
 सत्यमेव जयते	केंद्रीय कर आयुक्त (अपील) O/O THE COMMISSIONER (APPEALS), CENTRAL TAX वस्तु एवं सेवा कर भवन सातवीं मंजिल पॉलिटेक्निक के पास आम्बावाडी, अहमदाबाद-380015 079-26305065	 GST Building, 7 th Floor, Near Polytechnic, Ambavadi, Ahmedabad-380015 टेलीफैक्स : 079 - 26305136
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क फाइल संख्या : File No : **V2/189/GNR/2018-19** / 10793 to 10798

ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-07-19-20** Gy file

दिनांक Date : **23-05-2019** जारी करने की तारीख Date of Issue: **30/05/2019**

श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals) Ahmedabad

ग **अपर** आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश : **AHM-CEX-003-ADC-PMR-003-18-19** दिनांक : **09-01-2019** से सृजित

Arising out of Order-in-Original: **AHM-CEX-003-ADC-PMR-003-18-19**, Date: **09-01-2019**
 Issued by: Additional Commissioner, CGST, Div: RRA, HQ, Gandhinagar Commissionerate, Ahmedabad.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता
 Name & Address of the **Appellant** & Respondent
M/s. M.S Khurana Engg. Ltd

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

I. Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944, may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

\भारत सरकार का पुनरीक्षण आवेदन : **Revision application to Government of India :**

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

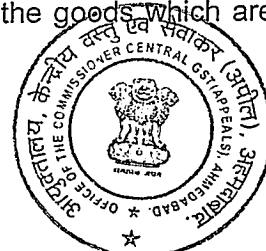
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.



- (ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।
 (c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनोंक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
 Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35- ण0बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में दूसरा मंजिल, बहुमाली भवन, असारवा, अहमदाबाद, गुजरात 380016

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhavan, Asarwa, Ahmedabad-380016 in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूप 5 लाख या उससे कम है वहां रूप 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूप 5 लाख या 50 लाख तक हो तो रूप 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूप 50 लाख या उससे ज्यादा है वहां रूप 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.



(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1988 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2018(2018 की संख्या 24) दिनांक: 06.08.2018 जो की वित्तीय अधिनियम, 1998 की धारा 43 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत “ माँग किए गए शुल्क ” में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।

For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

Under Central Excise and Service Tax, “Duty demanded” shall include:

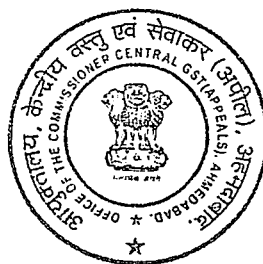
- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

→ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(6)(i) इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(6)(i) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.”

II. Any person aggrieved by an Order-in-Appeal issued under the Central Goods and Services Tax Act, 2017/Integrated Goods and Services Tax Act, 2017/Goods and Services Tax (Compensation to States) Act, 2017, may file an appeal before the appropriate authority.



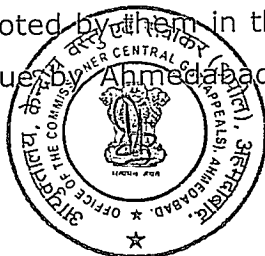
ORDER-IN-APPEAL

This appeal has been filed by M/s. M. S. Khurana Engg. Ltd, Gift City, Gandhinagar, Gujarat (hereinafter referred to as "the appellants") against the Order-in-Original number AHM-CEX-003-ADC-PMR-003-18-19 dated 09.01.2019 (hereinafter referred to as "the impugned order") passed by the Additional Commissioner, Central GST, Gandhinagar Commissionerate (hereinafter referred to as "the adjudicating authority").

2. Briefly stated, the facts of the case are that an offence case was booked against the appellant based on an intelligence that they were involved in the manufacture of "Ready Mix Concrete" (hereinafter referred to as "RMC") at the RMC site, Gift City, Gandhinagar for use in construction purpose; that neither they were registered with the Central Excise department, nor they were paying Central Excise duty, by misusing Central Excise Exemption Notification number 12/2012-CE (Sr. number 144) as amended. After completion of a thorough investigation, a show cause notice, dated 30.08.2017, was issued to the appellants for demand of Central Excise duty amounting to Rs.1,02,46,971/- with interest and imposition of penalty under Rule 25 of Central Excise Rules, 2002 (CER) read with Section 11AC of Central Excise Act, 1944 (CEA). The said show cause notice also proposes for confiscation of goods valued at Rs.49,74,25,772/- and fine under Rule 25(1) of CER. The adjudicating authority, vide the impugned order, confirmed the demand under Section 11A (4) of CEA with interest under Section 11AA of CCEA and also imposed penalty equal to the duty confirmed under Section 11AC of CEA. He further imposed redemption fine of ₹1,00,00,000/- under Rule 25(1) of the CER.

3. Being aggrieved with the impugned order, the appellant has filed the instant appeal on the following grounds:

- The product they manufactured at the site was "concrete mix" and not "Ready Mix Concrete"; that neither the department took any cognizance of evidence submitted by them nor the adjudicating authority for deemed it right to give his findings on such crucial evidence in his order.
- Just because they used some plasticizer in manufacture of "concrete mix" would not make it "Ready Mix Concrete"; that the usage of same in manufacture of "Concrete Mix" should adhere to the dosage as given in the IS norm.
- The appellant's company were received three show cause notice from different commissionerate; that in the instant case, SCN were received from Gandhinagar Commissionerate, wherein the authority has accepted the value quoted by them in the tender amount; that in the show cause notice issued by Ahmedabad South Commissionerate, the



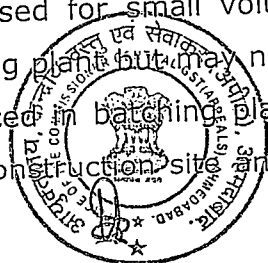
authority has accepted the value of different grades of goods proposed by them and appointed their own Cost Accountant at the value in accordance with CAS-4 norms and show cause notice issued by Ahmedabad North Commissionerate, the authority adopted the value under Rule 8 of the Valuation Rules.

- The issue of availability of exemption under notification No.12/2012-CE to "Ready Mix Concrete" was under litigation and the issue attained finality on 06.10.2015 when the Hon'ble Supreme Court has decided the issue. It is a settled principle that when the issue is under litigation and has not attained finality, extended period cannot be invoked.
- Further, when the association of manufacturers of "Ready Mix Concrete" approached the Government, the Government has extended the exemption benefit even to Ready Mix Concrete in Financial Year Budget 2016-17. The notification issued is a curative notification, it would have retrospective effect.

4. A personal hearing in the matter was held on 02.05.2019 and Shri M. K. Kothari, Consultant appeared for the same and reiterated the grounds of appeal. He pointed out that the valuation adopted by the authority in the case is faulty; that three show cause notices were issued against them in the instant issue by different Commissionerate in Ahmedabad Zone and different methods of valuation were adopted. He also pleaded for limitation and submitted case laws in their favour. The appellant submitted further written submission on 07.05.2019.

5. I have carefully gone through the facts of the case on records, appeal memorandum and submissions made by the appellants at the time of personal hearing. The issue to be decided in the matter is as to whether the Concrete used by the appellant at the site is "Ready Mix Concrete" (RMC) as held by the adjudicating authority or "Concrete Mix" (CM) as contended by the appellant and the exemption availed by the appellant under notification No.12/2012-CE dated 17.03.2012 is eligible to them or not.

6. At first, I would like to explain what exactly the difference between RMC and CM. Concrete produced at a location other than the construction site is generally called as Ready Mix Concrete or Rock. RMC is produced from a batching plant usually of high capacity and good control over the process. The concrete from the plant is dumped in to a transit mixer for transportation to the construction site. Alternatively concrete can be produced on site using a batching plant of smaller capacity and directly used. Concrete mixers deployed at site are used for small volumes. Ready mix concrete is also concrete from a batching plant but may not be exactly vice versa. Ready mix concrete is also produced in batching plant only, the difference is that it is produced away from construction site and brought to site in transit mixers.



Ready mix concrete shall be pumpable concrete which needs more workability and more slump. Ready mix concrete has 12 mm and down size aggregate and more quantity of super plasticizer to have more slump i. e. more than 100mm and generally 120 mm to 130 mm to avoid clogging of pump and piping. Ready mix concrete is also dosed with set retarders or retarding agents to delay setting and reach site in heavy traffic conditions also while concrete is still green. Ready mix plants will have 60 to 90 cubic meters per hour capacity batching plants where as site mix plants of lower capacity is sufficient depending on size of the construction site. Thus, I find that RMC contains super plasticizer to desist it from setting down at a faster rate. Nowadays, the manufacturers of RMC are adding fly ash to increase its fluidity. From the above, it is quite clear that that RMC and CM are two different products.

7. Further, in the instant case also, I find that the adjudicating authority has, very rightly, quoted the Board's Circular number 368/1/98-CX dated 06.01.1998 in para 58 of the impugned order, where it is clarified that RMC and CM are two separate distinguishable commodities. In the said circular, the relevant portion regarding the classification of Ready Mix Concrete reads as under;

"2. The Board has examined the issue of "RMC" afresh and finds that a clear distinction needs to be made between the two types - (a) concrete mix at site and (b) Ready Mix Concrete. The Ready Mix Concrete plant consists of stone crushers, conveyors, vibrator screen to segregate different sizes of stone aggregates, and a sand mill to produce sand from stones. A central batching plant is also installed in which all aggregates are weighed, batched by electrical controls and limit switches. Cement from silo is carried to the batching plant by a screw conveyer operated with automatic weighing gauges. Water is fed through flow meters after subjecting such water to chemical analysis. The mixture of stone aggregates, sand, cement and water is mixed in a mixer. The shelf life of the mixture so obtained is increased by addition of chemicals. This mix is loaded on a transit mixer mounted on truck chassis which is transported to the site of the customers and the same is discharged at site for use in further construction of building etc.

3. The qualities of Ready Mix concrete, are somewhat different to mixed concrete. The final product Ready Mix Concrete is a material in plastic, wet process state and not a finished product like blocks or precast tiles or beams.

4. Ready Mix Concrete is thus an excisable product which has a separate tariff entry under sub-heading 3824.20 of the Central Excise Tariff Act, 1985. It is also known under the Indian Standard IS: 4926-1976, which for the purposes of that standard defines Ready Mix Concrete as concrete delivered at site or into the purchaser's vehicle in a plastic condition and requiring no further treatment before being placed in the position in which it is to stay and harden".

5.....

6. The matter has been examined and concrete mix implies the conventional method of concrete production, conforming to the ISI Standard 456-1978, which is produced and used at the site of construction. It is this concrete



mixture, manufactured at the site of construction which is fully exempt vide Notification No. 4/97-C.E., dated 1-3-1997 (S. N. 51). It is thus clarified that ready mix concrete or pre-mixed concrete, by its very nature, cannot be manufactured at the site of construction and is brought from the factory of manufacturer for use in construction.

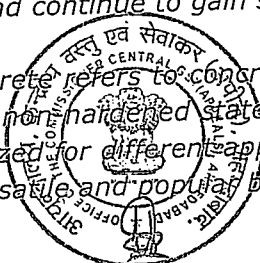
8. On record, it is admitted by the appellant during the course of investigation that the plant of the appellant situates at Plot No.45 at some distance from the site office. As per above clarification and going by the details of plant of the appellant and other batching machined installed at the manufacturing plant as discussed in the impugned order at para 59 and 60, the impugned goods in the present case is liable to be treated as 'RMC' by virtue of the fact that the appellant had installed their own concrete mix batch plant and produced RMC out of raw materials such as coarse aggregates, sand, cement, admixture and fly ash and the RMC was used onsite for construction work at the site. Further, the clarification of the Board has been cited and endorsed by Hon'ble Supreme Court in the case of Larsen and Toubro Ltd. vs. C.C.E., Hyderabad [2015 (324) E.L.T. 646 (S.C.)]. The relevant portion of this decision is reproduced below;

"19. We are also inclined to agree with the stand taken by the Revenue that it is the process of mixing the concrete that differentiates between CM and RMC. In the instant case, as it is found, the assessee installed two batching plants and one stone crusher at site in their cement plant to produce RMC. The batching plants were of fully automatic version. Concrete mix obtained from these batching plants was delivered into a transit mixer mounted on a self propelled chassis for delivery at the site of construction is in a plastic condition requiring no further treatment before being placed in the position in which it is to set and harden. The prepared chassis which was mounted was to ensure that when the concrete mix is taken to the actual place of construction, it keeps rotating. It is also significant to mention that for producing the concrete mix, material used was cement, aggregates, chemically analysed water and admixtures, namely, retarders and plasticizers. As the L&T was constructing cement plant of a very high quality, it needed concrete also of a superior quality and to produce that aforesaid sophisticated and modernised process was adopted. The adjudicating authority in its order explained the peculiar feature of RMC and the following extracts from the said discussion needs to be reproduced :

"32. Central Excise Tariff does not define Ready Mix Concrete. Therefore, as per the established case-laws on the subject it is necessary to look for the meaning of this expression as understood in the market viz., as understood by the people who buy and sell this commodity. In this connection it would be relevant to refer to the following excerpts from an article - what is ready mix concrete, appearing in internet website of National Ready Mix Concrete Association, USA :-

(i) Concrete, in its freshly mixed state, is a plastic workable mixture that can be cast into virtually any desired shape. It starts to stiffen shortly after mixing, but remains plastic and workable for several hours. This is enough time for it to be placed and finished. Concrete normally sets or hardens within two to 12 hours after mixing and continue to gain strength within months or even years.

(ii) Ready Mix Concrete refers to concrete that is delivered to the customer in a freshly mixed and non-hardened state. Due to its durability, low cost and its ability to be customized for different applications, Ready Mix Concrete is one of the world's most versatile and popular building materials.



(iii) Admixtures are generally products used in relatively small quantities to improve the properties of fresh and hardened concrete. They are used to modify the rate of setting and strength, especially during solid and cold weather. The most common, is an air-entraining agent that develops millions of tiny holes in the concrete, which imparts the durability to concrete in freezing and thawing exposure. Water reducing Admixtures enable concrete to be placed at the required consistency while minimizing water used in the mixture, thereby increasing the strength and improving durability. A variety of fibers are incorporated in the concrete to control or improve aberration and impact resistance."

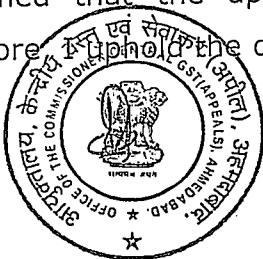
20. After referring to some text as well, the adjudicating authority brought out the differences between Ready Mix Concrete and CM which is conventionally produced. The position which was summed up showing that the two products are different reads as under :

"From the literature quoted above it is clear that Ready Mix Concrete is an expression now well understood in the market and used to refer to a commodity bought and sold with clearly distinguishable features and characteristics as regards the plant and machinery required to be set-up for its manufacture and the manufacturing processes involved, as well as its own properties and the manner of delivery. RMC refers to a concrete specially made with precision and of a high standard and as per the particular needs of a customer and delivered to the customer at his site. Apparently due to the large demand resulting from rapid urbanization and pressure of completing projects on time, consumption of RMC has steadily grown replacing the conventional/manual concreting works. Today leading cement companies have entered the field by setting-up RMC plants in which L&T ECC is one. RMC is slowly replacing site or hand mixed concrete because of the distinct advantages due to technology, speed and convenience. Furthermore, absence of the need to deal with multiple agencies for procuring and storing cement, sand, blue metal and water as well as the absence of the need to handle unorganized labour force are factors influencing customers to go in for RMC in preference to CM."

21. In this backdrop, the only question is as to whether RMC manufactured and used at site would be covered by notification. Answer has to be in the negative inasmuch as Notification No. 4, dated March 1, 1997 exempts only 'Concrete Mix' and not 'Ready Made Mixed Concrete' and we have already held that RMC is not the same as CM".

The above judgment was affirmed vide the order dated 24.02.2016 by the Supreme Court Bench comprising Hon'ble Mr. Justice A.K. Sikri and Hon'ble Mr. Justice Rohinton Fali Nariman [2016 (336) E.L.T. A135 (S.C.).

9. Thus, the above distinction between CM and RMC has been made on factual basis and the appellant's attempt to challenge the impugned order is not sustainable. In view of the above, it is very much clear that RMC and CM are two different products. Looking into the process carried out by the appellant, in the instant case, there is no doubt that the appellants are engaged in the manufacture of RMC falling under Chapter Head 38245010. This has been stated by the adjudicating authority in the impugned order where he has confirmed that the appellants were fully equipped with batching plant. Therefore, the decision of the adjudicating authority in this regard.

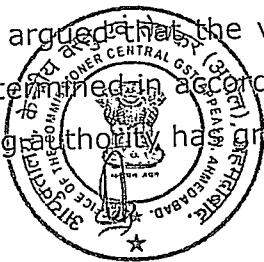


9. Now I come to the exemption notification No. 12/2012-CE dated 17.03.2012 (Sr.No.144) availed by the appellant. The said notification very clearly stipulates that exemption is eligible to the goods viz. Concrete Mix (CM) manufactured at the site of construction, falling under chapter 38. The concerned portion of the said notification is mentioned below;

Sl. No.	Chapter or heading or sub-heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition No.
144	38	Concrete mix manufactured at the site of construction for use in construction work at such site	Nil	-

10. Thus, it can be seen that the exemption is given only to the product Concrete Mix and not to Ready Mix Concrete. Further, the Hon'ble Supreme Court in its order supra had held that the legislature has treated Ready Mix Concrete (RMC) as product different from Concrete Mix (CM); whereas CM has generally been covered by exemption notification, such exemption is not extended to RMC. Classification entries have also been enacted accordingly; further, process of mixing concrete is different between CM and RMC; accordingly, assessee being RMC manufacturer which manufactured and used at site, was not entitled to benefit of Notification No. 4/97-C.E. In view of above discussion, and applying the ration of Hon'ble Supreme Court, I find that Ready Mix Concrete (RMC) manufactured by the appellant is not entitled for exemption under Notification 12/2012-CE supra and they are liable to pay Central Excise duty as held by the adjudicating authority.

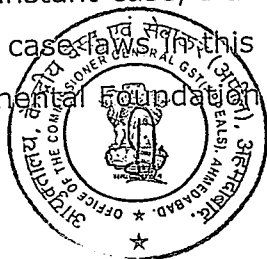
12. In the matter, the appellant has further contended that the different methods of valuation of goods have been adopted by the department in respect of goods i.e RMC manufactured by them in three different Commissionerate of Ahmedabad Zone. [i] They referred that in the instant case, the department has adopted the value quoted in the tender amount. [ii] In the show cause notice issue by Ahmedabad South Commissionerate, the authority has accepted the value of goods proposed by the Cost Accountant in accordance with CAS-4 norms and value under Rule 8 of Valuation Rules. [iii] In Ahmedabad North Commissionerate, the valuation has been arrived at by CMA Certificate tendered by the appellant to the department. They further argued that the value of the subject goods in the instant case should be determined in accordance with CAS-4 and by ignoring such value the adjudicating authority has grossly erred.



13. From the discussion above, it is clear that the appellant is manufacturing RMC for their own use in construction work. In the circumstances, the value of the said goods should be arrived from the Cost Accountant's certificate calculated as per Rule 8 of Central Excise (Valuation) Rules 2000. Therefore, CAS-4 certificate is mandatory to determine the cost of production in the instant case. The adjudicating authority, in the impugned order, has vehemently contended that though the department being called for CAS-4 Certificate, the appellant did not produce the same and instead, they had submitted Cost Accountant Certificate which is not in accordance with the CAS-4 format. Therefore, the department has taken rates which are also equivalent to tender rate, as submitted by the appellant, for calculation of Central Excise duty. The above facts contended by the adjudicating authority has been challenged or disputed by the appellant before me. Since the CAS-4 certificate is mandatory to determine the cost of production in the instant case, the demand of duty arrived at the value of the goods on the basis tender value is not correct. The said value includes value of concrete mix and other expenditure viz., transportation, pumping and placing charges, formwork and staging, labour charges, curing charges, water and electricity etc. Thus, the tender value considered by department shows that the expenditures and other incidental charges relating to construction are included by the department to arrive the duty which is not correct. Therefore, CAS-4 certificate is required to be obtained to determine the value, especially in a situation that other Commissionerate in same zone has adopted the said value. Therefore, I am of the considered view that in the instant case also, the value should be determined in terms of CAS-04 and duty may be demanded accordingly.

14. The appellant finally argued that extended period cannot be invoked in the instant case as the issue is under litigation and later the Government has also extended the exemption benefit to RMC also. They relied on decision of Hon'ble Supreme Court in case of M/s Continental Foundation Jt. Venture [2007 (216) ELT 177] and Hon'be CESTAT, Ahmedabad's order No.A/12121-12122/2018 dated 10.10.2018 in case of M/s Larsen & Toubro Ltd.

14.1 In the instant case, during the course of investigation, it was noticed by the department that the appellant have manufactured the goods RMC and wrongly availed the exemption notification which only pertains to CM. They also not obtained Central Excise Registration though they were manufacturing excisable goods. Therefore, the appellant has suppressed all the facts from the department with an intention not to pay any central excise duty towards manufacturing excisable goods. Looking into the facts and circumstances of the instant case, I do not find any merit to apply the ratio of the above referred case laws. In this case. The Hon'ble Supreme Court in the case of M/s Continental Foundation Jt. Venture supra has been held that



adjudication beyond the normal period of limitation is not applicable on the following facts and circumstances of the case.

"11. Factual position goes to show the Revenue relied on the circular dated 23-5-1997 and dated 19-12-1997. The circular dated 6-1-1998 is the one on which appellant places reliance. Undisputedly, CEGAT in Continental Foundation Joint Venture case (supra) was held to be not correct in a subsequent larger Bench judgment. It is, therefore, clear that there was scope for entertaining doubt about the view to be taken. The Tribunal apparently has not considered these aspects correctly. Contrary to the factual position, the CEGAT has held that no plea was taken about there being no intention to evade payment of duty as the same was to be reimbursed by the buyer. In fact such a plea was clearly taken. The factual scenario clearly goes to show that there was scope for entertaining doubt, and taking a particular stand which rules out application of Section 11A of the Act.

12. As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word 'wilful', preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty.' Therefore, there cannot be suppression or mis-statement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Mis-statement of fact must be wilful."

The Hon'ble CESTAT, Ahmedabad's in the case of M/s Larsen & Toubro Ltd supra has set aside the invocation extended period by referring Hon'ble CESTAT, Mumbai's decision in case of Shapoorji & Pallonji Co. Ltd [2016 (344) ELT 1132], wherein, the Hon'ble CESTAT has squarely applied the ratio of the above said decision of Hon'ble Supreme Court, by quoting above paras. In the instant case, the appellant has clearly suppressed the facts of manufacturing excisable goods by not getting registration from the department for the excisable goods manufactured or not referring the matter to the department for clarity which is only with an intention to evade payment of excise duty. Therefore, the extended period invoked is proper and correct. In the circumstances, the penalty is imposable and is justifiable.

15. Further, I find that the adjudicating authority has imposed redemption fine of Rs.1,00,00,000/- in lieu of confiscation of excisable goods in question, valued at Rs.49,74,25,772/- under Rule 25(1) of Central Excise Rules, 2002. In the instant case, it is a fact on records that the goods in question were not available for confiscation. In order to levy redemption fine, the following two conditions are very important (i) the goods should have been seized; and (ii) the goods should be held liable for confiscation. If the goods are not at all available even for seizure, there is no question of any redemption fine. Redemption fine relates only to goods which are seized/confiscated and released. Redemption fine is possible only in respect of goods seized and confiscated irrespective of the facts that the goods are available at the time of adjudication for confiscation. In this case, the goods were not physically seized and therefore, the question of confiscation and subsequent release on imposition of redemption fine do not arise. Further, it is settled law that



seized and therefore, the question of confiscation and subsequent release on imposition of redemption fine do not arise. Further, it is settled law that redemption cannot be imposed when the goods are not available for confiscation. Therefore, I do not find any merit in imposing redemption fine and required to be set aside. I do so. In this regard I rely following decisions.

1. Commissioner of Customs, Nhavqa Sheva V/s S.B.Impex [2017 (358) E.L.T. 358 (Tri. - Mumbai)]
2. Transworld Polymers Pvt Ltd [2018 (363) E.L.T. 996 (Tri. - Mumbai)]
3. CC V/s Alpha Pharma (Belgium) BVBA [2017 (357) E.L.T. 666 (Tri. - Chennai)]
4. Tej Overseas [2018 (364) E.L.T. 407 (Tri. - Mumbai)]
5. Shiv Kripa Ispat Pvt Ltd [2009 (235) E.L.T. 623 (Tri. - LB)]

16. In view of above, I partially allow the appeal filed by the appellant in above terms and amend the impugned order to that extend only.

17. The appeals filed by the appellant stand disposed off in above terms.

Uma Shankar

(उमा शंकर)

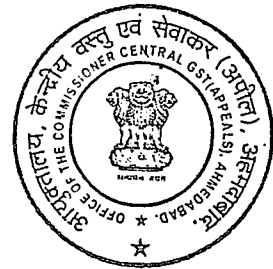
प्रधान आयुक्त (अपील्स)

Date : .05.2019

Attested

Zulma V.V
(Mohanan V.V)
Superintendent (Appeal),
Central Tax, Ahmedabad.

BY R.P.A.D



To,

M/s. M. S. Khurana Engg. Ltd.,
2nd Floor, MSK House, Nr. Passport Office,
Panjra Pole, Ambawadi,
Ahmedabad-380 015.

Copy to:-

1. The Chief Commissioner, Central Tax Zone, Ahmedabad.
2. The Commissioner, Central Tax, Gandhinagar.
3. The Additional Commissioner, CGST, Gandhinagar
4. The Asstt. Commissioner, (Systems), CGST, Hq., Gandhinagar
5. The Assistant Commissioner, Gandhinagar Division.
6. Guard file.
7. P.A file.