CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 61002 of 2018

[Arising out of Order-in-Appeal No. JNK-EXCUS-000-APP-478-17-18 dated 28.03.2018 passed by the Commissioner (Appeals), CGST, Jammu]

M/s Sudhir Power Ltd. **......Appellant**
EPIP, Kartholi, SIDCO, Industrial
Complex, Bari Brahmana,
Jammu & Kashmir – 181133

VERSUS

Commissioner of Central Excise & Service Tax, Jammu & Kashmir **......Respondent**
OB-32, Rail Head Complex,
Jammu & Kashmir-180012

APPEARANCE:

Ms. Krati Singh and Ms. Samiksha Uniyal, Advocates for the Appellant

Shri Yashpal Singh, Authorized Representative for the Respondent

CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 61658/2025

DATE OF HEARING: 15.10.2025
DATE OF DECISION: 13.11.2025

P. ANJANI KUMAR:

Heard both sides and perused the records of the case.

2. Brief issue involved in the case is as to whether the appellant, M/s Sudhir Power Ltd., an EOU, were required to take into account Education Cess and Secondary & Higher Education Cess two times,

while calculating duty payable on the clearances to DTA in terms of Explanation 2 (ii) to Section 3(1) of Customs Tariff Act, 1975; Revenue was of the opinion that the Education Cess and Secondary & Higher Education Cess must be taken into account twice i.e. once after calculating the BCD and duty under Section 3(1) plus once again after including Special Additional Duty in terms of Section 3(5) of CETA and thus, the total duty payable is at the rate of 26.628%. On the other hand, it is the case of the appellants that the said Education Cess and Secondary & Higher Education Cess needs to be taken into account only once after calculating the BCD and duty under Section 3(1) and the total duty payable is at the rate of 25.852%. A show cause notice dated 17.06.2014 demanding differential duty of Rs.4,58,878/- along with interest and penalty was issued. The demand was dropped vide OIO dated 18.02.2015 by the original authority. On an appeal filed by Revenue, the proposals in the show cause notice were upheld by the impugned order dated 28.03.2018 passed by Commissioner (Appeals).

3. Ms. Krati Singh, learned Counsel for the appellants, submits that the issue is no longer res integra having been decided by the Hon'ble Supreme Court, the Larger Bench of the Tribunal and other Benches; it was decided that once Education Cess and Secondary & Higher Education Cess is added to the customs duties to arrive at aggregate value of customs duties in terms of Proviso to Section 3 (1) of the Act, the question of charging Education Cess and Secondary & Higher Education Cess again on the value so arrived is not necessary; Education Cess and Secondary & Higher Education

Cess are in the nature of surcharge and therefore, cannot be levied again once duty has already been enhanced by levying the cess; it is a settled legal principle that cess cannot be charged twice. She further submits that the case of Vikram Ispat – 2000 (120) ELT 800 (Tri. LB) relied upon by the Commissioner (Appeals), in fact, supports their case as it was held that the measure of collection of duty does not change the nature of duty and therefore, once the excise duty is calculated under Proviso to Section 3(1) of CTA, 1975, Education Cess and Secondary & Higher Education Cess already levied cannot be levied again. She further submits, without prejudice to the above, that no amount is payable by the appellants as the same can be adjusted from the SAD which has already been paid by the appellants inadvertently. She also submits that when the demand is not sustained, the question of interest and penalty does not arise. She relies on the following cases:

- Sarla Performance Fibers Limited v. CCE, Vapi-2010 (253) E.L.T. 203 (Tri. - Ahmd.) [department's appeal dismissed in 2014 (307) E.L.T. A79 (S.C.))
- Meghmani Dyes & Intermediates Ltd. v. Commr. of C, Ex., Ahmedabad, 2014 (306) E.L.T. 658 (Tri. - Ahmd.) [department's appeal dismissed in 2014 (307) E.L.T. A79 (S.C.)]
- Kumar Arch Tech. Pvt. Ltd. v. Commissioner, 2013 (290) E.E.T. 372 (Tribunal-LB)
- M/s Meneta Automotive Components Pvt. Ltd. v. Commissioner of Central Excise, Rohtak and Shri Praveen Garg, Ex-Finance Head M/s Meneta Automotive Components Pvt. Ltd. v. Commissioner of Central Excise, Rohtak, 2025 (1) TMI 530 - CESTAT Chandigarh
- M/s Consolidated Coin Company Pvt. Ltd. v. Commissioner of CGST, Faridabad, 2024 (10) TMI 320-CESTAT Chandigarh
- Kadimi Tools Manufacturing Co. Pvt. Ltd. vs. C.C.E., Delhi-III, 2018-TIOL-1829-CESTAT-CHD

- C.C.E., Ahmedabad - Iv. Meghmani Dyes and Intermediate Ltd., 2024 (5) TMI 1052- CESTAT Ahmedabad
- Contacare Ophthalmics and Diagnostics v. Commissioner of Central Excise & ST, Vadodara-l, 2024 (2) TMI 1157-CESTAT Ahmedabad
- M/s. SKM Egg Products Export (India) Ltd. v. Commissioner of GST & Central Excise, Anaimedu, Salem, 2024 (6) TMI 1173-CESTAT CHENNAI
- EID Parry (India) Ltd. v. CCE & ST, LTU Chennai And Vice-Versa, 2017 (9) TMI 876- CESTAT CHENNAI
- M/s Komal Enterprises – 2024 (1) TMI 390-CESTAT Chandigarh

4. Learned Authorized Representative for the Department reiterates the findings of the impugned order.

5. We find that the issue is no longer res integra. We find that Co-ordinate Bench at Ahmedabad in the case of Sarla Performance Fibres Ltd. (supra) decided the issue in favour of the appellants. The decision of the Tribunal was upheld by the Hon'ble Apex Court (supra). The Tribunal held as follows:

> **58.** We have considered the submissions made by the appellant as well as other interveners.
> **59.** The issue to be decided is whether the department was right in demanding education cess under relevant provisions of Finance Act leviable as excise duty also after arriving at aggregate of duties of customs levialbe. In terms of proviso to Section 3(1) of the Central Excise Act, 1944 (the Act), when 100% EOU clear the goods and to domestic tariff area (DTA), duties of excise leviable shall be equal to the aggregate of duties of customs. The advocate for the appellant had submitted the calculations as per the appellant as well as, as per the department which have already been reproduced under para 12.1 of this order.

60. Shri Sridharan, learned advocate, submitted that the true nature of education cess is actually a surcharge. For this purpose he relied upon Section 91 of Finance Act, 2004 which reads as under :

"**91 : Education cess -** (i) when prejudices to the sub-section 2 of section 2, there shall be levied and collected, in accordance with the provisions of this chapter as surcharge for the purposes of the union, assess to be called the education cess, ..."

61. To support his contention that expression "surcharge" in the context of taxation means an additional imposition which results in enhancement of tax and the nature of the additional imposition is the same as the tax on which it is imposed as surcharge. To support his contention he relies upon the decision of the Hon'ble Supreme Court in the case of *CIT* v. *K. Srinivasan* [1972 (4) SCC 526] and *Sarojini Tea Co. (P) Ltd*. v. *Collector of Dibrugarh* [1992 (2) SCC 156] in the case of *Shri K. Srinivasan*, the Hon'ble Supreme Court analyses the meaning of the term "surcharge" and held as under :

> "7. The above legislative history of the Finance Acts, as also the practice, would appear to indicate that the term "Income tax" as employed in Section 2 includes surcharge as also the special and the additional surcharge whenever provided which are also surcharges within the meaning of Article 271 of the Constitution. The phraseology employed in the Finance Acts of 1940 and 1941 showed that only the rates of income tax and super-tax were to be increased by a surcharge for the purpose of the Central Government. In the Finance Act of 1958 the language used showed that income tax which was to be charged was to be increased by a surcharge for the purpose of the Union. The word "surcharge" has thus been used to either increase the rates of income tax and super tax or to increase these taxes. The scheme of the Finance Act of 1971 appears to leave no room for doubt that the term "Income tax" as used in Section 2 includes surcharge.

......

10. The meaning of the word "Surcharge" as given in the Websiter's New International Dictionary includes among others "to charge (one) too much or in addition..." also "additional tax". Thus the meaning of surcharge is to charge in addition or to subject to an additional or extra charge. If that meaning is applied to Section 2 of the Finance Act, 1963 it would lead to the result that income tax and super tax were to be charged in four different ways or at four different rates which may be described as (i) the basic charge or rate (In Part I of the First Schedule); (ii) surcharge; (Hi) special surcharge, and (iii) additional surcharge calculated in the manner provided in the Schedule. Read in this way the additional charges form a part of the income tax and super tax. It is possible to argue and that agreement has been commended on behalf of the Revenue that the word "surcharge" has been used in Article 271 for the purpose of separating it from the basic charge of a tax or duty for the purpose of distributing the proceeds of the same between the Union and the States. The proceeds of the surcharge are exclusively assigned to the Union. Even in the Finance Act itself it is expressly stated that the surcharge is meant for the purpose of the Union."

In the case of *Sarojini Tea Co. Pvt. Ltd*., after hearing various judgments including *K. Srinivasan's* case, Hon'ble Supreme Court came to the following conclusion:

> "16. From the aforesaid decisions, it is amply clear that the expression 'surcharge' in the context of taxation means an additional imposition which results in enhancement of the tax and the nature of the additional imposition is the same as the tax on which it is imposed as surcharge. A surcharge on land revenue is an enhancement of the land

> revenue to the extent of the imposition of surcharge. The nature of such imposition is the same viz.., land revenue on which it is a surcharge."

62. We find that the issue before us is clearly covered by the above decisions and therefore we find ourselves in agreement with the contention that education cess which is a surcharge means an additional imposition which results in enhancement of the tax.

63. The next submission made by Shri Sridharan was that once the tax rate is enhanced, the section imposing surcharge gets exhausted and it need not be again looked into. What is required to be done for the purpose of determination of duty leviable on the goods cleared by a 100% EOU to domestic tariff area is to arrive at aggregate duties of customs leviable on like goods imported. Therefore, once the customs duty is determined and education cess on the whole of customs duty under Section 94 under of the Finance Act is added, the question of adding the education cess under Section 93 of Finance Act does not arise. Because once the surcharge is levied on customs duty, the enhancement of customs duty is over. There cannot be enhancement of the duty twice. As per the proviso to Section 3(1) of the Act, what is required to be determined is the aggregate of the customs duties. Once it is accepted that education cess is only an additional tax and not a separate levy, the question of enhancement twice does not arise. We find ourselves fully agreement with this view also. In addition to the reasons given by the learned advocate, we also find that the very fact that cess is levied as a percentage of customs duty or excise duty and would automatically become nil in case where no excise duty or customs duty is leviable would also support the case of the appellants. Suppose in this case if the like goods imported were to attract no customs duty at all, the question of levy of excise duty equal to customs duty would not arise and therefore there would be no education cess also. Once the levy is a percentage of another duty and what is required to be worked out is the aggregate of customs duties, the percentage addition also once made for the purpose of customs duty, the working of aggregate of customs duty for levy of excise duty is complete. If by adding another percentage as the department has proposed to do, the department is adding something extra to the customs duty which is not supported by the proviso to Section 3(1).

64. The next submission was that the Central Excise Act, Customs Tariff Act, Exim Policy etc. together form an integrated scheme of taxation as far as EOU is concerned and therefore they have to be interpreted in integrated manner. We agree with this submission. We also agree that the action taken by the department in this case is against this basic principle. The proviso to Section 3(1) of the Act requires the department to arrive at aggregate of customs duties and levy an equal amount as excise duty. Therefore, once aggregate of customs duties is determined, applying the provisions of Finance Act as it relates to goods manufactured by 100% EOU does not arise. We find the following decision cited by the learned advocate relevant in this context.

1. *K.P. Varghese* v. *ITO.* [1981 (4) SCC 173]

In this case, the Hon'ble Supreme Court observed that the Income Tax Act, 1961 and the Gift Tax Act, 1958 are parts of an integrated submissions of taxation and the same amount which is chargeable as gift could not be intended to be charged also as capital gains.

65. Next submission was that the very fact that duty on the goods manufactured by 100% EOU when cleared to DTA has to be charged not under main Section 3(1) of the Act but under the proviso shows that EOU has been given a separate treatment in the Act. Further, provisions relating to exemption to excisable goods under Section 5A, provisions relating to job work, provisions relating to Cenvat credit show that in all these places EOUs have been treated separately. In the absence of specific provisions relating to EOU in Section 93 of Finance Act relating to education levy, it has to be assumed that the legislative was to excludive EOU from the scope of Section 93 of the Finance Act, 2004. We are not considering this aspect in detail since we consider that the issue can be decided in favour of the appellant on the basis of the other submissions with which we have found ourselves in agreement.

66. The next submission made was that a deemed fiction should be carried to its logical end. For this purpose, the learned advocate cited Lord Asquith in *East End Dwelling Co. Ltd*. v. *Finsbury Borough Council* [1951 (2) ALL ER 587] wherein he stated as under :

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must case or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

67. Hon'ble Supreme Court in *UOI* v. *Jalyan Udyog* [1993 (68) E.L.T. 9 (S.C.)] also observed as under :

"19. It is well settled that where a fiction is created by a provision of law, the court must give full effect to the fiction, and as is often said, it should not allow its imagination to be boggled by any other considerations. Fiction must be given its due play; there is to be no halfway stop.

25. The notification shifts the date of import - in the case of a ship which is imported as an ocean going vessel but is subsequently broken up from the actual date of import to the date of breaking up by creating a legal fiction. Once it is held that it is open to the Central Government to impose such a condition or to create such a fiction, as the case may be, the condition or the fiction has to be given full effect to. It must be deemed that the ship is imported on the date it is broken up (as explained hereinabove) and its value and rate of duty should be determined with reference to such date."

68. We find ourselves in agreement with the learned advocate. For all purposes, goods cleared to DTA from 100% EOU were treated as import but having been located within the country, nature of levy has to be a levy on the manufacture. Hence the need for a proviso and also explanation as to how the excise duty leviable on these goods have to be determined. Therefore, customs duty payable on imported goods is the measure of excise duty payable on goods cleared by EOU to DTA and therefore they cannot be treated as goods actually manufactured in India. The deemed fiction has to be carried to Finance Act also. Further, we also find that Chapter 22 of CBEC provides that the measure of excise duty leviable on goods manufactured in EOU is worked out exactly in the same manner as applicable to imported goods. This also supports the view canvassed by the learned advocate.

69. As pointed out by the learned advocate, since the object was not to levy excise duty on goods cleared by EOU, the question of adding education cess under Section 93 of Finance Act after determination of aggregate of customs duties does not arise.

70. Now we come to the submissions made by Shri Ravindran, intervening on behalf of Godrej Industries Ltd. The conclusions submitted by Shri Ravindran have been reproduced in para 23 onwards. According to him, education cess has to be added only at the aggregate level and not at the level of each type of duty. For this purpose it is his submission that what is levied is not a duty of customs but a duty of excise measured and only the measure is customs duty. There is no dispute about this contention. However, we are not convinced about the correctness of the calculation made by the learned advocate. As already observed by us with regard to the nature of education cess, it is a surcharge and is in the nature of enhancement by the quantum of education cess under Section 94 of Finance Act. Afterwards, to arrive at additional customs duty, what is required to be worked out is equallant excise duty levialbe. Therefore, since education cess enhances the quantum of excuse duty, additional customs duty at its own level has to be enhanced by the quantum of education cess. Since the aggregate of both the duties is again considered as customs duties in total, the addition of education cess again becomes necessary. Therefore, we do not find any logic in the submissions made by the learned advocate. Even though the contention that goods are manufactured in India is accepted, the fact

> remains that right from the inception of the 100% EOU scheme, the EOUs are treated differently as we have observed elsewhere. They are treated differently for various purposes under different provisions of excise law that being the position, only for the purpose of education cess, there cannot be a different treatment. Therefore what is required to be done is to calculate the aggregate of customs duties and thereafter apply it to 100% EOUs. Unless the calculation method adopted for arriving at aggregate of customs duties itself is challenged, which to our mind has not been done till now, challenging the same on other grounds does not appeal to us. As regards the submission that there is no specific exclusion of CVD in the provisions relating to education cess as compared with Section 3 of Customs Tariff Act, it is well accepted that additional customs duty is levied after calculating the excise duty leviable on like goods manufactured in India. This is the logic for levy of education cess separately on CVD while calculating customs duties.

6. We find that the above decision has been followed in many cases. Accordingly, we hold that the issue is no longer res integra and the impugned order is liable to be set aside. We do so and the appeal the allowed.

(Order pronounced in the open court on 13/11/2025)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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