

2013 (1) ECS ( 192) (Tri-Ban)

**Order passed by Department Officers**

*Member (L & J) in her forwarding note, in Vol no. 2, 2012 had welcomed well reasoned orders delivered by adjudicating authorities below CESTAT for publication in the ECS law reporter.*

*Chief Commissioner Bangalore has recommended an order passed by Shri D.P. Nagendra Kumar, Commissioner of Central Excise, Bangalore – I Commissionerate, Bangalore for publication. The order is printed below.*

**PASSED BY SHRI D P NAGENDRA KUMAR, COMMISSIONER OF CENTRAL EXCISE, BANGALORE-I COMMISSIONERATE BANGALORE IN THE CASE OF M/S BHUWALKA STEEL INDUSTRIES LTD., TAMAKA, KOLAR**

**“Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of the interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It may be appreciated from the discussions made herein above, that implementation of Section 3 A of the Central Excise Act, 1994 was done with a particular view to curtail the tax evasion as stated in the Section itself. Therefore the enforcement of the law has to be in consonance with the language of the law and no discretion is vested with the concerned authority to change the assessment just for the asking of the industry. In this situation, change of factors in the formula prescribed as statutory provision is not permissible for the Commissioner designated to determine the annual capacity of production.” [Para 23]**

**“It has been held by Hon’ble P & H High Court that for determining the annual production capacity of furnace of an assessee on the basis of any other material i.e. certificate of a Chartered Engineer or on the basis of sanctioned load of electricity is not sustainable when annual production capacity is determined on basis of capacity of induction furnace recorded in invoice of supplier of furnace.” [Para 24]**

**BRIEF FACTS:**

“M/s Bhuwalka Steel Industries Limited, Tamaka Industrial Area, Kolar (now renamed as M/s Bhuwalka Castings & Forging Private Limited – hereinafter referred to as the assessee), holding Central Excise Registration Certificate No. 63/92 are manufacturers of excisable goods viz. M.S. Carbon and Steel Ingots and M.S. Carbon and Steel Runners and Risers falling under

Central Excise Tariff Heading (CETH) 7206.90 of the first schedule to Central Excise Tariff Act, 1985 (CETA).

2. The Government having regard to large scale evasion of taxes in steel industries, brought a change in the assessment of excisable goods produced by such steel industries in Budget 1997. Accordingly, Induction Furnace Annual Capacity Determination Rules, 1997 was introduced vide Notification No. 24/97 – CE (NT) dated 25.07.1997 issued under the provisions of Section 3 A (2) of the Central Excise Act, 1994. Consequent to the said Rules, excisable goods namely – Ingots and Billets of non alloy steel falling under CETH 7206.90 and 7207.90 of CETA, 1985 were specified as ‘notified goods’ for the purpose of levy under the amended Section 3 A vide Notification NO. 30/97 – CE (NT) dated 01.08.1997. The said scheme of capacity determination was brought into effect from 01.09.1997 vide Notification No. 44/97 – CE (NT) dated 30.08.1997. The Rules prescribed that total capacity of production of the notified goods shall be based on the capacity of furnace installed in the factory of the assessee. In respect of those assessee whose annual capacity was determined by the designated authority viz. Commissioner of Central Excise, the concerned assessee had option to pay the duty in the manner prescribed under the then Rule 96ZO of the Central Excise Rules, 1994. Accordingly, the assessee exercised their option vide letter dated 29.08.1997 to pay duty in terms of sub Rule (3) of Rule 96 ZO of Central Excise Rules, 1994 read with Section 3 A of the Central Excise Act, 1994.

3. The Commissioner of Central Excise, Bangalore, after taking into consideration the capacity of the furnace of the assessee factory i.e. 5 MT and also keeping in view the option exercised by them under the said Rule 96 ZO (3), determined the Annual Capacity of Production (ACP) as 16,000 MTs and on pro rata basis for the period from 01.09.1997 to 31.03.1998 as 9333.333 MTs vide order C.No. IV/16/1302/97 Tech. dated 30.09.1997 Based on the said capacity determined by the Commissioner, the assessee was required to pay a sum of Rs. 8.33 lakhs as Central Excise duty per month in terms of the said option under Rule 96 ZO (3).

4. Being aggrieved by the said capacity determination order, the assessee represented to the Commissioner vide their letter dated 15.10.1997 that the annual capacity of production of their unit with two crucibles of capacity 4 MTs and 5 MTs, which were being used alternatively, could have not exceeded 11520 MTs. and sought redetermination of the capacity of production. Vide their letter dated 29.11.1997 it was also contended that the said two crucibles which were purchased in the year 1991 & 1995, required power supply of 1800 KVA and this power factor is an important factor in production of the final product. It is on record that the assessee who did not produce the attested copies of manufacturer’s invoice relating to crucibles installed in their factory, produced the same with the said letter dated 29.11.1997. based on the power factor mentioned in the said invoices, the assessee requested the Commissioner to re-determine the ACP taking into account the capacity of the crucibles and the power pack available to achieve maximum melting which according them could not have exceeded 3.6 MTs (Total Capacity of Furnace or TCF in short).

5. As against the duty liability of Rs. 8.33 Lakhs payable under Rule 96 ZO (3), the assessee vide their option dated 29.08.1997 determined the ACP of their unit as below and accordingly calculated the duty liability as Rs. 6 Lakhs as illustrated in the said Rule 96 ZO (3)

ACP = TCF x 3200 where TCF = Total capacity of Furnace.

TCF = 3.6 MTs which is arrived at on the basis of power pack i.e. 1800 kVA.

(In other words, according to assessee if a power pack of 500 kVA can produce on MT and accordingly 1800 kVA can produce 3.6 MTs).

Therefore ACP = 3.6 x 3200 = 11, 520 MTs

Duty liability = For 3 MTs = Rs. 5 lakhs and on pro rata basis for  
3.6 MTS = Rs. 6 Lakhs per month

6. From the above calculation, it appears that the assessee had not accepted the capacity determined by the Commissioner in his order dated 30.09.1997 and have put forth their capacity as 11,520 and also arrived at the duty liability of Rs. 6 lakhs per month and their total liability from 01.09.1997 to 31.03.1998 (7 months period) thus worked out to Rs. 42 Lakhs and for a full years it works out to Rs. 72 Lakhs as against a sum of Rs. 99.96 lakhs payable as per the capacity determined by this office.

7. The above pleas of the assessee was considered and rejected by the then Commissioner vide endorsement C.No. IV/16/1302/97 – Tech dated 11.03.1998 and directed them to discharge the duty liability in accordance with the order dated 30.09.1997. However it is seen from the records that the assessee ignored the directions of the department and continued to discharge the duty of Rs. 6 Lakhs only based on the ACP arrived by them i.e. 3.6 MTs (TCF).

8. Aggrieved by the order of the Commissioner in rejecting the representation for re-determination the ACP, the assessee filed a Writ Petition bearing No. 10473 of 1998 in the High Court of Karnataka with a prayer to strike down Rule 3 of Induction Furnaces Annual Capacity Determination Rules, 1997 which was unrealistic, unscientific and suffered from technical infirmity, as the determination of capacity of furnaces is not related to the power supplied to the furnaces. The Hon'ble single Judge vide order dated 18.03.2003 set aside the ACP determination order dated 30.09.1997 as also the rejection order dated 11.03.1998 and directed the Commissioner to take into consideration the power factor and re-determine the actual capacity in terms of the observations made in the judgment. The relevant portion of para 13 of the order reads as follows.

“In the light of this legal principle with regard to Interpretation of Statues, I am of the view that instead of striking down the Rule it can be read as providing for taking into consideration of power as a relevant factor so that justice is rendered to all the parties concerned. Otherwise, the very object of providing a relevant factor in terms of Sec. 3 A is defeated. Therefore instead of striking down, I would rather read into the annual capacity providing for power factor for the purpose of determination of capacity”.

9. The above decision was not accepted by the Department and the same was challenged in Writ Appeal no. 4056/2003 against the order of the HC in WP No. 10473 dated 18.03.2003. It was submitted before the High Court that the constitutional validity of Rule 3 of the ACP Rules having been upheld by the Supreme Court in the case of Union of India Vs. Supreme Steels and General Mills, 2001 (133) ELT 513 (SC), there cannot be any change in procedure for determination of capacity under Section 3 A r/w Rule 96ZO (3). The Division Bench of hon'ble High Court vide its order 11.11.2011 allowed the appeal in part setting aside the directions of Single Judge to include the power factor in re-determining the ACP with the observation that the contention as to whether power factor should be taken into account while re-determining the ACP is kept open to be urged before the competent authority to be decided in accordance with the provisions of Section 3 A of the CEA and Rule 3 of the Induction Furnace Annual Capacity Determination Rules, 1997.

10. In pursuance of the above directions of the Hon'ble HC in order WA No. 4056/2003 dated 11.11.2011, the assessee M/s Bhuvalka Castings & Forging Private Limited were informed vide this office letter C. No. IV/16/27/2012 Tech BI dated 06.03.2012 to appear in person before the Commissioner of Central Excise, Bangalore – I Commissionerate on 15.03.2012 and to produce the documents/records relating to the averments made by them before the Hon'ble HC for re-determination of their ACP. In response, the assessee vide letter dated 14.03.2012, pleaded for adjournment of the PH stating that the technical expert conversant with the working of induction furnace was not available. Accordingly the next date of PH which was fixed on 16.04.2012 was held on 17.04.2012.

11. The assessee, in their written brief dated 16.4.2012, has inter alia made the following submissions.

1. That the directions of Honible High Court of Karnataka contained in order dated 11.11.2011 to re-determine the Annual Capacity of Production of their induction furnace of the period 1977-98 to 1999-2000 by taking into consideration all the factors relevant for the purpose of determination of the production capacity of their induction Furnace is reasonable and is in their favour.
2. That none of the notification or the Rules issued in the year 1997 is in force as on date and hence the department cannot pass any fresh order for re-determination of the annual capacity of production in respect of their unit since these notifications have already been rescinded without any saving clause.
3. That if in case the departments wishes to proceed further against them ignoring the plea above, it is their contention that in the initial hearing held by the then Commissioner in 1997 they had suggested for obtaining a technical opinion about the mode of production of their unit as stated in the department's circular / rules so that it would give clear picture about the necessity of including the power factor in the

formula for determining the ACP as otherwise the quantum of 16,000 MTs fixed by the said Commissioner is unacceptable in the absence of power factor as one of the ingredient in the formula.

4. That since the Commissioner did not order for obtaining technical opinion, they appointed a Chartered Engineer on their own and he has certified that the total capacity of production of the furnace is only 3.6 MTs with the available infra structure of power i.e. 1800 kVA and that this certificate was submitted to the department on 24.03.1998.
5. That as the department has not disputed the veracity of the certificate issued by Chartered Engineer, their request for fixing the capacity as 3.6 MTs is to be considered favourably.

12. During the personal hearing held on 17.04.2012, Shri Kamal Bhuwalka, Director of M/s Bhuwalka Castings and Forging Private Limited, made following submissions inter alia reiterating the Contents of written brief and requested for passing favourable orders in the matter:-

- (1) That the earlier order of determining the capacity of production as 16,000 MTs with monthly duty liability of Rs. 8.33 Lakhs towards the said capacity was erroneous in as much as they used the two crucibles with capacity of 4 & 5 MTs on alternate basis.
- (2) That with the sanctioned power load i.e. 1800 KW their unit could not have produced 16000 MTs of ingots of non alloy steel and therefore it was necessary to re-determine the quantity of production by considering the variable factor viz. power available for charging the furnace in the said formula.
- (3) That the order of 1997 was also erroneous on account of the fact that the then Commissioner had failed to obtain the technical features of the crucibles of their factory as per the guidelines of the above Rules
- (4) That atleast the department ought to have considered the certificate given by Chartered Engineer confirming the factual position of production of 3.6 MTs as per the available power.
- (5) That with the above capacity, their total duty liability under Rule 96 ZO (3) works out to Rs. 6 Lakhs per month and accordingly they had paid the entire amount during the tenure of the said ACP Rules.

- (6) That pursuant to the directions of the Hon'ble High Court of Karnataka in Writ Appeal, it is necessary to consider the power factor as one of the parameters for determining the annual capacity of furnaces.
- (7) That as the said IFACD Rules is no longer subsisting now and hence any duty liability under the rules by fixing the annual capacity in the same manner at this stage would not be legally sustainable.
- (8) That though they had not challenged the constitutional validity of the said Rules, per se they were not in agreement with the methodology of determining the annual capacity which excluded the important parameter i.e. power factor and hence they had sought relief from the High Court.

#### **FINDINGS:-**

13. I have considered the facts of the case, written submission of the assessee vis-à-vis the pleadings in personal hearing held on 17.04.2012. The issue to be decided in this case is whether determination of annual production capacity of induction furnaces in the assessee factory by including power factor is permissible? As could be seen from the facts of the case explained in detail above, this case has travelled a long distance with the same contention i.e. to include power factor as one of the parameter in the capacity determination formula and thus re-fix the quantum of production capacity and provide relief from the duty liability. Before I set out to discuss the merits of the case, it is necessary to mention here that Section 3 A provisions were invoked by the Central Government in order to plug the leakage of revenue caused by Steel Industries. It would not be out of context to extract below the FM's speech in the budget 1997:

“It is reported that in some sectors, like induction furnace, steel re-rolling mills etc., evasion of excise duty is substantial and the production is not being reported correctly. I propose to tackle this problem by introducing collection of excise duty on the basis of the production capacity.”

14. In section 3 A, it has been provided that 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 collection duty of excise on such goods in accordance with the provisions of this section. (Emphasis supplied) Thus, pursuant to the policy decision taken by the Government, Ministry of Finance in exercise of the powers vested under Section 3 A of the Central Excise Act, 1994 issued Induction Furnace Annual Capacity Determination Rules, 1997 vide notification No. 24 / 1997 – CE (NT) dated 25.07.1997, the provisions of which covered the unit of the assessee as well. Detailed procedures

outlining the contour of scheme were issued by CBEC vide Circular No. 325/41/97 – CX dated 25.07.1997.

15. The salient features of these rules are mentioned below:

- (a) The rules applied to an induction furnace unit producing ingots and billets of non-alloy steel.
- (b) The annual capacity of production to be determined by the Commissioner of Central excise.
- (c) The capacity of production for any part of the year shall be calculated pro rata on the basis of annual capacity of production.
- (d) If a manufacturer proposes to increase or reduce the crucible capacity of the induction furnaces in his factory, he can do so with prior intimation and the approval of the Commissioner and the date from which the changed capacity will come into operation shall be determined and intimated by the Commissioner.

Further, para 5 of the circular read as under :

“5. It would be seen that, by virtue of the Induction Furnace Annual Capacity Determination Rules, 1997, the annual capacity of production of a factory has been deemed to be fixed multiple to the total capacity of furnaces actually installed in the factory. Thus, for determination of annual capacity of production, the relevant parameter is the determination of the capacity of the furnaces installed in the factory. Once this capacity is known, the annual capacity of production of ingots and billets shall be taken to be 3200 times the capacity of the such furnaces (in metric tonnes.)

16. The following formula was prescribed in the aforesaid notification No. 24/1997-CE (NT) [para 3 (3)] for determining the annual capacity of production of an Induction Furnace Unit

ACP = TCF X 3200, where –

ACP = Annual Capacity of Production of the factory producing ingots and billets of non – alloy steel in metric tonnes; and

TCF = Total capacity of the furnaces installed in the factory producing ingots and billets of non – alloy steel in metric tonnes.

17. In order to ascertain the actual capacity of the furnace installed in the factory, the notification envisaged that the Commissioner shall obtain authenticated copy of the manufacturer’s invoice or trader’s invoice, who have supplied or installed the furnace or crucible to the induction furnace unit, and ascertain the total capacity of the furnaces installed in the factory on the basis of such invoice or document. If in case the required invoice is not available, the notification provided alternative by way of ascertaining the capacity of the furnaces installed in the induction furnace unit on the basis of the capacity of comparable furnaces installed in any other factory in respect of which the manufacturer’s invoice or other document indicating the

capacity of the furnace is available or, if not so possible, on the basis of any other material as may be relevant for this purpose. Requisitioning the service of any technical authority by the Commissioner was made permissible in the notification.

18. Now coming to the factual position that obtained at the time of initial determination of the annual capacity of production. I find from records that though they filed a declaration dated 07.08.1997 exercising option to pay duty under the then Rule 96 ZO (3) of Central Excise Rule, 1994, copies of invoices relating to induction furnaces installed in their factory was not furnished by the assessee. The assessee had intimated vide their letter dated 29.08.1997 that they have two numbers of Crucibles with capacity of 4 MTs & 5 MTs. Based on these declared facts, the Commissioner accordingly proceeded to determine the capacity as 16,000 MTs for a full year and for the period from 01.09.1997 to 31.03.1998 as 9,333.333 MTs, vide order dated 30.09.1997 by following the formula prescribed as noted below.

$$ACP = TCF \times 3200$$

$$ACP = 5 \times 3200 = 16000 \text{ MTs}$$

**Note:** In above calculation, the figure 5 represents the crucible with highest capacity installed in the assessee factory. Further, the aforesaid capacity determination order dated 30.09.1997 carries the remark that “authenticated invoices in respect of installed furnace or crucibles not produced”.

19. I find from records that it has been the contention of the assessee for the beginning that capacity determination also needs inclusion of an important variable factor i.e. power consumption, for consideration. This request seems impermissible in as much as the method of determining the capacity of production by an Induction Furnace Unit has been arrived at after taking into consideration all the relevant factors.

20. The principle of induction melting is that a high voltage electrical source from a primary coil induces a low voltage, high current in the metal, or secondary coil. Induction heating is simply a method of transferring heat energy. Based on industrial needs, different manufacturer manufactures crucibles with different capacity vis-à-vis power consumption. However the factor that is crucial to the present proceedings is that the assessee to whom Section 3 A were being made applicable had to declare to the department the capacity of crucible supported by manufacturer's invoices. In the circumstances, it is the variable power factor is not a pre-requisite factor for determining the said capacity of production as per the formula prescribed under the Rules.

21. A perusal of the figures culled from the assessee's financial records i.e. annual balance sheets from 1994-95 onwards, it is observed that the assessee has substantial installed capacity of production of Ingots in their factory as declared pursuant to the provisions of Companies Act, 1956. It would not be in dispute that this declared installed capacity is based on the invoices concerning to the crucibles, the details of which were also required to be informed to the department soon after the new ACP rules were notified. Therefore, if the installed capacity itself is declared to be varying between 20 to 30 thousand MTs per annum as per financial statements

which are now in public domain, then the annual capacity of production determined by the department can hardly be discounted to be on higher side. Therefore, I do not find any merit in the contention of the assessee to accept their suggestion for inclusion of power factor in the above formula so as to arrive at a lower production figures.

22. The CBEC vide circular dated 25.07.1997 has informed that the capacity of the induction furnace is relatable to crucible (s), excluding the “idle (spare or standby)” crucible. It is also further stated in the circular that the capacity of a crucible size as indicated on the manufacturer’s invoice may be accepted. Viewed in this back ground, I find again no merits in the averments of the assessee that power factor influences the capacity determination.

23. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of the interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It may be appreciated from the discussions made herein above, that implementation of Section 3 A of the Central Excise Act, 1994 was done with a particular view to curtail the tax evasion as stated in the Section itself. Therefore the enforcement of the law has to be in consonance with the language of the law and no discretion is vested with the concerned authority to change the assessment just for the asking of the industry. In this situation, change of factors in the formula prescribed as statutory provision is not permissible for the Commissioner designated to determine the annual capacity of production. In the light of the above I find no merit in the averments of the assessee that the certificate given by their Chartered Engineer ought to have prevailed over the proceedings held by the erstwhile Commissioner in 1997. Consequently, I find no infirmity in the order dated 30.09.1997 as the same is in accordance with the rules that existed then.

24. It may not be out of context to place reliance on the decision of Hon’ble High Court of Punjab & Haryana in the case of APS Associates (P) Ltd. v/s Commissioner [reported vide 2008 (231) ELT 420 (P & H)] though an appeal is pending before Supreme Court against the High Court Order in the case. It has been held by Hon’ble P & H High Court that for determining the annual production capacity of furnace of an assessee on the basis of any other material i.e. certificate of a Chartered Engineer or on the basis of sanctioned load of electricity is not sustainable when annual production capacity is determined on basis of capacity of induction furnace recorded in invoice of supplier of furnace.

25. Once the annual capacity of production of an Induction furnace is determined in the manner prescribed under the said induction Furnace Annual Capacity Determination Rules, 1997, the next course of action is to determine the mode of payment of duty on the said production quantity. In this context the assessee has certain option to choose from the provisions of Rule 96 ZO of the Central Excise Rules, 1994 as it existed then. In the instant case it is seen from the records that the assessee had exercised their option under Rule 96 ZO (3) vide their letter dated 29.08.1997 for payment of duty on lump sum basis based on their own determined capacity arrived at by including power factor. Be that as it may, the provisions of Rule 96 ZO (3)

excluded the assessee from seeking any benefit of re-determining the capacity on account of the fact that the actual production was less than the capacity of production determined in the manner stated above. I find from records that at no point of time, the assessee disputed their duty liability created by Capacity Determination Rules by taking into the lower quantity of production. This being the case, it is necessary to conclude that assessee was aware of the prohibitory provisions of Section 3 A (4) and that their fight for re-determination of the capacity by including power factor, was beyond the boundaries of law.

26. The validity of the Section 3 A provisions was tested before Hon'ble Supreme Court and relying on their earlier decision in the case of Commissioner v/s Venus Casting (P) Limited [reported vide 2000 (117) ELT 273 (Supreme Court)] the apex court has held that the provisions of Section 3 A is in order [see Union of India v/s Supreme Steels & General Mills reported vide AIR 2001 SC 2987]

27. Thus having found no merit in any of the averments of the assessee in regard to inclusion of power factor and set off their duty liability, I now revert to their plea that their case cannot be adjudicated in view of the non existence of the law itself. In other words, their contention is that the said Induction Furnace Annual Capacity Determination Rules, 1997 having been withdrawn from 1.3.2000, the demand for duty on their clearance of ingots / billets is not sustainable under the law.

28. The contention of the assessee that the law regarding determination of ACP is no subsisting and hence re-determination is not permissible, is totally mis-conceived and not based on proper understanding of the legal position. In this regard it is necessary to state that as per Section 109 of the Finance Act, 2000, the validation of action taken under erstwhile Section 3 of Central Excise Act, 1994 has been restored inasmuch as all duties of excise levied, assessed or collected during the said period on any excisable goods under the Central Excise Act, shall be deemed to be and shall be deemed to always have been as validity levied etc., and consequently the recovery shall be made of all such duties of excise which have been collected or short collected, as the case may be is valid at all material times. The effect of the above saving clause is that the pending case would continue as if the provisions had not been omitted. In other words, I am of the view that the repeal or omission does not affect rights, privileges, obligations or liabilities acquired, accrued or incurred under any provisions so repealed/ substituted and this is also contained in section 6 of the General Clauses Act, 1897 (10 of 1897) and is specifically applicable to pending cases in respect of rights, privileges, obligations or liabilities acquired, accrued on incurred under and Act passed by the legislature or under a Regulation made by the President. Section 3 of the Central Excise Act, 1994 is a substantive provision of law is not in dispute. Further, the Calcutta High Court in the case of Bireswar Sirkar v/s Collector of Central Excise, Calcutta reported in 2003 (162) ELT 1170 (Cal) held at para 11 as under

“11. Now the question is only whether Section 6 of the General Clauses Act saves the show cause notice or not. Whenever a Central Act is repealed and unless a different intention appears, Section 6 of the General Clauses reads as under:

“6. Effect of repeal. – Where this Act, or any Central Act, or Regulation made after commencement of this Act, repeals any enactment hitherto made or hereafter to be made then, unless a different intention appears, the repeal shall not –

- (a) Revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) Affect the previous operations of any enactment so repealed or anything duly done or suffered hereunder; or
- (c) Affect any right, privilege, obligation or liability acquired, accrued or uncured under any enactment so repealed; or
- (d) Affect any penalty forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
- (e) Affect any investigation, legal proceeding or remedy in respect of any such rights, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.”

In view of the above, the contention of the assessee do not hold any water.

29. In the light of the above, it is necessary to consider the following for the purpose of finalizing the order:

- a) The capacity of production shall be determined in accordance with the prescribed formula set out in Induction Furnace Annual Capacity Determination Rules, 1997
- b) The maximum capacity of crucible i.e. 5 MTs installed in the assessee unit shall be Total Capacity of Furnace (TCF) factor in the said formula.
- c) Pro rata capacity shall be determined once the annual capacity is determined as above.
- d) The option dated 29.08.1997 exercised in terms of Rule 96ZO (3) shall stand valid for the present proceedings and

- e) The assessee shall accordingly discharge duty liability in respect of the capacity of production now determined hereunder.

Accordingly, I pass the following order:

**ORDER**

- (1) I determine the annual capacity of production of the notified goods viz. Non alloy Steel Ingots as 16,000 MTs in respect of the assessee unit in terms of Section 3 A (2) of the Central Excise Act, 1994 read with the provisions of Induction Furnace Annual Capacity Determination Rules, 1997
- (2) Based on the above capacity determined, the pro rata production capacity for the period from 01 September 1997 to 31<sup>st</sup> March 1998 shall be 9,333.333 MTs
- (3) The option exercised by the assessee under Rule 96 ZO (3) of the Central Excise Rules, 1994 is accepted for the purpose of payment of duty under Section 3 A
- (4) The assessee shall discharge their duty liability in respect of the annual capacity or as the case may be, the pro rata capacity for the period 1.9.1997 to 31.3.1998 in terms of Rule 96 ZO (3) i.e. at the rate of Rs.8,33,333.33 per month
- (5) The assessee shall discharge the above duty liability forthwith alongwith interest as specified in the said Rules by deducting the amount if any paid by them during the currency of the said Rules from September 1997 to March 2000.”