IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

CENTR.EXCISE APPEAL No. 60 of 2006

UNION OF INDIA
V/S
M/S GRASIM INDUSTRIES LTD.& ANR.

Date of Judgment : 31st July, 2008

PRESENT
HON'BLE SHRI N P GUPTA,J.
HON'BLE SHRI KISHAN SWAROOP CHAUDHARI,J.

Mr. RISHABH SANCHETI for Mr. VK MATHUR, for the appellant / petitioner

Mr. RAMIT MEHTA, for the respondent

REPORTABLE

BY THE COURT : (PER HON'BLE GUPTA,J.)

This appeal has been filed by the Revenue against the judgment of the learned Tribunal dated 9.8.2005, allowing the appeal of the assessee, and setting aside the demand of Rs.4,75,335/-, as demanded by the Revenue in respect of the scrap, so also the penalties.

Necessary facts are, that the assessee is engaged in manufacture of white cement. The officers of the Central Excise Range Jodhpur, while conducting surprise inspection on 30.10.1999 noticed, that the assessee had cleared various types of waste and scrap

without payment of duty on the private invoices (other than those issued under Rule 52A) during the period October, 1995 to July 1999. Accordingly show cause notice was issued, demanding duty on scrap, calling upon the assessee to show cause, as to why the duty may not be recovered, and interest, and penalty etc. may not be imposed. The statement of the Vice President Shri P.K. Jain were recorded on 8.4.1999 under Section 14(2) of the Central Excise Act, 1944, and he stated that various types of scrap viz. M.S. Scrap, Conveyer scrap, scrap of Wooden Boxes, Cartoons scrap, Bearing scrap, Cement bags scrap etc. had arisen in their factory, and that said scrap had arisen from packaging material of goods received for use in the factory, and from machine and parts, bearing, conveyer belts etc., which became unusable in the plant, during the course of manufacture of cement, that welding machine scrap, Heat Casting scrap, Liner plate scrap, steel scrap, 5 Kg. Packing machine scrap, Blow Bar Scrap, Grinding segment, Grinding Media, Electrical scrap, Cable scrap, Aluminum etc. were generated out of items used in the manufacturing machinery, and of white cement which became unusable on account of wear and tear, and various types of scrap were sent to scrap yard from various parts of the plant, and related department used to maintain a return pass which was sent to stores. The statement of Shri H.R. Kapoor, DGM (Mechanical) of the Unit was also recorded, wherein he admitted that M.S. Scrap and iron scrap are generated in the workshop as well as in the plant during the process of repairing and

maintenance, and for this purpose they were using welding electrodes, Mild Steel, M.S. Channel Beams, M.S. Angles and cutting tools.

The learned Additional Commissioner found, that various types of waste and scrap are generated at various stages. Metal scrap is generated in the workshop as well as in the plant during the course of repairing and maintenance of plant and machinery. Waste and scrap of metal has been defined under section note 8 of section XV of the Central Excise Tariff Act. In the factory of the assessee, such metal scrap is generated while mechanical working of metal products, and therefore, fall under the category of excisable goods, and are liable to excise duty. Another type of metal and other scrap is generated from the used capital goods, on which modvat credit was taken, and as per the provisions of erstwhile Rule 57-S(2)(c) of Central Excise Rules, 1944 such scrap was required to be cleared on payment of duty. Interalia with these findings, the demand of Rs. 10,81,736/- was confirmed, and penalty in the equal amount was imposed, interest was also levied, and the penalty of Rs. One Lakh was imposed under Section 173Q (1)(a) of Central Excise Rules, 1944, and another penalty of Rs. One Lakh was imposed on the Vice President under Rule 209A of the Central Excise Rules, 1944.

Aggrieved of this order the assessee filed appeal, and cited various case laws. Learned

Commissioner (Appeals) found, that in the instant case the waste and scrap cleared by the assessee broadly fall under three categories, as under:-

(i) Waste & scrap generated by cutting of plates, sheets, etc. during the course of repair and maintenance of plant and machinery. Under this head the duty charged was Rs. 4,75,333/-.

(ii) Waste & scrap generated by dismantling of capital goods/machinery. Under this head the duty charged was Rs. 5,52,354/-.

(iii) Waste and scrap of containers/packing material of inputs. Under this head the duty charged was Rs. 54,049/-.

Then, the learned Commissioner proceeded to examine the leviability of excise duty on each of the category individually. In this process considering the waste and scrap of first category, it was found, that metal waste and scrap generated in the workshop was generated by cutting of metal plates, angles, channels, sheets etc., for making of parts of their plant and machinery, during the course of repair and maintenance, and that these are cut pieces/trimmings of metal, arising during making of parts, which were being replaced in place of old and worn out parts, although these are not resulting directly from the process of manufacturing of their final product i.e. Cement. However, the process undertaken by the assessee is definitely covered by the expression “mechanical working of metal” as given in the definition of waste and scrap. In the opinion of learned Commissioner, thus these goods satisfied the

definition as contained in Section Note 8(a) of Section XV of the Central Excise Tariff. Learned Commissioner sought support from a judgment of Tribunal, in Budhewala Co-op Sugar Mills Ltd. Vs. CCE, Chandigarh-I reported in 2002 (141) ELT-490. It was also found, that the fact that these waste and scrap have been generated by cutting of M.S. Sheets etc. in the workshop has not been refuted by the assessee. Thus, it was found that adjudicating authority correctly demanded duty on such waste and scrap. So far other two categories are concerned, learned Commissioner found them to be not liable to excise duty, and thus the demand was accordingly reduced, and the penalty imposed in terms of Section 11-AC was also upheld by being reduced to the extent of duty confirmed, being Rs. 4,75,335/-. Then, the penalty imposed under Section 173Q was set aside, and the penalty imposed on appellant no. 2 Vice President was reduced to Rs. 45,000/-.

Against this order no appeal was filed by the Revenue, rather the order was never challenged by the Revenue in any manner whatsoever, with respect to the portion of duty which was not found to be leviable on 2nd and 3rd category of scrap. Thus that part of the matter acquired finality. However, the assessee filed appeal, challenging the levy of duty on first category of scrap.

The learned Tribunal found, that in the instant case the scrap cleared by the assessee during

the period did not arise out of any manufacturing activity, but arose during wear/ tear of the machine and machinery, and that, no credit had been availed by the assessee in respect of those machines and machinery. Under these circumstances, no duty could be demanded or confirmed in respect of scrap. The learned Tribunal for this purpose relied upon another judgment of the learned Tribunal in Commissioner of Central Excise Vs. Birla Corporation reported in 2005(181) ELT-263. With these findings the appeals were allowed, and the entire demand was set aside.

It is against this order that the Revenue has come up in present appeal, which was admitted on 13.10.2006, by framing following substantial question of law:-

> "Whether the learned Tribunal is right in law in dropping the demand and penalty on clearance of waste and scrap arisen out of cutting of M.S. Sheet plates etc. in their work shop as well as in the plant for making them of required size and specification for their own use in the factory viz. for repair and maintenance of the machines/plant.?"

Arguing the appeal learned counsel for the Revenue submitted, that the learned Commissioner (Appeals) had clearly put the scrap generated, into three categories, and had found the scrap of 2nd and 3rd category to be not leviable to excise duty, and found the scrap of first category to be leviable to excise duty, and it was no-where the case of the assessee in appeal, that even the first category of scrap is not leviable to excise duty, or that the catagorisation

made by the learned Commissioner is wrong. Not only this even the learned Tribunal has not found the exercise of catagorisation into three categories by the learned Commissioner (Appeals) to be incorrect, or unwarranted. In these circumstances, the findings recorded by the learned Tribunal shows, that the learned Tribunal has found the scrap to be arising during wear/tear of the machine and machinery, and not to be arising out of manufacturing activity, and has relied upon its judgment in Birla Corporation's case, while a look at the judgment in Birla Corporation's case would show, that in that case the goods related to second category of scrap, in the categories formulated by the learned Commissioner (Appeals), and was not a case with respect to first category of scrap. Thus, the finding as recorded is perverse, and is required to be set aside. It was also contended, that according to Section Note 8(a), metal waste and scrap from the manufacture or mechanical working of metals and metal goods definitely not usable as such because of breakage, cutting-up, wear or other reasons is described as waste and scrap. According to the learned counsel, in the present case, the metal waste, and scrap has arisen from manufacture, and in any case mechanical working of metal, and metal goods, and the scrap so generated is definitely not usable as such, because of breakage, cutting up etc., and therefore, it fall under Section XV 8(a) is clearly excisable, and the order of the learned Tribunal is required to be set aside.

On the other hand learned counsel for the assessee supported the impugned judgment, and contended, that there is no perversity in the order of the learned Tribunal, inasmuch as the learned Tribunal has found, that the waste and scrap arose during wear and tear of the machine and machinery, and had not arisen out of any manufacturing activity. According to the learned counsel, manufacturing activity is a sine qua non for making waste or scrap excisable to duty. It is contended, that until and unless it is shown, that the scrap was result of manufacturing process, merely because it is described in the schedule as excisable, cannot attract the liability of excise duty. Learned counsel relied upon three judgments of Hon'ble the Supreme Court, being, Union of India Vs. Ahmedabad Electricity Co. Ltd. Reported in 2003(158) ELT-3, Elphinstone Metal Rolling Mills Vs. Collector of C. Ex., Bombay reported in 2004(167) ELT-481, and third being Commissioner of Central Excise, Lucknow Vs. WIMCO Ltd. reported in 2007(217) ELT-3. Relying on the authority of these judgments, it was contended, that even if the scrap falls under the definition as given in Section Note 8(a) of Section XV of the Central Excise Tariff Act, still in view of Section 2 (f) and 3 of Central Excise Act, 1944, unless the activity amounts to manufacture, no excise duty can be levied, as the basic ingredient for attracting of excise duty is “manufacture”.

We have considered the submissions, and have also perused the impugned judgments, the provisions of

law, and the case law cited.

Straightway coming to the Birla Corporation's case, relied upon by the learned Tribunal, it may be observed, that that was a case where liability was sought to be levied in respect of wear and tear/waste and scrap of capital goods, and had found, that scrap cleared cannot be said to be the goods manufactured, as that was only wear and tear/scrap arising during the use of capital goods, and as such did not fall within the ambit of Section 2(f) of the Act, and for the purpose of charging of the duty, the dismantling of the capital goods, and waste arising in that process, also cannot be said to be manufactured goods. In our view, thus this judgment clearly relates to the second category of scrap, as categorised by the learned Commissioner (Appeals), and not to the first category. Then, we may refer to another judgment of the learned Tribunal cited by the learned counsel for the Revenue, being in Budhewal Co-op Sugar Mills Ltd.'s case. A look thereat shows, that in that case, the duty was claimed on the sale of MS scrap generated in the workshop of the assessee, whereon duty was affirmed. It was also found, that no duty has been demanded in that case on sale of old parts of the machinery or scrap, allegedly generated by dismantling of used machinery. This judgment in our view, of course, does help the cause of the Revenue, but then the fact remains, that this is judgment of the learned Tribunal only, and then, it does not give any reasons.

Next judgment relied upon is, in SIV Industries Ltd. Vs. CCE reported in 2004(177) ELT-856. This again is a judgment of the learned Tribunal, South Zonal Bench, Chennai. In that case also the controversy related to scrap generated by manufacture, or mechanical working of iron and steel. It was found to be no more res-integra, in view of the judgment of learned Tribunal in Hindalco Industries Ltd. Vs. CCE, Allahabad reported in 2002(144) ELT-339. It was found, that by going through the evidence on record, including the statement of the two senior officers of the assessees, who have given a detailed account of the existence of the three workshops and the machines installed therein, it is clear, that the waste emerged, was a result of mechanical working on the virgin metals, and is clearly covered by the expression, as given in Section Note 8(a). Thus, the duty was affirmed. We may observe here, that in this judgment also the learned Tribunal has not considered the aspect, as to whether the scrap was out come of any manufacturing process.

On the other hand in Ahmedabad Electricity Co. Ltd.'s case, Hon'ble the Supreme Court, after referring to previous judgments of Hon'ble the Supreme Court, found that cinder resulting from burning of coal is not an out come of any manufacturing process, rather it was found to be by-product. It is a different story, that cinder in that case was not an excisable item, coal ash was excisable item, and Hon'ble the Supreme Court found, that cinder cannot

fall in the category of ash. It is again a different story, that Hon'ble the Supreme Court found, that neither un-burnt material viz. cinder, nor ash, emerging therefrom, can be said to be manufactured products, rather at best they can be called as by-product. In that case the assessee was manufacturer of electricity, and for running the machines they were burning coal for producing steam, by which the machine was propelled. In our view, on facts, the case is distinguishable. However, this much is a clear proposition propounded therein, that if the scrap is not obtained in process of manufacture, it cannot be exigible to excise duty.

The next judgment relied upon by the assessee is, Elphinstone Metal Rolling Mills' case. In our view that case need not detain us, because that is entirely different case, on facts, as well as legal proposition, inasmuch as, in that case the question was, as to whether the copper circles or sheets manufactured from copper scrap and copper wire bars, copper wire rods and castings, copper slabs and billets would be leviable to excise duty, where the prescribed amount of duty has been paid on the copper or copper content of alloys, in which event it would be exempted, therefore, this case has no bearing either ways.

Then, we come to WIMCO Ltd.'s case. In that case the waste was, the waste, scrap and parings of paper and paper board, generated during manufacture of

printed paperboard boxes, and it was found, that the scrap is not new, distinct in name, character and use, and hence was not found to be dutiable. It was further held in this judgment, that merely because there is a tariff entry, goods would not become excisable, unless manufacture is involved. In our view, this judgment helps the assessee, to the extent it propounds the proposition, that excise duty cannot be attracted unless manufacture is involved, and the mere fact that there is tariff entry, the goods cannot become excisable.

Now, we proceed to examine the case in hand, bearing in mind the above legal position. We may at this place gainfully quote Section Note 8(a), which reads as under:-

> "(a) waste and scrap:
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> metal waste and scrap from the manufacture or mechanical working of metals, and metal goods definitely not usable as such because of breakage, cutting-up, wear or other reasons."

A reading of this provision shows, that it comprehends the metal waste and scrap, generated consequent upon manufacture, or consequent upon mechanical working of metal, and metal goods. Thus, it cannot be said, that by making this provision, the metal scrap has merely been put in the tariff entry, or that there is mere tariff entry. This tariff entry does show, and can reasonably be interpreted to mean to be comprehending, manufacture of metal waste, and scrap, either from manufacture, as comprehended by

Section 2(f), or from "mechanical working of metal and metal goods". This is one aspect of the matter. We make it clear, that we do not mean to decide the whole issue, only on this basis.

Examining the matter from the stand point of requirement of the scrap to be coming into existence consequent upon manufacturing activity, a look at Section 2(f) shows, that it is inclusive definition, which reads as under:-

> "(f) "manufacture" includes any process-
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> (i) incidental or ancillary to the completion of a manufactured product; and
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> (ii) which is specified in relation to any goods in the Section or Chapter notes of [the First Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to [manufacture; or]
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> (iii) which, in relation to the goods specified in third Schedule involves packing or re-packing of such goods in a unit container or labeling or re-labeling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer.
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> and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;"

Thus, from a reading of this provision it is clear, that it includes any process incidental or ancillary to the completion of a manufactured product, and if it is specified in relation to any goods, in the section or Chapter Notes of the First Schedule to

the Central Excise Tariff Act, as amounting to 'manufacture', and is to be construed to be including, not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in the production or manufacture, on his own account.

Thus, in our view, firstly any process incidental or ancillary to the completion of a manufactured product also amounts to manufacture, and secondly, it is not necessary that the scrap should emerge in the process of manufacture of an excisable goods only, or in the process of manufacture of the end product only.

Now, we come to the factual aspect of the matter. In our view, the learned Commissioner (Appeals) has rightly put the entire lot of scrap in three categories, and the catagorisation has not been assailed by either side as well. Likewise the scrap falling in category (ii) and (iii) have not been found to be excisable to duty, and we have to concentrate only on category (i) which is "Waste & scrap generated by cutting of plates, sheets etc., during the course of repair and maintenance of plant & machinery".

In our view, it is clear from the record, that this category of scrap is a scrap generated by cutting of plates, sheets, as noticed by the learned Commissioner (Appeals), and obviously also welding electrodes, Mild Steel, Mild Steel Channel, M.S.

Angles, beams, cutting tools etc., and this scrap is generated during the course of repair and maintenance of plant and machinery. May be that the parts of machinery, which are replaced, and emerge as scrap may not be excisable, and have been found to be not excisable, but then, the part which is replaced, either as a whole, or in part, is very much a product, coming into existence, as a result of manufacturing process, by using the raw material, being plates, sheets, welding electrodes, steel channels, beams, angles etc., and by using such raw material, and subjecting it to manufacturing process, by giving welding, bending, grinding or finishing etc., a part required to be replaced comes into existence/being which is obviously a spare part of the plant and machinery, a distinct commodity, and is placed in the plant and machinery, as a spare part, or as a replaceable part. In such circumstances, if in the process of manufacturing of such part, the metal waste, or scrap, comes into existence, there can be no escape from the conclusion, that the metal waste or scrap has come into existence, as a result of manufacturing process, within the meaning of Section 2 (f), i.e. manufacturing of said spare part, or replaced part of the plant and machinery.

A situation is required to be visualised, that the assessee may opt for acquiring such spare part or replaceable part from its manufacturer, outside the factory, and may place it in the plant and machinery. Obviously in that event, the scrap would be

generated by the manufacturer of that spare part, and excise duty would be attracted in his hand. Naturally the scrap would not be generated in the premises of the assessee, and liability would not be attracted, but then simply because for the reasons of commercial expediency, or economic viability, or variety of such other reasons, if the assessee chooses better, not to depend on outside manufacturer of a spare part, and manufactures the same in his factory premises itself, i.e. in the workshop, in our view, it cannot be said, that metal waste or the scrap, generated in that process, would not be a scrap generated as a result of manufacturing process. The repair and maintenance may require replacement of a floor sheet of a machinery, which sheet may require particular specification, in its thickness, metal properties, heat and cold resistance, and so many other aspects. Likewise, it may be some pipe, some tube, some plate, some pulley, or the like, at times it may be required to be fitted by nuts and bolts, at times it may be required to be fitted by heat process, while at times it may be required to be fitted by welding process, and in those events, the bringing about of the part concerned in existence in the workshop by a mechanical process, from out of plates, sheets, channels, beams, angles, welding electrodes etc. would definitely amount to manufacturing process, and if metal waste, and/or its scrap is generated in the course of manufacturing, in our view, there is no escape from the conclusion, that such metal waste, and scrap, would be exigible to excise duty.

It is a different story, that in that event, the raw-material used in manufacture of that particular part, may amount to input, and if the assessee has purchased that input duly paid, and fulfills other requirement of law, the assessee may claim Modvat and Cenvat Credit in that regard, but then, in our view, we are firm, that the metal waste, or scrap, generated in such circumstances, would definitely be a waste or scrap arising out of manufacture, as comprehended by Section 2(f) of the Act.

Thus, the question as framed is required to be, and is, answered in the negative, i.e. in favour of the Revenue, and against the assessee, and it is held, that the learned Tribunal was not right in law in dropping the demand, and penalty, on the clearance of waste and scrap arising out of cutting of M.S. Sheet Plates etc. in their workshop, as well as in the plant, for making them of required size and specification, for their own use in the factory, viz. for repair and maintenance of the plant and machinery.

The appeal is accordingly allowed. The judgment of the learned Tribunal is set aside, and that of learned commissioner (Appeals) is restored. Parties shall bear their own costs.

(KISHAN SWAROOP CHAUDHARI),J. **(N P GUPTA),J.**

/Sushil/