

Bimal Jain

FCA, ACS, LLB, B.Com (Hons)

Dear Professional Colleague,

No third time cess payable on DTA clearances from EOU to DTA

The Larger Bench of the Hon'ble Tribunal has held that no third time cess is payable on clearance from an Export Oriented Unit ("EOU") to the Domestic Tariff Area Unit ("DTA"), which is subject matter of litigation for long now.

Issue: Whether third time cess is leviable on clearance from an EOU to the DTA?

Brief background: The goods manufactured by an EOU and cleared in the DTA are subjected to duty of excise. In terms of proviso to Section 3 (1) of the Central Excise Act, 1944 ("the Excise Act") duty of excise on any excisable goods which are manufactured by a 100% EOU and cleared in the DTA shall be equal to the aggregate duties of Customs leviable on like goods if imported into India.

However, Notification 2/95-C.E. dated January 4, 1995 (current Notification 23/2003-C.E. dated March 31, 2003) provided exemption in excess of 50% of the aggregate duties of customs. While computing the total duty, education cess is levied on the CVD part of the duty and again cess is paid on the total customs duty. The department has taken a view that the total amount of duty computed under Notification 2/95 CE is only excise duty payable under Section 3 of the Excise Act read with Notification 2/95-C.E. and since education cess is levied under clause 83 of the Finance Act 2004, the EOUs have to pay education cess again on the total duty. The computation of the duties under the present Notification 23/2003 assuming assessable value of the good of Rs. 100 would be as under:

Particular	Amount
Assessable Value	Rs.100.00/-
Customs Duty (assuming BCD is 5%) @ 50% of 5% i.e. 2.5%	Rs.2.50/-
Assessable value for CVD	Rs.102.5/-
CVD (assuming rate of 16%)	Rs.16.4/-
2% Education Cess on CVD	Rs.0.328/-
1% Secondary & Higher Education Cess on CVD	Rs.0.164/-
Total Customs Duty	Rs.19.392/-
2% Education Cess on total customs duty	Rs.0.388/-

Bimal Jain

FCA, ACS, LLB, B.Com (Hons)

1% Secondary & Higher on total customs duty	Rs.0.194/-
Total Duty payable	Rs.19.97/-
2% Education Cess on total duty payable	Rs.0.39/-
1% Secondary & Higher on total duty payable	Rs.0.19/-
Total Duty payable by EOU	Rs.20.55/-

In view of above, the Hon'ble Tribunal in the **Sarla Polyester Ltd. Vs. CCE [2008-TIOL-985-CESTAT-AHM]** has held that the third time cess is payable on the aggregate duties of excise payable under the proviso to Section 3 of the Central Excise Act, 1944 ("**the Excise Act**") read with Notification 2/95-CE dated January 4, 1995 and observed as under:

"the education cess is to be levied on all dues of excise. As such, whatever duty of excise the appellants are required to pay, the education cess is in addition to the same and a fact that the customs education cess stands paid, will not alter the position."

Thereafter the High Court of Bombay in **Sarla Performance Fibers Ltd. Vs. CCE [2008-TIOL-516-HC-MUM-CX]** set aside the CESTAT order and remanded the matter to the Tribunal and observed as under:

"It, prima facie, appears that under proviso to Section 3 of the Central Excise Act the goods, which are manufactured in E.O.U., when they are brought to any other place in India, for the purpose of calculating excise duty they are treated as imported goods. Therefore, it appears that by proviso to Section 3 of the Central Excise Act statutory fiction is created that the goods though actually manufactured in India are treated as imported goods for the purpose of calculating and levying the excise duty. Perusal of Section 93 of the Finance Act prima facie shows that for the purpose of levying the education cess on excisable goods the education cess is treated as part of excise duty. We, therefore, find prima facie substance in the submission made on behalf of the Appellant that when the goods manufactured by E.O.U., which are brought to any other place in India are to be treated as imported goods for the purpose of levying excise duty, the same fiction will have to be extended while calculating and levying the education cess. We are not expressing any final opinion on this question. We find from the order of the tribunal that the tribunal has not approached the question from this perspective. In our opinion, the tribunal should have considered the purpose for which the statutory fiction has been created by the legislature and whether considering that purpose the fiction can be extended while levying education cess under Section 93 of the Finance Act also."

Bimal Jain

FCA, ACS, LLB, B.Com (Hons)

On remand, as per the directions of the Bombay High Court, the Hon'ble Tribunal served notice to the general public so that all the parties who are interested may also apply as interveners. After hearing the appellants, the interveners and the departmental representative, the CESTAT in the case of **Sarla Performance Fibres Ltd. Vs. CCE (2010-TIOL-408-CESTAT-AHM)** has held as under:

*"Once education cess is added to the customs duties to arrive at aggregate of customs duties, the **question of charging education cess again does not arise**. Because once it is an enhancement, it is part of the relevant type of the duty. What is required for the purpose of proviso to Section 3 of Central Excise Act, 1944 is to arrive at aggregate of customs duties and once education cess is part of the customs duty and is an enhancement, the question of adding it again does not arise."*

Thereafter the Board vide DGEP Letter No. DGEP/DAP/A45(09-10)/2010, dated December 27, 2010 **clarified that education cess had to be paid for a third time also.**

In **Kumar Arch Tech Pvt. Ltd Vs. CCE [2011-TIOL-1180-CESTAT-DEL]**{**"Kumar Arch Case"**} the Hon'ble Tribunal of Delhi did not agree with the decision in *Sarla Performance* and referred the issue to the Larger Bench to consider the following question of law:

"Whether Education Cess and Secondary and Higher Education Cess are leviable on DTA clearances made by a 100% EOU, even if such cesses were added while calculating the aggregate of duties of customs payable under Customs Act or any other law in force at the time of import of like goods."

In the meantime the Department also appealed against *the Sarla case* in the High Court. The Gujarat High Court in **CCE Vs. Sarla Performance Fiber Ltd. [2012-TIOL-359-HC-AMH-CX]** dismissed the Revenue appeal on the ground that the appeals were not maintainable before the High Court as it was a question of rate of duty and the appeal had to be made to the Supreme Court, relevant extract of the case is as under:

"the dispute between the parties and which came to be settled by the Tribunal by the impugned order is with respect to the question whether the manufacturers are required to pay education cess on the computation of the customs duty and the CVD on which, once they have already paid such education cess . The Tribunal ruled in favour of the manufacturers and rejected the Revenue's case that such education cess was required to be paid once again. Such decision of the Tribunal would certainly be covered under the expression "the order determining a question having relation to the rate of duty of excise". If the Department is correct in its stand, the manufacturers would have to pay excise duty at a rate higher than what they have been paying. In other words, computation of excise duty would have to include component of education cess. On the other hand, if the manufacturers are correct in their stand, such education cess would be excluded. In any case, it would have a direct bearing on the rate at which manufacturers should pay the excise duty on their clearances in the DTA from EOU Units. These Appeals would not be maintainable before the High Court.

Bimal Jain

FCA, ACS, LLB, B.Com (Hons)

Such appeal would lie only before the Apex Court in terms of proviso contained in Section 35L of the Act.

So, the Revenue took the matter to the Supreme Court but the appeal was dismissed on the ground of delay.

Now the Larger Bench in Kumar Arch Case [2013-TIOL-614-CESTAT-DEL-LB] has held that cess is not payable for the third time as under:

- Education cess and SHE cess would be chargeable only once under Section 93 of Finance Act, 2004 and Section 138 of Finance Act, 2007 on the sum of basic customs duty and Additional customs duty. Further duties payable on the goods cleared into the DTA from a 100% EOU should be on par with the duties payable on goods imported from abroad into the country. There can be no objection for double taxation if the legislature has distinctly enacted it, but while interpreting general words of taxation the same cannot be so interpreted as to tax the subject twice over to the same tax.
- The intention of the legislature was never to charge education cess on education cess. In fact this is not permissible from very mode of this levy as prescribed in Section 91 of the Finance Act, 2004 and Section 136 of the Finance Act, 2007, as when a new tax is introduced as surcharge on the existing levies, the base on which the new levy as surcharge is to be calculated will include only the existing levies, not the new levy. If the Revenue's stand is accepted, and on the sum of Basic customs duty and Addl. Customs duty, first "cess on imported goods" under Section 94 of Finance Act, 2004 and Section 139 of Finance Act, 2007 is charged as duty of customs and on the aggregate of duties of customs, "cess on excisable goods," under Section 93 of Finance Act, 2004 and Section 138 of Finance Act, 2007 is charged, it would amount to charging education cess on education cess for which there is no sanction in law.
- Since the DTA clearance of a 100% EOU attract central excise duty and in terms of proviso to Section 3(1) of the Excise Act, the measure of the excise duty leviable is aggregate of duties of customs charged on import of like goods into India under Customs Act, 1962 read with Indian Customs Tariff Act, 1975 or any other law for the time being in force, this aggregate of duties of customs on which education cess under Section 93 of Finance Act, 2004 and S&H cess under Section 138 of Finance Act, 2007 is to be charged, would not include education cess and S&H cess under Section 94 of Finance Act, 2004 and Section 139 of Finance Act, 2007.

Thus on the basis of the Larger Bench judgment, the EOU may decide not to pay cess third time on clearance from an EOU to the DTA but there is possible chances that the Revenue may go for an appeal against the order of the Larger Bench.

Bimal Jain

FCA, ACS, LLB, B.Com (Hons)

Hope the information will assist you in your Professional endeavours. In case of any query/information, please do not hesitate to write back to us.

Thanks & Best Regards

Bimal Jain

FCA, ACS, LLB, B.Com (Hons)

Mobile: +91 9810604563

E-mail: bimaljain@hotmail.com

[Website: www.a2ztaxcorp.com](http://www.a2ztaxcorp.com)