

A COLLECTOR OF CENTRAL EXCISE, PATNA
v.
M/S. TATA IRON AND STEEL CO. LTD.

FEBRUARY 26, 2004

B [S. RAJENDRA BABU, DR. AR. LAKSHMANAN AND G.P.
MATHUR, JJ.]

C *Central Excise Act, 1944—Sections 2(d) & 3—Central Excise Tariff Act, 1985—Zinc dross and Flux skimming arising out of galvanisation of steel sheets—Levy of excise duty by Revenue treating them as excisable goods—Correctness of—Held, Zinc dross and flux skimming are refuse and are not marketable commodities and hence not liable to excise duty.*

D Respondent-assesseees are engaged in the manufacture of steel sheets and galvanisation of steel sheets. During the process of galvanisation, two products-zinc dross and flux skimming - come into existence. The Revenue found that the two products were sold by the assesseees without payment of excise duty under the Central Excise Act, 1944. The Revenue issued show cause notices to the assesseees demanding excise duty and penalty by treating them as marketable commodities. In reply to the show cause
E notices, the assesseees contended that the products are not marketable goods and hence are not excisable goods liable to excise duty under Central Excise Tariff Act, 1985.

F Collector dismissed the appeals of the assesseees and ordered confiscation/redemption of goods. In appeal, CEGAT set aside the orders of the Collector.

G In appeal to this Court, Revenue contended that zinc dross and flux skimming are 'excisable goods' under the Central Excise Act, 1944 since they are covered under the Heading 79.02 sub-heading 7902.00 of Chapter 79 of the Central Excise Tariff Act, 1985 before amendment on 1.03.1988 and after amendment under the Heading 2620 Sub-heading 2620 of Chapter 26 of the Tariff Act.

H The respondents contended that the zinc dross and flux skimming are waste products in the process of galvanisation of steel sheets and

hence are not excisable goods under the Central Excise Act, 1944.

Dismissing the appeals, the Court

HELD: The dross and skimming are merely refuse, scum or rubbish in the process of manufacture of aluminium sheets and, therefore, cannot be said to be 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. The dross and skimming are not marketable commodities by merely selling them. Everything which is sold is not necessarily a marketable commodity as known to commerce and which, it may be worthwhile to trade in. The zinc dross and skimming, arising as refuse during galvanisation process, are not excisable goods.

[719-C; 726-F-G]

Union of India v. Indian Aluminium Co. Ltd., (1995) 77 ELT 268 SC relied on.

Tata Iron & Steel Company Limited v. CCE, Patna (2001) 135 ELT 1142; *Union of India v. Delhi Cloth and General Mills Co. Ltd.*, AIR (1963) SC 791; *Collector of Central Excise, Patna v. Indian Tube Co. Ltd.*, (1995) 77 ELT 21 SC; *Commr. of Central Excise, Chandigarh-I v. Markfed Vanaspati & Allied Indus.*, (2003) 153 ELT 491 SC and *Union of India v. Ahmedabad Electricity Co. Ltd.*, (2003) 158 ELT 3 SC, referred to.

Indian Alluminium Co. Ltd. v. A.K. Bandhopadhyay, (1980) 6 ELT 146 (Bom), referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 524-525 of 1998.

From the Final Order dated 29.8.97 of the Central Excise Customs and Gold (Control) Appellate Tribunal, New Delhi in F.O No.E/1296-1297 of 1997-B1 in A.No. E/2966-2967 of 1998-B1.

WITH

C.A. Nos. 5664/2002 and 5262 of 2003.

A A.K. Ganguli, Dileep Tandon, Hemant Sharma and B. Krishna Prasad for the Appellant.

J. Vellappally, Ajay Aggarwal, Ms. Shirin Khajuria, Punit Bhardwaj, Rajan Narain, Rajesh Kumar, Alok Yadav, V. Lakshmikumaran and Rajesh Kumar for the Respondent.

B The Judgment of the Court was delivered by

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.

C 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 assessee has 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:

H 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. v. A.K. Bandyopadhyay*, (1980) 6 E.L.T. 146 (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 v. Indian Aluminium Co. Ltd.*, (1995) 77 E.L.T. 268 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. According to the assessee, they filed declaration claiming the zinc dross as non-excisable commodity and continued to clear zinc dross without payment of duty up to December, 1997. Later, they paid duty under protest. A show cause notice was issued as to why zinc dross should not be classified under Heading 7902.00 and why excise duty should not be recovered. The Deputy Commissioner of Central Excise held the goods classifiable under Heading 7902 of the Central Excise Tariff Act,

A 1985 and confirmed the payment of penalty which was imposed. The Commissioner (Appeals) rejected the appeal filed by the assessee. The Tribunal, on appeal by the assessee, set aside the order in appeal holding that zinc dross and flux skimming are not excisable goods following the decision of this Court in *Indian Aluminium Co. Ltd.* (supra). The Tribunal further relied on the decision in the case of *Tata Iron and Steel Company Limited v. CCE, Patna*, (2001) 135 E.L.T. 1142 and *Siddarth Tubes Limited v. 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.

C 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.

D 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.

F 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 Aluminium Co. Ltd.* (supra). The Tribunal, following the judgment of this Court, categorically held that zinc