CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 85579 OF 2014

[Arising out of Order-in-Original No: PUN-EXCUS-001-COM-032-033-13-14 dated 20th November 2013 passed by the Commissioner of Central Excise, Pune – I.]

Finolex Cables Ltd
26-27 Mumbai-Pune Road, Pimpri, Pune – 411 018 … ***Appellant***

versus

Commissioner of Central Excise
Pune – I
41-A ICE House, Sassoon Road, Pune - 411001 ***…Respondent***

WITH

EXCISE APPEAL NO: 89329 OF 2014

[Arising out of Order-in-Original No: PUN-EXCUS-001-COM-013-14-15 dated 2nd July 2014 passed by the Commissioner of Central Excise, Pune – I.]

Finolex Cables Ltd
26-27 Mumbai-Pune Road, Pimpri, Pune – 411 018 … ***Appellant***

versus

Commissioner of Central Excise
Pune – I
41-A ICE House, Sassoon Road, Pune - 411001 ***…Respondent***

APPEARANCE:

Shri Rajesh Ostwal, Advocate for the appellant

Shri Sunil Katiyar, 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: 85572-85573/2024

DATE OF HEARING:	20/12/2023
DATE OF DECISION:	11/06/2024

PER: C J MATHEW

These two appeals of M/s Finolex Cables Ltd, arising from fastening of demand of duties of central excise of ₹ 4,61,694 and ₹ 1,15,05,004 for January 2012 and for February 2012 to January 2013 in one order[1] and of ₹ 81,59,711 for February 2013 to December 2013 in another order[2] under section 11A of Central Excise Act, 1944, along with applicable interest under section 11AA of Central Excise Act, 1944, and imposition of penalties under rule 26 of Central Excise Rules, 2002, relate to the finding of Commissioner of Central Excise, Pune-I that 'waste and scrap' arising during the course of manufacture of 'insulated electrical wires and cables' are also liable to duties of central excise. It was held that the said goods are products of 'manufacture', and hence liable to duty under section 3 of Central Excise Act, 1944, and 'excisable' owing to coverage by specific headings in the Schedule to Central Excise Tariff Act, 1985 besides being 'marketable' as evinced by sale in the market.

2. According to Learned Counsel for the appellant, they had been

[1] [order-in-original no. PUN-EXCUS-001-COM-032-033-13-14 dated 20th November 2013]
[2] [order-in-original no. PUN-EXCUS-001-COM-013-14-15 dated 2nd July 2014]

discharging duty liability on these 'waste and scrap' against relevant tariff line below heading 8544 in Schedule to Central Excise Tariff Act, 1985, and only for abundant caution, after insertion of

> *'Explanation – For the purpose 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.'*

below definition of 'excisable goods' in section 2(d) of Central Excise Act, 1944 with effect from 10th May 2008 which was intimated *vide* letter dated 18th June 2008 as also discontinuance of payment of duties *vide* 17th March 2011. It was also pointed out that proceedings were initiated against them for recovery of duty of ₹ 50,33,355 not paid from March 2011 to December 2011 which came to be dropped by Commissioner of Central Excise, Pune -I in order[3] ruling that 'waste and scrap' were not 'excisable goods' and that they were not manufactured besides holding that insertion of Explanation *supra* was not of relevance to dutiability.

3. Notwithstanding the acceptance of this outcome, notices were issued for recovery of duty on 'waste and scrap' cleared in January 2012 and for the rest of the calendar year, as above, reassigning proposed classification to tariff item 7404 0019 of Schedule to Central Excise Tariff Act, 1985 from ascertainment of 'copper' predominating

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[3] [order-in-original no. 37/RKS/CEX/P-I/2012 dated 7th November 2012]

therein and, upon corrigendum to the second of the notices having been issued on 30th May 2013, the goods covered by the latter, having been found to have 'aluminum' predominating in test report of 6th March 2013, to be chargeable to duty applicable to 'other waste and scrap' corresponding to tariff item 7602 0090 of Schedule to Central Excise Tariff Act, 1985. Commissioner of Central Excise Pune-I confirmed recovery of ₹ 1,19,66,698 for the entire period under this tariff item. Likewise, the second demand proposed, and recovery was ordered, of ₹ 81,59,711 by classifying the impugned goods as 'other waste and scrap' corresponding to tariff item 7602 0090 of Schedule to Central Excise Tariff Act, 1985.

4. Learned Counsel submitted that the issue of dutiability of 'scrap' arising in the process of manufacture undertaken by them stood settled in decisions of the Tribunal in *Finolex Cables Ltd v. Commissioner of Central Excise, Pune [1996 (86) ELT 418 (T)]*, in *Finolex Cables v. Commissioner of Central Excise, Pune [1997 (96) ELT 406 (T)]* and in *Finolex Cables Ltd v. Commissioner of Central Excise, Pune [1998 (100) ELT 517 (T)]* of which the first and last was affirmed by the Hon'ble Supreme Court. Furthermore, he contended that acceptance of the order of Commissioner of Central Excise, Pune-I, which held that the insertion of Explanation was not of consequence, thus established that duty was not leviable prior to and subsequent upon amendment following which they, in error, had paid duty for a period thereafter.

According to this was also held by the Hon'ble Supreme Court in *Union of India v. DSCL Sugar Ltd [2015 (322) ELT 769 (SC)]* and he submitted that like finding of the Hon'ble High Court of Bombay in *Hindalco Industries Ltd v. Union of India [2015 (315) ELT 10 (Bom)]* was affirmed by the Hon'ble Supreme Court. Learned Authorized Representative reiterated the findings in the impugned order and argued that duty liability had been correctly ordered for recovery. It was also contended that the impugned orders had taken note of proceedings revived for later period after having been dropped for earlier period by distinguishment of scope of notice.

5. We are not impressed by this argument as the issue of classification, and its distinguishment from that for the earlier period, is contingent upon occurrence of the 'taxable event', *viz.*, manufacture which relegates excisability to secondary determination. The primary issue of consequence of manufacture being emergence of 'waste and scrap' needed to be determined in the light of the circumstances in which notice for recovery on clearances between March 2011 and December 2011 came to be issued. Undeniably, it was the non-discharge after initial discharge of liability since May 2008, which itself arose with amendment to the Explanation *supra*, as well as absence of proceedings for recovery of duties prior to May 2008 that led to inference of said Explanation having supplanted the ascertainment of manufacture as foundation for levy.

6. In *re DSCL Sugars Ltd*, the Hon'ble Supreme Court had before it the issue of dutiability of 'bagasse' emerging during production of sugar and, though earlier held as non-dutiable in *Commissioner of Central Excise, Allahabad v. Balrampur Chini Mills Ltd [2015 (320) ELT A258 (SC)]*, for the period after insertion of Explanation *supra*, and the issue resolved this

> *'6. The aforesaid judgment was pronounced by this Court related to the period before 2008. In the year 2008 there was an amendment in Section 2(d) as well as in Section 2(f) of the Act which defines 'excisable goods' and 'manufacture' respectively. Section 2(d) with the said amendment reads as under :*
>
> > *Section 2(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."*
>
> *7. As per the aforesaid explanation, "goods" would now include any article, material or substance capable of being bought or sold for consideration and as such goods shall be deemed to be marketable. Thus, it introduce the deeming fiction by which certain kind of goods are treated as marketable and thus excisable.*
>
> *8. However, before the aforesaid fiction is to be applied, it is necessary that the process should fall within the definition of "manufacture" as contained in Section 2(f) of the Act. The relevant portion of amended Section 2(f) reads as under :*
>
> > *Section 2(f) - "manufacture" includes any process -*

> *(i) incidental or ancillary to be 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 "manufacture" 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 of manufacture on his own account;"'*

In *re Hindalco Industries Ltd*, the Hon'ble High Court of Bombay, the entirety of the issue was addressed thus

> *'10. We have, with the assistance of the Counsel appearing for the parties, perused the Larger Bench decision of the Tribunal and impugned in this Writ Petition. We have also perused all the decisions of the Hon'ble Supreme Court brought to our notice and the relevant legal provisions. Section 2(d) of the Central Excise Act, 1944 defines the term "excisable goods", to read as under :*
>
> > *"SECTION 2(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."*
>
> *xxxxxxxxx*
>
> *12. The facts being undisputed, the only issue that arose before the Tribunal was "whether the definition having been*

> *either amended or an Explanation inserted thereto would result in any change in the legal position".*
>
> *xxxxx*
>
> *18. It concluded that merely because the goods satisfying the test of being marketed and saleable, it does not mean that the test of being manufactured in India has been satisfied. The Hon'ble Supreme Court notes and specifically the argument which was canvassed namely, addition of dross, cinder, skimmings etc. in the list of the items to the Schedule to the Central Excise Tariff, however, it held that that is not safe to make it excisable as it has to pass further test of manufactured or produced in India.'*

before subjecting the Tribunal to criticism for ignoring settled law by recourse to inserted *Explanation* thus

> *'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.'

7. In *re Finolex Cables Ltd*, it was held that

'6. The Tribunal, thereafter, considered the Supreme Court decision in the case of Khandelwal Metal & Engg. Works v. U.O.I. - 1985 (20) ELT 222 and noted that the Supreme Court said that the production of waste and scrap was a necessary incident of the manufacturing process. Following then the ratio of Delhi High Court's decision in the Modi Rubber case (supra), the Tribunal held as follows in para 15 of its order to say that waste or scrap will not be dutiable unless specifically covered by the entry in the Tariff Schedule:

> *"In 1987 (29) ELT 502 (Del.) (Civil Writ Petition No. 214/1982, decided on 8-12-1986) re : Modi Rubber Limited, Modi Nagar v. P & Another v. U.O.I. & Others, the High Court at New Delhi dealt with just this problem. The waste and scrap of rubber tyre products were assessed by the department under Item 68. The court noticed that item 15A had specific heads for waste and scrap, and Item 18 for non-cellulosic waste; but item 16 for Tyres had none. The court observed that when the legislature wanted to cover waste or scrap arising in manufacture, it has been specifically provided in the tariff items. After a thorough analysis, the court ruled in para 16 that waste and scrap obtained in the course of manufacture are not goods, and that there was no event of manufacture of waste or scrap."*

In the result, it is held that waste and scrap of wires and cables are not excisable goods and the question of their classification under CETA, 1985 does not arise. So far as the satisfaction of the officers as to past clearances of the materials as scrap, the appellants in this appeal have submitted that they can produce documentary evidence to support their claim and that they will be in a position to satisfy Central Excise Officers on this aspect with reference to the description in the invoices, the price fetched, and the mode of sale of the material which was on weight basis. It would appear that usable wires and cables are sold in length. This aspect may also have to be considered with the submission that under the Indian Electricity Act and the Rules made thereunder, it is an offence to sell wires with improper insulation, voltage, etc. They have, further, submitted that the percentage of total production of cables whether *before 1-3-1986 or on and after that date would more or less remain the same. Therefore, it is directed that in respect of past clearances of such scrap where it was without excise presence such collateral documentary evidence can be taken as a working formula by the Department.'*

8. Indeed, demands for subsequent periods, i.e. May 2016 to June 2017, Commissioner of Central Tax (Appeals-I), Pune had set aside the recovery ordered by the original authority.

9. In the light of judicial determination, in their own disputes for earlier and later periods, that 'waste and scrap' arising during the process of manufacture of 'insulated electrical wires and cables' are not liable to duties of excise combined with determination that the insertion supra does not alter the fundamental step of manufacture, the impugned orders lack merit and are set aside to allow the appeals.

(Order pronounced in the open court on 11/06/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*