



**रजिस्टर्ड डाक ए. डी. द्वारा :-**

क्र	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/115/RAJ/2010	192 to 197/2009-10	27-01-2010
	V2/299/RAJ/2010	258/2009-10	19-03-2010
	V2/410/RAJ/2010	48 to 54/2010-11	29-04-2010
	V2/578/RAJ/2010	102/2010-11	08-06-2010
	V2/579,580/RAJ/2010	129,130/2010-11	25-06-2010

ख अपील आदेश संख्या (Order-In-Appeal No.):

**KCH-EXCUS-000-APP-025-TO-030-2018-19**

आदेश का दिनांक / 28.05.2018 जारी करने की तारीख / 30.05.2018  
Date of Order: Date of issue:

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

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ रोवाकर, राजकोट / जामनगर / गान्धीधाम द्वारा उपरोक्तित जारी  
मूल आदेश से सृजित: /  
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax,  
Rajkot / Jamnagar / Gandhidham :

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellant & Respondent :-**  
**M/s. Ratnamani Metal & Tubes Ltd., Survey No. 474, Anjar Bhimasar Road,,Village:  
Bhimasar, Tal; Anjar,, Dist: Kutch**

इस आदेश (अपील) से व्याधित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त पाधिकारी / पाधिकरण के समक्ष अपील दायर कर सकता है।/  
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

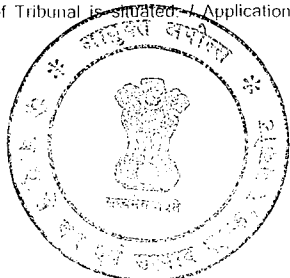
(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित उपाय की जा सकती है।/  
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्योंकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए।/  
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा वे सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिन, , द्वितीय तल, नहुमाली भवन असर्वा अहमदाबाद- 380016 को की जानी चाहिए।/  
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2<sup>nd</sup> Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की राशि, व्यय की राशि और लगाया गया जुर्माना, रुपये 5 लाख या उससे कम, 5 लाख रुपये या 50 लाख रुपये तक अथवा 50 लाख रुपये से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपये का निर्धारित शुल्क जमा करना होगा।/  
The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की राशि, व्यय की राशि और लगाया गया जुर्माना, रुपये 5 लाख या उससे कम, 5 लाख रुपये या 50 लाख रुपये तक अथवा 50 लाख रुपये से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपये का निर्धारित शुल्क जमा करना होगा।/  
The appeal under sub section (1) of Section 86 of the Finance Act, 1994, in the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs.500/-.



(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करे (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन देने करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टैट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 33 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जमा वारी अपेक्षित देय राशि दस करोड़ रुपये से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल हैं

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेजवेट जमा की ली गई गलत राशि
- (iii) सेजवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचारधीन स्थगन अर्जी एवं अपील को लागू नहीं होगी। /

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

आदेश सरकार को पुनरीक्षण आवेदन :

(C) Revision application to Government of India: इस आदेश को पुनरीक्षण याचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जेवन दीप भवन, ससद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। / A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। / In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल का विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के लुट (रिवेंट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को लात निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इयूरो क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (सं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाचिधि पर या बाद में पारित किए गए हैं। / Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संश्लेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। / The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए। / जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए। / The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपरोक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work by excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासाधारण न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिप्पट लगा होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। / Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दायित्व करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट [www.cbec.gov.in](http://www.cbec.gov.in) को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website [www.cbec.gov.in](http://www.cbec.gov.in)

**:: ORDER IN APPEAL ::**

The appeals listed below had been filed by M/s. Ratnamani Metals & Tubes Ltd., S. No. 474, Anjar Bhimasar Road, Village: Bhimasar, Taluka: Anjar, Dist: Kutch (hereinafter referred to as "the appellant") against Orders-In-Original shown against each appeal no. (hereinafter referred to as "the impugned orders") passed by the Deputy Commissioner, Central Excise Division, Gandhidham (hereinafter referred to as "the sanctioning authority").

Sr. No.	Appeal File No.	Order-In-Original No. & Date	Period of Refund claim	Amount of refund claim rejected (in Rs.)
01	V2/115/RAJ/2010	192 to 197/2009-10; 27.01.2010	10/2008 to 03/2009	13,52,689/-
02	V2/299/RAJ/2010	258/2009-10; 19.03.2010	04/2008 to 03/2009	7,04,025/-
03	V2/410/RAJ/2010	48 to 54/2010-11; 29.04.2010	06/2009 to 07/2009; 10/2009 to 11/2009; 01/2010 to 03/2010	23,64,280/-
04	V2/578/RAJ/2010	102/2010-2011; 08.06.2010	04/2010	4,87,219/-
05	V2/579/RAJ/2010	129/2010-2011; 25.06.2010	04/2009 to 03/2010	14,17,339/-
06	V2/580/RAJ/2010	130/2010-2011; 25.06.2010	05/2010	6,06,251/-

2. The brief facts of the case are that the appellant is a unit operating in the District of Kutch and was availing benefits of the provisions of Notification No. 39/2001-CE dated 31.07.2001, as amended (hereinafter referred to as 'the said notification'), by availing the facility of refund/re-credit, as per the scheme envisaged in the said notification. The said notification was amended vide Notification No. 16/2008-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 addition undertaken in the manufacturing process, by fixing percentage of refund ranging from 15% to 75% depending upon the type of commodity. Accordingly, the appellant had filed claims of refund/recruit of Central Excise Duty, Education Cess and Secondary and Higher Education Cess paid on manufactured goods through PLA during respective period by them. The sanctioning authority vide impugned orders had partially sanctioned the amount due, pertaining only to the Basic Excise Duty but did not sanction amount pertaining to Education Cess and Secondary & Higher Education Cess on the grounds that exemption under the said notification was available only to Central Excise Duty or additional excise duty and it did not cover Education Cess and Secondary & Higher Education Cess and hence the appellants were not entitled for refund/recruit of Education Cess and Secondary and Higher Education Cess.



3. Aggrieved with the impugned order, the appellant preferred these appeals, *inter-alia*, on the following grounds:

(i) As per Section 93 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 refunds, exemptions from duties and imposition of penalty shall also apply 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 Act or the rules, as the case may be.

(iv) Section 138 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. reported as 2007 (06) LCX 0044;
- (b) Dharmpal Premchand Ltd. reported as 2007 (218) ELT 610

(vi) Since Education Cess & Secondary and Higher Education Cess were duties of excise which were paid on the aggregate of duties of excise leviable under the above referred Acts, which were named in the Notification No. 39/2001-CE dated 31.07.2001, it should be treated to have been levied under



those Acts and, therefore, along with the refund, which was admissible in respect of the duties paid under the said Acts, even the Education Cess & Secondary and Higher Education Cess in the nature of excise duty paid at the rate of 2% & 1% respectively thereof, was required to be refunded. It is submitted that the Education Cess and Secondary & Higher Education Cess were clearly accepted as excise duties, which were paid by the appellant through PLA account in terms of the said Notification.

(vii) Levy and collection of Education Cess & Secondary and Higher Education Cess under Finance Acts cannot stand on its own independent of levy and collection of excise duties under the Act. In other words, if there is no levy of central excise by virtue of any exemption, there would be no need to levy of Education Cess & Secondary and Higher Education Cess. Therefore, there is no need to incorporate the provisions for refund of both the Cess being levied under the Finance Acts, in the said Notification No. 39/2001 CE.

(viii) The appellant relied upon case law of BANSWARA SYNTEX LTD. reported as AIT-2007-459-HC and Sun Pharmaceutical Industries reported as 2007 (207) E.L.T. 673 (Tn. - Del.)

(ix) The appellant submits that once the entitlement to exemption of the duty of excise or additional duty of excise, which would otherwise be payable under the Acts named in the Notification, is established by following the manner indicated in it for ascertaining the extent exemption, there cannot arise any question or imposing Education Cess or Secondary and Higher Education Cess in the nature of excise duty under Finance Acts. It became refundable because the exemption became operative.

(x) Thus, in view of the provisions of Section 93 of the Finance Act, 2004 and Section 138 of the Finance Act, 2007, the appellant submitted that 'duty of excise', means Education Cess and Secondary & Higher Education Cess and thus, the provisions relating to refund and exemption of the Central Excise Act, 1944 are also equally applicable to Education Cess and Secondary & Higher Education Cess. Therefore, the exemption under the said notification 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.

(xi) The appellant requested for condonation of delay in filing appeal No. V2/578/RAJ/2010 and No. V2/580/RAJ/2010 by 19 days and 4 days respectively on the grounds that due to lack of proper understanding of the refund order, knowledge and guidance, such a delay has occurred and the dealing person was also on tour during the last days of filing of appeals and hence the appeal could not be filed in time and requested to condone for delay in filing of appeals by 19 days and 4 days respectively.

4. Personal hearing in the matter was attended to by Shri R. Subramanya, Advocate who reiterated the grounds of appeal and submitted that the sanctioning authority had sanctioned amount due, pertaining only to the Basic Excise Duty but had not sanctioned amount due, pertaining to the Education Cess and Secondary & Higher Education Cess, which need to be sanctioned.

Findings:

5. I have carefully gone through the facts of the case, impugned orders and submissions made by the appellant in grounds of appeals, written as well oral submissions during the course of personal hearing. The issues to be decided in the present appeals are that

- (i) whether the appellant is eligible for refund/recredit of Education Cess and Secondary & Higher Education Cess under the provisions of the Notification No. 39/2001-CE dated 31.07.2001 as amended, or otherwise;
- (ii) whether the appellant is eligible for condonation of delay in filing appeal No. V2/578/RAJ/2010 and No. V2/580/RAJ/2010 by 19 days and 4 days respectively or not.

6. I find that the impugned orders No. 102/2010-2011 dated 08.06.2010 and No. 130/2010-2011 dated 25.06.2010 were received by the appellant on 15.06.2010 and 30.06.2010 respectively as mentioned in Appeal Memorandum. The appellant filed both appeals on 01.09.2010 i.e. delaying filing of appeal by 19 days and 4 days respectively after normal period of 60 days of filing from the date of receipt of the orders. In the applications for condonation of delay, the appellant has stated that due to lack of proper understanding of the refund order, knowledge and guidance, such delay occurred and the dealing person was also on tour during the last days of filing of appeals and hence the appeal could not be filed in time.

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."

7.3 The Secondary and Higher Education Cess was levied vide Section 136 to 138 of Chapter VI of the Finance Act, 2007, which reads 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. 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 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 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."*

7.4 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 two per cent and one per cent 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 in relation to the levy and collection of the Education Cess & 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 Act.

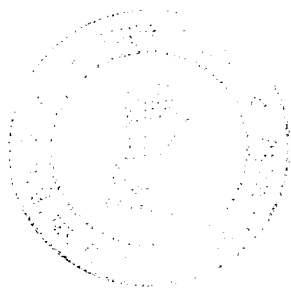
7.5 I find that Notification No. 39/2001-CE dated 31.07.2001 had granted total (100%) exemption from levy of excise duty by way of refund/credit of excise duty paid through PLA. Education Cess and Secondary and Higher Education Cess were levied on excise duty and when the levy of excise duty itself was exempted by way of refund/credit, then the Education Cess and Secondary and Higher Education Cess also got exempted thereby. In absence of primary tax i.e. Central Excise duty, the question of levy of any surcharge or cess or whatever name is called thereupon would not arise. CBEC clarifies vide Letter F. No. 345/2/2004-TRI(Pt.) dated 10.08.2004 that the Education Cess is part of excise, relevant portion thereof reads as under:

*"Letter F. 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 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 (excluding certain duties of customs like anti-dumping duty, safe guard duty etc.), levied and collected. If goods are fully exempted from excise duty or customs duty, 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. (3) : 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. (4) : Whether duties/cesses which either not collected as duty of excise/customs or are collected so but by a Department other than Department of Revenue, should be included for the purposes of calculation of Education Cess?*

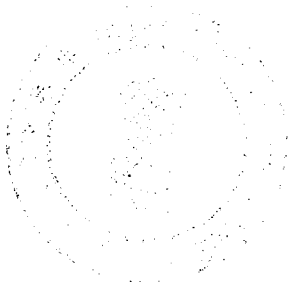
*Clarification : As the Education Cess is calculated on the aggregate duties of excise/customs (excluding certain duties of customs like anti-dumping duty, safe guard duty etc.) levied and collected by the Department of Revenue, only such duties, which are (a) levied and collected as duties of excise/customs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

(Emphasis supplied)

7.6 CBEC vide Circular No. 134/3/2011/ST dated 08.04.2011 clarified that since the Education Cess and Secondary and Higher Education Cess were levied and collected as percentage of service tax, no Education Cess and Secondary and 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 accepted therein by the department 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 (refers to both 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. Balasore Alloys Ltd. v. CCE, Customs and Service Tax, BBSR-I (2010-TIOL-1659-CESTAT-KOL) = 2010 (20) S.T.R. 506 (Tribunal).*

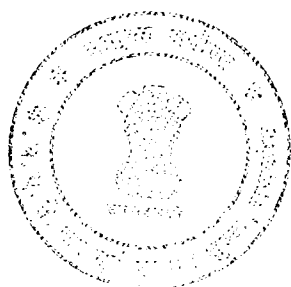
*2. The issue has been examined. Though Tribunal's Order referred above is in favor of revenue, it is inconsistent with the policy intention of the Government to exempt education cess in addition to service tax, where 'whole of service tax' stands exempted. According to section 95(1) of Finance (No. 2) Act, 2004 and section 140(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.*

7.7 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, then education cess and secondary & higher education cess were also exempted by way of refund. This view also finds support from the final order of the Hon'ble Supreme Court in case of SRD 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 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 assesseees who are required to pay excise duty have to shell out Education Cess as well. This Education Cess is introduced by Sections 91 to 93 of the Finance (No. 2) Act, 2004. As per Section 91 thereof, Education Cess is the surcharge which the assessee is to pay. Section 93 makes it clear that this Education Cess is payable on 'excisable goods' i.e. in respect of goods specified in the first Schedule to the Central Excise Tariff Act, 1985. Further, this Education Cess is to be levied @ 2% and calculated on the aggregate of all duties of excise which are levied and collected by the Central Government under the provisions of Central Excise*



*Act, 1944 or under any other law for the time being in force. Sub-section (3) of Section 93 provides that the provisions of the Central Excise Act, 1944 and the rules made thereunder, including those related to refunds and duties, etc., shall as far as may be applied in relation to levy and collection of Education Cess on excisable goods. A conjoint reading of these provisions would amply demonstrate that Education Cess as a surcharge, is levied @ 2% on the duties of excise which are payable under the Act. It can, therefore, be clearly inferred that when there is no excise duty payable, as it is exempted, there would not be any Education Cess as well, inasmuch as Education Cess @ 2% is to be calculated on the aggregate of duties of excise. There cannot be any surcharge when basic duty itself is Nil.*

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

*(Emphasis supplied)*

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

9. In view of above, I allow the appeals filed by the appellant and set aside the impugned orders.

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

9.1 The appeals filed by the appellant stands disposed off in above terms.

By Regd. Post AD.

*(कुमार संतोष)*  
आयुक्त (अपील्स)

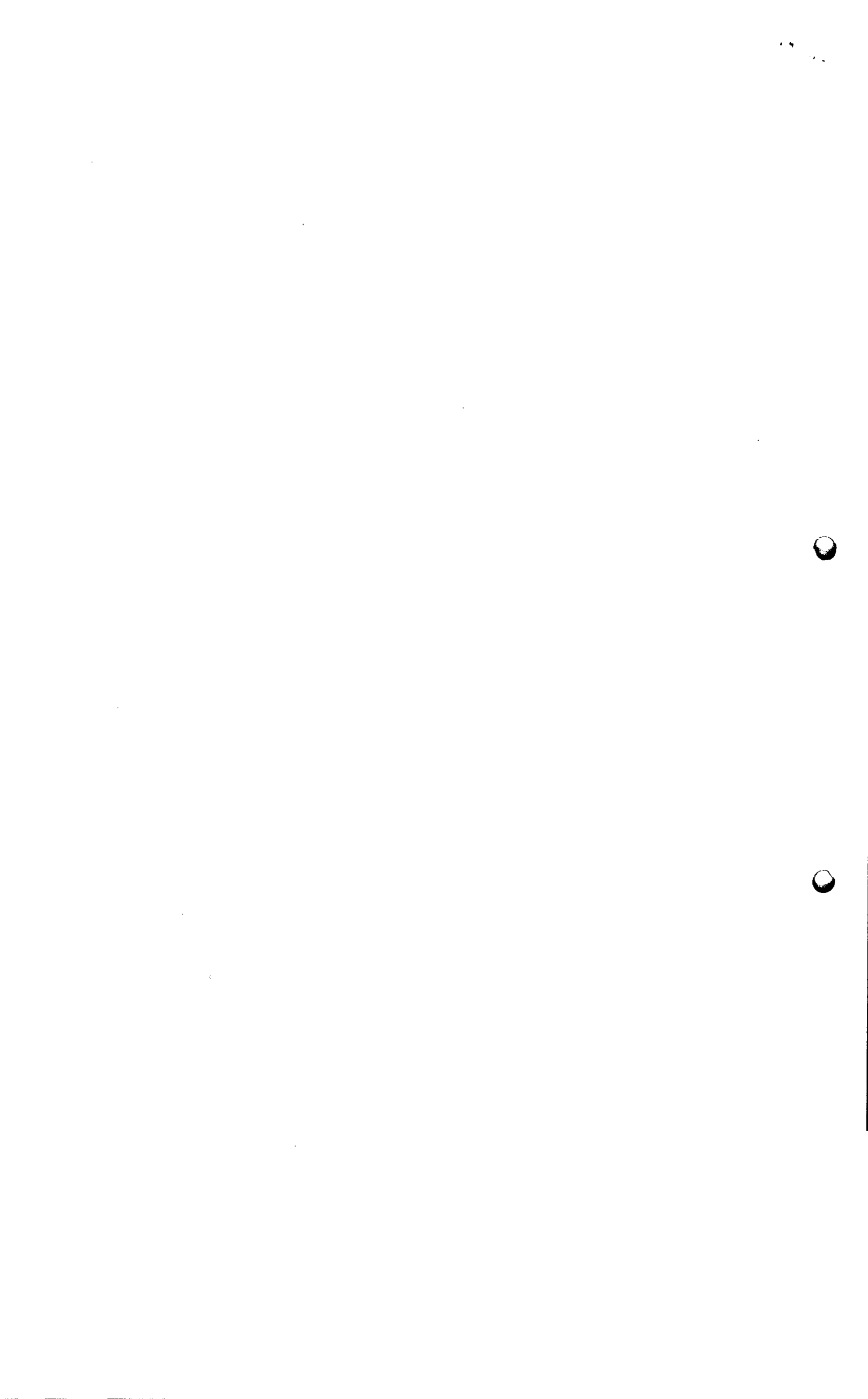
To,

M/s. Ratnamani Metals & Tubes Ltd.,  
S. No. 474, Anjar Bhimasar Road, Village: Bhimasar,  
Taluka: Anjar, Dist: Kutch

मे. रत्नमनी मेटल्स & ट्यूब्स ली.,  
एस. नं. ४७४, अंजार भीमासर रोड,  
गाँव - भीमासर, तालुका - अंजार,  
जिल्ला - कच्छ.

Copy for information and necessary action to:

- 1) The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad for his kind information.
- 2) The Commissioner, CGST & Central Excise, Kutch Commissionerate, Gandhidham.
- 3) The Assistant Commissioner, CGST & Central Excise, Division-Anjar, Gandhidham.
- 4) Guard File.
- 5) F. No. V2/410/RAJ/2010
- 6) F. No. V2/578/RAJ/2010
- 7) F. No. V2/579/RAJ/2010
- 8) F. No. V2/580/RAJ/2010
- 9) F. No. V2/115/RAJ/2010



6.1 I find that the appellant in the applications for condonation of delay, has mentioned that they received copy of the impugned order on 15.06.2010 and 30.06.2010 respectively. Since delay in filing of appeals is of 19 and 4 days only, which is within limit of 30 days beyond normal appeal period of 60 days. I therefore, condone delay of 19 days and 4 days respectively and proceed to decide both appeals on merits.

7. The appellant contented that 'duty of excise' means 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 by availing the facility of refund/re-credit of duties paid. 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 (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, 2001 :*

*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, 2001, 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 likely to be any delay in 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 by such amount as may be necessary in the subsequent refunds admissible to the manufacturer."

(Emphasis supplied)

7.1 The Education Cess was levied vide of Section 91 to 93 of Chapter VI of the Finance (No.2) Act, 2004, which reads 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. Definition. - The words and expressions used in this Chapter and defined in the Central Excise Act, 1944 (1 of 1944), the Customs Act, 1962 (52 of 1962) or Chapter V of the Finance Act, 1994 (32 of 1994), shall have the meanings respectively assigned to them in those Acts or Chapter, as the case may be.

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