

Collector of Central Excise Vs. J.K. White Cement Works

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-30-1992

Reported in : (1992)(42)LC19Tri(Delhi)

Judge : G Agrawal, B T N.K.

Appellant : Collector of Central Excise

Respondent : J.K. White Cement Works

Judgement :

1. This is an Application for staying the operation of the order passed by the Collector of Central Excise (Appeals), New Delhi by which he has set aside the order of the Assistant Collector, Central Excise, Ajmer about the classification of 'White Cement' manufactured by the respondents during the period 1.1.1986 to 27.2.1986 under item 23(2) of the erstwhile Central Excise Tariff and under sub-heading 2502.90 of the Central Excise Tariff Act w.e.f. 28.2.1986. By his order, Collector (Appeals) decided the classification for the two periods to be respectively under item 23(1) and sub-heading 2502.20 as Rapid Hardening Cement.

2. Apart from assailing the impugned order on numerous grounds, it has been stated in the Stay Application that the implementation of the order would upset the long standing practice of classification of 'White Cement' and would involve payment of refund of duty of huge amounts in crores resulting in substantial recurring loss in revenue.

The following grounds have been taken in the Stay Application by the Department:
(a) Collector (Appeals) has allowed the appeal solely relying on the physical properties of 'White Cement' one of which is hydraulic strength at one day but has ignored the fact that white portland cement conforms to Indian Standard Specification IS 8042 : 1978 which prescribes a whiteness index of 70% although no such specification is prescribed in IS 8041-1978.

(b) That while accepting the 'white cement' as rapid hardening cement, Collector (Appeals) has overlooked the fact that it did not comply with the requirement of price control of Rs. 555 per MT under the Cement (Control) Order, 1967.

(c) That Collector (Appeals) has also ignored the fact that the respondents are holders of ISI licence IS 8041 : 1978 but the very first condition that the cement bags should be marked with IS 8041 : 1978 was never followed and they have been selling their product with ISI marking IS 8042 : 1978.

(d) That Collector (Appeals) has also ignored the fact that the product of the respondents is known as 'White Cement' and not as 'Rapid Hardening Cement'; that they have never sold or marketed it as Rapid Hardening Cement; that various decisions of the Supreme Court, High Courts and the Tribunal have been overlooked and the impugned order, prima facie, appears to be incorrect.

3. It appears from the records that a sample of the White Cement was tested in the Central Revenues Laboratory, New Delhi to ascertain whether it conforms to ISI specification 8041 : 1978 for Rapid Hardening Portland Cement and the report was as under: The sample is in the form of white fine powder. It has hydraulic setting property. It conforms to the chemical requirement for white portland cement as laid down in IS 8042-1978. Physical characteristics as stipulated in the aforesaid specifications could not be determined as the laboratory is not equipped for the same.

4. When asked to comment upon the above report, the respondents stated that the chemical properties of white cement conforming to IS 8042 are the same as those of white cement conforming to IS 8041. They stated that the difference was in physical properties. A sample was thereafter sent for test to the National Council

for Cement and Building Materials, Ballabgarh. According to their report the sample conformed to IS 4031-1968 and had a whiteness index of 80 per cent. The authorities inferred that based on results of both the tests, and other factors the product was classifiable under item 23(2) of the erstwhile Central Excise Tariff up to 27.2.1986 and thereafter under subheading 2502.90 of the CETA. That is how the present proceedings were initiated.

5. Arguing on the Stay Application, Smt. Vijay Zutshi, the learned Chief Departmental Representative, submitted that not only have the manufacturers given the name of "White Cement" to their product, it is also known in the market as White Cement and is sold and marketed as conforming to IS Specification 8042 : 1978 for White Portland Cement.

The manufacturer's name is also J.K. White Cement Works. She submitted that the degree of whiteness prescribed in the IS specification was 70 per cent, whereas the product has 80 per cent whiteness. She contested the claim of the respondents that because their product has rapid hardening property and conforms to the standards prescribed for rapid hardening cement it should, therefore, be classified as rapid hardening cement under item 23(1) under the erstwhile Central Excise Tariff and under sub-heading 2502.20 under CETA from 28.2.1986 onwards. She submitted that merely because it has rapid hardening property, that by-itself will not entitle it to be classified as such. Whatever be the compressive strength and the setting time, all the properties have to conform to one and only one specification. She contended that one could not pick up a part of one specification and start comparing the properties of a product and proceed to decide the matter on that basis as the learned Collector (Appeals) had done. While the respondents claimed that their product conformed to the properties of rapid hardening cement as prescribed in IS 8041 : 1978, they had all along named their product as "White Cement" and each of their bags was marked as conforming to IS 8042 : 1978 which is the specification for White Portland Cement. This variety of cement could not fall under tariff item 23(1) CET or sub-heading 2502.20 CETA because of specific mention of grey portland cement alone under both the entries under the old and new tariff.

6. Resuming her arguments on the second day, Smt. Zutshi referred to the Cement (Conservation and Regulation of Use) Order, 1974 issued under the Essential Commodities Act and submitted that white cement was excluded from the purview of this order while rapid hardening cement was included. Similarly, the Cement Control (Regulation of Production) Order, 1981 also issued under the Essential Commodities Act, made a clear distinction between Rapid Hardening Portland Cement conforming to ISI 8041-1978 and White Portland Cement conforming to ISI 8042-1978.

Therefore, for the purposes of conservation, regulation and use of cement the two products were different and conformed to two different specifications prescribed by the ISI under which they were known in the trade and were marketed too. She referred to the Supreme Court observations in various judgments about the "Common parlance" test as a guide for determining the classification of goods under the Customs and Central Excise Tariffs and submitted that by this test alone, White Cement manufactured by the respondents as conforming to the specification for White Portland Cement (8042-1978) which was marked with this ISI certification Mark on each bag in which this cement was packed and marketed, it was classifiable differently from the rapid hardening variety of cement. She referred to the various certificates submitted by the respondents in support of their claim and submitted that the rapid hardening quality of the product alone was not enough for its classification because the index of whiteness had been completely overlooked, by the learned Collector (Appeals) in arriving at his conclusions. She also stated that while the Assistant Collector had discussed the judgment of the Calcutta High Court in the case of Purbanchal International and Anr. ELT 1985 (21) 673 : 1986 (6) ECR 581 (Calcutta) and held that the ISI in its authoritative publication had treated White Portland Cement as a different commercial commodity from Ordinary Portland Cement, the impugned Order did not even refer to this judgment. She submitted that the Cement and Concrete Sectional Committee of the Indian Standard Institution which formulated the various standards specifications for cement, comprised of eminent persons from the trade, industry and institutions engaged in cement study and research and there was, therefore, no reason to disregard its conclusions.

7. Smt. Zutshi also invited attention to the portion of the Assistant Collector's Order dealing with the licence for ISI 8041 : 1978 and submitted that mere possession of a licence for this specification did not mean that what they were manufacturing was Rapid Hardening Cement when the product manufactured was marketed as White Portland Cement with ISI Certification Mark IS 8042 : 1978. She also produced empty bags for our inspection in support of her argument.

8. While concluding her arguments, Smt. Zutshi handed over copies of interim orders of the Rajasthan High Court in the Writ Petition No.5353/1991 of Nihon Nirman Ltd. v. Assistant Collector of Central Excise which were as under: Under the facts and circumstances of the case, it would be just and proper to direct the respondents to provisionally assess the excise duty under sub-head 2502.20 till the dispute regarding the reversion of the rate of excise duty leviable on the petitioner's white cement is finally decided if the petitioner executes bond in the proper form to the satisfaction of the respondent No. 1 and furnishes bank guarantee for the payment of the difference between the amounts of duty as provisionally assessed and as finally assessed with interest at the rate of 15 per cent per annum and also to direct the Collector, Central Excise to pass necessary order under Rule 9B(3) of the Rules if the petitioner approaches him for an order thereunder. Directions are accordingly given.

9. While handing over a copy of the Note containing the submissions made before Collector (Appeals), Shri Ravinder Narain, the learned Counsel for the respondents, stated that neither tariff item 23 nor sub-heading 2502.20 make any mention of White Cement. Referring to the Cement Control Order cited by the learned C.D.R., Shri Ravinder Narain submitted that the purpose of the Order being regulation of supply and distribution of cement, any variety of cement which was not proposed to be covered by it, could be excluded from its purview by a specific provision to that effect. Such orders were not, therefore, indicative of any thing else.

10. Continuing his arguments, Shri Ravinder Narain stated that the product manufactured by the respondents being rapid hardening cement which conformed to the properties and specifications prescribed for it could either be grey or white.

The tariff entry which specifically mentions rapid hardening cement does not mention its colour and, therefore, the White rapid hardening cement manufactured by them could neither be excluded from tariff item 23(1) CET nor from sub-heading 2502.20 of CETA. It cannot, therefore, be said that Rapid Hardening Cement and White Cement are two distinct and different commodities. The same commodity may qualify as Rapid Hardening Cement as well as white cement. The ISI specification for Rapid Hardening Cement does not say that it should not have whiteness and merely because their product was white, it did not go out of the category of rapid hardening cement. He read out the following portion from the certificate of Prof. S.K.Kaushik, Professor of Civil Engineering, University of Roorkee: (i) J.K. White Cement has got rapid hardening property as it has satisfied all the requirements of IS : 8041-1978.

(ii) J.K. White portland cement can be used as rapid hardening portland cement since it has got all the properties of rapid hardening. In general White Cement can be of rapid hardening nature like grey cement because in practice the rapid hardening property of white or grey cement is due to their physical and chemical properties, irrespective of colour. Even grey cement can be of rapid hardening property like white or vice versa as it satisfies the requirements of National or International Standards. The colour of the cement is not the criterion for achieving rapid hardening property.

11. According to Shri Ravinder Narain, opinions of a number of experts had been submitted by the respondents in the proceedings before the Assistant Collector as well as Collector (Appeals) and these had not been controverted by the Revenue. In particular, he referred to the Test Report of Shriram Institute for Industrial Research, Delhi in which, after detailed analysis of a sample, it had been certified that the sample conformed to the ISI specification IS 8041 : 1978 for Rapid Hardening Portland Cement. He also submitted that the Rapid Hardening Cement and white cement were not mutually exclusive.

12. Shri Ravinder Narain cited the decision of the Tribunal in the case of Pattani Chemicals v. Collector of Central Excise and referred to para 15 in which it was held that for a commodity like cement, qualities like compressive strength were

important and this, in the case of J.K. White Cement, fully conformed to the ISI specification for rapid hardening cement.

13. Shri Ravinder Narain also referred to the decision of the Tribunal in the case of Toshiba Anand Batteries v. Collector of Central Excise in which it was decided that assessee's advertisements cannot bind them to one assessment if another is correct and advertisements should not form basis for assessment.

14. He also contested the claim of the department for stay of the operation of the impugned order either on the ground of involvement of large revenue or on the ground of recurring nature of the problem and stated that there was no averment that because of the order passed by Collector (Appeals), Government's Revenue was in jeopardy. He cited the decision of the Tribunal in the case of Collector of Central Excise v. Hindustan Petroleum Corporation 14. So far as the decision of the Calcutta High Court in the case of Purbanchal International case (supra) was concerned, Shri Ravinder Narain stated that it did not relate to the classification of rapid hardening cement or its classification under tariff item 23 CET. It had, therefore, no application to the present case.

15. As for the interim orders of the Rajasthan High Court directing provisional assessment under Rule 9B of the Central Excise Rules while furnishing a bond undertaking to pay the difference in duty, Shri Ravinder Narain claimed that the interim orders on writ petitions of parties who did not have any orders of classification in their favour strengthened the respondents' case rather than the case of the department. The respondents stood on a better footing because Collector (Appeals)'s order which was passed after a full consideration of the matter was in their favour and they could not be placed at a disadvantage vis-a-vis those parties who had secured interim orders from the High Court without any order in their favour. Judged in this background they did not think that there was any justification for staying the order of Collector (Appeals). In fact, Shri Ravinder Narain strongly urged that the appeal itself be taken up for early hearing.

17. Replying, Smt. Zutshi contested the claim of Shri Ravinder Narain that the respondents could, if necessary, use both the specification 8041 and 8042 at the same time. She submitted that she was sure that such a practice would not be

permitted by the ISI because each specification was different and no product could fully conform to two specifications at the same time. In fact, the respondents were not doing so. The compliance with other foreign standards like the British, Danish and other standards was of no relevance for classification under the Central Excise Tariff.

18. Concluding her arguments, Smt. Zutshi submitted that the classification dispute was not restricted to one assessee and because of large revenue implications, it was necessary that the order of Collector (Appeals) which prima facie appears not to be sustainable should be stayed in the light of her submissions. She also supported the plea of Shri Ravinder Narain for early hearing of the appeal itself in view of the recurring nature of effect on assessments.

19. We have given earnest consideration to the matter which has been argued at length and for almost a whole day. The first question to be decided is whether there is justification for stay of operation of the impugned Order. Stay applications are made to the Tribunal under Rule 41 of the CEGAT (Procedure) Rules, 1982, which provides that the Tribunal may make such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice. This provision vests the Tribunal with very wide powers. One of the prayers made in the Stay application is that the implementation of the order of Collector (Appeals) would upset the long standing practice of assessment of 'White Cement' and would involve payment of refund of duty of huge amounts in crores resulting in substantial recurring loss in revenue. In the light of this prayer the contention of Shri Ravinder Narain that there is no justification or urgency for granting stay fails and is rejected.

20. The second contention of Shri Ravinder Narain was that in the light of the interim orders passed by the Rajasthan High Court ordering provisional assessment under sub-heading 2502.20 under Rule 9B till the dispute is finally decided, there was no justification for allowing the Stay Application of the department. We observe from the interim order which was passed by the High

Court on 22.11.1991 that the ground taken in the Writ Petition was that they were being discriminated against by the orders of the Assistant Collector because of the very orders which are now under challenge before us in the present appeal. The Writ petitioners had stated that there was thus a violation of Article 14 of the Constitution of India and the High Court, in exercise of its writ jurisdiction under Article 226, passed the interim order. So far as the Stay Application before us is concerned, it has been moved along with an appeal challenging the order passed by Collector (Appeals) and we are well within our jurisdiction to hear the Stay Application in the light of the provisions of Rule 41 referred to earlier. The fact that some other assesseees have approached the High Court who have, in exercise of their extraordinary writ jurisdiction, directed the assessment to be made provisionally does not act as a bar to our hearing the Stay Application and allowing it, if circumstances so warrant. Moreover, the very order which is the ground for approaching the High Court is under challenge before us and it is, therefore, necessary that the Tribunal should, realising that it involves a number of manufacturers of White Cement, hear the matter urgently. We are, therefore, of the view that the matter is of sufficient importance and urgency so as to warrant exercise of our powers under Rule 41. We, therefore, reject the second contention too.

21. We now proceed to deal with the arguments canvassed by Smt. Vijay Zutshi the learned Chief Departmental Representative in support of the Stay Application. The main argument was that even though the product is called White Portland Cement and conforms to IS specification IS 8042 : 1978 and each bag is marked with the words "White Portland Cement", is known in the trade by that name and is marketed in that name, the respondents have chosen to seek its classification as rapid hardening cement and Collector (Appeals) has accepted their plea on the ground that it conforms to the properties of rapid hardening cement by completely overlooking the whiteness index of the product. She has submitted that Collector (Appeals) has erred in picking up some of the properties of rapid hardening cement from IS 8041 : 1978 and comparing them with those of the product while completely overlooking the fact that the respondents themselves claim that the specification to which their product conforms is IS 8042 : 1978 and this they proclaim by marking each of their bags with this certification mark. She had also

stated that according to her information only two judgments were available on cement, one of which was that of the Calcutta High Court in the case of Purbanchal International (supra) and the other of the Tribunal in the case of Digvijaya Cement Co. Ltd. v. Collector of Central Excise 1988 (36) ELT 500 : 1988 (17) ECR 535 (Cegat SB-C) and the former alone was relevant to the point at issue before us. She had read out extensively from the judgment of the Purbanchal case which has been cited by the Assistant Collector but not referred to by Collector (Appeals). In fact, her main grievance was that if he had considered the appeal in the light of this judgment, he could not have decided the matter the way he did and this alone strengthens her case for staying the operation of the impugned order.

22. In considering Stay applications the Tribunal has to see whether a prima facie case has been made out and where does the balance of convenience lie. We observe that the specification marked on the bags of the product of the respondents is IS 8042 :1978 which is the specification for White Portland Cement. The description of Tariff entries for item 23 as well as for Chapter 25 which are identical are as under: Grey portland cement (including ordinary portland cement, portland-pozzolana cement and portland slag cement), masonry cement, rapid hardening cement, low heat cement and waterproof (hydrophobic) cement 23. It is evident from the wordings of item 23(1) of the tariff item as well as from those of sub-heading 2502.20 that they cover only "grey" variety of portland cement and the "White" variety of Portland cement has, therefore, to fall under sub-item. (2) of item 23; similarly, tariff entry 2502.20 which is the same as item 23(1) would not cover white portland cement which is what the respondents manufacture and market as conforming to IS 8042 : 1978. This, in our view, itself shows that prima facie the order passed by Collector (Appeals) is not correct because, apart from other matters, he has completely disregarded any consideration of the specification marked on the cement/bags of the respondents. For a commodity like cement ISI specification indicated on the bags is of great significance. We are also strengthened in our view by the Calcutta High Court judgment in the Purbanchal case (supra).

24. One of the grounds taken in the Stay Application is that implementation of the order of the Collector (Appeals) would upset the long standing practice of classification of White Cement. As we have observed that the order is prima facie not sustainable, we are of the view that it would not be advisable to disturb the long standing practice of classification of White Cement without a full consideration of the matter by the Tribunal. We, therefore, order Stay of operation of the order of Collector (Appeals) till the disposal of the appeal. We do not consider that this is a case, which at the stage that it is before us, would be covered by the type of situation envisaged for provisional assessment under Rule 9B. There has been a long standing practice of assessment which stands-disturbed by an order which is prima facie incorrect. It is, therefore, proper that the assessment should be continued to be made in accordance with the long standing practice till the disposal of the appeal. In the result, the Stay Application is allowed.

25. In view of urgency and importance of the matter, we also accept the prayers orally made by both sides for early hearing of the appeal itself and direct that it be listed for hearing on a priority basis.

Both sides will, accordingly, prepare themselves for the purpose by filing necessary documents as may be required.

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