

Area based Excise Duty exemption does not cover exemption from Education Cess, NCCD



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[Analysis of Unicorn Industries \[2019\] 112 taxmann.com 127 \(SC\) 6-12-2019](#)

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. [Para 41] . Further future duties can not be presumed to be part of exemption notification issued earlier to levy of duty [Para 37]

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. [Para 41]

Facts/Background

There was scheme of re credit/refund of excise duty applicable in the state of Sikkim which provided for exemption from excise duty. Relevant notification was issued on 9-09-2003

Applicable Date of Duties/Cess

NCCD was made applicable by Finance Act 2001. Education cess was made applicable by Finance Act 2004 and Secondary Higher Education Cess was made applicable by Finance Act 2007.

Circulars extending exemption to Cess

In the circular dated 10.8.2004, reference has been made to the notification issued by Member (Customs), wherein it is stated that there is no collection of excise duty; hence, no education cess would be leviable on such clearances. Circular dated 8.4.2011 had been issued by the Central Board of Excise and Customs with respect to service tax. In case service tax stands exempted, education cess and secondary and higher education cess shall not be levied [Para 25].

SRD Nutrients and Bajaj Tempo

Supreme Court in SRD Nutrients had held that service tax exemption by Board Circular extends to exemption from education and Secondary Higher education cess. In Bajaj Tempo apex court had held in context of state of Uttarakhand that exemption from excise duty shall result exemption from NCCD also.

Decision

Larger Bench Decision not considered

However in present decision Court held that The most unfortunate part is that the binding decision of larger bench consisting of three-Judges of this Court in *Union of India v. Modi Rubber Limited*, (1986) 4 SCC 66, dealing with the similar issue, was not placed for consideration before this Court [Para 28]

Decision in Modi Rubbers

Apex court had held in Modi Rubber that exemption notification providing for "duty of " excise does not bear an extended meaning so as to include special excise duty and auxiliary excise duty [para 36]. Court also laid down that the **presumption is that** when the Central Government issues a notification granting exemption from payment of excise duty the Central Government would have considered whether exemption should be granted and if so, to what extent and can only be with reference to the duty of excise which is then leviable, not a duty to be imposed in future. Apex Court in *Modi Rubber Limited (supra)* strongly repelled the argument that it would cover the duties to be imposed in the future not prevailing at the relevant time [Para 37] A three-Judge Bench in *Rita Textiles Private Limited v. Union of India*, 1986 SCC Supp. 557, has followed the decision of *Modi Rubber Limited (supra)* [Para 38]

Circulars are not binding precedents

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.[Para 41]

Grounds for Disagreements with SRD Nutrients

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. [Para 41] The decision rendered in ignorance of a binding precedent (*Modi Rubbers*) and/or ignorance of a provision has been held to be *per incuriam*. [Para 42]The decisions in *SRD Nutrients Private Limited and Bajaj Auto Limited (supra)* are clearly *per incuriam*. [Para 43] The decision of larger bench is binding on the smaller bench [Para 42]

Exemption notification is specific document

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. {para 41]