M/S. UNICORN INDUSTRIES

v.

UNION OF INDIA & OTHERS

(Civil Appeal No. 9237 of 2019)

DECEMBER 6, 2019

[ARUN MISHRA, M. R. SHAH AND B. R. GAVAI, JJ.]

Central Excise Act, 1944 – Finance Act, 2004 – Finance Act, 2007 – Finance Act, 2001 – The High Court held that duties i.e. the levy of education cess, higher education cess and National Calamity Contingent Duty (NCCD) are not the part of the exemption notification – Appellant contended that the NCCD, education cess, and secondary and higher education cess form part of the excise duty and hence the decision of the High Court is bad in law – On appeal, held: Notification dated 09.09.2003 issued in the present case makes it clear that exemption was granted u/s. 5A of the Act 1944, concurring additional duties under the Act of 1957 and additional duties of excise under the Act of 1978 – There was no reference to the Finance Act, 2001 by which NCCD was imposed, and the Finance Acts of 2004 and 2007 were not in vogue – The notification could not have contemplated the inclusion of education cess and secondary and higher education cess imposed by the Finance Acts of 2004 and 2007 in the nature of the duty of excise – In the absence of a notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted – The High Court rightly relied on the decision of the three-Judge Bench of the Supreme Court in Modi Rubber Limited, *which was followed by another three-Judge in* Rita Textiles Private Limited *– Therefore, the Judgment and order of the High Court upheld.*

Dismissing the appeals, the Court

HELD: 1. Notification dated 9.9.2003 issued in the present case makes it clear that exemption was granted under Section 5A of the Act of 1944, concerning additional duties under the Act of 1957 and additional duties of excise under the Act of 1978. It was questioned on the ground that it provided for limited

exemption only under the Acts referred to therein. There is no reference to the Finance Act, 2001 by which NCCD was imposed, and the Finance Acts of 2004 and 2007 were not in vogue. The notification was questioned on the ground that it should have included other duties also. The notification could not have contemplated the inclusion of education cess and secondary and higher education cess imposed by the Finance Acts of 2004 and 2007 in the nature of the duty of excise. The duty on NCCD, education cess and secondary and higher education cess are in the nature of additional excise duty and it would not mean that exemption notification dated 9.9.2003 covers them particularly when there is no reference to the notification issued under the Finance Act, 2001. There was no question of granting exemption related to cess was not in vogue at the relevant time imposed later on vide Section 91 of the Act of 2004 and Section 126 of the Act of 2007. The provisions of Act of 1944 and the Rules made thereunder shall be applicable to refund, and the exemption is only a reference to the source of power to exempt the NCCD, education cess, secondary and higher education cess. A notification has to be issued for providing exemption under the said source of power. In the absence of a notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted. The High Court was right in relying upon the decision of three-Judge Bench of this Court in *Modi Rubber Limited*, which has been followed by another three-Judge Bench of this Court in *Rita Textiles Private Limited*. [Para 40] [1045-H; 1046-A-E]

2. The Circular of 2004 issued based on the interpretation of the provisions made by one of the Customs Officers, is of no avail as such Circular has no force of law and cannot be said to be binding on the Court. Similarly, the Circular issued by Central Board of Excise and Customs in 2011, is of no avail as it relates to service tax and has no force of law and cannot be said to be binding concerning the interpretation of the provisions by the courts. The reason employed in *SRD Nutrients Private Limited* that there was nil excise duty, as such, additional duty cannot be charged, is also equally unacceptable as additional duty

can always be determined and merely exemption granted in respect of a particular excise duty, cannot come in the way of determination of yet another duty based thereupon. The proposition urged that simply because one kind of duty is exempted, other kinds of duties automatically fall, cannot be accepted as there is no difficulty in making the computation of additional duties, which are payable under NCCD, education cess, secondary and higher education cess. Moreover, statutory notification must cover specifically the duty exempted. When a particular kind of duty is exempted, other types of duty or cess imposed by different legislation for a different purpose cannot be said to have been exempted. [Para 41] [1046-F-H; 1047-A-B]

Union of India v. Modi Rubber Limited **(1986) 4 SCC 66 : [1986] 3 SCR 587 ;** *A three-Judge Bench in Rita Textiles Private Limited v. Union of India*, **(1986) SCC Supp. 557 – relied on.**

SRD Nutrients Private Limited v. Commissioner of Central Excise, Guwahati, **(2018) 1 SCC 105 : [2017] 11 SCR 43 ;** *Bajaj Auto Limited v. Union of India & others,* **(2019) SCC OnLine SC 421, decided on 27.3.2019. [2019] 5 SCALE 325 – per incuriam.**

Union of India v. Unicorn Industries **(Civil Appeal No. 7432 of 2019), decided on 19.9.2019. (2019) 10 SCC 575 ;** *Rajasthan High Court in Banswara Syntex Ltd. v. Union of India*, **(2007) SCC OnLine Raj. 365 ;** *Mahanagar Railway Vendors' Union v. Union of India & Ors.* **(1994) Suppl. 1 SCC 609 ;** *State of Maharashtra & Ors. v. Mana Adim Jamat Mandal*, **AIR 2006 SC 3446 : [2006] 2 SCR 1142 ;** *State of Uttar Pradesh & Ors. v. Ajay Kumar Sharma & Ors.* **(2016) 15 SCC 289 ;** *Subhash Chandra & Ors. v. Delhi Subordinate Services Selection Board & Ors.* **(2009) 15 SCC 458 : [2009] 12 SCR 978 ;** *Dashrath Rupsingh Rathod v. State of Maharashtra* **(2014) 9 SCC 129 ; [2014] 11 SCR 921 ;** *Central Board of Dawoodi Bohra Community & Ors. v. State of Maharashtra & Ors.* **(2005) 2 SCC 673 : [2004] 6 Suppl. SCR 1054 – referred to.**

Case Law Reference

[2017] 11 SCR 43	**per incuriam**	**Para 13**
[2019] 5 SCALE 325	**per incuriam**	**Para 13**
(2019) 10 SCC 575	**referred to**	**Para 14**
[1986] 3 SCR 587	**relied on**	**Para 28**
(1986) SCC Supp. 557	**relied on**	**Para 38**
(1994) Suppl. 1 SCC 609	**referred to**	**Para 42**
[2006] 2 SCR 1142	**referred to**	**Para 42**
(2016) 15 SCC 289	**referred to**	**Para 42**
[2009] 12 SCR 978	**referred to**	**Para 42**
[2014] 11 SCR 921	**referred to**	**Para 42**
[2004] 6 Suppl. SCR 1054	**referred to**	**Para 42**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9237 of 2019.

From the Judgment and Order dated 11.05.2012 of the High Court of Sikkim at Gangtok in Writ Petition (C) No. 24 of 2007

With

Civil Appeal No. 9238 of 2019.

Dhruv Aggarwal, Dr. Ashok Saraf, Nakul Dewan, Balbir Singh, Guru Krishan Kumar, K. V.Viswanathan, S. Ganesh, Tarun Gulati, Sr. Advs., Ms. Nisha Bagchi, Rupesh Kumar, Ms. Aruna Gupta, Dharmendra Gupta, B.K. Prasad, Shriram P. Pingle, Gangdeep Sharma, M.L. Lahoty, Paban K. Sharma, Anchit Sripat, Himanshu Shekhar, Vishal Gupta, M/s. AP & J Chambers, Kaushik Choudhary, Mukunda Rao, Pawanshree Agrawal, K.J. John, M/s. K J John & Co. Ajoy K. Roy, Shantanu Tyagi, Ms. Nandita Chauhan, Ravinder Nijhawan, S.S. Shroff, Rahul Narayan, Shashwat Goel, Ajay Aggarwal, Ms. Mallika Joshi, Ishan Narain, Rajan Narain, Ms. Kavita Jha, Ms. Swati Agarwal, Ms. Devika Jain, Kumar Visalaksh, Udit Jain, Mahfooz A. Nazki, Rana Ranjit Singh, Vivek Kumar Singh, Ms. Akanksha Singh, Shuvodeep Roy, Kabir Shankar Bose, Satropp Das, Ms. Neelima Tripathi, Ms. Gunjan Singh, K.V. Mohan, Vishal Gupta, Sumeet Sharma, Diviyanshu Gupta,

Rakesh Sinha, Partha Sil, Parthiv K. Goswami, Ishan Bisht, Vivek Gupta, Ms. Palak Mahajan, Ms. Diksha Rai, Raghvendra Kumar, Ms. Aruna Mathur, Sunil Murarka, Kunal Chatterji, Ms. Maitrayee Banerjee, Supratik Sarkar, V. Lakshmikumaran, Ms. Charanya Lakshmikumaran, Aditya Bhattacharya, Mrs. Ishita Mathur, Ms. Apeksha Mehta, Ms. Monica Kasturi, R.Parthasarthy, Kshitij Vaibhav, Ms. Bina Gupta, Ms. Sheona Taqvi, R. Jawahar Lal, Siddharth Bawa, Shaymal Anand, Mayank Kshirsagar, Nikhil Singhvi, Mohit Seth, Ms. Sonia Dubey, Obhirup Ghosh, M/s. Legal Option, Gaurav Juneja, Aayush Jain, M/s. Khaitan & Co., V.K. Sidharthan, Ramendra Lal Auddy, B. Krishna Prasad, M/s. Arputham Aruna & Co., Satya Mitra, Ms. Hemantika Wahi, Gopal Singh, Advs. for the appearing parties.

The Judgment of the Court was delivered by

ARUN MISHRA, J.

1. Leave granted.

2. The question involved in the appeals is with respect to the levy of education cess, higher education cess, and National Calamity Contingent Duty (NCCD) on it. The appeals arise out of common judgment. The High Court has held that duties in question are not part of the exemption notification. The writ petitions have been dismissed. Hence, the appeals have been preferred.

3. The Government of India in order to promote industrial development in the North Eastern Region, announced vide Office Memorandum dated 24.12.1997, specific fiscal incentives including total exemption from tax to the new industrial units and substantial expansion of existing unit in the North Eastern Region for a period of 10 years from the date of commencement of production. Government of Sikkim vide Notification dated 17.2.2003, notified new industrial policy whereby all fiscal incentives available to the industries in the North Eastern Region would be available to the units set up in the State of Sikkim.

4. The Central Government issued a Notification dated 9.9.2003, granting exemption from payment of duty of excise for goods specified in the notification and cleared from a unit located in the Industrial Growth Centre or other specified areas within the State of Sikkim. Under the notification, a manufacturer of specified goods was required to pay excise duty on the goods cleared from its unit. The manufacturer has to first utilize the Cenvat Credit for discharging duty liability on final

products, and the remaining amount of duties had to be paid through Personal Ledger Account (PLA) or Current Account, i.e., in cash. Thus, the exemption scheme was to discharge the liability on the final product and then claim or avail the refund or re-credit of the duties paid in cash.

5. The Unicorn Industries established a unit in 2006 for manufacturing "Indian Mouth Freshener" an excisable commodity covered under Chapter 21 of the First Schedule of Central Excise Tariff Act, 1985. It was registered under the Central Excise Act. In June 2006, the appellant had started manufacturing its product.

6. The appellant has submitted that following excise duties were recovered under diverse names/nomenclature and rates on Indian Mouth Freshener manufactured and cleared by the appellant:

a. Basic Excise Duty @ 37.5 % *ad valorem*;

b. National Calamity Contingent Duty (NCCD) @ 23% *ad Valorem* (under Section 136 of the Finance Act, 2001);

c. Additional Excise Duty (Pan Masala & Tobacco Products) @ 5.5% *ad valorem* (under Section 85 of the Finance Act, 2005); and

d. Education Cess @ 2% *ad valorem* (under Section 91 of the Finance Act, 2004) aggregating to 68% *ad valorem*.

7. As per Notification No.71/2003-CE dated 9.9.2003, the appellant was entitled to refund of the abovesaid duties of excise. The respondents extended benefits and used to grant refund to the appellant as per the abovementioned notification. The Excise Authorities used to issue a certificate of re-utilization of excise duty for the particular month. The appellant used to re-credit the amount of excise duty.

8. The Deputy Commissioner of Central Excise issued a show cause notice dated 2.1.2007, requiring the appellant to repay the amount of NCCD for the period July, 2006 to December, 2006, on the ground that exemption was not permissible under the notification for the units located in the State of Sikkim. The appellant filed a writ petition before the High Court for quashing the abovementioned communication dated 2.1.2007. The High Court disposed of the same with liberty to show cause to the said communication. The appellant filed its reply. On 4.7.2007, the Commissioner, Central Excise issued show cause notice,

it was submitted that grounds phrased in the response were unsustainable. The appellant was asked to show cause why amount should not be recovered under Section 11-A of the Central Excise Act along with the interest and penalty.

9. Notification No.71/2003-CE came to be amended on 25.4.2007 by Notification No.21/2007, excluding Pan Masala falling under Chapter XXI of the Tariff from the purview of the notification. Thus, the exemption on Pan Masala came to an end vide Notification No.21/2007 dated 25.4.2007, which was challenged by way of separate Writ Petition No.22 of 2007. The High Court vide judgment and order dated 11.5.2012 allowed the Writ Petition (C) No.22 of 2007 and held that the appellant was entitled to exemption from payment of excise duty on manufacture of Pan Masala for ten years from the date of commencement of commercial production, i.e., 27.6.2006.

10. The appellant submitted that 14 separate claims were filed for refund of additional excise duty and education cess on the ground these levies are also duties of excise, for which exemption had been granted for ten years. The appellant filed Writ Petition (C) No.24 of 2007 before the High Court of Sikkim at Gangtok for quashing Notification No.71/2003-CE, confining the exemption to "under any of the said Acts" mentioned in paragraph 1 of the notification. The prayer was made for a declaration that the exemption notification was applicable to NCCD, additional excise duty (Pan Masala) and education cess and the Notification No.71/2003-CE was repugnant to the Industrial Policy decision declared by Union of India (respondent no.1) and State of Sikkim (respondent no.4). The appellant claimed that excise duty exemption would include all levy in nature of excise duty, levied and collected on goods manufactured in India.

11. Vide Notifications dated 27.3.2008 and 10.6.2008, the benefit of Cenvat Credit was withdrawn. The appellant challenged the notification through Writ Petition (C) No.11 of 2008. The High Court was pleased to allow the said petition vide judgment and order dated 15.11.2010.

12. Akshay Ispat and Ferro Alloys Private Limited, the manufacturer of Ferro Silicon, an excisable commodity, has filed other appeal. It had obtained permanent registration under the Central Excise Rules 2002 on 11.3.2004. The Government of India introduced education cess under Chapter VI of Section 91 of the Finance Act, 2004. The

A appellant did not claim the benefit of the education cess for the period August 2004 to March 2006. After that, it started taking the re-credit of the education cess w.e.f. 1.4.2006. On 12.9.2006, the Superintendent, Central Excise, sent a communication directing the appellant to pay the education cess with interest and penalty for August, 2006. The appellant submitted its reply. After that, show cause notice dated 31.10.2006, was issued to the appellant regarding default in payment of education cess for August, 2006 and September, 2006 and proceedings were initiated for infringement under Section 91(3) of the Finance Act, 2004. The appellant sent a reply; however, on 6.12.2006, another show cause notice was issued. The appellant after that claimed on 19.12.2006 repayment of education cess for the period August, 2004 to March, 2006. In March 2007, the Government of India introduced secondary and higher education cess under Section 126 of the Finance Act, 2007. Section 128(1) of the Finance Act, 2007 indicated how the said cess was to be calculated. The respondents demanded by issuance of further notice education cess and secondary and higher education cess. The appellant filed a writ application in the High Court. By the impugned judgment, the same has been dismissed. The High Court dismissed the Writ Petition (C) No.24 of 2007, and another concerning NCCD and education cess, secondary and higher education cess and held that they were not included under exemption Notification No.71/2003-CE and the appellant had illegally availed the benefits of the exemption in respect to it. Aggrieved by the dismissal of the writ petitions, the appeals have been preferred.

13. Learned counsel appearing on behalf of the appellant submitted that NCCD, education cess, and secondary and higher education cess form part of the excise duty. Hence, the decision of the High Court is bad in law. Reliance has been placed on *SRD Nutrients Private Limited v. Commissioner of Central Excise, Guwahati,* (2018) 1 SCC 105 and the decision of this Court in *Bajaj Auto Limited v. Union of India & others*, 2019 SCC OnLine SC 421, decided on 27.3.2019. It is submitted that the education cess was introduced by Sections 91 and 93 of the Finance Act, 2004 and higher education cess by the Finance Act, 2007 and the NCCD was imposed under Section 136 of the Finance Act, 2001. The imposition is in the nature of a duty of excise and in addition to any other duty of excise chargeable under the Central Excise Act, 1944 ('the Act of 1944'). It is further provided that the provisions of the Act of 1944 and Rules

made thereunder relating to refunds and exemptions from duties and imposition of penalty, shall, as far as may be, apply with respect to the abovementioned duties in question. Reliance has also been placed on circulars dated 10.8.2004 and 8.4.2011, issued by Central Board of Excise and Customs, on the subject of education cess and secondary and higher education cess.

14. Learned counsel appearing on behalf of respondents has submitted that the decision of the High Court is appropriate and no case for interference is made out. The benefit of exemption granted, w.e.f. 9.9.2003 from payment of excise duty was withdrawn vide notification dated 25.4.2007. Tobacco and Tobacco products including cigarettes, cigars and *gutkha*, were excluded from the benefit of exemption of the excise duty. The notification dated 25.4.2007 was set aside by the High Court. The decision of the High Court has been reversed by this Court in *Union of India v. Unicorn Industries* (Civil Appeal No. 7432 of 2019), decided on 19.9.2019. Apart from that, when exemption notifications were issued, the NCCD, education cess and secondary and higher education cess were not even imposed, as such, it could not be said that they were covered under the exemption notification. The duty described above had been imposed by separate legislation, which was not covered under the exemption notification. It was an additional duty imposed in the nature of excise duty. They were not covered under the exemption notification. As such, the High Court has rightly dismissed the writ application filed by the appellants. Hence, no case for interference is made out.

15. It is not disputed that the Government of India took a policy decision, Ministry of Industry, Department of Industrial Policy and Promotion vide Office Memorandum dated 24.12.1997, concerning new industrial policy and concessions in the North-Eastern region. The decision was taken for converting the Growth Centres and IIDCs into total tax-free zones for the next ten years. All industrial activities in these zones would be free from income tax and excise duty for ten years from the commencement of production.

16. The benefit of the said notification was extended to the State of Sikkim vide notification dated 17.2.2003. Following benefits were extended to the new and the existing industrial units:

> "i) New industrial units and existing industrial units on their substantial expansion as defined, set up in Growth Center,

Industrial Infrastructure Development Centers (IIDCs) and other locations like Industrial Estates, Export Processing Zones, Food Parks, IT Parks, etc., as notified by the Central Government are entitled to 100% (hundred percent) income tax and excise duty exemption for a period of 10 years from the date of commencement of commercial production. Thrust Sector Industries as mentioned in Annexure-II are entitled to similar concessions in the entire State of Sikkim without area restrictions."

17. The Government decided to exempt 100 per cent income tax and excise duty for ten years. In accordance with the policy decision the Notification No.71/2003 was issued on 9.9.2003 by the Central Government in exercise of powers conferred by Section 5A(1) of the Act of 1944 read with Section 3(3) of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 ('the Act of 1957') and Section 3(3) of the Additional Duties of Excise (Textiles and Textiles Articles) Act, 1978 ('the Act of 1978'), exempted goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985, other than goods specified in Annexure I in the State of Sikkim. The exemption from payment of so much of excise duty or additional duty of excise, as the case may be, leviable thereon under any of the said Act. The relevant portion is extracted hereunder:

"Notification No.71/2003 – Central Excise

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of Section 3 of the Additional Duties of Excise (Textiles and Textiles Articles) Act, 1978 (40 of 1978), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than goods specified in Annexure I appended hereto, and cleared from a unit located in the Industrial Growth Centre or Industrial Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estate or Industrial Area or Commercial Estate or Scheme Area, as the case may be, in the State of Sikkim, specified in Annexure – II appended hereto,

from so much of the duty of excise or additional duty of excise, as the case may be, leviable thereon under any of the said Acts as is equivalent to the amount of duty paid by the manufacturer of the said goods, other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2002."

(emphasis supplied)

18. Section 136 of the Finance Act, 2001 provides imposition of the NCCD. Section 136 is extracted hereunder:

"136. National Calamity Contingent Duty.-(1) In the case of goods specified in the Seventh Schedule, being goods manufactured or produced, there shall be levied and collected for the purposes of the Union, by surcharge, a duty of excise, to be called the National Calamity Contingent Duty (hereinafter referred to as the National Calamity Duty), at the rates specified in the said schedule.

(2) The National Calamity Duty chargeable on the goods specified in the Seventh Schedule shall be in addition to any other duties of excise chargeable on such goods under the Central Excise Act, 1944 (1 of 1944) or any other law for the time being in force.

(3) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty, shall, as far as may be, apply in relation to the levy and collection of the National Calamity Duty leviable under this section in respect of the goods specified in the Seventh Schedule as they apply in relation to the levy and collection of the duties of excise on such goods under that Act or those rules, as the case may be."

(emphasis supplied)

19. The education cess came to be imposed vide notification dated 10.9.2004 issued under the Finance Act, 2004. Sections 91 and 93 are extracted hereunder:

"91. Education Cess-(1) Without prejudice to the provisions of sub-section (11) of Section 2, there shall be levied and collected,

A in accordance with the provisions of this Chapter as surcharge for purposes of the Union, a cess to be called the Education Cess, to fulfil the commitment of the Government to provide and finance universalized quality basic education.

(2) The Central Government may, after due appropriation made
B by Parliament by law in this behalf, utilize, such sums of money of the Education Cess levied under sub-section (11) of Section 2 and this Chapter for the purposes specified in sub-section (1), as it may consider necessary.

***

C

93. Education Cess on Excisable Goods- (1) The Education Cess levied under Section 81, 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 (in this section referred to as the Education Cess on excisable
D goods), 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
E provisions of the Central Excise Act, 1944 (1 of 1944) or under any other law for the time being in force.

(2) The Education Cess on excisable goods shall be in addition to any other duties of excise chargeable on such goods under the Central Excise Act, 1944 (1 of 1944) or any other law for
F the time being in force.

(3) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the
G Education Cess on excisable goods as they apply in relation to the levy and collection of the duties of excise on such goods under the Central Excise Act, 1944 or the rules, as the case may be."

(emphasis supplied)

20. The Central Government introduced the secondary and higher
H education cess at the rate of 1 per cent of the total excise duty under

Sections 126 and 128 of the Finance Act, 2007, which are reproduced hereunder:

> "126. (1) Without prejudice to the provisions of sub-section (12) of section 2, there shall be levied and collected, in accordance with the provisions of this Chapter as surcharge for purposes of the Union, a cess to be called the Secondary and Higher Education Cess, to fulfil the commitment of the Government to provide and finance secondary and higher education.
>
> (2) The Central Government may, after due appropriation made by Parliament by law in this behalf, utilize, such sums of money of the Secondary and Higher Education Cess levied under sub-section
>
> (12) of section 2 and this Chapter for the purposes specified in subsection (1) as it may consider necessary.
>
> XXXXXX XXXXXX XXXXXX XXXXXX
>
> 128. (1) The Secondary and Higher Education Cess levied under section 126, in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985, being goods manufactured or produced, shall be a duty of excise (in this section referred to as the Secondary and Higher Education Cess on excisable goods), at the rate of one 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 chargeable under section 93 of the Finance (No. 2) Act, 2004 and Secondary and Higher 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 or under any other law for the time being in force.
>
> (2) The Secondary and Higher Education Cess on excisable goods shall be in addition to any other duties of excise chargeable on such goods, under the Central Excise Act, 1944 or any other law for the time being in force and the Education Cess chargeable under section 93 of the Finance (No. 2) Act, 1944.
>
> (3) The provisions of the Central Excise Act, 1944 and the rules made thereunder, including those relating to refunds and

A exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Secondary and Higher Education Cess on excisable goods as they apply in relation to the levy and collection of the duties of excise on such goods under the Central Excise Act, 1944 or the rules made thereunder, as the case may be."

B

21. The appellant challenged the exemption Notification No.71/2003 dated 9.9.2003, before the High Court only to the extent that it limits the exemption only in relation to basic excise duty under the Excise Act, additional duties under the Act of 1957 and the additional duties under the Act of 1978. It is submitted that though various Finance Acts C imposed these duties, they were recoverable as excise duty, notwithstanding their nomenclature. The notification dated 17.2.2003 indicated that 100 per cent income tax and excise duty exemption for ten years was granted. The exemption should cover the NCCD, education cess and the secondary and higher education cess imposed D by the notifications issued under Finance Acts of 2001, 2004, and 2007.

22. The main question arising for consideration is when 100 per cent exemption had been granted for excise duty for a period of 10 years, whether the exemption notification issued for the State of Sikkim on 9.9.2003 shall be confined to the basic excise duty under the Act of E 1944, additional duty under the Act of 1957 and additional duty under the Act of 1978, which were specifically mentioned in the notification issued on 9.9.2003, or it also include cess/duty imposed by Finance Acts of 2001, 2004 and 2007.

23. The submission raised on behalf of appellant is that the duty F and cess in the nature of excise duty cannot be realized, particularly in view of the provisions in the Finance Acts of 2001, 2004 and 2007 relating to refund and exemption, which have made applicable, the provisions of the Act of 1944 and the Rules made thereunder relating to exemption. As such, in view of the decisions of Division Bench of this Court in *SRD Nutrients Private Limited* (supra) and *Bajaj Auto* G *Limited* (supra), the decision of the High Court deserves to be set aside.

24. It is not in dispute that when initial exemption notification was issued in 1997 for the North-Eastern States, which was later on applied to the State of Sikkim on 9.9.2003. The benefits from payment of excise duty and additional excise duty were confined to the basic excise duty H payable under the Acts of 1944, 1957 and 1978. There was no

reference made to NCCD imposed under the Finance Act, 2001. Apart from that, when the notification came to be issued, the education cess and secondary and higher education cess, which came to be imposed by Finance Acts of 2004 and 2007, were not in vogue.

25. A Division Bench of this Court in *SRD Nutrients Private Limited* (supra) has considered the Finance Acts of 2004 and 2007, by which education and secondary and higher education cess were imposed. Under the Industrial Policy dated 1.4.2007 for the North-Eastern States, the notification dated 25.4.2007, issued by the Central Government, came up for consideration before this Court. The said notification and the industrial policy, have been dealt with in paragraphs 4 and 5 of the *SRD Nutrients Private Limited* (supra), which are extracted hereunder:

> **"4.** Industrial Policy dated 1-4-2007 for the North-Eastern States, including the State of Assam, was announced by the Ministry of Commerce and Industry (Department of Industrial Policy and Promotion), Government of India to set up a special package for the North-Eastern States to accelerate industrial development of the State. As per this package, new industrial units were entitled to 100% excise duty exemption for a period of ten years from the date of commencement of commercial production. Pursuant to the said Industrial Policy, the Central Government issued Notification No. 20/2007-Ex. Dated 25-4-2007 granting exemption from duties of excise levied under the Central Excise Act, 1944 (hereinafter referred to as "the Act") read with Section 3(3) of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and Section 3(3) of the Additional Duties of Excise (Textiles & Textile Articles) Act, 1978 to goods cleared from the notified areas within the North-Eastern States. The said Notification provided that the assessee would be entitled to refund of duty paid other than the duty paid by way of utilisation of CENVAT credit under the CENVAT Credit Rules, 2004.
>
> **5.** Reproduction of the first three paragraphs of this Notification would be sufficient, which are as follows:
>
> "***NOTIFICATION No.: 20/2007-CE dated 25-4-2007***
>
> **North-East — Exemption to all goods, except as specified, cleared from Assam, Tripura, Meghalaya, Mizoram,**

Manipur, Nagaland, Arunachal Pradesh or Sikkim from duty paid other than by utilisation of CENVAT credit.

In exercise of the powers conferred by sub-section (1) of Section 5-A of the Central Excise Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) other than those mentioned in the Annexure and cleared from a unit located in the States of Assam or Tripura or Meghalaya or Mizoram or Manipur or Nagaland or Arunachal Pradesh or Sikkim, as the case may be, from so much of the duty of excise leviable thereon under the said Act as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2004.

2. In cases where all goods produced by a manufacturer are eligible for exemption under this Notification, the exemption contained in this Notification shall be available subject to the condition that, the manufacturer first utilises whole of the CENVAT credit available to him on the last day of the month under consideration for payment of duty on goods cleared during such month and pays only the balance amount in cash.

3. The exemption contained in this notification shall be given effect to in the following manner, namely—

(*a*) the manufacturer shall submit a statement of the duty paid other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2004, to the Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be, by the 7th of the next month in which the duty has been paid other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules, 2004;

(*b*) the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, after such verification, as may be deemed necessary, shall refund the amount of duty paid other than the amount of duty paid by utilisation of CENVAT

credit under the CENVAT Credit Rules, 2004, during the month under consideration to the manufacturer by the 15th of the next month:

Provided that in cases, where the exemption contained in this Notification is not applicable to some of the goods produced by a manufacturer, such refund shall not exceed the amount of duty paid less the amount of the CENVAT credit availed of, in respect of the duty paid on the inputs used in or in relation to the manufacture of goods cleared under this Notification;

(*c*) if there is likely to be any delay in the verification, Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall refund the amount on provisional basis by the 15th of the next month to the month under consideration and thereafter may adjust the amount of refund by such amount as may be necessary in the subsequent refunds admissible to the manufacturer."

Circulars have also been referred to in the decision of this Court in *SRD Nutrients Private Limited* (supra). The same is extracted hereunder:

"17. It is clear from the arguments of the counsel for the parties that divergent views are expressed by the CESTAT as well as High Courts. Even one Bench of the same Tribunal has differed from its earlier Division Bench decision. In this scenario, it becomes important as to how the Department has viewed the position regarding education cess and higher education cess which is payable as a surcharge on the excise duty, once the excise duty is exempted. Two circulars are relevant in this behalf, one is Circular dated 10-8-2004 which clarifies that education cess is part of excise duty. In this circular, certain clarifications are given by the Ministry of Finance (Department of Revenue), Government of India and the relevant portion thereof reads as under:

"*Subject*: *Issues relating to imposition of education cess on excisable goods and on imported goods, as pointed out by the trade and the field formations—Reg.*

A The undersigned is directed to state that subsequent to Budget 2004 announcements, a number of representations/references have been received from the trade as well as from the field formations pertaining to imposition of education cess on excisable goods and on imported goods. The points raised and the clarifications thereon are as follows:

B *Issue (1)*: Whether education cess on excisable goods is leviable on goods manufactured prior to imposition of cess but cleared after imposition of such cess?

Clarification: Education cess on excisable goods is a new levy. C In similar cases, it has been held by the Supreme Court that if a levy is not there at the time the goods are manufactured or produced in India, it cannot be levied at the stage of removal of the said goods. Thus, education cess is not leviable on excisable goods manufactured prior to imposition of cess but cleared after D imposition of such cess.

Issue (2): Whether goods that are fully exempted from excise duty/customs duty or are cleared without payment of excise duty/ customs duty (such as clearance under bond or fulfilment of certain conditions) would be subjected to cess.

E *Clarification*: 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, safeguard duty, etc.), *levied and collected*. If goods are fully exempted from excise duty or customs duty, are chargeable to F 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 21-7-2004 issued by Member (Customs) may also be referred to."

G (emphasis in original)"

In the circular dated 10.8.2004, reference has been made to the notification issued by Member (Customs), wherein it is stated that there is no collection of excise duty; hence, no education cess would be H leviable on such clearances.

Circular dated 8.4.2011 had been issued by the Central Board of Excise and Customs with respect to service tax. In case service tax stands exempted, education cess and secondary and higher education cess shall not be levied.

26. This Court in *SRD Nutrients Private Limited* (supra) has observed that the circulars bind department. When there is no excise duty, the education cess and secondary and higher education cess could not have been demanded. This Court observed thus:

> **"21.** One aspect that clearly emerges from the reading of these two circulars is that the Government itself has taken the position that where whole of excise duty or service tax is exempted, even the education cess as well as secondary and higher education cess would not be payable. These circulars are binding on the Department.
>
> **22.** Even otherwise, we are of the opinion that it is more rational to accept the aforesaid position as clarified by the Ministry of Finance in the aforesaid circulars. Education cess is on excise duty. It means that those assessees who are required to pay excise duty have to shell out education cess as well. This education cess is introduced by Sections 91 to 93 of the Finance (No. 2) Act, 2004. As per Section 91 thereof, education cess is the surcharge which the assessee is to pay. Section 93 makes it clear that this education cess is payable on "excisable goods," i.e., in respect of goods specified in the First Schedule to the Central Excise Tariff Act, 1985. Further, this education cess is to be levied @ 2% and calculated on the aggregate of all duties of excise which are levied and collected by the Central Government under the provisions of the Central Excise Act, 1944 or under any other law for the time being in force. Sub-section (3) of Section 93 provides that the provisions of the Central Excise Act, 1944 and the Rules made thereunder, including those related to refunds and duties, etc. shall as far as may be applied in relation to levy and collection of education cess on excisable goods. A conjoint reading of these provisions would amply demonstrate that education cess as a surcharge is levied @ 2% on the duties of excise, which are payable under the Act. 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.

***

24. We are in agreement with the aforesaid reasons accorded by the Rajasthan High Court since it is in consonance with the legal principle enunciated by this Court. For this purpose, we may refer to the judgment in *CCE* v. *TELCO* (1997) 5 SCC 275. In that case, issue pertained to valuation of cess which was levied @ 1/8 per cent of ad valorem "value" of the Central excise duty. The Court held that the calculation of 1/8 per cent ad valorem of the motor vehicle for the purposes of the levy and collection of the automobile cess must be made that was being calculated since automobile cess was to be levied and calculated as if it was excise duty. As a fortiori, the education cess and higher education cess levied @ 2% of the excise duty would partake the character of excise duty itself."

27. In *Bajaj Auto Limited* (supra), a Division Bench of this Court considered the question of liability towards NCCD, education cess and secondary and higher education cess on manufacturing establishment which is exempted from payment of central excise duty under the Act of 1944. The matter arose from the State of Uttarakhand; an Office Memorandum dated 7.1.2003 was issued, by which 100 per cent outright excise duty exemption for ten years was granted from the date of commencement of the commercial production. Notification dated 10.6.2003 issued under Section 5A has been reproduced in the decision mentioned above, the same is extracted hereunder:

"GENERAL EXEMPTION NO. 41

Exemption to goods other than specified goods cleared from units located in the Industrial Growth Centre or Industrial Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estate or Industrial Area or Commercial Estate or Scheme Area of Uttarakhand and Himachal Pradesh.—In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944) read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section

(3) of section 3 of the Additional Duties of Excise (Textiles and Textiles Articles) Act, 1978 (40 of 1978), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than the goods specified in Annexure-I appended hereto, and cleared from a unit located in the Industrial Growth Centre or Industrial Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estate or Industrial Area or Commercial Estate or Scheme Area, as the case may be, specified in [Annexure-II and Annexure III] appended hereto, from the whole of the duty of excise or additional duty of excise, as the case may be, leviable thereon under any of the said Acts."

The Division Bench has relied upon the decision of *SRD Nutrients Private Limited* (supra). The decision of the Rajasthan High Court in *Banswara Syntex Ltd. v. Union of India,* 2007 SCC OnLine Raj. 365, which was considered in *SRD Nutrients Private Limited* (supra), was also referred to, besides the circular of 2004. This Court has observed thus:

"21. We may notice that the primary reasoning contained in the impugned order is common for the three cesses, i.e., NCCD; Education Cess and Secondary & Higher Education Cess. These were in the nature of surcharges levied in other Acts, which have not been specifically excluded under the Notification in question. That reasoning does not prevail, more so because of the judgment in SRD Nutrients Pvt. Ltd. The question, thus, is whether, even though the NCCD is in the nature of an excise duty, its incidence being on the product, rather than on the value of the excise duty, that itself would make any difference to the applicability of the NCCD to excise exempt units.

22. On a proper appreciation of the judicial pronouncement in *SRD Nutrients Pvt. Ltd*., we are not inclined to take a different view from the one taken for Education Cess and Secondary & Higher Education Cess, even while considering the issue of NCCD.

23. We may notice that this Court, in *SRD Nutrients Pvt. Ltd.* gave its imprimatur to the view expressed by the Rajasthan High Court in *Banswara Syntex Ltd.* The rationale is that while there

A may be surcharges under different financial enactments to provide the Government with revenue for specified purposes, the same have been notified as leviable in the nature of a particular kind of duty. In the case of NCCD, it is in the nature of an excise duty. It has to bear the same character as those respective taxes to which the surcharge is appended. NCCD will not cease to be
B an excise duty, but is the same as an excise duty, even if it is levied on the product. Thus, when NCCD, at the time of collection, takes the character of a duty on the product, whatever may be the rationale behind it, it is also subject to the provisions relating to excise duty, applicable to it in the manner of collection
C as well as the obligation of the taxpayer to discharge the duty. Once the excise duty is exempted, NCCD, levied as an excise duty, cannot partake a different character and, thus, would be entitled to the benefit of the exemption notification. The exemption notification also states that the exemption is from the "whole of
D the duty of excise or additional duty of excise." We may also note that the exemption itself is for a period of ten years from the date of commercial production of the unit.

24. We are, thus, of the view that the appellant would not be liable to pay the NCCD."

E 28. The Division Bench of this Court has rendered both the above decisions. The most unfortunate part is that the binding decision of larger bench consisting of three-Judges of this Court in *Union of India v. Modi Rubber Limited,* (1986) 4 SCC 66, dealing with the similar issue, was not placed for consideration before this Court when the
F abovementioned decisions came to be rendered.

29. This Court in *Modi Rubber Limited* (supra) has considered the similar question in the backdrop of the facts that what is the meaning of the expression 'duty of excise' employed in the notifications dated 1.8.1974 and 1.3.1981, issued by the Government of India under Rule
G 8(1) of the Central Excise Rules. A question arose whether expression 'duty of excise' is limited in its connotation only to basic duty levied under the Central Excises and Salt Act, 1944 or it also covers special duties of excise levied under the various Finance Bills and Acts, additional duty of excise levied under the Act of 1957 and other kind
H of duty of excise levied under the Central enactments.

30. In *Modi Rubber Limited* (supra), the company was the manufacturer of tyres, which product was subject to a duty of excise under the Central Excises and Salt Act, 1944. The word 'duty' under the said Act is defined in Rule 2(v) to mean "the duty payable under Section 3 of the Act". The exemption is dealt with under Rule 8 of Central Excise Rules, exempting various categories of excisable goods from the whole or any part of the duty of excise leviable on such goods. The notification dated 1.8.1974, came up for consideration before this Court in *Modi Rubber Limited* (supra), which is extracted hereunder:

> "3…..
>
> Notification No. 123/74-C.E. dated August 1, 1974
>
> In the 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*."

The notification was confined to the exemption of duty of excise under the Act of 1944 in excess of 55 per cent *ad valorem*. Subsequently, the notification dated 1.3.1981, was issued by the Central Government exempting specified goods from so much of the duty of excise leviable thereon as is more than the duty specified in the corresponding entry in column 5.

31. This Court in *Modi Rubber Limited* (supra) considered the question that since 1963, the special duty of excise was levied *inter alia* on the manufacture of tyres from year to year up to 1971 by various Finance Acts passed from time to time. It was discontinued from 1972 to 1978, and the Finance Act, 1978, again revived it. After that, it continued to be levied from year to year right up to the period. The special duties of excise came to be imposed under Section 32 of the Finance Act, 1979, which came up for consideration before this Court in *Modi Rubber Limited* (supra). The same is extracted hereunder:

> "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

A 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.

(2) Sub-section (1) shall cease to have effect after the 31st day of March, 1980, except as respects things done or B omitted to be done before such cesser; and Section 6 of the General Clauses Act, 1897, shall apply upon such cesser as if the said sub-section had then been repealed by a Central Act.

(3) The Special duties of excise referred to in sub-section C (1) shall be in addition to any duties of excise chargeable on such goods under the Central Excises Act or any other law for the time being in force.

(4) The provisions of the Central Excises Act and the rules made thereunder, including those relating to refunds and D exemptions from duties, shall, as far as may be, apply in relation to the levy and collection of the special duties of excise leviable under this section in respect of any goods as they apply in relation to the levy and collection of the duties of excise on such goods under that Act or those rules as the case may be."

E (emphasis supplied)

32. The provisions of Section 32 are *pari materia* to the abovementioned provisions of the Finance Act(s) in question. The special duty under Section 32 of Finance Act, 1979 imposed was in F addition to any duties of excise chargeable on such goods under the provisions of the Central Excises Act and the Rules made thereunder, with respect to refunds and exemptions from duties, shall, as far as may be, apply to the levy and collection of special duties of excise leviable under the provisions of Section 32 of the Finance Act, 1979.

G 33. The assessee *Modi Rubber Limited* (supra) claimed that in view of the notification dated 1.8.1974, assessee was exempted from payment not only in respect of basic excise duty levied under the Central Excises and Salt Act, 1944, but also in respect of special duty of excise levied under the relevant Finance Acts, because the language used in the notification was not restrictive and it referred generally to 'duty of H excise' without any qualification, therefore, it covered all duties of excise

whether levied under the Central Excises and Salt Act, 1944 or under any other Central enactments. The dispute pertained to the period from November 1979 to October 1982.

34. The Assistant Collector of Excise, in the case of *Modi Rubber Limited* (supra), held that exemption granted under the notification dated 1.8.1974, was not available in respect of special duty of excise levied under the Finance Acts. The assessee thereupon filed a writ petition in the Delhi High Court, challenging the order of the Assistant Collector of Excise. The Delhi High Court upheld the claim of the assessee. It took the view that the expression 'duty of excise' included not only basic duty of excise levied under the Central Excises and Salt Act, 1944, but also the special duty of excise levied under the various Finance Acts and any other duties of excise levied under Central enactment. Meanwhile, Parliament also enacted the Central Excise Laws (Amendment and Validation) Act, 1982 laying down statutory rules which should guide the court in interpreting notifications granting exemption from payment of duty of excise and prescribing the conditions on which a notification granting exemption from payment of duty of excise can be construed as applicable to duty of excise levied under any Central law making the provisions of the Central Excises and Salt Act, 1944 and the Rules made thereunder applicable to the levy and collection of duty of excise under such Central Law.

35. The question arose for consideration before this Court as to what is the real import of the expression 'duty of excise' in the notifications dated 1.8.1974 and 1.3.1981 and whether it includes the duties of excise leviable not only under the Central Excises and Salt Act, 1944, but also under any other enactment.

36. This Court in *Modi Rubber Limited* (supra) has considered the purport of the notifications and the specific provisions mentioned therein and held that exemption has to be considered in the light of provisions of Central Excise Rules, 1944, as envisaged under Rule 2(v) of Central Excise Rules, 1944. It cannot, in the circumstances, bear an extended meaning to include special excise duty and auxiliary excise duty. This Court observed thus:

> "**6.** The first question that arises for consideration on these facts is as to what is the true import of the expression "duty of excise" in the notifications dated August 1, 1974, and March 1, 1981. It is only if this expression is held to include duties of excise leviable

not only under the Central Excises and Salt Act, 1944 but also under any other enactments that the question would arise whether the Central Laws (Amendment and Validation) Act, 1982 is constitutionally invalid. We, therefore, asked the learned counsel appearing on behalf of the parties to confine their arguments only to the first question of interpretation of the expression 'duty of excise' in the notifications dated August 1, 1974 and March 1, 1981.

7. Both these notifications, as the opening part shows, are issued under Rule 8(1) of the Central Excise Rules, 1944 and since the definition of 'duty' in Rule 2, clause (*v*) must necessarily be projected in Rule 8(1) and the expression "duty of excise" in Rule 8(1) must be read in the light of that definition, the same expression used in these two notifications issued under Rule 8(1) must also be interpreted in the same sense, namely, duty of excise payable under the Central Excises and Salt Act, 1944 and the exemption granted under both these notifications must be regarded as limited only to such duty of excise. But the respondents contended that the expression 'duty of excise' was one of large amplitude and in the absence of any restrictive or limitative words indicating that it was intended to refer only to duty of excise leviable under the Central Excises and Salt Act, 1944, it must be held to cover all duties of excise whether leviable under the Central Excises and Salt Act, 1944 or under any other enactment. The respondents sought to support this contention by pointing out that whenever the Central Government wanted to confine the exemption granted under a notification to the duty of excise leviable under the Central Excises and Salt Act, 1944, the Central Government made its intention abundantly clear by using appropriate words of limitation such as "duty of excise leviable ... under Section 3 of the Central Excises and Salt Act, 1944" or "duty of excise leviable ... under the Central Excises and Salt Act, 1944" or "duty of excise leviable ... under the said Act" as in the Notification No. CER-8(2)/55-C.E. dated September 17, 1955, Notification No. 255/77-C.E. dated July 20, 1977, Notification No. CER-8(1)/55-C.E. dated September 2, 1955, Notification No. CER-8(9)/55-C.E. dated December 31, 1955, Notification No. 95/61-C.E. dated April 1, 1961, Notification No. 23/55-C.E. dated April 29, 1955, and similar other notifications.

But, here said the respondents, no such words of limitation are used in the two notifications in question and the expression "duty of excise" must, therefore, be read according to its plain natural meaning as including all duties of excise, including special duty of excise and auxiliary duty of excise. Now, it is no doubt true that in these various notifications referred to above, the Central Government has, while granting exemption under Rule 8(1), used specified language indicating that the exemption, total or partial, granted under each such notification is in respect of excise duty leviable under the Central Excises and Salt Act, 1944. But, merely because, as a matter of drafting, the Central Government has in some notifications specifically referred to the excise duty in respect of which exemption is granted as "duty of excise" leviable under the Central Excises and Salt Act, 1944, it does not follow that in the absence of such words of specificity, the expression "duty of excise" standing by itself must be read as referring to all duties of excise. It is 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 and even without it the same intention can be spelt out as a matter of judicial construction and this would be more so in case of subordinate legislation by the executive. The officer drafting a particular piece of subordinate legislation in the Executive Department may employ words with a view to leaving no scope for possible doubt as to its intention or sometimes even for greater completeness, though these words may not add anything to the meaning and scope of the subordinate legislation. Here, in the present notifications, the words duty of excise leviable under the Central Excises and Salt Act, 1944' do not find a place as in the other notifications relied upon by the respondents. But, that does not necessarily lead to the inference that the expression "duty of excise' in these notifications was intended to refer to all duties of excise including special and auxiliary duties of excise. The absence of these words does not absolve us from the obligation to interpret the expression "duty of excise" in these notifications. We have still to construe this expression — what is its meaning and import — and that has to be done, bearing in mind the context in which it occurs. We have already pointed out that these notifications having been issued

A under Rule 8(1), the expression 'duty of excise' in these notifications must bear the same meaning which it has in Rule 8(1) and that meaning clearly is — excise duty payable under the Central Excises and Salt Act, 1944 as envisaged in Rule 2 clause (*v*). It cannot in the circumstances bear an extended meaning so as to include special excise duty and auxiliary excise duty."

37. This Court in *Modi Rubber Limited* (supra) further considered the question when the notification was issued on 1.8.1974, there was no special duty of excise leviable on tyres, it came to be introduced in 1978 under various Finance Acts. It was held that the notification could not be read as comprehending the special duty of excise on the date of the notification and came to be levied four years later. This Court also laid down that the presumption is that when the Central Government issues a notification granting exemption from payment of excise duty under Rule 8(1) of Rules of 1944, the Central Government would have considered whether exemption should be granted and if so, to what extent and can only be with reference to the duty of excise which is then leviable, not a duty to be imposed in future. This Court in *Modi Rubber Limited* (supra) strongly repelled the argument that it would cover the duties to be imposed in the future not prevailing at the relevant time thus:

"**8.** Moreover, at the date when the first notification was issued, namely, August 1, 1974, there was no special duty of excise leviable on tyres. It came to be levied on tyres with effect from the financial year 1978 under various Finance Acts enacted from year to year. It is therefore difficult to understand how the expression "duty of excise" in the notification dated August 1, 1974 could possibly be read as comprehending special duty of excise which did not exist at the date of this notification and came to be levied almost four years later. When special duty of excise was not in existence at the date of this notification, how could the Central Government, in issuing this notification, have intended to grant exemption from payment of special excise duty? The presumption is that when a notification granting exemption from payment of excise duty is 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 can only be with

reference to the duty of excise, which is 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 may be levied in the future, without considering the nature and extent of such duty and the object and purpose for which such levy may be made and without taking into account the situation which may be prevailing then. It is only when a new duty of excise is levied, whether special duty of excise or auxiliary duty of excise or any other kind of duty of excise, that a question could arise whether any particular article should be exempted from payment of such duty of excise and the Central Government would then have to apply its mind to this question and having regard to the nature and extent of such duty of excise and the object and purpose for which it is levied and the economic situation including supply and demand position then prevailing, decide whether exemption from payment of such excise duty should be granted and if so, to what extent. It would be absurd to suggest that by issuing the notification dated August 1, 1974 the Central Government intended to grant exemption not only in respect of excise duty then prevailing but also in respect of all future duties of excise which may be levied from time to time."

38. This Court in *Modi Rubber Limited* (supra) also considered the provisions of Section 32 of the Finance Act, 1979, levying special duty making applicable to the provisions of the Act of 1944 and the Rules made thereunder, relating to refunds and exemptions from duties. They shall, as far as may be, apply in relation to the levy and collection of the special duty of excise as they apply to the levy and collection of the duty of excise under the Act of 1944. It was held that reference to the provisions under section 32 of the Finance Act as to the source of power under which notifications dated 1.8.1974 and 1.3.1981 were issued, it could not be held that exemption granted under these two notifications was extendable to Finance Act, 1979. It was limited only to the duty of excise payable under the Act of 1944. The expression 'duty of excise' in these two notifications could not legitimately be construed as comprehending special duty of excise. Merely reference to the source of power is not enough to attract the exemption and what exemption has been granted to be read from the notification issued therein. This Court has further laid down that in case notification granting exemption issued under the Central Excise Rules, 1944 without reference to any other statute, the exemption must be read as limited

A to the duty of excise payable under the Central Excises and Salt Act, 1944. It cannot cover such special or another kind of duty of excise. This Court in *Modi Rubber Limited* (supra) has discussed the provisions of the Finance Act, 1979 thus:

> "**9.** We have already pointed out, and this is one of the principal
> B arguments against the contention of the respondents, that by reason of the definition of "duty" in clause (*v*) of Rule 2 which must be read in Rule 8(1), the expression "duty of excise" in the notifications dated August 1, 1974 and March 1, 1981 must be construed as duty of excise payable under the Central Excises and Salt Act, 1944. The respondents sought to combat this
> C conclusion by relying on 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 Central Excises and Salt Act, 1944 and the rules made thereunder including those relating to refunds and exemptions from duties shall, as far as may be, apply in relation
> D to the levy and collection of special duty of excise as they apply in relation to the levy and collection of the duty of excise under the Central Excises and Salt Act, 1944. It was urged on behalf of the respondents that by reason of this provision, Rule 8(1) relating to exemption from duty of excise became applicable in
> E relation to the levy and collection of special duty of excise and exemption from payment of special duty of excise could therefore be granted by the Central Government under Rule 8(1) in the same manner in which it could be granted in relation to the duty of excise payable under the Central Excises and Salt Act, 1944. The argument of the respondents based on this premise was that
> F the reference to Rule 8(1) as the source of the power under which the notifications dated August 1, 1974 and March 1, 1981 were issued could not therefore be relied upon as indicating that the duty of excise from which exemption was granted under these two notifications was limited only to the duty of excise payable
> G under the Central Excises and Salt Act, 1944 and the expression "duty of excise" in these two notifications could legitimately be construed as comprehending special duty of excise. This argument is, in our opinion, not well-founded and cannot be sustained. It is obvious that when a notification granting exemption from duty of excise is issued by the Central Government in
> H exercise of the power under Rule 8(1) simpliciter, without

anything more, it must, by reason of the definition of 'duty' contained in Rule 2 clause (*v*) which according to the well recognised canons of construction would be projected in Rule 8(1), be read as granting exemption only in respect of duty of excise payable under the Central Excises and Salt Act, 1944. Undoubtedly, by reason of sub-section (4) of Section 32 of the Finance Act, 1979 and similar provision in the other Finance Acts, Rule 8(1) would become applicable empowering the Central Government to grant exemption from payment of special duty of excise, but when the Central Government exercises this 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 does not of its own force and on its own language apply to granting of exemption in respect of special duty of excise, but the reference would have to be to Rule 8(1) read with sub-section (4) of Section 32 or other similar provision. It is significant to note that during all these years, whenever exemption is sought to be granted by the Central Government from payment of special duty of excise or additional duty of excise, the recital of the source of power in the notification granting exemption has invariably been to Rule 8(1) read with the relevant provision of the statute levying special duty of excise or additional duty of excise, by which the provisions of the Central Excises and Salt Act, 1944 and the rules made thereunder including those relating to exemption from duty are made applicable. Take for example, the Notification bearing No. 63/78 dated August 1, 1978 where exemption is granted in respect of certain excisable goods "from the whole of the special duty of excise leviable thereon under sub-clause (1) of clause 37 of the Finance Bill, 1978". The source of the power recited in this notification is "sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 read with sub-clause (5) of clause 37 of the Finance Bill, 1978". So also in the Notification bearing No. 29/79 dated March 1, 1979 exempting unmanufactured tobacco "from the whole of the duty of excise leviable thereon both under the Central Excises and Salt Act, 1944 and Additional Duties of Excise (Goods of Special Importance) Act, 1957", the reference to the source of power mentioned in the opening part of the notification is "sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 read with sub-section

A (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957". The respondents have in fact produced several notifications granting exemption in respect of special duty of excise or additional duty of excise and in each of these notifications, we find that the source of power is described as sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 *read with* the relevant provision of the statute levying special duty of excise or additional duty of excise by which the provisions of the Central Excises and Salt Act, 1944 and the Rules made thereunder including those relating to exemption from duty are made applicable. Moreover, the exemption granted under all these notifications specifically refers to special duty of excise or additional duty of excise, as the case may be. 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. The notifications in the present case were issued under sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 simpliciter without reference to any other statute and hence the exemption granted under these two notifications must be construed as limited only to the duty of excise payable under the Central Excises and Salt Act, 1944."

F This Court in *Modi Rubber Limited* (supra) has also considered when the exemption is granted under the particular provision; it would not cover any other kind of duty of excise imposed under separate Acts. This Court observed thus:

G "**10.** We may incidentally mention that in the appeals a question of interpretation was also raised in regard to the Notification bearing No. 249/67 dated November 8, 1967 exempting tyres for tractors from "so much of the duty leviable thereon under item 16 of the First Schedule to the Central Excises and Salt Act, 1944 as is in excess of 15 per cent". The argument of the respondents H in the appeals was that the exemption granted under this

notification was not limited to the duty of excise payable under the Central Excises and Salt Act, 1944 but it also extended to special duty of excise, additional duty of excise and auxiliary duty of excise leviable under other enactments. This argument plainly runs counter to the very language of this notification. It is obvious that the exemption granted under this notification is in respect of "so much of the duty leviable thereon under item 16 of the First Schedule to the Central Excises and Salt Act, 1944 as is in excess of 15 per cent" and these words describing the nature and extent of the exemption on their plain natural construction, clearly indicate that the exemption is in respect of duty of excise leviable under the Central Excises and Salt Act, 1944 and does not cover any other kind of duty of excise. No more discussion is necessary in regard to this question beyond merely referring to the language of this notification."

The appeals were allowed, and it was held that exemption was not available in respect of special duty of excise or additional duty of excise or auxiliary duty of excise. A three-Judge Bench in *Rita Textiles Private Limited v. Union of India,* 1986 SCC Supp. 557, has followed the decision of *Modi Rubber Limited* (supra). The decision in *Modi Rubber Limited* (supra) squarely covers the issue and is rendered by a Co-ordinate Bench.

39. Rule 8 of Central Excise Rules, 1944, authorises the Central Government to grant an exemption to any excisable goods from the whole or any part of duty leviable on such goods. Rule 8 is extracted hereunder:

"8. *Power to authorise an exemption from duty in special cases.*—(1) The Central Government may from time to time, by notification in the official Gazette, exempt (subject to such conditions as may be specified in the notification) any excisable goods from the whole or any part of duty leviable on such goods.

(2) The Central Board of Excise and Customs may by special order in each case exempt from the payment of duty, under circumstances of an exceptional nature, any excisable goods."

The word 'duty' is defined under Rule 2(v) to mean the duty as levied under the Act.

40. Notification dated 9.9.2003 issued in the present case makes it clear that exemption was granted under Section 5A of the Act of

A 1944, concerning additional duties under the Act of 1957 and additional duties of excise under the Act of 1978. It was questioned on the ground that it provided for limited exemption only under the Acts referred to therein. There is no reference to the Finance Act, 2001 by which NCCD was imposed, and the Finance Acts of 2004 and 2007 were not in vogue. The notification was questioned on the ground that it should have
B included other duties also. The notification could not have contemplated the inclusion of education cess and secondary and higher education cess imposed by the Finance Acts of 2004 and 2007 in the nature of the duty of excise. The duty on NCCD, education cess and secondary and higher education cess are in the nature of additional excise duty
C and it would not mean that exemption notification dated 9.9.2003 covers them particularly when there is no reference to the notification issued under the Finance Act, 2001. There was no question of granting exemption related to cess was not in vogue at the relevant time imposed later on vide Section 91 of the Act of 2004 and Section 126 of the Act of 2007. The provisions of Act of 1944 and the Rules made thereunder
D shall be applicable to refund, and the exemption is only a reference to the source of power to exempt the NCCD, education cess, secondary and higher education cess. A notification has to be issued for providing exemption under the said source of power. In the absence of a notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they
E cannot be said to have been exempted. The High Court was right in relying upon the decision of three-Judge Bench of this Court in *Modi Rubber Limited* (supra), which has been followed by another three-Judge Bench of this Court in *Rita Textiles Private Limited* (supra).

41. The Circular of 2004 issued based on the interpretation of
F the provisions made by one of the Customs Officers, is of no avail as such Circular has no force of law and cannot be said to be binding on the Court. Similarly, the Circular issued by Central Board of Excise and Customs in 2011, is of no avail as it relates to service tax and has no force of law and cannot be said to be binding concerning the
G interpretation of the provisions by the courts. The reason employed in *SRD Nutrients Private Limited* (supra) that there was nil excise duty, as such, additional duty cannot be charged, is also equally unacceptable as additional duty can always be determined and merely exemption granted in respect of a particular excise duty, cannot come in the way of determination of yet another duty based thereupon. The proposition
H urged that simply because one kind of duty is exempted, other kinds of

duties automatically fall, cannot be accepted as there is no difficulty in making the computation of additional duties, which are payable under NCCD, education cess, secondary and higher education cess. Moreover, statutory notification must cover specifically the duty exempted. When a particular kind of duty is exempted, other types of duty or cess imposed by different legislation for a different purpose cannot be said to have been exempted.

42. The decision of larger bench is binding on the smaller bench has been held by this Court in several decisions such as *Mahanagar Railway Vendors' Union v. Union of India & Ors.* (1994) Suppl. 1 SCC 609, *State of Maharashtra & Ors. v. Mana Adim Jamat Mandal*, AIR 2006 SC 3446 and *State of Uttar Pradesh & Ors. v. Ajay Kumar Sharma & Ors.* (2016) 15 SCC 289. The decision rendered in ignorance of a binding precedent and/or ignorance of a provision has been held to be *per incuriam* in *Subhash Chandra & Ors. v. Delhi Subordinate Services Selection Board & Ors.* (2009) 15 SCC 458, *Dashrath Rupsingh Rathod v. State of Maharashtra* (2014) 9 SCC 129, and *Central Board of Dawoodi Bohra Community & Ors. v. State of Maharashtra & Ors.* (2005) 2 SCC 673. It was held that a smaller bench could not disagree with the view taken by a larger bench.

43. Thus, it is clear that before the Division Bench deciding *SRD Nutrients Private Limited and Bajaj Auto Limited* (supra), the previous binding decisions of three-Judge Bench in *Modi Rubber* (supra) and *Rita Textiles Private Limited* (supra) were not placed for consideration. Thus, the decisions in *SRD Nutrients Private Limited and Bajaj Auto Limited* (supra) are clearly *per incuriam*. The decisions in *Modi Rubber* (supra) and *Rita Textiles Private Limited* (supra) are binding on us being of Co-ordinate Bench, and we respectfully follow them. We did not find any ground to take a different view.

44. Resultantly, we have no hesitation in dismissing the appeals. The judgment and order of the High Court are upheld, and the appeals are dismissed. No costs.

Ankit Gyan Appeals dismissed.