

CASE NO.:
Appeal (civil) 2415 of 2005

PETITIONER:
M/s Channy Enterprises

RESPONDENT:
Commissioner of Central Excise, Chandigarh

DATE OF JUDGMENT: 05/04/2005

BENCH:
Ruma Pal & C.K. Thakker

JUDGMENT:
J U D G M E N T

(Arising out of SLP) No. 14175 of 2003)

RUMA PAL, J.

Leave granted.

The appellant has two mills in which it manufactures hot rolled steel products. With effect from 1st September 1997, the Government of India notified ingots and billets under Section 3-A of the Central Excise Act, 1944 for levy of excise duty on the basis of the annual capacity of production (ACP) of the factory. To give effect to the scheme, Rules were framed for determination of the annual capacity of production of a factory producing such notified goods known as the Induction Furnace Annual Capacity Determination Rules 1977. By the Rules, the ACP of a factory was taken to be a fixed multiple of the total capacity of the furnaces installed in the factory. The manner of levy and collection of duty was governed by Rule 96(ZP) of the Central Excise Rules, 1944 also issued under Section 3A of the Act. Circular dated 26th February 1998 had been issued by way of a clarification in answer to questions raised in connection with the operation of the Rules. One of the questions so raised was:

"How would the annual capacity of production be determined if a unit has more than one rolling mill in the same premises but operates only one rolling mill at a time."

In answer to this, it was clarified that:

"If a unit has one re-heating furnace with two rolling mills, then the capacity of the higher of the two mills should be taken as the assessed annual capacity for the unit. However, if each rolling mill has a reheating furnace, the capacity of the unit would be the sum total of the capacity of each

rolling mill in the unit".

Prior to 1st September 1999, the appellant had one heating furnace and the appellant's ACP was fixed on that basis. The appellant then installed a second furnace but, according to the appellant, there was only one electric motor which meant that the both furnaces could not be operated simultaneously. The appellant notified the change to the Commissioner under Rule 4 of the Rules. According to the appellant, the approval was communicated to the appellant by the Commissioner's letter dated 25th August 1999 after which the appellant filed a revised declaration on 1st September 1999. Response was given to this on 17th October 2000 by the Commissioner's office which sought to club the capacity of both the rolling mills since the second heating furnace had been installed on the basis of the circular dated 26th February 1998. The appellant's submission that the circular did not have any application to the appellant's case because both the furnaces could not be operated simultaneously was rejected by the Commissioner who then proceeded to fix the ACP by clubbing the capacity of both the rolling mills. An appeal was preferred by the appellant to the Customs Excise and Gold Control Appellate Tribunal (CEGAT) which rejected the appellant's appeal and affirmed the Commissioner's order. The appellant filed a Reference Petition under Section 35-H (I) of the Act as well as a writ petition contending that the respondents were not justified in determining the ACP of the appellant by taking the capacity of both the mills together. The High Court dismissed the Reference Application and the Writ Petition holding that no question of law arose from the order of the Tribunal. It was also found that the CEGAT had considered all aspects of the matter and had correctly determined the question raised.

The appellant has contended that all the fora had erred in overlooking the formula provided under Rule 3 for determination of the ACP which showed that a vital element of the formula included the revolutions per minute of the drive. This, according to the appellant, showed that the formula for calculating the ACP was on the basis of one motor per unit. It is therefore submitted that despite having two electric furnaces since there was only one motor which was common to both, then in terms of the circular issued by the Board itself the capacity of the higher of the mills should have been taken as the ACP. The second submission is that the appellant had submitted a certificate from the National Institute of Secondary Steel Technology, a Government Institute, which certified that the two mills could not be run simultaneously with the same motor and common flywheel. It is contended that the Commissioner could not discard the opinion of an expert and determine the technical issue on the basis of his own opinion. It was finally submitted that the Commissioner had himself approved the setting up of the second furnace within the ACP of the units. Learned counsel appearing for the respondents has submitted that the circular dated 26th February 1998 relied upon by both the parties had been misconstrued by the appellant. It is submitted that the question of taking the higher capacity of the two mills would only arise if there was one re-heating

furnace. According to the respondents, the installation of the two rolling mills and two heating furnaces had not been disputed by the appellant before the Commissioner. It is said that the Commissioner had applied his mind to the expert's certificate but had rejected it because it was issued after a lapse of nine months from the date of the withdrawal of the capacity based assessment scheme on 31st March 2000. The Commissioner in fact determined the issue on the basis of the admitted facts and on an interpretation of the 1998 circular.

The respondent's contentions are correct. It is not the appellant's case that the 1998 circular was incorrect. On the contrary it has been relied on to claim that the ACP should have been determined with reference to the mill which had the higher capacity alone. The circular in answer to a query which exactly reflects the issue in this case, clearly says that the capacity of the higher of the two mills would be taken for assessing the ACP only if each rolling mill did not have a separate re-heating furnace. If each rolling mill had a separate heating furnace, as the appellant admittedly does, then the capacity of the unit would be the sum total of the capacity of each rolling mill in the unit irrespective of the fact that only one mill operated at a time. The language could not be plainer. What the appellant's argument overlooks is that the scheme did not operate on the basis of the actual production but on the capacity of the rolling mills to produce. We, therefore, see no reason to differ with the view expressed by the Commissioner, CEGAT and the High Court.

The criticism of the action of the Tribunal in Hindustan Ferodo Ltd. v. Collector of Central Excise:1997 (89) ELT 16(SC) where the Tribunal had entered into the arena of dispute and in effect given evidence on behalf of the Revenue before itself, would not apply here. The Revenue in that case had led no evidence in support of its case. The assessee had. In the present case CEGAT proceeded on the basis of the admitted facts and relied on the language of the circular to reject the appellant's appeal.

The appellant has also sought support from a decision of the Kolkata Bench of CEGAT in Aditya Steel Industries Ltd. v. CCE & C, Bhubaneswar: 2002 (53) RLT 1068. The Tribunal relied upon the Board's circulars No.325/41/97-CX dated 25.7.1997 and 326/42/97-CX to hold that where it was not technically possible to run two mills simultaneously because of a common power supply, the capacity of the stand by mill was not to be taken into consideration for determining the ACP.

We do not agree. Separate schemes were formulated under Section 3A of the Act in relation to induction furnaces and hot re-rolling mills. Circular 325 dated 25.7.1997 dealt with induction furnaces and specifically provided:

"In this context, it is understood that some induction furnace units have, what they call "idle" crucible. It is reported that at any point of time only one crucible is used and the other remains idle. In such cases, it is claimed, the induction furnace unit has one transformer and one electrical panel. As

such the capacity of the induction furnace is relatable to crucible(s), excluding the "idle (separate or stand by)" crucible. This aspect may kindly be examined on basis of facts of each such case and the furnace capacity may be ascertained accordingly".

Circular No. 326 also dated 25.7.1997 dealt with the capacity of production of hot re-rolling mills. There is no paragraph in this circular similar to the quoted paragraph relating to the ACP of induction furnaces. Paragraph 18 of Circular No. 326 says that the paragraphs in the circular explain the salient features of Section 3A scheme as applicable to re-rolling mills. It also says that the scheme, in general terms, is on the same lines as that for the Induction Furnace units and that therefore the explanation on some of the common features are the same as those contained in circular No. 325. This does not tantamount to saying that all the features of the induction furnace scheme were to be incorporated into the hot rolling mill scheme. The appellant's contention that the second mill was set up after the approval of the Commissioner is of no consequence. The approval granted by the Commissioner did not in any way affect the assessment required to be made in accordance with the Rules. In the circumstances, the appeal is dismissed but without any order to costs.