

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

WEST ZONAL BENCH

EXCISE APPEAL NO: 165 OF 2011

[Arising out of Order-in-Original No: Belapur/25-26/Tal/R-III/COMMR/SLM/10-11 dated 20th October 2010 passed by the Commissioner of Central Excise, Belapur.]

Hindalco Industries Ltd
Post Box No. 5,MIDC, Taloja, Dist: Raigad - 410208 *... Appellant*

versus

Commissioner of Central Excise
CGO Complex, CBD Belapur, Navi Mumbai - 400614 *...Respondent*

WITH

EXCISE APPEAL NO: 1120 OF 2012

[Arising out of Order-in-Appeal No: BC/04/BEL/12-13 dated 19th April 2012 passed by the Commissioner of Central Excise (Appeals), Belapur.]

Hindalco Industries Ltd
Plot No. 5,MIDC, Taloja, Dist: Raigad - 410208 *... Appellant*

versus

Commissioner of Central Excise
CGO Complex, CBD Belapur, Navi Mumbai - 400614 *...Respondent*

AND

EXCISE APPEAL NO: 85751 OF 2013

[Arising out of Order-in-Appeal No: PVR/271/NGP/2012 dated 31st December 2012 passed by the Commissioner of Central Excise & Customs (Appeals), Nagpur.]

Hindalco Industries Ltd
Ramtek Road, Vill: Dahali, Tal: Mauda,
Dist: Nagpur - 410208

... Appellant

versus

Commissioner of Central Excise
Telangkhedi Road, Civil Lines, Nagpur - 440001

...Respondent

AND

EXCISE APPEAL NO: 87523 OF 2013

[Arising out of Order-in-Original No: Belapur/92-93/Tal/R-III/COMMR/KA/12-13 dated 25th March 2013 passed by the Commissioner of Central Excise, Belapur.]

Hindalco Industries Ltd
Post Box No. 5, MIDC, Taloja, Dist: Raigad - 410208

... Appellant

Versus

Commissioner of Central Excise
CGO Complex, CBD Belapur, Navi Mumbai - 400614

...Respondent

APPEARANCE:

Ms Payal Nagar, Advocate for the appellant

Ms Anuradha Parab, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 86194-86197 /2022

DATE OF HEARING:	10/06/2022
DATE OF DECISION:	09/12/2022

PER: C J MATHEW

These appeals of M/s Hindalco Industries Ltd arise from order-

in-original no. Belapur/25-26/Tal/R-III/COMMR/SLM/10-11 dated 20th October 2010 of Commissioner of Central Excise, Belapur, order-in-appeal no. BC/04/BEL/12-13 dated 19th April 2012 of Commissioner of Central Excise (Appeals), Belapur, order-in-appeal no. PVR/271/NGP/2012 dated 31st December 2012 of Commissioner of Central Excise & Customs (Appeals), Nagpur and order-in-original no. Belapur/92-93/Tal/R-III/COMMR/KA/12-13 dated 25th March 2013 of Commissioner of Central Excise, Belapur which were the culmination of proceedings initiated for clearance of 'aluminium dross and skimming', emerging during the process of manufacture of 'aluminium coil/sheets', for recovery of duty at rate corresponding to tariff item 2620 4010 of Schedule to Central Excise Tariff Act, 1985. Accordingly ` 85,47,008/- was ordered to be recovered for the period from 10<sup>th</sup> May 2008 to 30<sup>th</sup> January 2009 and ` 30,15,825/- for the period from 1st February 2009 to 30th September 2009 under section 11A of Central Excise Act, 1944, along with appropriate interest under section 11B of Central Excise Act, 1944, besides imposition of penalties of like amount under rule 25 of Central Excise Rules, 2002. Furthermore, recovery of ` 86,17,224/- for October 2009 to December 2010, ` 50,00,545/- for the period from January 2011 to 30th June 2011 and ` 56,13,021/- for the period from 1st July 2011 to 31st December 2011 in connection with clearance at the Taloja unit, and, in relation to the Dahali plant for the period from May 2006 to July

2010, recovery of ` 34,86,226/- ordered are challenged by impugning order-in-original no. Belapur/92-93/Tal/R-III/COMMR/KA/12-13 dated 25th March 2013 of Commissioner of Central Excise, Belapur for the demand pertaining to 2011 and order-in-appeal no. BC/04/BEL/12-13 dated 19th April 2012 of Commissioner of Central Excise (Appeals), Belapur and order-in-appeal no. PVR/271/NGP/2012 dated 31st December 2011 for the clearance at Taloja plant and Daheli plant.

2. Learned Counsel for appellant submits that the issue of whether ‘aluminium dross and skimming’ arising in the course of manufacture is excisable after 10th May 2008 had come up before a Larger Bench of the Tribunal and taxability decided therein was overruled by the Hon’ble High Court of Bombay in *Hindalco Industries Ltd v. Union of India* [2015 (315) ELT 10 (Bom.)].

3. We have heard Learned Authorised Representative who has reiterated the impugned order.

4. It is seen from the decision of the Hon’ble High Court of Bombay in *re Hindalco Industries Ltd* that dutiability of the impugned goods, which had been held by the Tribunal to be excisable even after the amendment inserting

‘Explanation - For the purposes of this clause, “goods” includes any article, material or substance which is capable

of being bought and sold for a consideration and such goods shall be deemed to be marketable.”

in section 2(d) of Central Excise Act, 1944 with effect from 10th May 2008, did not find favour in the light of several decisions and it was held that

‘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.'

5. In the light of the decision of the Hon'ble High Court of Bombay in their own matter on the very same impugned goods, which was affirmed by the Hon'ble Supreme Court in *Union of India v. Hindalco Industries Limited - 2019 (367) ELT A246 (SC)*] holding that

"In view of the decision in Union of India v. DSCL Sugar Ltd., 2015 (322) E.L.T. 769 (S.C.), nothing survives for consideration in these Special Leave Petitions and the Civil Appeal. The Special Leave Petitions and the Civil Appeal are dismissed accordingly."

the impugned orders do not survive and accordingly are set aside to allow the appeals.

(Order pronounced in the open court on 09/12/2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)