आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE
[illegible]
[illegible] Ring Road
राजकोट / Rajkot – 360 001
Tele Fax No. [illegible] Email: [illegible]@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	[illegible]	[illegible]	[illegible]
	V2/[illegible]/2018	[illegible]	15.05.2000

ख आदेश [illegible] (Order-In-Appeal No.):

KCH-EXCUS-000-APP-240-2018-19

आदेश का दिनांक / Date of Order:	**31.12.2018**	जारी करने की तारीख / Date of issue:	**01.01.2019**

कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग [illegible]

[illegible] Rajkot / Jamnagar / Gandhidham

घ अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellant & Respondent :-

M/s. Genus Electrotech Ltd., 43, Meghpar Borichi, Galpadar Road, Tal. Anjar-Kutch, Fax: 02836-240792

[illegible]

(A) [illegible]

[illegible] Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) [illegible]

[illegible] Customs, Excise & Service Tax Appellate Tribunal [illegible]

(ii) [illegible]

[illegible] Customs, Excise & Service Tax Appellate Tribunal [illegible]

(iii) [illegible]

[illegible]

(B) [illegible]

[illegible]

..2..

(i) [illegible]

(ii) [illegible]

(iii) [illegible]

(iv) [illegible]

(v) [illegible]

(vi) [illegible]

(vii) [illegible]

(viii) [illegible]

(ix) [illegible]

(x) [illegible]

(xi) [illegible]

(xii) [illegible]

(xiii) [illegible]

(xiv) [illegible]

(xv) [illegible]

(xvi) [illegible]

(xvii) [illegible]

(xviii) [illegible]

(xix) [illegible]

(xx) [illegible]

:: ORDER-IN-APPEAL ::

M/s. Gonus Electrotech Ltd., Survey No. 43, Meghpar-Galpadar Road, Taluka: Anjar, District: Kutch, Pin Code – 370 110 (hereinafter referred to as 'the appellant') filed this appeal against Order-in-Original No. 69/2009-10 dated 15.05.2009 (hereinafter referred to as "the impugned order") issued by the Assistant Commissioner, Central Excise Division, Gandhidham (hereinafter referred to as "the adjudicating 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. 15/2008-CE dated 27.03.2008 and Notification No. 33/2008-CE dated 20.06.2008, 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 15% to 75% depending upon the commodity. The appellant filed claim of Rs. 46,10,932/- for month of April, 2008 for refund of Central Excise Duty, Education Cess and Secondary & Higher Education Cess paid on manufactured goods through PLA. The sanctioning authority vide the impugned order sanctioned amount of Rs. 44,41,915/- but did not sanction amount of (i) duty of Rs. 4,618/- involved in the product of EPS Packing (Thermocol) which was manufactured from plant and machineries installed after 31.12.2003 and used for captive consumption and (ii) Rs. 1,94,299/- on the ground that the said notification did not cover Education Cess and Secondary & Higher Education Cess and hence, the refund of Education Cess and Secondary & Higher Education Cess not admissible.

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

3.1 **Rejection of refund of Rs. 4,618/-:**

(i) The impugned order is bad in law inasmuch as not considering the refund claim of amount of duty considered on captive consumption of EPS Packing (Thermocol) covered under Notification No. 67/1995-CE dated 16.03.1995, that it was undisputed fact that the appellant inadvertently cleared production of EPS Packing (Thermocol) for captive consumption during April, 2008, in manufacture of other eligible products viz. CTVs, Cables, Washing Machines, etc. etc. under cover of invoices paying at nil rate of duty, under and in terms of the Notification No. 67/1995-CE dated 16.03.1995, as amended; that through aforesaid notification the Central Government has exempted goods manufactured and used within the premises of production in or in relation to manufacture of final products,

Contd...4

from whole of duty of excise leviable thereon; that the notification is uniformly applicable to all products, which satisfy requirement of the notification; that this notification is issued and is working totally independent of the Notification No. 39/2001-CE and thus has nothing to do with the eligibility or ineligibility of products, under Notification No. 39/2001-CE; that Notification No. 67/1995-CE operates for all the products manufactured and captively cleared by a unit having common registration of central excise; that their instant case is squarely covered by the said notification as they are having common registration of central excise for all the products and clearances under company; that neither the Notification No. 39/2001-CE nor the CBEC's clarification referred to in the impugned order states or implies anywhere that benefit of Notification No. 67/1995-CE will not be allowed to the unit for any product, operating under Notification No. 39/2001-CE; that it is undisputed fact that the appellant cleared EPS Packing (Thermocol) for captive consumption at nil rate of duty under cover of invoices issued by taking benefit of Notification No. 67/1995-CE and that the sanctioning authority calculated imaginary duty payable on such clearances, ignoring the Notification No. 67/1995-CE and deducted the amount from eligible refund amount of other products. The appellant placed reliance on OIA No. 280/2009/COMMR(A)/RAJ dated 27.02.2009 passed by the then Commissioner (Appeals), wherein it was held that "*since the final products are chargeable to excise duty the appellants are eligible for the benefit of Notification No. 67/1995-CE dated 16.03.1995, as amended, for the intermediate product captively consumed* ......" and since the facts and circumstances of the present case are same as were there in above OIA, hence the above judgment is squarely applicable in present case also.

3.2 Rejection of refund of Rs. 1,94,290/-:

(i) As per Section 91 of the Finance Act, 2004, the Education Cess levied under Section 91, in case of goods specified in the First Schedule to the Excise Tariff Act, being goods manufactured or produced, shall be a duty of excise, at the rate of two per cent, calculated on the aggregate of all duties of excise which are levied and collected by the Central Government under the provisions of the Central Excise Act, 1944 (hereinafter referred to as the "Act") or under any other law for the time being in force.

(ii) As per Section 93(2) of the Finance Act, 2004, Education Cess on excisable goods is in addition to other duties of excise chargeable on such goods under the Act or any other law for the time being in force.

(iii) As per Section 93(3) of the Finance Act, 2004, the provisions of the Act and the rules made there under relating to re-credits, refunds, exemptions from duties and imposition of penalty shall also apply to the

levy and collection of the Education Cess on excisable goods in any way in relation to the levy and collection of the duties of excise on such goods under the Act or the rules, as the case may be.

(iv) Section 136 of the Finance Act, 2007 provides for levy of Secondary and Higher Education Cess @ 1% on the goods specified in the First Schedule to the Excise Tariff Act. Secondary and Higher Education Cess is also a duty of excise and is levied on the aggregate of all duties of excise (excluding Education Cess) which are levied and collected by the Central Government under the provisions of the Act or any other law for the time being in force.

(v) The appellant relied upon following case laws:

(a) Bharat Box Factory Ltd. – 2017 (355) ELT 481 (SC)

(b) Universal Plasto-Chem Pvt. Ltd. – 2017 (355) ELT ...

(vi) In view of the above, the exemption provisions of the said Notification No. 35/2001-CE dated 31.07.2001, as amended, is also applicable to the Education Cess and Secondary & Higher Education Cess and hence, the appellant was rightly taken re-credit of refund of Education Cess and Secondary & Higher Education Cess. The appellant requested to set aside the impugned order on the ground of rejection of refund of Education Cess and Secondary & Higher Education Cess.

(vii) The appellant argued that Education Cess and Secondary & Higher Education Cess nothing but duty of excise and therefore, the transfer/utilization of basic excise duty towards payment of Education Cess and Secondary & Higher Education Cess is allowable and hence, refund of the same is eligible. The appellant in their relied upon case law in case of Ramwara Syntex Ltd. Reported as AIT-2007-455 HC.

4. The appeal was kept in Call Book on the ground that appeal had been filed by the department on the issue 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) E.L.T 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 481 (SC). This appeal was, thus, taken out of Call Book for passing appropriate orders. Personal hearing was granted to the appellant as well as department but no one appeared on the given dates and, hence, I proceed to decide this appeal.

Findings:

5. I have carefully gone through the facts of the case, the impugned order, grounds of appeal and written as well as oral submissions made by the appellant.

The issues to be decided in the present appeal are as to whether (i) 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 and (ii) the appellant is eligible for refund of Rs. 4,5[illegible]/- which was not allowed on the ground that the product viz. EPS Packing (Thermocol) was manufactured from plant and machineries installed after 31.12.2005.

6. The appellant contended that duty of excise includes Education Cess and Secondary & Higher Education Cess in terms of provisions of Section 91 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) and cleared from units in Kutch District in 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 (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 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 factory below 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, 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 other than the amount 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 7th 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.

(c) If there is delay in the any 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 by such amount 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 (11) of section 2, there shall be levied and collected, in accordance with the provisions of this Chapter as surcharge for purposes of the Union, a cess to be called the Education Cess, to fulfil the commitment of the Government to provide and finance universalised quality basic education.

(2) The Central Government may, after due appropriation made by Parliament by law in this behalf, utilise, such sums of money of the Education Cess levied under sub-section (11) of section 2 and this Chapter for the purposes specified in sub-section (1), as it may consider necessary.

92. Definitions. — 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 under section 91, in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), being goods manufactured or produced, shall be a duty of excise (in this section referred to as the Education Cess on excisable goods), at the rate of two per cent., calculated on the aggregate of all duties of excise (including special duty of excise or any other duty of excise but excluding Education Cess on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under the provisions of the Central Excise Act, 1944 (1 of 1944) or under any other law for the time being in force.

(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."

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 (12) of section 2, there shall be levied and collected, in accordance with the provisions of this Chapter as surcharge for purposes of the Union, a cess to be called the 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 (12) of section 2 and this Chapter for the purposes specified in sub-section (1), as it may consider necessary.

137. Definitions. — 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 93 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 93 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 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.

7.3 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 Circular No. 345/2/2004-TRU(Pt.) dated 10.08.2004 also clarified that Education Cess is part of excise duty, the relevant portion is as under:

Circular No. 345/2/2004-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:

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

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. (2): Whether goods that are fully exempted from excise duty/customs duty or are cleared without payment of excise duty/customs duty (such as clearances under bond or fulfilment of certain conditions) would be subject to the 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 but excluding anti-dumping duty, safeguard duty, etc.) levied and collected. If goods are fully exempted from excise duty or customs duty or are chargeable to Nil duty or are cleared without payment of duty under specified procedure such as clearance under bond, there is no collection of duty

Thus, no education cess would be leviable on such clearances. In this regard, letter D.O. No. 605/54/2004-DBK dated 21st July, 2004 issued by Member (Customs) may also be referred to.

Issue No. (ii): Whether goods (like alcoholic beverages) that do not fall under the Central Excise Tariff be subjected to levy of Education Cess on excisable goods (as part of CVD), 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 subjected to the said Cess.

Issue No. (iii): Whether duties/levies, which are either not collected as duty of customs/excise or are collected by a Department other than Department of Revenue, should be included for the purposes of calculation of Education Cess?

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

(Emphasis supplied)

7.4 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 (levied as Education Cess leviable under Finance (No. 2) Act, 2004 and Secondary and Higher Education Cess leviable under Finance Act, 2007), under notifications where 'whole of service tax' stands exempted. Apparently the doubt arises in the context of Tribunal's Order in the matter of M/s. Reliance Industries Ltd. v. CCE, Customs and Service Tax, BBSR-I (2010 TIOL 1606 CESTAT KOL) – 2010 (19) S.T.R. 807 (Tribunal).

2. The issue has been examined. Though Tribunal's Order referred above is in favour of revenue, it is inconsistent with the policy intention of the Government to exempt education cess in addition to service tax, where 'whole of service tax' stands exempted. According to section 91(1) of Finance (No. 2) Act, 2004 and section 136(1) of Finance Act, 2007, Education Cess and Secondary and Higher Education Cess are leviable and collected as service tax, and when whole of service tax is exempt, the same applies to education cess as well. Since Education Cess is levied and collected as percentage of service tax, when and wherever service tax is NIL by virtue of exemption, Education Cess would also be NIL.

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

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 being 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 SRD Nutrients Pvt. Ltd.

reported as 2017 (355) ELT 481 (SC), wherein it has been held that:

> *"20. One aspect which 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.*
>
> *21. Even otherwise, we are of the opinion that it is more rational to accept the aforesaid position as clarified by the Ministry of Finance in the aforesaid circulars. Education Cess is on excise duty. It means that those 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, levy of 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 is a surcharge, (Education Cess @ 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. Secondary and Higher 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.*
>
> *. . .*
>
> *24. For the aforesaid reasons, we allow these appeals and hold that the appellants were entitled to refund of Education Cess and Higher Education Cess which was paid along with [illegible] which was exempted from duty. There shall, however, be no order as to costs."*
>
> (Emphasis supplied)

8. In view of the above facts and legal position, I hold that the appellant is eligible for refund of Education Cess and Secondary & Higher Education Cess.

9. I find that the sanctioning authority held that EPS Packing (Thermocol) was manufactured from the machinery installed after 31.12.2005 and used for captive consumption, in terms of Board's Circular No. 116/27/2000-CX-3 dated 10.07.2005, hence, the appellant was not eligible for benefit of Notification No. 39/2001-CE dated 31.07.2001, as amended. I find that as far eligibility of the product EPS Packing (Thermocol) under Notification No. 39/2001-CE dated 31.07.2001, as amended, is concerned, it is undisputed fact that the same has been manufactured from the plant and machinery installed after 31.12.2005.

9.1 I find that the said issue has been properly discussed by the Hon'ble CESTAT, Ahmedabad in case of Ratnamani Metals and Tubes Ltd. reported as 2012 (276) ELT 230 (Tri. – Ahmd.), in which provisions of Notification No. 39/2001-CE has been discussed and it is held as under:

> *"8. 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 was/is 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 in the Kutch area, wherein the investment was complete by 31.12.05. The benefit of the said notification is being 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 tube mill was 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 main 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 tube mill stand installed in the same factory, which was earlier enjoying the exemption, would not result in grant of exemption to the second tube mill.

8. From the plain reading of the conditions of the notifications, 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 installment of plant and machinery. As rightly contended by learned SDR, when the notifications are unambiguous and clearly lay down the conditions, the scope of the same cannot be extended by referring 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. 332/20/03-TRU dated 17-10-03 addressed to the Chief Commissioner of Customs, Vadodara seeking clarifications raised by the Chief Commissioner supports the Revenue's case. For better appreciation, we reproduce the clarification on issue No. 4:-

Issue in brief	View of Chief Commissioner, Customs & C.Ex., Vadodara	Board's decision
4. 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 in the explanation being only to the original value of investment in plant and machinery on the date of commencement of commercial production, subsequent investment should be ignored.	"We agree. The reference was to only the valuation of the original assets. Since benefit of subsequent investments would not only complicate the scheme, the quantum of benefit available to a unit would also keep changing."

10. Reference may be made to Circular No. [illegible]/2006-CX.3, dated [illegible]. The relevant part of said circular clarifying the issue is as under :-

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

Comments : There would 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 new 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 exemption, 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 shall be considered."

11. Additionally the clarification issued by the Government also makes clear the legislative intent that the benefit under the said notification is intended to be extended 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 TRU on 20th April 2006 addressed to the Secretary General, Federation of Industries of India, indicating that the benefit of the notification would not be available to those new industrial units, which commence commercial production after 31.12.05.

to avoid misuse the system and arbitrarily declare a new second hand mill after 31.12.2005 as though in the same factory which was earlier enjoying the exemption, the aim of the law was the benefit of the notification should not be available in the system to as much as the object of the notification was to make provisions for expansion of the existing area and to complete such investments before 31.12.05. Allowing of exemption in respect of subsequent investments of plant and machinery would defeat the very purpose of issuance of the notification and the legislative intent.

13. In view of the above discussion, the appeal is rejected."

9.2 I find that after issuance of Notification No. 39/2001-CE dated 31.07.2001, clarifications dated 27.10.2001 and dated 10.07.2003 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 any unit would also keep changing; that the 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 commenced commercial production after 31.12.2005, then such industrial unit was not eligible to avail exemption under the said notification. Also, if commercial production of a particular product has not commenced on or before 31.12.2005, then the benefit of the said notification would not be available to such goods. It is also clarified that if any unit introduces a new product by installing fresh plant, 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 were issued on the Notification No. 39/2001-Central Excise dated 31.07.2001 and are to be harmoniously read with the provisions of the said notification. Therefore, if the product EPS Packing (Thermocol) was commercially produced/manufactured, after 31.12.2005, then the benefit of the Notification No. 39/2001-CE dated 31.07.2011, as amended, is not available to the appellant.

9.3 I find that in the instant case the appellant had started commercial production of EPS Packing (Thermocol) after 31.12.2005, from plant and machineries installed after 31.12.2005 and the appellant has failed to submit any evidence of commercial production of EPS Packing (Thermocol) on or before 31.12.2005, then the contention that they had not cleared EPS Packing (Thermocol) for home consumption during the period under consideration and had only captively consumed it, does not make them eligible to avail benefit under Notification No. 39/2001-CE dated 31.07.2001, as amended. Therefore, I hold that rejection of refund of Rs. 4,618/- vide the impugned order is correct, legal and proper.

10. Accordingly, I allow appeal for sanction of refund of Education Cess and Secondary & Higher Education Cess but reject appeal for refund of Rs. 4,91,89/- and modify the impugned order accordingly.

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

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

By Regd. Post AD

To,

M/s. Genus Electrotech Ltd., Survey No. 48, Meghpar Galpadar Road, Taluka: Anjar, District: Kutch, Pin Code – 370 110

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 Anjar, Gandhidham for further necessary action.
4) Guard File.