CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
<u>CHANDIGARH</u>

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 646 of 2012

[Arising out of Order-in-Appeal No. 344-346/CE/APPEAL/CHD-II(J&K)/2011 dated 17.11.2011 passed by the Commissioner (Appeals), CE, ST & Cus, Chandigarh-II]

Sun Pharmaceuticals Industries **......Appellant**
6-9, EPIP, Kartholi,
Bari Brahmana,
Jammu 181133

VERSUS

Commissioner of Central Excise, Chandigarh-I **......Respondent**
Central Revenue Building,
Plot No. 19, Sector 17-C,
Chandigarh 160017

WITH

Excise Appeal No. 647 of 2012

[Arising out of Order-in-Appeal No. 344-346/CE/APPEAL/CHD-II(J&K)/2011 dated 17.11.2011 passed by the Commissioner (Appeals), CE, ST & Cus, Chandigarh-II]

Sun Pharmaceuticals Industries **......Appellant**
6-9, EPIP, Kartholi,
Bari Brahmana,
Jammu 181133

VERSUS

Commissioner of Central Excise, Chandigarh-I **......Responde**
Central Revenue Building,
Plot No. 19, Sector 17-C,
Chandigarh 160017

AND

Excise Appeal No. 648 of 2012

[Arising out of Order-in-Appeal No. 344-346/CE/APPEAL/CHD-II(J&K)/2011 dated 17.11.2011 passed by the Commissioner (Appeals), CE, ST & Cus, Chandigarh-II]

Sun Pharmaceuticals Industries **......Appellant**
6-9, EPIP, Kartholi,
Bari Brahmana,
Jammu 181133

VERSUS

Commissioner of Central Excise, Chandigarh-I **......Respondent**
Central Revenue Building,
Plot No. 19, Sector 17-C,
Chandigarh 160017

APPEARANCE:

Present for the Appellant: Sh. Kiran Sawale, Advocate

Present for the Respondent: Sh. Aneesh Dewan & Sh. Harish Kapoor, Authorized Representatives

CORAM: HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)

FINAL ORDER NO. 60326-60328/2024

DATE OF HEARING: 30.05.2024
DATE OF DECISION: 25.06.2024

PER: S. S. GARG

These three appeals are directed against a common Impugned Order No. 344-346/CE/APPEAL/CHD-II(J&K)/2011 dated 17.11.2011 passed by the Commissioner (Appeals), whereby the learned Commissioner (Appeals) has rejected the appeals of the appellant. Since the facts in all these appeals are identical, therefore, all three appeals are taken up together for discussion and decision. The details of all three appeals are given herein below in tabular form:

Sl. No.	Appeal No.	Issue Involved	Period of Dispute	Amount Involved
1.	E/646/2012	Rejected refund on account of education cess & HSEC and also appropriated amount of Rs.106/- on account of ed. cess short paid	October 2010	Rs.20,378/-
2.	E/647/2012	Rejected refund on account of ed. cess & HSEC paid through Cenvat Credit account of BED of Rs.3,561/-	January 2011	Rs.3,561/-
3.	E/648/2012	Rejected refund on account of education cess & HSEC	December 2010	Rs.23,654/-

2. Briefly stated facts of the present case are that the appellant is engaged in manufacture of P & P Medicines and Scrap falling under Tariff Item Nos. 30049099, 30039090 and 39203090. The appellant filed refund claims of the Cenvat duty paid through account current (PLA) in terms of the provisions of Notification No. 56/2002-CE dated 14.11.2002 as amended. It was observed that the appellant had utilized the Cenvat Credit of Basic Excise Duty (BED) account for paying education cess and secondary & higher education cess which they were required to pay in cash through PLA. It was accordingly held by the adjudicating authority that by doing so, the appellant had utilized the Cenvat Credit of BED resulting in more payment in cash

through PLA and therefore, had indirectly availed the refund of education cess and secondary & higher education cess, which is not permissible as per the provisions of Notification No. 56/2002 *ibid*. Aggrieved by the order of the adjudicating authority, the appellant filed appeals before the Commissioner (Appeals), who has rejected the appeals of the appellant. Hence, the appellant preferred the present appeals.

3. Heard both the parties and perused the material on record.

4.1 The learned Counsel for the appellant submits that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law.

4.2 He further submits that this issue is no more *res integra* and has been settled in favour of the appellant in the appellant's own case for the previous period vide ***Final Order No. 62157-62191/2018 dt. 23.03.2018*** as well as vide the decisions in the following cases:

- ***Sun Pharmaceuticals Industries vs. CCE, Jammu - 2007 (207) ELT 673 (Tri. Delhi)***
- ***Commissioner of Customs & C. Ex., Jammu vs. Bharat Box Factory Ltd – 2008-TIOL-407-HC-J&K-CX***
- ***Commissioner of C. Ex., Shillong vs. Godrej Consumer Products Ltd – 2007 (219) ELT 585 (Tri. Kolkata)***

5.1 On the other hand, the learned Authorized Representative for the Revenue reiterates the findings of the impugned order and submits that this issue was considered in details by the Division

Bench of this Tribunal in the case of ***Commissioner of C.E., Jammu vs. R.B. Jodhamal & Co. Pvt Ltd – 2013 (288) ELT 446 (Tri. Del.),*** wherein the Tribunal after considering the various judgments of the Tribunal and the High Courts, has held in para 8 as under:

> *"**8**. In view of the above discussion, we hold that –*
>
> *(a) A unit availing of exemption under Notification No. 56/2002-CE cannot utilize BED Credit for payment of education cess and S & H cess which are not exempted under this notification; and*
>
> *(b) Extra BED paid through PLA on account of diversion of BED Credit for payment of education cess and S & H cess would not be refundable under Notification No. 56/2002-CE."*

5.2 The learned AR further submits that this issue has now been finally settled by the Hon'ble Apex Court in case of ***M/s Unicorn Industries vs. Union of India – 2019 (370) ELT 3 (SC)*** whereby the Hon'ble Apex Court has held that the earlier decision of the Supreme Court in the case of ***SRD Nutrients Pvt Ltd vs. Commissioner - 2017 (355) ELT 481 (SC)*** as it held to be *per incuriam*.

6. I have considered the submissions made by both the sides and perused the material on record. I find that the only issue involved in the present case is whether the education cess and secondary & higher education cess can be paid by utilizing BED Credit by a unit availing exemption under Notification 56/2002-CE dated 14.11.2002. This issue has been considered by the Division Bench of this Tribunal in the case of ***Commissioner of C.E., Jammu vs. R.B. Jodhamal &***

Co. Pvt Ltd (supra), wherein it has been held that a unit availing of exemption under Notification No. 56/2002-CE cannot utilize BED Credit for payment of education cess and secondary & higher education cess which are not exempted under the said notification.

7. I note that the appellant is registered in the state of Jammu & Kashmir and were availing benefit of area based exemption under Notification No. 56/2002-CE dated 14.11.2002. The said notification provides mechanism to give effect to aforesaid exemption by way of refund of duty paid through PLA. As per the procedure, the manufacturer avails Cenvat Credit of duty/cess paid by them on inputs and utilizes whole of the CENVAT credit available with them on last day of the month for payment of Central Excise duty and Cess. The balance amount of duty is paid in cash and on application of refund, the refund is granted for payment of Central Excise made in cash only. The refund is granted by way of cash or by way of self credit in PLA. The above said issue is no more *res-integra* and stands finally decided by the decision of the Hon'ble Supreme Court in the case of ***M/s Unicorn Industries vs. Union of India*** (supra), wherein the Hon'ble Apex Court, after considering the provisions of Notification No. 71/2003-CE dated 09.09.2003 has held that a notification has to be issued for providing exemption under the said source of power and that in the absence of notification containing an exemption to such additional duties in the nature of education cess and secondary & higher education cess, they cannot be said to have been exempted.

8. Further, I note that the provisions of Notification No. 56/2002-CE dated 14.11.2002 are *pari-materia* to the provisions of Notification No. 71/2003-CE dated 09.09.2003. It is pertinent to reproduce the relevant findings of the case of ***M/s Unicorn Industries cited*** (supra) which are reproduced herein below:-

> ***"39.*** *Rule 8 of Central Excise Rules, 1944, authorises the Central Government to grant an exemption to any excisable goods from the whole or any part of duty leviable on such goods. Rule 8 is extracted hereunder :*
>
> > ***"8. Power to authorise an exemption from duty in special cases. -*** *(1) The Central Government may from time to time, by notification in the official Gazette, exempt (subject to such conditions as may be specified in the notification) any excisable goods from the whole or any part of duty leviable on such goods.*
> >
> > *(2) The Central Board of Excise and Customs may by special order in each case exempt from the payment of duty, under circumstances of an exceptional nature, any excisable goods."*
> >
> > *The word 'duty' is defined under Rule 2(v) to mean the duty as levied under the Act.*
>
> ***40.*** *Notification dated 9-9-2003 issued in the present case makes it clear that exemption was granted under Section 5A of the Act of 1944, concerning additional duties under the Act of 1957 and additional duties of excise under the Act of 1978. It was questioned on the ground that it provided for limited exemption only under the Acts referred to therein. There is no reference to the Finance Act, 2001 by which NCCD was imposed, and the Finance Acts of 2004 and 2007 were not in vogue. The notification was questioned on the ground that it should have included other duties also. The notification could not have contemplated the inclusion of education cess and secondary and higher education cess imposed by the Finance Acts of 2004 and 2007 in the nature of the duty of*

excise. The duty on NCCD, education cess and secondary and higher education cess are in the nature of additional excise duty and it would not mean that exemption notification dated 9-9-2003 covers them particularly when there is no reference to the notification issued under the Finance Act, 2001. There was no question of granting exemption related to cess was not in vogue at the relevant time imposed later on vide Section 91 of the Act of 2004 and Section 126 of the Act of 2007. The provisions of Act of 1944 and the Rules made thereunder shall be applicable to refund, and the exemption is only a reference to the source of power to exempt the NCCD, education cess, secondary and higher education cess. A notification has to be issued for providing exemption under the said source of power. In the absence of a notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted. The High Court was right in relying upon the decision of three-Judge Bench of this Court in Modi Rubber Limited (supra), which has been followed by another three-Judge Bench of this Court in Rita Textiles Private Limited (supra).

41. *The Circular of 2004 issued based on the interpretation of the provisions made by one of the Customs Officers, is of no avail as such Circular has no force of law and cannot be said to be binding on the Court. Similarly, the Circular issued by Central Board of Excise and Customs in 2011, is of no avail as it relates to service tax and has no force of law and cannot be said to be binding concerning the interpretation of the provisions by the Courts. The reason employed in SRD Nutrients Private Limited (supra) that there was nil excise duty, as such, additional duty cannot be charged, is also equally unacceptable as additional duty can always be determined and merely exemption granted in respect of a particular excise duty, cannot come in the way of determination of yet another duty based thereupon. The proposition urged that simply because one kind of duty is exempted, other kinds of duties automatically fall, cannot be accepted as there is no difficulty in making the computation of additional duties, which are payable under NCCD, education cess, secondary and higher education cess. Moreover, statutory notification must cover specifically the* *duty exempted. When a particular kind of duty is exempted, other types of duty or cess imposed by different legislation for a different purpose cannot be said to have been exempted.*

***42.** The decision of Larger Bench is binding on the Smaller Bench has been held by this Court in several decisions such as Mahanagar Railway Vendors' Union v. Union of India & Ors., (1994) Suppl. 1 SCC 609, State of Maharashtra & Ors. v. Mana Adim Jamat Mandal, AIR 2006 SC 3446 and State of Uttar Pradesh & Ors. v. Ajay Kumar Sharma & Ors., (2016) 15 SCC 289. The decision rendered in ignorance of a binding precedent and/or ignorance of a provision has been held to be per incuriam in Subhash Chandra & Ors. v. Delhi Subordinate Services Selection Board & Ors., (2009) 15 SCC 458, Dashrath Rupsingh Rathod v. State of Maharashtra, (2014) 9 SCC 129, and Central Board of Dawoodi Bohra Community & Ors. v. State of Maharashtra & Ors., (2005) 2 SCC 673 = 2010 (254) E.L.T. 196 (S.C.). It was held that a smaller bench could not disagree with the view taken by a Larger Bench.*

***43.** Thus, it is clear that before the Division Bench deciding SRD Nutrients Private Limited and Bajaj Auto Limited (supra), the previous binding decisions of three-Judge Bench in Modi Rubber (supra) and Rita Textiles Private Limited (supra) were not placed for consideration. Thus, the decisions in SRD Nutrients Private Limited and Bajaj Auto Limited (supra) are clearly per incuriam. The decisions in Modi Rubber (supra) and Rita Textiles Private Limited (supra) are binding on us being of Coordinate Bench, and we respectfully follow them. We did not find any ground to take a different view.*

***44.** Resultantly, we have no hesitation in dismissing the appeals. The judgment and order of the High Court are upheld, and the appeals are dismissed. No costs."*

9. By following the ratios of the decisions in the cases of ***Commissioner vs. R.B. Jodhamal & Co. Pvt Ltd*** (supra) and ***M/s Unicorn Industries vs. UOI*** (supra), I am of the considered opinion that there is no infirmity in the impugned order vide which the refund

of the education cess and secondary & higher education cess has been denied; accordingly, I uphold the impugned order by dismissing all the three appeals of the appellant.

(Order pronounced in the court on 25.06.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

RA_Saifi