CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL ALLAHBAD.
REGIONAL BENCH-COURT NO.I

Excise Appeal No.70125 of 2019 (DB)

[Arising out of Order-in-Original No.LKO/EXCUS/000/COM/EX/007/2018-2019 dated 09.10.2018 passed by the Commissioner, Central Goods & Service Tax and Central Excise, Lucknow.]

M/s. R.H.L. Profiles Ltd. **Appellant**
Magarwara,
District Unnao (U.P.).

VERSUS

Commissioner of Central Goods and Service Tax and Central Excise, **Respondent**
Lucknow.

APPEARANCE:

Shri Nishant Mishra, Advocate for the appellant.
Shri B.K. Jain, Authorised Representative for the respondent.

CORAM: HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI P.ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.70244/2021

DATE OF HEARING:02.08.2021
DATE OF DECISION:21.10.2021

ANIL CHOUDHARY:

This is the third round of litigation before this Tribunal. Brief facts of the case are as follows:-

Sl. NO.	**DATE/S**	**EVENTS**
1.	--	Appellant was engaged in manufacturing of hot re-rolled non-alloys steels products, falling under Chapter Heading Noo.7214.90, 7216.90 & 7213.90 of Central Excise Tariff Act, 1985**.**
2.	1.08.1997 & 30.08.1997	Notification No. 31/97 and Notification No. 43/97 were issued, by which goods manufactured by the Appellant were notified under Section 3A(1) of the Central Excise Act, 1944 ('Act').
3	24.9.1997 17.02.1998 & 14.08.2000	Annual production capacity of the three units of the Appellant provisionally determined on the basis of an undated declaration, alleged to be filed by Appellant on 1.8.1997. Order-in-Original dated 24.09.1997 was challenged by Appellant before this Hon'ble Court, but during the pendency of appeal, annual production capacity was finalised vide Order-in-Original dated 17.2.1998 and hence appeal was dismissed as withdrawn by this Tribunal vide order dated 14.08.2000.

4.	26.4.1999	Order-in-Original dated 17.2.1998 was challenged by Appellant before the Hon'ble Court and matter was remanded back for fresh decision after providing opportunity of hearing to Appellant.
5	31.7.2001	In compliance of order dated 26.4.1999 remand Order-in-Original was passed fixing the same annual production capacity and rejecting the request of appellant for re-determination of actual production.
6.	20.2.2002	On appeal , the Hon'ble Tribunal remanded back the case with direction to examine the issue in the light of the Supreme Court judgment in the case of Union of India vs. Supreme Steel.
7.	14.10.2005	Ld. Commissioner then passed Order-in-Original rejecting the claim of the Appellant for determination of duty liability on the basis of actual production u/s 3A(4) of the Act and upholding the annual production capacity vide order-in-original dated 31.7.2001.
8.	10.1.2017	On appeal, this Hon'ble Tribunal allowed the appeal and directed the adjudicating authority to determine the duty on the basis of actual production, as under:- *"Accordingly, we hold that the appellant is entitled to pay duty under the normal scheme of Section 3 and under the provisions of Section 3 A(4) on actual production basis. The appellant will be entitled to consequential benefits of adjustment of duty etc, if any, paid in excess in accordance with law. _We, further, direct the Adjudicating Authority to determine the duty, on the basis of actual production, taking into account the returns filed by the appellant and allow adjustment of duty already deposited. We also direct the appellant to appear before the Adjudicating Authority with a copy of this order and seek the determination of duty in terms of this order.*

2. In remand proceedings, the learned Commissioner, vide impugned order-in-original dated 9.10.2017, remanded the matter to the Deputy/ Assistant Commissioner of Central Excise, holding as follows:-

> *"In view of my findings, as discussed and detailed above, I am in agreement with the direction of Hon'ble CESTAT that the party is entitled for payment of duty under the normal scheme of Section 3 of Central Excise Act, 1944 and the rules made under relevant sections of the Act. It is also found that the original or certified documents required for determination of duty for the said period under consideration as specified herein is not readily available with me, therefore, the jurisdictional Deputy/ Assistant*

Commissioner of CGST and Central Excise Division is directed to re-determine the duty on the basis of actual production, as per direction of Final Order No. A/70704/2017-EX (DB) dated 10.01.2017 issued by Hon'ble CESTAT's as discussed above herein. The party is also entitled to consequential benefits of adjustment of duty etc., if any paid in excess in accordance with law in terms of the remand direction of the CESTAT. Excess amount (if any) shall be examined in terms of Section 11 B of the Central Excise Act, 1944."

3. Being aggrieved, the appellant is before this Tribunal, inter alia, on the following grounds that -

A. the impugned order is in violation of Section 3-A(4) of the Act, which contemplates determination of duty payable with reference to actual production by the Commissioner of Central Excise. Section 3A (4) is reproduced herein as under:-

> "*Where an assessee claims that the actual production of notified goods in his factory is lower than the production determined under sub-section (2), the Commissioner of Central Excise shall, after giving an opportunity to the assessee to produce evidence in support of his claim, determine the actual production and re-determine the amount of duty payable by the assessee with reference to actual production at the rate specified in sub-section (3).*

Thus, Section 3-A(4) provides for determination of actual production and re-determination of duty payable by Commissioner of Central Excise only and not by any other officer. Further, the words 'Commissioner of Central Excise' used in Section 3 A(4) does not include sub-ordinate officers such as Deputy or Assistant Commissioner.

B. Learned Commissioner cannot delegate his powers to officers junior to him, in absence of any such power in the statute. Apex Court, in the case of M. Chandru Vs Member Secretary (2009) 4 SCC 72, held that delegation is permissible only when there is provision in the statute.

C. Reasons given by learned Commissioner for remitting the matter to the Deputy/Assistant Commissioner that 'original or certified documents required for determination of duty are not readily available' is perverse and incorrect; RT-12 returns on the basis of which actual production was required to be determined and TR-6 challans and on the basis of which adjustment of duty was to be made, were already on record; the same were filed by appellant along with its written submissions; at any rate, if the learned Commissioner was of the opinion that RT-12 returns and TR-6 challans filed by appellant are required to be verified, he could have got the same verified from the Deputy/Assistant Commissioner and thereafter pass appropriate order.

D. Even if appellant submits to the jurisdiction of Deputy/ Assistant Commissioner for passing an appropriate order in compliance of directions contained in impugned order, the same will only result in a non-est and completely illegal order, as any officer before the rank of Commissioner or Central Excise has no jurisdiction and authority to exercise power under Section 3-A(4).

4. Accordingly, the learned Counsel submits that the approximate duty on actual basis will be Rs.1, 94, 12,808 whereas, the appellant has already deposited an amount of Rs.2,69,77,520 and thus they are entitled for refund. Learned counsel prays that the appeal be allowed and an appropriate order be passed.

5. Learned Authorised Representative relies on the impugned order.

6. Having considered the rival contentions, we find that the impugned order passed by the ld. Commissioner is not contrary to the Final Order of this Tribunal dated 10.01.2017, wherein the issue was remanded to the Adjudicating Authority (Commissioner). Learned Commissioner has only remanded the matter to the jurisdictional Deputy/ Assistant Commissioner observing that the relevant documents are not readily available before him. Section 3 A(4) (supra) is followed as the commissioner has decided the issue in principle and remanded the matter simply, only for the purposes of calculation of the duty payable. He exercised the quasi-judicial powers in

terms of Section 3 A (4) (supra) and administratively, directed his subordinate to calculate the duty. In the circumstances, we find that there is no infirmity in the order passed and directions given by the Commissioner. We find that the interest of justice is not in jeopardy if the directions of the learned Commissioner are sustained.

7. However, since the matter pertains to the period September, 1997 to March, 2000 and redetermination of duty has been directed, vide Final Order of this Tribunal dated 10.01.2017, and such finalisation has not taken place till date. Accordingly, we direct the jurisdictional Deputy/ Assistant Commissioner to comply with the directions of this Tribunal as contained in Final Order dated 10.01.2017 and to determine the duty payable on actual production basis, at the rates specified under Section 3A (3) of the Central Excise Act, 1944, within a period of 12 weeks, from the date of service/ receipt of this order. We further hold that the appellants would be entitled for refund of excess duty paid, if any, along with applicable interest, as per law. We find that this bench has already laid down the law in the case of Parle Agro Ltd. Accordingly, we direct the Adjudicating Authority Deputy/ Assistant Commissioner to refund the duty excess paid, within 4 weeks of quantification of the duty payable, as above, along with interest, as per law.

9. The appeal is disposed of in the above terms modifying the impugned order to that extent.

[Order pronounced on 21.10.2021]

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Ckp.