

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO. 2

Excise Appeal No. 11227 of 2014-DB

(Arising out of OIO-SUR-EXCUS-002-COM-048-13-14 Dated- 26/12/2013 passed by
Commissioner of Central Excise, Customs and Service Tax-SURAT-II)

Birla Cellulosic

Birladham, Village : Kharach, Kosamba R S,
Bharuch, Gujarat

.....Appellant

VERSUS

C.C.E. & S.T.-Surat-ii

New C.Ex Building...Opp. Gandhi Baug,
Chowk Bazar, Surat,
Gujarat-395001

.....Respondent

WITH

Excise Appeal No. 11713 of 2014-DB

(Arising out of OIO-SUR-EXCUS-002-COM-075-13-14 Dated- 29/01/2014 passed by
Commissioner of Central Excise, Customs and Service Tax-SURAT-II)

Birla Cellulosic

Birla Dham, Village : Kharach, Kosamba,
BHARUCH, GUJARAT

.....Appellant

VERSUS

C.C.E. & S.T.-Surat-ii

New C.Ex Building...Opp. Gandhi Baug,
Chowk Bazar, Surat,
Gujarat-395001

.....Respondent

APPEARANCE:

Shri. Anand Nainawati & Shri. Ishan Bhatt, Advocates for the Appellant

Shri. Rajesh Nathan Assistant Commissioner (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

Final Order No. A/ 12583-12584 /2023

DATE OF HEARING:13.07.2023
DATE OF DECISION:10.11.2023

C.L. MAHAR

Brief facts of the matter are that the appellant had procured and un-refined "Sulphur" from M/s. Reliance industries Ltd a 100% EOU unit at, Jamnagar and from M/s. Grasim Industries Ltd. of a 100 % EOU, Nagda who in turn has procured the same from M/s. Reliance Industries Ltd, a 100% EOU. The appellant have also procured "Petroleum Cock" (Non-Calced) from Reliance Industries Ltd. a 100% EOU, Jamnagar. M/s. Reliance Industries Ltd. a 100% EOU, Jamnagar who is the supplier of above mentioned inputs had paid duties in terms of Serial No. 2 of Notification No. 23/2003-CE dated 31st March, 2003 under Section 3 of the Central Excise Act 1944. As per the department, the appellant was required to avail CENVAT credit on the procurement of the said products as per formula given under sub Rule 7 of Rule 3 of CENVAT Credit Rules, 2004.

2. It has been the contention of the department that the basic customs duty rate which was to be adopted for calculation of the admissible CENVAT credit as per the provisions of Rule 3(7)(a) of the Cenvat Credit Rules, 2004 in the given formula should have been the actual rate of the basic customs duty. The department is of the view that the appellant has taken basic custom duty at higher rate than what has actually been paid by the raw material supplier of a 100% EOU namely M/s. Reliance Industries Ltd.

3. The second issue pertains to the fact that Cenvat credit of the CVD which has been taken in the prescribed formula and Rule 3 (7) (a) of Cenvat Credit Rules, 2004 by the assessee also included the elements of Education Cess and Secondary Education Cess in it. The department has not been in agreement on their aspect. The department has issued a show cause notice date 15.06.2012 demanding reversal of the Cenvat credit amounting to Rs. 86,09,185/- on the above mentioned issued. The amount which was reversed by the appellant at the time of visit of the audit party was also

demanded to be appropriated as per the provisions of Section 11 A(1) of the Central Excise Act 1994 read of Rule 14 of the Cenvat credit Rules, 2004. The matter was adjudicated vide Order-In-Original No. 23/Commr./Surat-II-2013 dated 06.02.2013 where in the above mentioned amount of the Cenvat credit was disallowed and the credit which were reversed by the appellant at the time of audit has been appropriated towards the demand. The appellants are before us against the above mentioned impugned Order-In-Original dated 29.01.2014

4. In the meanwhile, the appellant has taken back (re-credited) the amount of 82,38,315/- as Cenvat credit out of the above mentioned amount of 86,09,185/- suo-motto vide Entry No. 30009130 dated 07.02.2012 and intimated the same to the Jurisdictional Superintendent Range-4 of Division-3 vide there letter dated 05.03.2012. The department feeling aggrieved of re-credit to the Cenvat credit issued another show cause notice dated 29.01.2013 asking them as to why the Suo-motto credits availed by the appellant should not be recovered from them as per the provisions of Section 11 A (1) of the Central Excise Act, 1944 read with the Rule 14 of Cenvat Credit Rules,2004. The matter was adjudicated by the impugned Order-In-Original No. SUR-EXCUS-002-COM-075-13-14 dated 29.01.2014 wherein, the learned adjudicating authority disallowed Cenvat Credit of Rs. 82,38,350/- taken as refund by way of suo-motto re-credit.. The above mention Order-In-Original is also under challenged before us in one of these appeals also.

5. The basic contention in the entire issue here is, whether rate of basic customs duty is to be taken as full or normal rate of basic customs duty for the purpose of the formula provided under Rule 3(7)(a) of the Cenvat Credit Rules, 2004 or the basic Customs Duty is to be taken it 50% of normal rate as provided in the Customs exemption notification.

6. Whether the rate of CVD would include the 2% Primary Education Cess and 1% of Secondary and Higher Education Cess of Central Excise; whether

the 3rd times Cess on gross amounts of duties of excise paid as per Serial No. 2 of the table to the Notification No. 23/2003-CE dated 31.03.2003 were directly admissible as Cenvat credit in full quantum without making any reference to the formula provided under Rule 3(7)(a) of the Cenvat Credit Rules, 2004. The Central Excise Authorities are of the view that as per the provisions of Rule 3(7)(a) of the Cenvat Credit Rules, 2004, rate of basic customs duty to be taken in the formula provided under Rule 3 (7)(A) of the Cenvat Credit Rules, 2004 is to be taken 50%, of normal rate of Basic Customs Duty, at the same time 2% Primary Education Cess and 1% Secondary and Higher Education Cess should not to be taken into consideration for the purpose of the CVD. At the same time 3rd time Cess of 2% of Primary Education Cess and 1% of Secondary and Higher Education Cess paid by the supplier (a 100% EOU) in the gross amount of Central Excise Duty paid by it under Serial No.2 of the table to the Notification No. 23/2003-CE dated 31st March 2003 were not admissible to the appellants as Cenvat credits.

7. The learned advocate appearing for the appellant submitted that the expression Basic Customs Duties (BCD) appearing in the formula provides in Rule 3(7)(a) of the Cenvat Credit Rules, 2004 means the normal, a full rate of Basic Customs Duty and not 50% of Basic Customs Duty as paid by the supplier a 100% EOU, in terms of Serial No.2 of the table in the Notification No. 23/2003-CE dated 31st March 2003. If it is required by the legislature that BCD would mean 50% of the normal rate of the Basic Customs Duty; in that case the expression BCD should have incorporated in the formula as 50% of the BCD for effective rate of BCD.

8. Learned Advocate for the appellant was further argued that disallowing of Cenvat Credit of 2 % of Primary Education Cess and 1% of Secondary and Education Cess of Central Excise Duty called as third time Cess paid by a 100% EOU on the gross amount of the Central Excise Duty paid by such EOU in terms of the Serial No. 2 of table to the Notification No. 23/2003-CE

dated 31 March, 2003 is unjustified as the Central Excise Duty would not only be the amount equivalent to the Excise Duty but also the amount equivalent to the Cess on such duty. It has been the submission of the learned advocate that the restriction under sub Rule 2 of Rule 3 of CENVAT Credit Rules, 2004 are worded in such a way that only to restrict the credit of Basic Customs Duty. However, the actual amount of the Central Excise Duty and Cesses which are paid on such Excise Duty need to be allowed for taking credit as per Cenvat Credit Rules, 2004. It is further been mentioned that there is a plethora of judgments of this Tribunal wherein it has been held that the Cenvat Credit of 2% of Primary Education Cess and 1% of Secondary and Education Cess also called as third time Cesses are allowable as per the provision of Cenvat Credit Rules, 2004. The learned Advocate has relied upon the following decisions to support his argument in this regard.

- 2008-TIOL-226-CESTAT-MUM EMCURE PHARMACEUTICALS LTD. VERSUS C.C.E., PUNE.
- 2008-TIOL-2305-CESTAT-BANG SHREYA PETS PVT. LTD. VERSUS C.C. &C.E., HYDERABAD-IV.
- 2010-TIOL-810-CESTAT-BANG TYCHE INDUSTRIES LTD. KAKINADA (A.P.) VERSUS C.C.E., VISAKHAPATNAM.

9. With regard, Suo moto re-crediting of the debited amount. The learned advocate has submitted that, it is settled question of law that and if Cenvat Credit debited by a Central Excise assessee wrongly or on the ill-advice of any Central Excise Officer, same can be re-credited by the assessee on his own. In this regard, the learned advocate has relied upon following decisions in support of his arguments.

- 2005 (187) E.L.T. 266 (Tri.-Del.) HIND SPINNERS C.C.E., BHOPAL VERSUS

- 2005 (190) E.L.T. 406 (Tri.-Mumbai) GUJARAT ALKALIES & CHEMICALS LTD. VERSUS C.C.E., VADODARA.
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- 2006 (203) E.L.T. 133 (Tri.-Mumbai) VEENA DIECASTERS & ENGINEERS PVT. LTD. VERSUS C.C.E., THANE-I.
- 2007 (210) E.L.T. 406 (Tri.-Mumbai), C.C. &C.E., RAJKOT VERSUS INTRICAST PVT. LTD.
- 2007 (218) E.L.T. 98 (Tri.-Ahmd.) C.C.E., &C., SURAT-II VERSUS RADHA KRISHNA SYNTHETICS PVT. LTD.
- 2008 (224) E.L.T. 333 (Tri.-Bang.) SOLARIS CHEMTECH LTD. VERSUS C.C.E., MANGALORE.
- 2008 (228) E.L.T. 561 (Tri.-Ahmd.) SHREE VALSAD S.K. UDYOG MANDLI LTD. VERSUS C.C.E., & C., DAMAN.
- 2008 (231) E.L.T. 154 (Tri.-Ahmd.) VERSUS LARK WIRES & INFOTECH LTD.
- C.C.E., & C., VADODARA-II. 2013 (291) E.L.T. 399 (Tri.-Ahmd.) BODAL CHEMICALS LTD. VERSUS C.C.E., AHMEDABAD-I.

9.1 It has further been submitted that period of demanded pertains to 08.07.2007 to 31.01.2009 in this case audit of the appellant took place in February, 2009 while the show cause notice has been issued on 15.06.2012 invoking the extended time period under Section 11A Central Excise Act, 1944 read with Rule 148 Cenvat Credit Rules, 2004. The appellant has regularly reflected the amount of Cenvat Credit taken by them in E.R-1 returns and E.R-6 returns. There has been no suppression of facts or willful mis-statement on the part of the appellant, therefore, invoking of extended time proviso is not legally not sustainable.

10. We have also heard Shri. Rajesh Nathan, Assistant Commissioner (AR), who has reiterated the findings given in the impugned Order-In-Original.

11. Having heard both the sides before preceding further in the matter, it will be relevant to mention here that the period of demand in this case

pertains to the period from 08.07.2007 to 31st January, 2009. It will be proper to have a look at the relevant provisions of the Cenvat Credit Rules, 2004 as existed at relevant time. The relevant Rule is reproduced here below:-

"RULE 3. CENVAT credit - (1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of –

- (i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act;
- (ii) the duty of excise specified in the Second Schedule to the Excise Tariff Act, leviable under the Excise Act;
- (iii) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);
- (iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);
- (v) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001);
- (vi) the Education Cess on excisable goods leviable under section 91 read with section 93 of the Finance (No.2) Act, 2004 (23 of 2004);

[(via) the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007):]

(vii) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v) (vi) and (via));

(viii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act

Provided that a provider of taxable service shall not be eligible to take credit of such additional duty;]

(viii) the additional duty of excise, leviable under section 157 of the Finance Act, 2003 (32 of 2003);

(ix) the service tax leviable under section 66 of the Finance Act;

(x) the Education Cess on taxable services leviable under section 91 read with section 95 of the Finance (No. 2) Act, 2004 (23 of 2004); and

(xa) the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007); and]

[(xi) the additional duty of excise leviable under 7[section 85 of Finance Act, 2005 (18 of 2005)]-1 paid on-

- (i) any input or capital goods received in the factory of manufacture of final product or premises of the provider of output service on or after the 10th day of September, 2004; and
- (ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004,

including the said duties, or tax, or cess paid on any input or input service, as the case may be, used in the manufacture of intermediate products, by a job-worker availing the benefit of exemption in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 214/86 -Central Excise, dated the 25th March, 1986, published in the Gazette of India vide number GS.R. 547(E), dated the 25th March, 1986, and received by the manufacturer for use in, or in relation to, the manufacture of final product, on or after the 10th day of September, 2004.

Explanation. - For the removal of doubts it is clarified that the manufacturer of the final products and the provider of output service shall be allowed CENVAT credit of additional duty leviable under section 3 of the Customs Tariff Act on goods falling under heading 9801 of the First Schedule to the Customs Tariff Act. "

"RULE 3(7) Notwithstanding anything contained in sub-rule (1) and sub-rule (4), -

(a) CENVAT credit in respect of inputs or capital goods produced or manufactured, by a hundred per cent. export-oriented undertaking or by a unit in an Electronic Hardware Technology Park or in a Software Technology Park other than a unit which pays excise duty levied under section 3 of the Excise Act read with serial numbers 3, 5, 6 and 7 of notification No. 23/2003-Central Excise, dated the 31st March, 2003, [G.S.R. 266(E), dated the 31st March, 2003] and used in the manufacture of the final products or in providing an output service, in any other place in India, in case the unit pays excise duty under section 3 of the Excise Act read with serial number 2 of the notification No. 23/2003- Central Excise, dated the 31st March, 2003, [G.S.R. 266(E), dated the 31st March, 2003], shall be admissible equivalent to the amount calculated in the following manner namely:-

Fifty per cent. of $[X \text{ multiplied by } I(1 + \text{BCD} / 100) \text{ multiplied by } (\text{CVD}/100)]$, where BCD and CVD denote ad valorem rates, in per cent, of basic customs duty and additional duty of customs leviable on the inputs or the capital goods respectively and X denotes the assessable value.

[Provided that the CENVAT credit in respect of inputs and capital goods cleared on or after 1st March, 2006 from an export oriented undertaking or by a unit in Electronic Hardware Technology Park or in a Software Technology Park, as the case may be, on which such unit pays excise duty under section 3 of the Excise Act number 2 of the notification no. 23/2003 Central Excise dated 2003 IG.S. R * 0.266(E) . the 31st March, 2003] shall be equal to X multiplied by $[[1 + \text{BCD} / 400]]$ multiplied by $(\text{CVD} / 100)$]."

11.1 It can be seen from the provisions of Rule 3(7) (a) as reproduced above that the Cenvat Credit Rules, provides that incase of raw material/inputs are being procured from a 100% EOU. The eligible amount of

Cenvat Credit on such purchases is to be calculated as per the provisions of Rules, 3 (7)(a). We take note of the fact that the formula which have been provided under rule 7 of rule 3 of the Cenvat Credit Rules, 2004 only provides that the relevant Basic Customs Duty it does not mention about the effective rate of the Customs duty that is to say for calculation of the Cenvat Credit which is to be availed by the purchaser of the inputs. The buyer of the impacts has to apply in the provided formula the normal rate of Basic Customs Duty. We are of the view therefore that we find no wrong in the way, the Cenvat Credit has been availed by the appellant.

12. With regard to whether the 2% Primary Education Cess and 1% Secondary Education Cess of Central Excise are allowable for the purpose of inclusion in CVD for calculating Cenvat Credit. In this regard, we are of the view that since both Primary Education Cess and Secondary Education Cess are being paid as a component of the Central Excise and therefore their no bar under Cenvat Credit Rules, 2004, it the relevant time for not allowing the credit of such Cess, which have been paid as part of Central Excise Duty under Section 3(1) of the Customs Tariff Act, 1975 integral component of the CVD (countervailing duty). This Tribunal in case of Jai Corp Ltd. Vs. C.C.E reported under 2015 (317) ELT 489 (T) has examined this issue in detail and has found that for calculating of admissible Cenvat Credit under Rule 3 (7) (A) of Cenvat Credit Rule, 2004. The elements of Education Cess and Higher Education Cess need to be included for deciding the component of the CVD paid by a 100% EOU. The relevant portion of above mentioned order are been reproduced here.

4. Heard both sides and perused the case records. The issue involved in the present appeal is as to what will be the admissible credit on inputs which are received by the appellant from 100% EOU's under Notification 23/2003-C.E., dated 31-3-2013. It is the case of the appellant that for the inputs received under Sr. No. 1 of table to Notification No. 23/2003-C.E. full credit will be admissible including the cesses paid. In this regard it is relevant to reproduce Para 7.1 and 8 of case law *Iscon Surgicals Limited v. CCE, Jaipur* (supra) where it is held that when duty is paid by 100% EOU under Sr. No. 1 of the table to Notification No. 23/2003-C.E. then full credit will be admissible, the same are reproduced below :-

"7.1 Though the excise duty payable on DTA clearances of a 100% EOU paying duty under S. No. 2 of the table to the Notification No. 23/2003-C.E., has basic Customs duty component also, the Cenvat credit available is confined only to the component comprising of Additional Customs duty (also called countervailing duty). Therefore on this basis, it can be said that though Rule 3(7)(a) does not mention any formula restricting, the credit, when the inputs received from a 100% EOU have suffered duty under S. No. 1 of the table to the Notification No. 23/2003-C.E., i.e. duty paid on the goods is basic customs duty plus Additional Customs duty plus sp. additional customs duty, if any, payable, plus Education Cess and S & H Cess payable under Section 93 of Finance Act, 2004 & Section 138 of Finance Act, 2007 respectively, the Cenvat credit available would be confined only to the Additional Customs duty plus sp. additional customs duty if payable plus education and S & H cess.

8. In these cases, the Appellant's plea is that the duty on the inputs has been paid under S. No. 1 of the table to the Notification No. 23/2003-C.E. If this is correct, they have correctly taken the Cenvat credit of Additional Customs duty component and education and S & H cess. However, if the inputs received from the 100% EOU have suffered duty in terms of S. No. 2 of the table to Notification No. 23/2003-C.E., the Cenvat credit entitlement would be as per the formulas prescribed in Rule 3(7)(a). Since no finding has been given on the Appellant's plea that the inputs received from the 100% EOU had suffered duty in terms of S. No. 1 of the table to the Notification No. 23/2003-C.E., this plea is required to be examined for which this matter would have to be remanded."

It is observed from the representative copies of the invoices produced both by the appellant and the Revenue that in some invoices duty is paid under Sr. No. 1 of table to Notification 23/2003-C.E. On these invoices where duty is paid under Sr. No. 1 of table to Notification 23/2003-C.E. entire credit of CVD, including cesses will thus be admissible to the appellant.

4.1 Regarding admissibility of CENVAT credit on Education Cess and Secondary Higher Education Cess for the period prior to 7-9-2009 the following view was taken as held by this bench in the case of *CCE, Daman v. PVN Fabrics* (supra) :-

"5. As can be seen from the Rule, the second proviso providing credit of the full amount of CENVAT credit of Excise duty paid in respect of clearances made under Notification No. 23/2003-C.E., dated 31-3-2003 and also allowing the full education cess paid was introduced with effect from 7-9-2009 and at the time when the Tribunal considered the issue in the case of *Emcure Pharmaceuticals Ltd.*, this proviso was not there. It was the Id. AR's submission that the fact that legislature chose to introduce a proviso and specifically provide for credit of education cess paid shows that the CENVAT credit of education cess paid prior to 7-9-2009 was not admissible. It is his submission that if the intention of the legislature was to allow the CENVAT credit of education cess prior to 7-9-2009, there was no need to amend the rule since the decision in the case of *Emcure Pharmaceuticals Ltd.* was already available and a view had already been taken that credit would be admissible. He further relied upon the decision in the case of *Bansal Wire Industries Ltd.* - [2011 \(269\) E.L.T. 145](#) (S.C.), *Madura Coats Ltd.* - [2003 \(161\) E.L.T. 812](#) (Tri.-Chennai), *Central Board of Dawoodi Bohra Community* - [2010 \(254\) E.L.T. 196](#) (S.C.). He relied upon the decision in the case of *Madura Coats* to submit that right to education cess as CENVAT credit was created on 7-9-2009 and

therefore it cannot be said to be clarificatory since it is a substantive right and therefore the same would not be admissible prior to that date. He relies upon the decision in the case of *Bansal Wire industries Ltd.* to submit that rule or notification should not be interpreted in such a manner that rule would become redundant. The fact that the legislature chose to introduce the rule subsequently, would show that the benefit was not available earlier and if the decision in the case of *Emcure Pharmaceuticals Ltd.* is followed, it is rendering subsequent amendment of the rule by the legislature redundant. He also relies upon the decision in the case of *Central Board of Dawoodi Bohra Community* to submit that the decision in the case of *Emcure Pharmaceuticals Ltd.* is to be held as *per incuriam* since it is clear that the decision of the Tribunal rendered the amended rule redundant and further it also shows that *Emcure Pharmaceuticals Ltd.* has not considered the statutory provisions properly.

6. Learned Counsel for the respondents would submit that the settled law is that any decision by a judicial forum should not render the existing law or statutory provision redundant, but not the amendment or provision which is brought out in statute book on a subsequent date. He submits that the legislature would have introduced the provisions as a clarificatory one so that unnecessary litigation and confusion are avoided and it would not necessarily mean that prior to that date, the benefit was not available. He also submits that it is necessary to examine the decision in the case of *Emcure Pharmaceuticals Ltd.* without taking amendment into account to see its correctness and not taking the amendment made subsequently into consideration to consider previous decision.

7. I find myself in agreement with the submissions made by Id. Counsel for the respondents. Since the amended provisions of the rules were not there, it cannot be said that the decision in the case of *Emcure Pharmaceuticals Ltd.* is *per incuriam* because in the light of subsequent amendment, the benefit became available. What is required to be considered is whether the Tribunal is required to follow the decision in the case of *Emcure Pharmaceuticals Ltd.* or not. In my opinion, the Id. AR has not been able to make out a case on this issue. The decision of the Tribunal in the case of *Madura Coats Ltd.*, the issue before the Tribunal was whether the Notification No. 28/2001-C.E. which was issued after long time after issue of Notification No. 82/92-C.E., expanding the benefit can be said to have retrospective effect. A view was taken that substantive right which was subsequently created, cannot be said to be clarificatory in nature to have a retrospective effect. In this case, that is not the issue before me. Even before the amendment was introduced, the Tribunal had already taken a view that education cess paid in full has to be allowed as CENVAT credit. It has nothing to do with the amendment. There is neither a request from the assessee nor is the issue before me as to whether the benefit of amendment made with effect from 7-9-2009, can be extended for the earlier period. The question before me is whether I am required to follow the earlier Tribunal's decisions or not. Therefore, this decision is not clearly applicable.

8. As regards the decision of Hon'ble Supreme Court in the case of *Bansai Wire Industries Ltd.*, the decision was cited to submit that it is a settled principle of law that the words used in Section, Rule, or Notification should not be rendered redundant and should be given effect to. A decision which has been rendered prior to the amendment and if the legislature brings out an amendment subsequently, it cannot be said that the

decision of the Tribunal rendered prior to that date will become invalid because it extended the benefit which was extended subsequently by amendment. This decision would apply only when a decision of the Tribunal or a Court rendered existing provisions in Notification/Rule/Section redundant. Therefore, this decision is also not applicable to the facts of this case. As regards treating the decision of the Tribunal *per incuriam*, the question does not arise in this case because the decision in the case of *Emcure Pharmaceuticals Ltd.* had considered the statutory provisions in detail and had come to a conclusion and it cannot be said that there were decisions of a higher judicial forum or a provision of law or relevant facts which have been ignored or not considered, despite having been submitted. In such a situation, the decision cannot be said to be *per incuriam* especially when the statute was amended subsequently. Thus, I find that none of the decisions cited by the Id. AR can be applied to the facts of this case.

9. I have already observed earlier that there is no dispute about the applicability of the decision in the case of *Emcure Pharmaceuticals Ltd.* to the facts of this case. Under these circumstances, respectfully following the decision in the case of *Emcure Pharmaceuticals Ltd.*, the appeal filed by the Revenue is rejected and the cross objection filed by the respondent also gets disposed of."

5. In view of the above settled position of law Cenvat credit of Cesses was admissible before the amendment also. So far as calculation of admissible Cenvat credit, as per formula prescribed under Rule 3(7)(a) of the Cenvat Credit Rules, 2004 is concerned, appellant argued that elements of Education Cess and SHE Cess has to be considered as a part of CVD only. Appellant has relied upon the case laws of *Shri Venketeshwara Precision Components v. CCE, Chennai* (supra) and *CCE, Chennai v. Jumbo Bags Limited* (supra). In view of these case laws relied upon by the appellant this issue is no more *res integra* as per Para 6 of the case law *CCE, Chennai v. Jumbo Bags Limited* (supra) :-

"6. As regards the cases where the duty has been paid by the suppliers availing exemption under Sr. No. 2 of the Table under Notification No. 23/2003-C.E., dated 31-3-2003, the restriction under the proviso to Rule 3(7) of the Cenvat Credit Rules, 2004 comes into play as the period involved in this case is between June, 2007 to December, 2008. As has been argued by the learned advocate, there is no dispute that the restriction placed under sub-rule 7(3) is intended to prohibit a manufacturer from taking credit of that portion of the duty which is equivalent to the Basic Customs Duty. This provision is required so as not to give any undue advantage in respect of any supplies from the EOUs since in the case of imported goods, there is no provision for taking credit of the Basic Customs Duty paid on the imported inputs. As regards the Additional Duty of Customs, which is levied under Section 3 of the Customs Tariff Act, 1975, the same is equal to duty of excise including cess, which is also levied and collected as duty of excise, and hence credit is available under the main provisions under Rule 3(1) of the Cenvat Credit Rules, 2004 in respect of imported goods as well as in respect of indigenously produced goods. In the case of goods produced by EOUs, which are Units within the territory of India, the intention is to charge excise duty equivalent to the Customs Duty leviable on such goods, if imported. The calculation of such excise duty includes Basic Customs Duty as well as Additional Customs Duty. In turn, the Additional Customs Duty includes the excise duty as well as cess on excise duty. The formula provided under Rule 3(7) of the Cenvat Credit Rules, uses an expression "CVD" but the same is defined to be the "Additional Duty of Customs". Hence, the expression would include not only the amount

equivalent to the excise duty but also the amount equivalent to the cess on such excise duty. Since the restriction under the said sub-rule (7) is worded in such a ways to restrict credit of Basic Customs Duty but allow credit of Additional Customs duty, the appellants are within their rights to take credit of an amount equivalent to the Additional Customs Duty inclusive of excise duty as well as the amount of cess on such excise duty. I also note that there is no restriction on taking credit of cess in the Cenvat Credit Rules, 2004 although there is a restriction regarding utilization of various credits. On the other hand, Rule 3(1) does allow taking of credit of cess specifically. I also find that in the case *Emcure Pharmaceutical* cited supra, credit of cess has been allowed though entirely for different reasons."

In view of the above while calculating admissible CENVAT credit under Rule 3(7)(a) of Cenvat Credit Rules, 2004, appellant has correctly factored Education Cess and Higher Education Cess as CVD paid.

5.1 However, in Para 6.5, 6.7 and D of the appeal memorandum appellant has admitted that for the period 1-3-2008 to 31-7-2008 the duty on inputs received was reduced from 16% to 14% as per budget 2008-09 whereas they calculated admissible credit by taking duty at the rate of 16%. That the above wrong calculation lead to excess credit of Rs. 3,91,212/- and that any demand beyond Rs. 3,91,212/- is not maintainable. In view of the above submission demand of Rs. 3,91,212/- is required to be paid by the appellant along with interest.

6. Appellant has also argued that the manner of taking CENVAT credit of inputs received from 100% EOU was complicated and contentious. That different views were being expressed on the issue, therefore, extended period can not be invoked and there is no case for imposing penalties. It is observed from the case laws relied upon by the appellant that the issue of taking CENVAT credit on inputs received from 100% EOU under Notification No. 23/2003-C.E. and method of calculating admissible credit as per Rule 3(7)(a) formula was disputed, therefore, no intention to evade payment of duty can be attributed on the part of the appellant. Accordingly, it is held that extended period is not applicable to the present facts and circumstances of case. Accordingly, penalties can also not be imposed upon the appellant."

13. We find that demand in this case is clearly hit by time limit provided under Section 11A of the Central Excise Act, 1944, we take note of the fact that the appellant has been filing regular E.R-1 and E.R-6 returns intimating the amount of Cenvat Credit availed by them. At the same time credit has taken place in February, 200. The impugned show cause notice has been issued on 15.06.2012. We find that there is not element of suppression or mis-statement with an intent to evade duty. We are therefore of view that show cause notice is hit by time limit provided under Section 11A of Central Excise Act, 1944

13.1 In view of above, we allow that appeal on this issue with regard to merits and on time bar basis.

14. With regard to the question of *Suo moto* re-credit of Cenvat Credit. We find that the appellant initially admitting that they have availed Cenvat Credit wrongly in violation of the provisions of the Rule 3(7) (A) has debited the demanded amount on their own from there the statutory balances in the statutory records. We find that it was wrong on the part of the appellant to *suo moto* re-credit the amount when the matter was still pending for adjudication. In this regard, we find that Larger bench of this Tribunal in case of *BDH INDUSTRIES LTD Vs. Commissioner of Central Excise (Appeal)* , Mumbai-I has held as follow:-

"12. We find that there is no provision under Central Excise Act and Rules allowing *suo moto* taking of credit or refund without sanction by the proper officer. The appellant's contention that refund in respect of duty paid twice cannot be considered as refund of duty and is only the accounting error does not appeal to us as the debit entry made in the accounts is towards payment of duty only and therefore refund of these amounts has to be considered as refund of duty only. The PLA account and the credit accounts are required to be submitted to the department and any correction carried therein, need to have department's sanction. We also note that the law relating to refund has been fully analysed by the Apex Court in the case of *Mafatlal Industries* (cited supra) which makes it very clear that all types of refund claim be there of excess duty paid or otherwise are to be filed under Section 11B and have to pass the proof of not passing on the incidence of duty to others. The recent decisions of Hon'ble Supreme Court in the case of *Sahakari Khand Udyog and Others* clearly laid down that all refunds have to pass through doctrine of unjust enrichment, even if it is not so expressly provided for in the statute. From these decisions it clearly emerges that all types of refund have to be filed under Section 11B of the Central Excise Act and no *suo moto* refund can be taken unless and until the department is satisfied that the incidence of duty has not been passed on.

13. In view of above, we answer the reference made to us by holding that all types of refund have to be filed under Central Excise Act and Rules made thereunder and no *suo moto* credit of the duty paid in excess may be taken by the assessee. The matter is now sent back to the referral bench for passing appropriate orders on the appeal before it."

15. In view of above, we find it wrong on the part of appellant to have re-credited debited amount of the Cenvat Credit on their own and therefore their appeal on this account is being rejected. In view of above we hold that the demand of wrong availment of the Cenvat Credit under formula provided

as per Rule 3(7) (A) of Cenvat Credit Rules, 2004 is concerned. We find that the impugned Order-In-Original is without any merit and therefore we set aside the same and appeal in this regard is allowed. The appeal pertaining to the suo moto re-credit of the Cenvat Credit is concerned and explained in preceding para, same is dismissed.

16. The appeals are decided in the above manner.

(Pronounced in the open court on 10.11.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C. L. MAHAR)
MEMBER (TECHNICAL)

PRACHI