M/S Grasim Industries Ltd vs Union Of India on 13 October, 2011

Equivalent citations: AIR 2012 SUPREME COURT 161, 2011 (10) SCC 653, 2011 AIR SCW 6227, 2011 (11) SCALE 580, (2012) 1 WLC(SC)CVL 109, (2011) 4 CURCC 117

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Bench: Chandramauli Kr. Prasad, H.L. Dattu

REPORTAB

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7453 OF 2008

M/s. Grasim Industries Ltd. ..... Appellant

versus

Union of India .....Res

J U D G M E N T

H.L. Dattu, J.

1) This appeal is directed against the Judgment and Order dated 31.07.2008 of the High Court of

Judicature of Rajasthan in Central Excise Appeal No. 60/2006. By the impugned Order, the High Court has set aside the Order dated 09.08.2005 of the Customs, Excise and Service Tax Appellate Tribunal [hereinafter referred to as "the Tribunal"] whereby the Tribunal had dropped the entire duty demand and penalty imposed on the assessee.

2) The issue before us is: Whether the metal scrap or waste generated whilst repairing of worn out machineries or parts of cement manufacturing plant amounts to manufacture, and thereby, is excisable to excise duty.

3) The assessee is the manufacturer of the white cement.

The assessee repairs worn out machineries or parts of the cement manufacturing plant at its workshop such as damaged roller, shafts and coupling with the help of welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams, etc. In this process of repair certain metal scrap or waste is generated. In a surprise inspection conducted by the officials of the Central Range-II, Jodhpur, it was found that the assessee has cleared various types of metal scrap and waste without the payment of the excise duty for the period from 1.10.1995 to 16.07.1999. A show cause notice dated 05.10.2000 was issued to the assessee demanding a duty of ` 10,81,736/- under Section 11A of the Central Excise Act, 1944 [hereinafter referred to as "the Act"] along with equal amount of penalty under Section 11AC of the Act and further penalty under Rule 173 Q of the Central Excise Rules, 1944 [hereinafter referred to as "the Rules"] for non-payment of excise duty on clearance of said metal scrap and waste. On the request of the assessee on two occasions, the revenue has granted extension of time, first up to 31.12.2000 which was further extended till 22.01.2001, in order to reply to the said show cause notice. Thereafter, the assessee further made a request for some more time to file reply vide letter dated 20.01.2001, the same was rejected whilst confirming the duty demanded and penalty proposed in the show cause notice vide Order dated 08.02.2001 of the Additional Commissioner. The assessee filed appeal before the Commissioner (Appeals), Jaipur. The Commissioner (Appeals) vide its Order dated 30.04.2004, set aside the demand of duty along with equal amount of penalty pertaining to scrap and waste arising out of the dismantling of used capital goods and the packing materials to the extent of ` 6,05,955/-. The Commissioner (Appeals) also set aside the demand of penalty under Rule 173Q(1)(a) of the Rules, whilst, upholding the demand of duty and equal amount of penalty of ` 4,75,781 under Section 11AC of the Act on metal scrap and waste generated during course of repair and maintenance of the machinery or parts of the plant on the ground that such metal scrap and waste has been generated during mechanical working of metal in the workshop, as contemplated by the definition of the waste and scrap under Section Note 8(a) of Section XV of the Central Excise Tariff Act, 1985 [hereinafter referred to as "the Tariff Act"] and, in view of the decision of the Tribunal in Budhewala Co-op.

Sugar Mills Ltd. vs. CCE, Chandigarh-I, 2002 (141) ELT 490 (Tri. Delhi). Being aggrieved by the portion of the Order of the Commissioner (Appeals), pertaining to confirmation of demand of duty along with equal amount of penalty of ` 4,75,781 on the metal scrap and waste generated during repair of machinery, the assessee preferred an appeal before the Tribunal. The Tribunal, vide its Order dated 09.08.2005, allowed the appeal and set aside the demand of duty and penalty confirmed by the said portion of the Order of the Commissioner (Appeals) on the ground that metal

scrap and waste cleared by the assessee does not arise out of any manufacturing activity and, thereby, not excisable to any excise duty in view of the decision of the Tribunal in CCE v.

Birla Corpn. Ltd., 2005 (181) ELT 263. The Revenue, aggrieved by this Order, filed an appeal under Section 35G of the Act before the High Court of Rajasthan. The High Court, vide its Judgment and Order dated 31.07.2008, allowed the appeal, set aside the Order of the Tribunal and restored the Order of the Commissioner (Appeals) on the ground that the generation of scrap amounts to manufacture as it is incidental or ancillary to the manufacture of spare or replaceable part. The spare or replaceable part comes into existence as distinct product during the repairing of the parts of the cement plant. Also, the generation of scrap need not be in the process of manufacture of the excisable end product such as cement. Being aggrieved, the assessee has filed this appeal under Section 35L of the Act against the judgment and order of the High Court.

4) Shri. Alok Yadav, learned counsel has appeared for the assessee and the Revenue is represented by Shri. B. Bhattacharyya, learned Additional Solicitor of India. We will refer to their submissions while dealing with the issue canvassed before us.

5) Learned counsel Shri. Alok Yadav submits that the Revenue has wrongly relied on the definition of the metal waste and scrap under Note 8 (a) to Section XV of the Tariff Act which states- `Metal waste and scrap from the manufacture or metal waste and scrap from mechanical working of metal' in order to establish that metal scrap and waste arising out of the repairing and maintenance of the various machinery or parts of the cement manufacturing plant amounts to manufacture of such scrap and waste. He submits that nowhere the definition of waste and scrap in the said Note deems it to be manufacturing process. In other words, the definition of `waste and scrap' only gives coverage of the entry `waste and scrap' under Chapter 72.04 of the Schedule to the Tariff Act and does not ipso facto lead to a conclusion that waste and scrap arising by the mechanical working of metal amounts to a process of manufacture in terms of Section 2(f) of the Act in order to attract the charging Section. He further submits that unless the particular excisable product falling under the particular tariff entry is manufactured in the sense of Section 2 (f) of the Act, it does not entail or attract the operation of the charging Section under Section 3 of the Act. Learned counsel refers to the wordings of the definition of the manufacture under Section 2(f) of the Act and relies on the decision of this Court in Union of India v. Delhi Cloth and General Mills Co. Ltd., AIR 1963 SC 791 in support of his submission that the High Court, vide its impugned judgment, has grossly erred in observing that any incidental or ancillary process to the completion of any manufactured product, which itself need not be end product or excisable goods, would amount to manufacture and is excisable. In other words, such observation of the High Court creates very anomalous situation by conferring the status of manufacture on every process incidental and ancillary to any manufactured product which itself need not be excisable manufactured end product. Learned counsel submits, by placing reliance on several decisions of this Court in order to buttress his contention, that the excise duty mentioned under the tariff entry for the excisable goods cannot be levied in terms of charging Section 3 unless such excisable goods or items are produced and manufactured. In other words, the event of levying of excise duty under the charging Section 3 is the manufacture of the excisable goods. Learned counsel concludes that the manufacture of the excisable goods in terms of Section 2 (f) is the prerequisite to levy excise duty.

6) Per Contra, Shri. B. Bhattacharyya, learned ASG, submits that the metal scrap and waste are indisputably excisable goods under Section 2(d) of the Act falling under the Chapter heading 72.04 read with Note 8 (a) to the Section XV of the Tariff Act. He further submits that metal scrap and waste as excisable goods are generated during the repair and replacement of the old machinery or parts of the cement manufacturing plant, which is incidental and ancillary to the manufactured product, that is, cement. In other words the process of generation of scrap and waste amount to the manufacture in terms of Section 2(f) of the Act. In support of his contention, learned ASG has relied on the decision of this Court in CST v. Bharat Petroleum Corpn. Ltd., (1992) 2 SCC 579. He further submits that once the conditions or requirements of excisable goods and manufacture as envisaged by Section 2(d) and Section 2(f), respectively, of the Act are satisfied, then only, such metal scrap and waste would attract the levy of excise duty under the charging Section 3 of the Act. Shri. B. Bhattacharyya has cited several decisions of this Court in support of his submission.

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 are 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, this Court has held:

> "16. Thus, the amended definition enlarges the scope of manufacture by roping in processes 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.
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> 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.
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> 24. In this case, neither in the section note nor in the chapter note nor in the tariff item do we find any indication that the process indicated is to amount to manufacture. To start with, the product was edible vegetable oil. Even after refining, it remains edible vegetable oil. As actual manufacture has not taken place, the deeming provision cannot be brought into play in the absence of it being specifically stated that the process amounts to manufacture."

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. v. Union of India, (1995) 5 SC 338, Moti Laminates (P) Ltd. v. CCE, (1995) 3 SCC 23, CCE v. Wimco Ltd., (2007) 8 SCC 412] 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, the 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, South Bihar Sugar Mills Ltd. v. Union of India, AIR 1968 SC 922 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."

9) In Ujagar Prints (II) v. Union of India, (1989) 3 SCC 488, this Court has laid down the test to ascertain whether particular process amounts to manufacture:

> "whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognised as a distinct and new article that has emerged as a result of the processes"

10) In Hindustan Polymers v. CCE, (1989) 4 SCC 323, this Court has observed:

> "11. Excise duty is a duty on the act of manufacture. Manufacture under the excise law, is the process or activity which brings into being articles which are known in the market as goods and to be goods these must be different, identifiable and distinct articles known to the market as such. It is then and then only that manufacture takes place attracting duty. In order to be goods, it was essential that as a result of the activity, goods must come into existence. For articles to be goods, these must be known in the market as such and these must be capable of being sold or are being sold in the market as such. In order, therefore, to be manufacture, there must be activity which brings transformation to the article in such a manner that different and distinct article comes into being which is known as such in the market."

11) In CCE v. Rajasthan State Chemical Works, (1991) 4 SCC 473, this Court has considered the meaning of process in relation to manufacture as thus:

> "12. Manufacture implies a change but every change is not manufacture, yet every change of an article is the result of treatment, labour and manipulation. Naturally, manufacture is the end result of one or more processes through which the original commodities are made to pass. The nature and extent of processing may vary from one class to another. There may be several stages of processing, a different kind of processing at each stage. With each process suffered the original commodity experiences a change. Whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity. But it is only when the change or a series of changes takes the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place.
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> 13. Manufacture thus involves a series of processes. Process in manufacture or in relation to manufacture implies not only the production but the various stages

through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected (sic that the) manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process manufacture or processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture.

14. The natural meaning of the word `process' is a mode of treatment of certain materials in order to produce a good result, a species of activity performed on the subject-matter in order to transform or reduce it to a certain stage. According to Oxford Dictionary one of the meanings of the word `process' is a `continuous and regular action or succession of actions taking place or carried on in a definite manner and leading to the accomplishment of some result'. The activity contemplated by the definition is perfectly general requiring only the continuous or quick succession. It is not one of the requisites that the activity should involve some operation on some material in order to (sic effect) its conversion to some particular stage. There is nothing in the natural meaning of the word `process' to exclude its application to handling. There may be a process which consists only in handling and there may be a process which involves no handling or not merely handling but use or also use. It may be a process involving the handling of the material and it need not be a process involving the use of material. The activity may be subordinate but one in relation to the further process of manufacture."

12) In Union of India v. Ahmedabad Electricity Co. Ltd., (2003) 11 SCC 129, the issue before this Court was that whether the process in which cinder is produced by burning of coal as a fuel for producing steam to run machines used in the factory to manufacture end product amounts to manufacture. This Court has held:

"19. What is the meaning of "manufacture" in the context of excise law? We have already quoted the definition of the word "manufacture" as contained in Section 2(f) of the Act. According to this definition, manufacture includes any process incidental or ancillary to the completion of a manufactured product. The word "manufacture"

used as a verb is generally understood to mean as bringing into existence a new substance. It does not mean merely to produce some change in a substance. To quote from a passage in the Permanent Edition of Words and Phrases, Vol.

XXVI "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".

> "Manufacture" may involve various processes. The aim of any manufacturing activity is to achieve an end product. Depending on the nature of manufacturing activity involved, processes may be several or one. The natural meaning of the word "process" is a mode of treatment of some material in order to produce a good result. Every process which is incidental or ancillary to the completion of manufactured product is included within the meaning of manufacture. The word "process" has not been defined in the Act. In its ordinary meaning "process" is a mode of treatment of certain material in order to give a desired shape to the material. It is an activity performed on a given material in order to transform it into something."

This Court further observed thus:

> "27. In the case in hand also, coal which leads to production of cinder is not used as a raw material for the end product. It is being used only for ancillary purpose, that is, as a fuel. Therefore, irrespective of the fact whether any manufacture is involved in the production of cinder it should be held to be out of the tax net for the reason that it is not a raw material for the end product.
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> 28. In producing "cinder", there is no manufacturing process involved. Coal is simply burnt as fuel to produce steam. Coal is not tampered with, manipulated or transformed into the end product. For purposes of manufacture the raw material should ultimately get a new identity by virtue of the manufacturing process either on its own or in conjunction or combination with other raw materials. Since coal is not a raw material for the end product in all the cases before us, the question of getting a new identity as an end product due to manufacturing process does not arise."

13) In Commissioner of Central Excise, Chennai II Commissionerate v. Tarpaulin International, (2010) 9 SCC 103, whilst addressing the issue whether the process of preparing tarpaulin made-ups by cutting and stitching the tarpaulin fabric and fixing the eyelets would amount to manufacture, this Court has held:

> "25. Is there any manufacture when tarpaulin sheets are stitched and eyelets are made? In our view, it does not change the basic characteristic of the raw material and end product. The process does not bring into existence a new and distinct product with total transformation in the original commodity. The original material used i.e. the tarpaulin is still called tarpaulin made-ups even after undergoing the said process. Hence, it cannot be said that the process is a manufacturing process. Therefore, there can be no levy of Central excise duty on the tarpaulin made-ups. The process of stitching and fixing eyelets would not amount to manufacturing process, since tarpaulin after stitching and eyeleting continues to be only cotton fabric. The purpose of fixing eyelets is not to change the fabric. Therefore, even if there is value addition the same is minimum. To attract duty there should be a manufacture to result in different goods and the goods sought to be subject to duty should be known in the market as such."

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.

15) Learned ASG has placed reliance on the decision of this Court in CST v. Bharat Petroleum Corpn. Ltd., (Supra). In that case, the assessee purchased sulphuric acid and cotton for the manufacturing of kerosene and yarn/cloth. In the manufacturing process, the acid sludge and cotton waste emerged as a distinct product having commercial identity.

The issue before this Court was that whether the assessee can be said to manufacture acid sludge and cotton waste.

This Court observed that where a subsidiary product is turned out regularly and continuously in the course of a manufacturing business and is also sold regularly from time to time, an intention can be attributed to the manufacturer to manufacture and sell not merely the main item manufactured but also the subsidiary products. We are afraid, the decision does not help the Revenue because the metal scrap and waste arising out of the repair and maintenance work of the machinery used in manufacturing of cement, by no stretch of imagination, can be treated as a subsidiary product to the cement which is the main product. The metal scrap and waste arise only when the assessee undertakes repairing and maintenance work of the capital goods and, therefore, do not arise regularly and continuously in the course of a manufacturing business of cement.

16) In view of the above, we cannot sustain the Judgment and Order of the High Court dated 31.07.2008.

17) In the result, the appeal is allowed and the impugned Judgment and the Order of the High Court is set aside and the Order dated 09.08.2005 of the Tribunal is restored.

Costs are made easy.

.....J. [H.L. DATTU] .....J. [CHANDRAMAULI KR. PRASAD] New Delhi, October 13, 2011.