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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
EXCISE APPEAL BRANCH

STAY Application No. : E/Stay/362-371,784-792,1986,773-778,781-783,1493-1497,1498-1500,1505-1508,1976,1979,1980,1983-1985,/2009-EX
1503-1504,779-780,1977-1978,1982,759,/2009-EX
Appeal No. : E/349-358,793-801,1931,782-787,790-792,1472-1476,1477-1479,1484-1487,1921,1924,1925,1928-1930,/2009,E/2422-2449,2450-2459,
2588-2589/2008,1482-1483/2009,2466-2478,2590-2592/2008,788-789/2009,2595/2008,1922-1923,1927/2009,2593-2594/2008,773/2009,1753-1762/2008,
1764-1766/2008 & E/2200,2182/2007-EX[DB],

Dated: **04/09/2012**

Assistant Registrar
C.E.S.T.A.T. New Delhi
To,

C.C.E. JAMMU
OB-32, RAIL Head Complex, Jammu - 180012.

C.C.E. JAMMU (Appellant)

VS

TAWI CHEMICAL INDUSTRIES (UNIT-II,) (Respondent)

I am directed to transmit herewith a certified copy of Final Order No. **A/999-1127/2012-EX[DB]**, Stay Order No. **SO/1428-1482/2012** dated **31/08/2012** passed by the Tribunal under section **35-C(1) of the Central Excise and Salt Act, 1944.**

Assistant Registrar
EXCISE Appeal Branch

Copy To,
1. Respondent
TAWI CHEMICAL INDUSTRIES
(UNIT-II,)
LANE NO.4, SIDCO INDUSTRIAL
COMPLEX, BARI-BRAHMANA,
JAMMU.

2. Advocate(s) / Consultant(s): SH. S.K. MALHOTRA&CO, C.A. K.C. PLAZA, JAMMU

3. C.D.R
4. Bar Association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp. ICICI Bank of Defence Colony, New Delhi-3
7. Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
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Assistant Registrar
EXCISE Appeal Branch

P.T.O.-

15 . M/S ULTRA HOME CARE COILS P. LTD.,

LANE NO.2, PHASE-1, SIDCO INDL.
COMPLEX, BARI BARAHMANA,
JAMMU

16 . M/S SUN PHARMACEUTICAL INDS,
6-9, EPIE, KARTHOLI, BARI BRAHMANA
BARI BRAHAMANA, JAMMU.

17 . M/S BHARAT BOX FACTORY (UNIT-I)
INDL. GROWTH CENTRE,
SAMBA (J & K)

18 . M/S KRISHI RASAYAN EXPORTS P. LTD.,
INDL. GROWTH CENTRE,
SAMBA (J & K)

19 . M/S HITACHI HOME AND LIFE
SOLUTIONS (I) LTD.,
CANAL ROAD, BARI BRAHMANA, JAMMU

20 . M/S SUD PINES P. LTD.,
LANE NO3, SIDCO INDL. COMPLEX,
BARI BRAHMANA, JAMMU

21 . M/S BALAJEE ROSIN INDS.
SIDCO COMPLEX,
BARI BRAHAMANA, JAMMU

22. M/S K.S.PROFILES
LANE NO.4, SIDCO INDL. COMPLEX,
BARI BRAHAMANA, JAMMU

23. M/S K.L.MINERALS & ALLIED INDS.,
LANE NO.4, SIDCO INDL. COMPLELX,
BARI BRAHMANA, JAMMU

24. M/S CARDINAL CHEMICALS P. LTD.,
SICOP INDL, COMPLEX,
BARI BRAHMANA, JAMMU (J & K)

25. M/S J & K PULP & PER P. LTD.,
SIDCO INDL. COMPLEX,
BARI BRAHMAMNA, JAMMU (J & K)

26. M/S MODERN WHITENEERS P. LTD.,
LANE NO.2, PHASE-I, SIDCO,
INDL. COMPLEX, BARI BRAHMANA,
JAMMU (J & K)

27. M/S MASTER INDIA
LANE NO3, PHASE-I, SIDCO
INDL. COMPLEX, BARI BRAHMANA,
JAMMU (J & K)

28. M/S TAWI CHEMICALS INDS.
SIDCO INDL. COMPLEX,
BARI BRAHMANA, JAMMU

29. SHRI SITA RAM INDS. P. LTD.,
LANE NO3. SIDCO INDL. COMPLEX
BARI BRAHMANA, JAMMU

30. M/S J & K METALS
PHASE-1, LANE NO2,
SICOP INDL. COMPLEX, INDL. AREA,
BARI BRAHMANA, JAMMU

31. M/S SAMRAT FERRO ALLYS P. LTD.,
SIDCO INDL. COMPLEX,
BARI BRAHMANA, JAMMU

32. M/S JAMMU CASTING P. LTD.,
LANE NO3, SIDCO INDL, COMPLEX
BARI BRAHMANA, JAMMU

33. M/S AAR BEE INDUSTRIES
LANE NO.4, PHASE-II,
SIDCO INDL, COMPLEX,
BARI-BRAHMANA, JAMMU

34. M/S NAV BHARAT MEMTAL
LANE NO4, SIDCO INDL. COMPLEX
BARI BRAHMANA, JAMMU

35. M/S TAWI CHEMICAL INDS.
LANE NO.4, SIDCO INDL. COMPLEX,
BARI BRAHMANA, JAMMU

36. **CARDINAL CHEMICALS PVT. LTD.**
SICOP INDUSTRIAL AREA, KATHUA.

37. **RITZY POLYMERS,**
PHASE-I, INDUSTRIAL GROWTH
CENTRE, SAMBA, J&K.

38. **BHARAT BOX FACTORY UNIT-II,**
INDUSTRIAL GROWTH CENTRE,
SAMBA, J&K

39. **BHARAT BOX FACTORY UNIT-III,**
INDUSTRIAL GROWTH CENTRE,
SAMBA, J&K.

40. MR. A.R. MADHAV RAO, ADV., &
MR. R.K. HASIJA, ADV.
B-6/10, S. J. ENCLAVE,
N. DELHI-29

41. SH. S. J. VYAS, ADV.,
C-4, JAY APPARTMENTS,
OPP. AZAD SOCIETY,
AMBAWADI, AHMEDABAD-380015

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing: 08.6.2012
Date of pronouncement : 31/8/2012

Central Excise Appeal No.358 of 2009 along with Stay Application No.371 of 2009

Arising out of the order in appeal No.728-737-CE -APPL-JAL - 2007 dated 11.11.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

Central Excise Appeal No.793 to 801 of 2009 along with Stay Application No.784 to 792 of 2009

Arising out of the order in appeal No.830-849-CE -APPL-JAL - 2008 dated 22.12.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

Central Excise Appeal No.1931 of 2009 along with Stay Application No.1986 of 2009

Arising out of the order in appeal No.296-300-CE -APPL-JAL – JK - 2009 dated 31.3.2009 passed by the Commissioner (Appeals), Central Excise, JK/Jalandhar

C.C.E., Jammu .. Appellant

Vs.

M/s Tawi Chemical Industries (Unit II) .. Respondent

Present for the appellant : Shri S.R. Meena, A.R.
Present for the respondent : Shri S.K. Malhotra, C.A.

Central Excise Appeal No.2200 of 2007

Arising out of the order in appeal No.137-139-CE -APPL-JAL - 2007 dated 27.04.2007 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s Ultra Home Care Coils (P) Ltd. .. Respondent

Present for the appellant : S/Shri S.R. Meena. A.R. and Shri R.K. Verma, A.R.

Present for the respondent : Shri S.K. Malhotra, C.A.

Central Excise Appeal No.782 to 787 of 2009 along with Stay Application No.773 to 778 of 2009

Arising out of the order in appeal No.830-849-CE -APPL-JAL - 2008 dated 22.12.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s Modern Whiteners Pvt. Ltd. .. Respondent

Present for the appellant : Shri S.R. Meena, A.R.
Present for the respondent : Shri S.K. Malhotra, C.A.

Central Excise Appeal No.790 to 792 of 2009 along with Stay Application No.781 to 783 of 2009

Arising out of the order in appeal No.830-849-CE -APPL-JAL - 2008 dated 22.12.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s Masters India .. Respondent

Present for the appellant : Shri S.R. Meena, A.R.
Present for the respondent : Shri S.K. Malhotra, C.A.

Central Excise Appeal No.1472 to 1476 of 2009 along with Stay Application No.1493 to 1497 of 2009

Arising out of the order in appeal No.127-142-CE -APPL-JAL - JK -2009 dated 18.2.2009 passed by the Commissioner (Appeals), Central Excise, JK/Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s Shree Sita Ram Industries Pvt. Ltd. .. Respondent

Present for the appellant : Shri S.R. Meena, A.R. & Shri R.K. Verma, A.R.
Present for the respondent : Shri S.K. Malhotra, C.A.

Central Excise Appeal No.1477 to 1479 of 2009 along with Stay Application No.1498 to 1500 of 2009

Arising out of the order in appeal No.127-142-CE -APPL-JAL - JK -2009 dated 18.2.2009 passed by the Commissioner (Appeals), Central Excise, JK/Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s J & K Metals .. Respondent

Present for the appellant : Shri S.R. Meena, A.R.
Present for the respondent : Shri S.K. Malhotra, C.A.

Central Excise Appeal No.1484 to 1487 of 2009 along with Stay Application No.1505 to 1508 of 2009

Arising out of the order in appeal No.127-142-CE –APPL-JAL – JK -2009 dated 18.2.2009 passed by the Commissioner (Appeals), Central Excise, JK/Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s Samrat Ferro Alloys (P) Ltd. .. Respondent

Present for the appellant : Shri S.R. Meena, A.R.
Present for the respondent : Shri S.K. Malhotra, C.A.

Central Excise Appeal No.1921 of 2009 along with Stay Application No.1976 of 2009

Arising out of the order in appeal No.269-274-CE –APPL-JAL – JK -2009 dated 31.3.2009 passed by the Commissioner (Appeals), Central Excise, JK/Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s Jammu Castings Pvt. Ltd. .. Respondent

Present for the appellant : Shri S.R. Meena, A.R.
Present for the respondent : Shri S.K. Malhotra, C.A.

Central Excise Appeal No.1924 of 2009 along with Stay Application No.1979 of 2009

Arising out of the order in appeal No.269-274-CE –APPL-JAL – JK -2009 dated 31.3.2009 passed by the Commissioner (Appeals), Central Excise, JK/Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s Aar Bee Industries .. Respondent
Present for the appellant : Shri S.R. Meena, A.R. & Sh. N. Pathak, A.R.

Present for the respondent : Shri S.K. Malhotra, C.A.

Central Excise Appeal No.1925 of 2009 along with Stay Application No.1980 of 2009

Arising out of the order in appeal No.269-274-CE -APPL-JAL - JK -2009 dated 31.3.2009 passed by the Commissioner (Appeals), Central Excise, JK/Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s Nav Bharat Metals .. Respondent

Present for the appellant	:	Shri S.R. Meena, A.R.
Present for the respondent	:	Shri S.K. Malhotra, C.A.

Central Excise Appeal No.1928 to 1930 of 2009 along with Stay Application No.1983 to 1985 of 2009

Arising out of the order in appeal No.296-300-CE -APPL-JAL - JK -2009 dated 31.3.2009 passed by the Commissioner (Appeals), Central Excise, JK/Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s Hitachi Home and Life Solutions (I) Ltd. .. Respondent

Present for the appellant	:	Shri S.R. Meena, A.R. & Sh.R.K. Verma, A.R.
Present for the respondent	:	Shri S.J. Vyas, Advocate

Central Excise Appeal No.2422 to 2449 of 2008

Arising out of the order in appeal No.302-329-CE -APPL-JAL -2008 dated 30.7.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s Bharat Box Factory Unit II and III .. Respondent

Present for the appellant	:	Shri S.R. Meena, A.R. & Shri N. Pathak, A.R.
Present for the respondent	:	Shri S.K. Malhotra, C.A. and Shri R.K. Hasija, Advocate

Central Excise Appeal No.2450 to 2459 of 2008

Arising out of the order in appeal No.331-340-CE -APPL-JAL-2008 dated 31.7.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

Central Excise Appeal No. 2588 to 2589 of 2008

Arising out of the order in appeal No.444-445-CE -APPL-JAL-2008 dated 4.9.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

Central Excise Appeal No.1482 to 1483 of 2009 along with Stay Application No.1503 to 1504 of 2009

Arising out of the order in appeal No.127-142-CE -APPL-JAL-JK-2009 dated 18.2.2009 passed by the Commissioner (Appeals), Central Excise, JK/Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s Krishi Rasayan Exports Pvt. Ltd. .. Respondent

Present for the appellant	:	S/Shri S.R. Meena, A.R., N Pathak, A.R. & Sunil Kumar, A.R.
Present for the respondent	:	Shri S.K. Malhotra, C.A.

Central Excise Appeal No.2466 to 2478 of 2008

Arising out of the order in appeal No.424-436-CE -APPL-JAL-2008 dated 29.8.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s Hitachi Home and Life Solutions (I) Ltd. .. Respondent

Present for the appellant	:	Shri S.R. Meena, A.R.
Present for the respondent	:	Shri A.R. Madhav Rao with Shri R.K. Hasija, Advocates

Central Excise Appeal No.2590 to 2592 of 2008

Arising out of the order in appeal No.418-423-CE -APPL-JAL-2008 dated 29.8.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

Central Excise Appeal No.788 to 789 of 2009 along with Stay Application No.779 to 780 of 2009

Arising out of the order in appeal No.830-849-CE -APPL-JAL-2008 dated 22.12.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s Sud Pines Pvt. Ltd. .. Respondent

Present for the appellant	:	Shri S.R. Meena, A.R. and Shri Sunil Kumar, A.R.
Present for the respondent	:	Shri S.K. Malhotra, C.A.

Central Excise Appeal No.2595 of 2008

Arising out of the order in appeal No.418-423-CE -APPL-JAL-2008 dated 29.8.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

Central Excise Appeal No.353 to 355 of 2009 along with Stay Application No.366 to 368 of 2009

Arising out of the order in appeal No.728-737-CE -APPL-JAL-2007 dated 11.11.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

Central Excise Appeal No.1922 to 1923 of 2009 along with Stay Application No.1977 to 1978 of 2009

Arising out of the order in appeal No.269-274-CE -APPL-JAL-JK-2009 dated 31.3.2009 passed by the Commissioner (Appeals), Central Excise, JK/Jalandhar.

Central Excise Appeal No.1927 of 2009 along with Stay Application No.1982 of 2009

Arising out of the order in appeal No.296-300-CE -APPL-JAL-JK-2009 dated 31.3.2009 passed by the Commissioner (Appeals), Central Excise, JK/Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s K.C. Minerals and Allied Industries .. Respondent

Present for the appellant	:	Shri S.R. Meena, A.R. & Shri N. Pathak, A.R.
Present for the respondent	:	Shri S.K. Malhotra, C.A.

Central Excise Appeal No.2593 to 2594 of 2008

Arising out of the order in appeal No.418-423-CE -APPL-JAL-2008 dated 29.8.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s Balajee Rosin Industries .. Respondents
K.S. Profiles

Present for the appellant	:	Shri S.R. Meena, A.R.
Present for the respondent	:	Shri S.K. Malhotra, C.A.

Central Excise Appeal No.349 to 352 of 2009 along with Stay Application No.362 to 365 of 2009

Arising out of the order in appeal No.728-737-CE -APPL-JAL-2007 dated 11.11.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s Cardinal Chemicals Pvt. Ltd. .. Respondent

Present for the appellant : Shri S.R. Meena, A.R.
Present for the respondent : Shri S.K. Malhotra, C.A.

Central Excise Appeal No.356 to 357 of 2009 along with Stay Application No.369 to 370 of 2009

Arising out of the order in appeal No.728-737-CE -APPL-JAL-2007 dated 11.11.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s Ritzy Polymers .. Respondent

Present for the appellant : Shri S.R. Meena, A.R.
Present for the respondent : Shri A.R. Madhav Rao with Shri R.K. Hasija, Advocates

Central Excise Appeal No.773 of 2009 along with Stay Application No.759 of 2009

Arising out of the order in appeal No.787-CE -APPL-JAL-2008 dated 17.12.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s J & K Pulp & Papers Pvt. Ltd. .. Respondent

Present for the appellant : Shri S.R. Meena, A.R.
Present for the respondent : Shri S.K. Malhotra, C.A.

Central Excise Appeal No.2182 of 2007

Arising out of the order in appeal No.111-113-CE -APPL-JAL-2007 dated 30.3.2007 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

Central Excise Appeal No.1753 to 1762 of 2008

Arising out of the order in appeal No.263-272-CE -APPL-JAL-2007 dated 30.4.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

Central Excise Appeal No.1764 to 1766 of 2008

Arising out of the order in appeal No.260-262-CE -APPL-JAL-2007 dated 30.4.2008 passed by the Commissioner (Appeals), Central Excise, Jalandhar.

C.C.E., Jammu .. Appellant

Vs.

M/s Sun Pharmaceuticals Industries .. Respondent

Present for the appellant : Shri S.R. Meena, A.R.
Present for the respondent : Shri A.R. Madhav Rao with Shri R.K. Hasija, Advocate

For Approval and Signature:

Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr. Rakesh Kumar, Technical Member

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 26 of the CESTAT (Procedure) Rules, 1982?	
2	Whether it should be released under Rule 26 of 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 Departmental authorities?	

STAY order No. 1428-1482/2012-EX (BR)
FINAL Order No. A/999-1127/2012-EX (BR)

Per Mr. Rakesh Kumar:

Since a common issue in involved in these appeals filed by the Revenue, the same were heard together and are being disposed of by a common order.

1.1 The Respondents are the units situated in the areas specified in Annexure-II for the exemption notification No. 56/2002-CE. They manufacture the goods other than there specified in Annexure-I to the above mentioned notification. All the Respondents are availing of the Exemption Notification No. 56/2002-CE.

1.2 The notification No. 56/2002-CE exempts the goods covered by this notification and manufactured and cleared by the units located in the areas specified in Annexure-II to the notification from the following duties leviable thereon "as is equivalent to the amount of duty paid by the manufacturer, other than the amount of duty paid by utilizing of cenvat credit under the Cenvat Credit Rules"-

(i) Duties of excise leviable under Section 3 (1) of the Central Excise Act, 1944 i.e. the basic excise duty and special excise duty under Section 3(1) of the Act.

(ii) Additional excise duty leviable under Additional Duties of Excise (Goods of Special Importance Act), 1957 [(hereinafter referred to as AED (GSI)].

(iii) Additional excise duty leviable under Additional Duties of Excise (Textile & Textile Articles) Act, 1978 [(hereinafter referred to as the AED (T&TA)].

In terms of Explanation to this notification below para 2A, for the purpose of this notification, duty paid, by utilization of the amount credited in the account current , shall be taken as payment of duty by the way other than utilization of cenvat crdit under the Cenvat Credit Rules, 2004.

1.3 Clause 1A of the exemption notification reads as under:-

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

1.4 It is the duty paid in cash, after exhausting the entire cenvat credit for payment of duty, which is refunded by the jurisdictional Assistant / Deputy Commissioner or at the option of the assessee case be taken as self credit in PLA (account current) which can be utilized for payment of duty through PLA next month. Para 2 and 2A of the Notification prescribe the procedure to be followed for obtaining refund of duty paid through PLA or taking its self credit. Para 3 prescribes other conditions for being eligible for this exemption and there is no dispute that those conditions are satisfied.

1.5 In this case the Respondents manufacture only the goods eligible for exemption under Notification No. 56/2002-CE and thus only para 1A is applicable. The duties payable by the Respondents in these cases are basic excise duty, education cess leviable under Section 91 read with Section 93 of the Finance Act, 2004 and Secondary and Higher Secondary education cess (hereinafter referred to as S &H cess) leviable under Section 136 read with Section 138 of the Finance Act, 2007.

1.6 This notification provides exemption by requiring the assessee to pay duty on the goods cleared during a month, by first utilizing the whole of the cenvat credit available at the end of the month and paying the balance duty, if any, through PLA and thereafter refunding the duty, if any, paid through PLA.

1.7 In these cases, the Respondents, during the period of dispute, instead of first utilizing the BED credit for payment of BED to the extent possible, utilized the BED credit for the payment of education cess and S&H cess first and thereafter the remaining amount of BED credit was utilized for payment of BED. As a result of this practice adopted, they paid more duty through PLA and claimed higher quantum of refund in terms of exemption Notification No. 56/2002-CE. The Department is of the view that an assessee availing of Notification No. 56/2002-CE can not utilize BED credit for payment of education cess and S&H cess, as it results in higher payment of BED through PLA and thus and higher quantum of refund, to the extent the BED credit was used for payment of education cess and S&H cess. On this basis, the jurisdictional Assistant /Deputy Commissioner disallowed the refund claim of extra BED paid through PLA on account of diversion of BED credit for payment of education cess and S&H cess.

1.8. However, on appeals being filed against the orders of Assistant/Deputy Commissioner, the CCE (Appeals) by the impugned orders-in-appeal, set aside the orders of Assistant /Deputy Commissioner and allowed the appeals on the grounds that-

(a) In terms of the provisions of Rule 3(4) of the cenvat credit Rules, 2004, the cenvat credit of various duties can be utilized for payment of any duty of excise;

(b) The only restriction on utilization of cenvat credit of various duties is specified in Rule 3(7)(b) according to which the credit of AED (GSI), AED (T&TA), NCCD, education cess and S & H cess be utilized only for payment of AED (GSI), AED (T&TA), NCCD, education cess and S & H cess respectively, and there is no restriction on utilizing BED credit for payment of education cess or S & H cess.

1.9 Against the above orders of CCE (Appeals), these appeals have been filed by the Revenue. In respect of appeal No.E/358/09, E/793 to 801, 1931, 782 to 787, 790 to 792, 1472 to 1476, 1477 to 1479, 1484 to 1487, 1921, 1924, 1925, 1928 to 1930, 1482 to 1483, 788 to 789, 353 to 355, 1922 to 1923, 1927, 349 to 352, 356 to 357, 773/2009 , stay applications have also been filed.

2. Heard both the sides.

3. Shri S.R. Meena, 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. reported in 2011 (267) ELT 653 (Tri Del.) and Apex Court's judgement in case of Union of India vs. Modi Rubber Ltd. reported in [1986 (25) ELT 849 (SC)B],** 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 A.R. Madhav Rao and Shri R.K. Hasija, Advocates representing M/s Hitachi Home and life Solutions(I) Ltd., M/S Ritzy Polymers and M/s Sun Pharmaceuticals Industries; Shri S.K. Malhotra, Chartered Accountant representing M/s Tawi Chemical Industries (Unit II), M/s Ultra Home Care Coils (P) Ltd., M/s Modern Whitners Pvt. Ltd., Masters India, M/s Shree Sita Ram Industries Pvt. Ltd., M/s J & K Metals, Jammu Castings Pvt. Ltd., M/s Aar Bee Industries, M/s Nav Bharat Metals, M/s Bharat Box Factory Unit II and III, M/s Krishi Rasayan Exports Pvt. Ltd., M/s Sud Pines Pvt. Ltd., M/s K.C. Minerals and Allied Industries, M/s Balajee Rosin Industries, M/s K.S. Profiles, M/s Cardinal Chemicals Pvt. Ltd., M/s J & K Pulp & Papers Pvt. Ltd.

and Shri S.J. Vyas, Advocate representing M/s Hitachi Home & Life Solutions (I) Ltd., (Appeal No. E/1928 to 1930/09) 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 Bosami 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 Para 1, 1A, 2, 2A, 3 & 4 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 15^{th} 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 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.

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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 :

Xxx xxxx xxxxx xxxxx xxxx xxx

"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.]

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 unit located in area 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 2^{nd} 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, which is the case in all these appeals, the assessee for availing this exemption, is required 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);

(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 UOI in **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 and 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 asseessee 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, s 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 on this point and the orders passed by the original adjudicating authority restored. The Revenue's appeals are thus allowed. The stay applications also stand disposed of.

(Pronounced in open Court on 3/8/2012)

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Technical Member

scd/