

Audit - 2009

OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX  
PLOT NO. 6776/B-1, "SIDDHI SADAN" BUILDING,  
NARAYAN UPADHYAY MARG,  
BHAVNAGAR-364001.

F. No. V/15-102/Dem/HQ/2008

Date of Order: 27.05.2011

Date of issue: 08.06.2011

Passed by Harcharan Singh, Additional Commissioner

Order-in-Original No. 07/ADC/BVR/2011

This copy is granted free of charge for private use of the person(s) to whom it is sent.

Any person(s) deeming himself aggrieved by this Order may appeal against this order to the Commissioner (Appeals-II), Central Excise, Ahmedabad, 7th floor, New Central Excise Building, Near Polytechnic, Ambawadi, Ahmedabad- 380015 within 60 days from the date of its communication. The appeal should bear a court fee stamp of Rs 2.50/- paise only.

The appeal should be filed in form EA 1 in duplicate, as per the provisions of Section 35(1) of the Central Excise Act, 1944 read with Rule 3 of the Central Excise (Appeals) Rules, 2002. It should be signed by the appellants in accordance with the provisions of sub-rule (2) of Rule 3 of the Central Excise (Appeal) Rules, 2002.

- It should be accompanied with the following:
- Copy of appeal in duplicate

Copies of the order, one of which shall be certified copy **OR** the other must bear a court fee stamp of Rs 2.50/- paise as per Schedule 1 to Article 6 of the Court Fee Stamp Act, 1870.

Sub :- Wrong availment of exemption under Notification No. 108/95 dated 28.08.1995

**Brief Facts:**

M/s Saurashtra Cement Ltd, Near Railway Station, Ranavav, Gujarat (hereinafter referred to as "Noticee") having Central Excise Registration No. AAHFS 5211 JXM 001 under Rule 6 of Central Excise Rules, 2002 (hereinafter referred to as "CER-2002") read with section 6 of Central Excise Act, 1994 (hereinafter referred to as "CEA-1994") for the manufacture of the Ordinary Portland Cement (OPC), Portland Pozzolana Cement (PPC) and Sulphate Resistant Cement (SRC) falling under chapter Sub-heading 2523,2910, 2523 2920 and 2523 2990 respectively of the First Schedule to the Central Excise Tariff Act, 1985.

The Noticee is also clearing the Cement without payment of Central Excise duty claiming exemption under notification No. 108/95-CE dated 28.08.1995 as amended from time to time to various Government projects, without the payment of duty on basis of the certificates issued by the competent authority in the name of the assessee under the said notification for the goods cleared.

During the course of audit by the Central Excise Audit party, Central Excise, Bhavnagar of the records maintained by the Noticee, it was observed on scrutiny of some of the Certificates issued by the Competent Authorities as required under Notification No. 108/95-CE dated 28.08.1995 that the said Certificates were not in the name of the Noticee (as manufacturer and supplier of the goods) but were found in the name of the contractors (indirect supply through third party) like M/s Classic Network Pvt, Ltd, M/s Adam Suleman Durvesh; M/s Vinay Constructions; M/s Shanti Construction Co and M/s Backbone Project Ltd. In the absence of Certificates issued by project implementing authority showing assessee as supplier, exemption under Notification 108/95-CE dated 28.08.1995 is not available to them.

It appeared that the said Noticee was very well aware that they are not eligible to avail to the benefit of exemption under Notification No. 108/95-CE dated 28.08.1995 as amended in respect of cement cleared to the projects on the strength of such certificates issued by the competent Authorities which are not in their name. The notice suppressed the facts from the Department and these facts were found out only by the Central Excise Audit party of the Central Excise, Bhavnagar during the course of audit of the records maintained by the Noticee. The Noticee had cleared 1336.700 MT of the said goods without payment of duty during the period from November, 2006 to December, 2007 and wrongly availed the benefit of exemption Notification No. 108/95-CE, dated 28.08.1995 as amended and therefore extended period of 5 years, contemplated under proviso to section 11A of the Central Excise Act, 1944 was invokeable.

It further appeared that the Duty Exemption Certificate issued by concerned Department of Govt. of India is the essential and vital document for duty exemption, a third party certificate can not be accepted as discussed above and hence the Noticee were liable to pay the Central Excise Duty totally amounting to Rs 8,22,828/- [i.e. Rs 8,02,020/- (Cenvat) + Rs 16,040/- (Ed. Cess) + Rs 4,768/- (S. & H. Ed. Cess)]. Therefore, a notice was issued to the Noticee demanding aforesaid amount of duty under Section 11A of the Act alongwith the interest and proposing to levy penalty under Section 11AC of the Act.

#### **Defence:**

The Noticee submitted written reply vide letter dated 15.06.2009 and written submission at the time of personal hearing submitting therein that M/s Saurashtra Cement Limited (SCL) has complied with all the applicable conditions of the exemption notification (No. 108/95 CE), fully and there is no deficiency in compliance of the applicable conditions whatsoever as alleged in the SCN. A close reading of the exemption notification would reveal that it is no where stated in the relevant clause of the notification that supplier of goods should be mentioned/shown in the certificate issued by the Project implementing authority as assumed under the SCN;

What is required as per the relevant clause c (ii) of the said notification is that "goods are intended to be supplied to a project financed (whether by a loan or a grant) by the World Bank, Asian development Bank or any International Organization other than those specified in the notification" and that as per clause c(ii) "a certificate is produced from Project implementing authority and countersigned by the Principal Secretary or the Secretary (Finance) in the concerned state Government and that the said goods are required for execution of the said project and has been approved by the state Government. All these aspects have been duly complied in the certificates produced by SCL and there are no other allegations in the SCN other than that the certificates were not in the name of noticee but in the name of the contractors. It is submitted that the notification does not envisage any certificate in the name of supplier of goods and hence the said allegation is beyond the scope of the exemption notification. Further, it is not in dispute that the goods were required for the project and were also supplied to the contractor specified in the certificate issued by the implementing authority. It is further submitted that the notification has various sub clauses namely a, b (i) and b (ii) and c (i) and c (ii) and the subject case is covered by clause c(ii) and the show cause notice has wrongly tagged and relied upon a wrong clause and mixed up the same and made wrong allegations without proper appreciation of the relevant clause pertaining to the case under scrutiny.

It may be taken note of that this is a project approved by the Government of India for implementation by the Government of Gujarat State as seen from the certificate of the Project implementing authority and hence this case would not fall under clause (a) of the said notification and would be covered only by clause c (ii). In this case, contracts were awarded to various contractors by the various project implementing authorities of Gujarat State Government and the certificates were therefore issued in the name of the respective contractors in order to enable them to procure required goods for implementation of project and this is not a case where the Government of Gujarat or the implementing authority has directly purchased the goods from the suppliers, hence in these cases certificates would bear only the contractors' names and not the names of suppliers to the contractors for the project; that the availment of the exemption has been correctly and properly done and there is no deficiency in the same and the allegations in the SCN is unfounded and made on a wrong reading of the exemption notification. It is submitted

that the Jurisdictional Bench of the Tribunal namely CESTAT Ahmedabad has rendered a decision on the same point in favor of the party in the case of Hindustan Colas Limited vs CCE (2007(117) ECC 462, 2007ECR462(Tri.-Ahmedabad). It is an identical case where the department has denied the exemption stating that the certificate having been in the name of the contractor, the appellant is not entitled to avail the exemption' The Tribunal decided the case in favor of party on the following reasons'

"We have carefully considered the rival submissions. The followings are not in dispute: The project is funded by the World Bank; the projects are divided into various contracts for different types of work and assigned to different contractors; the project implementing authority has been approved by the World Bank and by the Govt. of India; the goods cleared by the appellants have been used for the project. The notification, no doubt, envisages production of the certificate from the project implementing authority and the 'purpose of the certificate is to ensure that the material procured duty free are required and used for the said project. It should be understood that the appellants may supply goods not only -for the project, which is eligible for exemption but also to others who are not availing the said exemption. There is no rational to issue the certificate in the name of the supplier. Basically, the Notification is a kind of end use notification and that is meant for use in the work funded by the World Bank. There is also no stipulation in the notifications that the certificate by the project implementing authority should be in the names of suppliers of the materials."

Hence the points submitted by SCL is supported by the decisions of Tribunal and hence even as a matter of judicial discipline, the decision of Tribunal is squarely binding on lower authorities especially when the matter being adjudicated is identical to the facts and circumstances of the decision of Tribunal cited above; that apart from the merits, it is submitted that the demand is barred by limitation.

SCL has clearly and unambiguously informed the Jurisdictional Central Excise authorities that they are availing the exemption notification No 108/95 CE and further informing the relevant certificate under which the said exemption is being availed and submitted the copy of the certificate and also given intimation of removal of the impugned goods under specific acknowledgement of the department. In fact, the intention to clear the cement under the said exemption notification was made known to the department before clearance itself along with copies of the certificates issued by the Project Authorities in the name of the contractors as required under the notification. Hence, there is no case for imposition of penalty under section 11AC of CEA . There is also no case made out for imposition of any penalty under Rule 4, 5 & 6 of Central Excise Rules, 2002, as the goods were cleared under the said exemption notification by complying with the conditions specified in the notification and also by informing the department of the same before clearance and hence no penalty is imposable under Rule 25(1) of CER 2002

As the issue is one of interpretation, there is no penalty is imposable on SCL under any provision. On merits as well as on the point of limitation, the demand is not legally tenable or sustainable and hence the proceedings proposed under the impugned SCN may be dropped. Personal hearing in matter was fixed on 07.02.2011. Shri Janakiraman, Chartered Accountant and Shri P. Balakrishnan, Consultant appeared for the Noticee and submitted the written submission alongwith case laws and copies of prior intimations.

#### **Discussion & Finding:**

I have carefully gone through the records of the case and the written submissions of the noticee and the submission made at the time of personal hearing. Demand notice was issued to the Noticee denying the benefit of notification No. 108/95-CE dated 28.08.1995 in respect of the goods viz. Cement cleared to contractors for use in the projects financed by the international organization on the grounds that the required certificates under the Notification No.108/95 ibid were not issued in the name of the Noticee. The Noticee has challenged the view taken by the department. Therefore, the short point to be considered in this case is whether the certificate envisaged under the notification No. 108/95 ibid should necessarily be in the name of the supplier-manufacturer desiring to avail the exemption under the notification. For better understanding, the relevant portion of the Notification No. 108/95 is reproduced below:

“.....exempts all goods falling under the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the said goods) when supplied to the United Nations or an international organisation for their official use or supplied to the projects financed by the said United Nations or an international organisation and approved by the Government of India, from the whole of -

(i) the duty of excise leviable thereon under section 3 of the central Excises and salt Act, 1914 (1 of 1944); and

(ii) the additional duty of excise leviable thereon under sub-section (1) of section 3 of the Additional Duties of Excise (Goods of Special Importance ) Act, 1957 (58 of 1957):

Provided that before clearance of the said goods, the manufacturer producers before the Assistant Commissioner of Central Excise having jurisdiction over his factory, a certificate from the (United Nations or an international organisation that the said goods are intended for official use by the said United Nations or the said international organisation or are to be supplied to a project financed by the said United Nations or the said international organisation and the said project has duly been approved by the Government of India.....”

It is evident from the above that the exemption to the goods supplied to the United Nations or an international organisation for their official use or supplied to the projects financed by the said United Nations or an international organisation and approved by the Government of India is subject to production of a certificate from the United Nations or an international organization to effect that the said goods are intended for official use by the said United Nations or the said international organisation or are to be supplied to a project financed by the said United Nations or the said international organisation and the said project has duly been approved by the Government of India

As can be seen, there is no specific requirement under the notification for the certificate to be in the name of the supplier-manufacturer. Further, the said notification does not require production of any kind of evidence as regards to actual use of the goods for the purpose intended in the notification. In other words, the exemption has been extended solely on basis of the production of certificate by the manufacturer intending to avail exemption. However, reading the notification in its context reveals that the exemption is goods specific i.e. exemption is available only to the goods which are intended for the use mentioned in the notification. Therefore, ‘certificate’ appearing in the notification is to be construed as certificate issued in name of the supplier-manufacturer. Since, in this case the certificates were not in the name of the Noticee, hence the exemption is rightly denied.

Now, I shall discuss, the contentions put forth by the Noticee in their defence. The noticee have submitted that the notification does not envisage any certificate in the name of supplier of goods and that it is not in dispute that the goods were required for the project and were supplied to the contractor specified in the certificate issued by the implementing authority. They have relied upon the decision of the Tribunal in case of Hindustan Colas Limited vs. CCE (2007(117) ECC 462). A careful reading of the decision of the tribunal in case of M/s Hindustan Colas Ltd reveal that the Hon’ble Tribunal have referred therein the decision of Delhi Tribunal in case of Dee Development Engineers Ltd. v. CCE, Delhi-v -2004 (178) E.L.T. 452 (Tri. Del.). In this matter, the appellants challenged the decision before Hon’ble High Court of Punjab & Haryana, who while dismissing the appeal have observed {2010 (2541) E.L.T. 412 (P & H)}

*“It is admitted fact that the goods were not supplied directly to the project financed by Asian Development Bank by the appellants. The Certificate produced by the appellants shows that Ms Thermax Babcock & Wilcox Limited are supplier of steam generator. No certificate issued by the project-Implementing Authority showing the appellants as supplier of the goods, in dispute, to the specified project is produced by the appellants. The Hon’ble Supreme court in the case of Novopan India Ltd. v. Collector of Central Excise and Customs, Hyderabad, reported in 1994 (73) E.L.T. 769 (S.C.) held that a person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. In case of doubt, or ambiguity, benefit of it must go to the state. In the present case as the appellant had not produced necessary certificate to show that the goods in question were supplied to the*

*Project Financed by the Asian Development Bank, we find no infirmity in the impugned order, the appeal is rejected."*

Therefore, relying upon this decision of the Hon'ble High Court, contentions of the Noticee cannot be accepted.

The Noticee has also contested the notice on limitation. They have submitted that it is on record that they had submitted the certificates under the cover of their letters to the jurisdictional Central Excise authorities before clearance of the goods and also informed the authorities that they are going to clear the cement under the said notification against the certificates. The Noticee has submitted copies of the letters under which the certificates were produced before the Assistant Commissioner, Junagadh. They also submitted that no penalty is imposable under Rule 25(1) of the Rules.

I find that the Noticee have submitted various letters addressed to the Assistant commissioner Central Excise Junagadh informing about the clearances covered under the notice and have also submitted copies of the certificates based on which the exemption was to be availed. This clearly established that the department was aware about the clearances on which exemption was availed based on the certificates which were not in the name of the Noticee even before clearances of the goods. As neither the suppression of facts nor intention to evade duty is established in this case, therefore, the invocation of extended period contemplated under section 11A of the Act is not allowable in this case. However, the notice demanding duty has been issued on 25.05.2009 i.e. after a period of more than a year. Therefore, the demand of duty is barred by limitation.

In view of the above, I drop the demand of duty and consequential penalty.

*Sd/-*  
(HARCHARAN SINGH)  
ADDL. COMMISSIONER

To,  
M/s Saurashtra Cement Ltd,  
Near Railway Station,  
Ranavav-360560  
Gujarat

Copy to: -

1. Commissioner, Central Excise, Bhavnagar.
2. The Assistant Commissioner Central Excise, Junagadh
3. The Assistant Commissioner(Audit), Central Excise, Bhavnagar
4. The Superintendent, AR-II, Porbander.
5. Guard File.

*RHS*  
*25/5/2011*  
(HARCHARAN SINGH)  
ADDL. COMMISSIONER