

M/S. SRD NUTRIENTS PRIVATE LIMITED

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v.

COMMISSIONER OF CENTRAL EXCISE GUWAHATI

(Civil Appeal Nos. 2781-2790 of 2010)

NOVEMBER 10, 2017

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[A. K. SIKRI AND ASHOK BHUSHAN, JJ.]

Central Excise Act, 1944:

s.5A(1) – Grant of exemption – From excise duty – Of all goods cleared from the north-east States – By Notification dated 25.4.2007 – Notification provided that assessee would be entitled to refund of duty paid other than the duty paid by way of utilization of CENVAT credit under CENVAT Credit Rules, 2004 – By Finance Act, 2004 Education Cess and Higher Education Cess also imposed which are surcharge on the excise duty – Education cess and Higher Education Cess also levied and collected from the manufacturers who had set up their units in north-east areas, alongwith the excise duty – However, while refunding the excise duty paid, Education Cess and Higher Education Cess were not refunded – Whether Education Cess or Higher Education Cess were refundable with refund of excise duty as per the Notification – Held: It is clear from Circular dated August 10, 2004 and Circular dated April 8, 2004 that Government itself had taken the position that where whole of excise duty is exempted, even the Education and Higher Education Cess would not be payable – When there is no excise duty payable, there would no Education Cess – Notification 20/2007-C.E. dated 25 Apr.2007.

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Allowing the appeals, the Court

HELD: 1. It is clear from two circulars i.e. Circular dated August 10, 2004 and Circular dated April 8, 2011 that the Government itself has taken the position that where whole of excise duty or service tax is exempted, even the Education Cess as well as Secondary and Higher Education Cess would not be payable. These circulars are binding on the Department. [Para 20][57-G]

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A 2. Even otherwise, 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. A conjoint
 B 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,
 C 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*. It is also trite that when two views
 are possible, one which favours the assesseees has to be adopted.
 [Paras 21, 23][58-A-B, D, E; 60-F]

D *Collector of Central Excise, Patna v. Tata Engineering
 and Locomotive Co.* 1997 (92) ELT 303 (SC) – relied
 on.

E *Bharat Box Factory Ltd. v. Commissioner of C. Ex.,
 Jammu* 2007 (214) ELT 534 (Tri.-Del.); *Cyrus
 Surfactants Pvt. Ltd. v. Commissioner of Central Excise,
 Jammu* 2007 (215) ELT 55 (Tri.-Del.); *Banswara Syntex
 Ltd. v. Union of India* 2007 (216) ELT 16 (Raj.) –
 approved.

F *Commissioner of Central Excise, Jammu v. Jindal Drugs
 Ltd.* 2011 (267) ELT 653 (Tri.-Del.) – disapproved.

G *Assistant Commissioner of Commercial Taxes (Asstt.)
 Dharwar v. Dharmendra Trading Company Etc. Etc.*
 (1998) 3 SCC 570; *Commissioner of Central Excise,
 Mangalore v. Suzlon wind International* 2012-TIOL-
 1837-CESTAT-BANG; *R.S. Joshi, Sales Tax Officer,
 Gujarat and Others v. Ajit Mills Limited and Another*
 AIR 1977 SC 2279 : (1977) 40 STC 497; *Biswanath
 Hosiery Mills Ltd. & Anr. v. Union of India & Ors.* (2017)
 346 ELT 353; *Balasore Alloys Ltd. v. CCE, Customs
 and Service Tax, BBSR-I* (2010-TIOL-1659-CESTAT-
 H KOL) – referred to.

Case Law Reference

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2007 (214) ELT 534 (Tri.-Del.)	approved	Para 9
2007 (215) ELT 55 (Tri.-Del.)	approved	Para 9
2011 (267) ELT 653 (Tri.-Del.)	disapproved	Para 10
(1998) 3 SCC 570	referred to	Para 12
2012-TIOL-1837-CESTAT-BANG	referred to	Para 13
2007 (216) ELT 16 (Raj.)	approved	Para 13
AIR 1977 SC 2279	referred to	Para 14
(2017) 346 ELT 353	referred to	Para 15
(2010-TIOL-1659-CESTAT-KOL)	referred to	Para 18
1997 (92) ELT 303 (SC)	relied on	Para 22

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CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 2781-2790 of 2010.

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From the Judgment and Order Nos. A-744-753/KOL/2009 dated 22.12.2009 of Customs, Excise & Service Tax Appellate Tribunal, East Regional Bench, Kolkata in Ex. Appeal Nos. 565-570/09-Ex., Ex. Appeal Nos. 606-608/09-Ex. and Ex. Appeal No. 610/09-Ex.

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Civil Appeal Nos. 4611, 4596, 2987, 5173, 5175, 8322, 8323-8324, 5927-5929, 4597, 4598, 4599, 4600, 4601, 4602, 4603, 4604, 4605, 4606, 4607, 4608, 4609, 4610, 5926, 6085-6092, 10253-10258, 10245-10252, 8330, 8326, 8331, 8328, 8336, 8335, 8332, 8329 of 2010

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Civil Appeal Nos. 2651-2660, 3735-3750, 5300-5303, 1445-1446, 1443-1444 of 2011

Civil Appeal Nos. 8178, 7605, 8181, 8180, 8185, 8186, 8179, 7876, 8182, 8504-8509, 720 of 2012

Civil Appeal Nos. 812, 3981-3983, 8732-8735, 813, 811, 4321-4322, 4292-4319, 4323-4325 of 2013

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Civil Appeal Nos. 5022-5023 of 2014

Civil Appeal Nos. 1730-1731, 2988 of 2016

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A Civil Appeal Nos. 18437, 18438, 18439, 18440, 18441, 18442, 18443-18446, OF 2017

Yashank P. Adhyaru, Sr. Adv., H. R. Rao, Ms. Nisha Bagchi, Arijit Prasad, Ms. Shirin Khajuria, B. K. Prasad, Ms. Pooja Sharma, Rupinder Sinhmar, Abhishek Baghal, Jatin Mahajan, Rajesh Kumar, B Ms. Poonam Kumari, Kaushal Kishore, R. K. Srivastava, Rahul Krishna, L. Badri Narayanan, Aditya Bhattacharya, Victor Das, Ms. Apeksha Mehta, A. R. Madhav Rao, Ms. Pragya Awasthi, Ms. Raorah Gurjar, M. P. Devantha, Pratap Venugopal, Ms. Surekha Raman, Anuj Sarma, Ms. Niharika, M/s. K. J. John & Co., M. P. Devanath, Vivek Sharma, C Abhishek Anand, Udit Jain, Ms. Ashwini Chandrasekaran, Praveen Kumar, Ramesh Choudhary, A. Samad, B. N. Pal, Ram Krishna, Tariq Ahmad, R. Santhanan, Anil Kr. Jha, Rakesh Dahiya, Jay Savla, Ms. Renuka Sahu, Prabhat Chaurasia, Jusdeep Singh Dhillon, Mohd. Irshad Hanif, Mukesh Kumar Maroria, Ms. Anil Katiyar, Ravindra Keshavrao Adsure, Dr. Kailash Chand, Arvind Kumar Sharma, Naveen D Kumar, Praveen Kumar, Advs. for the appearing parties.

The Judgment of the Court was delivered by

A. K. SIKRI, J. 1. Leave granted in the special leave petitions.

2. In order to encourage the business community to set up E manufacturing units in industrially backward areas like the North-Eastern States, viz. Assam, Jammu & Kashmir, Meghalaya, Tripura, Mizoram, Manipur, Nagaland, Arunachal Pradesh as well as Sikkim, notifications were issued by the Excise Department, Government of India, exempting goods specified in the First Schedule to the Central Excise Tariff Act, 1985 (other than those mentioned in the annexure to these notifications) F from payment of excise duty in respect of the goods manufactured and cleared from units located in the aforesaid States. The methodology which was adopted and prescribed in these notifications was that the manufacturer was initially supposed to pay the excise duty leviable on G such goods at the time of clearance as per the Tariff Act and thereafter claim the refund thereof. It was also mentioned in these notifications that exemption contained therein shall be available subject to the condition that the manufacturer first utilises whole of the CENVAT credit available to him on the last date of the month under consideration for payment of duty of goods cleared during such period and was to pay only the balance amount in cash. It is this balance amount which was refundable to him.

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Insofar as payment of the excise duty after availing the CENVAT credit and refund thereof subsequently is concerned, there is no dispute about the same. We are concerned with altogether different aspect which is associated with the aforesaid notification granting exemption from payment of excise duty. A

3. It so happened that vide Finance Act, 2004, the Education Cess and Higher Education Cess were also imposed, which are surcharge on the excise duty. These Education Cess and Higher Education Cess were also levied and collected from the manufacturers who had set up their units in the aforesaid areas, along with the excise duty. However, while refunding the excise duty paid by these manufacturers, the Education Cess and the Higher Education Cess that were paid by the manufacturers along therewith were not refunded. The dispute, thus, which arises for consideration in these appeals is as to whether the Education Cess and Higher Education Cess which were paid along with the excise duty was also liable to be refunded along with the central excise duty in terms of the exemption notifications. This is the issue which is common in all these appeals and the factual background in which the matter has travelled up to this Court is also almost the same. Therefore, for the sake of convenience, purpose would be served in tracing the factual events from Civil Appeal Nos. 2781-2790 of 2010. B C D

4. The appellant in these appeals is M/s. SRD Nutrients Private Limited (hereinafter referred to as the 'assessee'). It is engaged in the manufacture and clearance of Malted Milk Food (Horlicks) using sweetened milk powder since April 12, 2008 and has set up its factory in the State of Assam. This unit is duly registered with the Central Excise Department. E

5. Industrial Policy dated April 01, 2007 for the North-Eastern States, including the State of Assam, was announced by the Ministry of Commerce and Industry (Department of Industrial Policy and Promotion), Government of India to set up a special package for the North-Eastern States to accelerate industrial development of the State. As per this package, new industrial units were entitled to 100% excise duty exemption for a period of 10 years from the date of commencement of commercial production. Pursuant to the said Industrial Policy, the Central Government issued Notification No. 20/2007-Ex. dated April 25, 2007 granting exemption from duties of excise levied under the Central Excise Act, 1944 (hereinafter referred to as the 'Act') read with Section 3(3) of the F G H

- A Additional Duties of Excise (Goods of Special Importance) Act, 1957 and Section 3(3) of the Additional Duties of Excise (Textiles & Textile Articles) Act, 1978 to goods cleared from the notified areas within the North-Eastern States. The said Notification provided that the assessee would be entitled to refund of duty paid other than the duty paid by way of utilization of CENVAT credit under the CENVAT Credit Rules, 2004.
- B Reproduction of the first three paragraphs of this Notification would be sufficient, which are as follows:

“NOTIFICATION: 20/2007-C.E. dated 25-Apr-2007

- C **North-East – Exemption to all goods, except as specified, cleared from Assam, Tripura, Meghalaya, Mizoram, Manipur, Nagaland, Arunachal Pradesh or Sikkim from duty paid other than by utilisation of Cenvat Credit.**

- D In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), 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 to the Central Excise Tariff Act, 1985 (5 of 1986) other than those mentioned in the Annexure and cleared from a unit located in the States of Assam or Tripura or Meghalaya or Mizoram or Manipur or Nagaland or Arunachal Pradesh or Sikkim, as the case may
- E be, from so much of the duty of excise leviable thereon under the said Act as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2004.

- F 2. In cases where all 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 utilises whole of the CENVAT credit available to him on the last day of the month under
- G consideration for payment of duty on goods cleared during such and pays only the balance amount in cash.

3. The exemption contained in this notification shall be given effect to in the following manner, namely:-

- H (a) the manufacturer shall submit a statement of the duty paid other than the amount of duty paid by utilisation of CENVAT

credit under the CENVAT credit Rules, 2004, to the Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be, by the 7th of the next month in which the duty has been paid other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2004;

- (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 by utilisation of CENVAT credit under the CENVAT Credit Rules, 2004, during the month under consideration to the manufacturer by the 15th 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, 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 15th 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.”

6. It may be mentioned at this stage that power to grant exemption from payment of excise duty is conferred upon the Central Government vide Section 5A of the Act, which authorises the Central Government to exempt generally, either absolutely or subject to such conditions to be fulfilled, before or after removal, as may be specified in the notification, excisable goods of any specified description from the whole or any part of duty of excise leviable there, if the Central Government is satisfied that it is necessary, in public interest, so to do. The notifications in question have been issued in exercise of the said power conferred by sub-section (1) of Section 5A of the Act. Thus, the central excise duty, which is

- A payable at the rates specified in the Tariff Act, can be exempted, in respect of specified goods, wholly or partly.

7. As mentioned above, the Parliament levied Education Cess by Finance (No.2) Act, 2004. Chapter VI of the said Finance Act deals with Education Cess. Sections 91 to 93 thereof are relevant and are

- B reproduced below:

C **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.

D (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.

E **92. Definition.** – The words and expressions used in this Chapter and defined in the Central Excise Act, 1944 (1 of 1944), the Customs Act, 1962 (52 of 1962) or Chapter V of the Finance Act, 1994 (32 of 1994), shall have the meanings respectively assigned to them in those Acts or Chapter, as the case may be.

F **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 per cent, 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.

G (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. A

(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.” B

8. As the assessee was denied refund of the Education Cess and Higher Education Cess, he challenged the order of the Assessing Officer by filing appeal before the Commissioner of Central Excise and Customs (Appeals), Guwahati. However, these appeals were dismissed by the Commissioner and the order of the Commissioner has been upheld by the Customs Excise & Service Tax Appellate Tribunal (CESTAT) by the impugned judgment. Said order is the subject matter of these appeals. C

9. It may be pointed out at the outset that in its brief order, the Service Tax Appellate Tribunal (hereinafter referred to ‘Tribunal’) has taken note of two of its earlier judgments which were relied upon by the appellant. These are : D

(i) *Bharat Box Factory Ltd. v. Commissioner of C. Ex., Jammu*¹

(ii) *Cyrus Surfactants Pvt. Ltd. v. Commissioner of Central Excise, Jammu*² E

In both these decisions, the Delhi Bench of the Tribunal had opined that the Education cess and Higher Education Cess were also refundable along with the excise duty.

10. The Revenue, on the other hand, had relied upon another judgment of Tribunal in the case of *Commissioner of Central Excise, Jammu v. Jindal Drugs Ltd.*³. In this judgment which was also rendered by the Delhi Bench of the Tribunal, a contrary view has been taken, viz., the Excise Department was under no obligation to refund the Education Cess and Higher Education Cess as the notification exempted only the excise duty and, therefore, it is the excise duty which was to be refunded. F G

¹ 2007 (214) ELT 534 (Tri.-Del.)

² 2007 (215) ELT 55 (Tri.-Del.)

³ 2011 (267) ELT 653 (Tri.-Del.) H

A 11. The CESTAT, by impugned judgment, has preferred to follow the view taken by the Tribunal in *Jindal Drugs Ltd.* case on the ground that it is later in point of time in which earlier judgment in *Cyrus Surfactants Pvt. Ltd.* case has also been considered.

B 12. In the aforesaid backdrop, learned counsel for the appellant was vehement in his criticism of the view taken by the Tribunal. His first submission was that in case the Division Bench of the Tribunal in *Jindal Drugs Ltd.* decided to differ from the view taken by earlier Division Bench in *Cyrus Surfactants Pvt. Ltd.*, an appropriate course of action was to refer the matter to the larger Bench. That apart, submitted the learned counsel, the view taken in *Cyrus Surfactants Pvt. Ltd.* needs to be approved. In this behalf, he argued that reading of the exemption Notification dated April 25, 2007 would make it clear that there was 100% exemption granted by the said Notification from levy of excise duty which was clear from the reading of para 1 thereof. Para 2 of the Notification simply laid down the mechanism as to how the said exemption was to be applied, with the specification that the duty was to be paid first after adjusting the CENVAT credit and thereafter claim for refund was to be made. He further submitted that Education Cess was levied @ 2% on the excise duty. When the levy of excise duty itself was exempted, the Education Cess also got exempted thereby. He also submitted that Education Cess is in the nature of surcharge and in the absence of the primary tax (i.e. Excise), the question of payment of any surcharge thereupon would not arise. He also referred to Circular No. 134/3/211/ST dated April 08, 2011 issued by the Excise Department amply clarifying that since the Education Cess is levied and collected as percentage of service tax, no Education Cess would be payable when and wherever service tax is *Nil* by virtue of exemption. His plea was that though the aforesaid Circular was issued in the context of service tax, the principle accepted therein by the Department would apply in the present case also, more so, when Notification dated October 06, 2007 exempting service tax was *pari materia*. He also pointed out that under similar circumstances, Income Tax Department has been refunding the Education Cess. He also argued that in the scenario where there are two divergent views and two possible interpretations, one that is in favour of the assessee should be followed. In support of his aforesaid arguments, apart from relying upon the reasoning given by the Tribunal in *Cyrus Surfactants Pvt. Ltd.*, he referred to the judgment of this

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Court Assistant Commissioner of Commercial Taxes (Asstt.) Dharwar v. Dharmendra Trading Company Etc. Etc.⁴ A

13. He also relied upon the decision in the case of *Commissioner of Central Excise, Mangalore v. Suzlon wind International*⁵ rendered by Bangalore Bench of the Tribunal which had decided the case in favour of the assessee referring to Circular dated April 04, 2011. Even the Rajasthan High Court has leaned in favour of the assessee in the case of *Banswara Syntex Ltd. v. Union of India*⁶ holding that since Education Cess in the form of surcharge is levied and collected, there was no question of retaining this amount once the excise duty itself got exempted. B C

14. He also read out the following passage from the judgment of this Court in *R.S. Joshi, Sales Tax Officer, Gujarat and Others v. Ajit Mills Limited and Another*⁷: C

“34. Section 37(1) uses the expressions, in relation to forfeiture, “any sum collected by the person . . . shall be forfeited’. What does “collected” mean here? Words cannot be construed effectively without reference to their context. The setting colours the sense of the word. The spirit of the provision lends force to the construction that “collected” means “collected and kept as his” by the trader. If the dealer merely gathered the sum by way of tax and kept it in suspense account because of dispute about taxability or was ready to return it if eventually it was not taxable, it was not collected. “Collected”, in an Australian Customs Tariff Act, was held by Griffith, C.J., not “to include money deposited under an agreement that if it was not legally payable it will be returned’ : (Words & Phrases, p.274). We therefore semanticise “collected” not to cover amounts gathered tentatively to be given back if found non-exigible from the dealer.” D E F

15. Rebutting the aforesaid arguments of the appellants, Mr. Yashank P. Adhyaru, learned senior counsel appearing for the Revenue commended this Court to approve the view taken by the Tribunal in *Jindal Drugs Ltd.* case which has been accepted by the High Court as well. His argument was that the exemption notification exempts only G

⁴(1998) 3 SCC 570

⁵ 2012-TIOL-1837-CESTAT-BANG

⁶ 2007 (216) ELT 16 (Raj.)

⁷ AIR 1977 SC 2279 : (1977) 40 STC 497

A the excise duty. However, duty has to be paid first and along with that Education Cess and Higher Education Cess also become payable. He also emphasised the fact that excise duty is payable under the Excise Act, Education Cess and Higher Education Cess are payable under the Finance Act, by virtue of Section 11 thereof. Therefore, the mandate and source of charging Education Cess is altogether different. The exemption notification which is issued under Section 5A of the Excise Act could exempt only the excise duty payable under the said statute and not Education Cess which is payable under a different statute. He further submitted that since the duty is to be paid first, education cess also becomes payable. When it comes to refund of the excise duty in terms of Notification dated April 25, 2007, it is only excise that would be refunded and not the cess. He also argued that circular dated April 08, 2011 was not binding on the Court. His further submission was that even Calcutta High Court had taken identical view in *Biswanath Hosiery Mills Ltd. & Anr. v. Union of India & Ors.*⁸.

D 16. It is clear from the arguments of the counsel for the parties that divergent views are expressed by the CESTAT as well as High Courts. Even one Bench of the same Tribunal has differed from its earlier Division Bench decision. In this scenario, it becomes important as to how the Department has viewed the position regarding Education Cess and Higher Education Cess which is payable as surcharge on the excise duty, once the excise duty is exempted. Two Circulars are relevant in this behalf, one is Circular dated August 10, 2004 which clarifies that Education Cess is part of excise. In this Circular, certain clarifications are given by the Ministry of Finance (Department of Revenue), Government of India and relevant portion thereof reads as under:

F **“Subject: Issues relating to imposition of Education Cess on excisable goods and on imported goods, as pointed out by the trade and the field formations-reg.**

G The undersigned is directed to state that subsequent to Budget 2004 announcements, a number of representations/ references have been received from the trade as well as from the field formations pertaining to imposition of Education Cess on excisable goods and on imported goods. The points raised and the clarifications thereon are as follows.

⁸ (2017) 346 ELT 353

Issue No. (1): Whether Education Cess on excisable goods is leviable on goods manufactured prior to imposition of Cess but cleared after imposition of such cess? A

Clarification: Education Cess on Excisable goods is a new levy. In similar cases, it has been held by the Supreme Court that if a levy is not there at the time the goods are manufactured or produced in India, it cannot be levied at the stage of removal of the said goods. Thus, Education Cess is not leviable on excisable goods manufactured prior to imposition of cess but cleared after imposition of such cess. B

Issue No. (2): Whether goods that are fully exempted from excise duty/customs duty or are cleared without payment of excise duty/customs duty (such as clearance-under bond or fulfillment of certain conditions) would be subjected to Cess C

Clarification: The Education Cess is leviable at the rate of two per cent of the aggregate of all duties of excise/customs (excluding certain duties of customs like anti dumping duty, safe guard duty etc.), levied and collected. If goods are fully exempted from excise duty or customs duty, are chargeable to NIL duty or are cleared without payment of duty under specified procedure such as clearance under bond, there is no collection of duty. Thus, no education cess would be leviable on such clearances. In this regard, letter D.O. No. 605/54/2004-DBK, dated 21st July, 2004 issued by Member (Customs) may also be referred to.” D E

17. Other Circular is dated April 08, 2011 issued by the Central Board of Excise and Customs, New Delhi on the subject “education cess and secondary and higher education cess-reg.”. We would like to reproduce this Circular in its entirety: F

“Education Cess and Secondary and Higher Education Cess also exempted when notifications exempt whole of Service tax

Circular No. 134/3/2011-S.T., dated 8-4-2011 G

F.No. 354/42/2011-Tru

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

A *Subject : Education Cess and Secondary and Higher Education Cess – Reg.*

B Representations have been received from the field formations, seeking clarification regarding the applicability of service tax exemption to Education Cess (refers to both Education Cess leviable under Finance (No.2) Act, 2004 and Secondary and Higher Education Cess leviable under Finance Act, 2007), under notifications where ‘whole of service tax’ stands exempted. Apparently the doubt arises in the context of Tribunal’s Order in the matter of MIs. Balasore Alloys Ltd. Vs CCE, Customs and Service Tax, BBSR-I (2010-TIOL-16S9-CESTAT-KOL) = 2010(20)W.T.R. 506 (Tribunal).

C 2. The issue has been examined. Though Tribunal’s Order referred above is in favor of revenue, it is inconsistent with the policy intention of the Government to exempt education cess in addition to service tax, where ‘whole of service tax’ stands exempted. According to section 95(1) of Finance (No.2) Act, 2004 and section 140(1) of Finance Act, 2007, Education Cess and Secondary and Higher Education Cess are leviable and collected as service tax, and when whole of service tax is exempt, the same applies to education cess as well. Since Education Cess is levied and collected as percentage of Page 1 of 2 service tax, when and wherever service tax is NIL by virtue of exemption, Education Cess would also be NIL.

D 3. This being the principle, field formations are directed not to initiate proceedings to recover the education cess, where ‘whole of service tax’ stands exempted under the notification. Extending the same principle, where education cess has been refunded to exporters along with service tax, by virtue of exemption notifications where ‘whole of service tax’ is exempt, the same need not be recovered.

E 4. Field formations may be instructed accordingly.

F 5. Please acknowledge the receipt of this circular: Hindi version to follow.

G 18. No doubt, it clarified the position in relation to the exemption from payment of service tax that was given vide Notification No. 41/

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2007-ST dated October 06, 2007. We have gone through that Notification as well, which is *in pari materia* with Notification dated April 25, 2007. What is important is that this Circular dated April 08, 2011 refers to the judgment of the Tribunal in *Balasore Alloys Ltd. v. CCE, Customs and Service Tax, BBSR-I*⁹ which was a decision rendered in favour of the Revenue as it was held therein that the Education Cess and Higher Education Cess would not be refunded while giving back the exempted service tax. Notwithstanding the same, the Circular mentions that the said order of the Tribunal is inconsistent with the policy intention of the Government to exempt Education Cess in addition to service tax, 'whole on service tax' stands exempted.

19. During arguments, when these circulars were referred to and relied upon by the learned counsel for the assessee, Mr. Adhyaru had asked for some time to seek instructions from the Department in this behalf. In order to give him a chance to seek the clarification, matter was directed to be listed for direction on October 10, 2017. On that day, Mr. Adhyaru produced the copy of letter dated October 4, 2017 addressed by the Office of the Commissioner of Central Goods & Services Tax to The Commissioner, Directorate of Legal Affairs, Central Board of Excise & Customs. In this communication, it is simply stated that refund of central excise duty has been provided by exemption Notification dated July 8, 1999 and dated April 25, 2007 to the manufacturing units in the North Eastern Region to give effect to the North Eastern Industrial Promotion Policy 1997 (NEIPP 97). There are no provisions for any refund/exemption of service tax. It is further stated that in respect of income tax, exemption is granted under Section 80IC of the Income Tax Act. When we confronted the learned senior counsel with the fact that it does not give specific answer to the query raised, the learned senior counsel took further time to file written submissions by October 23, 2017. However, till date, no such written submissions are filed nor any clarification provided.

20. One aspect that clearly emerges from the reading of these two circulars is that the Government itself has taken the position that where whole of excise duty or service tax is exempted, even the Education Cess as well as Secondary and Higher Education Cess would not be payable. These circulars are binding on the Department.

⁹ (2010-TIOL-1659-CESTAT-KOL)

A 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
 B 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
 C 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
 D 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
 E 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
 F and Higher Education Cess would also be 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
 G 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:

H "15. The very fact that the surcharge is 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.

16. Apparently, when at the time of collection, surcharge has taken 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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18. The Explanation appended to Notification dated 26.6.2001 included 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.”

- A 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.*¹⁰ 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 @
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- C 2% of the excise duty would partake the character of excise duty itself.

- Insofar as judgment of Calcutta High Court in *Biswanath Hosiery 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 intendment 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.
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- F 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. There shall, however, be no order as to cost.
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Kalpana K. Tripathy

Appeals allowed.

¹⁰ 1997 (92) ELT 303 (SC)