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

Appeal No. Ex/181/2007

Arising out of Order-in-Appeal No. 131/KOL-IV/2006 dated 27.11.2006 passed by the Commissioner of Central Excise (Appeal-IV), Kolkata.

Commissioner of Central Excise, Kolkata-IV

Applicant (s)/Appellant (s)

Vs.

M/s. Kesoram Rayon,

Respondent (s)

Appearance:
Shri K. Choudhari, Suptd. (AR) for the Appellant (s)
Dr. Samir Chakraborty, Sr. Advocate for the Respondent(s)

CORAM:
HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)
HON'BLE SHRI S. K. PATI, MEMBER (JUDICIAL)

Date of Hearing/Decision: - 04.10.2018

ORDER No. FO/A/76751/2018

Per CORAM.

The present appeal is filed by the Revenue against Order-in-Appeal No. 131/KOL-IV/2006 dated 27.11.2006.

2. The respondent is engaged the manufacture of Viscose yarn and Cello Phane. They availed Modvat/Cenvat Credit for capital goods as well as inputs from time to time. The present dispute is covering the period from 01.02.2000-31.12.2004. The appellant cleared various items of used and worn out capital goods on which Modvat/Cenvat Credit were taken, without payment of duty. These capital goods were cleared as Waste & Scrap. Department was of the view that such Waste & Scrap of capital goods will be liable to payment of duty at the

time of its clearance since such Waste & Scrap has been generated during the course of manufacture of the final product. Show Cause Notice was issued covering the entire period of dispute proposing to demand of duty on such Waste & Scrap of capital goods. The original authority ordered payment of duty alongwith interest and penalty of equal amount. The order of the original authority was challenged by the assessee before the Commissioner (Appeals) which resulted in passing of the impugned order in which he set aside entire demand and allowed the appeal of the assessee. He dropped the demand by citing the following grounds :

(i) There was no provision at the relevant time in the Modvat/Cenvat Credit Rules for payment of duty on capital goods on which Modvat/Cenvat Credit were taken and these were cleared after Putting them to use.

(ii) He has also held that such Waste & Scrap of capital goods cannot be said to be the result of process of manufacture and hence mischief of Section 2 (f) will not be attracted. Revenue has filed the present appeal challenging the dropping of such demand.

3. The case of the Revenue has been argued by Shri K. Choudhary Ld. D. R., who emphasizes the following significant grounds of appeal:

(i) He refers to Section Note 8 (a) to Section XV Central Excise Tariff which states that Waste & Scrap are nothing but Metal Waste & Scrap arising from the manufacture of mechanical working of Metal and Metal goods. Waste & Scrap cleared by the assessee would fall within the above Section note and hence liable for payment of duty.

(ii) The Revenue seeks to disagree with the observations of the Ld. Commissioner (Appeals) in the impugned order to the effect that there was no provision in the Rules for payment of duty on Waste & Scrap of capital goods for the period 01.04.2002 to 15.05.2005. He submitted that the provision of Rules 57-S (2) of Central Excise Rules, 1944 [Sub heading 2(C)] had provided for payment of duty on capital goods if, sold as Waste & Scrap. Even though this rule have been superceeded the duty would continue to be payable in terms of the savings clause in Section 37 of the Act.

(iii) Waste & Scrap of metal known arising out of capital goods has an identity which is distinct from capital goods and hence will fall within the scrap covering under CETH 72.04. Finally, he submitted that the impugned order may be set aside and the order passed by the original authority restored.

4. The respondent is represented by Dr. Samir Chakraboraty, Ld. Sr. Advocate against the appeal filed by the Revenue and his main arguments are summarized below :

(i) He submitted that the Waste & Scrap cleared by the assessee does not fall within the Note 8 (a) of Section XV of the Central Excise Tariff. He relied on the decision Hon'ble Supreme Court in the case of Grasim Industries Ltd, Vs. Union of India reported in 2011 (273) E.L.T. 10 (S.C.) in which the Apex Court examined the precise question of Waste & Scrap arising from the repair & maintenance of the capital goods. The Apex Court held that Waste & Scrap arising from repair & maintenance cannot be covered within the Note 8 (a) ibid. By following the decision he justified the findings of the lower authority.

(ii) He also submitted that the duty of Waste & Scrap of old and used of capital goods, have also been held to be not payable in the various decisions of the Tribunal. He cited the following decisions.

(1). Kissan Co-Op Sugar Factory Ltd. Vs. Commissioner of Central Excise, 2008 (226) E.L.T. 196 (T).

(2). Birla Corporation Ltd. Vs. Commissioner of Central Excise, 2009 (236) E.L.T 476 (T) finally he submitted that the order passed by the lower authority may be sustain.

5. Heard both sides and perused the appeal records.

6. The crux of the present dispute is whether duty is liable to be paid for clearance of Waste & Scrap arising out of old and used capital goods during the period 01.02.2000 to 31.12.2004. To decide the question, it is required to examine whether the processe of generation of scrap of capital goods would amount to manufacture in terms of Section 2 (f) of Central Excise Act, 1944. In the impugned order, this has been held to be a process not amounting to manufacture. Revenue has argued that such goods cleared would fall within the description of Waste & Scrap in terms of Note 8 (a) Section XV of the Central Excise Tariff.

7. We note that the identical question was considered by the Apex Court in the case of Grasim Industries (Supra). The Apex Court

decided that the scrap arising during the course of repair & maintenance of the capital goods in the factory, cannot be considered to arise through the process of manufacture and hence, will not fall within the Note 8 (a) ibid. The observations of the Apex Court are given below for ready reference:

> ***"14.*** *In the present case, it is clear that the process of repair and maintenance of the machinery of the cement manufacturing plant, in which M.S. scrap and Iron scrap arise, has no contribution or effect on the process of manufacturing of the cement, which is the excisable end product, as since welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams etc. which are used in the process of repair and maintenance are not raw material used in the process of manufacturing of the cement, which is the end product. The issue of getting a new identity as M.S. Scrap and Iron Scrap as an end product due to manufacturing process does not arise for our consideration. The repairing activity in any possible manner cannot be called as a part of manufacturing activity in relation to production of end product. Therefore, the M.S. scrap and Iron scrap cannot be said to be a by-product of the final product. At the best, it is the by-product of the repairing process which uses welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams etc.*
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> ***15.*** *Learned ASG has placed reliance on the decision of this Court in CST v. Bharat Petroleum Corpn. Ltd. (supra). In that case, the assessee purchased sulphuric acid and cotton for the manufacturing of kerosene and yarn/cloth. In the manufacturing*

process, the acid sludge and cotton waste emerged as a distinct product having commercial identity. The issue before this Court was that whether the assessee can be said to manufacture acid sludge and cotton waste. This Court observed that where a subsidiary product is turned out regularly and continuously in the course of a manufacturing business and is also sold regularly from time to time, an intention can be attributed to the manufacturer to manufacture and sell not merely the main item manufactured but also the subsidiary products. We are afraid, the decision does not help the Revenue because the metal scrap and waste arising out of the repair and maintenance work of the machinery used in manufacturing of cement, by no stretch of imagination, can be treated as a subsidiary product to the cement which is the main product. The metal scrap and waste arise only when the assessee undertakes repairing and maintenance work of the capital goods and, therefore, do not arise regularly and continuously in the course of a manufacturing business of cement.

16. *In view of the above, we cannot sustain the Judgment and Order of the High Court dated 31-7-2008.*

8. The dutiability Waste & Scrap arising out of old and used capital goods has also been considered by the Tribunal in various decisions and it has been decided that such scrap will be not dutiable. In the case of Birla Corporation Ltd. (Supra), the Tribunal has observed as follows:-

"***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 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 2(f) 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."*
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> ***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."*

9. In the line with the above decision, it clearly emerges that Waste & Scrap cleared by the appellant is not dutiable. Consequently, we find no infirmity in the order passed by the lower authority. The impugned order is sustained and the appeal filed by the Revenue is rejected.

(Dictated and pronounced in the open court.)

(S. K. Pati) **Member (Technical)**	**(V. Padmanabhan)** **Member (Technical)**

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