IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 12TH DAY OF JUNE, 2015

BEFORE

THE HON'BLE MR.JUSTICE ARAVIND KUMAR

WRIT PETITION Nos.51753/2013 & 38767-69/2014
(T-RES)

BETWEEN:

M/S TVS MOTOR CO. LTD.,
P.B.NO.1, BYATHAHALLI,
KODAKOLA POST
MYSURU-561 311
REPRESENTED BY ITS
AUTHORISED SIGNATORY
SHRI K MURALI.

... PETITIONER

(BY SRI. G. SHIVADASS AND SRI. HARISH R, ADVOCATES)

AND:

1. UNION OF INDIA
   REPRESENTED BY ITS
   SECRETARY MINISTRY OF FINANCE
   DEPARTMENT OF REVENUE,
   NORTH BLOCK
   NEW DELHI-110 001.

2. COMMISSIONER OF CENTRAL EXCISE
   MYSURU-III DIVISION
   MYSURU.

3. COMMISSIONER OF CENTRAL EXCISE
MYSURU-III DIVISION
MYSURU.

4. COMMISSIONER OF CENTRAL
EXCISE (APPEALS)
V FLOOR, TRADE CENTRE,
BUNTS HOSTEL ROAD,
MANGALURU-575 003.

4. JOINT SECRETARY
GOVERNMENT OF INDIA
14, HUDCO VISHALA BLDG,
B WING, 6TH FLOOR,
BHIKAJI CAMA PLACE
NEW DELHI-110 066

...RESPONDENTS

(BY SRI JEEVAN J NEERALGI, ADVOCATE FOR R-2 TO R-5;
NOTICE TO R-1 DISPENSED WITH V/O DATED
14.08.2014)

THESE WRIT PETITIONS ARE FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA, PRAYING TO QUASH AND SET ASIDE THE IMPUGNED ORDER DATED 20.05.2013 PASSED BY THE REVISIONARY AUTHORITY (R-5 HEREIN) ENCLOSED AS ANNEXURE-Z.

THESE WRIT PETITIONS BEING HEARD AND RESERVED, COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT MADE THE FOLLOWING:

O R D E R

Petitioner is seeking for order No.401-404/2013 dated 20-05-2013 (Annexure-Z) passed by fifth respondent being set aside whereunder claim of the petitioner for refund of Automobile Cess, Education Cess on Automobile Cess and Secondary and Higher Education Cess (for short SHE Cess) on Automobile Cess paid along with customs duty on the goods exported outside the country has been denied on the ground it falls outside the purview of exemption notification No.19/04-CE(NT) dated 06.09.2004.

FACTUAL MATRIX:

2. Petitioner is engaged in the manufacture of motor cycles/two wheelers of different types falling under Chapter – 87 of the First Schedule to the Central Excise Tariff Act, 1985 (for short 'CETA') and is

registered under the provisions of the Central Excise Act, 1944 and has cleared the vehicles/goods to their plant at Hosur on payment of duty. It is not in dispute that petitioner's Hosur plant had not availed CENVAT credit against the consignments which were removed to the Hosur plant. It is also not in dispute that said two wheelers which were cleared were exported to various countries and had issued the disclaimer certificate to enable the petitioner to claim rebate of duty paid on two wheelers in respect of which petitioner had paid duty at the time of removal of the goods. Hence, petitioner filed a rebate claim under Rule 18 of the Central Excise Rules, 2002 in respect of the duty paid on clearance of the goods which came to be exported from Hosur plant. The jurisdictional Range Officer by his report interalia stated that the rebate claim was filed within the time limit of one year as per Section 11B and it was also

certified that duty debit particulars furnished by the petitioner had been verified and found to be in order.

3. Third respondent passed an order on 10.04.2007 (Annexure-B) whereunder part of the rebate of Automobile Cess, Education Cess and SHE Cess paid on Automobile Cess was disallowed and in certain cases rebate was disallowed on the ground that petitioner did not fulfill condition 2(b) of notification No.19/2004-CE(NT) dated 06.09.2014. Aggrieved by the said order, petitioner filed appeal and the appellate authority by order dated 22.05.2008 (Annexure-D) remanded the matter insofar as rebate/disallowance and dismissed remaining appeals. Aggrieved by this order, petitioner filed revision petition before the Ministry of Finance (Department of Revenue) which related to the period October, 2005 to May, 2007, June, 2007 to December, 2007. Fifth respondent passed an order on 07.07.2010

upholding the orders in appeal dated 22.05.2008 and 04.11.2008 and set aside the order in appeal dated 01.06.2009. Petitioner being aggrieved by this order, filed a writ petition before this Court in W.P.No.2495/2011 and this Court by order dated 31.01.2013 set aside the order No.1214-1216/10-CX dated 07.07.2010 and remanded the matter back to the Joint Secretary, Government of India to decide the same afresh within three months from the date of receipt of the order with following observations:

> "5.3 (a) A combined reading of the notification under the Central Excise Rules, 2002 and Automobile Cess Rules specifies that the manner of levying, collecting and refund as applicable to the duty are applicable to the Automobile Cess. This aspect of the matter is not considered in the Order dated 07.07.2010.
>
> (b) In identical circumstances, the Rajasthan High Court, while interpreting the education cess levied under the excisable goods, allowed

> rebate on cess though not covered under the Notification for the relevant period. This view taken by the Rajasthan High Court was affirmed by the Hon'ble Supreme Court vide SLP No.19864/2008. These decisions were not considered by the Joint Secretary in the order dated 07.07.2010 and on this ground also, the order is liable to be set aside."

4. For the period January, 2008 to August, 2010 another set of rebate claims was filed by the petitioner and third respondent disallowed certain claims and allowed certain claims. Aggrieved by same, appeal was filed by petitioner. Appellate authority by order dated 01.06.2009 (Annexure-M) allowed the appeal. Pursuant to the said order, third respondent granted refund of Automobile Cess, Education Cess and SHE Cess to the petitioner by order dated 13.07.2009. Aggrieved by this order dated 01.06.2009 Department filed a revision application in reference No.198/133/09-

RA-CX before the Ministry of Finance (Department of Revenue). Hence, show cause notice dated 17.05.2010 came to be issued to the petitioner to recover an amount of Rs.1,67,906/- being erroneous rebate already sanctioned on the ground that reference application has been decided by the Ministry in favour of the Department. Reply given to show cause notice came to be considered and the Deputy Commissioner rejected the rebate claim of the petitioner. Appeal came to be filed against this order.

5. Thereafter, respondents have issued show cause notice dated 25.06.2010 on the ground that the Department has challenged the order dated 01.06.2009 before the revisional authority and demanded the petitioner to refund the rebate granted. Reply came to be submitted to the said show cause notice which came to be adjudicated by upholding the show cause notice

and appeal filed against said order came to be rejected vide order dated 09.08.2012. Revision petition filed against said order before fifth respondent is said to be pending.

6. The revisional authority by order dated 07.07.2010 (Annexure-S) allowed the appeal filed by the Department, consequently denied the rebate of Automobile Cess to the petitioner.

7. As already noticed herein above, writ petition No.2495/2011 filed by the petitioner challenging the said order of the revisional authority came to be set aside by order dated 31.01.2013 with a direction to consider the matter afresh. Pursuant to same, revisional authority examined the claim for rebate and by a combined order dated 20.05.2013 denied the rebate of Automobile Cess, Secondary and Higher

Education Cess on Automobile Cess vide Annexure-Z. However, for the period 01.03.2007 to 07.03.2007 the revision application filed by the petitioner on the ground of violation of condition No.2(b) was answered in favour of the petitioner The details of the above factual matrix can be condensed as per the Tabular column noted herein below:

Sl. No.	RA/ F. No.	Name of Applicant	Name of the Respondent	Amt. of Rebate/Duty Paid	Period of dispute	No. and Date of order-in-appeal	Rebate of Automobile Cess involved
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1	198/133/09-RA-CX	CCE Mysore	M/s. TVS Motor Co. Ltd.,	15,56,560/-	01/2008 to 01/2009	215/09 1.6.09	Rs.15,56,560
2	195/335/08-RA-CX	M/s. TVS Motor Co. Ltd.,	CCE Mysore	(Duty) 3,25,005/- (Rebate) 9,47,823/-	05/2005 to 05/2007	21/08-CE 22.5.08	Rs.9,47,823
3	195/541/08-RA-CX	M/s TVS Motor Co. Ltd.,	CCE Mysore	(Rebate) 4,98,184/-	06/2007 to 12/2007	223/08-CE 4.11.08	Rs.4,52,569
4	195/415/11-RA-CX	M/s TVS Motor Co. Ltd.,	CCE Mysore	(Rebate) 7,26,717/-	07/2009 to 11/2009	06/2011 dated 21.1.11	

8. I have heard the arguments of Sriyuths Shivadass, learned Advocate appearing for petitioner and N.R.Bhaskar, learned Standing Counsel appearing for respondents.

9. It is the contention of Sri Shivadass, learned counsel appearing for petitioner that Automobile Cess, Education Cess on Automobile Cess and Secondary and Higher Education Cess on Automobile Cess is levied under Section 9 of the Industries (Development & Regulation) Act, 1951 read with Rule 3 of Automobile Cess Rules, 1984 and said rule would indicate that provisions of Central Excises and Salt Act, 1944 and Rules made thereunder including those relating to refund of duty to the levy and collection of cess is applicable and as such, it is evident that Central Excise Act, 1944 and Rules made thereunder will apply in

relation to levy and collection of Cess as they apply in relation to the duty of excise.

10. It is contended that under the impugned order it has been held by the Revisional Authority that provisions of Central Excise Act alone would be applicable and this is an erroneous finding and contrary to the law laid down by the Hon'ble Apex Court in **(1997) 92 ELT 303 (SC)** and **(1992) 57 ELT 3 (SC)**. It is further contended that Automobile Cess, Education Cess on Automobile Cess, Secondary and Higher Education Cess on Automobile Cess being one of the duties of excise being paid on the goods exported, rebate of Cess cannot be rejected on the ground that it does not find a mention in Explanation- I to Notification No.19/04-CE(NT) dated 6.9.2004. It is further contended that prior to 12.05.2000, Central Excise Act provided for levy and collection of 'duties of excise' as

indicated therein and with effect from 12.5.2000 the words "duty of excise" has been called as "Central Value Added Tax (CENVAT)" and throughout in Central Excise Act the phrase "duties of excise" and 'duty of excise' are used interchangeably. It is contended that Section 2A was introduced which provided that references to the expression 'duty', 'duties', 'duty of excise' and 'duties of exercise' shall be construed to include a reference to CENVAT and as such, there was no distinction in these phrases can be attributed.

11. On this premise, it is contended that Automobile Cess, Education Cess on Automobile Cess, Secondary and Higher Education Cess on Automobile Cess is a duty of excise and is part of the duties paid by the petitioners and no contrary view can be taken. In support of his submission he has relied upon the following Judgments:

(1) **1992 (57) ELT 3 (SC) –**

Barnagore Jute Factory Co., Vs Inspector of Central Excise

(2) **1997(92) ELT 303 (SC) –**
CCE, Patna Vs Tata Engineering and Locomotive Co.,

(3) **2007 (216) ELT 16 (Raj.)-**
Banaswara Syntex Ltd. Vs Union of India

(4) **2014(302) ELT 33 (Kar.) –**
Commissioner of C.Ex., Cus. And ST., Belgaum Vs Shree Renuka Sugars Ltd.

12. Per contra, Sri.Jeevan J.Neeralgi, learned counsel appearing for respondent would support the impugned order passed by 5th respondent by contending that duties of excise collected under the Central Excise Act can only be rebated in respect of goods exported and Automobile Cess, Education Cess and SHE Cess is not specified as duty in Explanation-I of Notification No.19/04-CE(NT) and as such rebate of such Cess paid

would not be admissible. Hence, he prays for dismissal of these writ petitions. In support of his submission he has relied upon the following Judgments:

(1) 1986(25) ELT 849 –

Union of India and others Vs Modi Rubber Limited and others

(2) 1991(53) ELT 408 (Tribunal)-

Collector of C.Ex. Vs Mahindra and Mahindra Ltd

(3) 1987(31) ELT 209 (Tribunal)-

Nellimarla Jute Mills Vs Collector of Central Excise, Guntur

BRIEF BACKGROUND OF THE CASE:

13. It is not in dispute that petitioner is engaged in the manufacture of motor cycles/Two wheelers of different types falling under Chapter 87 of First Schedule to the Central Excise Tariff Act, 1985. Petitioner is having two units namely one at Mysore and one at Hosur. The vehicles on being manufactured at

Mysore was transferred from their Mysore Unit to Hosur Unit on payment of excise duties. Subsequently two wheelers were exported to various countries from Hosur Unit. The Hosur Plant of petitioner has issued the disclaimer certificate in favour of their Mysore Unit to enable the petitioner to claim rebate of duty paid on two wheelers exported in respect of which petitioners had paid duty at the time of removal of the goods.

14. Petitioner lodged rebate claims under Rule 18 of the Central Excise Rules, 2002 in respect of duty paid on the clearance of the goods, which were exported from Hosur Plant. The compliance report of the jurisdictional Range Officer interalia stated that the rebate claim filed by the petitioner was within the time limit of one year as per section 11B of Central Excise Act and claim related to rebate of duty paid for export clearance and as such question of unjust enrichment

does not arise. After orders being passed by the original authority for different periods it has resulted in appeals being filed and ultimately the revisional authority namely 5th respondent has disallowed the rebate claimed by the petitioner by order dated 20.05.2013 Annexure-Z which is impugned in the present writ petitions. It is to be noted at this juncture itself that claim for rebate of Automobile Cess as indicated at Sl.No.1 to 3 of column No.1 to the extent of quantification made in column No.8 at Sl.No.1 to 3 of Table (referred to in Paragraph 7 supra) came to be disallowed by all the authorities including Revisional Authorities. However, in respect of claim of rebate indicated in Column No.1 at Sl.No.4 to an extent of Rs.7,26,717/- came to allowed by the appellate authority and as such Department filed a Revision

Petition which has been allowed and all these 4 Rebate claims are subject matter of these writ petitions.

15. In this background, it would be necessary and appropriate to extract relevant statutory provisions which have direct bearing on the issue. Hence, they are extracted herein below.

Section 9 of the Industries (Development and Regulation) Act, 1951 reads as under:

> **9. Imposition of Cess on Scheduled Industries in certain cases.-** (1) There may be levied and collected as a cess for the purpose of this Act on all goods manufactured or produced in any such scheduled industry as may be specified in this behalf by the Central Government by notified order a duty of excise at such rate as may be specified in the notified order, and different rates may be specified for different goods or different classes of goods:

Provided that no such rate shall in any case exceed two annas per cent. of the value of the goods.

Explanation:- In this sub-section, the expression "value" in relation to any goods shall be deemed to be the wholsesale cash price for which such goods of the like kind and quality are sold or are capable of being sold for delivery at the place of manufacture and at the time of their removal therefrom, without any abatement or deduction whatever except trade discount and the amount of duty then payable.

(2) The cess shall be payable at such intervals within such time and in such manner as may be prescribed, and any rules made in this behalf may provide for the grant of a rebate for prompt payment of the cess.

(3) The said cess may be recovered in the same manner as an arrear of land revenue.

(4) The Central Government may hand over the proceeds of the cess collected under this section in respect of the goods manufactured or produced by any scheduled industry or group of scheduled industries to the Development Council established for that industry or

group of industries, and where it does so, the Development Council shall utilise the said proceeds –

(a) to promote scientific and industrial research with reference to the scheduled industry or group of scheduled industries in respect of which the Development Council is established;

(b) to promote improvements in design and quality with reference to the products of such industry or group of industries;

(c) to provide for the training of technicians and labour in such industry or group of industries;

(d) to meet such expenses in the exercise of its functions and its administrative expenses as may be prescribed."

Rule 2 & 3 of Automobile Cess Rules, 1984

reads as under:

"**Rule 2 : Definitions.-** In these rules, unless the context otherwise requires, -

(a) xxx

(b) xxx

(c) 'Cess' means the cess levied and collected in terms of notification No.S.O.932(E), dated 28.12.1983 of Department of Heavy Industry issued under sub-section (1) of Section 9 of the Act."

"**Rule 3. Application of Central Excise Act and the rules made thereunder**.- Save as otherwise provided in these rules, the provisions of Central Excise Act, 1944 (1 of 1944), and the rules made thereunder including those relating to refund of duty, shall, so far as may be, apply in relation to the levy and collection of the cess as they apply in relation to the levy and collection of the duty of excise on manufacture of automobiles under the Act and the Rules."

Rule 18 of Central Excise Rules, 2002:

Rule 18. Rebate of duty- Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable

goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfillment of such procedure, as may be specified in the notification.

Explanation.- "Export" includes goods shipped as provision or stores for use on board a ship proceeding to a foreign port or supplied to a foreign going aircraft."

16. Automobile Cess, Education Cess on Automobile Cess and Secondary and Higher Education Cess on Automobile Cess has been levied under section 9 of Industries (Development and Regulation) Act, 1951 read with Rule 3 of Automobile Cess Rules, 1984. A bare perusal of Rule 3 of Automobile Cess Rules, 1984 indicates that provisions of Central Excise Act, 1944 and the Rules made thereunder including those relating to refund of duty has been made applicable to the levy and collection of Cess.

17. Perusal of the above referred section and rules would prima facie indicate that provisions of Central Excise Act, 1944 and Rules made thereunder will apply in relation to levy and collection of duty are indeed applicable to the Automobile Cess levied under Notification No.247(E) dated 22.3.1990.

18. Rule 18 of the Central Excise Rules, 2002 enables the Central Government to grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacturing or processing of such goods when they are exported, by issuance of notification prescribing such conditions or limitations and fulfillment of such procedure to claim rebate. In exercise of power vested under Rule 18 of Rules 2002 Central Government has issued notification No.19/2004-CE(NT)dated 06.09.2004 granting rebate of

whole of the duty paid on excisable goods falling under First Schedule to CETA exported to any country other than Nepal and Bhutan, subject to the conditions, limitations and procedures specified thereunder. A perusal of said notification dated 6.9.2004 would indicate that "duty" for the purposes of said notification would mean as specified in Explanation-I which 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 (Textiles and Textile Articles) Act, 1978 (40 of 1978);
>
> (d) the National Calamity Contingent duty leviable under section 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 under section 157 of the Finance Act, 2003 (32 of 2003);

(g) Education Cess on excisable goods as levied under clause 81 read with clause 83 of the Finance (No.2) Bill, 2004.

(h) the additional duty of excise leviable under clause 85 of the Finance Bill, 2005 the clause which has, by virtue of the declaration made in the said Finance Bill under the Provisional Collection of Taxes Act 1931.

(i) Secondary and Higher Education Cess on excisable goods leviable under clause (126) read with clause (128) of the Finance Bill, 2007, which has, but virtue of the declaration made in the said Finance Bill under the Provisional Collection of Taxes Act 1931".

19. As to whether the provisions of Central Excise Act would apply insofar as relating to levy and collection of Cess came to be considered by the Hon'ble Apex Court in the case of **COLLECTOR OF CENTRAL EXCISE, PATNA VS TATA ENGINEERING AND LOCOMOTIVE COMPANY** reported in **1997(92(ELT) 303 SC** and held as under:

> "3. Learned counsel for the assessee submits that the value of the motor vehicle for the purposes of the levy of the cess has to be calculated in the manner laid down in the Central Excises and Salt Act, 1944, for which purpose he places reliance upon Rule 3 of the Automobile Cess Rules.
>
> 4. The Tribunal in the order under appeal accepted the contention of the assessee and we are inclined to agree.
>
> 5. Section 9(1) of the Industries (Development & Regulation) Act, 1951, empowers the levy and collection of a cess on goods manufactured or produced in a scheduled industry at

such rate as may be specified by the Central Government, different rates being permissible for different goods or different classes of goods. The provision contemplates the exercise by the Central Government of the function of fixing the rate of the cess. The legislature, by the proviso to Section 9(1), has laid down the limits of the Central Government discretion in fixing such rate, namely, that such rate shall not exceed two annas per cent of the value of the goods. It is for this purpose that the Explanation in Section 9(1) defines the expression "value" and states that it shall be deemed to be the wholesale cash price for which such goods of the like kind and quality are sold or are capable of being sold for delivery at the place of manufacture and at the time of their removal therefrom without any abatement or deduction whatever, except trade discount and the amount of duty then payable. The opening words of the Explanation make it clear that it defines the expression "value" thus only for the purposes of Section 9(1).

6. The definition of the expression "value" for the specific purpose of Section 9(1) does not, therefore, apply

to the valuation of goods to be made for the purposes of computation of the cess under the said notification. In other words, in calculating 1/8 per cent ad valorem, the value of the goods is not to be determined as set out in the Explanation to Section 9(1). For this purpose, what is relevant is Rule 3 of the Automobile Cess Rules, 1984, which states that the provisions of the Central Excises and Salt Act shall apply so far as may be in relation to the levy and collection of the cess. **The calculation of 1/8 per cent ad valorem of the motor vehicle for the purposes of the levy and collection of the cess must, therefore, be made as if it was excise duty that was being calculated and applying the provisions of the Central Excises and Salt Act for the purpose.**

7. Accordingly, the appeals fail and are dismissed, with no order as to costs".

(Emphasis Supplied)

20. It has been held in the above case that for purpose of levy of Automobile Cess, "value" as defined in section 9(1) of Industries (Development and Regulation)

Act, 1951 would not apply insofar as it applies to the valuation of goods to be made for the purposes of computation of Automobile Cess, Education Cess on Automobile Cess, SHE Cess on Automobile Cess to be levied and calculated as if it was excise duty as prescribed under Rule 3 of Automobile Cess Rules, 1984.

21. The Hon'ble Apex Court in the case of **BARANGORE JUTE FACTORY COMPANY VS INSPECTOR OF CENTRAL EXCISE** reported in **1992(57) ELT 3(SC)** has held that levy and collection of Cess on jute manufacturers should be considered as a duty of excise when the machinery provisions of Central Excise Act and Rules were made applicable for levy and collection of Jute Cess. It has been held by the Apex Court therein as under:

"18. We think it convenient xxx could not be levied on captively consumed goods. The second and more important aspect is the nature of the cess in question. Though levied and collected as a cess, the imposition under section 9 is a duty of excise. Section 9 says so in so many words. The explanation to sub-section(1) of section 9 defines the expression `value' in practically the same terms as it is defined in the Central Excise Act. And Rule 3 of the Jute Cess Rules provides that except as otherwise provided in the said rules, the provisions of Central Excise Act and the rules made thereunder "shall, so far as may be, apply in relation to the levy and collection of the cess as they apply in relation to the levy and collection of the duty of excise on jute manufacturers under the Act". The language employed in this rule is significant. According to it, the provisions of the Central Excise Act and Rules are applicable in the matter of levy and collection of the cess in the same manner they apply in relation to levy and collection of excise duty on jute manufacturers. What do these words mean? Certainly they should mean something more than the words which fell for consideration in Mahindra and Mahindra. The facts of that case are: xxx well settled proposition that

"if a subsequent act xxx at all"

But, the language of Rule 3 of Jute Cess Rules is altogether different. It indicates a continuing applicability of the provisions of

> the Central Excise Act and the Rules. What was levied was a `duty of excise' and it was to be levied and collected in accordance with the provisions of the Central Excise Act and the Rules. The effect is as if the words `for the time being in force' were there after the words `the provisions of Central Excises Act and Salt Act, 1944 (1 of 1944) and the Rules made thereunder" in Rule 3. **We are, therefore, of the opinion that the amendment of rule 9 and 49 made in 1982 (with retrospective effect from 1944) is equally applicable in the matter of levy and collection of cess under the Act.** The contentions xxx in Bhatinda Improvement Trust Board Vs Balwant Singh".

(Emphasis Supplied)

22. In this background Explanation-I of the Notification 19/2004 acquires significance, whereunder the word "duty" has been defined for the purposes of said Notification to mean duties of excise collected under the enactments enumerated under Explanation-I. As to whether Automobile Cess, Education Cess on Automobile Cess and SHE Cess on Automobile Cess

levied pursuant to levy of excise duty and paid on the goods exported can also be construed as duty and entitled to rebate or the authorities were right in rejecting the rebate claimed by petitioner on the ground that it is not a duty specified in Explanation-I to the notification or Cess levied and paid falls outside the purview of exemption Notification is the issue in question.

23. When rival contentions are examined in the background of statutory provision namely Section 3 of Central Excise Act, 1944 it would indicate that prior to 12.05.2000 Excise Act provided for levy and collection of duties and phrases "duties of excise" and "duty of excise" were used interchangeably. For instance language employed in Section 3 was:-

> "There shall be levied and collected as may be prescribed,- ***duties of excise*** on all excisable ***goods***, other than....."

Whereas Phraseology used in section 4(1) read as under:

> "Where under this Act, ***duty of excise*** is chargeable on any excisable goods with reference to value, such value ....."

With effect from 12.05.2000 Section 3 of Central Excise Act, 1944 was substituted by Finance Act, 2000(Act 10 of 2000) as under:

> "There shall be levied and collected in such manner as may be prescribed – **(a) a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods.....(b) a duty of excise** in addition to the duty of excise specified in clause (a) ....."

Further section 4(1) of Excise Act, 1944 reads as under:

> "Where under this Act, the **duty of excise** is chargeable on any excisable goods with reference to their value, then on such removal....."

(Emphasis supplied)

24. Thus, it would indicate that the phrase "duties of excise" and "duty of excise" were used interchangeably namely sometimes in plural and sometimes in singular i.e., prior to 12.05.2000. However, said phraseology came to be substituted by new phrase viz., **'CENVAT'** with effect from 12.05.2000. In order to overcome the difficulty of replacing these words in entire Central Excise Act, 1944, Section 2A was introduced with effect from 12.05.2000 by Finance Act, 10/2000 whereunder expression "duty", "duties", "duty of excise" and "duties of excise" was to be construed to include a reference to "Central Value Added Tax (CENVAT)". Thus, intention of the legislature is clear and an unambiguous and the purpose of introduction of Section 2A was two(2) fold viz.,

(i) To minimize the amendments to be carried out in entire Central Excise

Act, 1944 by replacing the phrases earlier used in the Act with the words 'CENVAT', and

(ii) Not to create any distinction between various phrases used in Central Excise Act, 1944.

Thus, it would clearly indicate that there can be no distinction between the phrases 'duty', 'duties', "duty of excise" and "duties of excise".

25. The rebate of duty to be paid on exported goods is allowable under Rule 18 of the Central Excise Rules, 2002 read with notification No.19/04-CE(NT) dated 06.09.2004 as already noticed hereinabove. In the instant case, "Automobile Cess", Education Cess on Automobile Cess and SHE Cess on Automobile Cess levied and paid was claimed by way of rebate on the

exported goods and same has been denied on the ground that as per Explanation-I it is only the duties of excise specified in clause (a) to (i) of exemption notification dated 06.09.2004 which is allowable and can be rebated and "Automobile Cess", Education Cess and SHE Cess are not specified as duty under Explanation-I to notification and therefore such rebate claimed by petitioner came to be denied.

26. The levy of "Automobile Cess" is traceable to the charging Section namely, Section 9 of The Industries (Development and Regulation), Act, 1951.

27. Pursuant to above said power, Central Government by notification No.247(E) (Ministry of Finance) dated 22.03.1990 issued notification specifying the classes of goods manufactured on which a duty of excise shall be levied and collected as a Cess for the

purposes of said Act namely, The Industries (Development & Regulation) Act, 1951, except those exported in accordance with the procedure prescribed under Chapter IX of Central Excise Rules, 1944.

28. In exercise of the power conferred under Section 30 of The Industries (Development & Regulation) Act, 1951 Central Government has introduced Automobile Cess Rules, 1984. Rule 3 of the Rules would indicate the extent of applicability of Central Excise Act and Rules made thereunder. In other words, under Rule 3 the provisions of Central Excise Act and Rules made thereunder has been held to be applicable so far as they apply in relation to the levy and collection of duty of excise on manufacture of automobiles under the Act and the Rules.

29. The rebate has been claimed under Rule 18 Central Excise Rules, 2002 as noted hereinabove, which is in pursuance to exemption notification No.19/2004 CE(NT) dated 06.09.2004, since it enables the exporter to seek rebate of the whole of the duty paid on all excisable goods falling under the First Schedule to the Central Excise Tariff Act, 1985 exported to any country other than Nepal and Bhutan and Explanation I to the said notification would indicate that duty for the purpose of said notification would mean duties of exercise collected under the enactments specified thereunder, which undisputedly includes the Central Excise Act, 1944 (1 of 1944).

30. A bare reading of Rule 3 of Automobile Cess Rules would indicate that provisions relating to collection of duty are indeed applicable to the Automobile Cess levied under the notification No.923(E)

dated 28.12.1983 which notification came to be superseded by notification SO No.247(E) dated 22.03.1990 and as such, the Automobile Cess has been collected as a duty of excise in terms of the provisions of Central Excise Act. Thus, reference to Central Excise Act, 1944 in the notification dated 06.09.2004 would also include Cess collected as a duty of exercise. That apart, automobile Cess cannot be levied on the goods exported or in other words, when it is levied and rebate is claimed are required to be refunded when the goods are so exported.

31. The expression "duty" used in Rule 18 of the Central Excise Rules, 2002 would include such of those duties levied under Section 3 of the Central Excise Act, 1944 which includes the Cess defined under Rule 2(c) of Automobile Cess Rules, 1984. To put it in a different manner, Rule 18 does not indicate that rebate can be

granted in respect of any duty other than duty levied under Section 3 of the Central Excise Act, 1944. As such, the Automobile Cess, Education Cess on Automobile Cess and SHE Cess on Automobile Cess though not expressly specified under notification dated 06.09.2004 would encompass within its sweep to include these Cess within the definition of phrase 'duty'.

32. Yet another factor which requires to be noticed is, Section 9 of The Industries (Development & Regulation) Act, 1951 provides for levy and collection of Automobile Cess and the manner of collection is required to be determined by the Rules made in that regard. Further, Section 30 of the above said Act empowers the legislature to make Rules and pursuant to the same, Automobile Cess Rules, 1984 has been enacted and Rule 3 of the said Rules at the cost of repetition has to be noted and plain reading of said rule

indicate that provisions of Central Excise Act, 1944 is applicable ***for the collection of Cess as a duty of excise.*** Thereby, 'Cess' is a duty of excise collected in terms of Central Excise Act, 1944. Hence, this Court is in respectful agreement with the view expressed by Rajasthan High Court in Banswara Syntex Limited.

33. The High Court of Rajasthan in the case of **BANSWARA SYNTEX LTD., VS. UNION OF INDIA** reported in **(2007) 216 ELT 16 (Raj.)** while examining as to whether Education Cess levied on excisable goods would bear the same character as excise duty has held in the affirmative. It has been held by High Court of Rajasthan to the following effect:

> "12. Under Section 93(1) the Education Cess has specifically been directed that Education Cess levied under Section 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.

13. Under sub-section (3) xxxx Central Excise Rules.

14. Similar provision has been xxxx Section 91 of the Act.

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.

17. It is not xxxx export of its product.

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 26-06-2001. Consequently, rebate became available on collection of surcharge on Excise Duty under Finance Act, 2004 in terms of existing Notification dated 26-06-2001 immediately. Later Notification including the Education Cess in enumerative definition in the circumstances was only clarificatory and by way of abundant 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 5-9-2004. 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."

34. Thus, it can be seen from the above Judgment rebate of Education Cess denied by the authorities came to be allowed on the ground that the Education Cess is statutorily collected as duty of excise along with excise duty bearing the same character as excise duty. However, the revisional authority has held that the issue of admissibility of rebate claim of Education Cess which came to be considered by the Hon'ble High Court of Rajasthan was in the context of Section 91, 92 and 93 of Finance Act, 1994 and Section 93 of the Finance Act specifically says that Education Cess levied under section 91 shall be a duty of excise. However, the revisional authority has lost sight of the

fact that Education Cess collected in Banswara Syntex Limited Case was as part of customs duty under three different enactment which indicated that the 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. It has been further held that notification dated 06.09.2004 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. In that view of the

matter, this court is of the considered view that revisional authority erred in arriving at a conclusion that the ratio laid down by the Rajasthan High Court would be inapplicable to the facts on hand.

35. Yet another factor which cannot go unnoticed is that Rule 3 of the Automobile Cess Rules provides for that issues relating to refund of duty shall be applicable to the levy and collection of Cess. Since the provisions of Central Excise Act, 1944 would apply to the Cess collected consequent to being characterized as duty of excise, any reference in the Central Excise Act would also include a reference to the Cess collected as duty of excise. Section 11B of the Central Excise Act, 1944 explicitly states that refund includes a rebate of duty of excise paid on excisable goods exported out of India.

36. A Division Bench of this Court in the case of ***COMMISSIONER OF CENTRAL EXCISE, CUS. & S.T., BELGAUM VS. SHREE RENUKA SUGARS LTD.***, reported in **(2014) 302 ELT 33** while examining as to whether "***Sugar Cess***" levied and collected under the Central Excise Act, 1944 is to be treated as levy and collection of duty of excise on sugar, has held 'Sugar Cess' is duty of excise as defined under Section 3 of the Central Excise Act. It has been held by the Division Bench of this Court as under:

> "12. The wordings used in Section 3 of the Act makes it clear that, although a cess is levied and collected for the purpose of the Sugar Development Fund Act, 1982, it is in the nature of a duty of excise on all sugar produced by any sugar factory in India. The duty of excise levied under sub-section (1) shall be in addition to the duty of excise leviable on sugar under the Central Excise Act or any other law for the time being in force as is clear from sub-section (2). The way sub-section (2) is worded

makes it clear that what is levied and collected as a cess under sub-section (1) of Section 3 is characterized as a "duty of excise" levied under "the Central Excise Act". Further, sub-section (4) makes it clear that the provisions of the Central excise Act and the Rules made thereunder including those relating to refunds and exemptions from duty shall, so far as may be, apply in relation to the levy and collection of the said duty of excise as they apply in relation to the levy and collection of the duty of excise on sugar under that Act. In other words, the provisions of the Central Excise Act and the Rules made thereunder are read into the Act. Levy and collection of cess under the Act is treated as levy and collection of a duty of excise on sugar under the Central Excise Act.

13. The effect of such incorporation is clear from the judgment of the Supreme Court in *Bagmane Jute Factory Co. v. Inspector of Central Excise, 1992 (57) E.L.T. 3 (S.C.),* wherein the observations made by Lord Esher M.R. in 1886 31 Chancellary Division 607/615 were refereed to in para 18 of the judgment which reads as under:

> "If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that Act, as has been held, is to write those Sections into the new Act just as if they had been actually written in it with the pen or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all."

26. Any cess levied and collected in order to constitute a fee after such collections should go into a special fund earmarked for carrying out the purpose of the Act. The said fund so set apart should be appropriated specifically for the performance of the specified purpose and it should not be merged in the public revenues. In other words, the cess levied by way of fee is not intended to be and does not become a part of the Consolidated Fund. It should be earmarked and set apart for the purpose of services for which it is levied. Then only it should be described as a fee and not tax. If the cess levied and collected is credited to the Consolidated Fund of India and it has to be appropriated by the

Parliament by law and then only the said amount could be credited to the Fund, it ceases to be a fee and partakes the character of a duty or a tax.

27. In the instant case, Section 4 of the Act explicitly provides that the proceeds of the duty of excise levied under Section 3 shall be credited to the Consolidated Fund of India. Sub-Section (2) of Section 3 of the Sugar Development Fund Act, 1982, provides that the amount so credited, shall after due appropriate made by Parliament by law be credited to the Sugar Development Fund. Thus the cess collected under the Act invariably goes to the Consolidated Fund, which ultimately is utilized for all public purposes. Therefore, there is no *quid pro quo* between the cess levied and collected and the services rendered for such payment. On the contrary, the proceeds are credited to the Consolidated Fund of India which is meant to be utilized for all public purposes, may be including the purpose contemplated under the Sugar Development Fund Act, 1982. In the light of the aforesaid statutory provisions, the cess imposed under the Act is a duty of excise of a tax. The contention that it is a fee and the

> assessee is not entitled to Cenvat credit has no substance. Therefore, the sugar cess paid under the Act is tax, and to be precise it is *Duty of Excise* and not Fee."

37. Thus, an exporter in order to claim the benefit flowing from the notification No.19/04-CE (NT) dated 06.09.2004 will have to establish that the rebate claimed is in respect of the "duty" collected under the enactments enumerated thereunder and in the instant case, petitioner has clearly established that such duty has been levied and collected under the Central Excise Act, 1944 together with Cess. In view of the aforesaid discussion with regard to Rule 3 of Automobile Cess Rules, 1984 it has to be necessarily held that provisions of Central Excise Act relating to levy and collection of duty as applicable would also be applicable to Cess levied under the Automobile Cess Rules, 1984 which came to be levied on the goods exported by petitioner by

virtue of notification No.923(E) dated 28.12.1983 which came to be superseded by SO No.247(E) dated 22.03.1990 and therefore it has be necessarily held that Automobile Cess collected is "duty of excise" in terms of the provisions of the Central Excise Act, 1944 and thereby, Automobile Cess, Education Cess on Automobile Cess and SHE Cess on Automobile Cess is a "duty of excise" and is part of the duties paid by the petitioner and thereby petitioner is entitled to the rebate.

38. For the reasons aforestated, this Court is of the considered view that impugned order No.401-404/2013 dated 20.05.2013 – Annexure – Z passed by fifth respondent would not be sustainable and petitioner would be entitled to the relief sought for.

39. Hence, the following order:

ORDER

(i) Writ petitions are hereby allowed.

(ii) Order No.401-404/2013 dated 20.05.2013 – Annexure-Z passed by fifth respondent is hereby quashed to the extent of holding that rebate of Automobile Cess claimed by the petitioner held inadmissible.

(iii) The rebate of Automobile Cess paid on exported goods is held as admissible under Rule 18 of the Central Excise Rules, 2002 read with Notification No.19/04 – CE(NT) dated 06.09.2004.

(iv) Third respondent is hereby directed to process the rebate claims filed by the petitioner insofar as Automobile Cess,

Education Cess on Automobile Cess and SHE Cess on Automobile Cess which has been denied expeditiously at any rate, within eight weeks from the date of receipt of copy of this order and pass orders thereon.

Ordered accordingly.

Sd/-
JUDGE

*sp/SBN