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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.230 of 2006

(Arising out of Order-in-Original No.12-14/MP/Commr(Adjn)2006 dated31.01.2006 passed by Commissioner(Adjudication), Central Excise, Ranchi.)

M/s.Vikromatic Steels Pvt.Ltd.
(Mahesmara, Baijnathpur, B. Deogarh-814112, Jharkhand.)

...Appellant

VERSUS

Commissioner, CGST & CX, Ranchi Commissionerate

.....Respondent
(6th Floor, C.R. Building, 5A, Main Road, Ranchi-834001.)

APPEARANCE

Dr. Samir Chakraborty, Senior Advocate & Shri Abhijit Biswas, Advocate for the Appellant (s)

Shri S.K.Singh, Authorized Representative for the Revenue

CORAM:HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)

FINAL ORDER NO. 77051/2025

DATE OF HEARING :13.06.2025
DATE OF DECISION :13.06.2025

Per :R. MURALIDHAR

The appellant, is a manufacturer of M. S. Ingots. They also had a Rolling Mill in the same premises, at Jharkhand. After coming into effect of Section 3A, the Commissioner, Central Excise, Jamshedpur, on March 25, 1998, provisionally determined the annual capacity of production of the Induction Furnace, under the provision of Rule 3 of the Induction Furnace Annual Capacity Determination Rules, 1997 at 9600 MT. Thereafter, on May 28, 1998 the jurisdictional Superintendent of Central Excise issued a show cause notice mentioning therein that the annual capacity had been fixed at 9600 MT and thus the liability of the appellant from September, 1997 to March, 1998 was allegedly Rs. 42,00,000/- which had to be paid on or before March 31, 1998 but the assessee had paid only Rs. 14,54,996/- and thus paid less by Rs. 27,45,204/-. The appellant was asked to show cause as to why the said duty of Rs. 27,45,204/- together with interest @ 18% be not realized from the appellant. The appellant filed a reply dated June 21, 1998 to the said notice dated May 28, 1998 drawing the attention of the jurisdictional Assistant Commissioner of Central Excise to the fact that Central Excise duty was being paid by the appellant @Rs. 750/- per MT under Rule 96ZO(1) of the said Rules *"under protest".* It was stated that the liability of paying duty under Section 3A of the Act was *sub-judice* before Hon'ble Supreme Court and the Hon'ble Supreme Court had directed to file application on the basis of actual production by assessees which had to be considered by the Department and until then no coercive action was to be taken by the Department. A copy of the said letter dated 21.06.1998 was also filed.No further proceeding was continued thereafter by the Department on this show cause notice.

2. The appellant, thereafter, by a letter dated March 13, 1999 represented to the Commissioner against the arbitrary fixation of

Annual Production Capacity, ignoring the actual production figures. There was no response to the said representation. On June 14, 1999 another show cause notice bearing No. V(72)(15)16/99/3506 was issued to the appellant by the Deputy Commissioner, Central Excise, Dhanbad, alleging that the annual production capacity of the induction furnace had been fixed at 9600 MT and in terms thereof the appellant was required to pay duty of Rs. 72,00,000/- annually but they had paid only Rs. 24,38,381/- for the period 1998-99 (until March 31, 1999) and thus, had to be pay outstanding amount of Rs. 47,61,919/-. The appellant was called upon to show cause to the Commissioner of Central Excise, Jamshedpur as to why the said alleged outstanding amount should not be realized from it along with 18% interest. The appellant filed its reply dated July 15, 1999 to the said show cause notice before the Commissioner Central Excise. A personal hearing by the Commissioner was held thereafter. Thereafter, on November 7, 2000, another show cause notice bearing No. V(72)(15)35/2000/6272 was issued to the appellant by the jurisdictional Assistant Commissioner wherein on the basis of similar allegations as made in the first show cause notice, the appellant was called upon to show cause to the Commissioner of Central Excise, Jamshedpur as to why an alleged outstanding amount of duty of Rs. 37,78,160/- relating to the period April 1999 to March 2000 (1999-2000) should not be demanded and realised from the appellant along with interest thereon @ 18% per annum.

3. In the meanwhile the appellant installed a Rolling Mill in the said factory. On December 1st/ 3rd, 1999, the Commissioner of Central Excise, Jamshedpur passed an order purporting to fix annual capacity of production in respect of Re-rolling Mill of the assessee in exercise of power under Rule 3(4) of the **Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997**at 12533.073 MT with effect from the date of starting production i.e. October 27, 1998.

4. Thereafter, on November 7, 2000, a show cause notice was issued by the jurisdictional Assistant Commissioner of Central Excise, wherein it was alleged that since annual capacity of production of the appellant had been determined at 12533.073 MT vide order dated December 3, 1999 of the Commissioner by the appellant in respect of re-rolled products, it was required to pay duty @ Rs. 300/- per MT multiplied by the annual capacity determined, according to which the amount of duty came to Rs. 50,13,229.20 but the appellant had paid only Rs. 12,21,317/-. The appellant was therefore, called upon the show cause to the Commissioner of Central Excise, Jamshedpur as to why the alleged outstanding amount of Rs. 37,91,912/- together with interest @ 18% until the date of actual payment, should not be demanded from the appellant and why penalty should not be imposed upon the appellant.

5. In the meanwhile, there was change in the jurisdictional Commissioner and the appellant's all three cases were transferred to the Commissioner (Adjudication), Central Excise & Service Tax, Ranchi.Thereafter, a common personal hearing was granted to the appellant relating to all the three show cause notices on January 13, 2006 by the Commissioner (Adjn) Central & Service Tax, Ranchi. Vide the common impugned order, the Commissioner confirmed the demands alongwith interest and also imposed penalties. Being aggrieved whereby the instant appeal has been preferred.

6. The Ld Senior Counsel, representing the appellant, makes the following submissions :

6.1 Section 3A (4) of the Act provided for power of Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. The said provision reads as follows :

> *"Where an assessee claims that the actual production of notified goods in his factory is lower than the production determined under sub-section(2), the Commissioner of Central Excise shall, after giving an opportunity to the assessee, redetermine the amount of duty payable by the assessee with reference to such actual production at the rate specified in sub-section (3)"*.

6.2 The validity of section 3A and Rules 96ZO and 96ZP of the said Rules came up for determination before the Hon'ble Supreme Court in the case of Commissioner of C. Ex. & Customs Vs. Venus Castings (P) Ltd. 2000 (117) ELT 273 (SC). While upholding the validity of the said provision the Hon'ble Supreme Court observed and held inter alia as under (<u>para 10</u>):

> *"10. The schemes contained in Section 3A(4) of the Act and Rule 96ZO(3) or Rule 96ZP(3) of the Excise Rules are two alternative procedures to be adopted <u>at the option of the assessee</u>. Thus the two procedures do not clash with each other. If the assessee opts for procedure under Rule 96ZO(1) <u>he may opt out of the procedure under Rule 96ZO(3) for a subsequent period</u> and seek the determination of annual capacity of production. An assessee cannot have a hybrid procedure of combining the procedure under Rule 96ZO(1) to which Section 3A(4) of the Act is attracted."*

6.3 This issue again came up for consideration by a Larger Bench of the Hon'ble Supreme Court in **Union of India Vs. Supreme Steel and General Mills 2001 (133) ELT 513 (SC).**The Hon'ble cited approval the decision of the Supreme Court in the case of **Venus Castings (P) Ltd,** and held that the assessee has a choice to opt for either actual manufactured based assessment or based on the Annual Capacity based assessment.

6.4 The above decisions of the Hon'ble Supreme Court in **Venus Castings (P) Ltd.**and **Supreme Steel and General Mills,** are being relied upon by the appellant.

6.5 In the instant case it is evident from the letters that all through during the material period the appellant had exercised its option for determination of duty liability on the basis of actual production. In fact under letter dated 15.07.1999, the appellant had specifically stated that it was paying duty on the basis of Annual Capacity of Production determined by the Assistant Commissioner "**<u>under protest</u>**". It is thus evident that the only option exercised by the appellant in the instant case all along was that the determination of duty liability should be made on the basis of actual production made. There is no evidence to the contrary and none has been disclosed in either the show cause notices or in the impugned order.

6.6 In fact it is acknowledged in the impugned order, in the "*DISCUSSION & FINDINGS*" part thereof, that the option exercised was as aforesaid of actual production basis by the appellant, relying upon interim orders passed by the Hon'ble Supreme Court in the case of **Venus Castings (P) Ltd.** and by the Hon'ble Patna High Court in the case of the appellant..

6.7 It is submitted that letters of the appellant tantamounted to exercising of option by the appellant. In the premises, the Commissioner should have appreciated and erred in not doing so that in terms of the decisions of the Hon'ble Supreme Court in the case of **Commissioner of C.Ex& Custom Vs.Venus Castings (P) Ltd.**and **Union of India Vs. Supreme Steel & General Mills**, there was or could be no determination by the Commissioner or discharge of duty liability by the appellant under the provisions of either Rule 96ZO or Rule 96ZP of the Central Excise Rules in the instant case for the financial years 1998-99 and 1999-2000.

6.8 In spite thereof wrongfully and incorrectly the Commissioner has purported to hold in the impugned order that the appellant had "initially"opted for determination of the duty liabilities under Rules 96ZO and 96ZP of the said Rules and had requested for redetermination on actual production basis towards the end of financial year. This finding of the Commissioner has no support in the records of the instant proceedings including the show cause notices and/or in any other document. Significantly the finding of the Commissioner is also unsupported by any material disclosed. No credence can therefore be given to this erroneous finding of the Commissioner. It is an undisputed fact that all along the appellant had paid duty during the period involved as per actual production basis after exercising consistently option to this effect and has been filing returns accordingly.

6.9 The appellant submits therefore that in the instant case the duty demands confirmed by the impugned order are contrary to law and thus untenable and unsustainable.

6.10 Imposition of penalty and order to make payment of interest in terms of Rule 96ZO and 96ZP of the said Rules are illegal, invalid and bad.

6.11 In the case of **Shree Bhagwati Steel Rolling Mills** Vs. **COMMR of Central Excise 2015 (326) ELT 209 (SC)**the Hon'ble Supreme Courthas held that, inter alia, the provisions being Rule 96ZO and 96ZP of the said Rules, were ultra vires the Act, arbitrary and untenable and hence violative of Article 14 and 19(1)(g) pf the Constitution of India and no interest can be charged nor penalty imposed thereunder upon an assessee.

6.12 Therefore, the demand of interest and imposition of penalty on the appellant by the impugned order are also illegal, invalid and unsustainable.

7. In view of the above submissions, it is prayed that the impugned order may be set aside and the appeal may be allowed.

8. The A R, representing the Revenue, reiterates the detailed findings of the Adjudicating authority. He justifies the Annual Capacity fixed by the authorities and accordingly prays that the appeal may be dismissed.

9. Heard both the side and perused the appeal papers. The written submissions along with annexed documents submitted by the appellant was taken into consideration.

10. We have gone through the relevant letters from the Revenue and the appellant with regard to fixation of the Annual capacity. They are reproduced below :

ANNEX A

GOVERNMENT OF INDIA Annexure A

OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE::::::::::::::::::::::::PATNA

ORDER

Dated: 25 March, 1998

Annual capacity of production of M/s Vikromatic Steels (P) Ltd. Deoghar was determined provisionally at 9600 M.T. and was communicated to them vide this office letter IV(16)118/F-E/97 dated 29.9.97.

Where is any option?

Now, under the provisions of Rule-3 of the Induction Furnace Annual Capacity Determination Rules, 1997, the Annual capacity of production of M/s Vikromatic Steels (P) Ltd has been determined at 9600 M.T. M.T.

Annual capacity of production has been determined on the basis of information/documents produced. For any mis-statement and/or misdeclaration detected afterwards on the part of the assessee M/s Vikromatic Steels (P) Ltd Deoghar, they shall be liable for appropriate action under the provisions of Central Excise Act/Rules, 1944.

M/s Vikromatic Steels (P) Ltd Deoghar are directed to discharge their duty liability etc properly and within the prescribed period failing which action under the Central Excise Act/Rules/1944 will be taken against them.

25/3/98

(Dr. N.K.P. SINHA)
Commissioner
Central Excise:::::Patna

C.No. IV(16)118/F-E/92/1013 Dated: 25.3.98

Copy forwarded for information and necessary action to:

1. M/s Vikromatic Steels (P) Ltd, Baijnathpur, Deoghar.
2. Assistant Commissioner, Central Excise Division Bhagalpur with ref. to his letter [illegible] dated 12.2.98

Dy. Commissioner (T)
Central Excise:::::Patna

Excise Appeal No.230 of 2006

(12)

ANNEX 'B'

VIKROMATIC STEELS PVT. LTD.

BAIJNATHPUR, B. DEOGHAR-814112

21.[illegible].98.

Date

Ref. No. VSPL/98-[illegible]

To The [illegible] Commissioner,
~~[illegible]~~,
Central [illegible] Division,
Dhanbad.

(P2)

Sub.: Show Cause Notice.
Ref.: [illegible] [illegible], C.E., Deoghar [illegible] letter no. V/[illegible]/SecI/97-[illegible]/412 [illegible], 2[illegible].5.98.

Dear Sir,

In [illegible] to above, we would like to submit the following facts for your kind consideration :

1. That we [illegible] paying C.E. Duty @ Rs.750/-PMT on clearance under Sub-Rule(1) of Rule 96ZO under protest since ~~1st~~ September, 1997, on the production [illegible] 1st of September, 1997.

2. That accordingly, we are paying C.E.Duty by crediting and debiting the amount [illegible] Personal Ledger Account.

3. That we have already filed a claim petition for abatement for the closure period of production ~~[illegible]~~ October, 4th 1997 to March, 1998, which is of Rs.1[illegible],56,000/- only vide our courier and Regd.letter dt. 31.3.98 and 19.05.98, and still lying pending for grant of relief before the Commissioner of Central Excise and a copy to The Asstt.Commissioner Central Excise Division, Bhagalpur.

4. That on the clearance upto March, 1998, we have already deposited Rs.14,54,996/-under protest @ Rs.750/-per M.T.

5. That whereas the liability for depositing the C.E.Duty upto March, 1998 has been fixed Rs.42,00,000/- by the Department

6. That our deposited amount of Rs.1454996/- plus the amount of abatement claimed for Rs.1056000/- totalling to Rs.25,10,996/- out of Rs.42,00,000/-as demanded. Hence, our duty liability is only for Rs. 16,89,004/-under the sub-rule(1) of ~~[illegible]~~ of Rule 96ZO.

7. That the matter of decision of C.E.Duty liability under section 3A is under sub-judice to The Hon'ble Supreme Court of India.

8. That the Hon'ble Supreme Court of India has pleased to order in civil appeal that still, it will be open to the manufacturer to submit the application on the basis of the actual production and the same shall be duly considered by the department in accordance with the rules.

P.T.O.

बीमा नहीं NOT INSURED

Amount of Stamp affixed

Received a Registered

Addressed to

Signature of Receiving Officer

Received 20/6/98

11. From the above documents, we find that in terms of Section 3A of the CEA 1944, initially on 23.09.1997, the annual capacity of production of the Induction Furnace, @ 9600 MT was fixed on provisional basis. Subsequently, the Commissioner, vide Order dated 25.03.1998, finally determined the annual capacity of production of the Induction Furnace, @ 9600 MT. The appellant, vide their letter dated 21.06.1998, submitted that they were paying the Excise Duty 'Under Protest' towards the Annual Production Capacity determined provisionally in September 1997. They also drew the attention towards the issue pending before the Hon'ble Supreme Court and the direction of the Apex Court to the Revenue to allow the manufacturer to pay the Excise Duty based on the actual production. The appellant's letter clarifies that they did not accept the Provisional / Final capacity determination by the Revenue.

12. The appellants have subsequently regularly been taking up this issue by writing letters from time to time. The relevant letters are extracted below :

Annex

VIKROMATIC STEELS PVT. LTD.

Head Office

Factory
MAHESHMARA
BAIJNATHPUR
DEOGHAR - 814 112 (BIHAR)

Ref. No. VSPL/98/99 Regd. with A/D. Date 13.3.99.

To
The Commissioner of Central Excise(By name),
143, Buradwari,
Sakchi,
Jamshedpur-831 001.

Sub.: Representation against arbitrary determination of annual capacity.

Ref.: Our representation regd. with A/D letter no. VSPL/98/99/59 dt. 20.11.98.

Respected sir,

Kindly refer to our Regd. with A/D letter no. VSPL/98/99/57 dt. 20.11.98 on the above subject, which was as per decision of the Hon'ble Supreme Court of India (Copy enclosed for ready reference), wherein, it has been clearely ordered that" it will be open to the manufacturer to submit the application on the basis of the actual production and the same shall be duly considered by the department in accordance with the rules". And in our case, we have already submitted that our actual production during the year 1997/98 is 3215.345 M.T(from April to August -1226.570 M.T. and from September, 1'97 to March, 1998 is 1988.775 M.T.) and April, 1998 to October, 1998 is 2731.763 M.T. (photocopy of the production statement duly verified by RT-12 return is enclosed herewith) due to several unavoidable circumstances.

27/11/98

But, untilnow, your goodself have not been kind to pass an order approving our prayer.

We, therefore, request you, Sir, to kindly decide the matter at an early date, so that the SSI unit may be saved from unnecessary harrassment in the matter.

Thanking you,

Yours faithfully,
For Vikromatic Steels Pvt. Ltd.

Director.

Encl.: Photocopies. (as above)

Copy To The Assistant Commissioner, Central Excise Division, Central Revenue Building, Dhanbad for information please.

+ See next page

बीमा नहीं NOT INSURED
No. 4249
Amount of Stamps affixed
Received a Registered
Addressed to Central Excise Division
Dhanbad
Signature of Receiving Officer

बीमा नहीं NOT INSURED
No. 4248
Amount of Stamps affixed
Received a Registered
Commissioner of Central Excise
Addressed to Sakchi
Jamshedpur
Signature of Receiving Officer

-24- ANNEX 'D'

VIKROMATIC STEELS PVT. LTD.
MAHESHMARA, BAIJNATHPUR
B-DEOGHAR - 814112 (BIHAR)
STD : 06432 Phone : 20033, 22313 (F)
22291, 20111 (O)

Regd. Office :
14/8 MACANZY LANE
FLAT D, 3rd FLOOR
(SWASTIKA HOUSE)
SALKIA, HOWRAH—711101
Phone : 5560638

Ref. No. VSPL/ 5/2000/2001 Regd. with A/D. Date 2[illegible].5.2000.

To
The Commissioner of Central Excise,
143, New Baradwari, Sakchi,
Jamshedpur-831001.

Sub.: Central Excise-Notice to Show Cause bearing C.No.V(72)(15)16/99/
3506 Dt.14.6.99 as issued by the Deputy Commissioner of Central
Excise, Dhanbad-grant personal hearing correspondence regarding.

Ref.: Your letter no. V(72)(15)61/JSR/99/5123 dt.26.4.2000.

Dear Sir,

Kindly refer to the letter bearing C.No.V(72)(15)/61/Adj/JSR/
99/5123 dated 25/26.4.2000 of the Superintendent(Adjn.), Central Excise
Hqrs., 143, New Baradwari, Sakchi, Jamshedpur-831001 intimating us that
your honour was pleased to fix the hearing on 31st May 2000 in the
matter. It has also been stated therein that earlier three opportuni-
ties for personal hearing were granted and that this may be treated a
the last opportunity of personal hearing. But in this connection you
attention is invited to our submissions as submitted before your hono
on 15th July, 1999 interalia stating therein as under :

i) That the Show-cause notice bearing C.No.V(72)(15)/16/99/3506
dt.14th June, 1999 as issued by the Deputy Commissioner of Central Exc
se, Dhanbad without disclosing the documents to us so as to enable to
us but to deal with the same.

ii) It was also stated in the aforesaid representation that on the
basis of the restrospective effect of the amended Rule 96ZO of the
Central Excise Rules, 1944 the matter was moved before the Hon'ble
Supreme Court of India on 21.4.98 by the Union of India against the
decision of the High Court whereby the Hon'ble Supreme Court of India
in the case of Civil Appeal No.5263 of 1998, Union of India and others
Vrs-Supreme Steels & General Mills and others, the Hon'ble Mr.Justice
S.C.Agrawal, the Hon'ble Mr.Justice S.Saghir Ahmad and the Hon'ble Mr.
Justice A.P.Mishra were pleased to pass order which reads as undert-

"Whiel the matters are pending in thi Court the Union
Government shall not take any penal or coercive measures
under the Notification No.37/98-Central Excise(N.T.) dated
March 10, 1998. It will be open to the manufacturer to submit
applications on the basis of the actual production and if any
such application is submitted the [illegible] shall be duly consider-
ed by the competent authority in accordance with the rules."

iii) That meanwhile a writ application was filed by us before the
Hon'ble Patna High Court which was disposed of in a writ petition No.
CWJC No.8605 of 1999 that till the disposal of the Civil Appeal Nos.
52-63 of 1998 by the Hon'ble Supreme Court of India the Excise Duty
realisation shall continue on the basis of actual production. The
contents and purports of the said order was also communicated to you
you vide our letter dated 11.11.99 in the matter.

Head Office:
14/6 MACANZY LANE
FLAT D. 3rd FLOOR
(SWASTIKA HOUSE)
SALKIA HOWRAH—711101
Phone : 6660636

VIKROMATIC STEELS PVT. LTD.
MAHESHMARA, BAIJNATHPUR
B-DEOGHAR – 814112 (BIHAR) 25
STD : 06432 Phone : 20033 22313 (F)
22291 20111 (O)

Ref. No. VSPL/E/2000/2001. page-2. Date 23.5.2000

iv) That thereafter on 5.7.98,16.8.98,7.10.98,20.11.98,8.3.99 and 13.3.99 submitted representations to the Commissionerate of Central Excise,Jamshedpur for re-determination on the basis of actual production,but unfortunately no decision have been taken by the said Commissionerate of Central Excise,Jamshedpur till date. 4

That,unfortunately,no decision has been communicated to us interms of our representations as submitted before your goodself on 15th July,1999.

That on perusal of the purported notice to Show-Cause demand as issued by the Deputy Commissioner of Central Excise,Dhanbad under Rule 233A of the Central Excise Rules,1944 it appears that the proposed action against my client is based on various documents records/reports etc. alleged to have been taken into consideration in framing the purported charges,as is seen from the purported show cause cum-demand notice,copies of documents/records/reports including the report of the investigating agencies have not been supplied and/or furnished to my said client to enable my client to draw the effective representation to be placed before your Honour.

That you are well aware,Sir,that the Hon'ble Supreme Court in the case of Ambalal Vs-Union of India,..ported in AIR,1961 S.C. 264 had held that infiction of penal liabilities were quasi crimina in nature. In criminal trial as a fair play in action,the accused is entitled to the copies of the reports/documents etc. free of charges.

That your Honour is also aware that there are catena of decisions both by the Hon'ble Supreme Court of India as well as different High Courts that the adjudication proceedings is a quasi criminal and/or quasi judicial and that the accused persons are entitled to the copies of each of the documents relied upon in framing the charges.

That your Honour is further aware that in the case of M/s Naina Vrs-Collector of Customs,reported in 1975 Tax LR 1381, it was held by the Hon'ble High Court at Calcutta that the accused persons not only entitled to the copies of the documents relied upon by the Department but is also entitled to the copies of the documents which may enable him to prove his innocence.

That further,the Hon'ble Supreme Court in the case of Shalini Soni Vs-Union of India,reported in AIR,1981 SC-431 held that 'Grounds' do not mean mere factual inference but mean factual inferences plus factual material which led to such factual inferences. The 'Grounds' must be self sufficient and self explanatory.

P.T.O. on page-3.

13. From the above letters and the letters referred to in the second page of letter dated 23.05.2000, it gets clarified that the appellant was continuously taking up the matter with the Revenue protesting the fixation of the Annual Capacity. It is also noticed that the appellant themselves have approached the Patna High Court and based on the earlier directions of the Supreme Court, the High Court had directed the actual production may be taken for the Excise Duty payment.

14. The issue of the legal sanctity of the Section 3A of the CEA 1944and Rule 96ZO were before the Hon'ble Supreme Court in the case of **Union of India Vs. Supreme Steel and General Mills 2001 (133) ELT 513 (SC),** wherein the Hon'ble Apex Court has held as under :

> *"2.Learned counsel for the parties informed that now the matter remains confined to a period of three years only as the scheme so introduced, has since been dropped. Shri Joseph Vellapally and the other learned counsels appearing on behalf of the manufacturers have stated that they do not challenge the validity of Section 3A, introduced in Central Excise Act, 1944. On the other hand it has been submitted that the excise duty may be charged according to the said provision, on the basis of actual production but for the period of whole year. Shri Harish Salve, learned counsel appearing for the Union of India submitted that there is no dispute with the offer made and* ***<u>also that the assessment shall be made for whole period of one year namely the financial year</u>****. No dispute thus remains on the point and the excise duty shall accordingly be assessed in respect of matters not yet closed and still pending before the concerned authorities."*

> *"3............... It was absolutely optional for the manufacturer to opt for payment of excise duty in accordance with sub-rul3 3 of Rule 96ZO) on the basis of total furnace capacity installed as provided therein. <u>The manufacturer cannot opt twice during one financial year first choosing to pay in accordance with sub-rule 3 of Rule 96ZO and thereafter to switch over to actual production basis under Section 3A (4) of the Act, in case it is less than the duty payable under sub-rule 3 of Rule 96ZO</u>. The said sub-rule is quite clear that the option under it is available subject to the condition that once having opted for it, benefit if any under sub-s (4) of Section 3A of the Central Excise Act, 1944 shall not be available. We find that the controversy sought to be raised stands finally settled by a decision of this Court reported in JT 2000 (4) SC 77 – Commissioner of Central Excise & Customs v. M/s.*

Venus Castings (P) Ltd. It has been clearly held that two procedures namely one as provided under sub-s (4) of Section 3A of the Central Excise Act and the other as provided under sub-rule 3 of Rule 96ZO of Central Excise Rules are alternative procedures <u>and the assessee has to opt for one. Once having done so he cannot claim the benefit of the other</u>."

15. The Apex Court has held that the assessee has two options under Section 3A. They can opt for Annual Capacity based duty payment, which is required to be determined by the Revenue, based on various manufacturing paramaters. Secondly, they can pay based on the actual production / clearance basis. The only bar imposed is to the effect that the assessee cannot switch over from one procedure to another within the same financial year.

16. Coming to the factual matrix of the present case, it is seen that right from the beginning when the annual capacity was fixed provisionally in September 1997, the appellant has been filing letters to the effect that they are not agreeing with the same. They have submitted letter to the effect that the Duty is being paid 'Under Protest'. As a matter of fact, based on the conditional stay granted by the Hon'ble Supreme Court, they also have approached the Patna High Court and have got such an order. Therefore, we do not find any material evidence from the entire case history that the appellant has initially opted for / agreed to the Annual Capacity based Excise Duty payment as is being claimed by the Revenue. On the contrary, the documentary evidence placed before us by the appellant, clarifies the stand taken by them right from the beginning. Therefore, we do not agree with the Revenue's contention that the appellant had initially agreed to / opted for Annual Capacity based Excise Duty payment and subsequently sought change in the procedure. Therefore, we hold that the demands confirmed solely on the basis that the Revenue has not

made the payments as per the Annual Capacity fixed by the Revenue is legally not sustainable. We set aside the confirmed demands on this ground.

17. In respect of interest and the penalty, we find that this issue was dealt by the Hon'ble Supreme Court, wherein it is held :

> *"31. Applying the Constitution Bench decision stated above, it will have to be declared that since Section 3A which provides for a separate scheme for availing facilities under a compound levy scheme does not itself provide for the levying of interest, Rules 96ZO, 96ZP and 96ZQ cannot do so and therefore, on this ground the appellant in Shree Bhagwati Steel Rolling Mills has to succeed. On this ground alone therefore, the impugned judgment is set aside. That none of the other provisions of the Central Excise Act can come to the aid of the Revenue in cases like these has been laid down by this Court in* ***Hans Steel Rolling Mill*** *v.* ***CCE, (2011) 3 SCC 748 = 2011 (265) E.L.T. 321 (S.C.)****"*
>
> ***39.*** *A penalty can only be levied by authority of statutory law, and Section 37 of the Act, as has been extracted above does not expressly authorize the Government to levy penalty higher than Rs. 5,000/-. This further shows that imposition of a mandatory penalty equal to the amount of duty not being by statute would itself make Rules 96ZO, 96ZP and 96ZQ without authority of law. We, therefore, uphold the contention of the assessees in all these cases and strike down Rules 96ZO, 96ZP and 96ZQ insofar as they impose a mandatory penalty equivalent to the amount of duty on the ground that these provisions are violative of Articles 14, 19(1)(g) and are ultra vires the Central Excise Act.*

18. Applying this case law as also observing that the demands themselves are held as not sustainable, the interest and penalty are also set aside.

19. As a result, the impugned order is set aside and the appeal is allowed with consequential relief, if any, as per law.

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

Sd/	Sd/
(RAJEEV TANDON)	**(R. MURALIDHAR)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

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