# CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
# CHANDIGARH

REGIONAL BENCH - COURT NO. I

## Excise Appeal No. 2355 of 2011

[Arising out of Order-in-Appeal No. 88/CE/LDH/2011 dated 31.03.2011 passed by the Commissioner (Appeals), Customs & Central Excise, Chandigarh-II]

**M/s Osaka Alloy & Steel (P) Ltd** **……Appellant**
G T Road, Aman Nagar, Jalandhar
(present add: 428, Mota Singh Nagar,
Cool Road, Jalandhar)
Punjab

*VERSUS*

**Commissioner of Central Excise, Ludhiana** **……Respondent**
Central Excise House, F Block,
Rishi Nagar, Ludhiana
Punjab 141001

**APPEARANCE:**

Present for the Appellant: Sh. Om Prakash, Appellant in person

Present for the Respondent: Sh. Rakesh Agarwal (Special Counsel), Authorized Representative

**CORAM:**

**HON'BLE Sh. S. S. GARG, MEMBER (JUDICIAL)**
**HON'BLE Sh. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

**FINAL ORDER NO. 60471/2024**

DATE OF HEARING: 12.04.2024
DATE OF DECISION: 09.08.2024

**PER : S. S. GARG**

The present appeal is directed against the impugned order dated 31.03.2011 passed by the Commissioner (Appeals), whereby the learned Commissioner (Appeals) has upheld the Order-in-Original

and confirmed the demand of central excise duty of Rs.6,34,784/- along with interest and equal penalty on the appellant.

2. Briefly stated facts of the present case are that the appellant were engaged in the manufacture of non-alloy bars and rods falling under chapter heading 7211.11 and 7214.90 of the First Schedule to the Central Excise Tariff Act, 1985. During scrutiny of RT-12 returns of the appellant, it was observed that they had utilized the Modvat Credit amounting to Rs.1,24,027.67 during the month of August, 1997 for payment of central excise duty on the final products. Since the credit available with the appellant lying on 31.07.1997 had already lapsed as per Notification No. 33/97-CE (NT) dated 01.08.1997, no fresh credit could be allowed to the appellant, they were required to pay central excise duty from PLA on the clearances effected during August, 1997. Thus, an amount of Rs.1,24,027 67 was recoverable from the appellant. It was further observed that as the appellant had opted to pay duty under Section 3A of the Central Excise Act, 1994 (hereinafter referred to as the Act) as per their option under sub-Rule (i) of Rule 96ZP, their annual capacity was fixed by the Commissioner of Central Excise, Chandigarh-II vide letter dated 21.11.97 as 3755.530 MTs (provisionally) under Rule 3(4) of Hot Re-Rolling Mills Annual Capacity Determination Rules, 1997. As such, the appellant were required to pay central excise duty of Rs.1,25,184/- per month w.e.f. 01.09.1997. During the period September, 1997 to March, 1998, the appellant did not pay central excise duty as determined by the Commissioner, Central Excise,

Chandigarh-II which resulted in short paid central excise duty to the tune of Rs.5,10,756/-. Accordingly, the show cause notice dated 01.04.1998 was issued to the appellant. The adjudicating authority vide its order confirmed the demand of central excise duty of Rs.6,34,784/- (Rs.1,24,028/- + Rs.5,10,756/-) along with interest @ 18% per annum and imposed penalty of Rs.6,34,784/ on the appellant under Rule 173Q of the Central Excise Rules, 1994 (hereinafter referred as the Rules). Aggrieved by the said order, the appellant filed appeal before the Commissioner (Appeals) who vide the impugned order has rejected the appeal of the appellant and upheld the Order-in-Original. Hence, the present appeal.

3. Heard both the parties and perused the material on record.

4.1 Shri Om Prakash, the appellant appeared himself and submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the evidence on record.

4.2 He has further submitted that he has filed the detailed submissions before the Commissioner which may be considered for deciding the present appeal. The appellant has made the following submissions:

i) that they were not required to pay duty under Section 3A of the Act during the month of August, 1997 as provisions of compounded levy scheme introduced vide Notification No. 30/97-CE(NT) and 31/97-CE(NT) both dated 01.08.1997 were made applicable w.e.f.

01.09.1997 vide Notification No. 43/97-CE(NT) dated 30.08.1997. The compounded levy scheme was made applicable w.e.f. 01.09.1997 and not from 01.08.1997 and therefore, they had legitimately availed the Modvat Credit during the month of August, 1997 and accordingly demand of Rs.1,24,027.67 is not sustainable;

ii) that the demand of short payment of Central Excise duty of Rs.5,10,756/ has been confirmed for the period September, 1997 to March, 1998. The appellant had discharged central excise duty during the subject period while taking into account the period of closure of the factory and their eligible abatements under Rule 96 ZP(2) of the Rules; that the appellant followed the procedure of abatement as provided under Rule 96 ZP and accordingly paid the central excise duty for the period of operation of unit during the period September, 1997 to March, 1998;

iii) that vide letter dated 26.03.1998, the appellant had requested the Commissioner of Central Excise for sanction of abatements at the earliest so as to enable them to discharge their duty liability in the month of March, 1998;

iv) that it appeared that the abatement claims of the appellant had not been pursued by the department on account of another set of litigation wherein the Commissioner of Central Excise vide his Order-in-Original No. 107/CE/JAL/2003 dated 30.10.2003 finally determined the annual capacity of production of the appellant as 3755.53 MTs and directed them to deposit duty under Rule 96 ZP of the Rules; the

said order of the Commissioner of Central Excise was challenged by the appellant before the Tribunal at New Delhi who vide Final Order No. 622/05-EX dated 19.07.2005 set aside the order of the Commissioner of Central Excise with consequential relief to the appellant. Thereafter, the Hon'ble Punjab & Haryana High Court vide order dated 22.01.2007 dismissed the appeal filed by the department against Tribunal's Order. Further, the appeal of the department against the order of the Punjab & Haryana High Court was dismissed by the Hon'ble Supreme Court vide order dated 10.09.2007 which has been accepted by the department.

v) that since the order of the Commissioner of Central Excise fixing the annual capacity of production, has been quashed and therefore, the appellant are entitled to the legitimate claims of abatement as provided under Rule 96 ZP(2) of the Rules. Accordingly, demand of Rs.5,10,756/- without accounting for eligible abatements for the period of closure is not sustainable.

vi) that the imposition of penalty under Rule 173Q of the Rules is also liable to be set aside because the demand itself is not sustainable.

5. On the other hand, the learned Special Counsel (AR) for the Revenue reiterated the findings of the impugned order and has further submitted that the appellant vide letter dated 09.09.1997, exercised the option to pay the duty under Rule 96 ZP(3) and that said option was not withdrawn. He has further submitted that once the option is exercised as per Rule 96 ZP(3), the same cannot be

withdrawn during the said relevant year. He has further submitted that the appellant vide letter dated 26.03.1998, received on 01.04.1998, informed the department regarding the switching over the option to Rule 97 ZP(1) from Rule 96 ZP(3).

6. After considering the submissions made by both the parties and perusal of the material on record, we find that the first issue involved in the present case is that the appellant has wrongly availed the Modvat Credit amounting to Rs.1,24,027.67 during the month of August, 1997. In this regard, we may note that during the month of August, 1997, the Modvat Credit was available with the appellant and has only lapsed w.e.f. 01.09.1997 when the Notification No. 43/97 dt. 30.08.1997 was made applicable. Therefore, in our view, this Modavt credit has rightly been availed by the appellant.

8. As regard the second issue of short payment of central excise duty of Rs.5,10,756/-, we find that earlier the Commissioner vide his order dated 30.10.2003 finally determined the annual capacity of production of the appellant as recorded in para 3.4.6 that the appellant were paying duty @ Rs.400/- per MT. It clearly shows that they were working under Rule 96 ZP(1) instead of 96 ZP(3) of the Rules. Further, we find that the appellant have been regularly filing the returns showing that they are working under Rule 96 ZP(1) and therefore, are entitled to the abatements during the period of closure of the factory. Further, we find that the appellant have also made declaration under Rule 173B stating that w.e.f. 01.09.1997, they will operate under Rule 96 ZP(1) instead of Rule 96 ZP(3). Further, we

find that the demand of duty on the basis of annual capacity of production of the unit fixed by the competent authority is not sustainable in view of the fact that the order of the Commissioner dated 30.10.2003 fixing the annual capacity of production was set aside by the Tribunal vide order dated 19.07.2005; further the department filed the appeal before the Hon'ble High Court and the High Court vide order dated 22.01.2007 dismissed the appeal of the department and subsequently, the Hon'ble Supreme Court also dismissed SLP filed by the department vide order 10.09.2007 and the same was accepted by the department.

9. In view of our discussion above, we are of the considered opinion that the appellant have fully discharged payment of duty in accordance with Section 3A, Rule 96 ZP(1) & (2) and the impugned order is not sustainable in law and therefore, we set aside the same by allowing the appeal of the appellant with consequential relief, if any, as per law.

(Order pronounced in the court on 09.08.2024)

**(S. S. GARG)**
**MEMBER (JUDICIAL)**

**(P. ANJANI KUMAR)**
**MEMBER (TECHNICAL)**

RA_Saifi