IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Excise Appeal No.75890 of 2018

(Arising out of Order-in-AppealNo.118/HAL/CE/2017-18 dated16.01.2018 passed by Commissioner of CGST & Central Excise (Appeals-II), Kolkata.)

M/s.Uniglobal Paper Private Limited
(Junglekhas, Jhargram, Dist-Paschim Mednipur, Pin-721507.)

...Appellant

VERSUS

Commissioner of CGST & CX, Haldia Commissionerate

.....Respondent

(15/1, Strand Road, M.S. Building, Kolkata-700001.)

APPEARANCE

Shri N.K. Chowdhury, Advocate for the Appellant (s)
Shri K. Chowdhury, Authorized Representative for the Respondent (s)

CORAM:HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

FINAL ORDER NO. 75511/2022

DATE OF HEARING : 11 May 2022
DATE OF DECISION : 02 September 2022

P.K.CHOUDHARY :

The facts of the case in brief are that the Appellant was issued Show Cause Notices for payment of Education Cess and Secondary & Higher Education Cess on Paper Cess on and from 01.05.2011. Consequently two Adjudication orders were passed. The said Adjudication orders covered the period from May 2011 to February 2012 and March 2012 to February 2013 confirming the demand of Education Cess and Secondary & Higher Education Cess on Paper Cess along with interest and imposition of penalty. In respect of first Adjudication order, the Appellant paid the Education Cess on 26.06.2013 and for the subsequent Adjudication order, the Education Cess was paid on 28.08.2013. Thereafter the Appellant continued to pay Education Cess on Paper Cess up to 06.01.2014. On 07.01.2014,

the Central Board of Excise & Customs (CBEC) issued a Circular stating that Education Cess and Secondary and Higher Education Cess is not to be calculated on other Cesses. In view of the aforesaid Circular No.978/2/20214-CX (F.No.262/2/2008-CX.8) dated 07.01.2014, the Appellant realized that the payments made by them so far have been made erroneously and the Department had mis-directed and collected the Tax without authority of law. Accordingly the Appellant filed refund claims. A Show Cause Notice dated 29.09.2014 was issued proposing to reject the refund claim on the ground that the Appellant did not file any Appeal against the Adjudication orders.

2. In response to the Show Cause Notice, the Appellant submitted that the amounts have been collected by the Department wrongfully and the Department cannot retain the same. The amounts deposited so far being Education Cess on Paper Cess which they were not required to deposit has to be treated as a deposit with the Government and should be refunded to the Appellant. However, the Adjudicating authority rejected the refund claim by applying Section 11B of the Central Excise Act, 1944. On Appeal, the Ld.Commissioner(Appeals) bifurcated the refund claim and upheld the rejection of Rs.19,582/- as correct and for the balance claim of Rs.14,986/- set aside the rejection and remanded the matter to the lower authority.

3. Aggrieved by the order of the Ld.Commissioner(Appeals) both the Department and the assessee filed Appeals before the Tribunal. The Department was in Appeal challenging the order to the extent of remand and the assessee challenging the order in its entirety. Subsequently the Department filed a Miscellaneous Application before this Tribunal for withdrawal of their Appeal in terms of National Litigation Policy. The prayer of the Revenue was allowed and the Appeal was dismissed as withdrawn vide Order No.MO/75980/2018, FO/76877/2018 dated 05.11.2018.

4. The Appellant submits that the Department cannot argue against their own Circular. The Circular is clarificatory and hence the same has retrospective effect. There was a similar Circular dated 10.08.2004,

which was not considered. Further, the Appellant submitted that the Ld.Commissioner(Appeals) had erred in not considering decisions rendered by this Tribunal in this regardand hence the demand was without the authority of law. Reference was made to the decision of the Tribunal in the case of Andhra Pradesh Paper Mills Ltd. [2009 (235) E.L.T. 474 (Tri.-Bang.)]. The Circular of 07.01.2014, again clarified the same position and hence the Appellant was not required to pay any amount.With respect to the portion of the refund amount not covered by the Adjudication order, it was submitted that the said amount is required to be refunded since it was a subsequent payment and the question of unjust enrichment did not arise and the same has no application in this case. The Appellant also rely upon Grounds of Appeal, which are as under:

> "I. For that the Order passed by the Ld.Commissioner(Appeals) is not proper and the same is not maintainable in law in view of the fact that the Ld.Commissioner did not appreciate the applicability of Circular No.978/2/2014-CX dated 7th January 2014, stopping payment of Education Cess and Secondary Higher Education Cess on Cesses which are levied under Acts administered by Department/Ministries other than Ministry of Finance (Department of Revenue).
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> II. For that the Ld.Commissioner failed to appreciate that the said Circular is clarificatory in nature and has retrospective operation and in that view of the matter, even the payment made in compliance of Adjudication Order would be amounting to collection and keeping of the said Cess amount by the Govt. is without authority of law and hence, the said amount is payable to the Appellant.
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> III. For that the Ld.Commissioner(Appeals) failed to appreciate that the Commissioner(Appeals) cannot remand the matter in view of the decisions of the Apex Court in the case of MIL India and he has already decided that the part of the Refund Claim amount is not covered by any Adjudication Order. The said amount is required to be refunded for which 11B has no application.
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> IV. For that the Ld.Commissioner(Appeals) failed to appreciate that the matter of collection of Cess on Cess is not permissible since Cess is recoverable on duty. Other Cess recovered under different Acts are not

duty and hence the Cess was never recoverable on other Cesses and the same was without the authority of law and the amount realized shall be refunded without raising any question of filing Appeal or compliance of Section 11B of the Central Excise Act, 1944.

V. For that the Order passed by the Ld.Commissioner (Appeals) is also otherwise bad in law and in facts."

5. The Ld.Authorized Representative for the Department submitted that the Appellant manufactures excisable goods. On 10.07.2014 the Appellant had filed a claim for refund of Rs.34,568 paid towards Education Cess and Secondary and Higher Education Cess. The reason for filing the claim was that Education Cess and Secondary and Higher Education Cess. Cess was paid on 'Paper Cess', which was not levied by the Ministry of Finance, Department of Revenue, and hence, Education Cess and Secondary & Higher Education Cess was not payable on 'Paper Cess', and therefore, it was refundable to the Appellant. In support of the claim, the Appellant relied upon a CBEC Circular dated 07.01.2014.By a Show Cause Notice dated 29.09.2014, the Department proposed to deny the claim on the ground that the amount was paid in pursuance of two Orders-in-Original dated 19.03.2013 and 25.07.2013, and those orders were not challenged in Appeal.By an Order-in-Original dated 28.09.2016, the claim was rejected on that ground. In Appeal filed by the Appellant, the Ld.Commissioner(Appeals) observed that out of Rs.34,568/-, only an amount of Rs.19,582/- was covered by the said Orders-in-Original. He rejected the claim to that extent. For the remaining amount of Rs.14,986/-, he remanded the matter to the original authority with the direction to decide it in the light of Section 11B of the Central Excise Act,1944.

6. The Learned Counsel for the Revenue further submitted that the claim was filed on 10.07.2014, which has been the case of the Department as well as the Appellant throughout the proceedings. Even in the 'Statement of Facts' filed before this Tribunal, the Appellant has averred that the claim was filed on 10.07.2014. So, the claim of the Appellant made in the 'Synopsis' filed at the hearing that it was filed on 14.06.2014 is not acceptable.The claim to the extent of Rs.19,582/-was

rightly rejected by the authorities below because the proceedings reached finality as the said Orders-in-Original were not challenged in Appeal.The remand order of the Ld.Commissioner(Appeals) may not be interfered with because none of the authorities below has gone into the questions of limitation, merit, quantification, and unjust enrichment in respect of the amount of Rs.14,986/-.In any event, the limitation under Section 11B of the Central Excise Act shall apply as this is not a case of 'unconstitutional levy' [Mafatlal – 1997 (87) E.L.T. 247 (SC)]. This position has been reiterated in Veer Overseas [2018 (15) GLTL 59 (Tri.-LB)]. In the absence of any decision of the jurisdictional High Court on this point, the Tribunal's Larger Bench decision shall apply in the case of Kashmir Conductors [1997 (96) E.L.T. 257 (Tri.)].In any event, the principle of unjust enrichment shall apply as held in the judgement of Mafatlal – 1997 (89) E.LT. 247 (SC) and Sahkari Khand Udyog Mondal – 2005 (181) E.L.T. 328 (SC). The Appellant has failed to produce any evidence to get over the bar of unjust enrichment.

7. Heard both sides and perused the appeal records and the written submissions filed by both the sides.

8. The only issue in this Appeal is whether the Paper Cess is to be included in the calculation of Education Cess and Secondary and Higher Education Cess. The Department took a stand that Education Cess is levied on the excise duty and Cess on paper is also a duty of excise, therefore, it should be included.

9. The Board Circular No.978/2/20214-CX (F.No.262/2/2008-CX.8) dated 07.01.2014 is reproduced for ready reference:-

Circular No. 978/2/2014-CX, dated 7-1-2014

F.No. 262/2/2008-CX.8
Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject : Levy of the Education Cess and the Secondary and Higher Education Cess on other cesses - Regarding.

Attention is invited to Circular No. 345/2/2004-TRU (Pt.), dated 10th August, 2004 [2004 (171) E.L.T. (T3)], in which it was clarified that the Education Cess chargeable under Section 93(1) of the Finance (No. 2) Act, 2004 is to be calculated by taking into account only such duties which are both levied and collected by the Department of Revenue.

2.Representations have been received from trade and field formations seeking clarification as to whether the Education Cess chargeable under Section 93(1) of the Finance (No. 2) Act, 2004 and the Secondary and Higher Education Cess chargeable under Section 138(1) of the Finance Act, 2007 should be calculated taking into account the cesses which are collected by the Department of Revenue but levied under an Act which is administered by different departments such as Sugar Cess levied under Sugar Cess Act, 1982, Tea Cess levied under Tea Act, 1953 etc.

3.The matter has been examined. A cess levied under an Act which is not administered by Ministry of Finance (Department of Revenue) but only collected by Department of Revenue under the provisions of that Act cannot be treated as a duty which is both levied and collected by the Department of Revenue.

4.It is, therefore, reiterated that the Education Cess and the Secondary and Higher Education Cess are not to be calculated on cesses which are levied under Acts administered by Department/Ministries other than Ministry of Finance (Department of Revenue) but are only collected by the Department of Revenue in terms of those Acts.

5.All pending assessment may be finalized accordingly.

6.Difficulties, if any, may be brought to the notice of Board.

10. It was argued by the Ld.Advocate that in terms of Board's Circular it is very clear that a Cess levied under an Act which is not administered by the Ministry of Finance (Department of Revenue), but only collected by Department of Revenue under the provisions of that Act cannot be treated as a duty which is both levied and collected by

the Department of Revenue. In the present case even though the Cess on Paper is a duty of excise, it is not levied by the Department of Revenue, Ministry of Finance. It is levied under a different enactment namely Industries (Development & Regulation) Act, 1951, though it is collected by the Department of Revenue. Paper Cess is not levied by the Department of Revenue, it is levied by the Industrial Development, Ministry of Commerce and Industry. No doubt it is collected by the Department of Revenue, but not levied by it. Hence Paper Cess is not includible. I note that the lower authorities were proceeding on an erroneous premise when they considered the Paper Cess as a levy by the Central Government in the Ministry of Finance, Department of Revenue. They obviously lost sight of the Circular No. 978/2/2014-CX, dated 7-1-2014 where it has been clarified that the Education Cess and the Secondary and Higher Education Cess are not to be calculated on cesses which are levied under Acts administered by Department/Ministries other than Ministry of Finance (Department of Revenue), but rather only collected by the Department of Revenue in terms of those Acts.

11. I find that decision of Hon'ble Gujarat High Court in the case of Joshi Technologies International v. Union of India [2016 (339) E.L.T. 21 (Guj.)] is squarely applicable to the facts of the present case. In that case the petitioner was paying cess on the clearance of petroleum/crude oil under the provisions of Oil Industries (Development) Act, 1974. The petitioner filed a letter dated 17.07.2014 requesting for refund of the amount of Rs.73,60,061/- paid on account of Education Cess and Secondary and Higher Education Cess inadvertently during the period July 2004 to April 2014. Refund claim was filed in terms of Board's Circular dated 07.01.2014 (which is applicable in the present Appeal). The Department had rejected the entire refund claim under the provisions of Section 11B of the Central Excise Act, 1944 which was challenged before the Hon'ble High Court.The refund claim was rejected on the ground of limitation as well as unjust enrichment. The Hon'ble High Court quashed the adjudication

order and allowed the refund claim made vide Application dated 17.07.2014. The relevant portion of the said order is reproduced below:-

> ***"5.2*** *It was submitted that in the present case, there was no assessment to begin and that mere payment of tax cannot be said to be an assessment. It was submitted that assessment is a machinery provision which derives relevance from substantive power, that is, levy. If the levy does not exist, there is no question of assessment.*
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> ***10.*** *What is subject matter of challenge in the present petition, is the order passed by the adjudicating authority rejecting the application made by the petitioner seeking refund of the Education Cess, Secondary and Higher Secondary Education Cess erroneously paid by it, and hence, the next question that arises for consideration is as to whether the petitioner was liable to pay Education Cess and Secondary and Higher Secondary Education Cess. Education Cess has been levied under Section 93 of the Finance Act, 2004 and Secondary and Higher Secondary Education Cess has been levied under Section 138 of the Finance Act, 2007. It would, therefore, be germane to refer to the said provisions, which read as under :*
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> > ***"93. Education Cess on excisable goods.*** *- (1) The Education Cess levied under Section 91, in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), being goods manufactured or produced, shall be a duty of excise (in this section referred to as the Education Cess on excisable goods), at the rate of two per cent., calculated on the aggregate of all duties of excise (including special duty of excise or any other duty of excise but [excluding Education Cess, and Secondary and Higher Education Cess levied under Section 136 of the Finance Act, 2007] on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance (Department of*

Revenue), under the provisions of the Central Excise Act, 1944 (1 of 1944) or under any other law for the time being in force.

(2) The Education Cess on excisable goods shall be in addition to any other duties of excise chargeable on such goods, under the Central Excise Act, 1944 (1 of 1944) or any other law for the time being in force.

(3) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Education Cess on excisable goods as they apply in relation to the levy and collection of the duties of excise on such goods under the Central Excise Act, 1944 or the rules, as the case may be.

138. Secondary and Higher Education Cess on excisable goods. *- (1) The Secondary and Higher Education Cess levied under Section 136, in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), being goods manufactured or produced, shall be a duty of excise (in this section referred to as the Secondary and Higher Education Cess on excisable goods), at the rate of one per cent calculated on the aggregate of all duties of excise (including special duty of excise or any other duty of excise but excluding Education Cess chargeable under Section 93 of the Finance (No. 2) Act, 2004 (23 of 2004) and Secondary and Higher Education Cess on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under the provisions of the Central Excise Act, 1944 (1 of 1944) or under any other law for the time being in force.*

(2) The Secondary and Higher Education Cess on excisable goods shall be in addition to any other duties of excise chargeable on such goods, under the Central Excise Act, 1944 (1 of 1944) or any other law for the time being in force and the

Education Cess chargeable under Section 93 of the Finance (No. 2) Act, 2004 (23 of 2004).

(3) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Secondary and Higher Education Cess on excisable goods as they apply in relation to the levy and collection of the duties of excise on such goods under the Central Excise Act, 1944 or the rules made thereunder, as the case may be."

10.1 *On a plain reading of Section 93, it is clear that the Education Cess levied under the Finance Act, 2004 is a duty of excise levied at the rate of two per cent., calculated on the aggregate of all duties of excise (including special duty of excise or any other duty of excise but excluding Education Cess, and Secondary and Higher Secondary Education Cess levied under Section 136 of the Finance Act, 2007 on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under the provisions of the Central Excise Act, 1944 or under any other law for the time being in force. Thus, Education Cess is levied on the aggregate of all duties of excise (except to the extent indicated hereinabove) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue) under the provisions of the CE Act or any other law for the time being in force. The provisions of Section 138 of the Finance Act, 2007 are identically worded except that the rate of Secondary and Higher Secondary Education Cess is one per cent. Thus, Education Cess and Secondary and Higher Secondary Education Cess being a cess levied at a percentage of the aggregate of all duties of excise, the basic requirement for levy thereof is the existence of excise duty. In the present case, as noted hereinabove, oil cess is not a duty of excise, under the circumstances, the basic requirement of levy of such cesses is not satisfied. Furthermore, for the purpose of levy of Education Cess and Secondary and Higher Secondary Education Cess, two other*

conditions precedent, are required to be satisfied, viz., (i) that the duty of excise should be levied by the Central Government in the Ministry of Finance (Department of Revenue); and (ii) the duty of excise should be collected by the Central Government in the Ministry of Finance (Department of Revenue). In the present case, since the machinery provisions of the Central Excise Act, 1944 and the rules framed thereunder have been incorporated in the OID Act, the second condition precedent is satisfied, viz. that the cess is collected by the Central Government in the Ministry of Finance (Department of Revenue); however, the first condition with regard to levy of such duty of excise by the Central Government in the Ministry of Finance (Department of Revenue) is not satisfied inasmuch as the oil cess under the OID Act is levied by the Ministry of Petroleum and Natural Gas. In the aforesaid premises, the requirements of Section 93 of the Finance Act, 2004 and Section 138 of the Finance Act, 2007 are not satisfied in the present case, and consequently, the said provisions have no applicability to the facts of the present case. The petitioner, therefore, cannot be said to have been liable to pay Education Cess and Secondary and Higher Secondary Education Cess under the above provisions.

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12.1 *Thus, Section 11B of the Central Excise Act applies to the claim for refund of any duty of excise and interest, if any, paid on such duty. In the present case, as discussed hereinabove, Oil Cess under the OID Act is not a duty of excise though described as such for the sake of convenience. Education Cess under Section 93 of the Finance Act and Secondary and Higher Secondary Education Cess under Section 138 of the Finance Act, 2007 are duties of excise calculated on the aggregate of all duties of excise to the extent provided thereunder. Reverting to the facts of the present case, since Oil Cess is not a duty of excise, the amount paid by the petitioner by way of Education Cess and Secondary and Higher Secondary Education Cess, cannot in any manner be said to be a duty of excise inasmuch as what was paid by the petitioner was not a duty of excise calculated on the aggregate of all the duties of excise as envisaged in the said provisions. Thus, the*

amount paid by the petitioner would not take the character of Education Cess and Secondary and Higher Secondary Education Cess but is simply an amount paid under a mistake of law. The provisions of Section 11B of the Central Excise Act, 1944 would, therefore, not be applicable to an application seeking refund thereof. As held by the Supreme Court in U.P. Pollution Control Board v. Kanoria Industrial Ltd., (supra), a refund is claimed on the ground that the provisions of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of suit or by way of writ petition. In the present case, though the provision under which the amount was paid was not declared unconstitutional, it has been declared that the same applies only in cases where the duty is both, administered and collected, by the Department of Revenue, whereas in the present case, the Oil Cess, though collected by the Department of Revenue is administered by the Ministry of Petroleum and Natural Gas. The petitioner was therefore, wholly justified in making the application for refund under a mistake of law and not under Section 11B of the Central Excise Act, 1944.

13. *The next question that needs to be addressed is the aspect of limitation. The refund application has been made in July, 2014 seeking refund of the amount paid for the period July, 2004 to April, 2014. On behalf of the revenue it has been contended that in view of the provisions of Section 11B of the CE Act, the limitation for filing the refund claim would be before the expiry of one year from the relevant date. The expression "relevant date" is defined under clause (B) of the Explanation to Section 11B of CE Act and insofar as the present case is concerned would be the date of payment of duty. However, as discussed hereinabove, the provisions of Section 11B of the Act would not apply to the claim of refund made by the petitioner. Consequently, the limitation prescribed under the said provision would also not be applicable.*

14. *It has been further contended on behalf of the revenue, that in case the limitation prescribed under Section 11B of the CE Act is not applicable, the general principles of limitation would apply and the*

limitation of three years for filing a suit would apply, whereas on behalf of the petitioner reliance has been placed upon Section 17 of the Limitation Act, 1963 to contend that this case would be governed by the said provision and hence the limitation would not begin to run till the petitioner discovered the mistake. In support of the above submission, on behalf of the petitioner, reliance has been placed on the following decisions :

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14.4 *Thus, in view of the principles enunciated by the Supreme Court in Salonah Tea Co. Ltd. v. Superintendent of Taxes, Nowgong (supra), in case where money is paid by mistake, the period of limitation prescribed is three years from the date when the mistake was known. Besides, Section 17 of the Limitation Act inter alia provides that when a suit or application is for relief from the consequences of a mistake, the period of limitation would not begin to run until the plaintiff or applicant has discovered the mistake, or could, with reasonable diligence, have discovered it. Therefore, in case where money is paid under a mistake, the limitation would begin to run only when the applicant comes to know of such mistake or with reasonable diligence could have discovered such mistake. Adverting to the case at hand, the mistake is in the nature of a mistake of law. It appears that the legal position was not clear and hence, pursuant to representations made by the trade and field formations, the C.B.E. & C. was required to issue the circular dated 7-1-2014 clarifying the issue. As noticed earlier, the petitioner had all along, right from July, 2004 been paying Education Cess and subsequently, from the year 2007 was paying Secondary and Higher Secondary Education Cess, till April, 2014. It was only when the Circular dated 7-1-2014 came to be issued by the C.B.E. & C., clarifying the issue, that the petitioner came to know about its mistake. Considering the nature of the mistake and the fact that the issue was not free from doubt till the above circular came to be issued by the C.B.E. & C., it also cannot be said that the petitioner could with reasonable diligence have discovered the mistake. It appears that it is only sometime after the Education Cess and Secondary and Higher Secondary Education Cess came to be paid for the month of April, 2014 that the petitioner came to know about its*

mistake and in July, 2014, it filed the application for refund before the second respondent. Since the period of limitation begins to run only from the time when the applicant comes to know of the mistake, the application made by the petitioner was well within the prescribed period of limitation. Moreover, as discussed hereinabove, the retention of the Education Cess and Secondary and Higher Secondary Education Cess by the respondents is without authority of law and hence, in the light of the decision of this court in Swastik Sanitary wares Ltd. v. Union of India (supra), the question of applying the limitation prescribed under Section 11B of the CE Act would not arise.

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16. *The claim of refund made by the petitioner to the extent the same was within the period of limitation has been turned down by the adjudicating authority on the ground of unjust enrichment. The adjudicating authority has held that the petitioner was required to file the refund claim under the provisions of Section 11B of the Central Excise Act, 1944 along with the documentary evidences as provided under Section 12A. According to the adjudicating authority, two basic requirements are to be complied with based on documentary evidences (i) the amount of duty, in relation to which the refund is claimed, is paid by the claimant; and (ii) the incidence of such duty has not been passed by the claimant to any other person. The first requirement is satisfied. As regards the second requirement, the adjudicating authority has found that the petitioner has failed to prove conclusively and beyond doubt that the incidence of the duty, in relation to which the refund is claimed, has not been passed by it to any other person and has held that the refund claim is therefore squarely hit by unjust enrichment in view of the provisions of Section 12B of the Central Excise Act, 1944 as the claimant has passed on the incidence of duty to any other person. In this regard, it may be germane to refer to Paragraph 19.19 of the impugned order wherein the adjudicating authority has recorded thus :*

> *"19.19 The claimant vide letter F. No. JTI/2014-15/Excise/416, dated 20-11-2014 (received in the office on 21-11-2014) has*

also submitted a certificate dated 20-11-2014 signed by N.M. Bhalerao, Senior Finance Manager of M/s. Indian Oil Corporation Ltd. (IOCL) to an effect that "M/s. Indian Oil Corporation Limited (the buyer of crude oil from Dholka and Wavel Fields) do hereby confirm that they have not paid the amount of Primary Education Cess and Secondary & Higher Education Cess on OID Cess to JTI on purchase of crude oil from them".

Further, it is mentioned in the said certificate that "this certificate has been issued on the request of JTI for onward submission to the concerned Central Excise Authorities, in support of refund claim of Primary Education Cess and Secondary & Higher Education Cess on OID Cess. This certificate should not be used other than the intended purpose, without obtaining written permission from them". This certificate has been issued by the customer (M/s. IOCL), on the request of the claimant and it has been mentioned that it should not be used anywhere else, without their prior written permission. Hence, this certificate is merely statement without being backed by any supporting documents on the basis of which the veracity of the content could be verified. Hence, this certificate is not having any evidential value.

On verification of contents of the said certificates, it is also observed that these are mere statements, without giving the specific details of the relevant financial record i.e. balance sheet, from which the veracity of the said statement could be verified. The above said certificates itself does not have any evidential value, unless the contents of them are supported by documentary evidence."

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17.3 *In the opinion of this court having regard to the price clause contained in the Crude Offtake and Sales Agreement and the certificate of the Chartered Accountant and the documents referred to hereinabove, more particularly, the certificate dated 29-7-2015 issued by IOCL, the above decision of the Supreme Court would be squarely*

applicable to the facts of the present case. Thus, from the certificate issued by the IOCL, it is evident that the IOCL which is the sole customer, has certified that it has not paid any Education Cess and/or Secondary and Higher Secondary Education Cess on the OID cess to the petitioner in view of the fact that the price paid for crude purchased by it from the petitioner is fixed solely on the basis of the international price of crude as traded in the international market and the burden of cess and royalty payable to Government of India is on the seller. In the impugned order, the adjudicating authority has brushed aside the certificate dated 20-11-2014 issued by the Senior Finance Manager of IOCL merely on the ground that such certificate was issued at the request of the claimant. As has rightly been stated in the above letter dated 29-7-2015, in the ordinary course, the petitioner would not be required to obtain such a certificate and it is only in the peculiar facts of the present case, where it is called upon to prove that it has not passed the incidence of the Education Cess and Secondary and Higher Secondary Education Cess paid by it to the buyer, that the petitioner was required to obtain such a certificate. Under the circumstances, the adjudicating authority was not justified in not giving due weightage to the letter dated 20-11-2014 issued by the IOCL. In the opinion of this court, the material on record clearly establishes that the incidence of Education Cess and Secondary and Higher Secondary Education Cess has not been passed on to the buyer and hence, the question of any unjust enrichment on the part of the petitioner does not arise.

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18.4 *In the light of the above discussion, this court is of the view that the contention that the petition is not maintainable in view of there being an alternative statutory remedy of appeal available to the petitioner, does not merit acceptance.*

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20. *For the foregoing reasons, the petition partly succeeds and is, accordingly, allowed to the following extent :*

The order-in-original dated 24th November, 2014 is hereby quashed and set aside. The second respondent is directed to forthwith sanction and grant the petitioner refund of Rs. 73,60,061/- as claimed vide application dated 17-7-2014. Rule is made absolute, accordingly, to the aforesaid extent, with no order as to costs."

12. On a close reading of the decision of Hon'ble Gujarat High Court in the case of Joshi Technologies International (supra), I find that the facts of the present case are similar to that of the aforesaid case. I find that similar provisions as referred to in the above case and the Board's Circular have also been discussed by the lower authorities. As the Hon'ble High Court has already discussed at length there is no need to mention above provisions separately.

13. I find that the Hon'ble High Court after considering the decision of the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd., allowed the refund claims in an identical situation. Accordingly, in view of the judgement passed by the Hon'ble Gujarat High Court, I am of the view that since Cess on Paper is not a duty of excise, the provisions of Section 11B of the Central Excise Act would not apply. The Ld.Authorized Representative cited various case laws which are not applicable in the present facts and circumstances of the case.

14. In view of the above discussions and respectfully following the decisions of the Hon'ble High Court and the Tribunal, the Appeal filed by the Appellant is allowed with consequential relief.

(Order pronounced in the open court on 02 September 2022.)

Sd/

(P.K.CHOUDHARY)

MEMBER (JUDICIAL)

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