

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO. I**

Appeal No. E/771 to 773/2010

(Arising out of Order-in-Appeal No. SB/21-23/LTU/MUM/2010 dated 29.1.2010 passed by the Commissioner of Central Excise (Appeals), LTU, Mumbai).

M/s Man Industries Ltd.	Appellant
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Vs.

Commissioner of Central Excise & Service Tax, LTU, Mumbai	Respondent
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Appearance:

Shri B.B. Mohite, Advocate	for Appellant
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Shri A.B. Kulgod, AC (AR)	for Respondent
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CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL) HON'BLE MR. S. SRIVASTAVA, MEMBER (TECHNICAL)
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Date of Hearing: 14.06.2018

Date of Decision: 14.06.2018

ORDER NO. **A/86908-86910/2018**

Per: Dr. D.M. Misra

Heard both sides.

2. These three appeals are filed against Order-in-Appeal No. SB/21-23/LTU/MUM/2010 dated 29.1.2010 passed by the Commissioner of Central Excise (Appeals), LTU, Mumbai.

2. The short issue involved in the present appeal is whether the appellants are entitled to refund of Edu. Cess and Secondary & Higher Secondary Edu. Cess when they availed area based exemption under Notification No. 39/2001-CE dated 31.7.2001.

3. Both sides fairly agree that the issue is covered now by the judgment of Hon'ble Supreme Court in the case of *SRD Nutrients Pvt. Ltd. Vs. Commissioner of Central Excise, Guwahati – 2017* (355) ELT 481 (SC).

4. We find that the admissibility of refund of Edu. Cess and Secondary & Higher Secondary Edu. Cess paid by the appellant along with excise duty under area based exemption Notification No. 39/2001-CE dated 31.7.2001 is considered by the Hon'ble Supreme Court in the case of *SRD Nutrients Pvt. Ltd. (supra)*.

Their Lordships observed as follows: -

21. Even otherwise, we are of the opinion that it is more rational to accept the aforesaid position as clarified by the Ministry of Finance in the aforesaid circulars. Education Cess is on excise duty. It means that those assesseees who are required to pay excise duty have to shell out Education Cess as well. This Education Cess is introduced by Sections 91 to 93 of the Finance (No. 2) Act, 2004. As per Section 91 thereof, Education Cess is the surcharge which the assessee is to pay. Section 93 makes it clear that this Education Cess is payable on 'excisable goods' i.e. in respect of goods specified in the first Schedule to the Central Excise Tariff Act, 1985. Further, this Education Cess is to be levied @ 2% and calculated on the aggregate of all duties of excise which are levied and collected by the Central Government under the provisions of Central Excise Act, 1944 or under any other law for the time being in force. Sub-section (3) of Section 93 provides that the provisions of the Central Excise Act, 1944 and the rules made thereunder, including those related to refunds and duties, etc., shall as far as may be applied in relation to levy and collection of Education Cess on excisable goods. A conjoint reading of these provisions would amply demonstrate that Education Cess as a surcharge, is levied @ 2% on the duties of excise which are payable under the Act. It can, therefore, be clearly inferred that when there is no excise duty payable, as it is exempted, there would not be any Education Cess as well, inasmuch as Education Cess @ 2% is to be calculated on the aggregate of duties of excise. There cannot be any surcharge when basic duty itself is *Nil*.

22. It is rightly pointed out by the learned counsel for the appellants that the CESTAT in the earlier two judgments given in *Bharat Box Factory Ltd.* and *Cyrus Surfactants Pvt. Ltd.* held that Education Cess and Higher Education Cess would also refundable along with excise duty and in view thereof, another co-ordinate Bench of CESTAT could not take a contrary view in *Jindal Drugs Ltd.* Judicial discipline warranted reference of the matter to the Larger Bench which it did not do. In the impugned judgment, while preferring to follow the view taken in *Jindal Drugs Ltd.*, the Tribunal has not given any reasons for adopting this course of action. The Rajasthan High Court in the case of *Banswara Syntex Ltd.* while holding that surcharge taken in the form of Education Cess shall also be refundable has given the following reasons in support of the said view :

The very fact that the surcharge is “15. collected as part of levy under three different enactments goes to show that scheme of levy of Education Cess was by way of collecting special funds for the purpose of Government project towards providing and financing universalised quality of basic education by enhancing the burden of Central Excise Duty, Customs Duty, and Service Tax by way of charging surcharge to be collected for the purpose of Union. But, it was made clear that in respect of all the three taxes, the surcharge collected along with the tax will bear the same character of respective taxes to which surcharge was appended and was to be governed by the respective enactments under which Education Cess in the form of surcharge is levied & collected.

Apparently, when at the time of collection, surcharge has taken 16. the character of parent levy, whatever may be the object behind it, it becomes subject to the provision relating to the Excise Duty applicable to it in the manner of collecting the same obligation of the tax payer in respect of its discharge as well as exemption concession by way of rebate attached with such levies. This aspect has been made clear by combined reading of sub-sections (1), (2) & (3) of Section 93.

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The Explanation appended to Notification dated 26-6-2001 included 18. within the ambit of Excise Duty any special Excise Duty collected under any Finance Act when under Finance Act, 2004 it was ordained that Education Cess to be collected as surcharge on Excise Duty payable on excisable goods and shall be a Duty of Excise, it became a special Duty of Excise by way of Education Cess chargeable and collected under Finance Act, 2004 and fell within the ambit of clause (3) of Explanation appended to Notification dated 26-6-2001. Consequently, rebate became available on collection of surcharge on Excise Duty under Finance Act, 2004 in terms of existing Notification dated 26-6-2001 immediately. Later Notification including the Education Cess in enumerative definition in the circumstances was only clarificatory and by way of abandoned caution, but not a new rebate in relation to Excise Duty or any part thereof as statutorily pronounced as well as specified Excise Duty levied and collected under the Finance Act.”

We are in agreement with the aforesaid reasons accorded by the Rajasthan High Court, since it is in consonance with the legal principle enunciated by this Court. For this purpose, we may refer to the judgment in the case of *Collector of Central Excise, Patna v. Tata Engineering and Locomotive Co.* - [1997 (92) E.L.T. 303 (S.C.)] In that case, issue pertained to valuation of cess which was levied @ 1/8 per cent of *ad valorem* ‘value’ of the Central Excise duty. The Court held that the calculation of 1/8 per cent *ad valorem* of the motor vehicle for the

purposes of the levy and collection of the automobile cess must be made that was being calculated since automobile cess was to be levied and calculated as if it was excise duty. As a fortiori, the Education Cess and Higher Education Cess levied @ 2% of the excise duty would partake the character of excise duty itself.

Insofar as judgment of Calcutta High Court in *Biswanath Hosier Mills Ltd.* case is concerned, we find that the same would have no bearing in the present case. In the said case, cess was payable under Section 5A of the Textiles Committee Act, 1963. After going through the provisions of Textiles Committee Act, 1963 and the Textile's Committee (Cess) Rules, 1975, the High Court found that as per the scheme of Textiles Committee Act and the rules framed therein, levy of cess was independent of excise under the Act which was a complete code containing all the provisions relating to levy, collection, exemption and application of cess. Therefore, even the legislative intentment underlying Textiles Committee (Amendment) Act and rules read with the preamble, aims and objects of the Act was clearly discernable, namely, the legislature intended to levy the cess under the Act independent of and in addition to the excise duty which was payable under the Central Excise and Salt Act, 1944.

23. It is also trite that when two views are possible, one which favours the assessee has to be adopted.

24. For the aforesaid reasons, we allow these appeals and hold that the appellants were entitled to refund of Education Cess and Higher Education Cess which was paid along with excise duty once the excise duty itself was exempted from levy.

Following the aforesaid judgment, we find merit in the appeals.

Accordingly, the impugned orders are set aside and the appeals are allowed with consequential relief as per the law.

(Operative portion of the order pronounced in Court)

(S. Srivastava)
Member (Technical)

(Dr. D.M. Misra)
Member (Judicial)

Sinha