

BAJAJ AUTO LIMITED

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v.

UNION OF INDIA & ORS.

(Civil Appeal No.3239 of 2019)

MARCH 27, 2019

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[L. NAGESWARA RAO AND SANJAY KISHAN KAUL, JJ.]

Central Excise Act, 1944 – Central Excise Tariff Act, 1985 – National Calamity Contingent Duty (NCCD), Education Cess and the Secondary & Higher Education Cess – Liability of – Appellant-limited company was exempted from, inter alia, Central Excise Duty (CENVAT) under the second schedule of the Act, 1985 – Appellant was not paying National Calamity Contingent Duty, Education Cess and Secondary & Higher Education Cess – Dispute arose pertaining to the liability of the appellant to pay three cesses referred – An audit objection report was prepared on account of the failure of the appellant to pay the aforementioned three cesses – A show cause notice was given to the appellant – Writ petition filed by the appellant before the High Court against the show cause notice was dismissed – On appeal, held: The issue of the Education Cess and the Secondary & Higher Education Cess is covered by the SRD Nutrients Pvt. Ltd. case, which held that these cesses are a surcharge levied and collected on the total value of the excise duty and the excise duty itself is exempted, there cannot be any question of any recovery of these cesses, as the substratum does not exist – Therefore, appellant not liable to pay the Education Cess and the Secondary & Higher Education Cess – Insofar as NCCD is concerned, it is levied on the product – However, it is in nature of excise duty – It has to bear the same character as those respective taxes to which the surcharge is appended – NCCD will not cease to be an excise duty, but is the same as an excise duty, even if it is levied on the product – Once the excise duty is exempted, NCCD, levied as an excise duty cannot partake a different character and, thus, would be entitled to the benefit of the exemption notification – Thus, appellant not liable to pay NCCD as well – Finance Act, 2001 – s.136 – Finance Act, 2004 – ss. 91 and 93 – Finance Act, 2007 – ss.136 and 138.

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A **Allowing the appeal, the Court**

HELD: 1. The controversy before this Court is now in a narrow compass, on account of the subsequent judicial pronouncement in *SRD Nutrients Pvt. Ltd. v. Commissioner of Central Excise, Guwahati*. The issue of the Education Cess and the Secondary & Higher Education Cess, is covered against the Department in view of this judgment and that is how, also, the Department appears to have understood now, in view of the written synopsis placed before this Court. In the facts of that case, there was an initiative for development of industries in the North-Eastern States of Assam, Tripura, Meghalaya, Mizoram, Manipur, Nagaland, Arunachal Pradesh, etc. A Notification exempting goods from payment of excise duties was issued in respect of those States. Education Cess and Secondary & Higher Education Cess, as imposed under the Finance Acts of 2004 and 2007, respectively were also sought to be levied on the appellant therein. The gravamen of the reasoning of this Court is that since these cesses are a surcharge levied and collected on the total value of the excise duty, and the excise duty itself is exempted, there cannot be any question of any recovery of these cesses, as the substratum does not exist. Not only that, this Court also took into account how the Department itself had viewed the situation regarding Education Cess and Secondary & Higher Education Cess, which are payable as surcharge on the excise duty, once the excise duty is exempted. The Circular dated 10.08.2004 issued by the Department also clarified this position. Therefore, the result of the aforesaid discussion is that the appellant is not liable to pay Education Cess and Secondary & Higher Education Cess. [Paras 12, 13 and 24] [146-G; 151-A]

3. The real bone of contention which survives for consideration is the NCCD. The reason for this is that while the two cesses discussed aforesaid were in the nature of levy on the excise duty payable, the NCCD is levied on the product itself, as per Section 136 of the Finance Act, 2001. It is this aspect, *inter alia*, which was canvassed by the Department to persuade this Court to take a different view from the one taken *qua* the other two cesses. [Para 16] [149-A-B]

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4. On a proper appreciation of the judicial pronouncement in *SRD Nutrients Pvt. Ltd.*, this Court is not inclined to take a different view from the one taken for Education Cess and Secondary & Higher Education Cess, even while considering the issue of NCCD. [Para 21] [150-C]

5. In *SRD Nutrients Pvt. Ltd.* gave its imprimatur to the view expressed by the Rajasthan High Court in *Banswara Syntex Ltd.* The rationale is that while there may be surcharges under different financial enactments to provide the Government with revenue for specified purposes, the same have been notified as leviable in the nature of a particular kind of duty. In the case of NCCD, it is in the nature of an excise duty. It has to bear the same character as those respective taxes to which the surcharge is appended. NCCD will not cease to be an excise duty, but is the same as an excise duty, even if it is levied on the product. Thus, when NCCD, at the time of collection, takes the character of a duty on the product, whatever may be the rationale behind it, it is also subject to the provisions relating to excise duty, applicable to it in the manner of collection as well as the obligation of the taxpayer to discharge the duty. Once the excise duty is exempted, NCCD, levied as an excise duty cannot partake a different character and, thus, would be entitled to the benefit of the exemption notification. The exemption notification also states that the exemption is from the “whole of the duty of excise or additional duty of excise.” Thus, the appellant would not be liable to pay the NCCD. [Paras 22, 23] [150-D-G]

SRD Nutrients Pvt. Ltd. v. Commissioner of Central Excise, Guwahati (2018) 1 SCC 105 : [2017] 11 SCR 43 – relied on.

Banswara Syntex Ltd. v. Union of India (2007) SCC OnLine Raj 365 – approved.

Novopan India Ltd., Hyderabad v. CCE and Customs, Hyderabad (1994) 3 Suppl. SCC 606 : [1994] 3 Suppl. SCR 549; *Union of India v. Wood Papers Ltd.* (1990) 4 SCC 256 : [1990] 2 SCR 659 – referred to.

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Case Law Reference

[2017] 11 SCR 43	relied on	Para 12
[1994] 3 Suppl. SCR 549	referred to	Para 19
[1990] 2 SCR 659	referred to	Para 20

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CIVIL APPELLATE JURISDICTION: Civil Appeal No.3239 of 2019.

C From the Judgment and Order dated 16.03.2017 of the High Court of Uttarakhand, at Nainital in Special Appeal No. 625 of 2014.

Mukul Rohatgi, Arvind Datar, Sr. Advs., Arshak Hidayatullah, Mahesh Agarwal, Ankul Saigal, Makarand Joshi, Divyang Chandiramani, E. C. Agrawala Advs. for the Appellant.

D ANS Nadkarni, ASG, K. Radhakrishna, Sr. Adv., Devashish Bharuka, Ms. Nisha Bagchi, B. Krishna Prasad, Advs. for the Respondents.

The Judgment of the Court was delivered by

SANJAY KISHAN KAUL, J. 1. Leave granted.

E 2. The appeal raises the legal question of the liability towards National Calamity Contingent Duty (for short 'NCCD'), Education Cess and Secondary & Higher Education Cess of a manufacturing establishment, which is exempted from payment of Central Excise Duty (for short 'CENVAT') under the Central Excise Act, 1944 (hereinafter referred to as the '1944 Act').

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G 3. In order to encourage development of industries and to generate employment in the States of Uttarakhand and Himachal Pradesh, certain special measures were considered appropriate to be taken by the Government of India. On the visit of the Prime Minister of India to Uttarakhand, in March, 2002, an announcement was made that tax and Central Excise concessions, to attract investments in the industrial sector will be worked out for the Special Category States including Uttaranchal (now Uttarakhand). The industries eligible for such incentives were to be environment friendly, with potential for local employment generation and use of local resources. Subsequently, an

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Office Memorandum was issued on 7.1.2003, announcing a package of incentives providing for “New Industrial Policy and other concessions for the State of Uttaranchal and the State of Himachal Pradesh.” Para 3.1 (I) stipulated the fiscal incentives. It is not necessary to reproduce the complete paragraph, but suffice to reproduce the relevant portion as under:

“3.1: Fiscal Incentives to new Industrial Units and to existing units on their substantial expansion:

(I). New industrial units and existing industrial units on their substantial expansion as defined, set up in Growth Centres, Industrial Infrastructure Development Centres (IIDCs), Industrial Estates, Export Processing Zones, Theme Parks (Food Processing Parks, Software Technology Parks, etc.) as stated in Annexure-I and other areas as notified from time to time by the Central Government, are entitled to :

(a) 100% (hundred percent) outright excise duty exemption for a period of 10 years from the date of commencement of commercial production.

(b) 100% income tax exemption for initial period of five years and thereafter 30% for companies and 25% for other than companies for a further period of five years for the entire states of Uttarakhand and Himachal Pradesh from the date of commencement of commercial production.”

(emphasis supplied)

4. In order to implement the aforesaid policy initiative, the Central Board of Excise & Customs (for short ‘CBEC’) issued Notification No.50/2003-Central Excise, dated June 10, 2003, in exercise of powers conferred under Section 5A of the 1944 Act. The relevant portion of the Notification reads as under:

“GENERAL EXEMPTION NO. 41

Exemption to goods other than specified goods cleared from units located in the Industrial Growth Centre or Industrial Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estate or Industrial Area or Commercial Estate or Scheme Area of Uttarakhand and Himachal Pradesh.—In

- A 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 Textiles Articles) Act, 1978 (40 of 1978), the Central Government,
- B being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than the goods specified in Annexure-I appended hereto, and cleared from a unit located in the Industrial Growth
- C Centre or Industrial Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estate or Industrial Area or Commercial Estate or Scheme Area, as the case may be, specified in [Annexure-II and Annexure III] appended hereto, from the whole of the duty of excise or additional duty of excise, as the case may be, leviable thereon under any of the said Acts.
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(emphasis supplied)

5. Once again, for the controversy in question, it is not necessary to refer to the notification further, which stipulates other conditions to be fulfilled, to avail of the benefit of the exemption notification, since there
- E is no dispute that the appellant satisfies those conditions.

6. The appellant, a limited company, established a manufacturing unit of two wheeler vehicles in the year 2007. The appellant was exempted from, *inter alia*, CENVAT, by virtue of its manufactured products falling under the Second Schedule of the Central Excise Tariff
- F Act, 1985.

7. The appellant was apparently paying an automobile cess, but the NCCD, Education Cess and Secondary & Higher Education Cess were not being paid. The dispute arose on account of an audit conducted on 27/28.2.2009. The dispute pertains to the liability of the
- G appellant to pay the unpaid three cesses referred to aforesaid.

8. Now turning to the three cesses in question, NCCD was imposed under Section 136 of the Finance Act, 2001, in the nature of a duty of excise, in addition to any other duties of excise chargeable under the 1944 Act. The relevant portion is extracted as under:

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“S. 136- National Calamity Contingent Duty

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(1) In the case of goods specified in the Seventh Schedule, being goods manufactured or produced, there shall be levied and collected for the purposes of the Union, by surcharge, a duty of excise, to be called the National Calamity Contingent duty (hereinafter referred to as the National Calamity duty), at the rates specified in the said Schedule. B

(2) The National Calamity duty chargeable on the goods specified in the Seventh Schedule shall be in addition to any other duties of excise chargeable on such goods under the Central Excise Act, 1944 or any other law for the time being in force. C

(3) The provisions of the Central Excise Act, 1944 and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty, shall, as far as may be, apply in relation to the levy and collection of the National Calamity duty leviable under this section in respect of the goods specified in the Seventh Schedule as they apply in relation to the levy and collection of the duties of excise on such goods under that Act or those rules, as the case may be.” D

(emphasis supplied)

9. Sections 91 & 93 of the Finance Act, 2004 introduced the Education Cess as a duty of excise calculated on the aggregate of all duties of excise. Sections 136 & 138 of the Finance Act of 2007 similarly imposed Secondary & Higher Education Cess, on the same pattern as the Education Cess. E

10. As noticed above, on account of the audit conducted of the appellant, an audit objection report was prepared on account of the failure of the appellant to pay the aforementioned three cesses, and consequent queries were raised vide letter dated 27.2.2009, by the Superintendent (Audit), Central Excise Meerut-II on the appellant. These were responded to, by the appellant. This was followed by a show cause notice dated 26.8.2011. It is relevant to note that in terms of the show cause notice, the cesses were being so demanded on account of the fact that they had not been specifically exempted, even though they were a duty in the nature of excise, whether leviable on the product (NCCD) or on the amount of excise duty payable (Education Cess and Secondary F
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A & Higher Education Cess). The Department took a legal stand that the exemption notification had to be construed strictly and that there had been wilful suppression of facts. The demand raised was also specified.

B 11. The appellant filed a writ petition under Article 226 of the Constitution of India, before the High Court of Uttarakhand on 13.10.2011, assailing the show cause notice. This endeavour, however, did not succeed and the writ petition was dismissed by the learned Single Judge, vide order dated 9.10.2014. The appeal preferred before the Division Bench also met the same fate, vide impugned order dated 16.3.2017.

C 12. The controversy before us is now in a narrow compass, on account of the subsequent judicial pronouncement in *SRD Nutrients Pvt. Ltd. v. Commissioner of Central Excise, Guwahati*¹. The issue of the Education Cess and the Secondary & Higher Education Cess, in our view, is covered against the Department in view of this judgment and that is how, also, the Department appears to have understood now, D in view of the written synopsis placed before us.

E 13. In the facts of that case, there was an initiative for development of industries in the North-Eastern States of Assam, Tripura, Meghalaya, Mizoram, Manipur, Nagaland, Arunachal Pradesh, etc. A Notification exempting goods from payment of excise duties was issued in respect of those States. Education Cess and Secondary & Higher Education Cess, as imposed under the Finance Acts of 2004 and 2007, respectively were also sought to be levied on the appellant therein. The gravamen of the reasoning of this Court is that since these cesses are a surcharge levied and collected on the total value of the excise duty, and F the excise duty itself is exempted, there cannot be any question of any recovery of these cesses, as the substratum does not exist. Not only that, this Court also took into account how the Department itself had viewed the situation regarding Education Cess and Secondary & Higher Education Cess, which are payable as surcharge on the excise duty, once the excise duty is exempted. The Circular dated 10.8.2004 issued G by the Department clarified the position in this behalf as under:

“Issue (2): Whether goods that are fully exempted from excise duty/customs duty or are cleared without payment of excise duty/

H ¹(2018) 1 SCC 105

customs duty (such as clearance under bond or fulfilment of certain conditions) would be subjected to cess. A

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, safeguard 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 21-7-2004 issued by Member (Customs) may also be referred to.” B C

(emphasis supplied)

14. It was observed by this Court as under:

“22. Even otherwise, we are of the opinion that it is more rational to accept the aforesaid position as clarified by the Ministry of Finance in the aforesaid circulars. Education cess is on excise duty. It means that those 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 the 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 D E F G

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A 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.

B (emphasis supplied)

15. A reference was also made to the judgement of the Rajasthan High Court, in *Banswara Syntex Ltd. v. Union of India*², where it has been observed as under:

C “15. The very fact that the surcharge is collected as part of levy under three different enactments goes to show that scheme of levy of education cess was by way of collecting special funds for the purpose of Government project towards providing and financing universalised quality of basic education by enhancing the burden of Central excise duty, customs duty, and service tax by way of charging surcharge to be collected for the purpose of the Union. But, it was made clear that in respect of all the three taxes, the surcharge collected along with the tax will bear the same character of respective taxes to which surcharge was appended and was to be governed by the respective enactments under which education cess in the form of surcharge is levied and collected.

E 16. Apparently, when at the time of collection, surcharge has taken the character of parent levy, whatever may be the object behind it, it becomes subject to the provision relating to the excise duty applicable to it in the manner of collecting the same obligation of the tax payer in respect of its discharge as well as exemption
F concession by way of rebate attached with such levies. This aspect has been made clear by combined reading of sub-sections (1), (2) and (3) of Section 93.”

(emphasis supplied)

G This Court gave its imprimatur to the aforesaid judgment of the Rajasthan High Court, in para 24 of the judgment in *SRD Nutrients Pvt. Ltd.*³

² 2007 SCC OnLine Raj 365 :: (2007) 216 ELT 16

³ (supra)

16. The real bone of contention which survives for consideration is the NCCD. The reason for this is that while the two cesses discussed aforesaid were in the nature of levy on the excise duty payable, the NCCD is levied on the product itself, as per Section 136 of the Finance Act, 2001. It is this aspect, *inter alia*, which was canvassed by the Department to persuade this Court to take a different view from the one taken *qua* the other two cesses.

17. On behalf of the appellant, Mr. Mukul Rohatgi and Mr. Arvind Datar, learned Senior Advocates sought to persuade us to apply the same principles *qua* NCCD as the other two cesses and, thus, go along with the view taken in *SRD Nutrients Pvt. Ltd.*,⁴ even insofar as NCCD is concerned.

18. On the other hand, on behalf of the Department, Ms. Nisha Bagchi, Advocate sought to contend otherwise by seeking to point out the difference in the nature of incidence, since NCCD was to be calculated on the value of the product and not on the value of the excise duty payable.

19. We may note that in terms of the impugned judgment, one principle which clearly emerges, and over which there is no dispute before us, also, is that exemption notifications, like the one in question must be read in a manner that give them a liberal interpretation, provided that no violence is done to the language employed. The rationale for the same is well enunciated in *Novopan India Ltd., Hyderabad v. CCE and Customs, Hyderabad*,⁵ apart from in other judicial pronouncements. In such cases, it is not as if the principle of strict interpretation of tax law has been given a complete go by, but that rule of interpretation would apply at a different stage, i.e., to determine whether the exemption is applicable to the assessee or not. Once such exemption is indeed found to be applicable to the assessee in question, a liberal approach is to be adopted by the Court in construing the language, such as to allow the benefit to be reaped by the beneficiary in question (*Union of India v. Wood Papers Ltd.*⁶).

20. We may notice that the primary reasoning contained in the impugned order is common for the three cesses, i.e., NCCD; Education

⁴ (supra)

⁵ 1994 Supp (3) SCC 606

⁶ (1990) 4 SCC 256

- A Cess and Secondary & Higher Education Cess. These were in the nature of surcharges levied in other Acts, which have not been specifically excluded under the Notification in question. That reasoning does not prevail, more so because of the judgment in *SRD Nutrients Pvt. Ltd.*⁷ The question, thus, is whether, even though the NCCD is in the nature of an excise duty, its incidence being on the product, rather than on the value of the excise duty, that itself would make any difference to the applicability of the NCCD to excise exempt units.
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21. On a proper appreciation of the judicial pronouncement in *SRD Nutrients Pvt. Ltd.*,⁸ we are not inclined to take a different view from the one taken for Education Cess and Secondary & Higher Education Cess, even while considering the issue of NCCD.
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22. We may notice that this Court, in *SRD Nutrients Pvt. Ltd.*⁹ gave its imprimatur to the view expressed by the Rajasthan High Court in *Banswara Syntex Ltd.*¹⁰ The rationale is that while there may be surcharges under different financial enactments to provide the Government with revenue for specified purposes, the same have been notified as leviable in the nature of a particular kind of duty. In the case of NCCD, it is in the nature of an excise duty. It has to bear the same character as those respective taxes to which the surcharge is appended. NCCD will not cease to be an excise duty, but is the same as an excise duty, even if it is levied on the product. Thus, when NCCD, at the time of collection, takes the character of a duty on the product, whatever may be the rationale behind it, it is also subject to the provisions relating to excise duty, applicable to it in the manner of collection as well as the obligation of the taxpayer to discharge the duty. Once the excise duty is exempted, NCCD, levied as an excise duty cannot partake a different character and, thus, would be entitled to the benefit of the exemption notification. The exemption notification also states that the exemption is from the “whole of the duty of excise or additional duty of excise.” We may also note that the exemption itself is for a period of ten years from the date of commercial production of the unit.
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- G 23. We are, thus, of the view that the appellant would not be liable to pay the NCCD.

⁷ (supra)

⁸ (supra)

⁹ (supra)

H ¹⁰ (supra)

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24. The result of the aforesaid discussion is that the impugned A
orders are set aside and the show cause notice dated 26.8.2011 is quashed
while holding that the appellant is not liable to pay NCCD, Education
Cess and Secondary & Higher Education Cess.

25. The appeal is allowed, leaving the parties to bear their own B
costs.

Ankit Gyan

Appeal allowed.