CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 03

EXCISE Appeal No. 11232 of 2015

[Arising out of OIA-VAD-EXCUS-001-APP-80-2015-16 dated 15/05/2015 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I]

Shreno Ltd **.....Appellant**
Alembic Road,
Gorwa,
Vadodara, Gujarat

VERSUS

C.C.E. & S.T.-Vadodara-i **.....Respondent**
1st Floor...Central Excise Building,
Race Course Circle,
Vadodara,
Gujarat- 390007

APPEARANCE:
Shri Saurabh Dixit, Advocate for the Appellant
Shri. Prakash Kumar Singh, Superintendent (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO.A / 11370 /2022

DATE OF HEARING: 11.11.2022
DATE OF DECISION: 14.11.2022

RAMESH NAIR

The appellants are engaged in the manufacture of glass and glassware items. During the audit it was noticed that some value against sale of scrap is appearing in the balance sheet of the appellant. Accordingly, the range superintendent vide letter dated 06.03.2013, asked the appellant to furnish the details of all scrap cleared from their factory premises that reflected in their balance sheets for the period from 2008-09 to 2012-13 upto (January,2013). In compliance to the said letter, the appellant submitted the details of all the scrap cleared by them from factory vide letter dated 11.03.2013, wherein they have clarified that they have discharged the Excise Duty in respect of the manufacturing scrap and scrap generated out of cenvatable input/capital goods. They have also clarified that other than these

two types of scrap, since they are not liable to pay the duty, they have not paid the duty. However, Show Cause Notice came to be issued, wherein the demand of Excise Duty on all the scraps was raised. The Adjudicating Authority confirmed the demand and Learned Commissioner(Appeals) upheld the same by order in appeal, which is impugned herein, Therefore, the present appeal filed by the appellant.

2. Shri Saurabh Dixit, Learned Counsel appearing on behalf of the appellant at the outset submits that the Show Cause Notice has demanded the Excise Duty despite the appellant clarified that they have not paid duty on the scrap which is other than manufacturing scrap and cenvateable scrap. He submits that the scrap which is not generated during manufacture but general scrap on which no Cenvat Credit was taken excise duty is not payable. Accordingly, the Show Cause Notices are void and illegal. He submits that on the identical issue in the appellant's own case, this tribunal has decided the issue in their favour. He placed reliance on the following judgments:

- Alembic Glass Ltd. – 2006 (198) ELT 141 (Tri.-Mum.)
- Alembic Ltd. – 2007 (218) ELT 52 (Tri.- Ahmd.)
- Alembic Industries Ltd. – 2009 (233) ELT 392 (Tri.- Ahmd.)
- HEG LTd. – 2005 (191) ELT 1199 (Tri.- Del.)
- HEG Ltd. (Sponge Division) 2017 (349) ELT 314 (Tri.- Del.)
- L & T Ltd – 2008 (228) ELT 294 (Tri.- Mum.)
- Banswara Textile Mills Ltd.-2005 (183) ELT 318 (Tri.- Del.)
- GSFC Ltd. – 2019 (9) TMI 669- CESTAT AHMEDABAD
- Nizam Sugar Factory – 2008 (9) STR 314 (S.C)

3. Shri Prakash Kumar Singh, Learned Superintendent (Authorized Representative) appearing on behalf of the revenue reiterates the finding of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the records. We find that the demand was raised on all the scrap sold by the appellant value of which is reflecting in the balance sheet. The appellant while giving the information, as asked by the department vide their letter dated 06.03.2013, in their letter dated 11.03.2013 categorically stated that they have paid the excise duty on manufacturing scrap and cenvatable scrap, they also stated that on the general scrap which is neither manufacturing scrap nor cenvatable scrap, they have not paid the duty. As per this submission of the appellant the duty is clearly not payable. Moreover, the Show Cause Notice was baldly issued without carrying out any investigation that whether the appellant have availed the Cenvat Credit in respect to the scrap which were cleared without payment of duty and also the manufacturing scrap. In absence of any such investigation the allegation made in the Show Cause Notice is bald and without any support of any evidence. In this position the submission of the appellant must be taken as correct as there is no contrary material adduced by the revenue either in the Show cause Notice or even during adjudication. Therefore, it is clear that the appellant have cleared the scrap which is neither generated from the manufacturing nor generated from the cenvatable input or capital goods. Therefore, the same is clearly not liable to any duty. The identical issue was raised in the appellant's own case only for the different period wherein taking a consistent view it was held that scrap, other than manufacturing and non cenvatable is not liable to duty. The judgments are reproduced below:

- Alembic Class Industries Ltd- 2006 (198) ELT.141(Tri.-Mumbai)

> ***"2.*** *The appellants have produced invoices to show that miscellaneous income was for sale of diverse entities e.g. old and used machinery, iron grill etc. and other structured waste of GI Wires etc. Since these items prima facie are not emerged from conversion or inputs from raw material or resulting as scrap in the processing of conversion of raw material. The appellant being an assessee engaged in manufacture of medicaments, therefore following the decision in the case of UOI v. Ahmedabad*

Electricity Co. Ltd. - 2003 (158) E.L.T. 3 (S.C.) and which reads as follows.

"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 though 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."

Since the entities on which duties have been recovered are not emerging otherwise then skilful manipulation of raw materials, appellants by manufacture of medicaments, the levy of duly, as arrived at cannot be upheld. In view of the above the order is set aside and appeal allowed."

- Alembic Ltd:- 2007 (218) ELT. 52 (Tri.-Ahmd.)

"5. *We have considered the submissions carefully. The appellant is only a manufacturer of pharmaceutical products. They are not in the manufacture of scrap out of old and used machinery; we find that their case is covered by the decisions relied upon by the learned Advocate. We hold that the scrap of packing material and of old and used capital goods which are cleared by them cannot be considered as scrap arising out of the manufacture of pharmaceutical products and hence they are not liable to excise duty.*

6. *The appeal is allowed with consequential relief, if any."*

- Alembic Industries Ltd : 2009(233) ELT 392 (Tri- Ahmd.)

"3. *After hearing both the sides, we find that as regards the waste and scrap of packing material, appellate authority has relied upon Hon'ble Supreme Court's decision in the case of M/s. West Coast Industries [2003 (155) E.L.T. 11 (S.C.)]. The Revenue has not contended that the above decision is inapplicable to the facts of the present case.*

4. *As regards the other waste and scrap, we find Commissioner (Appeals) has made a detailed order, supported by various decisions and has arrived at a conclusive finding that there is no manufacturing activity involved. It is also not the Revenue's case that the appellants are manufacturing such waste and scrap. Merely because there is a sale and purchase of waste and scrap by itself is no ground that the same emerges as a result of some manufacturing activities. Such waste and scrap is damaged, old and used, obsolete pieces and machineries/equipments etc. and metal furniture etc. We find no acceptable reason to hold the same as excisable products.*

Accordingly, the appeal filed by the Revenue is rejected. Cross-objection is also disposed of."

- Gujarat State Fertilizers & Chemicals Ltd: 2019 (9) TMI 669

7. We have gone through the rival submissions. We find that demand has been raised on various items which were cleared by the appellant as scrap or as un-used items or partially used items. Revenue has invoked Rule 3(5A) of Cenvat Credit Rules, 2004 which reads as under:-

> *"(5A) If the capital goods are cleared as waste and scrap, the manufacturer shall pay an amount equal to the duty leviable on transaction value."*

It can be seen from the aforesaid Rule that it applies on capital goods on which credit has been taken and which are cleared as waste and scrap. The product has to be first been received as capital goods and on which the credit has been availed.

8. We find that before invoking Rule 3(5A) of the Cenvat Credit Rules, 2004, it is necessary for the Revenue to establish that items of capital goods are cleared as waste and scrap and on which the appellant has availed Cenvat credit. The defense of the appellant throughout is that they have not availed Cenvat credit in respect of capital goods. We find merit in the submissions made by the appellant. Unless Revenue establishes that they availed Cenvat credit on the capital goods which are being removed as waste 5 Excise Appeal No. 13128 of 2013 and scrap, provisions of Rule 3(5A) of Cenvat Credit Rules, 2004 cannot be invoked. In these circumstances, demand under Rule 3(5A) of Cenvat Credit Rules, 2004 is set-aside.

9. The next issue relates to demand on waste and scrap items lime MS Oil paint drums, spent zinc based catalyst, used therminol, comox catalyst etc., these items are in the nature of items the Revenue has invoked Section 2(d).

> *"SECTION 2. Definitions.— In this Act, unless there is anything repugnant in the subject or context, -*
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> *(a) to (c) ….. ……. …….*
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> *(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."*

It is seen that said Section has not application in the instant case. The Section 2(d) defines the excisable goods and to be excisable goods, is to be first manufactured. The goods coming into existence as by-product

during the process of manufacture cannot be treated as manufactured goods. The appellant placed reliance on the following decisions:-

(a) Hindalco Industries Limited vs. UOI – 2015 (315) ELT 10 (Bom.)
(b) Hariyana Steel and Power vs. CCE – 2015 (11) TMI 771 –CESTAT

We find that in the case of Hindalco Industries Limited (supra) the Hon'ble Bombay High Court has held as follows:-

> *"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 6 Excise Appeal No. 13128 of 2013 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 v. Indian Aluminium Co. Ltd. reported in 2006 (203) E.L.T. 3 (S.C.). 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:*
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> > *"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. v. CCE, (2005) 1 SCC 264 = 2004 (174) E.L.T. 145 (S.C.), this Court has held:*
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> > *"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." 7 Excise Appeal No. 13128 of 2013

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 excisable to excise duty. [See Hyderabad Industries Ltd. v. Union of India, (1995) 5 SC 338 = 1995 (78) E.L.T. 641 (S.C.), Moti Laminates (P) Ltd. v. CCE (1995) 3 SCC 23 = 1995 (76) E.L.T. 241 (S.C.), CCE v. Wimco Ltd. (2007) 8 SCC 412 = 2007 (217) E.L.T. 3 (S.C.)]. 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 v. CTO, AIR 1961 SC 412, Union of India v. Delhi Cloth & General Mills Co. Ltd., AIR 1963 SC 791 = 1977 (1) E.L.T. J199 (S.C.), South Bihar Sugar Mills Ltd. v. Union of India, AIR 1968 SC 922 = 1978 (2) E.L.T. J336 (S.C.) 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." 8 Excise Appeal No. 13128 of 2013

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."

Thus, even if the items cleared answered to the description under Section 2(d) of the Central Excise Act, duty can be charged only if they pass through the process under Section 2(f) of the Act. In similar circumstances, the Hon'ble Bombay High Court in the case of Hindalco Industries Limited (supra) has held that no duty liability can be charged. Relying on the aforesaid decision, the appeal, on this count is also allowed.

10. Consequently, the appeal is allowed.

In view of the above judgments and also in the facts of the present case, it is clear that the demand raised in the SCN is not sustainable.

5. Accordingly, the impugned order is set aside, appeal is allowed.

(Pronounced in the open Court on 14.11.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Palak