellant was issued show cause notice for demand of differential duty and the show cause notice was adjudicated, demand of duty was confirmed against the appellant. The appellant has challenged those orders before this Tribunal on the ground that without issuing the show cause notice the production capacity cannot be re-determined. Initially the revenue was heavily relying on the decision of this Tribunal in the case of Bengal Hammer Industries (P) Ltd. v. Commr. of C.Ex., Kolkata-II [2009 (234) E.L.T. 673 (Tri.-Kolkata)] to say that if the assessee does not challenge the order of re-determination of annual capacity of production, the appellant lose their right to question the re-fixation of annual capacity of production which has been given effect by the adjudicating authority by issuance of the show cause notice. We find that the said decision has been set aside by the Hon'ble High Court in Tax Appeal No.CEXA/1/2009 and vide order dated 03.05.2023, the Hon'ble High Court has observed as under:-

"Aggrieved by the same, the assessee preferred an appeal before the Commissioner of Central Excise, Calcutta redirecting the stand taken by them in the reply to the show cause notice. The Commissioner by an order dated 11.2.2005 dismissed the appeal solely on the ground that the jurisdictional Commissioner had reviewed the earlier determination and superseded the same by determining the annual capacity of the assessee for the material period in the light of the Board's letter dated 13.11.1998. However, the issue agitated by the assessee was not considered by the appellate authority. Aggrieved by the order passed by the appellate authority the assessee preferred appeal before the tribunal. The Tribunal non-suited the assessee solely on the ground that the assessee did not challenge the order passed by the Commissioner re-determining the annual production capacity. On perusal of the grounds of appeal filed before the Tribunal by the assessee we find that specific contention raised by the assessee was that the earlier order passed by the Commissioner attained finality accepted by the department not appealed against the review, the order could not have been done unilaterally by an officer, who is junior in rank than the Commissioner. This contention raised by the assessee was not considered by the Tribunal. Interestingly, identical issue has been raised in respect of the other assesses, who are also carrying on similar production activities and one such case travelled up to the Tribunal in the case of Hooghly Ispact Ltd. and in appeal no.E-718-719 of 2001 [Commissioner of Central Excise-IV vs. Hooghly Ispat Ltd.] The Tribunal by judgment dated 22.1.2022 dismissed the appeal filed by the department and affirmed the order passed by the Commissioner of Central Excise [Appeals] was granted relief in favour of the said assessee. The learned Tribunal pointed out that the availment of MODVAT credit by the said assessee was lawful. The contention of the department which is similar to the contention raised before us stating that the order of the Commissioner originally fixing the annual production capacity was not in accordance with the clarification issued by the Board dated 19.11.1998. The Tribunal pointed out that the order passed by the Commissioner was never withdrawn or challenged by the department before higher forum and, therefore, held that the said assessee had rightly discharged the duty burden. Similar issue also

arose before the Tribunal in the case of Hooghly Ispat Ltd. vs. Commissioner of Central Excise-IV in appeal no.E-813 of 2002 and by order dated 18.2.2003 the learned Tribunal had allowed the appeal accepting the stand taken by the assessee that they had discharged the duty burden based on the determination of the annual production capacity by the Commissioner and the said order having not been challenged before the higher forum, unilaterally the annual capacity cannot be re-fixed. The Tribunal in the said decision also noted the other decision of the Tribunal on the similar point. Thus, the Tribunal did not go into this aspect though the same was specifically canvassed by the assessee in the appeal before the learned Tribunal. The question thus would be whether the department can be directed to take a different stand when they have not preferred any appeal against those decisions of the Tribunal which were decided in favour of those assesses on an identical issue. In this regard, it would be beneficial to refer to the decision of the Hon'ble Supreme Court in the case of Birla Corporation Ltd. vs. CCE, 2005 69 RLT 580 (SC). The Hon'ble Supreme Court held when a same question arises for consideration on identical fact, the revenue cannot be permitted to take a different stand and it was pointed out that earlier appeal involving the identical issue was not pressed and dismissed and the revenue having taken a conscious decision to accept the principles laid down in the said order cannot be permitted to take opposite stand in a different manner and if the same is permitted, the law will be in a state of confusion and will place parties as well as the assessee in a quandary. The said decision on the point were relied on by the Hon'ble Supreme Court in the case of Indian Oil Corporation Versus CCE Baroda; 2006 (76) RLT 548 (SC) and in the case of Commissioner of Central Excise Mumbai Vs. Bigen Industries Limited; 2006 (197) ELT 305 (S.C.) and Jindal Dye Intermediate Limited Versus Collector of Customs, Mumbai; 2006 (197) ELT 471. The law laid down in the above decision is quite clear that once the department has accepted the orders passed in identical issue considering the scope of the revision of the annual production capacity of those units who are also carrying similar group of activities, the department has precluded from taking a different stand in other cases more particularly, in the case of the assessee.

Thus, we find that assessee had made out sufficient grounds for us to interfere with the order passed by the learned Tribunal.

For the above reasons, the appeal filed by the assessee is allowed and the order passed by the learned Tribunal is set aside and consequently, the orders passed by the first appellate authority and the Joint Commissioner of Central Excise are set aside and the demand is quashed."

3. As in this case also although the appellant has not challenged the order of re-determination of annual capacity of production determined by the Joint Commissioner on subsequent dates, but while demanding duty from the appellants, the appellants are having right to challenge the re-determination of annual capacity of production as held by the Hon'ble High Court in the case of Bengal Hammer Industries Pvt.Ltd.(supra).

4. Therefore, we hold that the order of re-determination of annual capacity without issuance of show cause notice is not sustainable. Accordingly, the impugned orders have no merits, therefore, the same are set aside.

In the result, the appeals are allowed with consequential relief, if any.

(Operative part of the order was pronounced in the open Court.)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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