

# RELEVANT CASE STUDIES

**For MAY, 2016 EXAM**

*[All the case studies are divided into three categories on the basis of their importance, namely*

***Category A: All case studies of the year 2015 and 2014.***

***Category B: All case studies of the year 2013.***

***Category C: Remaining case studies.***

*(Please Note- No Need to Remember The Name of Case Laws)*

# Category: A

## EXCISE LAWS

### Basic Concept

Q. The assessee purchased duty paid GI paper from the market and carried out printing on it according to the design and specifications of the customer. The printing was done on jumbo rolls of GI paper. On the paper, logo and name of the product was printed in colorful form and the same was delivered to the customers in jumbo rolls without slitting. The customer intended to use this paper as a wrapping/packing paper for packing of their goods. Revenue contended that the process amounted to manufacture and the assessee was liable to pay excise duty thereon. However, the Tribunal, when the matter was brought before it, concluded that printing was only incidental and primary use of GI paper roll was for wrapping, which was not changed by the process of printing. Aggrieved by the Tribunal's order, the Revenue appealed before the Supreme Court.

**Ans: Issue: Does printing on jumbo rolls of GI paper as per design and specification of customers with logo and name of product in colourful form, amount to manufacture?**

**Legal position:** The Supreme Court referred to one of its earlier judgments in the case of Servo-Med Industries Pvt. Ltd. 2015 In this case, the Apex Court had culled out four categories of cases to ascertain whether a particular process would amount to manufacture or not:

- (i) Where the goods remain **exactly** the same even after a particular process - There is obviously no manufacture involved.
- (ii) Where the goods remain **essentially** the same after the particular process - Again there can be no manufacture. This is for the reason that the original article continues as such despite the said process and the changes brought about by the said process.
- (iii) Where the goods are transformed into something different and / or new after a particular process **but the said goods are not marketable** - No manufacture of goods takes place. *Examples within this group are cases where the transformation of goods having a shelf life which is of **extremely** small duration.*
- (iv) Where the goods are transformed into goods which are different and / or new after a particular process and such goods are marketable as such - It is in this category that manufacture of goods can be said to take place.

The Apex Court observed that GI paper was meant for wrapping and its use did not undergo any change even after printing - the end use thereof was still the same namely wrapping / packaging. However, whereas the blank paper could be used as wrapper for any kind of product, after the printing of logo and name of the specific product thereupon, its end use got confined to only that particular and specific product of the particular company / customer.

The printing, therefore, was not merely a value addition but had **transformed the general wrapping paper to special wrapping paper.**

**Conclusion:** The Supreme Court held that the process of aforesaid particular kind of printing resulted into a product i.e., paper with distinct character and use of its own which it did not bear earlier. The Court emphasized that there has to be a transformation in the original article and this transformation should bring out a distinctive or different use in the article, in order to cover the process under the definition of manufacture. Since these tests were satisfied in the present case, the Apex Court held that the process amounted to manufacture. **Fitrite Packers 2015 (SC)**

**Q:** The assessee was availing the benefit of an exemption notification. One of the conditions to avail the benefit of said notification was that duty was to be paid in either of two modes of payment of duty - in cash or through account current. However, the assessee cleared the goods through utilization of CENVAT credit which was not the prescribed mode mentioned as per said condition.

The issue which arose for consideration was as to whether the assessee was entitled to avail the benefit of said notification.

**Ans: Issue:** Can the benefit of exemption notification be granted to assessee where one of the conditions to avail the exemption is not strictly followed?

**Legal Position :** The Apex Court observed that the assessee was required to fulfill the condition in stricto sensu viz. to pay the duty either in cash or through account current if it wanted to avail the benefit of exemption notification and not through adjustment of CENVAT credit which was not the mode prescribed in the aforesaid condition. **It is trite that exemption notifications are to be construed strictly and even if there is any doubt same is to be given in favour of the Department.**

**Conclusion:** The Supreme Court held that once it is found that the conditions had not been fulfilled the obvious consequence would be that the assessee was not entitled to the benefit of said notification.

**Honda Siel Power Products Ltd. 2015 (S.C.)**

**Q.** The appellant was engaged in manufacturer of aerated water. Revenue alleged that the appellant was draining out manufactured aerated water on account of contaminated, under filled, over filled, badly crowned bottles, without entering them in R.G.1 register [daily stock account] and without payment of excise duty on the same. It issued a demand-cum show cause notice on the appellant for the recovery of said duty. Revenue was of the view that contaminated, under filled, over filled, badly crowned bottles were excisable goods. Further, if such goods were defective/non-marketable, the appellant should have sought remission of duty paid on such goods.

The appellant contended that such aerated water was drained out as certain bottles were found to be defective on account of contamination, under/over filling of the aerated water in bottles or such bottles were badly crowned. Under and over filling of the bottles make them unusable under the erstwhile Weights and Measures Act [now Legal Meteorology Act, 2009] as well as under the Prevention of Food Adulteration Act. Consequently, the aerated water which was drained out was not marketable. Thus, it was not required to be entered in R.G.-1 register. The appellant further submitted that excise duty could not levied on the goods which had not been manufactured and which were not marketable.

**Answer :**

**Issue:** Whether contaminated, under or over filled bottles or badly crowned bottles amount to manufactured finished goods which are required to be entered under R.G.-1 register, and which are excisable to payment of excise duty?

**Legal position :** The Court observed that only a finished product can be entered in RG 1 register. A finished product is a product which is manufactured as well as which is marketable. The law required the appellant to provide a screening test before it could declare the manufactured product as a finished product, which was marketable. In other words, a finished product was required to be accounted for in R.G. 1 register only after undergoing the screening test and having found that they were fit for sale.

Under filled or over filled or badly crowned caps bottles could not be treated as being fully manufactured nor could they be treated as finished goods. Moreover, bottles filled with less or more aerated water were not marketable under the erstwhile Weights and Measures Act [now Legal Meteorology Act, 2009]. Consequently, such goods could not be entered in R.G. 1 register.

**Conclusion:** The Court held that in the instant case, contaminated, under filled, over filled and badly crowned bottles found at the stage of production were not marketable goods. Thus, they were not required to be entered under R.G.-1 register and consequently, no excise duty was payable on them.

### Amrit Bottlers Private Limited 2014 (All.)

Q. Background: Bagasse is a residue/waste of the sugarcane which is left behind when sugarcane stalks are crushed to extract their juice during the manufacture of sugar. It is currently used as a biofuel and in manufacture of pulp and paper products and building materials and is classified under sub-heading 2303 20 00 of Central Excise Tariff Act, 1985 as Beet-Pulp', 'bagasse' and 'other waste of sugar manufacture' with NIL rate of duty.

Section 2(d) of Central Excise Act, 1944 defines excisable goods. An explanation had been inserted in section 2(d) of the Central Excise Act, 1944 vide Finance Act, 2008 to provide that "goods\* include any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable.

However, Supreme Court in the case of Balrampur Chini Mills Ltd, in Civil Appeal No. 2791 of 2005, decided on 21-7-2010 held that bagasse is a waste and not a manufactured product.

Ans:

**Issue:** Whether bagasse which is a marketable product but not a manufactured product can be subjected to excise duty

**Decision and conclusion:** The High Court concluded that though bagasse is an agricultural waste of sugarcane, it is a marketable product. However, duty cannot be imposed/levied thereon simply by virtue of the explanation added under section 2(d) of the Central Excise Act, 1944 as it does not involve any manufacturing activity. The High Court quashed the CBECs Circular dated 28-10-2009.

### Balrampur Chini Mills Ltd. 2014 All.)

## Valuation

**Q:** The assessee was a prestigious unit manufacturing and selling vehicles in the State of Haryana. Being a prestigious unit, a tax concession was granted to the assessee considered by the High Powered Committee (HPC) under the erstwhile Haryana General Sales Tax Rules, 1975. Therefore, an entitlement certificate was issued to the assessee for implementation of the decision of HPC.

A show cause notice was issued by the Department on the ground that on the sale of its vehicles during the period in question, the assessee had deposited only 50% of the sales tax collected by it from its customers and retained balance 50% availing the tax concession granted to it. The retained sales tax was neither actually paid nor actually payable to the State Government. Therefore, the sales tax retained by the assessee constituted a part of the "transaction value" of the vehicles sold by the assessee to the customers in terms of its definition in section 4(3)(d) of the Central Excise Act, 1944 and excise duty was payable on the same.

The assessee contended that it was not actually exempted from payment of sales tax to the extent of 50% collected from the customers, but that the payment of sales tax was deferred. The 50% sales tax retained for a period of 14 years had to be adjusted against the capital subsidy due to the assessee by the State Government. However, Revenue contended that decision of the HPC did not support the case of the assessee as the entitlement certificate did not mention anything to the effect that it was for the deferment of payment of any sales tax. Thus, the assessee was not supposed to return any amount of sales tax concession to the State Government nor this amount was to be adjusted towards any capital subsidy granted by the State Government.

### Answer

**Issue:** Should a part of sales tax retained by the manufacturer from its customers under a tax concession granted to it, be included in the transaction value of such goods under section 4(3)(d) of the Central Excise Act, 1944?

**Legal position:** The Supreme Court concurred with the Revenue's contention that there was no mention in the decision of the HPC about adjustment of this amount of sales tax concession against any scheme or any capital subsidy. The entitlement certificate also did not give any indication of deferment of tax or capital subsidy.

Further, referring to CBEC Circular dated 30th June, 2000, the Apex Court opined that the assessee retained 50% of the sales tax collected from its customers and it was neither actually paid nor actually payable to the Government. Therefore, the transaction value under section 4(3)(d) shall be calculated by including the amount of sales tax retained by the assessee and they were liable to pay excise duty on such amount.

**Conclusion:** The Apex Court, overruling the Tribunal's decision, held that since assessee retained 50% of the sales tax collected from customers which was neither actually paid to the exchequer nor actually payable to the exchequer, transaction value under section 4(3)(d) of the Central Excise Act, 1944, would include the amount of such sales tax.

### Maruti Suzuki India Limited 2014 (S.C.)

**Q.** Assessee was a manufacturer of manmade fibre yarns which were chargeable to excise duty. The assessee availed the benefit of Sales Tax New Incentive Scheme for Industries, 1989 ('State Incentive Scheme') whereby he could retain 75% of the total sales tax collected from buyer and pay only remaining 25% to the State Government.

While computing the 'transaction value' for the purpose of payment of excise duty, assessee claimed 100% deduction of sales tax collected from buyer. Department objected to this as effectively, the assessee did not pay excise duty on the additional consideration received towards sales tax collected but not deposited with the State exchequer.

Ans.

**Issue:** Is the amount of sales tax/VAT collected by the assessee and retained with him in accordance with any State Sales Tax Incentive Scheme, includible in the assessable value for payment of excise duty?

**Observations of the Court:** Supreme Court observed that amount paid or payable to the State Government towards sales tax, VAT, etc. is excluded as it is not an amount paid to the manufacturer towards the price, but an amount paid or payable to the State Government for the sale transaction. Accordingly, the amount paid to the State Government is only excludible from the transaction value.

**Conclusion:** *The Apex Court held that such retained amount has to be treated as the price of the goods under the basic fundamental conception of "transaction value" as substituted with effect from 1.7.2000 and therefore, the assessee is bound to pay excise duty on the said sum.*

**Super Synotex (India) Ltd. 2014 (SC)**

**Note -** *This case establishes that retention of the specified sales tax amount under the relevant State Sales Tax Incentive Schemes ought to be treated as additional consideration and subjected to central excise duty since deduction of sales tax is available only when it is actually paid to the Sales Tax Department (in terms of the definition of transaction value as introduced from July I, 2000).*

*In other words, the Apex Court has negated the idea that such amounts are in the nature of a subsidy and do not form part of the sale proceeds.*

## Central Excise Rules, 2002

**Q.** The appellants cleared the manufactured goods on provisional assessment basis under Rule 7 of the Central Excise Rules, 2002, however, they did not wait for the passing of final assessment order by Deputy/ Assistant Commissioner finalizing the provisional assessment and paid the differential duty before the passing of said order.

The Department issued a show cause-cum-demand seeking to recover from the assessee the interest under Rule 7(4) of the Rule on the amount of differential duty paid by them. However, Revenue did not contend that the differential duty paid prior to finalization of the assessment was not correct, accurate or was not properly computed.

The assessee contended that interest liability under Rule 7(4) of the rules arises only after passing of final assessment order. Interest is liable to be paid from the month following the month **IN WHICH** assessments were finalized. However, since the assessee had paid the differential duty well before the date of finalization of the assessment order, it was not liable to pay the interest on the same. Further, since the finalisation of provisional assessment had not resulted into any additional liability, Rule 7(4) was not attracted and consequently, interest was not payable by the assessee.

**Issue is this whether interest payable under Rule 7(4) of the Central Excise Rules, 2002 if amount of differential duty paid in full before final assessment order is passed?**

**Answer:**

**Legal Position:** The High Court observed that on finalization of provisional assessment, it is possible that duty liability determined is more than that recovered in the provisional assessment. Liability to pay interest under Rule 7(4) arises on any such amount payable to Central Government consequent to order for final assessment under Rule 7(3).

The Court agreed that since in the assessee's case, final assessment resulted in nothing due and payable to the Government; later part of rule 7(4) was not attracted. Consequently, no interest was recoverable from them. Indeed, in case where assessee had paid the differential duty prior to finalization of the assessment, if the interest was to be recovered and was payable on such date, Rule would have specifically said so.

**Conclusion :** The High Court held that provisions of Rule 7(4) will not be applicable and hence, the interest is not payable, if amount of differential duty is paid in full before the final assessment order is passed.

**Ceat Limited 2015 (Bom.)**

**Q: Whether rule 18 of Central Excise Rules, 2002 (CER) allows export rebate of excise duty paid on both inputs as well as the final product manufactured from such inputs?**

**Ans:** Rule 18 of CER stipulates that where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods OR duty paid on material used in the manufacturing or processing of such goods. The issue in the instant case was that the word 'OR' used in between the two kinds of duties in respect of which rebate can be granted, postulates grant of one of the two duties or both the duties.

**Supreme Court's Observations:** The Apex Court made the following significant observations:

- (i) Rules 18 and 19 of CER provide two alternatives to an exporter for getting the benefit of exemption from paying excise duty.
- (ii) Under rule 19 of CER, the exporter is not required to pay any excise duty at all. When the exporter opts for this method, he is not required to pay duty either on the final product, i.e., on excisable goods or on the material used in the manufacture of those goods. The intention thus, is that goods meant for exports are free from any excise duty.
- (iii) Once this scheme is kept in mind, it cannot be the intention of the Legislature to provide rebate only on one item in case a particular exporter opts for other alternative under Rule 18, namely, paying the duty in the first instance and then claiming the rebate. Giving such restrictive meaning to rule 18 would not only be anomalous but would lead to absurdity as well and would defeat the very purpose

- of grant of remission from payment of excise duty in respect of export goods. It may also lead to invidious discrimination and arbitrary results.
- (iv) The Central Government has issued necessary notifications under rule 18 for rebate. These notifications providing detailed procedure for claiming such rebates contemplate a situation where excise duty may have been paid both on the excisable goods and on material used in the manufacture of those goods and enable the exporter to claim rebate on both the duties.
- (v) It is to be borne in mind that it is the Central Government which has framed the Rules as well as issued the notifications. If the Central Government itself is of the opinion that the rebate is to be allowed on both the forms of excise duties, the rule in question has to be interpreted in accordance with this understanding of the rule maker.

**Conclusion:** The Supreme Court held that normally the two words 'or' and 'and' are to be given their literal meaning. However, wherever use of such a word, viz., 'and'/or' produces unintelligible or absurd results, the **Court has power to read the word 'or' as 'and' and vice versa** to give effect to the intention of the Legislature which is otherwise quite clear. The Apex Court held that the exporters/appellants are entitled to both the rebates under rule 18 and not one kind of rebate.

**Spentex Industries Ltd (SC)**

***Note:** This case is in line with the Government's policy of neutralising the duty element (both Customs and Central Excise) on the goods exported with a view to promote exports of domestic products and make them internationally competitive.*

*This case overrules the Rajasthan High Court's decision in the case of Rajasthan Textile Mills.*

## Small Scale Industries

**Q:** The assessee was availing the benefit of SSI exemption notification and was using a brand name 'BILZ' of a foreign company. The foreign company had assigned the said brand name in favour of the assessee under an agreement with right to use the said trade mark in India exclusively. The Revenue contended that since the assessee was using a brand name of a foreign company, it was ineligible to seek exemption under the aforesaid Notification.

Issue is this **whether an assessee using a foreign brand name, assigned to it by the brand owner with right to use the same in India exclusively, is eligible for SSI exemption?**

**Ans:** The Supreme Court held that because of the aforesaid assignment, the assessee was using the trade mark in **its own right** as its own trade mark and therefore, it could not be said that it was using the trade mark of another person. The assessee was entitled to SSI exemption.

**Otto Bilz (India) Pvt. Ltd 2015 (SC)**

## Cenvat Credit Rules, 2004

**Q:** Assessee availed CENVAT credit of service tax paid on outward transportation of goods cleared from factory. The assessee was of the view that the transportation of goods from factory to the premises of the petitioner ought to be treated as input service. However, the Revenue disallowed the credit holding that the assessee was not entitled to credit of the service tax towards outgoing freight. The Appellate Tribunal, allowed the appeal of the assessee.

**Ans: Issue: Is the assessee entitled to avail CENVAT credit of service tax paid on outward transportation of goods cleared from factory?**

**Legal position:** The High Court relied upon one of its earlier decision in the case of Ambuja Cements Ltd. 2009 (P&H) and upheld the decision of the Tribunal.

The High Court held that outward transportation up to the place of removal falls within the expression "input service". The place of removal, in terms of the Circular of the Board is a question of fact. In the given case, there is **no evidence that the property in goods stood transferred to the purchaser at the factory door of the assessee.**

**Conclusion:** Therefore, the assessee is entitled to avail CENVAT credit of service tax paid on outward transportation of goods cleared from factory. **Haryana Sheet Glass Ltd. 2015 (P&H)**

**Note:** The above case establishes that factory cannot necessarily be the place of removal in all cases. Only if the property in goods is transferred at factory gate, the sale will get complete at the factory gate, and then the factory will be considered as the place of removal.

**Q:** The assessee is engaged in providing taxable commercial training and coaching services to students. It organises celebrations during the academic sessions whereby the services of catering, photography and tents are used. During these celebrations, students successful in coaching are rewarded so as to encourage the existing students and to motivate the new students. Further, it hires examination hall on rent basis for the purpose of conducting examination for students under the coaching. It also undertakes the maintenance and repair of vehicles used by it and incurs travelling expenses for the business tours.

It has availed CENVAT credit on the aforesaid services availed by it. However, Revenue alleged that CENVAT credit on such services was not admissible as these are not covered under the definition of input services under rule 2(l) of the CENVAT Credit Rules, 2004 **since not used in/ in relation to providing output services.**

When appealed before Tribunal, it held that assessee is eligible for CENVAT credit in respect of service tax paid on renting of immovable property service of hiring of examination hall, but disallowed the CENVAT credit availed with respect to other activities. The assessee appealed to High Court against the said order.

**Ans: Issue:** Can a commercial training and coaching institute claim CENVAT credit in respect of the input services of catering, photography and tent services used to encourage the coaching class students, maintenance and repair of its motor vehicle and travelling expenses?

**Legal Position:** The High Court agreed with the view taken by the Tribunal that-

- ✚ Once the students pass their coaching classes, the activities of catering, photography and tent services cannot be said to have been used to provide the output service of commercial training or coaching.
- ✚ Similarly, the assessee maintains and repairs its motor vehicle during the course of the business and there is no material to show that maintenance and repairs have any nexus to commercial training or coaching.
- ✚ Likewise, the travelling expenses incurred by assessee for the business tours cannot be related to provision of commercial training or coaching.

**Conclusion:** The High Court upheld the Tribunal's decision. Thus, the assessee is not eligible for CENVAT credit of the service tax paid on catering, photography and tent services, maintenance and repair of its motor vehicle and travelling expenses.

**Bansal Classes 2015 (Raj.)**

**Q :** Assessee had availed credit of service tax paid on house-keeping and gardening services. However, Revenue disallowed the credit and also imposed penalty on the ground that the assessee was not eligible to avail credit of service tax on these services.

**Ans: Issue:** Whether assessee is entitled to claim CENVAT credit of service tax paid on house-keeping and landscaping services availed to maintain their factory premises in an eco-friendly manner?

**Legal Position :**

- ✚ The High Court noted that principle enunciated in case of Millipore India Pvt. Ltd. 2012 (Kar.) is applicable to the case on hand. In this case, the Karnataka High Court held that landscaping of factory or garden certainly would fall within the concept of modernization, renovation, repair, etc., of the office premises.
- ✚ At any rate, the credit rating of an industry is depended upon how the factory is maintained inside and outside the premises. The environmental law expects the employer to keep the factory without contravening any of those laws.
- ✚ That apart, now the concept of corporate social responsibility is also relevant. It is to discharge a statutory obligation, when the employer spends money to maintain their factory premises in an eco-friendly manner, certainly, the tax paid on such services would form part of the costs of the final products.

**Conclusion:** The High Court agreeing with and following the ratio laid down in the aforesaid decision held that where an employer spends money to maintain their factory premises in an eco-friendly manner, the tax paid on such services would form part of the cost of the final products. Therefore, housekeeping and gardening services would fall within the ambit of input services and the assessee is entitled to claim the benefit of CENVAT credit on the same.

**Rane TRW Steering Systems Ltd. 2015 (Mad.)**

**Q:** The appellant was engaged in providing cellular telephone services and was paying service tax on the same. The appellant availed CENVAT credit of excise duty paid on the Base Trans -receiver Station (BTS) claiming to be a single integrated system consisting of tower, GSM or Microwave, Antennas, Prefabricated building (PFB), isolation transformers, electrical equipments, generator sets, feeder cables etc. The appellant treated these systems as "composite system" classifiable under Chapter 85.25 of the Central Excise Tariff Act [CETA].

**Department's view:** The Department allowed the credit on antenna but objected to availment of CENVAT credit on other items viz. the tower and parts thereof and the PFB on the following grounds:

- ✚ Each of the goods of the BTS had independent functions and hence, they could not be treated and classified as single unit, became immovable and therefore, could not be said to be goods. Even in CKD or SKD condition, the tower and parts thereof would fall under Chapter heading 7308 of the Central Excise Tariff Act which is not specified in clause (i) of Rule 2(a)(A) of the Credit Rules, 2004 (CCR) as capital goods.
- ✚ Tower and parts thereof were not directly utilised for output service as the same had been basically a structural support for certain equipment.

**Appellant's View:** The appellant contended that the goods in question were clearly covered within the ambit of the definition of "capital goods" under rule 2(a)(A) of the CCR. The appellant submitted that tower is an accessory of antenna and that without towers antennas cannot be installed and as such the antennas cannot function and hence, the tower should be treated as parts and components of the antenna.

Alternatively, the goods in question would fall within the definition of "input" under rule 2(k) of CCR. Since, the towers and shelters were received in knocked down condition (CKD) and were used for providing telecom services, the same qualified as "inputs" in terms of rule 2(k) of the CCR. The appellant submitted that since rule 2(k)(iv)] uses the words "all goods" which are "used for providing any "output service", these goods completely fell within the purview of rule 2(k) so as to mean inputs.

However, the Tribunal, when the matter was brought before it, rejected the appellant's plea that the towers and parts thereof and the PFB were capital goods under CCR as also the alternate plea of the appellant that the said goods were inputs falling under rule 2(k) of the CCR.

**Issue: A cellular mobile service provider entitled to avail CENVAT credit on tower parts & pre-fabricated buildings (PFB)?**

**Legal Position:** When the appellant moved the High Court, the High Court observed as under:

- ✚ A combined reading of rule 2(a)(A)(i), 2(a)(A)(iii) and 2(a)(2) indicates that only the category of goods in rule 2(a)(A) falling under clause (i) and (iii) and used for providing output services can qualify as capital goods in the relevant context. All capital goods are not eligible for credit and only those relating to the output services would be eligible for credit.
- ✚ The appellant's contention that they were entitled for credit of the duty paid on account of BTS being a single integrated/composite system classifiable under Chapter 85.25 of the CETA Tariff Act, is not acceptable. Since the various components of the BTS had independent functions, it could not be classified as single integrated/composite system so as to be capital goods. In that case, tower and parts thereof and PFB would not fall under clause (i) of rule 2(A)(a) of CCR.
- ✚ The other contention of the appellant of tower being an accessory of antenna is also without substance as the antenna can be installed irrespective of tower. It would be misconceived and absurd to accept that tower is a part of antenna. An accessory or a part of any goods would necessarily mean such accessory or part which would be utilized to make the goods a finished product or such articles which would go into the composition of another article. The towers are structures fastened to the earth on which the antennas are installed and hence, cannot be considered to be an accessory or part of the antenna.
- ✚ Therefore, the goods in question namely the tower and part thereof and the PFB did not fall within the definition of capital goods and hence, the appellants could not claim the credit of duty paid on these items.
- ✚ The alternative contention of the appellant that the tower and parts thereof and the PFB would also fall under the definition of „input“ under rule 2(k), could also not be sustained.
- ✚ Since the tower and parts thereof were fastened and were fixed to the earth and after their erection became immovable, they could not be termed as goods. The towers were admittedly immovable structures and non-marketable and non-excisable and hence, could neither be regarded as capital goods under rule 2(a) nor could be categorized as „inputs“ under rule 2(k) of the CCR.
- ✚ Even in the CKD or SKD condition, the tower and parts thereof would fall under the Chapter heading 7308 of the Central Excise Tariff Act which is not specified in clause (i) of rule 2(a)(A) of CCR so as to be capital goods.

**Conclusion** The High Court rejected the appeals of the appellant and upheld the findings of the Tribunal holding that the mobile towers and parts thereof and shelters / prefabricated buildings are neither capital goods under rule 2(a) nor „inputs“ under rule 2(k) of the CCR. Hence, CENVAT credit of the duty paid thereon by a cellular mobile service provider was not admissible.

**Bharti Airtel Ltd. 2014 (Bom.)**

Q. The assessee availed CENVAT credit of service tax paid by it on CHA services, shipping agent and container service and commission paid to overseas agents in respect of finished goods which were exported. The Revenue objected to the CENVAT credit claimed on these services.

The Revenue alleged that the CHA services, shipping agent's services, container services and services of overseas commission agent had been availed after the goods were cleared from the place of removal and they were not in relation to the manufacturing activities undertaken by the assessee nor these were pertaining to the activities of clearance of goods from the place of removal. These services, according to the Revenue, did not fall under the definition of the term "input service" and the related CENVAT credit availed was inadmissible.

The assessee contended that the Tribunal had taken a view that where exports are FOB basis, the place of removal has to be taken as port and, therefore, the service availed by it till the goods reach the port would be admissible; that without the assistance of overseas agents, manufactured goods cannot be sold and, therefore, the services of overseas agents have to be treated as one relating to manufacture.

**Answer :**

**Issue :** Whether CENVAT credit can be availed of service tax paid on customs house agents' (CHA) services, shipping agents' and container services and services of overseas commission agents used by the manufacturer of final product for the purpose of export, when the export is on FOB basis?

**Legal position:** The High Court referred to definition of 'input service' as also placed reliance on various cases dealing with subject and made the following observations:

- (i) In case of all three services in relation to which substantial question of law has been framed there is no specific inclusion of such services in the definition of input service.
- (ii) Any service used by the manufacturer directly or indirectly in relation to manufacture of final products and clearing of final products upto the place of removal would certainly be covered within the definition of input service. In the present case, the place of removal would be the port.
- (iii) Revenue has not disputed the fact that the services in relation to which the CENVAT credit is claimed by the assessee were availed for the purpose of clearing the goods for the purpose of export.
- (iv) As regards customs house agent service and shipping agents and container services, the decision of this Court in *Cadila Healthcare Ltd. 2013 (30) STR 3 (Guj.)* would apply and the definition of input service would cover both these services, considering the nature of services and the place of removal being the 'port' in this case.
- (v) With regard to the services of overseas commission agent also, the decision of this Court in **Cadila Healthcare Ltd. 2013 (Guj.)** would apply wherein it was held that the CENVAT credit on a service could be availed if that service is used directly or indirectly in the manufacture or clearance of final product. As the services of overseas commission agent have not been used for these purposes, the denial in the referred case shall apply to the present case also. Consequently, CENVAT credit would not be admissible in respect of the commission paid to foreign agents.

**Conclusion :** The High Court held that CENVAT credit in respect of (i) customs house agents services, (ii) shipping agents and container services and (iii) cargo handling services is admissible, but the CENVAT credit availed for the services of overseas commission agent is not allowed.

### **Dynamic Industries Limited 2014 (Guj.)**

Q.: The respondent assessee was engaged in the manufacture of a dutiable product. During the manufacturing process, a by-product was also being produced which was exempted from the excise duty.

The Department denied CENVAT credit to the assessee saying that since the output products of the assessee were both dutiable and exempted, they were either required to maintain separate records for inputs used in taxable and exempted output or were to pay

6% of the sale price of by-product in terms of rule 6 of the CENVAT Credit Rules, 2004. It was submitted that language of the CENVAT Credit Rules, 2004 needs to be interpreted literally. Since, rule 6 does not provide any distinction between exempted final product and exempted by-product, its provisions would also be applicable to the by-product manufactured and therefore, the assessee was obliged to pay excise duty @ 6% in respect of clearance of exempted by-product.

**Answer:**

**Issue :** Will rule 6 of the CENVAT Credit Rules, 2004 apply, if the assessee clears an exempted by-product and a dutiable final product?

**Legal Position :** The Supreme Court held that since in rule 6 of the CENVAT Credit Rules, 2004, the term used is 'final product' and not 'by-product', said rule cannot be applied in case of 'by-product' when such by-product emerged as a technological necessity. If the Revenue's argument is accepted, it would amount to equating by-product with final product thereby obliterating the difference, though recognised by the legislation itself.

**Conclusion :** The principle enunciated in the above case by the Supreme Court is that rule 6 of CCR would not apply when manufacture of dutiable final product results in emergence of exempt by-product on account of technological necessity.

**Hindustan Zinc Limited. 2014 (S.C.)**

Q: The respondent assessee was engaged in manufacturing of Oil Seals. On account of fire accident in the factory, the work in progress stocks were burnt and rendered unfit for usage. The assessee had availed CENVAT credit on the raw materials, which were to be used for production of Oil Seals.

A show cause notice was issued to the assessee demanding the CENVAT credit availed on raw materials destroyed along with the interest and penalty though Department did not dispute the fact that inputs on which CENVAT credit had been taken were destroyed by fire when work was in progress. The assessee contended that since inputs were put in use for the manufacture of final products, question of reversing the credit did not arise. However, Revenue, by relying upon rule 3(5C) of the CENVAT Credit Rules, 2004 submitted that the assessee was bound to reverse the credit taken on the inputs.

*Note: In the present case, the assessee has not claimed any remission.*

**Answer**

**Issue :** Can CENVAT credit availed on inputs (contained in the work-in-progress destroyed on account of fire) be ordered to be reversed under rule 3(5C) of the CENVAT Credit Rules, 2004?

**Legal Position:** The High Court observed that, it was not in dispute that the inputs on which the CENVAT credit had been availed were destroyed in a fire accident when the work was in progress. Once the fact was not disputed, then the assessee could not be called upon to reverse the credit.

The High Court placed reliance upon the view taken by the Gujarat High Court in the case of **Biopac India Corporation Limited 2010 (Gujarat H.C.)**, wherein it was held that the goods destroyed in fire after being used for many years cannot be said as not used in the manufacture of final product and the assessee need not reverse the credit availed on such inputs.

The High Court further noted that rule 3(5C) can be invoked where on any goods manufactured or produced by an assessee, the payment of duty is ordered to be remitted under rule 21 of the Central Excise Rules, 2002. Thus, only in such case, the CENVAT credit taken on the inputs used in the manufacture of production of said goods shall be reversed.

**Conclusion :** The High Court held that CENVAT credit would need to be reversed only when the payment of excise duty on final product is ordered to be remitted under rule 21 of the Central Excise Rules, 2002, which deals with the remission of duty. In the present case, the assessee has not claimed any remission and no final product has been removed, hence, assessee need not reverse the CENVAT credit taken on inputs (contained in the work-in-progress) destroyed in fire.

**Fenner India Limited 2014 (Mad.)**

## Common Topics

**Q:** The Deputy Commissioner issued an order to the respondent demanding service tax. The appeal before the Commissioner (Appeals) challenging the order of the Deputy Commissioner ended up in dismissal confirming the order of the Deputy Commissioner. The CESTAT, on consideration of the arguments of the respondent and perusal of the record, found that the respondent was never issued a show cause notice as required under section 73 of the Finance Act, 1994. Hence the Tribunal set aside the order of the adjudicating authority. Aggrieved by this order Revenue preferred appeal to High Court.

**Department's Contentions:** Revenue contended that the CESTAT was not justified in setting aside the speaking order passed by the competent adjudicating authority and confirmed by appellate authority, on the short ground of non-issuance of show cause notice as the respondent was suitably put on notice vide a letter. Thereafter the respondent had filed a 20 page explanation and fully utilized opportunity of personal hearing. The Revenue was of the view that since the respondent was afforded an opportunity of personal hearing before the case was decided, speaking order was passed after observing the principles of natural justice. Therefore, there was a substantial compliance on the part of the Revenue and the non-issuance of show cause notice was only a technical breach on their part.

**Assessee's Contentions:** The respondent submitted that there was a categorical finding of the Tribunal that there was fundamental breach of compliance of the statutory provision (i.e.. non-issuance of SCN) which is the basic requirement to initiate the very proceedings under service tax law. Therefore, the order of the Tribunal was unassailable and did not call for any interference by this Court.

**Ans: Issue: Can service tax be demanded by a speaking order without issuing a show cause notice but after issuing a letter and giving the assessee an opportunity to represent his case along with personal hearing?**

**Legal Position:** The High Court observed that a perusal of section 73 of the Finance Act, 1994 leaves no doubt that there is a requirement of issuance of notice stating whether the noticee falls within the category of section 73(1) and proviso to section 73(1) and further specify the amount of service tax that is payable.

The High Court observed that in the present case no notice was issued to the respondent and reliance was placed on a letter. The letter did not satisfy the requirements of the notice as there was no allegation that a specified amount was required to be paid as service tax and even no period was mentioned therein.

**Conclusion:** The High Court held that by no stretch of imagination, the said letter could be treated as a show cause notice satisfying the requirement of section 73 of the Act. The High Court further held that the procedural

requirement of issuance of notice and calling for explanation cannot be dispensed with as otherwise the demand of money in the name of tax would be in violation of the very procedure prescribed under the Act. The High Court thus, dismissed the appeal.

**Vijaya Consultants, Engineers and Consultants 2015 (AP)**

**Q:** In this case, the appellant was engaged in the business of cutting larger steel plates into smaller sizes and shapes as per the requirement of the customers. After cutting the plates as per the customers specifications, same were supplied to them. This process is known as profile cutting.

The appellant did not pay excise duty on the belief that the aforesaid process did not amount to manufacture as per section 2(f) of the Central Excise Act. 1944. Department issued a show cause notice demanding the excise duty and penalty alleging that the activity carried out by the appellant amounts to 'manufacture'. It had invoked the extended period of limitation under section 11A holding that it was a case of suppression and misrepresentation facts by the appellant.

The primary contention of the appellant was that penalty could not be imposed invoking extended period of limitation as there was no suppression or misrepresentation of facts by them. It referred to order-in-original in case of M/s Pioneer Profile Industries, Pune involving the same process wherein although the Commissioner held that process of profile cutting amounted to manufacture, but did not impose the penalty because the question as to whether this process amounted to manufacture was in doubt earlier.

**Ans:**

**Issue: In case the revenue authorities themselves have doubts about the dutiability of a product, can extended period of limitation be invoked alleging that assessee has suppressed the facts?**

**Legal Position :** Referring the order of the Commissioner in case of M/s Pioneer Profile Industries, Pune, the Apex Court inferred that even Department had the doubts relating to excisability of process of profile cutting. In view thereof, if the appellant also had nurtured the belief that the process carried out by him did not amount to manufacture and did not pay excise duty, this conduct of the appellant was a bonafide conduct and could not be treated as willful suppression of facts.

**Conclusion :** The Supreme Court held that since Revenue authorities themselves had the doubts relating to excisability of process of profile cutting, the bonafides of the appellant could not be doubted. Hence, extended period of limitation could not be invoked and penalty was set aside.

**Sanjay Industrial Corporation 2015 (SC)**

**Q. Does the Commissioner (Appeals) have the power to review his own order of pre- deposit?**

**Ans:** The High Court held that there is no provision of law under the Central Excise Act, 1944 which gives power to the Commissioner (Appeals) to review his order.

However, such a power is available to the Tribunal under section 35C (2) of the Central Excise Act, 1944, to rectify any mistake apparent on the record. The High Court elaborated that when there is no power under the statute, the Commissioner (Appeals) has no authority to entertain the application for review of the order.

**M/s Venus Rubbers 2014 (Mad.)**

**Q.** Can an appeal be filed before the Supreme Court against an order of the CESTAT relating to clandestine removal of manufactured goods and clandestine manufacture of goods?

**Answer:** The Supreme Court held that the appeals relating to clandestine removal of manufactured goods and clandestine manufacture of goods are not maintainable before the Apex Court under section 35L of the Central Excise Act, 1944.

**Fact Paper Mills Private Limited 2014 (SC)**

**Q:** Which remedy is available against a pre-deposit order passed by CESTAT under section 35F of Central Excise Act, 1944/section 129E of Customs Act, 1962; is it an appeal to High Court under section 35G of Central Excise Act, 1944/section 130 of Customs Act, 1962 or a writ petition before High Court?

**Ans:** As per section 35G(1)/130(1) of the relevant Acts, an appeal lies to the High Court from every order passed in appeal by the Appellate Tribunal (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise/customs or to the value of goods for purposes of assessment /taxability), if the High Court is satisfied that the case involves a substantial question of law. Sub-section (2) of section 35G/130 inter alia provides that the Commissioner of Central Excise or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court.

**Conclusion :** Finally, the High Court held that the order passed by the CESTAT in terms of section 35F of the Central Excise Act, 1944 or section 129E of the Customs Act, 1962 is appealable in terms of section 35G of the Excise Act, 1944 or section 130 of the Customs Act, 1962.

**Metal Weld Electrodes 2014 (Mad.)**

**Q.** Whether filing of refund claim under section 11B of Central Excise Act, 1944 is required in case of **suo motu** availment of CENVAT credit which was reversed earlier (i.e., the debit in the CENVAT Account is not made towards any duty payment)?

**Ans:** The High Court held that this process involves only an account entry reversal and factually there is no outflow of funds from the assessee by way of payment of duty. Thus, filing of refund claim under section 11B of the Central Excise Act, 1944 is not required. Further, it held that on a technical adjustment made, the question of unjust enrichment as a concept does not arise.

**ICMC Corporation Ltd. (CESTAI CHENNAI) 2014**

### Settlement Commission

- Q. (i) Where a settlement application filed under section 32E(1) of the Central Excise Act, 1944 (herein after referred to as 'Act') is not accompanied with the additional amount of excise duty along with interest due, can Settlement Commission pass a final order under section 32F(1) rejecting the application and abating the proceedings before it ?
- (ii) In the above case, whether a second application filed under section 32E (1), after payment of additional excise duty along with interest, would be maintainable?

**Ans:**

**Legal position:**

- (i) Section 32E (1) of the Act clearly lays down that no application under section 32E(1) shall be made unless the applicant has paid the additional amount of excise duty accepted by him along with interest due under section 11AB. Therefore, if an application is made without complying with the first proviso, it would be defective and not maintainable.
- (ii) Under section 32F(1) only valid applications which do not suffer from any bar created by the first proviso to section 32E(1) can be considered and decided according to the procedure provided in the section. Therefore, the applications which are defective and non-maintainable in terms of the first proviso to section 32E(1) cannot be decided or rejected or declared to have abated under section 32F(1).

**Conclusions:** High Court held that since the earlier application was dismissed on technical defect for non-compliance of the provisions of clause (d) of the proviso to section 32E(1) of the Act and the same was not considered and decided on merits, the second application filed after depositing the additional excise duty and interest would be maintainable.

**Vadilal Gases Limited 2014 (Guj.)**

# CUSTOM LAWS

## Valuation

**Q:** The assessee imported crude oil. On account of ocean loss, the quantity of crude oil shown in the bill of lading was higher than the actual quantity received into the shore tanks in India. The assessee paid the customs duty on the actual quantity received into the shore tanks.

The Department contended that the quantity of crude oil mentioned in the various bills of lading should be the basis for payment of duty, and not the quantity actually received into the shore tanks in India. This was stated on the basis that duty was levied on an ad valorem basis and not on a specific rate. The assessee contended that it makes no difference as to whether the basis for customs duty is at a specific rate or is ad valorem, inasmuch as the quantity of goods at the time of import alone is to be looked at.

**Ans: Issue: In case of import of crude oil, whether customs duty is payable on the basis of the quantity of oil shown in the bill of lading or on the actual quantity received into shore tanks in India?**

**Legal Position:** The assessee raised the issue before the Supreme Court. The Apex Court noted the following:

- (i) The levy of customs duty under section 12 of the Act is only on goods imported into India. Goods are said to be imported into India when they are brought into India from a place outside India. Unless such goods are brought into India, the act of importation which triggers the levy does not take place.
- (ii) If the goods are pilfered after they are unloaded or lost or destroyed at any time before clearance order for home consumption or deposit in a warehouse, the importer is not liable to pay the duty leviable on such goods. This is for the reason that the import of goods does not take place until they become part of the land mass of India.
- (iii) Under section 23(2), the owner of the imported goods shall not be liable to pay any duty thereon. This again is for the good reason that the act of importation gets complete when goods are in the hands of the importer after they have been cleared either for home consumption or for deposit in a warehouse.
- (iv) Further, as per section 47 of the Customs Act, the importer has to pay import duty only on goods that are entered for home consumption. Obviously, the quantity of goods imported will be the quantity of goods at the time they are entered for home consumption.

**Conclusion:** The Supreme Court set aside the Tribunal's judgment and declared that the quantity of crude oil actually received into a shore tank in a port in India should be the basis for payment of customs duty.

**Mangalore Refinery & Petrochemicals Ltd. 2015 (SC)**

Q.: The appellant imported some goods from China. On the basis of certain information obtained through a computer printout from the Customs House, Department alleged that during the period in question, large number of such goods were imported at a much higher price than the price declared by the appellant. Therefore, Department valued such goods on the basis of transaction value of identical goods as per rule 4 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007] and demanded the differential duty alongwith penalty and interest from the appellant. However, Department did not provide these printouts to the appellant.

The appellant contended that Department's demand was without any basis in law, without any legally admissible evidence and opposed to the principles of natural justice as the computer printout which formed the basis of such demand had not been supplied to them. Resultantly, the appellant had no means of knowing as to whether any imports of comparable nature were made at the relevant point of time.

### Answer

**Issue:** Can the value of imported goods be increased if Department fails to provide to the importer, evidence of import of identical goods at higher prices?

**Legal position :** Supreme Court observed that since Revenue did not supply the copy of computer printout, which formed the basis of the conclusion that the appellants under-valued the imported goods, the appellants obviously could not and did not have any opportunity to demonstrate that the transactions relied upon by the Revenue were not comparable transactions.

**Conclusion:** The Supreme Court held that mere existence of alleged computer printout was not proof of existence of comparable imports. Even if assumed that such printout did exist and content thereof were true, such printout must have been supplied to the appellant and it should have been given reasonable opportunity to establish that the import transactions were not comparable.

Thus, in the given case, the value of imported goods could not be enhanced on the basis of value of identical goods as Department was not able to provide evidence of import of identical goods at higher prices.

**Note:** *This case establishes the principle that the onus to prove that identical goods have been imported at a price higher than the value of the goods declared by the importer, lies with the Department.*

Gira Enterprises 2014 (SC)

## Types of duties

**Q:** Would countervailing duty (CVD) on an imported product be exempted if the excise duty on a like article produced or manufactured in India is exempt?

**Ans::** Supreme Court held that rate of additional duty leviable under section 3(1) of the Customs Tariff Act, 1975 would be only that which is payable under the Central Excise Act, 1944 on a like article. Therefore, the importer would be entitled to payment of concessional/ reduced or nil rate of countervailing duty if any notification is issued providing exemption/ remission of excise duty with respect to a like article if produced/ manufactured in India.

Aidek Tourism Services Pvt. Ltd. 2015(SC)

## COMMON TOPICS

Q: In this case, the assessee classified the mobile battery charger as an integral part of the main product i.e. Nokia mobile phone. It contended that cell phone could not be operated without the charger. Further, mobile battery chargers were provided free with the cell phone in a composite package. Therefore, it applied the concessional rate of

tax on the mobile battery charger also, as applicable on the mobile phone. However, it also admitted that whenever it sold the chargers separately, tax was not charged at the concessional rate.

According to Department, a battery charger was not a part of the cell phone but merely an accessory thereof. Thus, concessional rate of tax applicable on cell phones was not applicable to the mobile battery chargers.

**Ans:**

**Issue: Whether the mobile battery charger is classifiable as an accessory of the cell phone or as an integral part of the same?**

**Legal Position :** The Supreme Court decided the case in favour of Revenue and against the assessee holding that the battery charger is not a part of the mobile/cell phone but an accessory to it, on the basis of the following observations:

- ✚ Had the charger been a part of cell phone, cell phone could not have been operated without using the battery charger. However, as a matter of fact, it is not required at the time of operation. Further, the battery in the cell phone can be charged directly from the other means also like laptop without employing the battery charger, implying thereby, that it is nothing but an accessory to the mobile phone.
- ✚ As per the information available on the website of the assessee, it had invariably put the mobile battery charger in the category of an accessory which means that in the common parlance also, the mobile battery charger is understood as an accessory.
- ✚ A particular model of Nokia make battery charger was compatible with many models of Nokia mobile phones and also many models of Nokia make battery chargers are compatible with a particular model of Nokia mobile phone, imparting various levels of effectiveness and convenience to the users.
- ✚ Rule 3(b) of the General Rules for Interpretation of the First Schedule of the Customs Tariff Act, 1975 can also not be applied in the assessee's case as merely making a composite package of cell phone and mobile battery charger will not make it composite goods for the purpose of interpretation of the provisions.

**Conclusion :** The Apex Court held that mobile battery charger is an accessory to mobile phone and not an integral part of it. Further, battery charger cannot be held to be a composite part of the cell phone, but is an independent product which can be sold separately without selling the cell phone. **Nokia India Private Limited 2015 (SC)**

**Q:** The petitioners' imported tunnel boring machines which were otherwise fully exempt from customs duty. However, owing to erroneous classification of such machines, they paid large amount of customs duty.

After expiry of more than 3 years, the petitioners filed a writ petition claiming the refund of the amount so paid. The said refund claim was rejected on the ground that the petitioners failed to make a proper application of refund under section 27 of the Customs Act, 1962 within the stipulated period of 1 year of payment of duty.

**Issue is this whether, limitation period of one year applicable for claiming the refund of amount paid on account of wrong classification of the imported goods?**

**Ans:**

**Legal Position :** The High Court observed that, the provisions of section 27 applies only when there is over payment of duty or interest under the Customs Act, 1962. When the petitioners' case is that tunnel boring machines imported by it were not excisable to any duty, and any sum paid into the exchequer by them was not duty or excess duty but simply money paid into the Government account. The Government could not have claimed or appropriated any part of this as duty or interest. The money received by Government could more appropriately be called money paid by mistake by one person to another, which the other person is under obligation to repay under section 72 of the Indian Contract Act, 1872. The obligation was a continuing obligation. When a wrong is continuing, there is no limitation for instituting a suit complaining about it.

**Conclusion :** The High Court held that law of limitation under Customs Act is applicable to duty or interest paid under the Act. However, any sum paid into the exchequer by the assessee is not duty or excess duty but is simply money paid into the account of Government. Therefore, the assessee is entitled to refund of the sum paid by it to the customs authorities.

**Piramal Ray- 2015 (CAL)**

Q. In this case, the assessee filed a writ petition before the Delhi High Court against the order in original passed by the Commissioner of Customs of Kanpur. However, the jurisdictional High Court for the petitioner would have been Allahabad High Court. When the Revenue raised objection over the territorial jurisdiction of the High Court, the assessee withdrew the appeal from the Delhi High Court and filed the appeal with the Allahabad High Court with the application for condonation of delay.

The Allahabad High Court, however, dismissed the application for condonation of delay and also dismissed the appeal as time barred. Then, the assessee filed a special leave petition with the Supreme Court.

**Answer**

**Issue :** Can a writ petition be filed before a High Court which does not have territorial jurisdiction over the matter?

**Legal position and conclusion :** The Supreme Court observed that the very filing of writ petition by the petitioner in Delhi High Court against the order in original passed by the Commissioner of Customs, Kanpur indicated that the petitioner had taken chance in approaching the High Court at Delhi which had no territorial jurisdiction in the matter. The filing of the writ petition before Delhi High Court was not at all bona fide.

*Note: In the aforementioned case, the Apex Court has disapproved the practice of **Forum Shopping** as adopted by the petitioner.*

***Forum Shopping** = is the practice adopted by the litigants to have their legal case heard in the Court which would provide most favourable decision Provisions relating to illegal import, illegal export, confiscation, penalty & allied provisions.*

**Neeraj Jhanji 2014 (S.C.)**

## CONFISCATION ...

**Q:** In the instant case, an order for provisional release of the seized goods had been made under section 110A of the Act pursuant to an application filed by the petitioner in this regard. However, the petitioner claimed unconditional release of its seized goods in terms of sections 110(2) and 124 of the Act as no show cause notice had been issued within the extended period of six months (initial period of six months was extended by another six months by the Commissioner of Customs in this case).

As per section 110(2) of the Customs Act, 1962 where any goods are seized under subsection (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized. However, the aforesaid period of six months may, on sufficient cause being shown, be extended by the Commissioner of Customs for a period not exceeding six months.

**Point of dispute:** It was the contention of the Department that once an order for provisional release of goods has been made under section 110A of the Act, in view of judgment of the Bombay High Court in Jayant Hansraj Shah 2008 (Bom.), goods cannot be released under sections 110(2) and 124 of the Act. The only recourse available to the petitioner was either to comply with the order of provisional release and in case, the petitioner was unable to abide by the terms of the provisional release then in view of the judgment of the Bombay High Court in Jayant Hansraj Shah's case, the prayer for return of goods unconditionally could not be made.

Ans

**Issue :** Where goods have been ordered to be released provisionally under section 110A of the Customs Act, 1962, can release of goods be claimed under section 110(2) of the Customs Act, 1962?

**Legal Position:** The High Court observed that the object of enacting section 110(2) of the Act is that the Customs Officer may not deprive the right to property for indefinite period to the person from whose possession the goods are seized under subsection (1) thereof. Sub-section (2) of section 110 strikes a balance between the Revenue's power of seizure and an individual's right to get the seized goods released by prescribing a limitation period of six months from the date of seizure if no show cause notice within that period has been issued under section 124(a) for confiscation of the goods.

The High Court opined that a plain and combined reading of sections 110(2), 124 and 110A spells out that any order for provisional release shall not take away the right of the assessee under section 110(2) read with section 124 of the Act. Where no action is initiated by way of issuance of show cause notice under section 124(a) of the Act within six months or extended period stipulated under section 110(2) of the Act, the person from whose possession the goods were seized becomes entitled to their return.

The High Court did not accept the contrary interpretation of the Bombay High Court in Jayant Hansraj Shah's case. The High Court was of the view that the said interpretation was not borne out from the plain reading of the aforesaid provisions.

**Conclusion :** *The remedy of provisional release is independent of remedy of claiming unconditional release in the absence of issuance of any valid show cause notice during the period of limitation or extended limitation prescribed under section 110(2) of the Customs Act, 1962.*

Q: As per section 110(2) of the Customs Act, 1962, a notice under section 124(a) is required to be “given” to the person from whose possession they were seized informing him the grounds on which goods are proposed to be confiscated, within 6 months (extendable upto one year) of seizure of the goods. Otherwise, goods need be returned to such person.

However, in the present case, the notice under section 124(a) was dispatched by registered post on the date of expiry of stipulated period under section 110(2) and received by the petitioner after the expiry of such period.

The petitioner contended that since said notice had not been received before the expiry of the said period of six months (extendable upto one year), goods should be returned to him.

Relying on Supreme Court’s decision in case of *K. Narsimhiah v. H.C. Singri Gowda* 1966 SC and Gujarat High Court’s decision in case of *Ambalal Morarji Soni* 1972, it submitted that :

- By the use of the word "given" used in section 110(2), the legislative intent was clear that the notice had to be received by the person concerned or the notice had to be offered/tendered and refused by the person concerned.
- Mere dispatch by post would not be covered by the word "given" as appearing in the above mentioned provisions of the said Act. Further the expression "given" was distinct and different from the word "issued" or "served".

Revenue, referring to section 153(a), submitted that the moment a notice is tendered or sent by registered post or by an approved courier, that amounts to service of the notice and the actual receipt by the noticee is not a relevant consideration. Since the notice had been sent by registered post within the stipulated period as prescribed under section 110(2) of the said Act, the goods were not liable to be released. They primarily placed reliance on decision of Calcutta High Court in case of *Kanti Tarafdar* (Cal.) and Madhya Pradesh High Court in case of *Ram Kumar Aggarwal* 2012

### Answer

**Issue :** Whether mere dispatch of a notice under section 124(a) would imply that the notice was “given” within the meaning of section 124(a) and section 110(2) of the said Customs Act, 1962?

**Legal position :** The Delhi High Court observed that section 124(a) clearly stipulates that no order confiscating any goods or imposing any penalty on any person shall be made unless the owner of the goods or person from whom goods have been seized is “given a notice” in writing, “informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty”. In case such notice is not given within the stipulated period of six months or the extended period of a further six months, seized goods have to be released.

The object of section 124(a) is that the person from whom the goods have been seized had to be informed of the grounds on which the confiscation of the goods is to be founded. This can happen only when such person receives the notice and is capable of reading and understanding the grounds of the proposed confiscation. On a conjoint reading of section 110(2) and section 124(a) of the said Act, the Court opined that the notice contemplated in these provisions can only be regarded as having been “given” when it is actually received or deemed to be received by the person from whom the goods have been seized.

The Delhi High Court was in complete agreement with the Supreme Court’s decision in case of *K. Narsimhiah* as followed by Gujarat High Court in case of *Ambalal Morarji Soni*. However, it disagreed with the decision of Calcutta High Court in case of *Kanti Tarafdar*. The Delhi High Court pointed out that the decision in the said case was arrived at on the (wrong) premise that section 124 requires that a notice be “issued” as against a notice being “given” when the body of the provision of section 124 nowhere uses the expression “issue of show cause notice”. The Delhi Court elaborated that it is only the heading of that section which uses that expression (issue of show notice) and the body of section 124(a), on the contrary, uses the exact same expression “given” as used in section 110(2) of the said Act. Therefore, the Delhi High Court was of the view that very basis of the Calcutta High Court’s decision in *Kanti Tarafdar* is incorrect. The Delhi High Court also disagreed with the Calcutta High Court’s observation that the word “given” used in section 110(2) and section 124(a) is in any manner controlled by section 153. The Delhi High Court

opined that in the context of the present cases, section 153 would only define the mode and manner of service and not the time of service or when a notice can be said to have been “given”.

Further, Delhi High Court was of the view that Madhya Pradesh High Court, in case of Ram Kumar Aggarwal, wrongly concluded that when the legislature had used the words “notice is given” it would “obviously mean that the notice must be issued within six months of the date of seizure”. The Delhi High Court, on the other hand, opined that expression “notice is given” does not logically translate to the conclusion that “notice must be issued within the stipulated period”.

**Conclusion :** The High Court held that since the petitioners did not receive the notice under section 124(a) within the time stipulated in section 110(2) of the Act, such notice will not considered to be “given” by the Department within the stipulated time, i.e. before the terminal date, **Consequently, the Department was directed to release the goods seized.** **Purushottam Jajodia 2014 (Del.)**

**Q.** The Department disputed the re-export of confiscated goods. They said that the goods which have been confiscated were being smuggled in by the passenger without declaring the same to the Customs and are in commercial quantity. The appellate authority has erred in by allowing the re-export of the goods by reducing the redemption fine and penalty. While doing so, he has not taken into account the law laid down by the Hon’ble Supreme Court in the case of *Grand Prime Ltd. [2003 (S.C.)]*

**Basically the issue is this- Whether the smuggled goods can be re-exported from the customs area without formally getting them release from confiscation?**

**Ans.** The Government noted that the passenger had grossly mis-declared the goods with intention to evade duty and smuggle the goods into India. As per the provision of section 80 of the Customs Act, 1962 when the baggage of the passenger contains article which is dutiable or prohibited and in respect of which the declaration is made under section 77, the proper officer on request of passenger detain such article for the purpose of being returned to him on his leaving India. Since passenger neither made true declaration nor requested for detention of goods for re-export, before customs at the time of his arrival at airport. So, the re-export of said goods cannot be allowed under section 80 of Customs Act. **Hemal K. Shah**

**Note:** The aforesaid case is the revision application filed to the Central Government under section 129DD of the Customs Act, 1962.

**MISC**

## Service TAX

**Q:** The appellants entered into contracts with seven various agencies for display of advertisements, inter alia, on bus-queue shelters and time-keeping booths. The terms of the contract clearly stated that it would be the responsibility of the contractors/advertisers to pay directly to the concerned authority the tax/levy imposed by such authority in addition to the license fee.

The Department issued show cause notice asking the appellant to pay service tax along with interest and penalties on the service of display of advertisements rendered by them.

**Appellant's Contentions:** The appellant argued that they were under a bona fide belief that the liability to remit service tax stood transferred to the recipient qua the agreements; this caused the failure to file returns and remit service tax. They relied upon *Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran 2012 (SC)* to urge that having entered into the contracts in the nature mentioned above, it was a legitimate expectation that the service tax liability would be borne by the contractors/advertisers and, thus, there was no justification for the appellant being held in default or burdened with penalties.

**Ans: Issue: Based on the contractual arrangement, can the assessee ask the Department to recover the tax dues from a third party or wait till the assessee recovers the same?**

**Legal Position:** The High Court observed that there is no dispute that services provided are taxable and that the appellant is liable to pay service tax thereupon. Further, the reliance of the appellant on *Rashtriya Ispat Nigam Limited's* case regarding transferring of service tax liability by way of a contract was correct. The High Court, however, observed that the said ruling of Supreme Court cannot detract from, the fact that in terms of the statutory provisions it is the appellant which is to discharge the liability towards the Revenue on account of service tax.

The High Court agreed with the observations of CESTAT that the plea of "bona fide belief is devoid of substance. The appellant was a public sector undertaking and should have been more vigilant in compliance with its statutory obligations. It could not take cover under the plea that contractors engaged by it having agreed to bear the burden of taxation, there was no need for any further action on its part. For purposes of the taxing statute, the appellant was an assessee. and statutorily bound to not only get itself registered but also submit the requisite returns as per the prescription of law and rules framed thereunder.

**Conclusion:** The High Court held that undoubtedly, the service tax burden can be transferred by contractual arrangement to the other party. However, on account of such contractual/arrangement, the assessee cannot ask the Revenue to recover the tax dues from a third party (the other party) or wait for discharge of the liability by the assessee till it has recovered the amount from its contractors (the other party).

**Delhi Transport Corporation 2015 (Del.)**

**Q:** In this case, the assessee was engaged in preparation of ready mix concrete (RMC). While carrying out such dominant objects, other ancillary and incidental activities like pouring, pumping and laying of concrete were also carried out. The Revenue contended that the whole activity carried out by the assessee was not a sale transaction, as it also included element of service in it. Hence, the assessee was liable to pay service tax. The Department was of the view that the activities like pouring, pumping and laying of concrete is a significant part of the transaction and not incidental to transaction of sale.

The Tribunal, when the matter was brought before it, held that agreement to supply RMC does not constitute any taxable service. Aggrieved by such an order, the Revenue, preferred an appeal before the Supreme Court,. Discuss?

**Ans:**

**Issue:** Does preparation of ready mix concrete (RMC) along with pouring, pumping and laying of concrete amount to provision of service?

**Legal position and Conclusion :** The Supreme Court upheld the decision of the Tribunal wherein it was held that the contract between the parties was to supply RMC and not to provide any taxable services.

Therefore, since the Finance Act, 1994 is not a law relating to commodity taxation, the adjudication was made under mistake of fact and law fails. By this judgment, the Supreme Court dismissed the appeal filed by the Revenue.

**GMK Concrete Mixing Pvt. Ltd. 2015 (SC)**

**Q. Is 'hiring of cab' different from 'renting of cab' for service tax purposes?**

**Ans** The High Court opined that under rent-a-cab scheme, the hirer is endowed with the freedom to take the vehicle wherever he wishes, and he is only obliged to keep the holder of the license informed of his movements from time to time. However, when a person chooses to hire a car, which is offered on the strength of a permit issued by the Motor Vehicles Department, then the owner of the vehicle, who may or may not be the driver, will offer his service while retaining the control and possession of the vehicle with himself. The customer is merely enabled to make use of the vehicle by travelling in the vehicle. In the case of a passenger, he is expected to pay the metered charges, which is usually collected on the basis of the number of kilometers travelled.

The High Court observed that though rent and hire may, in a different context, have the same connotation; in the context of rent-a-cab scheme and hiring, they signify two different transactions.

**Conclusion:** The High Court upheld the decision of the Tribunal wherein it was held that unless the control of the vehicle is made over to the hirer and he is given possession for howsoever short a period, which the contract contemplates, to deal with the vehicle, no doubt subject to the other terms of the contract; there would be no renting.

**Sachin Malhotra 2015 STR (Uttarakhand)**

**Q:** Whether the amendment made by Finance Act, 2013 in section 37C(1)(a) of Central Excise Act, 1944 to include speed post as an additional mode of delivery of notice is merely clarificatory in nature having retrospective effect or does it operate prospectively?

The contention of the assessee was that the amendment made in section 37(C)(1)(a) of the Central Excise Act, 1944 which added "speed post" as an additional mode of service of notice could only operate prospectively and not retrospectively.

**Ans:** The High Court observed that in view of section 28 of the Indian Post Office Act, 1898, any postal article which is registered at the post office from which it is posted, and a receipt has been issued in respect of such article, is to be treated as "registered post".

The High Court pointed out that since for both "registered post" as well as "speed post", receipts are required to be issued when articles are delivered to the post offices, both "speed post" and "registered post" satisfy the requirement of section 28 of the Indian Post Office Act, 1898.

The only difference between the two is that the charges payable for the "speed post" are higher as the same ensures delivery at an early date.

Consequently, the High Court was of the view that addition of the term "speed post" in section 37(C)(1)(a) was merely clarificatory. The High Court further stated that the said amendment is clearly curative since various other High Courts have held that "communication of notices through speed post was in consonance with law". The High Court reiterated that it is well settled in law that where an amendment which is brought about is "clarificatory in nature", the same would date back to the date on which the original provision was introduced.

**Conclusion :** The High Court, therefore, held that insertion of words "or by speed post with proof of delivery" in section 37C(1)(a) of the Central Excise Act, 1944 is clarificatory and a procedural amendment and hence, would have retrospective effect.

**Jay Balaji Jyoti Steels Limited 2015 (Ori.)**

**Q: Can the Commissioner (Appeals) remand back a case to the adjudicating authority under section 85 of the Finance Act, 1994?**

The question of law which was raised in this case was that whether the Commissioner (Appeals), exercising powers under section 85 of the Finance Act, 1994, has the power to remand the proceedings back to the adjudicating authority.

**Ans:**

**Legal Position :** The High Court observed that section 85(4) of the Finance Act, 1994 is worded widely and gives ample powers to the Commissioner while hearing and disposing of the appeals to pass such orders as he thinks fit including an order enhancing tax, interest or penalty. Such powers would, therefore, inherently contain the power to remand a proceeding for proper reasons to the adjudicating authority.

The High Court held that sub-section (4) of section 85 itself contains the width of the power of the Commissioner (Appeals) in hearing the proceedings of appeal under section 85. The scope of such powers flowing from sub-section (4), therefore, cannot be curtailed by any reference to sub-section (5) of section 85 of the Finance Act, 1994.

**Conclusion :** The High Court, therefore, held that section 85(4) of the Finance Act, 1994 gives ample powers to the Commissioner while hearing and disposing of the appeals and such powers inherently contain the power to remand a proceeding for proper, reasons to the adjudicating authority. **Associated Hotels Ltd. 2015 (Guj**

**Q:** The assessee received the adjudication order on 08.10.2011 and filed an appeal against the said order before Commissioner of Central Excise (Appeals) on 09.04.2012 along with an application for condonation of delay. However, the Commissioner dismissed the appeal as being time barred and declined to condone the delay. Tribunal, on appeal, decided that the delay should be condoned in assessee's case. It observed that period of limitation of 3 months prescribed under section 85(3) of the Finance Act, 1994 meant 3 calendar months and not 90 days and proviso to said sub-section empowered Commissioner to condone the delay for sufficient cause so as to allow the appeal to be presented within a further period of 3 months.

The issue which came up for consideration before High Court was whether the period of limitation or the period within which delay in filing an appeal can be condoned, specified in terms of months in a statute, means a calendar month or number of days.

**Ans:** The High Court opined that where the legislature intends to define the period of limitation with regard to the number of days, it does so specifically. Section 85 of the Finance Act, 1994 has defined the period of limitation as well as the power to condone the delay with regard to a stipulation in terms of months and such a stipulation can only mean a calendar month. Once the legislature has used the expression "three months" both in the substantive part of sub-section (3) of section 85 as well as in its proviso, it would not be open for the High Court to substitute the words "3 months" by the words "90 days" and if it does so, it would amount to rewriting the legislative provision, which is impermissible.

The High Court noted that section 3(35) of the General Clauses Act, 1897 also defines the expression "month" to mean a month reckoned according to the **British calendar**. Further, the day, on which order was received by the assessee, i.e. 08.10.2011 had to be excluded while computing the period of limitation. Since the original period of limitation and the period within which delay could be condoned expired on a public holiday, i.e. 08.04.2012, the assessee filed the appeal on the next working day. i.e. 09.04.2012.

**Conclusion:** In the given case, the Commissioner of Central Excise (Appeals) had the jurisdiction to condone the delay in filing of appeal by the assessee as 1 the same had been filed within the stipulated time prescribed for the same.

**Ashok Kumar Tiwari 2015 (All.)**

Q. In the instant case, the assessee filed an appeal to Commissioner, but mistakenly gave it to the adjudicating officer who had passed the original order. The appellate authority rejected the appeal on the ground that the appeal was not received in time in his office. Basically appeal had been preferred in time, but reached different wing of the same building.

The Department contended that although appeal was received in time by the adjudicating officer, appellate authority rejected the appeal as the same was not received in its office in time. **Can the appeal filed in time but to wrong authority be rejected by the appellate authority being time barred?**

**Ans :** The High Court noted that Since the appeal was received by the adjudicating officer who has passed the original order, he ought to have sent it to the other wing of the same building, but he had not done the same. Therefore, the order passed by the appellate authority cancelling the appeal on the ground that it was not received in time, could not be accepted.

The High Court, further, referred to Andhra Pradesh High Court judgment in **Radha Vinyl Pvt. Ltd.** case where in similar circumstances it was held that although the appeal had been addressed to the wrong officer. Department could not deny the fact that the appeal was pending before it. Either the Department should have returned the appeal papers to the assessee to enable him to file appeal before the appropriate authority or should have handed over the appeal papers to the competent authority. Consequently, now the Department could not say that the appeal was not filed with the competent authority.

**Conclusion :** In the light of the above discussion, the High Court directed the appellate authority to entertain the appeal of the assessee and to pass appropriate orders on merits and in accordance with law, after affording him an opportunity of being heard.

**Chakiat Agencies (Mad.)**

Q. The assessee entered into agreements with National Thermal Power Corporation Limited (NTPC) for running and maintenance of a guest house and with Lanco Infratech Limited (LANCO) for running and maintenance of catering services for its Township. The assessee charged amounts in cash from individual customers for food, eatables and beverages supplied according to rates stipulated in the menu card. The assessee did not pay any service tax as it was of the view that it did not provide any service to NTPC or LANCO but only sold goods in their canteens to individual customers (not to NTPC and LANCO). NTPC and LANCO just provided a place for running the canteen on rent and reimbursed certain expenses for maintenance and running. Thus, there should not be any service tax liability on this activity.

However, the Revenue demanded service tax from the assessee by treating the activity of the assessee as outdoor catering services since he was engaged in providing services in connection with catering at a place other than his own. The Revenue was of the opinion that the fact that food, beverages or edibles were consumed by employees of NTPC and LANCO or by those who use the guest house or facility, made no difference to the position that the service was provided by the assessee to NTPC or LANCO, and attracted service tax.

**Answer:**

**Issue:** Whether supply of food, edibles and beverages provided to the customers, employees and guests using canteen or guesthouse of the other person, results in outdoor caterer service

**Legal Position:** The High Court opined that the assessee is a caterer. The assessee is a person who supplies food, edibles and beverages for a purpose. The purpose is to cater to persons who use the facility of a canteen which is provided by NTPC or by LANCO within their own establishments. NTPC and LANCO have engaged the services of the assessee as a caterer. Further, since the assessee provides the services as a caterer at a place other than his own, he is an outdoor caterer.

on the supply of food and beverages to those who consume them at the canteen, would not exclude the liability of the assessee for the payment of service tax in respect of the taxable service provided by the assessee as an outdoor caterer.

**Conclusion :** Based on the observation made above, the High Court held that the assessee was liable for payment of service tax as an outdoor caterer. **Indian Coffee Workers' Co-operative Society Limited 2014 (All.)**

**Q:** The assessee was running a Flying Training Institute and Aircraft Maintenance Engineering Institute. It was engaged in providing training and coaching to individuals in the field of flying of aircraft for obtaining Commercial Pilot License from the Director Civil Aviation (DGCA), New Delhi. It also provided training for obtaining Basic Aircraft Maintenance Engineering Licence.

**Point of Dispute:** The Department demanded service tax on this training activity. However, the assessee contended that since the services were leading to the grant of diploma/certificate recognised by the law, the services were exempt and thus, were not chargeable to service tax. The assessee cited the case of Indian Institute of Aircraft Engineering v. Union of India 2013 (30) STR 689, in which the Delhi High Court, in the similar matter held that such services were not chargeable to service tax being exempt.

**Answer:**

**Issue:** Whether the course completion certificate/training offered by approved Flying Training Institute and Aircraft Engineering Institutes is recognized by law (for being eligible for exemption from service tax) if the course completion certificate/ training/ is only for the purpose of eligibility for obtaining ultimate licence /approval for certifying repair/maintenance/airworthiness of aircrafts?

**Legal position :** The High Court referred to the judgment of the Delhi High Court in Indian Institute of Aircraft Engineering v. Union of India, wherein the Delhi High Court made the following observations:

(i) The expression 'recognized by law' is a very wide one. The legislature has not used the expression “conferred by law” or “conferred by statute”. Thus, even if the certificate/degree/diploma/ qualification is not the product of a statute but has approval of some kind in 'law', it would be exempt.

(ii) The Aircraft Act, 1934 (the Act) and the Aircraft Rules, 1937 (the Rules) and the Civil Aviation Requirements (CAR) issued by the DGCA under Rule 133B of the Rules, having provided for grant of approval to such institutes and having laid down conditions for grant of such approval and having further provided for relaxation of one year in the minimum practical training required for taking the DGCA examination, have recognized the course completion certificate and the qualification offered by such Institutes.

(iii) An educational qualification recognized by law will not cease to be recognized by law merely because for practicing in the field to which the qualification relates, a further examination held by a body regulating that field of practice is to be taken.

**Conclusion :** The High Court upheld the decision of the Tribunal and held that the Revenue had not been able to persuade the Court to take a contrary view as taken by the Delhi High Court in Indian Institute of Aircraft Engineering. The appeal filed by the Revenue would not give rise to any substantial question of law. Hence, the appeal filed was dismissed and the assessee was held not to be liable to pay service tax.

**Garg Aviations Limited 2014 (All.)**

Q. The assessee was engaged in manufacturing of fabrics and ready-made garments. In order to reduce its cost, they deputed some of their employees to their group company. The employees deputed did not work exclusively under the direction or supervision of the subsidiary company and upon completion of the work they were repatriated to the assessee company. The Revenue sought to recover service tax from the assessee for the reimbursement recovered by it from its group/subsidiary companies for the cost of such employees on deputation under the service category of 'manpower supply'.

### Answer

**Issue:** Whether deputation of some staff to subsidiaries/group of companies for stipulated work or for limited period results in supply of manpower service liable to service tax, even though the direction/control/supervision remained continuously with the provider of the staff and the actual cost incurred was reimbursed by the subsidiaries/group companies?

**Legal position:** The High Court observed that 'manpower supply services' would not cover the activity of the assessee. The assessee, in order to reduce its cost of manufacturing, deputed some of its staff to its subsidiaries or group companies for stipulated work or for limited period. All throughout, the control and supervision remained with the assessee. The assessee was not in the business of providing recruitment or supply of manpower. Actual cost incurred by the assessee in terms of salary, remuneration and perquisites was only reimbursed by the group companies. There was no element of profit or finance benefit. The subsidiary companies could not be said to be their clients. The High Court noted that the employee deputed did not exclusively work under the direction or supervision or control of subsidiary company.

**Conclusion :** The High Court rejected the contention of the Revenue and held that deputation of the employees by the respondent to its group companies was only for and in the interest of the assessee. There is no relation of agency and client. The assessee company was not engaged in providing any services directly or indirectly in any manner for recruitment or supply of manpower temporarily or otherwise to a client. Therefore, they were not liable to pay service tax. **Arvind Mills Limited 2014 (Guj.)**

Q. Whether section 66E(i) of the Finance Act, 1994 which levies service tax on the service portion of activity wherein goods being food or any other article for human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of activity, is ultra vires the Article 366(29A)(f) of the Constitution?

The substantial questions of law which arose before the High Court were:

- (a) Whether any service tax can be charged on sale of an item or vice versa?
- (b) Whether in view of Article 366(2A)(f) service is subsumed in sale of foods and drinks and whether such Article is violated by section 66E(i) of the Finance Act, 1994?

### Answer :

**Legal position:** The High Court observed as under:

(i) With reference to question (a) above, the High Court observed that a tax on the sale and purchase of food and drinks within a State is in exclusive domain of the State. The Parliament cannot impose a tax upon the same. Similarly, there is no entry in List II or List III of the Seventh Schedule to the Constitution under which service tax can be imposed. There is no legislative competence with the States to impose a tax on any service.

(ii) With reference to question (b) above, the High Court observed that Article 366(29A)(f) of the Constitution does not indicate that the service part is subsumed in the sale of the food; it rather separates sale of food and drinks from service. Section 65B(44) as well as section 66E(i) of the Finance Act, 1994, charge service tax only on the service part and not on the sales part. It indicates that the sale of the food has been taken out from the service part.

(iii) The quantum of services to be taxed is explained under rule 2C of the Service Tax (Determination of Value) Rules, 2006 read with Notification No. 25/2012 ST notified by the Central Government. Rule 2C presumes a fixed

percentage of bill value as the value of taxable service on which service tax should be charged. However, there is no provision in VAT Act to bifurcate the amount of bill into sale and service.

**Conclusion :** The High court held that section 66E (i) of the Finance Act, 1994 is intra vires the Article 366(29A)(f) of the Constitution of India.

Further, the High Court held that no VAT can be charged over the amount meant for service and that the amount over which service tax has been charged should not be subject to VAT. The High Court directed the State Government to frame such rules and issue clarifications to this effect to ensure that the customers are not doubly taxed over the same amount. The rules may be in conformity with the bifurcation as provided under the Finance Act, 1994 or ensure that the Commercial Tax authorities do not charge VAT on that part of the value of the food and drink on which service tax is being assessed.

**Hotel East Park 2014 (Chhatisgarh)**

**Q:** The petitioner assessee was awarded a contract for carrying out loading, shifting and feeding of coal and gypsum by roads, for which High Speed Diesel (HSD) would be provided free of cost by service recipient. The assessee paid service tax on the amount charged from the service recipient for the services provided which did not include the cost of the HSD supplied by the service recipient.

A show cause notice was issued to the assessee on the ground that cost of such HSD supplied free of cost by the service recipient should be included in the value of taxable services as the same was used for providing taxable services. The show cause notice invoked extended period of limitation by alleging willful suppression of fact of free supply of HSD.

The Revenue contended that the value of free HSD was to be included in the transaction value of service provided by the assessee under rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 (Valuation Rules). The petitioner's major contention was that the value of HSD supplied free by the service recipient does not form part of the gross value of the service provided by them. Also, the petitioner contended that the demand raised by the Revenue under rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 was not sustainable as the said rule has been held ultra vires by the Delhi High Court in the case of *Intercontinental Consultants and Technocrats Pvt. Ltd. v. Union of India 2013 (Del.)*.

#### **Answer**

**Issue:** Is rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 ultra vires the Finance Act, 1994? Can the expression 'suppression of facts' be interpreted to include in its ambit, mere failure to disclose certain facts unintentionally?

**Legal position:** The High Court observed that in view of the clear exposition of law that the value of the diesel supplied free of cost by the service recipient cannot constitute taxable event (value), the authorities cannot place a contrary stand by placing reliance upon the provision which has been declared ultra vires (i.e. rule 5(1) of the Valuation Rules).

The High Court observed that willful suppression cannot be assumed and/or presumed merely on failure to declare certain facts unless it is preceded by deliberate non-disclosure to evade the payment of tax. The High Court elaborated that the extended period of limitation can be invoked on clear exposition that there has been a conscious act on the part of the assessee to evade the tax by non-disclosing the fact which, if disclosed, would attract service tax under section 66B & 67 of the Finance Act. The non-disclosure of the fact which, even if, disclosed would not have attracted the charging section cannot be brought within the ambit of suppression of fact for the purpose of extension of limitation period.

**Conclusion :** The High Court held that in view of the clear exposition of law that the value of the diesel supplied free of cost by the service recipient cannot constitute taxable event, the authorities cannot place a contrary stand by placing reliance upon the provision which has been declared ultra vires (i.e. rule 5(1) of the Valuation Rules).

The High Court held that non-disclosure of free supply of HSD did not constitute willful suppression as same was not a taxable event and thus, the invocation of extended period of limitation by the Revenue is unsustainable.

**Naresh Kumar & Co. Pvt. Ltd 2014 (Cal.)**

**Q:** The assessee had manufacturing operations in the SEZ. The Development Commissioner of SEZ granted an extension of one year to the assessee to start manufacturing operations (which were authorised operations of the SEZ). The assessee procured certain services (scientific and technical consultancy) during this period (before beginning of the manufacture) in order to enable it to undertake manufacturing activity.

Later, when the assessee applied for refund of service tax paid on such input services under Notification No. 12/2013, the refund was denied on the ground that since the services were received before the authorised operations (i.e., manufacturing) started, the said input services would not be considered to have been used in authorised operations of SEZ unit, and thus, would not get qualified for refund.

The Revenue submitted that as per sub-section (2) of section 4 and sub-section (9) of section 15 of the Special Economic Zones Act, 2005 meaning of “authorized operations” can be concluded as “such operation so authorized shall be mentioned in the letter of approval”. Thus, since the manufacturing of the goods mentioned in the letter of approval had not started, it could not be said that the authorized operation of SEZ had started.

The assessee contended that it is necessary for SEZ to procure taxable services right from the budding stage and it is only after having obtained such support service of business that the unit would start functioning for production.

When the CESTAT held that the assessee shall be entitled to refund as claimed, the matter was brought before the High Court by the Department.

### Answer

**Issue:** Is exemption in relation to service provided to the developer of SEZ or units in SEZ available for a period prior to actual manufacture (which is the authorized operation) of final products considering these services as the services used in authorised operations of SEZ?

**Legal position :** The High Court relied on its decision passed in the case of **Cadila Healthcare Ltd 2013 (Guj.)** and held that no error has been committed by the CESTAT in holding that the assessee shall be entitled to refund; as though the operations of the assessee did not reach to the commercial production stage, the input services of scientific and technical consultancy procured by them were in relation to the manufacture which would take place at a later date.

**Conclusion :** In the instant case, the High Court referring to their previous decision in case of Cadila Healthcare Ltd. held that the services rendered for a period prior to actual manufacture of final product is commercial activity/production and assessee is entitled to exemption by way of refund claimed.

**Zydus Technologies Limited 2014 (Guj.)**

**Q.** Whether the recipient of taxable service having borne the incidence of service tax is entitled to claim refund of excess service tax paid consequent upon the downward revision of charges already paid, and whether the question of unjust enrichment arises in such situation?

The CESTAT answered the above question against the Revenue so this appeal was filed with the High Court by the Revenue. It was the contention of the Revenue that the respondent being recipient of service was not entitled to file a refund claim under section 11B as the expression “any person” in section 11B of the Central Excise Act, 1944 does not include the recipient of the service. The Revenue submitted before the High Court that the principles of unjust enrichment as provided in section 11B were not considered by the CESTAT while allowing the refund claim and that the refund claim filed was not within the period of limitation of one year under section 11B.

### Answer

**Legal position:** The High Court relied on the case of **Mafatlal Industries Ltd.** wherein the Supreme Court held that “Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund.”

The High Court observed that since the respondent, being the recipient of taxable service, had borne the incidence of service tax themselves; there was no question of unjust enrichment. Hence, the respondent was entitled to claim refund of excess service tax paid consequent upon the downward revision of the charges payable by it.

Further, the High Court pointed out that the fact that respondent had not filed the refund claim with the period of limitation was not challenged by the Revenue in the grounds of appeal before the first appellate authority [Commissioner (Appeals)] or in the form of cross objections before the Tribunal. The High Court relied on the Supreme Court's decision in the case of Commissioner of Customs v. Toyo Engineering India Limited 2006 (SC) wherein it was held that the Revenue could not be allowed to raise submissions for the first time in a second appeal before the Tribunal.

**Conclusion :** The High Court upheld the decision of the CESTAT that since the burden of tax has been borne by the respondent as a service recipient, question of unjust enrichment will not arise as per section 11B of the Central Excise Act 1944 (as applicable to service tax under section 83 of Finance Act,1994).

Further, the High Court held that once the finding of the adjudicating authority that the claim for refund was filed within the period of limitation was not challenged by the Revenue before the first appellate authority and CESTAT, Revenue could not assert to contrary and first time urge a point in an appeal before this Court which was not raised in grounds of appeal before authorities below.

**Indian Farmers Fertilizers Coop. Limited 2014 (All)**

**Q:** In the present case, the assessee availed CENVAT credit on sales commission services obtained by them. The Revenue, however, denied such credit on the contention that 'sales commission services' do not fit into the definition of 'input services' under rule 2(l) of CENVAT Credit Rules, 2004 in view of the Gujarat High Court decision in the case of M/s.Cadila Healthcare Ltd in 2013.

The assessee submitted that in view of CBEC Circular dated 29-04- 2011, they were entitled to CENVAT credit on sales commission services obtained by them and that the Department, bounded by the CBEC Circular, could not take a contrary decision. They further submitted that since the decision of the Gujarat **High Court in case of Cadila Healthcare Limited referred** by the Revenue is contrary to that of the Punjab & Haryana High court in the case of **Ambika Overseas 2012 (P&H)**, wherein the CENVAT credit on such input services was allowed to the assessee, hence the matter should be referred to the Larger bench.

### Answer

**Issue:** Whether sales commission services are eligible input services for availment of CENVAT credit? If there is any conflict between the decision of the jurisdictional High Court and the CBEC circular, then which decision would be binding on the Department? Also, if there is a contradiction between the decision passed by jurisdiction High Court and another High Court, which decision will prevail?

**Legal position:** The High Court observed that it is required to be noted that issue involved in the present appeal i.e. whether the appellant would be entitled to CENVAT credit on sales commission services obtained by them is now not res integra in view of the decision of this Court in the case of Cadila Healthcare Limited.

It was elaborated by the High Court that in the case of **Cadila Healthcare Limited,**

- The jurisdictional High Court did not allow CENVAT credit on sales commission services after interpreting the relevant provisions of law.
- The High Court clarified that the decision of the jurisdictional High Court is binding to the Department rather than the Circular issued by the C.B.E. & C.
- In regard to the request made by the assessee to refer the issue to the Larger Bench, the High Court rejected the same by saying that the appeal against the decision of the jurisdictional High Court (Gujarat H.C) in the case of Cadila Healthcare Limited was filed before the Hon'ble Supreme Court and the Apex Court had seized the matter and no stay order was granted in that case.

Therefore, the High Court opined that it will not be proper on its part to refer the matter to the Larger Bench in the present case. Even otherwise, the High Court did not find any reason to take a contrary view than its decision in the case of Cadila Healthcare Limited.

**Conclusion :** The High Court held that –

(i) if there is any conflict between the decision of the jurisdictional High Court and the CBEC Circular, then decision of the jurisdictional High Court will be binding to the Department rather than CBEC Circular. Therefore, the assessee would not be entitled to CENVAT credit on sales commission services obtained by them.

(ii) when there are two contrary decisions, one of jurisdictional High Court and another of the other High Court, then the decision of the **jurisdictional High Court** would be binding to the Department and not the decision of another High Court.

**Astik Dyestuff Private Limited 2014 (Guj.)**

# Category: B

## EXCISE LAWS

### Basic Concept

**Q.** The contract for fabrication of power project has been awarded by the petitioner-company to M/s. Amarnath Aggarwal Construction (Pvt.) Limited,

The petitioner-company had provided steel, trusses, angles, channels and other raw material. The contractor has carried out the fabrication work on job charge basis. The fabrication was carried out by the contractor at site under the supervision of Site Manager of the petitioner-company.

Whether fabrication of power project liable to excise duty ?

**Ans.**

- ❖ The job work undertaken by the contractor does not fit in the term “manufacture” of excisable goods as required by charging section 3.
- ❖ The fabrication of the structure embedded in earth results in an immoveable property.
- ❖ Thus petitioner company is not manufacturer and therefore, no excise duty is leviable under section 3 of the Central Excise Act, 1944. **BHEL [2013] (P&H)**

**CRUX- Fabrication of power project does not amount to manufacture.**

**Q.** The assessee, a manufacturer of pre-recorded audio CDs, VCDs, DVDs, claimed exemption from payment of central excise duty.

- The manufacturing process undertaken by the assessee is an integrated one, where the process of manufacture and transfer of data takes place simultaneously. And no independent eligible product as blank CD emerged in the intermittent stage.
- The Revenue issued a show cause notice demanding duty/interest/penalty contending that during the manufacture of pre-recorded CDs etc. blank CDs, VCDs etc are manufactured and thereafter the data is recorded, as data cannot be recorded on granules. The blank CDs/VCDs/DVDs so produced at the intermittent stage are liable to duty as they are a distinct commodity separately classifiable and dutiable under the Central Excise Tariff Act, 1985 and there is no exemption thereon.
- The Commissioner having confirmed the demand, the writ petition was filed by the assessee.

**Now the question is this-**

- Whether the assessee manufactures blank CDs/DVDs as an intermediate product to be classifiable as excisable goods ?
- Whether the writ petition was maintainable for quashing of a show cause notice and also of an adjudication order when the alternative remedies by way of an appeal has not been exhausted.

**Ans.**

#### Legal position and conclusion

Blank **CD/DVD/VCD** does not come into existence as excisable goods in course of manufacture of pre-recorded audio **CD/DVD/VCD**. Hence blank **CD/DVD/VCD** not liable to duty :

For being excisable, goods- must satisfy tests of manufacture and marketability. Intermediate product to be exigible must be goods i.e. a complete product with commercial identity and capable of being sold to consumer.

Please note that High Court can entertain the writ petition even where alternative remedy by way of an appeal is available, when situation warrants and no question of fact is involved.

*Sidharth Optical Disc Pvt. Ltd [2013] (Del.)*

## Valuation

Q. HE Ltd. is a manufacturer of Electronics items. It manufactured VCD players and also different models of colour TV sets, both the items chargeable to **MRP** based duty under section 4A of the Central Excise Act, 1944. As a sales promotion technique, HE Ltd. introduced a combo offer by giving VCD players free along with certain models of CTVs. The duty was paid by HE Ltd. on value determined on the basis of **MRP** of combo pack of CTVs along with VCD Players. As VCD players were cleared free along with CTVs their **MRP** was 'Nil' and therefore their assessable value was also nil and hence no duty was paid in respect of the same.

The Department issued a show cause notice considering the **MRP** of combo pack declared as **MRP** of CTVs only and demanding duty on clearances of V C D players claiming that same had been cleared without payment of duty. In absence of any **MRP** declared by the assessee, the **MRP** of V C D players as ascertained by the Department was taken. Besides duty, interest under section 11AA and penalty under section 11AC was also demanded. Decide, in light of the decided cases, whether the Department is justified in its claims?

**Ans:** The contention of appellant that MRP of VCD players is to be taken as 'nil' and on this basis, the duty chargeable would be nil is incorrect, as, the consideration for supply of VCD players free is promoting the sale of CTVs, while as per the definition of 'retail sale price' in Explanation -1 to Section 4A, the retail sale price must satisfy the condition of price being the sole consideration for sale.

Therefore, when a product 'A' notified under section 4A is supplied free or at RSP less than the RSP at which the product is individually sold, for being sold in combination with another product 'B', also notified under section 4A, with the objective of promoting the sale of the product B, the nil or lesser RSP of product A (for its sale in combination with product B) cannot be said to be its correct RSP for the purpose of determining the assessable value under section 4A.

**Therefore, MRP of VCD players cannot be taken as 'Nil'.**

### Conclusion

Applying the same rational to the given situation, the revenue is justified in demanding the duty. As regards penalty, since VCD players were cleared without discharging duty liability, penalty under Rule 25(l)(a) would be attracted in proportion of quantum of duty demanded.

*Hotline Electronics Ltd.[2013] (Tri- Del)*

## Central Excise Rules, 2002

Q. Can export rebate claim be denied merely for non-production of original and duplicate copies of ARE-1 when evidence for export of goods is available?

**Ans:**

**Legal Position:** The High Court observed that the objective of the procedure laid down in Notification No. 19/2004 is to facilitate the processing of a rebate claim and to enable the authority to be duly satisfied that the two fold requirement of goods (i) having been exported and (ii) being duty paid is fulfilled.

The High Court referred to the decision of Supreme Court in the case of Mangalore Chemicals & Fertilizers Ltd. 1991 (SC) wherein the Apex Court held that non-compliance of a condition which is substantive and fundamental to the policy underlying the grant of an exemption would result in an invalidation of the claim.

However, it would be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes which they intend to serve, as some requirements may merely relate to procedures.

**Conclusion:** The High Court, therefore, held that the procedure cannot be raised to the level of a mandatory requirement. Rule 18 itself makes a distinction between conditions and limitations subject to which a rebate can be granted and the procedure governing the grant of a rebate. It was held by the High Court that **while the conditions and limitations for the grant of rebate are mandatory, matters of procedure are directory.**

The High Court ruled that non-production of ARE-1 forms cannot invalidate rebate claim.

**UM Cables Limited 2013 (Bom.)**

## Cenvat Credit Rules, 2004

**Q.** The assessee contended that though CENVAT credit in respect of NCCD can be utilized only for payment of NCCD duty, NCCD can be paid by using CENVAT credit of basic excise duty also. The Revenue, however, rejected the assessee's contention.

**Ans.**

**Issue** Can CENVAT credit of duties, other than National Calamity Contingent Duty (NCCD), be used to pay NCCD

**Legal position**

The High Court noted that in terms of rule 3(1) of the CENVAT Credit Rules, 2004 [CCR], a manufacturer or producer of a final product is allowed to take CENVAT credit of NCCD.

Rule 3(4) of CCR provides that CENVAT credit may be utilized for payment of any duty of excise on any final product. Therefore, CENVAT credit of NCCD may also be utilized for payment of any duty of excise on any final product in terms of rule 3(4) subject to rule 3(7).

However, rule 3(7) of CCR limits the utilization of CENVAT credit in respect of NCCD as also other duties mentioned in rule 3(7)(b).

Rule 3(7)(b) provides that CENVAT credit in respect of NCCD and other duties shall be utilized towards payment of duty of excise leviable under various statutes respectively. The High Court stressed upon the importance of the word "respectively" as it confines the utilization of CENVAT credit obtained under a particular statute for payment of duty under that statute only. The High Court, however, categorically added that the converse does not follow from the above discussion.

**Conclusion:** The High Court held that merely because CENVAT credit in respect of NCCD can be utilized only for payment of NCCD, it does not lead to the conclusion that credit of any other duty cannot be utilized for payment of NCCD.

**Prag Bosimi Synthetics Ltd. 2013 (Gau.)**

**Q.** In the instant case, the assessee availed 100% CENVAT credit on capital goods in the year of purchase, i.e. in first year itself. However, he utilized only 50% of the CENVAT credit so availed in the first year. As per Revenue, assessee was entitled to avail 50% of the credit of duty paid on capital goods in the first financial year and avail the balance 50% credit in subsequent financial year.

**Whether wrongful availment of 100% CENVAT credit on capital goods in the year of purchase be upheld if wrongly availed credit of 50% is not utilized in the said year?**

**Ans:** *The High Court held that if 50% CENVAT credit on capital goods pertaining to subsequent financial year which had been wrongly availed in the first year had not been not utilized till the commencement of the subsequent financial year, no prejudice was caused to the Revenue and thus, the same could be upheld.*

**Satish Industries 2013 (Bom.)**

**Q.** Sintex Industries Ltd., a company registered under the Companies Act, 1956 has two units – a textile division and a plastic division located on a common ground surrounded by a common boundary wall and adjoining each other. Though a part of the single legal entity i.e. Sintex Industries Ltd. having a common PAN under the Income-tax Act, 1961, *but the 2 units have been separately registered under the Central Excise Act, 1944.* Sintex Industries Ltd. installed DG sets/electricity generation plant in textile division and was using furnace oil as fuel in the generation of electricity. The textile unit availed CENVAT credit on furnace oil used as fuel for the generation of electricity, which was used for captive consumption in their own factory.

The Department issued a notice requiring the textile unit to reverse the credit taken on the furnace oil used in the generation of electricity to the extent the same was supplied to the plastic division.

#### ISSUE-

Will the two units of a single legal entity surrounded by a common boundary wall be considered as one factory for the purpose of availing CENVAT credit, if they have separate central excise registrations?

#### Ans.

The High Court rejecting the contention of assessee held that –

**Two different units of a manufacturer, adjoining each other, set up within a common boundary wall, having a common PAN but separate Central Excise registration, shall be treated as two different factories.**

Assessee was entitled to credit on eligible inputs used for the generation of electricity only to the extent the same was used in the unit registered for that purpose i.e. the textile unit but not to the extent it was supplied to the plastic unit bearing separate registration.

**Sintex Industries Ltd. [2013] (Guj.)**

## SMALL SCALE INDUSTRIES

**Q.** In a case, the Department found that the assessee had set up a dubious company of another company to mis-utilize the benefits of SSI exemption notification. It was established that the dubious company did not manufacture and clear any goods and that all the transactions shown by it were, in fact, the transactions undertaken by the original company. Thus, the manufacture and clearances shown by the two units separately were clubbed together as manufacture and clearances of a single unit viz. original company in terms of the applicable SSI exemption notification and the differential duty and penalty was imposed on such original company. At the same time, penalty was also imposed on the dubious company.

The issue which came up before the High Court was whether separate penalty could be levied on the dubious company, as the same was, in fact, a non-existent company. The Department contended that since there existed two companies, which had different registrations and availed separate SSI exemptions, the dubious company could not be said to be a non-existent company. Therefore, the said dubious company should also be liable to penalty for taking wrong benefits of the SSI exemption.

**Ans.**

**Issue:** Where clearances such dubious company if all the clearances have been made by the original company? of a dubious company are clubbed with clearances of the original company, whether penalty can be

**Legal position:** The High Court observed that merely because the dubious company was in existence, it could not be said that it undertook the transactions. Its existence could not itself create any liability: the liability could arise only when the transactions were actually undertaken by the dubious company. If the transactions shown by the dubious company were not undertaken by the same but by the original company, then such transactions would be taken to be the transactions of the original company and clubbed with the transactions of the original company.

**Conclusion :** The High Court held that when it had been established that dubious company did not undertake any transactions, penalty could not be levied on the same for the transactions undertaken by the original company. The High Court emphasized that penalty could not be imposed upon the company who did not undertake any transaction.

**Xenon 2013 (Jhar.)**

## Penalties

**Q.** Prabhat Zarda Factory was engaged in manufacturing Zarda which had the brand name of "**Ratna**". It clandestinely cleared **Ratna'** zarda and stored them with Balaji Trading Co. (respondents) for further sales. The respondents were allegedly the related concerns of Prabhat Zarda Factory,

**ISSUE.** In a case where the manufacturer clandestinely removes the goods and stores them with a firm for further sales, can penalty under rule 25 of the Central Excise Rules, 2002 be imposed on such firm?

Ans. Commissioner (Adjudication) imposed a penalty under rule 25 of the Central Excise Rules, 2002 on the respondents. However, in an appeal filed by the respondents to CESTAT, CESTAT noted that penalty under rule 25 could be imposed only on four categories of persons:-

- (a) producer;
- (b) manufacturer;
- (c) registered person of a warehouse; or
- (d) a registered dealer.

Since, the respondents were neither producers nor manufacturers of the said Zarda. neither were they the registered persons of a warehouse in which the said Zarda had been stored nor were the registered dealers, penalty under rule 25 (higher of duty payable on excisable goods in respect of which contravention has been committed or Rs. 2,000), could not be imposed on the respondents.

The Department aggrieved by the said order filed an appeal with High Court wherein it contended that rule 25(1) (c) of the Central Excise Rules, 2002 would be applicable in the instant case. However, High Court concurred with the view of the Tribunal and concluded that rule 25(1) (c) would have no application in the present case.

**Balaji Trading Co. 2013 (Del.)**

*Note: Rule 25(1)(c) of the Central Excise Rules 2002 provides that in case of manufacture, production or storage of any excisable goods without having applied for the registration certificate, a penalty not exceeding the duty on such excisable goods or Rs. 2,000, whichever is greater is leviable on the producer, manufacturer, registered person of a warehouse or a registered dealer committing such contravention.*

## Common Topics

**Q. Where a circular issued under section 37B of the Central Excise Act, 1944 clarifies a classification issue, can a demand alleging misclassification be raised under section 11A of the Act for a period prior to the date of the said circular?**

**Ans,**

**Legal position::** The High Court observed that similar issue had been considered by the Supreme Court in the case of **H.M. Bags Manufacturer 1997 (SC)**:

Wherein the Apex Court held that a demand under section 11A of the Act cannot be raised for any date prior to the date of the Board Circular and the time-limit as provided under section 11A of the Act is not available to the Department.

**Conclusion:** The High Court, thus, held that once reclassification Notification/Circular is issued, the Revenue cannot invoke section 11A of the Act to make demand for a period prior to the date of said classification notification/circular.

**S&S Power Switch Gear Ltd. 2013 (Mad.)**

*Note: The principle enunciated in this judgment is that a Departmental Circular, issued under section 37B of the Central Excise Act, 1944, which clarifies a classification issue, can only apply prospectively from the date of the Circular and that the same cannot be applied*

*retrospectively. In other words, demands cannot be raised for mis-classification i.e., not following the classification specified by the said Circular, for a period prior to the date of the Circular.*

**Q. Can penalty under section 11 AC of the Central Excise Act, 1944 be imposed in a case where there are divergent judicial pronouncements on an issue and the assessee chooses to follow one of those pronouncements?**

**Ans** The High Court elucidated that mens rea (guilty mind) is an essential part for levy of penalty under section 11 AC of the Central Excise Act, 1944. Where a provision of statute is not clear and there are divergent judicial pronouncements, it cannot be said that there is mens rea on the part of the assessee if he chooses to follow his course of action in the light of one of the judicial pronouncements. **Delphi Automotive Systems Ltd. 2013 (All.)**

**Q. Can a former director of a company be held liable for the recovery of the excise dues of such company?**

**Ans**

**Legal position:** **Delhi High Court** in case of Anita Grover 2013 (Del.) had elucidated that a former director of a company cannot be held liable for the recovery of the customs dues of such company.

**Bombay High Court** has taken a similar view in case of **Vandana Bidyut Chatterjee 12013 (Bom.)**. In this case, Department alleged that the petitioner was liable to pay the arrears of the excise duty and penalty of a company of which her late father was a director and sought to attach the property belonging to the petitioner for recovery of such dues. The said property was gifted to the petitioner by her late father during his lifetime. *(The company was jointly controlled by Mukherjee Brothers (the petitioner) and Kapoor family. They entered into agreement wherein the latter transferred their shares to Mukherjee Brothers and placed the responsibility to discharge the excise duty liability of the company on them.)*

The High Court observed that duty and penalty were the arrears of the company because company was the person engaged in the manufacture of goods and registered as manufacturer. As per section 142 of the Customs Act, 1962 read along with the Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995, Central Government could recover dues belonging only to a defaulter. Thus, the recovery proceedings could be taken only against the company, as it alone was the defaulter. There was no provision to recover the arrears of the company from its directors and or shareholders under the Customs Act.

Since a company was a separate person having a distinct identity, independent from its shareholders and directors, company's dues could not be recovered from the directors and/or individual shareholder of the company.

Furthermore, the Department's reliance upon the agreement entered into between Mukherjee Brothers and Kapoor family to fasten the liability of excise duty and penalty arrears of the said company upon the petitioners' father was not sustainable.

**Conclusion:** Hence, the Court held that in the instant case, the attachment notices issued on the former late director and his daughter were without jurisdiction.

**Q. Can Appellate Authorities or Courts permit the assessee to pay reduced penalty of 25% beyond 30 days of the communication of the order of the adjudicating authority as prescribed under section 11 AC?**

**Ans**

The High Court answered the aforesaid **question of law in affirmative**. It held that an option can also be granted to the assessee to deposit the entire dues along with 25% interest and penalty within a period of 30 days of communication of the order of Tribunal. **Ratnamani Metals and Tubes Ltd. 2013 (Guj.)**

**Note:** *The Bombay High Court has taken a view contrary to the abovementioned opinion of Gujarat High Court in case of **Castrol India Ltd. 2012 (Bom.)**.*

**Q.** In this case, assessee filed the appeal to the Commissioner (Appeals) and then further appeal to CESTAT against the order-in-original passed by the adjudicating authority. However, the appeals were dismissed as time-barred.

The assessee filed a writ petition to the High Court challenging the correctness of the order-in-original. It further contended that although the appeal filed by it had been dismissed by the appellate authorities on the ground that same had been time-barred, it was entitled to challenge the correctness of the order-in-original in a writ petition.

**Ans.**

**Issue** In a case where an appeal against order-in-original of the adjudicating authority has been dismissed by the appellate authorities as time-barred, can a writ petition be filed to High Court against the order-in-original?

**Legal position and conclusion:** The High Court referred to the case of Raj Chemicals 2013 (Bom.) wherein it held that where the appeal filed against the order-in-original was dismissed as time-barred, the High Court in exercise of writ jurisdiction could neither direct the appellate authority to condone the delay nor interfere with the order passed by the adjudicating authority. Consequently, it refused to entertain the writ petition in the instant case.

**Khanapur Taluka Co-op. Shipping Mills Ltd. 2013 (Bom.)**

**Note:** *Gujarat High Court has taken a contrary view in case of **Texcellence Overseas 2013 (Guj.)** as reported below:-*

**Note:** *The principle enunciated in the afore-mentioned case is that the High Court has extraordinary powers to interfere in appropriate cases even while upholding the contention that there is statutory limitation to which delay can be condoned by the authorities. If an aggrieved person knocks the door of the High Court seeking redressal under writ jurisdiction to obviate extraordinary hardship and injustice, such plea can be entertained even beyond the period of limitation.*

**Q.** In this case, the application for filing appeal to CESTAT was filed with a delay of 45 days. The reason for the delay was that the authorised representative who dealt with the case had gone abroad for about a month. On his return, his mother had expired. After attending obsequies, the appeal was filed. However, the Tribunal dismissed the said application holding that there was no sufficient cause shown for condonation of delay.

**Ans.**

**Legal position and conclusion:** The High Court observed that there did not appear to be any deliberate laches or neglect on the part of the authorised representative to file the appeal. It held that the reason for delay in filing appeal to CESTAT, that the person dealing with the case went on a foreign trip and on his return his mother expired, could not be considered as unreasonable for condonation of delay.

**Habib Agro Industries 2013 (Kar)**

**Q:** The petitioner was granted a refund by way of order-in-original and the same was also upheld by the CESTAT. However, a fresh show cause notice was issued on the ground that refund was erroneously granted. The show cause notice, this time was adjudicated in favour of the Department. The petitioner challenged this order before Commissioner (Appeals) five months after the said order was passed. As per section 35 of the Central Excise Act, 1944, an appeal needs to be filed with the Commissioner (Appeals) within 60 days from the date of the communication of the order sought to be appealed against. However, the Commissioner (Appeals) is empowered to condone the delay for a period of 30 days if he is satisfied with the sufficiency of the cause of the delay. Therefore, the Commissioner (Appeals) and Tribunal (when the matter was brought before it) rejected the appeal on the grounds of limitation as the same was filed beyond three months from the date of the impugned order. **Can the High Court condone the delay - beyond the statutory period of three months prescribed under section 35 of the Central Excise Act, 1944 - in filing an appeal before the Commissioner (Appeals)?**

*Ans.:* The High Court opined that since the total length of delay was very small and the case had extremely good ground on merits to sustain, its non interference at that stage would cause gross injustice to the petitioner. Thus, the High Court, by invoking its extraordinary jurisdiction, quashed the order which held that refund was erroneously granted. The High Court held that such powers are required to be exercised very sparingly and in extraordinary circumstances in appropriate, cases, where otherwise the Court would fail in its duty if such powers are not invoked.

**Texcellence Overseas 2013(Guj.)**

**Q. Whether any appeal can be file against revisionary order made u/s 35EE?**

**Ans. No :** Revision order under section 35EE is not appealable by the assessee or Commissioner. The order of Central Government is final but is subject to judicial review under Article 226/227 of the constitution.

**Writ petition cannot be filed by department against revisionary order made u/s 35EE :** Writ petition cannot be filed by department against revisionary order passed by Central Government since department officials and revisionary authority are Central Government functionaries. If revisionary authorities passes any order, then it is a

order of Central Government and Central Government functionaries (he. department) cannot file writ petition against Central Government i.e. own order.

*Ind Metal Extrusion Pvt. Ltd. [2013] (Del.)*

**Q. Can refund of an amount mistakenly paid as excise duty be rejected on the ground of limitation under section 11B of the Central Excise Act, 1944?**

**Karnataka High Court** in case of KVR Construction 2012 (Kar.) had held that refund of an amount mistakenly paid as service tax could not be rejected on ground of limitation under section 11B of the Central Excise Act, 1944 (as made applicable in case of service tax vide section 83 of the Finance Act, 1994).

**Gujarat High Court** has taken a similar view in case of **Swastik Sanitarywares Ltd. 2013 (Guj.)**. In this case, the assessee had erroneously deposited the excise duty twice on the clearance of same goods.

**However, the burden of the duty paid the second time was not passed on to the consumer. When it applied for the refund** of the second deposit of the same amount, the refund claim was rejected on the ground of limitation under section 11B of the Central Excise Act, 1944. The High Court held that payment made by the assessee the second time could not be considered as duty deposited or paid. Hence, repayment of such amount could not be seen as a refund claim made under section 11B. Consequently, such amount is repayable to the assessee by the Department.

**Q. Whether assessee can be eligible for interest on interest if statutory interest is delayed?**

**Ans.** In case the assessee is entitled interest on delayed payment of refund under section 11BB of the Act and the refund of such statutory interest is delayed, then assessee shall be entitled interest on delayed payment of such interest.

*Shri Jagdamba Polymers (2013) (Guj.)*

# CUSTOM LAWS

## Import and Export Procedure

**Q. What is the maximum time limit to file bill of entry?**

**Ans.** There is no time limit prescribed under section 46 for filing of bill of entry.

However section 48 which authorizes the customs authorities to sell goods if they are not cleared for home consumption or warehoused or transhipped within 30 days after unloading thereof at custom station

But it cannot be treated as time limit for filing bill of entry.

Thus, if importer does not present bill of entry within 30 days of unloading of goods at customs station, he will not be liable to penalty under section 117 of Customs Act, 1962. **Shreeji Overseas (India) Pvt. Ltd. (2013) (Guj.)**

## COMMON TOPICS

**Q.** Section 3(5) of the Customs Tariff Act 1975 (CETA) provides for levy of special additional duty (special CVD) in addition to duty leviable under section 3(1) of the CETA to counterbalance sales tax, value added tax, local tax or any other charges. The exemption under the said notification is being granted by way of refund of the special CVD. In other words, exemption is not given ab initio but duty has to be paid first and thereafter, refund for the same needs to be claimed.

The assessee paid the special CVD and applied for the refund of the same under section 27 of the Customs Act, 1962 along with interest in pursuance of the above-mentioned notification. The Department, however, rejected the assessee's claim for the interest in view of that interest could not be granted as Notification No. 102/2007-Cus. did not have any specific provision for payment of the same on refund of duty. The Department was of the view that since such refund of special CVD was an automatic refund by virtue of Notification No. 102/2007 Cus, it could not be considered as a refund under section 27 of the Customs Act, 1962 so as to claim interest under section 27A of the Customs Act, 1962.

**Ans.**

**Issue :Whether interest is liable to be paid on delayed refund of special CVD arising in pursuance of the exemption granted vide Notification No. 102/2007 Cus dated 14.09.2007?**

**Legal position:** The High Court observed that grant of exemption under section 25(1) of the Customs Act, 1962 is an independent exercise of power by the Central Government. Notification No. 102/2007, issued in exercise of such powers, provides exemption by way of refund of special CVD and imposes certain conditions for seeking refund.

Therefore, provisions of section 27 of the Customs Act, 1962 in relation to refund of duty [made applicable to refund of special CVD] would be applicable to such refund of special CVD also.

The High Court further stated that a conjoint reading of section 25(1) and section 27 of the Customs Act makes it clear that the refund application of special CVD should only be filed in accordance with the procedure specified under section 27 of the Customs Act, 1962 and that there is no method prescribed under section 25 of the Customs Act, 1962 to file an application for refund of duty or interest.

**Conclusion :** The High Court, therefore, held that:

- (i) **When section 27 of the Customs Act, 1962 provides for refund of duty and section 27A of the Customs Act, 1962 provides for interest on delayed refunds, the Department cannot override the said provisions by a Circular and deny the right which is granted by the provisions of the Customs Act, 1962 and CETA.**
- (ii) **Paragraph 4.3 of the Circular No. 6/2008 Cus. dated 28.04.2008 being contrary to the statute has to be struck down as bad.**

**KSJ Metal Impex (P) Ltd. 2013 (Mad)**

***Note:** This case clarifies that refund of special CVD arising as a result of exemption granted by way of exemption notification is governed under section 27 of the Customs Act, 1962 and thus, the provisions relating to payment of interest on delayed refund of duty as contained in section 27A of the Customs Act also become applicable in respect of delayed refunds of special CVD which is granted to give effect to the exemption contained in an exemption notification. Thus, it appears that the provisions applicable to normal refunds of duty/ tax may apply to refunds of duty/ tax arising as a result of exemption granted by way of exemption notifications as well.*

**Q. Is the adjudicating authority required to supply to the assessee copies of the documents on which it proposes to place reliance for the purpose of re-quantification of short-levy of customs duty?**

**Ans:**

**Legal position and conclusion:** The Apex Court elucidated that for the purpose of re-quantification of short-levy of customs duty, the adjudicating authority, following the principles of natural justice, should supply to the assessee all the documents on which it proposed to place reliance.

Thereafter the assessee might furnish their explanation thereon and might provide additional evidence, in support of their claim.

**Kemtech International Pvt. Ltd. 2013 (S.C.)**

Q. In this case, CESTAT rejected the appellant's application for condonation of delay in filing the appeal before CESTAT on the ground that the reasons given for filing the appeal beyond time were not convincing. The Counsel of the appellant filed his personal affidavit stating that the appeal had been filed with a delay due to his mistake.

**Ans**

**Issue : Can delay in filing appeal to CESTAT due to the mistake of the counsel of the appellant, be condoned?**

**Legal position and conclusion:** The High Court held that the Tribunal ought to have taken a lenient view in this matter as the appellant was not going to gain anything by not filing the appeal and the reason for delay in filing appeal as given by the appellant was the mistake of its counsel who had also filed his personal affidavit.

**Margara Industries Ltd. 2013 (All.)**

Q. In the instant case, the CESTAT upheld a notification issued by the Central Government imposing definitive anti-dumping duty on certain products originating from specified countries pursuant to the findings recorded by the Designated Authority in a review of anti-dumping duty. The assessee filed a writ petition under Article 226 of the Constitution to challenge the said order passed by the CESTAT under section 9C of the Customs Tariff Act, 1975.

The Department contended that an appeal, and not a writ petition, would lie against the order passed by the CESTAT.

**Ans**

**Issue: Can a writ petition be filed against an order passed by the CESTAT under section 9C of the Customs Tariff Act, 1975?**

**Observations of the Court:** The High Court observed that section 9A(8) of the Customs Tariff Act, 1975 specifically incorporates all the provisions of the Customs Act, 1962 relating to appeal as far as may be, in their application to the anti-dumping duty chargeable under section 9A. The order of the CESTAT passed in appeal would, therefore, clearly be subject to appeal, either to this Court under section 130 or to the Supreme Court under section 130E of the Customs Act, 1962 if the appeal relates to the rate of duty or to valuation of goods for the purposes of assessment.

The assessee submitted that under section 130(2), an appeal can be filed by the Commissioner of Customs or the other party. However, in case of anti-dumping duty, Commissioner of Customs would have no occasion to file an appeal since proceedings are against the designated authority.

Against this submission, the High Court clarified that since appellate provisions of the Customs Act, 1962 have been incorporated in section 9A(8) of the Customs Tariff Act, 1975, they necessarily apply in a manner that would make the same intelligible and workable.

**Decision:** The High Court, therefore, held that it would not be appropriate for it to exercise the jurisdiction under Article 226 of the Constitution,, since an alternate remedy by way of an appeal was available in accordance with law. The High Court thus, dismissed the petition leaving it open to the assessee to take recourse to the appellate remedy.

**Rishiroop Polymers Pvt. Ltd. 2013 (Bom.)**

Q. In this case the Department contended that the Settlement Commission lacks the jurisdiction to entertain the baggage cases. In other words **Does Settlement Commission have jurisdiction over baggage cases?**

Ans.

**Legal position and conclusion:** Then High Court opined that the provisions that conferred jurisdiction on the Settlement Commission (Section 127B) cannot be construed as narrowly as it sought to be urged by the Revenue. A plain reading of the provisions of sections 127A and 127B reveals that there is no bar/express or implied on the Settlement Commission - in respect of entertaining applications by the passengers which brought in goods through their baggage. **Ashok Kumar Jain 2013 (Del.)**

**Q. Is judicial review of the order of the Settlement Commission by the High Court or Supreme Court under writ petition/special leave petition, permissible?**

Ans.

While examining the scope of judicial review in relation to a decision of Settlement Commission, the High Court noted that although the decision of Settlement Commission is final, finality clause would not exclude the jurisdiction of the High Court under Article 226 of the Constitution (writ petition to a High Court) or that of the Supreme Court under Articles 32 or 136 of the Constitution (writ petition or special leave petition to Supreme Court).

**The Court would ordinarily interfere if the Settlement Commission has acted without jurisdiction vested in it or its decision is wholly arbitrary or perverse or mala fide or is against the principles of natural justice or when such decision is ultra vires the Act or the same is based on irrelevant considerations.**

The Court, however, pronounced that the scope of court's inquiry against the decision of the Settlement Commission is very narrow, i.e. judicial review is concerned with the **decision-making process and not with the decision of the Settlement Commission.** **Saurashtra Cement Ltd. 2013 (Guj.)**

**Q.** In the instant case, the Settlement Commission ordered to release the seized goods of the assessee on payment of a specified amount of fine and penalty adjudicated by it.

However, since the seized goods had already been auctioned by the Department, the Commission directed the Revenue to refund to the assessee, the amount remaining in balance after adjustment of expenses and charges as payable in terms of section 150 of the Customs Act, 1962 and further adjustment of fine and penalty as adjudicated by it.

The refund was however, not granted despite several representations. The response to the RTI query showed that refund was sanctioned but it was not paid till filing of this writ petition.

During the pendency of this writ petition, the principal amount of the sale proceeds was paid to the assessee but the interest on the same was not paid. It was the contention of the Department that the amount paid to the assessee represented the balance of sale proceeds of the goods auctioned or disposed of after adjustments under section 150 of

the Act. Since the amount paid did not represent the amount of duty or interest, the provisions of sections 27 and 27A of the Customs Act relating to claim for refund of duty and interest on delayed refunds respectively would not be applicable.

**Ans.**

**Issue: Whether any interest is payable on delayed refund of sale proceeds of auction of seized goods<sup>1</sup> after adjustment of expenses and charges in terms of section 150 of the Customs Act, 1962?**

**Legal position:** The High Court observed that though no period was stipulated in the order of the Settlement Commission for the grant of refund, the entire exercise ought to have been carried out within a reasonable period of time. All statutory powers have to be exercised within a reasonable period even when no specific period is prescribed by the provision of law. The High Court noted that there was absolutely no reason or justification for the delay in payment of balance sale proceeds.

**Conclusion:** The High Court held that **Department cannot plead that:**

The Customs Act, 1962 provides for the payment of interest only in respect of refund of duty and interest and hence, the assessee would not be entitled to interest on the balance of the sale proceeds which were directed to be paid by the Settlement Commission.

The High Court clarified that acceptance of such a submission would mean that despite an order of the competent authority directing the Department to grant a refund the Department can wait for an inordinately long period to grant the refund.

The High Court directed the Department to pay interest from the date of approval of proposal for sanctioning the refund.

**Vishnu M Harlalka (Bom)**

## CONFISCATION

**Q.** In the instant case, the steamer agent (assessee) authored Import General Manifest and acted on behalf of the master of the vessel (the person-in-charge) before Customs Authorities to conduct all affairs in compliance with the Customs Act, 1962. The assessee filed Import General Manifest, affixed the seal on the containers and took charge of the sealed containers. It also dealt with the customs department for appropriate orders that had to be passed in terms of section 42 of the Customs Act. Penalty under section 116 of the Customs Act was imposed by the Department on the steamer agent for short landing of goods.

**Ans**

**Issue: Can penalty for short-landing of goods be imposed on the steamer agent of a vessel if he files the Import General Manifest, deals with the goods at different stages of shipment and conducts all affairs in compliance with the provisions of the Customs Act, 1962?**

**Legal position :** The High Court noted that section 116 of the Act imposes a penalty on the person-in-charge of the conveyance *inter alia* for short-landing of the goods at the place of destination and if the deficiency is not accounted for to the satisfaction of the Customs Authorities. Section 2(31) defines "person-in-charge" to *inter alia* mean in relation to a vessel, the master of the vessel. Section 148 provides that the agent appointed by the person-in-charge of the conveyance and any person who represents himself to any officer of customs as an agent of any such person-in-charge is held to be liable for fulfillment in respect of the matter in question of all obligations imposed on such person-in-charge by or under this Act and to penalties and confiscation which may be incurred in respect of that matter.

The High Court observed that if assessee affixed seal on containers after stuffing and took their charge, he stepped into shoes of/acted on behalf of master of vessel, the person-in-charge.

**Conclusion :** The High Court held that conjoint reading of sections 2(31), 116 and 148 of Customs Act, 1962 makes it clear that in case of short-landing of goods, if penalty is to be imposed on person-in-charge of conveyance/vessel, it can also be imposed on the agent appointed by him. Hence, duly appointed steamer agent of a vessel, would be liable to penalty. However, steamer agent, if innocent, could work out his remedy against the shipper for short-landing.

The High Court also clarified that in view of section 42 under which no conveyance can leave without written order, there is an automatic penalty for not accounting of goods which have been shown as loaded on vessel in terms of Import General Manifest. There is no requirement of proving *mens rea* on part of person-in-charge of conveyance to fall within the mischief of section 116 of the Customs Act. ***Caravel Logistics Pvt. Ltd. 2013 (Mad.)***

**Note:** Steamer agent is a person who undertakes, either directly or indirectly,-

- (i) to perform any service in connection with the ship's husbandry or dispatch including the rendering of administrative work related thereto; or
- (ii) to book, advertise or canvass for cargo for or on behalf of a shipping line; or
- (iii) to provide container feeder services for or on behalf of a shipping line.

## MISC

**Q. Whether Director's property can be attached for recovery of dues of the company:**

**Ans.** Default by a company (not being wound up) cannot be treated as default by the director in absence of misfeasance, so as to proceed against the director. The company has a separate juristic personality distinct from its director. Hence, attachment of the property belonging to the former director for dues sought to be recovered from the company is illegal and in violation of Article 265 of the Constitution of India. Such attachment amounts to illegal deprivation of one's property.

**No provisions for such recovery in Customs Act, 1962:** There is no provision in the Customs Act, 1962 enabling Revenue authorities to proceed against the directors of the company or such like 3<sup>rd</sup> parties who are not defaulters.

**Anita Grover (2013) (Del.)/ Suman N Agarwal (2013) (Bom.)**

## Service TAX

**Q. Whether tax is to be deducted at source under section 194J of the Income-tax Act, 1961 on the amount of service tax if it is paid separately and is not included in the fees for professional services/technical services?**

**Ans** The High Court held that if as per the terms of the agreement between the payer and the payee, the amount of service tax is to be paid separately and is not included in the fees for professional services or technical services, the service tax component would not be subject to TDS under section 194J of the Income-tax Act. 1961.'

**Rajasthan Urban Infrastructure 2013 (Raj.)**

**Q.** A search was conducted at a branch office of the petitioner company and at the residence of director wherein a sum of Rs.2 crores was collected by the Department from the petitioner. The petitioner filed a writ petition requesting the Court to direct the Department to return the money so collected. Points of dispute:

The petitioner's major contentions were as follows:-

- (i) Since the petitioner was not liable to pay service tax, collection of said amount from the petitioner, was arbitrary and illegal.
- (ii) Department had no jurisdiction to search the premises of the petitioner, or of its Directors, as it was neither carrying on its business nor was not registered, within the jurisdiction of the Commissionerate who had issued the search warrant.
- (iii) The petitioner further alleged that as per a deposition recorded under coercion on the date of search, the sum of Rs. 2 crores had been paid to the Department, voluntarily, as part of the arrears of service tax due from the company. However, tax could not be collected from the petitioner without a proper assessment order being passed, in accordance with the procedures established by law.

The Department counter argued that since the petitioner was actually liable to pay a larger amount of service tax, it could not claim for return of the said amount which was paid by him during the search as the said amount was paid by it voluntarily and not under coercion to mitigate the offence committed by it, under section 73(3) of the Finance Act, 1994.

**Ans**

**Issue: Is it justified to recover service tax during search without passing appropriate assessment order?**

**Legal position:** The Court observed that it is a well settled position in law that no tax can be collected from the assessee, without an appropriate assessment order being passed by the authority concerned and by following the procedures established by law. However, in the present case, no such procedures had been followed.

Further, although Department had stated that the said amount had been paid voluntarily by the petitioner in respect of its service tax liability; it had failed to show that the petitioner was actually liable to pay service tax.

**Conclusion:** Thus, the High Court elucidated that the amount collected by Department, from the petitioner, during the search conducted, could not be held to be valid in the eye of law, and directed the Department to return to the petitioner the sum of Rs. 2 crores, collected from it, during the search conducted.

**Chitra Builders Pvt Ltd. 2013 (Mad)**

**Q. Can extended period of limitation be invoked for mere contravention of statutory provisions without the intent to evade service tax being proved?**

**Ans**

**Legal position :** The High Court observed that as per proviso to section 73(1), extended period of limitation can be invoked if the service tax has not been levied or paid or has been short levied or short-paid or erroneously refunded by reason of fraud or collusion or willful misstatement or suppression of facts or contravention of any of the provision of Chapter V or of rules made thereunder with the intent to evade the payment of service tax.

**Conclusion :** It held that mere contravention of service tax provision or rules framed thereunder does not enable the service tax authorities to invoke the extended period of limitation. The contravention necessarily has to be with the intent to evade payment of service tax.

**Infinity Infotech Parks Ltd. 2013 (Cat.)**

**Q: Whether best judgment assessment under section 72 of the Finance Act, 1994 is an ex-parte\* assessment procedure?**

*(\*Note: The term ex-parte means of the one part; from one party. This term is applied in law to a proceeding by one party in the absence of, and without notice to, the other)*

**Ans:** The High Court held that section 72 could per se not be considered as an ex-parte assessment procedure as ordinarily understood under the Income-tax Act, 1961.

Section 72 mandates that the assessee must appear and must furnish books of account, documents and material to the Central Excise Officer before he passes the best judgment assessment order. Thus, said order is not akin to an ex parte order.

Such an order will be akin to an ex parte order, when the assessee fails to produce records and the Central Excise Officer has to proceed on other information or data which may be available.

**N.B.C. Corporation Ltd. 2014 (Del.)**

**Other provisions**

Q. In a case, CESTAT rejected the appellant's application for condonation of delay in filing the appeal before CESTAT on the ground that the reasons given for filing the appeal beyond stipulated time were not convincing. The Counsel of the appellant filed his personal affidavit stating that the appeal had been filed with a delay due to his mistake.

Ans

Issue : **Can delay in filing appeal to CESTAT due to the mistake of the counsel of the appellant, be condoned?**

**Legal position and conclusion:** *The High Court held that the Tribunal ought to have taken a lenient view in this matter as the appellant was not going to gain anything by not filing the appeal and the reason for delay in filing appeal as given by the appellant was the mistake of its counsel who had also filed his personal affidavit.*

**Margara Industries Ltd. 2013(All.)**

Q. The appellant rendered IT-enabled services such as technical support services, customer-care services, back-office services etc. to clients outside the country. It involved attending to cross-border telephone calls relating to a variety of queries from existing or prospective customers in respect of the products or services of multinational corporations. For rendering such services, the appellant used input services such as night transportation, recruitment training bank charges etc. The appellant claimed rebate of the service tax paid by it on such input services, used in providing the output services which were exported during a particular time period, under the said notification.

Issue: Whether filing of declaration of description, value etc. of input services used in providing IT enabled services (call centre/BPO services) exported outside India, after the date of export of services will disentitle an exporter from rebate of service tax paid on such input services?

**Ans.** The High Court, therefore, allowed the rebate claims filed by the appellants and held that the condition of the notification must be capable of being complied with as if it could not be complied with, there would be no purpose behind it.

**Wipro Ltd. 2013 (Del.)**

**Note:** *With effect from 0107.2012, provisions of rebate of service tax/excise duty paid on input services/inputs used in providing taxable service exported out of India are being governed by Notification No. 39/2012 ST dated 20.06.2012 issued under rule 6A of the Service Tax Rule- 1994. Since the said notification also requires filing of the declaration 'prior to export', the principle enunciated in the above case will hold good under the present law as well.*

**Please note**

|  |   |
|--|---|
| <p><b>TRANSFER OF RIGHT</b> to use trademark by its sole proprietor to franchises against agreed royalty comes under the ambit of deemed sale under article 366(29A)(d) of the constitution and liable to vat not service tax.</p>   | <p><b>Malabar Gold Pvt. Ltd.</b><br/><b>(2013) (Ker.)</b></p> |
| <p>In case goods are <b>purchased availing quantity discounts and subsequently sold to customers by the assessee</b> under cover of his own invoices under a contract on pre-decided price, such operations cannot be equated with work of clearing and forwarding agent.</p> <p>Clearing and Forwarding Agent, who normally would perform tasks such as receiving the goods from factory or premises of the principal, warehousing these goods, receiving dispatch orders <b>from the principal</b> and arranging dispatch according by engaging transport, maintaining, records of the receipt and dispatch of goods and the stock available in the ware house and preparing invoices <b>on behalf of the principal.</b></p> | <p><b>Trade Tek Corporation</b><br/><b>(2013) (Guj.)</b></p>  |

**Q.** The adjudicating authority had disallowed the refund claim filed by the assessee and called for certain additional documents. Similar refund claims filed by the assessee for the earlier periods had been allowed by the adjudicating authority without these additional documents. The assessee failed to furnish the additional documents despite being given several opportunities. The adjudicating authority passed an order rejecting the refund claim but failed to record any reason for the same.

**Assessee's view:** No reason given by the authority for differing with its earlier decisions of allowing the refund.

**Department view:** On failure to produce additional documents even after several reminders, non speaking order is passed.

**Ans.**

- ❖ The High Court decided the petition in favor of assessee and **held that no findings in relation to calling of such additional documents is furnished by Adjudicating Authority**, thus, order of Adjudicating Authority is set aside. *DBOI Global Service Pvt. Ltd. [2013] (Bom.)*

**DECIDE whether the following services are eligible as Input services – for CENVAT credit:**

|  |  |
|--|--|
| <b>Technical Testing and Analysis services</b>         | <b>Yes :</b> Testing and analysis of trial batches was directly related to manufacture of final product and the said service is an input service and assessee was entitled to take credit of service tax paid thereon. <i>Cadila Healthcare Ltd. [2013] (Guj.)</i>   |
| <b>Technical Inspection and Certification services</b> | <b>Yes :</b> As these instruments/equipment were used in and in relation to manufacture of final products, their maintenance, checking and calibration, would be in relation to manufacture of final products ,hence such services shall be eligible for CENVAT credit. <i>Cadila Healthcare Ltd. [2013] (Guj.)</i>  |
| <b>Commission paid to foreign agents</b>               | <b>No:</b> The said agents were directly concerned with sales rather than sales promotion. The said services do not fall within the meaning part or inclusive part of the definition of input service in Rule 2(1) of Cenvat Credit Rules, 2004. It was not used directly or indirectly in or in relation to manufacture of final products or clearance of final products upto the place of removal and hence the same shall not be eligible for Cenvat credit. -<br><i>Cadila Healthcare Ltd. [2013] (Guj.)</i> |

**Please note.**

|  |  |
|--|--|
| Rule 3(5C) of Cenvat Credit Rules 2004 is to be given prospective effect only and the same cannot be applied by the department retrospectively ie for the period before its insertion.   | <b>Intas Pharmaceuticals Ltd. (2013) (Guj.)</b>                  |
| There is no rule for reversal of credit taken on inputs which are destroyed. Credit is required to be reversed only if inputs are used in exempted goods. Hence, if inputs are destroyed then reversal of Cenvat credit available is not required.   | <b>Khurana Wollen Mills (P) Ltd. (2013) (P&amp;H)</b>            |
| If goods were received in factory along with duty paying documents and the payment is made to supplier by cheque. Validity of credit so taken cannot be denied. Merely because a manufacturer could not be found, invoices issued by them cannot be treated as fake or fraudulent.<br><br>Cenvat credit cannot be denied on goods purchased from manufacturer if such manufacturer who was registered with the Central Excise Department is not traceable. | <b>Pragraj Dyeing and Printing Mills Pvt. Ltd. (2013) (Guj.)</b> |

# Category: C

## EXCISE LAWS

### Basic Concept

**Q. Whether Mixing of polymers & additives to heated bitumen is amount to manufacture?**

Ans. No

It was held that-

- The process of mixing polymers and additives to heated bitumen, which results in emergence of Polymer Modified Bitumen (PMB) and Crumbled Rubber Modified Bitumen (CRMB) does not amount to manufacture
- because there was **NO CHANGE IN CHARACTERISTICS OR IDENTITY OF BITUMEN, ONLY ITS GRADE OR QUALITY WAS IMPROVED.**
- The said process did not result in transformation of bitumen into new product having different identity, characteristic and end use; the end use also remained same, viz. mixing of aggregates for constructing roads.
- Further, the said **process was not specified in** Section or Chapter notes of the Tariff Act as amounting to manufacture (**as deemed manufacture**) **Osnar Chemical Pvt. Ltd. [2012] (SC)**

Q. The assessee made testing equipments and used it captively for testing of final products manufactured by it. The Department demanded excise duty on such testing equipments. The assessee denied the liability contending that : assembly of testing equipments from various parts and components bought from outside didn't amount to manufacture; even if manufacture was involved, the testing equipments were not marketable; and since they were not removed outside the factory, hence, they were not liable to excise duty.

**Answer-**

Issue- (1)-whether such process is a manufacturing process?

Issue-(2) whether resultant product is a marketable commodity?

Issue-(3) whether use of testing equipment is amount to removal of goods?

- ✚ Assembly of various parts and components and assembling them so as to make testing equipments therefrom, having different name, character and use, **amount to manufacture.**
- ✚ The assessee had stated in its Balance Sheet that it had fabricated the testing equipments itself with a view to avoid import thereof so as to save foreign exchange. This statement in the Balance Sheet proved that the **testing equipments were marketable**, as they could be bought and sold in the market.
- ✚ As per Explanation to Rule 5 of the Central Excise Rules, 2002, the issue of excisable goods for captive use **amounts to 'removal'** for the purposes of levy of excise duty.

Hence, the testing equipments were liable to excise duty.

**[Usha Rectifier Corpn. (I) Ltd. [2011] (SC)**

**Question-** The assessee was engaged in the manufacture of **Vitamin A in a finished and marketable form**, which was cleared on payment of excise duty.

- ➔ During the intermediate stage of manufacture of vitamin A, "CRUDE Vitamin A" emerges.

- The “**CRUDE Vitamin A**” is subjected to further **process of crystallization** to obtain **FINISHED Vitamin A**, which was marketed by the assessee.

The assessee was ALSO engaged in the manufacture of **Animal Feed Supplements**, which was exempt. The assessee consumed “**CRUDE Vitamin A**” in the manufacture of **Animal Feed Supplements**.

**Department demanded excise duty** on such “**crude Vitamin A**” used for manufacture of animal feed supplements.

**Assessee contended** that crude Vitamin A was not marketable, as it had a **shelf-life of 2-3 days** only; further, it was unstable if it was not stored in sub-zero degree centigrade.

**Whether the contention of ASSESSEE is tenable in law?**

**Answer-**

**Issue-** whether “**CRUDE Vitamin A**” (**has short shelf life 2-3 days**) is a marketable commodity and accordingly liable to excise duty ?

**LEGAL POSITION- THE SIMILAR ISSUE WAS RECENTLY DECIDED BY THE APEX COURT IN THE CASE OF Nicholas Piramal India Ltd. [2010] (SC) WHERE IT WAS HELD THAT,**

- Intermediate products, even if captively consumed and not actually sold, are liable to levy of excise duty if they satisfy the test of both manufacture and marketability.
- Short shelf-life cannot be equated with no shelf-life and would not mean that it cannot be marketed.
- A shelf-life of 2 to 3 days is sufficiently long enough for a product to be commercially marketed.
- Shelf-life of a product would not be a relevant factor to test the marketability of a product unless it is shown that the product has absolutely no shelf-life or the shelf-life of the product is such that it is not capable of being brought or sold during that shelf-life.
- In the instance case –department clearly demonstrate that the crude vitamin A was commercially known and was capable of being sold.

**Conclusion –IN THE LIGHT OF WHAT IS STATED ABOVE IT CAN BE CONCLUDED THAT the contention of assessee is not correct and therefore CRUDE Vitamin A” (has short shelf life 2-3 days) is a marketable commodity and accordingly liable to excise duty. Nicholas Piramal India Ltd. [2010] (SC)**

**Question-** The assessee was engaged in manufacture of ‘tarpaulin made-ups’. The tarpaulin (CANVAS) made-ups were prepared by cutting the cloth into various sizes and stitched and eye-lets were fitted.

**Department viewed that-**

- ➔ The “tarpaulin made-ups” prepared by means of cutting, stitching and fixing of eye-lets amounted to manufacture and, hence, they were liable to excise duty.

**However, the assessee stated that-**

- ➔ The process of mere cutting, stitching and putting eyelets did not amount to manufacture and hence, the Department could not levy excise duty thereon.

**Whether the contention of department is tenable in law?**

**Answer-**

**Issue-**whether **Process of preparation of tarpaulin made-ups after cutting and stitching tarpaulin fabric and fixing the eye-lets is manufacture?**

**LEGAL POSITION- THE SIMILAR ISSUE WAS RECENTLY DECIDED BY THE APEX COURT IN THE CASE OF Tarpaulin International [2010] (SC) WHERE IT WAS HELD THAT,**

Stitching of tarpaulin sheets and making eyelets did not change basic characteristic of the raw material and end product.

- The process did not bring into existence a new and distinct product with total transformation in the original commodity.
- The original material used i.e., the tarpaulin, was still called tarpaulin made-ups even after undergoing the said process.
- Hence, it could not be said that the process was a manufacturing process.

**Conclusion -IN THE LIGHT OF WHAT IS STATED ABOVE IT CAN BE CONCLUDED THAT the contention of department is not correct. Process of preparation of tarpaulin made-ups after cutting and stitching tarpaulin fabric and fixing the eye-lets is not manufacture** Therefore, there could be no levy of Central excise duty on the tarpaulin made-ups. **Tarpaulin International [2010] (SC)**

## Valuation

Q. Where the goods are cleared

- for captive consumption
- and for sale to related and to unrelated buyers at the same price,

which will be the relevant rule for valuation of captive consumption and sale to related person ?

**Ans.** Where the goods are cleared

- for captive consumption
- and for sale to related and to unrelated buyers at the same price then-

Excise duty is leviable in terms of **Rule 4 of the Valuation Rules, 2000.**

Because:-

**Rule 8** of Valuation Rules, 2000 can be invoked only in case when the entire goods are captively consumed.

**Rule 9** of Valuation Rules, 2000 can be invoked only when the entire goods are sold solely to related persons.

*Thus, Rule 8 and 9 of Valuation Rules, 2000 cannot be applied when the goods are cleared for captive consumption and for sale to related and to unrelated buyers at the same price.* **Oswal Woollen Mills Ltd. [2012] (Tri.)**

Q. M/s. Lear Automotive India Pvt. Ltd., is engaged in the manufacture of seats and other interiors required for vehicles of M/s. M & M Ltd. To manufacture these parts M/s. M & M Ltd. had given certain tooling advance for manufacture of tools. This advance amount was not included in the assessable value by the appellant (*nor was it amortised in the assessable value of seats and other parts manufactured by them.*)

The appellants had also received certain other inputs free of cost from M/s. M & M Ltd., the value of which was not considered in determining the assessable value.

Hence, a show cause notice was issued for demanding differential duty on the amount of tooling advance received and value of inputs received free of cost (including them in the assessable value) alone with interest and penalty.

Now the issue is this

Whether the tooling advance received by the appellant from M/s. M & M Ltd. is required to be amortised in the assessable value of the goods applying Rule 6 of Central Excise Valuation Rules, 2000; OR

The entire tooling advance was to be included in the assessable value at one go under the provisions of Section 4(3)(d) of the Central Excise Act, 1944,

Whether the value of inputs received free of cost by the appellant from M/s. M& M Ltd. is required to be included in the assessable value of the goods?

Ans.

**Rule 6 of the Valuation Rules, 2000 includes only the money value of any additional consideration, which is not same as money. Hence any advance cash received for moulds and tools cannot be aggregated with the transaction value under Rule 6.**

**The value of any inputs, received free of cost by the assessee from their buyers, will be included in the assessable value of the goods.** *Lear Automatives India Pvt., Ltd. (2012) (Tri.-Mumbai)*

Q. Can the pre-delivery inspection (PDI) and free after sales services charges be included in the transaction value when they are not charged by the assessee to the buyer?

Ans. As per section 4(3)(d), the PDI and free after sales services charges could be included in the transaction value only when they were charged by the assessee to the buyer. *Tata Motors Ltd. 2012 (Bom.)*

## Central Excise Rules, 2002

Q: Whether **export duty can be levied** on goods supplied from Domestic Tariff Area to Special Economic Zone?

Ans - Held that, levy of export duty on goods supplied from the Domestic Tariff Area to the Special Economic Zone is not justified.

- The petitioner, are therefore not to be called upon to pay export duty on movement of goods from Domestic Tariff Area to Special Economic Zone Units or developers.

Because in case of goods cleared from **DTA to SEZ, the said goods are deemed to be exported BUT ONLY FOR THE LIMITED PURPOSE OF ALLOWING EXPORT INCENTIVES TO THE SELLER. THE SAME CAN NOT BE DEEMED TO BE EXPORT FOR THE PURPOSE OF LEVY OF EXPORT DUTY.** *Essar Steel Ltd. -H.C.-2010 -/ Biocon Ltd. [2011] (Kar.)*

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## Cenvat Credit Rules, 2004

**Q.** The assessee was issued a show cause notice by the Commissioner proposing confiscation of seized goods and imposition of penalty. A reply to the said notice was submitted by the assessee. However, before taking any decision on such SCN. another SCN was issued by the commissioner demanding excise duty and imposing penalty by invoking extended period of limitation of five years on the same allegations.

The assessee contended that since no decision was taken in respect of first SCN. the Commissioner could not pre-judge the issue involved in the matter and issue another SCN for recovery of duty and penalty. Therefore, the assessee submitted that the second SCN be quashed or an order be passed prohibiting the Commissioner from proceeding further with the said show cause notice till the final adjudication of the question involved in earlier SCN.

**Ans.** The High Court observed that since the subsequent show cause notice only formed prima facie view in regard to allegations, it could not be said to be issued after pre-judging the question involved in the matter. The High Court opined that since it was not a case of show cause notice being issued without jurisdiction, adjudicating authority could not be restrained from proceeding further with the SCN.

**Conclusion:** The High Court held that there was no legal provision requiring authorities to first adjudicate the notice issued regarding confiscation and only thereafter issue show cause notice for recovery of dues and penalty.

Jay Kumar Lohani 2012 (M.P.)

**Q. Whether the tool kits or the first aid kits sold along with the two wheelers are inputs to be eligible for Cenvat credit under the Cenvat Credit Rules, 2004?**

**Ans:** The Central Motor Vehicle Rules, 1989 has made it mandatory that every vehicle cleared by the manufacturer must carry a set of tool kit and a first aid kit. Therefore, the tool kit and the first aid kits sold along with the two wheelers are 'accessories of the final product, their cost being included in the cost of the final product.

The definition of 'Input' as given under Rule 2(k)(ii) of Cenvat Credit Rules, 2004, includes within its ambit 'accessories of final product cleared along with the final product'.

Therefore, the tool kits and first aid kits sold along with the vehicle are inputs eligible for Cenvat credit.

*Honda Motor Cycles and Scooter India P. Ltd. [2012] (Tri.)*

**Q.** The assessee purchased capital goods and availed CENVAT Credit thereon. The capital goods were **subsequently destroyed by fire** and the insurance company paid insurance claim (inclusive of excise duty on capital goods). The Department sought of CENVAT Credit on the ground that since excise duty had been reimbursed by the insurance company, the assessee cannot claim doubt benefit. Whether the contention of department is tenable in law ?

**Answer – NO**

- ✚ CENVAT credit once validity taken is indefeasible and can be reversed only in accordance with the provisions of the Act or rules.
- ✚ Merely because the insurance company paid the assessee the value of the goods (**claim / compensation for loss of goods**) including the excise duty paid, that would not render the availment of the CENVAT credit wrong or irregular.
- ✚ Further, the same doesn't confer any right on the Department to demand reversal of credit. The insurance claim was received only on prior payment of insurance premium by the assessee to cover the risk.
- ✚ Hence, it was not a case of doubt benefit to the assessee.

**CONCLUSION-** in absence of any provision in the Act or the rules requiring reversal of credit, the Department's demand in seeking reversal of credit was invalid in law.

[Tata Advanced Material Ltd. [2011] (Kar.)]

## SMALL SCALE INDUSTRIES

**Q.** The Elex Knitting Machinery Co. was engaged in the manufacture of flat knitting machines. They had been availing the SSI exemption. They were found using the brand name "ELEX" on those machines which belonged to M/s. Elex Engineering Works and according to the Central Excise Authorities, they were not entitled to avail the benefit of said notification. The proprietor of Elex Knitting Machinery Co. was a partner in M/s Elex Engineering Works.

The **Department denied the benefit of the SSI exemption** notification solely on the ground that they had

manufactured and cleared the goods (flat knitting machines) under the brand name “ELEX” which belonged to M/s. ELEX Engineering Works. Decide with the help of case laws if any, whether the assessee is entitled to avail SSI exemption ?

**Ans. YES**

- The Supreme Court was of the view that the benefit of exemption could be availed only when the company is manufacturing the goods under its own brand name or the brand name being used belonged to a sister concern of that company.
- The Supreme Court held that the appellant was eligible to claim benefit of the SSI exemption as the proprietor of Elex Knitting Machinery Co. was one of the partners in Elex Engineering Works.
- And hence being the co-owner of the brand name of Elex,

**He could not be said to have used the brand name of another person, in the manufacture and clearance of the goods in his individual capacity.** *Elex Knitting Machinery Co. 2012 (S.C.)*

### Common Topics

**Q. Whether a circular necessarily needs to be issued under section 37B, in order to be binding on the Department?**

Ans. The High Court observed that any clarification issued by the Board is binding upon the Central Excise Officers who are duty-bound to observe and follow such circulars. Whether section 37B is referred to in such circular or not, is not relevant. **Darshan Boardlam Ltd.(Guj.)**

**Q.** The question which arose for consideration before Gujarat High Court was that in a case where the assessee voluntarily pays the duty short paid recovery of which has become time-barred; can he be required to pay interest on the duty so paid.

**Ans.** The High Court observed that in case the recovery of the unpaid or short paid duty has become time-barred, if the manufacturer does not pay it voluntarily it would not be possible for the Department to recover the same. Thus, if he does it voluntarily despite completion of period of limitation, he should not, further be saddled with the liability to pay statutory interest. The High Court held that intention of the Legislature was not to impose interest on the voluntary payment of time-barred duty. Decision of the case: The High Court held that the assessee was not required to pay interest in case of voluntary payment of time-barred duty.

**Gujarat Narmada Fertilizers Co. Ltd. 2012 (Guj.)**

Q. The CESTAT, while hearing an appeal filed by the assessee, gave an option to the assessee that if 25% of the penalty amount was paid within 30 days from the date of its order (viz. 22<sup>nd</sup> July, 2010), the penalty would be reduced to 25%. The counsel (advocate) of the assessee was present in the CESTAT. The assessee deposited 25% penalty on 30<sup>th</sup> August, 2010 and was denied the benefit of the option as there had occasioned a delay of 9 days.

**Assessee’s view:**

Order will not be considered as tendered to him on 22<sup>nd</sup> July 2010 as it was not received by him in person on this day. He had deposited the 25% of penalty within 30 days of communication of order to him.

**Department view:**

Presence of assessee’s Advocate at the time of passing the order on 22<sup>nd</sup> July 2010 shall be deemed to be a proper communication to assessee himself.

**Ans. Decision/order pronounced in CESTAT in presence of the person for whom it is tendered or his authorized agent shall be deemed to be communicated on the pronouncement date itself.**

In the present case the order passed by the Tribunal on 22<sup>nd</sup> July, 2010 in presence of advocate of the assessee, would be deemed to be communicated to the authorized agent of the assessee (i.e. his advocate) on the same date and 30 days period would start from 22<sup>nd</sup> July, 2010

Hence the benefit of reduced penalty (25%) will not be allowed to the assessee.

*Najtumul Glass Works [2012] (All.)*

**Q. (a) Whether intimation to assessee of the option to pay dues within 30 days to avail the benefit of 25% penalty is necessary through demand order?**

**(b) Whether such benefit will be available after appellate order if yes then on total amount or on increased amount only?**

**Ans (a)** The option of paying the reduced penalty i.e 25%, as envisaged u/s 11AC is available only if the duty, interest and 25% of the penalty amount as determined u/s 11A are paid within 30 days of the communication of the order of Central Excise officer.

Failure to intimate the availability of this option in the adjudicating order does not result in violation of provisions of section 11AC of the Central Excise Act, 1944, as this section does not require the Central Excise officer to determine 25% penalty or communicate availability of the option.

(b) The Appellate authorities/courts cannot permit the assessee to pay 25% penalty beyond time prescribed u/s 11 A C. The incentive in this section is intended to encourage payment of tax due to Revenue at the earliest without resorting to unwarranted litigation and is not an incentive for violating the provisions of law. Thus, this section is to be construed strictly. If the Appellate Authority is allowed to permit assessee to pay 25% of penalty within 30 days from communication of its appellate order, it would defeat the object with

which incentive under this section is given within the stipulated time therein.

It is only when the duty payable is increased by Appellate Authority or Court, 25% of increased penalty has to be paid within 30 days of communication of the Appellate Authority's order.

*Castrol India Ltd. [2012] 2(Bom)*

**Q.** The appellant was engaged in the manufacture and clearance of Gutkha and Pan Masala. Search and seizure was conducted at the appellant's premises by the officers of the Directorate General of Central Excise, New Delhi. A show-cause notice was issued by Additional Director General, Directorate General of Central Excise Intelligence, asking the petitioner to show cause to the Commissioner of Central Excise, Kanpur within 30 days as to why the duty, penalty and interest were not to be imposed.

The appellant contended that Additional Director General, Directorate General of Central Excise Intelligence had no jurisdiction to issue the Show Cause Notice. It was contended that he was not a "Central Excise Officer" within the meaning of section 2(b) of the Central Excise Act, 1944. It was further contended that no notification regarding his appointment as Central Excise Officer was published in the Official Gazette as required by the rule 3(1) of the Central Excise Rules, 2002.

Another contention pressed by the appellant was that the authority who had issued the show cause notice ought to have obtained prior permission from the adjudicating authority before issuing the Show Cause Notice.

Now the issue is this- Whether Additional Director General, Directorate General of Central Excise Intelligence can be considered a central excise officer for the purpose of issuing SCN?

**Ans. YES**

The Court on observing the issue held that-

- Additional Director General, Directorate General of Central Excise Intelligence having been authorized to act as a Commissioner of Central Excise was a Central Excise Officer, within the meaning of section 2(b) of the Central Excise Act, 1944 and was fully authorized to issue the Show Cause Notice.

- It was held that the Additional Director General, Directorate General of Central Excise Intelligence having been specified as a Commissioner of Central Excise was fully entitled to issue the show cause notice under section 11A, being a Central Excise Officer.
- No such provision had been referred to nor shown which may require approval before issuing the show cause notice of the adjudicating authority/officer. **Raghnath International Ltd. 2012 (All.)**

**Q.** The appellant-assessee had filed an appeal in May 2010. The date of order was 31<sup>st</sup> March 2008. The assessee contended that the copy of the order passed by the Commissioner of Central Excise (Appeals) was not served upon the assessee. It was only when the recovery proceedings were initiated, the assessee sought a copy of the order dated 31<sup>st</sup> March 2008 and the same was made available to the assessee on 26<sup>th</sup> February 2010. Immediately thereupon the assessee filed an appeal before the CESTAT on 17<sup>th</sup> May 2010.

The Department contended that appeal was not filed within the stipulated time of 3 months from 31<sup>st</sup> March 2008 while the appellant contended that the appeal filed was within three months of the date of serving of the order i.e. 26<sup>th</sup> February 2010.

Issue is this- Would the copy of the order mandatory to be served via registered post or a speed post also suffice?

**Ans.**

- As per section 37C of the Central Excise Act, 1944, it was obligatory on the part of the Revenue, either to tender a copy of the decision to the assessee or to send it by 'registered post with due acknowledgment' to the assessee or its authorized agent
- In the present case, neither of the above had been complied with by the Revenue. The High Court thus held that in the facts of the present case, it cannot be accepted that the requirements of section 37C had been complied with.
- Accordingly, the contention of the assessee that a copy of the order of Commissioner of Central Excise (Appeals) was received for the first time on 26<sup>th</sup> February 2010 would have to be accepted.

**Amidev Agro Care Pvt. Ltd. 2012 (Bom.)**

**Q.** Kanyaka Parameshwari Engineering Ltd. was engaged in business of manufacture and sale of LPG cylinders. The appellant had paid excise duty under protest for the financial year 1999-2000 as the price was not finalized by the oil companies so the appellant undertook to pay the differential duty, if any, on fixation of exact price.

Pursuant to the reduction in the prices of LPG cylinders, the appellant filed applications for finalization of assessments and for refund of excess duty so paid by them. The Department refunded the excess duty paid by the appellant with interest from three months after the application for refund filed till the date of payment.

The appellant further filed an appeal demanding interest on the excess duty so paid by them as per section 11BB of Central Excise Act from the date of payment as duty was paid under protest.

The issue is this-Whether under section 11BB, the interest on refund is payable from the date of deposit of tax or from the date three months after the submission of the application of the refund?

**Ans. FROM THE DATE THREE MONTHS AFTER THE SUBMISSION OF THE APPLICATION**

Under section 11BB of the Central Excise Act, 1944, if any duty is not refunded within three months from the date of receipt of application under sub-section (1), the interest shall be paid on such duty from the date immediately after expiry of three months from the date of receipt of such application till the date of refund of such duty.

The High Court upheld the order of the CESTAT and granted interest on delayed refund from the expiry of three months from the date of application till the date of refund.

**Kanyaka Parameshwari Engineering Ltd. 2012 (A.P)**

**Q.** The assessee cleared the goods paying higher rate of excise duty in the month of March, although the rate of duty on the said goods had been reduced in the budget of the same financial year. However, the buyer refused to pay the higher duty which the assessee had paid by mistake. The customer raised a debit note in his name in the month of June of the same year. The assessee applied for the refund of excess excise duty paid. Revenue rejected his claim on the ground that incidence of the duty had been passed by him to the buyer.

While claiming refund, the assessee relied on the debit note raised by the buyer in his name in the month of June to demonstrate that his customer had not paid the excess duty to him. The adjudicating authority argued that since the debit note was issued in the month of June and not March, it could not be the basis for refund.

**Can the excess duty paid by the seller be refunded on the basis of the debit note issued by the buyer?**

**Ans. YES**

The High Court elucidated that once it is admitted that the Department has received excess duty, they are bound to refund it to the person who has paid the excess duty. If the buyer of the goods has paid that excess duty, he would have been entitled to the said refund.

In the instant case, when the buyer had refused to pay excess duty claimed and had raised a debit note, the only inference to be drawn was that the assessee had not received that excess duty which he had paid to the Department. Consequently, Department was bound to refund to the assessee the excess duty calculated. Hence, the substantial question of law raised was answered in favour of the assessee and against the revenue.

**Techno Rubber Industries Pvt Ltd. 2011 (Kar.)**

**Q.** The issue under consideration is that in case the first appellate authority had rejected the appeal filed by the assessee on the ground of limitation, whether the orders passed by the original authority would merge with the orders passed by the first appellate authority.

The learned counsel for the assessee contended that in given case, the orders passed by the original authority would merge with the orders passed by the first appellate authority and, therefore, the Tribunal should consider the appeal filed by the assessee.

It further submitted that the Tribunal ought to have considered the assessee's appeal not only on the ground of limitation but also on merits of the case. Since that has not been done, according to the learned counsel, the Tribunal has committed a serious error. The learned counsel further submitted that the "doctrine of merger" theory would apply in the sense that though the first appellate authority had rejected the appeal filed by the assessee on the ground of limitation, the orders passed by the original authority would merge with the orders passed by the first appellate authority and, therefore, the Tribunal ought to have considered the appeal.

On the other hand, the learned counsel for the respondent submitted that the doctrine of merger would not apply to a case where an appeal was dismissed only on the ground of the limitation.

**Basically the question is this – Whether doctrine of merger is applicable when appeal dismissed on the grounds of limitation and not on merits?**

**Ans.** The Court observed that if for any reason an appeal is dismissed on the ground of limitation and not on merits, **THAT ORDER WOULD NOT MERGE WITH THE ORDERS PASSED BY THE FIRST APPELLATE AUTHORITY.**

Apex Court opined that the High Court was justified in rejecting the request made by the assessee for directing the Revenue to state the case and also the question of law for its consideration and decision. In view of the above discussion, Supreme Court rejected the appeal.

**Raja Mechanical Co. (P) Ltd. 2012 (S.C.)**

## Classification

**Q.** Whether the “soft serve”[SOFTY] sold at Mc Donald’s India’s outlet should be classified as ‘ice cream’ under heading 2105 or as a ‘Dairy product’ under heading 0404.

**Assessee’s contention:**

“Soft serve” cannot be classified as ice-cream under heading 2105 as it contains only 5% milk fat contents as against 10% as statutorily required by Prevention of Food Adulteration Act, 1955.

**Revenue’s Contention**

In common parlance “Soft serve” is known as “Ice cream” and hence must be classified as ‘Ice cream under the heading 2105. In absence of any definition of ‘Ice cream’ available in any of the Chapter notes or Section notes, the common parlance test needs to be applied.

**Ans.**

**Common parlance test:** In absence of any statutory definition or technical description or scientific meaning of the term ‘ice cream’ or ‘soft serve’, the classification is to be based on the common parlance test.

**Please note that-**

*The definition of one Statute cannot be applied mechanically to another Statute : The plea that ‘Soft serve’ cannot be classified as ice cream as it contains only 5% of milk fats as against statutory requirements of 10% as per the Prevention of Food Adulteration Act, 1955 and thereby attracting criminal action is untenable. In absence of any statutory or scientific definition of “Ice cream” reliance cannot be placed on the definition given by food experts that has been changing. The definition of one Statute cannot be applied mechanically to another Statute having a different object purpose and scheme.*

**Specific heading to prevail over general:**

While Heading 0404 covers ‘other Dairy Product’, heading 2105 reads ‘ice cream and other edible ice. Hence heading 2105 is specific entry and soft serve, though dairy products, are to be classified under heading 2105 applying the Rule 3(a) of General Rules of Interpretation which states that specific heading prevails over general heading’.

***Crux. Soft serve (softy) is to be classified as ice cream and not dairy product as per trade parlance test: In absence of any statutory definition of technical description or scientific meaning of the goods, the classification is to be based on the common parlance test.***

**Connaught Plaza Restaurant (P) Ltd. [2012] (SC)**

**Q.** The assessee was a manufacturer of Povidone Iodine Cleansing Solution USP (“PICSU”) and Wokadine Surgical Scrub (“WSS”). The assessee contended that the said products were ‘Medicaments’ under Tariff Heading 3003 as it was used for surgical cleaning, while the Department contended that they were ‘detergent’ under Tariff Heading 3402.90 [*Reason of dispute- Surgical Cleansing Solution – Mostly used for medical purposes, though used in detergents also*]. Decide the classification?

**Ans- Medicaments**

It was held that- The products were medicaments in view of the following important tests for classification:

**Use Test:**

- The products in question were primarily used by surgeons for cleaning or de-germing their hands and scrubbing surface of skin of patients before operation.
- Merely because they were used in detergents as cleansing agents would not affect the classification.
- Therefore, as per primary use test, the products were medicaments.

**Common Parlance Test:**

- The products in question were understood as MEDICAMENTS IN COMMON PARLANCE AND TRADE.

Therefore, merely because of alternative used in making detergents, they could not be classified as 'detergents'.

**Wockhardt Life Science Ltd. [2012] (SC)**

Q. The assessee, a manufacturer of slagwool/rockwool containing more than 25% by weight 'blast furnace slag', classified that said goods under Tariff Heading 6807.10, while the Department sought classification under Tariff Heading 6803.

|                             |  |
|-----------------------------|--|
| <b>Heading 6803:</b>        | Slagwool, rockwool and similar wools<br>(Rate of duty 18%).                                    |
| <b>Heading 6807.10</b><br>: | Goods in which more than 25% by weight of....blast furnace slag .... Is used (Rate of Duty 8%) |

**Ans- Heading 6807.10 :**

it was held that-

- Heading 6807.10 is a Heading based entirely materials used in composition of goods. A heading based on composition of goods is a more specific heading, as it is based on commercial nomenclature.
- Hence, goods fell under 6807.10

**Minwool Rock Fibres Ltd. [2012] (SC)**

## Settlement Commission

**Q.**M/s. Maruthi Tex Print & Processors Pvt. Limited, Hyderabad, was a concern registered with the Excise Department for manufacture of man-made fabrics (MMF) and also for manufacture of cotton fabrics. During the course of business, search was carried out at various places, including the factory, registered office premises, their godown and dealers' premises, which resulted in recovery of certain records relating to delivery of processed fabrics, and seizure of certain quantities of grey and processed fabrics.

The Department issued SCN confirming demand at the higher rate of duty and interest and penalty thereon and seized goods also. However, there was no clear evidence to hold that the fabrics mentioned in all delivery challans were attracting higher rate of duty.

The assessee approached the Settlement Commission. The Settlement Commission confirmed the entire demand, penalty, seizure and denied the immunity from the prosecution. The assessee approached the High Court.

***Can the Settlement Commission decline to grant immunity from prosecution after confirming the demand and imposing the penalty?***

**Ans. NO**

The High Court held that when an allegation of clandestine manufacture and clearances is made, the person making the allegation should establish the complete charge including the nature of the goods and its value involved for determining the appropriate demand of duty.

Secondly, the Settlement Commission can be approached if a person, who suffered a show cause notice on the charge of evasion of duty, finally wants to settle the matter, by making full disclosure admitting certain

omissions/commissions. The Settlement Commission, by looking at the onus upon the Department to prove about the nature of goods cleared without payment of duty, should decide the matter. However, in the present case, without placing the burden on the Department to prove their case, the Settlement Commission confirmed the demand on the assessee.

Settlement Commission should not have refused the benefit of immunity from prosecution. Hence, that part of refusal to grant immunity for prosecution is alone interfered with. **Accordingly, the Court set aside the order relating to non-grant of immunity for prosecution and resultantly, the assessee was granted immunity from being prosecuted.**

**Maruthi Tex Print & Processors P. Ltd. 2012 (Mad.)**

# CUSTOM LAWS

## COMMON TOPICS.....

**Q.** The Commissioner of Customs (General), in his order-in-original, dropped the proceedings which were initiated against the appellant. The Committee of Chief Commissioners of Customs constituted under section 129A(1B) of the Customs Act, 1962 reviewed his order and directed him to apply to the Tribunal for determination of certain points. The Commissioner, accordingly, made an application under section 129D(4) of the Act before the Tribunal. As the said application could not be made within the prescribed period and was delayed by 10 days, an application for condonation of delay was filed with a prayer for condonation. However, Tribunal rejected the application for condonation of delay on the ground that Tribunal had no power to condone the delay caused in filing the application under section 129D(4) by the Department beyond the prescribed period of three months.

**Issue** The question which arose for consideration before this Court was whether it was competent for the Tribunal to invoke section 129A(5) where an application under section 129D(4) had not been made by the Commissioner within the prescribed time and to condone the delay in making such application if it was satisfied that there was sufficient cause for not presenting it within that period.

**Ans.** The High Court observed that Parliament intended that entire section 129A, as far as applicable, should be supplemental to section 129D(4). For the sake of brevity, instead of repeating what had been provided in section 129A as regards the appeals to the Tribunal, it had been provided that the applications made by the Commissioner under section 129D(4) should be heard as if they were appeals made against the decision or order of the adjudicating authority and the provisions relating to the appeals to the Tribunal would apply in so far as they might be applicable. The expression, “including the provisions of section 129A(4)” was by way of clarification and had been so said expressly to remove any doubt about the applicability of the provision relating to cross objections to the applications made under section 129D(4) otherwise it could have been inferred that provisions relating to appeals to the Tribunal had been made applicable and not the cross objections. The use of expression “so far as may be” was to bring general provisions relating to the appeals to Tribunal into section 129D(4).

Consequently, section 129A(5) also stood incorporated in section 129D(4) by way of legal fiction and must be given effect to. In other words, if the Tribunal was satisfied that there was sufficient cause for not presenting the application under section 129D(4) within prescribed period, it might condone the delay in making such application and hear the same

**Conclusion:** In light of the above discussion, the High Court ruled that the Tribunal was competent to invoke section 129A(5) where an application under section 129D(4) had not been made within the prescribed time and condone the delay in making such application if it was satisfied that there was sufficient cause for not presenting it within that period. **Thakker Shipping P. Ltd. 2012 (S.C.)**

**Q. Whether Revenue can prefer an appeal in case of a consent order?** [*A consent order is a judicial decree expressing a voluntary agreement between parties to a suit, especially an agreement by a defendant to cease activities alleged by the Government to be illegal in return for an end to the charges.*]

**Ans.** High Court held that if an order was passed by CESTAT based on consent and the matter was remanded at the instance of Revenue, then Revenue could not pursue an appeal against such order in a higher forum.

In the instant case, the Tribunal had remanded the matter in order to re-compute the duty payable by the assessee on the basis of representation of Revenue. Thereafter, the Revenue filed an appeal against the said order.

The assessee contended that the appeal filed by the Revenue was not maintainable since the order had been passed by the Tribunal on the submission of the representative of the Revenue. Further, since it is a consent order, no appeal would lie. The High Court held that an appeal against the consent order cannot be filed by the Revenue. **Trilux Electronics 2010 (Kar.)**

## CONFISCATION ...

**Q. Whether discharge of liability on indicated value would still make the assessee liable for confiscation of goods if he has initially made a mis-declaration of the value thereof?**

**Ans.** The High Court was convinced that there was clear mis-declaration of value by the appellant and as per section 111(m) of the Customs Act, the Revenue was asked to confiscate the goods so imported.

*Wringley India Pvt. Ltd. 2011 (Mad.)*

**Q.** The Department disputed the re-export of confiscated goods. They said that the goods which have been confiscated were being smuggled in by the passenger without declaring the same to the Customs and are in commercial quantity. The appellate authority has erred in by allowing the re-export of the goods by reducing the redemption fine and penalty. While doing so, he has not taken into account the law laid down by the Hon'ble Supreme Court in the case of *Grand Prime Ltd. [2003 (S.C.)]*

**Basically the issue is this- Whether the smuggled goods can be re-exported from the customs area without formally getting them release from confiscation?**

**Ans.** The Government noted that the passenger had grossly mis- declared the goods with intention to evade duty and smuggle the goods into India. As per the provision of section 80 of the Customs Act, 1962 when the baggage of the passenger contains article which is dutiable or prohibited and in respect of which the declaration is made under section 77, the proper officer on request of passenger detain such article for the purpose of being returned to him on his leaving India. Since passenger neither made true declaration nor requested for detention of goods for re-export, before customs at the time of his arrival at airport. So, the re-export of said goods cannot be allowed under section 80 of Customs Act. *Hemal K. Shah*

**Note:** The aforesaid case is the revision application filed to the Central Government under section 129DD of the Customs Act, 1962.

## MISC

**Q.** Department contended that 'Electronic Automatic Regulators' were classifiable under Chapter sub-heading 8543.89 whereas Keihin Penalfa Ltd. was of the view that the aforesaid goods were classifiable under Chapter sub-heading 9032.89. An exemption notification dated 1-3-2002 exempted the disputed goods classifying them under chapter sub-heading 9032.89. The period of dispute, however, was prior to 1-3-2002. The dispute was on classification of Electronic Automatic Regulators.

Is Where a classification (under a Customs Tariff head) is recognized by the Government in a notification any point of time, can the same be made applicable in a previous classification in the absence of any conscious modification in the Tariff?

**Ans. YES**

The Apex Court observed that the Central Government has issued a exemption notification dated 1-3-2002 and in the said notification it has classified the Electronic Automatic Regulators under Chapter sub-heading 9032.89. Since the Revenue itself has classified the goods in dispute under Chapter sub-heading 9032.89 from 1-3-2002, the said classification need to be accepted. *Keihin Penalfa Ltd. 2012(S.C.)*

**Q.** The export goods entered the customs area without the bills of entry. The Department wrote letter dated 04.08.2010 directing the Central Warehousing Corporation to keep vigil on the trucks containing such goods and not to allow anyone to remove the goods.

But, no formal show-cause notice or order of detention u/s 110 was passed.

The assessee contended that the goods had been wrongfully detained without any SCN/order to that effect u/s 110.

**Ans- Heading 6807.10 :**

It was held that-

- Although no specific order of seizure has been issued to the assessee, it is apparent that there has been actual detention of the goods u/s 110 of the Act and time will run for giving show-cause notice u/s 124(a) from 04.08.2010.
- Since the assessee had been summoned for further investigation and he is being examined, thus, it necessarily follows that there has been seizure of the goods in terms of section 110.

**If the consignment of a person is detained, it should be presumed that the goods has been seized in terms of Section 110 of the Act even if no formal order has been issued by the Customs Authority and the time for issuing notice to show-cause in terms of Section 124(a) runs from the actual date of detention.**

**S.J. Fabrics Pvt. Ltd. [2011] (Cal.)**

## Service TAX

Please note

|  |   |
|--|---|
| <p>Permission given for use of trademark (<i>Right to Use</i>) does not amount to transfer of right to use IPR so as to be covered in the scope of deemed sale under article 366(29A)(d) of the constitution.</p> <p>The trademark continues to be the property of the licensor and use of trademark is assigned subject to conditions. <b>Hence, it amounts to service and liable to service tax.</b></p> | <p><b>Eicher Goods Earth Ltd.<br/>(2012) (Tri.Del.)</b></p> |
| <p><b>Right to use goods and service is different than transfer of right to use goods. To levy VAT/ Sales Tax, there must be transfer of right to use the goods, involving transfer of possession.</b></p> <p><b>Mere delivery of goods with no transfer of right cannot be the basis for levy of VAT/Sales tax.</b></p>   | <p><i>Indus Towers Ltd., [2012]<br/>(Kar.)</i></p>          |

**Q.** The angadias were handed over cash in form of Indian Currency at the recipient branch, which issues instructions to the delivery branch, which in turn makes payment from the corpus available with it. Thus, there is only movement of instructions to the delivery branch and no transportation of cash takes place.

**Now the question is this** whether the services provided by couriers and angadias for delivery of cash received at one place and handed over at another place is a taxable service covered under the definition of “courier agency” given by Finance Act, 1994?

Ans.

The definition of “courier agency” lays down the following requirements to be satisfied for a person to fall within the scope of “courier agency”:

- (1) Such person should be **engaged in door to door transportation;**
- (2) Transportation should be of **time-sensitive** documents, goods or articles;
  - ❖ Therefore, the services provided by angadias with respect to transfer of money does not satisfy the above requirements, more so, when there is no transportation of cash amount as the same currency notes are not delivered to the consignee. Hence, the above service cannot be held liable to service tax as “courier agency”.
  - ❖ Only in case, cash was actually transported from recipient branch to delivery branch, it could be made liable. *Patel Vishnu Bhai Kanti Lal & Co (2012)- (Guj.)*

**Q.M/s. ASS Pvt. Ltd is running an online retail distribution channel and associated logistical to facilitate sale of goods by various merchants. It provides 2 types of services to merchants-**

**Firstly:** Listing of their products on the website for customers to purchase and delivery of the same;

**Secondly:** Logistical services like storage, packing and shipping etc. in relation to goods?

**ASS Pvt. Ltd. approaches you seeking your advice as to whether these activities amount to ‘manufacture’ so as to be excisable or are they liable for service tax under the Finance Act, 1994? Decide in light decided case laws.**

**Ans:** the above mentioned activities do not constitute manufacture. The decision was given on the following grounds in light of the Excise Act, considering each activity separately.

**Packing or repacking of goods :** As the packing referred here is neither a case of repacking from bulk pack to retail packs nor one of packing into unit containers and the outer packing is adopted only for during transit, it does not fall within the ambit of section 2(f) (ii) and (iii) of the Central Excise Act, 1944.

**Marketing activities :** “Marketability” has been regarded as an essential ingredient in determining whether the goods are excisable or not and “marketable” been held to mean that the goods are ready and fit for sale or are capable of being bought and sold. In the given case, as the goods received by the appellant is already marketable and no further ‘treatment’ was adopted to make them marketable, the activities being only a part of marketing strategy and does not enhance their marketability and hence does not amount to ‘manufacture’.

Thus, looking at the issues, it can be concluded that the activities described above does not amount to ‘manufacture’ within the meaning of section 2(f) of the Central Excise Act, 1944.

**They are service providers and therefore liable to service tax under the Finance Act, 1994.**

*Amazon Seller Services Pvt. Ltd. [2012]*

## Summarized

| <u>S.No.</u> | <u>Issue</u>  | <u>Decision</u>  | <u>Case law</u>                              |
|--------------|---|--|--|
| 1.           | Does the process of cutting & embossing aluminum foil for packing the cigarettes amounts to manufacture?  | There were no records to suggest that cut to shape/embossing aluminum foils used for packing cigarettes were distinct marketable commodity. Hence process did NOT amount to manufacture as per Section 2(F) of CE Act, 1944.   | <b>GTC Industries Ltd. 2011 (Bom.)</b>       |
| 2.           | Can re-appreciation of evidence by CESTAT be considered to be rectification of mistake apparent on records under section 35C (2) of the CE Act, 1944? | The court opined that CESTAT exceeded its power under section 35C (2) of the CE Act, 1944. In pursuance of a rectification application, it CANNOT re-appreciate the evidence & reconsider its legal view taken earlier.<br><br><b>Note: - section 35C (2) of the Act.</b><br><br>The appellate Tribunal may, at any time within 6 months from the date of order, with a view to rectify any mistake apparent from the records, amend any order passed by it under sub-section 1 & shall make such amendment if the mistake is brought to its notice by the CCE or the other party. | <b>RDC Concrete (I) Pvt. Ltd. 2011- (SC)</b> |
| 3.           | Is the CESTAT order disposing appeal on a totally new ground sustainable?   | The High court explained that CESTAT should have remanded the matter back to the Adj. Auth. However, it could NOT have assumed to itself the jurisdiction to decide the appeal on a ground which had NOT been urged before the lower authorities.  | <b>GujChem Distillers 2011- (SC)</b>         |

| <u>S.No.</u> | <u>Issue</u>   | <u>Decision</u>   | <u>Case law</u>  |
|--------------|--|---|--|
| 4.           | In case of combo pack of brought out tooth brush sold along with tooth paste manufactured by assessee; is tooth brush eligible as input under the CCR, 2004?   | The High court upheld the Tribunal's decision that the credit was admissible in the case of assessee.   | <b>Prime Health Care Products – 2011- (Guj.)</b>                 |
| 5.           | Whether the theoretical possibility of product being sold is sufficient to establish the marketability of a product?   | The mere theoretical possibility of the product being sold is NOT sufficient but there should be commercial capability of being sold to prove marketability.  | <b>Bata India Ltd 2010 (SC)</b>                                  |
| 6.           | Whether the M/c which is not assimilated in permanent structure would be considered to be moveable so as to be dutiable under the central excise Act?  | The Apex court held that the plant in Q. were NOT immovable property so as to be immune from the levy of excise duty. Consequently, duty would be levied on them.   | <b>Solid &amp; Correct Engineering works &amp; ORS 2010 (SC)</b> |
| 7.           | Does the activity of packing of imported compact discs in a jewel box along with inlay card amounts to manufacture?  | The court held that activities carried out by the respondent did NOT amount to manufacturing, since the CD had been complete & finished when imported by the assessee.  | <b>Sony Music Entertainment (I) (P) Ltd 2010 (Bom.)</b>          |
| 8.           | Whether the charges towards pre-delivery inspection & after sale services recovered by dealers from buyers of cars would be included in the assessable value of cars?  | It was held that the charges towards pre-delivery inspection & after sale services recovered by dealers from buyers of cars would be INCLUDED in the assessable value of cars.  | <b>Maruti Suzuki India Ltd. 2010 (Tri-LB)</b>                    |
| 9.           | Whether CENVAT credit can be denied on the ground that the weight of the inputs recorded on receipt in the premises of the manufacturer of the final products shows a shortage as compared to the weight recorded in the relevant invoice? | The Tribunal held that each case had to be decided according to merit & NO hard & fast rule can be laid down for dealing with different kinds of shortage. Similarly, minor variation arising due to Weightment by different M/c will also have to be ignored if such variations are within tolerance limits. | <b>Bhuwalka Steel Industries Ltd 2010 (Tri-LB)</b>               |
| 10.          | Merely because assessee has sustained loss more than the refund claim, is it justifiable to hold that it is not a case of unjust enrichment even though the assessee failed to establish non-inclusion of duty in the cost of Production?  | The High court held that assessee could NOT be granted relief since it had failed to establish that the cost of the duty was NOT included while computing the COP.  | <b>Gem Properties (P) Ltd 2010 (Karn.)</b>                       |
| 11.          | Whether the clearance of two firms having common brand name, goods being manufactured in the   | The High court held that the clearance of the common goods under the same brand name manufactured by both had been  | <b>Deora Engineering Work 2010 (P&amp;H)</b>                     |

| <u>S.No.</u> | <u>Issue</u>  | <u>Decision</u>  | <u>Case law</u>                                |
|--------------|---|--|--|
|              | same factory premises, having common management & a/c's etc can be clubbed for the purposes of SSI exemption?   | <b>RIGHTLY CLUBBED.</b>  |  |
| 12.          | Whether a consolidated return filed by the assessee after obtaining registration, but for the period prior to obtaining registration, could be treated as a return under clause (a) of the first proviso to sec. 32E (1)? | The court held that, it rejected the submission of the petitioner that filing of consolidated return covering all the past period would serve the purpose.   | <b>Icon Industries 2011 (Del.)</b>             |
| 13.          | Is the settlement commission Empowered to grant the benefit under sec. 11AC in cases of settlement?   | The court ruled that benefit under the proviso to sec. 11AC could NOT be granted by the settlement commission in cases of settlement.  | <b>Ashwani Tobacco Co. (P) Ltd 2010 (Del.)</b> |
| 14.          | Whether penalty can be imposed on the director of the co. for the wrong CENVAT credit availed by the co.?   | The court observed that CENVAT credit had been availed by the co. & penalty U/R 15 of CCR 2004 was imposable only on the person who had availed CENVAT credit, who was a manufacture. The petitioner director of the co. could NOT be said to be manufacture availing CENVAT credit. | <b>Ashok Kumar Fulwadhyia 2010 (Bom.)</b>      |
| 15.          | Can CENVAT credit be taken on the basis of private challans?  | The High court held that credit be taken on the strength of private challans as the same were NOT found to be fake & there was a proper certificate that duty had been paid.   | <b>Stelko Strips Ltd 2010 (P&amp;H)</b>        |
| 16.          | Whether non-disclosure of a statutory requirement under law would amt. to suppression for invoking the larger period of limitation u/s 11A?   | The High court held that non-disclosure of the said fact on the part of the assessee would NOT amount to suppression so as to call for invocation of the extended period of limitation.  | <b>Accrapac (I) (P) Ltd 2010 (Guj.)</b>        |
| 17.          | What is the date of commencement of the period for the purpose of computing interest on delayed refund u/s 11BB the date of receipt of application for refund or date on which the order of refund is made?               | The Apex court held that liability of the revenue to pay interest u/s 11BB commences from the date of expiry of 3 month from the date of receipt of application for refund u/s 11B(1) & NOT on the expiry of the said period from the date on which order of refund is made.         | <b>Ranbaxy Laboratories Ltd 2011</b>           |

**DECIDE whether the following services are eligible as Input services – for CENVAT credit:**

|                                    |   |
|------------------------------------|---|
| <b>Transportation of employees</b> | <b>Yes :</b> Transportation services provided by assessee to their staff to pick up from the residence to the factory and vice versa is an input service and shall be eligible for CENVAT credit. - <b><i>Graphite India Ltd. [2012] (Kar.)</i></b> |
|------------------------------------|---|

|   |   |
|---|---|
| <b>Landscaping/Factory garden maintenance</b> | <b>Yes:</b> Landscaping/Factory garden maintenance falls under ‘modernization, renovation, repair, etc. of factory’ and is also a social responsibility/statutory obligation of assessee to keep factory eco-friendly. Hence, it is an input service and eligible for, CENVAT credit. - <b>Millipore India Pvt. Ltd. [2012]</b> |
|---|---|

**Please note.**

|  |   |
|--|---|
| <b>CENVAT Credit cannot be utilized for paying sums payable under Section 11D of Central Excise Act, 1944.</b>   | <b>Inductotherm (I) Pvt. Ltd. [2012] (Guj.)</b> |
| <b>Whether</b> Steel and Cement, etc. used in manufacture of storage tank and pollution control equipment eligible for CENVAT credit ?<br><br>Ans. Steel and Cement, etc. used in manufacture of storage tank and pollution control equipment eligible for CENVAT credit, since storage tank and pollution control equipment are capital goods | <b>SLR Steels Ltd. (2012) (Kar.)</b>            |
| Cheetos Wheels and Lehar kurkure are classifiable under heading 2108 as edible preparation and are not classifiable under heading 1904 since the same are not being obtained by swelling or roasting of cereals  | <b>Pepsi Foods Ltd. [2012] (SC)</b>             |
| <b>Process of repacking clove/sandalwood oil from bulk packs into small pack not amount to manufacture :</b> Process of repacking Clove oil and sandalwood received in bulk into small quantity doesn’t amount to manufacture.   | <b>Dabur India Ltd. [2012] (SC)</b>             |

**Custom Laws**

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|----|--|--|---|
| 1. | Are the clearances of goods from DTA to SEZ chargeable to export duty under the SEZ Act, 2005 or the custom Act, 1962?                         | The high court inferred that the clearance of goods from DTA to SEZ is NOT liable to export duty either under the SEZ Act, 2005 or under Custom Act, 1962.   | <b>Tirupati Udyog Ltd.- 2011- (AP)</b>        |
| 2. | Can separate penalty under section 112 of the custom Act be imposed on the partner when the same has already been imposed on partnership firm? | The high court held that for the purpose of imposing penalty, the Adj. Auth. Under custom Act, 1962 might in an appropriate case, impose a penalty both upon a partnership firm as well as on its partner. | <b>Textoplast industries 2011- (Bom.)</b>     |
| 3. | Whether Chartered Accountants certificate alone is sufficient evidence to rule out the unjust enrichment under custom?                         | The respondent could NOT be granted refund merely on the basis of the said certificate. Thus, the High court overruling the Tribunal’s decision, answered the Q. of law in favor of revenue.               | <b>BPL Ltd.- Chennai 2010 ((Mad.)</b>         |
| 4. | Whether the benefit of exemption meant for imported goods can also be given to the smuggled goods?   | The Apex court held that the smuggled goods could NOT be considered as “Imported Goods” for the purpose of benefit of the exemption notification.  | <b>M. Ambalal &amp; Co. –Mumbai 2010 (SC)</b> |

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|-----|--|--|---|
| 5.  | Is it mandatory for the revenue officer to make available the copies of the seized documents to the person from whose custody such documents were seized?  | The High court directed the revenue to make available the copies of the document asked for by the assessee, which was seized during the course of the seizure action.  | <b>Manish Lalit kumar Bavishi - 2011 (Bom.)</b>     |
| 6.  | Under what circumstances can the penalty be imposed in term of section 112(a) (ii) of the custom Act, 1962?  | The High court inferred that UNLESS it is established that a person has, by his omission or commission, led to a situation where duty is "sought to be evaded", there CANNOT be an imposition of penalty in terms of section 112(a) (ii) of the custom Act, 1962.  | <b>O. T. Enasu 2011 (Kar.)</b>                      |
| 7.  | Whether classification of imported product changes if it undergoes a change after importation & before being actually used?  | The court noted that it was the use of the product that had to be considered in the instant case. If a product undergoes some changes after importation & before being actually used, it is immaterial, provided it remains the same product & it is used for the purpose specified in the classification.           | <b>Atherton Engineering Co. (P) Ltd 2010 (Cal.)</b> |
| 8.  | Will the description of the goods as per the documents submitted along with the shipping bill be a relevant criterion for the purpose of classification, if not otherwise disputed on the basis of any technical opinion or test? Whether a separate notice is req. to be issued for payment of interest which is mandatory & automatically applies for recovery of excess drawback? | The High court held that the description of the goods as per the doc. Submitted along with the shipping bill be a relevant criterion for the purpose of classification & NO notice need to be issued separately as the payment of interest becomes automatic, once it is held that excess drawback has to be repaid. | <b>M/s CPS Textiles (P) Ltd 2010 (Mad.)</b>         |
| 9.  | Whether the issue of the imported goods warehoused in the premises of 100% EOU for manufacture/production/processing in 100% EOU would amount to clearance for home consumption?   | The Tribunal held that imported goods warehoused in the premises of a 100% EOU (which is licensed as a custom bonded W/H) & used for the purpose of manufacturing in bond as authorized u/s 65 of the custom Act, 1962, CANNOT be treated to have been removed for home consumption.                                 | <b>Paras Fab International 2010 ((Tri-LB)</b>       |
| 10. | Whether revenue can prefer an appeal in case of consent order?   | The High court held that an appeal against the consent order CANNOT be filed by the revenue.   | <b>Trilux Electronics 2010 (Kar.)</b>               |
| 11. | Can the assessee be denied the refund claim only on the basis of contention that he had produced the attested copy of GAR-7 challan & not the original of the GAR-7 challan?   | The High court held that the petitioner could NOT be denied the refund claim & attested copy of GAR-7 challan would suffice for processing the refund application.   | <b>Narayan Nambiar Meloths 2010 (ker.)</b>          |

|     |  |   |  |
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| 12. | Is the want of evidence from foreign supplier enough to cancel the confiscation order of goods undervalued?                            | The High court held that in a case of confiscation of goods because of this under valuation, tribunal could NOT cancel the confiscation order for the want of evidence from foreign supplier. | <b>Jaya Singh<br/>Vijaya Jhaveri<br/>2010 (Ker.)</b>                         |
| 13. | In case of a settlement commission's order, can the assessee be permitted to accept what is favorable to them & reject what is not?    | The court opined that the appellant could NOT be permitted to dissect the settlement commission's order with a view to accept what is favorable to them & reject what is not                  | <b>Sanghvi<br/>Reconditioners<br/>(P) Ltd 2010<br/>(SC)</b>                  |
| 14. | Can the order of the settlement commission be considered to be a judicial processing?  | The High court observed that as per sec. 127M of Custom Act, 1962, the order passed by the settlement commission is in judicial proceedings & it is a judicial order.                         | <b>East &amp; West<br/>Shipping<br/>Agency 2010 (Bom.)</b>                   |
| 15. | Does the settlement commission have jurisdiction to settle cases relating to the recovery of drawback erroneously paid by the revenue? | The High court held that the settlement commission has jurisdiction to deal with the Q. relating to the recovery of drawback erroneously paid by the revenue.                                 | <b>UOI V. Cus. &amp;<br/>C. Ex Settlement<br/>commission 2010<br/>(Bom.)</b> |

### Service Tax

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|----|--|---|--|
| 1. | Is the service tax & excise liability mutually exclusive?  | The high court held that the excise duty is levied on the aspect of manufacture & S/Tax is levied on the aspect of service rendered. Hence, it would NOT amount to payment of tax twice & the assesses would be liable to pay Service tax on the value of services. | <b>Lincoln helios (I)<br/>Ltd. 2011-(Kar.)</b>                         |
| 2. | In case where rooms have been rented out by municipality, can it pass the burden of Service tax to service receiver ie tenant? | The court held that municipality can pass the burden of Service tax on service receiver.  | <b>Kishore K. S. V.<br/>cherthala<br/>Municipality 2011<br/>(Kar.)</b> |

**Others**

**Q.** The assessee a manufacturer and exporter of cotton yarn/polyester yarn, paid excise duty with respect to clearances affected for domestic requirements and also for export.

The party claimed rebate for all duties of excise paid on the goods exported under the relevant Government notification.

The party also claimed the refund of education cess which was paid by it since its introduction from 9<sup>th</sup> July 2004. However, clarificatory explanation notification clarifying that duty for purposes of rebate included education cess (among other duties included therein) was issued by the Central Government on 6<sup>th</sup> September, 2004.

Based on this notification the Department denied the refund of education cess retrospectively since 9<sup>th</sup> July, 2004 and admitted the claim only prospectively from 6<sup>th</sup> September 2004. Decide ?

**Ans. Explanatory notification only interprets the existing rights and is treated as part and parcel of the original notification. Explanatory notification being part of original notification has to apply from date of original notification.**

Education cess being a part of central excise duty, notification providing exemption/ refund of duty of excise is otherwise applicable to education cess also with effect from when it became payable as part of the duty of excise i.e. 9<sup>th</sup> July, 2004. **Loyal Textile Mills Ltd. [2012] (Mad.)**

**Q.** The assessee was engaged in the process of fabricating columns, purlines etc. by cutting, drilling, punching and welding on duty paid channels and angles and, thereafter, assembling to post at work site and fixing in the exact position for construction of a building or shed. The Department contended that said process amounted to manufacture. Whether the contention of department is maintainable in law?

Ans-NO

it was held that- Cutting, drilling, punching and welding do not result in transformation.

The products resulting out of these processes are **merely structural shapes; and assembling** them for constructing building or shed **is 'fabrication'; and not manufacture**, as no new article different in name, character or use emerges. **Elecon Engineering Co. Ltd. [2012] (SC)**

**Q.** The applicant proposes to import VRLA battery cells of 2 volts each and warehouse them in the customs bounded warehouse. After receiving orders from customers, the same would be cleared to a non-bonded warehouse, tested and recharged if required and subsequently 24 battery cells are mechanically inserted in shelves to make a battery bank of 48 volts. Commercial nomenclature 'Battery Bank' was given by the dealer himself. whether the above activity of making battery bank from battery cells amounts to manufacture?

Ans. NO

→ A battery bank is number of batteries acting as one battery.

→ The functions and **USE OF BATTERIES** whether in single units or in bank of multiple **BATTERIES REMAINS THE SAME.**

→ Process of putting two or more batteries does not alter their basic character and functions and no new product has come into existence and no manufacturing takes place.

**DELTA POWER SOLUTIONS INDIA PVT. LTD. (2012)**

**Q.** The assessee is a dealer in iron and steel. By treating the iron and steel plates to certain processes, assessee made 'Perforated Cable Trays' and 'Ladder type cable trays' and sold the cable trays without charging sales tax from the purchasing dealer. The Department contended that 'Perforated Cable Trays' and 'Ladder type cable trays' are goods

distinct from iron and steel and therefore the process of transforming the iron and steel plates into cable trays amounted to manufacture. Whether the contention of department is maintainable in law?

Ans. **YES**

- The type of process involved brings an ultimate product which is distinct and different and arte sold in the market to meet different mechanical and engineering needs as distinct from plain and chequered plates.
- It therefore, amounts to manufacture. **METALLITE IND. (2012) (DEL.)**

**Q.** The appellant, a manufacturer of various components of TV sets, assembled them as TV sets and after checking and confirming its working, they were disassembled with individual serial numbers and sent to sister units of assessee. The appellants classified these as “parts of Television Receivers” under Tariff Heading 8529.

The Department issued a SCN and sought to classify these as “Television Receivers” under Tariff Heading 8528. The issue under consideration is whether the goods manufactured by the appellant are liable to be taxed as ‘parts of television receivers’ falling under Tariff Heading 8529 of the Central Excise Tariff; or as ‘television receivers’ under Tariff Heading 8528 of the Tariff.

Ans. **COMPLETE TV SETS**

- The Apex court decided in favor of the Department. It based its decision on the following grounds:
- On the parts having been completely assembled or made completely finished goods manufacturing process was over.
- Goods/Components transported from factory had essential characteristics of finished television receiver and were to be classified as complete or finished goods by invoking Rule 2(a) of Rules for interpretation of tariff. **Thus, the same are to classified as complete TV sets and not as parts.**

**SALORA INTERNATIONAL LTD. (2012) (SC)**

**Q. Decide the classification of Mouse Pads- parts of computer, accessories of computer or otherwise.**

Ans

**Classification as parts:**

- The goods can be classified as parts, when such goods are intended to be assembled into articles, together with other goods or when such goods are intended to be incorporated into other articles, i.e. a part constitutes a component of an article.
- Since mouse pads do not meet these criterion they cannot be classified as parts.

**Classification as accessory:**

- Mouse pads fail to qualify as an accessory of a computer or Automatic Data processing mouse
- as they do not serve to adapt the computer mouse for a particular operation, or perform a service relative to a computer mouse, and increase the range of operations of a computer mouse.

**THEREFORE, MOUSE PADS ARE NEITHER PARTS NOR ACCESSORIES OF A COMPUTER MOUSE AND WOULD THEREFORE BE CLASSIFIABLE ACCORDING TO THEIR CONSTITUENT MATERIAL.**

## CIRCULAR No. 19/2012-CUS

**Q. Whether Royalty charges paid to the parent company for assistance in manufacture, sale, installation and service of lifts, will be covered under direct expenses and required to be added to cost of production, costing when done as per CAS-4.**

**Ans. YES**

According to CAS-4, goods assessed on the basis of costing principles, the royalty charges will be covered under direct expenses and will be required to be added to the cost of product under assessment.

**OTIS ELEVATOR CO. (I) LTD. (2012) (TRI.)**

**Q. Whether Rule 5 of CCR 2004 is applicable to deemed exports as well ?**

Ans- YES

- Clearances by a DTA to 100%EOU/ STP/ EHTP etc. are 'deemed exports' and
  - are to be treated at par with physical exports for the purpose of refund under Rule 5 of the CENVAT Credit Rules, 2004.
- NBM Industries [2012] (Guj.)**

**Q. The Reduced Crude Oil (RCO) was exempt from excise duty if used as fuel for generation of electrical energy.**

Similarly, Naptha was exempt from excise duty if used in manufacture of fertilizers.

The exemptions were subject to the condition that where such goods (RCO/Naptha) are used elsewhere than in the factory of production and **the procedure as specified in Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 shall be followed.**

The assessee cleared goods without paying excise duty to the buyer, who didn't comply with the procedure set out in the CER 2001 rules; **however, the goods were actually used by the buyer for specified purpose (generation of electricity or manufacture of fertilizers).**

The Department demanded excise duty from assessee. The assessee contended that when the goods were used for specified purposes, mere procedural non-compliance cannot lead to denial of exemption.

Issue- whether the benefit of **End Used Based Exemption** can be availed without following the specified procedure even if goods are used for intended purpose ?

**Ans- NO** it was held that-

- THE PROVISION FOR EXEMPTION/ CONCESSION, HAS TO BE CONSTRUED STRICTLY and if the exemption is available only on complying certain conditions, as specified in Rule 3 of CER 2001.
- The rule provides that a manufacturer (Buyer) who intends to receive subject goods for specified use at concessional rate of duty, **shall make an application in quadruplicate** to jurisdictional Assistant/Deputy Commissioner of assessee (supplier).
- The buyer-manufacturer had not submitted any such application. As the condition of exemption notification was not complied with the assessee was not entitled to exemption.
- HENCE THE DEMAND OF EXCISE DEPARTMENT IS VALID IN LAW.

**Indian Oil Corporation Ltd. [2012] (SC)**

**PLEASE NOTE-** The time limit for filing refund application for Cenvat credit is governed by provisions of Section 11B of Central Excise Act, 1944, since Notification No. 27/2012 issued under Rule 5 of Cenvat Credit Rules, 2004, specifically prescribes the same. The refund application is to be made within one year from relevant date (i.e. the date when final products are cleared for exportation.

**GTN Eng (I) Ltd. (2012) (Mad)**

**Q.** The petitioners were engaged in manufacture and supply of pre-fabricated structural components to Delhi Metro Rail Corporation Ltd. (DMRC). They claimed exemption from excise duty under Notification No. 21/2006-CE, which provided benefit of exemption to goods that were manufactured at site of construction for use in construction work at such site. The Department denied exemption to the petitioners as the manufacturing activity was undertaken by them at a separate off road site which was away from the main site, which according to the petitioners was done to avoid the traffic jams at site of construction.

**Ans. Exemption shall be allowed**

- Exemption cannot be denied on grounds that the off road site which is used for manufacture is not the site of construction, more so, in light of the clarification by CBEC. Circular dated 18.05.99, that “site” included any premises made available to manufacturer.
- The said goods so manufactured at off road site was ultimately used for construction work at site and the condition of exemption notification of use at construction site was satisfied.

**CP MEIER (2012) (DELHI)**

**Q.** The Appellate Tribunal rules that in computing assessable value under Central Excise law, freight, etc. are to be excluded. Since no appeal could be filed to the High Court u/s 35G to High Court, but the assessee filed a writ petition under Article 226 of Constitution before the High Court and High Court passed an order in favor of assessee. Whether High Court can entertain the cases involving the assessable Value or ROD or Both ?

**Ans. No It was held that,**

- The excise law is a complete code to seek redress in excise matters.
- Since the order of the Tribunal related to determination of assessable value, hence, the assessee should have filed appeal before the Supreme Court u/s 35L.
- Since the **ASSESSEE HAD EFFECTIVE REMEDY BY WAY OF APPEAL** to the Supreme Court,
- Therefore the High Court didn't have the power to entertain writ petition against the valuation matters under Central Excise.

**Guwahati Carbon Ltd. [2012] (SC)**

**Q.** The assessee was wrongly claiming SSI-exemption despite using brand name of others. When Department withdrew exemption and demanded excise duty, the assessee filed an application before the Settlement Commission. The Commission rejected the application **as not maintainable because the assessee had not complied with the condition of filing periodical returns as assessee was not registered with excise department. Decide whether the contention of set com is correct in law ?**

**Ans. NO, It was held that,**

- since the applicant was **neither registered with Central Excise Department nor was filing any declaration/return during relevant period,**
- Hence, the condition of Proviso to Section 32E(1) was not complied with
- Therefore, the settlement application was not maintainable at all.

**J.R.B. Engineering Works [2012] (Del.)**

**Please note that:**

|  |   |
|--|---|
| <b><i>Everest Flavours Ltd.</i></b><br><b><i>[2012] (Bom.)</i></b> | <b>Application of Rebate claim under Rule 18 of Central Excise Rules, 2002 is to be filed within the time limit prescribed under section 11B of Central Excise Act, 1944.</b> |
|--|---|

**Please note that- Legal heirs of deceased individual assessee cannot be called upon to meet the liabilities of the deceased unless they take over and continue to carry on the very same business of the deceased and comply with statutory requirements.** **DHIREN GANDHI (2012) (KAR.)**

Q. The imported goods were substantially damaged by rain water and were rendered of no use. The importer relinquished the title to such goods and **claimed remission of duty u/s 23 of the Customs Act, 1962**, while the Department contended that since the goods were damaged/deteriorated, the assessee was eligible for abatement of duty u/s 22 of the Act and, accordingly, it allowed abatement and demanded proportionate duty. Whether the action of department is maintainable in law?

**Ans- Heading 6807.10 :**

It was held that-

- The imported goods were neither 'lost' nor 'destroyed', but, they were rendered useless to the importer. In such a case, it was valid for the importer to relinquish his title u/s 23 and escape duty liability.
- Section 22 provides for abatement of duty in case of damage or deterioration to the goods on account of any accident not due to any willful act, negligence or title of the importer
- Crux – where section 23 [Relinquishment of title] applies then section 22 can not be applicable.

**Please note that- Relinquishment can be made even if the goods are in good condition.**

**Symphony Services Corporation India Pvt. Ltd. [2012] (Kar.)**

Q. The assessee imported pre-recorded Audio CDs in India from its holding company. The assessee was liable to pay royalty @ 20% of (MRP – Sales Tax – 6.5% packaging deduction) on the sale of imported recorded CDs in India. The assessee didn't include the royalty in the value of imported CDs, while the Department demanded duty on the royalty also. Decide with the help of case law if any?

**Answer- INCLUDIBLE**

- ✚ As per Rule 10(1)(c) of the Customs Import Valuation Rules, 2007, the assessable value shall include the royalties and the license fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued. But does not include RIGHT OF REPRODUCTION.
- ✚ Such royalty becomes due as soon as CDs are distributed and sold and, therefore, such royalty becomes payable on the CDs. The payment of royalty was a condition of sale.
- ✚ Accordingly, such royalty was includible in the assessable value of the imported Audio CDs.

**[Living Media India Ltd. [2011] (SC)]**

**Please note that – Service of show-cause notice u/s 124 within 6 months is not mandatory but it is a suggestive time limit. RAM KUMAR AGGARWAL (2012) (MP)**

**Please note that—Service tax is not leviable on the remittance of foreign currency in India from overseas.**

The CBEC as clarified that no service tax is leviable on the amount of foreign currency remitted to India from overseas. Section 65B(44), specifically excludes transaction in money. As the amount of remittance comprises money, the activity does not comprise a 'service' and thus not subjected to service tax.

**PLEASE NOTE THAT**

The Court held that an appeal against those orders of Appellate tribunal lies to High Court where CESTAT has not determined any issue raised before it or has wrongly determined the same. If any issue has not been raised before tribunal, the same cannot be raised before High Court.

In simple wordings- **Issues not raised in appeal before Tribunal – Cannot be raised in High Court:**

**IMPERIAL GRANITES PVT. LTD. (2012) (AP)**

**Q. M/s. Oracle India Pvt. Ltd.** a wholly owned subsidiary of Oracle System Corporation USA was carrying on business of software and service in India (consultancy and educational services). The applicant proposed to start hardware business in India for which hardware was to be imported from related parties and was to be resold in India subsequently. For valuation of hardware products, the applicant filed application to advance ruling authority.

A question arose before advance ruling authority that whether import of hardware can be regarded as proposed activity or was an already undertaken activity (as software's were being imported). Decide?

Ans. NO

- The Advance Ruling authority held that advance ruling is to be confined to an activity which is proposed to be undertaken by applicant.
- Where an existing activity is to be varied or added to or expanded that would not entitle existing entity to seek advance ruling under the Customs Act, 1962.
- Thus, applicant is not eligible to seek advance ruling because applicant was already engaged in the business of import of software and import of hardware is expansion of existing line of business.

**RE: ORACLE INDIA PVT. LTD. (2012) (AAR)**

Q. Whether an advance ruling pronounced by the Authority can be challenged by the applicant or any Income Tax Authority before the High Court or the Supreme Court?

**Ans. The ruling pronounced by advance ruling authority can be challenged in the High Court or the Supreme Court, by way of writ or special leave petition, as AAR being a judicial body.**

**COLUMBIA SPORTS WEAR CO. (2012) (SC)**

Q. The assessee clandestinely removed the goods without declaring the correct MRP. The Department adopted the weighted average method of MRP and demanded the differential duty. On the case being referred, the Settlement Commission devised a mechanism which was beyond the statutory provision of law. The said order of Settlement Commission was challenged before high court by both the parties.

Ans. The High **Court quashed the order** of the Settlement Commission on following grounds:-

- Settlement Commission cannot go beyond its jurisdiction and devise a mechanism, in the name of practical approach which is contrary to the provisions of law;
- Though finding of facts and concerned questions of facts cannot be examined by the High Court or the Supreme Court, but the same can be interfered with, when the order passed by lower authority is contrary to the provisions of the Act.

In simple wordings- **Settlement Commission cannot go beyond its jurisdiction and devise a mechanism for settlement which is contrary to the provisions of law.**

**SUZION CERAMICS (2012) (GUJ)**

Please note that-

**Service of show-cause notice u/s 124 within 6 months is not mandatory:**

**Ram Kumar Aggrawal (2012) (MP)**

**Rule –15 :Confiscation and penalty**

(1) If any person, takes or utilises CENVAT credit in respect of input or capital goods or input services, wrongly or in contravention of any of the provisions of these rules, then, all such goods shall be liable to confiscation and such person, shall be liable to a penalty in terms of clause (a) or clause (b) of section 11AC (1) of the Excise Act or section 76 (1) of the Finance Act , as the case may be.

(2) In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilised wrongly by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Excise Act, or of the rules made thereunder with intent to evade payment of duty, then, the manufacturer shall also be liable to pay penalty in terms of the provisions of clause (c), clause (d) or clause (e) of section 11AC (1) of the Excise Act.

(3) In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilised wrongly by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of these rules or of the Finance Act or of the rules made thereunder with intent to evade payment of service tax, then, the provider of output service shall also be liable to pay penalty in terms of the provisions of section 78(1) of the Finance Act.

(4) Any order under sub-rule (1), sub-rule (2) or sub-rule (3) shall be issued by the Central Excise Officer following the principles of natural justice.