IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI

COURT HALL No.III

EXCISE APPEAL No.40388 OF 2021

(Arising out of Order-in-Original No.21/2021-Commr.-CE) dated 31.03.2021 passed by Commissioner of GST & Central Excise, No.1, Foulks Compound, Anai Road, Salem 636 001)

M/s. Visaka Industries Limited **.... Appellant**
Manickanatham Village, Paramathy P.O.,
Namakkal District 637 207.

Versus

The Commissioner of GST & Central Excise, **...Respondent**
Salem Commissionerate
No.1, Foulks Compound, Anai Road,
Salem 636 001

WITH

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M/s. Natesan Engineers & Contractors **.... Appellant**
212, Rajaji Nagar, Madhaiyan Kuttai P.O.,
Mettur Dam 636 452.

Versus

The Commissioner of GST & Central Excise, **...Respondent**
Salem Commissionerate
No.1, Foulks Compound, Anai Road,
Salem 636 001

APPEARANCE :

Mr. Raghavan Ramabadran, Advocate
For the Appellant

Mr. Rudra Pratap Singh, Additional Commissioner (A.R)
For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 22.08.2023

DATE OF DECISION : 21.11.2023

FINAL ORDER Nos.41048-41049/2023

ORDER : Per Ms. SULEKHA BEEVI C.S.

The issue in both these appeals being connected they were heard together and are disposed of by this common order.

1. Brief facts are that, the appellant, M/s.Vishaka Industries Limited is engaged in manufacture of Asbestos Cement Sheet, falling under Central Excise Tariff 6811 of the Schedule to Central Excise Tariff Act, 1985. The appellant is registered with the Central Excise department. The appellant was using raw materials like cement, fly

ash, cotton pulp, etc. for manufacture of final product viz., Asbestos Cement Sheet. The appellant was availing the duty exemption in terms of Notification No.6/2002-CE dt.1.3.2002 on the finished products.

2. As per notification 6/2002 at serial no.158, for goods falling under Chapter heading 68 of CETA, 1985, the duty to be paid is 'Nil' if the goods are manufactured by use of not less than 25% by weight of fly ash or phosphogypsum or using both of these. The notification states that Condition 36 has to be fulfilled. As per the notification Condition 36 reads as under:

> "*If the manufacturer maintains proper account in such form and in such manner, as the Commissioner of Central Excise having jurisdiction may specify in their behalf, for receipt and use of fly ash or phosphogypsum or both, in the manufacture of all goods falling under Chapter 68 of the First Schedule and files monthly return in the form and manner, as may be specified by such Commissioner of Central Excise, with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, having jurisdiction*".

3. The department was of the view that the appellant has wrongly availed the exemption as per the notification 6/2002 dt.1.3.2002 by accounting bogus/excess fly ash receipts. According to department, if such bogus fly ash receipts are deducted, the fly ash usage percentage for manufacture of finished products (Cement Asbestos Sheet, falling under Chapter 68) would be below 25% and that therefore, the appellant is not eligible to claim exemption of 'Nil' duty as per the notification.

3.1 The factory of M/s. Visaka Industries Ltd., Paramathy was visited by the officers attached to Headquarters Preventive Unit, Salem Commissionerate on 27.8.2005. On verification of the accounts and documents maintained by them, it was noticed that the appellant was manufacturing Asbestos Cement Sheet and was availing exemption from excise duty as per Notification 6/2002-CE. The exemption under the said notification is available to the goods falling under Chapter 68, only if not less than 25% by weight of fly-ash or phosphor gypsum or both has been used with a condition that the manufacturer maintains proper account in such form and in such manner as the Commissioner of Central Excise having jurisdiction may specify in this behalf.

3.2 During the period from April, 2003 to March 2005, the appellant was filing ER1 returns and also filed return in Form C to the Assistant Commissioner of Central Excise, Salem-II Division. In the ER1 returns, the Opening Balance, quantity manufactured and cleared were furnished in numbers, while in Form C, the quantity of fly ash received, used and the quantity of asbestos cement products produced were furnished in MTs. The appellant procured fly ash from M/s. Mettur Thermal Power Station (MTPS) and they appointed M/s. Natesan Engineers and Contractors, 212, Rajaji Nagar, Madhaiyan Kuttai Post, Mettur Dam 636452, (hereinafter referred as NEC) as transport contractor for lifting the fly ash from MTPS and transporting the fly ash to M/s. Visaka Industries Ltd, Paramathy. The Officers visited the premises of NEC also being the fly ash supplier from MTPS. Verification carried out by the Officers revealed that there was shortage of quantity of fly ash received by M/s. Visaka Industries Ltd. and the quantity of fly ash lifted by NEC from MTPS. It was observed from simultaneous investigations conducted at the appellant's factory as well as at the premises of NEC that the accounting of fly ash was not in order. The appellant as well as NEC were found to have stated in their private records about the (bogus) excess supply of fly ash purportedly made from MTPS. Statement was recorded by the Officers from Shri D. Manickavasagam, Works Manager of M/s. Visaka Industries Ltd. and from Shri. N. Santhosh Kumar, Proprietor of NEC. It appeared that though they were aware of the actual quantity of fly ash lifted, NEC has connived with the appellant and prepared faulty/bogus consignment notes and raised them for dispatch of fly ash over and above the actual quantity of fly ash lifted from MTPS.

3.3 As per the data provided by MTPS, it was noticed that if the excess quantity of fly ash recorded by the appellant as received by them for the year 2003-04 & 2004 05 was reduced, the actual fly ash content percentage in final products would fall well below 25%. Thus, the investigation and scrutiny of the various documents recovered, revealed that there was bogus fly ash receipt accounted as received from MTPS to the tune of 2251.311 MT during the year 2003-04, and 7957.690 MTs for the year 2004-05. The average percentage of fly ash recorded in the statutory record Form B and Form C for the years 2003-04 & 2004 05 was 27.91% & 26.65% respectively; but if the bogus quantity of fly ash recorded as received from MTPS, but not actually received from MTPS, as found on investigation is reduced, the fly ash usage percentage would go below 25%. As the primary condition of usage of fly ash above 25% appeared to have been disproved as per investigation, the exemption availed by the appellant under Notification No.6/2002-CE during the years 2003-04 & 2004-05 appeared to be irregular and not available for the appellant.

4. The appellants were thus issued SCN No.32/2008 dated 7.4.2008, invoking the extended period and proposing to demand duty on the finished products along with interest and for imposing penalties. The appellant replied to the SCN. The gist of the reply issued by appellant to the SCN is stated in para 5.01 of the impugned order. Some relevant paras are extracted as under:

- *The allegation that the fly ash allotted by TNEB during the period 2003-04 and 2004-05 has not reached them is totally false. They billed for the said quantity diverted to the noticee and the noticee paid for the same. During the course of investigation, many important and relevant details were left out. The purchase details of NEC and NCP were left out in the SCN. The said units have procured fly ash from other allottees of MTPS and supplied to them for which they have paid them* *extra amount over and above the normal amount of Rs.60/-, transport and service tax.*

- *Apart from the allotment of M/s. Visaka Industries from MTPS they also got materials from outside sources like agents of brick units who got allotment from thermal power stations. Apart from their usage, excess material will be sold by them many agents like NEC and NCP. These two companies supply these quantities to those companies who need more fly ash apart from their allotted quantities. They got evidence to show procurement of fly ash from other sources.*
- *They procured MTPS fly ash from other sources also viz., Siar Traders, Sakthiquhan Construction Products. The department had not conducted any enquiry with other suppliers. None of the documents related to these suppliers are relied upon in the SCN and the quantity procured form them were deliberately excluded in the worksheet.*
- *Further, they also received fly ash from VTPS and RTPP from outside source only but accounted under the head VTPS/RTPP. The department has not suspected such unallotted receipt of fly ash."*

4.1 The gist of the reply filed by co-noticee, M/s. Natesan Engineers & Contractors (Appellant in Appeal No.40390/2021) is stated in para 5.02 of the impugned order. Relevant part is extracted as under:

- *Small units and brick manufacturers who are in existence only in paper also get allotment from MTPS and many of such units will not use the allotted quota of fly ash but sell it and make profit out of it. From such units, they procured fly ash allotted by MTPS and diverted to M/s. Visaka Industries Ltd., because they are actual users.*

- *Perusal of the purchase orders would reveal that two types of supplies i.e., delivery from MTPS quota to M/s. Visaka Industries Ltd., and another type was delivery of fly ash by them from the quota allotted to others by MTPS. The* *unloading of fly ash at Sankari Yard is known to MTPS. Further in the Sankari Yard not only the fly ash lifted from MTPS by them on behalf of M/s. Visaka Industries Ltd., but also fly ash lifted on behalf of other units was unloaded, packed and removed to the respective units. So the allegation of diversion of materials meant for M/s. Visaka Industries Ltd., is incorrect.*

- *They have collected due charges including transport charges from M/s. Visaka Industries Ltd., for the supplies made and there is no allegation that they have returned the payment received from them. The deposition of Shri N. Santhoshkumar during cross examination has clearly revealed that the allegations made in the SCN have no basis. The allegation of diversion of materials meant for M/s. Visaka Industries Ltd., is incorrect In support of their claim, they furnished the copies of the allotment orders of ACC RMC to whom they are acting as agents and their authorisation letter. They have also submitted few weighment slips for the different periods mentioned in the SCN to prove their contentions.*

4.2 After due process of law, the adjudicating authority, vide OIO No.4/2009 dt.6.5.2009 confirmed the demand of Rs.13,23,85,374/- under Section 11A (2) of Central Excise Act, 1944, after allowing cum-duty benefit and imposed equal penalty under Section 11AC ibid, and penalty under Rule 25 of Central Excise Rules 2002 on the appellant, M/s. Vishaka Industries. The adjudicating authority also imposed a penalty of Rs.19,00,000/- on co-noticee, appellant, Natesan Engineers & Contractors, under Rule 26 of Central Excise Rules 2002.

5. Aggrieved by such order, the appellants filed appeal before the Tribunal and vide Final Order No.40339-40340/2018 dt.6.2.2018, the Tribunal set aside the order and remanded to the adjudicating authority for fresh consideration after giving the appellants

opportunity to furnish documents. The relevant part of the Final Order passed by CESTAT is extracted as below:

> 7. The main argument put forward by the ld. Counsel for the appellant is that apart from fly ash received from MTPS directly they were also receiving fly ash from other sources and that appellants could not produce sufficient documents to substantiate this fact during the adjudication proceedings. They have now filed the miscellaneous application along with relevant documents. One of the document is the Memorandum of Understanding between the MTPS and four cement companies Chettinad Cement Corporation Ltd., ACC Cement, RMC etc. This document evidences that these cement companies were also allotted fly ash which have been supplied to the appellant on their request. It is also their case that M/s.NEC procured fly ash from other sources in open market. On perusal of the documents produced before us and after hearing the submissions made by both sides, we are of the considered opinion that the appellant has to be given a further chance of contesting the case with the support of these documents. They have consistently pleaded in the reply to the notice as well as in the appeal that they have received supply of fly ash not only from MTPS but also from various other sources. In fact, the appellant has stated in the reply as under :
>
> > *2. At the outset, we thank the Hon'ble Commissioner for allowing cross-examination of Sri N. Santhoshkumar as witness in this case. During the cross examination held on 19/11/2008 Sri N. Santhoshkumar inter-alia started that M/s.Natesan Engineers & Contractors and Natesan Construction Products are agents to many fly ash utilization companies like cement companies ACC, Asbestos Companies like Visaka, Readymix concrete plants like ACC RMC, RMC India Ultratech Readymix, R.B.S Readymix, Ganesh Concrete etc., and brick units like Sakthi Interlock and others; that no documents are given by MTPS for them for transport; that they are using their own consignment note for those companies to whom they are supplying fly ash; that they are collecting fly ash from MTPS through tipper lorries and they are dumping the same in the Sankari Yard and from there they are packing and supplying it to many companies; that apart from the allotment of M/s.Visaka from MTPS they also got materials from outside sources like agents of brick units who got allotment from thermal power stations; that apart from their usage excess material will be sold by them to many agents like M/s.Natesan Engineers & Contractors and Natesan Construction Products;*

> *that M/s.Natesan Engineers & Contractors and Natesan Construction Products supply these quantities to those companies who need more fly ash apart from their allotted quantities.*
>
> … …
>
> 8. From the discussions made above, we are of the considered opinion that the matter requires to be remanded to the adjudicating authority who shall reconsider the whole issue after giving sufficient opportunity to the appellants to furnish documents and also reasonable opportunity of hearing. The adjudicating authority is directed to consider the documents furnished by appellants in deciding the matter. In the result, the impugned order is set aside. Appeals are allowed by way of remand with consequential relief, if any. MA is allowed."

6. Against this order passed by Tribunal, the department filed appeal before the Hon'ble High Court of Madras in C.M.A 2799 & 2800 of 2018 CMP No.21320 of 2018 with the following substantial questions of law :

> *"i) Has not the Tribunal fallen in error in ignoring the settled positions of law with regard to admission of additional evidence in the appellate state?*
>
> *ii) Has not the Tribunal fallen in error in allowing the miscellaneous application in the absence of sufficient reason for not producing these documents at the stage of adjudication?*
>
> *iii) Has not the Tribunal fallen in error in allowing the additional documents to be considered. when there was no mention of such documents by the respondent at any point of adjudication? And*
>
> *iv) Has not the Tribunal fallen in error in ignoring the settled position of law that it is the assessee, who has to strictly prove that it has satisfied the conditions to avail the benefit of exemption?"*

6.1 The Hon'ble High Court vide judgement dated 30.11.2018, upheld the Final Order passed by CESTAT. The relevant paras are extracted as below:

"25. In the instant case, the Adjudicating Authority has recorded in paragraph 23.01 of the Order-in-Original that the quantity delivered to the assessee as per the MTPS records was found to be reflected in the private register of M/s. Natesan Engineers and Contractors and that there was no dispute over this. The dispute, therefore, appears to be with regard to the quantity received from outside allottees by M/s. Natesan Engineers and Contractors. Mr. Santhoshkumar, Managing Director deposed in his cross examination held on 19.11.2008 that he had evidence to show the procurement of fly ash from other sources. The explanation given by the assessee was that those were third party documents and therefore, they took some time to get those documents.

26. In paragraph 3.1 of the order passed by the Tribunal, this submission of the assessee as placed on record. That apart, with regard to the discrepancy in the vehicle numbers, the assessee produced certain records to show that an error had occurred. Similarly, we find that in paragraphs 23.01, 23.02(i), 23.02(x), 23.02(xvi), 23.02(xxii), 23.02(xxv) and 23.02(xxvi), there were references to the stand taken by the assessee. Therefore, in our considered view, the Tribunal was justified in remanding the matter to the Adjudicating Authority to consider the evidence, which may be produced by the assessee

27. It goes without saying that if the Department doubts the authenticity of the documents. that aspect can also be gone into by the Adjudicating Authority, as there can be no bar in doing so. In our considered view the Tribunal which has decided the matter, is best judge to take a decision as to which of the documents are required to enable it to pass orders. We find that there is no error in the exercise of such discretion. Furthermore, the assessee's case is that they were not given sufficient opportunity.

28. The leamed Senior Standing Counsel for the Revenue has relied upon the decision of the Hon'ble Supreme Court in the case of Ibrabim Uddin. The said decision arose out of a civil litigation and the Court found that there were absolutely no pleadings and that there was no evidence with regard to a Will. Interpreting Order XLI Rule 27 of the CPC, the decision was rendered. In the preceding paragraphs, we have pointed out the difference in the phraseology and language in Order XLI Rule 27 of the CPC and Rule 23 of the CESTAT Rules. Therefore, we are of the considered view that the decision in the case of Ibrahim Uddin would not render any assistance to the case of the Revenue. For the above reasons, we find that there is no error in the order passed by the Tribunal.

29. Accordingly, the civil miscellaneous appeals filed by the Revenue are dismissed. The substantial questions of law are answered against the Revenue and in favour of the assessee. No costs. Consequently, the connected CMP is also dismissed."

7. Pursuant to the dismissal of department appeals by the Hon'ble High Court by which the order of remand was upheld, the matter was taken up for fresh jurisdiction. The appellant furnished further documents along with additional reply explaining the documents. It is seen from para 12 of the impugned order that the appellants had furnished explanation to various allegations in the SCN in a tabular form which has been extracted in para 12 of the impugned order. Thus, after due process of law, the adjudicating authority passed the impugned order. The operative part of this order is extracted below:

ORDER

(i) I confirm and demand an amount of Rs.13,23,85,374/-(Rupees thirteen crores twenty three lakhs eighty five thousand three hundred and seventy four only) (BED Rs.13,12,20,280/-& Education Cess Rs.11,65,094/-) towards the Central Excise duty liability on Asbestos Cement Sheets cleared by them during the years 2003-04 & 2004 05 under Section 11A(2) of the Central Excise Act, 1944, from M/s.Visaka Industries Ltd.,

(ii) I demand appropriate interest under Section 11AB of the Central Excise Act, 1944 on the amount demanded at SI.No.(i) above;

(iii) I impose a penalty of Rs.13,23,85,374/-(Rupees thirteen crores twenty three lakhs eighty five thousand three hundred and seventy four only) under Section 11AC of the Central Excise Act 1944 and Rule 25 of Central Excise Rules 2002 on M/s.Visaka Industries Ltd.,, and

(iv) I impose a penalty of Rs. 19,00,000/-(Rupees nineteen lakhs only) on M/s.Natesan Engineers and Contractors under Rule 26 of the Central Excise Rules, 2002.

8. The very same duty demand, interest and penalties were again confirmed after re-adjudication also. Aggrieved, the appellants are once again before the Tribunal.

9. The Learned Counsel, Shri. Raghavan Ramabhadran appeared and argued for the appellant. His submissions are summarized as under:

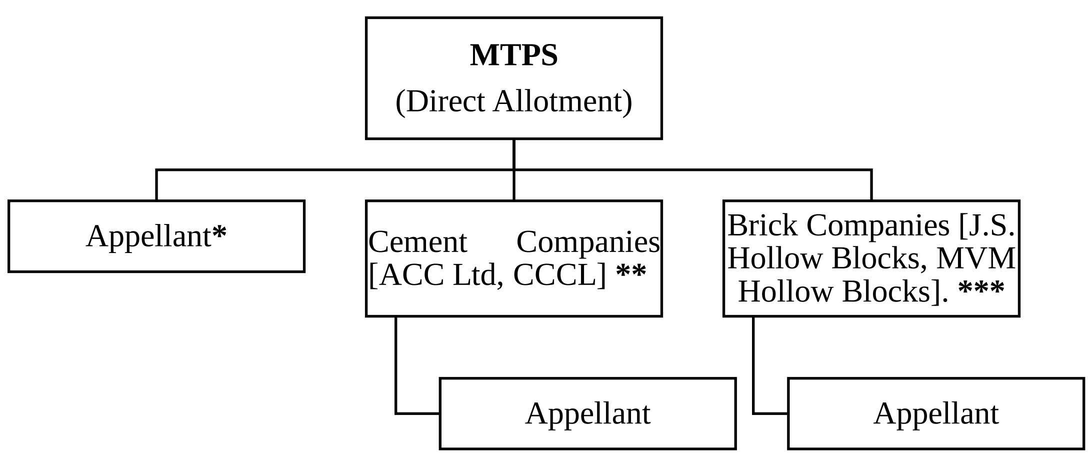
9.1 M/s Visaka Industries Limited ('**Appellant**') is a manufacturer of asbestos cement sheets in which at least 25% of its weight comprises of fly ash. Between the years 2003 and 2005, the Appellant had availed the benefit of exemption of excise duty as under Sl. 158 in Notification No. 06/2002-C.E. dated 01.03.2002 ('**NN 06/2002**') and cleared asbestos cement sheets containing not less than 25% of fly ash at *Nil* rate of duty. M/s Natesan Engineers & Contractors ('**Co-Appellant**') is one of the transporters of fly ash to the Appellant, and is a co-noticee in the SCN No. 32/2008 dated 7.4.2008.

9.2 The present dispute pertains to the denial of exemption availed by the Appellant on the asbestos sheets for the period 2003 to 2005. It is the case of the department that the Appellant has not satisfied the condition in the Notification No. 06/2002 to clear the asbestos sheets at 'Nil' rate of duty since the asbestos sheets (finished products) did not contain not less than 25% fly ash.

Facts relating to procurement of fly ash for use in manufacture of asbestos sheets

9.3 Up to the year 2003, fly ash was procured in direct/ open allotment system from the Mettur Thermal Power Station ('**MTPS**') and other power stations. From August 2003, the fly ash distribution from the thermal power stations was regulated by the MoEF under the Environment (Protection) Act, 1986. In line with the policy, 80% of the fly ash generated by MTPS was to be allotted to 4 major cement companies and the remaining 20% was reserved for allotting to other industries like brick companies and Appellant etc. The cement companies and brick companies sold the excess fly ash to other entities such as the Appellant. In effect, fly ash became a freely available commodity in the market after August 2003 due to the change in allotment mechanism and lifting of the legal restriction on MTPS to supply fly ash.

9.4 In view of the changed allotment policy, the Appellant was forced to procure fly ash from the open market to meet their requirements. Post 2003, the Appellant has been procuring fly ash from the following sources: a) direct allotment from MTPS, b) cement companies and c) brick companies. The fly ash procured from the cement companies and brick companies reached the Appellant through various transport operators like Natesan Engineers and Contractors ('NEC') etc. The sources of fly ash and their movement from MTPS to the Appellant is captured in the flow chart below:



* MTPS direct allotment of fly ash was supplied to Appellant through transport operator-NEC
** Cement Companies supplied fly ash to Appellant through transport operators like NEC, Guru Traders, etc.
*** NEC procured Fly Ash from bricks companies and in turn supplied to the Appellant, etc.

9.5 Since the Appellant was using more than 25% fly ash in manufacture of asbestos sheets, the Appellant cleared the asbestos sheets at NIL rate of duty under the NN 06/2002 for the year 2003-04 and 2004-05. The Appellant maintained proper records for receipt and use of fly ash and filed the monthly returns promptly as required under the NN 06/2002. There was no dispute raised by the Department when the monthly returns were filed by the Appellant. The Appellant continued to use more than 25% fly ash in asbestos sheets even after the NN 06/2002 was rescinded in 2006.

Proceedings initiated against the Appellant

9.6. The present dispute has a chequered past. The series of events leading upto the present Appeal are tabulated hereinbelow:

S No	**Date**	**Event**	**Annexure Reference**
1.	07.04.2008	SCN No. 32/2008 proposed to deny the benefit of NIL rate of duty claimed under NN 06/2002 alleging that Appellant had shown bogus receipts of fly ash	Annexure 8 Page 187-251
2.	28.10.2008, 19.01.2009	Replies filed against SCN No. 32/2008	Annexure 9 Page 252-325
3.	06.05.2009	Order-in-Original No. 04/2009 confirmed the demands proposed in the SCN.	Annexure 10 Page 326 - 361
4.	18.07.2009	Appeal E/422-423/2009-DB filed against the OIO.	Annexure 11 Page 362-393

S No	Date	Event	Annexure Reference
5.	05.12.2017	Miscellaneous Application filed in Appeals E/422-423/2009 for filing additional evidence	Annexure 12 Page 394-396
6.	06.02.2018	Final Hearing before Hon'ble CESTAT wherein Final Order No. 40339-40340/2018 was issued, ordering *de novo* adjudication of the SCN.	Annexure 13 Page 397-412
7.	20.11.2018	Department filed CMA 2799-2800/2018 assailing the Final Order No. 40339-40340/2018.	NA
8.	30.11.2018	Hon'ble HC of Madras affirmed the Final Order of the Hon'ble CESTAT.	Annexure 14 Page 413 – 427
9.	11.12.2020	Appellant filed 9 box-files with information on sources and receipt of fly ash used to manufacture asbestos sheets	Annexure-15 Page 428-433
10.	20.01.2021	Appellant & Co-Appellant filed common submissions	Annexure 17 Page 482-494
11.	31.03.2021	Impugned Order passed, confirming the demands proposed in the SCN	Annexure 1 Page 35-65
12.	02.07.2021	Appellant and Co-Appellant preferred present Appeals	Memorandum of Appeals

Case of the Department

9.7 The case of the Department as per the impugned order is that the documents produced by the Appellant ought to have reflected the source of fly ash, the source of such source of fly ash, as also the authorization held by the transporters appointed for transportation of fly ash to the Appellant's premises.

9.8 The impugned order has not disputed the evidence adduced by the Appellant, but has proceeded on the basis that the Appellant has not proved the sources of their sources.

Grounds

A. The Appellant has satisfied the rigors of NN 06/2002. The Impugned Order has adopted extraneous conditions to confirm the present demand by denying NIL rate of duty.

A.1. The NN 06/2002 permits asbestos sheets to be cleared at NIL rate of duty when:

- Such sheets are manufactured with not less than 25% fly ash;
- If the manufacturer maintains proper accounts in the specified form & manner and files monthly returns with the jurisdictional officer.

A.2. The contention of the Department is that the asbestos sheets do not contain 25% or more than 25% fly ash because the source of fly ash could not be substantiated.

A.3. The Appellant submits that such denial is alien to the NN 06/2002. The NN 06/2002 requires the Appellant to account for and furnish monthly receipts of fly ash to demonstrate that the asbestos sheets contained not less than 25% fly ash.

A.4. The impugned order has required the Appellant to also identify the source from where they procure fly ash when there is no requirement to prove the source of the supplier.

A.5. In Paragraph-16.01, the impugned order has held that the Appellant has not proved the sources of fly ash procured by the brick companies, Sakthiguhan Construction Products and SIAR Traders and therefore has held the Appellant to be ineligible for exemption under the impugned notification. These findings are wholly irrelevant to the NN 06/2002. The Appellant has gone above and beyond to prove that the exemption claimed is in consonance with the Notification by collating all their sources of fly ash from MTPS and independent suppliers. The RTI also attests to this fact.

A.6. In a case where the Notification and the SCN do not require the Appellant to prove the source of fly ash, the impugned order is seeking the source from where the Appellant's suppliers had sourced the fly ash. Such action is unwarranted and beyond the framework of the NN 06/2002. Reliance in this regard is placed on the following decisions:

A.6.1. Gaurav Triyugi Singh v. ITO, [(2020) 121 taxmann.com 86 (Bombay)]

A.6.2. Pr. CIT v. Veedhata Towers (P.) Ltd. [(2018) 403 ITR 415 (Bom)]

A.6.3. Prayag Tendu Leaves Processing Co. v. CIT [(2017) 88 taxmann. com 23 (Jharkhand)]

A.6.4. Zafa Ahmad & Co. v. CIT [(2013) 30 267 taxmann.com (Allahabad)]

A.7. Further, It is a settled position of law that the burden of proving eligibility to exemption is on the claimant. Once the initial burden of proof that the assessee is eligible for exemption is established, the onus shifts to the Department to prove that the evidence produced by the assessee is false. Reliance in this regard is placed on the following decisions:

A.7.1. Aveco Technologies Pvt. Ltd. v. CC [2018 (362) E.L.T. 624 (Tri.-Hyd.)], maintained in Commissioner v. Aveco Technologies Pvt. Ltd. [2018 (362) E.L.T. Al64 (S.C.)]

A.7.2. High Energy Batteries (I) Ltd. v. CCE [2002 (142) E.L.T. 266 (Tri. - Chennai)

A.7.3. Vendhar Movies v. Jt. Dir., D.G., of GST Intelligence, Chennai [2019 (28) G.S.T.L. 545 (Mad.)]

B. The impugned order has travelled beyond the SCN

B.1. The impugned order has travelled beyond the SCN to confirm the demands against the Appellant and Co-Appellant. The SCN alleged that the Appellant and Co-Appellant had inflated records, without any allegation against the source from where the Appellant had received fly ash for use in manufacture of asbestos sheets. However, the impugned order has now sought the supply source of fly ash and also the primary source of fly ash.

B.2. Paragraph 17.01 of the impugned order has confirmed the demand on the basis that the Co-Appellant had not specified the source of procurement of fly ash in the dispatch note/consignment note/freight bill issued to the Appellant. Further, Paragraph-16.01 of the impugned order observes that the Appellant has not proved the sources of fly ash procured by the brick companies, Sakthiguhan Construction Products and SIAR Traders.

B.3. Further, in Paragraph 17.03 of the impugned order, the impugned order has held that transactions between Co-Appellant and the Appellant are mere arrangements to satisfy the Department since there is no corroborative evidence produced by NEC in the form of Sales Tax Registration, Sales Tax returns, Ledger A/c, P&L A/c, Income Tax Return to prove the genuineness of transactions.

B.4. It is submitted that all the aforesaid findings are beyond the scope of the SCN and merits to be set aside. It is well settled that an order cannot travel beyond scope of SCN. Reliance in this regard is placed on the following decisions:

B.4.1. Caprihans India Ltd. v. CCE [2017 (51) STR 239 (SC)]
B.4.2. Saci Allied Products ltd. v. CCE, Meerut [2005 (183) ELT 225 (SC)]
B.4.3. CC Mumbai v. Toyo Engineering India Ltd. [2006 (201) ELT 513 (SC)]

C. The impugned order has misunderstood the scope of remand directed by this Hon'ble Tribunal.

C.1. The Appellant submits that the adjudicating authority has totally misunderstood the scope of the remand and has proceeded on an incorrect basis.

C.2. The Tribunal vide Final Order No. 40339-40340/2018 dated 06.02.2018 had remanded the matter to the Commissioner on the basis of documents produced by appellant to prove that the Appellant has procured fly ash from sources other than MTPS. The Appellant had produced 9 box sets of documentation to prove that fly ash was procured from brick-manufacturing companies, cement companies other than MTPS. It is clear from the Order of the Tribunal that the sources of procurement of fly ash by the suppliers of the Appellant was not in question before the Tribunal.

C.3. The impugned order has added words to the remand direction of the Tribunal to extend the scope of the remand. It is well settled that an Order which goes beyond the remand direction merits to be quashed. Reliance in this regard is placed on the following decisions:

C.3.1. CC v. National Steel & Agro Industries Ltd. [2015 (322) E.L. T. 690 (Bom.)], maintained in Commissioner v. National Steel & Agro Industries Ltd. [2015 (323) E.L. T. A 79 (S. C.)]

C.3.2. Anil Products Ltd. v. CCE, [2013 (291) E.L.T. 531 (Tri. - Ahmd.)], maintained in Anil Products Ltd. v. Commissioner [2014 (301) E.L.T. A14 (S.C.)]

C.3.3. Kalyani Sharp India Ltd. v. CCE [2008 (226) E.L.T. 197 (Tri. - Mumbai)], maintained in Commissioner v. Kalyani Sharp India Ltd. - 2010 (255) E.L.T. Al8 (S.C.)]

C.3.4. Carlisle Trading and Manufacturing (I) P. Ltd. v. Dy. C.C. (SVB), Chennai [2015 (325) E.L.T. 318 (Mad.)]

C.3.5. CCE & Customs v. D.J. Malpani [2010 (258) E.L.T. 185 (Bom.)]

C.3.6. Hi-Tech Arai Ltd. v. CCE [2009 (236) E.L.T. 91 (Tri. - Chennai)]

D. The Appellant is eligible for exemption for the year 2003-04

D.1. During the year 2003-04, the Appellant had procured fly ash indirectly from the following sources:

Source	**Quantity (in M.T.)**
Chettinad Cement Corporation Ltd. (CCCL)	1295
Sakthiguhan Construction Products	21.75
Shri Karthikeyan Transports	1322.235
Total	**2638.985**

D.2. The Appellant had submitted various evidence to prove the source of fly ash from CCCL. However, there is no finding in the impugned order with respect to CCCL. Therefore, to this extent, the source of fly ash is deemed to be accepted. Once the fly ash of 1295 MTs obtained from CCCL is considered, the fly ash used by the Appellant is more than 25%. The said computation is tabulated below:

Source	Quantity (in M.T.)
Quantity of Asbestos sheet manufactured (as per SCN) (A)	66,142.21
Quantity of fly ash consumed in production	
As per SCN (excluding the alleged bogus quantity) (B)	16,232.51
As per the Appellant (considering only 1295 MTs in excess of B) (C)	17,527.51
% of fly ash consumed in manufacture	
As per SCN (B/A * 100)	24.54%
As per the Appellant (considering only 1295 MTs in excess of B) (C/A* 100)	26.50%

D.3. In light of the above, even without considering the procurements from Sakthiguhan Construction Products and Shri Karthikeyan Transports, the Appellant is eligible for exemption.

E. The Appellant is eligible for exemption for the year 2004-05

E.1. During the year 2004-05, the Appellant had procured fly ash indirectly from the following sources:

Source	Quantity (in M.T.)
Chettinad Cement Corporation Ltd. (CCCL)	2957.85
MSM Transports	2480
ACC RMC	2482.015
SIAR Traders	30.06
Sakthiguhan Construction Products	13.26
Total	7963.185

E.2. When the above sources are considered, the consumption of fly ash is more than 25% and the Appellant is eligible for exemption. The said computation is as below:

Source	Quantity (in M.T.)
Quantity of Asbestos sheet manufactured (as per SCN) (A)	76,687.08
Quantity of fly ash consumed in production	
As per SCN (excluding the alleged bogus quantity) (B)	12,479.06
As per the Appellant (considering only 7963.185 MTs in excess of B) (C)	20,442.25
% of fly ash consumed in manufacture	
As per SCN (B/A * 100)	16.27%
As per the Appellant (considering only 7963.185 MTs in excess of B) (C/A* 100)	26.66%

E.3. The Appellant had submitted various evidence to prove the source of fly ash from CCCL and MSM Transports. However, there is no finding in the impugned order with respect to procurements from CCCL and MSM Transports. Therefore, to this extent, the source of fly ash is deemed to be accepted.

E.4. Further, with respect to procurements from Sakthiguhan Construction Products and SIAR traders, there is no requirement to prove the source of such sources.

E.5. In respect of procurements from ACC RMC, the impugned order has not disputed the source of such source and has rejected the procurement from ACC RMC on the sole ground that authorization provided by ACC RMC to Alliance carriers to appoint NEC as transporter was not furnished. The reason for rejection has no relevance whatsoever with eligibility to exemption under the impugned notification.

E.6. In the light of the above and without prejudice to the submission in paragraph E,.2, the appellant is entitled to the exemption on considering the procurement from CCCL, MSM Transportation and ACC RMC alone. The computation of fly ash used on considering the above three sources alone is as follows :

Source	Quantity (in M.T.)
Quantity of Asbestos sheet manufactured (as per SCN) (A)	76,687.88
Quantity of fly ash consumed in production	
As per SCN (excluding the alleged bogus quantity) (B)	12,479.06
As per the Appellant (considering only 7919.865 MTs in excess of B) (C)	20,398.965
% of fly ash consumed in manufacture	
As per SCN (B/A * 100)	16.27%
As per the Appellant (considering only 7963.185 MTs in excess of B) (C/A * 100)	26.60%

E.7. The Appellant submits that the impugned order is only attempting ways and means to deny the Appellant the benefit which it is otherwise eligible to.

F. If the disputed quantity of fly ash was never received by the Appellant, then the Department ought to have proved as to how the final product was manufactured.

F.1. The Appellant submits that to manufacture 1 Metric Tonne (1000 Kgs) of asbestos sheet, the Appellant uses 83.3 Kgs of Asbestos Fibre, 416.7 Kgs of Cement, 285.6 Kg of fly ash, 8 Kg of cotton pulp which totals to about 793.6 Kg of input approximately. Asbestos sheets predominantly contain cement and fly ash (about 90%).

F.2. The Appellant submits that assuming without admitting that the disputed quantity of fly ash was not received by the Appellant, the Department ought to have proved as to how the final product was manufactured by the Appellant.

F.3. In any case, the only substitute to fly ash, is cement which is significantly more expensive. Therefore, it is commercially not viable to manufacture asbestos without fly ash. Business prudence and best practises demand that the Appellant use fly ash to manufacture asbestos sheets.

G. The impugned order has been passed mechanically and with a pre-conceived mind. There is no positive evidence shown by the impugned order to reject the sources of procurements established by the Appellant. None of the evidence produced by the Appellant has been considered in proper light.

H. Entire demand is barred by limitation. Consequently, demand fails.

H.1. The impugned order has invoked extended period on the ground that the Appellant has not maintained proper records for receipt of fly ash and that they have shown bogus receipt which was unearthed and came to the knowledge of the Department.

H.2. It is an admitted fact even as per paragraphs 2.01 and 2.04 of the SCN (pages 188, 190 of Appeal 40388/2021), the Appellant was regularly filing the monthly returns as mandated by the NN 06/2002. In such situations, the Appellant ought not to be saddled with allegations of suppression. There are no grounds for imposing penalties.

I. In the interest of brevity, the Co-Appellant adopts the submissions made hereinabove to the extent the demand is made against the Co-Appellant.

10. The Learned A.R, Shri Rudra Pratap Singh appeared and argued for the department. The arguments were put forward mainly adverting to the earlier OIO, passed by the adjudicating authority which was set aside by the Tribunal. It is submitted that the factory of the appellant, M/s.Vishaka Industries was visited by the Officers of the Preventive Unit on 27.8.2005. It was observed that for the period April 2003 to March 2005, the appellant was filing ER-1 return with the Range Superintendent, Namakkal and also filed return in Form-'C' to the Assistant Commissioner of Central Excise, Salem-II Division. Salem. ER-I return, the opening balance, the quantity manufactured and cleared was furnished in numbers, whereas, in Form C, the quantity of fly ash received, used and the quantity of asbestos produced was furnished in metric tons.

10.1 The Officers noted in the Lab, a register named "Receiving Inspection Fly ash". This Register was maintained from 1.4.2000 onwards, and it contains, the details of Truck no., Source, Contract party, Quantity received, etc. Against the source details, it was mentioned as MTPS, ETPS, etc. In the Stores section, there was a consignment note of M/s.Natesan Construction Products, Dry/wet fly ash contractor, Mettur. These consignment notes showed the consignee as M/s.Vishaka Industries (the appellant). The description was 'dry fly ash'. Another miscellaneous file was found, which contained details of MTPS fly ash receipts for the year 2004-05, supplied by Mettur Thermal Power Station (MTPS) and Natesan Engineering Contractors was highlighted. A separate column Miscellaneous GRN accounted in the name of Natesan Engineers and Contractors was seen to be made.

10.2 Statements of Shri. D.Manickavasagam, Works Manager, of appellant company and Shri. Santhosh Kumar of Natesan Engineers and Contractors was recorded.

10.3 On enquiry, it was found by the department that the basis for receipt of fly ash is the allotment order issued by the Chief Engineer, of MTPS. The Officers visited MTPS on 6.10.2005 to verify the actual quantity of fly ash effected to appellant M/s.Vishaka Industries. The Superintending Engineer, of MTPS vide letter dated 6.10.2005 answered that the allotted quantity is 2000 tons/month and that no contract is made with TNEB. The month-wise details of lifting of fly ash by M/s.Vishaka Industries were furnished.

10.4 As per Board Circular 477/43/99-CX dt.10.8.1999, 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 100/weight of Asbestos Cement Products.

10.5 From the data furnished by MTPS, it was noticed that if the excess quantity of fly ash recorded by appellant which is shown as received in their records and returns is reduced, for the year 2004-05 the actual fly ash content percentage in the finished product would fall below 25%. From the data received from MTPS as well as documents recovered from M/s.Natesan Engineers and contractors, co-noticee and the appellant herein, it was noted that the fly ash lifted from MTPS was correctly accounted in their records. The quantity of fly ash lifted from MTPS being very less than the quantity shown in the records/ER-I returns and Form-C and D filed by the appellant M/s.Vishaka Industries, it is clear that they have not used 25% of fly ash in the final product, as claimed by them. The appellant is not eligible for the exemption as per notification 6/2002 dt.1.3.2002. The duty demand confirmed is thus legal and proper. The Learned AR argued that to claim exemption, the appellants have created bogus/excess fly ash receipts and reflected such receipts in their accounts. M/s.Natesan Engineers and Contractors have connived in raising such bogus consignment notes, receipts and therefore, the penalties imposed are also legal and proper.

10.6 It is submitted that after remand by the Tribunal, the appellant had furnished humungous documents to establish that they had procured the fly ash not only directly from MTPS but also from Cement companies, Brick manufacturers, etc. These documents cannot be relied as they are produced after much delay. The adjudicating authority had passed the earlier OIO dated 6.5.2009. Against this order, the appellants filed appeal before the Tribunal, as Appeal No.E/423 and E/422 of 2009. Later in 2017, the appellant filed Miscellaneous Application No.41821/2017 before the Tribunal, to receive additional documents. These documents were not furnished at the time of earlier adjudication. The Tribunal ought not to have remanded the matter, when the documents are produced after such a long lapse of time.

10.7 In the denovo adjudication, the adjudicating authority has considered the contention of the appellant that in addition to the quantity received from M/s.Natesan Engineers and Contractors from MTPS, the appellants also procured through Natesan Engineers and Contractors, sourced from the quantity allotted to small units; brick manufacturers, Cement companies, etc. In para 16.01, the adjudicating authority has examined the entire set of documents submitted by the assessee. However, the appellant was not able to establish their contentions that fly ash was procured from other sources also. Further, the documents having produced after much delay cannot be accepted, as their veracity is not established. The Learned AR submitted that the order passed being legal and proper, the appeals may be dismissed.

11. Heard both sides and perused the records carefully.

12. The issue to be considered is whether the duty demand, interest and penalties imposed on the appellants denying the exemption under notification 6/2002 dt.1.3.2002 is sustainable or not.

12.1 The undisputed fact is that the quantity of fly ash received by the appellant, viz, M/s.Vishaka Industries under direct allotment from MTPS tallies with the quantity of fly ash accounted by appellant as well as Natesan Engineers and Contractors, their transport contractor, in their books of account. According to department, this quantity would not be sufficient for the appellant to manufacture and remove cement asbestos sheet during the disputed period of 2003 to 2005, with fly ash content/use of not less than 25%.

12.2 The appellant counters the allegations by submitting that, besides receiving fly ash from MTPS as per direct allotment, they have also received fly ash from Cement companies, and others, for which they furnished documents. It is argued by appellant that though they raised this contention before the adjudicating authority in the earlier adjudication, it was not considered at all. The fly ash received from others has been used to manufacture cement asbestos sheet and thus the quantity of fly ash used by them would be well above 25%.

12.3 According to department, the entire quantity of fly ash received by the appellant, M/s.Vishaka Industries, other than the quantity lifted as direct allotment from MTPS is bogus.

12.4 At this juncture, it needs to be mentioned that in the earlier round of litigation before the Tribunal, the appellant had filed Misc. application to receive additional documents. The Tribunal after going through the allegations raised in the SCN, the reply filed by the appellants, the evidence brought forth by the cross examination of the witness, Shri.N.Santhosh Kumar (of Natesan Engineers and Contractors) recorded in the Final order that the documents furnished along with the Miscellaneous application do not relate to any fresh plea. The relevant part of the Final order of the Tribunal has already been reproduced. It was thus consistently pleaded by the appellant, that they not only received fly ash from MTPS but also received from various other sources.

12.5 The appellant then had relied upon the evidence adduced by cross-examination of Shri N.Santhosh Kumar, which has already been extracted in para 5 of this order.

12.6 It is brought out from the cross-examination of Shri.N.Santhosh Kumar, that M/s.Natesan Engineers and Contractors (NEC) and Natesan Construction Products are agents for supply of fly ash to many companies, who utilise fly ash. For eg., Cement companies, Asbestos companies like Vishaka, Ready Mix Concrete like ACC, RMC, RMC India, Ultratech Readymix, RBS Readymix, Ganesh Concrete, etc, and brick units like Sakhi Interlock and others. It is also stated that MTPS does not issue any document for transport and that they use their own consignment notes to the companies they supply fly ash. It is stated by him that brick units who get allotment from MTPS may have excess after their usage and these units sell the excess to them and they in turn sell these to those companies who need more fly ash apart from their allotted quantities.

12.7 The appellant, Vishaka Industries has furnished documents before the adjudicating authority to establish that they received fly ash from other sources over and above the quantity allotted to them by MTPS. The details of these documents are explained by the appellant. Some quantities were sourced through NEC and some quantity procured directly by appellant.

12.8 In para 16.01, the adjudicating authority has recorded his discussions and findings after examining the documents submitted by appellant, with regard to procurement of fly ash from other sources. The table in para 16.01 of the impugned order has summarized the procurements explained by the appellant :

2003-04

Name of Supplier	Quantity (MT)	Mode of procurement
Chettinad Cement Corporation Ltd	1295.000	The party got direct allotment of fly ash from MTPS and the assessee directly procured from the party.
Shri Karthikeyan Transports	1322.235	The party got fly ash bricks manufacturers. In turn NEC purchased fly ash from this party and supplied to the assessee
Sakthiguhan Construction Products	21.750	Directly procured by the assessee from the party
TOTAL	**2638.985**	

2004-05

Name of Supplier	Quantity (MT)	Mode of procurement
MSM Transports	2480.000	The party got fly ash from fly ash bricks manufacturers. In turn NEC purchased fly ash from this party and supplied to the assessee
ACC RMC	2481.930	ACC RMC got direct allotment of fly ash from MTPS. AMC RMC appointed Alliance Carriers as transport contractors. Alliance Carrier authorized NEC as transport contractor to transport fly ash. NEC diverted transport contractor to transport fly ash. NEC diverted some quantity of fly ash and sold to M/s.Visaka Industries Ltd. Alliance deduced the amount pertaining to cost of he fly ash diverted by NEC at the time of final settlement of Transport charges paid to NEC.
Chettinad Cement Corporation Ltd.	2957.850	The party got direct allotment of fly ash from MTPS and the assessee directly procured from the party.
Sakthiguhan Construction Products	13.260	Directly procured by the assessee from the party
SIAR Traders	30.060	Directly procured by the assessee from the party
TOTAL	**7963.185**	

12.9 The discussion of the adjudicating authority in regard to contention of procurement of fly ash from M/s.Chettinad Cements Corporation is as under :

> “(a) M/s.Chettinad Cements Corporation Ltd.: The assessee said to have procured 1295 Mt of fly ash from M/s.Chettinad Cements Corporation Ltd., who got allotment of fly ash from MTPS. The assessee had appointed NEC and M/s.Guru Traders as transport contractors to transport the fly ash to their factory premises. The

> assessee have produced the copies of various documents including allotment letter of fly ash by MTPS to M/s.Chettinad Cements Corporation Ltd."

12.9.1 From the above, it is seen that the adjudicating authority has not recorded any finding as to whether this contention of the appellant is acceptable or not. The adjudicating authority is seen to be silent or has conveniently avoided recording a finding as to the quantity said to have been procured from Chettinad Cements Corporation. In page 504 of the appeal paper book, the letter dt. 25.3.2004 issued by Chettinad Cements Corporation to the appellant is enclosed. This letter shows the lifting of 748 MTs of dry fly ash from MTPS by appellant which is the allotted quota of Chettinad Cements Corporation.

12.9.2 Similar letters are furnished in page 505, to 507 of the appeal paper book. The letter dt. 8.4.2004 shows that a quantity of 547 MTs fly ash has been lifted by appellant. The letter dt. 5.5.2004 shows that a quantity of 2957.85 has been lifted. The letter dt. 25.5.2004 shows that appellant has procured 748 MTs, 547 MTs and 2957.85 MTs in February, March and April respectively, and that the appellant (M/s.Vishaka) has to pay balance of Rs.2,93,589/- towards the cost of fly ash to M/s.Chettinad Cement Corporation Ltd. This letter is extracted as under :

CHETTINAD CEMENT CORPORATION LIMITED.

(Regd. Office : RANI SEETHAI HALL BUILDING IV & V FLOORS, 603, ANNA SALAI, CHENNAI-600 006)
WORKS OFFICE : PULIYUR.

IS/ISO 9001:2000

TELE PHONE : 250644, 251354, 251355, 251356, 250833 Puliyur
GRAMS : "CEMENT" PuliyurC.F
Telefax: 04324- 251320
E Mail : kru_cccl@sancharnet.in

All Correspondences to
Kumararajah Muthiah Nagar
PULIYUR CEMENT FACTORY POST - 639114
(Karur Dist.)

VR NO- 122/30/795

PDN MAIN | P & IR | PUR | A & D

FA:RM:2004: 636
May 25, 2004

V I L. PAD
RECEIVED
26 MAY 2004
S.No. 202

Visaka Industries Ltd.,
Mariappa Nathan Village,
Paramathi (PO)
Namakkal District.

Sub: Lifting of Dry Fly Ash from Mettur Thermal Power Station – Balance of payment – Reg

Ref: Our letter no.FA/RM/4398/25.03.04
Our letter no.FA/RM/104/08.04.04
Our letter no.FA/RM/400/05.05.04

With reference to the above, we would like to bring to your kind notice that we are yet to receive the balance payment of Rs.2,93,589/- towards Dry Fly Ash lifted by you from our silo as per details furnished below:

Month	Quantity	Amount
February 2004	748.00	1,02,900
March 2004	547.00	76,580
April 2004	2957.85	4,14,099
		5,93,589
Amount received		3,00,000
Balance to be received		2,93,589

137.57 —
140 —
140 —

We request you to release the payment of Rs2,93,589/- at the earliest without any further delay.

Yours faithfully,
For CHETTINAD CEMENT CORPORATION LTD.

(A.SUBRAMANIAN)
General Manager (Accts & Admn.)

12.9.3 In spite of this document there is no finding as to the procurement made from CCCL. The contention put forward by the appellant about the quantity of fly ash procured through M/s.Karthikeyan Transports is discussed as the letter dt. 20.12.2003 issued by M/s.Karthikeyan Transports which has been referred to by the adjudicating authority. The same is enclosed in the appeal paper book. As per these documents, M/s.Karthikeyan Transports have informed their interest to supply fly ash to M/s.NEC and it is stated in this letter that it is the fly ash from MTPS allotted to brick manufacturing companies. The names of the brick manufacturing companies who have allotments from MTPS, Mettur Dam, for lifting fly ash is also mentioned in this letter. Out of the 2162 MTs on two bills raised by M/s.Karthikeyan Transport on M/s.NEC, a quantity of 1322.235 MTs has been sold by M/s.NEC to appellant. This evidence has not been accepted by the adjudicating authority by observing that appellant has not produced copies of allotment order to these brick companies. The adjudicating authority has not been satisfied by the document showing the source but has rejected this by saying the document of source's source is not produced.

12.9.4 The Ld. Counsel for appellant submitted that the appellant has established the source from where they procured the alleged 1322.235 MTs of fly ash. The demand has been confirmed holding that this quantity is bogus alleging that appellant did not produce the allotment orders made by MTPS to the brick companies. This would be compelling the appellant to furnish source of a source. There is no such allegation in the SCN and it travels beyond the SCN.

12.9.5 The appellant contended that they procured 21.75 MTs of fly ash from Sakthiguhan Construction Products vide two bills dt. 27.8.2003 and 4.9.2003. These bills were furnished and further substantiated by Goods Receipt Note (GRN) of the appellant and weighment slip obtained at the weigh bridge. The adjudicating authority did not accept this evidence by observing that there is no evidence to show as to how Sakthiguhan Constructions obtained MTPS fly ash. This again is asking for the source of a source. The source (Sakthiguhan Constructions) which supplied to appellant would be the direct/immediate evidence. (The bills supported by GRN, weighment slip.) When such evidence is available, in our view, the adjudicating authority has to record findings why the direct/immediate evidence is not acceptable so as to call for source of a source.

12.9.6 For the period 2004-2005, the appellant has contended to have procured from M/s.Chettinad Cements Corporation Ltd. M/s.MSM Transports, ACC RMC, Sakthiguhan Construction Products, and SIAR Traders.

12.9.7 The appellant contends to have procured 2957.85 MTs of fly ash from Chettinad Cements. It is observed by the adjudicating authority that the appellant has furnished necessary documents for such procurement. However, again, there is no finding recorded as to whether these documents are accepted or not. The adjudicating authority is silent as to the procurement on the basis of these documents. The duty demand has been confirmed by disregarding these documents, without recording any reason.

12.9.8 In the case of procurement of fly ash from M/s.MSM Transport the appellant had explained that MSM had issued letter to NEC dt. 27.11.2004 wherein MSM proposed to supply fly ash to NEC and further supply to be made to appellant. It was also stated that this supply is made from the allotment made to seven brick companies which was indicated in the letter. From the documents, it is seen that the appellant had procured 2480 MTs of fly ash on various dates during February 2005. The appellant had furnished all documents evidencing the procurement through NEC from M/s.MSM Transport. So also, they produced the allotment orders of all the seven brick companies. The adjudicating authority though noted all these evidences produced by appellant has again opted to be silent as to why these procurements are to be considered as not bogus. The duty demand has been confirmed disregarding these documents and supply of 2480 MTs of fly ash.

12.9.9 In the case of ACC RMC, the appellant vide letter dt. 18.9.2003 appointed Alliance Carriers for transportation of fly ash from MTPS to ACC RMC, Bangalore. Alliance Carriers vide letter dt. 10.9.2003, had appointed NEC for the purpose of transportation of fly ash from MTPS to ACC RMC Bangalore. Dring the year 2004-05, NEC lifted 24,921 MTs from MTPS and supplied 21667.184 MT to ACC RMC, Bangalore. Out of the quantity of 2557.84 held as stock by NEC, 2482.015 MT was supplied to appellant. This is established by the letter dt. 12.5.2005 issued by Alliance Carriers. The relevant part of the letter reads as under :

ALLIANCE CARRIERS 543

No. 11. 1st Floor, 1st Cross,
N. S. Iyengar Street,
Seshadripuram,
Bangalore - 560 020.
Ph No. : 3465663

Date: 12/05/05

Natesan Engineers & Contractors,
5/77 A, Rajaji Nagar,
Madhayankuttai (P.O),
Mettur Dam – 636452.

Sir,

Sub: Supply of dry flyash from allotments of ACC Ltd by MTPS, Mettur Dam to your sangari site.

As per our statement for the period of 01/01/2004 to 31/03/2005, we hereby confirm you that the stock balance of dry flyash quantity of ACC RMC material in your sangari site works is 2557.84MT, quantities of which, we noticed that you have supplied to Visaka Industries Limited, Paramathi.

We therefore deduct your payment for material charge of dry flyash for the qty. 2557.84MT at the rate of Rs.140/MT in your future bills.

Thanking you,

Yours faithfully,

For Allince Carriers (MTPS), Mettur Dam.

Dry fly ash quantity letter from Acc-MTPS

ACC Madukkarai Cement Works,
Madukkarai, Coimbatore-105.

12.9.10 The above evidence shows that 2482.015 MTs of fly ash was supplied to appellant. This document has been disregarded by the adjudicating authority by observing that the consent letter of ACC RMC, who is the original allottee of MTPS fly ash, authorizing M/s.Alliance Carrier to appoint other transporters is not produced. The Ld. Counsel adverted to the letter dt. 12.5.2005 and submitted that the said letter bears the signature of M/s.ACC which is sufficient proof of acknowledgement of the transaction by ACC.

12.9.11 The appellant has furnished bill dt. 23.11.2004 evidencing supply of 13.260 MT from Sakthiguhan Construction Products. The GRN, corresponding weighment slip is also produced. This evidence is not accepted by adjudicating authority observing that the appellant has not furnished evidence as to how Sakthiguhan Constructions procured fly ash from MTPS. Again, this quantity has been considered as bogus for the reason that appellant though furnished evidence for the source, has not furnished evidence for source of the source.

12.9.12 The appellant procured 30.060 MTs of fly ash directly from SIAR Traders. The bill, along with GRN, and weighment slip has been produced. The quantity is considered as bogus by the adjudicating authority by not accepting the documents furnished for the reason that the appellant has not furnished how SIAR Traders has obtained the fly ash.

12.10 As per SCN, the department alleges that the quantity of fly ash of 2251.311 MTs 2003-04 and 7963.18 MTs for 2004-05 shown in accounts of appellant is bogus quantity.

12.11 The Ld. Counsel for appellant has given the calculation with regard to the actual quantity of fly ash received by appellant, and the alleged bogus quantity. The third table below would show that during the disputed period on the basis of the documents furnished by appellant by which they procured fly ash, the percentage of fly ash in the final product would be 28.53% (2003-04) and 26.66% (2004-05) which is higher than 25%

prescribed in the notification. The tabulation presented by the counsel for appellant is as under :

Ready reckoner: Supply of fly ash received in 2003-04

Supplier	Quantity per Impugned Order	Findings in the Impugned Order	Appellant's Submissions		
			Flow of Supply	Visaka's Source	Source of source
M/s. Chettinad Cements Corporation Ltd. ('**CCCL**')	Pg. 57, 58: 1295 MT	Pg 58: No findings.	MTPS→ CCCL→ Visaka	Pg 504 & 505: Letters issued by CCCL confirming the supply of fly ash to Visaka.	Pg: 144: CCCL is listed in MTPS's RTI response as a recipient of fly ash for the year 2003-04 vide serial number 9 in table (a).
M/s Shakthiguhan Construction Projects ('**SCP**')	Pg. 57, 58: 21.75 MT	Pg 59: No records as to show the source of SCP.	MTPS→SCP→ Visaka	Pg 513 to 520: Goods Receipt Report prepared by Visaka and invoices received from SCP for the supply of fly ash to Visaka.	Pg. 144: SCP is listed in MTPS's RTI response as a recipient of fly ash for the year 2003-04 vide serial number 15 in table (a).
M/s. Shri Karthikeyan Transports ('**SKT**')	Pg. 57, 58: 1322.235 MT	Pg 58: Visaka has not produced the allotment orders in favour of the 6 Brick Companies from whom SKT procured the fly ash.	MTPS→ 6 Brick Companies*→ SKT→ Visaka	Pg 509: Letter issued by SKT confirming the supply of fly ash to Visaka through NEC.	Pg 509: The letter issued by SKT further discloses that it had procured fly ash from the following 6 brick companies*: 1. Cheran Bricks Co, Coimbatore 2. Sun Hollow Bricks, Calicut 3. Sindhu FA Products, Sankari 4. Emerald FALG Bricks, Sankari 5. ERK Concrete, Modakuruchi 6. RM Concrete, Modakuruchi Pg 144 & 145: The above six companies are listed in MTPS's RTI response as recipients of fly ash

					for the year 2003-04 vide serial numbers 1, 7, 9, 10, 16 and 19 in table (b).

Ready reckoner: Supply of fly ash received in 2004-05

Supplier	Quantity per Impugned Order	Findings in the Impugned Order	Appellant's Source		
			Flow of Supply	Visaka's Source	Source of source
M/s. Chettinad Cements Corporation Ltd. ('**CCCL**')	Pg. 58, 59: 2957.850 MT	Pg. 59: No findings.	MTPS→ CCCL→ Visaka	Pg.506 & 507: Letters issued by CCCL confirming the supply of fly ash to Visaka.	Pg 146: CCCL is listed in MTPS's RTI response as a recipient of fly ash for the year 2004-05 vide serial number 4 in table (a).
M/s. MSM Transport ('**MSM**')	Pg. 58, 59: 2480 MT	Pg. 59: No findings	MTPS→7 Brick Companies*→ MSM→ Visaka	Pg. 523 & 524: Letter issued by MSM confirming the supply of fly ash to Visaka through NEC.	Pg 523: MSM discloses that it had procured fly ash from 7 Brick Companies* through its letter to NEC: 1. J.S. Hollow Blocks, Mettur Dam. 2. M.R. Hollow Bricks, Mettur Dam. 3. MVM Hollow Blocks, Mettur Dam. 4. Maragatham Hollow Blocks, Mettur Dam. 5. Muthu Hollow Blocks, Mettur Dam. 6. RAVI Hollow Blocks, Mettur Dam.

Supplier	Quantity per Impugned Order	Findings in the Impugned Order	Appellant's Source		
			Flow of Supply	**Visaka's Source**	**Source of source**
					7. Sakthivel Hollow Blocks, Mettur Dam. Pg. 149: The above six companies are listed in MTPS's RTI response as recipients of fly ash for the year 2004-05 vide serial numbers 81, 82, 83, 84, 87, 90 & 91.
ACC RMC	Pg. 58, 59: 2481.930 MT	Pg. 59: No evidence of ACC RMC authorizing M/s. Alliance Carriers to appoint other transporters. Pg. 59: No authorization letter of ACC RMC to M/s. Alliance Carriers for sale of fly ash to independent parties.	MTPS→ACC RMC→ Alliance→ Visaka	Pg. 543: Letter issued by M/s. Alliance Carriers confirming the supply of fly ash to Visaka through NEC.	Pg 527: ACC RMC issued letter to MTPS authorizing M/s. Alliance Carriers to collect and transport fly ash from MTPS. Pg. 528: M/s. Alliance Carriers issued a letter authorizing NEC for collection and unloading of fly ash. Pg. 543: M/s. Alliance Carriers confirms the supply of fly ash to Visaka through NEC.
Sakthiguhan Construction Products ('**SCP**')	Pg. 58, 60: 13.260 MT	Pg. 60: No records to show the source of SCP.	MTPS→ SCP →Visaka	Pg. 546: Acknowledgement receipt of Visaka accepting fly ash from SCP. Pg. 547: Bill raised by SCP against the supply of fly ash to Visaka.	Pg. 147: SCP is listed in MTPS's RTI response as a recipient of fly ash for the year 2004-05 vide serial number 22 in table (d).
SIAR Traders ('**SIAR**')	Pg. 58, 60: 30.060 MT	Pg. 60: No records to show the source of SIAR (wrongly recorded as SCP in the impugned order).	MTPS→ SIAR →Visaka	Pg. 551 & 555: Acknowledgement receipt of Visaka accepting fly ash from SIAR. to 552 & 556: Bill raised by SIAR against the supply of fly ash to Visaka.	Pg. 147: SIAR is listed in MTPS's RTI response as a recipient of fly ash for the year 2004-05 vide serial number 6 in table (d).

12.12 We have perused the table carefully as well as the documents adverted to by the Ld. Counsel for appellant. We find that the appellant has been able to establish that they have procured fly ash from sources other than MTPS. The Ld. Counsel for appellant submitted that the appellant is able to establish the source of the source also. In response to a RTI application for furnishing the list of Cement and ASC sheet companies which use MTPS dry fly ash, the name of appellant is seen mentioned. In the said list the name of Sakthiguhan Construction, Erode is also mentioned. This would prove that Sakthiguhan is also getting MTPS dry fly ash. In this document, the list of small scale industries which uses MTPS fly ash is also given. This list mentions the name of the six brick making units (Sun Hollow Bricks, Cheran Bricks, Sindhu FA Products, Sankar, Emerald FLAG Bricks, ERK Concrete, RM concrete) from whom Shri Karthikeyan Transports has sourced the fly ash, and supplied to appellant. Similarly, SIAR Traders, Salem is listed at Sl.No.18 in this document. These documents which are reply to RTI supports the contentions of the appellant.

12.13 Moreover, it requires to be mentioned that though the case put up by department in the SCN is that except the quantity allotted to appellant by MTPS, the entire quantity of fly ash accounted by them in their books of accounts, ER-I return, Form C, D etc. are bogus, there is indeed mention of supply from ACC RMC in the SCN itself.

13. The Ld. A.R Shri Rudra Pratap Singh had vehemently argued that as the documents were produced after much lapse of time, the veracity of these documents is doubtful. We have given our anxious consideration to this submission made on behalf of the department. We have to say that an appeal was filed by the department before the Hon'ble High Court. The same contention was put forward by the department before the Hon'ble High Court. After taking note of the argument put forward by the Ld. Standing Counsel for department, the Hon'ble High Court while upholding the order passed by CESTAT held as under :

> "25. In the instant case, the Adjudicating Authority has recorded in paragraph 23.01 of the Order-in-Original that the quantity delivered to the assessee as per the MTPS records was found to be reflected in the private register of M/s. Natesan Engineers and Contractors and that there was no dispute over this. The dispute, therefore, appears to be with regard to the quantity received from outside allottees by M/s.Natesan Engineers and Contractors. Mr.Santhoshkumar, Managing Director deposed in his cross examination held on 19.11.2008 that he had evidence to show the procurement of fly ash from other sources. The explanation given by the assessee was that those were third party documents and therefore, they took some time to get those documents.
>
> 26. In paragraph 3.1 of the order passed by the Tribunal, this submission of the assessee was placed on record. That apart, with regard to the discrepancy in the vehicle numbers, the assessee produced certain records to show that an error had occurred. Similarly, we find that in paragraphs 23.01, 23.02(i), 23.02(x), 23.02(xvii), 23.02(xxiii), 23.02(xxv) and 23.02(xxvi), there were references to the stand taken by the assessee. Therefore, in our considered view, the Tribunal was justified in remanding the matter to the Adjudicating Authority to consider the evidence, which may be produced by the assessee.
>
> **27. It goes without saying that if the Department doubts the authenticity of the documents, that that aspect can also be gone into by the Adjudicating Authority, as there can be no bar in doing So. In our considered view, the Tribunal, which has decided the matter, is the best judge to take a decision as to which of the documents are required to enable it to pass orders. We find that there is no error in the exercise of such**

> **discretion. Further more, the assessee's case is that they were not given sufficient opportunity.**
>
> 28. The learned Senior Standing Counsel for the Revenue has relied upon the decision of the Hon'ble Supreme Court in the case of ***Ibrahim Uddin***. The said decision arose out of a civil litigation and the Court found that there were absolutely no pleadings and that there was no evidence with regard to a Will. Interpreting Order XLI Rule 27 of the CPC, the decision was rendered. In the preceding paragraphs, we have pointed out the difference in the phraseology and language in Order XLI Rule 27 of the CPC and Rule 23 of the CESTAT Rules. Therefore, we are of the considered view that the decision in the case of Ibrahim Uddin would not render any assistance to the cee t the Revenue. For the above reasons, We find that there is no error in the order passed by the Tribunal."
>
> (emphasis supplied)

13.1 We humbly note the observations made by the Hon'ble High Court that the authenticity of the documents can always be checked by the adjudicating authority. We have to say that the adjudicating authority has not made any remark in the impugned order as to the authenticity of the documents. At the adjudication level the officer is fully equipped to cross check and verify in case of any doubt as to the authenticity of the documents.

14. After appreciation of the facts, evidence established by documents above, we have to say that the appellant has been able to successfully establish that the alleged bogus quantity of fly ash was actually received in their factory and used in the manufacture of final product. In such circumstances, the allegation that appellant has contravened the condition of the notification 6/2002 dt. 1.3.2002 in as much as their final products did not contain 25% of

fly ash is without any factual basis. The demand therefore cannot sustain and requires to be set aside. Ordered accordingly.

15. As we have concluded that the allegation of bogus quantity is factually wrong, the penalty imposed on the appellant in E/40390/2021, NEC alleging that NEC abetted / connived in creating bogus receipts also cannot sustain and requires to be set aside. The issue on merits is found in favour of appellants and against the department.

16. The Ld. Counsel has argued on the ground of limitation also. The entire case is set up on the basis of facts. It is alleged that appellant accounted bogus quantity with intention to wrongly avail the exemption benefit of the notification. As we have already held the issue on merits that the quantity accounted is not bogus and that the appellant is eligible for benefit of exemption of notification 6/2002 dt.1.3.2002, we do not find any ground to hold that the appellant has suppressed facts with intent to evade payment of duty. The issue on limitation is also answered in favour of appellant and against the department.

17. In the result, the impugned order is set aside. The appeals are allowed with consequential reliefs, if any,

(Pronounced in court on 21.11.2023)

sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

sd/-

(SULEKHA BEEVI C.S.)
Member (Judicial)

ramani/gs