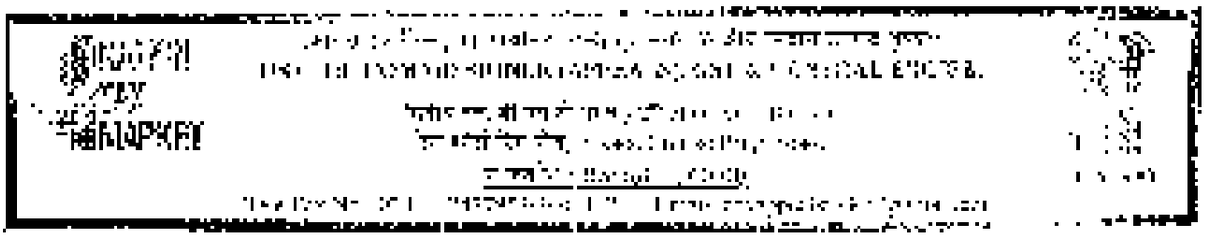

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| Date of Order | 18.12.2018 | Date of Issue | 19.12.2018 |

Passed by Shri Kumar Santosh, Commissioner (Appeals-I), Pune.

Appellant

Respondent

Advocate for the Appellant

Advocate for the Respondent

Ajanta Manufacturing Ltd., Gat No. 84, Mouje Kumbhivali, Village Tamsa, Post Dhanivali, Mr. Sanjeev Dhage, Tal. Bhiwandi.

The present appeal has been filed by M/s. Ajanta Manufacturing Ltd., Gat No. 84, Mouje Kumbhivali, Village Tamsa, Post Dhanivali, Mr. Sanjeev Dhage, Tal. Bhiwandi (hereinafter referred to as the appellant) against Order-in-Original No. [illegible] dated 19.12.2018 (hereinafter referred to as the impugned order) passed by the Assistant Commissioner of Central Excise & Service Tax, Division-I, Thane-II (hereinafter referred to as the adjudicating authority).

2. Brief facts of the case are that the appellant is engaged in the manufacture of [illegible] and is registered with the Service Tax department under the Service Tax Registration No. [illegible]. The appellant had filed a refund claim of Service Tax amounting to Rs. [illegible] for the period [illegible] under Notification No. [illegible] dated [illegible]. The adjudicating authority vide the impugned order rejected the refund claim on the grounds that [illegible].

3. Being aggrieved with the impugned order, the appellant has filed the present appeal on the following grounds:

[illegible]

4. Personal hearing in the case was held on 18.12.2018. Shri [illegible], Advocate appeared on behalf of the appellant and reiterated the grounds of appeal. He submitted that [illegible].

5. I have carefully gone through the facts of the case, the impugned order and the submissions made by the appellant. The issue to be decided in the present appeal is whether the impugned order rejecting the refund claim is legal and proper or not.

6. [illegible]

7. In view of the above discussion, I find that the impugned order is not sustainable in law. The appeal is therefore allowed and the impugned order is set aside. The appellant is entitled to consequential relief, if any.

8. The appeal is allowed in terms of the above.

:: ORDER-IN-APPEAL ::

M/s. Ajanta Manufacturing Ltd., Orpat Nagar, 8A National Highway, Village – Vandriya, Post – Samakhiyari, Near Sunajari Bridge, Taluka - Bhachau (hereinafter referred to as "the appellant") filed present appeal against Order-in-Original No. 52/2010-11 dated 10.08.2010 (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. 35/2001-CE dated 31.07.2001, as amended (hereinafter referred to as "the said notification"). The said notification was amended vide Notification No. 15/2008-CE dated 27.03.2008 and Notification No. 33/2008-CE dated 10.06.2008, which altered the method of calculation of refund by taking into consideration of duty payable on value added undertaken in the manufacturing process, by fixing percentage of refund ranging from 15% to 75% depending upon the commodity. The appellant filed claims for refund of Central Excise Duty, Education Cess and Secondary & Higher Education Cess for the months of June, 2007 to March, 2008. The refund claims were partly rejected by the Assistant Commissioner of Central Excise, Bhuj vide various refund orders and allowed refund of 8% and rejected balance refund claim of 8%. The appellant filed appeals against the said refund orders before the Commissioner (Appeals), Rajkot and the Commissioner (Appeals), Rajkot vide OIA No. 55 to 57/2008/COMMR(A)/RAJ dated 27.03.2008 and OIA No. 155 to 160/2008/COMMR(A)/RAJ dated 27.06.2008 upheld the said refund orders. The appellant filed appeals against the said OIAs before the CESTAT, Ahmedabad, which vide Order No. A/ 556-1856/WZB/AHD/2009 dated 10.06.2009 and Order No. A/2318-2324/WZB/AHD/2009 dated 06.11.2009 remanded the matter. The sanctioning authority vide the impugned order sanctioned differential refund claim of Rs. 4,39,35,671/- but did not sanction amount of Rs. 1,33,76,342/- by holding that the exemption was not admissible on new products i.e. Telephony Parts, Calculator Parts, E-Bike and Aluminium Composite Panels as the said products manufactured by new plant and machineries installed after 31.12.2005 and also did not sanction Rs. 54,10,610/- 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 the appellant was

not entitled for refund of Education Cess and Secondary & Higher Education Cess.

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

(i) They had setup facility to manufacture different kind of electronic products before 31.12.2005, which was not disputed. The denial was done stating that products were manufactured after 31.12.2005 hence not admissible for refund. The appellant argued that they were eligible for refund of Rs. 57,26,324/- on products, namely, Telephone Parts, Calculator Parts and Hanging Lamp even if they manufactured after 31.12.2005, the said products were manufactured using machineries installed before 31.12.2005. The appellant relied upon case law of Meera Agencies reported as 2013 (249) ELT 114 (Tri.-Ahd), which granted benefit to the products manufactured by the same machineries installed earlier.

(ii) Denial of benefit of exemption of Rs. 95,40,018/- for products E-Bikes and Aluminium Conneails Panels manufactured after 31.12.2005 by use of machineries installed after 31.12.2005 by the appellant is not proper. The denial based on D. O. Letter No. V/11-17/COC/Aud/2004 dated 15.11.2006 issued by the Office of the Chief Commissioner, Central Excise, Ahmedabad is not proper. The sanctioning authority misinterpreted the D. O. Letter dated 17.10.2001 of Joint Secretary (TRU) which clarified the position based on investments for the units whom the exemption is granted based on value i.e. units which have not invested 20 Crores or above. Thus, the entire spirit of Kutch exemption notification has been diluted and extra condition imposed by the said D. O. Letter not justified.

(iii) The Kutch package has a unique condition of investment in plant and machinery and exemption was based on the basis of investment and not on the basis of products or expansion or renovation as per the first para of the notification.

(iv) Cut-off date mentioned under para 3 of the notification, which provides that unit must be a new unit and established after issue of the notification. To make the condition more stringent, the rule makers made it mandatory to take certificate from the office of the Chief Commissioner that the unit is a new unit. The notification nowhere mentioned that exemption will be available to those items only and not the whole unit. The Kutch package makes it abundantly clear that it is applicable to the registered premises and the whole unit and not to the

part of the unit i.e. a particular area.

(v) The notification indicates that there is no bar in manufacturing a new product even after 31.12.2005 and denying the benefit of exemption to such new products manufactured after 31.12.2005 is not justified. It is settled law that exemption notifications are to be strictly construed and it is impermissible to add words to a notification. The appellant relied on case laws reported as 2004 (165) ELT 481 (SC) in case of Alkmar Rubbowell Traders reported as 2005 (181) ELT 154 (SC) in case of Surdev Steels Ltd. and reported as 1993 (67) ELT 299 (Tri. Del) in case of Canara Workshop Ltd.

(vi) The benefits of the said notification are available to the unit and not only to the products manufactured by the unit as all conditions laid down in the said notification are in respect of a unit. The appellant placed reliance on ratio of the decision of the Hon'ble Tribunal in case of Surfing Iron & Steel Co. reported as 2006 (202) ELT 383 (Tri. Mumbai) wherein it is held that the benefit of the exemption notification was given qua the manufacturer and not qua the goods.

(vii) The appellant relied upon decision of the Hon'ble Supreme Court in case of Indian Tobacco Association reported as 2005 (187) ELT 162 (SC) wherein it is held that an exemption notification must be construed with regard to object and purpose which it seeks to achieve. The object and purpose of Kutch notification was overall development of Kutch District by attracting investments and industries thereby generating employment and helping in achieving self-sustenance of the population. Adopting a stand that would deny exemption would be contrary to the public interest and would defeat the very purpose of the Kutch notification.

(viii) The exemption granted under the notification is to the unit and not the products. The appellant relied upon Circular No. 354/173/2000-TRU dated 29.12.2002, under Para 5, it is provided that exemption is given to the unit/factory and not to warehouse.

(ix) The impugned order is required to be set aside on the ground of gross violation of principles of natural justice in as much as prior to the passing of the order relating to deduction of Rs. 54,10,912/- towards Education Cess and Secondary & Higher Education Cess as neither show cause notice nor opportunity of personal hearing was given.

(x) Education Cess, being an excise duty is refundable as all "duty leviable under the Act" is refundable under Notification No. 39/2001-CE which refers to

duty evable under the Act". The exemption under the notification is granted to the extent of duty evable under the Act and which has been paid either in cash or by way of utilization of cenvat credit. Thus, actual duty of excise leviable and paid under the Act on products is refundable.

(xi) The distinction between excise duty and Education Cess and Secondary & Higher Education Cess made for the purpose of refund is not proper because Education Cess and Secondary & Higher Education Cess are excise duty for all purposes including exemption. Under Section 93 (1) of Finance Bill, 2004, it has been categorically mentioned that Education Cess and Secondary & Higher Education Cess shall be treated as 'duty of excise', as defined under Rule 2(e) of Central Excise rules, 2002 read with Section 3(1) of Central Excise Act, 1944.

(xii) Under Section 93 (3) of Finance Bill, 2004, it has been specifically held that the provisions of the Central Excise Act, 1944 and the rules made there under, including those relating to refunds and exemption from duties and imposition penalty shall 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. In short, the provisions of Central Excise Act, 1944 and rules made there under are applicable to Education Cess and Secondary & Higher Education Cess also.

(xiii) The appellant relied upon Board's Circular No. 249/1/2006-CX 4 dated 27.10.2006, wherein Para 3.2(h) states that definition of "duty of excise" given under Finance Bill, 2001 gets automatically transformed into Central Excise Act, 1944 and Central Excise Rules, 2002 by virtue of principle of "borrowed Act". It is not in dispute that Notification No. 39/2001-CE dated 31.07.2001 grants exemption to 'duty of excise' and hence, Education Cess of all sort is also refundable and not disallowable on any ground whatsoever.

(xiv) The stand of the department that 'duty of excise' referred to under Notification No. 39/2001-CE does not include Education Cess and Secondary & Higher Education Cess, is accepted, then question is bound to arise as to whether Education Cess and Secondary & Higher Education Cess can be recovered under Section 11A of Central Excise Act, 1944. Section 11A of Central Excise Act, 1944 empowers department, inter alia, to recover duty of excise erroneously refunded. Education Cess and Secondary & Higher Education Cess being outside the purview of definition of 'duty of excise' as

per stand of the department, denial of recovery of Education Cess and Secondary & Higher Education Cess erroneously refunded cannot be made under Section 11A of the Central Excise Act, 1944, which empowers the department to recover duty of excise referred to under Section 3 of Central Excise Act, 1944. In light of above, show cause notice to be set aside.

(xv) The appellant relied upon following case laws:

- Bharat Box Factory Ltd. – 2007 (214) ELT 554 (Tri. – Del.);
- Bharat Box Factory Ltd. – 2009 (235) ELT 406 (S. & J.);
  Reliance Industries Ltd. – 2009 (235) ELT 21 (SC);
- A.K. Agro Industries Ltd. – 2006 (203) ELT 55 (Tri. – Kolkata);
  Sandhar Chemicals – 1993 (68) ELT 72 (Chandi)

3.2 This appeal was kept in Call Book due to appeal filed by the department 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 415 (J&K). The decision of the Hon'ble High Court were approved by the Hon'ble Apex Court and reported as 2017 (355) ELT 481 (SC). This appeal was, thus, taken out of Call Book in September, 2018 for passing orders.

4. Personal hearing in the matter was attended by S/Shri Mahendra B. Joshi, Excise Incharge and Ishan Bhatt, Advocate, who reiterated the grounds of appeal and submitted that refund of Rs. 54,10,810/- of education Cess and Secondary & Higher Education Cess is required to be paid to them in view of the Hon'ble Supreme Court's order in the case of SRD Nutrients Pvt. Ltd., as they have not taken no-credit that they don't press for refund of Rs. 90,43,016/- in view of judgements against them but refund of Rs. 37,36,324/- is payable to them in view of judgement of the Hon'ble High Court of Gujarat in the case of Plastene India Ltd. reported as 2014 (314) ELT 14 (Guj.) – Para 5.2 and CBEC Circular No. 110/21/2006-CX.3 dated 15.07.2008. The appellant vide letter dated 11.10.2018 submitted a copy of this Circular.

4.1 No one appeared from department despite PH notices served to the Commissionerate.

**Findings:**

5. I have carefully gone through the facts of the case, the impugned order, the grounds of appeal and written as well oral submissions made by the appellant. The issues to be decided in the present appeal are

(i) whether the appellant is eligible for refund of central excise duty for products viz. Telephone Parts, Calculator Parts and Hanging Lamp manufactured after 31.12.2005 by the plant and machineries already installed before 31.12.2005;

(ii) whether the appellant is eligible for refund of central excise duty for new products viz. E-e (Electrically operated two wheeler) and Aluminium Composite Panel (Sheet) manufactured after 31.12.2005 by new plant and machineries installed after 31.12.2005;

(iii) 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.

6. The appellant was having facility to manufacture different types of electronic goods before 31.12.2005 and it is not disputed. The sanctioning authority denied refund claim of Rs. 1,33,76,317/- on the ground that *"As regards the amount of duty paid on new products viz. the products produced from the machineries installed after 31.12.2005, the same is not eligible in the light of clarification issued by the Board vide letter dated 31.07.2006, hence the same is liable to be rejected. Hence the amount of Rs. 1,33,76,342/- claimed by the assessee on clearance of new products i.e. TELEPHONE PARTS, CALCULATOR PARTS, ALUMINIUM COMPOSITE PANNELS & E BIKE is rejected."* The appellant submitted that refund claim of Rs. 1,33,76,342/- involved (i) refund of central excise duty of Rs. 37,36,124/- on account of Telephone Parts, Calculator Parts and Hanging Lamp which were manufactured after 31.12.2005 by use of machineries installed before 31.12.2005 and (ii) refund of central excise duty of Rs. 96,40,018/- on new products i.e. E-Bikes and Aluminum Composite Panels which were manufactured after 31.12.2005 by use of new machineries installed after 31.12.2005.

6.1 The appellant contended that Notification No. 39/2001-C.E. nowhere specifies that the products manufactured from the newly installed plant and machineries after cut-off date i.e. 31.12.2005 is not eligible for benefit of area based exemption. They further contended that the clarifications issued by the CBEC vide D.O. F. No. 353/2/2001-TRU dated 17.10.2001 and letter F. No. 137/07/2006-TRU dated 25.04.2006 are not applicable in this matter.

6.2 I find that this issue has already been properly discussed by the Hon'ble CESTAT, Ahmedabad in the case of Rukmani Metals and Tubes Ltd. reported as 2012 (270) E.L.T. 230 (Tri. – Ahmd.), in which provisions of Notification No. 29/2001-CE has been discussed and it is held that:

> *"6. After carefully considering submissions made by both the sides, we find that there is no dispute about the fact that the goods, in respect of which refund stands denied by lower authorities, were manufactured with the machinery installed after 31-12-05. The notification in question is available in respect of manufacturing units, which has made the investments and started their production before 31-12-05. As such, it can be reasonably concluded that the legislature intended to cover only those units of the Notifi*

area, wherein the investment was complete by 31-12-05. The benefit of the said notification is duly extended to the appellant in respect of the goods manufactured with the plant and machinery installed prior to the said date.

7. The question which arises is as to whether subsequent expansion of the unit by installing new machines after 31.12.05 would get covered by the said notification or not. Admittedly the second boiler has been installed after 31-12-05. If viewed from another angle, it can be reasonably observed as if the appellant have installed a second factory in the said area for manufacture of the goods. If the machines, instead of being installed in the same factory, would have been installed in a separate factory, the benefit of the notification was admittedly not available to the appellant. As such, merely because the second boiler was installed in the same factory, which was earlier eligible for exemption, would not result in grant of exemption to the second one also.

8. Even if we go by the conditions of the notification, it is clearly mentioned that the benefit of notification would be available in respect of those units which have been fully complete prior to 31-12-05 and has started their production prior to the said date. There is nothing in the said notification as regards extension of the said date of 31.12.05 in respect of the subsequent expansion of plant and machinery. As rightly contended by Learned SDR, when the notifications are unambiguous and clearly lay down the provisions, the scope of the same cannot be extended by reference to the legislative intent. Such notifications are required to be interpreted in accordance with the words of the notification.

9. Even if we go by the legislative intent, the same becomes clear from the various circulars and clarifications issued by the Government. The TRU letter F. No. 350/32/01-TRU, dated 17.10.01 addressed to the Chief Commissioner of Customs, Mumbai seeking clarifications raised by the Chief Commissioner explains the Government's case. For better appreciation, we reproduce the clarification in case No. '1' :-

| Issue in brief | View of Chief Commissioner, Customs & C. Ex., Mumbai | Reply to the |
|---|---|---|
| 1. Whether any extra benefit of exemption in terms of the proviso to the first para is to be given for the value of any subsequent investment increasing the capacity of the unit. | The reference to the Notification being only to the original value of investment in plant and machinery on the date of commencement of commercial production, subsequent investments should be ignored. | We agree. The intention was to keep the exemption of the scheme simple. Giving benefit of subsequent investments would not only complicate the scheme, the question of benefit available to a unit would also keep changing. |

10. Reference may be made to Circular No. 332/12/2002-CX.1, dated 20-2-02. The relevant part of said circular clarifying the issue is as under :

"Query No. 1 : Whether the benefit of exemption would be available to goods/products that the unit starts manufacturing after the cut off date for the commencement of commercial production i.e. 31-12-2005.

Clarification : There could be two situations. First is that where a unit introduces a new product by installing fresh plant, machinery or capital goods after the cut off date in such a situation, exemption would not be available to this new product. The said new product would be cleared on payment of duty, as applicable, and separate records would be required to be maintained to distinguish production of these products from the products which are eligible for exemption.

The other situation is the one where a unit starts producing some products (after the cut off date) using the plant and machinery installed upto the cut off date and without any addition to the plant and machinery. For example, in case of plastic moulded products a unit may commence the production of different products simply by changing the moulds and dies. In that case, the unit would be eligible for the benefit of Notification because the plant and machinery used for manufacture has remained the same. In this connection, it is further clarified that for the purpose of computing the original value of plant and machinery, the value of plant and machinery installed on the date of commencement of commercial production only need be considered."

11. Admittedly, the notification issued on the said date reflects view that the legislative intent that the benefit under the said notification is intended to be restricted only to those units, which have started commercial production on or before 31-12-05 and the benefit cannot be extended to the products manufactured by installing fresh plant and

*machinery. To the similar effect is another letter written by CBEC on 28th April 2005 addressed to the Secretary General Federation of Indonesia of India, indicating that the benefit of the notification would not be available to those new industrial units, which commences commercial production after 31-12-05.*

*In so much as the appellant had admittedly installed a new second hole mill after 31-12-05, though in the same factory, which was earlier enjoying the exemption, we are of view that the benefit of the notification would not be available to the appellant in as much as the object of the notification was to grant incentive for promotion of the export area and to complete such investments before 31-12-05. Allowing of exemption in respect of subsequent instalments of plant and machinery would defeat the very purpose of issuance of the notification and the legislative intent.*

*22. In view of the above, the appeals are rejected."*

6.3 After issuance of the said notification, the clarifications dated 17.10.2001; dated 10.07.2008 and dated 25.04.2002 clarified that the intention was to keep the operation of the scheme simple; that benefit of subsequent investments would not only complicate the scheme, the quantum of benefit available to a unit would also keep changing; that benefit of Notification No. 39/2001-CE would only be applicable to those new industrial units, which commence commercial production before 31.12.2005. In other words, if a new industrial unit is installed after 31.12.2005 and commence commercial production after 31.12.2005, then such industrial unit is/was not be eligible to avail exemption under the said notification. Similarly, if the commercial production of a particular kind of specified goods had not commenced before 31.12.2005, then the benefit of the said notification is/was not available to such goods. It is also clarified that if any unit introduced a new product by installing fresh part, machinery or capital goods after the cut-off date, then exemption would not be available to that new product and the same would be cleared on payment of duty, as applicable, and separate records would be required to be maintained to distinguish production of these products from the products, which were eligible for exemption. These clarifications are issued on Notification No. 39/2001-Central Excise dated 31.07.2001 and are to be harmoniously read with the provisions of the said notification only.

6.4 In view of the above, I do not find force in the arguments of the appellant that they were/are eligible for refund of Rs. 37,26,324/- on the products – Telephone Parts, Calculator Parts and Hanging Lamp manufactured after 31.12.2005 by use of plant and machinery installed before 31.12.2005.

6.5 I find that the appellant also declared in Annexure – 37/Form – R/Application for Refund of Excise Duty that they were not eligible for exemption under Notification No. 39/2001-CE for new products viz. Bike (Electrically operated two-wheeler) and Aluminium Composite Panel (Sheet) and their claim was confined to only these products which were eligible for exemption under

Notification No. 39/2001-CE. I further find that the appellant agreed at the time of personal hearing that *"they don't press for refund of Rs. 96,40,035/- in view of postponement against them"*. Accordingly, I hold that the appellant is not eligible for refund of new products viz. E-Bike (electrically operated two wheeler) and Aluminium Composite Panel (Sheet) manufactured after 31.12.2015 with the help of machineries installed after 31.12.2015.

7. 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/recredit 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 amended. The said notification is reproduced as under:

*'Kutch (Gujarat) — Exemption to excisable goods (except those specified in Annexure) manufactured 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 (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (2) 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 case 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 utilization 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 installed in the Kutch District during thirty years on the date of commencement of commercial production in that unit, the exemption contained herein shall apply only to the first thirty crore rupees or to an aggregate value not exceeding twice the value of such investment from the date of commencement of commercial production, in each year.*

*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 under the proof of duty paid by utilization 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 5th 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 utilization of CENVAT credit during the month under consideration to the manufacturer by the 15th day of the next month.*

*(7) If there is delay in the pay delay to such institution, 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 manufacturer under consideration, and thereafter may adjust the amount of refund by such amount as may be necessary in the subsequent refunds adjustable to the manufacturer."*

7.1 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 (1) of section 3, there shall be levied and collected in accordance with the provisions of this Chapter an additional 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 or money of the Education Cess levied under sub-section (1) of section 2 and the Chapter for the purposes specified in sub-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, 2004 (23 of 2004), shall have the meanings respectively assigned to them in those Act or Chapter, as the case may be.*

*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 to be collected in 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 the other duty of excise but excluding 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 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 refund and exemptions from duties and recovery of amount short, 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, 2004 or the rules, as the case may be."*

7.2 The Secondary and Higher Education Cess was levied vide Sections 135 to 139 of Chapter V of the Finance Act, 2007, which read as under:

*"135. Secondary and Higher Education Cess. - (1) Without prejudice to the provisions of sub-section (1) of section 3, there shall be levied and collected, in accordance with the provisions of this Chapter as are applicable for purposes of the levy, a cess to be called the Secondary and Higher Education Cess, to fulfil the commitment of the Government to provide and finance secondary education and higher education.*

*(2) The Central Government may, after due appropriation made by Parliament by law in this behalf, utilise such sums or money of the Secondary and Higher Education Cess levied under sub-section (1) of section 2 and this Chapter for the purposes specified in sub-section (1) as it may consider 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, 2004 (23 of 2004), shall have the meanings respectively assigned to them in those Act 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 135, in the case of goods specified in the*

*First Schedule to the Central Excise Tariff Act, 1985 (5 of 1985), 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 two per cent., calculated on the aggregate of all duties of excise (excluding special duty of excise or any other duty of excise but including 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 or the Ministry or 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."*

7.3 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 duties 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.

7.4 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/rebate 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/rebate, 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. 345/2/2001-TRU(Pt.) dated 10.08.2004 also clarified that Education Cess is part of excise duty, the relevant portion is as under:

*Letter F. No. 345/2/2001-TRU (Pt.) dated 10.8.2004*

*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:*

*Point No. (1) : Whether Education Cess on excisable goods is leviable on goods manufactured prior to introduction 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 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.*

*Issue No. (3) : Whether goods that are fully exempted from excise duty/exemption duty or are cleared without payment of excise duty/exemption duty (such as clearance under bond or fulfilment of certain conditions) would be subjected to Cess.*

*Clarification : The Education Cess is payable at the rate of two per cent of the aggregate of all duties of excise/customs (excluding certain duties as explained in the explanation below) which are collected by the Department of Central Excise or Customs. Thus, if goods are fully exempted from excise duty or customs duty, are cleared by EOU duly or 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 payable on such clearances. In this regard, letter D.O. No. 609/54/2004-CX, dated 21st July, 2004 issued by Member (Central) may also be referred to.*

*Issue No. (4) : Whether goods (like exempted beverages) that do not fall under the Central Excise Tariff be subjected to levy of Education Cess on excisable goods (or part of CVD), when they are imported into India?*

*Clarification : As the Education Cess on exclusive goods is leviable on goods specified in the first schedule to the Central Excise Tariff Act, goods like exempted beverages that are not specified are not subjected to the said Cess.*

*Issue No. (5) : Whether auto-cesses which either not collected as duty of excise/customs or are collected by Cus Dy a Department other than Department of Revenue, should be counted for the purpose of calculation of Education Cess?*

*Clarification : As the Education Cess is calculated on the aggregate duties of excise/customs (excluding certain duties of excise like the extra-duties duty, cess cesses duty etc.) levied and collected by the Department of Revenue only and duties which are not levied and collected as duties of excise/customs and / or are both levied and collected by the Department of Revenue should be taken into account for calculating Education Cess."*

(Emphasis supplied)

7.5 CBEC vide Circular No. 134/3/2011-ST dated 08.04.2011 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 wherever 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 08.04.2011 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 (cess) on taxable 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 basis arises in the context of Tribunal's Order in the matter of M/s. Reliance Airtel Ltd. v. CCE, Customs and Service tax, Delhi [2010-TIOL-1950-CESTAT DEL] – 2010 (20) S.T.R. 506 (Tribunal).*

*2. The issue has been examined. Though Tribunal's Order referred above is in favour of assessee, 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(j) 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 service tax is exempt, the same applies to education cess as well. Since Education Cess is levied and collected as percentage of*

*central tax, which and wherever service tax is not by virtue of exemption. Education Cess would also be NIL.*

*5. This being the position, Govt. formations are directed not to initiate proceedings to recover the education cess, where 'Nil' rate of service tax stands exempted under the notification. Following the same principle, where education cess has been refunded to exporters along with service tax, by virtue of exemption notifications where 'Nil' rate of service tax is exempt, the same need not be recovered."*

7.6 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 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 judgement of the Hon'ble Supreme Court in the case of SRD Nutrients Pvt. Ltd. reported as 2017 (355) ELT 481 (SC), wherein it has held that:

*"20. One aspect that clearly emerges from the reading of these two circulars is that the Government itself has taken the position that where 'Nil' rate 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.*

*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 an excise duty. It means that persons who are required to pay excise duty have to also pay 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 91 makes it clear that this Education Cess is payable on 'taxable goods' i.e. in respect of goods specified in the list appended 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 appeals, shall as far as may be applied in relation to any cess collection of Education Cess on excisable goods. A rational 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 easily 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 at 2% is to be calculated on the aggregate of duties of excise. There cannot be any surcharge when basically itself 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 even the excise duty itself was exempted from levy. There shall, however, be no order as to cost."*

*(Emphasis supplied)*

7.7 In view of above, I hold that the appellant is eligible for refund of education Cess and Secondary & Higher Education Cess.

7.8 It's needless to say that the refund of the Education Cess and Secondary & Higher Education Cess paid on new products i.e. Telephone Parts, Calculator Parts, E-Bike and Aluminium Composite Panels manufactured with the help of machineries installed after 31.12.2015, is not admissible to the appellant. However, it is not transpired from the documents available on records that whether the said amount of Rs. 54,10,810/- contained portion of Education Cess

and Secondary & Higher education Cess paid for manufacture of new products i.e. Telephone Parts, Calculator Parts, E-Bike and Aluminium Composite Panels manufactured with the help of machineries installed after 31.12.2005 or not. Hence, the sanctioning authority is directed to verify as to whether refund of Rs. 34,10,610/- being refund of Education Cess and Secondary & Higher Education Cess covers Education Cess and Secondary & Higher education Cess paid on new products manufactured with the help of machineries installed after 31.12.2005 and if so, the refund amount of Rs. 34,10,610/- shall be restored to this extent.

8. Accordingly, I allow appeal related to Education Cess and Secondary & Higher education Cess in respect of products where refund of central excise duty was allowed earlier. However, I reject appeal related to refund of Rs. 96,40,216/- on the new products – E-Bike and Aluminium Composite Panel and of Rs. 37,35,329/- on the products – Telephone Parts, Calculator Parts and Hanging Lamp commercial production of which started after 31.12.2005 only and uphold the impugned order in this regard.

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

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

(कुमार संतोष)
आयुक्त (अपील्स)

By Regd. Post AD.

To,

| | |
|---|---|
| M/s. Ajanta Manufacturing Ltd., Omkar Nagar, 8A – Vadodra Highway, Village – Vanchhiv, Post – Sameshvar, Near Surejbar Bridge, Taluka - Bharuch | मे. अजंता मैनुफैक्चुरिंग लि., ओमकार नगर, ८ए – वेडोदरा हाइवे, गाँव – वांछिया, पोस्ट – सामेश्वरी, सूरजबारी पुल के पास, तालुका – भरुच, |

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-Bhachau, Gandhidham for further necessary action.
4) Guard File.