APPLIED INDIRECT TAXATION

CONTENTS

Page No.

Study Note 1

General Background of Indirect Tax Low 1 - 10

Study Note 2

Basics of Central Excise Duty 11-30

Study Note 3

Manufacture & Manufacturer 31-45

Study Note 4

Procedures in Excise 47-72

Study Note 5

Valuation in Central Excise 73-110

Study Note 6

Cenvat Credit 111-152

Study Note 7

Exemptions & Demands in Central Excise 153-177

Study Note 8

Other Provisions in Central Excise 179-196

Study Note 9

Customs Duty 197-230

Page No.

Study Note 10

Customs Procedures 231-247

Study Note 11

Other Provisions in Customs 249-276

Study Note 12

Basics of Service Tax 277-296

Study Note 13

Taxable Services 297-334

Study Note 14

Adjudication & Penalties and Appeals in Indirect Taxes 335-362

Study Note 15

Appeals in Indirect Taxes 363-384

Study Note 16

Central Sales Tax Act 385-414

Study Note 17

State Level VAT 415-424

STUDY NOTE 1

General Background of Indirect Tax Law

1.1 Constitution of India

Our Constitution generally follows British pattern, though concepts of federal structure are borrowed from American and other constitutions. ***India is a Union of States***. The structure of Government is federal in nature.

Article 1(1) of Constitution of India reads, 'India, that is Bharat, shall be a Union of States'.

Government of India (Central Government) has certain powers in respect of whole country. India is divided into various States and Union Territories and each State and Union Territory has certain powers in respect of that particular State. Thus, there are States like Gujarat, Maharashtra, Tamil Nadu, Kerala, Uttar Pradesh, Punjab etc. and Union Territories like Pondicherry, Chandigarh etc.

Administration of State - President of India is head of the *State* (here, the word *State* is used with a different meaning). The *State* has three organs.

A. ***Legislative Organ*** - Parliament consists of President, *Lok Sabha* (House of People) and *Rajya Sabha* (Council of States). Parliament makes laws for governance of the country. It also sanctions budgetary expenditure for Government.

B. ***Executive (Administrative) Organ*** - Administration is looked after by Government for which *Council of Ministers* is at its head. The Council of Ministers is headed by Prime Minister. Government has to implement the laws passed by Parliament.

C. ***Judicial Organ*** - The highest court in India is Supreme Court. Law declared by Supreme Court is the law of the land and is binding on all Subordinate Courts, Tribunals and Executive.

1.2. Taxation under Constitution

In the basic scheme of taxation in India, it is envisaged that (*a*) Central Government will get tax revenue from Income Tax (except on Agricultural Income), Excise (except on alcoholic drinks) and Customs (*b*) State Government will get tax revenue from sales tax, excise on liquor and tax on Agricultural Income (*c*) Municipalities will get tax revenue from octroi and house property tax.

Income Tax, Central Excise and Customs are administered by Central Government. As regards sales tax, Central Sales Tax is levied by Central Government while State Sales Tax is levied by individual State Governments. Though Central Sales Tax is levied by Central Government, it is administered by State Governments and tax collected in each State is retained by that State Government itself.

Article 246(1) of Constitution of India states that Parliament has exclusive powers to make laws with respect to any of matters enumerated in List I in the Seventh Schedule to Constitution. (Called 'Union List'). As per Article 246(3), State Government has exclusive powers to make laws for State with respect to any matter enumerated in List II of Seventh Schedule to Constitution.

Seventh Schedule to Constitution (referred to in Article 246) indicates bifurcation of powers to make laws, between Union Government and State Governments. Parliament has exclusive powers to make laws in respect of matters given in list I of the Seventh Schedule of the Constitution (*called 'Union List'*). List II (*State List*) contains entries under jurisdiction of States. List III *(concurrent list*) contains entries where both Union and State Governments can exercise power. [In case of Union Territories, Union Government can make laws in respect of all the entries in all three lists].

Union List relevant to taxation - List I, called "Union List", contains entries like Defence of India, Foreign affairs, War and Peace, Banking etc. Entries in this list relevant to taxation provisions are as follows :

Entry No. 82 - Tax on income other than agricultural income.

Entry No. 83 - Duties of customs including export duties.

Entry No. 84 - Duties of excise on tobacco and other goods manufactured or produced in India except alcoholic liquors for human consumption, opium, narcotic drugs, but including medicinal and toilet preparations containing alcoholic liquor, opium or narcotics.

Entry No. 85 - Corporation Tax.

Entry No. 92A - Taxes on the Sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of Interstate trade or commerce.

Entry No. 92B - Taxes on consignment of goods where such consignment takes place during Interstate trade or commerce.

Entry No. 92C – Tax on services [Amendment passed by Parliament on 15-1-2004, but not yet made effective].

Entry No. 97 - Any other matter not included in List II, List III and any tax not mentioned in list II or list III. *(These are called 'Residual Powers'.)*

State list pertaining to taxation - State Government has exclusive powers to make laws in respect of matters in List II of Seventh Schedule to our Constitution. These entries include Police, Public Health, Agriculture, Land etc. Entries in this list relevant to taxation provisions are as follows:

Entry No. 46 - Taxes on agricultural income.

Entry No. 51 - Excise duty on alcoholic liquors, opium and narcotics.

Entry No. 52 - Tax on entry of goods into a local area for consumption, use or sale therein (usually called Octroi).

Entry No. 54 - Tax on sale or purchase of goods other than newspapers except tax on interstate sale or purchase.

Concurrent list - List III of Seventh Schedule, called "*concurrent list*", includes matters where both Central Government and State Government can make laws. This list includes entries like Criminal Law and Procedure, Trust and Trustees, Civil procedures, economic and social planning, trade unions, charitable institutions, price control, factories, etc. In case of entries included in concurrent list, in case of conflict, law made by Union Government prevails. The only exception is that if law made by State contains any provision repugnant to earlier law made by Parliament, law made by State Government prevails, if it has received assent of President. Even in such cases, Parliament can make fresh law and amend, repeal or vary law made by State. [Article 254 of Constitution].

1.3 Restrictions on powers of taxation

Restrictions on power of State Government on imposition of tax on sale or purchase of goods are provided in Article 286 of Constitution of India, as follows :

- State Government cannot impose tax on sale or purchase during imports or exports; or tax on sale outside the State. [Article 286(1)]

- Parliament is authorised to formulate principles for determining when a sale or purchase takes place (*a*) outside the State (*b*) in the course of import and export. [Article 286(2)]
- Parliament can place restrictions on tax on sale or purchase of goods *declared as goods of special importance* and State Government can tax such declared goods only subject to these restrictions [Article 286(3)].

Under these powers, CST Act has defined the terms 'sale outside a State' and 'sale during export/import'. Provisions for 'declared goods' have also been made in the CST Act.

1.4 No restriction on Inter-State Trade and Commerce

Each State and Union Territory has certain autonomy. However, the trade and commerce has to be free all over India, without which India cannot be 'One Nation'. As we saw above, tax on Inter-State sale/purchase can be imposed only by Central Government. Provisions in respect of inter-State Trade and Commerce in Constitution of India are summarised below :

- Trade, commerce and intercourse throughout the territory of India shall be free, subject to provisions of Articles 302 to 304 of Constitution. (*as stated below*) [Article 301]
- Restrictions on trade or commerce can be placed by Parliament in the *public interest*. [Article 302]
- No discrimination can be made between one State and another or give preference to one State over another [Article 303(1)]. Such discrimination or preference can be made only by Parliament by law to deal with the situation arising from scarcity of goods [Article 303(2)]
- State can impose tax on goods imported from other States or Union Territories, but a State cannot discriminate between goods manufactured in the State and goods brought from other States [Article 304(1)].
- State Legislature can impose reasonable restrictions on freedom of trade and commerce *within the state* in public interest. However, such bill cannot be introduced in State Legislature without previous sanction of the President [proviso to Article 304].

Limitations of Taxation Powers

Article 265 of the Constitution states that "no tax shall be levied or collected except by authority of law". Article 300A of the Constitution states that "no person shall be deprived of its property save by authority of law". The effect of these provisions is that any taxation which is found to be beyond the powers of Law is illegal and Government has no authority to levy that tax. If any amount is collected under a law which is found to be illegal, Government cannot retain such amount and must repay such illegally collected tax. Thus, whenever it has been found that Govt. has collected tax without proper authority of law, Courts have held that the illegally collected taxes must be refunded, subject to provisions of 'Unjust Enrichment' in respect of Indirect Taxes.

1.5 Features of Indirect Taxes

Taxes are conventionally broadly classified as Direct Taxes and Indirect Taxes. As the name suggests, 'direct taxes' are paid directly and 'indirect taxes' are paid indirectly. The direct taxes are paid directly by the person concerned. In case of indirect taxes, they are paid by one person, but he recovers the same from another person. Thus, the person who actually bears the tax burden (the ultimate 'consumer') pays it indirectly through some other person, who practically, merely acts as collecting agent.

Direct taxes are those which the tax payer pays directly from his income/wealth/estate etc., while indirect taxes are those which the tax payer pays indirectly i.e. while purchasing goods and commodities, paying for services etc. Broadly speaking, direct taxes are those which are paid *after* the income reaches hands of tax payer; while indirect taxes are paid *before* the goods/services reach the tax payer. Important direct taxes are Income Tax, Gift Tax and Wealth Tax. Important indirect taxes are Central Excise (Duty on manufacture), Customs (duty on imports and exports); Sales Tax; Octroi, Entry Tax, Service Tax, Expenditure Tax etc.

Advantages of Indirect Taxes

Indirect Taxes have certain advantages:

Psychological Advantage to tax payer - It is psychologically very difficult for a person to pay some amount *after* it is received in his hands. On the other hand, since the price of commodity or service is already inclusive of indirect taxes, the customer i.e. the ultimate tax payer does not feel a direct pinch while paying indirect taxes and hence, resistance to indirect taxes is much less compared to resistance to direct taxes. [This is the reason why even Income Tax Act is widening the scope of 'Tax Deduction at Source' (TDS) so that income tax is deducted before a payment is received by payee].

Manufacturers'/Dealers' Psychology favours indirect taxes - The manufacturer/trader who collects the taxes in his Invoice and pays it to Government, has a psychological feeling that he is only collecting the taxes and is not paying out of his own pocket (*though this feeling may not be always correct*). It has been observed that top management takes very keen interest in direct tax matters, while matters relating to indirect taxes are usually handled by lower management - in some cases only by clerks, though revenue implications are much higher in indirect taxes. Great care is taken in making any payment and sanctioning any expenditure, while decision in respect of debits and credits in Cenvat Credit Account (which is as good as cash), is left to the clerk handling the job !

Easier to collect - Indirect Taxes are easier to collect as Indirect Taxes are mainly on goods/commodities, for which record keeping, verification and control is *relatively* easy (at least in organised sector). Manufacturing activities are carried out mainly in organised sector, where records and controls are better. On the other hand, direct taxes are mainly on income/wealth of individuals, firms or Corporate bodies, where millions of transactions are carried out in lakhs of places and keeping an eye over all such transactions is virtually impossible.

Slightly less tax evasion - Tax evasion is *comparatively* less in indirect taxes in organised sector due to convenience of control. [Tax planning bordering tax avoidance is not uncommon in organised sector]. Admittedly, tax evasion of indirect taxes is common in unorganised sector.

Control over wasteful expenditure - Government can levy higher taxes on luxury goods, which reduces the wasteful expenditure.

Channelise Industrial growth - Government can judiciously use the indirect taxes to support development in desirable areas, while discouraging it in others, e.g. reducing taxes on goods manufactured in tiny or small scale units; lowering taxes in backward areas etc.

Supporting Local Industry - Government can and does shield indigenous industry from international competition (or dumping) by levying high customs duty.

Disadvantage of indirect taxes

Certain disadvantages of Indirect Taxes are as follows :

Regressive in Nature - Since the indirect tax is uniform, the tax payable on commodity is same, whether it is purchased by a poor man or a rich person. This hurts people in lower income group, while people in higher income groups can afford to pay the taxes.

Hence, the indirect taxes are termed as 'regressive'. [Income tax is termed as 'progressive', since rich person is taxed more compared to poor person].

Reduces Demand of goods - Tax on goods increases its selling prices, which reduces demand of goods. Lesser demand means lower growth of industrialisation. This is quite true in India, where tax rates are high.

Increases Project costs - Heavy customs duty levied on machinery increases its costs, which, in the long run, lowers the pace of industrialisation.

Shields inefficient local Industries - Higher rates of custom duty on imports means international competition is reduced, which help indigenous industries survive and prosper even if they are inefficient. They also tend to neglect quality, if they know that the buyer has no choice.

Modern technology becomes costly - Higher customs duty also increases cost of imported modern machinery and technology.

Increases smuggling/Tax evasion - High customs/excise duty increases smuggling, *havala* trade and *mafia* gangs, which is harmful in many ways. Similarly, high excise duty leads to evasion, due to which honest tax payers suffer, while dishonest persons can prosper as they can afford to sell their goods at lower prices.

Indirect taxes are perceived as inflationary - Indirect taxes increase the prices of products and hence are often perceived as inflationary.

Other Indirect Taxes - Central Sales Tax, Central Excise, Service Tax and Customs Law are major indirect taxes. Besides these, there are some other indirect taxes, like octroi, entry tax, luxury tax etc.

1.6 Administrative set up of Central Excise, Customs and Service tax

Administration of Central Excise, customs and service tax is under Ministry of Finance, Government of India.

Board - CBE&C - A Central Board of Excise and Customs (CBE & C - called '*Board*') has been formed with headquarters at New Delhi to administer provisions of indirect taxes, which consist of Central Excise, Customs and Service tax.

The Board is formed under Central Boards of Revenue Act, 1963. This Board, consisting of Chairman plus five members, has powers to administer the Excise Act. Chairman of Board is empowered to distribute work among himself and other members and specify cases which will be considered jointly by Board.

Section 37B of CEA [parallel Section 151A of Customs Act – similar Section 119 of Income Tax Act] authorises Board to issue orders, instructions and directions to Central Excise Officers for purposes of uniformity in the classification of excisable goods or with respect to levy of excise duties on such goods. However,

such order cannot require central excise officer to make assessment in a particular way or interfere with discretion of Commissioner (Appeals). [similar Section 119 of Income Tax Act empowers CBDT to issue orders, instructions and directions to officers].

Rule 31(1) of Central Excise Rules (Previous Rule 233) authorises CBE&C, Chief Commissioner and Commissioner to issue written instructions providing for any supplemental matters arising out of the rules. These administrative orders are binding on lower officers.

Appointment of Officers - Rule 3(1) of Central Excise Rules authorises Board to appoint Central Excise Officers Rule 3(2) of Central Excise Rules empowers Board (CBE&C) to specify jurisdiction of Chief Commissioner, Commissioner or Commissioner (Appeals).

Section 4(1) of Customs Act authorises Board to appoint officers of customs. As per Section 4(2) of Customs Act, Board can authorise Chief Commissioner, Commissioner of Customs, Joint/Deputy/Assistant Commissioner; to appoint officers below Assistant Commissioner.

Classes of Officers of excise and customs – Section 2(b) of Central Excise Act states that 'Central Excise Officer' means Chief Commissioner of Central Excise, Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, Joint Commissioner of Central Excise, Assistant/Deputy Commissioner of Central Excise or any other officer of Central Excise or any person (including officer of State Government), invested by CBE & C with powers of Central Excise Officer under the Act.

Superintendent and Inspector are other officers appointed in Central Excise.

Section 3 of Customs Act provides that there shall be following officers of customs –

(a) Chief Commissioner of Customs

(b) Commissioner of Customs

(c) Commissioner of Customs (Appeals) *(cc)* Joint Commissioner of Customs

(d) Deputy Commissioner of Customs

(e) Assistant Commissioner of Customs

(f) Such other officer of customs as may be appointed for purposes of the Act.

Appraiser and Examiner are other officers appointed under Customs Act.

Powers of excise and Customs Officers - Section 2(b) of CEA read with Rule 3(1) of Central Excise Rules empowers CBE&C to confer powers on an officer of excise or any person (including officer of State Government) with powers of Central Excise Officer under the Act.

Section 5(1) of Customs Act provides that an officer of customs shall exercise the powers and discharge his duties conferred on him or imposed on him, subject to conditions and limitations as may be imposed by CBE&C. As per Section 5(2) of Customs Act, an officer of customs may exercise powers of any Customs Officer who is subordinate to him.

Chief Commissioner and Director Generals

Country is divided in several zones. Each 'zone' is under supervision of '*Chief Commissioner of Central Excise*'. Rule 3(2) of Central Excise Rules authorised Board to specify jurisdiction of Chief Commissioner, Commissioner or Commissioner (Appeals).

Chief Commissioner has administrative control over Commissioners and Commissioner (Appeals) within his zone.

In the interior i.e. non-coastal areas, Chief Commissioner of Central Excise looks after customs work also.

Director General – Offices of Director General have been created for monitoring some specified functions e.g. , Director General of Export Promotion (DGEP), Director General Service Tax (DGST), Duty Drawback Directorate etc.

Commissioner of Central Excise

Each 'zone' covers various Commissionerates and Commissioner of Central Excise (CCE) is Administrative in-charge of the 'Commissionerate'.

Rule 3(1) empowers CBE&C to confer on any officer the powers of conferred by Central Excise Rules by issue of notification. In the interior i.e. non-coastal areas, Commissioner of Central Excise looks after customs work also.

Commissioner (Appeals) – Commissioner (Appeals) are appointed in various Commissionerates to hear appeals against orders from Assistant/Deputy/Joint and Additional Commissioner.

Commissioner (Appeals) cannot exercise powers of Central Excise Officer. However, he can issue summons u/s 14 of Central Excise Act and exercise powers under Chapter VIA (relating to appeals) [Section 12E(2) of CEA parallel Section 5(3) of Customs Act].

Other officers below Commissioner

Officers below Commissioner are as follows -

Additional Commissioner of CE **-** There may be one or more Additional Commissioner in a Commissionerate. Appeal against order of Commissioner lies with CESTAT while appeal against order of Additional Commissioner lies with Commissioner (Appeals). Restrictions on powers of Additional Commissioner have been placed through administrative instructions. Commissioner has unlimited powers of adjudication, while Additional Commissioner has restricted powers of adjudication.

As per Section 2(8) of Customs Act, 'Commissioner of Customs' includes Additional Commissioner, except for purposes of Chapter XV of the Act [This chapter deals with provisions of appeal and revision]. However, there is no parallel provision in Central Excise Act or Rules [Provision which was there in earlier rules has been deleted]. Thus, Additional Commissioner of Customs in Commissioner of Customs, but Additional Commissioner of CE and not Commissioner of Central Excise !

Joint Commissioner **-** This post has been created in May, 1999, subsequent to implementation of report of fifth pay commission. [The post is equivalent to earlier Deputy Commissioner].

Deputy Commissioner, Assistant Commissioner and Superintendent **-** Each Commissionerate of Central Excise is divided into divisions and each division is under administrative control of 'Deputy Commissioner' or 'Assistant Commissioner of Central Excise'. Assistant Commissioner (Senior Scale) is designated as 'Deputy Commissioner'. ***However, both Assistant Commissioner and Deputy Commissioner have same powers, except for issue of show cause notice proposing penalty or confiscation of goods***.

The division under each Deputy/Assistant Commissioner of Central Excise is further divided into various ranges and each range is under control of Superintendent of Central Excise, who is of the rank of a Gazetted

Officer. Inspectors work under Superintendent and some powers have been delegated to them. Inspector is not a Gazetted Officer.

Delegation of Powers

Section 37 of CEA (similar Section 156 of Customs Act) authorises Central Government to make rules for the purpose of the Act. Section 37A of CEA (similar Section 152 of Customs Act) authorises Central Government to delegate powers exercisable by Board to Chief Commissioner of Central Excise or Commissioner; powers exercisable by Commissioner to Joint, Deputy Commissioner or Assistant Commissioner; powers of Assistant Commissioner to Gazetted Officer of Central Excise. (Superintendent is lowest rank of a Gazetted Officer in excise and Appraiser in Customs).

Senior can exercise powers of junior - Section 12E(1) of CEA [parallel Section 5(2) of Customs Act] specifies that a Central Excise Officer/Customs Officer may exercise powers and discharge duties conferred on any other Central Excise/Customs Officer subordinate to him e.g. powers conferred on Superintendent can be exercised by Assistant Commissioner or Dy. Commissioner, but not by Inspector. Rule 3(3) of Central Excise Rules (Previous Rule 6) also makes same provision.

Administration of CST Act

Central Sales Tax Act (CST) is a peculiar Act - though the tax is levied as Central Sales Tax, it is administered by respective State Governments.

CST Act and Rules framed by Central Government make provisions for very few procedures. In respect of other procedures and provisions, provisions as applicable in the State in respect of the General Sales Tax Law of the State are also applicable in respect of Central Sales Tax in respect of Dealers registered in that State. State Governments are also authorised to frame rules under CST Act.

1.7 Common aspects of Customs, Central Excise and Service Tax

There are many common or similar provisions in Customs, Central Excise and Service Tax.

- All are Central Acts and derive power of levy from list I - Union List - of the Seventh Schedule to Constitution.
- All are under administrative control of one Board (Central Board of Excise and Customs) under Ministry of Finance.
- Departmental organizational hierarchy is same from top upto Assistant Commissioner level. Transfers between customs , excise and service tax are not uncommon.
- Chief Commissioner in charge of each Zone is same for excise and customs at many places.
- In the interior areas, Excise officers also work as Customs Officers
- In case of service tax, separate Commissionerates have been established in few places. In other places, excise officers look after service tax work.
- Classification Tariffs of excise and customs are based on HSN and principles of classification are identical. Principles of classification of service tax are similar to principles in excise and customs.
- Principles of deciding 'Assessable Value' are similar i.e. all are principally based on 'transaction value'.

- Concept of 'related person' for valuation purposes appears in Customs as well as Excise valuation. This concept is not there in service tax, but principle of 'piercing of corporate veil' can apply.
- Cenvat provisions of excise and service tax are same.
- Provisions of refund, including principle of 'unjust enrichment' are identical. Provisions for interest for delayed payment are also identical.
- Provisions of raising demand for short levy, non-levy or erroneous refund are similar. Provisions in respect of recovery, mandatory penalty etc. are also similar.
- Provisions for granting exemptions from duty - partial or full - conditional or unconditional are identical.
- Powers of search and seizure are quite similar in many respects in all three taxes.
- Provisions of Customs Act have been made applicable to Central Excise with suitable modifications in respect of confiscation of goods. However, provisions of confiscation of goods are not applicable to service tax.
- Excise and customs law make provisions of arrests and prosecution of offenses. There are no parallel provisions in service tax.
- Provisions in respect of Authority for Advance Ruling are identical.
- Provision of settlement of cases are same in excise and customs, but not applicable to service tax, since there is no provision of criminal offences in service tax.
- Appeal provisions are similar, except that departmental appeal cannot be filed with Commissioner (Appeals) in respect of service tax matters Instead of that, Commissioner can revise orders of lower authorities.
- Appellate Tribunal (CESTAT) is same. Hence, procedures of appeal to Tribunal are identical.

In this study note, as far as possible, common topics are discussed at one place to avoid repetition.

STUDY NOTE 2

Basics of Central Excise Duty

2.1 Laws relating to Central Excise

Provisions regarding Central Excise are covered under various Acts and Rules, as under :

Central Excise Act, 1944 (CEA) - This is the basic Act providing for charging of duty, valuation, powers of officers, provisions of arrests, penalty, etc. It has been amended from time to time. The name of Act was 'Central Excises & Salt Act, 1944'. The word 'salt' was dropped in 1996.

Central Excise Rules - As per usual scheme of any Act, Section 37(1) of the Central Excise Act [parallel Section 156(1) of Customs Act] grants power to Govt. to frame rules to carry into effect the purposes of Central Excise Act. Rules can make provision of penalty and prosecution [Section 37(3) and 37(4) of CEA – no parallel provision in Customs Act]. Section 38 of CEA (parallel Section 159 of Customs Act) provides that the rules should be made by issue of a notification. The rules should be placed before Parliament for 30 days when Parliament is in session.

Presently, the main rules are –

(a) Central Excise Rules, 2002

(b) Cenvat Credit Rules, 2004

(c) Central Excise (Appeal) Rules, 2001

(d) Central Excise (Settlement of Cases) Rules, 2001

(e) Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods), Rules, 2001.

Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 - Valuation means determination of value for the purpose of charging excise duty. The basic provisions for determining value are contained in Section 4 of Central Excise Act. However, in certain cases, the value cannot be fixed purely on the basis of Section 4 for which rules have been prescribed under Section 4(1)(b) of the Central Excise Act.

Notifications - Under Sections 5A and 11C of CEA, Central Govt. has been granted power to issue notification for granting partial or full exemptions from excise duty. Similarly, Central Excise Rules also provide for issue of notifications in respect of various matters Each of the Rules and Notifications has to be placed before each House of Parliament for a total period of 30 days. The period may be comprised in one or more sessions. If Parliament decides to amend any of such Rule or notification, it will have effect in modified form. Otherwise such rules or notifications will continue to be effective. The rules and notifications are treated as part of the Act itself. Thus, the rules and notifications issued under Central Excise Act have full legislative backing.

Central Excise Tariff Act, 1985 (CETA) - Since it is essential to prescribe different duties for different types of productions, it is necessary to classify the items under various heads. Central Excise Tariff Act, 1985 classifies all the goods under 96 chapters and specific code is assigned to each item. This classification forms basis for classifying the goods under particular chapter head and sub-head to prescribe duty to be charged on that particular product.

CESTAT (Procedure) Rules, 1982 - Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982, made by CESTAT, prescribe procedure of filing and hearing appeals to CESTAT.

2.2 Nature of Excise Duty

Entry No. 84 of list I of Seventh Schedule to the Constitution reads as follows : "*Duties of excise on tobacco and other goods manufactured or produced in India, except alcoholic liquors for human consumption, opium, narcotics, but including medical and toilet preparations containing alcohol, opium or narcotics.*".

Power to impose excise on alcoholic liquors, opium and narcotics is granted to States under entry No. 51 of list II of Seventh Schedule to the Constitution and it is called 'State Excise'. The Act, Rules and rates for excise on liquor are different for each State.

Section 3 of Central Excise Act (often called the '*Charging Section*') states that 'There shall be **levied and collected** in such manner as may be prescribed duties on all excisable goods (*excluding goods produced or manufactured in special economic zones*) which are produced or manufactured in India - . - . -'. The words 'goods which are manufactured or produced in India' are same as those used in Entry No. 84 to list I. Thus, the power to levy Central Excise duty is derived from the Constitution.

Basic excise duty and special excise duty (SED) are levied under Section 3 of Central Excise Act at rates specified in First Schedule and Second Schedule to Central Excise Tariff Act, 1985 (Other duties and cesses are levied under different provisions of law).

The definition of charging Section i.e. Section 3 of Central Excise is vital, because it clearly signifies that there are four basic conditions for levy of Central Excise duty.

(1) The duty is on goods.

(2) The goods must be excisable.

(3) The goods must be manufactured or produced

(4) Such manufacture or production must be in India.

Unless all of these conditions are satisfied, Central Excise Duty cannot be levied..

Goods manufactured in SEZ are 'excluded excisable goods' – As per Section 3(1) of Central Excise Act, duty is leviable on all excisable goods (excluding goods manufactured or produced in Special Economic Zones). Thus, goods manufactured or produced in SEZ are 'excisable goods' but no duty is leviable, as charging Section 3(1) excludes those goods. Thus, the goods manufactured in SEZ are not 'exempted goods'. They can be termed as 'excluded excisable goods'.

2.3 Taxable Event for Excise Duty

Tax can be imposed only on 'taxable event'. In excise, manufacture or production of goods in India is the 'taxable event'.

In *Bill to amend Section 20 of the Sea Customs Act, 1878 In re* - AIR 1963 SC 1760 = (1964) 3 SCR 787 (SC 9 member full bench), it was observed - 'Excise duty is not directly on the goods, but manufacture thereof. - . - . - Though both excise duty and sales tax are levied with reference to goods, the two are very different imposts. In one case, the imposition is on the act of manufacture or production, while in the other it is on act of sale. In neither case, therefore, can it be said that the excise duty or sales tax is directly on the goods, for in that event, they will really become the same tax'.

A duty of excise is a tax upon goods and not upon sales or proceeds of sale of goods. In terms of Entry 84, List I of Seventh Schedule to Constitution, taxable event in respect of excise is manufacture or production - *CCE* v. *Acer India Ltd.* 172 ELT 289 = 137 STC 596 = 2004 AIR SCW 5496 (SC 3 member bench).

Ownership of raw material is not relevant for duty liability – *Hindustan General Industries* v. *CCE* 2003 (155) ELT 65 (CEGAT) * *CCE* v. *Mahindra & Mahindra* 2001(132) ELT 632 (CEGAT).

The Duty liability in case of manufactured goods

- Rule 4(1) of Central Excise Rules makes it clear that excise duty is payable by the manufacturer or producer of excisable goods.

Exceptions where person other than manufacturer is liable - There are only three exceptions to basic provision that duty liability is of manufacturer -

(a) In case of goods stored in ware house under Rule 20, duty liability is of person who stores the goods

(b) The procurer is liable in case of molasses produced in khandsari sugar factory

(c) In case of job work under Notification No. 214/86-CE, the raw material supplier undertakes liability of duty.

Duty liability in case of goods stored in warehouse - Rule 20 of CE Rules permit warehousing of certain goods in warehouses without payment of duty. In such cases, the duty liability is on the person who stores the goods.

Duty liability in case of molasses produced in khandsari sugar factory - The other exception is in case of molasses produced in a Khandsari sugar factory, the duty liability is of the procurer (i.e. purchaser) of such molasses. The duty is payable on the date of receipt of such molasses in the factory of procurer. The duty on molasses produced in Khandsari sugar factory is payable only when the procurer procures the molasses for use in the manufacture of any commodity. Such commodity may or may not be excisable. [Rule 4(2) of CE Rules].

Duty liability in case of job work - Even in case of job work, the duty liability is of actual manufacturer and not of the raw material supplier. However, a job worker manufacturing goods under notification No 214/86 is exempt from excise duty, as the raw material supplier undertakes that he will use these goods further to manufacture final product or clear for export or pay duty on such goods.

Rate of duty as applicable on date of removal relevant

Though taxable event is 'manufacture', duty payable is as applicable on date of removal i.e. clearance from factory. In *Wallace Flour Mills Co. Ltd.* v. *CCE* 44 ELT 598 = 186 ITR 440 = 1989(4) SCC 592 (SC), goods were fully manufactured and packed when goods were exempt from duty. These were cleared after the exemption was withdrawn and goods became liable to duty. It was held that duty is payable as applicable on date of removal.

Goods have to be classified and valued in the state in which goods are removed from the factory. Any further processing done after removal is not relevant.

Duty liability even when goods not sold or free replacement given during warranty period

Since excise is a duty on manufacture, duty is payable whether or not goods are sold.

Duty is payable even when Goods are used within the factory, Goods are captively consumed within factory for further manufacture, Goods are given as free samples or Goods are given as free replacement.

Excise duty is payable even in case of free supply. Sale is not a necessary condition for charging excise duty.

In *Larsen & Toubro Ltd.* v. *CCE* 1998(103) ELT 40 (CEGAT), it was held that duty is payable on spare parts even if those are supplied free during warranty period.

Duty payable even when not collected

An assessee is liable to pay sales tax and the question whether he has collected it from consumer or not is of no consequence. His liability is by virtue of being an assessee under the Act. - *American Remedies P Ltd.* v. *Govt of AP* 1999(113) STC 400 = (1999) 2 SCC 117 = 29 APSTJ 43 (SC 3 member bench).

Duty can be levied on Government undertaking

As per Articles 285 and 289 of Constitution, tax cannot be levied by Central Government on income or property of State Government (and *vice versa*). In *Bill to amend Section 20 of the Sea Customs Act, 1878 In re* (1964) 3 SCR 787 = AIR 1963 SC 1760 (SC 9 member full bench), it was held that this restriction applies only to taxes which directly affect income or property, and not to taxes which may indirectly affect income or property. Thus, excise duty can be levied on goods manufactured by State or Central Government undertakings – followed in *Karya Palak Engineer* v. *Rajasthan Taxation Board* 2004 AIR SCW 4665 = 177 ELT 3 = 136 STC 641 (SC 3 member bench).

Excise and service tax are independent taxes

Though excise and service tax are administered by same department, both are independent taxes. Payment of excise is not same thing as paying service tax.

In *Lincoln Helios (India) Ltd.* v. *CCE* (2006) 3 STT 311 = 1 STR 302 (CESTAT), it was held that service tax is payable on charges of erection and commissioning even if assessee has paid excise duty on entire value of contract including erection and commissioning charges.

2.4 Types of excise duties

Basic duty and special duty of excise are levied under Central Excise Act.

Basic excise duty to be termed as Cenvat - Basic excise duty (also termed as Cenvat as per Section 2A of CEA added w.e.f. 12-5-2000) is levied at the rates specified in First Schedule to Central Excise Tariff Act, read with exemption notification, if any – [Section 3(1)(a) of CEA]. The present general rate is 14% w.e.f. 1-3.2008 (earlier, it was 16%). This duty is applicable to almost all excisable goods. There is partial exemption to a few products.

Education Cess – Education cess of 2% has been imposed, which is payable on central excise, customs, service tax and income tax. Education cess on excise and customs had become effective immediately w.e.f. 9-7-2004, while cess on service tax became effective with effect from 10-9-2004. As per Section 91(2) of Finance (No. 2) Act, 2004; the sum collected will be appropriated as per law approved by Parliament.

In case of excise duty, calculation of cess is easy. If excise duty rate is 14%, education cess will be 0.28%. Section 93 of Finance (No. 2) Act, 2004 states that education cess is 'duty of excise', to be calculated on aggregate of all duties of excise including special excise duty or any other duty of excise, but excluding education cess on excisable goods). As per Section 93(3) of Finance (No. 2) Act, 2004, all provisions of Central Excise Act, including those relating to refunds, exemptions and penalties will apply to education cess.

No education cess if basic duty is exempt – In *CC* v. *Reliance Industries Ltd.* 2005 (188) ELT 449 (CESTAT), it has been held that since customs duty is exempt under DEPB scheme, education cess is not leviable and hence its debit to DEPB scrip is not required.

Secondary and Higher Education Cess (SAH Education Cess)

In addition to existing education cess, an education Cess of 1% of the total duties of excise has been imposed on imported goods vide Section 136 read with Section 138 of Finance Act, 2007. The proceeds from this cess shall be utilized to finance secondary and higher education.

Education cess is not payable on SAH education cess [Notification No. 18/2007-CE dated 1-3-2007].

The SAH education cess should be shown separately in invoice. It will have to be shown separately in TR-6/GAR-7 challan since its accounting head will be different.

Credit of Education cess and SAH Education Cess not interchangeable – Cenvat credit of education cess and SAH education cess is not inter-changeable.

National Calamity Contingent Duty

A 'National Calamity Contingent Duty' (NCCD) was been imposed vide Section 136 of Finance Act, 2001. This duty was imposed on pan masala, chewing tobacco and cigarettes. It varies from 10% to 45%.

NCCD of 1% has been imposed on PFY, motor cars, multi utility vehicles and two wheelers and NCCD of Rs. 50 per ton has been imposed on domestic crude oil, vide Section 169 of Finance Act, 2003, w.e.f. 1-3-2003.

NCCD of 1% has been imposed on mobile phones w.e.f. 1-3-2008.

Duties under other Acts

Some duties and cesses are levied on manufactured products under other Acts. The administrative machinery of central excise is used to collect those taxes. Provisions of Central Excise Act and Rules have been made applicable for levy and collection of these duties/cesses.

Besides education cess, cess is leviable under various products.

Distinction between cess and duty is that cess is a charge levied and collected for specified purposes, while duty (excise duty or customs duty) is for general revenue of Government. Duty is for general revenue purposes, while cess is for a definite purpose. Cess may be on production of goods or on export of goods. If cess is leviable on goods manufactured or produced in India, corresponding cess will be payable if similar goods are imported.

2.5 Excisable Goods

The word "goods" has not been defined under the Central Excise Act. As per judicial interpretation, for purpose of levy of Excise duty, an article must satisfy two requirements to be 'goods' i.e. (*a*) it must be movable ***and*** (*b*) it must be marketable.

Goods must be **movable**. Thus, immovable property or property attached to earth is not 'goods' and hence duty cannot be levied on it.

Once marketable and movable commodity is manufactured, duty will become payable even if goods are consumed within the factory. Duty is payable on captive consumption or intermediate products. This aspect has been discussed in a later chapter.

Goods must be Marketable - The item must be such that it is **capable of being** bought or sold. This is the test of 'Marketability'. The goods must be known in the market. Unless this test of *marketability* is satisfied, duty cannot be levied as these will not be *goods*.

This view, expressed in *UOI* v. *Delhi Cloth Mills* - AIR 1963 SC 791 = 1963 (Suppl.) (1) SCR 586 = 1977 (1) ELT (J 177) (SC 5 member Constitution bench), has been consistently followed by Supreme Court in subsequent cases and by all High Courts. It was held that to become 'goods' an article must be something which can ordinarily come to market to be bought and sold.

In case of DCM, they were manufacturing '*Vanaspati*'. Raw material was groundnut and til oil. During manufacture, 'refined oil' got produced at intermediate stage which was consumed within factory for

manufacture of '*Vanaspati*'. Excise department demanded duty on this 'refined oil'. [During the relevant period, there was no excise duty on 'Vanaspati', but 'refined oil' was excisable.] This stand was negated by Supreme Court. It was observed that process of deodorisation was not carried out on the 'refined oil'. In the market, the product is not known as 'refined oil' unless it is deodorized. Applying this 'marketability test', it was held that the 'refined oil' which is not 'deodorized' is not 'goods'. [Deodorisation was carried out in the manufacturing process after hydrogenation only.]

Actual sale is not necessary in determining excisability of a product as long as goods are saleable or marketable.

The essence of marketability of goods is neither in the form nor in the shape or condition in which the manufactured article is found, it is the commercial identity of the article known to the market for being bought and sold. The fact that the product in question is generally not being bought and sold or has no demand in the market would be irrelevant. Simply because certain articles fall within the schedule does not make them marketable. Actual sale in market is not necessary, but the articles must be capable of being sold in the market or known in the market as goods.

Mere mention in Tariff is not enough

Mere mention of an item in tariff is not enough. Simply because a certain article falls within the schedule (of Central Excise Tariff), it would not be dutiable if the article is not 'goods' known to the market. - *Bhor Industries Ltd.* v. *CCE* 40 ELT 280 (SC) = 1989 (1) SCC 602 = 1989 (1) SCR 382 = AIR 1989 SC 1153 = 73 STC 145 (SC) = 184 ITR 129 (SC).

Further, the 'excisable goods' are liable to duty only if they are 'manufactured' or 'produced'.

Even one purchaser enough - The fact that goods are not in fact marketed is of no relevance. Even if goods are available from only one source or from a specified market, it makes no difference so long as they are available for purchasers. Marketability does not depend upon the number of purchasers or to territorial limits of the country.

Marketability to be decided on the basis of the state in which it is produced.

Gas, Steam etc. - Gas and Steam are goods as it is a tangible property. - . - It is marketable - *Ambalal Sarabhai Enterprises Ltd.* v. *UOI* 1991 (54) ELT 30 (Guj HC)..

Electricity – In case of electrical energy, generation or production coincides almost instantaneously with its consumption. Sale, supply and consumption takes place without any hiatus. - - Electricity is movable property though it is not tangible. It is 'goods'. – *State of Andhra Pradesh* v. *National Thermal Power Corporation* (NTPC) 2002 AIR SCW 1956 = 127 STC 280 (SC 5 member bench).

Sub-standard Goods - Sub-standard goods sold are still 'goods'. They cannot be classified as scrap as commercially understood - *Tisco* v. *CCE* - 1995 (75) ELT 3 (SC).

By-product - The 'By-product' will be 'goods'. By-product means something of value produced in making main product or a substance obtained in the course of a specific process, but not its primary object. - *Markfed Vanaspati* v. *CCE* 2000(116) ELT 204 = 36 RLT 170 (CEGAT 3 member bench).

Parts manufactured for Assembly at Site - Often Plant is assembled at site, for which some parts are manufactured in a factory and sent to site. Duty would be leviable on these parts while clearing from the factory, *if these are marketable.*

Software is 'goods'

In *Tata Consultancy Services* v. *State of Andhra Pradesh* (2005) 1 SCC 308 = 141 Taxman 132 = 271 ITR 401 = AIR 2005 SC 371 = 2004 AIR SCW 6583 = 137 STC 620 = 178 ELT 22 (SC 5 member Constitution bench), it has been held that canned software (i.e. computer software packages sold off the shelf) like Oracle, Lotus, Master-Key etc. are 'goods'.

In *Bharat Sanchar Nigam Ltd*. v. *UOI* (2006) 3 SCC 1 = 152 Taxman 135 = 3 STT 245 = 145 STC 91 = 282 ITR 273 (SC 3 member bench), following extract from decision in case of *Tata Consultancy Services* v. *State of Andhra Pradesh* was quoted with approval and adopted, 'A 'goods' may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold and (c) capable of being transferred, delivered, stored and possessed. If a software, whether customised or non-customised satisfies these attributes, the same would be goods'.

Excise duty on software - All software, except canned software i.e. software that can be sold off the shelf, is 'exempt' under notification No. 6/2006-CE dated 1-3-2006.

Meaning of 'software' - 'Information Technology Software' is defined in Supplementary Note of chapter 85 of Central Excise Tariff (and also Customs Tariff) as follows - 'For the purpose of heading 8523, 'Information Technology Software' means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data processing machine'.

Everything that is sold is not 'marketable'

'Marketability' implies regular market for a product. Occasional, stray or distress sales do not mean that the product is 'marketable'.

In *UOI* v. *Indian Aluminium Co. Ltd.* - 1995 (77) ELT 268 (SC) = AIR 1995 SC 1580 = 1995 Supp (2) SCC 465 = 1995 AIR SCW 2436 (SC 3 member bench), it was observed, 'Everything that is sold is not necessarily a marketable commodity as known to commerce and which, it may be worthwhile to trade in, as even rubbish can be sold. Thus, 'dross and skimmings' arising during manufacture of Aluminium is not 'excisable goods'. They are merely refuse or ashes given out in process of removing impurities from raw material. Hence they are not 'excisable goods' as understood in commercial parlance, even if they are sold and they fetch some price'.

2.6 Dutiability of waste and scrap

Waste and scrap is practically treated as 'final product' for excise purposes.

Board has clarified that waste and scrap is treated as 'final product' under Rule 2(e) of Cenvat Credit Rules [that time Rule 57AA(c)] and its clearance is as if it is a final product. – MFDR TRU No. 345/2/2000-TRU dated 29-8-2000.

Scrap can be 'goods' - In *Khandelwal Metal and Engg Works* v. *UOI* - 1985 (Supp) 1 SCR 750 = 1985 (20) ELT 222 (SC) = AIR 1985 SC 1211 = (1985) 3 SCC 620, Apex Court held that scrap would be liable to duty, if it is known in commercial parlance by that name and has an established market.

Waste dutiable only if there is 'manufacture'

In *CCE* v. *Indian Aluminium Co. Ltd.* 2006 (203) ELT 3 (SC), it has been held 'Aluminium dross' is not 'manufactured product' and hence not dutiable, even if there is specific entry in the tariff.

In *Markfed Vanaspati* v. *CCE* 2000(116) ELT 204 = 36 RLT 170 (CEGAT 3 member bench), it has been held that waste will be dutiable only if there is 'manufacture'. In this case, activated clay was used for deodoring, bleaching and decolouring of oil. These are not manufacturing processes. It was held that spent earth (which is residue/remains of activated clay after it loses its absorbent character during the course of refining and bleaching of edible oils) is not a 'manufactured product'. Spent earth remains 'earth' even after processing. All that happens is its capacity to absorb is reduced. The example given was that if water is purified by passing through sand and charcoal, the sand and coal will lose its potency to purify water after some time. Such sand and charcoal cannot be considered as outcome of any manufacturing process. No duty is payable even if the spent earth is sold.

Empty drums and packing material in which inputs were packed – Duty cannot be levied on empty drums or waste packing material in which inputs were packed as these are not 'manufactured'..

Waste arising due to dismantling of old machinery, structures etc. is not taxable as no 'manufacture' – Waste of scrap arising during cutting and dismantling of old and damaged machinery is not 'manufacture' – *ACC Ltd.* v. *CCE* 2001(133) ELT 375 = 46 RLT 745 (CEGAT).

Waste and scrap excisable only if mentioned in CETA

The waste and scrap will not be 'excisable goods' unless it is specified in CETA.

In *CCE* v. *Carborandum Universal Ltd.* 1998(103) ELT 363 (CEGAT), it was held that waste termed as 'dust collector fine' emerging during grinding is merely an industrial waste and even if it fetches some price, it is not 'excisable goods' as there is no tariff entry in CETA.

2.7 What are not "Goods"

Goods having very short life are not 'goods', if not marketable – Yeast having short shelf life is not 'goods' when there is no proof about its marketability, even if the product is specified in tariff. *CCE* v. *Jagjit Industries* 2002 AIR SCW 1277 = 141 ELT 306 (SC). Articles having short shelf life are not goods if they are not marketable within that short period.

Unstable product having no shelf life and not capable of being bought and sold in the market is not 'goods'. Test of marketability is essential - *CCE* v. *Citurgia Bio-Chemicals Ltd.* - 1996 (87) ELT 267 (CEGAT).

2.8 Plant and machinery assembled at site

Plant and Machinery assembled and erected at site cannot be treated as 'goods' for the purpose of Excise duty, if it is not marketable and movable.

The word 'goods' applies to those which can be brought to market for being bought and sold, and it is implied that it applies to such goods as are movable. Goods erected and installed in the premises and embedded to earth cease to be goods and cannot be held to be excisable goods. - *Quality Steel Tubes (P.) Ltd.* v. *CCE* 75 ELT 17 (SC) = (1995) 2 SCC 372 = 6 RLT 131 = 1995 AIR SCW 11 - in this case, it was held that tube mill and welding head erected and installed in the premises and embedded in the earth for manufacture of steel tubes and pipes are not 'goods'.

Assembly at site is not manufacture, if immovable product emerges - In *Mittal Engg Works* v. *CCE* 1996 (88) ELT 622 = 17 RLT 612 = 106 STC 201 = (1997) 1 SCC 203, it was held that if an article has to be assembled, erected and attached to the earth at site and if it is not capable of being sold as it is, without anything more, it is not 'goods'. Erection and installation of a plant is not excisable.

Assembly is manufacture only if machinery can be removed without dis-assembly

In *Triveni Engineering* v. *CCE* AIR 2000 SC 2896 = 2000 AIR SCW 3144 = 40 RLT 1 = 120 ELT 273 (SC), it was observed, 'The marketability test requires that the goods as such should be in a position to be taken to market and sold. If they have to be separated, the test is not satisfied'. [Thus, if machine has to be dis-assembled for removal, it is not 'goods' and duty cannot be levied].

If machine (generating set in this case) is only bolted on a frame and is capable of being shifted from that place, it is capable of being sold. It is goods and not immovable property – *Mallur Siddeswara Spinning Mills* v. *CCE* 2004 (166) ELT 154 (SC).

Clarification of CBE&C

Central Board of Excise and Customs have issued an order No 58/1/2002-CX dated 15-1-2002, as follows –

When identity changes during erection - When change of identity of inputs takes place in the course of construction or erection of a structure which is an immovable property, then there would be no manufacture of 'goods' and no excise duty is leviable.

Machinery fixed only for vibration free movement - Integrated plant/machines as a whole may or may not be goods. If it is only a system or net-work of machines, there is no 'manufacture' as it is only a case of assembly of manufactured goods into a system. However, if group of machines themselves are combined to constitute new machine which has own identity/marketability is dutiable if assembled at site and fixed to earth only for purpose of ensuring vibration free movement [e.g. paper machinery] [In the opinion of author, principle is correct but example given in Board circular is incorrect, as at least large paper machinery cannot be removed without dismantling].

When Machinery cannot be dismantled without damage to components - If items assembled or erected at site and attached to foundation to earth cannot be dismantled without substantial damage to its components and thus cannot be reassembled, then the items are not 'movable' and hence not excisable goods. However, if goods installed at site are capable of being sold or shifted as such after removal from base and without dismantling into its components/parts, the goods will be considered as movable and hence excisable. The guiding factor is whether they are ***capable*** of being marketed in original form and not whether they are *actually* dismantled or not. Each case will have to be considered considering whether it is practically possible to remove and sale the goods as they are without dismantling into components. [Here again, Board has given example of paper machinery, which in the opinion of Board can be sold as it is without dismantling. In the opinion of author, principle is correct but example given in Board circular is incorrect.]

Huge tanks embedded to earth - Huge tanks, though not embedded to earth, but erected at site, stage by stage, cannot be physically moved as such without dismantling. These are not goods [same view in *Dodsal P Ltd.* v. *CCE* 2006 (193) ELT 518 (CESTAT)].

Duty may be payable on components manufactured - When final product is considered as immovable and hence not excisable goods, the same product in CKD or unassembled form will also not be dutiable as a whole by applying Rule 2(a) of Interpretation Rules of CETA. However, the components, inputs and parts which are specified excisable products will remain dutiable as such goods at the time of clearance of factory. [Rule 2(a) states that goods complete or finished removed unassembled or disassembled will be classified in the same heading as complete or finished goods].

In case of doubt, intention of party whether the embedment in earth is temporary or permanent, may determine whether the goods are movable or immovable.

Turnkey projects - Turnkey projects like steel plants, cement plants, power plants etc. will not be considered as excisable goods, but their components would be dutiable. Same is case of refrigeration and air-conditioning plants assembled at site.

Lift and escalators - Lifts and escalators installed in building cannot be treated as excisable goods, even if that item is specified in Tariff. However, if lift and escalator is fabricated as whole and is movable in nature, it will be dutiable even if temporarily installed at construction site or exhibition.

Thus, practically, CBE&C has accepted that the machinery/ equipment will be 'goods' only if it is capable of moving without being dismantled.

Present legal position in respect of machinery erected at site

The latest judgment on the issue is of *Triveni Engineering* judgment dated 8-8-2000, which has been practically accepted by Board *vide* its circular dated 15-1-2002. Hence, the present legal provision is, as decided in *Triveni Engineering*, i.e. 'The marketability test requires that the goods ***as such*** should be in a position to be taken to market and sold. If they have to be separated, the test is not satisfied'. Thus, if machinery has to be dismantled before removal, it will not be goods. Following is also clear -

(a) Duty cannot be levied on immovable property

(b) If plant is so embedded to earth that it is not possible to move it without dismantling, no duty can be levied

(c) If machinery is superficially attached to earth for operational efficiency, and can be easily removed without dismantling, duty is leviable

(d) Turnkey projects are not dutiable, but individual component/machinery will be dutiable, if marketable.

Article can be 'goods' if marketable before erection - An article will be liable to duty if its manufacture is complete before it is fastened to earth. Similarly, if 'machinery' is in marketable condition at the time of removal from factory of manufacture, duty will be leviable, even if subsequently, it is to be fastened to earth.

2.9 Excisable Goods

Section 2(*d*) of Central Excise Act defines Excisable Goods as 'Goods specified in the Schedule to Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt'. Thus, unless the item is specified in the Central Excise Tariff Act as subject to duty, no duty is leviable. However, once an item is mentioned in Tariff, it will be 'excisable goods' even if duty rate is Nil (since Nil rate is also a rate of duty), or it is exempt from excise duty.

Goods 'excisable' even if exempt from duty - 'Excisable goods' do not become non-excisable goods merely because they are exempt from duty by an exemption notification - *Wallace Flour Mills Co. Ltd.* v. *CCE* 186 ITR 440 (SC) = 44 ELT 598 (SC) = (1989) 4 SCC 592.

Nil duty is also a rate of duty. Merely because goods were cleared under an exemption notification, it cannot be assumed that final product (ingots in this case) were not duty paid. Excisable goods do not become non-excisable by reason of exemption given under a notification. - *Precast Engineering P Ltd.* v. *CCE* 2000 (118) ELT 288 (CEGAT 5 member bench).

Dutiable and non-dutiable goods - Excisable goods are all those goods specified in the Central Excise Tariff Act, 1985. The words 'dutiable goods' are not in fact, used in Excise Law. In common parlance, goods

on which excise duty is payable as per Central Excise Tariff are termed as 'dutiable goods', while goods on which duty is not payable are termed as 'non-dutiable'. Non-dutiable goods are 'excisable goods' on which duty is not payable, either because of 'Nil' rate of duty or because of exemption. Thus, in common terminology, all dutiable goods are excisable goods but all excisable goods need not be dutiable goods.

Technically, such distinction is incorrect, since Nil duty is also a duty, and goods on which no duty is payable, but are mentioned in Tariff, are 'dutiable' goods.

Goods with blank duty rate in Central Excise Tariff are 'excisable goods' **-** Some goods are mentioned in Central Excise Tariff but column of rate of duty is blank (e.g. live animals in Chapter 1, Electrical Energy in Chapter 27, Newspaper and maps in Chapter 49).

As per additional note No. 1(c) to Central Excise Tariff, 'tariff item' means description of goods in the list of tariff provisions accompanying either eight-digit number and the rate of duty or eight-digit number with blank in the columns of the rate of duty. Hence, goods where duty rate is blank is excisable goods – para 22 of *Geetanjali Woolens* v. *CCE* (2007) 218 ELT 152 (CESTAT).

In excise tariff, rate is 'blank' in items like rice, wheat, soya bean, cotton seed etc. These are 'produced'.

Goods mentioned as 'free' in Customs Tariff - In *Associated Cement Companies Ltd*. v. *CC* 2001 AIR SCW 559 = AIR 2001 SC 862 = (2001) 4 SCC 593 = 128 ELT 18 = 124 STC 59 = (SC 3 member bench), it was held that if duty rate specified in Customs Tariff Act is 'FREE' (i.e. no duty is payable), no duty is payable on such goods and hence these are not 'dutiable goods'. [In Central Excise Tariff, the duty rate indicated is 'Nil'. Hence, these are 'excisable goods'].

Goods not included in CETA are 'non-excisable goods' **-** Some goods like flowers etc. are not mentioned in Central Excise Tariff *at all*. Hence these are not 'excisable goods', though they may be 'goods'. These are 'non-excisable goods'.

Marketability is a question of fact - Marketability is a question of fact - *Sirpur Paper Mills Ltd.* v. *CCE* 1998 AIR SCW 366 = 97 ELT 3 = AIR 1998 SC 1489 = 1998(1) SCC 400.

2.10 Classification of Goods

Once the liability of payment of excise duty/customs duty is established, the next question is what is the amount of duty payable. The two step process is

(*a*) Correctly classify the goods, to find out rate of excise duty

(*b*) Find its assessable value to which the rate of duty is to be applied for calculating amount of duty payable.

The rate of duty is found out by classifying the product in its appropriate heading under Central Excise Tariff/Customs Tariff.

The Central Excise Tariff Act, 1985 (CETA) classifies all the goods under 96 chapters and specific code is assigned to each item. There are over 1,000 tariff headings and 2,000 sub-headings. This classification forms basis for classifying the goods under particular Chapter head and Sub-head to prescribe duty to be charged on that particular product.

Since excise and customs are closely related, it is natural that both should follow same system of classification of products.

As international trade increased, need was felt to have universal standard system of classification of goods to facilitate trade flow and analysis of trade statistics. Hence, International convention of Harmonised

System of Nomenclature (HSN), called Harmonised Commodity Description and Coding System, was developed by World Customs Organisation (WCO) (That time called as Customs Cooperation Council).

This is an International Nomenclature standard adopted by most of the Countries to ensure uniformity in classification in International Trade. HSN is a multi purpose 6 digit nomenclature classifying goods in 5019 groups of goods. It contains 241 headings at 4 digit level and 5019 at 6 digit level.

Indian Customs adopted this nomenclature w.e.f. 28-2-1986. Central Excise Tariff also adopted HSN based classification w.e.f. 1-3-1986. Later, Customs Tariff and Central Excise Tariff have added two more digits for further precision. Thus, Customs and Central Excise Tariff uses 8 digit nomenclature.

WCO in its various committees discusses classification of individual products and gives classification opinion on them. Though their opinion is not binding in legal sense, it provides a useful guideline for classifying goods.

Both Excise and Customs Tariffs contains schedules.

Schedules to Central Excise Tariff - Central Excise Tariff consists of three schedules - the first schedule gives basic excise duties (i.e. Cenvat duty) leviable on various products, while second schedule gives list of items on which special excise duty is payable. Items included in second schedule are already covered and included in first schedule. (The second schedule has lost relevance since all the goods in that schedule are exempt from special excise duty). Third schedule contains all items covered under MRP valuation provisions, which are covered under 'deemed manufacture' provisions.

Export Tariff under Customs Act - Customs Tariff Act has two Schedules - first schedule is in respect of Import Tariff, which we have discussed above. Second Schedule is 'Export Tariff', showing export duties leviable. Since most of exports are exempt from export duty, the schedule contains only 26 items, out of which 24 items are exempt by way of a notification.

Sections, Chapters and headings in Tariff

Central Excise Tariff is divided in 20 Sections, while there are 21 Sections in case of Customs Tariff.

A 'Section' is a grouping of a number of Chapters which codify a particular class of goods. Each of the Sections is related to a broader class of goods e.g. Section I is 'Animal Products', Section VII is 'Plastics and Articles thereof', Section XI is 'Textile and Textile Articles', Section XVII is 'Vehicles, Aircrafts, Vessels and associated transport equipment', etc. Section Notes are given at the beginning of each Section, which govern entries in that Section. These notes are applicable to all Chapters in that Section.

Section divided in Chapters and chapters in sub-chapters - Each of the Sections is divided into various Chapters and each Chapter contains goods of one class. For example, Section XI relates to Textile and Textile Articles and within that Section, Chapter 50 is Silk, Chapter 51 is Wool, Chapter 52 is Cotton, Chapter 53 is other vegetable textile fabrics, Chapter 61 is Articles of Apparel and so on.

There are 96 chapters in Central Excise Tariff out of which Chapter 77 is blank. In Customs Tariff, there are 98 chapters out of which Chapter 77 is blank, which is kept reserved for future use.

Some Chapters are divided into sub-chapters e.g. Chapter 72 (Iron and Steel) is divided into I – Primary Materials, II – Iron and Non-Alloy Steel, III – Stainless Steel and IV – Other Alloy Steel.

Chapter Notes - Chapter Notes are given at the beginning of each Chapter, which govern entries in that Chapter.

Headings and sub-headings within the Chapter - Each chapter and sub-chapter is further divided into various headings depending on different types of goods belonging to same class of products.

Eight Digit classification – All goods are classified using 4 digit system. These are called 'headings'. Further 2 digits are added for sub-classification, which are termed as 'sub-headings'. Further 2 digits are added for sub-sub-classification, which is termed as 'tariff item'. Rate of duty is indicated against each 'tariff item' and not against heading or sub-heading.

The same classification will be used by DGFT (Director General of Foreign Trade) and DGCIS (Director General of Commercial Intelligence & Statistics). The additional 2 digits are to facilitate and provide flexibility in international trade. The common classification will reduce transaction costs and reduce diversion of classification among different agencies.

Coding of dashes

Single dash (-) at the beginning of description indicates a group, while two dashes (- -) at the beginning indicate a sub-group. The single dash (-) indicates primary classification of article covered by the heading, while double dash (- -) is the sub-classification of the preceding article which has single dash (-) i.e. it is a sub-classification of primary classification.

Triple dash (- - -) and quadruple dash (- - - -) indicate sub-sub- classification of immediately preceding description of article, which has '-' or '- -'. In other words, a single dash or double dash may be followed by either three dashes or four dashes. Both three dashes or four dashes are used to indicate 8 digit classification i.e. 'tariff item'.

Columns in CETA & CTA - Central Excise Tariff has four columns -

(1) Tariff Item
(2) Description of goods
(3) Unit and
(4) Rate of Duty. In Customs Tariff, there are five columns -
    (1) Tariff Item
    (2) Description of goods
    (3) Unit
    (4) Standard Rate of Duty
    (5) Rate of duty for Preferential Area.

Government charges lower customs duty in case of import of some specified goods from Myanmar, Bangladesh, Mauritius, Seychelles, Nepal, Tonga etc. If preferential rate is not specified for a particular product, the standard rate of customs duty will apply.

Standard unit of quantity

Third column of tariff is 'Unit' which is unit of measure. The unit of measure is indicated by abbreviations. Some abbreviations are as follows – cc – Cubic Centimetre, cm – Centimeter(s), g - gram(s), g/cm^3 – Gram per cubic centimeter, l – litre, m – metre, mt – Metric Tonne, t – Tonne, Tu – Thousand in number, u – Number, Vol. – Volume, W- Watt.

Distinction between Customs Tariff and Excise Tariff

Division of Sections and chapters is similar under Customs Tariff Act and Central Excise Tariff Act, but there are quite a few changes. Central Excise Tariff has 20 Sections and contains chapters 1 to 96 (with chapter 77 blank). Customs Tariff has one additional Section XXI (Work of art, collectors pieces and antiques), covering Chapters 97 to 99. Chapter 77 is blank in customs tariff also, reserved for future use.

Thus, Customs has 98 used Chapters (1 to 99 with Chapter No. 77 blank), while Excise Tariff has 95 used Chapters (1 to 96 with Chapter No. 77 blank).

Preferential Area Rates - Customs Tariff has extra column giving Rate of duty for Preferential area. If no rate is mentioned in the column 'Rate for Preferential Area', then Standard rate is applicable.

Second Schedule - Second Schedule of Customs Tariff is 'Export Tariff', showing export duties leviable. Second Schedule of Central Excise Tariff shows rates of special excise duty i.e. SED.

2.11 Rules for Interpretation of Tariff

Rules for Interpretation of Schedule to Tariff are given in the Tariff itself. These are termed as 'General Interpretative Rules' (GIR).

Abbreviation '%' in Column 4 indicates that duty is charged 'ad valorem' on the value of goods as calculated in Section 4 of Excise Act.

Rule 1 of Rules for interpretation of the Schedule states that classification shall be determined according to the terms of the headings and any relative Section or chapter notes and, provided such headings or Notes do not otherwise require, according to other provisions of the rules. It has been held that these rules are required to be applied only if classification is not possible on basis of tariff entry read with Chapter notes and Section notes.

Rule 1 gives primacy to the Section and chapter notes along with terms of the headings. They should be first applied. If no clear picture emerges, then only one can resort to subsequent rules - *CCE* v. *Simplex Mills Co. Ltd.* 2005 (181) ELT 345 = 140 STC 125 (SC 3 member bench).

Steps in classification of a product

Following are the steps of classification of a product.

(1) Refer the heading and sub-heading. Read corresponding Section Notes and Chapter Notes. If there is no ambiguity or confusion, the classification is final (Rule 1 of GIR). You do not have to look to classification rules or trade practice or dictionary meaning. If classification is not possible, then only go to GIR. The rules are to be applied sequentially.

(2) If meaning of word is not clear, refer to trade practice. If trade understanding of a product cannot be established, find technical or dictionary meaning of the term used in the tariff. You may also refer to BIS or other standards, but *trade parlance* is most important.

(3) If goods are incomplete or un-finished, but classification of finished product is known, find if the un-finished item has *essential characteristics* of finished goods. If so, classify in same heading - Rule 2(a).

(4) If ambiguity persists, find out which heading is specific and which heading is more general. Prefer specific heading.- Rule 3(a).

(5) If problem is not resolved by Rule 3(a), find which material or component is giving '*essential character*' to the goods in question - Rule 3(b).

(6) If both are equally specific, find which comes last in the Tariff and take it - Rule 3(c).

(7) If you are unable to find any entry which matches the goods in question, find goods which are most akin - Rule 4.

(8) In case of mixtures or sets too, the procedure is more or less same, except that each ingredient of the mixture or set has to be seen in above sequence. As per Rule 2(b), any reference to a material or substance includes a reference to mixtures or combinations of that material or substance with other material or substance.

2.12 GIR in Tariff

GIR (General Interpretative Rules) are to be applied for interpretation of Tariff, if classification is not possible on the basis of tariff entry and relevant chapter notes and Section notes.

The Rules are to be applied sequentially. - *Chapter 4 Para 7 of CBE&C's Customs Manual, 2001*. Classification is to be first tested in light of Rule 1. Only when it is not possible to resolve the issue by applying this Rule, recourse is taken to Rules 2, 3 and 4 in seriatim.

Rule 1. - The titles of Sections and Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the provisions hereinafter contained.

Section Notes and Chapter Notes have overriding effect - Classification is to be determined only on the basis of description of the heading, read with relevant Section or chapter notes. Since these notes are part of the Act itself, these have full statutory (legal) backing. Tribunal has (*very rightly*) held that coverage of respective headings has to be determined in the light of respective Section notes and chapter notes. In this sense, Section Notes and Chapter Notes have an overriding force over the respective headings and sub-headings.

If the description read with Section or chapter notes is not enough to correctly classify the goods, following further rules have been provided :

Classification of Incomplete or un-assembled Goods

Rule 2(a) - Any reference in a heading to goods shall be taken to include a reference to those goods incomplete or unfinished, provided that, the incomplete or unfinished goods have the essential character of the complete or finished goods. It shall also be taken to include a reference to those goods complete or finished (or falling to be classified as complete or finished by virtue of this Rule), removed unassembled or disassembled.

Some illustrations in HSN Explanatory notes are -

* a machine or apparatus normally incorporating an electric motor is classified in the same heading even if presented without motor.

* Passenger coach not fitted with seats will still be a passenger coach

* Motor vehicle not yet fitted with wheels, battery or tyres

* Bicycles without saddles and tyres * Photographic camera without an optical element

* Electric supply meter without its totalling device.

Scooter body unit without engine is classifiable as scooter. - *LML Ltd.* v. *CC* 1999(105) ELT 718 (CEGAT).

Un-assembled finished goods

Second part of Rule 2(a) of GIR further provides that the heading will also include finished goods removed un-assembled or disassembled i.e. in SKD or CKD packs. [second part of Rule 2(a)].

This provision is essential because sometimes, goods cannot be despatched in fully assembled condition. These are despatched in SKD (semi knocked down) or CKD (completely knocked down) condition and assembled at site. As we saw in previous chapter, in such cases, assembly at site does not amount to

manufacture. The goods are, in fact, fully manufactured in the factory itself. These are sent in SKD or CKD condition only for convenience of transport.

In *Shirke Construction Equipments P Ltd.* v. *CCE* 1997(95) ELT 644 (CEGAT), it was held that even when bulky goods are cleared in stages, the clearance is still of whole article and not its parts. In this case, bulky crane was cleared in disassembled condition in two consignments. It was held that assessee cleared 'crane in parts' and not 'parts of crane'.

Cycle removed in CKD condition is a 'cycle'. – *T I Cycles* v. *UOI* 1983(12) ELT 681 (Mad HC DB).

Classification of Mixture or Combinations

Rule 2(b) - Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles contained in Rule 3.

In *Himson Textile Engg* v. *CCE* 1997(95) ELT 519 (CEGAT), it was held that if Rule 2(a) covers the goods in dispute, resort cannot be had to Rule 2(b).

Classification in case of Conflict between various headings

While applying the aforesaid rules, some conflict may arise e.g., (*a*) a mixture or combination containing more than one material may be classifiable under more than one headings by applying Rule 2(b). If it contains two items A and B, one classification may be on the basis of 'A' and other on the basis of 'B' (*b*) There may be two descriptions which may both seem possible.

In such cases, Rule 3 states as follows –

Rule 3 - When by application of sub-Rule (b) of Rule 2 or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as given in Rule 3(a), 3(b) or 3(c).

Specific Description preferable over general heading - The heading which provides most specific description shall be preferred to heading providing a general description. [Rule 3(*a*)]

Rule 3(a) - The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

Thus, for classification of electric shaving machine, description of Heading 85.10 i.e. 'Shavers and Hair clippers, with self-contained electric motor' is more specific than description of Heading 85.09 i.e. Electro-mechanical domestic appliances with self-contained electric motor'. VIP bag is a 'Plastic Article' in common parlance, but if there is a specific entry 'suitcases', that entry will prevail over general entry 'plastic articles'. - *A Nagaraju Bros.* v. *State of AP* - (1994) 95 STC 1 = 72 ELT 801 (SC).

Classification as per Essential Character

Rule 3(b) - Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

For example, if a set consists of drawing instruments (90.17), pencil (96.09) and pencil sharpener (82.14), put up in a leather case (4201.90); the set will be classifiable under 90.17 i.e. drawing instrument.

Classification of composite machines - Often a machine is capable of multiple functions. In case of such combination machines, classification should be done according to its main function, and additional function may be ignored, by applying Rule 3(b). If the main function is not ascertainable, Rule 3(c) should be applied, i.e. the machine should be classified under the heading which occurs last in numerical order among those which equally merit consideration. - CBE&C circular No. 45/98-Cus dated 30.6.1998.

Mobile handset with additional features - Mobile phone with additional features like radio receivers, music players, email, net browsers, calculator, alarm, computing etc. is still 'mobile handset' as principal function continues to be 'telephony' and in trade parlance also, the goods are sold as cellular or mobile phones - MF(DR) circular No. 17/2007-Cus dated 19-4-2007.

In *CC* v. *Hewlett Packard India (Sales) P Ltd.* (2007) 215 ELT 484 (SC), it was held that pre-loaded software in laptop forms integral part of the laptop. Without operating system like windows, the laptop cannot work. Hence, the laptop along with software has to be classified as laptop and values as one unit. Software pre-loaded cannot be classified separately as software.

Book with CD and software with manual - Sometimes, a floppy diskette is attached to a book. Such diskette is supplementary or accessory to the book, which either explains contents of book or supplies some freeware or some tutorials. On the other hand, a manual is supplied along-with software. The manual gives instructions as to how to use the software. In the former case, the 'essential character' of the goods is 'book', while in later case, the 'essential character' is 'software'. Hence, the goods will be classified according to 'essential character' as per Rule 3(b). - CBE&C circular No. 528/106/93-Cus (TU) dated 24-8-1993.

If both are specific - Latter the better

If two or more headings seem equally possible and the dispute cannot be resolved by any of the aforesaid rules, if both the headings appear equally specific, the heading which occurs last in numerical order is to be preferred (*i.e. latter the better*). [Rule 3(c)].

Rule 3(c) - When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in the numerical order among those which equally merit consideration.

Akin Goods - Last Rule of classification

If the classification is not possible by any of the aforesaid rules 1, 2 and 3, then it should be classified under the heading appropriate to goods to which they are most akin. [Rule 4 of GIR].

This is only a last resort and a desperate remedy to resolve the classification issue, as the matter of classification cannot be kept hanging indefinitely.

Rule 4 - Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

Classification of packing containers and packing materials

Rule 5 for interpretation of schedule to Customs Tariff Act and CETA specifically provides for classification of packing material and packing cases.

Rule 5. In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein :

(a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This Rule does not, however, apply to containers which give the whole its essential character;

(b) Subject to the provisions of (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision does not apply when such packing materials or packing containers are clearly suitable for repetitive use.

As per this Rule, cases for camera, musical instruments, drawing instruments, necklaces etc. specially shaped for that article, suitable for long term use will be classified along with that article, if such articles are normally sold along with such cases. Further, packing materials and containers are also to be classified with the goods *except when the packing is for repetitive use*.

This provision is obviously made to ensure that the packing and the goods are charged at same rate of duty.

Goods can be compared at the same level only

Rule 6 - For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub-headings and any related Sub-heading notes and, *mutatis mutandis*, to the above rules, on the understanding that only sub-headings at the same level are comparable. For the purposes of this Rule, the relative Chapter and Section Notes also apply, unless the context otherwise requires.

Classification of Parts

Classification of parts is subject to notes in Sections and Chapters Question of classification of parts is relevant for parts of machinery, electrical equipment, vehicles, instruments, arms, furniture and toys (Chapters 82 to 96).

In *Electrosteel Castings* v. *CCE* 1989(43) ELT 305 (CEGAT), it was observed that 'part' is a component whose absence will disable a machine or appliance. It must be regarded as an essential ingredient or part of that machine.

Broadly, parts suitable solely for a particular machine generally fall in the same heading number in which main item falls. However, there are many exceptions.

Parts of General Use - Parts of general use are defined as (*a*) tube and pipe fittings, stranded wire, ropes, cables, chains, nails, screws, bolts, springs (other than clock springs) of base metal i.e. Iron and Steel, Copper, Aluminium, Tin, Nickel, Lead, Zinc etc. or of plastic (*b*) Padlocks, locks; mountings and fittings suitable for furniture, doors, windows etc.; clasps, buckles, eyelets; sign-plates, name plates; frames of pictures; mirrors; of Iron and Steel, Copper, Aluminium, Tin, Nickel, Lead, Zinc etc. or of plastic.

These parts are to be classified in their respective heading and not as part of the machine or equipment e.g. a bolt used in a vehicle will be classified as 'bolt' and not as 'motor vehicle part'. Plastic piping and fitting will be classified under Plastic articles (3917) only, even if used as machine component.

2.13 Trade Parlance Theory

Since the primary objective of the Excise Act is to raise revenue, resort should not be had, for purpose of classification, to the scientific and technical meaning of the terms and expressions used therein, but to their popular meaning, that is to say, the meaning attached to that by those using the product.

The burden of proof that a product is classifiable under a particular tariff head is on the revenue and must be discharged by proving that it is so understood by the consumers of product in common parlance – *CCE* v. *Vicco Laboratories* 2005 (179) ELT 17 (SC 3 member bench).

Criteria for classifications are given in the CETA. However, basic principle of classification, devised more than a century ago by Justice Pollok in *Grenfell* v. *IRC* (1876) 1 Ex D 242 continues. As per this principle, a word in statute should be construed in its popular sense and not in the strict or technical sense. 'Popular sense' means that which people conversant with the subject matter with which the statute is dealing, would attribute to it. This has been confirmed by Supreme Court in various cases.

Customer's identity with function - Supreme Court, in *Atul Glass Industries (P.) Ltd.* v. *CCE* (1986) 3 SCC 480 = AIR 1986 SC 1730 = 25 ELT 473 (SC) = 63 STC 322 (SC), have held that identity of a product is associated in mind of consumer with its primary function. The consumer buys an article because it performs a specific function for him. This mental association with a product is highly important for classification.

In *State of UP* v. *Kores (India) Ltd.*- AIR 1977 SC 132 = 1977 (39) STC 8 (SC) - Hon. Supreme Court had held that; in popular parlance; Paper is understood as something used for writing, printing, drawing, decorating etc. Carbon paper is not understood as paper and hence it cannot be classified as 'paper'.

Paper is understood as meaning a substance which is used for bearing, writing or printing, or for packing, or for drawing on, for decorating or covering the walls – *Parle Biscuits* v. *State of Bihar* (2005) 139 STC 204 (SC).

Statutory definition overrides Trade parlance - The 'trade parlance' is relevant only when Statute does not define the words. If words are defined in the Statute, 'trade parlance' is not relevant. - *Indo International Industrial* v. *CST, UP* - 1981 (2) SCC 528 = AIR 1981 SC 1079 = (1981) 3 SCR 294 = 8 ELT 325 = 47 STC 359 (SC).

HSN and Classification

Customs Tariff and Central Excise Tariff are based on Harmonised System of Nomenclature (HSN), but Tariff nowhere states that notes in HSN will be applicable for interpreting the tariff.

In *CCE* v. *Wood Craft Products Ltd.* - 77 ELT 23 = (1995) 3 SCC 452 = 1995 AIR SCW 1963 (SC - 3 member bench order), it has been held that as per Statement of Objects and Reasons of Central Excise Tariff Bill, 1985, new tariff has been introduced, based on HSN to reduce classification disputes. Thus, in case of doubt, HSN is a safe guide for ascertaining true meaning of any expression used in the Act, unless there is an express different intention indicated in the Tariff itself. - confirmed in *CC* v. *Business Forms* 2002(142) ELT 18 = 50 RLT 375 = (2005) 7 SCC 143 (SC 3 member bench) .

STUDY NOTE 3

Manufacture and Manufacturer

3.1 Taxable event is Manufacture

Taxable event for levy of excise is 'manufacture or production in India'. Excise is a duty on "manufacture or production" of goods.

In *Hyderabad Industries Ltd.* v. *UOI* - 1995 (78) ELT 641 (SC) = 1995 AIR SCW 3367 = (1995) 5 SCC 338 (SC 3 member bench), it was held that even if Central Excise Tariff mentions an item, there is no duty liability unless the process is 'manufacture', i.e. if new and identifiable product does not emerge after the process – quoted with approval in *UOI* v. *Ahmedabad Electricity Co. Ltd.* 2003 AIR SCW 5529 = 134 STC 24 = 158 ELT 3 (SC).

Difference between Sales Tax and Excise

Central Excise duty has to be distinguished from Sales Tax. The Sales Tax is a tax on sales and hence can be imposed only when there is a sale. On the other hand, excise duty is a duty on manufacture and the duty liability is fastened immediately after goods are manufactured; whether these are sold or not is immaterial. For example, if a Company manufactures a machine or fabricates some furniture within the factory for its own use, there will be no sales tax on the machine or furniture manufactured as it is not sold. However, the machine or furniture will be liable to excise duty as it has been *manufactured*. However, for administrative convenience, the payment of duty may be deferred till removal of goods from the factory.

Produced

The word *produced* is not defined in the Central Excise Act. Hence, the word has to be understood as in common trade parlance.

In *CIT* v. *N C Budharaja and Co.* 204 ITR 412 = 91 STC 448 = AIR 1993 SC 2529 = 1994 Supp (1) SCC 280 = 70 Taxman 312 = 1993 AIR SCW 3317, it has been held that the word 'production' has a wider connotation than the word 'manufacture'. Every 'manufacture' can be characterised as 'production', but every 'production' need not amount to manufacture. When the word 'produced' or 'production' is used in juxtaposition with the word 'manufacture', it takes in bringing into existence new goods by a process which may or may not amount to manufacture. It also takes in all by-products, intermediate products and residual products, which emerge in the course of manufacture of goods – same view in *CIT* v. *Tara Agencies* (2007) 162 Taxman 337 = 214 ELT 491 (SC).

Thus, the word 'produced' covers

(a) Items like coffee, tea, tobacco, dairy products etc. which are 'produced'

(b) The word 'produced' can also cover live products like horse, fish, flowers etc. which are 'produced'

(c) By-products, scrap etc. which are not really 'manufactured' but they do get 'produced'

(d) Obviously, it also covers 'manufactured goods' as term 'produced' is broader than 'manufacture'.

3.2 Manufacture

The word 'manufacture' is not defined completely in the Act. Definition in Section 2(f) is inclusive.

Section 2(f) - *"Manufacture"* includes any process - (*i*) incidental or ancillary to the completion of manufactured product; (*ii*) which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture; *or (iii)* which, in

relation to goods specified in Third Schedule to the CEA, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers or declaration or alteration of retail sale price or any other treatment to render the product marketable to consumer; - - and the word 'manufacturer' shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account.

[Clauses (ii) and (iii) are called deemed manufacture].

Thus, definition of 'manufacture' is inclusive and not exhaustive. However, there is ample case law on this issue.

'Manufacture' means :

(a) Manufacture as specified in various Court decisions i.e. new and identifiable product having a *distinctive name, character or use* must emerge *or*

(b) Deemed Manufacture.

'Manufacture' as defined by Courts, takes place only when the process results in a commercially different article or commodity. Following would be instances when 'manufacture' has taken place

(*a*) manufacture of table from wood

(*b*) conversion of pulp into base paper

(*c*) conversion of sugarcane to sugar.

Deemed manufacture – Deemed manufacture is of two types –

(a) CETA specifies some processes as 'amounting to manufacture'. If any of these processes are carried out, goods will be said to be manufactured, even if as per Court decisions, the process may not amount to 'manufacture' [Section 2(f)(ii)]

(b) In respect of goods specified in Third Schedule to Central Excise Act, repacking, re-labelling, putting or altering retail sale price etc. will be 'manufacture'. The goods included in Third Schedule of Central Excise Act are same as those on which excise duty is payable u/s 4A on basis of MRP printed on the package. [Section 2(f)(iii) w.e.f. 14-5-2003]

New substance having distinct name, character or use must emerge

As defined by Court, 'Manufacture' can be said to have taken place when after process, a new and different article emerges having a *distinctive name, character or use.*

In *Union of India* v. *Delhi Cloth Mills Co. Ltd.* AIR 1963 SC 791 = 1963 Suppl (1) SCR 586 = 1977 (1) ELT (J199) (SC) and 1990 (27) ECR 151 (SC five member constitution bench) it has been held that the manufacture means bringing into existence a new substance. Manufacture is end result of one or more processes, through which original commodity passes. Thus, manufacture implies a change but every change is not manufacture. A new and different article must emerge having a *distinctive name, character or use.*

There is no manufacture and hence no excise duty liability if a new and commercially different identifiable product does not result - *Hyderabad Industries Ltd.* v. *UOI* - 1995 (78) ELT 641 (SC) = 1995 AIR SCW 3367 = (1995) 5 SCC 338 - SC 3 member bench.

Commodity should be fit for commercial use

In *UOI* v. *JG Glass Industries* 1998 AIR SCW 573 = 97 ELT 5 = (1998) 2 SCC 32 = 78 ECR 761 = 23 RLT 768 = 114 STC 387 = AIR 1998 SC 839 = 96 Taxman 29 (SC), it was held that a process will amount to 'manufacture', if the commodity which was already in existence will serve no purpose or will be of no commercial use but for the process. In this case, printing of colour and logo was done on glass bottle. It was found that even before printing, glass bottle was commercial commodity and could be sold even without printing. Hence, it was held that printing of bottles with ceramic colour and decoration is not 'manufacture'. In this case, two fold test was applied –

(a) Whether by the said process a different commercial commodity comes into existence or whether the identity of original commodity ceases to exist and

(b) Whether the commodity which was already in existence will be of no commercial use but for the said process. In other words, whether the commodity already in existence will be of no commercial use but for the said process.

Trade Parlance is important

The test to be applied is whether a commodity subject to processing retains its original character and identity or whether the processed commodity is regarded in the trade by those who deal in it, as distinct identity from original commodity. Nature and extent of processing may vary. With each process, the original commodity experiences change. But it is only when the change or series of change take commodity to a point where commercially it is recognised as a new and distinct commodity, then it can be said that new commodity has come into being. The test is whether in the eyes of those dealing in the commodity or in commercial parlance, the processed commodity is regarded as distinct in character and identity from the original commodity - *Sterling Foods* v. *State of Karnataka* - 1986 (63) STC 239 = 1986(3) SCC 469 = AIR 1986 SC 1809 = 26 ELT 3 (SC).

There can be manufacture even if final product falls under same tariff

There can be 'manufacture' even if both inputs and final product fall under same tariff heading, if a different identifiable commercially known product comes into existence - *Laminated Packings (P.) Ltd.* v. *CCE* - 1990 4 SCC 51 = 49 ELT 326 (SC) = 1990 (30) ECR 166 (SC).

Different tariff does not necessarily mean manufacture – Mere change in tariff does not mean there is 'manufacture' – *CCE* v. *Markfed Vanaspati* 2003 AIR SCW 2158 = (2003) 4 SCC 184 = AIR 2003 SC 3534 = 153 ELT 491 (SC).

Burden of proof of manufacture is on department – It is settled law that if Revenue claims that there is manufacture, then the burden of proving the fact is entirely on the Revenue. Department has to prove that a new and distinct product has come into existence – *Metlex (India) P Ltd.* v. *CCE* 2004 AIR SCW 3782 = (2005) 1 SCC 271 = 165 ELT 129 (SC).

Assembly can be manufacture

Assembly of various parts and components may amount to manufacture if new product emerges, which is movable and marketable.

In *Triveni Engineering* v. *CCE* 2000 AIR SCW 3144 = AIR 2000 SC 2896 = 40 RLT 1 = 120 ELT 273 (SC), it was held that combining steam engine turbine and alternator by fixing them on platform and aligning them is

manufacture as new product, turbo alternator, comes into existence which has a distinctive name and use different from its components.

Supplying two or more items together is not 'manufacture'

Sometimes, two types of goods are supplied together in different packings. Sometimes, these are to be mixed at the user's end before use. Normally, this procedure is adopted when the item has limited shelf life after mixing the two items. (e.g. *araldite, Aluminium Paint* etc.) [Even then, at the user's end, it is not 'manufacture' as the product has short shelf life and is not marketable].

In *Hawkins Cookers Ltd.* v. *CCE* 1997(96) ELT 507 (SC), it was held that purchasing various items and packing them together will not amount to 'manufacture' if a new product does not emerge.

3.3 Incidental or ancillary process of manufacture

Section 2(f) of Central Excise Act, which defines 'Manufacture' states that "*manufacture*" includes any process which is incidental or ancillary to the completion of manufactured product.

Incidental means occasional or casual process. Ancillary means auxiliary, i.e. it is integral part of manufacturing. Manufacture is not complete unless all ancillary and incidental processes are complete. In border line cases, there can be ambiguity whether a particular process is incidental or ancillary process. For instance, painting or polishing may be essential process for manufacture of furniture. However, a machinery may be said to be finished without painting. It has been held that quality checking is not a process ancillary or incidental to manufacture, unless it is legally mandatory.

In *CCE* v. *Ashwin Vanaspati Industries P Ltd.* - (1996) 85 ELT 53 (CEGAT) and *Kashmir Vanaspati Ltd.* v. *CCE* - 1996 (85) ELT 150 (CEGAT SMB) it has been held that packing is a process incidental or ancillary to the completion of manufacture of a product.

3.4 Processing and Manufacture

Processing can amount to manufacture if a new and identifiable product known in the market emerges.

'Processing' is distinct from 'manufacturing' and mere processing does not mean 'manufacture'. In *Empire Industries* v. *Union of India* 20 ELT 179 (SC) = 1985 (3) SCC 314 = AIR 1986 SC 662 = 162 ITR 846 = 64 STC 42 (SC) = 1985 Supp (1) SCR 292, it was held that any process creating something else having distinctive name, character and use would be 'manufacture'. Thus, processing gray fabrics by bleaching, dyeing, printing of fabric will amount to 'manufacture'. In this case, 'fabric' was supplied by customer.

In *Sri Jagannath Industries* v. *State of Orissa* - (1995) 97 STC 375 (Ori HC FB), conversion of paper into exercise books was held as 'manufacture'. In *UOI* v. *JG Glass Industries* 97 ELT 5 = (1998) 2 SCC 32 = AIR 1998 SC 839 = 1998 AIR SCW 573 = 114 STC 387 = Taxman 29 (SC), it was held that a 'process' can amount to manufacture if the commodity had no commercial value but for the said process.

What is a process - The word 'process' has various shades of meanings depending upon the context.

A continuous and regular action or succession of actions taking place or carried on in a definite manner and leading to the accomplishment of some result – Oxford dictionary. A process is series of things which are carried out in order to achieve a particular result – Collins Cobuild English Dictionary – quoted with approval in *CIT* v. *Tara Agencies* (2007) 162 Taxman 337 = 214 ELT 491 (SC).

3.5 Manufacture must be in India

Last operative word of Section 3 of Central Excise Act is that excisable goods must be manufactured or produced in India. Thus, excise levy cannot be imposed on imported goods or goods manufactured in Nepal. This is also true if goods are imported in SKD or CKD condition and they are only assembled in India, as no new product emerges - *Walchand Nagar Industries* v. *CCE* - 1995 (79) ELT 485 (CEGAT - 3 member bench order) - same view in *Indian Xerographic System Ltd.* v. *CC, Bombay* - (1995) 80 ELT 337 (CEGAT) * *CIT* v. *Telco* (1968) 68 ITR 325 (Bom).

3.6 Case law on manufacture

There is ample case law on 'manufacture'. Following is the summary of various decisions on the issue.

What is manufacture ?

- Coffee beans from raw coffee berries is manufacture.
- Crushing of limestone into lime is manufacture
- Cutting of fabrics to make bed sheets etc. is manufacture.
- Cutting of jumbo rolls of typewriter to make ribbon of standard length and winding on spool is manufacture.
- Exercise books out of paper is manufacture.
- Fixing of glass sheets on Aluminium frame is 'manufacture' as new product known as Aluminium glass panel emerges is manufacture.
- Gray fabrics by bleaching, dyeing, printing of fabric will amount to 'manufacture'.
- Gray yarn to 'dyed yarn' is manufacture as there are two separate distinct heads of tariff item
- Making masala powder is manufacture.
- Making pan masala is manufacture.
- Paddy to rice is manufacture.
- Processing of commercial plywood is manufacture.
- Raw hide and skin to dressed hide and skin is manufacture.
- Recording of cassette is manufacture.
- Ship breaking is manufacture
- Sterilization of syringes and needles and clearing is 'manufacture'
- Stitching of cloth is manufacture.
- Turmeric to turmeric powder is manufacture.
- Wheat to wheat flour is manufacture.
- Yarn to thread is manufacture.

What is not 'manufacture'

- Affixing Brand Name is not manufacture.

- Affixing sticker of manufacturer etc. on imported goods is not 'manufacture' [However, now if the product is covered u/s 4A, it may be 'deemed manufacture' as defined in Section 2(f)(iii) and excise duty may be payable. In case of imported goods, corresponding CVD may become payable].
- Annealing and pickling of stainless steel rods is not 'manufacture'.
- Blending and Packing tea is not 'manufacture. Loose tea does not lose its character as such when it is put in packets of different sizes, small or large.
- Blending of duty paid ice cream in mixer with various flavours is not manufacture.
- Branding, polishing and affixing MRP is not manufacture
- Building body on chassis of vehicle is not 'manufacture' of Vehicle [However, building body on chassis is now 'amounting to manufacture' as per note 3 to Chapter 87].
- Calendering of fabrics with plain rollers is not a manufacturing process. It is only a finishing process.
- Carding and combing does not amount to manufacture.
- Changing colour of an article is not manufacture.
- Changing engine of forklift truck (by removing imported engine and fitting indigenous engine) is not manufacture.
- Charging of dry batteries is not 'manufacture'.
- Cleaning and repairs of old ornaments is not manufacture.
- Coating is not manufacture.
- Compounding of asafoetida is not manufacture.
- Compressing and bottling gas is not manufacture.
- Concentration of product (formic acid) from 65% to 85% by removing excess water is not 'manufacture'.
- Conversion into different variety is not 'manufacture'
- Conversion of anhydrous ammonia into aqueous ammonia is not 'manufacture' - CBE&C circular No. 236/70/96-CX dated 1-8-1996.
- Conversion of marble blocks into marble slabs/tiles is not 'manufacture' as no new product emerges.
- Conversion of round bar to bright bar is not manufacture.
- Cream into butter by stirring is not 'manufacture'. When cream is left for a few days, it would automatically get converted into butter.
- Crushing of boulders into small stones is not manufacture as it retains identity as stone boulders - *CST* v. *Lal Kunwa Stone Crushers* 2000 AIR SCW 939 = AIR 2000 SC 1161 = (2000) 3 SCC 525 = 118 STC 287 = 117 ELT 279 (SC).
- Cutting and polishing of granite stones amounts to manufacture.

- Cutting and polishing of raw and uncut diamond which yields 'polished diamond' is not manufacture as 'polished diamond' is not a new article or thing.
- Cutting of jumbo rolls into small sizes does not amount to manufacture.
- Cutting, sizing of cloth into small pieces is not 'manufacture' - *Mafatlal Industries Ltd*. v. *Nadiad Nagar Palika* AIR 2000 SC 1223 = 2000 AIR SCW 889 = 117 ELT 290 (SC 3 member bench).
- De-mineralisation of river water by cation exchange for use in boiler is not manufacture.
- Diesel bus to CNG bus conversion is not 'manufacture'.
- Dilution of duty paid product by adding water is not manufacture, even if different item having different concentration is given different name.
- Doubling/twisting or multifolding of yarn is not manufacture
- Electroplating is not manufacture, as no new commodity comes into existence.
- Emptying drums in which inputs were received is not 'manufacture'. No duty can be levied on empty drums.
- Frozen foods preparation is not manufacture .
- Galvanising is not manufacture, as the processes only improve utility of material.
- Glass/glass mirror processing by process of beveling, edge polishing, sand blasting and acid frosting carried out on duty paid mirrors is not 'manufacture'.
- Gold plating of watch cases is not 'manufacture' as watch cases are marketable even without such plating.
- Grading, bleaching, drying and sorting does not amount to manufacture. – *Hansraj* v. *State of J&K* 2002 AIR SCW 3029.
- Grinding of soap-stones is not manufacture. – *CIT* v. *Premier General Traders* 2002(123) Taxman 1086 (Bom HC).
- Heat treatment is not manufacturing activity.
- Improvement/purification - Only improving quality, utility or performance of a product would not amount to manufacture, as no new product comes into existence.
- Insulating wire by coating and covering is not manufacture as no new commercially recognised article is brought into existence
- Labelling, i.e. affixing of label on ready to use product is not manufacture (unless specified as 'deemed manufacture')
- Lacquering /Metallising is not manufacture
- Laminating/metallising film is not manufacture
- Lining of pipes, i.e. fixing rubber lining on pipes and tanks and painting not amount to manufacture – *Tega India Ltd.* v. *CCE* 2004 AIR SCW 835 = 135 STC 219 = 164 ELT 390 (SC).
- Making exercise books out of paper is not 'manufacture'
- Mastication of rubber without adding any chemicals is not 'manufacture'.

- Networking of computers, i.e. - Creating computer network at customer's premises by inter-connecting duty paid computers and peripherals is not 'manufacture' - CBE&C circular No. 497/63/99-CX dated 30-11-1999.
- New model from old machine is not 'manufacture'
- Polishing and sizing of stones such as cuddapah, shahbad and marble is not manufacture.
- Powdering is not 'manufacture'.
- Powdering of old scrap tyres by crushing and making it into crump rubber is not manufacture.
- Printing a name on film/foil is not manufacture - *CC* v. *Paper Products Ltd.* 2000(115) ELT 277 = 119 STC 552 (SC).
- Printing of colour and logo done on glass bottle does not amount to manufacture - *UOI* v. *JG Glass Industries* 1998(97) ELT 5 = (1998) 2 SCC 32 = 78 ECR 761 = AIR 1998 SC 839 = 114 STC 387 = (1998) 96 Taxman 29 (SC).
- Printing on cotton fabrics is not 'manufacture'.
- Processing of tea leaves is not manufacture.
- Pulverising, cleaning and washing is not 'manufacture'
- Purification and packing of water in bottles (known as mineral water) is not 'manufacture' – *Teejan Beverages* v. *State of Kerala* (2002) 128 STC 216 (Ker HC) [However, it is 'amounting to manufacture' as per chapter note in CETA and excise duty is payable].
- Purification is not manufacture.
- Reconditioning or Repairs is not manufacture.
- Reduction in size by drawing/cold rolling – In respect of goods falling under Section XV of Central Excise Tariff, process of drawing or redrawing a rod, wire or any other similar article into wire shall amount to manufacture – Note 10 to Section XV inserted w.e.f. 9-7-2004. This Section base metals and articles of base metals like iron and steel, copper, Nickel, Aluminium, Lead, Zinc, Tin, Tungsten, Manganese, Cermets, Cobalt etc. Earlier, in many judgments, it was held that drawing to reduce size is not manufacture.
- Reduction of rods and flat/bars into smaller size is not 'manufacture' of new product.
- Re-engraving of rollers is not 'manufacture' .
- Re-flavouring of *pan masala* by adding fresh flavour is not manufacture.
- Re-packing of goods will not be 'manufacture' unless the process has been specified as 'amounting to manufacture'.
- Repairing, reconditioning, re-making or re-processing will not amount to manufacture if no new product emerges, even if some parts are inter-changed.
- Re-rubberising and relining of old and used vessels such as tanks is not manufacture.
- Retreading of old tyres is not manufacture as no new commodity comes into existence.
- Sawing of timber logs is not manufacture

- Sieving of duty paid goods does not amount to manufacture.
- Sizing of yarn is not manufacture [However, now it is 'deemed manufacture'].
- Slitting/Cutting of jumbo Rolls in smaller rolls is not manufacture. However, if new and identifiable product emerges, it will be 'manufacture'.
- Sorting, grading of fruits is not manufacture.
- Tablet from powder is not manufacture.
- Testing, inspection and packing of items manufactured by others is not manufacture.
- Upgradation/modification is not manufacture.
- Vanaspati from groundnut oil is not 'manufacture' . Vanaspati (popularly identified as 'Dalda') is hydrogenated groundnut oil. Both Vanaspati and Groundnut oil serve same purpose in cooking. The only difference is vanaspati is more stable, has better keeping quality and ease of packing and transport without leakage. 'Hydrogenated Groundnut Oil' is still 'groundnut Oil'.
- Washing coal to reduce its ash content would not amount to production or manufacture of new item
- Welding one pipe to another to get desired length is not 'manufacture'

3.7 Process 'amounting to manufacture'

Section 2(f), which defines 'Manufacture' has two deeming provisions.

Deemed manufacture is of two types –

(a) CETA specifies some processes as 'amounting to manufacture'. If any of these processes are carried out, goods will be said to be manufactured, even if as per Court decisions, the process may not amount to 'manufacture' [Section 2(f)(ii)]

(b) In respect of goods specified in Third Schedule to Central Excise Act, repacking, re-labelling, putting or altering retail sale price etc. will be 'manufacture'. The goods included in Third Schedule of Central Excise Act are same as those on which excise duty is payable u/s 4A on basis of MRP printed on the package. [Section 2(f)(iii) w.e.f. 14-5-2003].

Thus, the process may not amount to manufacture as per principles evolved by Courts, but these will be liable to excise duty if it is defined as *amounting to manufacture* under CETA, or if the product is included in Third Schedule to Act and any of specified process (like re-packing, re-labelling, alteration of retail sale price etc.) are carried out.

This is called 'deeming provision' or a 'legal fiction'. e.g. process like labelling, re-labelling, re-packing is not 'manufacture' as no new product emerges. However, it will be 'deemed manufacture' and duty will be payable if the process is specified in Central Excise Tariff as 'amounting to manufacture' in relation to any goods. This amounts to charging excise duty on product which is not really manufactured as defined by Courts.

Test of marketability still required – Even if process is 'deemed manufacture' the test of marketability is still to be satisfied. Unless goods are marketable after that process, duty cannot be levied – *CCE* v. *Coats Viyella* 2004 (167) ELT 525 (CESTAT).

Processes amounting to manufacture as per Tariff - Some processes specified as '*amounting to manufacture*' in CETA (Central Excise Tariff) are as follows –

- In case of dairy products like milk, cream, butter and cheese, labelling or re-labelling of containers or re-packing from bulk packs to retail packs or adoption of any other treatment to render the product marketable to the consumer shall amount to manufacture. [Note 5 to Chapter 4]
- In case of tea or tea waste blending, sorting, packing or re-packing into smaller containers shall amount to 'manufacture'. [Note 2 to Chapter 9] In case of coffee, tea and spices, labelling or re-labelling of containers or re-packing from bulk packs to retail packs or adoption of any other treatment to render the product marketable to the consumer shall amount to manufacture. [Note 4 to Chapter 9]
- In case of preparations of meat, fish etc.; labelling or re-labelling of containers or re-packing from bulk packs to retail packs or adoption of any other treatment to render the product marketable to the consumer shall amount to manufacture. [Note 1 to Chapter 16]
- Labelling or re-labelling of containers or re-packing from bulk packs to retail packs of *natural or artificial mineral waters* shall amount to manufacture. [Note 2 to Chapter 22]
- Labelling or re-labelling of containers or re-packing from bulk packs to retail packs of un-manufactured tobacco, cigar and cigarettes shall amount to manufacture. [Note 2 to Chapter 24]
- Labelling or re-labelling of containers or re-packing from bulk packs to retail packs of *perfumes, beauty preparations and preparations for use on the hair* shall amount to manufacture. [Note 4 to Chapter 33]
- Labelling or re-labelling of containers or re-packing from bulk packs to retail packs of soaps, waxes etc. shall amount to manufacture. [Note 6 to Chapter 34]
- Bleaching, mercerizing, dyeing, printing, twisting, texturising, doubling etc. to (a) yarn of wool [Note 3 to Chapter 51] (b) cotton fabrics [Note 3 to Chapter 52] (c) mono-filaments [Notes 3 and 4 to chapter 54] (d) synthetic woven fabrics [Note 4 to chapter 55] (e) special woven fabrics, tufted textile fabrics [Note 8 to chapter 58] (f) Knitted or crocheted fabrics [Note 4 to chapter 60] shall amount to manufacture. In *Indian Rayon* v. *CCE* 2000(119) ELT 636 (CEGAT), it was held that even if more than one process is are carried out by same manufacturer, duty is payable only once. – followed in *Textile Corporation of Maharashtra* v. *CCE* 2002(145) ELT 385 (CEGAT) – departmental appeal admitted by SC – (2003) 151 ELT A296.
- Affixing brand name, labelling or re-labelling and repacking from bulk pack to small pack of readymade garments (Articles of Apparel) is manufacture. – Note 4 to chapter 61 and Chapter 62.
- In respect of goods falling under Section XV of Central Excise Tariff, process of drawing or redrawing a rod, wire or any other similar article into wire shall amount to manufacture – Note 10 to Section XV inserted w.e.f. 9-7-2004. This Section base metals and articles of base metals like iron and steel, copper, Nickel, Aluminium, Lead, Zinc, Tin, Tungsten, Manganese, Cermets, Cobalt etc.
- In relation to the products of chapter 72, the process of drawing or redrawing a bar, rod, wire rod, round bar or any other similar article, into bright bar, shall amount to 'manufacture' [note 4 to chapter 72 w.e.f. 1-3-2006].
- Galvanising of Articles of iron and steel falling under chapter 73 is manufacture. – Note 4 to Chapter 73.
- Recording of sound or other phenomena on audio or video tapes shall amount to manufacture. [Note 7 to Chapter 85]
- Building a body or fabrication of structure on chassis shall amount to manufacture [Note 3 to Chapter 87] [Body building on chassis falls under heading 8707 and is eligible for SSI concession. The

manufacture is of 'body' and not of 'motor vehicle'].

There are about 35 such processes specified as '*amounting to manufacture*' in CETA.

Note – The words 'Labelling or re-labelling of containers or re-packing' have been placed w.e.f. 1-3-2008, vide Notification No. 11/2008-CE(NT). Earlier, the words were Labelling or re-labelling of containers or re-packing'.

Repacking and putting new MRP is manufacture – In *Cipla Ltd.* v. *CCE* 2007 (208) ELT 140 CESTAT), the assessee brought back medicines from depot. He took Cenvat credit of the duty paid on medicines brought from depot. These were de-foiled, re-foiled and new (lower) MRP was put and paid duty on new MRP. It was held that this is 'manufacture' and Cenvat credit can be availed of duty paid on medicines brought from depots – relying on *Macleods Pharmaceuticals* v. *CCE* 2004 (170) ELT 411 (CESTAT).

When 'repacking and labelling' will amount to manufacture

In some cases, goods are bought in bulk and sold in retail. This will not amount to 'repacking'. Generally, the expression 'packing' is considered as a package containing pre-packed commodity and quantity of the product contained therein is also pre-determined. - . - Activity of simply transferring material from one container to another may not come under the description 'repacking and labelling' - . - . - However, facts should be ascertained and decision should be taken based on all relevant facts- CBE&C circular No. 342/58/97-CX dated 8.10.1997.

Re-packing only if packing from bulk pack to retail packs

In *Ammonia Supply Co*. v. *CCE* 2001(131) ELT 626 = 44 RLT 271 (CEGAT), it was held that repacking/re-labelling amounts to manufacture only if goods are packed from bulk packs to retail packs. Obtaining ammonia gas in tanker can never be termed as brought in bulk packs. 'Packing' is a package containing pre-packed commodity and the quantity contained therein is also pre-determined. The packages also contain information such as name of the manufacturer, quantity, value and other details of the product. These conditions are not satisfied in respect of gas received in tanker. Accordingly, activity of filling in small container from bulk container namely tanker is not 'deemed manufacture'. The cylinders carried the mark of manufacturer of cylinder (and not of the assessee). It was held that putting manufacturer's mark on the cylinder is not 'labelling'. 'Labelling' is synonymous to symbol, monogram, signature including the words or writing for the purpose of indicating connection between goods and the manufacturer.

3.8 Deemed manufacture in case of goods covered under MRP provisions

As per Section 2(f)(iii) effective from 14-5-2003, 'manufacture' includes any process, which, in relation to goods specified in Third Schedule to Central Excise Act, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on the container or adoption of any other treatment on the goods to render the product marketable to consumer will be 'manufacture'.

Goods included in Third Schedule - The goods included in Third Schedule of Central Excise Act are same as those on which excise duty is payable u/s 4A, i.e. on basis of MRP printed on the package. Thus, in case of goods on which duty is payable on basis of MRP, if any of the process as specified (like labelling, re-labelling, repacking in unit container, alteration of MRP etc.), it will be 'manufacture' and duty will become payable.

Sometimes, a manufacturer of goods (which are covered under MRP provisions) clears goods from factory in bulk without putting MRP at the time of clearance. Duty is paid on basis of Section 4. The goods are packed and labelled and MRP is put either by the buyer who buys the goods or in some godown or depot or C&F Agent of the manufacturer. Now, the process carried out by the buyer or by C&F Agent or at such depot or godown of manufacturer will be 'manufacture'. Such depot/buyer/C&F Agent/godown will have to be registered under Central Excise as 'manufacturer'. It will have to pay duty on the basis of MRP, but will get Cenvat credit of duty paid at the time of clearance from the factory.

Though the Section provides that alteration of Retail Sale Price shall be 'deemed manufacture', Rule 23(7) of Standards of Weights and Measures (Packaged Commodities) Rules, 1997 reads as follows – 'The manufacturer/packer shall not alter the price on wrapper once printed and used for packing'. - - Thus, in any case, alteration of MRP printed on wrapper is not permissible.

Meaning of 'Unit Container' **-** There seems to be no general definition of the term 'unit container'. However, this word has been used at many places in Central Excise Tariff.

For example, Chapter Note 3 of Chapter No. 4 states as follows – 'In this chapter, the expression 'unit container' means a container, whether large or small (for example - tin, can, box, jar, bottle, bag or carton, drum, barrel or canister), designed to hold a predetermined quantity or number'**.**

3.9 Duty liability on manufacturer

The question 'who is manufacturer' is important in Central Excise, since the liability to pay duty is basically on 'Manufacturer or producer' (except in few cases). Duty cannot be recovered from his purchaser.

Section 2(f), which defines the word 'manufacture', after defining the word '*manufacture*' states that "the word manufacturer shall be understood accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account."

The definition is not exhaustive but inclusive. The definition enlarges definition of 'manufacturer' to two categories of persons, besides actual manufacturers, namely :

(a) Persons who get the goods manufactured through hired labour.

(b) Persons who engage in manufacture of goods on their own account. - - These may be termed as 'deemed manufacturers'.

The definition of 'manufacturer' u/s 2(f) is not exhaustive. Hence, the word 'Manufacturer' has to be understood in its natural meaning.

'Manufacturer' is a person who actually manufactures or produces excisable goods, i.e. one who actually brings into existence new and identifiable product. Raw material supplier or brand name owner is not 'manufacturer'.

Person who transforms commodity into another commodity having a distinct name and character is the manufacturer. – *Pearl Soap Co.* v. *CCE* (2001) 138 ELT 1317 (CEGAT).

There can be only one manufacturer – There cannot be two manufacturers for same excisable product – *Techmesh Products* v. *CCE* 2003 (158) ELT 96 (CESTAT).

Manufacture/fabrication at site of buyer by independent contractor

In *Basti Sugar Mills* v. *CCE* 2000(115) ELT 626 (CEGAT), it was held that an independent contractor who

assembles the parts in a factory (assembly of crane in this case) will be the manufacturer and not the owner of factory. [In this case, contractor assembling the parts was independent contractor appointed by supplier of parts of crane. Obviously, he was not 'hired labour' of the factory owner.]

Manufacture through hired labour

A person will be treated as 'Manufacturer' if he engages 'hired labour' who may be Employee or Contractor for manufacture of excisable goods. A hired labour is one who hires himself out to work for and under control of another for wages. However, if he undertakes manufacture on own account, he cannot be said to have hired himself out to another even if he manufactures for other - *Techma Engineering Enterprise* v. *CCE* - 1987 (27) ELT 460 (CEGAT).

If there is master-servant relationship between the raw material supplier and the job worker, the raw material supplier will be the 'manufacturer' - *Maruti Udyog Ltd*. v. *CCE* 1998(101) ELT 675 (CEGAT).

Contractor supplying labour or doing work in the premises of Manufacturer

If contractor supplies labour and goods are manufactured in the premises of manufacturer with his machinery, the Contractor cannot be treated as 'Manufacturer'. In *S M Auto Engg Pvt. Ltd*. v. *CCE* 1999(108) ELT 738 (CEGAT), the appellant had entered into labour contract with buyer for carrying out assembly in factory of buyer, out of raw material supplied by the buyer. He was paid labour charges on piece rate basis. It was held that appellant is not the manufacturer as it is only contract for labour supply.

Raw material supplier is not the manufacturer

It is common in Industry to supply raw material to a Job Worker or Processor and get the goods manufactured from him in his factory e.g. Automobile Manufacturers like Bajaj, Maruti, Mahindra, Premier Automobiles or Hindustan Motor very often get many parts manufactured from outside on 'Job Work' basis. In such cases, they (Maruti, Bajaj etc.) will not be treated as 'Manufacturer' even if the Raw Material is supplied by them and right of rejection is retained by them.

In *Ujagar Prints* v. *UOI* - AIR 1989 SC 516 = 42 Taxman 151 (SC) = 1989 (39) ELT 493 (SC) = (1989) 74 STC 401 (SC) = (1989) 3 SCC 488 = 179 ITR 317 (SC) (5 member constitution bench), it has been held that excise duty is on 'manufacture and production of goods' and liability to pay duty is not dependent upon whether the manufacturer is owner or not.

In *CCE* v. *M M Khambhatwala* 84 ELT 161 = 14 RLT 624 = 1996 AIR SCW 2633 = AIR 1996 SC 3319 = (1996) 5 SCC 100, the appellant was supplying raw material and the household ladies were manufacturing 'dhoop, agarbatti' etc. in their houses. The final product was directly sold from premises of the ladies and was not brought to the factory of appellant. There was no supervision over their work by the appellant. Payment to the ladies was on basis of number of pieces manufactured. It was held that the household ladies are the manufacturers and raw material supplier is not the manufacturer. The ladies cannot be termed as 'hired labour'.

When raw material supplier will be manufacturer

Raw material supplier can be treated as manufacturer in following situations :

- Relation between manufacturer and supplier are on 'agency' basis - *Shree Agency* v. *S K Bhattacharjee* - AIR 1972 SC 780 = 1977 (1) ELT J168 (SC)
- Person employed by raw material supplier to manufacture the goods and return it to him - *Bajrang*

Gopilal Gajabi - 1986 (25) ELT 609 (SC) = 1986 (10) ECC 160 SC.

- Job workers are not manufacturing on their own account and they are dummy or bogus concerns and the arrangement is made to evade duty - *B S Rajasekar* v. *CCE* - 1993 (63) ELT 369 (CEGAT)
- There is no principal to principal relationship and job worker functions like a hired labour - *Light Metal Extrusion Pvt. Ltd.* v. *CCE* 1997(89) ELT 581 (CEGAT) * *Ekbote InterioRs.* v. *CCE* (2001) 135 ELT 751 (CEGAT) * *Interspace* v. *CCE* 2003 (157) ELT 221 (CESTAT). - - Raw material supplier supervises the work and employs labour - *Tansi* v. *CCE* 1999(111) ELT 645 (CEGAT).
- Labour doing work allotted to them under supervision and control of principal. – *Interscape* v. *CCE* (2001) 135 ELT 942 (CEGAT).

Brand Owner is not the Manufacturer

Some large units get their goods manufactured from others under their Brand Name, instead of manufacturing it themselves. They usually control quality and may even supply the design. e.g. Bajaj Electricals get many electrical goods manufactured from others; Bata procures some foot-wear from others and supplies under its brand name. Some large pharmaceutical companies also get the goods manufactured from small scale units under their brand names. In such cases; Bajaj, Bata or the Pharmaceutical Companies will not be treated as 'Manufacturer' even if they exercise quality control, or allow use of their brand name, or provide financial help to the small manufacturers, or even supply the raw material, if their relation with the manufacturer is '*Principal to Principal'* basis.

Supreme Court in *Cibatul Ltd.* v. *UOI* - 1978 (22) ELT 302 (SC) - have held that if the goods are produced with Customer's brand name under his quality control, it does not mean that the Customer is the Manufacturer. Same view was reaffirmed in *Jt. Secretary to Government of India* v. *Food Specialities Ltd.* - 1985 (22) ELT 324 (SC).

Goods manufactured under franchise - Sometimes, a common brand name is used by many manufacturers under a 'Franchise Agreement' *e.g.* '*Coca Cola*' or '*Pepsi*' often supply the concentrate to bottlers and the cold drink is manufactured by an independent bottler, under 'Franchise Agreement'. Cold drink is directly sold by the bottler. In such cases, the independent bottler will be the manufacturer and *not* 'Coca Cola' or 'Pepsi'.

STUDY NOTE 4

Procedures in Excise

4.1 Overview of procedural provisions

Some general provisions in respect of procedures are as follows –

Private records by assessee – Earlier, rules specified various records to be maintained in prescribed formats. Now, most of the 'statutory records' have been abolished, except a few like records by EOU. In some cases, like Daily Stock Account (DSA) or Cenvat credit, requirements of records have been prescribed but format is not prescribed. However, this does not mean that no records are required. It only means that assessee can maintain his own private records as long as the requirements as specified in the rules are satisfied. The records should be kept in the factory to which they pertain. The records should be preserved for five years immediately after the financial year to which such records pertain. Non maintenance of records as specified in rules will mean contravention of specified rules and will attract penal action. - *Chapter 6 Part I Paras 2.1 and 2.4 of CBE&C's CE Manual, 2005.*

Self pre-authentication – The DSA and even other records pertaining to Central Excise shall be pre-authenticated by assessee on first and last page of the book/register. - *Chapter 6 Part I Para 2.1(v) and (vi) of CBE&C's CE Manual, 2005.* - - Naturally, such pre-authentication is possible only if records are kept in book form. Pre-authentication is not possible if (a) Records are maintained on computer (b) Records are maintained in loose leaf form. Note that there is no statutory requirement that the records must be kept in book form only.

Invoice issued by assessee is also required to be pre-authenticated as per Rule 11(5) of Central Excise.

Submission of list of records – Every assessee and first stage dealer and second stage dealer should submit a list in duplicate, of all records prepared or maintained by him for the following, as per Rule 22(2) –

(i) all records prepared and maintained for accounting transaction in regard to receipt, purchase, manufacture, storage, sale or delivery of goods including inputs and capital goods

(ii) All the records prepared and maintained for accounting of transaction in regard to payment of input services and their receipt and procurement and

(iii) All the financial records and statements including trial balance or its equivalent.

Submission of records – The assessee, first stage dealer and second stage dealer is required to submit to his range officer duly empowered by Commissioner or audit party or audit persons of C&AG the following, for scrutiny –

(a) Records maintained or prepared in terms of Rule 22(2), as described above

(b) Cost Audit Report u/s 233B of Companies Act and

(c) Income Tax Audit Report u/s 44AB of Income Tax Act [Rule 22(3) of Central Excise Rules].

Authorising a person to sign excise records - Excise records should be signed by owner or a person authorised by him. In case of partnership, such authority may be given by any partner. In case of company, such powers may be conferred by a proper Board resolution. If Managing Director/Executive Director is authorised by Board to further delegate his powers, he may do so. Different persons may be authorised for various purposes. No particular form of authorisation has been prescribed. A simple letter with copy of Board resolution is enough.

Electronic maintenance of Excise records – Most of the statutory registers have been scrapped by department, but records containing required details are required to be maintained. Records can be maintained on

computer without any permission from department. Standard softwares are available. However, each industry has its own special features and some customisation is usually necessary. This should be kept in mind while selecting readymade software.

Declarations, intimations by fax, e-mail, post permitted - All declarations, intimations etc. when sent by FAX, e-mail, post or courier shall be accepted by department. Appointments can be given on e-mail and queries can be accepted and replied on e-mail. E-mail connectivity should be provided to all field formations. - *Chapter 1 Part II Para 3.4 of CBE&C's CE Manual, 2005*. [Note that all earlier provisions regarding obtaining 'dated acknowledgement' have been removed in new rules w.e.f. 1.7.2001].

Large Tax Payers Units

In many countries, special systems have been developed to administer large tax payers The international trend is to establish full fledged LTU (Large Tax Payers Units) that are responsible for most of tax administration functions elating to taxpayer, including collection, enforcement of tax arrears and audit. Many Asian countries have established such LTU.

It is proposed to establish LTU (Large Tax Payers Units) so that they can get all facilities of tax payments, filing of returns and documents, assessments, rebates/refunds, audit, recovery and refunds at one place, irrespective of geographical location of their units. This is to ensure uniformity in matters of tax/duty determination and quick actions.

It will be a 'single window clearance' for all matters relating to central excise, income tax, corporation tax and service tax. LTU will provide single point interface with tax administration to large tax payers

LTU will be headed by Chief Commissioner (either from CBDT or CBEC). Each large tax payer will be assisted by Client Executive (Additional/Joint/ Asstt Commissioner) from income tax or excise department.

It is voluntary for a tax payer to join LTU. He has to make application for that purpose and give consent to join LTU in form prescribed.

Bangalore LTU has become functional w.e.f. 1-10-2006. Chennai LTU has become operational w.e.f. 1-12-2007.

Definition of large tax payer - A taxpayer who is registered under Central Excise or Service tax provisions and is an assessee under Income Tax Act and has PAN number, and who fulfils prescribed conditions is LTU [Rule 2(ea) of Cenvat Credit Rules]. He is eligible as LTU if has paid excise duty or service tax in cash (current account) of Rs. five crore or more or who has paid advance tax/corporation tax of more than Rs. ten crore [condition 2 of notification No. 20/2006-CE(NT) dated 30-9-2006].

4.2 Procedures in Central Excise

Some procedures are basic, which every assessee is required to follow. Besides, some procedures are required to be followed as and when required.

Basic Procedures

(1) Every person who produces or manufactures excisable goods, is required to get registered, unless exempted. [Rule 9 of Central Excise Rules]. If there is any change in information supplied in Form A-1, the same should be supplied in Form A-1.

(2) Manufacturer is required to maintain Daily Stock Account (DSA) of goods manufactured, cleared and in stock. [Rule 10 of Central Excise Rules]

(3) Goods must be cleared under Invoice of assessee , duly authenticated by the owner or his authorised agent. In case of cigarettes, invoice should be countersigned by Excise officer. [Rule 11 of Central Excise Rules]

(4) Duty is payable on monthly basis through GAR-7 challan/Cenvat credit by 5th/6th of following month, except in March. SSI units have to pay duty on monthly basis by 15th/16th of following month. Assessee paying duty through PLA more than Rs. 50 lakhs per annum is required to make e-payment only [Rule 8].

(5) Monthly return in form ER-1 should be filed by 10th of following month. SSI units have to file quarterly return in form ER-3. [Rule 12 of Central Excise Rules] - - EOU/STP units to file monthly return in form ER-2 – Rule 17(3) of CE Rules

(6) Assessees paying duty of Rs. one crore or more per annum through PLA are required to submit Annual Financial Information Statement for each financial year by 30th November of succeeding year in prescribed form ER-4 [Rule 12(2) of Central Excise Rules].

(7) Specified assessees are required to submit Information relating to Principal Inputs every year before 30th April in form ER-5, to Superintendent of Central Excise. Return for 2004-05 was required to be submitted by 31-12-2004 [Rule 9A(1) to Cenvat Credit rules inserted w.e.f. 25-11-2004]. Any alteration in principal inputs is also required to be submitted to Superintendent of Central Excise in form ER-5 within 15 days [Rule 9A(2) to Cenvat Credit rules inserted w.e.f. 25-11-2004].

(8) Assessee who is required to submit ER-5 is also required to submit monthly return of receipt and consumption of each of Principal Inputs in form ER-6 to Superintendent of Central Excise by tenth of following month [Rule 9A(3) to Cenvat Credit Rules inserted w.e.f. 25-11-2004]. *Only those assessees who are required to submit ER-5 return are required to submit ER-6 return.*

(9) Every assessee is required to submit a list in duplicate of records maintained in respect of transactions of receipt, purchase, sales or delivery of goods including inputs and capital goods, input services and financial records and statements including trial balance [Rule 22(2)].

(10) Inform change in boundary of premises, address, name of authorised person, change in name of partners, directors or Managing Director in form A-1. [*Refer* Instructions given below form A-1]

These are core procedures which each assessee has to follow. There are other procedures which are not routine. The non-core procedures are as follows -

(a) Export without payment of duty or under claim of rebate [Rules 18 and 19 of Central Excise Rules]

(b) Receipt of goods for repairs/reconditioning [Rule 16 of Central Excise Rules]

(c) Receipt of Goods at concessional rate of duty for manufacture of Excisable Goods.

(d) Payment of duty under Compounded Levy Scheme

(e) Provisional Assessment [Rule 7 of Central Excise Rules]

(f) Warehousing of goods.

(g) Appeals and settlement.

The core procedures which each assessee has to follow are discussed in this chapter. There are other procedures which are not routine. These are discussed in subsequent chapter. Procedures related to Cenvat are discussed in chapter on Cenvat**.**

Sources of prescribed procedures

Various sources of procedures are as follows:

(a) Procedures prescribed by Rules/notifications - Central Excise Act has delegated powers to Central Government for making rules. These rules and notifications issued under the rules prescribe various records and procedures. These are statutory and have full legal backing.

(b) Central Excise Manual/Trade Notices/public notice under delegated powers – CBE&C has issued CE Manual, 2005, which contain provisions in respect of various procedures. The instructions in the CE Manual are issued under Rule 31 of CE Rules and have statutory significance. [Similarly Customs Manual, 2001 was released by CBE&C in September, 2001. It is not stated that the Customs Manual is issued under any provision of Customs Act or Rules. However, normally, instructions in Customs Manual, 2001 should be followed].

Commissioner can also issue supplementary instructions under Rule 31 of CE Rules.

(c) Administrative Instructions - Occasionally, administrative instructions are issued by department prescribing certain procedures. Technically, these are not binding as these are not statutorily prescribed.

4.3 Registration of factory/warehouse

As per Section 6 of CEA, registration is required to be obtained by any prescribed person who is engaged in

(a) every manufacturer or producer of excisable goods i.e. goods specified in First or Second Schedule to Central Excise Tariff Act and

(b) wholesale purchase or sale (whether on his own account or as broker or commission agent) or storage of any specified goods included in First or Second Schedule to Central Excise Tariff Act.

As per Rule 9 of Central Excise Rules, every person who produces, manufactures, carries on trade, holds private store-room or warehouse or otherwise uses excisable goods shall get registered. The Rule also authorises Board to issue notifications

(a) specifying conditions and procedures for registration and

(b) granting exemption to person or class of persons from provisions of registration.

Registration is compulsory as both Section 6 of CEA and Rule 9(1) use the words '***shall***'. It has been clarified that registration granted in earlier old Rule 174 will be valid under new rules.

Application for registration should be made in prescribed form issued vide notification No. 35/2001-CE(NT).

The requirements for registration, as contained in Notification No. 35/2001-CE(NT) are –

- Separate registration is required for each separate premises, if person has more than one premises.
- If business is transferred, fresh registration has to be obtained by the transferee. Thus, registration is not transferable.

- Registration certificate *shall* be granted within seven days of receipt of *duly completed* application. Registration Certificate will be issued in prescribed form 'RC'.
- Change in constitution of partnership firm or Company should be intimated within 30 days of change. In case of such change, fresh registration is not required.
- If the manufacturer ceases to carry on operations for which he is registered, he should apply for de-registration.
- Registration can be revoked or suspended if the holder of registration or any person in his employment commits breach of any of the provisions of Central Excise Act or Rules or has been convicted under Section 161 of Indian Penal Code.
- If there is any change in information given in the form, the change should be informed in the form itself.

Registration of Dealers - As per Cenvat Credit Rules, dealers/importers can issue invoices for Cenvat purposes, i.e. buyer can avail Cenvat on basis of such invoices. Dealers who intend to issue Cenvatable Invoices need registration. Other Dealers (i.e. those who do not intend to issue Cenvatable Invoice) are exempt from registration.

Penalty for non-registration - Manufacture without applying for registration is an offence under Rule 25(1)(c) of Central Excise Rules and penalty upto duty of contravening goods or Rs. 10,000 whichever is higher can be imposed. In addition, contravening goods can be confiscated. It is also an offence under Section 9 of CEA and imprisonment upto seven years (minimum 6 months) can be imposed.

Procedure for obtaining registration.

Procedure for registration has been prescribed vide CBE&C circular No. 662/53/2002-CX dated 17-9-2002 and notification No. 35/2001-CE(NT) dated 26-6-2001.

Application for registration in prescribed A-1 form duly completed and signed should be submitted in office of jurisdictional Assistant/Deputy Commissioner in duplicate. In case of EOU located in port towns, application should be submitted to DC/AC Customs, who is administrative in-charge of the EOU.

EOU units procuring goods from DTA or supplying goods to DTA are required to be registered. EOU unit having no inter-linkage with domestic economy through sale or purchase of goods need not register. [There will be hardly such a unit]. Unit in SEZ is not required to be registered under Central Excise.

Application should be accompanied by self-attested copy of PAN issued by Income Tax department. If PAN is not available, copy of application made for PAN should be submitted. Temporary 15 digit registration number can be issued which will later be converted into permanent number based on PAN.

The application will be scrutinized by inspector in the office of AC/DC and if found in order, it shall be fed into computer through website SACER (System for Allotment of Central Excise Registration). Registration Certificate bearing the 15 digit PAN based registration number will be generated by computer system, which will be delivered to assessee on the spot. Registration Certificate should be ready within 30 minutes on completion of data entry.

After grant of registration certificate, original copy will be retained by divisional office and duplicate copy will be sent to Range Superintendent for *post facto* verification. The Range Officer and Sector Officer (i.e. Superintendent and Inspector) shall verify the declared address and premises within 5 working days. If

found in order, it will be certified on the duplicate copy and sent to Divisional Office for record. Name of officer doing verification and date of verification will be entered into system.

The boundary of registered premises should be indicated in the application form. [Earlier, it was required to submit a ground plan. Now, as per revised application form A-1, submission of ground plan is not required]

It is envisaged that registration number shall be given through computer system within 30 minutes. As per Rule 11(2) of Central Excise Rules, invoice for clearance of goods shall indicate registration number of assessee. Since the registration number is to be given immediately on submission of application and hence clearances can start after submission of application form in form A-1.

Excise Registration Number – The excise registration number is a 15 digit code, given on following basis.

First 10 characters are Permanent Account Number (PAN) allotted by income tax department. Next two characters would be 'XM' if the assessee is manufacturer or registered warehouse and 'XD' if he is registered dealer. This will be followed by 3 character numeric code - 001, 002, 003 etc.

Assessee should mention the registration number in his Invoice, GAR-7 challans etc. Some assessees were given 10 digit ECC code. This must be got converted into 15 digit code latest by 1.4.2002.

Registration of different portions of same factory - Often a factory has different portions located in adjoining premises, or premises separated by road, railway line or canal. In such case, Commissioner can allow single registration, subject to proper accountal of movement of goods from one premise to other and other conditions and limitations as he may specify. - Para 3 of notification No. 36/2001-CE(NT) dated 26.6.2001.

Change in details to be submitted in form A-1 – The application form contains various details. Major among them are –

(a) Legal name of business and address

(b) Boundaries of premises to be registered

(c) Property holding rights

(d) Estimated investment in land, plant and machinery

(e) Address of HO

(f) Name of authorised person/s

(g) Business Transaction Numbers obtained from other Government Agencies

(h) Details of proprietor/partners/directors and Managing Director

(i) Major excisable goods manufactured (i) Major excisable goods used.

It is clarified that application form A-1 should be used to communicate changes to department in respect of changes in this information. [There are details in respect of e-mail address, phone numbers, investment, products, inputs etc. There will be frequent changes in these details. It will not be possible to inform in form A-1 if there are changes in these minor particulars. However, major changes should be informed].

Exemption from registration

As per Rule 9 of Central Excise Rules, every person who produces, manufactures, carries on trade, holds private store-room or warehouse or otherwise uses excisable goods shall get registered.

Each manufacturer, *unless exempted from provisions of registration,* has to obtain registration, *even if he is exempt from duty*. Exemption from excise duty does not mean automatic exemption from registration. - *Eagle Flask* v. *CCE* 1998(104) ELT 384 (CEGAT) .

Rule 9(2) of Central Excise Rules authorises Board to grant exemption from registration in certain cases. Under these powers, Notification No. 36/2001-CE(NT) grants exemption from registration. Following are exempt from registration under Central Excise -

(i) Persons who manufacture excisable goods which are unconditionally exempt from excise duty

(ii) SSI units availing exemption based on value of clearance, whose turnover is less than the SSI exemption limit.

(iii) Person getting goods manufactured from others on his own account, if he authorises actual manufacturer to pay excise duty

(iv) Persons manufacturing Excisable goods under Customs Warehousing Procedures, if all their products are exported

(v) Person who carries on wholesale trade or deals in excisable goods who does not issue Cenvatable Invoice i.e. who is not a registered dealer.

(vi) Users of excisable goods

(vii) A unit in SEZ.

When manufacturer is completely exempt from duty - If products of a manufacturer are completely and unconditionally exempt from duty, he is required to file a declaration in prescribed form to CE authorities. Mercifully, such declaration is required to be filed only once and not every year. [*Under old provisions, such declaration was not required*].

Exemption from registration if goods conditionally exempt - Some goods are exempt on basis of value of clearances e.g. goods manufactured by small scale units are exempt upto turnover of Rs. 150 lakhs. Such units are also exempt from registration. An SSI unit has to submit a declaration in prescribed form, only in cases where its turnover is more than 'specified turnover' of Rs. 90 lakhs. If clearances are more than 'specified turnover' (Rs. 90 lakhs), a declaration has to be submitted. However, they do not have to register with excise authorities. They do not have to follow any excise procedures. *Such declaration has to be filed only once and not every year.* SSI units whose clearances are less than Rs. 90 lakhs in a financial year are not required to submit any declaration. While calculating limit of Rs. 90 lakhs, export turnover is not required to be considered, as the limit of Rs. 90 lakhs is only in respect of clearances for home consumption.

Exemption if goods got manufactured from others - If a person gets goods manufactured *on his account* from others, he is the 'manufacturer' and has to obtain registration. However, he can be exempted from registration if

(a) He authorises actual manufacturer to comply with all excise procedural formalities

(b) Agrees to furnish information regarding selling price for determination of Assessable Value.

Wholesale and retail Traders and Dealers - Persons carrying on wholesale trade or Dealers in Excise require registration only if they intend to issue Cenvatable Invoice. Otherwise, they are exempt from registration.

Unit in SEZ - Unit in SEZ is not required to be registered under Central Excise.

Surrender, suspension or revocation of registration certificate **-** Registered person is required to apply for de-registration if he ceases to carry on operation for which he is registered. He has to apply in form Annexure III to Notification No. 35/2001-CE(NT) dated 26-6-2001 and surrender original registration certificate. - *Chapter 2 Para 6(6) of CBE&C's CE Manual, 2005.*

As per the form, he has to declare that that no Government dues are against him and no demand is pending against him under Central Excise Act and Rules as on date of surrendering the Registration certificate. Thus, if some demands are pending he may not be de-registered.

4.4 'Factory' under Central Excise

Section 2(*e*) of Central Excise Act states that 'factory' means any premises, including the precincts thereof, wherein or in any part of which, excisable goods other than salt are manufactured; or wherein or in any part of which any manufacturing process connected with production of these goods is being carried on or is *ordinarily* carried on.

Thus, whole premises will be 'factory' if in any of its part, excisable goods are manufactured or manufacturing process connected with production is carried out.

Two units within the same premises is one 'factory' – *Reliance Industries* v. *CCE* (2007) 215 ELT 413 (CESTAT).

The word 'ordinarily' imply that if some manufacture is carried out in emergency at a place, it will not be 'factory'. Factory need not be registered under Factories Act or any other Act. Thus, even if manufacturing is carried out in a house, it will be treated as 'factory'.

Cenvat allowed only even if inputs used outside factory but Capital Goods should be used within factory - Cenvat credit is allowed only if capital goods are used within the factory as defined in Section 2(e). Hence, definition of 'factory' is very important for Cenvat purposes. However, inputs can be used outside the factory also.

4.5 Storage and Accounting of final products

Since excise is a duty on manufacture of goods, duty liability is fastened as soon as goods are manufactured. However, under Rule 4(1) of Central Excise Rules, goods cannot be removed from the place they are produced or manufactured without payment of duty. Thus, finished goods can be stored in place of manufacture without payment of duty. This only defers the liability till clearance of goods from factory.

There is no time limit within which goods must be removed from the place of manufacture or production (that time it was store room). Duty is payable only when goods are removed and hence duty cannot be demanded in respect of goods accounted for and lying in the store room.

Daily Stock Account of manufactured goods **-** A daily stock of goods manufactured or produced has to be maintained by every assessee. [Rule 10(1) of Central Excise Rules].

The records should be maintained on daily basis, in a legible manner, indicating particulars regarding

(a) Description of goods manufactured or produced

(b) Opening Balance

(c) Quantity produced or manufactured

(d) Inventory (i.e. stock) of goods

(e) Quantity Removed

(f) Assessable Value

(g) Amount of duty payable

(h) Particulars regarding amount of duty actually paid [Rule 10(1)].

The first page and last page of such account book shall be duly authenticated by the producer or manufacturer or his authorised agent [Rule 10(2)]. All such records shall be preserved for 5 years [Rule 10(3)].

Entry once a day – Entry of production should be on 'daily basis'. That means there should be one entry at the end of day, and not several entries for the same day. When day's production is going on, it is required to be entered only at end of the shift.

Assessees working in three shifts - In case of assessees working in three shifts, their 'day' extends beyond the normal office working hours They can enter fully manufactured goods in daily stock account (that time RG-1 register) before completion of first shift of the next 'day'.

Storage outside the factory without payment of duty – Normally, goods can be cleared from factory only after payment of duty or to another warehouse without payment of duty (in cases where warehousing is permitted). However, in exceptional cases having regard to nature of goods and shortage of storage premises of the manufacturer where goods are made, Commissioner can permit storage of goods in any other premises outside the factory without payment of duty. Commissioner can specify conditions while giving such permission. [Rule 4(4) of CE Rules].

Storage of inputs outside the factory – Inputs received under Cenvat can be stored outside with permission.

Penalty for not maintaining records - Not accounting for excisable goods manufactured, produced or stored by assessee is an offence under Rule 25(1)(b) of Central Excise Rules. Penalty upto duty payable on goods can be imposed and offending goods can be confiscated.

As per Section 110(1) of Customs Act (which is made applicable to Central Excise), goods liable to confiscation can be seized by proper officer.

4.6 Invoice for removal of final products

Rule 11(1) of Central Excise Rules provides that excisable goods can be removed from factory or warehouse only under an 'Invoice' signed by owner or his authorised agent. In case of cigarettes, invoice shall be counter-signed by Inspector.

As per Rule 11(2) of Central Excise Rules, Invoice shall contain –

(a) Registration Number

(b) Address of jurisdictional Central Excise Division (added w.e.f. 1-4-2007).

(c) Name of consignee

(d) Description and classification of goods

(e) Time and date of removal

(f) Mode of transport and vehicle registration number

(g) Rate of duty

(h) Quantity and Value of goods

(i) Duty payable on the goods

(j) In case of a proprietary concern or a business owned by Hindu Undivided Family (HUF), the name of the proprietor or Hindu Undivided Family, as the case may be, shall also be mentioned in the invoice (inserted w.e.f. 25-1-2008)

[Obviously, other details like name and address of assessee and consignee should be mentioned. 'Mode of transport and vehicle registration number' have been added w.e.f. 28-9-2004].

Serial numbered - Invoice should be serially numbered. Earlier Rule provided for 'Printed Serial Number'. Now, the word 'printed' has been removed. However, the serial number can be given either by printing or by franking machine. Hand written serial numbers shall not be accepted.

New serial number from 1st April - The serial number should start from 1st April and will continue for the whole financial year. - *Chapter 4 Part I Para 3.1 of CBE&C's CE Manual, 2005.*

Invoice in triplicate with suitable marks - Invoice should be in triplicate and should be marked as follows

(*i*) Original shall be marked 'ORIGINAL FOR BUYER'

(*ii*) Duplicate copy shall be marked 'DUPLICATE FOR TRANSPORTER'

(*iii*) Triplicate shall be marked 'TRIPLICATE FOR ASSESSEE'.

Additional copies of Invoice – Assessee can make more copies of invoice for other requirements. These should be clearly marked as 'NOT FOR CENVAT PURPOSES'.

Serial numbers to be informed - Before making use of the invoice book, serial numbers shall be intimated to Range Superintendent. It is not necessary to obtain dated acknowledgement. Hence, intimation though post, e-mail, fax or hand delivery is sufficient.

One set of invoice book at a time, but separate series for export permitted - There should be only one invoice book in use at a time. Separate sets of invoices can be maintained with different serial numbers, with permission of Assistant/Deputy Commissioner. He can permit use of more than one invoice books of each type in special circumstances of each case. The Invoices should have different numeric serial numbers for different sets.

Pre-authentication of Invoice - Each foil of the Invoice shall be pre-authenticated by the assessee - by owner, working partner, Managing Director or Secretary or any person duly authorised for this purpose, before being brought into use. [Rule 11(5) of CE Rules].

Provisions in respect of computerisation of Invoices - Computerisation of Invoices is freely permitted and no permission is required. If running stationary is used, the stationary should be pre-printed with distinctive names and marks of the assessee. After invoices are prepared, triplicate copy shall be retained in bound book form. - *Chapter 4 Part I Para 5.4 of CBE&C's CE Manual, 2005.*

Cancellation of Invoices - It may happen that despatch is cancelled for any reason after an invoice is prepared. In such cases, assessee should keep the cancelled copies for record purposes, as these are

serially numbered and should be accounted for. Intimation of cancellation of invoice should be sent to Range Superintendent on same day if possible. In exceptional circumstances, intimation can be sent next day. Original copy of cancelled invoice should be sent along with the intimation. Triplicate copy should be retained for production when required by audit party or excise officers - *Chapter 4 Part I Para 12.1 of CBE&C's CE Manual, 2005.*

Supplementary Invoice for differential duty - Assessee may have to pay differential duty as his assessment was provisional or he got price escalation from buyer later or duty was short paid through mistake or for any other reason. Often buyer grants price rise after negotiations etc. with retrospective effect. In such cases, differential duty is paid by way of supplementary invoice at a later date.

In such cases, he has to pay differential duty by preparing supplementary invoice. Buyer can avail Cenvat credit on basis of such supplementary invoice, except when such differential duty payment was on account of fraud, suppression of facts, collusion or wilful misstatement. [Rule 9(1)(b) of Cenvat Credit Rules].

4.7 Relevant Date for determination of duty and tariff valuation

Rule 5 of Central Excise Rules provides that rate of duty and tariff valuation applicable for excisable goods shall be decided as follows :

Date of actual removal from factory or warehouse – Duty will be payable at rate and valuation as applicable at the time of actual removal from factory or warehouse, except in case of khandsari molasses.

Thus, if goods are manufactured and stored in store room, and if subsequently duty rate is enhanced or value is enhanced by increase of price, duty will be payable at the rate and value prevalent on the date of removal will apply. In case goods were allowed to be stored in a warehouse, duty is payable at rates and value on date of removal from warehouse.

Date in case of khandsari molasses – Rate of duty applicable in case of khandsari molasses shall be the rate in force on date of receipt of such molasses in the factory of the procurer of such molasses. [The provision has been made as in case of khandsari molasses, duty is payable by procurer and not the manufacturer] - Rule 5(2) of Central Excise Rules.

Date when goods cleared for captive consumption – If excisable goods are used within the factory (captive consumption), the date of removal will be the date on which the goods are issued for such use within the factory. – *Explanation* to Rule 5(2) of Central Excise Rules.

Clearance of manufactured excisable goods without payment of duty for carrying out tests or other process – A manufacturer can, with specific permission of Commissioner, remove excisable goods manufactured in his factory for carrying out tests or any other process not amounting to manufacture, to some other premises, without payment of duty. Such other premises may or may not be registered under central excise. After the test or any other process not amounting to manufacture, the goods can be

(a) brought back to factory without payment of duty for subsequent clearances for home consumption or export ***or***

(b) removed from the other premises either on payment of duty or exported without payment of duty. The provision does not apply to prototype which are sent out for trial or development test. Conditions as specified in permission of Commissioner of CE will have to be followed. [CE Rule 16C as substituted on 28-12-2006]

Clearances of samples

Since excise is a duty on manufacture, duty is payable on samples even if they are not sold. Samples may be

(a) Trade samples sent to customers for trial – these may be for trial and approval or for return

(b) Samples for test – The tests may be * in-house laboratory for quality testing

* for preservation for investigation of complaints (if any, that may be received)

* Testing at other concerns and independent testing agencies

* Government Test Centres including Chemical Examiners for test

(c) Sample for supply against sale contracts or for enforcement of control measures

(d) Samples for market enquiries by CE Officers

(e) Samples are also required to be drawn by central excise authorities under procedures relating to exports, assessment etc.

Duty payable on all samples if fully manufactured - Duty is payable on all samples, even if given free. Even duty is payable on sample drawn for test. Thus, duty is payable on samples whether given free or for testing.

Duty is payable on free samples also.

No duty on samples used/preserved in factory - If samples are preserved in factory for some period for investigation of complaints, if any, no duty shall be charged as the goods remain within the factory. If these samples are later proposed to be destroyed within the factory, remission of duty can be obtained by following procedure under Rule 21 of CE Rules - *Chapter 11 Para 3.3.1 of CBE&C's CE Manual, 2005*.

4.8 Payment of excise duty

Goods have to be cleared from factory under an Invoice. Duty is payable on monthly basis, by 5th of following month. In case of e-payment, last date is 6th [Rule 8(1) of Central Excise Rules] Duty can be paid through current account (PLA) and/or Cenvat credit.

SSI units availing SSI exemption are required to pay duty on by 15th of month following end of month. In case of e-payment, last date is 16th . If SSI unit pays normal duty without availing SSI concession, the relaxation will not apply and it will have to pay duty by 5th/6th of following month.

It is sufficient if cheque is deposited with Bank on or before due date, even if cheque is realised later, provided that cheque is realised when presented by collecting Bank [*Explanation* (b) to Rule 8(1)].

Special provisions for month of March - Since Government accounts close on 31st March, special provisions are made for payment of duty in March. Duty in respect of clearances in the month of March are payable by 31st March only and not in the following month. *This provision applies to SSI units availing concession also* [proviso to Rule 8(1)] [Similar provision has been made for service tax payment also].

Cenvat credit available to buyer instantly - Even if the manufacturer pays duty on monthly basis, the buyer of goods is entitled to get Cenvat credit as per Cenvat rules as soon as goods are received in the factory, as if the duty has been already paid on the goods. - Rule 8(2) of Central Excise Rules.

EOU have to pay duty each time before clearance – For some unknown and obscure reasons, the facility of monthly payment of excise duty is not available to EOU units. They have to pay excise duty every time before clearance of goods, as per clear provisions of Rule 17 of Central Excise Rules.

Payment when due day is holiday can be made next day – If due date is Sunday or holiday, cheque can be deposited on next working day. In such case, there is no default. Law does not compel a man to do what he cannot possibly do. Section 10 of General Clauses Act applies to statutory rules also – *Indian Seamless Steel* v. *UOI* 2003 (156) ELT 945 (Bom HC DB).

Rounding up of duty while making payment - As per Section 37D, duty, interest, penalty etc. should be rounded off to nearest Rupee. Part less than 50 Ps shall be ignored. Actually, this Section requires rounding up at the time of payment of duty. Thus, rounding up of duty at the stage of each invoice and each duty is not envisaged in Section 37D of Central Excise Act.

However, Bank cannot refuse to honour payment of cheque even if the cheque is drawn in fraction of rupees – RBI DBOD Dir BC.70/13.01.01/2006-07 dated 30-3-2007.

Consequences for non-payment on duty date – Rule 8(3) as amended w.e.f. 1-4-2005 provides that if duty is not paid fully on due date, assessee is liable to pay the outstanding amount along with interest on unpaid amount at the rate specified under Section 11AB. If part of duty is paid, the provision of interest will apply to that part of duty which is not paid.

Consequences if duty and interest not paid for 30 days after due date – If duty and interest is not paid within 30 days after due date, assessee will forfeit the facility to pay duty in monthly instalments. He will have to pay duty through PLA before clearance of goods. He cannot utilise Cenvat credit for payment of duty during that period. This forfeiture of facility is automatic and mandatory. Any order from Assistant/ Deputy Commissioner of Central Excise is not required (Till 1-6-2006, a specific order was required). The forfeiture of facility will continue till such date on which all dues including interest are paid.

If despite such restrictions, assessee clears goods without payment of duty and consequences and penalties as applicable for removal of goods without payment of duty will follow [Rule 8(3A)].

Besides penalty, the goods can be confiscated, wherever they may be, as it will be considered as violation of Rule 25 of Central Excise Rules.

Recovery of amount and interest due – Provisions of Section 11 shall apply for recovery of duty self assessed under Rule 6 and interest payable under Rule 8(3) [Rule 8(4)]. [Section 11 provides for recovery of amount due from assessee by attachment and sale of excisable goods or by certification proceedings].

Form and Maintenance of PLA – Assessee should pay duty through account current (Popularly known as PLA – Personal Ledger Account). Any assessee who has obtained 15 digit ECC number from Superintendent can operate a current account. No specific permission is necessary.

The PLA is credited when duty is deposited in bank by GAR-7 challan and duty is required to be paid by making a debit entry in the PLA on monthly basis. PLA and Cenvat credit should be used only for payment of excise duty and not for other payments like rent, fines, penalties etc.

PLA has to be maintained in triplicate using indelible pencil and both sided carbon. Each entry should be serially numbered and should be made on a separate line. The running serial number should start from 1 every financial year. Both debit and credit entry should not be on same line and there should be separate line for each debit or credit entry. Mutilations or erasures of entries once made in PLA are not allowed. If any correction is necessary, the original entry should be neatly scored out and attested by assessee. Two copies of PLA and copies of GAR-7 (earlier TR-6) receipted challans shall be submitted along with monthly/quarterly ER-1/ER-3 return. Form of PLA has been prescribed in Annexure 6 of CBE&C's CE Manual, 2005.

Cenvat credit only of inputs received upto end of month

Duty can be paid through PLA and/or Cenvat credit. Excise duty is payable on monthly basis. Proviso to Rule 3(3) of Cenvat Credit Rules states that Cenvat credit available at the end of the month only can be availed, even if duty is payable by 5th/6th or 15th/16th of following month. Thus, even if some inputs/ capital goods are received after end of the month, only Cenvat credit available as on last day of the month can be utilised for payment of duty, while paying duty by 5th/6th or 15th/16th of the following month. The word used is 'available' as on last day of the month. Cenvat credit becomes available as soon as goods enter the factory premises. Hence, Cenvat credit of all inputs and 50% of duty paid on capital goods is 'available' as soon as goods enter the factory, even if book entry is made later. Thus, Cenvat credit is available in respect of all goods received upto end of the month, even if book entry is made later.

Duty paying Challan

Duty is payable in authorised bank by way of GAR-7 where Bank is having 'EASIEST' facility (Earlier, it was a TR-6 challan for conventional mode of payment). The prescribed challan form should be filled in giving details like name and 15 digit ECC code number of manufacturer, code number of Excise Commissionerate/ Division/ range and code of branch of Bank.

Mandatory e-payment if annual excise duty exceeds Rs. 50 lakhs - Proviso to Rule 8(1) makes e-payment mandatory for payment of duty by all assessees who have paid excise duty of rupees 50 lakh or more in cash during the preceding financial year, w.e.f. 1-4-2007.

Account Head Code - The account head code has to be mentioned in GAR-7 challan. Major accounting head code is 0038 for Central Excise, 0037 for Customs duties and 0044 for Service Tax.

Electronic Accounting System in Excise and Service Tax (EASIEST)

Easiest has been developed to make payment of tax easy. The facility is available with some 28 banks. The payment is made by GAR-7 challan. Assessee has to make one single copy of challan and its counterfoil.

e-Payment of excise duty

e-payment is a mode of payment in addition to the conventional methods of payment offered by the banks under specific security norms of Reserve Bank of India. This scheme facilitates anytime, anywhere payment and an instant cyber receipt is generated once the transaction is complete. It provides the convenience of making online payment of Central Excise and Service Tax through Bank's Internet banking service. About 28 Banks are authorised for this purpose.

Mandatory e-payment if annual excise duty exceeds Rs. 50 lakhs - Proviso to Rule 8(1) makes e-payment mandatory for payment of duty by all assessees who have paid excise duty of rupees 50 lakh or more in cash during the preceding financial year, w.e.f. 1-4-2007.

Withdrawal of facility of monthly payment of duty and utilization of Cenvat Credit – Rule 12CC of Central Excise Rules and Rule 12AA of Cenvat Credit Rules (as inserted w.e.f. 30-12-2006) provide that in order to prevent evasion of, and default in payment of excise duty or misuse of provisions of Cenvat Credit, various restrictions can be placed on manufacturer and certain facilities can be withdrawn. Registration of a dealer can be suspended. Procedure for issue of such order by authorised officer of CBE&C will be notified by Central Government. The facilities that can be withdrawn are mainly

(a) Facility of monthly payment

(b) Utilisation of Cenvat Credit for payment of excise duty on final product

(c) Self sealing of export consignment by merchant exporter. This aspect is discussed in a later chapter.

4.9 Periodic returns under Central Excise

Assessee is required to file periodic returns.

Following are the returns to be filed

Form of Return	Description	Who is required to file	Time limit for filing return
ER-1 [Rule 12(1) of Central Excise Rules]	Monthly Return by large units	Manufacturers not eligible for SSI concession	10th of following month
ER-2 [Rule 12(1) of Central Excise Rules]	Return by EOU	EOU units	10th of following month
ER-3 [Proviso to Rule 12(1) of Central Excise Rules]	Quarterly Return by SSI	Assessees availing SSI concession	20th of next month of the quarter
ER-4 [Rule 12(2) of Central Excise Rules]	Annual Financial Information Statement	Assessees paying duty of Rs. one crore or more per annum through PLA	Annually by 30th November of succeeding year
ER-5 [Rules 9A(1) and 9A(2) of Cenvat Credit Rules]	Information relating to Principal Inputs	Assessees paying duty of Rs. one crore or more per annum through PLA and manufacturing goods under specified tariff headings	Annually, by 30th April for the current year (e.g. return for 2005-06 is to be filed by 30-4-2005].
ER-6 [Rule 9A(3) of Cenvat Credit Rules]	Monthly return of receipt and consumption of each of Principal Inputs	Assessees required to submit ER-5 return	10th of following month

As per Rule 12 of Central Excise Rules a monthly return, is to be submitted by every assessee to Superintendent of Central Excise, of production and removal of goods, and Cenvat credit availed, by 10th of the following month in form ER-1. -SSI unit availing concession on basis of annual turnover have to file return on quarterly basis within 20 days from close of quarter in form ER-3. SSI units paying duty at normal rate without availing SSI concession will have to submit return on monthly basis. EOU unit has to file return in form ER-2.

The return is basically 'self assessment' and the form of return contains self-assessment memorandum. The return is required *in quintuplicate*. Assessee will have sixth copy as his record copy.

Basic details required in the ER-1/ER-2/ER-3 return are – *(a)* Period (month/quarter) for which return is submitted *(b)* Name of assessee and registration number *(c)* Details of goods manufactured, cleared and duty payable. This should be product-wise under 8 digit Tariff Number *(d)* Details of duty paid through Cenvat Credit and Account Current (i.e. PLA) *(e)* Details of each type of Cenvat credit availed *(f)* Details of other payments i.e. interest, arrears etc. *(g)* Self Assessment memorandum. The return contains additional columns for returns of LTU (Large Taxpayer Unit).

Requirements of return - Following are the requirement of returns -

(a) The return should be on basis of 8 digit Tariff Heading, i.e. there should be separate details about each product having different classification at 8 digit level. If same product attracts different rates of duty, all rates should be mentioned separately, even if such different rates are within the same month.

(b) If goods are cleared for export under bond, these should be indicated separately

(c) Quantity should indicate relevant abbreviation e.g. cm, g, kg, kl, m, mm, t (for Tonne), u (For Number) etc.

(d) Value indicated should be as per Sections 4, 4A or tariff value as applicable. In case of exports, ARE-1/ARE-2/Invoice value should be indicated.

(e) If duty on some invoices is paid on provisional basis, the details are required to be given in the ER-1/ER-3 return.

Annual Financial Information Statement - Assessees paying duty of Rs. one crore or more per annum through PLA are required to submit Annual Financial Information Statement for each financial year by 30th November of succeeding year in prescribed form ER-4 [Rule 12(2) of Central Excise Rules w.e.f. 1-11-2004]. The ER-4 requires information in respect of following – (a) Details of Value of Inputs (b) Details of major raw materials independently accounting for 10% or more of total value constituting 10% or more of total value of raw materials (c) Details of Expenditure under specified heads (d) Goods manufactured by assessee through job worker (e) Details of sales of major finished goods which independently account for 10% or more of total value of finished goods sold (f) Details of other income (g) Job work undertaken done for others

Annual Information relating to Principal Inputs – Every assessee is required to submit Information relating to Principal Inputs every year before 30th April in form ER-5, to Superintendent of Central Excise [Rule 9A(1) to Cenvat Credit rules inserted w.e.f. 25-11-2004]. Any alteration in principal inputs is also required to be submitted to Superintendent of Central Excise in form ER-5 within 15 days [Rule 9A(2) to Cenvat Credit Rules inserted w.e.f. 25-11-2004].

Only assessees manufacturing goods under specified tariff heading are required to submit the return. The specified tariff heading are – 22, 28 to 30, 32, 34, 38 to 40, 48, 72 to 74, 76, 84, 85, 87, 90 and 94; 54.02, 54.03, 55.01, 55.02, 55.03, 55.04. Even in case of assessees manufacturing those products, only assessees paying duty of Rs. one crore or more through PLA (current account) are required to submit the return [Notification No. 39/2004-CE(NT) dated 25-11-2004].

Monthly return of receipt and consumption of each of principal inputs – Every assessee who is required to submit ER-5 is also required to submit monthly return of receipt and consumption of each of Principal Inputs in form ER-6 to Superintendent of Central Excise by tenth of following month [Rule 9A(3) to Cenvat Credit Rules inserted w.e.f. 25-11-2004]. *Only those assessees who are required to submit ER-5 return are required to submit ER-6 return.*

The ER-6 return requires details of inputs taken for manufacture, its opening and closing stock and quantity of finished goods manufactured. Details of waste and scrap are also required to be given. Since details of inputs lying in WIP at the beginning and end of month is not ascertained, the quantity issued for manufacture and final products actually manufactured will never tally. This may lead to disputes, notices and demands.

E-filing of return **-** The Electronic filing of excise returns has been introduced, vide CBE&C circular No. 791/24/2004-CX dated 1-6-2004. Assessee can file return on-line at the website http://exciseandservicetax.nic.in. Necessary manual, online help and FAQ are available on the home-page itself.

4.10 Duty free exports

Goods and services are to be exported, taxes are not to be exported. WTO stipulates free and fair global trade. Giving export incentives will be against principle of fair trade and hence export incentives are not allowed under WTO. However, goods and services can be made free of domestic taxes.

Inputs free of duty for export production - In relation to Central Excise and Customs, following are the concessions/incentives for exports :

(1) Exemption from duty on final products (or refund of duty paid).

(2) Exemption/Refund of excise and customs duties paid on inputs.

Exporting units need raw materials without payment of customs/excise duty, to enable them to compete with world market. Government has devised following schemes for this purpose :

(a) Special Economic Zones at various places where inputs are allowed to be imported without payment of duty and finished goods are exported

(b) Export Oriented Undertakings (EOU)

(c) Permission to avail Cenvat on inputs for other similar products

(d) Refund of duty on inputs if Cenvat credit cannot be used

(e) Duty Drawback Scheme

(f) Schemes of Advance License, DEPB and DFRC.

Elaborate procedures have been prescribed for the above, to ensure that the benefits are not misused.

Exports free of duty on finished product - Exports of almost all excise goods except hides, skin and leather and salt ***and*** exports to all countries except to Nepal and Bhutan are exempt from Central Excise Duties. Exports to Nepal and Bhutan do not qualify for export incentives as payment is received in Indian rupees. However, export rebate can be obtained if export to Nepal is made (*a*) on payment of free convertible foreign exchange ***or*** (*b*) for specified capital goods to Government of Nepal against global tender, even if payment is received in Indian currency.

Even inputs received by the factory can be exported as such without payment of excise duty. If manufacturer had availed Cenvat credit of duty on such inputs, it need not be reversed [The Cenvat credit can be utilised for payment of duty on products cleared for home consumption].

Export can be made without payment of all types of duties like basic, special, ADE(GSI) and ADE (TTA) – - Chapter 7 Part I Para 1.1 of CBE&C's CE Manual, 2005.

Export Procedures for Excise - There are basically two procedures for dispatching the final products out of India, to ensure that final product is duty free.

- In the first procedure, duties are paid on final product and subsequently rebate (refund) is claimed after exportation of such goods. Alternatively, rebate is granted of duty paid on inputs used in the exported final product and final product is exported without payment of excise duty (Rule 18 of Central Excise Rules).

- Another procedure is to export goods under bond without payment of excise duty. On actual exportation of goods and on presentation of necessary proofs regarding exports, the bond is released. Regular Exporters can have a running bond for this purpose. [Rule 19(1) of Central Excise Rules]. Rule 19(2) provides that inputs to be used for manufacture of final product to be exported can be obtained without payment of excise duty.

Inputs free of excise duty - Rule 19(2) provides that inputs to be used for manufacture of final product to be exported can be obtained without payment of excise duty. Rule 18 makes provision for granting rebate of duty paid on inputs which are used in manufacture of final product which is exported.

General procedures for exports

The goods have to be cleared from factory under Invoice. In addition to the Invoice, a prescribed form ARE-1 has to be filled in by Exporter. Invoice for export can be from same series from which goods for home consumption are cleared or a separate series of invoice can be maintained for export. General permission has been given to maintain separate series of Invoice for export purposes. The Invoice should be prominently marked as 'FOR EXPORT WITHOUT PAYMENT OF DUTY', if goods are cleared under bond.

ARE-1 form – Exporter has to prepare ARE-1 form. The copies of ARE-1 form should have following colour : (*i*) Original : White. (*ii*) Duplicate : Buff (*iii*) Triplicate : Pink (*iv*) Quadruplicate : Green. Assessee can optionally have quintuplicate form which can be used for claiming other export incentives. - - It is sufficient if copies of ARE-1 (that time AR-4) contain a colour band on the top or right hand corner as per the aforesaid colour scheme. Thus, it is possible to take out copies on plain/computer stationery and affix colour band.

Handling of ARE-1 forms - If export consignment is cleared under supervision of Excise Superintendent or Inspector, the excise officer will make endorsement on all copies of ARE-1. He will return original and duplicate copies to the exporter-assessee. He will send triplicate copy of ARE-1 directly to officer to whom bond was executed or letter of undertaking was given. This copy can also be handed over to the exporter in a tamper proof sealed cover to be submitted to the authority. Quadruplicate copy will be retained by excise officer. Exporter can have optionally quintuplicate copy which will be dealt with in same manner as the original copy.

At the time of export, original, duplicate and quintuplicate (optional) will be submitted to Customs Officer, along with the goods. These will be examined and then export will be allowed. He will make endorsement of export on all copies of ARE-1. He will cite shipping bill number and date and other particulars of export on ARE-1. Original and quintuplicate (optional) will be returned to exporter. The duplicate copy will be sent directly by Customs Officer to the officer with whom bond was executed or to whom letter of undertaking was given. The duplicate copy can be sent either by post or by handing over to the exporter in tamper proof sealed cover.

Export by post - If the export is through post, duplicate copy of ARE-1 will be sent with sufficient postage stamps to cover postal charges, at the time of booking the consignment. The duplicate copy will be endorsed and sent by Customs Officer at the post office, after the post parcel is exported.

Sealing of goods for export - Goods can be cleared from factory duly sealed. Goods can be cleared for export without sealing also. Self sealing and self certification is also permissible.

Clearance with seal of Central Excise - In this method, export goods are examined before despatch by Central Excise Officers In such case, the goods are not examined by Customs Officers at the port or airport of shipment, unless seals are found to be tampered or if there is specific information.

Clearance with self-sealing - Any manufacturer-exporter can clear export consignment with self sealing and self certification.

Third party exports – Third party exports means exports made by an Exporter or Manufacturer on behalf of another exporter/s. The Shipping Bill shall indicate the names of both the exporter/manufacturer and exporter. The BRC, GR declaration, export order and the Invoice shall be in name of the third party exporter [para 9.62 of FTP]

Merchant Exporter – Merchant Exporter means a person engaged in trading activity and exporting or intending to export goods [para 9.40 of FTP].

Removal under bond without payment of duty

The procedures are prescribed in Notification No. 42/2001-CE(NT) dated 26-6-2001.

The basic procedures for removal of final products from factory without payment of duty under Rule 19 are –

(a) Execute a bond (in case of merchant exporter) or issue letter of undertaking (LUT) (in case of manufacturer exporter)

(b) Clear goods from factory under bond/LUT without payment of duty

(c) Maintain running bond account of goods exported under bond/LUT. Export the goods within 6 months and obtain certificate of export on ARE-1 from customs authorities. Submit the proof of export and get self-credit in Running Bond Account.

Bond and CT-1 by merchant exporter – Merchant exporter is required to execute a bond so that goods can be cleared by the supplier-manufacturer without payment of duty.

The bond can be executed by merchant-exporter in form B-1. After execution of bond, merchant exporter has to obtain CT-1 certificates from excise office. The merchant exporter shall send CT-1 form to the manufacturer from whom goods are to be procured for export without payment of excise duty. Before sending CT-1, the merchant exporter should debit estimated amount of duty liability. This amount is required to be specified in part II form CT-1. On the basis of this CT-1, the manufacturer can clear goods for export without payment of duty by making suitable entries in part II of CT-1.

CT-1 certificate is required only when bond is executed by merchant exporter. CT-1 certificate is not required if bond is executed by manufacturer exporter with Maritime Commissioner.

Letter of undertaking by manufacturer-exporter - The manufacturer exporter can furnish a letter of undertaking (LUT) in form UT-1 as given in Annexure II of Notification No. 42/2001-CE(NT). The manufacturer exporter need not execute a bond. The LUT once given is valid for 12 calendar months. It is not necessary to submit LUT for each consignment.

Procedure at the time of export - The exporter or his agent will submit copies of ARE-1 form to Customs Officer at the time of export. These will be endorsed by him certifying export of goods. This will service as 'proof of export'.

Export within 6 months - Goods must be exported within 6 months from date of removal from the factory, unless extension is granted. Extension can be granted by AC/DC/Maritime Commissioner.

Proof of export – The exporter is required to submit proof of export authority where bond is executed

Export under claim of rebate

The rebate of excise duty paid on exported goods is granted under Rule 18. The rebate is available on all exports except exports to Nepal and Bhutan. In case of Nepal, the rebate is granted to Government of Nepal. In case of export to Nepal, Invoice in prescribed form has to be prepared and prescribed procedure has to be followed.

When rebate procedure may be useful - It is naturally advisable not to pay duty, than to pay it and then wait for refund from Government. However, in following situations, it may be beneficial to pay duty and claim rebate -

(a) If assessee has balance of duty in Capital Goods Cenvat Credit Account, it will be advisable to pay duty and claim refund, as balance in Capital goods Cenvat Credit Account is never refundable. This may happen when duty paid on capital goods is heavy and assessee may not be able to utilise the credit.

(b) An SSI unit may pay excise duty and claim rebate, as getting refund of Cenvat credit of inputs is not an easy procedure. Moreover, he is not entitled to get refund of duty paid on capital goods.

(c) When duty paid goods are proposed to be exported.

(d) Claiming rebate is much simpler and straight-forward procedure than claiming refund of duty paid on inputs under Cenvat procedure.

Clearance without bond, but under form ARE-1 - Export under claim for rebate should be made under ARE-1 form. Since the goods are being cleared after full payment of duty under Invoice, execution of any bond is not necessary. Copies of ARE-1 form and its distribution is same as that for export under bond. Export can be under seal of Central Excise or without seal. Procedure for export and distribution of copies of ARE-1 after export is also identical.

The rebate claim can be filed with Maritime Commissioner (if there is one for the port/airport/post). As per Section 11B of CEA, claim must be filed within one year from date of export. Rebate claim can also be lodged with jurisdictional Assistant/Deputy Commissioner of Central Excise.

Export of goods from duty paid stock - Duty paid goods can also be exported and duty paid can be claimed as rebate.

Rebate of duty on inputs used in manufacture of export goods

Sometimes, final goods may be exempt from duty. In such case, the exporter can claim rebate of duty paid on excisable materials used in manufacture of export goods, except in case of export to Nepal and Bhutan. Provision for granting such rebate is made in Rule 18 of CE Rules.

Input-output ratio has to be informed to AC/DC, which will be verified. Goods can be obtained from manufacturer or registered dealer under invoice on payment of duty. Inputs can be sent outside for job work and return. Export is required to be made under form ARE-2. After export, rebate claim should be filed. Procedure and form has been specified in Notification No. 21/2004-CE(NT) dated 6-9-2004 [earlier No. 41/2001-CE(NT) dated 26.6.2001].

Inputs free of Central Excise duty

manufacturer of export goods can get his inputs without payment of Central Excise Duty under Rule 19(2).

Input-output ratio should be informed to Assistant/Deputy Commissioner. Goods can be procured without payment of duty by following procedure prescribed under Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods), Rules [However, instead of giving bond or guarantee, a simple Letter of Undertaking can be given].

Generally, duty drawback procedure should be more suitable as it has minimum hassles.

Duty drawback of excise portion

The all industry drawback rates are given separately, i.e. when Cenvat facility has been availed and when Cenvat facility not availed. The difference between the two is central excise portion of duty drawback – MF(DR) circular No. 22/2005-Cus dated 2-5-2005. Duty paid on packing material is also eligible. Thus, even if Cenvat credit has been availed, duty drawback in respect of customs portion will be available.

Export to Nepal/Bhutan

India has Rupee trade with Nepal and Bhutan and hence export incentives are not available if goods are exported to Nepal/Bhutan. The clearance should be on normal Invoice on payment of duty. Invoice should mention 'For Export to Nepal/Bhutan' (as the case may be) and make declaration in prescribed form. Extra copy of Invoice should be made, which is to be used at India-Nepal border. After the goods are exported to Nepal, rebate is given to *Government of Nepal* (and not to the exporter). There is no rebate system for export to Bhutan.

Export to Nepal/Bhutan without payment of duty - Export to Nepal/Bhutan are allowed under bond without payment of duty if (*a*) payment is to be received in convertible foreign exchange ***or*** (*b*) Export of specified capital goods exported to Nepal against global tender issued by Government of Nepal or export against some specified projects. The procedure and conditions are given in Notification No. 45/2001-CE(NT) dated 26.6.2001. It is further elaborated in Chapter 7 Part IV of CBE&C's CE Manual, 2005.

Warehousing after clearance for export

Even if an exporter has no ready orders for export, he may like to keep goods in stock, so that goods can be exported from warehouse as soon as export order is received. The goods can be kept in a warehouse without payment of duty and exported therefrom. The warehouse should be registered with CE.

This facility is useful when the name of exporter is not known at the time of removal from the factory.

This facility is permitted only at specified places in India. Only exporters who are recognised as two star trading house and above, foreign departmental stores of repute and automobile manufactures who have signed MOU with DGFT are eligible under the scheme – CBE&C circular No. 832/9/2006-CX dated 4-9-2006.

4.11 Bringing goods for repairs, re-making etc.

It is often necessary to bring the duty paid final products for various purposes like refining, repairs, re-making, reconditioning, testing etc. Rule 16 of Central Excise Rules make provisions in this regard.

Procedure for receipt and clearance - As per the provisions, if the duty paid goods are brought for being re-made, refined, re-conditioned or for any other reason, assessee should take Cenvat credit of duty paid as if such goods are received as inputs under Cenvat Credit Rules and utilise the credit according to Cenvat Credit Rules [Rule 16(1)].

Bringing back rejected/excess goods - Goods can be brought 'for any other reason'. Thus, if goods are returned to assessee by buyer as they were in excess or if buyer refuses to accept the goods, the goods can be brought back. There is no time limit for bringing goods for repairs and goods can be brought any time.

Document for availing Cenvat credit - If the person sending the goods sends those goods under his invoice after payment of duty, Cenvat credit can be taken on the basis of that invoice. However, such credit can be taken even on the basis of own Invoice which was raised when the goods were originally cleared.

Goods brought themselves must be reprocessed – Note that the goods brought must themselves be reprocessed and then sent. If the goods brought are scrapped and fresh goods are sent, it is new manufacture. Fresh duty is payable and Cenvat credit of goods returned cannot be availed.

Removal after repairs/re-making etc. - At the time of clearance after repairs, amount/duty should be paid under Invoice as follows –

(a) If the process carried out on the goods brought amounts to manufacture, assessee should pay duty at the rate applicable on date of removal. Value shall be determined under Section 3(2), 4 or 4A as applicable [Rule 16(2) – second part].

(b) If the process does not amount to manufacture, an 'amount' equal to Cenvat credit taken at the time of receipt of final product is payable. The buyer can avail Cenvat credit of this 'amount'. [Rule 16(2) – first part].

As per Cenvat Credit Rules 3(4)(a) and 3(4)(d), the Cenvat credit available with assessee can be utilised for payment of 'duty' or 'amount' payable under Rule 16(2).

If some components are used during processing – If some components are used in processing where process does not amount to 'manufacture' duty will be payable on such components. – *Lumax Indus* v. *CCE* 2002(144) ELT 395 (CEGAT).

Cenvat credit of 'amount' – The buyer can avail Cenvat credit of 'amount' paid under Rule 16(2) – *Explanation* to Rule 16(2). He can of course, avail Cenvat credit of duty paid under Rule 16(1).

4.12 Bonds under Central Excise

The word 'bond' is used quite often in excise and customs e.g. manufacture under bond, clearance under bond, export under bond etc. 'Bond' means an undertaking given by the assessee to Government for due fulfilment of certain obligation e.g. export under bond means a 'bond' that goods cleared without payment of duty from factory for export will be exported and if not, appropriate duty will be paid.

Execution of Bonds - Assessee has to execute bond under various provisions of Act. Form of bond has been standardised by excise department and numbers have been given for identification. Bonds should be executed on a non-judicial stamp paper. If adhesive stamps are affixed to any instrument chargeable to duty, the stamps shall be cancelled so that it cannot be used again. Such cancellation may be done by drawing two lines across or by signing on the stamp or in any other effectual manner [If not cancelled, the instrument is treated as 'unstamped'].- - Amount of stamp depends on the State in which it is executed. Indian Stamp Act authorises each State to prescribe stamp duty chargeable on various documents and hence it varies from State to State.

Bond should be executed in favour of and in name of President of India.

Release of Bond – Bond will be preserved by excise officers till all the obligations are not discharged. After discharge of obligation, the bond can be got released if the terms of bond are fulfilled. Securities offered can be released and then encashed by guarantor. He can also get interest accrued on such securities.

Forms of Bonds

Bonds are of different nature and for various purposes. Forms of bond etc. have been standardised. The main bonds are as follows :

B-1 general bond - The bond is for due dispatch of excisable goods removed for export without payment of duty. The bond can be with surety or security. New form of B-1 bond has been given in Annexure-I of Notification No. 42/2001-CE(NT) dated 26.6.2001.

B-2 Bond - This is a General Bond for provisional assessment. It can be with security or surety.

B-5A Bond – It is for due arrival and re-warehousing of excisable goods removed from a warehouse in India to a factory in SEEPZ – Notification No. 146/89-CE dated 19-5-1989.

B-8 Bond - This bond is for obtaining goods at Nil or concessional rate of duty under Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules. A bond is required to be executed under these rules. Since no form of bond has been prescribed, earlier form B-8, which was prescribed under earlier Chapter X procedure may be used after making necessary changes.

B-11 Bond – Often, goods are seized by excise officer, if there is reason to believe that goods are liable to confiscation. The goods are actually confiscated only after these are confiscated after adjudication. This may take a long time. Hence, the assessee can gets the seized goods released after execution of bond in form B-11. The bond is for provisional release of seized goods. It can be only security bond. Bond should be for whole value of seized goods. Amount of security will be as determined by adjudicating authority taking into consideration of gravity of offence (normally 25%) – CBE&C circular No. 686/2/2003-CX dated 2-1-2003.].

B-17 Bond - This is a general surety/security bond to be executed by EOU, EHTP/ STP/BTP units. It is for provisional assessment of goods for export of goods to foreign countries without payment of duty and for accountal/disposal of excisable goods procured without payment of duty.

Types of Bond

Bonds are either surety or security type.

Surety bonds are covered under provisions of Contract Act. Under Surety Bond, another person stands as surety to guarantee the performance on the part of obligor. Surety should be for full value of bond and the person standing as surety should be solvent to the extent of bond amount.

Security Bond - Security Bonds are executed where security is offered instead of guarantee. Security can be in nature of Post Office saving deposit, National Saving Certificate or similar realisable Government papers of Central or State Government. Bank deposit receipt of large scheduled banks is also acceptable. Interest on such securities will accrue to person making such deposit. Security can also be furnished by cash deposit, but no interest will be receivable on such cash deposit (and hence it is advisable to provide security by way of NSC, Bank FD etc.).

4.13 Receipt of Goods at concessional rate of duty

Some users of excisable goods can obtain goods at nil or lower rate of duty, subject to certain conditions. In other words, the exemption is based on end use. If the buyer is entitled to obtain excisable goods at nil or concessional rate of duty, he is required to follow prescribed procedure. The provisions are contained in Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001.

Procedure of end use condition in some exemption notifications - Some exemption notifications prescribe that procedure as contained in Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules shall be followed. In such cases, the exemption will be available only if the required procedure is followed. This is to ensure that the exemption/concession based on intended end-use is not misused and goods cleared are really used for intended purpose.

Procedure for availing the benefit - The buyer of goods intending to avail the benefit of exemption notification issued u/s 5A shall apply to Assistant/Deputy Commissioner in quadruplicate in form specified at Annexure I to Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules. Separate application shall be filed for each supplier.

Bond to be executed - A bond in prescribed form should be executed with surety or security. Bond amount will be prescribed by Assistant/Deputy Commissioner, considering duty liability estimated to be involved at any given time. Form of new bond has not been prescribed. Hence, earlier B-8 bond form may be used with suitable modifications. [See under 'Bonds' for instructions about B-8 bond].

Certificate by AC/DC - The AC/DC will countersign the application submitted, certifying that necessary bond has been executed.

Subsequent procedure - Copy of this application duly signed by AC/DC will be sent to supplier-manufacturer. [The earlier procedure of CT-2 certificate has been discontinued]. The supplier can clear goods on receipt of the certificate duly countersigned by AC/DC. The removal details will be recorded on the application by the supplier-manufacturer.

Accounts after receipt of goods - Goods obtained by the manufacture at concessional rate of duty should be properly accounted for and should be used only for the purpose for which they are brought. Simple account indicating quantity and value of subject goods, quantity consumed for intended purpose and quantity remaining in stock shall be maintained invoice wise.

Return of goods to supplier – It may happen that goods received under the rules without payment of duty, may be found to be defective, damaged, unsuitable or surplus to the needs of manufacturer. In such case, the manufacturer can return the goods to supplier, i.e. original manufacturer. The original manufacturer will add this to his non-duty paid stock (in Daily Stock Account) and then deal with it. If there is loss while returning the goods, the duty liability will be of manufacturer [*Proviso* to Rule 6 of Removal of Goods at Concessional Rate of Duty Rules].

Monthly return - A monthly return in prescribed form should be submitted by 10th of following month. Form of monthly return has been prescribed in Annexure II to Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules.

Goods received at concessional rate not used for intended purpose - If the material received at concessional rate of duty is not used for intended purpose, manufacturer is liable to pay differential duty along with interest.

4.14 Warehousing in Excise

Normally, goods are removed from factory on payment of duty. However, in respect of certain goods, provision has been made to store the goods in warehouses without payment of duty. - - The provisions are also available for goods cleared for export on payment of duty under claim for rebate of duty under Rule 18 of CE Rules.

As per Rule 20 of Central Excise Rules, facility of warehousing can be extended for removal of excisable goods from factory of production to a warehouse or from one warehouse to another warehouse without payment of duty. CBE&C can prescribe conditions, limitations and safeguards. The Rule clarifies that responsibility for payment of duty on the goods removed from factory or warehouse to another warehouse is that of consignee. However, if goods do not reach the destination warehouse, the duty liability is that of consignee.

At present, these provisions are applicable to following -

(a) (i) benzene, toluene and xylene (ii) Goods transferred to customs bonded warehouse as 'Stores'. [These goods are cigarettes, aerated waters, prepared and preserved foods, Aluminium foil covers, stainless steel cutlery, butter and cheese]. These 'stores' are issued to foreign going vessels without payment of duty - Notification No. 17/2004-CE(NT) dated 4-9-2004 [Facility available to petroleum products has been withdrawn w.e.f. 6-9-2004]

(b) Goods removed by star export houses (status holders) for subsequent exports under Rule 18 or Rule 19 of Central Excise Rules - Notification No. 46/2001-CE(NT) dated 26-6-2001. This facility is available even to petroleum products – CBE&C circular No. 798/31/2004-CX dated 8-9-2004.

The warehouses can be public or private. Permission for such warehouses has to be obtained from Commissioner. The goods are in custody of officer-in-charge of the warehouse. Goods can be removed from warehouse on payment of duty plus penalty, godown rent etc. Transfer from one warehouse to another without payment of duty is also permissible. Goods can be stored for maximum period of 3 years [It may be noted that provisions of customs bonded warehouse also exist in respect of imported goods. That facility is available for all imported goods.]

4.15 Supervision/Overtime Charges

Sometimes, Central Excise Officer or Customs Officer has to be called for supervision in specified cases like export sealing, export inspection. In such cases, Merchant Overtime (termed as **MOT**) charges are payable, if such supervision is required beyond office hours or on Saturdays, Sundays and other holidays and where there is no specific posting of officers in shifts.

Same rates for excise and Customs Officers - Overtime rates as applicable to Customs Officers will apply to central excise officers also. - *Chapter 18 Part II Para 1.1 of CBE&C's CE Manual, 2005.*

In case of customs, the hourly rates are as follows, w.e.f. 15th October, 1998, as per Customs (Fees for Rendering Services of Customs Officers) Regulations, 1998.

STUDY NOTE 5

Valuation in Central Excise

5.1 Methods of calculation of duty payable

Excise duty is payable on *one of the following basis* :

- Specific duty, based on some measure like weight, volume, length etc.
- Duty as % of Tariff Value fixed under Section 3(2)
- Duty based on basis of Maximum Retail Price printed on carton after allowing deductions - Section 4A of CEA.
- Compounded Levy Scheme.
- Duty as % based on *Assessable Value* fixed under Section 4 (*ad valorem duty*)

Specific Duty - It is the duty payable on the basis of certain unit like weight, length, volume, thickness etc. For example, duty on Cigarette is payable on the basis of length of the Cigarette, duty on sugar is based on per Kg basis etc. In such cases, calculation of duty payable is comparatively easy. In view of the simplicity, many goods were earlier covered under 'specific duty'. However, the disadvantage is that even if selling price of the product increases, revenue earned by Government does not increase correspondingly. Frequent revisions of rates have to be done, which is a slow and time consuming process. Hence, now most of the goods are covered under '*Ad valorem*' duty.

Presently, specific rates have been announced for -

(a) Cigarettes (length basis),

(b) Matches (per 100 boxes/ packs),

(c) Sugar (per quintal basis),

(d) Marble slabs and tiles (Square meter basis),

(e) Colour TV when MRP is not marked on the package or when MRP is not the sole consideration (based on screen size in cm),

(f) Cement clinkeRs. (per tonne basis),

(g) Molasses resulting from extraction of sugar (Per ton basis).

5.2 Tariff value

In some cases, tariff value is fixed by Government from time to time. This is a "*Notional Value*" for purpose of calculating the duty payable. Once 'tariff value' for a commodity is fixed, duty is payable as percentage of this 'tariff value' and not the Assessable Value fixed u/s 4. This is fixed u/s 3(2) of Central Excise Act. Government can fix different tariff values for different classes of goods or goods manufactured by different classes or sold to different classes of buyers

Government cannot fix any tariff value at its whim and caprice. The tariff value may be fixed on basis of wholesale price or average price of various manufacturers as the Government may consider appropriate. Basis for deciding value should be method provided in Section 4. It should be one of the criteria, but need not be the only one criteria.

Provision of fixing tariff value is used very rarely as frequent changes become necessary when prices rise. Such tariff value can be fixed only for few selected commodities.

Presently, tariff values have been fixed for

(a) Pan masala packed in retail packs of upto 10 gm per pack [Notification No. 3/2006-CE(NT) dated 1-3-2006 – earlier No. 16/98-CE(NT) dated 2nd June 1998].

(b) Tariff value for readymade garments falling under heading 61 or 62 has been prescribed as 60% of the retail sale price of such goods as specified on the package. [Notification No. 20/2001-CE(NT) dated 30-4-2001].

Compounded Levy Scheme

Normal excise procedures and controls are not practicable when there are numerous small manufacturers Rule 15 of Central Excise Rules provides that Central Government may, by notification, specify the goods in respect of which an assessee shall have option to pay duty of excise on the basis of specified factors relevant to production of such goods and at specified rates. Central Government can specify procedure for payment, abatement allowable, interest and penalty payable etc.

This is termed as 'compounded levy scheme'. It is devised for administrative convenience as a simplified scheme. It is an optional scheme, i.e. the manufacturer can opt to pay duty as per normal rules and procedure also.

Under compound levy scheme, the manufacturer has to pay prescribed duty for specified period on the basis of certain factors relevant to production, like size of equipment employed etc. After making the lump sum periodic payment, the manufacturer does not have to follow any procedure of excise regarding storage and clearances of goods.

Applicability of scheme - The scheme is presently applicable to stainless steel pattas/patties, Aluminium circles, pan masala and gutkha. These articles are not eligible for SSI exemption.

5.3 Value based on Retail Sale Price

Section 4A of CEA empowers Central Government to specify goods on which duty will be payable based on 'retail sale price'.

The provisions for valuation on MRP basis are as follows -

(a) The goods should be covered under provisions of Standards of Weights and Measures Act or Rules [Section 4A(1)].

(b) Central Government has to issue a notification in Official Gazette specifying the commodities to which the provision is applicable and the abatements permissible. Central Government can permit reasonable abatement (deductions) from the 'retail sale price' [Section 4A(2)].

(c) While allowing such abatement, Central Government shall take into account excise duty, sales tax and other taxes payable on the goods [Section 4A(3)].

(d) The 'retail sale price' should be the maximum price at which excisable goods in packaged forms are sold to ultimate consumer. It includes all taxes, freight, transport charges, commission payable to Dealers and all charges towards advertisement, delivery, packing, forwarding charges etc. If under certain law, MRP is required to be without taxes and duties, that price can be the 'retail sale price' [*Explanation* 1 to Section 4A].

(e) If more than one 'retail sale price' is printed on the same packing, the maximum of such retail price will be considered [Explanation 2(a) to Section 4A]. If different MRP are printed on different packages for different areas, each such price will be 'retail sale price' for purpose of valuation [*Explanation* 2(c) to Section 4A].

(f) Removing excisable goods without MRP or wrong MRP or tampering, altering or removing MRP declared on a package is an offence and goods are liable to confiscation [Section 4A(4)] If price is altered, such increased price will be the 'retail sale price' for purpose of valuation [*Explanation* 2(b) to Section 4A].

For example, Government had issued a notification to the effect that excise duty on 'cosmetics and toilet preparations' will be payable on the basis of MRP printed on retail carton after allowing abatement of 40%. In such case, if MRP printed on carton is Rs. 200 and if the duty on 'cosmetics & toilet preparations' is 16% plus education cess of 2% plus SAH education cess of 1%, the duty @ 16% will be payable on Rs. 120 (i.e. after allowing 40% abatement on MRP of Rs. 200). Thus duty payable per pack will be Rs. 19.20, plus education cess Re 0.38 plus SAH education cess of Re 0.19.

Question - Refrigerators under heading No. 8418 10 carry 'abatement rate' of 40% and they are specified only in the First Schedule to the Central Excise Tariff Act 1985. Find out the amount of duty, if the maximum retail price (MRP) of a refrigerator is Rs. 20,000 only and the rate of excise duty is 16% plus education cess as applicable**.**

Answer - Since abatement of 40% is available, assessable value of refrigerator will be Rs. 12,000 (MRP Rs. 20,000 – Abatement @ 40% Rs. 8,000). Basic excise duty @ 16% will be Rs. 1,920. Education cess @ 2% of Rs. 1,920 is Rs. 38.40. SAH education cess @ 1% of Rs. 1,920 is Rs. 19.20.

Provision applicable even if goods manufactured on job work basis - Normally, if assessee is engaged in manufacture on job work basis, he has to pay duty on material cost plus job charges. However, if a product covered under MRP provisions is manufactured on job work basis, duty will be payable as per provisions of Section 4A, i.e. on basis of MRP less abatement and not on basis of material cost plus job work charges. This is because Section 4A has overriding effect over Section 4.

Applicability of MRP valuation provision

It has been clarified that provisions in respect of payment of duty on MRP are applicable only in cases where specific notification has been issued and manufacturer is statutorily required to put MRP under Weights & Measures Act. The provisions do not apply in cases where manufacturer voluntarily affixes MRP on the product - CBE&C circular No. 411/44/98-CX dated 31-7-1998. This is also made clear in Section 4A(1).

It is further clarified that where provisions of Weights & Measures Act do not apply, duty is payable on basis of AV as per Section 4 - Chandigarh Commissionerate TN 16-CE/99 dated 5-5-1999.

Goods packed in bulk – If goods are packed in bulk, MRP provisions do not apply – *Titan Industries* v. *CC* (2007) 216 ELT 327 (CESTAT).

Same product partly sold in retail and partly in wholesale - CBE&C has further clarified in circular No. 737/53/2003-CX dated 19-8-2003 that when goods covered u/s 4A are supplied in bulk to large buyer (and not in retail), valuation is required to be done u/s 4. Provisions of Section 4A apply only where manufacturer is legally obliged to print MRP on the packages of goods. Thus, there can be instances where

the same commodity would be partly assessed on basis of Section 4A and partly on basis of transaction value u/s 4 – view noted and approved in *Jayanti Food Processing* v. *CCE* (2007) 10 STT 375 = 215 ELT 327 (SC).

Some of the situations where MRP cannot be printed are – (1) bulk supplies for personal as well as industrial use, (2) Bulk supplies against contract, (3) Supplies to canteen store depots of defence, (4) Item supplied free with another consumer item, (5) Items supplied free as marketing strategy or market response, (6) Items meant for export. In case of doubt, a clarification may be obtained from Meteorology Department of State Government. – CBE&C circular No. 625/16/2002-CX dated 28-2-2002. – followed in *Bharti Systel* v. *CCE* 2002(145) ELT 626 (CEGAT).

Provision of MRP based valuation are applicable only when product is statutorily covered both under Weights and Measures Act and notification issued under CEA

Provision does not apply to ice cream sold in bulk - In *Monsanto Manufacturers* v. *CCE* 2006 (193) ELT 495 (CESTAT), it was held that if ice cream is sold in bulk to hotels and not intended for retail sale, valuation will be as per Section 4 and not on MRP basis – view confirmed in *Jayanti Food Processing* v. *CCE* (2007) 10 STT 375 = 215 ELT 327 (SC).

No MRP on free gifts/samples, hence valuation as per Section 4 – In *Jayanti Food Processing* v. *CCE* (2007) 10 STT 375 = 215 ELT 327 (SC), assessee as selling Kitkat chocolates to Pepsi. These were distributed as free gift along with Pepsi bottle as a marketing strategy. It was held that even if product (chocolate) is covered under MRP provisions, since the product was not to be sold in retail, MRP is not required. Hence, valuation should be on basis of Section 4.

Provision when more than one retail price declared – MRP printed on package is required to be inclusive of taxes. Rate of taxes vary from State to State. Hence, in some cases, a manufacturer may print different prices for different States. In some cases, manufacturer earmarks different packages for different areas and marks different prices for different areas.

If a package bears more than one retail sale price, maximum out of these will be deemed to be retail price for purpose of Section 4A [*Explanation* 2(a) to Section 4A(4)]. If retail price declared on the package at the time of removal is subsequently altered to increase the price, such increased retail price will be retail price for purpose of Section 4A [*Explanation* 2(b) to Section 4A(4)]. Where different retail sale prices are declared on different packages, each such retail price shall be the 'retail sale price' for purposes of valuation of excisable goods intended to be sold in area to which the retail price relates. [*Explanation* 2(c) to Section 4A(4)]. Thus, if different prices are printed on different packages, each such price will be 'retail price'.

Assessee crossing higher MRP and showing lower MRP to indicate saving – In some cases, assessee declares two MRPs on a package and crosses out one MRP (showing the higher price) to show consumers that they would be saving by purchasing the product at the reduced second MRP. [*Usual sale gimmick*]. The crossed out MRP is clearly visible. However, it cannot be said that the package has two MRPs as the scored out MRP cannot be considered as an MRP either by the seller or by consumer. In such cases, scored out MRP is to be ignored for purpose of valuation, even if the MRP scored/crossed out is visible. – CBEC circular No. 673/64/2002-CX dated 28-10-2002 – earlier circular No. 639/30/2002-CX dated 24-5-2002 rescinded (though the word used is 'modified').

'Retail sale' need not be for retail sale – As per Rule 2(q) of Standards of Weights & Measures (Packaged Commodities) Rules, 'retail sale', in relation to a commodity, means the sale, distribution or delivery of such commodity through retail sale agencies or other instrumentalities for consumption by an individual or a group of individuals or any other consumer.

Thus, even if goods are cleared to depot for ultimate distribution through retail stores, the provisions in respect of MRP will apply.

Interestingly, the definition envisages situations where product is not intended for retail sale, but intended only for consumption by individual or group of individuals.

Products covered under the MRP valuation scheme

So far, 96 articles have been covered under this scheme. Some of them and abatement as a percentage of retail price are given below –

- Chocolates in any form falling under 1806 – Abatement 35%
- Biscuits manufactured with aid of power, falling under 1905 31 00 – Abatement 35%
- Waffles & Wafer falling under 1905 32 11 – Abatement 35%
- Aerated waters 2201 10 20 or 2202 10 10 – Abatement 42.5%
- Toothpaste falling under 3306 10 20 – Abatement 35%
- Footwear falling under 6401 to 6405 – Abatement 37% if price between Rs. 250 and Rs. 750, and 40% if price exceeds 40%.
- Printers, ink cartridges 8443 – Abatement 25% (w.e.f. 25-1-2008)
- Computers 8471 30 – Abatement 22.5% (w.e.f. 25-1-2008)
- Input or output units for computers – printers, monitors, keyboard, scanner, mouse etc. – 8471 60 - Abatement 25% (w.e.f. 25-1-2008)
- Modems 8517 – Abatement 25% (w.e.f. 25-1-2008)
- TV Receivers including Video monitors and video projectors falling under 8528 – Abatement 35%.
- Photographic cameras falling under 9006 – Abatement 35%
- Toothbrush 9603 21 00 – Abatement 28.5%
- Vacuum Flasks falling under 9617 00 11, 96-7 00 12 – Abatement 40%.
- Automobile parts, components and assemblies – Abatement 33.5%

Definition of 'retail sale price' - For the purposes of this notification, "retail sale price" means the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing, forwarding and the like, as the case may be, and the price is the sole consideration for such sale.

Meaning of wholesale package - Wholesale package means a package containing (i) A number of retail packages, where the wholesale package is intended for sale, distribution or delivery to an intermediary and is not intended for sale direct to a single consumer *or* (ii) A commodity sold to an intermediary in bulk to enable the intermediary to sell, distribute or deliver such commodity to consumer in smaller quantities *or* (iii) packages containing ten or more than 10 retail packages where the retail packages are labelled as required under the rules - Rule 2(*x*).

Such package should contain declarations as specified in Rule 29 of Standard of Weights and Measures (Packaged Commodities) Rules, 1977 e.g. name and address of manufacturer/packer, identity of commodity and number of retail packages contained in such wholesale package or net quantity. ***Such package is not required to indicate MRP. Hence, provisions of MRP do not apply.***

Definition of MRP - *Explanation 1* to Section 4A(4) of Central Excise Act defines 'retail sale price' as the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing, forwarding and the like, as the case may be, and the price is the sole consideration for such sale. However, if any Act, Rules or other law requires that price declared on a package should be exclusive of any taxes, then 'retail sale price' in such cases, will be exclusive of such taxes.

MRP inclusive of all taxes - Under Weights & Measures Act, 'Maximum Retail Price' (MRP) has to be printed on packaged commodity for retail sale. The 'MRP' has to be inclusive of all duties and taxes, including local taxes. MRP should be exclusive of local taxes. In view of different rates of taxes in different States, a manufacturer can print different rates for sale in different States/areas. A retailer can sell the goods below MRP printed on the package.

Increase in retail price after clearance from factory

If retail price declared on the package at the time of removal is subsequently altered to increase the price, such increased retail price will be retail price for purpose of Section 4A [*Explanation* 2(b) to Section 4A(4)]. It may be noted that the provision applies only when retail price is 'increased' after clearance. However, as per Section 2(f)(ii), putting label of altered price will be 'deemed manufacture' and hence excise duty will become payable. - - Really, as per Rule 23 of Packaged Commodities Rules, alteration of MRP on the package is prohibited.

Deemed Manufacture of products covered under MRP

In respect of goods specified in third schedule to Central Excise Act, any process which involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on the container or adoption of any other treatment on the goods to render the product marketable to consumer will be 'manufacture'. [Section 2(f)(iii) effective from 14-5-2003].

The goods included in Third Schedule of Central Excise Act are same as those on which excise duty is payable u/s 4A, i.e. on basis of MRP printed on the package. Thus, in case of goods on which duty is payable on basis of MRP, if any of the process as specified (like labelling, re-labelling, repacking in unit container, alteration of MRP etc.), it will be 'manufacture' and duty will become payable.

Wrong indication or tampering of MRP is offense

If retail price is not declared on the package at the time of removal, or retail price is declared which is not the retail price as required to be declared as per provisions of Central Excise Law or any other law, the goods are liable to confiscation [Section 4A(4)(a)]. In such case, the 'retail sale price' will be ascertained in the prescribed manner and duty will be payable as per the retail price so determined.

Mode of ascertainment of MRP if MRP not declared or incorrectly declared or obliterated

If (a) assessee clears goods without declaring the retail sale price on the packages of such goods; or (c) by declaring the retail sale price, which is not the retail sale price as required to be declared under the provisions of the Standards of Weights and Measures Act, 1976 (60 of 1976) or rules made thereunder

or any other law for the time being in force ; or (c) by declaring the retail sale price but obliterates the same after their removal from the place of manufacture, the MRP will be determined as per Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008 inserted w.e.f. 1-3-2008.

MRP will be determined on following basis -

Tampering or altering MRP after removal - Section 4A(4)(b) provides that if a manufacturer tampers with, obliterates or alters retail sale price declared on the package of such goods, after removal from place of manufacture, the goods are liable to confiscation. In such case, the 'retail sale price' will be ascertained in the prescribed manner and duty will be payable as per the retail price so determined.

The provision applies only if such tampering, altering or obliteration is done by 'manufacturer'. Thus, if someone else does it, the goods will not be liable to confiscation. Usually, once goods are cleared from the factory, manufacturer has little control over what is done to goods.

5.4 Excise Duty based on 'value'

Fixing specific duty or tariff value is possible only for few selected items like Sugar, pan masala, consumer goods, Cigarette etc. Generally, it is not practicable to fix specific duty or tariff value for numerous products produced. Similarly, paying duty on the basis of MRP is possible only in respect of a few selected commodities. In other cases, Central Excise is payable on the basis of value. This is called "**ad valorem duty**". The 'assessable value' is arrived at on the basis of Section 4 of the Central Excise Act and duty is payable on the basis of such value.

Assessable Value (AV) - Assessable Value (AV) is the '***Value***' on which duty is payable as a percentage. Generally, by 'Value', we understand the price as mentioned in Bill or Invoice. However, for excise purposes, it is not possible to fully rely on such price as

(*a*) Duty is payable even if goods are not sold,

(*b*) It is desirable to have uniform policy in fixing the AV (*c*) Chances of manipulation in such price should be minimum.

Basis of Assessable Value

As per Section 4 (as substituted w.e.f. 1st July, 2000), excise duty is payable on basis of 'transaction value', if the goods are sold at the factory gate to an unrelated buyer when price is the sole consideration. If these requirements are not satisfied, valuation will be done as per Valuation Rules. - Section 4(1)(b)

The basic provisions of new Section 4(1)(a) state that 'assessable value' when duty of excise is chargeable on excisable goods with reference to value will be 'transaction value' on each removal of goods, if following conditions are satisfied -

- The goods should be sold at the time and place of removal.
- Buyer and assessee should not be related
- Price should be the *sole consideration* for the sale.
- Each removal will be treated as a separate transaction and 'value' for each removal will be separately fixed.

Cost of production not relevant - It may be noted that Central Excise Valuation can be below manufacturing Cost. If there is no allegation of flow-back of money from buyer to assessee, if price is the sole consideration and if dealings between assessee and buyer are at arm's length, Assessable Value will be decided on basis of selling price, even if it is below manufacturing cost. - *Guru Nanak Refrigeration Corpn.* v. *CCE* - (1996) 81 ELT 290 (CEGAT 3 member bench).

Cenvat provisions and valuation provisions are independent - CBE&C vide circular No. 137/3/2006-CX.4 dated 2-2-2006 has confirmed that availment of Cenvat credit and valuation for payment of duty are two independent issues.

Full intrinsic value should be considered, ownership is irrelevant - In *Burn Standard Co. Ltd.* v. *UOI* - AIR 1991 SC 1784 = 60 ELT 671 (SC) = 35 ECR 289 = 1991 SIR SCW 1887 = 1991(3) SCC 467, it was held that cost of material supplied free by buyer has to be added to arrive at full intrinsic value of goods. It was observed, '*The fact that the petitioners are not the owners of the end-product are irrelevant. Taxable event is manufacture - not ownership*'.

Each removal is different transaction – Each transaction is a separate transaction and has to be valued separately. Thus, separate prices for same product to different buyers is permissible.

Price must be sole consideration

Price should be sole consideration of sale. Price is the consideration given for purchase of a thing. 'Consideration' in layman's terms means 'in return'. Consideration is the inducement to the contract. It is the reason or material cause of a contract.

Consideration means reasonable, equivalent or other valuable benefit passed on by the promisor to promisee or by transferor to transferee. - *Sonia Bhatia* v. *State of UP* AIR 1981 SC 1274 = (1981) 2 SCC 585.

Some illustrations will clarify :

(a) Buyer supplies some material to be used in manufacture of product and manufacturer i.e. seller charges lower price for the goods, price is obviously not the 'sole consideration' for sale of goods

(b) If the purchaser agrees to pay advance along with order and manufacturer agrees to sell goods at lower price, then price is not the sole consideration.

(c) If buyer agrees to incur some advertisement expenditure of the goods manufactured by the manufacturer and manufacturer agrees to give extra discount over normal price. Here also, price charged by manufacturer cannot be treated as 'sole consideration'.

In such cases, 'transaction value' can be arrived at only after adding back the cost of material supplied free or extra discount or concessions offered in price.

Condition in which goods are removed is relevant for valuation - Goods are to be assessed at the time of removal from factory. Thus, the state in which they are removed is highly relevant for valuation.

Time and Place of Removal

Section 4(1)(a) states that transaction value shall be assessable value when goods are sold by assessee, for delivery at the time and place of removal.

Time of removal - As per Section 4(3)(cc), in case of sale from depot/place of consignment agent, 'time of removal' shall be deemed to the time at which the goods are cleared from factory.

Place of removal - 'Place of removal' has been defined in Section 4(3)(c).

Transaction Value is relevant for valuation only when goods are 'sold' at the time and place of removal.

Transaction Value as Assessable Value

Section 4(3)(d) defines 'transaction value' as follows –

'Transaction value' means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.

Following are main requirements of 'transaction value'.

- Price actually paid or payable
- Price is for the goods
- Price includes any amount that the buyer is liable to pay to, or on behalf of assessee. Thus, payment made by buyer to another person, on behalf of assessee, will be includable.
- The payment should be 'by reason of, or in connection with the sale'. As explained later, these terms have always been construed strictly in judicial interpretation.
- The amount may be payable at the time of sale or at any other time. Such time may be before or after sale.
- Any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter is includable. However, these expenses are includable only when aforesaid conditions are satisfied i.e. (a) The amount should be paid or payable to assessee or on behalf of assessee and (b) Payment should be by reason of sale or in connection with sale.
- Amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods is to be excluded while calculating 'transaction value'. The amount may be 'payable' any time in the future.

Amount payable by buyer to or on behalf of assessee

Any amount that the buyer is liable to pay to the assessee or to a third person on behalf of assessee is includable in 'transaction value'. The significance is as follows -

- Any payment made by buyer to assessee is includable only if it is by reason of or in connection with sale. Such connection should be immediate and direct and not remote or casual. e.g. if assessee designs and prints publicity material and supplies it to buyers on chargeable basis, such amount may be 'in relation to sale' but there is no 'connection' to sale.
- Any payment made by buyer to a third person is includable only if it is made 'on behalf of assessee'. Thus, expenses in respect of advertisements, publicity, marketing, servicing, warranty, commission etc. are not includable if these are incurred by buyer on his own and not 'on behalf of assessee'.

- Any payment made by assessee on behalf of buyer is not includable. e.g. if the contract is ex-works the assessee, but buyer requests assessee to make payment in respect of freight and insurance which is recoverable from buyer. In such case, the payment is made by assessee 'on behalf of buyer' and should not be includable.

By reason of or in connection with sale

The payment by the buyer to seller should be by reason of or in connection with sale of goods which are under assessment.

By reason of - As per Black's Law Dictionary 1979 edition, 'by reason of' means 'because of, by means, acts or instrumentality of'. As per Concise Oxford Dictionary, 'reason' means motive or cause. This indicates a cause and effect relationship.

In connection with - 'Connect' means 'join'. 'Connection' means 'act of connecting' or 'state of being connected' - Concise Oxford Dictionary. As per Black's Law Dictionary 1979 edition, 'connection' means the state of being connected or joined, union by junction, by an intervening substance or medium, by dependence or relation, or by order in a series. The term 'in connection with' has always received a strict interpretation from Court.

Deduction of Taxes from Assessable Value

Definition of 'transaction value' specifically states that transaction value does not include '*the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods*'.

Only effective duty/tax payable allowable as deduction – Since the words used are 'actually paid or actually payable', only tax payable at effective rate (i.e. after considering exemption notification, if any) will be allowable as deduction.

All taxes payable on goods allowable as deduction - Additional tax, surcharge on sales tax, turnover tax will be allowed as deduction, if proved to have been paid. The deduction is admissible even if they are paid periodically as per relevant provisions of taxing statutes/rules.

Formula for calculation of AV - In *GOI* v. *MRF Ltd.* - 1995 (77) ELT 433 (SC) = 1995 AIR SCW 2654 = (1995) 4 SCC 349 (SC 3 member bench), it was held that Assessable Value = (Cum Duty price - Permissible Deductions)/(1 + rate of duty)

Illustration - The selling price of a product, inclusive of basic excise duty @ 16% and education cess is Rs. 1,500 per piece. What is the AV, and what is duty payable per piece ?

Answer : Assume that Assessable Value (AV) is equal to 'Z'.

Total excise duty is 16.48% (Basic excise duty @ 16% plus education cess @ 2% plus SAH education cess of basic excise duty)

Assessable Value (AV)	=	Z
Duty @ 16.48%	=	0.1648 × Z
Sub-Total	=	1.1648 × Z
Now		
1.1648 × Z	=	1,500
Hence, 'Z'	=	1500/1.1648
Z	=	1,287.78

Thus, 'Z', i.e. Assessable Value is 1,287.78 and basis duty @ 16% of Rs. 1,287.78 would be Rs. 206.04 per piece. Education cess @ 2% of basic duty will be Rs. 4.12 and SAH education cess is Rs. 2.06 - (*confirm that 1,287.78 + 206.04 + 4.12 + 2.06 = 1,500*).

Question : The selling price of a product, inclusive of excise duty and sales tax is Rs. 300 per piece. Sales tax rate is 4%. Tariff rate of excise duty is 16%. However, as per an exemption notification, excise duty payable is 8%. Education cesses as applicable. What is the AV, and what is total duty payable per piece?

Answer : Sales tax is payable on cum duty price. If AV is 'Z', the total price will be as follows :

Assessable Value	=	Z
Duty @ 8.24%	=	0.0824 × Z
Sub-Total	=	1.0824 × Z
Add : Sales Tax @ 4%	=	0.0433× Z
Total price (*i.e.*, inclusive of duty and sales tax)	=	1.1257 × Z
Now :		
1.1257 × Z	=	Rs. 300
Hence, 'Z'	=	Rs. 300/1.1257
i.e., Z	=	Rs. 266.50

Check this as follows :

Assessable Value	=	266.50
Excise duty @ 8%	=	21.32
Education Cess	=	0.43
SAH Education Cess		0.21
Sub-Total	=	288.46
Add : Sales Tax @ 4%	=	11.54
Total price	=	300.00

Additional consideration and excise valuation

The additional consideration flowing directly or indirectly from the buyer shall be added to the price actually paid to assessee. This will be cum-duty price. The cum-duty price, exclusive of sales tax and other applicable taxes, if any, will be deemed to include the duty payable on such goods. – *Explanation* to Section 4(1) [inserted w.e.f. 14-5-2003].

Thus, additional consideration will be added to the price paid by buyer to assessee. This will be treated as cum-duty price and assessable value will be worked back after allowing admissible deductions (i.e. by back calculations). – confirmed and clarified in CBE&C DO letter No. 334/1/2003-TRU dated 28-2-2003 issued on Budget day to all Excise Commissioners

If goods are cleared without payment of duty and later demand is raised, the invoice value should be taken as cum-duty price and duty payable should be calculated by back calculations - *CCE* v. *Maruti Udyog* 2002 AIR SCW 1039 = 141 ELT 3 = 2002(3) SCC 547 = 49 RLT 1 = 122 Taxman 105 (SC 3 member bench).

Deduction of Excise Duty if goods removed without payment of duty - Sometimes goods are removed by the manufacturer without payment of duty on the understanding that the product is exempt from duty. However, later, if a demand is raised, the question arises whether the Invoice Price should be considered as

Cum Duty price and then backward calculations should be made or whether the Invoice Price (excluding other taxes) should be considered as Assessable Value and Excise duty should be charged on such Invoice Price ? e.g. assume that goods are sold at Rs. 110 without charging excise duty. Later it was observed that the goods are really dutiable and duty rate is 10%. In such case, whether the assessable value will be Rs. 100 or Rs. 110 ? The answer is – Rs. 100, as per case law discussed below.

In *CCE* v. *Maruti Udyog* 2002 AIR SCW 1039 = 122 Taxman 105 = (2002) 3 SCC 547 = 49 RLT 1 = 141 ELT 3 (SC 3 member bench), it has been held that the price should be considered as cum-duty price and excise duty should be calculated by making backward calculations – review petitions and civil appeal dismissed by 3 member bench of SC on 9-12-2004 (179 ELT A102) – informed to trade and earlier circular No. 749/65/2003-CX dated 26-9-2003 withdrawn – CBE&C circular No. 803/36/2004-CX dated 27-12-2004 – same view *CCE* v. *Supreme Fabrics* (2007) 212 ELT 161 (SC).

5.5 Inclusions in Transaction Value

'Transaction Value' as defined in Section 4(3)(d) states that any amount charged for (by assessee to buyer), or to make provision for (*presumably by buyer*), advertising or publicity, marketing and selling organisation expenses, storage, outward handling, servicing, warranty, commission ***or any other matter***; is includable in 'transaction value'. However, the payment or provision will be includable *only if* (a) Buyer is liable to pay to assessee or on behalf of assessee and (b) It is by reason of or in connection with the sale.

Packing charges

New Section 4 has made no specific provision for packing charges. Cost of normal packing will be covered, as in most cases, it is 'in connection with' or 'in respect of' sales. Moreover, each transaction is a separate transaction under new Section 4. Goods are to be valued in the condition in which they are removed from factory. Hence, any packing done in connection with sale is includable in assessable value.

Design, Engineering and technical knowhow Charges

Design and Engineering Charges are essential for purpose of manufacture and hence have to be included in Assessable Value, since such payment is 'in connection with sale'.

Cost of drawing supplied by buyer not includable - Often buyer supplies a drawing and the manufacturer makes a component as per the drawing and supplies the component to buyer. In such case, cost of such drawing is not includable as the manufacturer is not engaged in design of the product. - *CCE* v. *Bharat Forge Ltd.* 2000(122) ELT 169 (CEGAT).

Consultancy charges relating to manufacturing - These were includable under old Section 4 and should be includable in new Section 4 as well, as such payment is 'by reason of sale'.

Loading and handling charges within the factory

These are in by reason of sale and are includable – *Punjab Alkalies* v. *CCE* 2005 (179) ELT 341 (CESTAT).

Loading charges within factory are includable – *Shree Rajasthan Syntex* v. *CCE* 2005 (186) ELT 239 (CESTAT).

Price increase, variation, escalation

In some cases, prices increase after removal of goods.

Price increase subsequent to removal **-** Price relevant is 'at the time of removal'. Thus, any subsequent increase or reduction in prices of such goods after goods are cleared from the factory is not relevant, *provided the price is final at the time of removal.*

Question : Price of a machine was Rs. 3 lakhs on 28th September, 2006 when the machine was removed from the factory at Pune and sold to a buyer. The buyer refused to take delivery of the machine. In the meanwhile, the machinery manufacturer increased the price of machinery to Rs. 3.30 lakhs w.e.f. 1st October, 2006. The machinery manufacturer then sold the machine to another buyer on 12th November, 2006 at increased price of Rs. 3.30 lakhs. What is the excise duty payable. The excise duty rate is 15%. (The prices are exclusive of all taxes).

Answer : The price prevalent at the time of removal was Rs. 3 lakhs. Hence, duty payable is Rs. 45,000. The duty is payable on 28th September 2006 when the machine was removed from the factory after manufacture.

Price Escalation/ variation/increase - Often (particularly in large contracts), there is 'price escalation clause', where additional price is payable if there is escalation in prices (of raw materials etc.). In such cases, excise duty is payable on additional price realised.

Free after sale service/warranty

The heads 'servicing' and 'warranty' have been specifically included in definition of payments includable in 'transaction value'.

Manufacturers often give free after sale service during warranty period. Though these are called '*free services*', cost of such services is already included in the price of product. Promise for provision of after sale service certainly increases its marketability, it is in connection with sale and its cost is includable.

Free after sale services offered by dealer, but cost recovered from manufacturer - In automobile industry, the dealer inspects vehicle on receipt from manufacturer. It is called 'pre-delivery inspection'. Further, it is standard practice to issue 'free service coupons' to customers. The cost of these so called 'free services' is obviously included in the selling price. The dealer provides the 'free service', on submission of coupon by the customer. The dealer gets reimbursement of these charges from the manufacturer. The 'Dealers margin' is exclusive of the cost of these 'free services'. Cost of such 'free services' is clearly includable in 'transaction value'. – view reiterated in CBE&C circular No. 643/34/2002-CX dated 1-7-2002.

Pre-delivery inspection charges for vehicles - After the vehicles are sold to dealers, the Dealers conduct pre-delivery inspection (PDI) before delivering the vehicle to customer. In my opinion, these should be includable as these clearly appear to be 'by reason of' or 'in connection with' sale. The buyer has no option about these charges. Even applying the principle of *'ejusdem generis'*, these charges are similar to illustrations given in the definition of 'transaction value' e.g. 'marketing and selling organisation expenses, servicing, warranty etc'. The same view has been expressed in CBE&C circular No. 643/34/2002-CX dated 1-7-2002 [These were not includable prior to 1-7-2000, as per CBE&C circular No. 681/72/2002-CX dated 12-12-2002].

Deduction of Trade Discounts

Trade discounts are allowable as deduction for valuation purposes. Trade discount means discount usually expressed as a percentage deduction given to wholesale buyers Since quantum of trade discount is not payable by buyer to seller, it will not form part of 'transaction value'.

Note that 'commission to agent' will not be allowed as deduction, while trade discount given to buyer is not a 'commission'. It will not be added for purpose of Central Excise Valuation.

In *Pepsico India Holding* v. *CCE* 2004 (163) ELT 478 (CESTAT), it was held that discount need not be uniform. Varying discounts are permissible, *even when sale is through a related person.*

This is correct, since each transaction is a separate transaction for purpose of valuation.

Cash discount permissible - Department has confirmed that cash discount is allowable as deduction, if actually passed on to buyer, if transaction is on principal to principal basis. CBE&C circular No. 643/34/2002-CX dated 1-7-2002.

There is no provision that discount should be known or given at the time of removal of goods. Definition of 'Transaction Value' makes it clear that any amount the buyer is liable to pay to assessee at the time of sale or *at any other time* is includable in 'Assessable Value'. Such 'any other time' can be either before the sale or after the sale. Thus, year end discount or turnover discount given on basis of turnover achieved during a prescribed period should be allowable as deduction.

Commission to Selling Agents not allowed as deduction - 'Commission' means a percentage paid to the agent from the profits of goods sold or business obtained - Concise Oxford Dictionary.

Sometimes, goods are sold directly to a buyer and overriding commission is paid to selling agents/ commission agents. Sometimes (particularly in international transactions), buyer is asked to make payment of commission directly to the agent. Such commission is not deductible from 'transaction value'. If it is paid separately by buyer, it is clearly includable, as obviously, it is paid by buyer on behalf of seller.

5.6 Exclusions in Assessable Value

Outward handling, freight and insurance

As per Section 4(1)(a), 'transaction value' is considered as 'value' if goods are 'sold' at the time and place of removal. This implies that what is relevant for assessable value is the 'price at the time and place of removal'.

Place of removal - 'Place of removal' means - (i) a factory or any other place or premises of production or manufacture of the excisable goods from where such goods are removed, (ii) A warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty from where such goods are removed, (iii) A depot, premises of a consignment agent or any other place or premises from where excisable goods are to be sold after their clearance from factory; from where such goods are removed. [Section 4(3)(c)].

Thus –

(i) If excisable goods are removed for sale from factory of manufacture or place of production, that will be 'place of removal'. If there is no 'sale' at factory gate, it is not the place of removal.

(ii) If goods are cleared for sale from warehouse where goods were allowed to be kept without payment of duty, that will be the 'place of removal'.

(iii) If goods are cleared from factory to depot or branch or place of consignment agent, then such depot/ branch/place of consignment agent will be 'place of removal'.

(iv) In case where goods are 'sold' at destination and not at factory gate (this may be the case in case of CIF contract but not necessarily), such place or premises will be 'place of removal'.

In *Escorts JCB Ltd.* v. *CCE* 2000(118) ELT 650 = 35 RLT 9 (CEGAT), it was observed, in respect of provisions under old Section 4, as follows - 'Place where excisable goods are sold can be place of removal. A place where goods are sold can be a place where the property in goods sold passes from buyer to seller. If goods are sold only when they reach the destination, that will be the place of removal'.

Meaning of 'Warehouse' – If goods are sold from warehouse, that will be treated as 'place of removal' in terms of Section 4(3)(c)(ii). In such case, transport, handling and insurance charges upto warehouse incurred by assessee will be includable in the Assessable Value.

Sale ex-works - If sale is ex-works, then freight and outward insurance amount charged extra will not be includable. This would be so even if the manufacturer makes some profit on the transport charges.

Sale at depot or place of consignment agent – If goods are sold from depot or place of consignment agent, that will be 'place of removal' as per Section 4(3)(c)(iii). In such case, transport, handling and insurance charges upto depot or place of consignment agent will be includable in Assessable Value as depot/place of consignment agent is 'place of removal' where sale takes place. [Issue of depot sale has been considered in greater details in another Chapter]

Price for and sale takes place at destination only – In some cases, price is FOR and possession is given to buyer only at destination. 'Sale' takes place when delivery is given at destination and hence the 'destination' is 'place of removal'. Hence, freight upto the destination will be includable in assessable value.

The place where delivery is given to buyer will be 'place of removal' in terms of Section 4(3)(c)(iii). The 'value' will be price at that place, which will obviously include transport, handing and insurance charges upto that place.

Equalised freight

Sometimes, manufactures fix uniform all India price of the goods. The actual cost of transport will obviously vary from place to place. In such case, though the invoice shows the uniform price, deduction will be available on the basis of average freight i.e. equalised freight. (Till 28-2-2003, deduction on account of equalised freight was not permissible).

The deduction is allowable only if there is 'sale' at factory gate i.e. factory is 'place of removal', even if seller has agreed to bear freight charges.

The provision of equalised freight applies only when there is sale from factory. If sale is from depot, freight from factory to depot is not allowable as deduction.

Illustration **– A manufacturer having factory in Delhi has uniform price of Rs. 500 (excluding taxes) for sale anywhere in India. During 2004-05, he made following sales – (a) Sale at factory gate in Delhi – 1,000 pieces – no transport charges (b) Sale to buyers in Chandigarh – 500 pieces – actual transport charges incurred – Rs. 15,000 (c) Sale to buyers in Chennai – 700 pieces – actual transport charges incurred – Rs. 50,000 (d) Sale to buyers in Ahmedabad – 800 pieces. – Actual transport charges – Rs. 25,000. - - Find assessable value.**

The total pieces sold are 3,000. The actual total transport charges incurred are Rs. 90,000. Hence, equalised (averaged) transport charges per piece are Rs. 30. Hence, assessable value will be Rs. 470 (Rs. 500 – Rs. 30). This will apply to all 3,000 pieces sold by the manufacturer.

CAS-5 for calculation of equalised freight - ICWAI has issued Cost Account Standard 5 (CAS – 5) – Determination of Average (Equalised) cost of transportation on 21-7-2005. The standard provides for calculating equalised freight when (a) Own fleet is used or (b) Hired transport is used. Forms for certification have also been prescribed. The principles may be used to determine equalised freight that can be claimed as deduction.

Transit Insurance - The principle applicable to freight should hold good for insurance charges also, as insurance expenses are really part of the transport charges. - - CBE&C, vide its circular No. 643/34/2002-CX dated 1-7-2002 has confirmed that transit insurance will be allowed as deduction if shown separately in invoice.

Installation and Erection Expenses

Installation and erection expenses are incurred after the goods are removed from the factory. There may be an independent contract for erection or even a composite contract.

In *Gordhandas Desai* v. *CCE* 2005 (179) ELT 557 (CESTAT), it was held that charges of erection and commissioning are not includable in assessable value even in respect of new Section 4 w.e.f. 1-7-2000 – relying on *Emerson Network Power* v. *CCE* 2004 (176) ELT 168 (CESTAT).

Service Tax on erection and commissioning – Service tax has been imposed on erection, installation and commissioning w.e.f. 10-9-2004. Hence, even if excise duty is not payable, service tax will be payable.

Notional Interest on security deposit/advances

The manufacturer may often ask for advance/deposit from buyers. The purpose may be to ensure security of payment from buyers and/or to get working capital. Such deposit may be with or without interest. Such advance is 'in relation to sale'. If the advance obtained is without interest or with lower quantum of interest, there will be benefit to the buyer by way of reduction in his cost. The 'connection' between the selling price and reduced cost by way of reduction in interest cost is only 'indirect'. Thus, 'notional interest' on advances may not be includable if relation between advance and selling price is only casual. There is 'relation' but no 'connection'. 'Cause and effect' relationship is absent.

However, if there is evidence that selling price has been lowered due to receipt of advance/deposit, then price is not the 'sole consideration of sale', as required u/s 4(1)(a). In such case, there is 'cause and effect' relationship. There is 'connection' between advance received and the price charged. In such cases, notional interest on advance should be includable.

Explanation 2 to Rule 6 of Valuation Rules (inserted w.e.f. 1-3-2003) provides that notional interest on advances is includable in assessable value only if there is evidence with Central Excise Officer that such advance has influenced the fixation of prices by way of charging lower price or by offering a special discount to the buyer who has made the advance deposit. Thus, when the price is same to all buyers whether they have paid advance to seller, notional interest is not includable in assessable value. - - As per Illustration 2 to Explanation 2, even in cases where there is only one buyer from whom advance has been obtained and comparable price to other buyer is not available, notional interest is includable only if there is evidence with Central Excise Officer that such advance has resulted in lowering the prices. - - In other words, burden of proof that price has been lowered or special discount has been offered on account of receipt of advance from buyer, is on the department.

Interest on Receivables

The manufacturer may recover interest from buyer, if he does not make payment as per agreed terms. Department has confirmed that delayed payment charges will not be includable, if shown or indicated separately in invoice and charged over and above the sale price. – CBE&C circular No. 643/34/2002-CX dated 1-7-2002.

This is correct for the following reasons -

- Payment of interest is 'by reason of late payment' and not 'by reason of sale'.
- Payment of interest is 'related to sale', but there is no direct connection between 'sale' and 'interest payable for delayed payment'. There is 'casual relation' but no 'connection'. The payment is 'in connection with late payment' and not 'in connection with sale'.
- If the interest is held as includable, assessment of goods at the time of removal will be impossible. Excise Law expects assessment at the time of removal. Provisional Assessment is an exception, not a Rule. Thus, any interpretation which will make assessment at the time of removal virtually impossible cannot be termed as 'harmonious interpretation'.

Advertisement and sale promotion expenses incurred by buyer

Manufacturer incurs advertisement expenditure. These are obviously built in the cost for determining his selling price. In addition, often Dealers also advertise the product at their own cost.

Definition of 'transaction value' includes charges for 'advertisement, publicity and marketing expenses'. However, these are includable only if buyer is liable to pay the amount to assessee or *on behalf of assessee*. Thus, advertisement and Sales promotion expenses incurred by dealer/distributor, *if done on his own*, are not to be included, if transaction between buyer and seller is on principal to principal basis. This is because the buyer is not incurring these expenses 'on behalf of the assessee'.

CBE&C, vide its circular No. 643/34/2002-CX dated 1-7-2002, has clarified that even when advertisement and publicity charges are borne by dealers/buyers and dealings are on principal to principal basis, but if there is an agreement, either written or oral, that the buyer will incur certain expenditure for advertising the goods of the assessee, cost of such advertisement will be added to the price of goods to determine assessable value, as price is not the sole consideration.

'Dharmada' amount charged to seller addible ?

Sometimes, some amount is collected by seller in the invoice as 'Dharmada' (charity) and spent for charitable purposes.

CBE&C, vide circular No. 763/79/2003-CX dated 21-11-2003 has clarified that *dharmada* is includable in Assessable Value, as per decisions of Supreme Court.

Manufacture under brand name of others

Some Companies get the goods manufactured from others and sell them under their brand name (e.g. Batas get chappals manufactured from small units, Bajaj Electricals get their electrical products manufactured from other units, Philips/Crompton and others get many products manufactured under their brand name). In such cases, selling price of Bajaj or Bata will naturally be higher than the purchase price. Normally, the buyer will get the goods manufactured as per his specifications and will inspect the final product to ensure that quality is maintained. Even then, the buyer, who is a brand name owner, is not the actual manufacturer.

Naturally, the brand name owner sells the goods at higher rates. Even then, 'value' for purpose of excise will be based on the price at which the manufacturer sells the goods to brand name owner. The actual manufacturer and brand name owner cannot be termed as 'related person' as long as relations between them are on 'principal to principal' basis and price is the sole consideration – view upheld in *Voltas Ltd*. v. *CCE* 2005 (188) ELT 421 (CESTAT).

If the manufacturer of product manufactures goods with 'MRP' printed on the goods at the time of removal and if goods are covered under Section 4A, duty will be payable on basis of MRP printed on the product, as Section 4A has overriding effect over other provisions in respect of valuation. However, if the goods are cleared in bulk, without printing 'MRP', the goods will not be covered under Section 4A i.e. MRP provisions and duty will be payable on basis of Section 4, i.e. 'transaction value'.

5.7 Bought out goods, accessories for valuation

Often some articles are supplied along with the goods, which are bought out, i.e. not manufactured by the assessee. These bought out components broadly fall in following categories -

- Components/parts which are essential for functioning of the main product. However, these are not manufactured by the assessee. These are bought out and supplied along with the main product. e.g. a manufacturer of UPS buys a battery and supplies it along with his product. These should be addible in Assessable Value.
- Consumables which are required for use of the equipment e.g. ribbon for typewriter. These get used up in due course by the buyer.
- Sometimes, essential spares are supplied alongwith main product. Some of these may be bought out.
- Often manufacturer supplies some bought out accessories along with main product. These accessories are not essential for functioning of the main product, but do help in better and efficient use of the product or add to its beauty/utility. e.g. seat cover for car seats.
- Sometimes, buyer supplies an article and expects manufacturer to fit/assemble his product on the article supplied by him so that he gets assembly duly tested - e.g. buyer supplies tractor and asks manufacturer of compressor to fit the compressor on the tractor.
- As per earlier case law, value of essential bought out components was required to be added to 'Assessable Value', but, value of bought out accessories or consumables was not required to be added. The same principle will apply in new valuation rules also.

Following need consideration –

(a) Excise is a duty on manufacture. Duty should not be levied on an activity which is not manufacturing activity, unless it is incidental or ancillary to main manufacturing process.

(b) There is no levy on 'trading activity'.

(c) Goods are to be assessed in the stage in which they are cleared from the factory of production.

(d) Any payment by buyer to assessee 'in connection with' or 'in respect of' sale is includable, while payment which is only 'in relation to' the sale is not includable.

(e) Principles of classification or Cenvat are not directly relevant for valuation u/s 4. However, in my opinion, these could be considered in case of ambiguity, to achieve 'harmonious construction'.

If duty paid goods are to be brought in factory for trading purposes, this should be disclosed in application for registration in Form A-1 and also in registration certificate. Thus, technically, trading of goods from the factory without incorporating that activity in registration certificate is improper. This may make assessee liable for penalty, but this aspect has no relation with provisions of valuation of goods.

Value of essential bought out items

Value of essential bought out items, fitted to the main article at the time of removal should be includable in assessable value, as –

1. Goods should be assessed in the stage in which they are removed.
2. Payment for such item is 'in connection with' the sale and the main article cannot work without this bought out part.
3. Value of essential part or component should be added even if it is supplied by buyer. The reason is that if such part is supplied by buyer, 'price' is not 'sole consideration'. Thus, the additional consideration, i.e. value of parts supplied by buyer should be includable, as per Rule 6 of Central Excise Valuation Rules, 2000.

Value of optional bought out items

Sometimes, some bought out items are supplied on optional basis. These are not essential parts of the main article. Value of these should not be includable as - (a) It is a purely trading activity. Even reasonable profit of sale of such items should be permissible. (b) Supply of such bought out item may be 'in relation' to sale but not 'in connection' with sale or 'by reason' of sale. The sale of main article is independent of sale of optional bought out items.

Profit earned on such bought item should not be includable in Assessable Value of manufactured product, in view of *Triveni Engineering* v. *CCE* 2000(122) ELT 386 (CEGAT).

Bought out goods supplied but no manufacturing

Sometimes, manufacturer supplies some bought out parts with his own manufactured parts - may be as assembly or as a set. However, there is no manufacturing activity. In such case, duty should not be leviable.

Value of bought out consumables supplied with main Article - A 'consumable' is not 'essential part' of main article, even if the main article cannot function without such consumable. Value of such consumables should not be includable. The reasoning would be same for non-inclusion of optional bought out articles.

Accessories supplied with main article

Value of bought out accessories supplied along with main article should not be includable, as the supply is in 'relation to' sale but on 'in connection' with sale.

Profit earned on such bought accessory will not be includable in Assessable Value of manufactured product, in view of *Triveni Engineering* v. *CCE* 2000(122) ELT 386 (CEGAT).

Meaning of accessory - Accessory means 'an object or device not essential in itself but adding to beauty, convenience or effectiveness of something else' [*Webster's 9th New Collegiate Dictionary*]. The meaning of the term 'accessory' has been considered in various judgments.

Accessories of a machine promote the convenience and better utilisation of the machine but nevertheless they are not machine itself - *CCE* v. *Acer India Ltd.* (2004) 172 ELT 289 = (2004) 8 SCC 179 = AIR 2004 SC 4805 = 137 STC 596 = 2004 AIR SCW 5496 (SC 3 member bench). In this case, it was held that software is not part of computer even if it is pre-loaded on computer.

5.8 Valuation Rules to determine Assessable Value

Section 4(1)(b) of the Central Excise Act states that if Assessable Value' cannot be determined u/s 4(1)(a), it shall be determined in such manner as may be prescribed by rules. Under these powers, Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 have been made effective from 1-7-2000. These rules are discussed below.

Value nearest to time of removal if goods not sold

If goods are not sold at the time of removal, then value will be based on the value of ***such goods*** sold by assessee at any other time nearest to the time of removal, subject to reasonable adjustments. [Rule 4].

This Rule applies when price at the time of removal is not available as the goods are not sold by the assessee at the time of removal. Thus, this Rule should apply in case of removal of free samples or supply under warranty claims. In case of removal of samples or free replacement under warranty claims, duty will be payable on price of identical goods sold by assessee near about the time of removal of the samples.

This Rule should not apply in respect of depot transfer or branch transfer or in case of sale to 'related person' as specific provisions have been made. This provision will also not apply for 'job work' as in case of 'job work', specific provisions have been made by inserting Rule 10A w.e.f. 1-3-2007.

Valuation of free samples – CBE&C, *vide* circular No. 813/10/2005-CX dated 25-4-2005 has clarified that in case of samples distributed free, valuation should be done on basis of Rule 4 [Earlier, as per CBE&C circular dated 1-7-2002, valuation of free samples was required to be done on basis of 11 alongwith Rule 8 i.e. cost of production plus 10%].

The revised circular dated 25-4-2005 stating that valuation of samples should be on basis of Rule 4, has been upheld as valid in *Indian Drugs Manufacturers' Assn* v. *UOI* (2008) 222 ELT 22 (Bom HC DB).

Question - X Ltd. is engaged in the manufacture of 'paracetamol' tablets that has an MRP of Rs. 9 per strip. The MRP includes 16% Excise Duty plus education cess of 2% and SAH education cess of 1%. Abatement of 40% is available on MRP on drugs. The Company cleared 1,00,000 tablets and distributed as physician's samples free of cost. The package was marked 'Free samples' and MRP was not marked. Following data is available – (a) Cost of production of the tablet calculated as per CAS-4 is Rs. 3.40 per tablet (b) The company sales the goods in market to wholesalers at Rs. 4.00 (excluding excise duty and CST). Determine the total duty payable.

Answer - If the product is not covered under MRP provisions, valuation provisions u/s 4A do not apply. In that case, valuation is required to be done as per Central Excise Valuation Rules. CBE&C, vide circular No. 813/10/2005-CX dated 25-4-2005, has clarified that in case of samples distributed free, valuation should be done on basis of Rule 4. i.e. valuation should be on basis of value of identical goods cleared at or around the same. Hence, 'value' will be Rs. 4 per piece i.e. total Rs. 4,00,000. Excise duty will be Rs. 64,000 plus education cess of Rs. 1,280 plus SAH education cess of Rs. 640.

Goods sold at different place

Sometimes, goods may be sold at place other than the place of removal e.g. in case of FOR delivery contract. In such cases, actual cost of transportation from place of removal upto place of delivery of the excisable goods will be allowable as deduction. Cost of transportation can be either on actual basis or on equalized basis. [Rule 5].

Rule 5. Where any excisable goods are sold in the circumstances specified in clause (a) of sub-Section (1) of Section 4 of the Act except the circumstances in which the excisable goods are sold for delivery at a place other than the place of removal, then the value of such excisable goods shall be deemed to be the transaction value, excluding the cost of transportation from the place of removal upto the place of delivery of such excisable goods.

Explanation 1 – "Cost of transportation" includes – (i) the actual cost of transportation; and (ii) in case where freight is averaged, the cost of transportation calculated in accordance with generally accepted principles of costing.

Explanation 2 - For removal of doubts, it is clarified that the cost of transportation from the factory to the place of removal, where the factory is not the place of removal, shall not be excluded for the purposes of determining the value of the excisable goods.

Valuation when price is not the sole consideration

If price is not the sole consideration for sale, the 'Assessable Value' will be the price charged by assessee, plus money value of the additional consideration received [Rule 6 of Central Excise Valuation Rules].

The buyer may supply any of the following directly or indirectly, free or at reduced cost.

(i) Materials, components, parts and similar items

(ii) Tools, dies, moulds, drawings, blue prints, technical maps and charts and similar items used

(iii) Material consumed, including packaging materials

(iv) Engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of the goods

In such cases, value of such additional consideration will be added to the price charged by assessee to arrive at the 'transaction value'. [*explanation* 1 to Rule 6].

Cost of material supplied by buyer to be added - In *Texmaco Ltd.* v. *CCE* 77 ELT 501 = AIR 1992 SC 1801 = 1991 (2) SCC (Supp) 305 = 1992 AIR SCW 2020, the assessee was manufacturing wagons for railways. Railways had supplied wheels and axles which were used by company while manufacturing railway wagons. Hon. Supreme Court have held that value of this material should be added for considering 'Value' of wagon for purpose of excise duty.

Valuation in case of job work - Sometimes, the buyer (trader) supplies raw materials and manufacturing operations are carried out by Job worker/processor as per requirements of buyer/trader and the material is returned to buyer after job work/processing. (*Note* : The term Job Work is used in Engineering Industry while the term processing is used in Chemical/Textile Industry). Since excise is a duty on 'such goods', it is immaterial who has supplied the raw material.

In such case, duty is payable by job worker on basis of price at which goods are sold by raw material supplier in the market [Rule 10A inserted w.e.f. 1-4-2007].

Patterns/dies/masters/moulds supplied/made by buyer - If patterns/dies/masters/moulds are supplied by buyer, it is obvious that price charged for goods is not the 'sole consideration'. In such cases, proportionate cost of such patterns/dies etc. should be added to 'transaction value' to arrive at 'assessable value'.

Sale at depot/consignment agent

Section 4(3)(c)(iii) [amended w.e.f. 14-5-2003] provides that in case of sale at depot/consignment agent, the depot/place of consignment agent will be the 'place of removal'. As per Section 4(3)(cc), in case of sale from depot/place of consignment agent, 'time of removal' shall be deemed to the time at which the goods are cleared from factory.

In other words, in case of sale from depot/place of consignment agent, duty will be payable on the price prevailing at the depot as on date of removal from factory. Price at which such goods are subsequently sold from the depot is not relevant for purpose of excise valuation.

As per *explanation* 2 to Rule 5 of Central Excise Valuation Rules, if factory is not the 'place of removal', cost of transportation from factory to place of removal shall *not* be excluded for purpose of determining value of excisable goods. In other words, cost of transportation and handling from factory upto depot will have to be added for purpose of valuation, as the depot is the 'place of removal'.

When goods are sold through depot, there is no 'sale' at the time of removal from factory. In such cases, price prevailing at depot (but at the time of removal from factory) shall be the basis of Assessable Value. The value should be 'normal transaction value' of such goods sold from the depot at the time of removal or at the nearest time of removal from factory. [Rule 7 of Valuation Rules].

For example, if an assessee Transfers a consignment of paper to his depot from Delhi to Agra on 5-7-2000, and that variety and quality of paper is normally being sold at the Agra depot on 5-7-2000 at transaction value of Rs. 15,000 per tonne to unrelated buyers, where price is the sole consideration for sale, the consignment cleared from the factory at Delhi on 5.7.2000 shall be assessed to duty on the basis of Rs. 15,000 per tonne as the assessable value. If assuming that on 5-7-2000 there were no sales of that variety from Agra depot but the sales were effected on 1-7-2000, then the normal transaction value on 1-7-2000 from the Agra depot to unrelated buyers, where price is the sole consideration shall be the basis of assessment. [Illustration given in the departmental circular dated 30-6-2000].

In short, price ruling at the depot, but at the time of removal from the factory will be relevant. It does not matter if subsequently the goods are actually sold from depot at higher or lower price.

No differential duty if duty rate increased - In *Penninsula PolymeRs*. v. *CCE* 2005 (188) ELT 51 (CESTAT), excise duty was 5% when goods were cleared from factory to depot and duty was paid accordingly. When the goods were sold from depot, excise duty rate was 8%. It was held that differential duty is not payable.

Meaning of 'normal transaction value'

The term 'normal transaction value' is relevant in case of depot sale.

As per Valuation Rule 2(b), "normal transaction value" means the transaction value at which the greatest aggregate quantity of goods are sold. The term 'GREATEST AGGREGATE QUANTITY' is used in Rule 7 of Customs Valuation Rules. This Rule states that while considering selling price of imported goods in India, unit price at which greatest aggregate quantity of identical or similar goods are sold to unrelated persons in India should be the basis. e.g. if 65 units are sold @ Rs. 100, 55 units are sold @ Rs. 95 and 80 units are sold @ Rs. 90; then greatest aggregate quantity is 80 which is sold @ Rs. 90 per unit, which will be the basis for valuation. This principle should apply in deciding 'normal transaction value' under Rule 2(b) also.

CBE&C, *vide* its circular No. 643/34/2002-CX dated 1-7-2002, has clarified that 'greatest aggregate quantity' should be considered irrespective of number of buyers. If 'normal transaction value' from the depot on

date of removal from factory is not ascertainable, nearest day when clearances of identical goods were effected from depot or other place should be taken into consideration.

Question - Price of 'X' is Rs. 100 if sold from the factory at Ahmedabad, Rs. 120 ex-depot Mumbai and Rs. 130 ex-godown of consignment agent at Chennai. M/s ABC Co. Ltd. sold 200 pieces from factory at Ahmedabad on 30-10-2001. On the same day, 30 pieces were cleared for Mumbai depot and 70 pieces were cleared for Chennai godown of consignment agent. The prices are exclusive of all taxes. What is the assessable value in each case.

Answer - Assessable value will be Rs. 100, 120 and Rs. 130 respectively.

Question - What will be the position, if the goods were sold from Mumbai in November 2001 at Rs. 135 per piece and goods from Chennai were sold at Rs. 125 per piece.

Answer - Price change after removal of goods from factory does has no effect on the assessable value. Thus, no differential duty is payable if goods are sold from depot later at higher prices. Similarly, no refund is permissible, even if goods are actually sold from depot later at lower prices.

Valuation in case of captive consumption

In case of captive consumption, valuation shall be done on basis of cost of production plus 10%. (Rule 8 of Valuation Rules). Cost of production is required to be calculated as per CAS-4.

Captive consumption means goods are not sold but consumed within the same factory or another factory of same manufacturer (i.e. inter-unit transfers).

Valuation in case of captive consumption

In case of captive consumption, valuation shall be done on basis of cost of production plus 10% [The percentage was 15% upto 5-8-2003]. (Rule 8 of Valuation Rules). Cost of production is required to be calculated as per CAS-4.

Captive consumption means goods are not sold but consumed within the same factory or another factory of same manufacturer (i.e. inter-unit transfers).

The simplified provision has been probably made as in most of the cases, the buyer will be able to get Cenvat credit of duty paid on inputs and there is hardly any incentive to avoid any payment of duty.

Thus, the formula for determining value is simple. If the cost of production based upon general principles of costing of a commodity is Rs. 10,000 per unit, the assessable value of the goods shall be Rs. 11,000 per unit.

Principles of cost analysis for captive consumption - Institute of Cost and Works Accountants of India (ICWAI) has issued Cost Accounting Standard CAS-4 titled 'Cost of Production for Captive Consumption'. The standard deals with determination of cost of production for captive consumption. CBE&C, vide circular No. 692/8/2003 dated 13-2-2003, has clarified that in case of captive consumption, cost calculation should be as per CAS-4 standard only.

Following details are based on those prescribed in CAS-1 to CAS-4.

Formula of costs - Cost of Production will include various cost components as defined in Cost Accounting Standard –1 (Classification of Cost – CAS-1). As per CAS-1, the cost is classified as follows -

Direct material Cost + Direct labour Cost + Direct Expenses = Prime Cost

Prime Cost + Production Overheads + Administration Overheads + R&D Cost (Apportioned) = Cost of Production

Cost of Production + Selling Cost + Distribution Cost = Cost of Sales

(Note that Cost of Sales + Profit will be equal to Selling Price).

Elements of cost of production - As per CAS-4, Cost of Production shall consist of material consumed, direct wages and salaries, direct expenses, works overheads, quality control cost, research and development cost, packing cost, administrative overheads relating to production. To arrive at cost of production of goods dispatched/used for captive consumption, adjustment for stock of Work-in-process, finished goods, recoveries of sales of scrap, wastage etc. shall be made.

Material cost shall be net of discounts, Cenvat credit, sales tax VAT (if any) etc.(See case law under job work).

This is correct as per costing principles, since material cost does become lower if credit of duty paid is obtained.

The research and development cost incurred for development and improvement of the process of existing product shall be included in the cost of production. Administrative overheads in relation to activities other than manufacturing activities e.g. marketing, projects management, corporate office expenses etc. shall be excluded from cost of production. - - If product is transferred/dispatched duly packed for captive consumption, cost of such packing shall be included. - - Packing cost includes both cost of primary and secondary packing required for transfer/dispatch of the goods used for captive consumption.

Analysis of overheads for cost of production - Overheads shall be analysed into variable overheads and fixed overheads. The variable production overheads shall be absorbed in production cost based on actual capacity utilisation. The fixed production overheads and other similar items of fixed costs such as quality control test, research and development costs, administrative overheads relating to manufacturing shall be absorbed in the production cost on the basis of the normal capacity or actual capacity utilisation of the plant, whichever is higher. - - Normal capacity is the production achieved or achievable on an average over a period or a season under normal circumstances taking into account the loss of capacity resulting from planned maintenance. (Cost Accounting Standard for Capacity Determination – CAS-2).

Valuation of WIP - Stock of work-in-progress shall be valued at cost on the basis of stages of completion as per the cost accounting principles. Similarly, stock of finished goods shall be valued at cost. In case the cost for a shorter period is to be determined, where the figures of opening and closing stock are not readily available, the adjustment of figures of opening and closing stock may be ignored. (In my opinion, as per excise principles, goods are to be assessed at the time of removal. Hence, costing has to be 'future cost' i.e. cost for next quarter/half year. The cost is to be calculated on the basis of projected costs, projected production etc. In such case, the question of opening and closing stock of WIP or finished goods does not arise at all. Question of opening and closing stock of WIP/FG arises only in case of past costs i.e. historical cost. For purpose of Central Excise, valuation is required to be done on future cost basis).

Joint products, scrap and waste - A production process may result in more than one product being produced simultaneously. In case joint products are produced, joint costs are allocated between the products on a rational and consistent basis. In case of by-products, the net realizable value of by-products is credited to the cost of production of main product.

The production process may generate scrap or waste. Realised or realizable value of scrap or waste shall be credited to the cost of production. (Thus, practically, scrap or waste is treated as a by-product). - In case of any input material, whether of direct or indirect nature, including packing material supplied free

of cost by the user of the captive product, the landed cost of such material shall be included in the cost of production. - The amortised cost of such items shall be included in the cost of production.

Interest and finance charges to be excluded - Interest and financial charges being a financial charge shall not be considered to be part of cost of production.

Abnormal costs to be excluded - Abnormal and non-recurring costs are those arising due to unusual or unexpected occurrence of events, such as heavy break down of plants, accident, market conditions restricting below normal level, abnormal idle capacity, abnormal process loss, abnormal scrap and wastage, payments like VRS, retrenchment compensation, lay off wages etc. These abnormal costs shall not form part of cost of production.

Depreciation to be added - This standard as well as CAS-1 (Classification of Cost) and CAS-3 (Overheads) make it clear that depreciation is required to be treated as 'Overhead'.

Cost Sheet - Suggested cost sheet as per CAS-4 is as follows –

Statement of cost of production of _____ manufactured/to be manufactured during the period _____

Q1	Quantity Produced (Unit of Measure)		
Q2	Quantity Dispatched (Unit of Measure)		
	Particulars	**Total Cost (Rs)**	**Cost/ Unit (Rs)**
1	Material Consumed		
2	Direct Wages and Salaries		
3	Direct Expenses		
4	Works Overheads		
5	Quality Control Cost		
6	Research and Development Cost		
7	Administrative Overheads (Relating to production capacity)		
8	Total (1 to 7)		
9	Add – Opening stock of Work-in-Progress		
10	Less – Closing stock of Work-in-Progress		
11	Total (8+9-10)		
12	Less – Credit for Recoveries/Scrap/By-Products/ Misc Income		
13	Packing Cost		
14	Cost of Production (11-12+13)		
15	Add – Inputs received free of cost		
16	Add – Amortised cost of moulds, tools, dies and patterns etc. received free of cost		
17	Cost of Production for goods produced for captive consumption (14+15+16)		
18	Add – Opening stock of finished goods		
19	Less – Closing Stock of finished goods		
20	Cost of production of goods dispatched (17+18-19)		

Valuation in case of job work

Excise duty will not be payable if raw material/semi-finished components are sent for job work under Cenvat provisions or under notification No. 214/86-CE. However, in other cases, if job work results in 'manufacture' of a product, duty will become payable by job worker.

Rule 10A of Valuation Rules, as inserted w.e.f. 1-4-2007 provides that in such cases, excise duty will be payable on the basis of price at which the raw material supplier (termed as 'principal manufacturer' in valuation rules) sales the goods.

Rule 10A has been inserted in the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 to provide that where goods are manufactured by a job-worker on behalf of a person (commonly known as principal manufacturer), the value for payment of excise duty would be based on the sale value at which the principal manufacturer sells the goods - *Para 32.1 of DO letter F. No. 334/1/2007-TRU dated 28-2-2007.*

The value in such cases shall be as follows, w.e.f. 1-4-2007 -

When goods are sold at the factory of job worker by Principal Manufacturer – If the goods are sold by 'Principal Manufacturer' (raw material supplier) from factory of job worker, the value will be the 'transaction value of the goods at which the goods are sold' by the principal manufacturer for delivery at the time of removal of goods from the factory of job-worker.

This would be so if the principal manufacturer and the buyer of the goods are not related and the price is the sole consideration for the sale [Rule 10A(i) of Valuation Rules].

Proviso to Rule 10A of Valuation Rules clarifies that cost of transport from premises from which goods are sold to place of delivery will not be included in the assessable value.

When goods are sold by Principal Manufacturer from some other place – If goods manufactured by job worker are delivered at other place (e.g. depot, branch, godown etc. of Principal Manufacturer) and sold from there, the valuation will be on the basis of 'normal transaction value of goods sold at or about the same time' by the Principal Manufacturer from such place.

This would be so if the principal manufacturer and the buyer of the goods are not related and the price is the sole consideration for the sale [Rule 10A(ii) of Valuation Rules].

Proviso to Rule 10A clarifies that cost of transport from premises from which goods are sold to place of delivery will not be included in the assessable value.

This methodology is similar to valuation in case of sale through depot.

When valuation as per Rule 10A(i) or 10A(ii) of Valuation Rules is not possible – If valuation is not possible as per Rule 10A(i) or 10A(2) of Valuation Rules, 'value' will be determined in accordance with the principles enunciated in the Valuation Rules on a case-to-case basis [Rule 10A(iii) of Valuation Rules].

For example, if the excisable goods manufactured on job-work are sold by the principal manufacturer where the price is not the sole consideration for sale, the value of such goods shall be determined in terms of principles laid down in Rule 6.

If goods are captively consumed by Principal Manufacturer, valuation can be on basis of Rule 8.

Meaning of job worker – As per *Explanation* to Rule 10A, for the purposes of Rule 10A, 'job worker' means a person engaged in manufacture or production of goods on behalf of a principal manufacturer, from any inputs or capital goods supplied by the said principal manufacturer or by any other person authorised by him.

Question : A Trader supplies raw material of Rs. 1,150 to processor. Processor processes the raw material and supplies finished product to the trader. The processor charges Rs. 450, which include Rs. 350 as processing expenses and Rs. 100 as his (processor's) profit. Transport cost for sending the raw material to the factory

of processor is Rs. 50. Transport charges for returning the finished product to the trader from the premises of the processor is Rs. 60. The finished product is sold by the trader at Rs. 2,100 from his premises. He charges Vat separately in his invoice at applicable rates. The rate of duty is 16% plus education cess as applicable. What is the AV, and what is total duty payable ? (*CA Final May 2005 adopted*)

Answer : Assessable Value is to be calculated on basis of selling price of trader which is Rs. 2,100. This price is to be treated as inclusive of excise duty. Hence, assessable value will be (2,100 x 100)/116.48 i.e. Rs. 1,802.89. Basic excise duty @ 16% will be 288.46. Education Cess (2%) is Rs. 5.77 and Secondary and Higher Education Cess is Rs. 2.88. Total duty payable will be Rs. 297.11.

Material cost is not required to be added if parent manufacturer had sent material under Cenvat, as per decision of Supreme Court in *International Auto Ltd*. v. *CCE* 2005 (183) ELT 239 = 68 RLT 341 (SC 3 member bench).

Best judgment Assessment

If assessment is not possible under any of the foregoing rules, assessment will be done by 'best judgment'. If the value of any excisable goods cannot be determined under the foregoing rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and sub-Section (1) of Section 4 of the Act. [Rule 11]

5.8 Sale to a 'Related Person'

Excise is payable only at the manufacturing stage and once the goods enter the trade, no excise is payable for further sales in wholesale or retail. Thus, to reduce excise burden, an unscrupulous manufacturer may sell goods at lower price to some person related to him and then subsequently the goods will be sold at a higher price. For example, A may sell goods to B at Rs. 100 and will pay excise duty on Rs. 100. Subsequently, even if B sells the goods at Rs. 200, no excise duty is payable. This provision is likely to be misused for reducing excise liability. Hence, if A and B are related, the price relevant for excise purposes is not Rs. 100 but Rs. 200. *In other words, price to an independent buyer has to be considered for excise valuation*.

'Transaction Value' can be accepted as 'Assessable Value' only when buyer is not related to buyer.

As per Section 4(3)(b) of Central Excise Act, persons shall be deemed to be 'related' if –

(i) They are inter-connected undertakings

(ii) They are relatives

(iii) Amongst them, buyer is a relative and a distributor of assessee, or a sub-distributor of such distributor or

(iv) They are so associated that they have interest, directly or indirectly, in the business of each other.

Interconnected Undertakings

Buyer and seller are 'related' if they are inter-connected undertakings, as defined in Section 2(g) of Monopolies and Restrictive Trade Practices Act, 1969 (MRTP). - *Explanation* (i) to Section 4(3)(b) of Central Excise Act.

The definition in MRTP Act is quite long, but essence of the definition under MRTP is that the inter-connection could be through ownership, control or management. Just 25% of total controlling power in both undertakings is enough to establish inter-connection.

Since only 25% control is enough to make to buyer and assessee as inter connected undertakings, many assessees would come under the definition. This would have affected many assessees.

However, the provisions in respect of 'inter connected undertaking' have been made almost ineffective in valuation rules. Now, the 'inter connected undertakings' will be treated as 'related person' only if they are holding and subsidiary or they are 'related person' under any other clause. In other cases, they will not be treated as 'related person'. If they are not treated as related person, price charged by assessee to buyer will be accepted as 'transaction value' – confirmed in *South Asia Tyres* v. *CCE* (2003) 152 ELT 434 (CEGAT)

Interconnected undertaking - Section 2(*g*) of MRTP Act gives definition of interconnected undertaking. It is possible to have interconnection between two Companies, two firms, a Company and a firm, a Company and a trust, etc. The definition, therefore, states that if any of the following connection exists, the two undertakings would be deemed to be interconnected undertaking.

1. If one owns or controls another.
2. If both are owned by partnership firms, there is one or more common partners
3. If both are owned by companies and : (*a*) if one company manages another or (*b*) if one company is subsidiary of another, or (*c*) If both body corporates are under the same management, or (*d*) if one body corporate controls another in any other manner
4. If one is owned by company and another is owned by a partnership firm, if partners of the firm hold, directly or indirectly, more than 50% share in the company, or otherwise directly or indirectly have control over the company.
5. If one is owned by a firm in which companies are partners and if another is owned by a company and if such companies are under same management.
6. If the undertakings are owned by the same person or by the same group.
7. If one is connected with other directly or indirectly through other interconnected undertaking e.g. if A is interconnected with B and B is interconnected with C and C is interconnected with D, then A will be deemed to be interconnected with C and D.

Just 25% common control is sufficient to call two units 'inter connected undertakings'.

Interest in business of 'each other'

As per Section 4(3)(b)(iv), buyer and seller are 'related' if they are associated that they have interest, directly or indirectly, in the business of each other. It is not enough if only buyer has interest in seller or seller has interest in buyer. Both must have interest, directly or indirectly, in each other - *Atic Industries Ltd.* v. *UOI* (1984) 3 SCR 930 = 1984 (17) ELT 323 (SC) = AIR 1984 SC 1495 = (1984) 3 SCC 575. If buyer holds shares of manufacturer assessee, but the assessee does not hold shares in the buyer company, there is no mutual interest. - *CCE* v. *Kersons Mfg Co. of India Ltd.* 1998(100) ELT 194 (CEGAT) * *Beacon Neyrpic* v. *CCE* 2001(133) ELT 590 (CEGAT).

In *UOI* v. *Kaira Dist Coop Milk ProduceRs. Union* 2002(146) ELT 502 (SC), assessee was member of Federation known as 'Gujarat Cooperative Milk Marketing Federation Ltd'. Assessee was selling products to

Federation. The Federation was charging commission for marketing the product. It was held that the commission charged by Federation is deductible, as even if assessee may have interest in the Federation, the Federation has no interest in the business of assessee. Hence, they cannot be treated as 'related person'.

Relative and a distributor of Assessee

These words appeared under old Section 4 also, and hence interpretation placed on these words under earlier Section will apply to new Section 4 also.

Hon Supreme Court, in *Bombay Tyre International* v. *UOI* (1984) 1 SCR 347 = 14 ELT 1896 = (1984) 1 SCC 467 = AIR 1984 SC 420 = (1986) 59 Comp Cas 460 held that all distributoRs. are not to be treated as 'relatives'. The term 'relative and distributor' should be 'read down' and understood to mean as '*distributor who is a Relative*' of assessee.

The word 'relative' is defined in Section 6 of Companies Act, 1956 as follows : - A person shall be deemed to be a relative of another if, and only if, - (*a*) they are members of a Hindu undivided family; or (*b*) they are husband and wife; or (*c*) the one is related to the other in the manner indicated in Schedule I-A of Companies Act. This Schedule contains following relatives : (*1*) Father (*2*) Mother (including step-mother) (*3*) Son (including step-son) (*4*) Son's wife (*5*) Daughter (including step-daughter) (*6*) Father's father (*7*) Father's mother (*8*) Mother's mother (*9*) Mother's father (*10*) Son's son (*11*) Son's son's wife (*12*) Son's daughter (*13*) Son's daughter's husband (*14*) Daughter's husband (*15*) Daughter's son (*16*) Daughter's son's wife (*17*) Daughter's daughter (*18*) Daughter's daughter's husband (*19*) Brother (including step-brother) (*20*) Brother's wife (*21*) Sister (including step-sister) (*22*) Sister's husband.

It is obvious that only a living i.e. natural person can be 'relative' of other. Thus, a company, partnership firm, body corporate, HUF, trust cannot be 'relative' of other.

If the manufacturer or distributor is a Company or a partnership firm, it cannot be a *relative* as naturally a Company or partnership firm cannot be wife, husband, etc. of somebody else ! Concept of relatives cannot apply to companies as they are impersonal bodies and not natural one - *Jay Engineering Works Ltd.* v. *UOI* 1981 (8) ELT 284. (Del HC). In *J N Marshal P Ltd.* v. *CCE* 1997(96) ELT 149 (CEGAT), it was held that expression 'relative' has personal connotation. Even if the concerns have connection with each other (in this case, there were common directors), they cannot be regarded as 'related persons'.

Buyer and seller are 'relatives'

Buyer and seller will be 'related persons' if they are 'relatives'. As per *explanation* (ii) to Section 4(3)(b), 'relative' shall have meaning assigned to it in Section 2(41) of the Companies Act.

Definition of 'relative' as per Companies Act has already been explained above. It is clear that only a living i.e. natural person can be 'relative' of other. Thus, a company, partnership firm, body corporate, HUF, trust cannot be 'relative' of other.

Company not relative if some directors are relatives - A Company is different from its directors and even if some directors of the distributor company are relatives of some directors of the manufacturer, the Manufacturer cannot be the 'related person' of the Distributor. Similarly, if relatives of partners of buyer are directors in the limited company which is seller, the buyer and seller cannot be termed 'related' - *Hind Lamps Ltd.* v. *UOI* - 1977 (1) ELT (J1) (All HC) * *Mineral Wool Mfg* v. *CCE* 1999(109) ELT 228 (CEGAT) * *CCE* v. *Electro Services* 2001(127) ELT 828 (CEGAT).

Brand name owner is not related person - Often, some companies get the goods manufactured under their brand name from some other Companies. However, such brand name owner cannot be termed as relative

of the actual manufacturer, *only for this reason*. In such cases, duty payable will be on the basis of price charged by the actual manufacturer to the brand name owner – view upheld in *Voltas Ltd*. v. *CCE* 2005 (188) ELT 421 (CESTAT).

Buyer undertaking after sales service - He is not a related person *only on that account*, if otherwise the transactions are on principal to principal basis. - *Ashok Leyland Ltd.* v. *GOI* 1987 (30) ELT 281 (Mad).

Valuation when sale is through related person

If sale is made through 'related person', price relevant for valuation will be 'normal transaction value' at which the related buyer sales to unrelated buyer, as per rules 9 and 10 of Valuation Rules.

As per Valuation Rule 2(b), "normal transaction value" means the transaction value at which the greatest aggregate quantity of goods are sold. The term 'GREATEST AGGREGATE QUANTITY' is used in Rule 7 of Customs Valuation Rules. This Rule states that while considering selling price of imported goods in India, unit price at which greatest aggregate quantity of identical or similar goods are sold to unrelated persons in India should be the basis. e.g. if 65 units are sold @ Rs. 100, 55 units are sold @ Rs. 95 and 80 units are sold @ Rs. 90; then greatest aggregate quantity is 80 which is sold @ Rs. 90 per unit, which will be the basis for valuation. This principle should apply in deciding 'normal transaction value' under Rule 2(b) also.

The definition of 'related person' includes 'inter connected undertaking'. As per definition under MRTP Act, two units will be 'inter connected' if 25% controlling power is common. Inter connection could be through ownership, control or management. Just 25% control is enough. This would have affected many assessees. However, provisions in respect of 'related person' have been made almost ineffective by the Valuation Rules, by providing that 'inter connected undertakings' will be treated as 'related persons' only if there is holding-subsidiary relationship. In other cases, provisions in respect of 'related person' will not apply.

Goods sold exclusively through 'related person' other than interconnected undertaking - As explained above, definition of 'related person' has four sub-clauses i.e. (i) Inter-connected undertaking (ii) Relatives (iii) Relative and Distributor or (iv) Interest in each other. If goods are sold by assessee ***exclusively*** to or through 'related person' as defined in clause (ii), (iii) or (iv) above (i.e. except 'inter connected undertaking'), relevant price will be 'normal transaction value' of the related person to unrelated buyer. The 'normal transaction value' shall be considered as on date of removal from the factory. Thus, the actual price at which such goods are sold later by related person will not be relevant. The price of related person ruling at the time of removal from factory of assessee will be relevant.

Goods sold only through inter-connected undertakings - If goods are sold ***only*** through inter connected undertaking, as per Rule 10 of Excise Valuation Rules, the provision applies only when sale is to 'inter connected undertaking' which is a holding or a subsidiary, or it is 'related person' under other provisions of Section 4(3)(b). In other cases, it is treated as sale to unrelated person.

Thus, even if buyer and assessee are 'inter connected undertaking', price charged by assessee to buyer will be the 'transaction value' if (a) the buyer is not a holding or subsidiary of assessee or (b) if it is not related as per sub-clause (ii), (iii) or (iv) above – confirmed in *South Asia Tyres* v. *CCE* (2003) 152 ELT 434 (CEGAT) or (c) Only partial sale is through inter-connected undertaking.

Price charged by buyer to an unrelated person will be considered only if entire sale are through inter-connected undertaking ***and*** (a) the buyer is a holding or subsidiary of assessee or (b) if it is related as per sub-clause (ii), (iii) or (iv) above. In such cases, price will be 'normal transaction value' of buyer to

unrelated person as per provisions of Rule 9 of Customs Valuation Rules.

If only part sale is through related person - If 'related person' is only one of the buyers and price charged to him is same as charged to others, the same price may be considered, provided substantial quantity is supplied to unrelated buyers and sale to unrelated buyers is not a mere eye wash. This could also be conclusion if Rule 4 of Valuation Rules apply, which states that value of *such* goods for delivery at any other time nearest to the time of removal of goods under assessment can apply. [If 'transaction value' does not apply as all conditions of Section 4(1)(a) are not satisfied]. 'Such' goods means 'identical goods'. 'Such goods' are different from 'said goods' or 'the goods'.

If substantial sale is through related person - If substantial sale is to 'related person' and only minor amount of sale is to unrelated buyers, the value will be on the basis of price at which the 'related person' sales to unrelated buyer. In case of sale to unrelated person, the transaction value can apply, as each transaction has to be assessed separately.

In *Pepsico India Holding* v. *CCE* 2004 (163) ELT 478 (CESTAT), 97% of sales were through marketing subsidiary and only 3% sales were to independent buyers It was held that valuation is required to be done on basis of price at which the related person (subsidiary in this case) makes further sale. Net price charged by related person to its buyers (exclusive of discount) should be assessable value.

Question - An assessee sales goods to ABC Co Ltd. The buyer is a 'related person' as defined u/s 4(3)(b) of Central Excise Act for Rs. 10,000 on 15th December, 2000. On that date, the net price (excluding excise duty) of related person to an unrelated buyer was Rs. 12,000. What will be the 'Assessable Value' in each of the following cases -

(a) The related person sales the goods to an unrelated buyer on 5th February, 2001 at Rs. 12,500, exclusive of excise duty.

(b) The related person sales the goods to unrelated buyer on 10th February, 2001 at Rs. 11,000, exclusive of excise duty.

(c) The buyer is treated as 'related person' as it is an 'inter connected undertaking' in relation to manufacturer (assessee). However, the buyer is not a holding or subsidiary of assessee. Buyer and seller do not have interest in each other.

Answer - In case (a) and (b) the Assessable Value' will be Rs. 12,000. In case (c), the assessable value will be Rs. 10,000. [Note that since buyer is a limited company, it cannot be relative of assessee. An artificial person cannot be 'relative' of other. Hence, buyer cannot fall in any other definition of 'relative']

5.9 Practical Examples on Valuation

Question - B Ltd. manufactures two products namely, Eye Ointment and Skin Ointment. Skin Ointment is a specified product u/s 4A of Central Excise Act, 1944. The sales prices of both the products are at Rs. 43/ unit and Rs. 33/unit respectively. The sales price of both products included 16% excise duty as BED and education cesses as applicable. It also includes CST of 4%. Additional information is as follows - * Units cleared: Eye Ointment – 1,00,000 units, Skin Ointment – 1,50,000 units * Deduction permissible u/sec 4A: 40%. Calculate the total excise duty liability of B Ltd., on both the products. [ICWA June 2002, ***ICWA Final June 2006*** - adopted].

Answer - Duty on eye ointment and skin ointment is required to be calculated separately.

A) *Duty on Eye ointment :*

Let us assume that Assessable Value of Eye Ointment is Z.

Assessable Value	=	Z
Duty @ 16.48% [Basic 16% + plus 2% education cess + SAH Education Cess 1%]	=	0.1648 × Z
Sub-Total	=	1.1648 × Z
Add : Central Sales Tax @ 4%	=	0.046592 × Z
Total price (*i.e.*, inclusive of duty and sales tax)	=	1.211392× Z
Now :		
1.211392 × Z	=	Rs. 43.00
Hence, Z	=	Rs. 35.50
Check this as follows :		
Assessable Value per unit	=	Rs. 35.50
Basic Excise duty @ 16%	=	Rs. 5.68
Education Cess @ 2% of duty		Rs. 0.11
SAH Education Cess @ 1% of duty		Rs. 0.06
Sub-Total	=	Rs. 41.35
Add : State Vat @ 4%	=	Rs. 1.65
Total price	=	Rs. 43.00

Excise duty payable per unit of eye ointment is Rs. 5.85 Total quantity cleared is 1,00,000. Hence, total excise duty on eye ointment is Rs. 5,85,000.

B) *Duty on skin ointment*

Since the product is covered under Section 4A, Assessable Value is required to be calculated after deducting abatement @ 40%. The MRP is Rs. 33 and abatement is 40%. Hence, Assessable Value (after allowing deduction @ 40%) is Rs. 19.80. Excise duty payable per unit @ 16.48% is Rs. 3.26. Total quantity cleared is 1,50,000 units. Hence, total duty payable on skin ointment (basic plus special plus education cess plus SAH education cess) is Rs. 4,89,000.

Question - Determine the transaction value and the Excise duty payable from the following information: Total Invoice Price Rs. 18,000. The Invoice Price includes the following : State Vat Rs. 1000, Octroi Rs. 200, Insurance from Factory to depot Rs. 100, Freight from factory to depot Rs. 700. Rate of Basic Excise duty 16% ad valorem. Rate of education cess is as applicable [ICWA Inter, June 2001 - adopted]

Answer - It is assumed that the Invoice Price of Rs. 18,000 is depot price (Note – Since question does not specifically says that it is depot price, it is assumed that the price is depot price). Hence, deduction of insurance and transport charges from factory to depot will not be available. The deductions available will be – State Vat Rs. 1,000 and Octroi Rs. 200. Thus, net price excluding taxes on final product (but inclusive of excise duty) is Rs. 16,800. The rate of excise duty is 16.48% [16% basic plus 2% education cess plus 1% SAH education cess]. Hence, duty payable is as follows –

Assessable Value = Rs. (16,800 x 100)/116.48 = Rs. 14,423.08

Excise duty payable (basic plus special plus education cess) is 16.48% of Rs. 14,423.08 i.e. Rs. 2,376.92 (Check that Rs. 14,423.08+ 2,376.92 = Rs. 16,800).

1,500 pieces of a product 'A' were manufactured during the financial year. Its list price (i.e. retail price) is Rs. 250 per piece, exclusive of taxes. The manufacturer offers 20% discount to wholesalers on the list price. During the year, 840 pieces were sold in wholesale, 510 pieces were sold in retail, 35 pieces were distributed as free samples. Balance quantity of 115 pieces was in stock at the end of the year. The rate of duty is 16% plus education cess and SAH education cesses as applicable. What is the total duty paid during the financial year ? Assume that the manufacture is not eligible for SSI concession.

The total selling price is as follows –

Qty	Price		Total
510	250	=	1,27,500
840	200	=	1,68,000
35	200	=	7,000
	Total	=	3,02,500

Duty payable is 16% of Rs. 3,02,500 i.e. Rs. 48,400, plus education cess @ 2% i.e. Rs. 968.00 plus SAH education cess @ 2% is Rs. 484.00.

Note – (a) Since 115 pieces were in stock at year end, no duty will be payable. Duty will be payable only when goods are cleared from factory. (b) In case of samples, as per Rule 4 of Valuation Rules, value nearest to the time of removal, subject to reasonable adjustments is required to be taken. However, since prices are varying, value nearest to the time of removal may not be ascertainable and will not be acceptable for valuation as the prices are changing. In such case, recourse will be taken to Rule 11 of Valuation Rules, i.e. best judgment assessment. We can take recourse to Rule 7 and 9 where principle of 'normal transaction value' is accepted, when prices are varying. As per Rule 2(b) of Valuation Rules, 'normal transaction value' means the transaction value at which the greatest aggregate quantity of goods are sold. Since greatest quantity of 840 pieces are sold at Rs. 200, that will be 'normal transaction value', which can be taken for valuation of free samples.

A manufacturer has appointed brokers for obtaining orders from wholesalers The brokers procure orders for which they get brokerage of 5% on selling price. Manufacturer sells goods to buyers at Rs. 250 per piece. The price is inclusive of State Vat and Central excise duty. State Vat rate is 4% and excise duty rate is 16% plus education cess and SAH education cess as applicable. What is the AV, and what is duty payable per piece ?

Assume that Assessable Value = Z. No deduction is available in respect of brokerage paid to third parties from Assessable Value.

Since Excise duty is 16%, education cess is 2%, SAH education cess is 1% and State Vat rate is 4%, price including excise will be 1.1648 Z

State Vat @ 4% of 1.1648Z is 0.046592Z. Hence, price inclusive of sales tax and excise duty will be 1.211392Z.

Now,	1.211392Z	= Rs 250.00
Hence,	Z	= Rs 206.37
Check the answer as follows –		
Assessable Value		= Rs 206.37
Add duty @ 16.48% of Rs. 206.37		= Rs 34.01

Add State Vat @ 4% on Rs. 240.38 (206.37+34.01)	=	Rs	9.62
Total Price (Including duty and tax)	=	Rs	250.00

A manufacturer has to supply a machinery on following terms and conditions : (a) Price of machinery : 3,40,000 (net of taxes and duties) (b) Machinery erection expenses : 26,000 (c) Packing (normally done by him for all machinery) : 4,000 (d) Design and drawing charges relating to manufacture of machinery : 30,000 (Net of taxes and duties) (e) Central Sales Tax @ 4% (f) Central Excise Duty @ 16% plus education cess of 2% plus SAH education cess of 1% (g) Cash discount of Rs. 5,000 will be offered if full payment is received before despatch of goods. (h) the machine will be supplied along with bought out accessories @ Rs. 8,500. The accessories were optional.

You are informed that (a) The buyer made all payment before delivery. (b) The manufacturer incurred cost of Rs. 1,200 in loading the machinery in the truck in his factory. These are not charged separately to buyer. - - Find the 'Assessable Value' and the duty payable.

Erection expenses are not includable in AV. Cash discount is allowable as deduction. Duty is not payable on optional bought out accessories supplied along with the machinery. The cost of Rs. 1,200 is already included in the selling price of machinery (as it is not charged separately) and hence is not to be added again.

Hence, AV is Rs. 3,69,000 [Rs. 3,40,000 + 4,000 + 30,000 – 5,000]. Duty @ 16% will be Rs. 59,040, plus education cess @ 2% i.e. Rs. 1,180.80 and SAH education cess @ 1% i.e. Rs. 590.40.

Find Assessable Value and duty payable. The product is not covered under Section 4A. . - Maximum Retail Trade Price : Rs. 1,100/- per unit. - State Vat, Octroi and other Local Taxes : 10% of net price- Cash Discount : 2% - Trade Discount: 8% - Primary and Secondary packing cost included in the above MRP : Rs. 100 - Excise duty rate : 8% *ad valorem* plus education cesses as applicable. (ICWA Inter - December 1997 adopted)

Cash discount Rs. 22 (2% of Rs. 1,100) and trade discount 88 [8% of Rs. 1,100] are available as deduction. Packing cost is not allowable as deduction. Hence, price of excise purposes is Rs. 990. [Rs. 1,100 – 22 – 88]. - - Now, if X is the assessable value, excise duty is 0.0824 X and price including Excise duty is 1.0824 X. State Vat and local taxes @ 10 % of 1.0824 X will be 0.10824 X. Thus, price inclusive of excise duty and sales tax will be 1.19064 X.

Now, 1.19064 X	=	Rs	990.00
Hence, X	=	Rs	831.49
Excise duty @ 8.24 % of X	=	Rs	68.51
Check the answer as follows –			
Assessable Value	=	Rs	831.49
Add Excise Duty @ 8.24%	=	Rs	68.51
Add State Vat @ 10% on Rs. 900 (831.49 + 68.51)	=	Rs	90.00
Selling Price (After allowable deductions)	=	Rs	990.00

A manufacturer has agreed to supply a machine on following terms: - (i) Price of the machine at Rs. 4,50,000.00 (Exclusive of taxes and duties) (ii) Packing for transportation of the machine Rs. 15,000.00, (iii) Transport charges of machinery Rs. 25,000.00, (iv) Development and tooling charges Rs. 40,000.00 (exclusive of taxes and duties), (v) C.S.T. @ 4% (vi) Octroi paid on machine supplied Rs. 2,000.00 (not

recovered from party separately) (vii) Excise duty @ 16% plus education cesses as applicable (viii) Interest will be charged @ 16% on delayed payment beyond 30 days, (ix) Special discount of Rs. 5,000.00 if advance of Rs. 2,00,000.00 is paid with order. Work out the excise duty liability based on following additional information - (i) Actual transportation cost is Rs. 26,000.00, (ii) Interest of Rs. 5,000.00 was charged as party has failed to make payment within 30 days, (iii) The buyer paid advance with the order. (ICWA Inter - June 1997 adopted)

Packing charges (Rs. 15,000) and development and tooling charges (Rs. 40,000) are includable in Assessable Value.

Transport charges of final product are not includable in Assessable Value. In this case, transport charges charged were Rs. 25,000 against actual charges incurred of Rs. 26,000. Hence, question of its addition does not arise. This loss of Rs. 1,000 cannot be allowed as deduction, as it is not in connection with sale, it is in connection with additional service of arranging transport for customer, provided to him. It may be noted that even if actual transport charges paid to transporter were less than Rs. 25,000 which were charged to customer (say actual transport charges were Rs. 24,000), the difference of Rs. 1,000 was not required to be added as reasonable profits on other service activities are permissible. This is so if the sale was complete at factory gate itself and transport was arranged as additional service. Any profit earned in activity not relating to manufacture is not addible. Similarly, any loss relating to post removal activity is not allowable as deduction.

Octroi duty paid Rs. 2,000 on final product is allowable as deduction. Special discount of Rs. 5,000 is not allowable as deduction. The reason is that 'price' should be sole consideration'.

Interest on delayed payment is not includable in Assessable Value as it is not in 'connection' with sale, but it is in connection with delayed payment. Packing charges are includable in AV.

Hence, Assessable Value is Rs. 5,03,000 [4,50,000 + 15,000 + 40,000 – 2,000]. Excise duty @ 16% will be Rs. 80,480, education cess is Rs. 1,609.60 and SAH education cess will be Rs. 804.80.

Question - Depot price of a company are –

Place of removal	Price at depot on 1.1.2001	Price at depot on 31.1.2001	Actual sale price at depot on 1.2.2001
Amritsar Depot	Rs. 100 per unit	Rs. 105 per unit	Rs. 115 per unit
Bhopal Depot	Rs. 120 per unit	Rs. 115 per unit	Rs. 125 per unit
Cuttack depot	Rs. 130 per unit	Rs. 125 per unit	Rs. 135 per unit

Additional information: (i) Quantity cleared to Amritsar Depot - 100 units (ii) Quantity cleared to Bhopal Depot - 200 units (iii) Quantity cleared to Cuttack Depot - 200 units (iv) The goods were cleared to respective depots on 01/01/2001 and actually sold at the depots on 01/02/2001. [ICWA December, 2001 adopted]

Under Rule 7, the price prevailing at the Depot on the date of clearance from the factory will be the relevant value to pay Excise duty.

Hence – (i) Clearance to Amritsar depot will attract duty based on the price as on 01/01/2001. Transaction value Rs. 100 * 100 units = Rs. 10,000/- (ii) Clearance to Bhopal depot. Depot price on 01/01/2001 Transaction value Rs. 120 * 200 units = 24,000/- (iii) Clearance to Cuttack Depot. Depot price on 01/01/2001. Transaction value Rs. 130 * 200 units = Rs. 26,000/-.

Note that the relevant date is 01/01/2001, since the goods were cleared to the depots on that date. No additional duty is payable even if goods are later sold from depot at higher price.

Question - An assessee sales certain goods to a buyer who is a 'related person' for net price (excluding excise duty) of Rs. 1,400. The buyer does not sale the goods but uses it himself as intermediate product. The cost of production of the goods is Rs. 1,000. What is the assessable value? What will be the assessable value if the goods were sold to unrelated person at net price of Rs. 1,400, who does not sale it, but uses it as intermediate product ?

Answer – If goods were sold to related person, the assessable value is Rs. 1,100. [In case of captive consumption by related person, valuation is cost of production plus 10%]. If goods were sold to unrelated buyer, the assessable value will be Rs. 1,400.

Cost of production of a product 'X' calculated as per CAS-4 standard is Rs. 350 per piece. 500 pieces of a product were manufactured. 120 pieces were sold at Rs. 700 per piece to Industrial Consumers, 70 pieces were sold to a Central Government department @ Rs. 690 per piece; 210 pieces were sold to wholesalers at Rs. 720 per piece; 70 pieces were sold in retail @ Rs. 800 per piece and 20 pieces were given as free samples. Balance pieces were in stock, out of which 25 pieces were so damaged that they became unsaleable. Out of the 75 pieces sold to Government department, 25 pieces were rejected, which were subsequently sold to other customeRs. @ Rs. 300 per piece, without bringing them in the factory. [Note that All the prices are exclusive of excise and sales tax]. The rate of duty on the product is 16% plus education cesses as applicable. What is total duty payable? Advise Management about steps to be taken in respect of 25 pieces which have been damaged in storage.

The total value is as follows –

Quantity	Price Rs.		Total Value
120	700	=	84,000
70	690	=	48,300
210	720	=	1,51,200
70	800	=	56,000
20	720	=	14,400
			3,53,900

The price is exclusive of excise duty and taxes. Hence, Assessable Value is Rs. 3,53,900 and duty @ 16% will be Rs. 56,624 plus education cess @ 2% Rs. 1,132.48 and SAH education cess of Rs. 566.24..

As regards 25 pieces damaged in storage, assessee should apply for remission of duty to Commissioner. After remission is granted, the damaged goods should be destroyed in presence of Excise Officer.

Notes – (a) Once goods are cleared from factory, no duty is payable even if subsequently goods are sold at higher price. (b) There is no provision for refund of duty if goods are rejected after they are cleared from factory. (c) In case of samples, as per Rule 4 of Valuation Rules, value nearest to the time of removal, subject to reasonable adjustments is required to be taken. However, since prices are varying, value nearest to the time of removal may not be ascertainable and will not be acceptable for valuation as the prices are changing. In such case, recourse will be taken to Rule 11 of Valuation Rules, i.e. best judgment assessment. We can take recourse to Rule 7 and 9 where principle of 'normal transaction value' is accepted, when prices are varying. As per Rule 2(b) of Valuation Rules, 'normal transaction value' means the transaction value at which the greatest aggregate quantity of goods are sold. Since greatest quantity of 210 pieces are sold at Rs. 720, that will be 'normal transaction value', which can be taken for valuation of free samples.

Determine the value on which Excise duty is payable, quoting the relevant Section/rules of Central Excise Law – (a) A. Ltd. sold goods to B Ltd., at a value of Rs. 100 per unit, In turn, B Ltd. sold the same to C Ltd. at a value of Rs. 110 per unit. A Ltd. and B Ltd. are related, whereas B Ltd. and C Ltd. are unrelated (b) A Ltd. and B. Ltd. are inter-connected undertakings, under Section 2(g) of MRTP Act. A Ltd. sells goods to B Ltd. at a value of Rs. 100 per unit and to C Ltd. at Rs. 110 per unit, who is an independent buyer (c) A Ltd. sells to B Ltd. at a value of Rs. 100 per unit. B Ltd. sells the goods in retail market at a value of Rs. 120 per unit. The sale price of Rs. 100 per unit is wholesale price of A Ltd. Also, A Ltd. and B Ltd. are related (ICWA Inter December 2001).

(a) Transaction value is Rs. 110 per unit (Rule 9 of Transaction value Rules). Reason is that sale to unrelated party is relevant when first sale is to a related person.

(b) Transaction value Rs. 100 per unit for sale to B and Rs. 110 for sale to C - Rule 10 read with Rule 4. The reason is that inter connected undertakings will be treated as 'related persons' for purpose of excise valuation only if they are 'holding and subsidiary' or are 'related person' as per any other part of the definition of 'related person'. Note that A is selling directly to C as per the question, and not through B Ltd.

(c) Transaction value Rs. 120 per unit - Rule 9 read with Section 4 of Central Excise Act. Under Valuation Rules, there is no difference between 'wholesale price and retail price'.

STUDY NOTE 6

Cenvat Credit

6.1 Background of Vat

Cenvat (*Central Value Added Tax*) has its origin in the system of VAT (Value Added Tax), which is common in West European Countries. France was the first country to introduce VAT in 1954, followed by many other countries in Europe, Asia, Central America etc. European countries introduced Vat in 1970s when European Union made adopting VAT regime as condition precedent to joining European Union.

Concept of VAT was developed to avoid cascading effect of taxes. VAT was found to be a very good and transparent tax collection system, which reduces tax evasion, ensures better tax compliance and increases tax revenue.

Modvat (modified value added tax) was introduced in India in 1986 (Modvat was re-named as Cenvat w.e.f. 1-4-2000). The system was termed as Modvat, as it was restricted upto manufacturing stage and credit of only excise duty paid on manufacturing products (and corresponding CVD paid on imported goods) was available.

System of VAT was introduced to service tax w.e.f. 16-8-2002. Credit of excise duty and service tax was made inter-changeable w.e.f. 10-9-2004. Thus, partial integration of goods and service tax has been achieved, though full integration is likely to take time.

Excise duty is also known as Cenvat – Section 2A of CEA (inserted w.e.f. 12-5-2000) states that unless otherwise expressly provided or unless context otherwise requires, references to the expressions 'duty', 'duty of excise', and 'duties of excise' shall be construed to include a reference to 'Central Value Added Tax' (Cenvat).

Thus, the term 'Cenvat' can and does mean excise duty also. However, normally, the term 'Cenvat' is used to refer to provisions in respect of credit of excise duty paid on inputs and capital goods and service tax paid on input services, which is available for payment of excise duty on final product and service tax on output services.

Basic Concept of VAT

Generally, any tax is related to selling price of product. In modern production technology, raw material passes through various stages and processes till it reaches the ultimate stage e.g., steel ingots are made in a steel mill. These are rolled into plates by a re-rolling unit, while third manufacturer makes furniture from these plates. Thus, output of the first manufacturer becomes input for second manufacturer, who carries out further processing and supply it to third manufacturer. This process continues till a final product emerges. This product then goes to distributor/wholesaler, who sells it to retailer and then it reaches the ultimate consumer.

If a tax is based on selling price of a product, the tax burden goes on increasing as raw material and final product passes from one stage to other. For example, let us assume that tax on a product is 10% of selling price. Manufacturer 'A' supplies his output to 'B' at Rs. 100. Thus, 'B' gets the material at Rs. 110, inclusive of tax @ 10%. He carries out further processing and sells his output to 'C' at Rs. 150. While calculating his cost, 'B' has considered his purchase cost of materials as Rs. 110 and added Rs. 40 as his conversion charges. While selling product to C, B will charge tax again @ 10%. Thus C will get the item at Rs. 165 (150+10% tax). As stages of production and/or sales continue, each subsequent purchaser has to pay tax again and again on the material which has already suffered tax. This is called *cascading effect*.

VAT to avoid the cascading effect – VAT was developed to avoid cascading effect of taxes. In the aforesaid example, 'value added' by B is only Rs. 40 (150–110), tax on which would have been only Rs. 4, while the tax paid was Rs. 15. In VAT, the idea is that B will pay tax on only Rs. 40 i.e. value added by him. Then, it makes no difference whether a product passes through 5 or 10 stages or even 100 stages, as every person will pay tax only on 'value added' by him to the product and not on total selling price.

Tax credit system - VAT removes these defects by tax credit system. Under this system, credit is given at each stage of tax paid at earlier stage.

Illustration of tax credit system - In the example we saw above, 'B' will purchase goods from 'A' @ Rs. 110, which is inclusive of duty of Rs. 10. Since 'B' is going to get credit of duty of Rs. 10, he will not consider this amount for his costing. He will charge conversion charges of Rs. 40.00 and sell his goods at Rs. 140. He will charge 10% tax and raise invoice of Rs. 154.00 to 'C'. (140 *plus* tax @ 10%). In the Invoice prepared by 'B', the duty shown will be Rs. 14. However, 'B' will get credit of Rs. 10 paid on the raw material purchased by him from 'A'. Thus, effective duty paid by 'B' will be only Rs. 4. 'C' will get the goods at Rs. 154 and not at Rs. 165 which he would have got in absence of Cenvat. Thus, in effect, 'B' has to pay duty only on Rs. 40, which is the value added by him.

Following example will illustrate the tax credit method of Cenvat.

	Transaction without VAT		**Transaction With VAT**	
Details	A	B	A	B
Purchases	-	110	-	100
Value Added	100	40	100	40
Sub–Total	100	150	100	140
Add Tax 10%	10	15	10	14
Total	110	165	110	154

Note - 'B' is purchasing goods from 'A'. In second case, his purchase price is Rs. 100/- as he is entitled to Cenvat credit of Rs. 10/- i.e. tax paid on purchases. His invoice shows tax paid as Rs. 14. However, since he has got credit of Rs. 10/-, effectively he is paying only Rs. 4/- as tax, which is 10% of Rs. 40/-, i.e. 10% of 'value added' by him.

Meaning of 'Value added' – In the above illustration, the 'value' of inputs is Rs. 110, while 'value' of output is Rs. 150. Thus, the manufacturer has made 'value addition' of Rs. 40 to the product. Simply put, 'value added' is the difference between selling price and the purchase price.

Advantages of VAT - Advantages of VAT are as follows : (a) Exports can be freed from domestic trade taxes (b) It provides an instrument of taxing consumption of goods and services (c) Interference in market forces is minimal (d) Aids tax enforcement by providing audit trail through different stages of production and trade. Thus, it acts as a self-policing mechanism (e) Neutrality i.e. with minimum distortion in tax structure - as there are few variations in tax rates and exemptions from taxation are very few.

The disadvantage is that paper work required increases considerably and it is not as simple as a single point sales tax.

Persons and final products eligible for credit

Rule 3(1) of Cenvat Credit Rules states that a manufacturer or producer of final products and a provider of output service shall be allowed to take credit (hereinafter referred to as the Cenvat credit). EOU units can also avail Cenvat credit.

The Cenvat Credit is of specified duties (basic, special, AED, NCCD, education cess, service tax, CVD on imported goods etc. as discussed later) paid on inputs or capital goods received in the factory or premises of service provider, and also service tax paid on input services.

Manufacturer eligible for Cenvat credit

Cenvat credit can be availed by 'manufacturer or producer' of final products. 'Manufacture' or 'production' means new and identifiable product known in the market. Thus, 'manufacturer' or 'producer' is the person who actually brings the final product into existence.

Final products eligible under the Cenvat scheme - Cenvat has been extended to all items included in CETA.

As per Rule 2(h), 'Final Product' means excisable goods manufactured or produced from inputs, or using input service.

No Cenvat to manufacturer if no 'manufacture'

Cenvat credit is available only when 'manufacture' takes place. Cenvat provisions are available when there is 'manufacture' i.e. new and identifiable product known in the market having distinct name, character or use emerges. However, if the processing does not amount to 'manufacture' Cenvat credit on inputs is not available.

Service Provider eligible for Cenvat credit

As per Rule 3(1) of Cenvat Credit Rules, provider of output service shall be allowed to take Cenvat credit of specified duties and taxes.

As per Rule 2(p) of Cenvat Credit Rules (as amended w.e.f. 1-4-2008), "output service" means any taxable service, excluding the taxable service referred in Section 65(105)(zzp) of Finance Act, 1994 (This is GTA service) provided by the provider of taxable service, to a customer, client, subscriber, policy holder or any other person, as the case may be, and the expressions 'provider' and 'provided' shall be construed accordingly.

Till 31-3-2008, Rule 2(p) of Cenvat Credit Rules stated that "output service" means any taxable service provided by the provider of taxable service, to a customer, client, subscriber, policy holder or any other person, as the case may be, and the expressions 'provider' and 'provided' shall be construed accordingly.

6.2 Input Goods for Cenvat

Cenvat Credit is available on input goods, input services and capital goods.

Inputs which are goods are eligible for Cenvat credit by both manufacturer as well as service provider.

Statutory definition – Rule 2(k) defines 'input' as follows –

Rule 2(k) "Input" means –

(i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not ***and includes*** lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;

(ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service.

Explanation 1 - The light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2 - Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer.

It can be seen that definition of 'input' is much broader than mere 'raw material'. It covers not only raw materials but consumables, accessories, packing material and fuel (except LDO, petrol and HSD).

Inputs need not be utilised within the factory itself - In *Vikram Cement* v. *CCE* 2006 (194) ELT 3 = 3 STT 230 (SC 3 member bench), it has been held that inputs need not be used within the factory. In this case, it was held that explosives used for blasting mines to produce limestone in manufacture of cement is eligible as 'input' even if mines are situated away from factory.

In *Vikram Cement* v. *CCE* 2006(197) ELT 145 (SC), it has been held that Cenvat credit on capital goods is available only when mines are captive mines i.e. they constitute one integrated unit with main cement factory. Credit of duty on capital goods will not be available if the mine supplies to various cement factories of different assessees.

Capital goods must be used within the factory - Definition of 'capital goods' in Rule 2(a) of Cenvat Credit Rules specifies that the inputs/capital goods must be used within the factory of production. Even in that case, a view is possible that capital goods can be sent outside to job worker for *any purpose*. See discussions under 'Capital Goods'.

Fuel used in the factory – Definition of 'input' covers fuel used in factory in or in relation to manufacture of final products or for *any other purpose*. Thus, 'fuel' will be eligible for Cenvat credit even if electricity/ steam generated is utilized/sold outside the factory. As explained above, the words used are 'for any other purpose'.

Inputs eligible for Cenvat under first part of definition

The definition of 'input' covers following -

- All goods [except High Speed Diesel Oil (HSD), Light Diesel Oil (LDO) and petrol] used in, or in relation to, the manufacture of the final products. The input may be used directly or indirectly in or in relation to manufacture of final product. The input need not be present in the final product (*first part of the definition*)
- Input includes * lubricating oils, greases, cutting oils and coolants * accessories of final products cleared along with the final product * Goods used as paint * Packing material * Fuel * Goods used for generation of electricity or steam used in or in relation to manufacture of final products or for any purpose. - - These can be used '*for any purpose*'. (*second part of the definition*)
- Input also includes goods used in manufacture of capital goods which are further used in the factory of manufacturer (*Explanation* 2 to the definition).

Inputs should be 'used' – mere intention to use is not sufficient – Rule 2(k)(i) which defines 'inputs' for manufacturer states that these should be 'used in the factory'. Thus, mere intention to use is not sufficient to avail Cenvat credit.

In or in relation to manufacture of final product - The inputs are eligible for Cenvat credit only if used *in or in relation to the manufacture of final product*, ***in respect of inputs which are not covered in second part of the definition of 'inputs'.*** Thus, if an input is used 'in the manufacture' ***or*** 'in relation to the manufacture', it is eligible for claiming Cenvat credit.

'In the manufacture' means the input is actually used in the manufacture of finished product, either directly or indirectly. It may be present in the 'final product' in same or similar or identifiable form or it might have got converted during process and may not be seen or identified in the final product.

'In relation to the manufacture' means, the input has been used during a process while manufacturing the product like consumables, spare parts etc. The 'input' need not form part of final product. Thus, the term 'in relation to manufacture' is a very wide term and covers all inputs which have direct nexus with the manufacturing process. 'Manufacture' includes all processes incidental or ancillary to manufacture. Thus, the term 'inputs' is much more wider than mere 'raw materials'.

One to one correlation not necessary in Cenvat - Rule 3(4)(a) of Cenvat Credit Rules states that Cenvat credit may be utilised for payment of *any* duty of excise on *any* final product. Thus, there is no requirement of establishing relation between inputs/input services and final product.

Inputs used in exempted final products not eligible - If a manufacturer manufactures more than one products, it may happen that some of the products are exempt from duty. In such cases, duty paid on inputs used for manufacture of exempted products **cannot** be used for payment of duty on other products which are not exempt from duty. – Rule 6(1) of Cenvat Credit Rules. Thus, this is an exception to above Rule.

Storage of inputs outside the factory

Inputs should be stored within the factory. However, if manufacturer is unable to store the inputs inside the factory for want of space, hazardous nature of goods etc., he can store the inputs outside the premises. The storage point will be treated as extension of the factory. Permission from Assistant/Deputy Commissioner is necessary. [Rule 8 of Cenvat Credit Rules].

Input used in by-product is also input used in main product

In *Hindustan Copper Ltd*. v. *CCE* 2006 (201) ELT 295 (CESTAT), it was held the by-product is not 'final product'. It is not result of deliberate manufacture. It does not enter into equation between input and final product. In this case, it was held that reversal of Cenvat credit or payment of 10% 'amount' is not necessary if part of input goes into a by-product– relying on *Swadeshi Polytex Ltd.* v. *CCE* 1988(38) 794 (SC), where it was held that all inputs are used in manufacture of final product, even if part goes in by-product.

Process losses and handling loss are allowable

There will be some loss of inputs during manufacturing process. Cenvat is available on entire quantity of input even if part of input goes in process loss, since all inputs are 'used' in the manufacture of final product, even if it is not reflected in final product - *Multimetals Ltd.* v. *ACCE* 57 ELT 209 (SC) = 1992 (1) SCC 715 = AIR 1992 SC 1532 = 1992 AIR SCW 1644.

Inputs getting used up or consumed eligible – In *Eastern Electro Chemical Industries* v. *CCE* 2005 (181) ELT 295 (SC 3 member bench), assessee was using MS casings in manufacture of Calcium Carbide. These got melted during process and got mixed up with other molten materials. It was held that it is 'input'.

All inputs necessary to make the goods marketable are eligible - It is settled law that use of any material to render the goods marketable can be taken to be used in relation to manufacture of the final product - *Monotype India Ltd.* v. *CCE* - (1996) 83 ELT 594 (CEGAT) * *Joy Foam Pvt. Ltd.* v. *CCE* - (1996) 83 ELT 72 (CEGAT 3 member bench order).

Repeated use is not a bar for availing Cenvat credit - Cenvat credit cannot be denied merely because an input is capable of repeated use. Just because it is capable of repeated use, the same cannot be taken to be falling in category of 'appliances' or 'machinery', which are excluded items for definition of inputs - *CCE* v. *Halol Leather Cloth Mfg. Co. Ltd.* - 1994 (74) ELT 322 (CEGAT).

Credit if goods lost/destroyed/damaged in process but no credit if inputs are lost or destroyed in store room or pilfered - Since credit on inputs is available only for inputs used in or in relation to manufacture of final products, if the inputs are lost or destroyed in the store room, credit of duty paid on such inputs will not be available, as it cannot be said that they are used 'in or in relation to manufacture'.

Reversal of Cenvat credit in respect of obsolete goods written off

As per Rule 3(5B) of Cenvat Credit Rules (inserted w.e.f. 11-5-2007), if (i) inputs or (ii) capital goods before being put to use, are written of fully or provision is made in books of account to write off fully, the manufacturer is required to pay an 'amount' equal to Cenvat credit taken in respect of such inputs or capital goods. If these are subsequently used in manufacture of final products, manufacturer can take Cenvat credit of amount which was paid earlier.

Loss/shortage in transit during receipt of goods – There may be short receipt of goods. In such cases, no credit is available in case of shortages. However, if such shortage is due to natural causes, full Cenvat is available.

No credit on short received inputs - If inputs are short received and there is loss during transit, the goods short received cannot be termed as 'used in or in relation to manufacture'. Hence, Cenvat credit on such short received inputs is not available - *Asea Brown Boveri Ltd.* v. *CCE* 1994(74) ELT 897 (CEGAT) - same view in *Bombay Dyeing* v. *CCE* 1999(113) ELT 331 (CEGAT) * *Sterlite Industries* v. *CCE* (2007) 212 ELT 193 (CESTAT).

Inputs eligible for Cenvat credit even if intermediate product exempt - CBE&C had clarified vide para 5 of circular No. B4/7/2000-TRU dated 3-4-2000, that Cenvat credit should not be denied if the inputs are used in any intermediate of final product, even if such intermediate product is exempt from payment of duty. The idea is that Cenvat credit is available so long as the inputs are used in or in relation to manufacture of final product, and whether directly or indirectly.

Inputs which only facilitate manufacture not eligible - Inputs which facilitate manufacture but are not integrally connected with manufacturing process are not eligible.

Inputs as per inclusive part of the definition

Definition of 'input' has 'inclusive' part by which the definition has been extended. In case of items covered under the extended part, the requirement of 'in or in relation to manufacture' does not apply.

Accessories eligible for Cenvat - Accessories are eligible for Cenvat if these are cleared along with the final product - Rule 2(k)(i) of Cenvat Credit Rules.

Cenvat on Paints - Paints used in factory are eligible. As explained above, the extended definition of input says that paints can be used 'for any purpose'.

Thus, all paints used in the factory are eligible, for whatever purpose they are used.

Paints used to protect plant are eligible as input – *Ruchi Health Foods* v. *CCE* (2007) 218 ELT 716 (CESTAT).

Cenvat available on packaging material **-** Cenvat is available on packing material as per definition of input contained in Rule 2(k)(i) of Cenvat Credit Rules.

Lubricating oils, greases, cutting oils, coolants - Lubricating oils, greases, cutting oils, coolants are included in second part of the definition of 'input'. Hence, they can be used for 'any purpose'. In *Sudarshan Spinning Mills* v. *CCE* (2006) 195 ELT 290 (CESTAT SMB), it was held that credit of duty paid on lubricating oil in machinery is eligible even if the machinery is partly used for manufacture of exempted final products.

Input goods in respect of service providers

Duty paid on input goods used by service provideRs. is also eligible for Cenvat credit, but in a restricted way.

As per Rule 2(k)(ii), all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service is 'input'.

Petrol, LDO, motor vehicles Etc. not 'input'- Motor vehicle is not input for service providers. However, it is eligible as capital goods in certain cases [see under 'Capital Goods']. Petrol, LDO and HSD is also not eligible as 'input'.

Only goods directly used will be eligible in case of service providers – Definition of 'input' of goods in respect service provider is restrictive. In case of definition of 'input' in respect of manufacturer, the words used are 'in or in relation to manufacture', 'whether directly or indirectly', and 'whether contained in the final product or not'. In case of 'input service' the words used are 'in relation to providing an output service'. As we have seen, the words 'in relation' are broad and expansive and not restrictive. However, in case of input goods for service providers, the words used are 'used for providing output service'. Thus, only those goods (except of course LDO, HSD and petrol) used directly for providing output service will be eligible for Cenvat credit.

Receipt of input in premises of service provider not required – There is no requirement that inputs should be received in the premises of service provider.

6.3 Cenvat Credit of Input Service

Cenvat Credit is available on input goods, input services and capital goods.

Manufacturer as well as service provider will be eligible to get Cenvat credit of 'input services'. Rule 2(l) of Cenvat Credit Rules reads as follows, w.e.f. 1-4-2008

Rule 2(l) - "Input service" means any service –

(i) used by a provider of taxable service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products, upto the place of removal; (The words 'from the place of removal' have been replaced by ', upto the place of removal' w.e.f. 1-4-2008).

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal.

Wide coverage of input services – The words used in the definition in relation to manufacturer are 'in relation to'. As discussed in earlier chapter, 'in relation' expands the scope of coverage. It is not restrictive.

Input services used for providing output services – In case of service provider, the words used in definition of input service in Rule 2(l)(i) are 'used by a provider of taxable service for providing output service'. This appears to limit scope of 'input service' in respect of output service providers. However, as discussed later, the scope has been further widened by adding 'inclusive definition' to the rules, *i.e.* even to input services which have only remote or insignificant nexus with output services will get covered as long as these are related to activities of business.

Input service should have relation to 'manufacture'?

Definition of 'input service' is very wide. Any service in relation to business is input service. However, in recent Tribunal decisions, a restrictive view is being taken that 'input service' should have relation with manufacture.

Coverage beyond manufacturing/service provision stage - Inclusive definition clause of Rule 2(l) extends scope of 'input services' even beyond stage of 'manufacture' or 'provision of service'. The inclusive clause makes it clear that services much earlier to manufacture or provision of service or even after manufacture and after provision of service will be eligible as service tax credit.

Services which do not have even any casual relation with manufacture of goods or provision of service have been covered in the definition of 'input service'. In fact, any service in relation to business of assessee is 'input service'.

Thus, though the words used in Rule 2(l)(ii) are 'used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal', in view of the words 'includes', the scope of definition is much wider than 'in or in relation to manufacture' and would cover even services unrelated to 'manufacture'.

The services that will be covered are services *in relation to* –

(a) Setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises

(b) Advertisement or sales promotion

(c) Market research

(d) Storage upto the place of removal

(e) Procurement of inputs

(f) Activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal.

Services of commission agent – Commission Agents do promote sale and hence commission paid to them is eligible as 'input service' – *prima facie* view held in *Metro Shoes* v. *CCE* (2007) 10 STT 462 = 8 STR 502 (CESTAT).

Activities relating to setting up, modernisation, repairs etc. - Activities in relation to setting up, modernization, renovation or repairs of following will be eligible for Cenvat Credit - (a) a factory (b) premises of provider of output service or (c) an office relating to such factory or premises.

These may be relating to construction, erection, commissioning, and installation etc.

Services relating to marketing – The services of advertisement, sales promotion and market research have been specifically mentioned in the definition as eligible input services. 'Sales promotion' should also cover selling agent's commission, C&F Agent's services etc. Even if it is held that the selling agent's commission or C&F Agents services are not 'sales promotion', they should certainly get covered under 'activities relating to business'.

Procurement of inputs – These should cover services relating to commission of purchase agent, inward transport and insurance, storage and godown charges (if paid) etc.

Activities relating to business – All input services relating to 'activities relating to business' are eligible for service tax credit. Scope of this is very wide and is discussed in following paragraph.

Services relating to 'clearance' of final product – Services in or in relation to 'clearance of final products, *upto* place of removal' have been included in definition of 'input service' in respect of 'manufacturer' [The words were 'clearance of final product *from* the place of removal' upto 31-3-2008].

It is thus clear that service tax paid on all expenses of transport, insurance upto and in the depot or place of consignment agent will be eligible for Cenvat Credit. 'Storage upto place of removal' has specifically been defined as eligible input service in the inclusive clause of definition.

Activities relating to business

All services relating to business will be eligible for service tax credit. The words used are 'activities relating to business, such as - - - - - '. The activities specifically mentioned are as follows –

- Accounting, auditing, financing
- Recruitment and quality control
- Coaching and training
- Computer networking
- Credit rating
- Share registry
- Security
- Inward transportation of inputs or capital goods and
- Outward transportation upto the place of removal.

However, these are only illustrations, as the words used are 'such as'. The illustrations do not mean that only these services are covered under 'activities relating to business'.

The words 'such as' are used only to illustrate the scope. It is not restrictive.

Mobile phones eligible for Cenvat Credit – Earlier Service Tax Rules required 'installation' of telephones in the business premises. Hence, CBE&C had clarified vide circular No. 59/8/2003-ST dated 20-6-2003 that Cenvat credit will not be available in case of mobile phones. Now there is no such requirement. Hence, service tax paid on mobile phones will be eligible for Cenvat credit w.e.f. 10-9-2004, so long as these are used for 'activity relating to business'.

Credit only after payment is made to service provider

Credit of input services can be availed only after the output service provider makes payment of value of input services and the service tax payable on it, as shown in invoice of input service provider. [Rule 4(7) of Cenvat Credit Rules]. [In case of excise duty, credit is available as soon as goods are received in the factory. There is no condition that credit can be availed only after payment is made to supplier of goods].

This peculiar provision has a specific purpose. The reason for this provision is that as per Service Tax Rules, the service tax is payable only after the amount is actually received by the service provider. Thus, the service provider of input services will be liable to pay service tax only when the person who has availed the service (output service provider in this case) pays the amount of his invoice.

It may happen that the output service provider may avail credit of service tax on input services on the basis of Invoice raised by provider of input services. However, he may not actually pay the amount of Invoice to the input service provider. If such thing happens, the service provider of output services will avail credit of service tax, while service provider of input services will not be paying the service tax, as he has not received the payment. Hence, it is provided that service provider of output services can avail credit of service tax only when he makes payment of invoice of input service tax provider, including service tax charged by the input service tax provider.

Mere payment of service tax to service provider is not sufficient – Suppose the invoice is for Rs. 100 and service tax is Rs. 12.36, can you avail Cenvat credit if you pay only Rs. 12.36 to the input service provider? The answer is no, as the words used are 'value of input services *and* the service tax payable on it'.

Input Service Distributor

A manufacturer or service provider may have head office/regional office at different place/s. The services may be received at head office/regional office, but ultimately, these will be indirectly used for manufacture or providing output service. Provision has been made to avail Cenvat credit of services received and paid for at head office/regional office. Such head office/regional office can be registered with Central Excise as 'Input Service Distributor' and it can issue invoice on the manufacturer or producer or service provider.

If assessee intends to use the facility, he has to apply for registration in form ST-1.

Who is 'input service distributor' - As per Rule 2(m) of Cenvat Credit Rules, "input service distributor" means (a) an office managing the business of manufacturer or producer of final products or provider of output service, (b) which receives invoices issued under Rule 4A of the Service Tax Rules, 1994 towards purchases of input services ***and*** (c) issues invoice, bill or, as the case may be, challan for the purposes of distributing the credit of service tax paid on the said services to such manufacturer or producer or provider, as the case may be.

An office of assessee (manufacturer or service provider) is 'Input Service Distributor' if it satisfies all the three aforesaid requirements. It is not that each and every office of assessee is 'Input Service Distributor' and must register. The office should be registered as 'Input Service Distributor' only if it wants to distribute.

There is no law that 'distribution' is the only way of availing Cenvat credit of services received at office of assessee. There are various documents eligible for availing Cenvat credit. Invoice/challan issued by 'Input Service Distributor' is only one of the specified document.

Document eligible for Cenvat credit - As per Rule 9(1)(g); 'invoice, bill or challan' issued by an 'input service distributor' under Rule 4A of Service Tax Credit Rules is an eligible document for purpose of taking Cenvat credit.

Distribution of credit by input service distributor – The 'Input Service Distributor' may distribute Cenvat Credit in respect of service tax, among its manufacturing units or providing output service. The credit distributed should not be more than the service tax paid. If an input service is attributable to service use in a unit exclusively engaged in manufacture of exempted goods or providing exempted services, the credit of such credit of service tax shall not be distributed [Rule 7].

The 'input service distributor' should issue a 'Invoice, Bill or Challan' on monthly basis after consolidating the service tax paid on services received during the month.

Distribution can be in any ratio – There is no provision that 'distribution' should be on proportionate basis. Rule 7 of Cenvat Credit Rules does not make or even imply such a condition. For example, if office and main factory are at one place and even if office is registered as 'Input Service Distributor', it is perfectly possible to 'distribute' all credit to main factory itself. Thus, in such case, registration of office as 'Input Service Distributor' is an exercise in futility.

Responsibilities of Input Service Distributor – The input service distributor has following responsibilities :

(a) Take reasonable steps to satisfy himself about identity and address of provider of input service [Rule 9(3)]

(b) Submit half yearly return within one month from close of the half year, in prescribed form ST-3 [Rule 9(10)]

Penalty can be imposed on the input service distributor under Rule 15 for taking wrong credit. Credit wrongly taken can be recovered under Rule 14.

Distinctions between Input Service Distributor and Registered Dealer - The distinctions and similarities are as follows –

Input Service Distributor	**Registered Dealer (first stage or second stage)**
Similarities	
Required to be registered with Central Excise Authorities	Required to be registered with Central Excise Authorities
Passes on Cenvat Credit	Passes on Cenvat Credit
Distinctions	
Input Service Distributor and the factory/service provider are same legal entities	Dealer and buyer are separate legal entities
Cenvat credit of service tax is passed on	Cenvat credit of excise duty passed on
There is no actual provision of service by Input Service Distributor	There is actual sale of goods
Cenvat credit can be passed on by way of invoice, challan or Bill.	Cenvat credit can be passed on by way of Invoice
No such distinction	Only first stage and second stage dealer can pass on the credit
Half yearly return is required to be submitted	Quarterly return is required to be submitted

6.4 Cenvat credit of duty paid on Capital goods

Cenvat credit is available on input goods, input services as well as capital goods. Some provisions are common while there are some specific provisions in respect of Cenvat on capital goods. General provisions applicable to both inputs and capital goods are discussed in other chapter. The specific provisions in respect of capital goods are discussed here.

Capital Goods Eligible to a manufacturer or service provider – Manufacturers and service providers are eligible to avail Cenvat credit of capital goods used by them.

Rule 2(a) of Cenvat Credit Rules defines 'capital goods' as follows --

'Capital goods' means –

(A) The following goods, namely:-

(i) all goods falling under chapter 82, chapter 84, chapter 85, chapter 90, heading No. 6805, grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to Excise Tariff Act

(ii) Pollution control equipment.

(iii) Components, spares and accessories of the goods specified at (i) and (ii) above

(iv) Moulds and dies, jigs and fixtures.

(v) Refractories and refractory material.

(vi) Tubes, pipes and fittings thereof and

(vii) Storage Tank.

Used –

(1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or

(2) for providing output service

(B) motor vehicle registered in the name of provider of output service for providing taxable service as specified in sub-clauses (f), (n), (o), (zr), (zzp), (zzt) and (zzw) of clause (105) of Section 65 of the Finance Act, 1994.

Capital goods covered in clause (A)(i) – Following capital goods are covered in clause (A)(i) of above definition - Tools, hand tools, knives etc. falling under chapter 82 * Machinery covered under chapter 84 * Electrical machinery under chapter 85 * Measuring, checking and testing machines etc. falling under chapter 90 * Grinding wheels and the like, and parts thereof falling under sub-heading No 6804 * Abrasive powder or grain on a base of textile material, of paper, of paper board or other materials, falling under chapter heading 6805.

Use of Capital Goods - The capital goods should be used – (1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office ; or (2) for providing output service.

Spares, components etc. of Sr Nos. iii to vii - Item No (iii) covers only components, spares and accessories of Sr Nos. (i) and (ii). In the opinion of author, components, spares etc. of Sr Nos. (iv) to (vii) will be eligible as 'inputs' to a manufacturer, as these are obviously used 'in or in relation to manufacture'.

Capital goods received in initial stages - The assessee may take credit of capital goods in his books. There is no time limit for utilising the credit – 50% in first year and 50% next year. Credit can be utilised when manufacture of goods/provision of service starts.

Motor vehicle eligible as capital goods only to specified service provider – Motor vehicles are not 'capital goods' for purpose of 'manufacture', but credit on motor vehicles would be allowed as 'capital goods' only to the following service provideRs. [Rule 2(a)(B) of Cenvat Credit Rules] –

- Courier [Section 65(105)(f)]
- Tour operator [Section 65(105)(n)]
- Rent-a-cab scheme operator [Section 65(105)(o)]
- Cargo Handling Agency [Section 65(105)(zr)]
- Goods Transport agency [Section 65(105)(zzp)]
- Outdoor caterer [Section 65(105)(zzt)] and
- Pandal or shamiana contractor [Section 65(105)(zzw)]

Motor vehicle will not be treated as 'capital goods' or even 'input' for manufacturer or any service provider other than those specified above.

Capital goods used exclusively for exempted final products and output services not eligible – Capital goods used exclusively for manufacture of exempted goods or providing exempt service are not eligible for Cenvat credit [Rule 6(4)].

Capital goods does not cover equipment or appliance used in office for manufacturer – Rule 2(a)(A)(1) clarifies that equipment or appliances used in an office will not be eligible as 'capital goods'. This restriction is only for manufacturer and not for service provider.

Thus, if an assessee is both a manufacturer as well as service provider, he should be able to avail Cenvat on equipment or appliance used in an office, if these are used for providing output service.

Ownership of capital goods is not essential to avail Cenvat on capital goods –- In *Sharda Motors* v. *CCE* (2002) 51 RLT 33 (CEGAT), it was held that person receiving jigs and fixtures on leave and license basis from clients can avail Cenvat credit of duty paid on jigs and moulds supplied by the client. Ownership is not relevant - followed in *HIS Automotives Ltd*. v. *CCE* 2004 (163) ELT 116 (CESTAT SMB).

Use of capital goods by manufacturer - Rule 2(a) provides that capital goods should be used – (a) in the factory of manufacturer of the final products or (b) for providing output service.

'Capital Goods' in case of service provider - The eligible capital goods should be used for providing output services. There is no requirement that these should be brought in the premises or used within the premises of service provider himself.

Reversal of Cenvat credit if capital goods written off before use - As per Rule 3(5B) of Cenvat Credit Rules (inserted w.e.f. 11-5-2007), if (i) inputs or (ii) capital goods before being put to use, are written of fully or

provision is made in books of account to write off fully, the manufacturer is required to pay an 'amount' equal to Cenvat credit taken in respect of such inputs or capital goods. If these are subsequently used in manufacture of final products, manufacturer can take Cenvat credit of amount which was paid earlier.

Reversal of Cenvat credit in respect of obsolete capital goods written off without use - As per Rule 3(5B) of Cenvat Credit Rules (inserted w.e.f. 11-5-2007), if (i) inputs or (ii) capital goods before being put to use, are written of fully or provision is made in books of account to write off fully, the manufacturer is required to pay an 'amount' equal to Cenvat credit taken in respect of such inputs or capital goods. If these are subsequently used in manufacture of final products, manufacturer can take Cenvat credit of amount which was paid earlier.

Capital goods manufactured within the factory

As per *Explanation 2* to Rule 2(k) of Cenvat Credit Rules, 'input' includes goods used in manufacture of capital goods which are further used in the factory of manufacturer. Thus, if a manufacturer manufactures some capital goods within the factory, goods used to manufacture such capital goods will be eligible as 'inputs'. [*i.e.* 100% Cenvat credit will be available in the same financial year]. - - It may be noted that capital goods manufactured within the factory and used within the factory are exempt from excise duty *vide* notification No. 67/1995-CE dated 16-3-1995.

Capital goods used by Service provider - A service provider is eligible for Cenvat credit on capital goods, if these are used for providing output service. The definition does not say 'exclusively used'. It also does not specify the period for which the capital goods should be used. Legally, even if they are used for one day, they are 'used'. Thus, even if capital goods are used partially for providing output service or they are used only for limited period, Cenvat credit of excise duty paid on capital goods will be available.

Conditions for availing Credit on Capital Goods

The conditions for eligibility of Credit are as follows :

- Duty paying documents eligible are same for Cenvat on inputs
- Depreciation under Section 32 of Income Tax Act should not be claimed on the excise portion of the Capital Goods. – Rule 4(4) of Cenvat Credit Rules (Otherwise, the manufacturer will get double deduction for Income Tax - one credit as Cenvat and another credit as depreciation)

Depreciation cannot be availed on Cenvat portion - Rule 4(4) of Cenvat Credit Rules clarifies that manufacture cannot avail depreciation in respect of excise portion *e.g.* if cost of 'capital goods' is Rs. 1.16 lakhs, out of which Rs. 0.15 lakh is duty paid, assessee can claim depreciation under Income Tax only on Rs. one lakh, if he has availed Cenvat credit of Rs. 0.16 lakh. The requirement gets satisfied only if the assessee follows accounting procedure specified in guidelines issued by Institute of Chartered Accountants of India [explained in a later chapter]. Corresponding provision has been made in Income Tax, *vide* explanation to Section 43(1) to the effect that actual cost of asset will be reduced by any duty paid, if Cenvat credit is availed on the asset. This amendment to IT Act has been made with retrospective effect from assessment year 1994-95.

Even otherwise, as per Section 43(1) of Income Tax Act, depreciation can be claimed only on the 'actual cost' of the capital goods. Since Cenvat credit taken on capital goods will not form part of 'actual cost' of machinery, the depreciation on excise portion is really not available under Income Tax.

Cenvat credit on capital goods has to be availed in two stages - Cenvat credit on capital goods is required to be availed in more than one year, viz. upto 50% credit can be availed when these are received and balance in any subsequent financial year. The condition for taking balance credit is that the capital goods should be in possession of manufacturer of final products in subsequent years – Rule 4(2)(b) of Cenvat Credit Rules. [The word used is 'subsequent years' and not 'subsequent year'] [Till 10-9-2004, the words used were '*in possession and use*']. *Thus, mere 'possession' is sufficient. These need not be 'in use'.*

The exception is that in case of consumables like spare parts, components, moulds and dies, refractories, refractory materials, abrasive powder or grain, and grinding wheels, the balance credit can be availed in subsequent year, even if they are not in possession – Rule 4(2)(b) of Cenvat Credit Rules [The obvious reason is that these may not be available next year or subsequent years at all and even if they are available, it will be practically impossible to locate them and prove their possession].

Another exception is that in case of Additional Customs Duty paid u/s 3(5) of Customs Tariff Act (special CVD), full 100% Cenvat Credit will be available in first year itself, even if these goods are capital goods. Service providers are not eligible for Cenvat credit of this duty [second proviso to Rule 4(2)(a)].

Provision if capital goods are cleared 'as such' in the first year itself – If the assessee clears capital goods 'as such' in the first year itself, full 100% Cenvat credit will be available [Proviso to Rule 4(2)(a) to Cenvat Credit Rules] and then while clearing the capital goods, an 'amount' equal to full Cenvat will have to be paid – followed in *CCE* v. *Ispat Industries Ltd*. (2007) 208 ELT 440 (CESTAT SMB).

6.5 Utilisation of Cenvat Credit

Duties eligible for Cenvat credit - Assessee can avail credit of duty/ service tax paid on inputs and input services. This credit is known as 'Cenvat Credit'. This is a 'pool' which is available for utilisation for payment of duty on any final product or output services, subject to certain restrictions and limitations.

Meaning of Cenvat Credit - Rule 3(1) states that following duties/taxes will be available as credit (hereinafter referred as Cenvat Credit).

The term 'Cenvat Credit' used in various rules means aggregate of following duties and taxes [Rule 3(1)].

- Basic excise duty on indigenous inputs [Paid on goods specified in First Schedule to CETA]. Corresponding CVD on imported goods is allowable.
- Education cess on manufactured excisable goods and CVD equal to education cess on imported goods. This credit can be utilised only for payment of education cess on final product or output services
- SAH (Secondary and Higher Education) Cess manufactured excisable goods and CVD equal to SAH education cess on imported goods. This credit can be utilised only for payment of SAH education cess on final product or output services.
- Service tax on input services paid u/s 66 of Finance Act.
- Education cess paid on service tax. This credit can be utilised only for payment of education cess on final product or output services.
- SAH Education cess paid on service tax. This credit can be utilised only for payment of SAH education cess on final product or output services.

- Additional Customs Duty paid u/s 3(5) of Customs Tariff Act w.e.f. 1-3-2005 (SAD or Special CVD). This credit will not be available to service providers [This duty is perceived as in lieu of sales tax. It is payable @ 4%. on most of the products, with few exceptions.]
- National Calamity Contingent Duty (NCCD) leviable under Section 136 of Finance Act, 2001 and corresponding CVD paid on imported goods. This credit can be used for payment of NCCD on outputs only and not for any other duty.
- Additional Excise Duty paid under Section 85 of Finance Act, 2005. This duty is payable w.e.f. 1-3-2005 on pan masala and certain tobacco products, as specified in Seventh Schedule to Finance Act, 2005 [Credit of Additional Excise Duty paid under Section 85 of Finance Act can be used for payment of this duty. Any other credit cannot be utilised and balance amount is required to be paid in cash only].

Duties specified in Rule 3(1) but now not relevant - Following duties are specified in Rule 3(1) but are really not relevant, since all these duties are presently exempt.

- Special excise duty (SED) [paid on goods specified in Second Schedule to CETA]. Corresponding CVD on imported goods is allowable. SED on all products has been exempted w.e.f. 1-3-2006 and it has been merged with basic duty.
- Additional Excise Duties paid on textile and textile articles [AED (TTA)]. If these are imported, corresponding CVD paid is also eligible [*AED (TTA) has been abolished w.e.f. 9-7-2004*].
- Additional Excise Duty paid under Additional Duties of Excise (Goods of Special Importance) Act [AED(GSI)]. If these are imported, credit of corresponding CVD on imported goods can be availed [AED(GSI) has been exempted w.e.f. 1-3-2006 and it has been merged with basic duty.]
- Additional Excise Duty (Tea and Tea Waste) levied under Section 157 of Finance Act, 2003. This credit can be utilised only for payment of AED(TTW) on final product. This duty has been abolished w.e.f. 1-3-2005.

Inter-changeability of credit - Credit of basic duty (and corresponding CVD on imported goods), service tax on input services and Additional Customs Duty paid u/s 3(5) of Customs Tariff Act can be utilised for payment of basic excise duty, NCCD (except NCCD on mobile phones) education cess and SAH education cess on final products.

The credit can be utilised for payment of NCCD (except NCCD on mobile phones) Education Cess and SAH Education Cess **but *not vice versa.***

Credit of education Cess paid on goods and paid on services is inter-changeable i.e. credit of education cess paid on input goods can be utilised for payment of education cess on output services.

Similarly, credit of SAH education Cess paid on goods and paid on services is inter-changeable i.e. credit of SAH education cess paid on input goods can be utilised for payment of SAH education cess on output services. Similarly, credit of SAH education cess paid on input services can be utilised for payment of SAH education cess on final products.

One to one correlation not necessary in Cenvat

Rule 3(4)(a) states that Cenvat credit may be utilised for payment of *any* duty of excise on *any* final product or service tax on output service. Thus, there is no requirement of establishing relation between inputs/ input services and final product/output services. One to one relation is not required.

There is no correlation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related - *CCE* v. *Dai Ichi Karkaria Ltd.* 112 ELT 353 = AIR 1999 SC 3234 = 1999 AIR SCW 3205 = (1999) 7 SCC 448 (SC 3 member bench) – quoted with approval in *CCE* v. *Bombay Dyeing* (2007) 10 STT 286 (SC).

Restrictions on Cenvat credit in certain cases

Credit of any duty can be utilised for payment of any duty on final product. However, some exceptions are provided in Rule 3(7). Thus, excluding these exceptions as explained below, input credit of any type of duty can be utilised for payment of any type of duty on final product.

CVD paid on marble slabs - Cenvat credit in respect of CVD paid on marble slabs or tiles is allowed only to the extent of Rs. 30 per sqm. – Rule 3(7)(c) of Cenvat Credit Rules.

Goods procured from EOU unit - In respect of inputs/capital goods procured from EOU unit, Cenvat credit is available only as per formula – Rule 3(7)(a) of Cenvat Credit Rules.

Non-interchangeability of certain duties - Cenvat credit of Education Cess, SAH education cess, AED (TTA), AED (TTW), NCCD and Additional Excise duty paid under Section 85 of Finance Act, 2005 (and corresponding CVD in respect of imported goods) can be utilised for payment of corresponding duties only – Rule 3(7)(b) of Cenvat Credit Rules.

Exempted units from backward areas - Exempted units from North Eastern States, J&K, Sikkim and Kutch district can avail Cenvat on inputs and input services only for payment of duty on final products in respect of which exemption has been availed – second *proviso* to Rule 3(4).

Credit of Additional Customs Duty paid u/s 3(5) of Customs Tariff Act - Service providers will not be entitled to Additional Customs Duty paid u/s 3(5) of Customs Tariff Act. This duty on imports is payable w.e.f. 1-3-2005 [*third proviso* to Rule 3(4) and second *proviso* to Rule 5 of Cenvat Credit Rules inserted w.e.f. 1-3-2005]

Restrictions on utilisation of credit of some duties - Education Cess, SAH education cess, AED (TTA), NCCD, AED (TTW) and Additional Duty under Section 85 of Finance Act, 2005 paid on inputs and capital goods (and corresponding CVD paid in case of imports) can be utilised only for payment of Education Cess, SAH education cess, AED (TTA), NCCD, AED (TTW) duty and Additional Duty of excise leviable under Section 85 of Finance Act, 2005 respectively on final product [Rule 3(7)(b)].

Restrictions on credit of education cess and SAH education cess - Cenvat credit of Education cess paid on input or input service can be utilised for payment of education cess on output services or education cess on final product only [first *proviso* to Rule 3(7)(b)(vii]. Similarly, Cenvat credit of SAH Education cess paid on input or input service can be utilised for payment of SAH education cess on output services or SAH education cess on final product only [second *proviso* to Rule 3(7)(b)(vii].

Payment of NCCD on mobile phones can be only by Cenvat credit of NCCD and not any other Credit – As per fourth *proviso* to Cenvat Credit Rule 3(4) inserted w.e.f. 1-3-2008, only credit of NCCD can be utilised for payment of NCCD on mobile phones. Any other credit cannot be used. This restriction is only for mobile phones.

Credit of CVD in case of supplies made by SEZ – Supply made by SEZ to DTA unit is considered as export by SEZ and import by domestic unit. SEZ unit has to pay normal customs duty. The domestic unit will be entitled to CVD paid by SEZ unit.

6.7 Taking and Utilisation of credit

Credit of the duty paid on eligible inputs can be taken by the manufacturer immediately on receipt of inputs in the factory of manufacturer or in the premises of provider of output services - Rule 4(1) of Cenvat Credit Rules.

It is not necessary to wait till the inputs are actually utilised in manufacture or production. Similarly, it is not necessary that payment should have been made to supplier of goods. However, in case of input services, Cenvat Credit can be taken only after payment of bill and service tax is made to service provider.

In case of capital goods, upto 50% credit only can be taken at any point of time in a financial year and in any succeeding year or years – Rule 4(2) of Cenvat Credit Rules.

Payment of duty through Cenvat credit is almost as good as payment of duty through PLA and refund is permissible (if otherwise eligible) even if duty was paid through Cenvat credit. [For case law, see under 'refunds'].

Credit can be taken as soon as goods are received in the factory or premises of service provider. It is not necessary to wait till the inputs/capital goods are actually utilised in production [Rule 4(1) of Cenvat Credit Rules].

Utilisation of Cenvat credit – The Cenvat Credit [as defined in Rule 3(1)] can be utilised for payment of the following :

- ***Any*** duty on *any* final product manufactured by manufacturer [Rule 3(4)(a)]
- Payment of 'amount' if inputs are removed as such or after partial processing [Rule 3(4)(b)]
- Payment of 'amount' on capital goods if they are removed as such [Rule 3(4)(c)]
- Payment of 'amount', if goods are cleared after repairs under Rule 16(2) of Central Excise Rules [Rule 3(4)(d)]
- Service tax on output service [Rule 3(4)(e)]
- Payment under Cenvat Credit Rule 6 of 10% 'amount' on exempted goods or reversal of credit on inputs when common inputs or common input services are used for exempted as well as dutiable final products – *Explanation I* to Cenvat Credit Rule 6(3)
- Reversal of Cenvat credit, if assessee opts out of Cenvat – Rule 11(2)
- Payment of 'amount' if goods sent for job work are not returned within 180 days – Rule 4(5)(a).

If by-product, scrap or waste is dutiable as 'excisable goods', duty will be payable on these as if it is a 'final product'.

Carry forward of Unutilised Cenvat credit - The unutilised Cenvat credit at year end can be carried forward. There is no time limit for carrying forward this balance.

Cenvat credit only of inputs received upto end of month, even if duty/tax is to be paid by 5th/6th/15th/16th of following month - Excise duty/service tax is presently payable on monthly basis. Duty for clearances during the month is payable by 5th/6th of following month. In case of SSI units availing SSI concession, the duty for whole month is payable by 15th/16th of following month. In respect of service tax, it is payable by 5th/6th of following quarter in case of individual, proprietary firm or partnership firm, and by 5th of following month in case of other service providers.

In all aforesaid cases, in the month of March, duty/service tax is payable by 31st March itself.

First proviso to Cenvat Credit Rule 3(4) states that only Cenvat credit available as on last day of the month can be utilised for payment of duty even if duty is payable by 5th/6th/15th/16th of following month. Thus, Cenvat credit in respect of inputs/capital goods/input services received after end of month cannot be utilised while paying duty on 5th/6th/15th/16th as the case may be. The credit can be utilised in subsequent month only.

Question – An assessee cleared various manufactured final products during June 2007. The duty payable for June 2007 on his final products was as follows – Basic – Rs. 2,00,000 Education Cesses – As applicable. During the month, he received various inputs on which total duty paid by suppliers of inputs was as follows – Basic duty – Rs. 50,000, Education Cess – Rs. 1,000, SAH education Cess Rs. 500. Excise duty paid on capital goods received during the month was as follows – Basic duty – Rs. 12,000. Education Cess - Rs. 240. SAH education cess - Rs. 120. Service tax paid on input services was as follows – Service Tax – Rs. 10,000. Education cess – Rs. 200 SAH Education Cess - Rs. 100. How much duty the assessee will be required to pay by GAR-7 challan for the month of June 2007, if assessee had no opening balance in his PLA account? What is last date for payment?

Answer – Education Cess payable on final products is Rs. 4,000 (2% of Rs. 2,00,000). SAH education cess payable is Rs. 2,000.

The Cenvat credit available for June 2007 is as follows –

Description	Basic duty	Service Tax	Education Cess	SAH Education Cess
Inputs	50,000		1,000	500
Capital Goods (50% will be eligible and balance next year)	6,000		120	60
Input Service		10,000	200	100
Total	**56,000**	**10,000**	**1,320**	**660**

Credit of Rs. 66,000 (56,000 + 10,000) can be utilised for basic duty Credit of education cess and SAH education cess can be utilised only for payment of education cess and SAH education cess on final product only.

Hence, duty payable through GAR-7 challan for June 2007 is as follows –

	Basic Duty Rs	Education Cess Rs	SAH Education Cess Rs
(A) Duty payable	2,00,000	4,000l	2,000
(B) Cenvat Credit	66,000	1,320	660
Net amount payable (A-B)	1,34,000	2,680	1,340

Last date for payment is 5th July, 2007.

An assessee cleared his manufactured final products during January 2008. The duty payable for the month on his final products was as follows: Basic duty – Rs. 44,000, NCCD – Rs. 2,000, Education cesses – As applicable. During the month, he received various inputs on which total duty paid by suppliers of inputs was as follows - Basic duty – Rs. 40,000 plus applicable education cess. Service tax paid on input services was as follows: Service tax – Rs. 8,000. Education cess – Rs. 160. There is no opening balance in his PLA account. How much duty the assessee will be required to pay through account current for the month of January 2008?

Education Cess payable on final products is Rs. 920 (2% of Rs. 46,000). SAH education cess payable on final products is Rs. 460.

Education cess on his inputs is Rs. 800 (2% of Rs. 40,000)> SAH education cess on inputs is Rs. 400. The Cenvat credit available for the month of January, 2008 is as follows –

Description	Basic duty	Service Tax	Education Cess	SAH Education Cess
Inputs	40,000		800	400
Input Service		8,000	160	80
Total	**40,000**	**8,000**	**960**	**480**

Credit of Rs. 48,000 (40,000 + 8,000) can be utilised for payment of any duty.

Credit of education cess of Rs. 960 can be utilised only for payment of education cess on final product.

Credit of SAH education cess of Rs. 960 can be utilised only for payment of education cess on final product.

	Basic Duty Rs	NCCD	Education Cess Rs	SAH Education Cess Rs
(A) Duty payable	44,000	2,000	920	460
(b) Cenvat Credit (basic plus service tax)	48,000		960	480
Net amount payable (A-B)	(-4,000)		(-40)	(-20)

The credit of basic duty and service tax of Rs. 4,000 can be utilised for payment of NCCD of Rs. 2,000. Hence for the month of January, 2008, assessee is not required to pay any duty through PLA.

He will carry forward following balances for February 2008 - Basic duty - Rs. 2,000. Education Cess - Rs. 40. SAH education Cess - Rs. 20.

Reversal of Cenvat

Cenvat credit is taken as soon as inputs are received in factory or input services are paid for. In some cases, Cenvat credit may have to be reversed.

Reversal if finished goods cleared at concessional rate of duty - Finished products can be sent under bond under Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 without payment of duty. If such goods are sent, Cenvat credit will have to be reversed. If common inputs and input services were used on which Cenvat was availed, payment of 'amount' as per Rule 6(3)(b) will be required. Case law discussed in another chapter.

Reversal of Cenvat credit in respect of obsolete goods written off - As per Rule 3(5B) of Cenvat Credit Rules (inserted w.e.f. 11-5-2007), if (i) inputs or (ii) capital goods before being put to use, are written off fully or

provision is made in books of account to write off fully, the manufacturer is required to pay an 'amount' equal to Cenvat credit taken in respect of such inputs or capital goods. If these are subsequently used in manufacture of final products, manufacturer can take Cenvat credit of amount which was paid earlier.

Reversal if final product subsequently exempt – Cenvat Credit is taken as soon as goods enter factory premises. Final product may be cleared later. It may happen that the final product may be subsequently exempt (conditionally or unconditionally). At that time, some inputs (on which Cenvat has been availed) will be in stock. These inputs will be used for manufacture of exempted final product, if he decides to avail the exemption (in case of conditional exemption. In case of unconditional exemption, it is mandatory for him to avail exemption.

In such case, basic principle is that Cenvat is available only if duty is paid on final product. According to this principle, the Cenvat credit availed on stock is required to be reversed.

Rule 11(3) as inserted w.e.f. 1-3-2007 provides that in such case, the manufacturer will have to pay an amount equivalent to Cenvat credit availed by him in respect of inputs received for such final product and lying in stock or in process or contained in final product. Similar provision has been made in respect of services exempt subsequent to availment of Cenvat credit on inputs availed in Rule 11(4).

No reversal in case of export/deemed export of final – Cenvat credit is not required to be reversed, if final product is exported or supplied to UN Agencies, or to EOU/STP/EHTP. Supplies to SEZ are 'exports'. This aspect has been discussed at other place in the book.

6.8 Duty paying documents for Cenvat

As soon as a manufacturer/service provider receives an input, he can avail Cenvat credit of the duty paid on the inputs. *However, in case of input service, he is entitled to service tax credit only when he makes payment to service tax provider.* Documentary evidence is required regarding payment of duty on inputs/tax on input services.

Rule 9(1) of Cenvat Credit Rules prescribes that Cenvat Credit can be taken on the basis of -

- Invoice of manufacturer from factory
- Invoice of manufacturer from his depot or premises of consignment agent
- Invoice issued by registered importer
- Invoice issued by importer from his premises or consignment registered with Central Excise
- Invoice issued by registered first stage or second stage dealer
- Supplementary Invoice by manufacturer
- Bill of Entry
- Certificate issued by an appraiser of customs in respect of goods imported through foreign post office
- TR-6 or GAR-7 Challan of payment of tax where service tax is payable by other than input service provider
- Invoice, bill or challan issued by provider of input service on or after 10-9-2004
- Invoice, Bill or Challan issued by input service provider under Rule 4A of Service Tax Rules.

Credit can be on basis of any copy - Earlier, Cenvat credit was allowable only on basis of Invoice copy marked 'Duplicate For Transport'. *Now there is no such copy specified.*

The Cenvat Rule states that Cenvat credit can be availed on basis of 'Invoice issued by a manufacturer/ importer/dealer/service provider'. Thus, whether the invoice is marked as 'ORIGINAL FOR BUYER' or 'DUPLICATE FOR TRANSPORTER' or 'TRIPLICATE FOR ASSESSEE', it is still an 'invoice issued'. Hence, Cenvat credit can be availed on the basis of any copy.

Credit in case of defects in duty paying document only with permission of AC/DC – Cenvat credit is available on basis of proof of duty paying document like Invoice or Bill of Entry. Sometimes, there are some minor defects in the duty paying document, which are technical in nature. However, fact of duty payment is not in doubt.

Rule 9(2) as amended w.e.f. 1-3-2007 provides that Cenvat credit can be taken only if ***all*** the particulars as prescribed in Central Excise Rules, 2002 or Service Tax Rules, 1994 are contained in the eligible duty paying document.

As per *proviso* to Rule 9(2), if all prescribed details are not available in duty paying document, at least following minimum details should be available - (a) Details of duty or service tax payable (b) description of goods or taxable service (c) assessable value (d) Central Excise or Service Tax Registration Number and (e) name and address of the factory or warehouse or premises of first or second stage Dealers or provider of taxable service.

If all prescribed details are not available in duty paying document (but minimum details as prescribed above are available) and if Jurisdictional Assistant/Deputy Commissioner is satisfied that such goods or services covered by the document have been received and accounted for in books of account of receiver, he may allow Cenvat credit.

Invoice of Manufacturer or his depot - Excise duty payable by manufacturer has to be shown in his invoice. This Invoice should be as per requirements of Rule 11 of Central Excise Rules. The invoice may be for (I) clearance of inputs/capital goods manufactured in his factory or from his depot or premises of consignment agent *or* (II) inputs or capital goods cleared as such. [Rule 9(1)(a)(i)].

Invoice in name of head office permissible for another unit - If Invoice issued under Rule 11 of CE (that time Rule 52A) is in name of head office Cenvat credit will be available, if entire consignment is received in the factory in original packed condition.

Supplementary Invoice by manufacturer for differential duty - It is possible that a manufacturer who had supplied input/capital goods and who had paid duty on such inputs/capital goods may have to pay further duty on these inputs/capital goods on account of finalisation of provisional assessment or on account of cost escalation granted by buyer. In such cases, the other manufacturer who is using that input/capital goods will get further credit of additional duty paid by the supplier of inputs/capital goods. Suppose, S is a manufacturer of an input supplied to B. S had paid duty of Rs. 50,000 while supplying the input to B. On the basis of the duty paid by S, B had utilised Cenvat credit of Rs. 50,000. Now, if S has to pay further duty of say Rs. 15,000, B will be entitled to avail of extra Cenvat credit of Rs. 15,000.

The manufacturer (supplier) should issue supplementary invoice to buyer for this purpose, which is document eligible for availing Cenvat Credit [Rule 9(1)(b)]

The supplementary invoice can be issued from factory, depot or consignment agent.

Such supplementary invoice can be issued by manufacturer from his factory or depot, dealer, consignment agent or importer. The supplementary invoice can be in respect of excise duty or CVD paid subsequently.

Supplementary Invoice can be issued if differential duty is paid for any reason [e.g. demand received, price rise given etc.].

No credit if duty paid on account of fraud, suppression of facts etc. - If such additional duty is paid on account of fraud, collusion, wilful mistatement or suppression of facts or in contravention of any provision of Act or rules with intention to evade duty, the Cenvat credit will not be allowed on the supplementary invoice. – Rule 7(1)(b) of Cenvat Credit Rules.

Bill of Entry - Cenvat credit is available on additional duty (CVD) paid on imported goods [Rule 9(1)(c)].

As per Customs procedures, customs duty is payable by using a document called '*Bill of Entry*'. This is the authentic document regarding payment of CVD.

TR-6 or GAR-7 challan when service tax paid by person other than service provider – In following cases, service tax is payable by person other than a service provider –

(a) Insurance company on behalf of insurance agent [Rule 2(1)(d)(iii) of Service Tax Rules].

(b) Service receiver when the service provider is non-resident and has no office in India Rule 2(1)(d)(iv) of Service Tax Credit Rules.

(c) Consignor/consignee liable to pay service tax on Goods Transport Agency's services [Rule 2(1)(d)(v) of Service Tax Rules].

(d) The body corporate or firm receiving such sponsorship service liable to pay service tax in case of sponsorship service provided to the body corporate or firm [Rule 2(1)(d)(vii) of Service Tax Rules inserted w.e.f. 1-5-2006].

In such case, the recipient of service/insurance company will pay service tax by way of TR-6 or GAR-7 challan. Such challan is eligible for availing Cenvat credit [Rule 9(1)(e) of Cenvat Credit Rules]

Invoice/bill/challan of Service provider – An invoice, bill or challan issued by a provider of input service on or after 10-9-2004 will be an eligible document [Rule 9(1)(f)].

Invoice from depot or consignment agent – Invoice issued by manufacturer from depot or premises of consignment agent or any other premises where goods are sold on behalf of manufacturer is eligible for availing Cenvat credit [Rule 9(1)(a)(i)(I)]. The duty is paid by manufacturer, which is passed on by the depot/consignment agent. However, the depot/consignment agent of manufacturer is not a 'first stage dealer'. The depot/consignment agent should be registered with Central Excise.

Invoice of Registered Importer - An importer may import goods in bulk and then sell them to local buyers from his godown. In such case, Cenvat of CVD paid can be claimed on basis of invoice of the importer. The importer must be registered with Central Excise and his Invoice should contain details similar to those required for Dealer's Invoice. Invoice issued from depot or consignment agent of importer is also eligible for availing Cenvat Credit [Rule 9(1)(a)(ii) and 9(1)(a)(iii)].

Invoice of first stage and second stage dealer - Sometimes, goods are despatched by manufacturer to his depot and then sold from there.

Often goods are purchased in bulk by wholesaler/distributor from manufacturer's factory or from manufacturer's depot and then subsequently sold.

These may be bought by sub-dealer and then sold to ultimate user (who will avail the credit). In such case, the dealer who has purchased goods from manufacturer or manufacturer's depot or sub-dealer who has purchased from wholesaler/distributor will raise an invoice.

Only first stage and second stage Dealers can issue Cenvatable Invoice. The dealer issuing such Invoice must be registered with Central Excise. The Invoice should contain details as prescribed [Rule 9(1)(a)(iv)].

Transit sale - In case of transit sale, dealer's invoice is not required. Cenvat can be availed by buyer on the basis of invoice issued by manufacturer. Invoice can be in name of dealer through whom goods are purchased, provided that name of buyer appears as consignee.

Certificate issued by Appraiser of Customs in post office – A certificate issued by an appraiser of customs in respect of goods imported through a foreign post office is an eligible document for Cenvat credit. [Of course, only CVD portion of duty will be eligible for Cenvat credit] [Rule 9(1)(d)].

Dealer's Invoice for Cenvat

When the inputs are purchased directly from factory of original manufacturer, there is proof regarding amount of duty paid, in the form of Invoice of manufacturer. If goods are imported directly by manufacturer (who is user of inputs), Bill of Entry is proof of payment of CVD.

However, sometimes, goods are purchased from depot/consignment agent of the manufacturer and not directly from the factory. In some cases, indigenous or imported goods (inputs or capital goods) are purchased by the user of inputs (who wants to avail Cenvat) through trade channel i.e. wholesaler and retailer.

In such cases, a provision has been made to allow dealers/depots/consignment agents to issue Invoice to enable manufacturer (buyer of inputs) to avail Cenvat credit. This Invoice will be documentary evidence enabling the manufacturer to avail Cenvat credit.

All dealers/depots/consignment agents issuing invoice for Cenvat purposes will have to register with central excise authorities under Rule 9 of CE Rules. Only first stage and second stage Dealers are allowed to issue Cenvatable Invoices.

Procedure to be followed by Dealers –Rule 11(7) of Central Excise Rules states that provisions of Rule 11 (which is applicable to manufacturers) shall apply *mutatis mutandis* to goods supplied by a first stage dealer or a second stage dealer.

First stage and second stage Dealers can issue Cenvatable Invoice. Similarly importer and depot/ consignment agent of manufacturer/importer can issue Cenvatable Invoice.

First Stage dealer - As per Rule 2(ij) of Cenvat Credit Rules, 'First Stage Dealer' means

(a) a dealer who purchases goods directly from the factory of manufacturer under Invoice issued by manufacturer under Rule 11 of Central Excise Rules.

(b) a dealer who purchases goods from the depot of the manufacturer under cover of invoice.

(c) a dealer who purchases goods from consignment agent of the manufacturer under cover of invoice.

(d) a dealer who purchases goods from any premises where the goods are sold by or on behalf of the manufacturer under cover of invoice .

(e) a dealer who directly purchases goods from an importer or from depot of importer or from premises of consignment agent under cover of Invoice.

The depot, consignment agent of manufacturer or the importer issuing invoice must be registered with Central Excise.

Second Stage dealer - Second stage dealer means a dealer who purchases goods from a first stage dealer. – Rule 2(s) of Cenvat Credit Rules. Dealer of any subsequent stage after second stage cannot issue Cenvatable Invoice.

Dealer's invoice for Cenvat

Invoice raised by manufacturer of inputs will contain details of excise duty paid on total quantity. The wholesaler or distributor may supply the goods received from manufacturer to more than one buyer, Dealers or sub-Dealers

Cenvatable Invoice - In a normal commercial Invoice raised by wholesaler, distributor or dealer, excise duty will not be charged separately. In fact the dealer cannot charge excise duty in his invoice separately as he has not paid the same.

Rule 11(7) of Central Excise Rules states that provisions of Rule 11 (which is applicable to manufacturers) shall apply *mutatis mutandis* to goods supplied by a first stage dealer or a second stage dealer. In addition, as per Rule 9(4) of Cenvat Credit Rules, Amount of duty actually paid on goods should be *indicated* in the invoice of dealer on *pro rata* basis. [It should not be 'charged', but merely 'indicated'].

As per Rule 11(2) of Central Excise Rules, Invoice shall contain –

(a) Registration Number
(b) Name of consignee
(c) Description and classification of goods
(d) Time and date of removal
(e) Mode of transport and vehicle registration number
(f) Rate of duty
(g) Quantity and Value of goods
(h) Duty payable on the goods.
(i) Address of jurisdictional Central Excise Division (added w.e.f. 1-4-2007).
(j) In case of a proprietary concern or a business owned by Hindu Undivided Family, the name of the proprietor or Hindu Undivided Family, as the case may be, shall also be mentioned in the invoice (inserted w.e.f. 25-1-2008)

Thus, details of manufacturer or first stage dealer (from whom goods were purchased) are legally not required to be indicated in the Invoice. However, these were required under earlier provisions, and Dealers are blindly using the earlier forms though legally those details are now not required.

Excise duty should not be charged separately to buyer in invoice – A dealer is required to indicate in his invoice the excise duty paid on goods by the buyer. However, this should not be separately charged to buyer. Details of excise duty paid by the manufacturer should only be shown separately in the invoice. The amount of excise should not be recovered from buyer separately showing it as 'excise duty'.

Direct despatch from manufacturer to final buyer, but sale is through dealer i.e. Transit sale - If whole consignment is despatched to buyer from manufacturer, Cenvat will be permissible, if name of the final buyer is shown as consignee. (Invoice will be in name of dealer). The consignee can avail Cenvat on the basis of duplicate copy of manufacturer issued under Rule 11 (*that time Rule 52A*). In such cases, the goods need not be brought to the premises of registered person. Invoice of Registered person (dealer) is not required for availing Cenvat by the consignee -*CBE&C Circular No. 96/7/95-CX dated 13-2-1995*.

Records and returns by Dealer - As per Rule 9(4) of Cenvat Credit Rules, Cenvat credit in respect of inputs and capital goods purchased from a first stage dealer or second stage dealer shall be allowed only if the dealer maintains records indicating the fact that the inputs or capital goods were supplied from the stock on which duty was paid by the manufacturer/producer of such goods. Thus, the dealer issuing the invoice should maintain record of goods received and sold. The records of dealer can be inspected by Excise authorities on obtaining permission from Assistant/Deputy Commissioner, Central Excise. All records must be preserved for a period of five years

The first stage dealer and second stage dealer are required to file a quarterly return to Superintendent of Central Excise, in prescribed form, within 15 days from close of each quarter. [Rule 9(8) of Cenvat Credit Rules]. The form is prescribed vide CBE&C notification No. 73/2003-CE(NT) dated 15-9-2003.

Non-entry in RG23D may be on account of any factor. Confiscation of goods and penalty is not justified – *M H Steel Corpn* v. *CCE* (2007) 214 ELT 53 (CESTAT SMB).

Responsibility of person taking Cenvat credit

If there is even minor defect in duty paying document, assessee is required to seek permission of AC/DC for availing Cenvat credit.

Burden of proof on manufacturer or service provider – Rule 9(5) of Cenvat Credit Rules states that burden of proof regarding admissibility of Cenvat credit shall be on manufacturer of final product or provider of output services. Even here, the manufacturer can only provide proof over which he has control.

Practical Examples

Explain eligibility of Cenvat Credit in each of the following transactions occurred in a month.

A tempo containing raw materials was received. The raw materials were purchased through dealer. The dealer was registered with Central Excise. The dealer's Invoice has certified in the invoice that the duty paid by manufacturer was Rs. 13,200/-. The invoice was marked as 'First Stage Dealer'. The Invoice was marked 'ORIGINAL FOR BUYER'.	Cenvat credit of Rs. 13,200 is available.
A truck containing machinery falling under chapter heading 84 was received. Accompanying invoice marked 'DUPLICATE FOR TRANSPORT' indicated that duty paid was Rs. 7,600.	Cenvat credit of Rs. 3,800 (50%) is available.
Some inputs were directly sent on 1st of the month for job work to the factory of job worker, from place of the input supplier, without bringing them in factory. As per the invoice of supplier of inputs, duty paid on inputs was Rs. 5,000. Out of these inputs, 85% were received on 14th of the month, after carrying out job work.	Credit can be taken only when entire lot is received. Hence, no credit is available.
Some spare parts of machinery falling under chapter 84 were received. The invoice indicated that the duty paid was Rs. 1,600/-. The Invoice was marked 'DUPLICATE FOR TRANSPORT'.	Cenvat credit of Rs. 800 is available (since spare parts are 'capital goods')

Some raw materials were received. Accompanying Invoice indicated that the duty paid was Rs. 4,500/-. The Invoice was marked 'DUPLICATE FOR TRANSPORT'. The Invoice did not contain time of removal from the factory.	If there is any defect in invoice, Cenvat credit can be availed only with permission of Assistant/ Deputy Commissioner. Hence, application should be made.
Some raw material was received. The Invoice was in the name of dealer from whom the goods were purchased. However, name of user-manufacturer was indicated as 'Consignee'. The invoice No. 543 dated 7th September 2005 was marked 'ORIGINAL FOR BUYER' and excise duty paid was Rs. 15,000.	Cenvat credit of Rs. 15,000 is available.
An imported consignment of raw materials was received vide Bill of Entry showing payment of following duties - Basic customs duty - Rs. 1,000, CVD - Rs. 1,760, Education Cess of Excise - Rs. 35.20, SAH Education Cess of excise - Rs. 17.60, Education Cess of Customs - 56.26, SAH education cess of customs - Rs. 28.13. Special CVD @ 4% - Rs. 515.89.	Credit available - CVD - Rs. 1,760, Education Cess of Excise - Rs. 35.20, SAH Education Cess of excise - Rs. 17.60, Special CVD @ 4% - Rs. 515.89.
A consignment of 1,000 Kg of inputs was received. The excise duty paid was per invoice was Rs. 10,000. While the inputs were being unloaded, 50 Kgs were damaged and it was found that these were not usable.	Inputs lost before issuing to production cannot be termed as 'used in or in relation to manufacture'. Cenvat credit of Rs. 9,500 can be availed.
Some inputs for final product were received. These were accompanied by a certified Xerox copy of Invoice No. 286 dated 15th January, 2006 indicating that excise duty of Rs. 6,400 has been paid on the inputs. The original or duplicate copy of Invoice was not traceable.	Cenvat credit cannot be taken on basis of certified Xerox copy. If assessee can procure triplicate copy (available with supplier), he can avail Cenvat credit.
500 pieces of inputs were received. Duty paid on these goods was Rs. 2,500. These were issued to production. While on production line, a fire broke out and 200 pieces of inputs lying on shop floor were destroyed.	If inputs are lost during manufacturing process, it is 'used in or in relation to manufacture'. Hence any reversal of Cenvat credit is not required.
1000 litres of inputs were received on which duty paid was Rs. 10,000. Out of these, 950 litres of final products were manufactured. 50 litres of inputs were lost in process.	Process loss is allowable. Hence, any reversal of Cenvat credit is not required.
Some inputs were received on which duty paid was Rs. 20,000. Assessee used 60% of the inputs but balance 40% could not be used due to change in design. He made provision for 'obsolete goods written off' in his books of account. However, the inputs were still in his store room.	He will have to reverse the Cenvat credit of Rs. 8,000. If at a later date, he decides to use the material, he can take credit again.
Cenvat credit of Rs. 10,000 was taken on some inputs. These became obsolete and were sold as scrap for Rs. 15,000. Excise duty payable on scrap is 16.48%.	Assessee will have to reverse Cenvat credit of Rs. 10,000.
1,000 pieces of input 'I' were sent outside for job work on 10th. When the inputs were received, credit of duty of Rs. 15,000 was taken on those inputs.	No duty or amount is payable when inputs are sent outside for job work.

Question - M/s Tips and Toes Ltd., manufactures four types of "Nail Polishes", namely Sweety, Pretty, Beauty, Tweety. The company has availed CENVAT credit of Rs. 4,00,000 on the common inputs used in the manufacture of 'Nail Polishes'. During the financial year 2006-07, the company manufactured 1,000 litres of each type of 'Nail Polishes". The CENVAT availed input was used in equal proportion in all the four types of the products. Calculate the Cenvat credit amount not available or amount payable under Cenvat Credit Rule, using the following additional data: * Sweety - Sale to Home Consumption @ Rs. 30 per 20 ml bottle * Pretty - Sold to a 100% EOU @ Rs. 40 per 20 ml bottle * Beauty Fully exported @ Rs. 50 per 20 ml bottle * Tweety Supplied to Defence Canteen under exemption @ Rs. 60 per 20 ml bottle. [ICWA Inter June 2001 adopted]. Ignore effect of education cess.

Answer - Cenvat credit is available in respect of the products Sweety (Home Consumption), Pretty (Sale to EOU) and Beauty (Goods exported). However, Cenvat credit is not available in respect of goods cleared for home consumption under exemption notification. Thus, Cenvat credit is not available in respect of 'Tweety' i.e. goods supplied to defence canteen under exemption.

Assessee has two options – (a) Maintain separate records right from receipt stage in respect of inputs used in 'Tweety'. (b) If this is not possible, pay an amount of 10% on the exempted goods. In this case, since the inputs are common, it is assumed that assessee was not in a position to maintain separate records. The price of goods is Rs. 60 per 20 ml bottle i.e. Rs. 300 per 100 ml, i.e. Rs. 3,000 per 1000 ml, i. e. Rs. 3,000 per litre. Hence, total value of goods is 1,000 litres x 3,000 i.e. Rs. 30,00,000. Hence, he is required to pay 10% of Rs. 30,00,000 i.e. Rs. 3,00,000.

6.8 Exempted goods/output services

Cenvat credit is not available if inputs or input services are used for manufacture of exempted goods or provision of exempted output services.

As per basic principle of VAT, credit of duty or tax can be availed only for payment of duty on final product or output services. As a natural corollary, if no duty is payable on final product or output services, credit of duty/tax paid on inputs or input services cannot be availed.

As per Rule 6(1) of Cenvat Credit Rules, Cenvat credit is not admissible on such quantity of input or input service which is used in manufacture of exempted goods or provision of exempted services.

Thus, if inputs and input services are partly used in exempted final product/output service, Cenvat credit of that portion of input/input service will not be available.

Partial manufacture/provision of exempted products/services **–** Cenvat credit of inputs and input services is not available if final product/output service is exempt from excise duty/service tax. In case of manufacturer manufacturing both exempt and dutiable goods (or service provider providing taxable as well as exempt services), it may happen that same inputs/input services are used partly for manufacture of dutiable goods/taxable services and partly for exempted goods/services.

In such cases, the manufacturer/service provider has following three options (w.e.f. 1-4-2008) –

(a) Maintain separate inventory and accounts of receipt and use of inputs and input services used for exempted goods/exempted output services. Rules.

(b) Pay amount equal to 10% of value of exempted goods (if he is 'manufacturer) and/or 8% of value of exempted services (if he is service provider) if he does not maintain separate inventory and records – Rule 6(3)(i) w.e.f. 1-4-2008.

(c) Pay an 'amount' equal to proportionate Cenvat credit attributable to exempted final product/ exempted output services – Rule 6(3)(ii) w.e.f. 1-4-2008.

Cenvat credit on capital goods – If capital goods are partly used for exempted goods and party for dutiable final products, entire Cenvat credit of duty paid on capital goods is available. Cenvat credit of duty on capital goods is not allowable only when it is *exclusively* used for manufacture of final products [Rule 6(4)]

No reversal or payment of amount in certain cases – If excisable goods are removed to SEZ, EOU, EHTP, STP, UN agencies or for exports or removal of gold or silver arising in manufacture of copper or zinc by smelting, payment of 10% 'amount' is not required [Rule 6(6)].

Options available to manufacturer manufacturing both dutiable and exempt goods and service provider providing taxable as well as exempt services - The manufacturer/service provider has three options –

Maintain separate inventory and accounts - Maintain separate inventory and accounts of receipt and use of inputs and input services used for exempted goods/exempted output services. In such cases, he should not avail Cenvat credit of the inputs and input services which are used in exempted final services at all – Rule 6(2) of Cenvat Credit Rules.

Pay 10% 'amount' on value of exempted goods or 8% 'amount' on value of exempted services if separate inventory and records not maintained - If the manufacturer/service provider opts not to maintain such separate accounts, he has to pay an amount equal to 10% of the 'value' of such exempted goods or 8% of the value of 'exempted services' [Rule 6(3)(Such payment can be made by debit to Cenvat credit account or PLA [*explanation* II to Rule 6(3A)].

He cannot utilise Cenvat credit of inputs/input services utilised exclusively for manufacture or exempted final product or exempted output services, as is clarified in Explanation II to Rule 6 (3) inserted w. e. f. 1-4-2008.

Thus, he cannot utilise Cenvat credit in respect of inputs/input services utilised exclusively for manufacture of exempted final products or exempted taxable services. In addition, he has to pay 10%/8% amount. Thus, the option of payment of 10%/8% amount is not likely to be very attractive in most of the cases.

Such option has to be exercised in respect of all exempted goods manufactured and all exempted output services provided. The option once exercised shall not be changed in remaining part of financial year – *Explanation* I to Rule 6(3) inserted w.e.f. 1-4-2008.

Pay proportionate amount attributable to Cenvat credit utilised for exempted final product/ exempted output services – The manufacturer/service provider can opt to pay an 'amount' which is proportional to Cenvat credit availed on exempted final product/exempted output services.

He cannot utilise Cenvat credit of inputs/input services utilised exclusively for manufacture or exempted final product or exempted output services, as is clarified in Explanation II to Rule 6 (3) inserted w. e. f. 1-4-2008.

Thus, he cannot utilise Cenvat credit in respect of inputs/input services utilised exclusively for manufacture of exempted final products or exempted taxable services. In addition, he has to pay proportionate amount relating to exempted final products/exempted output services.

Dis-allowance of Cenvat of capital goods if used exclusively for exempted final product/services – Capital goods used exclusively for manufacture of exempted goods or providing exempt service are not eligible

[Rule 6(4)]. If capital goods are partly used for taxable services or dutiable final products, Cenvat credit will be available.

Some manufacturers are entitled to exemption based on turnover or quantity (e.g. SSI units). They will be entitled to Cenvat on capital goods. They can take Cenvat on capital goods and utilise it for payment of duty when their exemption limit is crossed.

Some services eligible even if partly used for manufacture of exempted goods/output services – As per Rule 6(1), proportionate Cenvat is disallowed if input/input service is used partly in manufacture of exempted final product or provision of exempted output services.

However, Rule 6(5) provides an exception to this general Rule. In case of specified services, full Cenvat credit of input service is available even if these services are partly used in manufacture of exempted final product/output services.

The services are –

- Consulting Engineer [Section 65(105)(g)]
- Architect [Section 65(105)(p)]
- Interior decorator [Section 65(105)(q)]
- Management consultant [Section 65(105)(r)]
- Real Estate Agent [Section 65(105)(v)]
- Security Agency Services [Section 65(105)(w)]
- Scientific or technical consultancy [Section 65(105)(za)]
- Banking and Financial Services [Section 65(105)(zm)]
- Insurance Auxiliary Services concerning life insurance business [Section 65(105)(zy)]
- Erection, Commissioning and Installation [Section 65(105)(zzd)]
- Maintenance or repair [Section 65(105)(zzg)]
- Technical testing and analysis [Section 65(105)(zzh)]
- Technical inspection and certification [Section 65(105)(zzi)]
- Foreign Exchange Broker [Section 65(105)(zzk)]
- Construction Service [Section 65(105)(zzq)]
- Intellectual property services [Section 65(105)(zzr)]

In case of these services, reversal of Cenvat or payment of 'amount' is not required, if these services are even partly used for providing output service or manufacture of dutiable final product. Cenvat credit will be dis-allowed only when these services are used *exclusively* in manufacture of exempted final product or exempted output service. Rule 6(5) has been given overriding effect over Rule 6(1), 6(2) and 6(3).

This Rule has not been amended even if Rule 6(3) of Cenvat Credit Rules has been recast w.e.f. 1-4-2008. Hence, the effect is that in respect of these specified services, proportionate reversal is not required.

Meaning of exempted goods

As per Rule 2(d) of Cenvat Credit Rules, 'exempted goods' means goods which are exempt from whole of duty of excise leviable thereon and includes goods which are chargeable to 'Nil' rate of duty. Thus,

'exempted goods' for purpose of Cenvat cover (a) Goods chargeable to 'Nil' duty as per Tariff and (b) Goods which are exempt by a notification issued under Section 5A.

Meaning of 'exempted services'

As per Rule 2(e) of Cenvat Credit Rules, "exempted services" means taxable services which are exempt from the whole of the service tax leviable thereon, and includes services on which no service tax is leviable under Section 66 of Finance Act.

Payment of 'amount' on exempted final product

If assessee opts not to maintain separate accounts in respect of inputs and input services utilised for exempted goods/exempted output services, he has to (A) pay 'amount' of 10% of 'value of exempted final product or 8% of 'value of exempted services or (B) pay 'amount' proportional to Cenvat credit attributable to exempted final products or exempted services.

Determination of Cenvat credit attributable to exempted final product/exempted services

If assessee intends to pay amount on proportionate basis, the 'amount' is to be calculated as provided in Rule 6(3A) of Cenvat Credit Rules. He has to pay 'amount' provisionally on monthly basis. At the yearend, he has to calculate exact amount and pay difference if any or adjust excess amount paid.

Principle behind the calculations – The mode of calculation is as follows –

Assessee should first take entire Cenvat credit of inputs and input services used in exempted as well as taxable final products and exempted as well as taxable services. Then, at the end of month, he should calculate Cenvat credit attributable to exempted final products and exempted services on provisional basis, as follows –

Inputs used for exempted final products (Based on his own Input/Output ratio, even in case of common inputs like consumables etc.) + Inputs used for exempted services (On proportionate basis, based on ratio of previous year) + Input services used for exempted final products and exempted services (On proportionate basis based on ratio of previous year).

At end of the year, he should calculate the ratios on actual basis and make fresh calculations and pay difference, if any, before 30th June. If it is found that he had paid excess amount based on provisional ratio, he can adjust the difference himself by taking credit.

In the first year of production or provision of services, ratios of previous year are not available. In that case, the calculations need not be made for the whole year. However, calculations should be made after the year is over and amount attributable to Cenvat credit on exempted final products and exempted services should be calculated and paid.

The basic idea behind the mode of calculations is sound and correct as per Vat principles. However, calculations are not easy and are prone to litigation.

There is no provision to calculate input services used exclusively for exempted services. This has to be done on ratio basis only.

Calculation of 'amount' on provisional basis - The manufacturer of goods or the provider of output service shall determine and pay, provisionally, for every month –

(i) the amount equivalent to CENVAT credit attributable to inputs used in or in elation to manufacture of exempted goods, denoted as A.

(ii) the amount of CENVAT credit attributable to inputs used for provision of exempted services (provisional) = (B/C) multiplied by D, where B denotes the total value of exempted services provided during the preceding financial year, C denotes the total value of dutiable goods manufactured and removed plus the total value of taxable services provided plus the total value of exempted services provided, during the preceding financial year and D denotes total CENVAT credit taken on inputs during the month minus A.

(iii) the amount attributable to input services used in or in relation to manufacture of exempted goods or provision of exempted services (provisional) = (E/F) multiplied by G, where E denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the preceding financial year, F denotes total value of taxable and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the preceding financial year, and G denotes total CENVAT credit taken on input services during the month [Rule 6(3A)(b) inserted w.e.f. 1-4-2008].

Calculation of 'final amount' after year end - The manufacturer of goods or the provider of output service, shall determine finally the amount of CENVAT credit attributable to exempted goods and exempted services for the whole financial year in the same manner [Rule 6(3A)(c) inserted w.e.f. 1-4-2008].

Self adjustment of excess amount was paid

If at the year end, it is found that the amount provisionally paid was more than the amount finally determined, the manufacturer of goods or the provider of output service may adjust the excess amount on his own, by taking credit of such amount [Rule 6(3A)(f) inserted w.e.f. 1-4-2008].

If assessee does not manufacture dutiable goods or does not render taxable services – If assessee does not manufacture dutiable final products or taxable output service, he can take credit but is not required to pay proportionate amount on provisional basis as provided in Rule 6(3A)(b). However, at year end, he should pay amount on proportionate before 30th June [Rule 6(3A)(h) inserted w.e.f. 1-4-2008].

The provision applies in case of production in first year when ratios of the previous year are not available to calculate Cenvat attributable to exempted products and exempted services.

If the amount is not paid by 30th June, interest is payable @ 24% June [Rule 6(3A)(i) inserted w.e.f. 1-4-2008].

Recovery of the 'amount'

If assessee does not pay the 'amount' as provided in Rule 6(3) or Rule 6(3A), it can be recovered along with interest under Rule 14 of Cenvat Credit Rules, as if it is a credit wrongly taken – *Explanation III to Rule 6(3A) inserted w.e.f. 1-4-2008.*

When payment of 'amount' is not required

In certain cases, payment of 'amount' or reversal of Cenvat is not required.

Export of goods, deemed exports or gold manufacture - As per Rule 6(6), a manufacturer can avail Cenvat credit on inputs when final product is despatched without payment of duty, in following cases –

(a) Final product is despatched to SEZ, EOU, EHTP or STP.

(b) Final product is supplied to United Nations or an international organisation for their official use or supplied to projects funded by them, which are exempt from duty.

(c) When final product is exported under bond without payment of duty

(d) Gold or silver arising in course of manufacture of copper or zinc by smelting.

(e) Goods supplied against International Competitive Bidding in terms of Notification No. 6/2006-CE dated 1-3-2006 or earlier Notification No. 6/2002-CE dated 1-3-2002, if such goods are exempt from customs duty when imported in India

6.9 Removal of input, capital goods and waste

A manufacturer/service provider who obtains the inputs/capital goods gets immediate credit of the duty paid by supplier on the inputs used by him.

The manufacturer/service provider uses these inputs/capital goods for manufacture of final products. However, occasionally, he may have to remove the inputs from his factory or premises of output service provider for -

(a) sale or disposal if these are not required by him or

(b) job work/processing in an outside factory and return

(c) rejected inputs for rework and return.

Since credit has been taken on the inputs, control over their removal is necessary.

Removal of inputs/capital goods 'as such' for sale/disposal - If the manufacturer/service provider is not able to use the inputs or capital goods (*on which he has availed Cenvat credit*) for any reason (like rejection, quality problems, excess supply, change in production plan, exports etc.), he can clear the inputs as such or after partial processing or capital goods *as such*, from factory/premises of service provider after payment of an 'amount'.

Amount payable equal to Cenvat credit availed – The inputs or capital goods can be removed *as such* from the factory of manufacturer or premises of service provider on payment of an 'amount' equal to Cenvat credit availed when the credit was taken. In other words, it amounts to reversal of Cenvat credit taken [Rule 3(5)].

Question : A manufacturer 'M' brings some inputs 'I' of value at Rs. 1 lakh on which duty of Rs. 16,000 has been paid @ 16%. As soon as he receives the inputs, he availed CENVAT credit. Subsequently, since he did not require the input, he sold the goods @ Rs. 1,20,000. What is the duty payable by 'M' if (*a*) On the date of clearance, duty rate on 'I' was 20% (*b*) On the date of clearance, duty rate on 'I' was 10%.

Answer : No 'duty' is payable. However, in case (a) as well as (b), an 'amount' of Rs. 16,000 is payable. Buyer can avail Cenvat credit of the 'amount'.

Question - An assessee had procured some inputs in May 2002 for Rs. 20 lakhs. Duty paid on the inputs was Rs. 3,20,000 (@ 16%) plus education cess of Rs. 6,400. He was unable to use the inputs in view of change in market conditions. He sold the inputs in March 2004 for Rs. 16,00,000. How much 'duty' or 'amount' is payable while clearing the inputs? (ICWA Inter June 2004).

Answer - As per Cenvat Credit Rule 3(5), an 'amount' equal to Cenvat credit availed is payable if inputs are removed 'as such'. Hence, the assessee is required to pay an 'amount' of Rs. 3,26,400 while clearing the inputs 'as such'.

Removal of capital goods after use

Provisions of Rule 3(5) apply when inputs or capital goods are removed 'as such'. Rule 2(a)(A) of Cenvat Credit Rules states that capital goods should be 'used'. Duration is not specified. Hence, even if the capital goods are used for one day, Cenvat eligibility of capital goods is established.

After use, the capital goods can be removed either as scrap or as second hand capital goods.

Removal of capital goods as waste and scrap – As per Rule 3(5A) (inserted w.e.f. 16-5-2005), if capital goods are removed as scrap, the manufacturer shall pay an 'amount' equal to duty payable on transaction value. In other words, an 'amount' equal to duty on scrap value should be paid. It should be shown as 'amount' in the invoice and not 'duty'. Rule 3(6) makes it clear that the buyer can avail Cenvat credit of the 'amount'.

Removal of capital goods as second hand goods – It is not that manufacturer will remove old capital goods only as scrap. He can as well sell it as second hand capital goods, if he does not need them. The machinery may be in working condition or could be brought in working condition after some expenditure.

In such case, if capital goods are removed after use, the manufacturer or output service provider shall pay an 'amount' (not 'excise duty') equal to Cenvat credit taken on the said capital goods, reduced by 2.5% for each quarter of a year or part thereof from the date of taking the Cenvat credit [third proviso to Rule 3(5) of Cenvat Credit Rules, inserted w.e.f. 13-11-2007].

For example, if capital goods are received in July 2007 (duty paid Rs. 1,00,000), 50% i.e. Rs. 50,000 credit was taken in November 2007, balance 50% credit was taken in April 2008, capital goods were installed in January 2008 and were sold after use in July 2009, the 'quarters' involved are 8 (2007 – 1, 2008-4, 2009 – 3) for first 50% and 6 for balance 50%.

Thus, assessee can get deduction of 20% of first Rs. 50,000 (Rs. 10,000) and 15% of balance Rs. 50,000 (Rs. 7,500). He has to pay 'amount' of Rs. 82,500 (1,00,000 – 10,000 – 7,500).

The buyer can avail Cenvat credit of this 'amount' as made clear in Rule 3(6) of Cenvat Credit Rules. Hence, seller should clear the second hand capital goods under 'invoice' charging 'amount' in invoice (not excise duty).

Removal for job work/repairs/testing

In modern manufacturing technology, a manufacturer usually does not carry out all the processes himself. It is common that some manufacturing processes are carried out by him from other manufacturer or subcontractors on job-work basis.

Similarly, a manufacturer or service provider may also have to remove inputs as such or after some processing for test, repairs etc. In such cases, he can clear the inputs received by him for further processing/test/repairs etc. and obtain the same back after processing/test/repairs is carried out.

He can clear inputs/capital goods as such or after carrying out partial processing, without payment of duty/amount. The goods should be returned within 180 days after job work.

Removal for processing/test - The inputs/capital goods can be removed as such or after partial processing to job worker for further processing, testing, repairs, reconditioning, or for manufacture of intermediate goods necessary for manufacture of final products *or any other purpose*.

Job work and job worker – As per Rule 2(n) of Cenvat Credit Rules, Job Work means processing or working upon of raw materials or semi-finished goods supplied to job worker, so as to complete a part or whole of the process resulting in the manufacture or finishing of an article or any operation which is essential for the aforesaid process, and the expression 'job worker' shall be construed accordingly. [The definition of 'job work' is same as given in Notification No. 214/86-CE dated 25-3-1986].

Goods should be returned to factory/premises of service provider - After carrying out the operation/test/repair etc., the goods should be returned to the factory or premises of service provider within 180 days. If these are not received back within 180 days of their being sent out, manufacturer/service provider should pay an 'amount' equivalent to Cenvat credit attributable to inputs/capital goods. Payment can be through Cenvat credit or PLA. If the inputs/capital goods come back after 180 days (say after 220 days), manufacturer/service provider can take Cenvat credit of duty paid by him - Rule 4(5)(a).

Final product can be despatched directly from job worker's place - If inputs are removed for job work/processing under Cenvat, these can be cleared directly from the place of job worker, without bringing the goods into the factory after job work, after obtaining permission from Commissioner - *Rule 4(6) of Cenvat Credit Rules.*

Removal of inputs other than covered under Cenvat

Removal of inputs not covered under Cenvat for job work - Rule 16A of Central Excise Rules specifically permits removal of inputs received in a factory as such or after partial processing to job worker for further processing, testing, repair, reconditioning or any other purpose, subject to fulfilment of conditions as may be prescribed by Commissioner. Thus, Commissioner can impose conditions for removal of inputs. This Rule will not apply when inputs/capital goods can be removed under Cenvat provisions, without any permission. Thus, Rule 16A has application only when automatic clearance under Cenvat Rules is not permissible.

Removal of semi-finished excisable goods for processing - Excisable goods which are in nature of semi-finished goods, can be cleared outside the factory, with permission of Commissioner, outside for carrying out certain manufacturing processes without payment of duty. After the processing, goods can be brought back to factory or can be sent to some other registered premises. After goods are returned to the factory or such other premises, these can be either removed on payment of duty or exported without payment of duty. Conditions as specified in permission of Commissioner of CE will have to be followed. [CE Rule 16B inserted w.e.f. 8-1-2004].

Clearance of manufactured excisable goods without payment of duty for carrying out tests or other process not amounting to 'manufacture' – A manufacturer can, with specific permission of Commissioner, remove excisable goods manufactured in his factory for carrying out tests or any other process *not amounting to manufacture*, to some other premises, without payment of duty. Such other premises may or may not be registered under central excise. After the test or any other process not amounting to manufacture, the goods can be (a) brought back to factory without payment of duty for subsequent clearances for home consumption or export ***or*** (b) removed from the other premises either on payment of duty or exported without payment of duty. The provision does not apply to prototype which are sent out for trial or development test. Conditions as specified in permission of Commissioner of CE will have to be followed. [CE Rule 16C as substituted on 28-12-2006].

H Ltd. purchased a Boring-Drilling machine at a cum-duty price of Rs. 32,14,476. The Excise duty rate charged on the said machine was @ 16% plus education cess of 2% plus SAH education cess of 1%. The machine was purchased on 01.04.2007 and disposed off on 30.09.2008 for a price of Rs. 12 lakhs

in working condition as second hand machinery. The company was claiming depreciation @ 25% following Straight Line Method. Using the said information, answer the following questions: (i) What is the Excise duty paid on the machine? (ii) What is the Cenvat credit allowable under Cenvat Rules? (iii) What is the amount of Cenvat credit reversible or duty payable at the time of clearance of the said machinery?

*Cum-duty price Rs. 32,14,476. Hence, Basic Price i.e. Assessable value = 32,14,476 * 100/116.48 = Rs. 27,59,680.63.*

Total duty paid - 4,54,795.37

As per Cenvat Credit Rules, 50% Cenvat credit can be availed in current financial year and balance 50% of Cenvat is allowable only in following financial year, if the capital Goods are in possession and use. Hence, 50% Cenvat credit can be taken on 1-4-2007. Since the Capital goods were in use for six months in the year 2007-08, Cenvat of balance 50% is allowable on 1-4-2008.

As per third proviso to Rule 3(5) of Cenvat Credit Rules, if capital goods are removed after use, the manufacturer or output service provider shall pay an 'amount' (not 'excise duty') equal to Cenvat credit taken on the said capital goods, reduced by 2.5% for each quarter of a year or part thereof from the date of taking the Cenvat credit. It is assumed that assessee took credit on 1-4-2007. Since machinery was disposed off on 30-9-2008, reduction for 6 quarteRs. @ 2.5% per quarter i.e. 15% will be available. Thus, assessee is required to pay 'amount' equal to 85% of Rs. 4,54,795.37 i.e. Rs. 3,86,576.06.

6.10 Procedures and Records for Cenvat

The main procedures for availment of Cenvat are—

- Maintaining records of inputs and capital goods
- Maintaining records of credit received and utilised
- Submit returns of details of Cenvat credit availed, Principal Inputs and utilization of Principal Inputs in Forms ER-1 to ER-6 (Discussed in earlier chapter)
- Returns by dealer/service provider/input service distributor

Record of inputs and capital goods - The manufacturer of final products or provider of output service or input service distributor shall maintain proper records for the receipt, disposal, consumption and inventory of the inputs and capital goods. The record should contain relevant information regarding (a) value (b) duty paid (c) Cenvat credit taken and utilised (d) the person from whom inputs/capital goods have been procured. Burden of proof regarding admissibility of Cenvat credit is on the manufacturer or provider of output service taking the credit – Rule 9(5) of Cenvat Credit Rules.

Record of input services – The manufacturer of final products or the provider of output service shall maintain proper records for receipt and consumption of the input services. The record should contain relevant information regarding – (a) Value of service (b) Tax paid (c) Cenvat Credit taken and utilised (d) Person from whom input service has been procured. The burden of proof regarding the admissibility of Cenvat credit shall lie upon the person taking such credit. [Rule 9(6)].

Cenvat Credit Record - Cenvat Credit record should be maintained, which is similar to PLA. It is a current account of Cenvat credit received, credit utilised and credit balance. This should give details of (*a*) credit availed against each input/capital goods (*b*) credit utilised against clearance of final products or removal of input as such or after processing or removal of capital goods as such (*c*) balance credit available.

Returns under Cenvat – A manufacturer has to submit returns to Range Superintendent of Central Excise in the prescribed forms ER-1 to ER-6 in respect of Cenvat Availed, Principal Inputs, utilization of Principal inputs etc. These are discussed in earlier chapter and hence not reproduced here. Others have to submit returns as follows -

- Quarterly return by first stage/second stage dealer within 15 days from close of quarter [Rule 9(8)]
- Half yearly return within one month from close of half year, by provider of output services [Rule 9(9)] Return should be in form ST-3.
- Half yearly return within one month from close of half year, by Input Service Distributor [Rule 9(10)] Return should be in form ST-3.

Revised return – A revised return can be filed by a service provider within 60 days of filing of original return [Rule 9(11) inserted w.e.f. 1-3-2007]. This facility is only to service providers and not to manufacturers

If assessee has not taken Cenvat credit of certain inputs, input services or capital goods, and mistake comes to notice after 60 days, he can avail it in subsequent period, since there is no time limit for availing Cenvat credit. This will be reflected in his return for that subsequent period, as in normal course.

6.11 Special Cenvat Provisions in respect of SSI

Opting out of Cenvat by SSI - An SSI manufacturer usually opts out of Cenvat at the beginning of financial year. He then again starts availing Cenvat when his turnover crosses the exemption limit (which is presently Rs. 150 lakhs). Transitional provisions have been made in Rule 11(2) to enable SSI units to do so.

SSI cannot opt out during financial year - In case of SSI, once they opt to avail Cenvat credit any time in the financial year, they cannot opt out during the financial year under any circumstances. Of course, they may opt out at the end of the year.

Reversal of credit at the time of opting out - It may happen that when the SSI unit opts out of Cenvat, there may be some stock of inputs on which Cenvat has been availed but those inputs are not utilised for manufacture on the day of opting out. Similarly, there may be final products in stock in which inputs are used on which Cenvat credit has been availed, but the finished goods are not cleared on date of opting out of Cenvat. In such cases, an 'amount' is payable equivalent to Cenvat credit on such inputs lying in stock or inputs contained in final products on which Cenvat credit has been availed. Balance Cenvat credit, if any, will lapse. – Rule 11(2) of Cenvat Credit Rules. [Note that the word used is 'amount' and not 'duty'. Thus, what is paid is 'amount'.].

This is quite logical. Cenvat credit is available only for payment of duty on final products. If the manufacturer opts out of Cenvat, it is obvious that he will then clear the goods without payment of duty. Thus, he cannot be allowed to avail of Cenvat credit of raw materials which are not used in final products cleared on payment of duty. [These will be used later in final products cleared without payment of duty.]

Opting for Cenvat by SSI - A small scale industry is exempt from duty upto a limit (presently Rs. 150 lakhs). The SSI unit is permitted to avail exemption upto exemption limit and then pay duty. The SSI unit can avail Cenvat credit when it starts paying duty in middle of the year. The SSI unit can also avail Cenvat credit in respect of inputs lying in stock, in WIP and in final products, when it starts availing Cenvat credit. This has been specifically provided in Rule 3(2) of Cenvat Credit Rules.

Procedure for opting for Cenvat - A manufacturer is entitled to avail of credit of all inputs used in or in relation to manufacture. Thus, when he opts to avail Cenvat credit, he will be entitled to avail credit of all inputs lying in his stock on date when he decides to opt for Cenvat. – Rule 3(2) of Cenvat Credit Rules.

This procedure is useful to SSI, who opts out of Cenvat at the year end on 31st March and then again opt for Cenvat when the turnover reaches Rs. 150 lakhs.

Export of final products and Cenvat

All exports of goods are services are tax free. Relief is given in respect of both input taxes/duties and taxes/duties on final product/output services.

Export Benefits - So far as excise is concerned, two major export incentives are available to a manufacturer (*a*) No duty is payable on finished products exported (*b*) Duty paid on inputs/tax paid on input services is refunded/not charged or Cenvat credit is allowed to be used for other final products.

Duty paid on inputs and service tax on input services used for exported final products not to be reversed - As an export incentive, no excise duty is payable on products exported. Supplies to SEZ are 'exports'. Similarly, goods can be supplied to units in EOU, EHTP or STP without payment of duty [these are 'deemed exports'].

As per normal Cenvat Rules, Cenvat is available only if duty is payable on final products. Hence, Cenvat credit on inputs used for manufacture of final products which are exported will lapse because final products are exempt from duty. However, as an incentive to export, it has been provided that Cenvat credit will be available on such inputs/input services, which are used in exported final product. The Cenvat credit can be used for clearance of any of the final products/output services. This is applicable to both duty on inputs and service tax on input services – Rule 6(6) of Cenvat Credit Rules.

Question : A manufacturer manufactures 1,000 Nos. of product 'P', Assessable Value of which is Rs. 2,000 per piece. Duty payable is 20%. Duty paid on raw materials is Rs. 2,00,000. The manufacturer sells 700 pieces in India and 300 pieces are exported. What is CENVAT available and what is the duty payable through PLA ?

Answer : The duty payable is Rs. 400 per piece and hence, duty payable on 700 pieces is Rs. 2,80,000. The manufacturer can avail CENVAT credit of Rs. 2,00,000 and will have to pay duty of Rs. 80,000 by cash through PLA.

Cash Refund if Cenvat cannot be utilised by exporter

If the credit cannot be used for payment of duty on any other final goods or service tax on other services, manufacturer or service provider can get cash refund of the same, if final products or output services were exported without payment of duty (either under bond or after giving Letter of undertaking), or if these were used in the intermediate product cleared for export. Refund is not admissible if exporter has availed duty drawback or has claimed rebate of duty in respect of such duties or has claimed rebate of service tax under Export of Service Rules - Rule 5 of Cenvat Credit Rules.

This provision is only for physical exports and not for deemed exports or home clearances.

Quantum of credit available - Refund of input service credit will be restricted to the extent of ratio of export turnover to the total turnover for the given period e.g. if total credit of input services is Rs. 100, total turnover is Rs. 500 and export turnover is Rs. 250, refund of input service tax credit will be only Rs. 50 (i.e. 50%, since export turnover is 50% of total turnover).

This restriction applies only credit of service tax paid on input services and not in respect of refund of excise duty.

When Exporters of taxable services eligible - The procedure under Cenvat Credit Rules is available even to service providers. However, they can avail the procedure only in cases where his output service is a 'taxable service', since as per Rule 2(p) of Cenvat Credit Rules, 'output service' means a taxable service provided by provider of a taxable service. Thus, if the output service is not 'taxable', Rule 5 of Cenvat Credit Rules is not useful.

When cash refund not admissible - Cash refund of Cenvat Credit is *not* admissible if

(a) Supply is to EOU units, EHTP or STP.

(b) Exports are to Nepal or Bhutan.

(c) If exporter claims rebate of duty in inputs/service tax.

(d) Duty drawback of excise portion should not have been claimed (customs portion of duty drawback can be claimed).

Refund of service tax paid in respect of certain services utilised for exports

A manufacturer exporter can avail Cenvat credit of certain input services utilized in relation to export. However, according to Government press release dated 6-10-2007 – 10 STT 25 (St), press note dated 17-9-2007 – 10 STT 14 (St), press release dated 29-11-2007 – 11 STT 55 (St), some services utilised for exports do not fall within the definition of input services.

Similarly, a merchant exporter utilises various input services for export of goods which he cannot avail any Cenvat credit. In respect of following such services, an exporter can claim refund of service tax paid on such services, under Notification No. 41/2007-ST dated 6-10-2007.

These services are – (a) General Insurance Services (b) Technical testing and analysis (c) Technical inspection and certification (d) Port and other port (e) Transport of export goods by road or by rail (f) Cleaning activity (g) Storage and warehousing. (No refund is available in respect of other input services utilised for export) (Cleaning activity and storage and warehousing services were added w.e.f. 29-11-2007).

Refund of service tax paid on business exhibition services availed by registered manufacturer- exporters of textile products – Manufacturer-Exporter of textile products, who is registered with specified Export Promotion Council, is entitled to get refund of service tax paid by them on business exhibition services availed by them. He should not have availed Cenvat credit of the service tax. Only manufacturer-exporter is eligible and not merchant-exporter. They have to file refund within 60 days at end of each quarter. The refund can be claimed only in respect of services availed upto 31-3-2009 – Notification No. 43/2007-ST dated 29-11-2007.

Transfer/Merger/Shifting of undertaking

If a manufacturer shifts his factory to another site or provider of output services shifts his business or a manufacturer/service provider Transfers his factory/business on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of factory to a joint venture, the manufacturer/ service provider can transfer unutilised Cenvat credit to the transferred/sold/merged/leased or amalgamated factory/business - Rules 10(1) and 10(2) of Cenvat Credit Rules.

The transfer of credit after transfer/merger/shifting is subject to following –

(a) There should be specific provision for transfer of liabilities of such factory/business of service provider [Rules 10(1) and 10(2)]

(b) The transfer is allowed only if stock of inputs as such or in process, or the capital goods are also transferred along with the factory/premises of service provider to the new site or ownership and the inputs or capital goods on which credit has been availed of are duly accounted for to the satisfaction of Assistant/Deputy Commissioner. [Rule 10(3)]

Penalty for wrongful availment of Credit or violation of rules

If the Cenvat credit has been taken or utilised wrongly, the same shall be payable along with interest and provisions of Sections 11A and 11AB of Central Excise Act (in respect of excisable goods) and Sections 73 and 75 of Finance Act, 1994 (in respect of service tax) shall apply *mutatis mutandis* for effecting the recovery - *Rule 14 of Cenvat Credit Rules.*

If the 'amount' which is payable under Rule 6 of Cenvat Credit Rules is not paid, the same can also be recovered along with interest.

Section 11A of Central Excise Act and Section 73 of Finance Act provide for recovery of duty and service tax respectively.

Section 11AB of Central Excise Act and Section 75 of Finance Act,1994 provide for interest for delayed payment.

Refund application not required for correcting mistake in Cenvat records – If an assessee has made wrong debit in Cenvat records due to mistake, he can correct by making credit entry under intimation to department. This is not covered u/s 11B and refund application is not required. See case law under 'refunds'.

Wrongful utilisation of Cenvat credit on inputs and capital goods – If any person takes Cenvat credit wrongly or in contravention of any of the provisions of Cenvat Credit Rules in respect of inputs and capital goods, the penalty can be (a) confiscation of goods plus (b) monetary penalty not exceeding the duty on excisable goods in respect of which contravention has been committed or Rs. 2,000 whichever is higher (minimum penalty was Rs. 10,000 upto May 2007) [Rule 15(1) as amended w.e.f. 1-3-2007].

Penalty in case of fraud etc. - Where credit has been taken wrongly or utilised wrongly on inputs and capital goods on account of fraud, wilful mistatement, collusion or suppression of facts, or contravention of any provision of Act or rules with intent to evade duty, penalty provisions of Section 11AC of CEA - Rule 15(2) of Cenvat Credit Rules. [Under Section 11AC of CEA, there is mandatory penalty equal to duty evaded. This penalty is reduced to 25% if amount along with 25% penalty is paid within 30 days from receipt of order].

Wrongful utilisation of Cenvat credit on input services – If any person takes Cenvat credit wrongly or in contravention of any of the provisions of Cenvat Credit Rules in respect of input services, penalty upto Rs. 2,000 (it was Rs. 10,000 upto May 2007) is leviable under Rule 15(3) of Cenvat Credit Rules.

Penalty in case of fraud etc. - Where credit has been taken wrongly or utilised wrongly on input services on account of fraud, wilful mistatement, collusion or suppression of facts, or contravention of any provision of Act or rules with intent to evade duty, penalty provisions of Section 78 of Finance Act - Rule 15(4) of Cenvat Credit Rules.

[Under Section 78 of Finance Act, there is mandatory minimum penalty equal to service tax evaded, but penalty upto twice the amount of tax evaded can be imposed. This penalty is reduced to 25% if amount along with 25% penalty is paid within 30 days from receipt of order].

STUDY NOTE 7

Exemptions and Demands in Central Excise

7.1 Exemption from Duty

CETA/Customs Tariff prescribe the rate of duty for each Chapter head and sub-head. This rate is called '*Tariff Rate*' and the duty payable is '*Statutory Duty*'. The rates are fixed by Parliament and changing these rates is time consuming. However, Government needs flexibility in operations of taxing statute. As the circumstances change, quick adoption to changing situations is required. CEA and Customs Act, have, therefore, granted powers to Central Government to modify rates as per requirements, by issuing a notification. The duty actually payable as per the notification (usually referred to as 'exemption notification') is called 'effective rate of duty'.

Exemption does not erase duty – Excisable goods do not become non-excisable only because of exemption given under an exemption notification.

Meaning of 'goods on which appropriate duty has been paid' –If an exemption notification uses the words 'on which appropriate duty has already been paid', it means that on which excise duty has, as a matter of fact, been paid and has been paid at 'appropriate' or correct rate. Thus, it cannot cover goods on which in fact, no duty has been paid. - *CCE* v. *Dhiren Chemical Industries* 2002(139) ELT 3 = 2001 AIR SCW 5073 = 2002(2) SCC 127 = 47 RLT 881 = 139 ELT 3 = 254 ITR 554 = 126 STC 122 (SC 5 member bench judgment).

Exemption from duty by a notification

Central Excise Rules grant exemption from duty if goods are exported under bond, *except* exports to Nepal and Bhutan. Similarly, goods manufactured in Special Economic Zone (SEZ) are 'excluded excisable goods' and hence no excise duty can be levied on goods manufactured in SEZ.

Section 5A(1) of CEA authorises Central Government to exempt the excisable goods, (*a*) generally (*b*) either absolutely or subject to such conditions (to be fulfilled before or after removal), (*c*) from whole or any part of excise duty leviable. Such exemption should be in public interest and it should be by way of a notification published in Official Gazette. – similar provision in Section 25(1) of Customs Act in respect of customs duty.

Excise exemption notification does not apply to supplies made by EOU and SEZ in DTA - The exemption notification issued u/s 5A of CEA is not applicable in respect of DTA clearances by EOU and SEZ unit, unless specifically provided in the notification. [*proviso* to Section 5A(1)].

Effective date of notification - The notification becomes effective on the date it is issued for publication in Gazette [Section 5A(5)(a)].

Method or form of granting exemption - The typical notification granting exemption reads as follows : "In exercise of the powers conferred by sub-Section (1) of Section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts goods falling under heading No. . . . . of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) from whole of the duty of excise leviable thereon under Section 3 of Central Excise Act, 1944 (1 of 1944)." In case of partial exemption, the wording is "exempts, from so much of the duty of excise leviable thereon which is specified in the said schedule, as is in excess of the amount calculated at the rate of . . . per cent *ad valorem*." *or* "as is in excess of the amount calculated at the rate of Rs. . . . . per Ton" and so on. The rate at which duty is actually payable is called '*effective rate*'.

Form or Method of exemption may be different - The Tariff Rate may be prescribed *ad valorem* or specific i.e. based on weight, length, area, volume or other measure. Section 5A(3) provides that partial exemption

under Section 5A(1) or 5A(2) can be granted by providing exemption from duty at a rate expressed in form or method different from which statutory duty is leviable. However, the duty prescribed by an exemption notification can never exceed the *Statutory Duty* e.g. duty on an item may be prescribed in tariff as 15% *ad valorem*, but the exemption notification may exempt the duty which is in excess of *(say)* Rs. 500 per ton. Thus, *effective duty* is Rs. 500 per ton. This duty cannot exceed the statutory duty which is 15% in this example. Here, tariff rate is prescribed as a percentage of value, while effective duty is on the basis of weight. This is specially permitted *vide* Section 5A(3) of CEA [parallel Section 25(3) of Customs Act].

Notifications to be placed before Parliament – The exemption notifications issued are required to be published in Official Gazette.

The notifications should be placed before each House of Parliament, for a period of at least 30 days (comprising of one or more successive sessions), as soon as possible after the notification is issued. Parliament may modify the same, but such modification or annulment will not affect the validity of anything already done under the notification. [Section 38(2) of Central Excise Act and Section 159 of Customs Act].

Exemption optional but absolute exemption compulsory

Section 5A(1A) inserted w.e.f. 13-5-2005 which reads as follows, 'For the removal of doubts, it is hereby declared that where as exemption has been granted u/s 5A(1) in respect of any excisable goods from the whole of duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods'.

Thus, if a notification grants unconditional exemption from whole of duty to certain goods, assessee cannot pay excise duty on such goods.

Provision applies only when duty is wholly exempt – Section 5A(1A) applies only when excise duty is wholly and unconditionally exempt. If exemption is partial, the provision does not apply e.g. if tariff rate is 16% and unconditional (absolute) exemption is to duty in excess of 8%, it is still possible to pay duty @ 16%.

When payment of duty could have been beneficial - A manufacturer may like to pay duty on his goods even if the goods are exempt, if the buyer intends to avail Cenvat on the inputs supplied by manufacturer. If manufacturer does not pay duty, he cannot avail of Cenvat credit on inputs used by him which is ultimately a loss to the buyer as chain of Cenvat is broken.

Assessee may also like to pay duty on exported goods and claim refund. This will enable him to utilised Cenvat credit on capital goods, which otherwise, he may not be able to utilise.

However, this is not permissible w.e.f. 13-5-2005.

Conditional exemption at option of assessee – Section 5A(1A) as inserted w.e.f. 13-5-2005 applies only in cases where exemption u/s 5A(1) has been granted 'absolutely' i.e. unconditionally.

Some exemptions are subject to some conditions e.g. following Central Excise (Removal of Goods at Concessional Rate of Duty for manufacture of Excisable Goods) Rules [earlier Chapter X] procedure or not claiming Cenvat etc. In such cases, the assessee may or may not avail of the concession or exemption.

Option to assessee if two exemption notifications available - When there are two provisions under which an assessee could claim some benefit, it is for the assessee to choose one. - *CIT* v. *Mahendra Mills* 2000 AIR SCW 1016 = AIR 2000 SC 1960 = 243 ITR 56 = 109 Taxman 225 (SC). Where there are two exemption notifications that cover the goods in question, assessee is entitled to the benefit of that exemption notification which gives

him greater relief, regardless of the fact that notification is general in its terms and the other notification is more specific to the goods. – *HCL Ltd*. v. *CCE* 2001(130) ELT 405 = 76 ECC 11 (SC 3 member bench order).

Exemption in exceptional circumstances

General exemptions from duty can be granted under Section 5A(1) of Central Excise and Section 25(1) of Customs Act, by issuing a notification. However, Section 5A(2) authorises Central Government to grant exemption, in public interest, in exceptional circumstances by a special order. The exceptional circumstances should be specified in the order (*It is not necessary to publish the order in Official Gazette*) - similar provision in Section 25(2) of Customs Act.

This is *ad hoc* exemption and can be granted even retrospectively.

Articles eligible - Following articles will be considered for granting the *ad hoc* exemption. – MF(DR) circular No. 49/2003-Cus dated 10-6-2003 -

- Import of secret or strategic goods by Government
- Defence need relating to military hardware and software or for R&D units
- Import by Government organisations engaged in security operations like Special Protection Group (SPG), Central Police Organisations or State Police Organisations for anti-subversion, anti-terrorism and intelligence work
- Goods meant for providing relief and rehabilitation under unforeseen and exceptional circumstances such as flood, earthquake, epidemic etc.
- Imports by registered charitable institutions, who receive goods as donations or gifts for charitable purposes. It should provide service free or on 'no profit no loss' basis. They have to give undertaking to fulfil prescribed conditions for availing exemption. Goods imported cannot be sold or gifted.

Retrospective insertion of clarification to exemption notification

An exemption notification cannot be amended with retrospective effect. However, sometimes it is found that there is some drafting mistake or ambiguity in *(a)* the general exemption notification issued u/s 5A(1) of CEA or 25(1) of Customs Act *or (b)* Special exemption order issued under Section 5A(2) of CEA or Section 25(2) of Customs Act. Sometimes, assessee gets unintended benefit while in some cases even intended benefit cannot be obtained due to drafting error in the exemption notification or exemption order. To overcome this problem, Section 5A(2A) of CEA and Section 25(2A) of Customs Act have been inserted w.e.f. 11-5-2002.

As per these inserted Sections, Central Government, for the purpose of clarifying the scope or applicability of exemption notification or exemption order, may insert an explanation to the exemption notification or order within one year of such notification or order. Such Explanation to an exemption Notification will have retrospective effect from date of exemption notification. Such Explanation can be inserted in exemption notification only within one year of date of issue of notification and not thereafter.

Exemption for past general practice

At times, the assessees and excise department treat a provision of excise law or classification/valuation of particular goods in a particular way. Duty is levied or exempted accordingly. However, the settled and mutually accepted position of duty liability may get disturbed for some reason like (*a*) Supreme Court/ High Court/Tribunal decision on classification or mode of valuation or any other decision having effect

on duty liability (*b*) Rethinking of excise department regarding correct legal interpretation of tariff item or interpretation of a notification which might affect duty liability of particular excisable goods (*c*) any other reason where earlier *general* understanding about duty payable on particular goods may be found to be incorrect.

If it is found that higher duty was legally recoverable, the same can be recovered for past period also within the limitations of law. However, this might seriously affect industries as they had not considered this unexpected burden while deciding their price structure. Some units may even become bankrupt or companies may go in liquidation.

Hence, Section 11C of CEA provides that if (*a*) there was a *generally prevalent practice* of levy or non-levy of any excisable goods *and* (*b*) such goods were *actually* liable for duty at higher rates; Central Government may, by notification in Official Gazette, direct that such excess duty payable, need not be paid. - similar provision u/s 28A of Customs Act in respect of customs duty.

Exemption to new units in backward area

In order to encourage development of backward areas, excise duty exemption has been granted to goods manufactured by new units (or existing units undertaking substantial expansion). The areas are as follows – (a) North Eastern Region and Sikkim - Notification No. 20/2007-CE dated 25-4-2007 (Earlier No. 32/1999-CE(NT) dated 8-7-1999, No. 33/1999-CE dated 8-7-1999, 56/2003-CE dated 25-6-2003 and 71/2003-CE dated 9-7-2004) (b) Kutch district of Gujarat – No. 39/2001-CE dated 31-1-2001 (c) State of Jammu and Kashmir – 56/2002-CE and 57/2002-CE both dated 14-11-2002 (d) Himachal Pradesh – 49/2003-CE dated 10-6-2003 (e) Uttarakhand (earlier Uttaranchal) – 50/2003-CE dated 10-6-2003.

In case of North-East Region and Sikkim, provision is that the unit should pay excise duty. Duty paid through PLA is refunded next month or self credit is allowed. Thus this is indirect way of giving duty incentive.

In case of units in Himachal and Uttarakhand (earlier Uttaranchal), there is direct exemption.

Quarterly returns by exempt units in HP/Uttarakhand – Exempt units are required to file quarterly return by 20th of subsequent month following the quarter. The return is to be filed in office of Commissioner and not in range office – proviso to Rule 12(1) of Central Excise Rules. The return is to be filed in form A prescribed *vide* notification No. 4/2008-CE(NT) dated 18-1-2008.

Buyer eligible for Cenvat credit - Buyer who purchases goods from such unit is entitled to avail full Cenvat credit of duty paid, as per Rule 12 of Cenvat Credit Rules.

Rebate even if inputs obtained from North East etc. are used in exported final product - Manufacturers in North East etc. get refund of duty paid by them. However, buyer of such goods is entitled to Cenvat credit. If goods obtained from North East etc. are used in manufacture of final product exported by buyer, rebate can be claimed by the exporter (since refund of duty is given to manufacturer and not the exporter) - MF(DR) instruction No. 209/11/2005-CX-6 dated 3-4-2007 - (8) STT 81 (Stat) = 210 ELT T28).

No rebate on exports to manufacturer who is availing the exemption available to backward areas – If a manufacturer claiming exemption in respect of backward area exports the goods, he is not eligible for claiming rebate of duty paid on the exported excisable goods under Rule 18 of Central Excise Rules – para 2(h) of Notification No. 19/2004-CE(NT) as inserted on 17-9-2007 [Thus, he should export goods without payment of duty and not under claim of rebate].

7.2 Provisions of General SSI exemption

Various concessions are given to small scale industries to encourage their growth and also on account of administrative convenience.

Exemptions to small units - The Government has given various concessions to small scale industries (SSI). The most important notification giving these concessions is notification No. 8/2003 dated 1-3-2003.

SSI units whose turnover is less than Rs. 4 crores are eligible for the concessions. If SSI unit does not avail Cenvat on inputs, turnover upto Rs. 150 lakhs is fully exempt. If SSI unit avails Cenvat on inputs, it has to pay normal duty on all clearances and no SSI exemption is available. [The exemption limit was Rs. 100 lakhs upto 31-3-2007].

SSI units eligible for SSI concession - All industries irrespective of their investment or number of employees are eligible for concession. In fact, even a large industry will be eligible for the concession if its annual turnover is less than Rs. 4 crores. *The SSI unit need not be registered with any authority* [The limit was Rs. 3 crores upto 2004-05]. *However, SSI exemption has not been not granted to some articles.*

Exemption available only if turnover in previous year was less than Rs. 4 crores - A unit is entitled for exemption only if its turnover in previous year was less than Rs. 4 crores. Units whose turnover was over Rs. 4 crores in 2006-07 are not eligible to any SSI concession in 2007-08. They have to pay full normal duty from 1st April, 2007.

See a subsequent para for provision regarding turnover to be included and excluded for calculating turnover of Rs. four crores and 1.50 crores.

Goods with other's brand name not eligible - Goods manufactured with other's brand name are not eligible.

Choice of various exemption to SSI - SSI units have been given two types of exemptions -

(a) SSI Unit can avail full exemption upto Rs. 150 lakhs and pay normal duty thereafter. Such units can avail Cenvat credit on inputs only after reaching turnover of Rs. 150 lakhs in the financial year.

(b) SSI Unit can also pay full 100% duty and avail Cenvat credit.

When second option suitable - Option of payment of duty may be suitable in following cases –

(a) When buyer intends to claim Cenvat credit. In such cases, the effective cost will be lower as SSI unit can claim Cenvat on inputs

(b) When SSI unit intends to export the products and has huge balance in Cenvat credit account. In such cases, he can pay duty and claim rebate after export of goods. Otherwise, the balance may remain unutilised. There is provision to get refund of balance lying in credit in Cenvat Credit account. However, such refund can be only of Cenvat on inputs and not of capital goods.

Option must be indicated, if SSI unit intends to avail Cenvat credit - The first option, i.e. Nil duty upto Rs. 150 lakhs and normal duty for subsequent clearances is automatic. However, if assessee wants to pay normal duty, he must inform option to department. He should inform in writing to Assistant Commissioner with a copy to Superintendent of Central Excise.

Simultaneous availment of Cenvat and SSI exemption not permissible – CBE&C has issued instructions that if a manufacturer manufactures various products, he has to avail Cenvat for all items or opt for exemption from Cenvat for all products. It is not permissible to avail Cenvat for some items and avail SSI exemption for other products. - *CBE&C Circular F. No. 22/46/86-TRU dated 8-9-1986* - reiterated in *Circular Nos. 9/93-CX.8 dated 24-8-1993* and 361/77/97-CX dated 3-12-1997.

Cenvat to be reversed if unit decides to opt for exemption - If the unit was availing Cenvat credit prior to 31st March, it will have to pay an amount equivalent to Cenvat credit allowed to him on the inputs lying in stock or used in finished excisable goods lying in stock as on 1st April. If any Cenvat credit on inputs is balance on 31st March, it will lapse on 1st April [Rule 9(2) of Cenvat Credit Rules]. The 'amount' is not 'duty' and hence, strictly, Cenvat credit of such 'amount' paid will not be available.

Clubbing of turnover of various factories

The provisions can be summarised as follows –

One manufacturer having more than one units - If the manufacturer has more than one factories (even at different places), the turnover of all factories (belonging to same manufacturer) have to be clubbed together for calculating the SSI exemption limits of Rs. 150 or Rs. 400 lakhs.

In *Jaybee Industries* v. *CCE* (2004) 168 ELT 316 (CESTAT), it was held that if one partnership firm has two units at different locations, their turnover will be clubbed for purpose of SSI exemption.

One manufacturer for part of year and other for balance part of year in same factory - Sometimes, a manufacturer may use the factory for part of the year and then another manufacturer may use the same factory for remaining part of the year. In such cases, the turnover of different manufacturers has to be clubbed for calculating the SSI exemption limits of 150 or Rs. 400 lakhs, if it is from the same factory.

More than one manufacturers in same factory - It is possible that more than one manufacturers may clear the goods from the same factory e.g. part of factory may be used by one manufacturer and another part of same factory may be used by another manufacturer. In such cases, all clearances from the factory has to be considered even if the clearance is of different manufacturers for calculating the SSI exemption limits of 150 or 400 lakhs.

Bogus or sham units - Clubbing is also possible if two units are sham or bogus or if there is unity of interest and practically they are one.

Slabs in SSI excise exemption

Following are slabs in SSI excise exemption.

First slab of Rs. 150 lakhs - There is full exemption from excise upto the first clearances of Rs. 150 lakhs, starting from 1st April every year, *if the SSI unit does not avail Cenvat credit on inputs*. If an SSI unit manufactures goods of different varieties, falling under different Chapter heads and/or in different factories, total exemption considering clearances of all Chapters together and all factories of same manufacturer together, will be Rs. 150 lakhs.

Second slab after initial Rs. 150 lakhs - After the turnover crosses Rs. 150 lakhs, full normal duty is payable. The SSI unit can avail Cenvat credit on inputs in respect of inputs used after turnover crosses Rs. 150 lakhs. - . - . - Even if an assessee crosses turnover of Rs. 4 crores, he has to only pay duty at normal rate. The SSI manufacturer does not have to pay duty on earlier turnover for which he had availed concession. [confirmed in *Searsole Chemicals* v. *CCE* 1999(113) ELT 435 (CEGAT)]. However, in next year, he will not be able to avail any concession and he has to pay normal rate of duty from 1st April itself.

Calculation of limit of Rs. 150/Rs. 400 lakhs

While calculating turnover of Rs. 400 lakhs, some of turnover of SSI is not to be considered, while some has to be considered.

Export turnover except export to Nepal/Bhutan to be excluded - The limit of Rs. 400 lakhs is of clearance for 'home consumption', i.e. within India. Export turnover (except export to Nepal and Bhutan) should not be considered for the purpose of calculating the turnover of Rs. 400 lakhs - confirmed in *Polo Singh* v. *CCE* 1999(108) ELT 416 (CEGAT) * *Kansal Knitwears* v. *CCE* (2001) 136 ELT 467 (CEGAT). Note that supply to SEZ unit is 'export' w.e.f. 11-5-2004. [*same provision for calculating limit of Rs. 150 lakhs*].

Deemed exports to be excluded – Goods can be cleared to EOU, SEZ, EHTP or STP unit or to UN or an international organisation without payment of duty. Such clearances are not to be considered for calculating the exemption limit of Rs. 400 lakhs [*Same provision for calculating limit of Rs. 150 lakhs*]. It may be noted that this exemption applies only if prescribed procedure is followed. If that procedure is not followed, such turnover will be includable for purpose of calculating exemption limit of Rs. 150 lakhs.

Goods manufactured with other's brand name cleared on payment of duty not to be included - A SSI unit can manufacture goods with brand name belonging to others Such goods are not exempt from duty and full duty is payable on such goods. This turnover has to be ignored for calculating SSI exemption limits. *Same provision applies for calculating limit of Rs. 150 lakhs.*

Intermediate products/captive consumption when final product eligible for SSI exemption - Value of intermediate products manufactured while producing final products which are eligible for SSI exemption cannot be considered for calculating limits of Rs. 400 lakhs, if both intermediate product and final product are eligible for SSI concession [*Same provision for calculating limit of Rs. 150 lakhs*].

Job work amounting to manufacture done under specified notifications to be excluded - Job work which amounts to manufacture will be excluded while calculating exemption limit of Rs. 400 lakhs, only if such job work is done under specified notifications. These notifications are - No. 214/86-CE, 83/94-CE or 84/94-CE. [SSI exemption notifications amended w.e.f. 11-8-2003] *This turnover will be excluded for calculating exemption limit of Rs. 150 lakhs also.*

Activity which is not 'manufacture' is to be excluded – Turnover in relation to activity which is not 'manufacture' is required to be excluded – *Karnataka Agro Chemicals* v. *CCE* (2007) 215 ELT 470 (CESTAT).

Turnover of goods exempted under other notification to be included – If goods are exempt under any other notification (i.e. other than SSI exemption notification and job work exemption notifications), it will be included for purpose of calculating exemption limit of Rs. 400 lakhs [*Note the difference that if goods are exempted under any notification other than SSI exemption notification, that turnover has to be excluded for calculating limit of Rs. 150 lakhs, but included for purpose of calculation of Rs. 400 lakhs*].

Further, clearances to EOU, SEZ, EHTP, STP, UN or other international agency without payment of excise duty will *not* be considered for calculating exemption limit of Rs. 150/400 lakhs.

Goods manufactured in rural area with other's brand name to be included - If goods are manufactured in rural area with other's brand name, these are exempt upto Rs. 150 lakhs. In such case, that turnover which is cleared without payment of duty will have to be *included* for calculating exemption limit of Rs. 400 lakhs – view *prima facie* held as correct in *Chamundi Foods* v. *CCE* 2006 (201) ELT 361 (CESTAT) . [*Same provision for calculating limit of Rs150 lakhs*].

Export to Nepal and Bhutan – Export to Nepal and Bhutan will have to be included for calculating exemption limit of Rs. 400 lakhs. This turnover is includable even if export is without payment of duty under international contract [*same provision applies for calculation of limit of Rs. 150 lakhs*] - confirmed in *R&D Engineers* v. *CCE* (2007) 210 ELT 715 (CESTAT SMB).

Distinction between mode of calculations of Rs. 150/400 lakhs : Generally, provisions for calculation of turnover for Rs. 150 lakhs and Rs. 400 lakhs are similar. Major distinction is that if goods are exempt under a notification other than SSI exemption notification or job work exemption notification, that turnover is included for calculating Rs. 400 lakhs limit but *not* for Rs. 150 lakhs limit. If final product is exempt under job work exemption notification, it is not be considered either for Rs. 150 lakhs or for Rs. 400 lakhs.

Clearances of goods exempted under any other notification to be excluded for Rs. 150 lakhs but includable for Rs. 400 lakhs – Some goods may be exempt under some other notification, i.e. other than SSI exemption notification. In some cases, duty may not be payable on such goods for some other reason. Turnover of such goods is not to be considered for calculating exemption limit of Rs. 150 lakhs. *However, this turnover (except clearances to EOU, SEZ, STP, EHTP, UN etc. and job work under notifications 214/86-CE, 83/94-CE and 84/94-CE) will have to be considered for calculating exemption limit of Rs. 400 lakhs*.

If some intermediate product gets produced during manufacture of exempted final product, its turnover will be held as includable for calculating exemption limit of Rs. 150 lakhs, if such intermediate product is dutiable.

The clearances of Akash Electric Co. Ltd. were Rs. 400 lakh during the financial year 2007-08. The following are included in the said clearances: (i) Exports to Nepal and Bhutan – Rs. 20,00,000, (ii) Exports to countries other than Nepal and Bhutan – Rs. 1,00,00,000 (iii) Job work exempted from duty under Notification No. 214/86 - Rs. 90,00,000 (iv) Sales to 100% EOU against Form CT-3 – Rs. 50,00,000. The company is of the view that it is not liable to pay any duty on its clearances in the financial year 2007-08 as per Notification No. 8/2003 dated 1st March, 2003. Do you agree with the company? Give reasons for your answer.

Answer - SSI exemption is available upto first clearances of Rs. 150 lakhs. While calculating limit of Rs. 150 lakhs, exports to countries other than Nepal and Bhutan, job work under notification No. 214/86-CE and supplies to EOU (deemed exports) are not required to be considered. However, supplies to Nepal and Bhutan are required to be considered. If these are excluded, the turnover of the assessee for purpose of calculation of limit of Rs. 150 lakhs is Rs. 160 lakhs. Thus, the assessee can avail exemption of Rs. 150 lakhs and will have to pay duty on Rs. 10 lakhs.

A SSI unit has effected clearances of goods of the value of Rs. 475 lacs during the Financial Year 2006-07. The said clearances include the following: (i) Clearance of excisable goods without payment of excise duty to a 100% EOU unit. Rs. 120 lacs (ii) Job work in terms of notification no : 214/86 CE, which is exempt from duty – Rs. 75 lacs (iii) Export to Nepal and Bhutan – Rs. 50 lacs (iv) Goods manufactured in rural area with the brand name of the others – Rs. 90 lacs. Examine with reference to the notification governing SSI, under the Central Excise Act whether the benefit of exemption would be available to the unit for the Financial Year, 2007-08.

An SSI unit will be entitled to SSI exemption in 2007-08 only if its turnover in 2006-07 was less than 400 lakhs. While calculating the turnover of Rs. 400 lakhs, following are not required to be considered –

(a) Deemed exports i.e. supplies to 100% EOU (Rs. 120 lakhs)

(b) Job work that amounts to 'manufacture' done under notifications No. 214/86-CE, 83/94-CE and 84/94-CE (Rs. 75 lakhs).

Exports to Nepal and Bhutan cannot be excluded, i.e. export turnover to Nepal and Bhutan will have to be added while calculating limit of Rs. 150 and 400 lakhs. It will be treated as 'clearance for home

consumption', even if actually it is 'export'. The export to Nepal and Bhutan will be includable *even if* such export is against free foreign exchange.

If goods are manufactured in rural area with other's brand name, these are exempt upto Rs. 150 lakhs. In such case, that turnover which is cleared without payment of duty will have to be ***included*** for calculating exemption limit of Rs. 400 lakhs.

Thus, turnover in respect of sale to EOU (Rs. 120 lakhs) and job work under notification No. 214/86-CE (Rs. 75 lakhs) is required to be excluded for purpose of SSI exemption limit of Rs. 400 lakhs. Turnover of SSI excluding these sales is Rs. 280 lakhs (475-120-75 lakhs). Hence, the SSI unit will be entitled to exemption in 2006-07 upto first turnover of Rs. 150 lakhs.

Goods not eligible for SSI concession

Many of goods manufactured by SSI are eligible for the concession. However, some items are not eligible (some of the items not eligible for SSI exemption are eligible for exemption under different notifications. Some are not exempt at all). Thus, SSI exemption is available only if the item is covered in this notification.

Broadly, items generally manufactured by SSI (except in tobacco, matches and textile sector) are eligible for SSI exemption. Some items like pan masala, matches, watches, tobacco products, Power driven pumps for water not confirming to BIS, products covered under compounded levy scheme etc. are specifically excluded, even when these can be manufactured by SSI. Some items like automobiles, primary iron and steel etc. are not eligible for SSI exemption, but anyway, these are beyond capacity of SSI unit to manufacture.

Illustrations of SSI exemption

Some examples will illustrate the legal position.

Question - An SSI unit (manufacturing goods eligible for benefits of SSI exemption notification) has cleared goods of the value of Rs. 60 lakhs during the financial year 2007-08. The effective rate of Central Excise Duty on the goods manufactured by it is 8% *Ad valorem*. Education cesses are payable at applicable rates. What is the correct amount of duty which the unit should have paid on the above clearances for 2007-08 ? (CA Final - November 1996) (Question adopted)

Answer - (a) If unit intends to avail Cenvat credit on inputs, duty payable is normal duty i.e. 8% of Rs. 60 lakhs, i.e. Rs. 4,80,000, plus education cess of Rs. 9,600 (2% of Rs. 4.80 lakhs), plus SAH education cess of Rs. 4,800 (1% of Rs. 4.80 lakhs). (b) If unit does not intend to avail Cenvat credit on inputs, duty payable is Nil.

Question - The value of excisable goods viz. Iron and Steel articles manufactured by M/s. Alpha Ltd., was Rs. 120 lakhs during the financial year 2007-08, net of taxes and duties. The goods attract 16% *ad valorem* **basic duty plus education cess of 2% plus SAH education cess as applicable. Determine the excise duty liability when the assessee opts for 'CENVAT' and 'opts for not to avail CENVAT' under SSI exemption notifications respectively.** (ICWA Inter - December 1997 adopted).

Answer - If the assessee does not avail Cenvat, duty payable is Nil. If assessee avails Cenvat credit, duty payable will be - Basic - Rs. 19.20 lakhs, Education Cess - Rs. 38,400 and SAH education Cess - Rs. 19,200.

Question : A small scale manufacturer had achieved sales of Rs. 73 lakhs in 2006-07. Turnover achieved during 2007-08 was Rs. 1.52 crores. Normal duty payable on the product is 16% plus education cesses as

applicable. Find the total excise duty paid by the manufacturer during 2007-08 (a) If the unit has availed Cenvat credit (b) If the unit has not availed Cenvat credit. [The turnover is without taxes and duties] [ICWA Inter December 2004 adopted].

Answer :

(a) If the unit has availed Cenvat credit, it has to pay full duty on entire turnover. Hence, duty payable is 16% of Rs. 1.52 crores i.e. Rs. 24.32 lakhs, plus education cess @ 2% of Rs. 24.32 lakhs i.e. 48,640, plus SAH education cess @ 1% of Rs. 24.32 lakhs i.e. Rs. 24,320. Total – Rs. 25,04,960.

(b) If the SSI unit has not availed Cenvat, the duty payable is as follows: (i) On first Rs. 150 lakhs : Nil (ii) On subsequent sales : Normal duty of 16% plus education cesses as applicable. Thus, duty on remaining Rs. 2 lakhs will be Rs. 32,000. Thus, excise duty paid is Rs. 32,000, plus education cess of Rs. 640 plus SAH education cess of Rs. 320 Total – Rs. 32,960.

Sending material for job work by exempt SSI unit

SSI unit can send his raw materials or semi-finished material to another unit for job work. Such another unit can carry out job work and return to SSI unit without payment of duty. The SSI unit can do further processing on these inputs and clear his final product without duty *if his total turnover is below Rs. 150 lakhs*.

The SSI unit has to file two declarations with Assistant/Deputy Commissioner for this purpose. *The job worker may be a small unit or large unit*. The job worker does not have to pay duty if the SSI unit sending goods for job work follows prescribed procedure. - refer notification Nos. 83/1994 and 84/1994 dated 11-4-1994.

Procedural concessions to SSI

Quarterly return - The SSI unit availing SSI concession need not submit monthly return. They have to submit a quarterly ER-3 return, by 20th of following month.

Payment by 15th of following Month - SSI units have to pay duty by 15th of following month (except for the month of March), while large units have to pay duty by 5th of following month. Both have to pay duty in March by end of the month.

No relaxation if SSI unit pays normal duty – If SSI unit pays normal duty without availing SSI concession, the procedural relaxation will not apply. It will have to pay duty on monthly basis by 5th of the month and file monthly return, even if its annual turnover is less than Rs. four crores.

Exempted small units exempt from registration - Exempted small units, having turnover below Rs. 150 lakhs, which are exempt from duty, are also exempt from provisions of registering their unit with excise authorities.

These small units, which are exempt from registration, do not have to follow any other excise formality. However, they have to maintain their own records of manufacture and clearance, to prove that their turnover is less than Rs. 150 lakhs per year.

SSI units whose turnover over Rs. 90 lakhs have to file declaration - Exempted units whose turnover is more than prescribed limit (called 'specified limit') have to file a declaration in prescribed form with Assistant Commissioner, Central Excise and obtain a dated acknowledgement. Such declaration has to be filed only once in lifetime of the assessee and *not* every year. The 'specified limit' is defined as Rs. 60

lakhs below exemption limit e.g. if exemption limit is Rs. 150 lakhs, the 'specified limit' is Rs. 90 lakhs, i.e. declaration has to be filed by units whose turnover exceeded Rs. 90 lakhs. Small units whose turnover is below Rs. 90 lakhs (specified limit) per annum, do not have to file any declaration at all - Notification No. 36/2001-CE(NT) dated 26-6-2001 - *Board Circular No. 400/33/98-CX dated 9.6.1998.*

Visit of officers only with prior approval - Excise inspectors, preventive parties and audit parties can visit SSI unit only with specific permission of Assistant Commissioner and for a specific purpose. They have to enter relevant particulars in Visitors book maintained by registered person - *CBE&C Circular No. 19/92-Cx.6 dated 18-12-1992 - similar earlier telex F No 233/17/86-CX dated 10-3-1986.*

Audit of SSI unit once in two to five years - Audit of SSI units should be done only as per following frequency * Units paying duty of Rs. 10 lakhs to one crore per annum through PLA – 7 working days – to be audited at least once in two years * Units paying duty less than Rs. 10 lakhs through PLA per annum – 5 working days – to be audited at least once in five years Duration of audit (5/7/10 working days as above) is the entire period spent on audit of a particular assessee from desk review to preparation of audit results. In case of audit of units paying less than Rs. 10 lakhs per annum through PLA, not more than three days should be normally spent in assessee's factory – CBE&C circular No. 731/47/2003-CX dated 1-8-2003.

7.3 SSI and goods with other's brand name

Some large units get their goods manufactured from small unit under their brand name or trade name. For example, Bata gets many of their *Chappals* made from small units. Similarly, Bajaj Electricals/Philips India etc. get many electrical goods made from small units with Bajaj/Philips brand name. In such cases, the small unit will not be eligible for excise exemption. However, if the small unit manufactures goods under his own brand name, SSI exemption *is* available. If he manufactures goods *bearing* brand name *of* any other person, SSI exemption is not available.

In *CCE* v. *Bhalla Enterprises* AIR 2005 SC 2891 = 173 ELT 225 (SC), it has been held that object of notification is to grant benefit to those industries do not have the advantage of a brand name. The object of exemption notification is neither to protect the owners of trade mark/trade name, nor the consumers from being misled. These are considerations which are relevant in cases relating to disputes arising out of infringement/passing off under the Trade Marks Act – quoted with approval in *Meghraj Biscuits Industries* v. *CCE* (2007) 7 STT 270 = 210 ELT 161 (SC).

Brand name should not belong to other - SSI exemption is not available *only if* the brand name or trade is *of* another person. Thus, if the brand name or trade name does not belong to any another person, SSI exemption will be available to the manufacturer. It is not requirement that the brand name must belong to the SSI manufacturer. The only requirement is that it should not be *of* another person.

SSI units manufacturing branded goods are in a big soup in view of some decisions of Supreme Court – SSI units are in big trouble, particularly those manufacturing goods where name of other person is put on the goods. So far, the Tribunal had consistently taken a view that mere writing words 'in collaboration with' or 'marketed by' or 'putting group name' does not make the goods 'branded goods' and SSI exemption will be available. All these decisions have now become of questionable validity after decision of Supreme Court in *CCE* v. *Grasim Industries Ltd*. 2005(183) ELT 123 (SC 3 member bench). In this case, assessee was manufacturing cement. Following words were used on the bag, 'Manufactured by Dharani Cements Ltd., A subsidiary of Grasim Industries Ltd'. It was held that this name indicated connection in course of trade between the product and 'Grasim Industries Ltd.', which is a well known cement manufacturer, and the

exemption available to small units will not be available – followed in *Grasim Industries Ltd.* v. *CCE* (2007) 218 ELT 429 (CESTAT).

The only ray of hope is the following sentence in judgment, 'No hard and fast Rule can be laid down however, it is possible that the words which merely indicate the party who is marketing the product may not be sufficient. As we are not dealing with such case we do not express any opinion on this aspect'.

However, now SSI units will have to be extremely careful while putting words like 'In technical collaboration' or name of group to which it belongs. Even putting name of marketing company should be avoided to be on safe side.

SSI exemption not available even if buyer uses the goods captively and does not sale them - In *Kohinoor Elastics P Ltd.* v. *CCE* (2005) 7 SCC 528 = 188 ELT 3 (SC), it has been held that SSI exemption will not be available if goods are used for captive consumption [However, the matter has been referred to Constitution bench to decide whether Board circulars prevail over judgment of Supreme Court – *Control Touch Electronics* v. *CCE* 2005 (190) ELT 155 (SC 3 member bench)].

However, if the SSI manufactures OE parts which are used in manufacture of final products, he will be entitled to SSI exemption as per para 4(a) of SSI exemption notification. He should follow procedure as prescribed in Central Excise (Removal at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules [earlier Chapter X procedure] while dispatching the goods to the large unit *if his turnover exceeds Rs. 150 lakhs*. If the turnover of such goods is less than Rs. 150 lakhs, the SSI manufacturer should only file a declaration that the specified goods shall be used as Original Equipment by the buyer.

Turnover of branded goods not to be considered for SSI exemption - The excise exemption is still available if a manufacturer manufactures goods under his brand name, or without brand name in addition to goods other's brand name or trade name as well as other goods. He will be eligible to excise exemption and concession on goods under his brand name or without brand name and for considering the limit of Rs. 100 or 400 lakhs, the goods manufactured with other's brand name and cleared on full payment of duty will *not* be considered. - *CCE* v. *Power and Control* - 1992 (62) ELT 662 (CEGAT).

However, if branded goods are manufactured in rural area after availing SSI exemption, that turnover will be considered for purpose of SSI exemption.

Definition of brand name and its interpretation

In respect of SSI exemption, brand name has been defined as follows – Brand name or trade name means any name or mark such as symbol, monogram, label, signature, or invented word or writing which is used in relation to the goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such goods and some person using such name or mark. The name or mark may or may not indicate identity of that person. The brand name or mark or trade name *may or may not be registered*. [Definition as per SSI exemption notifications].

Thus, the definition is very wide. Even name of person who markets the goods, if used on the product, may attract the provision, as such name or mark indicates the connection between the goods and person using that name or mark.

Provision applicable in respect of brand name of components as well as final product - Some SSI units manufacture a component or part which bears the brand name or trade name. These parts are for use by the large manufacturer as a part (Original Equipment part) e.g.

(a) A glass bottle may be manufactured by an SSI unit where the name 'Pepsi' or 'Coca-Cola' is engrossed.

(b) A SSI unit may manufacture a small component bearing 'Telco' mark, where the part will be used by Telco while manufacturing their truck.

(c) A SSI bag manufacturer may make bags with 'ACC' or 'L&T' mark and supply it to ACC/ L&T.

(d) A small manufacturer may manufacture lock with 'VIP' mark, which will be used by manufacturer of VIP Bags as a part of the bag. In such cases, the manufacturer of such parts/components will be eligible for SSI concession.

So far, Tribunal and department had consistently held that in such cases, SSI exemption will be available.

However, in *Kohinoor Elastics P Ltd.* v. *CCE* (2005) 7 SCC 528 = 188 ELT 3 (SC), it has been held that SSI exemption will not be available if goods are used for captive consumption [However, the matter has been referred to Constitution bench to decide whether Board circulars prevail over judgment of Supreme Court – *Control Touch Electronics* v. *CCE* 2005 (190) ELT 155 (SC 3 member bench)].

Luckily, supplies made to Original Equipment (OE) manufacturers for manufacture of final product are exempt from duty, as discussed below.

Special procedure if turnover of SSI exceeds exemption limit - SSI unit manufacturing components/ parts as OE are eligible for SSI exemption, even if the component bears brand name or trade name of the large manufacturer. However, he should follow procedure as prescribed in Central Excise (Removal at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules [earlier Chapter X procedure] while despatching the goods to the large unit *if his turnover exceeds Rs. 150 lakhs*. If the turnover of such goods is less than Rs. 150 lakhs, the SSI manufacturer should only file a declaration that the specified goods shall be used as Original Equipment by the buyer.

Assignee of brand name is eligible for SSI concession – In *P&B Pharmaceuticals* v. *CCE* 2003 AIR SCW 2949 = 153 ELT 14 (SC), it was held that once a logo is assigned, the assignee is entitled to SSI exemption, even if third party or assignor is also using the logo. There is no obligation on owner of a logo to make a roving enquiry to ascertain whether any other person is using his logo and then disclose it to department to avert a possible allegation of suppression of facts.material. However, it does not become brand name of final product and in such case, SSI unit is entitled for SSI concession.

Brand name on packing may also dis-entitle SSI exemption - Use of brand name even on packing of goods is sufficient to hold that branded goods are cleared - *Khanna Industries* v. *CCE* 1996(82) ELT 109 (CEGAT) - followed in *Filtech Pharma* v. *CCE* 2000(120) ELT 372 (CEGAT). Brand name can be on packing also. It is not necessary that goods themselves should be affixed with the brand name. – *Nirlex Spares* v. *CCE* 2001(133) ELT 161 (CEGAT). [Decision reversed by SC but on different grounds].

Valuation in respect of branded goods manufactured by SSI

The valuation aspect has been discussed in an earlier chapter. However, the summary is highlighted here –

- If the brand name does not belong to the manufacturing unit, it is not entitled to any SSI concession. It has to pay full normal duty.
- The duty is payable on the basis of price charged by SSI unit to the brand name owner, if the relationship between the SSI manufacturer and the brand name owner is on 'principal to principal' basis.

- If the goods are covered under Section 4A, i.e. valuation on basis of Maximum Retail Price printed on the carton, the manufacturing unit has to pay duty on basis of MRP printed on the product package, irrespective of the price at which he is selling the product.
- Brand name owner will not be treated as manufacturer if relations between actual manufacturer and brand name owner are on 'principal to principal' basis.

Exemption to manufacturers of branded goods

Excise duty exemption is available to branded goods if brand belongs to SSI manufacturer himself or has been assigned to him. In other cases, if brand name belongs to another person, SSI exemption is available only in following cases –

Concession if goods under brand of Khadi Board, NSIC, SSIDC etc. - The provision regarding brand name is not applicable if the brand belongs to (i) Khadi and Village Industries Commission (ii) State Khadi and Village Industries Board (iii) National Small Industries Corporation (NSIC) (iv) State Small Industries Development Corporation or (v) State Small Industries Corporation.

Manufacturer of OE parts - if the SSI manufactures OE parts which are used in manufacture of final products, he will be entitled to SSI exemption as per para 4(a) of SSI exemption notification. He should follow procedure as prescribed in Central Excise (Removal at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules [earlier Chapter X procedure] while dispatching the goods to the large unit *if his turnover exceeds Rs. 150 lakhs*. If the turnover of such goods is less than Rs. 150 lakhs, the SSI manufacturer should only file a declaration that the specified goods shall be used as Original Equipment by the buyer.

Goods manufactured in rural area – Excise duty on goods manufactured under other's brand name will be exempt if the goods are manufactured in rural area. 'Rural area' means the area comprised in a village as defined in the land revenue records, excluding (i) Area under any municipal committee, municipal corporation, town area committee, cantonment board or notified area committee or (ii) Any area that may be notified as an urban area by State Government or Central Government.

It is highly advisable to obtain certificate from State Government Revenue Authorities that the factory is within the 'rural area' as per land revenue records.

Manufacture of branded goods under job work – In case of goods manufactured on job work basis under Cenvat provisions or under Notification No. 214/86-CE, the duty liability is of raw material supplier. The job worker is not liable even if goods bear brand name of others

7.4 Clubbing of Clearances of SSI

SSI exemption is available if aggregate value of clearances of all excisable goods for home consumption by a manufacturer from one or more factories, or from a factory by one or more manufacturers does not exceed the prescribed limit (presently Rs. 4 crores).

If the same manufacturer (i.e. firm with same partners or same limited company or same proprietor) has more than one factory, turnover of all the factories will be clubbed together for calculating the limit of Rs. 100 lakhs or 4 crores. Thus, if a manufacturer has one unit at Mumbai with 1.2 crores turnover and another unit at Delhi with 3.1 crores turnover, he will not be entitled to Excise exemption in any of the factories.

Sometimes, as a tax planning, a manufacturer may start another unit, instead of increasing production in his own factory, so that both units can avail SSI concession. If the other unit belongs to same proprietor or same company or same partnership firm, the turnover of both these units will be added together for

purpose of SSI concession. To avoid this, the other unit may be started under different partnership or under different companies. If such other unit is genuinely separate and independent, their turnover will not be clubbed. However, if the other unit is a '*sham*' or a '*facade i.e. deceptive front*' or a '*bogus unit*', the turnover of these two units will be clubbed i.e. considered in total for calculating SSI exemption limit. This is called 'clubbing of turnover'.

***Clubbing if more than one manufacturer in same factory* –** In some cases, more than one manufacturer manufactures the goods in one factory. This usually happens in following cases -

***One manufacturer manufactures for part of year and then other* –** SSI exemption notification makes it clear that where the specified goods are cleared by one or more manufacturers from a factory, the exemption shall apply to aggregate value of clearance and not separately for each manufacturer.

For example, one manufacturer manufactures goods for some part of the year and then sells/Transfers the unit. The other manufacturer manufactures in remaining part of the year in the same factory. In such case, clubbing provisions will apply.

***Clubbing if the other units are considered sham* –** Clubbing provisions will apply if other units are bogus.

No clubbing if owners are different

There are various forms of ownership of an industrial unit i.e. (*a*) proprietorship (*b*) partnership firm (*c*) limited or private limited Company (*d*) Hindu Undivided Family (HUF) (*e*) Family Trust. All these forms of ownership have separate and distinct existence.

Clubbing provisions are applicable if two or more SSI units belong to same proprietor or to same partnership firm or to same private limited company. However, if one unit 'A' belongs to a proprietor 'P' and other unit 'B' belongs to a partnership firm where 'P' is one of the partners, turnover of 'A' and 'B' cannot be clubbed as the partnership has independent legal status different from its partners Similarly, if 'A' belongs to one partnership firm and 'B' belongs to another partnership firm where some partners are common in both firms, both the units i.e. 'A' and 'B' will be entitled to separate excise exemption. Same thing holds true if one unit is a firm and other is a limited Company where some partners of the firm are directors.

No clubbing if two units independent

Clubbing provisions do not apply if both units namely 'A' and 'B' are genuinely independent units. Often more than one factory are established to avail of excise concession and real owner is same. As explained above, if there are more than one factory and ownership is different, clubbing provisions will not apply.

In absence of evidence of financial flowback, mere recording a finding that one person managed entire affairs is not enough to allege clubbing of clearances - *Sri Vivekananda Industries* v. *CCE* 2003 (157) ELT 470 (CESTAT). * *CCE* v. *Servo Packaging* 2007 (210) ELT 355 (CESTAT).

If these two units are *truly* independent their turnover cannot be clubbed. However, if the two units are formed with *sole or main purpose* of saving on excise, these may be sham i.e. bogus units.

Common funding and financial flow back are important elements in determining whether or not the units have to be clubbed - *CCE* v. *Bombay Neon Signs* 2004 (166) ELT 102 (CESTAT) * *CCE* v. *Saint Laboratories* 2006 (201) ELT 85 (CESTAT) * *CCE* v. *National Adhesive* (2007) 208 ELT 361 CESTAT).

7.5 Demands of Duty

Though the excise duty, service tax and customs duty has to be assessed at the time of clearance of goods from the factory or warehouse, it is possible that the duty paid may be lower than the duty actually payable, or duty may be erroneously refunded. This may happen for various reasons as follows :

- Assessable value declared is not acceptable to Excise authorities.
- Classification and/or exemption notifications claimed by assessee is not acceptable to the authorities.
- Duty paid at concessional rate though concession was not available.
- Clandestine removal, non-accounting of goods etc.
- Clearance in name of dummy units.
- Duty/tax erroneously refunded.
- Any other reasons due to which the revenue officer is of the opinion that the duty paid is not correct due to difference in valuation, classification or rate of duty.

A Central Excise Officer can, within one year from relevant date, serve show cause notice on person chargeable to duty, if – (a) duty of excise has not been levied or paid or (b) short levied or paid or (c) erroneously refunded. The show cause notice should ask the person why he should not pay the amount specified in the notice. In case of fraud, collusion, wilful mistatement and suppression of facts, or contravention of any provision of Central Excise Act or rules with intent to evade payment of duty, demand can be raised within 5 years [*proviso* to Section 11A(1) of CEA – parallel provision in *proviso* to Section 28(1) and Section 73(1) of Finance Act, 1994 makes identical provisions in respect of service tax].

After considering representation of the person on whom notice is served, the central excise officer will determine the duty payable and then the person shall pay the duty so determined [Section 11A(2) of CEA – parallel Section 28(2) of Customs Act and Section 73(2) of Finance Act, 1994 (which contains provisions relating to service tax).].

Opportunity of personal hearing will be given to the person and then demand will be confirmed by issue of order giving reasons.

Rebate erroneously paid can be recovered u/s 11A - For purpose of Section 11A, 'Refund' includes rebate of excise duty paid on goods exported from India or rebate on excisable material used in manufacture of goods exported out of India [Section 11A(3)(i) of CEA].

Demand even if department had approved, accepted or assessed rate or value - A demand can be raised for previous period of one year/5 years even if department had approved, accepted or assessed value or rate of duty - Section 11A(1) of CEA [interestingly, no amendment is made in corresponding Section 28(1) of Customs Act or Section 73(1) of Finance Act, 1994] .

Time limit for issuing show cause notice

The show cause notice asking to show reason why duty should not be paid must be raised within one year from 'relevant date'. In case of fraud, collusion, wilful mistatement and suppression of facts, demand can be raised within 5 years [*proviso* to Section 11A(1) of CEA, parallel Section 73(1) of Finance Act, 1994 and Section 28(1) of Customs Act].

After considering representation of the person on whom notice is served, the central excise officer will determine the duty payable and then he shall pay the duty so determined [Section 11A(2) CEA, parallel Section 73(1) of Finance Act, 1994 and Section 28(1) of Customs Act].

Effect of notice for period beyond one year/five years - Supreme Court has held that if a show cause notice is issued pertaining to period beyond five years, the whole notice does not become invalid. The only effect is that the department will not be entitled to collect duty beyond a period of five years from date of show cause notice. - *UOI* v. *Maheshwari Woollen Mills* - AIR 1993 SCW 483 = AIR 1993 SC 1251 = 97 ELT 220 (3 member bench). Same principle applies if show cause notice is issued for a period beyond one year (i.e. when fraud etc. is not alleged). In such case, notice will be considered valid and enforceable for a period of one year – quoted in *Shahnaz Ayurvedics* v. *CCE* 2004 (173) ELT 337 (All HC DB).

Show Cause Notice

Under Section 11A of Central Excise Act [parallel Section 28 of Customs Act and Section 73 of Finance Act, 1994], Excise/Customs Officer can ask the manufacturer to pay the difference of duty. The Central Excise Officer has to issue a show-cause notice. After considering the representation from the person concerned, the Central Excise Officer can determine the amount of duty payable and then the person chargeable to duty has to pay the amount. [Till 14-5-2003, the show cause notice could be issued only with prior approval of Commissioner/Chief Commissioner. Now, such prior approval is not necessary].

Show cause notice is necessary but not issuing it is only irregularity – In *CC* v. *Virgo Steels* 2002 AIR SCW 1698 = 49 RLT 634 = 141 ELT 598 (SC 3 member bench), law provided for issue of show cause notice before confirming any demand of duty. It was held that though issue of show cause notice is a mandatory requirement, it can be waived by assessee as the provision deals with individual's right. It is a notice to the person concerned and not a public notice and right to receive show cause notice can be waived.

No notice if assessee voluntarily pays the amount – It is possible that a person who is liable to pay the duty due, may like to pay the duty voluntarily on his own, if he is convinced that duty is legally payable. In such case, he can pay the duty on his own and inform the proper officer in writing. The assessee will also have to pay interest for delayed payment as may be due u/s 11AB of CEA [corresponding Section 28AB of Customs Act and Section 75 of Finance Act, 1994].

If assessee pays duty due on his own, the officer shall not issue any show cause notice. However, if the officer is of the opinion that there is short payment in respect of the amount, he can issue notice for payment of balance amount. In such case, the time limit for issue of show cause notice will be counted from the receipt of information of payment. Further, the provision does not apply if the short payment or non-payment or erroneous refund was due to collusion, wilful mistatement or suppression of facts. [In such cases, penalty proceedings can be initiated even if assessee had paid the amount and interest due]. – Section 11A(2B) of CEA, Section 28(2B) of Customs Act and Section 73(3) of Finance Act, 1994.

In corresponding provision in Customs Act Section 28(2B), provision has been made for voluntary payment of both duty and interest. The interest mentioned is the interest u/s 47(2) of Customs Act, which is payable if the duty is not paid within five working days after Bill of Entry is returned duly assessed, for payment of duty.

Really, this provision seems meaningless, as when assessee has paid the duty voluntarily, there is no question of 'short payment' or 'non-payment' of duty.

The provision is applicable only if the amount has become due after Finance Act, 2001 was passed, i.e. on or after 11-5-2001. – Section 11A(2C) [corresponding Section 28(2C) of Customs Act].

Show cause notice to be in writing - Demand u/s 28 of Customs Act and Section 11A of Central Excise (parallel Section 73 of Finance Act, 1994) must be in writing. - *Voltas Ltd.* v. *CCE* 2000(121) ELT 802 (CEGAT) * *Titan Industries* v. *CCE* (2001) 138 ELT 545 (CEGAT).

Rule 25(2) of Central Excise Rules specifically provides that Central Excise Officer will follow principles of natural justice while issuing order of penalty or confiscation. Thus, show cause notice will be required, unless the department is able to justify that issue of oral notice did not violate principles of natural justice.

Oral show cause notice - Show cause notice is required to be given before confiscating goods and imposing any penalty.

However, the person concerned can waive the requirement of show cause notice. He can request issue of verbal notice. - *proviso* to Section 124 of Customs Act (It has been held by Supreme Court that receipt of show cause notice is a personal right and can be waived by the assessee).

Section 124 of Customs Act has been made applicable to Central Excise *vide* notification No. 68/63-CE dated 4-5-1963. Hence, the provision should apply to Central Excise also.

There is no provision for oral notice in service tax matters

The provision of oral show cause notice in Section 124 of Customs Act is only in respect of confiscation of goods and imposition of penalty. However, in *CC* v. *Jagdish Cancer & Research Centre* (2001) 6 SCC 483 = 132 ELT 257 = 2001 AIR SCW 2854 (SC 3 member bench), it was held that the show cause notice u/s 124 for confiscation of goods is independent of notice of demand of customs duty to be issued u/s 28(1). As per Section 125(2), customs duty and charges payable in respect of goods are also payable in addition to confiscation of goods. Hence, notice u/s 124 can include demand of customs duty also.

Relevant date for issue of Show Cause Notice

The prescribed period for service of show cause notice cum demand is one year or 5 years from "relevant date". The relevant date will be one of the following [Section 11A(3)(ii) of CEA – similar Section 73(6) of Finance Act, 1994 (which contains provisions relating to service tax)]:

Date of actual filing of monthly return – If Return is to be filed as per provision of law, the actual date of filing of return will be 'relevant date' [Section 11A(3)(ii)(a)(A) and Section 73(6)(i)(a) of Finance Act, 1994].

Date on which return should have been filed - If the return was required to be filed but was not filed, then the date on which return should have been filed will be 'relevant date'. Thus, if return is filed on 4th August, that will be the relevant date. If the return had not been filed at all, the relevant date is 10th August. However, if the assessee had filed return on 18th August, then 18th August will be relevant date [Section 11A(3)(ii)(a)(B) of CEA and Section 73(6)(i)(b) of Finance Act, 1994].

Date if no return is required to be filed - If no return is required to be filed under the relevant provisions of Excise law, then date of payment of duty is the 'relevant date'. [Section 11A(3)(ii)(a)(C) of CEA and Section 73(6)(i)(c) of Finance Act, 1994].

Date of adjustment after provisional assessment finalised – In case of provisional assessment, 'relevant date' is the date of adjustment of duty after final adjustment [Section 11A(3)(ii)(b)]

Date of erroneous refund – In case of demand on account of erroneous refund, date of such refund will be 'relevant date' [Section 11A(3)(ii)(c) of CEA and Section 73(6)(iii) of Finance Act, 1994].

Relevant date for issue of SCN in case of Customs - Relevant date means the date for calculating the limit of six months, one year or five years for serving show cause notice for demand of customs duty.

As per Section 28(3) of Customs Act, 'relevant date' is -

(a) if duty or interest was not levied, date of order of clearance of goods

(b) if the duty was provisionally assessed, then date when it was adjusted after final assessment

(c) if duty or interest was erroneously refunded - date of refund

(d) if duty was paid or interest levied - date of payment of duty or interest.

Who can issue show cause notice

Section 11A of CEA and Section 73(1) of Finance Act, 1994 specifies that show cause notice should be issued by 'Central Excise Officer'. Section 28 of Customs Act states that notice should be issued by 'proper officer'. As per Section 2(34) of Customs Act, 'proper officer' in relation to any function under Customs Act, means the officer of customs who is assigned those functions by CBE&C or Commissioner.

Authority in case of excise and service tax demands – In case of Central Excise and service tax demands, show cause notice should be approved and signed by officer empowered to adjudicate the case. The authority to adjudicate the case are - * Assistant/Deputy Commissioner - when demand of duty/Cenvat credit is upto Rs. five lakhs * Joint Commissioner - when amount is between Rs. 5 lakhs and Rs. 50 lakhs * Additional Commissioner - when amount is between Rs. 20 lakhs and Rs. 50 lakhs * Commissioner - without any limit. [Thus, now, Superintendent cannot issue show cause notice]. [CBE&C circular No. 752/68/2003-CX dated 1-10-2003 - prior to that *vide* MF(DR) circular No. 299/15/97-CX dated 27.2.1997 amended vide CBE&C circular No. 328/44/97-CX dated 13-8-1997].

No statutory restriction on powers to issue SCN - As per Section 11A of CEA and Section 73 of Finance Act, 1994, 'any Central Excise Officer' can issue show cause notice. The restrictions on authority of excise officer to issue show cause notice are only by way of trade notices.

Serving of Show Cause Notice

Section 37C(1) of CEA provides that any decision or order passed or any summons or notice under the Act shall be served (*a*) by tendering the same or by sending it with registered post with acknowledgement due to the person for whom it is intended or his authorised agent (*b*) If it cannot be served as aforesaid, then by affixing a copy at a conspicuous space in factory or warehouse. (*c*) If this is also not possible, then affixing a copy on the notice board of the office or authority which issued the notice, order, summons or decision (These provisions are applicable to issue of notices, order, summons or decisions issued under Central Excise Act or rules).

As per Section 37C(2), the notice/order/summons/decision shall be deemed to have been served on the date on which it is served or tendered or delivered by post or copy is affixed on notice board.

Section 37C of CEA has been made applicable to service tax matters

Difference between customs provisions and excise provisions – Section 153 of Customs Act provides only two modes of service of orders/decisions/summons/notice etc. - (*a*) by tendering the same or by sending it with registered post to the person for whom it is intended or to his agent (*b*) If it cannot be served as

aforesaid, then affixing a copy of order/decision/summons/notice on the notice board of the customs house. - - Thus, provision in respect of 'acknowledgement due' is absent. Moreover, provision similar to Section 37C(2) is not incorporated in Section 153.

Refusal to accept notice is due service of notice - In *Harcharan Singh* v. *Shivram Nair* (1981) 2 SCC 535 = AIR 1981 SC 1284, it was held that refusal to accept a registered letter tendered by a postman is due service effected upon addressee by refusal. The addressee must be imputed with the knowledge of its contents. This follows from presumption that are raised u/s 27 of General Clauses Act and Section 114 of Evidence Act.

Submission of evidence, cross examination of witness - The assessee should be allowed to produce supportive evidence and should be allowed examination and cross-examination of witnesses.

Personal hearing – Opportunity for a personal hearing should be given and then appealable speaking order should be passed by adjudicating authority (speaking order means an order giving reasons).

Adjudicating Authority shall give opportunity of personal hearing to a party in proceeding [Section 33A(1) of CEA]. This Section is applicable to service tax also.

Adjournment of hearing – Adjudicating Authority can give time to parties and adjourn the hearing for reasons to be recorded in writing. Maximum three adjournments can be granted during the proceeding [Section 33A(2)] [This can be taken only as directory provision and not mandatory provision].

Suggested time limit for passing adjudication order - Duty short levied or not levied should be determined within a period of 6 months, *as far as possible*. In case of short levy or non levy due to suppression of facts or collusion or wilful misstatement, duty should be determined within one year, *as far as possible*. [Possibly more time is given in case of suppression, collusion etc. are more evidence may have to be examined] [Section 11A(2A) of CEA - parallel Section 28(2A) of Customs Act. No parallel provision in Finance Act, 1994]. The time limit is not mandatory but only suggestive. There is no parallel provision in service tax.

Order must specify the amount of duty payable - Commissioner cannot confirm a demand in advance, which is to be worked out by Assistant/Deputy Commissioner subsequently. Commissioner must himself quantify the duty payable with assistance from departmental officers and after hearing the appellant. - *Nihon Electronics Ltd.* v. *CCE* 1995 (75) ELT 611 (CEGAT).

7.6 Provisional attachment pending adjudication

Section 11DDA of Central Excise Act and Section 28BA of Customs Act [inserted by Taxation Laws (Amendment) Act w.e.f. 13-7-2006] make provision for provisional attachment of property of a person to whom show cause notice has been serviced under Sections 11A or 11D of Central Excise Act or Section 28 or 28B of Customs Act, if the Central Excise Officer (or Customs Officer as the case may be) is of the opinion that it is necessary to do so, to protect interests of revenue. He can do so only with previous approval of Commissioner of Central Excise/Commissioner of Customs [Section 11DDA (1) of Central Excise Act and Section 28BA(1) of Customs Act, inserted by Taxation Laws (Amendment) Act w.e.f. 13-7-2006].

Similar provision has been made in case of service tax under Section 73C of Finance Act, 1994 w.e.f. 18-4-2006.

Income Tax Act contains similar provision in Section 281B (inserted w.e.f. 1-10-1975). Validity of that provision was upheld in *Dar International* v. *Asst. Director Income Tax* (1993) 114 CTR 172 (Del HC).

In *VLS Finance Ltd*. v. *CIT* (2000) 246 ITR 713 (Del HC), it was observed that purpose of the provision is to see that assessee does not fritter away or secret his resources out of reach of department when assessment is completed.

The provision seems to be harsh and may lead to harassment of assessees, though some safeguards have been kept.

Attachment only in prescribed manner - The attachment can be done only in manner prescribed by rules made under Section 142 of Customs Act, and only with previous written approval of Commissioner [Section 142 of Customs Act are for recovery proceedings of duty payable to Government. Section 142(1)(b) and Section 142(1)(c)(ii) of Customs Act have been made applicable to Central Excise vide notification No. 68/63-CE dated 4.5.1963].

Attachment can be only of property of the assessee and not of any other person – *Satyabir Singh* v. *CIT* (2001) 248 ITR 785 (Punj HC).

Attachment only during adjudication stage, not at appellate stage - Provisional attachment of property can be made only when proceeding is pending under Section 11A of Central Excise Act and Section 28 of Customs Act (show cause notice demanding duty) or Section 11D of Central Excise Act and Section 28B of Customs Act (show cause notice for demanding amount collected representing it as duty in excess of the duty which was payable).

Once the adjudicating authority passes an order, no proceedings remain pending under Section 11A/11D of Central Excise Act or Section 28/28B of Customs Act, even if appeal with Commissioner (Appeals) (under Section 35 of Central Excise Act or Section 128 of Customs Act) or appeal with Tribunal (under Section 35B of Central Excise Act or Section 129A of Customs Act) is pending, since none of these proceedings are under Section 11A/ 11D of Central Excise Act or Section 28/28B of Customs Act.

Same principle applies to service tax under Section 73C of Finance Act, 1994

Period of attachment - The attachment will cease to have effect after six months from date of order of attachment [Section 11DDA(2) of Central Excise Act, Section 73C(2) of Finance Act, 1994 and Section 28BA(2) of Customs Act inserted by Taxation Laws (Amendment) Act w.e.f. 13-7-2006]. This period can be extended with written permission of Chief Commissioner of Central Excise, but total period of extension cannot be more than two years

If assessee has made application to Settlement Commission, that period will be excluded for purpose of calculating the time limit of two years [second proviso to Section 11DDA(2) of Central Excise Act and Section 28BA(2) of Customs Act]. There is no parallel provision in Finance Act, 1994 since there is no provision of criminal prosecution under service tax law.

7.7 Interest if duty paid late

If duty is not paid when it ought to have been paid, interest is payable at the rates specified by Central Government by notification in Official Gazette. Such rate cannot be less than 10% and not more than 36%. The interest is payable from the first day of the month following the month in which the duty ought to have been paid, till the date of payment. The provision applies if the amount had become payable or ought to have been paid after Finance Act, 2001 received assent of the President, i.e. on or after 11-5-2001. [Section 11AB(1) of CEA - similar Section 28AB(1) of Customs Act and Section 75 of Finance Act, 1994 (which contains provisions relating to service tax)]

The actual rate of interest is 13% w.e.f. 12-9-2003 [Notification No. 66/2003-CE(NT) dated 12-9-2003 and 76/2003-Cus(NT) dated 12-9-2003 {It was 15% w.e.f. 13-5-2002 vide Notifications 19/2002-CE(NT) and 27/2002-Cus(NT) – both dated 13-5-2002}. - - Prior to that, the interest rate was 24%].

In case of service tax, the interest rate is 13% w.e.f. 10-9-2004, vide notification No. 26/2004-ST dated 10-9-2004.

No interest if duty voluntarily paid on issue of CBEC order – Section 37B of CEA (parallel Section 151A of Customs Act) authorises Board to issue an order, instruction or direction for purpose of uniformity in respect of classification of goods or with respect to levy of duties of excise (or customs) on such goods. Such orders are binding on officers of excise (and customs), though not on assessee. However, assessee may agree to abide by the order of Board and pay duty voluntarily on his own.

This Section has been made applicable to service tax matters.

If he pays full amount of duty within 45 days from such order, without reserving right of appeal against such payment at any subsequent stage, he is exempted from payment of interest even if the duty was due earlier. However, if he pays only part of amount or pays the amount but reserves to himself right of appeal (i.e. if he makes payment under protest), the interest is payable from the month following the month in which the duty ought to have been paid. [*proviso* to Section 11AB(1) of CEA and Section 28AB of Customs Act added w.e.f. 11.5.2001].

There is no parallel provision in respect of service tax.

It may be noted that this relaxation from payment of interest is applicable only when CBE&C had issued a general order u/s 37B of CEA or Section 151A of Customs Act. This relaxation does not apply if assessee pays duty on receipt of a show cause notice to him or even otherwise pays duty on his own.

Interest under Rule 8(3) if duty not paid on due date

As per Rule 8(3) of CE Rules (as amended w.e.f. 1-4-2005), if duty is not paid fully on due date, interest is payable at the rate specified under Notification issued under Section 11AB.

Distinction between interest under Rule 8(3) of CE Rules and Section 11AB – The interest under Rule 8(3) of CE Rules applies when assessee has assessed duty himself at the time of clearance and is required to pay by due date on following month. Interest u/s 11AB is payable when duty was short levied or paid or not levied or not paid. This happens when show cause notice/demand is issued subsequent to clearance goods.

The rate of interest in both the cases is same.

7.8 Recovery of dues

Once the demand of duty, penalty or any other dues is confirmed by excise/customs authorities, the person liable to pay dues has to pay the amount within time prescribed. If no time is prescribed, duty should be paid in reasonable time. The payment of duty may be made either by GAR-7 challan or by debiting PLA. However, penalty has to be paid by GAR-7 challan only.

If the assessee fails or refuses to pay the amount, Excise Officers have been given recovery powers – (a) under Section 11 of Central Excise Act and (b) under Section 142(1)(b) of Customs Act.

Similar provision for recovery is made in Section 87 of Finance Act, 1994 (which contains provisions relating to service tax).

Excise authorities can recover excise duty by means prescribed under Section 11 of CEA and Section 87 of Finance Act, 1994, by any of the following means –

- Adjusting against money payable to the person (e.g. if refund is due to him)
- By attachment and sale of excisable goods belonging to the assessee.
- As Arrears of Land Revenue, by issuing certificate to District Collector of Revenue, who is empowered to recover the amount as arrears of land revenue.

Powers of recovery can be used against surety or guarantor also. Chief Commissioner can grant instalments for recovery.

Recovery from successor of business – If business is transferred, the amount due can be recovered from successor to business by attaching and selling all goods, materials, plant, machinery etc. transferred to him [*proviso* to Section 11 – no parallel provision in Finance Act, 1994 relating to service tax]

Adjusting against money payable to the person – Recovery can be made by adjusting the amount against any money payable to person e.g. a refund may be due to the assessee on some other account, which can be adjusted against the money recoverable from him.

Attachment – Recovery can be made by attachment and sale of **excisable** goods *belonging* to the assessee. This provision is not made applicable to service tax.

Provision has been made for provisional attachment of property even when demand for duty is under adjudication.

As Arrears of Land Revenue – By issuing certificate to District Collector of Revenue, who is empowered to recover the amount as arrears of land revenue. Collector can attach and auction the belongings (*except cooking utensils and personal clothing*) and recover the amount. This is termed as '*certification proceedings*' or '*certificate action*'. The person who is authorised to issue a certificate to District Collector must quantify the amount. He should follow principles of natural justice before quantifying the exact amount recoverable.

Recovery by distrain and sale of property

Section 142(1)(b) and Section 142(1)(c)(ii) of Customs Act have been made applicable to Central Excise vide notification No. 68/63-CE dated 4.5.1963.

Under Section 142(1)(b) of Customs Act which is also made applicable to Central Excise, Assistant/Deputy Commissioner of Central Excise can detain and sale any goods belonging to the person which are under control of Central Excise Officer. Under Section 142(1)(c)(ii) of Customs Act which is also made applicable to Central Excise, the Assistant/Deputy Commissioner, with prior permission of Commissioner, distrain any movable or immovable property belonging to or under control of such person. If the amount is not paid within 30 days, the property can be sold.

Similar provision is made in Section 87(c) of Finance Act, 1994, in respect of service tax.

Detention and sale of any property - If the amount due is not paid, Assistant/Deputy Commissioner of Central Excise can, on authorisation by a Commissioner of Central Excise, distrain any movable or immovable property belonging to or in control of such person (from whom any sum is recoverable). The property can be detained until the amount is paid along with cost of the distress or keeping the property.

If amount is not paid, the property can be sold by excise authorities. [Section 142 (1)(c)(ii) of Customs Act as made applicable to Central Excise].

Provisions under Section 142(1)(c)(ii) of Customs Act permit detention of any immovable and movable property. Goods not belonging to the person, but under his control can also be detained and sold, if amount is not paid within 30 days. Prior authorisation of Commissioner is necessary for detention and sale.

Stay of Recovery - Orders of demand are appealable and appeal can be filed against the order for demand of duty/penalty. Under Central Excise as well as Customs law, appeal can be filed only after the amount demanded is paid. However, appellate authorities can grant stay for recovery pending final decision on appeal. The stay may be unconditional or conditional subject to conditions like part payment, bank guarantee, surety etc. If such stay is obtained, recovery proceedings will be stayed. However, mere filing of appeal does not amount to stay order. A separate application has to be made for stay order from appellate authorities.

Recovery of duty from successor in business

So far, the provision was that if a person Transfers his business or trade or dispose of his business to a third person, the successor was not liable to pay liability of excise and customs duties and other sums payable under the Act by the predecessor. Thus unscrupulous persons could avoid the liability of dues under Excise and Customs Law, by selling/transferring of the business/trade.

Now *proviso* to Section 11 of Central Excise Act and *proviso* to Section 142(1) of Customs Act (both inserted w.e.f. 10-9-2004) provide that if a person Transfers his business or trade or disposes of his business to a third person, any duty or any other sum due from predecessor can be recovered from successor in trade or business, by attaching all goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles which was transferred to the successor.

There is no parallel provision in Finance Act, 1994 relating to service tax.

The amount should be due from predecessor at the time of transfer/disposal of business or change in ownership. Such recovery can be done with written approval of Commissioner of Central Excise/Customs.

It is obvious that only goods, plant etc. transferred by predecessor can be attached and not goods/ machinery acquired by successor subsequent to the transfer. Land and building which is transferred cannot be attached. Though the word 'plants' is used, considering the other words used, it appears that only movable property can be attached under these provisions.

In case of winding up of company, the assets are transferred/disposed of by Court/official liquidator and not by voluntary action of the company. Hence, these Sections should not apply in case of winding up of company.

STUDY NOTE 8

Other Provisions in Central Excise

8.1 Refund of Duty

Assessee can claim refund of duty if due to him. Normally, refund claim can be filed for various reasons like

* Excess payment of duty due to mistake

* Forced by department to pay higher duty

* Finalisation of provisional assessment

* Export under claim of rebate

* Assessee paid duty under protest/pre-deposit of duty for appeal, and appeal decided in favour of assessee

* Refund of Cenvat credit if final product exported

* Unutilised balance in PLA .

Section 11B of Central Excise Act and Section 27 of Customs Act provide for refund of duty. Section 11B of CEA has been made applicable to service tax also.

Section 11B applies to refund of Cenvat Credit – Section 2A of CEA (inserted w.e.f. 12-5-2000) states that unless otherwise expressly provided or unless context otherwise requires, references to the expressions 'duty', 'duty of excise', and 'duties of excise' shall be construed to include a reference to 'Central Value Added Tax' (Cenvat). Moreover, Section 11B(c) specifically refers to refund of credit of duty paid on inputs. Hence, Section 11B applies to refund of Cenvat Credit – view also held in *Indo-Nippon Chemicals* v. *UOI* 2005 (185) ELT 19 = 49 RLT 642 (Guj HC DB).

Refund can be claimed during normal period – Refund can be claimed during normal period of limitation for any reason.

No res judicata in taxation – There is no *res judicata* (cause or suit already decided - case already decided by Court) or estoppel (stopped from denying) in taxation. Assessee can change its stand (about classification, valuation etc.). There is no law that a mistake once committed can never be rectified.

Refund of Pre-deposit of duty – If appeal is decided in favour of assessee, he is entitled to get refund of pre-deposit made by him. Provisions of unjust enrichment do not apply to such refund. No time limit applies for such refund claim.

Doctrine of Unjust Enrichment

If the manufacturer had charged excise duty to his buyer, it is clear that he has *passed on the burden* to the buyer and has already recovered duty from his customer. In such cases, refund of excess duty paid to the manufacturer will amount to excess and un-deserved profit to him. It will not be equitable to refund the duty to him, as he will get double benefit - first from the customer and again from the Government. This is called '*unjust enrichment*'. Refund, if any, should be paid to customer who has borne the burden of duty. However, in majority of the cases, it is not practicable to identify individual consumer and pay refund to him. At the same time, the duty is illegally collected and hence cannot be retained by Government.

In *UOI* v. *Roplas Ltd.* AIR 1989 Bom 183 = 1988(38) ELT 27 (Bom HC), it was suggested that in such cases, the refund due should be transferred to a Consumer Welfare Fund instead of paying it to the manufacturer.

The fund may be used for activities of protection and benefit of consumers With this view in mind, CEA was amended and the provisions in respect of 'unjust enrichment' were incorporated w.e.f. 20th Sept., 91. As per these provisions, refund will be paid to manufacturer only if he proves that he has borne the burden of duty. Otherwise, the amount will be paid to Consumer Welfare Fund.

These provisions relating to unjust enrichment apply to service tax and customs duty also.

Appeal should be filed and not a refund claim when adjudication order has been issued – An adjudication order should be appealed against, if assessee is aggrieved by adjudication order.

In case of customs, approval of Bill of Entry is an 'adjudication order' and appeal should be filed, if assessee is aggrieved with assessment. Filing refund claim cannot be equated to appeal. Section 17(5) of Customs Act (inserted by Taxation Laws (Amendment) Act w.e.f. 13-7-2006), provides that if assessment is done contrary to the claim of importer/exporter, the Customs Officer shall pass a speaking order within fifteen days from date of assessment of bill of entry or shipping bill, unless the importer/exporter confirms his acceptance of the assessment in writing.

In *CCE* v. *Flock (India) P Ltd.* (2000) 6 SCC 650 = AIR 2000 SC 2484 = 2000 AIR SCW 2777 = 40 RLT 131 = 120 ELT 285 (SC), it was observed, 'Refund is in nature of execution of a decree/order. Thus, issue of classification (which has become final as no appeal was filed) cannot be agitated in refund proceedings. If the order is appealable, appeal should be filed. Otherwise, provisions of appeal will become redundant. Refund claim cannot be used as an appeal against an adjudication order.

Customs Officer can correct mistake u/s 154 – Customs Officer can correct a mistake u/s 15 of Customs Act and can grant refund. In such case appeal is not required – *G S Metalica* v. *CC* (2007) 217 ELT 466 (CESTAT SMB) – same view in *Ank Seals* v. *CC* (2007) 208 ELT 572 (CESTAT SMB), in respect of calculation mistake due to mistake in taking exchange rate.

Procedure for filing refund application in excise and service tax

Refund application should be filed in form 'R' in duplicate as given in Annexure 28 - *Chapter 9 Para 2.1 of CBE&C's CE Manual, 2005.*

The same form is used for service tax refund claim also.

Documents while submitting refund claim - Normally, following supporting documents are required while filing refund claim -

(a) Original TR-6 challan/PLA/RG23/other document through which duty was paid

(b) Proof that duty burden has been borne by the assessee and has not been passed to the customer

(c) Other documents in support of the refund claim e.g. invoices etc.

(d) Statement or application giving reasons why refund is being claimed.

When refund can be made to assessee/buyer - Under *proviso* to Section 11B(2), [parallel Section 27(2) of Customs Act] a refund of excise duty can be made to assessee/buyer *only* in following cases :

- Rebate of excisable goods exported out of India (if he had exported on payment of duty)
- Rebate of excise on excisable materials used in manufacture of goods exported out of India (if he has not availed Cenvat credit)
- Refund of duty paid on inputs (if payable according to any Rule or notification)

- To Manufacturer, if he has not passed on incidence of the duty to another person
- To Buyer, if he has borne the duty **and** if he has not passed on incidence of the duty to another person
- To any other class of applicant if borne by any such class of applicants, as may be specified by Government of India, if the incidence of duty has not been passed on to any other person

Section 11B of CEA has been made applicable to service tax also.

Thus, in effect, refund to a person will be made only when he has not passed on the burden to another person. These provisions are overriding provisions and are applicable irrespective of any contrary judgment of Appellate Tribunal or any Court or any other provisions of Central Excise Act and Rules. Thus, refund provision in any other Rule will be always subject to the aforesaid provisions of Section 11B(2).

Duty incidence deemed to have been passed on - Refund is available to manufacturer/buyer only if he has borne the incidence. Section 12B of CEA [parallel Section 28D of Customs Act] provides that every person who had paid duty shall be deemed to have passed on the burden to buyer of the goods. The manufacturer/buyer claiming refund will have to prove that he has not passed on incidence of tax to any other person. [In legal terminology, this means that burden of proof is on manufacturer/buyer claiming the refund that he has himself borne the duty incidence. Excise department does not have to prove that incidence has been passed on to consumer.]

This Section is made applicable to service tax also.

Proof of not passing of burden to ultimate consumer not necessary - In *Addison & Co* v. *CCE* 2001(129) ELT 44 (Mad HC DB), it was held that 'any other person' or 'buyer' does not mean 'ultimate consumer'. Manufacturer is not liable to show as to who the ultimate consumer was and whether such consumer has borne the burden of duty. [Thus, if manufacturer proves that he has not passed on the burden to his immediate buyer, it is sufficient.] – followed in *CCE* v. *Jagsonpal Pharmaceuticals* (2003) 152 ELT 186 (CEGAT).

Time limit for filing refund application

A refund claim u/s 11B has to be filed within one year from the *relevant date*.

Definition of 'Relevant Date' - The relevant date for purpose calculation of period of one year for filing refund claim has been defined in *Explanation B* to Section 11B as under:

- In case of exports (*a*) when the ships or aircraft leaves India (*b*) if the goods are exported by land, the date on which the goods leave Indian frontier (*c*) if export is by post, date of despatch of goods by post office to a place outside India.
- If Compound levy scheme is applicable, if assessee pays the full duty and if rate is subsequently reduced by Government, then date on which notification regarding reduction of rate is published.
- In case of refund claim filed by purchaser, date of purchase of the goods
- If duty is exempted by a special order under Section 5A(2), the date of issue of such order
- If duty was paid on provisional basis, the date of adjustment of duty after final assessment of duty.

- Where duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, CESTAT or any Court, date of such judgment, decree, order or direction (This clause inserted by Finance Act, 2007 w.e.f. 11-5-2007)
- In other cases, date of payment of duty

This Section is made applicable to service tax also.

Duty collected from buyer must be paid

Every person, who is liable to pay duty under Central Excise Act and Rules and has collected from buyer any amount in excess of the duty assessed or determined and paid on any excisable goods under CE Act or rules, representing as duty of excise; must pay the amount immediately (forthwith) to the credit of Central Government [Section 11D(1) of CEA – corresponding Section 28B of Customs Act and Section 73A(1) of Finance Act, 1994 (which contains provisions relating to service tax)].

Thus, a person, who charges an amount in the invoice representing as excise duty, must deposit the same with Central Government, whether or not the duty was legally payable. [*This is to ensure that manufacturer does not collect excess amount from buyer in the name of excise duty or trader does not collect some amount in nature of Excise duty*].

After assessment is completed, if some amount is found to be refundable, the amount will be credited to Consumer Welfare Fund, or refunded to the person who has borne the duty incidence as per Section 11B [parallel Section 27 of Customs Act] (i.e. if he proves that he has not passed on the incidence to other person) [Section 11D(5) of CEA and Section 73A(6) of Finance Act, 1994].

Provisions apply only to person liable to pay duty - Provisions of Section 11D(1) of CEA would apply only to manufacturer/producer, as Section 11D states that 'every person who is liable to pay duty'. The provisions do not apply to dealer as he is not 'liable to pay duty'. Similarly, provisions of Section 73A(1) of Finance Act, 1994 apply only to person liable to pay service tax.

These provisions will also not apply when a manufacturer charged and paid duty even if he was not liable to pay duty. This is because he was not liable to pay duty in first place. If he was liable to pay 'amount' but recovers it as 'duty', the provision should not apply as he was not 'liable to pay duty'.

Duty to be shown separately in Invoice - It is presumed under Section 12B of CEA (Parallel Section 28D of Customs Act) that the incidence has been passed on to the buyer. To ensure that buyer knows what is the duty charged to him, Section 12A of CEA [Parallel provision in Section 28C of Customs Act] provides that every person liable to pay duty, shall prominently indicate in all documents relating to assessment, sales invoice and other like documents, the amount of duty, which forms part of the price at which such goods are sold. (This is also required under Rule 11(2) of Central Excise Rules in case of Central Excise).

This provision is applicable only to a person liable to pay duty on excise and customs.

Really, this provision is meaningless in respect of customs duty, as customs duty is never paid on basis of Invoice. No invoice is made at the time of clearance. However, provisions of Section 12A have been copied in Section 28C of Customs Act without applying mind.

In case of traded goods, there is no 'clearance of goods' and hence customs duty/excise duty paid is never charged separately.

Excise/customs authorities empowered to recover such excess amount - Section 11D(2) of CEA [corresponding Section 28B(2) of Customs Act and Section 73A(2) of Finance Act, 1994] provides that if any amount is payable by manufacturer/producer u/s 11D, a notice can be issued by excise/Customs Officer. After considering his representation, demand can be confirmed [Section 11D(3) of CEA corresponding Section 28B(3) of Customs Act and Section 73A(4) of Finance Act, 1994].

Interest on late disbursement of refund

Refund due must be disbursed within three months from date of application. If not so paid, Government will pay interest to the assessee. The interest rate will be fixed by Central Government if Official Gazette, which will not be less than 5%, but not more than 30% [Section 11BB of CEA, parallel Section 27A of Customs Act].

This Section has been made applicable to service tax also.

The rate prescribed is 6% w.e.f. 12-9-2003 [Notification Nos. 67/2003-CE(NT) dated 12-9-2003 and 75/2003-Cus(NT) dated 12-9-2003]. Earlier, it was 8% w.e.f. 13-5-2002 [17/2002-CE(NT) and 25/2002-Cus(NT) both dated 13-5-2002. It was 9% w.e.f. 11th May, 2001, vide Notification No. 23/2001-CE(NT) – parallel 21/2001-Cus(NT) both dated 11-5-2001. The rate prescribed was 15% w.e.f. 26th May, 1995]. Of course, the refund is subject to provision of 'unjust enrichment' and hence will not be available in most of the cases.

Interest u/s11BB of CEA (parallel Section 27A of Customs Act) is with reference to date of application and not with reference to an order granting refund – *Karnataka State Agro Corn Products Ltd.* v. *CCE* (2008) 9 STR 93 (CESTAT).

Section 11BB applies to service tax also.

Consumer Welfare Fund

A Consumer Welfare Fund has been formed as provided under Section 12C of CEA. Refund of excise or customs duty or service tax, after it is sanctioned by adjudicating authority, will be normally transferred to '*Consumer Welfare Fund*' and will not be refunded to assessee. A Standing Committee consisting of Secretary, Department of Consumer Affairs as Chairman has been formed.

This Section applies to service tax also.

Utilisation of Funds - The funds will be utilised for payment to

(a) Any agency/organisation engaged in consumer welfare activities for a period of three years, registered under any law, including village/samiti level cooperatives of consumers, specially women, scheduled castes and scheduled tribes consumer association ***or***

(b) Any Industry, engaged in viable and useful research activity in formulation of standard mark of products of mass consumption.

(c) State Government

(d) Consumer for reimbursement of legal expenses incurred by a consumer. [Section 12D]

Applicability and validity of doctrine of unjust enrichment

Legal validity of provisions of unjust enrichment as contained in Section 11B of CEA (parallel Section 27 of Customs Act) has been tested in Court of Law. The Section applies to service tax also.

Section 11B of CEA (parallel Section 27 of Customs Act) has been held as valid in *Mafatlal Industries Ltd.* v. *UOI* 89 ELT 247 = (1997) 5 SCC 536 = 111 STC 467 = 17 RLT 907 (SC 9 member Constitution bench).

Applicable even in case of Government undertaking – Doctrine of unjust enrichment applies to Government undertaking which is an incorporated company. It does not apply only if the undertaking is 'Government' itself – *Sescot Sheet Metal Works* v. *CCE* 2006 (201) ELT 458 (CESTAT).

Provision applicable to captive consumption of Inputs as well as to capital goods - In *UOI* v. *Solar Pesticides P Ltd*. 2000(2) SCC 705 = 2000 AIR SCW 444 = AIR 2000 SC 862 = 116 ELT 401 = 26 SCL 115 (SC 3 member bench), it has been held that provisions in respect of unjust enrichment are applicable in respect of raw material captively consumed also. In case of captive consumption, even if it is difficult to prove that incidence of duty has not been passed to purchase of final product, refund will not be granted if manufacturer is not able to show and prove that incidence has not been passed on to some body else.

Unjust enrichment applies to Capital goods captively consumed – In *SRF Ltd*. v. *CC* 2006 (193) ELT 186 (CESTAT 3 member bench) it has been held that doctrine of unjust enrichment applies to capital goods captively consumed [contrary decision in *Grasim Industries* v. *CCE* 2003 (157) ELT 123 (CESTAT) overruled]

Doctrine applicable even when duty paid under protest – In *CCE* v. *Allied Photographics* 2004 AIR SCW 1771 = (2004) 4 SCC 34 = 166 ELT 3 (SC 3 member bench), it has been held that doctrine of unjust enrichment applies even when duty is paid under protest. It has been held that even if there is no change in price before and after assessment (i.e. before and after imposition of duty), it does not lead to the inevitable conclusion that incidence of duty has not been passed on to the buyer, as such uniformity may be due to various factors Thus, even if price remains same before and after imposition of duty, the assessee has to establish that he has not passed on burden of duty to the buyer – review petition dismissed by SC – 173 ELT A191.

Doctrine applicable if duty paid on provisional basis

Doctrine of unjust enrichment applies even when assessment was done on provisional basis.

Rule 7(6) of Central Excise Rules makes it clear that even in case of provisional assessment, refund is subject to doctrine of unjust enrichment. Hence, in case of provisional assessment, assessee should recover only lower duty from the buyer in the invoice. [If the buyer is in a position to avail Cenvat, it is highly advisable to pay higher duty and forget about refund. The reason is - Section 11B(2) is applicable to all refund claims without any distinction and has overriding effect as per Section 11B(3)].

This Section is applicable to service tax also.

Provision in case of Customs - Section 18(5) of Customs Act inserted by Taxation Laws (Amendment) Act w.e.f. 13-7-2006, provides that if any amount is found to be refundable after finalisation of provisional assessment, such refund will be subject to doctrine of unjust enrichment. Refund will be granted to importer/exporter only in following cases –

- If Importer/exporter/buyer has not passed on incidence of the duty to another person.
- If Imports are made by *individual* for his personal use.
- In case of Refund of export duty, if any, u/s 26 of Customs Act.
- In case of Duty drawback payable to exporter u/s 74 or 75 of Customs Act.

Principle applies even if no change in price after imposition of duty - In *CCE* v. *Allied Photographics* 2004 AIR SCW 1771 = (2004) 4 SCC 34 = 166 ELT 3 (SC 3 member bench), it has been held that even if there is no change in price before and after assessment (i.e. before and after imposition of duty), it does not lead to the inevitable conclusion that incidence of duty has not been passed on to the buyer, as such uniformity

may be due to various factors - - Thus, even if price remains same before and after imposition of duty, the assessee has to establish that he has not passed on burden of duty to the buyer – review petition dismissed by SC – 173 ELT A191.

Non-Application of provisions of unjust enrichment

The bar of unjust enrichment applies only in case of refund excise duty u/s 11B of Central Excise Act and customs duty u/s 27(2) of Customs Act. The bar does not apply to refunds in other cases.

As per *proviso* to Section 11B(2), [parallel Section 27(2) of Customs Act], bar of unjust enrichment does not apply in following cases -

- Rebate of excisable goods exported out of India (if he had exported on payment of duty)
- Rebate of excise on excisable materials used in manufacture of goods exported out of India (if he has not availed Cenvat credit)
- Refund of duty paid on inputs (if payable according to any Rule or notification)
- Export duty
- Duty drawback

This Section is made applicable to service tax matters also.

Further, in following cases, bar of unjust enrichment does not apply

- Excess anti-dumping duty
- Penalty or fine imposed

When duty paid subsequently - If duty is paid subsequently after clearance, presumption u/s 11B regarding passing of duty is not attracted – *CCE* v. *Modi Oil* 2007 (210) ELT 342 (P&H HC DB) * *Gujarat State Fertilizers* v. *CCE* 2005 (186) ELT 607 (CESTAT) * *Easter Industries Ltd*. v. *CCE* 161 ELT 1034 = 1999(35) RLT 830 (CEGAT).

8.2 Captive consumption - Intermediate product

Since excise duty is on manufacture of goods, duty is payable as soon as goods are manufactured within the factory. Such goods are called 'intermediate products' and its use within the factory is termed as 'captive consumption'. Duty is payable even when goods are despatched from one factory to another factory of the same manufacturer.

Intermediate product should be marketable – Duty is payable only if intermediate product is marketable.

Intermediate product will not be dutiable if it has short shelf life and cannot be marketed in that condition. - *CCE* v. *Ambalal Sarabhai Enterprises* 43 ELT 214 = 77 STC 190 = AIR 1990 SC 59 = (1989) 3 SCR 784 = (1989) 4 SCC 112.

Exemption to intermediate products used for captive consumption

Paying duty on all captive consumption will obviously cause inconvenience to manufacturers and hence exemptions have been given in many cases.

Captive consumption for dutiable final products - The intermediate product manufactured within the factory is exempt from duty, if it is consumed captively for manufacture of (*a*) Capital goods as defined in Cenvat Credit Rules i.e. those which are eligible for Cenvat credit *or* (*b*) Used for in or in relation

to manufacture of final products eligible for Cenvat, made from inputs which are eligible for Cenvat. [Notification No. 67/1995 dated 16-3-1995].

Exemption if final product cleared for deemed export - As per excise provisions, no duty is payable if final product is cleared * to EOU * to a unit in Electronics Hardware Technology Park * to a unit in Software technology park. In such cases, duty on intermediate product is not payable even if final product is cleared without payment of duty. – *provisos* (i) to (iv) to Notification No. 67/1995-CE dated 16.3.1995.

Exemption applicable if goods cleared under bond to warehouse – Clearance of final product to a warehouse under bond cannot be regarded as a clearance made at Nil rate of duty or clearance of goods exempt from duty. Hence, exemption under Notification No. 67/1995-CE is available in respect of intermediate product – *Madras Refineries* v. *CCE* (2007) 212 ELT 231 (CESTAT).

Goods cleared to UN, WHO etc. – Final products cleared to ILO, WHO, UNDP, UNIDO programme etc. are exempt under Notification 108/95-CE dated 28.8.1995. In such case, any intermediate product manufactured will be exempt from duty – *proviso* (v) to Notification No. 67/1995-CE dated 16.3.1995.

Final product should not be exempt from duty - This exemption is not available if final product is exempt from duty or is chargeable to Nil rate of duty. In other words, if no duty is payable on final products, duty will be payable on intermediate products.

Capital goods manufactured and used within factory – As per notification No. 67/1995-CE dated 16-3-1995, capital goods (as defined in Cenvat Credit Rules) manufactured in a factory and used within the factory of production are exempt from excise duty.

Further, as per *explanation* 2 to Rule 2(g) of Cenvat Credit Rules, inputs include goods used in manufacture of capital goods which are further used in the factory of manufacturer. Thus, if capital goods are manufactured and used within the factory, Cenvat credit can be availed of goods which are used to manufacture such capital goods. Moreover, no duty will be payable on such capital goods.

Parts manufactured within the factory for repairs - Goods manufactured in a workshop within the factory for use within factory for repairs or maintenance of machinery installed within the factory are exempt from duty - [Notification No. 65/1995 dated 16-3-1995]. Thus, no duty is payable on parts manufactured within the factory for repairs or maintenance of machinery within the factory.

Duty leviable in certain cases on intermediate products

In following cases, duty will be leviable on intermediate products.

Intermediate product transferred to another factory of same manufacturer – Sometimes, intermediate product is transferred to another unit of same manufacturer for further manufacture. The product as such will not be sold. In such cases, when the goods are transferred, duty will be payable. Valuation will be on same basis as that for captive consumption.

Same provision applies when goods are sold to a 'related person' who does not sale them but uses them as inputs for further production.

Valuation in case of captive consumption

In case of captive consumption, valuation shall be done on basis of cost of production plus 10% [The percentage was 15% upto 5-8-2003]. (Rule 8 of Valuation Rules). Cost of production is required to be calculated as per CAS-4 [see discussions under valuation].

8.3 Job work under Central Excise

It is common for Industries to get some processing done from outside on *job work* basis. Job work means supplying the material by a Customer (often a Large Scale Unit) to a job worker who carries out certain processes [like machining, drilling, welding, painting etc. for engineering goods; bleaching, dyeing, printing etc. in textiles etc.], and returns the material to the customer after carrying out the processes. This is particularly common in Engineering and textile Industries. This is usually called 'job work' or 'sub-contracting' in engineering industry and 'processing' in chemical or textile industry. In drug industry, a system of 'loan licensee' is in vogue, where one unit gets the drugs manufactured from another small unit under his own brand name by supplying the raw material.

Job Work Definition - Job work is possible whether or not it results in 'manufacture' or 'finishing' of an article. Job work is defined in Notification No. 214/86-CE and Rule 2(n) of Cenvat Credit Rules.

Job Work means processing or working upon of raw materials or semi-finished goods supplied to job worker, so as to complete a part or whole of the process resulting in the manufacture or finishing of an article or any operation which is essential for the aforesaid process – *Explanation* I to Notification No. 214/86-CE dated 25-3-86 – same definition in Rule 2(n) of Cenvat Credit Rules.

Duty liability of goods manufactured under job work - Since excise duty is on 'manufacture', duty liability arises only when the goods are manufactured during job work. Thus, if an item is only repaired or reconditioned, no duty liability arises as no new product emerges. Similarly, if some operation is carried out which does not amount to manufacture, there is no duty liability. However, if goods are manufactured during job work, *excise liability will arise*, as duty is on **manufacture** and who has supplied the raw material is immaterial.

Duty liability is of job worker as he is the 'manufacturer'.

Exemption for job work under Cenvat

Payment of duty on the basis of price at which raw material suppliers final product in market will create a very big excise liability which will seriously hamper job work and hence exemption is given in many of the cases for job work.

Exemption if material received under Cenvat provisions - Material received by a manufacturer under CENVAT can be sent to a job worker for processing and can be brought back by the manufacturer for further processing under Cenvat Credit Rule 4(5)(a). In such cases, there is no duty liability on the job worker and he is exempted from the same.

Service tax on job work

Job work falls under 'Business Auxiliary Service', if the job work is not 'manufacture'. Service tax will be payable. Job work done under Cenvat provisions is exempt from service tax.

If the job worker is not availing any Cenvat credit of any common input or input services, question does not arise. However, if the job worker is availing Cenvat credit on inputs or input services, he will be liable to pay 8% 'amount' on job charges under Rule 6(3) of Cenvat Credit Rules, or he may have to go in for proportionate reversal of Cenvat Credit as per Rule 6(3A) of Cenvat Credit Rules effective from 1-4-2008.

Exemption to Job work under Notification No. 214/86

Notification No. 214/86 dated 25-3-1986 has been issued for exemption from job work. Raw material as well as semi-finished goods can be sent out for job work.

The exemption is available even if the job worker manufactures an intermediate product. Notification No. 214/86 provides that a declaration has to be given by person sending material or semi-finished goods for job work to jurisdictional Assistant Commissioner having jurisdiction over the factory of job worker.

Supplier has to undertake payment of duty on final product – The supplier of raw materials or semi-finished goods has to give an undertaking that he will discharge the duty on final product.

Use of goods after job work - After the job work, the material should be normally returned to person who had sent it for job work.

The person who had sent the material, can either use it for further manufacture or clear the product (as received from the job worker). He can clear the product received from job worker without any further processing [para 2 of Notification No. 214/86-CE]

(a) On paying duty.

(b) On payment of 10% 'amount' on exempted products under Rule 6 of Cenvat Credit Rules.

(c) Export under bond.

(d) Clear to SEZ, EOU, EHTP or STP unit without payment of duty

(e) Clearance to UN or international organisation or a project funded by them.

Direct despatch from place of job worker - Goods can be cleared directly from the place of job worker with permission of Assistant/Deputy Commissioner. This aspect is discussed under Cenvat.

Valuation in case of job work

Excise duty will not be payable if raw material/semi-finished components are sent for job work under Cenvat provisions or under notification No. 214/86-CE. However, in other cases, if job work results in 'manufacture' of a product, duty will become payable by job worker.

Rule 10A of Valuation Rules, as inserted w.e.f. 1-4-2007 provides that in such cases, excise duty will be payable on the basis of price at which the raw material supplier (termed as 'principal manufacturer' in valuation rules) sales the goods [see discussions under valuation].

8.4 Budget and Central Excise

Every year, Govt. introduces its taxation proposals at the time of annual budget which is presented usually on last day of February every year, by way of a Finance Bill. Major changes in excise duties are announced on budget day and hence budget is an important day for persons dealing with excise.

Increased rates become effective immediately **-** Normally, any provision of legislation, takes effect only after it is passed by the Parliament. However, in case of excise and customs provisions, this might create complications. Finance Bill is normally presented on last day of February, but it is passed by Parliament only after a few months. If the assessees know the changes in advance before new rates are effected, they will either clear the goods or will stop clearances for some time, as may be suitable to them.

To avoid these problems, it is provided vide Section 4 of '*Provisional Collection of Taxes Act, 1931*' that budget provisions in respect of imposition or increase in duty of excise and customs will take effect immediately if a declaration is inserted in the Bill that it is expedient in Public interest to have immediate effect to the provisions of the Bill. This provision is not applicable for reduction in duty.

Once this declaration is given, the new rates become effective on the expiry of the day when the bill is introduced. Accordingly, every year, the declaration is given and budget provisions come into effect immediately. Such declaration is valid only for 75 days or the date when the Finance Bill is passed, whichever is earlier.

Thus, if budget is presented on last day of February [28 or 29 as the case may be], new rates will become effective on 1st March itself.

Duty liability of Pre-budget Stock - Some goods in stock on the budget day are cleared subsequent to presentation of budget. If there is change in duty at budget, it was felt that these goods should be cleared at the rate applicable before the budget. The thinking was that duty liability is fastened as soon as goods are manufactured as 'manufacture in India' is taxable event in Central Excise. Since goods were already manufactured before budget, rate as applicable at the time of manufacture should be applied.

However, Supreme Court in *Wallace Flour Mills Co. Ltd.* v. *CCE* 186 ITR 440 = 44 ELT 598 = (1989) 4 SCC 592; have decided that rate applicable at the time of clearance from the factory will be applicable for payment of excise duty. In view of this, it is now settled that the duty will be payable as applicable on the date of clearance from the factory or warehouse.

Duty levied for first time in Budget - The exception is that if the goods were not included in tariff at all before budget, such goods manufactured before budget will be exempt. If excise duty is imposed on these goods in budget, no duty will be payable on pre-budget stock.

Similarly, if goods were brought under excise net by amending the definition of 'manufacture', goods manufactured prior to such amendment will not be liable to duty, even if cleared subsequently - *Ganesh Extrusion Industries* v. *CCE* - 1993 (66) ELT 639 (CEGAT) * *CCE* v. *National Tubes* 2000(118) ELT 716 (CEGAT) * *Lao Pala RG* v. *CCE* 2002(140) ELT 405 (CEGAT).

If a particular duty is levied for the first time in budget, there will be no duty on pre-budget stock. On the other hand, if a particular duty is withdrawn in budget, duty will be payable on pre-budget stock. - *CCE* v. *Vazir Sultan Tobacco Co. Ltd.* - AIR 1996 SC 3025 = 1996 AIR SCW 1353 = 13 RLT 291 = (1996) 3 SCC 434 = 83 ELT 3 (SC 3 member bench) [This judgment is in respect of Additional Duty. In this case, additional duty was levied for the first time on 1-3-1978 and was withdrawn on 28-2-1979. It was held that duty is not leviable in respect of goods manufactured before 1-3-1978, even if removed on or after 1-3-1978. Similarly, duty will be payable on goods manufactured on or before 28-2-79, even if removed later] - followed in *CCE* v. *Extrusion Processes P Ltd.* 1997(94) ELT 278 (SC).

No Restrictions on clearances on budget day – Goods can be cleared from factory on budget day without any restriction on its movements.

8.5 Remission of duty on lost/destroyed goods

Goods which are fully manufactured and entered in Daily Stock Account (DSA) are liable for duty. However, if these are lost or destroyed in storage, by natural causes or by unavoidable accident or are unfit by consumption for marketing, remission of duty can be given by Commissioner on application.

'Remission' means waiver or cancellation of excise duty legally payable. Section 5 of CEA provides that Central Government can provide for remission of duty of excise payable on excisable goods, which due to any natural cause, are found to be deficient in quantity, by making rules in that behalf. As per Rule 21 of Central Excise Rules, remission of duty can be granted in following cases –

- Goods have been lost or destroyed by natural causes
- Goods have been lost or destroyed by unavoidable accident
- Goods are claimed by manufacturer as unfit for consumption or for marketing.

Application for remission should be submitted before removal of goods from factory. Thus, there is no provision for remission after goods are cleared from the factory.

If the goods were not entered in 'daily stock account' as they were not fully manufactured, question of remission of duty does not arise at all as there is no duty liability.

The application for remission has to be made before removal of the goods from factory. [Rule 21 of Central Excise Rules].

Cenvat credit taken on inputs to be reversed if duty remitted on final product – Rule 3(5C) of Cenvat Credit Rules (as inserted w.e.f. 7-9-2007) provides that if duty on final products is remitted under Rule 21 of Central Excise, Cenvat credit of duty paid on inputs used in manufacture or such goods shall be reversed.

8.6 Excise Audit/Checks

Most of the factories are under 'Self Removal Procedure' and there is no physical control over production and clearance of goods. Department has evolved various checks and counter-checks to ensure that excise duty is not evaded. Following checks have been devised to reduce leakage of revenue.

Scrutiny of returns - Every assessee, first stage dealer and second stage dealer has to submit periodic returns to Superintendent, Central Excise. This will be acknowledged by him on the assessee's copy. No assessment order will be issued. These returns will be only scrutinised. Further enquiry can be made as provided in Rule 12(3).

Visits of Officers - Every factory comes under jurisdiction of Range Superintendent. The Superintendent and Excise Inspectors working under him do occasionally visit factories. However, they are not expected to have day to day checks.

Stock taking – Present Central Excise Rules make no provision for 'store room' or 'stock taking'. However, it does not mean that stock taking by excise authorities is prohibited. In the opinion of author, stock taking can be done of finished goods and Cenvat goods.

Road Checks - Surprise road checks are carried out to see that all goods moving are accompanied by duty paying documents.

Information from Informants - Like all tax departments, department can and does collect information from secret informants (sometimes he is a disgruntled employee of the Company).

Preventive Section - Each Commissionerate has a preventive Section to have surprise checks and raids when evasion is suspected.

Central Excise Intelligence - Directorate of Central Excise Intelligence under Central Board of Excise and Customs, gathers information from various sources (including informants) about tax evasion and take suitable action. The officers have been given powers on all India basis vide notification No. 7/2004-CE(NT) dated 11-3-2004.

Departmental Excise Audit – An Audit Section is attached to each Commissionerate. Some audit parties are functioning under Commissionerate headquarters, while some may function at important industrial centres where Joint Commissioner or Addl Commissioner has been posted. Audit of assessee's factory is carried out by visit by 'audit party'. The Audit Party usually consist of 2/3 inspectors and a Deputy Office Superintendent, headed by a Excise Superintendent. AC/DC and senior officers are also associated with the audit of large units. These audit parties visit factories periodically. Audit by these audit parties is called 'departmental audit'.

New audit system, termed as 'EA-2000' [Excise Audit 2000] has been introduced with help of Revenue Canada. This is part of various projects Ministry of Finance has taken up with aid of Canadian International Development Agency (CIDA).

Audit Manual – 'Audit Manual' is a document prepared for use of auditors. It gives detailed guidelines, formats and check lists for audit. - - Similarly, 'Service Tax Audit Manual' has also been prepared – CBE&C circular No. 742/58/2003-CX dated 3-9-2003.

Submission of records by assessee - *Vide* Rule 22(3) of Central Excise Rules, assessee and first stage and second stage dealer is required to produce to audit parties the following documents –

(i) Records maintained by him in respect of accounting of transactions in regard to receipt, purchase, manufacture, storage, sales or delivery of goods including inputs and capital goods, records of input services and all financial statements including trial balance; as required under Rule 22(2) of CE Rules

(ii) Cost audit reports u/s 233B of Companies Act

(iii) Income Tax audit report u/s 44AB of Income Tax Act.

Frequency of Departmental Audit – The frequency of audit will be on basis of excise duty paid annually. The 'duty paid' means paid by cash plus through Cenvat credit. The frequency is as follows, as per CBE&C letter No. 381/145/2005 dated 6-6-2006 –

- Units paying duty more than Rs. three crores – every year.
- Units paying duty between Rs. one crore and Rs. 3 crores – once every two years
- Units paying duty between Rs. 50 lakhs and Rs. one crore – once every five years
- Units paying duty below Rs. 50 lakhs – 10% of units every year.

Duration of audit - As per earlier CBE&C circular No. 731/47/2003-CX dated 1-8-2003, the duration of audit was as follows -

- Units paying duty through PLA over Rs. one crore per annum – 10 working days
- Units paying duty of Rs. 10 lakhs to one crore per annum through PLA – 7 working days
- Units paying duty less than Rs. 10 lakhs through PLA per annum – 5 working days.

Procedure of Excise Audit 2000 – The audit consists of – (a) Selection of assessee based on risk factors (b) Desk review (c) Gathering and documenting assessee information (d) Touring of premises (e)

Preparing audit plan (f) Verification of records (g) Discussing audit objections with party (h) Preparing audit report.

Help of practising Cost/Chartered Accountant in desk review - Department has decided to take help of practising Chartered/Cost Accountants in desk review of EA-2000 audit. Initially, major assessees paying duties exceeding Rs. 1 crore, having multi-locations, selling through related persons etc. will be selected and job of desk review will be given to Chartered/Cost Accountants. The fees paid will be Rs. 5,000 per day - CBE&C circular No. 821/18/2005 dated 7-11-2005.

Desk Review is the first step in EA-2000. This consists of study and analysis of returns submitted by assessee, balance sheet, cost audit report and other details collected from assessee; and identifying areas where revenue leakage is possible. This helps in finalising audit plan so that concentration can be made in those areas during audit. This helps in concentrating audit efforts on major areas.

This is really BPO i.e. 'outsourcing' of audit work to a limited extent [Audit Report under Section 44AB of Income Tax Act also is in nature of BPO].

CERA - Audit of C and AG

Comptroller and Auditor General of India also carries out audits of all assessees. These are called 'CERA' i.e. Central Revenue Audit. These audit parties audit accounts of excise as well as customs assessees. C&AG is an authority appointed under Article 148 of Constitution of India. Article 151 of Constitution specifies that reports of C&AG shall be submitted to President of India, who causes these to be laid before each House of Parliament. CERA audits are conducted as a part of audit of Government accounts. Thus, these audits are conducted under Constitutional authority and are in no way connected or related to internal audits carried out by staff of excise department. Frequency of CERA Audits is as per the importance they attach and availability of time to CERA audit parties.

Assessee is required to produce to audit parties (*i*) Records (*ii*) Cost audit report (iii) Income Tax audit report.

8.7 Special Audit - Valuation Audit and Cenvat credit audit

Sections 14A and 14AA make provision for special audit by Cost Accountants.

Valuation Audit - Special Audit - Valuation is one of the most vital and important aspect of assessment of excise duty payable. In order to ensure that duty is being paid correct 'Assessable Value', a provision has been made to order a 'Special Audit' in some specified cases, vide Section 14A of CEA. The audit can be ordered only with prior approval of Chief Commissioner of CE.

Cenvat Credit Audit - Special Audit - As per Section 14AA of CEA, special audit of Cenvat credit availed or utilised can be ordered by Commissioner of Central Excise. Such audit can be ordered if the Commissioner of CE has reason to believe that (a) Cenvat credit availed or utilised is not within the normal limits, having regard to nature of final products and type of inputs (b) Cenvat credit has been availed or utilised by reason of fraud, collusion or any wilful misstatement or suppression of facts.

Such audit can be done by practising 'Cost Accountant', to be appointed by Commissioner of CE. Expenses of and incidental to such audit, including the remuneration payable to the cost accountant shall be paid by Central Government (i.e. excise department)

Who can order audit - Special Audit for valuation under Section 14A can be ordered at any stage of enquiry, investigation or any proceedings before Assistant/Deputy Commissioner regarding assessable

value of the goods manufactured by assessee, if the Assistant/Deputy Commissioner is of the opinion that the value has not been correctly declared by a manufacturer or any person. The special audit for valuation can be ordered by Dy/Assistant Commissioner with prior approval of Chief Commissioner.

Audit of Cenvat credit availed or utilised by a manufacturer can be ordered under Section 14AA if Commissioner has 'reason to believe' that Cenvat credit availed is not normal or the credit has been availed on account of fraud, wilful misstatement, suppression of facts or collusion.

The audit of Cenvat credit availed can be ordered by Commissioner, while special audit for valuation can be ordered by Asstt Commissioner/Dy Commissioner only with permission of Chief Commissioner.

Audit only by Qualified Cost Accountant - The Cost Accountant must be a member of Institute of Cost and Works Accountants of India, holding Certificate of Practice.

Provisions regarding order - The Cost Audit Order in case of valuation (Section 14A) can be issued by Assistant/Deputy Commissioner only with prior approval of Chief Commissioner of Central Excise. Audit order in case of Cenvat (Section 14AA) can be ordered by Commissioner. Such order can cover accounts of his factory, office, depots, distributors or any place, as may be specified in the order. Audit has to be done by a qualified Cost Accountant. The Cost Accountant has to be nominated by Chief Commissioner in case of valuation audit [Section 14A(1) of CEA] and by Commissioner of CE in case of special audit of Cenvat credit. [Section 14AA(1) of CEA]. Such audit is irrespective of any other audit that may be carried out under any other law [Section 14A(3) of CEA and Section 14AA(3) of CEA].

Cost Audit Report - The Cost Accountant has to submit his audit report within the time specified in the order with such other particulars as may be prescribed by the Central Excise Officer. The Cost Audit Report has to be signed and certified [Section 14A(2) of CEA and Section 14AA(2) of CEA].

Time limit for submission of report - In case of special audit for valuation, the report should be submitted within time prescribed by Central Excise Officer. Such period can be extended at the request of manufacturer for material and sufficient reason. However, the maximum period for submission of audit report is 180 days from date of receipt of cost audit order by the manufacturer [Section 14A(2) of CEA]. In case of special audit of Cenvat credit, the audit report has to be submitted within the period prescribed by the Commissioner [Section 14AA(2) of CEA].

Audit fees and expenses - The expenses of audit and audit fees shall be paid by excise department.

Manufacturer can give his comments on the report - If the Central Excise Officer proposes to utilise the information gathered on basis of the audit, the manufacturer shall be given opportunity of being heard [Section 14A(5) and Section 14AA(5) of CEA].

Special Audit should be from point of view of purpose - Special Audit should be from point of view of purpose i.e. Valuation for Central Excise if order is under Section 14A and Cenvat credit if order is under Section 14AA. Thus, provisions and principles of Central Excise in respect of valuation/Cenvat credit should be kept in mind while presenting the data and figures so that adjudicating authority may take suitable action. The Cost Auditor should check the records from valuation/Cenvat point of view as per order.

8.8 Withdrawal of facilities to manufacturer/dealer misusing facilities

As a deterrent to evasion of duty and mis-utilisation of Cenvat Credit, provision as been made for withdrawal of facilities to manufacturer and suspension of registration of a dealer.

Rule 12CC of Central Excise Rules and Rule 12AA of Cenvat Credit Rules (as inserted w.e.f. 30-12-2006) provide that in order to prevent evasion of, and default in payment of excise duty (Rule 12CC of CE Rules) or misuse of provisions of Cenvat Credit (Rule 12AA of Cenvat Credit Rules), various restrictions can be placed on manufacturer, registered Dealers or exporters and certain facilities can be withdrawn. Registration of a dealer can be suspended.

Procedure for issue of such order by authorised officer of CBE&C will be notified by Central Government. The facilities that can be withdrawn are mainly (a) Facility of monthly payment (b) Utilisation of Cenvat Credit for payment of excise duty on final product (c) Self sealing of export consignment by merchant exporter (d) Any other facility that is provided by a Board circular.

Such order can be issued only when duty or Cenvat credit involved exceeds Rs. 10 lakhs.

Notification No. 32/2006-CE(NT) dated 30-12-2006 issued under these rules make provisions for the procedure etc.

When the facility can be withdrawn and restrictions imposed – Facilities to manufacturer/exporter/ dealer can be withdrawn and restrictions imposed, if *prima facie*, he is found to be *knowingly* involved in following –

(a) Removal of goods without cover of an invoice and without payment of duty

(b) Removal of goods without declaring the correct value for payment of duty, where a portion of sale price is received by him or on his behalf but not accounted for in the books of account

(c) taking Cenvat credit without receipt of goods specified in the document based on which the Cenvat credit is taken

(d) taking of Cenvat credit on invoices or other documents which a person has reasons to believe as not genuine

(e) issue of excise duty invoice without delivery of goods specified in the invoice

(f) claiming of refund or rebate based on the excise duty paid invoice or other documents which a person as reason to believe as not genuine.

Which restrictions can be placed and which facilities can be withdrawn? – Following restrictions can be placed and facilities can be withdrawn for a period to be specified in the order –

Payment of duty before clearance instead of monthly payment – Facility of monthly payment of duties can be withdrawn for a specified period. Assessee shall be required to pay excise duty for each consignment at the time of removal (i.e. duty is to be debited to PLA before clearance from the factory).

Restriction on utilization of Cenvat Credit – Utilisation of Cenvat credit can be prohibited. Assessee will be asked to pay duty by cash through PLA only during the specified period. As per *Explanation* I to para 2 of Notification No. 32/2006-CE(NT) dated 30-12-2006, assessee can take Cenvat credit during that period but cannot utilize the same.

Counter-signature of excise officer on invoice for second and subsequent offence – In case of second or subsequent offence, *in addition to aforesaid restrictions*, the invoice shall be countersigned by Inspector or Superintendent during the specified period (This is similar to physical clearance of goods that was existing in good old days).

Sealing of export consignments by excise officer in case of offence by merchant exporters – If a merchant exporter is found to be knowingly involved in offence specified in para 1(f) of Notification No. 32/2006-CE(NT) dated 30-12-2006 (i.e. claiming of refund or rebate based on the excise duty paid invoice or other documents which a person has reason to believe that they are not genuine), the facility of self sealing of export containers will be withdrawn. Thus, export consignments will be examined and sealed by jurisdictional Central Excise Officer.

Suspension of registration of dealer – Registration of a dealer can be suspended for a specified period. During that period, he can continue with his business, but cannot issue Cenvatable Invoice, i.e. during that specified period, he cannot show excise duty in his invoice.

Withdrawal of other facilities given by circular or order of Board – Any other facility available to manufacturer, registered dealer or an exporter, given by way of Board circular or order of Board can be withdrawn (Thus, any procedural relaxation which has been given under rules or notification cannot be withdrawn).

8.9 Emergency Powers to increase duty

Duty can be levied or enhanced only by Parliament. Central Government can only exempt the duty, partly or fully. However, if Central Government is of the opinion that it is necessary to take immediate action, it may increase the duty as per Section 3 of Central Excise Tariff Act (CETA). [It may be noted that powers to reduce or exempt duty are found in Sections 5A and 11C of Central Excise Act (CEA), power to enhance duty are prescribed in Tariff Act (CETA)]. The limit to which duty can be increased is as follows : (*a*) if no duty was levied, then maximum duty leviable will be 50% *ad valorem.* (*b*) if duty was already levied, the rate of duty can be increased to twice the rate of duty as specified in the Tariff.

The notification under this Section should be placed before Parliament within seven days after it assembles, and Central Government shall seek approval of Parliament within fifteen days. The Parliament may approve or annul or modify the notification, but it will not affect the validity of excess duty already recovered. Central Government can amend or rescind the notification, even if it was approved by Parliament.

This is only an enabling provision in emergency situations, and so far, Central Government had issued only one notification under this Section in January, 2002.

Emergency powers under Customs Tariff Act – Section 8 of Customs Tariff Act make provision for emergency powers to increase or levy of export duties, while Section 8A of Customs Tariff Act make provision for emergency powers increase or levy of import duty. The duty can be imposed and/or increased without any limit (under Central Excise, there is limit of 50% or twice the existing rate). Provisions regarding issue of notification and its approval by Parliament are identical to Central Excise.

STUDY NOTE 9

Customs Duty

9.1 Brief Background of Customs Law

Customs duty is on import into India and export out of India. As per ancient custom, a merchant entering a kingdom with his goods had to make a suitable gift to the King. In the course of time, this 'custom' was formalised into 'Customs Duty'. This is collected on imports (and occasionally on exports too). The word 'Customary' is derived from 'customs', which indicates that it is a very old tax. Taxes on goods were levied on various goods right from the *Veda* period.

Reduction in customs duty rates - Peak rate of customs duties were lowered to 150% (basic plus auxiliary) in 1991. It was brought to 110% in March 1992, 85% in March 93, 65% in March 94, 50% in March 95 and 42% in March, 1997. [40% basic plus 2% special]. The peak rate of basic customs duty was brought down to 38.5% in March, 2000 (35% basic plus 10% surcharge). It was brought down to 35% on 1.3.2001, 30% on 1-3-2002, 25% w.e.f. 1-3-2003, 20% w.e.f. 9-1-2004 and 15% w.e.f. 1-3-2005.

Peak rate of basis customs duty on non-agricultural goods has been reduced to 12.5% w.e.f. 1-3-2006 and to 10% w.e.f. 1-3-2007. In addition, education cess @ 2% is payable w.e.f. 9-7-2004 and secondary and higher education cess of 1% w.e.f. 1-3-2007.

Total customs duty incidence including CVD, special CVD and education cess comes to 34.13%.

Scope and coverage of Customs Law - Section 12(1) of Customs Act is the charging Section, which provides that duties of customs shall be levied at such rates as may be specified under 'The Customs Tariff Act, 1975', or any other law for the time being in force, ***on goods imported into, or exported from, India***. The rate of duty is as prescribed in Customs Tariff Act, 1975, read with relevant exemption notifications. Import duty is levied on almost all items, while export duty is levied only on a few limited products, where Indian goods are in commanding position.

Imports by Government - Section 12(2) of Customs Act makes it clear that customs duty is payable by Government also. Thus, there is no general exemption to goods imported by Government. However, various exemption notifications have been issued and Imports by Indian Navy, specific equipment required by Police, Ministry of Defence, Coastal Guard etc. are fully exempt from customs duty. However, if there is no such exemption notification, duty will be payable even if goods are imported by Central/ State Government.

Overview of Customs Act

Raising revenue for Central Government is the main but not the only purpose of Customs Act. Customs Act is used to (*a*) regulate imports and exports (*b*) protect Indian industry from dumping (*c*) collect revenue of customs duty. In addition, provisions of Customs Act are used for other Acts like Foreign Trade (Development and Regulation) Act, Foreign Exchange Management Act (FEMA) etc. Customs Law is covered under various Acts, rules, regulations and notifications, as follows :

Customs Act, 1962 - This is the main Act, which provides for levy and collection of duty, import/export procedures, prohibitions on importation and exportation of goods, penalties, offences etc.

Customs Tariff Act, 1975 - The Act contains two schedules - Schedule 1 gives classification and rate of duties for imports, while schedule 2 gives classification and rates of duties for exports. In addition, the CTA (Customs Tariff Act) makes provisions for duties like additional duty (CVD), preferential duty, anti-dumping duty, protective duties etc.

Rules under Customs Act - Under Section 156 of Customs Act, 1962, Central Government has been empowered to make rules, consistent with provisions of the Act, to carry out the purposes of the Act. Various rules have been framed under these powers Major among these are : *Customs Valuation Rules, 1988* : for valuation of imported goods for calculating duty payable; *Customs and Central Excise Duties Drawback Rules, 1995* : mode of calculating rates of duty drawback on exports; *Baggage Rules, 1998* : rules and allowances for bringing in baggage from abroad by Indians and tourists; *Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996* : provides procedure to be followed when goods are imported for export purposes; **Other rules are** : Rules regarding notified goods, specified goods, determination of additional duty for dumping, determination of origin of goods etc.

Regulations under Customs Act - Under Section 157 of Customs Act, 1962, Board (CBE&C) has been empowered to make regulations, consistent with provisions of the Act, to carry out the purposes of the Act. Various regulations have been framed under these powers Major among these are : *Project Import Regulations, 1986* : procedures for project imports; Customs House Agents Licensing Regulations: Regulation of CHA. **Other regulations** regarding transshipment of goods, Import and Export report, Import and Export manifest, manufacture in warehouse, shipping bill and bill of export (form) etc. have been made.

In *Sukhdev Singh* v. *Bhagatram Sardar Singh* (1975) 1 SCC 421 = AIR 1975 SC 1331 (SC Constitution Bench), it was held that regulations framed under statutory provisions would have the force of law.

Distinction between rules and regulations - Distinction between rules and regulations under Customs Act is that authority to make rules is with Central Government u/s 156 of Customs Act, while authority to make regulations is with CBE&C (Board) u/s 157 of Customs Act. Rules have to be placed before Parliament, while regulations framed by CBE&C are not required to be placed before Parliament. However, it may be noted that both rules and regulations have statutory force. Both are 'subordinate legislations' and are legally valid and enforceable. Both Rules and Regulations are made to carry out the purposes of Act.

Notifications under Customs Act - Various Sections authorise Central Government to issue notifications. The main are : Section 25(1) to grant partial or full exemption from duty and Section 11 to prohibit import or export of goods. *Others are* : - specifying notified goods (Section 11B), specifying specified goods (Section 11-I) etc.

Board Circulars– CBE&C is empowered u/s 151A of Customs Act to issue, for purpose of uniformity in classification of goods or with respect to the levy of duty thereon, issue such instructions and directions to officers of customs and they are required to observe and follow such orders, instructions and directions of Board. CBE&C issues circulars giving various instructions/prescribing various procedures etc. Normally, these instructions should be followed.

Customs Manual, 2001 - Customs Manual, 2001 was released by CBE&C in September, 2001. The Manual gives an overview of Customs Law and Procedures. It is not stated that the Customs Manual is issued under any provision of Customs Act or Rules. However, normally, instructions in Customs Manual, 2001 should be followed.

Public Notices – Often, Commissioners of Customs issue Public Notices. Often they just forward the Board circulars, but sometimes, public notices for local requirements are also issued.

Nature of Customs Duty

Entry 83 to List I - (Union List) of Seventh Schedule to Constitution reads 'Duties of customs including export duties'. Thus, import and export duty is a Union subject and power to levy is derived from Constitution. Section 12 of Customs Act, often called *charging Section*, provides that duties of customs shall be levied at such rates as may be specified under 'The Customs Tariff Act, 1975', or any other law for the time being in force, ***on goods imported into, or exported from, India***.

Customs Duty is leviable on free replacements and free supplies also - Customs duty is payable on replacement of parts provided free of cost during warranty period even if duty was paid on parts originally supplied - *New Video Ltd.* v. *CC* - (1996) 87 ELT 509 (CEGAT).

Taxable Event for Import duty - Goods become liable to import duty or export duty when there is '*import into, or export from India*'.

As per Section 2(18), 'export' with its grammatical variations and cognate expressions, means taking out of India to a place outside India.

As per Section 2(23), 'import' with its grammatical variations and cognate expressions, means bringing into India from a place outside India. In *Gramophone Company of India* v. *Birendra Bahadur Pandey* - AIR 1984 SC 667, it was held that 'import' included goods imported for transit across to Nepal.

Section 2(27) of Customs Act defines 'India' as inclusive of territorial waters Hence, it was thought that 'import' is complete as soon as goods enter territorial water. Similarly, export is complete only when goods cross territorial waters There were conflicting judgments of High Courts.

Finally, in *Kiran Spinning Mills* v. *CC* 1999(113) ELT 753 = AIR 2000 SC 3448 = 2000 AIR SCW 2090 (SC 3 member bench), it has been held that import is completed only when goods cross the customs barrier. The taxable event is the day of crossing of customs barrier and not on the date when goods landed in India or had entered territorial waters In the case of goods which are in the warehouse the customs barrier would be crossed when they are sought to be taken out of the customs and brought to the mass of goods in the country.

In *Garden Silk Mills Ltd*. v. *UOI* 1999 AIR SCW 4150 = 1999(113) ELT 358 = AIR 2000 SC 33 [SC 3 member bench - same bench which passed judgment in *Kiran Spinning Mills (Supra)*], it was held that import of goods in India commences when they enter into territorial waters but continues and is completed when the goods become part of the mass of goods within the country. The taxable event is reached at the time when the goods reach customs barrier and bill of entry for home consumption is filed.

Though there is slight contradiction between the SC judgments, it can be said that *'mixing up with mass of goods in the country'* after crossing customs barrier is the *'taxable event'* for customs duty on imports.

Taxable event in case of warehoused goods - In case of warehoused goods, the goods continue to be in customs bond. Hence, 'import' takes place only when goods are cleared from the warehouse - confirmed in *UOI* v. *Apar P Ltd.* 1999 AIR SCW 2676 = 112 ELT 3 = 1999(6) SCC 118 = AIR 1999 SC 2515 (SC 3 member bench).

Taxable event in case of exports

In *UOI* v. *Rajindra Dyeing and Printing Mills* 2005 (180) ELT 433 (SC), it has been held that export is complete when goods cross territorial waters of India. If ship sinks within territorial waters, export is not complete

and hence duty drawback is not payable. In *CC* v. *Sun Exports* 35 ELT 241 = 71 STC 149 (SC), it was held that export is complete once the goods leave Indian waters and property passes to purchasers. Even if goods return due to Engine trouble, duty drawback is payable.

In *B K Wadeyar* v. *Daulatram Rameshwarlal* AIR 1961 SC 311 = 11 STC 757 (SC), it was held that export is complete when ship leaves territorial waters of India.

Note that even if export duty is collected before ship leaves the port, that does not mean that taxable event has occurred. Duty can be collected in advance also.

Territorial Waters and customs waters

Territorial waters means that portion of sea which is adjacent to the shores of a country. On 22nd March, 1956, President of India had issued a proclamation that territorial waters of India shall extend upto 6 nautical miles from the base line. This was extended to 12 nautical miles w.e.f. 30th Sept., 1967. Later, 'Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zone Act, 1976' was passed.

Section 3 of the 'Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zone Act, 1976' specifies that territorial water extend upto 12 nautical miles from the base line on the coast of India and include any bay, gulf, harbour, creek or tidal river. (1 nautical mile = 1.1515 miles = 1.853 Kms). Sovereignty of India extends to the territorial waters and to the seabed and subsoil underlying and the air space over the waters

'*Exclusive economic zone*' extends to 200 nautical miles from the base-line. In this zone, the coastal State has exclusive rights to exploit it for economic purposes like constructing artificial islands (for oil exploration, power generation etc.), fishing, mineral resources and scientific research. However, other countries have right of navigation and over-flight rights. Other countries can lay submarine cables and pipelines with consent of Indian Government. Such consent may be declined for protecting interest of India. Section 7 of Territorial Waters - . - . - . - Act, 1976 has made similar provisions and thus, these provisions have been adopted in India too.

Beyond 200 nautical miles, the area is 'High Seas', where all countries have equal rights. These high seas are reserved for peaceful purposes. Any Country can use it for navigation, over-flight, laying submarine cables and pipes, fishing, construction of artificial islands permitted under international law and for scientific research.

'*Continental shelf*' is an area of relatively shallow seabed between the shore of a continent and the deeper ocean. [Concise Oxford Dictionary, 1990 edition].

Extension of Income Tax Act, Customs Act, Service Tax and Excise Act to designated areas in EEZ – Customs Act has been extended to designated areas in Continental Shelf and Exclusive Economic Zone of India vide notification No. 11/87-Cus dated 14-1-1987 and 64/97-Cus dated 1-12-1997. Similarly, Central Excise Law and Service Tax (Chapter V of Finance Act, 1994) have been extended to designated areas in Continental Shelf and Exclusive Economic Zone of India vide notification No 166/87-CE dated 11-6-1987 and 1/2002-ST dated 1-3-2002 respectively.

Income Tax Act was extended to continental shelf and exclusive economic zone by issuing notification No. G.S.R. 304(E) dated 31-3-1983 [142 ITR (ST) 11] u/ss 6(6)(a) and 7(a) of Territorial Waters, Continental Shelf - - - - Act, 1976.

Indian Customs Waters – As per Section 2(28) of Customs Act, 'Indian Customs Waters' means the waters extending into the sea up to the limit of contiguous zone of India under Section 5 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and includes any bay, gulf, harbour, creek or tidal river. As per provisions of that Act, contiguous zone of India comes immediately after territorial waters The outer limit of contiguous zone is 24 nautical miles from the nearest point of base line. Thus, area beyond 12 nautical miles and upto 24 nautical miles is '*contiguous zone of India*'. The Central Government has powers to take measures in this area for security of India and immigration, sanitation, customs and other fiscal matters [Section 5(4) of Territorial Waters - . - . - . - Act, 1976].

Thus, 'Indian Customs Waters' extend upto 12 nautical miles beyond territorial waters

Significance of definition of 'Indian Customs Waters' is as follows –

- Customs Officer has powers to arrest a person in India or within Indian customs waters [Section 104].
- Customs Officer has powers to stop and search any vessel in India or within the Indian Customs waters [Section 106]. If such vessel does not stop, it can be fired upon. If a vessel does not stop, it can be confiscated [Section 115(1)(c)].
- A vessel which is within Indian customs waters or which has been in Indian Customs Waters can be confiscated which is constructed or fitted in any manner for purpose of concealing goods. [Section 115(1)(a)].

Thus, powers of Customs Officers extend upto 12 nautical miles beyond territorial waters

'Goods' under Customs Act

Customs duty is on 'goods' as per Section 12 of Customs Act. The duty is payable on goods belonging to Government as well as goods not belonging to Government.

Section 2(22) gives inclusive definition of 'goods' as follows - 'Goods' includes (*a*) vessels, aircrafts and vehicles (*b*) stores (*c*) baggage (*d*) currency and negotiable instruments and (*e*) any other kind of movable property.

Dutiable Goods - Section 2(14) define 'dutiable goods' as any goods which are chargeable to duty and on which duty has not been paid. As per Section 2(15), 'duty' means a duty of customs leviable under Customs Act.

Imported Goods - Section 2(25) defines 'imported goods' as any goods brought in India from a place outside India, but does not include goods which have been cleared for home consumption. Thus, once goods are cleared by customs authorities from customs area, they are no longer 'imported goods'. (Though in common discussions, goods cleared from customs are also called 'imported goods').

Export Goods – As per Section 2(19) of Customs Act, 'export goods' means any goods which are to be taken out of India to a place outside India. Goods brought near customs area for export purpose will be '***export*** goods'. Note that once goods leave Indian territory, Indian laws have no control over them and hence the term '*exported* goods' has ***not been*** used or defined.

9.2 Classification for Customs and rate of customs duty

Classification is as per Central Excise Tariff Act for Central Excise and as per Customs Tariff Act for Customs. Both are based on HSN. Customs Tariff Act, 1975 earlier contained schedule based on CCCN

- Customs Cooperation Council Nomenclature. This was replaced by schedule based on Harmonised Commodity Description and Coding system w.e.f. 28th Feb., 1986. Central Excise Tariff Act, based on HSN was also brought into force on same day.

Though both tariffs are based on HSN, they are not copies of HSN. Many changes have been made to suit requirements of customs and excise. Customs tariff and excise tariffs are also not identical and both vary from each other. However, broad Sections and chapter headings are same.

Rate of customs duty applicable - Provisions in respect of rate of duty are as follows:

Basic Customs duty - The rate of customs duty applicable will be as provided in Customs Act, subject to exemption notifications, if any, applicable. In case of imports from preferential area, the preferential rate is applicable, if mentioned in the Tariff.

Rate for additional duty - Rate for additional duty (CVD) will be as mentioned in Central Excise Tariff Act, subject to any general exemption notification. Any specific exemption notification (e.g. exemption to goods manufactured by SSI unit or goods manufactured without aid of power) is not considered while calculating CVD.

Rate when goods consist of articles liable to different rates of duty - Often goods may be imported in sets. One set may contain goods under different Chapter headings and different rates may be applicable. In such cases, if the importer is able to provide breakup of the total price in respect of different goods, with sufficient evidence, the goods will be charged to different rates of duty as applicable to each type of goods. If importer is unable to give breakup with suitable evidence, the duty will be charged at the highest rate. Even articles exempt from duty will be chargeable at the highest rate, if breakup is not available (Section 19 of Customs Act).

Emergency Power to increase duty - Central Government has been granted emergency powers to (*A*) levy or increase export duty - Section 8 of Customs Tariff Act (*B*) Levy or increase import duty - Section 8A of Customs Tariff Act.

Such increase should be by way of a notification. Such notification should be placed immediately before Parliament if it is in session. If it is not in session, it should be placed within seven days when the session starts. The notification has to be approved within 15 days. It will be effective as approved by Parliament, but actions already taken are not affected. - - There is no ceiling to which duty can be increased. Thus, customs duty can be increased without any ceiling under this provision. - - Even when notification is approved, it can be rescinded by issuing a notification.

9.2 Type of Custom Duties

Basic Customs Duty

Basic customs duty is levied under Section 12 of Customs Act. Normally, it is levied as a percentage of Value as determined under Section 14(1). The rates vary for different items, but general rate on non-agricultural goods at present is 10% w.e.f. 1-3-2007 (It was 12.5% during. 1-3-2006 to 28-2-2007).

To protect Indian agriculture and Indian automobile sector, duties on some articles is higher.

Duty on liquor (including wine) is also high i.e. 150%. CVD and education cess on liquor and wine has been exempted w.e.f. 3-7-2007 as per WTO agreement.

Custom duty rates of baggage are discussed in a separate chapter.

Total duty payable generally comes to 31.70% - It is said that the intention is to bring it down to 'Asian' level of 8%. It is not clear what is meant by 'Asian' level of 8%, but factually, the total customs duty payable is much higher i.e. 31.70% as given below.

Assessable value = CIF Value of imported goods converted into Rupees at exchange rate specified in notification issued by CBE&C plus landing charges 1% (plus some additions often arbitrarily and whimsically made by customs).

Calculation of duty payable is as follows -

		Duty %	Amount	Total Duty
(A)	Assessable Value Rs. 10,000		10,000.00	
(B)	Basic Customs Duty	10	1,000.00	1,000.00
(C)	Sub-Total for calculating CVD '(A+B)'		11,000.00	
(D)	CVD 'C' x excise duty rate	14	1,540.00	1,540.00
(E)	Education cess of excise - 2% of 'D'	2	30.80	30.80
(F)	SAH Education cess of excise - 1% of 'D'	1	15.40	15.40
(G)	Sub-total for edu cess on customs 'B+D+E+F'		2,586.20	
(H)	Edu Cess of Customs - 2% of 'G'	2	51.72	51.72
(I)	SAH Education Cess of Customs - 1% of 'G'	1	25.86	25.86
(J)	Sub-total for Spl CVD 'C+D+E+F+H+I'		12,663.78	
(K)	Special CVD u/s 3(5) - 4% of 'J'	4	506.55	506.55
(L)	Total Duty			**3,170.33**
(M)	Total duty rounded to	Rs		3,170

Notes – Buyer who is manufacturer, is eligible to avail Cenvat Credit of D, E, F and K above.
A buyer, who is service provider, is eligible to avail Cenvat Credit of D, E and F above. .
A trader who sells imported goods in India after charging
Vat/sales tax can get refund of Special CVD of 4% i.e. 'K' above

Additional Customs Duty u/s 3(1) (CVD)

'Additional Customs Duty' is often called 'Countervailing Duty' (CVD). Additional duty is levied under Section 3(1) of Customs Tariff Act.

This duty is equal to excise duty levied on a like product manufactured or produced in India. If like article is not produced or manufactured in India, the excise duty that would be leviable on that article had it been produced in India is the base. If the product is leviable with different rates, then highest rate among those rates is to be considered. The duty is leviable on Value of goods plus customs duty payable.

Thus, assume that Customs Value of goods is Rs. 10,000, customs duty is 20% and excise duty on similar goods manufactured in India is 16%. Education cess is 2%. SAH education cess is 1%. Then, basic customs duty is Rs. 2,000. Additional customs duty (CVD) is payable on value plus basic customs duty, i.e. on Rs. 12,000 [Rs. 10,000+2,000]. Thus, CVD payable is Rs. 1,977.60 (16.48% of Rs. 12,000).

As per Section 3(7) of Customs Tariff Act, this duty is in addition to any other duty imposed under Customs Act or any other law. As per Section 3(8), all provisions of Customs Act and Rules, including those relating to drawbacks, refunds and exemptions will apply to this duty.

Calculation of CVD - CVD is equal to excise duty levied on a like product manufactured or produced in India. If like article is not produced or manufactured in India, the excise duty that would be leviable on that article had it been produced in India is the base. If the product is leviable with different rates, then highest rate among those rates is to be considered.

Mode of Calculation of CVD – CVD is payable on Assessable Value [as determined u/s 14(1) of Customs Act or tariff value fixed u/s 14(2) of Customs Act] plus basic customs duty chargeable u/s 12 of Customs Act plus any other sum chargeable on that article under any law in addition to, and in the same manner as duty of customs (e.g. NCCD of Customs).

However, while calculating CVD, following duties are not to be considered - Safeguard duty u/ss 8B and 8C of Customs Tariff Act * Countervailing duty, if any, u/s 9 of Customs Tariff Act * Anti-dumping duty payable u/s 9A of Customs Tariff Act * Customs portion of education Cess and SAH education Cess on imported goods * CVD itself which is payable u/s 3(1) * Additional Duty payable u/ss 3(3) and 3(5) of Customs Tariff Act [Section 3(2) of Customs Tariff Act].

In other words, CVD is payable on assessable value plus basic customs duty plus NCCD of customs. While calculating CVD, Anti Dumping Duty, education cess of customs, SAH education cess of customs and safeguard duty is not required to be considered.

CVD is not payable on anti-dumping duty – view confirmed in *Tonira Pharma* v. *CCE* (2007) 208 ELT 38 (CESTAT 2 v. 1 order).

CVD is not Customs Duty - CVD is leviable under Section 3(1) Customs Tariff Act, while customs duty is levied u/s 12 of Customs Act. Thus, these are two separate independent duties under different statutes. However, u/s 3(8) of Customs Tariff Act, the provisions of Customs Act regarding recovery, payment, drawbacks, exemption, refunds, appeals etc. are applicable to Additional Customs Duty (CVD).

Rate of CVD in case of alcoholic liquor – CVD is payable on alcoholic liquor imported. Additional duty is leviable even in case of goods chargeable to State Excise duty. - *Haryana Distillery* v. *CC* - 1992 (62) ELT 773 (CEGAT) (*alcoholic beverages are chargeable to State Excise)*

However, since alcoholic liquor is a State subject, excise duty varies from State to State. This was creating problems in imposing CVD in case of alcoholic liquor for human consumption. Hence, in case of alcoholic liquor, rate of additional duty (CVD) will be determined by Central Government by issuing a notification, having regard to excise duty leviable on like alcoholic liquor in different States. – *proviso* to Section 3(1) of Customs Tariff Act, 1975. Under these powers, rates of CVD were prescribed vide notification No. 32/2003-Cus dated 1-3-2003 (earlier No. 54/2001-Cus dated 11-5-2001).

The rate of CVD is Nil w.e.f. 3-7-2007. Education cess is also exempted.

No CVD on scrap – In *Karnataka Chemical Indus* v. *CC* (2005) 183 ELT 207 (CESTAT), it has been held that copper wire scrap is not 'manufactured' . These are not excisable and hence CVD cannot be charged.

Valuation for CVD when goods are under MRP provisions – In respect of some consumer goods, excise duty is payable on basis of MRP (Maximum Retail Price) printed on the carton as per Section 4A of Central Excise Act. If such goods are imported, duty will be payable on basis of MRP printed on the packing, i.e. at MRP specified on the packing carton less abatement as permissible u/s 4A of Central Excise Act. [proviso to Section 3(2)(ii) of Customs Tariff Act].

Often MRP label is affixed in docks to comply with the requirement. As per Section 2(f)(iii) of Central Excise Act (amended w.e.f. 14-5-2003), this will amount to 'manufacture' and excise duty may become payable, if product is covered under MRP provisions. Of course, Cenvat of CVD will be available.

Education cess on customs duty

An education cess of customs has been imposed on imported goods w.e.f. 9-7-2004. The cess will be 2% of the aggregate duty of customs. However, education cess will not be payable on (a) Special CVD (SAD) payable u/s 3(5) of Customs Tariff Act (aa) Safeguard duty under Sections 8B and 8C (b) Countervailing duty under Section 9 and (c) Anti Dumping Duty under Section 9A of the Customs Tariff Act (d) SAH education cess and (d) Education cess itself on imported goods.

Secondary and Higher Education Cess

In addition to existing education cess, an education Cess of 1% of the total duties of customs has been imposed on imported goods vide Section 136 read with Section 139 of Finance Act, 2007 (clauses 126 read with 129 of Finance Bill, 2007 upto 10-5-2007). The duty is payable w.e.f. 1-3-2007. The proceeds from this cess shall be utilized to finance secondary and higher education. The manner of levy of this cess would be the same as in the case of Education Cess of 2% imposed in budget 2004.

SAH education cess will not be payable on (a) Special CVD (SAD) payable u/s 3(5) of Customs Tariff Act (b) Safeguard duty under Sections 8B and 8C (c) Countervailing duty under Section 9 and (d) Anti Dumping Duty under Section 9A of the Customs Tariff Act (e) education cess and (e) SAH Education cess itself on imported goods [Section 139(1) of Finance Act, 2007].

Additional Duty under Section 3(3)

In addition to Additional Duty under Section 3(1) of Customs Tariff Act which is chargeable on all goods, further additional duty can be levied by Central Government to counter-balance excise duty leviable on raw materials, components etc. similar to those used in production of such article [Section 3(3) of Customs Tariff Act].

As per Section 3(7) of Customs Tariff Act, this duty is in addition to any other duty imposed under Customs Act or any other law. As per Section 3(8), all provisions of Customs Act and Rules, including those relating to drawbacks, refunds and exemptions will apply to this duty.

This levy has use when goods manufactured indigenously is exempt from excise duty. In such case, the indigenous manufacturer will be loser to the extent of duty paid on inputs. This duty paid on his inputs is lost as final product is exempt from duty. This becomes additional cost to indigenous manufacturer. On the other hand, the imported goods do not have to pay CVD as the product is exempt from duty. The foreign supplier has not paid any excise duty on his inputs. He gets cost advantage to that extent. Section 3(3) is intended to offset such cost advantage to foreign supplier.

Additional Duty under Section 3(5) (Special CVD - SAD)

Section 3(5) of Customs Tariff Act empowers Central Government to impose additional duty. This is in addition to Additional Duty leviable u/ss 3(1) and 3(5) of Customs Tariff Act.

Provision for this duty has been made w.e.f. 1-3-2005.

As per Section 3(7) of Customs Tariff Act, this duty is in addition to any other duty imposed under Customs Act or any other law. As per Section 3(8), all provisions of Customs Act and Rules, including those relating to drawbacks, refunds and exemptions will apply to this duty.

The Additional Duty u/s 3(5) can be imposed by issuing a notification. Such tax cannot exceed 4% of value of that Article.

Special CVD (SAD) - Purpose of the Additional Duty is to counter-balance sales tax, VAT, local tax or other charges leviable on articles on its sale, purchase or transaction in India.

The obvious intention is to provide level playing field to manufacturers in India who are manufacturing similar goods. Hence, it is termed as 'Special CVD" or 'SAD' (Special Additional Duty).

Explanation to Section 3(5) makes it clear that even if imported article was not sold in India, tax will be leviable on the basis of sales tax, VAT or other tax that would have been payable if the goods were sold, purchased or transported in India.

Value for purpose of Special CVD (SAD) - As per Section 3(6) of Customs Tariff Act, value of Article for purpose of levy of this Additional Duty is aggregate of – (i) Assessable Value determined u/s 14(1) of Customs Act or Tariff Value determined u/s 14(2) of Customs Act *(ii-a)* Basic customs duty payable u/s 12 of Customs Act and *(ii-b)* Any sum chargeable on that article in the same manner as duty of customs [This will include CVD payable u/s 3(1) and additional duty payable u/s 3(3) of Customs Tariff Act].

However, 'value' will not include following – (a) Additional Duty payable u/s 3(5) (b) Safeguard duty payable u/ss 8B and 8C (c) Countervailing duty payable u/s 9 *and* (d) Anti dumping duty u/s 9A of Customs Tariff Act.

Levy of Special CVD (SAD) on all products - Additional Duty u/s 3(5) of Customs Tariff Act was imposed w.e.f. 1-3-2005 on ITA (Information Technology Agreement) bound items and on specified inputs/ raw materials for manufacture of electronic/information technology items. This duty was not to be charged on information technology software, vide Notification No. 19/2005-Cus dated 1-3-2005 (which is rescinded w.e.f. 1-3-2006).

Refund of Special CVD of customs to Traders – Traders selling imported goods in India after charging sales tax/Vat can claim refund of special CVD from customs department – Notification No. 102/2007-Cus dated 14-9-2007. The dealer (trader) (if he is registered with Central Excise and is issuing Cenvatable Invoice) selling such imported goods must mention in his invoice that the buyer will not be able to avail Cenvat credit of such duty. This is required if he is claiming refund of the special CVD. If he is not claiming refund, obviously, such remark is not required.

A manufacturer using these goods in his manufacture can avail Cenvat credit of this duty. Thus, he gets credit through central excise route.

Protective Duties

'Tariff Commission' has been established under Tariff Commission Act, 1951. If the Tariff Commission recommends and Central Government is satisfied that immediate action is necessary to protect interests of Indian industry, protective customs duty at the rate recommended may be imposed under Section 6 of Customs Tariff Act. This notification should be introduced in Parliament in next session by way of a Bill. (or in the same session if Parliament is in session). If the Bill is not passed within six months of introduction in Parliament, the notification ceases to have force, but action already taken remains valid. The protective duty will be valid till the date prescribed in the notification. The protective duty can be rescinded, reduced or increased by a notification. Such notification should also be placed before Parliament for approval in next session. [This duty does not seem to be compatible with WTO regulations and hence not being used]

Countervailing duty on subsidised goods

If a country or territory pays any subsidy (directly or indirectly) to its exporters for exporting goods to India, Central Government can impose Countervailing duty upto the amount of such subsidy under Section 9 of Customs Tariff Act. If the amount of subsidy cannot be ascertained, provisional duty can be collected and after final determination, difference may be refunded. Such imposition should be by way of a notification.

Provisions of Customs Act in respect of date of determination of rate of duty, non-levy, short-levy, refunds, interest, offences, appeal and penalties shall apply to this duty [Section 9(7A) of Customs Tariff Act].

Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidised Articles and for determination of Injury) Rules, 1995 [*Customs Notification No. 1/95 (N.T.) dated 1-1-95* provide detailed procedure for determining the injury in case of subsidised articles.]

Anti Dumping Duty on dumped articles

Often, large manufacturer from abroad may export goods at very low prices compared to prices normally prevalent in export market. Such dumping may be with intention to cripple domestic industry ***or*** to dispose of their excess stock. This is called 'dumping' and is an unfair trade practice. In order to avoid such dumping and to protect domestic industry, Central Government can impose, under Section 9A of Customs Tariff Act, anti-dumping duty, if the goods are being sold at less than its normal value. Levy of such anti-dumping duty is permissible as per WTO agreement. Anti dumping action can be taken only when there is an Indian industry producing 'like articles'.

No CVD on anti dumping duty - Anti Dumping Duty and Safeguard Duty is not required to be considered while calculating CVD – view confirmed in *Tonira Pharma* v. *CCE* (2007) 208 ELT 38 (CESTAT 2 v. 1 order).

No education cess and SAHE cess on anti-dumping duty – Education cess and SAH education cess is not payable on anti-dumping duty.

Margin of Dumping - '*Margin of dumping*' means the difference between normal value and export price (i.e. the price at which these goods are exported). [Section 9A(1)(a)].

'*Normal Value*' means comparable price in ordinary course in trade, for like article, when destined for consumption in the exporting country or territory. If such price is not available or not comparable (a) comparable representative price of like article exported from exporting country or territory to appropriate third country or (b) cost of production plus reasonable profit, can be considered [Section 9A(1)(c) of Customs Tariff Act]. The 'normal value' is to be determined as per rules.

'*Export Price*' means the price at which goods are exported. If the export price is unreliable due to association or compensatory arrangement between exporter and importer or a third party, export price can be constructed (revised) on the basis of price at which the imported articles are first sold to independent buyer or according to rules made for determining margin of dumping. [Section 9A(1)(b)].

Margin of dumping is determined on basis of weighted average of 'normal value' and the 'export price' of product under consideration.

Quantum of dumping duty - The anti-dumping duty will be dumping margin or injury margin, *whichever is lower*. 'Injury margin' means difference between fair selling price of domestic industry and landed cost of imported product. The landed cost will include landing charges of 1% and basic customs duty. Thus, only anti-dumping duty enough to remove injury to domestic industry can be levied.

For example, if normal value in exporting country is Rs. 11 and export price is Rs. 8, dumping margin is Rs. 3. If landed cost is Rs. 9 and fair selling price of domestic industry is Rs. 10, then injury margin is Re 1/-. Hence, anti-dumping duty of only Re 1 can be imposed.

An importer imported Description of goods: Mulberry Raw Silk (not thrown) (HS Code 5002 00) from People's Republic if China. CIF value was US $ 20,000 and quantity 1,000 Kgs. Exchange rate was 1 US $ = Rs. 44 on date of presentation of Bill of Entry. Customs Duty rates are – (i) Basic Customs Duty 30% (ii) Education Cess 2% (iii) SAH Education cess - 1%. There is no excise duty payable on these goods if manufactured in India. As per Notification No. 106/2003-Cus dated 10-7-2003, anti-dumping duty has been imposed on these goods imported from China, manufactured by any producer in People's Republic of China. The anti-dumping duty will be equal to difference between amount calculated @ US $ 27.97 per Kg and 'landed value' of goods. Compute Customs Duty liability & anti-dumping liability.

Answer – a) Computation of Customs duty:-

Total CIF Price	US $	20,000
CIF @ Rs. 44 = 1 US $	Rs	8,80,000.00
Add – Landing charges @ 1%	Rs	8,800.00
Assessable Value	Rs	8,88,800.00
Basic duty @ 30%	Rs	2,66,640.00
Education Cess @ 2% on 2,66,640.00	Rs	5,332.80
SAH education Cess 1%		2,666.40
Total Customs Duty payable (Basic + Education Cess)	Rs	2,74,639.20
Rounded to	Rs	2,74,639.00

b) Computation of landed value

Assessable Value Under Customs Act,	Rs	8,88,800.00
Add: All Duties of Customs	Rs	2,74,639.00
Landed Value as per Anti-Dumping Notification	Rs	11,63,439.00

c) Computation of anti-dumping duty

Rate of Silk Yarn as per Anti Dumping Notification.(US $ 27.97 per Kg)	US $	27,970
Value @ Rs. 44 = 1 US $	Rs	12,30,680.00
Less:		
Landed Value as per Anti-Dumping Notification	Rs	11,63,439.00
Anti Dumping Duty payable	Rs	67,241.00

Thus, anti-dumping duty payable will be Rs. 67,241.

Safeguard duty

Central Government is empowered to impose 'safeguard duty' on specified imported goods if Central Government is satisfied that the goods are being imported in large quantities and under such conditions

that they are causing or threatening to cause serious injury to domestic industry. Such duty is permissible under WTO agreement. The only condition under WTO is that it should not discriminate between imports from different countries having Most Favoured Nation (MFN) status.

Safeguard duty is a step in providing a need based protection to domestic industry for a limited period, with ultimate objective of restoring free and fair competition. Safeguard duty is targeted at remedying or preventing serious injury to domestic industry with a view to making it competitive and to enable it to stand on its own.

Government has to conduct an enquiry and then issue a notification. [Section 8B(1) of Customs Tariff Act]. The duty, once imposed, is valid for four years, unless revoked earlier. This can be extended by Central Government, but total period of 'safeguard duty' cannot be more than ten years [Section 8B(4)]. The duty is in addition to any other customs duty being imposed on the goods. [Section 8B(3)].

Product specific safeguard duty on imports from China - Besides general provisions in respect of Safeguard duty (u/s 8B as above), special provisions of safeguard duty is made in respect of goods imported from Peoples Republic of China by inserting Section 8C to Customs Tariff Act w.e.f. 11-5-2002. Central Government is empowered to impose 'product specific safeguard duty' on any article imported from China, if the quantities are increased and such import is causing or threatening to cause market disruption to domestic industry. [Section 8C(1)].

Provisional duty can be imposed on basis of preliminary finding. However, if on final determination, it is found that the imports have not caused market disruption to a domestic industry, the safeguard duty provisionally collected is refundable.

Such product specific safeguard duty is not payable in respect of imports by EOU/SEZ units unless specifically made applicable to them . [Section 8C(3)].

NCCD of Customs

A 'National Calamity Contingent Duty' (NCCD) of customs has been imposed vide Section 134 of Finance Act, 2003, on *pan masala*, chewing tobacco and cigarettes.

Export duty

Since Government actively encourages export, there is export duty on very few products. Articles on which export duty is leviable are given in second schedule to Customs Tariff. At present, 25% export duty is imposed on luggage leather, 15% Export Duty is levied only on hides, skins and leather, and duty of 10% is levied on snake skins and lamb skins.

Export duty has been imposed on the following w.e.f. 1-3-2007 - :(1) Iron ores (whether in form of lumps or fines) and concentrates, all sorts @ Rs. 300 per metric tonne. (2) Chromium ores (whether in form of lumps or fines) and concentrates, of all sorts @ Rs. 2000 per metric tonne:

There is no export duty on any other product.

Refund of Export duty - Export duty is charged on very few items but Section 26 of Customs Act makes provisions for refund of export duty. Export duty is refundable if (*a*) Goods are re-imported within one year (*b*) the goods returned are not 're-sale' and (*c*) refund claim is lodged within six months from date of clearance by Customs Officer for re-importation.

Emergency powers of Central Government to increase or levy export duty. - Section 8 of Customs Tariff Act empowers Central Government to amend second schedule to Customs Tariff (which contains articles on which export duty is leviable) and increase or impose export duty on any product, by issue of a notification. Such notification should be placed before Parliament within 15 days after it assembles.

Cess

Education cess is levied on all imported goods. Similarly, if cess is leviable on goods manufactured or produced in India, corresponding cess will be payable if similar goods are imported. Besides, cess is leviable on export of some specific goods.

Distinction between cess and duty is that cess is a charge levied and collected for specified purposes, while duty (excise duty or customs duty) is for general revenue of Government. Duty is for general revenue purposes, while Cess is for a definite purpose. Cess may be on production of goods or on export of goods.

9.3 Value for purpose of duty on imports

Customs duty is payable as a percentage of 'Value' often called '*Assessable Value*' or '*Customs Value*'. The **Value** may be either (*a*) 'Value' as defined in Section 14(1) of Customs Act or (*b*) Tariff value prescribed under Section 14(2) of Customs Act.

The provisions relating to customs valuation have been completely revamped by introducing new Section 14 w.e.f. 10-10-2007.

Tariff Value - Tariff Value can be fixed by CBE&C (Board) for any class of imported goods or export goods. CBE&C should consider trend of value of such or like goods while fixing tariff value. Once so fixed, duty is payable as percentage of this value. (The percentage applicable is as prescribed in Customs Tariff Act). Fixing tariff value is not permitted under GATT convention. However, the provision of fixing tariff values has been retained.

Tariff value for crude palm oil, RBD Palmolein, palm oil, crude soyabean oil and brass scrap has been fixed by notification No. 36/2001-Cus (NT) dated 3-8-2001.

Customs Valuation on basis of transaction value - New Section 14(1) of Customs Act (effective from 10-10-2007) states that 'value' of imported and export goods will be 'transaction value' of such goods i.e. the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale, subject to such other conditions as may be specified in the rules made in this behalf.

Accordingly Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and Customs Valuation (Determination of Value of Export Goods) Rules, 2007 have been notified effective from 10-10-2007.

Addition to transaction value – *First proviso* to new Section 14(1) states that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid [i.e. as specified in Section 14(1)], any amount that the buyer is liable to pay for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manners specified in the Rules.

Though the *proviso* does not specifically say so, it is obvious that only those expenses which are relating to imported goods alone can be added.

Rate of foreign exchange - Third *proviso* to new Section 14(1) states that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under Section 46, or a shipping bill or bill of export, as the case may be, is presented under Section 50. As per *Explanation* (a) to Section 14(2), the rate of exchange will be determined by CBE&C or ascertained in such manner as CBE&C may direct.

Tariff value - New Section 14(2) empowers CBE&C to fix tariff values of imported goods or export goods by issuing a notification.

Valuation Rules if transaction value is not determinable - If there is no sale or buyer or seller are related or price is not the sole consideration, value of the goods will be determined as per Valuation Rules [Clause (ii) of second proviso to Section 14(1)].

Transaction value at the time and place of importation

Price should be at the time and place of importation. Since the wordings were similar in earlier Section 14, the following case law is still relevant and valid.

Price should be for delivery at the place of importation – Value at the place of importation does not mean that only expenses till goods enter Indian Customs water should be included. Import is an integrated process which culminates when goods land on land-mass of India so that they can be introduced in stream of supplies to form part of mass of goods within the country. Thus, all expenses upto the destination port, including freight, transit insurance, unloading and handling charges are to be included.

Price must be the sole consideration - Price should be sole consideration for sale. If there is other consideration, it should be added to the transaction value.

Price in case of high sea sale

Price relevant for customs valuation u/s 14(1) is the price for delivery at time and place of importation.

In case of high sea sale, price charged by importer to assessee would form the assessable value and not the invoice issued to the importer by foreign supplier. – *National Wire* v. *CC* 2000(122) ELT 810 (CEGAT) * *Godavari Fertilizers* v. *CC* (1996) 81 ELT 535 (CEGAT).

CBE&C vide circular No. 32/2004-Cus dated 11-5-2004 has clarified that the valuation should be on basis of last sale price. Even if there are more than one high sea sales, the last sale price should be taken for purpose of valuation, as that is the price at which final importation has been caused. If importer is unable to produce original invoice, high sea sale contract etc. to establish link, valuation can be done on basis of Valuation Rules.

Rate of Exchange for Customs Valuation

Exchange rate as applicable on *date of presentation of bill of entry* u/s 46, as prescribed by CBE&C (Board) should be considered. As per *Explanation* (a) to Section 14(2) of Customs Act, the rate of exchange will be determined by CBE&C or ascertained in such manner as CBE&C may direct [Till 10-10-2007, the rate was prescribed under earlier Section 14(3)(a) of Customs Act].

This rate is not same as 'Inter Bank Closing Rates' fixed by 'Foreign Exchange Dealers Association' or foreign exchange rate announced by 'Reserve Bank of India'.

The condition of 'grant of entry inwards' is not provided for this purpose. Bill of Entry can be presented 30 days before expected date of arrival of vessel. If Bill of Entry is presented within that time and even if 'Entry Inward' is granted subsequently, rate of exchange prevalent on the date of presentation of bill of entry will be considered.

Rate of exchange in case of warehoused goods – Relevant exchange rate for valuation is as in force on date on which bill of entry is presented u/s 46. Bill of Entry is presented u/s 46 of Customs Act either for home consumption or for warehousing. Hence, in case of warehoused goods, exchange rate prevailing on the date on which Bill of Entry is presented u/s 46 of Customs Act is to be considered and *not* when Bill of Entry is presented u/s 68 for clearance from customs warehouse.

WTO Valuation Agreement

Valuation in Customs Act has to be done as per valuation rules. These rules are based on 'WTO Valuation Agreement' (Earlier termed as GATT Valuation Code). *These rules are only for valuation of imported goods and not applicable to export goods.*

Under the WTO Valuation Agreement (earlier GATT code), 'transaction value' i.e. price at which the goods are actually sold is principal yardstick. However, it is not the only criteria for determining 'value' for Customs purposes.

Customs Value – Inclusions

Rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [Rule 9 upto 10-10-2007] provide that following cost and services are to be added, *if these are not already included in the invoice price*. –

- Commission and brokerage, except buying Commission, if not already included in the invoice price [Rule 10(1)(a)(i)].
- Cost of container which are treated as being one with the goods for customs purposes, if not already included in the invoice price [Rule 10(1)(a)(ii)].
- Cost of packing whether labour or materials, if not already included in the invoice price [Rule 10(1)(a)(iii)].
- Materials, components, tools, dies, moulds, and consumables used in production of imported goods, supplied by buyer directly or indirectly, free of charge or at reduced cost, to the extent not already included in price [Rule 10(1)(b)(i), (ii) and (iii)]
- Engineering, development, art work, design work, plans and sketches undertaken elsewhere than in India and necessary for production of imported goods, to the extent not already included in price [Rule 10(1)(b)(iv)].
- Royalties and license fees relating to imported goods that buyer is required to pay, directly or indirectly, as a condition of sale of goods being valued [Rule 10(1)(c)]
- Value of proceeds of subsequent resale, disposal or use of goods that accrues directly or indirectly to seller (i.e. to foreign exporter) [Rule 10(1)(d)]
- All other payments made as condition of sale of goods being valued made directly or to third party to satisfy obligation of seller, to the extent not included in the price [Rule 10(1)(e)]
- Cost of transport upto place of importation [Rule 10(2)(a)]

- Loading, unloading and handling charges associated with delivery of imported goods at place of importation [These are termed as landing charges and are to be taken as 1%] [Rule 10(2)(b)]
- Cost of insurance [Rule 10(2)(c)]

The additions should be on the basis of objective and quantifiable data [Rule 10(3) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (earlier Rule 9(3)].

No other additions - No other addition shall be made to price paid or payable, except as provided for in Rule 10 [Rule 10(4) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (earlier Rule 9(4)]. Interpretative Note to Rule 3 (earlier Rule 4) also clarifies that activities undertaken by buyer other than those for which adjustments are provided in Rule 10 (earlier Rule 9) are not to be added, even though it may be regarded as benefit to the seller.

Commission and Brokerage Includable - Commission and brokerage *except* buying commission is includable [Rule 10(1) (a) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007]

Meaning of 'buying commission' - Buying commission means fees paid by importer to his agent for the service of representing him abroad in purchase of goods being valued [Interpretative Note to Rule 10 (earlier Rule 9) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].

Commission to local agent - Exporters from abroad often appoint local agents in India to promote their sales in India. These agents get commission in Indian Rupees which is paid directly by Indian Importer. (Amount net of commission is paid to foreign exporter in foreign currency.) *This commission is includable for purpose of valuation*.

Value of Goods supplied by buyer to be added - If buyer has supplied goods free of cost or at reduced cost in connection with production or export of goods, these should be included. The goods may be (*a*) materials, components, parts and similar items incorporated in imported goods (*b*) tools, dies, moulds and similar items used in production of imported goods (*c*) consumables used in production of imported goods. [Rule 10(1)(b)(i), (ii) and (iii) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007]

The inclusion is necessary as price of imported goods would certainly have been higher if the parts, etc. were not supplied by buyer. Section 12, which is charging Section, specify that 'Customs duty' is on 'goods'. Section 14 specifies that value of 'such goods ordinarily sold' should be considered. Thus, 'ordinary price' of 'such goods' can be ascertained only after adding cost of such free material supplied by buyer. (*Note that this provision is identical with provision in Central Excise*).

Ascertaining cost of tooling - Cost of tooling supplied by importer to exporter should be ascertained as follows : (*a*) If importer has purchased the tooling from unrelated seller, the purchase cost should be considered *or* (*b*) if he has manufactured the tooling himself, the cost of production of tooling should be considered. If the tooling was previously used by importer, its original cost of purchase or cost of production should be suitably reduced (e.g. by suitably depreciating the cost) to reflect its present cost.

Services/documents/technical know-how supplied by Buyer - Cost of engineering, development, art work, design work and plans and sketches undertaken by buyer which is necessary for production of imported goods is includable, ***only if*** such work is undertaken *outside India*. [Rule 10(1) (b) (iv) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (earlier Rule 9)]

Technical know how related to imported machinery - In *CC* v. *Essar Gujarat Ltd.* (1997) 9 SCC 738 = 88 ELT

609 = 17 RLT 588 (SC 3 member bench), it was held that payment of licence fee and transfer of technology, without which the imported plant could not function, will have to be added to the value of imported plant. However, training charges cannot be included. - wrongly followed in *CC* v. *Himson Textile Engg. Ltd.* 1997(93) ELT 301 (CEGAT).

Royalties and licence fee **-** Royalties and license fees related to imported goods that the buyer is required to pay, directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable, are required to be added in assessable value. [Rule 10(1)(c) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (earlier Rule 9)].

The royalty, license fee or other payment for process is to be added even if the goods may be subjected to such process after importation of the goods – *Explanation* to Rule 10(1)]. There was no parallel explanation in earlier Rule 9(1).

Value of subsequent re-sale if payable to foreign supplier **-** If any part of proceeds of subsequent re-sale of imported goods is payable to seller, directly or indirectly, its cost is includable. (This may happen if a distributor/agent imports goods and once he sells these goods in India, part of sales proceeds may be payable to foreign seller). [Rule 10(1)(d) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (earlier Rule 9)].

Charges for reproduction of goods in India not to be added - Interpretative Note to Rule 10(1)(c) of Customs Valuation Rules makes it clear that charges for right to reproduce the imported goods in India shall not be added.

Sometimes, master copy of software like Page Maker, Norton, Windows are imported and are licensed to be reproduced in India by the foreign owner of these softwares. Charges for reproducing these softwares will not be added.

Other payments made to seller to be added **-** If buyer has made, directly or indirectly, any payment to seller ***as a condition of sale***, such payments should be included for obvious reason that 'ordinary' selling price has been reduced due to such payment. [Rule 10(1)(e) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].

The royalty, license fee or other payment for process is to be added even if the goods may be subjected to such process after importation of the goods – *Explanation* to Rule 10(1)]. There was no parallel explanation in earlier Rule 9(1).

Cost of Transport upto port should be added **-** Cost of transport from exporting country to India is to be added in 'Assessable Value'. [Rule 10(2)(a) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (earlier Rule 9).] In other words, CIF value is the basis for valuation. If the goods are imported by air, the air freight will be very high. Hence, in case air freight is higher than 20% of FOB price of goods, only 20% of FOB price will be added for Customs Valuation purposes.

If cost of transport is not ascertainable, it will be taken as 20% of FOB value of goods. *However, cost of transport within India is not to be considered*.

Barge/lighterage charges includable – In some cases, the ship is not brought upto jetty. Goods are discharged at outer anchorage. This may be for various reasons, e.g. (a) deep draught at port (b) Ports are busy (c) Odd dimensional or heavy lifts or hazardous cargo discharged at anchorage. Charges for brining the goods from outer anchorage are known as 'barging/lighterage charges'.

As per *explanation* to Rule 10(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [inserted w.e.f. 10-10-2007], ship demurrage charges on chartered vessels, lighterage or barge charges are includable.

Freight from port to ICD/CFS not includable in customs value – If goods are imported by sea and stuffed in container for clearance at Inland Container Depot (ICD) or Container freight Station (CFS), cost of freight incurred from port of entry to ICD/CFS is not includable in Assessable Value – Fourth proviso to Rule 10(2) of Customs Valuation Rules [earlier Rule 9]. This is also provided in customs notification No. 151-Cus dated 14-5-1982.

Landing charges to be added - Cost of unloading and handling associated with delivery of imported goods in port (*called landing charges*) shall be added. These will be calculated @ 1% of CIF value, i.e. FOB price plus freight plus insurance. [Rule 10(2)(b) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 – earlier Rule 9].

1% landing charges are towards loading, unloading and handling charges at place of importation, which is landmass of the Country – MF(DR) circular No. 29/2004-Cus dated 13-4-2004.

Ship demurrage on chartered vessels includable w.e.f. 10-10-2007 – As per *explanation* to Rule 10(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 inserted w.e.f. 10-10-2007, ship demurrage on chartered vessels is includable in cost of transport.

Insurance cost should be added - Insurance charges on goods are to be added. [Rule 10(2)(c) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007]. If these are not ascertainable, these will be calculated @ 1.125% of FOB Value of goods.

Additions to customs value on objective basis only - The additions to customs value should be based on objective and quantifiable data. Additions to price should not be on basis of whims or fancy and cannot be arbitrary. If objective and quantifiable data is not available, valuation cannot be made on the basis of transaction value under Rule 4.

No other addition to transaction value can be made except those specified above e.g. if buyer has made expenses for advertising or promoting sales in India or relating to warranties or guarantees, such expenses cannot be added.

9.4 Illustrations of computing Customs Value

Some illustrations will clarify the legal position.

Question : **An importer imports some goods @ 10,000 US $ on CIF basis. Following dollar rates are available on the date of presentation of bill of entry : (*a*) RBI Floor rate : Rs. 43.37 (*b*) Inter-bank closing rate : Rs. 43.38 (*c*) Rate notified by CBE&C under Section 14 (3) (a) (i) of Customs Act : Rs. 43.55 (*d*) rate at which bank has realised the payment from importer : Rs. 43.58. Find the assessable value for customs purposes.**

Answer : The relevant exchange rate is Rs. 43.55. Thus, CIF Value of goods is Rs. 4,35,500. Landing charges [Rule 9 (2) of Customs Valuation Rules] @1% of CIF Value are to be added - i.e. Rs. 4,355. Thus, Customs Value or Assessable Value is Rs. 4,39,855.

Question : **A consignment is imported by air. CIF price is 1,000 US Dollars. Freight is 320 US $. Insurance cost was $ 35. Exchange rate is same as above. Find Value for customs purposes.**

Answer : FOB Price of consignment is $ 645 (1,000 less 320 less 35). Air freight is to be restricted to 20% of FOB Value for purpose of customs valuation. Hence, freight should be considered as 20% of 645 i.e. 129 US $ for valuation. Thus, CIF Value for customs purposes is $ 809 (645 + 129 + 35) i.e. Rs. 35,231.95 @ Rs. 43.55 per dollar. Add 1% of CIF i.e. Rs. 352.32 as landing charges. Thus, Value for Customs purposes will be 35,584.27.

Question : **Customs value (Assessable Value) of imported goods is Rs. 2,00,000. Basic Customs duty payable is 10%. If the goods were produced in India, excise duty payable would have been 16%. Education cess is as applicable. Special CVD is payable at appropriate rates. Find the Customs duty payable. How much Cenvat can be availed by importer, if he is manufacturer?**

Answer :-

		Duty %	Amount	Total Duty
(A)	Assessable Value Rs. 10,000		200,000.00	
(B)	Basic Customs Duty	10	20,000.00	20,000.00
(C)	Sub-Total for calculating CVD '(A+B)'		220,000.00	
(D)	CVD 'C' x excise duty rate	16	35,200.00	35,200.00
(E)	Education cess of excise - 2% of 'D'	2	704.00	704.00
(F)	SAH Education cess of excise - 1% of 'D'	1	352.00	352.00
(G)	Sub-total for edu cess on customs 'B+D+E+F'		56,256.00	
(H)	Edu Cess of Customs - 2% of 'G'	2	1,125.12	1,125.12
(I)	SAH Education Cess of Customs - 1% of 'G'	1	562.56	562.56
(J)	Sub-total for Spl CVD 'C+D+E+F+H+I'		257,943.68	
(K)	Special CVD u/s 3(5) - 4% of 'J'	4	10,317.75	10,317.75
(L)	Total Duty			**68,261.43**
(M)	Total duty rounded to			68,261

Notes – Buyer who is manufacturer, is eligible to avail Cenvat Credit of D, E, F and K above. A buyer, who is service provider, is eligible to avail Cenvat Credit of D, E and F above. A trader who sells imported goods in India after charging Vat/sales tax can get refund of Special CVD of 4% i.e. 'K' above.

9.5 Exclusions from Assessable Value

Interpretative Note to Rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 provide that following charges shall be excluded :

- (a) Charges for construction, erection, assembly, maintenance or technical assistance undertaken *after* importation of plant, machinery or equipment
- (b) Cost of transport *after* importation
- (c) Duties and taxes in India

Other payments from buyer to seller *that do not relate* to imported goods are not part of the customs value.

Erection, testing and commissioning after importation – Erection, testing and commissioning charges are post importation expenses and are not required to be considered for purpose of customs value, as per interpretative note 3 to Customs Valuation Rules.

Demurrage charges payable to port trust – Demurrage payable to port trust as goods were not cleared in time is a post landing event, i.e. after goods are landed in the port. In any case, valuation is required to be done on 'ordinary price'. Demurrage cannot be termed as part of 'normal' or 'ordinary' price of a product and hence not includable.

Declaration of value by Importer

The importer or his agent has to furnish a declaration under Rule 11 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (earlier Rule 10 upto 10-10-2007) disclosing full details relating to value of imported goods. He should also submit other statement, information or documents of the manufacturer of imported goods (if the import is not from manufacturer but through a dealer/agent), if asked by Customs Officer. Similar provision is made in case of export goods in Rule 7 of Customs Valuation (Determination of Value of Export Goods) Rules, 2007.

An importer imported some goods for subsequent sale in India at $ 12,000 on CIF basis. Relevant exchange rate as notified by the Central Government and RBI was Rs. 45 and Rs. 45.50 respectively. The item imported attracts basic duty at 10% and education cess as applicable. If similar goods were manufactured in India, Excise Duty payable as per Tariff is 16% plus education cess of 2%. Spl CVD is payable at applicable rates. Arrive at the Assessable value and the total duty payable thereon. State eligibility of Cenvat credit to buyer.

CIF Value	=	12,000 US $
Total CIF in Rs. @ 45.00 per US $	=	Rs. 5,40,000
Add : Landing Charges @ 1% of CIF	=	Rs. 5,400
(A) Assessable Value	=	Rs. 5,45,400

Calculation of duty payable is as follows -

		Duty %	Amount	Total Duty
(A)	Assessable Value Rs. 10,000		545,400.00	
(B)	Basic Customs Duty	10	54,540.00	54,540.00
(C)	Sub-Total for calculating CVD '(A+B)'		599,940.00	
(D)	CVD 'C' x excise duty rate	16	95,990.40	95,990.40
(E)	Education cess of excise - 2% of 'D'	2	1,919.81	1,919.81
(F)	SAH Education cess of excise - 1% of 'D'	1	959.90	959.90
(G)	Sub-total for edu cess on customs 'B+D+E+F'		153,410.11	
(H)	Edu Cess of Customs - 2% of 'G'	2	3,068.20	3,068.20
(I)	SAH Education Cess of Customs - 1% of 'G'	1	1,534.10	1,534.10
(J)	Sub-total for Spl CVD 'C+D+E+F+H+I'		703,412.41	
(K)	Special CVD u/s 3(5) - 4% of 'J'	4	28,136.50	28,136.50
(L)	Total Duty			**186,148.91**
(M)	Total duty rounded to			186,149

Notes – Buyer who is manufacturer, is eligible to avail Cenvat Credit of D, E, F and K above. A buyer, who is service provider, is eligible to avail Cenvat Credit of D, E and F above. A trader who sells imported goods in India after charging Vat/sales tax can get refund of Special CVD of 4% i.e. 'K' above.

Question - A person makes an unauthorised import of 1000 pieces of ophthalmic rough blanks CIF priced at $ 1 per piece by air from USA (Tariff heading 70.1510). The consignment is liable to be confiscated. Import is adjudicated. AC gives to the party an option to pay fine in lieu of confiscation. It is proposed to impose

fine equal to 50 % of margin of profit. The market price is Rs. 100 per piece of opthalmic rough blank. The rates of duty are - Basic customs - 10%, CVD – 16%, Education Cess – as applicable, Exchange rate is - $ 1= Rs. 45. Compute: i) Amount of fine; ii) Total payment to be made by party to clear the consignment. What is the maximum amount of fine that can be imposed in this case? Quote Section. How much Cenvat can be availed by importer, if he is manufacturer?

Answer - Declared CIF value of goods is $ 1 per piece and price for consignment of 1000 pieces will be $ 1000 (CIF). Rate of exchange is $ 1 = Rs. 45. Hence, CIF value is Rs. 45,000. Add landing charges @ 1%. Hence, total Assessable Value in Rupees will be Rs. 45,450/-. [Rs. 45,000 CIF plus Rs. 450 landing charges]

Calculation of duty payable is as follows -

		Duty %	Amount	Total Duty
(A)	Assessable Value Rs. 10,000		45,450.00	
(B)	Basic Customs Duty	10	4,545.00	4,545.00
(C)	Sub-Total for calculating CVD '(A+B)'		49,995.00	
(D)	CVD 'C' x excise duty rate	16	7,999.20	7,999.20
(E)	Education cess of excise - 2% of 'D'	2	159.98	159.98
(F)	SAH Education cess of excise - 1% of 'D'	1	79.99	79.99
(G)	Sub-total for edu cess on customs 'B+D+E+F'		12,784.17	
(H)	Edu Cess of Customs - 2% of 'G'	2	255.68	255.68
(I)	SAH Education Cess of Customs - 1% of 'G'	1	127.84	127.84
(J)	Sub-total for Spl CVD 'C+D+E+F+H+I'		58,617.69	
(K)	Special CVD u/s 3(5) - 4% of 'J'	4	2,344.71	2,344.71
(L)	Total Duty			**15,512.40**
(M)	Total duty rounded to	Rs		15,512

Notes – Buyer who is manufacturer, is eligible to avail Cenvat Credit of D, E, F and K above. A buyer, who is service provider, is eligible to avail Cenvat Credit of D, E and F above. A trader who sells imported goods in India after charging Vat/sales tax can get refund of Special CVD of 4% i.e. 'K' above.

Total cost to the importer is price plus duty, i.e. Rs. 45,450 plus Rs. 15,512. Thus, total cost to the importer is Rs. 60,962. The market value is Rs. 100 per piece, i.e. Rs. 1,00,000 for the consignment. Hence, his margin of profit is Rs. 39,038. Fine equal to 50% of Margin of profit will be Rs. 19,519.

Hence, total amount payable is – Duty – Rs. 15,512 and fine Rs. 19,519.

The maximum amount of fine that can be imposed as per proviso to Sec. 125 is market value of goods less amount of duty. Hence, the maximum fine that can be imposed is Rs. 84,488 (Market price Rs. 1,00,000 less amount of duty Rs. 15,512).

Question : An importer has imported a machine from UK at FOB cost of 10,000 UK Pounds. Other details are as follows :

(*a*) Freight from UK to Indian port was 700 pounds.

(*b*) Insurance was paid to insurer in India : Rs. 6,000

(*c*) Design and development charges of 2,000 UK pounds were paid to a consultancy firm in UK

(*d*) The importer also spent an amount of Rs. 50,000 in India for development work connected with the machinery.

(*e*) Rs. 10,000 were spent in transporting the machinery from Indian port to the factory of importer.

(*f*) Rate of exchange as announced by RBI was : Rs. 68.82 = one UK Pound

(*g*) Rate of exchange as announced by CBE&C (Board) by notification under Section 14(3)(a)(i) : Rs. 68.70 = One UK pound

(*h*) Rate at which bank recovered the amount from importer : Rs. 68.35 = One UK Pound.

(*i*) Foreign exporters have an Agent in India. Commission is payable to the agent in Indian Rupees @ 5% of FOB price.

Customs duty payable was 10%. If similar goods were produced in India, excise duty payable as per tariff is 24%. There is an excise exemption notification which exempts the duty as is in excess of 16%. Education cess is as applicable Spl CVD is payable at applicable rates. Find customs duty payable. How much Cenvat can be availed by importer, if he is manufacturer?

Answer :

FOB Value	=	10,000.00 UK Pounds
Add : Design & Development Charges	=	2,000.00 UK pounds
Add : Ocean freight	=	700.00 UK Pounds
Total C & F	=	12,700.00 UK Pounds
Total in Rs. @ 68.70	=	8,72,490.00 Rs.
Add : Insurance	=	6,000.00 Rs.
Add : Local Agency commission 500 UK pounds @ Rs. 68.70 = 1 UK Pound	=	34,350.00 Rs.
Total CIF Price	=	9,12,840.00 Rs.
Add : Landing Charges @ 1% of CIF	=	9,128.40 Rs.
Assessable Value	=	9,21,968.40 Rs.
Assessable Value (rounded to)	=	9,21.968.00 Rs.

Calculation of duty payable is as follows -

		Duty %	Amount	Total Duty
(A)	Assessable Value Rs. 10,000		921,968.00	
(B)	Basic Customs Duty	10	92,196.80	92,196.80
(C)	Sub-Total for calculating CVD '(A+B)'		1,014,164.80	
(D)	CVD 'C' x excise duty rate	16	162,266.37	162,266.37
(E)	Education cess of excise - 2% of 'D'	2	3,245.33	3,245.33
(F)	SAH Education cess of excise - 1% of 'D'	1	1,622.66	1,622.66
(G)	Sub-total for edu cess on customs 'B+D+E+F'		259,331.16	
(H)	Edu Cess of Customs - 2% of 'G'	2	5,186.62	5,186.62
(I)	SAH Education Cess of Customs - 1% of 'G'	1	2,593.31	2,593.31
(J)	Sub-total for Spl CVD 'C+D+E+F+H+I'		1,189,079.09	
(K)	Special CVD u/s 3(5) - 4% of 'J'	4	47,563.16	47,563.16
(L)	Total Duty			**314,674.25**
(M)	Total duty rounded to	Rs		314,674

Notes – Buyer who is manufacturer, is eligible to avail Cenvat Credit of D, E, F and K above. A buyer, who is service provider, is eligible to avail Cenvat Credit of D, E and F above. A trader who sells imported goods in India after charging Vat/sales tax can get refund of Special CVD of 4% i.e. 'K' above.

Note : (1) Design and development work done in India and transport costs within India are not to be considered for purposes of 'Customs Value'. (2) Excise duty rate has to be considered after considering excise exemption notification. (3) Assessable Value and Final duty payable should be rounded off to nearest Rupee.

Duty payable is same whether the importer is manufacturer or a trader.

A has imported from U.S.A. by Air under-mentioned goods at Mumbai: Tariff Heading - 85-01, (1) Description - Micro motors – Value in FOB – US $ 10,000 (2) Soldering irons and guns - Value in FOB – $ 5000 - - Other relevant data are : Air freight $ 400, Insurance actual $ 200, Local agent's commission Rs. 5,000, Rate of exchange 1$ = Rs. 50, Customs duty – 10% Ad-valorem, CVD – 16% Ad-valorem, Education Cess as applicable. Effective Rate of duty on soldering irons and guns through a customs notification is 5%. Compute assessable value of each item and relative total customs duty and aggregate customs duty payable.

Details	Micro Motor	Soldering Iron
FOB US $	10,000.00	5,000.00
Air Freight & Insurance (pro-rata)	400.00	200.00
Total CIF US $	10,400.00	5,200.00
Total CIF in Rs. @ Rs. 50 = 1 US $	5,20,000.00	2,60,000.00
Agency Commission on pro-rata basis in Rs	3,333.33	1,666.67
Total Value	5,23,333,33	2,61,666.67
Add Landing charges @ 1%	5,233.33	2,616.67
Assessable Value	5.28,566.66	2,64,283.34
Assessable Value (rounded)	5,28,567	2,64,283

Calculation of duty payable is as follows -

		Duty %	Amount	Total Duty
(A)	Assessable Value Rs. 10,000		528,567.00	
(B)	Basic Customs Duty	10	52,856.70	52,856.70
(C)	Sub-Total for calculating CVD '(A+B)'		581,423.70	
(D)	CVD 'C' x excise duty rate	16	93,027.79	93,027.79
(E)	Education cess of excise - 2% of 'D'	2	1,860.56	1,860.56
(F)	SAH Education cess of excise - 1% of 'D'	1	930.28	930.28
(G)	Sub-total for edu cess on customs 'B+D+E+F'		148,675.33	
(H)	Edu Cess of Customs - 2% of 'G'	2	2,973.51	2,973.51
(I)	SAH Education Cess of Customs - 1% of 'G'	1	1,486.75	1,486.75
(J)	Sub-total for Spl CVD 'C+D+E+F+H+I'		681,702.59	
(K)	Special CVD u/s 3(5) - 4% of 'J'	4	27,268.10	27,268.10
(L)	Total Duty			**180,403.69**
(M)	Total duty rounded to	Rs		180,404

Notes – Buyer who is manufacturer, is eligible to avail Cenvat Credit of D, E, F and K above. A buyer, who is service provider, is eligible to avail Cenvat Credit of D, E and F above. A trader who sells imported goods in India after charging Vat/sales tax can get refund of Special CVD of 4% i.e. 'K' above.

Customs duty on soldering iron is 5%. Student can calculate duty and check that total duty is Rs. 73,714.

9.6 Methods of valuation in customs

The Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, based on WTO Valuation Agreement (earlier GATT Valuation Code), consist of rules providing six methods of valuation.

The methods of valuation for customs methods are as follows -

- Transaction Value of Imported goods [Section 14(1) and Rule 3(1)]
- Transaction Value of Identical Goods [Rule 4]
- Transaction Value of Similar Goods [Rule 5]
- Deductive Value which is based on identical or similar ***imported*** goods sold in India [Rule 7]
- Computed value which is based on cost of manufacture of goods plus profits [Rule 8]
- Residual method based on reasonable means and data available [Rule 9]

Methods to be applied sequentially - These methods are to be applied in sequential order, i.e. if method one cannot be applied, then method two comes into force and when method two also cannot be applied, method three should be used and so on. The only exception is that the 'computed value' method may be used before 'deductive value' method, if the importer requests and Assessing Officer permits.

Transaction value of same goods for customs valuation

Transaction value of same goods is the first and primary method as per Rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

What is transaction value - As per Rule 3(1), value of imported goods shall be transaction value adjusted in accordance with provisions of Rule 10 [Rules effective from 10-10-2007].

As per Rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (earlier Rule 9 upto 10-10-2007), various additions like sales commission, cost of containers, cost of packing; cost of materials, components etc. or services supplied by buyer; royalties payable, transport charges, insurance etc. are includable, *if these do not already form part of transaction value*.

No other additions - No other addition shall be made to price paid or payable, except as provided for in Rule 10 [Rule 10(4) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 – earlier Rule 9 upto 10-10-2007]. Interpretative Note to Rule 3 (earlier Rule 4 upto 10-10-2007) also clarifies that activities undertaken by buyer other than those for which adjustments are provided in Rule 10 are not to be added, even though it may be regarded as benefit to the seller.

When transaction value is acceptable – Subject to Rule 12, the value of imported goods shall be the transaction value, adjusted in accordance with provisions of Rule 10 [Rule 3(1)]. If value cannot be determined as per Rule 3(1), it shall be determined by proceeding sequentially through rules 4 to 9 of Valuation Rules. [Rule 3(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007] [Rule effective from 10-10-2007].

Transaction Value, i.e. the price at which the goods are actually sold is the primary method and is expected to be used in majority of cases. However, sometimes, transaction value of same goods cannot be accepted as the conditions prescribed for accepting such value are not fulfilled (e.g. unconditional sale, sale from un-related person, no restriction on disposition or use etc.). Occasionally, transaction value may not be available when actual sale does not take place. For example, actual transaction value for goods imported on lease, hire, loan or gift may not be available. In such cases, other methods should be used.

Provisions of rules 10 and 12 override – Rule 3(1) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 is subject to Rule 12, which means that provisions of Rule 12 overrides provisions of Rule 3. As per Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the value as declared by importer can be rejected by assessing officer, if he has doubts about truth or accuracy of the value as declared. However, the assessing officer has to give reasons for his doubts in writing and provide opportunity of personal hearing. Thus, it is not obligatory on Customs Officer to accept the transaction value if he has reasons to doubt the truth or accuracy of the same.

Conditions for accepting Transaction Value

In *Eicher Tractors* v. *CC* 2000 AIR SCW 4080 = AIR 2001 SC 196 = 2001(1) SCC 315 = 122 ELT 321 = 41 RLT 621 (SC), it has been held that actual transaction value can be rejected only for reasons specified in Rule 4(2) [Now Rule 3(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 w.e.f. 10-10-2007] of Valuation Rules and 'special circumstances' or 'extraordinary circumstances' as specified in Section 14(1). Subject to the three conditions laid down in Section 14(1) of time, place and absence of special circumstances, price of imported goods is to be determined u/s 14(1A) in accordance with Valuation Rules framed in this behalf.

Thus, transaction value can be rejected either for special circumstances as per Section 14(1) or conditions as specified in Rule 3(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

Special circumstances as per Section 14(1) - The 'special circumstances' in Section 14(1) are (*a*) Buyer and seller should not be related ***and*** (b) Price should be the sole consideration for the sale. If these 'special circumstances' are not satisfied, transaction value can be rejected. Any other 'special circumstances' cannot be considered.

Conditions as per Rule 3(2) - As per Rule 3(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [Earlier Rule 4(2) of Customs Valuation Rules], transaction value can be accepted only if following requirements are satisfied –

No restriction on buyer for disposal of goods - There are no restriction on buyer on disposition or use of goods *except* the following: (*a*) restrictions prescribed by public authorities in India (*b*) restriction on geographical area within which goods may be resold e.g. goods should not be sold outside particular State or outside India *or* (*c*) restriction that does not materially affect value of goods - e.g. exporter puts a condition to importer of automobile that car should not be exhibited before a particular date – illustration given in Interpretative Note to Rule 3(2)(a)(iii). [Rule 3(2)(a)] [earlier Rule 4(2)(e) upto 10-10-2007]

Sale not subject to conditions of which value cannot be determined - The sale or price should not be subject to a condition or consideration for which value cannot be determined. Examples given in interpretative note to Rule 3(2)(b) are – (a) Price is subject to condition that buyer buys some other goods in specified quantities from seller (b) price is dependant on price at which buyer of imported goods sells other goods to seller (c) Price is based on form of payment extraneous the imported goods. However, (i) buyer furnishing

engineering and plans undertaken in India to seller (ii) Buyer undertaking activities of marketing of imported goods in India will not form part of value of imported goods [Rule 3(2)(b)] [earlier Rule 4(2)(f) upto 10-10-2007].

No further consideration to seller of which adjustment cannot be made - Seller should not be entitled to further consideration like part of subsequent resale, disposal or use of goods by the buyer will accrue directly or indirectly to seller, unless proper adjustment in value terms can be made as per Rule 10 e.g. if the importer is a trader and the condition is that after he sells the goods in India, the foreign exporter will get a fixed amount after the sale, that extra amount can be added for Customs Valuation [Rule 3(2)(c)] [Rule 4(2)(g)]

Unrelated buyer and seller, except when price acceptable under Rule 3(3) - Buyer and seller are not be related, unless the transaction value is acceptable under Rule 3(3) [Rule 3(2)(d)] [earlier Rule 4(2)(h) upto 10-10-2007].

If any of the aforesaid requirement is not satisfied, 'transaction value' cannot be accepted for valuation purposes.

Related person under Customs Valuations Provisions - Rule 2(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and Rule 2(2) of Customs Valuation (Determination of Value of Export Goods) Rules, 2007 define that persons shall be deemed to be 'related' only if one of the conditions is satisfied [same definition and same Rule number prior to 10-10-2007]:

- they are officers or directors of one other's businesses [Rule 2(2)(i)]
- they are legally recognised partners in business [Rule 2(2)(ii)]
- they are employer and employee [Rule 2(2)(iii)]
- Any person directly or indirectly owns, controls or holds 5% or more of shares of both of them [Rule 2(2)(iv)]
- one of them controls other directly or indirectly [Rule 2(2)(v)]
- both of them are controlled - directly or indirectly - by third person [Rule 2(2)(vi)]
- together they control a third person - directly or indirectly [Rule 2(2)(vii)]
- they are members of same family [Rule 2(2)(viii)]. (*what is* "**family**" *is not defined*).

Person includes legal person i.e. Company, partnership firm, trust etc. [Explanation I to Rule 2(2)].

If a person is sold agent or sole distributor or sole concessionaire of other, he will be deemed to be 'related', if he falls within the criteria of Rule 2(2) [Explanation II to Rule 2(2)]. Thus, sole selling agent or sole distributor or sole concessionaire will be 'related person' only if he falls within the criteria as specified in Rule 2(2). A sole selling agent or sole distributor or sole concessionaire is not automatically deemed as 'related person' in all the cases.

When transaction value can be accepted even if buyer and seller are related – As per Rule 3(3) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [earlier Rule 4(3) upto 10-10-2007], transaction Value can be accepted ***even if*** buyer and seller are related if (*a*) examination of circumstances show that the relationship has not affected the selling price *or* (*b*) buyer demonstrates that the price is similar to identical or similar goods sold to unrelated buyers in India, or deductive value or computed value of identical or similar goods.

The value of identical or similar goods may be ascertained from (i) Transaction value or (ii) Deductive value or (iii) Computed Value – of identical or similar goods. - - While comparing prices of identical or similar goods to unrelated buyers, account should be taken of difference in commercial levels, quantity levels, adjustments to be made under Rule 10, cost incurred by seller in sale to unrelated buyers etc.

Burden of proof is on the importer.

Burden of proof that transaction value is 'Value' - Importer has to declare 'value' of goods. If the assessing officer has reason to doubt about truth or accuracy of the value declared by the importer, he can ask the importer to submit further information and evidence. If the Customs Officer still has *reasonable doubt*, he can reject the 'value' as declared by the importer. [Rule 12(1) w.e.f. 10-10-2007 – earlier Rule 10A(1) of Customs Valuation Rules added w.e.f. 19-2-1998]. If the importer requests, the assessing officer has to give reasons for doubting the truth or accuracy of value declared by importer. [Rule 12(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 – earlier Rule 10A(2) of Customs Valuation Rules upto 10-10-2007]. Thus, burden is on the importer to prove that the 'value' declared by him is correct as per Section 14 of Customs Act [This amendment was been made after agreement reached at WTO by all countries. - CBE&C circular No. 13/98-Cus dated 9-3-1998].

Transaction value of identical goods for customs valuation

Rule 4(1)(a) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [Rule 5(1)(a) upto 10-10-2007] of Customs Valuation Rules provide that if valuation on the basis of 'transaction value' is not possible, the 'Assessable value' will be decided on basis of transaction value of identical goods sold for export to India and imported at or about the same time.

However, if the other goods were provisionally assessed, that value cannot be considered [proviso to Rule 4(1)(a). – there was no parallel provision in earlier Rule 5(1)(a)].

Rule 4(1)(b) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [earlier Rule 5(1)(b) upto 10-10-2007] provides that transaction value of identical goods at the same commercial level and in substantially same quantity as the goods being valued shall be used to determine value of imported goods.

What are identical goods - 'Identical goods' are defined under Rule 2(1)(d) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [earlier Rule 2(1)(c) upto 10-10-2007] as those goods which fulfil all following conditions i.e. (*i*) the goods should be same in all respects, including physical characteristics, quality and reputation; except for minor differences in appearance that do not affect value of goods. (*ii*) the goods should have been produced in the same country in which the goods being valued were produced. (*iii*) they should be produced by same manufacturer who has manufactured goods under valuation - if price of such goods are not available, price of goods produced by another manufacturer in the same country. However, if engineering, development work, art work, design work, plan or sketch undertaken in India were completed by the buyer on these imported goods free of charge or at reduced rate for use in connection with the production and sale for export of these imported goods, these will not be 'identical goods' [obvious, since in such case, firstly, selling price of the foreign exporter will be lower and secondly, as per Rule 10(1)(b)(iv), value of such work is to be added to price only if it is done outside India. Hence, if identical goods were previously valued, its value would be lower than 'ordinary value' of such goods, if some engineering work was done in India].

Adjustments to be made - Price of identical goods should be compared at same commercial level and in substantially same quantity of goods [Rule 4(1)(b) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007] – noted in *Elite Packaging Industries* v. *CC* - 1992 (60) ELT 311 (SC).

If transaction value at different commercial level or in different quantities *or both* is available, suitable adjustments can be made to take into account the difference. It should be on demonstrated evidence which clearly establishes reasonableness and accuracy of adjustments [Rule 4(1)(c) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007] [earlier Rule 5(1)(c) upto 10-10-2007].

Adjustment for distances and transport costs - If valuation of identical goods was made after adding costs and services as per Rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, differences arising due to differences in distances and means of transport should be considered, while arriving at 'Assessable Value' of goods under valuation. This will be required if value of identical goods manufactured by different manufacturer and/or at different place is being taken as basis for valuation [Rule 4(2) – earlier Rule 5(2) upto 10-10-2007].

Transaction value of similar goods for customs valuation

If first method of transaction value of the goods or second method of transaction value of identical goods cannot be used, Rule 5 (earlier Rule 6) provide for valuation on basis of 'Transaction value of similar goods imported at or about the same time'.

However, if the other goods were provisionally assessed, that value cannot be considered [proviso to Rule 5(1)(a). – there was no parallel provision in earlier Rule 6(1)(a)].

What are Similar goods - Rule 2(1)(f) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [earlier Rule 2(1)(e) upto 10-10-2007] define 'similar goods' as (*a*) alike in all respects, have like characteristics and like components and perform same functions. These should be commercially inter-changeable with goods being valued as regards quality, reputation and trade mark. (*b*) the goods should have been produced in the same country in which the goods being valued were produced. (*c*) they should be produced by same manufacturer who has manufactured goods under valuation - if price of such goods are not available, price of goods produced by another manufacturer in the same country can be considered. However, if engineering, development work, art work, design work, plan or sketch undertaken in India were completed by the buyer on these imported goods free of charge or at reduced rate for use in connection with the production and sale for export of these imported goods, these will not be 'similar goods' [obvious, since in such case, firstly, selling price of the foreign exporter will be lower and secondly, as per Rule 10(1)(b)(iv), value of such work is to be added to price only if it is done outside India. Hence, if similar goods were previously valued, its value would be lower than 'ordinary value' of such goods, if some engineering work was done in India].

As per Rule 5(2) and interpretative note to Rule 5 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, the adjustments that can be made are same as can be done in respect of identical goods under Rule 4 i.e. (*a*) Adjustments for commercial level and/or quantity can be made (*b*) if valuation of similar goods is made after adding costs and services as per Rule 10, differences arising due to differences in distances and means of transport should be considered. (*c*) if more than one value is available, lowest of such values should be taken.

Distinction between identical goods and similar goods - The major distinction between 'identical goods' and 'similar goods' is that the 'identical goods' should be same in all respects, except for minor differences

in appearance, while in case of 'similar goods', it is enough if they have like characteristics and like components and perform same functions. In both the cases, (a) quality and reputation (including trade mark reputation) should be same (b) Goods should be from same country. (c) Goods produced by another manufacturer can be considered if price of goods produced by same manufacturer are not available. However, brand reputation and quality of other manufacturer should be comparable (d) If engineering, development work, art work, design work, plan or sketch undertaken in India were completed by the buyer on these imported goods free of charge or at reduced rate for use in connection with the production and sale for export of these imported goods, the price cannot be considered.

Deductive Value for customs valuation

Rule 7 [same Rule number prior to 10-10-2007] of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 provide for the next i.e. fourth alternative method, which is called 'deductive method'.

If the importer requests and the Customs Officer approves, 'computed value' method as given in Rule 8 can be used before the method of 'deductive value' [*proviso* to Rule 6 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007]

This method should be applied if transaction value of identical goods or similar goods is not available; but these products are sold in India. The assumption made in this method is that identical or similar imported goods are sold in India and its selling price in India is available. *The sale should be in the same condition as they are imported*. Assessable Value is calculated by reducing post-importation costs and expenses from this selling price. This is called 'deductive value' because assessable value has to be arrived at by method of deduction (deduction means arrive at by inference i.e. by making suitable additions/subtractions from a known price to arrive at required 'Customs Value').

The method may be used when goods are extracted on High Seas (e.g. minerals, crude oil etc.) and brought into India for sale. It will be 'import' and dutiable. In other cases, chances of using this method of valuation are indeed very rare.

Unit price sold in greatest numbers - Rule 7 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 specify that while considering selling price of imported goods in India, unit price at which greatest aggregate quantity of identical or similar goods are sold to unrelated persons in India should be the basis. Interpretative Note to Rule 7 of Customs Valuation Rules gives some illustrations - e.g. if 65 units are sold @ Rs. 100, 55 units are sold @ Rs. 95 and 80 units are sold @ Rs. 90; then greatest aggregate quantity is 80 which is sold @ Rs. 90 per unit, which will be the basis for valuation. Another example given in the Interpretative Note is that if 500 units are sold at price of Rs. 95 and 400 units are sold at Rs. 90, then greatest quantity is 500 and hence price of Rs. 95 should be considered.

Computed Value for Customs valuation

If valuation is not possible by deductive method, the same can be done by computing the value under Rule 8 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [earlier Rule 7A upto 10-10-2007], which is the fifth method. If the importer requests and the Customs Officer approves, this 'computed value' method can be used before the method of 'deductive value' [*proviso* to Rule 6 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007].

In this method, value is the sum of (*a*) Cost of value of materials and fabrication or other processing employed in producing the imported goods (*b*) an amount for profit and general expenses equal to that

usually reflected in sale of goods of the same class or kind, which are made in the country of exportation for export to India. (*c*) The cost or value of all other expenses under Rule 10(2) i.e. transport, insurance, loading, unloading and handling charges.

Method suitable when producer prepared to give costing - Generally, valuation should be done on basis of information available in India. Thus, this method is normally possible when the importer in India and foreign exporter are closely associated and the foreign exporter is willing to give necessary costings and to provide for subsequent verification, which may be necessary [Interpretative Note to Rule 8].

How to calculate cost and profit – Interpretative Note to Rule 8 [earlier Rule 7A upto 10-10-2007] of Customs Valuation Rules explains how cost or value and profit should be calculated.

Residual Method for customs valuation

The sixth and the last method is called "residual method". It is also often termed as 'fallback method'. This is similar to 'best judgment method' of the Central Excise, income tax and sales tax. This method is used in cases where 'Assessable Value' cannot be determined by any of the preceding methods. While deciding Assessable Value under this method, reasonable means consistent with general provisions of these rules should be the basis and valuation should be on basis of data available in India. [Rule 9(1) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 – earlier Rule 8 (1) upto 10-10-2007].

The value cannot exceed normal price - The value so determined cannot be more that the 'normal price' i.e. price at which such or like goods are ordinarily sold or offered for sale for delivery at the time and place of importation in course of International Trade, when seller and buyer have no interest in the business of each other or one of them has no interest in the other and price should be sole consideration for sale or offer for sale [proviso to Rule 9(1). There was no parallel proviso in earlier Rule 8(1)].

What can be considered – Interpretative Note to Rule 9 [earlier Rule 8 upto 10-10-2007] provide that to the *greatest extent possible*, value should be based on previously determined values. Method of valuation should be based on previous methods e.g. transaction value, identical goods, similar goods, deductive value or computed value but some flexibility may be used in applying these rules. e.g. (*a*) if value of identical or similar goods produced in same country is not available, value of identical or similar goods manufactured in other country could be considered (*b*) if value of identical or similar goods imported at or about the same time is not available, value at other time may be considered (*c*) while considering deductive method, condition that imported goods should be sold in the same condition as imported may be flexibly applied. These are only illustrations. Similar other flexibilities may be considered, but certainly, arbitrary or whimsical valuation cannot be permitted under this Rule.

What cannot be considered - While arriving at 'best judgment price' some assumptions, extrapolations and estimations are inevitable. However Rule 9(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 [earlier Rule 8(2) upto 10-10-2007] expressly prohibits use of any of the following for determining Assessable Value. These prohibitions are as follows :

- Use of the selling price in India of goods produced in India
- System of accepting highest of the alternative values
- Price of goods prevalent in the country of exportation (e.g. if goods are imported from Germany, price of the goods within Germany cannot be considered)
- Price of goods for export to a country other than India

- Minimum customs values
- Arbitrary or fictitious values

In other words, selling price for import in India (i.e. export from abroad) can alone form the basis. (Thus, fixing 'tariff value' is really against this Rule).

9.7 Valuation of Export Goods

Customs value of export goods is to be determined under Section 14 of Customs Act, read with Customs Valuation (Determination of Value of Export Goods), Rules, 2007.

Transaction value is the main criteria for valuation - Section 14(1) of Customs Act (effective from 10-10-2007) states that 'value' of imported and export goods will be 'transaction value' of such goods i.e. the price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale, subject to such other conditions as may be specified in the rules made in this behalf.

Thus, if buyer and seller are not related and if price is the sole consideration, transaction value at the time and place of exportation will be the assessable value.

Transaction value is the primary basis for valuation of export goods and the method specified in Rule 3 will be applicable in the vast majority of cases of export by acceptance of declared value – par 4 of MF(DR) circular No. 37/2007-Cus dated 9-10-2007.

Rate of foreign exchange - Third *proviso* to new Section 14(1) states that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under Section 46, or a shipping bill or bill of export, as the case may be, is presented under Section 50. As per *Explanation* (a) to Section 14(2), the rate of exchange will be determined by CBE&C or ascertained in such manner as CBE&C may direct.

Tariff value - Section 14(2) empowers CBE&C to fix tariff values of imported goods or export goods by issuing a notification.

Valuation Rules if transaction value is not determinable - If there is no sale or buyer or seller are related or price is not the sole consideration, value of the goods will be determined as per Valuation Rules [Clause (ii) of second proviso to Section 14(1)].

Valuation when buyer and seller are related – Definition of related person as per Rule 2(2) of Customs Valuation (Determination of Value of Export Goods) Rules, 2007 is same as per definition of Rule 2(2) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007.

As per Rule 3(2) of Customs Valuation (Determination of Value of Export Goods) Rules, 2007, the transaction value, the transaction value will be accepted as 'value' even if buyer and seller are 'related', if the relationship has not influenced price.

Valuation if value cannot be determined on basis of transaction value – If valuation is not possible on basis of transaction value, valuation will be done by proceeding sequentially through rules 4 to 6 [Rule 3(3) of Customs Valuation (Determination of Value of Export Goods) Rules, 2007].

The methods are - Export value by comparison [Rule 4}, Computed value [Rule 5] and Residual method [Rule 6]. These are explained below.

Export value by comparison - Value of export goods can be determined on the basis of transaction value of 'goods of like kind and quality' exported at or about the same time to other buyers in same destination country of importation. If such price is not available, another destination country of importation can be considered – Rule 4(1) of Customs Valuation (Determination of Value of Export Goods) Rules, 2007.

While determining value of export goods, adjustments can be made considering relevant factors like difference in dates of exportation, differences in commercial levels and quantity levels, difference in composition, quality and design, difference in domestic freight and insurance charges depending on place of exportation etc. – Rule 4(2) of Customs Valuation (Determination of Value of Export Goods) Rules, 2007.

'Goods of like kind and quality' means export goods which are identical or similar in physical characteristics, quality and reputation as the goods being valued, and perform the same functions or are commercially interchangeable with the goods being valued, produced by the same person or a different person – Rule 2(1)(a) of Customs Valuation (Determination of Value of Export Goods) Rules, 2007.

Computed value – If value cannot be determined by comparison under Rule 4, 'computed value' can be determined by basis of (a) cost of production, manufacture or processing of export goods (b) charges, if any, for design or brand (c) an amount towards profit – Rule 5 of Customs Valuation (Determination of Value of Export Goods) Rules, 2007.

While applying Rule 5, the Proper Officer shall give due consideration to the cost certificate issued by Cost Accountant or Chartered Accountant or Government approved valuer, as produced by the exporter – MF(DR) circular No. 37/2007-Cus dated 9-10-2007.

Residual method – If value cannot be determined on basis of Rule 4 or 5, it can be determined using reasonable means consistent with principles and general provisions of the rules. However, local market price of export goods cannot be the only basis for determining value of export goods [i.e. it can be one of the basis] – Rule 6 of Customs Valuation (Determination of Value of Export Goods) Rules, 2007.

Rejection of value as declared by exporter

As per Rule 7 of Customs Valuation (Determination of Value of Export Goods) Rules, 2007, the exporter has to file declaration about full 'value' of goods. The 'Export Value Declaration' should be in form given in Annexure A to MF(DR) circular No. 37/2007-Cus dated 9-10-2007. This declaration is compulsory w.e.f. 12-11-2007.

If the assessing officer has doubts about the truth and accuracy of 'value' as declared, he can ask exporter to submit further information, details and documents. If the doubt persists, the assessing officer can reject the value declared by importer. [Rule 8(1) of Customs Valuation (Determination of Value of Export Goods) Rules, 2007]. If the exporter requests, the assessing officer has to give reasons for doubting the value declared by exporter. [Rule 8(2)].

STUDY NOTE 10

Customs Procedures

10.1 General Provisions

Goods are imported in India or exported from India through sea, air or land. Goods can come through post parcel or as baggage with passengers Procedures naturally vary depending on mode of import or export. Procedures discussed in this Chapter are applicable for imports by sea, air or land, but not as baggage or postal despatch.

Entry – 'Entry' in relation to goods means an entry made in a Bill of Entry, Shipping Bill or Bill of Export. In respect of goods imported or to be exported by post, 'Entry' means (a) label or declaration accompanying the goods which contains description, quantity and value of the goods, as referred in Section 82 (b) If postal goods are not accompanied by label or description containing the description, quantity or value of goods, 'entry' will be as per form and manner prescribed by CBE&C as per regulations u/s 84 [Section 2(16)].

Section 46 of Customs Act requires every importer of goods to make 'entry' by presenting to the Customs Officer a Bill of Entry for home consumption or warehousing in prescribed form. Section 50 of Customs Act requires every exporter to make 'entry' by presenting shipping bill (if goods are to be exported in a vessel or aircraft) or bill of export (in case of goods to be exported by land). Section 82 provides that in case of goods imported or exported by post, any label or declaration accompanies the goods containing description, quantity and value of such goods will be 'entry' for import of export. Section 84 provides that if the postal article is not accompanied by such label or declaration, form and manner of 'entry' will be as specified by Board in regulations.

Section 77 requires owner of a baggage to make declaration of its contents to Customs Officer. However, this is not defined as 'Entry'.

Amendment to documents - Importer, exporter or 'Person in charge' have to submit various documents to customs authorities like Bill of Entry, Import Manifest, Export Manifest etc. Sometimes, it may become necessary to amend the document due to various reasons like change in classification, clerical mistake in document, change in unloading/loading plan of vessel etc. In such case, permission to amend these documents have to be obtained from customs authorities. [Section 149]. Such permission can be given if there are no fraudulent intentions.

Amendment after clearance - In case of bill of entry, shipping bill or bill of export, it can be amended after clearance only on the basis of documentary evidence which was in existence at the time the goods were cleared, warehoused or exported, and not on basis of any subsequent document. [proviso to Section 149].

Merchant Overtime fee – Supervision of Customs Officer is required for various purposes like loading/ unloading of vessels, stuffing/de-stuffing of containers, examination of cargo etc. No (*official*) charges are payable if this work is done during normal working hours and within customs area. However, if supervision is required due to urgency outside office hours or on holidays or at places other than customs station, merchant overtime is payable on payment of fee u/s 36 of Customs Act. The fees are prescribed in Customs (Fees for Rendering Services by Customs Officers) Regulations, 1998. - *see Chapter 13 of CBE&C's Customs Manual, 2001.*

Computerisation of customs work - Work of customs at Delhi airport has been computerised. Work at Mumbai port is also computerised. Whenever the work is computerised, documents like IGM and Bill of Entry have to be filed electronically. Guidelines for preparing data file for Bill of Entry and shipping bills

for Mumbai Customs House has been prescribed vide PN 108/99 dated 30-9-1999 and PN 10/2001 dated 30-1-2001.

Electronic filing of documents is compulsory for CHA, importers and exporters filing more than 5 documents per day – MF(DR) circular No. 15/2005-Cus dated 11-3-2005.

Documents can be filed through ICEGATE (Indian Customs and Central Excise Gateway) on www.icegate.gov.in.

Digital signatures on Shipping Bills and Bill of Entry – CBE&C has obtained license to issue digital signature certificates. It is caller 'iCERT'. ICEGATE provides EDI messaging for regulatory agencies like DGFT, DGCIS, RGI etc., with facility of filing Shipping Bills and Bills of Entry.

It is decided that w.e.f. 1-11-2005, all shipping bills and Bill of Entry filed through ICEGATE will be digitally signed and authenticated through class III digital signature certificate issued by iCERT. Procedure etc. has been given on CBE&C website [see 187 ELT T20 for details].

Customs Station

Imported goods are permitted to be unloaded only at specified places. Similarly, goods can be exported only from specified area. In view of this, definitions of 'Customs Station' is important.

Customs area means all area of Customs Station and includes any area where imported goods or export goods are ordinarily kept pending clearance by Customs authorities [Section 2(11) of Customs Act].

Thus, 'Customs Area' could include some area even outside the 'Customs Station'. Customs Station means (*a*) customs port (*b*) customs airport and (*c*) land customs station [Section 2(13) of Customs Act].

Section 7 of Customs Act empowers CBE&C (Board) to appoint * Customs ports * Customs airports *Places for inland container depots * Coastal ports. These are appointed by issuing a notification. Section 8 authorises Commissioner of Customs to approve proper places in any customs port, customs airport or costal port for unloading and loading of goods or for any class of goods and specify the limits of customs area. Thus, the place (city/town/village etc.) is approved by CBE&C, while exact location within that city/town/village is approved by Commissioner of Customs.

Customs Port - Section 2(12) define customs port as (*a*) port appointed under Section 7(*a*) by CBE&C and (*b*) Inland Container Depot appointed by CBE&C under Section 7(aa) of Customs Act. As per Section 29(1) of Customs Act, vessel entering India from a place out of India must land only at Customs port. The actual place where loading/unloading is permitted is approved by Commissioner of Customs.

Customs Airport - Section 2(10) define Customs Airport as airport appointed by CBE&C by notification under Section 7(*a*). As per Section 29(1), aircraft entering India from a place outside India must land only at customs airport.

Land Customs Station - This is a place appointed under Section 7(*b*). Goods imported by land route will be first received here. Once goods enter India by land route, they should follow prescribed route only, to come to Land Customs Station.

Commissioner of Customs is authorised, vide Section 8, to specify the limits of 'Customs Area' and approve places for loading and unloading of goods. Thus, CBE&C appoints Customs Stations, i.e. town/city/village etc. while actual place within that city/town is approved by Commissioner.

Inland Container Depot/Container Freight Stations - Present trend in transport is to stuff the goods in large containers and carry these containers Such containers are easy to load and unload with help of cranes. Once the containers are unloaded at the port, these containers are carried to Inland Container Depots (ICD) and stored there. These are then cleared from such depots. Goods can also be exported from ICD. Sealing can be done at ICD. Details about ICD are given in a later chapter. An Inland Container Depot is a 'customs port' as per Section 2(12). In short ICD acts like a 'Dry Port'.

Coastal Ports - Coastal ports are those which are permitted to carry trade on coastal goods. 'Coastal goods' means goods, other than imported goods, transported in a vessel from one port in India to another port in India [Section 2(7) of Customs Act]. Thus, 'coastal ports' are used to transport goods by sea within India.

Warehousing Stations - Imported Goods can be stored in public or private warehouses without payment of duty. Central Board of Excise and Customs (CBE&C) is authorised to declare places to be warehousing stations at which public warehouses may be appointed or private warehouses may be licensed. [Section 9]. These powers have been delegated to Chief Commissioners since 1990.

Boat Notes - If the vessel has to unload only a small cargo, it may not spend time in having berth in the port. If the small cargo is to be sent to shore, it may be loaded in a small boat and sent to shore. As per Section 35, such small boat must be accompanied by a 'Boat Note'. Boat Notes Regulations provide that such Boat Notes will be issued by Customs Officer. It will be maintained in duplicate and should be serially numbered. Boat Note should be in prescribed form.

In case of export, if small export cargo is to be loaded in ship through small boat, no Boat Note is required if the cargo is accompanied by the 'Shipping Bill', otherwise, Boat Note is required. Boat Note is also required for transshipment of cargo, i.e. transfer from one ship to another or for re-shipment.

Transit Goods - Section 53 provide that any goods imported in any conveyance will be allowed to remain on the conveyance and to be transited without payment of customs duty, to any place out of India or any customs station. However, all these goods must be mentioned in import manifest or import report submitted by person in charge of conveyance. Such goods should not be 'prohibited goods' under Section 11 of Customs Act. [The conveyance may be vehicle, ship or aircraft]. After transit, the goods may go to another customs station.

On arrival at customs station, the goods will be liable to customs duty as if it is first importation in India. - Section 55.

Transshipment of Goods - Goods imported in any customs station can be transshipped without payment of duty, u/s 54 of Customs Act. Transshipment means transfer from one conveyance to another. [The conveyance may be vehicle, ship or aircraft]. Such transshipment may be to any major port or airport in India. The goods can be transshipped to any other customs station in India if Customs Officer is satisfied that the goods are *bona fide* intended for transshipment to any customs station. The facility is available at all customs ports and Inland Container Depots (ICDs). [*Notification No. 50/95-Cus(NT) dated 6-9-95*].

Transit and transship - Distinction between transit and transshipment is that in 'transit' goods continue to be on same vessel, while in transshipment, goods are transferred to another vessel/vehicle. Hence, procedures are also different.

Coastal goods - Coastal goods means goods transported from one port in India to another port in India, *but does not include imported goods* [Section 2(7) of Customs Act].

Thus, coastal goods means goods taken by ship from one Indian port to another. No export or import is involved, but control is necessary to ensure that coastal goods are not diverted illegally for export.

Coastal Ports - Section 7(*d*) provide that trade in coastal goods can be carried out only at approved 'coastal ports'.

10.2 Import Procedures

Procedures have to be followed by 'person-in-charge of conveyance' as well as the importer.

Who is 'Person in Charge' - As per Section 2(31), 'person in charge' means (a) In case of vessel - its master (b) In case of aircraft - its commander or pilot-in-charge (c) In case of train - its conductor or guard and (d) In case of vehicle or other conveyance - its driver or other person in charge.

The significance of this definition is -

- He is responsible for submitting Import Manifest and Export Manifest.
- He is responsible to ensure that the conveyance comes through approved route and lands at approved place only.
- He has to ensure that goods are unloaded after written order, at proper place. Loading also has to be only after permission.
- He has to ensure that conveyance does not leave without written order of Customs authorities.
- He can be penalised for (a) giving false declaration and statement (b) shortages or non-accounting of goods in conveyance.

Conveyance - 'Conveyance includes a vessel, an aircraft and a vehicle' [Section 2(9) of Customs Act].

Arrival at customs port/airport only - Section 29 provides that person-in-charge of a vessel or an aircraft entering India shall call or land at customs port or customs airport *only*. It can land at other place only if compelled by accident, stress of weather or other unavoidable cause. In such case, he should report to nearest police station or Customs Officer. While arriving by land route, the vehicle should come by approved route to 'land customs station' only.

Import Manifest/Report - Person-in-charge of vessel, aircraft or vehicle has to submit Import Manifest/ Report. [also termed as IGM - Import General Manifest]. (In case of a vessel or aircraft, it is called import manifest, while in case of vehicle, it is called import report.) The import manifest in case of vessel or aircraft is required to be submitted *prior* to arrival of a vessel or aircraft. Import report (in case of vehicle) has to be submitted within 12 hours of arrival at the customs station. If the report/manifest could not be submitted within prescribed time, person-in-charge or any person specified as responsible by a notification is liable to penalty upto Rs. 50,000. Such penalty will not be imposed if the excise officer is satisfied that there was sufficient cause for the delay. [Section 30(1)].

IGM can be submitted electronically through floppy where EDI facility is available.

Grant of Entry Inwards by Customs Officer - After delivery of import manifest or if Customs Officer is satisfied that there are sufficient reasons for not delivering the import manifest, Customs Officer shall grant 'entry inward' u/s 31.

Unloading of cargo can start only after Customs Officer grant 'Entry Inwards' [Section 31(1)]. Such entry inwards can be granted only when berthing accommodation is granted to a vessel. If there is heavy congestion at port, shipping berth may not be available and in such case, 'Entry Inwards' cannot be granted. This date is highly relevant for determining rate of customs duty applicable.

Entry inward is not required for unloading of baggage, mail bags, animals, perishable goods and hazardous goods [Section 31(3) of Customs Act].

Unloading of reported goods only is permissible - Section 32 of Customs Act provide that only those goods mentioned in the import manifest can be unloaded. Such unloading can be only at approved place (Section 32) and under supervision of Customs Officer (Section 34). Unloading on Sundays or other holidays and after working hours can be done only after giving notice and paying prescribed fees (Section 36). Customs Officer is empowered to ask for any document and to answer any questions for purposes of carrying out the provisions of Customs Act.

Procedures for import

The broad procedures to be followed for assessment and clearance of imported goods are as follows –

- Importer to submit Bill of Entry giving details of goods to be cleared from customs
- Bill of Entry can be for home consumption (i.e. clearance after payment of duty) (white colour) or for warehousing (keeping in warehouse without payment of duty and later clearing on payment of duty when required) (yellow colour)
- Importer to submit other documents like Invoices, contracts, product literature, packing lists, import license etc. so that Customs Officer can assess the imported goods under clearance
- Noting of Bill of Entry by Customs Officer
- Examination of goods and assessment by Customs Officer (if first appraisement system) or assessment of goods on basis of documents (if second appraisement system)
- Pre-audit by customs department
- Customs Officer to approve assessment (valuation of goods) on the Bill of Entry and return to importer
- Importer to execute bond if clearance at concessional rate of duty subject to some conditions or clearance is under provisional assessment
- Importer to pay duty, if clearance is for home consumption or execute bond, if clearance is for warehousing
- Inspection of goods (if assessment was under second appraisement system)
- Out of customs charge order by Customs Officer
- Pay dues of port trust, pay demurrage (if applicable), pay other dues
- Transport the goods from customs

These procedures are for import by ship/air/road. There is separate procedure for goods imported as a baggage or by post.

Who is importer - Section 2(26) of Customs Act states that 'Importer' in relation to any goods at any time between their importation and the time when they are cleared for home consumption includes any owner or any person holding himself out to be the importer. - Thus, 'importer' may or may not be the 'owner' of goods.

Submission of Bill of Entry

Bill of Entry is a very vital and important document which every importer has to submit to Customs Officer in respect of imported goods other than goods intended for transit or transshipment. Bill of Entry should be in prescribed form. It can be either for home consumption or for warehousing [Section 46(1)]. It should include all goods mentioned in Bill of Lading or other receipt given by carrier to consignor [Section 46(2)]. Importer has to declare that contents of Bill of Entry are true [Section 46(4)]

Bill of Entry can be submitted after the person in charge of conveyance has submitted import manifest or import report. However, in case of aircraft or vessel, it can be submitted upto 30 days prior to expected date of arrival of ship or aircraft [Section 46(3)].

Bill of Entry can be either for home consumption (on payment of applicable customs duty) or for warehousing (without payment of customs duty).

The standard size of Bill of Entry is 16" × 13". However, for computerisation purposes, 15" × 12" size is permitted. (Mumbai Customs Public Notice No. 142/93 dated 3-11-93).

Normally, Bill of Entry is filed by CHA on behalf of the importer.

Bill of Entry should be submitted in quadruplicate – original and duplicate for customs, triplicate for the importer and fourth copy is meant for bank for making remittances.

Types of Bill of Entry - Bills of Entry should be of one of three types. Out of these, two types are for clearance from customs while third is for clearance from warehouse.

Bill of Entry for Home Consumption - This form, called 'Bill of Entry for Home Consumption', is used when the imported goods are to be cleared on payment of full duty. *Home consumption means use within India*. It is white coloured and hence often called 'white bill of entry'.

Bill of Entry for Warehousing - If the imported goods are not required immediately, importer may like to store the goods in a warehouse without payment of duty under a bond and then clear from warehouse when required on payment of duty. This will enable him to defer payment of customs duty till goods are actually required by him. In such cases, he will have to submit 'Bill of Entry for Warehousing'. This Bill of Entry is printed on yellow paper and often called 'Yellow Bill of Entry'. It is also called 'Into Bond Bill of Entry' as bond is executed for transfer of goods in warehouse without payment of duty.

Bill of Entry for ex-bond clearance - The third type is for Ex-Bond clearance. This is used for clearance from the warehouse on payment of duty and is printed on green paper. The goods are classified and value is assessed at the time of clearance from customs port. Thus, value and classification is not required to be determined in this bill of entry. The columns in this bill of entry are similar to other bills of entry. However, declaration by importer is not required as the goods are already assessed.

Rate of duty for clearance from warehouse - It may be noted that rate of duty applicable is as prevalent on date of removal *from warehouse*. Thus, if rate has changed after goods are cleared from customs port, customs duty as assessed on yellow bill of entry and as paid on green bill of entry will not be same.

Electronic submission under EDI system - Customs work at many ports has been computerised. In that case, the Bill of Entry has to be filed electronically, i.e. through Customs EDI system through computerisation of work. Procedure for the same has been prescribed vide Bill of Entry (Electronic Declaration) Regulations, 1995.

At some 23 Customs Stations, electronic filing of customs documents for clearance of goods can be done round the clock, i.e. any time during day/night. It is proposed to introduce self-assessment and selective examination. – *Announcement of Finance Minister while presenting Finance Bill on 3-2-2004.*

Noting of Bill of Entry - Bill of Entry submitted by importer or Customs House Agent is cross-checked with 'Import Manifest' submitted by person in charge of vessel/carrier. It is noted if the description tallies. 'Noting' really means taking on record by Customs Officer. This date is relevant for determining rate of customs duty. Thoka number (serial number) is given in the import Section. Otherwise, it is returned for clarifications. In case of EDI system, noting is done by the system itself which also generates bill of entry number.

Prior submission of Bill of Entry - After the goods are unloaded, these have to be cleared within stipulated time – usually three working days. If these are not so removed, demurrage is charged by port trust/airport authorities, which is very high. Hence, importer wants to complete as many formalities as possible before ship arrives. *Proviso* to Section 46(3) of Customs Act allows importer to present bill of entry upto 30 days before *expected date of arrival* of vessel. In such case, duty will be payable at the rate applicable on the date on which 'Entry Inward' is granted to vessel and not the date of presentation of Bill of Entry, *but rate of exchange will be as prevalent on date of submission of bill of entry*.

Assessment of Customs Duty

Section 17(1) of Customs Act provides that assessment of goods will be made after Bill of Entry is filed. Goods will be examined and tested and then duty leviable on such goods will be assessed [Section 17(2) of Customs Act]. Assessment can be made before examination or testing of goods on the basis of statements made in Bill of Entry and documents produced. Examination and testing of goods will be done subsequently [Section 17(4)]. Customs Officer can ask importer to submit documents like contract, broker's note, policy of insurance, catalogue or other documents whereby duty payable can be ascertained [Section 17(3)].

Date stamp of receipt is put on the 'Bill of Entry' and then it is sent to appraising department either manually or electronically.

The documents submitted by importer are checked and assessed by Customs authorities and then goods are cleared.

Section 2 (2) defines 'assessment' as follows – 'Assessment' includes provisional assessment, reassessment and any order of assessment in which the duty assessed is Nil. Thus, 'assessment' includes 'Nil' assessment.

First and second system of assessment - There are two systems of assessment of customs duty. Section 17(2) provides for assessment after examination of goods and Section 17(4) provides for assessment on basis of documents, followed by inspection and testing of goods.

"*First appraisement system*" or '*first check procedure*' comes u/s 17(2). It is followed if the appraiser is not able to make assessment on the basis of documents submitted and deems that inspection is necessary. Goods are examined first and then these are assessed. This method is followed only if assessment is not possible on basis of documents. - - The importer himself may also request 'first check procedure', if he cannot give all required details regarding description/value of goods. He has to make request for first check examination at the time of filing of Bill of Entry or at data entry stage in case of EDI. He has to give reason for seeking first appraisement. The examination order is recorded on Bill of Entry and then returned to

importer/CHA. It is then presented to import shed for examination. The shed appraiser/Dock examiner examines the goods as per examination order and records his findings. If samples are required, they are taken out. In case of EDI system, the report of examination is given in the computer itself. The goods are then assessed to duty by appraiser. - *Chapter 3 Para 23 of CBE&C's Customs Manual, 2001.*

In "*Second Appraisement System*" or '*second check procedur*e', which is normally followed, assessment is done on basis of documents and then goods are examined. Such assessment is covered u/s 17(4). Such examination is not mandatory. It is done on selective basis on the basis of 'risk assessment' or specific intelligence report.

Section 17(4) of Customs Act specifically provides that if initially assessment is done on basis of documents, re-assessment can be done after examination or testing of goods or otherwise, if it is found subsequent to examination or testing or otherwise, that any statement made on Bill of Entry or any information supplied is not true in respect of matter relevant to assessment of duty.

First appraisement is generally carried out in following cases - * If complete documents are not submitted * Goods are to be tested for correct classification * Goods are re-imported * Goods are damaged or deteriorated and abatement is claimed * Goods are abandoned and remission of duty is applied for * When goods are provisionally assessed * When importer himself requests for examination of goods before payment of duty * If there is specific intelligence report.

Examination of Goods - Examiners carry out physical examination and quantitative checking like weighing, measuring etc. Selected packages are opened and examined on sample basis in 'Customs Examination Yard'. Examination report is prepared by the examiner.

Procedure for approval of Assessment - The assessment has to be approved by Assistant Commissioner, if the value is more than Rs. one lakh. (In cases covered under 'fast track clearance for imports', appraiser is also authorised to approve valuation). After the approval, duty payable is typed by a "pin-point typewriter" so that it cannot be tampered with. As per CBE&C circular No. 10/98-Cus dated 11-2-1998, Assessing Officer should sign in full in Bill of Entry followed by his name, preferably by rubber stamp.

Assessment on Bill of Entry is an appealable order - In *Midland Plastics* v. *CC* 2002(141) ELT 235 (CEGAT), it was held that assessment order on Bill of Entry is a final order and is appealable. There is no necessity to pass a speaking order, if assessee did not context the assessment. If assessee is not satisfied, he should file appeal against the assessment made on Bill of Entry (and not a mere refund claim). – similar view in *National Engg* v. *CCE* 2002(140) ELT 122 (CEGAT).

Adjudication order if value and classification declared by assessee not accepted - Section 17(5) of Customs Act (inserted by Taxation Laws (Amendment) Act w.e.f. 13-7-2006), provides that if assessment is done contrary to the claim of importer/exporter, the Customs Officer shall pass a speaking order within fifteen days from date of assessment of bill of entry or shipping bill, unless the importer/exporter confirms his acceptance of the assessment in writing.

Provisional Assessment

Section 18 of Customs Act, 1962 provides that provisional assessment can be done in following cases (*a*) when Customs Officer is satisfied that importer or exporter is unable to produce document or furnish information required for assessment (*b*) it is deemed necessary to carry out chemical or other tests of goods (*c*) when importer/exporter has produced all documents, but Customs Officer still deems it necessary to make further enquiry.

In such cases, assessment is done on provisional basis. The importer/exporter has to furnish guarantee/ security as required by Customs Officer for payment of difference if any. Goods can be cleared after payment of duty provisionally assessed and after providing the security. After final assessment, difference is paid by importer or refunded to him as the case may be. If the imported goods were warehoused after provisional assessment, the Customs Officer may require importer to execute a bond for twice the difference in duty, if duty finally assessed is higher [Section 18(2)(*a*)].

The bond is called as 'P D Bond' (Provisional Duty Bond). The bond is with security or surety. Bank guarantee can also be given as a security.

Procedure for provisional assessment - As per Customs Appraising Manual Vol II Chapter I, if bond for provisional assessment is executed, it will be registered in both Bond Register as well as Provisional Duty Register. The serial number in both the registers will be entered boldly on each and every copy of Bill of Entry. Bill of Entry should be rubber stamped as 'Provisional Duty'. Samples will be taken for testing as per prescribed procedure.

After finalisation of provisional assessment, final assessment order will be issued. If the amount is found to be payable, it shall be paid by importer. If the amount is found to be refundable, importer should make application under Section 27. The refund will be subject to unjust enrichment.

Refund subject to unjust enrichment - Section 18(5) of Customs Act inserted by Taxation Laws (Amendment) Act w.e.f. 13-7-2006, provides that if any amount is found to be refundable after finalisation of provisional assessment, such refund will be subject to doctrine of unjust enrichment. Refund will be granted to importer/exporter only in following cases –

- If Importer/exporter/buyer has not passed on incidence of the duty to another person.
- If Imports are made by *individual* for his personal use.
- In case of Refund of export duty, if any, u/s 26 of Customs Act.
- In case of Duty drawback payable to exporter u/s 74 or 75 of Customs Act.

(This is similar to provisions under *proviso* to Section 27(2) of Customs Act in respect of refund of customs duty and interest).

Interest in case of provisional assessment - Till 13-7-2006, there was no provision for payment of interest in case of provisional assessment. Section 18(3) of Customs Act inserted by Taxation Laws (Amendment) Act w.e.f. 13-7-2006, provides that if differential amount is found to be payable, it will be paid with interest at rate prescribed under Section 28AB of Customs Act, from the first day of the month in which duty is provisionally assessed till date of payment [appears unfair. It should be from first day of next month or at least from date of provisional assessment].

Interest if amount is refundable to assessee – Section 18(4) of Customs Act inserted by Taxation Laws (Amendment) Act w.e.f. 13-7-2006, provides that if any amount is refundable after final assessment (subject to doctrine of unjust enrichment), interest will be payable if refund is not granted within 3 months. Interest will be at rates specified u/s 27A of Customs Act.

Relevant Date for Rate and Valuation of Import Duty

Section 15 of Customs Act prescribes that rate of duty and tariff valuation applicable to imported goods shall be the rate and valuation in force at one of the following dates. (*a*) if the goods are entered for home

consumption, the date on which bill of entry is presented (*b*) in case of warehoused goods, when Bill of Entry for home consumption is presented u/s 68 for clearance from warehouse and (*c*) in other cases, date of payment of duty.

Relevant date of Bill of Entry for home consumption - As per Section 46 of Customs Act, every importer of goods has to submit a 'Bill of Entry' giving details of goods being imported. The carrier of goods has to submit 'Import Manifest' or 'Import Report' giving details of all goods which are brought for unloading at the port. If shipping berth is available, 'Entry Inwards' is granted to the vessel.

Normally, Bill of Entry should be presented after ship arrives and import manifest is submitted by shipper. However, this will delay the assessment process and goods lying on docks will incur heavy demurrage. Hence, it is permitted to submit 'Bill of Entry' if the vessel in which goods have been shipped is expected to arrive within 30 days of such presentation. However, even if Bill of Entry is submitted earlier, date for purpose of assessment will be (*a*) date of grant of 'entry inward' to vessel or (*b*) date of submission of Bill of Entry *whichever is later* e.g. if Bill of Entry is presented on 5th January and 'Entry Inward' is granted on 10th January, relevant date will be 10th January, but if entry inward is on 10th January and Bill of Entry is presented on 13th January, then 13th January will be the relevant date.

Relevant date when goods were warehoused - The Bill of Entry may be for home consumption or for warehousing. Home consumption means goods are for use or consumption in India. At times, the importer may not immediately need the goods. In such cases, he can keep those goods in warehouse without payment of duty and clear the goods from warehouse when needed. In such cases, duty payable is as per rate of duty prevailing on date on which Bill of Entry for home consumption in respect of such goods is presented u/s 68 [Section 15(1)(b) as amended w.e.f. 14-5-2003]. Earlier, the relevant date was 'when goods are actually removed from warehouse'.

Question : Goods were imported in February 2005 and were cleared from Mumbai port for warehousing on 14th February, 2005 after assessment. Assessable Value was Rs. 10,000 calculated on the basis of rate of exchange of Rs. 45.54 = 1 US Dollar. The rate of duty on that date was 25%. (assume that no additional duty or education cess is payable). The goods were warehoused at Nashik and were cleared from Nashik warehouse on 3rd March, 2005, when rate of duty was 15% and exchange rate was Rs. 45.65 = 1 US Dollar. What is the duty payable while removing the goods from Nashik on 3rd March, 2005 ?

Answer : Duty is payable @ 15% of Rs. 10,000/- i.e. Rs. 1,500/-. As per Section 14(1), the rate of exchange relevant is as in force on the date on which bill of entry is presented under Section 46 for home consumption *or warehousing*. Thus, any subsequent change in rate of exchange will not affect the valuation already done.

Relevant date for foreign exchange rate

Relevant date for determining foreign exchange rate is date of presentation of Bill of Entry. The condition of 'grant of entry inwards' is not provided for this purpose. Bill of Entry can be presented thirty days before expected date of arrival of vessel. If Bill of Entry is presented within that time and even if 'Entry Inward' is granted subsequently, rate of exchange relevant is the date of presentation of bill of entry. e.g. assume that expected date of arrival as per 'Shipping News' is 18th March, 2001. Bill of Entry was filed on 1st March, 2001, i.e. within 30 days. However, ship was delayed and 'Entry Inward' was granted on 30th March, 2001. Thus, for 'rate of customs duty', 30th March, 2001 is the relevant date, while for considering foreign exchange rate, 1st March, 2001 is the relevant date i.e. foreign exchange rate as on that date will have to be considered.

Payment of duty - If goods are to be removed to a warehouse, duty payment is not required. The goods can be taken to a warehouse under bond, without payment of duty. However, if goods are to be removed for home consumption, payment of customs duty is required. CHA or the importer can take it for payment of customs duty. Large importers and CHA have P.D. accounts with customs. Duty can be paid either in cash or through P.D. account. P.D. account means provisional duty account. This is a current account, similar to PLA in central excise.

Interest for late payment of duty - The duty should be paid within five working days (i.e. within five days excluding holidays) after the 'Bill of Entry' is returned to the importer for payment of duty. [Section 47(2)]. (Till 11-5-2002, the period allowed was only 2 days).

If duty is not paid within 5 working days as aforesaid, interest is payable. Such interest can be between 10% to 36% as may be notified by Central Government. [Section 47(2) of Customs Act, 1962.]. - - Interest rate is 15% w.e.f. 13-5-2002. [Notification No. 28/2002-Cus(NT) dated 13-5-2002] Earlier, interest rate was 24% p.a, w.e.f. 1-3-2000, as per notification No. 34/2000-Cus(NT)].

Out of Customs Charge Order - After goods are examined, it is verified that import is not prohibited and after customs duty is paid, Customs Officer will issue 'Out of Customs Charge' order under Section 47 of Customs Act. Goods can be cleared from customs area only on receipt of such order. This is an 'adjudicating order' within the meaning of Customs Act, even if it is passed by Appraiser and not by Assistant Commissioner.

Self Assessment on basis of 'Risk Management System' (RMS)

One major step is being taken to move in the direction of implementing international best practices in customs clearance. A 'Risk Management System' for customs clearance of import and export cargo has been introduced. The details of scheme are contained in MF(DR) circular No. 43/2005-Cus dated 24-11-2005 – see also CC, Bangalore-I PN 88/2006 dated 31-7-2006 (201 ELT T5).

Initially, the scheme will be introduced in Air Cargo Complex, Sahar Mumbai and then it will be introduced in other customs houses in phases.

Under Risk Management System (RMS), only high risk cargo is selected for examination. The system provides for special customs clearance for Accredited Clients having good track record and meet specified criteria.

The scheme proposes to do away with existing system of routine assessments and concurrent audit. Goods will be normally cleared on basis of self assessment of importer. Bill of Entry submitted electronically will be transmitted to RMS. The RMS will process the data and produce an electronic output. This output will determine whether the Bill of Entry will be taken up for appraisement/examination or be cleared after payment of duty without any assessment and examination. Any change in system will require prior approval of Commissioner of Customs and after recording reasons.

Focus will be on quality assessment, examination and post clearance audit of Bills of Entry selected by the Risk Concurrent Audit will be replaced by Post Clearance Audit on Bill of Entry selected by the Risk Management System. Subsequently, demand can be raised even if goods have been cleared from customs.

Import of software through data communication

Import of software through data communication/tele-communication is permitted. Since such imports are

not available for physical verification, proper accountable in books should be maintained. Unit intending to import software through datalink is required to inform estimated annual requirement to Development Commissioner of EOU/Director of STP. This should be approved by him. [what for?]. After import of software through internet, written information should be submitted to Director of STP/Development Commissioner of EOU and importer shall get a certificate. This certificate should be submitted to Assistant/ Dy Commissioner of Customs within 48 hours, along with Bill of Entry and certificate from Development Commissioner of EOU/Director of STP. He will issue 'out of charge' order. The documents such as invoice etc. will be routed through bank. - MF(DR) circular No. 58/2000-Cus dated 10-7-2000.

Demurrage if goods not cleared from customs

Demurrage is payable if goods are not cleared from port within three working days.

As per Section 48 of Customs Act, goods must be cleared within 30 days after unloading. Customs Officer can grant extension. Otherwise, goods can be sold after giving notice to importer. Animals, perishable goods and hazardous goods can be sold any time - seven before 30 days. Arms and ammunition can be sold only with permission of Central Government.

10.3 Export Procedures

Export Procedures have to be followed by (*a*) 'person-in-charge of conveyance' and (*b*) the exporter. The procedures are similar to procedures for import, of course, in reverse direction.

Any new airline, shipping line, steamer agent should be registered in Customs Systems for electronic processing of shipping bills etc. The 'person-in-charge of conveyance' has to follow prescribed procedures.

Entry Outward - The vessel intending to start loading of export goods for outward movement should be granted 'Entry Outward' by Customs Officer. Loading can start only after entry outward is granted. Such permission is not necessary for loading of baggage and mail bags (Section 39 of Customs Act).

Loading with permission - Export goods can be loaded only after Shipping Bill or Bill of Export, duly passed by Customs Officer is handed over by Exporter to the person-in-charge of conveyance. In case of baggage and mail bags, shipping bill is not necessary, but permission of Customs Officer is required (Section 40).

Export Manifest - As per Section 41 of Customs Act, an Export Manifest/Export Report in prescribed form should be submitted before departure. [The report is popularly called as 'Export General Manifest' - EGM]. The details required are similar to import manifest. Such manifest/report can be amended or supplemented with permission, if there was no fraudulent intention. Such report should be declared as true by the person-in-charge signing the export manifest. This report is not required if the conveyance is carrying only luggage of occupants.

No stoppage of export consignment or stoppage of manufacturing - Exports are vital for our economy. Any stoppage in export consignment means loss of export orders to the exporter and loss of foreign exchange to the country.

Hence, it has been provided that movement of export consignment will not be interrupted and no export consignment shall be withheld for any reason whatsoever by any agency of Central/State Government. In case of any doubt, customs authorities may ask for an undertaking that the export is on sole responsibility of the exporter. [para 2.42 of FTP].

No seizure shall be made by any agency so as to disrupt the manufacturing activity and schedule of export goods. In exceptional cases, the concerned agency may seize the stock on basis of *prima facie* evidence. Such seizure should be lifted within seven days [para 2.42.1 of FTP]

Procedures to be followed by Exporter

Export procedures have been summarised in *Chapter 3 Part II of CBE&C's Customs Manual, 2001.*

The broad procedures to be followed for exports are as follows –

- Submit Shipping Bill for export to customs authorities
- Submit invoice, packing lists, contracts, export authorisation (if applicable) and other related documents
- Submit necessary declarations for export. Submit * GR/SDF/SOFTEX form as required under FEMA * Excise ARE-1 form
- The 'Export Value Declaration' should be in form given in Annexure A to MF(DR) circular No. 37/2007-Cus dated 9-10-2007.
- Noting of Shipping Bill by Customs Officer
- Assessment i.e. valuation and classification of goods. Checking of Advance Authorisation, if applicable
- Custom check whether export is restricted/prohibited
- Examination of goods by Customs Officer
- Pay export duty, if applicable
- Stuffing of container, if not already done
- 'Let export' Order by Customs Officer
- Obtain ARE-1 form duly signed by Customs Officer. Obtain Bill of Lading from shipping company. Submit proof of export to excise authorities.
- Complete formalities relating to claim of duty drawback.

Initial steps by exporter - Every exporter should take following initial steps -

- Obtain BIN (Business Identification Number) from DGFT. It is a PAN based number
- Open current account with designated bank for credit of duty drawback claims
- Register licenses/advance authorisation/DEPB etc. at the customs station, if exports are under Export Promotion Schemes.

RCMC certificate from Export Promotion Council - Various Export Promotion Councils have been set up to promote and develop exports (e.g. Engineering Export Promotion Council, Apparel Export Promotion Council, etc.) Exporter has to become member of the concerned Export Promotion Council and obtain RCMC - Registration cum Membership Certificate.

Third party exports - Third party exports means exports made by an Exporter or Manufacturer on behalf of another exporter/s. The Shipping Bill shall indicate the names of both the exporter/manufacturer and exporter. The BRC, GR declaration, export order and the Invoice shall be in name of the third party exporter [para 9.62 of FTP].

SEZ unit can export goods or software through a merchant exporter/status holder.

Merchant Exporter - Merchant Exporter means a person engaged in trading activity and exporting or intending to export goods [para 9.40 of FTP].

Shipping Bill to be submitted by Exporter – Every exporter has to submit 'shipping bill' for export by sea or air and 'bill of export' for export by road. Goods have to be assessed for duty, even if no duty is payable for most of exports, as 'Nil Duty' assessment is also an assessment.

Shipping Bill and Bill of Export (Form) Regulations, 1991 prescribe form of shipping bills. It should be submitted in quadruplicate. If drawback claim is to be made, one additional copy should be submitted. There are five forms : (*a*) Shipping Bill for export of goods under claim for duty drawback - these should be in green colour (*b*) Shipping Bill for export of dutiable goods - this should be yellow colour (*c*) Shipping bill for export of duty free goods - it should be white colour (*d*) Shipping Bill for export of duty free goods ex-bond - i.e. from bonded store room - it should be pink colour (e) Shipping Bill for export under DEPB scheme - blue colour.

As per Rule 7 of Customs Valuation (Determination of Value of Export Goods) Rules, 2007, the exporter has to file declaration about full 'value' of goods. The 'Export Value Declaration' should be in form given in Annexure A to MF(DR) circular No. 37/2007-Cus dated 9-10-2007. This declaration is compulsory w.e.f. 12-11-2007.

Excise formalities at the time of Export - If the goods are cleared by manufacturer for export, the goods are accompanied by ARE-1 (earlier AR-4). This form should be submitted to customs authorities. The Customs Officer certifies that the goods under this form have indeed been exported. This form has then to be submitted to Maritime Commissioner for obtaining 'proof of export'. The bond executed by Manufacturer-exporter with excise authorities is released only when 'proof of export' is accepted by Maritime Commissioner or Assistant Commissioner, where bond was executed.

Export duty, Cess etc. if payable – Export duty is levied on very few articles. Cess is payable on export of certain commodities under various Acts.

Relevant date in case of Exports - As per Section 16 of Customs Act (as amended in 1986), in case of exports, relevant date for determination of rate of duty and tariff valuation is (a) In case of goods entered for export u/s 50 (i.e. on submitting shipping bill/bill of export), the date on which clearance for export is permitted by Customs Officer under Section 51 after submission of Shipping Bill (such permission is granted only after payment of export duty, if applicable). (b) In case of other goods, on date of payment of duty.

GR/SDF/SOFTEX Form under FEMA

Reserve Bank of India has prescribed GR/SDF Form under FEMA. "GR" stands for 'Guaranteed Receipt' form, while SDF stands for 'Statutory Declaration Form'. SDF form is to be used where shipping bills are processed electronically in customs house, while GR form is used when shipping bills are processed manually in customs house.

The GR forms are printed and are serially numbered. These are supplied by Reserve Bank of India to Banks (authorised dealers). Exporter has to collect the GR form from authorised dealer (banker). Two copies are to be submitted to customs. One copy is sent by customs to RBI and other will be returned to exporter. The exporter will submit that copy to banker.

SDF form is to be typed by the exporter and submitted in duplicate to customs authorities along with shipping bill. The SDF form is not to be collected from banker. Serial number will be given to SDF form by customs authorities.

Purpose of GR/SDF Form is to enable RBI to ensure that export proceeds from the export are received in India through proper banking channels only.

In case of exports of software in non-physical form i.e. by direct data transmission/satellite links, 'SOFTEX' form has to be used. Value of exports declared on SOFTEX form should be certified by designated official of STP/SEZ. The designated officials of Ministry of Information Technology in STP or SEZ unit can also certify SOFTEX form in respect of EOU software exporters registered with them. – RBI circular No. 9 dated 25-10-2001.

GR/SDF Form is not required for (i) Goods sent outside for testing and re-import in India (ii) Repair abroad and re-import. – MF(DR) circular No. 19/2003-Cus dated 27-3-2003.

Waiver of GR/SDF Form – RBI has relaxed conditions in respect of GR/SDF Form. GR/SDF Form is not required in various cases as prescribed under FEMA. Main relaxation is that GR/SDF Form is not required when value of import bill does not exceed USD 25,000 – RBI circular No. 61 dated 31-1-2004 and MF(DR) circular No. 53/2004-Cus dated 13-10-2004 again brought to notice of Customs Officers *vide* MF(DR) circular No. 450/25/2005-Cus-IV dated 29-3-2005.

Permission to export by customs

Document submitted is processed by customs authorities, and following are checked - *Chapter 3 Para 39 of CBE&C's Customs Manual, 2001*. –

- Value and classification of goods under drawback schedule in case of drawback shipping bills
- Export duty/cess if applicable
- Advance Authorisation shipping bills are checked to ensure that description in invoice and final product specified in Advance Authorisation matches. If necessary, samples may be drawn and assessment may be done after visual inspection or testing
- Exportability of goods under Foreign Trade Policy and other laws - Some exports are totally prohibited under various Acts e.g. items restricted or prohibited under Foreign Trade (Regulation) Act; antiques; art treasures; Arms; narcotics etc. Some items like tea, coffee and coir products can be exported only against authorisation/licence under respective Acts.

Examination of goods before export - After shipping bill is passed by export department, the goods are presented to shed appraiser (exports) in dock for examination. Goods will be examined by examiner. This inspection is necessary (*a*) to ensure that prohibited goods are not exported (*b*) goods tally with description and invoice (*c*) duty drawback, where applicable, is correctly claimed.

Valuation of goods - As per Rule 7 of Customs Valuation (Determination of Value of Export Goods) Rules, 2007, the exporter has to file declaration about full 'value' of goods. The 'Export Value Declaration' should be in form given in Annexure A to MF(DR) circular No. 37/2007-Cus dated 9-10-2007.

If the assessing officer has doubts about the truth and accuracy of 'value' as declared, he can ask exporter to submit further information, details and documents. If the doubt persists, the assessing officer can reject the value declared by importer. [Rule 8(1) of Customs Valuation (Determination of Value of Export Goods)

Rules, 2007]. If the exporter requests, the assessing officer has to give reasons for doubting the value declared by exporter. [Rule 8(2)]. If the value declared by exporter is rejected, the assessing officer can value export goods on other basis e.g. value of goods of like kind and quality, computed value or residual method as provided in Customs Valuation (Determination of Value of Export Goods) Rules, 2007.

Adjudication order if value and classification declared by assessee not accepted - Section 17(5) of Customs Act (inserted by Taxation Laws (Amendment) Act w.e.f. 13-7-2006), provides that if assessment is done contrary to the claim of importer/exporter, the Customs Officer shall pass a speaking order within fifteen days from date of assessment of bill of entry or shipping bill, unless the importer/exporter confirms his acceptance of the assessment in writing.

If assessment is done contrary to claims made by exporter, he can file appeal.

Provisional assessment – Section 18 of Customs Act makes provision for provisional assessment. This aspect has been discussed under 'Import Procedures'.

Let Export Order by Customs Authorities - Customs Officer will verify the contents and after he is satisfied that goods are not prohibited for exports and that export duty, if applicable is paid, will permit clearance. (Section 51) by giving 'let ship' or 'let export' order.

GR-1, ARE-1, octroi papers, quota certification for export etc. are also signed. Exporter's copy of shipping Bill, GR-1, ARE-1 etc. duly certified are handed over to exporter or CHA. Drawback claims papers are also processed. - *Chapter 3 Paras 43 and 60 of CBE&C's Customs Manual, 2001.*

Conveyance to leave on written order - As per Section 2(9) of Customs Act, 'conveyance' includes a vessel, an aircraft and a vehicle.

The conveyance (vessel or aircraft or vehicle etc.) which has brought imported goods or which carry export goods cannot leave that customs station unless a written order is given by Customs Officer. Such order is given only after (*a*) export manifest is submitted (*b*) shipping bills or bills of export, bills of transshipment etc. are submitted (*c*) duties on stores consumed are paid or payment of the same is secured (*d*) no penalty is leviable (*e*) export duty, if applicable, is paid [Section 42 of Customs Act].

STUDY NOTE 11

Other Provisions in Customs

11.1 Baggage

Section 2(3) states that baggage includes 'un-accompanied baggage' but does not include motor vehicles. Thus, baggage rules are also applicable in respect of baggage which comes separately and which is despatched from abroad before or after the traveller's departure. Section 79(1)(b) of Customs Act exempts *bona fide* baggage of passenger which is for use of the passenger or his family. Section 79(2) authorises Central Government to frame rules for prescribing conditions for granting exemption to baggage. In exercise of these powers, Central Government has issued Baggage Rules, 1998, making provisions in respect of baggage.

What is a baggage - The term has not been defined as such. However, following may be noted : (*a*) Baggage means all dutiable articles, imported by passenger or a member of a crew in his baggage (*b*) Un-accompanied baggage, if despatched previously or subsequently within prescribed period is also covered (*c*) Baggage does not include motor vehicles, alcoholic drinks and goods imported through courier (*d*) Baggage does not include articles imported under an import licence for his own use or on behalf of others

Bona fide Baggage Exempt from duty - *Bona fide* baggage accompanying passenger is exempt from duty. It includes wearing apparel, toilet requisites and other personal effects.

General prohibitions - Following are general prohibitions/restrictions - (a) Foreign and Indian currency can be taken out/brought in only as per restrictions of RBI under FEMA. (b) Possession of narcotic drugs is strictly prohibited. (c) Domestic pets like dogs, cats, birds etc. can be brought as per strict health certificate regulations. (d) Taking out exotic birds, wind orchids and wild life, is strictly prohibited. (e) Endangered species or articles made from flora and fauna such as ivory, musk, reptile skins, furs, shahtoosh or antiques are prohibited.

Declaration by owner of baggage - Section 77 of Customs Act provides that owner of any baggage has to make declaration of its contents to Customs Officer. Rate of duty and tariff valuation shall be the rate and valuation in force on the date of declaration.

Green Channel - It is impractical to ask every traveller to declare contents of his baggage. Hence, customs have provided two channels at airports. If a person does not have any dutiable goods, he can go through green channel.

An incoming passenger has to submit disembarkation card, containing written declaration about his baggage. This should be collected when passenger goes through green channel. – MF(DR) circular No. 9/2001-Cus dated 22.2.2001.

Passenger who has nothing to declare can simply walk through green channel with baggage on basis of oral declaration/declaration on their disembarkation cards. Any passenger found walking through green channel with dutiable or prohibited goods (or found mis-declaring quantity, value or description while going through red channel) is liable to strict penal action of seizure and confiscation. He can even be arrest/prosecuted. - *Chapter 24 Para 8 of CBE&C's Customs Manual, 2001.*

Red Channel - Person carrying dutiable goods should pass through red channel and should submit declaration. The declaration of goods and value as given by passenger in disembarkation card is generally accepted, but baggage can be inspected by Customs Officer.

Rate of customs duty on baggage

Baggage is classified in Customs Tariff in Chapter 9803, irrespective of actual classification as per Customs Tariff. The entry reads as "All dutiable articles, imported by passenger or member of crew in his baggage". Tariff rate is 100%. However, effective rate (i.e. specified by a notification) is 35% w.e.f. 1-3-2005. Baggage is exempt from CVD. However, education cess @ 2% and SAH education cess of 1% is payable. Thus, total customs duty on baggage is 36.05%.

This rate is *not* available to - firearms, cartridge of firearms exceeding 50, cigarettes, cigars or tobacco in excess of the quantity prescribed for importation free of duty under Baggage Rules and goods imported through courier service. [*Notification No. 136/90 dated 20-3-90 as amended*]. Since 'baggage' does not include motor vehicles, liquor and firearms, the rate is obviously not applicable for those goods.

Exemption to laptop computer - Laptop computer (notebook computer) brought as baggage by person over 18 years of age (other than member of crew) is fully exempt from customs duty – Notification No. 11/2004-Cus dated 8-1-2004.

A laptop is a small portable Personal Computer (in short 'PC'). A notebook computer is a laptop - *CC* v. *Hewlett Packard India (Sales) P Ltd.* (2007) 215 ELT 484 (SC).

Duty on Gold in some cases - Gold brought as baggage by a passenger of Indian origin or a person holding Indian passport. The duty is only Rs. 100 per 10 gms for import of gold bars bearing manufacturer's or refiner's engraved serial number and weight expressed in metric units and gold coins. In case of other gold, including tola bars and ornaments (but excluding ornaments studded with stones or pearls), the duty is Rs. 250 per 10 gms. Upto 10 Kg gold can be brought by each eligible passenger [Notification No. 31/2003-Cus dated 1-3-2003].

No CVD is payable, but education cess @ 2% and SAH education cess of 1% of duty is payable. Gold can be brought in form of medallions, coins and jewellery, except foreign currency coins and jewellery studded with stones or pearls. The person should have been staying abroad for over six months. Duty must be paid only in convertible foreign currency. Out of the period of 6 months, short visits upto 30 days are permitted, if the concession was not availed in those short visits.

The gold so obtained can be sold in India, provided that payment for the same is obtained by cheque in Indian rupees - *RBI Notification No. FERA 167/95 dated 30-5-95.*

Gold can also be imported by STC, MMTC, HHEC and 8 nationalised banks for sale within India. EOU units in gem and jewellery sector can also import gold and silver directly – RBI circular No. 2 dated 9-7-2004.

Duty on silver in some cases - Silver brought as baggage by a passenger of Indian origin holding Indian passport upto 100 Kg is chargeable to duty of Rs. 500 per Kg (plus education cess @ 2% and SAH education cess of 1% of duty), if the person was staying abroad for over six months. Duty has to be paid only in convertible foreign currency. No CVD is payable. Silver can be brought in any form, including medallions, coins and jewellery, *except* foreign currency coins and jewellery studded with stones or pearls. Out of the period of 6 months, short visits upto 30 days are permitted, if the concession was not availed in such short visit.

Silver can also be imported by STC, MMTC, HHEC and 8 nationalised banks for sale within India. They have to pay duty of Rs. 500 per Kg in Indian Rupees, plus education cess @ 2% of duty. EOU units in gem and jewellery sector can also import gold and silver directly – RBI circular No. 2 dated 9-7-2004.

Relevant date for determining rate of duty and valuation – As per Section 78 of Customs Act, 'relevant date' for rate of duty and baggage is date on which declaration is made in respect of baggage as required u/s 77 of Customs Act.

Exemptions/Restrictions on Baggage

Tourists can be broadly classified as (*a*) Indian persons going abroad for a short trip and coming back (*b*) Indian persons gone abroad for work and coming back after few years (*c*) Tourists visiting India for sightseeing or business purpose. Accordingly, 'Baggage Rules, 1998' contain different provisions for (*a*) Residents from India (*b*) Tourists visiting India and (*c*) Persons transferring their residence.

Export Certificate - If a person had gone abroad from India, he should take 'Export Certificate' while taking out jewellery, camera etc. Otherwise, customs duty will be leviable while bringing back the goods. [Of course, note that customs people are practical persons. They won't ask for 'Export Certificate' if you bring items like a small personal camera or jewellery which a lady or man usually wears].

Baggage of Indian resident or foreigner residing in India

Resident means a person holding Indian Passport and normally residing in India (i.e. Indian persons going abroad for short visit). The concession of free import of used personal effects and General Free Allowance is also available for foreign citizens residing in India.

Used personal effects - Used articles of personal wear and articles in personal use of passengers for daily necessities is fully exempt. Used personal effects are also exempt. (This allowance is also available to foreign citizens residing in India returning from abroad).

General Free Allowance - In addition to personal effects (excluding jewellery) and a laptop computer, a passenger of 10 or more years of age is allowed general free allowance of Rs. 25,000, if the Indian Resident is returning from country *other than* Nepal, Bhutan, Myanmar or China. This allowance is also available to foreign citizens residing in India, after stay of more than three days. This allowance cannot be pooled with General Free Allowance of other passengers - e.g. husband and wife bringing one item of Rs. 50,000 *will not be permitted duty free*. This General Free Allowance is *not* applicable to un-accompanied baggage.

The limit of Rs. 25,000 is reduced as follows - (*a*) Rs. 12,000 for passengers after stay abroad of three days or less . (*b*) If the passenger is upto 10 years of age and is returning from country other than Nepal, Bhutan, Myanmar or China, the allowance is Rs. 6,000 if a person is returning after stay of more than 3 days and Rs. 3,000, if his stay was 3 days or less. *(c)* If the passenger is returning from Pakistan by land route, as specified in Annexure IV of Baggage Rules, the General Free Allowance is Rs. 6000 for passengers above 10 years and Rs. 1500 for passengers upto 10 years of age. [*Note – GFA has been increased w.e.f. 3-2-2004. Earlier, the GFA was about 50% of amounts as indicated above*]

Lower General Free allowance in case of certain countries - An Indian Resident or foreigner residing in India of age 10 or more is entitled to lower rate of General Free Allowance of Rs. 6,000, if he is returning from Nepal, Bhutan, Myanmar or China after stay of more than 3 days, by route other than land route. Passenger upto 10 years returning from these countries after stay of more than 3 days is entitled to General Free Allowance of Rs. 1,500. There is no duty on personal effects. [Appendix B to Baggage Rules, 1998]. There is no general free allowance if a person is returning from these countries after stay of three days or less. There is no free allowance if passenger returns by land route from these countries, even if his stay abroad was more than 3 days. If the passenger is returning from Pakistan by land route as specified in Annexure IV of Baggage Rules, the general free allowance is Rs. 6000 for passengers above 10 years and Rs. 1,500 for passengers upto 10 years of age.

No General Free allowance in certain cases - General Free Allowance is available to Indian Residents, foreigners who are residing in India and tourists of Indian origin. The allowance is also available if he is transferring his residence or returning after 3/12/24 months. A Non Resident Indian who does not hold Indian passport is also entitled to GFA if he is of Indian origin. The GFA is not available to foreign tourists.

No GFA on un-accompanied baggage - General Free Allowance is *not allowed on un-accompanied baggage*.

Restricted/Excluded items from General Free Allowance - The exemption is not allowed to items included in Annex I to Baggage Rules, 1998. Items included in Annex I are : (*1*) firearms; (*2*) cartridges of firearms exceeding 50; (*3*) cigarettes exceeding 200 or cigars exceeding 50 or tobacco exceeding 250 Gms; (*4*) Alcoholic liquor or wines in excess of two litres (*5*) Gold or Silver in any form, other than ornaments.

Allowance to professionals returning to India - An Indian passenger who was engaged in his profession abroad for over three months is allowed to import following duty free goods as additional allowance - (a) Used Household Articles upto Rs. 12,000 (e.g. linen, utensils, tableware, kitchen appliances, an iron etc.) (b) Professional equipment like portable equipments, apparatus and appliances required in such profession, upto Rs. 20,000. The limit will be increased to Rs. 40,000. if he was abroad for over 6 months. [This allowance is in addition to General Free Allowance].

Limited exemption to jewellery - If the passenger was residing abroad for over one year, jewellery can be imported duty free upto Rs. 10,000 in case of gentleman passenger and Rs. 20,000 in case of lady passenger. [Appendix D to Baggage Rules, 1998]. [Note that personal jewellery which was taken out can be brought back without any limit, if necessary export certificate was taken at the time of going out of India. Jewellery which is normally worn is treated as 'personal effects' and is exempt from import duty, even if 'Export Certificate' is not issued].

Concession to persons transferring his residence (TR)

A person who is transferring his residence to India is eligible to bring *used personal and household articles* to India without duty. The provisions are applicable to all - i.e. foreigners coming for residing in India as well as Indian resident coming after 2 years and who is transferring his residence to India.

Conditions for TR concession - The conditions for TR concession are :

(a) He should have been residing abroad for at least two years During this period short visits not exceeding 6 months are permissible.

(b) The provision regarding 2 years' stay can be condoned upto 2 months by Assistant Commissioner, if the early return was due to terminal leave or vacation or other special circumstances.

(c) The provision regarding maximum 6 months stay during 2 years can be relaxed by Commissioner in deserving cases.

(d) The passenger should not have availed this concession in preceding three years

(e) Goods in Annexure I and Annexure II are not allowed under this concession.

(f) Goods in Annexure III are fully exempt from customs duty, if within limit of Rs. five lakhs.

(g) Jewellery upto Rs. 10,000 for male passenger and Rs. 20,000 for female passenger can be imported free of customs duty. (Rules 8 of Baggage Rules, 1998, read with Appendix F). (However, duty on items in Annex II is 15% upto value of goods of Rs. 5.00 lakhs).

Since 'baggage' does not include motor vehicles, liquor and firearms, the exemption is obviously not applicable for those goods.

General Free Allowance - A passenger can also avail of 'General Free Allowance' as available to other residents, in addition to above. (Rule 8).

Concession for transfer of residence - A person transferring his residence to India after stay abroad for two years and who has not availed this concession in preceding three years is eligible for concession upto value of Rs. 5.00 lakhs *exclusive* of value of his personal effects and other household articles. This concession is available on all articles contained in Annex II and Annex III of Baggage Rules, 1998. [*As against only Rs. 75,000 in case of Mini TR - inclusive of personal effects and other household articles - available to those who are coming after stay abroad for 365 days out of last two years*]. Duty is 15% plus education cess of 2% of duty, for items in Annex II and Nil for items included in Annex III. Passenger has to declare that no other person of his family has availed this benefit. [*Notification No. 137/90 dated 20-3-90 as amended*].

Articles not allowed under TR - Transfer of Residence concession is not available to motor vehicles, vessels, aircrafts, cinematograph films, alcoholic liquor or wines (in excess of two litres), cigarettes (exceeding 200), cigars (exceeding 50), tobacco (exceeding 250 gms), Gold (other than ornaments), Silver (other than ornaments), firearms and cartridges of firearms exceeding 50 – Annex I of Baggage Rules – also confirmed in Publication of Director of Publicity - see 1999(113) ELT T18.

Allowance for persons returning after one year i.e. Mini TR - A person who was working abroad and is returning to India on termination of work and who was staying abroad for at least 365 days out of previous two years, is eligible to certain concessions. This is termed as 'mini TR' i.e. 'Mini Transfer of Residence'. He is entitled to bring personal effects and household articles upto Rs. 75,000 duty free [The limit was Rs. 30,000 upto 28-2-2002]. This allowance is in addition to General Free Allowance. The conditions are (*a*) These should be in possession of himself or his family and used for at least six months. (*b*) He shall be allowed to avail himself of this exemption only once in three years (*c*) Items in Annex I, Annex II or Annex III to Baggage Rules are not allowed under this Rule. (d) Goods should be contained in his *bona fide* baggage.

Since 'baggage' does not include motor vehicles, liquor and firearms, the exemption is obviously not applicable for those goods.

Concessions to Tourists

Tourists visit India for various purposes and rules have been framed to allow them to bring goods to India.

Tourist means (*a*) a person who is not normally resident of India (*b*) who enters India for stay of not more than six months in the course of twelve month period (*c*) he should come for legitimate non-immigrant purpose such as touring, recreation, sport, health, family reasons, study, religious pilgrimages or business. [Rule 2(iii) of Baggage Rules, 1998].

Thus, Non-Resident Indians who do not hold Indian passports are also covered in this definition.

Exemption to Baggage of tourists - Following are the exemptions -

(a) Used personal effects of tourist and travel souvenirs are allowed duty free. Personal effects should be for personal use of the tourist and these goods, other than consumed, should be re-exported when tourist leaves India for foreign destination.

(b) Tourists of Indian origin (even if holding foreign passport) other than those coming from Pakistan by land route as specified in Annexure IV of Baggage Rules, are entitled to General Free Allowance in addition to 'personal effects'.

(c) Foreign Tourists are permitted to bring articles upto Rs. 8,000 for making gifts. This can include upto 200 cigarettes or 50 cigars or 250 gms of tobacco and upto two litres of Alcoholic liquor or wine. Duty will have to be paid for gifts over the value of Rs. 8,000 (Rs. 6,000 if they are coming from Pakistan).

(d) Tourists of Pakistani origin or foreign tourists coming from Pakistan or tourists of Indian origin coming from Pakistan, by land route as specified in Annexure IV of Baggage Rules, are entitled to bring used personal effects and travel souvenirs are allowed duty free. Personal effects should be for personal use of the tourist and these goods, other than consumed, should be re-exported when tourist leaves India for foreign destination. In addition, articles upto value of Rs. 6,000 for making gifts are permitted duty free.

(e) Tourists of Nepalese origin coming from Nepal or of Bhutanese origin coming from Bhutan are not entitled to any exemption. The rules do not even make mention in respect of exemption of personal goods for their personal use. Obviously, this is not the intention. In fact, as per Section 79(1)(b) of Customs Act, articles of baggage for use of the passenger or his family are exempt from customs duty and hence they will be exempt even if no specific mention is made in rules.

Personal Effects - The term 'travel souvenirs' are not defined. The term 'Personal effects' as specified in MF(DR) circular dated 24-9-1998 has been explained earlier in this chapter.

Practical Examples on baggage

Some practical examples will illustrate the legal provisions.

Question : An Indian resident visiting Germany brought following goods while returning to India (*a*) His personal effects like cloth etc. valued at Rs. 25,000 (*b*) Two Liter of liquor of Rs. 1,600 (*c*) New Camera of Rs. 39,800. What is the customs duty payable ?

Answer : (*a*) There is no duty on personal effects. (*b*) Liquor upto 2 liter of Rs. 1,600 can be accommodated in General Free Allowance. (*c*) The total GFA is Rs. 25,000. Total dutiable goods imported are Rs. 41,400 [Rs. 1,600 + Rs. 39,800]. After deducting GFA of Rs. 25,000; passenger has to pay duty on Rs. 16,400 (41,400 - 25,000). (d) The duty payable is 35%, plus education cess of 2% and SAH education cess of 1% of duty. (e) Hence, duty payable is Rs. 5,740, education cess of Rs. 114.80 and SAH education cess of Rs. 57.40.

Question : An Indian resident goes to Nepal on tour. He purchases colour TV of Rs. 18,000, a laptop computer of Rs. 79,000 and hair dryer of Rs. 2,000 in a duty free shop in Nepal and brings the same to India. What is the duty payable (a) If he returns on 3rd day by air (b) If he returns on 3rd day by land route (c) If he returns on 11th day by air (d) If he returns on 11th day by land route.

Answer : One laptop computer can be imported without payment of customs duty. Hence, the dutiable goods are Rs. 20,000.

(a) If he returns within 3 days, there is no general free allowance for tourist coming from Nepal. Thus, duty @ 35% (plus education cesses) of Rs. 20,000. i.e. customs duty of Rs. 7,000 plus education cess of Rs. 140 plus SAH education cess of Rs. 70 is payable. (b) Same duty is payable if he returns on 3rd day by land route. (c) If he returns after 3 days by air, GFA is Rs. 6,000. Thus, customs duty is payable on Rs. 14,000 @ 35% i.e. duty of Rs. 4,900 plus education cess of Rs. 98 and SAH education cess of Rs. 49 is payable. (d) If

he returns after 3 days by land route, there is no General Free Allowance. Hence duty payable is same as per (a) above.

Question : Mr. and Mrs. Khanna visited USA and bought a personal computer for Rs. 38,000 and a laptop computer of Rs. 98,500 while returning to India, besides their personal effects valued at Rs. 86,000. What is the customs duty payable.

Answer : There is no customs duty on personal effects. One laptop computer can be brought without payment of customs duty. The General Free Allowance cannot be pooled i.e. husband and wife cannot have combined allowance of Rs. 50,000 in respect of one item, though individually, they are eligible for GFA of Rs. 25,000 each. Thus, they are eligible for general free allowance of Rs. 25,000. Thus, they have to pay duty on Rs. 13,000 (Rs. 38,000 – Rs. 25,000) @ 35% i.e. customs duty payable is Rs. 4,550 plus education cess of Rs. 91 plus SAH education cess of Rs. 45.50.

Mr. and Mrs. Bapat visited Germany as tourist and bought a personal computer for Rs. 52,000 and a laptop computer of Rs. 78,000 while returning to India, besides their personal effects valued at Rs. 1,33,000. What is the customs duty payable, if duty on baggage is 35% plus education cesses as applicable.

Answer – There is no customs duty on personal effects. One laptop computer can be brought without payment of customs duty. The General Free Allowance cannot be pooled i.e. husband and wife cannot have combined allowance of Rs. 50,000 in respect of one item, though individually, they are eligible for General Free Allowance of Rs. 25,000 each. Thus, Mr. and Mrs. Bapat are eligible for general free allowance of Rs. 25,000. They have to pay duty on Rs. 27,000 (Rs. 52,000 – Rs. 25,000) @ 35% i.e. customs duty payable is Rs. 9,450 plus education cess of Rs. 189 plus SAH education cess of Rs. 94.50.

11.2 Import and export through Courier

Imports and export through couriers are treated as imports or exports as any other mode. It is not treated as 'baggage'. There is no restriction on value of goods that can be brought through courier. The duty payable is normal duty as applicable to all other goods normally imported by ship or air transport. Duty concessions, if any, are also permissible. Courier Imports and exports (Clearance) Regulations, 1998 specify the procedures, which are summarised in Chapter 17 of CBE&C's Customs Manual, 2001.

Importability or exportability as per FTP - As per para 2.26.1 of HOP Vol 1, procedure will be as per customs. However, importability or exportability of an item through courier shall be regulated as per FTP.

Separate Bill of Entry if importer wants to avail Cenvat – If goods are imported through Courier, he submits a consolidated Bill of Entry. Individual importer who gets the goods from courier cannot avail Cenvat credit on basis of such Bill Entry. If an importer wants to avail Cenvat credit, he should file a normal individual Bill of Entry, which can then be used to avail Cenvat credit – CBE&C circular No. 31/2007-Cus dated 29-8-2007.

Registration of courier – Courier should be registered. He can have single registration. He has to apply to Commissioner of Customs in form A. Once he is registered with one customs authority, he can carry on business in all customs stations in country, after informing jurisdictional Commissioner of Customs in form A – CBE&C circular No. 31/2007-Cus dated 29-8-2007.

11.3 Export and Import by Post

Normal procedures for import by air/ship/road are not possible for imports as 'baggage' or import through post. Hence, separate provisions have been made for import/export by post.

Entry for purpose of postal articles - 'Entry' means an Entry made in 'Bill of Entry' in case of imports and 'Shipping Bill' in case of exports. In case of post parcels, Label/declaration accompanying goods which contain description, quantity and value of the goods will be deemed to be an '***Entry***' for purposes of Customs Act, vide Section 82 of Customs Act. Thus, filing of separate Bill of Entry or Shipping Bill is not necessary for import/export through post.

Rate of duty and tariff valuation - As per Section 83 of Customs Act, the rate of duty and valuation as on date on which postal authorities submit the list to Customs Officer will be considered for rate of duty and tariff valuation. However, if such list is presented before arrival of vessel, the date will be deemed to be date of arrival of the vessel. Similarly, in case of exports, rate and tariff valuation as applicable on date on which goods are handed over to postal authorities will be considered for valuation and rate of duty.

Post parcels to post office - Post parcels will be allowed to pass from port/airport to Foreign Parcel Department of Government Post Offices without payment of customs duty. Postmaster will hand over to Principal Appraiser, Customs following (*a*) Memo showing total number of parcels from each country of origin (*b*) Parcel Bills or Senders' declaration (*c*) Customs declaration and despatch notes, if any (*d*) Other information that may be required.

Inspection of mail - The mail bag will be opened and scrutinised by Postmaster under supervision of Principal Postal Appraiser of Customs. Packets suspected of containing dutiable goods will be separated and presented to Customs Appraiser with letter mail bill and assessment memos.

Parcel Bill/letter mail Bill - The parcel bill/letter mail bill will show details like (*a*) Serial number assigned by office of posting (*b*) Name of office of posting (*c*) Destination (*d*) weight (*e*) local number (*f*) Contents as ascertained by Customs (*g*) Declared value in foreign currency (*h*) Rupee Value (*i*) Rate of duty (*j*) Amount of duty and (*k*) Remarks.

Examination and assessment - Customs Appraiser will mark the parcels which are required to be detained as (*a*) necessary particulars are not available or (*b*) mis-declaration or under-valuation is suspected or (*c*) goods are prohibited for import. Other parcels will be assessed without opening, on the basis of details given in parcel bill or despatch notes. The duty will be assessed and will be entered on parcel bill. These will be audited and returned to Postmaster. Postmaster will hand over parcel to addressee only after collecting the customs duty.

Opening of parcels - Parcels selected by Appraiser for examination will be opened and examined. If required, details will be called from addressee. After inspection, the parcels will be sealed with a distinctive seal. If mis-declaration or under-valuation is noted or goods are prohibited goods for imports, these will be detained and reported to Customs Commissioner. After assessment, these will be handed over to Post Master, who will hand over to addressee on receipt of payment of Customs duty.

Gifts by post - Gifts from abroad upto Rs. 10,000 of goods which are not prohibited goods for import are duty free if sent by post or through courier. The postal charges or air freight will not be taken into account for determining value limit of Rs. 10,000. [Notification No. 171/93-Cus dated 16-9-1993 as amended on 6-7-1999]. However, if the value exceeds Rs. 10,000, customs duty is payable on whole value even if gift was received unsolicited.

Export by post

Articles exported by post are required to be covered by a declaration in prescribed form. Where the value exceeds Rs. 50 and payment is to be received, the export must be declared in exchange control form PP. Export of Indian and foreign currency, bank drafts, cheques, National Saving Certificates are not allowed unless accompanied by permit issued by RBI, unless where such negotiable instruments are sent by authorised Dealers in India. Goods upto Rs. 25,000 can be exported as gifts. Export of purchases made by foreign tourists is permitted on submission of proof that payment was received in foreign exchange.

11.4 Exemption from Customs Duty

Some exemptions from duties are provided in Customs Act, while some are provided in Customs Tariff Act. Besides, Central Government can grant partial or full exemption from duty under Section 25 of Customs Act. These exemptions are summarised here.

Exemptions by Notification **-** Section 25(1) of Customs Act, 1962 authorises Central Government to issue notifications granting exemptions from duty. Such exemption may be unconditional or subject to conditions. Such conditions may be required to be fulfilled before or after clearance. Government can also grant exemption by a special order in exceptional circumstances. The exemption notification should be published in gazette. The notification can be issued only in 'public interest'.

Some provisions are similar to Central Excise provisions - Following provisions discussed under Central Excise are applicable under Customs Act too (*a*) Method of granting exemption is similar (*b*) Different Form and method is permitted under Section 25(3) of Customs Act (*c*) Notification should be in 'public interest' (*d*) Different exemptions to different categories or classes permissible (*e*) No exemption with retrospective effect (*f*) Notification to be placed before Parliament (*g*) Interpretation of notification (*h*) Effective date of exemption (*i*) Exemptions have full statutory force (*j*) Estoppel in exemption notification (*k*) Exemption by special order can be under Section 25(2) of Customs Act - similar to Section 5A(2) of Excise Act. All these are discussed in detail under Central Excise and hence are not reproduced here for sake of brevity.

Ad hoc exemptions - Section 25(2) of Customs Act permit Government to issue *ad hoc* exemption from customs duty by issue of a special order in exceptional circumstances. The order should specify the exceptional circumstances for granting *ad hoc* exemption. [Similar provision in Section 5A(2) of Central Excise Act].

Project Imports

Heavy Customs duty on imported machinery for projects make the initial project cost very high and project may become unviable. Hence, concept of 'project Import' has been introduced to bring machinery etc. required for initial setup or substantial exemption at concessional customs duty.

The goods are classified under heading 98.01, though the machinery and its parts may actually fall under different tariff heading. This simple method is adopted, as otherwise, classifying each machinery and its parts in different heads and valuing them would have been cumbersome and would have delayed clearances, which would cause demurrages. - *Chapter 5 Para 1 of CBE&C's Customs Manual, 2001.*

Capital goods can be imported under EPCG scheme - Capital goods which can be imported under 'project imports' can be imported under EPCG scheme. The export obligation will be 8 times the duty saved i.e. difference between concessional rate under project imports and rate applicable under EPCG – para 5.1B of FTP.

Projects eligible - The projects eligible are : (*1*) Industrial Plant (*2*) Irrigation Project (*3*) Power Project (*4*) Mining Project (*5*) Project for oil or mineral exploration (*6*) Other projects as may be specified by Central Government. Under this head, Central Government has specified various projects like Mumbai Water supply, Mathura-Delhi- Ambala-Jullunder Pipeline, Nhava Sheva port Gas pipe line project, Delhi MRTS project, Konkan Railway project etc., vide notification No. 42/96-Cus dated 23-7-1996. All water supply projects for agricultural or industrial use have been added w.e.f. 9-1-2004 and are fully exempt from customs duty.

Preferential Rates of Customs Duty

Some countries have been declared as 'preferential areas'. These are - Mauritius, Seychelles and Tonga. Goods manufactured and produced in these countries are eligible for preferential rate of duty under Section 4 of Customs Tariff Act. Customs Tariff Act provides two columns - one for 'Standard rate' and other for 'Preferential Area'.

Preferential rates of duty for certain goods imported from Bangladesh, China, Korea and Sri Lanka under Asia Pacific Trade Agreement have been specified in notification No. 72/2005-Cus dated 22-7-2005.

Control over end use exemptions

Sometimes, concession or exemption from customs duty is subject to condition in respect of end use. Sometimes, the exemption or concession is subject to condition that the imported goods should be used for manufacture in India of an excisable commodity. In such cases, the control over the end use will be exercised by Assistant Commissioner of Central Excise having jurisdiction over the factory of manufacturer. [These provisions are applicable only in respect of certain specified exemption notifications].

The manufacturer intending to avail the benefit has to register with jurisdictional Assistant Commissioner of Central Excise, by applying in prescribed form. He has to execute a bond and give an undertaking that the imported goods shall be used for the intended purpose.

The manufacturer-importer has to maintain accounts of the imported goods received. If the goods are not used for intended purposes, he will take steps for recovery of the differential duty leviable. The differential duty is required to be paid along with interest at the rate fixed u/s 28AB of Customs Act.

11.5 Remission on lost/pilfered goods

Customs Act provides for remission of duty on goods lost/damaged/pilfered before clearance. These provisions have been specifically made because pilferage of goods in ports is very heavy - particularly of small and costly items.

Remission of duty - Section 23(1) of Customs Act provides for remission of duty on imported goods lost (*other than pilferage*) or destroyed, if such loss or destruction is at any time before clearance for home consumption.

Section 13 provides that if imported goods are pilfered after unloading but before order for clearance is passed by Customs Officer for clearance for home consumption or deposit in a warehouse, no duty is payable on the goods, unless the pilfered goods are restored to importer.

Normal practice is to inspect the goods in the port before payment of duty. The duty is paid only when imported goods are found to be in order. Shortages should be informed to customs authorities and they should be involved in examination of goods, to prove shortage of goods.

Difference between Sections 13 and 23(1) - Difference in Sections 13 and 23(1) can be summarised as follows:

Section 13	Section 23(1)
Section 13 deals with pilferage.	Section 23(1) deals with loss or destruction of goods, except pilferage.
No duty is payable at all under Section 13, but liability revives of duty if goods are restored.	Duty is payable under Section 23(1), but it is remitted by Assistant Commissioner of Customs. Thus, unless remitted, duty has to be paid under Section 23(1).
Importer does not have to prove pilferage.	Burden of proof is on importer to prove loss or destruction
Pilferage should be before order for clearance is made.	Loss or destruction can be anytime before clearance.
Loss must be only due to pilferage.	Loss or destruction may be due to fire, accident etc. but not pilferage. e.g. loss by leakage is covered under Section 23.
Under Section 13, normally duty is not paid. However, if duty is paid before examination of goods, refund can be claimed if goods are found to be pilfered during examination but before order for clearance is made.	Under Section 23(1), if duty is paid, then refund can be obtained only if remission is granted by Customs Authorities. Thus, remission under Section 23(1) is at the discretion of Custom Authorities. [Of course, the discretion has to be exercised judiciously].
Section 13 is not applicable for warehoused goods	Section 23(1) is applicable for warehoused goods also. [as goods transferred to warehouse are not 'cleared for home consumption'].

Loss after order of clearance but before actual clearance - Section 13 provides that duty on pilfered goods is not payable if the imported goods are pilfered before order of clearance is made. This Section is on basis of principle that goods are not in control of importer when they are in port and he should not be penalised if these are pilfered. As the Sections 13 and 23(1) stand today, there is no remedy if goods are pilfered **after** the order for clearance is made but **before** the goods are actually cleared. In *Zenith Bearing Enterprises* v. *Collector of Customs (ACC), Bombay* - 1995 (75) ELT 801 (CEGAT 2 v 1 decision), held that once '*out of charge*' order is given by customs authorities, no remission of customs duty can be granted for any shortage or loss found later. – same view in *CC* v. *Relaxo Rubber* 2001(134) ELT 797 (CEGAT).

Duty on pilfered goods is payable by port authorities - Once goods are unloaded from ship/aircraft, they are in custody of port trust authorities or airport authorities till the goods are cleared. They are in position of 'bailee'. If goods are pilfered after they are unloaded but before they are cleared from the port, the customs duty is payable by port trust authorities or airport authorities under whose custody the goods were lying [Section 45(3)]. Thus, though importer does not have to pay duty on pilfered goods, the same is payable by authorities who were custodians of the goods so that Government does not lose any revenue on account of pilferage.

Remission on relinquished goods

If the importer decides to abandon the goods, he shall not be liable to pay any duty [Section 23(2) of Customs Act]. Such situation normally arises if the goods are in very deteriorated condition and importer may feel that it is not worthwhile to pay duty and incur further losses. The importer may also abandon the goods if the assessment of duty is done on much higher side than expected by him. In such case, he may

abandon the goods if he feels that it is cheaper to abandon the goods than to pay heavy customs duty. He should relinquish title before (*a*) an order for clearance of the goods for home consumption *or* (*b*) before order permitting deposit of goods for warehousing is made.

No relinquishment if offence appears to have been committed – Relinquishment of title of goods will not be permissible if offence appears to have been committed in respect of such goods under Customs Act or any other law [*proviso* to Section 23(2) of Customs Act inserted w.e.f. 18-4-2006].

Relinquishing after warehousing - Even if goods are warehoused, the owner of warehoused goods can relinquish the title of goods anytime before order for home clearance is made. He will be required to pay rent, interest, other charges and penalties that may be payable, but duty will not be payable [*proviso* to Section 68 inserted w.e.f. 14-5-2003]. Relinquishment of title of goods will not be permissible if offence appears to have been committed in respect of such goods under Customs Act or any other law [second *proviso* to Section 68 of Customs Act inserted w.e.f. 18-4-2006].

Abatement of duty on damaged goods

Section 22 of Customs Act provides for reduction in duty if goods are damaged or deteriorated in any of the following cases :

(a) damaged before or during unloading in India

(b) damaged by accident after unloading but before examination of goods for assessment by Customs Officer - provided that the accident is not due to wilful act, negligence or default of importer, his employee or agent

(c) damaged by accident in warehouse before clearance of goods - provided that the accident is not due to wilful act, negligence or default of importer, his employee or agent.

Amount of concession **-** The customs duty chargeable will be in proportion to the value of damaged good to value of goods before damage or deterioration e.g. if value of goods is Rs. 10,000 and after damage, the value is Rs. 2,000, then 20% of the normal customs duty is payable. The value of damaged goods may be decided by Assistant

11.6 Demand of Customs Duty

If it is found that duty is not levied or short levied or erroneously refunded, Customs Officer can raise a show cause notice for demanding the duty and interest [Section 28].

Period for issue of Show cause Notice for demand **-** The notice must be issued within six months from relevant date. However, in case of import by an individual for his personal use or by Government or by any charitable, research or charitable Institution or Hospital, the demand can be raised within one year of relevant date. This period can be extended to five years in case the short levy or non-levy or refund was due to collusion, wilful mistatement, suppression of facts or fraud by importer, exporter, agent or employee of importer/exporter. While counting this period, if Court had granted a stay against issue of notice, that period will not be considered [Section 28(1) of Customs Act].

Relevant date for issue of SCN - Relevant date means the date for calculating the limit of six months, one year or five years for serving show cause notice for demand of customs duty.

As per Section 28(3) of Customs Act, 'relevant date' is -

(a) if duty or interest was not levied, date of order of clearance of goods

(b) if the duty was provisionally assessed, then date when it was adjusted after final assessment

(c) if duty or interest was erroneously refunded - date of refund

(d) if duty was paid or interest levied - date of payment of duty or interest.

Demand/refund in respect of correction of clerical error - Section 154 of Customs Act provides for correction of - (a) clerical or arithmetical mistakes or (b) erroRs. due to any accidental slip or omission in any decision or order passed by Central Government, CBE&C or any officer of Customs.

Interest on delayed payment of duty - Demand, once confirmed, must be paid within three months. Interest is payable from the next month from which duty ought to have been paid [Section 28AB of Customs Act as amended w.e.f. 11.5.2001]. The provisions are identical with provisions in Central Excise and hence are not elaborated here.

Recovery from agent if the same cannot be recovered from principal - As per Section 147(3) of Customs Act, short duty or demand can be recovered from agent if the same cannot be recovered from Principal.

Other provisions similar to Central Excise - Legal provisions regarding show cause notice, hearing, appealable order etc. are similar to excise. Provisions in respect of Settlement Commission and Advance Ruling are also same as excise. Principle of provisional assessment is also same, though provisions are not identical. Hence, these provisions are not elaborated here.

Section 28 of Customs Act is *pari materia* with Section 11A of Central Excise Act, except that the words 'with intent to evade payment of duty' appearing in Section 11A do not appear in Section 28 of Customs Act.

11.7 Recovery of sums due to Government

Section 142 of Customs Act provides that if any duty is demanded or drawback paid is recoverable from a person, it can be recovered by following means -

(a) deduct from any amount payable by any Customs Officer to such person [Section 142(1)(a)].

(b) detain and selling goods belonging to such person, which are under control of Customs authorities [Section 142(1)(b)].

(c) issue a certificate to District Collector in whose district any property of the person is situated or where he carries on business. The District Collector can recover the amount as arrears of land revenue [Section 142(1)(c)(i)]. [These are 'certification proceedings].'

(d) Destraining and detaining any property belonging to the person and selling the same [Section 142(1)(c)(ii)]

(e) Recover from successor by attaching goods, materials, machinery, plant etc. transferred to successor in trade or business [*proviso* to Section 142(1)]

(f) Enforcing a bond executed under the Act. [Section 142(2)]

Detention and sale of any property - If the amount due is not paid, Assistant Commissioner of Customs can, on authorisation by a Commissioner of Customs, distrain any movable or immovable property belonging to or in control of such person (from whom any sum is recoverable]. The property can be detained until

the amount is paid along with cost of the distress or keeping the property. If amount is not paid, the property can be attached and sold by customs authorities. [Section 142 (1)(*c*)(*ii*) of Customs Act].

This Section has been made applicable to Central Excise also.

11.8 Refund of Customs Duty

Refund may be obtainable if customs duty was paid in excess while clearing the goods. However, if there was adjudication order/approval of Bill of Entry, appeal should be filed and not a refund claim.

Refund of customs duty as well as interest - As per Section 47(2) of Customs Act, 1962, if duty is not paid within five days of return of bill of entry to make payment of duty, interest is payable. If excess duty is refunded, *pro rata* interest should also be refunded.

Time limit for filing refund claim - Refund claim should be lodged within six months (usually counted from date of payment of duty, except in few cases). This period is one year in case of imports made by individual for personal use or by Government or by any educational, research or charitable institution. If duty was paid under protest, time limit of 6 months/one year is not applicable. [*proviso* to Section 27(1) of Customs Act]. If duty was paid on provisional basis, period of 6 months/one year will be calculated from the date of adjustment of duty after final assessment [*Explanation* II to Section 27 (1) of Customs Act]. If duty was paid under protest, the time limit of 6 months/one year will not apply.

These provisions are mandatory and customs authorities cannot grant a refund which is filed beyond due date.

Relevant date for calculating limit of 6 months/one year - Relevant date for calculating time limit of 6 months/one year for filing of refund claim is as follows, as provided in Section 27(1) of Customs Act -

- If order for *ad hoc* exemption is issued u/s 25(2) - date of such order.
- If claim filed by purchaser (and not importer) - date of purchase.
- If duty and interest was paid provisionally - date of adjustment of duty after final assessment.
- If claim is consequent to order of tribunal, court or appellate authority - date of such order.
- In other cases - date of payment of duty.

There is no time limit if duty was paid under protest [second *proviso* to Section 27(1)].

Refund claim in case of appellate order - Forth proviso to Section 27(1)(b) of Customs Act (inserted vide Finance Act, 2007 w.e.f. 11-5-2007) provides that when refund becomes payable consequent to order of appellate authority or Appellate Tribunal or Court, refund claim should be filed within six months/one year from date of such order.

This provision applies when assessee had filed appeal against the adjudication order enhancing the duty. If appeal is decided in his favour, he will have to file refund claim.

If the assessee had filed refund claim and if that was rejected, really, filing refund claim after receipt of order of appellate authority is not necessary. The refund is automatic and filing fresh refund application was not necessary. In fact, refund claim was already filed and the adjudication order was on such refund claim.

However, if appeal was filed against assessment and if appeal is decided in favour of assessee, he will have to file refund claim.

So far, Tribunal had held that if refund is payable to importer/exporter, the interest will be payable three months from the original adjudication order and not from date of appellate order. Probably now department can take a stand that interest will be payable only if refund is not granted within three months after refund claim is filed subsequent to order of Appellate Authority.

Time limit applicable even in case of refund due to clerical and arithmetical error - Section 154 of Customs Act state that any clerical or arithmetical mistake or erroRs. due to any accidental slip or omission in any decision or order passed by Central Government, CBE&C or any officer of customs, or error arising therein from any accidental slip or omission may, *at anytime*, be corrected by the same authority. It has been held that this is applicable even in respect of refunds arising due to calculation mistakes.

Who can file refund claim - Refund claim will be normally filed by importer. However, if the goods were sold and if buyer has paid customs duty, he also can file refund claim, if he has not passed on its incidence to another person. Refund claim should be lodged with Assistant Commissioner. Refund, once sanctioned, will be normally paid to Consumer Welfare Fund, unless the importer/buyer proves that he has not passed on the burden to another person [Section 27(2) of Customs Act].

Refund to Buyer/Importer/Exporter if no 'Unjust Enrichment' - Under *proviso* to Section 27(2) of Customs Act, refund of customs duty and interest paid on such duty can be made to importer/buyer only in following cases :

- If Importer/exporter/buyer has not passed on incidence of the duty to another person.
- If Imports are made by *individual* for his personal use.
- In case of Refund of export duty, if any u/s 26 of Customs Act.
- In case of Duty drawback payable to exporter u/s 74 or 75 of Customs Act.
- If borne by any other such class of applicants, as may be specified by Central Government, by notification, if the incidence of duty has not been passed on to any other person. Such notification has to be placed before Parliament and got approved. (*So far, not a single notification has been issued under this provision*).

In other cases, refund will be credited to Consumer Welfare Fund.

These provisions are overriding provisions and are applicable irrespective of any contrary judgment of Appellate Tribunal or any Court or any other provisions of Customs Act and Rules. Thus, refund provision in any other Rule will be always subject to the aforesaid provisions of Section 27(2) of Customs Act.

Interest on delayed payment of refund claim - Refund claim must be paid within 3 months from date of filing application for refund. If payment is not made within three months, interest is payable. The interest rate can be 5% to 30% as determined by Central Government from time to time [Section 27A of Customs Act].

Application for refund of Customs Duty - Application for refund must be made in prescribed form in duplicate. The form has been prescribed in Customs Refund Application (Form) Regulations, 1995. Application should be filed along with relevant documents regarding payment of duty, reasons for claiming refund and evidence that burden of customs duty has not been passed on to another person.

Duty incidence deemed to have been passed to buyer - Refund is available to importer/buyer only if he has borne the incidence. Section 28D of Customs Act that every person who had paid duty shall be *deemed*

to have passed on the incidence to buyer of the goods. (i.e. he is deemed to have recovered the same from buyer). The importer/buyer claiming refund will have to prove that he has not passed on incidence of tax to any other person. [In legal terminology, this means that burden of proof is on importer/buyer claiming the refund that he has not passed on the incidence. Customs department does not have to prove otherwise i.e. that incidence has been passed on to consumer.]

Duty collected from buyer must be paid - *Every person* who has collected any amount from buyer as duty of customs, must pay the amount immediately to the credit of Central Government. This is true whether duty is legally payable or not [Section 28B (1)]. [This is to ensure that seller does not collect excess amount from buyer in the name of customs duty]. Thus, a importer, who charges an amount in the invoice representing as customs duty, must deposit the same with Central Government.

Refund normally credited to welfare fund - After assessment is completed, if some amount is found to be refundable, the amount will be credited to Consumer Welfare Fund, or refunded to the person who has borne the duty incidence as per Section 27 (i.e. if he proves that he has not passed on the incidence to other person).

Refund of Export duty - Export duty is charged on very few items but Section 26 of Customs Act makes provisions for refund of export duty. Export duty is refundable if (*a*) The goods returned are not 're-sale' to the person (*b*) Goods are re-imported within one year and (*c*) Refund claim is lodged within six months from date of clearance by Customs Officer for re-importation.

11.9 Warehousing in customs

If the imported goods are not required immediately, importer may like to store the goods in a warehouse without payment of duty under a bond and then clear from warehouse when required on payment of duty. This will enable him to defer payment of customs duty till goods are actually required by him. In such case, importer can keep goods in warehouse without payment of customs duty. Goods are cleared from customs port under bond and kept in the warehouse. The importer can clear goods from customs warehouse on payment of duty when he requires the goods for use/consumption/sale.

This facility is available to Traders as well as direct importers

A trader can import goods and keep in warehouse. He can supply the goods to buyers from warehouse, after paying customs duty. Thus, small importers, duty free shops etc. can procure goods from bonded warehouse without actually importing the goods.

A manufacturer can import inputs without payment of customs duty for manufacture in bond. He will have to export final product which was manufactured using imported duty free material.

Warehousing by Traders – Foreign Trade Policy permits keeping imported goods in bonded warehouse without payment of duty. These can be cleared later on payment of duty. Even goods under negative list can be imported by Traders and kept in warehouse. These can later be supplied on payment of duty against specific licence.

Warehousing to avoid demurrage and pilferage - If the goods are not cleared from port, heavy demurrage is payable to port authorities. Provision for heavy demurrage has been made to discourage delays in clearance of goods from port. There is shortage of space in ports. Port authorities have to make sure that ports are not cluttered with goods and space is available to store new incoming goods. Thus, importer has to clear goods from ports as quickly as possible.

Goods lying in port area are susceptible to pilferage and hence importer is interested in taking out goods as soon as possible.

Warehousing pending Import Authorisation **-** Goods can be kept in bonded warehouse. Even items in negative list can be kept in bonded warehouse and supplied on payment of duty against specific authorisation (earlier termed as licence). Goods from warehouses can also be removed without payment of duty against advance licence, to ensure timely availability of raw materials to exporters

Warehousing Bond – Since imported goods are kept in warehouse without payment of customs duty, importer has to execute a bond binding himself to (*a*) observe all provisions of Customs Act and rules/ regulations in respect of the goods (*b*) pay on demand the (*i*) duties, interest (*ii*) warehousing rent and charges with interest (*c*) pay all penalties leviable for violations of provisions of Customs Act, rules and regulations. The bond amount is equal to twice the amount of duty assessed. Generally, part of bond amount is secured by way of a bank guarantee. Bond will continue to be valid even if goods are transferred to another person or removed to another warehouse [Section 59].

Bond is cancelled and returned only when duty and all other dues are paid on goods cleared and goods are duly accounted for (Section 73).

Public/Private Bonded Warehouses

As per Section 2(43) of Customs Act, 'warehouse' means a public warehouse appointed u/s 57 or a private warehouse licensed under Section 58 of Customs Act. As per Section 2(44), 'warehoused goods' means goods deposited in a warehouse.

Sections 57 and 58 of Customs Act provide that 'warehouse' can be appointed or licensed only at a 'warehousing station'. As per Section 2(45) of Customs Act, 'warehousing station' means a place declared as a warehousing station u/s 9 of Customs Act.

Warehouses can be public or private.

Warehousing station - Section 9 of Customs Act authorises CBE&C (Board) to declare places as warehousing stations. Public and private warehouses can be situated only at such approved warehousing stations. Board has issued over 300 notifications prescribing various areas. Generally, cities and towns where imported goods are stored for use or where there is Industrial Estate where imported raw material is required are declared as 'Warehousing Stations'.

Public or Private Warehouses - Warehouses are of two types (*a*) Public warehouses appointed by Assistant Commissioner of Customs under Section 57 of Customs Act. (*b*) Private warehouses licensed by Assistant/ Deputy Commissioner of Customs. The licence can be cancelled by giving one month notice. Licence can be cancelled if licensee contravenes any provisions of Customs Act. In such cases, show cause notice has to be issued and pending enquiry, licence can be suspended.

As the name suggests, goods can be stored in Public Warehouse by any importer, while goods can be stored in private warehouse only by person who has been licensed.

Procedure for warehousing imported goods – Imported goods are cleared from sea port/airport on submission of Bill of Entry for warehousing. This Bill of Entry is printed on yellow paper and often called 'Yellow Bill of Entry'. Bond is executed for transfer of goods from port to warehouse.

Transit bond and insurance **-** If the warehouse is in the same port/airport station, goods are escorted to bonded warehouse. Otherwise, these are allowed to be moved under a transit bond without escort. - *Chapter 10 Para 7 of CBE&C's Customs Manual, 2001.*

Warehousing period under customs

Section 61 of Customs Act prescribes warehousing period. If goods are not removed within the prescribed period, Customs Officer can sell the goods after notice to owner as much quantity as he deems fit.

Normal warehousing for one year, extension can be granted - Section 61(1)(*b*) of Customs Act provides warehousing period as one year from the date of issue of order by Customs Officer permitting deposit of goods in a warehouse. The period of one year can be reduced by Commissioner if goods are likely to deteriorate. This period can be increased by Commissioner upto 6 months and by Chief Commissioner of Customs without any limit of period.

In case of EOU, the normal warehousing period is three years for inputs, spares and consumables and five years for capital goods. [Section 61(1)]. This warehousing period can be extended by Commissioner without any upper time limit.

Five years warehousing for capital goods for EOU - The warehousing period can be upto five years in case of capital goods intended for use in EOU unit, as per Section 61(1)(*a*) of Customs Act. This period can be reduced by Commissioner if goods are likely to deteriorate. The period can be extended without any upper limit.

However, if goods are stored beyond a period of five years, interest is payable for storing goods beyond the period of five years in the warehouse. The interest is payable on the basis of duty payable at the time of clearance (and not duty assessed when goods were warehoused). [Section 61(2)(i)].

Interest payable beyond prescribed period - In case of goods allowed to be warehoused, interest is payable at prescribed rate.

In case of normal warehousing (other than EOU), interest is payable if goods are warehoused beyond 90 days. [Section 61(2)(ii)].

Presently, the interest rate is 15% [Notification No. 18/2003-Customs (NT) dated 1-3-2003].

In case of EOU, interest is payable if warehousing is beyond three years in case of inputs/consumables/ spares and five years in case of capital goods.

Interest for warehousing beyond 90 days - Even if goods are permitted to be stored for one year (plus extension if permitted), interest is payable for storing goods beyond a period of 90 days in the warehouse. The interest is payable on the basis of duty payable at the time of clearance (and not duty assessed when goods were warehoused). [Section 61(2)(ii)].

CBE&C can waive part or full interest under exceptional circumstances. CBE&C can also specify the class of goods in respect of which interest will not be charged. The interest can be waived only by Board in exceptional circumstances. Board can also specify class of goods for which no interest will be levied.

Manufacture in Customs bonded Warehouse

Manufacturing or other operations can be carried out in the warehouse with sanction of Assistant Commissioner (Section 65 of Customs Act). The facility is useful if final products are to be exported after manufacture (*though final products can be cleared for home consumption too*). After manufacture, the produced goods may either be exported without payment of customs duty or cleared for home consumption on payment of duty.

These provisions are applicable to EOU, STP, EHTP or BTP units who have to manufacture goods under customs bond. They have to obtain license from customs.

Facility for manufacture in warehouse under bond is also available for goods imported for repairs, re-conditioning, re-engineering etc. The goods can be imported without payment of customs duty and can be re-exported after repairs, reconditioning etc. Such re-export must be within three years from date of import. [*Notification No. 134/94 - Cus dated 22-6-94*]

Conditions for manufacture in bonded warehouse - Board has framed 'Manufacture and Other Operations in Warehouse Regulations, 1966' prescribing procedures. Procedures for manufacture under bond have now been considerably simplified. Physical control and supervision of Customs Officer on the bonded warehouse has been done away with, since July 1998. - MF(DR) circular No. 88/98-Cus dated 2-12-1998.

Owner has to make application giving full details regarding process to be carried out, imported and other goods used, plan and description of warehouse and volume of manufacture anticipated. On obtaining permission, necessary bond has to be executed undertaking to observe all regulations and maintaining accounts etc. Manufacture will not be under supervision of Customs Officers However, Customs Officers can visit warehouse and control and supervise manufacturing process or imported and other goods. Detailed accounts are required to be maintained of raw materials, stock, WIP and production. Input-output norms should be fixed wherever considered necessary.

Clearance from bonded warehouse

Section 71 allows clearance for (a) home consumption, (b) re-exportation or (c) removal to another warehouse.

Procedure for removal of goods - Importer has to submit Bill of Entry in prescribed form for removal of goods from warehouse for home consumption. This Bill of Entry is printed on yellow paper and often called 'Yellow Bill of Entry'. It is also called 'Into Bond Bill of Entry' as bond is executed for transfer of goods in warehouse without payment of duty. The Bill of Entry is assessed by Customs Officer in charge of warehouse. Duty, penalties, rent and interest is payable as per rules. Goods are then allowed to be cleared by Customs Officer.

Rate of duty as applicable on date of removal - As per Section 15(1)(*b*), rate of duty as prevalent on date of presentation of Bill of Entry for home consumption for clearance from warehouse is applicable and not rate prevalent when goods were removed from customs port.

Rate of exchange in case of warehoused goods – Relevant exchange rate for valuation is as in force on date on which Bill of Entry is presented u/s 46. Bill of Entry is presented u/s 46 of Customs Act either for home consumption or for warehousing. Hence, in case of warehoused goods, exchange rate prevailing on the date on which Bill of Entry is presented u/s 46 and *not* when Bill of Entry is presented u/s 68 for clearance from customs warehouse.

Transfer to other bonded warehouse - Section 67 of Customs Act permit removal to other warehouse under bond. Transit bond for customs duty involved backed by bank guarantee/security should be furnished. In the case of EOU, bank guarantee for transfer of goods is not required. - *Chapter 10 Para 13 of CBE&C's Customs Manual, 2001.*

Clearance for export –Customs warehoused goods can be exported without payment of duty, *vide* Section 69(1) of Customs Act. A shipping bill has to be presented. Export duty, penalties, rent, interest etc. is payable as applicable and then goods are allowed to be exported.

Relinquishing of title after warehousing - The owner of warehoused goods can relinquish the title of goods any time before order for home clearance is made. He will be required to pay rent, interest, other charges and penalties that may be payable, but duty will not be payable [*proviso* to Section 68 inserted w.e.f. 14-5-2003]. The word 'interest' is not clear and is likely to lead to litigation. It has been consistently held that when duty is not payable, question of payment of duty does not arise.

Relinquishment of title of goods will not be permissible if offense appears to have been committed in respect of such goods under Customs Act or any other law [second *proviso* to Section 68 of Customs Act inserted w.e.f. 18-4-2006].

Owner's rights to deal in goods in warehouse - With the permission of Customs Officer and on payment of prescribed fees, owner can deal with warehoused goods as follows (*a*) inspect the goods (*b*) separate damaged or deteriorated goods (*c*) sort the goods or change containers for preservation, sale, export or disposal of goods (*d*) show the goods for sale (*e*) take samples of goods - the samples can be removed without payment of duty with permission of Customs Officer, but if these are not brought back, customs duty is payable (Section 64).

Allowance for volatile goods - Under Section 70 of Customs Act, Central Government can prescribe goods for which allowance for deficiency in quantity due to ***natural loss*** can be permitted by Assistant Commissioner. Duty on such deficiency can be remitted by Assistant Commissioner. Goods specified under customs notification No. 122-Cus dated 11-5-1963 for this purpose are : (*a*) Petroleum products like aviation fuel, motor spirit, kerosene, diesel oil (*b*) Ethylene dichloride kept in tanks *(c)* Liquid helium gas in containers *(d)* Wine, spirit and beer kept in casks. Duty can be remitted only if there is natural loss. Loss due to pilferage or thefts cannot be permitted.

Goods not accounted for - If goods are removed in contravention of rules or if goods are not properly accounted for, full duty is payable on such goods together with penalty, interest, rent etc. If duty, penalty etc. is not paid, goods in warehouse can be sold by Customs Officer after giving notice to importer. Besides, bond or bank guarantee executed by importer can be encashed [Section 72(1)(d)].

Storage without warehousing

Normally, imported goods are kept in customs bonded warehouse after goods are assessed to duty. However, occasionally, it may happen that assessment of duty may take time for want of some clarification/reports etc. In such cases, goods lying in docks may incur heavy demurrage. There is a provision that Customs department can issue 'detention certificate' and on the basis of such certificate, port trust authorities *may* remit demurrage. However, chances of pilferage or loss are high if goods lie at docks. Hence, if assessment is likely to be delayed, Section 49 allows that goods can be stored in public warehouse. However, such goods are not to be treated as 'warehoused goods' for purposes of Customs Act as the goods are not assessed. Hence, it is called 'storage without warehousing' or 'warehousing without warehousing'. The goods are cleared from the warehouse after duty is assessed and paid.

11.10 Prohibitions on Imports and Exports

Collecting revenue for Central Government by way of Customs duty is, of course, a major purpose of Customs Act. However, another major purpose is to prohibit or restrict illegal imports and exports. Section 11 of the Customs Act, 1962, empowers Central Government to prohibit the import or export of goods of any specified description. Such prohibition may be absolute or conditional. The conditions for

prohibitions may be required to be fulfilled before or after clearance. (e.g. there may be condition that after imports, goods should be used only for production purposes and not for trading). Such prohibition can be made by issuing a notification.

Purpose for which import/export can be prohibited - The purpose for which imports/exports can be prohibited are given in Section 11(2) as follows :

(a) maintenance of the security of India

(b) maintenance of public order and standards of decency of morality

(c) prevention of smuggling

(d) prevention of shortage of goods of any description

(e) conservation of foreign exchange and the safeguard of balance of payments

(f) prevention of injury to the economy of the country by the uncontrolled import or export of gold or silver

(g) prevention of surplus of any agricultural product or the product of fisheries

(h) maintenance of standards for the classification, grading or marketing of goods in international trade

(i) establishment of any industry

(j) prevention of serious injury to domestic production of goods of any description

(k) protection of human, animal or plant life or health

(l) protection of national treasures or artistic, historic or archaeological value

(m) conservation of exhaustible natural resources

(n) protection of patents, trade marks and copyrights

(o) prevention of deceptive practices

(p) carrying on of foreign trade in any goods by the State, or by a Corporation owned or controlled by the State to the exclusion, complete or partial, of citizens of India

(q) fulfilment of obligations under the Charter of the United Nations for the maintenance of International Peace and Security

(r) implementation of any treaty, agreement or convention with any country

(s) compliance of imported goods with any laws which are applicable to similar goods produced or manufactured in India

(t) prevention of dissemination of documents containing any matter which is likely to prejudicially affect friendly relations with any foreign State or is derogatory to national prestige

(u) prevention of the contravention of any law for the time being in force and

(v) any other purpose conducive to the interests of the general public.

Various notifications have been issued by covernment of India from time to time, the earliest one being of 1898. Some items prohibited are (*a*) labels impressed with designs of currency notes (*b*) dummy pistols (*c*) explosives (*d*) dead or alive animals and birds (*e*) narcotic drugs (*f*) monkeys from yellow fever areas (*g*) arms and ammunition *(h)* Counterfeit currency notes etc.

Imports in violation of IPR law – Import of goods which violate provisions of trade mark law, copyright law, patents law, designs act, geographical indication of goods is prohibited – Notification No. 49/2007-Cus dated 8-5-2007. Intellectual Property Rights (Import of Goods) Enforcement Rules, 2007 make provision for procedure to be followed for giving notice to Commissioner of Customs by right holder, procedure for suspending clearance of imported goods and disposal of infringing goods.

Exports in violation of trade marks law – Export of goods which violate provisions of trade mark law is prohibited – Notification No. 50/2007-Cus dated 8-5-2007.

Notified Goods - Though it is impossible to keep track of all imported goods in India, a check can be kept on some goods which are highly susceptible to smuggling. If control over such goods can be kept even when they are in India, it may help in reducing smuggling. With this idea, concept of 'notified goods' was incorporated in Customs Act in 1969 Chapter IV-A - Sections 11A to 11G specifically to check such smuggling. Procedures in respect of notified goods are prescribed in 'Notified Goods (Prevention of Illegal Import) Rules, 1969. The dealer in India has to maintain elaborate records of goods imported and stocked by him for sale.

At present No item is 'Notified Goods' - Section 11A(*d*) defines notified goods as ones notified by Central Government under Section 11B. After liberalisation of imports, reduction in customs duty, improvement in quality of Indian goods and convertible foreign currency in trade account, need for the special provisions are not serious. ***Hence, at present, not a single item is covered as 'Notified Goods'***.

Specified Goods - Similar to provision of 'notified goods', provision of 'specified goods' has been made for prevention and detection of illegal exports. Section 11-I authorises Central Government to specify goods by a notification. The prohibitions are applicable only when the goods are stored or transported in 'specified area' i.e. area specified by a notification. Such area can be only upto 100 Kms within the coast or border. Various areas have been declared as 'vulnerable area' under these provisions. The procedures and provisions in brief are : the person has to give intimation if market price of such goods exceeds Rs. 15,000, transport should be under a voucher, accounts should be maintained and identity of purchaser should be established etc.

At present only 'Acetic Anhydride' has been notified as 'specified goods' for Indo-Pakistan and Indo-Myanmar (earlier Burma) border.

11.11 Customs House Agent

An importer or exporter can transact business of imports and exports either himself or through his employees. However, generally, it is not possible for an individual to complete customs formalities and obtain clearance from ports. Hence, appointment of Customs House Agent (CHA) is necessary. An importer can appoint or change CHA at his will. 'No Objection Certificate' from previous CHA is not necessary. - CC, New Delhi PN 32/97 dated 5.4.1997.

In order to ensure that only authorised persons are permitted to work as CHA, Section 146 of Customs Act provide for licence to persons to carry on business as an agent relating to import or export of goods or entry/departure of conveyance. Board is authorised to make regulations for this purpose. 'Customs House Agents Licensing Regulations, 2004' have been made under these powers Subsequently, clarifications were issued vide MF(DR) circular No. 42/2004-Cus dated 10-6-2004. The highlights are as follows :

Obligations and Duties of CHA – Obligations and duties of CHA are specified in regulation 13 of Customs House Agents Licensing Regulations, 2004. He should transact business only personally or through authorised employee. He should advise clients property and exercise due diligence. He should inform all details to his clients. He should maintain proper records and accounts. He should discharge duties of CHA with speed and efficiency.

11.12 Penalties under Customs Act

Like Excise, Customs Law envisages two types of punishments i.e. *(a)* **Civil Liability** : Penalty for violation of statutory provisions involving a penalty of money and confiscation of goods. *(b)* **Criminal Liability** : Criminal punishment is of imprisonment and fine; which can be granted only in a criminal court after prosecution. Both penalty and punishment can be imposed for same offence.

Penalties are imposed on any person who, in relation to any goods, does or omits to do an act which rendeRs. such goods liable for confiscation. Hence, it is necessary to first understand what are goods liable for confiscation. Broadly, goods are liable for confiscation in case of improperly importing goods or improperly attempting to export goods. Section 111 provides goods liable for confiscation for improper imports while Section 113 contains details of goods liable for confiscation for attempt of improper export.

Smuggling **-** Smuggling, in relation to any goods, means any act or omission which will render such goods liable for confiscation under Section 111 or 113. [Section 2(39)].

Thus, * improper importation * attempting improper importation or * attempting improper export will amount to 'smuggling'. *Thus, 'smuggling' is much broader term than we normally understand*. **Since 'smuggling' has been specifically defined, normal or dictionary meaning is not applicable -** *N K Bapna* v. *UOI* **-** 1992 (60) ELT 13 (SC) **=** (1992) 75 Comp. Cas. 745 (SC).

Improper imports

As per Section 111 of Customs Act, following goods brought in India from a place outside India are liable to confiscation: They are 'improperly imported goods' -

- Goods imported by sea or air unloaded or attempted to be unloaded at place other than customs port or customs airport [Section 111(a)].
- Goods imported by land or inland water through route other than specified route [Section 111(b)].
- Goods brought into any bay, gulf, creek or tidal river for landing at place other than customs port [Section 111(c)].
- Goods imported or attempted to be imported contrary to prohibition under Customs Act or any other law [like FEMA, Foreign Trade Policy etc.] [Section 111(d)].
- Dutiable or prohibited goods concealed in any conveyance [Section 111(e)].
- Dutiable or prohibited goods required to be mentioned, but not mentioned in Import manifest [Section 111(f)].
- Dutiable or prohibited goods unloaded without mentioning in import manifest - except goods inadvertently unloaded but properly recorded. [Section 111(g)].

- Dutiable or prohibited goods unloaded at un-approved place or without supervision of Customs Officer. [Section 111(h)].
- Dutiable or prohibited goods concealed in any manner before or after unloading [Section 111(i)].
- Dutiable or prohibited goods removed or attempted to be removed from customs area or warehouse without permission or contrary to terms of permission [Section 111(j)].
- Dutiable or prohibited goods imported by land where order permitting clearance is not produced - this can be ordered in area adjoining land frontier u/s 109 [Section 111(k)].
- Dutiable or prohibited goods not mentioned or found excess of those mentioned in Bill of Entry or declaration in respect of baggage [Section 111(l)].
- Any goods not corresponding in respect of value or any other particular with the Entry or declaration of contents of Baggage or declaration of transshipment [Section 111(m)].
- Transshipment or transit of goods without permission [Section 111(n)].
- Goods were exempt from duty subject to some conditions or prohibition and those conditions were not fulfilled, unless non-observance of condition was sanctioned by proper officer. [Section 111(o)].
- Rules in respect of 'Notified Goods' are contravened. [Section 111(p)].

In brief, importing or attempting to import prohibited goods, avoiding duty payment, mis-declaring goods or violating rules regarding movement, storage, unloading or use of imported goods will make them liable for confiscation under Section 111. This is covered in the definition of 'smuggling'.

Prohibited goods

As per Section 2(33) of Customs Act, 'prohibited goods' means any goods the import or export of which is prohibited under Customs Act or any other law for the time being in force, but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with.

In some cases, conditions are to be fulfilled after importation of goods. Unless those conditions are fulfilled, the goods continue to be 'prohibited goods'.

Section 11 of Customs Act empowers Central government to prohibit absolutely or conditionally import or export of goods of any description. Section 111 which defines 'improperly imported goods' makes reference to 'prohibited goods'. Section 113 which defines 'goods improperly attempted to be improperly exported' also applies to 'prohibited goods'.

Import in violation of foreign trade policy – Section 3(3) of Foreign Trade (Development and Regulation) Act, 1992 states that all goods which are prohibited, restricted or regulated (subject to exceptions, if any) for import or export, by an order issued u/s 3(2) of FT(D&R) Act shall be deemed to be prohibited goods u/s 11 of Customs Act. Thus, if goods are restricted or regulated for import or export, they are 'prohibited goods', even if there is no complete prohibition.

Improper exports

As per Section 113 of Customs Act, following export goods are liable to confiscation. These are 'goods attempted to be improperly exported':

- Goods attempted to be exported by sea or air from place other than customs port or customs airport [Section 113(a)].
- Goods attempted to be exported by land or inland water through unspecified route [Section 113(b)].
- Goods brought near land frontier or coast of India or near any bay, gulf, creek or tidal river for exporting from place other than customs port or customs station [Section 113(c)].
- Goods attempted to be exported contrary to prohibition under Customs Act or any other law [like FEMA etc.] [Section 113(d)].
- Goods concealed in any conveyance brought within limits of customs area for exportation [Section 113(e)].
- Goods loaded or attempted to be loaded for eventual export out of India, without permission of proper officer, in contravention of Sections 33 and 34. [Section 113(f)].
- Goods stored at unapproved place or loaded without supervision of Customs Officer. [Section 113(g)].
- Goods not mentioned or found excess of those mentioned in Shipping Bill or declaration in respect of baggage [Section 113(h)].
- Any goods entered for exportation not corresponding in respect of value or any other particular in Shipping Bill or declaration of contents of Baggage [Section 113(i)].
- Goods entered for export under claim for duty drawback which do not correspond in any material particulars with any information provided for fixation of duty drawback [Section 113(ii)].
- Goods imported without duty but being re-exported under claim for duty drawback [Section 113(j)].
- Goods cleared for exportation which are not loaded on account of wilful act, negligence or default, or goods unloaded after loading for exportation, without permission [Section 113(k)].
- Provisions in respect of 'Specified Goods' are contravened. [Section 113(l)].

In brief, attempting to export goods in violation of law, mis-declaring goods, export under false claim of duty drawback or violating rules regarding movement, storage or loading of export goods will make them liable for confiscation under Section 113. This is all covered in the definition of 'smuggling'.

Penalties that can be imposed in customs

Customs authorities are empowered to impose (*a*) monetary penalty (*b*) confiscation of goods, conveyance etc. These are separately provided as, if, the smuggled goods are abandoned, smuggler may not be traceable. In such cases, it is not possible to impose penalty, but goods can be confiscated. Penalty can be imposed for improper import as well as attempt to improperly export.

Penalty for Improper Import - Section 112 of Customs Act provide that penalty can be imposed on any person : (*a*) who does or omits to do any act which act or omission would render such goods liable for confiscation under Section 111 of Customs Act or who abets in doing or omission of such act (*b*) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111.

No penalty if importer does not claim the goods or relinquishes them – As per *proviso* to Section 23(2) of Customs Act inserted w.e.f. 18-4-2006, relinquishment of title of goods will not be permissible if offence appears to have been committed in respect of such goods under Customs Act or any other law.

Monetary Penalty in Customs

The Customs Act provides for following monetary penalties.

Improper Imports - Section 112 of Customs Act provides following penalties for improper imports :

(i) Not exceeding the value of goods or Rs. 5,000 whichever is greater, if these are prohibited for imports under Customs Act or any other law

(ii) Not exceeding the duty sought to be evaded in case of dutiable goods, which are not prohibited goods or Rs. 5,000 whichever is greater

(iii) If actual value is higher than the value declared in Bill of Entry or declaration of contents of baggage, not exceeding the difference in actual value and declared value or Rs. 5,000 whichever is greater

(iv) If the goods are prohibited and the value is mis-declared, penalty not exceeding the value of goods ***or*** the difference between actual value and declared value, or Rs. 5,000, *whichever is higher*

(v) If the goods are not prohibited but duty is sought to be evaded and the value is mis-declared, penalty not exceeding the duty sought to be evaded ***or*** the difference between actual value and declared value, or Rs. 5,000 *whichever is higher*

In each case, minimum penalty is Rs. 5,000.

Attempt to improperly export - Section 114 of Customs Act provides following penalty for attempt to improper export (*i*) If goods are prohibited for export under any law, not exceeding the value of goods or Rs. 5,000 whichever is higher (*ii*) if goods are liable to export duty but not prohibited goods, penalty not exceeding duty sought to be evaded or Rs. 5,000 whichever is higher (*iii*) In case of other goods, penalty not exceeding the value of goods, as declared by exporter, or as value determined under Customs Act, whichever is greater.

The last clause i.e. (iii) is amended w.e.f. 14-5-2003, to cover cases where export value is inflated. The export value is inflated, so that exporter is entitled to higher export benefits. [The excess amount collected in invoice is sent back through *havala*]. - - In case of (i) or (ii), minimum penalty is Rs. 5,000.

Mandatory penalty in case of fraud, misstatement etc. - Where duty or interest was not levied or short levied or refunded on account of fraud, collusion, wilful misstatement or suppression of facts, person liable to pay duty and interest is also liable to pay a penalty equal to the duty or interest so determined. However, if the duty and interest demanded is paid within 30 days, penalty payable will be only 25%. - Section 114A of Customs Act.

There is similar provision in Central Excise Law also.

Penalty for false statement and document - Where a person knowingly or intentionally makes, signs or uses any declaration, statement or document which is false or incorrect in any material particular, penalty upto five times the value of goods can be imposed. The statement or document may have been made or signed or used in any transaction or business for purposes of Customs Act - Section 114AA of Customs Act (inserted w.e.f. 13-7-2006).

Residual Penalty - Section 117 of Customs Act provide general penalty to a person who contravenes any provision of the Act or abets in contravention and *if no penalty has been prescribed*, the penalty would be upto Rs. 10,000.

Procedure for imposing penalty - Section 124 of Customs Act provide that before imposing a penalty, show cause notice must be issued to the person, informing grounds for confiscation and he should be given opportunity to make representation and being heard. *Such notice and representation can be oral at the request of the person concerned.* [This provision has been made to speed up the clearing process].

Penalty for short landing

If the goods were loaded for importation in India, but they were not unloaded in India - partly or fully - the Shipping Agent must explain the reason for deficiency. If it is not satisfactorily explained, Assistant Commissioner can impose penalty upto twice the amount of duty normally payable on the imported goods, under Section 116 of Customs Act. The penalty is payable by the 'person in charge of conveyance' i.e. carrier of goods. This provision is to make sure that carrier unloads goods at authorised places only and that there is no smuggling with connivance of the carrier.

Confiscation of Goods in customs

In addition to penalty on the person liable, some goods can be confiscated. 'Confiscation' means the goods become property of Government and Government can deal with it as it wants. On the other hand 'seizure' means goods are in custody of Government, but the property of goods remains with the owner.

Goods that can be confiscated - Goods improperly imported - (Goods liable for confiscation under Section 111 of Customs Act) and goods attempted to be improperly exported (Goods liable for confiscation under Section 113 Customs Act) can be confiscated. In addition, following can be confiscated - * conveyance for transport of smuggled goods * packages * goods used for concealing * sale proceeds of contravening goods. The proceedings of confiscation are *in rem* against goods.

Procedure for confiscation, effect of wrong confiscation and provisions of redemption fine in lieu of confiscation are identical to provisions under Central Excise Act.

Goods already exported cannot be confiscated – Section 113 uses the words 'confiscation of goods attempted to be improperly exported' and not 'goods exported'. The reason is that goods already exported are not available for confiscation. Hence, goods already exported cannot be confiscated u/s 113. Hence, penalty u/s 114 cannot be imposed – *K Kamala Bai* v. *CCE* 2005 (186) ELT 459 (CESTAT) – same view in *Rekha Overseas* v. *CC* 2006 (197) ELT 359 (CESTAT).

STUDY NOTE 12

Basics of Service Tax

12.1 Introduction

Service tax is tax of 21st Century. In India share of GDP in 2006-07 was - Agriculture - 18.5%, Industry - 26.4%, Services - 55.1% (Source - Economic Survey 2006-07). Service tax was imposed on three services w.e.f. 1-7-1994 and its scope is being widened every year. Highlights of the service tax are as follows –

- Service tax is imposed under Finance Act, 1994 as amended from time to time. There is no Service Tax Act.
- Service tax is payable @ 12% plus education cess of 2%, plus SAH education cess of 1% (total 12.36%) w.e.f. 11th May 2007 [Section 66]. Service tax was 12.24% from 18-4-2006 to 10-5-2007. Earlier, the rate was 10.2% from 10-9-2004 to 17-4-2006.
- Service tax is payable on taxable services as defined in various clauses of Section 65(105) of Finance Act, 1994. Presently, about 99 services are taxable.
- Service tax is payable on gross amount charged for taxable service provided or to be provided [Section 67]. If consideration is partly not in money, valuation is required to be done as per Valuation Rules. Tax is payable when advance is received.
- Small service providers upto eight lakhs are exempt. Export of service is exempt from service tax under Notification No. 6/2005-ST dated 1-3-2005. Services provided in J&K are not taxable [Section 64(1)].
- Cenvat credit is available of inputs, input services and capital goods used for providing taxable output services.
- In some cases, receiver of service is liable to pay service tax. This is termed as 'reverse charge' [Section 68(2)].
- Every provider of taxable service should apply for registration in form ST-1 within 30 days from date of levy (in case of new services) and date of commencement of business of providing taxable service in case of existing services [Rule 4(1)]. Registration will be deemed to have been granted if not received within seven days [Rule 4(5)].
- Assessee providing service from various premises can have centralised registration [Rule 4(2)]
- Service provider is required to prepare invoice within 14 days, even in respect of advance received [Rule 4A].
- Tax should be paid by 5th of following month (6th in case of e-payment). If assessee is individual or proprietary or partnership firm, tax is payable on quarterly basis. This facility is not available to HUF. In March, tax is payable by 31st March [Rule 6].
- If payment of tax is delayed, interest is payable @ 13% [Section 75].
- Assessee has to submit half yearly return in form ST-3 in triplicate within 25 days of close of half year [Rule 7].
- Penalty is payable for non-registration, late payment of tax, non-submission of returns etc. Mandatory penalty is payable for suppression of facts, wilful misstatement, fraud or collusion [Sections 76 to 80].

- The tax is administered by excise department. Adjudication order is issued by excise officer.
- First appeal lies with Commissioner (Appeals) [Section 85] and second appeal with Appellate Tribunal (Customs, Excise and Service Tax Appellate Tribunal) [Section 86]. Further appeal lies with High Court and Supreme Court.

Nature of levy of Service Tax - Service tax is levied under Entry No. 97 of List I of Seventh Schedule to Constitution of India. The entry reads as follows – 'Any other matter not included in List II, List III and any tax not mentioned in List II or list III'. *(These are called 'Residual Powers'.)*

As per Section 65(95) of Finance Act, 1994, 'service tax' means tax leviable under the provisions of this Chapter (i.e. Chapter V of Finance Act, 1994). Section 66 (charging Section) provides that there shall be levied a tax (service tax) @ 12% of the value of taxable service referred to in various clauses of Section 65(105). It will be collected in a manner as may be prescribed.

Taxable Service - As per Section 66 of Finance Act, 1994, service tax is payable on 'taxable service'. Various clauses of Section 65(105) of Finance Act, 1994 define each type of 'taxable service'. The definition is different for each class of services, e.g. as per Section 65(105)(a), any service provided by stock broker to any person in connection with sale or purchase of securities listed on a recognised stock exchange will be 'taxable service'.

Service tax is destination-based consumption tax - Service tax is a destination based consumption tax, as per CBE&C Circular No. 56/5/2003 dated 25-4-2003.

Service implies existence of two parties - Service tax is attracted when there are two parties. One cannot give service to himself.

Cenvat Credit – Assessee is entitled to avail Cenvat credit of excise duty and service tax paid on his inputs, input services and capital goods. This aspect has been discussed in another chapter.

Rate of Service Tax

This tax was first time introduced with effect from 1-7-1994 on three services. The rate was 5%. It was subsequently increased to 8% w.e.f. 14-5-2003. It was 10% plus education cess of 2% w.e.f. 10-9-2004 (total 10.2%) during 10-9-2004 to 17-4-2006. Service tax rate was 12% plus education cess of 2% (total 12.24%) during 18-4-2006 till 10-5-2007.

Presently (w.e.f. 11-5-2007), service tax is payable @ 12% of value of taxable services referred in Section 65(105) of Finance Act, 1994. In addition, education cess of 2% and SAH education cess of 1% is payable. Thus, total service tax is 12.36%.

Service tax, education cess and SAH education cess to be shown separately in invoice - You have to show service tax, education cess and SAH education cess *separately* in invoice. You cannot just charge 12.36% as 'service tax'.

Taxable Event in Service Tax

Section 66 (which is a charging Section), reads, 'There shall be levied a tax (hereinafter referred to as the service tax) at the rate of ten percent of value of taxable services referred to in sub-clauses (a), (b), - - - (zzzzc) and (zzzzd) of clause (105) of Section 65 and collected in such manner as may be prescribed.

Opening sentence of Section 65(105) as amended w.e.f. 16-6-2005 reads as follows, 'taxable service' means any service provided or 'to be provided'. Thus, following are taxable events -

(*a*) *Entering into contract for service* - Entering into contract for providing service. Once you enter into a contract, it is certainly '*service to be provided*'. (Service tax is actually payable after payment is received, but receipt of advance is not a taxable event. It only defers the liability).

(*b*) *Provision of service* - This will happen in cases where contract for providing service was entered into *before* the service became taxable, but service was provided *after* the service became a 'taxable service'.

Person liable to pay Service tax

In most of the cases, service provider, i.e. person who is providing taxable service is liable to pay service tax. However, in few cases, exceptions have been made and service receiver is made liable to pay service tax. The provision that service receiver is liable to pay service tax is termed as 'Reverse Charge'. The exceptions are as follows -

Services provided to non-resident - In relation to taxable service provided or to be provided by any person from a country other than India and received by any person under Section 66A of Finance Act, service tax is payable by recipient of service [Rule 2(1)(d)(iv)]

Services of insurance agents - In case of insurance auxiliary service by an insurance agent, the tax will be payable by insurance company (general insurance or life insurance as the case may be). The insurance agent is not liable to register and pay tax. [*However, the insurance agent is not entitled to avail exemption available to a small service provider*].

Consignor/consignee paying freight, in case of GTA services - In case of services of Goods Transport Agency (GTA), service tax is payable by consignor/consignee who is paying freight [Rule 2(1)(d)(v)] [*However, the consignor/consignee is not entitled to avail exemption available to a small service provider*].

Services of Agents of mutual fund - In case of distributors/agents of mutual funds, the liability will be on the recipient of service, namely, mutual funds [Rule 2(1)(vi)]. [*However, the mutual fund agent is not entitled to avail exemption available to a small service provider*].

Body corporate or firm located in India receiving sponsorship service - In case of sponsorship service provided to a body corporate or firm located in India, the body corporate or firm receiving such sponsorship service will be liable to pay service tax [Rule 2(1)(d)(vii) inserted w.e.f. 1-5-2006 and amended w.e.f. 1-4-2007]. If the recipient of sponsorship service is located outside India, service tax is required to be paid by the service provider and not by the recipient.

Cenvat credit of tax paid - The Body corporate or firm paying such service tax will be eligible to avail Cenvat credit of the service tax paid, on the basis of TR-6/GAR-7 challan by which the tax is paid [Rule 9(1)(e) of Cenvat Credit Rules, as amended w.e.f. 1-5-2006]. *It may be noted that when person receiving service is liable to pay service tax, he is not entitled to exemption which is available to a small service provider*.

Large Taxpayer Unit (LTU) - A concept of LTU has been introduced for large taxpayers of direct taxes and indirect taxes. In case of service tax, Large Taxpayer has meaning assigned to it in Central Excise Rules [Rule 2(cccc) of Service Tax Rules]. LTU has started functioning in Bangalore w.e.f. 1-10-2006.

Service on sub-contract basis

CBE&C vide circular No. 999.03/23.8.07 has clarified that a sub-contractor is also a taxable service provider. His services are taxable even if these are used by main provider for completion of his work. The sub-contractor is liable even if the service is input service of the main contractor and main contractor is paying service tax on entire value of contract.

12.2 Value of Taxable Service

Section 67 of Finance Act, 1994 contains provisions for valuation of taxable services for charging service tax. The highlights of provisions of Section 67 as effective from 18-4-2006 are as follows -

- Service tax is payable on gross amount charged by service provider for service provided or 'to be provided'. Thus, tax is payable as soon as advance is received.
- 'Value of taxable service' plus service tax payable is equal to 'gross amount charged' [Section 67(2)].
- Where the consideration for providing services is entirely in money, gross amount charged by service provider of taxable service provided or to be provided by him will be relevant for 'valuation' [Section 67(1)(i)].
- Where the consideration for providing services is not wholly or partly in terms of money, service tax is payable on amount of money, which with addition of tax service tax charged, is equivalent to the consideration [Section 67(1)(ii)].
- Where consideration is not ascertainable, valuation will be on basis of Valuation Rules [Section 67(1)(iii)].
- If gross amount charged by service provider is inclusive of service tax (i.e. service tax not charged separately in invoice), value of taxable service will be calculated by back calculations such that with addition of service tax payable, the total is equal to the gross amount charged [Section 67(2)].
- Gross amount charged for taxable services can be before, during or after provision of service [Section 67(3)].

Highlights of service tax valuation rules - In exercise of powers under Section 67, Service tax (Determination of Value) Rules, 2006 have been issued w.e.f. 19-4-2006. The Service Tax Valuation Rules provide as follows -

- If consideration is not wholly or partly consisting of money, value will be determined by service provider in terms of Rule 3.
- As per Rule 3(a) of Service Tax Valuation Rules, valuation shall be on basis of gross amount charged by service provider for similar services.
- If value cannot be determined on basis of Rule 3(a), valuation shall be on basis of equivalent money value of such consideration, which shall not be less than cost of provision of such services [Rule 3(b) of Service Tax Valuation Rules].
- Central Excise Officer can reject 'value' determined by service provider and determine 'value' for purpose of service tax payment [Rule 4].
- Rules 5 and 6 make provisions for certain specific inclusions and exclusions for valuation.
- Payments made by service provider as 'pure agent' of service receiver and recovered from service receiver are excluded for purpose of valuation [Rule 5(2)].
- In case of services provided from outside India, actual consideration received will be relevant for valuation [Rule 7(1)].

Amount need not be 'charged' by service provider - money paid to third party may also be includable - It is not necessary that the money should be paid to service provider himself. Amount paid even to third party is includable in 'value' of service if it is for provision of service and at the instance of service provider.

Service tax payable on net amount excluding Vat/sales tax - Rule 2A(1)(i)(a) of Service Tax Valuation Rules and Rule 3(1) of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 make it clear that Vat/sales tax is not to be included in value for purpose of service tax. Thus, service tax is payable only on net amount excluding Vat/sales tax payable on the transaction.

Tax payable only on amount actually received - Rule 6(1) of Service Tax Rules makes it clear that service tax is payable on value of taxable services received. Thus, if service provider does not receive any payment from his customer, there is no liability of service tax. Service tax is payable only on 'value of taxable service' actually '*received*', and not on amount *'billed'*.

Calculation of service tax by back calculations

The gross amount charged can be taken as inclusive of service tax and the 'value' and 'service' tax is to be calculated by back calculations.

For example, if Bill amount is Rs. 1,000 and service tax is not shown separately in Invoice, the tax payable calculated by a simple mathematical formula is as follows -

Assessable Value = (Cum tax price)/(1 + rate of tax)

Assume that Assessable Value (AV) is equal to 'Z'.

AV	=	1.000 Z
Duty @ 12.36%	=	0.1236 × Z
Sub-Total	=	1.1236 × Z
Now :		
1.1236 × Z	=	1,000
Hence, 'Z'	=	1,000/1.1236
i.e. Z	=	890.00

Thus, 'Z', i.e. Assessable Value is Rs. 890 and service tax @ 12% will be Rs. 106.79. Education cess @ 2% of service tax will be Rs. 2.14. SAH education cess is Rs. 1.07. Thus, total tax will be Rs. 110.00.

Reimbursement of expenses or 'Out of pocket' expenses

The service provider often claims reimbursement of certain expenses incurred by him (like travelling, boarding and lodging, etc.) while providing a taxable service. These are often termed as 'out of pocket' expenses. These are really charges for taxable services and are includable.

Reimbursement of expenses incurred on behalf of service receiver not includable - Often, a service provider incurs some expenditure on behalf of service receiver and then recovers the amount from him. Such expenditure is not part of service provided by him to service receiver, but is incurred by him as per business practice or convenience. Following illustrations may clarify the provisions -

- Octroi/entry tax amount paid by Clearing & Forwarding Agent, CHA or Transporter on behalf of owner of goods/Principal.
- Customs duty, dock dues, demurrage, transport charges etc. paid by Customs House Agent on behalf of client.

- Advertisement charges paid by Advertising Agency to newspaper on behalf of clients.
- Ticket charges paid by Travel Agent and recovered from his customer.
- Reimbursement of godown, salary and loading/unloading expenses by Principal to C&F Agent.

These are not part of service provided and hence are not includable. Rule 5(2) provides that the expenditure or costs that a service provider incurs, as a pure agent of the client, shall be excluded from the value if such service provider fulfils prescribed conditions.

The principle is also discernible from various exclusions as contained in Rule 6(2).

Valuation in case of indivisible contracts

In case of indivisible contracts involving sale of goods plus provision of service, it is difficult to identify service portion.

Exclusion of value of material - Notification No. 12/2003-ST dated 20-6-2003 provides that if the amount charged includes value of goods and materials sold, service tax will not be payable on value of goods and materials sold. There should be documentary evidence showing value of goods and materials sold. This exemption is available *only if* Cenvat credit of such material is not taken. If such credit was taken, assessee should pay amount equal to the credit. Such payment should be before sale of such goods and materials.

Many exemption notifications provide that exclusion under notification 12/2003-ST is allowable only when the service tax is paid at full rate and any abatement under any other exemption notification is not claimed. Hence, in such cases, notification No. 12/2003-ST is of no use.

In *Bharat Sanchar Nigam Ltd*. v. *UOI* (2006) 3 SCC 1 = 152 Taxman 135 = 282 ITR 273 = 3 VST 95 = 145 STC 91 = 3 STT 245 = AIR 2006 SC 1383 = 2 STR 161 (SC 3 member bench), it has been clearly held that price of goods cannot be included in value of services. Conclusion (E) of the judgment (para 92 of SCC and para 81 of STT and Taxman) reads as follows, 'The aspect theory would not apply to enable the value of service to be included in the sale of goods or the price of goods in the value of service'.

All expenditure and costs relating to provision of service incurred by service provider are includable - Rule 5(1) provides that where certain expenditure or costs are incurred by the service provider in the course of providing any taxable service, all such expenditure or costs shall be treated as consideration for the taxable services provided or to be provided and shall be included in the 'value' for purpose of charging of service tax on the said service.

This is a general Rule which makes it clear that, even when such expenditure or costs are recovered separately by service provider from service receiver, such expenditure or costs must be included in the value of taxable service.

However, expenditure incurred by service provider as 'pure agent' of service receiver is not includable, as per Rule 5(2).

12.3 Exemptions from Service Tax

Central Government can grant partial or total exemption, by issuing an 'exemption notification' u/s 93 of Finance Act, 1994. Such exemption may be partial or total. Exemption may be conditional or unconditional. The only limitation is that exemption cannot be granted by Central Government with retrospective effect. There are following general exemptions -

Small service providers - Small units whose turnover less than Rs. ten lakhs per annum are exempt from service tax. Provisions are discussed a little later (The exemption limit was Rs. four lakhs upto 31-3-2007).

Export of Services - There is no service tax on export of services, if service is exported as per 'Export of Service Rules'.

Services to UN Agencies - Services provided to UN and International Agencies are exempt [Notification No. 16/2002-ST dated 2-8-2002].

Services provided within SEZ - Services provided to SEZ unit or SEZ developer for consumption within SEZ are exempt [Notification No. 4/2004-ST dated 31-3-2004 in respect of SEZ]. The wording of notification is such that services consumed within the zone are alone exempt. Thus services provided outside SEZ (e.g. customs clearance, transport etc.) are *not* exempt.

Taxable services provided to a developer or a unit in SEZ are exempt from service tax [Section 26(1)(e) of SEZ Act]. [Rule 31 to SEZ Rules]

Services provided to foreign diplomatic missions, family members of diplomatic missions etc. - Any taxable service provided to foreign diplomatic mission or consular post in India is exempt vide Notification No. 33/2007-ST dated 23-5-2007. Similarly, any taxable service provided for private use of family members of diplomatic agents or career consular offices posted in a foreign diplomatic mission or consular post in India is exempt vide Notification No. 34/2007-ST dated 23-5-2007.

Services provided by RBI exempt - Exemption from service tax has been provided to all taxable services provided by Reserve Bank of India. Services where RBI is liable to pay service tax are also exempt (Notification No. 22/2006-ST dated 31-5-2006 – earlier Notification No. 7/2006-ST dated 1-3-2006).

General Exemption to small service providers

The small service providers whose turnover of taxable services from one or more premises did not exceed Rs. ten lakhs in 2007-08 will be exempt from service tax in next financial year i.e. in 2008-09 upto the turnover of Rs. ten lakhs. The provisions are prescribed in Notification No. 6/2005-ST dated 1-3-2005. (The exemption limit was Rs. four lakhs upto 31-3-2007). However, if value of taxable turnover exceeds Rs. 10 lakhs in 2008-09, there will be not exemption at all in 2009-10.

For the purpose of determining eligibility in current year, what is relevant is that 'aggregate value of taxable services *rendered*' in previous financial year should not exceed Rs. ten lakhs, while for purpose of exemption upto first Rs. ten lakhs in current year, service tax is exempt to the extent of 'aggregate value not exceeding ten lakhs', i.e. the sum total of first *consecutive payments received* during the current financial year.

The exemption to small service providers is available subject to following conditions -

- The provider of taxable service shall not avail the Cenvat credit of service tax paid on any input services.
- Where a taxable service provider provides one or more taxable services from one or more premises, the exemption under this notification shall apply to the aggregate value of all such taxable services and from all such premises and not separately for each premises or each services.
- The taxable services provided by a person under a brand name or trade name, whether registered or not, of another person; will not be eligible for exemption available to small service providers.
- Person providing taxable service in excess of Rs. nine lakhs per annum (but less than Rs. ten lakhs) will have to register with Superintendent of Central Excise under Service Tax provisions [Notification No. 26/2005-ST dated 7-6-2005], though they will be eligible for exemption if turnover is less than Rs. ten lakhs per annum.

Specific Exemptions

In case of some services e.g. catering services, mandap keeper services and construction services, service tax is payable at lower rates, i.e. partial abatement is available from gross value, vide 1/2006-ST dated 1-3-2006. The lower rate is applicable if the service provider does not avail Cenvat credit of duty/tax on inputs, input services and capital goods. *Till 28-2-2006, he was entitled to avail Cenvat credit on input services*. W.e.f. 1-3-2006, he cannot avail any Cenvat credit, if he avails the partial abatement.

Some important exemptions are as follows –

Taxable Service	**Partial abatement available**
Accommodation booking service by tour operator	10% of gross amount charged
Air Travel Agent	Option to pay service tax at flat rate on 'basic fare' @ 0.6% in case of domestic booking and 1.2% in case of international booking [Rule 6(7) of Cenvat Credit Rules]
Business Auxiliary Service in relation to processing of parts and accessories used in manufacture of cycle, cycle rickshaws and hand operated sewing machines	Tax on 70% of gross amount if gross amount is inclusive of cost of inputs and input services, whether or not supplied by the client (*Is it exemption or punishment*?)
Erection, Commissioning and installation contract for supply of plant, machinery, equipment or structures plus erection, commissioning and installation services	Tax on 33% of gross amount if gross amount includes value of material
Construction Service	Tax on 33% of gross amount if gross amount includes value of material
Goods Transport Agency (GTA)	Tax only on 25% amount in his Invoice [Payment will be made by consignor/consignee who is actually paying freight]
Mandap keeper, hotels and convention services, providing full catering services	Tax on 60% gross amount charged
Outdoor caterer	Tax on 50% amount if he provides full and substantial meal
Pandal and shamiana Service	70% of gross amount charged if full catering service provided
Rent-a-cab operator	Tax payable on 40% of gross amount charged
Tour operator - Package tours ("package tour" means a tour wherein transportation, accommodation for stay, food, tourist guide, entry to monuments and other similar services in relation to tour are provided by the tour operator as part of the package tour to the person undertaking the tour).	Tax is payable only on 25% of gross amount charged w.e.f. 23-8-2007 (till 22-8-2007, tax was payable on 40% of gross amount)
Tour operator - providing services solely of arranging or booking accommodation for any person in relation to a tour (If Bill includes cost of accommodation)	Tax is payable only on 10% of gross amount charged
Tour operator – Other than package tours and other than service of booking accommodation where Bill includes cost of accommodation	Tax is payable only on 10% of gross amount charged
Transport of goods in container by rail	Tax payable on 30% of gross amount charged

Services provided to EOU - Services provided to EOU/EHTP/STP/BTP are ***not*** exempt from service tax. Para 6.11(c)(v) of Foreign Trade Policy (as amended on 7-4-2006) states that EOU/EHTP/STP/BTP units can avail Cenvat credit of service tax paid. The EOU units can claim rebate of service tax paid on their input services vide Rule 5 of Cenvat Credit Rules (as amended on 14-3-2006). Procedure for claiming refund of service tax paid on input services and excise duty on inputs has been specified in Notification No. 5/2006-CE(NT) dated 14-3-2006.

No service tax on service provided in J&K - Service tax provisions are not applicable in Jammu and Kashmir. Service tax will not be payable only if service is provided in J&K. If a person from J&K provides service outside J&K in any other part of India, that service will be taxable, as location where service is provided is relevant. Merely because office is situated in J&K does not mean that service is provided in J&K.

12.4 Classification of Service

There are various types of services on which service tax is payable. These are specified in various sub-clauses of Section 65(105) of Finance Act, 1994. It is possible that a service may appear to be classifiable under more than one headings. It is necessary to specify the heading under which the service being provided is falling. This is termed as 'classification'. As per Rule 4A(1) of Service Tax Rules, the invoice should indicate description and classification of service.

Principles of classification - The classification of services will be determined according to terms specified in various sub-clauses of Section 65(105). [Section 65A(1)]. If *prima facie*, a taxable service is classifiable under two or more sub-clauses of Section 65(105), classification shall be effected as per following rules -

- The sub-clause which provides most specific description should be preferred over sub-clauses providing a more general description [Section 65A(2)(a)].
- Classification should be as per essential character in case of composite services. Composite services are those consisting of combination of different services. In case of such services, if the service cannot be classified on the basis of specific description as per Section 65A(2)(a) above, it shall be classified as if they consisted of a service which gives them their essential character [Section 65A(2)(b)].
- Service which appears earlier in list, if service cannot be classified on above basis. If a service cannot be classified on basis of above provisions, the service should be classified under sub-clause which occu Rs. first among the sub-clauses which equally merit consideration [Section 65A(2)(c)].

Service which has been specifically excluded in definition of one service cannot be covered under another head - In *Dr. Lal Path Lab (P) Ltd.* v. *CCE* (2006) 5 STT 171 (CESTAT), it was held when there is a specific entry for an item in the tax code, same cannot be taxed under any other entry. If a service has been specifically excluded from definition of one service, it cannot be covered under another taxable service.

Introduction of new heading means earlier it was not taxable - In *Glaxo Smithkline Pharmaceuticals* v. *CCE* (2005) 1 STT 37 (CESTAT), it has been held that when an existing tariff definition remains same, introduction of new tariff entry would imply that the coverage under new Tariff was not covered by the earlier entry. When new category is introduced, it means that the service was not taxable under old category.

Service should be mainly or principally a taxable service - A composite contract cannot be vivisected and service portion cannot be subjected to tax – *Widia GMBH* v. *CCE* (2006) 5 STT 414 (CESTAT) * *Blue Star* v. *CCE* (2007) 7 STT 68 (CESTAT). In *Daelim Industrial Co.* v. *CCE* 2003 STT 438 = 7 STT 184 (CEGAT), it was held that a works contract cannot be vivisected and part of it subjected to tax.

12.5 Procedures of Service tax

Administration of service tax is under Central Excise department. The main procedures to be followed are - (a) Registration (b) Maintenance of records (c) Payment of service tax and (d) Half yearly return. There are no prescribed form of records. The records maintained by assessee including computerised data maintained by assessee in accordance with various other laws are acceptable [Rule 5(1)].

Registration under Service Tax

A 'person liable for paying service tax' has to register with Superintendent of Central Excise under whose jurisdiction your premises fall. He should register within 30 days from date of commencement of the business of providing taxable service. The person will have to apply for registration in form ST-1. If a person is providing more than one taxable service, he may make a single application. He should mention in the application all the taxable services provided by him. [Rule 4(4)].

Applicant should submit following at the time of filing application for registration - (a) copy of PAN (b) proof of residence and (c) constitution of applicant. If application is signed by authorised person, power of attorney would be required.

Most important document that is required is copy of Income Tax PAN number. Copy of memorandum of association or partnership deed and a list of partners/directors should be submitted.

The registration certificate will be granted by Superintendent of Central Excise in seven days in form ST-2.

STC code i.e. registration number - Registration No., also known as 'Service Tax Code (STC)' is a fifteen digit PAN based number. First 10 digits of this number are the same as the PAN of such person. Next two digits are 'ST'. Next three digits are serial numbers indicating the number of registrations taken by the service taxpayer against a common PAN – para 2.6 of CBE&C Circular No. 97/8/2007-ST dated 23-8-2007.

Premises code - The registration certificate gives details of 'premises code' which is given on the basis of Commissionerate + Division + Range + Serial No. The number is given in the registration certificate ST-2 at Sl No. 5. This number is used for easy identification of location of registration of tax payer – para 2.6 of CBE&C Circular No. 97/8/2007-ST dated 23-8-2007.

Changes to be informed in form ST-1 within 30 days - Rule 4(5A) is inserted w.e.f. 1-3-2006 provides that if there is any change in information and details submitted in form ST-1 at the time of registration, the same should be informed to jurisdictional AC/DC within thirty days of such changes. The form ST-1 is both for new registration as well as amendment to existing registration certificate.

Cancellation/surrender of Registration - If the assessee ceases to carry on the activity for which he is registered, he should surrender the registration certificate to the Superintendent of Central Excise [Rule 4(7)].

Assessee should file up-to-date returns and apply for cancellation. Registration may not be cancelled if any demands are pending.

Centralised Registration - In some cases, a person liable for paying service tax on a taxable service - (i) provides *such* service from more than one premises or offices (e.g. providing banking service or maintenance service from various branches/offices); *or* (ii) receives *such* service in more than one premises

or offices (e.g. GTA services, sponsorship services provided to body corporate or firm located in India, mutual fund agent's service, insurance agent's service etc. where he is liable under reverse charge method); *or*, (iii) is having more than one premises or offices, which are engaged in relation to *such* service in any other manner, making such person liable for paying service tax (e.g. import of services where person receiving service is liable u/s 66A).

In such cases, such person can obtain Centralised Registration, ***at his option***, if (a) he has centralised billing system or centralised accounting system in respect of such service, *and* (b) such centralised billing or centralised accounting systems are located in one or more premises.

He can register such premises or offices from where centralised billing or centralised accounting systems are located [Rule 4(2) as amended w.e.f. 2-11-2006].

More than one centralised registration of regional/zonal offices at various places is permissible as per MF(DR) circular No. B1/6/2005-TRU dated 27-7-2005 – confirmed in para 2.5 of CBE&C Circular No. 97/8/2007-ST dated 23-8-2007.

Centralised Registration will be granted by Commissioner in whose jurisdiction the premises or offices, from where centralised billing or accounting is done, are located [Rule 4(3) as amended w.e.f. 2-11-2006].

Invoice by service provider

Assessee should prepare invoice in respect of his services. The Invoice should be prepared within 14 days from date of completion of taxable service or receipt of payment towards the value of taxable service, whichever is earlier.

Details required to be shown in invoice/bill/challan - As per Rule 4A(1), the invoice/challan/Bill should be signed by authorised person of provider of input services, should be serially numbered and should contain following details -

(1) Name, address and registration number of person providing taxable service

(2) Name and address of person receiving taxable service

(3) Description, classification and value of taxable service provided or to be provided and

(4) Service tax payable on the taxable service

The Rule does not make mention of date, but actually, date should be mentioned.

Education cess and SAH education cess to be shown separately - Education cess and SAH education cess to be shown separately in the Invoice for complying with requirements of Cenvat Credit Rules to facilitate availment of Cenvat credit by recipient – para 5.1 CBE&C Circular No. 97/8/2007-ST dated 23-8-2007.

Relaxation in case of banking and financial services - In case of banking and financial services provided by banking company, FI, NBFC or a commercial concern, the invoice/challan need not be serially numbered and name and address of person receiving taxable service need not be contained on the invoice/challan [*proviso* to Rule 4A(1) of Service Tax Rules]. This facility is also available to input service distributors of such type of service provide Rs. – para 5.3 of CBE&C Circular No. 97/8/2007-ST dated 23-8-2007.

Invoice in case of continuous service - In some cases, service is provided continuously for successive periods of time and value of such taxable service is determined or payable periodically. In such cases, the Invoice or challan shall be issued within 14 days from last date of the period [second proviso to Rule 4A(1) of Service Tax Rules amended w.e.f. 16-6-2005].

Service like telephones or Annual Maintenance Services are provided on continuous basis. Billing is done periodically (usually monthly). In such case, invoice should be made within 14 days from close that period.

Invoice at end of billing period - In case of some services like services of commission agent, it is impractical to prepare invoice of commission for each sale. Billing is done at end of the agreed period (say month or quarter), which is termed as 'Billing Period'. In such cases, it can be argued that such services are provided on continuous basis and Billing at end of the period should be acceptable.

Rounding up of tax in each Invoice not required – Section 37D of Central Excise Act, which is also made applicable to service tax, requires rounding up of tax. However, this is only while making monthly/ quarterly payment to Government. Rounding up of duty in each Invoice is not envisaged in Section 37D of Central Excise Act.

Advance payment from customers - After 13th May 2005, service tax will be payable as soon as advance is received, even if service is provided later. Thus, service tax is payable when advance is received. Invoice will have to be prepared.

Payment of tax

A person liable to pay tax shall pay the same in prescribed manner [Section 68(1)]. The service tax is payable 5th (6th in case of e-payment) of the month following the month in which payments are received toward value of taxable services *except in March* [Rule 6(1) of Service Tax Rules].

If the assessee is an individual or proprietary firm or partnership firm, the tax is payable on quarterly basis within 5 days (within 6 days if e-payment is made) at the end of quarter *except in March.* (Rule 6). This facility is not available to HUF firm in view of clear wording of the provision.

Exception in March - Exception has been made in case of March. Service tax on value of taxable services received during month of March or quarter of March is required to be paid by 31st March.

Assessee may find it difficult to accurately estimate the amounts he is going to receive from his customers in last two days. Hence, he may pay excess amount upto Rs. 50,000; which can be adjusted in subsequent month/quarter, as per Rule 6(4B) inserted w.e.f. 1-3-2007.

Payment of tax on amounts actually received - Rule 6(1) makes it clear that the liability is to pay service tax on payments towards value taxable services actually received. Thus, service tax is not payable on amounts charged in the bills/invoice, but on amounts actually received.

Self Adjustment of excess tax paid in earlier period

Facility of self-adjustment of excess service tax paid has been allowed to all assessees vide Rule 6(4A) subject to the following conditions prescribed in Rule 6(4B) of Service Tax Rules inserted w.e.f. 1-3-2007.

Self adjustment only in case of reasons like calculation mistake, exact amount not known etc. - Self-adjustment of excess credit is *not* allowed on account of reasons like interpretation of law, taxability, classification, valuation or applicability of any exemption notification[Rule 6(4B)(i)]. In such cases, refund application should be filed and self adjustment is not permissible.

Thus, self adjustment is possible only in cases like – (a) Excess payment since exact amount to be paid could not be calculated (b) when tax is to be paid by 31st March and calculation of exact amount is practically impossible (c) calculation mistakes.

Adjustment upto Rs. 1,00,000 only permissible - Excess amount paid and proposed to be adjusted should not exceed Rs. 1,00,000 for the relevant month or quarter [Rule 6(4B)(iii)].

Adjustment in subsequent month/quarter - Adjustment can be made in the succeeding month or quarter [Rule 6(4A)] [Rule does not say that adjustment can be made in subsequent month or quarter *only*. As per Section 13 of General Clauses Act, unless there is anything repugnant to the subject or context, the word singular includes plural and vice versa. Hence, it can be argued that adjustment can be made in any subsequent month/s or quarter/s].

Inform details of adjustment within 15 days - The details of self-adjustment should be intimated to the Superintendent of Central Excise within a period of 15 days from the date of adjustment [Rule 6(4B)(iv)] [It can be argued that this is directory provision and not mandatory provision, since in many cases, it is impossible to inform in 15 days. In such cases, information at the time of filing return should be sufficient].

Adjustment in case of service tax on renting of immovable property - In case of service tax on renting of immovable property, abatement is available in case of property tax paid to local authorities. If such tax is paid at a later date, self adjustment in service tax payable is permissible within one year from date of payment of tax, without any monetary limit. Assessee should inform Superintendent within 15 days of making adjustment [Rule 6(4C) of Service Tax Rules].

Assessees having centralized registration - Assessees who have centralised registration can adjust the excess service tax paid on their own without any monetary limit provided the excess amount paid is on account of delayed receipt of details of payments from branch offices [Rule 6(4B)(ii)].

Adjustment if service not provided partly or fully - If excess tax is paid, in respect of service which is not provided either wholly or partly for any reason, the excess service tax paid can be adjusted against service tax payable for subsequent period, if the value of services and tax thereon is refunded to the person from whom it was received. [Rule 6(3)]. *Such adjustment is permissible only when refund is on account of services not provided.* Thus, if the person refunds on account of giving some discount to client, this provision does not apply.

Payment of service tax

The service tax is payable 5th of the month following the month (6th in case of e-payment) in which payments are received toward value of taxable services [Rule 6(1) of Service Tax Rules]. Thus, service tax is *not* payable on basis of amounts charged in the bills/invoice, but only on amounts *actually received* during the relevant period.

Payment from Cenvat credit plus/GAR-7 - Assessee should first utilise Cenvat credit available. Balance amount is payable in cash.

Account code - The tax is payable by a GAR-7 Challan in the bank where excise duty is accepted in that Commissionerate. The major account head is '044'. In addition, separate accounting code has been given to each service. See next chapter pages for account head for each type of service.

TR-6 challan (in yellow colour in quadruplicate) is for payment in conventional mode while GAR-7 (one challan in yellow colour with counterfoil) is used when Bank is having 'EASIEST facility'. In both cases, payment is by cash or cheque.

The tax paid should be rounded off in rupees. Education cess and SAH education cess should be shown separately under separate account head in TR-6/GAR-7 challan.

Presentation of cheque on or before due date is sufficient - Rule 6(2A) provides that cheque of proper amount should be deposited with bank on or before due date. It will be deemed to have been paid on due date, even if the cheque is realised later. However, if cheque is not realised, service tax will not be deemed to have been paid.

If last date is a holiday - If last day of payment and filing return is a public holiday, tax can be paid and return can be submitted on next working day - CBE&C circular No. 63/12/2003-ST dated 14-10-2003.

Electronic Accounting System In Excise and Service Tax (EASIEST) - 'Easiest' has been developed to make payment of tax easy. The facility is available with some 28 banks. The payment is made by GAR-7 challan. Assessee has to make one copy of challan and its counterfoil.

Mandatory e-payment if annual service tax payment exceeds Rs. 50 lakhs - E-payment is a mode of payment in addition to the conventional methods of payment offered by the banks under specific security norms of Reserve Bank of India. This scheme facilitates anytime, anywhere payment and an instant cyber receipt is generated once the transaction is complete. It provides the convenience of making online payment of Central Excise and Service Tax through Bank's Internet banking service. About 28 Banks are authorised for this purpose.

Proviso to Rule 6(2) of Service Tax Rules makes e-payment mandatory for payment of duty by all assessees who have paid Service tax of rupees 50 lakh or more in cash during the preceding financial year, w.e.f. 1-10-2006.

Mandatory interest for late payment of service tax - In case of delayed payment of service tax, there is mandatory payment of simple interest under Section 75 for the period which the payment is delayed. The interest rate is 13% w.e.f. 10-9-2004, vide notification No. 26/2004-ST dated 10-9-2004 [Earlier interest @ 15% per annum from 11-5-2002. The interest rate was 24% upto 11-5-2002].

Returns

Every assessee has to submit half yearly return in form ST-3 in triplicate within 25 days of the end of the half-year. 'Half year' means 1st April to 30th September and 1st October to 31st March of financial year. The return should be accompanied by TR-6/GAR-7 challans, evidencing payment of duty. Details in respect of each service are to be provided separately. However, service tax payment details and Cenvat credit details are common and combined.

There is no column to show excess amount paid, if any. Presumably, this will have to be intimated by a separate letter and/or given in the ST-3 form as a 'remark' or 'note'.

Last date for filing return is a bank holiday - If last day of payment and filing return is a public holiday, tax can be paid and return can be submitted on next working day - CBE&C circular No. 63/12/2003-ST dated 14-10-2003.

Revised return - Rule 7B of Service Tax Rules has been inserted w.e.f. 1-3-2007 to allow an assessee to rectify mistakes and file revised return within 90 days from the date of filing of the original return. Rule 9(11) of Cenvat Credit Rules (inserted w.e.f. 1-3-2007) allows an assessee to rectify mistakes and file revised return within 60 days from the date of filing of original return. This provision applies only to service providers and not to manufacturers.

What is to be done if mistake comes to notice after 90 days? – There is no provision for submission of revised return after 90 days. In such cases, if assessee finds that he has made some mistake, he should pay the amount by TR-6/GAR-7 challan and inform department suitably. If he has paid excess amount by mistake, he is required to file refund claim. He cannot adjust excess payment on his own, except in cases where it has been specifically permitted. If he has not taken Cenvat credit of certain inputs, input services or capital goods, he can avail it in subsequent period, since there is no time limit for availing Cenvat credit. This will be reflected in his return for that subsequent period, as in normal course.

Electronic filing of return - Department has introduced e-filing of service tax return on experimental basis from April, 2003. It is optional. The procedure has been described in CBE&C circular No. 52/1/2003-ST dated 11-3-2003. Guidelines are also issued in question answer form on CBE&C website. The facility is available to all service providers.

Late fee and penalty for filing late return - Section 70(1), as amended by Finance Act, 2007 w.e.f. 11-5-2007, makes provision for late filing of return with late fee which can be upto Rs. 2,000. Late fee payable will be prescribed by Central Government by issuing a notification. The late fee payable is as follows – (a) Delay Upto 15 days – Rs. 500 (b) Beyond 15 days and upto 30 days – Rs. 1,000 (b) Delay beyond 30 days – Rs. 1,000 plus Rs. 100 per day of delay beyond 30 days, from 31st day maximum Rs. 2,000- Rule 7C inserted w.e.f. 12-5-2007.

Penalty can be waived if no tax was payable – Once a person is registered, he has to file return even if there is no tax liability. He should file Nil return if there was no service tax payable. However, if he does not file return, penalty can be waived/reduced if non-filing of return was for sufficient cause [Rule 7C].

Department is required to accept late return even if late fee is not paid – In case of returns filed late, the appropriate late fees should be paid at the time of filing the return, without waiting for any communication or notice from the department. Mere non-submission of evidence of payment of late fee along with the return is, however, not a ground for refusal to allow filing of the return – para 6.4 of CBE&C Circular No. 97/8/2007-ST dated 23-8-2007.

Provisional assessment

Assessee can make request in writing for provisional assessment to Assistant/Deputy Commissioner. Provisions of Central Excise Rules in respect of provisional assessment are applicable, but there is no requirement of any bond [Rule 6(4)].

Of course, reason has to be stated why he is not able to correctly determine his tax liability.

After such request is made, assessee has to submit memorandum in form ST-3A showing difference between service tax collected and deposited. Application for provisional assessment should be made to Assistant/ Deputy Commissioner. Provisional assessment can be finalised by Assistant/Deputy Commissioner after calling further documents as may be necessary. - Rule 6(4), 6(5) and 6(6) of Service Tax Rules, 1994.

12.6 Adjudication and Appeals

Central Excise Officers have been empowered to adjudicate in following -

(*a*) Demand of service tax and its recovery - Section 73.

(*b*) Rectification of mistake by amending own order - Section 74.

(*c*) Imposition of penalty - Section 83A

(*d*) Refund of service tax - Section 11B of Central Excise Act made applicable to Service Tax.

Time limit for issue of show cause notice - If it is found that assessee has paid less tax, department will issue a show cause notice cum demand.

If any service tax is not levied or not paid or short levied or short paid or erroneously refunded, Central Excise Officer shall issue a show cause notice for demand can be made within one year from 'relevant date' [Section 73(1)].

If such short payment etc. was by reason of fraud, collusion, wilful misstatement, suppression of facts or contravention of any provision of Finance Act, 1994 or rules, show cause notice can be issued within five years [*proviso* to Section 73(1)]. After considering the representation, Central Excise Officer will determine the service tax payable. Such tax cannot be more than the amount specified in show cause notice. Thereupon, the person shall pay the amount so determined [Section 73(2)].

Voluntary Payment before receipt of show cause notice - Assessee may pay such tax on the basis of his own ascertainment or on the basis of tax ascertained by Central Excise Officer, before issue of show cause notice. After payment of tax, assessee should inform the Central Excise Officer in writing about such payment, and then the Central Excise Officer shall not issue any show cause notice under Section 73(1) in respect of service tax so paid [Section 73(3)].

Rectification - The Central Excise Officer who has passed order (of assessment or demand or penalty) can rectify any mistake apparent from the record, within two years of the date on which the order was passed. The mistake must be 'apparent from the records'.

Revision - The Commissioner of Central Excise can revise the orders passed by adjudicating authority subordinate to him. The revision order can be passed anytime within two years of the original order, but not afterwards. No revision can be made if appeal against such order is pending with Commissioner (Appeals) [Section 84]. Appeal against the order of Commissioner (after revision) lies with CESTAT under Section 86.

Appeals

Appeal to Commissioner (Appeals) - Appeal to Commissioner (Appeals) can be made against order of any Central Excise Officer subordinate to Commissioner in respect of demand, interest or penalty or denial of refund of service tax. Appeal should be in prescribed form and duly verified. Appeal must be filed within three months from date of receipt of order. Delay upto three months can be condoned by Commissioner (Appeals). The procedures and powers will be similar to those under Central Excise. [Section 85 of Finance Act, 1994].

Appeal to Tribunal - Appeal to CESTAT (Tribunal) can be made against order of Commissioner passed by him under Sections 73, 83A or 84 or order of Commissioner (Appeals) passed by him under Section 85 [order in appeal from order of AC/DC] by assessee or the department. Appeal has to be filed within three months from date of receipt of order by assessee, Board or Commissioner as the case may be. [Section 86 of Finance Act, 1996]. Tribunal can condone the delay in filing appeal on showing sufficient cause. Appeal has to be accompanied with prescribed fees, if appeal is by the assessee.

Tribunal is final fact finding authority.

Appeals to HC/SC – If issue involves classification or valuation, appeal lies with Supreme Court. If issue does not involve classification or valuation dispute, appeal lies with High Court only on substantial question of law.

Penalties

The penalties can be imposed by Central Excise Officers There is no provision for prosecution under the Act.

Penalty for non-payment or delayed payment of service tax - If service tax is not paid or belatedly paid, penalty shall be imposed, which will be minimum Rs. 200 per day during which such failure continues or @ 2% per month, whichever is higher, starting with the first day after due date till date of actual payment of outstanding amount. Mercifully, the penalty cannot exceed the service tax which was payable. In addition, of course, service tax and interest is payable. [Section 76 of Finance Act, 1994]. As per Section 80, this penalty can be waived or reduced if proper cause is shown.

Penalty for contravention of Act or Rules - Penalty for contravention of any provision of the Chapter or Rules (of service tax) can be upto Rs. 1,000 [Section 77]. The penalty can be waived under Section 80, if assessee proves that failure was due to reasonable cause.

Penalty in case of fraud, suppression of facts etc. - Where any tax is not levied or paid or erroneously refunded, the person shall be liable to pay penalty which shall not be less than amount of service tax but can be upto twice the amount of service tax amount of service tax not levied or not paid or erroneously refunded [Section 78]. The penalty can be waived under Section 80, if assessee proves that failure was due to reasonable cause. [The penalty will be reduced to 25%, if tax, interest and penalty is paid within 30 days from date of receipt of order of Central Excise Officer].

12.7 Export of Services

If service is exported, there is no service tax liability. If the service is exported, the Cenvat credit is not required to be reversed. Assessee can utilise credit for payment of service tax on other services. However, if this is not possible, he can get refund.

Service tax is required to be exempted only if there is actual export of service. 'Export of Services Rules, 2005' have been notified w.e.f. 15-3-2005. The rules make it clear that exemption from services/rebate of service tax and excise duty paid is admissible only if there is 'export of service' as defined in these rules. Mere receipt of payment in free foreign exchange will not be sufficient to treat the service as 'export service'.

Exemption or Rebate of Service tax - Exporter of service has three options -

(*a*) Export without payment of service tax and utilise Cenvat Credit for payment of service tax on other services.

(*b*) Export without payment of service tax and claim rebate of service tax paid on input services and excise duty paid on inputs (or forget about rebate as procedure is too complicated and impractical).

(*c*) Pay service tax on exported services and claim rebate (by this, he can utilise his input credit).

Meaning of Export of taxable service - Following conditions are common in respect of *all* taxable services - (**a**) The service should be provided from India and used outside India [Rule 3(2)(a) of Export of Service Rules] and (**b**) Payment for such service is received by the service provider in convertible foreign exchange [Rule 3(2)(b) of Export of Service Rules].

In addition, further conditions apply to different categories of services. Rule 3 of Export of Service Rules classifies the taxable services in four categories –

(i) Immovable property should be situated abroad [Rule 3(i)]

(ii) Service should be at least partly performed outside India [Rule 3(ii)]

(iii) Service can be provided firm Indian but recipient should be located outside India and order should be received from outside India [Rule 3(iii)]

(iv) Services which not be treated as 'export of services' under any situation.

Services falling under each category are given in next chapter.

Rebate of service tax paid on exported services or tax paid on inputs/input services - Subsequent to issue of Export of Service Rules, 2005; two notifications have been issued making provisions for rebate.

(*a*) Notification No. 11/2005-ST dated 19-4-2005, providing for rebate of service tax and education cess paid on taxable services exported i.e. tax paid on output services

(*b*) Notification No. 12/2005-ST dated 19-4-2005, providing for rebate of excise duty paid on inputs and service tax paid on input services, which are used in providing exported taxable services.

Refund of input service tax and duty under Cenvat Credit Rules - Rule 5 of Cenvat Credit Rules has been amended w.e.f. 14-3-2006 to provide for refund of Cenvat credit when output service is exported. Procedure for claiming refund of service tax paid on input services and excise duty on inputs has been specified in notification No. 5/2006-CE(NT) dated 14-3-2006. Application should be submitted in Form 'A' to Assistant/Deputy Commissioner.

Application can be submitted every quarter. However, in following cases, refund can be claimed on monthly basis - (a) persons whose average export clearances are more than 50% of total clearances (b) EOU units. Refund of input service credit will be restricted to the extent of ratio of export turnover to the total turnover for the given period e.g. if total credit of input services is Rs. 100, total turnover is Rs. 500 and export turnover is Rs. 250, refund of input service tax credit will be only Rs. 50 (i.e. 50%, since export turnover is 50% of total turnover). The procedure seems to be simple. EOU is eligible to avail this procedure.

12.8 Import of Services

The statutory provisions use the words 'Services provided from outside India and received in India'. However, generally, the tax is known as tax on 'Import of Services'.

Section 66A(1) (effective from 18-4-2006) provides that where any service specified in Section 65(105) of Finance Act, is, — (a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and (b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of this Section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply.

Exemption to individual receiving the service - First *proviso* to Section 66A(1) states that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-Section shall not apply.

When service provider has establishment at more than one places - Second *proviso* to Section 66A(1) states that where the provider of the service has his business establishment both in that country and elsewhere,

the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided. Thus, even if a service provider has office in India as well as in foreign country, the service will be treated as provided from foreign country, if service is provided from that country.

Two permanent establishments to be treated as two separate persons - As per Section 66A(2), where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this Section.

Intention seems only to tax services received in India - Though Section 66A is broadly worded and covers even services provided and consumed abroad, it appears that intention is to tax only services received in India. *If so, then only possible objection can be violation of DTA.*

Service provided from outside India and received in India - Though scope of Section 66A is wide, it can be argued that service tax is payable only if the service falls within the definition of 'Service provided from Outside India and Received in India'.

Classification of services - The rules classify all taxable services in four categories, namely (i) Services in relation to immovable property – the property should be situated in India – Rule 3(i) (ii) Services should be at least partly performed in India [Rule 3(ii)] (iii) Services received by recipient located in India [Rule 3(iii)] (iv) Services which will never be treated as import of service. The classification is same as per export of Service Rules.

Service receiver liable to pay service tax - As per Rule 2(1)(d)(iv) of Service Tax Rules, person liable for paying the service tax means — in relation to any taxable service provided or to be provided by any person from a country other than India and received by any person in India under Section 66A of the Act, the recipient of such service.

Thus, person receiving service in India will be liable to pay service tax. He will have to register under Service tax provisions and submit returns. Service receiver was made liable to pay service tax on services provided by non-resident by amending rules on 16-8-2002. In cases prior to that, it was held that service receiver cannot be made liable to pay service tax in case of services provided by non-resident.

Tax to be paid in cash without Cenvat credit - Rule 5 of Taxation of Services (Provided from outside India and Received in India) Rules, 2006 clarifies that the taxable service will not be treated as output service of the recipient for purpose of availing of Cenvat credit of duty of excise paid on inputs or service tax paid on any input services. Thus, the recipient of service has to pay the service tax in cash by TR-6/GAR-7 challan. He cannot utilise his Cenvat credit for payment of this amount, as it is not his 'output service', though he is liable to pay service tax.

Service receiver avail Cenvat credit of service tax paid by him - Though the person receiving the service is liable to pay service tax, the service is his 'input service'. Para 4.2-13 of MF(DR) circular No. B1/4/2006-TRU, dated 19-4-2006 confirms as follows 'Where such service is used as an input for providing any taxable output, the service tax paid on such service can be taken as input credit' (The TRU letters have not been withdrawn even when all other circulars have been withdrawn on 23-8-2007. Hence, TRU letters are still valid) [There is some controversy on this issue]

STUDY NOTE 13

Taxable Services

Description of service	Coverage	Exclusions/Exemptions
Advertising agency	**Statutory coverage** • "advertisement" includes any notice, circular, label, wrapper, document, hoarding or any other audio or visual representation made by means of light, sound, smoke or gas [Section 65(2)]. • Service connected with the making, preparation, display or exhibition of advertisement taxable. • Services of advertising consultant. Taxable [Section 65(3)]. **Case Law/Board Circulars** • Tax only on commission, not on advertisement charges paid to media or TV.	**Exclusions** • Sale of space or time for advertisement taxable under different head. • Space selling taxable under BAS. • Preparing sign board or hoardings not taxable. **Exemptions** • See para 12.3 for general exemptions.
Air transport of passengers embarking for international travel	**Statutory coverage** • Service in relation to scheduled or non-scheduled air transport of such passenger embarking in India for international journey, in any class other than economy class. **Case Law/Board Circulars** • Tax is payable for entire journey even if there is stop over in between. • In case of round trip or return ticket, service tax is payable on total value of ticket.	**Exclusions** • Economy class passengers are excluded. **Exemptions** • See para 12.3 for general exemptions.
Airport Services	**Statutory coverage** • Service by airports authority or any person authorised by it, in an airport or a civil enclave. **Case Law/Board Circulars** • Services statutorily provided by AAI as stated in MF(DR) circular No. B2/8/2004-TRU dated 10-9-2004 are only taxable.	**Exemptions** • See para 12.3 for general exemptions.
Air travel agent	**Statutory coverage** • Service in relation to the booking of passage for travel by air. **Case Law/Board Circulars** • Tax is payable only on commission and other charges but relating to booking of passage for air travel.	**Exclusions** • Services of GSA (General Sales Agent) appointed by foreign airlines are taxable under 'Business Auxiliary Service' and not under Air Travel Agent Service. **Valuation** • Air travel agent has option to pay service tax @ 0.60% of basic fare in case of domestic booking and @ 1.20% of the basic fare in case of international bookings, of passage for travel by air. In addition, education cess @ 2% and SAH education cess @ 1% will be payable. **Exemptions** See para 12.3 for general exemptions.

Architect	**Statutory coverage** • Services in the field of architecture. **Case Law/Board Circulars** • Designing or planning of construction of buildings, bridges, dams etc. and its supervision.	**Exclusions** • Actual execution of work is not Architect's services. • Interior design may be covered only to the extent of architecture. • No tax on material, furniture and temporary structures **Exemptions** • See para 12.3 for general exemptions.
Asset Management including portfolio management	**Statutory coverage** • Asset management including portfolio management and all forms of fund management. **Case Law/Board Circulars** • Services provided by individual service providers especially to high net worth individuals taxable.	**Exclusions** • Services by banking company or a financial institution, NBFC or any other body corporate or commercial concern taxable under 'Banking and other Financial Services' **Exemptions** • See para 12.3 for general exemptions.
ATM operations, maintenance or management	**Statutory coverage** • Automated teller machine (ATM) operations, maintenance or management service, in any manner. • Includes site selection, contracting of location, acquisition, financing, installation, certification, connection, maintenance, transaction processing, cash forecasting, replenishment, reconciliation and value-added services [Section 65(9b)]	**Exclusions** • No service tax on cash withdrawn from ATM. **Exemptions** • See para 12.3 for general exemptions.
Auctioneers' Service	**Statutory coverage** • Service in relation to auction of property, movable or immovable, tangible or intangible. • Calling the auction or providing a facility, advertising or illustrating services, pre-auction price estimates, short-term storage services, repair or restoration services in relation to auction of property [Section 65(7a)].	**Exclusions** • Auction of property under the directions or orders of a court of law or auction by the Government excluded. **Exemptions** • See para 12.3 for general exemptions.

Authorised service station (Motor car/ Two-wheelers/ LMV)	**Statutory coverage** • Service by an authorised service station, in relation to any service, repair, reconditioning or restoration of motor cars, light motor vehicles or two wheeled motor vehicles, in any manner. • Light Motor Vehicle (LMV) means any motor vehicle constructed or adapted to carry more than six passengers, but not more than twelve passengers, excluding the driver [Section 65(62)]. **Case Law/Board Circulars** • Free service to our customers for which reimbursement obtained from manufacturers is taxable. • Service tax payable on spare parts used during provision of service - Ref Code 036.03/23.8.07 of CBE&C Circular No. 96/7/2007-ST dated 23-8-2007 [doubtful]	**Exclusions** • Service provided at the time of purchase of new vehicle is not liable to tax. • Service to transport vehicle, buses, trucks, omnibus, road-roller, tractor, or invalid carriage is not covered **Exemptions** • See para 12.3 for general exemptions.
Banking and Financial services	**Statutory coverage** • Service by a banking company or a financial institution including NBFC, or any other body corporate or *commercial concern*, is taxable. • Financial leasing services including equipment leasing and hire-purchase. • Merchant banking services. • Securities and foreign exchange (forex) broking; • Asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services. • Advisory and other auxiliary financial services including investment and portfolio research and advice, advice on mergers and acquisitions and advice on corporate restructuring and strategy. • Provision and transfer of information and data processing. • Banker to an issue services. • Other specified financial services [Section 65(12)]. **Case Law/Board Circulars** • Cash management taxable. • Business chit funds are taxable - CBE&C Ref Code 034.04/23.8.07 of CBE&C Circular No. 96/7/2007-ST dated 23-8-2007.	**Exclusions** • Hire purchase finance not taxable – *Bajaj Auto Finance* v. *CCE* (2007) 9 STT 569 (CESTAT). • Money changers who buys and sells foreign exchange without charging commission or brokerage is not liable - Ref Code 034.01/23.8.07 of CBE&C Circular No. 96/7/2007-ST dated 23-8-2007. • Stock Exchanges, commodity exchanges, stock clearing house services not liable – CBE&C letter No. 137/57/2006-CX.4 dated 18-5-2007. • Simple chit funds not taxable but business chit funds taxable - CBE&C Ref Code 034.04/23.8.07 of CBE&C Circular No. 96/7/2007-ST dated 23-8-2007. • No service tax on entry and exit load charged by mutual fund to the investor **Exemptions** • Services provided to Government for tax collection exempt - Notification No. 13/2004-ST dated 10-9-2004. • Services provided by RBI exempt – Notification No. 22/2006-ST dated 31-5-2006. • No service tax on interest charged by service provider - Rule 6(2)(iv). • See para 12.3 for general exemptions.

Beauty treatment	**Statutory coverage** • Services includes hair cutting, hair dyeing, hair dressing, face and beauty treatment, cosmetic treatment, manicure, pedicure or counselling services on beauty, face care or make-up or such other similar services [Section 65(17)]. **Case Law/Board Circulars** • Materials used such as cosmetics and toilet preparations are includable for valuation	**Exclusions** • No tax on plastic surgery - CBE&C circular No. B.11/1/2002-TRU dated 1-8-2002. **Exemptions** • See para 12.3 for general exemptions.
Broadcasting	**Statutory coverage** • Service by a broadcasting agency or organisation in relation to broadcasting • In the case of a broadcasting agency or organisation, having its head office situated in any place outside India, includes service provided by its branch office or subsidiary or representative in India or any agent appointed in India. • Services of selling of time slots for broadcasting of any programme or obtaining sponsorships for programme and collecting broadcasting charges is a taxable service. [Section 65(16)]	**Exemptions** • Exemption to services by digital cinema service provider to distributor or producer - Notification No. 12/2007-Service Tax dated 01.03.2007. • See para 12.3 for general exemptions.

Business auxiliary services	**Statutory coverage** • Promotion or marketing or sale of goods produced or provided by or belonging to the client • Promotion or marketing of service provided by the client • Any customer care service provided on behalf of the client • Procurement of goods or services, which are inputs for the client • Production or processing of goods for, or on behalf of, the client • Provision of service on behalf of the client. • A service incidental or auxiliary to any activity specified above, such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision. • Services as a commission agent [Section 65(19)]. **Case Law/Board Circulars** • Job work liable to service tax, but job work done under Cenvat provisions exempt. Job work not taxable if it amounts to 'manufacture'.	**Exclusions** • 'Information Technology Service' means any service in relation to (a) designing or developing of computer software, or (b) system networking, or (c) any other service primarily in relation to operation of computer systems, is excluded. • Activity that amounts to "manufacture" within the meaning of Section 2(f) of the Central Excise Act is excluded. **Exemptions** • The services of production or processing of goods in relation to ***agriculture, printing, textile processing or education*** are fully exempt [Notification No. 14/2004 - ST dated 10-9-2004]. • Job work exempt if the goods after processing are returned back to client (raw material supplier) for use in or in relation to manufacture of 'other goods' by the client. The 'other goods' should be such that appropriate duty should be payable on such goods - notification No. 8/2005-ST dated 1-3-2005. • Job workers of parts and accessories of cycles, cycle rickshaws and hand operated sewing machines have to pay service tax is payable on 70% of gross amount if gross amount is inclusive of cost of inputs and input services. The 'exemption' is available if job worker does not avail any Cenvat Credit – Notification No. 1/2006-ST dated 1-3-2006. • Services of commission agents in relation to sale or purchase of agricultural produce are exempt from service tax *vide* notification No. 13/2003-ST dated 20-6-2003. • Job work done in gem, jewellery and diamonds sector has been exempted vide notification No. 21/2005-ST dated 7-6-2005. • See para 12.3 for general exemptions

Business exhibition	**Statutory coverage** • An exhibition, — (a) to market; or (b) to promote; or (c) to advertise; or (d) to showcase, - - - any product or service, intended for the growth in business of the producer or provider of such product or service [Section 65(19a)]. **Case Law/Board Circulars** • Organizers of events such as trade fairs, road shows, fashion shows, display show-cases kept in airports, railway stations, hotels etc. would be covered under this new levy.	**Exemptions** • See para 12.3 for general exemptions.
Business Support Services	**Statutory coverage** • Services provided in relation to business or commerce. • Evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational assistance for marketing, formulation of customer service and pricing policies. • Infrastructural support services • Other transaction processing [Section 65(104c)].	**Exemptions** • See para 12.3 for general exemptions.
Cable	**Statutory coverage** • Service provided by cable operator, including multi-system operator • Transmission by cables of a programme including retransmission by cable of any broadcast television signals is taxable [Section 65(22)]. **Case Law/Board Circulars** • Broadcasting services provided by cable operators are also taxable. • Service tax is not leviable on entertainment tax levied by State Government, if it is shown separately in the Bill of cable operator to the customer - CBE&C circular No. B.11/1/2002-TRU dated 1-8-2002.	**Exemptions** • See para 12.3 for general exemptions.

Cargo handling	**Statutory coverage** • Loading, unloading, packing or unpacking of cargo • Cargo handling services provided for freight in special containers or for non-containerised freight • Services provided by a container freight terminal or any other freight terminal, for all modes of transport • Cargo handling services incidental to freight [Section 65(23)]	**Exclusions** • Handling of export cargo or passenger baggage is excluded. • Mere transportation of goods excluded. **Exemptions** • Cargo handling services relating to agricultural produce or goods intended to be stored in a cold storage are exempt from service tax vide notification No. 10/2002-ST dated 16-8-2002. • See para 12.3 for general exemptions.
Cleaning Activity	**Statutory coverage** • Cleaning • Specialised cleaning services. • Disinfecting, exterminating or sterilising of objects or premises, of — (i) commercial or industrial buildings and premises thereof; or (ii) factory, plant or machinery, tank or reservoir of such commercial or industrial buildings and premises [Section 65(24b)].	**Exclusions** • Services in relation to agriculture, horticulture, animal husbandry or dairying. • 'Cleaning' of goods i.e. movable property will not be taxable under this head. • Cleaning of residential buildings and premises has been excluded from the provisions. **Exemptions** • See para 12.3 for general exemptions.
Clearing & Forwarding Agent	**Statutory coverage** • Service, either directly or indirectly, connected with clearing and forwarding operations. • It includes a consignment agent. [Section 65(25)]. **Case Law/Board Circulars** • Services of coal merchants, who are acting as buyer's agents and carry out such jobs/assignments as asked for by respective consumers/buyers are covered under definition of C&F Agent and are liable to service tax - CBE&C letter F No. 159/1/2003-CX.4 dated 10-12-2003. • Mere procuring or booking orders for the Principal by an agent on commission basis would not be 'Clearing and Forwarding Agent service' - *Larsen and Toubro Ltd.* v. *CCE* (2006) 4 STT 231 (CESTAT 3 member bench) • A commission agent is not a 'C&F' agent – *CCE* v. *Chandan Chemicals* (2007) 9 STT 556 (CESTAT).	**Exemptions** • See para 12.3 for general exemptions.

Club or Association's services	**Statutory coverage** • Service to members, by any club or association in relation to provision of services, facilities or advantages for a subscription or any other amount. **Case Law/Board Circulars** • As per Section 2 of Charitable Endowments Act, 1890, 'charitable purpose' includes relief to poor, education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship. • Service tax will be payable on life membership fees - para 10.6 of MF(DR) circular No. B1/6/2005-TRU dated 27-7-2005.	**Exclusions** "Club or association" does not include — (i) any body established or constituted by or under any law for the time being in force; or (ii) any person or body of persons engaged in the activities of trade unions, promotion of agriculture, horticulture or animal husbandry (iii) any person or body of persons engaged in any activity having objectives which are in the nature of public service and are of a charitable, religious or political nature (iv) any person or body of persons associated with press or media [Section 65(25a)]. **Exemptions** • Exemption to Services of housing societies or Resident Welfare Associations to their members are exempt vide Notification No. 8/2007-ST dated 01-03-2007, if the monthly contribution is less than Rs. 3,000. • See para 12.3 for general exemptions.
Commercial training or coaching	**Statutory coverage** • Service by a commercial training or coaching centre in relation to commercial training or coaching. • Imparting skill or knowledge or lessons on any subject or field other than sports, with or without issuance of a certificate. • Coaching or tutorial classes [Section 65(27)]. **Case Law/Board Circulars** • Computer training or coaching Institutes are liable to service tax w.e.f. 16-6-2005. • Coaching imparted to students of standards 1 to 9 taxable.	**Exclusions** • pre-school coaching [Section 65(27)]. • training centre or any institute or establishment which issues any certificate or diploma or degree or any educational qualification recognised by law Services provided by recognised colleges for training of competitive examinations or entrance tests not taxable [Section 65(27)] • Some institutes like colleges, apart from imparting education for recognised degrees/diplomas/certificates, also impart training for competitive examinations, various entrance tests etc. These services are not taxable as the Institutes providing the services are not 'commercial training institutes' - CBE&C circular No. 59/8/2003 dated 20-6-2003. • Home tuitions not taxable . • Training provided by employer not taxable but if outside agency provides service, it will be taxable. **Exemptions** • Commercial training which forms essential part of course leading to recognised certificate/diploma exempt - Notification No. 10/2003-ST dated 20-6-2003. • Vocational and recreational training Institutes are exempt vide Notification No. 24/2004-ST dated 10-9-2004. • See para 12.3 for general exemptions.

Commercial or Industrial Construction	**Statutory coverage** Following services used, or to be used, primarily for commerce or industry, or work intended for commerce or industry are taxable- a) Construction of a new building or a civil structure or a part thereof. b) Construction of pipeline or conduit. c) Completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure. d) Repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit [Section 65(25b)]. **Case Law/Board Circulars** • Educational, religious, Government buildings etc. not taxable. • If builder/promoter/developer undertakes construction work on his own without engaging the services of any other person, it is not taxable – Ref Code 079.01/23.8.07 of CBE&C Circular No. 96/7/2007-ST dated 23-8-2007. • Sub-contractors providing the construction services (to main contractor or to any other person) will be liable to service tax.	**Exclusions** • Such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams [Section 65(25b)]. • If Vat/sales tax is payable on goods involved in the contract, the service will be classifiable under 'works contract' service tax. **Valuation** • Any person providing taxable service of commercial or industrial construction can opt to pay service tax on 33% of gross amount charged. *This is at the option of service provider.* This relaxation is *not* available if only completion and finishing services are provided - Notification No. 1/2006-ST dated 1-3-2006. The partial exemption is available only if the gross amount charged includes value of goods and materials supplied or provided or used by provider of the commercial or industrial construction of service for providing such service (*Explanation* to Notification No. 1/2006-ST]. *However, value of land is not required to be added as it is neither goods nor material.* **Exemptions** • Construction and works contract services relating to port or other port are exempt. However, services of completion and finishing, repair, alteration, renovation, restoration, maintenance or repair provided in relation to existing port or other port are not exempt - Notification No. 25/2007-ST dated 22-5-2007. • See para 12.3 for general exemptions.

Construction of residential Complex	**Statutory coverage** Following services relating to construction of residential complex comprising of a building or buildings, having more than twelve residential units, a common area; and one or more common facilities – (a) Construction of a new residential complex or a part thereof (b) Completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services (c) Repair, alteration, renovation or restoration of, or similar services in relation to, residential complex [Section 65(30a) and [Section 65(91a)]] **Case Law/Board Circulars** • If builder/promoter/developer undertakes construction work on his own without engaging the services of any other person, it is not taxable – Ref Code 079.01/23.8.07 of CBE&C Circular No. 96/7/2007-ST dated 23-8-2007. • Sub-contractors providing the construction services (to main contractor or to any other person) will be liable to service tax.	**Exclusions** • A complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person - "personal use" includes permitting the complex for use as residence by another person on rent or without consideration. • If Vat/sales tax is payable on goods involved in the contract, the service will be classifiable under 'works contract' service tax. **Valuation** • Any person providing taxable service of commercial or industrial construction can opt to pay service tax on 33% of gross amount charged. *This is at the option of service provider.* This relaxation is *not* available if only completion and finishing services are provided - Notification No. 1/2006-ST dated 1-3-2006. The partial exemption is available only if the gross amount charged includes value of goods and materials supplied or provided or used by provider of the commercial or industrial construction of service for providing such service (*Explanation* to Notification No. 1/2006-ST). However, value of land is not required to be added as it is neither goods nor material. **Exemptions** • See para 12.3 for general exemptions.

Consulting Engineer	**Statutory coverage** • Advice, consultancy or technical assistance in any manner in one or more disciplines of engineering including the discipline of computer hardware engineering but excluding the discipline of computer software engineering. **Case Law/Board Circulars** • Technical assistance, training, software support are all 'taxable services' **-** In *Nokia (I) P Ltd.* v. *CC* (2006) 3 STT 209 (CESTAT). • Services of Valuation taxable **-** *V. Shanmughavel* v. *CCE* 2001 STT 132 = 6 STT 183 = 121 Taxman 274 = 2 STR 466 (Mad HC DB). • Contract for execution of a project is not consulting engineering service **-** *Ircon International Ltd.* v. *CCE* (2005) 2 STT 264 (CESTAT). • Royalty payment for use of technology and know-how cannot be equated with any services provided by foreign collaborator. Hence, no service tax is payable on such royalty payment - *Navinon Ltd.* v. *CCE* (2007) 6 STT 411 = 2004 STT 601 (CESTAT).	**Exclusions** • Services in discipline of computer software engineering. **Exemptions** • Cess is payable under Section 3 of Research and Development Cess Act, 1986, on transfer of technology. If such cess is payable, the consulting engineer will be granted exemption from service tax to the extent of cess paid - Notification No. 18/2002-ST dated 16-12-2002. Thus, if value of service is Rs. 100, tax payable is Rs. 12 and cess paid is Rs. 5, net service tax actually payable will be Rs. 7. • See para 12.3 for general exemptions.
Convention	**Statutory coverage** • "Convention" means a formal meeting or assembly which is not open to the general public, but does not include a meeting or assembly, the principal purpose of which is to provide any type of amusement, entertainment or recreation [Section 65(32)]. **Case Law/Board Circulars** • Service of providing room/hall for convention, video conferencing, head projectors, LCD projector, speakers, microphones, technical staff for operating these equipments, stationery etc. is covered.	**Exemptions** • In case of convention services provided by any person, service tax is payable only on 60% of the gross amount charged by the service provider for providing taxable service, if the gross amount includes charges for catering services. 'Catering service' means supply of a substantial and satisfying meal. - Notification No. 1/2006-ST dated 1-3-2006. • See para 12.3 for general exemptions.

Courier	**Statutory coverage** • Door-to-door transportation of time sensitive documents, goods or articles utilising the services of a person, either directly or indirectly, to carry or accompany such documents, goods or articles [Section 65(33)]. **Case Law/Board Circulars** • Basic postal services not taxable. However, courier services (Speed Post), insurance services (Postal Life Insurance), agency or intermediary services on commission basis which are also provided by other commercial organizations, are taxable - Ref Code 999.02/23.8.07 of CBE&C Circular No. 96/7/2007-ST dated 23-8-2007. • Co-loadersrs i.e. persons providing services to courier liable (earlier circular withdrawn).	**Exclusions** • Basic postal services not taxable. **Exemptions** • See para 12.3 for general exemptions.
Credit Card, debit card, charge or other payment cards related services	**Statutory coverage** • Service in relation to credit card, debit card, charge card or other payment card service. • Receipt and processing of application, transfer of embossing data to issuing bank's personalisation agency, automated teller machine personal identification number generation, renewal or replacement of card, change of address, enhancement of credit limit, payment updation and statement generation. • Settlement of any amount transacted through such card. • Service by the owner of trade marks or brand name to the issuing bank under an agreement, for use of the trade mark [Section 65(33a)].	**Exemptions** • See para 12.3 for general exemptions.
Credit Rating Agency	**Statutory coverage** • Credit rating of any debt obligation or of any project or programme requiring finance. • Credit rating of any financial obligation, instrument or security for providing a potential investor or any other person any information pertaining to the relative safety of timely payment of interest or principal [Section 65(34)]. **Case Law/Board Circulars** • Surveillance fee collected by a Credit rating agency is taxable.	**Exclusions** • Information and advisory services rendered, research and information such as analysis of industries in a specific sector, financial and business outlook, indexing services, macro studies, financial modelling etc. are not in relation to credit rating and hence are not taxable. **Exemptions** • See para 12.3 for general exemptions.

Custom House Agent	**Statutory coverage** • Service in relation to the entry or departure of conveyances or the import or export of goods.	**Exemptions** • See para 12.3 for general exemptions.
Design Services	**Statutory coverage** • Services provided in relation to designing of furniture, consumer products, industrial product, packages, logos, graphics, websites and corporate identity designing and production of three dimensional models [Section 65(36b)]. **Case Law/Board Circulars** • Design services, other than the above specifically mentioned taxable services, like furniture design, aesthetic design, consumer or industrial products, logos, packaging, production of three dimensional models, etc. will be taxable under this category.	**Exclusions** • Service provided by interior decorator and a fashion designer (they are covered under different head) **Exemptions** • See para 12.3 for general exemptions.
Development and supply of content services	**Statutory coverage** • Development and supply of content for use in telecommunication services, advertising agency services and on-line information and database access or retrieval services. • Development and supply of mobile value added services, music, movie clips, ring tones, wall paper, mobile games, data, whether or not aggregated, information, news and animation films [Section 65(36c)]	**Exemptions** • See para 12.3 for general exemptions.
Dredging	**Statutory coverage** • Removal of material including, silt, sediments, rocks, sand, refuse, debris, plant or animal matter in any excavating, cleaning, deepening, widening or lengthening, either permanently or temporarily, of any river, port, harbour, backwater or estuary [Section 65(36a)]. **Case Law/Board Circulars** • Excavation of material from sea, river or lake bed and putting the excavated material elsewhere for disposal is covered.	**Exemptions** • See para 12.3 for general exemptions.

Dry cleaning	**Statutory coverage** • 'Dry cleaning' includes dry cleaning of apparels, garments or other textile, fur or leather articles [Section 65(37)]. **Case Law/Board Circulars** • Dry cleaning includes tagging and inspection, pre-treatment, dry cleaning and post sorting. No tax is payable on wet cleaning, i.e. cleaning with water and water soluble detergents. Service tax is also not payable on job of dyeing, darning etc. - CBE&C circular No. B.11/1/2002-TRU dated 1-8-2002.	**Exemptions** • See para 12.3 for general exemptions.
Erection, Commiss-ioning or installation	**Statutory coverage** • Erection, commissioning or installation of plant, machinery, equipment or structures, whether prefabricated or otherwise. • Installation of — (a) electrical and electronic devices, including wirings or fittings therefor; or (b) plumbing, drain laying or other installations for transport of fluids; or (c) heating, ventilation or air-conditioning including related pipe work, ductwork and sheet metal work; or (d) thermal insulation, sound insulation, fire proofing or water proofing; or (e) lift and escalator, fire escape staircases or travelators; or (f) such other similar services [Section 65(39a)]. **Case Law/Board Circulars** • Supply of lift and its installation at site. It was held that it is a contract of 'sale' and not a 'works contract'. Skill and labour employed for converting the main components into lift was only incidental - *State of Andhra Pradesh* v. *Kone Elevators (India) Ltd.* 2005 (181) ELT 156 (SC 3 member bench). • Service tax payable even if excise duty paid on entire value of contract including erection charges – *Lincoln Helios (India) Ltd.* v. *CCE* (2006) 3 STT 311 (CESTAT).	**Exclusions** • If Vat/sales tax is payable on goods involved in the contract, the service will be classifiable under 'works contract' service tax. • Erection of Civil Structure not taxable. **Valuation** • Value of erection, commissioning or installation may, *at the option of assessee*, be taken as 33% of gross amount of contract and service tax will be payable accordingly. The gross amount charged will include value of plant, machinery, equipment, structures, parts and other material sold - Notification No. 1/2006-ST dated 1-3-2006. **Exemptions** • See para 12.3 for general exemptions.
Event management	**Statutory coverage** • Service provided in relation to planning, promotion, organising or presentation of any arts, entertainment, business, sports, marriage or any other event • Includes any consultation provided in this regard [Section 65(40)]	**Exclusions** • Service tax is not leviable on sale proceeds of tickets or revenue generated from the sale of space. - CBE&C circular No. B.11/1/2002-TRU dated 1-8-2002. **Exemptions** • See para 12.3 for general exemptions.

Fashion designing	**Statutory coverage** • Any activity relating to conceptualizing, outlining, creating the designs and preparing patterns for costumes, apparels, garments, clothing accessories, jewellery or any other article intended to be worn by human beings. • Any other service incidental thereto [Section 65(43)].	**Exclusions** • If fashion designer designs and makes garments himself and sells them, there is no service tax, as he is providing designing service to himself. - - Services of tailor and jewellers are not taxable, as no designing is involved. - - - CBE&C circular No. B.11/1/2002-TRU dated 1-8-2002. **Exemptions** • See para 12.3 for general exemptions.
Forward contract	**Statutory coverage** • Service by a member of a recognized association or a registered association, in relation to a forward contract. • "Forward contract" means the contract for delivery of goods at future date and which is not for ready delivery contract.	**Exemptions** • See para 12.3 for general exemptions.
Franchise	**Statutory coverage** • "Franchise" means an agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trademark, service mark, trade name or logo or any such symbol, as the case may be, is involved [Section 65(47)]. **Case Law/Board Circulars** • Some well known examples of franchise are - Coca-Cola, Pepsi, NIIT, Aptech, McDonald etc. • If vocational training is provided through franchisee, the service will be taxable under 'franchisee service' - *Jetking Information Ltd*. v. *CCE* (2007) 6 STT 444 (CESTAT).	**Exemptions** • See para 12.3 for general exemptions.

General insurance	**Statutory coverage** • Services by an insurer, including re-insurer, in relation to general insurance business. **Case Law/Board Circulars** • No service tax if assets are in J&K - – DGST instruction No. V/DGST/03/GEN/INS/01/2004 dated 17-8-2004	**Exemptions** • Certain schemes like personal accident social security scheme, crop insurance, cattle insurance, janata policy, export credit insurance, insurance on export of goods from India are exempt - Notification No. 3/1994-ST dated 30-6-1994. • Jana Arogya Bima policy is exempt from service tax - Notification No. 12/1997-ST dated 14-2-1997. • Group personal accident policy for self employed women is exempt under notification No. 3/1994-ST dated 30-6-1994. Scheme of Rajasthan Government is exempt under notification No. 1/2000-ST dated 9-2-2000. • (a) Cattle insurance services are exempt. - Notification No. 4/2000-ST dated 31-7-2000 (b) National Agricultural Insurance Scheme, Seed Crop Insurance, Farm Income Insurance Scheme are exempt from service tax - Notification No. 3/2000-ST dated 6-7-2000 (c) Insurance of sheep is exempt upto 31-12-2009 – Notification No. 31/2006-ST dated 11-12-2006. • General Insurance Business service provided under Universal Health Insurance Scheme is exempt from service tax - Notification No. 16/2003-ST dated 11-7-2003. • See para 12.3 for general exemptions.
Health and fitness	**Statutory coverage** • Service for physical well being such as, sauna and steam bath, turkish bath, solarium, spas, reducing or slimming saloons, gymnasium, yoga, meditation, massage (*excluding* therapeutic massage) or any other like service [Section 65(51)]	**Exclusions** • Institutions conducting diploma courses in yoga and research centers do not fall in the category of health club and will not be liable to service tax. - CBE&C circular No. B.11/1/2002-TRU dated 1-8-2002. **Exemptions** • See para 12.3 for general exemptions.

Insurance Auxiliary (General insurance)	**Statutory coverage** • Service to a policy holder or any person or insurer, including re-insurer, by an actuary, or intermediary or insurance intermediary or insurance agent, in relation to insurance auxiliary services concerning general insurance business. • Risk assessment, claim settlement, survey and loss assessment [Section 65(55)]. **Reverse charge - Person liable to pay service tax** • In respect of services provided by an insurance agent, the insurance company is the 'person liable for paying the service tax'. [Section 68(2) of Finance Act, 1994 read with Rule 2(1)(d)(iii) of Service Tax Rules, 1994]. The service tax is payable on commission payable to the insurance agent. However, the exemption available to small service providers cannot be availed by insurance agent.	**Exemptions** See para 12.3 for general exemptions.
Insurance Auxiliary (Relating to life insurance)	**Statutory coverage** • Service to a policy holder or any person or insurer, including re-insurer, by an actuary, or intermediary or insurance intermediary or insurance agent, in relation to insurance auxiliary services concerning life insurance business. • Risk assessment, claim settlement, survey and loss assessment [Section 65(55)]. **Reverse charge - Person liable to pay service tax** • In respect of services provided by an insurance agent, the insurance company is the 'person liable for paying the service tax'. [Section 68(2) of Finance Act, 1994 read with Rule 2(1)(d)(iii) of Service Tax Rules, 1994]. The service tax is payable on commission payable to the insurance agent. However, the exemption available to small service providers cannot be availed by insurance agent.	**Exemptions** • See para 12.3 for general exemptions.

Intellectual property	**Statutory coverage** • Transferring temporarily; or permitting the use or enjoyment of, any intellectual property right is taxable [Section 65(55b)]. • "intellectual property right" means any right to intangible property, namely, trademarks, designs, patents or any other similar intangible property, under any law for the time being in force, but does not include copyright [Section 65(55a)].	**Exclusions** • Copyright service is excluded. • Permanent transfer of Intellectual Property not taxable **Exemptions** • Cess is payable under Section 3 of Research and Development Cess Act, 1986, on transfer of technology. If such cess is payable, the holder of intellectual property right will be granted exemption from service tax to the extent of cess paid. - Notification No. 17/2004-ST dated 10-9-2004. Thus, if value of service is Rs. 100, tax payable is Rs. 12 and cess paid is Rs. 5, net service tax actually payable will be Rs. 7. • See para 12.3 for general exemptions.
Interior decorator	**Statutory coverage** • Planning, design or beautification of spaces, whether manmade or otherwise, in any manner. • Advice, consultancy, technical assistance or in any other manner, services relating to planning, design or beautification of spaces. • Landscape designer [Section 65(59)]. **Case Law/Board Circulars** • Services of vastu/Feng shui consultants are taxable. • No tax on material, furniture, and temporary structures.	**Exemptions** • See para 12.3 for general exemptions.
Internet cafe	**Statutory coverage** • Facility for accessing internet.	**Exemptions** • See para 12.3 for general exemptions.
Internet telephony service	**Statutory coverage** • Telecommunication service through internet and includes fax, audio conferencing and video conferencing [Section 65(57a)].	**Exemptions** • See para 12.3 for general exemptions.
Life insurance	**Statutory coverage** • Service in relation to risk cover in life insurance. **Case Law/Board Circulars** • Service tax is payable on gross amount charged in respect of risk portion of insurance premium.	**Valuation** • As per Rule 6(7A), the insurance company will have option to pay tax at flat rate of 1% of the gross premium without showing any break-up. If policy is purely risk coverage, then service tax will be at full rate on the gross premium. **Exemptions** • See para 12.3 for general exemptions.

Mailing list compilation and mailing	**Statutory coverage** • Service in relation to— (i) compiling and providing list of name, address and any other information from any source; or (ii) sending document, information, goods or any other material in a packet, by whatever name called, by addressing, stuffing, sealing, metering or mailing; for, or on behalf of the client [Section 65(63a)]	**Exemptions** • See para 12.3 for general exemptions.
Management, Maintenance or repair	**Statutory coverage** • Any service provided by— (i) any person under a contract or an agreement; *or* (ii) a manufacturer or any person authorised by him, - - in relation to, — (a) management of properties, whether immovable or not (b) maintenance or repair of properties whether immovable or not; or (c) maintenance or repair including reconditioning or restoration, or servicing of any goods or equipment, excluding motor vehicle • "Goods" includes computer software [Section 65(64)] **Case Law/Board Circulars** • Services relating to maintenance or management of immovable property (such as roads, airports, railways, buildings, parks, electrical installations and the like) have been covered under the purview of service tax - para 16.2 of MF(DR) circular No. B1/6/2005-TRU dated 27-7-2005 • Services provided during the warranty period by the dealer or any other authorized person is taxable - CBE&C circular No. 59/8/2003 dated 20-6-2003. • Software maintenance is taxable. • AMC contracts taxable.	**Exclusions** • Services to motor vehicles not taxable under this head [Section 65(64)]. **Exemptions** • See para 12.3 for general exemptions.
Management or Business Consultant	**Statutory coverage** • Service in connection with the management of any organisation or business in any manner • Advice, consultancy or technical assistance, in relation to financial management, human resources management, marketing management, production management, logistics management, procurement and management of information technology resources or other similar areas of management [Section 65(65)]	**Exclusions** • Executory services would not fall under 'consultancy services' - *Glaxo Smithkline Pharmaceuticals* v. *CCE* (2005) 1 STT 37 (CESTAT) – quoted with approval in *Glaxo Smithkline Consumer Healthcare* v. *CCE* (2007) 9 STT 496 (CESTAT). **Exemptions** • See para 12.3 for general exemptions.

Mandap keeper	**Statutory coverage** • "mandap" means any immovable property and includes any furniture, fixtures, light fittings and floor coverings therein let out for consideration for organising any official, social or business function [Section 65(66)] • Social function includes marriage [Section 65(67)] • Service provided as a caterer are included [Section 65(105)(m)] **Case Law/Board Circulars** • Services of hotel or restaurant will be taxable if it provides 'mandap' services. – view confirmed in *Rajmalal Hotel* v. *CCE* (2007) 6 STT 11 (CESTAT).	**Exclusions** • In *Social Service League* v. *CCE* (2006) 4 STT 283 (CESTAT), it has been held that drama performances conducted in a hall or mandap will not come under mandap keeper services. In a contrary view, in *ADA Rangamandira Trust* v. *CCE* (2007) 8 STT 206 (CESTAT), it was held that drama, music and dance should be held as social functions. **Exemptions** • If the mandap keeper provides catering services also and if his bill indicates that his bill is inclusive of charges for catering services, he has to pay service tax only on 60% of his gross charges to client. Catering service means supply of food - Notification No. 1/2006-ST dated 1-3-2006. • Use of precincts of a religious place as *mandap* is exempted from service tax - notification No. 14/2003-ST dated 20-6-2003, • See para 12.3 for general exemptions.
Manpower recruitment or supply agency	**Statutory coverage** • Recruitment or supply of manpower, temporarily or otherwise, in any manner • Services in relation to pre-recruitment screening, verification of the credentials and antecedents of the candidate and authenticity of documents submitted by the candidate. **Case Law/Board Circulars** • Academic/educational institutes providing recruitment services are taxable **-** Ref Code 010.01/23.8.07 of CBE&C Circular No. 96/7/2007-ST dated 23-8-2007. • Services of labour contractoRs. are taxable w.e.f. 16-6-2005. • Service of providing employees of Agency to business or industrial organizations for a specific period is taxable - Ref Code 010.02/23.8.07 of CBE&C Circular No. 96/7/2007-ST dated 23-8-2007.	**Exemptions** • See para 12.3 for general exemptions. **Valuation** • Service tax is to be charged on the full amount of consideration for the supply of manpower, whether full-time or part-time. The value includes recovery of staff costs from the recipient e.g. salary and other contributions. Even if the arrangement does not involve the recipient paying these staff costs to the supplier (because the salary is paid directly to the individual or the contributions are paid to the respective authority) these amounts are still part of the consideration and hence form part of the gross amount - per MF(DR) circular No. B1/6/2005-TRU dated 27-7-2005 para 22.4 (It is difficult to agree with this view. However, if the principal employer is in a position to avail Cenvat credit, it may be advisable to pay service tax on entire amount, instead of entering into fruitless and costly litigation).

Market research agency	**Statutory coverage** • Market research in any manner, in relation to any product, service or utility, including all types of customised and syndicated research services [Section 65(69)]	**Exemptions** • See para 12.3 for general exemptions.
Mining of mineral, oil or gas services	**Statutory coverage** • Service in relation to mining of mineral, oil or gas.	**Exemptions** • See para 12.3 for general exemptions.
On-line information and data base access or retrieval (Computer network)	**Statutory coverage** • On-line information and database access or retrieval or both in electronic form through computer network • Providing data or information, retrievable or otherwise, to a customer, in electronic form through a computer network [Section 65(75)] **Case Law/Board Circulars** • Following would be covered - (a) Internet Service Providers (ISP) (b) On line information provision and retrieval services like paid websites. However, e-commerce transactions are not covered as they do not charge surfers. - CBE&C letter No. B.II/I/2000-TRU dated 9-7-2001. • Providing matrimonial services on website is taxable – *prima facie* view in *Bharat Matrimony.com Pvt. Ltd.* v. *CST* (2007) 6 STT 85 (CESTAT)	**Exemptions** • See para 12.3 for general exemptions.
Opinion poll	**Statutory coverage** • Service designed to secure information on public opinion regarding social, economic, political or other issues [Section 65(75a)]	**Exemptions** See para 12.3 for general exemptions.

Outdoor Caterer	**Statutory coverage** • Services in connection with catering at a place other than his own, but including a place provided by way of tenancy or otherwise by the person receiving such services [Section 65(76a)]. • "Caterer" means any person who supplies, either directly or indirectly, any food, edible preparations, alcoholic or non-alcoholic beverages or crockery and similar articles or accoutrements for any purpose or occasion [Section 65(24)]. **Case Law/Board Circulars** • Supply of food to airlines for in-flight service to passengers is taxable - *Saj Flight Services* v. *Superintendent of CE* (2006) 3 STT 165 (Ker HC) – confirmed in *Saj Flight Services* v. *Superintendent of CE* (2006) 5 STT 266 (Ker HC DB). • In case of canteen in office or factory run by canteen contractor, if the service is received by the employer, it will be taxable. If the service is directly provided to employees/ workmen, then the canteen should not come within the definition.	**Exclusions** • Home delivery of food not taxable - MF(DR) circular No. B2/8/2004-TRU dated 10-9-2004. **Valuation** • The outdoor caterer can opt to pay service tax on 50% of his Bill amount. He can avail this concession if following conditions are satisfied - (a) The Bill or challan issued indicates that it is inclusive of charges for supply of food (Food means a substantial and satisfying meal, only snacks are not sufficient) (b) He does not take Cenvat credit of duty/service tax paid on inputs, input services and capital goods and (c) He does not avail benefit of notification No. 12/2003-ST dated 20-6-2003 - Notification No. 1/2006-ST dated 1-3-2006. **Exemptions** • See para 12.3 for general exemptions.
Packaging Activity	**Statutory coverage** • Packaging of goods including pouch filling, bottling, labelling or imprinting of the package [Section 65(76b)]. **Case Law/Board Circulars** • The intention seems to be to cover specialised packaging services like packing for transport etc. If packaging results in manufacture of new Article, excise duty will become payable.	**Exclusions** • Any packaging activity that amounts to 'manufacture' within the meaning of Section 2(f) of Central Excise Act, 1944 is excluded. **Exemptions** • See para 12.3 for general exemptions.
Pandal or Shamiana	**Statutory coverage** • Service by a pandal or shamiana contractor. • 'Pandal or shamiana' means a place specially prepared or arranged for organizing an official, social or business function. social function includes marriage [Section 65(77a)]. • Preparation, arrangement, erection or decoration of a pandal or shamiana. • Supply of furniture, fixtures, lights and lighting fittings, floor coverings and other articles for use in pandal or shamiana [Section 65(77b)].	**Valuation** If a pandal or shamiana contractor provides catering services of full meals, tax will be payable only on 70% of the gross amount charged to client - Notification No. 1/2006-ST dated 1-3-2006. **Exemptions** See para 12.3 for general exemptions.

Photography	**Statutory coverage** • "Photography" includes still photography, motion picture photography, laser photography, aerial photography or fluorescent photography [Section 65(78)]. **Case Law/Board Circulars** • In *Live Tone* v. *State of Tripura* (2001) 122 STC 115 (Gau HC), it was held that works contract tax (Vat) can be levied on the value of goods transferred (i.e. negative and printing paper) but not on whole price which includes charge of artistic skill required in developing photograph – same view in *Classic Colour Lab* v. *DCCT* (1998) 110 STC 269 (Kar HC) * *Bavens* v. *UOI* (1995) 97 STC 161 (Ker HC DB).	**Exclusions** • X-ray or CT scan will not be covered as in common parlance they are not photography studios or agencies. - CBE&C letter No. B.II/I/2000-TRU dated 9-7-2001. **Valuation** • In *Laxmi Colour* v. *CCE* (2005) 2 STT 220 = 3 STR 363 (CESTAT), it was held that no deduction of material cost is allowable. It was also held that in service like photography, there is no element of sale of goods. Thus, tax is payable on entire amount. **Exemptions** • See para 12.3 for general exemptions.
Port and other port services	**Statutory coverage** • Service by a port or any person authorised by the port in relation to port services. **Case Law/Board Circulars** • In *Homa Engg Works* v. *CCE* (2005) 2 STT 157 (CESTAT), it was held that only port services authorised by Board of Trustees of port under Section 42(4) of Major Port Trust Act where rates are specified by Board by notification, are taxable – same view in *Western (I) Shipyard Ltd*. v. *CCE* (2007) 8 STT 338 (CESTAT) * *Homa Engg Works* v. *CCE* (2007) 9 STT 294 (CESTAT). • Service tax is payable on * Port and dock charges, port dues * Cargo handling and storage charges * Railway haulage charges * Container handling charges * Labour charges for handling goods * Demurrage charges if goods are not cleared in time. Dock Labour Board is liable to pay service tax on labour charges recovered by them - CBE&C letter No. B.II/I/2000-TRU dated 9-7-2001.	**Exemptions** • Site formation and clearance, excavation and earthmoving and demolition services provided in course of construction of ports and other ports have been exempted *vide* Notification No. 17/2005-ST dated 7-6-2005. • Construction and works contract services relating to ports exempt, but no exemption to finishing or repairing services - Notification No. 25/2007-ST dated 22-5-2007 (effective from 1-6-2007). • See para 12.3 for general exemptions.

Practising CA/CWA/CS Services	**Statutory coverage** • Service by a Practising Chartered Accountant/Cost Accountant/Company Secretary in his professional capacity	**Exemptions** • Services provided by practising CA/CWA/CS in his professional capacity to a client, relating to representing before any statutory authority in the course of proceedings initiated under any law for the time being in force, by way of issue of notice, are exempt from service tax. All other services provided by practising CA/CWA/CS in his professional capacity are taxable (Notification No. 25/2006-ST dated 13-7-2006). • See para 12.3 for general exemptions.
Programme Production (of TV or Radio programmes)	**Statutory coverage** • Service by a programme producer, in relation to a programme. • "Programme" means any audio or visual matter, live or recorded, which is intended to be disseminated by transmission of electro-magnetic waves through space or through cables intended to be received by the general public either directly or indirectly through the medium of relay stations [Section 65(86a)]	**Exemptions** • See para 12.3 for general exemptions.
Public relations management service	**Statutory coverage** • Service in relation to managing the public relations of another person • "Public relations" includes strategic counselling based on industry, media and perception research, corporate image management, media relations, media training, press release, press conference, financial public relations, brand support, brand launch, retail support and promotions, events and communications and crisis communications [Section 65(86c)]	**Exemptions** • See para 12.3 for general exemptions.
Rail travel agent	**Statutory coverage** • Service in relation to booking of passage for travel by rail	**Exclusions** • Tax is *not payable* on rail fare collected by rail travel agent - Rule 6(2)(iii) of Service Tax Valuation Rules. **Exemptions** • See para 12.3 for general exemptions

Real estate agent	**Statutory coverage** • Advice, consultancy or technical assistance, in relation to evaluation, conception, design, development, construction, implementation, supervision, maintenance, marketing, acquisition or management, of real estate [Section 65(89)] • Service in relation to sale, purchase, leasing or renting, of real estate. • Services of Real estate consultant [Section 65(88)]	**Exemptions** • See para 12.3 for general exemptions
Recovery Agent	**Statutory coverage** • Service in relation to recovery of any sums due to banking company or financial institution, including a non-banking financial company, or any other body corporate or a firm.	**Exemptions** • See para 12.3 for general exemptions
Registrar to an issue	**Statutory coverage** • Activities in relation to an issue including collecting application forms from investors, keeping a record of applications and money received from investors or paid to the seller of securities, assisting in determining the basis of allotment of securities, finalising the list of persons entitled to allotment of securities and processing and despatching allotment letters, refund orders or certificates and other related documents [Section 65(89c)] • "Issue" means an offer of sale or purchase of securities to, or from, the public or the holder of securities [Section 65(59a)]	**Exemptions** • See para 12.3 for general exemptions

Rent-a-Cab operator	**Statutory coverage** • Service in relation to the renting of a cab • "cab" means - (i) a motorcab, or (ii) a maxicab, or (iii) any motor vehicle constructed or adapted to carry more than twelve passengers, excluding the driver, for hire or reward [Section 65(20)] **Case Law/Board Circulars** • If a driver is provided with cab, it is still rent-a-cab service – *Shiva Travels* v. *CCE* (2006) 7 STT 75 (CESTAT).	**Exemptions** • Maxicab referred to in sub-clause (ii) or motor vehicle referred to in sub-clause (iii) rented for use by an educational body imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre, is excluded. • Ambulances are not meant for carrying passengers for hire or reward. Hence, service tax liability does not arise - para 7.2.1 of D.O. F. No. 334/1/2007-TRU dated 28-2-2007. **Exemptions** • Service tax is payable only on 40% of the gross amount charged by the operator for providing taxable service, if the Rent-a-cab operator does not avail Cenvat of duty/tax paid on inputs, input services and capital goods and he does not avail benefit of notification No. 12/2003-ST dated 20-6-2003 - Notification No. 1/2006-ST dated 1-3-2006. • See para 12.3 for general exemptions

Renting of immovable property	**Statutory coverage** • Renting of immovable property for use in the course or furtherance of business or commerce. • "Immovable property" includes - (i) building and part of a building, and the land appurtenant thereto (ii) land incidental to the use of such building or part of a building (iii) the common or shared areas and facilities relating thereto; and (iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate. • "Renting of immovable property" includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce [Section 65(90a)] • Use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple-use buildings is covered [Explanation to Section 65(90a)]	**Exemptions** • Renting of following is not included – (a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes (b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land (c) and used for educational, sports, circus, entertainment and parking purposes; and (d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities [Section 65(90a)]. • Renting of immovable property by a religious body or to a religious body; or renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching center is excluded [Section 65(90a)]. **Exemptions** • Deduction of property tax will be allowed in respect of tax actually paid (and not on payable basis). Deduction will be on *pro rata* basis. Service tax is payable only on rent actually received from service receiver. • See para 12.3 for general exemptions.
Sale of advertising space or time	**Statutory coverage** • Sale of space or time for advertisement, in any manner is a 'taxable service' • Providing space or time, as the case may be, for display, advertising, showcasing of any product or service in video programmes, television programmes or motion pictures or music albums, or on billboards, public places, buildings, conveyances, cell phones, automated teller machines, internet • Selling of time slots on radio or television by a person, other than a broadcasting agency or organisation • Aerial advertising • Sale of space in yellow pages, business directories	**Exclusions** • Sale of space for advertisement in print media. "Print media" means - (i) "newspaper" (ii) "book" but does not include business directories, yellow pages and trade catalogues which are primarily meant for commercial purposes. • Sale of time slots by a broadcasting agency or organisation (It is taxable under different head). **Exemptions** • See para 12.3 for general exemptions.

Scientific and technical consultancy	**Statutory coverage** • Service by a scientist or a technocrat, or any science or technology institution or organisation, in relation to scientific or technical consultancy **Case Law/Board Circulars** • Executory services would not fall under 'consultancy services' - *Glaxo Smithkline Pharmaceuticals* v. *CCE* (2005) 1 STT 37 (CESTAT) – quoted with approval in *Glaxo Smithkline Consumer Healthcare Ltd.* v. *CCE* (2007) 9 STT 496 (CESTAT).	Exclusions • Service tax is not payable by doctors, medical colleges, nursing homes, hospitals, diagnostic and pathological labs etc. as in common parlance they are not known as scientists, technocrats etc. - CBE&C letter No. B.II/I/2000-TRU dated 9-7-2001. Exemptions • Notification No. 9/2007-ST dated 01.03.2007 exempts all taxable services provided by incubators. • Service tax exemption is also provided to incubates vide notification No. 10/2007-ST dated 1-3-2007: • See para 12.3 for general exemptions
Security agency	**Statutory coverage** • Services by security agency in relation to the security of any movable or immovable property or person, by providing security personnel or otherwise • Provision of services of investigation, detection or verification of any fact or activity [Section 65(94)] Case law/Board circulars • Service tax payable on services of safe deposit lockers. • Services provided by ex-servicemen or charitable organization taxable w.e.f. 18-4-2006.	**Valuation** • Service tax is payable on gross amount charged for service. It has been clarified that service tax is payable on entire amount charged by security agency to client, which includes salary of guards, employer's ESIC, PF, contribution towards labour funds, bonus, leave, uniform etc. No abatement can be granted in respect of such expenses incurred by security agency. • In *Panther Detective Services* v. *CCE* (2007) 8 STT 215 (CESTAT), it was held that service tax is payable on gross amount including ESI, PF and wages of guards. The amount should be inclusive of service tax and then back calculations should be made – same view in *Punjab Ex-Serviceman Corpn* v. *CCE* (2005) 2 STT 273 (CESTAT). **Exemptions** • See para 12.3 for general exemptions
Share Transfer Agent	**Statutory coverage** • Maintaining record of holders of securities and deals with all matters connected with the transfer or redemption of securities or activities incidental thereto [Section 65(95a)]	**Exemptions** • See para 12.3 for general exemptions

Ship Management Service	**Statutory coverage** • the supervision of the maintenance, survey and repair of ship; • engagement or providing of crews; • receiving the hire or freight charges on behalf of the owner; • arrangements for loading and unloading; • providing for victualling or storing of ship; • negotiating contracts for bunker fuel and lubricating oil; • payment, on behalf of the owner, of expenses incurred in providing services or in relation to the management of ship; • the entry of ship in a protection or indemnity association; • dealing with insurance, salvage and other claims; and • arranging of insurance in relation to ship [Section 65(96a)]	**Exemptions** • See para 12.3 for general exemptions.
Site formation and clearance etc.	**Statutory coverage** • Services in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities. • drilling, boring and core extraction services for construction, geophysical, geological or similar purposes • soil stabilization • horizontal drilling for the passage of cables or drain pipes • land reclamation work • contaminated top soil stripping work • demolition and wrecking of building, structure or road [Section 65(97a)]	**Exclusions** • Services in relation to agriculture, irrigation, watershed development. • Drilling, digging, repairing, renovating or restoring of water sources or water bodies. **Exemptions** • Exemption to services relating to roads, airports, railways, transport terminals etc. bridges, port etc. - Notification No. 17/2005-ST dated 7-6-2005. • See para 12.3 for general exemptions.
Sound recording	**Statutory coverage** • Recording of sound on any media or device including magnetic storage device • Services relating to recording of sound in any manner such as sound cataloguing, storing of sound and sound mixing or re-mixing or any audio post-production activity [Section 65(98)]	**Exemptions** • See para 12.3 for general exemptions.

Sponsorship service	**Statutory coverage** • Service in relation to sponsorship • "Sponsorship" includes naming an event after the sponsor, displaying the sponsor's company logo or trading name, giving the sponsor exclusive or priority booking rights, sponsoring prizes or trophies for competition [Section 65(99a)] • Service tax is leviable only when the sponsor is any body corporate or firm [Section 65(105)(zzzn)] Reverse charge - Person liable for payment of tax • In case of sponsorship service provided to a body corporate or firm located in India, the body corporate or firm receiving such sponsorship service will be liable to pay service tax [Rule 2(1)(d)(vii)]. • If the recipient of sponsorship service is located outside India, service tax is required to be paid by the service provider and not by the recipient.	**Exemptions** • Sponsorship of sports events is excluded from the scope of this levy. • Any financial or other support in the form of donations or gifts, given by the donors is not taxable, if the service provider is under no obligation to provide anything in return to such donors[Section 65(99a)]. **Exemptions** • See para 12.3 for general exemptions.
Steamer agent	**Statutory coverage** • Service in relation to a ship's husbandry or dispatch or any administrative work related thereto • Booking, advertising or canvassing of cargo • Container feeder services [Section 65(100)] **Case Law/Board Circulars** • Expenses paid by steamer agent on behalf of shipping line not liable to service tax - CBE&C circular No. B 43/1/97-TRU dated 6-6-1997.	**Exemptions** • See para 12.3 for general exemptions

Stock-broking	**Statutory coverage** • Service by a stock-broker in connection with the sale or purchase of securities listed on recognised stock exchange. • As per Rule 6(1)(i) of Service Tax Valuation Rules (Earlier, it was *Explanation* 1 clause (a) to Section 67 upto 18-4-2006), the value of taxable services shall include the commission or brokerage charged by a broker on the sale or purchase of securities including the commission or brokerage paid by the stock-broker to any sub-broker. **Case Law/Board Circulars** • No tax on turnover charges payable to stock exchange – *prima facie* view in *JSEL Securities Ltd.* v. *CCE* (2007) 8 STT 428 (CESTAT).	**Exemptions** See para 12.3 for general exemptions.
Storage and warehousing	**Statutory coverage** • Services in relation to storage and warehousing of goods, including liquids and gases [Section 65(102)] **Case Law/Board Circulars** • Storage outside the port premises is taxable - *Gujarat Chem Port Terminal Co. Ltd.* v. *CC* (2005) 1 STT 98 (CESTAT) • Storage of empty containers taxable - CBE&C circular No. 60/9/2003-ST dated 10-7-2003	**Exclusions** • Service provided for storage of agricultural produce or any service provided by a cold storage excluded [Section 65(102)] **Exemptions** • See para 12.3 for general exemptions
Survey and exploration of mineral	**Statutory coverage** • Geological, geophysical or other prospecting, surface or sub-surface surveying or map making service, in relation to location or exploration of deposits of mineral, oil or gas [Section 65(104a)]	**Exemptions** • See para 12.3 for general exemptions.
Survey and map-making	**Statutory coverage** • Geological, geophysical or any other prospecting, surface, sub-surface or aerial surveying or map-making of any kind [Section 65(104b)]	**Exemptions** • Service provided by an agency under the control of, or authorised by, the Government, in relation to survey and map-making not taxable [Section 65(105)(zzzc)] • Survey and exploration of mineral excluded [Section 65(104b)] (as covered under another head). **Exemptions** • See para 12.3 for general exemptions.

Technical inspection and certification	**Statutory coverage** • Inspection or examination of goods or process or material or any immovable property to certify that such goods or process or material or immovable property qualifies or maintains the specified standards, including functionality or utility or quality or safety or any other characteristic or parameter [Section 65(108)]	**Exclusions** • Service in relation to inspection and certification of pollution levels is excluded [Section 65(108)] **Exemptions** • See para 12.3 for general exemptions
Technical testing and analysis	**Statutory coverage** • Service in relation to physical, chemical, biological or any other scientific testing or analysis of goods or material or any immovable property • Clinical testing of drugs and formulations [Section 65(106)] **Case Law/Board Circulars** • Sample collection centers not taxable – *Dr. Lal Path Lab (P) Ltd.* v. *CCE* (2006) 5 STT 171 (CESTAT),	**Exclusions** • Testing or analysis service provided in relation to human beings or animals is excluded. • Testing or analysis for the purpose of determination of the nature of diseased condition, identification of a disease, prevention of any disease or disorder in human beings or animals is not taxable. Medical testing and diagnosis has been excluded from service tax [Section 65(106)] **Exemptions** • Testing and analysis of water quality by Government laboratories exempt - Notification No. 6/2006-Service Tax dated 1.3.2006. • Exemption to clinical testing of newly developed drugs - Notification No. 11/2007-ST dated 1-3-2007. • See para 12.3 for general exemptions

Telecommunication Services	**Statutory coverage** • Service of any description provided by means of any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence or information of any nature, by wire, radio, optical, visual or other electro-magnetic means or systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception • voice mail, data services, audio tex services, video tex services, radio paging • fixed telephone services including provision of access to and use of the public switched telephone network for the transmission and switching of voice, data and video, inbound and outbound telephone service to and from national and international destinations • cellular mobile telephone services including provision of access to and use of switched or non-switched networks for the transmission of voice, data and video, inbound and outbound roaming service to and from national and international destinations • carrier services including provision of wired or wireless facilities to originate, terminate or transit calls, charging for interconnection, settlement or termination of domestic or international calls, charging for jointly used facilities including pole attachments, charging for the exclusive use of circuits, a leased circuit or a dedicated link including a speech circuit, data circuit or a telegraph circuit • provision of call management services for a fee including call waiting, call forwarding, caller identification, three-way calling, call display, call return, call screen, call blocking, automatic call-back, call answer, voice mail, voice menus and video conferencing • private net work services including provision of wired or wireless telecommunication link between specified points for the exclusive use of the client • data transmission services including provision of access to wired or wireless facilities and services specifically designed for efficient transmission of data • communication through facsimile, pager, telegraph and telex [Section 65(109a)]	**Exclusions** • Service in relation to on-line information and database access or retrieval, a broadcasting agency or organisation in relation to broadcasting and internet telephony excluded [Section 65(109a)] (since covered under another head) **Sale of SIM Card** • In *Bharat Sanchar Nigam Ltd*. v. *UOI* (2006) 3 SCC 1 = 152 Taxman 135 = 3 STT 245 = 282 ITR 273 = 3 VST 95 = 145 STC 91 = AIR 2006 SC 1383 (SC 3 member bench), it has been held that what a SIM card represents is ultimately a question of fact. In determining the issue, the assessing authorities will have to keep in mind the following principles, 'If the SIM card is not sold by the assessee to the subscribers but is merely part of the services rendered by service providers, then a SIM card cannot be charged separately to sales tax. It would depend ultimately upon the intention of parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the sales tax authorities to levy sales tax thereon. If the sale of SIM card is merely incidental to the service being provided and only facilitates the identification of subscriber, their credit and other details, it would not be assessable to sales tax. In any event, cost of service cannot be included in the value of SIM card by relying on 'aspects' doctrine. **Exemptions** • See para 12.3 for general exemptions.

Tour operator	**Statutory coverage** • 'Tour' means a journey from one place to another irrespective of the distance between such places. • Business of planning, scheduling, organising or arranging tours (which may include arrangements for accommodation, sightseeing or other similar services) by any mode of transport • Business of operating tours in a tourist vehicle covered by a permit granted under the Motor Vehicles Act [Section 65(115)] **Case Law/Board Circulars** • In *Praseetha Suresh* v. *CCE* (2007) 8 STT 324 (CESTAT), it was held that the vehicle is required to satisfy specifications as per Rule 128 of Motor Vehicle Rules. If these are not satisfied, it is not a tourist vehicle and hence the service is not taxable.	**Exemptions** • In case of package tour, w.e.f. 23-8-2007, service tax is payable on 25% of gross amount charged (Till 22-8-2007, service tax was payable on 40% of gross amount charged) - Notification No. 1/2006-ST dated 1-3-2006 • Tax only on 10% amount when operator only provides booking services Notification No. 1/2006-ST dated 1-3-2006. • Tax payable 40% in case of other tours - Notification No. 1/2006-ST dated 1-3-2006. • See para 12.3 for general exemptions.
Transport of persons by cruise ships	**Statutory coverage** • Transport of person embarking from any port by a cruise ship. "cruise ship" means a ship or vessel used for providing recreational or pleasure trips.	**Exemptions** • See para 12.3 for general exemptions.
Transport of goods by air	**Statutory coverage** • Transport of goods by aircraft	**Exemptions** • Service of transport of goods is exempt if it is in relation to transport of export goods by aircraft - Notification No. 29/2005-ST dated 15-7-2005. • See para 12.3 for general exemptions

Transport of goods by road	**Statutory coverage** • Service by a goods transport agency, in relation to transport of goods by road in a goods carriage. • 'Goods transport agency' means any person who provides service in relation to transport of goods by road **and** issues consignment note, by whatever name called [Section 65(50b)] Reverse charge - Person liable for payment of service tax As per Rule 2(1)(d)(v) of Service Tax Rules, Consignor or consignee *who is paying freight* will be liable to pay service tax, if consignor or consignee is any one of the following - (a) any factory registered under or governed by the Factories Act, 1948 (63 of 1948). (b) any company formed or registered under the Companies Act, 1956 (1 of 1956). (c) any corporation established by or under any law. (d) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any law corresponding to that Act in force in any part of India. (e) any co-operative society established by or under any law. (f) any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder. (g) any body corporate established, or a partnership firm registered, by or under any law.	**Cenvat Credit** • The service receiver should pay tax by GAR-7 challan @ 3.09%. Then, he can avail Cenvat credit of tax so paid by him [Notification No. 1/2006-ST dated 1-3-2006]. **Exemptions** • As per exemption notification No. 13/2008-ST dated 1-3-2008, actually service tax is payable on 25% of gross amount charged from customer by goods transport agency. Thus, service tax payable will be 3% plus 2% education cess plus 1% SAH education cess i.e. total 3.09%. Transport of fruits, vegetables, eggs or milk by road (as exempt under notification 33/2004-ST dated 3-12-2004) • Gross Amount charged on consignments transported in a goods carriage does not exceed Rs. 1,500 (as exempt under clause (i) of notification No. 34/2004-ST dated 3-12-2004) [This is total of all consignments carried in a goods carriage at one time] • Gross Amount charged on individual consignment transported in a goods carriage does not exceed Rs. 750 (as exempt under clause (ii) of notification No. 34/2004-ST dated 3-12-2004). • See para 12.3 for general exemptions.
Transport of goods in containers by rail	**Statutory coverage** • Transport of goods in containers by rail	**Exemptions** • Service provide by Government railway exempt. **Exemptions** • Service tax is payable only on 30% of gross value charged, if Cenvat credit not availed - Notification No. 1/2006-ST, dated 1-3-2006. • See para 12.3 for general exemptions.
Transport of goods (other than water) through pipeline or conduit	**Statutory coverage** • Transport of goods other than water, through pipeline or other conduit	**Exemptions** Transport of water is excluded. **Exemptions** See para 12.3 for general exemptions.

Travel agent (other than air travel agent and rail travel agent)	**Statutory coverage** • Booking of passage for travel other than air travel and rail travel.	**Exemptions** See para 12.3 for general exemptions.
Underwriter	**Statutory coverage** • Service in relation to underwriting.	**Exemptions** • See para 12.3 for general exemptions.
Video tape production agency	**Statutory coverage** • Process of any recording of any programme, event or function on a magnetic tape or on any other media or device • Services such as editing, cutting, colouring, dubbing, title printing, imparting special effects, processing, adding, modifying or deleting sound, transferring from one media or device to another • Any video post-production activity [Section 65(120)].	**Exemptions** • See para 12.3 for general exemptions.

Works Contract Services	**Statutory coverage** "Works contract" means a contract wherein, – *(i)* transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, **and** *(ii)* such contract is for the purposes of carrying out,- *(a)* erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or *(b)* construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or *(c)* construction of a new residential complex or a part thereof; or *(d)* completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to *(b)* and (c); or *(e)* turnkey projects including engineering, procurement and construction or commissioning (*EPC)* projects **Case Law/Board Circulars** • In *Bharat Sanchar Nigam Ltd*. v. *UOI* (2006) 3 SCC 1 = 152 Taxman 135 = 3 VST 95 = 3 STT 245 = 282 ITR 273 = 145 STC 91 = AIR 2006 SC 1383 (SC 3 member bench), it was held that 'various 'aspects' of transaction can be taxed separately, but sales tax cannot be imposed on service portion and service tax cannot be imposed on value of goods. • In *Gannon Dunkerley & Co.* v. *State of Rajasthan* (1993) 66 Taxman 229 = 1993 AIR SCW 2621 = (1993) 1 SCC 364 = 88 STC 204 (SC 5 member Constitution bench) it was held that value of goods at the time of incorporation in the works can constitute measure for levy of tax. However, cost of incorporation of the goods in works contract cannot be made part of measure for the levy of tax.	**Exclusions** • Works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams, are excluded. **Value of taxable service** • Broadly, two options are available to service provider - (a) Calculate value of service as per Rule 2A of Service Tax (Determination of Value) Rules, 2006 (in short 'Valuation Rules) and pay service tax at normal rate @ 12.36% (inclusive of education cess and SAH education cess) on such 'value'. In such case, assessee can avail Cenvat credit of input services, inputs and capital goods (b) Pay service tax under 'composition scheme' at 4.12% of 'gross amount charged for works contract' (inclusive of education cess and SAH education cess), under 'Works Contract (Composition Scheme for Payment of Service tax) Rules, 2007' (the percentage was 2.06% upto 29-2-2008). As per Rule 3(2) of Composition Scheme, the assessee cannot avail Cenvat credit of inputs. Thus, the assessee can avail Cenvat credit of input services and capital goods. • In both the cases, Vat/sales tax will not be included in the 'value' for purpose of calculating service tax. **Exemptions** • Construction and works contract services relating to ports exempt, but no exemption to finishing or repairing services - Notification No. 25/2007-ST dated 22-5-2007 • See para 12.3 for general exemptions

STUDY NOTE 14

Adjudication & Penalties and Appeals in Indirect Taxes

14.1 Common topics in Indirect Taxes

Three major indirect taxes, viz. Central Excise, Service Tax and Customs are being administered by single authority i.e. Central Board of Excise and Customs (CBE&C) under Ministry of Finance, Government of India. Final departmental appellate authority i.e. Tribunal is common. It is, therefore, natural that basic thinking and approach is same in all the legislations connected with these three taxes.

Many provisions of Central Excise are made applicable to service tax. Many provisions of customs law have been made applicable to Central Excise.

Provisions in respect of demands, refunds, penalties, appeals are common or similar

Provisions relating to demands, refunds, penalties and appeals are either common in all the three legislations or at least they are similar.

Assessee and assessment

Assessment means determining the tax liability.

Duty is paid by the manufacturer on his own while clearing goods from the factory/warehouse, on 'self assessment'. The assessee himself has to determine classification and valuation of goods and pay duty accordingly.

Rule 2(b) of Central Excise Rules states that 'assessment' includes self-assessment of duty made by the assessee and provisional assessment made under Rule 7.

Who is 'assessee' - Rule 2(c) of Central Excise Rules states that 'assessee' means any person who is liable for payment of duty assessed or a producer or manufacturer of excisable goods or a registered person of a private warehouse in which excisable goods are stored, and includes an authorized agent of such person.

Self-assessment - The assessment under Central Excise is basically an Invoice based self-assessment, except in case of cigarettes. Rule 6 of Central Excise Rules provides that the assessee shall himself assess the duty payable on excisable goods, except that that in case of cigarettes, the Superintendent or Inspector of Central Excise shall assess the duty payable before removal of goods.

The assessee has to submit monthly return in ER-1/ER-2/ER-3 form. The return has to be along with 'Self Assessment Memorandum', where Assessee declares that (a) the particulars in ER-1/ER-2/ER-3 return are correctly stated (b) Duty has been assessed as per provisions of Section 4 or 4A of CEA (c) TR-6 challans by which duty has been paid are genuine.

In case of service tax also, Section 70(1) of Finance Act, 1994 provides that every person liable to pay service tax shall himself assess the tax due and file return. The ST-3 return filed by assessee contains a 'Self-Assessment Memorandum'.

Scrutiny of correctness of duty – After submission of return by assessee, first stage dealer and second stage dealer, the 'proper officer' will scrutinise the return on the basis of information contained in the return and further enquiry as considered necessary. The manner of scrutiny will be prescribed by CBE&C [Rule 12(3) – inserted w.e.f. 1-4-2005].

Every assessee shall make available to 'proper officer' all documents and records for verification as and when required by such officer [Rule 12(4)].

Assessment order in customs but not in excise and service tax - In case of customs, Bill of Entry (in case of imports) and Shipping Bill (in case of exports) is an assessment order. If the valuation shown by assessee is not accepted by department, order with reasons will have to be issued within 14 days. Appeal can be filed against the order. Mere filing of refund claim is not sufficient.

In case of excise and service tax, the assessee is required to file returns. Excise officers will not 'assess' the duty i.e. assessment order is not issued. If the officers are of opinion that there is short payment, show cause notice cum demand will have to be issued.

Provisional assessment

Rule 7 of Central Excise Rules make provisions in respect of provisional assessment. Provisional assessment can be requested by the assessee. Department cannot itself order provisional assessment.

Final assessment will be made later by Assistant/Deputy Commissioner after getting the required details. In case of such provisional assessment, demand can be raised within one year after the provisional assessment is finalised.

Overview of provisions of provisional assessment - An assessee can request for provisional assessment in following circumstances – (a) Assessee is unable to determine the value of excisable goods in terms of Section 4 of CEA on account of non-availability of any document or information *or* (b) Assessee is unable to determine rate of duty applicable.

In aforesaid cases, assessee may request Assistant/Deputy Commissioner in writing giving reasons for provisional assessment of duty. [Assessee should give reason why he wishes to have provisional assessment]. After such request, the Assistant/Deputy Commissioner may by order allow payment of duty on provisional basis. The Assistant/Deputy Commissioner shall also specify the rate or value at which the duty will be paid on provisional basis. [Rule 7(1)].

Payment of duty on provisional basis will be allowed subject to execution of bond for payment of differential duty [Rule 7(2)]. After that Assistant/Deputy Commissioner should pass order for final assessment within 6 months from date of order of provisional assessment. This period can be extended by further 6 months by Commissioner and further without any time limit by Chief Commissioner [Rule 7(3)]. If differential amount is payable, interest is payable [Rule 7(4)]. If excess amount was paid, it is refundable with interest [Rule 7(5)]. The refund is subject to provision of unjust enrichment [Rule 7(6)].

Finalisation of provisional assessment

AC/DC is required to pass order of final assessment after getting relevant information, within six months of date of communication of his order allowing provisional assessment. The period of 6 months can be extended by Commissioner of CE, on making a specific request, for reasons to be recorded in writing. Extension beyond one year for further period can be granted only by Chief Commissioner. [Rule 7(3) of Central Excise Rules].

No time limit for finalisation in case of customs – In *Shakti Beverages* v. *CC* 2003(153) ELT 445 (CEGAT 3 member bench), it was held that there is no time limit for finalising provisional assessment. The only question that can be considered by Tribunal is whether due to delay in finalising provisional assessment whether appellant has suffered any prejudice and whether there is violation of principles of natural justice. [The principle should apply to Central Excise also].

Interest payable/receivable - If differential duty is found to be payable, interest as specified in Section 11AA or 11AB will be payable by assessee from first day of the month succeeding the month *for which* such amount is determined till date of payment thereof. [Rule 7(4)].

Since the word used is '*for*', interest is payable from first day of next month after clearance of goods. For example, if goods were cleared on 15th October 2003 under provisional assessment and assessment was finalized on 25th March 2004, interest will be payable from 1st November 03 till date of payment.

If differential amount is found to be refundable to assessee, it shall be refunded with interest at rate as specified in Section 11BB from first day of the month succeeding the month *for which* refund is determined till the date of refund [Rule 7(5)]. Thus, interest is payable by department is on the same basis as payable by assessee, i.e. not from date of finalisation of provisional assessment, but from month next to the month on which duty was provisionally paid. [Note that u/s 11BB, interest on delayed refund is payable only three months after filing of refund application. This provision does not apply to refund obtainable after finalisation of provisional assessment].

Interest in case of customs - Section 18 of Customs Act (inserted w.e.f. 13-7-2006) makes provision for payment of interest after finalisation of provisional assessment.

Refund after finalisation of assessment

If duty is paid on provisional basis, refund claim can be filed within one year after duty is adjusted after final assessment. [*Explanation* B(eb) to Section 11B].

Refund subject to provision of unjust enrichment - Rule 7(6) of Central Excise Rules clarifies that refund is subject to provisions of 'Unjust Enrichment', i.e. refund will be granted to manufacturer if he has not passed on incidence of duty to another person – confirmed in *Hindustan Lever* v. *CCE* (2004) 171 ELT 12 (CESTAT).

In case of customs duty, there was no parallel provision in respect of provisional assessment. Section 18(5) of Customs Act inserted by Taxation Laws (Amendment) Act w.e.f. 13-7-2006, has made provision for unjust enrichment in case of customs duty refund when there was provisional assessment.

14.2 Adjudication in Indirect Taxes

Adjudicate means to hear or try and decide judicially and adjudication means giving a decision. As per Oxford Dictionary, 'adjudicate' means deciding judicially (regarding a claim etc.), pronounce.

Excise and customs authorities are empowered to determine classification, valuation, refund claims and the tax/duty payable. They are also empowered to grant various permissions under rules and impose fines, penalties, etc., and confiscate offending goods. Since the authorities are departmental officers, the process is called "departmental adjudication".

They are required to follow principles of natural justice. Their adjudicating powers are prescribed under Act and departmental circulars Their orders are appealable.

These are 'quasi judicial authorities' and they are not bound by any trade notice or instructions of superiors.

Uncontrolled authority may cause great damage to an assessee and hence opportunity of appeal against the order has been provided. The topmost authority of departmental appeal is "Tribunal" in excise and

customs. The decision of the Tribunal is final as far as the departmental remedy of appeal is concerned. Provisions are available for appeal/reference to High Court/Supreme Court in limited cases. Needless to mention, writ jurisdiction of High Court and Supreme Court is independent of any provision/s of the Excise Act and Writ Petition can be filed in High Court/SLP in Supreme Court irrespective of any provision of Excise Act.

Principles of Natural justice - Basic requirements of principle of natural justice are – (a) Full information about charges (b) Allowing party to state his defence (Personal Hearing) (c) Unbiased authority (d) Order with reasons.

Adjudicating Authority - Section 2(a) of CEA defines 'adjudicating authority' as any authority competent to pass *any order or decision* under the Central Excise Act, 1944. However, Commissioner (Appeals) and Central Board of Excise and Customs are not 'adjudicating authority'.

Similarly, as per Section 2(1) of Customs Act, 'adjudicating authority' means any authority competent to pass any order or decision under Customs Act, but does not include CBE&C, Commissioner (Appeals) or Tribunal (CESTAT).

Section 73(1) of Finance Act, 1994 (which contains provisions relating to service tax), empowers Central Excise Officer to serve notice demanding service tax short levied or short paid and then determine the tax payable. Section 11B of Central Excise Act (relating to refunds) and Section 33A of Central Excise Act (relating to adjudication procedure) has been made applicable to service tax. Thus, 'central excise officer' is adjudicating authority for service tax purposes.

Thus, any order or decision under the Act by authority *other than* Commissioner (Appeals) and CBE&C is an *adjudication order*.

Section 35 of Central Excise Act, Section 128 of Customs Act and Section 85 of Finance Act, 1994 (which contains provisions relating to service tax), provide that any person **aggrieved** by *any decision or order* passed by Central Excise/Customs Officer (lower than rank of Commissioner) can appeal to Commissioner (Appeals). However, appeal against order of Commissioner can be filed to Tribunal only if the decision or order is passed by Commissioner as *adjudicating authority*.

Adjudication in Indirect Taxes – Excise and Customs Officers are required to adjudicate matters in following cases.

Imposition of penalty and confiscation of goods - Various rules in Central Excise provide for penalty on persons and confiscation of goods. Commissioners of Central Excise have been authorised to impose penalty and confiscate the goods vide Section 33 of CEA. In respect of Service Tax, Section 83A of Finance Act, 1994 (which contains provisions relating to service tax) empowers Central Excise Officers to impose penalties.

Demand of duty short paid/not paid - Demand of duty can be raised by any Central Excise Officer under Section 11A of CEA and Section 73 of Finance Act, 1994 (which contains provisions relating to service tax). However, these powers have been restricted as per departmental instructions.

Original Jurisdiction in excise, customs and service tax

Adjudication powers in Central Excise and service tax - Departmental authorities have original adjudication powers as briefed below : [CBE&C circular No. 752/68/2003-CX dated 1-10-2003 amended vide Circular No.865/3/2008-CX dated 19-2-2008]

Authority	Issue of SCN and Demand of duty	Remission of duty for loss of goods	Other powers
Commissioner	Without limit	Without limit	
Additional Commissioner	Between Rs. 20 lakhs to 50 lakhs	Rs. 5,00,000	Cases relating matters under *proviso* to Section 35B(1) i.e. export under bond or under claim of rebate, loss of goods during transit to warehouse - without upper monetary limit
Joint Commissioner	Between Rs. 5 lakhs to 50 lakhs	Rs. 5,00,000	Cases relating matters under *proviso* to Section 35B(1) i.e. export under bond or under claim of rebate, loss of goods during transit to warehouse - without upper monetary limit
Deputy/Assistant Commissioner	Upto Rs. 5 lakhs	Rs. 1,00,000	(1) Issue registration certificate (2) Refund claim without limit
Superintendent	No powers	Upto Rs. 10,000	

Note (1) Demand of duty or differential duty may be relating to * determination of valuation and/or classification or * Cenvat credit cases or * duty short paid or not paid or erroneously refunded for any reason. Such demand may or may not contain for allegation of fraud, suppression of facts etc. (in other words, whether or not there is allegation of fraud/suppression of facts etc., the monetary limit of adjudication remains same.

Note (2) As per CBE&C circular No. 809/6/2005-CX dated 1-3-2005, in case of refund claim, AC/DC can pass order without any monetary limit. However, claims of Rs. 5 lakhs and above will be subject to pre-audit at level of jurisdictional Commissioner.

Who can issue show cause notice - Show cause notice should be approved and signed by officer empowered to adjudicate the case.

Similar monetary limit in case of service tax demands – In case of service tax, similar monetary limits for imposing penalty have been prescribed. Following restrictions have been placed for imposing penalty u/s 83A, *vide* Notification No. 30/2005-ST dated 10-8-2005. Though the restrictions are only on imposing penalty, indirectly, they act as restriction on demand of service tax also, since almost any demand of service tax will involve proposal to impose penalty.

Adjudication powers in customs - Monetary penalties and confiscation can be ordered by departmental authorities themselves. These are '*quasi-judicial*' powers

The powers are as follows :

(a) Gazetted officer lower in rank than Assistant Commissioner (like Appraiser) : when the goods liable to confiscation does not exceed Rs. 10,000

(b) Assistant Commissioner/Dy Commissioner : when the goods liable to confiscation does not exceed Rs. 2,00,000

(c) Additional Commissioner or Joint Commissioner : Rs. 10 lakhs - *as per Board circular*

(d) Additional Commissioner or Joint Commissioner : without limit in cases of baggage and duty drawback

(e) Commissioner : without limit.

All notices pertaining to demands on account of collusion, wilful misstatement or suppression of facts will be issued only by Commissioner if demand is over Rs. 5 lakhs, even if demand is issued within six months/one year. In case of demand upto Rs. 5 lakhs, show cause notice for collusion, fraud, mistatement etc. can be issued by Additional Commissioner/Jt Commissioner. [CBE&C circular No 47/97-Cus dated 6.10.97]

It may be noted that as per Section 122 of Customs Act, Additional Commissioner or Joint Commissioner is authorised to adjudicate the cases without any limit of amount. Restriction of Rs. 10 lakhs is only by an administrative instructions.

Demand of customs duty and interest - As per Section 28 (1) of Customs Act, show cause notice for demand of customs duty and interest can be issued by *'proper officer'* i.e. an officer of customs who is assigned the functions to be performed under Customs Act, by Board or Commissioner of Customs (Chief Commissioner, Commissioner, Additional Commissioner, Joint Commissioner, Deputy Commissioner, Assistant Commissioner and Appraiser are all 'officers of Custom' and hence authority can be given to them by Board).

As per Section 2(34) of Customs Act, 'proper officer' in relation to functions to be performed under the Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs (Chief Commissioner, Commissioner, Additional Commissioner, Joint Commissioner, Deputy Commissioner, Assistant Commissioner and Appraiser are all 'officers of Custom' and hence authority can be given to them by Board).

Order valid for demands of duty if the officer exceeds monetary limit, but what about order of penalty and confiscation? - The limits prescribed for issue of show cause notice and adjudication of demands u/s 11A of CEA and Section 73 of Finance Act, 1994 are only as per administrative instructions. As per Section 11A of CEA, any Central Excise Officer can issue show cause notice and confirm demand. As per Section 28 of Customs Act, notice can be issued by 'proper officer'.

In *Pahwa Chemcials P Ltd*. v. *CCE* 2005 (181) ELT 339 (SC 3 member bench), it was held that notice can be issued and demand can be confirmed by any 'Central Excise Officer'. These statutory powers cannot be cut down that jurisdiction by issuing a circular. The circulars issued by Board (specifying powers of various officers) are nothing more that administrative directions allocating certain types of works to various class of officers These administrative directions cannot take away jurisdiction vested in Central Excise Officer under the Act. At the highest all that be said is Central Excise Officer as a matter of propriety, must follow the directions and deal with the work which has been allotted to him by virtue of these circulars. But if an officer still issues a notice or adjudicates contrary to the circulars, it would not be a ground for holding that he had no jurisdiction to issue the show cause notice or to set aside the adjudication - – view confirmed in *Aeon's Construction Products* v. *CCE* 2005 (183) ELT 120 (SC 3 member bench).

Board can restrict powers of officers of confiscation of goods and imposition of penalty - The decision of Supreme Court in *Pahwa Chemicals P Ltd*. v. *CCE* 2005 (181) ELT 339 (SC 3 member bench) is based on provisions of Section 11A of CEA, where notice can be issued and demand can be confirmed by 'any Central Excise Officer'. However, Section 33 of CEA specifies powers of adjudication of confiscation and penalty. This Section confers very limited powers of confiscation of goods not exceeding Rs. 500 and imposition of penalty not exceeding Rs. 250 on Assistant Commissioner and Deputy Commissioner of

Central Excise. *Proviso* to this Section states that CBE&C may confer on any officer the powers indicated in Section 33 of CEA (This Section has not been made applicable to service tax).

Section 33 of CEA does not make any provision in respect of issue of show cause notice. Hence, in *Aeon's Construction Products* v. *CCE* 2005 (183) ELT 120 (SC 3 member bench), it has been held CBE&C can limit or confer powers on officers of excise the powers of adjudication u/s 33 (in respect of powers to impose penalty and confiscation of goods), but powers to issue show cause notice cannot be restricted either under Section 11A or under Section 33, i.e. show cause notice proposing penalty and confiscation can be issued by any central excise officer.

Suggested time for adjudication - There is no statutory bar to adjudicate the matter. In *CCE* v. *Bhagsons Paint Industry* 2003 (158) ELT 129 (SC), adjudication nine years after a lapse of nine years after issue of show cause notice was held as permissible, particularly because it pertained to duty and not to penalty or interest (Of course, even in respect of notice for penalty or interest, there is no statutory time limit for adjudication).

Suggested time limit for passing order in case of demand of duty - Duty short levied or not levied should be determined within a period of 6 months, *as far as possible*. In case of short levy or non levy due to suppression of facts or collusion or wilful misstatement, duty should be determined within one year, *as far as possible*. [Possibly more time is given in case of suppression, collusion etc. are more evidence may have to be examined] [Section 11A(2A) of CEA - parallel Section 28(2A) of Customs Act]. The time limit is not mandatory but only suggestive.

Notices/demands under Customs Act – As per Section 28 of Customs Act, a notice can be issued and demand can be confirmed by 'proper officer'. As per Section 2(34) of Customs Act, 'proper Officer' in relation to any functions to be performed under the Customs Act, means the officer of customs who is assigned those functions by the Board or Commissioner of Customs.

Thus, in case of customs notices and demands, if an officer exceeds limit specified by CBE&C, he will not be 'proper officer' and notice/demand issued by him cannot be held as valid.

Review of order by adjudicating authority

After passing of judgment, decree or order, the court or tribunal becomes *functus officio* and thus being not entitled to vary the terms of judgments, decrees or orders earlier passed. Only accidental omissions or mistakes can be corrected. – *Dwarka Das* v. *State of MP* AIR 1999 SC 1031. Same principle applies to adjudicating authority also.

Once an order is passed by the authority, he becomes *'functus officio*'. He cannot revise or review his own order. [At the most, he can correct typographical or clerical or arithmetical mistakes].

14.3 Enforcement Powers of Revenue Officers

Excise and Customs Officers have powers of adjudication i.e. Demand of duty, imposing penalty and confiscation of goods, sanctioning of refund claim. Excise officers can audit accounts of assessee. Besides, they have powers of enforcement of law. These include visits, searches, seizures and arrests. The powers are similar in excise, customs and service tax, though there are variations depending on nature of each tax. In fact, some provisions of customs have been made applicable to central excise and some provisions of central excise have been made applicable to service tax.

Applicability of some provisions to service tax - Section 14 of Central Excise Act which makes provisions in respect of summons has been made applicable to service tax. Provisions relating to search and seizure (of documents or books or things) have been made applicable to service tax vide Section 82 of Finance Act, 1994.

However, provisions relating to seizure of goods and provisions relating to arrest are not applicable to service tax.

Some provisions of Customs Act applicable to excise - Section 12 of CEA authorises Central Government to apply provisions of Customs Act regarding levy, exemption, drawback, warehousing, offences, penalties, confiscation and procedure relating to offences and appeal to Central Excise, making suitable modifications and alterations to adapt them to circumstances. Under these powers, Notification No. 68/63-CE dated 4th May, 1963 has been issued making some provisions of Customs Act applicable to Central Excise subject to some modifications.

Provisions of Customs Act, which are also made applicable to Central Excise Act are as follows –

- Section 105(1) - Powers of search
- Section 110 - seizure of goods, documents and things
- Section 115 - confiscation of conveyances
- Section 118(a) - confiscation of packages containing goods
- Section 119 - confiscation of goods used for concealing goods
- Section 120 - confiscation of goods even if form changes
- Section 121 - confiscation of sale proceeds of contravening goods
- Section 124 - issue of show cause notice before confiscation of goods
- Section 142(1)(b) - Recovery of duty
- Section 150 - procedure for sale of goods.

These powers are discussed at appropriate places.

Certain Officers required to assist Customs and Excise Officers - Following officers are empowered and required to assist officers of customs in the execution of Customs Act –

(a) Officers in Central Excise department

(b) Officers of Navy

(c) Officers of Police

(d) Officers of Central or State Governments employed at any port or airport

(e) Any other officer of Central or State Governments or local authority specified by Central Government in Official Gazette. [Section 151 of Customs Act]

Certain Officers required to assist CE officers - Section 15 of CEA specifies that all officers of police and customs and all officers of Government engaged in the collection of land revenue, and all village officers are empowered and required to assist the Central Excise Officers in the execution of Central Excise Act.

Protection of Acts done in good faith - Section 40 of CEA (parallel Section 155 of Customs Act), provides that no suit, prosecution or legal proceedings shall lie against Central Government or any officer of Central/State Government for anything done or intended to be done, in good faith, in pursuance of Central Excise Act or any Rule made thereunder. As per Section 40(2), if any proceeding (other than a suit) is to be commenced, one month advance notice is required to be given to Central Government.

This Section has been made applicable to service tax.

Power of visits and inspection

As per Rule 22(1) of Central Excise Rules, an officer empowered by Commissioner shall have access to any premises registered under CE Rules for purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue. All officers in the rank of Inspector and above are authorised for this purpose. All officers of rank of an Inspector and above have been authorised under Rule 22(1) within their jurisdiction.

Rule 5A of Service Tax Rules provides that an officer authorised by the Commissioner in this behalf shall have access to any premises registered under service tax rules for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue.

Visit Book of Excise Officers - Each factory is required to maintain a visit book in prescribed form. Inspector and Superintendent visiting the factory are required to fill in the book. The visit book should contain name and address of the factory, excisable items manufactured, Central Excise Commissionerate, division and range at the top. - [*CBE&C Circular No 3/90-CX dated 24-1-1990*].

Power of Customs Officers to inspect - Under Section 106A, Customs Officers have powers to inspect the premises intimated as storage places of 'notified goods' or 'specified goods'. The inspection can be at any reasonable time, with or without notice. The officers can check the records and inspect the goods. The person in charge of premises is required to produce accounts required to be maintained by 'notified goods' or 'specified goods'. Places other than those intimated under provisions of 'notified goods' or 'specified goods' cannot be inspected under this Section. (Since now there are no 'notified goods' or 'specified goods', these powers are redundant.)

Power to Stop conveyance, search and seize - Excise officers are empowered under Rule 23 of Central Excise Rules to search any conveyance carrying excisable goods in respect of which he has reason to believe that the goods are being carried with the intention of evading duty.

If Central Excise Officer has reason to believe that any goods, which are liable to excise duty but no duty is paid thereon or the said goods are removed with intention of evading the duty payable thereon, the Central Excise Officer may detain or seize the goods - Rule 24 of Central Excise Rules.

Vehicle carrying the goods can also be seized under Section 110 of Customs Act which is also made applicable to Excise.

These provisions are *not* applicable to service tax matters

Power to stop and inspect conveyance to Customs Officers - Customs Officer is empowered under Section 106 of Customs Act to stop any aircraft, vessel, vehicle or animal and to examine and search the aircraft, vehicle or vessel. He can break open any lock of door or package, if key is withheld. If the vessel, aircraft etc. does not stop or land after giving signals, it may be chased. If it refuses to stop after firing a signal, the vehicle may be fired upon.

Powers of Customs Officer

Some powers of Customs Officers are discussed below.

Power of Customs Officers to X ray bodies - Section 103 of Customs Act provides that if Customs Officer has reasons to believe that any person coming to India or leaving from India or any person in customs area has secreted inside his body any goods liable to confiscation, he can detain and take him to nearest magistrate. If the Magistrate is satisfied that reasonable grounds exist, he can order that body of such person may be X-rayed. The X-rays will be taken by a *qualified radiologist* and his report may be given to Magistrate. If the report indicates that goods are secreted inside, he may direct that suitable action may be taken to take out goods as per advise of qualified doctor. Magistrate can order that the person may be kept in custody. If the person himself admits that the goods are secreted inside his body and voluntarily submits for action to bringing out the goods, X-ray etc. may not be taken.

Power to call for documents and examine a person - Under Section 107, an officer of Customs, empowered by Commissioner, during enquiry in connection with smuggled goods, may require any person to produce relevant document or examine any person acquainted with the facts of the case.

Power to Summons

Section 108(1) of Customs Act and Section 14(1) of CEA provides that Gazetted Officers of customs or any central excise officer empowered by Central Government to issue summons to any person for any inquiry which such Customs Officer is making under Customs Act. As per Section 108(2) of Customs Act and Section 14(1) of CEA, the empowered customs/excise officer can require a person to produce any document or any other thing relevant to enquiry. The customs/excise officer can examine a person.

Section 14 of CEA has been made applicable to service tax.

The term 'summons' means asking a person to appear before the named authority and give evidence and produce documents or other things.

Person summoned is bound to attend and state the truth upon any subject respecting which they are examined. [Section 14(2) of CEA - similar Section 108(3) of Customs Act].

The enquiry are 'judicial proceedings' within the meaning of Sections 193 and 228 of Indian Penal Code [Section 14(3) of CEA and Section 108(4) of Customs Act]. The provision applies to service tax also.

Exceptions u/s 132 of CPC (Code of Civil Procedure) are applicable to requisitions for attendance under this Section (In case of central excise, Section 133 of CPC also applies)

No right of silence - Section 14(2) of CEA and Section 108(3) of Customs Act specifically provide that all persons summoned shall be bound to state the truth upon any subject respecting which they are examined and to produce such documents and other things as may be required.

Section 14 of CEA is made applicable to service tax.

Power to arrest

Excise and Customs Officers have powers of arrest. These provisions are not applicable to service tax matters

Powers under Central Excise - An Excise Officer not below the rank of Inspector, to arrest a person whom they have '*reason to believe*' to be liable to be punished under provisions of the Act. Such arrest can be only with prior approval of Commissioner of Central Excise [Section 13 of CEA].

Power to arrest under customs - In case of customs, as per Section 104 of Customs Act, an officer of customs who has been empowered by Commissioner of Customs by general or special order, can arrest a person whom they have '*reason to believe*' to be liable to be punished under Sections 132 (false declaration, false documents), 133 (obstruction of officer of customs), 135 (refusal to be x-rayed), 135A (evasion of duty or prohibitions) or 136 (offences by officers of customs) of Customs Act.

No Powers of arrest under service tax – Section 13 of CEA is not applicable to service tax. Hence, provisions of arrest are not applicable to service tax matters.

Procedure for arrest - The officer can arrest him and inform him ground of arrest. The person arrested has to be forwarded to the Magistrate. He must be produced before a magistrate within 24 hours The magistrate may grant the bail on bond or refuse the bail and remand him to custody. Bail is at the total discretion of Court. Offences under Customs Act and Central Excise are non-cognizable.

The arrest should be as per provisions of Code of Criminal Procedure [Section 18 of Central Excise Act]. As per Section 50 of CrPC, person arrested should be informed full particulars of offence and his rights about bail. Section 57 of CrPC provides that arrested person should be taken to Magistrate within 24 hours.

Forward to magistrate or Police custody - The person arrested has to be forwarded to the Central Excise Officer who is empowered to send the arrested person to a Magistrate. If such empowered excise officer is not available within reasonable distance, the person may be sent to Officer-in-Charge of nearest Police Station [Section 19 of CEA]. *Superintendent of CE has been empowered for this purpose.*

Arrested person must be produced before Judicial Magistrate within 24 hours of arrest. Power to grant bail is normally exercised by a Judicial Magistrate.

Procedure if the person sent to excise officer - Excise Officer of rank of Superintendent or above will make enquiry into charges against the person arrested. While making enquiry, he has same powers as the officer-in-charge of police station [Section 21(1)(b) of CEA]. If he is of the opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he can forward the person to Magistrate for bail or custody. [*proviso* (a) Section 21(2) of CEA].

Excise/Customs Officer also can release on bond - Central Excise Officer making arrest has powers to release a person on executing a bond, with or without sureties, and make a report to his superior officer. He can do so if it appears to him that there is no sufficient evidence or reasonable ground of suspicion against the accused person [*proviso* (b) Section 21(2) of CEA]. Superintendent of CE and officers above him have been empowered for this purpose - Notification No. 9/99-CE(NT) dated 10-2-1999.

Powers of Search

Search and seizure are coercive measures designed to be enforced forcibly against persons unwilling to be subjected to these operations.

Search as per CrPC - Section 18 of CEA and Section 82(2) of Finance Act, 1994 (which contains provisions relating to service tax), provides that all searches and seizures must be as per provisions of Code of Criminal Procedure.

Under Section 165 of CrPC, the requirements are : (*a*) The officer making investigation should have reason to believe that anything necessary for investigation may be found in a place within his jurisdiction (*b*) such thing cannot be otherwise obtained without undue delay (*c*) grounds of such belief should be recorded in writing and specifying the things for which search is to be made (*d*) the officer should search himself, if

practicable or require any officer subordinate to him to make the search (*e*) authority to subordinate officer should be in writing, specifying the place to be searched and things for which search is to be made (*f*) copy of record made should be sent to Magistrate and should be furnished to the owner or occupier of the place searched, if he applies for the copies. The copies should be supplied free of cost.

Power to Search - Under Section 105 of Customs Act (made applicable to Excise also), Assistant/Deputy Commissioner of Central Excise/Customs, who has *reasons to believe* that any goods liable to confiscation or any document or thing relevant to any proceeding under CEA/Customs Act are secreted in any place, can authorise any Central Excise Officer upto rank of Inspector to search or he may himself search for such goods, documents or things (*in common discussions 'search' is called 'raid'*). Such authority will be by way of a search warrant signed by him under his seal. However, in urgent necessity, search can be carried out without a search warrant. Search warrant should be shown to the person in charge of the premises and his signature should be obtained. Search warrant should indicate the place to be searched, but name of person need not be mentioned as the search warrant is in respect of place and not person.

Special provisions of search under customs

Searches under Customs Act are stipulated under following categories : (i) searches of persons under Customs Area or people entering or leaving India – Section 100 of Customs Act (ii) Search of other persons by officer specifically empowered by Commissioner for search of gold, diamond etc. which are liable to confiscation – Section 101 of Customs Act (iii) searches of premises e.g. godowns, bank vaults, etc. – Section 105 of Customs Act (iv) searches of conveyances, vehicles, etc. – Section 106 of Customs Act.

Provisions of Section 105 of Customs Act are made applicable to central excise also. These are discussed above. Other powers are discussed below.

Power of Customs Officers of search - Customs Officer can search a person if he has reason to believe that smuggled goods or documents relating thereto are secreted in his person (Section 100 of Customs Act). Such search may be of (*a*) any person who has landed from or is about to board or is on board of a vessel or foreign going aircraft or vehicle arrived from or going to any place out of India (*b*) any person who has entered or is about to leave India (*c*) any person in Customs area. Before the search, at least two persons should be called to attend and witness the search. Search should be made in presence of them and list of things seized should be signed by the witnesses. [Section 102(4) of Customs Act].

A female can be searched only by a female. The person being searched can request that the search may be carried out before a Gazetted Officer or magistrate. If such requisition is made, search must be carried out before Gazetted Officer of customs or magistrate. [Section 102(2) of Customs Act].

Search before magistrate or gazetted officer - It has been held that it is mandatory to inform the person to be searched about his right to be searched only before a Gazetted Officer or magistrate. Violation of this requirement will be fatal to prosecution case and will vitiate the trial - *State of Punjab* v. *Balbir Singh* 70 ELT 481 (SC) = 1994 AIR SCW 1802 = 1994 (3) SCC 299 = AIR 1994 SC 1872.

Power to search other persons - The powers of search under Section 100 of Customs Act are in respect of people in customs area or people entering or leaving India only. However, as per Section 101 of Customs Act, an Officer of Customs *empowered by special order of Commissioner of Customs* can search *any person* (anywhere in India), if he has reason to believe that such person is carrying gold, diamonds, manufacture of gold and diamonds or watches, or any other class of goods as may be notified by Central Government *which are liable to confiscation*. Before the search, two or more persons should be called to attend and witness the search. Search should be made in presence of them and list of things seized should be signed by the

witnesses [Section 102(4) of Customs Act]. A female can be searched only by a female. The person being searched can request that the search may be carried out before a Gazetted Officer or magistrate. If such requisition is made, search must be carried out before Gazetted Officer of customs or magistrate [Section 102(2) of Customs Act]

Search of premises - Under Section 105 of Customs Act, Assistant Commissioner of Customs, who has reasons to believe that any goods liable to confiscation or any document or thing relevant to any proceeding under Customs Act are secreted in any place, can authorise any Customs Officer or he may himself search for such goods, documents or things. Search should be as per provisions of Criminal Procedure Code, with the difference that report of search is to be submitted to Commissioner of Customs and not to Magistrate.

Powers of Seizure

If, during search, some goods are found, which are liable for confiscation, the same can be seized by excise officers

Seizure means to take possession of goods in pursuance of demand under legal right. Seizure is only taking goods in custody or detention. Ownership of goods remains with the owner even after seizure and he can get the goods released under bond. [**Confiscation** means the goods become property of Central Government].

Section 82(1) of Finance Act, 1994 (which contains provisions relating to service tax), empowers authorised Central Excise Officer to search and seize documents, books or things. *However, since there is no provision of confiscation of goods, any goods cannot be seized, if search relates to service tax only.*

Seizure under the Act **-** Vide Section 110 of Customs Act, which is also made applicable to Central Excise, Excise/Customs Officer is empowered to seize the goods if he has reasons to believe that such goods are liable for confiscation under Central Excise Act, 1944/Customs Act. Vehicle carrying the contraband goods can also be seized. Goods can be seized by officer of rank of Superintendent and above.

If the goods are bulky, they can be kept in possession of the owner himself and a notice be served on him that he should not remove or in any way deal with the goods. [*proviso* to Section 110(1) of Customs Act].

Detention and seizure - Detention and seizure are not same. 'Detention' of goods means the officer asks the person to stop so that he can check goods, documents. Such detention is normally for short period and officer does not take possession of goods. No documents are prepared. Detained goods can be released without any formality after excise officer is satisfied that goods are not contraband. The release can be made by Superintendent also.

Seizure means to take possession of goods in pursuance of demand under legal right. The officer takes actual or constructive possession of goods after making seizure memo i.e. *panchanama*. After goods are seized, these can be released only after following proper procedure. Usually, these are released under bond.

Thus, simple detention is without seizure of goods, while seizure necessarily means detention plus taking possession of goods by excise/Customs Officer.

Seizure of documents – Documents relevant to proceedings under the Customs Act can also be seized. The person from whom the documents are seized is entitled to take extracts therefrom in presence of Customs Officer [Section 110(4) of Customs Act which is also made applicable to Central Excise, except that in place of 'customs', 'excise' is substituted].

The person from whom the documents are seized is entitled to take extracts therefrom in presence of Central Excise Officer not below the rank of sub-inspector.

Provisional release of seized goods - Seized goods and vehicles can be provisionally released by the Excise/Customs Officer on such conditions as he may deem fit.

Provision in case of customs – As per Section 110A of Customs Act [inserted by Taxation Laws (Amendment) Act w.e.f. 13-7-2006], seized goods, documents or things can be provisionally released to the owner, on execution of a bond with security and conditions as may be required by Commissioner of Customs.

Return goods within 6 months if no SCN - If seized goods are felt to be liable for confiscation, a show cause notice has to be served giving him grounds for confiscation, asking his representation and giving him opportunity of personal hearing as per Section 124 of Customs Act, which is also made applicable to Central Excise. Vide Section 110(2) of Customs Act which is also made applicable to excise, if no show cause notice is issued within six months, the goods ***shall*** be returned to person from whose possession they were seized. This period can be further extended by six months on sufficient cause, by Commissioner of Central Excise. Since the words used are 'shall be returned', it has been held that it is a mandatory requirement. The owner of goods gets a civil right and goods must be returned even if no application is made.

This period of 6 months can be further extended by six months on sufficient cause by Commissioner of Customs.

14.4 Penalties in indirect Tax Laws

The word 'Offence' is not defined in Excise law. It is not defined in the Constitution, but Article 367 of the Constitution says that unless the context otherwise provides for, words not defined in Constitution, the meaning assigned in the General Clauses Act, 1897 may be given. - - Section 3(8) of General Clauses Act defines *Offence* as any act or omission made punishable by any law for the time being in force.

Civil and criminal punishment - The Central Excise and Customs Law envisages two types of punishments.

Civil Liability - Penalty for violation of statutory provisions involving a penalty of money and confiscation of goods. This is a civil penalty and can be adjudged in departmental adjudication. This penalty can be imposed by excise and customs authorities like Commissioner, Dy. Commissioner, Assistant Commissioner, etc. within the powers granted to them. These penalties are provided in various Central Excise Act and Rules and Customs Act.

Criminal Liability - Criminal punishment is of imprisonment and fine; which can be granted only in a criminal court after prosecution. These are provided in Central Excise Act and Customs Act.

Finance Act, 1994 (which contains provisions relating to service tax) does not provide for criminal liability in service tax matters

Section 34A of CEA and Section 127 of Customs Act specifically provide that confiscation made or penalty imposed under the Act (by departmental authorities) shall not prevent infliction of any other punishment to which the person affected is liable. Thus, both departmental penalties and criminal prosecution for same offence is permissible.

Penalty and punishment for same offence - Article 20(2) of Constitution of India provides that no person can be punished twice for the same offence. In *Shiv Dutt Rai Fateh Chand* v. *UOI* (1983) 53 STC 289 (SC) = AIR 1984 SC 1194 = (1984) 145 ITR 664 (SC), it was observed that the word 'offence' as mentioned in Article 20 relates to persons who are charged with a crime before criminal court. - - It does not include 'penalty' levied under tax laws imposed by departmental authorities. A penalty imposed by tax authorities is only a civil liability.

Departmental adjudication and criminal proceedings independent - Pending criminal matter is not impediment to proceed with the civil suit - *State of Rajasthan* v. *Kalyan Sundaram* - (1996) 86 Comp Cas 433 (SC). In *Santram Paper Mills* v. *CCE* 1997(96) ELT 19 (SC), it was held that criminal proceedings shall be determined on its own merits and according to law, uninhibited by the findings of the Tribunal.

Mens Rea in Penalty provisions - *Mens rea* means guilty mind. Normally, penalty is levied if violation is intentional. However, in many penal provisions in taxation laws, the liability is absolute, i.e. penalty is leviable irrespective of intention. Penalty is leviable for violation of rules - it does not matter whether it is a genuine mistake, lack of knowledge, negligence or intentional violation of rules. This can be considered only while deciding ***quantum of penalty leviable***.

Rule 25(1)(d) of Central Excise Rules provides penalty for contravention of rules if it is with *intention to evade duty*. Penalty provision in Rule 15 of Cenvat Credit Rules also makes no mention of state of mind. However, definition of 'reasonable steps' [*Explanation* to Rule 9(3) of Cenvat Credit Rules] states that the manufacturer should 'satisfy himself' about identity of supplier of goods on which Cenvat credit was taken. Except in these cases, other penalty provisions do not describe any state of mind. 'Intention to evade', 'wilfully, 'knowingly', 'satisfy himself' etc. are states of mind. These are difficult to prove.

In case of service tax, Section 76 (penalty for failure to pay service tax) and Section 77 (penalty for contravention of any provision for which no penalty is provided), do not envisage *mens rea*. Section 78 of Finance Act, 1994 provides for penalty in case of fraud, collusion, wilful misstatement or suppression of facts. This obviously requires *mens rea.*

Hon. Supreme Court, High Courts and Tribunals have consistently held that *mens rea* is not an essential ingredient for imposing a penalty unless statute specifically prescribes so. In economic crimes and departmental penalties, '*mens rea*' is not essential for imposing penalty - *R S Joshi* v. *Ajit Mills* - AIR 1977 SC 2279 = (1977) 40 STC 497 = 1979 UPTC 171 (SC 7 member bench).

Penalties under Central Excise Act

Excise authorities are empowered to impose penalties like fines, confiscation of goods, etc., which are provided in Central Excise Rules. Some rules themselves provide penalty for violating those rules, while some are general penalties. Excise Officers can impose (a) Penalty for violation of law (b) Confiscate the goods (c) Give option to pay fine in lieu of confiscation i.e. redemption fine. Court of Law can impose fine, imprisonment as well as confiscation of goods.

General Penalty provisions – Rule 25 of Central Excise Rules provide general provisions for breach of various rules. Under Rule 25(1) of Central Excise Rules, following are offences :

- Removing excisable goods in contravention of Excise Rules or notifications issued under the rules [Rule 25(1)(a)].
- Not accounting for excisable goods manufactured, produced or stored [Rule 25(1)(b)].
- Engaging in manufacture, production or storage of excisable goods without applying for registration certificate u/s 6 of CE Act [Rule 25(1)(c)].

- Contravening any provision of Central Excise Rules or notifications issued under these rules *with intent to evade* payment of duty [Rule 25(1)(d)].

Penalties imposable under Rule 25 - Penalty for violations prescribed in Rule 25 (earlier Rule 173Q) is –

(a) confiscation of contravening goods

(b) penalty upto duty payable on such contravening goods or Rs. 2,000 whichever is higher.

The Central Excise Officer will follow principles of natural justice while issuing the order [Rule 25(2)].

Residual Penalty under Central Excise - Rule 27 of Central Excise Rules is a residual penalty, which is that for breach of any excise Rule, if no penalty has been prescribed, the penalty would be Rs. 5,000 plus confiscation of goods in respect of which offence has been committed. [The Rule does not use the word 'notification'. Hence, it can be argued that no penalty can be imposed for violation of provision of any notification].

Mandatory penalty in case of fraud, suppression of facts etc. in excise and customs.

Provisions of Rule 25(1) are subject to Section 11AC of CEA, which means that provisions of Section 11AC of CEA prevail over provisions of Rule 25(1).

Mandatory penalty in case of fraud etc. - A mandatory penalty equal to the duty short paid or not paid or erroneously refunded is payable if such non-payment or short payment or erroneous refund was due to fraud, collusion, wilful mistatement or suppression of facts etc. [Section 11AC of CEA, similar Section 114A of Customs Act].

In case of service tax, Section 78 of Finance Act, 1994 does provide for penalty in case of fraud, suppression of facts, wilful misstatement or collusion, but penalty can be reduced u/s 80 if reasonable cause is shown.

In case of non-payment or short payment of duty due to fraud, wilful misstatement etc. there is mandatory penalty equal to duty evaded under Section 11AC of CEA - *neither more nor less*. CBE&C has confirmed that under Section 11AC of CEA (parallel Section 114A of Customs Act), there is no discretion to adjudicating authority to impose penalty less than or more than the amount of duty evaded.

Provisions of Section 114A of Customs Act are similar, the only difference is that the Section provides both for duty and interest. The distinction has been made as interest is payable under Customs Act if duty is not paid within five days from date of assessment on Bill of Entry.

Penalty u/s 114A will be equal to duty *and* interest (though the word used in the Section are '*or*'). – CBE&C circular No. 61/2002-Cus dated 20-9-2002. [In case of Central Excise, question does not arise as Section 11AC of CEA only uses the word 'duty'].

As per *proviso* to Section 11AC of CEA and Section 114A of Customs Act, if the duty, interest and penalty is paid within 30 days from communication of order, mandatory penalty payable u/s 11AC of CEA (parallel Section 114A of Customs Act) will be reduced to 25% - followed in *Finolex Industries Ltd*. v. *CCE* (2007) 208 ELT 88 (CESTAT).

If extended period of limitation is not available, penalty (u/s 11AC or 114A) is not imposable – *Pahwa Chemicals* v. *CCE* 2005 (189) ELT 257 (SC).

Voluntary payment when notice alleging fraud/suppression received – Even in cases where notice alleges suppression of facts, fraud, wilful misstatement or collusion, if assessee pays duty and interest within 30 days, penalty will be reduced to 25%. He can even make part payment of duty demanded.

Personal penalty on director, partners and employees

Normally, penalty is imposed on the company/firm which has committed an offence. The penalty under Rule 25(1) is on the company or firm.

Though Company is an independent legal person, it works through Managing Directors, directors and employees. In case of firms, it works through partners and employees. Hence, in addition to penalty that may be imposed on the company/firm, personal penalty can be imposed on the person who was actually involved in committing the offence.

Penalty for knowingly dealing in goods liable to confiscation - Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or rules, shall be liable to a penalty upto the duty payable on such goods or Rs. 2,000 whichever is greater – Rule 26(1) of Central Excise Rules. [The minimum penalty of Rs. 10,000 reduced to Rs. 2,000 w.e.f. 11-5-2007].

*Note that Rule 26 imposes personal liability **only** of penalty and **not** of duty involved.*

Thus, a director or partner or an employee or transporter will be personally liable to penalty if he is personally involved in clandestine removal etc.

Penalty for issuing false invoice or document for availing ineligible Cenvat credit - Any person who issues (i) an excise duty invoice without delivery of goods mentioned therein or abates in making such invoice or (ii) any other document or abates in making such document, on the basis of which the user of the said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made thereunder like claiming of Cenvat credit or refund, shall be liable to a penalty not exceeding the amount of such benefit or Rs. 5,000 whichever is greater [Rule 26(2) inserted w.e.f. 1-3-2007].

Publication of name of defaulters

Central Government can publish name and other particulars of a person in relation to any proceedings or prosecution under Central Excise Act or Customs Act, if in its opinion, it is in public interest to do so [Section 37E(1) of Central Excise Act and Section 154B(1) of Customs Act, inserted by Taxation Laws (Amendment) Act w.e.f. 13-7-2006]. Name of directors, partners or managers. or members of association can be published, if circumstances justify such publication [*explanation* to Section 37E(2) and Section 154B(2) of Customs Act, inserted by Taxation Laws (Amendment) Act w.e.f. 13-7-2006].

Publication relating to penalty imposed shall not be made if appeal is pending with Commissioner (Appeals) or Tribunal [Section 37E(2) of Central Excise Act and Section 154B(2) of Customs Act, inserted by Taxation Laws (Amendment) Act w.e.f. 13-7-2006].

Similar provision has been made in case of service tax under Section 73D of Finance Act, 1994.

14.5 Confiscation of goods in excise and customs

Some provisions of Customs Act relating to search, seizure, confiscation and recovery of duty have been made applicable to Central Excise subject to some modifications.

Provisions of confiscation of goods have not been made applicable to service tax.

Contravening goods liable to confiscation - Under Rule 25 of CE, following goods are liable to confiscation * excisable goods removed in contravention of Central Excise rules, * excisable goods not accounted for * Excisable goods manufactured without registration of the factory.

Confiscation of Conveyance - As per Section 2(9) of Customs Act, 'conveyance' includes a vessel, an aircraft and a vehicle.

Following conveyances are liable to confiscation under Section 115(1) of Customs Act, which is also made applicable to Central Excise :

a) Any conveyance from which goods are thrown overboard or destroyed to prevent seizure by officer of customs.

b) Conveyance which is required by Customs Officer to land or stop for inspection but fails to do so.

c) Conveyance by which warehoused goods are cleared for export, but goods are unloaded without permission.

d) Conveyance carrying imported goods which has entered India and is afterwards found with the whole or substantial portion of such goods missing, unless the master of vessel is able to account for the loss of or deficiency in goods.

Confiscation of Conveyance for transport of smuggled goods - Section 115(2) of Customs Act provides that any conveyance or animal used as a means of transport in smuggling of any goods or in the carriage of any smuggled goods shall be liable to confiscation, unless the owner of conveyance proves that the conveyance was used without the knowledge or connivance of the owner, his agent and the person in charge of the conveyance.

If such conveyance is used for carriage of goods or passengers for hire, the owner of conveyance shall be given an option to pay fine in lieu of confiscation. The fine shall not exceed market price of smuggled goods. Market price means the market price at the date when goods were seized [*proviso* to Section 115(2)].

This Section, which is also made applicable to Central Excise provides that conveyance used as transport for removal of excisable/prohibited goods in contravention of provisions of Central Excise Rules/Customs Act is liable for confiscation. However, conveyance used for transport of contravening goods will not be liable for confiscation, if the owner of conveyance proves that the conveyance was used without the knowledge or connivance of the owner, his agent or person in charge of the conveyance. Further, if the conveyance is normally used for hire, the owner shall be given option to pay fine not exceeding the market price of contravening goods being removed instead of confiscation of vehicle.

No confiscation of container - It has been held that 'container' obtained on hire and in which goods are 'stuffed' is not a 'package' and it cannot be confiscated. - *United States Lines Agency* v. *CC* (1998) 101 ELT 602 (CEGAT).

Confiscation of goods used for concealing - Goods used for concealing contravening excisable goods are liable for confiscation (except conveyance, for which separate provisions have been made) [Section 119 of Customs Act which is also made applicable to CE].

Distinction between conceal and cover - In *Mazda Chemicals* v. *CC* 1996(88) ELT 767 (CEGAT), it was held that there is difference between 'coverage and concealment'. It was held that Section 119 of Customs Act is applicable only when goods have actually been used for concealment of contraband items and not for coverage of the same [Conceal implies deliberate and intentional attempt, while in case of 'cover', the owner of such goods will not be even aware that his goods are being used to cover the smuggled goods].

Confiscation even if form changes - Contravening goods are liable for confiscation even if there is any change in its form. If the contravening goods are mixed with other goods and they cannot be separated, whole goods are liable for confiscation. If the owner proves that he had no knowledge that the goods included contravening goods, only that part of goods, value of which is equal to value of contravening goods shall be liable to confiscation [Section 120 of Customs Act which is also made applicable to CE].

Confiscation of sale proceeds - If the contravening goods are found to have been sold, sale proceeds of such sale are liable to confiscation [Section 121 of Customs Act which is also made applicable to CE]. The burden is on department to prove that (*i*) there was a sale (*ii*) the sale must be by a person having knowledge or reason to believe that the goods were of smuggled origin (*iii*) the sale proceeds are of the goods liable to confiscation *(iv)* seller and purchaser and quantity must be established by Customs authorities. - *Ramchandra* v. *CC* - 1992 (60) ELT 277 (CEGAT)

Disposal of seized/confiscated goods - Goods confiscated can be disposed off if redemption fine is not paid. Usual procedure is to auction the goods.

Redemption fine

After goods are confiscated, these become property of Central Government and Government can sell/ auction the goods. However, in some cases, the person from whom goods were seized can get them back on payment of fine. This fine is termed as 'redemption fine'.

Redemption fine in lieu of confiscation **-** Section 125(1) of Customs Act provides that whenever confiscation of goods is ordered, the adjudicating officer ***may*** give option to owner of goods to pay 'fine' in lieu of confiscation, if the importation or exportation of goods was prohibited. However, if importation or exportation of goods was not prohibited, the option to pay redemption fine ***shall*** be given to owner of goods. This is called 'redemption fine'. After payment of redemption fine, the goods are returned to the owner of goods. Section 125(2) of Customs Act makes it clear that where any fine in lieu of goods is imposed, the owner of goods or the person from whom the goods were seized, is liable to pay duty and charges in respect of such goods, in addition to the fine.

Limit for imposing redemption fine – As per *proviso* to Section 125(1) of Customs Act, redemption fine upto market price of goods less duty chargeable thereon can be imposed. [Of course, in addition, duty and charges (e.g. demurrage, storage charges, interest etc.) in respect of such goods is also payable, which is made clear in Section 125(2) of Customs Act].

As per Section 2(30) of Customs Act, 'market price' in relation to goods means the wholesale price of the goods in the ordinary course of trade in India.

Provision in Central Excise for redemption fine - Though Section 125(1) of Customs Act is not made applicable to Central Excise, as per Section 34 of CEA, such option must be given to assessee to pay redemption fine in lieu of confiscation. Normally, such option is always given to assessee.

14.6 Prosecution for Offences

Excise and Customs Law provides stiff punishments of imprisonment and fines for violation of law. These can be imposed only by *Court of Law* and these are independent of penalties and confiscation that can be imposed by Excise Authorities through departmental adjudication. Hon. Supreme Court has held that both can be imposed simultaneously.

Finance Act, 1994 (which contains provisions relating to service tax) does not make any provision in respect of criminal liability.

Offences under the Central Excise Act - Section 9 of CEA defines offences which are criminal offences under the Act. Section 9 of Central Excise Act makes following as offences punishable

- Contravening provisions of restrictions of possession of goods in excess of prescribed quantity as prescribed under Section 8.
- Evading payment of duty payable under CEA.
- Removing excisable goods or concerning himself with such removal, in contravention of provisions of Central Excise Act and Rules.
- Acquiring or in any way concerning himself with transporting, depositing, concealing, selling, purchasing or otherwise dealing with excisable goods where he knows or has reason to believe that the goods are liable to confiscation under Central Excise Act or Rules.
- Contravening any provision of Central Excise Act or rules in relation to Cenvat credit.
- Failure to supply information or knowingly supplying false information.
- Attempting to commit or abetting commission of an offence regarding evasion of duty or transit of goods or restriction on storage of goods or non-registration of a unit.

As per Section 135A of Customs Act, preparation for illegal export is an offence.

Punishment that can be imposed under Central Excise Act - Punishment imposable is imprisonment upto seven years and fine (without limit) if (*a*) the duty leviable on the excisable goods exceeds one lakh of rupees [Section 9(1)] *or* (*b*) a person already convicted for offence under Central Excise Act is convicted again [Section 9(2)]. The imprisonment should be minimum for six months unless there are special and adequate reasons for granting lesser punishment. If the duty leviable on goods is less than Rs. 1 lakh, imprisonment upto three years or fine (without limit) *or both* can be imposed.

Further punishments - In addition to aforesaid, Court has powers to order following punishment

(a) Forfeiture to Government of any goods in respect of which offence has been committed and packages, vehicles or conveyance, or machinery used in manufacture of the goods. - Section 10 of CEA. [The forfeiture is different than the power of confiscation available to Excise authorities. The difference is that if the goods are confiscated, option has to be given by departmental adjudicating authorities to the offender to redeem the goods i.e. take back the goods, on payment of prescribed penalty. In case of forfeiture, no such option is to be given by Court].

(b) Publication of names, place of business or residence, nature of contravention etc., under Section 9B of CEA – parallel Section 135B of Customs Act. Such publication will be at the cost of accused and in newspaper or otherwise as directed by Court.

Publication of name by department – Department itself can publish name and other particulars of a person relating to any penalty proceedings or prosecution. See under 'penalty'.

What are 'Special and adequate reasons' - Minimum punishment is imprisonment of six months in case of offences involving goods over Rs. 1 lakh *or* for habitual offenders; unless there are special and adequate reasons for awarding lesser imprisonment. Section 9(3) of CEA [Parallel Section 135(3) of Customs Act] provides that following ***will not be*** considered as special and adequate reasons

(a) accused is convicted for first time

(b) in departmental adjudication, penalty has already been imposed on him or the goods in respect of the offence have been confiscated

(c) Accused was not principal offender and he was a secondary party in the commission of offence or

(d) Age of accused (too young or too old).

Lesser penalty imprisonment can be imposed only for reasons other than these reasons. The reasons for awarding less punishment should be recorded in writing in the judgment.

Offences under Customs Act

Main penal provision contained in Section 135 of Customs Act is in respect of evasion of duty and breaking prohibitions under the Act.

Who can be punished - The punishment is imposable on a person (*a*) who is knowingly concerned in mis-declaration of value or in any fraudulent evasion or attempt to evasion of duty *or* of any prohibition imposed on the imports/export of such goods (*b*) who acquires possession or is any way concerned with carrying, harbouring, keeping, concealing, selling or purchasing, or otherwise dealing with goods which he knows or has reason to believe are liable to confiscation under Section 111 i.e. improper imports or under Section 113 i.e. attempt to improperly export (c) who attempts to export any goods which he knows or has reason to believe are liable to confiscation u/s 113. (d) who fraudulently avails or attempts to avail duty drawback or exemption from duty provided in Act in connection with export of goods [Section 135(1) as amended w.e.f. 11-5-2007]

Punishment that can be imposed - Punishment imposable is as follows

(a) If offence relates to - (A) goods with market price exceeding Rs. one crore (B) duty evaded or attempted to be evaded exceeds Rs. 30 lakhs (C) prohibited goods notified by Central Government or (D) drawback or duty exemption fraudulently availed exceeds Rs. 30 lakhs - imprisonment can be upto seven years and fine (minimum one year in absence of special and adequate reasons) - Section 135(1)(i) of Customs Act amended w.e.f. 11-5-2007.

(b) In other cases - imprisonment upto three years or fine or both - Section 135(1)(ii) of Customs Act amended w.e.f. 11-5-2007.

(c) repeat conviction : If a person already convicted for offence under Customs Act is convicted again, the imprisonment punishment can be seven years and fine and in absence of special and adequate reasons, the punishment shall not be less than one year. [Section 135(2) amended w.e.f. 11-5-2007]

Meaning of 'Special and adequate reasons' - Minimum punishment is imprisonment of one year in case of offences involving goods over Rs. 1 crore; unless there are special and adequate reasons for awarding lesser imprisonment. Section 135(3) of Customs Act provides that following ***will not be*** considered as special and adequate reasons: (*a*) accused is convicted for first time (*b*) in departmental adjudication, penalty has already been imposed on him or the goods in respect of the offence have been confiscated (*c*) accused was not principal offender and he was a secondary party in the commission of offence or (*d*) age of accused (too young or too old). Lesser penalty imprisonment can be imposed only for reasons other than these reasons. These should be recorded in writing in the judgment.

Publication of Name - If a person is convicted under this Act, Court can order publication of names, place of business or residence, nature of contravention etc., under Section 135B of Customs Act. Such publication will be at the cost of accused and in newspaper or otherwise as directed by Court.

Offence in case of Company - Though Company is an independent legal person, it works through Managing Directors, directors and employees. Personal penalty can be imposed on person in-charge or responsible to pay customs duty. If an employee is involved in fraud, penalty can be imposed on him. The provisions are common for excise and customs and are discussed later in this chapter.

Other minor Offences under Customs Act - Other minor offences under Customs Act are as follows.

False declaration - Person making, signing or using any statement, declaration or document knowing or having reason to believe that such statement, declaration or document is false in any material particular, shall be punishable with imprisonment upto two years or fine or both (Section 132 of Customs Act) (The period of imprisonment was six months upto 13-7-2006).

Obstruction of officers of customs - If any person intentionally obstructs any officer of Customs in exercise of any powers conferred under the Customs Act, he shall be punishable with imprisonment upto two years or fine or both (Section 133 of Customs Act) (The period of imprisonment was six months upto 13-7-2006).

Refusal to be X-rayed - If any person refuses to take X-ray picture of his body in accordance with order of Magistrate or refuses to allow suitable action to be taken to bringing out goods from his body under supervision of a doctor, he shall be punishable with imprisonment upto six months or fine or both (Section 134 of Customs Act). This provision is mainly in respect of persons smuggling goods by hiding the same in their body.

Preparation for improper export - Attempting to make exports in contravention of Customs Act is punishable with imprisonment upto three years or fine or both.

Offence by Officers of Customs - If an Officer of Customs enters into any agreement to do or abstain from doing or permits any act or connives at any act or thing, whereby any fraudulent export is effected, or by which duty of customs is evaded or prohibited goods are allowed to enter India or go out of India, he shall be punishable with imprisonment upto a term of three years or with fine, or both. [Section 136(1) of Customs Act].

If any Customs Officer (a) Requires a person to be searched for goods without any reason to believe that he has such goods (b) Arrests a person without any reason to believe that he has committed an offence u/s 135 or (c) Searches or authorises search without any reason to believe that any goods, documents or things are secreted in the place; he shall be punishable with imprisonment upto 6 months or fine upto Rs. 1,000 or both. [Section 136(2) of Customs Act].

If an officer of customs discloses any information obtained by him in official capacity, he shall be punishable with imprisonment upto 6 months or fine upto Rs. 1,000 or both. Of course, he can disclose the information in discharge of his duties on in compliance with any law in force. [Section 136(3) of Customs Act].

The prosecution can be launched in Court only with previous sanction of Central Government in case of prosecution against officer of rank of Assistant Commissioner and above. In lower ranks, previous sanction of Commissioner is required. [Section 137(2) of customs Act].

Who can be punished

Any person who commits an offence as prescribed is punishable.

Offences in case of company or firm - In case of Company or partnership firm, every person who was in-charge of or was responsible to affairs of the Company/firm is deemed to be guilty. Normally, a Managing Director (partner in case of firm) or other person specially authorised is deemed to be in-charge. However, such person can prove that offence was committed without his knowledge or he had taken due care to prevent the offence [Section 9AA(1) of CEA – parallel Section 140(1) of Customs Act].

In addition, if it is proved that the offence in relation to Company is committed with consent or connivance of, or due to neglect on part of any director, manager or Secretary or other officer of Company or partnership firm, such person shall be deemed to be guilty [Section 9AA(2) of CEA – parallel Section 140(2) of Customs Act].

Difference between provisions of Section 9AA(1) and Section 9AA(2) of CEA [parallel Section 140(1) and Section 140(2) of Customs Act] is that in former case, the person in charge is deemed to be guilty and burden of proof is on him to prove that he had no knowledge; while in later case, burden of proof is on prosecution to prove that offence was committed with knowledge or connivance of the director, manager, secretary or other officer.

Company includes firm and AOP – As per *explanation* to Section 9AA(2) of CEA and Section 140(2) of Customs Act, 'company' means any body corporate and includes a firm or other association of individuals, and 'director' in relation to firm means a partner of the firm.

Mens Rea presumed - State of mind (culpable mental state) like intention, motive, knowledge of a fact or belief in a fact or reasons to believe in a fact are difficult to prove. Section 9C of CEA [parallel Section 138A of Customs Act], therefore, provides that such mental state shall be *presumed* by Court. Prosecution (here the Excise/customs department) need not prove the guilty state of mind of the accused. If the accused claims that he did not have *guilty mind*, **he** has to prove the same. In legal terminology, it is explained as "*burden of proof regarding non existence of '**Mens rea**' is on the accused*". This proof has to be '**beyond reasonable doubt**'.

Cognizance of Case - Offences under Central Excise and Customs are non-cognizable [Section 9A of CEA and Section 104(4) of Customs Act]. - . – As per Section 2(c) of CrPC, 'cognizable offence' means an offence for which a police officer may arrest without warrant. As per Section 155 of Criminal Procedure Code, a police officer cannot investigate a non-cognizable case without the order of a Magistrate [A police officer can investigate cognizable case without order of Magistrate].

According to Black's Law Dictionary, cognizance means 'jurisdiction' or the 'exercise of jurisdiction' or 'power to try and determine causes'. In common parlance, it means taking the notice of – *State of Himachal Pradesh* v. *M P Gupta* 2003 AIR SCW 6887.

Cognizance of case in customs law – Section 104(4) of Customs Act provides that offences under Customs Act are not cognizable. As per Section 137(1) of Customs Act, Court cannot take cognizance of any offence u/ss 132, 133, 135, 135 or 135A of Customs Act, without previous sanction of Commissioner of Customs. In case of offence u/s 136 against officer of customs, sanction of Central Government/Commissioner is required without which cognizance of offence cannot be taken by Court. – Section 137(2) of Customs Act.

No time limit for launching prosecution - Economic Offences (Inapplicability of Limitation) Act provides that there is no time limit for launching a prosecution in case of offences under some specified Acts.

Limitation bar contained in Criminal Procedure Code is not applicable to offences under Central Excise, Service Tax and Customs Law.

Compounding of offences

Provisions of compounding have been introduced for the first time in excise and customs law.

Section 9A(2) of Central Excise Act and Section 137(3) of Customs Act has been inserted w.e.f. 10-9-2004, to provide that any offence under the Act can be compounded by Chief Commissioner of Central Excise/ Customs. Such compounding can be done either before or after the institution of prosecution. Central Government is authorised to make Rules to provide for amount to be paid for compounding.

What is compounding ? - Fine and imprisonment can be imposed only by competent criminal Court. However, instead of going to Court, the offender may agree to pay composition amount. Order for paying composition money can be made by quasi-judicial authorities. This is called 'compounding of offences'.

'Compounding' is essentially a compromise arrangement between administrator of the enactment and person committing an offence. Compounding crime consists of receipt of some consideration (termed as compounding fees) in return for an agreement not to prosecute one who has committed an offence - *Reliance Industries, In re* - (1997) 24 CLA 214 (CLB).

Procedure for compounding – Procedure for compounding has been prescribed in Central Excise (Compounding of Offences) Rules, 2005 and Customs (Compounding of Offences) Rules, 2005.

Who can apply – A person can apply either before launch of prosecution or even when prosecution is pending. Officers of customs and central excise cannot apply for compounding [Rule 2(b)]. As per MF(DR) circular No. 54/2005-Cus dated 30-12-2005, opportunity will be given to assessee to compound offence, before launching of prosecution.

Compounding Authority - Application can be made either before or after institution of application in form prescribed under the rules to jurisdictional Chief Commissioner (who is 'compounding authority'). If offence has been committed at more than once places, Chief Commissioner having jurisdiction over such place where value of goods seized or duty evaded or attempted to be evaded is more than others will be the 'compounding authority' [Rule 3].

Report from Commissioner – After such application is made, 'compounding authority' shall call report from jurisdictional Commissioner, who will be 'reporting authority'. The report will be sent within one month [Rule 4(1)].

Compounding of offence – After receipt of report, the 'compounding authority' will either allow application indicating the compounding amount and grant immunity from prosecution or reject the application. Application shall not be rejected unless opportunity of hearing is given [Rule 4(3)].

Application for compounding will not be allowed unless the duty, penalty and interest liable has been paid for the case for which application has been made [proviso to Rule 4(3)].

Compounding amount - Fixation of compounding amount will be within limits as given in Rule 5. Various limits have been specified.

Immunity from prosecution - Immunity from prosecution will be given if compounding authority is satisfied that applicant has cooperated in the proceedings before him and has disclosed all facts relating to case. Immunity from prosecution can be subject to conditions as prescribed [Rule 6].

Payment of compounding amount - On receipt of order, the applicant shall pay the compounding amount within 30 days and submit proof of payment. If Court rejects compounding application, the amount paid will be refunded, otherwise not [Rule 4(6)]

14.7 Proof in adjudication and prosecution in indirect taxes

Provisions in respect of proof under Customs Act are summarised below.

Burden of Proof of Offence is on Department **-** In Customs and Excise law, the commitment of offence has to be proved by department beyond reasonable doubt. However, the accused has to prove beyond reasonable doubt that there was no culpable state of mind like intention, knowledge, belief etc.

In case of goods covered under Section 123 of Customs Act i.e. notified goods, burden of proof is on person from whom goods are seized.

Mens Rea presumed - Section 138A of Customs Act provides that '*mens rea*' (guilty mind) shall be presumed by Court '*burden of proof regarding non-existence of* ***Mens rea*** *is on the accused*'. This proof has to be '**beyond reasonable doubt**'. Thus, department has to prove the offence beyond reasonable doubt. However, the accused has to prove that he had no 'culpable state of mind'. - validity of this provision upheld in *Devchand Kalyan Tandel* v. *State of Gujarat* 1997(89) ELT 433 (SC) = AIR 1996 SC 2787.

Special provisions for Goods covered u/s 123 of Customs Act

Section 123 of Customs Act makes special provisions in respect of certain sensitive goods like Gold, Synthetic yarn and metallised yarn, fabrics made of synthetic yarn, Electronic calculators, watches, watch movements, zip fasteners and Silver bullion. In case of these items, if these are seized in the reasonable belief that they are smuggled goods, the owner or possessor has to prove that these are not smuggled goods. In other words, 'burden of proof' that these are not smuggled is on accused. Validity of this Section (Section 178A of earlier Act) has been upheld in *CC* v. *Nathella Sampathu Chetty* AIR 1962 SC 316 = 110 ELT 157 (SC 5 member bench).

However, even in cases of goods covered under Section 123 of Customs Act, prosecution has to prove that (*a*) the goods are of foreign origin (*b*) they are imported from abroad - *Shanti Lal Mehta* v. *UOI* - 1983 (14) ELT 1715 (SC).

Ingredients in case of seizure under Section 123 of Customs Act - There are four ingredients –

(1) There should be seizure under provision of Customs Act

(2) Seizure must be from possession of the person proceeded against

(3) Seizure must be in respect of goods for which Section 123 of Customs Act applies

(4) Seizure must be in *reasonable belief* that the goods seized are smuggled.

Relevancy of Statement before Excise/Customs Officer

Statement made and signed before any Central Excise Officer/Customs Officer of gazetted rank is allowed as evidence in the prosecution as follows :

(a) In case of a person who is dead or if he cannot be found or whose presence cannot be obtained without undue delay or expenses, the statement *will be* allowed as evidence

(b) In case of person who is present before the Court and is examined as witness, Court *may* admit the statement if it is of the opinion that the statement should be admitted in the interest of justice. Thus, discretion is given to Court in case of statements made before Excise Officer, only if such person is examined as witness. [Section 9D of CEA – parallel Section 138B of Customs Act].

This Section is applicable to service tax also.

This provision is applicable to departmental adjudication also.

Revenue officer is not a police officer - A statement made before police officer cannot be admitted as an evidence. However, customs/excise officer is not 'police officer' though he is invested with some powers of a police officer. Hence, statement made before customs/excise officer can be admitted as evidence - *Illias* v. *CC* - 1969 2 SCR 613 = 1983 (13) ELT 1427 = AIR 1970 SC 1065 – (SC 5 member Constitution Bench).

Statement must be voluntary as well as true - It must not only be established that statement is voluntary but also it must be established that the statement is true. For purpose of establishing the truth, it is necessary to examine the confession and compare it with rest of the evidence on record - *Sarwan Singh* v. *State of Punjab* - AIR 1957 SC 637. Confession, before relied upon, must be established to have been made voluntarily and true - *Mohabir Biswas* v. *State of WB* - (1995) 2 SCC 25 (3 member bench).

If a statement is not true, that cannot be used even if the same were confessional in nature because the settled law is that for a confession to be used against the maker in criminal case, the same has to be both true and voluntary. - *State of Haryana* v. *Rajinder Singh* - (1996) 2 SCALE 488.

Evidence by documents

Provisions regarding documentary evidence are as follows.

Presumption regarding Documents seized from a person - Any document seized from a person shall be *presumed* to be true about the contents therein. Signature and other part of hand written document on such seized document, purporting to have been of a person or reasonably assumed to be of that person shall be presumed to be of that person. If such person claims that the document is not true or not signed by him, *the burden of proof* is on him [Section 36A of CEA – parallel Section 139(i) of Customs Act]. *This Section is applicable to service tax also.*

Presumption regarding documents received from place outside India – If any document is received from a place out of India in the course of investigation, it will be presumed that signature and other part of hand written document on such seized document, purporting to have been of a person or reasonably assumed to be of that person shall be presumed to be of that person. However, in case of such documents, there is no presumption that the contents are true. In other words, in case of documents obtained from abroad, prosecution has to prove that the contents are true, though they don't have to prove that the signature or handwriting is of that person only, who is purported to have signed it or written it [Section 139(*ii*) & (*c*) of Customs Act]. – (interestingly, no parallel Section in Central Excise Act).

Other documents admissible - (*a*) A document which is required by law to be stamped, will be admissible as evidence even if it is not duly stamped. [Section 36A(b) of CEA – parallel Section 139(b) of Customs Act] (*b*) Micro film or Photostat/Xerox copy of document or reproduction of image is admissible, without further proof of original [Section 36B(1)(*a*) & (*b*) of CEA – parallel Section 138C(1) of Customs Act]. *This Section is applicable to service tax also.*

Computer printouts - Statement printed by computer is admissible if (*a*) Computer printout was produced during the period when the computer was used for storing and processing the information (*b*) the information contained in the statement was regularly supplied to computer during the period (*c*) computer was operating properly during the period or breakdowns were not significant to affect accuracy of documents (*d*) the printout is reproduced in ordinary course of activities. [Section 36B(2) of CEA – parallel Section 138C(2) of Customs Act]. *This Section is applicable to service tax also.*

The computer print outs will be allowed as evidence even if multiple computers or different computers or different combinations of computers were used. A statement or a certificate given by a responsible person *to the best of his knowledge and belief* identifying the statement or describing its contents or giving particulars of computers used in production of documents shall be evidence of any matter contained in the certificate.

Coded data on computer admissible? - The provision is silent about any coded or secret data kept by the accused on computer and decoded by the authorities. Since such secret data entry is obviously not in ordinary course of activities, it is doubtful if such decoded data will be acceptable as evidence. Moreover, the Section talks only about print outs and not the data stored in computer. As use (*and misuse*) of computer spreads, suitable amendment in the law may become necessary.

In *Harsinghar Gutka* v. *CCE* (2008) 221 ELT 77 (CESTAT). Department had confirmed duty of Rs. 135 crores on gutka/pan masala, based on reconstructed/retrieved data from computer. It was held that computer printout is admissible only if the same was produced by computer during regular operation.

Testing of samples

Section 144 of Customs Act makes specific provision for taking samples. There is no specific provision to take samples in rules for testing by CE officers However, these powers can be said to be implied powers of excise officers *Chapter 11 of CBE&C's CE Manual, 2005* makes detailed provisions in respect of taking of samples, its testing, re-testing etc. Samples are required in case of export, assessment etc.

Quantity of samples to be taken in respect of various products has been specified in CE Manual of Chemical Laboratories in Customs House – *reproduced in chapter 11 of CE Manual, 2005.*

Test memo should be prepared in triplicate. Four samples should be drawn in the presence of owner/manager of the factory. These are sealed with excise seal in presence of manufacturer, along with test memo in prescribed form. It should be accompanied by owner's declaration that the sample is representative of the lot. Owner can also fix his own seal. The samples should be packed properly. Original sample is sent to Chemical Examiner with test memo, duplicate to DC/AC for safe custody, triplicate to range office for future reference and quadruplicate to the manufacturer for his own records – *Chapter 11 para 8.4 of CE Manual, 2005.*

The sample along with three copies of test memo are sent to Chemical Examiner. The Chemical Examiner will inform the test result. If the test results are not acceptable to manufacturer, he can apply to Assistant/Deputy Commissioner within 90 days for re-test. Request beyond 90 days is not acceptable. Re-test can be carried out of remnant of earlier sample or duplicate/triplicate sample. Schedule of fees for testing and re-testing of samples in laboratories of CBE&C has been specified in – *Chapter 11 para 8.8 of CE Manual, 2005.* [Interestingly, testing is only Rs. 50 per sample].

Assessee can request that re-test should be by laboratory other than control laboratory. This can be done with prior permission of Commissioner. However, he will have to pay for cost of re-test in outside laboratories – *Chapter 11 para 8.10 of CE Manual, 2005.*

STUDY NOTE 15

Appeals in Indirect Taxes

15.1 Provisions of Appeal and Revision

Excise and Customs Law empower excise/Customs Officers to pass adjudication orders demanding duty and interest and imposing penalty and confiscation of goods.

Excise and Customs Act have made elaborate provisions for appeals against adjudication orders passed by excise/customs authorities. There is only one appeal in case of orders of Commissioner, while in case of other orders (i.e. orders of Superintendent, Assistant Commissioner, Dy. Commissioner, Jt. Commissioner, and Additional Commissioner), first appeal is with Commissioner (Appeals) and other with Tribunal. In some matters, revision application lies with Government against order of Commissioner and Commissioner (Appeals).

Tribunal is final fact finding authority and no further appeal lies against facts as found by Tribunal (CESTAT). In case of order of Tribunal relating to classification or valuation, appeal lies with Supreme Court. In other matters, appeal can be made to High Court only if substantial question of law is involved.

Bar of jurisdiction of Civil Court

As per Section 9 of Code of Civil Procedure, civil court has a wide, all embracing jurisdiction to entertain a claim. It can try all civil suits except those which are expressly or impliedly barred. In *Sahebgouda* v. *Ogeppa* 2003 AIR SCW 3088, it was observed, 'It is well settled that Civil Court has jurisdiction to try all suits of civil nature and the exclusion of jurisdiction is not to be lightly inferred. - - A provision of law ousting the jurisdiction of a Civil Court must be strictly construed and onus lies on the party seeking to oust the jurisdiction to establish his right to do so'.

Excise and Customs Law provides remedies of appeal etc. and normally, assessee does not approach Civil Court to get redressal in excise matters Section 35C(4) of CEA [Parallel Section 129B(4) of Customs Act] prescribe that order of Tribunal is final, subject to reference to High Court or appeal to Supreme Court. Section 11B(3) of CEA [parallel Section 27(3) of Customs Act] makes it clear that any refund will be granted only as per provisions of Section 11B(2) of CEA [parallel Section 27(2) of Customs Act]. Thus, these provisions effectively bar the jurisdiction of Civil Court in excise matters, except in cases where the law is claimed or declared as invalid.

In *Mafatlal Industries Ltd.* v. *UOI* 89 ELT 247 (SC) = (1997) 5 SCC 536 = 17 RLT 907 (SC 9 member Constitution bench), it was held that jurisdiction of Civil Court is barred in case of Customs and Central Excise.

Remand to lower authority

Remand means sending the case back to lower authorities for decision. Section 35C(1) of CEA [parallel Section of 129B(1) of Customs Act] empower Appellate Tribunal to refer the case back to lower authority for fresh adjudication. Tribunal can also give directions to lower authorities while remanding the case. Broad reasons should be given for such remand. Lower authorities have to re-adjudicate as per the directions in the order of remand.

In view of Section 86(7) of Finance Act, 1994, Tribunal can remand in respect of service tax matters also.

When matter is remanded – In following cases, matter may be remanded –

(a) When fresh points are raised in appeal and appellate authority feel that these need consideration for proper decision

(b) Enquiry into questions of facts is required - *Cynamid India Ltd*. 1984(15) ELT 186 (CEGAT). When primary facts are not on record – *Assam Co*. v. *CIT* (1996) 217 ITR 109 (Gau)

(c) Verification of certain facts like dates, documents, proofs etc. is required

(d) order appealed against is contradictory, inconsistent and vague

(e) When principles of natural justice were not followed by lower authority - e.g. not giving opportunity of hearing, not allowing examination of witnesses, not giving speaking order etc. * *A R Almeida* 1987(32) ELT 358 (Bom) * *Macneill & Magor Ltd*. 1987 (28) ELT 318 (CEGAT) - Not consideration of cited judgment is violation of principles of natural justice and matter can be remanded – *Dorma Door Controls* v. *CC* 2002(139) ELT 232 (CEGAT)

(f) Since Tribunal is final fact finding authority, it can remand when it feels some difficulty to record a correct finding of fact. – *CIT* v. *Manohar Glass Works* (1998) 232 ITR 302 (All HC)

(g) An event subsequent to the order of adjudicating authority, which has important bearing on the issue - e.g. a subsequent favourable circular of Board - *Pioma Industries* v. *CCE* 1995 (77) ELT 424 (CEGAT)

(h) Point of law raised for the first time in second appeal - *Precision Fasteners Ltd*. 1984(15) ELT 188 (CEGAT) * *CIT* v. *Indian Overseas Bank* (1999) 239 ITR 335 (Mad). When a new aspect of issue is raised for first time in appeal – *CIT* v. *Jeypore Sugars* (1989) 175 ITR 627 (AP)

(i) Papers submitted for first time in appeal which were not seen by adjudicating or appellate authority – *Southern Iron* v. *CC* 2002(141) ELT 233 (CEGAT).

Remand delays the matter. Hence, present view of Supreme Court is that matter should be decided by Tribunal as far as possible, without remanding the matter.

Signing of appeal

Rule 3(2) of Central Excise (Appeals) Rules provides that appeal to Commissioner (Appeals) should be signed (*a*) in the case of individual, by himself or person duly authorised by him - usually through power of attorney. In case of minor or mentally retarded person, by his guardian or other person competent to act on his behalf (*b*) in case of Hindu undivided family - by *Karta* (*c*) in case of Company or a local authority - by its principal officer (*d*) in case of firm - by any major partner (*e*) in case of other person - by that person or competent person to act on his behalf.

These provisions are applicable only in respect of appeal to Commissioner (Appeals), but not to CESTAT.

As per Rule 8(3) of CESTAT (Procedure) Rules, 1982, appeal/application/cross objection shall be signed and verified by appellant/applicant/respondent or the Principal Officer duly authorised to sign appeal/application/cross objection. The appellant/applicant/respondent or the consultant or advocate retained by them shall certify as true the documents produced before Tribunal.

In case of a company, the term 'principal officer' has not been specified. Normally, appeal should be signed by Managing Director or Secretary. In case of large companies, it may not be possible. Hence, authority should be conferred by a Board Resolution.

Authorised representative in appeal

If a person has to make statement on oath or if he has to be examined/cross examined, he has to personally attend the hearing. Otherwise, a person can appear either himself or through authorised representative.

As per Section 35Q(2) of CEA [parallel Section 146A(2) of Customs Act], the authorised representative may be (*a*) His relative or regular employee (*b*) Advocate who is authorised to practice in civil court (*c*) Person holding requisite qualification prescribed under Rule 12 of Central Excise (Appeals) Rules – earlier Rule 232B - parallel Rule 9 of Customs (Appeal) Rules, 1982. Under Customs Law, Custom House Agent is also permitted to appear on behalf of appellant.

This Section is applicable to service tax also.

The qualification prescribed under Rule 12 are : (*i*) Chartered Accountant (*ii*) Cost Accountant (*iii*) Practising Company Secretary (*iv*) Post graduate or Hons. degree holder in Commerce (*v*) Post graduate degree or diploma in Business administration (*vi*) Person retired or resigned from Excise, Customs or narcotics department after serving for at least ten years.

Disqualifications of authorised representative - Section 35Q of CEA and Section 146A of Customs Act prescribe certain disqualifications, which are (*a*) A person who was member of Indian Customs and Central Excise Service Group A for at least three years cannot appear for two years after he retires or resigns from service (*b*) A person who is dismissed or removed from Government service is permanently debarred (*c*) A person who is convicted of an offence under Excise Act or Customs Act will be debarred for period prescribed by competent authority (*d*) An insolvent person cannot appear till the insolvency continues (*e*) A legal practitioner found guilty of misconduct in his professional capacity and debarred by that authority from practice (*f*) Authorised representative, other than legal practitioner, cannot appear if found guilty of misconduct in connection with proceedings under the Act by prescribed authority.

Adjournment

Case may be adjourned to a future date by adjudicating authority/appellate authority.

Adjudicating authority, Commissioner (Appeals) and Tribunal (CESTAT) can grant maximum three adjournments - Section 33A(2), Section 35(1A) and Section 35C(1A) of Central Excise Act and Sections 122A, 128(1A) and 129B(1A) of Customs Act, as inserted w.e.f. 10-9-2004.

This provision can be taken only as directory and not mandatory. It does not mean that adjournments cannot be granted beyond three adjournments even for genuine reasons.

In *Afloat Textiles* v. *CCE* (2007) 215 ELT 198 (CESTAT), Commissioner fixed three dates of notice i.e. 10th October, 17th October and 31st October in first notice itself. When assessee requested for adjournment, he considered these as three adjournments and passed order *ex parte*. It was held that this approach is not on the basis of principles of natural justice.

15.2 Pre-deposit for filing appeal

Section 35F of Central Excise Act (similar Section 129E of Customs Act) provides that person desirous of appealing against the order shall, *pending the appeal*, deposit the duty demanded or penalty levied. In case of customs, pre-deposit of duty, interest and penalty is required.

This Section has been made applicable to service tax also.

Meaning of 'duty demanded' - As per *explanation* to Section 35F of CEA (inserted w.e.f. 11-5-2007), 'duty demanded' shall include following –

(i) amount determined u/s 11D

(ii) amount of erroneous Cenvat credit taken

(iii) amount payable under earlier Central Excise Rule 57cc

(iv) amount payable under Rule 6 of Cenvat Credit Rules

(v) Interest payable under provisions of Central Excise Act and Rules.

This provision applies to service tax also.

Prior deposit of duty pending appeal - Section 35F of Central Excise Act (similar Section 129E of Customs Act) provides that person desirous of appealing against the order shall, *pending the appeal*, deposit the duty demanded or penalty levied. However, the appellate authority [Commissioner (Appeals) or Appellate Tribunal] is empowered to dispense with such deposit if it is of the opinion that the deposit of duty or penalty will cause undue hardship to the person. Such waiver may be subject to such conditions as may be imposed to safeguard interests of revenue.

This provision is only for hearing and deciding the appeal by the appellate authority on merits. Normally, while admitting appeal without payment of dues, stay for recovery is also granted as considerations for granting stay and dispensing of pre-deposit are same. It will be futile to admit appeal without payment of duty and penalty, if stay for recovery is not simultaneously granted. *However, mere filing appeal or admitting appeal does not amount to grant of stay*.

This provision applies to service tax also.

Stay/Dispensing of Prior deposit

Order passed by adjudicating authority becomes effective as soon as it is signed and issued to concerned person. Excise authorities can take legally permissible steps to recover the duty and penalty as confirmed in the order. *There is no legal binding on them to wait till the decision of appellate authority*.

Decision of appeal may take time and recovery of amount pending appeal might lead to injustice and hardship to party. Hence, appellate authorities can grant stay of recovery of dues till appeal is decided, subject to conditions as they may deem fit. Such powers are not specified in the Act, but Supreme Court, in *ITO, Cannanore* v. *M K Mohammad Kunhi* - AIR 1969 SC 430 = (1969) 71 ITR 815 (SC), has held that these are incidental and ancillary powers of appellate authority, as without such powers, appeal would be rendered nugatory even if successful. CEGAT (now CESTAT) has held that it is inherent powers to grant stay of recovery of redemption fine also.

A separate application should be made along with appeal requesting for stay of recovery *till appeal is decided*.

Stay by Commissioner (Appeals) - Stay can be granted by Commissioner (Appeals) in respect of appeals before him. He can grant stay subject to conditions as he deems fit. However, appeal cannot be filed to Tribunal against this order, though Commissioner (Appeals) can himself modify his own 'interlocutory order'.

Suggested time to decide stay application – Commissioner (Appeals) should, wherever possible to do so, decide such application within 30 days from filing. [second proviso to Section 35F of Central Excise Act – parallel 129E of Customs Act]. No such time limit has been specified in respect of stay application by CESTAT. Even the time limit prescribed in case of Commissioner (Appeals) is only indicative, as the wording is 'wherever possible to do so'.

Stay by CESTAT – CESTAT (Tribunal) can grant stay of recovery if order of demand of duty and imposition of penalty is passed by Commissioner or Commissioner (Appeals). While filing application to CESTAT of stay, application fees is payable. Section 35B(7) of Central Excise Act and Section 129A(7) of Customs Act have been inserted w.e.f. 10-9-2004, to provide for payment of fee of Rs. 500 for any of such application. The fees are not payable if department files a miscellaneous application.

Validity of stay granted by Tribunal is only 180 days - Section 35C(2A) of Central Excise Act and Section 129B(2A) of Customs Act provide that if stay is granted by Tribunal for recovery, appeal shall be decided by Tribunal within 180 days. *If appeal is not disposed of by Tribunal within 180 days, the stay shall stand automatically vacated.*

This Section has not been made applicable to service tax matters. However, it is advisable to file application for extension of stay even in respect of service tax matters.

Tribunal can extend stay beyond 180 days - In *Kumar Cotton Mills* v. *CCE* 2002(146) ELT 438 (CEGAT), it was held tribunal can pass fresh stay order after 180 days – view confirmed in *IPCL* v. *CCE* (2004) 169 ELT 267 = 63 RLT 1 (CESTAT 3 member bench).

Criteria for granting stay

First proviso to section 35F of Central Excise Act (parallel Section 129E of Customs Act) states that pre-deposit of duty and penalty for hearing appeal may be dispensed by appellate authority, if it would cause '*undue hardship*' to the person.

This Section has been made applicable to service tax also.

The hardship can be any hardship and not only financial hardship. Wide discretion is available to appellate authority in granting stay/dispensing pre-deposit of duty. There are no hard and fast rules, but appellate authority do take following into consideration of * *Prima facie* case * Balance of convenience * Financial Hardship * Irreparable Injury or loss etc. while granting stay and imposing conditions for stay/dispensing of pre-deposit.

While granting stay, interest of revenue should be safeguarded.

In Indian conditions, expression 'undue hardship' is normally related to economic hardship. 'Undue' means something which is not merited by the conduct of claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances. - - It is true that on merely establishing a *prima facie* case, interim order of protection should not be passed. But if on a cursory glance it appears that the demanded raised has no leg to stand, it would be undesirable to require the assessee to pay substantive part of the demand. Where denial of interim relief may lead to public mischief, grave irreparable injury or shake a citizens' faith in the impartiality of public administration, interim relief can be given – *Benara Valves* v. *CCE* (2007) 6 STT 13 = 204 ELT 513 (SC) – similar views in *Indu Nissan Oxo Chemicals* v. *UOI* (2008) 221 ELT 7 (SC).

For hardship to be undue, it must be shown that the particular burden is out of proportion to the nature of requirement and the benefit which applicant would derive from compliance of it. Consideration of hardship and imposition of conditions to safeguard the interest of revenue should be kept in view – *Indu Nissan Oxo Chemicals* v. *UOI* (2008) 221 ELT 7 (SC).

The principles for waiver of condition of pre-deposit, well settled by a catena of decisions of Supreme Court and High Court are (a) whether there is a *prima facie* case in favour of assessee (b) the balance of

convenience *qua* the deposit or otherwise (c) irreparable loss, if any to be caused in case stay is not granted and (d) safeguarding interest of revenue. – *UOI* v. *Adani Exports Ltd.* (2007) 218 ELT 164 (SC) * *Bhavya Apparels* v. *UOI* (2007) 216 ELT 347 (SC).

Prima facie case - If strong *prima facie* case is made out, deposit of duty and penalty may be dispensed with or considerably reduced, even if no financial hardship is pleaded. Thus, factors like (*a*) not considering decisions of Courts in the issue by lower authority (*b*) order without jurisdiction (*c*) not following principles of natural justice by lower authority (*d*) order based on no evidence etc. can be considered.

Effect of not getting stay or not fulfilling conditions

If aggrieved party does not apply for dispensing of pre-deposit or does not comply with conditions imposed by Appellate Authority for stay and dispensing of pre-deposit, the appeal can be dismissed without hearing. Normally, stay is granted subject to payment of part amount/issue of bank guarantee etc. If these conditions are not complied with within the time given (or extended time if such extension given), the appeals can be dismissed for non-compliance.

15.3 Time limit for filing appeal

Every Statute prescribes time limit within which appeal has to be filed. The time limit is necessary as firstly, matters cannot be kept hanging indefinitely and secondly law helps only those vigilant and careful about their rights and not those who are negligent and careless. Excise and Customs law allows time of 60 days for filing appeal to Commissioner (Appeals) (three months in case of service tax) and three months for filing of appeal to CESTAT (Tribunal), *after the order is communicated to him*.

Calculating time provided for appeal - Legal provisions for calculating the time prescribed for appeal are: (*a*) Section 35-O of CEA - parallel Section 131A of Customs Act - provides that time taken for obtaining a copy of order shall be excluded, as a certified copy of order must accompany the appeal. (*b*) Day on which order is received should be excluded. (*c*) As per Section 29(2) of Limitation Act, if last day is a gazetted holiday, appeal can be filed on next working day. (*d*) If appeal is sent by registered post, date of actual receipt at the appellate authority will only be considered.

Condonation of delay in filing appeal

Delay can be condoned if *sufficient cause* is shown for not presenting appeal in time. Delay upto last date of filing of appeal need not be explained, but *delay* thereafter has to be explained.

Separate application should be made to appellate authority for condonation of delay.

In *Shrimant Jadhavrao* v. *Dilip Balvantrao* 2002 AIR SCW 2612 (SC 3 member bench), it was reiterated that delay upto last date of filing is not required to be explained. Only delay subsequent to last date is required to be explained.

Power to condone delay - Delay may occur due to genuine reasons and hence appellate authorities are empowered to condone delay. Commissioner (Appeals) can condone delay only upto 30 days (that time three months). Commissioner (Appeals) has no powers to condone delay beyond 30 days – *Singh Enterprises* v. *CCE* (2008) 12 STT 21 = 12 VST 542 = 221 ELT 163 (SC).

There is no such restriction of time on Tribunal about the period. Condonation is not a matter of right even for genuine reasons. Various factors are considered and it may happen that even a one day delay may not be condoned while in another case, delay of even months may be condoned.

In *State of West Bengal* v. *Administrator, Howrah Municipality* - AIR 1972 SC 749 = (1972) 1 SCC 366, it was observed that in the matter in deciding whether a particular case amounts to 'sufficient cause' or not, Courts have to use their judicial discretion in the interest of justice. The words 'sufficient cause' should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of *bona fide* is imputable to party.

In *Collector, Land Acquisition, Anantnag* v. *Mst Katiji* 28 ELT 185 = AIR 1987 SC 1353 = 35 Taxman 17 = 167 ITR 471 (SC) = 66 STC 228 = (1987) 2 SCC 107 = (1987) 2 SCR 387 = 62 Comp Cas. 370 (SC); the Apex Court has given some guidelines, which can be summarised as follows :

(1) Ordinarily a litigant does not stand to benefit by lodging an appeal late.

(2) Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. When the delay is condoned, highest that can happen is that a cause would be decided on merits after hearing the parties.

(3) "Every day's delay must be explained", does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

(4) When substantial justice and technical consideration are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice done because of a non-deliberate delay.

(5) There is no presumption that delay is occasioned deliberately or on account of culpable negligence, on account of *mala fides*. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

(6) It must be remembered that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. It was held: "Law should be applied in meaningful manner which subserves the ends of justice. There may be various reasons like sudden sickness of appellant or his advocate, strike in factory etc. If delay is not condoned, appeal will be dismissed without hearing on merit".

(7) In respect of application for condonation from Government, it was observed : "All litigants, including the State as a litigant, should be accorded same treatment and law should be administered in an even handed manner. In fact, on account of impersonal machinery, and bureaucratic machinery, delay on part of State is less difficult to understand."

15.4 Departmental Appeal/Review

An assessee can file appeal against order of adjudicating authority. The adjudicating authority is a quasi-judicial authority when he passes adjudication order. Hence, his order cannot be straight away annulled by any authority higher to him. However, if the higher authority is of the opinion that the order is not proper, it can order for its review by higher appellate authority. In case of order of Commissioner (Appeals), department can file appeal against such order to Tribunal.

Departmental Review - Copy of order of Assistant/Deputy/Joint Commissioner as adjudicating authority is sent to Commissioner. After examination of the order, if Commissioner is of opinion that the order needs review, review application can be filed with Commissioner (Appeals) u/s 35E(2) of CEA – parallel Section 129D(2) of Customs Act.

In case of service tax matters, there is no provision for filing review application before Commissioner (Appeals).

Similarly, Copy of order of Commissioner as adjudicating authority is sent to Chief Commissioner. If Committee of Chief Commissioners is of opinion that the order needs review, a review application is filed with CESTAT u/s 35E(1) of CEA – parallel Section 129D(1) of Customs Act.

Such application will be treated as appeal filed against the adjudication order [Section 35E(4) of CEA – parallel Section 129D(4) of Customs Act].

In case of service tax, Section 86(2) of Finance Act, 1994 provides that Committee of Chief Commissioners can direct Commissioner file appeal against order of Commissioner.

Appeal against order of Commissioner (Appeals) – In case of order of Commissioner (Appeals), department has to file a regular appeal with Tribunal u/s 35B(2) of CEA [parallel Section 129A(2) of Customs Act and Section 86(2A) of Finance Act, 1994] within three months. It is a regular appeal, and not a 'review'.

Who can order review – Order of authority lower than Commissioner (i.e. order of Assistant/Deputy/Joint Commissioner) is to be reviewed by jurisdictional Commissioner. Order of Commissioner as adjudicating authority is to be reviewed by Committee of Chief Commissioner.

Committee of Chief Commissioners to review orders of Commissioner - Section 35E(1) of Central Excise Act and Section 129D(1) of Customs Act make provision for reviewing orders of Commissioner of Central Excise/Customs which have been passed as adjudicating authority. The decision to review the order will be taken by Committee of two Chief Commissioners (Till 13-5-2005, the review was required to be ordered by CBE&C). The Committee will be constituted by CBE&C u/s 35B(1B) of Central Excise Act and 129A(1B) of Customs Act, by issue of notification.

Section 86(2) of Finance Act, 1994 provides for filing of appeal against order of Commissioner. It is 'appeal' and not 'review', though in effect, it does not make any difference.

Purpose of review - The order by Commissioner for review is 'for the purpose of satisfying himself (i.e. Commissioner) as to legality or propriety of any decision or order passed by Assistant/Deputy/Joint Commissioner as adjudicating authority' [Section 35E(2) of CEA – parallel Section 129D(2) of Customs Act] (no parallel provision in service tax).

The order by Committee of Chief Commissioners is 'for the purpose of satisfying itself (i.e. Committee of Chief Commissioners) as to legality or propriety of any decision or order passed by Commissioner as adjudicating authority' [Section 35E(2) of CEA – parallel Section 129D(2) of Customs Act]. In case of service tax, there is provision of appeal u/s 86(2) of Finance Act, 1994 and not review.

Order for review by Commissioner of order of officer lower than him - Commissioner can order review of the order of authority lower than him (Joint Commissioner DC/AC of Central Excise) passed as adjudicating authority.

The Commissioner can instruct the adjudicating authority or any central excise officer subordinate to the Commissioner, within a period of three months from decision or order of adjudicating authority to apply to Commissioner (Appeals). [Section 35E(3)] [*The period was one year. It has been reduced to three months by Finance Act, 2007, w.e.f. 11-5-2007*].

On receipt of such order, the adjudicating authority (Joint Commissioner/DC/AC as the case may be) or the Central Excise Officer to whom should file application to Commissioner (Appeals) within one months

(appeal against his own order). [This period was three months, which has been reduced to one month vide Finance Act, 2007 w.e.f. 11-5-2007].

Section 35E(4) of CEA [parallel Section 129D(4) of Customs Act] states that where in pursuance of order u/s 35E(1) or 35E(2) of CEA [parallel Section 129D(1) or 129D(2) of Customs Act], adjudicating authority or authorised officer makes an application to Commissioner (Appeals) within one month, it will be treated as departmental appeal (Till 11-5-2007, the time limit from filing application was three months).

The appeal shall be in respect of such points arising out of the order of adjudicating authority (DC/AC/ Superintendent) as may be specified by Commissioner in his order.

Any officer can be authorised to sign appeal - Section 35E(2) of CEA [parallel Section 129D(2) of Customs Act] as amended w.e.f. 13-7-2006 by Taxation Laws (Amendment) Act, 2006; state that Commissioner can direct the adjudicating authority or any Central Excise Officer subordinate to him to apply to Commissioner (Appeals) for determination of such points out of decision or order as may be specified by Commissioner. (This is treated as departmental appeal).

Order by Committee of Chief Commissioners for review of order of Commissioner – Committee of Chief Commissioners can order review of the order of Commissioner of Central Excise (as adjudicating authority). Such order can be issued by Committee of Chief Commissioners under Section 35E(1) of CEA [Parallel Section 128D(1) of Customs Act].

The Committee of Chief Commissioners can instruct any Commissioner within a period of three months from the date of communication of order of Commissioner to apply to CESTAT [Section 35E(3) of CEA – parallel Section 129D(3) of Customs Act]. [Till 11-5-2007, the period available was one year from date of order. This period has been reduced to 'three months from communication of order', vide Finance Act, 2007 w.e.f. 11-5-2007].

In case of service tax, there is provision for appeal u/s 86(2) of Finance Act and not of review.

On receipt of such order, the Commissioner should file application to CESTAT within one month from communication of order to him, in form EA-5 (Form CA-5 in case of Customs) – Rule 7(1) of Central Excise (Appeals) Rules. This will be treated by CESTAT as appeal by department against the decision of Commissioner [Section 35E(4) of CEA - parallel Section 129D(4) in Customs Act]. This will be treated by Tribunal as appeal by department against the decision of Commissioner.

Note that in case of order of Commissioner (Appeals), an appeal has to be filed by Committee of Commissioners under Section 35B(2) of CEA [Parallel Section 129A(2) of Customs Act and Section 86(2A) of Finance Act, 1994], within three months as specified in Section 35B(3) of CEA [Parallel Section 129A(3) of Customs Act], while in case of order of Commissioner as adjudicating authority, application for review (which is in nature of departmental appeal) can be filed within four months (plus time in communication) - three months for Committee of Chief Commissioners to issue order for review and further one month to Commissioner to file an application. In case of service tax, appeal is to be filed within three months only.

Review must arise out of order as may be specified - It may be noted that order of Committee of Chief Commissioners (for review of order of Commissioner) and that of Commissioner (for review of order of Assistant/Deputy Commissioner) must satisfy two requirements

(a) The matter must arise out of the decision or order. Thus, review cannot be made if the matter does not arise out of the order. New points not connected with order cannot be raised.

(b) The points to be determined have to be specified by CBE&C or Commissioner as the case may be. Thus, in such departmental appeal, only points specified can be determined. New point cannot be taken up.

Departmental Appeal against order of Commissioner (Appeals)

Department can file appeal against orders of Commissioner (Appeal).

It should be noted that departmental appeal cannot be filed on entirely new ground. Plea must arise out of the order. New case cannot be made at appellate stage.

Vide Section 35B(2) of CEA [parallel Section 129A(2) of Customs Act and Section 86(2A) of Finance Act, 1994], Committee of Commissioners of Central Excise may authorise any officer to file appeal against order of Commissioner (Appeals), if it is of the opinion that the order is not legal or proper. [Note that Commissioner (Appeals) has to forward a copy of his order to assessee, jurisdictional Commissioner and Chief Commissioner. Committee of Commissioners can file an appeal if the Commissioner (Appeals) has given a decision favouring the assessee].

Committee of Commissioners to decide to file appeal against orders of Commissioner (Appeals) - The decision to file appeal against order of Commissioner (Appeals) will be taken by Committee of two Commissioners (So far, i.e. upto 13-5-2005, decision to file appeal against the order of Commissioner (Appeals) was taken by jurisdictional Commissioner singly).

Copy of authorisation to be filed – Copy of authorisation of Committee of Commissioners is required to be filed along with appeal.

15.5 Appeal to Commissioner (Appeals)

Appeal against order of Superintendent, Assistant Commissioner, Dy. Commissioner and Additional Commissioner lies with Commissioner (Appeals), u/s 35(1) of CEA - parallel Section 128(1) of Customs Act and Section 85(1) of Finance Act, 1994 (which contains provisions relating to service tax) *[Appeal against order of Commissioner lies directly to Tribunal.*]

Time limit for filing appeal – In case of central excise and customs, appeal must be filed within 60 days from *date of communication* of order. Commissioner (Appeals) has powers to extend this period by further 30 days if *sufficient cause* is shown.

In case of service tax, appeal is to be filed within three months from date of receipt of order [Section 85(2) of Finance Act, 1994].

Application for Condonation of delay – If appeal is filed beyond date, application for condonation of delay should be filed with appeal. Otherwise, appeal is likely to be dismissed [In case of service tax, time limit for appeal is 3 months and Commissioner (Appeals) can condone delay upto three more months].

No fees are payable while filing application with Commissioner (Appeals) for Condonation of delay, but fee of Rs. 500 is payable while filing stay application to CESTAT, as per Section 35B(7) of Central Excise Act and Section 129A(7) of Customs Act.

Commissioner (Appeals) cannot condone delay beyond statutory limit - Commissioner (Appeals) cannot condone delay beyond the statutory limits - *Singh Enterprises* v. *CCE* (2008) 12 STT 21 = 12 STT 542 = 221 ELT 163 (SC).

Form of Appeal to Commissioner (Appeals) - Appeal should be in prescribed form No. EA-1 (CA-1 in case of Customs and ST-4 in case of service tax) in duplicate and should be accompanied by a certified copy of the decision or order against which appeal is filed. – Rule 3(3) of Central Excise (Appeals) Rules * Parallel Rule 3 of Customs (Appeal) Rules, 1982. The form requires to give name and address of appellant, details of order appealed against, description of goods, whether duty or penalty is deposited, whether appellant wants to be heard in person and relief claimed. Appeal should also include **statement of facts and grounds of appeal**. It should be properly verified.

Form of Departmental appeal - Departmental appeal should be in form EA-2 in duplicate (form CA-2 in case of Customs), with two copies of decision or order passed by adjudicating authority and a copy of order passed by Commissioner of CE directing the authority to apply to Commissioner (Appeals). – Rule 4(2) of Central Excise (Appeals) Rules * Rule 4 of Customs (Appeal) Rules, 1982.

In case of service tax, department cannot file appeal to Commissioner (Appeals). Commissioner can revise the order of lower authority u/s 84 of Finance Act, 1994.

Affixing Court fee stamps - As per Schedule 1 Article 6 of Court Fees Act, 1970, copy of an order not having force of decree should bear court fee stamp of 50 Ps. Hence, copy of order enclosed with appeal to Commissioner (Appeals) or CESTAT is required to bear court fee stamp of 50 Ps.

As per Schedule II Article 11 of Court Fees Act, 1970, memorandum of appeal to executive officer requires court fee stamp of 50 Ps, while memorandum of appeal to Chief Controlling Executive or Revenue Authority requires court fee stamp of Rs. 2. Thus, in case of appeal to Commissioner (Appeals), the memorandum of appeal should bear court fee stamp of 50 Ps, while appeal to CESTAT should bear court fee stamp of Rs. 2. [*It appears that in some States, the fee has been increased. It is advisable to refer to provisions of State where appeal is being filed*].

Additional evidence before Commissioner (Appeals) – As per Rule 5 of Central Excise (Appeals) Rules * Parallel Rule 5 of Customs (Appeals) Rules, 1982, additional evidence can be produced before Commissioner (Appeals) in following cases - (*a*) when adjudicating authority has refused to admit an evidence which ought to have been admitted (*b*) where the appellant was not able to produce evidence due to sufficient reasons (*c*) when sufficient opportunity was not given to appellant to produce relevant evidence. Commissioner (Appeals) has to record reasons for admitting the additional evidence.

However, if such evidence has to be admitted, the adjudicating authority which passed the original order or an officer authorised by him, should be given reasonable opportunity to examine the evidence or document or cross-examine the witness or produce any evidence to rebut evidence produced by appellant. – Rule 5 of Central Excise (Appeals) Rules * Parallel Rule 5 of Customs (Appeals) Rules, 1982.

Additional grounds of Appeal - Grounds of Appeal have to be specified in the appeal. Additional grounds of appeal may be raised only if Commissioner (Appeals) is satisfied that omission of that ground in the original appeal was not wilful or unreasonable. [Section 35A(2) of CEA - parallel Section 128A(2) of Customs Act].

This provision has been made applicable to service tax, *vide* Section 85(5) of Finance Act, 1994.

Suggested time to finalise order – The Commissioner (Appeals) shall, *wherever it is possible to do so*, hear and decide the appeal within 6 months from the date on which it is filed. [Section 35(4A) of Central Excise Act – parallel Section 128A(4A) of Customs Act].

Suggested time to decide stay application – Often appeal is accompanied by application for admission of appeal without pre-payment of duty and for stay of demand of duty and penalty. Commissioner (Appeals) should, wherever possible to do so, decide such application within 30 days from filing. [second proviso to Section 35F of Central Excise Act – parallel Section 129E of Customs Act] {Deciding stay application almost takes the same time as time taken to decide the appeal, as the Commissioner (Appeals) has to give personal hearing and pass a reasoned order even in respect of stay application. Thus, his workload is almost double. It will be much better if system is evolved such that final appeal itself is decided within maximum 6 months}.

Powers of Commissioner (Appeals) - Commissioner (Appeals) cannot exercise powers of Central Excise Officer. However, he can issue summons u/s 14 of Central Excise Act and exercise powers under Chapter VIA (relating to appeals) [Section 12E(2) of Central Excise Act and Section 5(3) of Customs Act].

This provision is made applicable to service tax matters

Commissioner (Appeals) can direct production of any document or examine any witness on his own to enable him to dispose of the appeal – Rule 4(4) of Central Excise (Appeals) Rules.

Order that can be passed – The Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against [Section 35A(3) of Central Excise Act – parallel Section 128(3) of Customs Act and Section 85(4) of Finance Act, 1994].

Communication of order – The order of Commissioner (appeals) will be communicated to appellant, adjudicating authority, Commissioner and Chief Commissioner [Section 128A(5) of Customs Act].

Order of Commissioner (Appeals) - The order should be in writing, shall state all points for determination, give decision and reasons for the same [Section 35A(4)]. Copy of the order should be communicated to (*i*) Appellant (*ii*) the adjudicating authority against whose order the appeal was filed and (*iii*) Commissioner.

15.6 Revision by Commissioner in Service Tax

The Commissioner of Central Excise can revise the orders passed by adjudicating authority subordinate to him. The revision order can be passed any time within two years of the original order, but not afterwards. No revision can be made if appeal against such order is pending with Commissioner (Appeals) [Section 84 of Finance Act, 1994] [The powers are similar to Section 263 of Income Tax Act].

Appeal against the order of Commissioner (after revision) lies with CESTAT under Section 86 of Finance Act, 1994.

15.7 Revision by Central Government

The Act provides for appeal to Tribunal in most of the cases against order of Commissioner (Appeals). However, in few matters, appeal does not lie with CESTAT. In such cases, a revision application has to be made with Central Government. [An officer of the rank of Joint Secretary hears the issue and passes orders on behalf of Central Government].

Appeal from order of Commissioner or Commissioner (Appeals) lies with Tribunal against all orders, ***except*** (*a*) loss of goods occurring in transit from factory to warehouse or to another factory (*b*) rebate

of duty on goods exported outside India or excisable goods used in manufacture of goods which are exported and (*c*) goods exported without payment of duty [Section 35EE of CEA].

In the aforesaid matters, Tribunal has no jurisdiction, but revision application can be filed with Central Government under Section 35EE of CEA [parallel Section 129DD of Customs Act] within three months. Central Government can annul or modify the order. *In all other matters, appeal lies with Tribunal*. Revision application can be filed by assessee or the Commissioner of CE.

There is no parallel provision in service tax.

In case of Customs, CESTAT has no jurisdiction in the matters of (*a*) baggage (*b*) payment of duty drawback and (*c*) goods short landed in India. In these matters, revision application lies with Central Government [Section 129DD of Customs Act].

The revision application should be submitted personally to Under Secretary, Revision Application Unit, Government of India, Ministry of Finance, Department of Revenue, 4th floor, Jeevan Deep Building, Sansad Marg, New Delhi - 110001, or sent by registered post to him. The revision application will be deemed to have been submitted on the date on which it is received in the office of Under Secretary. [Rule 10(2) of Central Excise (Appeals) Rules * Rule 8B of Customs (Appeal) Rules, 1982]. Application should be accompanied by prescribed fees.

Time limit for filing application - Revision application must be filed in 3 months from communication of the order. This period can be further extended by three months on sufficient cause being shown. - . - Section 35EE(2) of CEA - Section 129DD(2) of Customs Act.

Revision application by Commissioner - Application for revision can also be made by Commissioner of Central Excise, if he is of the opinion that order of Commissioner (Appeals) is not proper. He can direct an officer to file revision application. [Section 35EE(1A) of CEA - parallel Section 129DD(1A) of Customs Act]. This is like departmental appeal against order of Commissioner (Appeals).

No fees are payable along with such an application. No time limit has been prescribed for filing the application.

Suo motu revision by Central Government - Central Government can, on its own motion, annul or modify the order of Commissioner (Appeals). Before passing such order, show cause notice has to be given to the party within one year from date of order of Commissioner (Appeals), if it is proposed to enhance the penalty or fine in lieu of confiscation - Sections 35EE(4) and 35EE(5) of CEA - parallel Sections 129DD(4) and 129DD(5) of Customs Act.

15.8 Settlement Commission

Central Excise and Customs law have made provision of 'Customs and Central Excise Settlement Commission' on the lines of a similar Commission under the Income-Tax Act, 1961 u/ss 245A to 245L of Income Tax Act.

The provisions are incorporated in Sections 31, 32 & 32A to 32P of Central Excise Act and Sections 127A to 127N of Customs Act.

The provisions are not made applicable to service tax.

Settlement Commission is constituted for settling complicated cases of chronic tax evaders as an extraordinary measure, for giving an opportunity to such persons to make a true confession and to have

matters settled once for all, and earn peace of mind. It is a forum of self surrender and not a forum of challenging the legality of assessment order. – *N Krishnan* v. *Settlement Commission* (1989) 180 ITR 585 = 47 Taxman 294 (Kar HC DB).

The Settlement Commission consists of a Chairman and as many Vice-Chairmen and other Members as the Central Government thinks fit and shall function within the Department of the Central Government dealing with Customs and Central Excise matters. The Chairman, Vice-Chairmen and other members of the Settlement Commission shall be appointed from amongst persons of integrity and outstanding ability, having special knowledge of, and experience in, administration of Customs and Central Excise laws.

The powers and authority of the Settlement Commission will be exercised by a principal Bench sitting at Delhi and such additional Benches established by the Central Government at the places as it considers necessary. The Chairman of the Settlement Commission may, for the disposal of any particular case, constitute a Special Bench of three or even more members Decisions of the Commission will be by majority [Section 32A of CEA].

Who can approach Settlement Commission

Any assessee (in case of Central Excise) and any importer, exporter or any other person (in case of customs) can approach the Settlement Commission. The 'case' should be pending and amount involved should be more than Rs. three lakhs. Applicant should make full disclosure.

Application should be accompanied by prescribed fees. Application once made cannot be withdrawn.

Application only if the case is pending – Application to Settlement Commission can be made only when a 'case' is pending before adjudicating authority on date of application [Section 32E(1) read with 31(c) of CEA and Section 127B(1) read with Section 127A(b) of Customs Act as amended w.e.f. 1-6-2007].

"Case" means any proceeding under this Act (Customs or Central Excise Act) or any other Act for the levy, assessment and collection of excise duty, pending before an adjudicating authority on the date on which an application u/s 32E(1) of CEA or Section 127B(1) of Customs Act. - - When any proceeding is referred back in any appeal or revision, as the case may be, by any court, Appellate Tribunal or any other authority, to the adjudicating authority for a fresh adjudication or decision, then such proceeding shall not be deemed to be a 'proceeding pending'. [Section 31(c) of CEA – Section 127A(b) of Customs Act as amended w.e.f. 1-6-2007]

Thus Settlement Commission can be approached only when original adjudication is pending and not even when matter was remanded for fresh adjudication - confirmed in Para 29(t) of D. O. F. No. 334/1/2007-TRU dated 28-2-2007.

Disclosure to be made by applicant

Applicant has to make an application in prescribed form and prescribed manner stating, *inter alia*, a true and full disclosure of his duty liability which has not been disclosed before the Central Excise/Customs Officer having jurisdiction, the manner in which such liability has been incurred and the additional amount of excise/customs duty accepted to be payable by him. He has also to supply other information regarding dutiable goods in respect of which he admits short levy. Application should be for settlement of the case [Section 32E(1) of Central Excise Act and Section 127B(1) of Customs Act].

Which issues can be taken before Settlement Commission

As per Section 32E(1) of Central Excise Act (parallel Section 127B(1) of Customs Act), an application for settlement is ***not*** entertained by the Settlement Commission under Central Excise Act, 1944/Customs Act in the following circumstances :- (i) The applicant has not filed a return (in case of Central Excise) or bill of entry or shipping bill (in case of customs). (ii) A show cause notice has not been issued and case is not pending (iii) the additional amount of duty accepted by the applicant does not exceed Rs. 3 lakhs. (iv) An application/case is pending with the Tribunal or Court. (v) Where any dutiable goods or books of accounts/documents are seized and 180 days have not expired. (vi) Application pertains to classification or valuation of excisable goods.

Application for settlement only once in lifetime - Section 32-O of CEA and Section 127L of Customs Act (amended w.e.f. 1-6-2007) provides that application for settlement can be made only once in life time of applicant. In respect of cases involving identical recurring issue, the applicant can file application for settlement provided that his earlier application is pending before the Settlement Commission.

Additional amount should be more than three lakhs - The additional amount accepted by applicant as payable shall be more than Rs. three lakhs (The limit was Rs. two lakhs upto 1-6-2007).- *proviso* (c) to Section 32E(1) of Central Excise Act and *proviso* (b) to Section 127B(1) of Customs Act as amended w.e.f. 1-6-2007).

Case involving classification or valuation cannot be taken - Applications involving interpretation of the classification of excisable goods under the Central Excise Tariff Act, or Customs Tariff Act cannot be taken by Settlement Commission. This is made clear in third *proviso* to Section 32E(1) of Central Excise Act and fourth *proviso* to Section 127B(1) of Customs Act.

Case should not be relating to narcotics or Section 123 goods - In case of customs, application in respect of following cannot be entertained - (a) Goods to which Section 123 of Customs Act applies (b) Goods in respect of which offence under Narcotic Drugs & Psychotropic Substances Act has been committed [third *proviso* to Section 127B(1) of Customs Act].

Application 180 days after seizure - If any excisable goods or dutiable goods, books of account or other documents have been seized, application for settlement can be made only 180 days after such seizure.

Admitted duty with interest to be paid along with application - The appellant is required to pay duty admitted to be payable by him along with interest [*proviso* (d) to Section 32E(1) of Central Excise Act and *proviso* (c) to Section 127B(1) of Customs Act as amended w.e.f. 1-6-2007].

The amount along with interest should be paid by way of TR-6/GAR-7 challan in quintuplicate.

Admission of application - On receipt of application, Settlement Commission will issue notice within seven days to explain in writing why the application should be allowed to be proceeded and then within 14 days from date of notice, will either allow the application to be proceed with or reject the application. If no notice is issued within the prescribed period, the application shall be deemed to have been allowed to be proceeded with [Section 32F(1) of CEA and Section 127C(1) of Customs Act].

Copy of the order u/s 32F(1) will be sent to applicant and jurisdictional Commissioner of Central Excise [Section 32F(2) of CEA and 127C(2) of Customs Act].

Duty, penalty or interest to be paid within 30 days - Commission will pass the final order and determine the duty, penalty and interest payable [Section 32F(5) of CEA and Section 127C(5) of Customs Act]. The

amount of duty determined shall not be less than duty liability admitted by applicant. [*proviso* to Section 32F(8) of CEA and Section 127C(8) of Customs Act].

Powers to grant immunity from prosecution

The Settlement Commission shall, subject to certain provisions, have power to grant immunity from prosecution penalty and fine in respect of the case covered by the settlement, if the applicant has cooperated with the Commission and has made full and complete disclosure. If the payment is not made as per order, the immunity will be withdrawn.

Immunity can be granted only in respect of prosecution under Central Excise Act or Customs Act and not in respect of prosecution under Indian Penal Code or any other Central law. Immunity under IPC or other Central law can be exercised in existing pending cases or cases filed upto 31-5-2007. [Section 32K(1) of CEA and Section 127H(1) of the Customs Act as amended w.e.f. 1-6-2007].

15.9 Advance Ruling

A businessman would like to be clear in his mind about various aspects of his venture and risks involved, before he starts a new business or adventure. He would like to get clear verdict about his doubts in respect of taxation matters, before he decides to venture in the new business. Otherwise, he may be exposed to certain unexpected risks which may have serious adverse consequences and his business may even fail. Hence, provisions of advance ruling were made in 1993 in Income Tax Act vide Sections 245N to 245R.

Advance ruling brings certainty in determining duty liability and it helps in avoiding long drawn and expensive litigation at a later date.

Similar provision of 'advance ruling' in respect of indirect taxes has been made in 1999 so that the manufacturer/producer/importer/exporter is clear about legal aspects. The provisions were extended to service tax in May 2003. The provisions are contained in Sections 23A to 23H of Central Excise Act, 1944, Sections 28E to 28L of Customs Act, 1962 and Sections 96A to 96-I of Finance Act, 1994 (in respect of service tax). The Authority for Advance Ruling will give a decision on question raised before it. Such ruling will be binding on the applicant and the department.

Constitution of Authority - Authority of Advance Ruling (Central Excise, Customs and Service Tax) shall be constituted by Central Government by issuing a notification in official gazette. The Authority will consist of (a) Chairperson, who shall be retired judge of High Court or Supreme Court. (b) An Officer of Customs or Central Excise who is eligible to become member of CESTAT. (c) An officer of Indian Legal Service who is qualified to be Additional Secretary to Government of India. The authority can function even if there is any vacancy or defect in the constitution of Authority. The office of Authority will be in Delhi. [Section 28F of Customs Act]. - same Authority will decide customs, excise and service tax matters.

Who can apply to the authority – As per Section 23A(c) of CEA, Section 28E(c) of Customs Act and Section 96A(a) of Finance Act, 1994, application for advance ruling can be made by any of following, if they propose to undertake any business activity in India -

(i) (a) Non-resident setting up a joint venture in India in collaboration with a non-resident or a resident

(b) A resident setting up a joint venture in India in collaboration with a non-resident or (c) A wholly owned subsidiary Indian company, of which the holding company is a foreign company, who or which proposes to undertake any business activity in India.

(ii) A joint venture in India or

(iii) A resident falling in any class or category, as may be specified by Central Government by issuing a notification.

'Joint venture in India' means a venture in which at least one of the participants, partners or equity holders is a non-resident having substantial interest in the joint venture and exercising joint control over it [*explanation* to Section 23A(c) of Central Excise Act, explanation to Section 96A(b) to Finance Act, 1994 and *explanation* to Section 28E(1) of Customs Act inserted by Finance Act, 2007 w.e.f. 11-5-2007]. Till 11th May 2007, a joint venture could make application even if all parties to/ joint ventures were residents of India.

As can be seen, presently, scope of advance ruling is very limited, i.e. only in respect of joint ventures where a non-resident is involved or in case of wholly owned subsidiary of foreign company. The provision can be extended to any resident by issuing a notification.

Meaning of advance ruling - 'Advance Ruling' means determination of a question of law or fact specified in the application submitted by applicant regarding the liability to pay duty in relation to activity (of manufacture/production/import/export) proposed to be undertaken by the applicant.

As per Section 23C of CEA – similar Section 28H of Customs Act and Section 96C(2) of Finance Act, 1994, the question can be in respect of –

(a) classification of goods (or services in case of service tax)

(b) applicability of an exemption notification

(c) principles to determine value of goods for purpose of assessment

(d) notifications issued in respect of excise duty payable under CEA, CETA or any other law where duty is chargeable in same manner as duty of excise or customs duty payable under Customs Tariff Act or

(e) Admissibility of Cenvat Credit (service tax credit in respect of service tax).

(f) Determination of liability to pay duties of excise on any goods (clause inserted w.e.f. 18-4-2006)

(g) Determination of origin of goods in terms of Customs rules and matters relating thereto.

As per Section 96C(2) of Finance Act, 1994 (applicable to service tax), application for advance ruling can be made on a question in respect of –

(a) classification of any service as a taxable services

(b) valuation of taxable services for charging of service tax

(c) principles to be adopted for determination of value of taxable service

(d) Applicability of notifications issued

(e) Admissibility of credit of service tax

(f) Determination of liability to pay service tax (clause inserted w.e.f. 18-4-2006)

Binding nature of Advance Ruling - The advance ruling is binding on the applicant. It is binding on Commissioner only in respect of the applicant (i.e. not in respect of others). The advance ruling will continue to be binding unless there is change in law or facts on the basis of which advance ruling was given. [Section 23E of CEA, Section 28J of Customs Act and Section 96E of Finance Act, 1994 (Service Tax Provisions)].

Advance Ruling void if obtained by fraud or misrepresentation - As per Section 23F(1) of Central Excise Act, Section 28K of Customs Act and Section 96F(1) of Finance Act, 1994 (which applies to service tax), where an advance ruling pronounced by the authority has been obtained by the applicant by fraud or misrepresentation of facts, the authority can declare the ruling to be void *ab initio*. Thereupon, all the provisions of the Act shall apply to the applicant as if such ruling had never been made. Copy of such order declaring the ruling void *ab initio* shall be sent to Commissioner of Customs and Central Excise.

15.10 Appeal to Tribunal

Appeal against order of Commissioner/Commissioner (Appeals) - Section 35B(1) of CEA [parallel Section 129A(1) of Customs Act and Section 86(1) of Finance Act, 1994 (which contains provisions relating to service tax) provides that any *person aggrieved* by (*a*) Decision or order of Commissioner of Central Excise as adjudicating authority (*b*) Order of Commissioner (Appeals) under Section 35A of CEA [parallel Section 128A of Customs Act and Section 85 of Finance Act, 1994] (*which are passed on appeal from order of lower authorities*); can file appeal.

There are two parties to an appeal : one the assessee and other the excise department. If one party files an appeal, another can file cross-objections, in nature of cross appeal. Appeal to CESTAT should be in form EA-3. [In case of Customs, form No. is CA-3. In case of service tax, it is ST-5].

Appeal only against decision or order - Appeal can be filed against decision or order only. A Trade Notice is not a decision or order as it has no legal force. Appeal cannot be filed against a trade notice.

Refusal of petty Appeals - Tribunal may, at its discretion, refuse to admit an appeal if the duty involved or difference of duty involved or penalty involved is less than Rs. 50,000. However, such appeal cannot be refused if the issue pertains to valuation or rate of duty - *proviso* to Section 35B(1) of CEA [parallel Section 129A(1) of Customs Act].

Cross Objections to appeal

There are two parties to an appeal - one the assessee and other the excise department. If one party files an appeal, another will get notice of such appeal with a copy of appeal. The other party (assessee or department as the case may be) can file cross-objections. Provision of such cross objection has been made u/s 35B(4) of CEA, Section 86(4) of Finance Act, 1994 and Section 129A(4) of Customs Act.

The cross objection should be filed within 45 days of receiving of such notice. However, Tribunal can condone delay if sufficient cause is shown. The memorandum of cross objections should be in form EA-4 and should be duly verified. [In case of Customs, form number is CA-4. In case of service tax, form No. is ST-6]. The cross objections should be serially numbered and under distinct heads without any argument or narrative. Cross objections are in the nature of *Cross Appeal* and ***not*** in nature of opposing the points raised in the appeal. Following example will make the distinction clear.

Constitution of Tribunal - The Tribunal consists of Judicial Members and Technical Members, which gives the Tribunal a balanced overall view of legal background and practical implementation of law.

Benches of Tribunal

Tribunal sits in benches. Presently, benches are at New Delhi, Mumbai, Kolkata, Chennai and Bangalore.

Types of Benches - The benches are (*a*) Principal Bench (*b*) Zonal Bench. The Principal Benches are situated at Delhi. Presently there are seven Principal Benches. These benches can be assigned cases arising

anywhere in India. (*b*) Zonal benches : These are * Northern Bench at Delhi * Southern Bench at Chennai and Bangalore * Eastern Bench at Kolkata and * Western Bench at Mumbai and Ahmedabad.

Single Member Bench - Vide Section 35D(3) of CEA [parallel Section 129C(4) of Customs Act], President of CESTAT can authorise any member to hear case singly when the duty involved or difference of duty involved *or* the fine *or* penalty involved does not exceed Rs. 10,00,000 (ten lakhs).

Fees payable for appeal before Tribunal - The appeal must be accompanied by a fee. Section 35B(6) of Central Excise Act, Section 86(6) of Finance Act, 1994 and Section 129A of Customs Act as amended w.e.f. 10-9-2004, prescribes fees for filing appeal before Tribunal.

Grounds of Appeal - Applicant is expected to mention all grounds of appeal in the appeal memorandum. A ground not mentioned in grounds of appeal can be accepted only with permission of Tribunal.

Time limit for passing of order by Tribunal - Section 35C(2A) of Central Excise Act and Section 129B(2A) of Customs Act, (as amended on 11-5-2002) provides that the Appellate Tribunal shall hear and decide every appeal within a period of three years, wherever it is possible to do so. Thus, the time limit is only indicative and not mandatory. - - However, if stay is granted by Tribunal for recovery, appeal shall be decided within 180 days. *If appeal is not disposed of by Tribunal within 180 days, the stay shall stand automatically vacated.*

As per Section 86(7) of Finance Act, 1994, these provisions apply to service tax also.

15.11 Rectification of own mistakes by Tribunal

Tribunal has no powers to review its orders - *Patel Narshi Thakershi* v. *Pradyumansinghji Arjunsinghji* - AIR 1970 SC 1273 = (1971) 3 SCC 844. However, Tribunal can pass order for rectifying a mistake apparent from the records, within six months of passing of order. - Section 35C(2) of CEA - similar Section 129B(2) of Customs Act.

This Section has not been made applicable to service tax. However, Section 86(6A) of Finance Act, 1994 specifies fees for application for rectification. Section 86(7) of Finance Act, 1994 states that all powers exercisable by Tribunal under Central Excise can be exercised by Tribunal in matters of service tax. Hence, Tribunal should be able to rectify its own orders In any case, it can exercise its inherent powers

Mistakes apparent from records can be rectified – The purpose of 'rectification of mistake' is based on the fundamental principle that no party appearing before Tribunal, be it an assessee or department, should suffer on account of any mistake committed by the Tribunal. When prejudice results from an order attributable to Tribunal's mistake, error or omission, then it is duty of Tribunal to set it right - *Honda Siel Power Products Ltd.* v. *CIT* (2007) 165 Taxman 307 = 9 STR 117 = 12 VST 500 = 221 ELT 11 (SC).

The mistake can be corrected only if it is apparent from records. The error could be of fact or an error in law - *K B Foams (P.) Ltd.* v. *Dy Commissioner of CT* - (1986) 62 STC 233 (Kar HC).

Mistakes that can be rectified - The mistakes may be (*a*) typographical errors or calculation mistakes (b) Palpable mistakes (*c*) order based on inapplicable statutory provisions (*d*) point raised in appeal but not considered (*e*) wrong application of judgment of High Court. (*f*) subsequent binding decision of Superior Court (g) binding decisions not considered (h) orders traversing beyond show cause notice.

15.12 Appeal to High Court on substantial question of law

Appeal can be made to High Court against order of Tribunal if the case involves substantial question of law, except in cases relating to rate of duty and valuation.

Appeal to High Court in certain cases - Tribunal is final fact finding authority. However, if there is a substantial question of law arising out of order of Tribunal (in cases other than relating to rate of duty and valuation); an appeal can be made to High Court within 180 days. [Section 35G(1) of CEA - parallel Section 130(1) of Customs Act].

This Section has been made applicable to service tax also.

The provisions are identical to Section 100 of Civil Procedure Code [CPC] and Section 260A of Income Tax Act.

In case of question relating to rate of duty and valuation, appeal lies with Supreme Court.

The appeal can be made either by the Commissioner of CE/Customs or the other party. If the appeal is made by other party, the application should be accompanied by fee of Rs. 200/-. The memorandum of appeal shall clearly state the substantial question of law involved. [Section 35G(2)(c) of CEA - parallel Section 130(2)(c) of Customs Act].

Hearing of appeal - The appeal will be heard by High Court bench of at least two judges. [Section 35G(7) of CEA – parallel Section 130(7) of Customs Act]. Decision will be by majority. If the judges are equally divided on the issue, matter will be referred to third judge. He will hear only on the point on which the judges were differing. The point will then be decided by majority, including those who had first heard the appeal. [Section 35G(8) of CEA - parallel Section 130(8) of Customs Act]. Provisions of Code of Civil Procedure relating to High Court will apply in case of such appeals.

Court to decide whether substantial question involved – If High Court is satisfied that substantial question of law is involved, it will formulate the question. Other party can argue that substantial question of law is not involved. High Court can even answer question of law not formulated by it, if it is satisfied that the case involves such substantial question of law. [Section 35G(4) of CEA – parallel Section 130(4) of Customs Act].

Judgment of High Court and action by concerned excise officer - The High Court will deliver the judgment on the substantial question of law either formulated by it or even if not formulated by it. High Court may award cost as it deems fit. [Section 35G(5) of CEA - Section 130(5) of Customs Act]. The concerned Central Excise Officer will give effect to the order passed by High Court in appeal, on the basis of certified copy of the judgment of High Court. [Section 35K(1A) of CEA – parallel Section 130D(1A) of Customs Act].

These Sections have been made applicable to service tax also.

Substantial question of law – Appeal can be made only if there is 'substantial question of law'.

15.13 Appeal to Supreme Court

Appeal to Supreme Court can be made in following cases :

- Judgment of High Court in appeal, if High Court certifies it to be a fit case for appeal to Supreme Court [Section 35L(a)(i) of CEA - parallel Section 130E(a)(i) of Customs Act]

- Judgment of High Court in reference (pertaining to matters prior to 1-7-2003), if High Court certifies it to be a fit case for appeal to Supreme Court
- Order of Appellate Tribunal where it relates to question relating to rate of duty excise or value for purpose of duty. [Section 35L(b) of CEA - parallel Section 130E(b) of Customs Act]
- By Special Leave Petition (SLP) under Article 136 of Constitution i.e. permission of Supreme Court, even in cases where High Court does not certify it to be a fit case for appeal to Supreme Court.

Section 35L of CEA has been made applicable to service tax also.

Appeal against order regarding dutiability/ valuation/classification - Appeal to Supreme Court can be made if the order of CESTAT relates, among other things, to the determination of any question having a relation to rate of duty or to value of goods. [If it does not relate to these issues, appeal has to be made to High Court u/s 35G].

Since the words used are 'among other things', even if one of the issue relates to rate or value, appeal lies with Supreme Court and not High Court.

Appeal to SC should be presented within 60 days from the date the order is communicated. Appeal should be with seven extra sets and should recite all relevant facts and set forth objections to the order and ground of appeal. An authenticated copy of order appealed against should be attached. These are 'civil appeals'.

15.14 Constitutional remedies in Indirect Taxes

Our Constitution has maintained a balance between powers of Legislature, Judiciary and Executive. All actions of Government are subject to judicial scrutiny of Supreme Court and High Courts, irrespective of provisions of any particular statute. These judicial powers are conferred by Constitution itself and hence cannot be curtailed by any legislation. Declaration in any Statute that the order shall be final does not affect writ jurisdiction.

Powers of Supreme Court - Article 136 authorises Supreme Court to grant special leave to appeal from any judgment, decree or order in any cause or matter passed or made by any court or Tribunal in India. This is at the discretion of the Supreme Court and applications under this Article are termed as Special Leave Petitions (SLP) as these can be admitted only with special leave (permission) of Supreme Court.

Powers of High Court - High Court, within the territory of its jurisdiction, has powers, *vide* Article 226 of Constitution, to issue orders or writs for enforcement of any fundamental right and *for any other purpose*. Article 227 confer powers on High Court of superintendence over all courts and Tribunals in the territory in which the High Court has jurisdiction. Thus, Tribunals in a State are subordinate to the High Court of that State and decisions of the High Court are binding on the Tribunal bench sitting in that State.

Norms for invoking special powers - Powers to issue high prerogative writs are extraordinary discretionary powers and hence are to be exercised sparingly and in fit case, on sound principles of law. Courts will invoke writ jurisdiction only in exceptional cases. Thus, when alternate remedy like departmental appeal or ordinary civil suit is available, writ jurisdiction will not be normally invoked.

STUDY NOTE 16

Central Sales Tax Act

16.1 Objects of CST Act

- To formulate principles for determining **(a)** When a sale or purchase takes place in the course of inter-state trade or commerce **(b)** When a sale or purchase takes place outside a State **(c)** When a sale or purchase takes place in the course of imports into or export from India.
- To provide for levy, collection and distribution of taxes on sales of goods in the course of inter-state trade or commerce.
- To declare certain goods to be of special importance in inter-state trade or commerce and specify the restrictions and conditions to which State laws imposing taxes on sale or purchase of such goods of special importance (called as declared goods) shall be subject.

As explained in first chapter,

- Entry 92A of List I (Union List) empowers Central Government to impose tax on inter-state sales.
- Article 269(3) and Article 286(2) of Constitution authorises Parliament to formulate principles for determining when the sale or purchase takes place outside a State or in the course of imports and exports.
- Article 286(3) of Constitution authorises Parliament to place restrictions on tax on 'declared goods'.

CST Act imposes the tax on inter state sales and states the principles and restrictions as per the powers conferred by Constitution.

Basic scheme of the CST Act - The basic scheme of the CST Act is as follows.

Sales Tax Revenue to States - The CST Act provides for levy on Inter-State sales and also defines what is 'Inter-State Sale'. However, the concept that revenue from sales tax should be collected by States has been retained. Thus, though it is called ***Central Sales Tax Act***, the tax collected under the Act in each State is kept by that State only. This is provided in Article 269(1)(g) of Constitution of India. - - CST in each State is administered by local sales tax authorities of each State.

Tax collected in the State where movement of goods commences - The scheme of CST Act is that Central Sales Tax is payable in the State from which movement of goods commences (i.e. from which goods are sold). The tax collected is retained by the State in which it is collected. CST Act is administered by Sales Tax authorities of each State. Thus, the State Government Sales Tax officer who collects and assesses local (State) sales tax also collects and assesses Central Sales Tax.

Tax on Inter-State sale of goods - CST is tax on Inter-State sale of goods. Sale is Inter-State when (*a*) sale occasions movement of goods from one State to another ***or*** (*b*) is effected by transfer of documents during their movement from one State to another.

State Sales Tax law applicable in many aspects - CST Act makes provisions for very few procedures and rules. In respect of provisions like return, assessment, appeals etc., provisions of General Sales Tax law of the State applies.

CST Act defines some concepts - Under the authority of Constitution, the CST Act defines concepts of 'Sale Outside the State' and 'sale during the course of import/import'.

Declared goods - Some goods are declared as goods of special importance and restrictions are placed on power of State Governments to levy tax on such goods.

Inter-State and Intra-State Sale - Entry 92A of List I - Union List reads : 'Taxes on the sale and purchase of goods other than newspapers, where such sale or purchase takes place in the course of Inter-State trade or commerce'. Entry 54 of List II - State List - reads : 'Tax on sale or purchase of goods other than newspapers except tax on Inter-State sale or purchase'. Thus, sale within the State (Intra-State sale) is within the authority of State Government, while sale outside State (Inter-State sale) is within the authority of Central Government.

Sale where both buyer and seller are from same State is Intra-State sale e.g. from * Mumbai to Pune or * Ahmedabad to Surat * Howrah to Kolkata * Mysore to Bangalore etc. These are Intra-State sales. However, when buyer and seller are in different States, it is Inter-State sales. e.g. : Chennai (Tamil Nadu) to Trivandrum (Kerala) * Allahabad (UP) to Hyderabad (Andhra Pradesh) * Bhubaneshwar (Orissa) to Daman (Union Territory) etc.

Newspapers specifically excluded - It can be seen that 'newspapers' are specifically excluded from purview of both Union as well as State list. The obvious reason is that newspapers have a very vital role to play in a democratic society. Freedom of speech and free flow of information is the backbone of democracy and hence newspapers have been excluded from tax. [Otherwise, 'newspaper' are 'goods', but for the exclusion].

Taxable event in sales tax - In *Sea Customs Act In re* - AIR 1963 STC 437= (1964) 3 SCR 827 (SC 9 member bench), it was held that in case of sales tax, taxable event is the act of sale. It is not a tax directly on goods.

Categories of Sales - Sales can be broadly classified in three categories. (*a*) Inter-State Sale (*b*) Sale during import/export (*c*) Intra-State (i.e. within the State) sale. - *Murli Manohar & Co.* v. *State of Haryana* (1991) 80 STC 79 = (1991) 1 SCC 377 (SC 3 member bench). In this case, it was observed that they cannot conceive fourth category of sale.

Mode of a sales transaction - Initially, buyer places an order on seller for supply of goods, called 'Purchase Order'. After the goods ordered are ready, the buyer may come to the business place (godown, factory or warehouse) of seller and obtain delivery of goods. This will be 'Sale within the State'. Alternatively, buyer may ask seller to send the goods by transport. In such cases, the seller will book the consignment by rail, road, ship or air as per requirement of buyer to the destination where buyer requires the goods. In such a case, generally, (*a*) if buyer and seller are in the same State, it is Intra-State sale (*b*) if they are in different States, it is Inter-State sale (*c*) if buyer is outside India, it is sale during export (d) if seller is outside India, it is sale during import.

16.2 Inter-State sale

As per the Constitution, tax on Inter-State sale/purchase can be levied only by Union Government. CST Act has been enacted for this purpose. Section 6(1) of CST Act provides that subject to other provisions of the CST Act, every dealer shall be liable to pay tax under this Act on all sale of goods (other than electrical energy) effected by him in the course of Inter-State trade or Commerce. Section 6(1) is called as '*Charging Section*' as it imposes levy on sale of goods on Inter-State sale.

Important words in charging Section of CST - **(*a*)** Levy is on ***sale*** of goods *(i.e. levy is not on purchases)* **(*b*)** it is on ***sale*** as defined under Section 2(*g*) **(*c*)** sale should be of ***goods*** as defined in Section 2(*d*) **(*d*)** there is no levy on electrical energy, though electrical energy is 'goods'. [Section 6(1)] **(*e*)** sale should be *in course of inter-state Trade or commerce* as defined in Section 3.

Section 3 of CST Act defines Inter-State sale or purchase as follows :

Section 3 - A sale or purchase of goods shall be deemed to take place in the course of Inter-State trade or commerce if the sale or purchase -

(*a*) occasions the movement of goods from one State to another *or*

(*b*) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Thus, inter-state sale can be as per Section 3(a) or Section 3(b).

The first mode is 'direct inter-state sale', while second mode is 'by transfer of documents'.

Sale which 'Occasions movement of goods' - As per Section 3(a), 'Inter-State sale' takes place if the sale *occasions movement of goods* from one State to another.

Complete sale required - Transaction must be a completed **sale**.

Buyer and seller may be in same State - Location of buyer and seller is immaterial. Thus, even if buyer and seller are within the same State, sale will be inter-state, if sale occasions movement of goods from one State to another. e.g. the buyer may have construction site in another State and may ask seller to despatch goods directly to the site e.g. *Cement Marketing Co.* v. *State of Mysore* AIR 1963 SC 548 = (1963) 3 SCR 792 = 14 STC 175 (SC). Inter-State sale by transfer of documents is also possible even when buyer and seller are in same State.

There should be express or implied stipulation for movement of goods outside the State - There should be an agreement to sale which contains a stipulation (express or implied) regarding movement of goods from one State to another. - *Balabhgas Hulaschand* v. *State of Orissa* (1976) 37 STC 207 (SC) = AIR 1976 SC 1016 = (1976) 2 SCC 44 = 1976 2 SCR 939.

Contract need not be in writing - The contract of sale need not be in writing. There should be obligation to transport goods outside the State. Such an obligation may be expressed under contract or implied. Such obligation can be inferred from circumstantial evidence too – *Buishi Yada Motors* v. *State of Arunachal Pradesh* (2004) 135 STC 438 (Gau HC).

Completed sale may be before or after movement of goods - It is immaterial whether a completed sale precedes the movement of goods or follows the movement of goods or takes place while the goods are in transit. What is important is that movement of goods and the sale must be inseparably connected - *CST, UP* v. *Bakhtawar Lal Kailash Chand Arhti* - (1992) 87 STC 196 = 1992 AIR SCW 2246 = AIR 1992 SC 1952 (SC 3 member bench).

Movement in pursuance to agreement to sale is sufficient - Even if goods move from one State to another in pursuance of agreement to sale and the sale is completed in the State in which goods are received, it will be an inter-State sale. - *Balabhgas Hulaschand* v. *State of Orissa* 1976 2 SCR 939 = (1976) 37 STC 207 (SC) = AIR 1976 SC 1016 = (1976) 2 SCC 44.

Goods must physically move from one State to another - There should be physical movement of goods from one State to another. Such movement must be inextricably connected with sale. - *Balabhgas Hulaschand* v. *State of Orissa* (1976) 37 STC 207 (SC) = AIR 1976 SC 1016 = (176) 2 SCC 44 = 1976 2 SCR 939.

Property in goods may pass in either State - It is immaterial in which State the property (i.e. ownership) of goods passes to the buyer. - *Oil India Co. Ltd.* v. *Superintendent of Taxes* (1975) 3 SCR 797 (SC) = AIR 1975 SC 887 = (1975) 1 SCC 733 = 35 STC 445 (SC).

Movement of goods should be inter-linked with sale - Movement of goods should be incident of sale and should be necessitated by the contract of sale and this be inter-linked with the sale of goods - *Kelvinator of India Ltd.* v. *State of Haryana* (1973) 32 STC 629 (SC).

Mode of transport is not relevant - Mode of transport is immaterial. It may be aircraft, rail, post, motor transport, angadia, ship or handcart - *State of Bombay* v. *United Motors* – AIR 1953 SC 252 = (1953) 4 STC 133 (SC).

Sale can be inter-state even if buyer takes delivery within State of seller - Even if buyer takes delivery from the seller, it can be Inter-State sale if movement of goods to other State is a necessary part of transaction, e.g. if cement is issued within the State to a buyer but as per allotment order the buyer had to necessarily take the goods out of the State, it is an Inter-State Sale. - *Mohanlal Hargovandas* v. *State of MP* - (1955) 6 STC 687 (SC).

Sale should not be complete within the State - Sale should conclude in different State. - *State of Andhra Pradesh* v. *National Thermal Power Corporation* (NTPC) 2002 AIR SCW 1956 = AIR 2002 SC 1895 = (2002) 5 SCC 203 = 127 STC 280 (SC 5 member bench). [Meaning that if sale concludes in the same State, subsequent movement will be on behalf of purchaser alone and will not be Inter-State sale].

16.3 Inter-State Sale by transfer of documents

Section 3(b) provides for Inter-State sale by transfer of documents of title to goods during the movement from one State to another. As per Section 3(b), a sale or purchase of goods shall be deemed to take place in the course of Inter-State trade or commerce if the sale or purchase is effected by a transfer of documents of title to the goods during their movement from one State to another.

This definition is important as all subsequent inter-state sales to registered Dealers by transfer of documents during movement of goods are exempt from sales tax [E-I, E-II transaction].

Section 3(a) requires that sale should 'occasion movement of goods'. There is no such requirement in Section 3(b). Hence, for purpose of Section 3(b), the movement of goods from one State to another need not be occasioned by sale. For example, if the goods are being sent to a branch by transport, sale during movement by transfer of document will also be an 'inter-state sale' u/s 3(b).

What is 'Document of Title of Goods' - Document of title to goods means a document which evidences that the person holding the document has title to goods represented by the document. Handing over the document is as goods as handing over the goods which the document represents. Such handing over can be my simple delivery. However, normally, it is transferred by endorsement as evidence that person in possession of the document has obtained it by legal means. Such document is usually a transport document or godown receipt.

Such document is usually called (*a*) Lorry Receipt - LR in case of transport by Road (*b*) Railway Receipt - RR - in case of transport by rail (*c*) Bill of Lading - BL - in case of transport by sea (*d*) Air Way Bill - AWB - in case of transport by air. It is called 'document of title' as one who submits the same is entitled to get delivery of goods, if document is in his name or endorsed in his name.

Section 2(4) of Sale of Goods Act permits transfer of goods by 'endorsement or delivery' of documents of title. Thus, technically and legally, document can be transferred by mere delivery even without endorsement.

However, endorsement is a convenient mode of transfer as it gives proof that the transfer is in due course of trade and is usually followed.

What is transfer 'during Movement of Goods'

Sale/purchase will be inter-State if sale/purchase is effected by transfer of documents of title during the *movement of goods* from one State to another. Often, goods may reach destination quickly while documents may reach the buyer after goods reach destination. If endorsement is made *after* goods reach destination (but *before* delivery of goods is taken from carrier), the transfer of documents will really not be '*during the movement of goods*' and the sale may not be termed as '*inter-State sale*'. This will cause great hardships to the trade.

To overcome the problem explained above, *Explanation 1* to Section 3 of CST Act specifically states that the movement of goods commences when goods are delivered to carrier and terminates when delivery is taken from the carrier.

16.4 Stock Transfer/Branch Transfer

One of the basic and obvious conditions of Inter-State sale is that there should be a *sale*. If a manufacturer sends goods to his branch in other State, it is not a 'sale' as you cannot sell to yourself. Similarly, if a dealer sends goods to his Agent in other State who stocks goods *on behalf of the dealer*, it is not a sale. Such agent is usually called 'Consignment Agent'. Goods are despatched to another State on consignment basis and the person despatching goods retains ownership of goods. Since no sale is involved, there is no 'Inter-State Sale'.

This is called 'stock transfer' or 'branch transfer'. Here, movement of goods takes place from one State to another, but it is not an Inter State sales.

In *Ashok Leyland Ltd.* v. *State of Tamil Nadu* 2004 AIR SCW 1001 = 134 STC 473 (SC 3 member bench), it was held that where purchaser places order on manufacturer for manufacturing goods which would be as per his specifications, a presumption that agreement to sale has been entered into may be raised (i.e. it may be presumed that the movement is not really a 'stock transfer').

When Stock Transfer is treated as Inter-State sale

Goods are despatched to branch/consignment agent in another State and then these are sold from the branch, depot or place of consignment of agent. However, if the movement of goods is occasioned on account of sale, the movement will be treated as Inter-State sale. One illustration will make the distinction clear.

Let us assume that Tata Iron and Steel Co. Ltd. (TISCO), manufacturing Steel, has a factory at Jamshedpur, Bihar. TISCO manufactures Steel of various **standard** shapes and sizes. TISCO has a depot at Howrah in West Bengal. Steel plates, rods, billets etc. are sent to its depot at Howrah. When the goods are sent from Jamshedpur to Howrah, there is inter State movement, but the movement has not occasioned on account of any covenant or contract for sale. Hence, it is not an Inter-State sale but a stock transfer. Sale takes place when a customer approaches TISCO depot at Howrah and takes delivery from Howrah. Here, the sale by TISCO from its Howrah depot is an *Intra-State* sale within West Bengal.

However, assume that a buyer from Howrah wants Steel of a particular size and specification, which is not a standard size and specification and hence is not available in Howrah depot of TISCO. He approaches

TISCO and TISCO manufactures Steel in its Jamshedpur factory in Bihar as per the specific requirements of the buyer. After manufacture, goods are sent to depot of TISCO at Howrah and goods are sold to the buyer from Howrah depot of TISCO. In such case, the movement of goods from Jamshedpur, Bihar to Howrah, West Bengal has occasioned as a necessary incident of contract and hence it is a Inter-State sale, *even if* goods are supplied from depot of TISCO at Howrah and invoice is raised from TISCO, Howrah.

Double taxation when stock transfer held as sale

In *Ashok Leyland Ltd.* v. *UOI* (1997) 9 SCC 10 = 105 STC 152 (SC), the dealer despatched the goods to his depots in another States from his factory in Tamil Nadu, treating the same as stock transfer. Dealer sold the goods from the depots and paid sales tax in the State in which goods were sold. Later, the dealer received notice from Tamil Nadu sales tax authorities that in respect of its sale of vehicles to various State transport undertakings from the depot, the movement of goods from Tamil Nadu has to be treated as 'inter-state sale'.

Dealer pleaded that if Tamil Nadu sales tax authorities ask him to pay tax on such stock transfer, it will be double taxation, as he has already paid sales tax in respective States when goods were sold from the depots. Other State Governments will not refund the sales tax collected by those State Governments. Supreme Court appreciated the difficulty, which has arisen because there is no central mechanism which would decide questions of such nature. Supreme Court directed dealer to continue with assessment. If the assessing authority and appellate authority of Tamil Nadu decided against the dealer, the dealer should approach Supreme Court for suitable directions.

Authority to resolve disputes in course of inter-state sale – To overcome the difficulties as above, 'Central Sales Tax Appellate Authority' has been constituted u/s 19 of CST Act w.e.f. 17-3-2005. [Sections 19 to 26 were incorporated in CST Act w.e.f. 11.9.2001].

F form for stock transfer

F form is required to be produced as proof of stock transfer.

Burden of proof in case of consignment despatches - Since consignment despatches are usually resorted to avoid liability of CST, Section 6A of CST Act provides that when a dealer claims that transfer of goods outside State is not a sale (i.e. it is branch transfer/consignment sale); he has to prove that the inter-State transfer of goods is not a sale. (In legal terminology; this means that *burden of proof* is on dealer to establish that the Inter-State transfer of goods is not a sale). Sales tax authorities do not have to prove that the sale is 'Inter-State'. The authorities can presume the same unless contrary is proved by the dealer. Dealer will have to prove that it is ***not*** an Inter-State sale. For this purpose, he must produce a declaration from agent/branch from other State in prescribed form 'F'.

Relevant date for issue of C/F form is date of Bill or date of receipt of material? – Often, material is despatched by seller in one month but received by branch/depot in another month. The issue is whether C forms are to be issued on basis of month in which transfer was made by seller or month in which material was received by depot/branch. Commissioner of Sales Tax, Maharashtra has clarified that essence of interstate sale or transfer is delivery of goods and not the date of sale or date of transfer. Hence, declaration in C/F form will not be refused only because date of sale bill is in one quarter while date of purchase/transfer recorded by purchaser falls in next quarter/month – Trade circular No. 70T dated 6-12-2007 issued by Commissioner of Sales Tax, Mumbai [The principle is sound and may be accepted in other States also, though not binding on officers in other States].

16.5 Sale outside the State

CST Act defines 'sale outside a State'. [This definition is under powers conferred vide Article 286(2) of Constitution]. This definition is important as 'sale outside a State' cannot be taxed by State Government.

Section 4(1) defines 'Sale outside a State' in a round about way. The Section states that 'subject to provisions of Section 3, when a sale or purchase is inside a State as per Section 4(2), such sale or purchase will be outside all other States'. Thus, it is necessary to understand 'what is sale inside a State'.

Sale inside a State - Section 4(2) states that a sale or purchase of goods shall be deemed to take place inside a State if the goods are within the State (*a*) in the case of specific or ascertained goods, at the time the contract of sale is made *and* (*b*) in the case of un-ascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation. *Explanation* to this Section states that where there is a single contract of sale or purchase of goods situated at more than one place, provisions of Section 4(2) shall apply as if there were separate contracts at each of such places.

Specific Goods - "Specific goods" means goods identified and agreed upon at the time a contract of sale is made [Section 2(14) of Sale of goods Act]. Goods identified after the sale are 'ascertained goods' and not 'specific goods'.

Sale when goods are 'ascertained' - As can be seen, in case of specific goods, goods are already identified at the time of sale. In case of un-ascertained or future goods, the situs of goods, i.e. the state in which the goods are 'ascertained' determines the State in which the sale takes place. Thus, a 'sale' can take place only after goods are 'ascertained', i.e. identified.

16.6 Goods under CST Act

Section 2(d) of CST Act defines that 'goods' includes all materials, articles, commodities and all kinds of movable property, but does not include newspapers, actionable claims, stocks, shares and securities.

Goods includes all movable property. It includes * steam - *Nizam Sugar Factory Ltd.* v. *CST* - (1957) 8 STC 61 (AP HC) * Electrical energy - *CST* v. *MP Electricity Board* - (1970) 25 STC 188 (SC) * Animals and birds in captivity - *K J Abraham* v. *Asst. STO* - (1960) 11 STC 291 (Ker HC) * Goods include uprooted trees, second hand goods, rejected goods, worn out goods etc.

No tax on Immovable Property - Section 3(14) of General Clauses Act define that 'Immovable property' includes land, benefits arising out of land and things attached to the earth or permanently fastened to anything that is attached to the earth. However, as per Section 2(7) of Sale of Goods Act, goods include standing crop, grass and things attached to and forming part of the land, which is agreed to be severed before sale or under contract of sale.

Standing Trees - Standing trees are not 'goods' and not taxable. However, standing timber will be taxable under CST if timber is identified, contract is unconditional and timber is in deliverable state. In such case, it is 'movable property' and 'goods' hence can be taxed. - *State of Orissa* v. *Titaghur Paper Mills Co. Ltd.* – AIR 1985 SC 1293 = (1985) 60 STC 213 (SC).

Electricity – In case of electrical energy, generation or production coincides almost instantaneously with its consumption. Sale, supply and consumption takes place without any hiatus. - - Electricity is movable property though it is not tangible. It is 'goods'. – *State of Andhra Pradesh* v. *National Thermal Power Corporation* (NTPC) 2002 AIR SCW 1956 = (2002) 5 SCC 203 = 127 STC 280 (SC 5 member bench).

Plant & machinery assembled at site is not 'goods' - Plant and Machinery or structure assembled and erected at site cannot be treated as 'goods' for the purpose of levy of sales tax, if it is not marketable and movable.

Newspapers are not 'goods' for purpose of CST Act and State Act - Newspapers are really 'goods', but are specifically excluded in view of entry No. 92A of List I to Seventh Schedule to Constitution of India (Union List) where newspapers are specifically excluded from purview of tax on inter-State sales of goods. Entry 54 of List II (State List) authorises States to levy tax on sale of goods *other than newspapers* only. Hence, newspaper are not 'goods' for purpose of CST Act and State Vat Acts.

Stock, shares etc. not liable under CST - Share certificates, securities like debentures are not taxable under CST Act. Shares and securities have been specifically excluded from definition of goods u/s 2(d) of CST Act.

Money is not 'goods'.

Actionable claim is not 'goods' – Definition of 'goods' in CST Act specifically excludes 'actionable claim'. Definition of 'goods' in Sale of Goods Act also excludes actionable claim.

Lottery tickets – Lottery ticket is actionable claim. Actionable claim has been excluded from definition of 'goods'. Hence, lottery ticket is not goods – *Sunrise Associates* v. *Government of NCT of Delhi* (2006) 5 SCC 603 = 4 STT 105 = 145 STC 576 (SC 5 member Constitution Bench).

Trade mark – Trade mark is intangible goods. Transfer of right to use trade mark is deemed sale and consideration is taxable – *SPS Jayam & Co*. v. *Registrar, TNTST* (2004) 137 STC 117 (Mad HC DB).

Activation charges of SIM cards are not liable to sales tax – 'Goods' do not include electromagnetic waves or radio frequencies. Hence, activation charges of SIM cards are not liable to sales tax – *Escotel Mobile Communications* v. *State of Haryana* (2008) 12 VST 443 (P&H HC DB).

Software is 'goods'

In *Tata Consultancy Services* v. *State of Andhra Pradesh* (2004) 141 Taxman 132 = AIR 2005 SC 371 = 2004 AIR SCW 6583 = 271 ITR 401 = (2005) 1 SCC 308 = 137 STC 620 = 178 ELT 22 (SC 5 member Constitution bench), it has been held that canned software (i.e. computer software packages sold off the shelf) like Oracle, Lotus, Master-Hey etc. are 'goods'. The copyright in the program may remain with originator of programme, but the moment copies are made and marketed, they become 'goods'.

16.7 'Sale' under CST Act

Sale as normally understood involves transfer of complete property in goods for valuable consideration. There were many transactions which were escaping the sales tax net. Hence, concept of 'deemed sale' was introduced by introducing definition of 'sale or purchase of goods' in Constitution vide Article 366(29A) w.e.f. 2-3-1983 by 46th Amendment to Constitution.

The 'deemed sale' covered goods involved in works contract, leasing, hire purchase, sale of food articles and transfer among members of unincorporated association.

Subsequently, most of State Governments had amended definition of 'sale'. However, definition of 'sale' under CST Act was not amended till May 2002. Finally, definition of 'sale' u/s 2(g) of CST Act was amended in CST Act w.e.f. 11-5-2002 to incorporate 'deemed sale' in the definition of 'sale'.

Thus, w.e.f 11-5-2002, for purpose of levy of central sales tax, 'Sale' covers (a) Sale as understood in Sale of Goods Act (b) Deemed sale. Till 11-5-2002, there was no CST on inter state transactions of goods involved in works contract, leasing, transfer among members of unincorporated association or sale of food articles.

Section 2(g) - Sale with its grammatical variations and cognate expressions, means any *transfer of property* in goods by one person to another for cash or for deferred payment or for any other valuable consideration, and includes (i) Transfer other that by contract (compulsory transfer) (ii) Goods involved in Works contract (iii) Right to use goods (like leasing) (iv) Transfer among members of unincorporated association (v) Supply of food articles (vi) Hire purchase; but does not include a mortgage or hypothecation or a charge or pledge on goods (definition as amended w.e.f. 11-5-2002).

The first part of the definition is 'sale' as conventionally understood and inclusive part is 'deemed sale'.

Sale must be a complete sale - In *Tata Iron and Steel Co. (TISCO)* v. *S R Sarkar* - (1960) 11 STC 655 (SC) = AIR 1961 SC 65 = (1961) 1 SCR 379, it was held that a transaction of sale is subject to tax under CST on the completion of sale, and a mere contract of sale is not a 'sale' for purpose of levy of CST.

Transfer of 'Property' essential in 'sale'

There is no sale unless there is 'transfer of property'. 'Property' means a thing over which a person has a domain. This implies transfer of ownership. Mere 'agreement to sale' does not mean sale as there is no transfer of property. 'Property' is different from 'possession'. Property in goods can pass even before handing over possession. Conversely, transfer of possession does not ***necessarily*** mean that it is a transfer of property.

Charge/mortgage/hypothecation/pledge is not 'sale' - Definition of 'sale' u/s 2(g) specifically states that 'sale' shall not include a mortgage or hypothecation or a charge or pledge of goods.

Job Work/processing - Here, the owner sends the goods for some job work (like machining, cutting, heat treatment, welding etc.) or processing (like bleaching, painting etc.). Goods are returned to owner after such job work/processing. Property in goods remains with the person supplying material. Thus, this is contract for labour or work and not a contract of sale and there is no CST liability.

Material used by job worker may be held as taxable – Though there is no sales tax on job work, tax may be leviable on material used by job worker in execution of job work, as it will be goods involved in execution of works contract. See discussions under 'Works contract'.

Consignment/depot transfer/branch transfer - Goods are despatched to Consignment Agent/branch/depot by Principal. Goods remain property of the Principal. Agent sells goods *on behalf of Principal*. Consignment Agent collects sale proceeds and remits the same to Principal.

Free gift is not 'sale' - It is obvious that free gifts given by Company cannot be taxed as there is no 'consideration'.

Sale as defined in Constitution

Article 366(29A) of Constitution, as amended by Constitution (46th Amendment) Act, 1982, w.e.f. 2-2-1983 states as follows :

As per Article 366(29A) of Constitution, '*Tax on the sale or purchase of goods*' **includes -**

(*a*) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration

(*b*) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract

(*c*) a tax on the delivery of goods on hire-purchase or any system of payment by instalments

(*d*) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration

(*e*) a tax on supply of goods by any un-incorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration

(*f*) a tax on supply, by way of or as part of any service or in any manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration

And such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

This definition is an amended one which was amended w.e.f. 2-2-1983 by Constitution (46th Amendment) Act, 1982. This definition has been made wide to cover transactions of works contract, leasing, hire purchases and food served in hotels. As clarified in the definition itself, these transactions are 'deemed sales', i.e. these will be deemed as sales even if as per normal definition, these will not be 'sales'. Subsequent to this amendment, most of the State Governments have amended the State sales tax laws to impose tax on these transactions. However, CST Act was not amended for a long time. Finally, CST Act was amended w.e.f. 11-5-2002 to cover 'deemed sale'.

Works contract and deemed sale

'Goods involved in works contract' have been included in definition of 'sale' w.e.f. 11-5-2002.

Section 2(g)(ii) of CST Act states that 'sale' includes a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract.

Section 2(ja) of CST Act defines 'works contract' as follows – 'Works contract' means a contract for carrying out any work which includes assembling, construction, building, altering, manufacturing, processing, fabricating, erection, installation, fitting out, improvement, repair or commissioning of any movable or immovable property.

Definition of 'works contract' in Section 2(zt) of Haryana VAT Act is identical. Definitions in Section 2(zo) of Delhi VAT Act, Section 2(52) of Tamil Nadu VAT Act, Section 2(45) of AP Vat Act and Section 2(zu) of Punjab VAT Act. Definition in Section 2(57) of West Bengal VAT Act is elaborate, but more or less similar.

The definition in CST Act is clearly very wide and scope is further widened by making it an 'inclusive definition'. Thus, any contract for carrying out any 'work' will be a 'works contract'.

Distinction between contract of sale and a 'works contract'

Some contracts are for contracts for labour, work or service and not for sale of goods, though goods are used in executing the contract for labour, work or service e.g. when a contractor constructs a building, the buyer pays for cost of building which includes cost of building material, labour and other services offered by the Contractor. Property in building is passed on to buyer and there is no contract for supply

of building material as such.

An air-conditioner manufacturer may undertake a 'works contract' for designing, fitting and commissioning of air-conditioning equipment. This is contract for sale of labour and material and not contract of sale. Property in air-conditioning equipment passes as an incidental to the works contract. Here, there is no sale of 'goods'. It is a 'works contract' and not liable to CST – *State of Madras* v. *Voltas Ltd*. (1963) 14 STC 446 and 861 (Mad HC) – also indirectly approved in *Batliboi* v. *STO* (2000) 119 STC 583 (Guj HC DB).

Laying of pipeline is yet another example of works contract, where passing of property in the pipe is incidental to works contract.

16.8 Dealer under CST Act

Section 8(1) specifies that every dealer who in the course of inter State trade or commerce sells the goods shall be liable to pay tax under the Act. *Thus, liability is on the dealer who 'sells' the goods.* The word 'dealer' has been elaborately defined in Section 2(b) of CST Act.

Section 2(b) - "dealer" means any person who carries on (whether regularly or otherwise) the business of buying, selling, supplying or distribution of goods, directly or indirectly, for cash, or for deferred payment, or for valuable consideration, and includes –

(i) a local authority, a body corporate, a company, any cooperative society, club, firm, Hindu undivided family or other association of persons which carries on such business

(ii) a factor, broker, commission agent, *del credere agent*, or any other mercantile agent, by whatever name called, and whether the same description as hereinbefore mentioned or not, who carries on the business of buying, selling, supplying or distribution, goods belonging to any principal whether disclosed or not *and*

(iii) an auctioneer who carries on the business of selling or auctioning goods belonging to any principal, whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of principal.

There are two explanations to the definition of 'Dealer'. *Explanation 1* states that a mercantile agent, agent handling goods, agent for collection of payment and every branch or office in a State of a firm or Company which is outside the State is also a 'dealer'. *Explanation 2* states that 'Government' is also a dealer except in case of sale of old and discarded stores or waste.

Incidental and ancillary business is also taxable. Sale of scrap, waste etc. can be taxed. However, sale of business is not a 'business'.

Explanation 2 to Section 2(b) clarifies that Government, which, whether or not in the course of business; buys, sells, supplies or distributes; goods, directly or otherwise, for cash or for deferred payment or for commission, remuneration or other valuable consideration shall be a dealer.

The exception is sale, supply or distribution of un-serviceable or old stores or old materials or waste products or obsolete or discarded machinery or parts or accessories. This exception is made as all Government departments have to make such sale of old goods.

Definition of 'Dealer' specifies liability on any '*person*' who carries on '*business*'.

Business - Section 2(*aa*) of CST Act defines that 'business' includes (*i*) any trade, commerce or manufacture,

or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern *and* (*ii*) any transaction in connection with or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern.

Following points emerge from the definition of 'business' as defined u/s 2(aa):

- Profit motive is immaterial.
- Business normally implies something done on regular basis. However, since business includes '*Adventure*', occasional transactions may also be covered. Adventure implies some 'speculation'.
- Incidental or ancillary business is also covered e.g. sale of used car, sale of scrap, sale of old machinery, sale of old furniture etc. is taxable, though normally the dealer may not be in business of selling cars, furniture or machinery.

Main activity should be business

Definition of dealer as per Section 2(b) states 'dealer' means 'a person who carries on (whether regularly or otherwise) the business of buying, selling - - -'. Thus, this definition envisages that he should be 'carrying on business of buying, selling - - '. Hence, if main business is not buying and selling of goods, the person may not be held as 'dealer'.

16.9 Quantum of CST payable

CST has been reduced from 4% to 3% w.e.f. 1-4-2007. It is proposed to reduce CST rate by 1% every year and to make it Nil by 1-4-2010. Such reduction can be made by Central Government by issue of a notification under *proviso* to Section 8(1) of CST Act (as amended w.e.f. 1-4-2007). Thus, further reduction in CST will not be automatic, but will be only if the reduction in CST rate is notified by Central Government. However, it will not be necessary to amend CST Act for this purpose.

CST rate at a glance- The CST rates at a glance as applicable w.e.f. 1-4-2007 are as follows, in case of both declared goods and other goods –

Sales tax rate for sale within the State	CST rate in case of sale to registered Dealers (applicable to declared goods as well as other goods)	CST rate in case of sale to unregistered Dealers (applicable to declared goods as well as other goods)
Nil	Nil	Nil
1%	1%	1%
2%	2%	2%
3%	3%	3%
4%	3%	4%
8%	3%	8%
10%	3%	10%
12.5%	3%	12.5%
20%	3%	20%

Note – Usually, State Vat rates of 2%, 3%, 8% and 10% do not exist. However, these rates are given only to explain the principle, particularly because UP and Uttaranchal have not introduced VAT.

Calculation of Sales Turnover

Central Sales tax is payable on 'turnover of a period'. Rate is determined as per Section 8, while 'turnover' is determined as per Section 2(*j*).

'Turnover' (often called 'taxable turnover') is defined under Section 2(*j*) as aggregate of the sale prices received and receivable by the dealer in respect of sales of any goods in the course of inter-State trade or commerce made during any *prescribed period* and determined in accordance with provisions of Central Sales Tax Act and Rules. Section 8A(1) states that in determining turnover, *deduction of sales tax should be made from the aggregate of sale price.* **Prescribed period** is the period in which sales tax return has to be filed as per local sales tax law. Such period is usually quarterly - *it is monthly also in some States*.

Total of 'sale price' of all Inter-State sales effected during the prescribed period (monthly, quarterly as the case may be) *less* **the Central Sales Tax payable is the 'turnover' (**taxable turnover**) of dealer** *for that period***.**

The 'aggregate sale price' i.e. total sale price for the prescribed period, is assumed as inclusive of Central Sales Tax and backward calculation is made. Thus, if aggregate of sale price is 'S' and rate of tax is 'R'; 'turnover' and 'tax payable' will be calculated as follows :

$$Turnover = \frac{100 \times S}{100 \times R}$$

$$Tax\ Payable = \frac{S \times R}{100 \times R}$$

Question : 'Aggregate Sale Price' during July - Sept. 2007 was Rs. 10,300 in Inter State sale from Haryana. If the goods are sold within the State of Haryana, sales tax rate is 12.5%. Buyer from Delhi issued declaration in form C. What is the turnover and tax payable ?

Answer :

Since buyer has issued C form declaration, sales tax rate applicable is 3%.

$$Turnover = \frac{100 \times 10,300}{100+3}$$

$$Turnover = \frac{100 \times 10,300}{103}$$

$$Turnover = 10,000$$

$$Tax\ payable = \frac{10,300 \times 3}{100+3}$$

$$Tax\ payable = \frac{30,900}{103}$$

$$Tax\ payable = \text{Rs. } 300$$

Thus, Taxable Turnover is Rs. 10,000 and tax payable is Rs. 300.

Prescribed period under CST - The 'prescribed period' is the period in respect of which a dealer is liable to submit returns under the General Sales Tax law of the appropriate State e.g. if the dealer is registered in West Bengal and if Sales Tax Law of West Bengal (local sales tax law) prescribes that return of tax should

be submitted quarterly i.e. every three months, the turnover is 'aggregate sale price' of that three-month period less tax payable.

Service tax and VAT (sales tax) are mutually exclusive, Vat cannot be imposed on value of service

In *Imagic Creative Pvt. Ltd* v. *Commissioner of Commercial Taxes* (2008) 12 STT 392 = 12 VST 371 = 9 STR 337 (SC), it has been held that service tax and Vat (sales tax) are mutually exclusive. In case of a composite contract, Vat cannot be imposed on portion relating to value of service.

In this case, appellant is an advertising agency. It creates original concept and design advertising material for their clients and design brochures, annual reports etc. In a typical case, the appellant charged the following separately (a) designing and artwork Charges (Conceptualising, Design and Production of Computer Artwork) (b) Preparing positives for printing ***and*** (c) offset printing on Paper. The order of customer also gave similar breakup.

Appellant charged service tax on (a) above and resale tax on (b) and (c) above. The sales tax assessing officer accepted the returns and completed assessment. However, later, the applicant was raided and criminal proceedings were initiated. Application was filed before 'appropriate authority' set up under State Sales Tax Act, for classification and advance rulings The 'appropriate authority' held that there is comprehensive contract or supply of printed material developed by the company. Giving breakup in invoice is making indivisible contract into a divisible contract. Hence, entire sale value including creation of concept etc. is liable to sales tax. Appellant's appeal was dismissed by High Court. The matter went to Supreme Court.

After reviewing the entire case law, Supreme Court observed that a distinction must be borne in mind between an indivisible contract and a composite contract. If in a contract, an element to provide service is contained, the purport and object for which the Constitution had to be amended and clause 29A had to be inserted in Article 366, must be kept in mind.

If it is held that Vat can be imposed on entire value of composite contract, Central Government will be deprived of obtaining any service tax. If it is held as indivisible contract, it is possible to arrive at a conclusion that no tax at all would be payable as the service has been held as an indivisible one.

Finally, Supreme Court (in effect) held the contract is composite contract and Vat (sales tax) cannot be imposed on value of services.

Aggregate Sale price

Gross Turnover is aggregate sale price for a prescribed period. - - Section 2(*h*) of CST Act states that, 'Sale Price' means the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof, other than cost of freight or delivery or the cost of installation, in cases where such cost is separately charged.

Proviso to Section 2(h) (inserted w.e.f. 13 May 2005) provides that in case of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract, the 'sale price' of such goods shall be determined in the prescribed manner by making such deductions from the total consideration for the works contract as may be prescribed and such price shall be deemed to be the sale price for the purposes of Section 2(h).

Inclusions in Sale price

Any sum charged for by dealer at or before delivery – 'Sale Price' includes any sum charged for anything done by the dealer in respect of goods at the time or before the delivery of goods. Thus, 'sale price' will include – (a) Weighment charges charged for weighing of goods at the time of delivery (b) Design charges in respect of goods.

Central Sales Tax – CST is includable, whether or not shown separately in invoice. [Then back calculations are made].

Taxes and duties on goods sold – Sale Price is inclusive of taxes and duties payable on goods sold, except in cases where the duty/tax is statutorily recoverable from buyer.

Packing material and packing charges - Sales tax is leviable on packing material as well as packing charges (i.e. labour charges for packing goods). Sales tax is leviable on packing charges, even if shown separately - *CST* v. *Rai Bharat Das* - (1988) 71 STC 277 (SC) = AIR 1989 SC 315 = (1989) 1 SCC 143.

Cost of freight - Freight is includable only if (a) Freight is not shown separately in invoice *or* (b) Contract is for sale FOR destination and property in goods is transferred only at destination.

Exclusions from sale price

Cash Discount - The cash discount for making timely payment is not includable, as is clarified in Section 2(h) itself. In case of State law also, in *Mohan Breweries* v. *CTO* (2005) 139 STC 477 (Mad HC DB), it was held that cash or other discount cannot be included in the turnover for levy of tax.

Trade discount - Trade discount is deduction from list price to wholesalers/Dealers cannot be considered for calculation of CST. Such discounts may be *given periodically* at end of period - e.g. end of month or end of quarter - there is no Rule that discount must be given at the time of sale only. SC in *Dy. CST* v. *Advani Oerlikons (P.) Ltd*. - (1980) 1 SCR 931 = 1980(1) SCC 360 = 1981 (8) ELT 801A (SC) = (1980) 45 STC 32 (SC), have held that net amount after deduction of trade discount is the sale price.

Goods returned by buyer - Section 8A(*b*) provides that if goods are returned by buyer within six months, its sale price will be deducted from 'aggregate sale price', if satisfactory evidence is produced before sales tax authority in respect of the same. .

Supreme Court in *Dy CST* v. *Motor Industries Co.* = 1983(2) SCC 108 = (1983) 53 STC 48 (SC) has held that the claim of deduction in respect of such returned goods is allowable in the assessment year relating to financial year in which sale of goods had taken place. If assessment is completed, adjustment or refund can be demanded by claiming in time.

Goods Rejected by buyer - Calcutta High Court, in case of *Metal Alloy Co. (P.) Ltd.* v. *CTO, Bhavanipur Charge Calcutta,* (1977) 39 STC 404 (Cal HC), has held that the period of six months is not applicable in respect of rejected goods, as in respect of rejected goods, there is no 'completed sale' at all within the meaning of CST Act or Sale of Goods Act as the purchasing party has not accepted the goods. Return of goods and rejection of goods stand on different footings.

Question : A dealer effected following inter-state sales during the quarter July 07 - Sept. 07. (*a*) Invoice No. 25 dated 5th July, 07 : Rs. 1,12,400 (tax not shown separately) (*b*) Invoice No. 26 dt 13th August 07 : Rs. 50,000 plus tax @ 4% i.e. 2,000, Total : Rs. 52,000. (*c*) Invoice No. 27 dt 18th Sept. 07 : Rs. 20,000 plus tax @ 4% Rs. 800 Total Rs. 20,800 (*d*) Invoice No. 28 dt 27th Sept. 07 : Rs. 31,200. Tax not shown separately. Goods

returned within 6 months were Rs. 8,400 (inclusive of taxes). Sales tax rate is 4% if goods are sold within the State. What is the turnover and what is tax payable, if the buyers did not issue C form?

Answer : Aggregate sale price = 1,12,400 + 52,000 + 20,800 + 31,200 - 8,400 = 2,08,000. This is inclusive of tax @ 4%., since buyers did not issue C form.

$$\textit{Turnover} = \frac{100 \times 2,08,000}{100+4}$$

$$\textit{Turnover} = \frac{2,08,00,000}{100+4}$$

$$\textit{Turnover} = 2,00,000$$

$$\textit{Tax payable} = \frac{100+4}{2,08,00,000}$$

$$\textit{Tax payable} = \frac{8,32,000}{104}$$

$$\textit{Tax payable} = 104$$

$$\textit{or, Tax Payable} = 8,000$$

$$\textit{i.e., Tax Payable} = 4\% \text{ of Rs. } 2,00,000 \text{ i.e. Rs. } 8,000$$

Instead of remembering the formula, the example can be solved by using algebra as follows :
Assume that turnover is equal to 'T'.

$$\text{Tax Payable} = 0.04 \times T$$

$$\text{Aggregate Sale Price} = T + 0.04 \times T = 1.04 \times T$$

$$\text{Now, } 1.04 \times T = 2,08,000$$

$$\text{Hence, } T = 2,00,000$$

$$\text{Tax Payable} = 4\% \text{ of Rs. } 2,00,000 \text{ i.e., Rs. } 8,000$$

Thus, 'Turnover' is 2,00,000 and tax payable is Rs. 8,000 for the quarter July-September, 2007.

Question : Mr. X reported sales turnover of Rs. 36,20,000. This includes the following: (i) Excise duty Rs. 3,00,000; and (ii) Deposit for returnable containers and packages Rs. 5,00,000. Sales tax was not included separately in the sales invoice. Compute tax liability under the CST Act, assuming the rate of tax @ 3%.

Answer : Sales tax is not payable on deposit for returnable containers, but is payable on excise duty. Hence, aggregate sale price for purpose of CST is Rs. 31,20,000. This is inclusive of CST @ 3%.

Hence, turnover = Rs. (31,20,000 x 100)/103 = Rs. 30,29,126.21

CST @ 3% of Rs. 30,29,126.21 = Rs. 90,873.79

Question : Inter-State sales of 'Deepak Brothers, Bhopal, MP' was Rs. 6 lakhs during April 07-March 08 of his product 'X'. The sales are inclusive of sales tax charged in Invoice at appropriate rates. The goods

were liable to tax @ 4% if sold within State of MP. Out of the goods sold, goods of Rs. 50,000 were returned. These were sold by Deepak Brothers in February 08 and returned by buyer in May 08 as they were excess of his requirements. Some goods of Rs. 30,000, despatched in December 07 were rejected by buyer and sent back in November 08. Find the 'taxable turnover' if 'C' form was received from all buyers

Answer : Goods returned are allowed as deduction if these are returned within 6 months, even if they are returned after close of financial year. In case of goods rejected by buyer, the condition of return of goods within six months is not applicable as per decision of Calcutta High Court in *Bhavanipur Charge, Calcutta*. Thus, 'aggregate sale price' for 07-08 is Rs. 5,20,000. This price is inclusive of CST of 3%. Hence, 'taxable turnover' is Rs. 5,04,854.37 and CST payable @ 3% is Rs. 15,145.63 [as per the formula explained above].

Question : Gross Inter-State sales of ZX Co. Ltd., Patna, Bihar; were Rs. 18,00,000 during 07-08 (April 07-March 08). CST was not shown separately in Invoice. Other information is as follows :

(*a*) The sales are of product 'P'. If the product is sold within State of Bihar, sales tax rate is 8%.

(*b*) Sale of Rs. 8 lakhs are inclusive of erection expenses of Rs. 1,00,000, excise duty of Rs. 76,000 and packing charges of Rs. 25,000. The sale price is also inclusive of trade discount of Rs. 30,000, which has been later given by issuing a Credit Note. Buyers of these goods have issued form 'C' for these purchases.

(*c*) Balance sale of Rs. 10 lakhs are inclusive of excise duty of Rs. 95,000 and outward freight of Rs. 21,000. The freight was charged separately in Invoice. Buyers of these goods have not issued any declaration under Central Sales Tax Act. Out of these sales, goods of Rs. 2 lakhs were returned by customers. The goods were despatched in February 08 and returned in June 08, i.e. after end of the accounting year.

Find the turnover and CST payable.

Answer : Since rate of tax is different for sale to registered Dealers and un-registered dealers, we have to calculate 'aggregate sale price' separately.

(*i*) Where C form has been issued (i.e. buyer is a registered dealer and is eligible to buyer goods as per his Central Sales Tax Registration Certificate), the sales tax payable is 3%. Out of sales of Rs. 8 lakhs, deduction of erection charges of Rs. 1 lakh and trade discount of Rs. 30,000 is available. Thus, 'Aggregate Sale Price' is Rs. 6,70,000. Sales tax is payable on excise duty and packing charges and hence no deduction is allowed on these accounts.

(*ii*) Where no C form is received (i.e. buyer is unregistered dealer), CST rate is 8%. Out of sale of Rs. 10 lakhs, deduction of freight of Rs. 21,000 is available. Deduction of goods returned of Rs. 2 lakhs is also available as the goods were returned within 6 months, even if returned after close of financial year. Thus, 'Aggregate Sale Price' will be Rs. 7,79,000.

Thus, turnover and CST payable is as follows :

A	B	C	D	E
Product	*Aggregate Sale price Rs.*	*Sales tax Rate %*	*Turnover Rs.*	*CST payable Rs.*
P	6,70,000	3%	6,50,485.44	19,514.56
P	7,79,000	8%	7,21,296.30	57,703.70
	Total		13,71,781.74	77,218.26

16.10 Goods eligible for registration by Dealer

A dealer can purchase some goods at concessional rate.

All goods purchased by 'Registered Dealer' are not eligible for concessional rate.

Only those goods for which a dealer *is eligible* and which are *contained in his Registration Certificate* are eligible for concessional rate.

Section 8(3) of CST Act indicates the goods which a registered dealer can obtain at concessional rate. Only those items can be incorporated in Registration certificate issued to him.

As per Section 8(3), goods (i) intended for resale, (ii) for use in manufacture or processing for sale (iii) for use in telecommunications network (iv) for use in mining (v) for use in power generation/distribution, or (vi) containers and packing materials are only eligible for concessional rate.

Meaning of 'for use' - Section 8(3)(b) states that goods specified intended, for resale' or 'for use, by him in manufacture or processing goods for sale or telecommunication network on in mining or in generation or distribution of electricity or any other form of power. The words used are '*for use*' and not 'used'.

Tax at full rate payable if wrong declaration given - The tax at full rate will be payable on material in respect of which the declaration in form 'C' was wrongly given, and not on cost of finished product manufactured out of such material. – *Hira Cement* v. *State of Orissa* (1998) 108 STC 619 (Ori HC DB).

16.11 Exemptions from CST

Exclusions from CST - Following transactions have been excluded from CST.

(a) Section 6(2) provides that no tax shall be payable in respect of subsequent sales during movement of goods.

(b) Section 6(3) provides that no tax is leviable on supplies to foreign diplomatic missions, UN, international organisations etc.

(c) Section 8(1) provides for lower/nil sales tax rate when sale is to registered dealer/Government.

(d) proviso to Section 6(1) provides that no tax shall be payable when sale is penultimate to export as defined u/s 5(3).

(e) Section 8(6) states that no tax is payable if sale is to SEZ developer and SEZ unit.

(f) sale during export/import is not taxable, as charging Section 6(1) levies tax only on Inter-State sale.

Exemption from CST – Section 8(5) empowers State Government to grant partial or full exemption by issue of notification.

Proviso to Section 8(1) of CST Act empowers Central Government to reduce rate of CST.

Subsequent Sales by transfer of documents

CST Act envisages a single point levy at the first point of sale. Subsequent sales during movement of goods are exempt to avoid multi-point levy of tax (*Indeed this is against Vat principles*).

Conditions for exemption - Section 6(2) of CST Act (amended w.e.f. 1-4-2007) provides that notwithstanding anything contained in Section 6(1) or 6(1A), where a sale of any goods in the course of inter-State trade or commerce has either occasioned the movement of such goods from one State to another or has been

effected by transfer of documents of title during movement from one State to another, any subsequent sale during such movement effected by transfer of documents of title to such goods to registered dealer is exempt from tax. The condition is that certificate in prescribed form has to be obtained from seller who is a Registered dealer.

Transfer of documents of title - Documents of title should be transferred to subsequent buyer. Transfer is usually made by endorsement, but really, such endorsement is for purpose of convenience and easy proof only.

Certificate required - Dealer selling the goods has to issue a certificate in prescribed form to the purchasing dealer (E-I/E-II as applicable). Subsequent purchaser also has to issue declaration in prescribed form (C form). These certificates have to be produced to sales tax assessing authority, within prescribed time. In absence of such certificate and declaration, the subsequent sale will not be treated as exempt [*proviso to Section 6(2)*]. Declaration in C form is not essential if sale of such goods is generally exempt from tax inside the State or is generally subject to tax at less than 3%. However, in such cases, other satisfactory evidence has to be produced that the sale is to registered dealer whose certificate of registration entitles him to procure the goods in question [second proviso to Section 6(2)].

The certificates are E-I or E-II and declaration is in C form. These are to be issued by buyer on quarterly basis.

Lower rate if local sales tax rate is lower than 3%

As per Section 8(1) (as amended w.e.f. 1-4-2007), CST payable in respect of sale to registered dealer is 3%. However, if local sales tax rate is less than 3%, same (i.e. lower) rate will apply in respect of sale to registered dealer. This provision is applicable even in respect of sale to unregistered dealer, as per Section 8(2) of CST Act, as amended w.e.f. 1-4-2007.

If local sales tax rate is exempt or chargeable at rate lower than 3%, subject to certain conditions which cannot be complied with by the seller/buyer, the exemption/lower rate will not apply.

Exemption from CST if sale to SEZ unit or SEZ developer

Sub-Sections 8(6), 8(7) and 8(8) have been incorporated w.e.f. 11th May 2002 in CST Act to provide that inter state sale made to a unit in SEZ (Special Economic Zone) will be exempt from CST. Section 8(6) was amended w.e.f. 10-9-2004, to extend this exemption to developer of Special Economic Zones.

The SEZ unit can obtain goods for purpose of manufacture, trading, production, processing, assembling, repairing, reconditioning, re-engineering, packaging or for use as or packing material or packing accessories.

The developer of Special Economic Zone can obtain goods for development, setting up, operation and maintenance of the zone.

The registered dealer in SEZ (developer of SEZ or SEZ unit as the case may be) should have been authorised to establish such unit in SEZ by authority specified by Central Government [Section 8(6)].

The goods which the developer of SEZ or unit in SEZ can obtain without CST shall be specified in the sales tax registration certificate of SEZ unit [Section 8(7)].

The purchasing dealer has to submit a declaration in prescribed form. Consequential amendment is made by inserting Section 13(1)(aa) to authorise Central Government to make rules to provide form and manner of furnishing declaration u/s 8(8).

SEZ unit has to submit 'I' form - The purchasing dealer has to submit a declaration in prescribed form. Consequential amendment is made by inserting Section 13(1)(aa) to authorise Central Government to make rules to provide form and manner of furnishing declaration u/s 8(8).

Original I form should be submitted to the Assessing Authority. Hence, copy marked as 'duplicate' may not be held as acceptable.

In such case, supplies to unit in SEZ or to developer of SEZ will not be liable to CST.

Exemption to supplies to foreign missions/UN etc.

No tax in inter-state sale shall be payable in case of sale to any official, personnel, consular or diplomatic agent of – (i) any foreign diplomatic mission or consulate in India or (ii) the UN or any other similar international body; entitled to privileges under any convention or agreement to which India is a party, or under any law for the time being in force. The sale will be exempt if such official, personnel, consular or diplomatic agent has purchased the goods for himself or for purposes of the mission, consulate, United Nations or similar international body. [Section 6(3) inserted in CST Act].

The exemption will be available only if such official, personnel, consular or diplomatic agent issues a certificate in prescribed manner and that certificate is produced to assessing authority [Section 6(4) of CST Act inserted w.e.f. 13 May 2005].

The certificate is to be given in form J and shall be furnished upto time of assessment by the first assessing authority [Rule 12(11A) of CST (Registration and Turnover), Rules, 1957].

16.12 Sale in course of Export

Article 286(1)(b) of Constitution of India prohibits imposition of tax by State Government on sale or purchase of goods when such sale or purchase takes place in the tax on import and export. Since charging Section 6(1) of CST Act levies tax only on Inter-State sale, naturally, there is no CST on sale in the course of export/import. [Interestingly, prohibition on taxing sale in the course of export/import is only on State Government and not on Union Government].

Article 286(2) authorises Parliament to formulate principles for determining when sale is in the course of import/export. Under these powers, Section 5 of CST Act has been enacted. Principle is that Export sales have to be tax free so that Indian exports become competitive in world market. *We should export goods and services, not taxes.* Similarly, imports are subject to customs duty and hence these should not be subject to sales tax.

'Sale in the course of export' includes not only direct exports, but also (a) Sale by transfer of documents after goods cross customs frontier (b) Penultimate sale for export (c) Export with help of agent.

Thus, if a sale occasions export, i.e. if export is the result of sale, it is in the course of export. Even indirect sale could be 'sale in the course of export'.

Section 5(1) of CST Act - A sale or purchase of goods is deemed to be in course of export of the goods out of the territory of India, only if (*a*) the sale or purchase either occasions such export or (*b*) is effected by a transfer of documents of title to goods after the goods have crossed the customs frontiers of India.

Section 5(3) states that notwithstanding provisions of Section 5(1), last sale or purchase of goods preceding the sale or purchase occasioning the export of those goods out of territory of India shall also be deemed to

be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the arrangement or order for or in relation to such export. This is termed as 'penultimate sale'.

Sale in course of export by transfer of documents

It is possible to have sale by transfer of documents *after* goods cross the Customs frontier, i.e. goods are cleared by Customs authorities and are handed over to carrier for loading in vessel/aircraft.

Meaning of 'Crossing Customs Frontiers of India'

Section 2(ab) of CST Act states that 'Crossing Customs Frontiers of India' means crossing the limits of the area of a customs station in which imported goods or export goods (i.e. Goods which are to be exported) are ordinarily kept before clearance by customs authorities.

Explanation to this clause states that for purpose of this clause, 'customs station' and 'customs authorities' have same meaning as per Customs Act.

Penultimate sale for export

Export is a specialised business and many small units are unable to export directly. Export is often effected through specialised agencies like Export Houses etc., termed as 'Merchant Exporters' under Foreign Trade Policy. [Manufacturers who export the goods themselves are termed as 'Manufacturer Exporters'].

Such indirect exports also need exemption from taxes to make the products competitive. Hence, such penultimate sale, i.e. sale preceding the sale occasioning export is also deemed to be in the course of export under Section 5(3) of CST Act and is exempt from tax.

Exemption to penultimate sale is subject to the condition that the penultimate sale (*i.e. last but one sale*) is

(a) for purpose of complying with agreement or order in relation to export, *and*

(b) such sale is made *after* the agreement or order in relation to export, and

(c) same goods which are sold in penultimate sale should be exported.

In other words, the final exporter should be in possession of export order from foreign buyer and should take delivery of goods from the supplier making penultimate sale solely for execution of such export order and export the *same* goods.

Certificate in form H

Sale in the course of export is exempt from CST. As per Section 5(3) of CST Act, penultimate sale is also deemed to be in course of export and is exempt from CST.

Dealer actually exporting the goods has proof of export like customs documents, bank certificate, airway bill/bill of lading, shipping bill etc. However, the penultimate seller does not have any direct evidence to prove that his sale is exempt from tax. In such cases, the actual exporter has to issue a certificate to the penultimate seller in form H. The blank 'H' forms are to be obtained from sales tax authority by the final exporter.

The certificate is to be given in form H and shall be furnished upto time of assessment by the first assessing authority [Rule 12(10)(a) of CST (Registration and Turnover), Rules, 1957 amended w.e.f. 14-7-2005]. Thus, certificate produced before Appellate Authority may not be held as acceptable.

Original form should be submitted to the Assessing Authority. Hence, duplicate copy may not be held as acceptable.

Form I for SEZ – in case of SEZ unit and SEZ developer, the certificate should be in form I.

16.13 Sale in the course of Import

As per Article 286(1) of Constitution of India, sales tax cannot be levied by State Government in respect of sale in the course of import.

A sale or purchase of goods is deemed to be in course of import of the goods into the territory of India, only if (*a*) the sale or purchase occasions such import *or* (*b*) is effected by a transfer of documents of title to goods *before* the goods have crossed the customs frontiers of India [Section 5(2) of CST Act].

Sale in the course of imports could be (*a*) import and sale through agent when the sale or purchase occasions such import (*b*) import by transfer of documents.

Sale by Agents in India

It is common to import goods through agent. Some illustrations will make the provision clear. M/s K. G. Khosla & Co. entered into contract for sale with DGS & D, New Delhi (A Central Government department) for supply of axle bodies. These were to be manufactured by principal of K. G. Khosla & Co. in Belgium. Goods were to be inspected by representative of DGS & D in Belgium, but DGS & D was entitled to reject the same on receipt in India if goods were found not as per specifications. Goods were cleared by Khosla & Co. from port and were despatched by railway to Government departments.

It was held that Khosla & Co. were agents of foreign manufacturer and sale by Khosla & Co. to Government departments was in the course of imports. If two sales are integrated or inter-linked so as to form one transaction, they are 'sale in course of imports' – *K. G. Khosla & Co.* v. *Dy. CCT* - (1966) 17 STC 473 = AIR 1966 SC 1216.

Privity of contract between the ultimate buyer and exporter necessary - If the contract between foreign supplier and importer on one hand and importer and Indian buyer on the other hand are independent of each other, the sale within India cannot be termed as 'in the course of imports'.

Practical illustration

Question : Calculate the CST payable from the following data - (1) Invoice No.1011 dated 01.04.2001 for Rs. 1,78,967 inclusive of CST @ 4% (2) Invoice No.1012 dated 02.04.2001 for Rs. 1,87,697 exclusive of CST @ 4% (3) Invoice No.1013 dated 03.04.2001 for Rs. 1,75,000 inclusive of local Sales Tax. @ 10% (4) Invoice No.1014 dated 04.04.2001 for Rs. 2,50,000 exclusive of local Sales Tax @ 8% (5) 50% of the goods sold on 01.04.2001 on inter-state trade was rejected and returned on 31.03.2002 (6) 20% of the goods sold on 04.04.2001 on local sale was returned on 30.06.2001 (7) 30% of the goods sold on 02.04.2001 on inter-state trade returned on 02.06.2001 (8) 10% of goods sold on 03.04.2001 on local sale was rejected on 03.10.2001 (9) Goods of Rs. 1,50,000 was stock transferred from Bangalore to Indore on 05.04.2001 excludes CST elements of 4% (10) Export of goods worth 10 million Yens to Japan on 06.04.2001 of which 50% were rejected and returned on 01.11.2002 (1 Yen = Re. 0.35) (11) Export through Canalising Agency for value of 100 thousands Dollars (Export order with Canalising Agency) (1dollar = Rs. 48) (12) Purchased goods for Rs. 3,00,000 from the market on 09.01.2001 and exported to Singapore on 14.01.01 to the Agent for further sale (The goods attracted local sales tax of 10%). - - Give reasons for inclusion/non-inclusion of the above.

Answer - Calculation of CST will be as follows –

Notes: (1) Since CST payable is required to be calculated, local sales as given at Sr. Nos. 3, 4, 6 and 8 are not considered. (2) Any rejections are excludable without restriction that these must be returned within six months. (3) Direct exports and export through canalising agency are exempted from CST. Hence, sales given in Sr Nos. 10, 11 and 12 are ignored. (4) No tax is payable on stock transfer and hence transfer as shown at Sr No. 9 is not taxable.

Thus, we have to consider only Sr. Nos. 1, 2, 5 and 7 for calculation of CST.

Invoice No. and Date	Turnover (Rs.)	CST (Rs.)	Aggregate Sale Price
1011 dt 01.04.01	1,72,083.65	6,883.35	1,78,967.00
1012 dt 02.04.01	1,87,697.00	7,507.88	1,95,204.88
Total	3,59,780.65	14,391.23	3,74,171.88
Less -			
(a) Rejected & returned goods sold on 01.04.01	86,041.83	3,441.68	89,483.50
(b) Returned goods sold on 02.04.01	56,309.10	2,252.36	58,561.46
Net Amounts	2,17,429.72	8,697.20	2,26,126.92

Hence, total CST payable Rs. 8,697.20.

16.14 Goods of special importance

Article 286(3)(a) of Constitution of India authorises Parliament to declare some goods as of 'special importance' and to impose restrictions and conditions in regard to power of States in regard to levy, rates and other incidence of tax on such goods. Parliament can restrict powers of State Government to tax such 'declared goods'. Section 2(c) of CST Act defines 'Declared Goods' as those declared under Section 14 of CST Act as 'goods of special importance in Inter State Trade or commerce. Section 14 of CST Act gives a list of such goods and Section 15 specifies restrictions on power of States to tax such goods.

Section 2(c) of CST Act defines 'Declared Goods' as those declared under Section 14 of CST Act as 'goods of special importance in Inter State Trade or commerce'. Section 14 of CST Act gives a list of such goods and Section 15 specifies restrictions on power of States to tax such goods.

Section 14 of CST Act gives list of 'goods of special importance' called 'declared goods'. Important among them are :

- Cereals i.e. paddy, rice, wheat, bajra, jowar, barley, maize etc.
- Coal and coke in all forms *excluding* charcoal
- Cotton in unmanufactured form but not cotton waste
- Cotton fabrics, cotton yarn
- Crude oil
- Hides and skins
- Iron and Steel i.e. pig iron, sponge iron, iron scrap, steel ingots, billets, steel bars, steel structurals, sheets, plates, discs, rings, tool steel, tubes, tin plates, steel wheels, wire rods; defectives of above etc.

- Jute
- Oil-seeds i.e. groundnut, til, cotton seed, linseed, castor, coconut, sunflower, mahua, kokum, sal etc.
- Pulses i.e. gram, tur, moong, masur, urad etc.
- Man-made fabrics - fabrics of man-made filament yarn i.e. artificial textile materials, polyester filament yarn, staple fibres, polyester staple fibre, tyre cord fabric, impregnated textile fabrics etc.
- Sugar and Khandsari Sugar
- Woven fabrics of wool
- Aviation Turbine Fuel sold to an aircraft with a maximum take-off mass of less than 40,000 kilograms operated by scheduled airlines i.e. airlines permitted by Central Government to operate any scheduled air transport service (entry as substituted w.e.f. 11-5-2007 by Finance Act, 2007. Earlier, the entry read as follows - Aviation Turbine Fuel sold to a turbo-prop aircraft)
- LPG (Liquid Petroleum Gas) for domestic use (inserted w.e.f. 18-4-2006 to maintain tax rates at reasonable level).

Un-manufactured tobacco, cigars, cigarettes, biris, chewing tobacco, snuff etc. have been omitted from the list w.e.f. 1-4-2007. This will enable State governments to impose Vat/sales tax on these products.

Tax on declared goods not to exceed 4% - Tax on declared goods within a State cannot exceed 4%. [Section 15(a)].

As per provision in Section 15(1) upto 11-5-2002, tax on declared goods could be imposed only at one stage. Now, this restriction has been removed w.e.f. 11th May 2002, since such restriction was against principles of VAT.

Reimbursement of local tax if declared goods sold Inter-State - If any declared goods, on which Intra-State sales tax (i.e. State sales tax) is paid; is sold in Inter-State sale; then the tax levied on sale within the State should be reimbursed to the person making such Inter-State sale [Section 15(b)].

However, (*a*) the Inter-State sale of goods must be in *same form*. (*b*) If Inter-State sale of the goods are exempt from tax, refund of tax paid on Intra-State sale is not available. (*c*) The word used is 'reimbursement'. Thus, the tax on local sale must have been paid.

Sales Tax rates applicable for sale of declared goods

State Governments cannot charge sales tax for sale within the State at the rate which is more than 4%.

The position w.e.f. 1-4-2007 is as follows - If sale of declared goods is made to registered dealer, CST rate will be local sales tax rate or 3%, whichever is lower. If inter-state sale is made to unregistered dealer, CST rate will be equal to Vat/sales tax rate as applicable within the State.

16.15 Procedures under CST Act

Central Sales Tax Act is a peculiar Act - though the tax is levied as Central Sales Tax, it is administered by respective State Governments.

Procedures for CST Act are covered as follows :

- Rules framed by Central Government

- Rules framed by State Governments under CST Act
- Rules as prescribed in State Sales Tax Laws of each State.

CST Act and Rules framed by Central Government make provisions for very few procedures. In respect of other procedures and provisions, provisions as applicable in the State in respect of the General Sales Tax Law of the State are also applicable in respect of Central Sales Tax in respect of Dealers registered in that State. State Governments are also authorised to frame rules under CST Act.

Registration under CST Act

CST Act makes provisions for registration of dealer. Registration brings many advantages e.g. the dealer can issue 'C' form and purchase goods at concessional rate.

Section 2(f) states that 'registered dealer' means a dealer who is registered under Section 7 of CST Act.

As per Section 7(1), every dealer liable to pay Central Sales Tax has to register himself with sales tax authority. As per Section 6(1) of CST Act, every dealer *effecting* sale in the course of Inter State trade or commerce is liable to pay CST. Thus, only those Dealers who 'effect' inter state sales are required to register under CST Act. 'Effect' means 'bring about, accomplish, cause to exist or occur' [Concise Oxford Dictionary 1994 edition]. Thus, intermediaries like agents, transporters etc. who only facilitate sales are not required to be registered, as they do not 'effect' sales.

Central Government has authorised State Governments to prescribe State Sales Tax authorities authorised for the purpose of registration. Thus, registration under CST Act is done by State Sales Tax authorities who are authorised for the purpose.

Application for registration should be made in prescribed form 'A' as per CST (Registration and Turnover) Rules; within 30 days from the date when dealer becomes liable to CST. Application fee of Rs. 25 is payable (*by way of court fee stamps*).

Security from dealer under CST Act - As per Section 7(2A) of CST Act, the Registering authority can ask for proper security from the applicant for (*a*) realisation of taxes due *and* (*b*) proper custody and use of forms (like C, E-I/E-II, F and H) which are supplied by Sales Tax authorities for use by the dealer [Section 7(2A)]. Additional security can also be demanded from a dealer who is already registered [Section 7(3A)].

Registration certificate not transferable - Certificate of registration is not transferable. In case of sale of business, new buyer has to apply for fresh registration. However, in case of retirement or death or addition of partner, only amendment to Registration Certificate is necessary.

Effective date of Registration - Registration is effective from the date on which application for registration is made, even if registration is granted later.

All items of purchase and sale must be included in Registration - The 'Registration certificate' is indeed very important. As per Section 10(c), *false representation* when purchasing any goods that the class of goods are covered by the registration certificate, is an offence. As per Section 10(a), furnishing a false certificate is an offence.

Thus, while issuing 'C' form or other forms under the Act, it must be ensured that goods are covered in the Registration Certificate. This is particularly so because there is no provision to amend the Registration Certificate with retrospective effect.

Cancellation of CST Registration - Registration can be cancelled either on request of dealer or *suo motu* by sales tax authorities.

Forms and declarations under CST

Some forms have been prescribed under CST Act. In some cased, the dealer has to issue declarations in prescribed form, to enable him to avail concessions under CST Act.

Declarations to be submitted - A dealer has to issue certain declarations in prescribed forms to buyers/ sellers. These forms are prescribed in Central Sales Tax (Registration and Turnover) Rules, 1957. Out of these forms, forms C, E-I, E-II, F, H and I are printed and supplied by Sales Tax authorities and are supplied by them. Dealer has to issue declarations in the forms printed and supplied by the Sales Tax authorities only. These forms are in triplicate. [Form D was to be issued by Government and can be printed/typed by the Government department making purchases. Now, form D will not apply in case of sale made to Government on or after 1-4-2007].

When to submit the declarations – As per Rule 12(7) (amended w.e.f. 1-10-2005), declaration in form C, E-I/E-II or F is required to be submitted to assessing authority within three months after end of the period to which it relates. STO can allow further time for submission of the form, if dealer was prevented by sufficient cause from furnishing such declaration within prescribed time [Rule 12(7) amended w.e.f. 1-10-2005].

In case of forms D, H, I and J, no time limit has been prescribed. Hence, submission at any time before assessment should be sufficient, though some harassment and demands cannot be ruled out on this issue. Wherever possible, it is advisable to obtain and submit the forms on quarterly basis to avoid fruitless litigation.

One C, D and E-I/E-II declaration is required to be obtained per quarter. Hence, after end of quarter, within three months, the declarations should be submitted to Assessing Authority.

In case of declaration in F form, it is required to be obtained monthly. Hence, strictly legally, within three months after end of the month, the F form is to be submitted.

Prescribed forms under CST – Following are the forms prescribed under CST (Registration and Turnover) Rules, 1957.

Form	Description	Frequency
A	Application for registration	Once
B	Certificate of Registration	Once
C	Declaration by purchasing registered dealer to obtain goods at concessional rate	To be obtained for every quarter and submitted on quarterly basis
D	Form of certificate for making government purchases (D form cannot be issued in case of sale made to Government on or after 1-4-2007)	No question arises after 1-4-2007.
E-I/E-II	Certificates for sale in transit	To be obtained for every quarter and submitted on quarterly basis
F	Form by branch/consignment agent for goods received on stock transfer	Monthly, but to be submitted quarterly
G	Indemnity bond when C form lost	When required
H	Certificate of Export	Upto the time of assessment by first assessing authority.
I	Certificate by SEZ unit	Not specified in rules (but should be submitted before assessment).
J	Certificate to be issued by foreign diplomatic mission or consulate in India or the UN Agency	Upto the time of assessment by first assessing authority.

16.16 Appeals to Appellate Authority

Assessment of Central Sales Tax is done by sales tax officer who also does assessment of local sales tax. Appeal against assessing authority lies with State sales tax authorities (like Appellate Commissioner or Tribunal etc). Highest Appellate Authority is usually Tribunal in many of the States.

In case of order of highest appellate authority made u/s 6A *read with* Section 9 of CST Act, further appeal will lie with 'Central Sales Tax Appellate Authority' u/s 20(1) of CST Act, if the issue relates to dispute concerning the sale of goods effected in inter-state sale.

As per *explanation* to Section 20(1) of CST Act (inserted w.e.f. 1-3-2006), 'Highest Appellate Authority of a State' means any authority or Tribunal or Court (except High Court) established under the General Sales Tax law of a State, by whatever name called.

Background of the provision - The provision of Appellate Authority was made in September, 2001, but made effective only from 17-3-2005. Reason for introducing this provision is as follows:

Often disputes arise whether a particular transaction is 'stock transfer' or a 'sale'. A dealer claims his transfer as stock transfer while the assessing authority treats it as a sale. In such case, the dealer has to pay sales tax in the State from which movement of goods commenced. However, he has already paid tax in other State after transferring the goods on stock transfer basis. Thus, he has to pay tax twice. The disputes can also happen when one State sales tax authority treats the transaction as 'sale' (and not stock transfer) while other Sales tax assessing authority also treats the transaction as 'sale'. Naturally, both State Governments cannot tax the same transaction.

In such cases, so far, there was no mechanism to resolve the disputes and only option was to approach Supreme Court. Hence, Supreme Court suggested that a mechanism should be evolved to resolve such disputes.

The Authority will resolve disputes u/s 6A *read with* Section 9 of CST Act.

A separate 'Central Sales Tax Appellate Authority' will be constituted by Central Government. The Authority will consist of Chairman, Officers of Legal Service of Central Government of level of Additional Secretary and officer of State Government of rank of Secretary who is expert in sales tax matters/officer of Central Government of rank of Additional Secretary who is expert in sales tax matters Central Government will provide administrative staff to the Authority. [Section 19 of CST Act]. The authority will regulate its own procedures. [Section 23 of CST Act].

Till such separate authority is formed, 'Authority for Advance Ruling' formed u/s 245-O of Income Tax Act will function as 'Appellate Authority', by making suitable changes in the present structure of the 'Authority for Advance ruling'. After constitution of Appellate Authority' u/s 19 of CST Act, the appeals will be transferred to that authority. [Section 24].

Powers of CST Appellate Authority - The CST Appellate Authority has powers to enforce attendance of persons, compel production of documents, issue commission for examination of witnesses, receipt of evidence on affidavits and other powers as may be prescribed. The proceeding before authority will be deemed to be a judicial proceeding and the CST Appellate Authority shall be deemed to be a civil court for purposes of Section 195 and Chapter XXVI of Code of Criminal Procedure. [Section 22].

Order of Appellate Authority is binding on assessing authorities and other authorities under State sales tax laws [Section 26].

No appeal if dispute relating to value - If there is dispute relating to valuation of sale, it will not go to CST Appellate Authority. Only disputes whether a particular transaction is inter state sale or stock transfer (i.e. taxability under CST Act) will go to Appellate Authority.

Stay by appellate authority – Appellate Authority can grant stay to operation of order of highest authority of State, against which appeal has been filed before it. Appellate Authority can also order pre-deposit of tax before entertaining the appeal. While granting stay or ordering pre-deposit, Appellate Authority shall consider if assessee has already made any pre-deposit of tax under General Sales tax Laws of the State [Section 22(1A)].

16.17 Offences under the CST Act

Central Sales Tax Act provides for penalties and punishments in respect of certain offences. In respect of offences not provided in the CST Act, provisions of General Sales Tax Law of the State where the dealer is carrying on business are applicable.

CST Act envisages three types of punishments (*a*) Imprisonment and fine which can only be imposed by Court of Law (*b*) Compounding of offences by Sales Tax authorities (*c*) Penalty in certain cases which can be imposed by Sales Tax authorities.

Offences punishable - Section 10 of CST Act provides that punishment upto six months of simple imprisonment or with fine or both.

The following acts of 'omissions' (failing to do a certain thing required by law) and 'commissions' (acting in contravention of tax law) attract penal provisions under Section 10 of the CST Act –

- *Knowingly* giving declaration in form C, E-I, E-II, F or H which he knows, or has reason to believe, to be false [Section 10(a)].
- Not registering under CST Act when required to be registered or not furnishing security when required [Section 10(aa)].
- *False* representation by a registered dealer that the goods being purchased are covered under his Certificate of Registration for concessional rate [Section 10(b)].
- *Falsely* representing that he is a registered dealer, though he is not [Section 10(c)].
- After purchasing goods are concessional rate under C, D, E-I/E-II, H or I form, making use of goods for other purposes, without reasonable cause [Section 10(d)].
- Having in possession C forms, D forms, E-I/E-II forms, H forms or I forms which are not obtained as per provisions of Act [Section 10(e)].
- Collecting any amount representing as Central Sales Tax by an unregistered dealer or by a registered dealer in contravention of provisions of Act [Section 10(f)].

Stale law provisions apply in case of other offences - Provisions regarding offences in 'General Sales Tax Law' (excepting those enumerated above) are applicable in respect of offences committed by Dealers in that State.

Punishment by Court of law - Punishment of imprisonment and/or fine can be imposed only by Court of law. If the offence is a continuing offence, fine of Rs. 50 per day till offence continues can be imposed.

The person has to be prosecuted in a criminal case. Such prosecution can be launched only with previous sanction of State Government or its authorised officer. The offences are cognizable and bailable.

Penalty in lieu of Prosecution - Section 10A of CST Act authorises imposition of penalty in lieu of punishment in respect of offences regarding

(a) obtaining goods not included in registration certificate, by making false representation

(b) purchasing goods falsely representing that he is registered dealer, though he is not

(c) using goods for purposes different than the purposes for which purchased, without reasonable cause

(d) (Other offences can be compounded by Sales Tax authorities, if provision exists in State Sales Tax Law).

The penalty can be upto one and half time the tax which would have been payable. The penalty can be imposed by Sales Tax Authority having jurisdiction over the dealer's place of business. Once penalty is imposed, prosecution for same offence shall not be instituted. The penalty is collected by Union of India in the State in which the dealer is registered ***or*** if he is not registered - in which he should have got himself registered.

Offences cognizable and bailable - The offences under CST Act are cognizable and bailable. [Section 11(2)]. However, Court can take cognizance of offence under CST Act only with previous sanction of State Government or its authorised officer. The offence can be tried only in court of presidency magistrate of a magistrate of first class or court above that. [Section 11(1)]

Punishment for other offences - Besides above, State laws provide for other offences like late payment or non-payment of tax, false declaration of turnover, non-filing or late filing of returns etc. These provisions are also applicable in respect of Dealers in that State who make inter State sale [Section 9(2A) of CST Act].

Liability of company in liquidation - As per Section 17(1), if a liquidator or receiver is appointed for a Company, he should inform sales tax authorities within 30 days of the appointment. The appropriate authority [assessing officer i.e. sales tax officer - Section 16(a)] will inform him within three months the amount of tax due from company which is in liquidation. [Section 17(2)]. Liquidator cannot sell assets of company before setting aside amount of due as informed by sales tax authorities - unless such transfer or sale is by order of Court. [Section 17(3)]. Otherwise, liquidator is personally liable. [Section 17(4)].

Liability of directors of Private limited Company in case of liquidation - Section 18 provides that if a private limited company is being wound up, liability of directors of such private limited company is personal if amount cannot be recovered in liquidation i.e. the tax due can be recovered from his personal property. He can save the liability only if he proves that non-payment of tax cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to affairs of the company.

STUDY NOTE 17

State Level VAT

17.1 Background of State VAT

Tax on sale within the State is a State subject. Over the period, many distortions had come in taxation. Central Government initiated discussions with State Governments in 1995. After lot of persuasion by Central Government, all States ultimately agreed to introduce State Level Vat at the conference of Chief Ministers all States at Delhi in November, 1999.

'Empowered Committee' of State Governments - A high power committee consisting of senior representatives of all 29 States was constituted under Chairmanship of Dr. Asim Dasgupta, Finance Minister, West Bengal. After deliberations and many meetings, it was announced that all States have agreed to introduce VAT w.e.f. 1-4-2005. A 'White paper' was released by Dr. Asim Dasgupta, Chairman of Empowered Committee, on 17-1-2005. The White Paper is a policy document indicating basic policies of State Sales Tax VAT.

CST is proposed to be abolished - CST is against principles of VAT. CST has been reduced to 3% w.e.f. 1-4-2007. CST rate is proposed to be reduced by 1% every year and made Nil by 1-4-2010.

Revenue loss if CST rate is reduced - If CST rate is reduced, State finances will suffer, since revenue of Central Sales Tax goes to respective State Government. It is proposed to authorise State Governments to levy tax on some services like medical, legal and education.

The VAT system as introduced is result of deliberations of committee of representatives from 29 States. Each State has its own views and peculiarities. Hence, having uniform nationwide VAT is very difficult and some compromises/adjustments are inevitable.

The Vat as introduced, is a diluted version of Vat and some compromises have been made.

There is no credit of Central Sales Tax paid on inter-state purchases. This problem will not arise if CST rate is reduced to 0% on 1-4-2010, as planned and inter-state sale is made 'zero rated'.

If goods are sent outside State on stock transfer basis, credit (set off) of tax paid on inputs is available only to the extent of tax paid in excess of 4%. Thus, credit (set off) to the extent of 4% tax on inputs is lost. It is not clear what will be position when CST rate is brought down to Nil.

Thus, the VAT as introduced is State Vat and not a national VAT.

2.2-1 VAT (Value Added Tax) is a tax on final consumption of goods and services.

VAT works on the principle that when raw material passes through various manufacturing stages and manufactured product passes through various distribution stages, tax should be levied on the 'Value Added' at each stage and not on the gross sales price. This ensures that same commodity does not get taxed again and again and there is no cascading effect. In simple terms, 'value added' means difference between selling price and purchase price. VAT avoids cascading effect of a tax.

Basically, VAT is multi-point tax, with provision for granting set off (credit) of the tax paid at the earlier stage. Thus, tax burden is passed on when goods are sold. This process continues till goods are finally consumed. Hence, VAT is termed as 'consumption based' tax. It is tax on consumption of goods and services. VAT works on the principle of 'tax credit system'.

Distinction between sales tax and VAT - Basic distinction between Vat and sales tax is that sales tax is payable on total value of goods while VAT is payable only on 'value addition' at each stage.

Revenue Neutral Rate

If VAT is introduced, revenue of Government may reduce. To avoid loss of revenue, rate of tax will have to be suitably increased/modified such that Government gets same revenue as per previous system. This is termed as 'RNR' (Revenue Neutral Rate').

It has been decided to levy sales tax at RNR of 12.5% for most of commodities.

What is meant by consumption Types of VAT? - 'Consumption based tax' means tax is actually levied only when goods are finally consumed/utilised. Till then, the tax burden is passed on to next buyer.

Advantages of VAT are as follows :

- Tax burden is only at the last i.e. consumption stage. This is useful for taxation structure based on 'destination principle'.
- It becomes easier to give tax concessions to goods used by common man or goods used for manufacture of capital goods or exported goods.
- Exports can be freed from domestic trade taxes.
- It provides an instrument of taxing consumption of goods and services.
- Interference in market forces is minimum.
- Simplicity and transparency.
- Aids tax enforcement by providing audit trail through different stages of production and trade.
- Thus, it acts as a self-policing mechanism resulting in lower tax evasion.
- Tax rates can be lower as tax is levied on retail price and not on wholesale price.

Tax credit system i.e. Invoice method

The Tax Credit system (also termed as 'Invoice method') discussed above, which is called as 'Invoice method' or 'Tax credit' method, is the most popular method since it is simple and easy to operate. This method is adopted by almost all the countries.

Some major problems in VAT are –

- Bogus Invoices on which tax credit is availed, i.e. invoice without actual purchase of goods.
- Acquisition fraud (missing trader fraud).
- Carousel Fraud (missing trader fraud).

17.2 Overview of State VAT

A 'White paper' was released by Dr. Asim Dasgupta, Chairman of Empowered Committee, on 17-1-2005. The White Paper is a policy document indicating basic policies of State Sales Tax VAT.

The white paper gives background of problems in present system of sales tax, principles of VAT and its advantages. It also gives basic design of State level VAT proposed to be implemented.

States have generally followed the principles as given in the White Paper. Of course, there are variations. The highlights are as follows.

Tax Credit - Manufacturer will be entitled to credit of tax paid on inputs used by him in manufacture. A

trader (dealer) will be entitled to get credit of tax on goods which he has purchased for re-sale [*para 2.3 of White Paper on State-Level VAT*].

Input Tax Credit - Credit will be available of tax paid on inputs purchased within the State. Credit will ***not*** be available of certain goods purchased like petroleum products, liquor, petrol, diesel, motor spirit (position of furnace oil is not clear in white paper, but many States do not give credit).

No credit is available in case of Inter-State purchases.

Credit of tax paid on capital goods - Credit will be available of tax paid on capital goods purchased within the State. Credit will be available only in respect of capital goods used in manufacture or processing. The credit will be spread over three financial years and not in first year itself. There will be a negative list of capital goods [*para 2.4 of White Paper on State-Level VAT*]

States has deviated from these provisions.

Instant credit – Credit will be available as soon as inputs are purchased. It is not necessary to wait till these are utilised or sold [*para 2.3 of White Paper on State-Level VAT*].

No credit of CST paid - Credit of Central Sales Tax (CST) paid on inputs and capital goods purchased from other States will not be available [*para 2.6 of White Paper on State-Level VAT*]. This appears to be discriminatory and violative of Articles 303 and 304(a) of Constitution.

Very few sales tax forms – Most of present sales tax forms will disappear. [*para 2.14 of White Paper on State-Level VAT*] However, forms relating to EOU/SEZ may continue. Forms under CST Act will continue.

One to one correlation not required – VAT does not require one to one i.e. Bill to Bill correlation between input and output. Credit is available as soon as inputs/capital goods are purchased. The credit can be utilised for payment of VAT on any final product. It is not necessary to wait till the input is actually consumed/sold.

Entry tax/Octroi will continue - There is no proposal to extend VAT to entry tax (in lieu of octroi) or Octroi levied by local authorities. These will continue.

Refund of Special CVD paid on goods imported by a trader – A special CVD (SAD) of 4% is imposed on imported goods u/s 3(5) of Customs Tariff Act. This is in lieu of sales tax which is payable by manufacturers in India. A manufacturer using these goods in his manufacture can avail Cenvat credit of this duty. Thus, he gets credit through central excise route.

Traders selling imported goods in India after charging sales tax/VAT can claim refund of special CVD from customs department – Notification No. 102/2007-Cus dated 14-9-2007. The dealer (trader) selling such imported goods must mention in his invoice that the buyer will not be able to avail Cenvat credit of such duty.

'Reverse charge'.

Normally, VAT is payable by seller of goods. However, in some cases, the liability is cast on the purchaser of goods. This is termed as 'reverse charge'.

This concept is used in service tax also. In most of the cases, service tax is payable by service provider. However, in some cases, the liability to pay service tax is cast on the receiver e.g. in case of import of services, goods transport agency (GTA) services etc.

In reverse charge, the service receiver also acts as service provider. He pays tax on services received by him. He can avail Cenvat credit of tax paid by him, since the service is actually his 'input service'.

There is provision of 'tax collection at source' under Section 206C of Income Tax Act. Here, seller of liquor is liable to pay tax at source. The buyer has no liability. Tax deduction at source (TDS) under Income tax is really not 'reverse charge', since basic responsibility of payment of income tax continues to be that of person earning income.

Mode of 'reverse charge' is used when it is administratively difficult to collect tax from seller of goods or service provider or income earner.

Tax rates under VAT

Ideally, VAT should have only one rate. Though this is not possible, it is certain that there should be minimum varieties of rates. Broadly, following VAT rates are proposed [*para 2.18 and 2.19 of White Paper on State-Level VAT*] -

- 0% on natural and un-processed produces in unorganised sector, goods having social implications and items which are legally barred from taxation (e.g. newspapers, national flag). This will contain 46 commodities, out of which 10 will be chosen by individual States which are of local or social importance. Other commodities will be common for all States. Certain specified life saving medicines have been exempted from VAT tax.
- No VAT on Additional Excise Duty items (textile, sugar and tobacco) in first year. Position will be reviewed later. VAT has been imposed by State Governments @ 12.5% on tobacco products w.e.f. 1-4-2007.
- 1% floor rate for gold and silver ornaments, precious and semi-precious stones.
- 4% for goods of basic necessities (including medicines and drugs), all industrial and agricultural inputs, declared goods & capital goods. This will consist of about 270 commodities.
- 12.5% RNR (Revenue Neutral Rate) on other goods.
- Aviation turbine fuel (ATF) and petroleum products (petrol, diesel and motor spirit) will be out of VAT regime. Liquor, cigarettes, lottery tickets, will also be taxed at a higher rate. These will have uniform floor rates for all States (generally 20%). Tax paid on these will not be eligible for input tax credit.

Broadly, VAT rates of all States follow this pattern, but still there are many variations.

Concessions for small dealers

VAT tax will be payable only by those Dealers whose turnover exceeds Rs. five lakhs per annum. The Dealers whose turnover is less than Rs. five lakhs can register on optional basis. Dealers having turnover exceeding 5 lakhs should register within 30 days from date of liability to get registered [*para 2.9 of White Paper on State-Level VAT*]

In case of Karnataka, the limit is only Rs. two lakhs. Most of States have kept the limit as Rs. five lakhs.

Composition scheme for Dealers with turnover upto Rs. 50 lakhs - Small Dealers having gross turnover exceeding Rs. five lakhs but less than Rs. 50 lakhs have option of composition scheme. They will have to pay a small percentage of gross turnover. They will not be entitled to any input tax credit [*para 2.9 of White Paper on State-Level VAT*].

The percentage has not been announced in white paper, but earlier, it was announced as 1%. This rate has been prescribed in West Bengal VAT Act, AP VAT Act, Delhi VAT Act, Kerala VAT Act and Karnataka VAT Act.

Dealers who make Inter-State purchases are not eligible for the composition scheme. This provision applies to VAT law of almost all States.

The scheme is optional. They can opt to pay normal VAT tax and avail credit of input tax.

Situations where input credit will not be available

Credit of tax paid on inputs will be denied in following situations -

No credit if final product is exempt - Credit of tax paid on inputs is available only if tax is paid on final products. Thus, when final product is exempt from tax, credit will not be availed. If availed, it will have to be reversed on *pro-rata* basis.

Restricted credit if output goods are transferred to another State - If the final products are transferred to another State as stock transfer or branch transfer, input credit availed will have to be reversed on *pro-rata* basis, which is in excess of 3%. In other words, in case of goods sent on stock transfer/branch transfer out of State, 3% tax on inputs will become payable e.g. if tax paid on inputs is 12.5%, credit of 9.5% is available. If tax paid on inputs is 3%, no credit is available (This is termed as 'retention'). Thus, the VAT as introduced is State VAT and not a national VAT.

No input credit in certain cases - In following cases, the dealer is not entitled to input credit - (a) Inputs used in exempted final products (b) Final product not sold but given as free sample (c) Inputs lost/damaged/ stolen before use. If credit was availed, it will have to be reversed.

No credit on certain purchases – Generally, in following cases, credit is not available – (a) Purchase of automobiles (except in case of purchase of automobiles by automobile Dealers for re-sale) (b) fuel.

There are variations between provisions of different States.

Distinction between 'Zero rated sale' and 'exempt sale'

Certain sales are 'zero rated' i.e. tax is not payable on final product in certain specified circumstances. In such cases, credit will be available on the inputs i.e. credit will not have to be reversed. Distinction between 'zero rated sale' and 'exempt sale' is that in case of 'zero rated sale', credit is available on tax paid on inputs, while in case of exempt goods, credit of tax paid on inputs is not available.

As per para 2.5 of White Paper on State Level VAT, export sales are zero rated, i.e. though sales tax is not payable on export sales, credit will be available of tax paid on inputs.

In respect of sale to EOU/SEZ, there will be either exemption of input tax or tax paid will be refunded to them within three months. If supplies to EOU/SEZ are exempt from sales tax, then the question will arise whether these are 'zero rated' or 'exempt goods'.

In case of stock transfer to another State, CST is not payable, but input credit will have to be reversed to the extent of 3%. Thus, stock transfer of goods to another State is 'exempt' and not 'zero rated'.

It is not clear what will be the policy after CST is reduced to 2% or when CST is reduced to zero. As per basic concept of VAT, inter-state transactions should be 'zero rated' and not 'exempt'.

If the Vat credit of input tax available cannot be utilised

Entire input tax will be refundable within three months, when final product is exported. In respect of sale to EOU/SEZ, there will be either exemption of input tax or tax paid will be refunded within three months [*para 2.5 of White Paper on State-Level VAT*].

If tax credit exceeds tax payable on sales, the excess credit will be carried to end of next financial year. Excess unadjusted credit at end of second year will be eligible for refund [*para 2.4 of White Paper on State-Level VAT*].

Tax Identification Number

A system of audit checks will have to be established to keep check on bogus invoices. One essential requirement is to give TIN (Tax Identification Number) to all registered dealers, so that a check is maintained that (a) The tax as shown in the invoice has indeed been paid (b) There is no double credit on basis of same invoice. TIN will have to be indicated on each invoice issued. It will be a 11 digit numerical code. First two digits will indicate State Code [*para 2.10 of White Paper on State-Level VAT*] .

Thus, State level computer network with check based on TIN will be established. Otherwise, misuse will be rampant.

Documentation required to avail credit of tax paid on inputs

Tax credit will be given on basis of document, which will be a 'Tax Invoice', cash memo or bill. Such invoice can be issued only by a registered dealer, who is liable to pay sales tax. The invoice should be serially numbered and duly signed, containing prescribed details. The tax payable should be shown separately in the Invoice. The dealer should keep counterfoil/duplicate of such invoice duly signed and dated [*para 2.8 of White Paper on State-Level VAT*].

In case of manufacturer, Invoice issued under Central Excise Rules should serve purpose of VAT also, if the invoice contains required particulars

Dealers availing composition scheme shall not show any tax in their invoice. They are not entitled to any credit of tax paid on their purchases.

Debit note and credit note - If sale price is increased/reduced subsequent to sale, the transaction will be recorded through proper debit/credit note. The buyer will adjust the input credit available to him accordingly.

Assessment of tax

Dealer is required to assess his tax and pay himself. It will be basically self assessment. There will be no compulsory assessment at end of the year. If notice is not issued within prescribed time, dealer will be deemed to have been self assessed [*para 2.12 of White Paper on State-Level VAT*].

Returns will be filed monthly/quarterly, as prescribed, along with challans. Returns will be scrutinised and if there is technical mistake, it will have to be rectified by dealer [*para 2.11 of White Paper on State-Level VAT*].

There will be audit wing in department and certain percentage of Dealers will be taken up for audit every year on scientific basis. The audit wing will be independent of tax collection wing, to remove bias. There will be cross verification with Central Excise and Income Tax also. [*para 2.13 of White Paper on State-Level VAT*].

Audit by outside Agencies – VAT laws of some States provide for audit by outside agencies. AP VAT Act provides for audit by CA, Cost Auditor or Sales Tax Practitioner (STP), if audit is ordered by Commissioner.

In Karnataka, audit report is required if turnover exceeds Rs. 25 lakhs.

In Delhi, the dealer is required to submit copy of audit report u/s 44AB of Income Tax Act (This report is required when turnover exceeds Rs. 40 lakhs per annum). No separate audit is prescribed, unless special audit is ordered by department.

Check posts and transit passes under VAT

State Government can set up check posts at the borders. The invoice will have to be produced at the check posts. System, of transit pass may be introduced if goods are passing through the State but there is no sale within the State.

The purpose is as follows – (a) ensure that all goods which enter the State are duly accounted for in sales (b) Goods claimed to have been sent outside the State indeed have gone out.

17.3 Impact of VAT on CST

The provisions in respect of Central Sales Tax are summarised below –

- Para 4.3 of White Paper on State-Level VAT had stated that present CST rate (that time it was 4%) will continue for some time. CST may go after decision in respect of loss of revenue to States is taken and comprehensive Taxation information System is put in place. Accordingly, CST rate has been reduced to 3% w.e.f. 1-4-2007.
- Present CST forms i.e. C, D, E-I/E-II, F, H, I and J will also continue.
- There will be no credit of CST paid on inter-state purchases [para 2.6 of White Paper on State-Level VAT].
- If goods are sent on stock transfer outside the State, input tax paid in excess of 3% will be allowed as credit. In other words, input tax to the extent of 3% will not be allowed as credit if goods are sent inter-state (The CST rate has been reduced to 3% w.e.f. 1-4-2007. The dis-allowance is also reduced to 3%).

Unfortunately, the way sales tax VAT is to be implemented by States, it is only local (i.e. State) VAT and not national VAT. This is because –

(a) If goods are purchased from another State, credit (set off) of CST paid in other State will not be granted by the State where the goods are consumed/used/sold.

(b) If goods are sent to another State on stock transfer basis, only restricted input credit will be given, i.e. there will be no credit on first 3% tax paid on inputs.

Obviously, this is against basic concept of VAT. Thus, the State Level VAT is a truncated version of VAT. It can at the most be termed as 'Local Sales Tax VAT' and not 'National Sales Tax VAT'.

A dealer purchased 11,000 Kgs of inputs on which VAT paid @ 3% was Rs. 3,000. He manufactured 10,000 Kgs of finished products from the inputs. 1,000 Kgs was the process loss. The final product was sold at uniform price of Rs. 10 per Kg, as follows – Goods sold within State – 4,000 Kgs. Finished product sold

in inter-state sale against C form – 2,500 Kgs. Goods sent on stock transfer to consignment agents outside the State – 2,000 Kgs. Goods sold to Government departments outside the State – 1,500 Kgs. There was no opening or closing stock of inputs, WIP or finished product. The State Vat rate on the finished product of dealer is 12.5%. Calculate liability of Vat and CST. Find Vat credit available to dealer and tax required to be paid in cash.

CST against C form is 3%. Sale to government will be treated as sale to unregistered dealer and tax payable is 12.5%. Thus, the tax payable would be as follows –

Description	Quantity sold	Value of goods sold	CST payable Rs.	State VAT payable Rs.
Sale within State @ 12.5%	4,000	40,000		5,000
Goods sent on stock transfer	2,000	20,000		
Goods sold against C form, tax rate 3%	2,500	25,000	750	
Goods sold to Government, tax rate 12.5%	1,500	15,000	1,875	
Total	10,000	1,00,000	2,625	5,000

Tax paid on inputs – Rs. 3,000. Credit (set off) will not be available in case of goods sent on stock transfer. Hence 20% credit i.e. credit of Rs. 600 will not be available. Credit of Rs. 2,400 (tax paid on inputs) is available.

Thus, tax payable is as follows –

(A) Total Tax payable (State VAT plus CST) – Rs. 7,625

(B) Set off (credit) available) – Rs. 2,400

Tax payable in cash – Rs. 5,225

In aforesaid example, if 2,000 Kgs were exported (and not stock transferred), what would be the tax liability and credit available.

If finished product is exported. There is no tax liability. Further, the credit of tax paid on raw material is available. This credit can be utilised either for payment of CST or for State VAT or even for both, if required. Hence, tax payable is as follows –

(A) Total Tax payable (State VAT plus CST) – Rs. 7,625

(B) Set off (credit) available – Rs. 3,000

Tax payable in cash – Rs. 4,625

17.4 Records and Accounts

Each State has prescribed records to be maintained. Broadly, following records will be required.

- Records of purchases of Inputs.
- Record of debit notes and credit notes.
- Quantity record of inputs.
- Record of credit notes received from supplier.

- Record of capital goods.
- Sale register and tax charged on sales.

Record of Tax credit available - Monthly/quarterly totals of the following should be taken - (a) Input credit available (b) Credit available on capital goods (c) Credit notes from suppliers.

Carry forward/refund of tax credit - If input tax credit cannot be utilised in a particular month/year, the credit can be carried forward and used in subsequent months/year. Refund of such excess credit is permitted only if goods were exported out of India. If credit is not utilised in two years, refund will be granted.

Preservation of records - Since assessment can be opened for prescribed period (usually five to eight years), it is necessary to preserve all relevant records for prescribed period from close of the financial year. The records can be audited by departmental audit party.

Payment of VAT Tax and filing of returns

Every dealer is required to file returns on monthly/quarterly basis. If the records are kept properly, filing the return will be very easy and mistakes will be minimum.

Net Tax payable - Net tax payable will have to be calculated as follows - (a) Output tax *plus* (b) Reversal of Credit (On exempted goods, stock transfers, free samples, lost inputs) - *Less* - (c) Input tax credit available.

This net amount is required to be paid through prescribed challan on or before due date.

Notes

Notes

Notes

Notes