

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 03

EXCISE Appeal No. 10215 of 2013-DB

[Arising out of Order-in-Original/Appeal No CCEA-SRT-II-SSP-99-100-101-U-S35A-3--FINALORDER- dated 27.11.2012 passed by Commissioner of Central Excise-SURAT-II]

Alkem Laboratories Ltd

...Appellant

N H No 8, Naugama,
Post : Mandva, Ankleshwar,
Bharuch,
Gujarat

VERSUS

C.C.E. & S.T.-Surat-ii

...Respondent

New C.Ex Building...Opp. Gandhi Baug,
Chowk Bazar,
Surat,
Gujarat-395001

WITH

EXCISE Appeal No. 10216 of 2013-DB

[Arising out of Order-in-Original/Appeal No CCEA-SRT-II-SSP-99-100-101-U-S35A-3--FINALORDER- dated 27.11.2012 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-SURAT-II]

J D Gandhi

...Appellant

Alkem Laboratories Ltd, N H No 8, Naugama,
Post : Mandva, Ankleshwar,
Bharuch,
Gujarat

VERSUS

C.C.E. & S.T.-Surat-ii

...Respondent

New C.Ex Building...Opp. Gandhi Baug,
Chowk Bazar,
Surat,
Gujarat-395001

AND

EXCISE Appeal No. 10217 of 2013-DB

[Arising Out Of Order-In-Original/Appeal No CCEA-SRT-II-SSP-99-100-101-U-S35A-3--FINALORDER- Dated 27.11.2012 Passed By Commissioner Of Central Excise, CUSTOMS (Adjudication)-SURAT-II]

C J Lohani General Manager**...Appellant**

Alkem Laboratories Ltd, N H No 8, Naugama,
Post : Mandva, Ankleshwar,
Bharuch
Gujarat

*VERSUS***C.C.E. & S.T.-Surat-ii****...Respondent**

New C.Ex Building...Opp. Gandhi Baug,
Chowk Bazar,
Surat,
Gujarat-395001

APPEARANCE:

Shri Ishan Bhatt, Advocate for the Appellant

Shri. P K Singh, Superintendent (Authorized Representative) for the
Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C.L MAHAR

FINAL ORDER NO.A / 12377-12379 /2023

DATE OF HEARING: 05.07.2023
DATE OF DECISION:31.10.2023

C.L MAHAR

The brief facts of the case are that the appellants are engaged in the manufacture of excisable goods falling under Chapter 21 and 29 of Schedule to the Central Excise Tariff Act, 1985. The appellants are also availing CENVAT Credit of duty paid on capital goods, inputs used in or in relation to the manufacture of finished goods. During the preventive check carried out by the officers of the department at the factory premises of the appellant on 20 October 2010. The visiting officers recovered (i) a diary containing details of removal of DMF solvent on cash basis from the office of the senior executive, and (ii) a file containing commercial invoices and delivery challans issued for sale of waste and scrap of capital goods and packing materials on which CENVAT Credit was taken by the appellant. After completion of the investigation a SCN dated 28 February 2011 was issued to the appellants proposing to demand as follows:

"(a) Excise duty of Rs. 2,02,242/- on 3,53,215 Kg of DMF spent solvent cleared without payment of duty and without issuing invoices during August 2007 to October 2010

(b) Excise duty amounting to Rs. 13,84,146/- under Rule 3(5A) of the CENVAT Credit Rules, 2004 on waste and scrap of various M.S. items and packing materials cleared without payment of duty under commercial invoices during April 2008 to September 2010

(c) Interest amounting to Rs.29,886/- and Rs.3,59,016/- on the above duty amounts at (a) and (b) respectively

(d) Penalty under Section 11AC of Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002.

(e) Confiscation of and redemption fine in lieu of confiscation on DMF solvent weighing 4,35,575 Kg seized from the factory during panchnama on 20.10.2010 under Rule 25 of Central Excise Rules, 2002.

(f) Confiscation of and redemption fine in lieu of confiscation on goods already cleared from the factory allegedly without payment of appropriate excise duty as mentioned in clause (a) and (b) above."

1.1 The matter has been adjudicated vide order dated 2 August 2011, wherein all the charges as mentioned above confirmed by the Adjudicating Authority. The appellants appealed against the order-in-original before Commissioner (Appeals), and the appellant did not succeed at the Commissioner (Appeals) level also and therefore they are before us against the impugned order in appeal dated 27 November, 2012. With regard to the issue of excisability of the "spent solvent" it has been submitted by the learned Advocate appearing on behalf of the appellant that during the course of manufacture of the "Sucralose", a by product DMF solvent gets generated. The DMF solvents are repeatedly used after purification within the factory premises and it gets mixed up with various kinds of the impurities and finally a stage

searches when it cannot be used any further. The waste so generated of spent solvent is cleared from the factory premises as the residue.

2. The learned Advocate submits that the issue regarding excisability of "Spent Solvent" is no longer *res integra* in view of the decision of Hon'ble Supreme Court in case of Commissioner Vs. Aurobindo Pharma Ltd., reported under 2011 (269) ELT A147 (SC), wherein the Hon'ble Apex Court has dismissed the petition filed by the Department challenging the decision of Hon'ble Andhra Pradesh High Court reported under 2010 (259) ELT 673 (AP), wherein the Hon'ble Andhra Pradesh High Court has held that "Spent Solvent" is not taxable.

2.1 The Learned Advocate has also placed reliance upon following decision of co-ordinate Benches of CESTAT, wherein the issue whether the spent solvent undergoing the process of purification and treatment is a marketable commodity, therefore exigible to excise duty has been dealt with on multiple occasions, and it has been held that spent solvent is not excisable dutiable under Central Excise laws. Learned Advocate has relied upon following decisions in this regard:

- CCE, Hyderabad V. Lee Pharma Pvt Ltd., 2010 (252) ELT 557 (Bang)
- CCE, Hyderabad V. Aurobindo Pharma Ltd., 2010 (249) ELT 415 (Bang)
- CCE, Hyderabad V. Everest Organics Ltd., 2008 (226) ELT 554 (Bang)
- CCE, Hyderabad V. Natco Pharma Ltd., 2007 (208) ELT 573 (Bang)
- CCE, Hyderabad V. Sreepathi Pharmaceuticals Ltd., 2006 (205) ELT 273 (Bang.)
- CCE, Hyderabad V. Aurobindo Pharma Ltd., 2006 (200) 236 (Bang)

2.2 With regard to demand of duty in respect of waste and scrap arising out of non-deductible parts and components of capital goods and packaging materials of raw materials. It has been submitted that MS, SS and GI scraps and wastes cleared by them did not arise out of capital goods on which

CENVAT credit has been taken, rather the same had arisen from the parts and components of the capital goods namely MS Channels, MS pipes, MS Elbows, MS Flanges, Nuts and Bolts on which appellants have not availed any credit at the time of the purchase. These parts and components after certain period of use get worn out and had to be replaced and therefore the worn out parts and components are scrapped time to time and same are cleared without payment of duty as at the time of the purchase of the same no CENVAT Credit has been availed on the same and same not being the manufactured goods of the appellant and therefore no duty can be levied on the same. It has further been emphasised by learned Advocate that the provisions of Rule 3 (5A) of the CENVAT Credit Rules, 2004 can only be invoked in case of removal of items on which CENVAT Credit was availed at the time of purchase. Learned Advocate for emphasising his point of view has relied upon decision of CESTAT Mumbai in the case of M/s. Padmashri Dr. Vitthalrao Vikhe Patil SSK Vs. CCE, Aurangabad as reported at 2017 (349) ELT 650, wherein this Tribunal has held that waste and scrap of generated during maintenance of machinery is not excisable, more so when CENVAT Credit has not been availed on the items out of which the same had arisen. The learned Advocate has also relied upon various other decisions of this Tribunal as well as orders of various High Courts, some of them are as mentioned below:

- Shreno Ltd V. CCE, Vadodara-I, 2022 (11) TMI 691 (Ahm.)
- Kumbhi Kasari SSK Ltd. V.CCE, Pune, 2004 (173) ELT 61 (Mum.)
- Diesel Components Works V. CCE, Chandigarh 2000 (120) ELT 648 (Chad.)
- Finolex Cables V. CCE, Pune, 1996 (86) ELT 418 (Mum.)

2.3 Learned Advocate has also submitted that waste scrap which has been cleared without payment of duty also covered the HDPE/MS/GI Drums. It has been submitted that this waste has arising out of the containers of raw

materials received by them and subsequently when the raw material from the aforesaid drums is emptied. The said drums become scraps and are sold to scraps dealers. Therefore, no duty can be levied on such clearance of scrap arising from packaging of the raw materials. In this regard the learned Advocate has placed reliance on the decision of Hon'ble Supreme Court in case of CCE Vs. West Coast Industrial Gases Ltd., reported at 2003 (155) ELT 11 (SC), wherein it has been categorically held that waste in form of drums/barrels in which the raw materials received by manufacturer could not be treated as waste arising out of processing of the inputs for which credit has been taken and consequently no duty is leviable on such drums/barrels/containers cleared from the factory. In this regard, the learned Advocate has further relied upon following decisions:

- RSPL Ltd (Dhar Unit-IV) Vs. CCE, Ujjain, 2022 (382) ELT 139 (Del.)
- Maruti Suzuki India Ltd. Vs. CCE, Delhi, 2016 (339) ELT 287 (Chan)
- CCE, Pune-II V. Kirloskar Copeland Ltd., 2009 (246) ELT 466 (Mum.)

2.4 Learned Advocate has also mentioned that Board Circular No. 721/37/2003-CX dated 06.06.2003, where under it has been clarified that no duty shall be payable and no reversal of the credit is warranted on waste packages or containers used for packing of the inputs on which credit has been taken, when cleared from the factory of the manufacturer has availed CENVAT Credit as the same could not be treated as scrap on waste arising out of manufacturing process.

3. We have also heard Shri P K Singh, learned Superintendent (Authorized Representative) has reiterated the findings as given in the impugned order-in-original as well as order in appeal.

3.1 Having heard rival submissions, we find that following two questions need to be answered by us:

(i) Whether demand of Central Excise duty of Rs. 2,02,242/- on spent solvent (DMF) arising during course of manufacturing of dutiable "Sucralose" is sustainable or not?

(ii) Whether credit of Rs. 13,84,146/- need to be reversed as per the provisions of Rule 3 (5A) of the CENVAT Credit Rules, 2004 on clearance of waste and scrap arising out of items on which CENVAT Credit was not availed at the time of purchase and on items which were packing material of inputs which were used in the manufacture of dutiable goods?

3.2 We find that so far as the dutiability of the spent solvent is concerned same has already been decided by Hon'ble Apex Court in decision of CCE Hyderabad Vs. Aurobindo Pharma Ltd reported at 2011 (269) ELT A147 (SC), the Hon'ble Supreme Court's decisions has endorsed the findings given by Hon'ble Andhra Pradesh High Court in case of above mentioned party's case. The relevant extract of the same is reproduced below:

"7. Two issues arise for consideration. First, whether the department, having accepted the principle in the earlier case, can be permitted to take contra stand in subsequent cases. Secondly, whether the resultant spent solvent in the manufacturing activity of APL is liable to duty in view of Note-11 under Chapter 29 of the Central Excise Tariff Act. We may make it clear that if the answer to the first question is in the negative, there is no need for this Court to go into the second aspect of the matter.

8. The first question is no more res integra. It is well settled. To avoid burdening this judgment with precedents, we need to excerpt only from Indian Oil Corporation Ltd., wherein it was held.

.....the learned Additional Solicitor General has fairly conceded that against the order passed by the Tribunal in the case of Hindustan Petroleum Corporation Ltd., v. CCE, Hyderabad, [2000 \(124\) E.L.T. 323](#) (T), no appeal was preferred by the department and the said order has attained finality. Since no appeal was preferred against the order passed by the Tribunal in Hindustan Petroleum

Corporation Ltd., and the same has become final, the department is not entitled to raise the same point in other cases in view of the decisions of this Court in Union of India & Others v. Kaumudini Narayan Dalal & Another reported in (2001) 10 S.C.C. 231; Collector of Central Excise, Pune v. Tata Engineering & Locomotives Co. Ltd., reported in [2003 \(158\) E.L.T. 130](#) (S.C.), Birla Corporation Limited v. Commissioner of Central Excise reported in [2005 \(186\) E.L.T. 266](#) (S.C.) and Jayaswals Neco Ltd. v. Commissioner of Central Excise, Nagpur reported in [2006 \(195\) E.L.T. 142](#) (S.C.), wherein it has been held that if no appeal is filed against an earlier order of the earlier appeal involving the identical issue was not pressed by the revenue, the revenue is not entitled to press the other appeals involving the same question. In Birla Corporation Ltd., this Court observed as follows :

In the instant case the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving identical issue was not pressed and was, therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in Pepsico India Holdings Ltd., [2001 \(130\) E.L.T. 193](#), cannot be permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assesses in a quandary. Birla Corporation Ltd. (supra) is being followed consistently.

Since the point involved in the present case is identical to the point involved in Hindustan Petroleum Ltd., (supra) and the department having accepted the principle laid down in Hindustan Petroleum Corporation Ltd., (supra), the department cannot be permitted to take a different stand in the present appeals.

9. *Yet again, in Novapan Industries Ltd., following Birla Corporation Ltd., v. CCE and Jayaswals Neco Ltd., v. CCE, Nagpur the Supreme Court reiterated the law that, "the department having accepted the principles laid down in the earlier case cannot be permitted to take a contra stand in subsequent cases".*

10. *In CCE, Hyderabad v. Aurobindo Pharma Ltd. the learned Tribunal considered the question, whether spent solvent (spent methanol, in that case) is liable to duty. It was held as follows.*

On a careful consideration, we notice from the extracted order of the Commissioner v. Herren Drugs &

Pharmaceutical Ltd., Order-in-Appeal No. 99/2005, dated 28-6-2005, that the Commissioner has examined the issue in depth and in detail. It has been clearly brought out that the spent solvents had already been utilized in the factory and latter it had undergone further purification for reuse. The excess spent solvents were sold to the outsiders, as it had lost its value and therefore, what was sold was not new goods but only spent solvents which had undergone certain purification process. Such purification process of chemicals has been held to be not a process of manufacture as held in the case of S.D. Fine Chem, this issue has been affirmed by the Supreme Court. The Tribunal ruling in the case of New Sharrock Mills v. Commissioner, [2005 \(190\) E.L.T. 35](#) (Tribunal) held that recovery of caustic soda from spent caustic soda lye by increasing the concentration of spent caustic soda lye does not amount to manufacture inasmuch as caustic soda itself was initial product used for mercering the fabrics.

11. *Therefore, the department accepted the assessee's contention that at the relevant period the spent solvent is not a marketable product after process of manufacture. The question now - we are afraid - cannot be reagitated on the strength of the ratio in Birla Corporation Ltd., which received approval in Indian Oil Corporation Ltd. and Novapan Industries Ltd."*

3.3 Similarly this Tribunal in case of M/s. Orchid Chemicals & Pharmaceuticals Ltd reported at 2017 ((356) ELT 287 (Tri-Mumbai) has also decided the issue in the favour of the party. The relevant extract of the same reproduced here below:

"7. *The issue needs to be decided in the case in hand is whether the mixture of solvents, which is sold by the appellant, is excisable products or not for the period prior and post 15-6-2008. It is undisputed that the mixture of solvents, which is cleared by the appellant, is mixture solvents obtained after considerable reuse, which cannot be reused by the appellant in their factory premises and the said solvents are cleared on the invoices from the factory premises of the appellant. It is also undisputed that the appellant was discharging duty liability on this mixture/spent solvents prior to September 2006 but subsequently did not discharge the central excise duty by relying upon the judgment of the Tribunal in the case of Aurobindo Pharma Pvt. Ltd.*

8. *On perusal of the records, we find that the goods which are cleared by the appellant are mixture of solvents which have been reused in the factory premises over a period of time for the manufacturing of final products i.e. bulk drugs. It is also not disputed by the Revenue in the impugned orders that the solvents are repeatedly used after purification within the factory premises and they get mixed up with various impurities and at a stage when they cannot be reused, they are cleared by the assessee for a consideration. In short, clearances of the mixed solvent, which is done from the factory premises, is the residue, which gets retained after the manufacturing of final products by repeated use of the solvents during the course of manufacturing of final products. The appellant's claim that these goods are not excisable is supported by the judgment of the Tribunal in the case of CCE, Hyderabad v. Aurobindo Pharma Ltd. reported in [2010 \(249\) E.L.T. 415](#) (wherein I authored the judgment). The relevant paragraphs in the said judgment of Aurobindo Pharma Ltd. need to be reproduced:-*

"3.2 The assessees are engaged in the manufacture of Bulk Drugs and Bulk Drugs Intermediates. They use solvents such as Methanol, Toluene etc., in the manufacture of the said products and availing Modvat credit on the above said inputs/solvents. In the manufacturing process of the said finished goods, solvents such as Methanol, Toluene etc., are recovered and the same are re-used in the subsequent batches for four to five times till they become non-usable in the process. Then the assessees are clearing the recovered/distilled/spent solvents which contain 80 to 90% of Methanol, Toluene etc., by declaring them as "industrial waste solvents".

6. We have considered the submissions made at length by both sides and perused the records. We find that in the case of the respondent i.e. Aurobindo Pharma Ltd. (supra), this Bench has held that the issue in favour of respondent and hence the issue is no more res integra. Further, it is also seen that in the case of Sreepathi Pharmaceuticals Ltd. (supra) & Natco Pharma Ltd. (supra), the issue was the very same as is before us i.e., spent solvent and excisability thereof. We find that the learned Commissioner (Appeals) reliance upon the decided case laws of the very same Bench to hold in favour of respondent seems to be correct. We also note that the learned Commissioner (Appeals) has followed the judgment given by the Tribunal."

From the above reproduced paragraphs, it can be seen that the issue involved in the case in hand and in the case of Aurobindo Pharma Ltd. is the same. At least up to 10-5-2008, the question of excisability of the mixed solvent that arises during the course of manufacturing of bulk drugs, does not arise as it does not get covered in the provisions of Section 2(f) of the Central Excise Act, 1944. This judgment of the Tribunal having been affirmed by the Hon'ble High Court and maintained by the Hon'ble Supreme Court, the ratio would apply in the case in hand and the demands raised prior to 10-5-2008 needs to be set aside.

9. *As regards the demands raised by the Revenue post 10-5-2008 for which duty provisions of Section 2(d) has been invoked, needs to be addressed now. The said provisions of Section 2(d) defines excisable goods and states that for the purposes of this sub-section, goods includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable. In the cases in hand, from Appeal Nos. 86521 to 86526/13, 85825/14 and 85851/14, the period involved is post 10-5-2008. Even with the enactment of provisions of Section 2(d) of the Central Excise Act, 1944, the demand raised on the appellant does not get fastened for the simple reason that the show cause notice does not invoke the provisions of Section 2(d) of the Central Excise Act, 1944. All the show cause notices are alleging that the process that is carried out for the purification of the mixed solvents amounts to manufacture as per the provisions of Section 2(f) of the Central Excise Act, 1944. Since the said proposition is already decided by the Tribunal in the case of Aurobindo Pharma Ltd. and followed in the case of Lee Pharma Pvt Ltd. (supra), the question of demanding any duty from the appellant on this invocation of the provisions of Section 2(f) does not arise.*

10. *Be that as it may, the Apex Court was considering the provisions of Section 2(d) of the Central Excise Act read with Section 2(f) of the Central Excise Act in the case of DSCL Sugar Ltd. (supra). The ratio of the said judgment would apply in the case in hand squarely. We respectfully reproduce the relevant paragraphs:-*

"5. However, show cause notices were issued to the respondents herein stating that Bagasse would be subject to duty under the Central Excise Act, 1944, as "other products". These show cause notices were issued to the respondents in terms of the provision contained in Rule 6(3) of the Cenvat Credit Rules,

2004 demanding various amounts. The said show cause notices were challenged by the respondents filing writ petitions in the High Court of Allahabad. The High Court has allowed these writ petitions holding that Bagasse being a waste and not a manufactured product, no duty is payable thereupon. For arriving at this conclusion, the High Court also have relied upon the judgment of this Court in *Balrampur Chini Mills Ltd. in C.A. No. 2791 of 2005* decided on 21-7-2010 [[2015 \(320\) E.L.T. A258](#) (S.C.)].

6. The aforesaid judgment was pronounced by this Court related to the period before 2008. In the year 2008 there was an amendment in Section 2(d) as well as in Section 2(f) of the Act which defines 'excisable goods' and 'manufacture' respectively. Section 2(d) with the said amendment reads as under :

"Section 2(d) - "excisable goods" means goods specified in [the First Schedule and the Second Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt;

Explanation. - For the purposes of this clause, "goods" includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable."

7. As per the aforesaid explanation, "goods" would now include any article, material or substance capable of being bought or sold for consideration and as such goods shall be deemed to be marketable. Thus, it introduce the deeming fiction by which certain kind of goods are treated as marketable and thus excisable.

8. However, before the aforesaid fiction is to be applied, it is necessary that the process should fall within the definition of "manufacture" as contained in Section 2(f) of the Act. The relevant portion of amended Section 2(f) reads as under :

Section 2(f) - "manufacture" includes any process -

(i) incidental or ancillary to the completion of a manufactured product;

(ii) which is specified in relation to any goods in the section or Chapter notes of [the First Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to [manufacture; or]

(iii) which in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer;

and the word "manufacture" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production of manufacture on his own account;"

9. The Revenue sought to cover the case under sub-clause (ii) as per which the process which is satisfied in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 would amount to 'manufacture'. Here again, fiction is created by including those goods as amounting to manufacture in respect of which process is specified in the Section or Chapter notes of the First Schedule."

It can be seen from the above reproduced ratio that the Revenue has sought to invoke the same provisions of Section 2(d) to fasten the liability on the appellant, even by applying the provisions of Section 2(d) of the Central Excise Act, 1944. In our view, the impugned orders are unsustainable as per the authoritative judicial pronouncements as reproduced herein above.

11. *As we are holding that the entire issue is now squarely covered by the various judicial pronouncements, we are not recording any findings on the various other points raised by both sides.*

12. *As regards the various case laws cited by learned departmental representative, we find that the said case laws are in relation to the excisability of the spent sulphuric acid that arises during manufacturing process, vis-a-vis sulphuric acid. The said judgment may not carry the Revenue's case any further, as the judgments which are cited hereinabove are directly on the issue of mixture of solvents/spent solvents and similarly placed assessees.*

13. *In view of the foregoing, we hold that the impugned orders are unsustainable and liable to be set aside and we do so. The impugned orders are set aside and the appeals are allowed."*

Thus, in view of the above pronouncement of this Tribunal as well as High Court, we are of the view that waste solvents is not dutiable and therefore the demand of Central Excise duty amounting to Rs. 2,02,242/- is not sustainable.

3.4 So far as the second issue pertaining to dutiability of the waste scrap cleared by the appellant is concerned. The appellant during all the proceedings under the impugned SCN has been claiming that the waste in scrap which have been cleared by them without payment of duty pertains to MS, SS & GI scraps and this waste has arisen out of parts/components of the capital goods namely MS Channels, MS Pipes, MS Elbows, MS Flanges, Nut and Bolts on which the appellant had not availed the CENVAT Credit. These parts and components have been used by the appellants in the course of repair and replacement of various parts for the smooth running of the capital goods/machineries as the said parts /components gets worn out with the passing of time and thus need to be replaced with the fresh materials and the old MS pipes etc becomes wastes and scraps. Since the MS pipes, MS Elbows, MS Flanges etc have been purchased by the appellants but no CENVAT Credit has been availed on the same and therefore at the time of the clearance when same becomes waste and scrap it is cleared without payment of the duty. We also said that such waste and scrap is not arising out of the manufacturing process or from the goods on which CENVAT Credit has been availed by the appellant. We find that department has not produced any evidence to contradict the submissions which have been made by the appellants that the waste and scrap which have been cleared without payment of duty has arisen from the materials on which CENVAT Credit has not been availed by the appellant. We find force in the submissions made by the appellant, as the assertion made by them had not been contradicted by the department by adducing any evidences in this regard. While holding this view we also take

shelter of this Tribunal's decision M/s. Padmashri Dr. Vitthalrao Vikhe Patil SSK Vs. CCE, Aurangabad reported at 2017(349) ELT 650 (Tri.- Mum):

"5. The demand was confirmed on the waste and scrap of paper and steel. The show cause notice has not indicated that why this duty is being levied on waste and scrap. As per the facts submitted by the appellant the paper waste is import of waste paper and the same was cleared as such. As regard the steel scrap, it is scrap generated from the maintenance of plant and machinery. On the both items appellant has not availed Cenvat credit. The Excise duty can be charged on the waste and scrap only (i) where waste and scrap is generated during the course of manufacture of excisable goods; and (ii) such waste and scrap of such excisable goods has been classified dutiable goods in the Central Excise Tariff, which is not the case here. Judgments relied upon by the appellant are squarely applicable in the facts of the present case. I therefore set aside the impugned order and allow the appeal with consequential relief, if any, in accordance with law."

3.5 Similarly for the waste of drums and packaging material which have been cleared without payment of duty. We find that matter is no longer *res integra* as Hon'ble Supreme Court in case of CCE Vs. West Coast Industries Gases Ltd has already decided the matter holding that waste in form of drums/ barrels in which the raw material has been received by the manufacturer could not be treated as waste arising out of processing of the inputs for which the credit has been taken and therefore no duty can be demanded on the same.

3.5 In view of above, we hold that the demand on the above mentioned two issues are not maintainable and therefore we set aside the impugned order-in-appeal and allow the appeal.

3.6 The other two appeals of Shri J.D Gandhi & C.J. Lohani are for personal penalties imposed under Rule 26 of Central Excise Rules, 2002. Since the issue on merit is being decided in favour of the appellant as in the foregoing paras

the cause of penalizing the appellants get extinguished automatically and therefore we hold that no penalty is imposable on the appellants. Accordingly the appeals are allowed.

4. In view of above, we allow all the three appeals.

(Pronounced in the open Court on 31.10.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C.L MAHAR)
MEMBER (TECHNICAL)

PALAK