SUPREME COURT OF INDIA

Paras Ship Breakers Ltd

Vs.

Commissioner of Central Excise

SLP (Civil) No. 10073 of 2005

(S.B. Sinha and Harjit Singh Bedi JJ.)

12.10.2007

JUDGMENT

S.B. SINHA, J:

1. Leave granted.

2. This appeal is directed against a judgment and order dated 11.02.2005 passed by a Division Bench of the Gujarat High Court in Tax Appeal No.

427 of 2004 whereby and whereunder the appeal preferred by the appellant herein from a judgment and order of the Customs, Excise and Gold Control Appellate Tribunal dated 22nd May, 2003 as well as Miscellaneous order dated 6th February, 2004, was dismissed.

3. The issue involved in this appeal is as to how the deemed annual production in terms of Section 3A of the Central Excise Act, 1944 which was brought into force with effect from 14.05.1987 should be determined.

Appellant herein installed an induction furnace, the capacity whereof was 8 M.Ts. It had asked the Gujarat State Electricity Board (Board) for supply of 3000 KVA of electrical energy. The Board agreed to supply only 1900 KVA input of power. The said furnace was manufactured by Inductotherm (India) Ltd. Keeping in view the fact that the appellant could not obtain supply the requisite quantity of electrical energy, it thought of reducing the capacity of the said induction furnace. According to it, the capacity was brought down to 4 = M.Ts from 8 M.Ts. Appellant contends that the Department was informed thereabout. Allegedly, an inspection was carried out and the capacity of the said induction furnace was also noticed by the inspecting team. Despite the same, a show cause notice was issued as to why the deemed annual production should not be determined on the basis that the capacity of the said furnace was 8 M.Ts. A finding of fact was arrived at by the concerned authorities that the capacity of the said furnace was 8 M.Ts, and not 4 = M.Ts.

4. Mr. Gourab Banerjee, learned senior counsel appearing on behalf of the appellant, would submit that the appellant had obtained a certificate from M/s. Furcon Consultancy Services to show that the possible capacity of the furnace was 4.5 M.Ts. for melting steel and in view of the fact that the Board was not in a position to supply 3000 KVA at 11 KV to the Unit, the appellant had no other option but to reduce the capacity of the said furnace.

In this connection, our attention has been drawn to the following letter dated 16.07.1997 issued by the Board:

In connection to your letter cited above regarding increase in power requirement from 2400 KVA to 3000 KVA at 11 KV to your unit to Khakhariya, it is informed you that your total power requirement of 3000 KVA cannot be catered at 11 KV as per feasibility received from our field office.

Please note that as per recent amendment condition No. 28 power requirement of 2500 KVA and above requirement to be catered at 66 KV or above voltage as per condition of supply. We are accordingly advising our E.E. (Const.) Amreli to send feasibility report.

5. A certificate dated 4.09.1997 was issued by a Chartered Engineer wherein the following observation was made:

c. Crucibles are converted to 4500 Kg.

capacity due to lack of power supply.

6. Our attention has also been drawn to a letter dated 7.04.2000 issued by the Customs and Central Excise, Commissionerate, Rajkot addressed to the Deputy Commissioner wherein it was stated:

Parameters which are crucial for the determination capacity of production of the Induction furnace were measured in presence of the authorized person of the unit (Drawing of the measurement is enclosed herewith). As shown in the drawing the heating coils which wrapped around the Crucible Furnace are only upto Metal Level. Hence, only upto that level scrap can be melted. Weighment of Iron ingots, duly manufactured in during the visit were made. In each batch, number of ingots manufactured on an average taken from three batches comes to 42 nos.

per batch. And the weight of five nos. of ingots from different batches was taken and the average weight of one ingot came to 98 kgs. Hence, average production on the basis of this calculation comes to 4.1 tones per batch. Moreover, one heat (batch) time required is about 1 hours and 30 minutes.

7. Despite the same, Mr. Banerjee would submit that a show cause notice was issued purported to be only on the premise that the appellant had not intimated any proposed change in the induction furnace to the Commissionerate which is contrary to the fact as such an intimation had been given to the authorities, as would appear from the show cause filed by the appellant therein on 6.02.2001 wherein it was stated:

We have found out from our records that on the date of carrying out modifications i.e. on 14.5.1997 we had addressed a letter dated 14.5.1997 to the Superintendent of Central Excise, AR-Sihor, intimating that we were carrying out changes in the capacity of our crucible through M/s Furcon Consultancy Services. We have given detailed reasons necessitating such modification.

A copy of the said letter dated 14.5.1997, duly received in the office of the said Superintendent, is enclosed for your perusal. After completion of the changes, we again informed the said Superintendent vide our letter dated 16.5.1997, a receipted copy of which is also enclosed for perusal. Even though at that time the compounded levy was not in force, still we kept the Department informed of the changes carried out by us. It is, therefore, not correct to allege that the

department was not informed about the changes. It was urged that the said statement having not been factually disputed, what arose for consideration was the legal interpretation of the rules.

The said contention of the appellant, however, was rejected by the respondent on the ground that modification of the capacity of induction furnace was irrelevant; the only relevant criterion therefor being the installed capacity.

Mr. Banerjee would submit that such a finding on the part of the respondent was eminently unreasonable as the said conclusion could not have been arrived at in view of the extant rules.

8. Submission of Mr. Gopal Subramanium, learned Additional Solicitor General appearing on behalf of the respondent, on the other hand, is that the Tribunal having arrived at a finding of fact, no question of law arose for consideration before the High Court.

9. Section 3A(2) of the Central Excise Act reads as under:

(2) Where a notification is issued under sub- section (1), the Central Government may, by rules, provide for determination of the annual capacity of production, or such factor or factors relevant to the annual capacity of production of the factory in which such goods are produced, by the 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 only during a part of the year, the production thereof shall be calculated on proportionate basis of the annual capacity of production.

10. The show cause notice dated 19.06.2000 was issued to the appellant by the respondent on the premise that the capacity of the induction furnace is in excess of 4.5 MTs. The question as to whether in effect and substance the appellant had reduced the capacity of the said induction furnace or not is essentially a question of fact. The Tribunal has passed a very detailed order.

It took into consideration all the contentions raised by the appellant herein.

It is evident that on representation having been made by the appellant that the capacity of the furnace stood reduced, a Deputy Commissioner was deputed by the Department for the purpose of measurement and verification of the parameters of furnace on 8.03.2000. The officers of the Department had actually seen the melting capacity of the furnace and the average production. They took into consideration the actual production recorded in RG I registers. On verification of the relevant registers, it was found that the actual production recorded was nearer to the level of 8 M.Ts. The rule no doubt provides for determining the annual capacity in case where manufacturer proposes to increase or decrease the capacity of the induction furnace but before the said authorities even Shri Deepak Shah, Chartered Engineer was examined. In his statement, he admitted that he had certified the capacity of the furnace on the basis of the documents produced and information made available to him by the appellant. It was, therefore, evident that he had not carried out any physical verification of the furnace.

According to the said witness, the actual production may vary from 10% to 20% of the capacity shown in the joint verification report. Even the officer of M/s. Furcon Consultancy Services, Shri B.K. Shukla stated that the modification had been carried out in one of the crucible only but a certificate was issued in respect of both the crucibles. The Tribunal, therefore, arrived at the finding

that in fact no modification was carried out in the crucible of the said induction furnace. Various other circumstances which were relevant for determination of the issue, viz., the conduct of the parties, had also been taken into consideration.

11. The Tribunal in its order dated 22.05.2003 held:

4. The learned Advocate, further, contended that the Commissioner seems to have laboured under a misconception of the scope of ACD Rules as he had observed that change in the working capacity did not lead to change in the installed capacity of the furnace; that the ACD Rules do not talk of installed capacity as the Rules require capacity of the furnace installed in the factory to be determined; that the Rules even provide for increase and reduction of the capacity of the furnace even where a particular capacity has already been determined; that, therefore, where any change is effected before or after the introduction of compounded levy scheme, such increased or reduced capacity has to be given due weight and regard. He relied upon the decision in Excise & C, Rajkot, 2002 (139) ELT 131(T) wherein it has been held by the Tribunal that The Rules do not at any point speak of capacity of a furnace when it is first manufactured. They refer to only capacity and the specified parameter on which the capacity is to be based. One of the parameters is the total capacity of the furnace installed in the site. Such capacity is evidently the capacity that is present. The capacity of the furnace after would be the quantity of bunch that it can produce in one operation (illegible) bunch the annual capacity would be based upon it. That this is so (illegible) from the provisions of Rule 4.

This Rule provides for determining the annual capacity in case where a manufacturer proposes to increases or (illegible) the capacity of the induction furnace. No doubt the Rules does (illegible) installed capacity. In the context of the other Rule it is clear that (illegible) too the capacity of a furnace, not when it was initially constructed, but (illegible) the increase or decrease referred to in that Rules, newly determined (illegible) capacity. He emphasized that since Rule 4 provides for change (illegible) capacity in a case where the capacity is already fixed at the commencement of the scheme, the change which has already taken place before (illegible) commencement of the scheme, is required to be given due weightage (illegible) consideration; that the last sentence of Rule 4 of ACD Rules makes (illegible) obligatory on the part of Commissioner to determine the date from which the change in the installed capacity has taken place. 12. In its judgment, the Tribunal has noticed:

These evidences, according to Revenue are (i) measurement of Crucible volume of the furnace (specific gravity x volume) which works out to be 7.97 MTs (ii) the weight of MS Ingots including runners and riser produced in a single heat during spot visit was 5.86 MTs (iii) Increase in power consumption and (iv) scrutiny of daily production.

We find substantial force in the finding of the commissioner which are contained in the impugned order

13. Upon consideration of all relevant facts, as a finding of fact had been arrived at by the Tribunal, in our opinion, the High Court cannot be said to have committed any error in passing the impugned judgment.

14. Relevant portion of Section 35G of the Central Excise Act reads as under:

35G. Appeal to High Court (1) An appeal shall lie to the High Court from every order passed in

appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law

18. In terms of Section 35G of the Central Excise Act, the High Court, thus, could entertain an appeal only if a question of law arose. No question of law having, thus, arisen for consideration before the High Court, we are of the opinion that the impugned judgment does not suffer from any legal infirmity.

19. For the reasons aforementioned, there is no merit in this appeal which is dismissed accordingly. No costs.