CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

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Shri R. Parthasarathy, Consultant
For the Appellant

Shri K.P.Muralidharan, AC (AR)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 05.03.2018

FINAL ORDER No. 41415-41421 / 2018

Per Bench

All these appeals since involving identical disputes they are taken up for common disposal.

2.1 The facts of the case are that M/s.Madras Cements Ltd., the appellants herein (MC, for short, appellants in Appeal Nos.E/475/2010, E/115/2011, E/377/2011, E/40001/2013 & E/40531/2014) and Ramco Cements Ltd. (RC for short, appellants in E/41480/2014, E/41270/2015), are engaged in the manufacture of cement. They were also clearing certain other products under the names “Ramco Super Fine”, “Ramco-Tile Fix” and “Ramco Super Plaster – Plastering Compound”, classifying these products under Chapter Heading 3824.90 upto 27.2.2015 and 3824.90.90 thereafter of Central Excise Tariff Act (CETA), 1985.

2.2 Department took the view that the product “Ramco Super Fine” is wall based putty and appears to be more correctly classifiable under CETA 3214.00 upto 27.02.2015 and 3214.9090 thereafter; that the product Ramco-Tile Fix appears to be classifiable under 3506.00

of CETA upto 27.02.2005 and 3506.9999 thereafter; that the product Ramco Super Plaster – Plastering Compound is classifiable under CETA 25232990.

2.3 Show cause notices were issued to the appellants proposing demand of differential duty and imposition of penalties which culminated in the impugned Orders-in-Original and resultant appeals to this forum as tabulated below :-

Appellant	Appeal No.	SCN date	OIO No. and date	Period covered	Duty involved (Rs.)	Penalty imposed (Rs.)
Madras Cements Ltd.	E/475/2010	07.09.2009	7/2010 dt. 29.04.2010	August 04 to March 09	2,00,46,367	2,00,46,367
Madras Cements Ltd.	E/115/2011	29.04.2010	31/2010 dt. 23.12.2010	April 09 to Dec 09	66,71,070	Nil
Madras Cements Ltd.	E/377/2011	28.01.2011	1/2011 dt. 27.04.2011	Jan 10 to Dec 10	1,05,66,331	Nil
Madras Cements Ltd.	E/40001/2013	06.02.2012	5/2012 dt. 12.10.2012	Jan 11 to Dec 11	1,45,23,268	Nil
Madras Cements Ltd.	E/40531/2014	22.01.2013	1/2014 dt. 06.02.2014	Jan 12 to Oct 12	1,19,15,167	Nil
Ramco Cements ltd.	E/41480/2014	28.11.2013	5/2014 dt. 29.4.2014	Nov 12 to Oct 13	1,17,94,234	Nil
Ramco Cements Ltd.	E/41270/2015	25.09.2014	4/2015 dt. 19.3.2015	Nov 13 to Mar 14	89,02,389	Nil

3. When these appeals came up for hearing on 05.03.2018, on behalf of appellants, Ld. Consultant Shri R. Parthasarathy made oral and written submissions which can be broadly summarized as under :

i) Appellants MC had set up factory in 2002 for manufacture of various products of Dry Mix Plaster. As there was no specific reference to the products in the Central Excise Tariff, they submitted detailed representation to jurisdictional Commissioner wherein they indicated that their products would get classified under Heading 3824.20 with Nil rate of duty. In a reply dated 01-02-2003, the Jurisdictional Commissionerate clarified that Dry Mix Plasters would be classifiable under CETH SH 3824.90, attracting duty at 16%. Accordingly, appellants started clearing Dry Mix Plasters on payment of duty at 16% and monthly RT-12 / E.R 1 returns were also filed within the stipulated time limit.

ii) Central Excise records were audited by the department during the year 2006-2007 and no objection with regard to tariff classification or on valuation of the goods was raised. In fact, in respect of issues raised by the audit party relating to sale of dry mix plaster through depots, appellants had subsequently made a claim for refund of excess duty paid by them of Rs.5,05,166/-, which was in fact granted to them.

iii) The present dispute was raised by the Internal Audit party in March 2009. The samples of the three impugned products were drawn for test by the Customs Laboratory. The test result of samples of Customs Laboratory was not made available to them, however proceedings were initiated by SCN dt. 7.9.2009 invoking extended time limit. Appellants were given copies of the test memo results only on 17.3.2010, after the date of personal hearing on 27.1.2010 and after making request on 19.1.2010.

iv) Appellants had furnished material composition of the three disputed items to the department vide a letter dt. 12.12.2009; hence SCN dt. 7.7.2009 and OIO dt. 29.4.2010 (in respect of Appeal No.E/475/2010) are hit by time bar for the period prior to 1.8.2008.

v) Wall Putty falling under CETH 3214 are basically puttys normally used on Dry Plastered Surfaces. Appellants' product Ramco Super Fine is used more to do plastering which gives a plastered surface. Putty is normally used on dry surfaces. However, Ramco Super Fine is meant for use both on dry and wet surfaces and the product literature contained reference to putty only to convey that the product gives the result of a putty which is normally applied on a dry surface. Reclassification has been done arbitrarily on the product pamphlet and without taking into account the technical parameters and ingredients that go into the manufacture of putty and other items referred to under the heading CETA 3214. Putty refers to a pigmented stiff plastic material which is applied by knife to the surface in order to obtain smooth surface for applying paint. Ramco Super Fine, which is cleared in powder form is mixed with water at the place of use and directly applied on the walls and ceiling more to plaster product walls / ceiling. The product once mixed with water becomes cement mortar. By virtue of its material composition, the product is a non-refractory mortar hence is only classifiable under 3824.90 upto 27.2.2005 and 34249090 thereafter is very much in order.

vi) With regard to Ramco Tile Fix, this product has been erroneously classified under CETH SH 3506 as 'prepared glues and other prepared additives'**.** This product is in the form of powder and the not in the form of semi-liquid glue or adhesive. The product is used as tile fix at the place of its use after making it in to a paste by adding water. Similar products manufactured by other manufacturer elsewhere in the country are being assessed to duty under CETA SH 3824 and not under 3506.

vii) With regard to the third product viz. Ramco Super Plaster – Plastering compound, the Commissioner has arbitrarily classified that under CETA SH 25232990 as other cement. Ramco Super Plaster –

Plastering compound consists of OPC Cement, Fly ash, Hydrated lime and polymer additives. Cement in general as per the BIS standards applicable will not contain Hydrated lime. Further, Cement falling under 2523 (all types of Cement) is used for concrete as well as plastering purpose, as against Ramco Super Plaster, which is used only for plastering purpose and it cannot be used for concreting purposes.

viii) The appellants have obtained an opinion from CSIR – National Metallurgical Laboratory Madras Centre by which all the three disputed products have been concluded as non refractory mortar based on their composition, application and usage.

ix) As per the technical opinion given by Director, Commercial Rulings Division, United States Customs Texas, Non-refractory mortar surfacing preparation are not liable to be classified under 3414905000 as Glaziers putty and on the contrary, the said mixtures would be classifiable under sub heading 382450.50.0050 HTSUS. Similarly the same customs authorities, USA has clarified that Non refractory concrete dry mix consisting of 55% lime stone and 45% cement would be classifiable under sub-heading 382450.50.0050 HTSUS.

x) The impugned order of Commissioner with regard to reclassification, assessment of duty under Section 4A for **Ramco Super Fine**, **Ramco Tile Fix** & in the case of **Ramco Super Plaster – Plastering compound** under CETH SH 2324 as other cement Rs.400/600 per MT's is not correct and therefore, the impugned orders demanding differential duty and imposition of penalty in the case of OIO dated 29.04.2010, are required to be set aside.

xi) Ld. Consultant relied on the following case laws :

1) CCE, Surat II Vs Nirmala Dye Chem
2007 (207) ELT 161 (SC)

2) Vicco Laboratories Vs CCE Goa & Thane
2007 (218) ELT 129 (Tri.-Mumbai)

3) CCE Mumbai Vs Narendrakumar & Co
2008 (232) ELT 866 (Tri.-Mumbai)

4) Gail India Ltd. Vs CCE Kanpur
2015 (323) ELT 186 (Tri.-Delhi)

5) Soma Papers & Industries Ltd. Vs CCE Nashik
2015 (326) ELT 339 (Tri.-Mumbai)

6) CCE Mumbai IV Vs Brahans Rubber Pvt. Ltd.
2015 (326) ELT 743 (Tri.-Mumbai)

7) Sunil Forging & Steel Ltd. V CCE Belepur
2016 (332) ELT 341 (Tri.-Mumbai)

8) Neel Metal Products Ltd. Vs CCE Delhi
2017 (7) GSTL 76 (Tri.-Chandigarh

4.1 On the other hand, Ld. A.R Shri K.P. Muralidharan supported the impugned orders. He submits that the adjudicating authority has correctly analysed the product literature of each of these three products and only thereafter has he arrived at the conclusions in the impugned order.

4.2 Ld. A.R further submits that reliance of appellant on the rulings of the US tax authorities, will not help their case since the said rulings are not binding and the classification is required to satisfy the description as laid down in the Central Excise Tariff of India.

4.3 With regard to contention of appellant on time bar, in respect of the first appeal, Ld. A.R submits that appellant had led the department to believe that the products are only dry mix plaster with different brand name and had actually suppressed the fact of production and clearance of the products falling under different headings of the tariff.

5. Heard both sides and have gone through the facts.

6.1 The disputes in all these appeals concern classification of the impugned products manufactured and cleared by both these appellants and consequential duty liability may arise.

6.2 We intend to take up the classification in respect of each of the three impugned products.

6.3 (i) In respect of the product "**Ramco Super Fine"**, Ld. Advocate was at pains that the product is basically a dry mix mortar hence classifiable under CETA SH 3824; that the product by virtue of its material composition is more in the nature of cement mortar in powder form and the same can be applied directly over the brick / concrete walls and ceiling which is either wet or dry as against the wall putty which cannot be applied in the same manner.

(ii) As per the appellants themselves, "Ramco Super Fine" consists of the following ingredients :

(a) White Cement – 20 to 33%

(b) Lime stone powder of High purity grade – 68 to 72%

(c) Fine sand (of size < .05 mm) – 5 to 7%

(d) Polymer Additives – 2 to 3%

(iii) A sample of 'Ramco Super Fine' was sent for test to Chemical Examiner, Customs House Laboratory. The Chemical Examiner only indicated that the sample is in the form of white fine powder and is composed of inorganic compounds of Aluminium, Calcium, Magnesium and Iron in traces. However, this report is very vague and not helpful in determining the classification.

(iv) The Technical Opinion dated 11-10-2006 proffered by CSIR-National Metallurgical Laboratory, on the basis of samples sent by the appellants themselves, confirm the product composition as claimed by the latter. In page 13 of the Report, CSIR 'infers' that Ramco Super Fine is a non-refractory product. However, in page 12, it is also conceded by CSIR that the product will be suitable for non-structural purpose in the construction industry; that it can be used for inside and outside applications on walls and ceilings and plastered surfaces.

(v) We find that the appellants claimed classification under CETA heading SH 3824 on the ground that impugned product is a non-refractory mortar. However, on perusal of the HSN heading description for 3824, submitted by the appellant themselves, in Paper Book-4, page 20, it is evident that, the heading covers "prepared binders for foundry moulds or cores"; chemical products and preparations of the chemical or allied industries not elsewhere specified or included and residual products of the chemical or allied industries not elsewhere specified or included. We find that CETA description for 38.24 during the period of dispute reads as follows :

38.24 Prepared binders for foundry moulds or cores; chemical products and preparations of the chemical or allied industries

> **(including those consisting of mixtures of natural products), not elsewhere specified or included: Residual products of the chemical or allied industries, not elsewhere specified or included**

Thus it is seen that CETA heading description for 38.24 during the impugned period also covered predominantly chemical products / residual chemicals not elsewhere specified or included.

(vi) The product literature projects Ramco Super Fine as “cement based putty” and claims that it is a better alternative to acrylic putty for cement walls and also makes the following claims about the advantages of Ramco Super Fine :

- A better alternative to gypsum or acrylic putty for the cement walls
- By using this product the customer can prevent expensive paints from cracking, flaking and peeling off
- Cement based putty and is the perfect match for the cement walls
- The customers can realize the advantages of its homogeneity in the way it teams with the wall and paints
- The interplay will give the customer a world class paint finish, in any condition
- It is an all season player and it does not flinch under any weather condition; and it is thermal insensitive, i.e. non expansion due to heat or contraction due to cold attacks ; and it will last longer

- It gives the benefit of no peeling, no flaking, no blistering, no water logging, excellent bonding with surface, improved life for paint finishes, better surface hardness, excellent crack resistance, improved breathability.

(vii) As oft reiterated by the Hon'ble Supreme court in a number of judgments, one of the tests to ascertain the classification of product would be the manner in which it is known in common parlance. The use of the product as projected by the manufacturer / seller would also be an important yardstick in this exercise. On both these counts, we find that the product "Ramco Super Fine" is known and sold as a cement based putty only.

(viii) The HSN chapter heading description for 3214 reads as follows :

> **"32.14 Glaziers' putty, grafting putty, resin cements, caulking compounds and other mastics; painters' fillings; non-refractory surfacing preparations for facades, indoor walls, floors, ceilings or the like"**

The corresponding heading descriptions in chapter SH 32.14 of the CETA, during the period of dispute are as follows :-

(Upto 27-02-2005)

32.14	**Glaziers' putty, grafting putty, resin cements, caulking compounds and other mastics; painters' fillings; non-refractory surfacing preparations for facades, indoor walls, floors, ceilings or the like, but excluding primers (heading No.32.08), varnishes (heading No.32.09)**

(After 27-02-2005)

3214	**Glaziers' putty, grafting putty, resin cements, caulking compounds and other mastics; painters' fillings; non-refractory surfacing preparations for facades, indoor walls, floors, ceilings or the like**

(ix) As clarified in the HSN, the products of heading 32.14 are "preparations of widely differing composition which are essentially characterised by the uses to which they are put; these preparations are usually put up in a more or less pasty form and in general they harden after application; however, some are in solid or powder forms; the products of this heading are usually applied with a caulking gun, a spatula, a trowel, a plasterer's float or similar tools". It is interesting to note that while the appellants have been claiming that the product is a non-refractory preparation, by virtue of the HSN clarification, we find that even non-refractory preparations also fall under the ambit of both HSN 3214 and of CETA SH 3214.

(x) Viewed in this light, we do not find any reason to interfere with the decision of the adjudicating authority reclassifying the product 'Ramco Super Fine' under CETA SH 3214.00 upto 27-02-2005 and 32149090 thereafter and also holding that the said product is required to be assessed to duty under Section 4A of the Central Excise Act, 1944.

6.4 (i) Coming to the product '**Ramco Tile Fix'**, the material composition of that product as informed by the appellants themselves is as follows :

a) OPC cement	-	35 to 40%
b) River sand (of size < 1mm)	-	56 to 62%
c) Polymer Additives	-	3 to 4%

(ii) The department seeks to classify the product under CETA SH 3506 upto 27.02.2005 and under CETA SH 3506.99.99 thereafter "as prepared adhesive not elsewhere specified or included".

(iii) The assessees have contended that Ramco Tile Fix is only a ready-to-use thin bed plaster to be mixed with water at site for fixing tiles over the floors and walls; that it is a masonry mortar and is also a workable paste used to bind construction blocks together and fill the gaps between them. They have also contended that addition of polymer additives to the extent of 3% to 4% is made to replace the cement hybrid binders and it reduces the incidence of drying, shrinkage cracking and mainly designed for repairing concrete structures. It is claimed that since cement is the main ingredient, it cannot be brought under Heading 3506 of CETA.

(iv) The sample of the product was sent for test on 05.08.2009 to the Chemical Examiner which report has indicated that the it is in the form of grey coloured powder and is composed of cement composition and along with other inorganic materials. However, the Chemical Examiner has not given any indication regarding the classification of the product. We therefore note that the Chemical Examiner report is not at all helpful either in understanding the exact composition of the product nor does it have any take way to assist in arriving at the classification.

(v) The product literature has been filed in page 35-39 of Paper Book-3. Ramco Tile Fix is projected as a "*polymer modified, cement based* and *ready to use tile adhesive; the easiest, fastest and most convenient way to fix your tiles; protects the tile and ensures a long life for your floor surfaces; longer life, excellent bond strength, good workability, better open time, easy to use, anti sagging and no pre-soaking of tiles*". The brochure also advises usage of a notch trowel and also to wear filter mask and protective clothing due to 'cementious' nature of Tile Mix. We, therefore, note that the impugned product is only sold as a cement based product with polymer additives which lend adhesive properties. It is definitely not marketed as a prepared glue or a prepared adhesive. Polymer adhesive content in the product is only around 3 to 4% with the remainder being comprised of OPC cement and river sand. Surely then, such a predominantly cement based product with miniscule percentage of polymer additive, cannot then be straitjacketed as an adhesive wholly or predominantly based on polymers of headings 3901 to 3913 or on rubber or as a synthetic glue or prepared glue or other prepared adhesives. From the facts on record, the product appears to be a cement-based mastic having addition of polymers to lend adhesive properties which would possibly bring it within the ambit of CETA SH 32.14. However, since there is no such proposal made in the SCN and since the attempt of the department to classify it under CETA SH 35.06 has not found favour with us, we would only set aside that part of the impugned order which has ordered classification of "Ramco Tile Fix" under CETA SH 3506.00 upto 27.02.2005 and 3506.99.99 from 28.2.2005. So ordered.

6.5 (i) We now come to the last item "**Ramco Super Plaster – Plastering Compound**".

(ii) As per the appellants themselves, the product consists of following ingredients :

(a) OPC Cement - 70 to 75%
(b) Fly Ash - 20 to 25%
c) Hydrated Lime - 3 to 4 %
d) Polymer additives - 1 to 2%

(iii) The appellants have sought classification of the item as a plastering compound meriting classification under CETA SH 38249090. On the other hand, the impugned order has classified the product under CETA SH 2523 2990 as "Other Cement".

(iv) It is seen that vide a test memo dt. 25.08.2009 a sample of the product had been sent for test to the Chemical Examiner, Customs Laboratory to determine whether the goods can be classified as "Dry Mortar". However, the Chemical Examiner in his report dt. 9.11.2009 has only indicated that the sample is in the form of grey coloured powder and is composed of cement composition along with other inorganic materials and has not given any indication regarding classification of the product. We therefore find that the Chemical Examiner's report neither gives any useful pointer with regard to detailed composition of the product nor any assistance to determine the classification of the item.

(v) The product literature of the Ramco Super Plaster-Plastering Compound filed in page 33-34 of paper Book-3 has been perused by us. While the product has been projected as “Super Plaster, the literature also lists the following attributes of the product :

> *“A Superior substitute to plain cement for all plaster and mortar applications; a cement based product value added through addition of hydrated lime of 80% purity and other additives; product has better ability than cement to resist cracks; additives in the product help further to improve crack resistance; has higher fineness and lower density than cement and therefore gives better finish and higher coverage ; used in the same way as cement ; the product can be used for all non structural applications*”.

Evidently, not only is Ramco Super Plaster predominantly consisting of cement upto around 75%, but also, the product is projected as a superior substitute to cement for all plaster and mortar applications. No doubt the product may have better qualities than plain cement. Nonetheless there is no gainsaying that it is still predominantly cement only upto almost 75%. Further even the literature states that it “is used the same way cement is used.

(vi) We are then not able to find any infirmity with the conclusions of the adjudicating authority that ‘Ramco Super Plaster’ is nothing but a “value added cement” meriting classification as “Other Cement” in CETA sub heading 2523 2990. Hence that part of the impugned order confirming classification of “Ramco Super Plaster – Plastering Compound” under CETA sub heading 2523 2990.

7. The appellants have also taken recourse to the rulings of Harmonized Tariff Schedule of the United Station (HTSUS) for products with brand name “Uniazul” and “Uniblock” which the mixture containing port land white cement and marble sand with the ratio of marble sand to cement being approx. 2.3 : 1. Uniblock contains 3.2% Hydrated lime and small amounts of calcium stearate, glass fiber, and pigments, in addition to cement and marble sand, the ratio of marble sand to cement being approx. 3.8 : 1. ‘Uniazul’ was described as a “thin set mortar” to be used to join tile, marble and ceramic coatings in walls and floors and ‘Uniblock’ was described as a “final finish on inside and outside walls and floor. HTSUS concluded that the mixtures are classified as “non-refractory mortar under sub heading 3824.50.0050. Appellant claims that these headings will be applicable to their products also. In the first place, we find that both Uniblock as well as Uniazul have different compositions when compared to Ramco Super Fine and Ramco Tile Fix. The ratio of sand to cement in Ramco Super Fine is approx. 1 : 4 against 3.8 : 1 for Uniblock. So also, the ratio of sand to cement in respect of Ramco

Tile Fix is approx. 3 : 2 wherein the case of Uniazul it was 2.3 : 1. In our opinion, the products are widely differing in their composition and cannot be compared. Secondly, these rulings have been given by the US authorities in respect to their tariff which may be persuasive, but cannot be said to be binding in respect of disputes under Central Excise Tariff of India or for that matter have any precedential value.

8. The duty liability in respect of the impugned products will therefore be required to be worked out, wherever applicable, as per the CETA classifications ordered above, with interest therein. However, in respect of Appeal No.E/475/2010 seeking to cover the period August 2004 to March 2009, the show cause notice has been issued only on 07-09-2009. Considering the fact that appellants had conveyed to the authorities even as early as 2002 the CETA classifications that they intended to adopt for the impugned products, we hold that much of the period covered by the SCN dated 07-09-2009 is hit by limitation. Hence the demand with interest in respect of the appeal E/475/2010 will be limited for the normal period of limitation, based on the CETA classifications ordered herein above, to the extent that such liability does arise.

9. Coming to the penalty, there is no gainsaying that the entire dispute has arisen out of a difference in interpretation *vis-a-vis* the classification of the new products brought out by the appellant for specific usages. This being the case, we are of the considered opinion that there cannot be any allegation that appellants have evaded duty by way of fraud or mis-interpretation or misstatement or suppression of facts. In the circumstances, we hold that no penalty can be imposable in this case under Section 11AC. Accordingly, that part of the impugned orders imposing penalty under Section 11AC of the Central Excise Act, 1944 cannot sustain and is therefore set aside.

10. To sum up,

(1) That portion of the impugned order ordering classification of the product **Ramco Super Fine** under CETA sub heading 3214.00 upto 27.02.2005 and under CETA sub heading 3214.90.90 thereafter and assessment to duty under Section 4A of the Central Excise is upheld.

(2) That part of the impugned order classifying **Ramco Tile Fix – High Performance Tile Adhesive** under CETA sub heading

3506.00 upto 27.02.2005 and under CETA sub heading 3506.99.99 is set aside.

(3) That part of the order classifying the product **Ramco Super Plaster – Plastering Compound** under CETA sub heading 2523 2990 is upheld.

(4) The proceedings and resultant impugned order emanating from SCN dt. 7.9.2009 for the period August 2004 to March 2009 in respect of Appeal No.E/475/2010 are hit by limitation for the major period and hence the said impugned order is set aside in its entirety including the penalty imposed under Section 11AC of the Act. The demand along with interest in respect of Appeal E/475/2010 will be limited to the normal period of limitation and will be reworked out accordingly by the adjudicating authority, based on the CETA classifications decided herein above. However, no penalty will be imposable since the entire dispute has arisen out of a difference in interpretation and there is no allegation that appellants have evade duty by way of fraud or mis-representation.

(5) The duty liability in respect of the remaining impugned orders shall be reworked on the basis of the CETA classifications upheld / set aside as above.

10. The MA filed in Appeal E/40531/2014 by the assessee for rectification of error in stay order has become infructuous as the connected appeal itself is heard and disposed. Therefore, MA stands disposed of along with Appeal E/40531/2014.

(operative part of the order pronounced in court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S)
Member (Judicial)

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