

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

Appeal No. E/1631/2005-1632/2005 - EX[DB]

Date 20/12/2010

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

To :
M/S BIRLA CORPORATION LTD
CEMENT FACTORY, CHANDERIYA, CHITTORGARH
(RAJASHTHAN)
M/S BIRLA CORPORATION LTD

Appellant
Vs
Respondent

2010 EX[DB] dated 16-12-10

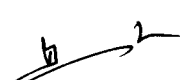
C.C.E JAIPUR - II

I am directed to transmit herewith a certified copy of Final order No. 868-869/
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 JAIPUR - II
NEW C.R.BUILDING, STATUE
CIRCLE, 'C'SHEME, JAIPUR
(RAJASTHAN)
2. Adv. / Consult
MR.BIPIN GARG
B-1/1289,A-VASANT KUNJ, NEW
DELHI
3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd., No.2 (Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17
8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road,
Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd, LAW House, 1-8, Sector - 10, Faridabad 121003 (Harvana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file
15. HON'BLE PRESIDENT.


Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi.

Date of hearing: 02.11.2010

Date of decision: 16.12.2010

For approval and signature:

Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982.	Yes
2.	Whether it should be released under Rule 27 of the 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?	See
4.	Whether Order is to be circulated to the Departmental authorities?	Yes

Excise Appeal No. 1631 - 1632 of 2005

[Arising out of Order-in-Appeal No. 105-106 (RM)CE/JPR-II/2005 dated 15.02.2005 passed by the Commissioner (Appeals) Customs & Central Excise, Jaipur].

M/s Birla Corporation Limited

Appellants

Vs.

CCE, ^{Jaipur} Chandigarh

Respondent

Appearance:

Rep. by Sh. Bipin Garg, Advocate for the appellants.

Rep. by Sh. Nitin Anand, DR for the respondent.

Coram: Hon'ble Sh. Justice R.M.S. Khandeparkar, President
Hon'ble Sh. Rakesh Kumar, Member (Technical)

Final Oral Order No. 868-869/10-EX

Per: Shri Justice R.M.S. Khandeparkar:

Since common questions of law and facts arise in both the matters, they were heard together and are being disposed of by this common order.

2. These appeals arise from common order passed by the Commissioner (Appeals) Jaipur on 15.02.2005. By the impugned order, the Commissioner (Appeals) has disposed of the appeals by reducing the penalty while confirming the order of the adjudicating authority on the point of demand of duty on the waste and scrap. The adjudicating authorities by their orders dated 5.2.2003 and 31.12.2003 had confirmed the demand of duty to the tune of Rs. 1,89,802/- and Rs. 1,82,928/- respectively as interest besides imposing penalty of Rs. 2,000/- and Rs. 10,000/- respectively. The demand under order dated 03.02.2003 related to the period from 10.09.2001 to 31.3.2002 whereas the demand under order dated 31.12.2003 related to the period from July 2002 to March 2003. The proceedings in the first matter were initiated under show cause notice dated 27.08.2002 whereas in relation to the later case, it was initiated under show cause notice dated 6.06.2003.

3. The appellants are engaged in manufacture of clinker and cement classifiable under chapter sub-heading 2502.10 and 2502.29 of the Schedule to the Central Excise Tariff Act, 1985. The allegation against the appellants was that they had cleared M.S. Scrap classifiable under tariff heading 7204.90 of the Schedule to the Central Excise Tariff Act, 1985 without payment of duty and without issuing central excise invoices for the relevant period. The M.S. Scrap was generated from cutting of M.S. angles, Channels, Sheets, Plates & Tars etc.

4. It was the case of the department that the assessee being a manufacturer of cement having various structural portions which use to get damaged either due to prolonged use or due to excessive heat and evaporation and, therefore, it was becoming necessary to replace deteriorated or damaged parts /structures periodically. The scrap which was so obtained while dismantling the said structure was sold off as waste and scrap. Similarly, the conveyor belt installed in the plant used to get worn out deteriorated and damaged in the process of its use and had to be replaced and the scrap of the said belt was also sold periodically.

5. It was the case of the assessee that they had not manufactured any excisable goods by virtue of scrap and waste which was generated on account of wear and tear of various parts of the plant. In the absence of any excisable goods being manufactured, mere generation of scrap and waste do not amount to manufacture and, therefore, no duty was leviable and for the same reason no penalty was warranted.

6. It was specific case of the assessee that the waste and scrap was generated by cutting of sheets, plates etc. for making and replacing various parts of machinery and plant during periodic repairs and maintenance of the plant. During such process, certain end pieces were left out which were accumulated and sold as scrap. These items were neither manufactured by the assessee nor waste and scrap had arisen during the course of the manufacture of any final product. Those items were not classifiable under any chapter heading and demand of duty on waste and scrap was not sustainable. The scrap had not been generated from any input which was used for manufacture of final product. Under no circumstances any penalty could have been imposed.

7. The authorities below did not accept the contention sought to be canvassed on behalf of the assessee. Referring to Section Note 8(a) of Section XV of the Central Excise Tariff Act, 1985, the authorities below held that the waste and scrap cleared by the appellants was generated by cutting of metal plates, angles, channels, sheets etc. for making of parts of their plant and machinery during the course of repairs and maintenance and the process under which the waste and scrap was generated is covered by the expression "mechanical working of metal" as is found in the said Section Note.

8. Learned Advocate for the appellants while assailing the impugned order submitted that the authorities below erred in holding that the appellants were liable to pay duty in respect of the waste and scrap cleared by the appellants. There being no excisable goods manufactured by the appellants, the imposition of duty and penalty was not warranted. He further submitted that as far as the appellants are concerned, the issue stands concluded by the decision of the Tribunal in the case of **Prism Cement Ltd. vs. CCE, Bhopal** reported in 2009 (243) ELT 231 (Tri. Del.). According to the learned Advocate it has been clearly held in the said decision that no duty is imposable on the scrap and waste which has not been generated out of any manufacturing process. Referring to the facts of the case, it was submitted that the waste and scrap in the case in hand, was not generated out of any manufacturing process as such.

9. On the other hand, the DR submitted that the decision in Prism Cement case was delivered solely on the ground that in the earlier case of the Prism Cement, the same was decided in favour of the assessee and it was not challenged and, therefore, in the absence of any new material brought on

record in relation to subsequent period of the same assessee the Tribunal held that there was no justification to take a different view and that, therefore, the order was delivered in favour of the assessee. In the said case, undisputedly, the earlier order of the Tribunal in relation to the Prism Cement case was not challenged by the department. That is not the case in the matter in hand and considering the facts of the case, the same is squarely covered by the decision of the Rajasthan High Court, which was also not brought to the notice of the Tribunal while deciding the case in Prism Cement Limited, and that was in the matter of **Union of India vs. Grasim Industries Ltd.** reported in 2008 (229) ELT 328 (Raj.).

10. In **Prism Cement** case to which one of us was the party (Shri Justice R.M.S. Khandeparkar), the Tribunal had recorded that undoubtedly in relation to the period from January 2001 to September 2002 the scrap generated in Prism Cement factory had been subject matter of proceedings between the parties which had culminated in the appeal before the Tribunal being Excise Appeal Nos. 4657-4666/2004 which were disposed of on 18.08.2008 holding that Prism Cement Limited were not involved in the manufacture of iron and steel product but only in maintenance and repair work and further it was not disputed that no credit had been taken on the items used in such repairs and maintenance and, therefore, no duty was leviable on M.S. Scrap borings, turnings etc. generated by them in the maintenance and repair work. Considering the said decision and the fact that the department had not challenged the said decision, it was held that there was no scope for rejudication of the same issue between the same parties in relation to the same subject matter, even though it is for different period, unless additional evidence which would justify such adjudication was

brought on record. Obviously, therefore, the decision in Prism Cement case was not on the point in issue but on the ground that issue was already decided in relation to that assessee pertaining to the earlier period and no new evidence was available to take a different view in relation to the subsequent period on the same issue and pertaining to the same subject matter. Hence, the decision is of no help to decide the issue in question.

11. The Rajasthan High Court in **Grasim Industries** case after taking note of the fact that M.S. Scrap and Iron were generated during the process of repairs and maintenance while dealing with the similar issue involved in the matter held that the category of scrap generated by cutting of plates, sheets etc. is obviously was in the course of repairs and maintenance of the plant and machinery and though it is not excisable, but then, the part which is replaced, either as a whole, or in part, is very much a product, coming into existence, as a result of manufacturing process, by using the raw material, being plates, sheets, welding electrodes channels, beams, angles etc. and by using such raw material, and subjecting it to manufacturing process, by giving welding, bending or finishing etc. a part required to be replaced comes into existence being which is obviously a spare part of the plant and machinery, a distinct commodity, and is placed in the plant and machinery, as a spare part, or as a replaceable part, ~~It~~ was held that in such circumstances in the process of manufacturing of such part, metal waste or scrap comes into existence, there can be no escape from the conclusion that metal waste or scrap has come into existence as a result of manufacturing process within the meaning of Section 2(f) of the said Act.

12. It is also pertinent to note that under Section Note 8(a) to Section XV of the Central Excise Tariff Act, 1985, metal waste and scrap generated from

the manufacture or mechanical working on metals items, and metal goods definitely not usable as such, because of breakage cutting up, wear and tear or other reasons.

13. Taking into consideration the decision of the Rajasthan High Court, it is difficult to accept the contention sought to be canvassed on behalf of the appellants. It is true that in Prism Cement case the Tribunal had answered the issue in favour of the assessee. The same however, was not on adjudication of the issue but on the ground that in the earlier adjudication the issue was answered in favour of the assessee and there was no justification to take a different view in respect of the similar case of the same assessee for the subsequent period in the absence of any evidence on record justifying such different view. Besides as rightly pointed out by the DR the decision of the Rajasthan High Court was not brought to our notice in the said case. Indeed, the decision of the Rajasthan High Court in Grasim case is a clear answer to all the points sought to be raised in the matter. The decision was delivered in similar type of facts and on similar issue raised in the matter.

14. Once it is found that the appellants had suppressed the relevant fact from Department, consequently department was justified in insisting for imposition of the penalty.

15. In the result, therefore, the appeals fail and are hereby dismissed.

[Justice R.M.S. Khandeparkar]
President

[Rakesh Kumar]
Member [Technical]

/Pant/