

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

EASTERN ZONAL BENCH: KOLKATA

REGIONAL BENCH COURT NO.2

Excise Appeal No. 75992 of 2015

(Arising out of Order-in-Appeal No. 201/KOL-IV/2015 dated 20.07.2015
passed by Commissioner of Central Excise, Appeal-II, Kolkata)

M/s Leadstone Energy Limited.,

(NH-2, Delhi Road, Rajhat, Hooghly-71213)

...Appellant (s)

VERSUS

Commissioner of Central Excise, Kolkata-IV

(Customs House, M.S. Building, 15/1, Strand Road, Kolkata-700001)

...Respondent(s)

WITH

**Excise Appeal No. 1010 of 2011 &
Cross Objection No. 4 of 2012**

(Arising out of Order-in-Original No. 23/Commissioner/CE/KOL-IV/2011 dated
13.09.2011 passed by Commissioner of Central Excise, Kolkata-IV)

Commissioner of Central Excise, Kolkata-IV

Customs House, M.S. Building, 15/1, Strand Road, Kolkata-700001.

...Appellant (s)

VERSUS

M/s Leadstone Energy Limited.,

(NH-2, Delhi Road, Rajhat, Hooghly-71213)

...Respondent (S)

APPEARANCE :

Shri S. P. Siddhanta, Consultant for the Appellant/Assessee

Shri A. Roy, Authorized Representative for the Respondent/Revenue

CORAM:

HON'BLE MR. P. K. CHOUDHARY MEMBER (JUDICIAL)

HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...75932-75933/2023

DATE OF HEARING : 02.05.2023

DATE OF PRONOUNCEMENT: 26th June, 2023

PER K. Anpazhakan:

A Show Cause Notice dated 18.08.2011 was issued to M/s Leadstone Energy Ltd (herein after referred as the Appellant) demanding Central Excise

duty of Rs.2,63,100/- along with interest and penalty equal to the duty under Section 11AC of the said Central Excise Act,1944, with respect to the removal of 1,11,808 Kgs of 'pure lead ingot' 'as such' during the period from September 2010 to March 2011. It was alleged that the Appellant has cleared the 'pure lead ingot' on which CENVAT Credit was availed, but were sold it 'as such' in the home market on payment of an amount as duty which was less to the tune of Rs.2,63,100/- than the amount of Cenvat Credit availed by them at the time of it's procurement. The Notice was adjudicated and demands were dropped by the adjudicating authority vide Order-in-Original dated 10.01.2012. The said order was reviewed by the Commissioner vide Order-in-Review dated 22.02.2012 and filed appeal before the Commissioner (Appeals), who vide Order-in-Appeal dated 20.07.2015, allowed the appeal of the department.

2. Another Notice was earlier issued to the Appellant on the same issue demanding central excise duty of Rs.67,33,096/-for the period from July 2006 August 2010, which was adjudicated by the Commissioner and the proceedings initiated in the said Notice was also dropped by Commissioner vide Order-in-Original dated 13.09.2011.

3. Aggrieved against the O-I-A dated 20.07.2015, the Appellant filed the present appeal. The Department has also filed this appeal against the O-I-O dated 13.09.2011 passed by the Commissioner. As the issue involved is the same in both the Appeals, they are taken up together for decision.

4. In their grounds of appeal, the Appellant made the the following submissions:

(a)The entire issue was raised on the basis of hypothetical and imaginary grounds, without adducing any cogent evidences.

(b) By using lead scraps, re-melted lead Ingot, re- melted lead Block, they manufactured pure Lead Ingot. Such Pure Lead Ingot is one of their major finished products. A portion of the self-manufactured pure lead ingot has been captively consumed for manufacturing Lead alloys, Lead oxide Grey, Litharge, Lead oxide Red etc, called as downstream products. Rest of the pure lead ingot manufactured by them were cleared in domestic market on payment of Central Excise Duty.

(c) They imported pure lead ingot on fixed price basis on payment of customs duty including countervailing duty and also procured pure lead ingot from indigenous market as input for use in the manufacturing of their downstream products.

(d) They not only availed the Cenvat credit of countervailing duty paid on imported material but also availed credit on indigenous inputs and utilized such credit for payment of duty:

(e) There was no allegation that customs duty was not paid on the imported pure lead ingot. They maintained all records with respect to receipt, disposal, consumption and inventory of inputs. So, the allegation of contravention of Rule 9(5) of Cenvat Credit Rules is unfounded and unsustainable.

(f) There was no restriction under any law for the importation of pure lead ingot by a manufacturer of the same pure lead ingot. Therefore, the allegation brought out in the grounds of appeal that since the Appellant had the capacity of manufacturing lead ingot, there was no need for importation of pure lead ingot, is in the nature of presumption and surmise only.

(g) They supplied self manufactured pure lead ingot to their domestic and foreign customers. After fulfilling the commitments to their customers, they have been using their own self-manufactured pure lead ingot captively for manufacturing downstream products. In case of shortfall of self-manufacturing downstream products, the additional requirement was fulfilled by importing pure lead ingot. Therefore, they denied the allegation that the imported pure lead ingot, on which CV duty credit was availed, has been removed 'as such' without using the same in the manufacture of downstream products.

5. The Appellant denied the allegation of contravention of rule 3(5) of Cenvat Credit Rules, since in the material period they never removed imported pure lead ingot on which Cenvat credit of countervailing duty was availed. There is no substance in the allegation that the Appellant avoided furnishing the particulars of consumption of pure lead ingot in ER-6 return. The Appellant clarified that item wise correlation of the consumption of pure lead ingot was not possible because the same was used for various downstream products and remained in various stage of production as in process material. So, it was technologically not possible to show the quantity of consumption of pure lead ingot in the manufacturing of individual downstream product. They had correctly determined the duty liability of the finished products manufactured and removed from their factory during the material period. They had rightly availed countervailing duty paid on imported pure lead ingot. So, the allegation of excess amount of Cenvat credit availed on imported pure lead ingot is not based on any legal provision. Therefore, the demand of C. Ex Duty with proposal of imposition of penalty and charging interest is not valid.

6. Regarding demand of interest, they cited the decision of Hon'ble Supreme Court in the case of Pratibha processors Vs. UOI -1996 (88) E.L.T 12 wherein it has been held that if no tax is payable no interest is also payable.

7. Regarding imposition of penalty, the Appellant submitted that when the demand of duty itself is not sustainable, there is no cause for imposition of penalty. The Appellant relied on the following case laws in support of their contention:

(i) H. Guru Investment (North India) Pvt. Ltd vs. CEGAT – 1998 (104) E.L.T 8;

(ii) CCE vs. H.M.M Ltd 1995(76) E.L.T 497

8. The Appellant further contended that since there was no element of mensrea with a mala fide intention to evade payment of duty, no penalty can be imposed as held in the following cases :

(i) Hindustal Steel Ltd. vs. State of Orissa-1978 (2) E.L.T J159;

(ii) Akbak Badruddin Jiwani vs. Collector -1990 (47) E.L.T 9;

(iii) Tamilnadu Housing board vs. C.C.E -1994 (74) E.L.T 9.

9. The Ld. DR reiterated the grounds raised by the department in the Appeal.

10. Heard both sides and perused the appeal records.

11. The issue to be decided here in both the appeals is whether the Appellant has cleared 'pure lead ingot' on which CENVAT Credit was availed, 'as such' in the home market on payment of an amount less than the Cenavt credit availed.

12. We find that the Commissioner has dropped the proceedings initiated on this issue vide order dated 13.09.2011 and the Assistant Commissioner has also dropped the demand for the subsequent period vide order dated 10.01.2012. But, this order was overturned by the order of the Commissioner Appeals dated 20.07.2015. Accordingly, the appeals are filed by the Appellant as well as the department on the same issue.

13. We observe that the department has not adduced any evidence to substantiate the allegation that the Appellant has availed excess credit on the inputs and paid less duty at the time of clearance of the inputs 'as such'. In the grounds of appeal, the department stated that the Appellant themselves are manufacturers of pure lead ingot of a quantity

more than required for its captive consumption. Hence, there was no necessity for importing the pure lead ingot and then re-selling the same in the market. We find the allegation very strange. In business, there is nothing wrong in manufacturing one product and importing the same to meet the market requirement. If there is any malafide intention in it, the department should have brought it out clearly with evidence. Mere allegation without any evidence is not sufficient to demand the differential duty.

14. In their submission, the Appellant stated that they supplied self manufactured pure lead ingot to their domestic and foreign customers. After fulfilling the commitments to their customers, they have been using the self-manufactured pure lead ingot captively for manufacturing downstream products. In case of shortfall of self-manufactured pure lead ingot for use in downstream products, the additional requirement was fulfilled by importing the same. Therefore, they denied the allegation that the imported Pure Lead Ingot, on which credit of CV duty was availed, has been removed 'as such' without using the same in the manufacture of downstream products. We find it is a normal trade practice and nothing unusual in importing the same product which were manufactured by them.

15. We observe that there is no material evidence available on record to substantiate the allegation of the department regarding excess availment of Cenvat credit on the imported pure lead ingot. Hence we hold that the allegation of excess availment of credit by the department is not sustainable.

16. The Appellant stated that they have maintained all records with respect to receipt, disposal, consumption and inventory of inputs. So, the allegation of contravention of rule 9(5) of the Cenvat credit rules is unfounded. It was also alleged that the Appellant failed to produce any evidence to prove the consumption of the pure lead ingot procured by them in the manufacture of any final product. We observe that the department has not adduced any evidence for diversion of Cenvat credit availed inputs 'as such'. All the allegations of the department were only on presumption basis, without any evidence.

17. One such allegation of the department is that during the period Sept 2010 to March 2011, the Appellant procured 1,11,808 Kgs of pure lead ingot and availed Cenvat credit. During this period they have also manufactured 13,77,957 Kgs of the same pure lead ingot and cleared the same to domestic market. Thus, allegation of the department is that there is no need to procure 1,11,808 Kgs of pure lead ingot when they themselves manufactured 13,77,957.10 Kgs of pure lead ingot during the same period. In their submission, the Appellant stated that they procure pure lead ingot from outside sources only when they were unable to meet the requirement from their own manufacturing. We find there is nothing wrong in procuring pure lead ingot from outside sources when there was a shortage. Just because they manufacture huge quantity of pure lead ingot, it does mean that they should not import the same goods to meet their requirement. Thus, we observe that the allegations are only on presumption basis without any evidence. In view of the above, we hold that the appeal filed by the department is not sustainable.

18. Accordingly, we allow the appeal filed by the Appellant assessee and reject the appeal filed by the department.
(Pronounced in the open court on.....26th June, 2023.....)

Sd/-
(P. K. Choudhary)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Pinaki