

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 21481 of 2014

*(Arising out of Order-in-Original No.142/2013-C.E.
(Commr.) dated 31.10.2013 passed by the
Commissioner of Central Excise and Service Tax, LTU,
Bangalore.)*

**M/s. Fosroc Chemicals
(India) Pvt. Ltd.**

No.6203, 6204, GIDC
Ankleshwar - 393 002.

Appellant(s)

versus

**The Commissioner of Central
Excise & Service Tax,**

LTU, JSS Towers,
100 ft. Ring Road,
Banashankari III Stage,
Bangalore - 560 085.

Respondent(s)

WITH

Central Excise Appeal No. 21712 of 2014

*(Arising out of Order-in-Original No.143/2014-C.E.
(Commr.) dated 31.10.2013 passed by the Commissioner
of Central Excise and Service Tax, LTU, Bangalore.)*

**M/s. Fosroc Chemicals (India)
Pvt. Ltd.**

41st KM, N.H.-4,
Kuluvanahalli Post,
Nelamangala Taluk,
Bangalore Rural Dist. - 562 111.

Appellant(s)

versus

**The Commissioner of Central
Excise & Service Tax,**

LTU, JSS Towers,
100 ft. Ring Road,
Banashankari III Stage,
Bangalore - 560 085

Respondent(s)

AND

Central Excise Appeal No. 20158 of 2019

*(Arising out of Order-in-Original No.517/2018 CT dated
26.12.2018 passed by the Commissioner of Central Excise
(Appeals-II), Bangalore.)*

**M/s. Fosroc Chemicals (India)
Pvt. Ltd.**

Embassy Point
Door No.150, 2nd Floor
Infantry Road
Bangalore – 560 001.

Appellant(s)

versus

**The Commissioner of Central
Excise (Appeals)**

Bangalore North West Commissionerate
Bangalore.

Respondent(s)

Appearance:

Mr. B. V. Kumar, Advocate

For the Appellant

Mr. H. Jayathirtha,
Superintendent (AR)

For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20887 - 20889 /2023

Date of Hearing: 15.06.2023

Date of Decision: 15.06.2023

Per : R. BHAGYA DEVI

The appellants, M/s. Fosroc Chemicals (India) Pvt. Ltd., (FICPL) are manufacturers of construction chemicals falling under Chapter Heading 38, 32 and 34, of the Schedule to the Central Excise Tariff Act, 1985. They also avail CENVAT credit as per the provisions of the Cenvat Credit Rules. On detailed examination of the products and their manufacturing process, the Commissioner found that the goods are classifiable under different Chapter Headings as against the classification claimed by the appellant. Aggrieved by this order, the appellant is in appeal claiming that for certain products the classification

claimed by them was correct and therefore to that extent the appeal has to be allowed.

2. The learned counsel on behalf of the appellant put forth the following submissions:

2.1 The Commissioner in the impugned order at para 44.4 classified the products as follows:

Sl. No.	Product	As classified by M/s. FCIPL	Now reclassified under CSH
1	Conbextra GP series	38244090	38245090
2	Conbextra AT	38244090	38245090
3	Conbextra HES	38244090	38245090
4	Conbextra HF	38244090	38245090
5	Conbextra HR	38244090	38245090
6	Conbextra UHS	38244090	38245090
7	Conbextra UW	38244090	38245090
8	Expocrete EC	38244090	38245090
9	Nitobond SBR	38244090	38245090
10	Nitoflor Hardtop/ Hardwear/Level Crete	38244090	38245090
11	Superpatch	38244090	38245090
12	Renderoc	38244090	38245090
13	Epoxy Nitozinc Primers	38244090	38245090
14	Reebaklens	38244090	34022090
15	Nitoflor SOL	38244090	34022090
16	Conbextra EP series	382440	32149020
17	Conbextra EBGM	382440	32149020
18	Exposeal UW	382440	32141000
19	Expocrete EUW	382440	32149010
20	Nitocote SN Series	382440	32149010
21	Nitocote VF	382440	32149090
22	Nitofill EPLV	382440	32149090
23	Colpor	382440	32149090
24	Decofill	382440	32149090
25	Brushbond	382440	32149090
26	Brushbond RFX	382440	32149090
27	Brushbond TGP	382440	32149090
28	Brushbond Ti Flexicoat	382440	32149090
29	Lokfix Range	382440	32149090
30	Nitobond AR/HAR/ARM	382440	32149090
31	Nitobond BB, EP & PC	382440	32149010
32	Nitoflor Topcoat	382440	32149010
33	Nitoflor EPW	382440	32149010
34	Nitoflor SI-Conductive Dissipative Topcoat/undercoat	382440	32149010

Sl. No.	Product	As classified by M/s. FCIPL	Now reclassified under CSH
35	Nitoflor EPU / EUS	382440	32149010
36	Nitoflor SL Range	382440	32149010
37	Nitoflor TF, TS	382440	32149010
38	Nitoflor Uranguard series	382440	32149010
39	Nitomortar series	382440	32149090
40	Nitoseal	382440	32149090
41	Nitotile EPW	382440	32149090
42	Nitotile GP	382440	32149090
43	Nitotile Grout	382440	32149090
44	Nitotile GTA	382440	32149090
45	Nitotile MPA	382440	32149090
46	Nitowrap	382440	32149010
47	Pimers 20, 4, 7E	382440	32149010
48	Thioflex GG/PG	382440	32149090
49	Dekguard S/Std/S300	382440	32149090
50	Nitocote AP/EP/UR	382440	32081090
51	Nitoflor FC	382440	32149010
52	Nitoprime	382440	32081090
53	Nitoproof	382440	32100090
54	Proofex Torchseal	382440	32100090

2.2 The learned counsel submitted that serial number 1 to 13 of the table below, there is no change in the rate of duty and as such, no revenue implication, hence, they accepted the said classification by the Commissioner.

Sl. No.	Product	As classified by M/s. FCIPL	Now reclassified under CSH
1	Conbextra GP series	38244090	38245090
2	Conbextra AT	38244090	38245090
3	Conbextra HES	38244090	38245090
4	Conbextra HF	38244090	38245090
5	Conbextra HR	38244090	38245090
6	Conbextra UHS	38244090	38245090
7	Conbextra UW	38244090	38245090
8	Expocrete EC	38244090	38245090
9	Nitobond SBR	38244090	38245090
10	Nitoflor Hardtop/Hardwear/Level Crete	38244090	38245090
11	Superpatch	38244090	38245090
12	Renderoc	38244090	38245090
13	Epoxy Nitozinc Primers	38244090	38245090

2.3 He further submits that the dispute is limited to serial number 14 to 54 of the above list at para 2.1. With regard to the

14 products mentioned below, the classification is based on opinion given by IIT Madras, hence they accept the classification. It is also submitted that these 14 products are required to be assessed under Section 4A of central Excise Act 1944 on account of reclassification. However, since these products are supplied in bulk and sold to industrial consumers/institutional consumers in large quantities, MRP is not applicable in terms of Rule 2A of the Standard of Weights and Measures (PC) Rules, 1977 and Rule 3 of Chapter II of the Legal Metrology (Packaged Commodities) Rules, 2011. Hence, they request for valuation under Section 4 as against the Section 4A as claimed by the Revenue.

Sl. No. (as in para 2.1)	Product	As classified by M/s. FCIPL	Now reclassified under CSH
21	Nitocote VF	382440	32149090
22	Nitofill EPLV	382440	32149090
23	Colpor	382440	32149090
24	Decofill	382440	32149090
40	Nitoseal	382440	32149090
41	Nitotile EPW	382440	32149090
42	Nitotile GP	382440	32149090
43	Nitotile Grout	382440	32149090
44	Nitotile GTA	382440	32149090
45	Nitotile MPA	382440	32149090
47	Pimers 20, 4, 7E	382440	32149010
48	Thioflex GG/PG	382440	32149090
49	Dekguard S/Std/S300	382440	32149090
50	Nitocote AP/EP/UR	382440	32081090

2.4 In respect of remaining 27 products which are given below:

Sl.No. (as in para 2.1)	Product	As classified by M/s. FCIPL	Now reclassified under CSH
14	Reebaklens	38244090	34022090
15	Nitoflor SOL	38244090	34022090
16	Conbextra EP series	382440	32149020
17	Conbextra EBGM	382440	32149020
18	Exposeal UW	382440	32141000

Sl.No. (as in para 2.1)	Product	As classified by M/s. FCIPL	Now reclassified under CSH
19	Expocrete EUW	382440	32149010
20	Nitocote SN Series	382440	32149010
25	Brushbond	382440	32149090
26	Brushbond RFX	382440	32149090
27	Brushbond TGP	382440	32149090
28	Brushbond Ti Flexicoat	382440	32149090
29	Lokfix Range	382440	32149090
30	Nitobond AR/HAR/ARM	382440	32149090
31	Nitobond BB, EP & PC	382440	32149010
32	Nitoflor Topcoat	382440	32149010
33	Nitoflor EPW	382440	32149010
34	Nitoflor SI- Conductive Dissipative Topcoat/undercoat	382440	32149010
35	Nitoflor EPU / EUS	382440	32149010
36	Nitoflor SL Range	382440	32149010
37	Nitoflor TF, TS	382440	32149010
38	Nitoflor Uraguard series	382440	32149010
39	Nitomortar series	382440	32149090
46	Nitowrap	382440	32149010
51	Nitoflor FC	382440	32149010
52	Nitoprime	382440	32081090
53	Nitoproof	382440	32100090
54	Proofex Torchseal	382440	32100090

The learned counsel claims that the classification done by the Commissioner without any evidence or any test reports or any expert opinion is baseless and needs to be set aside. Based on various expert opinions such as technical opinion provided by Civil-Aid Techno clinic Private Limited, Bangalore, the impugned products are classifiable under Chapter Sub-Heading 3824 40 10 and not under Chapter Sub-Heading 3824 90 90. He further submitted that the Revenue did not get the products tested by any Chemical Examiner of the Department neither have obtained any technical opinion of a recognised testing agency; and in the

absence of any such reports, the submissions made by the appellant on the basis of technical opinions should not be brushed aside. To substantiate this claim, they have relied upon the following decisions:

- Bharat Textile Processing vs CC, Tuticorin: 2004 (171) ELT 86 (T)
- Wipro GE Medical System Ltd. vs. CC: 2006 (206) ELT 400 (T)
- Inter-continental (India) Ltd. vs. UOI: 2003 (154) ELT 37 (Guj.)
- CCE, Nagpur vs. DCL Polyesters Ltd.: 2000 (122) ELT 911 (Tri.)

2.5 It is also submitted that the appellants have been regularly filing the classification list as required under Rule 173B of the erstwhile Central Excise Rules, 1944 and the Department had approved such classifications filed from time to time under the heading 3824 of Central Excise Tariff Act, 1985. Appellants also claimed that they were regularly filing the monthly RT-12/ER-1 Returns with the concerned Range Officers and audit officers visited their units at regular intervals. In view of the above, they cannot be alleged with suppression of facts with intention to evade payment of duty and therefore the duty needs to be redetermined only for the normal period.

3. The authorised representative of the Department reiterating the findings of the Commissioner submits that the Commissioner was right in classifying the products and invoking suppression in as much as the appellant had wilfully suppressed the classification of the products in dispute.

Findings in respect of Appeals Nos. E/21481/2014 and E/21712/2014:

4. Heard both sides in detail. On perusal of the records of the case, we find that the issue to be considered in the present case relates to classification of the products manufactured (para 2.1 above) by the appellant and whether the products are required to be assessed/valued under the provisions of Section 4/4A of the Central Excise Act, 1944.

4.1 Appellants have accepted the reclassification in respect of products Sl. No. 1 to 13 as listed at para 2.2 and the Commissioner has duly noted that since the rate of duty remains the same there is no revenue implication as such and therefore to this extent the order has been accepted by the appellant.

4.2 Now the dispute is limited to only 41 products out of the 54 products listed at para 2.1. Out of these 41 products, the appellant before us accepts the classification made by the Revenue in 14 products as shown at Sl. No. 14 to 20, 25 to 39, 46, 51 to 54 as listed in para 2.3 supra. Consequent to reclassification, the goods are liable to be assessed under Section 4A, however, the appellant disputes the valuation of these products under Section 4A as against Section 4 of the Central Excise Act, 1944 on the pretext that the products are cleared to industrial consumers in bulk packages and therefore, Section 4A is not applicable in terms of Rule 2A of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977. Rule 2A of the above Rules reads as follows:

The provisions of this chapter shall not apply to

- a) packaged of commodities containing community of more than 25 kg over 25 L excluding cement and fertiliser sold in bags upto 50 kg; and
- b) packaged commodities meant for Industrial consumers or Institutional consumers.

Explanation:- for the purpose of this rule

- a) Institutional consumers means those consumers who buy packaged commodities directly from the manufacturers/Packers for service industry like transportation (including airways, railways), hotel or any other similar service industry.
- b) Industrial consumer means those consumers who buy packaged commodities directly from the manufacturers/Packers for using the product in their industry for production etc;

The Commissioner in the impugned order dated 31.10.2013 at para 49 has clearly stated that the unit quantity packages in respect of the above products did not exceed 25 kgs. He has extracted copies of invoices to show that the clearances were made to building contractors, applicators, distributors and on stock transfers to their own depots. The appellant has also produced various copies of invoices before us in Volume-1A and

on perusal of these invoices, we find that the observations made by the Commissioner in the impugned order appears to be correct. Moreover, in none of these invoices, quantity cleared is above 25 kgs/25 litres and clearly marked as 2.9 kgs or 2.7 kgs which are seen to be in small packages. Perusal of some of the invoices, show that in invoice No. BNGMI 03085 10-11 dated 31.08.2010 for the item 'Nitocote', the quantities cleared to Karan Agencies are 2.7 kgs and 4L. Similarly, in the case of 'Colpor' product, vide Invoice No. BNGMI 02765 10-11 dated 18.8.2010, the quantities cleared to Sri. Mitra Consultancy Services are 3L, 3.2kg cleared; and for the product 'Dekguard' cleared to Shashwath Solutions vide Invoice No. BNGMI 02053 10-11 dated 14.7.2010 the quantities are 20L. Under no stretch of imagination, these clearances can be considered as clearances made to industrial consumers in bulk packages and therefore, the observations made by the Commissioner are factually correct and hence, the assessment under Section 4A is appropriate. Therefore, we uphold the classification of the above 14 products as accepted by the Revenue and the appellant; and the valuation of these 14 products will be under Section 4A as per the Standard of Weights and Measures (PC) Rules, 1977. Accordingly, the demand for these products is upheld.

4.3 With regard to the remaining 27 products as listed at para 2.4, we find that the Commissioner has decided the classification without getting the products tested and without considering the test reports placed by the appellant on record. The test report

given by ISO-LABS Construction & Environmental Materials Testing Laboratory, Bangalore dated 5.3.2019 is placed below:

ISO - LABS

Construction & Environmental Materials Testing Laboratory

Ref: ISO-LAB: CR/ 195/03/2019
Test Order dated: 02.03.2019

Date: 05.03.2019

Issued to: M/ S FOSROC CHEMICALS INDIA PVT.LTD
41th KM, NH4, Kuluvanahalli Post, Nelamangala Taluk
Bengaluru Rural District-562111

TEST REPORT ON REEBAKLENS SAMPLE

Source of sample for testing : Sample supplied by the customer
Customer's reference : E-mail letter reference Dated 05.03.2019
Sample received for testing on : 02.03.2019
Total number of samples tested : 01(one)
Product description # : Reebaklens (HCL Based)
UIN : 226
Project# : Not Specified
Period of Test : 02.03.2019 to 05.03.2019
Condition of sample during testing : Satisfactory

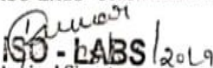
Sl. No.	Parameter Test	Test Results	Method of Testing
1	Estimated Assay Content of Hydrochloric acid(HCl)	18.24%	Lab Method
2	Specific Gravity	1.082	IS: 265
3	Iron (as Fe)	54.60 mg/l	IS:3025(Part 53)-2003 cl.6 Reaff.2014
4	Lead (as Pb)	48.62 mg/l	IS:3025(Part 47)-1994
5	Mercury	BDL	IS:3025(Part 48)-1994 cl.5 Reaff.2014
6	Ammonia	BDL	IS:3025(Part 34)-1994 cl.2.5 Reaff.2014

As furnished by the customer

BDL-Below Detection Limit

Note: 1. The test results issued relate only to the above items tested.
2. Report shall not be reproduced except in full, without the written approval of the lab.
3. Any corrections invalidate this report.

for ISO-LABS- Construction materials testing laboratory


ISO - LABS 2019
Authorized Signatory
Environmental Products Testing Laboratory
Employee Code:
#22, 2nd Floor, 13th Cross, Muniyappa Layout,
Devinagar Main Road, Maruthi Nagar,
Bangalore - 560 094.


Verified By

End of report (Page-1/1)

22, 2nd Floor, 13th Cross, Muniyappa Layout, Located on Ring Road Near BEL Circle & Hebbal, Devinagar Main Road, Maruthi Nagar, Bangalore - 560094. Mob: 9741847323 | Email: info@isolabs.in | customercare@isolabs.in
www.isolabs.in

Report from Dr. R. Sundaravadivelu, FNAE, Professor of Department of Ocean Engineering, IIT Madras dated 1.7.2013 is placed below:



DEPARTMENT OF OCEAN ENGINEERING
Indian Institute of Technology Madras
Chennai 600 036, India

Dr. R. Sundaravadivelu FNAE
Professor

No.IC/13-14/OEC/FOSROC/RSUN/Ltr 0107

1.07.2013

The Vice President

Fosroc Chemicals India Pvt Limited

No.38,Sapthagiri Palace, 12 th Cross

CBI Road Ganganagar North

Bangalore - 560032

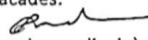
Dear Sir,

Sub: Classification Of Fosroc products as per Central Excise Tariff Act

With reference to your request, Please find attached the classification code as per CETA for the key brands. This document is prepared based on the specifications provided in the FOSROC product catalogue updated in 2012 and the specifications prepared by IIT Madras for many completed and ongoing repair and rehabilitation projects in marine civil works for the last 25 years.

Most of the products manufactured by Fosroc are not used for improving the appearance or for architectural features. The products are used as construction chemicals for enhancing the strength, and durability properties. The products for repair and rehabilitation are used either as an additive to cement, mortar or concrete or as a standalone dry mix concrete.

Only few products like Nitofill, Nitoseal and Nitotile are used as surface preparations for walls, floors and for facades.


(R. Sundaravadivelu)

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email: rsun@iitm.ac.in; rsun.oec@gmail.com

Appellants in their written submissions dated 1.7.2013 have stated that Dr. R. Sundaravadivelu, FNAE, Professor of Department of Ocean Engineering, IIT Madras had certified regarding the characteristics of each product and there is also letter dated 28.6.2013 from Dr. R. Nagendra, Technical Director

from Civil-Aid Technoclinic Pvt. Ltd. wherein technical opinion is given in some of the products. Therefore, we direct the adjudicating authority to consider all the test reports/technical opinions placed on record by the appellant along with the opinion given by IIT, Madras before concluding the classification of the above 27 products as listed at para 2.4. Since the valuation under Section 4A of the Central Excise Act, 1944 depends on the classification of the products, the same may be considered after redetermining the classification based on the technical reports referred above.

4.4 The appellants have also pleaded that regular returns were being filed classification was approved from time to time and it was in the knowledge of the department, therefore, the question of invoking proviso to Section 11A does not arise. Without any opinion on these facts, we remand the matter to the Commissioner to dwell upon classification, valuation and for demanding duty for the extended period after taking into consideration the fact that classifications were approved and regular returns were filed regularly by the appellant.

Findings in respect of Appeal No. E/20158/2019

5. The show-cause notice in respect of this appeal was for the period February 2016 to December 2016, which is well within the normal period of one year under Section 11A(1) of Central Excise Act, 1944. However, the issue on merits remains the same as discussed above with regard to 54 products manufactured by the appellant, out of which classification with

regard to 13 products have been accepted and with regard to 14 products as listed at para 2.4 though the classification has been accepted by the appellant but they have disputed valuation under Section 4A. However, as per our discussions supra, the valuation by the Commissioner under Section 4A has been upheld. With regard to 27 products (as mentioned in para 2.4), the matter is being remanded for *de novo* adjudication based on our observations as discussed above.

6. The appeals are disposed of as follows:

- (i) Appeal No. E/21481 & 21712/2014 are allowed by way of remand for re-determining the classification and valuation for the 27 products and to examine the evidences placed by the appellant afresh on suppression and other ingredients to invoke proviso to Section 11A.
- (ii) Appeal No. E/20158/2019, the demand for 14 products is upheld and remanded to re-quantify the demand for these products. With regard to 27 products, to re-examine the classification and valuation of the products as discussed above.

(Order pronounced in Open Court.)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)