**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA**
**EASTERN ZONAL BENCH: KOLKATA**

**Appeal No. E/74/2008**

(Arising out of Order-in-Appeal No.32/KOL-VII/2007 dated 10.10.2007 passed by the Commissioner (Appeal-I) of Central Excise, Kolkata)

M/s. Adishakti Alloys Pvt. Ltd.

Applicant (s)/Appellant (s)

**Vs.**

Commissioner of Central Excise, Kolkata-VII

Respondent (s)

Appearance:

Shri Arijit Chakraborty, Advocate and Shri Nilatpal Choudhary, Advocate for the Appellant (s)
Shri H.S.Abedin, AC(AR) for the Respondent (s)

**CORAM:**
**Hon'ble SHRI JUSTICE (DR.) SATISH CHANDRA, PRESIDENT**
**Hon'ble SHRI V.Padmanabhan, Member (Technical)**

Date of Hearing/Decision:- 01.05.2018

ORDER NO. FO/76029/2018

**Per Shri V.Padmanabhan**

1. The present appeal has been filed against the Order-in-Appeal No.32/KOL-VII/2007 dated 10.10.2007.

2. The brief facts of the case are that the appellant is engaged in the manufacture of "Aluminium Alloy Bars, Aluminium Notch Bars and Shorts" and during the course of manufacture Alluminium Dross & Skimmings are generated which are considered as waste arising in the manufacture. The lower authorities were of the view that excise duty was liable to be paid on such Aluminium Dross and Skimming during the period from February, 2005

to January, 2006. Accordingly, the duty demand was confirmed alongwith interest and penalty. Challenging such demand the present appeal has been filed.

3. With this background we heard both sides and perused the appeal record.

4. It is the submission of the ld. Counsel for the appellant that the issue regarding excisability of Aluminium Dross and Skimming and other non-ferro material was decided in favour of the appellant by Hon'ble Bombay High Court in the case of Hindalco Industries Ltd. vs. Union of India [2015(315) ELT 10 (Bom.)]. He further submits that subsequent to the decision of the Hon'ble Bombay High Court the CBEC has issued circular dated 25.04.2016 in which they have withdrawn the earlier circulars issued by Board holding the view that duty was leviable to be paid on such Aluminium Dross and Skimming. Accordingly, ld. Advocate submitted that no excise duty was payable on such Aluminium Dross and Skimming.

5. Ld. DR on the other hand justified the impugned order. He submitted that the Aluminium Dross and Skimming arising in the factory was used for extraction of Aluminium and hence the same cannot be considered as waste and was liable to pay excise duty.

6. After perusal of the decision of the Hon'ble Bomby High Court we note that the Hon'ble High Court has overruled the decision of the Cestat Larger Bench in the case of Hindalco Industries Ltd. vs. Commissioner [2014(308) ELT 472 (Tribunal-LB). After considering the submissions the Hon'ble Bombay High Court finally observed as under:

> " ***22.*** *That the Revenue does not wish to abide by them would not mean that the Tribunal is justified in not following them. We find that the attempt made by the Tribunal to hold*

*that what is marketable and satisfies the requirement stipulated in the Explanation necessarily means that they are liable for imposition of duty under Section 3 is directly contrary to the binding Judgments of the Hon'ble Supreme Court on the same issue. The attempt of the Tribunal in para 6.5 in proceeding to analyse that the process and concluding that nobody deliberately manufactures waste, dross and scrap is in direct conflict with the findings of the Hon'ble Supreme Court. Waste and scrap emerge as a by-product in the course of manufacture of other products. The whole purpose of making these observations is to justify the conclusion that because there is a reference to these items in the Tariff Entry or the Tariff Schedule that would change the colour of the controversy. That would enable the Tribunal to then hold that the earlier Judgments and in the case of this very Assessee are no longer good law. However, we do not see how the decision in the case of Grasim Industries Ltd. (supra) and particularly the above reproduced paragraphs could have been brushed aside by the Tribunal. The Hon'ble Supreme Court listed the twin tests and which have to be satisfied before the goods can be said to be excisable to tax or Central Excise duty. It is in these circumstances that the attempt of the Tribunal and which is supported before us by Mr. Sethna cannot be upheld. Each of these observations and from para 6.5 onwards run counter to the Judgments of the Hon'ble Supreme Court.*

***23.*** *In para 6.9, the Tribunal takes assistance of a Supreme Court Judgment and concludes that the ratio of any decision can be applied only if the facts are identical. True it is that the Hon'ble Supreme Court holds this way, however, what are those facts and emerging from the record of this case which would enable it to take a different view have not been spelt out by the Tribunal. Even these observations and conclusions would go to show that the Tribunal does not dispute that it is considering the same controversy and in relation to the same aluminium dross, which could be termed as either a by-product or waste or scrap or rubbish. Once there are twin tests, then, all these observations are of no assistance to the Revenue. The reliance placed by Mr. Sethna on a Judgment in the case of this very Assessee rendered by the Allahabad High Court 2009 (243) E.L.T. 481 (All.) is entirely misplaced. There the argument was that the Writ Petition has been admitted and therefore, a interim order be passed so as to restrain the Department/Revenue from taking any coercive action against the Petitioner Hindalco Industries Ltd. including seizure and clearance of aluminium dross and skimming etc. in terms of the impugned orders. All the observations made prima facie do not take note of the decisions of the Hon'ble Supreme Court. It only takes note of one of the decision. In the light of the conclusions reached by us and finding that there are authoritative pronouncements of the Hon'ble Supreme Court rendered after* *the Division Bench of Allahabad High Court, that we are unable to agree with Mr. Sethna."*

7. We also note that the CBEC has also changed its stand by following the decision of the Bombay High Court (supra). The earlier circular suggesting that duty was payable on such Aluminium Dross and Skimming stand withdrawn.

8. In the result, we conclude that there is no justification for charging excise duties on Aluminium Dross and Skimming. Accordingly the impugned order is set aside. Appeal is allowed with consequential relief, if any.

(Dictated and pronounced in the Open Court )

**S/d.**
**(Justice Dr. Satish Chandra)**
**President**

**S/d.**
**(V.Padmanabhan)**
**MEMBER (Technical)**

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