IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I
DATE OF HEARING : 12/07/2012.
DATE OF DECISION : 19/09/2012.

Excise Appeal No. 764-768 of 2009

[Arising out of the Order-in-Appeal No. 811-815/CE/Appl/Jal/ 2008 dated 22/12/2008 passed by The Commissioner (Appeals), Central Excise Commissionerate, Jalandhar.]

Hon'ble Shri Justice Ajit Bharihoke, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:
3.	Whether their Lordships wish to see the fair copy of the order?	:
4.	Whether order is to be circulated to the Department Authorities?	:

CCE, Jammu — Appellant

Versus

M/s R.B. Jodhamal & Co. Pvt. Ltd.]
M/s R.B. Jodhamal Industries Pvt. Ltd.] — Respondents

Appearance

Shri R.K. Verma, Authorized Representative (DR) – for the appellant.

Shri S.K. Malhotra, C.A. - for the Respondent.

CORAM : **Hon'ble Shri Justice Ajit Bharihoke, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Order No. A/1175-1179/2012-EX(BR) Dated : ____________

Per. Rakesh Kumar :-

The respondents are units located in the State of Jammu & Kashmir and are availing exemption under Notification No. 56/2002-CE. In all these cases, the respondents are liable to pay on the goods cleared by them, the basic excise duty leviable under Section 3 (1) of the Central Excise Act, Education Cess leviable under Section 91 readwith Section 93 of the Finance Act, 2004 and Secondary and Higher Education Cess (S&H Cess) leviable under Section 136 readwith Section 138 of the Finance Act, 2007. The point of dispute in all these appeals is as to whether in terms of the scheme of Notification No. 56/2002-CE, the respondent can pay education cess and S&H Cess by utilizing the Basic Excise Duty Credit (BED Credit). In these cases, the respondent had paid the education cess and S&H Cess by utilizing the BED Credit and as a result of which, they paid higher amount of basic excise duty through PLA and thus, claimed higher amount of refund in terms of Notification No. 56/2002-CE. The Jurisdictional Assistant Commissioner in all these cases holding that an assessee availing of exemption under Notification No. 56/2002-CE cannot pay education cess and S&H through BED credit, as these cesses are not exempted under this notification and utilization of BED Credit for payment of education cess and S&H cess amounts to permitting refund of these cesses also under this notification, disallowed the refund of excess Basic excise duty paid through PLA on account of diversion of BED credit towards payment of education cess and S&H Cess. These orders of the Assistant Commissioner were set aside by the Commissioner (Appeals) vide order-in-appeal dated 23/12/2008 holding that in terms of Cenvat Credit Rules, 2004, there is no restriction on utilization of BED credit for payment of education cess and S&H Cess. Against the order of the Commissioner (Appeals), these appeals have been filed by the Revenue.

1.1 Though these appeals had been heard alongwith a group of other appeals and had been disposed of by a common order No. 900A – 1143A/2009 – EX dated 12/08/2009 by following the Tribunal's judgment in case of **CCE, Jammu vs. Jindal Drugs Ltd.** reported in **2011 (267) E.L.T. 653 (Tri. – Del.)**, the respondent filed ROM applications No. E/ROM/10-14/2010 in respect of Final order dated 12/08/2009 on the ground that the Tribunal has wrongly decided these appeals alongwith other appeals, as while in these appeals the point of dispute is regarding utilization of BED credit for payment of education cess and S&H Cess, in the other appeals the dispute was whether Notification No. 56/2002-CE exempts education cess and S&H Cess also and that all the appeals have been decided only by considering the 2nd issue by following the Tribunal's earlier judgment in the case of **CCE, Jammu vs. Jindal Drugs Ltd.** (supra).

1.2 The applications for rectification of mistake were allowed by the Tribunal vide order dated 12/07/2012 and the appeal No. E/764-768/2009 earlier disposed of by the Final order dated

12/08/2009 were restored to their original numbers. Accordingly, these appeals were heard afresh.

2. Heard both the sides on the issue involved in these appeals i.e. whether an assessee availing of exemption under Notification No. 56/2002-CE can pay education cess and S&H Cess through BED Credit.

3. Shri R.K. Verma, the learned Senior Departmental Representative assailed the impugned orders by reiterating the grounds of appeal in the Revenue's appeals and pleaded that-

(a) In terms of para (1A) of the notification, a manufacturer availing of this exemption, has to first utilize the whole of the Cenvat credit available at the end of the month for payment of duty on clearances made during the month and only the balance amount of duty, if any, payable, is required to be paid through PLA and the word 'duty' in para (1A) of the notification refers only to the duties which are exempted in this notification, not the duties which are not covered by this exemption notification;

(b) Since education cess and S & H cess are not covered by notification No. 56/2002-CE [Tribunal's judgement in case of **CCE vs. Jindal Drugs Ltd.** (supra) and Apex Court's judgement in case of **Union of India vs. Modi Rubber Ltd.** reported in **[1986 (25) ELT 849 (SC)**], the BED credit cannot be used for payment of education cess.

(c) The education cess/ S & H cess levied under Section 91 of Finance Act, 2004 and Section 136 of Finance Act, 2007 respectively is not duty of excise levied under Section 3(1) of Central Excise Act, 1944 and, hence, the same is not covered by this notification and, therefore, for the purpose of para (1A) of the Notification, BED credit can not be utilized for payment of these education cess; and

(d) The issue involved in this group of cases stands decided in favour of the Department by the Tribunal's judgement in the case of **CCE , J&K vs. Bharat Box Factory Ltd.** reported in **2011 (265) ELT 366 (Tri. Del.)**

He, therefore, pleaded that the impugned orders passed by the CCE (Appeals) are not sustainable.

4. Shri S.K. Malhotra, Chartered Accountant, defending the impugned orders pleaded that the notification No. 56/2002-CE exempts the education cess and S & H education cess also, that in this regard they rely upon judgments of the Tribunal in the cases of **Bharat Box Factory Ltd. vs. CCE, Jammu** reported in **2007 (214) ELT 537 (Tri. Del)** and **Cyrus Surfactant Pvt. Ltd.** reported in **2007 (215) ELT 55 (Tri. Del.);** that when the education cess is a duty exempted under Notification No. 56/2002-CE, and neither in Rule 3(4) nor in Rule 3 (7)(b) of Cenvat Credit Rules, 2004 there is any restriction on the utilization of basic excise duty credit for payment of education cess, and S & H cess, these cesses payable by the Respondents could be paid through BED credit also, not necessarily through the education cess credit and S & H cess credit respectively; that Hon'ble Gauhati High Court in case of **CCE, Dibrugarh vs M/s Prog Bosimi Synthetics Ltd.** in its judgment dt. 29.6.2011 has held that while NCCD is not exempt under Notification No. 32/99-CE (a notification similar to Notification No. 56/2002-CE), a

manufacturer availing of notification No. 32/99-CE can pay NCCD through credit of basic excise duty; that Tribunal in case of **CCE, Ludhiana vs. Malwa Industries Ltd.** reported in **2004 (171) ELT 67 (Tri. Del)** has held that BED or SED credit could be utilized for payment of AED (GSI); that the Tribunal in case of **CCE, Vapi vs. Balaji Industries** reported in **2008 (88) RLT 236 (CESTAT-Ahmd.)** has held that in terms of Rule 3(4) of Cenvat Credit Rules 2004, education cess could be paid through BED credit and restrictions in Rule 3(7) cannot be extended for utilization of BED credit for payment of education cess; that same view has been taken by the Tribunal in the cases of **Prag Bosimi Synthetics Ltd. vs. CCE, Dibrugarh** reported in **2007 (216) ELT 254 (Tri. – Kolkata**) wherein it was held that BED credit could be utilized for payment of NCCD; that Tribunal in the case of **Sun Pharmaceutical vs. CCE** reported in **2006 (77) RLT 824 (para 5)** has held that there is no prohibition on use of BED credit for payment of education cess; that Tribunal's judgment in case of **CCE vs. Bharat Box Factory Ltd.** reported in **2011 (265) ELT 366(Tri-Del.**) is *per incurium* and that in view of the above, there is no infirmity in the impugned orders passed by CCE (Appeals).

5. We have considered the rival submissions and perused the records. The point of dispute in these cases is as to whether a manufacturer availing of exemption under Notification No. 56/2002-CE and who for availing of this exemption, as per the condition of the exemption notification in para 1A, is required to

first utilize the whole of the Cenvat credit available on the last day of the month for payment of duty on the goods cleared during the month, so that he pays only the balance amount of duty, if any payable, through PLA, can utilize BED credit for payment of education cess and S & H cess, before fully utilizing the BED credit available at the end of the month for payment of BED. Before going into the above question, it would be worthwhile having a look at –

(a) The relevant provisions of Notification No. 56/2002-CE;

(b) Provisions regarding levy of education cess and S&H cess; and

(c) Relevant provisions of Cenvat Credit Rules;

5.1 Relevant portions of the exemption Notification No. 56/2002-CE, as it existed during the period of dispute, read as under:-

Notification No.56/02-CE

Exemption to all goods (except cigarettes, cigars, tobacco and its product and soft drinks and their concentrates) produced in Jammu & Kashmir by units located in Industrial Growth Centre, Industrial Infrastructure Development Centre or Export Promotion Industrial Park; or Industrial Estate or Industrial Area or Commercial Estate or Scheme Area. -

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the First Schedule and the second schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than goods specified in Annexure I appended hereto, and cleared from a unit located in the Industrial Growth Centre, Industrial Infrastructure Development Centre or Export Promotion Industrial Park; or Industrial Estate or Industrial Area or Commercial Estate or Scheme Area as the case may be, leviable thereon under any of the said Acts as is equivalent to the amount of duty paid by the manufacture of goods, other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2002;

IA. In cases where all the goods produced by a manufacturer are eligible for exemption under this notification, the exemption contained in this notification shall be available subject to the condition that , the manufacturer first utilizes whole of the CENVAT credit available on the last day of the month under consideration for payment of duty of goods cleared during such month and pays only the balance amount in cash.

2. The exemption contained in this notification shall be given effect to in the following manner, namely:-

(a) The manufacturer shall submit a statement of the duty paid, other than by way of utilisation of CENVAT credit under the CENVAT Credit Rules, 2002 to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, by the 7th day of the next month to the month under consideration;

(b) the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, after such verification, as may be deemed necessary, shall refund the amount of duty, other than the amount of duty paid by utilization of CENVAT credit under he CENVAT Credit Rules, 2002, during the month under consideration to be manufacturer by the 15th day of the next month.

Provided that in cases, where the exemption contained in this notification is not applicable to some of the goods produced by a manufacturer, such refund shall not exceed the amount of duty paid less the amount of the CENVAT Credit availed of, in respect of the duty paid on the inputs used in or in relation to the manufacture of goods cleared under this notification.;

(c) If there is likely to be any delay in the verification, the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall refund the amount on provisional basis by the 15th day of the next month to the month under consideration, and thereafter may adjust the amount of refund by such amount as may be necessary in the subsequent refunds admissible to the manufacturer.

2A. Notwithstanding anything contained in paragraph 2, -

(a) the manufacturer at his own option, may take credit of the amount of duty paid during the month under consideration, other than by way of utilisation of CENVAT credit under the CENVAT Credit Rules, 2002, in his account current, maintained in terms of Part V of the Excise Manual of Supplementary Instruction issued by the Central Board of Excise and Customs. Such amount credited in the account current may be utilised by the manufacture for payment of duty, in the manner specified under rule 8 of the Central Excise Rules, 2002, in subsequent months, and such payment should be deemed to be payment in cash;

Provided that where the exemption contained in this notification is not applicable to some of the goods produced by a manufacturer, the amount of such credit shall not exceed the amount of duty paid less the amount of the CENVAT Credit availed of, in respect of the duty paid on the inputs used in or in relation to the manufacture of goods cleared under this notification.;

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Explanation. - For the purposes of this notification, duty paid, by utilisation of the amount credited in the account current, shall be taken as payment of duty by way other than utilisation of CENVAT credit under the CENVAT Credit Rules, 2002.".

3. The exemption contained in this notification shall apply only to the following kind of units namely:-

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5.2 Section 91 and 93 of the Finance Act, 2004 are as under-

"91. Education Cess. - (1) Without prejudice to the provisions of sub-section (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 fulfill 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.

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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 percent, 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."

5.2.1 The provision of Section 136 and 138 of the Finance Act, 2007 regarding levy of S&H an identical to Section 91 and 93 of the Finance Act, 2004 regarding levy of education cess except that the rate of cess is 1% of the aggregate of duties of excise.

5.3 The relevant portion of Rule 3(4) and 3(7)(b) of the Cenvat Credit Rules, 2004 are as under:-

> 3(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 :
>
> 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 :
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"Rule 3(7)(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 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 :]

[Provided that the credit of the education cess on excisable goods and the education cess on taxable services can be utilized, either for payment of the education cess on excisable goods or for the payment of the education cess on taxable services :

Provided further that the credit of the Secondary and Higher Education Cess on excisable goods and the Secondary and Higher Education Cess on taxable services

> can be utilized, either for payment of the Secondary and Higher Education Cess on excisable goods or for the payment of the Secondary and Higher Education Cess on taxable services.]
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> *Explanation.* - For the removal of doubts, it is hereby declared that the credit of the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) paid on or after the 1st day of April, 2000, may be utilised towards payment of duty of excise leviable under the First Schedule or the Second Schedule to the Excise Tariff Act.

6. From a plain reading of the Notification No.56/2002-CE, it will be seen that -

(1) this notification has been issued under section 5A of Central Excise Act, 1944 read with Section 3(3) of AED (GSI) Act, 1957 and Section 3(3) of AED (T &TA) Act, 1978 and it exempts to the extent as mentioned in it, the duty of excise or Additional duty of Excise, as the case may be, leviable under any of these Act on the goods covered by this notification and manufactured and cleared by the units located in areas as specified in Annexure-II to the notification and thus the duties exempted under this notification are –

(a) Basic Excise duty leviable under section 3(1) of Central Excise Act, 1944 on the goods mentioned in the 1st scheduled to the Central Excise Tariff Act, 1985;

(b) Special Excise duty leviable under section 3(1) of Central Excise Act, 1944 on the goods covered by 2nd Schedule to the Central Excise Tariff Act, 1985;

(c) AED (GSI) leviable under AED (GSI) Act, 1957 and

(d) AED (T&TA) leviable under AED (T&TA) Act, 1978;

(2) When all the goods manufactured by a unit are covered by the exemption, <u>which is the case in all these appeals</u>, the assessee for availing this exemption, is

required <u>to first utilize the whole of the Cenvat credit available to him on last day of the month under consideration for payment of duty on the goods cleared during such month and pays only the balance amount, if any payable, in cash (PLA);</u>

(3) It is the amount so paid through PLA which is refunded or can be taken as self credit by following the procedure as prescribed in para 2 & 2A of the notification; and

(4) Thus this notification grants exemption in form of refund/self credit in PLA of the duties levied under Central Excise Act, 1944, AED (GSI) Act, 1957 and AED (T&TA) Act, 1978 to the extent the same have been paid through PLA when the liability for excise duty and/or AED has been discharged in the manner prescribed in para 1A of the notification.

6.1 In our view, the expression - "first utilize the whole of Cenvat credit available on the last day of the month for the payment of duty on goods cleared during the month" in para 1A of the notification, implies that for availing this exemption, a manufacturer must first discharge the duty liability on the goods cleared by utilizing during the Cenvat credit available at the end of the month to the extent possible and the word, "duty' means only the duties exempted under this notification and not the duties which are not covered under this notification for exemption. The Cenvat credit available at the end of month cannot be utilized for payment of duty which is not covered for exemption under this notification, as doing so would distort the quantum of duty payable through PLA. If a particular duty not covered by this exemption is also paid through Cenvat credit before utilizing the Cenvat credit to the extent possible for payment of duties covered by this exemption, the payment through PLA of the duties covered by this exemption notification would increase to the extent the duty not covered by this exemption had been paid through Cenvat credit and will result in refund of the duty not covered by this exemption, which is not permissible. To illustrate, if all the goods manufactured by a manufacturer availing of Notification No.56/2002-CE attract BED; education cess and S&H cess, and while Cenvat credit of BED available at the end of a month is 'C' and his BED liability for the goods cleared during the month is 'B' (more than 'C') and he after fully utilizing the Cenvat credit to the extent possible, pays the balance amount of duty (B – C) through PLA, the quantum of refund available to him would be B-C. But if before fully utilizing the Cenvat credit (BED credit) for payment of BED, he utilizes credit amount – 'D' for payment of education cess, the credit available for payment of BED would be C – D and the duty payment through PLA and the quantum of refund would then be B – (C – D) i.e. (B - C) + D. Thus he will end up getting exemption in respect of education cess also. This would be permissible only if Notification No.56/2002-CE also exempts education cess and S&H cess.

6.2 But education cess leviable under section 91 of the Finance Act 2004 and S & H cess leviable under section 136 of Finance Act, 2007 are not covered by Notification No.56/2002-CE as is clear from the language of para 1 of the notification. Apex Court in case of **Union of India vs. Modi Rubber Ltd.** reported in **1986 (25) ELT 847 (SC**) has held that the words 'duty of excise' in exemption notification No.123/74-CE and 27/81-CE issued under Rule 8(1) of Central Excise Rules, 1944 (now section 5A of Central Excise Act, 1944) cover only the duty of excise leviable under section 3(1) of the Central Excise Act, 1944 and do not cover special excise duty leviable under Finance Act, 1978 and AED (GSI) leviable under AED (GSI) Act, 1957. Relying upon this judgement of the Apex Court this Tribunal in case of **CCE, Jammu vs. Jindal Drugs Ltd.** reported in **2011 (267) ELT 653 (Tri.-Del.)** has held that notification No.56/2002-CE does not cover education cess leviable under Section 91 read with section 93 of Finance Act, 2004 and S&H cess leviable under section 136 read with section 138 of the Finance Act, 1978. Same view has been taken by Hon'ble Gauwati High Court in case of **CCE, Shillong vs.Dharmpal Satyapal Ltd.** reported in **2012 (275) ELT 71 (GAU**) wherein with regard to Notification No.32/99-CE, a notification similar to Notification No.56/2002-CE, it was held that the notification does not exempt education cess. Therefore, education cess leviable under section 91 read with section 93 of the Finance Act, 2004 and S&H cess leviable under section 136 read with section 138 of the Finance Act, 2007 is not covered by exemption Notification No.56/2002-CE.

6.3 Since these two education cess are not covered by Notification No.56/2002-CE, the same cannot be paid by the respondent in the manner they seek to pay the same i.e. by utilizing BED credit before utilizing the BED credit to the extent possible for payment of BED as doing so would result in refund of education cess also.

6.4 Normally the BED payable is more than the BED credit available at the end of the month and after utilizing the BED credit to the extent possible for payment of BED leviable, no BED credit would be left. But if due to some reason, after payment of duty on the goods cleared during the month by utilizing the BED credit to the extent possible, some credit is left, can the leftover BED credit be used for payment of education cess and S & H cess? Our answer to this would be in the negative, as unutilized BED credit of a particular month would be available next month for payment of BED and if this credit is utilized/ diverted for payment of education cess and S & H cess, the payment of BED through PLA and, hence, the quantum of refund, during next month will get distorted i.e. will increase to that extent.

6.5 Therefore, in our view, a manufacturer availing of notification 56/02-CE cannot utilize BED credit for payment of education cess and S & H cess as, as demonstrated above, it will amount to the indirect refund of education cess and S. & H cess, which is not permissible. The payment of education cess and S&H cess through BED credit is in conflict with the scheme of this exemption which does not exempt the education cess and S&H cess and which is available only in respect of the duties mentioned in it subject to following of condition of para 1A of the notification.

7. The respondents citing the judgment dated **29.06.2011 of Hon'ble Guwahati High Court in case of CCE, Dibrugarh vs. Prag Bosimi Synthetics Ltd. (Central Excise Reference application No.4/2008)** and various judgment of Tribunal plead that in terms of the provisions of Rule 3(4) read with Rule 3(7) (b) of the Cenvat credit Rules 2004, there is no prohibition on use of the BED credit for payment of education cess and S & H cess. The above cited judgment of Guwahati High Court, in our respectful view is of no avail to the respondents for the reason that the Guwahati High Court has answered only to question of law namely, whether NCC duty is exempted under Notification No.32/99-CE and if the answer to the first part is negative, then whether the Cenvat credit under Cenvat Credit Rules can be utilized for the payment of NCC duty. The High Court has answered the first question in negative. As regards the second question, the High Court has held that Cenvat credit of basic excise duty can be utilized by the assessee for payment of NCC duty. On perusal of the aforesaid judgment it is seen that Hon'ble High Court has not considered the scheme of refund admissible to the assessee under Notification No.32/99-CE which is identical to the Notification No.56/2002-CE which is subject matter of these appeals.

7.1 A perusal of Rule 3(4) and Rule 3(7) (b) of the Cenvat Credit Rules, 2004, would show that while AED (T &TA) credit, NCCD credit, credit of education cess leviable under section 91 read with section 93 of Finance Act, 2004, credit of S&H cess leviable under section 136 read with section 138 of the Finance Act, 2007, and credit of AED leviable under section 85 of the Finance Act, 2005 can be used only for payment of AED (T&TA), NCCD, education cess, S & H cess and AED leviable under section 85 of Finance Act, 2005 respectively, the Cenvat credit from other sources i.e. BED credit , AED (GSI) credit etc. can be used for payment of any duty of excise including education cess and S & H cess. Thus, while the Cenvat credit of the various duties/taxes mentioned in Rule 3(7) (b) can be used only for payment of the respective duties/taxes, there is no such restriction for utilization of credit of other duties i.e. BED credit, AED (GSI) credit, etc. In our view, in case of a manufacturer availing of exemption under Notification No.56/02-CE, while the restriction on utilisation of Cenvat credit of duties/taxes as mentioned in Rule 3(7) (b) would be applicable, there would be one more additional restriction on utilization of credit of duties/taxes other than those mentioned in Rule 3(7) (b), i. e. credit of BED, AED (GSI) etc. and this restriction is that this credit cannot be used for payment of duties not exempted under this notification, as, as discussed above, if this is permitted, this would result in refund of duties like education cess, S & H cess, NCCD etc. which is not permitted under this notification, while it is well settled law that what is not permissible directly can not be allowed indirectly. Therefore, in order to ensure that an assessee availing of exemption under this notification does not end up availing this exemption in respect of education cess and S & H cess also, he cannot be allowed to use BED credit for payment of education cess and S & H cess, though this may be permitted under the provision of Rule 3(4) of the Cenvat Credit Rules, 2004. The provisions of Rule 3(4) of the Cenvat Credit Rules are after all a facility and the extent to which the same are in conflict with the condition of notification No.56/2002-CE, the same would not be applicable, as it is the condition of notification which would prevail. In our view, therefore, the question as to whether education cess and S & H cess can be paid by a manufacturer availing exemption under notification No.56/2002-CE by utilizing BED credit, has to be answered in the context of the conditions and the scheme of this notification and not by looking at the provisions of Cenvat credit Rules, 2004 in isolation. It is pertinent to note that education cess and S & H cess have been levied vide Section 91 of Finance Act, and 136 of Finance Act, 2007 respectively and the object behind this levy is to generate fund to finance and provide infrastructure for promoting education in the country. If the argument of the respondents is accepted, then by adopting the practice of paying education cess and S & H cess from the Cenvat credit (BED) the assessee would indirectly get the refund of aforesaid cess which is not permissible under law as held by the Guwahati High Court in the matter of Dharampal & Satyapal (supra).

8. In view of the above discussion, we hold that -

(a) A unit availing of exemption under Notification No.56/2002-CE cannot utilize BED credit for payment of education cess and S & H cess which are not exempted under this notification ; and

(b) Extra BED paid through PLA on account of diversion of BED credit for payment of education cess and S& H cess would not be refundable under Notification No.56/2002-CE.

8.1 The impugned orders holding to the contrary are therefore set aside and on this point, the orders passed by the original adjudicating authority are restored. The Revenue's appeals are thus allowed.

(Pronounced in the open court on 19/09/2012.)

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

PK

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi.
Court No. 1

Date of hearing/decision: 12.07.2012

Excise RoM Application Nos. 10 to 14 of 2010 in
Excise Appeal Nos. 764 to 768 of 2009

CCE, Jammu — Appellants

Vs.

M/s R.B. Jodhamal & Co. Pvt. Ltd. — Respondent
M/s R.B. Jodhamal Ind. Pvt. Ltd.

Present Sh. R.K. Verma, AR for the appellant.
Present Sh. S.K. Malhotra, C.A. for the respondent

Misc. order No. 809-813/2012-Ex (BR)

This is an application seeking rectification of final order No. 900A to 1143A/2009-Ex. so far as it relates to appeal No. 764 to 768 of 2009 preferred by the department in respect of the applicant-respondent.

2. Learned AR for the appellant submits that the impugned order so far as it relates to the applicant suffers from an error apparent on the record as in the said order the Tribunal has not addressed the arguments of the respondent-assessee to the effect that he was justified in adjusting cenvat credit of basic excise duty against the payment of education cess and higher education cess and that the Tribunal has decided the appeals only in terms of the judgement in the matter of Jindal Drugs.

3. Ld. R.K. Verma, AR for the appellant –department has fairly concedes that aforesaid issue has not been considered and decided in the order of the Tribunal and there is justification in the request of rectification of mistake application.

4. In view of the above, RoM applications are allowed and appeals of the department being Excise Appeal Nos. 764 to 768 of 2009 are restored to their original numbers.

5. Arguments heard on appeal. Reserved for order.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

Pant