IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-SM

COURT –IV

Excise Appeal No.E/3180/2012 [SM]

[Arising out of Order-in-Appeal No.102-103/RPR-I/2012 dated 19.07.2012 passed by the Commissioner (Appeals), Central Excise, Raipur]

M/s.Refracast Metallurgicals (P) Ltd. ...Appellant

Vs.

C.C.E., Raipur ... Respondent

Present for the Appellant : Ms. Sukriti Das, Advocate
Present for the Respondent: Mr.K. Poddar, D.R.

Coram: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

Date of Hearing/Decision: 10/10/2017

FINAL ORDER NO. 57379/2017

PER: S.K. MOHANTY

This appeal is directed against the impugned order dated 19.07.2012 passed by the Commissioner (Appeals), Central Excise and Customs, Raipur.

2. Brief facts of the case are that the appellant is engaged in manufacture of aluminium alloy ingots falling under Chapter 76 of the First Schedule to the Central Excise Tariff Act, 1985. During July, 2005, the appellant imported aluminium scrap for use as input for manufacture of the said final product. Additional Duty of Customs (CVD) paid on such imported goods was availed as Cenvat credit by the appellant. Based on

certain investigation conducted by DGCEI, it was alleged by the Department that M/s. Nikhil Shipping Agency (CHA), instead of delivering the goods at the factory premises of the appellant, had diverted the goods as per the Bill of Entry to M/s. Rajmothi Extrusions Pvt. Ltd., Ahmadabad. On the basis of investigation conducted by the DGCEI, the Department initiated show cause proceedings against the appellant, seeking denial of the Cenvat Credit availed by it. The matter was adjudicated vide order dated 16.09.2011, wherein Cenvat Credit amounting to Rs.3,83,185/- was disallowed alongwith interest and also equal amount of penalty was imposed on the appellant. On appeal, the ld. Commissioner (Appeals) vide the impugned order has upheld the adjudged demand. Hence, the present appeal is before this Tribunal.

3. The ld. Advocate appearing for the appellant submits that the Department has proceeded against the appellant on the basis of the delivery challan issued by M/s.Nikhil Shipping Agency, showing the name of M/s. Rajmoti Extrusions Pvt. Ltd. She submits that no further investigation was conducted either at M/s. Rajmoti Extrusions Pvt. Ltd. or with any other person to ascertain as to whether the goods were really diverted to M/s. Rajmoti Extrusions Pvt. Ltd., instead of delivering at the factory of the appellant. Thus, she submits that since the Department has not specifically brought on the evidence to show that goods were not received at factory of the appellant, disallowance of Cenvat Credit by the authorities below is not proper and justified. She also refers to the consignment notes

issued by the transporter M/s. Lakshya Container Carrier and ERE Form issued by the local authority to show that the goods covered under the Bills of Entry were in fact transported from the port of import to the factory of the appellant for use in or in relation to manufacture of final product. She also relied on judicial pronouncement to state that the onus to prove non-receipt of goods in the factory and diversion of the same to third party entirely lies with the Department, which have not been satisfactorily discharged by the Revenue.

4. On the other hand the ld. D.R. appearing for the Revenue submits that the goods were diverted to M/s. Rajmoti Extrusions Pvt. Ltd. and in absence of receipt of the goods as per the description mentioned in the Bill of Entry, taking of Cenvat Credit by the appellant is not in confirmity with the statutory provisions. He also referred to the Bill of Entry No. 921778 dated 21.07.2005 and ERE Form issued by the local authorities to show that the goods were cleared from Customs custody on 30th July, 2005, whereas the ERE form was signed at Mumbai on 29.07.2005 i.e. before movement of goods from the Port of Import. Thus, he submits that since the goods were not physically moved from the Port of Import to the factory of the appellant, the Cenvat Credit taken on CVD amount is not available to the appellant in terms of Rule 3 of the Cenvat Credit Rules, 2004.

5. Heard both sides and examined the case records.

6. I find that the Commissioner (Appeals) vide the impugned order dated 19.07.2012 has specifically discussed

the aspect of non-movement of goods from the Port to the factory and non-receipt of the same by the appellant for use in the intended purpose. The relevant paragraph in the same order is extracted below:-

> *"On going through the copy of LR No.1160 & 1161 both dated 29.07.2005 furnished by Appellant No.1, I find that 20.080 MT and 19.340 MT of 'Aluminium scrap' were stated to have been transported on 29.07.2005 in loose condition whereas pass out order in case of Bill of entry No. 921778 was given on 30.07.2005 which substantially proves that there is substantial evidence against Appellant No.1 regarding non receipt of imported goods in their factory premises. From the copy of RG-23A Pt.1 for the month of August, 2005 and RG-23A Pt.2 for Sept., 2005 showing entry regarding receipt of goods on 20.08.2005 and taking Cenvat credit on 01.09.2005, I find that, Appellant NO.1 has deliberately shown the receipt of the item and subsequently took credit of duty/ CVD on the basis of document only as they failed to put on record any documentary evidence showing movement and receipt of containerized goods under the cover of BOE No.921777 & 921778 dated 21.07.2008. Also I find that the above view is further substantiated from the contradictory statement given by Shri K.Prabhakar Rao, Authorised signatory who failed to depose true and correct facts regarding import and disposal of 39.240 M.T. Aluminium scrap under the cover of Bill of Entry No.921777 & 921778 dated 21.07.2005. Thus, I find that Appellant No.1 through M/s. Nikhil Shipping Agency (CHA)Partner Shri Bhimsen B. Singh had knowingly and intentionally diverted the goods in the local market in cash and availed Cenvat credit without using the said*

> *quantity of Aluminium scrap in the manufacture of finished goods and in this manner Appellant NO.1 fraudulently availed Cenvat Credit amounting to Rs.3,85,185/-. Thus, I do not find any cogent and valid reason to interfere into impugned order of the Adjudicating Authority and therefore, grounds put forth by7 Appellant No.1 is of no help and do not deserve any consideration. Held accordingly."*

7. In view of the fact that on the date of presentation of the ERE on 29.07.2005, the same were in the custody of the Customs Department, the matter is proved beyond any shadow of doubt that the same were not removed from the Port of Import to the factory of the appellant for use in or in relation to manufacture of the final product. Since, without receipt of the goods covered under the Bill of Entry, Cenvat Credit was availed by the appellant, same in my considered opinion, is not permissible under Rule 3 ibid.

8. Therefore, I do not find any infirmity in the impugned order in rejecting the appeal of the appellant. Accordingly, the appeal filed by the appellant is dismissed.

[Dictated and pronounced in the Open Court]

(S.K. MOHANTY)
MEMBER (JUDICIAL)

Anita