IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. III

<u>DATE OF HEARING : 09/02/2017.</u>
<u>DATE OF DECISION : 20/02/2017.</u>

Excise Appeal No. 55684 of 2013

[Arising out of the Order-in-Original No. COMMISSIONER/RPR/CEX/84/2012 dated 31/10/2012 passed by The Commissioner, Central Excise & Customs, Raipur.]

M/s Akash Ispat Pvt. Ltd. Appellant

Versus

CCE, Raipur Respondent

<u>Appearance</u>

Shri Hemant Bajaj, Advocate – for the appellant.

Shri H.C. Saini, Authorized Representative (DR) – for the Respondent.

CORAM: **Hon'ble Shri S.K. Mohanty, Member (Judicial)**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 51878/2017 Dated : 20/02/2017

<u>Per. B. Ravichandran :-</u>

The appeal is against order dated 31/10/2012 passed by Commissioner of Central Excise, Raipur. The appellants are engaged in the manufacture of MS Ingots and runners/risers liable to Central Excise duty. They have availed Cenvat credit of duty paid on inputs, capital goods and input services. The Central

Excise officers conducted audit of the accounts of the appellant and thereafter proceedings were initiated based on the findings of the audit officers. The allegation against the appellant is that they had wrongly taken Cenvat credit on Concast blooms, structural cobbles and rail cuttings which were never used in the manufacture of final products. On conclusion of the adjudication, the Original Authority disallowed Cenvat credit of Rs. 1,15,16,118/-, as wrongly availed by the appellant. He imposed equal amount of penalty on the appellant under Rule 15 of Cenvat Credit Rules, 2004 readwith Section 11AC of the Central Excise Act, 1944. The main grounds of denial of credit are that the said inputs are Mild Steel products which can be used directly for re-rolling. Owing to the physical dimension of these inputs, they have to be cut into smaller sizes before they are charged into the furnaces. It does not make business sense to use such product as inputs and sell the MS Ingots at a loss. The electricity consumption is not commensurate with the usage of huge size inputs. No consignment note to prove the transportation of material was submitted by the appellant. Low yield of final product and non-usage of required amount of gas for cutting the inputs all indicate that the appellants did not use the inputs on which credit has been availed. Further, the name of these inputs were not declared in ER-6 returns during the material time and the appellant did not maintain separate records in terms of Rule 9 of Cenvat Credit Rules, 2004.

2. The learned Counsel appearing on behalf of the appellant submitted that the denial of credit was mainly based on assumption and presumption without any corroborative evidence adduced by the Revenue. They have requested the jurisdictional officers to verify the process undertaken by them in their furnace. The statement given by Shri K.K. Agarwal, Director of the appellant company, explained all the queries raised by the officers. While the statement was shown as relied upon document in the show cause notice, there is no discussion at all about the clarifications offered by the Director in his statement. There is no evidence of non-receipt of the raw material or diversions of credit availed raw material. No verification of the process undertaken by the appellant and the method adopted by them to cut these raw materials into pieces and use them in the process have been conducted by the officers. No verification with supplier of raw material or transporter has been done. Admittedly, the appellants manufactured and cleared dutiable final products. If the credit taken inputs were diverted without usage, the Revenue has to bring out by investigation how such manufacture of final product was possible. In other words, there is no allegation or evidence to the effect that the appellants substituted the inputs/raw materials in their manufacture. The learned Counsel also relied on various decided cases to assert that credit legally taken by the appellants on duty paid raw materials which were received in their factory, cannot be disallowed without adducing evidence for diversion/ illicit removal of such inputs from the appellant's unit.

There is no evidence in this regard in the present proceedings. The learned Counsel also contested the imposition of penalty and demand for extended period.

3. The learned AR supported the findings of the lower Authority and submitted that the appellants did not maintain separate records for the purchase and use of these raw materials and contained filed required details in their periodical returns. Accordingly, it is his submission that the denial of credit is sustainable.

4. We have heard both the sides and perused the appeal records. We note that in the present case the Cenvat credit availed on various duty paid raw materials was sought to be denied on the basis of inferences drawn by the Original Authority and not based on any recorded evidence of non-receipt of duty paid raw material in the factory of the appellant or improper diversion of such credit availed inputs. The allegations are mainly about the improbability of selling final product at a loss; electricity and gas consumption being not in line with usage of such raw materials in the furnace; low yield of final product and non-availability of details of transport of raw material. We find that the various assertions and inference made in the impugned order have been contested by the appellant. A summary of pointwise submission is reproduced below, for better appreciation :-

S. No.	**Finding in Impugned Order**	**Submissions of Appellant**
1.	Looking at the low yield of 80%, it can be safely concluded that the goods have not been taken into use for manufacture of MS Ingots	The actual yield is 83.99% in 2006-07, 84.07% in 2007-08, and 84.32% in 2008-09, as is evident from the figures submitted in Reply to Show Cause Notice. There is absolutely no evidence produced in this regard in the impugned order. The finding is based on assumption and presumption.
2.	The appellant has failed to follow proper procedure for maintaining accounts for raw material receipts, disposal, consumption and inventory of inputs & capital goods.	Non-maintenance of separate inventory of inputs was merely a procedural lapse for which substantive benefit cannot be denied.
3.	The appellant has incurred loss on sale of every M. Ton of the product. No prudent manufacturer would continue to suffer losses.	In 2005-06 & 2006-07, raw material rates were very high in comparison to finished products and being an induction furnace, the Appellant had to bear losses in 2005-06 to the tune of Rs. 1,22,02,523/- & in 2006-07, profit of Rs. 30,42,123/- was recorded, as per Balance Sheet. This loss was accrued due to market trend and not for using the inputs in question.
4.	Heavy materials even if charged after cutting into pieces, will consume more electricity in addition to excess cost incurred in cutting process, which will therefore cannot be a viable option. Further, impugned order placed reliance on N.K. Batra report, IIT Kanpur/ Article of Shri R.P. Varshney	Average consumption of electricity for the period 2006-2007 was 958 per MT. The reliance on the NK Batra report and Article is incorrect as the same was not relied upon the SCN. It is well settled law that reliance cannot be placed on evidence not relied in SCN without giving opportunity to rebut the assessee.
5.	The impugned goods are bulky and heavy material, thus cutting/slicing of the same for charging in furnace would require gas	The comparison made by the department with other units situated in Raipur is not justifiable, because rate of gasses is Rs. 5.25 to Rs. 5.5/-

	many times then what is normally used.	per cum high in Raigarh in comparison to Raipur. Consumption of gasses is different from one unit to another. Copy of additional submission regarding consumption of gases and invoices of gases are enclosed.
6.	These items, by itself are mild steel products which can be used directly for re-rolling after slicing or cutting into required sizes. In order to consume these items in the Induction furnaces for melting, owing to the physical dimensions of such concasted products, it has to be sliced into several small pieces with the help of gas cutting equipment before being charged into furnace. And in such eventuality, the item loses its characteristic identity before being charged into furnace. And in such an eventuality, the item loses its characteristic identity as Blooms, Cobbles, etc., and would be rendered as MS Scrap.	The inputs in question cannot be equated with mild steel as there was huge price difference between Mild Steel which was used for re-rolling and inputs in question, which were hard due to their composition and could not be used for re-rolling but only for the purpose of melting. The Learned Commissioner has erred in treating 'Concast Blooms' at par with 'Bloom Cuttings'
7.	From the facts of the case, I find that the Appellant has been regularly filing the prescribed monthly return in the form of ER-6, in respect of information regarding receipt and consumption of each principal inputs with reference to the quantity if final cobbles, defective rails and wire rod cables in any of the ER-6 returns filed by them pertaining to the period in dispute. The demand has been	There was no suppression as the Appellant had regularly submitted ER-1 returns along with enclosures, i.e. Annexure under Rule 7, Details of sale invoices, Challan and PLA, etc. Thus extended period is not invocable and penalty is not imposable.

	raised subsequent to audit of books and accounts and thus it is an established case of suppression.	
8.	Finding regarding conversion into MS Scrap from sister concerns on job work basis	The allegation/finding is beyond the SCN as there is no such allegation in the SCN. Further, finding is entirely based on presumptions.
9.	Finding regarding non-submission of consignment notes.	It is submitted that the Learned Commissioner failed to appreciate that Appellant paid service tax on transportation of inputs in dispute. Further, proper ST returns were filed. Even if, there was default of non-issuance of consignment note, that cannot be attributed note, that cannot be attributed to the Appellant.
10.	The finding that Appellant used inputs which were priced higher than low price of inputs available in the market.	There is absolutely no evidence/enquiry placed by the Department to make this assertion. Therefore, demand on assumption and presumption.

5. We also note that on the statement recorded from the Director of the appellant, though shown as one of the relied upon documents in the show cause notice, there is no discussion in the impugned order. We note that defective concast bloom, structural cobbles and rail cuttings were purchased from M/s SAIL, BSP, Bhillai and received by the appellant in their factory. The transport charges have been paid and the voucher indicates the quantity, truck number and signature of the receiver. The appellants paid service tax on the GTA service on such transport and also filed ST-3 returns. The appellants also submitted copies of some of the vouchers and ledger maintained. We have perused

some sample documents. We note that the findings in the impugned order regarding non-receipt of materials in the factory of the appellant is not justifiable. The appellants submitted yearwise details of purchase of these inputs consumed by them and quantity sold as such during the material period. Even when the items were sold as such, the buyer has used such material for melting purposes. These assertions by the appellant, some of which are supported by the documentary evidence, have not been subjected to cross verification by the officers before proceeding to deny the credit. Further, the presumption that defective concast bloom is a MS item and can be used for re-rolling purpose has been contested as incorrect by the appellant. It is the submission of the appellant that even during the visit by the audit officers, the appellants sought to demonstrate the usage of the duty paid inputs in their furnace.

6. Regarding the yield being on the lower side, we note that a verification has been conducted by the Income Tax Department to find out the burning loss in another similarly situated unit. It was recorded that the yield varies from 82.87% to 85.21%. We also find that the impugned order made observation regarding impossibility of selling MS Ingots on loss, if the disputed raw materials were actually used in the manufacture. In this connection, we observed that, in 2005-2006 the appellant incurred a loss of about 1.22 crores and in 2006-2007 they got a profit of Rs. 30 lakhs. Further, it is not for the Revenue to determine on what price the final product should have been sold

by the appellant. In the absence of any manipulation with ulterior motive, the sale price is generally determined by market forces. Based on the sale price no presumptive conclusion can be made about possible non-usage of duty paid inputs in the manufacture of final product. We find various inferences made in the impugned order, at best can lead to a suspicion regarding possible improprietary on the part of the appellant. However, the same is not sufficient to deny the credit of inputs received, without any corroborative evidence of non-receipt or diversion of received inputs. We find in the present case no such evidence has been brought forward by the Revenue. The inferences based on possible loss on sale, lesser usage of electricity or gas etc. are not sufficient enough to deny credit on inputs which are otherwise legitimately available to the appellant.

7. Regarding non-maintenance of separate inventory of inputs, we find that the inputs were received and records of their receipt was maintained by the appellant. However, the inventory was not maintained individually on different inputs. In our opinion, this by itself cannot lead to the denial of credit on duty paid inputs. Such denial can only happen on the basis of ineligibility of the appellant either due to the inputs being not eligible to credit or such inputs having been improperly diverted by the appellant without put to intended use. We note that the present case does not present any evidence in these directions.

8. On careful consideration of the impugned order and the grounds of appeal by the appellants, we note that the denial of credit ordered by the impugned order is not legally sustainable. Accordingly, we set aside the same and allow the appeal.

(Order pronounced in open court on 20/02/2017.)

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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