IN THE HIGH COURT OF JHARKHAND AT RANCHI

W.P.(T.) No. 79 of 2015

with

W.P.(T.) No. 80 of 2015

with

W.P.(T.) No. 81 of 2015

with

W.P.(T.) No. 85 of 2015

M/s Adhunik Power Transmission Limited (A Company incorporated under the Companies Act, 1956), (formerly known as 'Unistar Galvanisers Fabricators Ltd.') having its registered office at B-32 to B-36, First Phase, Adityapur Industrial Area, Adityapur, P.O. & P.S. Adityapur, District Saraikela-Kharsawan, through its Authorized Signatory, namely, V. Kali Prasad, son of Late V. Rama Rao, resident of B-1/8, 3rd Floor, Jai Prabha Complex, Outer Circle Road, Kadma, P.O. & P.S. Kadma, Jamshedpur-831005, District East Singhbhum (Jharkhand).

... ... **Petitioner** (in all cases)

Versus

1. The Union of India, through the Commissioner, Central Excise and Service Tax, having its office at 143, New Baradwari, Sakchi, P.O. & P.S. Sakchi, Town Jamshedpur-831001, District East Singhbhum

2. Joint Commissioner, Central Excise and Service Tax, having its office at 143, New Baradwari, Sakchi, P.O. & P.S. Sakchi, Town Jamshedpur-831001,

3. Assistant Commissioner, Central Excise and Service Tax, Division-III, having its office at 9E Road, Bistupur, P.O. & P.S. Bistupur, Town Jamshedpur-831001.

4. Superintendent, Central Excise and Service Tax, Adityapur (1) Range, P.O. & P.S. Adityapur, Town Jamshedpur.

...

Respondents (in all cases)

CORAM: HON'BLE MR. JUSTICE D.N. PATEL
HON'BLE MR. JUSTICE PRAMATH PATNAIK

For the Petitioner : Mr. Sumeet Gadodia, Advocate
For the Respondents : Mr. Deepak Roshan

04/Dated: 19th January, 2015

Per D.N. Patel, J.:

1. These writ petitions have been preferred against the order passed by the Customs, Excise and Service Tax Appellate Tribunal,

Eastern Regional Bench, Kolkata (hereinafter referred to as the CESTAT for the sake of brevity), whereby the CESTAT has dismissed the appeals, preferred under Section 35B of the Central Excise Act, 1944 (hereinafter referred to as the Act, 1944 for the sake of brevity) and has confirmed the orders passed by the Commissioner (Appeals), Central Excise and Service Tax, Ranchi. The Commissioner (Appeals) had dismissed the appeals preferred by these petitioners mainly on the ground that the delay beyond the further period of 30 days cannot be condoned, looking to the bar imposed under Section 35(1) of the Act, 1944. The order/judgment of the Commissioner (Appeals) dismissing the appeals preferred by these petitioners is based upon the decision rendered by Hon'ble Supreme Court in the case of **Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and others** as reported in **(2008) 3 SCC 70,** which speaks that if there is delay of more than 30 days, then under Section 35 (1) of the Act, 1944 the Commissioner (Appeals) has no power to condone the delay. Thus, the delay was not condoned by Commissioner (Appeals) and, therefore, these petitioners preferred appeals before CESTAT, which has also dismissed the appeals preferred by these petitioners, confirming the order passed by Commissioner (Appeals) and, therefore, these writ petitions have been preferred by these petitioners.

2. Learned counsel appearing for the petitioners submitted that the petitioners are invoking the writ jurisdiction of this Court under Article 226 of the Constitution of India, mainly for the reason that the order passed by the Commissioner (Appeals), refusing to condone the delay beyond 30 days, may be under Central Excise Act, 1944, but, whenever there is a perpetuated injustice or

whenever there is miscarriage of justice, looking to the facts of the case, then the writ application can always be preferred invoking Article 226 of the Constitution of India and there is no bar upon the power, jurisdiction or authority of the High Court under the Constitution of India to entertain the writ petitions.

3. It is further submitted by the learned counsel for the petitioners that even if efficacious alternative remedy is available, then also to prevent the miscarriage of justice the writ jurisdiction can be invoked. Even if any petitioner has missed the bus or boat because of the provisions of any Act and if it is beyond certain period of limitation, that does not mean that scope of writ jurisdiction is also taken away by virtue of the said Act and, therefore, it is always open to a person or party to approach this Court, even if there is efficacious alternative remedy available or whenever for any reason whatsoever, the petitioner is unable to avail the efficacious alternative remedy. Learned counsel appearing for the petitioners in all the aforesaid writ petitions has relied upon the decision rendered in the case of ***JCB India Ltd. V. Union Of India,*** as reported in ***2014 (301) E.L.T 209 P&H*** and the decision rendered by Hon'ble Gujarat High Court rendered in the case of ***D.R. Industries Ltd. Vs. Union of India*** as reported in **2008 (229) E.L.T. 24 (Guj.)**. On the basis of these decisions, it is submitted by learned counsel for the petitioners that the petitioners are confining their prayers, challenging the orders passed in Order-in-Original (herein after referred to as the O-in-O for the sake of brevity). This O-in-O has been passed by the Assistant Commissioner, Central Excise, Jamshedpur. Thus, the arguments canvassed by the learned counsel for the petitioners is that O-in-O is a miscarriage of justice and is having an effect of

perpetuated injustice and therefore, instead of challenging the orders passed in Order-in-Appeal (herein after referred to as the O-in-A for the sake of brevity) by Commissioner (Appeals), apart from the order passed by the CESTAT, these petitioners are challenging orders passed in O-in-O in the writ jurisdiction.

4. Learned counsel for the petitioners has also pointed out to this Court Section 3 of the Central Excise Act, 1944, which is a charging Section to be read with Section 2(d), which is definition of a word “excisable goods” and Section 2(f), which is definition of a word “manufacturer”. With the help of these, Section 3 and two definitions, it has been submitted by the learned counsel for the petitioners that they are manufacturing galvanized tubes and in that process, Zinc dross ("Zn-dross") is also produced, which is a by-product. This product is also known as "Zn-dross" in the language of manufacturers. It is contended by the learned counsel for the petitioners that "Zn-dross" is not excisable at all, because it is never manufactured by the petitioners, even though it is saleable, marketable and capable to fetch some sale price. To substantiate his argument, learned counsel for the petitioners has relied upon a decision rendered by Hon'ble the Supreme Court in the case of **Collector of Central Excise, Patna Vs. Tata Iron & Steel Co. Ltd.** as reported in **(2004) 9 SCC 1,** specially paragraphs 2, 11, 12, 14, 15, 16 & 17 etc. thereof. This judgment is absolutely upon "Zn-dross". Learned counsel for the petitioners has also relied upon a judgment delivered by the Hon'ble Supreme Court in the case of **Commissioner of Central Excise Vs. Indian Aluminium Co. Ltd**. as reported in **(2006) 8 SCC 314.** Learned counsel for the petitioners has though relied upon the whole judgment, but, specially paragraphs 17, 18 and 19 etc.

thereof. This is a judgment upon “Aluminium-dross”. On the basis of these two judgments, it is submitted that "Zn-dross" is not an “excisable goods” as per Section 2(d) nor the same is intended to be manufactured by these petitioners and the said product is not even covered by the definition 'manufacturing', as per Section 2(f), nor it is produced by these petitioners. Thus, "Zn-dross" is neither produced nor manufactured nor it is excisable goods and therefore, charging Section, viz. Section 3 of the Act, 1944, cannot be applied and hence, no show cause notice could have been given by the department. This aspect of the matter has not been properly appreciated by the Assistant Commissioner, Central Excise, Jamshedpur while passing orders in O-in-O and hence O-in-O deserves to be quashed and set aside, in all the aforesaid writ petitions.

5. It is further submitted by the learned counsel for the petitioners that Section 2(d) of the Act, 1944, which is a definition of the word “excisable goods”, has been amended in the budget of the year 2008 and the explanation has been added in Section 2(d). This has been brought into effect on 10th May 2008, but, we are not concerned with this amendment because all the aforesaid matters are of the years prior to 2008.

6. It is further submitted by the learned counsel for the petitioners that "Zn-dross" is also added in the tariff entry which is under Tariff Item No. 7902-0010 of the Schedule. These tariff entries are prepared under the Central Excise Tariff Act, 1985. This entry has been amended with effect from 28th February, 2005. Learned counsel appearing for the petitioners in all the aforesaid writ petitions has submitted that this entry is brought into effect merely because a tariff entry is amended/added by itself. The said

commodity cannot fall within the definition of “excisable goods”, unless it is manufactured or produced. Even though this entry viz. 7902-0010 is incorporated w.e.f. 28th February, 2005 that does not mean that "Zn-dross" is produced or manufactured by these petitioners. There is no deeming provision that if the goods are referred in the tariff entry that means they are produced always by manufacturing. In short, there is no presumption for manufacturing and it is consistent argument of these petitioners that they have never manufactured this "Zn-dross" nor they have produced the same and, therefore, it is not “excisable goods” and, therefore, tariff Entry No. 7902-0010 to "Zn-dross" is not helpful to the respondents.

7. Learned counsel for the petitioners is also relying upon a circular bearing no. 904 dated 28th October, 2009, and on the basis of the said circular it is submitted by learned counsel for the petitioners that by this circular, the Central Board of Excise and Customs has stated that such type of matters arising between period 2005 to 2008 should be kept in a 'Call book' because one matter is already pending before the Hon'ble Supreme Court. This aspect of the matter has not been properly considered by the Assistant Commissioner, Central Excise, Jamshedpur while passing the order in O-in-O and hence O-in-O passed in all these writ petitions deserves to be quashed and set aside.

8. Learned counsel appearing for the respondents submitted that looking to Section 3 of the Act, 1944 to be read with Section 2(d) and 2(f) and also looking to the percentage of Zinc in "Zn-dross", the by-product is crossing the permissible limit and hence it is excisable goods under Section 2(d) and the rate of tax will be as per Entry 7902-0010. It has been stated in the order passed in O-

in-O that sample drawn of "Zn-dross" was sent to National Metallurgical Laboratory, Jamshedpur and the percentage of Zinc found out is more than permissible limit i.e 90-92%. In fact, in some of the cases, it is approximately 96% Zinc in so called "Zn-dross". Thus, the goods in question is falling within Section 2(d) and tariff levied is as per entry 7902-0010. It is submitted by learned counsel for the respondents-Union of India that "Zn-dross" is added in the tariff w.e.f. 28th February, 2005 and once the goods are mentioned in the tariff they are always “excisable goods”. Moreover, the so called "Zn-dross" which is being narrated as a by-product is also saleable, marketable and purchasable commodity. In fact, it is a commercially another item and in the market these goods in question is also capable of being bought and sold. In fact these petitioners are selling "Zn-dross" and even selling price is mentioned in the show cause notice given by the department and is also referred in the order passed in O-in-O, because duty leviable is ad valorem. It is submitted by learned counsel appearing for the respondent-Union of India that in fact, looking to the high percentage of Zinc, the goods in question is not a "Zn-dross", but, it is alike liquid Zinc. If these matters are allowed by this Hon'ble Court in exercise of the writ jurisdiction having more than 96 % of Zinc then tomorrow another manufacturer can approach this Court, who is having 99% of Zinc in "Zn-dross", and if his matter of 99% Zinc is allowed, then third petitioner can also approach this court having 99.99% of Zinc, in "Zn-dross" and ultimately there will be no distinguishable line, between pure Zinc and "Zn-dross" and, therefore, what is not permitted by the law, beyond 90-92% Zinc cannot be permitted by this Court, as it is a policy decision of the Union of India what to permit and what to not. This policy decision

can not be altered by this Court looking to the tariff Entry no. 7902-0010, specially about "Zn-dross". It permits only 90-92% of Zinc in "Zn-dross". If the percentage of Zinc is crossing the limit of 92% and if these matters are allowed by this Court having 96% of Zinc then as per logic advanced in the arguments, this Court will have to permit up-to 99.99% Zinc in "Zn-dross". This will lead to absurdity because at one stage there will not be much difference between pure Zn liquid and the "Zn-dross" having 99.99% Zinc. This demarcating line between Zinc and "Zn-dross" has already been drawn by the legislature that if Zinc is up-to 90-92% in a "Zn-dross" the said liquid will be termed as "Zn-dross" liquid and beyond that, or if percentage of Zinc is more in the said liquid, it will be an “excisable goods” falling within Section 2(d) and even though it is a by-product, the same is a “manufacturing of a by-product”. It is commercially another item. It is marketable commodity and hence no illegality has been committed in imposing and levying excise duty on the goods in question. It is further submitted by the learned counsel for the respondents that in fact the factual aspects have already been crystallized in the O-in-O and the appeal against O-in-O has already been dismissed, because it was beyond the period of condonable delay and as CESTAT has also dismissed the appeal for facts there is a concurrent finding of facts. So far as law is concerned, as stated hereinabove, the percentage of Zinc is higher than 90-92% and therefore, it is “excisable goods”. Learned counsel appearing for the respondents has submitted that the judgment cited by the learned counsel for the petitioners are not useful to the petitioners mainly for the reason that the peculiar facts of the present case of more than 96% of Zinc content in a "Zn-dross" makes the present

case different. Moreover, if this percentage of Zinc in "Zn-dross" is allowed by this Court and if this Court treats this goods as non-excisable then tomorrow there may be a case before this court having 99.99% Zinc in a "Zn-dross" and, therefore, these petitions may not be entertained by this Court.

9. Having heard learned counsels for the parties and looking to the facts and circumstances of the case, we see no reasons to entertain these writ petitions mainly for the following facts, reasons and judicial pronouncements:-

(i) Counsel appearing for the petitioners, has confined his arguments, challenging the Orders-in-original (O-in-O) by the Assistant Commissioner, Central Excise, Jamshedpur. Other prayers in these writ petitions are not pressed.

(ii) It appears from the facts of the present case that the petitioners in the aforesaid writ petitions are manufacturing "galvanized tubes". In the process of manufacturing one more product is emerging out which is commonly known as "Zn-dross". Educational meaning of dross as per *Oxford Advanced Learner's Dictionary New 8th Edition* *is as under:*

> *"**dross**: something of very low quality; the least valuable part of sth: mass-produced dross 2 (technical) a waste substance, especially that separated from a metal when it is melted"*

This "Zn-dross", by-product, is marketable, saleable, purchaseable and commercially a new goods. In the facts of the present case also, "Zn-dross" has been sold by these petitioners in the market. The value of "Zn-dross" has also been mentioned in the show cause notice given by the department dated 09.11.2006 (in Writ Petition No. 79 of 2015). Similar are the notices in other writ petitions. These

"Zn-dross", as per department-respondents Union of India is an “excisable goods” as per Section 2(d) of the Central Excise Act, 1944, whereas, as per these petitioners "Zn-dross" is never produced or manufactured by these petitioners and therefore, is not “excisable goods” and hence the orders passed in O-in-O in all the aforesaid writ petitions passed by Assistant Commissioner of Central Excise, Jamshedpur are in gross violation of the Act, 1944.

Therefore, the question before this Court is whether "Zn-dross" is excisable goods or not. There is one more question before this Court to the effect that these petitioners were slow enough which, in the eye of law, is known as lethargic enough to prefer appeals, under Section 35 of the Act, 1944. The period of limitation is 60 days and the delay which can be condoned by the Commissioner (Appeals) is of 30 days and not beyond that. These petitioners had preferred appeals beyond the limitation period and also beyond the condonable period and, hence on the basis of decision rendered by Hon'ble the Supreme Court in the case of **Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and others** as reported in **(2008) 3 SCC 70**, their appeals were dismissed because delay was not condoned by the Commissioner (Appeals). These orders passed in appeals preferred by these petitioners were further challenged before CESTAT, East Regional Bench, Kolkata under Section 35B of the Act, 1944. Obviously, based upon the same decision of **Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and others** as reported in **(2008) 3 SCC 70,** when delay was

not condonable by the Commissioner (Appeals), CESTAT dismissed the appeals preferred by these petitioners because no error was committed by the Commissioner (Appeals) while passing O-in-A and, therefore, these writ petitions have been preferred by these petitioners challenging the order passed by the CESTAT in Appeal, order passed by Commissioner (Appeals) in O-in-A and the order passed by Assistant Commissioner of Central Excise and Service Tax, Jamshedpur in O-in-O. But, the learned counsel for the petitioners is restricting his arguments and limiting the prayers made in these petitions to the effect that now they are challenging directly Orders-in-Original passed in all these writ petitions, mainly on the ground that there will be miscarriage of justice or there will be perpetuated injustice if this Court is not interfering with the orders passed in originals. Thus, the second issue before this Court is whether petitioners can invoke writ jurisdiction challenging the O-in-O, specially when the appeals preferred by these petitioners under Section 35 of the Act, 1944 before the Commissioner (Appeals) and their appeals before CESTAT preferred under Section 35B of the Act, 1944 have been dismissed.

(iii) We would first like to reply the second issue raised by the petitioners viz. whether these petitioners can invoke the writ jurisdiction under Article 226 of the Constitution of India or not. The answer is affirmative. It ought to be kept in mind that no statute passed by Parliament or state legislative assembly or any existing law can abridge the powers vested in this Court, which is known as writ jurisdiction of this Court under Article 226 of the Constitution of India. Merely,

because some appeals were dismissed by Commissioner (Appeals) or by CESTAT because they were preferred beyond the period of condonable delay (in these cases 30 days as per Section 35 of the Act, 1944) that does not mean that powers of this Court has also been curtailed. Writ jurisdiction is an extraordinary jurisdiction. If there are extraordinary facts present before this court, leading to perpetuated injustice or a miscarriage of justice or patently palpable and gross illegalities, this Court has all power, jurisdiction and authority to entertain, the writ petitions, even though their appeals have been dismissed by Commissioner (Appeals) or by CESTAT, under Section 35 and 35B respectively because their appeals were beyond the period of condonable delay.

(iv) It has been held by Hon'ble High Court of Gujarat in paragraph 19 of the decision rendered in the case of ***D.R. Industries Ltd. & Anr. Vs. UOI & Ors.*** as reported in **2008 (229) E.L.T. 24 (Guj.)** as under :-

> *"19. As regards the contention that there may be extra-ordinary cases where assessees may not be in a position to challenge the order of the adjudicating authority before the Commissioner (Appeals) within a period of 90 days from the date of communication of the order, we are of the view that in such extra-ordinary cases where an assessee can show extra ordinary circumstances explaining the delay and also gross injustice done by the adjudicating authority, the assessee may invoke the writ jurisdiction of this Court. Hence, in cases where the assessees have suffered gross injustice and they could not file appeals before the Commissioner (Appeals) within a period of 90 days from the date of communication of the order-in-original on account of circumstances beyond their control, such assessees can invoke the powers of this Court under Article 226 of the Constitution but, of course, not as a matter of right."*
>
> *(Emphasis supplied)*

(v) Similarly , the Hon'ble Punjab and Haryana High Court in paragraph 18 of the judgment rendered in the case of ***JCB***

India Ltd. V. Union Of India, as reported in ***2014 (301) ELT 209 P&H,*** held as under:-

> *"18. In view of what has been recorded hereinabove, the writ petition is allowed; the impugned assessment order dated 25.01.2006 (Annexure P-4), order dated 8-12-2008 (Annexure P-11) passed by the Commissioner of Central Excise (Appeals), are set aside and the matter is remitted to the Adjudicating Authority to decide show cause notice dated 3-3-2005 (Annexure P-3), afresh and in accordance with law. The respondents would be at liberty to point out any distinguishing feature between the case in hand and the cases already decided by the Adjudicating Authority."*

(vi) We are in full agreement with the ratio decidendi propounded by Hon'ble Gujarat High Court as well as by Hon'ble Punjab and Haryana High Court. The writ petitions are tenable at law, despite, Sections 35 & 35 B of the Act, 1944 and even if the appeals preferred by these petitioners have been dismissed because the delay cannot be condoned beyond period of 30 days. In the facts of present case there is delay of 93 days and, therefore, 63 days are beyond the period of condonable delay.

(vii) Now the question before this Court is even if these petitions are tenable at law whether O-in-Os passed in aforesaid writ petitions are legal or not. To answer this question there is a need to refer Section 3 to be read with Section 2 (d) and 2(f) of Central Excise and Customs Act, 1944. For ready reference, these Sections 2(d), 2(f) and relevant part of Section 3 read as under :-

> ***Section 2(d) "excisable goods"*** *means goods specified [the First Schedule and the Second Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986)] as being subject to a duty of excise and includes salt;*
>
> *[Explanation.- For the purposes of this clause, "goods" includes any article, material or substance which is capable of being bought and sold for a*

consideration and such goods shall be deemed to be marketable.]

*[**(f) "manufacture**" includes any process-*
(i) incidental or ancillary to the completion of a manufactured product;
(ii) which is specified in relation to any goods in the section or Chapter notes of [The First Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to [manufacture; or]
(iii) which in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer;]
and the word "manufacture" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;]

***3.** Duties specified in [the Schedule and the Second Schedule to the Central Excise Tariff Act, 1985] to be levied. - (1) [There shall be levied and collected in such manner as may be prescribed,-*
(a) [a duty of excise to be called the Central Value Added Tax (CENVAT)] on all excisable goods [(excluding goods produced or manufactured in special economic zones)] which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);
(b) a special duty of excise, in addition to the duty of excise specified in clause (a) above, on excisable goods [(excluding goods produced or manufactured in special economic zones)] specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) which are produced or manufactured in India, as, and at the rates, set forth in the said Second Schedule:]

(Emphasis Supplied)

In view of the aforesaid provisions of the Act, 1944 "Zn-dross" which is a by-product of these manufacturers-petitioners is to be watched. If "Zn-dross", which is a by-product of manufacturing process of "galvanized tubes" is capable of being sold and purchased in a market and if it is commercially, a new item, then the same is "excisable goods" produced or manufactured, in India. Learned counsel

appearing for the petitioners submitted that "Zn-dross" is never manufactured or produced by these petitioners nor it is excisable goods and hence O-in-Os deserve to be quashed and set aside.

This contention is not accepted by this Court mainly for the reason that even if a by-product or ancillary product or even a subsidiary product of a main manufacturing product is capable of being sold in a market which is commercially a new item, it is always falling within Section 2(d) and 2(f) and, hence, always excise duty can be imposed and levied in view of the tariff entry for that particular item enacted under the Central Excise Tariff Act, 1985. In the facts of the present case, these petitioners are manufacturing “galvanized tubes” and during the process of manufacturing of “galvanized tubes”, "Zn-dross" is produced. This may be a voluntary phenomena or involuntary phenomena and there may not be any intention on the part of the manufacturer to produce “Zinc-dross”; nonetheless it is a fact that "Zn-dross" is produced during the manufacturing process of “galvanized tubes”. This involuntary phenomena of the production of "Zn-dross" is also covered, by the definition given under Section 2(d) and 2(f) specially, when "Zn-dross" is-

- commercially another item;
- saleable item;
- purchasable commodity,
- marketable;

In the facts of the present case, these petitioners have actually sold away this "Zn-dross" in open market for lakhs of rupees. These lakhs of rupees have been mentioned in all

the four O-in-Os by the Assistant Commissioner of Central Excise, Jamshedpur. Therefore, "Zn-dross" is undoubtedly produced by these petitioners and they are produced as a by-product of galvanized tubes. Several times it happens that several by-products are also produced whenever main product is being manufactured. For example :-

A + B ⇄ C + D

If A+B are the raw materials and if the main manufacturing item is 'C' and if the product 'D' is also, under compulsion, manufactured, in that situation “D” is known as a by-product. This by-product may be a desirable item or may be an undesirable item. If this by-product is commercially another item and if it is marketable item and if it is saleable and purchasable in the open market then the production of 'D', even though there was no intention on the part of manufacturer to produce goods “D”, is always excisable. In the facts of the present case also, "Zn-dross" is commercially another item produced as a by-product - may be compulsory by-product - may be undesirable by-product. Nonetheless if it is saleable and purchasable in the open market, it is marketable goods and hence this "Zn-dross" is excisable goods arising out of manufacturing process of galvanized tubes and hence looking to the provisions of Section 3 - a charging Section for Excise Duty to be read with Section 2(d) and 2(f) of the Central Excise of the Act, 1944. The rate of the duty is also prescribed under tariff entry no. 7902-0010. The said entry reads as under :

Tariff Item	Description of goods	Unit	Rate of duty#
7902 7902 00 7902 00 10	**Zinc waste and scrap** - Zinc waste and scrap : ---Zinc scrap, namely the following : …… Old Zinc die cast scrap covered by ISRI code word 'Saves'; New Zinc die cast scrap covered by ISRI code word 'Scabs'; New plated Zinc die cast scrap covered by ISRI code word 'Scope'; Zinc die cast automotive grills covered by ISRI code word 'Scoot'; Old scrap Zinc covered by ISRI code word 'Score'; New Zinc clippings covered by ISRI code word 'Screen'; Zinc die cast slabs or pigs covered by ISRI code word 'Scull'; Crushed clean sorted fragmentizers die cast scrap, as produced from automobile fragmentizers covered by ISRI code word 'Scribe'; Hot dip galvanizers slab zinc dross (batch process) covered by ISRI code word 'Scrub' (minimum 92% zinc)- free of skimmings; Continuous line galvanizing slab zinc top dross covered by ISRI code word 'Seal' (minimum 90% zinc)-free of skimmings; Continuous line galvanizing slab zinc bottom dross covered by ISRI code word 'Seam' (minimum 92% zinc)-free of skimmings; Prime zinc die cast covered by ISRI code word 'Shelf' (85% zinc)-free from corrosion or oxidation.	Kg	10%

In view of the aforesaid tariff entry no. 7902-0010 under the Central Excise Act and Tariff Act, 1985 10% Ad-Valorem excise duty is imposed.

(viii) Learned counsel for the respondent-Union of India submitted that samples of the "Zn-dross" were drawn. They were analysed at National Metallurgical Laboratory, Jamshedpur, and the percentage of Zinc was found approximately more than 96%. These facts have been stated in the Orders-in-Original passed by Assistant Commissioner of Central Excise, Jamshedpur in all the aforesaid writ petitions specially in W.P.(T) No. 79 of 2015. Thus, the Zinc content was up-to 96% in the "Zn-dross" and,

therefore, if this matter is allowed in favour of the petitioners merely because it is a "Zn-dross" then tomorrow there may be a matter having 99% of Zinc in Zinc dross that should also be allowed by this Court to maintain consistency and if 99% of the contents of Zinc in "Zn-dross" is allowed and if it is said it is also not an excisable excisable goods, then there can also be a matter having 99.99% contents of Zinc in a "Zn-dross". That will also not be an excisable goods and ultimately it will lead to an absurd situation that even a pure Zinc manufactured, which is having a purity 99.999999% of Zinc in a Zinc dross (which is almost a pure Zinc produce process) will also be a non-excisable goods. This is not permissible in the eye of law. For ready reference, paragraph 9 of the order passed in O.-in-O of Assistant Commissioner of Central Excise, Jamshedpur in in Writ Petition (T) No. 79 of 2015 reads as under:-

> *"With the introduction of eight digit tariff code in Central Excise Tariff (Amendment) Act, 2004 with effect from 28.02.2005 the Zinc Dross with minimum 90-92 % of Zinc contents – free of skimming in the context of ISRI Code words have been classified specifically under Tariff Item No. 79020010 of the CETA, 1985 considering the percentage of zinc content in it and attracted Central Excise Duty @ 16 % Adv. Though the zinc dross produced by M/s Neepaz Tube Pvt Ltd had zinc contents more than 96 % in it, they cleared the same with-out payment of central excise duty and they neither reflected the production of zinc dross in their Daily Stock Account nor did they disclose this fact to the department through monthly ER-1 Return or through any other documents/submission. On the basis of specific classification of Zinc Dross in Central Excise Tariff with the amendment CETA, 1985 (Central Excise Tariff (Amendment) Act, 2004) wef 28.02.2005, an investigation was conducted by the department and sample of the zinc dross was drawn and tested and National Metallurgical Laboratory, Jamshedpur as regards to the recovery of percentage of zinc in the said zinc dross and it found to have contained 96.08 % of Zinc in it which is much more higher*

than the prescribed minimum percentage to qualify its place in tariff item No. 79020010 of Central Excise Tariff (Amendment) Act, 2004 w.e.f 28.02.2005 and thereby it is liable to Central Excise Duty @ 16 %Adv."

The aforesaid paragraph 9 of the order passed in Order-in-Original reflects that Zinc content was more than 96% in "Zn-dross". Looking to Entry No. 7902-0010 of the tariff under the Central Excise Act, 1985, the by-product, which may be involuntary product or which may be undesirable product, to the main manufacturing process of galvanized tubes, is also excisable goods. It is produced due to manufacturing process of galvanized tubes and it is commercially another item and as it is marketable, it is excisable goods. Thus, all the ingredients of Section 2(d) and 2(f) have been fulfilled by "Zn-dross". This item is, therefore, excisable and thus, no illegality has been committed by the Assistant Commissioner, Jamshedpur while passing order in O-in-O in all these four writ petitions.

(ix) If the contentions of the petitioners is allowed that "Zn-dross" having more than 96% of the Zinc is not excisable because it is an involuntary by-product then as stated hereinabove there may be process in which a product may come out with 99.99% Zinc content, which may also be an involuntary and undesirable product, as stated in the equation A+B ⇄ C+D and, therefore the zinc dross, which is a by-product, will be saved from the provisions of Section 3 of the Act, 1944. All the by-products are desirable or undesirable, but, if they are produced, even under compulsion due to main manufacturing process and if they are commercially another item, capable of being

marketable, i.e. capable of being sold and purchased in the market, then these types of by-products are also manufactured by the concerned assessee and, therefore, Section 2(f) is applicable and as the by-product is marketable and as it is capable of being sold and purchased and in the market and as they are commercially another item they are covered by definition of word “excisable goods” under Section 2(d) and, therefore, under Section 3 of the Central Excise Act, 1944 excise duty can be imposed and levied upon these manufacturing goods looking to tariff prescribed and in the facts of the present case is tariff entry No. 7902-0010. In the facts of the present case "Zn-dross" has been sold away by these petitioners in the open market. There is definite sale value of the "Zn-dross" and, therefore, ad valorem duty is levied by the order of Assistant Commissioner of Central Excise, Jamshedpur and thus no illegality has been committed by the Assistant commissioner of Central Excise in passing Order-in-Originals.

(x) Learned counsel appearing for the petitioners has placed heavy reliance upon decisions rendered by Hon’ble the Supreme Court in **Collector of Central Excise, Patna Vs. Tata Iron & Steel Co. Ltd.** as reported in **(2004) 9 SCC 1.** This is a judgment for "Zn-dross". This judgment is not helpful to the petitioners mainly for the reason that tariff entry No. 7902-0010 has been amended w.e.f. 28th February 2005. The aforesaid decision rendered by Hon'ble the Supreme Court was prior to amendment of the tariff entry whereas the fact of the present case is after the amendment in the tariff entry i.e. after 28th February 2005.

Moreover, the Zinc content in the "Zn-dross" is more than permissible limit of 90-92%. As stated hereinabove, samples of "Zn-dross" were drawn. They were sent to further analysis at National Metallurgical Laboratory, Jamshedpur and it was found that there is more than 96% of the Zinc in "Zn-dross" from the samples drawn from the factory of the present petitioners. These two facts make the present case different from the facts of the reported decision in the case of **Collector of Central Excise, Patna Vs. Tata Iron & Steel Co. Ltd.** as reported in **(2004) 9 SCC 1.** and hence, the ratio decidendi propounded by Hon'ble the Supreme Court of this reported decision is not helpful to these petitioners.

(xi) Learned counsel for the petitioner has placed heavy reliance upon the decision rendered by the Hon'ble Supreme Court reported in the case of ***Commissioner of Central Excise Vs. Indian Aluminium Co. Ltd.*** as reported in ***(2006) 8 SCC 314***. This is a judgment for Aluminium dross. Learned counsel appearing for the petitioner submitted that this is a judgment after amendment in the tariff entry for the “Aluminium-dross”. This Aluminium dross entry is at Chapter no. 76 at entry Nos. 7602.10 and 7602.90. In that entry also there is an amendment and despite the amendment in Aluminium dross, the judgment was delivered in favour of the assessee and the same logic may be applied in the matter of "Zn-dross" also.

We are not in agreement with this argument of the petitioners mainly for the reason that, as stated

hereinabove the Zinc content was more than 96% in the "Zn-dross" and, therefore, the facts of the present case are remarkably different from the facts in the judgment rendered in the case of ***Commissioner of Central Excise Vs. Indian Aluminium Co. Ltd.*** as reported in **(2006) 8 SCC 314**. If the contention of the petitioners is accepted by this Court that even if Zinc content is more than 96% in a "Zn-dross", it is not excisable goods, then 99.999999% Zinc content in "Zn-dross" will also not be an excisable goods. This is an absurdity. Even a pure Zinc will escape from the liability of payment of excise duty. It should be kept in mind that up-to what percentage of Zinc should be allowed in the "Zn-dross", which is a policy decision. Court is not sitting in appeal upon this policy decision. The contention that even if the Zinc content is more than 92% then also it remains non-excisable goods, is not accepted by this Court .

(xii) Learned counsel for the petitioners has also relied upon a circular issued by Central Board of Excise and Custom bearing no. 904 dated 28th October 2009 and submitted that as per this circular the Assistant Commissioner of Central Excise and Custom Jamshedpur ought not to have issued the show cause notice and he should have kept all these matters in “Call book”. This contention is also not accepted by this Court mainly for the reason that learned counsel for the petitioners has not pointed out that which matter is pending before the Hon'ble Supreme Court and what is the law point involved in the said matter. Whenever an issue is to be decided, whether any goods have been produced or manufactured and whether it is excisable goods, it depends

upon facts of the case. As stated hereinabove, the Zinc content is more than 96% in a "Zn-dross" which is a by-product of main manufacturing process of galvanized tubes and this by-product viz. "Zn-dross" is a commercially another item, which is saleable and purchasable in a market. In the facts of the present case, actually it has been sold away by the petitioners worth rupees several lakhs, the “Zinc-dross” produced by these petitioners is undoubtedly arising out of manufacturing process and is undoubtedly excisable goods and, therefore, under the charging Section viz. Section 3 of the Central Excise Act, 1944 the central excise duty is rightly imposed and levied by the Union of India.

10. As a cumulative effect of the aforesaid facts, reasons and judicial pronouncements, we see no reason to entertain these writ petitions. Hence, these writ petitions are hereby dismissed.

(D.N. Patel, J.)

(Pramath Patnaik, J.)

Alankar/MM/-