

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO. IV**

Appeal No. E/86209/18

(Arising out of Order-in-Original No. NSK/CGST-CS/002/CPM/13/2017-18 dated 29.12.2017 passed by the Commissioner of CGST & Central Excise, Nasik).
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M/s Mohammadi Steel Inds. Pvt. Ltd.

Appellant

Vs.

Commissioner of CGST & Central Excise, Nashik
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Respondent

Appearance:

Shri Jayesh P Doshi, C.A.

for Appellant

Shri Sanjay Hasija, Supdt. (AR)

for Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
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Date of Hearing: 05.07.2018

Date of Decision: 05.07.2018

ORDER NO. **A/87037/2018**

Per: Dr. D.M. Misra

Heard both sides.

2. This is an appeal filed against Order-in-Original No. NSK/CGST-CS/002/CPM/13/2017-18 dated 29.12.2017 passed by the Commissioner of CGST & Central Excise, Nasik.

3. Briefly stated facts of the case are that the appellant during the relevant period i.e. May, 1998 to March, 2001 were engaged in the manufacture of re-rolling products and discharged duty under Section 3A of Central Excise Act, 1944 read with Rule 96ZP(3) of erstwhile Central Excise Rules, 1944, on the basis of the Annual Production Capacity fixed by the competent authority. During the said period, the factory remained closed for more than 7 days at different point of time. Accordingly, they claimed abatement of Rs.14,44,275/- under Rule 96ZP(2). The said production has been rejected on the ground that since the appellant has exercised option to pay lump sum duty under Rule 96ZP(3) of the said Rules, therefore, the abatement for the period of closure under Rule 96ZP(2) is not admissible to them.

4. Learned C.A. for the appellant submits that even though the matter has been decided against them by three members Bench of the Hon'ble Supreme Court but recently the issue has been referred by two members Bench of the Hon'ble Supreme Court for constitution of the Larger Bench in the case of *Bhuwalka Steel Industries Ltd. Vs. Union of India* – 2017 (348) ELT 393 (SC). Therefore, the matter should not be decided and be kept in abeyance. However, he submits that no stay has been granted by the Hon'ble Supreme Court against the earlier judgment of the three members Bench.

5. Per contra learned AR vehemently argued that this Tribunal has decided the issue. He further submits that all these issues have been considered by the jurisdictional High Court in the case of *Rajuri Steels Pvt. Ltd. – 2008 (225) ELT 189 (Bom)*,

wherein it has been held that once the assessee opted to discharge duty under Rule 96ZP(3) of the erstwhile Central Excise Rules, 1944, he cannot in turn ask for abatement under Rule 96ZP(2) of the Central Excise Rules, 1944. Further, he submits that in absence of stay from the Supreme Court, the precedent on the issue ought to be followed. In support he referred to the judgment of Hon'ble Delhi High Court in the case of *Principal Commissioner of Central Excise, Delhi –I Vs. Space Telelink Ltd. – 2017 (358) ELT 189 (Del)*.

6. I have carefully considered the submissions advanced by both sides. I find that learned C.A. for the appellant could not produce any order whereby, the operation of the judgment of 3 members Bench in the case of *Supreme Steels and General Mills - 2001 (133) ELT 513 (SC)* has been stayed. In absence of any stay, the ratio laid down thereunder be considered as binding precedent interpreted by the Hon'ble Bombay High Court in the case of *Rajuri Steels (supra)*, and the issue is settled in favor of the Revenue. Their Lordships observed as follows: -

“5. Coming back to Rule 96ZP(3), terminal clause of the same clearly indicates that those manufacturers, who are enjoying benefit of the scheme of payment of one twelfth of the duty payable on the basis of annual production capacity determined, are required to pay the duty at the rate of Rs. 300/- per tonne, as against Rs. 400/- per tonne in the cases covered by sub-rule (1) of Rule 96. Therefore, if the manufacturer desires to enjoy the benefit of the scheme under Rule 96 ZP(3) of payment of annual duty at a lower rate at Rs. 300/- per tonne and by payment in twelve monthly instalments payable before 10th of every calendar month, the condition is that he shall not have benefit of proviso to sub-section (3) as also sub section (4) of Section 3, which we have already reproduced hereinabove. If the proviso to sub-section (3) is not available, the manufacturer-enjoying benefit of payment by the procedure prescribed under Rule 96-ZP(3) shall have no remission, merely because production had come to halt for certain period, although exceeding seven days.

6. So far as reliance placed by Advocate Shri Chillarge on proviso to sub-section (2) is concerned, on comparing the text of sub-section (2)

with sub-section (3), it is evident that, sub-section (2) is pertaining the procedure for determination of annual production capacity whereas sub-section (3) is regarding rate and manner of recovery, wherein proviso enables some relaxation. Proviso relied upon by Advocate Shri Chillarge is for the purpose of determination of annual production capacity. If the authorities, after declaring particular product as “notified goods”, proceeds to fix the annual production capacity of the factory, it has to do so by giving proportionate increase, if during the year under consideration for the purpose of fixation of annual production capacity, the factory was closed for certain period, manufacturer will be able to evade the duty, by taking the production of six months to be the annual production capacity, because factory was closed for six months during the year, taken as standard for the purpose of determination of annual production capacity.

7. We are afraid, proviso relied upon by learned Counsel for the appellant does not come to the rescue of the appellant-assessee. On the contrary, the same supports the department during the process of determination of annual production capacity. The benefit of proviso to sub section (3) and sub-section (4) of Section 3A of the Act, is not available to the appellant herein, if it has enjoyed benefit of payment of excise duty under procedure prescribed by Rule 96-ZP(3).”

Following the aforesaid judgment, I do not have any hesitation to confirm the order of the adjudicating authority and dismiss the appeal of the appellant.

7. Appeal is accordingly dismissed.

(Dictated and pronounced in the Court)

(Dr. D.M. Misra)
Member (Judicial)

Sinha