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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/5586/2004 - EX[DB] Date 16/12/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S BIRLA CORPORATION LTD.
P.O-BIRLA VIKAS, SANTNA-
485005

M/S BIRLA CORPORATION LTD. Appellant
Vs
C.C.E.BHOPAL Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 925/2008- **EX[DB]** dated 10-12-08 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   C.C.E.BHOPAL
   48 ADMINISTRATIVE AREA,AREA HILLS HOSHANGABAD ROAD,BHOPAL
2. Adv. / Consult SH. S. GROVER, ADV., E-500, GREATER KAILASH-II, N. DELHI-48
3 S.D.R
~~4 J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7 M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3
8 Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 Nidheshak publications, I.P.Estate, new Delhi
11 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12 Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagarava Road, T. Nagar,Chennai
13 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-1
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Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-III

Date of hearing/decision:10.12.2008

Central Excise Appeal No.5586 of 2004

Arising out of the Final Order No.317-CE/ BPL/2004 dated 29.9.04 passed by the Commissioner(Appeals), Customs & Central Excise, Bhopal.

For Approval and Signature:

Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K. Das, Member (judicial)

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

Appellant   Respondent

M/s Birla Corporation Ltd.   vs.   C.C.E. Bhopal

Appearance:

Shri Sanjay Grover, Advocate for the appellant
Shri B.S. Suhag, Authorized Departmental Representative (DR) for the Revenue

Coram : Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K. Das, Member (Judicial)

FINAL Order No. 925/08-EX

Per M. Veeraiyan:

This is an appeal against the order of the Commissioner (Appeals) No. 317-CE/ BPL/2004 dated 29.9.04 .

2. Heard both sides.

3. The appellant is a manufacturer of cement. They brought certain capital goods and took mod vat credit of duty paid on them and used the capital goods for considerable period time and thereafter, they were discarded as they were not usable any more for their purpose. The discarded machineries were sold as waste and scrap. The original authority held that the said waste and scrap" movable and marketable" and hence goods and that they have been manufactured by the appellant as waste and scrap and accordingly, confirmed the demand of duty on the said items. The Commissioner (Appeals) has upheld the said order.

4. Learned Advocate assails the findings of the original authority and Commissioner (Appeals) and submits that they are not legal and proper and that the said waste and scrap cannot be subject to excise duty as goods manufactured. No amount equal to excise duty can be demanded on the ground that they have availed Modvat credit , the same is also not permissible as during the relevant period (1.4.01 to 2002) there was no provisions similar to the Rule 57S(2)© or rule similar to Rule 3(5A) of Cenvat Credit Rules which was with effect from 16.5.05. He also relies on the decision of the Tribunal in the case of Kissan Co-op. Sugar Factory Ltd. vs. C.C.E., Meerut II - 2008 (226) ELT 196 (Tri-Del.) wherein it has been held that waste and scrap of old and used capital goods not arising out of mechanical working of metals in a factory are not dutiable.

5. Learned DR reiterates the finding of the Commissioner (Appeals).

6.1 We have carefully considered the submissions. The relevant portion of the finding of the original authority is reproduced below:

> ***"10. Further, the contention of the noticee that from 1.4.2000, Cenvat was introduced by framing a new set of Rules 57AA to 57AK. These rules were replaced by Cenvat Credit Rules, 2001 w.e.f. 1.7.01 and then by Cenvat Credit Rules, 2002 w.e.f. 1.3.02.None of these rules containy any rule similar to rule 57S(2)©.Hence, waste and scrap arising out of capital goods and discarding of old machinery is not liable to excise duty even if the manufacturer had availed***

Modvat credit on the capital goods and at the time of purchase of the machine is wrong and incorrect."

6.2 The relevant portion of the Commissioner (Appeals) order upholding the order of the original authority is reproduced below:

> ***"5. From the submission made by the appellant it is evident that they had availed modvat credit on the obsolete/outlived machineries when these were received and removed the same as waste and scrap. I find that Section Note 8(a) of Section XV of CETA, '85 covers metal waste and scrap from the manufacture or mechanical working of metals, and metal goods definitely useable as such, because of breakage, cutting up, weal or other reasons. The waste and scrap of iron and steel and other metals being specifically classifiable under the respective Chapter heading of these metal have come into existence within the factory and hence are chargeable to duty on the value on which these are cleared. All these waste and scraps are clearly identifiable under the C.Excise Tariff and there is an individual tariff heading in respect of each of these waste and scrap, these waste and scrap are also marketable being available in the market for sale and purchase , and therefore, they meet the criteria for manufacture of excisable goods, hence , chargeable to excise duty. Accordingly, duty on such waste and scrap is payable.***

6.3 We find that both the authorities have gone on the lines that the discarding of used capital goods will amount ~~of~~ to manufacture of excisable goods. We are not able to appreciate the rational behind the said decision. The present case is akin to the case decided by the Tribunal in the case of Kissan Co-op Sugar Factory Ltd. cited supra. In this connection, para 4 of the said decision is reproduced below:

> ***4. The contention of revenue is that as per the chapter note 8a in Section xv of Central Excise Tariff Act, the waste and scrap question made dutiable. We have gone through the chapter note 8a in Section xv of Central Excise Tariff Act, which covers the metal waste and scrap arising from the working of metal and metal goods. The only contention of revenue is that as the scrap in question is arising by cutting of the metal which are definitely usable as such, therefore as per Section 2f of the Central Excise Act the same amounts to manufacture. We find we are unable to agree with the contention of revenue. In the present case, the scrap in***

> ***question is of old and used capital goods and it is not arising out of mechanical working of metals in the factory. The Tribunal in the decisions relied upon by the appellant specifically held that such scrap is not dutiable. In view of this, we find merit in the contention of appellant. Impugned order is set aside and appeals are allowed."***

7. In the light of the above, we are not able to sustain the orders of the authorities below and accordingly, we set aside the same and allow the appeal with consequential relief.

(Dictated and pronounced in the open Court)

(M. Veeraiyan)
Member (Technical)

(P.K. Das)
Member (Judicial)

scd/