2000 (116) E.L.T. 204 (Tribunal)

IN THE CEGAT, COURT NO. III, NEW DELHI [LARGER BENCH]

Justice K. Sreedharan, President, S/Shri C.N.B. Nair, Member (T) and P.S. Bajaj, Member (J)

MARKFED VANASPATI & ALLIED INDUS.

Versus

COMMR. OF C. EX., CHANDIGARH

Misc. Order Nos. 102-105/99-C, dated 12-11-1999 in Appeal Nos. E/32/90-C, E/299/90-C, E/3134/91-C and E/309/92-C

Spent earth - Excisability - Manufacture - Spent earth being another name of activated clay, when that clay loses its absorbent character during the course of refining and bleaching edible oils, not a manufactured product arising out of any manufacturing process and therefore not excisable - Section 3 of Central Excise Act, 1944, Section 2(f) ibid.

- Spent earth cannot be said to be a manufactured product. It is only another name of activated clay, when that clay loses its absorbent character, strength during the course of refining and bleaching the edible oils. It is in fact the same earth which is once initially known as activated clay/earth and which after losing its absorbent character in the process of refining the edible oil by absorbing the impurities and traces of oil therefrom becomes known as 'spent earth'. Therefore, it cannot be concluded that it is a manufactured product. In this case, we have no doubt that no manufacturing process takes place. Likewise, activated earth is used only to bleach and purify oil which is passed through it. The earth loses its efficacy to purify and becomes spent earth. This is not the outcome of any manufacturing process. [paras 13, 14, 19]

Spent earth - Dutiability - Marketability - Manufacture - Not only test of marketability but test also of manufacture to be satisfied before goods can be subjected to levy of excise duty - Spent earth not dutiable merely because it is marketable as allegedly sold to soap processors because test of manufacture not satisfied - Section 3 of Central Excise Act, 1944.

- In the instant case even if it is assumed that the spent earth is covered by sub-heading 15.07 of the Tariff as residue resulting from the treatment of fatty substances, still it cannot be subjected to levy of duty as it satisfies only one test that is of marketability as it is allegedly sold to the soap processors, and not the other test that is of manufacture, which is the main test under Section 3 of the Central Excise Act, as discussed above. [para 26]

Spent earth - Tariff schedule - Manufacture - Spent earth not excisable and dutiable merely because it is specified in Heading 15.07 of the Schedule to the Central Excise Tariff Act, 1985 - Even if article finds mention in a specific sub-heading of heading of the schedule it has to satisfy the test of manufacture before it can be subjected to levy of excise duty.

- If it is not a manufactured good or article, no excise duty can be levied thereon, even if it finds mention in the Tariff Schedule. The duty is attracted not because an article is covered in any of the items or it falls in residuary category, but it must further have been produced or manufactured and is marketable. This very view has been reiterated by the Apex Court in Moti Laminates Pvt. Ltd., supra and Dharanghdra Chemical v. Union of India, 1997 (91) E.L.T. 253 (S.C.). [paras 24, 25]

Words and Phrases - By-product - By-product means something of value produced in making main product or a substance obtained in the course of a specific process, but not its primary object - Spent earth not a new or by-product - Section 3 of Central Excise Act, 1944.

[para 15]

Manufacture - No change in the definition of 'manufacture' having taken place with the change over from old to new tariff, decision rendered in 1985 (22) E.L.T. 232 in the context of old tariff on spent earth not excisable not obsolete but correct view even in the context of new tariff - Section 3 of Central Excise Act, 1944.

[para 27]

CASES CITED

Collector v. India Gelatine & Chemical Indus. Ltd. — 1996 (88) E.L.T. 425 (Tribunal) — **Differed from** [Paras 6, 20]
Collector v. Keti Chemicals — 1999 (113) E.L.T. 689 (Tribunal) — **Distinguished** [Paras 6, 17]
Collector v. Kiran Spinning Mills — 1988 (34) E.L.T. 5 (S.C.) — *Relied on* [Para 10]
Collector v. Kusum Products — 1996 (18) RLT 32 (Tribunal) — **Approved** [Para 3]
Collector v. Mehta Vegetables Products — 1996 (93) E.L.T. 229 (Tribunal) — **Approved** [Paras 3, 27]
Collector v. Oswal Vanaspati — 1994 (70) E.L.T. 236 (Tribunal) — **Differed from** [Paras 3, 6, 24]
Collector v. Tata Oil Mills Company Ltd. — 1996 (85) E.L.T. 391 (Tribunal) — **Differed from** [Paras 3, 6, 24]
Commissioner v. Bharat Petroleum Corporation — 1995 (77) E.L.T. 790 (S.C.)— **Distinguished** [Paras 6, 16, 20]
Dharanghdhara Chemical Works Ltd. v. U.O.I. — 1997 (91) E.L.T. 253 (S.C.) — *Relied on* [Paras 5, 25]
Hindustan Lever Ltd v. Collector — 1985 (22) E.L.T. 232 (Tribunal) — **Approved** [Paras 2, 27]
Hindustan Polymer v. Collector — 1989 (43) E.L.T. 165 (S.C.) — *Relied on* [Para 11]
Hyderabad Industries v. U.O.I. — 1999 (108) E.L.T. 321 (S.C.) —*Referred* [Paras 21, 22, 23]
Hyderabad Industries Ltd. v. U.O.I. — 1995 (78) E.L.T. 641 (S.C.) — *Relied on* [Paras 5, 25]
HMT Ltd. v. Collector — Tribunal's Final Order Nos. 793-794/85-C, dated 16-12-1986 — **Differed from** [Paras 6, 22]
Indian Tube Company Ltd. v. Collector — 1988 (37) E.L.T. 418 (Tribunal) — **Followed** [Para 18]
Kashmir Vanaspati Ltd. v. Collector — 1996 (13) RLT 670 (Tribunal) — **Approved** [Paras 3, 27]
Khandelwal Metal & Industry Ltd. v. U.O.I. — 1985 (20) E.L.T. 222 (S.C.) —**Distinguished** [Paras 6, 21, 22, 26]
Modi Vanaspati Mfg. Co. v. Collector — 1990 (47) E.L.T. 57 (Tribunal) — **Approved** [Paras 2, 6, 27]
Moti Laminates Pvt. Ltd. v. Collector — 1995 (76) E.L.T. 241 (S.C.) — *Relied on* [Paras 5, 7, 25]
Shriram Foods & Fertilizer Ltd. v. Collector — Final Order Nos. 126 & 127/96-C — **Approved** [Paras 3, 27]
Tata Iron & Steel Company Ltd. v. Collector — 1993 (68) E.L.T. 249 (Tribunal)— **Differed from** [Paras 6, 20]
U.O.I. v. Delhi Cloth & General Mills — 1977 (1) E.L.T. (J. 199) (S.C.) — *Relied on* [Paras 8, 13, 15]
U.O.I. v. Delhi Cloth & General Mills Company Ltd. — 1997 (92) E.L.T. 315 (S.C.) — *Relied on* [Para 5]
U.O.I. v. Indian Aluminium Company Ltd. — 1995 (77) E.L.T. 268 (S.C.) — *Relied on* [Paras 3, 22]

REPRESENTED BY : S/Shri K.M. Murlidharan, Advocate and R. Swa- minathan, Consultant, for the Appellant.
Shri K. Srivastava, SDR, for the Respondent.

[Order per : P.S. Bajaj, Member (J)]. - The issue referred to this Bench is as to whether "spent earth" is liable to excise duty or not.

2. The necessity of the reference by the "C" Bench of the Tribunal in Appeal No. E/299/90-C which had been filed against the Order-in-Original No. 124-CE/JPR/89, dated 19-10-1989 passed by the Collector of Central Excise (Appeals), by M/s. Rajasthan Vanaspati Products Ltd. (one of the appellants) raising demand of excise duty on spent earth, arose due to the conflicting decisions of the various Benches of the Tribunal in different cases regarding the exigibility of the spent earth. Under the erstwhile Tariff 1944, the Benches of the Tribunal expressed consistent view in *Hindustan Lever Ltd.* v. *CCE*, 1985 (22) E.L.T. 232 (Tribunal), *Modi Vanaspati Mfg. Co.* v. *CCE*, 1990 (47) E.L.T. 57 (Tribunal) that spent earth is not excisable being not a manufactured product.

3. But after the enforcement of the new Tariff 1985, the different Benches of the Tribunal had rendered contradictory decisions on this point. In *Kashmir Vanaspati Ltd.* v. *CCE*, 1996 (13) RLT 670 (Tribunal), *Shriram Foods & Fertiliser Ltd.* v. *CCE*, Final Order Nos. 126 and 127/96-C, *CCE* v. *Kusum Products Ltd.*, 1996 (18) RLT 32 (Tribunal), *CCE* v. *Mehta Vegetable Products*, 1996 (93) E.L.T. 229 (Tribunal), the Benches of the Tribunal had taken the view that spent earth is not excisable, by following the ratio of the law laid down by the Apex Court in *Indian Aluminium Co. Ltd.*, 1995 (77) E.L.T. 268 (S.C.). However, the contrary view that the spent earth is excisable, as the same stands covered by the specific sub-heading No. 1507 of the new Tariff, had been taken by the Benches of the Tribunal in *CCE* v. *Oswal Vanaspati*, 1994 (70) E.L.T. 236, *CCE* v. *Tata Oil Mills Co. Ltd.*, 1996 (85) E.L.T. 391.

4. Faced with all the above referred for and against decisions of the various Benches of the Tribunal, the "C" Bench of the Tribunal had made this reference for adjudicating upon the exigibility of the spent earth.

5. The learned Counsel for the assessees has contended that spent earth is not a manufactured product being simply waste emerging in the course of refining of the oils with the aid of activated fuller's earth and by placing it in a specific Tariff sub-heading in the new Tariff 1985, its basic character does not stand altered. Being not a manufactured product, it cannot be subjected to levy of duty. In support of his contention, he has placed reliance on *Moti Laminates Pvt. Ltd.* v. *CCE*, 1995 (76) E.L.T. 241 (S.C.), *Dharangadhra Chemical Works Ltd.* v. *Union of India*, 1997 (91) E.L.T. 253 (S.C.), *Union of India* v. *Delhi Cloth & General Mills Co. Ltd.*, 1997 (92) E.L.T. 315 (S.C.), *Hyderabad Industries Ltd.* v. *Union of India*, 1995 (78) E.L.T. 641 (S.C.).

6. On the other hand, while refuting this contention of the counsel, learned JDR has argued that spent earth is a by-product resulting in the course of manufacture of the oils and has also been placed in specific sub-heading No. 1507 of the Tariff, in consonance with the World Customs Organisation Opinion recorded in HSN Notes, being residues resulting from the treatment of fatty substances. Therefore, it is excisable and dutiable goods. He has derived support to his argument from *CCE* v. *Tata Oil Mills*, 1996 (85) E.L.T. 391, *CCE, Chandigarh* v. *Oswal Vanaspati*, 1994 (70) E.L.T. 236, *HMT Ltd.* v. *CCE, Hyderabad* (decided the Tribunal vide Final Order No. 793-794/85-C, dated 16-12-1986), *Khandelwal Metal & Industry Ltd.* v.

Union of India, 1985 (20) E.L.T. 222 (S.C.), *Commissioner of Sales Tax Bombay* v. *Bharat Petroleum Corporation*, 1995 (77) E.L.T. 790, *CCE, Ahmedabad* v. *Keti Chemicals*, 1999 (113) E.L.T. 689, *CCE, Vadodara* v. *India Gelatine & Chemical Industries Ltd.*, 1996 (88) E.L.T. 425 (Tribunal), *Tata Iron & Steel Company Ltd.* v. *CCE*, 1993 (68) E.L.T. 249, *CCE* v. *Modi Vanaspati Mfg. Company*.

7. Section 3 of the Central Excise Act levies duty on all excisable goods mentioned in the Schedule, provided they are produced and manufactured. Therefore, where the goods are specified in the schedule, they are excisable goods, but whether such goods can be subjected to duty would depend upon whether they are produced or manufactured by the person on whom duty is proposed to be levied. The test of manufacture has to be satisfied before any goods can be subjected to excise duty. Rather the expression "produced" or "manufactured" has been explained by the Apex Court in *Moti Laminates Ltd.* v. *CCE, Ahmedabad*, 1995 (76) E.L.T. 241 (S.C.) to mean that the goods so produced must also satisfy the test of marketability. Therefore, now two tests - one of manufacture and other of marketability, have to be satisfied before subjecting any goods to levy of excise duty.

8. The expression "manufacture" stands defined by Section 2(f) of the Central Excise Act as under :-

> "'manufacture' includes any process; -
>
> (i) incidental or ancillary to the completion of manufactured product; and
>
> (ii) which is specified in relation to any goods in the Section or Chapter notes of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture, and the word 'manufacture' shall be construed accordingly."

9. This expression has also been interpreted by the Apex Court in various judgments. In *Union of India & others* v. *Delhi Cloth & General Mills*, 1977 (1) E.L.T. (J 199) the Apex Court has interpreted this expression "manufacture" as under :-

> "The word 'manufacture is generally understood to mean as bringing into existence a new substance' and does not mean merely ' to produce some change in a substance' therefore, ' 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".

10. In *CCE* v. *Kiran Spinning Mills*, 1988 (34) E.L.T. 5 (S.C.) similar view has been expressed by the Apex Court regarding the expression 'manufacture'. It has been observed in that case, by the Court as under :-

> "It is true that etymological word 'manufacture' properly construed would doubtless cover the transformation, but the question is whether that transformation brings about fundamental change, a new substance brought into existence or a new different article having distinct name, character or use results from a particular process of particular activity."

11. In *Hindustan Polymer* v. *CCE*, 1989 (43) E.L.T. 165 the Apex Court has defined the expression 'manufacture' as under :-

> "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."

Keeping in mind the aforesaid definition of the 'manufacture', we have to see what the spent earth is, how it comes into existence and whether it can be said to be a manufactured product.

12. Spent earth is not a natural name of any type of earth or clay. Natural clay/earth, as we know, is most important absorbent used in bleaching fats and oils. This natural bleaching earth is also known as fuller's earth. However, in recent years this earth has been supplanted by acid-activated clays in order to conduct refining, bleaching and decolouring of the oils, effectively as certain types of colour are difficult to remove except by the activated clays. When this activated clay while refining, decolouring, bleaching the oils, is completely exhausted and becomes non-absorbent by taking its absorbent character capacity, it gets the name of spent earth. The spent earth is thus the second name of activated clay. It is residue/remains of the activated clay.

13. The activated clay is not used for manufacturing edible oils. It is only used for deodouring, bleaching and decolouring of oils. These processes of bleaching and decolouring etc. cannot be equated with that of 'manufacture' under the law. In *Union of India & Ors.* v. *Delhi Cloth & General Mills* (supra), the Apex Court while defining the expression 'manufacture' as used in Section 2(f) has ruled that "this expression cannot be equated to processing. Therefore, spent earth cannot be said to be a manufactured product. It is only another name of activated clay, when that clay loses its absorbent character, strength during the course of refining and bleaching the edible oils.

14. It is in fact the same earth which is once initially known as activated clay/earth and which after losing its absorbent character in the process of refining the edible oil by absorbing the impurities and traces of oil therefrom becomes known as 'spent earth'. Therefore, it cannot be concluded that it is a manufactured product.

15. The argument of the learned SDR that spent earth is a by-product resulting from the manufacture of the edible oils cannot be accepted, in the light of process and source of its emergence, discussed above. Even otherwise, by-product means something of value produced in making main product or a substance obtained in the course of a specific process, but not its primary object. For example, kerosene is by-product of petroleum refining. The spent earth, as observed above, is only the second name of the activated clay and is not a new or by-product emerging from the manufacture of oils, as the activated clay is used only for the purpose of bleaching and decolouring the oil and that process as per the observations of the Apex Court in *Union of India* v. *Delhi Cloth & General Mills* (supra) cannot be said to be a manufacturing process.

16. The observations made by the Apex Court in Commissioner of *Sales Tax* v. *Bharat Petroleum Corpn.* (supra) on

which the learned DR has placed reliance for contending that spent earth is a by-product, are not at all attracted to the facts of the present case. In that case, the assessees claimed set off against sales tax paid by them under the provisions of Bombay Sales Tax Act for having entered into a contract with Oil Company to process and refine crude oils and to manufacture kerosene for the company. The refined kerosene was eventually sold by the company and there was no sales tax payable on that sale till March 1961. It became payable only thereafter. For the purification process the assessee used Sulphuric Acid, the crude oil got refined and purified, but the impurities therein precipitated into the acid and yield acid sludge. The contract provided that the acid sludge would be sold and accordingly, it was sold and on the price of the same sales tax was paid. The Bharat Petroleum claimed as against the sales tax paid-by it, on the acid sludge, a set off of certain amount. While adjudicating upon this claim of the Bharat Petroleum, the Apex Court made the observations in para 17 of the judgment as under :-

> "the entire sulphuric acid had no doubt been used in the manufacture of kerosene though perhaps not a drop of acid clings to the kerosene manufactured. Equally the entire sulphuric acid has gone into the composition of sludge. Having regard to the nature of interactions here it is incontrovertible that the entire sulphuric acid purchased has gone into the manufacture of the sludge."

The set off claimed by Bharat Petroleum was allowed by the Tribunal and then by the High Court. The Apex Court also dismissed the appeals of the Revenue. The question regarding the exigibility of the acid sludge was neither directly or indirectly in issue before the Apex Court in that case. The Apex Court had nowhere observed that acid sludge being the by-product was liable to levy of excise duty. The set off claimed by the Bharat Petroleum, in that case, was also not in respect of the excise duty, but the sales tax on the product, acid sludge. Such is not the position in the case on hand. Here, as observed above, spent earth is not a manufactured product and it cannot even be termed as a by-product. The observation reproduced above regarding "manufacture" was made in the light of the definition of that word in the Sales Tax Act. That definition differs from the one given in the Excise Act.

17. Similarly, the opinion expressed by the Larger Bench of the Tribunal in *CCE* v. *Keti Chemicals*, 1999 (113) E.L.T. 689 on which also heavy reliance has been placed by the SDR to contend that spent earth is also a by-product, is of no avail to the Revenue. In that case, the assessees were manufacturer of acid slurry and detergent powder and one of the raw materials used by them was sulphuric acid classifiable under sub-heading 2807 of the Tariff Act. They opted for availing the Modvat credit. They were obtaining spent sulphuric acid in the process of manufacture of their product. The Modvat credit on spent sulphuric acid was disallowed to them by the Collector on the ground that it cannot be regarded as sulphuric acid, a raw material for the production of the final product as the same contained lower percentage of sulphuric acid, i.e. 40 to 60%, as against sulphuric acid between 77 to 100%. The issue referred to the Larger Bench was whether spent sulphuric acid was distinct from sulphuric classifiable under Heading 2807 or whether the spent sulphuric acid was required to be considered as unmanufactured product or a product distinct from sulphuric acid and classifiable under Heading 38.23 and whether Modvat credit could be claimed on the spent sulphuric acid. While answering all these questions the Larger Bench expressed opinion that spent sulphuric acid is a by-product in the form of waste/residue and must suffer duty. This opinion was expressed keeping in view the fact that even spent sulphuric acid did contain sulphuric acid though of a lower percentage as against the percentage of sulphuric acid and could not be considered to be simply a waste. But in the case on hand, the spent earth is that name of the activated clay/earth, when it loses its absorbent character, power in the course of refining the oils and, thereafter cannot be re-used for that very purpose.

18. In *Indian Tube Co. Ltd.* v. *CCE* - 1988 (37) E.L.T. 418, this Tribunal had to consider the issue whether waste pickle liquor was an excisable goods. This Tribunal took the view that it is not excisable on two grounds. The first ground was that waste pickle liquor is not in the nature of a valuable by-product arising during the course of manufacture of some other goods. The second ground relied on by the Tribunal was that dilute sulphuric acid used in the pickling process loses its efficacy and at the stage when it becomes unfit for further pickling, it has to be discarded. From this decision it is evident that spent sulphuric acid cannot be taken as a by-product obtained in the manufacture of another product. Decision of this Tribunal was taken in appeal by the Revenue before the Supreme Court. Their Lordships dismissed the same observing :

> "The Tribunal is right in saying that the diluted Sulphuric Acid, that is, the liquid which remains after user, cannot be said to have been manufactured by the respondent and, therefore, no duty can be levied thereon."

This view expressed by Their Lordships gives a quietus to the issue that a substance used in the manufacture of another when gets changed in its character or properties will not become a by-product of the manufacturing process.

19. For purifying water to make it potable it is passed through sand and charcoal. By deposit of waste and other impurities on account of long use the sand and charcoal will lose its potency to purify water any further. Such sand and charcoal cannot, by any stretch of imagination, be considered as the outcome of any manufacturing process. In this case, we have no doubt that no manufacturing process takes place. Likewise, activated earth is used only to bleach and purify oil which is passed through it. The earth loses its efficacy to purify and becomes spent earth. This is not the outcome of any manufacturing process.

20. Similarly, the view of the Tribunal in *CCE, Vadodara* v. *India Gelatine and Chemical*, 1996 (88) E.L.T. 425 that sludge, dust and sinews obtained during the manufacture of Di Calcium Phosphate animal feed grade, are subsidiary product sold regularly and are excisable goods, cannot be followed and accepted having been based mainly on the observations made by the Apex Court in *Commissioner of Sales Tax, Bombay* v. *Bharat Petroleum Corporation* (supra) wherein the issue of exigibility of the goods was not at all before the Court directly or indirectly, rather the issue was regarding the claim of set off under the Bombay Sales Tax Act.

For these very reasons, the law laid down in *Tata Iron & Steel Co. Ltd.* - 1993 (68) E.L.T. 249 (Tribunal), cannot be relied upon in this case. Moreover, in that case, disputed item was caustic lye which had sodium carbonate and sodium hydroxide and the assessees admitted that it was used by them in the manufacture of tubes and for that reason the item was held to be by-product emerging during the manufacture of oxygen. But in the case in hand, spent earth is not being used by the assessees after its emergence from the activated clay/earth in the factory. It is a waste and nothing more.

21. In *Khandelwal Metal & Engg. Works & Anr.* v. *Union of India*, 1985 (20) E.L.T. 222 (S.C.) on which much reliance has been placed by the learned SDR, the Apex Court in para 34 of the judgment had, no doubt, observed that the production of waste and scrap is necessary incident of the manufacturing process. It may be true to say that no prudent businessman will intentionally manufacture waste and scrap. But, it is equally true to say that the waste and scrap are the by-products of the manufacturing process. The 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 manufacturing process. Intention, is not the gist of the manufacturing process". But these observations were made by the Court while dealing with the question of levy of additional duty under Section 3(3) of the Customs Tariff Act on the goods which was imported viz. brass scrap. The duty on those goods were resisted by the assessees on the ground of being waste and rejects. It was under these circumstances, the Apex Court made the above said observations and maintained that Section 3(3) of the Customs Tariff Act is not charging section and does not impose countervailing duty and the duty chargeable under this Section is in addition to any other duty imposed under the Act. But this view of the Apex Court was subsequently doubted in *Hyderabad Industries Ltd. & Anr.* v. *Union of India* - 1999 (108) E.L.T. 321 (S.C.) = 1999 (32) RLT 541 by the another Bench of the Apex Court as is clear from para 14 of the judgment and later on overruled by the Constitution Bench. Moreover the question whether the goods could be subjected to levy of excise duty even if it did not satisfy the test of manufacture and marketability, was not at all in issue before the Apex Court in *Khandelwal Metal & Ind. Ltd.* Therefore, the observations made therein and referred to above do not advance the case of the Revenue before us.

22. Similarly, the view taken by the Bench of the Tribunal in *HMT Ltd.* v. *CCE*, Final Order No. 793-794/85-C, dated 16-12-1986 by following the above referred observations of the Apex Court in *Khandelwal Metal & Ind. Ltd.* case, that moly sludge arising in the process of manufacture of filament, tungsten wires is a by-product and liable to pay excise duty, cannot be attached any legal value when the view of the Apex Court was not accepted in *Hyderabad Industries Ltd*. case (supra) and in face of the law laid down by the Apex Court thereafter in *Union of India* v. *Indian Aluminium Co.*, supra, wherein it has been observed that everything which is sold is not necessarily a marketable commodity as known to the commerce. The Apex Court in that case ruled that the refuse, ashes, rubbish arising in the course of manufacture are different from waste and scrap and therefore, are not goods liable to excise duty. The dross and skimmings emerging in the process of manufacture of aluminium sheets from aluminium ingots were held to be not excisable goods being not manufactured products.

23. In *Hyderabad Industries Ltd. & Anr.* v. *Union of India*, (supra) the Apex Court has also ruled that separation of asbestos bire embedded in the rock by manual and mechanical means is not a process of manufacture and as such not liable to excise duty.

24. This takes us to another contention of the SDR. He has argued that under the erstwhile Tariff 1944 spent earth was not covered by any specific sub-heading and it could be said that it was not excisable, but when under the new Tariff it stands covered by a specific Chapter 15 sub-heading No. 15.07, it must be taken to have become excisable and dutiable. But this argument of the learned SDR also cannot be accepted. True, that by adopting this argument some Benches of the Tribunal in *CCE* v. *Oswal Vanaspati & Allied Inds.*, 1994 (70) E.L.T. 236 and *CCE* v. *Tata Oils Mills*, 1996 (85) E.L.T. 391 had taken the view that when after the enforcement of the new Tariff, 1985 the spent earth is classifiable under sub-heading 15.07 it is, therefore, excisable and dutiable. But the view taken in these cases by the Benches cannot be said to be correct. The scheme in the Tariff Schedule is to divide the goods into two broad categories - one for which rates are mentioned under different sub-heading entries and other the residuary. By this method all goods have been brought under the Schedule but the Tariff Entries in the Schedule have to be read not in isolation, for determining the excisability and dutiability of the goods mentioned therein but in conjunction with Section 3 of the Central Excise Act. That Section clearly enacts that only those goods mentioned in the Schedule will be excisable, which had been manufactured or produced by the person on whom the duty is proposed to be levied. Therefore, even if a particular good or article finds mention in a specific or a residuary sub-heading or a heading of the Schedule in the Tariff still it has to satisfy the test of manufacture before it can be subjected to levy of excise duty. If it is not a manufactured good or article, no excise duty can be levied thereon, even if finds mention in the Tariff Schedule.

25. The Apex Court has laid down two criteria for levy of excise duty, the first being that goods so produced must be a distinct commodity known as such in common parlance or to the commercial community for the purpose of buying and selling and the second being marketability (*Moti Laminates Pvt. Ltd.*). Therefore, not only one test, that is of 'manufacture' or produce, but also another of 'marketability' also to be satisfied, while determining the excisability and dutiability of the goods. By merely bringing the goods in a specific heading/sub-heading of the Tariff Schedule, the goods cannot be subjected to the levy of excise duty. In *Hyderabad Industries Ltd.* v. *Union of India*, 1995 (78) E.L.T. 641, the Apex Court in this regard has also ruled that Tariff Schedule by placing the goods in specific or general category does not alter the basic character of leviability. The duty is attracted not because an article is covered in any of the items or it falls in residuary category, but it must further have been produced or manufactured and is marketable. This very view has been reiterated by the Apex Court in *Moti Laminates Pvt. Ltd.*, supra and *Dharanghdra Chemical* v. *Union of India*, 1997 (91) E.L.T. 253.

26. In the instant case even if it is assumed that the spent earth is covered by sub-heading 15.07 of the Tariff as residue resulting from the treatment of fatty substances, still it cannot be subjected to levy of duty as it satisfies only one test that is of marketability as it is allegedly sold to the soap processors, and not the other test that is of manufacture, which is the main test under Section 3 of the Central Excises Act, as discussed above. The observations of the Apex Court in *Khandelwal Metal Engineering Works*, 1985 (20) E.L.T. 222 in relation to countervailing duty on imported brass scrap is not of any assistance for deciding the issue on hand.

27. No change in the definition of manufacture as it stood under the old Tariff, had taken place after the enforcement of the new Tariff 1985. At that time, the test of manufacture was required to be satisfied for determining the dutiability of any goods as it is now after enforcement of new Tariff 1985. Therefore, the view taken in the cases of *Hindustan Lever* v. *C.C.E.* and *Modi Vanaspati* v. *C.C.E.*, supra though decided under old Tariff, that spent earth is not manufactured product, and is not excisable

cannot be said to have become obsolete, rather it is the correct view and deserves to be endorsed even after the enforcement of the new Tariff. Similarly in *Kashmir Vanaspati Ltd.* v. *C.C.E.*, *Shriram Foods & Fertilizer Ltd.* v. *C.C.E.* (Final Order Nos. 126 & 127/96-C) *C.C.E.* v. *Kusum Products Ltd.* and *C.C.E.* v. *Mehta Vegetable Products*, supra correct view had been taken that spent earth is not excisable being not manufactured product.

28. In the light of discussion made above, it must be held that spent earth is not dutiable. Reference is answered accordingly.

29. Appeals involving question of excisability of spent earth shall now be posted by the Registry before the concerned Bench for final disposal.

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