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CEMENTO CORPORATION LTD.

v.

COLLECTOR CENTRAL EXCISE

OCTOBER 23, 2002

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[RUMA PAL AND S.N. VARIAVA, JJ.]

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Central Excises and Salt Act, 1944—First Schedule, Tariff Item 23(1), 23(2) and 68—Lympo, a lime-pozzolana mixture—Classification of for purpose of Excise Duty—Excise Department claiming it a variety of cement exigible to duty— Assessee claiming it to be a cement substitute and thus classifiable under Tariff Item 68 — Collector holding it to be classifiable under Tariff Item 23(2)—Tribunal upholding the order—On appeal held : Once it is admitted that Lympo is a cement substitute, Tribunal erred in holding that Lympo was cement or a variety of cement—Further if Lympo is not cement or a variety of it under the 1985 Tariff Act it could not have been cement under the Schedule of the 1944 Act either—Hence Lympo not classifiable under Tariff Item 23(1) or (2) but under Item 68 of the Schedule of 1944 Act—Central Excise Tariff Act, 1985—Schedule Chapter 25.

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The question which arose in this appeal, was regarding classification of Lympo, a lime-pozzolana mixture for the purposes of excise duty for the period 1982-1985.

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Prior to the amendment of Central Excises and Salt Act, 1944 in 1985, Cement was specified in Tariff item 23 in the First Schedule of the Act and was exigible to duty. In 1985, First Schedule to 1944 Act was repealed and re-enacted as Schedule to Central Excise Tariff Act 1985 in terms of which cement was classified under Tariff Item 25.02 while Lympo came under Tariff Item 25.05. Appellants manufactured Lympo-lime-pozzolana mixture since 1982. Respondent-Excise Department claimed that Lympo is a variety of cement and hence exigible to duty. Appellants contended that Lympo was a cement substitute and was classifiable under Tariff Item 68 and not under 23. Collector held that lympo was correctly classifiable under Tariff Item 23(2) and was subject to duty, upto the amendment of 1944 Act. Tribunal upheld the order. Hence the present appeal.

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Allowing the appeal, the Court

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HELD: 1.1. Lympo was not classifiable under Tariff Item (T.I.) 23(1) or 23(2) but under T.I. 68 of the Schedule to Central Excises and Salt Act, 1944. [218-G]

1.2. The Tribunal and the Collector incorrectly interpreted the provisions of Tariff Item 23 of the First Schedule to the Central Excises and Salt Act, 1944. The Tariff heading of the entry is 'Cement'. Therefore, when T.I. 25(2) speaks of "all others" it means "all other kinds or varieties of cement". It is axiomatic that if the product is not cement but can be used for some purposes like cement, such product is not cement. The test as enunciated by the Tribunal for determination of the question of classification is no doubt how the product is known to the trade. Appellant has produced evidence to show that lympo had never been known or indeed advertised as 'cement' whether of a superior or inferior quality, but was known as a cement substitute. Respondents have produced nothing to show to the contrary. A substitute necessarily implies a difference in identity. When once it is admitted that lympo is a cement substitute, Tribunal could not have come to the conclusion that lympo was cement or a variety of cement. There is no ambiguity in the definition of T.I. 23(1) or 23(2). Even if there were, on the principle that when two constructions can be equally drawn, the one favourable to the taxpayer should be adopted, Tribunal should have held in favour of appellant.

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[217-E, H; 218-A]

Dunlop India Limited v. Union of India and Ors., [1976] 2 SCC 241, relied on.

1.3. The position has been clarified by the 1985 Act beyond doubt. Cement and all its varieties including 'Sagol' and 'Ashmoh' have been separately provided for under TI 2502 and Lympo has been classified under a different Tariff item altogether. The Schedules to the 1944 and the 1985 Act deal with the same commodity. If lympo is not cement or a variety of it under the 1985 Act it could not have been cement under the Schedule of the 1944 Act either. Since even according to the respondents there was no other entry of the Schedule to the 1944 Act, under which lympo could have been classified, necessarily it would have to be classified under the residuary Tariff item 68. [218-E, F]

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Income Tax Officer v. Mani Ram, AIR (1969) SC 543, relied on.

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A *Nageswara Pozzolana Works Pvt Ltd. v. Collector of Central. Excise., (1992) 58 ELT 321, referred to.*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2657 of 1994.

B From the Judgment and Order dated 14.9.1993 of the Central Excise Customs and Gold (Control) Appellate Tribunal, New Delhi in A.No. E. 98 of 1988-C in F.O. No. 299 of 1993-C.

Rajesh Kumar and Nischal K. Neeraj, for the Appellant.

C Yashank Adhyaru, Sanjiv Sen and B. Krishna Prasad, for the Respondent.

The Judgment of the Court was delivered by

D RUMA PAL, J. The Issue in this case relates to the classification for the purposes of excise duty of a product manufactured by the appellant, which the appellant claims is a cement substitute and not cemento. The product is 'Lymbo' which is a lime - pozzolana mixture which the appellant manufactures under the trade name "Gajaraj Lymbo". The respondent's claim that lymbo is in fact a variety of cement and was exigible to duty as such.

E The issue has arisen in the context of the Central Excise and Salt Act, 1944 prior to its amendment in 1985. Cement was then specified in Tariff item (T.I.) 23 in the First Schedule of that Act and was exigible to duty. The relevant entry then read as follows:

F Item No. 23-Cement.

Item No.	Tariff Description	Rate of duty
G (1)	Grey portland cement (including ordinary portland cement, portland-pozzolana cement and portland slag cement), masonry cement, rapid hardening cement, low heat cemento and waterproof (hydrophobic) cement.	Two hundred and fifty rupees per metric tonne.
H (2)	All others	Forty per cent <i>ad valorem</i>

According to the appellant since its product was not cement, it was not classifiable under T. 123 and was classifiable under T.I. 68 which covered all other goods, not elsewhere specified excluding a few specified articles which are not material to the case before us. A

The appellant's further case is that the manufacturing activity had been started in 1982 with technical assistance from the Khadi and Village Industries Commission in Patna, Bihar and, therefore, was also entitled to the benefit of notification No. 116/75-CE dated 30th April 1975 by which products of village industries falling under tariff Item 68 of the First Schedule to the Central Excise and Salt Act, 1944 were exempted from the whole of the duty of excise leviable thereon provided the Khadi and Village Industries Commission certified that the said products were the genuine products in the industry as specified in the Schedule to the Khadi and Village Industries Commission Act, 1956. The Director of KVIC by his letters dated 1/2.4.1981 and 2.3.1983 had, according to the appellant, certified that technical consultancy services were being extended to the appellant to establish a Lympo unit (Lime Pozzolana Mixture) and that lympo was the substitute of cement, it was a masonry binder and not cement and that the product fell under "Village Industry" as specified under the Khadi and Village Industries Commission Act, 1956. On the basis of this certificate, the appellant cleared the lympo manufactured, at Nil rate of duty. B C D

On 31st July 1982, the Superintendent Central Excise, Ranchi directed the appellant to clear its product lympo by classifying the same under T.I. 23(2) upon payment of duty as specified against that tariff entry. Samples of the appellant's product were taken on 8th October 1982. One of the samples was given to the Chemical Examiner, Customs House, Calcutta which according to the respondent submitted a report that Lympo could be regarded as a type of cement. The report is not on record. By letter dated 3rd May 1983 issued by the Superintendent, Central Excise, Ranchi the appellant was again directed not to clear the product without payment of duty and proper licence treating its product as classifiable under T.I. 23(2). The appellant filed a writ application before the High Court at Ranchi/vide C.W.J.C. No. 691 of 1983 challenging the demand. The Court directed a fresh sample of the appellant's product to be drawn. This was done on 14th September 1983 and sent to the Director General, National Test House, Alipore, Calcutta. The Test certificate states: E F G

"the said sample fails to meet the requirement as covered under tariff H

A item No. 23 (1) of Central Excise and Salt Act, 1944. It appears that tariff item 23(2) of the said Act does not specify any particular variety of cement but include all others. In absence of the identity of the variety of cement it will not be possible to comment on the material covered under T.I. 23(2) on the basis of the result of test carried out.”

B On the basis of this report, the High Court dismissed the writ application and gave the appellant liberty to challenge the directive of the Superintendent Central Excise before the Collector, Central Excise. The appellant duly approached the Collector (Appeal) who by an order dated 3rd April 1984 set aside the impugned directive but leaving the question of classification open for a fresh determination in accordance with the prescribed procedure.

C On 30th May 1984 a show cause notice was issued to the appellant by the Superintendent, Central Excise. The appellant gave its reply in which it was contended that lympo was not a cement but was a cement substitute. Material was also submitted and reliance was placed on the Indian Standard D specifications to show that there was a marked difference between the compressive strengths and composition of different varieties of cement and lympo. In addition the names of various manufactures in West Bengal who were manufacturing lympo and taking the benefit of the Exemption Notification dated 30th April 1975 were also submitted.

E The Collector, Central Excise by his order dated 29th September 1987 accepted that there was a difference between the plasticity and setting property of lympo and ordinary portland cement, but rejected the appellant's case on the following grounds:

F 1. Since lympo serves the purpose of all types of residential constructions, save and except R.C.C. work, the characteristics and actual uses of the product conforms fully to cement, as it is known in common parlance.

G 2. Tariff item 23 covers all varieties of cement including inferior variety with lower compressive strength such as 'Sagol' and 'Ashmoh' and that these inferior varieties of cement were covered by Tariff Item 23(2) as was clear from Notification No. 5/70 dated 31st January 1970 and 14/79 dated 27th January 1979.

H 3. Tariff item 23 was not based on Indian Standard Specifications and, therefore, merely because lympo did not meet the I.S.

Specification for cement or its varieties did not mean that lympo was not classifiable under Tariff Item 23. A

Accordingly, the Collector held that lympo was correctly classifiable under Sub-Item (2) of item 23 and was subject to duty during the relevant period, namely, upto the amendment of the 1944 Act.

This decision was upheld of 14.9.1993 by the impugned decision of the New Delhi Bench of Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT). In rejecting the appellants appeal, the Tribunal said: B

“The ultimate test of classification is how the product is known in the trade parlance. ‘Lympos’ is put to practically all the uses to which cement is put - except for RCC construction work. Considering all the facts and circumstances, it appears to be an inferior type of cement like ‘Sagol’ and ‘Ashmoh’ as held by the Collector - though described as a Cement substitute. When the substitute is so much like the real thing, it is difficult not to hold it as the same.” C

Before dealing with the submissions of the parties, it may be noted at this stage in 1985, the first Schedule to the 1944 Act was repealed and re-enacted with some changes, as the Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as ‘1985 Act’). Cement has now been classified under Chapter 25 of the Schedule to the 1985 Act along with ‘Salt Sulphur: Clay and Stone: Plastering Materials: and Lime’. The specific tariff entry relating to cement is 25.02 which reads: D

Heading No.	Sub-Heading	Description of goods	Rate of Duty
(1)	(2)	(3)	(4)

25.02	2502.10	Cement clinkers Portlant cement (including ordinary portland cement, Portland pozzolana cement and Portland slag cement)	Rs. 200 per tonne
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25.02.21	White cement, whether or not artificially coloured and whether	25%
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A		or not with rapid hardening properties	
	2502.29	Others	Rs. 350 per tonne
	2502.30	Aluminous cement (Cement fondu)	25%
B	2502.40	Sagol: ashmoh	25%
	2502.50	High alumina refractory cement	25%
	2502.90	Other	25%

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It is not and cannot be disputed by the respondents that *lympo* is not classifiable under T.I. 25.02 but under T.I. 25.05 which reads:

D	Heading No.	Sub-Heading	Description of goods	Rate of Duty
	(1)	(2)	(3)	(4)
E	25.05	2505.00	Mineral substances not elsewhere specified (including clay, earth colours, natural abrasives, sulphurs, slate and stone) lime: Plasters with a basis of Calcium Sulphate, plasters specially prepared for use in Dentistry.	Nil

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Although *lympo* has not been mentioned either in T.I. 25.02 or 25.05, the appellant has drawn our attention to the Budget speech of the Finance Minister in 1988 where in paragraph 135, it is stated :

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“It is time that we think innovatively and use unconventional materials for housing which could be cheap and functional. The excise duty on blocks, slabs, lintels, etc. constituting structural intermediates and components of pre-fabricated building is being reduced from 12% to 5% *ad valorem*. Similarly, fly ash bricks will pay a lower duty of 5% *ad velorem*, and *lympo*, a cement substitute, will bear a zero rate of duty.”

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Soon after this a Notification was issued being Notification No. 33/88-C.E. dated 1st March 1988 exempting lympo from the whole of duty of excise leviable thereon. A

In 1990, Notification No. 16/90-CE dated 20th March 1990 was issued under Section 5(A) of the 1944 Act exempting certain goods described in column (3) of the Table annexed to the notification and falling under the heading number or sub-heading number of the 1985 Act from the levy of excise duty. Among the goods so exempted were cement which was described as being under TI 2502.20 and lympo which was described as being under Tariff Entry 25.05 of the Schedule to the 1985 Act. B

In supersession of this notification another was issued by the Central Government under 5A(1) of the 1944 Act being notification No. 7/92 dated 1st March 1992 again exempting lympo from the whole of the duty and describing the corresponding entry in the 1985 Act as 25.05. Therefore for the period after the 1985 came into force, a distinction has been statutorily maintained, between cement, the different varieties and 'other' cement which have been classified under T.I. 2502.02 and lympo which has been classified under TI 25.05. The only question which remains is whether for the period 1982 to 1985 the lympo manufactured by the appellant could be classifiable under the TI 23(2) of the Schedule to the 1944 Act. C D

In our view, the Tribunal and the Collector have incorrectly interpreted the provisions of Tariff Item 23 of the First Schedule to the 1944 Act. The Tariff heading of the entry is 'Cement'. Therefore when T.I. 25(2) speaks of "all others" it means "all other kinds or varieties of cement". It is axiomatic that if the product is not cement but can be used for some purposes like cement, such product is not cement. The test as enunciated by the Tribunal for determination of the question of classification is no doubt how the product is known to the trade¹. The appellant has produced evidence to show that lympo had never been known or indeed advertised as 'cement' whether of a superior or inferior quality, but was known as a cement substitute. The respondents have produced nothing to show to the contrary. A substitute necessarily implies a difference in identity. When once it is admitted that lympo is a cement substitute, the Tribunal could not have come to the conclusion that lympo was cement or a variety of cement. In our view, there is no ambiguity in the definition of T.I. 23(1) or 23(2). Even if there were, on the principle that when two constructions can be equally drawn, the one E F G

1. See: *Dunlop India Limited v. Union of India and Ors.*, [1976] 2 SCC 241. H

A favourable to the tax payer should be adopted, the Tribunal should have held in favour of the appellant.

Indeed an earlier Bench of the same Bench of CEGAT, in *Nageswara Pozzolana Works Pvt. Ltd. v. Collector of C. Ex.* (1992) 58 ELT 321 had clearly held:

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“The dictionary meaning of cement cannot be the factor for considering the product in question as cement as cement has a different meaning and trade understanding. The product which is an alternative, is used for such purposes as laying bricks and plastering which function can be obtained by mixture of limestone and, therefore, cannot be considered as a cement.”

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In that case after considering a vast volume of technical material and taking into consideration the trade parlance and understanding of cement and Lime pozzolana mixture, the Tribunal came to the conclusion that the latter cannot be considered as a variety of cement to be classifiable under T.I.23(1) or T.I.23(2) to the First Schedule of the 1944 Act but under Tariff Item 68. Appeals (C.A. No. 7504-7505 of 1995) filed by the Collector of Central Excise against this decision of CEGAT were dismissed by this Court on 15th February 1996.

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In any event, the position has been clarified by the 1985 Act beyond doubt. Cement and all its varieties including ‘Sagol’ and ‘Ashmoh’ have been separately provided for under TI 2502. Lympo on the other hand has been classified under a different Tariff item altogether. The Schedules to the 1944 and the 1985 Act deal with the same commodity. If lympo is not cement or a variety of it under the 1985 Act it could not have been cement under the Schedule of the 1944 Act either. [See in this connection *Income Tax Officer v. Mani Ram*, AIR (1969) SC 543. Since even according to the respondents there was no other entry of the Schedule to the 1944 Act, under which lympo could have been classified, necessarily it would have to be classified under the residuary Tariff item viz., TI 68.

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For all these reasons, we set aside the impugned decision of the Tribunal and allow the appeal and hold that lympo was not classifiable under T.I.23(1) or 23(2) but under T.I.68 of the Schedule to 1944 Act. Since the appellant’s case was dismissed *in limine* by the Tribunal and the respondent authorities, the further question whether the appellant was entitled to the benefit of

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Notification 116/75-CE dated 30th April 1975 had not been considered by them. With this judgment the respondent will consider the appellant's claim to exemption from excise duty under the notification treating the appellant's product for the period in question as classifiable under T.I.68. A

The appeal is allowed accordingly without any order as to costs.

N.J.

Appeal allowed. B