
(2023) 05 CESTAT CK 0012

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No.440 Of 2009

M/S.Hazra Iron Works

APPELLANT

Vs

Commissioner Of Central Excise, Kolkata-III

RESPONDENT

Date of Decision : 04-05-2023

Acts Referred:

Central Excise Rules, 1944 — Rule 3A(4), 96ZO, 96ZP, 96ZP(1), 96ZP(3), 96ZQ
Hot Re-Rolling Steel Mills Annual Capacity Determination Rules, 1997 — Rule 3(1)
Central Excise Act, 1944 — Section 3A, 3A(4)

Citation : (2023) 05 CESTAT CK 0012

Hon'ble Judges : P.K.Choudhary, Member (J);K. Anpazhakan, Member (T)

Bench : Division Bench

Advocate : N.K.Chowdhury, S.Mukhopadhyay

Final Decision : Disposed Of

Judgement

K. Anpazhakan, Member(T)

1. The briefly stated facts of the case are that the Appellant is a manufacturer of hot re-rolled products of non alloy steel falling under Chapter Heading 7214.90 of the Central Excise Tariff Act, 1985. On the basis of the declaration filed by the Appellant on 28/08/97, the Annual Capacity of Production (ACP) of the Appellant was provisionally fixed as 587.83 MT. Subsequently, the Appellant submitted Chartered Engineers Certificate vide letter dated 01/05/1998, based on which the ACP was revised as 1055.435 MT. Thereafter a joint verification was done on 12/04/2000, to verify the correctness of the declared parameters and some differences were observed. On the basis of the verified parameters, the ACP was finally fixed as 1106.82 MT. As there was no change in the plant and machinery from Sept 1997 to 12/04/2000, the parameters found in joint verification was declared as correct and accordingly the Appellant was asked to pay duty as per the final ACP of 1106.82 MT, fixed.

2. The Appellant did not file any option either to avail the scheme for payment of duty under Rule 96ZP(1) of the Central Excise Rules, 1944 or the scheme under

Rule 96ZP (3) of the Central Excise Rules, 1944 on introduction of compounded levy scheme under Section 3A of the Central Excise Act, 1944 w.e.f. 01.09.1997. However, they opted vide their letter dated 11.01.1999 to avail the scheme under Rule 96ZP (3) of the Central Excise Rules, 1944. Since the assessee did not opt for the scheme at the time of introduction of compounded levy, they were liable to discharge duty in terms of Rule 96ZP(1) of the Central Excise Rules, 1944, till they specifically exercised the option of 96ZP(3). Thus, the contention of the Department is that the Appellant are liable to pay duty in terms of 96ZP(1) for the financial years 1997-98 and 1998-1999 and at the rate prescribed under 96ZP(3) for the year 1999-2000. Since the Appellant has not paid the duty on the basis of the ACP fixed for the period 01/09/1997 to 31/03/2000, the Appellant was asked to pay differential duty of Rs 2,94,196, vide the Impugned Order. The Order passed by the Commissioner is as follows:

30. In view of the foregoing, I fix the Annual Capacity of Production of the Re-rolling Mill of the assessee as 1106.820 Mt for the year 1997-98, 1998-99, 1999-2000 in terms of Rule 3(1) of the Hot Re-rolling Mills Annual Capacity Determination Rules, 1997. Since there is admittedly no change in the parameters after 1996-97 the Annual Capacity of Production for the subsequent period shall also be 1106.820 MT per financial year. The differential C.Ex duty should be paid by the assessee accordingly forthwith.

31. Consequently, I confirm the demand for differential for C.Ex duty of Rs.2,94,196/- ((Rupees two lakh ninety four thousand one hundred ninety six) only against the assessee, M/s. Hazra Iron Works under Rule 96ZP(1)(3) of the erstwhile C.Ex Rules 44 and direct the assessee to pay the amount forthwith.

32. I also impose penalty of Rs.2,94,196/- (Rupees two lakh ninety four thousand one hundred ninety six) only equivalent to the outstanding C.Ex duty involved in terms of Rule 96ZP(1) and 96ZP(3) of the erstwhile C Ex Rules 44 to be paid forthwith.

33. I also order the assessee to pay interest @ 18% per annum on the outstanding differential C.Ex duty for the period of delay involved in making payment in terms of Rules 96ZP(3)/96ZP(1) of the erstwhile C.Ex Rules, 1994.

3. The Appellant is before us against the Impugned Order.

4. The Appellant contested the final ACP of 1106.82 Mt fixed by the Commissioner. They stated that the Commissioner has not given any reason for over-ruling the Chartered Engineer certificate given by them.

The arbitrary enhancement of the ACP of the rolling mill from 1055.435 Mt to 1106.82 MT is legally not permissible. They stated that during the year 1997-98 and 1998-1999 they have not exercised any option for payment of Central Excise duty under the provisions of Rule 96ZP(3). They exercised the option only for the financial year 1999-2000 vide their letter No.NIL dated 11.01.1999 for payment of duty under the provisions of Rule 96ZP(3). The actual production of the

Appellant during those two years were lesser than the determined capacity of their Rolling Mill. Hence, they are eligible to pay the duty under the provisions of Section 3A(4) of the Central Excise Act, 1944. The appellant wanted to pay the duty on the basis of actual production for the year 1997-98 & 1998-99.

5. They cited the decision of the Hon'ble Supreme Court in the case of Supreme Steel & General Mills (2001 (47) RLT 129 (SC)), wherein it has been held that the appellant is at liberty to opt for actual production at any stage of the proceedings. Since the dispute has not been extinguished the appellant was eligible to pay the duty on actual production in terms of the provisions of section 3A(4) for the years 1997-98 & 1998-99. For the year 1999-2000, since they submitted the option to pay duty under Rule 96ZP(3), they are required to pay the duty on the basis of determination of annual capacity of production under the provisions of Hot-Rolling Mills Annual Capacity Determination Rules, 1997. Accordingly, they contended that the order of the Ld. Commissioner is not proper and valid. In case, they are allowed to pay the duty on the basis of the actual production, they are not required to pay any differential duty as confirmed in the Impugned Order.

6. The Departmental Representative reiterated the findings of the Commissioner in the Impugned Order. Regarding the demand for waiver of interest and penalty, he admitted that the decision of the Hon.ble Supreme Court in the case of Shree Bhagawati Steel Rolling Mills Vs Commissioner of Central Excise, reported in 2015 (326) ELT 209 (S.C.) will be applicable to this case also.

7. Heard both sides and perused the documents available on record.

8. We observe that the main dispute in the present case is with respect to fixation of the annual capacity of the rolling mill for the financial years 1997-98 and 1998-99. When the ACP Scheme was introduced w.e.f. 01/09/1997, the Appellant has not exercised any option either under 96ZP(1) or under 96 ZP(3). They exercised the option for the first time only on 11/01/1999 to avail the scheme under 96ZP(3). As this option cannot be exercised in the middle of a financial year, the option exercised by them will be applicable only for the financial year 1999-2000. Thus, for the period from 01.09.1997 to 31.03.1999 the Appellant automatically falls under the provisions of Rule 96ZP(1) of the erstwhile Central Excise Rules, 1944.

9. We find that the Ld. Commissioner has also accepted this view that for the period from 01.09.1997 to 31.03.1999 duty was payable by the Appellant under the provisions of Rule 96ZP(1) i.e., as per the ACP of 1106.82 MT fixed. The Appellant contended that when they are entitled to pay the duty under Rule 96ZP(1), they can always opt for payment of duty on the basis of the actual production under the provisions of Section 3A(4) of the Central Excise Act, 1944. Sub-section (4) of Section 3A postulates that if the actual production is less than the determined capacity of production, then the Appellant is entitled to pay the duty on the basis of the actual production.

10. The contention of the Department is that the Appellant themselves submitted a revised calculation of ACP by submitting CA certificate and never opted for fixation under subsection (4) of Section 3A of the C.E. Act,⁴⁴ prior to filing of Appeal against Order-in-Original No.531/COMMISSIONER/CE/Kol-III/ADJN/2003 dated 30.04.2003 passed by the Commissioner of Central Excise, Kolkata-III. In terms of their own submission of Annual Capacity of Production i.e. 1055.435 MT, the monthly figure of production comes to $1055.435/12=88.00$ MT (approx.). However, the Appellant was showing their monthly production during 1997-98 & 1998-99 as 25 MT & 20 MT (approx.) respectively without explaining adequately the reasons for such huge shortfall of production in every month. Thus, the Department contended that they are taking the plea for fixation of ACP, based on their actual production at this belated stage only to escape from payment of the legitimate Government revenue as fixed by the Commissioner.

11. We find that the Appellant has not paid the duty as per the ACP fixed by the Commissioner for the years 1997-1998 and 1998-1999. The Appellant's contention is that they have not opted for payment of duty under 96ZP(3) and hence they are liable to pay duty under Rule 96ZP(1) only. Once their request for payment of duty under 96 ZP(1) is accepted, they are eligible to pay duty on the basis of actual production in terms of the provisions of Section 3A(4) of the Central Excise Rules, 1944. Their actual production is much less than the capacity determined by the Commissioner and they have paid duty as per the actual production and hence the differential duty demanded is not sustainable. For the sake or ready reference, Rule 3A(4) referred by the Appellant is reproduced below:

12. Rule 3(A)

"3A. Power of Central Government to change Excise duty on the basis of capacity of production in respect of notified goods. – (1) Notwithstanding anything contained in section 3, where the Central Government 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 collected duty of excise on such goods in accordance with the provisions of this section.

(4) 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 redetermine the amount of duty payable by the assessee with reference to such actual production at the rate specified in sub-section (3).

13.As per the above provision, when an assessee claims that their actual production is lower than the ACP determined by the Commissioner, then the

Commissioner has to determine the actual production and re-determine the amount of duty payable on the basis of such actual production. This re-determination has to be done by the Commissioner based on the evidence produced by the assessee to show that their actual production is much less than the ACP fixed. However, we find that in the present case, the Appellant has not submitted any evidence before the Commissioner for re-determination of the ACP and fixing of the duty based on actual production. In the absence of any re-determination done by the Commissioner, the ACP fixed by the Commissioner @ 1106.82 MT per annum remains and the assessee needs to pay duty as per ACP fixed. In the instant case, we find that the assessee has paid duty based on actual production and not on the basis of ACP fixed. Hence, we find that the differential duty demanded and confirmed by the Impugned Order is sustainable. Accordingly, we uphold the demand of duty confirmed in the Impugned Order.

14. Regarding interest and penalty chargeable, the Appellant cited the decision of the Hon'ble Supreme Court in the case of *Shree Bhagwati Steel Rolling Mills v. Commr. Of Central Excise* [2015 (326) E.L.T. 209 (S.C.)] and argued that interest and penalty are not liable to be paid in such cases. We find merit in the argument of the assessee. The Hon'ble Supreme Court in the above-mentioned case held that the provisions of interest and penalty under Rule 96ZP of the Central Excise Rules, 1944 as ultra vires. Relevant Para of the said judgement is reproduced:-

"44. Conclusion

We have declared in this judgement that the interest and penalty provisions under the Rules 96ZO, ZP and ZQ of the Central Excise Rules, 1994 are invalid for the reasons assigned in the judgment. Accordingly, the appeals filed by the Revenue are dismissed and the appeals filed by the assessee are allowed to the extent indicated above. It may be noted that in an appeal from the judgment of the Allahabad High Court dated 8-11-2012 in SLP (C) No.9796/2013, it has been held that the levy of penalty under the aforesaid provisions is mandatory in character. In view of what has been held by us today, this appeal will also have to be allowed in the same terms as the other assessee's appeals which have been allowed. All the aforesaid appeals are disposed of accordingly."

15. In view of the above discussion, we hold that the demand of interest and penalty in the Impugned Order is not sustainable.

16. In view of the above, we uphold the demand of duty confirmed in the impugned order and set aside the interest and penalty demanded in the said Order.