

Associated Cement Co. Ltd. Vs. Cce

Associated Cement Co. Ltd. Vs. Cce

SooperKanoon Citation : sooperkanoon.com/19778

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Nov-17-2000

Reported in : (2001)(96)LC176Tri(Mum.)bai

Judge : G Srinivasan, S T S.S.

Appellant : Associated Cement Co. Ltd.

Respondent : Cce

Judgement :

1. These two appeals have been filed against the orders dated 30.12.1997 and 20.12.1996 passed by the Commissioner of Central Excise, Mumbai-IV and Mumbai-III. Appeal No. E/688/98-Bom Order-in-Original No. 27/97 Dated 30.12.1997 Appeal No. E/640/98-Bom Order-in-Original No. 284/96 dated 20.12.1996) 2. These appeals have been filed by the appellants who are engaged in the manufacture of cement in its factories located across in India. One of the most common items used in the construction and building industry in India is concrete. Concrete is used at tens of thousands of sites throughout the country where buildings, bridges, dams, etc. are being built. The appellants state that the excise during the relevant periods and periods prior thereto did not contain any entry covering "concrete" or an "in process" material called "Ready Mix Concrete" (RMC) and even otherwise concrete/RMC was not regarded as excisable commodity by the department. It is further stated by the appellants that in the present proceedings for the first time after several decades the excise department is trying to levy duty on RMC even though neither the expression "RMC" nor

"concrete" is used in tariff entry 38.23 where the department seeks to classify this subject item. The assessee received a show cause notice dated 9.5.1996 calling upon the assessee as to why duty amounting to Rs. 41,69,103/- should not be recovered. Another show cause notice was issued on 26.6.1997 calling upon the assessee to pay a sum of Rs. 8,26,43,587-. In the first show cause notice period in dispute is from November 1995 to March 1996 and in the second notice period in dispute is December 1993 to October 1996. Replies were filed.

Personal hearings were given for the parties. After hearing the parties the two Commissioners by the impugned orders have confirmed the demand.

During the course of the argument of stay application, Rs. 2 crores was paid by the assessee towards the duty. Hence the present appeals.

3. S/Shri A. Hidayatullah, Senior Counsel along with Shri V.S. Nankani and other Advocates appeared for the appellants. Smt. Reena Arya, SDR appeared for the department.

4. Shri Hidayatullah the learned Senior Counsel explained to us as to the history of the methodology adopted by the department regarding the taxation of the product namely throughout the period from 1944. Until the present time no excise duty was levied on the products in question.

He stated that the product which is sought to be classified under sub-heading 3823 is wrong. He stated after reading the said sub-heading that it consists of various types of chemicals like Prepared Binders for Foundry moulds or cores; Chemical products followed by "residual products of chemical or allied industries". The appellants nowhere did it represent that the products were chemical or allied products. When such is the position how could the department seek to levy duty on the product manufactured by it which is not a chemical product. He stated when the entry itself contains two, show cause notice does not whisper about as to how the product could be identified as coming within the clauses contained in between two; he read through the various circulars issued by the Board as well as the departmental officials. He stated that a doubt has been arising in the minds of the Board as to the classification and exigibility of the duty on readymix concrete.

When such was the position he stressed the point that invocation of larger period of limitation in these cases cannot be accepted. He also stated that where there was possibly doubt in matters of taxation then it should be decided in favour of the assessee. He further stressed the point by stating that unless the department armed with the proper legislative backing in a clear terms they cannot seek to classify the product under a particular entry. In case of doubt it should be decided in favour of the assessee. He stated from the reading of the various Board circulars that there is a conflict of use apparent and in such a situation invocation of the larger period of limitation is wrong in law. He further stated that the department at the highest level had entertained the doubt about the exigibility. This is after 56 years of the present enactment. When such is the position he stated that when the department itself is having such a doubt then how could the assessee be charged with allegation of suppression? He further stated that bringing the product under 3824 of the CETA is wrong because as stated earlier show cause notice does not state as to how it could be done so. He further stated that no material has been produced to justify the goods under the residuary entry of chemicals. He further stated that no material has been produced by the department to show that Ready Mix Concrete is a chemical product. Burden is on the department to prove the classification which has not been discharged.

For the above propositions he cited the following cases: The Central India Spinning and Weaving and Manufacturing Co.

Ltd., The Empress Mills v. The Municipal Committee 1958 (SC) 341 page 344 para 28, page 347 para 31 and page 348, Voltas Ltd. v. CCE He further argued that clearances on site or at site could not be chargeable to duty because there is no intelligible idea or criteria for ordering levy and taxation. He stated that several certificates and affidavits have been filed and the learned adjudicating authority namely the Commissioner of Central Excise, Mumbai-IV in the impugned order at page 22 thereof simply stated they did not have any relevance on the issue as that is not relating to plasticity of a product or its characteristics without discussing the contents of the affidavits and certificates. Such affidavits or certificates have been given from the variety of persons including famous educational institutions like Jadavpur University. In any event as he stated that as per the Board circular RMC

can never be treated as a chemical product as it was admitted as a product of construction.

5. As against this learned DR would argue that the non-payment of duty for number of years, as claimed by the Learned Counsel, is wrong. The party himself has paid duty for two months i.e. April, 1996 onwards.

When such is the position how could the party deny the existence of suppression? The party cannot be allowed to take contradictory stands before two different authorities. She further stated that the product in question is one of the items included in the HSN 3823. When the particular product namely non-refractory mortars and concretes are included in HSN 3823.50 it goes without saying that the product in question before the Tribunal has to be treated as product coming within the chapter sub-heading 3823 only. When a product is included in one of the subheading of the HSN classification naturally it has to be deemed to be included in the particular heading. The argument of the learned Counsel that there has been a doubt is belied for the fact that they themselves have paid duty from April 1996 onwards. When the matter is not in doubt she again reiterated that there is a violation on the part of the assessee to make the payment attracting penal provisions under the Act and Rules. As far as the Board's circular is concerned she read through the same and pointed out the difference as to what is "READYMIX CONCRETE" and the shelf life etc. We shall refer to the same in the body of the judgment later. She invited our attention to exhibit 'D' in Appeal No. E/688 especially page 31 and first paragraph of page 32.

6. We have considered the rival submissions. The appellants case are two appeals, one relates to the factory at Bandra (East) and the other one relates to Kalamboli. Shri Hidayatullah stated that concrete is normally made out of agglomeration of water, sand, cement, aggregated stones along with plasticizer in the desired proportion mixed with certain chemicals like plasticizers. The entire mixture is agitated in a concrete mixture with the help of power. If proper care is not taken the concrete may not form or set in a proper way which will not come in a desired result. The entire thing called hardening of the concrete after the elapse of the period for setting in. The question of the exigibility of duty and payment

thereof started in this case with issue of a Board circular No. 237/71/96-CX dated 12.8.1996. The said circular is extracted below: "I am directed to say that doubts have been expressed regarding excisability and classification of the product 'Ready Mix Concrete' a mixture of duty paid cement, sand, coarse aggregates and a few chemicals in fixed proportions and involving strict quality control and sample tests as to whether the same is excisable and merits classification under Tariff Entry 68.07 as opposed to 38.23 of the Schedule to Central Excise Tariff Act, 1985. The trade is claiming classification of the product under Heading No. 68.07 with benefit of exemption from central excise duty in terms of Notification No. 36/94-CE, dated 1.3.1994 (Now Notification No. 8/96-CE, dated 23.7.1996) which exempts the goods manufactured at the site of construction for use in construction work at such site.

2. The Ready Mix Concrete plant consists of stone crushers, conveyors vibrator screen to segregate different sizes of stone aggregates, and a sand mill to produce sand from stones. A central batching plant is also installed in which all aggregates are weighed, batched by electrical controls and limit switches. Cement from-silo is carried to the batching plant by a screw conveyor operated with automatic weighing gauges. Water is fed through flow meters after subjecting such water to chemical analysis. The mixture of stone aggregates, sand, cement and water is mixed in a mixer. The mixture so obtained is loaded on a transit mixer mounted on truck chassis, which is transported to the site of the customers and the same is discharged at site for use in further construction of building etc. The qualities accruing to the Ready Mix Concrete so obtained far out weight to those of the site mixed concrete. The final product Ready Mix Concrete is a material in plastic, wet process state and not a finished product like blocks or precast tiles or beams.

3. In the instant case, the activity engaged for making the product "Ready Mix Concrete" very much falls within the ambit of the meaning of the word "manufacture", as envisaged under Section 2(f) of CESA, 1944 and in view of the pronouncements of the Hon'ble Supreme Court, as a new product with a new name emerges. As regards, the marketability vis-a-vis the shelf life of the impugned goods, it is quite apparent that in spite of the fact that the goods have a

short shelf life, the same are marketable. Thus to put it simply, the product "Ready Mix Concrete" is marketable though within the time frame of its short shelf life. As such, the product satisfies the twin test of "goods" and "marketability" which are needed if they are to be held as chargeable to Central Excise duty under CETA, 1985.

4. Regarding classification it is stated that the impugned goods which are non-refractory and used in the construction/building activity is more akin to "Non-refractory mortars and concrete". As per H.S.N. Explanatory note on pages 540-541, "Non-refractory Mortars and Concrete" fall under Heading No. 38.23, sub-heading 3823.50. Further, the CETA, 1985 (Chapter 38 of the same) is fully aligned to the HSN. Therefore, applying the Rules of Interpretation, viz., Rule 2(b) it is seen that the classification of the goods under reference is appropriate under Heading No. 38.23 (sub heading 3823.00) of CETA, 1985.

5. In view of the above and the case law on the subject, the Board has taken a view that Ready Mix Concrete is an excisable product and would merit classification under Heading No. 38.23 of the CETA, 1985. Accordingly, it is clarified that Ready Mix Concrete, the condition in which it is put up for sale is excisable and is appropriately classifiable under Heading 38.23 of Central Excise Tariff Act, 1985 and chargeable to appropriate rates of duty.

6. All pending disputes/assessments on the issue may be settled in the light of these guidelines.

When we read paragraph 4 thereof it mentions that the goods are non-refractory and used in the construction/building activity is more akin to non-refractory mortars and concrete. Once it is mentioned the term "construction and building activity" it passes one's comprehension as to how it comes under item 3823? Heading 3823 HSN which became 3824 in the CETA from 1.3.1997 and heading 6807. When we go through these two sub-headings we are clear that the chapter sub-heading 38 deals with Chemical and Allied products and it does not speak of any building material. Sub-heading 6801 mentions articles of stone blaster and cement. The product namely concrete may be called as an article of cement that is why probably the department itself issued a notification 36/94 exempting the products

coming under heading 6807. However the HSN notes relating to heading 3824 reads the chemical products classified here which are therefore products whose composition is not chemically defined whether they are obtained as by products of the manufacture of other substances or prepared directly. But the sub-heading 3824.50 speaks of Non-Refractory Mortars and concrete. It is an admitted fact that the product under question is one of the types of concrete. The argument of Shri Hidayatullah is that there has been a doubt in existence in the minds of parties. This he reads from the circular dated 12.8.1996 which has been extracted above. It starts with the term doubt has been expressed regarding excisability. When that is the question thereafter we find a letter written on 6.12.1997 by the Bangalore Commissionerate stating that in view of the letter of the Member, Central Excise dated 22.1.1997 the circular which is mentioned above dated 12.8.1996 should be kept in abeyance. The Bangalore letter further states that a protective show cause notice may be issued.

Normally protective show cause notice is sent for retrospective one or a longer period. When we look into the Ministry of Finance CBSE Circular No. 315/319/97 dated 23.5.1997 at para 2 it states that- A doubt has been raised "as to whether exemption from excise duty is available to concrete mix manufactured at or on the site of construction for use in construction work at site is applicable to Concrete Mix manufactured at the site of construction for use in construction work at site is applicable to "Ready Mix Concrete" manufactured at the site of construction.

Readymix Concrete and Concrete Mix are two separate and distinctive commodities. Readymix concrete, even if it is manufactured at site, is chargeable to duty at 13% under sub-heading 3824.20 of the Central Excise Tariff Act, 1985. The exemption for concrete mix manufactured at the site of construction for use in construction work at site available vide Sr. No. 51 of notification 4/97 is not applicable to Readymix Concrete manufactured at site of construction.

When we see the letter dated 22.1.1997 of Shri Mohile, Member, Central Excise it also states that prior to issue of Circular dated 12.8.1996 there was a long standing practice not to levy duty on Readymix Concrete. When we look into the circulars and the understanding of the department as reflected in the Bangalore

Commissionerate's letter one has to come to a conclusion that a doubt has been there. Secondly they are attacking doubt in respect of concrete which is made in building industry not product of chemical industry. Therefore it has been rightly argued by Shri Hidayatullah with a lot of stress that it was nobody's case that the appellant was manufacturing any chemical products. When we look at the tariff entry 3823 it definitely contains two items; it talks of chemical products and it also talks of Residual Products of chemical nature. The show cause notice in our view does not state as to how they come within the four corners of 3823.

7. Learned DR would argue by reading Exhibit D to appeal E/688 which reads as follows: As regards the classification of the goods in question i.e. RMC being a mixture of natural and allied produced viz. stone aggregates, sand, cement and water, the same appear to be properly classifiable under sub-heading 3823.00. The description of tariff heading 3823.00 "Chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural product), not elsewhere specified or included" squarely covers the goods under consideration as the goods do not appear to be falling elsewhere in the tariff. Classification of the goods was also considered under tariff heading 6807.00, but tariff heading 3823.00 appears to be more specific and therefore the goods appear to be appropriately classifiable under tariff heading 3823.00. This classification is also reinforced in view of the fact that in HSN non-refractory concrete is classified under subheading 3823.50 (though there are some minor variations in the different sub-heading of chapter 38 vis-a-vis those in HSN but heading 38.23 in Central Excise Tariff is identical to that of the HSN).

Enough materials have been given in the show cause notice but when we read the same we do not find any material has been mentioned there except the reproduction of the chapter sub-heading. No material has been given. We therefore accept the argument of Shri Hidayatullah.

After all any quasi judicial proceedings whenever any action is proposed to be taken which may result in prejudicial to one's interest, the grounds must be taken in the show cause notice with proper material evidence. Such material evidence should be given to the noticees. Here such actions are absent. We are therefore of

the view that the principles of audi alteram partem has not been complied with.

8. This takes us to the another argument of Shri Hidayatullah namely when there is question of doubt where two views are possible, the benefit of such a doubt should be given to assessee. When we go through the circulars No. 237/7/96 dated 12.8.1996 and 315/31/97 dated 23.5.1997 the word doubt as stated already is in the first para of the first circular and in the second para of the second circular. Even subsequently the circular No. 368/1/98 dated 6.1.1998 the doubt still persisted. In paragraphs 2 & 5 of the circular the Board observes as follows: 2. The Board has examined the issue of "RMC" afresh and finds that a clear distinction needs to be made between the two types-(a) concrete mix at site and (b) Ready Mix Concrete. The Ready Mix Concrete plant consists of stone crushes, conveyors, vibrator screen to segregate different sizes of stone aggregates, and a sand mill to produce sand from stones. A central batching plant is also installed in which all aggregates are weighted, batched by electrical controls and limit switches. Cement from silo is carried to the batching plant by a screw conveyer operated with automatic weighing gauges.

Water is fed through flow meters after subjecting such water to chemical analysis. The mixture of stone aggregates, sand, cement and water is mixed in a mixer. The shelf life of the mixture so obtained is increased by addition of chemicals. This mix is loaded on a transit mixer mounted on truck chassis which is transported to the site of the customers and the same is discharged at site for use in further construction of building etc.

4. A doubt has been raised as to whether Concrete Mix manufactured at site using large mechanical devices is a form of ready mix concrete.

In our view all these things in a combined reading go to show that doubt was existing and subsisting.

9. That takes us to the case law cited by the learned senior counsel.

In the first case of Empress Mills AIR 1958 341 the Supreme Court at para 5 has held as follows: The efficacy of the relative contentions of the parties therefore

requires the determination of the construction to be placed on the really important words of which are "terminal tax", "imported into or exported from" and "the limits of the Municipality". In construing these words of the statute if there are two possible interpretations then effect is to be given to the one that favours the citizen, and not the one that imposes a burden on him.

If "terminal" besides the above meaning has an additional meaning also and that meaning signifies the terming or the jurisdictional limits of the municipal area even then the construction to be placed on the term should be the one that favours the tax-payer, in accordance with the principle of construction of taxing statutes, which must be strictly construed against the taxing authorities and doubt resolved in favour of the tax-payer.

The above judgment clearly states that when there is a doubt it has to be in favour of the assessee.

In interpreting a fiscal statute, the court cannot proceed to make good deficiencies if there be any; the court must interpret the statute as it stands and in case of doubt in a manner favourable to the tax-payer.

In these cases before us the existence of doubt even in the minds of the authority which deals with the administration of the excise duty exists as reflected in the Board circulars (supra). When that is the position we cannot hold the appeals in favour of the department. We therefore accept the arguments made by the learned senior counsel.

11. As far as the exigibility and the classification is concerned, burden is on the department to prove the classification. This has been succinctly stated by the judgment of the Supreme Court in the case of UOI v. Garware Nylons Ltd. there of: In our view, the conclusion reached by the High Court is fully in accord with the decisions of this Court and the same is justified in law. The burden of proof is on the taxing authorities to show that the particular case or item in question, is taxable in the manner claimed by them. Mere assertion in that regard is of no avail. It has been held by this Court that there should be material to enter appropriate finding in that regard and the material may be either oral or documentary. It is for the taxing

authority to lay evidence in that behalf even before the first adjudicating authority.

Especially in a case as this, where the claim of the assessee is borne out by the trade inquiries received by them and also the affidavits filed by persons dealing with the subject matter, a heavy burden lay upon the revenue to disprove the said materials by adducing proper evidence. Unfortunately, no such attempt was made.

As stated, the evidence led in this case conclusively goes to show that Nylon Twine manufactured by the assessees has been treated as a kind of Nylon Yarn by the people conversant with the trade. It is commonly considered as Nylon Yarn. Hence, it is to be classified under Item 18 of the Act. The Revenue has failed to establish the contrary. We would do well to remember the guidelines laid down by this Court in *Dunlop India Ltd. v. UOI* , in such a situation, wherein it was stated: ...When an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause.

In this connection it is relevant to mention that the argument of Senior Counsel was various affidavits and certificates were given-affidavit of Narendra D. Patel, President of Association of British Council Scholars and National Chairman of Architectural Engineering Division of the Institute of Engineers, another affidavit of Moreshwar Laxman Diwan, Principal of K.J. Somaiya Engineering College at Ghatkopar and affidavit of Chandubhai T. Sanghani, Chairman of Builders Association of India, regarding the product and certificates from Jadavpur University, Maharashtra India Chapter of American Concrete Institute and Gammon India Ltd. None of these cases have been discussed in the order except for the statement at page 212 (in Appeal 688/98) where the Commissioner states as follows (in Order-in-Original 27/97 dated 30.12.1997): In this regard, I find that the certificates and opinion of experts do not have any relevance on the issue is not relating to plasticity of a product or its other characteristics. The product in the form in which it-is sold satisfies the criteria of goods for the purpose of the Central Excise Act and no further scrutiny of the issue is material for the point at issue.

In our view the certificates which we have referred to above have not been discussed at all except to state that they do not have any relevance on the issue. In our view whenever any authority is passing an order it should not be prejudicial to the interest of the assessee if it does not discuss the materials given before it 12. This takes us to question of invocation of larger period. It is curious and relevant for us to refer to the Board's letter dated 22.1.1997 written by S.D. Mohile. In para 3 thereof it has been stated as follows: It may also be clarified whether prior to issue of notification dated 12.8.1996 there was a long standing practice not to levy duty on readymix concrete made in batching plants.

In our view this seems to be the entire scenario. When the Board makes such a statement it is not possible for us to agree with the argument of the DR that prior to March 1996 the party should be asked to pay duty/tax. The show cause notice in this case is for the period from December 1993 to October 1996. When the Board's member incharge himself says there is a long standing practice of not to levy duty, how could for the period in question December 1993 to October 1996 the department issue notice? No doubt, with alacrity Smt. Arya states in 1996 onwards one factory has paid but when we view it as entire industry -as reflected in the Board's letter and Board's understanding we cannot accept the argument efficiently made by the DR. Board's understanding cannot be whittled down thus for when the Board has written the letter we accept and infer that the same would have been written by the Board with deep appreciation of what is in existence at the field level. It cannot be argued against such an understanding. We therefore reject the arguments of the DR. The appellants case here is payment was made under protest. Whatever may be the situation the demand for the period in question is December 1993 to October 1996 and November 1995 to March 1996 reflected in show cause notice dated 9.5.1996 invoking the larger period of limitation cannot be accepted since relates to provisos to Section 11A(1) of the Central Excise Act. We therefore accept the appeals of the appellants setting aside the two impugned orders with consequential relief, if any, according to law.

13. When we do not find the ingredients of proviso to Section 11A(1) of the Central Excise Act in the facts of these cases we cannot uphold any penalty under Section 11AC or nor interest under Section 11AB. Therefore orders regarding penalties and

interest imposed in both appeals are set aside. Mumbai (G.N. Srinivasan) Dated: 7.9.2000 Member (J) 15. I have gone through the order prepared by my Learned Brother Shri G.N. Srinivasan, Member (Judicial) and I agree with him. I would however like to record and to append the following, to come to the same conclusion i.e. the demands are barred by limitation, in as much as their exist no ground to raise the demands under the proviso clause of Section 11A(i) and the classification of 'Ready Mix Concrete' under heading 38.23, cannot be arrived at for the period November, 1995 to March, 1996 in the first notice and December 1993 to October, 1996 is the second notice: (a) As regards classification, I find the first step to arrive at the same is to determine as to what is the entity to be classified.

Examining the same, I find that CONCRETE is a mixture of Portland Cement and Aggregates of stone, gravel, broken bricks with sand, water in a particular proportion. In special kinds of Concretes, certain chemicals are added in small quantities to achieve the derived end results of quick setting, acid resistance or render the same suitable for marine use. The cement used is normally Port land Cement, but other specialty Cements as per end use requirements could be also used. My search on 'Ready Mix concrete' reveals it to be: (i) Proportioned and mixed at a central plant sites and removed in plain trucks or agitator trucks or (ii) Proportioned at a central Point and mixed in a mixer truck (truck mixed concrete) equipped with water tanks, during transportation. It is largely displacing job-mixed concrete in metropolitan areas. The truck agitators and mixers are essentially rotary mixers, mounted on trucks. There is no deleterious effect on the concrete, if it is used within one hour after the cement has been added to the aggregate, this period can be increased by lowering the temperature by adding ice or/and other coolants to maintain freezing range.

(iii) Mixtures for concrete, are also centrally batched, particularly for road construction, transported to the site in batcher trucks with compartments to keep aggregate separate from cement. The truck discharges into the charging hopper of the job mixture, partly mixes the materials and discharges into a second mixture which completes the mixing. The above findings are the results of gleaning through Marks Hand Book for Mechanical Engineers Hand book and the Internet

sites on 'Ready Mix Concrete' which lead me to conclude -that the chemicals content of Ready Mix Concrete is never more than 8% to 99% and is mostly absent. It mainly consists of Cement, sand, stones and brick and gravel which are not considered or commonly understood as chemicals.

(b) Cement, Sand, Stone, brick gravel are not understood as chemical products and preparation of the chemical or allied industry. With a short shelf life and being marketable, Ready Mix Concrete, cannot be considered to be a product of chemical or allied industry, so, I would find the Ready Mix Concrete being batched with Cement gravel sand and water at Central Plants to be products of civil construction industry even if plasticizers and/or chemicals in small proportions are added to achieve desired results. Therefore, I would not consider the classification under 38.23 to be called for the entity as it is understood herein.

(c) I have considered the alternative classification under 6807 which covers 'all other articles of cement not elsewhere specified'.

Since the appellant, manufacturers, are a well known name in Cement Industry in India. Cement is the major item constituting the entity under classification giving its essential characteristics is understood to be and dealt with by the building and other civil construction persons. It can be understood as article of cement.

Therefore, I would consider the classification-to be more appropriate, when classified under 6807 of Central Excise Tariff by applying Rule 3(a) or and 3(b) or and 3(c) when the two entries viz.

3823 and 6807 are compared. Even by applying Rule 4(1) find the entity to be more 'akin' to 6807 than to 33823.

(d) When I find that after determining, what the entity is, and by applying rules of classification, the classification can be arrived at without any further assistance, classification is to be confirmed under 6807. The application of HSN heading notes, to justify the classification under 38.23 being pleaded, is a plea to apply non-statutory rules of interpretation. They can be considered/applied and are relevant only when the classification by employing the statutory rules of

interpretation is ambiguous and resort to their assistance is called for. One cannot read HSN head notes to determine classifications, when the same will result and conflicts with the Statutory Rules of Interpretation. However, if legislature enacts a heading and places it under chapter 38 then that heading becomes specific and has to be applied as provided by Rule 2 of the Interpretative Rules by ignoring the Chapter Headings.

For the period under consideration there was no specific heading for ready mix concrete, which has been enacted under Chapter 38 only after as 3824.20 after the period under dispute.

(e) I would also find that the Boards Circulars mentioned and extracted in my Learned Brother's order would lead to a firm conclusion, that there was a definite understanding regarding the doubts regarding the excisability of the process and the product being entertained by the assessee and the department. Data on the pending assessments/disputes was therefore sought and was under collection. That should have been considered under Section 11C of the Act. The boards instructions dated 12.8.1996 do not indicate what decision, if any, has been arrived at by the Central Government as regards the data collected on 'Ready Mix Concrete' in pursuance of the Circulars in this case. In that case, I would find that there can be no charges of a kind envisaged in the proviso clause to Section 11(A)(1) which could be invoked, or that demands under Section 11A(1) provides should at all be determined.

16. Consequently I would allow both the appeals after setting aside the orders impugned.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com