CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

EXCISE APPEAL No. 85127 of 2019

(Arising out of Order-in-Original No. 60/SRP/COMMR/MUM. SOUTH/2018-19 dated 25.10.2018 passed by Commissioner of Central GST & C. Excise, Mumbai South Commissionerate, Mumbai.)

ACC Limited .....**Appellants**
Cement House, 121, M.K. Road
Church gate, Mumbai – 400020.

VERSUS

Principal Commissioner of Central GST & Central Excise .....**Respondent**
Mumbai South Commissionerate
13th Floor, Air India Building
Marine Drive, Nariman Point
Mumbai - 400 021.

APPEARANCE:

Shri Prakash Shah, Shri Mihir Mehta, Shri Suyog Bhave a/w Shri Vikram Nankani, Advocates for the Appellants
Shri Ajay Jain, Special Counsel for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86227/2024

Date of Hearing: 20.06.2024
Date of Decision: 21.10.2024

PER : M.M. PARTHIBAN

This appeal has been filed by M/s ACC Limited, Mumbai (herein after, referred to as 'the appellants'), assailing Order-in-Original 60/SRP/COMMR/MUM. SOUTH/2018-19 dated 25.10.2018 (herein after, referred to as 'the impugned order') passed by the Commissioner of Central GST & C. Excise, Mumbai South Commissionerate, Mumbai.

2.1 The facts of the case, leading to this appeal, are summarised herein below:

2.2 The appellants herein, are *inter alia,* engaged in the manufacture ofCement, Clinker and Ready-Mix Concrete (RMC). The appellants during the period of dispute, had multiple factories manufacturing only RMC in the name and style of ACC Concrete Limited and apart from that, also had various factories across India for the manufacture of Cement and Clinker, in the name and style of ACC Limited. For the above purpose, the appellants were registered with Large Taxpayer Unit (LTU) having membership No. LTU-Mum/300 dated 29.09.2009. The Mumbai office of appellants was a registered/corporate office and the said office had obtained Service Tax registration bearing No.AAACT1507CST 023 as input service distributor (ISD) for distribution of credit among various units of ACC Ltd. holding Central Excise/Service Tax Registration and engaged in manufacture of excisable goods namely Cement and Clinker falling under Central Excise Tariff Item (CETI) 25232930 & 25231000 of the Central Excise Tariff Act, 1985 (CETA).

2.3 The Hon'ble Bombay High Court had delivered judgement dated 09.10.2012 in Company Scheme Petition No.605 of 2012, in which the ACC Concrete Limited, being the Transferor company, had sought for sanction of the scheme of its amalgamation with ACC Limited, being the Transferee company. The said judgement of the Hon'ble High Court made the said amalgamation scheme absolute, after the parties having fulfilled all statutory compliances under Section 391 to 394 of the Companies Act, 1956. Thus, after such merger, the appellants also became engaged in manufacture of Ready-Mix Concrete (RMC) falling under CTI 3824 5010 of the CETA, besides Cement and Clinker.

2.4 During the course of EA 2000 Audit conducted on the appellants company M/s ACC Ltd., bearing ISD registration, it was observed by the department that after merger of M/s ACC Concrete Ltd. with M/s ACC Ltd. in 2012, the assessee had also started manufacturing RMC falling under CTI 38245010 of CETA. The appellants were availing benefit of concessional rate of duty @2% under exemption Notification No.01/2011-C.E.dated 01.03.2011,as amended by Notification No.16/2012-C.E. dated 17.03.2012 on clearances of RMC. The said concessional rate of duty under the above notification was admissible to the appellants subject to the condition that the claimant of such duty concession is not availing Cenvat credit on duty paid on inputs or tax paid on input services, which are used in or in relation to manufacture of RMC.

2.5. Accordingly, the Audit wing of the department had observed that the appellants-assessee had availed entire credit of input services pertaining to both cement division & RMC division and distributed entire credit to their cement manufacturing units of Cement division. Since the appellants were availing concessional rate of duty under Notification No.01/2011-C.E.dated 01.03.2011,as amended, it was interpreted by the department that they were not entitled for the benefit of concessional rate as they had availed Cenvat credit on input services as stated above. Consequently, the department contended that the appellants were liable to discharge full rate of Central Excise duty @6% *advalorem* for RMC manufactured and cleared by them w.e.f. 17.03.2012.

2.6. As per turnover mentioned in the Annual balance sheet of the appellants, the differential duty liable to be recovered from the appellants by denying the duty concession benefit of said notification was worked out by the department as Rs. 104,01,00,000/- as detailed below:

Year	RMC Turnover	RMC (Ch.38245010) Tariff rate of duty @6%	Duty paid @2% by availing Notification No. 01/2011-CE. dt. 01.03.2011 as amended	Differential duty @4% is payable (Rs in Crore)
2012	539.45	32.37	10.79	21.58
2013	544.58	32.67	10.89	21.78
2014	664.75	39.89	13.30	26.59
2015	851.47	51.09	17.03	34.06
Total	**2600.25**	**156.02**	**52.01**	**104.01**

Accordingly, the department had proceeded with the issue of Show Cause Notice (SCN) dated 07.02.2017 to the appellants asking them to show cause to the Commissioner of Central Excise and Service tax, LTU, Mumbai, as to why the following action should not be taken against them:

(i) The amount of Rs. 104,01,00,00/- (Rupees one Hundred Four Crores and One Lakh only) for the period 2012 to 2015 should not be demanded & recovered from them under the proviso to Section 11A(4) of Central Excise Act, 1994;

(ii) An Amount of Rs. 2,25,16,688/- paid by the assessee should not be appropriated against the liability stated in (i) above;

(iii) Interest as applicable should not be charged and recovered from them Section 11AA of Central Excise Act, 1994, on the amount demanded as at sr. no. (i) above;

(iv) An amount of Rs 1,03,44,822/- paid by the assessee should not be appropriated against the liability stated (iii) above;

(v) Penalty should not be imposed on them under Section 11AC of the Central Excise Act, 1944 for suppressing the facts of availment of Cenvat credit in contravention of the conditions laid down in the Notification.

2.7 In adjudication of the above SCN, learned Commissioner had confirmed all the proposals made in the show cause proceedings, besides imposing penalty equivalent to the duty, on the basis of the findings recorded in the impugned order. Feeling aggrieved with the impugned order, the appellants have filed this appeal before the Tribunal.

3.1 Learned Advocate for the appellants has submitted that the appellants were availing the benefit of concessional rate of Central Excise Duty under Sr. No. 46 of Notification No. 01/2011-C.E. dated 01.03.2011 as amended by Notification No.16/2012-C.E. dated 17.03.2012, on the RMC cleared by the appellants for home consumption. In the impugned Order dated 25.10.2018, the adjudicating authority had disallowed the benefit of concessional rate of Central Excise Duty vide above referred notification, on the ground that in respect of RMC cleared by the appellants during 2012 to 2015, they had availed CENVAT credit in contravention of proviso to the said Notification No.1/2011-C.E. dated 01.03.2011, inasmuch as the appellant's head office being a Input Service Distributor (ISD) took CENVAT Credit of common input services provided by Holcim Technologies Limited, Switzerland.

3.2 Learned Advocate also submitted that, in view of admitted fact that no part of the disputed CENVAT Credit was distributed to RMC factories, there is no CENVAT Credit taken by RMC factories in contravention of the proviso to the said Notification No. 01/2011-C.E. The denial of exemption on the purported findings that the appellants took CENVAT credit of disputed common input services is ex-facie erroneous and untenable in law. He further stated that in fact, the purported findings in the impugned Order and submissions of the learned Special Counsel proceeded on an assumption that taking of CENVAT Credit by ISD means that the CENVAT Credit is taken by the RMC factories. This he claimed is patently erroneous.

3.3 He further submitted that in terms of Rule 3 of the CENVAT Credit Rules, 2004 (CCR), CENVAT Credit can be taken only by the manufacturer of final products or provider of output services. ISD is neither manufacturer nor provider of output services. ISD is only a facilitator for distribution of

CENVAT credit to various factories of manufacturer and premises of service provider.No provisions of the CCR permits taking of CENVAT Credit by ISD. The ISD can only distribute the CENVAT Credit. In absence of any distribution of CENVAT credit by the ISD to RMC factories, RMC factories cannot be said to have contravened the proviso of the Notification and denial of exemption is liable to be set aside.

3.4 He also stated that it is undisputed fact that, even though the appellants were member of Large Tax Payer Unit, each of the factories were required to maintain separate account of production and file their returns and pay excise duty. Each of the factories of the appellants had filed separate returns and discharged appropriate duty liabilities. Each of the factories maintained their separate CENVAT accounts. The disputed CENVAT credit never entered the CENVAT account of the RMC factories of the appellants.

3.5 On the other hand, it was contended by the learned Special Counsel that the disputed input services are common to all the factories of the appellants including RMC factories. However, it was countered by the learned Advocate for the appellants, that the disputed input services were exclusively used by cement factories and correctly distributed to the cement factories. He stated that even going by the case of the department and submissions of the learned Special Counsel that disputed input services are common to all factories and ought to be distributed proportionately to all factories including RMC factories, in terms of Rule 7 of CCR, it can at best be case of alleged improper distribution of CENVAT Credit and not denial of exemption.

3.6 Learned Advocate stated that admittedly, the impugned SCN does not propose recovery of allegedly erroneously distributed CENVAT Credit to the cement factories. No recovery in respect of alleged improper distribution of CENVAT Credit can be made in the present proceedings. Apart from the above, he reiterated the submissions made in the grounds of appeal, written submissions dated 16.10.2023 and the arguments made during the course of the hearing on 20.06.2024.

3.7 In view of the aforesaid, Learned Advocate had humbly prayed that the appeal be allowed with consequential reliefs.

4. On the other hand, learned Special Counsel appearing for Revenue reiterated the findings of the adjudicating authority in the impugned order, and submitted that the learned Commissioner had examined the agreement entered by the appellants for obtaining the Technical know-how from the foreign entity, and stated that since such IPR services cover 'cementitious materials', such services is intended to cover both cement products and RMC and therefore the service tax paid on such common input services, used in the manufacture of RMC, makes the appellants ineligible for the concessional rate of excise duty payable on the RMC. Therefore, he prayed that the impugned order is sustainable and the appeal preferred by the appellants are liable to be set aside.

5. Heard both sides and perused the records of the case.

6. The short issue for consideration before the Tribunal in this case is,-

(i) whether the technical know-how services, obtained from the foreign entity has been used by the appellants for use in the manufacture of final products viz., cement, clinker, etc. as well as the manufacture of Ready-Mix Concrete (RMC), or not?

(ii) whether clearance of RMC is eligible for concessional rate of Central Excise duty of 1% / 2%, under Sr. No. 46 of Notification No. 01/2011-C.E. dated 01.03.2011 as amended by Notification No.16/2012-C.E. dated 17.03.2012, as the condition of the notification is that no CENVAT credit can be taken in order to be eligible for applying or claiming the above exemption benefit.

7. In order to address the above issue of CENVAT credit taken on input services; whether the same has been used in manufacture of cement or for both cement and RMC; and the issue of eligibility of RMC to concessional Central Excise duty exemption under the aforesaid Notifications, we would like to refer the relevant legal provisions contained in CENVAT Credit Rules, 2004 (CCR) and notifications issued thereon for considering whether there is any violation of CCR or not, and for determination of proper Central Excise duty applicable on the subject goods under dispute.

CENVAT credit.

Rule 3. *(1) A manufacturer or producer of final products or a provider of output service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of—*

(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act;
…..
(ix) the service tax leviable under section 66 of the Finance Act;

(ixa)the service tax leviable under section 66A of the Finance Act;

(ixb) the service tax leviable under section 66B of the Finance Act;
….

Manner of distribution of credit by input service distributor.

Rule 7. *The input service distributor shall distribute the CENVAT credit in respect of the service tax paid on the input service to its manufacturing units or unit providing output service or an outsourced manufacturing units, as defined in Explanation 4, subject to the following conditions, namely :—*

(a) the credit distributed against a document referred to in rule 9 does not exceed the amount of service tax paid thereon;

(b)the credit of service tax attributable as input service to a particular unit shall be distributed only to that unit;

(c)the credit of service tax attributable as input service to more than one unit but not to all the units shall be distributed only amongst such units to which the input service is attributable and such distribution shall be pro rata *on the basis of the turnover of such units, during the relevant period, to the total turnover of all such units to which such input service is attributable and which are operational in the current year, during the said relevant period;*

(d)the credit of service tax attributable as input service to all the units shall be distributed to all the units pro rata *on the basis of the turnover of such units during the relevant period to the total turnover of all the units, which are operational in the current year, during the said relevant period;*

(e) outsourced manufacturing unit shall maintain separate account for input service credit received from each of the input service distributors and shall use it only for payment of duty on goods manufactured for the input service distributor concerned;

(f) credit of service tax paid on input services, available with the input service distributor, as on the 31st of March, 2016, shall not be transferred to any outsourced manufacturing unit and such credit shall be distributed amongst the units excluding the outsourced manufacturing units….

Notification No. 01/2011-C.E. dated 01.03.2011

Effective rate of duty of 1% on specified goods when no Cenvat credit availed on inputs or input services

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the excisable goods of the description specified in column (3) of the Table below and falling under Chapter, heading, sub-heading or tariff item of the

First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), specified in the corresponding entry in column (2) of the said Table, from so much of the duty of excise leviable thereon under the said Central Excise Act, as is in excess of the amount calculated at the rate of 1% ad valorem :

Provided that nothing contained in this notification shall apply to the goods in respect of which credit of duty on inputs or tax on input services has been taken under the provisions of the CENVAT Credit Rules, 2004.

S. No.	Chapter or heading or sub-heading or tariff item of the First Schedule	Description of excisable goods
(1)	(2)	(3)
1	13021920, 13021930	Cashew shell liquid (CNSL)
	xxx	xxxxxxxxx
46	38245010	Ready-mix concrete (RMC)
	xxx	xxxxxxxxx

Notification No.16/2012-C.E. dated 17.03.2012

Effective rate of duty of 2% on specified goods when no Cenvat credit availed on inputs or inputs services — Amendment to Notification No. 1/2011-C.E.

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 01/2011-Central Excise, dated the 1st March, 2011, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 116(E), dated the 1st March, 2011, namely :—

In the said notification, —
(a) in the opening paragraph, for "1% ad valorem:", "2% ad valorem:" shall be substituted;

(b) in the Table, —
(i) serial number 28, 40, 88 and 89 and the entries relating thereto, shall be omitted;

(ii) against serial number 115, for the entry in column (3), the entry "Spectacle lenses" shall be substituted;

(iii) after serial number 130 and the entries relating thereto, the following shall be inserted, namely :-

(1)	(2)	(3)
"131	Any Chapter	Parts, components and accessories namely, battery chargers, PC connectivity cables, memory cards and hands-free headphones of mobile handsets. Explanation. - For the purposes of this entry, mobile handsets include cellular phones."

8. In the impugned order dated 25.10.2018, learned Commissioner had dealt with the issues of dispute and gave his findings by concluding that the inputs services were used for the entire products manufactured by the appellants company, and therefore they are not eligible for concessional excise duty in terms of the aforesaid notifications. Accordingly, he confirmed all the proposals made in the SCN for demand of duty along with interest, imposition of penalty an appropriate in the already paid by the appellants against such adjudged demands. The relevant paragraphs of the impugned order is extracted and given below:

> *"13. The issues which require to be determined in this case are:-*
> *i)whether the noticee has wrongly availed the benefit of concessional rate @2% of Central Excise duty on clearances of Ready Mix Concrete (RMC) under exemption notification No. 01/2011-CE dated 01.03.2011 as amended by NF No. 16/2012-CE dated 17.03.2012?*
>
> *ii) Consequently, whether the noticee is liable to pay Central Excise duty on RMC at full rate @6% adv as they had availed cenvat credit on inputs or input services, which were used inb or in relation to manufacture of RMC?*
>
> *iii) Whether the noticee is liable to pay short paid CE Duty in terms of proviso to Section 11A(4) of CE Act, 1944; interest thereon u/s 11AA of CE Act and is liable to penal action under section 11AC of CE Act, 1944, as proposed in the SCN?*
>
> *xxx xxx xxx xxx*
>
> *20. In this case, however, I find that the noticee had reversed the credit attributable to the input services used in the manufacture of RMC later in Oct, 2016 and justified that they are eligible to exemption under the said notification. While I agree that there are legal pronouncements in favour of the noticee, wherein it is held that later reversal of credit also would entitle them to exemption notification in such cases, but it is further alleged in the notice that they did not reverse the credit taken by them in respect of TKH service availed by them in respect of both Cement and RMC divisions...*
>
> *xxx xxx xxx xxx*
>
> *21.1. I have perused the copy of the said Technology and Know-How agreement dated 17.12.2012 and find that HTL and ACC belong to the Holicim Group, which is operative in the business of manufacturing and sale of cementitious materials and rendering allied services to all Group Companies. As per the agreement recitals (IV), M/s ACC was interested in obtaining a licence to used the Business Concept and IP-Rights from HOLCIM, which should enable them to increase its production base and to achieve higher standards of proficiency similar to those achieved by HOLCIM Group. Accordingly, HOLCIM agreed to provide on a non-exclusive basis, the Business Concept (Involving valuable technical know-how, services and expertise) and as per interest of ACC, HTL shall make the Business Concept available to ACC which shall help ACC in sustaining and enhancing the business model (Recital-V).*
>
> *xxx xxx xxx xxx*

21.5 From conjoint reading of the Recitals, Definition, Section 5 and Exhibit 2 of the agreement, it is observed that the agreement was not only meant to improve the manufacturing of cement only but mostly for Commercial and marketing of all products and solutions, knowledge management including strengthening of knowledge and skills in various areas of work, sustainable development of all areas including waste management including best practices and Innovations etc. The agreement has no where indicated that the agreement for IPR and other allied services shall be limited to Cement division only, instead it talks about the Business Concepts as a whole in addition to IP-Rights, which is a bundle of inseparably linked intangible rights and intangible properties. Similarly, the definition of IP-Rights, Technology and Know How contained in the agreement, do not speak about any particular product, instead it refers to products (plural) and not only about cement. Considering the wide scope of the said agreement, as emerging from the terms & conditions as highlighted above, I am of the firm view that the contention of the noticee that it was meant for cement division only, would not sustain. Accordingly, I reject their contention especially in view of the stipulations made in the agreement, as discussed above, as well as the method of calculation of fees for the services provided by HTL, which has been admittedly computed @1% of total sales turnover of both Cement and RMC divisions…

xxx xxx xxx xxx

23.1. The noticee has relied upon para 5.6. of Accounting Standard (AS) 17, for Segment Reporting', issued by the Council of the Institute of Chartered Accountant of India, which stipulates as under:

> *"5.6 Segment expense is the aggregate of*
>
> *i. The expense resulting from the operating activities of a segment that is directly attributable to the segment, and*
>
> *ii. The relevant portion of enterprise expense that can be allocated on a reasonable basis to the segment, including expense relating to transactions with other segments of the enterprise.*

They have also relied upon According Standard (AS)-1 (Part 10-Fundamental Accounting Assumptions), which covers "accrual" and stated that Revenues and costs are accrued, that is, recognised as they are earned or incurred (and not as money is received or paid) and recorded in the financial statements of the periods to which they relate. They have further stated that following this Accounting Standard, the expenditure related to Technical Know-How is entirely booked in the books of account of Cement Division and correspondingly, the Cenvat Credit is taken accordingly. They also state that they maintain separate books of account for the Cement and RMC Divisions. By these arguments, they are trying to contend that the THK service is only used for cement division. In this regard, I find undisputed that for payment of THK fees to M/s HTL, the total turnover of both Cement and RMC divisions have been taken into account. It is not clear as to why the turnover of RMC division has been considered if the services were meant only for Cement division and especially when separate books of account are maintained for the two divisions. The reason is obvious that the services under the said agreement were meant for the entire company comprising of both the *divisions and the expenses were accounted for in the books of accounts of Cement division only with an intent to avail entire cenvat credit of tax paid on the said services and to avail benefit of concessional rate of duty for RMC wrongly.*

xxx xxx xxx xxx

27. In view of above findings, I pass the following order:

ORDER

(i) I confirm the demand of Central Excise duty of Rs.104,01,00,000/- (Rupees One hundred four crores one lakh only) short paid by the noticee for the period from 2012 to 2015 on ready mix concrete against M/s ACC Ltd and order for recovery of the same from them, under proviso to section11A(4) of Central Excise Act, 1944 read with section 174 of CGST Act, 2017.

An Amount of Rs.2,25,16,188/- paid by the assessee is hereby appropriated against the CE liability determined as above.

(ii) I order for recovery of interest at appropriate rates under the provisions of Section 11AA of Central Excise Act, 1944 on Central Excise duty amounting to Rs.104,01,00,000/- determined that (i) above from the date on which the said amount was due to till the date it is actually paid, from M/s ACC Ltd.

An Amount of Rs.1,30,44,882/- paid by the assessee is hereby appropriated against the interest liability.

(iii) I impose penalty of Rs.104,01,00,000/- (Rupees One hundred four crores one lakh only) under the provisions of Section 11AC of Central Excise Act, 1944 on M/s ACC Ltd. however, the noticee has an option to pay reduced penalty @25% of this penalty amount under this Section, if the entire amount of Central Excise duty and interest thereon is paid along with the reduced penalty among within a period of 30 days from the date of communication of this order, in terms of section 11AC(1)(e) of the Act."

9. From the records placed in file, it transpires that the appellants were engaged in the manufacture of cement, clinker and other related products in various manufacturing units situated all over the country coming under the umbrella of M/s ACC Limited, duly discharging the applicable Central Excise Duty on removal of such excisable products by registering with Central Excise department under Large Taxpayer Unit (LTU) having membership No. LTU-Mum/300 dated 29.09.2009. On the other hand, M/s ACC Concrete Limited were manufacturing Ready Mix Concrete (RMC) and were availing the concessional rate of Central Excise Duty for clearance of such goods, under the aforementioned Notification No. 01/2011-C.E. dated 01.03.2011under exemption entry at Sr. No. 46. After merger of M/s ACC Concrete Limited with the appellants, in terms of the Hon'ble Bombay High Court judgement dated 09.10.2012, the appellants became the

manufacturer of Cement, Clinker and other related products as well as the manufacturer of RMC. In order to distribute the common input credit, the appellants had obtained the registration as Input Service Distributor (ISD) for receiving The invoices relating to branches of the input services and for issue of invoice/challan for the purpose of distributing the credit of service tax paid on such input services among various units of ACC Ltd. who are engaged in manufacture of excisable goods. It also transpires that the registered/corporate office of the appellants at Mumbai was registered with the Department and obtained Service Tax registration bearing No.AAACT1507CST 023 as ISD under the CCR, 2004.

10. It is also on record that the Department had alleged in the SCN that appellants had availed input credit paid in respect of input services availed by them and have distributed the same as ISD, to the various units under cement division as well as on RMC division. Further, it is also a fact on record that upon a merger of M/s ACC Concrete Limited with the appellants company M/s ACC Limited, with effect from October, 2012, and upon being pointed out by the Audit wing of the Department, the appellants after segregating their records had reversed service tax credit amounting to Rs.2,25,16,688/- and Rs.1,25,16,688/-from their ISD CENVAT account on account of other common input services and have also paid interest thereon amounting to Rs,1,03,44,822/-, Rs.69,00,022/- and these facts are not in dispute. It is only the service tax paid on Technical Know-how for an amount of Rs.18,02,19,131/- as input services, which is under dispute as having been used, both for units under cement division as well as on RMC division, and therefore the department has alleged in the SCN that the concessional rate of Central Excise Duty availed is inappropriate and therefore the impugned order had confirmed the adjudged demands.

11. In order to examine the issue of technical know-how services, obtained by the appellants from M/s Holcim Technology Limited, Switzerland and to determine whether the same has been used by the appellants either for use in the manufacture of final products viz., cement, clinker, etc. or in the manufacture of both cement, clinker as well as Ready Mix Concrete (RMC), we have perused the 'Technology and Know-How Agreement' dated 17.12.2012, submitted as a part of the appeal records. The relevant clauses concerning the scope of services rendered, and details

regarding such services related to specific products under manufacture by the appellants have been extracted and given below:

Extract of Technology and Know-How Agreement

Between

Holcim Technology Ltd. and ACC Limited

PARTIES

On one side

Holcim Technology Ltd, a corporation duly incorporated and existing under the laws of Switzerland with registered office at Zürcherstrasse 156, 8645 Jona, Switzerland

(hereinafter referred to as the "Holcim")

and on the other side

ACC Limited, a company duly incorporated and existing under the laws of India with registered office at Cement House, 121 Maharshi Karve Road, Mumbai 400 020, India,

(hereinafter referred to as the "Company")

(Holcim and the Company hereinafter jointly referred to as "Parties" and individually as "Party")

RECITALS

I. **WHEREAS,** both Parties belong to the Holcim Group, which is operative in the business of manufacturing and sale of cementitious materials and rendering allied services to all Group Companies.

II. **WHEREAS,** Holcim has, or has access to, valuable experience and expertise and possesses secret and valuable methods, systems and processes in relation to the research, development, testing, production, conditioning and marketing of the Products. Moreover, Holcim is either the owner or has otherwise a contractual entitlement to use and license various intellectual property rights and other materials that are valuable for the Company in connection with the manufacture of the Products and such intellectual property rights, other materials and related services, which are to be provided by the Holcim, are inextricably linked to each other.

III. **WHEREAS,** in order to capture the best practices and technology available within the Holcim Group, both Parties intend to set up a uniform structure and within the framework of this new contractual structure, Holcim agrees to implement this Agreement.

IV. **WHEREAS,** the Company is already engaged in the business of manufacturing and distributing the Products in the Territory and has successfully run and developed the business in the Territory but it feels that the business of the Company can be further advanced with new technology and know-how which can be available from Holcim. For these reasons, the Company is interested in obtaining a licence to use the Business Concept and IP-Rights from Holcim, which shall enable the Company to increase its production base & to achieve higher standards of proficiency similar to those achieved by Holcim Group.

V. **WHEREAS,** Holcim has agreed to provide on an non-exclusive basis the Business Concept (involving valuable technical know-how, services & expertise) and the Company is interested in being provided the Business Concept, so that both Parties hereto wish and intend to enter into this Technology and Know-How agreement according to which Holcim shall make the Business Concept available to the Company which shall also help the Company in sustaining and enhancing its business model and the Company shall pay an appropriate consideration for it.

NOW THEREFORE in consideration of the mutual covenants and agreements hereinafter contained and for other good and valuable consideration (the receipt and sufficiency of which is acknowledged by each of the Parties hereto) the Parties covenant and agree each with the other as follows:

1. DEFINITONS

Agreement	means this technology and know-how agreement including all exhibits
Applicable Laws	means any statute, treaty, law, code, regulation, ordinance, rule, judgment, order, decree, bye-law, approval of any governmental authority, directive, guideline, policy, requirement or other governmental restriction or any similar form of decision of or determination by, or any interpretation or administration having the force of law, by any governmental authority having jurisdiction over the matter in question, whether in effect as of the execution date of this Agreement or at any time thereafter and applicable to the Party concerned.
Business Concept	means a bundle of inseparably linked intangible rights and intangible property which, when used all together in the manner in which it has been done directly or indirectly by Holcim Group in the past, results in a precise and defined business operation model. The components of the Business Concept are Technology and Know-How and other rights as further specified in section 5.0 read with Exhibit 2
Effective Date	means 1 January 2013
Fee Rate	means the percentage as specified in Exhibit 1
Group Company	means any company belonging to the Holcim Group
Holcim Group	means Holcim Ltd, in Switzerland, and all companies controlled by it. Control of a company means (a) the power, direct or indirect, to direct or cause the direction of the management and policies of such company whether by contract or otherwise; or (b) the ownership, directly or indirectly, of more than 50% of the voting securities or similar right of ownership of such company.

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V. **WHEREAS**, Holcim has agreed to provide on an non-exclusive basis the Business Concept (involving valuable technical know-how, services & expertise) and the Company is interested in being provided the Business Concept, so that both Parties hereto wish and intend to enter into this Technology and Know-How agreement according to which Holcim shall make the Business Concept available to the Company which shall also help the Company in sustaining and enhancing its business model and the Company shall pay an appropriate consideration for it.

NOW THEREFORE in consideration of the mutual covenants and agreements hereinafter contained and for other good and valuable consideration (the receipt and sufficiency of which is acknowledged by each of the Parties hereto) the Parties covenant and agree each with the other as follows:

1. DEFINITONS

Agreement	means this technology and know-how agreement including all exhibits
Applicable Laws	means any statute, treaty, law, code, regulation, ordinance, rule, judgment, order, decree, bye-law, approval of any governmental authority, directive, guideline, policy, requirement or other governmental restriction or any similar form of decision of or determination by, or any interpretation or administration having the force of law, by any governmental authority having jurisdiction over the matter in question, whether in effect as of the execution date of this Agreement or at any time thereafter and applicable to the Party concerned.
Business Concept	means a bundle of inseparably linked intangible rights and intangible property which, when used all together in the manner in which it has been done directly or indirectly by Holcim Group in the past, results in a precise and defined business operation model. The components of the Business Concept are Technology and Know-How and other rights as further specified in section 5.0 read with Exhibit 2
Effective Date	means 1 January 2013
Fee Rate	means the percentage as specified in Exhibit 1
Group Company	means any company belonging to the Holcim Group
Holcim Group	means Holcim Ltd, in Switzerland, and all companies controlled by it. Control of a company means (a) the power, direct or indirect, to direct or cause the direction of the management and policies of such company whether by contract or otherwise; or (b) the ownership, directly or indirectly, of more than 50% of the voting securities or similar right of ownership of such company.

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2. SCOPE OF THIS AGREEMENT

Holcim grants to the Company and its Subsidiaries during the term of this Agreement the non-exclusive licence to use the Business Concept and IP Rights (involving valuable technical know-how, services & expertise) within the Territory for the operation of the Company's and Subsidiaries's business including necessary support & help in sustaining and enhancing its business model.

This Agreement outlines the terms and conditions under which the Company shall remunerate Holcim for granting the licence to use the Business Concept and IP-Rights as well as for the respective rights and obligations of both Parties under the terms of this Business Model.

3. TERRITORY

The licence to use the Business Concept and IP-Rights is granted for the Territory.

4. VALIDITY

This Agreement shall be valid as from the Effective Date and shall remain in force for a period of five years unless terminated earlier in accordance with section 19 hereunder, whichever is earlier.

5. BUSINESS CONCEPT

General Provisions

The object of this Agreement is to grant to the Company the licence to use the Business Concept and IP-Rights, which is a bundle of intangible rights and property which, when used all together in the manner in which it has been done by Holcim Group in the past, results in a precise and defined business operation model.

Without limiting the generality of the foregoing statement and just for the sake of clarity, the Business Concept shall include *inter alia* the following elements:

(i) Technology,

(ii) Know-How.

Holcim shall provide the Company with a detailed description of technology and know-how, services etc. to be provided by Holcim to the Company under this Agreement which may be updated from time to time as may be found necessary and the same are summarized in 'Exhibit 2' to this Agreement.

General Limited License

Holcim hereby grants to the Company during the term of this Agreement a limited license on the IP-Rights and Business Concept to the extent, and only to the extent, which is necessary to enable Holcim to exercise its rights effectively and fulfil its obligations under this Agreement.

6. REMUNERATION

As a consideration for the licence to use the IP-Rights and Business Concept granted hereby, the Company commits to remunerate Holcim with a fee (hereinafter referred to as "the Technology and Know-How Fee") to be calculated in accordance with the following formula:

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IN WITNESS THEREOF the Parties hereto have entered into this Technology and Know-How Agreement on the date and at the place set hereunder and have executed it in two originals, both of them together constituting one and the same document.

For Holcim:

DATED, 17 December 2012.

HOLCIM TECHNOLOGY LTD

Bernard Fontana Member of the Board of Directors	Paul Hugentobler Member of the Board of Directors

For the Company:

DATED, 17 December 2012.

ACC LIMITED

Signed by: Onne Van Der Weijde
Title: Authorised Signatory.

ACC Limited
MUMBAI

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EXHIBIT 1: FEE RATE

The Fee Rate payable by the Company to Holcim shall be set at:

1% (ONE PERCENT)

ACC Limited
MUMBAI

EXHIBIT 2 – TECHNOLOGY, KNOWHOW & SERVICES

Holcim shall provide to the Company and its Subsidiaries, the technology and know-how, services & expertise which shall include the following non-exhaustive list. It is clarified that the scope of this Agreement shall not cover (a) services in relation to Large CAPEX Projects (Projects with total capital expenditure of more than Swiss Franc 200 millions) and (b) senior executive training by 3rd parties, which shall be invoiced separately by Holcim.

Cement Manufacturing

Holcim shall provide the Company with the additional and unique value as Cement Manufacturing (CMS) has operational data of cement plants worldwide captured within the databases representing 30 years of experience on these plants. This will help the Company with a clear advantage when they need to optimize production output, increase the quality or reduce costly downtime of the cement plants. The key functions under CMS would be:

1) General and on demand support to the Company like standard tools and procedures, process innovation and performance analysis.

2) Building Cost Effective Plants by reducing energy intensity, optimising fuel mix and use of Alternate Fuels and Raw Materials (AFR)

3) Operating Plants Efficiently

4) Leading Technological Development

5) Knowledge Management

- All solutions and IP developed by Holcim will be stored in the global iShare database as well as libraries, communities of practices ("COPs") and database platforms.
- Holcim Asset Code ("HAC") is of significant value to the Company as every asset is monitored and can be replaced quickly if needed

Commercial and Marketing

Holcim's mission of Commercial and Marketing is to ensure commercial excellence throughout the Group by providing and sharing best-in-class expertise combined with customized, on-demand support to the Company in the following areas:

1) Product and Solution Management

2) Price and Sales Force Management

3) Knowledge Management

To build and strengthen knowledge and skills in the commercial field, commercial trainings are organized for the Company in all relevant key areas:-

- Segmenting – Targeting – Positioning;
- Service Management;
- Product Management;
- Pricing;
- Customer Management; and
- Channel Management.

ACC Limited Mumbai

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Sustainable Development

1) Performance Measurement:

- AFR, Climate Change, Environment and Social Responsibility Indicators as published in the annual Sustainable Development Performance Data;
- AFR Certification;
- Use of 'Geocycle' brand & methodology to provide for environmentally sound waste management solutions to the waste market, best practices of re-use, recycling & co-process to provide AFR to cement production, continuous emission monitoring system & ISO certification, quality control, adequate safety standards Co-processing as Technology;
- Internal Corporate Social Responsibility ("CSR") Questionnaires per OpCo to be completed and submitted by all Companies yearly;
- Benchmarking Tool (Environmental Index); and
- CSR Benchmark Report.

2) Knowledge Management:

3) Fostering a safe working environment

Occupational health and safety (OH&S) remains a top priority for Holcim. The health and safety of employees, contractors, third parties and visitors is fundamental to business success.

The overall goal of OH&S at Holcim is "Zero Harm to People". Holcim applies OH&S standards and directives, define organizational accountabilities, provide necessary resources and training, manage performance and minimize risk to employees, contractors, visitors and the community.

Information and Knowledge Management

The Knowledge Management ("KM") Function was created in 2008 in order to enhance learning and exchange of knowledge throughout the organization to leverage Holcim's group-wide know-how.

Knowledge Management comprises access to the following elements as:

- iShare;
- Committees, conferences (e.g. ITCG, VESTA);
- Networks and CoPs;
- Training and development; and
- Best practices (including business process recommendations).

Innovation

The Innovation Function focuses mainly on:

- Innovate in collaboration across Holcim and with external partners;
- Support innovation in Companies and other functions;
- Facilitate multiplication of innovative solutions; and
- Support Group companies in capturing added value from optimized products.

Limited MUMBAI

12. On careful examination of the aforesaid Technical Know-how agreement entered into between the appellants and the foreign supplier, in totality and on the specific clauses explaining the nature of such services rendered to the appellants, it transpires that the scope of such services have been described as 'Business Concept' and 'Intellectual Property Rights (IPR)' having the elements of technology, know-how and the said agreement is intended to capture the best practices and technology available within the Holcim Group to be transferred to the appellants as per the contractual terms and conditions. The detailed explanation of the services provided in Exhibit-2 of the said agreement indicate that the technology, know-how and services are for 'cement manufacturing, commercial and marketing, sustainable development, information and knowledge management, innovation and procurement'. There is no specific mention in such agreement that the technical know-how is related to manufacture of Ready-Mix Concrete. On the other hand, the activities of cement manufacturing at various plants, standards tools and procedures for innovation and performance analysis of such cement manufacturing plants, building their cost effectiveness, operating the plants efficiently have been specifically mentioned in the said agreement. In view of the above detailed analysis, we are of the considered opinion that the services provided in terms of the said Technical Know-how agreement is related to the cement plants and for manufacture of cement by the appellants at various cement plants and is not in relation to manufacture of RMC. We are also of the considered view, that since the agreement provide a formula for determination of fees at prescribed percentage (1%) of the agreed base i.e., not only the net sales of the appellants' company, but also the net sales of its subsidiaries, does not *per se* indicate that the technical know-how was provided to appellants company manufacturing cement, as well as to their subsidiary companies manufacturing RMC, in absence of any credible evidence or supporting documents.

13. Sr. No. 46 of Notification No. 01/2011-C.E. dated 01.03.2011 as amended by Notification No.16/2012-C.E. dated 17.03.2012, prescribe concessional rate of Central Excise duty at 1%/2% payable in respect of RMC, subject to the condition that such notification shall not apply to the goods in respect of which credit of duty paid on inputs or tax paid on input services has been taken under the provisions of the CENVAT Credit Rules, 2004.We find that initially the factories/production units involved in

manufacturing cement and RMC were functioning under two different business entities viz. ACC Limited and ACC Concrete Limited, respectively. It is only after the proposal of merger having been approved by the Hon'ble Bombay High Court vide judgement dated 09.10.2012 in Company Scheme Petition No.605 of 2012, the ACC Concrete Limited, being the Transferor company got itself amalgamated with ACC Limited, being the Transferee company. Hence, the Technical Know-how agreement dated 17.12.2012, had specifically stated that those services are relating to cement manufacturing units only. Thus, we find that there is no case of availing CENVAT credit on such Technical Know-how by the RMC units, inasmuch as the ISD on service tax paid thereon was distributed as ISD credit only to the cement manufacturing units, by the appellants. Further, it is also on record that the appellants had paid the ineligible input credit of Rs.2,25,16,688/- on 24.10.2016; Rs.1,25,16,688/- on 22.11.2016 on account of other common input services, which were availed during the transition period of merger, during the middle of the financial year, and upon being pointed out by the audit wing of the department. Further, the appellants have also paid applicable interest thereon of Rs.1,03,44,822/- on 07.11.2016 and Rs.69,00,022/- on 23.11.2016. All such payments have been made by the appellants much before the issue of SCN on 07.02.2017. this has been conceded by the learned Commissioner in para 20 of the impugned order and he had observed that there are legal pronouncements by the Courts holding that later reversal of credit would entitle the appellants the benefit of exemption notification.

14. In this regard, we find that the Co-ordinate Bench of the Tribunal in the case of *Sakthi Sugar Ltd., vs. Commissioner of Central Excise, Salem* – 2008 (230) E.L.T. 676 (Tri.-Chennai) have held that the appellants are entitled to the benefit of Notification No. 67/95-C.E. in respect of molasses used captively for manufacture of Rectified Spirit and Denatured Spirit, since it is sufficient if the Cenvat credit attributable to inputs in the exempted product is reveres or paid and the appellants have discharged the same. The said order of the Tribunal was also upheld by the Hon'ble Supreme Court in the judgement dated 23.11.2015 delivered in Civil Appeal D.No.32506 of 2015, by holding that there is no good ground to interfere with the judgment(s) and order(s) passed by the Tribunal.

15.1 We also find from the records of the case that the CENVAT credit involved on Technical Know-how is the only dispute for considering the issue that whether the appellants have taken such CENVAT credit or not, in the manufacture of RMC for enabling them to clear those goods at concessional rate of excise duty. As the above issue, that the input service tax paid in respect of technical know-how services alleged to have been used in manufacture of RMC having been answered in the negative, in our discussion as above at paragraphs 12 and 14, we are of the considered view, that there is no ground on which the benefit of Notification No. 01/2011-C.E. dated 01.03.2011, as amended by Notification No.16/2012-C.E. dated 17.03.2012 can be denied to the appellants.

15.2 In view of the foregoing discussions and analysis, we are of the opinion that there is no case made out by the department that CENVAT credit in respect of input service tax credit on technical know-how fees/charges having been taken for the impugned goods i.e., 'Ready Mix Concrete' and as such we are of the opinion, that the appellants have rightly availed the duty concessions extended vide Sr. No. 46 of Notification No. 01/2011-C.E. dated 01.03.2011 as amended by Notification No.16/2012-C.E. dated 17.03.2012. Therefore, we are of the considered view, that the impugned order passed by the learned Commissioner of Central GST & C. Excise, Mumbai South Commissionerate, Mumbai is liable to be set aside on this limited point of eligibility of the exemption/concessional duty notification No.01/2011-C.E. as amended, as it does not stand the scrutiny of law. Therefore, by modifying the impugned order dated 25.10.2018, to the extent of setting aside the adjudged demands towards Central Excise duty, interest thereon and penalty as ordered by the learned Commissioner in paragraphs 27(i), (ii) and (iii) of the impugned order, we allow the appeal in favour of the appellants. We also make it clear as a matter of abundant caution, that the amount of CENVAT credit of Rs.Rs.2,25,16,688/-& Rs.1,25,16,688/- on account of other common input services,Rs.1,03,44,822/- & Rs.69,00,022/- on account of interest thereon already paid the appellants, as they relate to reversal of CENVAT credit of other common input credit attributable to RMC units, the said payments having been credited to the Government account are incorrectly appropriated to the adjudged demands by the impugned order for demand of differential Central Excise duty on RMC. Thus, we only set aside such appropriation by the impugned order, while allowing the payment already made in the CENVAT account to be retained by the department in the Government account as proper discharge of duty on reversal of CENVAT credit. Hence, no relief of such payment is given to the appellants for such amounts already paid by them as indicated above.

16. In the result, the impugned order dated 25.10.2018 is modified to the extent of setting aside the adjudged demands and the appeal is allowed in favour of the appellants.

(Order pronounced in the Open Court on 21.10.2024)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

(M.M. PARTHIBAN)
MEMBER (TECHNICAL)

Sinha