

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

EXCISE APPEAL NO. 765 OF 2012

(Arising out of OIA-436-437/2012/COMMR-A-/RBT/RAJ dated 17.07.2012 passed by Commissioner of Central Excise, Customs & Service Tax- RAJKOT)

JYOTI CNC AUTOMATION PVT LTD

Plot No. 2839, Kalawad Road, Lodhika, Gidc,
RAJKOT-GUJARAT

....Appellant

VERSUS

C.C.E. & S.T. RAJKOT

CENTRAL EXCISE BHAVAN,
RACE COURSE RING ROAD...INCOME TAX OFFICE,
RAJKOT, GUJARAT-360001

....Respondent

WITH

EXCISE APPEAL NO. 10459 OF 2014

(Arising out of OIA-RJT-EXCUS-000-APP-515-13-14 dated 31.10.2013 passed by Commissioner of Central Excise, Customs & Service Tax- RAJKOT)

JYOTI CNC AUTOMATION PVT LTD

Plot No. 2839, Kalawad Road, Lodhika, Gidc,
RAJKOT-GUJARAT

....Appellant

VERSUS

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CENTRAL EXCISE BHAVAN,
RACE COURSE RING ROAD...INCOME TAX OFFICE,
RAJKOT, GUJARAT-360001

....Respondent

APPEARANCE:

Shri Rahul Gajera, Advocate appeared for the Appellant

Shri. V.G. Iyengar (Authorized Representative) for the Respondent

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

Final Order No. A/ 12238-12239 /2022

DATE OF HEARING: 17.10.2022
DATE OF DECISION: 22.12.2022

RAMESH NAIR

These appeals are preferred by M/s. Jyoti CNC Automation Pvt Ltd ("appellant") against Order-In-Appeal (OIA) No. 436 to 437/2012/COMMR(A)/RBT/RAJ dated 17-07-2012 and OIA No. RJT-EXCUS-000-APP-515-13-14 dated 31-10-2013 passed by the Learned Commissioner (Appeals) of Central Excise, Rajkot. Identical issues involved in both the appeals, for convenience, facts of Appeal No. E/765/2012 are considered first.

2. Briefly, the facts of the case are that Appellant is engaged in manufacturing of excisable goods viz. CNC turning centre, Vertical Machining Centre (VMC), SPM machine and horizontal machine falling under Chapter 84 of the Central Excise Tariff Act, 1985 at its factory which is registered under the provisions of the Central Excise Act, 1944 ("Act"). During the period 2006-07 to 2010-11, the appellant manufactured five machines namely VMC & SX04 at its factory for captive use. Due to space constraint the appellant transferred under invoice; endorsing transfer under Notification No. 67/95-CE, the said machines to its additional premise owned and controlled by the appellant situated about 500 mtrs away from the appellant's factory. At the said additional premise, the appellant, utilizing the said machines carried out work of manufacturing parts of machinery. Such parts were received back to the appellant's factory for use in the manufacturing of final products. Such final products manufactured were thereafter cleared from the appellant's factory on payment of applicable central excise duty.

3. Pursuant to Audit, a notice to show cause dated 5.08.2011 was issued seeking recovery under section 11A of the Act, a duty of Rs. 14,14,702/- in respect of aforesaid five machines transferred by the appellant to its additional premise on the ground that the said additional premise is not registered under the Act and hence benefit of duty exemption under notification no. 67/95-CE envisaged for captive consumption is not admissible to the appellant and further sought recovery of cenvat credit of basic excise duty amounting to Rs. 13,28,394/- on the ground that the same are wrongly utilized for payment of education cess and secondary and higher education cess as both the cess are not considered as excise duty and that there is no provision in the Cenvat Credit Rules, 2004 which permits utilization of

basic central excise duty for payment of education cess and secondary and higher education cess levied on final goods. Learned Additional Commissioner vide OIO dated 13.01.2012 confirmed the duty demand and interalia held that benefit of notification no. 67/95-CE dated 16.03.1995 cannot be extended to the machines cleared to the appellant's another unit which is a different and distinct unit other than appellant's registered unit. He further confirmed demand of duty pertaining to the cenvat credit of Basic Excise duty utilized towards education cess and higher & secondary education cess. However, learned additional commissioner restricted the duty demand to the normal period of limitation and set aside the duty demand for the extended period on the ground that relevant details were reflected in ER-1 returns and that therefore there was no suppression of facts to invoke extended period of limitation under proviso to section 11A of the Act. Both revenue and appellant preferred appeal before the Learned Commissioner (Appeals) of Central Excise, Rajkot who vide OIA dated 17.7.2012 upheld the said OIO by OIA on merits, however, allowed the revenue's appeal on the issue of limitation.

4. In the meantime, another show cause notice dated 16.3.2012 for the subsequent period viz. 2011-2012 was issued to the appellant vide which demand of duty on identical issues was raised. The said notice was confirmed, except for allowing cum-price benefit, by Additional Commissioner vide Order-In-Original dated 10.1.2013. Learned Commissioner (appeals) vide OIA dated 31.10.2013 upheld the demand of duty pertaining to clearance of five machines in dispute and set aside the demand in respect of utilization of cenvat credit of basic excise duty towards the payment of education cess & higher & secondary education cess. Department has not preferred appeal against that part of the

demand set aside by commissioner (appeals) of central excise vide OIA dated 31.10.2013.

5. Shri Rahul Gajera, learned counsel appearing for the appellant argued that the additional premise of the appellant is to be treated as part or extension of the factory of the appellant in view of definition of "Factory" in terms of section 2(e) of the Central Excise Act, 1944, hence notification no. 67/95-CE applies to the five machines transferred to appellant's own premise; that the appellant has declared such clearances in ER1 returns and even department had not insisted on registration of the said additional premises of the appellant itself goes on to show that department accepts that the said additional premise of the appellant is the extension of the appellant's factory; that even if appellant would have paid duty the same would have been available as cenvat credit; when the entire situation is revenue neutral, demand of duty on transfer of such capital goods is not sustainable in law as the same would result in to unnecessary formality without any revenue implications. In this behalf he relied upon the decision of Tribunal in the case of Hartech Plastics (P) Ltd V. Commissioner of C. Ex., New Delhi – 2016 (340) ELT 601 (Tri. Del.). As regards, the issue of utilization of cenvat credit of basic excise duty for payment of education cess, it is argued that the said issue is covered by several decisions cited in the OIA dated 31.10.2013 and department has not preferred appeal against the said OIA dated 31.10.2013 hence attained finality.

6. Shri V.G. Iyengar, learned (Superintendent) Authorized Representative appearing for the Revenue reiterated the findings given in the Orders-In-Appeal.

7. We have carefully considered the submissions made by both the sides and perused the records. We find that the case of the revenue is

that since the additional premise is not registered, the same was separate unit and hence benefit of notification no. 67/95-CE is not applicable to the capital goods so cleared to the said separate unit of the appellant. In this regard, it can be seen from the available records that the capital goods in question were transferred by appellant under transfer invoice to its additional premise situated about 500 mtrs away from its registered factory premise. Further, it is not in dispute that both the premises are known as M/s. Jyoti CNC Automation Pvt Ltd; are owned and controlled by the same legal entity; and the use of the said capital goods so transferred to the additional premise is exclusive and in or in relation to manufacturing of final products cleared by the appellant at its registered factory on payment of duty. If that be so, capital goods in question cannot be said to have been cleared from the appellant's factory attracting excise duty but have to be treated as captively used in the factory of the appellant. The additional premise of the appellant where the said capital goods were installed is to be treated as extension of appellant's factory in view of definition of "Factory" as provided under section 2(e) of the Central Excise Act, 1944 as reproduced hereunder:

"Factory" means any premises including the precincts thereof wherein or in any part of which excisable goods are manufactured or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on"

The word "precincts" has to be given a broader meaning and the distance between such premises carrying out manufacturing process connected with the production of excisable goods, is not material to deny benefit of exemption notification. This issue is settled by the Hon'ble Supreme Court in the case of South Eastern Coal Field Ltd V. Commissioner of Customs & Central Excise, M. P. – 2006 (200) ELT 357 (SC). In view of above, it follows that the additional premise is an extension of factory of the appellant and hence benefit of notification

no. 67/95-CE cannot be denied to the appellant. Further, it can be seen that even if appellant would have paid duty the same would have been available as cenvat credit; the situation is therefore revenue neutral, in the circumstances, demand of duty on transfer of such capital goods on the ground that the other premise is to be treated as separate premise requiring separate registration under the Act is not tenable.

8.1 As regards, the issue of utilization of cenvat credit of basic excise duty for discharge of education cess and secondary and higher education cess, it can be seen that learned commissioner (appeals) has set aside the duty demand by giving detailed finding in para. 7 of OIA dated 31.10.2013 the same is reproduced herein after:

"7. I would like to take up the issue relating to the utilization of the cenvat credit of basic excise duty for payment of both the education cesses, or not.

In past, in some stray cases, this appellate office have upheld the lower authority's order gainsaying cross-utilisation of basic excise duty for payment of cesses. However, I find that the issue, all the same have kept simmering and remained fluidic all along at the various higher fora.

However, the legal position seems to have altered in favour of the appellant with release of the recent case-laws on the subject matters are as follows:-

- (i) *M/s. Madura Industrial Textiles Vs. CCE, Vapi, 2013 (3) TMI 2 – CESTAT*

"Utilization of basic excise duty for discharge of education cess – period from May 2009 to November 2009 – Held that:- As decided in assessee's own case in [2013 (1) TMI 352 – Gujarat High Court] wherein decided that the benefit of utilization of credit of basic excise duty for payment of education cess is to be allowed - in favour of assessee."

- (ii) *M/s. New India Corpotec Versus Commissioner of Central Excise, Vapi, 2013 (1) TMI 411 – CESTAT Ahmedabad*

"Utilization of cenvat credit in basic excise duty for discharge of liability of Education Cess and Senior and Higher Education Cess – Held that:- As decided in Madura Industrial Textiles case [2013 (1) TMI 352 – Gujarat High Court] the benefit of utilization of credit of basic excise duty for payment of education cess is allowed relying on

CCE Vapi Vs. M/s. Balaji Industries [2008 (7) TMI 215 – CESTAT AHMEDABAD] – in favour of assessee.”

(iii) *Savita Oil Technologies Ltd. Verses CCE Vapi, 2013 (5) TMI 63 – CESTAT AHMEDABAD*

"Utilisation of credit of basic excise duty for discharge of Education Cess and Secondary and Higher Education Cess – Held that – in view of judgment of the Hon'ble High Court of Gujarat in the case of Commissioner, Central Excise, Customs & Service Tax, Vapi Versus M/s. Madura Industries Textiles [2013 (1) TMI 352] demand set aside - appeal allowed - decided in favour of assessee."

In light of the above judicial pronouncements of the higher judicial fora, it is quite apparent that the legal position has morphed/transformed in favour of the assessee. This apart, the decision in the case of M/s. Bharat Box Factory supra, is in respect of Area Based Exemption unit. I observe that the scheme of things, as envisages in the Area Based Exemption unit is quite different vis-à-vis DTA Unit, which had bearing on the Cenvat utilization on payment of duty from PLA and consequent refund/re-credit in PLA. I, therefore, find that the ratio of the said case law is distinguishable in respect of the units working in the DTA.

7.1 I also find that the Noticee has rightly placed reliance on the ratio of the decision of the Tribunal in the case of M/s. Sun Pharmaceutical Industries V/s. Commissioner of Central Excise, Jammu reported at 2007 (207) ELT 673 (Tri. Del) and Commissioner of Central Excise, Shillong V/s. Godrej Consumer Products Limited reported at 2007 (219) ELT 585 (Tri. Kolkata) wherein it has been clearly held that Education Cess can be paid by utilizing the Cenvat Credit of Basic Excise duty.

7.2 I also find ratio of the decision of the Commissioner of Central Excise, Vapi V/s. Balaji Industries reported at 2008 (232) ELT 693 (Tri. Ahmd) has been upheld by the Hon'ble High Court of Gujarat in their judgment dated: 23.07.2012 in Tax Appeal No: 2210 of 2010 filed by the Commissioner, Central Excise, Customs and Service Tax, Vapi.

7.3 In view of above, it is clear that Cesses have been levied as surcharge on the duties/taxes with specific purpose and intent. However, I find that in case of normal DTA unit, there is no embargo over utilisation of the Cenvat credit of basic excise duty for payment of education cesses. However, other way round, would definitely be a valid point of objection. Therefore, the impugned order to the above extent is set aside. Since the utilization of Basic Excise duty for payment of education cesses have been held to be valid, the penalty attributed to that portion of demand is required to be set aside and I hereby hold so."

8.2 The said finding of the Learned Commissioner (Appeals) vide OIA dated 31.10.2012 is legal and proper as held in several decisions cited therein and would apply to the earlier period as well. Further, since department has not preferred appeal against the said OIA dated 31.10.2013 and hence said order has attained finality in respect of issue of utilization of cenvat credit of basic excise duty towards discharge of education cesses.

8.3 In view of above, the OIAs to the extent confirmed the duty and penalty is required to be set aside and appeals of the appellant is required to be allowed. Accordingly, the impugned orders are modified to the above extent. Appeals are allowed with consequential relief.

(Pronounced in the open court on 22.12.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

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