CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 89785 OF 2013

[Arising out of Order-in-Original No: Belapur/94-95/Taloja/R-III/COMMR/KA/ 2013-14 dated 30th September 2013 passed by the Commissioner of Central Excise, Belapur.]

Hindalco Industries Ltd
Post Bag No. 5, MIDC, Taloja, Dist: Raigad – 410 208 … ***Appellant***

versus

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

APPEARANCE:

Ms Payal Nahar, Advocate for the appellant

Shri Amrendra Kumar Jha, Deputy 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 / 87179/2023

DATE OF HEARING: 17/08/2023
DATE OF DECISION: 30/11/2023

PER: C J MATHEW

The issue for consideration in this appeal of M/s Hindalco Industries Ltd, a manufacturer of aluminum sheets and coils, is the leviability of duty under Central Excise Act, 1944 on ‘aluminum dross and skimming’ generated while processing ‘aluminum ingots’ in their facility. The order[1] of Commissioner of Central Excise & Customs, Belapur has confirmed demand of ₹ 55,54,467 and ₹ 71,67,294 for January 2012 to June 2012 and from July 2012 to December 2012 respectively by relying on the meaning assigned to ‘excisable goods’ after insertion of

> *‘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. Besides charging interest under section 11AA of Central Excise Act, 1944 on the duty ordered to be recovered under section 11A of Central Excise Act, 1944, penalty was also imposed under rule 25 of Central Excise Rules, 2002.

2. According to Learned Counsel for appellant, the oxidizing of top layer of molten aluminum by exposure to air upon heating of aluminum ingots in furnace causes a thin film to form which is manually removed and is nothing but a waste product. He submitted that though a Larger Bench of the Tribunal had, in *Hindalco Industries Ltd v. Commissioner of Central Excise, Belapur, Mumbai-*

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[1] [order-in-original no. Belapur/94-95/Taloja/R-III/COMMR/KA/ 2013-14 dated 30th September 2013]

III [2014 (308) ELT 472 (Tri-LB)] had held that the 'aluminum dross and skimming' are liable to duty, reversal of that decision by the Hon'ble High Court of Bombay in *Hindalco Industries Limited v. Union of India [2015 (315)ELT 10 (Bom)]* was affirmed by the Hon'ble Supreme Court in dismissing of the special leave petitions (SLP) of Revenue thus

> *'In view of the decision in Union of India v. DSCL Sugar Ltd [2015 (322) ELT 769 (SC)], nothing survives for consideration in these Special Leave Petitions and the Civil Appeal. The Special Leave Petitions and the Civil Appeal are dismissed accordingly.'*

It was further submitted that, relying on the aforesaid decisions, the Tribunal, in dispute for the period May 2008 to December 2011 at the Taloja unit and Daheli unit, had, in *Hindalco Industries Ltd v. Commissioner of Central Excise, Navi Mumbai and another [2022 (12) TMI 1295 –CESTAT MUMBAI]*, set aside the demands.

3. We have heard Learned Authorized Representative.

4. As the issue, dealt with in appeals carried upto the Hon'ble Supreme Court and noted by the Tribunal *in re Hindalco Industries Ltd* thus

> *'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.*
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> *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.'

has attained finality, we have no reason to uphold the impugned order.

5. Appeal is allowed by setting aside the impugned order.

(Order pronounced in the open court on 30/11/2023)

(AJAY SHARMA)	**(C J MATHEW)**
Member (Judicial)	***Member (Technical)***

**/as*