

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**R/SPECIAL CIVIL APPLICATION NO. 7987 of 2021**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR. JUSTICE BHARGAV D. KARIA**

**and**

**HONOURABLE MRS. JUSTICE MAUNA M. BHATT**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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**M/S SHREE MAHALAXMI CEMENT PRODUCTS THROUGH ITS  
DIRECTOR MR. DIPAKKUMAR RAMJIBHAI PATEL**

**Versus  
STATE OF GUJARAT & ORS.**

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**Appearance:**

**AADITYA D BHATT(8580) for the Petitioner(s) No. 1  
MR SNEH PUROHIT, ADVOCATE for the Petitioner No. 1  
CHANDNI S JOSHI(9490) for the Petitioner(s) No. 1  
MR CHINTAN DAVE, AGP for the Respondent(s) No. 1  
MR HIRAK SHAH, ADVOCATE for  
MR NIKUNT K RAVAL(5558) for the Respondent(s) No. 3  
SERVED BY RPAD (N) for the Respondent(s) No. 2**

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**CORAM:HONOURABLE MR. JUSTICE BHARGAV D. KARIA**  
**and**  
**HONOURABLE MRS. JUSTICE MAUNA M. BHATT**

**Date : 25/09/2024**

**ORAL JUDGMENT**

**(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)**

1. Rule. Learned Assistant Government Pleader Mr. Chintan Dave waves service of notice of Rule on behalf of the respondent No. 1 – State and learned advocate Mr. Hirak Shah for learned advocate Mr. Nikunt Raval waives service of notice of Rule on behalf of respondent No. 3.

2. By this petition under Article 226 of the Constitution of India the petitioner has prayed for the following reliefs:-

“6A. Your lordships may be pleased to quash and set aside the order dated 08/03/2021 passed in ADVANCE RULING (APPEAL) NO. GUJ/GAAAR/APPEAL/2020/11, by the office of the The Gujarat Appellate Authority For Advance Ruling Commissionerate of Goods and Service Tax Gujarat State, confirming the order dated 02.07.2020 in ADVANCE RULING NO. GUJ/GAAR/R/20/2020 passed by the Gujarat Authority For Advance Ruling, Goods And Service Tax, in the interest of justice; AND

6A/1 Your lordships may be pleased to hold that the entry No. 225B in Schedule-I as amended vide the Notification No:24/2018-Central Tax (Rate) dated 31.12.2018, reading as:

225B	6815	Fly ash bricks or fly ash aggregate	5%
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		with 90 percentage or more fly ash content; “Fly ash blocks”;	
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Is bad in the eyes of law inasmuch as it is interpreted that “Fly ash bricks” require 90% of more fly ash contents to fall in the tax GST slab of 5%; and thereby by pleased to quash and set aside the Notification No:24/2018-Central Tax (Rate) dated 31.12.2018 to the extent of amended Entry No.225B interpreted as above, as being totally unjust, illegal, arbitrary and/or being ultra vires to the constitution, environmental laws. Parent statute and other laws in force in the interest of justice;

6B. Be pleased to hold that the impugned order passed by the learned Advance ruling authority is bad in the eyes of law in so far as it holds that Fly Ash Bricks produced by the petitioner to be covered by entry 453 of Schedule II of notification no 1/2017 Central Tax (Rate) Dt:-28.06.2017 and thereby liable to be taxed at 18% of GST after 01.01.201; and be pleased to hold that applicable rate of GST for “Fly Ash Bricks” fall under the entry 225B of Schedule I of notification no. 1/2017 Central Tax (Rate) Dt:- 28.06.2017 (as amended from time to time) and therefore taxable at the rate of 2.5% CGST + 2.5% SGST;

6C. Pending admission hearing and final disposal of the present petition, your lordships may be pleased to stay the execution and implementation of the order dated 08/03/2021 passed in ADVANCE RULING (APPEAL) NO. GUJ/GAAAR/APPEAL/2020/11, by the office of the Gujarat Authority For Advance Ruling, Goods And Service Tax, in the interest of justice.

6D. Any other and further order may be passed as may be deemed fit, just and proper in the interest of justice”

3. The brief facts of the case are as under:-

The petitioner is engaged in manufacturing and selling of Fly Ash Bricks and Fly Ash Blocks. According to the petitioner, the manufacturing process of Fly Ash Bricks is as under:-

3.1 Fly Ash Bricks are made using the waste of thermal power plants. The ash of burnt coal is used as an input, thus reinforcing the idea of turning waste into wealth. In India itself, the annual generation of fly ash is expected to be around 200 million tonnes. The subject goods were cleared after provisional assessment of the relevant Bills of Entry, pending test report of representative samples drawn from each of the consignment.

3.2 The petitioner is manufacturing Fly Ash Bricks from the mixer prepared of the following raw materials in desired proportion with the use of machinery by the petitioner:

- A Cement (5% to 20%)
- B Fly Ash (40% to 60%)
- C Sand (35% to 55%)
- D Lime (5% to 20%)
- E Water (As per requirement)

3.3 That the Fly Ash Bricks are standard size of the bricks ie.

230mm x 110mm x 70mm Fly Ash Bricks are sound, compact and uniform in shape, size and colour. Smooth rectangular surfaces of the bricks are accompanied with sharp and square corners. They are free from visible cracks, warpage, flaws and organic matter. They are Economical & environment friendly & 28% lighter than ordinary clay bricks. Fly Ash Bricks are of cement colour while the colour of clay bricks differs from burnt red to light brown depending on the type of clay used for manufacture of the bricks.

3.4 Fly Ash Bricks are cast in moulds hence are always of uniform shape. Clay bricks are handmade causing slight differences in their shape and size. Fly Ash Bricks have a very smooth finish hence plaster is not required on the bricks to create a smooth surface. Clay bricks require plastering.

3.5 Clay bricks are more porous than Fly Ash Bricks. Fly Ash Bricks are lighter in weight and less costly than Clay bricks. Fly Ash Bricks are made of waste materials which come from the combustion of coal in thermal power plants. Clay bricks are made of clay which is collected from fertile land or the topsoil. This is the prime reason that makes Fly Ash Bricks more preferable than Clay bricks.

3.6 After the introduction of the Goods and Service Act, 2016 the product of Fly Ash Bricks and Fly Ash Blocks were classified under Notification No. 1/2017 (CGST-Rate) dated 28.06.2017 at Sr. No. 177 for the period from 01.07.2017 to 14.11.2017 for GST Rate of 12%. Thereafter, by amendment dated 14.11.2017 by Notification No. 41/2018 the Entry No.

177 was amended by omitting “Fly Ash Bricks” from the said entry and new Entry No. 225A was inserted for Fly Ash Bricks specified thereby and GST Rate of 5% was prescribed. The petitioner filed application for advance ruling on 22.01.2019 seeking ruling on the correct rate of tax for Fly Ash Bricks and Fly Ash Blocks manufactured by the petitioner.

3.7 The Advance Ruling Authority by the order dated 02.07.2020 decided the application filed by the petitioner holding that Fly Ash Blocks are classifiable under Entry No.225B of Schedule-I after 01.01.2019 and liable to 5% whereas Fly Ash Bricks are classifiable under Entry No. 453 of Schedule-III and liable to 18% GST after 01.01.2019 on the ground that Fly Ash Bricks under Entry No. 225B of the Schedule-I manufactured and sold by the petitioner contains less than 90% of fly ash.

3.8 The petitioner thereafter challenged the order passed by the Advance Ruling Authority before the Appellate Authority. The Appellate Authority rejected the appeal filed by the petitioner vide order dated 08.03.2021. Being aggrieved the petitioner has preferred this petition with the aforementioned prayers.

4. Learned advocate Mr. Aaditya Bhatt for the petitioner has submitted that the petitioner has explained in detail about the manufacturing process, however the same is not taken into consideration by the Advance Ruling Authority as well as the Appellate Authority to come to the conclusion that the Fly Ash Bricks manufactured by the petitioner does not contain 90% fly

ash.

4.1 Learned advocate Mr. Bhatt further submitted that as per the notification issued by the Ministry of Environment and Forest dated 03.11.2009, minimum fly ash content for building material is prescribed in amendment made in Paragraph 1C of the said notification which provides that the bricks, blocks and tiles etc made with fly ash should contain 50% of the total input materials. It was therefore submitted that the reasoning given by the Advance Ruling Authority is contrary to the notification issued by the Ministry of Environment and Forest.

4.2 Learned advocate Mr. Bhatt further submitted that the Advance Ruling Authority and the Appellate Authority had wrongly applied the condition of 90% or more tiles content to the product in question to classify the same under Entry No. 453 in the residual category to levy GST at 18% instead of 5% as recommended by the fitment committee as per agenda 6(i) of the GST Council. It was submitted that the GST Council had recommended the rate of 5% of GST and on basis of such recommendation regular No. 179/11/2022-GST dated 03.08.2022 issued by the CBIC which clarifies that in the Fly Ash Bricks condition of 90% fly ash content applies to only fly ash aggregate and not to Fly Ash Bricks. It was submitted that accordingly the rate of 5% of GST is leviable instead of 18%.

4.3 Learned advocate Mr. Bhatt further submitted that as per the Harmonized System of Nomenclature (for short 'HSN') also the petitioner cannot be classified into slab of 18% of GST as the HSN pertaining to Fly Ash Bricks is classified under 5%

slab category and therefore it is an extensional aid to interpretation of legislative intention and moreover it is an extensional aid for construction of statute. It was therefore submitted that the GST rates are based on HSN and considering the same the rate of 5% is leviable on the Fly Ash Bricks produced by the petitioner.

4.4 In support of his submissions, reliance was placed on the decision of the Hon'ble Supreme Court in the case of **Collector of Central Excise V/s. Wood Craft Products Ltd.** reported in **1997 (77) ELT 23 (SC)** and decision of the Hon'ble Supreme Court in the case of **Reckitt Benckiser (India) Ltd. V/s. Commissioner, Commercial Taxes** reported in **(2015) 7 SCC 126**.

4.5 Learned advocate Mr. Bhatt further submitted that dual interpretation is required to be avoided as the intent of legislature behind the provision is to levy the tax @ 5%. In support of his submission reliance is placed on the decision of Hon'ble Supreme Court in the case of **Rosy and Anr. V/s. State of Kerala and Ors** and **Direct Mining Officer V/s. Tata Iron & Steel Co.** and in the case of **Reserve Bank of India V/s. Peerless General Finance and Investment Co.** It was therefore submitted that in view of the recommendation of the GST Council, the Fly Ash Bricks and Fly Ash Aggregates with 90% or more fly ash content are differently classified in the recommendation. The reliance placed by the Advance Ruling Authority and the Appellate Authority on the ground that the Fly Ash Bricks produced by the petitioner does not contain 90% fly ash is without any basis.



5. On the other hand, learned advocate Mr. Hirak Shah for learned advocate Mr. Nikunt Raval for the respondent submitted that in view of the notification No. 179/11/2022 dated 03.07.2022 the issue of levy of GST @ 18% could not survive as the applicable GST rate would be 5% on the Fly Ash Bricks manufactured by the petitioner.

5.1 In support of his submissions reliance was placed on the averments made in the affidavit-in-reply filed on behalf of the respondent wherein it is contended as under:-

“6. With respect to contentions raised in para. B, it is submitted that the recommendation of the GST rates of Fly Ash Bricks in the 23rd GST Council as recommended by the committee, was 5% (2.5% CGST + 2.5% SGST). Thus, in respect of agenda item 6(i), the Council decided to reduce the tax rate on fly ash bricks from 12% to 5%. The same recommendations are notified by virtue of any specific notification/ Circular/ orders vide Notification No.41/2017 Central Tax dated 14.11.2017 to reduce the tax rate from 12% to 5% on fly ash bricks with 90% or more fly ash content (Sl.No.225A). As the goods, i.e., Fly Ash Bricks supplied by the Appellant having only 40 to 60% of fly ash content, therefore the grounds for appeal before Hon'ble High Court of Gujarat are not sustainable.

7. With respect to contentions raised in para. C, it is submitted that the recommendation of the GST rates of fly ash blocks in 31st GST Council as recommended by the fitment committee was 5%

(2.5% GST recommendation + 2.5% SGST). The same is to be notified by virtue of any specific Notification/ Circular/ Order to reduce the tax rate from 12% to 5%. However, in the absence of specific notification/circular/ order with respect to fly ash blocks to reduce the tax rate from 12% to 5%, the grounds opted for appeal before Hon'ble High Court of Gujarat is not sustainable.

8. With respect to contentions raised in paras D, E & F, it is submitted that the same are formal & factual in nature hence no comments are offered at present.

9. With respect to contentions raised in para G, it is submitted that the Hon'ble Supreme Court has held in the case of Wood Craft Products Ltd. (1995 (77) ELT 23 (SC)) that any dispute relating to tariff classification must, as far as possible, be resolved with reference to the nomenclature indicated by the HSN unless there be an express different intention indicated by Central Excise Tariff Act, 1985 itself. In the present case, there is no dispute with regard to Classification of 'Fly Ash Bricks'. Therefore, the appellant's submissions is not correct and proper.”

6. Having regard to the submissions made by learned advocates for the respective parties and considering the facts of the case, the controversy arising in this petition is now settled during the pendency of the petition by Circular No. 179/11/2022-GST dated 03.08.2022 wherein the CBIC has clarified the issue as under:-

**“7. Fly ash bricks and aggregate condition of 90% fly ash content applied only to fly ash aggregate,**

**and not fly ash bricks:**

7.1. Representations have been received seeking clarification regarding the applicable rate on the fly ash bricks and fly ash aggregates.

7.2. Hitherto, as per entry at S. No. 176B of the Schedule II the items of description "Fly ash bricks or fly ash aggregate with 90 per cent. or more fly ash content; Fly ash blocks" attracts a GST rate of 12%. Confusion has arisen about the applicability of 90 per cent. condition on fly ash aggregates and fly ash bricks. As per the recommendations of the GST Council in the 23rd Meeting, the condition of 90% or more fly ash content was applicable only for fly ash aggregate.

7.3. Therefore, it is clarified that the condition of 90 per cent. or more fly ash content applied only to Fly Ash Aggregates and not to fly ash bricks and fly ash blocks. Further, with effect from 18th July, 2022 the condition is omitted from the description.”

7. In view of above, the findings arrived by the Advance Ruling Authority would not be applicable in the facts of the case inasmuch as the Entry No. 176 of Schedule-II with description of goods as Fly Ash Bricks or Fly Ash Aggregate with 90% or more fly ash content and if Fly Ash Blocks attracts GST rate of 12% and therefore the confusion has arisen about the applicability of 90% condition of Fly Ash Aggregates and Fly Ash Bricks. The circular has clarified that as per recommendation of the GST Council in 23<sup>rd</sup> meeting the condition of 90% or more fly ash content was applicable only for Fly Ash Aggregate and accordingly it was clarified that 90%

or more fly ash content applied only to Fly Ash Aggregate and not to Fly Ash Bricks and Fly Ash Blocks and w.e.f. 18.07.2022 the condition is omitted from the description.

8. Hence, in view of above clarification, as per the Notification No. 04/2018-Central Tax (Rate) dated 31.12.2018 Entry No. 225B refers to applicability of levy of GST rate of 5% on Fly Ash Bricks and all Fly Ash Aggregate with 90% or more fly ash content or Fly Ash Blocks as per the clarification fly ash aggregate at 90% or more fly ash content would not be applicable Fly Ash Bricks or Fly Ash Blocks and accordingly the rate of GST applicable to the products manufactured by petitioner would be 5% as per the Entry No. 225B.

9. In view of the foregoing reasons the petition succeeds and is accordingly allowed by quashing and setting aside the orders passed by the Advance Ruling Authority and the Appellate Authority. The products manufactured by the petitioner i.e. Fly Ash Bricks and Fly Ash Blocks are liable to levy of GST @ 5% as per the Notification No. 24/2018 dated 31.12.2018. Rule is made absolute to the aforesaid extent. No order as to costs.

**(BHARGAV D. KARIA, J)**

**(MAUNA M. BHATT, J)**

SHRIJIT PILLAI