

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
SOUTH ZONAL BENCH, CHENNAI  
COURT HALL No. III**

**EXCISE APPEAL Nos. 42660 - 42662 of 2017**

(Arising out of Order-in-Original No.09 to 11 / 2017 dated 21.06.2017 passed by the Commissioner of Central Excise, Chennai IV Commissionerate, No.692, M.H.U. Complex, Nandanam, Chennai 600 035).

**M/s. Komatsu India Pvt. Ltd.**

**.... Appellant**

Plot No. A1, SIPCOT Industrial Park Growth Centre  
Oragadam, Thenneri (Via)  
Kanchipuram District 631 604

Vs.

**The Commissioner of GST & Central Excise**

**...Respondent**

Chennai Outer Commissionerate  
Newry Towers, No.2054, I Block,  
II Avenue, 12<sup>th</sup> Main Road, Anna Nagar  
Chennai 600 040.

APPEARANCE:

Mr. G. Natarajan, Advocate for the Appellant  
Shri Rudra Pratap Singh, ADC (AR) for the Respondent

CORAM:

**HON'BLE MS. SULEKHA BEEVIC.S., MEMBER (JUDICIAL)  
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)**

DATE OF HEARING :28/08/2023  
DATE OF DECISION :07/11/2023

**FINAL ORDER Nos. 41003-41005/2023**

**ORDER: Per Ms. SULEKHA BEEVI C.S.**

1. Brief facts are that the appellant is engaged in the manufacture of 'Dumpers' classified under CETH 87041010. In terms of Section 136 of the Finance Act, 2001 (14 of 2001) as amended, a surcharge by way of duty of excise, called as National Calamity Contingent Duty (NCCD) is levied on the goods specified in the 7<sup>th</sup> schedule of Finance

Act, 2001 at the rates specified therein and has to be collected as duty of excise. The Finance Act, 2003 has imposed NCCD at the rate of 1% ad-valorem on motor cars falling under Chapter Heading 87 with effect from 1/3/2003 for the replenishment of National Calamity Fund.

2. On verification of records of the appellant, it was found that they have manufactured and cleared Dumper trucks and Dumper trucks without body (Chassis with Cabin) and classified the goods under CTEH 87041010 and 87060043 respectively. On further enquiry, it revealed that the Dumper Truck was manufactured by fixing the load body on the chassis with cabin. According to the department, the chassis is thus captively consumed in the production of final product, viz., Dumper Truck. However, no NCCD was paid by the appellant in respect of the Chassis captively consumed in the production of Dumper Trucks. While chassis are fully exempt from excise duty vide notification no. 67/95-CE dated 16/03/1995, there is no exemption in respect of NCCD. The department was of the view that as there is no exemption from payment of NCCD, as per notification 67/95, the appellant is liable to pay NCCD in respect of chassis, the intermediate product which is captively consumed.

3. The appellant was issued Show Cause Notice dated 28/10/2014 proposing to demand the short-paid amount being NCCD on the value of dumper chassis captively consumed in the manufacture of dumper trucks during the period from 1/4/2010 to 28/2/2014. The Show Cause Notice was issued invoking the extended period, alleging suppression of facts with intent to evade payment of duty.

4. As the appellant continued to violate the provisions of Central Excise law by not paying the NCCD, Statement of Demands (SOD) for subsequent period from 1/3/2014 to 28/2/2015 and 1/3/2015 to 31/1/2016 were issued. After due process of law, the original authority confirmed the duty being NCCD, along with interest and imposed equal penalty in respect of Show Cause Notice dated 28/10/2014. An amount of Rs.4,27,98,912/- was confirmed being NCCD along with interest in respect of SOD no. 13/2015 dated 23/3/2015. Penalty of Rs.5,000/- was imposed under Rule 27 of CER 2002. An amount of Rs.4,79,60,622/- was confirmed along with interest being the NCCD in respect of SOD no. 11/2016 dated 15/3/2016. Penalty of Rs.5,000/- was imposed under Rule 27 of Central Excise Rule 2002. Aggrieved by such confirmation of demands, interest and penalties, the appellant is now before the Tribunal.

5. The Learned counsel Shri G. Natarajan appeared and argued for the appellant. It is submitted that the authorities below had confirmed the demand of NCCD for the period April 2010 to February 2014, March 2014 to Feb. 2015 and March 2015 to January 2016.

5.1 The levy of NCCD has been introduced vide Section 136 of the Finance Act, 2001 for the goods mentioned in the Seventh Schedule to the said Act. As per the said section, NCCD shall be levied and collected, as duty of excise, called as NCCD and all the provisions of the Central Excise Act, 1944 and the Rules made thereunder including those relating to the refunds and exemptions etc., shall be made applicable to the levy and collection of NCCD. The said section

136 of the Finance Act, 2001 is reproduced below for ease of reference:

***Section 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 or any other law for the time being in force.*

(3) *The provisions of the Central Excise Act, 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.*

5.2. The demands are confirmed alleging that during the manufacture of Dumper Trucks by the appellant, Dumper chassis are emerging as an intermediate product, which is classifiable under heading 8706 0043 on which NCCD is payable and the benefit of exemption available for Excise Duty under Notification 67/95 C.E. Dt. 16.03.1995 is not applicable to NCCD.

5.3. The Ld. counsel submitted that the benefit of exemption under Notification 67/95- CE is available for the whole duty of excise leviable thereon which is specified in the schedule to the Central Excise Tariff Act, 1985 (5 of 1986) for the goods manufactured and captively consumed in a factory. The provisions of the Central Excise Act (1 of 1944) and the rules made including refunds, exemptions

and penalty are also made applicable to NCCD since it is levied and collected as a duty of excise. Hence, it is the case of the appellant that the denial of benefit of Notification No. 67/95-CE is not sustainable. The appellant also relied on the following CBEC Circulars, wherein it has been clarified that NCCD is not leviable on exports and the same ratio would apply in the case of duty demand on captive consumption also.

(i) Circular No. 641/32/2002 CX. Dt. 26.06.2002.

(ii) Section 37 B order No. 60/1/2006 Dt.2006.

5.4. The Learned Counsel relied on the decision of the Tribunal in the case of *Filatex India Ltd., Vs CCE – 2014 (302) ELT 446 Tri-Ahmd*, wherein it has been held that the benefit of exemption under Notification 67/95 is available for NCCD. Further, in the case of *Indorrama Synthetics India Ltd., Vs CCE – 2016- TIOL-2629-CESTAT, Mum*, the Tribunal has followed the decision in Tatra Trucks Case and *Filatex* case supra and held that the benefit of the exemption under Notification no.67/95 is available for NCCD also, as the phrase used in the Notification no.67/95 is “**from the whole of duties of excise leviable thereon which is specified in the Schedules of the Central Excise Tariff Act, 1985**”.

5.5. Further, the following cases are also relied upon where similar views were taken by the Tribunal.

1) *Modern Petrofils Vs CCE – 2012-TIOL-132-CESTAT-Ahmd*

2) *Modern Petrofils Vs CCE- 2009-TIOL-515-CESTAT-Mum*

6. It is the case of the appellant that no Chassis is emerging as such as intermediate product in the continuous assembly line and hence there is no liability to pay NCCD on such chassis. One of the issues framed by the Commissioner in the impugned order is as to "Whether Dumper Chassis emerge during the manufacture of dumper trucks?"

6.1 To conclude that intermediate product as chassis emerges, the department has laid emphasis on the fact that the appellant had described the product as "Chassis with cabin assembly" in their export documents and also paid NCCD (under claim for rebate) and that now the appellant is taking a contradictory stand that Chassis does not at all emerge during the process of manufacture. In this connection, the Ld. counsel for appellant submitted that from the photographs furnished before the Court, it can be seen that, what is being treated as Chassis by department has all the essential character of the finished product, the Dumper. Only the body is absent. In this connection, the Ld. counsel invited our attention to Note 2 (a) of the General Rules of Interpretation to the Central Excise Tariff, which is reproduced below.

*2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.*

6.2. Accordingly, since the dumper without body has all attributes and essential character of the finished product viz; Dumper, the same shall merit to be considered only as Dumper. The fact that the

appellant had described the same as "Chassis" whenever such Dumpers without body are sold / exported, cannot be the sole reason to conclude that during the manufacturing process, Chassis emerge as an intermediate product. It is settled law that there is no estoppel in taxation matters and even if the appellant had wrongly mentioned in the export document as export of chassis, they are not precluded from contending that no Chassis is emerging in the manufacture of Dumpers in a continuous assembly line. In respect of the demands pertaining to subsequent periods, though the appellant had requested the respondent to depute his officers to their factory premises to verify their manufacturing operations so as to understand and decide whether any chassis is emerging as an intermediate product or not, the respondent has failed to adhere to this request.

6.3. Accordingly, the Ld. counsel for appellant stressed that during the continuous manufacturing process / assembly line, no identifiable Chassis emerges as an intermediate product; only the Dumper emerges as the final product; as there is no manufacture and captive consumption of Dumpers; no NCCD can be levied / demanded on such non-existent intermediate product viz., Chassis.

6.4. Reliance is placed on *CCE, Mysore V Bharat Earth Movers Ltd reported in 2010 (261) ELT 596 Tri-Bang*, wherein an identical case, the Tribunal of Bangalore has held that during the manufacturing process of dumpers, the chassis is not emerging as an intermediate product and there is no manufacture of chassis to attract the levy. The order was challenged before the Hon'ble Supreme Court of India by department and was dismissed as reported in

*Commissioner Vs Bharat Earth Movers Ltd., 2015 (324) E.L.T A35 (S.C).* To buttress the argument, reliance was also placed in the case of *Tatra Trucks India Ltd., Vs CCE – 2008 (227) ELT 269 Tri.*

7. The Ld. counsel for appellant pointed out that as per the HSN Explanatory Notes for Chapter 8706, as stated in Para 6.1 of this order, the subject goods cannot be classified as Chassis.

8. Without prejudice to the above, the Ld. counsel for appellant submitted the following in regard to classification of impugned dumper chassis.

8.1 Prior to 07.03.2005, Chapter Note 3 to Chapter 87 read as below.

*3. Motor Chassis fitted with cabs fall in headings 8702 to 8704, and not in 8706.*

With the introduction of 8-digit tariff from 2005, Notification 14/2005 C.E. Dt. 07.03.2005 has been issued to rectify some anomalies in the excise duty rates, in exercise of the powers conferred under Section 3 (1) of the Central Excise Tariff Act. Vide the said notification, the above said Note 3 of Chapter 87 was substituted as

*3. Heading 8706 shall include chassis, whether or not fitted with a cab.*

8.2. From Section 3 it can be seen that under the emergency powers available to the Central Government, the only amendment that is possible is change in the rate of duty of excise as specified in the First Schedule and Second Schedule to the Act and an amendment by way of substitution of a new Chapter note is not at all



contemplated in the said section. Hence the amendment carried out in Chapter Note 3 of Chapter 87, vide Notification 14/2005 C.E. Dt. 07.03.2005 is ultra vires of Section 3 (1) of the Central Excise Tariff Act and hence non est. As per the unamended Note 3 of chapter 87, the subject goods merit classification only under Chapter 8704. Hence, the demand of NCCD by classifying the subject goods under chapter 8706 is not at all sustainable.

8.3. In the impugned order, the Commissioner has held that the exemption under Notification 67/95 ibid is not available for NCCD on the basis of the decision of the Hon'ble Supreme Court in the case of *Union of India Vs Modi Rubber Ltd 1986 (25) ELT 849 SC*.

8.4. The Learned Counsel submitted that the ratio of the decision in *Modi Rubber (supra)*, is not applicable to the present issue. The decision is based on an area based exemption notification. This decision of Hon'ble Apex Court is based on the fact that the power to grant exemption was originating from Rule 8 of the Central Excise Rules, 1944 which grants the power to exempt "duty" and the term duty is also defined in Rule 2 (v) of the Rules, to mean only the duty leviable under Section 3 of the Act and hence any exemption notification issued under Rule 8 must refer only to the basic excise duty leviable under Section 3 of the Act and if any other duties have to be exempted, the source of power to grant exemption must be specifically identified.

9. Rule 8 of the erstwhile Central Excise Rules, 1944 read as below.

***8. Power to authorize 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."*

9.1 The Rule 8 of CER, 1944 has been omitted with effect from 01.07.1988 and simultaneously, the power to grant exemption has been introduced in the CE Act, 1944 itself, by inserting Section 5A, which is reproduced below:

**5A. Power to grant exemption from duty of excise.--***(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the **duty of excise** leviable thereon:*

*Provided that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured--*

- (i) in a free trade zone and brought to any other place in India; or*
- (ii) by a hundred per cent export-oriented undertaking and brought to any other place in India.*

*Explanation. --In this proviso, ["free trade zone" and hundred per cent export-oriented undertaking" shall have the same meanings as in Explanation 2 to sub-section (1) of Section 3.*

*(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods.*

*(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty of excise, under circumstances of an exceptional nature to be stated in such order, any excisable goods on which duty of excise is leviable.*

*(2A) The Central Government may, if it considers it necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2), insert an explanation in such notification or order, as the case may be, by notification in the Official Gazette at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2),*

*and every such explanation shall have effect as if it had always been the part of the first notification or order, as the case may be.*

*(3) An exemption under sub-section (1) or sub-section (2) in respect of any excisable goods from any part of the duty of excise leviable thereon (the duty of excise leviable thereon being hereinafter referred to as the statutory duty) may be granted by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any excisable goods in the manner provided in this sub-section shall have effect subject to the condition that the duty of excise chargeable on such goods shall in no case exceed the statutory duty.*

*Explanation. -- "Form or method", in relation to a rate of duty of excise means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty is leviable.*

*(4) Every notification issued under sub-rule (1), and every order made under sub-rule (2), of Rule 8 of the Central Excise Rules, 1944, and in force immediately before the commencement of the Customs and Central Excises Laws (Amendment) Act, 1988 shall be deemed to have been issued or made under the provisions of this section and shall continue to have the same force and effect after such commencement until it is amended, varied, rescinded or superseded under the provisions of this section.*

*(5) Every notification issued under sub-section (1) or sub-section (2-A) shall, unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette.*

9.2. It may be observed from the above that the power under Section 5A is for grant of exemption from payment of "duty of excise". The term "duty of excise" has not been defined in the Act. But reference may be made to Section 2 A of the Act, introduced with

effect from 12.05.2000 vide Finance Act, 2000, which reads as,

***"References of certain expressions 2A. - In this Act, save as otherwise expressly provided and unless the context otherwise requires, references to the expressions "duty", "duties", "duty of excise" and "duties of excise" shall be construed to include a reference to "Central Value Added Tax (CENVAT)"***

9.3. It may be observed that contrary to the exhaustive definition of the term "duty" under Rule 2 (v) of the old Central Excise Rules (which was considered by the Hon'ble Supreme Court in *Modi Rubber*

Case), the term "duty of excise" used in Section 5A of the Act has an inclusive definition, the scope of which is not limited to basic excise duty levied under Section 3 alone. Once NCCD is declared as a "duty of excise" under Section 136 (1) of the finance Act, 2001, the power to grant exemption from the levy of NCCD can be traced back to Section 5A of the Central Excise Act, 1944 and there is no necessity to draw such power from Section 136 (3) of the Act. Hence the ratio of the Hon'ble Supreme Court in the case of *Modi Rubber Ltd.*, (supra) is not applicable to the case in hand, in view of the change in law. Further, in the case of *Tatra Trucks India Ltd.*, (supra) the decision of the Hon'ble Supreme Court in *Modi Rubber Ltd.* has been considered by Tribunal and distinguished. For the same reasons, the decision of the Hon'ble Supreme Court in the case of *Unicorn Industries Vs UOI* – 2019 (370) ELT 3 (SC), which is solely based on its earlier decision in *Modi Rubber supra*, is also distinguishable.

9.4. Further, the appellant also wish to submit that the ratio of the decision of the Hon'ble Apex Court in *Unicorn Industries* (supra) is not applicable to the present case, in as much as the notification involved in *Unicorn Industries* (supra) is 'area based exemption' under Notification 71/2003, the language of which is different from Notification 67/95. Notification 71/2003 grants only partial exemption to the extent of duty payable on value addition, whereas the exemption under Notification 67/95 is for the "whole of the duty of excise".

"Notification 71/2003.

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 Textile 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.**

9.5. For this reason also, the ratio of the Hon'ble Supreme Court in *Unicorn Industries* (supra) is not applicable to the present case.

10. The appellant also wish to submit that when a question came up before the Hon'ble Karnataka High Court, whether CENVAT Credit can be availed in respect of "Sugar Cess" which was levied as a duty of excise, in the case of *CCE Vs Renuga Sugars Ltd.* 2014 (302) ELT 33 (Kar.), it was held that even though such Sugar Cess is not specifically mentioned under Rule 3 of the CENVAT Credit Rules, 2004, since it is levied as a duty of excise, credit of the same is admissible. When the said decision was cited for a similar claim for CENVAT Credit of Clean Energy Cess paid on coal, the Hon'ble CESTAT, Hyderabad, in the case of *Deccan Cements Ltd. Vs CCE* - 2020 (371) ELT 795 (Tri-Hyd.) has distinguished the decision of the Karnataka High Court in the context of Sugar Cess, as below.

*14. We have also considered the argument of the appellants that the ratio of judgment of Hon'ble High Court of Karnataka in the case of Shree Renuka Sugars (supra) not being overturned by any superior judicial forum, must apply. On going through the judgment of the Hon'ble High Court of Karnataka, we find that in that case the entire Central Excise Act and Rules were applicable to sugar cess but in the case of CEC, only some provisions of Central Excise Act have been made applicable. Section 37 of the Central Excise Act under which the CCR, 2004 as well as other Rules are framed are not made applicable to the CEC. Therefore, the Finance Act itself does not conceive of applying CENVAT Credit Rules to the CEC. In the absence of any explicit provision, they cannot be made applicable to the CEC. In other words, neither does Rule 3 of CCR provide for credit of CEC nor do the provisions of CEC make CCR and any other Rules under Central Excise Act applicable to it. Therefore, this is clearly distinguishable from the case of the Hon'ble High Court of Karnataka in the case of Shree Renuka Sugars (supra).”*

10.1. In the instant case, the entire provisions of the Central Excise Act, 1944 had been made applicable for NCCD, as per Section 136 (3) of the Finance Act, 2001. As per the ratio of the above decisions, the benefit of exemption notification no.67/95 issued under Section 5 A of the CE Act, shall be available for NCCD also.

11. In view of the foregoing, the demand of NCCD confirmed on the Appellant for the reason that the benefit of the exemption under Notification 67/95 CE is not available for NCCD is liable to be set aside. As the demand of NCCD is itself not sustainable and liable to be set aside, the demand of interest and imposition of penalties on the appellant are also not sustainable. Further, the non-payment of NCCD on the alleged chassis captively consumed is only on the bonafide belief that no such NCCD is payable. In the various decisions, the issue was decided in favour of assessee. In such circumstances, the question of imposition of penalty does not arise. Further, the demand in the first show cause notice is by way of invocation of extended period, for which there is no justification at all as the issue is interpretational in the given facts and

circumstances. Hence, the demand up to August 2013 is hit by time bar.

12. In view of the foregoing, it is prayed that the impugned orders may kindly be set aside and the appeals may kindly be allowed.

13. The learned AR Shri Rudra Pratap Singh appeared and argued for the department. The Ld. AR adverted to the discussions by the original authority in order dated 21/6/2017 at para 10.1 to 10.3 and argued that though the notification no.67/95/CE exempts from payment of excise duty, there is nothing in the notification to exempt from paying the NCCD leviable on the goods captively consumed. Merely because excise duty is not payable on the captively consumed dumper chassis, it cannot be said that NCCD is also not payable. The levy of NCCD is a surcharge to excise duty. When there is no express exemption from payment of NCCD, the appellants cannot claim any exemption from payment of NCCD by inferring that NCCD is the duty of excise and therefore is also exempted.

14. The very same issue was decided by the Tribunal in the case of *Paras Petrofils Ltd. Vs. CCE, Surat- 2009 (237) ELT 367 (Tribunal) Ahmedabad* and *Superfine Syntex Pvt. Ltd. Vs CCE, Surat- 2009 (237) ELT 292 (Tribunal) Ahmedabad*. In both the above cases the Tribunal has held that in the absence of inclusion of exemption of NCCD in the notification no.67/95 and in view of the similarity between Section 136 and Section 3 (3) of both the enactments, the assessee is liable to pay NCCD on captively consumed goods. The

decision in the case of *Union of India Vs. Modi Rubber Ltd.* 1986 (25) ELT 849 (SC) was relied by the Ld. AR to argue that in the said case the Hon'ble Apex Court held that exemption of duty of excise did not mean exemption from Special excise duty, Additional excise duty or Ancillary duty also. In a later decision the Hon'ble Apex Court in the case of *Unicorn Industries Vs. Union of India* (supra) has relied on the earlier decision in the case of *Modi Rubber Ltd.* to hold that when particular kind of duty is exempted, other types of duty or cess imposed by different legislation for different purpose cannot be said to be exempted. The Ld. AR submitted that the decision in the case of *M/s. Unicorn Industries Ltd.*(supra) would prevail and applicable to the facts of the case. It is prayed that the assessee appeals may be dismissed.

15. Heard both sides.

16. The demand of NCCD has been confirmed by department alleging that during the manufacture of Dumper Trucks by the appellant, an intermediate product, viz., Dumper chassis emerges and if not, for the exemption as per notification 67/95-CE dt. 16.03.1995, excise duty is payable on Dumper chassis. Though excise duty on the intermediate product viz., Dumper chassis is exempted as per notification 67/95, the exemption of this notification is not applicable to NCCD payable on the intermediate product which is captively consumed.

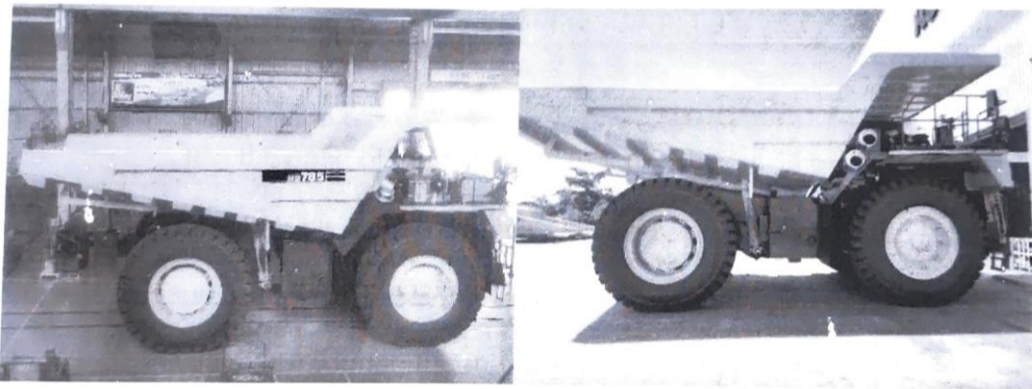
16.1. The appellant has contested the demand of NCCD on Dumper chassis on two grounds. Firstly, that during the



manufacture of Dumper trucks, no chassis emerges as an identifiable and marketable intermediate product to attract the levy of excise duty. Secondly, that the benefit of exemption under notification 67/95 is applicable to NCCD also.

16.2. Let us proceed to examine whether the appellant is liable to pay NCCD on Dumper chassis as an intermediate product. The appellant has furnished images of the Final product (Dumper Truck with body) and Dumper without body. The images are as under:

**Dumper with body.**



**Dumper without body.**



16.3. From the above photographs, it can be seen that the Dumper without the body cannot be treated as a chassis of a dumper, for the reason that it appears to have all the essential features of a dumper,

except for that it is not fitted with the body. As per Note (2) of the Interpretative Rules to the Central Excise Tariff Act, 1985 which has been already noticed in para 6.1 of this order, when the incomplete or unfinished article has the essential character of the complete or finished article, such unfinished article merits classification under the heading of the complete or finished article. The Ld. Counsel for the appellant has emphasized that there is no practice in the market to sell a chassis of a Dumper.

16.4. It is asserted by the Id. Counsel that in the continuous assembly line of manufacture, only dumpers, emerge as final product and there is no identifiable and marketable intermediate product as chassis available for captive consumption. To support this argument, the Ld. Counsel has relied on the decision of the Tribunal in the case of *CCE, Mysore Vs Bharat Earth Movers Ltd.* 2010 (261) ELT 596 (Tri.-Bang). In the said case, after analyzing the entire process of manufacture of dumpers, the Tribunal upheld the findings of the adjudicating authority that at no stage, an intermediate product of Drive-away chassis emerges. The issue in the case is the very same issue as to the leviability of NCCD on the alleged chassis in the course of manufacture of dumpers. The relevant paras read as under:

“8.2 It can be seen from the above reproduced findings, after the verification and considering the process of manufacture and flow chart, the Adjudicating Authority came to the conclusion that the items which come into existence at a particular stage, i.e. stage 4, cannot be called as Drive away Chassis. He also placed reliance on the clarification given by the Mysore Chamber of Commerce Industry i.e. on the basis of findings available at the time of adjudication, the Adjudicating Authority has held that the Drive away Chassis does not come into existence at the factory premises of the respondents. As against these findings, we find that Revenue has not refuted the same in their entire grounds of appeal. The findings indicated in the above reproduced paragraphs, are not contraverted by any evidence, to dislodge the findings of the Adjudicating Authority.

8.3 Further, as regards applicability of NCCD on such chassis, as is in the case before us, we find that learned Commissioner has held that duty is not applicable as there being no manufacture of product, on which the levy of duty arises, therefore, imposition of NCCD does not arise. It is also seen that the learned Commissioner has recorded a finding that even if it is assumed that there is manufacture of goods, even then benefit of exemption under 67/95-C.E., dated 16-3-1995 would be applicable and NCCD is not leviable. Revenue is disputing this point. We find that in an identical issue, in the case of *Tatra Trucks India Ltd. v. CCE* (supra), Revenue was arguing the very same point before the Tribunal. We may reproduce the entire findings of the Tribunal:

“One of the appeals is by the Revenue and the other by the assessee, both against the same order of the Commissioner (Appeals). The assessee is engaged in the manufacture of what they call “Dumper “ [SH 8704.30] and the department calls “Dumper Chassis” [SH 8706.49]. A show-cause notice was issued to them for recovery of National Calamity Contingent Duty (NCCD) at 1% on the “dumper chassis” in terms of Section 136 of the Finance Act, 2001 and for imposing penalty for non-payment of NCCD. The original authority confirmed the demand against the assessee and imposed on them a penalty of Rs. 10,000/- after holding that (a) the assessee’s product was only dumper chassis [SH 8706.49] and could not be considered as ‘incomplete or unfinished dumper having the essential character of dumper’ for classification under SH 8704.30; (b) NCCD was leviable on this product and (c) the benefit of Notification No. 67/95-C.E. was not available to NCCD. In the appeal filed by the assessee, learned Commissioner (Appeals) endorsed the view taken by the lower authority that their product was dumper chassis rather than dumper. But the appellate authority held NCCD to be a duty of excise for purposes of Notification No. 67/95-C.E. and accordingly granted the benefit of exemption to the assessee. At present, the assessee is aggrieved by the concurrent view taken by the lower authorities to the effect that their product is dumper chassis and not dumper. The Revenue is challenging the grant of exemption under Notification No. 67/95-C.E. to the assessee in respect of NCCD.

2. After hearing both sides and considering the case law cited by them, we find that the question whether NCCD is a duty of excise for purposes of Exemption Notifications issued under Section 5A of the Central Excise Act has been considered and answered in the affirmative in *Toyota Kirloskar Motor Pvt. Ltd. v. CCE, Bangalore* [2007 (217) E.L.T. 403 (Tribunal) = 2001 (82) RLT 828 (CESTAT - Ban.)], wherein the benefit of Notification No. 108/95-C.E. dated 28-8-1995 was held to be admissible to NCCD leviable under Section 136 of the Finance Act, 2001. We agree with that decision, which was rendered after examining the relevant provisions of the Finance Act and considering a Circular of the CBEC. The contention raised by the Revenue that NCCD is only a surcharge and not a duty of excise cannot be accepted. The Revenue, in their appeal, has also claimed support from the Supreme Court’s judgment in *Union of India & Ors. v. Modi Rubber Limited & Ors.* [1986 (25) E.L.T. 849 (S.C.)], wherein it was held that exemption from duty of excise did not mean exemption also from Special Excise Duty, Additional Excise Duty or Auxiliary Duty. We find that this case law is not

applicable to NCCD in view of subsection (3) of Section 136 of the Finance Act, 2001, which reads as under :-

“(3) The provisions of the Central Excise Act, 1944 and the Rules made there under, 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, as the case may be”.

For the aforesaid reasons, the Revenue ‘s appeal is dismissed.”

8.4 It can be seen from the above reproduced ratio of the Co-ordinate Bench that the exemption extended under Notification 67/95 is available to NCCD. In view of the above findings and respectfully following the decision of the Co-ordinate Bench, we hold that the impugned order is correct and legal and does not suffer any infirmity. The appeal filed by the Revenue is rejected”.

16.5. The Learned AR, Shri Rudra Pratap Singh countered the above judgment of the Tribunal by submitting that in the said case, the detailed process of manufacture was available before the adjudicating authority. That the appellant herein has not provided the details of the manufacture or stages of assembly line. We have to say that it is for the department to explain in the SCN as to the stage of manufacture and at which stage the intermediate product viz. Dumper chassis emerges. In the SCN nothing is stated except the bare allegation that dumper chassis is emerging as intermediate product. The appellant has consistently raised the plea in all replies issued to the SCN, SOD that a marketable identifiable intermediate product like chassis does not emerge. In their reply they have relied on the above decision in the case of Bharat Earth Movers Ltd (supra) to support and substantiate their contention. When repeated SCNs have been issued raising the same allegations, the department ought to have verified and collected details from the factory of the appellant

regarding the assembly line of manufacture and the stages at which intermediate product if any, emerges, and whether reliance placed by appellant on the facts of *Bharat Earth Movers* is different as contented by them in their reply to SCN.

16.6. The reason in the impugned order to hold that an intermediate marketable product emerges is not based on the process/ stages of manufacture. The reason is that the appellant while making some exports had described the product as "chassis with cabin assembly" in the export documents. The exigibility to duty of a product cannot merely be based on how the assessee described the product in a document. In case of dispute, the department has to clearly state in the SHOW CAUSE NOTICE the nature, classification and dutiability of the product. The Tribunal in the case of *Bharat Earth Movers Ltd.* (supra) has categorically held that the demand of NCCD cannot sustain as there is no intermediate, identifiable and marketable product viz. Dumper chassis emerging in the process of manufacture of dumpers. The issue as to whether NCCD is payable on dumper chassis was also held in favour of assessee by the Tribunal.

16.7. The levy of NCCD has been introduced vide Section 136 of Finance Act, 2001 for the goods mentioned in Seventh Schedule of the said Act. Section 136 has already been noticed in para 1.1 of this order. The issue whether NCCD is a duty of excise for the purpose of Exemption Notification issued under Section 5A of the Central Excise Act, 1944 has been considered in the case of *Tatra Trucks India Ltd. Vs CCE- 2008 (227) ELT 269 (Tri.-Chennai)*. This case was relied in

Bharat Earth Movers (supra). It was held that NCCD is a duty of excise and the benefit of exemption notification no.67/95 would be available for NCCD also. The relevant paras have already been extracted and reproduced. The issue was decided in favour of assessee.

16.8. The adjudicating authority has relied on the decisions of the Tribunal in the case of *Paras Petrofills Ltd. Vs CCE - 2009 (237) ELT 367 (Tri.-Ahd.)* and *Super Fine Syntex Pvt. Ltd. Vs CCE - 2009 (237) ELT 292 (Tri.-Ahd.)*. Both these cases were decided on 7.1.2009. The Tribunal held that in absence of inclusion of NCCD specifically in notification no.67/95, the exemption under the said notification is not available to NCCD. Thus, the issue was decided against assessee and in favour of Revenue.

16.9. Besides the above two decisions, the adjudicating authority has also relied on the decision of the Apex Court in *UOI Vs Modi Rubber Ltd. 1986 (25) ELT 849 (SC)*. In the said case, it was held that exemption from duty of excise did not mean exemption also from Special Excise Duty, Additional Excise Duty or Auxiliary Duty of excise leviable under other enactments. It can be seen that in the *Modi Rubber Ltd.* case, the Hon'ble Apex Court was dealing with area based exemption notification. In the case of *Tatra Trucks India Ltd.* (supra) the Tribunal has distinguished the applicability of this Apex Court decision to the issue of NCCD by adverting to Section 136 of the Finance Act, 2001. The relevant para has already been noticed.

16.10. In the case of *Bajaj Auto Limited Vs UOI 2019 (366) ELT 577 (S.C)* the Hon'ble Apex Court was considering the issue as to whether

the area-based exemption notification no.50/2003-CE dated 10.06.2003 issued under Section 5A of CE Act, 1944, would be applicable to NCCD also. The Hon'ble Apex Court held the issue in favour of assessee and that the appellant would not be liable to pay the NCCD. The relevant paras read as under:

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

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

24. The result of the aforesaid discussion is that the impugned orders are set aside and the show cause notice dated 26-8-2011 is quashed while holding that the appellant is not liable to pay NCCD, Education Cess and Secondary & Higher Education Cess.

25. The appeal is allowed, leaving the parties to bear their own costs.”

16.11. The above decision was followed by the Hon'ble Apex Court in the case of *Hero Motor Corporation Limited Vs Commissioner of Customs & Central Excise, Dehradun 2019 (366) ELT 807 (S.C)*. The relevant paras read as under:

“[Order]. - All the appeals pertain to the liability of the assessee to pay National Calamity Contingent Duty (for short ‘NCCD’). This issue was pending consideration before this Court when these appeals were filed and subsequently the legal position stands settled by the decision of this Court in Civil Appeal No. 3239 of 2019 titled as *Bajaj Auto Limited v Union of India* decided on 27-3-2019 [2019 (366) E.L.T. 807 (S.C.)] opining that the NCCD is in the nature of excise duty and is, thus, entitled to the benefit of the exemption notification.

2. Learned Counsel for the respondent-Department did seek to contend that the appellant has given up this plea before the High Court but on reading of the order we cannot come to such a conclusion as all that has been stated is that at the relevant stage of time view of the High Court was against the assessee which has been specifically reversed in *Bajaj Auto Limited* case (supra).

3. In view of the aforesaid, all the appeals are liable to be allowed in terms of the Judgment in *Bajaj Auto Limited’s* case (supra). We order accordingly.

4. As per the interim order, dated 19-3-2018 interim stay had been granted in respect of the penalty amount but the other amounts had to be deposited and are stated to have been so deposited.

5. That being the position, the amount paid to the Department would be refunded back within a maximum period of two months from the receipt of copy of this order.

6. The appeals are accordingly allowed.”

Against this order of Apex Court dated 30.04.2019, the Revenue had filed Review petition before Apex Court as M.A. No.1675/2021, and the same was dismissed as reported in *Commissioner Vs Hero Motor Corporation Limited* 2023 (383) ELT A 33 (S.C).

16.12. Again, in the case of *Unicorn Industries Vs UOI* 2019 (370) ELT 3 (S.C) the issue under consideration was whether the exemption granted by notification no.71/2003-CE (which is an area-based exemption notification for North Eastern states) would also apply to Education Cess, Secondary and Higher Education Cess imposed by Finance Acts 2004 to 2007 in the nature of duty of excise and also to NCCD. The exemption granted vide the said notification is such that, the manufacturer has to first utilise 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 of this notification is in the nature, that the duty has to be first discharged on the final product, and then claim or avail re-credit of the duties or refund by cash. Thus, the notification 71/2003 is not a direct exemption from payment of excise duty. The scheme of exemption is to discharge the entire duty liability and then seek credit or refund. The main question considered was, when 100 percent exemption had been granted for excise duty for a period of 10 years, whether the exemption notification issued for the state of Sikkim on 09.09.2003 shall be confined to the basic excise duty under the Act of 1944, additional duty under the Act of 1978, which were specifically mentioned in the notification issued on 09.09.2003, or it also include cess/duty imposed by the Finance Acts of 2001, 2004 and 2007 (NCCD). The Hon'ble Apex Court relied on Modi Rubber Limited (supra) and observed that 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. It is to be seen that the language in notification 71/2003 is different and it grants only partial exemption to the extent of value addition. The language used in the notification 67/95 is more specific. It uses the words exempts from the 'whole of the duty of excise'.

16.13. The Board vide Circular No.641/32/2002-CX dated 26.06.2002 has clarified the exemption from payment of NCCD, as applicable to Notification no.42/2001 in regard to export of goods. The Circular reads as under:

“Subject: Payment of NCCD on snuff exported under bond - regarding.

I am directed to refer to Section 129 of the Finance Act, 2001 relating to imposition of National Calamity Contingent Duty (NCCD) and Notification No. 42/2001-C.E. (N.T.), dated 26-6-2001 relating to export of goods without payment of duty under bond and to say that reportedly some of the field formations are issuing demands for collection of National Calamity Contingent Duty (NCCD) on goods exported under bond. The duty demands are issued on the ground that the said notification does not apply to NCCD.

2. Board has examined the matter. Though NCCD is levied under Finance Act, 2001, it is a duty of excise. Notification No. 42/2001-C.E. (N.T.), dated 26-6-2001 issued under Rule 19 of Central Excise Rules, 2001 read with Central Excise Rules, 2002 allows goods to be exported without payment of duty. Further, it is the policy to grant relief form element of domestic taxes on goods, which are exported. Accordingly, it is clarified that **noNCCD leviable under Section 129 of Finance Act, 2001 to be paid on the goods exported under bond**. No doubt if export does not eventually take place the **goods** would be subject to all duties of excise including NCCD as applicable.

3. The field formations may suitably be informed.

4. Receipt of this Circular may please be acknowledged.

16.14. The Tribunal in the case of *Modern Petrofills Ltd. Vs Commissioner* – 2009-TIOL-515-CESTAT MUMBAI (date of decision 3.12.2008) had considered the issue whether the benefit of exemption under notification 108/95-CE dt. 28.8.95 is available to NCCD also. The Tribunal answered in the affirmative, and held that NCCD is not leviable in respect of clearances for captive consumption. The said decision was followed in *J.B.F. Industries Ltd. Vs Commissioner, Vapi* 2009 (246) ELT 286 (Tri.-Ahmd) as well as in the case of *Nava Petrochemicals Ltd. Vs CCE, Ahmedabad* - 2010 (254) ELT 165 (Tri.-Ahmd). From the above, it can be seen that the decision passed by the Tribunal in the case of *Paras Petrofills Ltd.* and *Superfine Syntex* relied by the adjudicating authority are *per in curium* and therefore not applicable.

16.15. The Tribunal in the case of *Modern Petrofills Vs CCE* – 2012-TIOL-132 CESTAT AHMD. Considered the very same issue and held that the exemption under notification no.108/95 is available to NCCD also. The relevant para reads as under:

“5. The facts are identical and the issue is no more res-integra. The decision of this Bench is as follows:

The appellants have challenged the impugned order confirming the demand for NCCD in respect of clearance of Partially Oriented Yarn (POY) to 100% EOUs and for captive consumption with interest and penalties.

2. The Learned Advocate on behalf of the appellants submits that the issue is no more res Integra and submits that in respect of captive consumption, the following decisions of the Tribunal in support his stand that NCCD is not leviable in respect of clearance for captive consumption:

(i) *Tata Trucks India Ltd. Vs CCE Chennai reported in 2008 (227) ELT 269 (Tri.-Chennai) = (2008-TIOL-1209-CESTAT-MUM)*

(ii) *CCE Trichy Vs Kulavi Tobacco Industry reported in 2008 (27) ELT 416 (Tri.-Chennai)*

3. As regards clearances to 100% Eous, he submits that in the case of *Toyota Kirloskar Motor Pvt. Ltd. CCE Bangalore* reported in 2007 (217) ELT 403 (Tri.-Bang) = (2007-TIOL-1422-CESTAT-BANG), it was held that NCCD is not leviable in respect of goods cleared availing the benefit of Notification No.108/95-CE dated 28.8.95. He submits that ratio of this judgment can be applied for the purpose of clearance to 100% EOU also.

4. We find that as pointed out by the learned Advocate, the issue is no more res Integra and we also agree with the contention of the learned Advocate that the judgment of the Tribunal in relation to clearance under Notification No.108/95 can be applied and, therefore, NCCD is not leviable in respect of clearance to 100% EOUs also. Accordingly, the appeal is allowed with consequential relief to the appellants.”

16.16. The Tribunal in the case of *M/s. Indorama Synthetics India Ltd. Vs CCE, Nagpur 2016-TIOL-2629 CESTAT, MUM.*, considered the issue of payment of NCCD for goods cleared to 100% EoU and captive

consumption. The issue was answered in favour of the assessee. The relevant part of the order reads as under:

“8. As regards the POY cleared for captive consumption, the Tribunal decision in the case of M/s Chiripal Industries Ltd. (supra) held as under:

"1. This appeal has been filed by the Appellant with respect to OIA No.78/2007(Ahd-I), dt.27.02.2007, under which the first Appellate Authority has confirmed the OIO dt.22.11.2006 passed by the Adjudicating authority. The issue involved in the present proceedings is whether National Calamity Contingency Duty (NCCD) is leviable on Partially Oriented Yarn (POY) and FDY when used captively in the manufacture of the goods falling under CETH 54.02 exempted under Notification No.46/2003-CE, dt.17.05.2003.

2. Shri P.P. Jadeja, learned Consultant appearing on behalf of the Appellant argued that POY and FDY does not attract NCCD when captively consumed. That when POY is sold as such by the Appellant, NCCD is paid by the Appellant at the time of clearance from the factory. It was his case that the issue of leviability of NCCD during captive consumption is no more res integra and is covered by the following case laws decided by this Tribunal:

*a) M/s Modern Petrofils Vs CCE Vadodara-II Order No.A/2094/WZB/AHD/2011, dt. 10.06.201 1 (in Appeal No.E/2748/2006) = 2012-TIOL-132-CESTAT-AHM*

*b) M/s Modern Petrofils Vs CCE Vadodara-II Order No.A/2689/WZB/AHD/2008, dt.03. 12.2008 (in Appeal No.E/1640/2005) = 2009-TIOL-515-CESTAT-AHM*

*c) M/s Filatex India Ltd Vs CCE Vapi [2014 (302) ELT 446 (Tri-Ahmd)]*

3. Shri L. Patra, learned Authorised Representative appearing for the Revenue defended the order passed by the first Appellate Authority. He made the Bench go through Para 4 of the OIA t.27. 02. 2007 passed by the first Appellate Authority, to drive home the point that exemption under Notification No.67/95-CE, dt. 17.03. 1995 is not applicable to the POY Consumed captively when the end product is chargeable to Nil rate of NCCD.

4. Heard both the sides and perused the case records. The issue involved in this appeal is whether the NCCD is leviable on POY captively consumed. The Appellants has relied upon the case law of Modern Petrofils Ltd (supra) in Appeal No.E/2748/2006 passed by this Tribunal.

4.1 Para 2, 4, 5 &6 of the above Order dt. 10.06. 201 1 are reproduced below:

4.2. The facts of the case are that the appellants are manufacturing Polyester Chips falling under sub-heading 3907.60 of CETA. Partially Oriented Yarn (PTY) falling under sub-heading 5402.32 and Polyester Filament Yarn (PEY) falling under sub-heading 5402.52 of the CETA. The National Calamity Contingent Duty (NCCD) was imposed @ 19% Adv. with effect from 01.03.2003 on the said goods as per Section 136 of the Finance Act, 2001 read with clause 161 of Finance Bill 2003 (now Section 169 of the Finance Act, 2003). It appeared that the exemption from the payment of National Calamity Contingent Duty (NCCD) was not available to the manufacturer of the above goods cleared to 100% EOU. Further, whereas the Notification No.46/2003-CE, dt.17.5.2003 was issued to exempt goods falling under heading No.54.02 from the whole of the NCCD leviable under Section 136 of the Finance Act, 2001 read with Clause 161 of the Finance Bill, 2003 (now Section 169 of the Finance Act, 2003) if such goods are manufactured from the goods falling under Heading No.54.02. However, there was no specific exemption notification that exempted NCCD imposed on POY cleared for captive consumption.

4.3 We find that the issue had already been decided by this Bench in the case of same appellant (M/s Modern Petrofils Ltd) in Appeal NO. E/1040705 reported in -2009-TIOI -515 CESTAT-AHM.

5. The facts are identical and the issue is no more res integra. The decision of this Bench is as follows:

1. The appellants have challenged the impugned order confirming the demand NCCD in respect of clearance of Partially Oriented Yarn (POY) to 100% EOU and for captive consumption with interest and penalties.

2. The learned Advocate on behalf of the appellants submits that the issue is po more res integra and submits that in respect of captive consumption, the following decisions of the Tribunal in support of his stand that NCCD is not leviable in respect of clearance for captive consumption:

(i) Tatra Trucks India Ltd Vs CCE, Chennai reported in 2008 (227) ELT 269 (Tri-Chennai) = 2008-TIOL-1209-CESTAT-MUM

(ii) CCE Trichy Vs Kulavi Tobacco Industry reported in 2008 (227) ELT 416 (Tri-Chennai)

3. As regards clearances to 100% EOUs, he submits that in the case of Toyota Kirloskar Motor Pvt.Ltd. Vs CCE, Bangalore reported in 2007 (217) ELT 403 (Tri Bang) = 2007-TIOL-1422-CESTAT-BANG, it was held that NCCD is not leviable in respect of goods cleared availing the benefit of Notification No. 108/95-CE, dt. 28.08.95. He submits that ratio of this judgment can be applied for the purpose of clearance to 100% EOU also.

*4. We find that as pointed by the learned Advocate, the issue is no more res integra and we also agree with the Contention of the learned Advocate that the judgment of the Tribunal in relation to clearance under Notification No. 108/95 can be applied and therefore, NCCD is not leviable in respect of clearance to 100% EOUs also. Accordingly, the appeal is allowed with consequential relief to the appellants."*

*6. In view of these facts and the legal position, we find that the Order-in-Appeal No. does not stand. The appeal filed by the appellants is therefore, allowed with consequential relief."*

*7. It is observed from Para 2 of the above order dt. 10.06.2011 that POY manufactured by that Appellant in this case was being supplied to 100% EOUS as well as consumed in captive Consumption. After considering the facts of the case and the earlier orders passed in the case of Modern Petrofils Ltd -2009-TIOL-515-CESTAT-AHM, the Bench allowed the appeal filed by the Appellant Modern Petrofils. In the other case of Modern Petrofils Vs CCE Vadodara-III (Supra) the clearances of POY were made under Notification No. 108/95-CE, dt.28.08. 1995 wherein the end product (POY) was cleared at Nil rate of duty, The same ratio has been followed by us in the case of M/s Filatex India Ltd Vs CCE Vapi (supra).*

*After carefully going through the records of the case we are of the considered view that the facts involved in the present case are similar to the facts involved in the relied upon case laws decided by this Bench.*

*8. Respectfully following the judicial discipline, we allow the appeal filed by the Appellant with consequential relief, if any.*

*9. Since the issue regarding discharge of NCCD on the clearance made to EOU and captive consumption is now settled by the Tribunal's decision. We find that the impugned order is unsustainable and liable to be set aside we do so. Appeal is allowed."*

16.17. From the foregoing, we find that the issue as to whether the exemption under notification 67/95 is available to NCCD is to be answered in the affirmative and in favour of the assessee. The demand of NCCD therefore cannot sustain and requires to be set aside. Ordered accordingly.

16.18. The Learned Counsel for the appellant has put forward arguments with regard to classification of the impugned chassis, the alleged intermediate product. It is argued by the Learned Counsel that prior to 07.03.2005, Chapter Note 3 to Chapter 87 read as "Motor Chassis fitted with cabs fall in headings 8702 to 8704 and not in 8705". With the introduction of 8 digit tariff w.e.f 28.02.2005, the notification 14/2005-CE dated 07.03.2005 sought to rectify some of the anomalies. The amended Chapter No.3 to Chapter No.87 read as, "Heading 8706 shall include Chassis, whether or not fitted with a cab". It is argued that under the emergency powers available to the Central Government, only the rate of duty can be changed and an amendment in Chapter note ought to have been laid before Parliament. That therefore the demand of duty classifying the goods under Chapter Heading 8706 is not sustainable.

16.19. As, we have already found the issue on merits as to whether the exemption under notification 67/95 is available to NCCD in favour of assessee, we do not think it necessary to delve into these arguments on classification. We make it clear that we do not render any decision on the classification of the impugned goods and confine our finding as to whether the demand of NCCD is sustainable or not.

17. In the result, the impugned order is set aside. The appeal is allowed with consequential reliefs, if any.

(Pronounced in Court on 07.11.2023)

**(VASA SESHAGIRI RAO)**  
MEMBER (TECHNICAL)  
gs/ra

**(SULEKHA BEEVI C.S.)**  
MEMBER (JUDICIAL)