CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 2022 of 2010

(Arising out of Order-in-Original No. BEL/06/BEL-II/COMMR/2010-11 dated 23.08.2010 passed by the Commissioner of Central Excise & Customs, Belapur)

M/s Simplex Infrastructures Ltd. .... Appellant

Versus

Commissioner of Central Excise, Belapur .... Respondent

Appearance:

Shri A.K. Singh, Advocate for the Appellant

Shri A.B. Kulgod, Authorized Representative for the Respondent

WITH

Excise Appeal No. 2011 of 2010

(Arising out of Order-in-Original No. BEL/06/BEL-II/COMMR/2010-11 dated 23.08.2010 passed by the Commissioner of Central Excise & Customs, Belapur)

Shri Amithabh Mundhra .... Appellant

Versus

Commissioner of Central Excise, Belapur .... Respondent

Appearance:

Shri A.K. Singh, Advocate for the Appellant

Shri A.B. Kulgod, Authorized Representative for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. S. SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/88414-88415/2018

Date of Hearing: 28.11.2018

Date of Decision: 28.11.2018

Per: Dr. D.M. Misra

These appeals are filed against Order-in-Original No. BEL/06/BEL-II/COMMR/2010-11 dated 23.08.2010 passed by the Commissioner of Central Excise & Customs, Belapur.

2. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of Ready Mix Concrete (RMC) but since not paid Central Excise duty, hence, a show-cause notice was issued to them on 03.08.1998 demanding duty of Rs.16,18,00,388/- for the period from July, 1993 to March, 1998 with interest and penalty. On adjudication, the demand was confirmed by the learned Commissioner with interest and penalty. Aggrieved by the said order, they filed an appeal before the Tribunal and this Tribunal vide order dated 6.11.2006 allowed the appeals. Aggrieved by the said order of the Tribunal, the Revenue filed an appeal before the Hon'ble Supreme Court. By its order dated 10.04.2008, the Hon'ble Supreme Court remanded the matter to the Tribunal for fresh consideration restricting the period of demand from 10.02.1998 to 31.03.1998. Consequently, Tribunal vide its order dated A/76-77/2010/EB/C-II dated 18.03.2010 remanded the matter back to the adjudicating authority for *de novo* adjudication. The learned Commissioner adjudicated the demand for the period 10.02.1998 to 31.03.1998 and reduced the demand to Rs.10,72,683/- with interest and also imposed penalty of

Rs.2.00 lakhs under Rule 173Q(1) of erstwhile Central Excise Rules, 1944 on the appellant company M/s Simplex Infrastructures Ltd. and also imposed penalty of Rs.2.00 lakhs on the Director under Rule 209A of erstwhile Central Excise Rules, 1944. Hence, the present appeal.

3. Learned Advocate Shri A.K. Singh for the appellant has submitted that in its order dated 10.4.2008, the Hon'ble Supreme Court remanded the matter to the Tribunal to ascertain the facts whether the Ready Mix Concrete for the relevant period has been manufactured at their unit at Pen and Pagdhe as recorded by the learned Commissioner in the impugned order or the same were manufactured at the construction site of the customers. Learned Advocate further submitted that they have installed a batching plant for construction of civil work at the construction site itself. The said fact have been duly corroborated in the Panchanama dated 04.09.1997. The learned Commissioner also did not take into cognizance that the batching plant at village Pagdhe, Bhiwandi was installed within the boundary of the project undertaken for the construction of civil work and the ready mix concrete manufactured at the site was specifically used for the purpose of such contract and accordingly entitled to the benefit of the exemption Notification No. 4/97-CE. Further, he has submitted that they were awarded another contract by M/s H & R Johnsons India Ltd. and the scope of work involved construction of Main Plant building and Ancillary structures at Khar Devli, Gadad Village, Taluka Pen, Dist. Raigad. The

learned Commissioner also failed to appreciate that at the work site of the Ceramic Tile Plant, batching plant was located, as is evident from the panchanama dated 4.9.1997. Thus, the ready mix concrete has been manufactured at the site and used exclusively for the said project. Accordingly, they are eligible to the benefit of the Notification No. 4/97-CE for the said project also. Further, he has submitted that imposition of penalty on the appellant is unwarranted as no suppression of facts has been sustained against the appellant. Also, in absence of any involvement of the Director in the alleged wrong availment of benefit of exemption Notification, personal penalty imposed on him under Rule 209A of the erstwhile Central Excise Rules, 1944, is bad in law.

4. Learned AR for the Revenue reiterates the findings of the learned Commissioner. He has submitted that after analyzing the panchanama and the statements recorded, the learned Commissioner arrived at the findings that the claim of the appellant that the batching plants were situated at the site is without any basis, hence, not acceptable. Consequently, the demand was worked out for the period as directed.

5. Heard both sides and perused the records.

6. The Hon'ble Supreme Court while disposing the appeal filed by the Revenue against the Tribunal's order dated 6.11.2006 observed as follows: -

"Therefore, for deciding these civil Appeals, we are only concerned with the period 10th February, 1998 to March, 1998.

As stated above, if RMC is produced at site, then alone the assessee is entitled to exemption under the requisite Notification, though it so defined in the later circular. We may also state that with the advancement of technology, there could exist batching plants which are mobile. Ultimately, the question which would arise for determination would depend upon the facts of each case. In the present case, the Commissioner, as an adjudicating authority, has held that cement concrete obtained at Pen and Padghe sites conforms to the definition of BMC as prescribed in Bureau of Indian Standards definition of BMC. However, according to the Commissioner, the respondent-assessee has manufactured RMC during the above period in the said placers, namely, Pen and Padghe and, thereafter, they have cleared the same to the construction sites of the customers/clients of the assessee herein without payment of central excise duty and without observing the central excise formalities.

When the matter came in Appeal before the Tribunal, the Tribunal, the Tribunal has stated in its order that there was no dispute between the parties that BMC was manufactured at site. We do not know on what basis the said finding is recorded by the Tribunal, particularly when the Commissioner in the above order has held that RMC has been manufactured at Pen and Padghe and thereafter moved to the construction site. Therefore, it cannot be said that there was no dispute that BMC was manufactured at site."

7. The limited question for determination in the light of the above judgment of the Hon'ble Supreme Court is to ascertain whether the ready mix concrete has been manufactured in Pen and Pagdhe and moved thereafter to the construction site or it was manufactured at site. Analyzing the evidence on record, the learned Commissioner in the *de novo* proceeding observed as under: -

"25. Before concluding my findings, I must also place on record the submissions made by the Advocate during the personal hearing granted to the assessee on 23.07.2010. The Advocate has cited various paras of the show cause notice which in their opinion clearly indicates that RMC are manufactured at site of manufacture. On careful reading of the cited paras, I find that what is indicated is the existence of a batching plant for the manufacture of RMC at their project site at village Padghe, Taluka Bhivandi, District Thane and at village Gadab, Taluka Pen, District Raigad. There is however no indication to the fact that the spatial location of the point of construction within the project area are some or are adjacent to each other. On the contrary I find that it has been stated in the panchanama drawn at the respective project sites that the cement mix obtained after mixing is discharged into transit mixers and/or Dumpers which implies that the two 'sites' are physically distant from each other. It can therefore, be unambiguously inferred from this fact that the spatial location of the batching plant and the spatial location of the point of construction within the project area are not same or are adjacent to each other. The drawings/site plan of the project site submitted by the Advocate also lends credence to the aforesaid conclusion. The Tribunal's decision, which was cited by the Advocate, in the case Chief Engineer Ranjit Sagar Dam Vs. CCE, Jalandhar – 2006 (198) ELT 503(Tri-LB) that if RMC is manufactured at factory and brought to the site

> then it is excisable also further enriches the grounds for the aforesaid conclusion. In the instant case in the context of the Central Excise Act and the rules made there-under the site of the batching plant will be the site of the factory of the manufacture of RMC. Since it has been unambiguously proved that the location of the batching plant is not adjacent to the construction site but situated at a distance from the construction site, it would not be wrong to conclude that the aforesaid judgement of the larger bench in the case of Chief Engineer Ranjit Sagar Dam Vs. CCE, Jalandhar will also enrich the grounds for concluding that the RMC had not been manufactured at the construction site and used at the same site."

The appellant could not place any evidence contrary to the findings recorded by the learned Commissioner that the ready mix concrete was manufactured not at site but at Pen and Pagdhe. Consequently, the appellants are not eligible to the benefit of the said notification No. 4/97-CE dated 1.3.1997 for the period in dispute. However, we find force in the argument of the learned Advocate appellant with regard to imposition of penalty on the Director. No specific evidence brought on record pointing out the role of the Directors towards wrong availement of benefit of the said notification intentionally. Since the order was directed to be confined for the normal period of limitation, we do not find justification imposing personal penalty on the Director.

8. In the result, the company's appeal is dismissed and the Director's appeal is allowed.

(Operative portion of the order pronounced in court)

(Dr. D.M. Misra)
Member (Judicial)

(S. Srivastava)
Member (Technical)

Sinha