FAX : 0532-2400149

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 05/07/2017

To
Appellant as per address in table below
Respondent as per address in table below

Final Order No. A/70598-70599/2017-SM[BR] dated 20/04/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/144/2008	**ALAKNANDA CEMENT PVT. LTD.** RAM NAGAR, INDUSTRIAL ESTATE, VARANASI
2	E/151/2008	**ALAKNANDA CEMENT PVT. LTD.** RAM NAGAR INDUSTRIAL ESTATE, VARANASI.
		Name and Address of Respondent
3		-C.C.E Allahabad 38,M.G.Marg, civil Lines, Allahabad
4		-C.C.E Allahabad 38,M.G.Marg, civil Lines, Allahabad

Other Appellants and Respondents as per Annexure

Copy To
5Advocate(s) / Consultant(s):

Vineet Kumar Singh,Advocate
5 Narain Nagar, Sector 11,
Indira Nagar,
Lucknow,
Uttar Pradesh

6 Bar Association, CESTAT, Allahabad

7 Director Publications, Customs, Excise. I.P. Estate, Delhi

8 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

9 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

10 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

11 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

12 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

13 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad -- 38

14 The ICFAI society, 52, Nagarjuna Hill, Punjagutta Hyderabad.-500082

15 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

16 C.D.R.   17 Office Copy   18 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. E/144 & 151/2008-EX[SM]

(Arising out of Order-in-Original No. MP(Dem-38/2006) 19 of 2007 dated 10/10/2010 passed by Commissioner of Customs, Central Excise & Service Tax, Allahabad)

M/s Alaknanda Cement Pvt. Ltd. **Appellant**

Vs

Commissioner of Central Excise, Allahabad **Respondent**

Appearance:
Shri Vineet Kumar Singh, Advocate for Appellant
Shri Sandeep Kumar Singh, Deputy Commissioner (AR), for Respondent

CORAM:
Hon'ble Mr. Anil Choudhary, Member (Judicial)

Date of Hearing & Date of Decision: 20/04/2017

FINAL ORDER NO. 70598-70599/2017

Per: Anil Choudhary

The appellant is engaged in manufacture of Portland Pozzolana Cement of different brands falling under chapter heading 252329.30 of the Central Excise Tariff Act, 1985. The inputs used by the appellant in manufacture of cement are clinker, gypsum, fly ash and HDPE Bags. Out of these four HDPE Bags & Clinkers are Cenvatable inputs. The officers of Preventive Wing of Central Excise inspected the factory on 28/09/2005 and verified the physical stock of inputs as well as final products in presence of Girish Narain Mishra – Plant Supervisor and two independent witnesses. The stock position was found as under: –

Sl. No.	Name of Item	Stock Verified	As per record	Shortage/Excess
1	Clinker	375.00 MT	7525.421 MT	(-)7159.421 MT
2	HDPE Bags	23650 Bags	29299.00 Bags	(-) 5649 Bags
3	Gypsum	55.00 MT	67.022 MT	(-) 12.022 MT
4	Fly Ash	185.00 MT	80.383 MT	(+) 104.617 MT
5	Cement	351.00 Bags	351.00 Bags	NIL

Moreover there was some shortage in the stock of Gypsum & some excess in the stock of Fly Ash which are Non-cenvatble inputs. Credit balance was found to be Rs.14,57,653/- in RG 23A Part II. Shri Prabhu Narain Tiwari in his statement dated 26/09/2005 stated that one person comes from the factory everyday and he brings the stock position of the firm at the end of the day to their office located at Varanasi and the same is entered into the records and sometimes the stock position is communicated on telephone from the factory to the office. Shri Girish Narain Mishra – Plant Supervisor in his statement dated 29/10/2005 confirmed the stock position of inputs found on 28/09/2005. On summons issued to Mr. Kamal Potddar - Manager of the Company, his statement was recorded on 29th September, 2005 wherein he stated that production in the factory was started from April, 2005 when they took over the charge of the unit from previous management. At present with one old machine, they are carrying out production of cement and another one is under process of installation. After installation production capacity will be around 300 MT per day. However, only 35 to 40 MT cement is produced in a day, as the machine is old and runs only 10 to 12 hours per day due to frequent breakdowns. On the question of excess/shortage he stated that at the time of taking over of the factory, it was told by the previous owners of the unit that the physical stock of clinker was 3912.00 MT as shown in the stock register and also other stocks as per the stock register. Since they were new in this field and due to lack of experience, could not verify the stock position. So far excess Fly Ash is concerned he explained that a truck loaded with Fly Ash (about 31.830 MT) reached the factory on the day, which is included in the physical stock and that the same could not be entered in the stock register till the arrival of the inspection team. Mr. Kamal Potddar - Manager of the Company accepted the shortage/excess of Clinker, Gypsum & HDPE Bags in the stock. Further statement of Mr Kamal Potddar was recorded on 7th December, 2005 wherein he accepted the difference – shortage/excess in stock, as found at the time of physical verification of the stock on 28th September, 2005 by the Preventive Officers. Further by communication dated 25/10/2005, the appellants informed the Revenue that the losses occurred due to natural reasons and that at the time of taking over of the factory in April, 2005, the physical stock of clinker was nil. Whereas as per record, the stock of clinker was 3912.00 MT. It was further informed that during the course of packing of finished goods in HDPE Bags, some bags are damaged and as such shortage of bags was noticed at the time of inspection.

4. It appeared to Revenue that the reasons for shortage narrated by appellant are not tenable and an afterthought, as the physical stock of clinker was nil at the time of taking over the factory. The same should have been got verified from the Department and the appellant should not have utilized the Cenvat credit related to such clinker. Even if it is accepted that stock of clinker on taking over the factory was nil, still appellant have not explained the differences just saying that it is due to natural loss. In inspection and verification by revenue, the discrepancy in the stock of clinker comes to approximately 49% of the clinker purchased by them, as it is evident from Range Officers report dated 20th January, 2006. As per the said report, appellant have received 7,946.300 MT clinker during the period from February, 2005 to 27/09/2005 and used 3682.187 MT during the said period. At the time of inspection only 375 MT of clinker was found on floor. As such shortage of clinker noticed during the said period is 7946.300 - 3682.187 - 375.00 or 3889.113 MT which is approximately 49% of the total clinker received by the appellant during the said period. It further appeared to Revenue that under the provisions of Cenvat Credit Rules, statutory duty is cast on the appellant-assessee to maintain proper records in respect of inputs and reflect the same in the records. Any manufacturer buys further inputs when he finds that the

available quantity of inputs is adequate to sustain the production, which is simply not possible unless the stock of inputs is checked. The party has been buying further quantity of clinker for manufacture of cement obviously noticing inadequate stock of clinker. After all a manufacturer needs no Central Excise Officer to tell them the shortage of inputs. It further appeared that the appellant have cleared or removed Cenvatable inputs namely clinker and HDPE Bags without paying duty or reversing the Cenvat credit taken by them and suppressed this vital fact from the Department. In the ER-1 return for the month of November, 2005, submitted in the range office appellant have intimated to have reversed the Cenvat credit taken on the inputs of Rs.14,17,500/- + Education Cess Rs.28,350/-, vide debit entry dated 26/11/2005, under protest. It was also informed to Revenue that appellant have further reversed Cenvat credit taken on inputs Rs.2,45,000/- + Education Cess Rs.4,900/-, vide debit entry dated 24/03/2006 as such total Cenvat credit reversed or debited is Rs.16,95,750/-. Accordingly, the appellant was required to show cause vide Show Cause Notice dated 30/08/2006 as to why Cenvat credit wrongly taken by them on the inputs found short to the tune of Rs.25,71,875/- (as per details given Annexure-I to SCN) be not demanded and confirmed and further why not the credit so far reversed be not appropriated and the balance Rs.8,76,125/- be not demanded with further proposal to impose penalty under

Rule 15(2) of Cevnat Credit Rules, 2004 with further proposal to impose penalty under Rule 27 of Central Excise Rules, 1944, for failure to maintain proper records.

5. The appellants contested the Show Cause Notice by filing reply, it was urged that the allegation of clearance/removal of Clinker & HDPE Bags clandestinely is vague and presumptive and not corroborated with any evidence. No instance of any clandestine removal is cited or brought on record. It was further stated that clinker is transported to their factory over a distance of about 250 km. and the same is prone to handling and transportation loss. Such losses are natural loss or normal loss in the ordinary course of business. It was further urged that the stock taking was not done by way of actual measurement. The same was done by way of approximation, as there was no weigh bridge or other equipment capable of measuring the stock available in the plant. It was also stated that the appellants have applied for remission under Rule 21, before the appropriate authority. The appellant's cement plant is located at Ramnagar, Chandauli which is a mini cement plant. The principal raw material clinker is brought from J. P. Cement and Maiher Cement. Both are situated at a distance of about 300 km. Further, the road condition is bad and good part of the road is through mountainous region, which further increases the transit loss. That no weighbridge is available inside the plant and the clinker was stored in the open.

Further, the conveyor belt is also not properly covered, which results in handling loss during the process of production. So far the loss of HDPE Bags is concerned the same have occurred during the packing process, wherein in normal course, some bags get damaged in the process of filling and packing, which have to be discarded. It is further stated that there is no deliberate default and/or contumacious conduct and/or suppression of facts on their part. The loss occurred is in the ordinary course of the business, due to nature of the raw materials. There is no dispute about the dispatch of Clinker & HDPE Bags to the appellant and the receipt of the same. The entries are made on the basis of invoice. Further, from the statement of Plant Supervisor - Shri G. N. Mishra, it is evident that only stock register of cement was available in the factory and the rest of the records were maintained in the office situated at Varanasi. He further stated that there is no case of any abnormal loss, but whatever loss occurred, have occurred over a period of last 4-5 years, in the course of handling, transportation and manufacture, and is a normal loss. That there is no instance of any removal of Cenvatable inputs clandestinely nor any such buyer of the Cenvatable inputs have been identified. In view of the admitted fact that the clinker is restored on the factory floor, in the open the same also spreads over the area and some part of it becomes unrecoverable over the course of time due to mixing with the soil and/or erosion, etc. It is an apparent fact that the factory shed has a thick layer of clinker which was not taken into account at the time of stock picking. The ld. Counsel for the appellant also urged that the shortage in handling and transportation of clinker have been accepted by Hon'ble Allahabad High Court in the case of U. P. State Cement Corporation Ltd. *Versus* Union of India reported at 1996 (86) E.L.T. 6 (Allahabad) wherein under similar facts and circumstances, where the manufacturing point of clinker and the cement plant are situated about 125 km. away. The Hon'ble High Court relying on its earlier judgment and also judgment of Hon'ble Supreme Court in the case of J. K. Steels Ltd. *Versus* Union of India reported at 1978 (2) E.L.T. (J 355) (SC) observed that Revenue have not disputed that the transit losses have actually occurred in the handling and transport of cement clinker from the clinkerization plants to the cement plant at Chunar. The two places of storage are about 125 km. away from each other and the goods are admittedly carried in open trucks and open wagons. Neither of them is spillage proof. The extent of shortage is not regulated by any statutory provision nor by the Collector, while granting the concession under Rule 192, prescribed the extent of handling loss that would be permissible. Therefore, any loss that occurs during transit, for causes which are normal has to be allowed. The variation in the shortage shows that it is not manipulated. In the circumstances, the entire shortage has to be deemed to be natural/normal/incidental and unavoidable in the handling and transport of clinker from one place to another, and it cannot be said that the clinker to the extent of the shortage was not duly accounted for by the assessee.

6. The aforementioned ruling in U. P. State Cement Corporation Ltd. *Versus* Union of India reported at 2002 (145) E.L.T. 513 (Allahabad) was followed by the Hon'ble Allahabad High Court in its subsequent ruling in the case of same assessee taking note that the Revisional Authority of the Central Government under the Central Excise Act, have accepted 2% loss of clinker in handling and transport. The Hon'ble High Court observed that the loss of Cement - Clinkers in handling and transport from Dala and Churk to Chunar factory was a natural loss and full exemption was justified, and consequently quashed the impugned orders and granted full exemption of the loss of Cement - Clinkers. The Hon'ble High Court further directed the Revenue Authority to grant full exemption for the loss of Cement - Clinkers from Central Excise duty.

7. The ld. Counsel further urges that as per the records of the appellant during the period 1998-99 to 2004-05, 81,067 MT of clinkers were received in the factory and it is undisputed fact that clinker is subject to transportation, handling and manufacturing loss. He further states that if the data for this period is taken into account the loss comes to about 4 to 5% of the total quantity of clinker which is definitely a normal loss.

8. The Show Cause Notice was adjudicated on contest vide Order-in-Original dated 10th October, 2007 and the proposed demand of Cenvat credit was confirmed for Rs.25,71,875/- and further the amount already deposited during investigation under protest Rs.16,95,750/- was appropriated with further direction to pay the balance demand Rs.8,76,125/- along with interest and further equal amount of penalty Rs.25,71,875/- was imposed under Rule 15(2) of Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944 and further penalty of Rs.5,000/- was imposed under Rule 27 of Central Excise Rules, 2002 on the appellant company for contravening the provisions of Central Excise Act /Rules made thereunder.

9. The appellant have preferred appeal before this Tribunal on the various grounds as hereinabove noticed. Accordingly, the appellant prays for setting aside the impugned order under the admitted facts that there is no clandestinely removal on the part of appellant found by the Revenue and also in view of the ruling of Hon'ble Allahabad High Court in the case of U. P. State Cement Corporation Ltd. *Versus* Union of India (supra).

10. The ld. A. R. for revenue relies on the impugned order. He further draws my attention to findings in paragraph 17 of the impugned order. Although in the instant case, there is no finding or any corroborative evidence for removal or clearance without payment of duty of the Cement – Clinker, ld.

Commissioner have referred to a previous litigation, wherein this Tribunal vide final order dated 1st August, 2007 in the case of this very appellant have referred to the observations of this Tribunal – "the contention of Revenue is that appellants are clearing the goods under the fake invoices and some of the invoices are having same serial numbers with different dates. The contention is same serial number is used on different dates for clearance of goods. Therefore, it cannot be said that the invoice which was recovered from the place of the appellant is the same invoice, which was recovered from the place of the customer. There are parallel set of invoices under which goods were cleared and the quantity does not tally with the suppressed production. Hence the demand is rightly made." The ld. Commissioner have relied on the findings in the previous litigation between the parties and drawn adverse view, that the appellant have been engaged in clandestine removal of cement and suppression of production. Accordingly, the ld. A. R. prays for dismissing the appeal.

11. Having considered the rival contentions and on perusal of facts on record, I find that there is no allegation in the Show Cause Notice of any clandestine activity on the part of the appellants. The whole Show Cause Notice is based on the apparent shortage found at the time of inspection. Moreover, I find that the valuation of stock have been done basically by way of eye estimation, which is definitely prone to error. Further, I find that this issue have been repeatedly

considered by Hon'ble Allahabad High Court, wherein the Hon'ble High Court have accepted that clinker is an item prone to handling, transportation and manufacturing loss. Hon'ble High Court have further held that such loss is under the category of normal loss requiring no special order of remission from the appropriate authority under Rule 21 of the Central Excise Rules, 2002. I, further find that the new management of the appellant which took over from the earlier management with effect from 01/04/2005, have also been negligent in their duty and responsibility, as they have not cared to prepare proper inventory of finished goods and raw materials actually available as compared with the statutory records. In view of the statements and admission by the management of the appellant, that although opening balance of clinker on 01/04/2005 as per books was 3912, but physically there was no balance of Clinker on 01/04/2005. I direct that the appellant will not be entitled to Cenvat credit on the same, which have already been debited, as it appears, under protest, during the course of investigation. However, I make it clear that the appellant shall be entitled to take credit, of the Cenvat credit reversed for HDPE Bags. Further, I find that there is no contumacious conduct nor any suppression of facts as is evident on the face of the record. In this view of the matter, I set aside the balance demand of Cenvat credit as confirmed, vide the impugned order under Rule 15 (2) of Cenvat Credit Rules, 2004. I also set aside the penalties imposed, under all the Sections and/or Rules. The appellant shall be entitled to take credit of the balance Cenvat, if any, as indicated hereinabove.

12. With the aforesaid observations the appeal is allowed in part. The appellant will be entitled to consequential benefits as indicated hereinabove.

Order be issued dasti.

(Dictated and pronounced in Court)

-Sd/-
(ANIL CHOUDHARY)
Member(JUDICIAL)

Ansari

प्रमाणित प्रति/Certified True Copy
05/07/2017
सहायक पंजीकार/Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण(C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001