CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 769 OF 2012

[Arising out of Order-in-Appeal No: P-III/RS/41/2012 dated 14th February 2012 passed by the Commissioner of Central Excise (Appeals – III), Pune.]

S C Vankudre
Subhash Industries
90 Industrial Estate, Hotgi Road, Solapur – 413 003 … ***Appellant***

versus

Commissioner of Central Excise
Pune – II
ICE House, 41/A Sassoon Road, Pune – 411 001 ***…Respondent***

APPEARANCE:

Shri Rajesh Ostwal, Advocate for the appellant

Shri Sanjay Hasija, Superintendent (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 86205 /2022

DATE OF HEARING:	14/06/2022
DATE OF DECISION:	14/12/2022

PER: C J MATHEW

This appeal of Mr SC Vankudre, proprietor of M/s Subash Industries, against order-in-appeal no. P-III/RS/41/2012 dated 14th

February 2012 of Commissioner of Central Excise (Appeals-III), Pune brings this dispute before us for the second time. On the former occasion, difference of opinion among the constituents of the Bench was resolved, upon reference to Third Member, with majority opining that the matter should be remanded to the original authority.

2. The limited issue for determination in this appeal is the conformity of the findings of the lower authorities with the terms of remand. The dispute pertains to the proposal of central excise authorities to include 2 nos. 'cold rolling machines' - claimed by the appellant to be 'standby' and functionally inoperable – in assessment under 'compounded levy scheme', in pursuance of rule 96 ZA - ZV of Central Excise Rules, 1944 along with notification no. 109/94-CE (NT) dated 13th May 1994, between January 1997 and January 1998 culminating in assessment of differential duty of ₹ 1,20,000. The appellant uses 'aluminium sheets' produced by them which are cut as 'circles' for subsequent conversion into aluminium utensils. Circles are cut by deploying 'cold rolling machine' and the scheme prescribes levy at ₹ 7500 per month per machine which was alleged to have been evaded insofar as the two other machines are concerned.

3. We have heard Learned Counsel for the appellant and Learned Authorised Representative.

4. It is seen from the impugned order that the first appellate

authority has upheld the order of the original authority with the finding that

> *'10. It is interesting to observe that the appellant got machine No.1 and installed but procured the other two machines reportedly as standby but never installed and used since it's acquisition in the year 1974 to 1975. It is uncommon and strange for a prudent businessman to purchase three machines but using only one machine and never even installed the other two machines for more than 20.years. If it is purchased as standby not one but two machines, there is no satisfactory explanation or reasoning as to why the said two machines reportedly purchased for use as standby, have never been installed or used. In the Statement Mr. Subhash stated that it is his experience that breakdown takes place and repairing requires two-three months and hence standby machines are essential to maintain the production. This statement of Shri Subhash and the contention that the machines purchased for use as standby have not been installed and never used are inconsistent and self-contradictory. There was no occasion, according to the appellant, warranting use of the standby machines. Appellant reportedly not installed the machines probably not expecting any such exigencies. In any case, the appellant for the reasons best known to him, failed to comply with the statutory declarations required to be filed under Rule 96ZC and Rule 96ZL indicating the material facts including the changes, if any, to the department.*
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> *11. Department has established it's case with reasonable evidences. On the other hand, the appellant had failed to come up with any satisfactory explanations on the suppression of material facts amounting to mis-declaration. Member (Technical) in Para No.3 of the order observed that from the statement of the proprietor of the firm recorded on 5/2/1998*

under Section 14 of CEA that the three machines were installed on various dates prior to the year 1980 and it is difficult to accept two machines standby for one machine and the machine not in working order will be useless as standby. The Honourable Member (Technical) has also observed that the burden of proof that they have not utilized the two machines was on the appellant. I am, therefore, of the view that the material facts do not support the plea of the appellant that two machines were not installed or used in the manufacture of the final product and thereby conclude that the appellant is liable to pay excise duty under the Compounded Levy Scheme taking the number of cold rolling machines installed in the factory premises as three by applying the rate of duty of Rs.7,500/- per month per machine. The duty is liable to be discharged accordingly. Since this is the case of evasion of duty by suppression of material facts and mis-declaration, there is no merit to consider the plea to waive the penalty imposed.'

in response to the plea of the appellant that two of the machines remained idle at any given point in time.

5. The terms of remand are unarguably clear and the remit to the lower authorities specific to

'5. The only contention of the appellants is that they were having electric connection for 50HP from MSEB on which only one machine can operate. This plea was also taken before the ld. Commissioner (Appeals). The ld. Commissioner (Appeals) has not given any findings on this aspect. Admittedly, the appellants were availing special procedure under Notification No. 33/97 issued under Rule 96ZB. Therefore, the burden of proof that they have not

utilized the two machines is on the appellant. This aspect requires reconsideration. In view of the above, the impugned order is set aside and the case is remanded to the ld. Commissioner (Appeals) for deciding afresh, after affording an opportunity of personal hearing to the appellant. The appeal is disposed of by way of remand.'

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'7. I find that on the date of visit it was found that there were three machines in the premises. The contention of the appellants is that two machines were standby and were not used in the manufacture of the specified goods. Therefore, duty cannot be demanded. I further find that the ratio of the decision of the Hon'ble High Court of Rajasthan in CCE vs. Jupiter Industries (supra) is not applicable in the facts and circumstances of the case as in para 7 of the order noticed the fact that two machines were dismantled after due intimation to the Commissioner of Central Excise. The appellants' plea is that two machines were not used in the manufacture of the final product. Hence this contention of the appellants requires reconsideration by the learned Commissioner (Appeals) as held by the Hon'ble Member (Technical)'.

6. The findings of the first appellate authority appears to be rhetorical with intent to eliminate improbability coupled with mere restatement of observation of the Tribunal for adoption of conclusion that is vague. That is not consistent with the specific aspect highlighted in the order of remand requiring ascertainment of the claim of the appellant that the machines were, in fact, non-functional. This the lower authorities have failed to do.

7. As the order of remand has not been complied with, it would be only fit and proper for the impugned order to be set-aside.

8. Accordingly, the appeal is allowed.

(Order pronounced in the open court on 14/12/2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*