A COMMISSIONER OF CENTRAL EXCISE

v.

M/S. INDIAN ALUMINIUM CO. LTD.

SEPTEMBER 29, 2006

B [S.B. SINHA AND DALVEER BHANDARI, JJ.]

Central Excise Tariff Act, 1985—Heading 26.20 'zinc dross' and 'flux skimming'—Dutiability—The articles previously held to be 'waste and scrap' not exigible to duty by Supreme Court—Subsequent changes in the tariff—
C *Revenue demanding duty on the same on the ground that the articles contained high percentage of metal and the same were marketable—Held: The articles are not dutiable as they are not manufactured products—The commodity is not exigible for tax only because it has saleable value and contains high percentage of metal.*

D

Words and Phrases: ' Manufacture'—Meaning of.

The question for consideration in the present case was whether 'zinc dross' and 'flux skimming' which were extracted in the process of manufacture of aluminium sheets by the respondents are excisable articles. The Tribunal
E **relying on *Indian Aluminium* and *Tata Iron and Steel* cases held that the same were not excisable.**

In appeal to this Court appellant-Revenue contended that the articles are excisable as the same are ash and residue in view of chapter heading 26.20 of Central Excise Tariff, and since they are marketable commodity containing
F **high percentage of aluminium and that the *Indian Aluminium* case was not applicable as at the time that judgment was rendered there was no specific entry for dross.**

Dismissing the appeal, the Court

G **HELD: 1. Only because there now exists a specific entry in the Central Excise Tariff by way of 'ash and residue', the same would not by itself make dross subject to payment of excise duty although no manufacturing process was involved. [892-D]**

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2. The entry in question does not contain any legal fiction. It does not say that any residue having more than a certain percentage of the metal would be deemed to have been manufactured or would be excisable. Records maintained by respondent whereupon the Revenue has relied upon may be a relevant factor to identify 'dross' as a marketable commodity but then percentage of the metal in dross may not by itself make it excisable, if it is otherwise not. An article is not exigible to tax only because it may have some saleable value. [892-E]

3. It may be that dross no longer answers the description of "waste and scrap" in view of the changes made in the Tariff. It is, however, almost well-settled that even if some percentage of metal is found in the dross the same in absence of something more in the entry would not be rendered as an excisable article. Even assuming that dross having a high percentage of metal is a marketable commodity, the question would arise as to whether the same can be said to be a manufactured product. The term 'manufacture' implies a change. Every change, however, is not a manufacture. Every change of an article may be the result of treatment, labour and manipulation. But manufacture would imply something more. There must be a transformation; a new and different article must emerge having a distinctive name, character or use. [892-F, H; 893-A]

Union of India and Ors. **v.** *Indian Aluminium Co. Ltd. and Anr.*, **[1995] Supp 2 SCC 465 and** *Collector of Central Excise, Patna* **v.** *Tata Iron and Steel Co. Ltd.*, **[2004] 9 SCC 1, relied on.**

Union of India and Anr. **v.** *Delhi Cloth and General Mills Co. Ltd.*, **AIR 1963 SC 791, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 240 of 2005.

From the final Order No. 645/04-NB(A) dated 25.6.2004 of the CESTAT, New Delhi in Appeal No. E/4126/30-NB(A).

Gopal Subramanium, A.S.G., T.S. Murthy, Raghavendra Rao, P. Parmeswaran and B. Krishna Prasad for the Appellant.

V. Lakshimkumaran, Rajesh Kumar and Alok Yadav for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. Whether zinc dross and flux skimming are excisable

A articles is the question involved in this appeal, which arises out of a judgment and order dated 25.06.2004 passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi, allowing the appeal filed by Respondent herein.

Respondent herein manufactures aluminium sheets, the raw material B wherefor is aluminium oxide. In the melting furnance, the top layer of the molten metal is exposed to atmosphere and gets oxidized. As a result of oxidation, a thin layer/ film is formed which is removed by skimming. The second layer so removed is called dross. Indisputably, the percentage of metal in dross will vary and there would be some quantity of aluminium metal C therein.

Whether excise duty is payable on 'dross' came up for consideration before a Bench of this Court in Respondent's own case i.e. in *Union of India and Ors.* v. *Indian Aluminium Co. Ltd. and Anr.*, [1995] Supp 2 SCC 465 : (1995) 77 ELT 268. The said decision has been followed by a 3-Judge Bench D of this Court in *Collector of Central Excise, Patna* v. *Tata Iron & Steel Co. Ltd.*, [2004] 9 SCC 1.

The Tribunal by reason of its impugned" judgment following *Indian Aluminium* (supra) and *Tata Iron and Steel Co. Ltd,* (supra) opined that the issue is covered by the said decisions.

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Mr. Gopal Subramanium, learned Additional Solicitor General appearing on behalf of Appellant *inter alia* raised a contention that Indian Aluminium (supra) and consequently *Tata Iron and Steel Co. Ltd.,* (supra) do not lay down a good law having regard to the fact that the classification of ' dross' under the Central Excise Tariff Act, has been changed. It is, thus, no longer F a waste or scrap but would come within the purview of 'ash and residue'. The learned Additional Solicitor General would submit that *Indian Aluminium* (supra) proceeded on the basis that dross was a waste material and it was not marketable, whereas in fact it is not only marketable but in fact contains high percentage and in some cases upto 78% of aluminium. It is the contention G of the learned Additional Solicitor General that the value of dross is sometimes more than the value of the aluminium itself and thus, it will come within the purview of the term "goods".

Per contra, Mr. V. Lakshmikumaran, learned counsel appearing on behalf of Respondent, argued that dross is not a manufactured item. It may be a H produce in the process of manufacturing but that by itself would not make

it a manufactured product. A

Chapter 26 of Central Excise Tariff deals with ores, slag and ash. Sub-heading 2620.00 of Heading 26.20 of the said Chapter reads as under:

"Heading	Sub-Heading	Description of goods	Rate of duty
26.20	2620.00	Ash and residues (other than from the manufacuter of iron or steel), containing metals or metal compounds)	16%

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Paragraph 3 of the Chapter Note states that the said Heading applies only to ash and residues of a kind used in industry either for extraction of metals or as a basis for the manufacture of chemicals compounds of metals. C

Section XV of the Central Excise Tariff deals with base metals and articles of base metal. Note 8 defines waste and scrap to mean "metals waste and scrap from the manufacture or mechanical working of metal, and metal goods definitely not usable as such because of breakage, cutting-up, wear or other reasons. Chapter 76 deals with aluminium and articles thereof. 'Aluminium, not alloyed' is defined to mean metal containing by weight at least 99% of aluminium, provided that the content by weight of any other element does not exceed the limit specified therein. 'Aluminium waste and scrap' comes within the purview of Sub-Heading Nos. 7602.10 and 7602.90 of Heading 76.02 which read as under: D E

"Heading	Sub-Heading	Description of goods	Rate of duty
76.02		Aluminium waste and scrap	
	76.02.10	Waste and scrap used within the factory of production for the manufacture of unwrought aluminium plates and sheets	Nil
	76.02.90	Others	16%

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Explanatory Note in respect of 'aluminium waste or scrap' reads, thus:

"76.02 - *Aluminium Waste or Scrap.* - The provisions concerning waste and scrap in the Explanatory Note to heading 72.04 apply, *mutatis mutandis*, to this heading. H

A Aluminium waste and scrap is an important source of raw material for the aluminium industry. It is also used as a de-oxidising or de-carburising agent in metallurgy.

The heading does not cover:

B (a) Slag, dross, etc., from the manufacture of iron or steel containing recoverable aluminium in the form of silicates (heading 26.18 or 26.19).

(b) Ash and residues from the manufacture of aluminium (heading 26.20)

C (c) Ingots and similar unwrought forms, cast from remelted aluminium waste and scrap (heading 76.01)."

In *Indian Aluminium* (supra), the contentions of Respondent were noticed in the following terms:

D "(1) that aluminium dross and skimmings are finished excisable goods produced by the assessees which are exempted from the whole of the duty of excise leviable thereon or are chargeable to nil rate of duty, and (2) a proportionate credit should not be allowed to the assessees in respect of the excise duty paid on that portion of aluminium ingots which "result in the manufacture'[5] of aluminium dross and skimmings. E This argument proceeds on the assumption that aluminium dross and skimmings are finished excisable goods. If one looks at the definition of excisable goods, it is clear that aluminium dross and skimmings were not in the First Schedule to the Central Excises and Salt Act, 1944 at the relevant time and are not excisable goods, finished or otherwise."

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Noticing that aluminium dross does arise during the process of manufacture, this court held:

"The entire quantity of raw material, namely, duty-paid aluminium ingots procured by the assessees from outside was used in the G manufacture of aluminium sheets. It is nobody's case that the aluminium sheets which were manufactured by the assessees could have been manufacturcd 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

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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."

What is the meaning of dross is the core question.

In *Indian Aluminium* (supra), this Court noticed the meaning of the term 'dross' in the following terms:

"The term 'dross' is defined in *The New Shorter Oxford English 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 Edn., 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 Edn.) defines it as:

"An impurity, usually an oxide, formed on the surface of molten metal.""

The decision of this Court in *Indian Aluminium* (supra), it is submitted, is no longer good law, as:

(a) There was no specific entry for dross when the decision was rendered by this Court whereas Chapter heading 26.20 covers the same.

(b) Dross and skimming are not thrown out but are preserved for

A further sale.

The contention of Respondent, on the other hand, are:

(i) Appellants are not extracting metal from dross.

(ii) The content of metal in dross is immaterial.

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(iii) Dross is not comparable to metal or waste.

(iv) The issue as to the dutiability of dross was settled by this Court in *Indian Aluminium* (supra). Thereafter, the Tribunal after considering Tariff Heading 26.20 held that dross was not dutiable.

C Tariff Heading 26.20 was introduced with effect from 13.1986. It is not waste but it comes under the heading 'ash or residue'. It may be true that the old tariff did not contain a specific entry as regards dross' when the decision of this Court was rendered but the question which arises for consideration is whether only because there now exists a specific entry in the Central Excise Tariff by way of 'ash and residue, would the same by itself D make 'dross' subject to payment of excise duty although no manufacturing process is involved.

The entry in question does not contain any legal fiction. It does not say that any residue having more than a certain percentage of the metal would E be deemed to have been manufactured or would be excisable.Records maintained by Respondent whereupon the Revenue has relied upon may be a relevant factor to identify 'dross' as a marketable commodity but then percentage of the metal in dross may not by itself make it excisable, if it is otherwise not. An article is not exigible to tax only because it may have some saleable value.

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It may be that dross no longer answers the description of "waste and scrap" in view of the changes made in the Tariff. It is, however, almost well-settled that even if some percentage of metal is found in the dross the same in absence of something more in the entry would not be rendered as an excisable article. This Court in *Indian Aluminium* (supra) in fact noticed that G some amount of metal is found in dross and skimming. A distinction, however, was made that dross and skimming are not metals in the same class as 'waste or scrap'. Even assuming that dross having a high percentage of metal is a marketable commodity, the question, in our opinion, would arise as to whether the same can be said to be a manufactured product. The term 'manufacture' H implies a change. Every change, however, is not a manufacture. Every change

of an article may be the result of treatment, labour and manipulation. But manufacture would imply something more. There must be a transformation; a new and different article must emerge having a distinctive name, character or use. See *Union of India and Anr.* v. *Delhi Cloth and General Mills Co. Ltd.,* AIR (1963) SC 791.

We have noticed hereinbefore as to how dross comes into being. The learned Additional Solicitor General submitted that in *Indian Aluminium* (supra) itself this Court held that "undoubtedly dross and skimming do arise during the process of manufacture', but, it was not held therein that it amounts to manufacture.

In *Tata Iron and Steel Co. Ltd.* (supra), on the other hand, this Court noticed that dross and skimming are capable of being sold. This Court furthermore opined that only because the article may have some saleable value, the same would not render it to be 'a manufactured product'.

This Court clearly opined:

> "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."

It was further held:

> "In our opinion, this Court in *Indian Aluminium Co. Ltd.* has held that merely selling does not mean dross and skimming are a 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.* and in view of the above decision of the Tribunal following this Court's opinion in *Indian Aluminium Co. Ltd.* we disagree with the appellants that zinc dross, flux skimming and zinc scalings are goods and hence excisable."

In this case also, it has not been contended that the article was obtained

during the process of manufacture. It was faintly suggested by the learned Additional Solicitor General that the proposition of law in *Tata Iron and Steel Co. Ltd.* (supra) has been overstated, but in view of our findings aforesaid we do not think that we should enter into the said question.

For the reasons aforementioned, we find no merit in this appeal which is dismissed accordingly. No costs.

K.K.T. Appeal dismissed.