IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. IV

Appeal No. E/2546/2009-EX [SM]

[Arising out of Order-in-Appeal No. 263-306(DK) CE/JPR-II/2008 dated 19.01.2009, passed by the Commissioner of Central Excise, Jaipur – II]

For approval and signature:

Hon'ble Shri V. Padmanabhan, Member (Technical)

C.C.E. Jaipur II ....Appellant

Vs.

Shree Charbhuja Industries ....Respondent

Appearance:

Sh. Dharam Singh, AR for the Appellant
None, for the Respondent

CORAM:
Hon'ble Shri V. Padmanabhan, Member (Technical)

Date of Hearing: 23.12.2016

FINAL ORDER NO. 56370 /2016-EX[SM]

Per V. Padmanabhan

The present appeal filed by Revenue is directed against the Order dated 19.1.2009 passed by the Commissioner (Appeals), Jaipur. The impugned order decides the same issue with reference to 43 manufactures of SS Cold Rolled Patta /Patti falling under Sub Heading No. 7219.90 of the Central Excise Tariff. All these manufacturers have opted for payment of Central Excise duty under the compound levy scheme formulated for this commodity issued under Rule 15 of the Central Excise Rules, 2002. The relevant Notification applicable during the period under dispute was notification no. 34/2001 CE dated 28.6.2001 as amended from time to time. This notification had fixed the rate of compound levy payable at the rate of Rs 15,000/- per month for cold rolling machine which was increased to Rs 30,000/- per month vide amending notification dated 1.3.2006. The dispute in the present case is whether the manufacturers who have opted for compound levy are liable to pay, in addition to the rate fixed under the notification, the Education cess which were payable during the relevant time. These manufacturers paid the cess and subsequently claimed refund of the same through refund claims filed before the jurisdictional Assistant Commissioners. The original authority rejected these refund claims. However, vide impugned order, the Commissioner (Appeals) allowed such refunds. Aggrieved by the Impugned order the present appeal has been filed by Revenue.

2. Heard Shri Dharam Singh, ld. AR for the Revenue. However, none appeared on behalf of respondents.

3. I note that the case has come up for hearing several times but the respondent has not been represented. Since the appeal cannot be kept pending endlessly, I take up issue for a decision.

4. Ld. DR submitted that the issue stands decided in favor of the Revenue by the Tribunal in the case of **Commissioner Central Excise, Jaipur-II Vs. Shri Ram Steel Industries** reported as **2010 (258) ELT 154 (Tribunal Delhi).**

5. I have gone through the records and the case laws cited by the ld. DR. In the said case Tribunal has held as follows:

> "*Undisputedly, the compounded levy scheme was formulated under Rule 15 of the Central Excise Rule, 2001. The said Rule 15 read as under :-*
> ***"Special procedure for payment of duty. -*** *(i) the Central Government may, by notification, specify the goods in respect of which an assessee shall have the option to pay the duty of excise on the basis of such factors as may be relevant to production of such goods and at such rate as may be notified for this purpose, subject to such limitations and conditions, including those relating to interest or penalty, as may be specified in such notification.*
> *(ii) The Central Government may also specify by notification the manner of making an application for availing of the special procedure for payment of duty, abatement, if any, that may be allowed on account of closure of a factory during any period, and any other matter incidental thereto".*
> ***8.*** *The term 'duty' was defined under Rule 2(e) of the said Rules to mean the duty payable under Section 3 of the Central Excise Act, 1944. The definition clause in Rule 2 also clarified under item No. (i) that the words and expressions used in the said Rule and not defined but are defined in the Act shall have the meaning respectively assigned to them in the said Act.*
> ***9.*** *Section 3 of the said Act refers to duties specified in first schedule and second schedule to the Central Excise Tariff Act, 1985 to be levied. In terms of sub-section (i) thereof, there shall be levied and calculated in such manner as may be prescribed as duty of excise to be called the central value added tax on all excisable goods which are produced or manufactured in India and at the rate set forth in the said schedule of the Central Excise Tariff Act, 1985 and special duty of excise in addition to the duty of excise specified as above, on excise goods specified in the second schedule to the Central Excise Tariff Act, 1985 which are produced or manufactured in India as also set forth in the said second schedule.*
> ***10.*** *The provisions of law comprised under Rule 15 of the said Rules, under which the compounded levy scheme is sought to be introduced under Notification No. 34/2001-C.E., dated 28-6-2001, therefore, specifically refers to the duty of excise payable in terms of Section 3 of the said Act. The conjoint reading of Rule 15, Rule 2(e) of the said Rules and Section 3 of the said Act makes it abundantly clear that the scheme which can be introduced in terms of Rule 15 giving option to the manufacturer in that regard would be in relation to the duties payable in terms of Section 3 of the said Act. Section 3 specifically refers to the duties specified in first and second schedule to the Central Excise Tariff Act, 1985.*

11. *The education cess has been levied in accordance with Section 93 of the Finance Act, 2004 whereas the higher education cess was levied under Section 138 of the Finance Act, 2007. The education cess so levied under Finance Act cannot be said to be excise duty levied in terms of Section 3 of the said Act. The issue regarding the same had arisen before the Tribunal in the matter of CCE, Jammu v. M/s. Jindal Drugs Limited and various other matters which were disposed of by the Tribunal on 12-8-2009 by final Oral Order No. 900A to 1143A/2009-Ex. holding therein that "Undisputedly, the levy of cess is under totally independent enactment i.e. Finance Act, 2004 and Finance Act, 2007. However, both the said enactments cannot be read as forming part of the Central Excise Act nor both Acts are required to be read together. In the Finance Act, under Section 93(3), it provides that the provisions of Central Excise Act, 1944 and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of the 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, would disclose that the provisions of two Acts are independent from each other and merely because education cess is defined as the excise duty, it could not be construed that the cess levied under Finance Act should also be exempted under the said notification even in the absence of clear specification in that regard under the said notification".*

12. *Before arriving at the said finding the Tribunal had taken into consideration the various provisions of law of the said Act as well as of the Finance Acts and has held that the cess so imposed cannot be construed as forming part of the duty levied under Section 3 of the said Act. Obviously, therefore, education cess and higher education cess cannot be said to be part of the compounded levy determined under the compounded levy scheme in terms of Notification No. 34/2001-C.E., dated 28-6-2001 read with Rule 15 of the said Rules.*

13. *Clause 3(1) of the said notification provides that a manufacturer whose application has been granted under paragraph 2 shall pay a sum calculated at the rate specified in the said notification, subject to the conditions laid down in the said notification and such payments shall be in full discharge of his liability for duty leviable on his production of such cold re-rolled stainless patta/patties, or aluminium circles during the period for which the said sum has been paid. Referring to the word 'duty' in the said clause it was the contention, as is revealed from the records, of the respondents that on payment of duty determined under the compounded levy scheme, the entire duty liability of the manufacturer would stand discharged and that therefore they were not liable to pay the education cess or higher education cess. Once it is clear that the term 'duty' in Rule 15 under which the compounded levy scheme was formulated refers to the duty payable in terms of Section 3 of the said Act which in turn exclusively relates to the first and second schedule of the Central Excise Tariff Act, 1985, it is obvious that the duties, merely because they are classifiable as the excise duty, but imposed under Finance Acts cannot form part of the duty payable under Section 3 of the said Act and for the same reason mere payment of the duty in terms of determination of compounded levy payable would not result in discharge of their liability to pay the duty payable in terms of the Finance Acts.*

14. *Clause 3 of the said notification refers only to the liability which arises in terms of determination thereof under compounded levy scheme* *and not in relation to the liability which arises on account of statutory provisions other than Rule 15 under which the scheme is formulated. Once Rule 2(e) of the said Rules restricts the scope of the term 'duty' to the liability which could be discharged in terms of Section 3 of the said Act and Section 3 refers to the first and second schedules of the Central Excise Tariff Act, 1985, the cess being imposed under independent statutory provisions comprised under Finance Acts, certainly, the liability flowing therefrom would not be part of the duty determined under the compounded levy scheme. The Rule 15 of the said Rules merely enables the Central Government to specify the goods in respect of which assessee can opt to pay the duty of excise on the basis of such factors as may be relevant to production of such goods and at such rate as may be notified for that purpose. It does not relate to exemption of duty liability imposable and recoverable under other statutory provisions, once he opts for the compounded levy scheme. On the other hand, considering the phraseology of Rule 15 read with Rule 2(e) of the said Rules, it is evident that the scheme under the said Rule would apply to the duties payable under Section 3 of the said Act. If the contention sought to be raised on behalf of the assessee is accepted, it would virtually result in construing the Rule 15 of the said Rules as granting exemption from payment of all the duties payable under any other statute once the manufacturer opts for compounded levy scheme. Rule 15 nowhere discloses any such intention of the legislature even remotely. It is true that in the letter dated 25-8-2008 issued by the Board, there was reference to the Board's instruction dated 19-12-2007 which related to the compounded levy scheme for pan masala containing tobacco and it was stated therein that no education cess or higher education cess would be leviable over and above the amount to be paid under the compounded levy scheme. It is not understood as to on what basis the Board had issued those instructions. Neither the provisions comprised under Rule 15 of the said Rules nor the provisions under Rule 96ZO of the erstwhile Rules disclose that the duties in the nature of the education cess or higher education cess imposed under Finance Acts are included in the duty payable in terms of Section 3 of the said Act. In any case, when the provisions of law are very clear, the question of following the instructions of the Board which are apparently contrary to the provisions of law, cannot arise. Besides the letter dated 25-8-2008 even after noting those instructions proceeded to clarify with reference to Notification No. 34/2001-C.E., dated 28-6-2001 that the Notification No. 17/2007-C.E., dated 1-3-2007 which is similar to amended Notification No. 34/2001-C.E., dated 28-6-2001 covers only basic excise duty and does not include education cess or higher education cess and the same apparently is in consonance with the provisions of law. Being so, question of referring to the earlier instructions of the Board does not arise.*

15. *For the reasons stated above, therefore, we find that the Commissioner (Appeals) erred in interfering with the order passed by the adjudicating authority. The impugned order cannot be sustained and is liable to be set aside with consequential relief.*

16. *The appeals therefore succeed on the above grounds. They are hereby allowed. The impugned order is set aside with all consequential relief."*

6. By following the decision of the coordinate bench, I set aside the impugned order and allowed the appeal filed by Revenue.

[Order dictated and pronounced in the open court]

V. Padmanabhan
(Member Technical)

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