

Alagappa Cements (P) Ltd. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Sep-13-2002

Reported in : (2002)(84)ECC670

Judge : K A Krishna

Appellant : Alagappa Cements (P) Ltd.

Respondent : Cce

Judgement :

1. By this appeal the appellants herein challenge the Order-in-Original No. 15/96 dated 31.10.96 passed by the Commissioner of Central Excise & Customs, Trichy, by which the Commissioner has demanded Central Excise duty of Rs. 23,04,994 under Rule 9(2) of the CE Rules, 1944 read with proviso to Section 11A(1) of the CE Act, 1944, besides imposing penalty of Rs. 23,04,994 on the appellants. There is a personal penalty of Rs. 40,000 on the Vice President of the appellants Company who is not in appeal before us.

2. Brief facts of the case are that the appellants are engaged in the manufacture of ordinary port-land cement falling under sub-heading 2502.29 of the CETA 1985. Verification of the stock and scrutiny of the records of appellants by the Central Excise officers revealed certain discrepancies relating to wrong availment of benefit of Notification No. 24/91.-CE dated 25.7.1991. According to the Department under this Notification benefit was allowable only for cement manufactured out of the clinkers produced in the same factory whereas it was

found that the appellants had manufactured cement out of Clinker manufactured in their own factory using vertical shaft kiln as well as from Clinker purchased from M/s. Chettinadu Cements Corporation Ltd. During the period from 12/92 to 7/93 they had purchased 1159.940 MTs of Clinkers from outside and produced 1220.989 MTs of Cement and inasmuch as cement produced was cleared at concessional rate, a differential duty of Rs. 1,68,191 was payable by the assessee-appellants. The records also revealed that on 23.7.93 i.e. the date of visit of Central Excise Officers, Form IV had a balance of 1214.579 MTs of Clinker whereas the physical stock was only 123.500 MTs leaving a shortage of 1091.079 MTs of Clinker. By using 1091.504 MTs of Clinker the assessee would have manufactured 1148.504 MTs of cement and would have removed the same clandestinely without payment of duty. There was also discrepancy in the account inasmuch as the Cement register showed clearance of 100 bags of cement to M/s. KAP Viswanathan Higher Secondary School on 10.7.93 whereas the GPI showed only sale of 50 bags of cement to the said party. It was also found that the assessee was maintaining private records and when it was compared with RGI Register there was a wide discrepancy and the quantum of cement thus produced and suppressed from the department worked out to 4402.45 MTs during the period 1989-90 and 1990-91 and the department worked out a duty of Rs. 8,93,396.53 on the alleged manufacture and clearance of cement. The appellants also maintained private record of daily receipt of Limestone from Mines for manufacture of Clinker and there was a wide variation in regard to the quantum shown in the Form IV with those shown in the private record. The records also revealed that the appellants had manufactured hollow blocks falling under sub-heading 6807, for construction of compound wall and cleared the same without payment of duty. It was found by the department that 27 blocks have been manufactured per bag of cement.

Statements were recorded from various employees of the company including Vice Chairman of the Company. One Shri Rajadurai, Senior Supervisor, Production-cum-Maintenance in his statement dated 20.7.93 explained the ratio used of clinker used in the manufacture of cement, However, he could not explain the shortage of clinker noticed in the factory and so also, by Shri Ramachandran, Despatch Clerk. Shri Ravichandran, Accountant of Pudupalayam Mines of the assessee in his statement dated 15.9.93 admitted removal of lime stone from the

mines to the factory as per the entries in the Daily Despatch Report. This statement was corroborated by the statement given by Shri Ambalavanan, Vice President. He further stated that there was difference in production figures between the production register and stoppage note and stated that he was ignorant of the excess removals to M/s. KAP Viswanathan Higher Secondary School. Proceedings were therefore drawn against the appellants by issue of show cause notice proposing to demand duty of Rs. 24,27,802.94 under Rule 9(2) read with proviso to Section 11A(1) of the CE Act, 1944, apart from imposing penalty on the company In terms of Section 11AC read with Rule 173Q, as also personal penalty on the Vice President of the Company, under Rule 173Q of the CE Rules, 1944. On consideration of the reply furnished by the appellants and after granting personal hearing to the representative of the appellants, the impugned order was passed which is challenged by the appellants on the following grounds: (a) Notification No. 24/91 does not distinguish between cement produced out of assessee's own clinker and clinker purchased from outside. They have stated that the very same issue has been decided in their own case in their favour vide CEGAT order No. 212/96 (b) As regards suppression of facts relating to shortage of clinkers, at the time of visit of the officers on 20.7.93 shortages was noticed in the stock of clinkers. But actually there was no shortage. Original stock i.e. 1214.579 was continued to be shown as stock in the form IV Register and the same was issued for manufacture of cement. The department has not produced any evidence for the manufacture of cement by using the alleged shortage. As regards clandestine removal of cement is concerned, no evidence for the procurement of other raw materials such as clay, coal breeze and gypsum in excess of the accounted quantity has been let in by the department. There is no evidence for the manufacture of finished goods in excess of the accounted quantity and so also in respect of alleged removal of finished goods in excess of the accounted quantity. No statement has been recorded from any customers. There was no seizure of any unaccounted cash and there was no evidence for the alleged manufacture and clearance of 11600 MTs of cement in excess of the accounted quantity. Unauthorised private registers cannot be a basis to demand duty. They have also cited various case laws in support of their pleas such as Lili Foam Industries (P) Ltd. v. CCEOudh Sugar Mills Ltd. v. UOI, , Kashmir

Vanasapathi (P) Ltd. v. CCE 1989 (39) ELT 665, Krishna Bottlers P. Ltd, v. CCE 1999 (32) RLT 845, TGL Poshak Corporation v. CCE, Hyderabad .

(c) As regards lime stone cleared from the mines are concerned, the quantities of lime stone despatched by the lorries were received in the factory and accounted for properly and factory records show the correct quantity. As regards excess quantity of lime stone cleared, in order to ensure that the permit for quarrying is not cancelled, they had to show a specified quantity of lime stones removed from the quarry, but the fact remains that actually the quantity shown in the records as having been removed has not been actually transported the to non-availability of transport.

(d) As regards manufacture of hollow blocks for construction of compound wall, no duty is liable to be paid in terms of Notification No. 59/90.

(e) As regards penalty, since penalty under Section 11AC and Rule 173Q has not been apportioned, penalty imposed is liable to be set aside. The period involved is 11/89 to 7/93 i.e. much before Section 11AC was introduced.

The appellants have also submitted copies of Notification and case laws relied upon by them to the Registry on 4.7.2002 which have been taken on record.

3. Shri S. Venkatachalam, learned Counsel appearing for the appellants argued the matter on the above lines and submitted that the impugned order has been passed without any evidence and sought for dismissal of the appeal. As regards penalty, he vehemently argued that penalty is not imposable in this case and he cited the decision of the Tribunal in the case of Punjab Recorder Ltd. v. CCE 2002 (132) ELT41, 4. Shri C. Mani, learned DR appearing for the Revenue defended the order in original. He has invited our attention to para 13 onwards of the impugned order wherein the learned Commissioner has specifically and extensively dealt with the various grounds taken by the appellants and has come to a right conclusion. His order is well reasoned and needs to be sustained and he sought for dismissal of the appeal being devoid of merits.

5. We have carefully considered the rival submissions and gone through the case records and perused the case laws relied upon by the defence.

Now we proceed to give our findings in respect of each of the item.

6. Appellants have taken the plea that the notification does not specifically say that clinker purchased from outside and used for manufacture of cement in the factory of the appellants will not be eligible for the benefit of the Notification as had been specifically laid down in the previous Notifications No. 36/87-CE and No. 24/87-CE. We observe that the Notification No. 24/91 exempts from duty in excess of amount calculated at the rate of 165 per tonne in respect of port-land cement manufactured by a factory described under column No. 2 of the table to the notification as per conditions shown under column 3 thereto. The appellant's factory was using vertical shaft kiln, which is one of the condition for enjoying the benefit of the Notification.

The notification does not specifically say that the concession is admissible only if the cement is produced by using the clinker manufactured in the same factory. In this case they have used clinker manufactured in their own factory as well as clinker purchased from outside. We also observe similar issue had been decided by the Tribunal vide order No. 212/86 in favour of the appellants in their own case and the appeal and the reference application filed by the department were dismissed by the Tribunal. It is settled proposition of law that a Notification has to be interpreted in terms of the words used therein and nothing can be added or deleted. The Notification in question in the present case does not say that the factory concerned should have manufactured the clinker in the cement factory itself for producing cement for enjoying the benefit of the said Notification. We are, therefore, of the view that the benefit of the Notification cannot be denied merely because the factory has used clinker purchased from outside along with the clinker produced in their own factory for manufacture of cement in their factory using vertical shaft kiln. We therefore allow the benefit of the said Notification to the appellants.

7. Appellants have taken the plea that the issue is known to the department and there is no suppression. With regard to shortage of clinker, there was a shortage

of 1214.579 MTs as against the physical stock of 123.500. The contention of the appellants is that clinker is not the only raw material for manufacture of cement and hence the allegation of the department that the excess quantity must have been used for manufacture of cement is baseless. In support of their plea they have cited the decision of the Tribunal in the case of Kanpur Strips (P) Ltd. v. CCE, Kanpur-II 2001 (137) LET 1198. We observe that, in the said case, the Tribunal had noted that there was no corroborative evidence to support the statement given by the person from whom the statement was recorded whereas in this case, there is acceptable evidence of removal of 2.5 Tons of cement to M/s. KAP Viswanathan Higher Secondary School. Further, Clinker purchased from outside has been used in the manufacture of cement is also supported by the statement of Shri Rajadurai, Senior Supervisor of the appellants.

We observe that the raw materials required for cement are lime stone, clinker coke breeze and gypsum. The appellants themselves have admitted that they have shown excess quantity of removal of lime stone from the quarry. The reason advanced by the appellants for the difference in the quantity of lime stone was that in order to ensure that the State Govt.

does not cancel their permit, they had to mention a specified quantity of lime stone having been removed. Removal of the quantity of lime stone as per the entries in the Daily despatch sheet is supported by the statement of Accountant of the mines. In the circumstances, we, are not inclined to accept this plea of the appellants. Shortage of other raw material viz. coke breeze is also supported by the payment of wages for unloading 1445.325 MTs of coke breeze during the period from 8.4.93 to 13.4.93 and as against that quantity 232.2 MTs was shown in the form IV Register. Therefore, the contention of the appellants that only one raw material has been taken into consideration for the purpose of quantifying the alleged excess production has no force in the face of clinching evidence of use of excess lime stone, coke breeze and clinker for manufacture of cement. The records clearly show the modus operandi adopted by the appellants to suppress the fact of production of excess quantity of cement and their clearance clandestinely without payment of duty. Further they have also suppressed the removal of 838 bags of cement for manufacture of hollow blocks for construction of

compound wall and this fact is admitted by them. They have only questioned the duty demanded on the manufacture of hollow blocks and not the removal.

The various case laws cited by the appellants in regard to clandestine removal do not come to the rescue of the appellants as the facts and circumstances in those cases are not similar to the facts and circumstances in the case before us. In the above background, we are of the considered opinion that longer period of limitation has been correctly invoked for demand of duty and we reject the plea of the appellants in this regard.

8. During the period 1990-91 and 1991-92 appellants have used cement for manufacture of hollow blocks for construction of compound wall.

Appellants have taken the plea that hollow blocks are exempt payment of duty In terms of Notification No. 59/90. Further, we observe that that this Notification also exempts from payment of duty in respect of Light weight (solid or hollow) concrete building blocks falling under sub-heading 6807 of the CETA 1985. The Commissioner has sought to demand duty on the hollow blocks holding that the hollow blocks were not manufactured at the site but only In the factory of the appellants, as per the initial statement given by the Vice President of the appellants company. This finding of the Commissioner Is not acceptable to us as there is evidence to show that the hollow blocks have been manufactured at site. Therefore, we find force in the plea of the appellant that they are entitled to the benefit of the said Notification and we accept their plea in regard to the non-dutiability of the hollow blocks. However, as already noted above, the appellants have suppressed the fact of diversion of 838 bags of cement for manufacture of hollow blocks and the allegation of the department that the appellants have not brought to the notice of the department in that regard is supported by clinching evidence and we accept the same.

9. In the impugned order the Commissioner has imposed a penalty equivalent to the duty amount under Section 11 AC read with Rule 173Q of the CE Rules, 1944. We observe that Section 11 AC came into force with effect from 28.9.1996. The period involved in the present case is 11/89 to 7/93. Therefore, penalty under Section 11 AC cannot be imposed on the appellants. We also observe that the

Commissioner has not apportioned the penalty amount under Rule 173Q and Section 11 AC and a combined penalty under both the provisions has been imposed. Therefore, Imposition of penalty is not sustainable in view of the decision recorded CEGAT, New Delhi in the case of Punjab Recorder Ltd, v. CCE, Chandigarh . Respectfully following the said decision, we set aside the penalty imposed on the appellants.

10. In the result, the appeal is partially allowed in the following terms: (a) Duty of Rs. 1,68,191 demanded on account of denial of benefit of Notification No. 24/91 CE dated 25.7.91 is set aside.

(b) Duty of Rs. 19,599.77 (as shown in Annexure IV to the show cause) demanded on the hollow blocks manufactured is also set aside.

(c) The entire penalty of Rs. 23,04,994 imposed under Rule 173Q read with Section 11 AC of the CE Act, 1944 is set aside.

(d) The rest of the duty demand of Rs. 21,17,204 (i.e. 23,04,994 -1,68,191 + 19,599) is confirmed.

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