[illegible]
O/O THE COMMISSIONER [illegible] CENTRAL EXCISE,
[illegible]
[illegible]
[illegible]

[illegible]

[illegible]	[illegible]	[illegible]
V2(GST)RA[illegible]	[illegible]	22.05.2019

[illegible]

KCH-EXCTS-000-APP-219-2018-19

[illegible] Date of Order	11.12.2018	[illegible] Date of Issue	17.12.2018

[illegible]
Passed by Shri [illegible] Santosh Commissioner (Appeals), Raigad

[illegible]

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:: ORDER IN APPEAL ::

M/s. Excel Crop Care Limited, 235-209, Bhuj-Mundra Road, Gujrat, Near Kera Village, Bhuj - Kutch, Pin Code - 370 430 (hereinafter referred to as "the appellant") filed this appeal against Order-in-Original No. 173 to 176/2010-2011 dated 22.06.2011 (hereinafter referred to as "the impugned order") passed by the Deputy Commissioner, Central Excise Division, Gandhidham (hereinafter referred to as "the sanctioning authority").

2. The brief facts of the case are that the appellant was operating in the District of Kutch, availing benefits of Notification No. 39/2001-CE dated 31.07.2001, as amended (hereinafter referred to as "the said notification"). The said notification was amended vide Notification No. 16/2006-CE dated 27.03.2009 and Notification No. 33/2006-CE dated 13.06.2006, which altered the method of calculation of refund by taking into consideration of duty payable on value addition undertaken in the manufacturing process, by fixing percentage of refund ranging from 25% to 75% depending upon the commodity. The appellant filed claim of Rs. 43,18,738/- for month of May, 2007 & June, 2007 for refund of Central Excise Duty, Education Cess and Secondary and Higher Education Cess paid on manufactured goods through PLA. The sanctioning authority vide the impugned order sanctioned Rs. 41,55,890/-, pertaining to Basic Excise Duty but did not sanction Rs. 1,62,850/- pertaining to Education Cess and Secondary & Higher Education Cess on the ground that exemption under the said notification was available only to Central Excise Duty or additional excise duty and the said notification did not cover education Cess and Secondary & Higher Education Cess and hence the appellant was not entitled for refund of Education Cess and Secondary & Higher Education Cess and the excess amount of Rs. 1,62,890/- taken by the appellant needs to be reversed and paid by them along with interest.

3. Aggrieved with the impugned order, the appellant preferred this appeal, inter alia, on the grounds as under:

(i) Notification No. 39/2001-CE is issued in terms of sub-section (1) of Section 5A of the Central Excise Act, 1944 read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and sub-section (3) of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978. The said Notification No. 39/2001-CE as amended, exempts excise duty leviable under the Central Excise Act, 1944, additional excise duty leviable under Additional Duties of Excise (Goods of Special Importance) Act, 1957 and

manufactured and cleared in the specified area for which the said notification is applicable.

(ii) As per Section 93(3) of the Finance Act, 2004 stipulates 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 may be, apply in relation to the levy and collection of the Education Cess on taxable goods.

(iii) The appellant relied on decisions of the Hon'ble CESTAT in case of Bharat Box Factory Ltd. reported as 2007-TIOL-1509-CESTAT-DEL and Sun Pharmaceutical Industries reported as 2006-TIOL-1444-CESTAT-DEL wherein the Hon'ble CESTAT held that Education Cess is an excise duty and refund of excise duty should also include refund of Education Cess.

(iv) The appellant also relied on following case laws:

- Sesmat Metro Alloys Ltd. – 2009-TIOL-2554-CESTAT-DEL;
- Cyrus Confectionery Pvt. Ltd. – 2007-TIOL-1626-CESTAT-Chennai;
- Denseware Surtex Ltd. – 2007-TIOL-55-HC-MUM-CE.

4. This appeal was kept in Call Book due to appeal filed by the department in similar case in the Hon'ble Supreme Court against decision of the Hon'ble High Court of Jammu & Kashmir in case of Bharat Box Factory Ltd. reported as 2008 (231) ELT 416 (J&K). The decision of the Hon'ble High Court was approved by the Hon'ble Apex Court and reported as 2017 (355) ELT 461 (SC). This appeal was, thus, taken out of Call Book in October, 2018 for passing orders. No one appeared for Personal Hearing in the matter.

4.1 The appellant was given opportunity for personal hearing but they did not avail. Since, the issue is settled by the Hon'ble Apex Court as stated above, I proceed to decide this appeal on merits.

Findings:

5. I have carefully gone through the facts of the case, the impugned orders, grounds of appeal and written as well oral submissions made by the appellant. The issue to be decided in the present appeal is as to whether the appellant is eligible for refund of Education Cess and Secondary & Higher Education Cess under the provisions of Notification No. 39/2001-CE dated 31.07.2001 as amended, or otherwise.

6. The appellant contended that duty of excise includes Education Cess and Secondary & Higher Education Cess in terms of provisions of Section 93 of the

Finance Act, 2004 and Section 138 of the Finance Act, 2007 and hence, the provisions of refund and exemption of the Central Excise Act, 1944 are also equally applicable to Education Cess and Secondary & Higher Education Cess; that the exemption under Notification No. 39/2001 CE dated 31.07.2001 is also applicable to Education Cess and Secondary & Higher Education Cess and hence, they are eligible for refund/rebate of Education Cess and Secondary & Higher Education Cess. I find that the appellant, a manufacturing unit situated in District of Kutch, availed benefit of exemption under Notification No. 39/2001 CE dated 31.07.2001, as an excise. The said notification is reproduced as under:

> *"Kutch (Gujarat) — Exemption to excisable goods (except those specified in Annexure) and cleared from Units in Kutch District of Gujarat*
>
> *In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), read with sub-section (5) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), 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 goods specified in the annexure appended to this notification and cleared from a unit located in Kutch district of Gujarat from so much of the duty of excise or the additional duty of excise, as the same may be leviable thereon under any of the said Acts as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2002 :*
>
> *Provided that in the case of a unit having an original value of investment in plant and machinery excluded in the factory factor rupees twenty crore on the date of commencement of commercial production in that unit, the exemption contained herein shall apply only for the first clearances up to an aggregate value not exceeding twice the value of such investment from the date of commencement of commercial production of such plant.*
>
> *2. The exemption contained in this notification shall be given effect to in the following manner, namely :-*
>
> *(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, 2002, to the Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be, by the 10th day of the next month in which the duty has been so paid.*
>
> *(b) The Assistant Commissioner or Deputy Commissioner of Central Excise, as the case may be, after such verification, as he may deem necessary, shall refund the amount of duty paid other than the amount of duty paid by utilisation of CENVAT credit during the month under consideration to the manufacturer by the 15th day of the next month.*
>
> *(c) If there is delay in the disposal of such verification, the Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be, shall refund the amount on provisional basis by the 15th day of the next month to the month under consideration, and thereafter may adjust the amount of refund in such manner as may be necessary in the subsequent refunds admissible to the manufacturer."*

7. The Education Cess was levied vide of Sections 91 to 93 of Chapter VI of the Finance (No.2) Act, 2004, which read as under:

> *"91. Education Cess. - (1) Without prejudice to the provisions of sub-section (1A) of section 3, there shall be levied and collected, in accordance with the provisions of this Chapter as applicable 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 the behalf, utilise such sums of moneys of the Education Cess levied under sub-section (1A) of section 3 and the Chapter for the purposes specified in sub-section (1), as it may consider fit and apply.*

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 dutiable 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) to be paid, at the rate of two per cent. ad valorem on the aggregate of all duties of excise including special duty of excise or any other duty of excise not including 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 (1 of 1944) or the rules made thereunder, as the case may be.

7.1 The Secondary and Higher Education Cess was levied vide Sections 136 to 138 of Chapter VI of the Finance Act, 2007, which read as under.

136. Secondary and Higher Education Cess. — (1) Without prejudice to the provisions of sub-section (1A) of section 2, there shall be levied and collected, in accordance with the provisions of this Chapter, as amended, for purposes of the Union, a cess to be called the Secondary and Higher Education Cess, to fulfil the commitment of the Government to provide and finance secondary and higher education.

(2) The Central Government may, after due appropriation made by Parliament by law in this behalf, utilise such sums of money of the Secondary and Higher Education Cess levied under sub-section (1A) of section 2 and this Chapter for the purposes specified in sub section (1) as it thinks necessary.

137. 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.

138. Secondary and Higher Education Cess on excisable goods. — (1) The Secondary and Higher Education Cess levied under section 136, 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 Secondary and Higher Education Cess on excisable goods) at the rate of one 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 chargeable under section 91 of the Finance (No. 2) Act, 2004 (23 of 2004) and Secondary and Higher 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 Secondary and Higher 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 and the Education Cess chargeable under section 91 of the Finance (No. 2) Act, 2004 (23 of 2004).

(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 Secondary and Higher 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 (1 of 1944) or the rules made thereunder, as the case may be.

7.2 Thus, the Education Cess and Secondary & Higher Education Cess were in

nature of surcharge and were levied under Section 91 of the Finance (No. 2) Act, 2004 and Section 136 of the Finance Act, 2007 respectively as duty of excise at the rate of 2% and 1% respectively to be calculated on the aggregate of all duties of excise, which are levied and collected by the Central Government. The provisions of the Act and the rules made thereunder, including those relating to refunds and exemptions from rules and imposition of penalty were made applicable to the levy and collection of the Education Cess and Secondary & Higher 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 Act.

7.3 I find that Notification No. 39/2001-CE dated 31.07.2001 had granted total (100%) exemption from levy of excise duty by way of refund/recredit of excise duty. Education Cess and Secondary and Higher Education Cess were levied on excise duty and when the levy of excise duty itself was exempted by way of refund/recredit, then the Education Cess and Secondary and Higher Education Cess also got exempted thereby. In absence of Central Excise duty, the question of levy of any surcharge or cess or whatever name is called thereupon would not arise. CBEC vide Letter F. No. 345/2/2004-TRU(Pt.) dated 10.06.2004 also clarified that Education Cess is part of excise duty, the relevant portion is as under:

> *"Letter F. No. 345/2/2004-TRU (Pt.) dated 10.6.2004*
>
> *The undersigned is directed to state that subsequent to Budget 2004 announcements, a number of representations/queries 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.*
>
> *Issue No. (2) : Whether Education Cess on excisable goods is leviable on goods manufactured prior to imposition of Cess but cleared after imposition of such cess?*
>
> *Clarification : Education Cess on excisable goods is a new levy. In similar cases, it has been held by the Supreme Court that a levy is not chargeable 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.*
>
> *Issue No. (3) : Whether goods that are fully exempted from excise duty/customs duty or are cleared without payment of excise duty/customs duty from as clearance under bond or fulfilment of certain conditions would be subjected to Cess.*
>
> *Clarification : The Education Cess is leviable at the rate of two per cent of the aggregate of all duties of excise/customs (including certain duties of customs like additional duty, safeguard duty and anti-dumping). If goods are fully exempted from excise duty or customs duty, no cess is levied and collected. If goods are cleared without payment of duty under specified provisions such as clearance under bond, there is no collection of duty. Thus, no education cess would be levied on such clearances. In this regard, Letter C.No. 341/4/2004-TRU, dated 21st July, 2004 issued by Ministry (Finance) may also be referred to.*
>
> *Issue No. (3) : Whether goods like alcoholic beverages that do not fall under the Central Excise Tariff but subject to levy of Education Cess on excisable goods for part of 2003, when they are imported into India?*
>
> *Clarification : As the Education Cess on excisable goods is leviable on goods specified in the first schedule to the Central Excise Tariff Act, goods like alcoholic beverages that are not specified are not applicable to the said Cess.*

Issue No. (4) : Whether duties/cess which never got collected as duty of exemptions or are collected so but by a Department other than Department of Revenue should be included for the purpose of calculation of Education Cess?

Clarification : As the Education Cess is calculated on the aggregate duties of exemptions (excluding certain duties of customs like anti dumping, safe guard duty etc.) levied and collected by the Department of Revenue only, such duties, which are (a) levied and collected as duties of exemptions and (b) are both levied and collected by the Department of Revenue should be taken into account for computing Education Cess."

(Emphasis supplied)

7.4 CBEC vide Circular No. 134/3/2011/ST dated 06.01.2011 again clarified that since Education Cess and Secondary & Higher Education Cess were levied and collected as percentage of service tax, no Education Cess and Secondary & Higher Education Cess would be payable, when and whenever service tax is nil by virtue of exemption. The said circular was issued in context of service tax matter but the principle was accepted therein by the Board and hence would apply in the present case also. Circular No. 134/3/2011/ST dated 06.01.2011 is reproduced as under:

"Subject: Education Cess and Secondary and Higher Education Cess - reg.

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 levable under Finance (No. 2) Act, 2004 and Secondary and Higher Education Cess levable 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 M/s. Sukhjit Alloys Ltd. v. CCE, Customs and Service Tax, [illegible] (2010-TIOL-[illegible]-CESTAT-[illegible]) – 2010 (20) S.T.R. 529 (Tribunal).

2. The order has been examined. Through Tribunal's Order referred above, no loss of revenue is involved. It is consistent 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 91(1) of Finance (No. 2) Act, 2004 and section 140(1) of Finance Act, 2007, Education Cess and Secondary and Higher Education Cess are levied and collected as service tax and when whole of the tax is exempted, the same applies to education cess as well. Since Education Cess is levied and collected as percentage of service tax, when and whenever service tax is nil by virtue of exemption, Education Cess would also be nil.

3. This being the position, field formations are directed not to follow proceedings to recover the education cess where whole of service tax stands exempted under the notification. Similarly the same principle, where education cess has been collected in instances along with service tax, by virtue of exemption notifications where whole of service tax is exempt, the same need not be recovered."

7.5 In view of above, Education Cess and Secondary & Higher Education Cess were part of the Central Excise duty and since the central excise duty was itself exempted by way of refund, Education Cess and Secondary & Higher Education Cess would also be exempted by way of refund. This view finds support from the final order of the Hon'ble Supreme Court in the case of SKD Nutrients Pvt. Ltd. reported as 2017 (355) ELT 481 (SC), wherein it has been held that:

"20. One aspect that clearly emerges from the reading of the rules is that the Government itself has taken the position that where whole of excise duty or Service Tax is exempted, then the Education Cess as well as Secondary and Higher Education Cess would not be payable. These orders are binding on the Department.

21. Even otherwise, we are of the opinion that it is more rational to accept the aforesaid position as stated by the Ministry of Finance & the aforesaid circulars

Education Cess is an excise duty. It appears that those assessees who are required to pay excise duty have to shell out Education Cess as well. This Education Cess is introduced by Section 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 92 makes it clear that any Education Cess is payable on excisable goods (as in respect of goods specified in the first schedule to the Central Excise Tariff Act, 1985. Further, the 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 relating to refunds and duties, etc., shall as far as may be applied in relation to levy and collection of Education Cess as aforesaid goods. A cursory reading of these provisions would amply demonstrate that Education Cess is a surcharge, a levied at 2% on the duties of excise which are payable under the Act or any law. Indeed, it is only natural that when there is no excise duty payable, no it is essential there would not be any Education Cess as well. Moreover, as Education Cess @ 2% is to be calculated on the aggregate of duties of excise, there cannot be any surcharge when basic excise duty is NIL.

....

24. For the aforesaid reasons, we allow these appeals and hold that the assessee were entitled to refund of Education Cess and Higher Education Cess which was paid along with excise duty since the excise duty itself was exempted from levy. These shall, therefore, be paid to them as well.

(emphasis supplied)

8. In view of the above facts and legal position, I hold that the appellant is eligible for refund of Rs. 1,02,680/- of Education Cess and Secondary & Higher Education Cess. Accordingly, I allow the appeal filed by the appellant and set aside the impugned order to this extent.

९. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

9. The appeal filed by the appellant stands disposed off in above terms.

(कुमार संतोष)
आयुक्त (अपील्स)

By Regd. Post AD.

To,

M/s. Exim Cross Core Limited, 205-209, Bhuj Mundra Road, Gajod, Near Kora Village, Bhuj - Kutch, Pin Code 370 420

मे. एक्सिम क्रॉप केर लि., **205-209**, भुज-मुंद्रा रोड, गाजोड, केरा गांव के पास, भुज - कच्छ, पिन कोड – 370 420.

Copy to:

1) The Chief Commissioner, CGST & Central excise, Ahmedabad Zone, Ahmedabad for his kind information please.
2) The Commissioner, CGST & Central Excise, Kutch Commissionerate, Gandhidham for necessary action.
3) The Assistant Commissioner, CGST & Central Excise, Division-Bhuj, for further necessary action.
4) Guard File.