

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

EXCISE APPEAL NO: 88957 OF 2014

[Arising out of Order-in-Original No: 105/04/V/2014/COMMR/ANS dated 30th May 2014 passed by the Commissioner of Central Excise, Mumbai – V.]

Mahindra & Mahindra Ltd

(Automotive Sector)

Akurli Road, Kandivali East, Mumbai - 400101

... Appellant

versus

Commissioner of Central Excise

Mumbai – V

5th Floor, Kendriya Utpad Shulk Bhavan, Sector ‘E’

Plot No. C-24, Bandra-Kurla Complex

Bandra (E), Mumbai - 400051

...Respondent

APPEARANCE:

Shri Gajendra Jain, Advocate with Shri Rajesh Ostwal, Advocate for the appellant

Shri Dharendra Kumar, Joint Commissioner (AR) for the respondent

CORAM:

HON’BLE MR C J MATHEW, MEMBER (TECHNICAL)

HON’BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 85182 /2023

DATE OF HEARING:

17/08/2022

DATE OF DECISION:

16/02/2023

PER: C J MATHEW

The issue in controversy in this appeal of M/s Mahindra &

Mahindra Ltd (Automotive Sector), Kandivali, assailing the order¹ of adjudication of Commissioner of Central Excise, Mumbai – V is on the short point of recovery of credit distributed by the registered ‘input service distributor’ which, in addition to the appellant unit, also undertakes manufacture at Rudrapur and Haridwar both of which are entitled to ‘area based exemption’ extended by notification no. 50/2003-CE dated 10th June 2003 and, according to central excise authorities, precluded thereby, from deriving the benefits of CENVAT Credit Rules, 2004 to such extent.

2. The appellant had, during 2007-08 to 2012-13, availed credit of ₹ 42,13,65,443/- and proceedings were initiated against them to disallow ₹ 8,35,24,797/- pertaining to credit attributable to the other two factories in proportion to production that should, according to central excise authorities, have been excluded from the pool available for distribution.

3. The appellant had submitted before the adjudicating authority that the said factories, even though exempted from basic excise duty, could not be said to have been manufacturing ‘exempted goods’ within the meaning of rule 2(d) of CENVAT Credit Rules, 2004 as ‘automobile cess’ levied under the Industrial (Development and Regulation) Act, 1951, along with other applicable cesses thereon, was being fully discharged by them. This plea did not find resonance

¹ order-in-original no. 105/04/V/2014/COMMR/ANS dated 30th May 2014

in the impugned order which held that

‘43. As per Rule 2(d) of Cenvat Credit Rules, 2004 exempted goods means excisable goods which are exempted from the whole of duty of excise leviable thereon and includes goods which are chargeable to Nil rate of duty. The Central govt. has the power to grant exemption full or partial from payment of duty by issue of a notification under Section 5A of the Act, where exemption is granted from duty of excise it means exemption only from basic excise of duty. Exemption from additional excise duty or from cess if intended to be granted has to be spelt out separately in the same or in a different notification.

44. Duty of Excise is levied & collected on any excisable goods which are produced or manufactured and of the rates forthin First Schedule/ Second Schedule to the Central Excise Tariff Act 1985 as per Section 3 of the Central Excise Act 1944. However Automobile Cess and Industrial Cess are imposed under Industries (development and Regulation) Act 1951, Education Cess and The Secondary & Higher Education Cess levied under Finance Act 2004 and Fianance Act 2007 respectively. Cess is the levy for some administrative expences/ particular purpose levied under different Act and collected by Central Excise department. Therefore the noticee contention that gooods manufactured at their Haraidwar and Rudrapur units are not exempted from payment of duty is misleading and they intentionally availed inadmissible Cenvat Credit of service Tax piad on the input Service which are attributable to their plants, the finished goods of which were exempted from payment of Central excsie duty contravening the provisions of Rule 7(b) of Cenvat Credit Rules, 2004.’

4. According to Learned Counsel for the appellant, the manufacturing unit at Kandivali is an undertaking of M/s Mahindra & Mahindra Ltd, with their corporate office at Worli distributing credit of services procured in common for all three factories, and the disputed credit is limited to that distributed to the Kandivali undertaking in proportion to the sales of each of the units to that extent that reversal of credit under rule 6 of CENVAT Credit Rules, 2004 had not been done. According to him, subsequent to the issue of the impugned order, the legality of discharge of ‘automobile cess’ sufficing to exclude the units at Rudrapur and Haridwar from being considered as manufacturers of ‘exempted goods’ was upheld in *Mahindra & Mahindra Ltd v. Commissioner of Central Excise*² by reversing the decision of the Tribunal challenged by them in appeal before the Hon’ble High Court of Bombay.

5. Learned Authorised Representative contends that the impugned order is correct for being in conformity with the decision of the Tribunal in *Fosroc Chemicals India Pvt Ltd v. Commissioner of Central Excise & Service Tax, Bangalore – LTU*³ and that the decision of the Hon’ble Supreme Court in *Bajaj Auto Limited v. Union of India*⁴, following the earlier decision in *SRD Nutrients Private Ltd v.*

² [2019 (12) TMI 230-HOMBAY HIGH COURT]

³ [2016 (42) STR 28 (Tri.-Bang.)]

⁴ [2019 (366) ELT 577 (SC)]

*Commissioner of Central Excise, Guwahati*⁵ that discarded the claim of Revenue to limit exemption under the notification *supra* to the basic excise duty on the finding that the ‘other cess’ was also so entitled owing to being based on basic excise duty. It was also pointed out that exemption from basic excise duty on clearances effected by the units at Rudrapur and Haridwar was not in dispute.

6. On perusal of the decision of the Hon’ble High Court of Bombay in *re Mahindra & Mahindra Ltd*, we find that there is an elaborate discussion on the logic in the decision of the Tribunal to narrow the intent of rule 6 of CENVAT Credit Rules, 2004 to basic excise duties only. Taking note that the submission of Revenue mirrored the decision of the Hon’ble High Court of Uttarakhand in *Hero Motocorp Ltd v. Commissioner of Central Excise, Dehradun*⁶, the Hon’ble High Court of Bombay held that the distinction in the phrases in section 2A of Central Excise Act, 1944 was not intended as mutually exclusive enumeration. Differing from the Hon’ble High Court of Uttarakhand in *re Hero Motocorp Ltd* which was found to have relied upon the judgment of the Hon’ble Supreme Court in *Union of India and Others v. Modi Rubber Ltd and Others*⁷ that arose from an expression in Central Excise Rules, 1944 and that, ironically, the appeal against the order of the Hon’ble High Court of Uttarakhand

⁵ [2017 (355) ELT 481 (SC)]

⁶ [2018 (14) GSTL 200 (Uttarakhand)]

⁷ [1986 (25) ELT 848 (SC)]

was allowed by the Hon'ble Supreme Court on the basis of the decision in *re Bajaj Auto Limited* approving the coverage of exemption to National Calamity Contingent Duty (NCCD), the Hon'ble High Court of Bombay held that the principle laid down in *re Bajaj Auto Limited* would exclude 'automobile cess' from the exemption as it was chargeable on value and not on basic excise duty, which was 'nil', thus

'7(c). Ms. Cardozo, Learned Counsel for the Department, supports the Tribunal's conclusion. She relies on a Division Bench decision of Uttarakhand High Court in the case of Hero Motocorp Ltd. v. Commissioner of Central Excise - 2018 (14) GSTL 200 (Uttarakhand) to support it. In Hero Motocorp, the appellant before the Court was a manufacturer of motor cycles, which were exempt from payment of basic excise duty, but were subject to National Calamity Contingent Duty ('NCCD'), Education Cess ('EC'), and Secondary and Higher Education Cess ('SHEC'). The appellant adjusted Cenvat credit of duty paid on inputs against payment of NCCD, EC and SHEC. Uttarakhand High Court observed that NCCD and the cesses were undoubtedly surcharges by way of duties of excise, but they were not levies under the Act; they were levies under the concerned Finance Acts. Since they were part of the basket of levies embraced under Rule 3(1) of Cenvat Credit Rules making up the aggregate Cenvat credit, there was no doubt the assessee could make use of the credit of basic excise duty under the Act for payment of NCCD and the cesses on the final products. But, as for utilization of such credit for payment of NCCD and other cesses on the final products which were otherwise exempted from payment of basic excise duty, the Court held that it was

impermissible. The Court held that Rule 6 was intended to cover those cases, where the main duty, which was the basic excise duty, was exempted. It construed the expression “duty of excise” appearing in the definition of “exempted goods” (in respect of which Rule 6 applied) to be covering only the basic excise duty payable under the Act. The Court held that the basic excise duty was the substantial duty, out of the aggregate levies on the final product; apparently, the intention of rule-makers was that when the final product was exempted from payment of substantial part of the aggregate levies, the assessee, who opted for the benefit of exemption from duty under Section 3 of the Act, could not, at the same time, claim further benefit by way of Cenvat credit. The Court, accordingly, rejected the appellant’s case that it was entitled to claim Cenvat credit of basic excise duty paid on the raw materials for payment of NCCD and the cesses on the final products exempted from payment of basic excise duty. Learned Counsel for the Department submits that the decision in Hero Motocorp squarely covers the present case, and the law stated therein deserves to be followed.

7(d). Having regard to (i) the nature of the various duties or cesses [which are in addition to the duty of excise leviable under the Act or additional duty of excise leviable under Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957], which are nothing but levies of excise, and (ii) the overall scheme of Cenvat credit, as contained in the Rules of 2002 as well as 2004, there is no obvious or self-evident reason why the expression ‘duty of excise’ used in the definition of “exempted goods” should not include these other levies. It matters not that these additional duties or cesses are not to be traced to the Act or are provided for by other enactments such as Finance Acts, or that they are levied as an increment, or are expressed as a

proportion, to an existing tax (namely, basic duty of excise). After all, as the Supreme Court has explained in the case of Guruswamy & Co. v. State of Mysore [(1967) 1 SCR 548], ‘cess’ means nothing but ‘tax’ and must be judged of in the same way as the validity of the tax (here, excise duty) to which it is an increment; and as for the taxing power of the State for its levy, it can be traced only to Entry 84 of Schedule VII to the Constitution, which is ‘tax on manufacture of goods’, i.e. excise duty. Besides, as explained in TVS Motor Co. Ltd. v. Union of India [2015 (323) ELT 57 (Kar.)], the phrase “duties of excise” and “duty of excise” were used originally in the Act inter-changeably, namely, sometimes in plural and sometimes in singular. When the new term “Cenvat” came to substitute these terms as on 12 May 2000, in order to overcome the difficulty of replacing these words in the entire Act, Section 2A was introduced in the Act with effect from 12 May 2000 by Finance Act, 10/2000, whereunder the expressions “duty”, “duties”, “duty of excise” and “duties of excise” were to be construed to include a reference to “Central Value Added Tax (Cenvat)”. As the Supreme Court said in TVS Motor Co. Ltd., this clearly indicated that there could be no distinction between the phrases “duty”, “duties”, “duty of excise” and “duties of excise”.

7(e). The rationale of the Tribunal’s decision in the present case that the expression used in the definition of “exempted goods” in Rule 2(d) being “duty of excise” and not “duties of excise”, there being a distinction between them, the goods are to be treated as exempted if they are exempt from payment of basic excise duty as opposed to all excise duties, thus, holds no water. The singular use of the word “duty” cannot be considered as a decisive basis for construing the expression “exempt from the whole of duty of excise” in Rule 2(d). The

only other reason cited by the Tribunal for its interpretation that Rule 3 of Cenvat Credit Rules, 2002/2004 allows a manufacturer credit of all duties of excise, i.e. basic duty of excise and additional duty of excise, and also of other duties and cesses such as education cess, national calamity contingent duty, etc., but “duty of excise” has been referred to Rule 3(1)(i) and 3(1)(ii) and nowhere else, whereas other cesses and duties have been separately referred to, is also neither here nor there. Once it is seen that these cesses and duties are also excise duties and on that basis are included in the Cenvat credit scheme, as indicated by Rule 3 itself, the fact that these are referred to as cesses or duties loses its significance altogether; it is hardly determinative for construing the expression “duty of excise”.

7(f). The decision of Uttarakhand High Court in Hero Motocorp Ltd. relies, apart from the singular-plural dichotomy referred to above, heavily on the Supreme Court judgment in Union of India v. Modi Rubber Ltd. [(1986) 4 SCC 66 : 1986 SCC (Tax) 781 = 1986 (25) ELT 849 (S.C.)]. In Modi Rubber Ltd., the Supreme Court was construing the expression “duty of excise” used in two exemption notifications issued under Rule 8(1) of Central Excise Rules. The question before the Court was whether the expression was limited in its connotation only to basic duty of excise levied under the Act or it also covered 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 any other Central enactment. The Supreme Court held that the expression “duty of excise” denoted only the basic duty of excise leviable under the Act and not the other duties. It was argued by the assessee before the Supreme Court that the expression “duty of excise” was

one of large amplitude and in the absence of restrictive or limitative words indicating that it was intended to refer to only duty of excise leviable under the Act, it must be held to cover all duties of excise - whether leviable under the Act or any other enactment. The assessee contrasted the subject notifications with other notifications issued under the Act which specifically confined the exemption granted thereunder to duty of excise leviable under the Act unlike the subject notifications. The Court did not find much substance in this submission. The Court was of the view that it was not uncommon to find that the legislature, sometimes, with a view to making its intention clear beyond doubt, uses language ex abundanti cautela though it may not be strictly necessary, but, even without it, the same intention could be spelt out as a matter of judicial construction. The Court observed that this would be more so in the case of subordinate legislation made by the executive. Though the officer drafting a particular piece of subordinate legislation in the Executive Department may employ words to make the intention express or sometimes even for greater completeness, the absence of such words does not necessarily lead to the inference that the expression used in the subordinate legislation was without any limitation or was of wide amplitude. The Court was of the view that absence of these restrictive or limitative words did not absolve it from the obligation to interpret the expression “duty of excise” in the two notifications. Whilst construing the expression, thus, the Court, in the first place, noted that the notifications were issued under Rule 8(1); if so, the expression “duty of excise” used in them ought to bear the same meaning which it had in Rule 8(1) and that meaning clearly was : excise duty payable under the Central Excises and Salt Act, 1944. Such “duty”, for the purposes of the Rules, was defined in Clause (v) Rule 2 to mean “duty payable under Section 3 of the Act”. It could not, in the

circumstances, bear the extended meaning suggested by the assessee so as to include special excise duty or auxiliary excise duty. Moreover, the Court noted that when the first notification was issued, namely, as of 1 August 1974, there was no special duty of excise leviable on the concerned goods, i.e. "tyres". It came to be levied under various Finance Acts enacted year to year subsequently. The Court was of the view that, in the premises, it was difficult to understand how the expression "duty of excise" in a prior notification could possibly be read as comprehending special duty of excise which did not even exist at the date of the notification and came to be levied almost four years later. The Court noted that the presumption was that when the notification granting exemption from payment of excise duty was issued by the Central Government under Rule 8(1), the Central Government would have applied its mind to the question whether exemption should be granted and if so, to what extent, and obviously that could only be with reference to the duty of excise which was then leviable. The Central Government could not be presumed to have projected its mind into the future and granted exemption in respect of excise duty which might be levied in future, without considering the nature and extent of such duty and the object and purpose for which such levy might be made and without taking into account the situation which might be prevailing then. The Court repelled the assessee's argument that sub-section (4) of Section 32 of the Finance Act, 1979 - there being an identical provision in each Finance Act levying special duty of excise - which provided that the provisions of the Act and the Rules made thereunder, including those relating to refunds and exemptions from duty, shall, as far as may be, apply in relation to levy and collection of such special duty of excise as they apply in relation to levy and collection of the duty of excise under the Act. The Court observed that undoubtedly,

by reason of sub-section (4) of Section 32 of the Finance Act and similar provisions in other Finance Acts, Rule 8(1) would become applicable, empowering the Central Government to grant exemption from payment of special duty of excise, but whenever the Central Government exercised such power, it would be doing so under Rule 8(1) read with sub-section (4) of Section 32 or other similar provision. The reference to the source of power in such a case would not be just to Rule 8(1), since it did not of its own force and on its own language apply to granting exemption in respect of special duty of excise; the reference would then have to be to Rule 8(1) read with sub-section (4) of Section 32 or other similar provision. The provisions construed by the Supreme Court in Modi Rubber Ltd. and the rationale of the Court in construing the expression “duty of excise” in that matter can, thus, have no place or relevance to the issue which we are concerned with in the present case. In the present case, the expression “duty of excise” is used in Cenvat Credit Rules, which themselves include the various duties and cesses referred to therein, including the education cess and auto cess, etc. as part of “Cenvat”, which is an equivalent expression to “duty of excise” after the Act was amended by introducing Section 2A therein. The expression “duty of excise” used in Cenvat Credit Rules, thus, does not, by its own force or on its own logic, lend to a distinction between basic duty of excise under the Act and special excise duties or cesses or other duties leviable under other enactments.

7(g). We are in respectful disagreement with the judgment of Uttarakhand High Court in Hero Motorcorp Ltd., to the extent it holds that Rule 6 of Cenvat Credit Rules was intended to cover those cases, where the main duty, which is the basic excise duty, was exempted. The only reasons for this statement indicated in Hero Motorcorp Ltd. were that, firstly,

when the rulemaker made the Cenvat Credit Rules, it had before it the understanding of the phrase “duty of excise” in terms of the judgment of the Supreme Court in Modi Rubber Ltd. and, secondly, the expression “whole of the duty” was appropriately traced to the provisions contained in Section 5A of the Act, which enabled the authority to grant exemption from the whole of the duty or exemption which was partial in nature. As we have noted above, the construction of the phrase “duty of excise” in Modi Rubber Ltd. was not a general construction of the words “duty of excise” wherever they were used. It was in particular reference to the expression “duty of excise” used in a subordinate piece of legislation, namely, a notification issued under Rule 8(1) of the Central Excise Rules. Rule 8(1) read with Rule 2(V) specifically covered only duty of excise “under the Central Excises and Salt Act”; and the expression “duty of excise” used in the notification could not be given any extended meaning beyond what it bore under Rule 8(1) itself. (Incidentally, when the case of Hero Motocorp was carried in appeal by the assessee, the Supreme Court allowed the appeal, though that was on the ground that NCCD, as held by the Supreme Court in Bajaj Auto Limited v. Union of India [2019 (5) SCALE 325] = 2019 (366) ELT 577 (SC), was in the nature of excise duty and the assessee was, accordingly, entitled to the benefit of the exemption notification. The decision in Bajaj Auto Ltd. was, in turn, based on the case of SRD Nutrients Pvt. Ltd. v. Commissioner of C. Excise, Guwahati [2017 (335) ELT 481 (SC)]. In that case, the Supreme Court had held that “Education cess” being a surcharge on excise duty, payable as a percentage of ‘value’ of central excise duty, i.e. basic excise duty, would partake the character of that very excise duty and was, accordingly, exempt under the notification applicable to units in North-

Eastern States, under which the assessee in that case was claiming exemption from excise duty.)'

7. We also find that the decision of the Tribunal in *re Fosroc Chemicals India Pvt Ltd* was also about a dispute in which the 'other cess' on the output of the units, entitled to the same 'area based exemption', was to be computed on the basic excise duty which was exempted. The distinction of 'automobile cess', in so far as not being a levy under Central Excise Act, 1944 and not levied on basic excise duty, with 'other cess', that are exempted owing to exemption of basic excise duty in the decision of the Hon'ble High Court of Bombay, makes the position abundantly clear.

8. Nothing further survives in the finding of the adjudicating authority in the impugned order as the discharge of 'automobile cess' effaces coverage of rule 6 of CENVAT Credit Rules, 2004 to the output of the Rudrapur and Haridwar factories. Consequently, we set aside the impugned order and allow the appeal.

(Order pronounced in the open court on 16/02/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)