

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

EXCISE APPEAL NO: 819 OF 2012

[Arising out of Order-in-Appeal No: PI/RKS/32/2012 dated 6th March 2012
passed by the Commissioner of Central Excise (Appeals), Pune – I.]

Tata Motors Limited
Chinchwad, Pune – 411 019

...Appellant

versus

Commissioner of Central Excise
Pune – I
'F' Wing, 41A, ICE House, Sassoon Road
Opp: Wadia College, Pune - 411001

...Respondent

WITH

**EXCISE APPEAL NO: 862 OF 2012
AND
EXCISE CROSS-OBJECTION NO. 102 OF 2012**

[Arising out of Order-in-Appeal No: PI/RKS/32/2012 dated 6th March 2012
passed by the Commissioner of Central Excise (Appeals), Pune – I.]

Commissioner of Central Excise
Pune – I
'F' Wing, 41A, ICE House, Sassoon Road
Opp: Wadia College, Pune - 411001

...Appellant

versus

Tata Motors Limited
Chinchwad, Pune – 411 019

...Respondent

APPEARANCE:

Ms Payal Nahar, Advocate for the assessee-appellant

Shri N N Prabhudesai, Superintendent (AR) for the Revenue

CORAM:

**HON'BLE MR RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)**

FINAL ORDER NO: A / 87108-87109/2021

DATE OF HEARING:	03/11/2021
DATE OF DECISION:	09/11/2021

PER: RAMESH NAIR

The issue involved in the present case is that whether the aluminium dross and skimming arising out of the manufacture of aluminium motor vehicle parts amounts to manufacture and liable to duty or otherwise. By the impugned order, Learned Commissioner (Appeals) dropped the demand for the extended period against which Revenue filed appeal No. E/862/2012 and the assessee filed appeal No. E/819/2012 against confirmation of demand for the normal period.

2. Ms Payal Nahar, Learned Counsel appearing on behalf of the appellant, submits that the demand was confirmed invoking explanation to section 2(d) of Central Excise Act, 1944 which was inserted with effect from 01/05/2008 on the allegation that aluminium dross is excisable goods, therefore, liable to duty. She submits that the issue, even after considering the amended provision under Section 2(d) of Central Excise Act, 1944, various judgments have been passed whereby it was held that

aluminium dross and skimming are not liable to duty. She relies upon the following judgments.

- i. *Hindalco Industries Limited v. Union of India* [2015 (315) ELT 10 (Bom.) affirmed by apex Court reported at [2019 (367) ELT A246]
- ii. *Balrampur Chini Mills Ltd v. Union of India* [2014 (300) ELT 371 (All.)]
- iii. *Union of India v. DFSC Sugar Ltd* [2015 (322) ELT 769 (SC)]
- iv. *Hindalco Industries Ltd v. Commissioner of Central Excise, BBSR-II* [2019 (4) TMI 1458 – CESTAT KOLKATA]
- v. *Honda Motorcycle & Scooter India Pvt Ltd v. Commissioner of Central Excise, Gurgaon* [2017 (3) TMI 638 – CESTAT CHANDIGARH]
- vi. *KEC International Ltd v. Commissioner of Central Excise, Nagpur* [2016 (342) ELT 418 (Tri.-Mumbai)]

3. Learned Authorised Representative Shri N N Prabhudesai reiterates the findings in the impugned order.

4. We have carefully considered the submissions of both sides and perused the records. Revenue's contention is based only on

explanation inserted to section 2(d) of Central Excise Act, 1944 whereby it was interpreted that as per this amendment any product arising in the course of manufacture would be liable to duty. We find that there is no dispute prior to 2008 amendment. In the various judgments even after considering the amendment section 2(d) to Central Excise Act, 1944 it was held that no duty liability arise on the aluminium dross skimming generated unavoidably during the manufacture of aluminium products. The said judgments and relevant orders are reproduced below:

5. In *Hindalco Industries Ltd (supra)* it was held

“19. Mr. Sridharan then placed reliance upon the Judgment of the Hon'ble Supreme Court in the case of *Commissioner of Central Excise v. Tata Iron and Steel Co. Ltd.* (supra). There, again the Hon'ble Supreme Court was required to examine the issue as to whether zinc dross, flux skimming and zinc scallings arising as by-product during galvanization of steel sheets are excisable goods. In that regard, paras 9, 10, 14 and 16 of this decision are relevant. They read as under :

“9. According to the Department, prior to 1-3-1988 as per Chapter Note 3 of Chapter 26 ash and residue other than dross and ash of zinc containing metals or metallic compounds applies only to the ash and residue of a kind used in industry either for the extraction of metal or as a basis for the manufacture of chemical compound of metal. This chapter note was subsequently amended w.e.f. 1-3-1988 by omitting the words “other than dross and ash of zinc containing metals or metallic compounds”. Thus, prior to 1-3-1988 the said dross and ash of zinc containing metals or metallic compound were classifiable under 7902 and subsequent to 1-3-1988 the said product got classified under sub-heading 26.20.

10. Here also a show cause notice was issued and the Assistant Commissioner rejected the refund claim holding that the ash cleared by the noticee (assessee) contains metals and oxide of zinc and the same is also used for the extraction of metal as a basis for the manufacture of chemical compounds of metal and they are marketable and also answer of the description of chapter heading.

Therefore, they contended that the same is correctly classifiable under Chapter Heading No. 26.20 of the Central Excise Tariff Act, 1985. The assessee's appeal before the Commissioner was also rejected and the further appeal by the assessee before the CEGAT was allowed relying on the judgment of this Court in *Indian Aluminium Co. Ltd.* (supra). The Tribunal, following the judgment of this Court, categorically held that zinc dross and zinc scalling are not goods, hence not excisable.

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14. On the above pleadings and of the arguments, the following questions of law may arise for determination of this Court.

The issue which arises for consideration is that whether zinc dross and flux skimming arising during galvanisation of steel sheets are goods within the meaning of the Central Excise Act, 1944 and are liable to central excise duty as classified by the Revenue.

OR

Whether zinc dross and flux skimming are waste products in the process of galvanisation of steel sheets and are not goods under the Central Excise Act, 1944 as claimed by the assessee.

.....

16. We are of the opinion that the dross and skimming are merely the refuse, scum or rubbish thrown in the process of manufacture of aluminium sheets and, therefore, cannot be said the result of treatment, labour or manipulation whereby a new and different article emerges with a distinctive name, character or use which can ordinarily come to the market to be brought and sold. Merely because such refuse or scum may fetch some price in the market does not justify it being called a by-product, much less an end-product or a finished product."

20. The Hon'ble Supreme Court finally in para 22 agrees with its earlier view in the case of *Indian Aluminium Co. Ltd.* (supra). and holds that merely selling does not mean dross and skimming are marketable commodity as even rubbish can be sold. Everything which is sold is not necessarily a marketable commodity as known to commerce and which it may be worthwhile to trade in. The issue involved is governed by the past decisions of the Tribunal and also of the Supreme Court. Thus, it agrees with its earlier Judgments. Thereafter, the Hon'ble Supreme Court was required to consider this issue and as already referred by us in the case of *Commissioner of Central Excise v. Indian Aluminium Co. Ltd.* reported in 2006 (203) ELT 3 (SC). Finally, in the case of *Grasim Industries Ltd.* (supra), the Hon'ble Supreme Court referred to all the amendments including the insertion of the Explanation and on noticing the issue before it, proceeded to hold as under :

"7. We have heard the learned counsel for the parties. In the present case, the assessee had undertook repair and maintenance work of his worn out old machinery or parts of the cement manufacturing plant for the period between 1995 to 1999. The assessee repaired machinery or capital goods such as damaged roller, shafts and coupling by using welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams etc. In this process of repair and maintenance, M.S. Scrap and Iron Scrap were generated in the workshop. It is not in dispute that these M.S. Scrap and Iron Scrap were excisable goods under Section 2(d) of the Act falling under the Chapter Heading 72.04 in the Schedule to the Tariff Act read with Note 8(a) to Section XV of the Tariff Act as 'metal scrap and waste'. We are of the opinion that Section Note has very limited purpose of extending coverage to the particular items to the relevant tariff entry in the Schedule for determining the applicable rate of duty and it cannot be readily construed to have any deeming effect in relation to

the process of manufacture as contemplated by Section 2(f) of the Act, unless expressly mentioned in the said Section Note. In *Shyam Oil Cake Ltd. v. CCE*, (2005) 1 SCC 264 = 2004 (174) ELT 145 (SC), this Court has held :

“16. Thus, the amended definition enlarges the scope of manufacture by roping in process which may or may not strictly amount to manufacture provided those processes are specified in the section or chapter notes of the tariff schedule as amounting to manufacture. It is clear that the legislature realised that it was not possible to put in an exhaustive list of various processes but that some methodology was required for declaring that a particular process amounted to manufacture. The language of the amended Section 2(f) indicates that what is required is not just specification of the goods but a specification of the process and a declaration that the same amounts to manufacture. Of course, the specification must be in relation to any goods.

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23. We are in agreement with the submission that under the amended definition, which is an inclusive definition, it is not necessary that only in the section or chapter note it must be specified that a particular process amounts to manufacture. It may be open to so specify even in the tariff item. However, either in the section or chapter note or in the tariff entry it must be specified that the process amounts to manufacture. Merely setting out a process in the tariff entry would not be sufficient. If the process is indicated in the tariff entry, without specifying that the same amounts to manufacture, then the indication of the process is merely for the purposes of identifying the product and the rate which is applicable to that product. In other words, for a deeming provision to come into play it must be specifically stated that a particular process amounts to manufacture. In the absence of it being so specified the commodity would not become excisable merely because a separate tariff item exists in respect of that commodity.”

8. The goods have to satisfy the test of being produced or manufactured in India. It is settled law that excise duty is a duty levied on manufacture of goods. Unless goods are manufactured in India, they cannot be subjected to payment of excise duty. Simply because a particular item is mentioned in the First Schedule, it cannot become exigible to excise duty. [See *Hyderabad Industries Ltd. v. Union of India*, (1995) 5 SC 338 = 1995 (78) ELT 641 (SC), *Moti Laminates (P) Ltd. v. CCE* (1995) 3 SCC 23 = 1995 (76) ELT 241 (S.C.), *CCE v. Wimco Ltd.* (2007) 8 SCC 412 = 2007 (217)

E.L.T. 3 (S.C.)]. Therefore, both on authority and on principle, for being excisable to excise duty, goods must satisfy the test of being produced or manufactured in India. In our opinion, the charging Section 3 of the Act comes into play only when the goods are excisable goods under Section 2(d) of the Act falling under any of the tariff entry in the Schedule to the Tariff Act and are manufactured goods in the terms of Section 2(f) of the Act. Therefore, the conditions contemplated under Section 2(d) and Section 2(f) has to be satisfied conjunctively in order to entail imposition of excise duty under Section 3 of the Act. The manufacture in terms of Section 2(f) includes any process incidental or ancillary to the completion of the manufactured product. This 'any process' can be a process in manufacture or process in relation to manufacture of the end product, which involves bringing some kind of change to the raw material at various stages by different operations. The process in manufacture must have the effect of bringing change or transformation in the raw material and this should also lead to creation of any new or distinct and excisable product. The process in relation to manufacture means a process which is so integrally connected to the manufacturing of the end product without which, the manufacture of the end product would be impossible or commercially inexpedient. This Court has in several decisions starting from *Tungabhadra Industries v. CTO*, AIR 1961 SC 412, *Union of India v. Delhi Cloth & General Mills Co. Ltd.*, AIR 1963 SC 791 = 1977 (1) E.L.T. J199 (S.C.), *South Bihar Sugar Mills Ltd. v. Union of India*, AIR 1968 SC 922 = 1978 (2) E.L.T. J336 (S.C.) and in line of other decisions has explained the meaning of the word 'manufacture' thus :

"14. The Act charges duty on manufacture of goods. The word 'manufacture' implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use."

.....

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.”

21. We do not see how, in the light of these authoritative pronouncements of the Hon'ble Supreme Court, can the Tribunal take a different view. When the Hon'ble Supreme Court holds and as in *Grasim Industries Ltd.* (supra) 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 Act, then, we cannot agree with the Tribunal. The Larger Bench decision does not take into account the fact that the authoritative pronouncement by the Supreme Court and repeatedly rendered is binding on it. That is law declared under Articles 141 of the Constitution of India. That it is rendered in the case of identical issues, controversy and the Assessee makes these Judgments of the Supreme Court all the more binding. Their binding effect is not lost merely because the Tribunal has another occasion to consider the issue or another shade of the same controversy. So long as there are Supreme Court Judgments in the field, we do not see how the Revenue could have proceeded to disregard them.

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) ELT 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.

24. We had called upon Mr. Sethna to take instructions from the Department as to why the Department cannot, in the light of these authoritative pronouncements, enable the Tribunal to deal with the matter afresh. However, Mr. Sethna,

on instructions, states that the legal position and which has been consistently applied and followed by the Revenue is analysed in the Circular. That having already been issued, the Board finds it unable to agree to any contrary suggestion. It is only thereafter that we are called upon to decide the matter. It is only to enable Mr. Sethna to take such instructions that the Judgment was not pronounced immediately. However, finding that the matter stands completely covered by the Judgments of the Hon'ble Supreme Court and which have been totally disregarded by the Tribunal that we are unable to sustain and uphold its conclusions. The impugned order can be safely termed as perverse and vitiated by an error of law apparent on the face of the record. The Tribunal has reached a conclusion, which, no reasonable person in the position and as an adjudicating body could have reached. Its order passed on 19th August, 2014 and applied to the Petitioner's case is quashed and set aside.

25. The Rule is therefore, made absolute in terms of prayer clause (a). No order as to costs. All Circulars impugned in this Writ Petition and identical and brought to the notice of this Court would not therefore, survive after the legal position has been set out as above"

6. In *KEC International Ltd (supra)* it was held

"4. We have gone through the documents and the provisions of the Central Excise Act, 1944. We find that learned counsel was correct in stating that the issue is now squarely covered by the judgment of the Hon'ble High Court of Bombay in the case of *Hindalco Industries Ltd.* - 2015 (315) E.L.T. 10 (Bom.). Their Lordships were

considering the same issue after the Larger Bench of the Tribunal - 2014 (308) E.L.T. 472 - sought to hold that the duty liability on metal dross and skimming arises, Hon'ble High Court held that the judgment of the Larger Bench of the Tribunal is incorrect. The ratio of the issue is in Paragraph No. 21 of the judgment, Their Lordships held as under :-

"21. We do not see how, in the light of these authoritative pronouncements of the Hon'ble Supreme Court, can the Tribunal take a different view. When the Hon'ble Supreme Court holds and as in *Grasim Industries Ltd.* (supra) 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 Act, then, we cannot agree with the Tribunal. The Larger Bench decision does not take into account the fact that the authoritative pronouncement by the Supreme Court and repeatedly rendered is binding on it. That is law declared under Articles 141 of the Constitution of India. That it is rendered in the case of identical issues, controversy and the Assessee makes these Judgments of the Supreme Court all the more binding. Their binding effect is not lost merely because the Tribunal has another occasion to consider the issue or another shade of the same controversy. So long as there are Supreme Court Judgments in the field, we do not see how the Revenue could have proceeded to disregard them.

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."

5. In view of the foregoing, we hold that the impugned order is unsustainable and is liable to be set aside and we do so. The impugned order is set aside and the appeal is allowed."

7. In *Commissioner of Central Excise, Raipur v. Bharat Aluminium Co Ltd* [2015 (329) ELT 580 (Tri.Del.)]

"4. We have considered the submissions of both the sides and perused the records.

5. The only point of dispute in the present case is as to whether the aluminium dross and skimming arising in course of manufacture of aluminium products during the period of dispute would attract Central Excise duty. There is no dispute that Heading 2620 covers "Slag, ash and residue (other than from manufacture of iron and steel) containing mainly zinc, lead, copper, aluminium" and specifically covers aluminium dross. The dispute is only as to whether the same could be treated as marketable and, hence, excisable goods. We find Apex Court judgment in the case of *Union of India v. Indian Aluminium Co. Ltd.* (supra) has held that the dross and skimming of Aluminium neither goods nor marketable commodities and, hence, are not liable to Excise duty. Though Apex Court's judgment pertains to the period prior to 1986 when there was no specific entry in the Central Excise Tariff for dross and skimming of non-ferrous metal in the Central Excise Tariff and the such dross and skimming was sought to be taxed under Tariff Item 68 of the Central Excise Tariff, and during the period of dispute there was a specific Heading 2620 covering the dross and skimming of aluminium, just because a particular product is covered by a tariff entry, it would not imply that the

same is excisable, as for treating the goods as excisable the same must be “goods”, that is, the same must be marketable and the Apex Court in the abovementioned judgment, which is relied upon by the Commissioner (Appeals), has held that dross and skimming of aluminium are neither goods nor marketable. In our view this judgment of the Apex Court would be applicable to the present case also. As held by the Apex Court in the case of *CCE, Patna v. Tata Iron & Steel Co. Ltd.* reported in 2004 (165) E.L.T. 386 (S.C.) for treating the product as marketable, what is relevant is as to whether there is existence of market for it and the product is known to commence as marketable commodity and merely that some waste or by-product is sold, this cannot be treated as evidence of marketability. In this case, no such evidence of existence of market for aluminium dross and skimming, like prices of this item being quoted in commercial journals and newspapers, existence of persons selling this product or e-commerce websites for sale of aluminium dross and skimming, etc., has been produced. We also find Hon'ble Bombay High Court in the case of *Hindalco Industries Ltd. v. CCE, Belapur, Mumbai-III* (supra) has reversed the finding of the Larger Bench judgment of the Tribunal in the same case that during the period w.e.f. 10-5-2008 the aluminium dross and skimming were excisable. In view of this judgment also the finding of the Commissioner (Appeals) that the goods, in question, are not excisable cannot be assailed.

5. There is one more reason why the impugned order is correct. In terms of Chapter Note 3 to Chapter 26 of the Tariff, Heading 26.20 applies only to that ash and residue which are used in the industry for extraction of metal or as starting material for manufacture of metal compounds. Such ash and residues would, obviously, be marketable as there would be demand for the same from metal extraction and chemical industry. But in this regard, no evidence in form of evidence of end use of the dross for

extraction of aluminium or for manufacture of aluminium compound has been produced. Therefore, the dross and residues, in question, is not covered by 2620.

6. In view of the above discussion, we do not find merits in the Revenue's appeal. The same is dismissed

8. In view of above judgments particularly in the case of *Hindalco Industries Ltd* which was upheld by the Hon'ble Supreme Court, the issue is no longer *res integra*. Hence the generation of aluminium dross and skimming in the manufacture of aluminium castings/parts of motor vehicles does not amount to manufacture. Accordingly, it is not liable to duty.

9. Hence following the above judgments we set aside the demand on merits. Since the issue itself is not sustainable on merits, Revenue's appeal, which is on time-bar will also not sustain. Accordingly, the impugned order stands modified. The assessee's appeal is allowed and Revenue's appeal is dismissed. Cross-objections are also disposed off.

(Pronounced in Open Court on 09/11/2021)

(C J Mathew)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

*/as