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(2007) 07 RAJ CK 0067

In the Rajasthan High Court

Banswara Syntex Ltd. APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 17-07-2007

Acts Referred:
Finance Act, 1994 — Section 2, 91, 92, 93, 94

Citation : (2007) 4 RLW 2995

Hon'ble Judges : Rajesh Balia, J;Manak Lall Mohta, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Rajesh Balia, J.—Heard learned Counsel for the parties.

2. The petitioner has challenged the order of revisional authority annexure 5 dated 31st July 2006 withdrawing the claim to rebate on exports of goods manufactured by the petitioner relating to education cess payable under the Finance Act, 1994 which came into effect w.e.f. 9/7/2004 in terms of Sections 91, 92 and 93 of the said Act of 1994.

3. The petitioner is engaged in the manufacture of yarn, gray fabrics and in getting man made fabrics processed. The applicant has filed refund claim under Rule 18 of the Central Excise Rules, 2002 for claiming rebate on Excise Duty paid during the period from 9/7/2004 to 5/9/2004 including amount of education Cess paid under the aforesaid provisions of Finance Act, 1994 on export of man made processed fabrics.

4. The claim to rebate was sanctioned by learned Deputy Commissioner.

5. Against the order of Deputy Commissioner, Central Excise, an appeal was preferred before the Commissioner (Appeals) under the directions of Commissioner of Central Excise. The Commissioner (Appeals) set aside the Order-in-Original and allowed the appeal of Department by confirming that the Education Cess paid during the period from 9/7/2004 to 5/9/2004 on exported

goods was not eligible for rebate and the rebate has been granted by the authority erroneously to the applicant.

6. Aggrieved with the order of Commissioner (Appeals), application for revision was filed before the Central Government. The revisional authority by referring to the Notification No. 19/04 dated 6/9/2004 held that rebate on Education Cess was first granted by aforesaid Notification and that being hot retrospective in operation, the petitioner was not entitled to claim rebate on Education Cess payable under the Finance Act, 1994. However, it is not disputed that even prior to Notification dated 6/9/2004, on export of man made fabrics, rebate was available in respect of Excise Duties paid thereon.

7. For reaching this conclusion, the revisional authority relied on notification dated 6/9/2004, Annex. 1 attached to the writ petition in which an Explanation was appended defining ''Duty'' for the purpose of notification. The definition of ''Duty'' was inclusive one and it included under Clause (g) "Education Cess" on excisable goods as levied under Clause 81 read with Clause 83 of the Finance Bill 2/2004. Considering that under this Notification alone rebate on Education Cess was allowed in terms of Rule 18 of the Central Excise Rules, 2002, the revisional authority held that prior to issuance of notification dated 6/9/2004, no rebate was available on Education Cess which become payable on commencement of Finance Act of 2004 w.e.f. 9/7/2004-

8. This has led to filing of this petition as no remedy is provided under the Statute against the order of Central Government.

9. Learned Counsel for the petitioner contends that Section 93 of the Finance Act makes it abundantly clear that With the commencement of the Finance Act, 1994, particularly the provisions relating to levy of Education Cess and exemption attached with the excise Duty payable under the Central Excise Act automatically became available to Education Cess as part of Duties on excise and no separate Notification was in fact required. Learned Counsel further contends that even in the absence of Notification Annex. 1 dated 6/9/2004 the petitioner is entitled to avail exemption on excise duty payable on man made fabrics exported out of India, which was manufactured by the petitioner and did not depend on any fresh Notification.

10. Learned Counsel for the respondents urged that order under challenge has been validly made as the rebate is a creature of notification issued by appropriate Government in that regard and there being no earlier Notification providing rebate on Education Cess payable under Finance Act, 2004, no rebate was available in respect of Education Cess paid by any manufacturer in respect of export of his product out of country untilthe Notification was issued.

11. It will be profitable to notice Sections 91, 92 & 93 under which Education Cess was levied, which read as under:

91. Education Cess-(1) Without prejudice to the provisions of subsection (11) of

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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.

(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 inSub-section (1), as it may consider necessary.

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.

93. Education Cess on excisable goods.- (1) The Education Cess levied u/s 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.

(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.

(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.

12. u/s 93(1) the Education Cess has specifically been directed that Education Cess levied u/s 91 shall be a duty of excise. In Sub-section (2), it was further ordained that Education Cess on excisable goods shall be in addition to excise duty chargeable under Central Excise Act, 1944 or under any other law. Thus, statutorily the Education Cess levied on excisable goods was directed to be Duty of Excise itself and has to be collected as excise Duty in addition to Excise Duty otherwise chargeable under Central Excise Act or any other law.

13. Under Sub-section (3) it was further envisaged that the provisions of the Central Excise Act, 1944 and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as

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may be, apply in relation to the levy and collection of the Education Cess as they apply in relation to the levy and collection of the duties of excise on such goods under the Central Excise Rules.

14. Similar provision has been made u/s 94 in respect of Education Cess collected as part of customs Duty and u/s 95 Education Cess levied and collected as part of Service Tax. In other words, levy of surcharge under Sections 93, 91 and 95 on respective taxes was the levy for the purpose of Union and was to be utilised by the Union to fulfil the commitment of the Central Government to provide and finance universalised quality of basic education, as has been given out u/s 91 of the Act.

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 levieyj & 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.

17. It is not in dispute that notification dated 26/6/2001 allowing rebate on Duty of excise payable by manufacturer in respect of goods manufactured and exported out of India was also in existence and petitioner was otherwise eligible to avail rebate in respect of excise duty payable by him on the export of its product.

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

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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.

19. The order of appellate authority as well as revisional authority disallowed the rebate on excise duty payable by the petitioner as surcharge levied on excise duty named as "Education Cess" for the purpose of appropriating the same for specific project of the Government in funding universalised quality basic education cannot be sustained. If we read Section 93 as a whole, it becomes clear that existing Notification providing exemption to the Duty of Excise is otherwise applicable to Education Cess also w.e.f. it became payable as part of the Duty of Excise or at any rate special Excise Duty collected under Finance Act, and did not need a separate Notification in that regard. The position may have been different if the Education Cess would have been collected not as surcharge but as an independent levy and matter would have been left to be considered independently for the purpose of providing rebate in respect,, thereof. The Notification dated 6/9/2004 had included the definition of Excise Duty only in consonance with the meaning of Excise Duty as was existing on the date Notification was issued, even if Explanation would not have been there the term Duty of Excise in ordinary circumstance would have included the surcharge levied as Education Cess in terms of Section 93 of the Act of 2004.

20. In view thereof, we have no hesitation to hold that impugned orders, of Central Government as revisional authority and appellate order of Commissioner (Appeals) are patently erroneous and deserve to be quashed.

21. Accordingly, writ petition is allowed, impugned orders are set aside to the extent the petitioner has been dented the claim to rebate on surcharge on Excise Duty appropriated by Union of India as Education Cess for funding Universalised quality basic education programme but was paid by the petitioner only as Duty of Excise w.e.f. 9/7/2004 to 5/9/200-1. There is no contention about eligibility to rebate w.e.f. 6/9/2004. There shall be no order as to costs. Rule is made absolute.

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