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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

Appeal No. : E/2430/2009-EX[DB], E/2431/2009-EX[DB], E/2432/2009-EX[DB], E/2433/2009-EX[DB], E/2434/2009-EX[DB], E/2435/2009-EX[DB]

Dated: **03/08/2012**

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

KAISER INDUSTRIES LTD. , (Respondent)

I am directed to transmit herewith a certified copy of Final Order No. **A/891-896/2012-EX[DB]** dated **30/07/2012** 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
KAISER INDUSTRIES LTD. ,
INDUSTRIAL GROWTH CENTRE,
SAMBA, J&K.

2. **Advocate(s) / Consultant(s):** SH. UDIT JAIN, ADV.,
A-103, DEFENCE COLONY,
N. DELHI - 24

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

8. Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9. Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

10. LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11. TaxIndiaOnline.com Pvt. Ltd., Unit No. 1, 2nd Floor, Vasant Arcade, Nelson Mandela Road, Vasant Kunj, New Delhi - 110070

12. Office Copy

13. Gaurd File

Assistant Registrar
EXCISE Appeal Branch

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 : 09/07/2012.
DATE OF DECISION : 20/07/2012.

Excise Appeal No. 2430 to 2435 of 2009

[Arising out of the Order-in-Appeal No. 447-456/CE/Appl/Chd-II (JK)/2009 dated 19/05/2009 passed by The Commissioner (Appeals), Central Excise, Chandigarh – II.]

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 Kaiser Industries Ltd.
Respondent

Appearance

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

S/Shri Udit Jain and Hrishikesh, Advocates - for the Respondent.

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

FINAL Order No. A/891-896/12-Ex(PB) Dated : 20.07.2012

Per. Rakesh Kumar :-

The respondents are the units located in the state of Jammu and Kashmir and are manufacturing EMUSOL and KAISPERSE chargeable to Central Excise duty under sub-heading 34029099 of the Central Excise Tariff. Since the unit is located in the areas specified in the Notification No. 56/2002-CE dated 14/11/2002, as amended, and the goods being manufactured are also covered by this notification, the respondent are availing the benefit of this exemption. As per the scheme for availing the exemption under this notification, a unit is required to determine its duty liability in respect of the clearances made during the month and thereafter first pay the duty to the extent possible through Cenvat credit available and only the balance amount of duty, if any, is required to be paid through PLA, which is refundable. The unit can either apply to the Jurisdictional Central Excise Authorities for the refund of duty paid through PLA in terms of the provisions of this Notification or take self-credit in the PLA, which can be utilised for payment duty through PLA during the next month. The point of dispute in this case is as to whether the respondent are also eligible for the benefit of this notification in respect of education cess or in other words, whether the respondents are also eligible for refund of education cess and Secondary and Higher education cess, which had been paid through PLA. The original Adjudicating Authority disallowed the benefit of this exemption to the respondent in respect of both the education cess and rejected the refund of education cess and secondary and higher education cess. The Respondent filed appeals against the orders of the Deputy Commissioner before CCE (Appeals). The Commissioner (Appeals) vide impugned order-in-appeal dated 19/5/2009 allowed the appeals relying upon the Tribunal's judgment in the case of **Bharat Box Factory Ltd. vs. CCE, Jammu** reported in **2007 (214) E.L.T. 534 (Tri. – Del.)**. Against this order of the Commissioner (Appeals), these appeals have been filed by the Revenue.

2. Heard both the sides.

3. Shri R.K. Verma, the learned Departmental Representative, assailed the impugned orders by reiterating the grounds of appeal in the Revenue's appeals and emphasised that while the judgment of the Tribunal in the case of **Bharat Box Factory Ltd. vs. CCE, Jammu** (supra), relied upon by the Commissioner (Appeals) is a single bench judgment, this judgment has been over-ruled by Division Bench in the case of **CCE, Jammu vs. Jindal Drugs Ltd.** reported in **2011 (267) E.L.T. 653 (Tri. – Del.)**, wherein the Tribunal taking into account the judgment of the Apex Court in the case of **Union of India vs. Modi Rubber Ltd.** reported in **1986 (25) E.L.T. 849 (S.C.)** has held that benefit of Notification No. 56/2002-CE cannot be extended to education cess and secondary and higher education cess, that Notification No. 56/2002-CE covers only the duty of excise leviable under Section 3 (1) of the Central Excise Act and the additional duties of excise, levied under Additional Duties of

Excise (goods of Special Importance Act), 1957 and Additional Duties of Excise (Textile and Textile Articles) Act, 1978, that when this notification does not cover the education cess leviable under Finance Act, 1964 and secondary and higher education cess leviable under Finance Act, 2007, the benefit of this notification cannot be extended to the education cess and secondary and higher education cess, and that in view of this, the impugned order is not correct.

4. Shri Udit Jain and Hrishikesh, Advocates, the learned Counsels for the respondent, relied upon the judgment of the Tribunal in the case of **Cyrus Surfactants Pvt. Ltd. vs. CCE, Jammu** reported in **2007 (215) E.L.T. 55 (Tri. – Del.)**, wherein Division Bench of the Tribunal held that Notification No. 56/2002-CE is applicable to the education cess, that in any case, since the education cess and secondary and higher education cess chargeable under the Finance Act, 2004 and Finance Act, 2007 respectively, is 2% and 1% respectively, of the Central Excise duty levied and collected and since under Notification No. 56/2002-CE, the duty paid through PLA as per the provisions of this notification being exempt, is refunded, there is no question of charging education and secondary and higher education cess on duty paid through PLA, that in any case since the Division Bench of the Tribunal has held that the benefit of Notification No. 56/2002-CE is admissible in respect of education cess and secondary and higher education cess, if this bench takes a different view, the matter must be referred to a Larger Bench.

5. We have considered the submissions from both the sides and perused the records.

6. From plain reading of the Notification No. 56/2002-CE, it is clear that this notification issued under Section 5 A (1) of Central Excise Act, 1944, 3 (3) of Additional Duties of Excise (Goods of Special Importance Act), 1957 and Section 3 (3) of Additional Duties of Excise (Textile and Textile Article Act), 1978 exempts the duties levied by these three acts only to the extent as mentioned in this notification. This notification does not mention the education cess levied under Finance Act, 2004 and Finance Act, 2007 as being covered by this exemption. The Apex Court in the case of **Union of India vs. Modi Rubber Ltd.** (supra) has held that when Notification No. 123/74-CE dated 1/8/74 and No. 27/81-CE dated 1/3/81 issued under Rule 8 (1) of Central Excise Rules, 1944 (corresponding to Section 5A of Central Excise Act, 1944) exempted the goods "from the duty leviable thereon", according to well recognised canons of construction of statutes, these exemptions should be read as granting exemption only in respect of duty of excise payable under the Central Excise Act, 1944 and the exemption cannot be extended to any other duty leviable on the goods under some other act. Accordingly, the Apex Court in this case held that these exemption notifications would not cover the Special Duties of Excise leviable under Finance Act, and Additional Duty of Excise, leviable on the goods under Additional Duty of Excise (Goods of Special Importance Act), 1957. It is in view of this judgment of the Apex Court that

the Division Bench of the Tribunal in the case of **CCE, Jammu vs. Jindal Drugs Ltd.** (supra) has held that the Notification No. 56/2002-CE would not be applicable to the education cess leviable Section 93 of the Finance Act, 2004. In the judgments of the Tribunal in the cases of **Bharat Box Factory Ltd. vs. CCE, Jammu** (supra) and **Cyrus Surfactants Pvt. Ltd. vs. CCE, Jammu** (supra), the judgment of the Apex Court in the case of **Union of India vs. Modi Rubber Ltd.** (supra) has not been considered.

7. It has been pleaded that since under the provisions of Section 93 (1) of Finance Act, 2004 and Section 136 of Finance Act, 2007 education cess and secondary and higher education cess is 2% and 1% respectively of the aggregate of duties of excise (including special excise duty but excluding education cess) <u>levied and collected</u> by the Central Government in the Ministry of Finance (Department of Revenue) under Central Excise Act, 1944 on any other law for the time being in force, the education and secondary and higher education cess cannot be collected on the duty, which having been paid through PLA is exempt and is, hence, refunded as per the provisions of Notification No. 56/2002-CE. In our view, this plea is not acceptable for the following reasons.

(1) Notification No. 56/2002-CE is different from other exemption notification~~s~~, as in terms of this notification, an assessee is first required to pay full duty leviable on the goods cleared during the month to the extent possible through Cenvat credit account and the balance amount, if

any left to be paid, through PLA and it is the amount paid through PLA which is refunded. This refund is outside the scheme of Section 11B. However, the invoices issued show full duty payment which the assessee can recover from the customers and the customers can avail Cenvat credit as if no portion of duty paid was exempt. We are of the view that in these circumstances it cannot be said that the duty levied and collected is only the duty paid through Cenvat credit amount and that the education cess would be chargeable only on the portion of duty which was not refunded.

(2) In any case, the point raised pertains to determination of quantum of education cess and secondary and higher education cess payable by the units availing of Notification No. 56/2002-CE – whether the education cess are to be calculated on total duty payable which had initially been paid or on net duty paid after adjusting the refund of duty paid through PLA. This issue is totally different from the core issue in these appeals – whether Notification No. 56/2002-CE also exempts the education cess levied under Section 93 (1) of Finance Act, 2004 and Section 136 of Finance Act, 2007 in the manner it exempts the basic excise duty and Special excise duty levied under Section 3 (1) of Central Excise Act, 1944 and AED (GSI) and AED (T&TA) levied under AED (GSI) Act, 1957 and AED (T&TA) Act, 1978 respectively. As discussed above, this exemption notification does not cover the education cesses levied under Section 93 of Finance Act, 2004, and Section 136 of Finance Act, 2007.

(3) Even if the Respondent's plea is accepted, the refund of education cess on the exempted portion of aggregate of the duties of excise can not be given under the provisions of notification No. 56/2002-CE. It can be considered only

under Section 11B where it will be subject to the bar of unjust enrichment.

8. In view of the above discussion, following the Division Bench judgments in the case of **CCE, Jammu vs. Jindal Drugs Ltd.** (supra), we hold that the impugned order is not sustainable. The same is set aside. The orders of the original Adjudicating Authority on this point are restored. The Revenue's appeals are accordingly allowed.

(Order pronounced in open court on 26/07 /2012.)

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

PK