(SUPREME COURT OF INDIA)

Collector of Central Excise, Patna

Vs

Tata Iron and Steel Company Limited

HON'BLE JUSTICE S. R. BABU, HON'BLE JUSTICE A. S. LAKSHMANAN AND

26/02/2004

Appeal (Civil) 524-525 of 1998

JUDGMENT

DR. AR. LAKSHMANAN J

In these appeals, we are concerned with the question of levy of excise duty on zinc dross and flux skimming arising during galvanisation of steel sheets.

BRIEF FACTS OF THE CASE:

During galvanisation of steel sheets, zinc dross and flux skimming arises which the respondent/assessee has declared as by- product in their product manual published by the Marketing Division for information of customers. It has been alleged that zinc dross and flux skimming are being sold by the assessee to various customers without making any declaration in the classification list, without paying any duty on clearance of the above product and without maintaining any records prescribed under the Central Excise Rules, 1944 besides showing them as non-excisable in their Despatch Advices.

According to the Department, the assessees have cleared the goods without payment of duty and thus evaded duty in contravention of the Central Excise Rules, 1944 and in doing so they did not obtain Central Excise licence for manufacture of zinc dross and flux skimming as required under Rule 174 of the Central Excise Rules, 1944 inasmuch as they have suppressed the production and removal of the said goods with intent to evade payment of duty.

CASE FOR THE DEPARTMENT:

A show cause notice was issued to the assessee to show cause why a penalty should not be imposed on them under the provisions of the Central Excise Rules, 1944 and why the duty be not demanded under Rule 9 (2) of the Central Excise Rules, 1944.

CASE FOR THE PARTY:

In response to the show cause notice, the assessee made a written defence denying all the allegations of contravention of various Central Excise Rules and stated that flux skimming is a material held as non-excisable by the CEGAT. In support of their contention, they have cited various judgments and, in particular, the case of Indian Aluminium Co. Ltd. vs. A.K. Bandyopadhyay 1979 Indlaw MUM 137 (Bom.)] stating further that dross and skimming are neither goods nor end products nor finished goods attracting duty under item 25 of the Central Excise Tariff. As regards zinc dross, they have claimed to clear the item as non-excisable as per the decision of the Bombay High Court.

It is the contention of the assessee that they do not manufacture zinc and article thereof but they do galvanise sheets falling under Chapter 72. Since zinc dross and flux skimming have already been held to be non-excisable item, the issue of gate passes for removal of products and submission of quarterly returns etc. and filing classification list does not arise. All the assesses have denied violation of the Central Excise Rules, 1944. They have further stated that they submitted classification list and are in the bona fide impression that the goods are non-excisable and are not manufactured by them and, therefore, the question of imposing penalty under any rule is out of question.

In Civil Appeal Nos. 524 and 525 of 1998, the Collector of Central Excise, Patna ordered for confiscation of the zinc dross. However, the Collector gave the manufacturers the option to redeem the goods on payment of redemption fine. A penalty was also imposed on the manufacturer. The assesses preferred an appeal to the CEGAT, New Delhi which set aside the order of the Collector, Central Excise relying upon the decision of this Court in the case of Union of India vs. Indian Aluminium Co. Ltd. 6 (S.C.)]. Aggrieved by the said decision, the Commissioner of Central Excise, Patna preferred the above two appeals.

In Civil Appeal No. 5262 of 2003 M/s National Steel Industries Limited now known as M/s National Steel and Agro Industries Limited filed declaration classifying the zinc dross under Heading 7902.00 of the Schedule to the Central Excise Tariff Act, 1985 1997 Indlaw CEGAT 2639] and Siddarth Tubes Limited vs. CCE, Indore dated 08.04.2002 which referred to the judgment in the case of Indian Aluminium Co. Ltd. (supra). Before the Tribunal, it was submitted by the Department that zinc dross is a distinct commercial commodity and hence liable to excise duty.

Civil Appeal No. 5664 of 2002 also arises out of similar circumstances. In this appeal, according to the assessee, zinc dross and zinc scalling does not constitute to be excisable goods as defined in Section 2(d) of the Central Excise Salt Act, 1944 and, therefore, they filed refund claims for amount of duty paid on zinc scalling.

According to the Department, prior to 01.03.1988 as per Chapter Note 3 of Chapter 26 ash and residue other than dross and ash of zinc containing metals or metallic compounds applies only to the

ash and residue of a kind used in industry either for the extraction of metals or as a basis for the manufacture of chemical compound of metal. This chapter note was subsequently amended w.e.f. 01.03.1988 by omitting the words "other than dross and ash of zinc containing metals of metallic compounds". Thus, prior to 01.03.1988 the said dross and ash of zinc containing metals or metallic compound were classifiable under 7902 and subsequent to 01.03.1988 the said product got classified under sub- heading 26.20.

Here also a show cause notice was issued and the Assistant Commissioner rejected the refund claim holding that the ash cleared by the noticee (assessee) contains metals and oxide of zinc and the same is also used for the extraction of metal as a basis for the manufacture of chemical compounds of metal and they are marketable and also answer of the description of chapter heading. Therefore, they contended that the same is correctly classifiable under Chapter heading No. 26.20 of the Central Excise Tariff Act, 1985. The assessee's appeal before the Commissioner was also rejected and the further appeal by the assessee before the CEGAT was allowed relying on the judgment of this Court in Indian Aluiminium Co. Ltd. (supra). The Tribunal, following the judgment of this Court, categorically held that zinc dross and zinc scalling are not goods, hence not excisable.

We have perused the relevant records and the rules i.e. the Central Excise Rules and of the orders passed by the respective authorities and of the CEGAT and heard the arguments of Mr. A.K. Ganguli and Mr. J. Vellapally - learned senior counsel appearing for the respective parties. Mr. Rajesh Kumar and Mr. Alok Yadav, learned counsel in other appeals adopted the arguments of learned senior counsel.

Mr. Ganguli, learned senior counsel, appearing on behalf of the appellant submitted that sub-heading 7902.00 of the Central Excise Tariff includes waste and scrap of zinc and waste and scrap of zinc include dross and ash. According to Mr. Ganguli, the case of Indian Aluminium Co. Ltd. (supra) relates to aluminium dross and skimming and the definition of aluminium waste and scrap does not include dross and skimming and, therefore, zinc dross and skimming are covered under sub-heading No. 7902.00 of the Central Excise Tariff Act, 1985. He, therefore, prays that the appeals filed by the appellant be allowed. He would further submit that prior to 01.03.1988, as per Chapter Note 3 of Chapter 26 ash and residue other than dross and ash of zinc containing metals or metallic compounds applies only to the ash and residue of a kind used in industry either for the extraction of metals or as a basis for the manufacture of chemical compound of metal. This chapter note was subsequently amended w.e.f. 01.03.1988 by omitting the words "other than dross and ash of zinc containing metals of metallic compounds". Thus he submits that prior to 01.03.1988, the said dross and ash of zinc containing metals or metallic compound were classifiable under 7902 and subsequent to 01.03.1988 the said product got classified under sub- heading 26.20. It was contended that a close reading of the above chapter note reveals that the heading 26.20 covers ash and residue which contain metal or metallic compounds and which are of kind used in industry either for the extraction of metal or metallic compound or as basis for the manufacture of chemical compound of metals.

Countering the argument, Mr. J. Vellapally, learned senior counsel for the respondent, submitted that zinc dross and flux skimming were waste products in the process of galvanisation of steel sheets and are not goods under the Central Excise Act, 1944 and that the process of galvanisation merely involves the steel sheets through a batch of molten zinc whereby the said sheets acquire a coat of zinc on the surface resulting in galvanisation and that zinc dross is merely the impurity which arises as a result of the process of galvanisation and settle to the bottom. During the same galvanisation

process, ammonium chloride is used as a flux for cleaning the impurities from the sheets. This ammonium chloride when mixed with molten zinc also creates some impurities in the form of flux which floats to the surface. This flux is periodically skimmed off the surface of the zinc and these are known as 'flux skimming'. Learned counsel would further submit that zinc dross and flux skimming are nothing but refuse products and these are not marketable. Learned counsel relied on the decision of this Court being Indian Aluminium Co. Ltd. (supra) and submitted that this Court held that aluminium dross and skimming are neither goods nor marketable commodity and, therefore, not liable to excise duty and he, therefore, prays that the appeals filed by the appellant be dismissed.

On the above pleadings and of the arguments, the following questions of law may arise for determination of this Court.

The issue which arises for consideration is that whether zinc dross and flux skimming arising during galvanisation of steel sheets are goods within the meaning of the Central Excise Act, 1944 and are liable to central excise duty as classified by the Revenue

OR

Whether zinc dross and flux skimming are waste products in the process of galvanisation of steel sheets and are not goods under the Central Excise Act, 1944 as claimed by the assessee.

In this case, the respondents are engaged in the manufacture of steel sheets and are also galvanising steel sheets. During the process of galvanisation, zinc dross and flux skimming come into existence. The contention of the assessee is that these flux and zinc dross are the waste and are not marketable. The High Court of Bombay in the case of Indian Aluminium Co. Ltd. (supra) held that dross and skimming are neither goods nor en-products. As seen earlier, dross is nothing but scum thrown off from metals in something; refuse and rubbish or worthless impure metal and skimming is that which is removed or obtained from the surface by skimming. These are, in our opinion, nothing but ashes resulting in the process of manufacture of aluminium sheets from aluminium ingots. In Union of India vs. Delhi Cloth and General Mills Co. Ltd.] it was held that "goods" must be something which can ordinarily come to the market and be brought and sold and that the "manufacture" which is liable to excise duty under the Central Excise and Salt Act, 1944 must, therefore, be the "bringing into existence of a new substance known to the market".

The passage runs thus :-

"Manufacture" implies a change but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character of use." *

We are of the opinion that the dross and skimming are merely the refuse, scum or rubbish through out in the process of manufacture of aluminium sheets and, therefore, cannot be said the result of treatment, labour or manipulation whereby a new and different article emerges with a distinctive name, character or use which can ordinarily come to the market to be brought and sold. Merely because such refuse or scum may fetch some price in the market does not justify it being called a by-product, much less an end product or a finished product. #

This view of the High Court of Bombay was upheld by this Court in Indian Aluminium Co. Ltd. (supra). This Court held as under: " It is also not possible to accept the contention of the appellants that aluminium dross and skimmings are "goods" or marketable commodity which can be subjected to the levy of excise. Undoubtedly, aluminium dross and skimmings do arise during the process of manufacture. But these are nothing but waste or rubbish which is thrown up in the course of manufacture. The term "dross" is defined in The New Shorter Oxford Dictionary as:

Dross:

"Dregs (1) Impurities separated from metal by melting the scum which forms on the surface of molten metal (2) Foreign matter mixed with anything (3) Refuse, rubbish, worthless matter especially as contrasted with or separated from something of value." #

The ASM Metals Reference Book (2nd Edition, 1983) produced by the American Society for Metals defines "dross" as follows:

"The scum that forms on the surface of molten metals largely because of oxidation but sometimes because of the rising of impurities to the surface." *

Mcgraw Hill Dictionary of Science and Engineering (1984 Edition) defines it as: "An impurity, usually an oxide, formed on the surface of molten metal." *

Dross and skimmings may contain some small percentage of metal. But dross and skimmings are not metal in the same class as waste or scrap. It may be possible to recover some metal from such dross and skimmings. They can, therefore, be sold. But this does not make them a marketable commodity. As learned Single Judge of the Bombay High Court has pointed out, even rubbish can be sold. Everything, however which is sold is not necessarily a marketable commodity as known to commerce and which, it may be worthwhile to trade in. Learned Single Judge of the Bombay High Court, therefore, rightly came to the conclusion that the proviso to Rule 56A was not applicable as aluminium dross and skimmings are not excisable goods.

The entire quantity of raw material, namely duty-paid aluminium ingots procured by the assesses from outside was used in the manufacture of aluminium sheets. It is nobody's case that the aluminium sheets which were manufactured by the assesses could have been manufactured out of a lesser quantity of aluminium ingots than what was actually used. In the process of manufacture, dross and skimmings had to be removed in order that aluminium sheets of the requisite quality could be manufactured. This does not mean that the entire quantity of aluminium ingots was not used for the manufacture of aluminium sheets. In the course of manufacture, a certain quantity of raw material may be lost because of the very nature of the process of manufacture or some small quantity of raw material may form part of wastage or ashes. This does not mean that the entire raw material was not used in the manufacture of finished excisable products. An exact mathematical equation between the quantity of raw material purchased and the raw material found in the finished product is not possible, and should not be looked for.

Under Tariff Item 27 "Waste and Scrap of Aluminium" is one of the items exigible to excise duty. An explanation was added to Tariff Item 27 by the Finance Act, 1981 to the following effect:

"27. Explanation (1) 'Waste and Scrap ' means waste and scrap metal fit only for the recovery of metal by remelting or for use in the manufacture of chemicals, but does not include sludge, dross, scalings, skimmings, ash and other residues;" *

Tariff Item 68 which was introduced for the first time in 1975 was as follows:

"68. All other goods, not elsewhere specified, but excluding-

(a) * * * * * * * * * * * * * * *

(b) * * * * * * * * * * * * * * *

(c) * * * * * * * * * * * * * * *

Explanation For the purposes of this Item, goods which are referred to in any preceding Item in this Schedule for the purpose of excluding such goods from the description of goods in that item (whether such exclusion is by means of an Explanation to such Item or by words of exclusion in the description itself or in any other manner) shall be deemed to be goods not specified in that Item." *

The question in all these appeals relates to the exigibility of aluminium dross and skimmings to excise duty by reason of Item 68 and its Explanation read with the Explanation to Item 27. It is contended by the appellants that the Explanation to Item 27 makes it clear that dross and skimmings are not included in the item "Waste and Scrap of Aluminium". Since these are expressly excluded from Item 27, these must be included in Item 68 as the Explanation to Item 68 makes it clear that goods which are referred to in any preceding Item in the Schedule for the purpose of excluding them from the description of goods in that Item, will have to be included in Item 68.

The entire argument proceeds on the basis that aluminium dross and skimmings are excisable goods. Otherwise the question of their inclusion in Tariff Item 68 does not arise. The appellants have emphasized the fact that aluminium dross and skimmings are capable of being sold. Hence they must be considered as marketable goods. Since they arise in the course of manufacture, the duty of excise can be levied on such goods. The foundation of the arguments rests on the assumption that aluminium dross and skimmings are marketable goods. **For reasons which we have set out earlier, it is not possible to consider aluminium dross and skimmings as "goods" or as a commercial and marketable commodity. Dross and skimmings are merely refuse or ashes given out in the course of manufacture, in the process of removing impurities from the raw material. This refuse is quite different from waste and scrap which is prime metal in its own right. #**

The Explanation to Item 27 is not for the purpose of separating certain types of wastes and scrap from the main Item of "Waste and Scrap of aluminium" and thus making it exigible to tax under Item 68. The Explanation to Item 27 merely excludes from waste and scrap certain residues or rubbish which cannot be categorised as "goods" at all. It is only those goods, which are otherwise liable to be included in a given Tariff Item, but are expressly excluded from it, which fall under the residuary Tariff Item 68. The Customs, Excise and Gold (Control) Appellate Tribunal in its order, which is the subject-matter of Civil Appeal No. 1423/87, has given several examples of this kind of exclusion which is covered by the Explanation to Tariff Item 68. It has given the illustration of a motor specially designed for use in a gramophone or record player which is expressly excluded from Tariff Item 30 which covers electric motors. These excluded motors are also motors, but because of

some peculiar characteristics imparted to them in their manufacture, they are excluded for assessment under Tariff Item 30. Similarly, slotted angles and channels made of steel which can be used as part of steel furniture, are expressly excluded from Tariff Item 40 which covers steel furniture and parts. These exclusions are for the purpose of correct assessment of these excisable products.

These excluded articles are "goods" in their own right, and are openly bought and sold in the market. Such excluded items, if they are not covered by any other item, would fall in the residuary Item 68 by virtue of the Explanation to Tariff Item 68.

In Collector of Central Excise, Patna vs. Indian Tube Co. Ltd. 0 (S.C.)], this Court has approved the reasoning of the Tribunal that the diluted sulphuric acid, i.e., liquid which remains after user, cannot be said to be a manufactured product and hence not liable to duty and that waste pickle liquor is in the nature of waste product and has neither marketability nor saleability and, therefore, not liable to duty.

In Commr. Of C.Ex., Chandigarh-I vs. Markfed Vanaspati & Allied Indus. (S.C.)], the question for consideration in this case was whether "spent earth" is liable to excise duty or not. Under the Tariff, prior to its amendment in 1985, it had been consistently held that "spent earth" was not liable to duty. However, with the enforcement of new Tariff in 1985, a conflict arose between various benches of the Tribunal. Some benches held that "spent earth" was still not excisable, whereas other benches held that, as it now stood included by a specific sub-heading, it became excisable. In view of these conflicting decisions, the matter was placed before the Larger Bench of the CEGAT which held that "spent earth" was still not dutiable. In the appeal preferred before this Court, this Court held the burden to prove that there is manufacture and that what is manufactured is on the Revenue and that merely because an item falls in a Tariff entry, manufacture must not be deemed. In para 6, this Court held as under:

"6. However, it appears to us that the observation made in this authority are "per incuram". In so observing, the decision of a Larger Bench of this Court in the case of Collector of Central Excise, Indore v. Universal Cable Ltd. Reported in [1995 Supp (2) SCC 465], has not been noted or considered. In this case an argument that a good become excisable because it is covered by Tariff Entry, has been negatived. In the case of B.P.L. Pharmaceuticals Ltd. v. Collector of Central Excise reported in [1995 Supp (3) SCC 1] it has also been held that merely because there is a change in the Tariff Item the goods does not become excisable. Subsequently in a judgment dated 13th February, 2003 in Civil Appeal No. 6745 of 1999 it has been held that merely because an item falls in a Tariff Entry, it does not become excisable unless there is manufacture and the goods is marketable. In Lal Woollen & Silk Mills' case (supra) it has not been held that the twin test of manufacture and marketability is not to apply. It is not possible to accept the contention that merely because an item falls in a Tariff Entry it must be deemed that there is manufacture. The law still remains that the burden to prove that there is manufacture and that what is manufactured is on the revenue. In this case, no new evidence is placed to show that there is manufacture. "Spent earth" was "earth" on which duty has been paid. It remains earth even after the processing. Thus if duty was to be levied on it again, it would amount to levying double duty on the same product." *

In Union of India vs. Ahmedabad Electricity Co. Ltd. (S.C.)], the question which arose for consideration was regarding exigibilty of 'cinder' to excise duty. The respondent in the said appeals use coal as fuel for producing steam to run the machines used in their factories to manufacture the

end product. Coal is burnt in the boilers or furnaces for producing steam. Normally, coal when it is burnt in boilers is reduced to ash. Some part of coal does not get fully burnt because of its low combustible quality. This unburnt or half burnt operation of coal is left out in the boilers. It is called 'cinder'. A point was posed for determination by this Court in para 7 of this judgment which is quoted hereinbelow.

"7. Whether inclusion of an item in the entries to the First Schedule to the Tariff Act per se makes the item exigible to excise duty ?. * It is useful to reproduce the relevant paragraphs of the judgment which read as under:

"We are unable to accept the proposition advanced by the learned Additional Solicitor General. A close look at Section 3 of the Central Excise Act shows that the words 'excisable goods' have been qualified by the words "which are produced or manufactured in India". Therefore, simply because goods find mention in one of the entries of the First Schedule does not mean that they become liable for payment of excise duty. Goods have to satisfy the test of being produced or manufactured in India. It is settled law that excise duty is a duty levied on manufacture of goods. Unless goods are manufactured in India, they cannot be subject to payment of excise duty. There is no merit in the argument that simply because a particular item is mentioned in the First Schedule, it becomes exigible to excise duty. [See Hyderabad Industries Ltd. & Anr. Vs. Union of India & Ors., (1995) 5 SCC 338 and Moti Laminates Pvt. Ltd. & Ors. Vs. Collector of Central Excise, Ahmedabad, (1995) 3 SCC 23]. Therefore both on authority and on principle, for being exigible to excise duty, excisable goods must satisfy the test of being produced or manufactured in India. The arguments to the contrary is rejected. *

Recently this Court had occasion to deal with a case of excise duty sought to be levied on 'spent earth'. This was in Commissioner of Central Excise, Chandigarh vs. Markfed Vanaspati & Allied Industries]. Excise duty was being paid on "earth", 'spent earth' is a residue resulting from treatment of fatty substances. The 'spent earth' remained 'earth' even after processing though its capacity to absorb was reduced. It was held that no excise duty was leviable on 'spent earth'. The facts in this case are quite similar to the facts of the case in hand. In Markfed case 'earth' was reduced to 'spent earth' with a reduced potency to absorb. In the case in hand, coal was reduced to inferior quality coal which was no longer of use in the furnaces in the factories, therefore, it could be reasonably be said that 'cinder' i.e. coal of reduced quality still was coal and not exigible to excise duty.

In Modi Rubber Ltd., Modi Nagar, U.P. & Anr. Vs. Union of India & Ors. 1986 Indlaw DEL 14 (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 exigible 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 exigible 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 skilful manipulation of the inputs or the raw materials. This was not so in case of scrap.

It is worth mentioning that in UOI & Ors. Vs. Indian Aluminium Co. Ltd. & Anr. 1995 (2)

Suppl(SCC) 465], it was held that waste or rubbish which is thrown up in the course of manufacture could not be said to be a produce of manufacture exigible to excise duty. In this case the assesses manufactured aluminium products out of the aluminium ingots. In the process of manufacture dross and skimmings arise and accumulate in the furnace in the shape of ashes as a result of oxidization of metal. Aluminium dross contain an amount of metal from which they come but they lack not only metal body but also metal strength, formability and character. Such dross and skimmings are distinct from scrap which is a metal of good quality. Dross and skimmings though obtained during process of manufacture were held to be not exigible to excise duty at the relevant time. Since the dross and skimmings were sold in the market it was argued that they were a marketable commodity and should be subject to levy of excise duty. The Court observed that these were nothing but waste or rubbish which is thrown up in the course of manufacture. This judgment also answers the argument of the learned counsel for the appellant based on Khandelwal Metal's case[ ] wherein brass scrap produced during manufacturing of brass goods were considered to be liable to excise. In the present case, cinder though sold for small price cannot be said to be a marketable commodity in the sense the word " marketable" is understood. Due to sheer necessity cinder has to be removed from the place where it occurs because unless removed it will keep on accumulating which in turn lead to loss of precious space. Facts noted in TISCO's case by the lower authorities show that TISCO had been paying substantial amounts for removing cinder to a dumping ground. From the dumping ground, it was picked up by parties to whom it was sold. As per the averment, TISCO is spending many times more on removing cinder than what it realizes from its sale. These are matters of fact which have not been gone into by the authorities concerned and therefore it is too late for us to go into all this.

Applying the tests laid down in these judgment, it is not possible to say that cinder satisfied the requirement of being manufactured in India."

This Court, in conclusion, held that 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 and that the Revenue have done nothing to discharge this onus.

In our opinion, this Court in Indian Aluminium Co. Ltd. (supra) has held that merely selling does not mean dross and skimming are marketable commodity as even rubbish can be sold and everything, however, which is sold is not necessarily a marketable commodity as known to commerce and which, it may be worthwhile to trade in. The issue involved in this case is governed by the past decisions of the Tribunal and also of this Court where the Tribunal and this Court held that the zinc dross and skimming arising as refuse during galvanisation process are not excisable goods. The Tribunal, in our opinion, has rightly relied upon the decision of this Court in Indian Aluminium Co. Ltd. (supra) and in view of the above decision of the Tribunal following this Court's opinion in Indian Aluninium Company Limited (supra), we disagree with the appellant's that zinc dross, flux skimming and zinc scallings are goods and hence excisable.

The appeals filed by the Revenue have no merits and are liable to be dismissed and we do so accordingly. The respondent/assessee will be entitled for refund of the duty and penalty, if any, paid by them. No costs. #