

2013 (3) ECS (119) (Tri-Del)

**IN THE CUSTOMS, EXCISE & SERVICE TAX  
APPELLATE TRIBUNAL  
West Block No. 2, R.K. Puram, New Delhi - 110 066.**

Date of Hearing: 26.10.2012

Date of Pronouncement :

**M/s VMI Industries**

**Vs**

**CCE, Jammu**

**Excise Appeal No. 3403-3411 of 2010**

[Arising out of Order-in-Appeal No. 153-209/CE/CH-II/J&K/2010 dated 16.3.2410  
passed by the Commissioner of Central Excise, Jammu (J&K)]

M/s VMI Industries

Appellants

Vs

CCE, Jammu

Respondent

Appearance:

Appeared for Appellant : Shri Mayank Garg, Advocate

Appeared for Respondent : Shri Sanjay Jain, A.R.

**CORAM:**

**Hon'ble Ms. Archana Wadhwa, Member (.Judicial)**

**Hon'ble Shri Mathew John, Member (Technical)**

Order No. IO /E/61/2013

Final Order No. 56908 – 56916 / 2013

**“We do not find any reason to refer this matter to the Larger Bench of the Tribunal and we agree with the decision in the case of Jindal Drugs Ltd. So we dismiss the appeals.” [Para 19]**

**“In view of my above observations I refer the following question to larger bench:-**

**“As to whether an assessee located in J & K and enjoying the area- based exemption notification no 56/2002-CE dated 14.11.2002 would be entitled to refund of education cess and higher education cess paid through PLA, in terms of the said notification.” “[Para 26]**

**Difference of Opinion**

**Whether the appeals are to be rejected as held by Member (Technical or the same are required to be referred to Larger Bench as held by Member (Judicial)**

**“I agree with the findings of Shri Mathew John, Member (Technical) that there is no need to refer the matter to Larger Bench and appeals are to be rejected.” [Para 37]**

**Per Mathew John, Mr.:**

1. There are nine appeals being decided in this proceeding. All of these are filed by the same appellant and relate to the same issue but in respect of different periods.
2. Appellant is a manufacturer of excisable products and is situated in Jammu. They have been claiming exemption under notification 56/2002-CE dated 14-11-2002 which provides exemption from certain types of excise duties on goods manufactured by factories situated in specified areas of Jammu. It is necessary to reproduce the first two paragraphs of the notification before proceeding further. These paragraphs read as under:

"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 and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than goods specified in Annexure I appended hereto, and cleared from a unit located in the Industrial Growth Centre, 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 appended hereto, from so much of the duty of excise or 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.

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 of Central Excise or Deputy Commissioner of

Central Excise, as the case may be, by the 7th day of the next month in which the duty has been paid.

(b) The Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, after such verification, as may be deemed necessary, shall refund the amount of duty paid, other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2002, 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 the verification, the Assistant Commissioner of Central Excise 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. "

3. It may be noted that this exemption is granted through a mechanism under which a manufacturer pays the specified excise duties for a month by 7th day of the next month firstly out of Cenvat credit to be taken on raw materials used in manufacture of final products and pays the balance amount through cash or PLA. By 15th of that month the excise officers are required to refund to the manufacturer the amount paid through cash or PLA.

4. It may be seen from the opening paragraph of the notification that this exemption notification issued in the year 2004 provides exemption,-

"from so much of the duty of excise or 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."

5. It may also be noted that the "said Acts" mentioned in the opening paragraph are,-

1. Central Excise Act, 1944 (1 of 1944),
  - (ii) Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and
  - (iii) Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978).
1. By Section 91 Finance Act, 2004 Educational Cess of 2% was levied as 2% as aggregate of all duties excise and by section 136 of Finance Act 2007 a Higher Educational Cess equal 1% of the aggregate of all duties excise were imposed. The short question before the Tribunal in these appeals is whether the exemption will extend to the new levies imposed by Finance Act 2004 and Finance Act, 2007. The appellant had filed refund applications for Education Cess and Higher Education Cess paid through cash during different period which refund applications stand rejected on the ground that the exemption under the said notification does not extend to Education Cess and Higher Education Cess. The appellant has appealed against such rejection orders of the lower authorities.
2. The Counsel for appellant submits that both Education Cess and Higher Education Cess are collected as duties of excise. These Cesses are collected as a percentage of the aggregate of duties of excise leviable on the goods. When other excise duties are exempted the Cess which is an appendage to the exempted duty cannot be levied. So the provisions of the notification should apply to Education Cess and Higher Education Cess also especially considering the view that the two new levies have come after the notification has been issued. The notification provides exemption from "excise duty".
3. The Counsel for appellant relies on the following decisions:
  - 8.1 **Baswara Syntex Ltd Vs. UOI-2007 (216) ELT 16 (Raj).**

The issue involved in this case was whether refund of excise duty paid on excisable goods exported as available under Rule 18 of Central Excise Rules, 2002 read with Notifications 40/2001-CE(NT) dated 20-06-2001 and 19/2004-CE (NT) dated 06-09-2004 would cover refund of education cess also. The Court held that "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."

#### **8.2 Vipor Chemicals Pvt. Ltd Vs. UOI-2009 (233) ELT 44 (Guj).**

This case deals with the same situation as in the case of Baswara Syntex Ltd. The court held that "the definition of 'duty' would include Education Cess on excisable goods" and therefore the assessee is entitled to refund of education cess also.

#### **8.3 State of Karnataka Vs. Sunagar Bros.-1993 (65) ELT 471 (SC)**

The question for consideration in this appeal is whether the mandate under Section 20(3) of the Karnataka Sales Tax Act, 1957 (the Act), to pay the undisputed tax before the appeal is entertained, is also applicable to the additional tax payable under Section 6B of the Act. In other words whether it is obligatory under the Act to deposit the tax and the additional tax before the appeal is entertained. The Hon. Court held as under:

"The fact that the quantum of the additional tax is determined with reference to the sales tax/purchase tax imposed would not alter its character. The additional tax is nothing but an enhancement in the rate of the sales tax, purchase tax under the Act. As soon as the assessing authority determines the levy of sales tax/purchase tax the additional tax under Section 6B becomes part of the assessment order. Similarly if the main impost under Section 5(1) is successfully challenged, the reasoning sustaining the challenge would also ipso facto affect the validity of the additional impost under Section 6B of the Act."

4. The Counsel also further points out that there are two decisions of the Tribunal directly dealing with refund under notification 56/2002-CE in favour of the assessee. These are,-

- (i) Cyrus Surfactants Pvt. Ltd Vs. CCE-2007 (215) ELT 55 (Tri-Del);
- (ii) Bharat Box Factory Ltd Vs. CCE-2007 (214) ELT 534 (Tri-Del).

5. Thereafter he points the Tribunal cannot take a different view without constituting a larger bench to reconsider the issue. He relies on the observation of the Apex Court in para 24 of the decision in Gammon India Ltd Vs. CCE-2011 (269) ELT 289 (SC) and emphasizes the need to follow judicial discipline
  
11. The Ld AR for Revenue on the other hand points out that exemption is only a partial exemption for duty paid through cash and there is no exemption for duty paid through Cenvat Credit. Further the exemption is very specific as to the types of excise duties which are exempt which are only three. There are many other levies collected by the Central Excise department as excise duty like National Calamity Contingent Duty imposed under Finance Act, 2001, Duty under Medicinal and Toilet Preparation Act, 1955, different types of Cesses like Cess on Sugar, Cess on Tea etc which are also referred to as excise duty for the purpose of extending the machinery provisions for collection of excise duty to the collection of such levies. The Education Cess and Higher Education Cess are not applied for the same purpose for which the other three excise duties mentioned in the notification are used. The beneficiaries of the collection also are different. So the argument that these Cesses are just a surcharge on the three specified excise duties is not correct.
  
12. The A.R. for Revenue relies on the following decisions of the Tribunal.
  - (i) Jindal Drugs Ltd. Vs. CCE- Final Order No. A-1158-1163/2012-EX [DB] dated 10-09-2012 in appeal Nos. E/2463 to 2468/2012 EX [DB]
  
  - (ii) CCE Jammu Vs. Bharat Box Factory Ltd. (Unit-I) - Final Order No. A/1164-1166/2012-Ex [DB] dated 14-09-12 in appeal Nos E/2401-2402/2009-Ex [DB].
  
13. We have considered arguments on both sides. We find that the issue in dispute is already examined in great detail by the Tribunal in the case Jindal drugs Ltd and the decision dated 14-09-2012 in the case of Bharat Box factory referred to by the Ld A. R. for Revenue and decided against the appellants.
  
14. The decisions in the case of Baswara Syntex Ltd (supra) and Vipor Chemicals Pvt. Ltd (Supra) are with reference to machinery provisions for grant of rebate on export. Neither Rule 18 nor the notification 40/2001-CE (NT) nor Notification 19/2004-CE(NT) specifies the type of excise duty to which the rule or notification will apply whereas Notification 56/2002-CE specifies the types of Excise duties to which the exemption applies. In those cases the dispute was about a

Non-Tariff Notification which ipso facto implies that it was about a procedural matter. There cannot be a dispute that the procedure for collection and refund of excise duty will apply for collection of education cess and higher education cess also. But the issue to be decided in this case is whether the exemption which is a substantive benefit to be granted in exercise of powers given under the Act can be extended by implication. Just because the exemption is granted by refunding the part of the duty paid in cash, there is no reason to treat this as a case of refund or rebate and extend decisions given in the case of refund and rebate when goods are exported. So these decisions cannot be applied to the situation at hand.

15. The decision in the case of Sunagar Bros. (supra) was also with reference to a procedural matter of pre-deposit of tax, pending appeal. Further the dispute was about surcharge levied through another section of the very same Act which had the provision regarding pre-deposit and not about a levy by a different enactment as in this case. So this decision also has no relevance to the dispute at hand.
16. We note that the exemption is not for the whole of the three duties levied. It is only for part of it. Secondly it is not for all duties collected as excise duty but only for three specified duties. The fact that Education Cess is calculated as percentage of the aggregate of all excise duties cannot give Education Cess the same character as the other levies. The three levies dealt in the notification have distinct character and purposes. A new levy like Education Cess cannot at once take the nature of many levies. So the argument that Education Cess has the same nature as other excise duties exempt has no meaning. It is relevant that the notification was issued in the year 2002. At that time excise duty under Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 was leviable. This levy was 15% of basic excise duty. But that levy was specifically exempted in the notification and not by implication.
17. The power to grant exemption is to be exercised by the government and not through judicial interpretation or by implication or by reading words into the notification which words are not there. So we are not able to agree with the arguments canvassed by the Counsel for appellant. If the persons affected feels that there is a genuine ground for exempting the said Cesses also under Notf 56/2002-CE and the absence of such exemption in the notification is accidental and not intentional, the proper course is that the matter is considered by authority which has the power to grant such exemption.

18. Now the question is whether the Tribunal was right in differing from the initial decision in *Cyrus Surfactants Pvt. Ltd* and the decision dated 15-06-2007 in the case of *Bharat Box Factory Ltd* without referring the issue to a larger bench. We find that this issue has been examined in para 6 of the order and reason recorded in the case of *Jindal Drugs Ltd.* which is reproduced below :-

"6. We find that the issue involved in this case stands decided against the appellant by a detailed judgment of the Tribunal in the case of *CCE, Jammu Vs. Jindal Drugs Ltd.* (supra), wherein the Tribunal relying upon the Apex Court's judgment in the case of *Union of India Vs. Modi Rubber Ltd.* reported in 1986 (25) ELT 849 (SC) had held that Notification No. 56/2002-CE is not applicable to education cess levied under Section 91 read with Section 93 of Finance Act, 2004. Though the Tribunal in the case of *Bharat Box Factory Ltd. Vs. CCE, Jammu* (supra) and *Cyrus Surfactants Pvt. Ltd. Vs. CCE, Jammu* (supra) had taken a contrary view, we find that in these judgments of the Tribunal, the Apex Court's judgment in the case of *Union of India Vs. Modi Rubber Ltd.* (supra) has not been considered. In the case of *Union of India Vs. Modi Rubber Ltd.* (supra), the Apex Court had held that the words "duty of excise" in the Notification No. 123/74-CE dated 1.8.74 and 27/81-CE dated 1.3.81 issued under Rule 8(1) of Central Excise Rules, 1944 (corresponding to Section 5A of Central Excise Act, 1944) would not cover the Special Excise duty leviable under Finance Act, 1978 and AED (GSI) levied under AED (GSI) Act, 1957. In our view, when the Notification No. 56/2002-CE specifically exempts only the duties levied under Section 3(1) of Central Excise Act, 1944 and the Additional Excise Duties levied under AED (GSI) Act, 1957 and AED (T&TA) Act, 1978, there is no scope for doubt that this notification would not cover the education cess levied under Section 91 read with Section 93 of Finance Act, 1994 (sic 2004). We find that same view had been taken by Hon'ble Guwahati High Court in the case of *CCE, Shilling Vs. Dharampal Satyapal Ltd.* (supra), wherein Hon'ble High Court held that Notification No. 32/1999-CE dated 8.7.99 (which is similar to Notification No. 56/2002-CE) does not exempt the education cess. Earlier Hon'ble Guwahati High Court in the case of *CCE, Shilling Vs.*

Dharampal Satyapal Ltd. (supra) {judgment dated 29.6.11 in respect of reference application No. 4/2008} had held that Notification No. 32/1999-CE does not exempt the NCCD {National Calamity Contingent Duty} leviable under Section 136 of Finance Act, 2001 which is also levied by the way of surcharge as a duty of excise. In view of the judgments of the Apex Court and Hon'ble Guwahati High Court on the issue involved in this case, there is no need to refer the issue to a Larger Bench."

19. We do not find any reason to refer this matter to the Larger Bench of the Tribunal and we agree with the decision in the case of Jindal Drugs Ltd. So we dismiss the appeals.

(Pronounced in Court on \_\_\_\_\_ )

**Per Archana Wadhwa, Ms.:**

20. As the entire facts as also the question of law stands discussed in detail in the order proposed by my learned Member (Technical), the same is not being repeated to avoid redundancy. As is clear from the narration of fact detailed in the order of learned Technical Member, the issue was decided in favour of the assessee by the two decisions of the Tribunal in the case of Cyrus Surfactants Pvt. Ltd. as reported 2007 (215) E.L.T. 55 (Tri-Del.) as also in the case of Bharat Box Factory Ltd. 2007 (214) E.L.T.534(Tri.-Del.). The subsequent decision in the case of Jindal Drugs did not agree with the said pronouncement of law by the earlier decisions and arrived at a different conclusion. The said order of Tribunal in the case of Jindal Drugs Ltd. stand subsequently followed by the Tribunal in other appeals.
21. Learned Member Technical has relied upon the Tribunal's order in the case of Jindal Drugs, which has, after considering the issue has held that there is no requirement of reference of the matter to Larger Bench. Accordingly learned Member Technical has held that the matter need not be referred to Larger Bench and has dismissed the appeals.
22. With respect to learned Member Technical, I am not in agreement with the conclusion arrived at by him. The two decisions of the Tribunal in the case of

Cyrus Surfactants Pvt. Ltd and in the case of Bharat Box Factory Ltd. are the earlier decisions which do not stand followed in subsequent decision of Jindal Drugs Ltd. The quescion which arises is that when the Tribunal in the case of Jindal Drugs proposed to take a view different then the one taken in the earlier decisions, whether the matter should have been referred to the Larger Bench or not.

23. The learned adv. for the appellant has relied upon the observations made by the Hon'ble Supreme Court in the case of M/s Gammon India Ltd Vs. CCE, Mumbai 2011 (269) E.L.T. 289 (S.C.). The said decision has not got the attention of my learned brother Member Technical. For better appreciation I re-produce the relevant para 24:-

'Before parting, we wish to place on record our deep concern on the conduct of the two Benches of the Tribunal deciding appeals in the cases of IVRCL Infrastructures & Projects Ltd. (supra) & Techni Bharathi Ltd. (supra). After noticing the decision of a co-ordinate Bench in the present case, they still thought it fit to proceed to take a view totally contrary to the view taken in the earlier judgment, thereby creating a judicial uncertainty with regard to the declaration of law involved on an identical issue in respect of the same Exemption Notification. It needs to be emphasised that if a Bench of a Tribunal, in identical fact-situation, is permitted to come to a conclusion directly opposed to the conclusion reached by another Bench of the Tribunal on earlier occasion, that will be destructive of the institutional integrity itself. What is important is the Tribunal as an institution and not the personality of the members constituting it. If a Bench of the Tribunal wishes to take a view different from the one taken by the earlier Bench, the propriety demands that it should place the matter before the President of the Tribunal so that the case is referred to a Larger Bench, for which provision exists in the Act itself. In this behalf, the following observations by a three Judge Bench of this Court in Sub-Inspector Rooplal & Anr, v. Lt. Governor & Ors., (2000) 1 SCC 644 are quite apposite :

“At the outset, we must express our serious dissatisfaction in regard to the manner in which a Coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another Coordinate Bench of the same Tribunal. This is opposed to all principles of

judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a Larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again that precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate court is bound by the enunciation of law made by the superior courts. A Coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a Larger Bench if it disagrees with the earlier pronouncement. "

We respectfully concur with these observations and are confident that all the Courts and various Tribunals in the country shall follow these salutary observations in letter and spirit. "

24. On going through the observation of the Hon'ble Supreme Court I find that serious concern stands made by their Lordships about taking a different view than the one taken by the coordinate Bench. If the subsequent bench of the Tribunal was not in agreement with the views expressed in the earlier order, the matter should have been referred to larger bench for resolving the issue. After having said so, the Hon'ble Supreme Court observed that they are confident that all the Tribunals in the country shall follow the observations made by the Hon'ble Supreme Court in the case of Sub-Inspector Rooplal. As such I am of the view that the matter need to be referred to Larger Bench for consideration of the earlier decision of the tribunal and to resolve the issue relating to two contra declarations of law by two benches.
25. Apart from above I note that the Tribunal's decision in the case Cyrus Surfactants Pvt. Ltd. was taken by Division Bench and apart from taking note of

various Supreme Court's decision, the bench also referred to a clarification issued by the ministry laying down that where goods are fully exempted from excise duty and there is no collection of duty, no education cess, would be leviable on such clearances. Learned advocate appearing for the appellant has also relied upon various other decisions laying down that cess being part of duty and where duty is not being collected (may be by the mechanism of refund) the cess would not be payable. As such I am of the view that the issue is not free from doubt and their being decisions on both the sides, it is appropriate and proper to refer the matter to the Larger Bench for its considered opinion. I make it clear that I have not expressed my opinion on the merits of the disputed issue.

The question of law referred to the Larger Bench is.

26. In view of my above observations I refer the following question to larger bench:-

"As to whether an assessee located in J & K and enjoying the area- based exemption notification no 56/2002-CE dated 14.11.2002 would be entitled to refund of education cess and higher education cess paid through PLA, in terms of the said notification."

### **Difference of Opinion**

Whether the appeals are to be rejected as held by Member

(Technical or the same are required to be referred to Larger Bench as held by Member (Judicial))

### **Per Sahab Singh, Mr.:**

27. I have gone through orders recorded by Hon'ble Member (T) Shri Mathew John and Hon'ble Member (J), Mrs. Archana Wadhwa and also difference of opinion sent to me by Hon'ble President for decision.

28. Brief facts of the case and issue involved in appeal has been discussed by Member (Technical) in detail in his proposed order. I do not find any necessity to repeat the same. Issue in brief is whether duty of excise referred in Notification No. 56/2002 dated 14.11.2002 includes Education Cess of 2% levied under Section 91 of the Finance Act, 2004 @ 2% of aggregate of all duties of excise and Higher Education Cess leviable under Section 136 of the Finance Act, 2007 at the rate of 1% of aggregate of all duties of excise.
29. Ld. Advocate Shri Mayank Garg appearing for the appellants submits that Education Cess and Higher Education Cess are levied and collected by the department as duty of excise. As clear from provision of Finance Act, 2004 and Finance Act, 2007, these are collected as a percentage of all duties of excise. He submits that when any exemption notification is issued exempting other excise duties, these cesses which are collected as appendage to these duties cannot be levied. In support of his contention that 'duty of excise' appearing in Notification No. 56/2002 includes Education Cess and Higher Education Cess he relied on the following decisions :-
1. Banswara Syntex Ltd. Vs. UOI - 2007 (216) ELT 16 (Raj.)
  2. State of Karnataka Vs. Sunagar Bros. 1993 (65) ELT 471 (SC).
  3. Cyrus Surfactants Pvt. Ltd. Vs. CCE 2007 (215) ELT 55 (Tri.-Del.)
  4. Bharat Box Factory Ltd. Vs. CCE 2007 (214) ELT 534 (Tri.-Del.)
30. Ld. Advocate submits that decisions of this Tribunal mentioned at Sr. No. 3 and 4 are on the same issue in connection with same notifications and Tribunal cannot take different stand without referring the matter to Larger Bench and in support of this contention he relies on the following decisions :-
1. M/s Gammon India Ltd. Vs. CCE 2011 (269) ELT 289 (SC).
  2. Sant Lal Gupta & Ors. - MANU/SC/0859/2010
  3. Tribhuvandas Purushottamdas Thakur - MANU/0345/1967
  4. S.I. Rooplal & Anr. - MANU/SC/0776/1999

These decisions are on issue of following the precedence of decisions of Coordinate Benches.

31. Ld. Authorised Representative Sh. Sanjay Jain on the other hand submits that Notification No. 56/2002 exempts duties mentioned in notification i.e duty of excise leviable under Central Excise Act. Additional Duty of Excise (Goods of Special Importance) Act and Additional Duties of Excise (Textile and Textile Article) Act and not Education Cess or Higher Education Cess. He submits that these cesses were not even leviable when the Notification No. 56/2002 was issued as these cesses were levied in Finance Act, 2004 and Finance Act, 2007. He relies on the decision of the Tribunal in case of Jindal Drugs Ltd. reported in 2011 (267) ELT 653 wherein Tribunal held that duty of excise referred in Notification No. 56/2002 does not include Education cess and Higher Education cess. As regards issue of referring the matter to Larger Bench, he submits that this Tribunal in case of Tawi Chemical Industries Ltd. Vs. CCE - 2012 (286) ELT 553 (Tri.-Del.), relying on decision in Jindal Drugs has held that there is no need of reference to Larger Bench.
32. I find that decisions of this Tribunal in case of Bharat Box Factory Ltd. (supra) and Cyrus Surfactants Pvt. Ltd are in favour of assessee whereas decision in case of Jindal Drugs Ltd. is in favour of Revenue. Issue is when these decisions are cited before the Bench, whether matters should be referred to Larger Bench or following Jindal Drugs assessee's appeal be rejected.
33. I find that decision in case of Jindal Drugs was pronounced on 12.8.2009. Ld. Advocate appearing for respondents in Jindal Drugs case relied on the decision of Tribunal in case of Bharat Box Factory Ltd. and Cyrus Surfactants Pvt. Ltd. but Tribunal has distinguished these decisions in para 25 of the order and on noting the decision of Apex Court in case of Modi Rubber Ltd. - 1986 (25) ELT 849 (SC) has held that exemption or refund is not admissible in respect of Education Cess and High Education Cess under the Notification. It was for the Bench in Jindal Drugs to consider whether matters needs to be referred to Larger Bench in view of earlier decisions of Tribunal in assessee's favour. But Bench did not do so presumably as it relied on decision of Supreme Court in case of Modi Rubber (supra).
34. I also find that issue of referring the matter to Larger Bench came up before this Tribunal in case of Tawi Chemical Industries Ltd (supra). The Bench presided

over by the President relied on the decision of Tribunal in Jindal Drug Ltd. (supra) and has held as under :-

6. We find that the issue involved in this case stands decided against the appellant by a detailed judgment of the Tribunal in the case of CCE, Jammu v. Jindal Drugs Ltd. (supra), wherein the Tribunal relying upon the Apex Court's judgment in the case of Union of India v. Modi Rubber Ltd. reported in 1986 (25) E.L.T. 849 (S.C.) had held that Notification No. 56/2002-C.E. is not applicable to education cess levied under Section 91 read with Section 93 of Finance Act, 2004. Though, the Tribunal in the case of Bharat Box Factory Ltd. v. CCE, Jammu (supra) and Cyrus Surfactants Pvt. Ltd. v. CCE, Jammu (supra) had taken a contrary view, we find that in these judgments of the Tribunal, the Apex Court's judgment in the case of Union of India v. Modi Rubber Ltd. (supra) has not been considered. In the case of Union of India v. Modi Rubber Ltd. (supra), the Apex Court had held that the words "duty of excise" in the Notification No. 123/74-C.E., dated 1-8-1974 and 27/81-C.E., dated 1-3-1981 issued under Rule 8(1) of Central Excise Rules, 1944 (corresponding to Section 5A of Central Excise Act, 1944) would not cover the Special Excise duty leviable under Finance Act, 1978 and AED (GSI) levied under AED (GSI) Act, 1957. In our view, when the Notification No. 56/2002-C.E. specifically exempts only the duties levied under Section 3(1) of Central Excise Act, 1944 and the Additional Excise Duties levied under AED (GSI) Act, 1957 and AED (T & TA) Act, 1978, there is no scope for doubt that this notification would not cover the education cess levied under Section 91 readwith Section 93 of Finance Act, 1994. We find that same view had been taken by Hon'ble Guwahati High Court in the case of CCE, Shillong v. Dharampal Satyapal Ltd. (supra), wherein Hon'ble High Court held that Notification No. 32/1999-C.E., dated 8-7-1999 (which is similar to Notification No. 56/2002-C.E.) does not exempt the education cess. Earlier Hon'ble Guwahati High Court in the case of CCE, Shillong v. Dharampal Satyapal Ltd. (supra) [judgment dated 29-6-2011 in respect of Reference Application No. 4/2008] had held that Notification No. 32/1999-C.E. does not exempt the NCCD {National Calamity Contingent Duty} leviable under Section

136 of Finance Act, 2001 which is also levied by the way of surcharge as a duty of excise. In view of the judgments of the Apex Court and Hon'ble Guwahati High Court on the issue involved in this case, there is no need to refer the issue to a Larger Bench.

35. Tribunal held that there is no need to refer the matter to Larger Bench. When a matter is to be referred to Larger Bench, matter is required to be put up before President for decision. I find that when a Bench presided over by the President has taken a decision on one issue not to refer it to a Larger Bench, same issue in other appellant's cases is not required to be referred to Larger Bench.
36. I also find that High Court of Sikkim in case of Unicorn Industries Ltd. Vs. Union of India reported in 2013-TIOL-438 HC-Sikkin-CX has held that exemption under Notification No. 71/2003 dated 9.9.2003 (71/2003 is area based exemption identical to 56/2002) is not applicable to NCCD, Education Cess and Higher Education Cess.
37. In view of above, I agree with the findings of Shri Mathew John, Member (Technical) that there is no need to refer the matter to Larger Bench and appeals are to be rejected. Registry is directed to send the file to referral Bench.

**Final Order No.**

38. In view of the majority order, all nine appeals are rejected.