

Vinayaka Alloys Ltd. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Jun-26-2002

Reported in : (2003)(86)ECC126

Judge : K Kumar, R K Jeet

Appellant : Vinayaka Alloys Ltd.

Respondent : Cce

Advocate for Pet/Ap. : Shri. S. Venkatachalam

Judgement :

1. The Appeal together with stay application has been filed by the appellants against the Order-in-Original No. 10/2001 dated 29.6.2001 by which the Commissioner has demanded duty of Rs. 59,71,061 by invoking the longer period of limitation in terms of Section 11A(1) of the CE Act, 1944 read with Rule 96ZO of the CE Rules. The Commissioner by the said order has kept in abeyance action relating to penalty and interest awaiting the judgment of the Hon'ble Supreme Court in the case of UOI v. Supreme Steel and General Mills and Ors. 2001 (78) ECC 225 (SC).

Since we propose to dispose of the appeal itself on a shot point of law, we grant waiver of pre-deposit of duty amount and take up the appeal for decision.

2. The brief facts of the case are that the appellants are engaged in the manufacture of MS Ingots falling under Chapter sub-heading 7206.90 of the

CETA, 1985 and were paying Central Excise Duty in terms of Section 3A of the CE Act, 1944(Act for short) read with Rule 96ZO of the CE Rules, 1944(Rules for short). They had opted for the scheme described in Sub-rule (3) of Rule 96ZO for discharging duty liability for manufacture and clearance of their product viz. Ingots & Billets of Non-Alloy Steel under Section 3A of the Act. Based on the declaration, their Annual Capacity was fixed at 25600 MT based on the total installed capacity of Furnace as 8 MT and their duty liability was accordingly fixed at Rs. 13,33,333 per month. On gathering intelligence that the appellants had misdeclared the actual capacity of the second furnace, proceedings were initiated against them by issue of show cause notice No. 76/2000 dated 28.11.2000 proposing to demand differential duty of Rs. 7,33,335 for the period from 9/97 to 1/98 apart from imposition of penalty under Rule 173Q, and demand of interest under Section 11AB and statutory penalty under Section 11 AC. However, proceedings initiated under show cause notice No. 76/2000 dated 28.11.2000 was dropped under the impugned order. Appellants were also issued with six more show cause notices for different periods as detailed in para 24,0 of the impugned order for short paid duty based on the ACP already fixed and all the show cause notices were on same lines except that they were for different periods. After considering their reply to the show cause notices and after affording personal hearing on two occasions, and the Commissioner passed the impugned order as noted above.

3. Arguing on the Stay petition, Shri S. Venkatachalam learned Counsel for the applicants submitted that the impugned order is violative of the principles of natural justice inasmuch as the ACP communicated by the Assistant Commissioner is not valid in law and appellants had relied on the decision of this Tribunal in the case of Arun Vyapar Udyog Ltd. (Final Order No. 665/2000 dated 16.5.2000. He has further submitted that the Commissioner has not dealt with the reply filed by the petitioners. Further various case laws cited by the applicants were also not discussed by the Commissioner in the impugned order and hence impugned order is not a speaking order according to him. He further submitted that the Commissioner after determining the ACP has not intimated the same to the appellants by way of an order and hence the ACP fixed is not in accordance with law. He has also submitted several other grounds, one being that Unit-1, having a furnace of 3 Ton crucible capacity was under closure since 24.7.95, whereas Unit

II having a furnace of 4.5 Ton to 5 Ton crucible capacity only working the electricity meter was also dismantled in respect of Unit I having a 3 Ton capacity and they have also filed necessary declaration in that behalf and in spite of this, the total capacity was fixed at 8 tonnes (3 Ton + 5 Ton) He further contended that as per sub-rule of the Rule 96 ZO the assesseees are to pay duty-calculated on pro rata basis if there is any change in the total capacity. Rule 4 of the Induction Furnace Annual Capacity Determination Rules 1997 also says so. Annual capacity of production cannot be fixed by taking into account the capacity of a closed unit. He has further submitted that the longer period of limitation cannot be invoked in this case. As regards financial position of the appellants, he submitted that they are facing financial hardship and are not in a position to pre-deposit any amount.

He submitted that the impugned order is not a speaking order and sought for setting aside the same.

4. Shri C Mani, learned DR defended the view taken by the Commissioner in the impugned order and submitted that as could be seen from the impugned order, he has dropped the demand against show cause notice No.76/2000 dated 28.11.2000. As regards the other show cause notices, he invited our attention to para 34.0 onwards of the impugned order and submitted that the Commissioner has passed a very detailed speaking order dealing with each point raised by the assessee. As regards the plea of violation of principles of natural justice he invited our attention to para 34.5 of the impugned order wherein the Commissioner has dealt with the plea and submitted that in the case the ACP was fixed by the Commissioner and it was communicated by the Assistant Commissioner by way of a letter. He submitted under the circumstances the appellants should be put to terms.

5. We have considered the submissions made before us. We find that in this case, though the ACP was fixed by the Commissioner, it was communicated by the Assistant Commissioner by way of a letter to the appellants. We observe that Rule 3(4) of Induction Furnace Annual Capacity Determination Rules 1997, envisages that the "Commissioner of Central Excise shall as soon as may be, after determining the total of capacity of furnace installed in the factory as also the

annual capacity of production by an order intimate the manufacturer". We further find that similar case came up for consideration before the Tribunal in the case of Arun Vyapar Udyog Ltd. v. CCE, Chennai vide (sic) Miscellaneous Order No. 237/2000 dated 16.5.2000 wherein in para 5, the Tribunal has held as under: "We have considered the submissions and records of the case. We find that in this case the Commissioner has fixed the ACP of the appellants unit under Section 3A and the rules made thereunder after consideration of their declaration filed before him. However, the said decision has not been communicated by the Commissioner in the form of a speaking order. Section 3A empowers only a Commissioner of Central Excise to do so. Similar situation was considered by us in the case of Triveni Alloys and vide Misc. & Final Order noted above, we held that since speaking order of Commissioner of Central Excise sitting in adjudication proceedings existed on record when the matter was considered by the Tribunal, therefore, the application for condonation of delay is infructuous there being no possibility of a delay against a non-existing order and since the appeal lay on a short compass, the matter had been remanded for a de novo fixing of the capacity and issue of a proper speaking order in the hand and signature of the concerned Commissioner. We find that the facts of the case being the same, we have to apply the ratio thereof to this case also." The Tribunal in the case of NGA Steels Pvt. Ltd. v. CCE, Coimbatore vide Final Order No. 623/2000 dated 8.5.2000Q also remanded similar case for de novo consideration. We further find that the Commissioner of Central Excise, Chennai-II Commissionerate vide Order No. 7/IF/99 dated 29.11.99 has issued an order fixing the ACP in the case of one M/s R V Steels (P) Ltd. and the order was communicated by the Commissioner under his signature. Therefore, there was no reason why the Commissioner of the same Commissionerate in the present case where the impugned order is passed much later i.e. in October 2001, chose to take a different course.

6. In view of what has been stated above, we hold that the issue is no longer res integra and respectfully following our earlier decisions cited supra we set aside the impugned order and remand the matter to the Commissioner who shall pass a speaking order dealing with all the points raised by the defence by affording opportunity of hearing to the appellants in accordance with law. The Stay application also stands disposed of. Ordered accordingly.

