

IN THE HIGH COURT OF KARNATAKA, BANGALORE

DATED THIS THE 26TH DAY OF AUGUST 2010

PRESENT:

THE HON'BLE MR.JUSTICE N.KUMAR

AND

THE HON'BLE MR.JUSTICE H.S.KEMPANNA

CEA No: 144/2009

BETWEEN:

Commissioner of Central Excise,
Bangalore II, Commissionerate,
P.B.No.5400, Queen's Road,
Bangalore - 560 001.

...Appellant

(By Sri.Jewan J.Neeralgi, Advocate)

AND:

M/s.Mysore Cements Limited,
P.O.Ammasandra,
Turuvekere Taluk,
District : Tumkur - 572 211.

...Respondent

This CEA filed under Section 35G of the Central Excise Act, 1944 arising out of order dated 06.05.2009 passed in Final Order No.611/2009, praying that this Hon'ble Court may be pleased to decide the substantial question of law stated therein, etc.




This CEA coming on for admission this day, N.KUMAR, J., delivered the following:-

JUDGEMENT

This appeal is by the revenue challenging the order passed by the Tribunal holding that the construction industry is a service industry and the cement supplied to such an industry is entitled to concessional rate of duty of Rs.400/- per MT in terms of Notification No.4/2006 CE dated 01.03.2006 and accordingly, set aside the order passed by the adjudicating authority.

2. The assessee is engaged in the manufacture and sale of packaged cement in unit packages (packed in HDEP/PP Bags) of 50 Kg and cement clinker falling under the schedule to Central Excise Tariff (Amendment) Act, 2005. The assessee has been clearing the cement by paying the duty at the normal tariff rate at Rs.600.00 per metric tonne. During the course of scrutiny of the self assessed monthly returns in Form ER-1 filed before the




Superintendent of Central Excise, Tumkur II Range for the months of January 2008 to March 2008, it was noticed that the assessee besides effecting the clearances at Rs.600.00 per metric tonne, it has cleared certain quantities of cement by paying duty at Rs.400.00/- per metric tonne, along with the applicable education cess at 2% and higher education cess at 1% in terms of the above said Notification. The said concessional rate of duty per tonne is available only if the cement cleared by the manufacturer is not in a packed condition. But, in the instant case, the assessee had cleared the cement in packaged form since from January 2008 to March 2008. Therefore, on the ground that the assessee is not eligible to avail the benefit of concessional rate of duty to Rs.400.00 per metric tonne as envisaged in the Notification, a show-cause notice was issued claiming additional duty, penalty, etc.

The assessee replied to the show-cause notice contending that, according to Notification No.4/2006

dated 01.03.2006 as amended by Notification No.4/2007 CE dated 01.03.2007, where the retail sale price of the goods are not required to be declared under the Standards and Weights and Measures (Packaged Commodities) Rules, 1977 and thus not declared, the duty shall be determined as is in the case of goods cleared in other than packaged form. They have supplied to goods to institutional consumers, and as per Rule 2A (ib)(id) of the said Rules, the provisions of Chapter II would not apply to the packaged commodities meant for institutional consumers and industrial consumers. Therefore, they contended that they were entitled to avail the concessional rate of Rs.400/- per metric tonne on the quantity of cement cleared to such institutional consumers. The adjudicating authority referring to the Rules, the Notifications, held that, the assessee has not given any reasons or cited any authority, as to how the construction industries would be categorized as a service industry. Further, they have not produced any other order issued by



the State Government Authorities, who are administering the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 to the effect that they have been exempted from declaring the retail sale price on the packages under the said Rules in respect of the said goods. In absence of any such details/information, it cannot be held that the assessee have supplied the impugned goods to institutional consumers to become eligible for the concessional rate of duty of Rs.400/- per tonne. Hence, they are liable to pay the differential duty of Rs.11,94,079/- as demanded in the show-cause notice. Aggrieved by the same, the assessee preferred an appeal before the Tribunal.

The Tribunal relying on the Notification as well as the decisions of the co-ordinate Bench in the case of *M/s.Grasim Industries Limited -vs CCE, Jaipur* reported in 2004(175) ELT 779 (Tri.Del), which was followed by the Tribunal in the case of *M/s.Chettinad Cement Corporation Limited -vs- CCE, Trichy* reported in 2009-TIOL-139-

CESTAT-MADRAS, where it was held that, Construction is treated as an industry under the various statutes and it in fact, is one of the biggest industries in any Country, the construction industry is a service industry and therefore, the assessee is entitled to the concessional rate of excise duty and therefore, it set aside the order passed by the adjudicating authority and held that, the assessee is entitled to the benefit of the Notification. Aggrieved by the said order, the revenue is in appeal.

3. The learned counsel for the appellant assailing the impugned order contends that, the construction industry is not a service industry. Only when cement is sold in not packed condition, the assessee would be entitled to the benefit of concessional rate of Rs.400/- per metric tonne. When admittedly, the cement is sold in packaged condition of 50 Kgs bags, the assessee is not entitled to the said benefit and therefore, he contends that the impugned order requires to be quashed. From the



material on record, it is clear that, there is no dispute as regards the fact that clearances are made to the institutional consumers by the assessee. Among these institutional consumers, one is construction industry. If the construction industry is held to be a service industry, then the assessee is entitled to the benefit of the Notification. The construction activity has been considered as a service industry by the Finance Ministry. In the foreign trade policy of Government of India in the list of services as enumerated in the Appendix 10, construction and related engineering services in particular, general construction work for building, general construction work for civil engineering installation and assembly work building, completion and finishing work and assessee is treated as a service industry.

4. The two co-ordinate Benches in the aforesaid two judgements have taken similar view. Under these circumstances, the Tribunal committed no illegality in

holding that the construction industry is a service industry and the assessee had satisfied the other requirement of the Notification, they are entitled to the benefit under the Notification. In those matters, we do not see any good reason to interfere with the well considered order passed by the Tribunal, which in turn based on the judgements delivered by co-ordinate Benches. Therefore, the appeal lacks merits. Accordingly, it is dismissed.

**Sd/-
Judge**

**Sd/-
Judge**

dh*