



eBX

केन्द्रीय उत्पाद शुल्क एवम सेवा कर आयुक्तालय , भावनगर  
OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX  
प्लॉट नं. 6776-बी/1, 'सिद्धि सदन' बिल्डिंग,  
PLOT NO. 6776/B-1, "SIDDHI SADAN" BUILDING,  
नारायण उपाध्याय मार्ग, भावनगर-364001  
NARAYAN UPADHYAY MARG, BHAVNAGAR-364 001.  
दूरभाष : (0278) 2523627 फैक्स : 0278-2513086

रजिस्टर्ड डाक पावती द्वारा

By R.P.A.D.

फाईल सं. V/15-17/Adj/2007

F. No.

आदेश की तारीख : 28/02/2012

Date of Order :

जारी करने की तारीख : 28/02/2012

Date of Issue :

पारितकर्ता

Passed by

श्री एन के भुजबल

SHRI N. K. BHUJABAL

आयुक्त , केन्द्रीय उत्पाद शुल्क एवम सेवा कर, भावनगर

Commissioner , Central Excise and Service Tax, Bhavnagar

मूल आदेश संख्या Order-in-Original No : 5 to 10/BVR/Commissioner/2012

1. आदेश की यह प्रति जिसको जारी किया गया है उनके व्यक्तिगत उपयोग के लिए निःशुल्क भेजी जा रही है ।
1. This copy of order is granted free of charges for private use of the person(s) to whom it is issued and sent.
2. यदि कोई व्यक्ति इस आदेश से स्वयं को असंतुष्ट अनुभव करता है , तो इस आदेश के विरुद्ध सीमा शुल्क , केन्द्रीय उत्पाद शुल्क एवं सेवा कर अपीलीय प्राधिकरण , ओ-20 , मेघानी नगर , नया मानसिक अस्पताल संकुल , अहमदाबाद को केन्द्रीय उत्पाद शुल्क अधिनियम की धारा 35-बी की उपधारा 1(a) की शर्तों के आधार पर अपील कर सकता है । धारा 35-बी (1) (परंतुक) (a) से (d) के अंतर्गत मामले जैसे कि हानि , छूट , बॉण्ड के अंतर्गत निर्यात , शुल्क क्रेडिट के मामले , आवेदन के पुनरीक्षण के मामलों में आवेदन भारत सरकार के संयुक्त सचिव , राजस्व विभाग , वित्त मंत्रालय , नई दिल्ली को बंधनकर्ता रहेगा ।
2. Any person(s) deeming himself aggrieved by this Order may appeal against this order to The Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad, O-20, Meghani Nagar, New Mental Hospital Compound, Ahmedabad, in terms of the provision of Section 35B(1)(a) of the Central Excise Act, 1944. If the case covered under the category specified in Section 35B(1) (Proviso) (a) to (d), i.e. Loss, Rebate, Export under Bond, duty credit cases, the Revision application shall lie to the Joint Secretary to the Government of India, Department of Revenue, Ministry of Finance, New Delhi.
3. अपील फॉर्म E.A.-3 में केन्द्रीय उत्पाद शुल्क (अपील) नियम , 2001 के नियम 3 के उपनियम 2 में विनिर्दिष्ट व्यक्ति द्वारा की जानी चाहिए ।
3. The Appeal should be filed in form EA.-3. It shall be signed by the person as specified in Rule 3(2) of the Central Excise (Appeals) Rules, 2001.
4. केन्द्रीय उत्पाद शुल्क अधिनियम , 1944 की धारा 35-B के अंतर्गत अपील इस आदेश की प्राप्ति के तीन माह के अंदर दर्ज करवानी होगी ।
4. The appeal should be filed within three months from the date of communication of this order. (Section 35B of the Central Excise Act, 1944).
5. यह अपील चार प्रतियों में दाखिल की जाए और जिसके विरुद्ध अपील की गई है ,उस आदेश की समान संख्या में प्रतियां भेजी जाए (इन में से कम से कम एक प्रति अधिप्रमाणित होनी चाहिए) । उक्त अपील के समर्थक सभी दस्तावेज चार प्रतियों में भेजे जाएंगे ।



5. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (One of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate. The appeal shall be presented in person to the Register or sent by Registered Post addressed to the Registrar. But the date of receipt in office of the said Registrar in time or otherwise will be the relevant date for the purposes of limitation of time.

6. फीस का भुगतान न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के पक्ष में रेखांकित बैंक ड्राफ्ट द्वारा अधिनियम के प्रावधानों के अंतर्गत करना अपेक्षित है। यह ड्राफ्ट जहाँ पीठ स्थित है, किसी राष्ट्रीयकृत बैंक की किसी शाखा के नाम पर जारी किया जाए और उस उक्त अपील प्रपत्र के साथ डिमाण्ड ड्राफ्ट संलग्न किया जाना चाहिए।

6. The Fee is required to be paid as under through a cross Bank Draft in favour of the Assistant Registrar of Bench of the Tribunal on a branch of any Nationalized Bank located at the place where the Bench is situated and it shall be attached to the form of appeal.

- (क) जहाँ पर मांगा गया शुल्क ब्याज और दण्ड रूप 50,00,000/- (रुपए पचास लाख) से ज्यादा हो, रु. 10,000/- (रुपए दस हजार)
- (a) Where the amount of duty and interest demanded and penalty is levied is more than ₹ 50,00,000/- (Rupees Fifty Lakhs), ₹ 10,000/- (Rupees Ten Thousand);
- (ख) जहाँ पर मांगा गया शुल्क ब्याज और दण्ड रूप 5,00,000/- (रुपए पांच लाख) से अधिक हो लेकिन, रूप 50,00,000/- (रुपए पचास लाख) से कम हो 5,000/- (रुपए पांच हजार)
- (b) Where the amount of duty and interest demanded and penalty levied is more than ₹ 5,00,000/- (Rupees Five Lakhs) but not exceeding ₹ 50,00,000/- (Rupees Fifty Lakhs), ₹ 5,000/- (Rupees Five Thousand);
- (ग) जहाँ पर मांगा गया शुल्क ब्याज और दण्ड रूप 5,00,000/- (रुपए पांच लाख) अथवा कम हो, रूप 1,000/- (रुपए एक हजार)
- (c) Where the amount of duty and interest demanded and penalty levied is ₹ 5,00,000/- (Rupees Five Lakhs) or less, ₹ 1,000/- (Rupees One Thousand);

7. इस आदेश की प्रतिलिपि पर न्यायालय शुल्क मुद्रांक अधिनियम, 1970 की अनुसूची 1 मद 6 के अंतर्गत निर्धारित 50 पैसे का न्यायालय शुल्क मुद्रांक (कोर्ट फी स्टाम्प) लगाया जाना चाहिए।

7. The Copy of this order attached therein should bear a Court fee stamp of 50 paise as prescribed under schedule 1 of Article 6 of the Court fee stamp Act, 1970.

8. उक्त अपील फॉर्म के साथ शुल्क / दण्ड की अदायगी का प्रमाण संलग्न किया जाना चाहिए।

8. Proof of payment of duty, penalty etc. should also be attached in original to the form of appeal.

9. अपील पर रु. 5 (रुपए पांच) का न्यायालय शुल्क मुद्रांक (कोर्ट फी स्टाम्प) लगाया जाना चाहिए।

9. Appeal should bear a Court Fee Stamp ₹ 5/-.

10. पूर्ण जानकारी हेतु केंद्रीय उत्पाद शुल्क (अपील) नियम, 2001 एवम CESTAT (कार्यविधि) नियम 1982 देखें।

10. Please refer to the Central Excise (Appeals) Rules, 2001 and the CESTAT, Procedure Rules, 1982 for complete details.

To,

**M/s. Rameshwar Steel Re-Rolling Mills,  
106, G.I.D.C., Vartej,  
Bhavnagar - 364 060.**

विषय : कारण बताओ नोटिस संख्या :

Subject: Show Cause Notice F.No. (i) ARIV/C.72/MS-ROUNDBAR/RS/RM/6/98 dated 26.10.1998, (ii) V.72/3-183/D/99/CX.3 dated 31.03.1999, (iii) V.72/3-349/D/99/CX.3 dated 01.07.1999, (iv) V.72/500/D/99/CX.3 dated 28.09.1999, (v) V.72/3-13/D/2000/CX.3 dated 13.01.2000 and (vi) V.72/3-146/D/2000/CX.3 dated 31.03.2000 issued to M/s. Rameshwar Steel Re-Rolling Mills, 106, G.I.D.C., Vartej, Bhavnagar - 364 060.



**BRIEF FACTS OF THE CASE :-**

M/s. Rameshwar Steel Re-Rolling Mills, Bhavnagar (hereinafter referred to as the "Noticee") are engaged in the manufacture of Bars, Angles, Rods etc. of non-alloy steel in their Hot Rolling Mill. The Noticee, vide their application dated 20.08.1997 opted to work under the scheme of discharging Central Excise duty based on the Annual Capacity of Production (ACP) as described in Sub-Rule (3) of Rule 96ZP of the Central Excise Rules, 1944 (herein after referred to as "CER, 1944") read with Section 3A of the Central Excise Act, 1944 (hereinafter referred to as the "CEA, 1944") (commonly known as Compounded levy scheme). The Noticee had declared the parameters of their rolling mill, as required under the scheme, while applying for discharging the duty liability under this scheme.

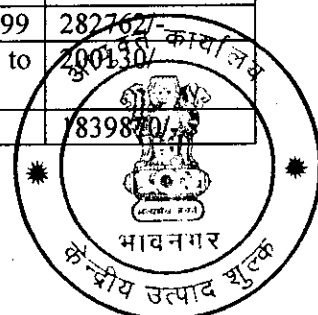
2. The Commissioner of Central Excise, Rajkot, vide letter F. No. IV/16-78/MP/97 dated 23.10.1997 determined the Annual Capacity of Production of the Mill of the Noticee as 3305.287 MTs under Rule 3 read with Rule 5 of Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 (herein after referred to as "HRSMACD Rules, 1997") with effect from 01.09.1997, on the basis of information relating to the various parameters of the mill furnished by the Noticee. Since, no manufacturing activity was carried out by the Noticee during the year 1996-97, the Annual Capacity of Production was fixed at 3305.287 MTs in terms of Rule 3 read with Rule 5 of the "HRSMACD Rules, 1997".

3. Subsequently, the Noticee vide their letter dated Nov.'98 (received on 23.03.1999) along with the Report dated 27.11.1998 of M/s. Corona Enterprise, Chartered Engineer, requested for re-determination of Annual Capacity of Production on account of change in the value of various parameters/ factors, including factor 'd' from 190 mm to 158 mm. As such, as per the changed value of factor 'd' from 190 mm to 158 mm, the Annual Capacity of Production was determined as 1273.760 MTs w.e.f. 22.04.1999 in terms of Sub-rule 2 of Rule 4 of HRSMACD Rules, 1997, by the Commissioner of Customs & Central Excise, Rajkot vide letter F. No. IV/16-181/MP/97 dated 06.06.2000. It has been noted that though the request letter for seeking re-determination was dated as Nov.' 98, the said letter was received in the office of the Commissioner only on 23.03.1999.

4. The Noticee was therefore required to pay Central Excise duty (Compounded levy) as provided under Rule 96ZP(3) *ibid* on the aforesaid basis. However, the Noticee failed to pay the Central Excise duty in accordance with the Annual Capacity of Production fixed in this regard. Accordingly, following 6 show cause notices were issued to the Noticee demanding duty and the interest thereon as described in the Notices apart from proposing penal action under Rule 96ZP(3) and Rule 173-Q(1) *ibid*.

T A B L E

Sr. No.	SCN No.	SCN Date	Duty payable as per SCN (₹)	Period	Duty demanded in SCN (₹)
(1)	(2)	(3)	(4)	(5)	(6)
1	AR IV /C.72 / MS - ROUND BAR / RS / RM/6/98	26.10.98	495972/-	4/98 to 9/98	495792/-
2	V.72/3-183/D/99/CX.3	31.03.99	413160/-	10/98 to 2/99	413160/-
3	V.72/3-349/D/99/CX.3	01.07.99	247896/-	3/99 to 5/99	247896/-
4	V.72/500/D/99/CX.3	28.09.99	247896/-	6/99 to 8/99	200130/-
5	V.72/3-13/D/2000/CX.3	13.01.00	330528/-	9/99 to 12/99	282762/-
6	V.72/3-146/D/2000/CX.3	31.03.00	247896/-	1/2000 to 3/2000	200130/-
	TOTAL		1983348/-		1839870/-



**ORDER-IN-ORIGINAL :-**

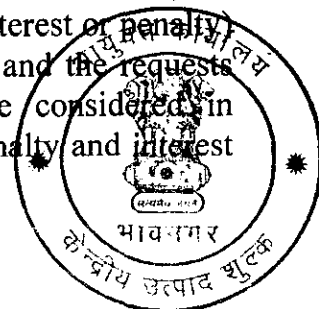
5. The Noticee was requested vide letter dated 09.11.2000 to submit the defence, if any, to above six show cause notices. The Noticee was also intimated the date of Personal Hearing. Shri A. D. Maru, Advocate appeared for the Personal Hearing and filed written submission dated 10.11.2000 in which it was inter-alia submitted that there is contradiction of Rule 4 and 5 of HRSMACD Rules, 1997 each other and also Rule 5 is inconsistent with the Rule 3 and 4 of HRSMACD Rules, 1997; that a dispute was pending before the Supreme Court and also Gujarat High Court; that they had opted to work under Rule 96ZP(3) of the Rules; that the parameter was changed from 01.11.1998 and calculated ACP came to 1273.760 MTs; that as provided under Rule 4(2) of the HRSMACD Rules, 1997, proposed change in installed machinery was intimated under letter dated 01.11.1998 effective from 01.11.1998 of parameter as 158 mm and thereby the duty liability shall be at the rate of ₹ 150/- per MT as provided under the provisions of Rule 96ZP(3); that the revised ACP shall be 1273.760 MT with effect from 01.11.1998; that under the notice issued by the department, it was proposed to reject the revised ACP worked out to 1273.760 MT which is less than the ACP of 3305.287 MTs; that they relied upon the judgments of the CEGAT in the case of M/s. Awadh Alloys Pvt. Ltd. [1999 (112) ELT 719 (T)] and in the case of Durga Agro Industries [2000 (121) ELT 422 (T)]; that they requested to determine ACP at 1273.760 MTs w.e.f. 01.11.1998.

6.1 After considering the written submission of the Noticee and after following the principles of natural justice, the aforesaid 6 show cause notices were adjudicated vide Order-in-Original No. 425 to 430/TECH/COMMR/2000 dated 05.01.2001 passed by the Commissioner, Customs & Central Excise, Rajkot.

6.2 In the said Order-in-Original, it was observed that the ACP of the Noticee had already been re-determined in terms of the formula at 1273.760 MTs by the appropriate authority under Rule 4 of the HRSMACD Rules, 1997. The only short point for consideration would be whether the effective date of the re-determined ACP would be 22.04.1999 or 01.11.1998, as requested by the Noticee.

6.3 It was found by the adjudicating authority that though the request letter was purportedly dated 27.11.1998, the said letter was received in the office only on 29.03.1999 (sic), hence the said letter dated 27.11.1998 could not be considered as the true date for intimation of the change. Rule 4(2) of the HRSMACD Rules, 1997 makes it mandatory for the manufacturer to intimate about the change in parameters affecting the ACP of the mill at least one month in advance of such proposed change. The said Rule empowers the Commissioner to determine the date from which such change would be effective. In view of the above, the adjudicating authority did not find any need to order a change in the date for altering the parameters.

6.4 It was also observed that though the Noticee had cited the interim order of the Hon'ble Supreme Court in their defence, the fact was that they had not even requested to seek payment of duty on the basis of actual production during the period in question for which demands had been issued, so as to obtain assistance from the interim orders of the Supreme Court. In the interim order, the Supreme Court had directed that no coercive action (to recover interest or penalty) as stipulated in Notification No. 7/98-CE(NT) should be taken, and the requests for determination of capacity on actual production basis be considered in accordance with law. The said notification merely prescribed penalty and interest



on default in payment of duty due under the scheme. There was no estoppel against collection of duty due under the scheme. In the event they claimed duty payment on actual production basis, then the rate of ₹ 400/- per M.T. was applicable, which they had not paid. The Noticee could not adopt the rate prescribed in the scheme on one hand and seek payment of duty on actual production during the period involved on the other hand, if they were challenging the scheme. Therefore, reliance on the Supreme Court's interim order was found to be misplaced. However, keeping in view the directions of the Hon'ble Supreme Court dated 21.04.1998 referred to above, orders for imposition of penalty or recovery of interest as proposed in the show cause notices were deferred till the final outcome of the Civil Appeals pending before the Hon'ble Supreme Court.

6.5. It was found that the Noticee was liable to pay the Central Excise duty as provided under sub-rule (3) of Rule 96ZP and that the Noticee had short paid the duty amounting to ₹ 8,06,060/- as shown in column (9) of table below.

Sr. No.	SCN No. and Date	SCN Date	Total Duty payable as per SCN (₹)	Duty payable for the period (₹)	Period	C.Ex. duty paid (₹)	ACP on which revised duty payable (MTs)	Differential Central Excise duty payable (₹)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1	AR IV /C.72 / MS - ROUND BAR / RS / RM/6/98	26.10.98	495972/-	495792/-	4/98 to 9/98	---	3305.287	---
2	V.72/3-183/D/99/CX.3	31.03.99	413160/-	413160/-	10/98 to 2/99	300000/-	3305.287	790138/-
3	V.72/3-349/D/99/CX.3	01.07.99	247896/-	165264/-	3/99 to 4/99	---	3305.287	---
				15922/-	5/99	---	1273.760	---
4	V.72/500/D/99/CX.3	28.09.99	247896/-	47766/-	6/99 to 8/99	47766/-	1273.760	---
5	V.72/3-13/D/2000/CX.3	13.01.2000	330528/-	63688/-	9/99 to 12/99	47766/-	1273.760	15922/-
6	V.72/3-146/D/2000/CX.3	31.03.2000	247896/-	47766/-	1/2000 to 3/2000	47766/-	1273.760	---
	TOTAL			12,49,358/-		443298/-		806060/-

6.6 The adjudicating authority, vide aforesaid Order-in-Original confirmed the demands of Central Excise duty under Rule 96ZP(3) of CER, 1944 aggregating to ₹ 12,49,358/- (Rupees Twelve Lakh Forty Nine Thousand Three Hundred Fifty Eight Only) out of which the Noticee had paid ₹ 4,43,298/- (Rupees Four Lakh Forty Three Thousand Two Hundred Ninety Eight Only). Hence the Noticee was required to pay up the differential amount of duty being short paid amounting to ₹ 8,06,060/- (Rupees Eight Lakh Six Thousand Sixty Only). M/s. Rameshwar Steel Re-Rolling Mills, Bhavnagar was directed to forthwith pay the said amount of ₹ 8,06,060/-.

#### **ORDER OF HON'BLE CESTAT :-**

7. Aggrieved by the aforesaid Order-in-Original, the Noticee preferred an Appeal No. 840 of 2001 with the Hon'ble CESTAT, WZB, Ahmedabad. Hon'ble CESTAT, vide Order No. A/515/WZB/Ah'bad/07 dated 05.03.2007 set-aside the impugned order and remanded the matter back to the original authority to consider the matter afresh after granting an opportunity of personal hearing. While passing the order, Hon'ble CESTAT observed as under :-



"6. We considered the submissions at length made by both sides and perused records. The contention of the advocate regarding no findings in the order in original regarding change in parameters has strong force. If the said letter written on 27.11.98 is received by the Office of the Commissioner on 27.11.98 then the annual production capacity of the appellant requires re-determination from that date or at least within one month of the date of receipt. Since no documentary evidence is produced before us, we are unable to come to any conclusion on this point. If, the appellant has submitted letter to the Office of the Commissioner of Central Excise, Rajkot on 27.11.98, then he should be given benefit of changed parameters. We find that the order in original in paragraph 3 indicates having received the said letter on 23.3.99 while the findings portion of the order in Paragraph 8 contradicts the date of receipt as later than the one indicated in Para 3. Further the abatement claimed for the period of closure of factory, needs to be considered (though not claimed by the appellant before adjudicating authority), as this would reduce the duty liability on the appellant.

7. Accordingly, in view of the facts and circumstances, we are of the opinion that the Ld. Adjudicating authority has to reconsider the matter afresh on the evidences that may be produced by the appellant as regards submission of the letter for re-determination of the capacity due to change in parameters and may also consider the appellant's claim for the abatement of duty for the period of closure of the factory subject to eligibility thereof.

8. Without going into the merits of the case, we set aside order impugned and remand the matter back to the original authority to consider the matter afresh after granting an opportunity of personal hearing to the appellant."

#### **WRITTEN SUBMISSION AND PERSONAL HEARING :-**

8.1 In view of the directions of the Hon'ble CESTAT, the matter has been taken up for adjudication afresh. Further, issue of imposition of penalty or recovery of interest, which were deferred in the earlier adjudication proceeding, till the final out come of the Civil Appeals pending before the Hon'ble Supreme Court in view of Hon'ble Supreme Court order dated 21.04.1998, have also been taken up for adjudication.

8.2 Accordingly, the Noticee was informed vide letter dated 10.10.2011 that in view of the Hon'ble CESTAT's order No. A/515/WZB/Ah'bad dated 05.03.2007, the case would be adjudicated afresh. It was also informed that while adjudicating the matter afresh, the issue of interest and penalty, which were deferred in accordance with the Order dated 21.04.1998 of the Hon'ble Supreme Court in C.A. N. 52-63/98 till the final outcome of the said Civil Appeals, would also be considered and decided. The Noticee was requested to submit written reply on the above matters, if any, along with copies of evidences in support of their defence. However, the Noticee did not submit any written reply to defend their case.

8.3 Thereafter, opportunities of Personal Hearing were granted to the Noticee on different dates. The Noticee was informed about Personal Hearing fixed on 09.12.2011 vide letter dated 01.12.2011, on 04.01.2011 vide letter dated 15.12.2011, on 20.01.2012 vide letter dated 04.01.2011 and on 02.02.2012 vide



letter dated 23.01.2012. The letters dated 01.12.2011, 15.12.2011 and 23.01.2012 informing date of Personal Hearing were sent through Regd. Post Acknowledgement Due and letter dated 04.01.2012 was delivered to Shri Hemant Dixit, a representative of the Noticee. However, the Noticee neither remained present for Personal Hearing nor submitted any written reply.

### DISCUSSION AND FINDINGS :-

9. I have carefully gone through the show cause notices, written submission dated 10.11.2000, Order-in-Original dated 05.01.2001 passed during earlier adjudication proceedings, Order No. A/515/WZB/Ah'bad/07 dated 05.03.2007 of Hon'ble CESTAT whereby the case has been remanded and other evidences available on record.

10. I find that opportunities have been given to the Noticee to submit evidences with regards to their claim for re-determination of the capacity due to change in parameters w.e.f. 01.11.1998 and abatement of duty for the period of closure of the factory as well as on the issue of imposition of penalty and recovery of interest, vide letter dated 10.10.2011 and by giving opportunity of Personal Hearing on 09.12.2011, 04.01.2012, 20.01.2012 and 02.02.2012 vide letters dated 01.12.2011, 15.12.2011, 04.01.2012 and 23.01.2012 respectively. All these letters were sent through Regd. Post Acknowledgement Due and letter dated 04.01.2012 was handed over to Shri Hemant Dixit, a representative of the Noticee. However, the Noticee neither filed any written submission nor appeared for Personal Hearing to represent their case in order to support their claim as observed by Hon'ble CESTAT while remanding the matter back for denovo consideration. I find that sufficient opportunities have been given to the Noticee to submit evidences in support of their claim. I, therefore proceed further to adjudicate this case on the basis of materials and evidences available on record.

11. Hon'ble CESTAT, vide Order No. A/515/WZB/Ah'bad/ 07 dated 05.03.2007 has remanded the matter with specific directions to reconsider the following issues :-

- (i) Whether date of submission of the letter for re-determination of the capacity due to change in parameters is 23.03.1999 as taken by the department or 27.11.1998 as claimed by the Noticee.
- (ii) To consider the claim for the abatement of duty for the period of closure of the factory, subject to eligibility thereof.

12.1 I find that on the basis of letter dated Nov., 1998 (specific date not mentioned in the letter), the ACP of the Noticee had been re-determined as 1273.760 MTs with effect from 22.04.1999 by the appropriate authority under Rule 4 of the HRSMACD Rules, 1997. It is the contention of the Noticee that the effective date of re-determined ACP would be 01.11.1998 instead of 22.04.1999.

12.2 The provision of Rule 4 of the HRSMACD Rules, 1997 are relevant in this regard, which are reproduced as under :-

*"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 Rule 3, such manufacturer shall intimate about the proposed change to the Commissioner of Central Excise in writing, with a copy to the 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".*

12.3 The provisions of sub rule (2) of Rule 4 of HRSMACD Rules, 1997 make it abundantly clear that the manufacturer is required to intimate in writing to the Commissioner of Central Excise with a copy to the Assistant Commissioner of Central Excise about the proposed change in parameters which affects the Annual Capacity of Production of the Mill, at least one month in advance of such proposed 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.

12.4 I have perused the application of the Noticee for re-determination of ACP under Section 3A of CEA, 1944. In the said application dated Nov.'98 (specific date not mentioned in the letter) addressed to the Commissioner of Central Excise & Customs, Rajkot, various parameters affecting the Annual Capacity of Production have been declared. A Chartered Engineer's Report dated 27.11.1998 given by Shri Vipinchandra B. Kambad, Chartered Engineer (Regn. No. L.M. 25850/9/79) of Corona Enterprise, has also been found attached with the said application of the Noticee.

12.5 It is observed from the endorsement made on the body of the said application that the said application dated Nov.'98 was received in the office of the Commissioner of Central Excise, Rajkot on 23.03.1999. The date of receipt of said application as 23.03.1999 further gets confirmed from the internal correspondence and file notings of the department. A detailed report on the above said application was called for from the jurisdictional Assistant Commissioner, Central Excise, Bhavnagar vide Assistant Commissioner (T), Central Excise, Rajkot's letter F.No. IV/16-181/MP/97 dated 30.03.1999, wherein it was mentioned at para 3 as, "please also enclosed find herewith a copy of declaration dt. -11-98 received by this office on 23-3-99 filed under rule 96ZP by the above party for your detailed report".

12.6 I also find that while determining/ fixing Annual Capacity of Production at 1273.760 MT by the Commissioner of Customs & Central Excise, Rajkot under Rule 4 of HRSMACD Rules, 1997, the date of receipt of aforesaid application of the Noticee was duly considered and accordingly date from which the change in the installed capacity shall be deemed to be effective was determined as 22.04.1999 i.e. one month from the date of receipt of application on 23.03.1999. The Noticee was informed vide letter F. No. IV/16-181/MP/97 dated 06.06.2000 that the Annual Capacity of Production was determined / fixed at 1273.760 MT by the Commissioner of Customs & Central Excise, Rajkot under Rule 4 of HRSMACD Rules, 1997 and that the duty liability was to be discharged at the revised rate with effect from 22.04.1999.





12.7 In the written submission dated 10.11.2000, the Noticee submitted that the proposed change in installed machinery was intimated under letter dated 01.11.1998 effective from 01.11.1998. However, I observe that Chartered Engineer's Report dated 27.11.1998 given by Shri Vipinchandra B. Kambad, Chartered Engineer (Regn. No. L.M. 25850/9/79) of Corona Enterprise has been found attached along with the application dated Nov.'1998 of the Noticee. Obviously, Chartered Engineer's certificate dated 27.11.1998 could not have been submitted by the Noticee had they intimated about proposed change in installed machinery on 01.11.1998. Therefore, the claim of the Noticee that they submitted intimation under letter dated 01.11.1998 effective from 01.11.1998 is not found tenable. It appears that the Noticee has claimed before the Hon'ble CESTAT that they have submitted the said application in the office of the Commissioner of Central Excise on 27.11.1998. However, the Noticee has not submitted any documentary or other evidence before me, substantiating their claim that they have intimated to the department about the proposed changes in the parameters of production capacity of their Re-rolling Mill on 01.11.1998 as claimed in their written submission dated 10.11.2000, or on 27.11.1998 as claimed before Hon'ble CESTAT (or on any date earlier than 23.03.1999).

12.8 Thus, on the basis of evidences available on record, as discussed above, I find that the application for proposed change in Annual Capacity of Production has been received only on 23.03.1999. Accordingly, there is no infirmity in fixing / re-determining Annual Capacity of Production at 1273.760 MTs effective from 22.04.1999 by the Commissioner of Central Excise, Rajkot. Therefore, the Noticee was required to discharge his duty liability on the basis of ACP 3305.287 MTs prior to 22.04.1999 and 1273.760 MTs from 22.04.1999 onwards.

13.1 The Noticee had claimed (though not claimed during earlier adjudication proceeding) that their factory was closed for the period from 01.04.1998 to 31.10.1998 and they were eligible for abatement of duty for the period of closure of the factory.

13.2.1 I observe that the Noticee, vide their declaration dated 20.08.1997, had opted to discharge his duty liability in terms of sub-rule (3) of Rule 96ZP of CER, 1944 and accordingly submitted declaration as required under sub-rule (4) of Rule 96ZP of CER, 1944 as follows :-

*"M/s. Rameshwar Steel Re-Rolling Mills located at Vartej G.I.D.C. hereby wish to avail of the described in the Rule 96ZP(3) for full and all discharge of our duty liability for the manufacture of hot rolled products of non-alloy steel under section 3A of the Central Excise Act, 1944 (1 of 1944)"*

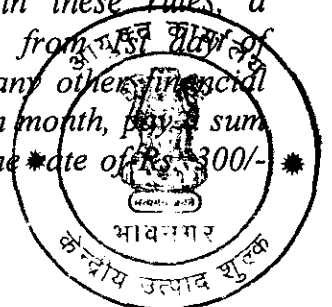
13.2.2 The relevant provisions of sub-rule (3) of Rule 96ZP of CER, 1944 and sub-section (3) of Section 3A of CEA, 1944 provided as follows :-

***"96ZP Procedure to be followed by the manufacturer of hot re-rolled products.***

(1) .....

(2) .....

(3) *Notwithstanding anything contained elsewhere in these rules, a manufacturer may, in the beginning of each month from September, 1997 to the 31st day of March, 1998 or any other financial year, as the case may be, and latest by the tenth of each month, pay a sum equivalent to one-twelfth of the amount calculated at the rate of Rs 300/-*



*multiplied by the annual capacity in metric tonnes, as determined under sub-rule (3) of rule 3 of the Hot Re-rolling Mills Annual Capacity Determination Rules, 1997, and the amount so paid shall be deemed to be full and final discharge of his duty liability for the period from the 1st day of September, 1997 to the 31st day of March, 1998, or any other financial year, as the case may be, subject to the condition that the manufacturer shall not avail of the benefit, if any, under the proviso to sub-section (3) or under sub-section (4) of the section 3A of the Central Excise Act, 1944 (1 of 1944) :*

*Provided that .....*  
*..... "*

*[emphasis supplied]*

**Section 3A. Power of Central Government to change Excise duty on the basis of capacity of production in respect of notified goods.**

(1) .....

(2) .....

(3) *The duty of excise on notified goods shall be levied, at such rate as the Central Government may by notification in the Official Gazette specify, and collected in such manner as may be prescribed :*

*Provided that, where a factory producing notified goods did not produce the notified goods during any continuous period of not less than seven days, duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfils such conditions as may be prescribed.*

13.2.3 It is evident that the manufacturers, who have opted to discharge their duty liability in terms of sub-rule (3) of Rule 96ZP of CER, 1944, were required to pay as duty by tenth of each month, a sum equivalent to one-twelfth of the amount calculated at the rate of ₹ 300/- multiplied by the annual capacity in metric tones, as determined under sub-rule (3) of rule (3) of HRSMACD Rules, 1997, as against ₹ 400/- per tonne in the cases covered by sub-rule (1) of Rule 96ZP of CER, 1944. Therefore, when the Noticee had opted to discharge his duty liability in terms of sub-rule (3) of Rule 96ZP of CER, 1944, they were bound by the condition provided therein which provides that the manufacturer shall not avail of the benefit, if any, under the proviso to sub-section (3) or under sub-section (4) of the section 3A of the CEA, 1944. The proviso to sub-section (3) of Section 3A of CEA, 1944 provided for abatement of duty in case of a factory producing notified goods did not produce the notified goods during any continuous period of not less than seven days. Therefore, when the benefit of proviso to sub-section (3) of Section 3A of CEA, 1944 was not available to the Noticee as they have opted to discharge duty liability in terms of sub-rule (3) of Rule 96ZP of CER, 1944, the question of allowing abatement of duty on the ground of closure of factory does not arise. This view is supported by the decisions of Hon'ble Supreme Court in the case of Commissioner of Central Excise & Customs V/s. Venus Castings (P) Ltd. [2000 (117) E.L.T. 273 (S.C.)] and Hon'ble High Court of Bombay in the case of Rajuri Steels Pvt. Ltd. V/s. Commissioner of Central Excise & Customs, Aurangabad [2008 (225) E.L.T. 189 (Bom.)].

13.3.1 Even otherwise, I find that conditions for claiming abatement (for which the Noticee has not been found eligible as discussed above) as prescribed under sub-rule (2) of Rule 96ZP of CER, 1944 have not been fulfilled by the Noticee.



13.3.2 The Noticee vide their letter dated 01.11.1998, which was received on 25.11.1998, informed that they were starting their unit from 01.11.1998. In the said letter dated 01.11.1998, reference of their earlier letter dated 01.04.98 has been given, wherein it was purportedly mentioned that their unit was closed. However, there is nothing on record to suggest that an intimation was given by the Noticee vide their letter dated 01.04.1998 to the effect that their factory would remain closed w.e.f. 01.04.1998. The Noticee has also not submitted any evidence in support of their claim that they submitted the said letter dated 01.04.1998 intimating about closure of their factory or that their factory remained closed for the period from 01.04.1998 to 31.10.1998.

13.4 Therefore, the Noticee's claim for abatement of duty is not found admissible. I, therefore hold that the Noticee is not eligible for abatement of Central Excise duty in view of proviso to sub section 3 of Section 3A of CEA, 1944.

14. In view of the foregoing discussion, I find that the Noticee is liable to discharge their duty liability on the basis of ACP of 3305.287 MT for the period up to April - 1999 and on the basis of ACP of 1273.760 MT from May-1999 onwards. Accordingly, for the period covered in SCNs, the Noticee is liable to discharge Central Excise duty aggregating to ₹ 12,49,358/-, out of which they have already paid ₹ 4,43,298/- and the differential amount of ₹ 8,06,060/- (as shown in Para 6.5 above) short paid by the Noticee is required to be paid by them as per provisions of Rule 96ZP(3) of CER, 1944.

15.1 In sub-rule (3) of Rule 96ZP of CER, 1944, the following proviso was substituted vide Notification No. 7/98-C.E.(N.T.) dated 10.03.1998 :-

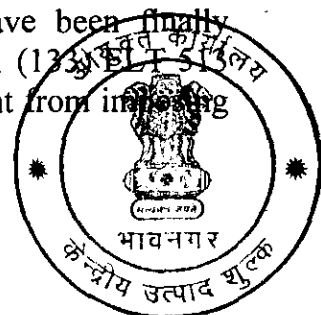
*"Provided also that where a manufacturer fails to pay the whole of the amount payable for any month by the 10<sup>th</sup> day of such month, he shall be liable to, -*

- (i) *pay the outstanding amount of duty alongwith interest thereon at the rate of eighteen per cent, per annum, calculated for the period from the 11<sup>th</sup> day of such month till the date of actual payment of the outstanding amount; and*
- (ii) *a penalty equal to such outstanding amount of duty or five thousand rupees, whichever is greater."*

15.2 I observe that in the earlier adjudication proceedings, the orders for imposition of penalty and recovery of interest were deferred keeping in view the directions contained in Hon'ble Supreme Court's order dated 21-4-1998 in the case of UOI and Others V/s. M/s. Supreme Steels and General Mills and Others, till the final outcome of the Civil Appeals pending before the Hon'ble Supreme Court. I have gone through the said Order dated 21-4-1998 passed in Civil Appeal Nos. 52-63/98 wherein it was inter alia ordered that :-

*"While the matters are pending in this Court, the Union Government shall not take any penal or coercive measures under the Notification No. 7/98-Central Excise (NT) dated March 10, 1998. ...."*

15.3 I further observe that the said Civil Appeals have been finally disposed off by the Hon'ble Supreme Court on 15.10.2001 [2001 (13) Supp (1) SC] without putting any restriction or restraining the Department from im-



penalty and charging interest from the manufacturer in case of failure to pay whole of the duty within stipulated time, as provided under Rules.

15.4 I, therefore proceed to examine the issue of imposition of penalty and recovery of interest, as proposed in the show cause notices, which were deferred in earlier adjudication proceedings in view of Hon'ble Supreme Court's Order dated 21.04.1998.

16.1 I find that out of Central Excise duty of ₹ 12,49,358/- payable by the Noticee during the period covered by the show cause notices, they have already paid ₹ 4,43,298/-, details of which are as shown in the table below :-

Sr. No.	SCN No. and Date	SCN Date	Total Duty payable as per SCN (₹)	Duty payable for the period (₹)	Period	C.Ex. duty paid (₹)	Details of payment of C.Ex. duty	Amount of Central Excise duty not paid within stipulated time (₹)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1	AR IV /C.72 / MS - ROUND BAR / RS / RM/6/98	26.10.98	495972/-	495792/-	4/98 to 9/98			495792/-
2	V.72/3-183/D/99/CX.3	31.03.99	413160/-	413160/-	10/98 to 2/99	300000/-	March-99	413160/-
3	V.72/3-349/D/99/CX.3	01.07.99	247896/-	165264/-	3/99 to 4/99			165264/-
				15922/-	5/99			15922/-
4	V.72/500/D/99/CX.3	28.09.99	247896/-	47766/-	6/99 to 8/99	15922/-	PLA E.No. 2 Dtd. 7.7.99	47766/-
						15922	PLA E.No. 4 Dtd. 2.8.99	
						15922	PLA E.No. 7 Dtd. 30.8.99	
5	V.72/3-13/D/2000/CX.3	13.01.2000	330528/-	63688/-	9/99 to 12/99	31844/-	PLA E.No. 10 Dtd. 15.12.99	63688/-
						15922/-	PLA E.No. 12 Dtd. 31.12.99	
6	V.72/3-146/D/2000/CX.3	31.03.2000	247896/-	47766/-	1/2000 to 3/2000	47766/-	Paid as per new parameters	47766/-
	TOTAL			12,49,358/-		443298/-		1249358/-

16.2 From the above table, I find that the Noticee failed to pay the whole of the amount payable for the months of April-1998 to March-2000 by the 10<sup>th</sup> day of those months and thereby rendered themselves liable to pay the outstanding amount of duty payable on due date during the period covered in SCNs alongwith interest thereon at the rate of eighteen per cent, per annum, calculated for the period from the 11<sup>th</sup> day of such month till the date of actual payment of the outstanding amount and a penalty equal to such outstanding amount of duty not paid by due date or five thousand rupees, whichever is greater, as provided under sub-rule (3) of Rule 96ZP of CER, 1944.

16.3 I find that the Hon'ble Supreme Court, in the case of Commissioner of Customs & Central Excise, Coimbatore Versus Kannapiran Steel Re-Rolling Mills [2011 (263) E.L.T. 22 (S.C.)] has decided the issue of penalty under Rule 96ZP(3) of CER, 1944, after referring to the decision in the case of Union of India V/s. Dharamendra Textile Processors [2008 (231) E.L.T. 3 (S.C.)], and held as follows :-



*"11. After considering all the concerned aspects, this Court finally held that the plea that Rule 96-ZQ and Rule 96-ZO have a concept of discretion inbuilt cannot be sustained meaning thereby that the said Rules are mandatory and there is no discretion available for reducing the penalty. Provisions of Rule 96-ZP being identical and pari materia with that of Rule 96-ZQ and Rule 96-ZO, the ratio of the aforesaid decision rendered by Three Judges Bench is squarely applicable to the facts and circumstances of the present case....."*

16.4 Similarly, Hon'ble CESTAT in the case of Bharat Steel Rolling Mills V/s. Commissioner of Central Excise, Salem [2009 (246) E.L.T. 260 (Tri. - Chennai)], referring to the case of Union of India v/s Dharamendra Textile Processors [2008 (231) E.L.T. 3 (S.C.)], has held as follows :-

*"4 .....  
.....From the Apex Court's reading of the above expressions appearing in Rule 96ZO of CER, the legislative intention behind the Rule 96ZP of CER is also that the provision did not leave any discretion as regards penalty to the authority. In the circumstances, there is no scope for any doubt that the Commissioner (Appeals) sustained the penalty for default of payment of duty in the four months involved in accordance with law. ...."*

16.5 Following the ratio of decisions rendered in above cases, I find that as per the provisions of sub-rule (3) of Rule 96ZP of CER, 1944, liability to pay interest and penalty arises in case of failure to pay the duty within the stipulated time period by the manufacturer who have opted to discharge duty liability under said sub-rule (3) of Rule 96ZP of CER, 1944 and the quantum of penalty and interest prescribed under Rule 96ZP is mandatory. Therefore, I find that the Noticee is liable to pay interest at the rate of eighteen per cent, per annum, calculated for the period from the 11<sup>th</sup> day of month till the date of actual payment of the outstanding amount of duty and penalty equal to outstanding amount of duty or five thousand rupees, whichever is greater, as provided under Rule 96ZP(3) of CER, 1944.

17. I also observe that the provisions of Central Excise Rules, 1944 have application in the present case by virtue of provisions of Section 38A of the Central Excise Act, 1944.

18. In view of foregoing, I pass the following order :-

### ORDER

- (i) The date of receipt of letter submitted by M/s. Rameshwar Steel Re-Rolling Mills, Bhavnagar for re-determination of the capacity due to change in parameters is 23.03.1999 and accordingly the Noticee is liable to discharge duty on the basis ACP determined at 1273.760 MT for the period from 22.04.1999 and ACP determined at 3305.287 for the period prior to 22.04.1999.
- (ii) M/s. Rameshwar Steel Re-Rolling Mills, Bhavnagar is not eligible for the abatement of duty as provided under Section 34(3) of the Central Excise Act, 1944.



- (iii) M/s. Rameshwar Steel Re-Rolling Mills, Bhavnagar are liable to pay Central Excise duty of ₹ 12,49,358/- (Rupees Twelve Lakh Forty Nine Thousand Three Hundred Fifty Eight Only) for the period from April-1998 to March-2000 under Rule 96ZP(3) of Central Excise Rules, 1944 out of which amount of ₹ 4,43,298/- (Rupees Four Lakh Forty Three Thousand Two Hundred Ninety Eight Only) already paid by them is appropriated and they are ordered to forthwith pay the outstanding amount of duty of ₹ 8,06,060/- (Rupees Eight Lakh Six Thousand Sixty Only).
- (iv) M/s. Rameshwar Steel Re-Rolling Mills is ordered to pay interest calculated at the rate of 18% per annum on the amount of duty not paid within stipulated period, from the 11<sup>th</sup> day of respective month till the date of actual payment of duty, in terms of Rule 96ZP(3) of Central Excise Rules 1944.
- (v) I impose penalty of ₹ 12,49,358/- (Rupees Twelve Lakh Forty Nine Thousand Three Hundred Fifty Eight Only) on M/s. Rameshwar Steel Re-rolling Mills under Rule 96ZP(3) of Central Excise Rules, 1944.

*NK 28/2/2012*  
(N. K. BHUJABAL)  
COMMISSIONER

**BY REGD. POST A.D.**  
F.No.V/15-17/Adj/2007

Date : 28/2/2012.

To,

M/s. Rameshwar Steel Re-Rolling Mills,  
106, G.I.D.C., Vartej,  
Bhavnagar – 364 060.

Copy submitted to :-

- (1) The Chief Commissioner, Central Excise, Ahmedabad Zone, Ahmedabad.
- (2) The Assistant Commissioner, Central Excise, Division Bhavnagar.
- (3) The Superintendent, Central Excise, AR-I, Division Bhavnagar.
- ✓ (4) Guard file.

