(2019) 02 J&K CK 0034

In the Jammu And Kashmir High Court

Case No : Excise Appeal (EXAP) No. 01 Of 2012

Jsb Aluminum Inds. Growth Centre APPELLANT

Vs

Commissioner Of Customs And Central Excise RESPONDENT

Date of Decision : 14-02-2019

Acts Referred:

Finance Act, 2004 — Section 91, 92, 93
Finance Act, 2007 — Section 136
Central Excise Act, 1944 — Section 35G, 93(1), 93(2), 93(3)
Constitution Of India, 1950 — Article 248

Citation : (2019) 02 J&K CK 0034

Hon'ble Judges : Rajesh Bindal, J;Tashi Rabstan, J

Bench : Division Bench

Advocate : P. R. Sharma, Jag Paul Singh

Judgement

Rajesh Bindal, J

1. Assessee is in appeal before this Court against Order No. A/1268/2012-EX(DB) passed by the Customs Excise & Service Tax Appellate Tribunal for short (?the CESTAT?) in Appeal No. 605 of 2012, decided on 18.10.2012, raising the following substantial questions of law:

"i) Whether provisions regarding Education cess and S&H Education in Finance Act, 2004 and Finance Act, 2007 respectively have been made and enacted by the Parliament under Article 248 read with entry 97 of list 1 of schedule 7 and if so, whether these provisions do not apply and so cannot be extended to the Jammu and Kashmir State in new of the application of Art. 248 and entry 97 of List I of Schedule 7 in modified form under Constitution (Application to Jammu and Kashmir) Order, 1954.

ii) Whether provisions of Education Cess and S&H Education cess as contained in chapter VI of Finance Act, 2004 and Finance Act. 2007 cannot be made applicable to the State of J&K as no prior concurrence of the Govt. of J&K under Art. 370(1) has been obtained before the enactment and extension of those provisions to the State of J&K.

iii) Whether both Educational cess levied and collected under section 91 Finance Act, 2004 and Secondary and Higher Education cess levied and collected under section 136 of Finance Act. 2007 in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985(Act No. 5 of 1986) are, for all purposes and intent, duty of excise.

iv) Whether the said Education cess and secondary and Higher Education cess which are paid by the appellant along with the excise duty in terms of exemption Notification No. 56 2002-CE dated 14-11-2002 are also refundable along the excise duty paid in cash or through PLA under the said exemption Notification."

2. Learned counsel for the assessee submitted that the issues raised in the present appeal are squarely covered by judgment of the Hon?ble Supreme Court in (2018) 1 Supreme Court Cases 105 titled as SRD Nutrients Private Limited v/s Commissioner of Central Excise, Guwahati. Hence, the questions of law be answered in favour of the assessee.

3. Learned counsel for the revenue while referring to the order passed by a Division Bench of this Court in 2008 (231) E.L.T. 416 titled as Commissioner of Customs & Central Excise Jammu v/s Bharat Box Factory Ltd. submitted that the issue regarding levy and collection of Education Cess in terms of Section 91 of the Finance Act, 2004 or grant of refund thereof, in view of the Notification No. 56/2002-CE, would mean dispute regarding rate of duty for the purpose of assessment. Hence, in view of Section 35-G of the Central Excise Act, 1944 (for short ?the Act?), the present appeal before this Court will not be maintainable. However, as far as merits of the controversy is concerned, learned counsel for the revenue was fair enough to concede that the controversy stands resolved by the Hon?ble Supreme Court in favour of the assessee in SRD Nutrients Private Limited's case (supra).

4. Heard learned counsel for the parties and perused the paper book.

5. We deem it appropriate firstly to deal with the preliminary objection raised by the learned counsel for the revenue.

6. In our view, it would be an exercise in futility and would generate more litigation, if the argument regarding maintainability of the appeal is accepted. Courts are already overburdened with the litigation. The stand taken by the learned counsel for the revenue is that the issue involve in the appeal is regarding the rate of duty, hence, the appeal is not maintainable before this Court. In that event, the appeal would lie to the Hon?ble Supreme Court in terms of Section 35-G of the Act. Present appeal before this court is pending for the last more than eight years. It was fairly conceded by the learned counsel for the revenue that the issue on merits is otherwise covered by the recent judgment of Hon?ble Supreme Court in SRD Nutrients Private Limited's case (supra). Dismissing the appeal as not maintainable and giving liberty to the party to

approach Hon?ble the Supreme Court will generate avoidable litigation. Hence, we deem it appropriate to entertain and decide the appeal on merits.

7. It was fairly conceded by the learned counsel for the revenue that the issues raised by the assessee in the present appeal are squarely covered by the judgment of Hon?ble the Supreme Court in SRD Nutrients Private Limited's case (supra). In the aforesaid judgment, while dealing with the issue, the Court had opined as under:

"21. 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.

22. 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 assessees 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.

23. 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 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 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:

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 universalized 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.

xxx xxx xxx

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."

24. 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) ELT 303 (SC). 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.

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

27. 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 the excise duty once the excise duty itself was exempted from levy. There shall, however, be no order as to cost."

8. For the reasons recorded above, in our view the issues raised by the assessee deserve to be answered in favour of assessee.

9. Ordered accordingly.

10. The appeal is accepted.