BOMBAY HIGH COURT

Indian Aluminium Co. Ltd

Vs

A.K. Bandyopadhyay

(B Lentin, J.)

01.01.1800

ORDER

B Lentin, J

1. The 1st petitioner (referred to hereafter as ``the Company") is a public limited company whereof the 2nd petitioner is a shareholder. The Company owns factories at Belur, Taloja and the places. the Company carries on business of manufacturing aluminium sheets at its taloja factory. The bulk of the raw material required for the manufacture of aluminium sheets is aluminium ingots which the Company procures from various sources. At the first stage of professing,m dross and skimmings arise and accumulate in the furnace in the shape of ``ashes" on the oxidisation of the aluminium ingots. These ``ashes" are formed mainly during the melting down of the solid charge, i.e. aluminium ingots and to some extent during subsequent treatments and holding operation of molten baths in the furnace. Dross consists mostly of oxides, non-metallic and other foreign materials which are formed during the melting and holding operations and finally accumulates on the surface of the molten bath. The dictionary meaning of ``dross" is : ``scum thrown off from metals in smelting; refuse; rubbish or worthless impure metal". The dictionary meaning of skimming is ``that which is removed or obtained from the surface by skimming." Skimmings are mostly thin oxide layers normally obtained by skimming a molten bath prior to metal transfer on casting. The skimming operation is essential to help dissolved gasses escape from molten bath. Re- melting of skimmings along with normal production melts impairs metal quality of the raw material and consequently losses it s original chemical composition and characteristics. According to the petitioner, dross and skimmings represent process loss or melt loss.

2. Section 3 of the Central Excise and Salt Act, 1944, provides, inter alia, that there shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and at the rates set forth in the First Schedule to the Act. It is further provided that Central Government may by Notification in the

Official Gazette fix for the purpose of levying the duties, tariff values of any articles enumerated either specially or under general headings in the First Schedule as chargeable with duty ad valorem and may alter any tariff values for the time being in force and the tariff values may be fixed for different classes or description of the same articles. Tariff Item No. 27 in the First Schedule deals with aluminium. Aluminium ingots and aluminium sheets are both excisable Items, the former being dutiable under Tariff Item No. 27 (a)(i) and the latter under Item No. 27(b), the rate of excise duty on both being 40% ad valorem.

3. The Central Excise Rules, 1944 have been framed under the Act In the exercise of powers conferred by sub-Rule (1) of Rule 56-A, the Central Government has specified several excisable goods in respect of which the procedure laid down in sub-rule (2) of Rule 56-A shall apply and the said excisable goods so specified, include aluminium. With the permission of the Collector, the Company brought or received duty-paid aluminium ingots for the purpose of manufacturing aluminium sheets under the procedure provided in Rule 56-A. At the time of obtaining the requisite permission prior to 1st March 1975, the Company submitted from time to time to the Collector, a classification list showing excisable and non-excisable items. As aluminium ingots were used in the manufacture of aluminium sheets and since the duty was already paid in respect of the aluminium ingots under the same item as aluminium sheets, namely Item No. 27, the Company was allowed credit of the duty already paid on the aluminium ingots. Accordingly a the time of clearing aluminum sheets prior to 1st March 1975, the Company availed itself of credit of duty already paid by it on the aluminium ingots. As far as the dross and skimmings which arose and accumulated during the manufacturing operation, the Company cleared the same prior to 1st March 1975 with the permission of the Excise authorities without payment of any duty.

4. On 29th September 1966 and 5th October 1967, Trade Notices were issued by the collector of Central Excise at calcutta, stating that aluminium extracted out of dross and skimmings would be excisable and assessable at the appropriate rate and clarified that aluminium dross and skimmings were not liable to Central Excise duty under Item No. 27. Thereafter Government of India by its Notification dated 23rd November 1968, allowed exemption of excise duty on aluminium recovered from aluminium dross and skimmings. By his Trade Notice dated 27th December 1968, the Collector of Central Excise, Calcutta, stated that in view of the aforesaid Notification, his two earlier Trade Notices dated 29th September 1966 and 5th October 1967 shall be treated as cancelled. Since, however in those two Trade Notices of 29th September 1966 and 5th October 1967, it had not only been stated that aluminium extracted out of dross and skimmings would be excisable and assessable at the appropriate rate but it was also clarified that aluminium dross and skimmings were not liable to Central Excise duty under item No. 27 and since the Notification affected only a part of the two earlier Trade Notices dated 29th September

1966 and 5th October 1967, which stated that aluminium extracted out of dross and skimmings would be liable to excise duty, it was not lead to the Company whether the cancellation of the two earlier Trade Notice in their entirety had the effect of withdrawing the other part of the said two earlier Trade Notice where it was clarified that aluminium dross and skimmings could be cleared without payment of excise duty. Accordingly the Company addressed a letter dated 7th January 1969 to the Collector, Central Excise at Calcutta, pointing out that dross and skimming's contain only a small percentage of aluminium and hence they had not been included in the Central Excise Tariff and the cleans of the same had therefore been allowed without payment of duty and at the same time felt that aluminum being a scarce metal even the small percentage contained in dross and skimmings should not be destroyed although the Rules permitted waste products to be destroyed. By that letter a request was made to review the position and remove the doubt resulting from the cancellation of the two earlier trade Notices. On 30th January 1969 , the Superintendent (Tech) for Collector of Central Excise Calcutta addressed a letter to the COmpany, stating that by the Notification exemption had been provided for aluminium ingots recovered from aluminium dross and skimmings and that when exemption had been allowed on aluminium ingots itself recovered from dross and skimmings, the question of subjecting dross and skimmings to excise control did not arise and as such it was not considered necessary to keep in operation the earlier two Trade Notice. It is therefore the petitioners' case it was accordingly represented to them by the excise and skimmings were not subject to excise control and that in view of the Notification even aluminum recovered from dross and skimmings was exempt from excise duty.

5. On 3rd January 1969 , the Collector of Central Excise, Calcutta, addressed a letter to the Member of the Central Board of Excise and Customs, New Delhi, stating that aluminum dross and skimmings arise from aluminium ingots when the ingots/scrap were melted in the factories manufacturing sheets, strips etc., and that this kind of ``waste'' did not fall under Tariff Item no. 27, that aluminium, ingots were also recovered out of dress and skimmings and such ingots had been exempted from payment of duty under the Notification and therefore the provisions of Rule 56-A regarding the disposal of waste could not be made applicable in respect of dress and skimmings and requested the Board to examine the issue. On 4th January 1969, the Collector, Central Excise, Calcutta, addressed a letter to the Member of the Central Board of Excise and Customs, New Delhi, referring to the Ministry's circular dated 20th December 1968, the amendments to Rule 56-A and the issue regarding proforma credit being in admissible for material or components lost or destroyed in the manufacturing factory and stating that it was not clear whether the possessing losses would also come under the category or only the physical losses from the stock of RG-23 Part I. In that letter the Collector further stated that processing losses in manufacturing pertained to manufacturing operation and he presumed that such losses

would remain immune. The Collector also referred to the question of admissibility of proforma credit as regards by- products, wastages, scrap , dross, skimmings, etc., obtained in the process of manufacture of products and stated that the emergence of the end-product was the final stage when materials/components had merged their identity finally with the product, that during the process of manufacture several changes in the from, shape and property of the materials take place entailing from waste matter or by-product or waste like dross, skimmings not being excisable products need not be charged with duty or incur debit liability against proforma credit and requested for confirmation of this assumption by the Collector. On 17th March 1969, the Central Board of Excise and Customs, New Delhi, addressed a communication to all Collector of Central Excise and confirmed that the provisions of sub-rule 3(iv) of Rule 56-A for the disposal of waste referred to in the letter dated 3rd January 1969 were not applicable to aluminum dross and skimmings. By its letter dated 17th November 1969, the Ministry of Finance confirmed to the Collector of in the circular dated 20th December 1968 was not to be made on account of bona fide processing losses which occurred during the manufacturing operations to which the material or component parts may be subjected. The Ministry further clarified that sub-rule 3(iv) or Rule 56-A was applicable only when the waste arising from the process of manufacture was excisable material and that if such waste or by-product was of non-excisable category it obviously could not be charged to duty. It is the petitioner's case in the petition that it was accordingly represented by the Excise authorities that there was no question of any reduction in the proforma credit on account of bona fide processing losses occurring during the manufacturing operation to which the material or component parts may be subjected , that sub-rule 3(iv) of Rule 56-A did not apply to dross and skimmings which were not chargeable to any excise duty and did not incur any debit liability against the proforma credit allowed for aluminium ingots.

6. Subsequently by Notification No. 46/70-CE, dated 1st March 1970, the effective rate of duty for aluminium recovered from dross and skimmings of aluminium was specified as ``Nil."

7. From time to time prior to 1st March 1975, the Company cleared dross and skimmings without payment of any duty with the knowledge and consent of the Excise Authorities who allowed the Company credit of the duty paid on the entire quantity of aluminum ingots at the time of clearance of the aluminum sheets. In connection with the procedure under Rule 56-A, the Company maintained the requisite which Registers were scrutinised and checked by the Excise authorities from time to time and the Company was at all times prior to 1st March 1975 permitted to clear dross and skimmings without payment of any excise duty and claim at the time of clearance of the aluminium sheets, credit for the duty paid on the entire quantity of aluminum ingots received by the Company. According to the petitioners, dross and skimmings were treated as non-excisable throughout as it was only from 1st March 1975 that the same were brought under the purview of Tariff Item No. 68 pursuant to which the Company was required to furnish

a separate classification list regarding dross skimmings wherein dross and skimmings were shown as liable to duty at the rate of 1% ad valorem.

8. On 7th February 1974, the Superintendent of Central Excise, Khopoli, issued a notice calling upon the Company to show cause why it should not be required to pay excise duty of Rs. 1,71,923.49 basic and Rs. 57,307.83 auxiliary aggregating to Rs. 2,29 231.32 at 40% ad valorem on the ground that these duties had not been levied and that the said amount was recoverable from the Company under Rule 10 of the Central Excise Rules, 1944. The grounds on which the aforesaid amount was proposed to be recovered were that the Company was receiving duty- paid aluminium ingots and was availing itself of the proforma credit under Rule 56-A and that it was observed that the Company was clearing aluminium dross and skimmings :-

> "which is a product out of these aluminium Ingots, etc. (on which proforma credit is availed) without payment of CEX duty."
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> By the said show cause notice, it was further stated that the Company was not entitled for the proforma credit amount on the materials later cleared in the form of aluminium dross and skimmings without payment of duty. It the circumstances, the Company was directed to pay the amount of duty erroneously availed of by the Company :
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> "as proforma credit under Rule 56A on the quantity which is later on cleared in the Shape of Aluminium Skimmings."

9. By its letter dated 20th February 1974, the Company showed cause against the aforesaid notice. In that letter it was stated, iner alia, that raw materials brought into the Company's factory at Taloja were aluminium ingots brought into the factory under the same Item or sub- item, namely, No. 27(a)(i), and not on dross and skimmings, the latter not being dutiable it not being included in Item No. 27 of the Central Excise Tariff pertaining to aluminium. It was further stated that dross and skimmings are formations from the raw material, namely aluminium ingots, brought into the factory, that during the manufacturing process the raw material changes its form with the result that dross and skimmings have no identity with the raw material particularly as the latter is in solid form the almost 100% metal whereas dross and skimmings are in the form of "ash" and are not "metal". The Company further stated that in the circumstances the amount of duty was not erroneously availed of by the Company as proforma credit under Rule 56-A on the quantity of the raw material which was later on cleared in the shape of aluminium dross and skimmings. It was further stated that there was no stipulation in sub- clauses (ii)(a) of clause (2) of Rule 56-A that quantity of the material on which proforma credit has been obtained which was lost in the resultant formations different from the raw material. it was further stated that dross and skimmings subsequently cleared from the factory were not the material brought into the factory

and duty was not paid on them (as they were non-dutiable) under the same Item or sub-item as required by Rule 56-A but on aluminium ingots. By that letter the Company further submitted that the demand of duty for the period September 1972 to 6th February 1973 was time-barred.

10. Thereafter a personal hearing was given by the Assistant Collector of Central Excise who, by his order dated 7th September 1974, opined that the show cause notice demanding duty on dross and skimmings cleared without debiting the amount of proforma credit was correctly issued and confirmed the same.

11. On 21st September 1974, the Inspector of Central Excise issued a demand notice in the sum of Rs.2,29,231.32. In the meantime on 20th September 1974, the Company filed an appeal before the Appellate Collector against the order dated 7th September 1974 passed by the Assistant Collector. By his order dated 10th November 1974, the Appellate Collector allowed the Company's appeal and set aside the order dated 7th September 1974 of the Assistant Collector and granted consequential relief to the Company.

12. Thereafter in exercise of the powers vested in the Central Government under section 36(2) of the Act, Government issued a show cause notice dated 10th June 1975 stating that Government tentatively held the view that the order of the Appellate Collector was not proper, legal and correct inasmuch as the Company was :

> "not entitled to the amount of proforma credit on that portion of Aluminium ingots brought to their factory which is equivalent to the weight of Aluminium Dross and Skimmings in view of the provisions of sub-rule 2(i) of Rule 56-A of the Central Excise Rules, 1944,....".

By this show cause notice, the Company was informed that Central Government proposed to set aside the order of the Appellate Collector and to restore the order passed by the Assistant Collector. By its letter dated 29th July 1975 the Company sent a reply to the show cause notice.

13. By its order dated 25th October 1975, the Central Government observed that sub-rule 2(i) of Rule 56-A says that no credit is permissible in respect of any material or component parts used in the manufacture of finished excisable goods if such finished excisable goods produced by the manufacturer are exempted from the whole of duty of excise leviable thereon or are chargeable to `Nil' rate of duty and that though sub-rule 2(i) of Rule 56-A was not quoted in the original show cause notice dated 7th February 1974, the Superintendent of Central Excise who issued that show cause notice relied upon the provisions of sub-rule 2(i) of Rule 56-A. by that order it was further observed that dross and skimmings are not waste because aluminium ingots can be recovered out of them and hence sub-rule 3(iv) of Rule 56-A of the rules for disposal of waste

was not applicable in the dross and skimmings. The order concluded :-

> "In this consideration, the Government of India orders, that to the extent such dross and skimmings are not utilised in the finished product, the credit on such portion of ingots is not admissible."

14. As a result, the petitioners filed the present petition for an appropriate writ to set aside the show cause notice dated 10th June 1975 issued, and the order dated 25th October 1975 passed, by the Central Government.

15. The defence taken up in the affidavit-in-reply filed by the Assistant Collector of Central Excise is that the dross and skimmings arise as a result of melting of aluminium ingots in the Company's factory and are marketable products which are sold by the Company. Dross and skimmings contain aluminium metals and are a by-product sold as such. Prior to 1st March 1975, dross and skimmings were non- excisable goods and no excise duty was leviable thereon. The Company brings duty-paid aluminium ingots for manufacture of aluminium sheets under the procedure provided in Rule 56-A. The Company used in the manufacture of aluminium sheets duty-paid aluminium ingots and as duty was already paid for the aluminium ingots, the Company got credit in respect of the entire duty paid on aluminium ingots obtained by it for manufacture of aluminium sheets which are excisable goods and excise duties are levied thereon under Item No. 27 of the Central Excise Tariff. The aluminium ingots were being melted in the process of manufacture of aluminium sheets. In the melting process of the aluminium ingots, dross and skimmings arise as by- products which are marketable products sold by the Company. Under Rule 56-A (2), no credit in respect of duty already paid on the excisable materials or component parts is allowable if the excisable materials or component parts are used in the manufacture of non-excisable materials or component parts are used in the manufacture of non-excisable goods. The Company obtained credit for the entire duty paid on aluminium ingots which were to be used by it in the manufacture of aluminium sheets. However, in the process of manufacturing aluminium sheets, dross and skimmings arise as marketable by-products which were non-excisable prior to 1st March 1975. The weight of the aluminium dross and skimmings plus the weight of the aluminium sheets plus the melting loss will account for the total weight of the aluminium ingots. The dross and skimmings are resultants from the aluminium ingots, but no duty was payable or paid on the dross and skimmings prior to 1st March 1975 as the same were non- excisable. As the dross and skimmings contain aluminium and form part of the original aluminium ingots, the Company was not entitled to any credit for duty paid on the portion of the quantity of aluminium ingots equal to the quantity of dross and skimmings obtained from the aluminium ingots by virtue of the provisions of Rule 56-A(2). The Company therefore wrongly obtained credit in respect of the portion of the aluminium ingots, which got converted into dross

and skimmings. The Company was wrongly obtained credit of duty paid on the whole guantity of aluminium ingots utilised by the Company in the manufacture of aluminium sheets and dross and skimmings. In respect of the weight of the dross and skimmings, the Company is liable to be debited against the credit given for the full quantity of aluminium ingots. It is denied that the entire quantity of aluminium ingots, received by the Company was used in the manufacture of aluminium sheets inasmuch as a part of the aluminium ingots was converted into dross and skimmings which include part of the aluminium contained in the aluminium ingots. It is denied that the dross and skimmings represent only bona fide process loss or melt loss, inasmuch as from the dross and skimmings, aluminium could be recovered. While in the affidavit- in-reply, there is a constant emphasis that dross and skimmings are by-product, it is conceded that aluminium dross and skimmings are not pure aluminium but only contain some percentage of aluminium out of which the parties to whom the dross and skimmings are sold, recover aluminium. To the extent that the dross and skimmings are not utilised in the finished product, the credit on such portion of aluminium ingots is not is denied that the petitioners are entitled to credit for the entire quantity of aluminium ingots used by them in the manufactured dross and skimmings which were finished by-products and accordingly on the quantity of dross and skimmings the Company was not entitled to avail itself of credit in respect of any duty paid by the Company.

16. The first show-cause notice dated 7th February 1974 issued by the Superintendent as also the demand order dated 21st September 1974 issued by the Inspector proceed on the footing as if aluminium dross and skimmings are goods on which there was a levy of duty under Tariff item No. 27 and that the Company had cleared the dross and skimmings without payment of duty and accordingly it was a case of non levy of duty under rule 10. It is conceded by the respondents that during the relevant period dross and skimmings were not excisable goods and hence this point does not survive. However, the show cause notice dated 10th june 1975 issued by the Central Government as well as the impugned order dated 25th October 1975 make out a new case and proceed on the footing that the Company was not entitled to credit of duty paid on ingots which is equivalent to the weight of dross and skimmings in view of sub-rule 2(i), i.e. the first proviso to Rue 56-A(2). Accordingly it was the case of the respondence that the petitioners are not entitled to proportionate credit of the duty paid on ingots in view off the proviso. This has also been stated in the affidavit-in- reply. Thus the only case which the petitioners have to meet is whether they are disentitled from claiming credit of duty paid on ingots by virtue of this proviso.

17. On behalf of the petitioners, the impugned show cause notice and order were challenged on 4 grounds. Firstly, it was urged that proviso to Rule 56-A(2) was inapplicable. Secondly it was urged that the notice dated 7th February 1974 was time-barred under Rule 10 read with Rule 173 (j) of the Rules. Thirdly it was urged that the power of revision under section 36 had been

exercised in violation of the jurisdiction conferred by that section. Fourthly it was urged that the letters dated 30th January 1969, 17th March 1969 and 17th November 1969 constituted a representation giving rise to the principle of promisors estoppel. However, the second, third and fourth contentions were not pr essed because it is no the result of the first contention that the petitioners have chosen to stand or fall.

18. On the other hand, it was urged by Mr. Dalal, the learned Counsel appearing on behalf of the respondents, that the proviso to Rule 56-A is applicable. He urged that in respect of any part of the ingots which had not actually been used in the manufacture of aluminium sheets but which resulted in dross or skimmings the Company was not entitled to claim the requisite credit. Mr. Dalal further urged that the show cause notice dated 7th February 1974 issued by the Superintendent of Central Excise was under sub-clause (v) of Rule 56- A.

19. This last contention of Mr. Dalal can conveniently be disposed of straightaway by stating that such is not even the case of the respondents in the affidavit-in-reply and there is nothing beyond the ipse dixit of learned Counsel in support of such contention. Here it may also be stated that in the affidavit-in-reply, a plea has been taken that this petition should have been filed on the Appellate Side of the High Court. That technical ground was, however, not pressed by Mr. Dalal.

6th December 1979

20. In order to appreciate the rival contentions of the parties, it would be pertinent to refer to Rule 56-A which provides for special procedure for movement of duty-paid materials or component parts for use in the manufacture of finished excisable goods. Sub-rule (1) states that notwithstanding anything contained in the rules, the Central Government may, by notification in the Official Gazette, specify the excisable goods in respect of which the procedure laid down in sub-rule (2) shall apply. The relevant excerpts from sub-rule (20 are as under :-

> "The Collector may,...permit a manufacturer of any excisable goods specified under sub-rule (1) to receive material or component parts .....on which the duty .....has been paid in his factory for the manufacture of these goods.....and allow a credit of the duty already paid on such material or component parts or finished product, as the case may be:"

This under sub-rule (2), the Collector can permit a manufacturer of the specified excisable goods to receive duty-paid material for manufacture of the goods and the allow a credit of the duty already paid on such material. In this matter there is no dispute that the Company manufactures the specified excisable goods, namely, aluminium sheets out of aluminium ingots and thus are covered by sub-rule (2). It is also not in dispute that the Company receives duty-paid ingots

(namely materials) for the manufacture of aluminium sheets (namely goods) which are excisable goods and since ingots and sheets fall under the same Tariff item, namely, Item No. 27, the petitioners are entitled to credit of duty already paid on the ingots while clearing the sheets.

21. However, the proviso to sub-rule (2) carves out an exception where no credit is allowed. The relevant excerpts from that proviso are as under :-

> "Provided that no credit duty shall be allowed in respect of any material or component parts used in the manufacture of finished excisable goods-
>
> (i) If such finished excisable goods produced by the manufacturer are exempted from the whole of the duty of excise leviable thereon or are chargeable to "nil" rate of duty,....."

This proviso brings to the forefront that the credit under sub- rule (2) shall not be allowed if (a) material is used in manufacture; (b) such manufacture is of goods; (c) such goods are finished excisable goods and (d) such finished excisable goods are either exempt from the whole of the duty of excise leviable thereon or are chargeable to "nil" rate of duty. It can hardly be gainsaid that if any of the conditions mentioned in this proviso is absent, the proviso would be inapplicable with the result that the manufacturer would not be disentitled from claiming credit of duty paid in respect of the material. On behalf of the petitioners it was emphasised that this proviso to Rule 56-A(2) is not and cannot be applicable because 9a) dross and skimmings are not goods, (b) dross and skimmings are not finished excisable goods, (c) ingots are not used for the manufacture of dross and skimmings and (d) dross and skimmings are not goods which were liable for excise duty and have been relieved from such duty by grant of exemption nor was any duty chargeable on dross and skimmings the rate of which was "nil".

22. it is difficult to come to the conclusion that dross and skimmings are "goods" and the contention to the contrary urged on behalf of the petitioners is not entirely devoid of substance. As stated earlier, dross is nothing but "scum thrown off from metals in something; refuse, rubbish or worthless impure metal" and skimming is "that which is removed or obtained from the surface by skimming." These are nothing but "ashes" resulting in the process of the manufacture of aluminium sheets from aluminium ingots. In Union of India v. Delhi Cloth and General Mills Co. Ltd., , it was held that "goods" must be something which can ordinarily come to the market and be bought and sold and that the "manufacture" which is liable to excise duty under the Central Excises and Salt Act, 1944, must therefore be the "bringing into existence of a new substance known to the market." At para 14 of the Report it was observed as under :-

> ".....The word `manufacture' used as a verb is generally understood to mean as `bringing into existence a new substance' and does not mean merely `to produce some change in a

substance' however minor in consequence the change may be. This distinction is well brought about in a passage thus quoted in Permanent Edition of Words and Phrases, Vol. 26, from an American Judgment. The passage runs that :-

"`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 or use.'"

23. The decision in the Delhi Cloth Mills' case was followed by the Supreme Court in S. B. Sugar Mills v. Union of India, , where at para 14 of the Report it was observed as under :-

"The Act charges duty on manufacture of goods. The word `manufacture' implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use. The duty is levied on goods. As the Act does not define goods, the legislature must be taken to have used that word in its ordinary, dictionary meaning. The dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market. That it would be such an article which would attract the Act was brought out in Union Of India v. Delhi Cloth and General Mills Ltd., ."

24. The question that one must ask oneself is whether therefore dross and skimmings are "goods". It may well be that dross and skimmings may be capable of fetching some sale price. For that matter any rubbish can be sold. But that is not the criterion. It cannot be said that dross and skimmings are the result of treatment, labour or manipulation whereby the end-product is dross and skimmings. They are merely the scum thrown out in the process of manufacture of aluminium sheets. Therefore it cannot be said that dross and skimmings are transformation resulting in a new and different article with a distinctive name, character or use or that they ordinarily come to the market to b bought and sold and are known to the market. The article or goods manufactured from the aluminium ingots was not dross and skimmings but the aluminium sheets. it was the aluminium sheets therefore that were the end-product or the finished product and not the dross and skimmings, which were merely the refuse or scum or rubbish thrown out in the course of the manufacture of the finished product, namely, the aluminium sheets. As stated earlier, in the affidavit-in-reply, there has throughout been a repeated emphasis that the dross and skimmings are a by-product and that the aluminium ingots were used by the Company in the manufacture of dross and skimmings. To illustrate, in para 7 of the affidavit-in-reply, it is stated.

".....aluminium ingots utilised by the first petitioners in the manufacture of aluminium

sheet and dross and skimmings."

(The underlining is mine).

In para 15 it is stated -

".....I submit that to the extent that dross and skimmings are not utilised in the finished products, the credit on such portion of aluminium ingots is not admissible as the end product dross and skimmings is not excisable".

(The underlining is mine).

In para 32 it is stated -

".....I deny that the entire quantity of aluminium ingots was used by them in the manufacture of aluminium sheets as is sought to be alleged, as part thereof was used in the manufacture of by-products, viz. dross and skimmings ....."

In para 34 it is repeated that -

".....the petitioners had manufactured dross and skimmings, which were finished by-products.....".

(The underlining is mine).

Refuse or scum thrown off during the process of manufacture cannot by any stretch of imagination be considered as a by- product and merely because such refuse or scum may fetch some price in the market does not justify it being clothed with the dignity of being called by by-product, much less an end-product or a finished product. The aluminium ingots were utilised by the Company for the manufacture of the end- product, namely, aluminium sheets and certainly not for the manufacture of scum and refuse like dross and skimmings. Dross and skimmings cannot be called a finished by-product nor can it be said that out of the aluminium ingots it was dross and skimmings, in other words "ashes", that the Company manufactured. furthermore, the fact that dross and skimmings are not excisable is borne out by the admissions contained in the affidavit-in-reply itself. What also cannot be lost sight of is that the third limb of the proviso refers to the use of the material received in the manufacture of the end- product, namely "the finished excisable goods." Hence the thrust of the manufacturing process must be the production of the finished product, namely, the aluminium sheets from the ingots. Aluminium ingots could by no stretch of imagination be considered to have been used by the Company for the manufacture of dross and skimmings but necessarily for the manufacture of aluminium sheets. Dross and skimmings cannot be said to be "finished excisable goods". Further, dross and

skimmings were not exempted from the whole of the duty of excise nor were they chargeable to "nil" rate of duty.

25. Thus none of the requirements of this proviso can be said to have been complied with so as to bring the case of the department within its ambit. In these circumstances, the contention urged on behalf of the petitioners that this proviso has no application whatsoever must be upheld.

26. What also is not without significance is that the respondents' case that the Company wrongly availed itself of credit on the weight of dross and skimmings (as emphasised in paras 11, 15 and 23 of the affidavit-in-apply) is totally erroneous in view of their own admission that dross and skimmings are not pure aluminium but contain only a very small percentage of aluminium. In that event, even the show cause notice dated 7th February 1974 issued by the Superintendent, Central Excise, is bad as it refers to the entire quantity of dross and skimmings and not to the percentage of the aluminium in the dross and skimmings.

27. In the result, the petition is allowed in terms of prayer (a). There will be no order as to costs. Rule is made absolute accordingly.