Marketable Products: -

"The flue gas generated during the course of manufacturing metallurgical coke is not a manufactured product and is also not marketable." - CESTAT Kolkata Bench of Customs, Excise and Service Tax Appellate Tribunal.

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

EASTERN ZONAL BENCH: KOLKATA

REGIONAL BENCH – COURT NO. 1

Excise Appeal No.75422 of 2017

(Arising out of Order-in-Original No.49/COMMISSIONER/CE/HAL/ADJN/2016 dated 14.12.2016 passed by Commissioner of Central Excise & Service Tax, Haldia Commissionerate, Kolkata.)

M/s. Tata Steel Limited

(Hooghly Met Coke Division, Pathikhali, P.O. Haldia Oil Refinery, Haldia, Purba Medinipur, Pin-721606, West Bengal.)

...Appellant

VERSUS

Commissioner of Central Excise, Haldia

(15/1, Strand Road, Custom House, M.S. Building, Kolkata-700001.)

...Respondent

APPEARANCE

Shri B.L.Narasimhan, Shri Deepro Sen, both Advocates & Ms.Payal Bharwani, Chartered Accountant for the Appellant (s)

Shri K.Chowdhury, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)

HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 76144/2023

DATE OF HEARING: 12 JULY 2023

DATE OF DECISION: 12 JULY 2023

Per: ASHOK JINDAL:

This appeal is against the impugned order demanding central excise duty from the appellant along with interest and imposition of equivalent amount of penalty.

2. During the period of dispute the appellant entered into agreement with Tata Power Company Ltd. (TPCL) for supply of flue gas, who would use the heat contained in the flue gas in the generation of electricity. The activity undertaken by the appellant is as under: -

i) The appellant is engaged in manufacturing metallurgical coke. The coke so manufactured is cleared to Tata Steel Ltd., Jamshedpur, who use it in the blast furnace for manufacturing steel.

ii) Such coke is manufactured through waste recovery method by carbonizing of coking coal at 1100 degree Celsius to 1250 degree Celsius in heat recovery type coke oven battery by following steps:

a) The seized coal is fed into Heat Recovery type coke oven batteries consisting of wide and low chambers with arched roof suing shaped refractories.

b) Carbonization takes place at 1100 degree Celsius – 1250 degree Celsius wherein heat is supplied by combustion of volatile matter evolved from coal by admitting air into the chamber.

c) Primary air is maintained at below stoichiometric level to control burning of coal.

d) During such carbonization process lean gas is generated inevitably in the oven chamber due to partial combustion of volatile matters.

e) Since the lean gas cannot be emitted into the atmosphere as per environmental norms, the same is directed below the oven side walls for further combustion by admitting secondary air.

f) Resultantly, hot flue gas is generated from the oven at a temperature ranging from 1100 degree Celsius – 1150 degree Celsius which is free from volatile and toxic matter.

3. Revenue is of the view that the flue gas generated and cleared to TPCL by classifying the flue gas as 'Nitrogen'. As appellant is engaged in the manufacture of flue gas, a show cause notice was issued to the appellant by invoking extended period of limitation alleging that as per the agreement with TPCL flue gas is being sold, hence, it can be said to marketable since it is capable of being bought and sold. The Appellant contested the matter, but the adjudicating authority confirms the demand in holding that as per Rule 3(b) of the General Rules of Interpretation, flue gas should be classified as 'Nitrogen' under CTH 28043000 which gives flue gas its essential character and flue gas is not a waste but is in fact a byproduct produced during the manufacture of another product and was sold regularly and

known in the market as a distinct entity. Aggrieved from the said order, the appellant is before us.

4. The ld. Counsel appearing on behalf of the appellant submits that the flue gas is not being manufactured by the appellant. It is his submission that flue gas is automatically emitted during the process of manufacturing coke from coal by the Waste Recovery Method being followed by the appellant. It is not manufactured by the appellant but is a waste gas which arises inevitably without beyond the appellant's control. Therefore, flue gas fails to satisfy the test to be fulfilled to get an excisable product i.e., 'manufacture'. It is his submission that it is mere waste gas. Even if, the same is put to some use, it does not automatically become a manufactured product. To support this contention, he relies on the decision of Hindalco Industries Ltd. v. UOI [2015 (315) ELT 10 (Bom)], which has been affirmed by the Hon'ble Apex Court as reported in 2019 (367) ELT A246. He also relied on the decision of Hon'ble Supreme Court in the case of CCE v. Indian Aluminium Co. Ltd. [2006 (203) ELT 3 (SC)] and UOI v. Indian Aluminium co. Ltd. [1995 (77) ELT 268 (SC)].

5. He further submits that merely because goods finding mention in the First Schedule, does not automatically mean that the test of manufacture is fulfilled. To manufacture a product raw material should have gone through the process of transformation into a new product by skilful manipulation which is absent in the present case. To support his contention, he relied upon the decision of the Hon'ble Apex Court n the case of UOI v. Ahmedabad Electricity Co. Ltd. [2003 (158) ELT 3 (SC)]. He also

relied on the CBEC Circular No.35/88 dated 22.12.1988 which clarifies that mixture of crude gases consisting of Nitrogen, Oxygen, Carbon Dioxide and some other inert gases which is referred to as 'lean gas' yielded during manufacture of carbon black are not excisable. Therefore, it is his submission that lean gas is not excisable on account of non-fulfilment of the test of the manufacture. To support his contention, he relied on the decision of this Tribunal in the case of Himadri Speciality Chemical Ltd. v. CGST & Excise, Howrah [2020- TIOL-214-CESTAT-KOL], which has been affirmed by the Hon'ble High Court [2022-TIOL-1034-HC-KOL-CX], Vanati Organics Ltd. v. CCE, Raigad [2007 (209) ELT 145 (Tri. -Mumbai)] and Philips Carbon Black Ltd. v. CCE, Bolpur [1999 (111) ELT 835 (CEGAT-Kolkata)].

6. He further submits that flue gas is not marketable. It is his submission that every item bought and sold does not become marketable. Test of marketability implies regular market for a product. He relied on the decision of the Hon'ble Supreme Court in the case of Hindustan Zinc Ltd. v. CCE, Jaipur [2005 (181) ELT 170 (SC)].

7. It is his submission that the revenue has merely relied upon the Flue Gas Agreement to state that flue gas is marketable without conducting any market survey and placing of record a proof to such extent. He also relied on the decision of Hon'ble Supreme Court in the case of CCE, Patna v. Tata Iron & Steel Co. Ltd. [2004 (165) ELT 386 (SC)]. He further submitted that in the impugned order the adjudicating authority has relied upon various online dictionaries and the information available on

Wikipedia, without having any regard to the facts of the instant case of the appellant. In this context he relies on the decision of the Hon'ble Supreme Court in the case of Ponds India Ltd. v. Commissioner of Trade Tax, Lucknow [2008 (227) ELT 497 (SC)] to say that Wikipedia is not an authentic source of information and it cannot be used for the purpose of interpreting a taxing statute or classification of a product.

8. He further submits that flue gas is not marketable as Nitrogen gas. As per the chemical test report of flue gas, it mainly consists of Nitrogen (80.08% v/v), Oxygen (10.09% v/v), Carbon Dioxide (9.0% v/v) with small quantities of Sulphur Dioxide, Nitrogen Dioxide and Carbon Monoxide.

9. He submits that in the impugned order, it is held that flue gas is a mixture and is classifiable as Nitrogen considering the volumetric supremacy after considering the aforesaid report. However, while proposing such classification, no evidence has been placed that flue gas is capable of being put to use or marketed as Nitrogen. He further submits that the respondent has failed to discharge the burden of proof cast upon them to show that flue gas is marketable as Nitrogen. To support his contention, he relied upon the decision of the Hon'ble Supreme Court in the case of UOI v. Delhi Cloth & General Mills Co. Ltd. [1997 (92) ELT 315 (SC)]. He also submits that waste heat recovered does not have any calorific value, hence, principle of calorimetry has been wrongly applied in the present case.

10. Finally, he submits that without prejudice to the above, if at all the flue gas has to be classified, it would merit classification as coal gas.

11. He also submits that extended period of limitation is not invocable therefore substantial portion of the demand is time barred and he also prayed that in the facts and circumstances of the case penalty is not imposable.

12. On the other hand, the ld.AR supported the impugned order and submits that the flue gas which is generated in the process of manufacturing coke is a manufactured product and is marketable as evident from the facts and circumstances of the case and having more 80% contents of Nitrogen, therefore, the adjudicating authority has rightly demanded duty from the appellant.

13. Heard the parties. Considered the submissions.

14. On careful consideration of the submissions made by both the sides, we find that in this case it is fact that the flue gas is generated during the course of manufacturing of coke. It is not manufactured by the appellant, but it is a waste gas which arises inevitably without beyond the control of the appellant. In that circumstances it is to be seen that the flue gas which was not intended to be produced by the appellant can fulfil the test of manufacture or not.

15. The issue has been examined by the Hon'ble Bombay High Court in the case of Hindalco Industries Ltd. (supra), wherein the Hon'ble High Court observed as under: -

*"**22**. ……. Waste and scrap emerge as a by-product in the course of manufacture of other products. The whole purpose of making these observations is to justify the conclusion that because there is a reference to these items in the Tariff Entry or the Tariff Schedule that would change the colour of the controversy. That would enable the Tribunal to then hold that the earlier Judgments and in the case of this very Assessee are no longer good law. However, we do not see how the decision in the case of Grasim Industries Ltd. (supra) and particularly the above reproduced paragraphs could have been brushed aside by the Tribunal. The Hon'ble Supreme Court listed the twin tests and which have to be satisfied before the goods can be said to be excisable to tax or Central Excise duty. It is in these circumstances that the attempt of the Tribunal and which is supported before us by Mr. Sethna cannot be upheld. Each of these observations and from para 6.5 onwards run counter to the Judgments of the Hon'ble Supreme Court."*

The said decision has been affirmed by the Hon'ble Apex Court wherein it has been held that "dross and skimming of aluminium, zinc or other non-ferrous metal emerging during manufacture of aluminium/non-ferrous sheets/foils and other products and sold by assessee were not manufactured goods.

16. Further in the case of UOI v. Indian Aluminium Co. (supra), the Hon'ble Apex Court has an occasion to deal the issue, wherein the Hon'ble Apex Court held as under: -

> *"**22.** The entire argument proceeds on the basis that aluminium dross and skimming are excisable goods. Otherwise, the question of their inclusion in Tariff Item 68 does not arise. The appellants have emphasized the fact that aluminium dross and skimming 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 skimming are marketable goods. For reasons which we have set out earlier, it is not possible to consider aluminium dross and skimming as "goods" or as a commercial and marketable commodity. Dross and skimming are merely refused 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."*

17. Further, in the case of Ahmedabad Electricity Co. Ltd. (supra), the Hon'ble Apex Court has occasion to deal such issue and wherein the facts and circumstances are as under: -

> *"The respondents in all the appeals use coal as fuel for producing steam to run the machines used in their factories to manufacture the end product. Coal is burnt in the boilers or furnaces for producing steam. Normally coal when it is burnt in boilers is reduced to ash. Some part of coal does not get fully burnt because of its low*

combustible quality. This unburnt or half burnt portion of coal is left out in the boilers. It is called 'cinder'. Though the respondents are engaged in manufacturing different end products, one thing is common between them and that is that they all use coal as a fuel."

In these set of facts, the Hon'ble Apex Court observed as under: -

*"**23** 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 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.*

***24** 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.*

……..

26 *Can burning of coal be. called manufacturing? The locomotive steam engines used to run on coal. Coal was being constantly burnt in the boiler of the engine. The constant burning of coal produced cinder. Could it be said that the engine driver was manufacturing cinder? Is any manufacturing activity involved? Burning of coal for purposes of producing steam cannot be said to be a manufacturing activity. Therefore, neither ash nor cinder can be said to be products of a manufacturing process. From burning coal when you get either cinder or ash, it cannot be said that a new product had emerged. Cinder remains coal, in fact, the Department has itself described it as unburnt part of coal in the grounds of appeal in C.A. Nos. 2168-2169 of 2001 in the Ahmedabad Electricity Supply Company case 'Cinder' is not a new product. After correctly describing cinder as unburnt part of coal, the Revenue cannot equate it to ash simply to somehow bring it within Entry 26.21 of the Tariff Act. In the First Schedule to the tariff, cinder does not find any place anywhere. It appears that it is because of this that the Revenue had to fall back upon Entry 26.21 in the First Schedule in order to cover cinder within the excise net. The new Tariff that is Tariff Act, 1985 does not have a residuary entry like Entry 68 in the old Tariff. Instead, the new Tariff has interpretative notes. Whenever some by-product of a product is sought to be included for taxability it has been so said in the interpretative notes. However, regarding coal there is no interpretative note nor there is anything*

about cinder. When cinder is derived from coal it could have at best been treated as coal for purposes of entries in the First Schedule to the Tariff Act. But that would not suit the department because coal is exempt from excise duty. The department now describes cinder as "coal ash". But coal ash also falls the test of being manufactured in India. It cannot be subjected to levy of excise duty."

In view of the above judicial pronouncements, we hold that the flue gas which is generated in the manufacture of coke is not manufactured product, therefore, duty is not payable.

18. We further take note of the fact that merely this flue gas has been sold by the appellant in terms of the agreement with TPCL, it does not make it marketable as held by the Hon'ble Apex Court in the case of Hindustan Zinc Ltd. (supra), wherein it has been held that burden of proof that the product is marketable is on the revenue to prove that the flue gas in question is a marketable product. There is no market enquiry was conducted by the revenue in this case to hold that the gas in question is marketable and freely be sold, therefore, we hold that revenue has failed to prove the test of marketability also.

19. We further take note of the fact that merely because it is having contents more than 80% v/v, it cannot be said that the said gas is Nitrogen gas by applying rule 3(b) of the General Rules of Interpretation without any evidence. In the absence of any evidence produced on record that the flue gas can be sold in the market as Nitrogen and the same cannot be classified as Nitrogen.

20. In view of the above observations, we hold that the flue gas generated during the course of manufacture metallurgical coke, is not a manufactured product and is also not marketable. The same cannot be classified as Nitrogen.

In view of this, we set aside the impugned order and allow the appeal with consequential relief, if any.

(Operative part of the order was pronounced in the open Court.)

Sd/

(ASHOK JINDAL)

MEMBER (JUDICIAL)

Sd/

(K. ANPAZHAKAN)

MEMBER (TECHNICAL)