

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
MUMBAI
REGIONAL BENCH**

Excise Appeal No. 1689 of 2012

[Arising out of Order-in-Appeal No. BK/8, 9 & 10/LTU/MUM/2012 dated 31.08.2012 passed by Commissioner of Central Excise & Service Tax (Appeals), Mumbai]

M/s. Ambuja Cements Ltd.

Elegant Business park, MIDC Cross Road 'B',
Off Andheri-Kurla Road, Andheri (East),
Mumbai-400 059.
Vs.

Appellant

**Commissioner of Central Excise & Service Tax
(Appeals), Mumbai**

Large Tax Payer Unit,
29th Floor, World Trade Centre, Cuffe Parade,
Mumbai-400 005.

Respondent

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**Commissioner of Central Excise & Service Tax
(Appeals), Mumbai**

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Mumbai-400 005.

Respondent

Appearance:

Shri Rajesh Ostwal, Advocate along with Ms. Hanisha Jatania, Chartered Accountant,
for the Appellant

Shri Sunil Kumar Katiyar, Assistant Commissioner, Authorized Representative for the
Respondent

CORAM:

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

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

Date of Hearing: 10.02.2023

Date of Decision: 10.02.2023

FINAL ORDER NO. A/85892-85893/2023

PER: SANJIV SRIVASTAVA

This appeal is directed against order-in-appeal no. BK/8, 9 & 10/LTU/MUM/2012 dated 31.08.2012. By the impugned order commissioner appeal has up held the order-in-original stated as follows:

'The appellants contention is that the waste and scrap of various items cleared by them are not dutiable on which they have not availed modvat /cenvat credit is not tenable as they have not put forth any documentary evidence to support their contentions. Further, it is noticed that judgement relied upon by them in the case of Gujarat Ambuja Cement Vis CCE Rajkot- 2004i. Del) which was relied upon in Prism Cement Ltd v/s. CCE x Bhopal, 2008 (232) ELT 564 (Tri. Del.) Principal Bench pertains to Waste & Scrap MS scrap, trimmings etc. generated during repairs and maintenance of works. Assessee was not involved in manufacture of Iron and Steel products, only in maintenance of repair work no credit taken on items used in such repair and maintenance. No duty leviable on ms Scrap, borings, trimmings etc. generated in repair and maintenance work Sec. 3 of C. Ex. Act, 1944 (Para 6) has been distinguished in Birla Construction Ltd. V/s. CCE Jaipur reported in 2011(266) ELT 275 (Tr. Del).'

2.1 Appellants are manufacturer of cement and avail Cenvat credit of duty paid on inputs & capital goods under Cenvat Credit Rules, 2004. During the disputed period appellant cleared scrap of TOR steel and waste & scrap of PP wrapper, PP/HDPE bags, scrap of grinding material & waste and scrap of cable & mixed waste and scrap.

2.2 Show cause notices were issued to the appellant remanding duty on clearance of various types of waste and scrap under Rule 3 (5A) of Cenvat Credit Rules, 2004.

2.3 The show cause notices were confirmed by the adjudicating authority and the appeals filed against the set order-in-original has been dismissed as Commissioner (Appeal).

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3.1 We have heard Shri Rajesh Ostwal, Advocate along with Ms. Hanisha Jatania, Chartered Accountant, for the Appellant and Shri Sunil Kumar Katiyar, Assistant Commissioner, Authorized Representative for the Respondent.

3.2 Arguing for Appellant Learned Council submits that:

- Contention obtaining that the scrap in dispute is capital goods. As the appellant have not cleared any capital goods as waste and scrap.
 - Show cause notice do not state as to this waste and scrap is the scrap of which capital goods and has not given any evidence to the effect of availment of Cenvat credit on the goods out of which the waste and scrap has been generated.
 - The impugned order of the Commissioner (Appeals) travels beyond this court. The show cause notice remanded duty by invoking Rule 3 (5A) of Cenvat Credit Rules, 2004 and adjudicating authority confirm the demand relying upon Central Excise Act, 1944. Commissioner (Appeals) up held the demand under Rule 3(5A) without making any observation on the findings recorded by the adjudicating authority. They rely on following decisions in their support:
 - CC Vs. Toyo Engineering India Limited- 2996 (201) ELT 513 (SC)
 - CCE Vs. Ballarpur Industries Ltd. – 2007 (215) ELT 489 (SC)
- The issue in the present case has been settled in their own case proceedings of decisions **CCE Vs. Ambuja Cements Ltd. – 2015 (2) TMI 1007-CESTAT MUMBAI** and **2015 (10) TMI 1781- CESTAT Mumbai.**
- Larsen & Toubro Ltd Vs. CCE – 2004 (173) ELT 515 (T)
 - Panasonic Carbon India Co. Ltd. Vs. CCE – 2007(213) ELT 391
 - Finolex Cables Ltd. Vs. CCE reported in 1998 (100) ELT 517 (T)
Affirmed in 2002 (146) ELT A100 (S.C)
 - CCE Vs. J.K. Industries reported in 2004 (164) ELT 332 (T)
 - Ahmedabad Electricity Co. Ltd., reported in 2003 (158) ELT 3 (SC)

3.5 Learned AR reiterates the findings recorded in the impugned order.

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4.1 We have considered the impugned order along with the submissions made during the course of arguments. We find that the issue is no longer *res-integra*. In the Appellant's own case the issue has been settled under the decisions referred by the Learned counsel. We reproduce the observations made in the decision of 2015 wherein following has been held:

'CCE Vs. Ambuja Cements Ltd. - 2015 (10) TMI 1781 - CESTAT MUMBAI

"5. The learned counsel for the respondent-assessee submitted that the waste and scrap of HDPE bags has not arisen during the manufacturing process and, therefore, there cannot be any duty liability on removal of such waste and scrap. The learned counsel further submitted that the PP wrapper is not used for packing the final product and is an outer packing in which HDPE bags are received and that the cement is packed in HDPE bags. The learned counsel has also submitted that the demand of duty on grinding media balls is also not sustainable, and that the grinding media is used in ball mill or grinding mills in the manufacture of cement and is eligible for credit as input. The learned counsel has relied upon the decision of the Hon'ble Supreme Court in the case of CCE v. West Coast Industrial Gases Ltd. reported in 2003 (155) E.L.T. 11 (S.C.).

6. I find that the issue is covered by the decision of the Hon'ble Supreme Court in the case of West Coast Industrial Gases Ltd. (supra) read with Board's Circular No. 721/37/2003- CX., dated 6-6-2003. Following the said decision of the Hon'ble Supreme Court and the circular, I dismiss the appeal of the Revenue."

4.2

In case of Panasonic Carbon India Co. Ltd. Vs. CCE – 2007(213) ELT 391 following has been held:

"1..... The learned Counsel submits that all these items are Waste and Scrap and are basically, not excisable. He submits that each of the item cleared is

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not dutiable as held by various judgments. He gave a list of the judgments in which each of the item cleared.

a) Drums, Containers, Barrels & HDPE bags in which inputs are received

(i) CBEC Circular Nos. 721/37/2003-CX, dated 6-6-2003 & 449/15/99-CX, dated 23-3-1999.

(ii) West Coast Industrial Gases Ltd. v. CCE [1999 (108) E.L.T. 383] affirmed by the Apex Court in CCE v. West Coast Industrial Gases Ltd. [2003 (155) E.L.T. 11 (S.C.)]

(iii) IOL Ltd. v. Collector [1993 (68) E.L.T. 624]

(iv) Castrol India Ltd. v. CCE [1998 (99) E.L.T. 234]

b) Fire Bricks and grinding wheels (capital goods) due to wear & tear

(i) Larsen & Toubro Ltd. v. CCE [2004 (173) E.L.T. 515]

(ii) CCE v. Birla Corporation [2005 (181) ELT. 263]

(iii) Birla Corporation v. CCE [2003 (162) ELT. 499]

c) Coal/Black Powder (Floor Sweepings)

(i) Union of India v. Ahmedabad Electricity Company Ltd. [2003 (158) E.L.T. 3 (S.C.)]

d) Waste and Scrap obtained in factory workshop during repair and maintenance

(i) Kumbhi Kasari SSK Ltd. v. CCE [2004 (173) E.L.T. 61]

(ii) A.C.C. Ltd. v. CCE [2001 (133) ELT, 375 (Tri.) 2001 (46) RLT 745]

(iii) HPCL v. CCE [2002 (144) ELT. 555 (Tri.) 2002 (52) RLT 688]

2. Heard the learned JDR in the matter.

3. On a careful consideration of the matter and on perusal of the judgments cited supra, we noticed that all the items which were cleared are not dutiable. They were cleared from the workshop of the factory as Waste and Scrap on account of its wear and tear. All the judgments cited supra are clearly applicable to the facts of the case. Respectfully following ratio of the cited

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judgments, the demand raised on waste and scrap is set aside by allowing the appeal with consequential relief."

4.3 Hon'ble supreme court in case of Ahmedabad Electrical Co. Ltd., reported in 2003 (158) ELT 3 (SC), which is held as under:

- *In Modi Rubber Ltd., Modi Nagar, U.P. and Anr. v. Union of India and Others [1987 (29) E.L.T. 502 (Del.)] it was held that waste/scrap obtained not by any process of manufacture but in the course of manufacturing the end product was not eligible to excise duty. This was a case of manufacture of tyres, tubes etc. In the course of manufacturing process to produce the end product i.e. tyres, tubes, flaps etc. waste was obtained in the shape of cuttings. It was held that this was not eligible to tax even though the waste may have some saleable value. The essential reason for this was that there was no transformation in the case of waste/scrap to a new and different article. No new substance having a distinct name, character and use was brought about. Manufacturing process involved treatment, labour or manipulation by the manufacturer resulting in a new and different article. It requires a deliberate skillful manipulation of the inputs or the raw materials. This was not so in case of scrap.*
- *From the above discussion it is clear that to be subjected to levy of excise duty 'excisable goods' must be produced or manufactured in India. For being produced and manufactured in India the raw material should have gone through the process of transformation into a new product by skilful manipulation. Excise duty is an incidence of manufacture and, therefore, it is essential that the product sought to be subjected to excise duty should have gone through the process of manufacture. Cinder cannot be said to have*

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gone through any process of manufacture; therefore, it cannot be subjected to levy of excise duty.

- *The onus to show that particular goods on which excise duty is sought to be levied have gone through the process of manufacture in India is on the revenue. They have done nothing to discharge this onus. For this reason alone, they must fail."*

5.1 In view of the above decisions we do not find any merits in the impugned order setting aside the same. Appeals are allowed.

(Order pronounced in the open court)

S. Srivastava
(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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