
(2015) 07 MAD CK 0324

In the Madras High Court

Case No : Writ Petition No. 17282 of 2014 and M.P. Nos. 1 & 2 of 2014

Mettur Thermal Power Station

APPELLANT

Vs

The Central Board of Excise and Customs an Ors.

RESPONDENT

Date of Decision : 15-07-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A(1), 11A(5), 2 (d), 2(d), 2(f)
Customs Tariff Act, 1975 — Section 3

Citation : (2015) 52 GST 481

Hon'ble Judges : S. Vaidyanathan, J

Bench : Single Bench

Advocate : K. Jayachandran, for the Appellant; V. Sundareswaran, Senior Panel Counsel, Advocates for the Respondent

Judgement

S. Vaidyanathan, J—This Writ petition has been filed, praying for the issuance of Writ of Certiorari, to call for the records relating to the impugned show cause notice, issued by the 2nd respondent in SCN.Sl. No. 12/2014 (C.Ex) (Commr) dated 21.03.2014 (C. No. V/26/15/2/2014-C.Ex.ADJ) and quash the same as without authority of law, contrary to the scope and objective of Central Excise law and barred by limitation.

2. The petitioner is one of the various Thermal Stations of TANGEDCO. TANGEDCO is a Public Sector Undertaking owned by the Government of Tamilnadu, engaged in the generation and distribution of electricity and manufacturer of "Fly Ash" and "Fly Ash Bricks" falling under Chapter sub heading 26219000 and 68159910 respectively, of the Central Excise Tariff Act, (CETA) 1985. The petitioner is aggrieved by the impugned show cause notice dated 21.03.2014, in and by which, the second respondent has stated that the petitioner has contravened the provisions of Rule 4,6,8 to 12 of Central Excise Rules, 2002 (in short, the Rules) since it had cleared "Fly Ash" and "Fly Ash Bricks" without payment of appropriate Excise duty, without taking Central Excise registration, without filing statutory monthly returns and without following the

prescribed procedure. Therefore, CENVAT duty of Rs. 1,40,70,803/- including Education cess and Secondary Higher Education cess has been demanded under erstwhile Section 11A(1) / Section 11A(5) of Central Excise of the Act 1944 (in short, the Act) for the clearance of "Fly Ash" and further CENVAT duty of Rs. 1,85,443/-, including Education and Secondary Higher Education cess has been demanded for clearance of "Fly Ash Bricks". Apart from this, the respondent has also demanded interest and also proposed to impose penalty under the Rules. Challenging the same, the petitioner has come forward with the present Writ Petition.

3. A counter affidavit has been filed on behalf respondents, inter alia, it is stated that during the process of production of electricity, "Fly Ash" emerges as by-product and generated during the burning of pulverized coal for power generation, which is marketable and has also an intrinsic value in the commercial market. The petitioner is engaged in manufacture of "Fly Ash Bricks". "Fly Ash" is a fine powder recovered from the gases of burning coal during the production of electricity. It is used as input in the manufacture of various commodities such as cement, asbestos sheet, bricks etc. The end-users themselves create infrastructure for collection of "Fly Ash" and take delivery of "Fly Ash" from the "Fly Ash" extractions system placed/ installed by them at the factory premises of the petitioner. The "Fly Ash" collection system installed at the premises of the petitioner is subject to the condition for the cement companies have to pay charges for "Fly Ash" at the rate charged by the Tamilnadu Electricity Board (TNEB). 100% of the "Fly Ash" schedule should be collected by the company from the allotted unit, out of which 20% of "Fly Ash" should be spared to TNEB for allotting the same to other industries. The "Fly Ash" is cleared to various customers such as cement plants, "Fly Ash Bricks" manufactures etc, on collection of charges which is shown as revenue realized as per their worksheet. It is stated that "Fly Ash" falls under chapter sub heading 26219000 of the Act, is a marketable and excisable commodity and remained exempted from payment of duty till 28.02.2011 vide notification No. 76/86 CE dated 10.02.1986, which was superseded by another notification No. 17/2011 CE dated 01.03.2011. Later, duty at the rate of 1% was imposed on "Fly Ash" vide notification No. 01/2011-CE dated 01.03.2011 subject to the conditions that CENVAT credit is not availed by the manufacturer of "Fly Ash". Further, duty was increased 1% to 2% vide notification No. 16/2012 CE with effect from 17.03.2012. Notification No. 2/2011-CE dated 01.03.2011 prescribes a duty at the rate of 5% on "Fly Ash" with CENVAT credit facility, which was increased to 6% from 17.03.2012 by notification dated 17.03.2012. The petitioner is not availing CENVAT credit facility, it is liable to pay CENVAT duty at 1% from 01.03.2011 to 16.03.2012 and 2% from 17.03.2012 onwards, on the value of "Fly Ash" cleared. The product, "Fly Ash Bricks", is excisable goods classified under chapter 68159910 of the Act and effective rate of excise duty was applicable on such goods cleared. It attracts duty at 8% from February 2009 to 2010, 10% from March 2010 to 16th March 2012 and 12% from 17th March 2012. Since "Fly Ash" finds a place in the

Central Excise Tariff, the petitioner is liable to pay Central Excise duty on the "Fly Ash" clearances from 01.03.2011.

4. It is stated that electricity is not an exempted product and it finds a place in the first schedule to the Act and thereby it is classified as tariff item. Being non-excisable goods, electricity cannot be regarded as exempted goods and as the "Fly Ash" arising during the production of electricity is not covered by the Notification No. 89/95-CE dated 18.05.1995, duty is to be paid on the "Fly Ash". The petitioner has not paid duty on the "Fly Ash" in lieu of the levy of duty on the clearance of "Fly Ash" with effect from 01.03.2011 with an intent to evade payment of duty which was detected during the investigation carried out by the department. The extended period of limitation is applicable. The petitioner being a public sector undertaking, it is mandatory on their part to discharge government liability in the form of excise duties and taxes which, it has failed to do so. Since there is an intention to evade payment of duty, extended period has been invoked while issuing the notice. The impugned notice has been issued based on the introduction of levy of duty on "Fly Ash" from 01.03.2011 and the act of non-payment of the same by the petitioner has warranted the issue of the impugned notice. The production of "Fly Ash" is admittedly a by-product which is marketable and the consequential production of "Fly Ash Brick" is manufactured, there is a statutory liability fastened on the petitioner to adhere to law and comply with the statutory obligations. With these averments, the respondents sought for dismissal of the Writ Petition.

5. Heard the learned counsel for the petitioner and the respondents and perused records.

6. The issue before this Court is, whether the "fly ash" and "fly ash bricks" included as items in the entries to the First Schedule to the Central Excise Tariff Act, per se make the same exigible to excise duty?

7. According to the learned counsel for the respondent, during the process of production of electricity "fly ash emerges as by product and generated during the burning of pulverized coal for power generation, which is marketable and has also an intrinsic value in the commercial market, since it is used as input in the manufacture of various commodities such as cement, asbestos sheet, bricks, etc. and thereby, it is found place under chapter sub heading 26219000 of the Central Excise Act, 1985 as a marketable and excisable commodity. It is stated that though it remained exempted from payment of duty till 28.02.2011 vide Notification No. 76/86 CE dated 10.2.1986, however, later, the said exemption notification was superseded by Notification No. 17/2011 CE dated 01.03.2011 and duty at the rate of 1% was imposed on "fly ash" vide notification No. 01/2011-CE dated 1.3.2011, subject to condition that cenvat credit is not availed by the manufacturer of fly ash. Thereafter, the rate of duty has been increased from to time by various notifications upto 6% with effect from 17.3.2012. Likewise, according to the respondent, "fly ash brick" is also marketable and excisable commodity falls under Chapter 68159910 of the Act, attracts duty at

8% from February, 2009 to February 2010, at 10% from March, 2010 to 16th March 2012 and at 12% from 17th March, 2012. In view of this, it appears that the second respondent has issued a show cause notice, dated 21.3.2014, impugned in this writ petition, proposing to raise demand towards CENVAT duty along with interest and penalty, inasmuch as, the petitioner have cleared "fly ash" and "fly ash bricks" without payment of appropriate excise duty, without taking central excise registration and without filing statutory monthly returns.

8. This issue needs a reference to the relevant statutory provisions. Section 3 of the Act insists imposition of duties specified in first schedule, reads as under:

"3. Duties specified in the First Schedule to be levied.

(1) There shall be levied and collected in such manner as may be prescribed, duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the First Schedule."

"Excisable goods" and "manufacture" have been defined in the Act under Section 2(d) and 2(f), which reads as under:

"2(d). "excisable goods" means goods specified in the First Schedule as being subject to a duty of excise and includes salt;

*Explanation - For the purpose 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."

(*Explanation has been inserted by Act 18 of 2008, Sec.78 (wef.10.5.2008)

"2(f) "manufacture" includes any process incidental or ancillary to the completion of a manufactured product.

(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 labeling 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 "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."

9. From the above, 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 skillful 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.

10. In the present case, according to the respondent, "fly ash" and "fly ash bricks" are included in the items in the entries to the First Schedule to the Act and thereby, they are subjected to levy of excise duty in view of Section 3 of the Act. It is to be noted that 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. It is essential that the goods have to satisfy the test of being produced or manufactured in India. Excise duty is a duty leviable only on the manufactured goods.

11. It is appropriate to describe the meaning of "fly ash" and "fly ash bricks" as under:

"Fly ash, also known as flue-ash, is one of the residues generated in combustion, and comprises the fine particles that rise with the flue gases. Ash which does not rise is termed bottom ash. In an industrial context, fly ash usually refers to ash produced during combustion of coal. Fly ash is generally captured by electrostatic precipitators or other particle filtration equipment before the flue gases reach the chimneys of coal-fired power plants, and together with bottom ash removed from the bottom of the furnace is in this case jointly known as coal ash. Depending upon the source and makeup of the coal being burned, the components of fly ash vary considerably, but all fly ash includes substantial amounts of silicon dioxide (SiO₂) (both amorphous and crystalline) and calcium oxide (CaO), both being endemic ingredients in many coal bearing rock strata.

"Fly ash brick (FAB)" is a building material, specifically masonry units, containing class C fly ash and water. Compressed at 28 MPa (272 atm) and cured for 24 hours in a 66°C steam bath, then toughened with an air entrainment agent, the bricks last for more than 100 freeze-thaw cycles. Owing to the high concentration of calcium oxide in class C fly ash, the brick is described as "self-cementing". The manufacturing method saves energy, reduces mercury pollution, and costs 20% less than traditional clay brick manufacturing."

12. First, let us first examine whether the good "fly ash" does involve any manufacturing activity, falls under the purview of excisable good so as to attract levy of excise duty?

13. In this regard, it is worthwhile to refer the decision of the Apex Court in "Union of India versus Ahmedabad Electricity Company Limited" reported in (2002) 11 SCC 129, wherein, while upholding the view of the High Court of Gujarat, the Apex Court has categorically held the "cinder" which is unburnt part of coal, is not exigible to excise duty since no manufacturing process was

involved to produce the same and as such it did not satisfy the test of being manufactured in India as envisaged in the provisions of the Act and that the onus to establish that cinder has gone through the process of manufacture in India was not discharged by the department. It has been held so, in para 37 and 38 which read as under:

"36. 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.

37. 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. They have done nothing to discharge this onus. For this reason alone they must fail."

Here, we are concerned with "fly ash", which is produced during combustion of coal. The difference between "cinder" and "fly ash" is that when coal is not burnt fully and leaves pieces behind, is called "cinder" whereas, when it is fully burnt and reduced to ash, is called "fly ash". Therefore, I am of the considered view that the ratio decided in the above said decision would squarely apply in the case of "fly ash" also since the product "fly ash" also cannot be said to have gone through any manufacturing process.

In fact, to attract excise duty under Section 3 of the Central Excise Act, the article must satisfy the twin attributes of excisable goods, i) Mobility and ii) Marketability or it should find a place by that name in the Schedule to the Act, as held by the Apex Court in Commissioner of C. Ex. Vs. Josts Engineering Co. Ltd., (2002) 146 ELT 29 : (2002) 10 SCC 164 .

14. However it is pertinent to note that in the above referred to decision, viz., Ahmedabad Electricity Co.Ltd., case, the Hon"ble Apex Court, though has held that the cinder cannot be subjected to levy of excise duty since it did not satisfy the test of being manufactured, however, as regards marketability of the said product, it has observed as under in para 36, which reads as follows.

"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 assesseees. 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."

15. Therefore, regarding the marketability of the the product, "cinder", even if it is saleable, the Hon'ble Supreme Court has held the same cannot be subjected to levy of excise duty since it does not satisfy the test of being manufactured. By the time, the above said judgment was rendered by the Apex Court, in order to levy excise duty on the excisable goods as defined under Section 2(d) of the Act, the primary requirements were, that the goods should be subjected to process of manufacture and have marketability. However, it is to be noted that the definition of the term, "excisable goods" under Section 2 (d) of the Central Excise Act, 1944, was amended by Act 18 of 2008 in the year 2008 by inserting the Explanation with effect from 10.5.2008. The said explanation added to Section 2(d) reads as under:

"For the purpose 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."

16. By virtue of the above amended section, now the term "goods" is meant, any article, material or substance being bought and sold for a consideration and such goods shall be deemed to be marketable.

17. While so, de-horsing the marketability of the product, the learned counsel appearing for the petitioner would vehemently contend that the product fly ash would not attract levy of excise duty since it was produced during combustion of coal, as a waste product and no manufacturing process is involved. In this regard, the learned counsel relied upon an exemption Notification No. 89/95 CE, dated 18.5.1995 issued by the Government of India, which grants exemption from the levy of duty on waste, parings and scrap arising in the course of manufacture of exempted goods and falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986). According to the learned counsel, since the fly ash is a waste or scrap arising in the course of manufacture of "electricity" which is exempted good, by virtue of the above said Notification, no excise duty can be levied on the fly ash.

18. On the other hand, the learned counsel appearing for the respondent would contend that benefit of exemption granted by Notification No. 89/95 CE, dated 18.5.1995 would be extended only on waste, parings and scrap arising during the manufacture of exempted products and electricity is not an exempted product, but it is a nonexcisable good found place in the First Schedule to the Central Excise Tariff Act, 1985 and though the rate of duty is left blank in the relevant column, it denotes that electricity is classed as tariff item and hence, it cannot be construed that the electricity is an exempted good. The learned counsel pointed out that admittedly, the fly ash is used as input in the manufacture of various commodities such as, cement, asbestos, sheet, bricks, etc., and it emerged during the course of burning of pulverized coal for the

manufacture of electricity as a by product, which has marketability and hence, it cannot be treated as waste or scrap unless it has no value or negligible value and admittedly, the fly ash is being sold to various companies on a fixed price.

19. There are several judicial pronouncements on the issue, excisability on by-product and waste product rendered by various High Courts and the Apex Court. The scrap means a waste and a scrap from the manufacture or mechanical working of materials which is definitely not usable as such because of breakage, cutting up, wear and other reasons. Meaning thereby, the scrap is the waste left out of the raw materials which cannot be used in any manner, whereas the byproduct is not a waste and it has its own market value, though it may not be at par with the main product. Generally, the scrap is either being thrown out or sold at a cheaper rate, because it cannot be used as a raw material for manufacture of different items. But in the case of a by-product it has its own market value and can be used for production of different items. Though many decisions are available on the subject "waste vis-a-vis by-product", I feel it appropriate to refer to the decisions of the CESTAT, Principal Bench, New Delhi in the case of "Commissioner of Central Excise, Jalandhar versus A.G. Flats Limited", wherein, the Hon'ble Tribunal, having dealt with the issue in a perspective manner, has held as under in para 6:

"6. Coming to the main point of dispute as to whether the soap stock/fatty acids, waxes and gums obtained in course of refining of crude vegetable oil can be treated as waste, since this term has not been defined in the Notification or in the Central Excise Act, 1944 or the Rules made thereunder, the meaning of this term has to be understood from the dictionary and judicial pronouncements. However, a distinction has to be made between the term "by-product" and the term "waste." Oxford Advanced Learner's Dictionary defines the term "by-product" as a substance produced during the process of making or destroying something else. Thus, if in course of manufacture of product A, a product B, also emerges in addition to the intended product A, even though there was no intention to manufacture the product B, the product B would be called a by-product. The waste is a by-product which is of no value or very low value. Larger Bench of the Tribunal in the case of Markfed Vanaspati & Allied Indus v. CCE, Chandigarh reported in 2000 (116) E.L.T. 204 (Tribunal) after observing that by-product means something of value produced in making the main product or a substance obtained in course of a specific process but not a primary object, has held that the spent earth arising in course of refining of oil, being of no value, is not a new product or a by-product. Though the Tribunal in the case of CCE, Hyderabad v. Priyanka Refineries Ltd. (supra) has held that soap stock arising in course of refining of oil is waste, no reasons have been given for arriving at this conclusion. In this order, the observations of the Tribunal that the decision of Hon'ble Supreme Court in the case of Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, AIR 1985 SC 1211 : (1985) 6 ECC 142 : (1985) 5 ECR 2571 : (1985) 20 ELT 222 : (1985) 1 SCALE 1073 : (1985) 3 SCC 620 : (1985) 1 SCR 750 Supp would cover the issue in favour of

the respondent are also not correct as the issue involved in the case of Khandelwal Metal & Engineering Works was as to whether the imported brass scrap in form of old and used articles of brass sold as scrap, would attract additional custom duty under Section 3 of the Indian Customs Tariff Act, while the issue involved in the case of CCE, Hyderabad v. Priyanka Refineries Ltd. (supra) was as to whether the soap stock arising in course of refining of crude vegetable oil could be treated as waste for the purpose of Notification No. 85/95-C.E., which is a totally different issue. Just because the appeal filed by the Government against this order of the Tribunal has been dismissed by Hon''ble Supreme Court, the dismissal being a summary dismissal without giving any reasons does not lay down any law as, as held by Hon''ble Supreme Court in a series of judgment in the cases of Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, AIR 1990 SC 781 : (1991) 188 ITR 402 : (1989) 4 JT 229 : (1989) 2 SCALE 982 : (1990) 2 SCC 71 : (1989) 1 SCR 510 Supp : (1990) 76 STC 71 and A-One Granite v. State of U.P. reported in 2001 AIR SC 848 summary dismissal of an appeal or a SLP without giving any reasons i.e. a sub silentio decision, does not lay down any law or a binding precedent. When a product emerges as a by-product in course of manufacture of some other product, that by-product cannot be treated as waste just because it is an unintended product arising in course of manufacture of an intended final product. The by-product would be waste only if it is of no value or negligible value something which the manufacture would want to get rid of. No evidence has been produced by the Assessee that the products, in question, are of no value or negligible value, which have to be got rid of."

20. Though this Court is in full agreement with the above view of the Hon''ble Tribunal, however, the same yardstick cannot be applied to the case on hand since this Court has categorically come to the conclusion that the product "fly ash" cannot be said to have gone through any manufacturing process. But in the above referred to case, the Hon''ble Tribunal has held that when a product emerges as a by-product in course of manufacture of some other product, that by-product cannot be treated as waste and thereby, the by-products, viz., soap stock/fatty acids, waxes and gums which were obtained in course of refining of crude vegetable oil cannot be treated as waste. The Tribunal was of the view that these by-products had satisfied the criteria for treating the process as manufacture and thereby they are manufactured products. It has been held so, by the Tribunal in para 4, which reads as under:

"4. The waxes and gums obtained in course of refining is covered by heading 1522. As regards soap stock, the same would also be covered by Heading 1522, as, as per HSN Explanatory Notes of heading 1522, this heading among other things, covers soap stocks which are the by-product of oil refining, produced by neutralisation of free fatty acids with a base (sodium hydroxide) and consist of mixture of crude soap, natural oils or fats. As regards, fatty acids obtained in course of refining, the same by virtue of Chapter Note 1 (e) to Chapter 15 are

excluded from the purview of Chapter 15 and the same are specifically covered by Heading 3823. Therefore, each of the three by-products, soap stock/fatty acids, waxes and gums are the manufactured products covered by Central Excise Tariff and since it is not under dispute that the same are marketable, the same have to be treated as excisable product chargeable to Central Excise Duty."

But in the present case, it has already been held by this Court that the fly ash has not gone under the process of manufacture and it cannot be said to be a manufactured product. However, as regard the applicability of exemption Notification No. 85/95-CE to the product "fly ash" on the ground that it is a waste arising in the course of manufacture of "electricity" which is exempted good, no excise duty can be levied is concerned, it is to be noted that it could be applied only if the waste, parings and scrap arise in course of manufacture of excisable goods which are exempted goods i.e. goods chargeable to nil rate of duty or the same are fully exempt from duty under an exemption notification.

21. It is relevant to extract the Notification No. 89/95-CE, dated 18.5.1995, which reads as under:

"Waste, Parings and scrap arising during manufacture of exempted goods -

Exempted In exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise and Salt Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest to do so, hereby exempts waste, parings and scrap arising in the course of manufacture of exempted goods and falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), from the whole of the duty of excise leviable thereon which is specified in the said Schedule :

Provided that nothing contained in this notification shall apply to waste, parings and scrap cleared from a factory in which any other excisable goods other than exempted goods are also manufactured.

Explanation - For the purpose of this notification, the expression "exempted goods" means excisable goods which are chargeable to "Nil" rate of duty or, are exempted from the whole of the duty of excise leviable thereon by any other notification (not being a notification where exemption from the whole of duty of excise is granted based upon the value or quantity of clearance made in a financial year) issued under sub-rule (1) of rule 8 of the Central Excise Rules, 1944 or subsection (1) of section 5A of the said Act."

22. A reading of the above notification, it is clear that the following conditions must be satisfied for exemption under this notification:-

- (i) the goods must be waste, parings and scrap;
- (ii) the goods must be falling within the schedule to the Central Excise Tariff Act;
- (iii) the waste, parings and scrap must have arise in course of manufacture of excisable goods which are exempted goods i.e. goods chargeable to nil rate of

duty or the same are fully exempt from duty under an exemption notification other than exempt notification granting full duty exemption based on value or quantity of the goods cleared in a financial year; and

(iv) other than the exempted final product no other dutiable excisable goods are manufactured and cleared

23. It is the specific contention of the department that the "fly ash" would emerge as a by product in the course of burning of pulverized coal for the manufacture of electricity and electricity is not an exempted product, but a non-excisable good, found place in the First Schedule to the Central Excise Tariff Act, 1985 and though the rate of duty is left blank in the relevant column, it denotes that electricity is classed as tariff item and hence, it cannot be construed that the electricity is an exempted good.

24. It is not in dispute that "electricity" has been specified in the First Schedule of the Central Excise Tariff under heading 27160000, but it is not subjected to a duty of excise since under the "rate column" the duty of excise is indicated as "nil". Merely, rate of duty is mentioned "nil", it cannot be construed that it is non-excisable good. In "Collector of Central Excise, Hyderabad etc. etc. Vs. M/s. Vazir Sultan Tobacco Company Limited, Hyderabad Etc. Etc., (1996) 2 AD 580 : AIR 1996 SC 3025 : (1996) 54 ECC 94 : (1996) 63 ECR 359 : (1996) 83 ELT 3 : (1996) 3 JT 112 : (1996) 2 SCALE 603 : (1996) 3 SCC 434 : (1996) 2 SCR 1194 , the Hon'ble Supreme Court has held that though by virtue of an exemption notification, the rate of duty was nil, this does not mean that they were not excisable goods. They were excisable goods. Nil rate of duty is also a rate of duty. Therefore, electricity is excisable good and can be construed as exempted goods by virtue of the above notification No. 89/95-CE, dated 18.05.1995 as it has been clearly clarified in the Explanation that "...for the purpose of this notification, the expression "exempted goods" means excisable goods which are chargeable to "Nil" rate of duty. Therefore, as rightly contended by the learned counsel for the petitioner, the exemption Notification No. 89/95-CE would squarely applicable to the product "fly ash", which is a waste arise during the course of manufacture of electricity, which is an excisable good chargeable to "nil" rate of duty.

25. However, as already this Court held that the commodity "fly ash" 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 may not be necessary for this Court to delve upon any other related issues. Accordingly, the issue is answered, holding that the good "fly ash" does not involve any manufacturing activity and it does not fall under the purview of excisable good so as to attract levy of excise duty.

26. As regards "fly ash bricks", I am of the view that since fly ash does not itself get shaped as bricks unless some manufacturing activity is involved. Since the raw material fly ash undergoes a change since an operation performed on it,

resulting into fly ash brick, such operation would certainly amount to processing of the commodity and such commodity is recognized as a new and distinct article, i.e. "fly ash brick" and therefore, it can be said that the good fly ash brick does involve manufacturing activity, which is admittedly, has marketability also being sold on a considerable price. Therefore, the good "fly ash brick", having satisfied the test of being manufactured in India and also marketability, I am of the view that it is leviable to excise duty.

27. In view of the above discussion, the impugned show cause notice issued by the second respondent, dated 21.3.2014 is hereby set aside in so far as it concerned to the imposition of excise duty, interest and penalty in respect of "fly ash" alone.

In the result, the Writ Petition is partly allowed. No costs. Consequently, connected MPs are closed.