2014 (4) ECS (115) (Tri. – Mum)

In the Customs Excise & Service Tax Appellate Tribunal,
West Zonal Bench, Mumbai

M/s. HINDALCO INDUSTRIES LTD.

V/s.

C.C.E., BELAPUR, MUMBAI - III & NAGPUR.

Date of hearing: 04/07/2014

Date of decision: 19/08/2014


Appearance:
Shri Gajendra Jain, Advocate   For the Appellant
Shri K.M. Mondal, Special Consultant   For the Respondent

CORAM:
Hon’ble Shri S.S. Kang, Vice President
Hon’ble Shri P.R. Chandrasekharan, Member (Technical)
Hon’ble Shri Anil Choudhary, Member (Judicial)

(Order No: M/1721/14/EB/C-II)

“Explanation to Section 2(d) creates a legal fiction by which any goods which are capable of being bought and sold for a consideration shall be deemed to be marketable and on this basis it was held that aluminium dross and skimmings are liable to duty of excise. (para 5.1)

“Sub-heading 2620 40 deals with slag, ash or residues containing mainly aluminium. CETH 2620 4010 specially deals with aluminium dross and CETH 2620 4090 deals with other slag, ash or residues containing mainly aluminium. Thus, the aluminium dross, skimmings are clearly specified in the Central Excise Tariff and there is no dispute in this regard.” (para 6.2)

“Explanation added. to Section 2 (d) vide Finance Act, 2008 provided that, for the purpose of the said 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’. It is not in dispute that aluminium dross and skimmings are capable of being bought and sold for a consideration and are, in fact, regularly bought and sold. The Customs Tariff also includes aluminium dross and skimmings under CTH 2620 40.” (para 6.3)

“When dross and skimmings are specifically mentioned in the tariff, it would not be unreasonable to assume that such products are manufactured goods even though they arise in the course of manufacture of other products. Inasmuch as the goods which are capable of being bought and sold are deemed to be marketable, in view of explanation to Section 2(d), the twin tests of `manufacture’ and `marketability’ are clearly satisfied in the case of dross and skimmings. As per the settled position in law manufacture takes place when a new commodity with a distinct name, character or use emerges from a process or series of processes. In the present case, this test of manufacture is satisfied in respect of dross and skimmings. Therefore, the will of the legislature has to be given effect to by adopting a harmonious interpretation. In this view of the matter, it appears to us that w.e.f. 10/05/2008, aluminium dross and skimmings are liable to excise duty.” (para 6.5)

Per. P.R. Chandrasekharan:

The reference made to the Larger Bench reads as follows:

(a) Whether Aluminium Dross and Skimmings or similar Non-ferrous Metal Dross and Skimmings, which arise in the process of manufacture of aluminium/Non (ferrous metal products can be considered as a `manufactured goods’ and hence excisable for the period post 10.5.2008 in view of the Explanation added to Section 2(d) of the Central Excise Act, 1944?

Or

(b) Notwithstanding the Explanation to Section 2(d), Aluminium Dross and Skimmings or other Non-ferrous metal dross and Skimmings cannot be considered as `manufactured products’ and hence, not liable to excise duty?

2. The above reference has been made in the context of four appeals filed by the appellant, M/s. Hindalco Industries Ltd. wherein the adjudicating/appellate authorities have held that aluminium dross and skimmings would merit classification under CETH 2620 4010 of the Central Excise Tariff Act and is liable to duty accordingly for the period on/or after 10/05/2008 and have accordingly confirmed duty demands. The reason for taking this view is that Section 2(d) of the Central Excise Act, 1944 was amended w.e.f. 10/05/2008 so as to provide that:
“(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.”

It is on account of this explanation, the Revenue seeks to classify aluminium dross and skimmings manufactured by the appellant under CETH 2620 4010 w.e.f. 10/5/2008.

3. The appellant is a manufacturer of aluminium sheets and coils falling under CETH 7607 1190 of the Central Excise Tariff. The major raw material required for manufacture of aluminium sheets/ coils is aluminium ingots: In the course of manufacture of aluminium sheets/coils, aluminium dross/skimmings emerge as byproducts. The appellant sell these byproducts on a regular basis. This matter had come up for consideration earlier before a Division Bench of this Tribunal. The Division Bench noted that there are two contrary views taken by this Tribunal on this issue. In the case of Bhushan Steel Ltd. vs. C.C.E. [2012 (284) ELT 713] the Mumbai bench of this Tribunal, in respect of zinc dross which arose as a byproduct during galvanization of cold rolled coils held that zinc dross is not a manufactured product and therefore, not liable to excise duty even after the amendment made to Section 2(d) w.e.f 10/05/2008. However, a coordinate bench of this Tribunal at Delhi in the case of KEC International Ltd. vs. C.C.E., Jaipur - I [2012 (283) ELT 428] considered the very same issue and held that as per Explanation to Section 2(d) zinc dross and ash are deemed to be marketable and even in the HSN Explanatory Notes, zinc dross is specifically mentioned as a tradable item and consequently it was held that zinc dross is an excisable product liable to excise duty. In view of these conflicting views expressed by two benches of the Tribunal, the reference mentioned above has been placed before the Larger Bench.

4. The learned counsel appearing for the appellant made the following submissions:

4.1. Dross and skimmings are not manufactured goods in view of the series of decisions consistently holding that they are not manufactured goods and hence not liable to excise duty. The major decisions in this regard are - (1) Union of India vs. Indian Aluminium Co. Ltd. & Another vs. A.K. Bandyopadhyay & Others 1980 (6) ELT 146 affirmed by the hon’ble apex Court
reported in 1995 (77)ELT 268 (SC); (2) C.C.E. vs. Indian Aluminium Co. Ltd. 2006 (203) ELT 3 (SC); (3) Indian Aluminium Co. Ltd. & Another vs. Collector of Central Excise, Bangalore 1987 (31) ELT 158 affirmed by the apex Court in 1999 (111) ELT A200 (SC); (4) C.C.E., Patna vs. Tata Iron & Steel Co. Ltd. 2004 (165) ELT 386 (SC); (5) Indian Aluminium Co. Ltd. vs. C.C.E. 2002 (53) RLT 219 affirmed by Kolkatta High Court 2012-TIOL-1081-HC-KOL and (6) Shri Ram Agro Chemicals (P) Ltd. vs. Union of India 2009 (234) ELT 218 (P&H).

4.2. The learned counsel for the appellant submits that the explanation was inserted in Section 2(d) in order to clarify that the goods which can be bought and sold in the market are deemed to be marketable and to put at rest the argument that the goods are not marketable in law even though they are bought and sold. In the judgments cited supra, for goods to be excisable two conditions need to be satisfied, that is, goods should be manufactured and they should be marketable. The explanation deals with only with the marketability aspect of the question and does not say that even nonmanufactured goods are deemed to be manufactured goods.

4.3. The hon’ble High Court of Allahabad in the case of Balrampur Chini Mills Ltd. vs. Union of India [2014 (300) ELT 372 (All.)] had held that the explanation inserted w.e.f. 10/05/2008 does not deem non-manufactured goods as manufactured goods and in the said order, the CBEC Circular No. 904/24/2009-CX dated 28/109/2009 which clarified that bagasse, aluminium dross and skimmings are liable to excise duty w.e.f. 10/05/2008 was quashed. The said decision of the hon’ble Allahabad High Court has been followed by this Tribunal in other cases also.

4.4. As regards the decision in KEC International Ltd. (supra), the learned counsel submits that in the said case, the Tribunal did not deal with Section 2(f) which defines `manufacture’ and other binding decisions in this regard whereas in the Bhushan Steel Ltd case (supra), the Tribunal dealt with the issue of `manufacture’ as defined in Section 2(f) and thereafter, came to the conclusion that dross and skimmings are not manufactured goods. It is therefore, submitted that the reference be answered in favour of the appellant.

5. The learned Special Consultant for the Revenue made the following submissions:

5.1. The various decisions of the apex Court cited and relied upon by the appellant were rendered much before 10/05/2008 when
the explanation was inserted creating a deeming fiction that goods capable of being bought and sold for a consideration shall be deemed to be `marketable'. Therefore, the hon’ble apex Court had no occasion to consider the effect of the explanation and consequently, the appellant’s reliance on the aforesaid judgments is of no avail. In the KEC International Ltd. case, the Tribunal, after considering the effect of the amendment to Section 2(d) held that zinc dross and zinc ash are marketable and hence excisable. While coming to the said conclusion, the Tribunal relied upon the judgment of the hon’ble Allahabad High Court in appellant’s own case 2009 (243) ELT 481 and held that explanation to Section 2(d) creates a legal fiction by which any goods which are capable of being bought and sold for a consideration shall be deemed to be marketable and on this basis it was held that aluminium dross and skimmings are liable to duty of excise.

5.2. As regards the reliance placed on the decision of the hon’ble Allahabad High Court in the case of Balrampur Chini Mills (supra) the said decision was rendered in the context of Rule 6 of the CENVAT Credit Rules and it was observed by the hon’ble High Court that bagasse was being bought and sold prior to 10/05/2008 as well as thereafter and, therefore, the said addition of explanation to Section 2(f) did not make any difference about the marketability of bagasse. The learned consultant also placed reliance on the decision of this Tribunal in the case of C.C.E., Jalandhar vs. A.G. Flats Ltd. 2012 (217) ELT 96 wherein it was held that when a product emerges as a byproduct in the course of manufacture of some other product, that byproduct cannot be treated as a waste just because it is an unintended product arising in the course of manufacture of an intended final product. The byproduct would be waste only if it is of no value or negligible value, something which the manufacturer would want to get rid of. In the facts of the case before us, aluminium dross and skimmings emerges as byproduct during the course of manufacture of aluminium sheets/coils from aluminium ingots. These dross and skimmings have a substantial commercial value and cannot be treated as `waste'. They also cannot be compared-with bagasse which is the dry pulpy residue left after the extraction of juice from sugarcane, usable as fuel or to make paper etc. The learned consultant submits that by the same process of manufacture, both aluminium sheets/coils and aluminium dross and skimmings come into existence, although the latter may be unintended as a final product by the appellants. The
hon’ble apex Court in the case of Union of India vs. Indian Aluminium Company Ltd. 1995 (77) ELT 268 (SC), in para13 thereof, had noted that aluminium dross and skimmings do arise during the process of manufacture. It is, therefore, the Revenue’s contention that these are manufactured goods which are capable of being bought and sold for a consideration and hence they are marketable. Thus, aluminium dross and skimmings satisfy the twin tests of manufacture and marketability. It is therefore, urged that the reference be answered in favour of Revenue and against the appellants.

6. We have carefully considered the submissions made by both the sides.

6.1. In the Central Excise Tariff, Chapter 26 deals with Ores, Slag and Ash. Heading 2620 reads as follows:

“2620 Slag, ash and residues (other than from the manufacture of iron or steel), containing Arsenic, metals or their compounds.”

- Containing mainly zinc
- Containing mainly lead
- Containing mainly copper

2620 40 - Containing mainly aluminium
2620 40 10 - - Aluminium dross
2620 40 90 - - Other

6.2. Sub-heading 2620 40 deals with slag, ash or residues containing mainly aluminium. CETH 2620 4010 specially deals with aluminium dross and CETH 2620 4090 deals with other slag, ash or residues containing mainly aluminium. Thus, the aluminium dross, skimmings are clearly specified in the Central Excise Tariff and there is no dispute in this regard.

6.3. Explanation added. to Section 2 (d) vide Finance Act, 2008 provided that, for the purpose of the said 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’. It is not in dispute that aluminium dross and skimmings are capable of being bought and sold for a consideration and are, in fact, regularly bought and sold. The Customs Tariff also includes aluminium dross and skimmings under CTH 2620 40. Customs Tariff is based on the Harmonized System of Nomenclature and an entry (heading/sub-heading) is created specifically for a product only when the commodity is bought and sold on a regular
basis on a substantial scale. This would imply that aluminium dross and skimmings are marketable commodities. Therefore, the only question left for consideration is whether they are ‘manufactured’ goods.

6.4. Explanation to section 2(d) of the Central Excise Act, 1944 was inserted to overcome certain adverse judicial decisions with regard to marketability of waste products. This is evident from the explanatory notes to clause 73 of Finance Bill, 2008 which reads as under:

“Clause 73 seeks to amend section 2 of the Central Excise Act with a view to insert an Explanation in clause (d) which defines “excisable goods”. The proposed Explanation provides that for the purposes of this clause, “goods” includes any article, material or substance which is capable of being bought and sold for consideration and such goods shall be deemed to be marketable. It will remove the ambiguity occurred due to the judgments in certain cases regarding the marketability of goods and it will be applicable prospectively. “

6.5. It is a well known fact that nobody deliberately manufactures waste and scrap. Waste and scrap emerge as a byproduct in the course of manufacture of other products. In fact both the Central Excise and Customs Tariffs provide for separate headings/sub-headings in respect of waste and scrap of various materials such as plastics, rubber, paper, textile, iron and steel, non-ferrous metals, glass and glassware, precious metals and so on. Therefore, the tariff recognises waste and scrap as a distinct and different commodity and seeks to impose a tax on waste and scrap either when it is traded (Customs duty) or when it is manufactured, by way of excise duty. In other words, the purpose and object of creating a tariff entry for waste and scrap including ‘dross and skimmings’ is to make the product liable to tax/duty. Ti is also equally well understood that nobody undertakes, either deliberately or purposefully, manufacture of waste and scrap, whether it be of aluminium or other metals or of plastics, rubber, textiles, glass, etc. Waste arises in the manufacturing process of various products. It is to tax such waste and scrap which arise in the course of manufacture of other products, separate entries are created in the tariff, including those for aluminium dross and skimmings. Thus, the intent of the legislature is very clear. Therefore, a specific entry created for the purpose of levy of duty/tax cannot be merely wished away or brushed aside, by holding that waste and scrap are not manufactured
goods. It is a settled principle in taxation that no part of the law should be interpreted in such a way as to make it non-effective or odious. Viewed from this perspective, when dross and skimmings are specifically mentioned in the tariff, it would not be unreasonable to assume that such products are manufactured goods even though they arise in the course of manufacture of other products. Inasmuch as the goods which are capable of being bought and sold are deemed to be marketable, in view of explanation to Section 2(d), the twin tests of `manufacture' and `marketability' are clearly satisfied in the case of dross and skimmings. As per the settled position in law manufacture takes place when a new commodity with a distinct name, character or use emerges from a process or series of processes. In the present case, this test of manufacture is satisfied in respect of dross and skimmings. Therefore, the will of the legislature has to be given effect to by adopting a harmonious interpretation. In this view of the matter, it appears to us that w.e.f. 10/05/2008, aluminium dross and skimmings are liable to excise duty.

6.6. The hon’ble Apex Court in the case of Balwant Singh vs. Jagdish Singh [2010 (262) E.L.T. 50 (S.C.)] explained the principle of statutory interpretation as follows:-

“It must be kept in mind that whenever a law is enacted by the legislature, it is intended to be enforced in its proper perspective. It is an equally settled principle of law that the provisions of a statute, including every word, have to be given full effect, keeping the legislative intent in mind, in order to ensure that the projected object is achieved. In other words, no provisions can be treated to have been enacted purposelessly. Furthermore, it is also a well settled canon of interpretative jurisprudence that the Court should not give such an interpretation to provisions which would render the provision ineffective or odious.”

If we apply the above principle of statutory interpretation to CETH 26204010 and the Explanation to Section 2(d), then full effect to the said entry has to be given by bringing the same under the purview of excise levy.

6.7. As regards the reliance placed by the appellant on the various decisions cited supra, in the case of Indian Aluminium Co. Ltd. 1995 (77) ELT 268 (SC), the question before the hon’ble apex Court was whether dross and skimmings are `goods' or marketable commodities. While upholding decision of the Bombay High Court in this regard, it was held that dross and
skimmings are not goods or marketable goods. It is pertinent to note that in the said decision, the hon’ble apex Court noted that aluminium dross and skimmings do arise during the process of manufacture but these are nothing but waste or rubbish thrown up in the course of manufacture. Only if waste and scrap could be categorised as ‘goods’, they would merit classification under tariff item 68 as ‘goods not elsewhere specified or included’, if these are not specifically covered under other items of the tariff. In other words, the hon’ble apex Court was concerned with the marketability of dross and skimmings. The question whether these were manufactured goods or not, was not before the apex Court. Further the apex Court clearly observed that they do arise in the course of manufacture of other goods.

6.8. In the Tata Iron & Steel Co. Ltd.’s case (supra) relied upon by the appellant, wherein excisability of zinc dross and skimmings arising as byproduct during galvanization of steels sheets was in question, the hon’ble apex Court held that, merely selling does not mean that dross and skimmings are a marketable commodity as even rubbish can be sold. Everything which is sold is not necessarily a marketable commodity known to commerce and may be worthwhile to trade in. In this case also, the apex Court did not consider the question of ‘manufacture’ but merely considered the question of marketability of dross and skimmings. These decisions were followed in Indian Aluminium Co. Ltd. 2006 (203) ELT 3 (SC) wherein the hon’ble apex Court held that dross and skimmings are not excisable goods. In other words, the apex Court was merely reiterating their earlier view that since dross and skimmings are not marketable, they cannot be considered as ‘manufactured goods’. It is precisely to overcome these adverse decisions of the hon’ble apex Court, explanation was added to Section 2(d) to deem that if any goods are being capable of bought and sold, they shall be deemed to be marketable. Since the law has been amended w.e.f. 10/05/2008 to overcome the legal hurdle, the explanation has to be given the full effect. It is also very relevant to note that prior to Finance Act, 2005, there was no specific entry for aluminium and other metallic dross in the Central Excise Tariff. Therefore, in our humble view, on account of the changes made in the law, the ratio of various decisions cited by the appellant does not apply, as the issue considered in all these decisions related to ‘marketability’ and not ‘manufacture’. Even in the Balrampur Chini Mills Ltd. (supra), on which much reliance has been placed, the said decision was rendered in the context
of CENNVAT Credit Rules. In the said case, the hon’ble Allahabad High Court observed that bagasse is an agricultural waste of sugar cane, though marketable product, but the duty cannot be imposed as it does not involve any manufacturing activity. This decision of the hon’ble Allahabad High Court will not apply to the facts before us for the reason that dross and skimmings is a byproduct/metallic waste arising in the process of manufacture of various metal products and unlike bagasse, it is not an agricultural waste. The scheme of levy under the central excise law does not envisage taxing of agricultural produce unless they are processed in a substantial measure. Dross and skimmings are industrial products widely traded and has a significant commercial value depending upon the metal content therein and they are primarily used for extraction of metals.

6.9. It is a settled position in law as held by the hon’ble apex Court in Al Noori Tobacco Products India Ltd. case [2004 (170) ELT 175 (SC)] that the ratio of a decision can be applied only if the facts are identical. A slight or a material change in the facts could lead to an entirely different conclusion. In the said case, the hon’ble apex court noted as follows:-

“There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case.”

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is, not proper.

The following words of Lord Denning in the matter of applying precedents have become locus classicus:

`Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. “

In our considered view, the facts of the case before us are different and distinguishable from those involved
in the Balrampur Chini Mills Ltd. case. It is for this reason that the very same Allahabad High Court, in its decision rendered in the case of Hindalco Industries Ltd. vs. Union of India relied upon by Revenue held the view that when a product emerges as a byproduct in the course of manufacture of some other product, that by-product cannot be treated as a waste just because it is an unintended product arising in the course of manufacture of an intended final product. The by-product would be waste only if it is of no value or negligible value, something which the manufacturer wants to get rid off. No evidence has been produced by the appellant herein that the products in question are of no value or of negligible value which it wants to get rid off.

6.10. In the A.G. Flats Ltd. case (supra), this Tribunal took a similar view and held that waxes, gums and soap stock emerging during the manufacture of refined vegetable oil and vanaspati are liable to excise duty. The hon’ble apex Court also upheld the view taken by the Tribunal that soap stock/fatty acid, waxes and gums which emerged in the course of manufacture of refined vegetable oil /vanaspati are manufactured goods, even though they are by-products as reported in 2014 (300) ELT A74.

6.11. The principles of res judicata and estoppel do not apply to tax matters especially when the law has undergone changes. The hon’ble Apex Court in the case of Bharat Sanchar Nigam Ltd. 2006 (2) S.T.R. 161 (S.C.) has held as follows:-

“The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar Courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The Courts will generally adopt an earlier pronouncement of the law or a conclusion of Fact unless there is a new ground urged or a material change in the factual position. The reason why Courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi judicial or judicial can generally be permitted to take a different view.
This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a bench of superior strength or in some cases to a bench of superior jurisdiction. “

In the facts of the case before us, the legal position has undergone a change after the decisions were rendered by the High Court and the Supreme Court with regard to aluminium/zinc dross and skimmings. An explanation has been added to section 2 (d) to provide for a deeming fiction in respect of goods. Secondly, a specific tariff entry has been created in Heading 262040 for aluminium dross, which was not the position when the issue was examined earlier by the hon’ble Apex Court. Therefore, the ratio of these decisions cannot be applied to the facts of the case before us.

7. In the factual and legal matrix discussed above, we answer the reference made to us as follows:-

Aluminium dross and skimmings and similar non-ferrous metal dross and skimmings which arise as a by-product in the process of manufacture of aluminium/non-ferrous metal products are manufactured goods and hence excisable w.e.f. 10/05/2008 in view of the explanation added to Section 2(d) of the Central Excise Act, 1944.

8. The matter is returned to the referral bench for further necessary action.

(Pronounced in Court on 19/08/2014)