IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.1

Excise Appeal No.75529 of 2019

(Arising out of Order-in-Appeal No.459/HWH/CE/2018-19 dated 09.11.2018 passed by Commissioner of Central Excise (Appeals), Kolkata II)

Commissioner of CGST & Central Excise, Howrah
(15/1, Strand Road, Kolkata-700001)

Appellant

VERSUS

M/s Hindalco Industries Limited
(39, G.T.Road, Belur Math, Howrah-711202)

Respondent

APPERANCE :

Shri D.Sue, Authorized Representative for the Appellant
S/Shri Deepro Sen & Shovit Betal, both Advocates for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 76241/2025

DATE OF HEARING : 28 APRIL 2025
DATE OF DECISION : 28 APRIL 2025

Per Ashok Jindal :

The Revenue is in appeal against the impugned order.

2. The facts of the case are that the Respondent is engaged in the manufacture of excisable goods namely Hot Rolled Aluminium Products. During the process of manufacturing of such product, raw materials such as billets, ingots, waste and scraps, etc. are melted and accumulated mass of the metal is then rolled into desired sheet. During such conversion, a portion is alienated by forming a waste lump which is then allowed to cool and is commonly known as *"Dross".*

2.1 The respondent is clearing the said Aluminium Dross without payment of duty being in the nature of waste or residue arising during the course of manufacture of Hot Rolled Aluminium Products.

2.2 An investigation was conducted and it was found that the respondent is not paying duty for the clearance of Aluminium Dross. Therefore, various show-cause notices were issued to the respondent for the period April 2001 to March, 2016 demanding duty on such clearance of Aluminium Dross along with interest and penalty.

2.3 The Adjudicating authority by relying on the Circular Nos.941/02/2011-CX dated 14.02.2011 and 1027/15/2016-CX dated 15.04.2016, dropped the proceedings against the respondent.

2.4 Against the said order, the Revenue is in appeal on the ground that it was considered by the authorities below that the Aluminium Dross is classifiable under Central Excise Tariff Sub-Heading No.2620 4010 of the Central Excise Tariff Act, 1985 and the same was chargeable to duty and also not considered that the monetary consideration for sale of Aluminium Dross in their customers, which established that the product is marketable. The Revenue has filed this appeal on the following grounds:

> *(i) The Adjudicating authority had erred in not considering that the impugned goods i.e. Aluminium Dross is classifiable under Central Excise Tariff Sub-heading No. 2620 4010 of the Central Excise Tariff Act, 1985 and the same were chargeable to duty and also not considered that the monetary consideration of sale of aluminium dross to their customers which established that the product is marketable.*
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> *(ii) Section 3 of the Central Excise Act, 1944 stipulates that duties specified in the First Schedule and the Second Schedule shall be levied and collected in such manner as may be prescribed - (a) a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods excluding goods produced or manufactured in Special Economic Zones which are produced or manufactured in*

India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986). Clause (d) of section 2 of the Central Excise Act, 1944 defines excisable goods as "goods specified in the First Schedule and Second Schedule to the Central Excise Tariff Act, 1985 (5 of the 1986) as being subject to a duty of excise and includes salt." An Explanation has been added by Section 78 of the Finance Act, 2008 (18 of 2008) to clarify "goods" includes any article, material or substance which is capable or being bought and sold for a consideration and such goods shall be deemed to be marketable. It is an established principle of legal interpretation that an Explanation added in a statute in a declaratory form to clarify the ambit of the statute as a measure of abundant caution to allay groundless apprehensions must have retrospective effect. There was no indication whatsoever that the insertion of the Explanation to Clause (d) of Section 2 of the Central Excise Act, 1944 changes to scope of the Rules or to introduce any new provision. The amendment was in the form of an explanation. Therefore, the explanation added to Clause (d) of Section 2 of the Central Excise Act, 1944 by the Finance Act, 2008 in a declaratory form much have retrospective effect. As such, the impugned goods are deemed to be marketable and also specified in the First Schedule to the Central Excise Tariff Act, 1985 and eligible for appropriate rate of duty.

(iii) The Adjudicating authority has not considered that the department had filed an appeal before the Hon'ble Supreme Court which has been admitted by the Hon'ble Apex Court in Civil Appeal Diary No.1188 of 2017 (reported in 2017 (349) ELT A36 (S.C.)] against the CESTAT Final Order A/88268/2016-WZB/EB, dated 16-6-2016 as reported in 2016 (342) E.L.T. 418(Tri.-Mumbai) (KEC International Ltd. v. Commissioner) wherein CESTAT had held that "Waste and scrap - Dutiability - Zinc dross, zinc oxide, zinc ash and zinc waste and scrap arising during course of manufacture of transmission tower line can be cleared without payment of duty -Section 2(d) and 3 of Central Excise Act, 1944"

3. On the other hand, the ld.Counsel for the respondent, submits that the issue is no longer *res integra* and is settled in favour of the respondent-assessee by the various judicial pronouncements. To support his contention, he relies on the decision of the Hon'ble Supreme Court in the case of Commissioner of Central Excise vs. Indian Aluminium Co. Ltd. : 2006 (203) ELT 3 (SC) and Circular No. 941/02/2011-CX dated 14-02-2011, wherein the issue was that the Zinc Dross and flux are excisable or not ? In this case, the issue was that the Zinc Dross are not excisable.

3.1 It is further submitted that the Hon'ble Bombay High Court in the case of Hindalco Industries Limited Vs. Union of India reported in 2015 (315) ELT 10 (Bom.), which has been affirmed by the Hon'ble Apex Court as reported in 2019 (367) ELT A246 (S.C.) and Circular No.1027/15/2016-CX dated 15.04.2016. It was held that merely because a good satisfies the test of being marketed and saleable, it does not mean that the test of being manufactured has also been satisfied. Accordingly, it was held that the conditions contemplated under Section 2 (d) and Section 2 (f) have to be satisfied conjunctively in order to entail imposition of excise duty under Section 3 of the Central Excise Act, 1944. It is therefore, prayed that the impugned order is to be upheld.

4. Heard both the parties and considered the submissions.

5. We find that the issue has been settled by this Tribunal in the appellant's sister unit in 2019 (4) TMI 1458-CESTAT Kolkata, wherein this Tribunal has observed as under :

" 2. Brief facts of the case are that the Appellant is engaged in the manufacture and sale of Aluminium products classifiable under Chapter 76 of the First Schedule to the Central Excise Tariff Act, 1985. During the process of manufacture of Aluminium products, Aluminium dross and skimmings were generated and the same were cleared without payment of duty being waste products. Show Cause Notice dated 27.05.2009 for the period May 2008 to December 2008 were issued to the Appellant seeking recovery of the duty on clearance of Aluminium Dross on the ground that the same was excisable as Aluminium Dross was 'marketable' in terms of the explanation added to Section 2(d) of the Central Excise Act, 1944 (w.e.f. 10.05.2008). The demand in the Show Cause Notice was confirmed by the Adjudicating Authority vide Order-in-Original dated 10.11.2009 which confirmed the demand of ₹ 5,09,838/- as against excise duty of ₹ 5,83,357/- proposed in the Show Cause Notice. TheOrder-in-Original also imposed penalty of ₹ 1,25,000/- Appeal against the Order-in-Original was dismissed by the Ld. Commissioner (Appeals) vide Order-in-Appeal dated 28.01.2010. Hence, the present appeal before the Tribunal.

3. The Ld. Advocate appearing on behalf of the Appellant submitted that the issue involved in the present case has already been settled in favour of the Appellant by Hon'ble Bombay High Court, in the Appellant's own case-Hindalco Industries Ltd Vs. UOI reported as 2015 (315) ELT 10 (Bom.), wherein, it has been held that aluminium dross, not being a result of any process, is not covered within the definition of manufacture under Section 2(f) of the Central Excise Act, 1944.

The Ld. Advocate also submitted that the Hon'ble Supreme Court in the matter of Union of India & Ors. Vs. DSCL Sugar Ltd. 2015 (322) ELT 769 (S.C.), has held that waste product/residue, which itself is not the result of any process, cannot be treated as falling within the definition of Section 2(f) of the Act and in the absence of manufacture, there cannot be any excise duty.

4. It was further submitted that in view of the judgments in the case of M/s DSCL Sugar ltd. and M/s Hindalco Industries Ltd. (Supra), a CBEC Circular bearing No.1027/15/2016-CX, dated 25.04.2016 has been issued which has rescinded, inter alia earlier CBEC Circular No. 904/24/09-CX dated 28.10.09. The relevant part of the Circular is reproduced below for ready reference.

"Excisability of bagasse and similar other by-products or waste arising during the course of manufacture of an excisable product has been an issue under dispute. Following circulars/instruction have been issued from time to time on the subject:-

(a) Circular No.904/24/09-CX dated 28.10.2009 [2009 (243) ELT T9))

(b) Circular No.941/02/2011-CX, dated 14.02.2011 [2011 (264) ELT (T21)).

(c) Instruction F. No.17/02/2009-CX (Pt.), dated 12.11.2014 [2014 (309) ELT (T16)).

2. The issue came before the Hon'ble Supreme Court in a case of M/s Union of India and Ors Vs. M/s. DSCL Sugar Ltd. (2015-TIOL-240-SC-CX=2015 (322) ELT 769 (S.C.)). Dated 15.07.2015.

Hon'ble Supreme Court examined the issue and reaffirmed that bagasse is not a manufactured product. The Judgment applies to both periods, before and after the insertion of explanation in Section 2 (d) of the Central Excise Act, 1944 by the Finance Act, 2008. It may also be noted that Hon'ble High Court of Bombay in case of M/s Hindalco Industries Ltd. Vs. Union of India [2015 (315) E.L.T. 10 (Bom)) came to similar conclusion in relation to dross and skimming of aluminium, Zink or other non-ferrous metal.

3. In the light of the above dudgments, circulars of the Board on the subject viz, 904/24/09-CX, dated 28.10.2009, 941/02/2011-CX, dated 14.02.2011 and instruction issued vide F. No. 17/02/2009-CX (Pt.), dated 12.11.2014 have become non est and are hereby rescinded. Cases kept in Call Book on the above issue may be taken out and adjudicated"

6. Further, in their sister unit's case as reported in 2019 (8) TMI 1310-CESTAT Kolkata, again this Tribunal has observed as under :

> *"5. We find that the issue is no longer res integra. This Bench in the case of appellants themselves (supra) has held that :-*
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> > *"6. Thus, in view of the aforesaid orders of the Hon'ble Supreme Court and Hon'ble High Court of Bombay and also CBEC Circular No.1027/15/2016-CX, dated 25.04.2016, the issue now stands settled in favour of the Appellant as it becomes abundantly clear that Aluminium dross, being a waste product emerging during the manufacture of Aluminium products, cannot be subject to excise duty. Therefore, the impugned order is liable to be set aside."*

7. As the issue has been settled in favour of the respondent, therefore, we do not find any merit in the appeal filed by the Revenue. Accordingly, the same is dismissed.

(Operative part of the order was pronounced in the open court)

(Ashok Jindal)
Member (Judicial)

(K.Anpazhakan)
Member (Technical)

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