CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Excise Appeal No. 54058 of 2014

(Arising out of order-in-appeal No. 44(CE)/RPR-II/2014 dated 30.04.2014 passed by the Commissioner of Central Excise (Appeals-II), Raipur)

DATE OF HEARING : 15.06.2017
DATE OF DECISION : 19.06.2017

M/s Jai Balaji Industries Ltd. …. Appellants
(Rep by Ms. Surabhi Sinha, Adv.)

VERSUS

CCE&ST, Raipur …. Respondent
(Rep. by Sh. S. Bansal, DR)

CORAM : HON'BLE MR. JUSTICE (DR.) SATISH CHANDRA, PRESIDENT
HON'BLE MR. B. RAVICHANDRAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 54037/2017

PER B. RAVICHANDRAN :

This appeal is against the order dated 30.04.2014 of the Commissioner of Central Excise (Appeals-II), Raipur.

2. The Appellants are engaged in the manufacture of Sponge Iron and other excisable goods. They are also availing the Cenvat Credit of duty paid on inputs and capital goods under Cenvat Credit Rules, 2004. The Appellants are engaged in generation of

electricity in their captive thermal power plant. During the generation of electricity, fly ash is also generated. The dispute in the present case is the liability of the Appellants to pay the Central Excise Duty on such fly ash cleared by the Appellants. Proceedings were initiated against the Appellants to demand and recover Central Excise Duty on fly ash for the period February 2011 to February 2012. The case was adjudicated by the original authority who confirmed the liability of Rs. 2,02,057/-. He also imposed equal amount of penalty on the Appellants. On appeal, vide the impugned order, the original order was upheld.

3. The learned counsel appearing for the Appellants contested the findings of the lower authorities. She submitted that the fly ash produced during combustion of coal in the manufacture of electricity is a waste by-product. The same is not emerging out of any manufacturing process. Reliance was placed on the decision of the Hon'ble Madras High Court in **M/s Mettur Thermal Power Station,** 2017-TIOL-237-HC-MAD-CX.

4. The learned DR reiterated the findings of the lower authorities.

5. We have heard both sides and perused the appeal records. The dispute is with reference to the liability of the Appellants to pay Central Excise Duty on the fly ash emerging during the course of generation of electricity. The lower authorities held that the said fly ash is classifiable under Chapter 26 of the Central Excise Tariff and is liable to duty of 1% / 5% with the condition that no Cenvat Credit has been availed on input/input services under

Cenvat Credit Rules, 2004. The lower authorities held that the Appellants are liable to payment of duty on the consideration received on sale of such fly ash. We note that the fly ash emerging during the course of generation of electricity cannot be considered as a manufactured product liable to Central Excise Duty. In this connection, the observation of the Hon'ble Madras High Court in **Mettur Thermal Power Station** (supra) is relevant. The Hon'ble High Court recorded as below :

> **"24. From the above judgment of the Supreme Court, it is clear that the first test of the process of levy of excise duty is that the product has to be produced or manufactured and the second test being that the product so produced or manufactured should be a marketable commodity. Further, the Supreme Court has also categorically held that levy of excise duty is on the manufacture or production of the goods and that leviability of duty is linked to its manufacture or production. Therefore, as propounded by the Supreme Court in a catena of decisions referred to above, the twin tests of manufacture and marketability should be satisfied in order to bring the goods within the ambit of excise duty and failure of even one of the test would render the product not liable for excise duty. In the case on hand, it is clear from the averments of either rparty and is also not in dispute that 'fly ash' is a by-product during the production of electricity and is not the main manufactured item. Further, the 'fly ash' is not a commodity which can be used as such in the manufactured item. Further, the 'fly ash' is not a commodity which can be used as such in the market, but it is usable only as one of the materials in the production of other products. Therefore, there being no manufacture of 'fly ash'' but 'fly ash' gets formed as a by-product during the production of electricity, merely because the goods 'fly ash' finds a place in the specific or residuary entry in the schedule it cannot be termed as an excisable commodity, since it satisfies the test of marketability. The twin tests have to be**

satisfied in order to bring a product within the ambit of excise duty and satisfaction of solitary test alone would not be sufficient to levy excise duty on the commodity. Therefore, mere marketability of the product alone would not be suffice to levy duty on the 'fly ash', there being no manufacturing process involved."

6. The dispute in the present case is squarely covered by the findings of the Hon'ble High Court, as above. Accordingly, we find no merit in the impugned order and set aside the same.

7. In the result, the appeal is allowed.

(Pronounced in the open court on 19.06.2017)

(B. RAVICHANDRAN)
MEMBER (TECHNICAL)

(JUSTICE Dr. SATISH CHANDRA)
PRESIDENT

Golay