Customs, Excise and Gold Tribunal - Delhi
Collector Of Central Excise vs Aluminium Industries Ltd. on 2 June, 1987
Equivalent citations: 1987 (12) ECR 1204 Tri Delhi, 1987 (31) ELT 748 Tri Del
ORDER H.R. Syiem, Member (T)

1. The learned counsel for the department Mr. Rajhans began his arguments by quoting a decision of the Supreme Court in 1985 (20) ELT 222 (S.C.); 1985 ECR 2571 (Khandelwal Metal & Engineering Works and Anr. v. Union of India and Ors.) in which he said the Supreme Court approved the assessment of scraps under their respective heads. He than read the order of the Assistant Collector and pointed to various paragraphs to support his argument that the scrap should be charged to duty under Item 68.

2. The learned counsel for M/s. Aluminium Industries however submitted that there was no manufacturer and that the goods remained aluminium. The scrap came from duty paid aluminium and therefore no further duty is leviable on them. There have been various dicisions of courts that scrap was not dutiable. The Supreme Court in its decision quoted by the JDR was only considering the question of countervailing duty; this decision was not relevant to this dispute. He then read the Tariff Item 27, and quoted 1980 ELT 789. In 1980 ELT 146 Indian Aluminium Co. Ltd. and Anr. v. A.K. Bandyopadiyay and Ors., the Bombay High Court ruled that dross and skimmings were not goods. He also cited a number of decisions, but they have no relevance; it would take too much time to discuss them.

3. In his order-in-original No. V(68)(17)2/76 dated 28.10.1980 the Assistant Collector of Central Excise, Smabalpur records the following paragraph in his finding :-

The wires and cables was intended to be manufactured but at times in the process of such manufcturing some portion comes out defective and damaged which is unfit to be used as goods as perfect material or. unfit for being reprocured or remade to bring into perfect shape or size. Scraps of wires and cables are nothing but an entangled mass of different size: and shapes and almost a refuse. Above all, it is damaged and defective for rendering. Its further utility as useless as E.W.C. Therefore scraps of E.W.C. cannot be used as E.W.C. It therefore goes to mean that it has got a separate characteristic and separate nomenclature and separate utility. It is to be regarded as finished product because it is sold as such it is marketed as such and it has got a saleable value. It is evident that this scrap comes out of Aluminium wires but it is no more aluminium or does not come as wires and cable because it cannot be used as such as aluminium or for conductivity of Electricity. It is used usually for melting and recording aluminium. Out of it and sometimes for cloth hangers. It is to be treated as manufactured product because it has undergone the various manufacturing process and not subjected to further manufacturing of finishing operation.

If the scraps of wires are nothing but entangled mass, it is difficult to see how they are to be regarded as finished product, simply because they are sold as such. Selling a product does not make it a finished product for the purpose of assessment to central excise duty. And since he did not assess the goods as wires, the Assistant Collector held that they became finished products; but he does not say what finished product they became; he only said that they were to be regarded as

finished product. But if we are to regard them as finished products, we must first know what products they are.

4. It is not correct to argue, as the department does, that scrap is a goods assessable under Item 68. Scrap is a rejected product when the prime products are finished. These scrap arose after the manufacture of electric wires and cables was finished. Some wires and cables were rejected, or there may be end cuttings, trimmings etc. which collectively were gathered into scrap.

5. Scrap is not a goods that the factory set out to produce. We can even say that the scraps arose in spite of the factory's efforts to prevent their appearance because they represent a loss to the factory as rejects incapable of fetching the price of the prime products. When they do sell the scrap, it is at a fraction of the price of the prime goods. This led the Assistant Collector into seeing in the scraps a finished product with a new character and new name and new use. Scraps have no character nor do they have a name unless the word "scrap" is a name ; but I hold differently. Scrap is a "name" that is not much used in central excise assessment; it applies to copper aluminium, iron, plastic, paper; it is no name to assess a product by; waste, scraps and rejects are not names of goods but names of non-goods, materials that could have been but did not become prime goods. The use of the scrap, says the Assistant Collector, is to be melted, and this is the new use. He perhaps does not know that the prime quality wires can be melted just as quickly, as can the raw material from which they both come.

6. The arguments in favour of assessing the scrap for duty under Item 68 are merely dialectical activities. They have no convincing grounds in law or in technology or in usage. It is not the intention of the law to ensnare every product or non-product or refuse or reject under the catch-all Item 68; I do not think this item was designed for this work. Its very nominative definition suggests that it was designed to cover only goods i.e. products, that a man or a manufacturer employs capital, labour in producing; goods which he plans to put on the market by bestowing on them expenditure of energy and resources and for which he sees a regular customer demand. He devotes his time and his skill to produce prime goods, not scraps and waste. I have heard of no man who plans and executes a programme of production of waste, refuse, scraps - things he would rather not have. But since they are inevitable in an industry, or at least in most industries, he does the best he can to minimise the loss caused by their appearance; one way is to sell them at whatever price he can get.

7. But it is a great fallacy to say that these are finished goods with a new name, character, use etc. The blind incantation of these words has too often led to this kind of trouble; but a. rational view can lead to but one result and conclusion, which is, that goods must be just those, that is to say, they must be goods with a market which men consciously view and plan for and for which they produce a commercial product in commercial quantities; scraps are not in that category.

8. The learned SDR Mr. Rajhans relied very strongly on the Khandel-wal decision of the Supreme Court and said this judgment lays down the law that scraps can be said to be produced or manufactured. The court said that waste and scrap are by-products of the manufacturing process; and that the production of waste and scrap is a necessary incident of the manufacturing process. Therefore, said the learned SDR, these scraps must be charged to duty, as the department has done.

9. The hon'ble court did say all this, but the SDR's interpretation is not a correct reading of its meaning. The court said in paragraphs 37 and 38.

Paragraph 37.

The next question which is raised by some of the appellants is as to whether the imposition of Excise duty on 'waste and scrap', which is referred to in clause (1b) of Entry 26A of the First Schedule to the Central Excises and Salt Act, 19 W is either ultra vires Section 3 of that Act or beyond the legislative competence of the Parliament. Section 3 of the Act of 19W provides that there shall be levied and collected duties of excise on all excisable goods, other than salt, which are produced or manufactured in India. The question as to whether 'waste and scrap1 can be regarded as capable of being produced or manufactured the appellants' argument being that it cannot be so regarded, has already been answered by us in the affirmative. The production of waste and scrap is a necessary incident of the manufacturing process. It mey be true to say that no prudent businessman will intentionally manufacture waste and scrap. But it is equally true to say that waste and scrap ore the by-products of the manufacturing process. Sub-standard goods which are produced during the process of manufacture may have to be disposed of as 'rejects' or as scrap. But they are still the products of the manufactruing process. 'Intention' is not the gist of the manufacturing process. We have already dealt with this aspect of the matter and do not consider it necessary to elaborate upon it any further.

Paragraph 38.

The argument of legislative competence of the Parliament is a facet of the same contention. Section 3 of the Act of 1944 brings to duty excisable goods produced or manufactured in India. Section 2(d) of the act defines 'excisable goods' to mean goods which are specified in the First Schedule as being subject to the duty of excise. Therefore, the goods mentioned in the First Schedule will attract excise duty under Section 3 only if they are manufactured in India and not otherwise. Entry 26A(1b) of the First Schedule of the Act of 1974 cannot be held to be beyond the legislative competence of the Parliament because, the pre-condition of the excisability of the articles mentioned therein, namely, waste and scrap, is in the manufacturability of those articles. Since the production of waste and scrap is an integral part and an inevitable incident of the manufacturing process, Parliament has the legislative competence to make "waste and scrap' excisable under Entry 84 of List 1 of the Seventh Schedule to the Constitution, which relates to "Duties of excise on Tobacco and other goods manufactured or produced in India", except certain intoxicants and narcotics.

10. It is necessary to note carefully that the words were written in respect to a question. That question was whether the imposition of excise duty on "waste and scrap" which is referred to in clause (1b) of Entry 26A of the First Schedule of the Central Excises and Salt Act, 1944 is either ultra viers Section 3 of that Act or beyond the legislative competence of Parliament. The question was not whether waste and scrap were goods, as in our present case. The Supreme Court said that the production of waste and scrap was a necessary incident of the manufacturing process; but it also added these very significant words : "it may be true to say that no prudent businessman will intentionally manufacture waste and scrap". It said that they are by-products of manufacturing.

11. Now, this is not to be understood to mean that the court accords to waste and scrap the status of goods because it took care to record that no prudent businessman will intentionally manufacture waste and scrap : that is also what I say. This case before us does not have to deal with the question of Item 26A, whereas the Supreme Court made a pronouncement on the vires of the item "waste and scrap". It noted that Section 3 of the Central Excises and Salt Act, 1944 required that duty should be collected on all excisable goods which are produced or manufactured in India; when waste and scrap are excisable goods, and if they are produced, they are liable to excise duty. An item is awaiting them and if they are produced as products of the manufacturing process, they become excisable.

12. In para 38, the court finally disposed of the question by ruling that Parliament had the legislative competence to make "waste and scrap" excisable under Entry 84 of List I of the Seventh Schedule to the Constitution. The scrap, ruled the court, would be excisable goods under Item 26A(lb) of the central excise tariff, if it is produced in India. That is to say, because the law lists waste and scrap as excisable under the tariff, they became excisable goods to be taxed, if produced in India.

13. Item 68, under which the department wanted to levy M/s. Aluminium Industries scrap, has not received such a confirmation from the court; nor is it an entry of the central excise tariff for imposing duty on "waste and scrap" as was Item 26A(1b). Because Item 26A(lb) was found lawful entry by the Supreme Court for taxing waste and scrap is not a reason for finding Item 68 similarly lawful. The court gave it, approval to the taxation of waste and scrap in the Khandelwal judgment, only because it found an explicit entry waiting for them. So, even if no prudent man will intentionally manufacture waste and scrap, if such waste and scrap are produced, they must be taxed as the legislature has specifically levied a tax on them; and that levy is not unconstitutional.

14. There is nothing of this specificity about Item 68 for scrap, nor can we say that the Supreme Court's decisions allow a levy on scrap under Item 68. It does not; and this was the levy in this case which the factory rightly contests: not a levy on waste and scrap. The Khandelwal judgment does not support this levy.

15. In 1987 (29) ELT 502 (Del.) (Civil Writ Petition No. 214/1982 decided on 8.12.1986) re : Modi Rubber Limited, Modi Nagar v. P and Anr. v. Union of India and Ors., the High Court at New Delhi dealt with just this problem. The waste and scrap of rubber tyre products were assessed by the department under Item 68. The court noticed that Item 15A had specific heads for waste and scrap, and Item 18 for non-cellulosic waste; but Item 16 for Tyres had none. The court observed that when the legislature wanted to cover waste or scrap arising in manufacture, it has been specifically provided in the tariff items. After a thorough analysis, the court ruled in para 16 that waste and scrap obtained in the course of manufacture are not goods, and that there was no event of manufacture of waste or scrap.

16. This case before us arose from the assessment of the scrap to excise duty under Item 68. The counsel for the respondent said the goods are not assessable under Item 68. I hold this assessment is wrong and that the aluminium scraps are not assessable under Item 68. I set the order or assessment under Item 68 aside.

M. Santhanam, Member (J)

17. Since the orders were reserved in the above cases, the Hon'ble President has passed orders in [Appeal Nos. E/522/83-B-I of M/s. Indian Aluminium Co. Ltd. and E/Appeal No. 550/83-B-I of M/s. Mysore Rolling Mills (P) Ltd.] on 16.6.1987. Those two appeals arose out of a difference between the two Members constituting the Bench whether the dross & skimmings were goods. One of the Members strongly relied on the decision of the Hon'ble Supreme Court in the case of Khandelwal & Metal Engineering Works (as in this case) 1985 (20) E.L.T. 222 (S.C.). The Hon'ble President has considered the scope of the Hon'ble Supreme Court decision and plalcing reliance on the latter case of the Delhi High Court in M/s. Modi Rubber Ltd. and Ors. 1987 (29) E.L.T. 502 (Delhi) has held that the Aluminium Dross & Skimmings are not goods. The reasonings of this decision also go to show that the products in the present appeal will not attract the duty under Item 68. With these observations, I agree with my Ld. Brother that the appeal should fail.