CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

MUMBAI

REGIONAL BENCH

Excise Appeal No. 87066 of 2013

(Arising out of Order-in-Appeal No. BR/(117)/TH-I/2013dated 13.02.2013passed by the Commissioner ofCentral Excise(Appeals), Mumbai Zone-I.)

M/s. JSW Steel Ltd. ....Appellant

Village-Vasind,

Tal. Shahapur, Thane – 400 601.

VERSUS

Commissioner ofCentral Excise, Thane-I ....Respondent

4th Floor, Navprabhat Chambers,

Ranade Road, Dadar (West),

Mumbai – 400 028.

APPERANCE

Shri Sachin Chitnis, Advocate for the Appellant

Shri P. K. Acharya, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85850/2023

Date of Hearing:21.04.2023

Date of Decision:21.04.2023

PER: BENCH

This appeal is directed against Order-in-Appeal no. BR/(117)/TH-I/2013 dated 13.02.2013. By the Impugned order Commissioner (Appeals) has rejected the appeal filed by the appellant against Order-in-Original No. BR/117/Th-I/2013 dated 13.02.2013 holding as follows:

(i) *I confirm the demand of Rs. 23,38,602/-{(Rupees Twenty three Lakhs Thirty Eight Thousand Six Hundred Two Only) (Basic Rs. 2276088 + Ed Cess Rs. 45522 +H. S. Edu. Rs. 16992)} and order recovery of the same from M/s JSW Ltd. under proviso to sub section (1) of section 11A.,*

(ii) *I order for recovery of interest from them at appropriate rate on the confirmed duty amount of Rs. 23,38,602/- (Rupees Twenty Three Lakhs Thirty Eight Thousand Six Hundred Two only) under Section 11AB of the Central Excise Act, 1944.*

(iii) *I impose a penalty of Rs. 23,38,602/- (Rupees Twenty three Lakhs Thirty Eight Thousand Six Hundred Two Only) on M/s JSW Ltd., under Section 11AC {now 11AC(1)(a)} of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002.*

(iv) *In case M/s JSW Steel Ltd., opt to pay the Central Excise duty as confirmed against sr.no.(i) above alongwith entire interest ordered at sr.no.(ii) within 30 (thirty) days from the date of communication of this order, the amount of penalty liable to be paid by M/S JSW Steel Ltd., under Section 11AC of the Central Excise Act, 1944 shall be 25% (twenty five percent) of the demand confirmed in para (i) above. The 11AC of the said Act shall be available only if the amount of penalty so imposed is also paid within the period of 30(thirty) days from the date of communication of this order.*

2.1 Appellants are manufacturer of excisable goods under Chapter 32 & 33 Central Excise Tariff Act 1985, availing Cenvat Credit facility in respect of duty paid on input capital goods and every tax paid on input services.

2.2 During course of manufacture ofvarious product certain product i.e. Mills Scaleemerges which has been cleared by the appellant about payment of Central Excise duty for period from April, 2006 to August, 2010. It was also observed that these goods were not reflected in the monthly ER-1 return filed by the appellant.A show cause notice was issued on 21.04.2019 was issued to the appellant asking them to show cause as to why:-

(a) The Central Excise duty of Rs. 23,38,602 (Rupees Twenty three Lakhs Thirty Eight Thousand six Hundred two Only) (Basic Rs. 2276088 + Ed Cess Rs. 45522 +H. S. Edu. Rs. 16992) as detailed in Annexure "A" to this notice should not be demanded and recovered from them under proviso to Sub-section (1) of Section 11A of the Central Excise Act, 1944.

(b) Interest of applicable rate payable on the said duty amount should not be levied and recovered from them under Section 11AB of Central Excise Act, 1944.

(c) Penalty should not be imposed upon them, under Section 11AC of Central Excise Act, 1944

(d) Penalty should not be imposed upon them under Rule 25 of Central Excise Rules, 2002.

2.3 Show cause notice was adjudicated by learned Additional Commissioner as per Order-in-Original referred in para 1 above and upheld by the Commissioner (Appeals) filed the impugned order. Hence this appeal.

3.1 We have heard Shri. Sachin Chitnis, Advocate for the Appellant &Shri P. K. Acharya, Superintendent, Authorized Representative for the Revenue.

3.2 Arguing for the appellant Learned Counsel submits that:

- ‘Mill Scale’ is inevitable waste/scrap that arisen during the course of manufacture offinal product. They have not setup any unit for intentionally manufacturing or selling or clearing these goods. It has been settled under by various decisions as follows:

- Tata Iron & Steel Co. Ltd.-2004(165)ELT 386 (SC)
- Indian Aluminium Co. Ltd.- 1995 (77) ELT 268 (SC)

This waste even if cleared against the commercial transaction should not be subjected to Excise duty.

- Commissioner (Appeals) while deciding the issue relied on CBEC Board Circular No. 904/24/2009-Cx, dated 28.10.2009, which has been withdrawn by CBIC Circular No. 1027/15/2016-Cx. dated 25.04.2016.

3.3 Learned Authorised Representative reiterates the findings recorded in the impugned order and submits that issue needs to be considered in light of following decisions:

- M*/s. BHEL Vs. Commissioner of Central Excise, Trichy*reported in *1999 (113) E.L.T. 606 (Tribunal).*
- Commissioner of Customs, Central Excise and Service Tax, Hyderabad-ii Vs Reactive Metals of India Pvt Ltd. [2018-TIOL-455-CESTAT-Hyd]
- Adhunik Power Transmission Ltd Vs Commissioner Central Excise & Service Tax, Jamshedpur [2015-TIOL-3095-HC-JHARKHAND-CX]

4.1 We have considered the impugned order alongwith the submissions made in the appeal and during the course of arguments.

4.2 Impugned order records as follows for confirming the demand made:

'*I have carefully gone through the case records and considered the averments made in the appeal memorandum and also relevant provisions of law relating to subject matters. Present issue to be decided in this case is whether the appellant is liable to pay Central Excise duty on sale of "Mill Scale' falling under Chapter Sub Heading No. 2619.00 of the Central Excise Tariff Act, 1985. It is observed appellant are engaged in the manufacture of excisable goods falling under Chapter 72 and 73 of the Central Excise Tariff Act. 1985. To manufacture these products appellant are using different raw materials on which they are availing Cenvat credit under Cenvat Credit Rules, 2004. During the manufacture of finished goods different waste and scraps are* *generated as in normal course of manufacture of any product. In the present case 'Mill Scale' comes into existence while sprinkling of water over heated M.S. Slab coming out of furnace in the course of manufacture of final products. These 'Mill Scale' are specifically covered under Chapter Sub Heading No. 2619.00 of the Central Excise Tariff Act, 1985. These were sold by the appellant to the customers for monetary consideration, but these were cleared without accounting for in the specified records, without mentioning in the monthly return filed in Form ER1 and without payment of Central Excise duty amongst others.*

(5) Chapter Sub Heading No. 2619.00 of the Central Excise Tariff Act, 1985 states that:

2619	*Slag, Dross (other than Granulated Slag), Scalings and other Waste from the Manufacture of Iron or Steel*
261900	*Slag, dross (other than granulated slag), scalings and other waste from the manufacture of iron or steel:*
2619 00 10	*Converted slag (scull) of blast furnace*
2619.00 90	*Other*

There is no dispute that the 'Mill Scale' that came into existence during the manufacture of finished goods in the present case is specifically covered above. Chapter Sub Heading No. 2619.00 of the Central Excise Tariff Act, 1985 specifically states and covers the Slag, Dross (other than Granulated Slag), Scalings and other Waste that arises during or from the manufacture of Iron or Steel. As per HSN Note to Chapter Sub Heading No. 2619.00 amongst others,

"Scalings are chips of iron oxide which result from the forging, hot rolling etc. of iron or steel.

The heading also includes dust from blast furnaces and other kinds of waste resulting from the manufacture of iron and steel".

Therefore, there is no dispute that these are specifically covered under the said heading and are chargeable to Central Excise duty. 'Mill Scale' is scaling and are therefore, specifically covered under Chapter Sub Heading No. 2619.00 of the Central Excise Tariff Act, *1985 mentioned above. Scaling means 'Climbing', 'Scrabbling', 'Scrambling', 'Clambering'. 'Mounting', 'Surmounting'. 'Topping' etc. Hon'ble CESTAT in the case of B.H.E.L. vs Collector of Central Excise, Trichy reported in 1999 (113) ELT 606 (Tri-Del) held that:*

"we find that this mill scale is nothing but a thick layer of oxide formed due to high temperature, as such ***this mill scale cannot be called as 'waste and scrap' of steel of the type covered by 7204.90. Chapter Heading 26.19 of the Central Excise Tariff specifically includes*** *materials like slag, dross and scaling, and the* ***mill scale generated in the manufacture of seemless steel tubes is nothing different from the scaling covered under this chapter"****. (Emphasis Supplied).*

There is no dispute that 'Mill Scale' in the present case are therefore, specifically covered under Chapter Sub Heading No. 2619.00 of the Central Excise Tariff Act, 1985 mentioned above. Duty becomes payable at the effective rate of duty applicable to 'Mill Scale'. Further, the respondent has discussed this issue in detail including about its utility, use and that these products are also exported. The same is therefore, applicable. Since, the 'Mill Scale' are sold by the appellants for consideration, there cannot be any dispute about its marketability and duty becomes payable on it.

(7) Section 2(f) of the Central Excise Act, 1944 defines 'manufacture' as

(f) "Manufacture" includes any process, -

(i) Incidental or ancillary to the completion of a manufactured product;

(ii) Which is specified in relation to any goods in the Section or Chapter notes of [the First Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to [manufacture; or]

(iii) Which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer,]

and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account".

It is very clear from the above that the definition "manufacture" includes any process, incidental or ancillary to the completion of a manufactured product. It is not under dispute that the appellants are engaged in the manufacture of excisable goods falling under Chapter 72 and 73 of the Central Excise Tariff Act, 1985 and to manufacture the same different raw materials are used on which they had taken Cenvat credit. The scaling ('Mill Scale') aroused while working on these different raw materials in order to manufacture the finished goods. Therefore, these activities carried out by the appellant are specifically covered under the definition of "manufacture" that includes any process, incidental or ancillary to the completion of a manufactured product. They are liable to pay the Central Excise duty as confirmed by the respondents under Section 11A of the Central Excise Act, 1944.

(8) Section 2(d) of the Central Excise Act, 1944 defines 'excisable goods' as

"(d) "excisable goods" means goods specified in [[the First Schedule and the Second Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986)] as being subject to a duty of excise and includes salt;

*[**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".** (Emphasis Supplied).*

The explanation was inserted by amendment in the Budget, 2008 / Finance Act, 2008. As per the amended definition of excisable goods, duty becomes payable on the above mentioned goods. It is quite clear from the above definition that 'excisable goods' includes any article, material or substance which is capable of being bought and sold for a consideration. Therefore, to consider any goods as 'excisable goods' it can be any article, material or substance and it should be capable of being bought and sold for a *consideration. The same is only clarificatory in nature. The 'Mill Scale' sold by the appellants clearly fulfils this condition. These are specifically covered under Chapter Heading No. 2619.00 of the Central Excise Tariff Act, 1985. Therefore, these are 'excisable goods' and Central Excise duty is required to be paid on them.*

(10) CBEC vide Circular No. 904/24/2009-CX. dated 28-10-2009 issued under F.No. 17/02/2009-CX on the subject "Clarification regarding excisability of Bagasse, Aluminium/Zinc Dross and other such products termed as waste or residue or refuse arising during the course of manufacture Regarding." clarified that

"Generally, the courts have been taking a view that the waste or refuse or residue arising during the course of manufacture cannot be treated as excisable goods even if such waste fetches some price in the market. However, all these matters pertain to the period prior to 2008."

In the budget of 2008, the definition of "excisable goods" in clause (d) of Section 2 of the Central Excise Act, 1944 was amended by adding an explanation that for the purposes of this clause, "goods" include 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.

It is clarified that with this amendment in Section 2(d), the bagasse, aluminium/zinc dross and other such products termed as waste, residue or refuse which arise during the course of manufacture and are capable of being sold for consideration would be excisable goods and chargeable to payment of Excise duty.

Field formations are advised to take suitable action for ensuring recovery of duty from the assessees in respect of these goods for the period after the budget of 2008. It is further clarified that in case the rate of duty in respect of such products is Nil in the tariff or they are exempt from duty in terms of any exemption notification, and if Cenvat Credit has been taken on the inputs which are used for manufacture of dutiable and exempted goods, then in terms of Rule 6 of Cenvat Credit Rules, 2004, the assessee is required to reverse the proportionate credit or pay 5% amount".

4.3 The issue involved in the matter i.e. *"Whether duty can be demanded on the manufacturing waste arising during the course of manufacture even if the same is cleared for certain consideration"* is no longer *res-integra* and have been considered by this Tribunal time again. Vide Final Order No. A/86194-86197/2022 dated 09.12.2022. Tribunal has observed as follows:

"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.)] ***= 2014-TIOL-2266- HC-MUM-CX.***

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)* ***=2009-TIOL-786-HC-ALL-CX*** *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.) ***=2015-TIOL-240-SC-CX,*** *nothing survives for consideration in these Special Leave Petitions and the Civil Appeal. The Special Leave Petitions and the Civil Appeal are dismissed accordingly."*

5.2 We also note that the Circular of 2009 relied upon by the Commissioner (Appeals) in the impugned order has been withdrawn by the Board Circular No. 1027/15/2016-Cx dated 25.04.2016 on the relevant paragraphs. xxxxx

5.1 Accordingly, we do not find any merits in the impugned order and set aside the same. Appeal is allowed.

(Dictated &Pronounced in open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr.Suvendu Kumar Pati)
Member (Judicial)

Sujeet