

2013 (2) ECS (49) (Tri-Del)

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM,
NEW DELHI – 110066.
Court No. 2**

M/s Berger Paints India Ltd.

Vs.

CCE, Lucknow

Excise Appeal No. E/3664 – 3667/2012

(Arising out of OIA No. 129-132/CE/App/Chd – II (K)/2012 dated 22.08.2012 passed by the Commissioner of Central Excise (A), Chandigarh - II)

Date of Hearing/decision :20.03.2013

M/s Berger Paints India Ltd.

Appellant

Vs.

CCE, J & K

Respondent

Appearance:

none for the Appellants

Shri B B Sharma, DR for the Respondent

CORAM:

Hon'ble Mr. D N Panda, Judicial Member
Hon'ble Mr. Manmohan Singh, Technical Member

FINAL ORDER NO. 56021 – 56024/2013

“On totality of the consideration of matter, the Id. Appellate authority came to the conclusion that refund claim of education cess and S & H education was not entertainable. His decision being in accordance with law, all the four appeals are dismissed.” [Para 4]

PER: D.N. PANDA

1. None present for the appellant nor is there any adjournment application. Earlier the matter was on board on 10.12.2012, for no sitting of the Bench, the matter was adjourned to today. Even on 10.12.2012, matter was adjourned for reason attributable to appellant. With the assistance of Revenue and on the basis of appeal memo filed by appellant, we took up all the four appeals for disposal by this common order as the issue arising in these four appeals is common.
2. So far as refund claim of education cess and S & H education cess is concerned, the Tribunal has already decided in favour of Revenue. That is no more in controversy in the case of the four appellants appearing at Sr. No. 19 to 24 of the cause list. Reading para 6.6. of the appellate order demonstrate that the adjudicating authority was in error about provision of law relating to the cess. There is no further scope to interfere with is appellate order because that does not suffer from legal infirmity due to consistent view of the Tribunal holding in favour of Revenue. It would be proper to reproduce para 6.6. of the appellate order appearing at page 39 of the appeal folder for appreciation of reasoning of the decision : -

“The appellant also relied upon the decisions of the Tribunal in the case of Cyrus Surfactants Pvt. Ltd. (supra). While interpreting the provisions of 56/2000 – C.E., tribunal allowed the refund of education cess. On the contrary, we find that Hon'ble Himachal Pradesh High Court in the case of Indo Farm Tractors & Motors Ltd. v. Union of India – 2008 (222) E L T 184 (H P) while interpreting the provisions of Finance Act, 2004 vide which the

education cess was levied held that in case the goods are exempted from payment of basic duty, the education cess is leviable. The Hon'ble High Court held that Excise duty can always be calculated even if it is not collected on notional basis and education cess can be calculated as per provisions of Finance Act, 2004. The decision of Hon'ble Himachal Pradesh High Court over ruled the decision of the tribunal. As there is no provisions under the notification for refund of education cess hence we find no infirmity in the impugned orders and the appeals are dismissed."

3. Apart from the above, Id. Commissioner (Appeals) has looked in the clarification of CBEC which is in pursuance of the Tribunal's decision. Examining the aspect in para 8 of the appellate order appearing at page 30 of the appeal folder, Id. Appellate Authority has reproduced the contents of the Board's clarification which reads under : -

"The appellants' further contended that as per clarification dated 10.08.2004, issued by the Ministry of Finance the Education Cess would not be leviable on the goods that were fully exempted from excise duty. I have perused the clarification issued vide letter F.No 345/2/2004 – TRU (Pt.) dated 10.08.2004. The Ministry has clarified the issue of imposition of education cess on the goods, which are exempt from payment of Excise duty. The relevant para of the letter is reproduced hereunder : -

" 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 fulfillment 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 fall duties of excise / customs (excluding certain duties of customs like and 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 clearance. In this regard, letter D.O. No. 605/54/2004 – DBK, dated 21st July, 2004 issued by Member (Customs) may also be referred to".

4. On totality of the consideration of matter, the Id. Appellate authority came to the conclusion that refund claim of education cess and S & H education was not

entertainable. His decision being in accordance with law, all the four appeals are dismissed.

(Dictated & pronounced in the open court)