

**Customs, Excise & Service Tax Appellate Tribunal  
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

**Excise Appeal No.12159 of 2019**

(Arising out of OIO-DMN-EXCUS-000-COM-044-18-19 dated 29/03/2019 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN)

**Nico Extrusions Ltd**

**.....Appellant**

Survey No. 678/1/3 Plot No. 4, Bhillad Silvassa Road, Naroli  
Silvassa, Gujarat

*VERSUS*

**C.C.E. & S.T.-Daman**

**.....Respondent**

3rd Floor...Adarsh Dham Building, Vapi-Daman Road, Vapi  
Opp.Vapi Town Police Station,  
Vapi, Gujarat-396191

**WITH**

- **Excise Appeal No. 11380 of 2019 (Metec Asia Pvt Ltd)**
- **Excise Appeal No. 13005 of 2019 (Shri Tushar Porwal)**
- **Excise Appeal No. 13007 of 2019 (Shri Rajkumar Agrawal)**

**APPEARANCE:**

Shri Uday Joshi, Shri Aashish Chauhan, Shri Rahul Dhirubhai Patel & Ms. Neha Agrawal, Advocates for the Appellant

Shri T G Rathod, Additional Commissioner (AR)for the Respondent

**CORAM:       HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR  
                  HON'BLE MEMBER (TECHNICAL), MR. RAJU**

**Final Order No. A/ 11049-11052 /2022**

DATE OF HEARING: 06.06.2022  
DATE OF DECISION: 29.08.2022

**RAMESH NAIR**

All these appeals have been filed against the common Order-in-Original No. DMN-EXCUS-000-COM-044-18-19 dated 29.03.2019 passed by the Commissioner of Central Excise, Vapi. The details related to Appeals are separately given in the following tabular form:

| <b>Appeal No.</b> | <b>Name of the Party</b>                 | <b>Demand</b>                                            |
|-------------------|------------------------------------------|----------------------------------------------------------|
| E/12159/2019      | Nico Extrusions Ltd.                     | Cenvat demand of Rs. 16,95,76,390/- + Interest + Penalty |
| E/11380/2019      | Department appeal – Metec Asia Pvt. Ltd. | Penalty under Rule 26                                    |

|              |                                           |                       |
|--------------|-------------------------------------------|-----------------------|
| E/13005/2019 | Department appeal - Shri Tushar Porwal    | Penalty Under Rule 26 |
| E/13007/2019 | Department Appeal - Shri Rajkumar Agrawal | Penalty under Rule 26 |

**Appeal No. E/12159/2019:**

02. The facts of the case are as under :-

2.1 The Appellant M/s Nico Extrusions Ltd. are engaged in the manufacture of Aluminium Alloy ingots, copper zinc base alloys, copper-nickel alloys, copper ingots etc. and was availing the benefit of Cenvat Credit of duty paid on inputs received by them from various indigenous buyers as also imported raw materials.

2.2 The officers of Central Excise & Customs, Vapi, acting upon an intelligence that Appellant were availing the cenvat credit of the duty paid on inputs/ raw materials without physically receiving and using the said goods in their factory and to compensate the same they were showing excess generation of Ash during the manufacturing of their finished products, than that of its actual production, conducted preventive checks/ searches at factory premises, head office of Appellant and premises of transporter. During the course of investigation various incriminating documents / records were seized by the officers. Statements of various persons were recorded including the transporters/sellers of raw materials/ purchaser of finished goods and employees of Appellant. On completion of investigation a show cause notice dated 27.04.2007 was issued to Appellant and other co-noticees and the same was adjudicated by the adjudicating authority vide Order-In-Original No. 01/MP/VAPI/2009 dtd. 30.03.2009 confirming Cenvat demand along with interest and imposing penalty. Being aggrieved, Appellant and other co-noticees filed appeals before the CESTAT, Ahmedabad and CESTAT vide its Final Order No. A/1983-2012/WZB/AHD/2009 dated 27.08.2009 set aside the order-in-original and remanded back the case for fresh decision after allowing the cross examination of witnesses whose statements are relied upon. Therefore, the present case was re-adjudicated vide impugned order whereby Ld. Adjudicating authority confirmed the Cenvat Credit demand of Rs. 16,95,76,390/- and imposed equal amount of penalty on the Appellant. Aggrieved with the said orders, the Appellants are in appeal before us.

03. The learned Advocates Shri Uday Joshi, Shri Aashish Chauhan, Shri Rahul Patel & Ms. Neha Agrawal for the appellant submits that department had analysed the consumption of raw material used by the Appellant and manufacturing wastage from the perspective of applicability of SION and accordingly inferred that the Appellant is involved in a mischievous activity of inflating the qty. of raw material and wastages for availing the inadmissible credit on the goods which had never been received by the Appellant in their factory premises. From the provisions of Foreign Trade Policy, it is evident that the SION are fixed and published by the DGFT solely for the purpose of import entitlement against the advance licences and specified duty remission schemes under Chapter 4 of the FTP. In the instant case, the department had referred SION C-3 for "Aluminium Alloys Ingots". It is pertinent to note that the SION C3 had been amended during the material period which the department had not even taken the cognizance. The Appellant in the instant case had manufactured the Aluminium Alloys ingots of specific grades (LM4, LM, 24, LM13, ADC 12, ALSI132, YMD, ACB4B etc) and their predominate raw material for such manufacturing was "Aluminium Scrap – Twitch Grade". The SION published under the FTP did not regulate the manufacturing process of the manufacturers. The manufacturing process entirely depends on technical requirement of the resultant product and available resources. The Department had ignored the specification/grade of the Aluminium scrap that had been procured by the Appellant. The Institute of Scrap Recycling Industries, Inc. (ISRI) prescribed the standard specification to assist its members in the buying and selling of the scrap materials. The specification are internationally accepted and are used through out the world to trade the various commodities. ISRI had prescribed around 45 specifications of Aluminium Scrap. The relevant grade for Appellant is "Twitch". Aluminium scrap (Twitch Grade), used to be imported from the overseas suppliers and the specifications of the Aluminium scrap such as "twitch grade" were always declared on the supplier's invoice and the corresponding bills of entry. The finished goods viz. Aluminium alloys ingots were also manufactured of specific grade such LM 4, LM 24, LM 13 ,ADC 12, ALSI132, YMD, AC4B etc. and were primarily supplied to automobile OEMS. Hence it is well established that the appellant was manufacturing specific grade Aluminium Alloys Ingots out of the aluminium scrap of specific grade and hence the SION C-3 which were published with generic input material and generic finished, with no mention of specific grade, had no implication and applicability on the Appellant, in

whatsoever manner. The Appellant had not applied any specific norms for its specific grade resultant goods for the reason that the Appellant had neither availed nor intended to avail any benefit under the FTP for the material period. Hence the Appellant had neither applied for fixation of the specific norms nor sought an amendment of SION C-3 from DGFT. It is apparent that the department had grossly erred in enforcing the SION C-3 on the Appellant and inferring that the Appellant had consumed less quantities of the input items and to camouflage that has superficially shown the excess qty, of wastages i.e. aluminium dross.

3.1 He also submits that department had contended that the qty. of purchase and consumption, of Silicon had been accounted extremely less in the books of accounts as against the content of Silicon in the finished goods. The entire case was booked by the department on hypothesis and without going into the technicalities of the manufacturing process, nature of raw materials and finished goods. The objective of such procurements is that the chemistry of the scrap was more or less similar to the chemical composition requirement of the finished goods. The alteration required to meet the chemistry of the final product were done in the furnace by frequent testing of molten metal and based on the requirement of chemical composition necessary of final product as per the customer, the operations of addition of requisite element and removal of impurities are conducted. The scrap procured by the Appellant from auto shredders also contains more or less similar compositions and therefore while manufacturing the finished goods alloys, only a small qty of silicon is supplemented. The department had not considered or factored in the net content of the various elements including silicon that were available in the raw material i.e. Aluminium Scrap (twich grade) and had imprudently just presumed that the silicon content available in the resultant finished goods was the result of addition of pure silicon during the manufacturing process.

3.2 He further submits that department had completely lost sight while making such inference that the Appellant had procured the Aluminium Ingots of purity to the extent of 99.7% and aluminium scrap of 90-97% purity, while the manufactured resultant goods have purity of 83-86% . The department had not even taken efforts to understand that manufacturing process of the Appellant and the nature of the raw material and finished

goods. The department had disregarded the facts that Appellant is a remelter and its predominant raw material is Aluminium scrap "Twitch Grade" The department had inferred that the impurities present in twitch grade scrap were 1% zinc + 1% magnesium + 1% analytical Iron + 2% of non-metallic waste, totalling to 5% and therefore the scrap had purity of 95%. The department had stipulated the purity of aluminium scrap in a range of 90 to 97%. From SION C3 wherein 3% wastage was mentioned, purity was derived as 97%. This shows that apathy of the department that the technicalities of the matter had not been given any significance and the entire inferences had been made on some assumptions. Circular of the Director General of Valuation (DGOV) on the valuation of the imported Aluminium scrap that price of Aluminium scraps are derived after discounting the wastages present in the metal scrap. This discount is given based on the extent of metal recovery from such scrap. Accordingly, the price of aluminium scrap of "Twitch Grade" is assessed at 30% discount of the virgin Aluminium metal with absolute purity. Hence the contention of the revenue that the purity of Aluminium scrap of twitch grade had purity of 90% to 97% is absurd and the entire proceedings on such notion need to be scrapped.

3.3 He also submits that the department had completely gone off track while disallowing the admissibility of Cenvat Credit based on the assumption that the finished goods were not manufactured as the consumption of furnace oil was less. The Department had not taken any effort to get the technical assistance from any scientific body or technical literature to substantiate its assumption. Metal recycling is a complicated industry because the raw materials are scraps which contain many different impurities which too changes from lot to lot within the same grade, impurity contents etc, and to remove impurities from the Heat charges, some heats take more time, some take less depending on the quality of scraps, Different Fluxes to remove the different impurities e.g. for magnesium removal from the molten metal MG remove flux is used. Some scraps may contain higher magnesium some may have less and therefore the charge time differs depending on the contents in the scraps. It will also differ on the Temperature control of each heat, type of furnace etc. Department had derived the so called actual requirement of Furnace Oil on the basis of un-authenticated paper, and further stretched it down to the entire material period. He placed reliance on Hon'ble Supreme Court order in the case of M/s Oudh Sugar Mills Vs. Union of India 1978 ELT (J172)

3.4 He further submits that the contention of the department that excess ash/waste was shown and cleared to non-existent buyers, is not correct. Formation of dross/Ash is a chemical process that occurs for various reasons and the quantum of such dross also depends on the quality of scrap and methodology of the burning and fluxing operations. The appellant had obtained a certificate from the independent Chartered Engineer for monitoring the charges for manufacturing recycled Aluminium Alloys from Aluminium scrap "Twitch Grade". The Chartered Engineer on its conclusion had derived that the yield of Aluminium was to extent of 73% and the balance 27% was the wastage in the form of burning /melting/slag/Iron/non-metallic etc. The buyers of ash, Slag, Skimming Iron waste & non-metallic waste etc. are of unorganized section. Individuals who come and collect such accumulated waste. They pay the value and pick it up. The appellant had not maintained any data of their name and address. Further the transportation of such waste was always in the scope of such buyers and therefore the Appellant was never concerned with respect to the documentation.

3.5 He further submits that department contended that the appellant had shown the clearances of the finished goods mostly Copper Based Alloys on the value which is very less than the cost of consumed Raw Material in their production, without delivery of the goods from their factory at Silvassa. Department had completely disregarded the purchase price of the metal scrap that had been procured by the Appellant and recorded in the books of accounts. The Department had not taken efforts to analyse any data from the Appellant's record or any other sources such as industry data, technical /commercial supporting etc., It is absurd that on one side the Appellant alleged that Nickel and Copper had not come into the factory and on the other hand acknowledge the fact that the Appellant had supplied Copper Nickel based Alloys but at the lower prices. There is no case of the department towards under valuation and the income tax returns and other books of accounts duly audited by the statutory auditors, further substantiate the boanfide of appellant.

3.6 He further submits that department based on the statements of couple of transporters alleged that the Appellant had procured the LR's to substantiate their movement of raw material from supplier to their factory.

The Lorry receipts is a title documents as per the "Sales of Goods Act 1930 and there is a prime relevance while transporting the goods as the transporter while issuing the LR act as bailee (custodian of goods) and accordingly owns a liability to that extent. The department had completely misconstrued the statements of the representative of transporters. The transporter, M/s Avadh Transport had confirmed that they were frequently transporting the goods for the Appellant and payment has been received by them through banking channel. The department also had relied upon a statement of transporter, M/s Haryana Commercial Cargo Carriers, Delhi wherein they had purported issued LR for 5 paisa/Kg to the Appellant. However, when the said transporter was called for cross-examination, no one turned up and Ld. Commissioner in impugned order held that the address of such transporter is not clear. While the department at its own convenience records the statements at the premises of such transporter, and seized their documents under Panchnama, but at the cross examination stage, the address suddenly became vague. The Appellant had made entire payment to the transporter through banking channel and the department had not taken any efforts to find from such transporter that if LRs were issued for 5 paisa/Kg, the investigators should have produced evidence how and to whom the cash was returned. There is no evidence produced by the department or such transporter in support of their argument. Thus, it is evident that the statement was recorded under suspicious circumstances, may be under coercion and therefore the cross –examination was not conducted. This statement had no relevance in the eyes of law and therefore shall be ignored.

3.7 He argued that demand of Rs. 7,22,30,953/- had been raised with a heading " details of the cenvat credit wrongly taken by M/s Nico Extrusion Pvt. Ltd., Naroli, Silvassa on the Cenvatable goods without actual receipt and use of the same in their factory, during the period 01.04.2002 to 13.02.2006." The condition for allowing the cenvat credit on inputs used for manufacturing excisable goods are stipulated in Rule 4 of Cenvat Credit Rules 2004. Similarly, the documents on which the cenvat credit be allowed has also been well defined in Rule 9 of Cenvat Credit Rules 2004. In fact, there is no mention of SION norms in the entire Central Excise Act 1944 and Rule framed thereunder and hence any compulsive inference to disallow the admissible Cenvat Credit is untenable. He placed reliance on the decision

in Jakap Metind Pvt. Ltd. Vs. Commissioner of Cus. & Central Excise – 2017(356)ELT 279 (Tri. – Mumbai).

3.8 He further submits that demand of Rs. 1,34,26,199/- had been raised in with a heading “ Details of the Cenvat Credit wrongly availed by M/s Nico Extrusion Pvt. Ltd., Naroli, Silvassa on the cenvatable goods without actual receipts from M/s Metal Plast and NEPI, Kalyan and without use of the same in their factory.” The entire demand had been raised on assumption that the M/s Avadh Transport Service had not transported the raw material from the Appellant’s warehouse in Kalyan and Metaplast factory to the premises of Appellant in Silvassa. However, M/s NEPL, Kalyan is the excise registered warehouse of the Appellant. This facility was created by the Appellant to store raw material for the reason that the storage capacity of factory premises is limited. The raw material being automobile scrap occupies, lot of space and therefore this warehouse had been used. Further the other supplier, M/s Metaplast was a 100% EOU and therefore under Excise Control. The statement of Shri Ashish Gupta, authorised signatory of Avadh Transport, and Shri Ramji Singh Manager, Piparia, Silvassa were recorded during the investigation. Shri Ashish Gupta in the cross examination had confirmed that M/s Avadh Transport frequently transported the goods to the factory of Appellant. All payment had been received by them as recorded on the books of account. Further the copies of ledger of M/s Avadh as shared by them with Appellant for account confirmation and couple of sample bills issued by M/s Avadh against supply from Appellant’s warehouse to Silvassa factory. When inputs are entered in the statutory records as stipulated under Central Excise law, it is well settled law that the documentary evidence is more reliable then the statements. The denial of Cenvat Credit on the basis of transporter statements and records is not tenable. This issue is well settled in catena of decisions. He placed reliance on the following decisions.

(i) Monarch Metals – 2010(261) ELT 508 (Tri.)

(ii) Motabhai Iron & Steel – 2014(302) ELT 69 (Tri.)

3.9 He further argued that demand of Rs, 2,99,63,292 /- had been raised with a heading “ details of the cenvat credit wrongly availed by M/s NEPL, Silvasa without actual receipts and use of the goods i.e. Copper Ingots/ Nickel imported through ICD, TKD, New Delhi”. The said purported demand is entirely based on assumption that the goods which were purchased by the Appellant on high sea sales basis and imported through ICD Tughlakabad,

had not been transported to the factory of Appellant. Department in this matter relied upon the statement of three transporters, viz. M/s Delight Cargo, M/s Haryana Commercial Cargo and M/s ABC Transport, who used to transport such goods of the Appellant. The representative of M/s Delight Cargo, Shri Inder Pal Singh Nanda, in his statement to the department had stated that the goods had been supplied to the Appellant but such goods were delivered in Bhiwandi. Payment from the Appellant had been received through the banking channel. Shri InderPal Singh could not be cross examined by the Appellant as he remained absent during the entire cross examination proceedings. The representative of M/s Haryana Commercial Cargo Carriers, Delhi, Shri Rajesh Kumar Narula, in his statement has stated that they had purportedly issued LRs for 5 Paise/ Kg . to the Appellant. However, when the said transporter was called for cross-examination, no one turned up and the Ld. Commissioner in impugned order mentioned that address of such transporter is not clear. While the department at its own convenience record the statement at the premises of such transporter, and seized their documents, but at the cross examination stage, the address suddenly became vague. The Appellant had made the entire payment to the transporter through banking channel. Thus, it is evident that the statement was recorded under suspicious circumstances, may be under coercion and therefore the cross examination was not conducted. This statement had no relevance in the eyes of law and therefore shall be ignored. The representative of M/s ABC Transport, Shri Ashok Gaur in his statement dated 21.08.2006, had stated that they had not transported the goods for the Appellant. However, Shri Gaur in his letter dated 24.07.2006 addressed to the Superintendent (Preventive) in response to earlier summons has stated that his company had transported the goods for appellant and he had received the payment from Appellant towards such transportation. Further Shri Gaur didn't turn up for cross-examination by the Appellant.

3.10 He also submits that The department had not given any corroborative evidence to support its contention and had not placed any proof in their support that the goods had been diverted by the Appellant to some other place. Neither the revenue had produced any evidence of sale of such goods. The revenue also failed to substantiate the fact that how the finished goods could be manufactured without the procurement and receipt of such raw materials. The revenue also could not produce any evidence that alternative goods were sourced by the Appellant to manufacture their finished goods.

The Buyer of the Appellant viz. M/s Jindal Steels , M/s Mukund Steels, M/s Stainless India, etc. in their communication to the department in this matter against summons, had confirmed that they had purchased the finished goods such Copper Ingots, Copper Nickel Base Alloys etc., from the Appellant and the payment from them were given to the Appellant through the banking mode. Hence, in view of the above, where transporters were not available for cross-examination, and the purchases were confirmed by the supplier, the cenvat credit shall not be denied under any circumstances.

3.11 He further submits that the demand of Rs. 4,57,79,503/- had been raised with a heading "details of the cenvat credit wrongly availed by M/s Nico Extrusion, on the cenvatable goods without actual receipts from M/s Metec Asia Pvt. Ltd. Piparia, Silvassa." The revenue had created this superficial demand based on the statements of local transporters who in the common trade practice neither issue any LR's nor maintain any transportation records. The supplier M/s Metec Asia was a Central Excise dealer and used to sell the goods viz. Copper scrap, zinc scrap, Copper Ingots, Zinc Ingots, Nickel Aluminium Ingots etc, to the Appellant. The revenue in this case had gone far enough to record the statements of the suppliers of M/s. Metec Asia and their transporters. The suppliers of M/s Metec Asia had confirmed their sales to Metec on consignment basis and receipt of payment through banking channel. Further Metec had confirmed that they had sold the goods to the Appellant and all payment towards such sale had been received by them through the banking mode. The factory premises of the Appellant and depot of Metec were located in Silvassa, with a proximity of 10-15 KM. The transportation of goods was the responsibility of Metec and generally such transportation used to happen on the vehicles sourced locally. The revenue had relied on the statements of owners of tempo or other vehicles and inferred that the goods had not been delivered by Metec to the Appellant. However, no corroborative evidence was given by revenue that if such goods were not delivered then how the Appellant had manufactured the finished goods. In most of case the presumption of non delivery of goods to Metec and then Metec to Appellant had been on some purported report of Gujrat RTO. The report of RTO regarding the vehicles is inconclusive and cannot be relied upon considering the inconsistency and misadministration in the department. It is a well acknowledged fact that the transportation industry in our country is substantially unorganized. Revenue failed to furnish any evidence to corroborate the assumptions and therefore

reliance on such third party oral statements or records is untenable. The Appellant hereby states that the goods had been received at their factory at the relevant time and the credit has been correctly taken. There is no allegation that the goods have been diverted to third party. In absence of any such allegation or empirical proof, the demand of irregular Cenvat Credit cannot be sustained. The Invoiced goods have been received and the payments were made by the Appellant and the same has not been denied by the department nor has the investigation brought out any evidence that no payments were made to the suppliers/ transporters. The department has not produced any evidence from where the appellant has procured the said raw materials and how the Appellant had produced the finished goods and has supplied to organized sector. In cross examination proceedings, less than 50% of the witnesses had appeared. Further these witnesses have not produced any evidence towards their ownership or any documentary evidence to substantiate that their vehicle were not used for transportation. Infact none of such witness (vehicle owner) had given any trips sheet or any booking related documents maintained by them. During cross examination proceedings, these witnesses informed that all the statements were given based on their memory.

3.12 He further argued that demand of Rs. 81,76,443/- had been raised with a heading " details of the Cenvat Credit wrongly availed by M/s Nico Extrusion, Naroli, Silvassa on the cenvatable goods without actual receipts from M/s Metal Links Alloys and M/s N.D. Metal Ind. Ltd./ M/s Kothati Metals." The Ld. Commissioner while confirming this demand had conveniently relied on the statements of few individuals who had deposed their statement based on memory. The Ld. Commissioner had not considered the statements of the suppliers M/s Metal Links Alloys and M/s N.D. Metal Ind. Ltd. / M/s Kothari Metals that had been recorded by the department, that they had supplied the goods to the Appellant and all payments towards such goods had been received by them through banking channel. All the transporters in this case had been arranged by the suppliers and therefore the privity lies with them. Further no evidence had been given by the department or such individuals on whose statements, the contention of non transportation had been relied upon.

04. On the other hand, Shri T.G.Rathod, Learned Additional Commissioner (AR) appeared on behalf of the Revenue reiterates the finding of impugned order.

05. Heard both the sides in detail at length. We find that the main issue to be decided is as to whether the appellant have correctly availed of the Cenvat credit of duty based on the invoices issued by their raw material / inputs suppliers. Before we proceed to decide the matter and to understand this issue in proper perspective, it is imperative to know the relevant cenvat credit provisions. In this context we find that the Cenvat Credit Rules, 2004, deal with the procedure relating to availment of credit. As per Rule 3, a manufacturer or a producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as Cenvat credit) of the duties specified therein paid on any inputs or capital goods and received by the manufacturer for use in or in relation to the manufacture of final products. Rule 4 of the said Rule stipulates that Cenvat credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service. Rule 9 of Cenvat Credit Rules, 2004 deals with the documents and accounts on the basis of which the Cenvat credit can be taken and this includes an invoice issued by a manufacturer, an importer, a first stage dealer or second stage dealer. Sub-rule (2) further stipulates that no Cenvat credit shall be taken unless all the particulars as prescribed under the Central Excise Rules, 2002 or the Service Tax Rules, 1994 are contained in the said document. In case any particulars are missing, Cenvat credit may be taken only with the prior approval of the jurisdictional Asst./Dy. Commissioner of Central Excise, if he is satisfied that the goods or service covered by the document have been received and accounted for in the books of account of the receiver. Sub-rule (4) of the said rule further stipulates that the Cenvat credit in respect of input or capital goods purchased from a first stage dealer or second stage dealer shall be allowed only if such first stage dealer or second stage dealer, as the case may be, has maintained records indicating the fact that the input or capital goods was supplied from the stock on which duty was paid by the producer of such input or capital goods and only an amount of such duty on pro rata basis has been indicated in the invoice issued by him. Sub-rule (5) further stipulates that the burden of proof regarding the admissibility of the Cenvat credit shall lie upon the manufacturer or provider of output service taking such credit.

5.1 From the above provisions of law, it becomes evident that to avail Cenvat credit, the inputs or capital goods should have suffered the appropriate duty by the producer/manufacturer of such goods and the goods should be received by the manufacturer availing credit in his factory and the inputs or capital goods so received should be utilised in or in relation to the manufacture of final products. In respect of inputs received from a first or second stage dealer, an additional condition is stipulated to the effect that the inputs or capital goods were supplied from the stock on which duty was paid by the producer of such goods and only an amount of such duty on *pro rata* basis has been indicated in the invoices issued by him. It is further stipulated that the burden of proof regarding admissibility to Cenvat credit shall lie upon the manufacturer taking such credit. further stipulated that a manufacturer/producer taking Cenvat credit on inputs or capital goods shall take all reasonable steps to ensure that the inputs or capital goods in respect of which he has taken Cenvat credit are goods on which appropriate duty of excise as indicated in the document accompanying the goods has been paid.

5.2 We find that the issues involved in present matter related to admissibility of Cenvat Credit have been categorised into five parts , namely, (1) Cenvat demand of Rs. 7,22,30,953/- on account of alleged non receipt and use of Aluminium wire Rod, Aluminium Ingot, Aluminium Scrap, Copper Ingot and Scrap, Nickel and Zinc Ingot and Scrap etc., ; (2) Cenvat demand of Rs. 1,34,26,199/- on account of alleged non receipts of raw materials from M/s Metal Plant and M/s Nico Extrusions Pvt. Ltd. (3) Cenvat demand of Rs. 2,99,63,292/- on account of alleged non receipts of goods i.e remelted Copper Ingots and Nickel imported through ICD, Tughlakabad, (4) Cenvat demand of Rs. 4,57,79,503/- on account of alleged non receipt and use of goods purchased from M/s Metec Asia Pvt. Ltd. (5) Cenvat demand of Rs. 81,76,443/- on account of alleged non receipt and usage of raw material purchased from M/s Metal Link Alloys, Daman and M/s N.D. Metals and M/s Kothari Metals. We examine the issues based on the categories indicated above.

5.3 We first take up the issue relating to admissibility of cenvat credit of Rs. 7,22,30,953/-. The case of the department is that Appellant has shown the receipts and consumption of cenvatable raw materials Aluminium Wire rods, Aluminium Ingots, Aluminium scrap, Copper Ingot and scrap, Nickel

and Zinc Ingot and scrap etc. in their records for the manufacture of the finished goods without physically receiving and using the same with an intent to evade the payment of central excise duty by availing the cenvat credit of such goods. Appellant have shown excess/more production/generation of Ash, Iron waste, Non metallic waste, manufacturing loss etc., We noticed that the sole reason for this issue is that the inputs/ raw material used by the Appellant for manufacturing their final products are not in line with the declared standard Input Output Norms (SION) described in Foreign Trade Policy. Revenue calculated the production of final products and the consumption of raw materials in the respective products by adopting the DGFT-SION norms and calculated the differential duty/ cenvatavailment. We find that the conditions for allowing the cenvat credit on the inputs used for manufacturing excisable goods are stipulated in Cenvat Credit Rules 2004 and similarly the documents on which the Cenvat Credit be allowed has also been well defined in Rule 9 of Cenvat Credit Rules 2004. There is no provisions in Cenvat Credit Rules 2004 and Central Excise Act 1944 for availment of Cenvat Credit on basis of SION norms or on the Input-Output ratio. There is no input/output ratio for allowing the credit of duty paid on inputs under the Cenvat Scheme. What is required to be established, only receipt of the inputs in the factory under cover of valid duty-paying documents and utilization of the goods in the manufacture of the final products cleared on payment of duty. The department in the present case itself admitted that the Appellant shown the receipts and use of the goods in their factory, therefore we do not find any reason for disallowance of cenvat credit in this matter specifically when the supplier of the goods/ raw material, nowhere admitted that, they have not supplied the goods to appellant and any evidences in relation to diversion of disputed raw materials. When the inputs are used in the manufacture of dutiable final products, the benefit of cenvat credit in respect of such input cannot be denied. There is no provision in the Central Excise Law and Cenvat Credit Rules for determination of Cenvat amount on the basis of SION norms. In this context we also draw the attention to the provisions of Section 3A of the Central Excise Act, 1944 read with Rule 96ZO and 96ZP of the Central Excise Rules, 1944 whereby the production was determined on the basis of capacity of the furnace and capacity of the rolling mill. There was specific provision in the Act and the Rules for determination of capacity of production on the basis of capacity of furnace and rolling mill. Since there was no similar

provision in the law for determination of cenvat amount on the basis of SION norms, the entire proceeding in the impugned matter is void.

5.4 In the case of M/s. Suzlon Fibres Ltd. [2008 (230) E.L.T. 166 (Tri. Ahmd)], it was observed that the case of clandestine removal cannot be made on the basis of input-output ratio and is required to be corroborated by an independent evidence. Thus by relying upon the precedent decision of the Tribunal in the case of M/s. Hindustan Coca Cola Beverages Pvt. Ltd. [2006 (205) E.L.T. 700 (Tri)], the demand was set aside. Similarly in the case of M/s. Ghodavat Pan Masala Products Ltd. [2004 (175) E.L.T. 182 (Tri.-Mum.)], it was observed that theoretical calculations based on minor inputs without tangible, strict, positive, direct and corroborative evidence to show that goods produced in excess removed or transported, the allegations of clandestine removal cannot be upheld. To the same effect is the Tribunal's decision in the case of M/s. Parle Beverages Ltd. [1999 (114) E.L.T. 872 (Tri.)], it was observed that there is no contractual obligation on the part of the assessee to strictly adhere to the formula. The object of the formula is to ensure consistency of the product in different batches and in each bottle of the same batch. It is therefore, more of a working guide than an inflexible requirement in terms of quantity of end-product and it is not permissible to demand duty only on the basis of consumption of a single raw material. In the case of M/s. Nav Karnataka Steels Pvt. Ltd. v. CCE, Bangalore [2008 (225) E.L.T. 454 (Tri. Bang.)], it was observed that theoretical formulas based upon the consumption of the raw material cannot be made the basis for arriving at the correct production.

5.5 The Hon'ble Supreme Court in the case of Oudh Sugar Mills Ltd. v. Union of India [1978 (2) E.L.T. (J172) (S.C.)] has held that allegations of clandestine production and removal based only on calculations of raw material fed into the process or on working of the machinery as noticed during test inspection cannot be upheld in the absence of any tangible evidence on record.

5.6 The ratio of all the above decisions is to the effect that the charges of clandestine activities cannot be upheld on the basis of theoretical input-output norms. The same are required to be corroborative by production of independent evidences. Examining the present issue from the above angle, we find that apart from the input-output ratio, which has been made the basis, there is no other evidences on record to show that the appellant either

did not receive the raw materials, on which they have taken the credit or after receiving the same and availing the credit, the same stand removed by them in the open market. Further in the entire case there is no admission in the statements of Appellant's directors or employees to the effect that the raw materials were not actually received by them and they were showing excess consumption of the raw materials to accommodate such non-receipted raw materials. There is also no admission in the said statements to the effect that raw materials stand diverted in the open market. We further take note of the fact that no efforts were made by the Revenue to ascertain the fact whether the buyers of the goods have actually received the goods or it is merely paper transactions to clear the goods and when cleared goods have not been received by the buyers premises and how they procured the goods which have been used in the manufacture of dutiable goods cleared on payment of duty. In that circumstances, credit cannot be denied to Appellant merely by relying the SION norms and transporters statements. All these factors lead to show that the findings, arrived at by the adjudicating authority are on the basis of assumptions and presumptions and in the absence of any independent evidence, cannot be upheld.

5.7 The next issue for consideration is regarding the Cenvat Credit demand of Rs. 1,34,26,199/- on account of non -receipts of raw materials from M/s Metal Plast Exim (India) Pvt. Ltd. and M/s Nico Extrusions Pvt. Ltd, Kalyan by relying the records of transporters and statements of transporters. We find that M/s Metal Plast Exim (India) Pvt. Ltd. was a 100% EOU unit and M/s Nico Extrusions Pvt. Ltd. Kalyan was registered warehouse of Appellant. The goods were duly found to have recorded in the Appellant's factory and were consumed in the production. The payment was made through banking channels to supplier and transporters which is not denied. Both the suppliers nowhere stated that they have not supplied the alleged goods to the Appellant. In such case we do not find any reason to disallow the credit to the Appellant. We rely upon the judgment of *M/s. Monarch Metals P. Ltd. v. Commissioner of C.Ex., Ahmedabad* - [2010 \(261\) E.L.T. 508](#) (Tri.-Ahmd.) wherein it was held that credit is available where the assessee produced ample evidence in shape of documentary record to prove that they had actually received inputs from first dealer and made payments through Demand Draft. We also find that Shri Ashish Gupta, Authroised signatory of M/s Avadh Transport during the cross-examination had confirmed that they

frequently transported the goods to the factory of Appellant and all the payments had been received by them as recorded in the books of account. Further it is well settled law that no cenvat demand is sustainable on the basis of third party documents and their statements. In the present matter the goods were found to be duly shown as received and entered in the factory of the Appellant. The statutory records of the Appellant concern show the receipt and consumption of the goods. Pertinently it is noted that there is no statement of the supplier that the goods were not supplied to the appellant. We therefore find no reason to disallow credit to the Appellant.

5.8 The next issue for consideration is regarding the Cenvat Credit demand of Rs. 2,99,63,292/- on the ground that Appellant in collusion with the transporters and suppliers, High Sea Seller, have wrongly availed the credit on inputs without actual receipts of the goods in factory and without actually using the said goods in the manufacture of their finished goods on the strength of Bill of Entries issued by ICD. The said allegation is based on the records of transporter and their statements. We find that the basis for denial of such substantial amount of Cenvat credit on imported raw materials is totally unsustainable and beyond reason. There is no other corroboration of such allegation. Here, again it has not been proved, if such quantities of imported raw materials were diverted without receipts in the factory and use of the same in manufacturing of finished goods, how there be production of given quantity of final product. Department in the present matter nowhere produced any corroborative evidences related to the diversion of imported raw materials/ substitute of imported raw material in factory/ any buyer of imported raw material who admitted that the Appellant had delivered the said imported goods to them. Moreover in the said matter Transporters did not turn up for cross-examination, hence their statement cannot be relied upon. During the investigation the transporter admitted the payment from the appellant towards transportation, high seas sale supplier had also confirmed the sale to the appellant. The bills of entry filed by the Appellant and clearances of the goods from customs substantiate the purchase of goods by the Appellant and appellant also account for the said goods in their books of account. Therefore, we find the case on merit is not sustainable due to lack of evidence to establish the allegations.

5.9 The next issue for consideration is regarding the Cenvat Credit demand of Rs. 4,57,79,503 in respect of invoices issued by Supplier M/s Metec Asia Pvt. Ltd., Silvassa. The case of the Revenue is that the Appellant has availed the Cenvat Credit on inputs mainly copper/Nickle, supplied by M/s Metec Asia Pvt. Ltd. without actual receipts of the said goods in their factory and without using the said goods in manufacture of their finished goods. The revenue in support of their allegations rely on the statement of transporters and RTO reports. However, we find that the Revenue failed to establish beyond doubt that the goods received were only on paper and physically there was no receipt of goods by the appellant. The Revenue has not shown anything on record to establish that the goods were not physically received as well as completely ignored the documents and exculpatory statements of the supplier showing that the goods were actually transported. We also find that The Hon'ble Gujarat High Court dealing with the issue in the case of *Motabhai Iron Steel Industries* (supra) [2015 \(316\) E.L.T. 374](#) (Guj) agreed with the Tribunal despite the fact available in that case that as per RTO reports the vehicle were not capable of carrying the goods but on the basis of other facts, such as the goods were found duly recorded in the appellants factory and consumed in the production, the payment were made through banking channels, no evidence of non-supply of the goods by the consignor etc. considering these facts, the Hon'ble Gujarat High Court itself upheld the order of the Tribunal.

5.10 In the present matter we also observed that these facts are not under dispute that the appellant have recorded the receipt of the goods in books of account and payment of the same was made through cheque. The finished goods were cleared on payment of Central Excise duty. Transportation charges were also paid by banking Chanel and such payment was accounted for in the books of account. There is no corroborative evidence that the inputs shown in the invoices of supplier by the appellant were not used in the manufacture of final product. Department has not disputed the correctness of quantity manufactured by the appellant recorded in production records. There is no allegation by the department regarding the financial flow back that against the said goods for which the payments were made through cheque, any cash payment was received by the appellant. With all these undisputed facts, merely on the basis of the transporter statements, it cannot be concluded that the inputs were not received by the appellant. Therefore the facts are established that the appellant have

received the inputs in their factory used in the manufacture of final product and same was cleared on payment of duty. Therefore, there are no substantial evidence which result the disallowance of credit. The evidences placed by department before us are not cogent to establish that appellant is guilty of fraudulent availment of Cenvat credit. Mere suspicion or assumptions and presumptions cannot be the basis for such serious allegation of fraudulent availment of credit. From the facts and evidences placed before us, we are of the view that impugned demand alleging fraudulent availment of credit is not sustainable.

5.11 The last issue for consideration is regarding the Cenvat Credit demand of Rs. 81,76,443/- in respect of invoices issued by Supplier M/s Meal Links Alloys Ltd., M/s N.D. Metal Ind. Ltd., M/s Merchandiser Pvt. Ltd. and M/s Kothari Metals. We find that Ld. Commissioner while confirming the demand in this matter relied on the statements of transporter and He did not consider the statements of suppliers that they had stated and admitted the supply of goods to the Appellant and receipts of payment of goods through banking channel. Moreover it is on records that in the present case all the transporters had been arranged by the suppliers and therefore in our view when the suppliers had admitted the supply of goods, the denial of cenvat credit on the basis of transporters statements not sustainable. The contention of the Ld. Commissioner is that investigation shown that the supplier of the material has not actually supplied the material as the transporter denied the transportation of the material not sustainable in the absence of any corroborative evidences. In this case the appellant's submission is that they had received the material in question from the suppliers, the suppliers in his statement admitted that supply of the material and payments made through banking channel the material was duly entered in the statutory records and issued for manufacture of finished goods. The payments were made through banking channel and there is no evidence on record to show that the amounts for consideration paid by the appellants were subsequently received by them. In these circumstances, as the material in question is received by the appellant under the cover of duty paying invoices and payments were made through banking channel, we find merit in the contention of the appellant. Consequently, the impugned orders are not sustainable in the eyes of law.

5.12 Without prejudice, we also find that in the whole matter department has relied upon the 125 witnesses, out of which 106 were called for cross-examination and only 32 were cross-examined. While disposing off the earlier appeal of appellant in this matter tribunal vide its order dtd. 27.08.2009 had remanded the matter to the Ld. Commissioner for fresh decisions after allowing cross-examination of witnesses whose statements had been relied upon to confirm the demand. It is well settled law that statements recorded by the Central Excise officers during the course of investigation cannot be relied upon, unless procedure prescribed under Section 9D of the said Act is scrupulously followed. Such statement would have no evidentiary value if the person making it is not subjected to examination-in-chief before the adjudicating authority and also not produced for cross-examination as stipulated under Section 9D(1)(b) of Central Excise Act, 1944. From the chart produced by the Appellant we find that in almost cases the witnesses have not been examined by the Adjudicating authority and such statements cannot be admitted as evidence. The demand confirmed alleging fraudulent availment of Cenvat credit on strength of invoices without receiving inputs can not be held sustainable solely based on statements of transporters and their records to the Appellant inasmuch as the suppliers in their statements had admitted supply of goods on duty paying documents and Appellant also produced documentary evidences in respect of receipt of inputs, use thereof in manufacture of final product, statutory records showing manufacture and clearance of final product on payment of duty. Since the Revenue failed to prove alternative source of receipt of raw materials and also money flow back from manufacturer/supplier to the assessee, it can not be said that they had not received the inputs especially when statements relied upon by the Revenue are contrary to the documentary evidence on record produced by the Appellant. Therefore, the contention of the Adjudicating authority on this issue cannot be accepted.

5.13 We also noticed that in the present case the reliance of third party i.e. transporters documents /statements was placed while confirming demand against present appellant is also observed to be unjustified and unreasonable. It is necessary to check the evidentiary value of the third party evidence. The relevant case law in the case of *Bajrangbali Ingots &*

*Steel Pvt. Ltd. & Suresh Agarwal v. CCE, Raipur* in Appeal Nos. E/52062 & 52066/2018 supports the appellant, which held as follows.

9. *The law i.e. as to whether the third party records can be adopted as an evidence for arriving at the findings of clandestine removal, in the absence of any corroborative evidence, is well established. Reference can be made to Hon'ble Allahabad High Court decision in the cases of Continental Cement Company v. Union of India - [2014 \(309\) E.L.T. 411](#) (All.) as also Tribunal's decision in the case of Raipur Forging Pvt. Ltd. v. CCE, Raipur-I - [2016 \(335\) E.L.T. 297](#) (Tri. - Del.), CCE & ST, Raipur v. P.D. Industries Pvt. Ltd. - [2016 \(340\) E.L.T. 249](#) (Tri. - Del.) and CCE & ST, Ludhiana v. Anand Founders & Engineers - [2016 \(331\) E.L.T. 340](#) (P & H). It stand held in all these judgments that the findings of clandestine removal cannot be upheld based upon the third party documents, unless there is clinching evidence of clandestine manufacture and removal of the goods.*

In the matter of *Commissioner of C. Ex., Indore v. PragPentachem Pvt. Ltd.* Reported in [2018 \(360\) E.L.T. 1025](#) (Tri. - Del.) the Tribunal observed as under:

*Cenvat credit - Bogus transactions - Invoice only received without goods - Evidence - Third party evidence - Revenue, inter alia, relying on written slops/entries of laptop seized from residence of cashier of dealer issuing invoices, alleging that these contain details of cash transaction in respect of goods not of business - The seized records therefore are third party records - Settled law in catena of decisions including that of Apex Court in 1998 AIR SC 1406 that third party records alone cannot be relied upon as admissible piece of evidence - Further, even in these records there is no identification of person to whom said alleged cash transaction belong - Said entries having not been corroborated by any independent evidence, not reliable - On same facts and investigations, credit allowed in respect of another party and no appeal filed against such order - Denial or credit on the basis of these entries not sustainable - Rule 3 of Cenvat Credit Rules, 2004. [paras 21, 22, 23, 24, 26].*

Thus, it has been consistently held that demands of whatever nature cannot be confirmed solely on the basis of third party's evidence/record.

06. In view of the our above discussion, we find that the demand of Cenvat cannot be sustained. We find that the appellant have satisfied the

requirement of receipt of inputs along with cenvatable invoices and use of such inputs in the manufacture of final product, accordingly, the Cenvat credit taken by them is in accordance with the scheme of the Act read with Cenvat Credit Rules. Therefore, the impugned order is not sustainable, hence the same is set aside.

**Appeal No. E/13005/2019 , E/13007/2019 and E/11380/2019 filed by department.**

07. These above three appeals have been filed by the department against the common impugned order, In these appeals revenue is seeking to impose personal penalty under Rule 26 of the Central Excise Rules 2002 on the ground that these persons have abetted the wrong availment of cenvat by M/s Nico Extrusions Ltd. Since we decide to set aside the demand itself, the proposal of personal penalties being consequential to the same demand, shall also not sustain. Accordingly, we do not find any merit in revenue's appeals and the same are liable to be dismissed.

08. As a result, appeals bearing No. E/12159/2019 filed by M/s. Nico Extrusions Ltd is allowed and the appeals bearing Nos. E/13005/2019, E/13007/2019 and E/11380/2019 filed by the revenue are dismissed.

(Pronounced in the open court on 29.08.2022)

**(RAMESH NAIR)  
MEMBER (JUDICIAL)**

**(RAJU)  
MEMBER (TECHNICAL)**