CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

Appeal Nos.E/313 to 319/2012

[Arising out of Order-in-Appeal No.10 to 16/2012-C.Ex dt. 24.02.2012 passed by Commissioner of Customs & Central Excise (Appeals), Salem]

Dunsandale Tea Factory | Appellant

Versus

Commissioner of Central Excise, Salem | Respondent

Appearance :

Shri K. Sankaranarayanan, Advocate
For the Appellant

Shri K .Veerabhadra Reddy, ADC (AR)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi, C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing : 24.08.2018
Date of Pronouncement: 02.11.2018

FINAL ORDER No. 42752-42758 / 2018

Per Bench

All these appeals since relating to the identical issue, are taken up for common disposal.

2. The facts of the matter are that the appellants are engaged in manufacture of Tea classifiable under Chapter Heading 0902 4040 of the Central Excise Tariff Act, 1985. The tea is exempt from payment of excise duty under Sl.No.2 of Notification No.11/2006 dt. 1.3.2006. However, cess under Tea Act, 1953 is levied and collected as duty of excise as per section 25 of the Tea Act, 1953. The appellants exported tea under bond under Rule 19 of the Central Excise Rules without payment of any duty. However, department took the view that even for export under bond, cess as applicable was payable by the appellants. Accordingly, show cause notices were issued demanding Tea cess with interest on the grounds that exemption from payment of cess is applicable only to 100% EOU. After due process of law, the original adjudicating authorities *inter alia*, confirmed various amounts of Tea cess with interest as proposed in the corresponding SCNs. In appeal, the Commissioner (Appeals) vide common impugned order upheld the orders of original authority and rejected the appeal. Hence appellants are before this forum.

3. When the matter came up for hearing, on behalf of the appellants Ld. Advocate Shri K. Sankaranarayanan made various oral and written submissions which can be broadly summarized as under :

i) Under Rule 19 of the Central Excise Rules any excisable goods may be exported without payment of duty from a factory of the producer or the manufacturer under sub rule 3 of Rule 19. Notification No.42/2001 CE (NT) dt.26.06.2001 had been issued which specified procedure for export under bond without payment of duty.

ii) Tea cess is nothing but duty of excise and therefore as per Rule 19 (1) the goods under export are not required to pay any duties including Tea Cess.

iii) The Ld. Advocate draws our attention to Section 25 (1) of the Tea Act, 1953 which lays down that cess is collected as duty of excise. Section 25 (2) of the same Act further clarifies that duty of excise levied under sub-section 25 (1) is an addition to duty of excise leviable on tea under the Central Excise and Salt Act, 1944 or any other law for the time being in force. Hence by fiction of law, duty of excise is collected which is an additional duty of excise collected under the Central Excise Act, 1944.

iv) For these reasons, when tea is manufactured and exported both Central Excise duty that may be otherwise leviable as also cess which is collected as duty of excise will be not be required to be paid in view of the provisions of Rule 19 (1) of the Central Excise Rules.

v) The CBEC had issued amendment notification No.6/2004-CE (NT) dt. 10.08.2004 and substituted Explanation III in principle notification No.42/2001-CE (NT). As per the substituted Explanation III, "duty" was clarified to mean duty of excise collected, not only under Central Excise Act, 1944, but also, duties collected under seven other enactments have also been notified to be claimed as "duty of excise". Hence cess which is collected as duty of excise under Tea Act, 1953 is also duty of excise for the purpose of Notification No.42/2001-CE (NT) as amended . Both the lower adjudicating authority and the lower appellate authority have held that Tea Cess is exempt only for 100% EOU and hence appellants are not entitled to avail exemption. It is submitted that issue on hand is whether cess is payable on tea exported under bond under Rule 19 of CER 2001/2002 or Rule 13 of Central Excise Rules, 1944 or not. Hence observations of both the authorities are not relevant for adjudicating the case at hand.

vi) Ld. Advocate drew our attention to Section 37B Order No.60/1/2006-CX dt. 13.01.2006 wherein the Board referred to objections over non-payment/non-collection of some of the duties such as Additional Duty of Excise (AED) and Special Additional Excise Duty (SAED) on Motor Spirit, and High Speed Diesel and Education Cess and National Calamity Contingent Duty (NCCD) on various goods. To put an end to uncertainty for the trade and industry and to bring any clarity the Board for the purpose of uniformity with respect to levy of duties of excise ordered therein as per Rule 19 of the CER 2002, 19 of the CER 2001 and Rule 13 of the CER 1944, none of the duties is chargeable under any Act of Parliament which provides that in relation to levy and collection of such duty, the provisions of the Central Excise Act and the Rules made thereunder, shall as far as may be, apply or is payable on export of goods under bond. Apart from duties under the Central Excise Act, certain other duties of excise, NCCD, Education cess etc. have been given as examples. Accordingly, on this ground also, in the said 37B Order, the word 'inter alia' was used which means "among other things" Therefore although cess is collected as duty of excise it is not explicitly mentioned in the Section 37B Order and the substantive benefit normally available to exporter should not be denied.

vii) Ld. Advocate inter alia relies upon the ratio of the following decisions :

1) TVS Motor Co. Ltd. Vs Union of India
2015 (323) E.L.T. 57 (Kar.)
2) ITC Ltd. Vs CCE New Delhi
2004 (171) ELT 433 (SC)
3) UOI Vs Dharmendra Textile Processors
2008 (231) ELT 3 (SC)
4) TATA Consultancy Services Vs State of Andhra Pradesh
2004 (1780 ELT 22 (SC)

4. Ld. A.R Shri K. Veerabhadra Reddy supports the impugned order. He points out that against one Order-in-Appeal No.106/2006 dt. 31.05.2006, the appellants had filed Revision Application before the Ministry of Finance under Section 35EE of

the Act 1944 praying that Cess is also a duty and exempted for payment of export clearances. However, in the order passed by the Joint Secretary to Govt of India, it was pointed that while cess is exempted for Export Oriented Units (EOUs) exporting tea, in the absence of any notification exempting Tea cess for the goods exported, other than EOUs, no merit was found in the revision application and it was rejected. Ld. A.R also draws our attention to decision of Hon'ble Supreme Court in the case of *CCE Cochin Vs TATA Tea Ltd.* - 2002 (142) ELT 3 (SC) which had held that instant tea manufactured and exported by the unit is leviable for cess.

5. Heard both sides and have gone through the facts.

6.1 The issues that arises for consideration is whether the appellants on export of tea are required to discharge Tea Cess which is otherwise leviable under Section 25 of the Tea Act, 1953. The main grounds on which the lower authorities have held that cess is payable by the appellants on the exports are as under :

- Only tea produced and exported by EOUs are exempted from levy and collection of Cess
- Ld. AR has also drawn our attention to judgment of the apex court in TATA Tea 2002 (142) ELT 3 (SC) to support the stand of Revenue.

6.2 The lower authority has relied upon Board's Circular No.48/88-CX.8 dt. 12.9.1988 wherein it was clarified that export under bond only payments of cess under erstwhile Rule 12 / 13 of CER 1944 is not permissible which had inter alia clarified that export under bond without payment of Cess under Rule 13 would not be permissible. Lower authorities have also held that Section 37B Order of CBEC dt.13.1.2006 will not help the appellants to avoid payment of Cess on tea cleared for export.

6.3 With regard to the exemption extended to tea produced and exported by EOUs from levy and collection of Cess, we find that the exemption was brought about by Notification dt. 1.9.2004which was published in the Gazette of India Part-Ii Section 3 of 1st September 2004. In this regard, we find that the exports by EOUs are on different footing from export goods under bond by manufacturer / assessees in the DTA. For the latter, during the period of dispute, erstwhile provisions of Rule 19 of Central Excise Rules, 2002 would be applicable. Hence for these reasons we are of the firm conclusion that the exemption granted to EOUs vide the above notification cannot be used in support of proposition that by implication export made by DTA units will be exigible to Cess.

6.4 In our view, the Order No.60/1/06-CX dt. 13.1.2006 issued under Section 37B of the Central Excise Act, 1944 would have to be looked into for answers to the imbroglio. In the said Order, the Government in the first paragraph itself states that the orders instructions and directions in the Order have been issued for the purpose of uniformity with respect to levy of duties of excise of goods exported under bond under Rule 13 of the Central Excise Rules, 1944, Rule 19 of the CER 2005 and Rule 19 of the CER 2002. The order has taken note of demands being issued by field formations over non collection of some duties such as AED SED of motor spirit and HSD etc. For the sake of ready reference, the said Section 37B order is reproduced below :

"Export of goods under bond — Non levy of duties of Excise — Clarifications

Section 37B Order No.60/1/2006-CX., dated 13-1-2006

F.No.232/16/2004 (Part-II) CX.7

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

In exercise of the power conferred under section 37B of the Central Excise Act, 1944, the Central Board of Excise and Customs having been satisfied that it is necessary and expedient so to do for the purpose of uniformity with respect to levy of duties of excise on goods exported under bond under rule 13 of the Central Excise Rules, 1944, rule 19 of the Central Excise Rules, 2001 and rule 19 of the Central Excise Rules, 2002, issues following orders, instructions and directions:-

(i) As per rule 19 of the Central Excise Rules, 2002, any excisable goods may be exported without payment of duty under bond. Prior to coming into force of the Central Excise Rules, 2002, any excisable goods may be exported without payment of duty under bond. Prior to coming into force of the Central Excise Rules, 2002, rule 19 of the Central Excise Rules, 2001 and rule 13 of the Central Excise Rules, 1944, had similar provisions.

(ii) Apart from the duties chargeable under Central Excise Act, 1944, certain other duties of excise are chargeable under different Acts of Parliament. The relevant Acts explicitly stipulate that the provisions of the Central Excise Act and the rules made thereunder, including those relating to refunds and exemptions from duties, shall, as far as may be, apply in relation to the levy and collection of such other duties of excise as they apply in relation to the levy and collection of the duties of excise leviable under that Act or those rules, as they case may be.

(iii) Accordingly, none of the duties leviable under any such Act of Parliament is required to be paid on export of goods under bond under rule 19 of the Central Excise Rules, 2002 or rule 19 of the Central Excise Rules, 2001 or rule 13 of the Central Excise Rules, 1944.

(iv) A number of instructions and circulars, indicating the position as above have been issued by the Board from time to time in respect of various such duties brought in by various Acts from time to time. Some of such circulars are as follows :-

- Circular No.278/112/96-CX., dated 11-12-1996 (F.No.209/52/96-CX.6) [1997 (89) E.L.T.T25]
- Circular No.641/32/2002-CX., dated 26-6-2002 (F.No.209/44/96-CX.6) [2002 (143) E.L.T.T38]
- M.F. (D.R.) F.No.345/2/2004-TRU (Pt.), dated 10-9-2004 [2004 (171) E.L.T. T3]
- Circular No.807/4/2005-CX., dated 10-2-2005 (F.No.209/41/2004-CX.6) (Pt.II)] [20051(80) E.L.T.T23]

(v) Objections over non-payment /non-collection of some of the said duties, such as Additional Duty of Excise (AED) and Special Additional Excise Duty (SAED) on Motor Spirit (MS) and High Speed Diesel Oil (H.S.D.) and Education Cess and National Calamity Contingent Duty (NCCD) on various goods are still being raised and demands are being issued by the field formations in pursuance thereof or otherwise. This is causing hardship to the exporting community and may adversely affect country's exports. To put an end to the uncertainty for the trade and industry and to bring in clarity , the Board, for the purpose of uniformity with respect to levy of duties of excise, hereby orders that as per rule 19 of the Central Excise Rules, 2002, rule 19 of the Central Excise Rules, 2001 and rule 13 of the Central Excise Rules, 1944, none of the duties chargeable under any Act of Parliament which provides that in relation to levy and collection of such duty, the provisions of the Central Excise Act and the rules made thereunder, shall, as far as may be, apply; was/is payable on export of goods under bond. Such duties, *inter alia*, include the following :-

a. the Central Excise Act, 1944 (1 of 1944);

b. the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

c. the Additional Duties of Excise (Textile & Textile Articles) Act, 1978 (40 of 1978);

d. the Additional Duties of Excise as levied vide section 111 of the Finance Act, 1998 (21 of 1998) as amended by section 167 of the Finance Act, 2003 (32 of 2003);

e. the Additional Duties of Excise as levied vide section 133 of the Finance Act, 1999 (27 of 1999) as amended by section 168 of the Finance Act, 2003 (32 of 2003) read with Notification No.28/2002-C.E., dated 13-5-2002 as amended by Notification No.62/2002-C.E.,. dated 31-12-2002; No.16/2003-C.E., dated 1-3-2003 and No.12/2004-C.E., dated 4-2-2004;

f. the Special Additional Duties of Excise as levied vide section 147 of the Finance Act, 2002 (20 of 2002);

g. The National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), as amended by section 169 of the Finance Act, 2003 (32 of 2003) which was amended by section 3 of the Finance Act, 2004 (13 of 2004);

h. the Additional Duties of Excise as levied vide section 157 of the Finance Act, 2003 (32 of 2003);

i. the Education Cess as levied and collected under section 91 read with section 93 of the Finance (No.2) Act, 2004 (23 of 2004);

j. the Additional Duties of Excise as levied vide section 85 of the Finance Act, 2005 (18 of 2005);

k. any special excise duty collected under a Finance Act.

(vi) Accordingly, none of the duties leviable under any such Act of Parliament is required to be paid on export of goods under rule 19 of the Central Excise Rules, 2002, rule 19 of the Central Excise Rules, 2001,rule 13 of the Central Excise Rules, 1944.

(vii) Based on the above, pending cases may be disposed off. Past instructions, Circulars and Orders on the issue may be considered as suitably modified.

2. Suitable Trade Notice may be issued for the information and guidance of the trade.

3. Receipt of this order may please be acknowledged

4. Hindi version will follow”

6.5 It is seen that as per para (iii) of the aforesaid Order, none of the duties leviable under any such Act of Parliament is required to be paid on export of goods under bond. Tentative list of eleven such duties of Excise and Cesses are listed under para (v). Lower authority has interpreted the above Board’s Order to conclude that only Education Cess is not required to be paid on tea cleared for export, but that Tea Cess by itself is very much payable since there is no notification from the Ministry of Commerce exempting Tea Cess on tea exported. Ld. Adjudicating authority relied on earlier circular No.48/88-CX.8 dt. 12.09.1988 to buttress his stand.

6.6. We are not able to appreciate these conclusions. The Section 37B Order dt. 13.1.2006 clearly states that "*Past instructions, Circulars and Orders on the issue may be considered as suitably modified*". From the facts on record, there has been no instruction or order etc. issued earlier to 13.01.2006 to the effect that Tea Cess being duty of excise is required to be collected in respect of exports made by DTA units, such as the appellants. In any case, even if there had been any such instruction, that would obviously have got nullified by the said 37B order dated 13.01.2006. An argument has also been made by the lower authority that para (v) of Section 37B Order dt. 13.1.2006 does not specifically list or incorporate Tea Cess levied under Tea Act, 1953. In this regard, it is pertinent to note that the said para (v) has only given illustrative examples of various types of duties of excise and cesses that have been made leviable by an Act of Parliament. The wordings in the sentence immediately preceding this list, namely "*Such duties **inter alia, include** the following*" (emphasis added) only serves to indicate that the list is not exhaustive and is only to meant to give examples of some of the duties of excise and cess collected as duties of excise that would not be required to be paid at the time of export.

6.7 Further in para (vi) of Section 37B Order it is categorically ordered that none of the duties leviable under any such Act of parliament is required to be paid on export of goods inter alia under Rule 19 of the Central Excise Rules, 2002.

6.8 Viewed in this light, we are of the considered opinion that Tea Cess being collected as duty of excise as per Section 25 of the Tea Act, 1953, in view of Section

37B Order dt. 13.1.2006, cannot be collected in respect of exports under bond made by the appellants.

6.9 Ld. A.R has relied upon the Supreme Court judgement in *CCE Cochin Vs TATA Tea Ltd*. - 2002 (142) ELT 3 (SC). We however find that the Hon'ble Apex Court in the aforesaid judgement has predominately gone into the issue of whether instant tea is a variety of tea liable to cess. While holding that the manner of preparation of tea and the process of manufacture of 'instant tea powder' cannot take away 'instant tea" out of the definition of 'tea' under the Act, the Hon'ble Apex Court has held that the latter is also leviable for levy of cess under Section 25 of the said Act. Be that as it may, it has to be kept in mind that the said Supreme Court judgment of *TATA Tea Ltd*. (supra) was delivered on 2.5.2002, much before the issue of Section 37B Order dt. 13.1.2006. In our view, post-Section 37B order, there should not be any doubt or confusion that cess under Section 25 of the Tea Act 1953 is not required to be paid in respect of exports under bond by DTA units, like the appellants.

6.10 In passing, we also note that in respect of another tea factory of the very same appellants, in another location but falling within the same Coimbatore Commissionerate, proceedings initiated vide SCN dt. 1.12.2005 proposing demand of cess on tea exported and educational cess payable on such tea cess, was dropped by the adjudicating authority vide Order-In-Original No.20/2006 dt, 27.03.2006. While arriving at that conclusion, the adjudicating authority has relied upon the aforesaid Section 37B Order dt. 13.1.2006. From the facts on record, it does not appear that the said adjudication order passed by the same Commissionerate in respect of the same appellants herein has been appealed against by the department. The Hon'ble Supreme Court in the case of *Marsons Fan Industries Vs CCE Calcutta* 2008 (225)ELT 334 (SC) has inter alia held that department accepting its earlier order pertaining to the same assessee has attained finality. The relevant portion of the said judgement is reproduced as under :

> "**3.** Mr. Joseph Vellapally, learned senior counsel appearing for the appellant has brought to our notice that in a case pertaining to earlier period from February 1982 to December 1982 of the assessee, the Collector (very same officer) in Order (Original) No. 61 (30-D) 87-Collr. 57/89, dated 21st July 1989 took the view that rotors and stators were incomplete and were unfinished goods not known in the market as stators and rotors. He also states that the subsequent order dated 21st July 1989 was brought to the notice of the Tribunal but the Tribunal did not take note of it. In support of his assertion, learned senior counsel has filed an affidavit of the counsel who had appeared for the assessee before the Tribunal. He further states that the Department has accepted the subsequent decision dated 21st July 1989 for the period February 1982 to December 1982. He submits that in view of the fact that the Department has accepted the subsequent decision dated 21st July 1989 in which it has been held that the rotors and stators in the form in which they are cleared from the appellant's factory are not finished goods and, therefore, not exigible to the levy of excise duty, the present appeal be accepted and the impugned order be set aside.
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> **4.** Learned senior counsel for the Department, after taking instructions, very fairly submits that the Department has accepted the decision dated 21st July 1989 and the same has attained finality.
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> **5.** Keeping in view the fact that the Department has accepted the decision dated 21st July 1989 pertaining to the assessee itself on the similar goods, we accept this appeal and set aside the order of the Tribunal and hold that the rotors and stators which were cleared by the appellant were not finished goods and were, therefore, not exigible to the levy of excise duty for the relevant period."

6.11 We find that the ratio of the *Marsons Fan Industries* (supra) is applicable on all fours to the facts of the present appeal.

7. In view of the discussions, findings and conclusions herein above, we hold that the impugned Order-in-Appeal in respect of all these appeals cannot be sustained and will require to be set aside, which we hereby do. All the appeals are therefore allowed with consequential benefits, if any, as per law.

(Order pronounced in Court on 02.11.2018)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi, C.S)
Member (Judicial)

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