

(1995) 04 SC CK 0043

In the Supreme Court Of India

Case No : Civil Appeal No. 4676 of 1995 (arising out of SLP (C) No. 11315 of 1987) with C.A. No's. 1423 with 2759 and 3982 of 1987

Union of India and others

APPELLANT

Vs

Indian Aluminium Co. Ltd. and another

RESPONDENT

Date of Decision : 19-04-1995

Acts Referred:

Central Excise Rules, 1944 — Rule 56A
Central Excises and Salt Act, 1944 — Section 2, 3

Citation : AIR 1995 SC 1580 : (1995) 77 ELT 268 : (1995) 5 JT 465 : (1995) 3 SCALE 29 : (1995) 2 SCC 465 Supp : (1995) 3 SCR 497

Hon'ble Judges : Sujata V. Manohar, J;N. P. Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Sujata V. Manohar, J.—All these appeals have been filed at the instance of the Union of India and the Collector of Central Excise. The respondents in all these appeals manufacture aluminium products such as aluminium sheets, aluminium shapes, aluminium angles etc. out of aluminium ingots. In the process of manufacture, at the stage of processing, dross and skimmings arise and accumulate in the furnace in the shape of ashes as a result of oxidation of metal. These ashes are formed mainly during the melting down of aluminium ingots and, to some extent, during subsequent treatment and holding operation of molten baths in the furnace. Dross consists mostly of oxides, non-metallic material and other foreign material which separates or forms during melting and holding operations, and finally accumulates on the surface of the molten bath. It has to be removed. Skimmings are mostly thin oxide layers obtained by skimming a molten bath prior to metal transfer on casting. The skimming operation is essential to the manufacturing process. Dross and skimmings, according to the assesseees, represent a process-loss or a melt- loss. Aluminium dross and skimmings contain a certain amount of metal from which they come. But they lack not only metal body but also metal strength, formability and

character. Such dross and skimmings are, therefore, distinct from scrap which is a metal of as good a quality as the prime metal form which it arises. In all these appeals, we are concerned with the question of exigibility of such aluminium dross and skimmings to excise duty.

CIVIL APPEAL NO. 4676 OF 1995 (Arising out of SLP (C) No. 11315 of 1987)

2. Delay condoned.

3. Special leave granted.

4. In this appeal, we are concerned with the question of levy of excise duty on aluminium dross and skimmings removed by the assesseees between September 1972 and March 1973.

5. The aluminium ingots, which were the raw material obtained from outside and used by the assesseees, and the aluminium sheets which were manufactured by the assesseees out of these ingots, were both liable to payment of excise duty under Tariff Item 27 as it stood at the relevant time. It is an accepted position that Tariff Item 27 as it stood at the relevant time made no mention of aluminium dross and skimmings. The Excise Tariff also did not have, at the relevant time, Tariff Item 68 which is a residuary item covering goods not elsewhere specified (but excluding certain goods set out therein). Item 68 was introduced in the Central Excise Tariff only in 1975. Aluminium dross and skimmings were, therefore, not excisable at the relevant time.

6. The assesseees cleared their manufactured product viz. aluminium sheets by following the procedure under Rule 56A of the Central Excise Rules, 1944. This Rule provides for a special procedure for movement of duty-paid material and component parts for use in the manufacture of finished excisable goods. The assesseees claimed credit for the duty paid on aluminium ingots while clearing aluminium sheets manufactured by them. They also cleared aluminium dross and skimmings without payment of any excise duty.

7. By a show-cause notice dated 7.2.1974 the assesseees were, however, asked to pay excise duty on dross and skimmings removed by them between September 1972 and March 1973. This show-cause notice was confirmed by the Assistant Collector. However, the Appellate Collector of Central Excise allowed the appeals preferred by the assesseees. A revision preferred by the excise authorities was, however, allowed by the Government of India. This decision was challenged by the assesseees by filing a writ petition which was allowed by a learned Single Judge of the High Court. An appeal before the Division Bench of the High Court was summarily dismissed. The present appeal is filed by the department from the decision of the Division Bench of the Bombay High Court upholding the decision of a learned Single Judge of that Court.

8. u/s 3 of the Central Excises and Salt Act, 1944, there shall be levied and collected, in such manner, as may be prescribed, duties of excise on excisable goods other than salt which are produced or manufactured in India.

9. "Excisable goods" are defined u/s 2(d) as meaning "goods specified in the First Schedule as being subject to a duty of excise...." Since aluminium dross and skimmings were not covered by Item 27 of the First Schedule, they were not excisable goods as defined in Section 2(d).

10. Both aluminium ingots and aluminium sheets manufactured out of ingots are, however, excisable under Tariff Item 27 in the First Schedule.

11. Under the Central Excise Rules of 1944 framed under the Central Excises and Salt Act, 1944, Rule 56A prescribes a special procedure for movement of duty-paid materials or component parts for use in the manufacture of finished excisable goods. In the exercise of powers conferred by Sub-rule (1) of Rule 56A, the Central Government has specified several excisable goods in respect of which the procedure laid down in Sub-rule (2) of Rule 56A shall apply. The excisable goods so specified includes aluminium. The relevant provisions of Sub-rule (2) as it stood at the material time provided as follows :

"The Collector may ...permit a manufacturer of any excisable goods specified under Sub-rule (1) to receive material or component parts of finished product...on which the duty of excise...has been paid in his factory for the manufacture of these goods... and allow a credit of the duty already paid on such material or component parts or finished product, as the case may be:

Therefore, under Sub-rule (2), the assesseees were entitled to a credit for the duty already paid on aluminium ingots, while paying duty on aluminium sheets. It is not in dispute that the assesseees received duty-paid ingots for the manufacture of aluminium sheets which were excisable goods. Both ingots and sheets fall under the same Tariff Item, namely, Item 27. The assesseees were entitled to credit for the duty already paid on the ingots while clearing the sheets. The assesseees accordingly availed themselves of this credit while clearing aluminium sheets during the relevant period. This was done by following the procedure laid down under Rule 56A with the permission of the Excise authorities. During the same period, the assesseees also cleared aluminium dross and skimmings arising from the process of manufacture with the permission of the Excise authorities without payment of any duty.

12. The show-cause notice of 7.2.1994 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 assesseees which are exempted from the whole of the duty of excise livable thereon or are chargeable to nil rate of duty, and (2) A proportionate credit should not be allowed to the assesseees 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, aluminum 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 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 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 some times because of the rising of impurities to the surface.

Mcgraw Hill Dictionary of Science and Engineering (1984 Edition) defines it as :

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

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.

14. The entire quantity of raw material, namely, duty-paid aluminium ingots procured by the assesseees from outside was used in the manufacture of

aluminium sheets. It is nobody's case that the aluminium sheets which were manufactured by the assessee could have been manufactured 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 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.

15. This Court, in the case of *M/s. Multimetals Ltd. Vs. Assistant Collector, Central Excise, Kota and others*, has considered an Excise Notification dated 28th of December, 1963 bearing No. GSR 1957 which gives a credit, in respect of duty paid on copper and copper alloys in any crude form used in the manufacture of copper products. This Court observed that in the process of manufacture, a portion of the copper and copper alloys in crude form was lost. The Court negated the contention of the Revenue that the rebate granted should relate only to the copper and copper alloys content of the final product and, therefore, only that quantity that was found in the finished product would get relief, and not the entire quantity which was put in the process of manufacture. This Court held that it was the duty paid on the input material that was relevant and not the duty referable to the ultimate component of the final product. It said :

So far as the manufacturer is concerned he has used copper and copper alloys of a particular quantity in the manufacture of pipes and tubes. The 'manufacturing loss' forms part of the raw material 'used' in the manufacture though not reflected in the final product. The relief, as we understand the notification, that has to be given to the manufacturer was in respect of the duty already paid on the raw material used in the manufacture of the final product. That is, the relief has to be given to the extent of the duty paid on the input material and not with reference to the quantity which ultimately forms part of the final product.

The Court also relied, in this connection, on the ratio of the judgment of this Court in *Swadeshi Polytex Ltd. Vs. Collector of Central Excise*, .

16. In the case of *M/s. Swadeshi Polytex Ltd. (supra)* this Court was concerned with Notification no. 201 of 1979. Prior to April 11, 1981, it provided for set off of duty on all excisable goods which required for their manufacture the use of duty-paid goods falling under Tariff Item 68. This Notification also was similar in terms to the provision of Rule 56A. This Court compared the provisions of Rule 56A with the provisions of the above Notification and held that the two provisions were similar. The assessee in that case used duty-paid ethylene glycol in the manufacture of polyester fibre. As a result of chemical reaction, a non-excisable

by-product methanol emerged in the course of manufacture which used up a part of ethylene glycol. This Court said that although a part of the ethylene glycol was contained in the by-product methanol, yet the credit of duty paid on ethylene glycol could not be reduced to the extent of the ethylene glycol contained in methanol. It further said that it was clear that ethylene glycol was used in the manufacture of polyester fibre, that methanol arises as a part and parcel of the chemical reaction during the process of manufacture and that it is not possible to use a lesser quantum of ethylene glycol for producing a given quantity of polyester fibre. The appellants had not used excess ethylene glycol want only to produce methanol. They were entitled to full credit for the duty paid on ethylene glycol. This Court, also approved of the decision of the Bombay High Court in the case of Indian Aluminium Co. Ltd. and another Vs. A.K. Bandyopadhyay and others, from which judgment the present appeal is filed.

17. In the premises, we agree with the reasoning and conclusion of the learned Single Judge of the Bombay High Court from whose judgment an appeal was dismissed by a Division Bench of the Bombay High Court and which judgment is under challenge before us. The appeal is, therefore, dismissed with costs.

CIVIL APPEAL NOS. 1423, 2759 AND 3982 OF 1987

18. The manufacturers in all these appeals were also engaged, at the material time, in the manufacture of aluminium goods out of aluminium ingots. Their cases, however, are a little different from the case of Indian Aluminium Co. Ltd. because we are concerned with the manufacture of these aluminium goods during a subsequent period when there were some changes in the Excise Tariff.

19. Under Tariff Item 27 "Waste and Scrap of Aluminium" is one of the items exigible to excise duty. An Explanation was added to Tariff Item 27 by the Finance Act, 1981 to the following effect :

27 : Explanation: (1) 'waste and scrap' means waste and scrap metal fit only for the recovery of metal by remolding or for use in the manufacture of chemicals, but does not include sludge, dross, scalings, skimmings, ash and other residues;

20. Tariff Item 68 which was introduced for the first time in 1975 was as follows:

68: All other goods, not elsewhere specified, but excluding -

(a) x x x x

(b) x x x x

(c) x x x x

Explanation : For the purposes of this Item, goods which are referred to in any preceding Item in this Schedule for the purpose of excluding such goods from the description of goods in that item (whether such exclusion is by means of an Explanation to such Item or by words of exclusion in the description itself or in any other manner) shall be deemed to be goods not specified in that Item.

21. The question in all these appeals relates to the exigibility of aluminium dross and skimmings to excise duty by reason of Item 68 and its Explanation read with the Explanation to Item 27. It is contended by the appellants that the Explanation to Item 27 makes it clear that dross and skimmings are not included in the Item "Waste and Scrap of Aluminium". Since these are expressly excluded from Item 27, these must be included in Item 68 as the Explanation to Item 68 makes it clear that goods which are referred to in any preceding Item in the Schedule for the purpose of excluding them from the description of goods in that Item, will have to be included in-Item 68.

22. The entire argument proceeds on the basis that aluminium dross and skimmings are excisable goods. Otherwise the question of their inclusion in Tariff Item 68 does not arise. The appellants have emphasised the fact that aluminium dross and skimmings are capable of being sold. Hence they must be considered as marketable goods. Since they arise in the course of manufacture, the duty of excise can be levied on such goods. The foundation of the argument rests on the assumption that aluminium dross and skimmings are marketable goods. For reasons which we have set out earlier, it is not possible to consider aluminium dross and skimmings as "goods" or as a commercial and marketable commodity. Dross and skimmings are merely refuse or ashes given out in the course of manufacture, in the process of removing impurities from the raw material. This refuse is quite different from waste and scrap which is prime metal in its own right.

23. The Explanation to Item 27 is not for the purpose of separating certain types of wastes and scrap from the main Item of "Waste and Scrap of Aluminium" and thus making it exigible to tax under Item 68. The Explanation to Item 27 merely excludes from waste and scrap certain residues or rubbish which cannot be categorised as "goods" at all. It is only those goods, which are otherwise liable to be included in a given Tariff Item, but are expressly excluded from it, which fall under the residuary Tariff Item 68. The Customs, Excise and Gold (Control) Appellate Tribunal in its order, which is the subject-matter of Civil Appeal No. 1423/87, has given several examples of this kind of exclusion which is covered by the Explanation to Tariff Item 68. It has given the illustration of a motor specially designed for use in a gramophone or record player which is expressly excluded from Tariff Item 30 which covers electric motOrs. These excluded motors are also motors, but because of some peculiar characteristics imparted to them in their manufacture, they are excluded for assessment under Tariff Item 30. Similarly, slotted angles and channels made of steel which can be used as part of steel furniture, are expressly excluded from Tariff Item 40 which covers steel furniture and parts. These exclusions are for the purpose of correct assessment of these excisable products. These excluded articles are "goods" in their own right, and are openly bought and sold in the market. Such excluded items, if they are not covered by any other item, would fall in the residuary Item 68 by virtue of the Explanation to Tariff Item 68.

24. The exclusion of aluminium dross and skimmings from "Waste and Scrap of Aluminium" in Tariff Item 27 is not of this nature. Dross and skimmings are excluded because they are not even waste or scrap. They are not goods at all as understood in commercial parlance. Therefore, they are not assessable under Tariff Item 68.

25. The appellants have drawn our attention to the decision in the case of *Khandelwal Metal and Engineering Works and Anr. Etc. v. Union of India and Ors.* [1985] Supp. 2 SCR 750 where this Court has held that brass scrap which comes into being in the process of manufacture, is a dutiable commodity. It has said that brass scrap is a well-known marketable commodity and is a by-product of manufacture. This, however, will not help the appellants in the present appeals because dross and skimmings are not waste and scrap as understood in common or commercial parlance. These are ashes and impurities and contain only a small percentage of metal which it may or may not be economical to extract, but its presence results in dross and skimmings being sold for a small price.

26. Reliance was also placed on decisions of this Court in the cases of *M/s. Indian Cable Company Ltd., Calcutta Vs. Collector of Central Excise, Calcutta and others*, and *A.P. State Electricity Board Vs. Collector of Central Excise, Hyderabad*, an essential ingredient for holding that an article is dutiable or exigible to duty of excise. The article should be capable of being sold to consumers in the market as it is, without any change. Observations to a similar effect are made in the case of *A.P. State Electricity Board (supra)* where the Court has said that marketability is a question of fact to be decided in the facts of each case.

27. In our view, it is difficult to dignify dross and skimmings with the appellation of a marketable commodity, for reasons which we have set out above.

28. In the premises, the appeals fail and are dismissed with costs.