

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH-COURT No. III

**Excise Miscellaneous Application No. 40196/2024
&
Excise Appeal No. 40002 of 2015**

(Arising out of Order-in-Original No. 44/2014 dated 23/30.09.2014
passed by Commissioner of Central Excise, Chennai II)

Birla Carbon India Pvt. Ltd.,
K-16, Phase II Hi-Tech Carbon, Gummidipoondi,
SIPCOT Industrial Complex, Gummidipoondi,
Thiruvallur, Tamil Nadu – 601 201.

... Appellant

VERSUS

The Commissioner of Central Excise
Chennai II Commissionerate,
MHU Complex, Nandanam,
Chennai – 600035.

... Respondent

APPEARANCE :

Ms. Charulatha Rajaji, Advocate, for the Appellant
Shri. Anoop Singh, Authorised Representative for the Respondent

CORAM :

**HON'BLE MS. SULEKHA BEEVI.C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)**

FINAL ORDER No. 40499/2024

DATE OF HEARING: 16.04.2024
DATE OF DECISION: 26.04.2024

Per Ms. Sulekha Beevi. C.S

Brief facts are that the appellant is engaged in manufacture of "carbon black" and cleared the same on payment of Central Excise duty. They are registered with the department and are availing the facility of Cenvat Credit on inputs. It was noted by the department that the appellant has availed Cenvat Credit of Basic Excise Duty and utilized the same for payment of Education Cess and Secondary/Higher Education

Cess for the period from April 2013 to January 2014 which according to department is against the provisions of Cenvat Credit Rules, 2004. Show cause notice dated 15.04.2014 was issued to the appellant proposing to recover the wrongly utilized credit along with interest and also for imposing penalty. After due process of law the original authority confirmed the demand along with interest and imposed the penalty of Rs.1,00,00,000/- (Rupees one crore only) under Rule 15 (1) of Cenvat Credit Rules, 2004. Aggrieved by such order the appellant has filed the present appeal.

2. The Ld. Counsel Ms. Charulatha Rajaji, appeared and argued for the appellant. It is submitted that the case of the department is that appellant wrongly utilized Cenvat Credit availed on Basic Excise Duty (BED) for payment of EC and SHEC in violation of Rule 3 (7)(b) of Cenvat Credit Rules, 2004. It is explained by the Ld. Counsel that in terms of Rule 3 of Cenvat Credit Rules, 2004 a manufacturer or producer of final products or a provider of output service is allowed to take credit of duty of excise specified in the First schedule in the Excise Tariff Act leviable under the Excise Act. As per Rule 3 (4) of Cenvat Credit Rules, 2004, the Cenvat Credit may be utilized for payment of any duty of Excise on any final product. It is pointed out by Ld. Counsel that Rule 3 (4) uses the words 'any duty of Excise'. The credit availed being on Basic Excise Duty the department cannot allege that the appellant has wrongly utilized the credit for payment of Education Cess / Secondary Higher Education Cess.

3. Ld. Counsel submitted that the very same issue has been considered and decided by the Tribunal in the case of M/s. Vendanta

Ltd., Vs CCE, Tirunelveli 2018 (7) TMI 158 CESTAT Chennai. The Tribunal in the said case relied upon the decisions of the Hon'ble High Court of Gujarat in the case of CCE Vs. Madhura Industries Textiles 2012 (TIOL) 1094 HC AHM – CX. A similar view was taken by the Hon'ble High Court of Guwahati in the case of UOI Vs. Kamakya Cosmetics and Pharmaceuticals Pvt. Ltd., 2015 (323) ELT (33) (Gau), Dharampal Satyapal Ltd., Vs CCE, Delhi I, dated 21.04.2005, CCE Dibrugarh Vs. Prag Bomsimi Synthetics Ltd., 2013(295) ELT 682 (Gau). The Ld. Counsel prayed that the appeal may be allowed.

4. Ld. AR Shri. Anoop Singh appeared and argued for the department. The relevant provisions contained in Cenvat Credit Rules was adverted to by the LR AR which is reproduced as under:-

RULE 3. CENVAT credit. — (1) A manufacturer or producer of final products or a [provider of output 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 :

[Provided that CENVAT credit of such duty of excise shall not be allowed to be taken when paid on any goods –

(a) in respect of which the benefit of an exemption under Notification No. 1/2011-C.E., dated the 1st March, 2011 is availed; or

(b) specified in serial numbers 67 and 128 in respect of which the benefit of an exemption under Notification No. 12/2012-C.E., dated the 17th March, 2012 is availed;]

(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);]

4.1 It is submitted that the appellant as a manufacturer has availed Cenvat Credit of the Basic Excise Duty. Though there is no error in the credit availed, the appellant cannot utilize the credit availed on Basic Excise Duty for payment of Education Cess and Secondary / Higher Education Cess. This is because Rule 3(4) says that the credit availed can be utilized for payment of 'any duty of excise'. Education Cess and Secondary /Higher Education Cess are not duties of excise levied under Central Excise Act, 1944. Section 2(A) of Central Excise Act 1944 reads as under:-

8 [2A. References of certain expressions.— In this Act, save as otherwise expressly provided and unless the context otherwise requires, references to the expressions "duty", "duties", "duty of excise" and "duties of excise" shall be construed to include a reference to "Central Value Added Tax (CENVAT)".]

5. It is argued by the LR. AR that the credit availed on Basic Excise Duty cannot be utilized for payment of EC and SHEC for the reason that these Cesses are not levied or collected under the Central Excise Act 1944. These Cesses do not fall under category of "duty of Excise" mentioned in Section 2 (A) of Central Excise Act 1944. The words "same as otherwise expressly provided and unless the context

otherwise require" used in Rule 2A has to be read along with Sub Rule (4) of Rule 3 of Cenvat Credit Rules, 2004. It has been mentioned in clause (a) of Rule 4 of CCR, 2004 as "any duty of Excise" on final product. Whereas, in clause (b) and clause (c) the word CENVAT is expressly mentioned. Similarly in clause (b) of Sub Rule 7 to Rule 3 of Cenvat Credit Rules, 2004 the words "duty, Education Cess and Secondary Higher Education Cess" has been mentioned separately.

6. The charging Section for levy of duty is Section 3 of Central Excise Act 1944. It reads as "duties specified in the first schedule and second schedule in the Central Excise Tariff Act 1985 to be levied". The expression, duty, duties, duty of excise and duties of excise shall be same as otherwise expressly provided in the Central Excise Act 1944 and unless the context otherwise requires, be construed to include the reference to the special duty of excise specified in the second schedule of the Central Excise Tariff Act 1985. Section 3 says that there shall be levied and collected in such manner as may be prescribed.

7. In terms of Section 3 (a) "duty of Excise" is to be called as Central Value Added Tax (CENVAT) on all excisable goods which are produced or manufactured in India as and at the rates set forth in the first schedule of CETA 1985. In terms of Section 3 (b), a special duty of excise is levied in addition to the duty of excise specified in clause (a) above, and all excisable goods specified in the second schedule of CETA 1985, which are produced or manufactured in India as and at the Rates set forth in the second schedule of CETA 1985.

8. The Ld. AR argued that Section 3 and Section 2A cannot be

treated as conjoined and are not at par. Further, the issue is not availment of credit but utilization of credit of Basic Excise Duty for payment of EC and SHEC.

9. It is submitted that EC and SHEC are levied under Section 91 of Finance Act 2004 and Section 136 of Finance Act 2007 respectively. Therefore these cesses are not duty of excise levied under Section 3 (1) of CEA 1944.

10. The relevant Section 91 and 93 of Finance Act 2004 and 2007 under which Education Cess is levied, read as under:

91. Education Cess-(1) Without prejudice to the provisions of subsection (11) of [Section 2](#), there shall be levied and collected, in accordance with the provisions of this Chapter as surcharge for purposes of the Union, a cess to be called the Education Cess, to fulfil the commitment of the Government to provide and finance universalised quality basic education.

(2) The Central Government may, after due appropriation made by Parliament by law in this behalf, utilise, such sums of money of the Education Cess levied under Sub-section (11) of [Section 2](#) and this Chapter for the purposes specified in Sub-section (1), as it may consider necessary.

93. Education Cess on excisable goods.- (1) The Education Cess levied under [Section 91](#), in the case of goods specified in the [First Schedule to the Central Excise Tariff Act, 1985](#) (5 of 1986), being goods manufactured or produced, shall be a duty of excise (in this section referred to as the Education Cess on excisable goods), at the rate of two per cent, calculated on the aggregate of all duties of excise (including special duty of excise or any other duty of excise but excluding Education Cess on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under the provisions of the [Central Excise Act, 1944](#) (1 of 1944) or under any other law for the time being in force.

(2) The Education Cess on excisable goods shall be in addition to any other duties of excise chargeable on such goods, under the [Central Excise Act, 1944](#) (1 of 1944) or any other law for the time being in force.

(3) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Education Cess on excisable goods as they apply in relation to the levy and collection of the duties of excise on such goods under the Central Excise Act, 1944 or the rules, as the case may be.

11. The Ld. AR emphasized much on Rule 3 (7)(b) of CCR 2004. Rule 3 (7)(b) of CCR 2004 reads as under :-

RULE 3. CENVAT credit

(7) Notwithstanding anything contained in sub-rule (1) [, sub-rule (1a)] and sub-rule (4)

[(b) CENVAT credit in respect of -

(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);

(ii) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001);

(iii) the education cess on excisable goods leviable under section 91 read with section 93 of the Finance (No. 2) Act, 2004 (23 of 2004);

[(iiia) 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);]

(iv) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under items (i), (ii) and (iii) above;

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

(vi) the education cess on taxable services leviable under section 91 read with section 95 of the Finance (No. 2) Act, 2004 (23 of 2004);

[(via) 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]

(vii) the additional duty of excise leviable under [section 85 of the Finance Act, 2005 (18 of 2005)], **[shall be utilised towards payment of duty of excise or as the case may be,** of service tax leviable under the said Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 or the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), **or the education cess on excisable goods leviable under section 91 read with section 93 of the said Finance (No. 2) Act, 2004 (23 of 2004), or 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)** or the additional duty of excise leviable under section 157 of the Finance Act, 2003 (32 of 2003), or the education cess on taxable services leviable under section 91 read with section 95 of the said Finance (No. 2) Act, 2004 (23 of 2004), or 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), or the additional duty of excise leviable under section 85 of the Finance Act, 2005 (18 of 2005) **respectively,** on any final products manufactured by the manufacturer or for payment of such duty on inputs themselves, if such inputs are removed as such or after being partially processed or on any output service

11.1 The Ld. AR stressed that as per the above rule the Basic Excise Duty which is levied under CEA cannot be utilized for payment of EC

and SHEC which though are duty of excise but are levied under Finance Act 2004 and 2007 respectively, and not under Central Excise Act, 1944.

12. The decision in the case of M/s. Unicorn Industries Vs. UOI - 2019 (12) TMI 286 SC was relied to support the above arguments. The relevant paras of the said judgment adverted to by the Ld. AR are reproduced as below:

13. Learned counsel appearing on behalf of the appellant submitted that NCCD, education cess, and secondary and higher education cess form part of the excise duty. Hence, the decision of the High Court is bad in law. Reliance has been placed on [SRD Nutrients Private Limited v. Commissioner of Central Excise, Guwahati](#), (2018) 1 SCC 105 and the decision of this Court in [Bajaj Auto Limited v. Union of India & others](#), 2019 SCC OnLine SC 421, decided on 27.3.2019. It is submitted that the education cess was introduced by [Sections 91 and 93](#) of the Finance Act, 2004 and higher education cess by the [Finance Act, 2007](#) and the NCCD was imposed under [Section 136](#) of the Finance Act, 2001. The imposition is in the nature of a duty of excise and in addition to any other duty of excise chargeable under the [Central Excise Act, 1944](#) ('the Act of 1944'). It is further provided that the provisions of the Act of 1944 and Rules made thereunder relating to refunds and exemptions from duties and imposition of penalty, shall, as far as may be, apply with respect to the abovementioned duties in question. Reliance has also been placed on circulars dated 10.8.2004 and 8.4.2011, issued by Central Board of Excise and Customs, on the subject of education cess and secondary and higher education cess.

37. This Court in [Modi Rubber Limited](#) (supra) further considered the question when the notification issued on 1.8.1974, there was no special duty of excise leviable on tyres, it came to be introduced in 1978 under various Finance Acts. It was held that the notification could not be read as comprehending the special duty of excise on the date of the notification and came to be levied four years later. This

Court also laid down that the presumption is that when the Central Government issues a notification granting exemption from payment of excise duty under Rule 8(1) of Rules of 1944, the Central Government would have considered whether exemption should be granted and if so, to what extent and can only be with reference to the duty of excise which is then leviable, not a duty to be imposed in future. This Court in *Modi Rubber Limited* (supra) strongly repelled the argument that it would cover the duties to be imposed in the future not prevailing at the relevant time thus:

"8. Moreover, at the date when the first notification was issued, namely, August 1, 1974, there was no special duty of excise leviable on tyres. It came to be levied on tyres with effect from the financial year 1978 under various Finance Acts enacted from year to year. It is therefore difficult to understand how the expression "duty of excise" in the notification dated August 1, 1974 could possibly be read as comprehending special duty of excise which did not exist at the date of this notification and came to be levied almost four years later. When special duty of excise was not in existence at the date of this notification, how could the Central Government, in issuing this notification, have intended to grant exemption from payment of special excise duty? The presumption is that when a notification granting exemption from payment of excise duty is issued by the Central Government under Rule 8(1), the Central Government would have applied its mind to the question whether exemption should be granted and if so, to what extent. And obviously, that can only be with reference to the duty of excise, which is then leviable. The Central Government could not be presumed to have projected its mind into the future and granted exemption in respect of excise duty which may be levied in the future, without considering the nature and extent of such duty and the object and purpose for which such levy may be made and without taking into account the situation which may be prevailing then. It is only when a new duty of excise is levied, whether special duty of excise or auxiliary duty of excise or any other kind of duty of excise, that a question could arise whether any particular article should be exempted from payment of such duty of excise and the Central Government would then have to apply its mind to this question and having regard to the nature and extent of such duty of excise and the object and purpose for which it is levied and the economic situation including supply and demand position then prevailing, decide whether exemption from payment of such

excise duty should be granted and if so, to what extent. It would be absurd to suggest that by issuing the notification dated August 1, 1974 the Central Government intended to grant exemption not only in respect of excise duty then prevailing but also in respect of all future duties of excise which may be levied from time to time."

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. 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 Co ordinate 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.

(emphasis supplied)

The Ld. AR prayed that the appeal may be dismissed.

13. Heard both sides.

14. The issue to be decided is whether CENVAT Credit availed of the Basic Excise Duty can be utilized for payment of Education Cess and Secondary Higher Education Cess.

15. The very same issue was considered by Tribunal in the case of M/s. Vedanta Ltd., (supra) and the Tribunal held that the demand confirmed alleging that the appellant cannot utilize the credit availed on Basic Excise Duty for discharging Education Cess and Secondary Higher Education Cess cannot be sustained. In the said case the Tribunal followed various decisions in which Rule 3 (7)(b) of Cenvat Credit Rule

was also analysed. In the case of Prag Bosimi Synthetics Ltd. (supra), the Hon'ble Guwahati High Court considered the issue in detail as to whether National Calamity Contingent Duty (NCCD) is a duty exempted under Notification No.32/99 - CE dated 08.07.1999 and if not whether CENVAT credit availed under Cenvat Credit Rules, 2004 can be utilized for payment of such duty which is not exempted under such Notification.

15.1 Hon'ble High Court held that NCCD is nothing but a duty of Excise and in para 8 of the said judgment the question whether the CENVAT credit can be utilized for payment of NCCD was discussed and held in favour of assessee. The relevant paragraph reads as under:-

8. *The second part of the substantial question of law would now arise, namely, whether CENVAT credit can be utilized towards payment of NCC duty under the CENVAT Credit Rules.*

9. *In this regard it is necessary to go through the CENVAT Credit Rules, particularly Rule 3(4) and Rule 3(7) thereof.*

10. *Rule 3(1) provides that a manufacturer or producer of a final product shall be allowed to take CENVAT credit of the NCC duty leviable under Section 136 of the Finance Act, 2001. To this extent there is no dispute between the parties.*

11. *Rule 3(4) of the CENVAT Credit Rules is important and this reads as follows :*

(4) The CENVAT credit may be utilized for payment of -

(a) any duty of excise on any final product; or

(b) an amount equal to CENVAT credit taken on inputs if such inputs are removed as such or after being partially processed; or

(c) an amount equal to the CENVAT credit taken on capital goods if such capital goods are removed as such; or

(d) an amount under sub-rule (2) of rule 16 of Central Excise Rules, 2002; or

(e) service tax on any output service :

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Provided that while paying duty of excise or service tax, as the case may be, the CENVAT credit shall be utilized only to the extent such credit is available on the last day of the month or quarter, as the case may be, for payment of duty or tax relating to that month or the quarter, as the case may be :

Provided further that the CENVAT credit of the duty, or service tax, paid on the inputs, or input services, used in the manufacture of final products cleared after availing of the exemption under the following notifications of Government of India in the Ministry of Finance (Department of Revenue), -

(i) No. 32/99-Central Excise, dated the 8th July, 1999 [G.S.R. 508(E), dated 8th July, 1999];

(ii) No. 33/99-Central Excise, dated the 8th July, 1999 [G.S.R. 509(E), dated 8th July, 1999];

(iii) No. 39/2001-Central Excise, dated the 31st July, 2001 [G.S.R. 565 (E), dated the 31st July, 2001];

(iv) No. 56/2002-Central Excise, dated the 14th November, 2002 [G.S.R. 764(E), dated the 14th November, 2002];

(v) No. 57/2002-Central Excise, dated 14th November, 2002 [G.S.R. 765(E), dated the 14th November, 2002];

(vi) No. 56/2003-Central Excise, dated the 25th June, 2003 [G.S.R. 513 (E), dated the 25th June, 2003]; and

(vii) No. 71/2003-Central Excise, dated the 9th September, 2003 [G.S.R. 717(E), dated the 9th September, 2003],

shall, respectively, be utilized only for payment of duty on final products, in respect of which exemption under the said respective notifications is availed of.

Rule 3(4) provides that CENVAT credit may be utilized, inter alia, for payment of any duty of excise on any final product. To this extent also there is no dispute between the parties. However, what is of importance is the second proviso to Rule 3(4) of the CENVAT Credit Rules. This provides that the CENVAT credit of duty paid on inputs used in the manufacture of a final product cleared after availing of the exemption under Notification No. 32/99-C.E. shall be utilized only for payment of duty on the final product in respect of which exemption under the said notification is availed of. It is clear from this that CENVAT credit of duty paid on inputs shall be utilized only for payment of duty on the final product for which exemption is availed.

12. *Rule 3(7) is equally important and this reads as follows :*

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

(a)

(b) CENVAT credit in respect of, -

(i)

(ii) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001);

(iii)

(iv)

(v)

(vi)

shall be utilized only towards payment of the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001, respectively, on any final products manufactured by the manufacturer

(words not necessary are deleted)

Rule 3(7) provides that notwithstanding anything contained in sub-rule (1) and sub-rule (4), CENVAT credit in respect of NCC duty shall be utilized only towards payment of the NCC duty under Section 136 of the Finance Act, 2001 on any final product manufactured by the manufacturer.

13. Insofar as the assessee is concerned the contention urged was that CENVAT credit in respect of NCC duty can be utilized only for payment of NCC duty. But this does not mean that CENVAT credit on basic excise duty cannot be utilized for payment of NCC duty on the final product. Simply put, the contention is that payment of NCC duty through utilization of CENVAT credit on basic excise duty is not prohibited. The question is whether this is permissible or not. According to the Revenue, CENVAT credit on NCC duty can be utilized only for paying NCC duty and CENVAT credit on basic excise duty cannot be utilized for paying NCC duty.

14. On the above broad facts, the matter was adjudicated before the Commissioner of Central Excise at Dibrugarh and he came to the conclusion that CENVAT credit of duty paid on inputs can be utilized only for payment of duty on the final product as per the second proviso to Rule 3(4) but CENVAT credit on any other duty could not be utilized for payment of NCC duty. Accordingly, the said Commissioner confirmed the demand of ` 82,07,125/- and passed an order for recovery of NCC duty from the assessee.

15. Feeling aggrieved, the assessee preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal at Kolkata. The appeal filed by the assessee was registered as Excise Appeal EDM 648/2006. The CESTAT noticed the provisions of Rule 3(4) as well as the provisions of Rule 3(7) of the CENVAT Credit Rules and held that though credit of NCC duty could be utilized for paying NCC duty only, the restriction would not extend to utilization of credit of duty which is not specifically listed in Rule 3(7). The corollary to this argument is that since credit on basic excise duty is not mentioned in Rule 3(7), CENVAT credit on basic excise duty could be utilized for payment of NCC duty.

16. *We are in agreement with the view expressed by the CESTAT. In terms of Rule 3(1) a manufacturer or producer of a final product is allowed to take CENVAT credit of NCC duty. Since NCC duty is admittedly a duty of excise, Rule 3(4) provides that CENVAT credit may be utilized for payment of any duty of excise on any final product. Therefore, CENVAT credit of NCC duty may also be utilized for payment of any duty of excise on any final product in terms of Rule 3(4) subject to Rule 3(7).*

17. *Rule 3(7) limits the utilization of CENVAT credit in respect of NCC duty as also other duties mentioned in Rule 3(7)(b). It provides that CENVAT credit in respect of NCC duty and other duties shall be utilized towards payment of duty of excise leviable under various statutes respectively. The use of the word "respectively" in this regard is important inasmuch as it confines the utilization of CENVAT credit obtained to a particular statute and for utilization for payment of duty under that statute only. The converse, however, does not follow. That is to say that merely because CENVAT credit in respect of NCC duty can be utilized only for payment of NCC duty, it does not follow that any other credit of duty cannot be utilized for payment of NCC duty.*

18. *This being the position, in our opinion the Commissioner of Central Excise at Dibrugarh was in error in coming to the conclusion that CENVAT credit of basic excise duty cannot be utilized for payment of NCC duty on the final product.*

19. *Under the circumstances the second part of the substantial question of law must be answered in the affirmative and it must be held that while CENVAT credit of NCC duty can be utilized under the CENVAT Credit Rules only towards payment of such NCC duty, CENVAT credit obtained from other sources can be utilized for payment of NCC duty on the final product.*

20. *The reference is answered accordingly.*

21. *We may note that a preliminary objection was raised about the maintainability of the appeal, but in the view that we have taken, it is not necessary to decide that issue.*

15.2 The adjudicating authority as well as the Ld. AR has much emphasized on the word "respectively" used in the Rule 3 (7) (b) of Cenvat Credit Rules, 2004. In para 17 of the above judgment, Hon'ble High Court categorically held that the said provision does not bar the utilization of credit of duty for payment of NCCD. The issue being identical argument of department that Rule 3(7) (b) uses the word 'respectively' and therefore there is a bar to use the credit availed for Basic Excise Duty for payment of Education Cess / Secondary Higher

Education Cess cannot be accepted. The Ld. AR has relied upon the decision in the case of M/s. Unicorn Industries (supra). The Hon'ble Supreme Court in the said judgment was analyzing an area based exemption notification and the issue was not with regard to availment of credit. The Hon'ble Supreme Court in para 40 of the said judgment in the case Unicorn Industries has observed that 'the duty on NCCD, Education Cess and Secondary Higher Education Cess are in the nature of additional Excise duty and it would not mean that the area based exemption Notification dated 09.09.2003 would be applicable to these duties (NCCD), particularly, when there is no reference to the Notification issued under Finance Act 2001. The relevant paragraph reads as under:-

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 threeJudge Bench of this Court in [Modi Rubber Limited](#) (supra), which has been followed by another threeJudge Bench of this Court in [Rita Textiles Private Limited](#) (supra).

15.3 It can be seen that in the case of M/s Unicorn Industries, the issue under consideration was whether, the exemption granted by Notification No.71/2003 – CE dated 09.09.2003 (which is an area-based exemption for north-eastern states) would also apply to NCCD which is in the nature of a duty of excise. The Hon'ble Apex Court followed the view taken in Modi Rubber Limited 1986 (25) ELT 849 S.C and held that when a particular kind of duty is exempted, other types of levy of duty or Cess imposed by different legislation for a different purpose do not get automatically exempted. It is to be noted that exemption granted by the above notification is by which the excise duty has to be paid by assessee and thereafter refund claimed. The issue here is not eligibility of exemption from duty, but utilizing the credit availed for payment of Cess which is imposed by a different legislation and not Central Excise Act, 1944. Need less to say, Cenvat Credit Rules, is the law which comprehensively deals with availment of credit and utilization of

credit. These Rules provide for availment and utilization of credit on excise duty, additional excise duty imposed under other legislations / notifications and cess, surcharge etc imposed vide various notification. These Rules cannot be interpreted to be applicable only within the frame work of Central Excise Act, 1944. The imposition of cess is in the nature of duty of excise. The notification also provides that the provisions of Central Excise Act, 1944 and Rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall be applicable to Cess.

15.4 The Ld. Counsel for appellant has countered the arguments advanced by the Ld. AR relying on the decision in the case of M/s. Unicorn Industries (supra) by taking assistance of the decision of the jurisdictional Hon'ble High Court in the case of KTV Health Food Pvt. Ltd., Vs. Commissioner of Customs (Preventive), Trichirapalli - 2022 (381) ELT 66 (Madras). In the said case though the petitioner had paid the entire duty to the extent of Rs.22,88,86,212/- which includes the Education Cess of Rs.66,66,582/- by using MEIS Scrips, the department by order in original dated 16.06.2020 held that the Education Cess stands unpaid as it cannot be paid through MEIS Scrips. The department thus was of the view that though Customs duty can be paid through MEIS Scrips, the Cess cannot be paid through such Scrips and has to be paid by way of cash only. The department sought to deny the payment of Cess made through MEIS Scrips by relying on the above decision of Hon'ble Apex Court in the case of M/s. Unicorn Industries Ltd. The Hon'ble jurisdictional High Court held that the Education Cess / Secondary Higher Education Cess being duty of Excise, there is no bar in

making the payment of above Cess through MEIS Scrips which is in accordance with the Board's Circular No.02/2020 dated 10.01.2020. The relevant part of the decision of Hon'ble jurisdictional High Court is reproduced as under:-

18. Insofar as the factual matrix as has been projected by the petitioner is concerned, there could be no much controversy, as the petitioner had imported RBD Palmolein under 10 warehouse bills of entry and 52 bills of entry, for which, whatever the duty imposed against him had been paid, of course, by using the scrips issued under MEIS. This is an acceptable method for debiting the duty by using the credit scrips under MEIS. While paying such duty, using the scrips, the petitioner had paid the entire duty, which includes the education, secondary education or higher education cess to the total amount of Rs. 22,88,86,212/-, that was accepted and the clearance of the goods had also been given by the Customs. Subsequently, the Customs department has come forward to issue a show cause notice on the ground that, while paying the duty by using the scrips, the petitioner also paid the education cess to the tune of Rs. 66,66,582/-. That kind of payment for other heads other than the duty or additional duty of customs cannot be paid through MEIS scrips. Therefore, insofar as the said amount is concerned, that was demanded with interest and also it was proposed to impose the penalty under Section 117 of the Customs Act. This is how the show cause notice was issued on 19-11-2019, which was responded by the petitioner on 2-12-2019, where the petitioner by citing Circular No. 2/2020, dated 10-1-2020, has sought for the benefit especially, in the context of clause 11 referred to above.

19. When that was considered, the Customs department has come to a conclusion that, if at all any duty or additional duty had been paid using scrips that could be accepted as a payment of the revenue and insofar as the other payments like the education cess or higher education or secondary education cess are concerned, the same cannot be treated as form part of the customs duty or additional customs duty. Therefore, since it is a different component, that kind of benefit under Clause 11 of Circular No. 2/2020, cannot be extended to the petitioner.

20. In aid of the said decision taken, the Customs department has heavily relied upon the decision in Unicorn Industries case, cited supra. The relevant portion of the Unicorn Industries case has already been quoted above, where the issue was, the assessee sought for exemption under Notification No. 71/2003 of Central Excise. While deciding the same, the Hon'ble Supreme Court has made it clear that the notification dated 9-9-2003, issued in that case made it clear that exemption was granted under Section 5A of the 1944 Act, concerning additional duties under the Act of 1957 and the additional duties of excise under the Act of 1978. It was further held in that judgment that, since there has been no reference to the Finance Act, 2001 by which NCCD was imposed and the Finance Acts of 2004 and 2007 were not in vogue.

21. Therefore, the Hon'ble Supreme Court has negated the plea raised therein in the said Unicorn Industries case, for the specific reason that, since the Finance Act, 2004 and 2007 are post Notification No. 71/2003, Central Excise regime, therefore, that kind of benefit unless and until is specifically included in the notification, such kind of benefit cannot be expected and therefore, it was negated.

22. Here in the case in hand, it is no doubt that, the exemption Notification No. 24/2015 is dated 8-4-2015 i.e., well after the Finance Act, 2004 and 2007. In the 2004 Finance Act, Section 91 deals with education cess and Section 93 made it clear that, the education cess levied under Section 91 in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985, being goods manufactured or produced, shall be a duty of excise. Therefore, insofar as the Central Excise is concerned, the education cess imposed under Section 91 of the Finance Act, 2004 was to be treated as a duty of excise, in view of Section 93. Similarly, a provision is available under Section 94 of the very same Finance Act, 2004, which reads thus :

"94. Education Cess on imported goods. - (1) The Education Cess levied under section 91, in the case of goods specified in the First Schedule to the Customs Tariff Act, 1975, being goods imported into India, shall be a duty of customs (in this section referred to as the Education Cess on imported goods), at the rate of two per cent., calculated on the aggregate of duties of customs which are levied and collected by the Central Government in the Ministry of Finance (Department of

Revenue), under section 12 of the Customs Act, 1962 and any sum chargeable on such goods under any other law for the time being in force, as an addition to, and in the same manner as, a duty of customs, but not including -

(a) the safeguard duty referred to in Sections 8B and 8C of the Customs Tariff Act, 1975;

(b) the countervailing duty referred to in Section 9 of the Customs Tariff Act, 1975;

(c) the anti-dumping duty referred to in Section 9A of the Customs Tariff Act, 1975; and

(d) the Education Cess on imported goods.

(2) The Education Cess on imported goods shall be in addition to any other duties of customs chargeable on such goods, under the Customs Act, 1962 or any other law for the time being in force.

(3) The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Education Cess on imported goods as they apply in relation to the levy and collection of the duties of customs on such goods under the Customs Act, 1962 or the rules or the regulations, as the case may be."

23. Like that, insofar as the secondary and higher education cess is concerned, that has been brought in only under Finance Act, 2007, where the relevant provision is Sections 126 and 129 which are extracted hereunder :

"126. (1) Without prejudice to the provisions of sub-section (12) of Section 2, there shall be levied and collected, in accordance with the provisions of this Chapter as surcharge for purposes of the Union, a cess to be called the Secondary and Higher Education Cess, to fulfil the commitment of the Government to provide and finance secondary and higher education.

(2) The Central Government may, after due appropriation made by Parliament by law in this behalf, utilise, such sums of money of the secondary and Higher Education Cess levied under sub-section (12) of section 2 and this Chapter for the

purposes specified in sub-section (1) as it may consider necessary.

129. (1) The Secondary and Higher Education Cess levied under section 126, in the case of goods specified in the First Schedule to the Customs Tariff Act, 1975, being goods imported into India, shall be a duty of customs (in this section referred to as the Secondary and Higher Education Cess on imported goods), at the rate of one per cent., calculated on the aggregate of duties of customs which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under section 12 of the Customs Act, 1962 and any sum chargeable on such goods under any other law for the time being in force, as an addition to, and in the same manner as, a duty of customs, but not including -

(a) the additional duty referred to in sub-section (5) of section 3 of the Customs Tariff Act, 1975;

(b) the safeguard duty referred to in sections 8B and 8C of the Customs Tariff Act, 1975;

(c) the countervailing duty referred to in section 9 of the Customs Tariff Act, 1975;

(d) the anti-dumping duty referred to in section 9A of the Customs Tariff Act, 1975; and

(e) the Education Cess chargeable under section 94 of the Finance (No. 2) Act, 2004 and Secondary and Higher Education Cess on imported goods.

(2) The Secondary and Higher Education Cess on imported goods shall be in addition to any other duties of customs chargeable on such goods, under the Customs Act, 1962 or any other law for the time being in force and the Education Cess chargeable under section 94 of the Finance (No. 2) Act, 2004.

(3) The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Secondary and Higher Education Cess on imported goods as they apply in relation to the levy and collection of the duties of customs on such goods under the

Customs Act, 1962 or the rules or the regulations made thereunder, as the case may be."

*24. In Section 126 of the Finance Act, 2007, a cess to be called the Secondary and Higher Education Cess, to fulfil the commitment of the Government to provide and finance secondary and higher education shall be levied. Therefore, the levy of secondary or higher education cess was first introduced in Finance Act, 2007, by the aforesaid Section 126. In the very same Finance Act, Section 129 makes it clear that the secondary and higher education cess levied under Section 126, in the case of goods specified in the First Schedule to the Customs Tariff Act, 1975, being goods imported into India, shall be as duty of customs at the rate of one per cent calculated on the aggregated of duties of customs. Exactly similar wordings, *pari materia* to Sections 91 and 93 is available in Section 129 of Finance Act, 2007. Therefore, the effect of these provisions of Finance Act, 2004 and 2007 is that, the education cess at the rate of 2% and higher and secondary education at the rate of 1% imposed under Finance Act, 2004 and 2007, respectively are to be treated as part of the duty of customs.*

25. When that being the statutory declaration made by the Act of Parliament i.e., the Finance Act, 2004 and 2007, we cannot have any different view to state that there were different components. What is the duty to be imposed on the imported goods first be calculated and accordingly, 2% of education cess and 1% of secondary and higher education cess shall be levied and imposed. Hence, when the importer pay the duty, he shall also pay the cess which become part and parcel of the duty of customs. That is the reason why the total amount of Rs. 22,88,86,212/- were paid by the petitioner as duty of customs as well as education cess through the scrips of MEIS. Having accepted the same, though subsequently, in view of the notifications, if the Customs Department come forward to take a stand that the mode of payment of the education cess even though being part of the customs duty, shall not be on the same line by using the scrip, such kind of payment can be insisted upon, provided only in future cases and not in the cases where it has already been paid and where the goods have been cleared. This was exactly been made in execution by Circular No. 2/2020, dated 10-1-2020.

26. When such a circular was issued by the Customs Department and the same having been implemented in respect of various people like the petitioner, the benefit of the said circular cannot be denied to the petitioner on the alleged reason that, the education cess or the higher and secondary education cess being a different component cannot be treated as customs duty or additional customs duty and therefore, the benefit conferred under Clause 11 of the said circular cannot be made available to the petitioner. The said view taken by the respondent/Customs Department, in the considered opinion of this Court, in view of the aforestated legal position, is untenable and unacceptable.

27. The quoting of the Hon'ble Supreme Court judgment in Unicorn Industries case is a wrong fitment of the citation, as the issue decided in the said case, in fact the principle enunciated in that case if it is culled out, certainly would support the case of the petitioner and not the respondent. Therefore, this Court has no hesitation to state that, the reasons stated in the impugned order rejecting to give the benefit under Circular No. 2/2020 is not supported by any legal basis. Therefore, the said reasons are unsustainable and therefore, based on such reason, since the rejection has been made through the impugned order, it is also equally unsustainable. Hence, it is liable to be interfered with.

28. In view of the aforesaid discussions, this Court is inclined to pass the following orders :

"The impugned order is hereby quashed. As a sequel, there shall be a direction to the respondent to give the benefit of Clause 11 of Circular No. 2/2020, dated 10-1-2020 to the petitioner."

29. With the above directions, the writ petition stands allowed. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

15.5 The Hon'ble jurisdictional High Court had considered the decision in the case of M/s, Unicorn Industries also to reach the conclusion that Cess being duty of excise the importer can pay Cess using MEIS Scrips. From the above, we have no hesitation to hold that

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the decision of the Tribunal in the case of M/s. Vedanta Ltd., (supra) is squarely applicable. The demand therefore cannot be sustained.

16. The impugned order is set aside. The appeal is allowed with consequential reliefs if any. The miscellaneous application filed by the appellant for change of cause tile is allowed.

(Order pronounced in the open court on 26.04.2024)

(VASASESHAGIRIRAO)
Member (Technical)

(SULEKHABEEVI,C.S.)
Member (Judicial)

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