

HIGH COURT OF CHHATTISGARH, BILASPUR**TAXC No. 139 of 2016**

- Raipur Ferro Alloys Limited Now Abhishek Steel Industries Ltd. 535A, Urla Industrial Complex, Raipur Distt. Raipur, Chhattisgarh, Through Its Director

---- Appellant**Versus**

1. The Commissioner Central Excise And Customs New Central Revenue Building, Civil Lines, Raipur, Distt. Raipur, Chhattisgarh
2. The Customs, Excise And Service Tax Appellate Tribunal, West Block No.2, K.K.Puram, New Delhi
3. The Commissioner Appeals Customs And Central Excise, Central Excise Building Tikarapara, Raipur, Chhattisgarh

---- Respondents

For Appellant : Shri Ashish Shrivastava and Ms. Medha Shrivastava,
Advocates
For Respondents/Revenue : Shri Vinay Pandey, Advocate

Hon'ble Shri Ajay Kumar Tripathi, Chief Justice**Hon'ble Shri Parth Prateem Sahu, Judge****Judgment on Board****Per, Ajay Kumar Tripathi, Chief Justice****19.03.2019**

1. Assessee is the Appellant challenging the order dated 16.02.2016 (Annexure-A/1) as well as order dated 11.08.2016 (Annexure-A/2) passed by the Customs, Excise & Service Tax Appellate Tribunal, Principal Bench, New Delhi (hereinafter referred to as 'the Tribunal') in Appeal No.E/3006/03.NB/SM in E/1964/2006-EX[SM] & ROM Application No. E/ROM/50821/2016. Since the Tribunal dismissed the appeal as well as ROM application, the present Tax Appeal has been preferred.
2. The facts behind the present litigation which is required to be stated are as follows :

The Appellant was engaged in manufacture of Non-Alloy Steel Ingots. He was covered under what was known as Compound Levy Scheme under Rule 96 ZO of the Central Excise Rules, 1944 which dealt with 'notified goods'. Under

the Compound Levy Scheme, Duty is to be paid by an Assessee on the basis of annual capacity of the Induction Furnace.

3. It also emerged that the Assessee was manufacturing other goods which fell in the category of non-notified goods in respect of which a demand for Duty of Rs. 31,06,416/- was raised by the Department. Since these goods (non-notified goods) would not come under the Scheme of Compound Levy even a penalty of Rs.15,00,000/- was imposed on the Assessee for non payment of excise duty.
4. In the earlier round, the Appellate Tribunal did not interfere with the demand of Duty of Rs.31,06,416/-, but reduced the penalty to Rs. 3,00,000/- and directed the Commissioner to re-examine the claim of adjustment of MODVAT Credit of Duty already paid by the Appellant on the non-notified goods.
5. The Appellant appeared before the Commissioner on remand, made his submissions which were taken into consideration, analysed, discussed and concluded in following terms :

“10. I have gone through the calculation as summarized by M/s RFAL in their written submission dated 20.01.2006 (vide Para-IV, Page-3). From the total duty liability of Rs. 31,06,416/-, they have claimed deduction of Rs.19,89,404/- on account of Modvat credit. I observe from the said statement showing details of modvatable inputs purchased during the period from 01.09.97 to 30.01.98 that the claim of Modvat credit of Rs. 19,89,404/- is on the input viz. Sponge Iron which was usable and used in both the products, non-notified as well as notified under Section 3A. Hence, Modvat credit can be allowed only on the duty paid input i.e. Sponge Iron which was used in the manufacture of the non-notified products on which duty demand of Rs. 31,06,416/- is confirmed. In this context, the matter was referred to the jurisdictional Assistant Commissioner (i.e. Assistant Commissioner, Central Excise Division Raipur) vide this office letter of even No. 1217 dated 25.01.2006 to verify and

ascertain the quantum of Modvat credit admissible to M/s RFAL. In reply, the Assistant Commissioner vide his letter F.No. IV(16)06/DENOVO/ADJ/2006/947 dated 22.02.2006 and the jurisdictional Range Superintendent (i.e. Superintendent, Central Excise, Range-III, Raipur) vide his letter F.No.GL-2/Non-Notified/RFA/R-IV/RPR/05/1190 dated 10.02.2006 have submitted their verification report, inter alia, as under :

(i) During the relevant period (i.e. from 01.09.97 to 08.03.98) the Noticee manufactured 648.77 MT non-specified goods, and in the manufacture of the said non-specified goods, they have used/consumed total 763.27 MT raw materials.

(ii) No separate prescribed records i.e. RG-23A Part-I & Part-II in respect of non-specified goods were maintained by the party, rather, they were maintaining the common record in form-IV Raw Material Register for both the categories of goods i.e. goods notified under Section 3A and the non-notified goods and on clearance of all the final products and they discharged the Central Excise duty liability in terms of Section 3A of Central Excise Act, 1944.

(iii) The aforesaid figures in respect of manufacture and clearance of non-notified items/goods are worked out on the basis of Monthly RT-12 Return submitted by the Noticee for the months of September 1997 to March 1998.

(iv) Out of the aforesaid manufactured quantity of 648.77 MT, the Noticee cleared 621.54 MT during the aforesaid period in question for which duty demand of Rs.31,06,416/- was confirmed by the earlier Adjudicating Authority and subsequently upheld by the Hon'ble CESTAT vide their said Final Order dated 24.11.2003.

(v) During the period September 1997 to March 1998, the Noticee received total 2823.480 MT raw material valued at Rs.1,32,62,673/- involving Central Excise duty @ 15% Adv. Amounting to Rs.19,89,404/-, whereas, out of Rs.2823.480 MT raw materials the Noticee consumed only 763.27 MT raw materials for the manufacture of 648.77 MT non-notified goods.

11. I observe that Modvat credit can be allowed only on those duty paid inputs which were used in the manufacture of the non-notified products on which duty demand of Rs. 31,06,416/- was confirmed by the then Commissioner and subsequently upheld by the Hon'ble Tribunal. Thus, I find that the Noticee is entitled to the proportionate Modvat credit on the quantity of raw material consumed for manufacture of

621.54 MTs of goods which were cleared without payment of duty of Rs. 31,06,416/-. To find the quantity of raw materials consumed to produce 621.54 MTs of non-notified finished goods, I find that in accordance with the ratio of 'raw material consumed' to production of non-notified goods are ascertained and reported by the jurisdictional Assistant Commissioner and the Range Superintendent in para 9(v) above, Modvat credit admissible on 731.23 MTs (i.e. 763.27:648.77::731.23:621.54) of raw material is admissible to M/s RFAL and such Modvat credit works out to Rs. 5,15,219/-.

12. As regards the Noticee's claim of deduction of an amount of Rs. 2,80,907/- I find that this is claimed on account of the credit balance that was lying in their RG-23A Part II Account. This amount cannot be allowed for deduction from the duty demand of Rs. 31,06,416/- because this balance amount of credit stood lapsed on account of subsequent availment of benefit of the scheme of payment of duty under Section 3A of the Central Excise Act, 1944 read with Rule 96 ZO of the erstwhile Central Excise Rules, 1944. Hence, I hold this credit not allowable to be adjusted. In any event, as discussed in the preceding para credit on the inputs used in the manufacture of goods in respect of the duty demand has been confirmed, is being allowed. Therefore, there is no justification for allowing any further deductions.

13. Further, M/s RFAL's have claimed of deduction of an amount of Rs. 1141/- being credit balance lying in their PLA when they closed their unit. I find that there was separate provisions for getting back the unused credit balance and this has not relevance with the production of said 621.54 MTs of non-notified goods on which duty demand of Rs. 31,06,416/- was confirmed. Also, it is not within the scope of the Hon'ble CESTAT's Final Order.

14. In so far as the Noticee's claim of deduction of an amount of Rs.7,54,425/- is concerned, I observe that this amount has been worked out by M/s RFAL by splitting up the payment of total duty made by the Noticee under Section 3A of the Central Excise Act, 1944 vis-a-vis the quantity of non-notified goods. I find that while fixing duty amount on the basis of capacity determination quantity of clearance was not a parameter, hence this claim of M/s RFAL has no legal basis nor is it within the scope of the Hon'ble CESTAT's Final Order.

15. However, I find that the amount of Rs.10,00,000/- which the Noticee have deposited in compliance with the Stay Order No.S/226/03-NB-C dated 22.07.2003 of the Hon'ble Tribunal, can be adjusted with the total amount of duty to be recovered from M/s RFAL.

16. Thus, in the final analysis, the total duty liable to be recovered is as under:

Duty held to be recoverable on clearance of 621.54 MTs of non-notified goods as mentioned at Sr. No.2 to 7 of table 2 above Rs.31,06,416/-

Modvat credit commensurate with 731.23 MTs of raw material which was consumed for production of 621.54 MTs of finished goods cleared without payment of duty: (-) Rs. 5,15,219/-

Total duty payable Rs. 25,91,197/-

I hold that this amount of Rs. 25,91,197/- is recoverable from M/s RFAL along with interest and the amount of Rs.10,00,000/- which was already deposited by them through TR-6 Challan in compliance of Stay Order No.S/226/03-NB-C dated 22.07.2003 of the Tribunal is to be appropriated from the date of its deposit.

17. With regards to imposition of penalty, I find that the Hon'ble Tribunal in the Final Order No.A/710/03&M/227/03 NBC dated 24.11.2003 has set aside the penalty in excess of Rs. 3 Lakhs. No orders are therefore, required to be passed on this point in these proceedings.

ORDER

In view of the foregoing discussions and findings, I pass the following orders:

(i) Out of the total duty of Rs. 31,06,416/- confirmed by the Hon'ble Tribunal, M/s RFAL are entitled to Modvat credit of Rs.5,15,219/-. Thus they are liable to pay net duty of Rs. 25,91,197/- (Rupees Twenty Five Lakh Ninety One Thousand One Hundred Ninety Seven only) after being allowed adjustment of Rs. 5,15,219/- towards Modvat credit allowable.

(ii) The amount of Rs. 10,00,000/- (Rupees Ten Lakhs) as already deposited by M/s RFAL through TR-6 Challan in compliance of Stay Order No.S/226/03-NB-C dated 22.07.2003 of the Tribunal is to be appropriated from the date of its deposit.

(iii) The amount as confirmed above should be recovered from the Noticee along with interest under Section 11AA of the Central Excise Act, 1944."

6. The above order of the Commissioner dated 29.03.2006 became the reason for the second round of litigation which was heard and the appeal dismissed since the Appellate Tribunal did not find infirmity in the view taken by the Commissioner, especially, after remand.

7. An effort was thereafter made to demonstrate before the Appellate Tribunal by filing an ROM application, but since nothing emerged in relation to the so-called rectification in the previous order, this too was dismissed.
8. We have heard learned counsel representing the Appellant. Facts are not a matter of dispute in the present case. The Appellant did indulge in manufacture of non-notified goods and the details of the non-notified goods which were manufactured had already been taken note of in the previous round of adjudication by the Commissioner and is also reflected in his decision after the order of remand was passed by the Tribunal in the previous litigation. So far as the demand for Duty of Rs.31,06,416/- is concerned, no infirmity was found by the learned Tribunal in the previous round of litigation. So it has attained finality. The only issue which was required to be decided by the Commissioner was the adjustments or the credits or the MODVAT Credits of Duty already paid by the Assessee. Those are the issues which were looked into by the Commissioner and after such adjustment he opined that a Duty of Rs.15,91,197/- became the Duty payable along with interest.
9. The Tribunal has not committed any error. Though reliance was sought to be placed on a decision rendered in the case of **Trishul Electrocasting P. Ltd. V. Comm. Of C. Ex. & Service Tax, Patna reported in 2013 (287) ELT 131 (Tri.-Kolkata)** wherein a concept was sought to be introduced that non-notified goods incidentally manufactured were not liable to duty when the assessee was predominantly manufacturing notified goods and paying duty there on, but the said case was distinguishable.
10. The Tribunal has rightly rejected to accept the principles laid down in **Trishul** (*supra*). We too have gone through the said decision, but the decision is

distinguishable clearly on facts and the finding which has emerged therein. In the present case it was not an accidental or incidental manufacturing of a non-notified goods, but a conscious decision for production of six different non-notified goods by the Assessee, in significant quantity and therefore, it is not that such production undertaken by the Assessee was part of a process of manufacturing of the notified goods and the out put was incidental or ancillary to the same.

11. Learned counsel for the Revenue seems to be correct in pointing out these distinguishing features in the case of the present Appellant wherein the facts vis-a-vis the factual findings which been recorded in the case of **Trishul** (*supra*) are totally different and distinguishable.
12. The view, therefore, so taken by the Tribunal in rejecting the appeal as well as the application filed for rectification or modification does not suffer from any infirmity.
13. The appeal, therefore, is fit to be dismissed and is dismissed.

Sd/-
(Ajay Kumar Tripathi)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge