

Significant Legal Decisions

Indirect Tax Laws

A. CENTRAL EXCISE

1. Does a product with short shelf-life satisfy the test of marketability?

Nicholas Piramal India Ltd. v. CCEx., Mumbai 2010 (260) E.L.T. 338 (S.C.)

Facts of the case: In the instant case, the product had a shelf-life of 2 to 3 days. The appellant contended that since the product did not have shelf-life, it did not satisfy the test of marketability.

Decision of the case: The Supreme Court ruled that short shelf-life could not be equated with no shelf-life and would not *ipso facto* mean that it could not be marketed. A shelf-life of 2 to 3 days was sufficiently long enough for a product to be commercially marketed. Shelf-life of a product would not be a relevant factor to test the marketability of a product unless it was shown that the product had absolutely no shelf-life or the shelf-life of the product was such that it was not capable of being brought or sold during that shelf-life.

Hence, product with the shelf life of 2 to 3 days was marketable and hence, excisable.

2. Are the physician samples excisable goods in view of the fact that they are statutorily prohibited from being sold?

Medley Pharmaceuticals Ltd. v. CCE & C., Daman 2011 (263) E.L.T. 641 (S.C.)

The question which arose for consideration was whether physician samples of patent and proprietary medicines intended for distribution to medical practitioner as free samples, satisfied the test of marketability. The appellant contended that since the sale of the physician samples was prohibited under the Drugs and Cosmetics Act, 1940 and the rules made thereunder, the same could not be considered to be marketable.

Supreme Court observed that merely because a product was statutorily prohibited from being sold, would not mean that the product was not capable of being sold. Physician sample was capable of being sold in open market.

Moreover, the Drugs and Cosmetics Act, 1940 (Drugs Act) and the Central Excise Act, 1944 operated in different fields. The restrictions imposed under Drugs Act could not lead to non-levy of excise duty under the Central Excise Act thereby causing revenue loss. Prohibition on sale of physician samples under the Drugs Act did not have any bearing or effect on levy of excise duty.

Therefore, the Court inferred that the physician samples were excisable goods and were liable to excise duty.

Note: This case was affirmed in case of Medley Pharmaceuticals Ltd. v. Commissioner - 2011 (269) E.L.T. A20 (S.C.).

3. Whether assembling of the testing equipments for testing the final product in the factory amounts to manufacture?

Usha Rectifier Corpn. (I) Ltd. v. CCEx., New Delhi 2011 (263) E.L.T. 655 (S.C.)

Facts of the case: The appellant was a manufacturer of electronic transformers, semiconductor devices and other electrical and electronics equipments. During the course of such manufacture, the appellant also manufactured machinery in the nature of testing equipments to test their final products.

The appellant had stated in their balance sheet that the addition to the plant and machinery included testing equipments. The said position was further substantiated in the Director's report wherein it was mentioned that during the year, the company developed a large number of testing equipments on its own.

However, the assessee contended that such items were assembled in the factory for purely research and development purposes, but research being unsuccessful, same were dismantled. Hence, it would not amount to manufacture.

The appellant further submitted that the said project was undertaken only to avoid importing of such equipment from the developed countries with a view to save foreign exchange.

Decision of the case: The Supreme Court observed that once the appellant had themselves made admission regarding the development of testing equipments in their own Balance Sheet, which was further substantiated in the Director's report, it could not make contrary submissions later on. Moreover, assessee's stand that testing equipments were developed in the factory to avoid importing of such equipments with a view to save foreign exchange, confirmed that such equipments were saleable and marketable. Hence, the Apex Court held that duty was payable on such testing equipments.

4. Whether the interest on irregular credit under rule 14 of the CENVAT Credit Rules, 2004 arises from date of availing such credit or date of utilization of the credit?

UOI v. Ind-Swift Laboratories Ltd. 2011 (265) E.L.T. 3 (S.C.)

The Supreme Court elucidated that rule 14 is clear and unambiguous. It specifically provides for levying interest when CENVAT credit is taken or utilized wrongly or erroneously refunded. Thus, credit is recoverable with interest on happening of any of the three specified circumstances.

It held that rule 14 cannot be interpreted to mean that interest is payable from date of utilization of irregular credit and not from the date of availing such credit.

5. Does the process of cutting and embossing aluminum foil for packing the cigarettes amount to manufacture?

CCE v. GTC Industries Ltd. 2011 (266) E.L.T. 160 (Bom.)

Facts of the case: A roll of aluminum foil was cut horizontally to make separate pieces of the foil and word 'PULL' was embossed on it. Thereafter fixed number cigarettes were

wrapped in it. Aluminum foil, being a resistant to moisture, was used as a protector for the cigarettes and to keep them dry.

Revenue submitted that the process of cutting and embossing aluminum foil amounted to manufacture. Since the aluminum foil was used as a shell for cigarettes to protect them from moisture; the nature, form and purpose of foil were changed.

Decision of the case: The High Court pronounced that cutting and embossing did not transform aluminum foil into distinct and identifiable commodity. It did not change the nature and substance of foil. The said process did not render any marketable value, only made it usable for packing. There were no records to suggest that cut to shape/embossed aluminum foils used for packing cigarettes were distinct marketable commodity. Hence, process did not amount to manufacture as per section 2(f) of Central Excise Act, 1944. Only the process which produces distinct and identifiable commodity with marketable value can be called manufacture.

6. Whether time-limit under section 11A of the Central Excise Act, 1944 is applicable to recovery of dues under compounded levy scheme?

Hans Steel Rolling Mill v. CCEx., Chandigarh 2011 (265) E.L.T. 321 (S.C.)

The Apex Court elucidated that compounded levy scheme is a separate scheme from the normal scheme for collection of excise duty on goods manufactured. Rules under compounded levy scheme stipulate method, time and manner of payment of duty, interest and penalty. Since the compounded levy scheme is comprehensive scheme in itself, general provisions of the Central Excise Act and rules are excluded from this scheme.

The Supreme Court affirmed that importing one scheme of tax administration to a different scheme is inappropriate and would disturb smooth functioning of such unique scheme. Hence, it held that the time-limit under section 11A of the Central Excise Act, 1944 is not applicable to recovery of dues under compounded levy scheme.

7. Can re-appreciation of evidence by CESTAT be considered to be rectification of mistake apparent on record under section 35C(2) of the Central Excise Act, 1944?

CCE v. RDC Concrete (India) Pvt. Ltd. 2011 (270) E.L.T. 625 (S.C.)

Decision of the case: In the instant case, the arguments not accepted at an earlier point of time were accepted by the CESTAT while hearing the application for rectification of mistake and it arrived at a conclusion different from earlier one.

The Apex Court elucidated that re-appreciation of evidence on a debatable point cannot be said to be rectification of mistake apparent on record. It is a well settled law that a mistake apparent on record must be an obvious and patent mistake and the mistake should not be such which can be established by a long drawn process of reasoning.

The Supreme Court observed that arguments not accepted earlier during disposal of appeal cannot be accepted while hearing rectification of mistake application.

Submissions made before Tribunal while arguing rectification of mistake application had also been advanced before Tribunal when appeal heard at earlier stage. The Apex Court held that CESTAT had reconsidered its legal view as it concluded differently by accepting the arguments which it had rejected earlier.

Hence, the Court opined that CESTAT exceeded its powers under section 35C(2) of the Act. In pursuance of a rectification application, it cannot re-appreciate the evidence and reconsider its legal view taken earlier.

Note: Section 35C(2) reads as under:-

The Appellate Tribunal may, at any time within six months from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1) and shall make such amendments if the mistake is brought to its notice by the Commissioner of Central Excise or the other party to the appeal.

8. Is the CESTAT order disposing appeal on a totally new ground sustainable?

CCE v. Gujchem Distillers 2011 (270) E.L.T. 338 (Bom.)

The High Court elucidated that in the instant case, the CESTAT had disposed of the appeal on a ground which was not urged by the respondents before the adjudicating authority. Thereby the CESTAT had disposed of the appeal on a totally new ground which was not laid before the adjudicating authority and which would entail a finding on facts.

The High Court explained that had the CESTAT not been satisfied with the approach of the adjudicating authority, it should have remanded the matter back to the adjudicating authority. However, it could not have assumed to itself the jurisdiction to decide the appeal on a ground which had not been urged before the lower authorities.

9. The assessee claimed the CENVAT credit on the duty paid on capital goods which were later destroyed by fire. The Insurance Company reimbursed the amount inclusive of excise duty. Is the CENVAT credit availed by the assessee required to be reversed?

CCE v. Tata Advanced Materials Ltd. 2011 (271) E.L.T. 62 (Kar.)

Facts of the case: The assessee purchased some capital goods and paid the excise duty on it. Since, said capital goods were used in the manufacture of excisable goods, he claimed the CENVAT credit of the excise duty paid on it. However, after three years the said capital goods (which were insured) were destroyed by fire. The Insurance Company reimbursed the amount to the assessee, which included the excise duty, which the assessee had paid on the capital goods. Excise Department demanded the reversal of the CENVAT credit by the assessee on the ground that the assessee had availed a double benefit.

Decision of the case: The High Court noted that the as per CENVAT Credit Rules, 2004, CENVAT credit taken irregularly stands cancelled and CENVAT credit utilised irregularly has to be paid for.

In the instant case, the Insurance Company, in terms of the policy, had compensated the assessee. The High Court observed that merely because the Insurance Company had paid the assessee the value of goods including the excise duty paid, it would not render the availment of the CENVAT credit wrong or irregular. It was not a case of double benefit as contended by the Department.

The High Court therefore answered the substantial question of law in favour of the assessee and against the Revenue.

10. Head office distributed the CENVAT credit of the service tax paid on the services received to its various units. Can the CENVAT credit be denied to a particular unit on the ground that input services were obtained by another unit belonging to the same manufacturer?

CCE v. Ecof Industries Pvt. Ltd. 2011 (271) E.L.T. 58 (Kar.)

Facts of the case: The assessee was engaged in manufacturer of excisable goods in Malur. Its head office, located in Chennai, was registered as 'Input Service Distributor'. The head office had paid service tax for services received by the head office and its units from various service providers. Thereafter, it had distributed the credit of service tax to its various units including the unit at Malur. The assessee availed and utilized the said credit for payment of central excise duty on their final products.

Revenue contended that since the service tax was paid in respect of services obtained by Cuttack unit, the credit of the said service tax paid could not be utilized by Malur unit.

Decision of the case: Considering rules 2(k), 2(l), 2(m), 3(1) and 7 of the CENVAT Credit Rules, 2004, the High Court elucidated that availment of credit of the service tax paid on the input service at a particular unit by another unit is not prohibited under law. However, the head office is expected to register itself as an input service distributor and thereafter, is entitled to distribute the credit of such input services in the manner prescribed under law. The High Court therefore held that Malur unit had rightly availed the CENVAT credit of the service tax paid by its head office.

11. In case of combo-pack of bought out tooth brush sold alongwith tooth paste manufactured by assessee; is tooth brush eligible as input under the CENVAT Credit Rules, 2004?

CCus. v. Prime Health Care Products 2011 (272) E.L.T. 54 (Guj.)

Facts of the case: The assessee was engaged in the manufacture of tooth paste. It was sold as a combo pack of tooth paste and a bought out tooth brush. The assessee availed CENVAT credit of central excise duty paid on the tooth brush. Revenue contended that the tooth brush was not an input for the manufacture of the tooth paste

and the cost of tooth brush was not added in the M.R.P. of the combo pack and hence, the assessee had availed CENVAT credit of duty paid on tooth brush in contravention of the provisions of the CENVAT Credit Rules, 2004.

Decision of the case: The High Court noted that the process of packing and re-packing the input, that was, toothbrush and tooth paste in a unit container would fall within the ambit of "manufacture" [as per section 2(f)(iii) of the Central Excise Act, 1944].

Further, the word "input" was defined in rule 2(k) of the CENVAT Credit Rules, 2004 which also included accessories of the final products cleared along with final product. There was no dispute about the fact that on toothbrush, excise duty had been paid. The toothbrush was put in the packet along with the tooth paste and *no extra amount was recovered from the consumer on the toothbrush**.

Considering the definition given in the rules of "input" and the provisions contained in rule 3, the High Court upheld the Tribunal's decision that the credit was admissible in the case of the assessee.

Note: The definition of inputs under rule 2(k) has been substituted vide Notification No. 3/2011-C.E. (N.T.) dated 1-3-2011.

The erstwhile definition, inter alia, stipulated that input includes accessories of the final products cleared along with the final product. As per the new definition, input still includes accessories of the final products cleared along with the final product. However, it has also added the condition that the value of such accessory should be included in the value of the final product.

In the aforesaid judgment, since no extra amount was recovered from the customer on the toothbrush, it implies that the value of the toothbrush was included in the value of the final product i.e. toothpaste. Hence, the judgment holds good as per the provisions of the new definition.

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

CCE v. Techno Rubber Industries Pvt Ltd. 2011 (272) E.L.T. 191 (Kar.)

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

While claiming refund, the assessee relied on the debit note raised by the buyer in his name in the month of June to demonstrate that his customer had not paid the excess

duty to him. The adjudicating authority argued that since the debit note was issued in the month of June and not March, it could not be the basis for refund.

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

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

B. SERVICE TAX

13. *Supreme Court, in case of Idea Mobile Communications Ltd. v. CCE 2011 (23) S.T.R. 433, has affirmed the decision taken by Kerela High Court in CCE v. Idea Mobile Communications (reported in Select Cases-2010) wherein it was held that SIM cards were not goods sold or intended to be sold to the customer, but supplied as part of service and hence, the value of SIM card supplied by the assessee would form part of the value taxable service on which service tax was payable by the assessee.*

14. Is the service tax and excise liability mutually exclusive?

Commissioner of Service Tax v. Lincoln Helios (India) Ltd. 2011 (23) S.T.R. 112 (Kar.)

Facts of the case: The assessee undertook not only manufacture and sale of its products, but also erected and commissioned the finished products. The customer was charged for the services rendered as well as the value of the manufactured products. The assessee had paid the excise duty on whole value including that for services, but did not pay the service tax on the value of services on the ground that there could not be levy of tax under two parliamentary legislations.

Decision of the case: The High Court held that the excise duty is levied on the aspect of manufacture and service tax is levied on the aspect of services rendered. Hence, it would not amount to payment of tax twice and the assessee would be liable to pay service tax on the value of services.

15. Can appeal be filed to High Court for deciding the question relating to the taxability of service tax?

CCEx. & ST v. Volvo India Ltd. 2011 (24) S.T.R. 25 (Kar.)

Decision of the case : The High Court held that the question as to whether the assessee is liable to pay service tax falls squarely within the exception carved cut in section 35G of the Central Excise Act, 1944, 'an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the

value of goods for purposes of assessment', and the High Court has no jurisdiction to adjudicate the said issue. The appeal lies to the Apex Court under section 35L of the Central Excise Act, 1944, which alone has exclusive jurisdiction to decide the said question.

C. CUSTOMS

16. Are the clearance of goods from DTA to Special Economic Zone chargeable to export duty under the SEZ Act, 2005 or the Customs Act, 1962?

Tirupati Udyog Ltd. v. UOI 2011 (272) E.L.T. 209 (A.P.)

Decision of the case: The High Court, while deciding the aforesaid question of law, made the following observations:-

- A charging section has to be construed strictly. If a person has not been brought within the ambit of the charging section by clear words he cannot be taxed at all.
- SEZ Act does not contain any provision for levy and collection of export duty for goods supplied by a DTA unit to a Unit in a Special Economic Zone for its authorised operations. In the absence of a charging provision in the SEZ Act providing for the levy of customs duty on such goods, export duty cannot be levied on the DTA supplier by implication.
- With regard to the Customs Act, 1962, a conjoint reading of section 12(1) with sections 2(18), 2(23) and 2(27) of the Customs Act, 1962 makes it clear that customs duty can be levied only on goods imported into or exported beyond the territorial waters of India. Since both the SEZ unit and the DTA unit are located within the territorial waters of India, Section 12(1) of the Customs Act 1962 (which is the charging section for levy of customs duty) is not attracted for supplies made by a DTA unit to a unit located within the Special Economic Zone.

The High Court thus inferred that the clearance of goods from DTA to Special Economic Zone is not liable to export duty either under the SEZ Act, 2005 or under the Customs Act, 1962.

Notes:

1. *Chapter X-A of the Customs Act, 1962, inserted by Finance Act 2002, contained special provisions relating to Special Economic Zones. However, with effect from 11-5-2007, Chapter X-A, in its entirety, was repealed by Finance Act, 2007. Consequently, Chapter X-A of the Customs Act is considered as a law which never existed for the purposes of actions initiated after its repeal.*
2. *Karnataka High Court in case of CCE v. Biocon Ltd. 2011 (267) E.L.T. 28 has also taken a similar view as elucidated in the aforesaid judgment.*

17. Can separate penalty under section 112 of the Customs Act be imposed on the partners when the same has already been imposed on partnership firm?

Textoplast Industries v. Additional Commissioner of Customs 2011 (272) E.L.T. 513 (Bom.)

Decision of the case: The High Court noted that Explanation to section 140 of the Customs Act, 1962 brings within purview of "Company", a firm or an association of individuals, and "Director" in relation to firm, includes its partner. The High Court observed that in case of Apex Court judgment of *Standard Chartered Bank v. Directorate of Enforcement*, there emerged the principle that the deeming fiction is not confined to a criminal prosecution but will also extend to an adjudication proceeding as well. Hence, the High Court, in the instant case, held that the deeming fiction in section 140(2) making Director, Manager, Secretary or other officer of company liable to penalty, would not be confined to criminal prosecution but extends to adjudication proceeding as well.

The High Court explained that had it been otherwise, it would have led to strange situation where, for criminal prosecution, partner as well as person in charge responsible for conduct of business of partnership firm would be liable whereas for adjudication purposes, a narrower construction had to be adopted. There was no reason to exclude penalty on partnership firm, particularly when it was consistent with overall scheme and object of the Act.

In view of the above discussion, the High Court held that for the purpose of imposing penalty, the adjudicating authority under Customs Act, 1962 might, in an appropriate case, impose a penalty both upon a partnership firm as well as on its partners.

Note: The Gujarat High Court, in case of CCE & C, Surat-II v. Mohammed Farookh Mohammed Ghani 2010 (259) E.L.T. 179, has held that separate penalty under section 112 could not be imposed on the partners in addition to the penalty on the partnership firm. However, the Gujarat High Court, while deciding the said case, has not considered the principle enunciated by the Supreme Court in the Standard Chartered Bank case. In the circumstances, it appears that separate penalty under section 112 can be imposed on the partners in addition to the penalty on the partnership firm.

18. Whether Chartered Accountant's certificate alone is sufficient evidence to rule out the unjust enrichment under customs?

CCus., Chennai v. BPL Ltd. 2010 (259) E.L.T. 526 (Mad.)

Decision of the case: The High Court noted that section 27 of the Customs Act mandates on the importer to produce such documents or other evidence, while seeking refund, to establish that the amount of duty in relation to which such refund is claimed, has not been passed on by him to any other person.

However, in the given case, the respondent had not produced any document other than the certificate issued by the Chartered Accountant to substantiate its refund claim. The certificate issued by the Chartered Accountant was merely a piece of evidence acknowledging certain

facts. It would not automatically entitle a person to refund in the absence of any other evidence. Hence, the respondent could not be granted refund merely on the basis of the said certificate.

Thus, the High Court, overruling the Tribunal's decision, answered the question of law in favour of revenue.

19. Whether the benefit of exemption meant for imported goods can also be given to the smuggled goods?

CCus. (Prev.), Mumbai v. M. Ambalal & Co. 2010 (260) E.L.T. 487 (SC)

Decision of the case: The question which arose before the Apex Court for consideration was whether goods that were smuggled into the country could be considered as 'imported goods' for the purpose of granting the benefit of the exemption notification.

The Apex Court held that the smuggled goods could not be considered as 'imported goods' for the purpose of benefit of the exemption notification. It opined that if the smuggled goods and imported goods were to be treated as the same, then there would have been no need for two different definitions under the Customs Act, 1962.

The Court observed that one of the principal functions of the Customs Act was to curb the ills of smuggling on the economy. Hence, it held that it would be contrary to the purpose of exemption notifications to give the benefit meant for imported goods to smuggled goods.

20. Can the goods be detained indefinitely without any formal order under section 110 of the Customs Act, 1962?

S.J. Fabrics Pvt. Ltd. v. UOI 2011 (268) E.L.T. 475 (Cal.)

Decision of the case: The High Court held that there is no time limit for issuance of an order under section 110 and/or the proviso thereof. However, such notice should ordinarily be issued immediately upon interception and detention of the goods. The goods cannot indefinitely be detained without any order under section 110.

The High Court observed that section 110(2) provides that when any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession, the goods were seized. The proviso to Section 110(2), however, empowers the Commissioner of Customs to extend the aforesaid period of six months by a further period of not exceeding six months on sufficient cause being shown.

Note: Although, it has already been established in number of cases that detention and seizure are not same under the customs provisions, in the aforesaid judgment, the two terms seem to have been used inter-changeably. The said fact may be borne in mind while going through the aforesaid decision.

21. Is it mandatory for the Revenue officers to make available the copies of the seized documents to the person from whose custody such documents were seized?

Manish Lalit Kumar Bavishi v. Addl. DIR. General, DRI 2011 (272) E.L.T. 42 (Bom.)

Facts of the case: The assessee sought copies of the documents seized from his office premises under panchanama and print outs drawn from the Laptop during his attendance in DRI. However, Revenue officers replied that the documents would be provided to him on completion of the investigation.

Decision of the case: The High Court held that from the language of section 110(4), it was apparent that the Customs officers were mandatorily required to make available the copies asked for. It was the party concerned who had the choice of either asking for the document/seeking extract and not the officer.

If any document was seized during the course of any action by an officer and relatable to the provisions of the Customs Act, that officer was bound to make available copies of those documents. The denial by the Revenue to make the documents available was clearly an act without jurisdiction.

The High Court directed the Revenue to make available the copies of the documents asked for by the assessee which was seized during the course of the seizure action.

22. Under what circumstances can the penalty be imposed in terms of section 112(a)(ii) of the Customs Act, 1962?

O.T. Enasu v. UOI 2011 (272) E.L.T. 51 (Ker.)

The High Court noted that under sub-clause (ii) of clause (a) of section 112, the liability to penalty is determined on the basis of duty sought to be evaded. Therefore, the jurisdictional fact to impose a penalty in terms of section 112(a)(ii) includes the essential ingredient that "duty was sought to be evaded". Being a penal provision, it requires to be strictly construed. "Evade" means, to escape, slip away, to escape or avoid artfully, to shirk, to baffle, elude. The concept of evading involves a conscious exercise by the person who evades. Therefore, the process of "seeking to evade" essentially involves a mental element and the concept of the status "sought to be evaded" is arrived at only by a conscious attempt to evade.

In view of the above discussion, the High Court inferred that unless it is established that a person has, by his omissions or commissions, led to a situation where duty is sought to be evaded, there cannot be an imposition of penalty in terms of section 112(a)(ii) of the Act.