(2014) 12 BOM CK 0116

In the Bombay High Court

Case No : Writ Petition No. 9263 of 2014

Hindalco Industries Limited — APPELLANT

Vs

The Union of India — RESPONDENT

Date of Decision : 08-12-2014

Acts Referred:

Central Excise Tariff Act, 1985 — Section 2(d)
Central Excises and Salt Act, 1944 — Section 2, 2(d), 2(f), 3
Constitution of India, 1950 — Article 141, 226
Customs Tariff Act, 1975 — Section 12, 3(1)

Citation : (2015) 315 ELT 10

Hon'ble Judges : S.C. Dharmadhikari, J;A.A. Sayed, J

Bench : Division Bench

Advocate : V. Sridharan, Senior Advocate and Prakash Shah i/b. PDS Legal, Advocate for the Appellant; Advait M. Sethna and Ruju Thakker i/b. Suchitra kamble, Advocate for the Respondent

Judgement

1. Rule. Respondents waive service. By consent, Rule made returnable forthwith.

2. This Writ Petition, under Article 226 of the Constitution of India challenges the order passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), West Zonal Bench, dated 19th August, 2014. That is an order passed by a larger Bench of the said Tribunal.

3. The Petitioner has also challenged two Circulars dated 28th October, 2009 and 14th February, 2011.

4. The Petitioner submits that it is engaged in the activity of melting aluminium ingots to obtain rolled products like sheets, foils etc. During melting process, some quantity of aluminium ingots get oxidised resulting in emergence of dross and skimming. Since inception, the Petitioners has been clearing aluminium dross and skimming for a price, without payment of excise duty.

5. The matter has a checkered history. According to the Department, the

Petitioner is engaged in the manufacturing of aluminum sheets, foils falling under Chapter sub-heading 76071190 of the Central Excise Tariff Act, 1985. The major raw material for aluminum sheets/foils is aluminium ingots. In the course of manufacturing of aluminum sheets/foils, aluminium dross and skimming emerge as by-products, which are chargeable to Central Excise duties under sub-heading 26204010 of the Central Excise Tariff Act, 1985. The Petitioner sells these on regular basis. The Department terms them as by-products. The Department claims that section 3 of the Central Excise Act, 1944 levies Central Excise duty on all excisable goods, which are produced or manufactured in India and at the rate set-fourth in the First and Second Schedules of the Central Excise Tariff Act, 1985. They rely upon the definition of the term "excisable goods" appearing in section 2(d) of the said Act. They also rely upon an Explanation which was added to clause (d) of section 2 of the Central Excise Act, 1944 by Finance Act, 2008.

6. An order was passed against the Petitioner by the Commissioner, Central Excise (Appeals) and this order was challenged before the Customs, Excise and Service Appellate Tribunal (CESTAT). There were conflicting decisions according to the Revenue/Department of two Benches of the Tribunal and which required placing of the matter before the larger Bench. The conflicting views are stated to be on the question, "whether aluminium dross and skimmings or similar non-ferrous metal dross and skimmings, which arise in the process of manufacture of aluminium/non-ferrous metal products can be considered as "manufactured goods" and hence, excisable for the period post 10th May, 2008 in view of the Explanation added to section 2(d) of the Central Excise Act, 1944. Notwithstanding this Explanation, it was the case of the Petitioner that aluminium dross and skimming or other nature dross and skimming cannot be considered as manufactured products and not liable to excise duty. However, it is submitted by the Respondents that the legal position has now been settled by the larger Bench decision of the Tribunal and therefore, the Petitioner will have to comply with the same.

7. In relation to this aspect, Mr. Sridharan, learned Senior Counsel appearing on behalf of the Petitioner submits that the Petitioner and the Department of Central Excise/Revenue have been engaged in several litigations on this point/issue for the past more than three decades. In the first decision in the case of Indian Aluminium Co. Ltd. and another Vs. A.K. Bandyopadhyay and others, , in the Petitioner''s own case or rather the predecessor in title of the present Petitioner, this Court held that "dross and skimming" cannot be termed as "goods". It 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". It is nothing but ''ashes'' resulting in the process of the manufacture of aluminium sheets from aluminium ingots. That may fetch some sale price. For that matter, any rubbish can be sold, however, that is not the criteria inasmuch as they are not the new and different articles with a distinctive name, character or use or that they ordinarily come to the market to be bought and sold and are known to the market. Mr. Sridharan submits that in

the case of Union of India and others Vs. Indian Aluminium Co. Ltd. and another, the above view taken by a learned Single Judge of this Court was specifically referred to and confirmed. Again, the issue of excisability of aluminium dross and skimming was adjudicated before the Tribunal. In the Petitioner''s own case, which is also a reported one, the technical member of the Tribunal, who was in minority, held that aluminium dross and skimming are ''goods'' because they being bought and sold in the market. However, the majority followed the decision of this Court and held that the aluminium dross and skimming are not a result of manufacture and hence not goods, being not a new commodity. Therefore, that is not liable to Excise duty.

8. An appeal was filed by the Revenue to the Hon''ble Supreme Court and in the decision reported in 1999(111) E. L. T A200 (SC), the Revenue''s Appeal came to be dismissed. Further, during the course of dealing with the issue of excisability of cinder, i.e. ash obtained by burning of coal, to excise duty, once again the Hon''ble Supreme Court in the decision in the case of Union of India (UOI) Vs. Ahmedabad Electricity Co. Ltd. and Others, , took the same view. Mr. Sridharan also placed reliance upon the Judgment of the Hon''ble Supreme Court in the case of Collector of Central Excise, Patna Vs. Tata Iron and Steel Co. Ltd., . Mr. Sridharan therefore submits that all these decisions consistently took the same view and which is finally to be found in the case of Commissioner of Central Excise Vs. Indian Aluminium Co. Ltd., . Merely because these items are mentioned in the tariff heading of the Schedule and are sold in the market, but since they are not obtained as a result of manufacture, they cannot be said to be liable to Excise duty. Mr. Sridharan also relied upon the decision of the Hon''ble Supreme Court in the case of Grasim Industries Ltd. Vs. Union of India (UOI), . Mr. Sridharan also contended that the position does not undergo any change despite the insertion of Explanation to section 2(d) of the Central Excise Act, 1944 w.e.f. 10th May, 2008, though the same states that the term ''goods'' includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to marketable. The two Circulars issued by the Board relying on these circulars cannot override or run contrary to the legal position. Despite a contrary legal position and as asserted in the Explanation being placed on record by the Board, the Hon''ble Supreme Court has consistently taken the view that the test of marketability cannot be overcome by such a process. The Explanation does not and is not intended to overcome the test of manufacture. The same view has been taken even after insertion of the Explanation and in that regard, Mr. Sridharan relies upon a Judgment of the Allahabad High Court in the case of 2014 (300) ELT 372. Mr. Sridharan has therefore submitted that the larger Bench decision of the Tribunal and impugned in this Writ Petition can very well be said to be contrary to the judicial discipline. The Tribunal could not have, in the teeth of the Hon''ble Supreme Court Judgments, made any observations or rendered any conclusions which would amount to by-passing them. That shows disrespect and disregard to the settled legal position emerging from these Judgments. Mr. Sridharan

therefore submits that the ground or reasons on which these Judgments have been distinguished show that the Tribunal completely misdirected itself and the larger Bench did not abide by the legal principles, but ignored them completely. The Tribunal''s order can safely therefore be termed as perverse. He therefore submits that the Writ Petition be allowed.

9. On the other hand, Mr. Sethna appearing on behalf of the Revenue submitted that the Tribunal''s view can be justified because now the legal position has undergone a complete change. Mr. Sethna heavily relies upon the affidavit in reply filed in this Writ Petition to urge that the explanation has been inserted with a specific purpose. Mr. Sethna submits that the observations of the Hon''ble Supreme Court in the case of Union of India and others Vs. Indian Aluminium Co. Ltd. and another, are nullified with the change in law. With the amendment in section 2(d) of the Central Excise Act, 1944, the produce aluminium dross and skimming are deemed to be marketable. They are capable of being sold and for a consideration. They are therefore excisable goods. So long as they are falling within this definition, then, no assistance can be derived by the definition of the term ''manufacture''. However, even with the aid of this definition, it is apparent that manufacturing process includes all incidental or ancillary steps and resulting in manufacture of by-products which are goods. The process of formation of dross due to oxidation process is integral part of the entire manufacturing activity undertaken by the Petitioner. Without the extraction of dross, without the process of skimming, the intended finished produce aluminium coil/sheet cannot be obtained. The dross is thus a unintended by product arising out of an incidental and ancillary process. He therefore submits that the Tribunal was right in the view that it has taken. The view cannot be termed as perverse or vitiated by any error of law apparent on the face of the record. For all these reasons, he submits that there is no merit in the Writ Petition and it deserves to be dismissed.

10. We have, with the assistance of the Counsel appearing for the parties, perused the larger Bench decision of the Tribunal and impugned in this Writ Petition. We have also perused all the decisions of the Hon''ble Supreme Court brought to our notice and the relevant legal provisions. Section 2(d) of the Central Excise Act, 1944 defines the term "excisable goods", to read as under:

"SECTION 2(d). "excisable goods" means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt;

Explanation- For the purposes of this clause, "goods" includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable."

11. The term ''manufacture'' has also been defined in section 2(f). That reads as under:

"SECTION 2(f). "manufacture" includes any process-

(i) incidental or ancillary to the completion of a manufactured produce;

(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

(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-rebelling 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;

and the word "manufacture" 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"

12. The facts being undisputed, the only issue that arose before the Tribunal was "whether the definition having been either amended or an Explanation inserted thereto would result in any change in the legal position".

13. We do not wish to once again burden this Judgment with the manufacturing activities undertaken by parties like the Petitioner, who was Appellant before the Tribunal. The Tribunal has extensively referred to them. The only argument was whether dross and skimming are not manufactured goods. In the first decision, which was rendered by a Single Judge of this Court, in the case of Indian Aluminium vs. A.K. Bandyopadhyay (supra), the Single Judge considered this controversy and proceeded to decide it. After noting the rival contentions and the material placed, the Single Judge held as under:

"22. It is difficult to come to the conclusion that dross and skimming are "goods" and the contention to the contrary urged on behalf of the Petitioner 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 (UOI) Vs. Delhi Cloth and General Mills, , 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 Excise 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 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 or use."

23. The decision in the Delhi Cloth Mills'' case was followed by the Supreme Court in South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, , 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 (UOI) Vs. Delhi Cloth and General Mills, ."

24. The question that one must ask oneself is whether therefore dross and skimmings are "goods". It may 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 be 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 sheets 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 ingot 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 of 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 a by-product, much less an end-product or a finished product."

14. The process was identical so also the Assessee. Then, the matter reached the Hon''ble Supreme Court and this time when it reached the Supreme Court, it was at the instance of the Union of India, against the manufacturers of aluminium products, including aluminium sheets and out of the aluminium ingots. The Hon''ble Supreme Court was concerned, in that decision and which is reported in Union of India and others Vs. Indian Aluminium Co. Ltd. and another, , with the correctness of the view taken by the Assistant Collector of Excise Department. His view was reversed by the Appellate Collector. A revision was preferred by the Excise Authorities and which came to be allowed by the Government of India. The revisional decision was challenged by the Assessees by filing a Writ Petition, which was allowed by a learned Single Judge of the High Court. A Division Bench upheld this decision in Appeal by summarily dismissing it. That is how the matter was carried to Supreme Court. In that regard, the Supreme Court made the following observations:

"12. The show cause notice of 7-2-1974 was, however, issued by the department relying upon the proviso to sub-rule (2) of Rule 56A which is to the following effect:

"56A(2):

Provided that no credit of duty shall be allowed in respect of any material or component parts used in the manufacture of finished excisable goods-

(1) 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...."

In other words, the contention of the department appears to be: (1) that aluminium dross and skimmings are finished excisable goods produced by the assessee 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" of aluminium dross and skimmings. 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.

13. 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 English Dictionary as:

Dross:

"Dregs ..... (1) Impurities separated from metal by melting the scum which forms on the surface to 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."

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."

15. Thereafter, in para 18 of this Judgment, the argument noted was that the manufacturers in Civil Appeal Nos. 1423, 2759 and 3982 of 1987 were also engaged in manufacturing aluminium goods out of aluminium ingots. Their cases, however, were little different from the case of Indian Aluminium Co. Ltd. and

there the Supreme Court dealt with the same legal issue but after the changes were made in the Excise Tariff. Pertinently, however, the Supreme Court reiterated the legal position in para No. 22. The Hon''ble Supreme Court agreed with the reasons and conclusions of the learned Single Judge of this court, from whose Judgment an Appeal was dismissed by the Division Bench. It confirmed the view taken in Indian Aluminium Co. Ltd. and another Vs. A.K. Bandyopadhyay and others, .

16. Once again this issue came before the Hon''ble Supreme Court in the context of zinc dross and flux skimming. That arose from a Judgment and order of the Customs, Excise and Service Tax Appellate Tribunal, New Delhi, dated 25th June, 2004. After discussing the rival contentions and referring to the legal position and the Judgments brought to its notice including which it rendered previously, the Hon''ble Supreme Court dismissed the Appeal of the Revenue. Prior thereto, what we find is that the matter was taken to the Supreme Court and from a decision which was rendered by the Collector of CEGAT dated 18th June, 1987 in the case of Indian Aluminium Co. Ltd. and Anr. vs. Collector of Central Excise, Bangalore reported in 1987 (31) E. L. T 158 (Tribunal). The Supreme Court, following its earlier Judgment in the case of Union of India and others Vs. Indian Aluminium Co. Ltd. and another, , dismissed the Department''s/Revenue''s Appeal.

17. Then, the matter was carried once again to the Supreme Court Union of India (UOI) Vs. Ahmedabad Electricity Co. Ltd. and Others, , and this time, the argument was in relation to cinder, which is unburnt or partly burnt pieces of coal in boiler. In that regard, the arguments of the Revenue have been noted in paras 2 and 3. Thereafter, the Hon''ble Supreme Court discussed as to what is cinder. In paras 10, 13, 31, 32 and 36 of this Judgment, the Court holds thus:

"10. For the sake of deciding this issue, we will assume that cinder is ash and, therefore, is liable to be covered under Entry 26.21, per se become subject to levy of excise duty. According to the learned Counsel for the Revenue, all excisable goods listed in the first Schedule are subject to the liability to pay excise duty in view of Section 3 of the Act. Excisable goods as per Section 2(d) are those which are specified in the First Schedule to the Tariff Act. ''Ash'' being found mentioned in Entry 26.21 in the First Schedule, it per se becomes liable to payment of excise duty. In support of his argument, the learned Counsel relied up Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, . This was a case of levy of additional customs duty under Section 3(1) of the Customs Tariff Act, 1975. This duty is leviable in addition to the customs duty under Section 12 of the Customs Act. The additional customs duty is leviable on items imported into India if like articles if produced or manufactured in India are liable to payment of excise duty. The argument on behalf of the assessee was that brass scrap imported by it was not subject to levy of the additional customs duty which is in the nature of counter veiling duty. It cannot be levied on brass scrap because such scrap is not manufactured in

India. This contention of the assessee was rejected on the ground that brass scrap was being produced in India. The argument on behalf of Revenue was that waste and scrap is mentioned in Entry 26A of the first Schedule to the Tariff Act and is therefore exigible to excise duty. Since reliance was placed on the argument that waste and scrap being found in relevant entry in the First Schedule to the Tariff Act and therefore were exigible to customs duty, this authority was pressed into service in support of the argument that presence of an item in an Entry to the First Schedule to the Act makes it per se subject to levy of excise duty. In our view, this authority is of no help to the appellants. This was basically a case of levy of additional customs duty, for which different considerations apply.

.....

13 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 subjected 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. and Another Vs. Union of India (UOI) and Others, and Moti Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad, . 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 argument to the contrary is rejected.

.....

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

32. From the above discussion it is clear that to be subjected to levy of excise duty ''excisable goods'' must be produced or manufactured in India. For being produced and manufactured in India the raw material should have gone through the process of transformation into a new product by skilful manipulation. Excise duty is an incidence of manufacture and, therefore, it is essential that the product sought to be subjected to excise duty should have gone through the process of manufacture. Cinder cannot be said to have gone through any process of manufacture, therefore, it cannot be subjected to levy of excise duty.

.....

36. In view of our finding that cinder cannot be subjected to levy of excise duty

because it is not an item of goods which has been subjected to process of manufacture, it is not necessary for us to go into any other point. We may only note that courts have evolved another test of marketability i.e., to be exigible to excise duty goods must be marketable. It is not disputed that cinder is being sold by the assessees. But can it be said to be marketable. It is not disputed that cinder is being sold by the assessees. But can it be said to be marketable goods in the sense word marketable is used? We doubt it. However, this need not detain us since cinder does not satisfy the test of being manufactured in India. Even if it is saleable, it does not make any difference. The result is that the contention of the revenue that cinder is liable to payment of excise duty is hereby rejected."

18. It concluded that merely because the goods satisfying the test of being marketed and saleable, it does not mean that the test of being manufactured in India has been satisfied. The Hon''ble Supreme Court notes and specifically the argument which was canvassed namely, addition of dross, cinder, skimmings etc. in the list of the items to the Schedule to the Central Excise Tariff, however, it held that that is not safe to make it excisable as it has to pass further test of manufactured or produced in India.

19. Mr. Sridharan then placed reliance upon the Judgment of the Hon''ble Supreme Court in the case of Commissioner of Central Excise vs. Tata Iron and Steel Co. Ltd. (supra). There, again the Hon''ble Supreme Court was required to examine the issue as to whether zinc dross, flux skimming and zinc scallings arising as by product during galvanization of steel sheets are excisable goods. In that regard, paras 9, 10, 14 and 16 of this decision are relevant. They read as under:

"9. According to the Department, prior to 1-3-1988 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 metal or as a basis for the manufacture of chemical compound of metal. This chapter note was subsequently amended w.e.f. 1-3-1988 by omitting the words "other than dross and ash of zinc containing metals of metallic compounds". Thus, prior to 1-3-1988 the said dross and ash of zinc containing metals or metallic compound were classifiable under 7902 and subsequent to 1-3-1988 the said product got classified under subheading 26.20.

10. 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 dross and zinc scalling are not goods, hence not excisable.

.....

14. 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.

.....

16. We are of the opinion that the dross and skimming are merely the refuse, scum or rubbish thrown 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."

20. The Hon''ble Supreme Court finally in para 22 agrees with its earlier view in the case of Indian Aluminium Co. Ltd. (supra). and holds that merely selling does not mean dross and skimming are marketable commodity as even rubbish can be sold. Everything 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 is governed by the past decisions of the Tribunal and also of the Supreme Court. Thus, it agrees with its earlier Judgments. Thereafter, the Hon''ble Supreme Court was required to consider this issue and as already referred by us in the case of Commissioner of Central Excise Vs. Indian Aluminium Co. Ltd., . Finally, in the case of Grasim Industries Ltd. (supra), the Hon''ble Supreme Court referred to all the amendments including the insertion of the Explanation and on noticing the issue before it, proceeded to hold as under:

"7. We have heard the learned counsel for the parties. In the present case, the assessee had undertook repair and maintenance work of his worn out old machinery or parts of the cement manufacturing plant for the period between 1995 to 1999. The assessee repaired machinery or capital goods such as damaged roller, shafts and coupling by using welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams etc. In this process of repair and maintenance, M.S. Scrap and Iron Scrap were generated in the workshop. It is not in dispute that these M.S. Scrap and Iron Scrap were excisable goods under Section 2(d) of the Act falling under the Chapter Heading 72.04 in the Schedule to the Tariff Act read with Note 8(a) to Section XV of the Tariff Act as ''metal scrap and waste''. We are of the opinion that Section Note has very limited purpose of extending coverage to the particular items to the relevant tariff entry in the Schedule for determining the applicable rate of duty and it cannot be readily construed to have any deeming effect in relation to the process of manufacture as contemplated by Section 2(f) of the Act, unless expressly mentioned in the said Section Note. In Shyam Oil Cake Ltd. Vs. Collector of Central Excise, Jaipur, , this Court has held:

"16. Thus, the amended definition enlarges the scope of manufacture by roping in process which may or may not strictly amount to manufacture provided those processes are specified in the section or chapter notes of the tariff schedule as amounting to manufacture. It is clear that the legislature realised that it was not possible to put in an exhaustive list of various processes but that some methodology was required for declaring that a particular process amounted to manufacture. The language of the amended Section 2(f) indicates that what is required is not just specification of the goods but a specification of the process and a declaration that the same amounts to manufacture. Of course, the specification must be in relation to any goods.

.....

23. We are in agreement with the submission that under the amended definition, which is an inclusive definition, it is not necessary that only in the section or chapter note it must be specified that a particular process amounts to manufacture. It may be open to so specify even in the tariff item. However, either in the section or chapter note or in the tariff entry it must be specified that the process amounts to manufacture. Merely setting out a process in the tariff entry would not be sufficient. If the process is indicated in the tariff entry, without specifying that the same amounts to manufacture, then the indication of the process is merely for the purposes of identifying the product and the rate which is applicable to that product. In other words, for a deeming provision to come into play it must be specifically stated that a particular process amounts to manufacture. In the absence of it being so specified the commodity would not become excisable merely because a separate tariff item exists in respect of that commodity."

8. The 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 subjected to payment of excise duty. Simply because a particular item is mentioned in the First Schedule, it cannot become exigible to excise duty. [See Hyderabad Industries Ltd. and Another Vs. Union of India (UOI) and Others, , Moti Laminates Pvt. Ltd. and

Others Vs. Collector of Central Excise, Ahmedabad, , CCE, Lucknow Vs. Wimco Ltd., . Therefore, both on authority and on principle, for being excisable to excise duty, goods must satisfy the test of being produced or manufactured in India. In our opinion, he charging Section 3 of the Act comes into play only when the goods are excisable goods under Section 2(d) of the Act falling under any of the tariff entry in the Schedule to the Tariff Act and are manufactured goods in the terms of Section 2(f) of the Act. Therefore, the conditions contemplated under Section 2(d) and Section 2(f) has to be satisfied conjunctively in order to entail imposition of excise duty under section 3 of the Act. The manufacture in terms of Section 2(f) includes any process incidental or ancillary to the completion of the manufactured product. This ''any process'' can be a process in manufacture or process in relation to manufacture of the end product, which involves bringing some kind of change to the raw material at various stages by different operations. The process in manufacture must have the effect of bringing change or transformation in the raw material and this should also lead to creation of any new or distinct and excisable product. The process in relation to manufacture means a process which is so integrally connected to the manufacturing of the end product without which, the manufacture of the end product would be impossible or commercially inexpedient. This Court has in several decisions starting from Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool, , Union of India (UOI) Vs. Delhi Cloth and General Mills, , South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, and in line of other decisions has explained the meaning of the word ''manufacture'' thus:

"14. 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."

.....

14. In the present case, it is clear that the process of repair and maintenance of the machinery of the cement manufacturing plant, in which M. S. scrap and Iron scrap arise, has no contribution or effect on the process of manufacturing of the cement, which is the excisable end product, as since welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams etc. which are used in the process of repair and maintenance are not raw material used in the process of manufacturing of the cement, which is the end product. The issue of getting a new identity as M.S. Scrap and Iron Scrap as an end product due to manufacturing process does not arise for our consideration. The repairing activity in any possible manner cannot be called as a part of manufacturing activity in relation to production of end product. Therefore, the M. S. scrap and Iron scrap cannot be said to be a by-product of the final product. At the best, it is the by-product of the repairing process which uses welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams etc."

21. We do not see how, in the light of these authoritative pronouncements of the

Hon''ble Supreme Court, can the Tribunal take a different view. When the Hon''ble Supreme Court holds and as in Grasim Industries Ltd. (supra) that the conditions contemplated under Section 2(d) and Section 2(f) have to be satisfied conjunctively in order to entail imposition of excise duty under section 3 of the Act, then, we cannot agree with the Tribunal. The larger Bench decision does not take into account the fact that the authoritative pronouncement by the Supreme Court and repeatedly rendered is binding on it. That is law declared under Articles 141 of the Constitution of India. That it is rendered in the case of identical issues, controversy and the Assessee makes these Judgments of the Supreme Court all the more binding. Their binding effect is not lost merely because the Tribunal has another occasion to consider the issue or another shade of the same controversy. So long as there are Supreme Court Judgments in the field, we do not see how the Revenue could have proceeded to disregard them.

22. That the Revenue does not wish to abide by them would not mean that the Tribunal is justified in not following them. We find that the attempt made by the Tribunal to hold that what is marketable and satisfies the requirement stipulated in the Explanation necessarily means that they are liable for imposition of duty under section 3 is directly contrary to the binding Judgments of the Hon''ble Supreme Court on the same issue. The attempt of the Tribunal in para 6.5 in proceeding to analyse that the process and concluding that nobody deliberately manufactures waste, dross and scrap is in direct conflict with the findings of the Hon''ble Supreme Court. Waste and scrap emerge as a by-product in the course of manufacture of other products. The whole purpose of making these observations is to justify the conclusion that because there is a reference to these items in the Tariff Entry or the Tariff Schedule that would change the colour of the controversy. That would enable the Tribunal to then hold that the earlier Judgments and in the case of this very Assessee are no longer good law. However, we do not see how the decision in the case of Grasim Industries Ltd. (supra) and particularly the above reproduced paragraphs could have been brushed aside by the Tribunal. The Hon''ble Supreme Court listed the twin tests and which have to be satisfied before the goods can be said to be excisable to tax or Central Excise duty. It is in these circumstances that the attempt of the Tribunal and which is supported before us by Mr. Sethna cannot be upheld. Each of these observations and from para 6.5 onwards run counter to the Judgments of the Hon''ble Supreme Court.

23. In para 6.9, the tribunal takes assistance of a Supreme Court Judgment and concludes that the ratio of any decision can be applied only if the facts are identical. True it is that the Hon''ble Supreme Court holds this way, however, what are those facts and emerging from the record of this case which would enable it to take a different view have not been spelt out by the Tribunal. Even these observations and conclusions would go to show that the Tribunal does not dispute that it is considering the same controversy and in relation to the same aluminium dross, which could be termed as either a by product or waste or scrap or rubbish. Once there are twin tests, then, all these observations are of no

assistance to the Revenue. The reliance placed by Mr. Sethna on a Judgment in the case of this very Assessee rendered by the Allahabad High Court 2009 (243) E. L. T. 481 (All) is entirely misplaced. There the argument was that the Writ Petition has been admitted and therefore a interim order be passed so as to restrain the Department/Revenue from taking any coercive action against the Petitioner Hindalco Industries Ltd. including seizure and clearance of aluminium dross and skimming etc. in terms of the impugned orders. All the observations made prima facie do not take note of the decisions of the Hon''ble Supreme Court. It only takes note of one of the decision. In the light of the conclusions reached by us and finding that there are authoritative pronouncements of the Hon''ble Supreme Court rendered after the Division Bench of Allahabad High Court, that we are unable to agree with Mr. Sethna.

24. We had called upon Mr. Sethna to take instructions from the Department as to why the Department cannot, in the light of these authoritative pronouncements, enable the Tribunal to deal with the matter afresh. However, Mr. Sethna, on instructions, states that the legal position and which has been consistently applied and followed by the Revenue is analysed in the Circular. That having already been issued, the Board finds it unable to agree to any contrary suggestion. It is only thereafter that we are called upon to decide the matter. It is only to enable Mr. Sethna to take such instructions that the Judgment was not pronounced immediately. However, finding that the matter stands completely covered by the Judgments of the Hon''ble Supreme Court and which have been totally disregarded by the Tribunal that we are unable to sustain and uphold its conclusions. The impugned order can be safely termed as perverse and vitiated by an error of law apparent on the face of the record. The Tribunal has reached a conclusion, which, no reasonable person in the position and as an adjudicating body could have reached. Its order passed on 19th August, 2014 and applied to the Petitioner''s case is quashed and set aside.

25. The Rule is therefore made absolute in terms of prayer clause (a). No order as to costs. All Circulars impugned in this Writ Petition and identical and brought to the notice of this Court would not therefore survive after the legal position has been set out as above.

