CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SCO 147-148, SECTOR 17-C, CHANDIGARH – 160 017

COURT NO. I

Appeal No. E/60111-60113, 60162 & 60325/2013

(Arising out of OIO No. 35/CE/COMMR/DM/RTK/2013-2014 dt. 31.07.2013 passed by the CCE, Rohtak.)

Date of hearing: 05.07.2017
Date of decision: 26.03.2018

For approval and signature:
Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. Devender Singh, Member (Technical)

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1. JSL Stainless Limited. **Appellant(s)**
2. National Udyog.
3. Ram Kishan Gupta, Vice President.
4. Jagdish Jindal, Partner.
5. Ridhi Sidhi Alloys Pvt. Ltd.

VS

CCE, Rohtak. **: Respondent(s)**

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Appearance:
Sh. B.L. Narashiman, Advocate for the Appellant(s)
Sh. Satya Pal, AR for the Respondent(s)
CORAM:
Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. Devender Singh, Member (Technical)

FINAL ORDER NO. 61960-61964 / 2018

Per : Ashok Jindal

The appellants are in appeal against the impugned order.

2. The case of the Revenue is that M/s JSL Stainless Ltd. (JSL) took the Cenvat Credit on the invoices issued by M/s National Udyog (a first stage dealer) and from M/s Ridhi Sidhi Alloys Pvt. Ltd. (manufacturer suppliers). The case has been made out by the Revenue on the basis of investigation conducted at the end of the M/s AIP Industries, Ludhiana. It was revealed that M/s AIP Industries is not having manufacturing capacity to the manufacture copper nickel alloys ingots and nickel plates. Further investigation revealed that M/s National Udyog is a first stage dealer who obtained the invoices from M/s AIP Industries copper nickel alloys ingots and M/s Jay Shree Enterprises, Hisar a first stage dealer, obtained invoices from M/s AIP Industries for nickel plates. M/s Jay Shree Enterprises supplied nickel plates to the M/s Ridhi Sidhi Alloys Pvt. Ltd. who further manufactured goods and supplied to the M/s JSL on payment of duty. As M/s API Industries is not having manufacturing capacity to manufacture the goods in question, therefore, the show cause notices were issued to the appellants on the ground that as M/s API Industries is not having manufacturing facility of the impugned goods, therefore M/s National Udyog and M/s Ridhi Sidhi Alloys Pvt. Ltd. have not received the goods against the duty paying document issued by the M/s API Industries, consequently, the goods received by the appellants have not suffered the duty, therefore M/s JSL is not entitle to avail Cenvat Credit on the goods supplied by M/s National Udyog or M/s Ridhi Sidhi Alloys Pvt. Ltd. On the basis of the said show cause notice, the adjudication took place and Cenvat Credit was denied to M/s JSL.

Consequently, the penalty on M/s National Udyog and M/s Ridhi Sidhi Alloys Pvt. Ltd. were imposed. Penalty on Sh. Ram Kisan Gupta, Vice-President of JSL and Sh. Jagdish Jindal, Partner of M/s National Udyog were also imposed. Aggrieved from the said order, all the appellants are before this Tribunal.

3. The Ld. Counsel appearing on behalf of the appellants submits that the denial of Cenvat Credit to the appellants on the basis of goods supplied by the M/s National Udyog and M/s Ridhi Sidhi Alloys Pvt. Ltd. is not sustainable. As M/s Ridhi Sidhi Alloys Pvt. Ltd. is a manufacturer of copper nickel alloys ingots which have been received by the appellant and the same has not been disputed by the Revenue in the show cause notice. As M/s Ridhi Sidhi Alloys Pvt. Ltd. has paid duty on the goods supplied by them to the appellant, therefore, the Cenvat Credit cannot be denied.

4. With regard to the supplies made by the National Udyog, the ld. Counsel submits that it is not the case of the Revenue that M/s National has not supplied goods along with duty paying invoices to them and they have made the payment through account payee cheque. It is not the case of the Revenue that goods have never transported from M/s National Udyog to the appellant, therefore, the appellant has received the goods against the duty paying document, therefore, they are entitle to avail Cenvat Credit on those goods in the light of the decision of this Tribunal in the case of *CCE Vs. Ridhi Sidhi Alloys Pvt. Ltd. Vide Final Order No. 51613/2015 dt. 30.04.2015 and CCE Vs. Juhi Alloys Ltd. – 2013 (296) ELT 533*

(Tri. – Del.) which has been affirmed by the *Hon'ble Allahabad High Court – 2014 (302) ELT 487 (All.).* He also relied on the decision of *Nidhi Metal Auto Components Pvt. Ltd. Vs. CCE 2016 (343) ELT 576 (Tri. Del.).*

5. On the other hand, Ld. AR opposed the contention of the Ld. Counsel and submits that it is fact on record that goods were never transported from M/s AIP Industries against the duty paying documents to M/s National Udyog or to M/s Ridhi Sidhi Alloys Pvt. Ltd. through Jay Shree Enterprises. As it is fact on record that goods have never supplied by M/s AIP Industries. As the invoices against which M/s JSL has taken Cenvat Credit are showing M/s API Industries has manufacturer of the said goods, therefore, M/s JSL is not entitle to take the Cenvat Credit on those goods. He further submitted that the proceedings against the M/s AIP Industries were initiated and order was passed against M/s AIP Industries to deny the Cenvat Credit to them on input used in manufacture of their final product and the said order has attained finality by this Tribunal vide Final Order No. 57281 dt. 12.08.2013 which has been affirmed by the Hon'ble High Court of Punjab & Haryana vide order dt. 10.12.2014, therefore, the impugned order is required to be upheld and the appeals filed by the appellants are to be dismissed.

6. Heard both the sides and considering the submissions.

7. We find that in this case facts on receipt of the goods by M/s JSL against duty paying documents by M/s National Udyog and M/s Ridhi Sidhi Alloys Pvt. Ltd. are not dispute. It is also not in dispute

that the appellants have not made the payment of those goods. In fact M/s JSL payment of these goods through account payee cheques. It is also facts on record that on verification by the authorities, it was found that M/s JSL have in fact received the goods supplied by M/s National Udyog and M/s Ridhi Sidhi Alloys Pvt. Ltd. On the basis of above admitted facts, the issue arose before us whether in these circumstances Cenvat Credit can be denied to the M/s JSL or not?

8. The said issue has been examined by this Tribunal in the case of *M/s Ridhi Sidhi Alloys Pvt. Ltd. (supra)* wherein this Tribunal observed as under:-

> *"7. The main allegation of the Revenue is that M/s AIP Industries is not having manufacture facility, therefore, Cenvat Credit is not available to the Respondent. To support his contention Ld. AR heavily relied on the decision in the case of Harsaran Dass Sita Ram (supra). In the said case in earlier round of proceedings after examining the facts of the case this Tribunal came to the conclusion that assessee who is availing Cenvat Credit has to prove that they have received the goods. Therefore, the Tribunal came to the finding that burden of proof in the facts of that case was on the assessee availing Cenvat Credit. Further in second round of litigation it was held that assessee has failed to prove cogent evidence that they have received the goods in their factory and then it was concluded that they are not entitled to take Cenvat Credit. In fact, facts of this case are somewhat different as in the impugned order itself ld. Commissioner (A) has come to the conclusion that respondent has been able to prove that they have received the goods in their premises. Therefore, the said facts are not applicable to the facts of this case. Further, I have examined the impugned order and in the impugned order ld. commissioner (A) has observed as under:-*
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> > *"As regard, appellant No. 1 the representative of the appellant during the investigation categorically submitted that they have received the goods along with invoices*

from appellant No. 2 entered them into their books of records including the gate register, issued for manufacturer of further goods in the factory. Likewise, the appellant No. 2 on receipt of the show cause notice filed detailed reply vide their letter dt. 03.04.2012 in which they gave complete details about the goods, the mode of transport and also submitted the copies of relevant documents such as consignment notes issued by the transporter, sales tax / vat returns, assessment order from the sales tax department, copies of declaration inform-H and the statements of bank accounts to substantiate their claim that they have received the goods from appellant No. 2. All these were verifiable facts. The department has not conducted any investigation whatsoever on the factual statements made by the appellant No. they have not been commented upon in the Order-in-Original neither there is any rebuttal. Therefore, the existences of these documents and the transaction conducted under them have to be accepted. Thus, it cannot be said that the appellant No. 1 did not received any goods from appellant No. 2. Further, the show cause notice has alleged fraud and invoked extended period for demand. In the entire proceedings no evidence whatsoever has been brought on record about the fact that appellant nos. 1 and appellant nos. 2 have ever connived and that either of them had any knowledge about the alleged fact that M/s. AIP Industries did not have any manufacturing facilities of nickel plates, the goods which are subject matter of the proceedings. Therefore, extended period in this case not justified. The period involved in this case is August 2006 to October 2006 whereas the show cause notice has been issued on 07.09.2011, the entire demand being beyond a period of one year is therefore, not sustainable."

8. I do agree with the observation made by the Ld. Commissioner (A) as the respondent has made all the payments through account payee cheque to the first stage dealer who has accepted that they have delivered the goods along with invoices. Moreover, no statement of transporter have been recorded to ascertain the fact that respondent has not received the goods. In these circumstances, I do not find any infirmity with the impugned order on merits. Further, I find that in this case show cause notice has been issued in September, 2011 whereas transaction involved the period

August, 2006 to September, 2006. Therefore, I hold that show cause notice is barred by limitation also. In these circumstances, impugned order is upheld. Appeal filed by the Revenue is dismissed."

Further examined in the case of *CCE Vs. Juhi Alloys Ltd. (supra)* and observed as under :-

> ***6.*** *On going through the impugned order of Commissioner (Appeals), I find that he has held M/s. Juhi Alloys Ltd., recipient of the inputs from M/s. M.K. Steels, eligible to avail Cenvat credit inasmuch as the invoices issued by M/s. M.K. Steels are the proper invoices and M/s. Juhi Alloys have taken due precaution in terms of Rule 7(4) of Cenvat Credit Rules, 2002 and Rule 9(5) of the Cenvat Credit Rules, 2004. The said recipient has placed orders on M/s. M.K. Steel for procurement of the raw materials through a broker. It is also not in dispute that the said inputs covered by the invoices raised by M/s. M.K. Steels Ltd. stand received by M/s. Juhi Alloys and duly entered in their Cenvat credit account. They have further been used in the manufacture of final product of M/s. Juhi Alloys which stand cleared on payment of duty by them. The appellate authority has observed that a buyer can take steps which are in their control and he cannot be expected to verify the records of the supplier's broker to check whether infact the supplier has paid duty on the goods supplied by him or not. As such, he has relied upon the Board's Circular being Circular No. 776/82/03-CX., dated 15-12-2003 laying down that as long as bona fide nature of the consignee transaction is not doubted, credit should not be denied. He has also relied upon various decision of the Tribunal to hold that the recipient of the inputs, where all the legal formalities stand complied with, would be entitled to Cenvat credit of duty.*
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> ***7.*** *I find Revenue is not disputing the fact that M/s. M.K. Steels raised dealers invoice, giving all the particulars required to be given under law in the invoice supplied to the respondents. It is also not being disputed that the respondent received inputs and entered the same in their records. The said inputs were further used by them in the manufacture of their final product, which were cleared by them on payment of duty. It is also a part of the record that the goods travelled from the dealer premises to the respondents premises under the cover of form 31 of UP Trade Tax department. This fact is sufficient to prove the physical entries of the inputs in the*

assesses premises. Further, the ledger account and RG 23A records maintained by the assessee also proves the receipt of the goods. Further, the payment of the said inputs stand made by the recipient through cheque.

8. *In terms of the provisions of Rule 7(4) of Cenvat Credit Rules, 2002 and Rule 9(5) of Cenvat Credit Rules, 2004, a manufacturer is required to check the particulars as mentioned in the invoice issued by the first stage dealer and he should be familiar with him. As rightly observed by Commissioner (Appeals), it is not only possible but impractical also for an assessee to further check the records maintained by the first stage dealer and to verify correctness of the same. It is sufficient if the assessee buys the goods from first stage dealer whose status he has checked and verified. There is no dispute in the present case that M/s. M.K. Steels was registered as a dealer with the Revenue and the invoices issued by him reflected his registration number. As such, I fully agree with the finding of the appellate authority that denial of credit to the respondent manufacturing unit on the ground that first stage dealer has fraudulently received the goods is neither proper nor justified. Reliance by the appellate authority on various Tribunal's decision is proper.*

The order of this Tribunal in the case of *CCE Vs. Juhi Alloys Ltd. (supra)* was examined by the Hon'ble High Court of Allahabad and the Hon'ble High Court has observed as under:

*"**7.** In the present case, both the Commissioner (Appeals) and the Tribunal have given cogent reasons to indicate that the assessee had taken reasonable steps to ensure that the inputs in respect of which he has taken the Cenvat credit are goods on which the appropriate duty of excise, as indicated in the documents accompanying the goods, has been paid. Admittedly, in the present case, the assessee was a bona fide purchaser of the goods for a price which included the duty element and payment was made by cheque. The assessee had received the inputs which were entered in the statutory records maintained by the assessee. The goods were demonstrated to have travelled to the premises of the assessee under the cover of Form 31 issued by the Trade Tax Department, and the ledger account as well as the statutory records establish the receipt of the goods. In such a situation, it would be impractical to require the assessee to go behind the records maintained by the first stage dealer. The assessee,*

in the present case, was found to have duly acted with all reasonable diligence in its dealings with the first stage dealer.

The view which the Tribunal has taken is consistent with the judgment of the Jharkhand High Court in Commissioner of C. Ex., East Singhbhum v. Tata Motors Ltd. - 2013 (294) E.L.T. 394 (Jhar.), where it was held as follows :-

> *"... Once a buyer of inputs receives invoices of excisable items, unless factually it is established to the contrary, it will be presumed that when payments have been made in respect of those inputs on the basis of invoices, the buyer is entitled to assume that the excise duty has been/will be paid by the supplier on the excisable inputs. The buyer will be therefore entitled to claim Modvat credit on the said assumption. It would be most unreasonable and unrealistic to expect the buyer of such inputs to go and verify the accounts of the supplier or to find out from the department of Central Excise whether actually duty has been paid on the inputs by the supplier. No business can be carried out like this, and the law does not expect the impossible."*

As the Hon'ble High Court has held that the assessee is required to take reasonable steps to ensure that the input in respect of which Cenvat Credit is taken the same are duty paid or not? In this case also, we find that the goods which have been received by M/s JSL are against the duty paying documents issued by M/s National Udyog and M/s Ridhi Sidhi Alloys Pvt. Ltd. As M/s JSL is bona-fide purchaser of the goods against the price of the said goods along with duty, in that circumstances, the Cenvat Credit cannot be denied to M/s JSL. In these circumstances, we hold that the Cenvat Credit cannot be denied to the M/s JSL against the invoices issued by M/s National Udyog or M/s Ridhi Sidhi Alloys Pvt. Ltd.

9. We further observed that in case of M/s Ridhi Sidhi Alloys Pvt. Ltd., it is not the case of Revenue that M/s Ridhi Sidhi Alloys Pvt. Ltd. is not a manufacturer and have not manufacture the goods in

question which has been supplied to M/s JSL against duty paying documents. In that circumstances, the investigation conducted at the end of the M/s API Industries have not relevance to the facts of the case to denying Cenvat Credit against the invoices issued by M/s Ridhi Sidhi Alloys Pvt. Ltd. to the M/s JSL along with goods.

10. In view of above analysis, we hold that M/s JSL has correctly taken the Credit on the goods supplied by the M/s National Udyog and M/s Ridhi Sidhi Alloys Pvt. Ltd. Therefore, impugned order deserves no merit, hence, is set aside.

11. In result, the appeals filed by the appellants are allowed with consequential relief (if any).

(Dictated and pronounced in the open court)

Devender Singh **Ashok Jindal**
Member (Technical) **Member (Judicial)**

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PER: DEVENDER SINGH

12. After going through the draft order of learned Brother Member (J), I record separate order.

13. It has been alleged in the show cause notice that the appellant received the impugned goods through two modes –

(i) Cupro Nickle Ingots through M/s. National Udyog Limited, registered dealer (ii) Nickel Plates through M/s.Jay Shree Enterprises, registered dealer who supplied to M/s.Ridhi Sidhi Alloys Pvt.Ltd. from whom the appellant received the goods.

14. In so far as, the Cenvat credit taken on the goods received through M/s.Ridhi Sidhi Alloys Pvt.Ltd., I agree with finding of Ld.brother Member (J) because the Tribunal order with regard to the M/s.Ridhi Sidhi Alloys Pvt.Ltd., which has been relied upon by the appellant and has been reproduced in the order of the Ld. Brother Member (J), has attained finality. Further, the evidence in the cases of M/s.Ridhi Sidhi Alloys Pvt.Ltd., who supplied the goods to appellant is partially different from the goods received through M/s. National Udyog Limited.

15. It is evident from show cause notice dt.4.10.2011 that the verification from Punjab Sales Tax and from the transporter company were done for invoices/GRs for the supplies purportedly received from M/s. AIP Industries by M/s.National Udyog only.

16. I find that significant part of evidence is separate in the case of M/s. National Udyog Limited and considering the same, I differ with the order of the Ld.Member (J) in relation to Cenvat credit availed in respect of invoices issued by M/s.National Udyog. My findings in relation to the goods purportedly received from M/s. National Udyog Limited are as below:-

17. As has been observed by the Ld. Commissioner in his order the evidence in relation to the M/s. National Udyog Limited is brought out in the para 38,39 and 40, which are reproduced below:

38. In the light of the facts contained in the said order dated 02.11.2010 that M/s.AIP Industries, Ludhiana did not at all have the facility to manufacture above goods except enamelled copper wire, the department took follow up action with the help of Deputy Commissioner, Central Excise, Ropar for conducting the enquiry with Balongi Sales Tax Barrier Office against the supply of goods received by M/s.National Udyog, Hissar from M/s.AIP Industries, Ludhiana. The documents (vide details at Para-3 of SCN) so obtained from M/s.National Udyog, Hissar indicating the details of invoices of M/s.AIP Industries. Description of goods, Qty.in MT, Vehicle numbers, concerned Transporter – M/s.Amirtsar Ludhiana Transport Co., Plot No.182, Transport Nagar, Ludhiana, and GR No. and date were sent. I find that th report of ETO, ICC, Balongi Post vide letter endorsement No.2694 dated 20.1.2011 has been sent by the Deputy

Commissioner, Central Excise Ropar along with his letter C.No.CE-20/Misc. enquiry/Prev /PPR/2009/386 dated 24.1.2011. The said report reads as under:-

"that as per computer data of their ICC, the vehicles (list provided as per details given above) have not been existed this ICC with the said goods on the dates of GR and near about dates and these transactions are not recorded on the ICC Balongi".

39. I also find that Assistant Commissioner (Prev.), Ludhiana vide his letter C.No.IV(Hq)/05/24/11 dated 22.09.2011 has also sent his verification report in respect of GR Nos., Truck Nos. as well as Transporter-operators who had shown to have transported goods from M/s.AIP Industries, Ludhiana to M/s. National Udyog, Hissar along withthe statement dated 21.99.2011 of Shri Malkit Singh, Partner of M/s.Amirtsar Ludhiana Transport Co. recorded under Section 14 of Central Excise Act, 1944. I find that the said Statement dated 21.09.2011 that Shri Malkit Singh, has admitted that they had started the work of transportation goods carried between Ludhiana to Amritsar and vice versa in the year 2004; that they had never sent any consignment to Hissar as they were operating between Ludhiana and Amritsar only for transportation of goods. He also admitted that after going through the GRs that these were fake and bogus and did not belong to their firm as they had closed down their business in 2004.

40. The foregoing facts including the said report ICC Balongi and the statement dated 21.09.2011 of Shri Malkit Singh, Partner of M/s.Amirtsar Ludhiana Transport Co., go to establish beyond doubt that the GR Nos. were fake and the goods did not pass the Sales Tax barrier confirming the fact robustly that the goods covered under the invoice of M/s. AIP Industries had never been transported to M/s. National Udyog. Further, it also *reinforces the view of the learned Commissioner, Ludhiana taken in the aforesaid Order-in-Original No.32-33/ldh/2010 dated 02.11.2010 that M/s. AIP Industries did not have the facility to manufacture copper ingots, Cupro Alloy Ingots, Nickel, Cupro Nickel, Pipes and Tubes, Aluminium Ingots, Brass Ingots, and I have no hesitation to subscribe to it in the facts and circumstances of the case.*

18. The above evidence shows that M/s.AIP Industries, Ludhiana did not have the facility to manufacture copper nickel alloys ingots. Further verification of invoice No., GR No., date, truck no. as well as transport operator, details of which were obtained from M/s. National Udyog themselves, showed that there was no record of the vehicles passing through ETO, ICC, Balongi Post on the dates of GRs. The verification done from the transport operator M/s.Amirtsar Ludhiana Transport Co. has also revealed that they never sent any consignment to Hissar and categorically stated that the GRs in their name were fake and bogus. Following extract of the statement dt.21.9.2011 of Sh.Malkit Singh, Partner of M/s. Amirtsar Ludhiana Transporter Co. is very relevant:

"M/s. The Amritsar Ludhiana Transport Co., Ludhiana had two partners and they started and they started work of transportation of goods carried from Ludhiana to Amritsar and Amritsar to Ludhiana in the year 2004 and closed down their business after 5-6 months. Further after going through the GRs he stated that those are fake as they had already closed their business in 2004.

The CST No. mentioned on the GRs does not belong to them as they had not even applied for CST NO. They did not have the mark of Swastika on their GRs and they had never signed in Punjabi. They had never transported any goods to Hissar and were working for Punjab area. All the GRs are bogus and do not belong to their firm."

Thus, it is established that that the impugned goods have not been transported in the vehicles mentioned in the invoices of M/s. AIP Industries, Ludhiana and therefore no such goods were received by M/s.National Udyog, Hissar. Proceedings against M/s.AIP have already attained finality by Tribunal vide Final Order dt.12.8.2013 which has been affirmed by Hon'ble Punjab & Haryana High Court vide its order dt.10.12.2014. As such, the entries in RG-23D register of M/s.National Udyog of goods received from AIP Industries are bogus and fraudulent. Clearly, the invoices issued by M/s. National Udyog to M/s.JSL Stainless Steel without actually receiving the goods were bogus and fraudulent and Cenvat credit taken on such invoices was fraudulent.

19. Another contention of the appellant is that they had entered the goods in RG-23A Part-I. However, I observe that the Department has raised the presumption against the appellant by establishing that the inputs could not have been received in the factory of the appellant as verification report

from the ETO shows that the vehicle mentioned in the invoices of M/s.AIP never crossed commercial check post and the transport company has stated that they never transported the goods to Hissar. Therefore, it is for the appellant to establish how they have received goods showing M/s.AIP as manufacturer when they were never supplied by M/s.AIP and when they were not transported to M/s. National Udyog. However, they failed to do the same. Once it is established that the inputs have not been transported in the vehicles mentioned in the invoices, it is reasonable to conclude that the inputs were not received in the factory. The fact that the inputs were entered in the RG23A Parr-1 does not establish that the goods were received in the factory. In this regard, I rely on the judgment of this Tribunal in the case of Viraj Alloys Limited vs. CCE, Thane-II-2004 (177) ELT 892 (Tri.-Mum.) wherein the Tribunal had relied on the evidence of RTO and the truck owners to take similar view:

> "**11.** In the present case the show cause notice is issued by ADG of DGCEI. He is competent to issue such a notice. The ld. Advocate's contention that if the authorities allege that the inputs were not received in the factory it is also obligatory on them to establish as to what happened to the duty paid inputs purchased and how the appellant could have produced the final products without the inputs is not tenable. In our opinion the above issues are extraneous and therefore the department is not required to deal with them. It is enough if the fact of non-receipt is established to deny Modvat credit under Rule 57G. The ld. Advocate relied on the case of *Indian Polypipes & Ors.* v. *CCE, Kol.I* [2003 (157) E.L.T. 652 (T) = 2003 (89) ECC 249 (Tri.)]. We have perused this decision the facts in that case are completely different from the present one. We do not consider that the ratio of the decision applies in the present case. Similarly the decision in the case of *Swastik Tin Works* v. *CCE, Kanpur* [1986 (25) E.L.T. 798

(T)] also does not lay down any ratio which supports the appellant's case. We observe that the department raised a presumption against the appellants by establishing that the inputs could not have been received in the factory in vehicles mentioned in the invoices. This allegation itself is based on the reports by RTOs, who certified that the registration numbers belonged to vehicles other than goods transport vehicles with 10 tons capacity. It is for the appellants thereupon establish that indeed such vehicles as mentioned in the invoice did bring the input to their factory. They have failed to do so. Their gate register was burnt in some fire accident and the bills/vouchers indicating payment of cash to the drivers/owners of the trucks were also, destroyed in fire. One could understand that bills/vouchers, getting destroyed in fire or lost. But one cannot understand as to what has happened to the ledgers and registers to which the transactions done in cash are ultimately transferred. It is not the appellant's case that even such ledger and registers were destroyed in the fire. The fact that the inputs in the form of ship-breaking scrap was entered in RG 23A, Part-I does not establish that the goods were received in the factory. At least two truck owners have categorically denied having transported any goods to the appellant. The plea that the truck owners indulged in mal-practices and run them with false numbers is farfetched. In the appellants case 99 vehicles were such that they could not have carried the goods from the supplier to the buyer, some of the numbers belonged to auto-rickshaws, motorcycles and some numbers did not exist. The fact that out of the list of vehicles which were shown to be tankers, according to RTOs Office, two vehicles turned out to be regular carriers of goods does not establish that the case of other vehicles also it was true. An exception cannot make a rule. Once it is established that the input has not been transported in the vehicle mentioned in the invoice it is but reasonable to say that the inputs were not received in the factory as required under Rule 57G. The Commissioner as well as the ld. SDR relied on the case of *A.N. Guha & Co*. cited supra wherein the Tribunal held that it is not necessary for the department to establish a fact with mathematical precision once a presumption as to the existence of a fact is raised against an assessee. This test is satisfied in the present case.

20. I also find that the above evidence has not been challenged by the appellant at any stage. Their only contention is that they had received the goods from M/s. National Udyog Limited and the payments were made through banking channels. As brought out above, GR forms and transport documents were clearly bogus as the trucks bearing those numbers never went to Hissar and as per ETO, ICC, Balongi Post, they never crossed commercial check post.

21. The appellant have also relied upon the case of CCE vs. Juhi Alloys Ltd.-2013 (296) ELT 533 (Tri.-Dl.). In the said case, there was evidence that the goods travelled from dealer's premises to the respondent premises under cover of Form 31 of UP Trade Tax Department. On the contrary in the present case, there is verification report from ETO, ICC, Balongi Post (Mohali), Punjab Sales Barrier that the said goods on the date of GR and near about the date did not pass through ETO, ICC, Balongi Post and these transactions were not recorded on ICC Balongi. Hence, the goods did not travel to the first stage dealer and the transport documents were bogus and fake. Hence, the facts being different, the ratio of that judgement cannot be applied in this case. The appellant have also relied upon the case law of Nidhi Metal Auto Components Pvt.Ltd. vs. CCE-2016 (343) ELT 576 (Tri.-Del.), which is Single Member order and not binding. The said case has mainly relied upon on case of Juhi Alloys Ltd., which has already been distinguished above. Besides, in that case there appears to be no verification done from Excise and Taxation Office and from the transporter, unlike in the present case. Hence, this case also does not come to rescue of the appellant.

22. The appellant have also relied upon the case, S.K.Foils Ltd. vs. CCE-2015 (315) ELT 258 (Tri.-Del.). In the said decision of a Single Member Bench of this Tribunal, facts show

that cenvatable invoices were issued by second stage dealer. Besides, in the said case, the Commissioner (Appeals) had recorded a finding that the appellant had received the goods whereas in the present case, the allegation of the Revenue is that the goods have not been received by the appellant. Hence, the facts being different, the ruling of the said case is not applicable to the present case.

23. In view of the above foregoing, I hold that the credit of Rs.1,72,74,939/- during the period October, 2006 to April, 2007 on the strength of invoices issued by National Udyog has been fraudulently availed by M/s.JSL Stainless Ltd. and the demand to that extent by invoking extended period along with interest is therefore upheld.

24. As for the penalties, it is evident that the whole sequential chain has been meticulously planned by M/s.JSL Stainless Ltd. in connivance with M/s.National Udyog, Hissar to avail and utilize the credit fraudulently. The appellant M/s. JSL Stainless Ltd. therefore have rendered themselves liable to penal action under Section 11AC of the Act. Penalty of Rs.1,72,74,939/- imposed on M/s.JSL Stainless Ltd. under Section 11AC of the Act is therefore upheld. As for the penalties on M/s.National Udyog, Shri Ram Kishan Gupta, Vice President of M/s. JSL Stainless Ltd. and Shri Jagdish Jindal, partner of M/s.National

Udyog for their role in abetting fraudulent availment of credit, penalties are not imposable on them under Rule 26 prior to the amendment in Rule 26, which came into effect on 1.3.2007, as has been held by Hon'ble Punjab and Haryana High Court in Mini Steel Traders-2014 (319) ELT 404 (P&H). From Annexure 'A' to the show cause notice dt.4.10.2011, it is seen that there are 16 invoices for the period after 1.3.2007. For the Cenvat credit taken on these invoices, the provisions of Rule 26 (2) are applicable and M/s. National Udyog, Shri Ram Kishan Gupta and Shri Jagdish Jindal are liable to be penalized for their role in facilitating M/s. JSL Stainless in fraudulent availment of Cenvat credit. Accordingly, for the period after 1.3.2007,penalty of Rs.50 lakh is imposed on M/s. National Udyog, penalty of Rs.10 lakh on Shri Ram Kishan Gupta and penalty or Rs.3 lakh on Shri Jagdish Jindal under Rule 26 (2) of Cenvat Credit Rules, 2002.

25. The appeals are disposed of in above terms.

(DEVENDER SINGH)
MEMBER (TECHNICAL)

mk

DIFFERENCE OF OPINION

As there is divergent views of the Members of this Tribunal, therefore the matter may be placed before the Hon'ble President to appoint third Member to resolve the following issue;

(a) Whether in the facts and circumstance of the case and evidences placed on record, Member (Judicial) is correct in holding that the appellant namely M/s. JSL Stainless Limited has correctly taken Cenvat credit on the invoices issued by M/s. National Udyog and therefore, proceedings against the appellant are not sustainable;

OR

Whether, in the facts and circumstances of the case and evidences placed on record, the Member (Technical) is correct in holding that appellant M/s. JSL Stainless Limited is not entitled to avail Cenvat credit on the invoices issued by M/s. National Udyog and consequently, Cenvat credit is required to be reversed along with interest and the appellant is to be penalised and penalty under Rule 26 (2) is to be imposed on M/s. National Udyog, Shri Ram Kishan Gupta, Shri Jagdish Jindal for the period after 01.03.2007, as per the order of Member (Technical).

(Points of difference pronounced in the court on ______________)

Devender Singh
Member (Technical)

Ashok Jindal
Member (Judicial)

KL

Per : Mr. Anil G. Shakkarwar

Heard on difference of opinion, in respect of M/s/. JSL Stainless Limited, National Udyog, Shri Ram Kishan Gupta, vice President and Shri Jagdish Jindal, partner.

2. Ld. Counsel for the appellant submitted that it is undisputed fact as recorded in Para 9 of the show cause notice dated 04.10.2011 that the inputs dispatched from M/s National Udyog Limited, Hissar have been found entered into RG-23 part-I and II of the register maintained by M/s JSL Stainless Limited, Hissar and that M/s. National Udyog had received payments through bank from M/s JSL Stainless Limited, Hissar. He has further submitted that, before the original authority, they had produced the purchase orders issued to M/s. National Udyog, invoices raised by M/s. National Udyog along with corresponding GRs, gate entry register and weighment slips in the appellant's factory, stores receipt report in the appellant's factory, records reflecting the consumption of inputs received from National Udyog and production of final product recorded in RG-1 register. He also argued that investigation was not carried out in respect of inputs received by the appellants. Investigation dealt in the said show cause notice was dealt with in respect of the transaction between M/s AIP Limited, Ludhiana and M/s National Udyog Limited. He further submitted that M/s National Udyog was first stage dealer and the documents issued by the first stage dealer were showing all the particulars required for availment of Cenvat credit and therefore, their case is squarely

covered by the ruling of the Hon'ble High Court of Allahabad, in the case of ***CCE vs. Juhi Alloys Limited – 2014 (302) ELT 487 (Allahabad).***

3. Heard the Ld. AR. He has supported the impugned order in original.

4. Having considered the rival submissions and on perusal of the record, I find that the show cause notice is silent on the investigation in respect of the documents on the basis of which the appellant have availed Cenvat credit which was sought to be denied by Revenue, and that Revenue have not carried out any investigation regarding the goods which were transported from M/s National Udyog Limited to the appellant. The show cause notice is silent on the name of the manufacturer who supplied the said goods to the first stage dealer which were intern received by the appellant. The said show cause notice only discussed about the transaction between M/s. AIP Industries Limited and M/s. National Udyog. M/s. National Udyog is first stage dealer and any first stage dealer is not required to receive the goods only from one manufacturer. The National Udyog being a first stage dealer was therefore, eligible to purchase duty paid goods from any manufacturer. Had there been any investigation establishing that the inputs on which Cenvat credit was availed, as entered in the invoices issued by the first stage dealer, were the same goods which were involved in the investigation about the transaction between M/s AIP Industries and M/s National Udyog, then only this show cause notice could have sustained. I further find that Hon'ble High Court of Allahabad has ruled in the above stated case that it would be impracticable to

require the assessee to go behind the records maintained by the first stage dealer. In the present case, the assessee is found to have duly acted with all reasonable diligence in its dealings with the first stage dealer. In view of the above, I find that the ruling of Hon'ble High Court of Allahabad in the case of ***Juhi Alloys Limited*** (supra) is squarely applicable to the present case.

5. I, therefore, agree with the order passed by Member Judicial.

6. With this opinion, I refer the matter back to the Division Bench.

(Order dictated and pronounced in the open court)

(Anil G. Shakkarwar)
Member (Technical)

Kailash

Majority Order

In view of the majority decision the appeals are allowed.

(Order pronounced in the court on 26.03.2018.)

Devender Singh
Member (Technical)

Ashok Jindal
Member (Judicial)

KL