

**(2011) 08 MAD CK 0371**

**Madras High Court (Madurai Bench)**

**Case No:** Writ Petition (MD) No. 5412 of 2006

M/S. Loyal Textile Mills Ltd.

APPELLANT

Vs

Joint Secretary to the  
Government of India, Ministry of  
Finance (Department of  
Revenue) Hudco Vishala  
Building, B Wing, 6th Floor,  
Bhikaji Cama Place, Newh  
Delhi-110 066., The  
Commissioner of Central Excise  
(Appeals) Bibikulam, Madurai-2.  
and The Assistant Commissioner  
of Central Excise, Kovilpatti  
Division, Kovilpatti

RESPONDENT

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**Date of Decision:** Aug. 5, 2011

**Acts Referred:**

- Central Excise Rules, 1944 - Rule 12, 3
- Central Excise Rules, 2002 - Rule 18
- Central Excises and Salt Act, 1944 - Section 35EE
- Constitution of India, 1950 - Article 226
- Finance Act, 2001 - Section 136
- Finance Act, 2003 - Section 157, 169
- Finance Act, 2004 - Section 3, 91, 93, 93(1), 93(2)

**Hon'ble Judges:** Vinod K. Sharma, J

**Bench:** Single Bench

**Advocate:** S. Renganathan, for the Appellant; B. Ravichandran, for the Respondent

**Final Decision:** Allowed

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**Judgement**

@JUDGMENTTAG-ORDER



Honourable Mr. Justice Vinod K. Sharma

1. The Petitioner M/S. Loyal Textile Mills Ltd., Kovilpatti, has invoked the extraordinary jurisdiction of this Court, under Article 226 of the Constitution of India, with a prayer, for issuance of a writ, in the nature of certiorari, for quashing order passed by the Respondent No. 1, dated 28.04.2006, declining the claim of the petitioner, for the refund of education cess.

2. The Petitioner is engaged in manufacture of Cotton Yarn and Polyester Cotton Yarn, falling under Chapter Heading 52 of Central Excise Tariff Act, 1985. The Petitioner pays the central excise duty, with respect to clearances, effected for domestic requirements, as also for the export. According to the notification of the Government, the party is entitled to rebate for all the duties and excise paid, on the goods exported.

3. Vide notification, u/s 91 and 93 of the Finance Act 2004, education cess was levied as duty of excise, effected from 9th July 2004, as per the provisions of Clause 81, 83 and 84 of the Provisional Collection of Taxes Act 1931.

4. The Petitioner Company, exported Cotton Yarn on payment of duty and education cess, and claimed refund of excise duty and education cess, under the notification under the Finance Act 2004.

5. The benefit of rebate of whole of the duty paid on all excisable goods, falling under the first schedule to the Central Excise Tariff Act, exported to any country, was under notification, dated 26th June 2001.

6. This notification was adopted subsequently. The notification, imposing central excise and education cess with effect from 9th July 2004 was by way of partial modification, superseding the notification thus in force.

7. Thereafter, on 6th September 2004, the Central Government issued explanation to the notification No. 90/2004.

8. The explanation issued reads as under:

Explanation I - 'duty' for the purpose of this notification means duties of excise collected under the following enactments, namely:

(a) the Central Excise Act, 1944(1 of 1944);

(b) the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(c) the Additional Duties of excise (Textile and Textiles Articles) Act 1978 (40 of 1978);

(d) the National Calamity Contingent duty leviable u/s 136 of the Finance Act, 2001 (14 of 2001), as amended by Section 169 of the Finance Act, 2003(32 of 2003) and further amended by Section 3 of the Finance Act 2004(13 of 2004);



(e) special excise duty collected under a Finance Act,

(f) additional duty of excise as levied u/s 157 of the Finance Act, 2003(32 of 2003);

(g) Educational cess on excisable goods as levied under Clause 81 read with Clause 83 of the Finance (No. 2) Bill, 2004

9. Thereafter, notification No. 28/2004 CE(N.T), dated 21th October 2004, was issued u/s 91 read with Section 95 of the Finance Act 2004.

10. The Petitioner, claimed that notification No. 90/2004, dated 06.09.2004 was effected from on 9th July 2004 and was not prospective. The Petitioner, accordingly, claimed refund of the education cess, paid as part of excise duty. The claim was rejected by the Assistant of Commissioner of Central Excise, Kovilpatti Division, vide order, dated 26th April 2005.

11. The Petitioner preferred an appeal against the order passed by the Assistant Commissioner of Central Excise, before the Commissioner of Central Excise (Appeal). The appeal filed by the Petitioner was also rejected, vide order, dated 12th September 2005.

12. The Petitioner, thereafter, preferred a revision petition before the Government, u/s 35EE of the Central Excise Act 1944. The revision petition was also dismissed.

13. The operative part of the revisional order, reads as under:

6.4. On a careful consideration of the Notification No. 40/2001-CE(Nt.) dt. 26.6.2001, as amended, Government, finds that the notification permits rebate of whole of the duty paid on all excisable goods falling under the first schedule to the Central Excise Tariff Act, 1985 and explanation I further clarified duties which can be rebated. It is admitted fact that education cess is not mentioned in the explanation-I to Notification mentioned above. A plain reading of the explanation-I of the Notification 41/2001-CE(Nt.) dt.26.6.2001, as amended reveals that it is of restrictive nature and under Notification such duties can be rebated which have been mentioned in above said explanation of the Notification. The Provisions of the said Notification regarding duties to be rebated are very clear and there is no ambiguity which requires any clarification. Similarly perusal of the Notification No. 19/2004 -CE(Nt.) dt.6.9.2004, issued in exercise of the power conferred by Rule 18 of the Central Excise Rules, 2002 and in supersession of the Ministry of Finance Dept., of Revenue, Notification No. 40/2001-Cx(Nt.), dt.26.6.2001, (G.S.R.469(E) dt.26th June 2001 also reveals that there is nothing in the Notification to show that the provisions of the Notification have been given retrospective effect.

6.5. In Mahar Dairies (Supra), a Division Bench of the Apex Court observation:

8. It is settled law that in order to claim benefit of a Notification a party must strictly comply with the terms of the notification. If on wording of the notification the benefit is not available then by stretching the words of the notification or by adding



words to the Notification benefit cannot be conferred... A similar view has been expressed by a Division Bench of this Court in [Tata Iron and Steel Co. Ltd. Vs. State of Jharkhand and Others](#), in which one of us was a party, stating;

6.6. Similarly Hon'ble Tribunal in case of 1993 (46) ECR 38, held that rebate of cess on export of automobiles is not admissible in the absence of notification issued under Rule 12 of the Central Excise Rules, 1944 r/w Rule 3 of the Automobile Cess Rules, 1984, Govt., respectively concurs with the decisions of CEGAT.

6.7. Govt., would also observe that cited judgments have already been examined by the Commissioner (Appeals), as evident from perusal of the impugned Order-in-Appeal and Govt., agrees with the findings of the Commissioner(Appeals), that facts of the cited judgments are totally different from the facts of the instant case and accordingly not applicable.

7. In view of the above facts and circumstances Govt., would agree with the findings and orders of the Commissioner (Appeals), that no rebate of education cess is admissible to the applicants during the period from 9.7.2004 to 3.9.2004, and Govt., accordingly upholds the impugned Order-in-Appeal in this regard.

8. These Revisions Application are accordingly rejected.

7. In view of the above facts and circumstances, Govt., feels that issue the instance Revision Applications is exacted identical/similar to the facts of the Revisionary Order mentioned above, and the Revision Applications deserve similar treated. Govt., accordingly upholds the impugned Order-in-Appeal, and reject the Revision Applications.

8. So ordered.

14. The Learned Counsel for the Petitioner, challenged the order, declining the relief of education cess to the Petitioner, by contending, that the education cess is a part of central excise and was also paid as such. Therefore, the Petitioner was entitled to the refund of central excise, inclusive of the education cess.

15. It is also the contention of the Learned Counsel for the Petitioner, that in any case, if there was any doubt regarding interpretation of the notification, that stood clarified by way of explanation.

16. The explanation being explanatory in nature, was required to be read as part of original notification, and could not be treated as prospective, as held by the authorities under the Act.

17. The contention of the Learned Counsel for the Petitioner is that the judgments, relied upon by the revisional authority in the order, has no application to the facts of this case, as the Petitioner had complied with the terms of notification, and the claim raised was not by stressing the word, as was case of [Tata Iron and Steel Co. Ltd. Vs. State of Jharkhand and Others](#), .



18. The other judgment relied upon by the revisional authority also has no application to the facts of the present case, and it is not in dispute that the notification did cover, the case of the Petitioner. The only question was as to whether the explanation given to the notification can be treated to be an independent notification or the notification already issued, and thus, operative from the date of original notification.

19. There is force in this petition. The custom authorities are not right in rejecting the claim of refund of education cess, by treating the explanatory notification to be prospective. The explanatory notifications are in the nature of judgment of courts, which only interpret the existing rights. The explanatory notification thus is to be treated as part and parcel of notification, which is clarified, by explanatory notification, there is operative from the date of original notification, as in absence of clarificatory notification, the original notification is required to be read, as explained in subsequent explanatory notification. The explanatory notification being part of original notification therefore has to apply from the date of original notification and does not operate with prospective effect, as it does not give any substantive right independently.

20. This view finds support from the judgment of Rajasthan High Court, in the case of Banswara Syntex Ltd. v. Union of India 2007 (216) E.L.T. 16 (Raj.), wherein the Hon'ble High Court of Rajasthan, has pleaded to lay down as under:

12. u/s 93(1) the Education Cess has specifically been directed that Education Cess levied u/s 91 shall be a duty of excise. In Sub-section (2), it was further ordained that Education Cess on excisable goods shall be in addition to excise duty chargeable under Central Excise Act, 1944 or under any other law. Thus, statutorily the Education Cess levied on excisable goods was directed to be Duty of Excise itself and has to be collected as excise Duty in addition to Excise Duty otherwise chargeable under Central Excise Act or any other law.

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 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 & collected.

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 concession by way of rebate attached with such levies. This aspect has been made clear by combined reading of Sub-sections (1), (2) & (3) of Section 93.

18. The Explanation appended to Notification dated 26.6.2001 included within the ambit of Excise Duty any special Excise Duty collected under any Finance Act when under Finance Act, 2004 it was ordained that Education Cess to be collected as surcharge on Excise Duty payable on excisable goods and shall be a Duty of Excise, it became a special Duty of Excise by way of Education Cess chargeable and collected under Finance Act, 2004 and fell within the ambit of Clause (3) of Explanation appended to Notification dated 26/6/2001. Consequently, rebate became available on collection of surcharge on Excise Duty under Finance Act, 2004 in terms of existing Notification dated 26/6/2001 immediately. Later Notification including the Education Cess in enumerative definition in the circumstances was only clarificatory and by way of abandoned caution, but not a new rebate in relation to Excise Duty or any part thereof as statutorily pronounced as well as specified Excise Duty levied and collected under the Finance Act.

19. The order of appellate authority as well as revisional authority disallowed the rebate on excise duty payable by the Petitioner as surcharge levied on excise duty named as "Education Cess" for the purpose of appropriating the same for specific project of the Government in funding universalised quality basic education cannot be sustained. If we read Section 93 as a whole, it becomes clear that existing Notification providing exemption to the Duty of Excise is otherwise applicable to Education Cess also w.e.f. it became payable as part of the Duty of Excise or at any rate special Excise Duty collected under Finance Act, and did not need a separate Notification in that regard. The position may have been different if the Education Cess would have been collected not as surcharge but as an independent levy and matter would have been left to be considered independently for the purpose of providing rebate in respect,, thereof. The Notification dated 6/9/2004 had included the definition of Excise Duty only in consonance with the meaning of Excise Duty as was existing on the date Notification was issued, even if Explanation would not have been there the term Duty of Excise in ordinary circumstance would have included the surcharge levied as Education Cess in terms of Section 93 of the Act of 2004.

20. In view thereof, we have no hesitation to hold that impugned orders, of Central Government as revisional authority and appellate order of Commissioner (Appeals) are patently erroneous and deserve to be quashed.

21. Accordingly, writ petition is allowed, impugned orders are set aside to the extent the Petitioner has been denied the claim to rebate on surcharge on Excise Duty appropriated by Union of India as Education Cess for funding Universalised quality basic education programme but was paid by the Petitioner only as Duty of Excise w.e.f. 9/7/2004 to 5/9/200-1. There is no contention about eligibility to rebate w.e.f. 6/9/2004. There shall be no order as to costs. Rule is made absolute.



21. For the reasons stated, the writ petition is allowed, the impugned order is set aside. The writ, in the nature of mandamus, is issued to refund the claimed education cess to the Petitioner within a period of two months of the receipt of certified copy of this order.

22. No costs.