IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Appeals No.E/75786/2016

Arising out of Order-in-Appeal No. 16/KOL-II/2016 dated 15.03.2016 passed by the Commissioner of Central Excise (Appeal-I), Kolkata.

M/s Hindalco Industries Ltd.

…APPELLANT(S)

VERSUS

Commissioner of Central Excise, Kolkata-II

…RESPONDENT (S)

APPEARANCE
Shri Harsh Shukla, C.A. for the Appellant (s)
Shri H. S. Abedin, A.C. (AR) for the Respondent (s)

CORAM:
SHRI P. K. CHOUDHARY, HON'BLE JUDICIAL MEMBER

DATE OF HEARING & DECISION ;-06.04.2018

ORDER NO..FO/A/76401/2018

Per Shri P. K. Choudhary :

Briefly stated the facts of the case are that the appellant is engaged in the manufacture of various rolled products of aluminium such as corrugated or plain sheet of various thickness classifiable under Chapter 76 of the First Schedule to the Central Excise Tariff Act, 1985. The finished goods manufactured by the appellant are cleared on payment of duty. The appellants procure slabs, strips in coil form, pigs, ingots and other rolled products of aluminium required for the manufacture of the final product. The appellant avails credit of the duty paid on the raw material. During an audit conducted by the department, it was observed that the appellant had written off input material and capital goods worth Rs.148.89 Lakhs and in terms of Circular No. 645/36/2002-CX dated 16.07.2002, the credit availed by the appellant was to be reversed. Accordingly, a show cause notice dated 19.03.2008 was issued proposing to disallow and recover, CENVAT Credit of Rs.23,82,279/- along with interest and for imposing penalty. The adjudicating authority confirmed the demand along with interest and imposed penalty. On appeal, the Commissioner (Appeals) rejected the appeal of the appellant as the appellants had paid the mandatory pre-deposit through their CENVAT Credit balance and not in cash. Hence, the present appeal.

2. The ld. Counsel for the appellant stated that Section 35F of the Central Excise Act, 1944 nowhere provides that the pre-deposit needs to be made from the PLA alone. Therefore, the deposit made by the appellant before the Commissioner (Appeals) was in compliance with the provisions under Section 35F of the Act. He further stated that as per Circular F. No. 15/CESTAT/General/2013-14 dated 28.08.2014 issued by this Tribunal, the duty deposit under Section 35F could be made from the CENVAT Credit account. He also relied upon the judgment of the Hon'ble Jharkhand High Court in the case of Akshay Steel Works v. Union of India reported as 2014 (304) ELT 518 (Jhar.).

3. The ld. AR reiterated the findings of the Commissioner (Appeals).

4. Heard both sides and perused the appeal records.

5. The issue involved in the present proceedings is whether mandatory deposit of seven and half percent as per Section 35F(i) of the Central Excise Act, 1944, is required to be paid in case or the same can be paid from Cenvat Credit Account maintained by the appellant. Relevant Section is reproduced below:-

> "SECTION 35F. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal.- The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal-

(i) Under sub-section (1) of Section 35, unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the (Principal Commissioner of Central Excise or Commissioner of Central Excise]."

It is observed from the above provisions that it is not specifically mentioned that amount has to be deposited only by way of cash payment. First Appellate Authority in para 3.1 of Order-in-Appeal dated 15.2.2016 has discussed Rule 3(4) of the Cenvat Credit Rules, 2004 indicating the situation where Cenvat Credit can be utilized. In a case of dispute about admissibility of CENVAT Credit, ultimate action against an asseessee, if found to be inadmissible to CENVAT Credit, will be to reverse CENVAT Credit taken. In such a case there may not be only need to make pre-deposit in cash. Similarly, in the case of demand of duty, if CENVAT Credit is permissible for payment of tax, the same can always be debited from Cenvat Account of an assessee. As per procedure followed by CESTAT Registry at Kolkata, payments made from Cenvat Credit Account are considered as due payments for considering as deposit under Section 35F(ii) and (iii) of Central Excise Act, 1944. First Appellate Authority could have a view if debit of mandatory deposit was with respect to personal penalty or payment of interest.

6. In view of the above observations, the view taken by the First Appellate Authority, that deposit under Section 35F(i) cannot be made from Cenvat Credit Account, is not the correct appreciation of law so long as the CENVAT Credit is permissible for utilization as per Rule 3(4) of the Cenvat Credit Rules, 2004. Accordingly, appeal filed by the appellant is allowed by way of remand to the Ld. Commissioner (Appeals) to decide the appeal on

merits without insisting on any further pre-deposit. All issues are kept open. Appellant be granted adequate opportunity of hearing to present their case. Both sides are at liberty to produce evidences in their favour.

7. Appeal is allowed by way of remand.

(Operative part of the order already pronounced in the court)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

T.K.