IN THE HIGH COURT OF BOMBAY AT GOA

EXICISE APPEAL NO.34 OF 2008

The Commissioner of Central Excise,
ICE House, Patto, Panaji,
Goa – 403 001. … Appellant

Versus

M/s. Global Ispat Ltd.,
Plot No.M-20, Cuncolim Industrial Estate
Cuncolim
Salcete – Goa. …. Respondent.

Ms. Asha Desai, Standing Counsel for the Appellant.

Mr. Rajiva Srivastava, Advocate for the respondent.

Coram : N.M. Jamdar &
Prithviraj K. Chavan, JJ.

Date : 12 September 2018.

ORAL JUDGMENT :

By this appeal, the Commissioner of Central Excise has challenged the order passed by the Customs and Excise Service Tax Appellate Tribunal, Mumbai. The Tribunal, by the impugned order has allowed the appeal filed by the Respondent – Assessee and has remanded the matter to the Commissioner (Appeals).

2. The Respondent – Assessee, Global Ispat Ltd., has a unit

at Cuncolim Industrial Estate, Salcete Goa. The Respondent – Assessee was engaged in manufacturing of mild steel ingots. The said goods were amenable to the provisions of the Central Excise Tariff Act, 1985 under Chapter 72 thereof and the central excise duty was payable on their final products.

3. The capacity of the production of the Assessee was fixed by the Commissioner of Central Excise of Goa. The Assessee by the communication dated 4 August 1997 opted to avail the specific duty liability under Rule 96ZO(3) of the Central Excise Rules, 1944. It had declared that the capacity of their induction furnace as 3.5MT. It had produced a Certificate to that effect. The Department accordingly extended the said benefit under Rule 96ZO(3) to the Assessee. Thereafter the Assessee by the communication dated 22 September 1998, opted out the provisions of Rule 96ZO(3). According to it, it was compelled to do as there were recurrent power cuts in the area. Since the Assessee did not paid the amount of ₹5,00,000/- as specified under Rule 96ZO(3) before the Assessee opted out, various Show Cause Notices were issued. They were in respect of August 1997, September 1997 to December 1997, January 1998 to May 1998, June 1998 to November 1998, December 1998 to May 1999, June 1999 to August 1999, September 1999 to January 2000, February 2000 to March 2000. These eight Show

Cause Notices raised a total demand of ₹1,33,53,880/-. A demand of ₹23,61,950/-/- was confirmed and the demand of ₹1,02,91,661/- was dropped and penalty of ₹50,000/- under Rule 96ZO was imposed. The Revenue filed an appeal before the Tribunal on 24 October 2004. The appeal was dismissed by the Tribunal by an order dated 14 November 2005. An appeal was filed by the Revenue in this Court and by order dated 27 November 2006 this Court directed the Tribunal to consider the issues involved alongwith the appeal filed by the Respondent – Assessee. On 28 December 2006, Tribunal decided the matter and the matter was sent to the Commissioner. The Commissioner of Central Excise, Goa by an order dated 28 September 2007 confirmed the differential duty amounting to ₹23,61,950/- alongwith the accrued interest @18%. The Assessee filed an appeal before the Tribunal and the Tribunal by the order impugned in this appeal remanded the proceedings to the Commissioner.

4. Being aggrieved, the Revenue has filed the present appeal on 28 January 2009. The appeal was admitted on the following substantial question of law:

> *"Whether provisions of Section 3A requiring determination of annual capacity of production are relevant for the purpose of the assessee who is paying excise duty under Rule 96ZO(3) based upon furnace capacity shall be the substantial question of law for*

adjudication?"

5. The two provisions of the Act are relevant for consideration in this matter. First is the Section 3A of the Central Excise Act, 1944. The Section has been inserted by way of amendment notified in the year 1997. Section 3A reads thus :

> *"3A Power of Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. –*
>
> *(1) Notwithstanding anything contained in section 3, where the Central Government, having regard to the nature of the process of manufacture or production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such other factors as may be relevant, is of the opinion that it is necessary to safeguard the interest of revenue, specify, by notification in the Official Gazette, such goods as notified goods and there shall be levied and collected duty of excise on such goods in accordance with the provisions of this section.*
>
> *(2) Where a notification is issued under sub-section (1), the Central Government may, by rules,–*
>
> *(a) provide the manner for determination of the annual capacity of production of the factory, in which such goods are produced, by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity shall be deemed to be the annual*

production of such goods by such factory; or

(b) (i) specify the factor relevant to the production of such goods and the quantity that is deemed to be produced by use of a unit of such factor; and (ii) provide for the determination of the annual capacity of production of the factory in which such goods are produced on the basis of such factor by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity of production shall be deemed to be the annual production of such goods by such factory: Provided that where a factory producing notified goods is in operation during a part of the year only, the annual production thereof shall be calculated on proportionate basis of the annual capacity of production: Provided further that in a case where the factor relevant to the production is altered or modified at any time during the year, the annual production shall be re-determined on a proportionate basis having regard to such alteration or modification.

(3) The duty of excise on notified goods shall be levied, at such rate, on the unit of production or, as the case may be, on such factor relevant to the production, as the Central Government may, by notification in the Official Gazette, specify, and collected in such manner as may be prescribed: Provided that where a factory producing notified goods did not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfils such conditions as may be prescribed.

(4) The provisions of this section shall not apply to

goods produced or manufactured, by a hundred per cent. export-oriented undertaking and brought to any other place in India. Explanation 1. – For the removal of doubts, it is hereby clarified that for the purposes of section 3 of the Customs Tariff Act, 1975 (51 of 1975), the duty of excise leviable on the notified goods shall be deemed to be the duty of excise leviable on such goods under the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), read with any notification for the time being in force. Explanation 2. – For the purposes of this section, the expression "hundred per cent. export-oriented undertaking" shall have the meaning assigned to it in section 3."

6. Section 3A refers to power of the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. It empowers the State to issue a notification having regard to the nature of the process of manufacturing or production of excisable goods of any specified description having regard to such other factors as may be relevant and to safeguard the interest of the Revenue. Section 3A(2) provides for determination of the annual capacity of production, or such factors or factors relevant to the annual capacity of production by specifying so in Rules.

7. The second provision which is of relevance is Rule 96ZO(3) of the Central Excise Rules, which reads thus :

"96ZO. Procedure to be followed by the manufacturer

of Ingots and billets.-

(1) ….

(2) ….

(3) Notwithstanding anything contained elsewhere in these rules, if a manufacturer having a total furnace capacity of 3 metric tonnes installed in his factory so desires, he may, in the beginning of each month from 1st day of August, 1997 to the 31st day of March, 1998 or any other financial year, as the case maybe, and latest by the tenth of each month, pay a sum of rupees five lakhs and the amount so paid shall be deemed to be full and final discharge of his duty liability for the period from the 1st day of August, 1997 to the 31st day of March, 1998, or any other financial year, as the case may be, subject to the condition that the manufacturer shall not avail of the benefit, if any, under proviso to sub-section (3) or under sub-section (4) of the section 3A of the Central Excise Act, 1944 (1 of 1944);

Provided that for the month of August, 1997 the Commissioner may allow a manufacturer to pay the sum of rupees five lakhs by the 31st day of August,1997:
Provided further that if the capacity of the furnaces installed in a factory is more than or less than 3 metric tonnes, o there is any change in the total capacity, the manufacturer shall pay the amount, calculated pro rata:
Provided also that where a manufacturer, falls to pay the whole of the amount payable for the month of August, 1997 by the 31st day of August, 1997 or for any other month by the tenth of each month, as the case may be, he shall be liable to pay the outstanding

amount along with interest thereon at the rate of eighteen per cent per annum, calculated for the period from the 1st day of September, 1997 or the tenth of the month, as the case may be, till the date the actual payment of the whole of the outstanding amount.

Explanation - For removal of doubts it is hereby clarified that sub-rule (3) does not apply to an induction furnace unit which ordinarily produced castings or stainless steel products but may also incidentally produce non-alloy steel Ingots and billets.

(4) …..

8. The Rule 96ZO(3) was incorporated to cover a specific eventuality. It enables the manufacturer who had total furnace capacity of 3MT installed in its factory to opt for the payment of ₹5,00,000/- per month specified as a duty. It was also provided in the said Rule that if the furnace has a capacity of more than 3MT or there is change in total capacity, the manufacturer shall pay amount calculating pro rata.

9. Therefore the Act and Rules provides for two modes of payment of Excise. First as per Section 3A pro rata, and second a fixed payment as per Rule 96ZO. If the conditions specified in the Rule 96ZO(3) are fulfilled an Assessee can opt for the flat rate specified in the said Rule.

10. It is not in dispute that the Assessee had opted for the payment at flat rate under Rule 96ZO(3). It is also not in dispute that the Assessee did not paid the amount of ₹5,83,000/- per month, the fixed amount, for the relevant period. Since the amount of ₹5,83,000 was not paid for the relevant assessment period show cause notices have been issued.

11. It is the contention of the learned Standing Counsel of the Appellant that once the Assessee had opted for a fixed rate under Rule 96ZO(3), the Assessee is under obligation for the period for which the amount is so fixed, i.e. the relevant assessment year, and there cannot be any variation thereof. It was submitted that the unit of the Assessee has closed down on 24 September 1998, an intimation in respect of the same was given, and the Revenue has extended all the benefits available under Rule 96ZO(3) in respect of the same. It was submitted that the Assessee had admittedly failed to pay the amount fixed under rule 96ZO(3) and therefore the Commissioner had properly assessed the liability and the penalty. It was contended that the grounds given in the decision of Tribunal for remand that the Commissioner has not looked into the capacity based on the power situation during the relevant period, is not germane to the scheme of Rule 96ZO(3). The learned Standing Counsel relied upon the decisions of the Supreme Court in the case

of *Commissioner of Central Excise and Customs v/s. Venus Castings (P) Ltd.*[1] and *Union of India v/s. Supreme Steels and General Mills*[2]. The learned Standing Counsel submitted that the Tribunal has therefore committed an error in remanding the matter.

12. The learned Counsel for the Assessee submitted that the second proviso to Rule 96ZO(3) makes it clear that if there is any change in capacity, the Assessee can opt for a pro rata payment. It is contended that since there were several power cuts during the relevant period, there was a change in total capacity and the Assessee therefore paid the amount calculated pro rata and therefore there was no default. The leaned Counsel submitted that there is no error committed by the Tribunal in remanding the matter to the Commissioner as the Commissioner has not looked into the implications of second proviso to the Rule 96ZO (3). He submitted that Section 3A(2) also indicates that various factors relevant for annual capacity of production of the factory have to be taken into consideration which includes the power cut. The learned Counsel relied upon the decision in the case of *Bhuwalka Steel Industries Ltd. V/s. Union of India*[3], *Tirupari Steel Pvt. Ltd. V/s. Union of India and Ors.*[4], *Bharat Ferrous (P) Ltd. V/s. Union of India*[5] and the

1 2000 Law Suit (SC) 671
2 2001 Law Suit (SC) 1369
3 2003 (159)E.L.T.147 (Kar.)
4 WP 135/1998
5 2005(183) E.L.T. 6(Gau.)

decision of the Apex Court in Shree Bhagwati Steel Rolling Mills v/s. Commr. of Central Excise[6]. The learned Counsel for the Assessee submits that the observations of the Single Judge of Karnataka High Court in *Bhuwalka Steel Industries Limited* has been approved by the Supreme Court in the decision of *Shree Bhagwati Steel Rolling Mills*.

13. We have gone through the order passed by the Commissioner and the order passed by the Tribunal. The Commissioner had passed a detailed order running into 60 pages. The Commissioner had referred to the earlier proceedings that the factual aspects in detail. Thereafter the Commissioner reproduced the statutory provisions and discussed the various judgments of the Tribunal and the Supreme Court.

14. The Tribunal in the impugned order has simply referred to its earlier order and observed that the order of the Commissioner has to be set aside because he has not adverted to the re-determination of the capacity based on the power situation i.e. power consumption. It noted that the Tribunal has passed an order in some other matter in the identical situations and the reference was made to the decisions which the learned Counsel for the Assessee, has cited before us.

6 2015(326) E.L.T. 209 (S.C.)

15. We have gone through the decisions of the Supreme Court in the case of *Venus Castings* and *Supreme Court* which have been placed before us by the Revenue.

16. In the case of *Venus Castings,* the issue arose before the Apex Court as the respondent-Assessee had availed of the procedure for payment of duty under the Act in terms of Rule 96ZO of the Central Excise Rules. The Apex Court after noting the rival contentions, made the following observations:

> *9. Rules 96ZO and 96ZP provide for procedure to be followed by the manufacturer of ingots and billets and hot re-rolled products respectively. The scheme envisaged under these provisions is identical. These two Rules come into play after the Commissioner of Central Excise determines the annual capacity of the factory or mills manufacturing ingots or billets and hot re-rolled steel products under Section 3-A of the Act read with the relevant annual capacity determination rules. Rules 96ZO and 96ZP proceed to lay down the manner of payment of duty, claim for abatement non-payment, payment of interest/penalty and such other incidental matters. Rule 96ZO classifies the manufacturers into two classes, those whose furnace capacity is 3 tonnes and other manufacturers with high capacity of furnaces. The rate of duty payable, except for period from 1.1.1997 to 31.3.1998 which was the transitional period, is Rs. 750/- per tonne, at the time of clearance. Total amount of duty should be paid by the 31st March of relevant financial year, otherwise interest at the rate of 18 per cent per annum is payable*

and if the duty has not been paid by this date penalty is also payable which is equal to outstanding duty or Rs. Five thousand whichever is greater. Sub-rule (2) thereof provides that if no ingots and billets are produced for a continuous period of seven days, the manufacturer may claim abatement by following appropriate procedure. Sub-Rule 3 thereof envisages a composition method of payment of duty. Manufacturers of ingots and billets with furnace capacity of 3 tonnes have an option of paying duty of Rs. Five lakhs per month in two equal instalments prior to 15th of a month and by last date of that month. Such payment is treated to be in full discharge of duty liability. The Rule specifically excludes application of Section 3A(4). But manufacturers opting for this composite scheme cannot claim abatement. If the furnace capacity is less than or more than 3 tonnes payment of Rs. 5 lakhs can be varied on pro-rata basis. The manufacturer opting for this composite scheme has to give a declaration to the Jurisdictional Assistant Commissioner as provided under the Rules. There are similar provisions in relation to hot re-rolled products. By reason of the assessee having exercised his desire of paying duty based on total furnace capacity the determination of annual capacity of production is not determined by the Revenue as the procedure adopted obviates determination of production. In the absence of determination of production the question of its determination on the basis of actual production as detailed in Section 3A(4) of the Act does not arise.

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 at the option of the assessee. Thus the two procedures do not clash with each other. If the assessee opts for

procedure under Rule 96ZO(1) he may opt out of the procedure under Rule 96ZO(3) for a subsequent period 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. The claim by the respondents is a hybrid procedure of taking advantage of the payment of lumpsum on the basis of total furnace capacity and not on the basis of actual capacity of production. Such a procedure cannot be adopted at all, for the two procedures are alternative schemes of payment of tax.

11. The learned counsel for the respondent contended that the Rule 96ZO(3) is contrary to Section 3A(4) of the Act and, therefore, should be held to be ultra vires or read the relevant rules in such a manner as to allow the procedure prescribed under the provisions of Section 3A(4) to be followed. Section 3A of the Act provides for levy and collection of the tax arising under the Act in such manner and at such rate as may be prescribed by the Rules. Section 3A provides special procedure in respect of the power of the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. If such interpretation is not accepted, it is contended, that the levy of tax is in the nature of a license fee and not on production of goods at all. Schemes of composition are available in several other enactments including the Sales Tax Act and the Entertainment Tax [See : State of Kerala and Anr vs. Builders Association of India & Ors., 1997 (2) SCC 133]. In this context, the learned counsel for the respondents referred to several decisions. However, in our opinion, all these decisions either arising under the Income Tax Act in relation to special mode of collection of tax or excise duty on

timber dealers or other enactments have no relevance. What can be seen is that the charge under the Section is clearly on production of the goods but the measure of tax is dependent on either actual production of goods or on some other basis. The incidence of tax is, therefore, on the production of goods. It cannot be said that collection of tax based on the annual furnace capacity is not relatable to the production of goods and does not carry the purpose of the Act. In holding whether a relevant rule to be ultra vires it becomes necessary to take into consideration the purpose of the enactment as a whole, starting from the preamble to the last provision thereto. If the entire enactment is read as a whole indicates the purpose and that purpose is carried out by the rules, the same cannot be stated to be ultra vires of the provisions of the enactment. Therefore, it is made clear that the manufacturers, if they have availed of the procedure under Rule 96ZO(3) at their option, cannot claim the benefit of determination of production capacity under Section 3A(4) of the Act which is specifically excluded. We find that the view taken by the Andhra Pradesh High Court in Sathavahana Steel & Alloys (P) Ltd. vs. Government of India (supra) and the similar view expressed by the Division Bench of the Allahabad High Court in Civil Miscellaneous Writ Petition No. 1127 of 1999 M/s. Jalan Castings (P) Ltd. vs. Commissioner of Central Excise & Ors. disposed of on February 28, 2000 is reasonable and correct. We overrule the view taken by the Allahabad High Court in Pravesh Castings (P) Ltd., Kanpur Nagar vs. Commissioner of Central Excise, Allahabad & Anr. (supra).

17. In the case of the *Supreme Steels* again the provisions of

Rule 96ZO and the newly added Section 3A of the Central Excise Act, 1944 had came up for consideration of the Supreme Court. The Supreme Court, in this case referred to the decision of in *Venus Castings* and held that the procedure under sub-section (4) of Section 3A of the Act and Rule 96ZO(3) of the Rules are alternate procedures and the Assessee has to opt for one. Having done so, it cannot claim the benefit of the other.

18. Both these decisions therefore referred to the very same statutory provisions which are involved in the present matter. The law laid down in these two decisions would have guided the Tribunal to decide the interplay between these two provisions. The Tribunal had not made any reference at all to both these dicta. If the Tribunal was of the opinion that in spite of the position, the factor of power disruption is germane even for the scheme of 96ZO(3), the Tribunal had to deal with this position of law and come to a definite finding.

19. The Chapter VI-A of the Central Excise Act deals with appeals. The Section 35B provides for appeals to the Appellate Tribunal from the orders passed by the Commissioner, the composition of the Appellate Authority and the Act also provides for limitations. Section 35C deals with the order of the Appellate Tribunal and the procedure of the Appellate Tribunal is laid down

under Section 35D. If no appeal is filed from the decision by the Appellate Tribunal then the decision by the Appellate Tribunal becomes final and generally the Tribunal gives a deference to the decision on the legal question by the co-ordinate Benches. Therefore in the appeal, the Tribunal is expected to deal with the questions of law and facts before it, in detail. It is upon an informed decision is given after considering the legal and factual questions, if a question of law arises that an appeal lies to this Court on limited grounds.

20. In the present case, the Tribunal has not considered the relevant legal position with reference to the facts and the scheme of Rule 96ZO(3) and Section 3A(4). The Tribunal has held that legal position stands concluded and only a factual enquiry is needed, without considering the decisions of the Supreme Court in *Venus Castings* and *Supreme Steel*. Since that basis is incorrect, it is appropriate that the Tribunal takes an informed decision considering the legal position. This primary task must be done by the Tribunal. We therefore intend to remand the matter to the Tribunal.

21. Accordingly, the appeal is allowed and the impugned order dated 05 August 2018 is set aside.

22. The matter is remanded for consideration of the Tribunal

in the light of the discussion above and the question which has been crystalised.

23. We make it clear that the contentions of both the parties on the above question are kept open to be considered.

Prithviraj K. Chavan , J. ***N.M. Jamdar, J.***