

## Social Welfare Surcharge – Not Liable when no Basic Customs Duty collected

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Social Welfare Surcharge (SWS) is a surcharge levied u/s 110 of the Finance Act, 2018. It is levied as a duty of Customs on the goods imported into India, to fulfil the commitment of the Government to provide and finance education, health and social security. The question now that arises is whether this SWS would be liable when the Basic Customs Duty (BCD), on which it is to be calculated, itself is exempt. The department seems to be of the view that it is liable by relying on the decision of the Hon'ble Supreme Court in the case of M/s. Unicorn Industries v. Union of India 2019 (370) E.L.T. 3 (S.C.), given in the context of liability of Education Cess (EC) and Secondary & Higher Education Cess (SHE), when the BCD is exempt.

In this article we would analyse the provisions and the relevant cases in this context to examine whether the importer would be liable to SWS when the BCD itself is exempt and thereby not collected. If liability exists then the Export Oriented Units (EOUs), persons holding Advance Authorisation, EPCG license holders, etc. would all have to shell out this extra duty on their imports, which was never factored in their costing, leading to a disadvantage for them in the international market.

### Analysis of the legal provisions

In terms of section 110(3) of the Finance Act, 2018,

*(3) The Social Welfare Surcharge levied under sub-section (1), shall be calculated at the rate of ten per cent. on the aggregate of duties, taxes and cesses 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 the goods specified in sub-section (1) under any other law for the time being in force, as an addition to, and in the same manner as, a **duty of customs**, .....*

Thus, SWS being, a duty of Customs, would be calculated at the rate of 10% on:

- a. The aggregate of duties, taxes and cesses which are **levied and collected** u/s 12 of the Customs Act, 1962 i.e. BCD, **and**
- b. Any sum **chargeable** on the imported goods under **any other law** for the time being in force, for example IGST, GST Compensation Cess, etc. which are liable to be paid on the imported goods but chargeable under laws other than the Customs Act.

### Collection of BCD a pre-requisite

As seen above, SWS is calculated on the BCD which is actually **levied and collected**. Important to note occurrence of both these events, i.e. levy and collection, is necessary to attract the levy of SWS. Collection and levy are two different aspects. Collection is not an essential facet of levy. Absence of collection does not necessarily mean absence of levy - Peekay Re Rolling Mills v Assistant Commissioner<sup>1</sup>.

In the case of S.K. Pattanaik Versus State Of Orissa<sup>2</sup>, the Supreme Court while differentiating between 'levy' and 'collection', held as under:

*While the expression 'levy' may include both the process of taxation as well as the determination of the amount of tax or duty, the expression 'collection' refers to actual collection of the payable duty or the tax, as the case may be..."*

<sup>1</sup> 2009 ELT 3 (SC) A.I.R. 1971 Supreme Court 2377

<sup>2</sup> 2000 (115) E.L.T. 9 (S.C.)

Also, in the case of Somaiya Organics V. State of UP<sup>4</sup>, the Supreme Court held :

*In taxing statute the words 'levy' and 'collect' are not synonymous terms, (refer to Assistant Collector of Central Excise, Calcutta Division v. National Tobacco Co. of India Ltd. - 1978 (2) E.L.T. (J 416) (S.C.)= (1972) 2 SCC 560 at page 572, while 'levy' would mean the assessment or charging or imposing tax, 'collect' in Article 265 would mean the physical realisation of the tax which is levied or imposed. Collection of tax is normally a stage subsequent to the levy of the same.*

Thus, levy is the charge of tax which in any taxing statute is its heart, also called the taxable event. Occurrence of this event mentioned in the statute triggers the levy. However, mere occurrence of the taxable event does not mean collection has also happened. Levy and collection are two different events, where collection refers to the physical realization of the tax.

Hence, when goods are imported, levy is attracted u/s 12 of the Customs Act. Let us examine the scenario of an EOU. Due to exemption from BCD under notification No. 52/2003, there is effectively no collection of BCD i.e. zero collection. Hence, while calculating SWS as per section 110(3) of the Act, SWS = 10% of 0 = 0. In effect, no liability of SWS would arise when there is no actual collection of BCD due to exemption.

#### **Other exemptions from SWS**

The following are notifications providing specific exemption from levy of SWS:

- a. **Notification No.11/2018**-Customs dated 02.02.2018: Specifies a list of goods on which the levy of SWS is exempt when imported into India. These were the list of goods which were exempt from EC and SHE. These cesses were abolished and, in their place, SWS was levied whereby the exemptions were extended to SWS also.
- b. **Notification No.13/2018**-Customs dated 02.02.2018 - To exempt SWS on IGST and GST Compensation cess.

#### **Analysis of the decisions**

##### **SRD Nutrients**

In the case of SRD Nutrients Pvt. Ltd. v. Commissioner of Central Excise<sup>3</sup> the Hon'ble Supreme Court which dealt with levy of EC and SHE on excisable goods, held that when the basic excise duty is *Nil* there cannot be any liability of EC and SHE.

In this regard it is important to note that the provision for the levy of EC is similar to that of SWS. EC was introduced vide sections 91 to 93 of the Finance (No. 2) Act, 2004. Section 93(1) which provides for the manner of computation of EC, which reads as below:

*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 ..... , 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.*

Thus, EC is a surcharge, being a duty of Excise, payable by on excisable goods at the rate of 2% of the aggregate of all the duties of excise which are **levied and collected** by the Government. Similar are the provisions for the levy of SHE vide section 136 of the Finance Act, 2007.

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<sup>3</sup> (2018) 1 SCC 105 = 2017 (355) E.L.T. 481 (S.C.)

The Supreme Court in the case of SRD Nutrients *supra* held that the levy of EC and SHE would not be attracted in case there is an exemption from Excise Duty by affirming the decision given by the High Court of Rajasthan in the case of Banswara Syntex Ltd Vs Union of India<sup>4</sup> for the following reasons:

- a. Clarification in the circular of 2004 was relied upon which clarified as below:

*The Education Cess is leviable at the rate of two per cent of the aggregate of all duties of excise/customs (excluding certain duties of customs like anti-dumping duty, safe guard duty etc.), levied and collected. If goods are fully exempted from excise duty or customs duty, are chargeable to NIL duty or are cleared without payment of duty under specified procedure such as clearance under bond, there is no collection of duty. Thus, no education cess would be leviable on such clearances. In this regard, letter D.O. No. 605/54/2004-DBK, dated 21st July, 2004 issued by Member (Customs) may also be referred to.*

- b. The position explained in the circular No. 134/3/2011-S.T., dated 8-4-2011 F. No. 354/42/2011-TRU is more **rational to accept**. The Government itself has taken the position that where whole of excise duty or Service Tax is exempted, even the EC as well as SHE would not be payable, **by taking a stand different from the decision of the Tribunal** in the case of Balasore Alloys Ltd.] v. CCE, Customs and Service Tax, BBSR-I - 2010 (20) S.T.R. 506 (Tri. - Kolkata).
- c. EC is on excise duty. It means that those assessee who are required to pay excise duty have to shell out EC as well.
- d. It can, therefore, be clearly inferred that when there is no excise duty payable, as it is exempted, there would not be any Education Cess as well, inasmuch as Education Cess @ 2% is to be calculated on the aggregate of duties of excise. There cannot be any surcharge when basic duty itself is Nil.

### **Unicorn Industries**

However, a contrary by the three member bench of the Supreme court in the case of M/s. Unicorn Industries v. Union of India<sup>5</sup>, which had also analyzed the levy of EC and SHE on excisable goods. Further, this decision held that the decision in the case of SRD Nutrients *supra* is *per incuriam*. However, all of this was because of heavy reliance on the decision of the Supreme Court in the case of Union of India v. Modi Rubber Limited<sup>6</sup>.

### **Modi Rubber Ltd**

The issues under examination of the Supreme Court in the case of Modi Rubber *supra*, were:

**Issue:** The issue to be decided in this case was whether the expression 'duty of excise' is limited in its connotation only to basic duty of excise levied under the Central Excises and Salt Act, 1944 or it also covers special duty of excise levied under various Finance Bills and Acts, additional duty of excise levied under the Additional Duty of Excise (Goods of Special Importance) Act, 1957, and any other kind of duty of excise levied under a Central enactment.

**Provision:** The Court while examining the eligibility of exemption from Special Duties of Excise (**SDE**) was examining the below notification which provides for exemption from duty of excise:

Exemption notification No. 123/74-C.E., dated August 1, 1974

*In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby **exempts** tyres for motor vehicles falling under sub-item (1) of Item No. 16 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), **from so much of the duty of excise** leviable thereon as is in excess of fifty-five per cent ad valorem.*

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<sup>4</sup> 2007 (216) E.L.T. 16 (Raj.)

<sup>5</sup> 2019 (370) E.L.T. 3 (S.C.)

<sup>6</sup> 1986 (25) E.L.T. 849 (S.C.).

Another relevant provision for our examination in the present case would be section 32 of the Finance Act, 1979 which provides for the levy of the SDE, as follows:

*32. Special Duties of excise (1) In the case of goods chargeable with a duty of excise under the Central Excises Act as amended from time to time read with any notification for the time being in force issued by the Central Government in relation to the duty so chargeable there shall be levied and collected a special duty of excise equal to five per cent of the amount so chargeable on such goods.*

As per above, mere levy of the Excise Duty (**ED**) is sufficient to attract the levy of SDE. The provision above does not have the word 'collection' used for the ED, on which the SDE would be levied.

**Decision:** It was held by the Supreme Court that the exemption from '**duty of excise**' would only cover the excise duty levied under the Excise Law and **not the duty of excise levied under any other law**, since the notification has not derived power from the special statutes under which the levy of these special taxes/cesses/surcharges is attracted.

*It is, therefore, clear that where a notification granting exemption is issued only under sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 without reference to any other statute making the provisions of the Central Excises and Salt Act, 1944 and the Rules made thereunder applicable to the levy and collection of special, auxiliary or any other kind of excise duty levied under such statute, the exemption must be read as limited to the duty of excise payable under the Central Excises and Salt Act, 1944 and cannot cover such special, auxiliary or other kind of duty of excise.*

Thereby, it can be noted that *Modi Rubber supra* has only held that 'duty of excise' will not include the other special duties or surcharges levied under other statutes.

#### **Modi Rubber *supra* not applicable to the present case**

It is a settled principle that any decision is only an authority for the question that it answers. In the case of *Maheshwari Mills Ltd. Versus Union Of India*<sup>7</sup>, it was held that *Modi Rubber supra* cannot be applied to the case where the interpretation of provisions of the Act of 1978 since the said decision is only on a limited question of whether the expression 'duty of excise' would also include SDE and thereby exemption being available to SDE as well.

However, in the present case at hand, the question is not at all whether the expression 'duty of Customs' would include SWS. The only question is, when BCD is exempt whether any SWS would become payable since SWS is calculated as a percentage of the BCD collected. This precise question was answered in the case of *SRD Nutrients* by referring to the provisions and circulars that decide this specific question.

Another reason why *Modi Rubber supra* cannot be applied to the present case is that the provision for the levy of SDE is very different from the provision for the levy of EC and SHE. As mentioned above, SDE would be liable even in cases where ED is exempt since SDE is levied on the ED chargeable on the goods and does not require its collection as a criterion.

Thus, the decision in the case of *Modi Rubber supra* cannot be applied to the facts of the present case since the issue under consideration is different and also the provisions are not pari materia.

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<sup>7</sup> 1992 (58) E.L.T. 9 (Guj.)

Also, any judgement cannot be read as if it is a legislation. It has to be applied in the considering the factual situation. Thus, reliance on Unicorn Industries *supra* maybe misplaced in the present dispute of liability of SWS.

#### **Agriculture Infrastructure and Development Cess**

Some more clarity may appear while examining the levy and exemption in respect of Agriculture Infrastructure and Development Cess (AIDC). As per section 124(1) of the Finance Act, 2021

*There shall be levied and collected, in accordance with the provisions of this section, for the purposes of the Union, a duty of customs, to be called Agriculture Infrastructure and Development Cess, on the goods specified in the First Schedule to the Customs Tariff Act, 1975 (hereinafter referred to as the Customs Tariff Act), being the goods imported into India, at the rate not exceeding the rate of customs duty as specified in the said Schedule, for the purposes of financing the agriculture infrastructure and other development expenditure*

AIDC is thus not dependent or calculated on the BCD. Thereby, mere exemption from BCD will not lead to a situation of no liability of AIDC. Also, a notification 11/2021-Cus dated 01.02.2021 was issued which provided for exemption. In such notification exemption as per entry 19 read with S. No. 7 of Annexure, exemption from AIDC is provided to goods imported under notification 52/2003-Cus *ibid*. This clearly indicates that since AIDC is not exempt in cases where BCD is exempt, this specific exemption was supposed to be given. No such exemption is required for SWS since SWS is calculated as a % of the BCD collected and thereby no specific exemption given for EOUs importing under notification 52/2003-Cus.

#### **Concluding remarks**

However, since there are conflicting decisions of the SC and the larger bench decision is not in favour of the taxpayers, it is time that the Government refers this situation to the Law Committee to get a proper view and do the needful so that this litigation, which would finally not benefit the Government but would benefit the professionals who would work to bring justice to the litigants, does stop at this point and the Government and judiciary concentrate their time and efforts on many other cases that require resolution.