



C.M.A.(MD)No.398 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.398 of 2019
and
C.M.P(MD)Nos.4772 of 2019

The Commissioner of Customs,
Custom House,
New Harbour Estate,
Tuticorin- 628 004.

... Appellant/Respondent

-VS-

M/s.A1 Hollow Bricks and Construction,
PP III 765, Mullakade,
Parasavakkal,
Thiruvananthapuram-695 121.

... Respondent/ Appellant

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PRAYER: Civil Miscellaneous Appeal filed under Section 130 of the Customs Act, 1962, against the order of the CESTAT in Common Final Order No. 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 these Appeals 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.398 of 2019 is M/s A-1, Hollow Bricks and Construction, Thiruvandram. The case of the Customs Department is that, M/s A-1, Hollow Bricks and Construction imported Ordinary Portland cement Grade 43 falling under CTH 2523 under 72 Bills of Entry during the period from January 2009 to December 2012 from Pakistan through Tuticorin

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port. Out of 72 Bills, for 9 Bills th importer availed concession rate of Countervailing (CVD) under Clause IA(i) of the Notification No: 04/2006 C.E. Dated 01/03/2006 as amended and for the remaining 63 Bills of Entry, they availed concession rate of duty under Claus IC 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



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not exceed 1,09,500 tonnes; or

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. During the investigation conducted subsequently, the following violation of the notification by misdeclaration was found:-

(i) the Respondent had imported Cement in 50 Kg bags with RSP declared as Rs.190/- and the cost of the import of cement up to the place of delivery imported by them was more than Rs.190/- per bag.



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(ii) They had availed concessional rate of duty under different clauses, IA(i) and IC, under the Notification No.04/2006-CE dated 01.03.2006 as amended for the import of Ordinary Portland Cement.

(iii) The importer/Respondent was not an Industrial consumer as per the conditions stipulated under Rule 2A of the Standards Weight and Measures (Packaged Commodities) Amendment Rules, 2006 and also they had not imported the cement as per the conditions laid down under Clause IC and IA(i) i.e., in bulk or in more than 50 kgs bags directly from the manufacturer. Thus they were not eligible for the concessional rate of duty under Clause IC of the said Notification.

(iv) As the cost of the imported cement was more than Rs.190/- per 50 Kg bag during the above period they were not eligible for the concessional rate of duty under Clause IC and 1A(i) of the said Notification;



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(v) The importer had not correctly declared the actual Retail Selling Price of the cement imported by them and evaded payment of appropriate duty.

5. 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 dated 25.11.2013 was issued to explain why action not be taken for availing duty concession wrongly. In response to the SCN, Mr.Wilfred Jose Dennison, Proprietor of M/s A-1, Hollow Bricks and Construction, Tiruvandrum in his statement dated 22.08.2013 *inter alia* stated that he imported cement from Pakistan through Tuticorin under 72 Bills of Entry. Availed the duty concession under Clause 1A(i) of the Notification No: 4/2006 for 09 Bills of entry, and under Clause IC for the remaining 63 Bills of Entry. In his statement, he admitted the import of cement in bags of 50 kgs retail packing and not in bulk as envisaged in the concession notification. Also admitting that he did not declare the purpose for which the cement was imported and was not aware of the true meaning of the concession under two different clauses IA(i) and IC of the Notification, sought for extension of the concession rate of duty under Clause 1A(ii) of the

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Notification and willing to pay the differential duty along with the appropriate interest.

6. After following due process of laws, Order-in-Original No: 01/2015 dated 16.01.2015 was passed by the Adjudicating Authority rejecting the declaration of RSP of Rs.190/- per 50 kg bags and refixed the price as per the contemporaneous RSP. The CVD concession claimed was rejected. Ordered payment of duty under Section 28(4) of the Customs Act, directing to pay the differential duty of Rs.35,14,162/- along with appropriate interest under Section 28AA (1) and 28AA (2) of the Customs Act. Further, held that the importer with the intention to evade payment of duty under the 72 Bills of Entry had misdeclared the RSP, hence 17540 MT of Cement worth Rs.5,37,84,504/- to be confiscate under Section 111 (m) and Section 111(o) of the Customs Act or in alternate to pay a fine of Rs.53,00,000/- under Section 125 of the Customs Act. Also directed to pay penalty of Rs.35,14,162/- equal to the differential duty imposed under Section 114 A of the Customs Act.



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7. The above Order-in-Original was challenged by the Importer before the (CESTAT). The Customs, Excise and Service Tax Appellate Tribunal pleading that he is a manufacturer of hollow bricks and for the said purpose he imported 17450 MT of Ordinary Portland Cement from Pakistan based on High Seas Sale which was deemed to be a direct import for customs guidelines. He engaged the service of licensed Custom House Agent for filing Bills of entry for all the consignments. The documents were examined by the Customs Officials and after proper assessment, the goods were cleared and subsequently utilised by him for manufacturing hollow bricks. The last clearance was during the month of December, 2011. Mr.Wilfield Jose Dennison was summoned under Section 108 of the Customs Act and was asked to sign in a pre keyed computer printout. The order in original to be set aside since the SCN issued invoking the extended period of limitation alleging mis-declaration of RSP, when such declaration of RSP is not required when the import is by industrial consumer. Especially, when the Bills of Entry were assessed by proper officer and goods cleared by the Customs Official.

8. The department cleared the bills knowing well that the consignments were purchased on high seas sales basis (HSS). The department

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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 three years thereafter and further action for collection of differential duty and penalty is barred by limitation.

9. In the Appeal, it was further contended that at the relevant point of time duty concession was granted to several importers of packed cements. The cap on RSP is not applicable to importers of cement for their institutional/ industrial purpose. The purchase of the cement was through High Sea Sale and not from the Manufacturer directly. Therefore, the MRP printed on the cement bags cannot be taken into consideration to collect differential duty or to collect penalty or order confiscation. When there was no intentional suppression by the importer, the order in original is not sustainable. After three years, the department cannot open the case alleging duty concession wrongly bestowed.

10. The CESTAT allowed the Appeal and set aside the order in original passed by the adjudicating authority in the common Final Order passed on 31.01.2018.

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11. Being aggrieved, the Customs Department had filed the C.M.A(MD)No.398 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?”

12. According to the Customs Department, the import of cement by M/s A-1, Hollow Bricks and Construction was in violation of the Notification terms. The violations are admitted by the importer in his reply to show cause notice. The delay in initiating action cannot be a reason for exonerating the violator. The provision of extended limitation is applicable in case of misdeclaration for evading duty and suppression of facts. The importer claimed concession rate of duty by declaring the RSP of the cement imported is less than Rs. 190 /- per 50 kgs bag. Whereas the price of the cement upto to the place of delivery was more than Rs.190/-. The importer was not a consumer to avail

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concession under Clause 1 C of the Notification. The explanation by the importer for the term institutional/industrial purpose is not in tune with the spirit of the Notification.

13. The specific case of the Department is that, the importer by mis-declaration and suppression of facts availed duty concession in the following manner :-

- a) The import of cement was not from the manufacturer directly. Purchase was from a Trader through High Sea Sales (HSS).
- b) The Retail Sale Price (RSP) of the cement purchased was not below Rs 190/-.
- c) The cement imported was not used/ consumed for the institutional/industrial purpose. Admittedly, It was used for manufacturing hollow Bricks and sold to the customers.

14. The gist of the notification No: 4/2006 dated 01/03/2006 is extracted in para No.3 above for easy reference.



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15. 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:-

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.

16. Based on the Bills of Entry and admission of the importer, the Adjudication Authority in his Order in Original dated 16.01.2015 held that the importer is not eligible for concessional rate of duty. The violation of the concession condition amounts to misdeclaration to evade duty. Whereas, the CESTAT by a common final order had set aside the order in original without advertng to the factual aspects of the individual case. The reasoning given by

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CESTAT to interfere the well considered order of the Adjudicating Authority of the face of it suffers patent infirmity.

17. For easy reference the operative portion of the CESTAT order is extracted 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 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



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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 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



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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.”

18. 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 a high sea purchase from a non-manufacturer/trader. No doubt, the Bill of Entry contains details of the manufacturer, but that is not sufficient to claim concessional rate of duty. The concessional rule not only specifically mandates that the purchase must be from the manufacturer directly, it 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 become redundant.



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19. The CESTAT failed to understand that cement is manufactured by one or other factory. The condition imposed in the Notification is three fold. First, the purchase must be directly from the manufacturer. Secondly, the said manufacturer/factory must use only the rotary kiln with installing capacity of not more than 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 name in the bills of entry may be a condition required for import but 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. Mere clearance of goods to be imported by the Examiner of Customs Department will not be a ground to set aside the order of withdrawal of duty concession when it is found later there is suppression and mis-declaration knowingly.

20. The order of CESTAT by ignoring the admission of the importer that the cement imported through High Sea Sales was used for manufacturing Hollow Bricks and sold in the local market had held that no such condition was put to the importer at the time of assessment and clearance. This observation



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bristles with non application of mind. The end use of the cement imported is one of the condition for granting concession rate of duty as per Clause I C. In fact the importer has to file a end use declaration at the time of clearance and violation of the declaration will obviously come to knowledge of the Revenue only after the misuse of the goods imported for a purpose other than for which it was allowed to be imported at concession rate.

21. 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 Hollow bricks and sold to its customers. Therefore, it is evident that the cement was not used for institutional/industrial purposes. Hence, 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.

22. The common order without considering the facts of the individual cases and the evidence in the form of admission, renders the Final

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Order of CESTAT perverse. The CESTAT erred in allowing the benefit of concessional rate of counter veiling Duty (CVD) to the respondent M/s A-1, Hallow Bricks and Manufacturer despite gross violation of the concession condition. Hence, the question of law is answered in negative favouring the Department.

23. In the result, C.M.A(MD)No.398 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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NCC : Yes / No
Index : Yes / No
Internet : Yes / No
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Judgment made in
C.M.A.(MD)No.398 of 2019

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