CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

Appeal No. E/1583, 1584, 2059/2010

(Arising out of Order-in-Original No. 04/2010- CE- HYD-III-Adjn. Commr. dated 26.02.2010 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad)

M/s Raasi Refractories Ltd.,
Mr. Sanjay Agarwal
CCE, CE, Hyderabad-III **…..Appellant(s)**

Vs.

Commissioner of Central Excise, Customs and Service Tax, Hyderabad-III
M/s Raasi Refractories Ltd., **…..Respondent(s)**

Appearance
Shri R. Narsimhamurthy, Consultant for the Appellant.
Shri Divashish, (AR) for the Respondent.

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)
Hon'ble Mr. C.J. MATHEW, MEMBER (TECHNICAL)

Date of Hearing: 20/02/2018
Date of Decision: 20/02/2018

FINAL ORDER No. A/30400-30402/2018

[Order per: M.V. Ravindran]

These three appeals are directed against Order-in-Original No. 04/2010- CE- HYD-III-Adjn. Commr. dated 26.02.2010.

2. Appeal No. E/1583, 1584/2010 is filed by the main appellant and individual while appeal No. E/2059/2010 is filed by the Revenue against the same impugned order. Since all these three appeals risen a common issue against the same Order-in-Original their being disposed of by a common order.

3. The relevant facts that arise for consideration in brief are, during the period 01.04.2004 to 31.01.2008, Raasi Refractories Ltd., (RRL) main appellant herein was alleged to have availed irregular CENVAT credit on the invoices issued by Sarvesh Refractory Pvt. Ltd., Rourkela (SRPL) without receiving inputs into their factory premises. It was noticed by the lower authorities that the main appellant were purchasing refractory/Mortar from SRPL and the goods were delivered directly to RINL (earlier VSP) for use, while availing the CENVAT credit of the Central Excise duty paid by SRPL; it is also noticed by the authorities that RRL had issued invoices in the name of RINL for refractory bricks/refractory mortar purchased from SRPL and discharged Central Excise duty on the said goods. Show cause notice was issued for demand of ineligible CENVAT credit availed, as lower authorities of the view that RRL could not have availed the CENVAT credit on such goods purchased from SRPL. The show cause notice was adjudicated and the Adjudicating Authority confirmed demands raised with interest and also imposed equivalent penalty on RRL and imposed penalty on Shri Sanjay

Agarwal, Managing Director. Revenue is in appeal against the said order on the ground that the Adjudicating Authority has not imposed equivalent amount of penalty on RRL.

4. Heard both sides and perused the records.

5. Learned Consultant appearing for RRL and the Managing Director submits that the CENVAT credit availed on the bricks purchase from SRPL and delivered to RINL (earlier VSP) is already reversed by way of payment of duty on the invoices prepared by RRL. He submits that they had to take recourse to such an action due to some industrial problems in factory premises of RRL. It is his submission that there is no requirement under the law to receive inputs in the factory, as has been decided by the Supreme Court in the case of *Jaypee Rewa Cement* [2001 (133) ELT (3)] and *Vikram Cement* [2006 (194) ELT 3]. It is his submission that these refractory bricks used by them at RINL (VSP) is lining of furnace. He would submit having paid the duty on the said refractory bricks as being manufactured by them they have in turn reversed the CENVAT credit, which should be considered as correct as held by the Hon'ble High Court of Gujarat in the case of *Tripura Containers Pvt. Ltd.,* [2011 (264) ELT 339 (Guj.)]. He submits that the penalties imposed on RRL and the Managing Director needs to be set aside.

6. Learned Departmental Representative on the other hand submits that the Adjudicating Authority has upheld the demands for the extended period, but failed to impose equivalent amount of penalty on the appellant RRL which is incorrect as per the proposition of law, settled by the Apex Court in the case of *Rajasthan Spinning & Weaving Mills* [2009 (238) ELT 3(SC)]. As regards the appellants RRL's appeal it is his submission that they could not have availed the CENVAT credit without receipt of the goods in the factory premises and direct delivery of the goods to VSP will not support their case any further.

7. We find that the issue is regarding eligibility to avail the CENVAT credit of refractory bricks purchase from SRPL but delivered directly to RINL (VSP) on a invoice that indicated discharge of duty liability by the appellant RRL, whether RRL is eligible to avail CENVAT credit of the duty paid by SRPL or otherwise.

8. It is undisputed that the amount of CENVAT credit availed by the appellant of the duty paid on the refractory bricks which were procured by RRL from SRPL, were delivered to RINL (VSP), on the invoices raised by the appellant RRL, which indicated discharge of duty. In short, even assuming that the appellant has availed ineligible CENVAT credit, they have paid back the same to the Government of India by discharging the duty liability on the bricks which were

delivered to RINL (VSP). Admittedly, the transaction was back to back and there was no manufacturing activity of the bricks in RRL is factory for which Central Excise duty needs to be discharged. It is settled position, of ineligible CENVAT credit, if any, is reversed of there is discharge of duty liability on the goods which were presumably not manufactured in the factory premises, accordingly there is no need to confirm the demands. This law is settled by the Hon'ble High Court of Gujarat in the case of Tripura Containers Pvt. Ltd., wherein their lordships in para 6 and 7 held as under:

> *"6. From the facts noted hereinabove, it is apparent that the assessee had purchased the M.S. Drums from manufacturers. On the M.S. Drums so purchased by it the assessee had availed of CENVAT credit. The assessee sold the said M.S. Drums to purchasers without undertaking any manufacturing activity thereon. As such, the M.S. Drums not having been used as inputs for manufacture of final product, the assessee was not entitled to avail of CENVAT credit in respect thereof. However, as noted by both the Commissioner (Appeals) as well as the Tribunal, though the assessee had availed of CENVAT credit on the M.S. drums purchased by it, it had sold the same to buyers raising central excise invoices and had discharged central excise duty thereon. Thus, on the one hand, while the assessee was not entitled to avail of CENVAT credit on the M.S. Drums purchased by it, correspondingly there was also no obligation on it to pay central excise duty on the sale thereof as it had not carried out any manufacturing activity thereon. Thus, the entire exercise is revenue neutral inasmuch as though CENVAT credit had been wrongly availed, central excise duty had been paid on the goods in respect of which CENVAT credit had been availed.*
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> *7. Insofar as invocation of the provisions of Section 11AC of the Act and Rule 25 of the Rules is concerned, in the entire order of the adjudicating authority there is no finding to the effect that there is any fraud, misrepresentation or suppression of facts or that there is contravention of the provisions of the Act or Rules with intent to evade payment of duty on the part of the assessee. Rule 25 of the Rules provides for levy of penalty in case of any contravention of the nature referred to in clauses (a) to (d) therein. Rule 25 opens with the words, "subject to the provisions of Section 11AC of the Act". Thus, for the purpose of invoking the said Rule, the requirements of Section 11AC of the Act are required to be satisfied, namely that the default should be occasioned by reason of fraud, collusion or any willful misstatement or suppression of facts, or the contravention of any of the provisions of the Act or Rules should be with the intent to evade payment of duty. Unless, the said basic ingredients are satisfied, the question of invoking either Section 11AC of the Act or Rule 25 of the Rules would not*

arise. In the circumstances, in the absence of any such finding having been recorded by the adjudicating authority, the question of imposing penalty under Section 11AC of the Act and Rule 25 of the Rules would not arise."

The above ratio squarely covers the issue in favour of the appellant RRL herein. Respectfully following the same, we set aside the demands raised along with interest and also the penalty imposed on RRL. Since no demand arises on RRL, question of imposing any penalty does not arise on the individual Shri Sanjay Aggarwal. Accordingly, the penalty imposed on Shri Sanjay Agarwal, the second appellant is set aside.

9. As regards the appeal filed by the Revenue, since we have set aside the demands themselves nothing survives in the appeal filed by the Revenue. The same stands rejected.

10. In sum, appeals of RRL Shri Sanjay Agarwal are allowed and the appeal of the Revenue is rejected.

(Operative part of this order was pronounced in open court
on conclusion of hearing)

C.J. MATHEW **MEMBER (TECHNICAL)**	**M.V. RAVINDRAN** **MEMBER (JUDICIAL)**

Lakshmi….