IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Excise Appeal No.539 of 2010
And
Excise Cross Objection No.116 of 2010

(Arising out of Order-in-Original No.69/Denovo/Commr/CE/Kol-II/Adjn/2009-10 dated 16.03.2010 passed by Commissioner of Central Excise, Kolkata-II.)

Commissioner of Central Excise, Kolkata-II
(15/1, strand Road, Kolkata-700001.)

...Appellant

VERSUS

M/s. Beekay Steel Industries Limited

.....Respondent

(286 & 287 G.T. Road, Salki, Howrah-711106.)

APPEARANCE

Shri S.S.Chattopadhyay, Authorized Representative for the Revenue
Shri Sourav Bagaria & Shri Indranil Banerjee, both Advocates for the Respondent (s)

CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)

FINAL ORDER NO. 75069/2023

DATE OF HEARING : 27 February 2023
DATE OF DECISION : 27 February 2023

P.K. CHOUDHARY :

The present Appeal has been filed by the Revenue against the Order-in-Original No.69/Denovo/Commr/CE/Kol-II/Adjn/2009-10 dated 16.03.2010 passed by Commissioner of Central Excise, Kolkata-II vide which he has dropped the proceedings initiated against the assessee vide Show Cause Notice dated 02.04.2002 by observing that the assessee complied with the Order of the Commissioner of Central Excise, Kolkata-II Commissionerate and acted on that basis and no duty was intentionally paid in excess and passed on to the buyers by the assessee inasmuch as MODVAT Credit was available to the buyers when duty was paid by the assessee correctly under the provisions of Section 3 of the Central Excise Act, 1944. This is the second round of litigation before the Tribunal. We find that the Tribunal vide Order No.A/1241/KOL/2008 dated 11.12.2008 in Excise Appeal No.E-195/2008 remanded the matter to the original authority for fresh decision observing that the Order-in-Original dated 14.01.2008 has been passed without reference to the quantum of production of specified and non-specified goods without reference to whether permission to pay duty under Section 3 was correctly given or whether it was reviewed later on. In the light of the cited decisions of the Tribunal and also without examining whether there has been any excess utilization of the MODVAT Credit in respect of bars and rods manufactured by the Appellant which are used for construction purposes.

2. In the *de novo* order the Ld.Commissioner has framed three substantial questions of facts :-

i) It is required to be determined whether the asessee was required to pay the duty under Section 3 or Section 3A of the Central Excise Act, 1944 during the material period, which in turn (sic.) requires determination of pre-dominance of the specified and non-specified items manufactured by them.

ii) It is to be determined whether the permission to pay the duty under Section 3 was correctly given or whether it was reviewed later on in the light of the cited decision of the Tribunal.

iii) It is to be examined whether there has actually been any excess utilization of MODVAT Credit in respect of rods and bars manufactured by the assessee, which are used for construction purposes.

iv) The Ld.Commissioner further observes that the question of law as regards applicability of Section 3 of Central Excise Act, 1944 in case of pre-dominance of production of non-notified items stands settled by the Tribunal in the case of Commissioner of Central Excise, Chandigarh-II vs. Bhawani Shankar Casting Ltd. [2003 (162) E.L.T. 532 (Tri.Del.)], Shree Venkatesh Steel Vs. Commissioner of Central Excise, Raigad [2006 (199) E.L.T. 721 (Tri.-Mum.)] and Order No.A-1219-1220/KOL/2007 dated 15.06.2007.

3. We find that the jurisdictional Commissioner of Central Excise vide his letter dated 23.09.1997 permitted the assessee to continue paying duty under Section 3 of the Act subject to review at the end of the financial year. We further find that the orders passed by the Commissioner of Central Excise, Kolkata-II Commissionerate dated 23.09.2007 and 20.04.2008 were not reviewed nor any Appeal was filed against the said order.

4. We find that the case of the department as per their grounds of Appeal is that with introduction of Induction Furnace (Annual Capacity) Determination Rules, 1997 w.e.f. 01.08.1997 in terms of Notification No.24/1997 dated 25.07.1997 which is applicable to induction furnace unit which ordinarily produce non-alloy ingots and billets falling under sub-heading No.7206.90 and 7207.90 of the Central Excise Tariff Act, 1985. Induction Furnace has no other option but to pay Central Excise duty under Section 3A of the said Act.

5. We find that the Ld.Commissioner in the *de novo* order has given detailed findings. The relevant paragraphs are reproduced:-

> 6.6. The Assistant Commissioner Central Excise Kol-II Commissionerate in his letter under C. No. V(I)9/Audit/CERA/HND/99/2704 dt. 18.05.99 offered his comment which is reproduced below:-
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> " M/s Beekey Steel Industries Ltd., of 286 & 287 G.T. Road, Saikia, Howrah-6 were engaged in manufacture of both notified goods and other alloy goods of Chapter 72. As per notification 22/97-CX-(NT) dated 25.07.97 and CBEC circular No. 225/41/97-Cx dated 25/07/97 manufacturers produced casting or stainless steel products and also incidentally produced mild steel ingots or billets, such manufacture would pay normal Excise Duty of 15% Adv. Under Section 3 on all this

products including ingot or billet of mild steel. Considering the all aspect and for the sake of revenue, Commissioner of Central Excise may permit the assessee to pay CEX duty in respect of all product under Section 3 of Central Excise Act, 1944. As the assessee had paid CEX duty on non-alloy notified product at the rate of 15% Adv. Under Section 3 of Central Excise Act, 1944 the downstream manufacturer would have entitled to take Modvat Credit under Rule 57A of Central Excise Rules, 44 at the rate of 15% Adv. On the aforesaid goods. So there is no question of loss of revenue. On the basis of above, the objection may be considered for closure."

6.7. From the submission made by the assessee and perusal of the case records as well as the facts held by the Hon'ble Tribunal in its order no. A-124/Kol/08 as well as jurisdictional Assistant Commissioner's comments furnished to the then Commissioner of Central Excise, Kolkata-II Comm'te it appears that the assessee sought permission from the then Commissioner of Central Excise, Kolkata-II to pay duty under Section 3 of the Central Excise Act, 1944. The ground taken by them was that they are manufacturing both kinds of goods which were specified under Section 3A are also those which were not so specified. They also represented to the Commissioner that they are actually paying much higher duty in respect of the specified non-alloy steel items @ Rs.561.95 per MT as against the compounded levy of only Rs.300.00 per M.T. In response to the representation of the assessee to the then Commissioner, the Additional Commissioner (Tech.) C.E, Kolkata-II under his letter C. No. IV(16)206 CE/ PRO/Cal-I/97-6133A dated 23.09.97 informed the Appellants that the Commissioner of Central Excise, Kolkata-II permitted them to continue paying duty under Section 3 of the Act subject to review at the end of the financial year. The jurisdictional Assistant Commissiner also confirmed that the assessee during the material period produced predominantly non-notified goods. However, there is no evidence of any such review of the order of the Commissioner permitting the assessee to pay duty under Section 3 of Central Excise Act, 44. It appears that the Appellants continued paying duty all along under Section 3 of the Act and not under Section 3A during the material period.

6.8. From the scheme of levy of excise duty on the basis of capacity of production it is clear that an assessee can pay duty under Section 3A on the basis of annual capacity of production (ACP)determined by the jurisdictional Commissioner of Central Excise. The assessee himself can not determine the A.C.P. In the instant case the jurisdictional Commissioner of Central Excise passed an order that assessment by the assessee and for that purpose payment of duty was required to be done under Section 3 of Central Excise Act, 1944. When an order of assessment is made by an authority with jurisdiction under taxing statute which is intra vires, such assessment order is not open to challenge, though it may be open to question such assessment order under appeal provided in the statute under Act.226 or 227 of the condition. (Apex Court's judgment in the case Pioneer Trader Vs. Chief Controller-1983(13)ELT1376(S.C) is followed.)

6.9. The orders passed by the Commissioner of Central Excise, Kolkata-II Commissionerate dated 23/09/2007 and 20/04/2008 were not reviewed nor any appeal was filed against the said orders. I agree with the assessee's contention that the said two orders have reached there finality and question of payment of duty otherwise than the order passed by the Commissioner can not arise.

6.10. The assessee have been issued the impugned show cause notice which alleges that by paying duty under Section 3 of the Act, they have enabled the buyers of their goods to avail credit of the entire duty amount of Rs. 3,95,74,989/- , whereas had they paid the duty under the Compounded levy scheme, the buyers of their product would have got credit of only Rs.3,16,59,991/- Hence, an allegation was made that there has been a revenue-loss of Rs. 79,14,998/- The Hon'ble Tribunal's observation in this regards is pertinent, which is as follows.

"Surprisingly, there is no allegation that the entire amount of the compounded levy which would have been paid by the Appellants, but had not been so paid, has been lost to the Government."

6.11 In this context the original adjudicating Commissiner vide his order no. 54/Commr/CE/Kol-II/Adjn/2007-08 dated 14/01/2008 held as follows.

"From the record of the case it is revealed that demand of Rs.79,14,998/- (Rupees Seventy Lakh Fourteen Thousand Nine Hundred Ninety Eight) only has been made in terms of proviso to section 11A of the said Act alleging "loss of revenue" but has not disputed the payment of Central Excise duty amounting to Rs.3,95,74,989/- on Billets & Ingots of non-alloy steel and on notified hot-rolled products of non-alloy steel by the said assessee during the period from September 1997 to July 1998. Section 11A of the said Act during the material time was a provision of law by which department could demand Central Excise duties not levied or not paid or short paid or short levied or erroneously refunded. In the instant case, there was no allegation in respect of not levied or not paid or short paid or short levied or getting erroneous refund of Central Excise duty by the said assessee. Allegation is "loss of revenue" caused by the said assessee by willful excess payment of Central Excise duty by paying the same under Section 3 of the said Act in place of under Section 3A of the said Act. Section 11A of the said Act during the material time did not permit the department to raise demand of "loss of revenue" to Government exchequer.

In view of the discussion made hereinabove, on careful consideration and perusal of entire records of the case I find that there is contravention of the provisions of Section 3A of the said Act and rule 96ZP of the said Rules read with Notification No. 24/1997 CE dated 25.07.1997 and there is intent on the part of the said assessee to evade duty of excise by way of abetting their buyers, for omission and commission, in getting irregular MODVAT Credit amounting to Rs.79,14,998/- (Rupees Seventy Lakh Fourteen Thousand Nine Hundred Ninety Eight) only during the material period but the existing law provisions does not permit to confirm the demand made in the said notice though the allegations made in the said notice are correct. As there is certain contravention of the provision of the said Act or

Rule made thereof with intent to evade payment of duty of excise I find penalty under rule 173Q(1)(a) of the said Rules is warrantable."

6.12 On re-appreciation of the entire case records and factual matrix in consideration of which the commissioner of Central Excise permitted the assessee to pay the duty under Section 3 of Central Excise Act, 1944 vide Additional Commissioner (Tech), Central Excise, Kolkata-II Commissionerate's lettre C.No.IV (16)206-CE/PR/Cal-II/97/6133A dt.23.09.97 and C.No.IV (16)206-CE/PRO/Cal-II/97/6382-G dt.20.04.98 I find that the Commissioner in the impugned order has decided the nature of products oridinarily produced by the assessee on the basis of quantify of notified and non-notified items and I do not find any infirmity in the criteria adopted by the Commissioner to detemine whether the assessee manufactured ordinarily alloy or non-alloy iron and steel products during the period from Sept, 1997 to July, 1998 and allow the assessee to discharge the duty liability under Section 3 of the Act with a rider that the concession would be reviewed at the end of the financial year on the basis of revenue performance. From August, 1998 onwards the Commissioner in his order communicated under Additional Commissioner C.E. (Tech), Kolkata-II Commissionerate's letter C.No.IV (16)206-CE/PRO/Cal-II/97/7854G dt.17.07.98 has rightly, in my view, not allowed the assessee to discharge duty liability under Section 3 of Central Excise Act, 12 it can not be said during that period that the assessee were manufacturing non-notified alloy iron & steel argicles predominantly.

The Commissioner did not review at the end of the financial year 1997-98 or the period from April, 98 to July, 98 on being satisfied on the basis of the revenue performance of the assessee.

Having held so, the questions (i) & (ii) in para 6.2 viz whether the assessee was required to pay duty under Section 3 or Section tion 3A of Central Excise Act, 1944 and whether the permission to pay duty under Section 3 was correctly given or whether it was reviewed later on have been determined on the terms as discussed in the forgoing paragraph and having determined the question no.(i) & (ii), Question no (iii) viz. whether there has actually been any excess utilisation of modvat credit in respect of bars & rods manufactured by the assessee does not survive for determination as the buyers of such goods could avail modvat credit in respect of full duty paid by the assessee in terms of Section 3 of Central excise Act, 1944 on bars and rods manufactured and removed by the assessee.

6.13 In view of the above discussion and findings I am of the view that the assessee complied with the order of the Commissioner of Central excise, Kolkata-II Commissionerate and acted on that basis and no duty was intentionally paid excess and passed on to the buyers by the assessee in as much as the modvat credit was avialable to the buyers when duty was paid by the assessee correctly under the provisions of Section 3 of Central excise Act, 1944 and hence I hold the charges framed against the assessee not sustainable.

6. We find that the Commissioner's permission dated 23.09.1997 and 20.04.1998 was neither withdrawn nor challenged before the higher appellate forum. Inasmuch as the Commissioner vide his order dated 23.09.1997 and 20.04.1998 allowed the Respondents to work under the provisions of Section 3 w.e.f. Financial Year 1997-98 and the Respondent had discharged the duty burden under the said provisions availing MODVAT Credit.

7. In view of the above discussions, we do not find any infirmity in the order passed by the Ld.Commissioner. The Appeal filed by the Appellant Revenue is rejected. Cross Objection also gets disposed of.

(Operative part of the order was pronounced in the open Court.)

Sd/

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/
(RAJEEV TANDON)
MEMBER (TECHNICAL)

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