



C.M.A.(MD)No.395 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.02.2025

Delivered on : 20.02.2025

CORAM:

THE HONOURABLE DR.JUSTICE **G.JAYACHANDRAN**

and

THE HONOURABLE MS.JUSTICE **R.POORNIMA**

C.M.A.(MD)No.395 of 2019

and

C.M.P(MD)Nos.4769 of 2019

The Commissioner of Customs,

Custom House,

New Harbour Estate,

Tuticorin- 628 004.

... Appellant/Respondent

-VS-

M/s.VV Mineral

No.17/C, Tisaiyanvilai,

Keeraikaranthattu,

Tirunelveli-627 657.

... Respondent/ Appellant

PRAYER: Civil Miscellaneous Appeal filed under Section 130 of the Customs Act, 1962, against the order of the CESTAT in Common Final Order No.

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40271-40292/2018 dated 31.01.2018.

For Appellant : Mr.R.Nandakumar
Senior Standing Counsel

For Respondent : No appearance

JUDGMENT

[Judgment of the Court was made by **DR.G.JAYACHANDRAN, J.**]

The Commissioner of Customs, Tuticorin has preferred this Appeal against the Common Final Order passed by the CESTAT, South Zonal Bench, Chennai, dated 31.01.2018.

2. The respondent in C.M.A(MD)No.395 of 2019 is M/s V.V Minerals, Tisaivanvilai. The case of the Customs Department is that, M/s V.V. Minerals between January 2009 to February 2012 imported Portland cement from manufacturer at Pakistan through Tuticorin port. The transactions were by High Sea Sales. Out of 33 bills of entry, the importer M/s V.V.Minerals availed concession rate of Counterveiling (CVD) under clause IC of the Notification No: 04/2006 C.E. Dated 01/03/2006 as amended and for 10 Bills of Entry, they

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availed concession rate of duty under Claus IA (ii) of the said Notification.

3. Under the Notification No:04/2006 the importer of cement is eligible for concession rate of duty on complying the following conditions:-

a) The concessional rate of duty under Clause 1A(i) is available to the Cement whose Retail Sale Price does not exceed Rs.190/- per 56 Kg bag.

b) The concessional rate of duty under Clause IA(ii) is available to the White Cement whose Retail Sale Price exceeds Rs.190/- per 50 Kg bag.

C) The concessional rate of CVD under Clause IB of the Notification No.4/2007 dated 01.03.2007 is available to the Cement which is purchased from a mini cement plant, other than those cleared in packaged form which is having a manufacturing capacity of

i) A factory using vertical shaft kiln, with installed capacity not exceeding 300 tonnes per day or 99,000 tonnes per annum and the total clearances of cement produced by the factory in a financial year shall not exceed 1,09,500 tonnes; or



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ii) A factory using rotary kiln with installed capacity not exceeding 900 tonnes per day or 2,97,000 tonnes per annum and the total clearances of cement produced by the factory in a financial year shall not exceed 3,00,000 tonnes.

d) The concessional rate of CVD under Clause IC is eligible for cement whether or not manufactured in a mini cement plant, not covered in Sl.No.IB of the Notification No.4/2006 dated 01.03.2006 other than those cleared in packaged form ie., in bulk.

4. Alleging that the import of the cement under these Bills of Entry was in violation of the eligible conditions mentioned in the Notification, show cause notice was issued to explain why action not be taken for availing duty concession wrongly. The Manager of M/s V.V.Minerals participated in the adjudication and gave a statement admitting import of cement bags of 50 kgs retail packing and not in bulk as envisaged in the concession notification. Also admitted that they did not declare the purpose for which the cement was imported. This was again violation of the concession notification which says that

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the cement imported must be used for personal use of the importer and not to be sold. Further for concessional rate of duty the price of 50 kg bag must not exceed Rs.190/-. Whereas it was found that the Respondent had paid more than Rs.190/- for a bag of 50 kg. Neither, the cement was purchased directly from the manufacturer.

5. Therefore, Order-in-Original No:37/2014 dated 31.10.2014 was passed by the Adjudicating Authority under Section 28(4) of the Customs Act to pay the differential duty of Rs.30,22,259/- along with appropriate interest under Section 28AA (1) and 28AA (2) of the Customs Act. In addition, penalty of Rs.30,22,259/- was imposed under Section 114 A of the Customs Act.

6. The above order in original was challenged by M/s V.V. Minerals before the Commissioner(Appeals), Tiruchy. The appellate Authority dismissed the appeal vide order dated 14.01.2015 upholding the order of the Adjudicating Authority. Against the concurrent finding, the respondent Appealed to Customs, Excise and Service Tax Appellate Tribunal (CESTAT) and pleaded that while importing cement under 23 bills of entry. It claimed concession under Clause 1 C



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of the notification declaring as actual user. The said actual user declaration was verified by the Examining Officers and made endorsement in their report. There was no suppression of actual usage of the imported cement. The department cleared the bills knowing well that the consignments were purchased on high seas sales basis (HSS). The department knew the consignments were not purchased directly from the manufacturers or packers. After allowing the import and granting concession based on the declaration, the issue of show cause notice 3 to 4 years thereafter and further action for collection of differential duty and penalty is barred by limitation.

7. In the appeal it is further contended that at the relevant point of time duty concession was granted to several importers of packed cements. That was not construed as mis-declaration. After three years, the department cannot open the case alleging duty concession wrongly bestowed. Relying on the judgement of the Supreme Court in **Commissioner –vs- Sab Nife Power Systems Ltd (2002 (141) ELT A 95 (SC)**, it was contended that, there is no mis-declaration or suppression with intent to evade duty merely because the exemption claimed found to be inadmissible by Customs Authorities later. The

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CESTAT allowed the Appeal vide Common Final Order dated 31.01.2008 and set aside the order in original passed by the adjudicating authority as confirmed by the appellate authority.

8. Being aggrieved, the Customs Department had filed the C.M.A(MD)No.395 of 2019 raising the following question of law: -

“Whether the CESTAT is correct in allowing the benefit of concessional rate of Counter Veiling Duty (CVD) on the imports wherein the importers have failed to fulfill the conditions stipulated in the Notification No.4/2006-CE as amended and also when such imports by the importers are in contrary to the conditions stipulated in the Notification No.4/2006-CE as amended?”

9. According to the Customs Department, the import of cement by M/s V.V. Minerals was in violation of the Notification terms. The violations are admitted by the company in its reply to show cause notice and the statement of its representative. The delay in initiating action cannot be a reason for exonerating the violator. The explanation by the company for the term institutional/industrial



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purpose is not in tune with the spirit of the Notification.

10. The specific case of the Department is that, the company by mis-declaration availed duty concession in the following manner :-

- a) The import of cement was not from the manufacturer directly. It was through High Sea Sales (HSS).
- b) The purchase was not in bulk but in bags of 50 kgs.
- c) The Retail Sale Price (RSP) of the cement purchased was not below Rs.190/-.
- d) The cement imported was not consumed for the institutional/industrial purpose. It was used for manufacturing Ash Bricks and sold to the local customers.

11. The gist of the notification No:4/2006 dated 01.03.2006 is extracted in para No.3 above for easy reference. The term packaged commodities for Institutional/industrial purpose is defined and explained in Rule 2A (b) under Chapter II of Weights and Measures (Packaged Commodities) Amendment Rule, 2006 as under:-

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Explanation: - For the purpose of this rule,

i) “Institutional consumer means” those consumers who buy packaged commodities directly from the manufactures/packers for service industry like transportation (including Airways, Railways), Hotel or any other similar service industry.

ii) “Industrial consumer” means those consumers who buy packaged commodities directly from the manufacturers/packers for using the product in their industry for production, etc.

12. Based on the Bills of Entry and admission of the importer, the Adjudication Authority in his Order in Original dated 31.10.2014 as well as the Appellate Authority in his Order in Appeal dated 14.01.2015 had held that the importer is not eligible for concessional rate of duty. The violation of the concession condition amounts to mis-declaration to evade duty. Whereas, the CESTAT had set aside the order citing reasons as below:-

“6. On the first issue we have perused the sample invoice and import documents. It is clear that Bills of Entry filed along with invoices contain details of goods imported. The exporters



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details with evidences linking up with high sea sale invoices further linked up with Bill of Entry. Hence, the import from the designated exporter who is declared as manufacturer of cement based on the details in the invoices cannot be disputed. No contrary evidence that purchase is from a trader has also been submitted by the Revenue.

7. Regarding the second issue of actual user condition for the imported cement, we note that the appellants all along claimed fulfilment of such condition. Though same is post-importation, actual use based condition, the assessments were finalized accepting the claim of the appellant for such concessional duty. It would appear that officers had opportunity to satisfy themselves about the actual user condition. In case of possible doubt on such fulfilment, the requirement is to resort to provisional assessment and call for post-importation actual user confirmation. This was not done in the present case will show that the assessing officer is satisfied with the claim made by the appellants. The Revenue can initiate demand proceedings of differential duty by denying the exemption later, only upon unearthing the evidences of misuse of such end-use condition. Such evidences have not been brought before us. The impugned orders observe that the appellants failed to establish actual user. No such



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condition regarding manner establishing such fact was put at the time of assessment and clearances. The claim in the Bills of Entry at the time of import as well as in the written submissions made before the lower authorities by the appellant-importer categorically states about not selling the imported product to any other person. No evidence to that effect has also been brought by the Revenue. In such situation, the eligibility to the CV duty concession as claimed by the appellant during the material time cannot be questioned much later without any evidence.

13. In the instant case, it is an admitted fact by the importer that he did not purchase the cement from the manufacturer directly. It was an high sea purchase from third party. No doubt, the Bill of Entry contain details of the manufacturer, but that is not sufficient to claim concession rate of duty. The concessional rule not only mandates that the purchase must be from the manufacturer directly but also specifies the mode of manufacturing and the capacity of the manufacturer. If the reasoning given by the CESTAT to be accepted, then the condition in Clause IB in the notification which imposes condition about the mode of manufacturing and capacity of the manufacturer will



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become redundant. The CESTAT failed to understand that all kind of cement are manufactured by one or other factory. The condition imposed in the Notification is 3 fold. First the purchase by the importer must be directly from the manufacture in bulk. Second the manufacturing of cement must be by using rotary kiln with installing capacity not exceeding 900 tonnes per day. Thirdly, the cement produced by the factory must not exceed 3,00,000 tonnes per financial year. Therefore declaration of the manufacturer in the bills of entry may be a condition required for clearing the goods, not for concessional rate of duty. To avail concession rate of duty, it should be purchased directly from the manufacturer who had satisfied the conditions mentioned in the notification. In case of High Sea Sales (HSS), it is not the manufacturer who sell the goods contrarily, it is the Middleman or a Trader for commission who sell the goods. Likewise, clearance of goods by the Examiner of Customs Department will not be a ground to set aside the order of withdrawal of duty concession on the ground of mis-declaration if evasion is found subsequently.

14. The order of CESTAT by ignoring the admission of the importer that the cement imported through High Sea Sales was used for manufacturing Ash

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Bricks and sold in the local market had wrongly held that no such condition was put to the importer at the time of assessment and clearance. This observation bristles with non application of mind to the Notification as well as Bills of Entry. The end use of the cement imported is one of the condition for granting concession rate of duty as per Clause IC. In fact the importer has to file a end use declaration at the time of clearance and any violation of the declaration will come to knowledge of the Revenue obviously only after the misuse of the goods imported for a purpose other than for which it was allowed to be imported at concession rate. In this case, the records reveals that, by way of show cause notice, the department had sought for explanation about the Post- Importation actual user confirmation. The importer has admitted that the cement imported was used for manufacturing Ash brick and sold in the local market. Therefore, it is evident that the cement was not used for institutional/industrial purposes.

15. The CESTAT order which is apparently against the terms of the notification and the evidence by way of Bills of Entry and Statement of importer, is liable to be set aside. By passing a common order without considering the facts of the individual cases and the evidence in the form of admission, renders the

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order in appeal perverse. The CESTAT erred in allowing the benefit of concessional rate of counter veiling Duty (CVD) to the respondent M/s V.V.Minerals despite gross violation of the concession condition. Hence the question of law is answered in negative favouring the Department.

16. In the result, C.M.A(MD)No.395 of 2019 is allowed. The Order in Appeal by CESTAT dated 31.01.2018 is set aside. The Order in Original dated 30.10.2014 is upheld. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

[G.J, J.] [R.P., J.]

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(1/2)

NCC : Yes / No

Index : Yes / No

Internet : Yes / No

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Judgment made in
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