

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNALSOUTH ZONAL BENCH
CHENNAI**

Appeal No.E/126/2009

[Arising out of Order-in-Original No.06/2008 (Commr.)
dt.27.11.2008 passed by the Commissioner of Central Excise,
Coimbatore]

ACC Ltd.

Appellant

Versus

Commissioner of Central Excise,
Coimbatore

Respondent

Appearance:

Shri Raghavan Ramabadrn, Advocate
For the Appellant

Shri S. Govindarajan, 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 : 21.08.2017

FINAL ORDER No. 41783/2017

PerBench

The facts of the case are that appellant is engaged in the manufacture of cement falling under Chapter 2523 29 90 of CETA. The cement was cleared in bags of 50 Kgs each as well as in loose form. They were selling cement to retail customers as well as industrial/institutional consumers (Not for Retail sale bags viz. NFR Bags). They paid excise duty @



Rs.600/- per tonne or 12% *ad valorem* on clearances made to retail customers depending on the quantity of cement sold. As regards sale to industrial/institutional customers and self-consumption, they availed exemption under Notification No.4/2007-CE dated 01.03.2007 and paid excise duty @ Rs.400/- per tonne. During the impugned period, the Appellant claimed concessional rate of duty on 28,470.20 MT of cement cleared to various consumers. A Show Cause Notice No.03/2008 dated 08.04.2008 was issued alleging that only 2,980.95 MT of the said clearances, sold to M/s. Visaka Industries Ltd. & M/s.The Indian Hume Pipe Co. Ltd. can be said to been cleared to eligible consumers while 25,489.25 MTs which have been cleared to other than industrial/institutional consumers and hence concessional rate of duty cannot be claimed on the same. Concessional rate of duty was also denied for self-consumption of 945.05 MT of cement on ground that the cement was consumed within the factory of the appellant and not used for purpose of construction or further production of goods within the factory. The Show Cause Notice was adjudicated vide impugned order dated 27.11.2008 when the demand of differential duty of Rs.54,45,465/-, along with interest and equal penalty was confirmed. Hence this appeal.

2. Today when the matter came up for hearing, on behalf of appellant, Id. Advocate Shri Raghavan Ramabhadran reiterated the grounds of appeal



and also made oral and written submission which can be broadly summarized as under :

(i) Details of various consumers to whom NFR bags have been sold during the impugned period are as under:

SI.No.	Category of Customer	Uses	Quantity (in MT)
1.	Builders	Construction of Buildings	9,447.30
2.	Contractors	Construction of Infrastructure/ Buildings/ Govt. Projects	2307.75
3.	Govt. company	Infrastructure	1,626.00
4.	Manufacturers	Sale to Visaka Industries Ltd. & M/s. The Indian Hume Pipe Co. Ltd. – Asbestos & Cement Pipe manufacturers	2,981.00
5.	Manufacturers	Ready mix concrete manufacture	3,126.00
6.	Manufacturers	Buildings/ I.T. projects	1,215.00
7.	Charitable institutions	Buildings	144.00
8.	Educational institutions	Buildings/infrastructure	4,248.25
9.	Hospitals	Buildings/infrastructure	1,744.50
10.	Societies	Buildings	998.10
11.	Self-consumption inside factory	Construction & other purposes	945.05
12.	Stock-in-transit/ closing stock at warehouses	Unsold	632.30
Total			29,415.25

(ii) This table was submitted to the Commissioner and there is no dispute regarding the same. The only ground of denial is that the above categories do not constitute.

(iii) The goods manufactured and cleared by them are classifiable in CETH 25232990 with tariff rate of Rs.600/- per tonne during the impugned period, a fact which is not disputed. They claimed benefit of Notification



No.4/2006-CE vide Entry 1C which provided for effective duty of Rs.400/- per tonne for cement, whether or not manufactured in a mini cement plant other than those cleared in packaged form.

(iv) As per the third proviso to Entry 1C, goods cleared by them have to be treated as goods cleared in packaged form.

(v) Ld. Advocate further draws attention to Rule 2A of Chapter II of The Standards of Weights and Measures (Packaged Commodity) Rules, 1977[for short, SoW&MRules] to contend that the said provision will not apply to the cement cleared by them since they would not constitute packages to which the provisions of that chapter apply.

(vi) Issue is no longer *res integra*. It has been held in the following cases that cement cleared in packaged form (50 kg bags) to charitable organizations, builders/ developers/ ready mix concrete (RMC) manufacturers, contractors and construction firms, infrastructural development projects, educational institutions, societies and hospitals, government bodies, captive consumption, manufacturers of finished goods will qualify as sale to industrial/institutional customers:

- i. Sanghi Industries Ltd vs. CCE, 2017-VIL-462-CESTAT-AHM-CE
- ii. Ambuja Cement Ltd vs. CCE [2017-TIOL-189-CESTAT-DEL]
- iii. Prism Cement Ltd vs. CCE & CCE vs. M/s. Prism Cement, 2016-VIL-776-CESTAT-DEL-CE
- iv. Heidelberg Cement (India) Ltd. vs. CCE, 2015 (315) E.L.T. 53 (Tri.-Mum)



- v. Ultratech Cement Ltd. vs. CCE, 2015 (317) E.L.T. 505 (Tri.-Del)
- vi. CCE vs. Mysore Cements Ltd, 2010 (259) E.L.T. 30 (Kar.)
- vii. Mysore Cements Ltd. vs. CCE, 2010 (349) E.L.T. 398 (Tri. Bang.)
- viii. Grasim Industries Ltd. (Unit-I) vs. CCE, 2009 (238) E.L.T. 655 (Tri. - Chennai)
- ix. Shree Cement Ltd. vs. CCE, 2016-VIL-1020-CESTAT-DEL-CE
- x. Chettinad Cement Corp. Ltd. vs. CCE, 2015 (329) E.L.T. 845 (Tri. - Chennai)
- xi. Grasim Industries Ltd. vs. CCE, 2004 (175) E.L.T. 779 (Tri. -Del.)

(vii) In the instant case, the non-trade sector sale bags and relevant invoices are unambiguously marked as "SPECIALLY PACKED" "NOT FOR RETAIL SALE" "NOT FOR RESALE", and thus the requirement under Rule 34 of Packaged Commodities Rules has been complied with. It is thus submitted that the reliance on the case *Grasim Industries Ltd. vs. CCE, 2004 (175) E.L.T. 779 (Tri. – Del.)* is correct.

(viii) Concessional rate of duty prescribed under Entry 1C of Notification No.04/2006 is also applicable in cases where packed goods are consumed captively or held as unsold stock inasmuch as Packaged Commodity Rules are attracted only in case of a retail sale and in the present case, there is no sale at all. Hence, the quantity of 945.05 MT cement used inside the factory for repairs and construction and 632.30 kept unsold in the



warehouses during the impugned period will not attract a duty @ Rs.600/- per MT as incorrectly alleged in the O-I-O.

3.1 On the other hand, on behalf of Revenue, Ld. A.R Shri S. Govindarajan supports the adjudication. He further submits that cement packed in 50 kgs packs are covered under the SoW&M Rules and as such, Retail Sale Price (RSP) should be declared on the packs. Any clearances of cement in packed form upto 50 kgs without following the provisions of the said rule is not eligible for concessional rate of duty under Notification No.04/06-CE as amended and hence will attract tariff rate of duty at Rs.600/- per MT.

3.2 So also, quantity of 945.05 MTs used for self-consumption has not satisfied the term "for using the product in their industry for production". It is only a use for construction purpose and nothing to do with further production. Hence concessional rate of duty under Notification No.04/06- cannot be availed for these clearances also.

4.1 Heard both sides and have gone through the facts. The core issue that comes up for appellate decision in this appeal is whether the clearances of cement made by the appellant will satisfy the conditionalities of Entry 1C of Notification No.4/2006-CE dt. 01.03.2006 to benefit from reduced duty liability of Rs.400 per ton.

4.2 As already seen above, the said entry 1C seeks to cover the following goods :



"All goods, whether or not manufactured in a mini cement plant, not covered in S.No.1B, other than those cleared in packaged form;"

Discernably, to benefit from the said exemption, the primary requirement is that the goods should not be "other than those cleared in packaged form"

4.3 The Third Proviso to the Entry 1C of the notification clarifies which goods should be considered as "cleared in other than packaged form". The said provision reads as under :

"Provided also that where the retail sale price of the goods are not required to be declared under the Standards of Weights and Measures (Packaged Commodities) Rules, 1977, and thus not declared, the duty shall be determined as is in the case of goods cleared in other than packaged form;"

4.4 We therefore now will require to go the Rules to ascertain whether the retail sale prices are required to be declared or otherwise on the types of goods cleared by the appellant. The provisions of SoW&M Rules require that retail sale prices should be mentioned on packages intended for retail sale. However, Rule 2A of the Rules clarify that these requirements shall not apply to —

(a) packages of commodities containing quantity of more than 25 kg or 25 litre excluding cement and fertilizer sold in bags up to 50 kg; and

(b) packaged commodities meant for industrial consumers or institutional consumers.



Explanation: For the purpose of this rule,—

- (a) Institutional consumer—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.**

4.5 It is seen that the appellant had sold cement in packs of 50 kgs each. Except for 945.05 MTs (self-consumption) and 632.30 MTs (stock-in-transit closing stock at warehouse), the remaining portion of the disputed clearances totalling to 29415.25 MTs were sold either to manufacturers, users, asbestos and cement/pipe manufacturers, ready-mix concrete manufactures or otherwise to builders, as infrastructure/buildings/ government projects construction, educational institutions, hospitals and societies. From a combined reading of the above reproduced provisions of Rule 2A of the Rules, these genre of buyers would fall under the category of Institutional Consumer or Industrial Consumer, in our opinion. On this score itself, we find that the provisions applicable to packages intended for retail sale in Chapter II of the said rules, will not apply to the clearances of cement by the appellant to its Industrial or Institutional consumers.



4.6 It can be argued that for exemption from retail sale price will apply only where the conditionalities of both (a) and (b) of Rule 2A *ibid* are satisfied and that since packs contain only 50kgs, and not more than 50 kgs., they would still be considered as packages intended for retail sale. However, we find that in the case of *Heidelberg Cement (India) Ltd. Vs CCE Nagpur & Raigad*– 2015 (315) ELT 53 (Tri.-Mumbai), the Tribunal has ruled that word “and” between Rule 2A (a) and 2A (b) has to be read disjunctively and not conjunctively. The relevant portion of the decision is reproduced below for ready reference :

"5.2 From the above, it can be seen that packages of commodities containing a quantity of more than 25 kg or 25 litre excluding cement and fertilizers sold in bags upto 50 kg and packaged commodity meant the industrial or institutional consumer are excluded from the provisions of the said Rules. In other words, the Rules exclude two categories - the first category is packaged commodity containing a quantity of more than 25 kg or 25 litre and cement and fertilizer bags containing more than 50 kg. The second category is packaged commodity meant for industrial or institutional consumer. As regards the second category there is no restriction with respect to the quantity of the goods contained in the package. There is a 'semi colon' between the two clauses. This would clearly indicate that the word 'and' between the two clauses have to be read disjunctively and not conjunctively. In other words, in respect of both the above categories, the provisions of PC Rules would not apply."

4.7 In the event, in respect of the clearances of 25489.250 MT (26434.30 MT Less 945.050 MT) referred to in the Annexure to the Show cause notice, these clearances will necessarily have to be held as packages not intended for retail sale and to which the provisions of Chapter II of the Rules shall not apply. In view of Rule 2A thereof, duty demands in respect of these clearances will therefore not sustain and will have to be set aside which we hereby do. So ordered.



4.8 In respect of remaining 945.05 MTs for "self-consumption" inside the factory and 632.30 MTs unsold quantity at warehouses (Sl.No.11 to 12) of para 2(i) above by no stretch of imagination would these clearances can be considered as "retail sales". They would also not fall within the ambit of definition of "retail sale" and Rule 3(q) of the SoW&M Rules , which defines "Retail Sale Price" as follows :

"retail sale", in relation to a commodity, means the sale, distribution or delivery of such commodity through retail sales agencies or other instrumentalities for consumption by an individual or a group of individuals or any other consumer

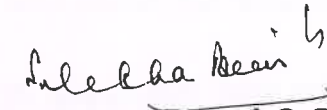
4.9 Viewed in this light, we are unable to accept the argument of the adjudicating authority that these two types of clearances amounting to 26434.30 MTs fall foul of the Notification No.4/2006-CE. These clearances, in our considered view, cannot be considered as retail sales and hence benefit of the said notification cannot be denied to them.

5. We therefore hold that the duty demand in its entirety as ordered in the impugned order will not sustain. In consequence, impugned order will have to be set aside which we hereby do, and allow the appeal with consequential benefits, if any, as per law.

(Operative part of the order pronounced in court)



(Madhu Mohan Damodhar)
Member (Technical)


(Sulekha Beevi C.S.)
Member (Judicial)

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