

---

**(2019) 12 BOM CK 0012**

**In the Bombay High Court**

**Case No :** Central Excise Appeal No. 119, 120, 145, 202, 220, 221, 234 Of 2007, 225 Of 2008

M/s. Mahindra & Mahindra Ltd And Ors

APPELLANT

Vs

Commissioner Of Central Excise Mumbai V And Ors

RESPONDENT

---

**Date of Decision :** 04-12-2019

**Acts Referred:**

Central Excise Act, 1944 — Section 2A, 2(24), 3, 3(1), 4, 4(4)(d), 4(4)(d)(ii), 5A, 35G, 37  
Finance Act, 2004 — Section 93  
Industrial (Development And Regulation) Act, 1951 — Section 9  
Additional Duties Of Excise (Goods Of Special Importance) Act, 1957 — Section 3  
Finance Act, 1979 — Section 32(4)  
Uttar Pradesh Sheera Niyantaran Adhiniyam, 1964 — Section 8(4)  
Income Tax Act, 1961 — Section 271, 271(1)(c)  
Finance Act, 1999 — Section 9(1)(ii)  
Cenvat Credit Rules, 2002 — Rule 2(d), 2(V), 3, 6, 6(1), 6(3), 6(3)(b), 8(1)  
Cenvat Credit Rules, 2004 — Rule 2(d), 2(V), 3, 3(1), 3(1)(i), 3(1)(ii), 3(3), 6, 6(1), 6(2), 6(3), 6(3)(b), 8(1)  
Central Excise Rules, 2002 — Rule 12B

**Citation :** (2019) 12 BOM CK 0012

**Hon'ble Judges :** M.S. Sanklecha, J;S.C. Gupte, J

**Bench :** Division Bench

**Advocate :** Sriram Sridharan, Prakash Shah, P.S. Cardozo

**Final Decision :** Allowed

---

**Judgement**

S.C. Gupte, J

1. These appeals, filed under Section 35G of the Central Excise Act, 1944, challenge an order dated 16th February, 2007 passed by the Customs Excise and Service Tax Appellate Tribunal, West Zone Branch, Mumbai (Tribunal) in appeal. The impugned order, Order No.A/107 to 110/2007/C.1(EB), passed in Appeal Nos.3/2183, 2184, 471, 3118/06, disposed of four appeals filed by the Assessee herein involving Cenvat credit in respect of inputs used for manufacture of exempted as well as dutiable goods without maintaining separate accounts for

such use. Both the Assessee and the Revenue are in appeal before us from the common impugned order dated 16th February, 2007.

2. The Assessee's appeals (being Appeal Nos. 119, 202, 234, 145, & 120 of 2007 and 225 of 2008) were admitted on the following substantial questions of law:

a) Whereas CESTAT was correct in law in holding in para 31, that though education cess levied and collected from the Appellants on tractors is a duty of excise, that tractors are exempted goods within the meaning of Rule 6(1), since tractors are wholly exempt from basic excise duty levied under Section 3(1) of Central Excise Act?

b) Whether in the facts and circumstances of the case CESTAT was correct in invoking provisions of Rule 6(1) of the Cenvat Credit Rules, 2002 or Cenvat Credit Rules, 2004?

c) Whether CESTAT was correct in concluding that expression 'duty of excise' appearing in Rule 2(d) of the Cenvat Credit Rules 2002 / Cenvat Credit Rules, 2004 while defining "exempted goods", will cover only duty prescribed in First Schedule and the Second schedule of the Central Excise Tariff Act, 1985 read with Section 3(1) of Central Excise Act, 1944 and no other duties of excise like education cess though duly specified in Rule 3(1) and Rule 3(3) of Cenvat Credit Rules, 2004?

d) Whether, in law, CESTAT is correct in concluding that Rule 6(1) is attracted to the present case, despite the position that (i) duty of excise in the form of education cess under Section 93 of Finance Act, 2004 is duly levied and paid on tractors and / or (ii) duty of excise in the form of cess under Section 9 of Industrial (Development and Regulation) Act, 1951 is duly levied and paid on tractors?

e) Whether in the facts and circumstances of the case, the CESTAT was correct in holding that an amount equal to 10% paid in terms of Rule 6(3)(b) of the Cenvat Credit Rules, 2004 is not tax and hence not excludable from the sale price of the exempted goods?

f) Whether the decision of CESTAT that amount payable under Rule 6(3)(b) is not a tax is correct particularly in view of the paras 14 and 15 of the decision of the Hon'ble Supreme Court in Tata Iron & Steel Co. Ltd., v/s. CCE - 2002 (146) ELT 3 (SC)?

g) Whether in the facts and circumstances of the case CESTAT was correct in holding that amount of 10% is payable by the Appellate under Rule 6(3)(b) of the Cenvat Credit Rules, 2004 on the sale price charge by the Appellant for the tractors without excluding 10% payable in terms of Rule 6(3) (b)?

3. The Revenue's appeals (being Appeal Nos.220 and 221 of 2007) were admitted on the following substantial questions of law:-

"(a) Whether on true and proper interpretation of Rule 6(1) of Cenvat Credit

Rules 2004 the Assessee is not entitled to take Cenvat Credit on the inputs used exclusively for manufacture of "Exempted Goods" i.e. Tractor w.e.f. 08-07-2004?"

(b) Whether the Tribunal is justified in holding that the Assessee is entitled to take Cenvat Credit on all inputs including inputs exclusively used in the manufacture of Exempted Final Product contrary to the provisions of Rule - 6(1) of Cenvat Credit Rules 2004?

(c) Whether the Notification No.27/2005 - CE (NT) dated 16-05-2005 adding Explanation III to Rule 6 (3) only is not applicable to Rule 6(1) of Cenvat Credit Rules, 2004?

(d) Whether the Notification No.27/2005-CE (NT) dated 16-05-2005 which clarifies the provisions of Rule 6 (3) of Cenvat Credit Rules 2004 is clarificatory in nature and therefore applicable retrospectively?"

4. At the hearing, with the assistance of the Advocates for the parties, we reformulated the substantial questions of law in the Assessee's appeal and the Revenue's appeal as under:-

(A) Substantial questions of law in Assessee's Appeal:-

(i) Whether on the facts and circumstances of the case and in law, was the Tribunal justified in holding that though auto cess and education cess were duties of excise, yet the goods on which they were paid, continued to be exempted goods as basic excise duty was not payable thereon?

(ii) Whether on the facts and circumstances of the case and in law, was the Tribunal justified in holding that the amount of 8% (later raised to 10%) of the price of exempted goods, required to be paid under Rule 6(3)(b) of Cenvat Credit Rules, 2002 & 2004 (for not maintaining separate accounts), was a mere facilitation measure and not in the nature of tax, and therefore not allowable as a deduction to arrive at the assessable value of goods?

(B) Substantial question of law in Revenue's Appeal:-

(iii) Whether on the facts and circumstances of the case and in law, was the Tribunal justified in holding that Cenvat Credit could be utilized by the Assessee, where common inputs were used along with non-common inputs in manufacture of exempted goods, as Explanation - III added to Rule 6 (3)(b) of Cenvat Credit Rules inserted w.e.f. 16 May, 2005 was prospective in nature?

Summary of facts:

5. The assessee - Mahindra & Mahindra Ltd. ("Assessee") is engaged in the manufacture of tractors, tractor skids, IC engines and transmission assemblies and parts thereof. While tractors manufactured by it were exempted from excise duty, the other items such as tractor skids, IC engines, transmission assemblies and parts thereof were dutiable and cleared on payment of duty. The Assessee took Cenvat credit in respect of all inputs which were used for manufacture of

tractors as also other dutiable goods without maintaining separate accounts for use of inputs in tractors (exempted goods) and other goods (dutiable goods). As required by Rule 6(3) of Cenvat Credit Rules, 2002 and the equivalent rule of Cenvat Credit Rules, 2004, it accordingly paid amounts equal to 8% (upto 9.9.2004) and 10% (from 10.9.2004) of the total price (excluding sales tax and other taxes) of exempted final goods (i.e. tractors) cleared for home consumption. These amounts (8% or 10%, as the case may be) were recovered from its customers by the Assessee in addition to the sale price charged. It was the Department's case that these amounts were payable on the entire amount recovered from the customer, that is to say, not just the net sale price, but the sale price plus 8% / 10% duty. Since they were not so paid, demands were raised on the Assessee. The Department also found that the Assessee had taken credit in respect of some inputs which were exclusively used for the manufacture of exempted goods and issued show cause notices, accordingly, demanding recovery of the credit wrongfully taken. The Commissioner, Central Excise, Mumbai held against the Assessee on all issues. Being aggrieved, the Assessee filed appeals before the tribunal. The tribunal partly allowed the appeals. The Department and the Assessee are aggrieved by different parts of the order, as noted above.

#### Legal Provisions:

6. We are essentially concerned here with the interpretation of various sub-rules of Rule 6 of Cenvat Credit Rules, 2002 (applicable upto 9.9.2004) and Cenvat Credit Rules, 2004 (from 10.9.2004) in the context of "exempted goods". These two sets of Cenvat Credit Rules are made by the Central Government in exercise of powers conferred on it by Section 37 of the Central Excise Act, 1944 ("Act"). They inter alia provide for (i) eligibility for availment of Cenvat credit of various duties (which generally go by the description of duties of excise) paid on inputs by any manufacturer of final products, (ii) conditions for allowing such Cenvat credit and (iii) obligations of manufacturers of dutiable and exempted goods for availment of such Cenvat credit. Rule 6 of Cenvat Credit Rules, 2002, as was applicable at the relevant time, is quoted below.

#### Rule 6. Obligation of manufacturer of dutiable and exempted goods.-

(1) The CENVAT credit shall not be allowed on such quantity of inputs which is used in the manufacture of exempted goods, except in the circumstances mentioned in sub-rule (2).

Provided the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12B of the Central Excise Rules, 2002 on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.

(2) Where a manufacturer avails of CENVAT credit in respect of any inputs, except inputs intended to be used as fuel, and manufactures such final products which are chargeable to duty as well as exempted goods, then, the manufacturer

shall maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted goods and take CENVAT credit only on that quantity of inputs which is intended for use in the manufacture of dutiable goods.

(3) The manufacturer, opting not to maintain separate accounts shall follow either of the following conditions, as applicable to him, namely:-

(a) if the exempted goods are-

- i. goods falling within heading No. 22.04 of the First Schedule to the Tariff Act;
- ii. Low Sulphur Heavy Stock (LSHS) falling within Chapter 27 of the said First Schedule used in the generation of electricity;
- iii. Naphtha (RN) falling within Chapter 27 of the said First Schedule used in the manufacture of fertilizer;
- iv. Omitted.
- v. newsprint, in rolls or sheets, falling within heading No.48.01 of the said First Schedule;
- vi. final products falling within Chapters 50 to 63 of the said First Schedule;
- vii. Naptha (RN) and furnace oil falling within Chapter 27 of the said First Schedule used for generation of electricity;
- viii. goods supplied to defence personnel or for defence projects or to the Ministry of Defence for official purposes, under any of the following notifications of the Government of India in the erstwhile Ministry of Finance (Department of Revenue), namely:-

(1) No. 70/92-Central Excise, dated the 17th June, 1992, G.S.R. 595 (E), dated the 17th June, 1992;

(2) No. 62/95-Central Excise, dated the 16th March, 1995, G.S.R. 254 (E), dated the 16th March, 1995;

(3) No. 63/95-Central Excise, dated the 16th March, 1995, G.S.R. 255 (E), dated the 16th March, 1995;

(4) No. 64/95-Central Excise, dated the 16th March, 1995, G.S.R. 256 (E), dated the 16th March, 1995,

the manufacturer shall pay an amount equivalent to the CENVAT credit attributable to inputs used in, or in relation to, the manufacture of such final products at the time of their clearance from the factory; or

(b) if the exempted goods are other than those described in condition (a), the manufacturer shall pay an amount equal to eight per cent. of the total price,

excluding sales tax and other taxes, if any, paid on such goods, of the exempted final product charged by the manufacturer for the sale of such goods at the time of their clearance from the factory.

Explanation I.- The amount mentioned in conditions (a) and (b) shall be paid by the manufacturer by debiting the CENVAT credit or otherwise.

Explanation II.- If the manufacturer fails to pay the said amount, it shall be recovered along with interest in the same manner, as provided in rule 12, for recovery of CENVAT credit wrongly taken.

(4) No CENVAT credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year.

(5) The provisions of sub- rule (1), sub-rule (2), sub-rule (3) and sub-rule (4) shall not be applicable in case the exempted goods are either-

(i) cleared to a unit in a free trade zone; or

(ii) cleared to a unit in a special economic zone; or

(iii) cleared to a hundred per cent. export-oriented undertaking; or

(iv) cleared to a unit in an Electronic Hardware Technology Park or Software Technology Park; or

(v) supplied to the United Nations or an international organization for their official use or supplied to projects funded by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue) No.108/95-Central Excise, dated the 28th August, 1995, number G. S R. 602 (E), dated the 28th August, 1995; or

(vi) cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002.

(vii) gold or silver falling within Chapter 71 of the said First Schedule, arising in the course of manufacture of copper or zinc by smelting.

Rule 2(d) defined "exempted goods" as follows:

"exempted goods" means goods which are exempt from the whole of the duty of excise leviable thereon, and includes goods which are chargeable to "Nil" rate of duty;

In supercession of the aforesaid rules of 2002, the Central Government framed Cenvat Credit Rules, 2004 (with effect from 10.9.2004). Sub-Rules (1) and (2) of Rule 6 of these Rules are more or less similar to the old Rules, i.e. 2002 Rules (at least for our purposes). Sub-Rule (3) of Rule 6 of 2004 Rules contains

material changes and is quoted below:

RULE 6. Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services.

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer or the provider of output service, opting not to maintain separate accounts, shall follow either of the following conditions, as applicable to him, namely:-

(a) if the exempted goods are -

(i) goods falling within heading No.22.04 of the First Schedule to the Excise Tariff act (hereinafter in this rule referred to as the said First Schedule);

(ii) Low Sulphur Heavy Stock (LSHS) falling within Chapter 27 of the said First Schedule used in the generation of electricity;

(iii) Naphtha (RN) falling within Chapter 27 of the said First Schedule used in the manufacturer of fertilizer;

(iv) Naphtha (RN) and furnace oil falling within Chapter 27 of the said First Schedule used for generation of electricity;

(v) newsprint, in rolls or sheets, falling within heading No.48.01 of the said First Schedule;

(vi) final products falling within Chapters 50 to 63 of the said First Schedule;

(vii) goods supplied to defence personnel or for defence projects or to the Ministry of Defence for official purposes, under any of the following notifications of the Government of India in the Ministry of Finance (Department of Revenue), namely:-

(1) No. 70/92-Central Excise, dated the 17th June, 1992, G.S.R. 595 (E), dated the 17th June, 1992;

(2) No. 62/95-Central Excise, dated the 16th March, 1995, G.S.R. 254 (E), dated the 16th March, 1995;

(3) No. 63/95-Central Excise, dated the 16th March, 1995, G.S.R. 255 (E), dated the 16th March, 1995;

(4) No. 64/95-Central Excise, dated the 16th March, 1995, G.S.R. 256 (E), dated the 16th March, 1995,

(viii) Liquefied Petroleum Gases (LPG) falling under tariff items 2711 12 00, 2711 13 00 and 2711 19 00 of the said First Schedule.

(ix) Kerosene falling within heading 2710 of the said First Schedule, for ultimate sale through public distribution system.

the manufacturer shall pay an amount equivalent to the CENVAT credit

attributable to inputs and input services used in, or in relation to, the manufacture of such final products at the time of their clearance from the factory; or

(b) if the exempted goods are other than those described in condition (a), the manufacturer shall pay an amount equal to eight per cent of the total price, excluding sales tax and other taxes, if any, paid on such goods, of the exempted final product charged by the manufacturer for the sale of such goods at the time of their clearance from the factory.

(c) the provider of output service shall utilize credit only to extent of an amount not exceeding twenty per cent of the amount of service tax payable on taxable output service.

Explanation I.- The amount mentioned in conditions (a) and (b) shall be paid by the manufacturer or provider of output service by debiting the CENVAT credit or otherwise.

Explanation II.- If the manufacturer or provider of output service fails to pay the said amount, it shall be recovered along with interest in the same manner, as provided in rule 14, for recovery of CENVAT credit wrongly taken.

Explanation III - For the removal of doubts, it is hereby clarified that the credit shall not be allowed on inputs and inputs services used exclusively for the manufacture of exempted goods or exempted services.

(Explanation III was added by notification No.27/2005-C.E. (N.T.) dated 16 May 2005.)

Consideration of the questions framed:

7. Re. Question (i):-

7(a) The Assessee claims Cenvat credit of input tax (all duties of excise paid on inputs and described in Rule 3) for payment of auto cess and education cess (which, it submits, are nothing but duties of excise) on the finished tractors. The Department objects to this credit. It claims that tractors are exempt from duty of excise (that is to say, basic duty of excise) and therefore, no Cenvat credit of input tax can be availed of in case of tractors. The Department's argument, which appears to have carried before the tribunal, is that the definition of "exempted goods" in Rule 2(d) envisages exemption from the whole of "the duty of excise" leviable thereon including charge of 'nil' "rate of duty"; the expression is a singular expression referring to one duty of excise and not all duties of excise, the intention of the legislature, thus, being that the goods should be exempt from the basic duty of excise referred to in Rule 3(1)(i) and (ii) and not other duties or cesses so as to qualify as "exempted goods". If the goods are thus 'exempted goods', no Cenvat credit can be availed of, as provided in Sub-rule (1) of Rule 6, except in the circumstances mentioned in Sub-rule (2). As per Sub-rule (2), so far as common inputs, that is to say, inputs used both for

dutiable and exempted goods, are concerned, Cenvat credit can be availed of only on that quantity of inputs which is intended for use in the manufacture of dutiable goods, provided separate accounts are maintained by the manufacturer for receipt, consumption and inventory of inputs meant for use in dutiable final products and those meant for use in the manufacture of exempted goods. Since the Assessee's case is not covered by Sub-rule (2), no Cenvat credit can at all can be claimed on any common input used in manufacture of tractors, which are exempted goods, understood as above.

7(b) The tribunal accepted this argument in the impugned order. The tribunal did not dispute the Assessee's case that both auto cess and education cess were levies in the nature of excise duties. It, however, proceeded on the basis, as noted above, that tractors were 'exempted goods', though both cesses were payable thereon. The tribunal's reasoning was as follows: the words used in Rule 2(d) for defining "exempted goods" were singular expressions, namely, "duty of excise" and "nil rate of duty" and not all "duties of excise". Section 2A of the Act used four terms :-'duty', 'duties', 'duty of excise' and 'duties of excise', meaning thereby that there was a difference between them. If the intention of the legislature was that the goods should be exempted from all duties of excise then the words used should have been 'from the whole of the duties of excise' and not 'from the whole of the duty of excise' as is the case. The expression 'duty of excise' has been referred to in Rule 3(1)(i) and (ii) alone and nowhere else, and such 'duty of excise' does not include other duties or cesses, which are separately referred to in Rule 3(1).

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. vs. Commissioner of Central Excise 2018 (14) G.S.T.L. 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. vs. 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. vs. Union of India* 2015 (323) E.L.T. 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 vs. Modi Rubber Ltd. (1986) 4 SCC 66 : 1986 SCC (Tax) 781 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 vs. Union of India 2019(5) SCALE 325, 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. vs. Commissioner of C.Excise, Guwahati 2017 (335) E.L.T. 481 (S.C.). 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(h) In view of the above, the substantial question of law is answered in the negative, i.e. in favour of the Assessee and against the Revenue.

8. Re.Question No. (ii):-

8(a) That brings us to the second of the three issues noted above, namely, whether ten percent (eight percent, under the earlier Rules) of the sale price referred to in clause (b) of Sub-rule (3) of Rule 6 is to be included in the total price of final goods exigible to duty or is it eligible for deduction as a tax from such total price. The argument of the Department, which appears to have weighed with the tribunal, is that this amount (i.e. eight or ten percent, as the case may be) is not a compulsory exaction; the goods being exempt from payment of duty, there is no requirement for payment of duty. The nature of this payment is voluntary; it is for adjustment of credit which is otherwise not admissible but allowed as a measure of facilitation. The tribunal suggests that Rule 6 was not meant to be a device for the Government to raise money; it was therefore not in the nature of tax and its deduction accordingly could not be allowed for computing the excisable price. Mr.Sridharan relies on the judgments in Commissioner of Central Excise, Meerut vs. Kisan Sahkari Chinni Mills Ltd. 2001 (132) E.L.T. 523 (S.C.), Commissioner of Central Excise, Lucknow vs. Chhata Sugar Co.Ltd. 2004 (165) E.L.T. 369 (S.C.) and Assistant Collector of Central Excise vs. Madras Rubber Factory Ltd. 1987 (27) E.L.T. (S.C.), and submits that what is to be excluded from the assessable value is the amount of duty of excise, sales tax and "other taxes"; taxes, as such, not being defined under the Act, the expression must be understood to cover "any levy". Learned Counsel submits that just because it is optional for the manufacturer to pay this tax, it cannot be termed as voluntary; it is nonetheless a compulsory exaction made under an enactment.

8(b) Learned Counsel is right there. The amount of eight or ten percent of sales price referred to in clause (b) of Sub-rule (3) of Rule 6 is an exaction under an enactment. Just because an option has been given to a manufacturer under this clause, the exaction does not cease to be compulsory. The option merely signifies that the exaction, compulsory as it is, applies in certain cases and not in others. These former cases are those where a manufacturer producing both dutiable and exempted goods does not maintain separate accounts of receipt, consumption and inventory of common inputs and yet proposes to claim Cenvat credit in respect of those common inputs which go into the manufacture of dutiable goods. In these cases, the exaction of eight or ten percent, as the case may be, is compulsory and not voluntary. It is immaterial that the purpose of introducing this exaction is for facilitating credit which is otherwise unavailable. Whatever be the purpose, if and to the extent the exaction is compulsory (in cases covered by the provision) and is under a statute, it is nothing but 'tax'. And if it is so, it is liable to be deducted from the assessable price for the purpose of computing excise duty, namely, in the present case, auto cess and education cess, which are payable even on exempted goods in our case.

8(c) The cases cited by Mr.Sridharan do support his cause. In Kisan Sahkari Chinni Mills Ltd. 2001 (132) E.L.T. 523 (S.C.), the Supreme Court was considering whether administrative charges leviable under Section 8(4) of the Uttar Pradesh Sheera Niyantaran Adhiniyam, 1964 on the molasses sold or

supplied by an occupier of a sugar factory, which charges were capable of being recovered by the occupier from persons to whom molasses are sold or supplied, were "other taxes" within the meaning of Section 4(4)(d)(ii) of Central Excise Act, 1944. The Court held that the expression "tax" was to be understood, in the absence of any definition in that Act, to cover "any levy". The court relied on the case of D.G. Ghose & Co. (Agents) Pvt.Ltd. vs. State of Kerala 1980 (2) SCC 410, which had held that broad meaning had to be given to the expression "tax" used in the Act. The Court held that administrative charges leviable in the case would be covered under Section 4(4)(d)(ii) as "other taxes", because they were a compulsory exaction made under an enactment and, therefore, in the nature of a tax covered by that section. In Chhata Sugar Co.Ltd. (supra), the Supreme Court expressed its agreement with the view expressed in Kisan Sahkari Chinni Mills Ltd. In Madras Rubber Factory Ltd. (supra), the Supreme Court was considering the method of computation of assessable value in the case of a cum-duty selling price at a factory gate sale in the context of Section 4(4)(d) of the Central Excise Act. The issue was whether excise duty should be first computed or permissible deduction should first be made from the selling price for reassessment before the Assessment Collector. The Court observed that assessment of excise duty, both in relation to Section 4 and in relation to the valuation rules, was now subject to the definition contained in Section 4(4)(d) of the Act. The value, as defined thereunder, was to be arrived at after the costs of package of durable or returnable nature as also amounts of duty of excise, sales tax and other taxes and trade discount allowed in accordance with the normal practice of wholesale trade, were determined. The Court held that it was, thus, implicit that no excise duty was payable on an element of excise duty in the price; the value, as contemplated under Section 4, could not include a component of excise duty. The Court held that, thus, in ordinary cases, where factory price was not the duty price, the first step in arriving at the assessable value was to make the permissible deductions and thereafter, compute the excise duty on an ad valorem basis; even in the case of a cum-duty sale price, the same principle ought to be followed to arrive at the assessable value. The Court held that to compute excise duty as a predetermined amount without making permissible deductions for reducing the cum-duty selling price was a fallacy both legally or mathematically. These observations are clearly apposite in the present case. After payment of ten or eight percent amount, as the case may be, which, as we have seen above, is nothing but tax, the assessable value can be derived from such cum-duty price only after making permissible deductions, that is to say, deduction inter alia of the tax component, namely, ten or eight percent of the amount, as the case may be, of the selling price of the goods.

8(d) For the above reasons, this question is answered in the negative, i.e. in favour of the Assessee and against the Revenue.

9. Re. Question (iii):-

9(a) Coming now to the last issue, arising in the Revenue's appeal, namely,

Cenvat credit in respect of non-common inputs used in the manufacture of exempted goods, it is important to note that it is not in dispute that with effect from 16 May 2005, when Explanation III was added to Rule 6(3)(b) of Cenvat Credit Rules, 2004 by Notification 27/2005, such credit cannot be availed of. The Explanation makes it abundantly clear that no credit shall be allowed on inputs or input services used exclusively for the manufacture of exempted goods or exempted services. What is argued by the Assessee is that this Explanation was introduced with effect from 16 May 2005; that such introduction signified a change of law, meaning thereby that under the law, as it originally stood, such credit was available. It is, on the other hand, the submission of the Department that Explanation III merely clarifies what was always the law as per Rule 6(3)(b) and accordingly, no credit could be availed of even for the anterior period. We are, thus, required to consider if Explanation III is merely clarificatory or declaratory, or does it have the effect of amending the existing law, and if so, whether it applies retrospectively.

9(b) Mr.Sridharan, learned Senior Counsel for the Assessee, relying on the judgments of Commissioner of Income Tax (Central)-I, New Delhi vs. Vatika Township Pvt.Ltd. (2015) 1 SCC 1 and Greatship (India) Ltd. vs. Commissioner of Service Tax, Mumbai-I 2015 (39) S.T.R. 754 (Bom.) submits that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. Learned Counsel submits that any legislation, which modifies accrued rights or imposes new obligations or duties or attaches new disabilities, ought to be treated as prospective, unless the legislative intent is clearly to give the enactment a retrospective effect; or unless the legislation is for the purpose of supplying an obvious omission in a former legislation or to explain it. There is no quarrel with the proposition. We are, however, at the very threshold of the Assessee's contention here. The edifice of Mr.Sridharan's argument is built on the basic or foundational premise that the explanation amends the existing law in the sense that it introduces a new rule of law - something which did not exist earlier. What is questioned by the Department is the correctness of this very premise. Their case is that it is merely clarificatory or declaratory, and accordingly, to be applied retrospectively.

9(c) Vatika Township's case (supra) elucidates this aspect by explaining how and under what circumstances, a particular amendment may be treated as clarificatory or declaratory in nature. It quotes the discussion on the subject in Justice G.P. Singh's seminal work: "Principles of Statutory Interpretation" (13th Edn.). For felicity of reference, the entire passage from G.P. Singh is quoted below:

"Declaratory statutes

The presumption against retrospective operation is not applicable to declaratory statutes. As stated in CRAIES and approved by the Supreme Court : 'For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are

usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the word "declared" as well as the word "enacted". But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduced new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law."

Three propositions clearly emerge from the above discussion:

(i) the raison d'être of a declaratory enactment is clearing of a doubt existing as to the common law, or the meaning or effect of any statute; (ii) such enactment is usually held to be retrospective if it is "to explain" an earlier statute, since it would be without object unless construed retrospective; and (iii) whether it is so or not must be determined by having regard to the nature of the particular enactment as a matter of substance rather than form. Sometimes the new law may employ clear words to indicate its clarificatory or declaratory nature, such as "it shall be deemed always to have meant". If such words are used, no difficulty may generally arise for construction. But, in the absence of such clear words, one must look to the substance of what the original law was and what the new statute seeks to achieve. When the pre-amended provision created a doubt or was ambiguous, the new law explaining it may be treated as curative or declaratory; the legal provision may be implicit in the pre-amended law and the new Act may simply be designed to make it explicit so as to cast away any doubt or ambiguity in that behalf; If, on the other hand, the prior provision was clear and unambiguous, the new law might not be so treated; it might have to be seen as altering the existing law.

9(d) Two cases decided by the Supreme Court may be taken as illustrating this distinction. In *Commissioner of Income-Tax-I, Ahmedabad vs. Gold Coin Health Food Pvt.Ltd.* 2008 (110) SCALE 492, the Supreme Court considered whether

Explanation 4 to Section 271(1)(c) of the Income Tax Act was clarificatory or substantive. The Court found that Section 271 of the Act provided for penalizing the assessee for concealment of particulars of income or furnishing of inaccurate particulars of such income. By Explanation 4, introduced subsequently in Section 271, it was clarified that penalty under that Section can be levied even if no tax was payable on the total income assessed. The Supreme Court, whilst construing the Explanation, considered the definition of "income" in Section 2(24) of the Act. That was an inclusive definition and also included losses, i.e. negative profits. The Supreme Court had earlier held in *Commissioner of Income Tax (Central) Delhi vs. Harprasad & Co.P.Ltd.* 1975 (99) ITR 118 whilst considering the charging provisions of the Act that the expression "income" should be construed so as to include losses inasmuch as losses represent negative profit or minus income. Having regard to these aspects, the Court in *Gold Coin Health Food* held that the Explanation was intended to make the position in law explicit which even otherwise was implicit in it; the Explanation was accordingly treated as clarificatory and made applicable retrospectively. On the other hand, in *Sedco Forex International Drill. Inc. vs. Commissioner of Income Tax, Dehradun* (2005) 12 SCC 717, the question before the Supreme Court was whether the salaries payable for field breaks outside India to employees of the appellant, who was a foreign company, could be subjected to tax under Section 9(1)(ii) of the Act read with the Explanation thereto by Finance Act, 1999. The Court considered the legislative history of Section 9(1)(ii) and held that there was no ambiguity in its main provision. It included salaries in the total income of an assessee if the assessee earned it in India; the word "earned" meant income "arising or accruing" in India. By an earlier explanation, introduced in 1983, it was declared that salary paid for services rendered in India shall be regarded as income earned in India. The new Explanation provided that the rest period or leave period which was preceded or succeeded by services rendered in India, and which formed part of the contract of employment, shall be regarded as income earned in India. The Court noted that the new Explanation had expanded the existing Explanation so as to specifically provide that any salary payable for rest period or leave period which was either preceded or succeeded by service in India and which formed part of the service contract, would also be regarded as income earned in India. The Court observed that the Explanation had sought to give an artificial meaning to income 'earned in India' and effectively bring about a change in the existing law and accordingly, had to applied prospectively and not retrospectively.

9(e) With the legal position being thus put in perspective, let us now consider the nature of the amendment we are concerned with in the present case. Rule 6 of Cenvat Credit Rules of 2002 and 2004 inter alia provides for obligations of manufacturers who manufacture both dutiable and exempted goods, if they are to claim Cenvat credit. Sub-Rule (1) makes it clear that Cenvat credit is not available on inputs used in the manufacture of exempted goods. Sub-rule (2) is an exception; it provides for circumstances in which Cenvat credit on inputs used

in the manufacture of exempted goods can be availed of. Where inputs are used for manufacture of dutiable as well as exempted goods, the manufacturer may take credit on that quantity of inputs which is intended for use in the manufacture of dutiable goods. This is, however, subject to a condition that the manufacturer maintains separate accounts for receipt, consumption and inventory of input meant for use in the manufacture of dutiable goods and quantity of input meant for use in the manufacture of exempted goods. Sub-rule (3) is an exception both to sub-rule (1) and (2). It provides for an eventuality where a manufacturer does not opt for maintenance of separate accounts. There are two options available to such manufacturer. If the exempted goods are covered by the list of specified goods in clause (a) of Sub-rule (3), the manufacturer may pay an amount equivalent to the Cenvat credit attributable to inputs used in the manufacture of such goods at the time of their clearance from the factory; or if they are other goods, the manufacturer may pay an amount equal to ten percent (eight percent, under the 2002 Rules) of the total price of the exempted goods charged by the manufacturer for sale of such goods at the time of their clearance from the factory. That is the broad scheme of Rule 6. In this scheme, Explanation III was introduced in Sub-rule (3) by Notification No.27/2005 with effect from 16 May 2005.

9(f) The Explanation, at least ostensibly, is for removal of doubts and purports to be clarificatory; it starts with the words "For the removal of doubts" and the operative verb used is "clarified". The apparent purpose seems to be to clear any ambiguity in that behalf and declare that in the scheme of things under Sub-rule (3), there is no scope for availment of Cenvat credit for inputs used exclusively for the manufacture of exempted goods. The whole purpose of Sub-Rules (2) and (3) appears to be to deal with a situation where a manufacturer uses common inputs for manufacture of both dutiable goods and exempted goods, and not where he uses inputs exclusively for manufacture of exempted goods.

9(g) Mr.Sridharan, however, suggests otherwise. Learned Counsel argues that the amendment [i.e. insertion of Explanation III in Sub-rule (3)] introduces, or has the consequence of, a fiscal liability and no amendment which does that can ever be said to be declaratory and no such amendment can, thus, be applied retrospectively. Learned Counsel submits that even otherwise, Sub-rule (1) being the main clause to which Sub-rule (2) is an exception, and Sub-rule (3) being an exception both to Sub-rules (1) and (2), there is no reason why Sub-rule (3) should be said to be covering only those cases where a manufacturer who uses common inputs for manufacture of both dutiable and exempted goods, which cases are covered only by Sub-rule (2); Sub-rule (1), on the other hand, does not cover only those cases; it covers even cases where inputs are used in the manufacture of exempted goods alone. Learned Counsel submits that it is important to note that Sub-rule (1) is in respect of goods, namely, exempted goods in the manufacture of which quantity of inputs, on which Cenvat is paid, is used, whereas Sub-rule (3) is in respect of manufacturers; in Sub-rule (3), an exception is carved out in respect of manufacturers of exempted goods who

follow the condition laid down therein. In Clause (b) of Sub-rule (3), Counsel submits, the condition is to pay ten percent (eight percent, under the earlier Rules) of the sale price of exempted goods; as the sub-rule originally provided, upon payment of this amount, Cenvat credit could be availed of even in respect of inputs used exclusively for the manufacture of exempted goods; and this position has been changed by the rule-maker by inserting Explanation III providing for non-availability of credit on inputs used exclusively for the manufacture of exempted goods.

9(h) The argument seems attractive, but, on a closer scrutiny, does not hold good. In the first place, there is nothing in law to suggest that the rule of construction for ascertaining the nature of an amendment - whether clarificatory or altering the law - is different for fiscal statutes (bearing on a fiscal liability) as opposed to others (not involving any fiscal liability). The principle is the same. Where the amendment clears a doubt or an ambiguity and makes explicit what is already implicit in the pre-amended statute, it is clarificatory or declaratory. On the other hand, where it introduces a change in the pre-existing law, namely, an element which was not there earlier, even latently, it is altering the earlier law. The former is usually applied retrospectively and the latter prospectively. Secondly, merely because Sub-rule (3) opens with the words "Notwithstanding anything contained in Sub-rules (1) and (2)", it cannot be said to be an exception separately to sub-rules (1) and (2). It is possible for the legislature or a rule-making body to provide, when an exception is carved out in a rule, say, Rule 2, to Rule 1 and exception to Rule 2 in, say, Rule 3, that rule 3 is 'notwithstanding what is contained Rules 1 and 2'. That does not carve out cases independently of Rule 2 from Rule 1. It is very much conceivable, in such a case, that Rule 2 carves out a separate class out of what is covered by Rule 1, whilst Rule 3 carves out a separate class out of Rule 2. And that is precisely what appears to be the case here. There is nothing particular about Sub-rule (1) referring to 'exempted goods' as against Sub-rule (3) which refers to a 'manufacturer'. They both deal with the same subject, namely, "manufacture" of exempted goods and apply to one and the same entity, namely, "manufacturer" of such goods. Though Sub-rule (1) mandates against availment of Cenvat credit in respect of inputs used for manufacture of exempted goods, what it effectively does is to provide against use by manufacturer of exempted goods of Cenvat credit in respect of inputs used for such manufacture. Sub-rule (2) culls out a sub-set out of this larger set of manufacturers of exempted goods, and that sub-set is of those manufacturers who manufacture both exempted goods and dutiable goods. Two further sub-sets are then made from out of these latter manufacturers - one of those who maintain separate accounts of receipt, consumption and inventory of inputs going into exempted goods and those going into dutiable goods, and the second of those manufacturers who do not do so, but observe the conditions either in clause (a) or clause (b) of Sub-rule (3). The first sub-set is covered under Sub-rule (2), the second under Sub-rule (3). It is in this sense that Sub-rule (3) applies "notwithstanding anything contained in

Sub-rules (1) and (2)". This makes it clear that Sub-rule (3), applies only to those cases, where the manufacturer in question uses common inputs for manufacture of dutiable as well as exempted goods; it does not apply to a manufacturer of exempted goods, who uses exclusive inputs for such manufacture. This is implicit in Rule 6, read in the light of all its sub-rules together. Explanation III merely underscores this position. It makes explicit what was already implicit. It is purely and simply clarificatory or declaratory; it does not alter the old law in any manner or, in other words, introduce a new element in it which did not exist earlier. It must apply, accordingly, retrospectively.

9(i) For the above reasons, this question is answered in the negative, i.e. in favour of the Revenue and against the Assessee.

10. The substantial questions of law arising in these group of appeals are accordingly answered as under:-

Question (i) :- In the negative, i.e. in favour of the Assessee and against the Revenue;

Question (ii):- In the negative, i.e. in favour of the Assessee and against the Revenue; and

Question (iii):- In the negative, i.e. in favour of the Revenue and against the Assessee.

11. Thus, the Appeals of both the Assessee (Mahindra & Mahindra Ltd.) and the Department are allowed accordingly.