CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO.4

Excise Appeal No. 88847 of 2013

(Arising out of Order-in-Appeal No.BC/87/Bel/2013-14 dated 30.05.2013 passed by the Commissioner (Appeals), Central Excise, Mumbai-III)

M/s. Bhansali Bright Bars Pvt. Ltd. **Appellant**
(C-8/3, TTC Industrial Area,
Village: Pawne, Navi Mumbai 400075.)

Vs.

Commissioner of CGST & CE, Belapur **Respondent**
(1st Floor, CGO Complex, CBD Belapur,
Navi Mumbai 400614.)

Appearance:

Shri Rajesh Ostwal, Advocate, for the Appellant
Shri P.K. Acharya, Superintendent, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)

Date of Hearing: 22.12.2023
Date of Decision: 03.04.2024

FINAL ORDER NO. 85393/2024

PER: P.K. CHOUDHARY

Credit of Education Cess and Secondary and Higher Education Cess to the tune of Rs.29,81,602/- availed by the appellant herein who are manufacturers of stainless steel bright bars during the period from 15.06.2006 to 29.06.2009 has been disallowed by the Authorities below on the ground that the goods were supplied to them by 100% EOU M/s Viraj Profiles Ltd. and as per Rule 3(7)(a) of Cenvat Credit Rules, 2004, the assessee receiving goods from 100% EOU can avail credit of Basic Excise Duty only as per the formula prescribed there under.

2. Heard both sides and perused the appeal records.

3. I find that the issue is no more *res integra* and is squarely covered by several decisions of this Tribunal. In the case **of M/s Emcure Pharmaceuticals Ltd. V/s Commissioner of C.Ex., Pune reported in 2008 (225) E.L.T. 513 (Tri.-Mumbai)** it was held that :-

> ***"5.*** *Rule 3(1) allows a manufacturer to take credit of specified duties paid on inputs or capital goods or input services and Rule 3(4) allows a manufacturer to utilise such credit for payment of excise duty on final product or service tax on output service. However, an exception has been carved out in respect of inputs supplied by an EOU where the availment of credit is restricted to the formula specified under Rule 3(7)(a) only in respect of basic excise duty levied under Section 3 of the Central Excise Act. Rule 3(7) (a) does not cover all duties paid by EOU as it refers only to availment of credit of duty paid by EOU under Section 3 of the Central Excise Act, 1944. The rule refers to Notification 23/2003-C.E. which exempts duty leviable under Section 3 of the Central Excise Act, 1944 and nowhere refers to the Finance Act under which education cess is levied. From this, it appears that the objective of the legislature was to restrict availment of credit of BED paid by an EOU and not to restrict availment of credit of other duties leviable under the Finance Act, 1944 (Education Cess) and National Calamity Contingent Duty Act and Additional Duties of Excise (Textile and Textiles Articles) Act, etc.*
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> ***6.*** *According to the Revenue, since Rule 3(7)(a) begins with a non-obstante clause, it overrides the provisions contained in sub-rule (1) and (4) of Rule 3 and, therefore, the only credit available to the appellants in respect of the inputs supplied by EOU will be the amount as specified under the formula given therein. However, this stand is not tenable for the reason that the non-obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found in the same enactment or some other enactment, and not all provisions contained therein. My view is fortified by the Apex Court's decision in UOI v. G.M. Kokil - (1984) Supp SCC 196, wherein the Apex Court has held as under :-*
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>> *"Section 70, so far as is relevant, says "the provisions of the Factories Act shall, notwithstanding anything contained in that Act, apply to all persons employed in and in connection with a factory". It is well-known that a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions. Thus the non obstante clause in Section 70, namely, "notwithstanding anything contained in that Act" must mean*

> *notwithstanding anything to the contrary contained in that Act and as such it must refer to the exempting provisions which would be contrary to the general applicability of the Act. In other words, as all the relevant provisions the Act are made applicable to a factory notwithstanding anything to the contrary contained in it, it must have the effect of excluding the operation of the exemption provisions. Just as because of the non-obstante clause the Act is applicable even to employees in the factory who might not be 'workers' under Section 2(1), the same non-obstante clause will keep away the applicability of exemption provisions qua all those working in the factory. The Labour Court, in our view, was, therefore, right in taking the view that because of the non-obstante clause Section 64 read with Rule 100 itself would not apply to the respondents and they would be entitled to claim overtime wages under Section 59 of that Act read with Section 70 of the Bombay Shops and Establishments Act, 1948."*

The above decision has been followed by the larger bench of the Tribunal in Das & Co. v. CCE, 2000 (121) E.L.T. 275, holding that a non-obstante clause is used where contrary provisions exist. Similar view has been expressed by the apex court in the case of Jindal Poly Films Ltd. v. CCE, 2006 (198) E.L.T. 3 (S.C.) in the context of the Modvat Rules. Rule 3(1) is applicable to all manufacturers or producers of final products or providers of taxable services including 100% EOU. Rule 3(7)(b) allows utilisation of Cenvat credit by all categories of manufacturers or producers of final products or providers of taxable services, including 100% EOU, in respect of AED for payment of AED, NCCD for payment of NCCD, education cess for payment of education cess, etc. Rule 3(7)(b) also opens with the non-obstante clause. Therefore, if the interpretation canvassed by the Revenue is accepted as correct, there would have been no question of utilisation of education cess for payment of education cess if the taking of the credit itself, according to the Revenue, is barred by Rule 3(7)(a), and the provisions of Rule 3(7)(b) would, therefore, be rendered redundant.

***7.** In the light of the above discussion, I am of the view that credit of education cess is admissible to the appellants herein, and accordingly set aside the impugned order and allow the appeal."*

4. I find that the facts of the present case are similar to the facts considered in the aforesaid decision of the Tribunal and therefore, I find myself in agreement with the contention that Education Cess is a surcharge which relates in enhancement of the tax. Further the objective was not to levy excise duty on goods cleared by EOU. The question of adding Education Cess under Section 93 of the Finance Act,1944 after determination of the aggregate of customs duty does not arise.

5. Since the issue involved in this case is squarely covered by the aforesaid decision of the Tribunal, there is no need to discuss the other decisions cited by the learned Advocate.

6. In view of the above observations, the impugned order is set aside and the appeal filed by the Appellant is allowed with consequential relief, as per law.

(Order pronounced in the open court on 03.04.2024)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

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