

**Bee Kay Cement Ltd. Vs. Cce**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** May-20-2005

**Reported in :** (2005)(192)ELT475TriDel

**Judge :** N T C.N.B.

**Appellant :** Bee Kay Cement Ltd.

**Respondent :** Cce

**Judgement :**

1. The issue that arises for consideration in the appeals of M/s Bee Kay Cement Limited is the same. Accordingly, the appeals were heard together and are disposed of under this common order.
2. Facts first. The appellant manufactures cement from raw materials like clinker, fly ash and gypsum. Process is basically one of grinding and mixing these inputs at high temperature.
3. Cement is liable to Central Excise duty and the stage for payment is the time of removal from the factory. Appellant was following this stipulation. Even so, show cause notices were issued to the appellant alleging that it had removed certain quantities of cement produced by it without paying Central Excise duty. The basis for the allegation was that the quantity of cement accounted in revenue documents from time to time was less than the total quantity of raw material consumed. Notice dated 26.4.2000 states as under: On examination of Central Excise records from

April 2000 to Sept.

2000 it was noticed that they are showing manufacturing losses 2.576% by way of dust fly in the air. It comes on the basis of productions and raw material used in the manufacturing. The information supplied by the party on 31.9.2000 (Copy enclosed).

On calculation of raw material used i.e. Clinker 3964.52 M..T. Gypsum 83.749 M.F. and Fly Ash 134.292 M.T. during April 2000 to Sept. 2000 the production of Cement should be 4182.561 M.T. while it was shown 4074.800 M.T. by the party difference of these figures come to be 107.761 which was claimed by the party as losses during manufacturing process.

4. The appellant contested the allegation, explaining that it was a case of loss of inputs during manufacture and no production or removal of the alleged quantities had taken place. The Dy. Commissioner held that the manufacturing loss of 2.576% is enormous and is not satisfactorily explained. He, therefore, confirmed the duty demand and imposed penalty.

5. The assessee took up the matter in appeal before the Commissioner.

That Commissioner accepted the appellant's submission that there was no evidence whatsoever to support the allegation of clandestine removal of the quantity in question. He still held that it is established beyond doubt that there was short accountal of the goods with intent to evade payment of duty and confirmed the duty demand on the basis that "as the duty is leviable on the goods manufactured, they are liable to pay duty on the quantity of goods found short". Para 16 of the order may be read:- 16. These are numerous decision of Tribunal in this connection and time and again, it has been held by the Tribunal that charge of clandestine removal should be proved on the basis of clinching evidence and absolute proof or the charge of clandestine, removal has to be proved on the basis of corroborating evidences. In the instant appeals, there is absolutely no evidence oral or documentary to substantiate the charge of the Revenue. In the case of Commissioner v. Ravi Shankar Industries Ltd. 2002 (105) ELT 131-7 (Tribunal-Chennai), it has been held that the documentary evidence is required to prove the

charge, and in the case of Krishna v. Collectors of Central Excise, Jaipur 1998 (98) ELT 74 it has been held that the department ought to produce corroborative evidences in case of clandestine removal. Similarly, in the case of Oudh Sugar Mills Ltd. v. UOI 1978 (2) ELT (J)-172, the Apex Court has ruled that the conclusion regarding the clandestine removal of the goods should be carried at from the tangible evidence and should not be based on inferences involving unwarranted assumptions. In the absence of any piece of tangible evidence, the observation of the adjudicating authority about the clandestine removal that the cement was cleared by the appellants, without payment of Central Excise duty is nothing but presumption and suspicion and hence, not sustainable, and the revenue has failed to prove their case about the clandestine removal or otherwise. But it is established beyond doubt that there is short accountal of the goods with intent to evade payment of duty. As the duty is leviable on the goods manufactured, they are liable to pay duty on the quantity of goods found short.

6. Having thus, come to the conclusion that there was short accounting of goods, the Commissioner set out to determine the quantity actually short accounted. He took a view that the Tribunal had accepted manufacturing loss of 0.02% as the acceptable loss in its decision in the case of Amba Cement and Chemicals v. Commissioner of C. Ex.

Allahabad and deduction in duty liability i.e. Rs. 2790/- in a demand of over Rs. 3.7 lakhs. Penalty was also reduced from an amount equal to the duty involved to Rs. 50,000/-. The present appeals are directed against this order.

8. The contention of the appellant is that manufacturing loss is a well understood factor in production and in the present case since the demand is based entirely on the quantity of raw materials consumed, the same is not sustainable, being contrary to a well accepted principal.

The aspect of loss of raw materials during production has also been judicially noticed by the Apex Court in its judgment in the case of Union of India v. Indian Aluminium Co. Ltd. 1995 (77) ELT (SC) : 1995 (58) ECR 612 (SC). Reliance has specifically been placed by the appellant on the observation in para 14 of the judgment. I read that para:- 14. The entire quantity of raw materials, namely duty-

paid aluminium ingots procured by the assesseees from outside was used in the manufacture of aluminium sheets. It is nobody's case that the aluminium sheets which were manufactured by the assesseees could have been manufactured out of a lesser quantity of aluminium ingots than what was actually used. In the process or manufacture, dross and skimmings had to be removed in order that aluminium sheets of the requisite quality could be manufactured. This does not mean that the entire quantity of aluminium ingots was not used for the manufacture of aluminium sheets. In the course of manufacture, a certain quantity of raw material may be lost because of the very nature of the process of manufacture of some small quantity of raw material may form part of wastage or ashes. This does not mean that the entire raw material was not used in the manufacture of finished excisable products. An exact mathematical equation between the quantity of raw material purchased and the raw material found in the finished product is not possible, and should not be looked for.

9. On the facts of the case, it is being emphasized that there is no material whatsoever with the Revenue to show that the loss was not real, excess quantity of cement had actually come into existence, or that, such excess quantity had anyway been disposed of clandestinely.

It is, therefore, submitted that the duty demands have no factual basis and they were required to be set aside.

10. With regard to the Commissioner's finding regarding quantity of loss to be allowed, the appellant has submitted that the order of this Tribunal in the case of Amba Cement and Chemicals case contained no finding that a particular quantity or percentage is normal or that duty demands after allowing such quantity of raw material loss is sustainable.

11. Learned SDR has submitted that high production loss as observed in the present case cannot be accepted and that the loss within the norm should alone be allowed. He has also relied on the decision in the case of Amba Cement and Chemicals.

12. Mercifully, facts are not in controversy. The Commissioner himself has noted that there is no evidence indicating clandestine removal of unaccounted production. All the same it has been held that "but it is established beyond doubt that there is short accountal of the goods with intent to evade payment of duty". The records do not reveal any material or evidence indicative of more production than accountal.

Thus, this finding that there is "short accountal" of goods is also without any basis. In fact, the show cause notice itself sought to make a case only on the ground that going by the total quantity of raw material charged "the production of cement should be..." Thus, the case arose from a presumption that given the quantity of raw material consumed, the production 'should be' so much.

13. It is well settled that duty demands cannot be sustained on presumption. In the present case, the appellant has shown how the materials going into production are hygroscopic and in a process at high temperature, there will be loss of quantity. One of the materials used by the appellant is also fly ash. Thus, the appellant's case about loss in process loss is well founded and required to be accepted.

Authorities have failed to consider elementary facts about production.

14. A perusal of the decision of this Tribunal in the case of Amba Cement and Chemicals case makes it clear that this Tribunal approved no percentage or ratio with regard to loss of raw materials in the manufacture of cement. In fact, the Tribunal rejected the claim for determining production according to any formula. Thus there is, nothing in this order to support the process loss of 0.02% followed by the Commissioner, I may read para 17 of that order:- 17. Allegation No. 5 is that the appellants suppressed the production of cement. The contention of the Revenues is that balance sheet for the year 1988-1989 showed that 3291 MTS of lime stone was used for production 2226.70 MTS of cement whereas as per the formula given by Sh. Manoj Thakur, the production showed 2843 MTS of cement.

The contention of the appellants is that the formula is merely theoretical any duly dependent on purity of raw material. We further find that as per formula given by Manoj Thakur, for production of 1000 kg. of clinker, 1238.4 kg. of lime stone, 361.2

kg. of coal, 17.2 kg. of gypsum and 103.2 kg. of clay is required. Thereafter, this 1000 kg. of clinker is mixed with 70.2 kg. of gypsum to manufacture 1070 kg. of cement. The Revenue had produced the evidence for short accountal of lime stone only. No investigation is conducted in respect of order raw-materials such as coal, gypsum and day which are also required for manufacture of cement. Further, we find that Manoj Thakur, in his statement, stated-that from 12384 kg.

of lime stone 1060 to 1080 kg. of cement can be produced. Therefore, we find that this formula does not give exact production of the cement from the fixed quantity of raw material. Further, no experimental test was conducted in support of the formula, which was relied upon by the Revenue. As no investigation is conducted in respect of other raw-materials which were essential for the production of cements, therefore the demand on the basis of that appellants suppressed the receipt of one raw-material, is not sustainable.

15. As I have already noted, there is no evidence in the present case to support the Revenue's case that there was unaccounted excess production or unaccounted removal of cement. Duty demands are clearly baseless. Penalties were also unwarranted. Penalty being the shadow of duty, it has no separate existence. Accordingly, impugned order is set aside and the appeals are allowed with consequential relief, if any, to the appellant.

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