



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 06.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.P.[MD]No.11003 of 2020

and

W.M.P.[MD]No.9656 of 2020

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M/s. KTV Health Food Pvt. Ltd.,
Represented by its Director, Shri B.Babu,
No.1, Sivasakthi Nagar,
Keela Anandhanpettai, Manjakollai Post,
Nagapattinam - 611 006.

... Petitioner

Vs.

The Commissioner of Customs (Preventive),
No.1, Williams Road,
Cantonment,
Tiruchirapalli - 620 001.

... Respondent

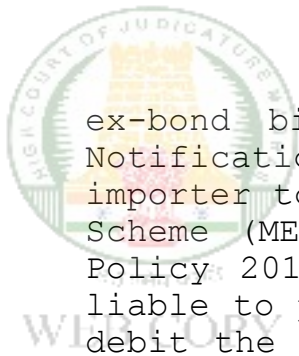
PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari, calling for the records pertaining to the impugned order-in-original No.TCP-CUS-PRV-COM-04-2020 dated 16.06.2020 in C.No.VIII/10/121/2019-Cus.ADJN passed by the respondent and quash the same or alternatively issue any writ or order or direction most particular in the nature of Writ of Mandamus and direct the respondent to refund the amount of Rs.66,66,582/- debited from the MEIS scrips issued to the petitioner in cash.

For Petitioner	: Mr.Hari Radhakrishnan
For Respondent	: Mr.B.Vijay Karthikeyan
	Standing Counsel

O R D E R

The prayer sought for herein is for a Writ of Certiorari, calling for the records pertaining to the impugned order-in-original No.TCP-CUS-PRV-COM-04-2020 dated 16.06.2020 in C.No.VIII/10/121/2019-Cus.ADJN passed by the respondent and quash the same and direct the respondent to refund the amount of Rs.66,66,582/- debited from the MEIS scrips issued to the petitioner in cash.

2. The petitioner is an importer / manufacturer and in their course of business, they had imported RBD Palmolein, falling under Customs Tariff Heading 1511 9020, for the purpose of manufacture of refined oil. During the period 2017-2018, the petitioner had filed 10 warehouse bills of entry with regard to such import. Thereafter, the petitioner had filed 52 bills of entry for ex-bond clearance for the aforesaid 10 warehouse bills of entry. At the time of filing the



ex-bond bills of entry, the petitioner claimed the benefit of Notification No.24/2015-Cus dated 08.04.2015, which enables an importer to use the scrip issued under Merchandise Export from India Scheme (MEIS), which is a scheme notified under the Foreign Trade Policy 2015-20. As per the said notification, an importer who is liable to pay the customs duty, instead of paying the duty by cash, debit the customs duty from the scrips that is issued to him under the said scheme. Accordingly, by using the scrips under the MEIS, the petitioner had debited a total amount of customs duty of Rs.22,88,86,212/-. Out of the said duty paid, an amount of Rs.66,66,582/- was debited in respect of education cess and secondary and higher secondary education cess that were payable as a percentage of basic customs duty leviable on the goods.

3. It is the further case of the petitioner that, after the assessment was over and the clearance of the goods were given, however, the respondent has issued a show cause notice dated 19.11.2019, on the ground that, the education cess that was wrongly debited from MEIS scrips of the petitioner was not permissible in terms of Notification No.24/2015-Cus dated 08.04.2015. In this context, it seems to be the contention of the respondent that, only basic customs duty can be debited from the scrips and education cess and secondary and higher education cess are to be paid only by way of cash. Therefore, on that basis, the show cause notice proposed to demand an amount of Rs.66,66,582/- that was paid by the petitioner by way of debit in MEIS scrips along with interest and there was also a proposal to impose a penalty under Section 117 of the Customs Act, 1962.

4. In response to the show cause notice, the petitioner had given a reply on 02.12.2019. However, the respondent has passed order-in-original dated 16.06.2020, whereby, rejecting the show cause given by the petitioner, the proposal already made through the show cause notice had been confirmed by which they demanded the petitioner to pay the said amount of Rs.66,66,582/- along with applicable interest and also had imposed a penalty of Rs.2,00,000/- in terms of Section 117 of the Customs Act. Felt aggrieved over the said order, the petitioner has preferred this writ petition with the aforesaid prayer.

5. Heard Mr.Hari Radhakrishnan, learned Counsel appearing for the petitioner, who straightaway took the Court to the reasons cited by the respondent in rejecting the claim of the petitioner by permitting the petitioner to debit the percentage of cess payable by way of education and higher education cess also through the scrip. In the impugned order, mainly, the respondent has given the following reasons for rejecting the claim of the petitioner:

"14.04. From the above, it is clear that only Customs duties which are leviable under First Schedule of Customs Tariff Act, 1975 and additional duty leviable



thereon under sub-section (1), (3) and (5) of Section 3 of the said Customs Tariff Act are allowed to be debited against MEIS Scrips.

14.05. I find that the Education Cess and Secondary Higher Education Cess are being debited against the MEIS Scrip despite being leviable under Finance Act, 2004 and Finance Act, 2007 respectively and hence not eligible for debit against MEIS Scrips.

14.06. I find that the decision of the Hon'ble Supreme Court judgment dated 06.12.2019 in the case of Unicorn Industries Vs. Union of India and others (Civil Appeal No.9237 & 9238 of 2019) wherein it has been inter-alia been held that "A notification has to be issued for providing exemption under the said source of power. In the absence of a notification containing an exemption to such additional duties in the nature of Education Cess and Secondary Higher Education Cess, they cannot be said to have been exempted. The proportion urged that simply because one kind of duty is exempted, other kinds of duties automatically fall, cannot be accepted as there is no difficulty in making the computation of additional duties, which are payable under NCCD, Education Cess, secondary and Higher Education Cess. Moreover, statutory notification must cover specifically the duty exempted. When a particular kind of duty is exempted, other types of duty or cess imposed by different legislation for a different purpose cannot be said to have been exempted."

14.07. CBIC vide para 4 of Circular No.02/2020-Customs dated 10.01.2020 has stated that the duty credit scrips issued under schemes such as MEIS, SEIS, etc. are granted as rewards / incentives for exporters under the respective FTP, as per para 3.02 of the Foreign Trade Policy 2015-2020, these scrips can be used for payment of Basic Customs Duty and Additional Customs Duty specified under Section 3(1), 3(3) and 3(5) of the Customs Tariff Act, 1975 for import of inputs or goods and for payment of Central Excise duties on domestic procurement of inputs of goods. The relevant Customs exemption notifications also allow debit of Basic Customs Duty and Additional Duties of Customs in the duty scrips. It is to mention that the debit of SWS through duty credit scrip is not envisaged in the FTP and the exemption notifications. Further it is clarified that in para 11 of the said circular that in respect of past cases of debits of SWS already made in duty credit scrips, it has been decided by the Board that for ensuing ease of doing



business, such past cases should not be disturbed and the payments made through debit in duty credit scrips may be accepted as revenue duly collected and recoveries in cash not be insisted for these cases.

14.08. From the above circular, it is very clear that the past cases of debits of SWS made through duty credit scrips alone need to be accepted as revenue duty collected and there is no instruction about the debits of Education Cess and Secondary Higher Education Cess through Scrips in the said circular. Hence, as per the said circular, the past cases pertain to debits of SWS and not the debit of Education Cess and Secondary Higher Education Cess in the MEIS scrip. Hence debit of Education Cess and Secondary Higher Education Cess in the MEIS Scrip is not proper and hence the importer is liable for payment of said amount through cash only. Hence, the importer is liable to pay the Education Cess and Secondary Higher Education Cess in cash which are levied under Finance Act, 2004 and Finance Act, 2007 and not as Customs duty under First Schedule of Customs Tariff Act, 1975 and additional duty leviable thereon under sub-section (1), (3) and (5) of Section 3 of the said Customs Tariff Act."

6. Insofar as the said reason cited by the respondent through the impugned order, the learned Counsel for the petitioner submits that, the quoting of the judgment of the Supreme Court dated 06.12.2019, made in the case of **Unicorn Industries Vs. Union of India and others (Civil Appeal No.9237 & 9238 of 2019)** is concerned, in the said judgment, in fact, exemption had been sought for by the assessee in the said case under Notification No.71/2003 of Central Excise that, the said assessee was exempted to pay excise duty and this was, when confronted, the Hon'ble Supreme Court in the said **Unicorn Industries case** has held that, since the SWS components are a separate entity which cannot be included, unless and until if specific exemption is granted in this regard.

7. The education cess was brought in to the statute book for levying the same through the Finance Act, 2004, both in Central excise duty as well as the customs duty by two separate provisions under Sections 91 and 94 of the Finance Act and since such levy of education cess had come, which had been considered to be part and parcel of duty of excise and customs duty, that position since was not prevailing till the regime of Notification No.71/2003, such exemption sought for in the **Unicorn Industries case** was negated by the Hon'ble Supreme Court. In support of his case, he relied on the



following:

"19. The education cess came to be imposed vide notification dated 10.9.2004 issued under the Finance Act, 2004. Sections 91 and 93 are extracted hereunder:

"91. Education Cess- (1) Without prejudice to the provisions of sub section (11) of Section 2, there shall be levied and collected, in accordance with the provisions of this Chapter as surcharge for purposes of the Union, a cess to be called the Education Cess, to fulfil the commitment of the Government to provide and finance universalized quality basic education.

(2) The Central Government may, after due appropriation made by Parliament by law in this behalf, utilize, such sums of money of the Education Cess levied under subsection (11) of Section 2 and this Chapter for the purposes specified in subsection (1), as it may consider necessary.

93. Education Cess on Excisable Goods. - (1) The Education Cess levied under Section 81, 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 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."

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40. Notification dated 9.9.2003 issued in the present case makes it clear that exemption was granted under Section 5A of the Act of 1944, concerning additional duties under the Act of 1957 and additional duties of excise under the Act of 1978. It was questioned on the ground that it provided for limited exemption only under the Acts referred to therein. There is no reference to the Finance Act, 2001 by which NCCD was imposed, and the Finance Acts of 2004 and 2007 were not in vogue. The notification was questioned on the ground that it should have included other duties also. The notification could not have contemplated the inclusion of education cess and secondary and higher education cess imposed by the Finance Acts of 2004 and 2007 in the nature of the duty of excise. The duty on NCCD, education cess and secondary and higher education cess are in the nature of additional excise duty and it would not mean that exemption notification dated 9.9.2003 covers them particularly when there is no reference to the notification issued under the Finance Act, 2001. There was no question of granting exemption related to cess was not in vogue at the relevant time imposed later on vide Section 91 of the Act of 2004 and Section 126 of the Act of 2007. The provisions of Act of 1944 and the Rules made thereunder shall be applicable to refund, and the exemption is only a reference to the source of power to exempt the NCCD, education cess, secondary and higher education cess. A notification has to be issued for providing exemption under the said source of power. In the absence of a notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted. The High Court was right in relying upon the decision of threeJudge Bench of this Court in Modi Rubber Limited (supra), which has been followed by another threeJudge Bench of this Court in Rita Textiles Private Limited (supra).

41. The Circular of 2004 issued based on the interpretation of the provisions made by one of the Customs Officers, is of no avail as such Circular has no



force of law and cannot be said to be binding on the Court. Similarly, the Circular issued by Central Board of Excise and Customs in 2011, is of no avail as it relates to service tax and has no force of law and cannot be said to be binding concerning the interpretation of the provisions by the courts. The reason employed in *SRD Nutrients Private Limited (supra)* that there was nil excise duty, as such, additional duty cannot be charged, is also equally unacceptable as additional duty can always be determined and merely exemption granted in respect of a particular excise duty, cannot come in the way of determination of yet another duty based thereupon. The proposition urged that simply because one kind of duty is exempted, other kinds of duties automatically fall, cannot be accepted as there is no difficulty in making the computation of additional duties, which are payable under NCCD, education cess, secondary and higher education cess. Moreover, statutory notification must cover specifically the duty exempted. When a particular kind of duty is exempted, other types of duty or cess imposed by different legislation for a different purpose cannot be said to have been exempted.

8. Therefore, the learned Counsel for the petitioner submits that, in the teeth of the decision of the Hon'ble Supreme Court in the **Unicorn Industries case** as referred to above, now the plea raised by the petitioner to seek the benefit of Circular No.2/2020 customs dated 10.01.2020, since has been rejected through the impugned order by the respondent, such rejection is untenable, he contended.

9. Learned Counsel for the petitioner would also submit that, as per Notification No.24/2015 Customs dated 08.04.2015, the whole of the customs duty leviable thereon, under the first schedule to the Customs Tariff Act, 1975 and the whole of the additional duty leviable thereon, under Section 3 of the Customs Tariff Act, 1975 are exempted, when goods are imported into India against a duty credit scrip issued by the original authority under the Merchandise Export from India Scheme ie., MEIS in accordance with paragraph 3.04 r/w. paragraph 3.05 of the Foreign Trade Policy. The relevant portion of the Notification No.24/2015 reads thus:

"Customs Duty (CVD)

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods when imported into India against a duty credit scrip issued by the Regional Authority under the



Merchandise Exports from India Scheme in accordance with paragraph 3.04 read with paragraph 3.05 of the Foreign Trade Policy (hereinafter referred to as the said scrip) from,-

(a) the whole of the duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as said Customs Tariff Act); and

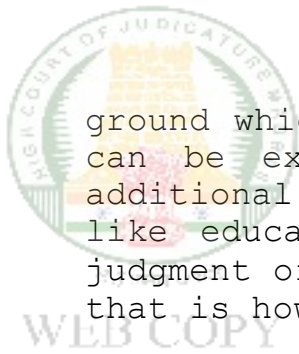
(b) the whole of the additional duty leviable thereon under section 3 of the said Customs Tariff Act."

10. Only in that context, eventhough the petitioner had paid the entire duty to the extent of Rs.22,88,86,212/-, which includes the education cess of Rs.66,66,582/- by using MEIS scrips, the impugned order now has been passed stating that, the education cess therein does not form part of the mode of payment of MEIS scrip. Therefore, the same should have been paid only by way of cash by the importer ie., the petitioner and that is the reason why, the show cause notice was issued.

11. Learned Counsel would further submit that, however, subsequently, the department of Customs issued a Circular in Circular No.2/2020 dated 10.01.2020. Under the said circular, following the **Unicorn Industries** judgment of the Hon'ble Supreme Court as referred to above, they had come to the conclusion that such kind of payment of education cess or any other SWS, by using the scrip no longer would be permitted, however, insofar as the past cases are concerned, in order to ensure ease of doing business, such past cases should not be disturbed and the payments made through debit in duty credit scrips may be accepted as revenue and recoveries in cash not be insisted for these cases. Clause 11 of the circular dated 10.01.2020, enables such a benefit conferrable to the importers which reads thus:

"11.With regard to the past cases of debits of SWS already made in duty credit scrips, it has been decided by the Board that for ensuring ease of doing business, such past cases should not be disturbed and the payments made through debit in duty credit scrips may be accepted as revenue duly collected and recoveries in cash not be insisted for these cases."

12. This kind of exemption alone, now the petitioner has sought for before the respondents, since it is a past case. Therefore, whatever has been paid by using the scrip should be accepted as if that the revenue duly collected and no recovery in cash to be insisted in these cases. However, the said benefit has been now denied to the petitioner through the impugned order, on the main



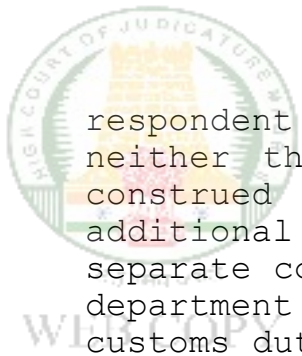
ground which has been quoted hereinabove that, that kind of benefit can be extended only for those who paid the customs duty and additional customs duty by way of scrips and not any other payment like education cess or SWS payments, for which, they quoted the judgment of the Hon'ble Supreme Court in **Unicorn Industries case** and that is how the impugned order has been passed.

13. Therefore, learned Counsel for the petitioner would submit that, in view of the aforesaid provisions stated in 2004 as well as 2007 Finance Act, where the education cess and higher secondary cess has been introduced respectively, and those higher and secondary education cess since has been declared as part of the duty, the present reason stated in the impugned order is not justifiable, as it goes against the spirit of the aforesaid provisions of the Finance Act. According to the learned Counsel for the petitioner, the import of the judgment in **Unicorn Industries case** has been misinterpreted and wrongly fit in in the present case. Therefore, the learned Counsel for the petitioner seeks indulgence of this Court against the impugned order.

14. Per contra, Mr.B.Vijay Karthikeyan, learned Standing Counsel appearing for the respondent has relied upon two judgments ie., **2006 (194) E.L.T. 11 (S.C.)** in the case of **Tata Teleservices Ltd., Vs. Commissioner of Customs** and **2019 (370) E.L.T. 3 (S.C.)** in the case of **Unicorn Industries Vs. Union of India**. By relying upon these judgments, learned Standing Counsel has made submissions that, if at all any notification has been issued, that could have been issued only by the Central Government, under its powers. Therefore, the Notification No.24/2015 dated 08.04.2015, cannot be overridden by any subsequent circular issued by the department of customs. Therefore, Circular No.2/2020 dated 10.01.2020, cannot have any overriding effect and this proposition is in consonance with the decision taken in the Hon'le Supreme Court in the two cases cited supra.

15. Learned Standing Counsel would also submit that, insofar as the plea raised by the petitioner is concerned, he has not sought for any exemption of paying any duty or education cess as the case may be, as he had paid both the duty as well as education cess. His only contention is that, he needs the benefit which has been provided under Circular No.2/2020, to be extended to the petitioner also. Insofar as the said benefit is concerned, though a decision had been taken by the customs department under the said circular not to reopen the past cases and in those cases, the duty credit scrips paid may be accepted as a revenue duly collected and the recovery not to be insisted in those cases has been provided for, such a benefit can only be extended in cases of any payments made for paying the customs duty or additional customs duty.

16. In this context, the pointed contention on the part of the

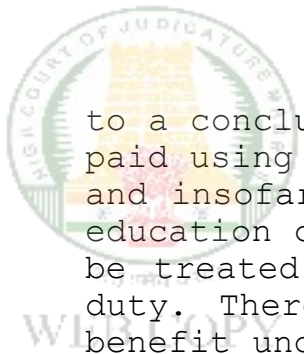


respondent as projected by the learned Standing Counsel is that, neither the education cess nor the higher education cess can be construed as part and parcel of either the customs duty or the additional customs duty. That is the reason why, since both are two separate components and capable of being differentiated, the customs department has come to a right conclusion that, if at all any customs duty had been paid by the petitioner by using scrip that can be accepted and insofar as in education cess or higher education or secondary education cess has been paid, as in the present case, such kind of payment cannot be treated as if revenue collected duly in that regard and if at all any such benefit is to be extended as per Paragraph No.11 of the Circular dated 10.01.2020, the petitioner is not entitled for that kind of benefit, because, in this case, the petitioner seeks such a benefit for payment of education cess and secondary and higher education cess through the scrips. Therefore, the learned Standing Counsel appearing for the respondents would vehemently contend that, the reasons stated in the impugned order, especially in the context of the law having been declared by the Hon'ble Supreme Court in the **Unicorn Industries case**, are justifiable and accordingly, the impugned order does not require any interference.

17. I have considered the said rival submissions made by the learned Counsel for the parties and have perused the materials placed before this Court.

18. Insofar as the factual matrix as has been projected by the petitioner is concerned, there could be no much controversy, as the petitioner had imported RBD Palmolein under 10 warehouse bills of entry and 52 bills of entry, for which, whatever the duty imposed against him had been paid, of course, by using the scrips issued under MEIS. This is an acceptable method for debiting the duty by using the credit scrips under MEIS. While paying such duty, using the scrips, the petitioner had paid the entire duty, which includes the education, secondary education or higher education cess to the total amount of Rs.22,88,86,212/-, that was accepted and the clearance of the goods had also been given by the Customs. Subsequently, the Customs department has come forward to issue a show cause notice on the ground that, while paying the duty by using the scrips, the petitioner also paid the education cess to the tune of Rs.66,66,582/-. That kind of payment for other heads other than the duty or additional duty of customs cannot be paid through MEIS scrips. Therefore, insofar as the said amount is concerned, that was demanded with interest and also it was proposed to impose the penalty under Section 117 of the Customs Act. This is how the show cause notice was issued on 19.11.2019, which was responded by the petitioner on 02.12.2019, where the petitioner by citing Circular No.2/2020 dated 10.01.2020, has sought for the benefit especially, in the context of clause 11 referred to above.

19. When that was considered, the Customs department has come



to a conclusion that, if at all any duty or additional duty had been paid using scrips that could be accepted as a payment of the revenue and insofar as the other payments like the education cess or higher education or secondary education cess are concerned, the same cannot be treated as form part of the customs duty or additional customs duty. Therefore, since it is a different component, that kind of benefit under Clause 11 of Circular No.2/2020, cannot be extended to the petitioner.

20. In aid of the said decision taken, the Customs department has heavily relied upon the decision in **Unicorn Industries case**, cited supra. The relevant portion of the Unicorn Industries case has already been quoted above, where the issue was, the assessee sought for exemption under Notification No.71/2003 of Central Excise. While deciding the same, the Hon'ble Supreme Court has made it clear that the notification dated 09.09.2003, issued in that case made it clear that exemption was granted under Section 5A of the 1944 Act, concerning additional duties under the Act of 1957 and the additional duties of excise under the Act of 1978. It was further held in that judgment that, since there has been no reference to the Finance Act, 2001 by which NCCD was imposed and the Finance Acts of 2004 and 2007 were not in vogue.

21. Therefore, the Hon'ble Supreme Court has negated the plea raised therein in the said **Unicorn Industries case**, for the specific reason that, since the Finance Act, 2004 and 2007 are post Notification No.71/2003, Central Excise regime, therefore, that kind of benefit unless and until is specifically included in the notification, such kind of benefit cannot be expected and therefore, it was negated.

22. Here in the case in hand, it is no doubt that, the exemption Notification No.24/2015 is dated 08.04.2015 ie., well after the Finance Act, 2004 and 2007. In the 2004 Finance Act, Section 91 deals with education cess and Section 93 made it clear that, the education cess levied under Section 91 in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1994, being goods manufactured or produced, shall be a duty of excise. Therefore, insofar as the Central Excise is concerned, the education cess imposed under Section 91 of the Finance Act, 2004 was to be treated as a duty of excise, in view of Section 93. Similarly, a provision is available under Section 94 of the very same Finance Act, 2004, which reads thus:

"94.Education Cess on imported goods.- (1) The Education Cess levied under section 91, in the case of goods specified in the First Schedule to the Customs Tariff Act, 1975, being goods imported into India, shall be a duty of customs (in this section referred to as the Education Cess on imported goods), at the rate of two per cent., calculated on the



aggregated of duties of customs which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under section 12 of the Customs Act, 1962 and any sum chargeable on such goods under any other law for the time being in force, as an addition to, and in the same manner as, a duty of customs, but not including-

(a) the safeguard duty referred to in section 8B and 8C of the Customs Tariff Act, 1975;

(b) the countervailing duty referred to in section 9 of the Customs Tariff Act, 1975;

(c) the anti-dumping duty referred to in section 9A of the Customs Tariff Act, 1975; and

(d) the Education Cess on imported goods.

(2) The Education Cess on imported goods shall be in addition to any other duties of customs chargeable on such goods, under the Customs Act, 1962 or any other law for the time being in force.

(3) The provisions of the Customs Act, 1962 and the rules and regulations 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 imported goods as they apply in relation to the levy and collection of the duties of customs on such goods under the Customs act, 1962 or the rules or the regulations, as the case may be."

23. Like that, insofar as the secondary and higher education cess is concerned, that has been brought in only under Finance Act, 2007, where the relevant provision is Section 126 & 129 which are extracted hereunder:

"126. (1) Without prejudice to the provisions of sub-section (12) of Section 2, there shall be levied and collected, in accordance with the provisions of this Chapter as surcharge for purposes of the Union, a cess to be called the Secondary and Higher Education Cess, to fulfil the commitment of the Government to provide and finance secondary and higher education.

(2) The Central Government may, after due appropriation made by Parliament by law in this behalf, utilise, such sums of money of the secondary and Higher Education Cess levied under sub-section (12) of section 2 and this Chapter for the purposes specified in sub-section (1) as it may consider necessary.



129. (1) The Secondary and Higher Education Cess levied under section 126, in the case of goods specified in the First Schedule to the Customs Tariff Act, 1975, being goods imported into India, shall be a duty of customs (in this section referred to as the Secondary and Higher Education Cess on imported goods), at the rate of one per cent., calculated on the aggregate of duties of customs which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under section 12 of the Customs Act, 1962 and any sum chargeable on such goods under any other law for the time being in force, as an addition to, and in the same manner as, a duty of customs, but not including-

(a) the additional duty referred to in sub-section (5) of section 3 of the Customs Tariff Act, 1975;

(b) the safeguard duty referred to in sections 8B and 8C of the Customs Tariff Act, 1975;

(c) the countervailing duty referred to in section 9 of the Customs Tariff Act, 1975;

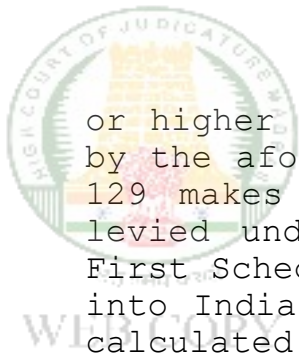
(d) the anti-dumping duty referred to in section 9A of the Customs Tariff Act, 1975; and

(e) the Education Cess chargeable under section 94 of the Finance (No.2) Act, 2004 and Secondary and Higher Education Cess on imported goods.

(2) The Secondary and Higher Education Cess on imported goods shall be in addition to any other duties of customs chargeable on such goods, under the Customs Act, 1962 or any other law for the time being in force and the Education Cess chargeable under section 94 of the Finance (No.2) Act, 2004.

(3) The provisions of the Customs Act, 1962 and the rules and regulations 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 imported goods as they apply in relation to the levy and collection of the duties of customs on such goods under the Customs Act, 1962 or the rules or the regulations made thereunder, as the case may be."

24. In Section 126 of the Finance Act, 2007, a cess to be called the Secondary and Higher Education Cess, to fulfil the commitment of the Government to provide and finance secondary and higher education shall be levied. Therefore, the levy of secondary

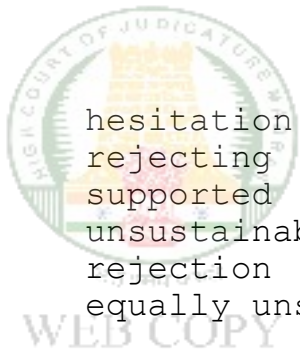


or higher education cess was first introduced in Finance Act, 2007, by the aforesaid Section 126. In the very same Finance Act, Section 129 makes it clear that the secondary and higher education cess levied under Section 126, in the case of goods specified in the First Schedule to the Customs Tariff Act, 1975, being goods imported into India, shall be as duty of customs at the rate of one percent calculated on the aggregated of duties of customs. Exactly similar wordings, *pari materia* to Section 91 and 93 is available in Section 129 of Finance Act, 2007. Therefore, the effect of these provisions of Finance Act, 2004 and 2007 is that, the education cess at the rate of 2% and higher and secondary education at the rate of 1% imposed under Finance Act, 2004 and 2007, respectively are to be treated as part of the duty of customs.

25. When that being the statutory declaration made by the Act of Parliament ie., The Finance Act, 2004 and 2007, we cannot have any different view to state that there were different components. What is the duty to be imposed on the imported goods first be calculated and accordingly, 2% of education cess and 1% of secondary and higher education cess shall be levied and imposed. Hence, when the importer pay the duty, he shall also pay the cess which become part and parcel of the duty of customs. That is the reason why the total amount of Rs.22,88,86,212/- were paid by the petitioner as duty of customs as well as education cess through the scrips of MEIS. Having accepted the same, though subsequently, in view of the notifications, if the Customs Department come forward to take a stand that the mode of payment of the education cess even though being part of the customs duty, shall not be on the same line by using the scrip, such kind of payment can be insisted upon, provided only in future cases and not in the cases where it has already been paid and where the goods have been cleared. This was exactly been made in execution by Circular No.2/2020 dated 10.01.2020.

26. When such a circular was issued by the Customs Department and the same having been implemented in respect of various people like the petitioner, the benefit of the said circular cannot be denied to the petitioner on the alleged reason that, the education cess or the higher and secondary education cess being a different component cannot be treated as customs duty or additional customs duty and therefore, the benefit conferred under Clause 11 of the said circular cannot be made available to the petitioner. The said view taken by the respondent / Customs Department, in the considered opinion of this Court, in view of the aforestated legal position, is untenable and unacceptable.

27. The quoting of the Hon'ble Supreme Court judgment in **Unicorn Industries case** is a wrong fitment of the citation, as the issue decided in the said case, in fact the principle enunciated in that case if it is culled out, certainly would support the case of the petitioner and not the respondent. Therefore, this Court has no



hesitation to state that, the reasons stated in the impugned order rejecting to give the benefit under Circular No.02/2020 is not supported by any legal basis. Therefore, the said reasons are unsustainable and therefore, based on such reason, since the rejection has been made through the impugned order, it is also equally unsustainable. Hence, it is liable to be interfered with.

28. In view of the aforesaid discussions, this Court is inclined to pass the following orders:

"The impugned order is hereby quashed. As a sequel, there shall be a direction to the respondent to give the benefit of Clause 11 of Circular No.02/2020 dated 10.01.2020 to the petitioner."

29. With the above directions, the Writ Petition stands allowed. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS I)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

MR

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To
The Commissioner of Customs (Preventive),
No.1, Williams Road,
Cantonment,
Tiruchirapalli - 620 001.

+1 CC to M/s.B.VIJAY KARTHIKEYAN, Advocate (SR-25554[F] dated 06/08/2021)

W.P. [MD]No.11003 of 2020
06.08.2021

MGJ(01.10.2021) 15P 3C