HIGH COURT OF MADHYA PRADESH : JABALPUR
(Division Bench)

Writ Petition No. 7979/2017

ACC Limited …..... ..PETITIONER

Versus

State of Madhya Pradesh & others …..... RESPONDENTS

CORAM :

Hon'ble Shri Justice Hemant Gupta, Chief Justice

Hon'ble Shri Justice Vijay Kumar Shukla, Judge

Appearance:

Shri Kishore Shrivastava, Senior Advocate with Shri Prem Francis, Advocate for the petitioner.

Shri Samdarshi Tiwari, Additional Advocate General for the respondents/State.

Whether Approved for Reporting : Yes

Law Laid Down:

- The Collector is competent to frame assessment for claim of royalty and raise demand thereof in respect of any mineral removed or consumed from the leased area in terms of Section 26(2) of the Mines and Minerals (Development and Regulation) Act, 1957 and the Notification dated 01.05.1970 published by the State. The Judgement of the Division Bench of this Court in **C.P. Syndicate (Private) Ltd. vs. State of M.P. And others (1972 MPLJ 699) followed.**
- The State is within its jurisdiction to rely upon the conversion factor as found by National Council for Cement and Building Material (NCCBM). Such conversion formula is in tune with the judgment of this Court reported as **2015 (2) MPLJ 393 (Grasim Industries Limited, Neemuch vs. State of M.P.)** as the quantity of manufactured cement on the basis of extracted limestone may not be correct depiction of the mineral extracted.
- The State is to determine the ratio of limestone to final product keeping in view the each industry. It is only in case where the Weighbridge or Beltometer has been installed and also there is study by NCCBM, the consumption of limestone which is found more, has to be applied. Therefore, the assessment is based upon a logic that where the extraction reflected in Weighbridge and Beltometer is not possible to manufacture cement/clinker then the study of NCCBM is the reasonable yardstick.
- It was for the petitioner to substantiate its stand that the cement or clinker manufactured was in terms of the quantity extracted, as recorded in the Weighbridge or Beltometer. The quantity reflected by the petitioner in the Weighbridge or Beltometer is not sufficient

enough to manufacture cement or clinker as reflected by the petitioner in view of the report of NCCBM.

- The order of the Collector seeking report from the Chartered Accountant is to calculate the amount of royalty and the interest on delayed payment of royalty and was entrusted in respect of the calculation part i.e. a mathematical requirement rather than the essential assessment, which was completed by the Collector. The report of the Chartered Accountant is in respect of calculation of the royalty amount and the interest payable on the delayed payment of the royalty amount but it is not the basis of determining the royalty.

Significant Paragraph Nos.: 8, 11, 14 to 16, 18, 19 and 22

Reserved on : 01.02.2018

O R D E R

(15-02-2018)

Per : Hemant Gupta, Chief Justice:

The challenge in the present petition is to the demand dated 20.03.2017 (Annexure P-9) demanding a sum of Rs.18,83,25,122.00 towards the royalty for the period from April, 1992 to December, 2016 and interest of Rs.10,11,58,278.00. The said demand is consequent to liberty granted by this Court on 08.07.2014 in Writ Petition No.7860/2009 (*ACC Limited vs. Principal Secretary, the State of M.P. and others*) as well as W.P. No.1886/2012 (*ACC Limited vs. State of M.P. & others)*; W.P. No.1913/2013 (*ACC Limited vs. State of M.P. & others)*; and W.P. No.4081/2014 (*ACC Limited vs. State of M.P. & others)* filed by the petitioner challenging the circulars dated 19.12.1992 and 11.08.1993 providing for the mode of computation of royalty amount in respect of extracted limestone by applying the conversion factor of 1.6:1 Metric Tonne. The challenge in these writ petitions were raised against the demands raised

on the basis of the circulars rather than the mineral removed or consumed by the petitioner on the basis of data recorded by Weighbridge or the Beltometer.

2. The brief facts out of which the present petition arises are that the petitioner was granted mining lease over an area of 1520.22 Hectares for a period of 20 years under the provisions of the Mines and Minerals (Development and Regulation) Act, 1957 (in short "the Act") and the Mineral Concession Rules, 1960 (for short "the Rules"). Such lease has been extended from time to time. Last extension was granted for the period from 17.10.2009 to 31.03.2030 vide lease dated 05.06.2015 (Annexure P-1).

3. The petitioner was initially paying royalty as contemplated under Section 9 of the Act on the basis of conversion formula. Such conversion formula was approved by this Court in M.P. No.1225/1993 (*Associated Cement Companies Ltd. vs. Union of India and others*) decided on 28.06.1993. However, such conversion formula was prior to the circular of the State Government dated 25.05.1987 mandating requirement of installation of Weighbridge. The Misc. Petition No.2175/1993 *(Grasim Industries Ltd. vs. Collector (Mines) and others*) was filed before Indore Bench of this Court seeking to dispense with the requirement of weighbridge and raising objection to the conversion formula. The petitioner therein relied upon two reports of National Council for Cement and Building Material (hereinafter referred to as "NCCBM"), which dealt with the factors contributing to limestone consumption and on which basis the average limestone consumption per tonne of clinker can be determined. The conclusion in the said report reproduced by this Court in its Judgment

reported as **2015 (2) MPLJ 393 (Grasim Industries Limited, Neemuch vs. State of M.P. and others**), read as under:-

> **"7.....**
>
> **(vii)** As aforesaid, the said petitioner had made representation to the State Government to dispense with the requirement of weighbridge and had raised objections to the conversion formula of 1.6:1. In response to the said representation, the Principal Secretary, Government of Madhya Pradesh after hearing the petitioner thought it appropriate to refer the matter to the Cement Research Institute (CRI) of India, Faridabad (later on became "National Council for Cement and Building Materials"). The petitioner is relying on the two reports of the said National Council for Cement and Building Materials, which dealt with the factors contributing to Limestone consumption and on which basis the average Limestone consumption per tonne of Clinker can be determined. The conclusions in the said report can be summed up thus:
>
> "**CONCLUSIONS**
>
> 1. Limestone consumption factor was determined on the basis as explained in para 7.0 and found to be :
>
> (i) **1.44** tonne per tonne of clinker on the samples collected by the NCB for a period of three days.
>
> (ii) **1.42** tonne per tonne of clinker based on the chemical analysis data provided by the plant.
>
> (iii) **1.42** tonne per tonne of clinker based on actual kiln food consumed and the kiln dust losses through stack.
>
> (iv) **1.43** tonne per tonne of clinker when kiln dust stack losses and cooler stack losses together taken into account."
>
> **(viii)** As regards the necessity of installation of weighbridge, the observations of the report of National Council for Cement and Building Materials reads thus:
>
> "Hence, in case a weighbridge is installed, it will lead to lower productivity, higher equipment cost in the form of additional dumper, higher operational cost for the same leading to increased production costs of cement, higher fuel consumption which is scarce national resource.
>
> In view of the above study it is recommended that the limestone booking on the basis of number of dumpers is

adequate and there is no need to install any weighbridge for the same."

*** *** ***

(xii) According to the said petitioner, the National Council for Cement and Building Materials submitted its report while the representation filed by the petitioner was pending. On the basis of the analysis done by the National Council, the Government of India issued a letter dated 20th March, 2002, under the signature of Joint Secretary regarding fixation of norms to determine the requirement of Limestone for manufacture of cement as 1:1.43 qua the petitioner....."

4. On 19.12.1992, a circular was issued by the Mineral Resources Department to the effect that on account of lack of installation of weighbridges, the assessment of mineral extracted is difficult; therefore, it is decided to recover royalty in the ratio of 1.6:1 from all those lessees, who have not installed the weighbridges. Subsequently, another circular was issued on 11.08.1993 in continuation of earlier circular of 19.12.1992 to the effect that the consumption of limestone is shown to be so less out of which manufacturing of cement is not possible, therefore, the royalty should be claimed on the basis of actual quantity of cement manufactured or on the basis of per tonne cement manufactured out of 1.6 tonne of limestone as the lessees are not keeping correct accounts of extraction of limestone. It was, thus, communicated that the royalty be claimed either on the basis of actual extraction or 1.6 tonne of limestone extracted for every one tonne of cement manufactured, whichever is higher. The relevant circular, when translated into English, read as under:-

Government of Madhya Pradesh
Mineral Resource Department

N.K.Desai
Additional Secretary

Bhopal, dated 11.08.1993

Sub:-Tax assessment on consumption of limestone by cement plant.

Kindly peruse the directions issued on 19.12.1992 on the aforesaid subject whereby it was ordered that the tax assessment of those cement plants which have not installed weighing machine in the approved leased area, shall be done on the basis of 1.6 tonne limestone for per tonne cement.

It has come to knowledge that action is not being taken accordingly and some of cement plants which have kept the accounts by weighing through weighing machine, the quantity of consumption of limestone is being shown so much less that it is not possible to prepare cement on that basis. Therefore, while assessment of tax of limestone consumed by the cement plant, it is necessary to take into consideration that how much of cement has been produced by them and if consumption of limestone for preparing per tonne cement has been shown below 1.6 tonne then it is clear that the lease-holder has not properly kept the account of consumption of limestone. Thus, it is extremely necessary in all such cases to assess tax by comparative study of consumption of limestone and production of cement at the time assessment of tax. The standard for the basis of tax assessment that should be adopted must be actual weight or 1.6 tonne per tonne cement whichever is more. This should be strictly complied with and apprise me with the action taken in this regard.

Sd/-
(N.K.Desai)
Additional Secretary
State of M.P.
Mineral Resources Department

5. The challenge to the said circulars remained unsuccessful before the learned Single Bench forming the subject matter of W.P. No.516/1996 (*Associated Cement Companies Ltd. vs. State of M.P. And others*) decided on 15.05.2002. However, in appeal, the circular was upheld excepting quashing the clause "whichever is higher". It was held that the State Authorities are not denuded to apply for notional conversion factor in suitable cases. The relevant extract of the decision in **Grasim Industries Limited (supra)** read as under:-

"**39**. The first question is: whether the State Government has power to provide such mode of assessment. As aforesaid, neither the provisions of the Act nor the Rules framed thereunder expressly provide for the mode of assessment in case the Assessing Officer rejects the claim of the assessee being incorrect or untruthful. As per the said provisions, Returns are required to be filed before the State Authorities and the State Authorities are expected to analyze and undertake scrutiny of those Returns. In the event of incorrect or untrue information furnished in the Returns, the Assessing Officer, who is the employee of the State, is obliged to apply some tangible, just and reasonable yardstick for finalizing the assessment. To overcome this difficulty and keeping in mind the past experience of the Authorities that incorrect or untrue information was being furnished in the Returns, the Authorities had sought information from all the licencees, as well as, from other sources, on the basis of which it was decided to specify the conversion factor of 1.6:1 tonne. The conversion factor so determined, therefore, cannot be termed as unrealistic and arbitrary. We agree with the said view taken by the Tribunal in paragraph 14 of its decision (reproduced in paragraph 9 above) and confirmed by the learned Single Judge in paragraph 58 of the impugned judgment. Further, the impugned circulars are only in the nature of administrative instructions issued in larger public interest to obviate any inconsistent approach by the officials of the Department concerned. Instructions contained in the impugned circulars, therefore, merely delineate the mode of assessment and nothing more. It does not impinge upon the subject of levy of Royalty or the quantum thereof, which is within the exclusive domain of the Parliament. No doubt, it was open to the Parliament to even legislate on the mode of assessment, but the Parliament having chosen not to do so, does not denude the State Authorities to apply notional conversion factor in a suitable case.

40. As is noticed earlier, even though the assessment and computation of Royalty is in respect of major mineral under the Central enactment, but the lease is granted by the State Government. Further, Returns are required to be filed before the State Government. The Returns are assessed by the authorized officers of the State Government. Thus understood, there can be no impediment for the State Government to issue administrative instructions in respect of mode of assessment on which no provision is found in the Act or the Rules - so long as the

> instructions are not derogatory to or inconsistent therewith. Even in absence of such instructions the Assessing Officer, during the scrutiny of Returns is competent nay, obliged to take recourse to notional conversion factor on the basis of past record and performance of the assessee."

6. However, the Court found that the circular dated 11.08.1993 does not leave any option to the Assessing Officer but to compute the royalty by applying notional conversion factor being higher. The Court set aside the clause "whichever is higher". The relevant extract of the order passed in **Grasim Industries Limited (supra**) read as under:-

> "**45**. Be that as it may, the impugned Circular dated 11th August, 1993, will have to be held as excessive to the extent it directs the Assessing Officer to compute the liability on the basis of weighment record or conversion factor of 1.6, "whichever is higher". In cases, where the Licensee/Assessee is able to satisfy the Assessing Authority that the removal or consumption of Limestone is much below the notional conversion factor of 1.6, the question of invoking the notional conversion factor of 1.6 will not arise nor can be countenanced. Inasmuch as, the royalty is payable on the removed or consumed minerals. To that extent, the instructions contained in the aforesaid Circular cannot be sustained."

7. After returning such finding, the Assessing Authority was directed to re-examine the entire matter afresh *inter alia* observing that it is not open to mechanically apply notional conversion factor even if the Assesse is able to substantiate the fact that he had in fact removed and consumed limestone of lesser quantity.

8. After the said judgment, the State issued another circular on 19.07.2016 (Annexure P-7). The circular is in two parts; the first part (A) of which relates to reassessment of tax of the previous years and second part (B) is regarding the assessment of tax in upcoming years. The said circular

contemplates that for those lessees, who have installed the weighbridge or Beltometer, the basis of claim of royalty shall be as per the quantity of limestone extracted as per the Weighbridge/Beltometer. It is contemplated that in the cement or clinker plant in which weighbridge or Beltometer is installed, the quantity of limestone on the basis of weighbridge or Beltometer may be considered after the date of installation of such weighbridge and Beltometer but if the study has been got conducted earlier by cement or clinker plant from NCCBM, the ratio shown for consumption of limestone in the making of clinker shall be relevant for that calendar year. If the weighbridge and Beltometer has been installed and also study has been got conducted from NCCBM then amongst the two in which quantity of consumption of limestone is more, that quantity shall be considered. Such report of NCCBM is given credence for the reason that manufacturing of cement is not possible without consuming limestone, as found in the report of NCCBM in respect of a particular industry and location.

9. In terms of such instructions, show cause notice dated 27.12.2016 (Annexure AR-1) was served upon the petitioner when the following information was sought:

> "(1) to give information relating to quantity of limestone shown on the basis of Weighbridge/Beltometer after the date of installation of weighbridge/Beltometer in the cement plant/clinker plant where such weighbridge/Beltometer is installed;
>
> (2) to submit copy of report of NCCBM (National Council of Cement and Building Materials) if study has been got conducted earlier by cement plant/clinker plant wherein ratio for the consumption of limestone in the making of clinker has been shown;
>
> (3) If any cement plant/clinker plant has installed weighbridge/ Beltometer and study has also been got conducted from the NCCBM,

then amongst the two in which the quantity of consumption of limestone is found more, that quantity should be made basis for consideration.

(4) If the weighbridge/Beltometer has not been installed by any cement plant/clinker plant, nor any study has been got conducted from NCCBM, in such situation, the quantity of clinker manufactured by the cement plant/clinker plant shall be made basis of manufacture and for manufacture of one tonne clinker, consumption of 1.6 tonnes of limestone shall be accepted.

(5) To produce copy of monthly return to this office for verification in respect of figures of production of clinker by cement plant/clinker plant, if those figures have been shown to have been given on the basis of its monthly return to the Central Excise and Custom Department."

10. On the basis of such show cause notice, the petitioner submitted the following reply:

"To,

The Collector,
Katni

Subject: Assessment of limestone quantity for making cement in the ratio of 1:1.6 tonne by M/s ACC Limited, Keymore Cement Works.

Ref. - Letter of M.P. Govt. Mineral Resource Department vide their letter No.F/19-10/2015/12/1, dated 19.07.2015.

Dear Sir,

Please refer your letter no.4289/mining/2016, dated 27.12.2016 on the above mentioned subject. In this connection our point wise reply as given below:

(A) **Reassessment of taxes related to previous years**

1. In our mine the weighbridge was installed in April 1992 and thereafter the royalty for the limestone dispatched from our mines is being paid on actual weighment basis. The challan for payment of royalty along with covering letter is being submitted to your good office on regular basis. Recently the requisite information has been submitted on dated 31.12.2016. (Copy attached).

2. During 2014, a study was conducted by NCCBM to establish the limestone consumption factor with respect to Clinker. The photo copy of relevant page of the report is attached herewith for your reference.

3 Not applicable for us.

4. We have already installed weighing machine as well as limestone consumption factor with respect to clinker has been established by NCCBM. Hence this point is not applicable to us.

5. The production data provided to your office has been cross verified by your designated chartered accountant along with your officials. The soft copy of PDF format has already been handed over to them due to voluminous in nature & convenient for cross verification.

(B) **With respect to Part B, our submissions are as follows:**

1. We are maintaining our records on actual weighment quantity.

2. It will be adhered as per the guidelines of BIS.

3. Not applicable for us.

4. The excise return is being submitted in Excise department website, However down load copy shall be made available.

5. This shall be complied.

We humbly requested you to advise the concerned department for regular assessment of limestone dispatches from our mines....."

11. It may be mentioned that on 27.12.2016 itself the Collector appointed a Chartered Accountant to make the calculations of use of limestone, payment of royalty on limestone and interest on the delayed payment of royalty for the period 1992 to 2016 in respect of the petitioner. On the basis of information furnished and the calculation given by the Chartered Accountant, the demand as mentioned above was raised. It has been found in the order that the weighbridge was installed in April, 1992 and Beltometer in the year 2005 by the petitioner and that the petitioner has got the report from NCCBM in the year 1997, 2002 and 2014. On the basis of information from NCCBM dated 21-25th of October, 2016, the limestone consumption factor was found to be 1.45 for the period April, 1992 to December, 2001; 1.46 as the consumption factor for the period from January 2002 to December, 2013 and 1.39 for the period from January, 2014 to

December, 2016. It is the said order, which is challenged by the petitioner in the present writ petition.

12. Learned counsel for the petitioner has raised the following arguments:-

(i) The royalty can be claimed by the State Government in terms of Section 9 of the Act and Rule 27(5) of the Rules. It is, thus, contended that the Collector is not competent to raise demand against the petitioner. The relevant provisions are quoted hereunder:-

> **"9. Royalties in respect of mining leases**.—(1) The holder of a mining lease granted before the commencement of this Act shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area after such commencement, at the rate for the time being specified in the Second Schedule in respect of that mineral.
>
> (2) The holder of a mining lease granted on or after the commencement of this Act shall pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral.
>
> (2A) The holder of a mining lease, whether granted before or after the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972, shall not be liable to pay any royalty in respect of any coal consumed by a workman engaged in a colliery provided that such consumption by the workman does not exceed one-third of a tonne per month.]
>
> *** *** ***
>
> **The Mineral Concession Rules, 1960**
>
> **27. Conditions**.- (1) Every mining lease shall be subject to the following conditions:

*** *** ***

(5) If the lessee makes any default in the payment of royalty as required under section 9 or payment of dead rent as required under Section 9A or commits a breach of any of the conditions specified in sub-rules (1), (2) and (3), except the condition referred to in clause (f) of sub-rule (1), the State Government shall give notice to the lessee requiring him to pay the royalty or dead rent or remedy the breach, as the case may be, within sixty days from the date of the receipt of the notice and if the royalty or dead rent is not paid or the breach is not remedied within the said period, the State Government may, without prejudice to any other proceedings that may be taken against him, determine the lease and forfeit the whole or part of the security deposit."

(ii) this Court in its order dated 08.07.2014 rendered in **Grasim Industries Limited (supra**) has struck down the condition of claiming royalty "whichever is higher" on the basis of notional conversion formula 1.6:1. Though the said formula was struck down but again the State has claimed royalty not on the basis of actual consumption of limestone but on the basis of report of NCCBM, which is higher than the actual consumption, therefore, what was the actual consumption, has not been made basis of raising demand against the petitioner but the report of NCCBM which gives higher conversion factor than what the weighbridge or Beltometer has recorded.

(iii) Another circular has been issued by the State Government on 19.07.2016 (Annexure P-7) still the State is relying upon the conversion factor of 1.6:1 tonne, therefore, the said circular and the basis of assessment are illegal;

(iv) the petitioner has deposited the royalty amount on the basis of limestone extracted as per the weighment recorded by weighbridge or beltometer, therefore, the resort to conversion formula on the basis of NCCBM data is not permissible;

(v) the Collector has delegated its essential function of framing the assessment to the Chartered Accountant. Since the essential adjudication process could not be delegated as the assessment has to be carried out by the Collector therefore, the calculation ought to have been computed by the Collector himself and not by the Chartered Accountant;

(vi) the petitioner has paid royalty from time to time and has been given No Dues Certificate (NOC) by the Department, therefore, demand now raised is not sustainable; and

(vii) the petitioner was not given any opportunity to rebut that the actual extraction of limestone cannot be made basis of assessment, therefore, the assessment framed is in contravention of the decision of the Division Bench in **Grasim Industries Limited (supra**).

13. We have heard learned counsel for the parties and find no merit in the present petition. The reasons are as follows:

14. In respect of the first argument that the Collector was not competent to frame assessment as the assessment has to be framed by the State Government in terms of Rule 27(5) of the Rules. We find that Sub-section (2) of Section 26 of the Act empowers the State Government to confer powers on such officer or authorities subordinate to the State

Government, as may be specified in the Notification to exercise any power exercisable by the State. In terms of the said provision, the State has published the following Notification on 01.05.1970:

> "No.824-4045-XII, d.12-2-70, Published in M.P. Rajpatra, Part I, d.1-5-70, p. 1010.- In exercise of the powers conferred by sub-section (2) of section 26 of the Mines and Minerals (Regulations and Development) Act, 1957, and in supersession of this Department Notification No.108-2748-XII, d. 2-1-63, the State Government hereby direct that the powers to issue notice exercisable by it under sub-rule (5) of rule 27 of the Mineral Concession Rules, 1960, shall be exercisable also by the Collectors or Additional Collector."

15. Still further, such aspect that the Collector is competent to frame assessment has been examined by a Division Bench of this Court in a judgment reported as **1972 MPLJ 699 (C.P. Syndicate (Private) Ltd. vs. State of Madhya Pradesh and another**) wherein the Court held as under:-

> "**10**. Therefore, in our view, statutory rules framed under an Act, constitute part and parcel of the Act itself so that when an Act is authorised to be done under the Rules framed under the Act, it is also authorised to be done 'under the Act'. Moreover, a reference to a power "under the Act" includes a power conferred indirectly by a subordinate legislation, e.g. Rules framed under that Act, so that a power conferred under the Rules can be exercised as if it is conferred by the Act. Even if the words 'by the Act" may be restricted to refer to something which the Act itself empowers, the expression "under the Act" is wide enough to embrace powers conferred and duties imposed by the Rules framed under the Act.
>
> *** *** ***
>
> **13**. We shall look at this point from another angle also. Clause 2 of the Part IX of the lease also provides for a notice to be given by the State Government. This condition being contractual, the State Government can undoubtedly authorise any one as its agent to do the act. Therefore, the Collector could be authorised to issue a notice on behalf of the State Government. In the present case, as a matter of fact, the notice (Annexure 'D') was issued by the Collector on behalf of the Governor of

> Madhya Pradesh. The order cancelling the lease was passed by the State Government itself."

Therefore, in view of the provisions of the Statute, the Notification published by the State Government and the law laid down by a Division Bench of this Court in **C.P. Syndicate (supra**), we do not find any merit in the first argument of the learned counsel for the petitioner.

16. In respect of second argument, the Division Bench in its order passed in **Grasim Industries Limited (supra**), referred to the average limestone consumption per tonne of the clinker or the cement. It was held that the Assessing Officer is competent for notional conversion factor on case to case basis if and when such occasion arises, on account of rejection of claim of the assessee and the return filed in that respect. Referring to the Supreme Court decision reported as **AIR 1990 SC 85** (**The India Cement Ltd. Etc. etc. vs. State of Tamil Nadu etc.**[2]), the Court also found that invocation of universal notional conversion factor must meet the test of necessity to do so. The royalty is payable on the quantum of minerals extracted as it is relatable thereto. At the same time, applying a just and reasonable conversion factor does not necessarily entail in demand of royalty from the assessee in respect of non-extracted material. The Division Bench held as under:-

> "**31**. …..... However, it does not follow that the Assessing Officer is not competent to invoke notional conversion factor on case to case basis if and when such occasion arises, on account of rejection of the Assessee's claim and the Returns filed in that behalf. For the same reason, the administrative instructions contained in the two impugned Circulars on this subject, cannot be treated as trenching upon the occupied legislative field or to doubt the competence of the State

> Government to issue the same. On the other hand, if uniform notional conversion formula specified by the State Government is found to be just and reasonable, applying the same to all the cement companies across the State as and when such occasion arises, may obviate the possibility of uncertainty, inconsistency and exercise of unguided discretion by the Assessing Officer on case to case basis. That logic and approach would inevitably further the larger public interest and also obviate loss to public exchequer.
>
> 32. But, a word of caution may have to be expressed that invocation of uniform notional conversion factor must meet the test of necessity to do so - on account of rejection of the Assessee's claim and the Return as filed in that behalf. Royalty is payable on the quantum of minerals extracted, as it is relatable thereto. At the same time, applying a just and reasonable conversion factor does not necessarily entail in demand of royalty from the Assessee in respect of non-extracted minerals as such. On the other hand, on finding that the notional conversion factor is just and reasonable and in conformity with the past experience of the concerned Cement Company or Industry as a whole, it can be safely assumed that the Assessee Unit has had extracted and consumed the quantity equivalent to the notional conversion factor of Limestone for manufacture of cement. However, that would be a rebuttable fact. The concerned cement company/assessee will then have to substantiate that it has extracted or removed lesser quantity of Limestone than determined as per the conversion factor and that the records maintained by it are truthful. Suffice it to observe that application of such notional conversion factor in a given case would be a matter of mode of assessment and nothing more. Resultantly, the administrative instruction issued in that regard cannot be considered as ultra vires or impinging upon the occupied legislative field or for that matter arbitrary and discriminatory."
>
> (emphasis supplied)

17. Having returned the finding that notional conversion factor is just and reasonable; the Court found that it is a rebuttable fact. The concerned Company will have to substantiate that it has extracted or removed lesser quantity of limestone than determined as per the conversion factor and the

record maintained by it are truthful. The Court considered the recommendation of Ministry of Commerce and Industries Department of Industrial Policy Promotion dated 20.03.2002 that result of studies conducted by the Central Government in respect of "Vikram Cement Plant" in the State of Madhya Pradesh has disclosed that the consumption factor is 1.43:1, which was arrived at after detailed scientific analysis carried out by the NCCBM. The Court found that if the State Government were to accept the said recommendation of the Government of India then the entire controversy would come to an end as that conversion factor is broadly acceptable to all the petitioners/appellants. The relevant excerpt from the Division Bench judgment read as under:-

> "**48**. We may mention that to obviate the complexity of the processes to finalize the assessment, it will be open to the State Government to consider the efficacy of the recent communication issued under the signature of Joint Secretary (Cement), Government of India, Ministry of Commerce & Industry Department of Industrial Policy and Promotion dated 20th March, 2002. It mentions that the result of studies conducted by the Central Government in respect of "Vikram Cement Plant" in the State of Madhya Pradesh has disclosed that the consumption factor is 1.43:1, which was arrived at after detailed scientific analysis carried out by the Council. The Government of India has recommended to the State Government to consider the possibility of adopting the said norm. Notably, this communication was placed on record before the Revisional Authority in the revision filed by the petitioners in the leading writ petition. However, the Tribunal and the Revisional Authority chose to follow the decision in the case of ACC Limited (the judgment of the learned Single Judge of this Court against which writ appeal is under consideration). On the other hand, if the State Government were to accept the said recommendation of the Government of India, then the entire controversy would come to an end as that conversion factor is broadly acceptable to all the petitioners/appellants. We, however, clarify that we may not be

> understood to have examined the justness of the position stated in the said communication dated 20th March, 2002. That is a matter for the State Government, to examine. We are not expressing any opinion either way on that matter. The State Government may consider the same expeditiously."

18. In the light of the finding recorded and the fact that quantity of manufacturing cement on the basis of extracted limestone may not be correct depiction of the mineral extracted, therefore, in terms of the circular dated 11.08.1993 as upheld by this Court, the State was within its jurisdiction to rely upon the conversion factor as found by NCCBM. Such conversion formula is in tune with the judgment of this Court in **Grasim Industries Limited (supra**). In fact, conversion formula applied by NCCBM was accepted by all the petitioners and appellants before the Division Bench including the present petitioner. Therefore, we do not find any merit in the second argument raised by the petitioner.

19. In respect of the third argument of the learned counsel for the petitioner that in the circular issued by the State Government on 19.07.2016 (Annexure P-7) still the State is relying upon the conversion factor of 1.6:1 tonne, therefore, the said circular and the basis of assessment are illegal. We do not find any merit in the said argument. The circular of the State Government has three steps. Firstly, to rely upon the minerals recorded in the weighbridge and Beltometer and the second step is to rely upon the study conducted by NCCBM. As such, the State is to determine the ratio of limestone to final product keeping in view the each industry. It is only in case where the weighbridge or Beltometer has been installed and also there is study by NCCBM, the consumption of limestone which is found more,

has to be applied. Therefore, the assessment is based upon a logic that the extraction reflected in weighbridge and Beltometer is not possible to manufacture cement/clinker then the study of NCCBM is the reasonable yardstick.

20. The fourth limb of the argument of the learned counsel for the petitioner is that the petitioner has deposited the royalty amount on the basis of limestone extracted as per the weighment recorded by weighbridge or Beltometer; therefore, resort to conversion formula on the basis of NCCBM data is not permissible. It was for the petitioner to substantiate its stand that the cement or clinker manufactured was in terms of the quantity extracted, as recorded in the weighbridge or Beltometer. The quantity reflected by the petitioner in the weighbridge or Beltometer is not sufficient enough to manufacture cement or clinker as reflected by the petitioner in view of the report of NCCBM; therefore, the second option was to base upon the report of NCCBM, which report was accepted in the judgment of this Court in **Grasim Industries Limited (supra**).

21. Thus, the stand of the petitioner that the royalty is being paid on the actual weighment basis is not sufficient to rebut the presumption that the limestone extracted was sufficient to give yield as disclosed by the petitioner to the Excise Department particularly in view of the Reports of NCCBM in respect of the period in question, therefore, the onus was on the petitioner to show that the quantity of cement manufactured was corresponding to the limestone extracted as reflected in the weighbridge or Beltometer. The petitioners have not said anything in their reply to this effect.

22. We do not find any merit in the fifth argument raised by the learned counsel for the petitioner that the Collector has delegated its essential function of framing assessment to the Chartered Accountant. In fact, the order of the Collector seeking report from the Chartered Accountant is to calculate the amount of royalty and the interest on delayed payment of royalty. What was entrusted to the Chartered Accountant was the calculations part i.e. a mathematical requirement rather than the essential assessment, which was completed by the Collector. The Collector has sought information from the Chartered Accountant in respect of calculation of the royalty amount and the interest payable on the delayed payment of the royalty amount but it is not the basis of determining the royalty.

23. We do not find any substance in the argument raised that the Department has issued No Dues Certificate, therefore, the Department is precluded from raising fresh demand towards the royalty amount. We find that such No Dues Certificate (Annexure P-4 dated 31.01.2014) clearly stipulates that if any amount is found due, the same can be recovered. Still further, such certificate was given prior to the judgment of this Court on 08.07.2014. Earlier assessments were set aside with a direction to the Assessing Authority to reassess the extraction of limestone. Similarly, Annexure P-12 is a declaration submitted by the petitioner that it has furnished the details of extraction and deposited the royalty correctly. The said communication is for the period prior to 2014 and is based upon the consumption of 1.6 tonne of limestone for manufacturing of one tonne of clinker. The said declaration is of no help as the petitioner itself has calculated royalty by adopting conversion formula of 1.6:1 tonne.

24. The argument that the petitioner was not given any opportunity to rebut that the actual extraction of limestone cannot be made basis of assessment, is again not tenable. The petitioner was served with a notice calling information in respect of extraction of limestone and also to seek information regarding the report of NCCBM. In terms of the Division Bench judgment of this Court, the onus was on the petitioner to assert that the clinker or cement manufactured by the limestone is possible on the basis of limestone extracted by the petitioner. The petitioner has not raised even a little finger in respect of process of assessment adopted by the State and made known to the petitioner before framing the assessment.

25. In view of the foregoing reasons, we do not find any merit in the present writ petition. The same is accordingly **dismissed**.

(HEMANT GUPTA)
CHIEF JUSTICE

(VIJAY KUMAR SHUKLA)
JUDGE

S/