Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO. 3

Excise Appeal No. 94 of 2009

(Arising out of OIO-19/COMMISSIONER/RKS/AHD-II/2008, Dated-24/10/2008 passed by Commissioner of Central Excise-AHMEDABAD-II)

M/s. A K Chaturvedi **........Appellant**
Ex-Vice President, Gujarat Composite Ltd.,
House No. 60, Sector-20, Indira Nagar,
Lucknow, Uttarpradesh

VERSUS

C.C.E.-Ahmedabad-ii **........Respondent**
Custom House... First Floor,
Old High Court Road, Navrangpura,
Ahmedabad, Gujarat-380009

WITH

1. **Excise Appeal No. 95 of 2009 (N K Bangur);**
2. **Excise Appeal No. 96 of 2009 (Purushottam Soni);**
3. **Excise Appeal No. 97 of 2009 (Basant Kumar Bangur);**
4. **Excise Appeal No. 98 of 2009 (H N Maheshwari);**
5. **Excise Appeal No. 103 of 2009 (Gujarat Composite Ltd);**

(Arising out of OIO-19/COMMISSIONER/RKS/AHD-II/2008, Dated-24/10/2008 passed by Commissioner of Central Excise-AHMEDABAD-II)

APPEARANCE:
Shri. Anand Nainawati, Advocate for the Appellant
Shri. H.K. Jain, Authorised Representative for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

Final Order No. A/ 10578-10583 /2020

DATE OF HEARING: 31.01.2020
DATE OF DECISION:27.02.2020

RAMESH NAIR

The present appeals are filed by M/s Gujarat Composite Ltd. (M/s GCL), Shri A.K. Chaturvedi (Vice-president, Works), Shri N.K. Bangur, Managing director, Shri Purshottam Soni (Senior G.M- Finance), Shri H.N.Maheshwari, Executive Director and Shri Basant Kumar Bangur against Order No. 19/COMMISSIONER/RKS/AHD-II/2008 dt. 24.10.2008 passed by Commissioner of Central Excise, Ahmedabad. The facts of the case are that M/s GCL are engaged in manufacture of Asbestos Cement Products viz. Sheets and Pipes falling under chapter 68 of the Central Excise Tariff Act, 1985. They are using Fly Ash, Asbestos Fibre and Cement as an Input. M/s GCL were availing benefit of concessional rate of duty in terms of exemption notification No. 5/99 CE dt. 28.02.99, 6/2000 – CE dt. 01.03.2000 under which they were paying concessional duty on clearances of sheets and pipes subject to the condition that the products should have contained not less than 25% by weight of fly ash or phosphorous Gypsum or both by usage.

2. On the basis of investigation and search, they were issued show cause notice alleging that on the basis of actual weight mixtures report seized from the factory and production shown in the actual wet mixture, the goods contain fly ash less than 25%. The office premise of M/s Vikram foundation and Shree Hanuman Trading company the fly ash suppliers were searched on 17.08.2004 in presence of Shri Basantkumar Raghunathdas Bangur, authorised signatory of said firms and he accepted that many times M/s Hanuman Trading only issued bills of Fly ash to M/s GCL without actual supply and such amount was returned in cash. The show cause notice relied upon the Wet Mixture report alleged to be actual and also adjusted. Based upon statements of quality assurance, production, maintenance and finance employees and seized records in the show cause notice it was proposed that M/s GCL are not eligible for exemption under concessional rate of duty as the fly ash content in manufactured product was less than 25% and the Appellant Unit has shown incorrect consumption. It was proposed to demand duty of Rs. 24,65,54,345/- leviable on Asbestos products viz. Pipe and Sheet cleared during the period 01.01.2004 to 17.08.2004 by denying the concessional duty exemption as the goods were cleared in contravention of the same; to impose penalty under section 11AC; to confiscate the finished goods lying in factory as the same was intended to be cleared by availing

ineligible exemption and since the same was not available for confiscation, to enforce the condition of Bond. The show cause notice also proposed penalty upon Shri N.K. Bangur, Chairman cum Managing Director, Shri H.N. Maheshwari, Executive Director, Shri Arun Kumar Chaturvedi, Vice-President (Works) , Shri Purshottam Soni, Senior General manager (Finance), Shri Basant kumar Bangur, authorised signatory of M/s Vikram Foundation and Shree Hanuman trading. Vide impugned order the demands and penalties as proposed in show cause notice were confirmed by the adjudicating authority. Hence the present appeals.

3. Shri. V. Sridharan, Learned Senior Counsel appearing for the appellants submits that they were maintaining Wet Mixture Report showing consumption of raw material shift wise in a day and the same was prepared under the signature of Shift In charge. They were also maintaining Log Sheet which is prepared by the Shift In-charge giving details of production of Sheets/pipes made in his shift. The Wet Mixture report collected by the quality assurance department also notes down the shift wise production on the back side of the Wet mixture report. In addition they also maintain RG-1 Register showing daily production, Note book showing entire production and stocks matured and un-matured, Physical lab register which gives complete break up of finished and unfinished goods, General Shift and Sheet furnishing report prepared by quality control department In charge. It also contains details of materials released for dispatch and production from which details are entered in finished goods record. He submits that vide impugned order a duty demand of Rs. 21,34,09,778/- has been made on sheets and demand of Rs. 3,31,76,764/- on pipes on the ground that the goods contain less than 25% fly ash. The allegation is based upon the consumption of fly ash shown in Wet Mixture report. The actual report as per show cause notice is in register A1, A/4,A5 to A/10 and the Adjusted Wet Mixture report is in document A/2,A/3,A/11 to A/15. The demand in case of Pipes has been confirmed on the ground that the duty liability stands admitted before Settlement Commission. The demand in case of sheets was confirmed on ground that the weight of sheet in dry condition alone is relevant and that the quantity of fly ash used has to be seen vis a vis the total weight of sheet in dry condition. The goods were also ordered to be confiscated on the ground that the goods were in ready to dispatch condition. He takes us through the relevant Exemption Notifications for impugned product issued from time to time. In Notification No. 60/91- CE dt. 25.07.91 the exemption

was to goods "containing more than 25% more by weight of fly ash or phosphor-gypsum". In Notification No. 38/93 – CE dt. 28.02.93 the exemption was given to goods "in which more than 30% by weight (minus the water content) of fly ash of phosphor-gypsum or both has been used". In Notification No. 38/93 – CE dt. 28.2.93 as amended by Notification No. 79/93-CE dt. 12.03.93 the exemption was given to "goods in which not less than 25% by weight of fly-ash or phosphor-gypsum or both has been used. Further amendments vide notification No. 17/95-CE dt. 16.03.95 added the proviso "provided that the manufacturer maintains proper account in such form and in such manner as the collector of central excise may specify in this behalf for receipt and use of those fly-ash or phospho-gypsum or both, in the manufacture of all goods falling under chapter 68 of the schedule to the central excise tariff act, 1985 and files a monthly return in the form and manner as may be specified by the Collector of Central Excise with the Assistant Collector of Central Excise". He submits that in all the successive notifications the conditions are identical. He further submits that in case of Asbestos sheet, the adjudicating authority has confirmed demand on the ground that the weight of finished goods has to be taken in dry condition. The actual weight mixture report gives production details based on standard weight i.e Number of sheets x standard weight of sheet, Standard weight of sheet is 38.4 Kg in dry condition as stated by the officer of the company and as per actual Wet Mixture report consumption of Fly Ash had been less than 25%. The finding of the adjudicating authority that weight of finished goods in dry condition is relevant for determining the percentage of use of fly ash is correct but the conclusion that the use of fly ash is less than 25% is wrong. The weight of the finished goods with respect of which the percentage of fly ash has to be arrived at should be determined without any moisture content in finished goods. Vide Circular No. 6/92 dt. 21.10.92, the CBEC Board clarified to maintain shift wise register for ascertaining the percentage of fly ash in final product. However vide Circular No. 477/43/99 – CX4 dt. 10.08.99 it was clarified that the percentage by weight of fly ash has to be calculated taking into account of fly ash used with reference to weight of the finished product in dry condition. That circular No. 5/64 dt. 30.6.64 issued in context of notification No. 33/64 granting concessional rate of duty on paper containing not less than 40% of bagasse, jute stalks or cereal straw in form of pulp was issued by CBEC and it was noted that the dry weight of raw materials has to be considered. Thus even if percentage of fly ash has to be determined with respect to finished goods, the weight of finished goods has to be considered without any moisture content. He relies upon decision in case of Sikka Paper Mills Ltd. 1999 (111) ELT 432. He submits that even in the decision of Eternit Everest Ltd. 2002 (150) ELT 1151 (TRI) relied upon by the revenue, the decision supports their contention that weight of goods with respect to which the percentage has to be arrived at should be determined as if no water is contained in those goods. He submits that M/s GCL are engaged in manufacture of Asbestos articles falling under chapter 68. The composition of raw material used by Appellant is Asbestos fibre 5% to 9%, Pulp 1.5% to 2%, Cement 50% to 55%, Fly ash 30% to 36%, H.G Waste 1.5% to 2%. The exemption was denied by lower authority on ground that if quantity of water used is taken into account then the percentage of fly ash will go down below 25%. The tribunal held that weight of the finished goods is to be considered for arriving at percentage should be in dry condition. Each of the raw material used by them viz. Fly ash, cement, pulp and asbestos fibre are bone dry material and water used has to be ignored as finished goods has to be weighed in dry condition. That in all cases the fly ash used for manufacture of sheet is more than 25%. He also submits that the decision of High Court of Rajasthan cited by the revenue in case of A. Infrastructure Ltd. 2005 (191) ELT 111 (RAJ) is not on issue whether weight of finished goods to be taken with moisture or without moisture. He also submits that even if chemically bonded water is taken into account, fly ash use will be more than 25%. After the material is sheeted out from slurry it is in wet condition and the water is added for 21 days to cure/hydrate the cement in the product. Even when the product is used by the customer, it keeps gaining or losing weight by absorbing/ releasing moisture. Therefore dry condition referred to in circular dt. 10.08.99 at the best can include chemically bonded water. He relies upon Volume Encyclopedia of Chemical Technology by Kirk and Othmer, 5th Edition, Volume 5 and Concrete Technology by AM Neville and JJ Brooks, 1987 Edition (ELBS edition) (a) page 13 read with table at page 10 (b) page no. 245 of appeal paper book to support his above submission. That in present case as is evident from the wet mixture report alleged to be actual by the Revenue, it shows that in the raw material mix, cement constitutes 55%. 25% (chemically bonded water present after hydration) thereof would be 13.75% dry weight of mix of the raw material. Therefore if total raw material is 100 kgs, the weight of chemically modified water would be 13.75kgs. If dry condition of asbestos sheet is assumed to include chemically treated water, the total weight of asbestos sheet in dry condition would be 113.75 Kgs. Therefore fly ash used is 28.5 Kgs in batch of 100 kgs would be 25% of 113.75 kgs. That whenever fly ash used in not less than

28.5% of the total weight of raw materials namely fly ash, cement, asbestos fibre and pulp used in batch, then in such cases fly ash would be more than 25% of weight of asbestos in dry condition, even if it is assumed that dry condition will include chemically combined water. In the present case the actual wet mixture report shows that the fly ash used is not less than the 28.5% for each shift for each day for entire five years except few shifts involving total quantity of 342 mtrs. He relies upon the statement dt. 13.01.2005 of Shri A.K. Chaturvedi based upon experiment conducted in December 1992 that even in normal condition the moisture is 19 to 20% in standard weight. Therefore when the moisture is removed to adjust the weight of sheet, the weight of fly ash would be more than of the weight of sheets. The actual wet mixture report shows that the fly ash mixed is always more than 30% for each shift for each day except some days for a very small quantity as shown by them in their appeal. He takes us through the chart and calculations annexed to the appeal based upon reports in support of his submission. He thus submits that the conditions of the exemption notification were followed and no demand can be made against them.

4. As regard demand on pipes without admitting the demand he submits that the appellants are entitle for adjustment on account of cum duty price and Modvat Credit admissible on Cement Pipes.

4.1 He further submits that the adjudicating authority has confiscated 3270 MT of Asbestos Cement sheets and 4589 MT of Asbestos Cement pipe on the ground that they were fully finished and their curing period was also over however they were not recorded in RG-1 register and were thus intended to be cleared without payment of excise duty. In this regard, he submits that goods properly accounted for by the appellants and their confiscation under Rule 25 (1)(b) is not warranted. The appellants were maintaining various records for stock and that none of the goods manufactured in the factory goes unaccounted. He submits that records of production are maintained at various stages and only at the final stage the goods are accounted in RG-1 register, therefore, there is no intention to clear the goods without payment of duty. He submits that the appellant have made correspondence vide letter dated. 02.07.1996 the regarding stage at which entries is made in RG-1 register, therefore the stage of entries in RG-

1 register was disclosed to the department. In support, he placed reliance on the following judgments:-

- M/s. Rehsam Petrotech Ltd-2010 (258) ELT 60 (Guj.)
- M/s. Madhu Crimpers Pvt. Ltd-2004 (166) ELT 414 (T)
- M/s. Marigold Paints Pvt. Ltd-2014 (308) ELT 421 (T)
- M/s. Koch Rajes C.C. Industries Pvt. Ltd-2006 (193) ELT 566

4.2. He also submits that the issue involved is of interpretation of notification and the appellants understanding regarding such interpretation have submitted Vide there letter No. AR/IV/Fly Ash/98 dated 13.10.1998 to the department. They further made a correspondences vide letter dated 22.10.98, 15.09.99, 29.09.99 and the department's letter dated 26.05.2000 regarding percentage of Fly Ash, therefore, there is no suppression of fact, hence the demand for the extended period is not in sustainable.

4.3. As regard appeal of Shri Basant Kumar Bangur, he submits that during the pendency of appeal Shri Basant Kumar Bangur expired and therefore the appeal filed by him may be abated.

5. Shri Sameer Chitkara ld. AR appeared in the first hearing and during rehearing Shri H.K.Jain appeared for the revenue and reiterate the findings of impugned order. He submits that since as per actual wet mixture reports the content of fly ash was found to be less than 25%, the demands have been correctly made. For the same reason the penalty is also imposable.

6. Heard both the sides and perused the case records. The exemption notification in question i.e 5/99 – CE dt. 28.02.99, 6/2000 – CE dt. 01.03.2000 and other analogues notification during the material time provided exemption to the goods falling under chapter 68 of the CETA of Description "Goods, in which not less than 25% by weight of fly-ash or phosphor-gypsum or both have been used" subject to condition of maintenance of proper accounts. The show cause notice on the basis of actual wet mixture reports has alleged that the content of fly ash in Asbestos Sheet was found to be 24.03% and in pipes 14.87%. The adjudicating authority has confirmed demand in case of sheets that the weight of finished goods has to be taken in dry condition; actual weight mixture report gives

production details based on standard weight i.e Number of Sheets x standard weight of sheet; standard weight of sheet is 38.4 Kgs in dry condition as stated by the officers of the Appellant Company and as per actual wet mixture report consumption of fly ash has been less than 25%.

7. The Appellant in their reply to show cause notice as well as appeal has submitted chart based upon actual Wet Mixture report, gives details of percentage of quantity of Fly ash used vis-a-vis total raw materials consumed in the manufacture of sheet as per wet mixture report which is almost 31.5% on average basis. Taking date of production of 30.12.2001, the chart takes into account, the date of production/ consumption, Total production as per production report of all three shifts in respect of sheets, pipes and moulded goods, details of fly ash consumed shift wise, percentage of fly ash used vis a vis shift wise production as per production report, total raw materials consumed shift wise as per actual wet mixture report and percentage of fly ash used shift wise. On the basis of shift wise entries the actual production as per actual wet mixture report is Shift–I 27.904 MT, Shift – II 25.856 MT, Shift-III- 33.024 MT. The fly ash content in said production in wet form is as under:

Shift – I : 6.93/27.904 x 100 = 24.8351%
Shift – II : 6.27/25.856 x 100 = 24.2497%
Shift – III : 8.58/33.024 x 100 = 25.9811%

The raw materials used for the production of sheet as per Actual Wet mixture Report shiftwise were Shift – I- 21.966 MT, Shift – II – 19.874 MT, Shift – III – 27.196 MT. The percentage of fly ash vis-a-vis total raw material ignoring the moisture is as under:

Shift – I – 6.93/21.96 x 100 = 31.54876%
Shift – II – 6.27/19.874 x 100 = 31.5487%
Shift – III – 8.58/27.196 X 100 = 31.5487%i

7.1 The above undisputed position emerging from actual production and consumption based upon actual wet mixture reports the use of Fly ash in Sheets were above 25%. The CBEC vide Circular No. 6/92 dt. 21.10.92

clarified to maintain shift wise register for ascertaining the percentage of fly ash in final product. Vide Circular No. 477/43/99 – CX.4 dt. 10.08.99, the Board clarified that the percentage by weight of fly ash has to be calculated taking into account the weight of fly ash used with reference to the weight of the finished product in dry condition. The gist of the same is as under:

> *"I am directed to say that it has been brought to the notice of the Board that there is non-uniformity in the practice with regard to determine of percentage of fly ash in the asbestos cement products for the purpose of eligibility of exemption available under Notification No. 60/91 and succeeding notifications presently Notification No. 5/99 (S. No. 179). Some Commissionerates, reportedly have taken a view that percentage of fly ash should be determined taking into account weight of all the raw materials including water used in the manufacture whether continued or not in the final product, whereas some other have taken a view that water contents should not be considered for the purpose of calculating the proportion of fly ash. Some Commissionerates are calculating the percentage with reference to the weight at the wet stage and others at the dry stage of asbestos cement products.*
>
> *2. The matter has been re-examined by the Board and it is clarified that the percentage by weight of fly ash has to be calculated taking into account the weight of fly ash used with reference to the weight of the finished product in dry condition i.e. weight of fly ash x 1000/weight of asbestos cement products. The Commissioner may keep the proforma as prescribed under Board's Circular No. 6/92, dated 21-10-1992 issued from F. No. 134/7/92-CX.4 in mind while specifying the accounts to be maintained by the manufacturers."*

8. From the above, it is an accepted position of revenue that weight of fly ash used should be with reference to the weight of the finished product in dry condition and thus the percentage of fly ash has to be determined with respect to weight of finished goods without moisture content. In case of Eternit Everest Ltd 2002 (150) ELT 1151 (TRI), the percentage use of raw material was Asbestos fibre 5% to 9%; Pulp 1.5% to 2%, Cement 50% to 55%, Fly ash 35 to 36%; H.G. waste 1.5% to 2%. The tribunal held that the weight of goods with respect to which the percentage has to be arrived at should be determined as if no water is contained in these goods. In the present case the raw material for use in production i.e fly ash, cement, pulp and asbestos fibre are bone dry. The water used in process has to be ignored for computing the ash percentage and weight of finished goods. Since the fly ash used in production is more than 25% as is apparent from the wet mixture content report, therefore it has to be considered that the goods fulfil the condition of the Exemption notification. We also note that in case of Sikka Paper Mills Ltd. 1999 (111) ELT 432, the Tribunal upheld the order passed by the adjudicating authority wherein he held that the paper

contains moisture of 5% and additives of 3% and therefore deducted 8% from the total weight of finished paper to arrive at the pulp content. The Baggasse pulp used by the assessee was compared with the total pulp so computed by backward calculation and the adjudicating authority concluded that baggasse has been used to the extent of 75% by weight so as to become eligible for exemption under Notification No. 48/99 – CE which provided use of pulp containing more than 75% baggase pulp. The decision of the Tribunal thus clearly shows that moisture has to be ignored while arriving at weight of finished goods. Thus we find that the fly ash content in sheet is more than 25% and the Appellant are eligible for the exemption on Asbestos Sheet. However in respect of some quantity of Asbestos Sheet it was admitted by the appellant that fly ash quantity is less than 25% on which duty liability comes to Rs. 2,80,000/- which is liable to be upheld. Accordingly duty demand of Rs. 21,31,29,778/-(Rs.21,34,09,778-2,80,000/) in respect of Asbestos Cement Sheet and corresponding, Interest and penalty are set aside.

9. As regard asbestos pipes, we find that the Appellant could not establish that the contents of fly ash in asbestos pipe are more than 25%. Unlike in sheet, the use of fly ash in pipe is much lower than 25% even after excluding the water content. The appellant also not pressed much upon the issue related to pipe. Their main contention in regard to demand on pipe is that they are entitled for cum duty price and modvat credit on the inputs used in the manufacture of Asbestos Pipe. We agree with the appellant on these points that the appellant is legally entitle for the benefit of cum duty price and modvat credit as settled in catena of judgments. Accordingly the duty demand on the Asbestos Pipe shall be re-quantified after allowing the benefit of cum duty price and modvat credit. As per re-quantification submitted by the appellant, the duty on Asbestos Pipe comes to Rs.2,32,20,340/- and on asbestos sheet Rs. 2,80,000/- which is subject matter of verification by the adjudicating authority. Since the duty on pipe/sheet shall be re-quantified, the option of 25% penalty under section corresponding to such re-quantified duty on pipe and sheet is also extended to the appellant in terms of proviso to section 11AC of Central Excise Act, 1944.

10. The adjudicating authority in the impugned order confiscated Asbestos Cement pipe and sheets. Considering the submission made in this regard by the Learned Counsel, we find that the appellant in the various

correspondences informed the department regarding the stage of making entries in RG-1. It is also observed that the appellant, apart from RG-1 register have been maintaining various other records such as Wet Mixture Reports, Daily Production Reports/Register, Physical Lab Register, General shift furnishing report, Stock register,RG-1 register. Maintenance of these records were not in dispute, as some of these records were relied upon in show cause notice raising the demand, therefore, it cannot be said the stock of goods not entered in RG-1 register is with intent to clear the goods without payment of duty. Moreover, not a single incident of clandestine removal was brought on record by the Revenue. In this fact, we find that the adjudicating authority has erred in confiscating the goods on the pretext of non accountal of the same in RG-1 register. We therefore, set aside the confiscation and consequential redemption fine imposed upon the appellant.

11. As regard personal penalty imposed upon various persons related to the appellant company, we find that the penalty was imposed commensurate to the quantum of total duty and in view of gravity of offence. As held by us above the duty demand has been reduced substantially and the issue involved is of interpretation of notification, therefore the personal penalty also need to be reduced. Accordingly, considering the overall facts & circumstances of the case and our above discussions, the penalty is reduced on Shri Shri A.K. Chaturvedi (Vice-president, Works) to Rs.3,00,000/-, on Shri Shri N.K. Bangur, Managing Director to Rs.3,00,000/-, on Shri Purshottam Soni (Senior G.M- Finance) to Rs.50,000/- and on Shri H.N.Maheshwari, Executive Director to Rs.2,00,000/-.

12. All the appeals are partly allowed in the above terms, except the appeal filed by Shri Basant Kumar Bangur which is abated due to his demise.

(Pronounced in the open court on 27.02.2020)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Prachi