REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3400 OF 2003

COMMISSIONER OF CENTRAL EXCISE, CHANDIGARH — APPELLANT

VERSUS

M/S DOABA STEEL ROLLING MILLS — RESPONDENT

WITH

CIVIL APPEAL NOS.8342-8344 OF 2004,

CIVIL APPEAL NO.8345 OF 2004 &

CIVIL APPEAL NOS.4992-4993 OF 2011
(ARISING OUT OF S.L.P. (C) NOS.35323-35324 OF 2010)

J U D G M E N T

D.K. JAIN, J.:

1. Leave granted in SLP (C) Nos. 35323-35324 of 2010.

2. This batch of appeals, by grant of leave, arises out of judgements and orders dated 17th October 2001 in C.C.E.S.No.4 of 2001, 21st October, 2003 in C.E.C. 11, 12, 13 of 2003 and C.E.C. No.122 of 2003 passed by the High Court of Punjab & Haryana; 6th November 2009 in Review application No.29356 of 2008 and 8th July 2010 in C.E. Reference application No.113 of 2000 both passed by the High Court of Judicature at Allahabad. By the impugned judgements, in the main reference applications, filed by the Commissioner of Central Excise, under Section 35H of the Central Excise Act, 1944 (for short "the Act"), the questions referred by the Customs, Excise and Gold (Control) Appellate Tribunal, as it then existed, (for short "the Tribunal") have been answered in favour of the assessee and the review applications preferred by the Commissioner against the said judgments have been dismissed.

3. Since all the appeals involve a common question of law, these are being disposed of by this common judgment. However, to appreciate the controversy, the facts emerging from C.A.No.3400 of 2003 are being adverted to. These are as follows :

4. Section 3A of the Act, which has a chequered history of insertions and omissions in the Act, was inserted in the Act for the second time by Act 26

of 1997, with effect from 14th May, 1997, the provision relevant for the purpose of these appeals. The Section has again been omitted by Act 14 of 2001, with effect from 11th May, 2001. Section 3A of the Act enables the Central Government to charge Excise duty on goods on the basis of annual capacity of production of mills etc. in respect of the notified goods.

The relevant part of the Section reads as follows:

> "**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.
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> (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
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> (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.

.....”

5. It is clear from a bare reading of the Section that the reason which persuaded the Legislature to introduce this provision was attributed to large scale evasion of payment of Excise duty by certain sectors. Thus, the insertion of the Section in the Act was with a view to safeguard the interest of revenue in the sectors, like induction furnaces, steel re-rolling mills etc., where evasion of Excise duty on goods produced in such mills was rampant. The provision authorises the Central Government to notify certain goods, for levy and collection of duty of Excise on such goods, in accordance with the provision of the said Section, having regard to the extent of evasion of duty as also other relevant factors. The scheme evolved under this provision, envisages

the determination of annual capacity of production of such factory by an officer not below the rank of Assistant Commissioner of Central Excise in terms of the rules to be framed by the Central Government under sub-section (2) of Section 3A of the Act. The annual capacity of production of the factory is deemed to be the annual production of such goods by such factory, on which an assessee is liable to pay duty. The two provisos to sub-section (2) of Section 3A of the Act, provide for determination/re-determination of annual capacity of production in the event of operation of the factory during a part of the year or alteration or modification in any of the factors relevant to the production of the factory.

6. In exercise of the powers conferred by Section 3A(2) of the Act, by Notification No. 23/97-CE (NT) dated 25th July, 1997, the Central Government framed and notified Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 (for short "the 1997 Rules"), to be effective from 1st August, 1997, for determination of annual capacity of production of a factory producing re-rolled products as contained in the said notification. The Rules prescribed the formulae for determination of the annual capacity of production of a hot re-rolling mill, on the basis of the information to be furnished by the mill to the Commissioner of Central Excise; on the

parameters referred to in Rule 3(3) of the 1997 Rules. The rate and the manner of payment of Excise duty under Section 3A of the Act was also indicated in the notification. Subsequently, another Notification No.32/97-CE (NT) was issued on 1st August, 1997 making the said Rules effective from the even date. For the sake of ready reference, Rules 3 and 4, in so far as they are relevant for these appeals, are extracted below:

> "3. The annual capacity of production referred to in rule 2 shall be determined in the following manner, namely:-
>
> (1) a hot re-rolling mill shall declare the values of 'd' 'n' 'I' and 'speed of rolling', the parameters referred to in sub-rule (3), to the Commissioner of Central Excise (hereinafter referred to as the Commissioner) with a copy to the Assistant Commissioner of Central Excise:
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> (2) on receipt of the information referred to in sub-rule (1), the Commissioner shall take necessary action to verify their correctness and ascertain the correct value of each of the parameters. The Commissioner may, if so desires, consult any technical authority for this purpose;
>
> (3) the annual capacity of production of hot re-rolled products of non-alloy steel in respect of such factory shall be deemed to be as determined by applying the following formula :-
>
> Annual Capacity $=1.885 \times 10^{-4} \times d \times n \times i \times e \times w \times$ Number of utilised hours (in metric tonnes) Where :
>
> d = Nominal diameter of the finishing mill in millimetres
>
> n = Nominal revolutions per minute (RPM) of the drive
>
> i = Reduction ratio of the gear box

w =Weight in Kilogramme per metre of the re-rolled product.

value of 'e' in the formula shall be deemed to be 0.30 in case of low speed mills, and 0.75 in case of high speed mills the value of 'w' factor in the formula for the high speed mills shall be deemed to be 0.45 and for the low speed mills shall be deemed to be as under, -

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4. the Commissioner of Central Excise shall, as soon as may be, after determining the total capacity of the hot re-rolling mill installed in the factory as also the annual capacity of production, by an order, intimate to the manufacturer.

Provided that the Commissioner may determine the annual capacity of the hot re-rolling unit on provisional basis pending verification of the declaration furnished by the hot re-rolling mills and pass an order accordingly. Thereafter, the Commissioner may determine the annual capacity, as soon as may be, and pass an order accordingly.

4 (1) The capacity of production for any part of the year, or any change in the total hot re-rolling mill capacity, shall be calculated *pro rata* on the basis of the annual capacity of production determined in the above manner stated in Rule 3.

(2) In case a manufacturer proposes to make any change in installed machinery or any part thereof, which tends to change the value of either of the parameters 'd' 'n' 'e' 'I' and 'speed of rolling' referred to in sub-rule (3) of sub-rule 3, such manufacturer shall intimate about the proposed change to the Commissioner of Central Excise in writing, with a copy to Assistant Commissioner of Central Excise, at least one month in advance of such proposed change, and shall obtain the written approval of the Commissioner before making such change. Thereafter the Commissioner of Central Excise shall determine the date from which the change in the installed capacity shall be deemed to be effective."

7. However, by Notification No. 45/97-CE (NT) dated 30th August, 1997, 1997 Rules were amended with effect from 1st September, 1997. By reason of the said amendment, apart from substituting a fresh sub-rule (3) of Rule 3, prescribing a new formulae to determine the annual capacity of production, not very relevant for the purpose of the present appeals, Rule 5 was inserted after sub-rule (2) of Rule 4, which reads as follows :

> "5. In case, the annual capacity determined by the formula in sub-rule (3) of rule 3 in respect of a mill, is less than the actual production of the mill during the financial year 1996-97, then the annual capacity so determined shall be deemed to be equal to the actual production of the mill during the financial year 1996-97."

8. The respondent-assessee is engaged in the manufacture of hot re-rolled steel products of non-alloy steel in a hot steel rolling mill, classifiable under Chapter 72 of the Central Excise Tariff Act, 1944, for the purpose of levy of Excise duty etc. On 5th January, 1998 the Commissioner, Central Excise, Chandigarh determined the annual capacity of production of the respondent at 7683.753 MT, as per the formula laid down in sub-section (3) of Rule 3 of 1997 Rules. However, keeping in view Rule 5, the annual capacity was finally fixed at 11961.135 MT on the basis of actual production of the mill during the financial year 1996-97.

9. Vide letter dated 13th September, 1999, the respondent requested the Commissioner for re-determination of annual production capacity of their unit in terms of Rule 4(2) of the 1997 Rules on the ground that they have changed some of the parameters of their mill. The request was acceded to and vide order dated 27th January 2000, the Commissioner, applying the formula as laid down under Rule 3(3), determined the annual capacity of the mill at 7328.435 MT but relying on Rule 5, he again computed the annual capacity at 11961.135 MT, being equal to the actual production of the mill during the financial year 1996-97.

10. Aggrieved by the said order of the Commissioner, the respondent filed an appeal before the Tribunal. The Tribunal, vide order dated 6th April, 2000, allowed the appeal and held that Rule 5 of the 1997 Rules cannot be applied in view of change in technical parameters of the rolling mill.

11. Dissatisfied with the said order, the Commissioner made an application to the High Court under Section 35H of the Act, seeking a direction to the Tribunal to refer the question of law, which according to him, arose from the order of the Tribunal. Vide order dated 17th October, 2001, the High Court rejected the reference petition holding that no question of law arose from the order of the Tribunal. The High Court has held that the provisions of Rule 5

cannot be invoked in a case where the annual capacity of the mill is to be determined in terms of Rule 4(2) of the 1997 Rules on account of change in parameters, observing thus:

> "It is the admitted position that the capacity for the year 1996-97 was fixed on the basis of the parameters adopted by the respondent at the relevant time. Subsequently, the parameters were altered. In view of the change in parameters, it is admitted position that the capacity was considerably reduced. In fact, it has not been disputed that the annual production had come down from 11961.135 Metric Tons to 7328.435 Metric Tons. This having happened, the Revenue could not have claimed excise duty for the capacity which was not in existence. The provisions of Rule 5 cannot be invoked in a case where after determination of the capacity for the year 1996-97, the Unit makes a change in the capacity and the production actually comes down. If such a course were permitted, the result would be grossly unfair."

Additionally, the High Court has also noted that a similar view had been taken by the Tribunal in the case of M/s Awadh Alloys (P) Ltd., since reported in 1999 (112) ELT 719 (Tri.), against the revenue but despite opportunity no information was furnished whether the said decision had been challenged by the revenue or not. We may however, note at this juncture itself that the finding of the High Court to the effect that on account of change in parameters, the annual production had come down from 11961.135 MT to 7328.435 MT is factually incorrect. The actual annual production determined initially as per the formula laid down in Rule 3(3) had worked out to 7638.753 MT, which on change in

parameters now worked out at 7328.435 MT i.e. a difference approx. 300 MT only.

12. Hence, the Commissioner has preferred the present appeals against the orders of the High Courts, noted in para 2 (supra).

13. Mr. B. Bhattacharya, learned Additional Solicitor General of India, appearing for the revenue, had strenuously urged that the view taken by the High Court to the effect that once the technical parameters, as stipulated in Rule 3(3) of the 1997 Rules, are altered in terms of Rule 4(2) of the said Rules, resulting in reduction in the production capacity, Rule 5 cannot be invoked, is clearly fallacious. According to the learned counsel, for the purpose of Rule 4(2), the production capacity of the rolling mill has to be determined under the said Rule 3(3) as there is no other rule to take care of such a situation. It was argued that when the production capacity of a factory is to be determined under the said Rule, Rule 5 will automatically come into play. Relying on the clarification issued by the Board vide Circular dated 26th February 1998, learned counsel argued that since reference to previous year's production in Rule 5 of the 1997 Rules is to the actual production of the mill and does not relate to the technical parameters of the machinery, the actual production of the year 1996-97 would be

relevant for determining the current year's duty liability under Section 3A of the Act, even when parameters of the machinery are altered. It was thus, asserted that since re-determination of capacity of production under Rule 4(2) has to be done by the formulae prescribed in the said Rule 3(3), the provisions of Rule 5 cannot be disregarded. Commending us to the decision of this Court in ***Commissioner of Customs, Bangalore*** *Vs.* ***ACER India (P) Ltd.***[1], learned counsel contended that the Rules relating to determination of capacity of production have to be strictly construed.

14. *Per contra,* learned counsel appearing for the respondents, led by Mr. Balbir Singh, submitted that when there is any change in the parameters of a rolling mill, which are different from the rolling mill in the financial year 1996-97, Rule 5 has no application. Highlighting the fact that the decision of a Full Bench of the Tribunal in ***Sawanmal Shibumal Steel Rolling Mills*** *Vs.* ***C.C.E., Chandigarh-I***[2] as also the decision of the High Court of Karnataka in ***Commr. of Central Excise, Belgaum*** *Vs.* ***Bellary Steel Rolling Mills***[3], wherein it has been held that when there are alterations in the parameters, referred to in Rule 3(3) of the 1997 Rules, Rule 5 does not apply, learned

[1] (2008) 1 SCC 382
[2] 2001 (127) E.L.T. 46 (Tri.-LB)
[3] 2009 (245) E.L.T. 114 (Kar)

counsel stressed that the revenue having accepted these decisions on the very same point, it is debarred from taking a contrary stand in these appeals.

15. In rejoinder, Mr. Bhattacharya, cited the decision of this Court in ***C.K. Gangadharan & Anr.*** *Vs.* ***Commissioner of Income Tax, Cochin***[4] in support of his submission that the revenue is not precluded from questioning the correctness of the decision of the authorities below in these appeals despite the fact that orders/decision in the afore-mentioned cases have not been challenged.

16. Thus, the short question for consideration is whether Rule 5 of the 1997 Rules will apply in a case where a manufacturer proposes to make some change in the installed machinery or any part thereof and seeks the approval of the Commissioner of Excise in terms of Rule 4(2) of the said Rules?

17. Before addressing the contentions advanced by learned counsel for the parties, it is essential to note at the outset that in all these appeals, there is no challenge to the validity of Rule 5 of the 1997 Rules, inserted vide Notification dated 30th August, 1997 and, therefore, we are only required to interpret it and examine the width of its application.

[4] (2008) 8 SCC 739

18. As noted above, Section 3A was inserted in the Act to enable the Central Government to levy Excise duty on manufacture or production of certain notified goods on the basis of annual capacity of production to be determined by the Commissioner of Central Excise in terms of the Rules to be framed by the Central Government. Section 3A of the Act is an exception to Section 3 of the Act – the charging Section and being in nature of a *non obstante* provision, the provisions contained in the said Section override those of Section 3 of the Act. Rule 3 of 1997 Rules framed in terms of Section 3A(2) of the Act lays down the procedure for determining the annual capacity of production of the factory. Sub-rule (3) of that Rule contains a specific formula for determination of annual capacity of production of hot rolled products. This is the only formula whereunder the annual capacity of production of the factory, for the purpose of charging duty in terms of Section 3A of the Act, is to be determined. Second proviso to sub-section (2) of Section 3A of the Act contemplates re-determination of annual production in a case when there is alteration or modification in any factor relevant to the production of the specified goods but such re-determination has again to be as per the formula prescribed in Rule 3(3) of the 1997 Rules. It is clear that sub-rule (2) of Rule 4, which, in effect, permits a manufacturer

to make a change in the installed machinery or part thereof which tends to change the value of either of the parameters, referred to in sub-rule (3) of Rule 3, on the basis whereof the annual capacity of production had already been determined, would obviously require re-determination of annual capacity of production of the factory/mill, for the purpose of levy of duty. It is plain that in the absence of any other Rule, providing for any alternative formula or mechanism for re-determination of production capacity of a factory, on furnishing of information to the Commissioner as contemplated in Rule 4(2) of the 1997 Rules, such determination has to be in terms of sub-rule (3) of Rule 3. That being so, it must logically follow that Rule 5 cannot be ignored in relation to a situation arising on account of an intimation under Rule 4(2) of the 1997 Rules. Moreover, the language of Rule 5 being clear and unambiguous, in the sense that in a case where annual capacity is determined/redetermined by applying the formula prescribed in sub-rule (3) of Rule 3, Rule 5 springs into action and has to be given full effect to.

19. The principle that a taxing statute should be strictly construed is well settled. It is equally trite that the intention of the Legislature is primarily to be gathered from the words used in the statute. Once it is shown that an

assessee falls within the letter of the law, he must be taxed however great the hardship may appear to the judicial mind to be.

20. On the principles of interpretation of taxing statutes, the following passage from the opinion of *Late Rowlatt, J.* in ***Cape Brandy Syndicate*** *Vs.* ***Inland Revenue Commissioners***[5] has become the *locus classicus* and has been quoted with approval in a number of decisions of this Court:

> "….in a taxing act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

21. In ***Commissioner of Sales Tax, Uttar Pradesh*** *Vs.* ***The Modi Sugar Mills Ltd.***[6], J.C. Shah, J. observed thus:

> "In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency."

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[5] 1921 (1) KB 64, 71
[6] (1961) 2 SCR 189

22. In ***Mathuram Agrawal*** *Vs.* ***State of Madhya Pradesh***[7], D.P. Mohapatra, J. speaking for the Constitution Bench, stated the law on the point in the following terms:

> "The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter."

23. We do not find any reason to depart from these well settled principles to be applied while interpreting a fiscal statute. Therefore, bearing in mind these principles and the intent and effect of the statutory provisions, analysed above, the conclusion becomes inevitable that Rule 5 of the 1997 Rules will

[7] (1999) 8 SCC 667

be attracted for determination of the annual capacity of production of the factory when any change in the installed machinery or any part thereof is intimated to the Commissioner of Central Excise in terms of Rule 4(2) of the said Rules.

24. As regards the argument of learned counsel for the respondents that having not assailed the correctness of some of the orders passed by the Tribunal and a decision of the High Court of Karnataka, the revenue cannot be permitted to adopt the policy of pick and choose and challenge the orders passed in the cases before us, it would suffice to observe that such a proposition cannot be accepted as an absolute principle of law, although we find some substance in the stated grievance of the assessees before us, because such situations tend to give rise to allegations of malafides etc. Having said so, we are unable to hold that merely because in some cases revenue has not questioned the correctness of an order on the same issue, it would operate as a bar for the revenue to challenge the order in another case. There can be host of factors, like the amount of revenue involved, divergent views of the Tribunals/High Courts on the issue, public interest etc. which may be a just cause, impelling the revenue to prefer an appeal on the same view point of the Tribunal which had been accepted in the past. We, may however, hasten to add that it is

high time when the Central Board of Direct and Indirect Taxes comes out with a uniform policy, laying down strict parameters for the guidance of the field staff for deciding whether or not an appeal in a particular case is to be filed. We are constrained to observe that the existing guidelines are followed more in breach, resulting in avoidable allegations of malafides etc.; on the part of the officers concerned.

25. For the foregoing reasons, the orders impugned in these appeals cannot be sustained. All these orders are set aside and that of the Commissioners of Central Excise are restored. The appeals are allowed accordingly with costs, quantified at `50,000/- in each set of appeals.

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(D.K. JAIN, J.)

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(H.L. DATTU, J.)

NEW DELHI;
JULY 6, 2011.
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